WOTTON KEARNEY

New Zealand Insurance Market Trends Update 2025

Contents

Welcome to our 2025 New Zealand Insurance Market Trends update

We are pleased to present Wotton Kearney's 2025 Insurance Trends Report, an in-depth analysis of key developments shaping the insurance industry in Aotearoa New Zealand.

This report provides insights into the legal trends, claims activity, and legislative and regulatory changes that are influencing insurers, underwriters, brokers, and corporates operating in our market. In addition, we explore significant court decisions that have impacted the sector, offering a perspective on how these rulings may guide future practices and policies.

Key highlights include:

- An update on the Contracts of Insurance Act 2024, something we know will be on every insurer's radar
- Key employment and statutory liability legislative changes
- Claims trends: An overview of the types of claims that are shaping the market and the implications for underwriting and risk assessment.
- Legislative and regulatory developments: Updates on recent reforms and regulatory priorities, with a focus on compliance challenges and opportunities.
- Significant decisions: Analysis of landmark cases and their implications for insurers and the broader industry.

In an environment of constant change, it is critical for industry participants to stay informed and prepared. This report is designed to support your strategic decision-making and provide actionable insights to navigate the complexities of the insurance landscape in New Zealand.

We trust you will find this report valuable and insightful. Should you have any questions or wish to discuss any of the topics further, please do not hesitate to reach out to one of our WK partners.

Antony Holden

Managing Partner

New Zealand

Contracts of Insurance Act

Contracts of Insurance Act

The modernisation of New Zealand's insurance law has been resurrected. The Contracts of Insurance Act, a revised version of the Insurance Contracts Bill proposed in 2022 by the previous Government, has passed.

The Act consolidates and replaces six Acts and the surrounding principles and case law that currently govern New Zealand insurance law. Unless there are orders made for an earlier date, the Act will commence on 15 November 2027.

Some changes from the current position are summarised below. There are many more though.

What changes should insurers be aware of?

- **Recognising the duty of utmost good faith**

  The Act expressly recognises the common law duty of good faith between insurer and policyholder, though does not codify it. At common law, insurance contracts are considered to be utmost good faith between the parties, which imposes duties on both the insurer and the policyholder. The Court of Appeal had, most recently, rejected a submission that a duty of good faith should be implied into every insurance contract, instead observing that any duty owed is context specific, to be determined by reference to aspects of the parties' dealings. [1]

  The 2022 Bill sought to codify that duty and imply it into every contract. Its omission from the current version was a heated topic around release and during public submissions. Ultimately, the Select Committee has recommended to leave the common law as it is, and for the common law to develop that duty.

  That said, the Act does codify one aspect of the common law duty: disclosures or representations. It necessarily abolishes the common law permitting a party to avoid an insurance contract on the ground that utmost good faith has not been observed by the other party.

- **The codified duty of disclosure**

  A policyholder's duty of disclosure depends on whether the policy is a consumer policy, being wholly or predominantly for personal, domestic, or household purposes. If not, it is a non-consumer policy.

  - **Consumer duty**
    The consumer duty is to take reasonable care not to make a misrepresentation to the insurer before entering (or varying) the insurance contract. The consumer duty provisions (more so after Select Committee recommendations) align with the UK provisions on which they are based.

Contracts of Insurance Act

The onus, however, remains on the insurer to ensure they are receiving an appropriate representation of the risk – as explicitly stated when introducing the Bill's first reading, it will be "the insurer's responsibility to ask the right questions".2

The Act prescribes what is relevant for assessing whether the policyholder took reasonable care. There will not, for example, be any misrepresentation where a policyholder has either (a) failed to answer a question or (b) given an obviously incomplete or irrelevant answer to a question.

- **Non-consumer duty**
  The non-consumer duty is to make a fair representation of the risk to the insurer before entering (or varying) the contract. A fair representation of risk is prescribed by the Act as disclosing every material circumstance known or ought to be known by the policyholder, or giving the insurer sufficient information to put a prudent insurer on notice that it needs to make further inquiries for the purpose of revealing those material circumstances.

A circumstance is material if it would influence the judgment of a prudent insurer in determining whether to take the risk and, if so, on what terms. A policyholder is not obliged to disclose circumstances if the insurer knows, ought to know, or is presumed to know the circumstances, or if the insurer waives the information as material.

- **Remedies for insurers**
  The Act proposes changes to the scope of remedies available to an insurer, so the remedies are proportional to the breach. The insurer will only have a remedy for breach of the respective duty if it can prove that it would either not have entered into the contract at all, or entered into the contract on different terms. The remedies available also depend on when the misrepresentation was made. The available remedies are helpfully summarised in explanatory material provided when introducing the Bill.

Notably, an insurer only has the right to avoid a policy and decline a claim if the misrepresentation was deliberate or reckless. The test for deliberate or reckless misrepresentation depends on whether the policyholder is a consumer or a non-consumer – the policyholder must have:

Consumer	Non-Consumer
Known that it was untrue or misleading, or did not care whether or not it was untrue or misleading AND known that the matter to which the misrepresentation related was relevant to the insurer, or did not care whether or not it was relevant to the insurer.	Known that it was in breach of the duty of fair representation, or did not care whether or not it was in breach of that duty.

Contracts of Insurance Act

Claims-made policies get their teeth back

The Act heralds an important change for claims-made policies. For over 30 years, New Zealand courts have squeezed claims-made policies into a statutory provision directed at occurrence-based policies precluding declinature where a policyholder failed to comply with prescribed time limits.[3] This meant that, in certain circumstances, claims could be "back-" or late-notified to claims-based policies preceding the making and notification of a claim. As far back as 1998, the Law Commission considered this an unsatisfactory outcome unfairly changing the bargain struck between insurers and policyholders for claim-based policies. [4]

While the Act carries over and modernises that statutory provision remedying late notice in the absence of material prejudice, it expressly carves out its application to claims-made policies. An insurer may decline cover where the policyholder does not notify the insurer of a claim or circumstance within 90 days of a claims-made policy period ending, or within that 90-day period if the insurer has been prejudiced.

No statutory charges

The Act also repeals the maligned statutory charge regime, [5] which often precluded defence costs from eroding policy limits. [6]

Third party claims

Instead, there will be a similar regime to New South Wales under which claims can be made directly against the insurer. This requires the insured to first be insolvent, deceased or struck-off the companies register, and then for the Court to grant leave to proceed.

Unlike the old statutory charge regime, the right to claim directly against an overseas insurer is not precluded by the fact sums payable under the insurance contract fall outside New Zealand.

Perhaps most significantly under the Act, claims under the regime can be paid in the order in which they are settled, or judgment obtained. Expect races to settlement with multiple third party claimants against policies where claims exceed policy limits

Defence costs and payments

The regime still provides that some payments by insurers to insureds do not reduce, discharge or otherwise affect the insurer's liability to third party claimants though. Namely, where an insured is insolvent, deceased or struck-off:

- compromises or settlements with those insureds for their insured liability, unless: (1) the insurer entered into that compromise or settlement in good faith, and (2) the compromise or settlement is on reasonable terms.
- payments to those insureds in respect of their insured liability unless and to the extent the payment is or has been paid by that insured to the claimant in respect of the insured liability.

We expect there will continue to be careful consideration by insurers, third-party claimants, and insureds of whether payments under policies permissibly erode limits, particularly where claims exceed policy limits.

Information requests

As part of this new regime, a third party will be able to request specified information from a policyholder or another person reasonably believed to be able to provide that information – a wide net. This information can include the existence and terms of a policy, the insurer's identity, any declinature by the insurer, and remaining policy limits. The request can be made if the policyholder is insolvent, deceased or struck-off, and the person reasonably believes there is an insured liability to them, and they may be able to recover that liability from the insurer.

The person receiving the request may require payment of a reasonable charge to provide that information. If that is required, the information can be withheld until that payment is made. [7] Otherwise, the person receiving the request has 28 days to provide the requested information.

Contracts of Insurance Act

Implied time for payment

The Act introduces an implied term to every insurance contract for payment of sums due in respect of the claim within a "reasonable time".

Reasonable time is said to include reasonable time to investigate and assess the claim, and its reasonableness will depend on all relevant circumstances. While no remedies are prescribed for breaching this implied term, the Act infers it will include damages and says that it is in addition to and distinct from any right to enforce payment of sums due and right to interest on those sums.

What will this mean for insurers?

Some changes are already reflected in insurers' contractual terms and are consistent with the Fair Insurance Code. Some changes, however, will necessitate changes to policy terms, and to disclosure and underwriting practices. For example, insurers may want to consider the distinction between consumer policies and non-consumer policies and how their practices and material reflect that divide and consequent duties on them. While the default commencement date is 15 November 2027, we expect parts of the Act to commence sooner. Insurers may want to begin their review soon.

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1. https://www.fma.govt.nz/about-us/enforcement/cases/du-val/.
2. https://www.pwc.co.nz/pdfs/redacted-20240816-receivers-report-to-high-court.pdf
3. The last time it was exercised was 2010.
4. 381 liquidations in the annual period ending 30 June 2024, compared to 252 in the 2022 to 2023 period, and 97 in the 2021 to 2022 period: New Zealand Insolvency and Trustee Service. https://www.insolvency.govt.nz/about/statistics/corporate-insolvency-statistics/cumulative-totals
5. s9 Law Reform Act 1936.
6. See BFSL and Bridgecorp v Steigrad [2014] 1 NZLR 304 (SC).
7. The Select Committee added this condition, where the previous version of the Bill payment could be requested but was not required for the disclosure.

Directors & Officers

Directors & Officers

Two elephants in the room

At the time of writing, two elephants are in the room for D&O and representative actions, with developments expected to happen quickly.

- The Contracts of Insurance Act is discussed in more detail on page 11 of this report. For D&O and representative actions, the most significant parts to the Act are that (1) claims made policies may now decline cover for late notice, and (2) the statutory charge regime will be repealed, replaced by a third-party claim regime similar to that in New South Wales, so that defence costs might be advanced and erode policy limits.

- The Financial Market Authority's action against the Du Val Group.[1] The Group constructed and invested in residential property through three investment funds. In August 2024, the FMA obtained orders without notice placing the Group into interim receivership, initially to seek clarity on the Group's financial position. After the initial receivers' report estimating creditor claims exceeding $250 million and raising significant concerns,[2] the Governor General used a rarely used power to place the Group into statutory management.[3]

The FMA's investigations into the Group and its directors, officers and advisers continues and is expected to result in civil and criminal proceedings. Developments with such a rare and high-profile case will be watched closely, not just for D&O interests as the collapse seems likely to pull in professional advisers and others at the periphery.

Continued financial distress

Otherwise, the unabated economic pressure has increased companies' prospects of financial distress, with many succumbing to insolvency events. Liquidations have dramatically increased over the last two years,[4] largely for companies involved in construction and investment, and now retail and services. Where this happens, we continue to see liquidators investigating when the financial distress arose and contributors to it, and the extent to which directors discharged their duties in response to those contributors and distress. This is not to say that all insolvent companies resulted from director wrongdoing. The Supreme Court's decision in *Yan v Mainzeal Property and Construction Ltd (in liq)* has been around for over a year now, offering helpful comments on expectations of directors when the company is financially distressed, so they might discharge their obligations under the Companies Act.[5]

Some directors have learnt from those comments, prudently assessing the company's financial position and prospects, and appropriately making decisions on the risks in trading out of financial distress. That said, given the broad and deep economic pressure, we consistently see close investigations of that financial distress and director decisions, so creditors can be satisfied that all potential avenues for their own relief have been exhausted.

While economic pressure remains, we expect alleged breaches of director duties during a company's financial distress will continue to be the primary driver of D&O claims.

1. https://www.fma.govt.nz/about-us/enforcement/cases/du-val/.
2. https://www.pwc.co.nz/pdfs/redacted-20240816-receivers-report-to-high-court.pdf
3. The last time it was exercised was 2010.
4. 381 liquidations in the annual period ending 30 June 2024, compared to 252 in the 2022 to 2023 period, and 97 in the 2021 to 2022 period: New Zealand Insolvency and Trustee Service https://www.insolvency.govt.nz/about/statistics/corporate-insolvency-statistics/cumulative-totals
5. Our note on the decision can be found at https://www.wottonkearney.com.au/directors-duties-in-the-face-of-risk-to-creditors-mainzeal-concludes/

Directors & Officers

Climate risk accountability

We also expect to see a continued increase in director accountability for climate risks, as companies are required or choose to report on climate-related financial risks and face increased public accountability.

Disclosures under the climate-related financial disclosure regime are now mandatory and in effect for approximately 200 large financial institutions.[6] Stakeholders of a broader range of companies are likely to increase pressure on those companies to make similar disclosures for all ESG issues, whether required or not, and to do so adequately and accurately.

The FMA has said it will take a broadly educative and constructive approach, initially focussing on high-level guidance in assessing these climate-related financial disclosures.[7] For the next year or two, we expect engagement with the FMA to largely be positive, with constructive outcomes rather than immediate enforcement action (except in the most egregious of cases).

