June 2023

Trends
& Insights

Class Actions in New Zealand

The future at a crossroads

chapman tripp

Contents

Trends & Insights

Class action reform idling at the lights

New Zealand's market for class actions, although still small by international comparison, is set on a growth trajectory fuelled by a mix of social and economic drivers, including growing share market activism, increasing data security risk, and a stronger consumer focus in commercial regulation.

Class actions of this kind may also see an increased interest from offshore funders.

This trend was anticipated by the Law Commission who took stock of class actions and litigation funding in the context of an increasing number of large representative proceedings in New Zealand. It recommended in June 2022 that New Zealand establish a statutory class action regime, governed by a new Class Actions Act and supported by a formal litigation funding framework to resolve class action claims justly and efficiently.[1]

Yet the future of class actions in New Zealand remains at a crossroads.

The Law Commission's report, comprising of 121 recommendations, was regarded as a landmark piece of work and was endorsed by the Government in November 2022, with an indication of progress this year with policy work meant to take place behind the scenes.

But we seem now to be idling at the lights with the prospect of a "green light" seeming to diminish as the election comes closer. In the meantime, class action activity continues with the courts stepping in to fill the legislative and regulatory gaps.

While we endure the long wait for reform, it is timely to take stock of the class action landscape in New Zealand.

1. Law Commission *Ko ngā Hunga Take Whaipānga me ngā Pūtea Tautiringa | Class Actions and Litigation Funding* (R147, 2022).

Key trends

Increasing demand

More than half – 56% – of the class actions that occupied the courts' time in New Zealand between 2020 and 2023 were new filings.[2] We expect this rate of growth to either be sustained or accelerate, and for the litigation to become larger and more complex.

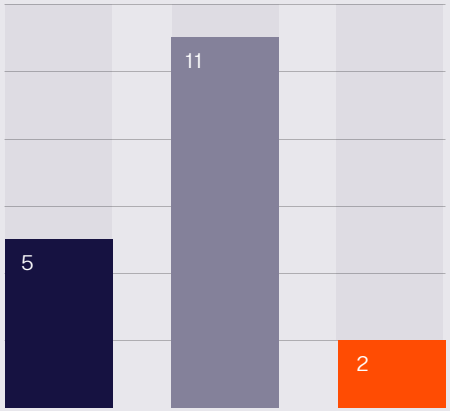
Increasing diversity

Shareholder or investor class actions, and insurance-based class actions have dominated the types of class actions before the courts from 2020 to 2023. But the claims we are seeing are increasingly diverse, including class actions raising issues with product liability, banking or consumer credit, public powers and employment law. We expect this diversification to continue, and we identify future risk areas in this publication.

Litigation funder activity continues

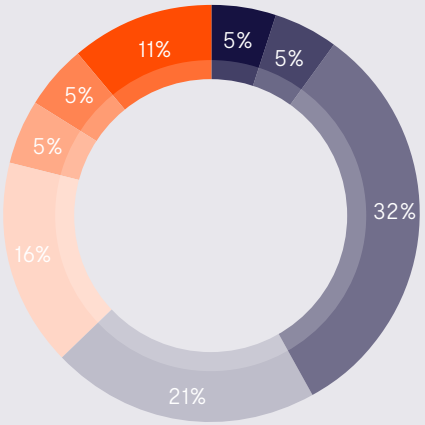
The main handbrake on funder engagement in New Zealand is the relatively small size of potential claims relative to opportunities in other markets. While this will likely preclude the fever pitch of activity that has occurred in Australia and elsewhere, funder interest in New Zealand is high when the right conditions are met.

New class action proceedings filed*



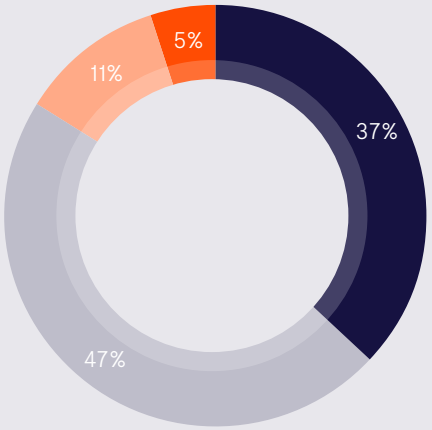
*High Court or lower courts

Types of class action



- Employment
- Product Liability
- Insurance
- Shareholder/investor
- Public powers
- Banking/consumer credit
- Privacy
- Other

Class action cases that received funding 2020-2022



- Received funding
- Did not receive funding or it is unclear
- Signalled intent to engage funder
- Attempted to engage funder

2. Calculated based on the filing dates for class action proceedings where a judgment was released between 2020-2023. But not necessarily a comment on whether the Court permitted it to be bought as a class action.

