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NZ Insurance Market Trends Update

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

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Welcome to our 2023 NZ Insurance Market Trends Update

As active market participants and close watchers of insurance trends in New Zealand and around the world, we are pleased to share our *2023 NZ Insurance Market Trends Update*.

In this year's report, we explore emerging legal and claims trends impacting local insurers, underwriters and their customers – such as modern slavery and the construction industry, director accountability for ESG issues, and an increase in derivative and representative actions. We also look at the impact of current and impending reform, including the Therapeutic Products Act, the Worker Protection (Migrant and Other Employees) Act, the Resource Management Act, lawyer regulation and complaints, FMA auditing frequency, and the list of occupational diseases in Schedule 2 of the Accident Compensation Act 2001.

There have been many developments in long-standing industry issues, including natural disaster claims, D&O claims driven by financial distress, product liability recalls and cybercrime.

We also share summaries of significant case law developments across a range of legal areas, including property major loss, construction, professional indemnity, healthcare, statutory liability and employment law.

There has also been plenty happening at Wotton + Kearney in the past year. Our Wellington team moved to new premises at 342 Lambton Quay and we have opened our third New Zealand office in Christchurch Ōtautahi. Our expansion into Christchurch provides an on-the-ground solution for our South Island clients, by offering a local team who will work closely with our national product specialists.

We also celebrated many well-deserved promotions, including Shane Swinerd's promotion to partner. With 14 partners and more than 80 staff, we are proud that W+K has cemented its place as New Zealand's largest specialist insurance and disputes practice.

If you have any questions about any of the articles in this report or would like to know more, please get in touch with one of our partners or authors.

Antony Holden
Managing Partner – New Zealand

Significant cases addressing

Weathertightness exclusions
(Riskpool)

10-year longstop in leaky building litigation
(Beca)

Real estate fiduciary duties
(James)

Landlord duties
(Preena)

Tikanga in employment relations
(GF)

Extension of employee rights
(Pilgrim)

Property exclusions
(Polladio)

Vicarious liability for healthcare providers
(Ryan)

Trends

Financial distress driving D&O claims

A rise in director accountability for ESG issues

Increase in natural disaster claims against construction professionals

Expected hikes in claims against mortgage brokers and advisors due to market conditions

A climb in recovery claims against third parties for property damage arising from weather events

Growth in regulatory investigations and prosecutions

Impending change

New modern slavery laws

Increase to trustee tax rates

Review of legal services framework

Residential Property Managers Bill

New extended period for employees to raise sexual harassment personal grievances

New legislation to protect migrant workers

New regime for managing New Zealand's environment

Extension to Schedule 2 Occupational Diseases

Significant change to regulation of medicines, medical devices and natural health products

D&O and representative actions

D&O AND REPRESENTATIVE ACTIONS

Financial distress driving claims

Economic pressures, evident from the end of 2022, continue without relief. These are increasing the prospects of financial distress, particularly for companies involved in construction and investment. As a result, alleged breaches of directors' duties during a company's financial distress look set to continue as the primary driver of D&O claims.

We are consistently seeing that, where distressed companies are subject to liquidation, investigations focus on when that financial distress arose, any contributors to that financial distress, and the extent to which directors discharged their duties in response to those contributors and distress.

The focus on directors' duties during such distress has been emphasised with the delivery of the highly anticipated Supreme Court judgment in *Yan v Mainzeal Property and Construction Ltd (in liq)*. In *Mainzeal*, the Court was asked to consider the scope and extent of director liability when trading insolvent, including the extent to which a director might be liable for new debts incurred while a company trades insolvent. The Supreme Court found directors had breached their duties by agreeing to (1) carry on the business in a manner that was likely to, and did, create a serious risk of substantial loss to creditors (breaching s135 Companies Act); and (2) caused the company to incur obligations without reasonable belief that those obligations could be met when required (breaching s136 Companies Act). The Court upheld the loss assessment for the s135 breaches as the net deterioration of the company's financial position between the date of breach and liquidation (which was not provided) and determined the loss assessment for the s136 breaches as the new debts incurred from the date of breach. The decision includes some helpful comments on liability under ss135 and 136, and the assessment of consequent loss. Our recent note on the decision can **be read here**.

ESG with an emphasis on the E

We also expect an increase in director accountability for ESG issues. These are likely to manifest in alleged liabilities from inadequately or inaccurately disclosing ESG (particularly environmental) risks. This has come into sharp focus with the obligations for reporting climate-related financial disclosures, which are now in effect for financial years commencing in 2023.[1]

Approximately 200 large financial institutions are now required to start making climate-related financial disclosures. Additionally, stakeholders of a broader range of companies are likely to increase pressure on those companies to make ESG disclosures, and to do so adequately and accurately.

In May 2023, the Financial Markets Authority repeated its mandate under the Financial Markets Conduct Act 2013 to investigate and take enforcement action for inadequate and incorrect disclosures about social or environmental issues.[2] This followed the FMA's investigation of managed investment funds, which identified an "immature" approach in the industry.[3] Coupled with the recent Australian action in *ASIC v Mercer Superannuation (Australia) Ltd* for false and misleading statements about the sustainable nature and characteristics of investment options, the prospect of regulatory action seems acute when dealing with ESG risks.

The public will also play a part in ensuring accountability for ESG issues. In New Zealand, there is an increasing degree of public activism in this space – including from the incorporated society Lawyers for Climate Action New Zealand (LCANZ). LCANZ has, amongst its other recent activities, begun pursuing complaints of greenwashing. It was notably successful in *Lawyers for Climate Action v Firstgas* (ASCB, 21/194, 21 July 2021), a decision requiring Firstgas to cease an advertising campaign based on claims it was "going zero carbon". While there is increased potential for these types of claims, we expect them to be relatively infrequent while the new regime beds in.

Increase in derivative actions

We are seeing an increase in derivative actions being used in disputes amongst joint ventures and similar structures, which necessarily call on (if nothing else) cover for directors' defence costs in any D&O insurance.

The arrangements within a joint venture may lend themselves to an application for leave to commence a derivative action where the relationship deteriorates. For example, a disgruntled limited partner to a limited partnership may seek leave to commence a derivative action in the general partner's name (and at the general partner's cost) against other limited partners and directors in the general partner. This was the case in *Beverley v Drylandcarbon GP One Ltd* [2022] NZHC 3606, where disputes arose between business partners regarding the ownership of corporate information and opportunities arguably governed by their agreement for entering a joint venture. As this was sufficiently concerned with alleged breaches of duties owed by directors appointed to the general partner, the Court granted leave for the disgruntled directors to proceed with action in the general partner's name.

1 Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021. Mandatory disclosures will only commence from 2024.
2 https://www.fma.govt.nz/library/opinion/sustainable-ethical-the-substance-must-back-up-the-claims/
3 Financial Markets Authority, *Integrated financial products: Review of managed fund documentation* (28 July 2022).

An application for leave to proceed with a derivative action serves as an attractive tool for some in seeking to resolve underlying issues between joint venture participants, regardless of whether a derivative action is the most appropriate avenue for resolving the dispute. For that reason, any D&O insurance for directors within a limited partnership, or D&O insurance with an outside board extension, may be impacted by the increased reliance on leave applications.

Representative actions

Representative actions in New Zealand continue to increase steadily, although we are seeing a general preference for pursuing any actions in Australia over New Zealand where possible. In *Whyte v the A2 Milk Company Ltd* [2023] NZHC 22, the High Court stayed action in New Zealand under the Trans-Tasman Proceeding Act 2010 pending resolution in the class action in Victoria, Australia. That decision reflected the Victorian Supreme Court's determination that it had jurisdiction to determine alleged breaches of New Zealand law.[4]

The preference to pursue actions in Australia is likely tied to the favourable benefits of the Victorian regime,[5] coupled with the relatively immature state of procedural and substantive issues in representative actions in New Zealand.

The development of New Zealand's representative actions regime has stalled somewhat. In 2022, The Law Commission produced its report on representative actions and litigation funding.[6] The Government responded by accepting the report's recommendations and seeking further consideration and an intent to advance policy work.[7] However, given the general election scheduled later this year, we would be surprised if there is any further substantive policy-led progress in 2023.

However, the regime may be further developed in an ad hoc way. For example, we await judgment from the Court of Appeal in the ASB and ANZ class action, which was heard in July 2023. Both the representative plaintiff and the banks appealed the High Court decision in *Simons v ANZ Bank New Zealand Ltd & ASB Bank Ltd* [2022] NZHC 1836, in which opt-out orders were made. The High Court found it had jurisdiction to make common fund orders but that it was premature to make those orders. The Court of Appeal has been asked to consider whether common fund orders are, or are not, available in New Zealand, referring to the High Court of Australia in *Brewster* and comments by the Court of Appeal and Supreme Court in *Southern Response*.

Caroline Laband
Partner, Auckland

Michael Cavanaugh
Special Counsel, Auckland

4 *Thomas v the a2 Milk Company Ltd* (No 2) [2022] VSC 725.
5 See https://www.wottonkearney.com.au/class-actions-overview-for-fy23/.
6 Law Commission, *Class Actions and Litigation Funding* (NZLC, R147, 27 June 2022).
7 Government Response to R147 (30 November 2022).

Construction PI

(Engineers, architects, QS and project managers)

MODERN SLAVERY AND THE CONSTRUCTION INDUSTRY

As the scale of New Zealand's corporations expands, so too do the corporate responsibilities and obligations. Momentum has been building for the Government to regulate modern slavery and migrant exploitation since the 2020 New Zealand Labour Government included the Modern Slavery and Worker Exploitation Legislation proposal in its election manifesto.[8]

The proposed legislation

On 8 April 2022, the Ministry of Business Innovation and Employment sought feedback on proposed Modern Slavery and Worker Exploitation legislation. Its objective was to achieve "freedom, fairness and dignity in the operations and supply chains of entities to address modern slavery and worker exploitation both in New Zealand and internationally."[9]

New Zealand has ratified several international treaties that set out obligations and definitions that directly relate to forced labour and slavery. The Government has also criminalised exploitative practices through New Zealand legislation.[10]

For the purposes of the legislation, the definition of modern slavery will include "non-minor" breaches of employment standards in New Zealand.[11] The scheme is expected to extend the breadth of what is considered modern slavery and potentially merge into behaviours that involve business decisions that capitalise on power imbalances between workers.[12]

The proposed approach is similar to legislation in Australia and the United Kingdom as it requires companies to disclose statements about their expected risks of modern slavery within their supply chains. However, New Zealand's proposal goes a step further as it requires active participation in disclosure of compliance rather than simply omitting to commit such unlawful practices. It also includes a separate due diligence obligation that would require all regulated entities, not just large companies, to have specific action plans that correspond to the companies' operations, size and overall fiscal responsibility.

The proposal would create obligations across the operations and supply chains of all types of organisations in New Zealand, with more responsibilities falling on larger organisations.[13] As a result, this recommendation has significant implications for the construction industry.

Construction industry risks

In 2022, an estimated 18% of modern slavery victims internationally were within the construction industry and 22% fell within the manufacturing and production of raw materials sector.[14] There are various intersectional reasons why the construction industry has an elevated risk of modern slavery. These include a high demand for unskilled labour and migrant employees, difficult visibility over supply chains that operate across the world, and the structure of tendering, which produces competitive pressure to reduce expenditure. These factors contribute to the industry's significant risk of falling within the scope of modern slavery for the purposes of the suggested legislation.

Modern slavery and ESG factors

The commitment to considering environmental, social and governance (ESG) factors when assessing the best interests of the company means that directors will need to consider other businesses' supply chains and employment practices before acquiring subsidiaries or dealing with other corporations in the tender process.

To remain competitive, and arguably to comply with section 131 of the Companies Act 1993 (which contains a duty on directors to act in good faith and in the best interests of the company), companies must have comprehensive modern slavery policies in place. As the legislation suggests, risks will only multiply for businesses and the overall industry if these requirements are not implemented industry wide.

Conclusion

New Zealand's proposed legislative approach goes further than other Commonwealth countries' modern slavery laws, both in terms of disclosure duties and the number of corporations it captures. Overall, the proposed legislation will create more transparency in the supply chain of many industries, especially the construction industry.

The definition of modern slavery included in the proposed legislation is likely to capture non-minor breaches of employment standards, including instances where power imbalances are capitalised on. The construction industry is likely to require significant disclosure and industry participants may need to adapt their structures to ensure that their practices do not fall within the definition of modern slavery.

As modern slavery is considered a social and governance issue for the purposes of ESG factors/considerations it will also be something that directors must consider when assessing whether they are acting in the best interests of the company under section 131 of the Companies Act 1993.

It is expected that the Bill will be drafted soon, with a first reading in the House likely in quarter one of 2024.