The more visible and potentially acute accountability will come from other stakeholders, and most likely the public. Two recent examples of this are:

- The Supreme Court's ground-breaking decision in *Smith v Fonterra*, and the Lawyers for Climate Action New Zealand (LCANZ) proceeding against Z Energy. In *Smith v Fonterra*, an Iwi leader and elder of Ngāpuhi and Ngāti Kahu pursued claims against seven of New Zealand's largest corporations across several industries, contributing to greenhouse gas emissions. Mr Smith alleged their production of greenhouse gases in New Zealand (directly or indirectly) was negligent, a public nuisance, and a breach of a novel "climate system damage" tort. The Supreme Court unanimously allowed the claim to proceed to trial, accepting that climate change might be addressed by common law and the tools available to the court - contrary to the UK Supreme Court's decision in *ClimateEarth*. The judgment is also notable for its observations that stated Tikanga Māori informs the development of common law in New Zealand.[8] Our note on the decision can be read **here**. The trial is expected to be some years away.

- LCANZ's proceedings against Z Energy for alleged greenwashing in their public statements and its advertising campaigns.[9] LCANZ has a history of pursuing climate risk litigation, with success in obtaining orders on advertising campaigns where LCANZ felt regulators could have done more than educate companies.[10]

Stakeholders might also rely on the amendments to s131 of the Companies Act, which came into force in August 2023. This includes the insertion of subsection (5), which states that when acting in the best interests of the company, the director "*may consider matters other than the maximisation of profit (for example, environmental, social, and governance matters*)".[11] This addition could see arguments that directors need to be aware of climate risks and other environmental issues for their company when seeking to discharge their duties. If directors do not consider these issues or remain silent on the extent to which they did consider such matters, they may be at risk of claims against them.

6. Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021.
7. Climate-related Disclosures Monitoring Plan 2023-2026, Financial Markets Authority (June 2023) https://www.fma.govt.nz/assets/Guidance/Crd-monitoring-plan-2023-2026.pdf
8. Tikanga Māori is the indigenous law and customary practices, which includes recognising the important connection between Māori and their environment.
9. The statement of claim, along with LCANZ's comments on it, are publicly available at https://www.lawyersforclimateaction.nz/news-events/lcanzi-consumer-nz-and-environmental-law-initiative-file-nzs-first-greenwashing-case-against-z-energy
10. For example, in Lawyers for Climate Action v Firstgas (ASCB, 21/194, 21 July 2021).
11. Though the proposed reforms below include the repeal of s131(5), it is said to be on the basis it is redundant as the law already allows considerations beyond maximising profit.

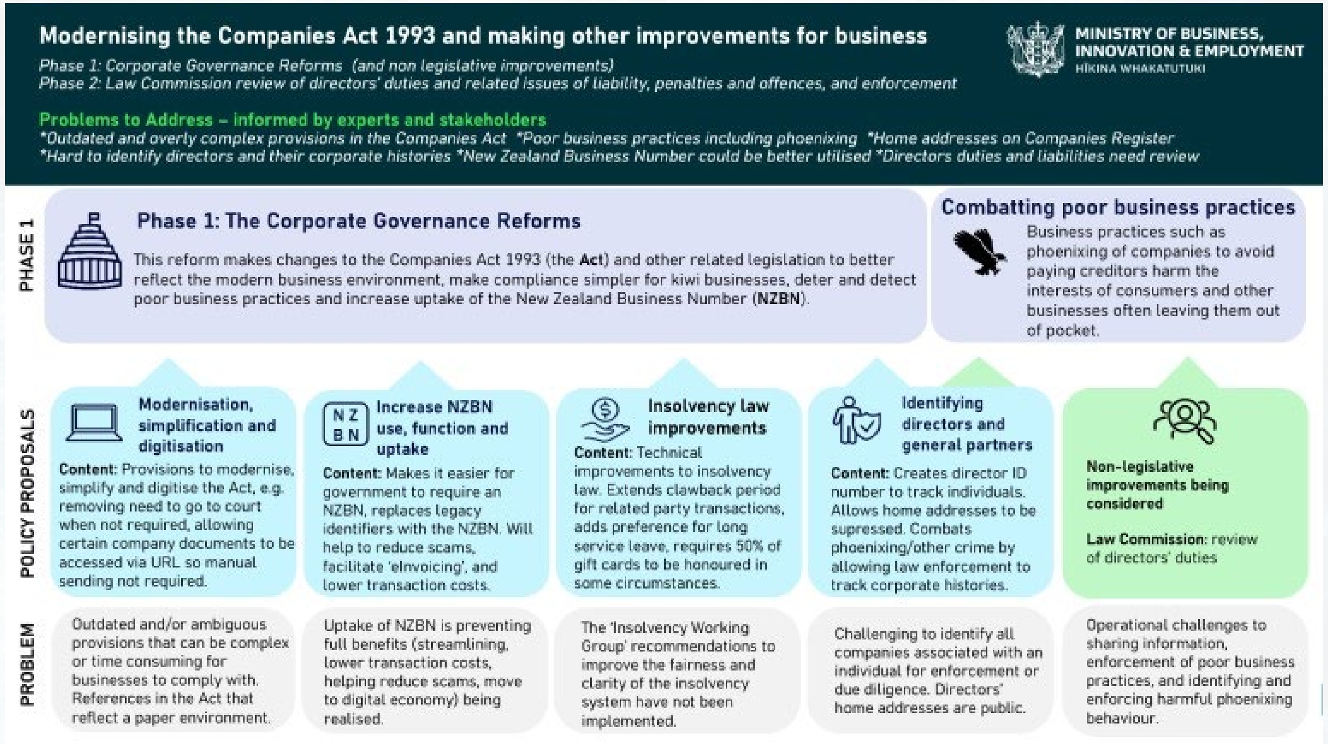
Directors & Officers

Companies act reform

The government has announced it will modernise the Companies Act and related corporate governance legislation. The plan comprises two phases.

Phase one is updating the Companies Act to reflect the modern New Zealand business environment, simplify compliance, deter and detect poor business practices and increase the uptake of the New Zealand Business Number. The Bill to make these amendments is expected to be introduced in early 2025.

Phase two will be a Law Commission review of director duties and liability, penalties and offences, and enforcement on the back of the Supreme Court's concerns with the Companies Act in *Mainzeal*.



Source: https://www.mbie.govt.nz/business-and-employment/business/regulating-entities/companies-act-reforms

The Court noted the tension in the Act between a director's discretion and the protection of creditors. While the Court accepted this tension appears to have been resolved in the Act by preferring creditor interests (taking a different approach to the UK Supreme Court decision in *Sequana*), it did not enable creditors to sue directors directly for breach of a duty owed to protect creditors' interests. The review is expected to commence later in 2025, with necessary legislation after that process.

Directors & Officers

AI challenges

The use of generative AI raises an interesting potential emerging risk. The increased use of generative AI to generate content presents ethical, societal and legal challenges with misinformation, intellectual property rights and harmful content. As more companies and service providers look to develop and use generative AI, we expect greater stakeholder scrutiny of directors in that use.

An example is "AI washing", a company's misrepresentations about its use of or reliance on generative AI. The US Securities and Exchange Commission has already acted against two investment advisory firms on such statements, and the UK Advertising Standards Authority has actively been investigating complaints of similar statements.[13]

Given stakeholder concerns in New Zealand with traditional AI, particularly on data privacy and security,[14] an extension of these concerns into generative AI and the risks arising seems inevitable.

Increased actions against directors

We may also see increased actions against directors in new areas. One potential is with workplace safety.

In 2024, the chief executive of Auckland Ports, Tony Gibson, was prosecuted by Maritime New Zealand for a workplace death in 2020. Maritime New Zealand alleged Mr Gibson failed to undertake due diligence to ensure the Port complied with its health and safety obligations under s44 of the Health and Safety at Work Act. The Port had previously pleaded guilty to breaches of the Act, and this was not the first time an officer has been charged under the Act. However, it was the first time a chief executive of a large New Zealand company was charged.

Mr Gibson accepted he was responsible for the Port's operations but argued that he could not be personally liable for failures of individual systems and staff over which he had no direct control. His evidence included prioritising of health and safety reports to him and the board, developing a programme to ensure worker health and safety, and his reliance on the delegation of responsibilities to others. A similar case in Australia, under similar legislation with similar evidence, was dismissed.

Judgment was delivered on 25 November 2024, finding Mr Gibson guilty, which we are digesting and will discuss in more detail soon. The adverse judgment may see increased scrutiny of directors in any investigation of serious workplace incidents. Directors and insurers will need to consider cover closely with such a judgment, although noting that fines for breaches of the Act are not insurable.

Directors & Officers

Representative actions

The number of representative actions in New Zealand has slowed, though there are key ad hoc developments. The Court of Appeal released its decision in *Smith & Ors v ANZ Bank New Zealand Ltd & ASB Bank Ltd*. In the High Court, the representative plaintiffs had obtained opt-out orders for the proposed classes,[15] but failed their attempt to get common fund orders.[16] On appeal, the Court of Appeal upheld the opt-out orders and made the common fund orders. Importantly, the Court of Appeal accepted that there was jurisdiction in New Zealand to make common fund orders, and they should be made as early as possible on the basis sought. The Supreme Court refused ANZ's request for leave to appeal, saying it "hard to resist the reasoning" for that timing given the Supreme Court's emphasis on access to justice when previously allowing opt-out orders. This sets New Zealand apart from Australia, where similar orders might not be possible early in the proceeding.

Otherwise, the progress envisioned by the Law Commission's 2022 report on representative actions and litigation funding has stopped. The (then) Labour Government accepted the report. However, in December 2023, they released their response, noting further consideration of recommendations and policy was required. Since the change in government after last year's general election, the National-led coalition government has not progressed this further. Until this work is prioritised, the representative action regime must continue to be developed ad hoc in the Courts and by convention amongst counsel.

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12. https://www.sec.gov/newsroom/press-releases/2024-36.
13. For example, https://www.asa.org.uk/rulings/codeway-dijital-hizmetler-anonim-sirketi-a23-1197999-codeway-dijital-hizmetler-anonim-sirketi.html
14. For example, https://www.privacy.org.nz/publications/guidance-resources/ai/.
15. That persons falling within the prescribed classes would become members of the action unless they expressly opted out of the action.
16. Broadly, orders for the distribution of funds on any settlement or judgment are to first be applied to litigation funders for the costs of pursuing the action and for the funder's service fee, whether the member was party to an agreement with the funder.

Construction PI

Construction PI

Implication of the 10-year longstop and contribution claims (BECA)

In *Beca Carter Hollings & Ferner Ltd v Wellington City Council* [2024] NZSC 117, the Supreme Court confirmed that contribution claims are not subject to the 10-year longstop. We look at some implications of this decision for the insurance industry.

Background

The Bank of New Zealand (**BNZ**) leased a building that was irreparably damaged in the 2016 Kaikoura earthquake. In August 2019, BNZ sued the Wellington City Council, alleging the Council had negligently granted a building consent, inspected construction, and issued a code compliance certificate for the building. BNZ's losses exceeded $100 million.

In September 2019, the Council sought contribution from Beca, which had provided engineering services during the building's construction in 2007-2008.

Beca sought to dismiss the contribution claim. It relied on the 10-year longstop in section 393(2) of the Building Act, which prevents civil proceedings relating to building work if the alleged breach or omission occurred more than 10 years prior.

The Council argued that the 10-year longstop did not apply to contribution claims, which are instead governed by section 34 of the Limitation Act.

Section 34 provides that contribution claims must be brought within two years from the date liability (of the party bringing the contribution claim) is determined by agreement, award or judgment.

Supreme Court decision

In a 3:2 majority decision, the Supreme Court departed from a long line of High Court authority, holding that:

- The 10-year longstop in the Building Act did not apply to contribution claims.
- Limitation for contribution claims was instead governed by section 34 of the Limitation Act. This means those seeking contribution had two years from the date their liability was determined by agreement, award or judgment, to bring a contribution claim.

To reach its conclusion, the Court relied on legislative history and emphasised the special statutory regime applicable to contribution claims. It found that the 10-year longstop provision in the Building Act was insufficiently clear to override that specific regime. The majority opined its conclusion gave effect to the purpose of the contribution regime (to remedy the injustice where a plaintiff sues only one of two possible tort-feasors) without unduly undermining the purpose of the 10-year longstop (to provide finality and certainty to building industry participants).

Takeaways

The decision alters a long-held understanding that contribution claims were subject to the 10-year longstop and is significant for those in the construction industry. It eliminates the certainty and finality afforded by the 10-year longstop, and exposes building professionals to contribution claims in relation to projects completed more than 10 years ago. Implications for the insurance industry include:

- Brokers will need to be careful about the advice they provide on run off cover – there is no "end point" for potential claims to be made, only decreasing chances as time goes on.
- In the short term, Insurers will see an uptick in activity on contribution claims which have been on hold over the last few years pending the outcome of the final ruling in Beca.
- We should see third party claims being made in a considered and focussed way later in the litigation lifecycle, rather than the current shotgun approach of joining all possible defendants under the urgency of looming limitation dates. Theoretically, that should mean less third party claims, but those made having stronger merit.

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Construction PI

Producer statements and liability under section 40 of the Building Act

In *Solicitor-General's Reference* (No 1 of 2022) [2024] NZCA 514, the Court of Appeal confirmed that the issue of PS4 producer statements for non-compliant building work can give rise to criminal liability under section 40 of the Building Act.

Background

Under section 40 of the Building Act, a person must not carry out "building work" unless it is done in accordance with a building consent. A breach of this provision is an offence punishable by a fine of up to $200,000. For continuing offences, additional fines of up to $10,000 per day may apply.