A funder will typically seek out cases:

- with a potentially *large* plaintiff class;
- where *each* potential plaintiff's claim may be small on its own, but the *aggregate* of all plaintiff claims will be material;
- where unlawful conduct is clear or more easily proved, or even admitted by the target defendants – this makes regulated industries and listed companies particularly attractive class action targets;
- conversely, where *compensation for breach is not automatic* – or is not fully realised – by the relevant regulatory response; and
- with "*deep pocket*" defendants – or defendants who are likely to be able to access insurance to meet any liability in the claim – such as many directors of large companies.

Unresolved relationship with regulator action

While there is scope for private class actions and regulatory enforcement actions to be complementary, the interface in New Zealand is largely unresolved. But recent trends indicate a need for greater clarity in this area – particularly in circumstances where the regulator has already obtained compensation for affected parties.

This friction is demonstrated in two recent contexts:

- the High Court's refusal of a request by the Financial Markets Authority (FMA) that the FMA have its claims for breach of the Financial Markets Conduct Act 2013 (FMCA) arising out of the collapse of CBL Insurance (CBL) heard before, and separately to, the shareholder proceedings; and
- ANZ and ASB – after settling with the Commerce Commission having admitted breaches of the Credit Contracts and Consumer Finance Act 2003 (CCCFA) and compensated the affected borrowers – now each facing a borrower class action arising out of the same conduct.

Unregulated and unlegislated

New Zealand class actions, although becoming progressively more common and despite the fact that the Law Commission has provided a policy model, are still unregulated and almost wholly unlegislated – an omission that puts us out of step with comparable overseas jurisdictions, such as Australia, Canada, the United Kingdom and parts of Europe.

Rules unfit for purpose

Litigants have generally brought class action proceedings as "representative actions" under r 4.24 of the High Court Rules 2016, a rule that simply permits one person to represent a class of persons having the same interest in a proceeding.

There is no legislative provision for the more sophisticated class action options available overseas, such as mechanisms to deal with competing class actions, court-sanctioned settlements, and the use of common settlement funds. This absence will have a cost. It will mean that class actions in New Zealand will typically involve a number of procedural skirmishes before they can sufficiently get off the ground – that will add to the parties' costs, both financial and in terms of time, in what are already challenging proceedings.

The courts have been left to "fill in the gaps" in r 4.24 to enable class actions to proceed smoothly and fairly. They have done so out of necessity on an ad hoc basis as cases arise.

Two meaningful precedents have been established through this process in recent times.

"Opt-out" proceedings

Class actions initially proceeded on an opt-in basis, meaning that only those who had signed up would form part of the class. However, the Supreme Court endorsed opt-out proceedings in *Southern Response Earthquake Services Ltd v Ross*, allowing those who shared a common interest in the proceeding to automatically become a part of the class unless they formally opted out of the action.[3] The availability of opt-out proceedings appeals to litigation funders, as it increases the prospect of a larger claimant class, and ultimately a larger damages award.

Common fund orders

The courts have also addressed the issue of potential "free-riders" in opt-out proceedings. The concern was that individuals may financially benefit from the class action without contributing to the costs of it because they did not specifically agree to the litigation funding contract. The Supreme Court left the issue but explained that a common fund order, in which costs can be deducted from any class member awards before the proceeds are distributed, was one technique which may address it.[4] The High Court has since confirmed it has jurisdiction to make these orders.[5]

3. *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, [2021] 1 NZLR 117.
4. *Southern Response Earthquake Services Ltd v Ross* [2020] NZSC 126, [2021] 1 NZLR 117 at [60] and [62]. But as the High Court had not dealt with the application at the time, it did not comment on its availability here.
5. *Simons v ANZ Bank NZ Ltd* [2022] NZHC 1836 at [168].