Antony Holden
Managing Partner, Wellington

Emma Abbot
Paralegal, Auckland

CONSTRUCTION PROFESSIONALS – CLAIMS ARISING OUT OF NATURAL DISASTERS

We have seen an increasing number of claims against construction professionals, in particular structural engineers and architects, arising out of defective repair work done to properties damaged by the Canterbury earthquakes of 2010/11. These claims often have little merit, and in many cases have been instigated by the Canterbury Earthquakes Insurance Tribunal. It has the power to join parties to a proceeding, even if the claimant has not chosen to include them.

The insurance industry is also steadily working its way through the thousands of claims lodged following the January 2023 floods and Cyclone Gabrielle. During 2024, we expect flood and storm damage claims to start coming through against construction professionals, in particular structural engineers, architects and geotechnical engineers. These are likely to involve properties where either there is a reasonable prospect that negligence of the construction professionals exacerbated the storm damage, or, regardless of the merits of a negligence claim, there

8 Ministry of Business, Innovation and Employment "Modern slavery and worker exploitation" (31 July 2023) Ministry of Business, Innovation and Employment <www.mbie.govt.nz>
9 *Ibid.*
10 For example: International Labour Organization (ILO)'s Forced Labour Convention, 1930 (No.29).
11 Ministry of Business, Innovation and Employment *Modern Slavery Legislation Final Report, Impact and effectiveness of modern slavery and legislation* (July 2021) at 11.
12 Anna Crosbie and Petra Carey "New legislation tackling modern slavery and worker exploitation proposed: property and construction under the spotlight?" (7 June 2022) Russell McVeagh <www.russellmcveagh>
13 Modern Slavery Legislation *Final Report, Impact and effectiveness of modern slavery and legislation* by Ministry of Business, Innovation and Employment (July 2021) at 13.
14 Modern Slavery Legislation *Final Report, Impact and effectiveness of modern slavery* and legislation by Ministry of Business, Innovation and Employment (July 2021) at 13.
15 Anna Crosbie and Petra Carey "New legislation tackling modern slavery and worker exploitation proposed: property and construction under the spotlight?" (7 June 2022) Russell McVeagh <www.russellmcveagh>

is a shortfall between the cost of repairing the damage and the cover provided by EQC and the private property insurer. In these circumstances, owners will look at other sources of recovery to 'make them whole'. For some this is likely to include a critical evaluation of the structural and geotechnical design of the property.

It is also possible that in the years ahead, construction professionals will face 'second generation' flood or cyclone-related claims in the event repair work is done inadequately.

Mathew Francis
Partner, Auckland

Richard Tosh
Special Counsel, Auckland

RISKPOOL JUDGMENT

***Local Government Mutual Funds Trustee Ltd v Napier City Council* [2023] NZSC 97**

In *Local Government Mutual Funds Trustee Ltd v Napier City Council*, the Supreme Court has issued its judgment on the application of the weathertightness exclusion contained in the Napier City Council's insurance policy, bringing an end to a long-running dispute in which the lower Courts had reached diametrically opposed outcomes.

The issue for the Court was whether the weathertightness exclusion excluded the Napier City Council's liability for weathertightness defects only, or whether it excluded the entirety of the claim against the Napier City Council, including its liability for non-weathertightness defects.

Background

In 2013, owners of the Waterfront Apartment complex in Napier sued the Napier City Council over weathertightness and non-weathertightness building defects. They alleged the Napier City Council had been negligent when issuing building consents, ensuring adequate inspections and issuing code compliance certificates.

The Napier City Council settled the owners' claim for about $12 million and sought cover from its insurer, Local Government Mutual Funds Trustee Ltd (Riskpool), in respect of that part of the claim unrelated to the weathertightness defects.

Riskpool declined cover based on a weathertightness exclusion in the policy. The weathertightness exclusion excluded "liability for Claims alleging or arising directly or indirectly out of, or in respect of" weathertightness defects.

The Napier City Council challenged Riskpool's declinature and litigation followed. Riskpool initially sought to strike the claim out but the Court of Appeal held that the relevant exclusion could not be interpreted without a full trial to establish the facts surrounding the deal struck between the Napier City Council and Riskpool, as reflected in the policy. Following trial, Riskpool was successful in the High Court but unsuccessful in the Court of Appeal. Riskpool appealed to the Supreme Court.

Supreme Court decision

Referring to orthodox principles of interpretation, the Supreme Court unanimously dismissed Riskpool's appeal and upheld the decision of the Court of Appeal, which favoured the Napier City Council. When the weathertightness exclusion was read as a whole and in context, the Court held that the common intention was to exclude only the risks specifically referred to, namely weathertightness risks. The exclusion could not be read as excluding the entire claim against the Council, including that part of it unrelated to weathertightness defects. The Supreme Court found that where the Napier City Council faced liability for divisible loss arising from weathertightness and non-weathertightness defects, cover was available under the policy for the portion of the claim relating to non-weathertightness defects.

As part of its argument, Riskpool had relied on contextual matters, including the evolution of the relevant policy wording and contemporaneous correspondence between the Napier City Council and Riskpool. The Court held that these contextual matters, in this instance, were insufficiently compelling to displace the proper interpretation of the weathertightness exclusion.

Key takeaways

The proper scope and application of a weathertightness exclusion will turn primarily on a close examination of its text, the policy wording as a whole and, where appropriate, relevant contextual matters. While the Court in this case held in favour of the Napier City Council, the Court's decision should be confined to the specific policy wording at issue and the contextual matters relied on. Regardless, insurers and brokers should consider taking a closer look at how they expect exclusions to apply and ensuring their wordings are fit-for-purpose.

Mathew Francis
Partner, Auckland

Hugh King
Special Counsel, Auckland

Richard Tosh
Special Counsel, Auckland

10-YEAR LONGSTOP TESTED

***Beca Carter Hollings & Ferner Ltd v Wellington City Council* [2022] NZCA 624**

Background

Beca issued design and construction monitoring producer statements for a building on Waterloo Quay, Wellington in February 2007 and March 2008. Wellington City Council (the Council) issued building consents and code compliance certificates for the building. BNZ leased the building after its completion.

The Kaikoura earthquake in 2016 caused irreparable structural damage to the building, which was ultimately demolished. In August 2019, BNZ issued proceedings against the Council for its losses. In September 2019, the Council joined Beca to the proceeding. Beca applied to dismiss the contribution claim on the basis that its material acts or omissions occurred before September 2009, more than 10 years earlier.

High Court

The High Court declined to strike out the Council's claim. It held that contribution claims could be issued against a third party 10 years after the alleged wrongdoing occurred, provided proceedings commenced within the two-year period (contribution period) imposed by s 34(4) of the Limitation Act 2010. Essentially, the High Court determined that s 17(1)(c) of the Law Reform Act 1936 and the contribution period in the Limitation Act created a code for contribution claims that was not impacted by the 10-year longstop in the Building Act.

Court of Appeal

The Court of Appeal upheld the High Court's decision, concluding that the 10-year longstop did not bar the Council's contribution claim against Beca.

The Court of Appeal considered the legislative history of contribution, noting that contribution claims arise, and that the limitation period for such claims begins, when the liability of the claimant seeking contribution is determined. If Parliament had intended to do away with the bespoke approach to claims for contribution, it would have said so in unambiguous terms. Given Parliament did not do that, the Court of Appeal confirmed the bespoke approach in s 34(4) of the Limitation Act.

What this means

The Court of Appeal's ruling removes practical problems for defendants in leaky building litigation. Previously, homeowners would discover water damage long after building work was completed and file proceedings just before the 10-year longstop kicked in. That then left defendant building professionals with little to no time to assess whether others were culpable and to bring contribution claims.

However, the Court of Appeal ruling also eliminates the certainty provided to third parties by the 10-year longstop. Construction professionals are now potentially exposed to contribution claims arising from projects more than 10 years old.

Importantly, the Supreme Court has granted leave to appeal, with a hearing date set down for 18 October 2023.

Mathew Francis
Partner, Auckland

Richard Tosh
Special Counsel, Auckland

Laura Glasson
Senior Associate, Christchurch

Financial services PI

(Accountants, brokers, financial advisors, solicitors, tax agents and trustees)

AUDITORS

The Financial Markets Authority (FMA) has announced that it will start reviewing audit firms more frequently from the next financial year. This increased scrutiny may increase the number of auditors who are subject to disciplinary action.

In July 2023, the FMA released its Auditor Regulation and Oversight Plan 2023-2026. The main change outlined in the plan is that every licensed audit firm will now be reviewed for audit quality annually. Previously the FMA was required to perform quality reviews for each licensed audit firm every four years, with the Big Four reviewed every two years and the other firms every three years.

Last year the FMA reviewed 25 audit files and found 28% were non-compliant – a 4% increase on the previous year's results. With reviews becoming more frequent, there is likely to be increased disciplinary claims against auditors.

Given the FMA's role in monitoring the regulatory systems, the NZICA and CPA Australia are likely to continue to take a robust approach to auditor complaints, particularly those that have been referred by the FMA.

MORTGAGE ADVISORS – PURCHASING 'OFF THE PLANS'

During the COVID-19 pandemic many New Zealanders purchased investment properties 'off the plans', encouraged by low interest rates and a strong housing market. As many of these developments near completion, and therefore settlement, there has been an increase in claims against mortgage brokers.

Pre-approval for mortgage finance is valid for 90 days. This creates risk when purchasing 'off the plans' as purchasers must reapply for finance closer to the settlement date. There is always a risk that the terms will change in the time between pre-approval and completion if there is a change in the borrowers' circumstances, it is also possible that lenders will not offer finance.

The risk of a claim against mortgage brokers based on an unfavourable change in terms is particularly high in the current market conditions. Rates over the past 18 months have nearly doubled, and the property market in some areas has dropped by around 16% since late 2021. Accordingly, we expect to see more claims against mortgage brokers, particularly if they have also advised on affordability.

INVESTMENT ADVISORS IMPACTED BY MARKET DOWNTURN

As Warren Buffett famously said, it is "only when the tide goes out do you discover who's been swimming naked". For investment advisors, that adage may be ringing true as they continue to see a steady flow of claims against them.

Many younger investors have only experienced the post-GFC bull market. That experience has led many to push for aggressive investment strategies rather than defensive ones. However, many investors have had to crystallise their losses before the markets recover because they need the funds for other purposes, such as home deposits. They are then making claims alleging that the investment advice they received was not suitable, or that they did not understand the financial advice and associated risk.

At the other end of the spectrum, we are seeing older claimants who are concerned about retirement adopting aggressive investment strategies, including borrowing to invest. When those decisions do not go according to plan, many are also alleging the advice they received was not suitable, or that they did not understand the financial advice and associated risks.

INSURANCE BROKERS AND CLAIMS ARISING OUT OF NATURAL DISASTERS

We expect to continue to see a flow of claims against insurance brokers arising out of the Auckland Floods and Cyclone Gabrielle.

After the Christchurch and Kaikoura Earthquakes, there were several material changes to home, business, and rural insurance policies. Most home insurance policies changed to sum insured, and many rural and business policy extensions stopped being automatic and required an additional premium.

Given the wider area damage from the recent natural disasters, many instances of under-insurance are being exposed. Many sum insureds have not been updated recently to factor in the increase in construction costs, and many businesses are regretting their decision not to take up additional extensions. We have already started to see some claimants seeking to take advantage of oral discussions.

Conveyancing solicitors and purchases 'off the plans'

Under a general retainer, a conveyancing solicitor will normally be required to advise on the agreement for sale and purchase. For clients that are purchasing off the plans, this will normally involve advice on a sunset clause.

A sunset clause is a condition that provides that if a specified event does not occur by a specific date, then either one or both parties can cancel the contract. Sunset clauses are particularly relevant for proposed subdivisions or new build properties that are purchased 'off-the-plans', sometimes before construction starts.

During the pandemic many people purchased property 'off the plans'. Due to changes in their circumstances, some are now seeking to extricate themselves from these agreements but are prevented from doing so because of the absence of sunset clauses and/or clauses prohibiting on sales before settlement.

As the interest rate increases start to bite with more people coming off fixed mortgages, we expect to see an increase in claims against conveyancing solicitors regarding off-the-plan purchases. This is likely to include opportunistic claims.

ACCOUNTANTS AND THE TRUSTEE TAX RATE INCREASE

New Zealanders with trusts will be unhappy to learn that the trustee tax rate will be increasing from 33% to 39% from 1 April 2024. Given the Government's focus on trust disclosure and the 1 April 2021 increase in the top income tax rate from 33% to 39%, this should not come as a surprise.

With any tax change there is always an increased scope for errors, particularly around the margins, and this change is no different.

The 39% rate will not apply to deceased estates for a period of 12 months after death unless the deceased was subject to a 39% tax rate. This is quite a short period

and could easily be missed, particularly if there are internal family disputes. There does not appear to be any rationale for this rule, given people do not generally use their own death as a tax planning strategy.