The question referred to the Court was whether the issue of producer statements following or resulting from construction monitoring (known as PS4s) certifying non-compliant building work could give rise to liability under section 40.

Producer statements, issued by qualified professionals in the building industry, are used to advise building consent authorities about construction work carried out in the course of implementing building consents. Building consent authorities typically rely on producer statements to fulfil their regulatory building functions.

Prior to the decision, there was competing High Court authority on whether issuing a producer statement constituted "building work".

Court of Appeal decision

The Court of Appeal concluded that issuing a PS4 producer statement certifying non-compliant building work does fall under the definition of "building work" in section 40, thereby exposing the author to potential liability.

The Court reached its conclusion based on the Building Act's text and purpose. It held that producer statements are not merely expert opinions, they reflect the work undertaken by the author to form his or her opinion and confirm the author has reasonable grounds to certify compliance. The Court emphasised that criminal liability will only arise if it is proven beyond reasonable doubt that the matters certified in the producer statement are incorrect.

Takeaways

Producer statements are an integral part of the construction landscape. This decision highlights the need for those issuing them to take care in doing so, given the potential for criminal liability if they are issued incorrectly. Insured building professionals (and their brokers) should also ensure that they have adequate insurance cover to protect themselves if charges under section 40 are laid.

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Misrepresentations and common mistake

In *Trustees of the Ruth Weine Family Trust v Tadd Management Limited* [2024] NZCA 323, the Court of Appeal emphasised the importance of context when construing representations about a building.

Background

A vendor, through its agent, gave a prospective purchaser an engineer's initial seismic assessment of a commercial building (ISA) to the effect that the building's seismic strength was 60% of the new building standard (NBS), and a sales brochure saying the building had a "good NBS rating".

Following sale, the purchaser's engineers undertook detailed seismic assessments (DSA) and found the building's seismic rating was only 10% or 30% of the NBS.

The purchaser sued for contractual misrepresentation and common mistake. The High Court held misrepresentations had been made and that in contracting, the parties had been influenced by a mistake as to the building's seismic strength rating. The vendor appealed.

Court of Appeal decision

The Court of Appeal overturned the High Court's decision, ruling that there was no actionable misrepresentation or common mistake in this case.

Misrepresentation

A misrepresentation requires an untrue statement of present or past fact. Statements, the Court of Appeal emphasised, must be assessed in context. The Court disagreed with the High Court's finding that the ISA represented the building as being 60% NBS in an absolute sense. Instead, the ISA conveyed that, *applying ISA methodology*, the engineers had assessed the building's rating at 60% NBS – a statement the Court held was true.

As for the sales brochure's claim that the building had a "good NBS rating", the Court held that this statement should also be considered in the context of the ISA. It conveyed that the ISA's NBS rating was good. It was not a representation that the rating was good in any other sense, and there was no evidence to suggest an ISA rating of 60% NBS was not good.

Common mistake

The Court also ruled that there was no common mistake, as there was no evidence the parties held a mistaken belief as to the actual seismic performance of the building. The parties' common belief was that the ISA rating was 60% of the NBS, and this belief was correct.

Takeaways

The Court's decision should provide reassurance to professionals engaged to provide seismic and other building assessments to property owners and real estate agents involved in the marketing of property. Statements, the Court indicated, will be interpreted in context.

That said, professional report writers should ensure their advice clearly sets out any assumptions and limitations, conclusions and disclaimers, and those forwarding such reports to third parties are well-advised to refrain from commenting on them.

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Construction PI

Late knowledge and limitation in latent defect cases

In *Rea and Rea v Auckland Council* [2024] NZCA 313, the Court of Appeal gave guidance on the late knowledge date in latent defect building cases.

Background

In 2013, Auckland Council issued a code compliance certificate (**CCC**) for a property purchased by the Reas in 2014. The Reas received reports in 2016 and 2017 identifying certain defects (**Early Reports**) and another engineering report in 2019 revealing further issues (**2019 Report**). In September 2021, following an MBIE determination that the property was non-compliant with the Building Code, the Reas sued the Council in the High Court for negligently issuing the CCC.

The Council applied to strike out the claim on limitation grounds, arguing the Reas had brought the claim more than six years after the 2013 CCC. The Reas contended the claim was in time, having been issued within the 3-year late knowledge period under sections 11 and 14(1) of the Limitation Act (**Act**).

Section 14(1) of the Act relevantly provides that a claim's "late knowledge date" is the date a claimant has gained (or ought reasonably to have gained) knowledge of the facts that:

- The act or omission underlying the claim has occurred.
- Such act or omission was attributable to the defendant.
- Loss has been suffered.

The Reas contended their late knowledge arose on receipt of the 2019 Report, arguing the Early Reports did not sufficiently reveal the true extent of the defects and Council breaches.

The High Court disagreed, holding that the Reas acquired late knowledge on receipt of the Early Reports in 2017, which identified 12 of 19 defects claimed. The Reas appealed.

Court of Appeal decision

The Court of Appeal upheld the High Court's decision, emphasising that the Limitation Act's purpose is to ensure claims are brought without undue delay. The Court clarified:

- Section 14(1) does not require knowledge of all facts necessary to bring a claim.
- It was sufficient that the Reas knew of the CCC, which was clearly attributable to the Council, and that they had suffered loss or damage.
- It was unnecessary for the Reas to know of a causal link between the relevant act or omission and the loss or damage.
- Therefore, the Reas acquired actual or constructive "late knowledge" by March 2017, after receipt of the Early Reports. Accordingly, the late knowledge period expired at the latest in March 2020, rendering the Reas' claim time-barred.

Takeaways

Claimants in latent defect building cases must promptly commence legal action once aware of building defects, regardless of whether further expert investigations are necessary.

This decision is favourable to (defendant) construction professionals (and their insurers) insofar as it demonstrates a judicial willingness to strictly uphold limitation defences in construction litigation where claims are brought late.

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ACCOUNTANTS & AUDITORS

Accountants – continuity breaches

While claims relating to losses of imputation credits and tax losses are not uncommon, we have recently seen an increase in claim activity over the past 6-12 months.

There are several different continuity requirements, including:

- Where a company is carrying forward tax losses, shareholder continuity of at least 49% must be maintained to preserve these losses. If continuity falls below this level, the losses are generally forfeited.
- Where a company has imputation credits, shareholder continuity of at least 66% must be maintained to preserve the credits. If continuity falls below this level, these credits are lost.
- In respect of amalgamations, to group losses, the loss company and the profit company must have at least 66% commonality of shareholders.
- A common scenario is where businesses are sold via a sale of shares. However, we have seen an increase in claims arising from owners transferring to family trusts, resettling trusts, or amalgamating companies with a group to simplify and reduce compliance costs.

Auditors – continued risk of disciplinary action

There is a continuing risk of disciplinary sanction for auditors subjected to complaints relating to audits by clients or the audit misconduct complaints by clients or the Financial Markets Authority (FMA). We continue to see a disproportionate number of auditors subject to disciplinary action compared to the profession as a whole.

This trend will likely continue with the FMA now reviewing each licensed audit firm yearly for audit quality. 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 other firms every three years.

With the increased monitoring, we expect the current trend of auditors being overly represented in disciplinary claims to continue.

Auditors – climate related risks

In June 2024, the FMA released their Auditor Regulation and Oversight Plan 2024-2027, again highlighting their increasing focus on the climate-related risks in an audit or financial statements. In their previously released guidance, the FMA set out their expectations for auditors.

This imposes a reasonably onerous obligation on auditors to understand both macro and micro issues, and climate-change-related laws in the jurisdictions the entities operate.

1Therefore, not only is there a risk that the FMA will refer to NZICA/CAANZ, but there is potential for some of the current climate-related litigation to encompass auditors. While there are questions over the merit of such a claim, such litigation would attract public interest.

FINANCIAL ADVISERS

Financial Advisers - increase in financial cap for the dispute resolution schemes

- On 18 July 2024, the financial limits for complaints across the four approved financial dispute resolution schemes (the Insurance & Financial Services Ombudsman Scheme (IFSO), Financial Services Complaints Limited (FSCL), and Financial Dispute Resolution Service (FDRS)) materially increased to as follows:
- Maximum Lump Sum Amount - $500,000 + GST (if any).
- Maximum weekly amount - $2,600 + GST (or other amounts specified in the Scheme's Rules.

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- Non-financial loss / special inconvenience or expenses - $10,000 + GST (if any).

The increase in the monetary limits is of some concern. While the dispute resolution schemes provide a valuable service, particularly with consumer insurance products, they are less suited to determining professional negligence claims.

Claims against insurance brokers, investment advisers and mortgage brokers are often complex and require careful analysis and expert input. We see an inconsistent approach to these claims, with expert opinions sometimes ignored, no visibility of the external opinions obtained by the schemes and whether those 'experts' received proper instructions. We also see an inconsistent approach to the scope of duty analysis and causation.

There are also no mechanisms for the responding financial adviser to obtain relevant documents from the complainant or third parties. There is also no ability to join other third parties to the claim that may have contributed to the loss, which is particularly relevant for mortgage brokers, who are just one of several professionals involved in advising the complainant concerning the property transaction.

Financial advisers - Continued FMA scrutiny of financial advisers

We expect to see continued scrutiny of Financial Advice Providers over the next 12-24 months,

following the new financial advice regime coming into full effect on 17 March 2023.

In May 2024, the FMA released their first monitoring report, covering the period from 15 March 2021 to 30 April 2024. During this period, the FMA conducted monitoring engagements of almost 60 Financial Advice Providers (FAPs). The FMA report indicates a mixed bag, but issues included:

- Insufficient steps were taken to ensure that clients understand their advice (s.431J), specifically clients not sufficiently informed of the risks or consequences.
- Insufficient needs analysis (standard 3), so insufficient investigation into client's circumstances.
- Making recommendations outside of risk tolerance (standard 3).
- Switching products that resulted in a loss of benefits.
- FAP oversight arrangements not fit for purpose, no oversight of the quality of advice.

The approach taken by the FMA in relation to their monitoring, investigation and enforcement, particularly concerning some of the smaller firms, has at times been concerning.

The regime introduced new duties, disclosure requirements, and a Code of Professional Conduct for Financial Advice Services (the Code) that applies when giving financial advice, setting sector-wide standards for conduct, client care, and competence. There are few direct authorities relating to these new obligations and duties. In the absence of authority, the FMA has made their own ad hoc determinations and then exercised their powers, accordingly, including the cancellation of licenses. They are not using the Financial Advisers Disciplinary Committee, chaired by a former Associate High Court Judge. The only recourse for the financial adviser is to file an appeal in the High Court with the associated legal costs and cost risk, often out of reach of smaller financial advisers.

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LAWYERS | ACCOUNTANTS | FINANCIAL ADVISERS

Eligible investor certificates

We expect to see further scrutiny of the whole investor exclusion and eligible investor certificates provided by lawyers, accountants and financial advisers, particularly after the issues with Du Val Group.

The Financial Markets Conduct Act 2013 prescribes how offers of financial products can be made to potential investors, subject to several exclusions. One of these exclusions is for offers made to wholesale investors.

You can self-certify yourself to be an 'eligible investor' to a particular transaction if you have sufficient experience in acquiring or disposing of financial products to be able to assess:

- The merits of the transaction
- Your own information needs in relation to the transaction, and
- The adequacy of the information provided by any person involved in the transaction.

That certification requires a financial adviser, accountant, or lawyer to sign the certification stating they are satisfied:

- The investor has been sufficiently advised of the consequences of self-certification
- Have no other reason to consider the self-certification is incorrect or that further information or investigation is required.

Du Val raised some funds from the public and created a series of funds to invest the public's money. They marketed the funds to sophisticated wholesale investors only.

This meant they did not have to follow the normal strict processes that a normal company would have to when raising money. There have now been allegations that the sophisticated investors that Du Val were taking money from, were not that sophisticated.

While sometimes with Du Val-type collapses, the pool of professional's counter-signing eligible investor certificates can be quite small - given that professionals are, to a degree, gatekeepers, it is likely to result in more scrutiny from the FMA.

If interest rates stay elevated, we could see further stress in the property/property syndication market that can result in further collapses and potentially civil claims.

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INCREASE IN DISCIPLINARY CHARGES FOR AGENCIES FOUND IN BREACH OF THE REAL ESTATE AGENTS (AUDIT) REGULATIONS 2009

Background

Money received from real estate transactions must be paid into a trust account. Those trust accounts must be audited. A recent focus of the Real Estate Agents Authority has been making examples of agencies that fail to comply with auditing obligations under the Real Estate Agent (Audit) Regulations 2009. While the Regulations have been in force for some time, historically, a breach of these has seemingly not been met with a disciplinary response, unless the misconduct reached the threshold of wilful or reckless.

Disciplinary charges

Over the last year, the Complaints Assessment Committees brought three disciplinary charges under s 73(b) of the Real Estate Agents Act 2008 for failure to comply with the Regulations. Section 73(b) refers to conduct that "constitutes seriously incompetent or seriously negligent real estate agency work". In each case, the charge was admitted, and the hearings proceeded on the papers by way of agreed facts:

- ***CAC 2106 v City Realty Limited* [2024] NZREADT 12:** City Realty failed to hold money and only pay it to those individuals entitled. They failed to ensure that deposits of trust monies were correctly recorded or paid from the trust account and also overdrew from the trust account at times. In addition to this, they provided some reconciliations over a year late. The REA warned City Realty of the consequences for non-compliance. The Tribunal placed the conduct at the middle to upper level of available penalty and ordered censure and a fine of $15,000.