Class actions & retail consumer finance law

The Commerce Commission recommended that any statutory class action regime should be designed to include appropriate protections for self-reporting entities and parties entering into settlements, as well as leniency applicants.

The borrower protections delivered by the CCCFA have increased the risk to lenders of facing class actions – even if the conduct in question was self-reported and has been dealt with by the Commerce Commission.

This is already the experience of some New Zealand banks. And it raises an important question of whether class actions which proceed following a settlement with the regulator may potentially discourage self-reporting of CCCFA breaches by some lenders.

The aim of the 2019 amendments was to better protect kiwi consumers against debt spirals and predatory lending through a combination of new affordability and suitability regulations, the introduction of a revised Responsible Lending Code, increased enforcement scope, tougher penalties for breach, and direct personal liability for directors and senior managers.

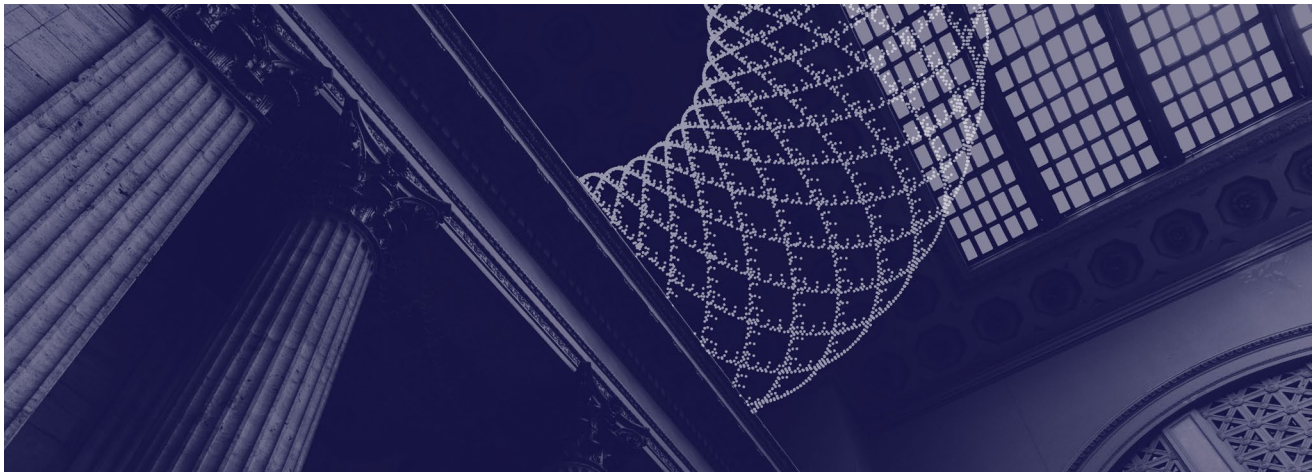
Disputes under the CCCFA fit the class action model for a number of reasons:

- CCCFA breaches may affect a large number of borrowers, creating a natural – and potentially large – "class" of claimants for litigation;
- while each individual claim against a lender may be small (and so not worth pursuing), the potential aggregate liability across all affected borrowers may be significant;
- CCCFA compliance is technical and burdensome – lenders may breach their obligations through inadvertent error or automated process failures; and
- regulatory responses to CCCFA breaches are publicly reported by the Commerce Commission, providing a "pathway" to lawyers and funders considering class action claims.

The Commerce Commission, in its submission to the Law Commission's 2020 consultation on class actions and litigation funding, supported class actions as a tool complementary to regulatory enforcement. But it also noted that the prospect of follow-on class action proceedings in competition, credit, fair trading and economic regulation may make businesses more reluctant to self-report to the Commerce Commission or to reach settlements with regulatory bodies.

The Commerce Commission recommended that any statutory class action regime should be designed to include appropriate protections for self-reporting entities and parties entering into settlements, as well as leniency applicants.

While the Law Commission acknowledged this submission, it did not consider that it was appropriate to address the concern in its proposed Class Actions Act (which it intended as a procedural piece of legislation). But it suggested this concern might be more appropriately dealt with in other legislation.



Lessons from the New Zealand experience to date

ANZ identified that some of the automated customer loan variation letters sent between 30 May 2015 and 28 May 2016, contained the wrong information on matters, including the total amount payable, the interest payable, the amount of the payment, the number of payments remaining, and the date of final payments.