Another issue relates to how the rules will apply to trust distributions to a close company beneficiary. Beneficiary income derived by the corporate beneficiary will be treated as trustee income and taxed at 39%, and not the company tax rate of 28%, with the trust returning the income and paying the tax.

SOLICITORS AND PROFESSIONALS GENERALLY

In April 2023, the High Court in *Body Corporate 207624 v Grimshaw & Co* [2023] NZHC approved the scope of duty analysis adopted by the English Supreme Court in *Manchester Building Society v Grant Thornton UK LLP* [2021] UKSC 20 (MBS).

MBS refines the analysis in the seminal case of *South Australia Asset Management Corporation v York Montague Ltd* [1997] AC 191 (*SAAMCO*), which sets out that a professional will only be liable for damage that falls within the scope of their duty. *SAAMCO* had previously been adopted by the New Zealand Court of Appeal in *Sherwin Chan & Walshe Ltd (in liq) v Jones* [2013] 1 NZLR 166.

The test is relevant to professionals, including valuers, conveyancing solicitors and pre-purchase inspectors, providing information as part of a larger transaction. The duty analysis now focuses on the purpose of the professional role and the risk that has been assumed. The New Zealand Court of Appeal approved this analysis in *PGG Wrightson Real Estate v Routhan* [2023] NZCA 123.

This timely case will assist in the defence of several of the claim trends discussed in this publication.

Lawyers regulation and complaints – transforming for the future

The New Zealand Law Society (NZLS) has launched a dramatic review of the legal services framework, with its recent *Independent Review Report* proposing a wave of reforms to achieve a more modern regulatory structure and a consumer-focused, fit-for-purpose complaints process.

Key recommendations include:

1. **Creating a new independent regulator** – The NZLS's regulatory and disciplinary functions would be replaced by an independent statutory body, with competence-based public and legal board members to enhance accountability.
2. **A union for lawyers** – The NZLS would be realigned as a purely membership body, representing the interests of lawyers, advocating for law reform and speaking up for the rule of law.
3. **Explicit importance of Te Tiriti** – The new regulatory framework would be underpinned by Te Tiriti o Waitangi obligations, with everyone working within the regulator required to uphold the principles of Te Tiriti.
4. **Strengthening consumer protection** – The primary objective of the legal services regime would be to protect and promote the public interest, with lawyers' fundamental obligations enhanced to include promoting client interests. The emphasis would move away from a reactive disciplinary process, to one of targeted support and intervention before consumers are harmed.
5. **Complaints system reform** – Standards committees would be abolished with most complaints being resolved by the regulator's in-house staff. Consumer-type complaints (e.g. fees, delay and poor communication) would be handled through a fast, flexible and informal non-disciplinary pathway. The regulator's specialist complaints staff would be able to make findings of unsatisfactory conduct and investigate matters appearing to reach the misconduct threshold (for referral to the Disciplinary Tribunal).
6. **Renewed emphasis on culture and conduct** – Lawyers' fundamental obligations would explicitly require them to maintain their competence and fitness to practise. The regulator would be empowered to promote diversity, inclusion, cultural competence, ethical conduct and mental health in the profession. This builds on recent work and conduct rules reform to counter bullying and harassment in the law.
7. **Investment and muti-disciplinary partnerships welcomed** – The restriction on non-lawyers investing in law firms would be removed, along with the ban on lawyers partnering with non-lawyers. This could promote innovation and enhance services and benefits for consumers, while providing wider career opportunities for lawyers.

Many lawyers find the protracted and highly adversarial complaints process disproportionately stressful and punitive, and would welcome a more positive, restorative and growth-focused approach to professional conduct concerns.

While the Law Society has accepted most of the recommendations in the Report, further consideration and consultation is needed. As a result, legislative change remains some way off. PI policies and their quasi-judicial costs offerings will need to be updated once the changes are finalised.

Mathew Francis
Partner, Auckland

Rebecca Scott
Partner, Auckland

James Dymock
Special Counsel, Auckland

Grace Guy
Paralegal, Auckland

Property PI

(REA, valuers, building inspectors and surveyors)

PROPERTY PI

There have been several significant cases in the property professional indemnity space in the last year. These decisions serve as a useful reminder for property professionals about their obligations.

James v Luxury Real Estate Ltd [2023] NZHC 1104

The High Court's decision in *James v Luxury Real Estate Ltd* [2023] NZHC 1104 was an appeal from the District Court by the owners of a luxury property in Queenstown. The case concerned allegations of a breach of fiduciary duties and repudiation of an agency agreement by the listing agency and agent. Ultimately, despite a finding of breach of fiduciary duty, Luxury Real Estate Ltd (Luxury RE) was successful in recovering its commission. The decision serves as a useful reminder for real estate agents and other professionals about their obligations in their interactions with clients.

Background

The plaintiffs, Mr and Mrs James, entered into a sole agency agreement with Luxury RE by its director Mr Spice (the Agent) for the sale of their Queenstown property.[16] A prospective purchaser, Mr Bharadwja, was introduced to the property by the plaintiffs' neighbour and was shown the property on two occasions by the plaintiffs without the Agent being present. Following the viewings, negotiations took place directly between Mr Bharadwja and the plaintiffs. As a result, the plaintiffs instructed the Agent to negotiate with Mr Bharadwja. Due to other interest in the property, the Agent initiated a multi-offer process to promote a competitive environment, however, the only offer received was an increased offer from Mr Bharadwja of $3,150,000. The Agent considered he was ethically bound to advise Mr Bharadwja that he was no longer in a multi-offer situation, and after informing the plaintiffs, proceeded to do so. The plaintiffs belatedly asked the Agent not to do this as they considered it detrimental to their interests.

A subsequent meeting between the Agent and plaintiffs became tense and ended with angry recriminations. The Agent swore and used aggressive language. The Agent also said words to the effect that he could not work with Mrs James and, as he left the property, said he was "walking away". Mr James then emailed the Agent saying it was not feasible to continue to work together, but requested ideas for a resolution and continued to correspond with the Agent regarding the sale.

The plaintiffs eventually accepted Mr Bharadwja's offer. Later, by their lawyer, the plaintiffs told the Agent that "it appears you ended [the Agent's] agency agreement on 2 March [the date of the Agent's outburst]. The [plaintiffs] do not wish to resume a relationship with [the Agent]." The plaintiffs refused to pay the Agent's commission on the sale.

The High Court's decision

Three key issues were highlighted in this case:

- whether the Agent repudiated the agency agreement during a heated meeting with the plaintiffs
- whether the Agent breached his fiduciary duties to the plaintiffs, and
- if the Agent had breached his fiduciary duties to the plaintiffs, whether he was nevertheless entitled to commission for the sale.

The High Court upheld the trial judge's finding in the District Court that the agency agreement had not been repudiated by the Agent, nor cancelled by the plaintiffs.

The trial judge reasoned that swearing is commonly used for emphasis in modern New Zealand and, in this instance, it was not directed at the plaintiffs. In saying he could not work with Mrs James, the Agent did not clearly indicate an unwillingness to continue with the agency agreement. The Agent's statement that he was "walking away" could similarly be construed as 'walking away from the heated discussion to cool off'. Later correspondence between the Agent and the plaintiffs showed an intention to continue to work together.

Contrary to the trial judge's findings, which found no breach of fiduciary duty, the High Court found the Agent had breached his fiduciary duty to the plaintiffs in one respect. The High Court considered that whilst the Agent had obtained the plaintiffs' consent to advise Mr Bharadwja that he was no longer in a multi-offer situation, the consent was not "informed". The plaintiffs, in agreeing to the terms of the agency agreement, would not reasonably have understood that in agreeing to the multi-offer process they authorised the Agent to disclose information that he could not otherwise disclose due to the duty of loyalty.

Generally, a fiduciary in breach of duties will not be entitled to remuneration. However, in exceptional cases, where an agent is found to have acted in good faith and the transaction was completed to the benefit of the principal, that rule may be parted from. The High Court considered the facts of the case fell squarely within this exception. The Agent had not been dishonest or deliberately deceptive, nor was his failure to obtain informed consent motivated by bad faith. The plaintiffs still obtained the benefit of the sale within the period of agency. Therefore, the High Court held the Agent was entitled to his commission.

Implications for real estate agents

The facts of this case illustrate the tension between an agent's duties to its vendor client and an agent's ethical duties of disclosure and the duty to deal fairly with all parties engaged in the transaction, as embodied in Rule 6 of the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012.

The case serves as a useful reminder for real estate agents and other professionals to be mindful of how their words and actions may be construed/interpreted, and to ensure they explain how a client's information might be provided to others and obtain informed consent before disclosure.

MacFarlane v Informed House Inspections Limited & Sewell [2023] NZHC 934

Background

The plaintiff homeowner, Rosemary MacFarlane, issued proceedings against pre-purchase inspector, Informed House Inspections Ltd (IHI) and IHI's sole director and shareholder, Mark Sewell.

Ms MacFarlane claimed that she purchased the Lower Hutt residential property in May 2019 in reliance on an inspection report prepared by IHI (through Mr Sewell), which represented that there were no major issues with the property and verbal advice from Mr Sewell that it was "definitely not a leaky home".

Ms MacFarlane said she later discovered the property suffered from weathertightness issues. She brought claims against IHI and Mr Sewell for misleading and deceptive conduct in breach of s 9 of the Fair Trading Act 1986 and negligent misstatement. She sought the cost of rectifying those issues from IHI and Mr Sewell.

16 James v Luxury Real Estate Ltd [2023] NZHC 1104 at [2] and [14].

The report was commissioned by, and addressed to, the vendor and contained various limitations and disclaimers, including that it could only be used by the vendor and use by third parties was prohibited. An inspection agreement provided to the vendor, but not Ms MacFarlane, also contained a substantive disclaimer as to the limits of any weathertightness inspection. Mr Sewell sought to rely on these limitations and disclaimers in defence.

Judgment

The Court found IHI and Mr Sewell liable to Ms MacFarlane for misleading and deceptive conduct and negligent misstatement. Mr Sewell was held personally liable as he acted as the "alter ego" of IHI.

Regarding the Fair Trading Act claim, McQueen J found that:

- Representations in the report that the property had no major issues and was in a reasonable condition for its type and age were incorrect. Although the inspection report did alert the reader of weathertightness risks and recommended a specialist report, this had not been provided to Ms MacFarlane, and the report omitted to recommend that a more detailed inspection and analysis take place.
- It was reasonable for Ms MacFarlane to rely on the report, despite it being prepared for the vendor, and verbal advice given by Mr Sewell because IHI held itself out as a specialist in pre-purchase reports and Ms MacFarlane had no expertise in property inspection, buildings or weathertightness. It followed that IHI and Mr Sewell had positive knowledge of the fact that it likely that the report would be viewed and relied on by prospective purchasers, and that it was in fact viewed and relied on by Ms MacFarlane.

McQueen J also noted that there is a general prohibition on contracting out of the Fair Trading Act.

Regarding the negligent misstatement claim, McQueen J found that IHI and Mr Sewell owed a duty of care to Ms MacFarlane and other prospective purchasers. The report was obtained by the vendor for the purpose of marketing the property for sale, so it was common sense that IHI and Mr Sewell could be taken to know that their work would be communicated to prospective purchasers. This was confirmed by the subsequent conversation between Mr Sewell and Ms MacFarlane.

IHI and Mr Sewell were also found to have known that the report and advice was likely to be acted on by potential purchasers without further independent inquiry. The verbal representation by Mr Sewell to Ms MacFarlane that the property was not a leaky home was an implicit indication that further independent verification was not required because it was reasonable for Ms MacFarlane, as a lay-person, to rely on that representation because it came from a person holding themselves out as an expert on property and building inspection matters. There was nothing in the information available to Ms MacFarlane to suggest she should make further enquiries.

In considering the effect of disclaimers, McQueen J noted the decision in *Steel v Spence Consultants Ltd*[17] where Gendall J said a disclaimer might absolve a defendant of liability for negligent misstatement if reliance on that statement was unreasonable. In that case, a report was included in an auction pack provided to the plaintiff before auction, and the inspector had no control over whether the disclaimers were provided to the purchaser. Further, the inspector made no positive verbal representations to the purchaser.

In distinguishing that case, McQueen J found that Ms MacFarlane's reliance on the report and verbal advice was not unreasonable as Mr Sewell had the opportunity to communicate those disclaimers to Ms MacFarlane but did not do so. He also made positive representations, which were not limited in any fashion.

IHI and Mr Sewell were held jointly and severally liable for the cost to remediate the defects (and associated costs) totalling $524,495.52 plus interest. McQueen J allowed a 5% reduction from the claimed amount to reflect the fact that the benefit (the $1,200 fee for the report) obtained by IHI and Mr Sewell was relatively small.