- ***CAC v RCG Limited* [2024] NZREADT 25:** After opening a trust account, RCG failed to appoint an auditor and notify the Authority of when an auditor was appointed, before receiving money into the trust account. RCG also failed to provide the monthly list of balances and yearly reconciliation statements to an auditor, and failed in preparing a statement and/or statutory declaration. The Tribunal ordered censure and a fine of $14,000.

- ***CAC 2108 v Leading Edge Properties Limited* [2024] NZREADT 20:** Under regulation 15 of the Audit Regulations, an agency must provide its list of balances for each client ledger account, the amount of money in each trust account, and a reconciliation statement monthly. Over three years, Leading Edge failed to do this. The Tribunal ordered that the agency be censured and pay a fine of $7,000.

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An untested area

Despite the above, it remains debatable whether Committees are correct in bringing charges under s 73(b) for seriously incompetent or negligent real estate agency work in regard to breaches of the Regulations.

'Real estate agency work' is defined in the Act as "work done or services provided, in trade, on behalf of another person for the purpose of bringing about a transaction". 'Transaction' is defined as the "sale, purchase, grant or other disposal or acquisition of an interest in land, a business, an occupation right or licence or a license registerable under the Land Transfer Act 1952."

Therefore, it is arguable that failures to comply with the regulations does not fall within the definition of 'real estate agency work.' Auditing requirements are not for the purpose of bringing about a specific transaction. Indeed, some Committees that have determined not to lay charges have taken this approach (for example, re Complaint No C39269, 16 June 2021).

The challenge for agencies

The difficult decision for agencies in determining whether to challenge a s 73(b) charge is that Committees will often bring an alternative charge for the more serious wilful or reckless misconduct under s 73(c) (this was the situation in the above three cases). Unlike a s 73(b) charge, this does not need to be directly linked to 'real estate agency work'.

Where there is a clear breach of the Regulations, accepting the lesser charge gives an agency more certainty about the outcome. Challenging a wilful/recklessness charge is a high risk /strategy. Additionally, if the agency is insured, a policy will often not respond to wilful or reckless conduct. Therefore, while the law remains untested, an agency may be inclined to continue to take a risk-averse approach and accept the lesser charge

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CHO V REAL ESTATE AGENTS AUTHORITY (CAC 2108) [2024] NZHC 2812

In 2019, the Real Estate Agents Act 2008 was amended to provide Complaints Assessment Committees with a discretionary power to refer complaints to the Real Estate Agents Disciplinary Tribunal, for the purpose of considering whether to make a compensation award (see s 93(1)(ha)).

To preserve efficiency within the disciplinary process, a Committee retains a discretion in that it may make a referral to the Tribunal to consider compensation where the licensee's unsatisfactory conduct amounts to more than a minor or technical breach of the Act, regulations or rules.

Given s 93(1)(ha) is relatively new, its application to date has been limited. Cho v Real Estate Agents Authority discusses the nature of the Committees' discretionary power to refer.

Background

In purchasing a property, Mr E signed a Sale and Purchase Agreement, which was completed by the licensee, stating that he was "GST registered." He was not. The implication was that being GST registered meant Mr E would have to pay GST on the sale price, which was significant.

Mr E complained to the Real Estate Agents Authority about the licensee's conduct in completing the Sale and Purchase Agreement, arguing that circling that he was GST registered had caused him loss. As part of his complaint, he claimed compensation.

The Committee's and Tribunal's decisions

The Committee made a finding of unsatisfactory conduct against the licensee. It ordered censure and a $3,500 fine.

However, the Committee dismissed Mr E's claim for compensation on the basis that the licensee's conduct was not that serious and there was insufficient evidence setting out the loss he claimed. It further noted that "referrals are rare and made in limited circumstances", "something more than mid-level unsatisfactory conduct is required", and "conduct that approaches a high level". Mr E appealed the entire decision (liability, penalty and the matter of compensation) to the Tribunal.

On a preliminary basis, the Tribunal heard the issue of whether the Committee was right not to refer the matter of compensation. It found that the Committee had erred in not referring, as it had no jurisdiction to consider the merits of a compensation claim, and it had misinterpreted the statutory threshold for referral.

The licensee appealed the Tribunal's decision to hear Mr E's claim for compensation to the High Court.

The High Court's decision

The High Court dismissed the licensee's appeal, holding that:

- Unsatisfactory conduct which does not involve more than a minor or technical contravention of the Act, regulations or rules, cannot be referred to the Tribunal to consider compensation.
- If the unsatisfactory conduct is more than minor or technical, a Committee will retain a limited and residuary discretion not to refer the matter to the Tribunal. This is in the situation where it is abundantly clear on the face of the claim that it ought not to be assessed under s 110(5). For example, matters that are clearly vexatious or brought for an improper purpose should not be referred.
- In Mr E's case, the Tribunal was correct in its finding that the Committee should not have considered the merits of the claim for compensation, even in a provisional way.

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Implications

The High Court's decision seems to have narrowly interpreted Parliament's intention that Committees act as gatekeepers for complaints (and compensation claims). It has provided a clear statement that a Committee's discretion to consider a complainant's claim for compensation is limited. It is essentially only where a minor or technical breach has occurred or where the claim for compensation is clearly trivial or vexatious that a Committee can refuse to refer the Tribunal.

It has previously been understood that the purpose of discipline was to protect the public and maintain standards, with the civil courts giving parties the ability to seek compensation for alleged financial loss. This decision suggests a move towards harsher financial treatment of real estate professionals and an increased willingness to make compensation awards in a disciplinary context, making real estate professionals outliers in the professional disciplinary space.

Real estate agents can expect an increase in referrals to the Tribunal to consider compensation, resulting in an increase in the number of compensation awards made.

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RESIDENTIAL PROPERTY MANAGERS BILL NO MORE

The government has discharged the Residential Property Managers Bill. If the Bill had passed, it would have established a regulatory regime for the provision of residential property management services. This would have established minimum competency requirements, required licensing and passing a fit and proper test (like most other professionals), set professional practice standards and a regulatory framework to ensure property managers were accountable to those standards.

The Real Estate Authority was set to be the regulator for the regime and the complaints process was to mirror that of real estate agents.

The government withdrew the Bill, concluding that further regulation of the property market would not open up the housing supply. It also considered that the cost and compliance burden to the sector was not balanced when compared to the potential benefits.

For now, property managers will remain outside of any formal regulatory system or body. There will remain no specific standards to guide the conduct of property managers. This means that complaints and claims against property managers (that are not resolved via internal complaints processes) will continue to be managed through either:

- the Tenancy Tribunal (for claims by the tenant where the property manager is an agent of a landlord),
- the Disputes Tribunal or higher courts (for claims by either tenants or property owners,
- the appropriate forum depending on the level of quantum claimed).

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Employment

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HIGH BAR FOR EMPLOYERS CONDUCTING DISCIPLINARY INVESTIGATIONS

Employers' handling of disciplinary investigations and serious misconduct dismissals can create significant risk. The Employment Court has recently re-emphasised the importance of thorough, and transparent processes to ensure justifiable treatment of employees. The case *Gumbeze v The Chief Executive of Oranga Tamariki* highlights the obligations on employers to conduct fair and unbiased investigations. Here, the Court held that Oranga Tamariki fell short in its handling of serious misconduct allegations against Mr Gumbeze. The Court's findings illustrate critical lessons on maintaining procedural integrity during investigations.

Case background

Mr Gumbeze (a social worker) was dismissed from his employment for serious misconduct, after Oranga Tamariki received complaints regarding his behaviour. In response to these complaints, Oranga Tamariki launched an investigation, including using an independent external investigator. Following this, Oranga Tamariki concluded that Mr Gumbeze's actions amounted to serious misconduct, rendering his employment untenable. It terminated his employment summarily.

However, the Court identified several issues in the employer's approach, which ultimately compromised the fairness of the investigation:

- **Lack of good faith and transparency:** Oranga Tamariki did not provide Mr Gumbeze with clear terms of reference for the investigation, even well into the investigation and when requested by Mr Gumbeze. The refusal to engage deprived him of crucial information and impacted his ability to respond effectively to the allegations. This was inconsistent with good faith.
- **Predetermination in decision-making:** Although Oranga Tamariki had engaged a third-party investigator, it retained the final decision-making authority, and the decisions on serious misconduct and dismissal were left to a regional manager. A fair and reasonable employer would have assessed whether that individual could remain impartial, due to their prior involvement with Mr Gumbeze, which may have biased the final decision.
- **Limited opportunity for feedback:** The Court noted the preliminary decision letter articulated such strong and determined views that it appeared to be a "draft letter of termination" rather than an "opportunity" for Mr Gumbeze to provide feedback to gain a less onerous outcome.

Key takeaways for employers

The *Gumbeze* case underscores important principles for employers conducting investigations.

Employers must stay alert in implementing a rigorous standard in their approach to investigating misconduct. This includes scrutinising their ability to remain independent and undertaking a transparent investigative process. Conducting a fair process is a fine balance between giving enough attention to each step, while also taking an overarching perspective so as not to get lost in the details.

The consequences of getting it wrong can be significant. In *Gumbeze* the employee was awarded over $100,000 ($35,000 compensation plus one year's gross salary for lost wages).

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PROTECTIONS FOR GIG WORKERS – AN UBER STORY

Employees have access to a range of protections that contractors do not, including entitlement to the minimum wage, annual leave, paid sick leave and the ability to raise a personal grievance. It is therefore important to know whether someone is an employee or contractor.

The New Zealand Court of Appeal upheld a ruling that Uber drivers can be employees, following a decision in the Employment Court. Whilst this may be appealed, this could have a profound impact on other app-based service providers in the gig economy.

These are key reasons why Uber drivers were found to be employees:

- The contractual documentation included an expression exclusion of employment status, but the way the agreements operated in practice meant an employment relationship existed.
- Drivers provide services on terms determined by Uber, with no opportunity to bargain.
- Uber was the sole determinant of fares, but also made payments to drivers for certain costs, so was not simply an intermediary.
- Uber had significant control. Every aspect of the driver-rider/eater relationship was determined by Uber.
- Whilst the level of choice and flexibility for drivers was unusual in an employment relationship, the existence of flexible work arrangements does not rule out employment status.

While a driver was logged into the app, they had no opportunity to establish any business goodwill of their own, or to influence the quantity/quality of the work they received or their revenue from the work.

Until a different conclusion is reached by the Supreme Court or the Government alters the current law as is currently proposed, businesses will need to continue to look at how they operate, the terms on which they engage and how the relationship works in practice. Insurance policies will often exclude employment disputes liability for contractors claiming to be employees. A ruling that a contractor is an employee could therefore have significant consequences.

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HIGH-VALUE EMPLOYMENT AWARDS: BACK ON THE RADAR

Two recent decisions in the employment law space pinged loudly as a demonstration of the jurisdiction's willingness to make substantial awards, with both the Employment Court and Employment Relations Authority showing openness to award significant compensation if provided with certain circumstances.

The Cases

The Employment Court's decision in Cronin-Lampe v The Board of Trustees of Melville High School, involving two unsupported school counsellors suffering PTSD after managing 32 student deaths, might have been viewed as a blip, with its award of nearly $1.8 million, including $130,000 for non-economic losses to Mrs Cronin-Lampe and $97,500 to Mr Cronin-Lampe.

However, the Employment Relations Authority followed a similar flight path in Parker v Magnum Hire Limited, awarding $105,000 for hurt and humiliation in a case involving sustained, psychologically abusive workplace bullying leading to PTSD-like symptoms.

The cases also demonstrate the broad scope of special damages in employment matters. Both decisions awarded damages for psychological treatment - Parker for completed and ongoing treatment, while Cronin-Lampe included approximately $10,000 for anticipated future therapy costs. These awards illustrate how special damages can encompass both immediate and future losses flowing from employment breaches.

Looking Ahead: Risk indicators

Unsurprisingly, Cronin-Lampe faces an appeal centred on remedies, particularly the assessment of causation and remoteness of damages. The Court of Appeal's decision will be crucial in understanding risk exposure for employers.

Cronin-Lampe indicates an uplift on earlier significant breach of contract awards such as *Gilbert* ($75,000).While not every case will reach such stratospheric levels, the benchmark has been raised. Insurers and lawyers need to be alert to key risk indicators when scanning claims:

- Evidence of sustained psychological harm.
- Inadequate employer response to raised health and safety concerns.
- Multiple traumatic incidents over a period of time.
- The impact has led to employee resignation.

Early identification of these factors enables appropriate claim management and reserves.

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THE FUTURE OF WORK: KEY EMPLOYMENT LAW REFORMS TO WATCH

Below we discuss some notable legislation in Parliament's pipeline.

Employment Relations (Employee Remuneration Disclosure) Amendment Bill

The Bill seeks to protect employees from any adverse action (dismissal and unfair treatment) if they disclose their remuneration to any person. Pay transparency is not a new concept. The UK, and several states in USA, already have in place similar legislation.