When the errors were brought to the bank's attention by customers, ANZ took corrective measures and reported the conduct to the Commerce Commission in June 2017.

ANZ reached a settlement with the Commerce Commission in 2020 under which ANZ agreed to pay the affected individuals from a $35m remediation fund – the largest settlement the Commission has obtained from a single bank – and admitted a breach of s 9C(2)(a)(iii) of the lender responsibility principles of the CCCFA by failing to take sufficient steps to ensure that the loan variation letters were correct. The Commission accepted that the bank's breaches were inadvertent and not reckless.

Despite this, a class action was filed against ANZ (and ASB, which had also settled with the Commerce Commission on similar terms after a similar issue – but for breaches of different sections of the CCCFA). The action alleges that, because both banks breached (and remain in breach of) certain disclosure requirements pertaining to when a credit contract is varied, affected borrowers are not liable to pay any borrowing costs for the period during which the breach persists. The class action is jointly funded on a success fee basis by Australian based funder, CASL Management Ltd, and New Zealand based funder, LPF Litigation Funding No. 33.

ASB and ANZ are both defending the class action on multiple grounds – including that the borrowers in question have already received remediation payments, the effect of which is that they have paid less than would otherwise be owed under their loan contracts. No loss or damage has therefore been suffered, so no further relief is due.

However, already the lenders' experience in this case points to the need for more explicit rules giving appropriate protections to lenders who self-report breaches in future reforms.

Take-outs for lenders

We expect litigation funders (and lawyers) will continue to look for opportunities to pursue class actions following reported breaches of the CCCFA.

The main take-out for lenders is to be aware from the identification of a breach that going through the statutory reporting and settlement process, even including financial remediation for the victims, will not protect them from being sued in a class action for the same conduct.

As a result, it is important lenders consider class action risk if they identify any actual or potential CCCFA breaches, and bear in mind this risk when addressing the potential breach, including when designing remedial steps.

Lenders should also notify their insurers when any actual or potential breaches are identified – no matter how minor and no matter any remedial moves they have already made.

Data breach class actions in New Zealand only a matter of time

A data breach class action is yet to be filed in New Zealand, but they are becoming well-established in Australia. We expect it is only a matter of time before the same happens here.

As digitisation becomes entrenched in almost every aspect of our lives, and cybercrime becomes ever more sophisticated and endemic, anxiety about data security is emerging as a hot button issue.

Research by the Privacy Commissioner's Office, for example, shows two out of three New Zealanders chose to boycott at least one online service in the past 12 months out of privacy concerns.

The risks for data holders are large:

- they will feel the heat from consumers if their data is breached;
- they are increasingly likely to be victims of cybercrime; and
- insurance cover for data breaches can be tricky and cannot always be assumed.

Instead, businesses will have to rely on the strength of their data security measures, robust internal processes including those to minimise human error, and sensible risk mitigation policies relating to what customer data is retained and for how long.

These precautions will become increasingly important because, in the context of increasing data security risk, litigation risk will also increase.

A data breach class action is yet to be filed in New Zealand, but they are becoming well-established in Australia. We expect it is only a matter of time before the same happens here, given our trajectory of cyber spills and cybercrime.

Two key trends emerge

Increasing data theft – We are perhaps now accustomed to the risks of compromised passwords, phishing, and Ransomware. But data attacks are continuing in more sophisticated ways and on a larger scale, and are translating into data theft. Reported privacy breaches catapulted 41% in the last two years and New Zealand sustained its biggest data hack to date in the Latitude Financial leak, which affected around 20% of our population, as well as individuals in Australia.

Growing pool of remedies for privacy breaches – There is a growing pool of remedies available for breaches of privacy flowing from several causes of action:

- the Privacy Act 2020 provides for an individual or a class of individuals to make a complaint to the Privacy Commissioner who may then commence proceedings at the Human Rights Review Tribunal for a declaration of interference with privacy, orders restraining or to remedy the interference, and damages. With increasing and significant penalties being handed down for privacy breaches overseas, we may see greater statutory damages made available under the Privacy Act to give that remedy more bite;
- the tort of invasion of privacy is available at common law where an individual's private information has been made public in a manner that would be highly offensive to a reasonable person; and
- New Zealand's consumer laws can also be invoked, with all the usual remedies, where a breach involves, or arose through, a failure to honour contractual obligations with customers or a duty of care to customers.