Implications

This case highlights that an inspector may be liable to potential purchasers for reports prepared for vendors. However, the case was also very fact specific and not actively defended.

This case offers some other helpful reminders for property professionals, including:

- to ensure that inspection limitations and disclaimers are available to any party that might have access to a report – for example, it may be worth annexing any inspection agreement or disclaimers to a report to ensure that they will be seen by a subsequent party
- to be careful with absolute statements, such as "definitely not a leaky home"
- that an inspector can be personally liable where they are the "alter ego" of their company, and
- to always have insurance – neither IHI nor Mr Sewell did, so they are liable to pay the awarded costs.

***Preena v Barfoot & Thompson Limited Parnell (as agent for Mark and Joanna Bramley)* [2023] NZTT 335870, 4117731**

In *Preena*, the Tenancy Tribunal made an order against the landlord for $6,000 in exemplary damages. This order consisted of $3,000 for a breach of the Healthy Homes Standards (HHS) and $3,000 for expired smoke alarms.

Background

Mr and Mrs Preena leased a property in Parnell, Auckland, from Barfoot & Thompson (as agent of Mr and Mrs Bramley) on 11 December 2021 for $3,000 per week.

Mr and Mrs Preena filed a claim against Barfoot & Thompson (as agent of Mr and Mrs Bramley) in the Tenancy Tribunal for multiple alleged failures, including exemplary damages for expired smoke alarms and exemplary damages for breach of HHS, false and misleading HHS statement, and a refund of $559.10 for HHS reports.

Tenancy Tribunal decision

The Tribunal considered whether there was a false representation of the premises' compliance with the HHS and if there was a failure to adhere to the HHS requirements.

The Tenancy Agreement recorded that the tenancy started on 11 December 2021 and the premises was compliant with the HHS. However, on 13 December 2021, the landlord gave the tenant a Healthy Homes Statement, which stated that the premises 'will comply' with the HHS.

Under the HHS, a tenancy is required to be compliant with the HHS within 90 days of the tenancy beginning, however, the landlord did not commission a HHS inspection to confirm if the premises was compliant within this timeframe. The landlord then issued a statement on 25 March 2022 that the premises complied with the HHS. The landlord explained that this statement was issued on the basis that there was a genuine belief that the premises was compliant.

On 4 July 2022, the tenant obtained a HHS report, which found the premises was not HHS compliant as there was no ground moisture barrier, draught issues, insufficient floor and ceiling insulation and insufficient heating. The tenant provided this report to the landlord on 28 July 2022, who questioned its legitimacy. The tenant then commissioned another report that confirmed the original report's accuracy. The landlord later commissioned their own report, which showed substantially similar findings to the tenant's two reports.

The Tribunal ordered reimbursement of the two HHS reports and $3,000 in exemplary damages for an intentional failure to adhere to the HHS requirement. The Tribunal did not order an award for any false representation of the HHS as the landlord was grossly negligent, but this was not intentional.

The Tenancy Agreement noted all smoke alarms were working. However, the tenant's HH inspection report found that two smoke alarms had expired before the commencement of the tenancy. The landlord did not replace the smoke alarms until 15 November 2022, some 110 days later.

17 Steel v Spence Consultants Ltd [2016] NZHC 398, (2017) 18 NZCPR 540 at [54]–[64];

The landlord explained that the smoke alarms were not replaced sooner as they were part of the claims before the Tribunal. The Tribunal found this explanation highly unsatisfactory and ordered $3,000 in exemplary damages for an intentional failure to replace the smoke alarms.

Implications

This decision serves as a reminder for landlords and property professionals to:

- ensure that all smoke alarms are in working order and have not expired
- ensure that the property is compliant with the HHS within the required timeframe, and
- act promptly and adopt a pragmatic approach – failing to replace the smoke alarms for over 100 days due to the Court process was seen to be "highly unsatisfactory".

Watch this space – Residential Property Managers Bill

On 18 August 2023, the Residential Property Managers Bill was introduced to parliament with public submissions now being invited on the Bill. The Bill aims to establish a regulatory regime for residential property managers and management organisations. This will require those who provide residential property management services to be licensed (it does not include private landlords).

The intention is to make it easier for tenants and landlords to bring actions against property managers and to raise the standards in the profession. This would sit alongside the currently available courses of action in the courts and Tenancy Tribunal. The Real Estate Agents Authority is to be the regulator and the proposed licensing scheme and disciplinary process mirrors the current regulatory regime for real estate agents. Passage of the bill is expected to be in 2024 with commencement in 2025.

Katie Shanks
Partner, Auckland

Sophie Lucas
Partner, Wellington

Natasha Cannon
Special Counsel, Wellington

Caitlin Barclay
Associate, Based in Tauranga

Pia Kitchin Gordon
Paralegal, Auckland

> There have been several significant cases in the property industry space in the past year.
>
> These decisions serve as useful reminders for property professionals about their obligations and appropriate actions.

Employment

(Core & EPL)

TIKANGA IN EMPLOYMENT RELATIONS

There has been an increasing trend of government departments, public sector organisations and businesses expressing their values in Te Reo Maori or as tikanga. Not all will have done so considering what these concepts mean beyond the English translation.

The recent case of *GF v Comptroller of the New Zealand Customs Service and Ors*[18] in the Employment Court engages with this trend, with potentially significant ramifications for both the public and private sectors regarding HR processes and the expectations of a reasonable employer.

Background

GF was dismissed from employment as a frontline border worker at the Port of Tauranga because of their decision not to have the COVID-19 vaccine. The ERA dismissed GF's claims of unjustified disadvantage and dismissal.

In a de novo challenge in the Employment Court, GF, who was non-Maori, argued that even though the Employment Relations Act 2000 (Act) did not have express requirements regarding tikanga, tikanga and tikanga values were incorporated into their employment agreement and/or were part of good faith obligations. Accordingly GF argued they had to be adhered to through employment processes, including termination.

Tikanga and Tikanga values

The Court found that:

- By its nature, employment law is "relationship" centric, which comfortably accommodates tikanga and its values and that the Act, whilst not expressly including, does not exclude tikanga.
- Customs had incorporated tikanga and tikanga values into its employment relationships by referring in its employment agreements to its statement of intent, strategy and values, which were all expressed as tikanga.
- Against that backdrop, what is reasonable and in good faith in any employment relationship will be determined on a case-by-case basis, depending on the tikanga values incorporated and what they mean to that organisation. This may require expert opinion.

In the circumstances, having determined the meaning of the tikanga values incorporated by Customs, the Court considered Customs had fallen short in how it had engaged with GF. It found that GF was unjustifiably dismissed, reversing the ERA's decision.

What this means in practice

Organisations will need to consider how applicable tikanga/tikanga values should inform their conduct in dealing with employment relationship issues and then act accordingly. While not necessarily requiring a wholesale change, employment processes may need to be refined or reconsidered.

In *GF* there was a focus on the employer's process and conduct being mana enhancing. For instance, in *GF*, a tikanga-compliant approach would have required, at a minimum, face-to-face discussions with the affected employee with a view to reaching consensus. This would have involved ensuring that the right people were present (including those who were professionally close to the employee e.g. a line manager), designing and implementing an individualised process, and ensuring minimal damage to the relationship, including post-employment (potentially through post-termination care and counselling).

The impact

The *GF* case involved one government department and one relatively unique process in a unique scenario (COVID-19 vaccination mandates). However, the impact of *GF* could be far more wide-ranging. Any organisation or business that has chosen to incorporate tikanga into its relationships will have to consider, if they haven't already, what these values mean for it and for its employees in any given situation. For example, how will mana be enhanced in a disciplinary scenario? Organisations will need to consider revising everyday HR processes, such as disciplinary action, performance management and restructuring and, potentially take a more individualised approach (individual to both the organisation and the person involved).

Sectors or organisations that are used to working with tikanga may be relatively unaffected by this decision. For example, education sector collective agreements have for some time specifically required questions of competence, conduct and/or discipline to be handled in a manner which, as far as possible, protects the mana and dignity of the employee concerned. They have also provided for the option of discussions in a Maori context. Accordingly, school boards may be ahead of many other organisations when it comes to acting in line with tikanga. However, other organisations may need to revise standard processes to mitigate risk in light of the *GF* decision.

Murray Grant
Special Counsel, Wellington

Melissa Castelino
Associate, Auckland

Edward Yoo
Solicitor, Auckland

EMPLOYMENT PROTECTIONS EXTEND TO A WIDER RANGE OF WORKERS

Recent employment cases continue the trend of extending employee rights more broadly. In an era marked by evolving labour landscapes, employers need to understand and proactively address this emerging risk.

***Pilgrim v Attorney-General* [2023] NZEmpC 105**

The Employment Court has recently held that unpaid former residents were employees and not volunteers during their time at the Gloriavale Christian Community.

The plaintiffs were born and raised in the Gloriavale Christian Community, a religious community on the West Coast of the South Island. They worked within the Gloriavale community from around six years of age and progressed to working full-time on assigned 'teams' once they left school, at around 15 years of age. As females, the plaintiffs had no choice about whether they worked on the teams or not – that decision had been made for them at birth. Their work on the teams was structured around four core work types – cooking, cleaning, washing and food preparation. The evidence established the work was unrelenting and both physically and psychologically demanding.

The plaintiffs brought a claim under s 6 Employment Relations Act 2000 for a declaration of employment status.

The decision

The Court held that the plaintiffs were employees while working on the teams. The Court stated that a belief or label is not the test for determining employment status, and the decision required a contextual assessment of the reality of the relationship and how it operated in practice.

18 [2023] NZEmpC 101

The Court emphasised the importance of challenging long-standing assumptions about what may or may not signify volunteer or employment status, including the assumption that domestic labour (often historically performed by women) does not constitute employment.

While the plaintiffs did not expect or receive financial remuneration, this was not determinative of volunteer status. In exchange for their work, the plaintiffs expected they would be permitted to remain in the community with their family and friends, and continue to receive food, shelter, clothing, religious support and guidance, and a promise of spiritual redemption. The Court found these benefits amounted to reward for their services and that employment status was not inconsistent with the religious focus of the community.

Students on placement were employees

Association of Professionals and Executive Employees Inc v Secretary of Education [2023] NZERA 167 is another example of a successful challenge regarding employment status. In this case, the Employment Relations Authority found that post-graduate students of educational psychology undertaking a practicum placement with the Ministry of Education as "intern psychologists" were employees.

The Authority stated that work arrangements may fall along a spectrum so that an activity may be both training and employment, and that training and employment are not mutually exclusive.

Implications for insurers

Pilgrim shows the Court's willingness to challenge the traditional understanding of domestic work and import employment protections and minimum standards into a wider spectrum of relationships. It highlights the importance of agreements and labels reflecting the true nature of a working relationship, particularly when organisations engage faith-based volunteers or independent contractors.

We expect continued scrutiny of volunteer roles as the Court's intolerance for exploitation of workers continues. While the *Pilgrim* decision is being appealed, the trend to extend employment protections – particularly to groups perceived as vulnerable or lacking in choice – is gaining ground. Other recent examples of workers successfully challenging their employment status include apprentices, parent caregivers, builders, couriers and uber and taxi drivers.

The trend towards categorising more workers as employees creates risk for organisations that rely on non-employee labour. This may increase liability for insureds, particularly if challenges to employment status are excluded from policies.

Employers need to recognise and confront these risks. Conventional contractual analysis cannot be relied on. Targeted legal advice may assist employers to reflect fully and objectively on the role of a worker from the start, and ensure accurate written agreements are in place and that working practices and documentation are robust.

Rebecca Scott
Partner, Auckland

Jayde Mead
Associate, Wellington

RIGOROUS PROCESSES REQUIRED FOR RESTRUCTURES AND REDUNDANCIES

Restructurings and redundancies have been on the rise recently, largely due to businesses facing financial pressures from the economic conditions. However, even genuine and necessary restructuring exposes businesses to risk, because of the potential for rigorous process scrutiny.

The duty of good faith

Increasingly, the Employment Court and the Employment Relations Authority are prioritising and promoting the duty of good faith in employment relationships. Recent case law has re-emphasised employers must:

- have open and transparent communication and genuine and substantive engagement with employees facing a restructure, and
- meaningfully consider redeployment as part of the redundancy process.

Open and transparent communication

In *Hansen v United Flower Growers Limited* [2023] NZERA 347, where a redundancy was driven by finances, the Authority found the duty of good faith required the employer to provide employees with access to all relevant financial information, irrespective of whether the information was commercially sensitive or confidential. In this case, the employee was in a senior position so the Authority considered she should have been trusted with such information in the face of a redundancy.