If passed, we expect many businesses will be slow to adjust to the change. The first few years after assent would likely bring the most volume of claims alleging adverse action. Remedies (compensation and lost wages) for such breaches will likely be comparable to other personal grievances, rather than being comparatively lower or higher.

The Bill passed its first reading and is currently in the Select Committee stage.

Employment Relations (Termination of Employment by Agreement) Amendment Bill

This Bill essentially seeks to expand the longstanding application of privilege to exit discussions. Currently, for privilege to apply there must be a current dispute between the parties.

The Bill seeks to apply privilege without the need for a dispute. That will mean an employer may, in any circumstances, make an exit offer to an employee, and the employee cannot rely on that offer to claim a personal grievance.

If passed, we would end up seeing fewer constructive dismissal claims, as a botched exit attempt is a common feature of those claims currently. We may see fewer employment claims generally as employers would have more freedom to negotiate an exit before a problem arises. The Bill was introduced in February 2024 and is yet to have its first reading.

Upcoming change: Independent contractors

Partly in response to the recent Uber decision, Government plans to amend the test for determining whether someone is an independent contractor.

The test will be: If the working arrangement meets four criteria, then the worker will be an independent contractor:

1. The contract says the worker is an independent contractor
2. The worker can work for anyone else
3. The worker can set their own hours
4. The worker can decline additional tasks

We will likely see a Bill in early 2025. If a Bill was passed, it would provide certainty to the issue of employee v contractor and so we expect far fewer claims of that nature.

Upcoming change: Entitlement to personal grievance remedies

National and Act's coalition agreement promised to amend the Employment Relations Act to remove "the eligibility for remedies if the employee is at fault". No Bill has been introduced yet, but on 4 December 2024 the Government provided more details on the planned amendments:

1. If an employee's behaviour amounts to serious misconduct, they will not be entitled to any remedies.
2. If an employee has contributed to their dismissal, they will not be entitled to reinstatement or compensation.
3. Allowing reduction of remedies to up to 100% where the employee has contributed to their dismissal, noting reductions are currently capped to 50%.
4. Requiring the Authority and Court to consider if the employee's behaviour obstructed the employer's ability to meet their fair and reasonable obligations.
5. Increasing the threshold for procedural error in cases where the employer's actions against the employee are considered fair.

Employment (Core & Employment Practices Liability)

An issue we foresee is that the suggested changes could encourage employers to abandon or water down procedural fairness in dismissal processes, and in turn undermine (and expose to liability) the employer's decision of serious misconduct. A fair process supports the ultimate finding of serious misconduct, as it ensures an employer has all information before making a decision.

Upcoming change: Barring high earners from challenging dismissal

Government is intending to amend the Employment Relations Act to set an income threshold for unjustified dismissal cases, similar to the Australian regime. If passed:

1. Employees earning more than $180,000 per annum would be unable to challenge termination of their employment.
2. Employees' rights to challenge other employment issues (discrimination, unjustified disadvantage etc) would not be affected.
3. Employees' will be able negotiate with employers to 'opt back in' to unjustified dismissal rights.

Government's rationale for this change is to ease the cost of exiting senior executives and technical specialists who have significant impact on organisation performance and culture.

Establishing a threshold purely based on income seems to be a questionable method to achieve those aims. A more targeted approach, albeit needing more thoughtful legislation, may be to set out what roles would be subject to the bar from challenging termination, either in place of or additional to an income threshold.

These proposed changes will likely be in the same Bill as above, in Q2 or Q3 2025.

Implications of rebalancing the personal grievance regime

Government rationale for the upcoming changes seems to be concerns the system has tilted too far towards employees. These changes mark a substantial shift.

Minister van Velden has emphasised the reforms will not prevent legitimate grievances where both parties share responsibility. The Employment Relations Authority will continue to weigh employer and employee contributions in each case. However, the changes establish clear boundaries: violent behaviour or actions endangering workplace safety will eliminate remedy eligibility entirely.

Employers will need to manage risk in this new environment through sophisticated employment documentation, thorough investigation processes, and clear communication trails.

We also consider that they must carefully categorise misconduct and maintain robust investigation procedures, as incorrect categorisation could still expose them to significant liability.

High-income employees may seek enhanced contractual protections through longer notice periods or additional benefits structured below the threshold. Employment agreements will likely evolve to include more sophisticated severance provisions and detailed definitions of misconduct.

While certain claim pathways may be closed, others will likely emerge. High-income employees may increasingly frame their grievances as discrimination claims, harassment complaints, unjustified disadvantage or breach of contract.

The reforms aim to create more certainty and efficiency in employment dispute resolution, but they also introduce new complexities requiring careful navigation by all parties in an employment relationship. The flow-on may be increased complexity in employment litigation.

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Employment (Core & Employment Practices Liability)

EMPLOYEES' SAFETY FROM VITRIOL

Social and mainstream media is an integral part of modern life with the average person spending hours scrolling daily. It continues to expand from connecting people and shaping how we learn, communicate, and share ideas and experiences, to influential spaces for news, and academic and political views. So how does it affect the employment space and particularly the obligations of employers to ensure their employees are protected from the risks of trolling, harassment and / or abuse?

Wiles v University of Auckland

The recent Employment Court judgment in Wiles v University of Auckland considered the point. Associate Professor Wiles raised a personal grievance with her employer, the University of Auckland, for failing to ensure her health and safety when she received vitriol and on-line "doxing" (revealing and publicising previously private information or documents about a person) following her public discussions and postings about the Covid-19 pandemic.

The University had supported their academics sharing their commentary and academic views on the pandemic at the time. However, when the vitriol came to the attention of the University, it's approach was inadequate. It advised Wiles to stop engaging on the pandemic and asserted it was outside of her role with the University to do so. However, the University later accepted that her commentary was part of her work.

The Employment Court found that the University failed to implement a proper strategy to sufficiently support academics to continue with their public activities. By failing to actively engage constructively regarding Associate Professor Wiles' safety, the University had breached its express and implied contractual obligations to protect health and safety, and its duties of good faith and to be a good employer.

Takeaway

Where employees have an online presence, public profile, or otherwise engage in social (or traditional) media relating to their work, employers will need to consider reasonably practicable steps to protect their employees from the risks of psychological (and physical) harm. Measures employers can take include having robust policies and well-developed strategies for such risks, NetSafe notifications, seeking advice for takedown orders and cease and desist letters, increasing security, and access to EAP.

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General Liability

In 2024, we have seen an uptick in general liability notifications. Across the board, there has been an increase in the number of notifications, though not necessarily in the value of the claims. As a snapshot, we have seen:

- In particular, an increase in construction and infrastructure claims being made during or shortly after or during project works, likely associated with the rise in the number of infrastructure projects. We expect the number of claims will intensify as the need for infrastructure adaptation, upgrade and repair continues to grow. The new government is also ushering in major infrastructure projects (including roading). The promulgation of 149 fast track projects under the Fast Track Approvals Bill, intended in part to address the 'infrastructure deficit', may also contribute to the extension of this trend in years to follow.
- An increase in the number of claims relating to damage to underground services, including cable strikes.

Coverage

An increase in notifications means more consideration is required to navigate complex coverage issues that arise in general liability claims (in some cases, the value of the claim is initially low, but can substantially increase if there are multiple claimants with separate property damage, that emerge over time from the initial event).

The hike in construction and infrastructure claims is linked to a rise in claims reliant on the 'property worked on' extension, which extends sub-limited cover with a higher excess, for legal liability for property worked on by an insured.

This extension is increasingly relied on, particularly by SMEs, and is something for brokers to consider when placing cover for their insureds. It can sometimes be an optional extension.

The sub-limited extension for underground services works has increasingly come into play in infrastructure projects. This extension generally requires the insured to undertake appropriate due diligence regarding the location of underground services and take all reasonable precautions to prevent damage. This can be a high bar, which generally plays into a strong liability defence, where services have been struck despite the high degree of care and preparedness before commencing work.

There has been an uptick in general liability claims, where there are allegations of design issues and defective products, but there is no back-to-back professional indemnity cover. Where there are elements of design inherent in the supply of a product (for example, the design of installation for the product), it is important to consider whether professional indemnity cover is also required.

Product Liability and Recall

The number of product liability claims have also increased, with cases of fires from consumer products on the rise. This includes the trend of fires resulting from charging lithium battery-powered devices (such as e-scooters) at home. While many of these fires are caused by unsafe disposal or charging practices, we expect to see the number of related product liability claims grow.

More new products are being developed in New Zealand, for which customers will need comprehensive liability cover. We forecast a challenge in obtaining liability cover for new and developing products that does not fall foul of the business efficacy exclusion contained in many product liability policies, ensuring that the policy does not act as a manufacturer's guarantee.

In the defence space, achieving global settlement for claims with insured and uninsured losses remains a challenge. Large third-party claimants are dictating contractual terms with. Comprehensive consequential loss indemnities, which are generally excluded by product liability policies. We also see increasingly hefty uninsured claims, which must be managed co-extensively with covered claims.

In addition, we also see a mix of allied product liability and general property damage claims in the construction space.

As indicated in our forecast trends last year, the Court of Appeal has now ruled on the application of the Consumer Guarantees Act 1993 (CGA) to overseas manufacturers in Body Corporate Number DPS 91535 & Anor v 3A Composites GmbH & Ors [2023] NZCA 647.

All that is required to establish a CGA claim against an overseas manufacturer of a product, is the supply of a consumer good in New Zealand. There is no requirement that the manufacturer has any New Zealand presence itself.

For example, the manufacturers of products drop shipped to New Zealand by a third-party still face potential liability in New Zealand, despite any apparent lack of knowledge of the supply of their product in this jurisdiction. This may increase the total number of recovery targets in a supply chain, but the usual difficulties in bringing claims against foreign entities (including expense, exclusive jurisdiction clauses in supply contracts, etc) remain a barrier.

Coverage

Recently, the Australian Courts have weighed in on incorporating an insured's defective products into third-party products (relevant to the "property damage" trigger for the main insuring clause in most product liability policies).

In Capral Limited v Insurance Australia Limited t/as CGU Insurance [2024] FCA 775, the Federal Court of Australia held that, where an insured's defective product has been incorporated into a broader third-party product, whether that third-party product has suffered property damage is dependent on the following factors:

- whether the defective product has caused a physical alteration to the third-party product
- whether the defective product must be removed (at a cost), with a reduction in usefulness or value of the third-party product
- whether the claim against the insured is for the difference in usefulness or value.

Product Liability and Recall

In this case, the product imported and supplied by Capral was aluminium plate approved for the construction of marine vessels which had not been adequately heat-treated to achieve the required corrosion resistance. Unfortunately, the plate had been used in construction of multiple vessels and became the subject of complaint by 10 customers who elected to remove the plate and/or reconstruct the vessels. Removal required cutting the plate and alloy (originally used to weld the plate in place) out using a saw or oxy-torch. However, this also damaged the surrounding plate and extrusion, amounting to property damage.

Capral settled the claims for AU$2.2 million and sought indemnification under their General Products and Liability Policy issued by CGU. The FCA confirmed that the claims were for property damage (without making findings on quantum).

Product recall costs

The product recall space has remained busy this year. There were several widespread mandatory recalls of products prone to fire. Product liability policies generally require a property damage trigger for recall cover and that cover is typically limited to direct product recall costs. Therefore, there is room to consider whether first-party recall cover is required for bigger shipments of goods which may be recalled before reaching market. Product recall cover is usually sub-limited. However, we are seeing growing interest in parties taking out specific first-party recall cover for larger exports or cargo.

Voluntary product recalls are sometimes also requested by the Commerce Commission regarding safety standards or representations made under the Fair Trading Act – this would be more relevant to the investigations costs extension under the statutory liability policies, rather than any product recall cover.

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Life Sciences

We previously provided an update on the Therapeutic Products Act 2023 and how it would influence how products are manufactured, tested (including clinical trial research), imported, promoted, supplied and exported. Here, we examine the emerging era for biotech and life sciences innovation in New Zealand. The proposed changes reflect the government's clear message that regulation should encourage innovation in New Zealand and bring us up to speed with the research sector and markets of our overseas counterparts. This will become relevant to product liability and life science insurers.

Therapeutic Products regulation 2.0

After many years in the making, the Therapeutic Products Act 2023 passed in July 2023 and was meant to replace the Medicines Act 1981 and Dietary Supplements Regulations 1985. Intended to come into force in 2026, the purpose of the 2023 Act was to create a risk-proportionate regulatory framework and introduce regulation to devices and natural health products, align with the approach in Australia's Therapeutic Goods Act.

On 18 December 2024, the 2023 Act was repealed. As the 2023 Act was not yet in force, the existing framework (the Medicines Act 1981) continues. However, the 2024 Repeal Act moved the Dietary Supplements Regulations 1985 from the long-repealed Food Act 1981 and reissued these under the modern Food Act 2014. The primary purpose for this was to allow for exported products to apply for exemptions from New Zealand labelling and composition requirements so they can better compete in international markets.

Replacement regulation can still be expected. Following decisions by Government in September 2024, the Ministry of Health is developing a new Medical Products Bill to replace the Medicines Act 1981. There will also be a standalone natural health products bill to be developed following engagement with the natural health products sector.

A new biotech regulator

Since its implementation, the restrictive rules of the Hazardous Substances and New Organisms Act 1996 have effectively prohibited any research in gene technologies outside the laboratory. No commercial genetically engineered or modified crops are grown in New Zealand. Researchers, even Crown Research Institutes, must travel overseas to conduct field trials of New Zealand-developed products.