However, there are some holes in the system. There is no effective statutory compensation regime for individuals affected by a data breach at a private business. The Privacy Act recognises that damages may have been incurred but does not have a mechanism to compensate the affected parties.

And a class action may be the most appropriate and obvious format in circumstances where the data breach:

- involves large volumes of data;
- affects a large number of people (creating a large plaintiff class); and/or
- results in losses or harm which may not justify the cost of litigation on an individual basis but which, in aggregate, may be substantial.

Three high profile class actions from Australia illustrate these trends

01 OPTUS

Optus class action

The Optus class action commenced on 21 April 2023 arose out of a cyberattack in September 2022 which compromised the private data of approximately 9.8 million current and former Optus customers.

The proceedings were brought against a number of entities within the Optus Group alleging a failure to protect, or take reasonable steps to protect, customers' personal information.

The allegations include that Optus breached:

- its contract with Optus customers;
- Australian privacy principles, contained in the Privacy Act 1988;
- Optus' duty of care to its customers; and
- Australian consumer laws.

The Optus class action is backed by a ligation funder. But that funder has not been named by the acting law firm.

02 medibank

Medibank class action

A number of class actions have been filed against Medibank, an Australian private health insurance provider, for a data breach announced on 13 October 2022.

The breach affected approximately 9.7 million current, former and prospective customers, resulting in access to personal information including names, addresses, phone numbers, identification documents and medical records.

Like the Optus class action, the Medibank class action reflects the scope of allegations that may be brought for a data breach. Alongside alleged breaches of contract, and Australian privacy principals and consumer law, the Medibank class action also alleges breaches of Australian private health insurance legislation and prudential standards.

The Medibank class action is also backed by an Australian based funder: Omni Bridgeway.

03 LATITUDE

Latitude class action

Latitude Finance, a consumer finance provider, confirmed that the details of some 14 million customers were stolen in a cyberattack in March this year.

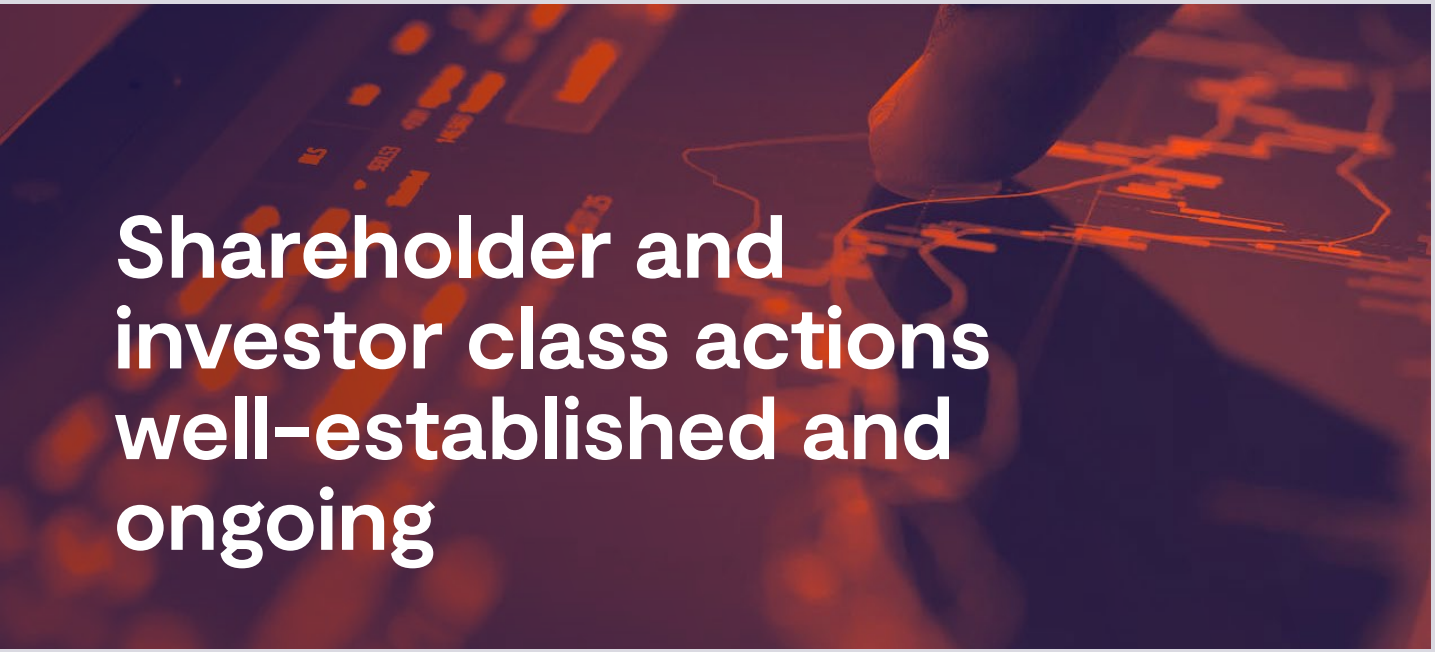
This includes 7.9 million driver licence numbers, 53,000 passport numbers, 6.1 million customer records containing personal information, and the monthly financial records of less than 100 customers.