Alternative proposals to preserve employment

Recent decisions have also shown that employers should actively and constructively seek to maintain the employment relationship as part of the restructure process (*New Zealand Steel Limited v Haddad* [2023] NZEmpC 57 and *Ferris & Anor. v Nuhiti Q* [2023] NZERA 395). These decisions highlight that employers should explore redeployment and genuinely consider and consult on alternatives to termination. Failing to consider alternatives and seek employee input can make dismissal for redundancy unjustified, even if – after consideration – the employee would have been dismissed anyway.

The need for transparency and forethought

Transparency is required throughout the redundancy process, including during redeployment assessment. For example, in *Sherard v Transportation Auckland Corporation* Limited [2023] NZERA 228 an employee was being considered for redeployment, however the employer's failure to be transparent about the basis on which candidates were to be selected for the new role amounted to a breach of good faith.

Recent case law has also highlighted that redeployment cannot be treated as an afterthought that is separate from the restructure. Redeployment consideration and consultation needs to be approached with seriousness and respect. Where redeployment obligations are breached, it can bring the fairness of the entire process into question. For example, in *New Zealand Steel Limited v Haddad* [2023] NZEmpC 57, the Employment Court found that the employer should have engaged early and responsively on redeployment options, before disestablishing the employee's position. Overall, the redundancy process was carried out unfairly, and this unfairness was exacerbated by NZ Steel's breaches of its redeployment obligations.

Higher awards and penalties add to risk

Despite being under pressure, businesses need to be aware that they cannot take process shortcuts or apply a formulaic "box-ticking" approach to restructuring or redundancies.

Employment awards are trending upwards, amplifying exposure for distressed employers. Compensation for hurt and humiliation can now be $20,000 to $25,000 in relatively routine cases – on top of awards for lost wages, costs and, in some cases, reinstatement of the employee. There is also a trend of higher and more frequent penalties for good faith breaches. This increases risks for insureds faced with breach of good faith claims, because penalties are generally excluded from EPL policies.

Rebecca Scott
Partner, Auckland

Melissa Castelino
Associate, Auckland

NEW EXTENDED PERIOD FOR EMPLOYEES TO RAISE SEXUAL HARASSMENT PERSONAL GRIEVANCES

New 12 month period

A new law gives employees who have experienced sexual harassment in the workplace more time to raise a personal grievance against an employer. The Employment Relations (Extended Time for Personal Grievance for Sexual Harassment) Amendment Act 2023

amends the Employment Relations Act 2000 to provide employees with 12 months (rather than 90 days) to raise a personal grievance involving allegations of sexual harassment.

Why the change?

The change recognises that victims of sexual harassment often come forward after a delayed period of time, if at all. The previous 90 day provision was arbitrarily restrictive for affected employees to raise a sexual harassment personal grievance.

The change follows more awareness about sexual harassment in the workplace following the #MeToo movement and the corresponding encouragement of victims to speak up. The extended period will give employees, who have experienced sexual harassment, time to consider and process what has happened to them before coming forward.

Prevalence of sexual harassment in the workplace

Statistics in New Zealand regarding sexual harassment in workplaces remain patchy and its prevalence is hard to estimate accurately given some victims may not raise it at all. However, a survey reported by Te Kahui Tika Tangata, Human Rights Commission,[19] reported that:

- Nearly one in three (30%) workers have personally experienced sexual harassment in the last five years.
- Young women (54%), bisexual workers (67%) and disabled workers (58%) are especially likely to have experienced sexual harassment.
- Sexual harassment is more common in the healthcare and social assistance (41%) and hospitality sectors (43% for hospitality workers aged under 30 years).

It will be interesting to see what impact increasing the period for raising this type of grievance has on these statistics over the coming years. There may be, in time, an increased number of sexual harassment claims going before the Employment Relations Authority / Employment Court.

Implications for employers

Employers need to be aware of the increased period and allow employees 12 months to raise a personal grievance involving allegations of sexual harassment. Employers should also include the new 12 month time frame in all new employment agreements.

Existing employees are covered by the new 12 month timeframe and their agreements do not need to be updated. If an existing employment agreement needs to be amended or reviewed, employers could include the new 12 month timeframe at that point.

Employers should also update their policies to outline that employees have 90 days to raise a personal grievance, except in the case of a personal grievance regarding sexual harassment for which they have 12 months. All employees should be told about this change.

Victoria Waalkens
Senior Associate, Auckland

NEW LEGISLATION WELCOMED TO PROTECT MIGRANT WORKERS

The Worker Protection (Migrant and Other Employees) Act (the Act) comes into force on 6 January 2024. It follows the Government's Temporary Migrant Worker Exploitation Review, which considered ways to protect vulnerable migrant workers in New Zealand.

As the final piece of the migrant worker exploitation prevention program, the Act amends the Immigration Act 2009, the Employment Relations Act 2000 and the Companies Act 1993.

What the new legislation means

The Act:

- implements an infringement offence and penalty regime for low-level non-compliance, to deter employers from failing to comply with their obligations
- enables infringement notices to be issued for allowing a person to work without, or inconsistently with, immigration requirements
- gives immigration officers powers to request employment documents and allows publication of the names of employers committing immigration offending
- ensures employers will now have to comply with requests from the Labour Inspectorate within 10 working days – failure to comply will be an offence, and
- gives the High Court new powers to disqualify a person from their directorship of a New Zealand company if they are convicted of exploiting unlawful or temporary workers under the Immigration Act 2009 or of committing a trafficking in persons offence under the Crime Act 1961.

Migrant worker exploitation trends

Since 2018, the Government has had a clear focus on stopping employers from exploiting migrants, with legislative change being part of that. However, according to data from The Ministry of Business, Innovation and Employment released earlier this year, there were still 956 reports of potential exploitation between 1 July 2021 and 30 June 2022.[20]

The Labour Inspectorate's migrant exploitation team has had some high-profile successes. For example, in December 2022, the Employment Court awarded fines totalling about $1.55 million against a liquor store owner and his associated companies for serious and sustained breaches of minimum employment standards (A *Labour Inspector v Samra Holdings Ltd T/A Te Puna liquor Centre* [2022] NZEmpC 234).

Unfortunately, recent media reporting[21] has highlighted an apparent trend of exploitative employers colluding with overseas recruiters for illegal premium kickbacks without providing ongoing employment. There are reports of workers paying unlawful premiums of up to $40,000 for employment and then being promptly dismissed under 90-day trial provisions. This can leave migrant employees abandoned, jobless and in debt.

Immigration New Zealand has initiated a major investigation following reports of over 100 recent migrants in Auckland left mostly without work, and in overcrowded and unsanitary houses. Additionally the Government is launching an independent review of the Accredited Employer Work Visa Scheme after a whistleblower apparently raised serious concerns.

The implications

Employers need to be aware of these issues and rigorous in their compliance approach, including scrutinising their arrangements with overseas recruiters. Insurers should look carefully at EPL claims involving alleged fake jobs and premiums apparently paid for employment. Most EPL policies exclude claims arising out of dishonesty, illegal profit or the insured deliberately committing a wrongful act.

Rebecca Scott
Partner, Auckland

Edward Yoo
Solicitor, Auckland

19 https://tikatangata.org.nz/news/new-research-shows-high-prevalence-of-workplace-bullying-and-harassment
20 https://www.mbie.govt.nz/dmsdocument/25942-2223-2123-government-response-to-the-report-of-the-education-and-workforce-committee-inquiry-into-migrant-exploitation-cabinet-paper-proactiverelease-pdf
21 https://www.rnz.co.nz/news/national/488987/recovery-visa-sold-for-more-than-30-000-by-unlicensed-agents-immigration-adviser-says

Property damage (third party)

PROPERTY DAMAGE (THIRD PARTY) CLAIMS

Following the significant weather events in the North Island in early 2023, insurers have seen an influx of first party claims regarding the scope of cover available to farmers, residents, businesses and local authorities arising from flooding, slips and other weather-related damage.

In the next 12 months, we expect to see an increase in third party property damage claims arising from weather-related recoveries. For example, we anticipate more claims against local authorities involving the failure to adequately maintain drainage and roading, as well as group actions for consenting to developments in flood-prone areas. We expect there will also be claims due to neighbours' failures in maintaining retaining walls or adequately preventing the escape of landslips or other substances from their property. Similarly, there may be claims for a failure to adequately protect products or stock stored or grazed on behalf of a third party.

We expect to see these weather-related third-party claims increasing as time goes on. We anticipate that they may raise a variety of coverage and defence issues in the general liability space. One central issue that is likely to arise is the perennial question of whether property damage has been suffered. For example, we anticipate questions of whether water exposure alone amounts to property damage in line with the decision in *Technology Holdings Ltd v IAG New Zealand Ltd* (2009) 15 ANZ Ins Cas 61-786. The question of loss where there has been area wide damage will also be a key issue. For example, where damage has been caused to a third party's perishable product, what loss flows from that damage if the product could not have made it to market because of area-wide damage?

Misha Henaghan
Partner, Auckland

Anna McElhinney
Special Counsel, Auckland

> We expect to see these weather-related third-party claims increasing as time goes on.

Product liability and recall

PRODUCT LIABILITY AND RECALL

In the product recall space, the Ministry for Primary Industries | Manatū Ahu Matua and the New Zealand Food Safety Authority | Haumaru Kai Aotearoa (NZFSA) continue to take a more active role in recall investigations. For example, there have been several tahini recalls so far this year, with the NZFSA actively monitoring tahini food safety issues overseas.

A Food Notice, in effect from 1 August 2023, implements more stringent requirements on importing food, including assessing and confirming food safety before arrival in New Zealand, checking the food safety compliance background of the supplier, and keeping evidence of assessments and confirmations.

Additionally, from July 2023, all businesses with a plan or program under the Food Act, Wine Act or Animal Products Act, as well as food importers and exporters, will need to undertake a simulated recall at least once a year, with significant penalties for a breach of the requirement. In the case of a body corporate, failure to meet the simulated recall requirements exposes an insured to liability for a fine not exceeding $100,000.

The latest case law developments in the product liability space include confirmation that the Consumer Guarantees Act 1993 (CGA) and Fair Trading Act 1986 (FTA) do not have extraterritorial jurisdiction and do not apply to overseas manufacturers that do not have a presence as a trading entity in New Zealand.

The 3A Composites case confirmed claimants seeking redress from overseas manufacturers can still rely on tortious claims. 3A Composites involved the manufacture and distribution of polyethelene core cladding, which was a factor in the rapid spread of fire through the Grenfell Tower. The cladding has been the subject of bans in a variety of jurisdictions. The Court noted that even if it was wrong about the question of jurisdiction, the cladding would not amount to a 'consumer good' for the purpose of the CGA as it was acquired for the purpose of constructing residential and commercial buildings. Leave to appeal the High Court's decision has been granted.

Misha Henaghan
Partner, Auckland

Anna McElhinney
Special Counsel, Auckland

Statutory liability

LEGISLATIVE CHANGES

In February 2021, the Government announced that the Resource Management Act (RMA) would be repealed and replaced with three new Acts: the Spatial Planning Act (introduced in 2022), the Natural and Built Environment Act (introduced in 2022) and the Climate Adaptation Act (not yet introduced).

The Natural and Built Environments Act introduces various changes to compliance and enforcement powers, with a focus on deterrence. Key changes that impact the statutory liability landscape include:

- making it illegal to indemnify liability to pay a fine, infringement fee or pecuniary penalty – any existing insurance policy or contract will have no effect (currently, insureds can get cover for fines for breaches of the RMA)
- increasing the maximum fines significantly– fines against companies (or other non-natural person entities) will be increased to $10 million from $600,000 and fines against individuals will increase to $1 million from $300,000
- creating new enforcement powers for non-compliance, such as revoking an existing resource consent, making adverse publicity orders, requiring a pecuniary penalty be paid to the Crown, and making orders to pay an amount reflecting the monetary benefit accrued due to the offending, and
- lengthening the limitation period to take enforcement action from one to two years.

The Natural and Built Environments Act achieved royal assent on 23 August 2023. However, the provisions regarding illegality of indemnifying a liability to pay a fine, and pecuniary penalty orders, do not come into force for a further two years. It remains to be seen if the Act may be repealed or amended by future governments following the upcoming elections.

Trends for investigations and prosecutions

In 2023, there continues to be an increase in regulatory investigations and prosecutions across the board. This is evidenced by:

- the Ministry of Primary Industries increasing its prosecutions of farmers under the National Animal Identification and Tracing Act 2012
- the Commerce Commission increasingly prosecuting cartel cases across markets, such as waste oil, livestock, cardboard packaging, real estate and air freight – more anti-competitive behaviour is immediately deemed to be cartel under amendments to the Commerce Act 1986, with an increase in penalties that now criminalises cartel behaviour and imposes larger fines
- the Environmental Protection Agency (EPA), formed in 2011, bringing its first prosecution in 2022 against Channel Infrastructure NZ Limited for use of banned, toxic firefighting foam – with more prosecutions appearing to be on the horizon, and
- a series of prosecutions arising under the RMA regarding water-take, after Bay of Plenty Regional Council officers carried out a region-wide analysis of sites where bore drilling consents had been granted but no water-take consents had been sought.