By contrast, Australia, Japan, and the UK have embraced gene technologies. In February 2024, the European Parliament voted to relax some genetic modification legislation in favour of creating a more sustainable and resilient food system.

As part of its 'Harnessing Biotech' plan, the New Zealand government intends to repeal the existing ban (except for certain applications including human cloning and human embryonic genetic engineering) and create a dedicated biotech regulator. This new regulator would enforce rules to allow for greater use of genetic engineering and modification, while retaining strong protections for human health and the natural environment.

Life Sciences

It would also streamline approvals for trials and use of non-genetically engineered or modified biotech.

The intent is to reduce delays for biotech products that lowers emissions, and for those that have already been approved for trial or use by at least two other OECD countries (or the EU and at least one OECD country outside the EU).

The proposed overhaul of biotech regulation will have a pivotal influence on the attractiveness of New Zealand for research, product development, manufacturing and distribution. Insurers can expect increased interest in New Zealand by biotech businesses and researchers, who may require tailored insurance solutions that reflect the new biotech regulations.

Insuring commercial clinical trials

New Zealand has a world-class record of accomplishment in clinical trials. Key incentives include the country's fast ethics approval processes and supportive regulatory framework. It is also important to note that New Zealand's accident compensation scheme (ACC) covers non-industry, publicly-funded clinical trials.

There are no legislative requirements for compensating research-related injuries in commercially sponsored clinical trials. However, ethics committees generally do not approve research unless the sponsoring manufacturers have made appropriate arrangements for injury compensation to an amount at least equivalent to ACC compensation, usually by obtaining privately arranged insurance.

The clear intent is that compensation for commercial and non-commercial trials should be limited to ACC entitlement. However, there is no case law confirming this. We are seeing a trend of manufacturers being interested in conducting trials in New Zealand and insurers interested in ACC-equivalent insurance to manufacturing sponsors.

Whilst there are many benefits to conducting clinical trials in the non-litigious environment of New Zealand, sponsoring manufacturers and their insurers should equally be aware of the uncertainties in establishing liability and the reputational risks associated with defending injured participants' claims.

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Legislative changes

The new National coalition government was sworn in on 27 November 2023 and it has proceeded to implement its election promises to reduce government regulation.

One of its first priorities after forming a government was to repeal Labour's RMA reforms with a promise to introduce measures of its own. As noted in our review last year, in February 2021 the then Labour government had decided to repeal the Resource Management Act 1991 (**RMA**) and replace it with three new Acts:

- the Spatial Planning Act (introduced in 2022)
- the Natural and Built Environment Act (**NBEA**) (introduced in 2022),
- and the Climate Adaptation Act.

The Spatial Planning Act and NBEA were made law on 23 August 2023, and were both repealed by the new government on 22 December 2023.[1]

The effect is a reversion to the old RMA for the time being, while retaining and modifying the fast-track consenting processes under the NBEA. The consequences for the statutory liability landscape include:

- It remains lawful to insure fines for breaches of the RMA. The NBEA had made that unlawful, in similar terms to the prohibition under the Health and Safety at Work Act 2015.
- The maximum penalties revert to RMA levels of $300,000 for an individual (instead of $1 million under the NBEA) and $600,000 for companies (instead of $10 million).
- The limitation period for laying a charge for breach remains 12 months, rather than two years under the NBEA.
- The NBEA reduced the maximum term of imprisonment to 18 months which effectively removed a defendant's right to jury trial. By reverting to the RMA maximum term of two years, the right to jury trial remains, although we query whether this will be looked at again as the government is consulting generally on amending the right to jury trials.[2]
- The NBEA had provided that fines be paid to the Crown, but reversion to the old rules means the RMA provides that 90% will still be paid to the local authority which brought the prosecution.

Given the intended deterrence effect of making cover for RMA fines unlawful and increasing the maximum amounts were not retained, review of those issues does not of the current government. It remains to be seen whether those features are reintroduced in the coalition government's substantive reforms.

The Coalition government had expected to introduce the third and final stage of the RMA reform package into the House before Christmas, with the goal of passing that legislation by mid-2025.

A fast-track consenting process was initiated as part of the COVID-19 recovery programme, and the new government is extending its application. In March 2024 it introduced the Fast-track Approvals Bill, and on 6 October 2024 a list of the 149 projects to be included in the process. They span housing, aquaculture and farming, infrastructure, power and mining projects, amongst others.

One impact of the Fast-track Approvals Bill is that is takes significant projects out of the Environment Court process. Freeing up court time from deliberations over consent processes appears likely to speed up prosecutions.

On the health and safety front, the Coalition Agreement between the National Party and ACT committed to enacting reform in this area. The minister responsible for workplace relations and safety, ACT MP Brooke van Velden is undertaking a health and safety sector review including consulting with industry. [3]

Statutory Liability

One of the objectives is said to be the balancing of risks with costs, such that compliance costs are minimised. It will be interesting to see if that results in a review of the definition of 'reasonably practicable' in determining the scope of an employer's duty.[4]

Trends for investigations and prosecutions

In June 2024, WorkSafe New Zealand, which is one of the health and safety regulators (alongside Maritime New Zealand - MNZ) produced a new strategy focusing on acute, chronic and catastrophic harm. In particular, the regulator will be monitoring and intervening in high-risk sectors such as forestry, transport, manufacturing and construction.[5] We are commonly instructed in relation to serious injury or fatal incidents in the workplace. These remain high in number. We expect there is unlikely to be any downturn in investigations. As it is unlawful to insure fines under HSWA, insureds have shown some determination to invest time and defence costs in navigating the initial official investigation by the regulator, in an attempt to avoid a subsequent prosecution (as cover may be available for these defence costs). These efforts have resulted in the regulator not pursuing some cases which may have been prosecuted in the past.

Personal liability of officers/directors under HSWA

On 26 November 2024, the District Court issued *Maritime New Zealand v Anthony Michael Gibson* [2024] NZDC 27975, a landmark decision about the scope of the duty owed by 'officers' under the Health and Safety At Work Act 2015 (**HSWA**).

Tony Gibson, former Chief Executive Officer of Ports of Auckland Limited. was found guilty of failing to exercise due diligence to ensure that Ports of Auckland, the "person conducting a business or undertaking" (**PCBU**), complied with its duty to ensure, so far as was reasonably practicable, the health and safety of workers. Given the novelty of this charge in New Zealand, the District Court looked to the legislative framework, purpose and history, and equivalent Australian decisions. In summary. the key principles were:

- An assessment of whether an officer has exercised due diligence must, necessarily, be fact and circumstance dependent.
- The duty applies to all officers across all PCBUs, large and small, with both flat and hierarchical structures.
- For large, hierarchical organisations, the duty is not limited to governance or directorial oversight functions.
- The officer is not required to do everything that the PCBU is required to do, the duties are distinct.
- An officer in a large PCBU does not need to be involved in day-to-day operations in a hands-on way but cannot simply rely upon others. The officer must personally acquire and maintain sufficient knowledge to reasonably satisfy him or herself that the PCBU is complying.
- Where others are assigned health and safety obligations or roles, an officer must ensure they have the necessary skills and experience to properly execute their roles and must adequately and regularly monitor their performance.
- The officer must also acquire and maintain sufficient knowledge of the operations of the PCBU and the work actually carried out "on the shop floor".
- Merely putting in place policies or procedures is not enough. The officer must ensure entrenched and adequate systemic processes.
- An officer must ensure that there are effective reporting lines.
- An officer cannot assume compliance in the absence of being told otherwise. An officer must be proactive.
- Due diligence also requires the officer to engage an effective process of monitoring, review and/or auditing.

Statutory Liability

- A court will obtain assistance from relevant industry evidence and standards, and the practices of comparable officers and businesses. However, the Court must objectively determine the reasonableness of the officer's actions.

The case determines, at least at the District Court level, that the duty of due diligence of an officer is demanding, goes beyond governance and oversight, and appears to extend to operational issues. While we await the outcome of sentencing, if there is an appeal it will be interesting to see whether higher courts will view the duty as less stringent, and in particular whether on the facts of the case and in the context of a large organisation, Mr Gibson met that standard.

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.

In 2023, we reported on the decision in *WorkSafe New Zealand v Kellisa Farms Limited and Ors* [2022] NZDC 2490. WorkSafe filed identical charges against both the RH & JY Trust and, in the alternative, the three trustees in their capacity as trustees of RH & JY Trust. The District Court confirmed trusts cannot be charged and convicted in their own right.

However, the decision was appealed by WorkSafe and was heard in August 2023 and the decision released at the end of December 2023.

In the appeal to the High Court, *WorkSafe New Zealand Mhi Haumaru Aotearoa v RH & JY Trust & Ors* [2023] NZHC 3871, the question of law for determination was: can a trust (or its trustees collectively) meet the definition of "person" in s 16 of the Act which includes a "body of persons, whether corporate or unincorporate"?

The High Court overturned the District Court decision in part. The High Court agreed that a trust could not be a "person" as a separate entity but did decide that the trustees collectively were a "body of persons unincorporate". Justice Harvey held there should be a wide interpretation given to the definition of PCBU insofar as it is necessary to achieve the purposes of the Act in an enforcement context. In either prosecuting a trust or trustees collectively, the higher maximum penalty under s 48(2)(c) is available and so there does not appear to be any real advantage between either interpretation from an enforcement perspective. Given the many different types of business arrangements fall into the definition of a PCBU who is not an individual, consistency within the Act between these different types of arrangements, including the use of trust structures, must be the priority.

Justice Harvey also considered conceptual consistency with civil law and general trusts law should be preferred.

Justice Harvey also found that section 29 of HSWA, which prohibits insurance against fines, does not also prohibit indemnity of trustees from trust assets under the trust deed. This is because section 29 specifically refers to "insurance policy" and "contract of insurance", and if the legislature intended section 29 to be broader and override a fundamental trusts principle it would be worded more broadly. However, Judge Harvey also commented that this does not mean the trustees will always be indemnified from the trust assets when fined under HSWA. That will still depend on the specific facts, the trust deed and the general law of trustee indemnity.

The matter is being appealed to the Court of Appeal on both issues, whether a trust is a person and whether the trustees collectively are a person. It is set to be heard in September 2025.

Statutory Liability

Consumer protection

In January, the Minister of Commerce and Consumer Affairs announced a two-phased plan to reform and streamline New Zealand's financial services regulation. Part of phase two of the reforms will be a more substantive review of various pieces of financial services legislation, including progressing legislative reform to transfer regulatory responsibility for the Credit Contracts and Consumer Finance Act 2003 (CCCFA) from the Commerce Commission to the Financial Markets Authority (FMA). This follows the first prosecution under the CCCFA against TSB Bank Limited which concluded in August this year where the Court determined a $2.47 million penalty for the bank's long-term charging of unreasonable credit and default fees.

The Commerce Commission continues to investigate and regulate other consumer industries. Recently, the Commerce Commission has shown particular focus on product safety for children's products, including fire and choking hazards. The Commerce Commission has also now completed market studies into personal banking services, residential building supplies and retail grocery and fuel. It is expected that further investigations and/or prosecutions may arise from these market studies.

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Property & Energy

Property & Energy

FRAUD AND THE ECONOMIC CLIMATE

New Zealand, like the rest of the world, has been subject to difficult economic conditions over the last couple of years. We have seen a surge in suspicious and fraudulent claims, several of which are progressing through the judicial system.

For instance, we recently successfully defended an insurer against a fraudulent fire claim, in which the High Court held that the insured deliberately set the fire and was dishonest during the claims process – *Work v IAG New Zealand Ltd [2023] NZHC 3428*.

Through this decision, the High Court confirmed the position on the fraudulent claims rule in New Zealand, previously outlined in the Court of Appeal decision in *Taylor v Asteron*. The fraudulent claims rule states that if the insured acts fraudulently in making a claim, the whole of the fraudulent claim is disallowed.

The decisions in Work and Taylor follow that of the UK's in Versloot Dredging, in that the fraudulent claims rule should be seen as a term implied by law in all insurance contracts, and that the insured must act honestly in making a claim. If the insured dishonestly makes a claim that is false in some material respect, the whole of the claim will be disallowed.

It remains to be seen whether New Zealand will follow the more controversial aspect of Versloot, where a lie in support of an otherwise valid claim will not affect entitlement.

The rule is now an implied term of every insurance contract in New Zealand. It is still subject to the express terms of the insurance contract, as it was in Work, where the policy wording set out even stricter terms on dishonesty, such that the claim could be declined if the claim was dishonest or fraudulent in any way (there being no materiality threshold).

It is important to note that the Insurance Contracts Bill will likely codify the position on fraudulent claims in New Zealand, as previously covered at the beginning of this report.

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INSURED MUST PROVE CLAIM - MOORHOUSE COMMERCIAL PARK LTD V VERO INSURANCE NEW ZEALAND LIMITED [2024] NZCA 415

The New Zealand Court of Appeal's recent decision in Moorehouse v Vero confirmed the insured's burden of proving the existence of damage – specifically where the insured alleges the existence of more extensive damage than what was accepted by the insurer. Proving the mere possibility of the existence of further damage is not enough.