There has also been recent focus on how entities, such as unincorporated partnerships and trusts, are treated in the statutory liability context. Regulators are increasingly seeking to prosecute entities where a larger maximum penalty is available, rather than individuals.

Trusts

The decision in *WorkSafe New Zealand v Kellisa Farms Limited and Ors* [2022] NZDC 2490 confirmed trusts cannot be charged and convicted in their own right.

However, the decision has been appealed by WorkSafe and was set to be heard in August 2023.

In *Kellisa Farms* a defendant trust challenged the validity of the charge against it. WorkSafe brought an application under s 147 of the Criminal Procedure Act seeking a ruling on whether the trust "is a person" in terms of the HWSA or alternatively whether the trustees of the trust could be classified as a "body of persons" of the trust. The Court took the view that a trust cannot be charged as a "person" for the purposes of the HWSA, as this would be counter to equity and common law principles. It stated that it would be absurd to find a trust liable for a fine and a conviction, asking: "Against whom would the conviction be lodged and the fine enforced?"

No examples had been provided where WorkSafe had prosecuted a trust as a person. However, there were cases where a trustee of a trust was charged and convicted. In *Kellisa Farms*, the Court said that "[t]he case law and trust law principles support the proposition that a trust is not a person and cannot be held liable for the actions or failures of the trustees of the trust. Rather the trustee should be held personally liable."

Unincorporated partnerships

The difference between the issue of charging trusts and unincorporated partnerships is that the HWSA and the RMA do not explicitly refer to a trust as falling within the definition of "person", whereas they do explicitly treat an unincorporated partnership as a "body of persons" distinct from its "partners".

When an unincorporated partnership is charged under the HSWA or the RMA, courts have often looked to the individual partners as the appropriate defendants at sentencing. At common law, an unincorporated partnership is not a separate legal entity. In practice, the unincorporated partnership is charged, enabling WorkSafe or the Council to adopt the higher maximum penalty for non-individuals, whilst the conviction is later entered against the individual partner – a seemingly contradictory approach.

The HSWA defines a person as including "a corporation sole and a body of persons, whether corporate or unincorporate." The HSWA then states at s 18 that "officer … means, if the PCBU is … a partnership (other than a limited partnership), any partner". This has the effect of treating the partner as an officer distinct from the PCBU partnership. This is a clear statutory departure from the common law principle that an unincorporated partnership is not a separate legal entity.

The Court of Appeal decision in *Cometa United Corporation v Canterbury Regional Council* [2008] NZRMA 154 stated that, in its view, "the RMA clearly contemplates the prosecution of unincorporated bodies".

This statutory departure from the common law benefits insureds that operate their business through an unincorporated partnership because the partners should not, in principle, receive a criminal record. However, this statutory departure also means the partnership faces much larger maximum penalties ($1.5 million as opposed to $300,000 under the HSWA). The question remains whether the Court will look beyond the limited property of the partnership and reach into the pockets of the individual partners to satisfy a fine on conviction.

Misha Henaghan
Partner, Auckland

Neil Beadle
Special Counsel, Auckland

Thomas Cunningham
Senior Associate, Wellington

Isabelle Kwek
Associate, Auckland

Environmental liability

RMA REFORM – ARE $10M PENALTIES AROUND THE CORNER

As one of its last items of business before the election, Parliament passed the titanic Natural and Built Environment Act 2023 to repeal the Resource Management Act and enact a new regime for managing New Zealand's environment. If it survives the election, the Act will have far-reaching implications for businesses and their insurers.

However, the future of the legislation is unclear as the National and ACT parties have promised to repeal it if elected. Regardless of the election outcome, the offence regime is likely to continue to have some relevance: the major political parties support environmental reform, although they differ on the Act's merits. The opposition's objections to reform are focused on the problems with consenting and 'red tape', rather than with the proposed enforcement regime. So it appears likely at least some of these changes will remain on our statute books under one guise or another.

The Act focuses on 'environmental bottom lines', which means environmental outcomes are to be prioritised above other considerations. The new offence regime communicates that very clearly with its massive increases to fines and other penalties. This attempts to achieve a 'polluter pays' enforcement system.

The following proposed changes are particularly noteworthy:

1. Maximum fines are to increase from $600,000 to $10m for companies and other entities, or up to $1m or 18 months imprisonment for natural persons (including directors and officers).
2. Fines are to be uninsurable.
3. Pecuniary penalty orders (PPOs) of up to $10m are available. PPOs are civil penalties that regulators can pursue in a civil proceeding. They require proof to a balance of probabilities standard only, rather than the beyond reasonable doubt standard applicable in the criminal jurisdiction. Unlike fines, PPOs are insurable.
4. The Environment Court will be able to make enforcement orders requiring a polluter to pay the cost that a regulator has incurred in remediating the environment.
5. Monetary benefit orders will require businesses to pay for any financial advantage they obtain from illegal discharges.
6. Enforceable undertakings (EUs) are available. EUs will be undertakings that an offender volunteers to do to improve environmental outcomes in exchange for the regulator's agreement not to pursue enforcement action.

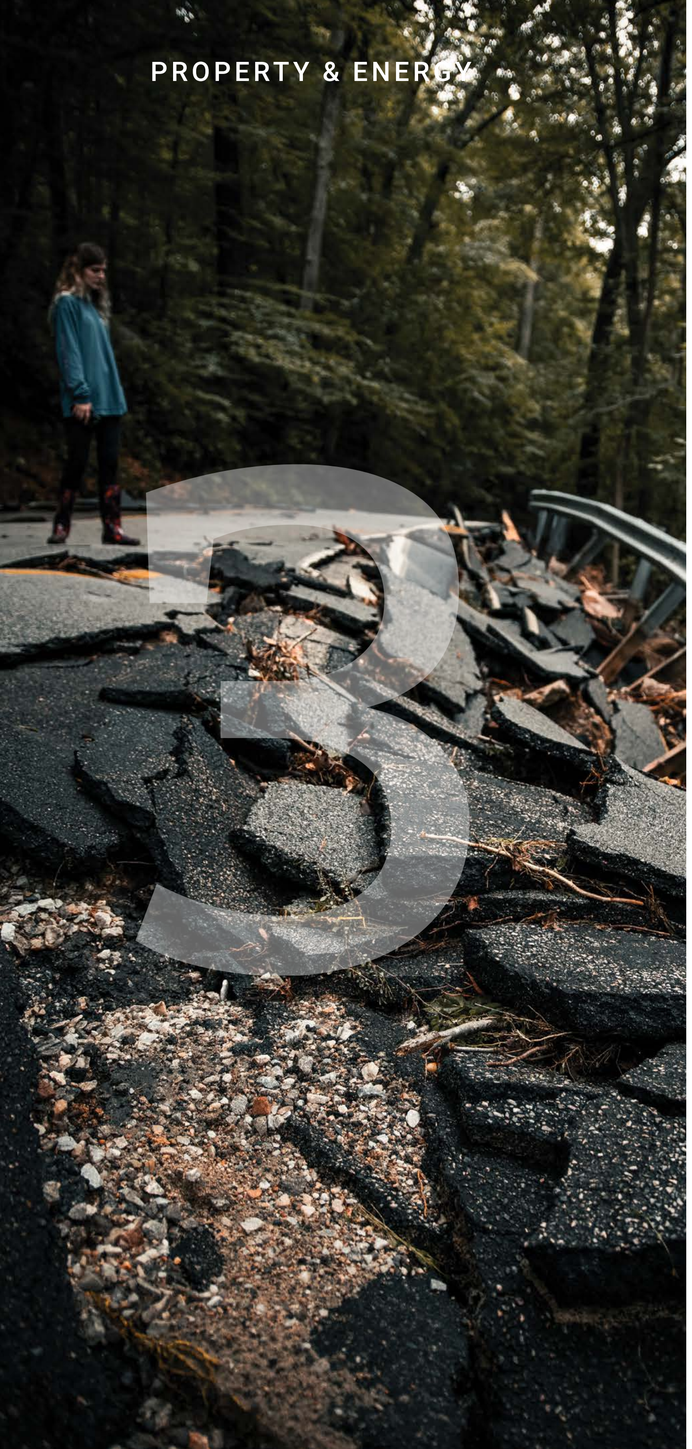
The Act also heralds more consistent enforcement action against polluters. A hallmark of the status quo is very lumpy enforcement resourcing from region to region. The new regime proposes to address this by mandatory direction from the Minister to guide local planning and national monitoring of environmental performance to ensure compliance. Regional planning committees are to enact regional plans to ensure consistency and coherency between regions. They will also have enforcement powers.

In summary, the insurance sector can expect:

- more regulation, with significantly more in the way of costs and penalties applied to businesses
- more stringent environmental expectations due to environmental bottom lines, and therefore more enforcement action against polluters
- removal of the ability to insure for fines – this factor, together with significant increases to maximum fines, will have a dramatic effect on businesses' environmental risk management
- investigations and proceedings that will inevitably become a lot more time intensive and complex, as a result of the new financial signals, and
- PPOs that are very attractive to environmental regulators, as they are a more cost-effective and less onerous process than criminal proceedings. This will have significant financial implications for defendants, so insurers will need to consider how their existing wordings respond to environmental PPO proceedings.

To the extent it survives, the new compliance and enforcement regime is expected to be phased in over the next few years, with some changes (including increased penalties) already in force.

Richard Flinn
Partner, Wellington



MDBI, coverage and subrogation

THE CO-INSURANCE QUANDARY

Co-insurance on construction projects is common as a single policy is often purchased to cover all instances of damage to the project. In the event of damage, (sub) contractors frequently look to insurers as the single pool of funds to indemnify the insured parties for the cost of remediation. But what of subrogation?

If a (sub)contractor has caused the damage, they will inevitably say they are a co-insured and entitled to rely on the policy (including any subrogation waiver) to avoid liability. But what if the cause of damage is not insured or the (sub)contractors cover differs from the primary policy holders in some other material way? The UK Court of Appeal has recently clarified that the law provides a complete answer to this quandary in *FM Conway Limited v The Rugby Football Union & Ors [2023] EWCA Civ 418*.

The Rugby Football Union (RFU) refurbished the Twickenham stadium before the 2015 Rugby World Cup. RFU engaged Clark Smith to design ductwork to accommodate high voltage power cables. FM Conway was engaged to install the ductwork. RFU alleged that the ductwork was defectively designed and installed, that the defects caused damage to the power cables when they were pulled through, and that it suffered a loss of £4,440,909.45. RFU was indemnified for a portion of its loss by its CAR insurers, which commenced subrogated proceedings against FM Conway.

The policy included a typically wide definition of insured:

"(a) Rugby Football Union as the Principal and/or associated and/or subsidiary companies

(b) The Contractor for each Project

(c) All other contractors and/or sub-contractors of any tier and others engaged to provide goods or services in connection with the Project insured hereunder…

Each for their respective rights and interests."

There was no argument that FM Conway was an insured under either (b) or (c). As a consequence, FM Conway asserted that neither RFU nor its insurers could claim against it. The Court disagreed, pulling together the developing line of authorities in this area to provide a cogent statement of the law, determining:

- the mere fact that two parties are both insured under the same policy does not automatically mean that they are covered for the same loss or cannot make claims against each other
- where one party (here FM Conway) alleges that another has purchased insurance for its benefit (here RFU), it is necessary to consider authority, intention and scope of cover – these issues are usually considered by reference to the principles of agency, and
- where there is an underlying contract, this will normally be the best place to find evidence of authority, intention and scope – such an investigation is not precluded because the contract is not in writing or because the contract is implied or exhaustive. It may be necessary to look to other places for evidence as well.

FM Conway's claim failed, as the underlying building contract between it and RFU expressly provided that the insurance would not extend to claims arising from defects. The contract did not provide RFU with authority to obtain such cover on FM Conway's behalf nor did it evidence an intention for them to do so. FM Conway pointed to pre-contractual discussions to evidence intention that wider cover should be provided – in other words any claims against it, including those arising from defective workmanship.

However, those discussions did not show a common intention and were not reflected in the contracts, which were subsequently signed. The same documents also gave clear evidence that FM Conway's "respective rights and interests" differed from RFU's, leading to the same outcome. As such, the claims by RFU and its insurers were not precluded and can proceed to a full hearing.

Antony Holden
Managing Partner, Wellington

Andrew Moore
Special Counsel, Auckland

MAJOR LOSS CASE LAW UPDATES FROM AROUND THE WORLD

We highlight three major loss case law updates, one each from Canada, the United Kingdom and New Zealand.

MDS Inc v Factory Mutual Insurance Company

MDS Inc v Factory Mutual Insurance Company[22] involves a Canadian dispute arising after MDS bought radioisotopes from a local nuclear reactor. Corrosion in a key part of the reactor caused the reactor operator to shut it down, which caused MDS significant BI losses.

The issue was whether the policy exclusion for physical damage to a supplier caused by corrosion covered both anticipated and unexpected corrosion. The judge at first instance thought that the exclusion should not apply to unanticipated corrosion. There was some support for that from two witnesses from the insurer.

That approach was rejected by the Ontario Court of Appeal, which determined that:

- cover here was on a standard form policy, so the Court needed to be careful not to find an interpretation that would affect many policyholders, and the view of one party was irrelevant, and
- it could not have been intended that there would be cover for anticipated corrosion as that would fail the operative clause requirement that the damage be accidental.

It is hard to fault the Court's reasoning.

Allianz Insurance plc v University of Exeter

While undertaking building works, the University of Exeter uncovered an unexploded bomb that had been dropped by German bombers in WWII. There was no safe way to disarm the bomb or remove it from the building, so the decision was made to detonate it. The subsequent explosion damaged the surrounding buildings.

The university's policy excluded damage 'occasioned by war…'. Accordingly, in *Allianz Insurance plc v University of Exeter,*[23] the argument was whether the proximate cause of the damage was war, or the decision to detonate.

Clearly, the bomb exploded because of the decision to detonate it. But the court did not accept that was enough to constitute the proximate cause. Following the guidance in Arch (on COVID BI losses), the judge said that what was important was how the man in the street would view it '…without too microscopic analysis but on a broad view…'. In his view, the real cause of the damage was the presence of the bomb, as the university had no real alternative but to detonate it. That left it squarely within the war exclusion.

This decision is a neat and satisfying application of the law around proximate cause.

Polladio Holdings Limited v New India Assurance Company Limited

The NZ High Court's decision in *Polladio Holdings Limited v New India Assurance Company Limited*[24] involved a dispute regarding hail damage to a hotel roof.

The policy had two relevant exclusions, one for rust and one for marring and scratching. The Court heard the roof was not in great condition before the loss as it had been weakened by rust.

The evidence showed that the hail had only caused holes where the roof was rusty. In terms of causation, the holes were therefore caused by both the hail and the rust. As rust was excluded, that took precedence over the hail damage so all damage associated with the loss was excluded.

The policy had no definition of 'marring', so the court used the dictionary definition of "detract from or impair the perfection of, disfigure". The next part of the inquiry was whether the hail-related denting went further than cosmetic damage and left indentations deep enough for water to pool in, which in turn would exacerbate rusting. The configuration of the roof meant there was no evidence of any pooling and the roof was not otherwise affected in terms of integrity or function. On that basis, the judge found that the denting damage was cosmetic only and fell within the exclusion for marring.

Insurers will find comfort in the sensible approach taken here.

Peter Leman
Partner, Wellington

Shane Swinerd
Partner, Wellington

WILD WEATHER RECOVERY

New Zealand has unfortunately been subjected to several recent extreme weather events, including the Nelson Floods of 2022, and the Auckland Floods and Cyclone Gabrielle in early 2023. These events caused widespread flooding, silt contamination and landslip damage, resulting in tens of thousands of claims being lodged by property owners with their insurers.

Due to the widespread damage and volume of claims, patterns of scenarios are arising regarding damage suffered by residents from floods, slips, landslides and forestry slash, where councils, other landowners or contractors may be responsible for causing or contributing to the damage that has occurred during the weather event. Such scenarios include:

1. A neighbour exacerbating the risk of landslip onto adjacent land, for example by building or failing to maintain structures that put excess load onto the land, redistributing soil, or removing support.
2. A neighbour exacerbating or altering water onto adjacent property, for example by removing a stormwater pipe or otherwise re-channelling water.
3. Councils granting consent regarding the works in scenarios 1 and 2.
4. Councils failing to maintain stormwater assets, such as culverts, dams and stormwater drains.
5. Land slipping from private property or council property onto private property.
6. Forestry slash or other destructive debris flows washing down onto private property during a storm event.

Liability

Depending on the circumstances of individual cases and the cause of the loss, these scenarios might create a viable recovery action against landowners, forestry owners, councils or contractors. Actions can be brought in negligence, nuisance or under the rule in *Rylands v Fletcher*. In the case of councils, actions can also be brought for breach of statutory duties, if certain elements and circumstances are established on the facts of each case. The key elements across all actions are likely to be:

- whether the damage (or some of the damage) would have occurred in any event (establishing causation)
- the defendant's knowledge or awareness of the potential hazard
- whether the defendant was using its land in a particularly unusual or hazardous way, creating the risk of landslip or water damage or debris flows
- whether the defendant took positive steps to create a hazard, rather than omitting to rectify a hazard that already existed, and
- whether it was reasonable to expect the defendant to carry out and pay for works to avoid or rectify a hazard. In the case of a council, the court will consider what maintenance or repair programs were reasonable given the council's finite resources.

Steps to identify possible recovery action

To assist insurers with identifying possible recovery actions, we highlight a list of relevant factors to consider when assessing the prospects of any recovery action:

- What is the extent of loss/damage the landowner suffered due to the weather event?
- Has the landowner suffered similar damage/loss previously or had previous issues with
  - flooding or pooling water on the property?
  - water drainage onto and/or through the property?
  - landslips and/or subsidence?
  - any other water/land damage?
- Is the landowner aware of any circumstances or actions from neighbouring properties or any nearby structures (such as culverts or drains) that have concerned them regarding flooding, landslips, drainage or other water/land damage?
- Have any neighbours carried out any works on their land recently, such as building or altering structures, changing the drainage, or undertaking any earthworks?
- Is the property in a designated high risk zone as may be classified and known by councils.
- Are there any patterns where damage has been caused to several properties, such as
  - from a slip/water flow emanating from a single property or flood prevention asset, or
  - in a single subdivision or recently constructed area?

Prevalence of damage in an area could be an indication of failures by a council in its consenting process or in managing stormwater assets in that area.

Ultimately, recovery claims in the context of natural catastrophes can be difficult to pursue. In particular, causation is often difficult to establish. However, in the right circumstances with the right facts, recovery is possible so recovery actions are worth considering as part of the claims process.

Caroline Laband
Partner, Auckland

Charles Henley
Senior Associate, Based in Tauranga

22 2021 ONCA 594 (Ontario Court of Appeal)
23 [2023] EWHC 630
24 [2023] NZHC 1346

Medico-legal

VICARIOUS LIABILITY FOR HEALTHCARE PROVIDERS

The Supreme Court recently settled the issue of 'vicarious liability' regarding breaches of the Code of Health and Disability Services Consumers' Rights (the Code) in *Ryan v Health and Disability Commissioner* (SC 98/2021) [2023] NZSC 42.

The case arose after Dr Sparks prescribed medication from a class of antibiotics to which his patient had a documented allergy. The patient suffered an allergic reaction, was admitted to hospital and later made a complaint to the Health and Disability Commissioner (HDC).

Dr Sparks shared premises with Dr Ryan and, while they operated separate practices, they jointly traded as Moore Street Medical Centre. While the HDC found that Dr Sparks breached the Code, it also found the centre liable for Dr Sparks' breaches under s 72(3) of the Health and Disability Commissioner Act 1994 (HDC Act) as Dr Sparks was its 'agent'.

Dr Ryan sought a judicial review of the HDC's opinion that the centre was 'vicariously liable'. He argued that Dr Sparks was acting in his own business and was not an 'agent' of the centre when the breaches occurred so it could not be said that the centre authorised his actions expressly or implicitly.

The decisions

The High Court found that Dr Sparks was the centre's agent and that he had acted within the centre's implied authority when he breached the Code. The Court of Appeal, however, considered that holding the centre liable under s 72(3) was problematic. While there was a relationship of agency and partnership regarding the centre's administrative components, it did not follow that the relationship persisted in Dr Ryan and Dr Sparks consulting with their respective patients. In that context, they were not necessarily agents of one another. Nevertheless, it found that Dr Sparks was acting as a 'member' of the centre and was liable instead under s 72(4).

The Supreme Court (4-1) held the centre liable for Dr Sparks' error by virtue of s 72(3). It found a provider may be considered an agent if they carry out, on behalf of the healthcare provider, work that satisfies an obligation of the provider to provide the relevant service, and/or if a partnership arrangement applies. The Court considered several factors demonstrated that the centre partnership business encompassed the provision of medical services by Dr Ryan and Dr Sparks.

With agency established, the Court considered whether liability could be avoided through the application of the proviso in s 72(4), which says "unless the act or omission occurred without the employing authority's express or implied authority, precedent or subsequent". The majority held that the phrase meant that the centre would be liable if its agent breached the Code in the course of performing authorised functions.

William Young J considered the majority view would make the proviso redundant, where an agent can only act with authority. He considered the proviso would exclude liability unless the agent had actual or implied authority to do the wrongful act. His view was that it would be "odd" to face an enhanced risk of liability for the conduct of agents and members, over employees, where s 72(5) provides a defence to an employer who can establish it took reasonably practicable steps to prevent the acts or omissions relevant to the breach of the Code.

Implications of the decision

The judgment confirms the potentially broad liability exposure of healthcare providers for the acts or omissions of agents or members. Any proactive, reasonable and responsible steps taken by an employing authority to protect against a breach of the Code would seemingly have no relevance to liability once agency or membership was established. This appears counterintuitive to the HDC's consumer protection via quality improvement mandate.

Avoiding the risk of liability could be achieved by practitioners conducting entirely separate and independent practices. However this approach would sacrifice the benefits of shared premises, including cost and operational efficiencies and ensuring practitioners are not isolated. In an already overburdened health system, the ultimate impact of this decision on healthcare consumers remains to be seen.

ACC UPDATE – EXTENSIONS TO SCHEDULE 2 OCCUPATIONAL DISEASES

The Ministry of Business, Innovation and Employment (MBIE) is currently reviewing the list of occupational diseases in Schedule 2 of the Accident Compensation Act 2001 (Act). A person diagnosed with an occupational disease that is included in Schedule 2 of the Act automatically receives the benefit of cover under the Act for work-related gradual process, disease or infection. Schedule 2 was last updated in 2008.

The test

There are two ways that work-related gradual process, disease or infection injuries are covered under the Act:

1. Being diagnosed with an occupational disease that is included in Schedule 2 of the Act. Schedule 2 currently includes 41 occupational diseases. For an occupational disease to be included in this list there must be strong scientific evidence of a causal link to a work-related risk.

2. Using the three-stage test set out in section 30(2) of the Act. This test will determine if a personal injury is, on the balance of probabilities, more likely to be caused by a work-related factor or not. At a high level, the test requires evidence of property or characteristics in the workplace, which cause or contribute to the personal injury, and which were more likely to have caused the injury than not.

Currently cover is excluded for a gradual process, disease or infection not contracted in the workplace, or caused by personal injury or treatment (e.g. RSI or hearing loss caused by a hobby). The exception to this is mesothelioma, which is a lung cancer most often caused by exposure to asbestos.

Consultation on Schedule 2

MBIE has recently closed public consultation on suggestions for additions to the list. It received submissions from 20 parties on proposed additions, including cancers, heart diseases, lung diseases and musculoskeletal disorders. Other proposed additions included hepatitis A, B and C, COVID-19 (including Long COVID), and "diseases of a type generally accepted by the medical profession as caused by" factors such as chemicals and extreme temperatures. The review process will also include an assessment by independent researchers and medical experts.

The submitters included several individuals as well as the Cancer Society of New Zealand, Fire and Emergency New Zealand (FENZ), WorkSafe, The Royal Australasian College of Physicians (RACP) and Perioperative Nurses College of the New Zealand Nurses Organisation (NZNO).

Any updates to Schedule 2 are due to be decided later this year after MBIE provides its recommendations to the Minister for ACC.

Impact of expansion of Schedule 2

The appetite in New Zealand for suing for personal injury is very low and there are very few litigated cases for gradual process diseases. This is largely due to New Zealand's legal framework, where the ACC scheme generally bars proceedings relating to personal injury. Although personal injury litigation is rare, additions to Schedule 2 will further reduce the risk to employers and their insurers regarding the types of diseases that employees may seek compensation for.

LAND TRANSPORT (DRUG DRIVING) AMENDMENT ACT 2022

The presence of impairing drugs found in drivers' blood in fatal crashes is now essentially equal to that of alcohol. The Government has responded by introducing the Land Transport (Drug Driving) Amendment Act 2022 (the Act), bringing new illegal limits with lower limits for infringements, and tougher penalties for drivers who mix different qualifying drugs and/or alcohol. The Act creates a total of 82 new offences and is part of the 'Road to Zero' strategy – Waka Kotahi's vision of zero serious deaths and injuries on New Zealand roads.