Moorehouse owned commercial buildings in Christchurch that were damaged by the Canterbury earthquakes, with cracks forming throughout the concrete elements. Vero accepted the cracking damage and suggested epoxy injection as the repair. Moorehouse claimed that, while this would address the cracks, it would not resolve the underlying loss of stiffness and structural damage caused by "bond loss" within the concrete reinforcing. Moorhouse argued that the alleged the presence of this underlying damage required the buildings to be rebuilt.

The Court of Appeal upheld the High Court's decision, dismissing Moorhouse's claim and approving Vero's epoxy repair. It found that Moorhouse only established that it was possible that "bond loss" occurred in the buildings, as the construction made them vulnerable to this.

However, Moorhouse had not established that "bond loss" had occurred due to the earthquakes or that, if it had, it had materially adversely affected the usefulness of the buildings – 'The fact that it is possible does not mean it has probably occurred'. The Court further rejected Moorhouse's argument that once it had proved the (undisputed) general fact earthquake damage occurred, the burden shifted to Vero to disprove the existence of the possible underlying "bond loss" damage claimed.

This case is welcome news for insurers. Insurers are often faced with claims from insureds and their experts taking overly risk-averse approaches to damage assessments and alleging the possible existence of extensive hidden damage following an insured event. This greatly inflating their claims. The Court of Appeal's clear approach to the onus of proof should encourage more negotiated outcomes in claims where complex factual and expert evidence is presented by insureds that only establishes the potential of significant additional hidden or latent damage without more.

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LEGISLATIVE CHANGES AFFECT PROPERTY INSURANCE

Fire Service levy

- On 1 July 2026, the new levy provisions in Part 3 of the Fire & Emergency New Zealand Act 2017 will come into force. These provisions contain significant amendments to the current levy regime, including:

- The levy will not be charged on material damage policies as originally proposed, but instead on insurance contracts for fire damage. While this will not affect most material damage policies (which are written on an all-risks basis), it may give rise to different issues where cover is placed for specified risks only, either for all or some of the property insured.

- The levy will no longer be calculated based on the maximum amount payable for an event, but instead on the sum insured. This is designed to simplify the calculation of the levy.

- The definition of residential property is changing. This means for mixed use buildings, different levies may be payable.

- The Act now contains anti-avoidance provisions so that if a party tries to avoid paying the levy, that arrangement will be void. It remains to be seen how this will apply to split policies or arrangements where one policy covers fire risks and a separate policy all other risks.

Natural Hazards

On 1 July 2024, the Natural Hazards Insurance Act 2023 came into effect. This Act replaces the Earthquake Commission Act 1993 and has been designed to incorporate the lessons learned from EQC's handling of the Canterbury Earthquakes and the public inquiry that followed. 'EQC' is now known as the Natural Hazards Commission or NHC.

The new Act largely preserves the scope of natural hazard cover which was available under the old EQC Act for residential land and residential buildings. However, it also seeks to modernise the existing content and make it easier to understand. The Act clarifies the cover available for certain items of insured property, which were previously ambiguous. For example, retaining walls now have cover up to $50,000 per dwelling.

One of the most significant changes is an express provision that allows the NHC to delegate its claims-handling function to insurers. While EQC previously could do this through its powers as a Crown Entity, the new Act provides clarity on what may be delegated, to whom, and how. The intention is to ensure a seamless service and avoid some of the issues presented during the Canterbury Earthquakes, where homeowners had their claims dealt with first by EQC, and then if the quantum was assessed as exceeding the EQC cap, by private insurers.

The NHC has established a new Code of Insured Persons' Rights applicable to NHC claims, which is similar to the Fair Insurance Code. Complaints concerning NHC claims can also now be independently reviewed by the Fair Way dispute resolution scheme.

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Health

Disciplinary findings on annual practicing certificates

Background

In 2022, Dr Appanna was the subject of an adverse finding by the Health Practitioners Disciplinary Tribunal in relation to the blurring of professional boundaries in the context of a personal relationship. As part of the penalty ordered, Dr Appanna was suspended for three months. During his suspension, his annual practising certificate (**APC**) expired.

In April 2023, after his suspension had lifted, Dr Appanna applied for a new APC. The Medical Council of New Zealand (**Council**) declined Dr Appanna's application, on the basis that he did not meet the required standard of competence, and that his competence could not reasonably be assured through conditions on his scope of practice. Relevant to the Council's decision were:

- The adverse Tribunal finding,
- A current Professional Conduct Committee investigation that was considering similar conduct (blurring of professional and personal boundaries),
- A history of (low level) concerns.

Issues on appeal

Under s 29(1) of the Health Practitioners Competence Assurance Act 2003, an APC must not be issued, unless the applicant meets the “required standard of competence”.

The issues on appeal were:

- Whether the Council erred in finding Dr Appanna's conduct breached the “required standard of competence” as required by s 29(1) of the Act, and
- Whether the Council was wrong to find that there were no conditions that could be imposed on Dr Appanna's scope of practice under s 29(2) to address its concerns.

Decision

Dr Appanna submitted that the Council's decision was based on conduct rather than competence concerns and that his conduct had little bearing on his competence. In any event, the conduct alleged was historic. His return to practice was already subject to conditions imposed by the Tribunal. However, he proposed that additional conditions could be ordered to address any residuary concerns. Dr Appanna argued that the Council was usurping the Tribunal's decision and subjecting him to double jeopardy by essentially extending the suspension of his APC.

The Council stated that a core domain of competence is a doctor's professionalism. Dr Appanna's relationships, actions, honesty, and integrity were all highly relevant to the Council's consideration of his competence. It further stated that there could be no conditions imposed to address areas where Dr Appanna's competence was lacking, namely his professionalism. However, the Council's decision was not the end of the road, and Dr Appanna was not prohibited from re-applying for an APC in the future.

The Court ultimately accepted the Council's position. It found that the Council made no error, that Dr Appanna did not meet the required standard of competence, and that there were no conditions that could be imposed to address the concerns raised.

Health

Implications

Typically, conduct and competence concerns are separately addressed by regulators in the health practitioner space. However, when considering APC applications, conduct issues can be relevant to an assessment of competence. Notably, Dr Appanna's disciplinary case received significant publicity, including criticism amongst the profession regarding the Tribunal's penalty order. This case demonstrates that where a regulator retains concerns about a practitioner that it does not consider have been adequately addressed by professional disciplinary proceedings, there may be other avenues available to restrict the practitioner's practice.

Consequently, practitioners (and their indemnifiers) should be aware that an adverse disciplinary finding may not be the end of the road in what is often already a long and stressful process. Applications for re-registration and annual practising certificates will be assessed in the context of the practitioner having been through a disciplinary process.

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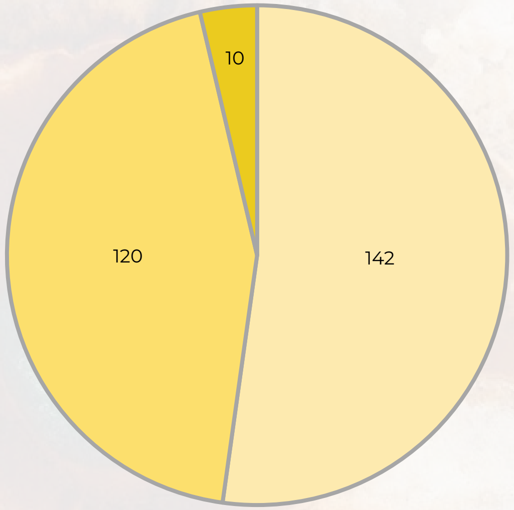
INCREASE IN VOLUME AND TIME TAKEN FOR RESOLUTION OF HEALTH PI COMPLAINTS

Complaints in the Health PI space have seen a sharp increase in both volume and time taken for resolution in recent years.

The Office of the Health and Disability Commissioner (**HDC**) reported that, over the past five years, there has been a 52% increase in the number of complaints received [HDC Annual Report 2023/2024]. This upsurge in complaints has placed a significant strain on the HDC and has led to an ageing profile of open complaints, 20% of which are over two years old (as of 30 June 2024). While the majority of complaints are resolved without formal investigation, the 7-8% of complaints that progress for further assessment are taking increasingly longer to resolve. To improve efficiency in resolving complaints, the HDC has implemented several initiatives, including a new "fast-tracked process". A review of the Health and Disability Commissioner Act 1994 and the Code of Health and Disability Services Consumers' Rights is currently underway, with a key focus on timeliness of complaint resolution over the 2024/25 period. The HDC was due to make recommendations to Health Minister Dr Shane Reti by 20 December 2024, based on this review.

The HDC's counterpart, the Medical Council of New Zealand, has similarly reported a spike in notifications regarding the performance and/or conduct of healthcare practitioners. In the 2022/2023 period, there were 272 notifications relating to a practitioner's performance and/or conduct. This is a 14.7% increase from the previous year.



Of these 272 notifications…

- 142 were related to practitioner's performance
- 120 were about practitioner's conduct, 39 of which progressed to a committee investigation (18% increase from previous year)
- 10 were in regards to both performance and conduct.

While there is no public data available regarding a notification's lifespan at the Medical Council, anecdotal feedback confirms practitioners' frustration over the lack of timeliness in reaching resolution. The implications of sector-wide delays in complaint resolution mean increased periods of uncertainty for practitioners who are the subject of complaints. Being 'in limbo' for extended periods of time while complaints are assessed or investigated, adds additional stress to an already fraught process.

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THE RISE OF 'PUBERTY BLOCKERS' AND INFORMED CONSENT

Background

Gender dysphoria is defined as distress caused by a mismatch between an individual's experienced gender and birth sex, gender referring to an inner sense of being male, female or non-binary. Globally, there has been a substantial increase in children and young people referred with gender dysphoria. This has led to the consequent rise in the usage of puberty-supressing hormones, also known as 'puberty blockers'.

As the name suggests, puberty blockers stop the physical changes associated with puberty, buying time for children and young people with gender dysphoria to make decisions about their long-term health, particularly in regard to whether they would like to start hormone therapy.[1]

Puberty blockers were first used in the 1980s to delay central precocious puberty (a condition where puberty begins too early - before age eight for girls and nine for boys), primarily to improve final height. This indication remains approved and frequently used for precocious puberty.

While usage of puberty blockers in New Zealand has risen, the effectiveness of puberty blockers or who they are most effective with, remains unknown. Clinicians must have a good understanding of informed consent prior to finalising treatment, especially in the case of children and young people.

Access to puberty blockers

In August 2024, the United Kingdom (UK) government issued a notice announcing the renewal of a temporary ban on the sale and supply of puberty-suppressing hormones.[2] The ban applies to the sale or supply of these medications prescribed by private UK-registered prescribers for gender incongruence or dysphoria to under 18s not already taking them.[3]

The ban also prevents the sale and supply of the medications from prescribers registered in the European Economic Area or Switzerland for any purposes to those under 18 years. The ban now extends to cover Northern Ireland.

The ban came after a four-year independent inquiry published in April 2024[4], which found "remarkably weak evidence" for the use of puberty blockers.[5] The study concluded that the effectiveness of these treatments or who they are most effective with was unknown. Numerous reports show a benefit to those who use them, but the lack of evidence (at this time) was said to inhibit any definitive conclusions about their use.

In September 2024, an article published in the New Zealand Medical Journal reported that puberty blockers had become more accessible in New Zealand compared with other countries. However, as is the case in the UK, there is still a lack of information published to support the use of puberty blockers.

Health

The prevalence of prescribing puberty blockers in New Zealand increased from 2011, when the first New Zealand guidelines were published. This increase continued to 2016, with a significant rise in prescriptions observed between 2016 and 2022, followed by a steady decline. In 2023, Pharmac confirmed that 740 patients in New Zealand were dispensed Goserelin or Leuprorelin (puberty blockers). 469 of these patients identified as female.

The article's authors could not state why New Zealand had higher prescribing rates than other countries. However, they speculated the reasons can be found within our health system. These included :

- easier access to assessment
- a lower threshold for diagnosis of gender dysphoria
- greater likelihood of recommending treatment with Gonadotropin Releasing Hormone Analogues (GnRHa) than other treatment options.

In the UK, there have been long wait lists for specialist services, and these have served to restrict access. These specialist services have also developed detailed protocols for the diagnosis of gender dysphoria and for psychological assessment, which are seemingly lacking in New Zealand. The authors noted the direction in New Zealand has been to prioritise access over assessment and psychological support.

The use of puberty blockers

In November 2024 the Ministry of Health published an evidence brief and position statement on the use of puberty blockers.[6] The review found a lack of good quality evidence for the effectiveness or safety of puberty blocking treatment in young people with gender dysphoria. In their position statement, the Ministry of Health set out that gender-affirming treatment should be started only by prescribers who are experienced in gender-affirming care and working as part of an interprofessional team. It is important that prescribers are aware that the medications used to delay puberty are not approved by Medsafe for this purpose and whilst prescribers can prescribe the medication 'off label' under section 25 of the Medicines Act 1981, they must ensure that they are working within their scope of practice in doing so.

The Ministry of Health has stated that clinicians should take a holistic approach and undertake a comprehensive assessment in the provision of gender-affirming care. Puberty blockers are one of a range of options (eg, medical, mental health, and social support) clinicians can discuss with individuals and their families.

The Ministry noted that prior to the release of its brief and position statement, guidelines for gender-affirming care have been independently published in New Zealand by the Professional Association for Transgender Health Aotearoa.[7] The guidelines set out the key considerations for health teams, including the prescribing of puberty blockers. There are also local clinical pathways within primary care and specialist services across New Zealand, but there is not currently a nationally consistent approach.

Health

The Royal New Zealand College of General Practitioners has endorsed the guidelines published by the Professional Association for Transgender Health Aotearoa. However the guidelines should be considered alongside with the Ministry's position statement and evidence brief as both set out clear expectations for health practitioners in initiating gender-affirming hormone therapy for adults in primary care settings.

Informed consent

Informed consent is the paramount consideration alongside the ethical consideration of avoiding harm. The guidelines highlight that withholding gender-affirming treatment is not considered a neutral option, as this may cause or exacerbate gender dysphoria or mental health conditions.

Clinical decision-making relating to the use of puberty blockers can be complex, particularly in cases where there is family opposition for young people, the person is neurodiverse and/or has complex mental health needs. The guidelines recommend that gender-affirming healthcare is provided by well-resourced multidisciplinary teams that include mental health professionals and have good links with peer support groups.[8] This is supported in the Ministry's position statement.

Conclusion

Clinicians must ensure informed consent is obtained before treatment is finalised. This includes spelling out risks to cognitive function, bone health, sexual function and fertility, even when these risks are uncertain. Patients must also have the capacity to understand the risks. In the case of children and young people, clinicians should pay additional attention to a patient's capacity to give informed consent.

The Code of Health and Disability Services Consumers' Rights (**Code**) establishes the rights of all patients to be fully informed, to make an informed choice, and to give informed consent. The Code notes that every consumer must be presumed competent to make an informed choice and give informed consent, unless there are reasonable grounds for believing that the consumer is not competent. Clinicians should also ensure they understand Section 36 of the Care of Children Act 2004 which outlines requirements for a child's consent to medical treatment or procedure.

Finally, clinicians must ensure that they are practising within their scope of practice when prescribing puberty blockers or initiating gender affirming care and working as part of an interprofessional team in doing so.

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1. Jeannie Oliphant and others Guidelines for Gender Affirming Healthcare for gender diverse and transgender children, young people and adults in Aotearoa, New Zealand (University of Waikato, Transgender Health Research Lab, 2018) at 29.
2. https://www.gov.uk/government/news/puberty-blockers-temporary-ban-extended
3. The Medicines (Gonadotrophin-Releasing Hormone Analogues) (Emergency Prohibition) (Extension) Order 2024
4. https://cass.independent-review.uk/home/publications/final-report
5. Case study on page 13
6. https://www.health.govt.nz/publications/consultation-on-safety-measures-for-the-use-of-puberty-blockers-in-young-people#:~:text=On%2021%20November%202024%20the,young%20people%20with%20gender%20dysphoria.
7. Jeannie Oliphant and others Guidelines for Gender Affirming Healthcare for gender diverse and transgender children, young people and adults in Aotearoa, New Zealand (University of Waikato, Transgender Health Research Lab, 2018)
8. Jeannie Oliphant and others Guidelines for Gender Affirming Healthcare for gender diverse and transgender children, young people and adults in Aotearoa, New Zealand (University of Waikato, Transgender Health Research Lab, 2018) pg 26
9. Rona Carroll and others Primary Care Gender Affirming Hormone Therapy Initiation Guidelines – Aotearoa New Zealand guidelines for commencing GAHT for adults in primary care (University of Otago, 2023)

Cyber & Technology

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A YEAR IN THE PRIVACY ACT

Privacy regulation in New Zealand has not received quite the same attention as other jurisdictions in 2024 (particularly compared to our Australian cousins). All that said, there have been some significant developments in our regulatory and legislative frameworks and how our regulator (the **OPC**) regulates privacy in New Zealand.

PouPou Matatapu

In August 2024, the OPC released its new, comprehensive privacy management framework – PouPou Matatapu (the 'pillars of privacy').

The OPC identified that many organisations have been struggling "...with the principle-based approach of the Privacy Act and how to comply...". The PouPou guides agencies on how to implement a robust and effective privacy management framework and encourage a culture of privacy. The Poupou Matatapu covers ten topics[1] spanning the privacy management lifecycle and should prove a helpful tool to assist agencies in complying with the Information Privacy Principles contained in the Privacy Act 2020. On the other hand, PouPou also provides a standard which can assess compliance with the Act. Now that PouPou is available, the OPC will expect agencies to have considered and be aware of their obligations under the Act and how they may be applied. We anticipate the OPC will become less understanding of agencies unaware of their obligations under the Act or have failed to take steps to implement good privacy practices going forward.

The Privacy Amendment Bill 2023

The Privacy Amendment Bill 2023 is waiting to progress through the select committee process. To bolster transparency and individual privacy rights, the Privacy Amendment Bill 2023 extends the notification requirement of Information Privacy Principle 3 (IPP3) through the new information privacy principle – IPP3A. Under IPP3A, agencies will need to provide notice to the individuals they collect personal information from indirectly. As matters stand under IPP3, notice is only required where an agency collects personal information directly from an individual.

As with IPP3, IPP3A requires that individuals are notified of the collection and its purpose, the intended recipients of the information, details of the agency collecting and or holding the information, if the collection is authorised or required by law, the particulars of that law, and the individual's rights to access and correct the information.

As with IPP3, there are exceptions to the IPP3A requirements, including where the information is publicly available or where the individual has already been made aware of the information referred to in the notification.

When the Bill passes, agencies must assess their notification practices and ensure they comply with the Privacy Act 2020 when collecting personal information from individuals directly and third-party/indirect sources.

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The importance of prompt notification

Along with regulatory and legislative developments, there has been a range of insightful commentary from the OPC throughout 2024.

For example, in September 2024, the OPC released a practice note with helpful comments on timing around data breach notification and the importance of avoiding delay.[2]

The practice concerned a complaint made by a representative of a resident of Ultimate Care Group (Ultimate Care). An audit by the Capital and Coast DHB in August 2021 revealed that part of the resident's paper-based clinical records were missing. The audit team recommended Ultimate Care to report this as a privacy breach in December 2021. The breach was only notified in October 2023 after receiving the same recommendation from the Health Disciplinary Tribunal.

In its decision note, the OPC commends the actions Ultimate Care took to improve its practices and proactively engage with the OPC since the notification. However, the OPC states that the two-year delay in notification is "seriously concerning".

The OPC notes that Ultimate Care had not complied with its obligations to notify the OPC "as soon as practicable" under section 114 of the Act and expands on what it saw as repeated failures to notify. The practice note is noteworthy for its content (the OPC does not commonly publish practice notes on privacy breaches), as it reflects the more robust approach it appears to have adopted in managing breaches and expectations around notification in 2024.

1. https://www.privacy.org.nz/responsibilities/poupou-matatapu-doing-privacy-well/
2. PBN23505 [2024] NZPrivCmr1 - Ultimate Care Group Limited

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NEW ZEALAND'S APPROACH TO WORK ON AI

Artificial Intelligence (AI) remained a buzzword throughout 2024. New AI applications and use cases hit the news on a weekly basis. Several jurisdictions progressed regulation in 2024 to manage the risks associated with the widespread adoption of AI. New Zealand's regulatory response came via a Cabinet paper released in July 2024. The paper "Approach to work on Artificial Intelligence" recognised that New Zealand has been slow to adopt AI. The paper states two reasons for this: concern about negative impacts, and uncertainty around regulation. With this in mind, the government has committed to a "strategic approach" consisting of a *"light-touch, proportionate and risk-based approach to AI regulation."*

The government's '*strategic approach*' includes applying existing law and considering international norms where applicable, rather than developing a standalone AI Act. The government's view is that further regulatory intervention should only be considered to unlock innovation or address acute risks, and then should leverage current frameworks in favour of implementing new ones. It remains to be seen if this position will be sustainable going forward. The light touch approach contrasts with our peers in the EU who have developed AI-specific regulatory frameworks.[1]

It is also far less comprehensive than the policy released by the Australian government for the responsible use of AI, recognising that its "current regulatory framework is not fit for purpose." Whether such light touch regulation is feasible in New Zealand, given the leaps and bounds being taken internationally, remains to be seen. There is also a question as to whether the approach aligns with the realities and challenges faced by industry and achieves the stated goal of building trust and confidence in the deployment of AI.

There are significant applicable regulations and guidance are already in place. For example, in the legal profession, guidance for practitioners can be found in the following:

1. The Information Privacy Principles (IPPs) from the Privacy Act,[2] apply to each stage of the AI process, from the collection of training data to output and taking actions from the results. Privacy is the starting point.

2. Guidelines from the Courts of New Zealand on using AI in Courts and Tribunals.[3] They refer to the OPC guidance, the need to understand AI's limitations, and the importance of upholding confidentiality and privacy, while ethical issues such as bias with generative AI and lack of NZ cultural context remain a concern.

3. Guidance from the Law Society[4] against quality assurance and compliance issues, concerns for privacy, data protection and cyber security with AI use. It also highlights the remaining grey areas regarding intellectual property and the professional and ethical obligations around disclosure and transparency with clients.

Our take on AI

For now regulation of AI in New Zealand is a case of "work with what you've got". As AI becomes more integrated into our day-to-day lives, we can expect the existing guidance and regulation to expand and develop in response. Whether this will be enough in light of a growing international norm of specific AI regulation remains to be seen. In the meantime, agencies should consider how their use of AI complies with the likes of the Privacy Act 2020 and industry-specific guidance on adopting new technologies.

1. https://www.europarl.europa.eu/topics/en/article/20230601STO93804/eu-ai-act-first-regulation-on-artificial-intelligence
2. https://www.privacy.org.nz/publications/guidance-resources/ai/
3. https://www.courtsofnz.govt.nz/going-to-court/practice-directions/practice-guidelines/all-benches/guidelines-for-use-of-generative-artificial-intelligence-in-courts-and-tribunals/
4. https://www.lawsociety.org.nz/professional-practice/rules-and-maintaining-professional-standards/generative-ai-guidance-for-lawyers/

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A TREND TOWARDS LITIGATION

2024 marked a rather busy year for the Courts and litigation over privacy matters. While these cases dealt with discrete issues, they are noteworthy both in isolation and as a part of a growing trend towards litigating privacy matters in the Courts. This is particularly notable given how much of the Privacy Act 2020 is actionable only through a complaint to the OPC and subsequent claim via the Human Rights Review Tribunal.

Here we outline six privacy matters:

D'Arcy-Smith v MSD[1] concerned a complaint under IPP8. The subject matter of the complaint was two automatically generated letters by MSD. The letters concerned alleged debts, although MSD had previously approved said debts for write-off. The appellant complained that the MSD had breached IPP 8 by not checking the accuracy of his personal information before sending the two letters. The High Court agreed on appeal that the mistake constituted an actionable interference with privacy but did not agree that sufficient harm had been caused. This requires a "significant" injury to feelings, which must have impacts synonymous with "important", "notable", or "considerable".

The Court of Appeal in Dotcom v Crown Law Office[2] dismissed the special leave application to appeal the High Court's decision to refuse to award damages for a breach of privacy under s 88 of the Privacy Act 1993. The appellant argued there had been various breaches of the Privacy Act 1993 by various government agencies transferring access requests to the Attorney-General's office, and that as a result he should be entitled to damages. The Court of Appeal reaffirmed the long-standing position that a breach of privacy does not entitle a claimant to damages – the claimant must also show a sufficient degree of harm has been caused.

In H v Attorney-General,[3] the High Court held the rights to access personal information under the Privacy Act 1993 and Privacy Act 2020 (as adults), in this instance of survivors of abuse in state care, were not limited under specific provisions in welfare legislation. This decision confirmed the importance of individuals' right to access their information, as well as the importance of not restricting such rights.

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In Gorgus v Chief Executive Department of Corrections[4], the High Court upheld a Human Rights Review Tribunal's decision to refuse damages sought for humiliation, loss of dignity and injury to feelings relating to an actionable interference with privacy. While the delay in responding to an information request by Corrections was found to interfere with privacy, this was not "exceptional" enough to warrant damages.

In Greer v Commissioner of Police[5], the High Court was asked to strike out an appeal of a Human Rights Review Tribunal decision. The first instance decision had itself concerned the Human Rights Review Tribunal's strike-out decision, against a claim that the Police had breached principle 6 of the Privacy Act 1993 by failing to respond to an information request in a timely manner, which was dismissed. The High Court ruled that the appeal was an abuse of process.

Lovatt v Te Whatu Ora[6] saw the first High Court case on s 98 of the Privacy Act 2020, described as a jurisdictional gateway to the Human Rights Review Tribunal for review in respect of OPC complaints. The High Court found the Tribunal was correct to strike out the appellant's amended statement of claim against Waikato DHB, on the grounds it had no jurisdiction under s 98 over additional matters raised in it.

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1. [2024] NZHC 1550
2. [2024] NZCA 260
3. [2024] NZHC 2317
4. [2024] NZHC 634
5. [2024] NZHC 104
6. [2024] NZHC 2538

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Wotton Kearney (WK) is Asia Pacific's largest specialist insurance and risk advisory law firm. Founded in Australia in 2002, WK has grown from two partners to be a recognised leader in insurance, risk management and dispute resolution. In New Zealand we have offices in Auckland, Wellington, and Christchurch, as well as a hub in Tauranga.

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