From 11 March 2023, those who have not taken their medicine/s as prescribed, have also consumed alcohol, and/or have mixed with other qualifying drugs will be subject to enforcement of the legislation.

The legislation targets specified prescription medicines and illicit drugs that are known to impair a driver's ability to drive safely and have the highest risk to road safety in New Zealand. An independent expert panel determined which drugs should be targeted based on the scientific literature, data from other countries, and New Zealand data from drug-related car crashes.

Testing for drugs

There are currently 25 qualifying drugs listed in Schedule 5 of the Act, consisting of four illicit drugs and 21 prescription drugs. These qualifying drugs have new enforcement levels (or limits) that determine the type of offence, being either an infringement (such as a fine, demerit points or licence disqualification) or a criminal charge. It is important to note that Schedule 5 may change over time.

Where drugs are detected that are not listed in Schedule 5, the presence of the drug determines the offence.

If an individual is involved in a crash, is incapable of proper control of a motor vehicle, or fails a compulsory impairment test (comprising an eye, walk and turn, and one-leg-stand assessment), an individual may be subject to an evidential blood test.

If an evidential blood test shows the individual is above the tolerance level, they will receive an infringement notice. However, if their blood test indicates levels around the high-risk level, they will be charged with a criminal offence.

Medical defence

It is important to note that medical defence is available when a prescription medicine is detected. A medical defence applies if the driver can demonstrate that the prescription medicine was taken in line with a current and valid prescription from a health practitioner, and they have followed any instructions from a health practitioner or the manufacturer.

Mitigating the risk

To minimise the risk of breaching the Act, drivers should consider checking if any medicines they are taking are listed in Schedule 5 and ensure they always take their medicine as prescribed. They can also seek advice from their doctor, nurse or pharmacist.

Similarly there are actions healthcare professionals can take to reduce their risks associated with the Act, including discussing with patients whether their medicines (both prescription and over the counter) could impair their driving, and advising patients to be vigilant about whether they experience any side effects that could impair their driving, and not to drive if these occur.

If you are unsure of the effect of a medicine, check section 4.7 of the medicine's datasheet.

Katie Shanks
Partner, Auckland

Aimee Credin
Partner, Auckland

Sean O'Sullivan
Partner, Wellington

Adam Holloway
Partner, Wellington

Samantha Beattie
Senior Associate, Auckland

Kate Wills
Senior Associate, Wellington

Jayde Mead
Associate, Wellington

Pia Kitchin Gordon
Paralegal, Auckland

Life sciences

LIFE SCIENCES UPDATE

In 2022, we examined the continuous evolution of the life sciences industry. We anticipated the changing regulatory requirements and evolving liability risks that have emerged as societal and government focus shifts from rapid pandemic response to long-term sustainable health solutions in an endemic environment.

Therapeutic Products Act 2023

A major recent development is the passing of the Therapeutic Products Bill on 19 July 2023, which marked the most significant change to the regulation of medicines, medical devices and natural health products in nearly 40 years. The Government was keenly aware that many New Zealanders were opposed to the Bill, or had concerns about how it would affect them, their whānau or their businesses. The Health Committee received more than 16,500 submissions.

The Therapeutic Products Act 2023 will replace the Medicines Act (1981) and the Dietary Supplements Regulations 1985. It is set to come into force on the earlier of a date appointed by the Governor-General by Order in Council or 1 September 2026. Currently, most of the provisions in the Bill are intended to commence in 2026, allowing time for public and sector consultation on secondary legislation. There will also be transition periods for products currently in-market.

The purpose of the Act is to protect, promote and improve the health of all New Zealanders by providing for the acceptable safety, quality and efficacy of medicines and active pharmaceutical ingredients, medical devices and natural health products across their lifecycle. It also addresses the need for substantiating any health benefit claims made about those products.

Medical devices and gene, cell and tissue therapies were not previously fully regulated. The Act will regulate how all products are manufactured, tested, imported, promoted, supplied and exported.

The Therapeutics Products Regulator will be established as an independent statutory officer within the Ministry of Health (Manatū Hauora). Costs will be recovered through fees, charges and levies, which will be determined after consultation with regulated sectors, professions and individuals. The Ministry of Health considers consultation and an 'open book' approach will mean that charges are efficient and effective. It plans for stakeholders to have visibility over the costs that underpin the charges they pay.

Key final amendments made to the Bill by Supplementary Order Paper before it was passed included:

- The inclusion of an exemption regime for small-scale NHP manufacturers where their products are made and supplied in-person to customers in New Zealand. No product authorisation or manufacturing licence is required, but manufacturing standards will apply.
- The clarification that there will be no regulation of rongoā (traditional Māori medicinal practices) unless products are made for commercial wholesale or commercial export. This will ensure rongoā activities and services operating from marae continue as usual.
- The removal of the ban on personal importation of prescription medicines via the internet, as long as a New Zealand health practitioner has prescribed the medicines. Other restrictions will remain to mitigate the risks of contaminated and counterfeit goods. Health practitioners may now also explicitly consider affordability when prescribing an unauthorised medicine.
- The inclusion of defences for advertising, including advertising for the purpose of satire, research, study, criticism or review, reporting the news, advocacy, protest or industrial action, public discussion, or to advocate for a change to law or government policy.
- The potential for regulations to mitigate the risk of 'astroturfing', which involves disguising a professionally orchestrated PR or marketing campaign by presenting it as having arisen from unsolicited public comments or grass-roots support. This may involve requiring disclosure of any funding or in-kind support received from the manufacturer or supplier.

Clinical trials

Clinical trials are a core part of a high-performing health system and are a key action under Strategic Priority 2 of the New Zealand Health Research Strategy (2017–2027). New Zealand has a world-class record of accomplishment for clinical trials and has one of the fastest ethics approval processes in the OECD. It is estimated there is a direct contribution of over $169,000 per clinical trial employee to the economy, which is more than the clinical sector employee contribution in the UK, Ireland and Thailand.

The Therapeutic Products Act 2023 will make regulation of clinical trials more robust. Conducting clinical trials is a controlled activity requiring a licence or permit, in parallel with any ethics approval process. This regulation will apply to clinical trials for medicines and medical devices, but not natural health products. The Act's definition of clinical trial is internationally aligned and does not capture non-interventional trials (such as observational trials relying on retrospective analysis of patient records), pre-trial activities (such as participant recruitment), and post-trial activities (such as epidemiological data analysis). These will be subject to ethical oversight by the relevant committees.

Once enacted, existing approved clinical trials under the Medicines Act will be authorised to continue for up to 12 months before applying for a new licence or permit to extend the trial. Existing unapproved clinical trials lawfully being carried out will be authorised for up to six months.

Misha Henaghan
Partner, Auckland

Isabelle Kwek
Associate, Auckland

Cyber and technology

CYBER, PRIVACY AND DATA SECURITY

A year of other people getting hacked

In 2022, many industry groups reported a dip in both the volume of ransomware attacks and the rate at which victims paid ransoms. Conversely, the quantum of the average ransom paid increased.[25] The New Zealand cyber claims environment also felt this trend of fewer but more ferocious, larger and successful ransomware attacks.

In New Zealand, this trend has played out most obviously in the recent string of attacks on managed service providers (MSPs). By targeting MSPs, threat actors can maximise the impact of a single attack by affecting multiple victims in a single compromise. Agencies that store information with their MSPs, or otherwise rely on MSPs for provision of key services, can find their business operations disrupted or data impacted without having a compromise of their own environment. As victims retain obligations under the Privacy Act 2020 for impacts on personal information, an MSP client organisation's lack of practical ability to investigate or otherwise mitigate the compromise is concerning.

The lesson for New Zealand agencies is critical. Beyond their own networks, organisations need to consider the security posture of third parties they rely on for business operations and that may store their data.

Legislative developments – tweaking New Zealand's Privacy Act 2020

The Government continues to iterate the Privacy Act 2020, having been open about its limitations during its passage through Parliament. This year the Government has made significant progress on two initiatives in particular, which are designed to address the perceived gaps.

One of these is the Customer and Product Data Bill (the Bill), the first draft of which has now been published.[26] The Bill creates a consumer data right, which is a variation of a right sometimes called a right to data portability. Based on the regime implemented in Australia, this right empowers individuals to require entities in prescribed industries to share their information, as well as information about products provided to them, with competitors. The intention of the consumer data right is to empower consumers to switch between providers more freely. The right will be implemented on an industry-by-industry basis, beginning with the banking and finance sector. Insurance is likely to follow.

The Ministry of Justice is also considering broadening the notification requirements under the Privacy Act 2020 regarding when agencies gather information from third parties. This would extend current requirements under the Act to require notification when entities gather information about individuals indirectly. As with the Bill, expansion of the notice requirements in this way is designed to bring New Zealand's data protection framework in line with international norms.

'A single front door' – Government changes approach to dealing with cybercrime in NZ

On 31 July, the Government released a 2022 report from the Cyber Security Advisory Committee (CSAC). It sheds light on the future of the Government's role in cyber incident response in New Zealand. The CSAC made sweeping recommendations, including:

- substantial new funding for the NCSC
- a review of cyber insurance led by RBNZ
- direct intervention to strengthen the cyber security labour market through migration, training and working with education providers
- strengthened oversight of ISPs and MSPs, and
- a 'single front door' agency for cyber incidents to address the confused state of reporting and response coordination.

Of note are the CSAC's comments regarding the state of cyber insurance in New Zealand, in particular the under-insurance of New Zealand businesses.

At this stage, the Government has announced an intention to proceed with just one of the CSAC report's recommendations. CERT NZ will be folded into the GCSB from 31 August 2023, with GCSB Minister Andrew Little confirming that an improved operation model will take effect in 2024. This appears to be the first step towards the creation of a 'single front door', with the intention of streamlining the Government's outreach and assistance to entities impacted by cybercrime. We await the Government's next steps in this area with great interest.

Joseph Fitzgerald
Partner, Wellington

Laura Glasson
Senior Associate, Christchurch

Mathew Harty
Solicitor, Auckland

25 See for example: https://www.coveware.com/blog/2023/7/21/ransom-monetization-rates-fall-to-record-low-despite-jump-in-average-ransom-payments
26 https://www.mbie.govt.nz/dmsdocument/26877-unlocking-value-from-our-customer-data-bill-discussion-document-pdf

W+K partner contacts

WELLINGTON

Antony Holden
Managing Partner

T +64 4 260 4286
antony.holden@wottonkearney.com

Adam Holloway
Partner

T +64 4 260 4636
adam.holloway@wottonkearney.com

Peter Leman
Partner

T +64 4 974 4127
peter.leman@wottonkearney.com

Richard Flinn
Partner

T +64 4 472 6962
richard.flinn@wottonkearney.com

Shane Swinerd
Partner

T +64 4 909 0336
shane.swinerd@wottonkearney.com

Sophie Lucas
Partner

T +64 9 377 1870
sophie.lucas@wottonkearney.com

Sean O'Sullivan
Partner

T +64 4 260 4633
sean.osullivan@wottonkearney.com

Joseph Fitzgerald
Partner

T +64 4 260 4796
joseph.fitzgerald@wottonkearney.com

AUCKLAND

Aimee Credin
Partner

T +64 9 393 9512
aimee.credin@wottonkearney.com

Katie Shanks
Partner

T +64 9 600 565
katie.shanks@wottonkearney.com

Mathew Francis
Partner

T +64 9 280 0528
mathew.francis@wottonkearney.com

Caroline Laband
Partner

T +64 9 282 0098
caroline.laband@wottonkearney.com

Rebecca Scott
Partner

T +64 9 377 1871
rebecca.scott@wottonkearney.com

Misha Henaghan
Partner

T +64 9 280 1497
misha.henaghan@wottonkearney.com

New Zealand Offices

Auckland
L evel 18, Crombie Lockwood Tower
191 Queen Street, Auckland 1010

T +64 9 377 1854

Christchurch

235 High Street
Christchurch 8011

Wellington
Level 12, 342 Lambton Quay
Wellington 6011

T +64 4 499 5589

Australian Offices

Adelaide
Level 1, 25 Grenfell Street
Adelaide SA 5000

T +61 8 8473 8000

Brisbane
Level 23, 111 Eagle Street
Brisbane QLD 4000

T +61 7 3236 8700

Canberra
Canberra ACT 2601

T +61 2 5114 2300

Melbourne
Level 15, 600 Bourke Street
Melbourne VIC 3000

T +61 3 9604 7900

Perth
Level 49, 108 St Georges Terrace
Perth WA 6000

T +61 8 9222 6900

Sydney
Level 26, 85 Castlereagh Street
Sydney NSW 2000

T + 61 2 8273 9900

www.wottonkearney.com.au

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