Two Australian law firms are seeking current and former Australian and New Zealand customers to register for a class action relating to this breach. It is not yet clear how this action is being funded, but we expect, at the very least, there will be arrangements in place for the lawyers to recover their fees from any damages awarded or secured in a settlement.

Take-outs for New Zealand businesses

The Australian data breach class actions are a warning to New Zealand businesses to ensure their data security measures are up to standard. Effective risk minimisation will require:

- security measures to prevent and respond to data breaches, including robust internal processes to minimise human error;
- sensitivity in the use of customers' confidential information; and
- ensuring that no customer data is stored unnecessarily.



Shareholder and investor class actions well-established and ongoing

Shareholder and investor class actions are reasonably well-established in New Zealand but have been largely confined to insolvency situations.[6] That is now changing, and we expect the rate of change will accelerate.

That is the experience in Australia and other similar jurisdictions, partly reflecting the emergence of a more activist shareholder culture and more demanding disclosure requirements – both trends which are also evident here.

While we do not anticipate an Australian-style explosion of shareholder or investor claims, we do expect to see more class action litigation against solvent trading entities in the near future.

The New Zealand Exchange (NZX) disclosure obligations, the FMCA, and the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021 create scope for class action claims against listed companies in the event of a reporting error or omission.

Current examples are the a2 Milk Company (a2) class action and the CBL class action, both recently before the New Zealand courts, and both featuring dual-listed companies. We discuss these below.

Read our commentary: Dual listed a2 not required to do battle on both sides of the ditch.

The a2 Milk Company class action

a2 faces multiple shareholder class actions in Australia for statements to the Australian Stock Exchange (ASX) and the NZX in late-2020 and 2021 regarding its revenue and earnings forecasts for FY21.

The shareholders allege that a2 ought to have been aware that documents it released to the ASX and subsequent representations it made did not take into account factors that would affect the company's performance, meaning that a2 engaged in misleading or deceptive conduct in breach of the Australian Corporations Act 2001, and breached its continuous disclosure obligations.

Two class actions were filed, the first in late 2021 and the second shortly after. In mid-June 2022, the Australian courts consolidated them into one proceeding.

Earlier this year, the Auckland High Court heard a request by a New Zealand shareholder (Mr Whyte), for leave to commence an opt-in class action in New Zealand in respect of the statements already the subject of the Australian shareholder litigation.

The Court granted the application but immediately stayed the proceedings under s 24 of the Trans-Tasman Proceedings Act 2010.

While this looks like a pyrrhic victory for Mr Whyte, the decision is important as it protects dual-listed companies from the costs of simultaneous litigation on both sides of the Tasman, and the case may be revived after the resolution of the Australian class action.

6. We note that the long-running Feltex case, filed in 2008 on behalf of some 3,600 shareholders against the directors of Feltex Carpets Limited and its former private equity owner, Credit Suisse, finally came to an anti-climactic end in 2021 when it was struck out for claimant's failure to provide security for costs.

The CBL class action

Two class actions were brought against CBL's directors to obtain compensation for shareholder losses arising out of the company's collapse in 2018. Institutional investor, Harbour Australasian Equity Fund, and Australian based Argo Investments Limited are both named as representative plaintiffs.

At issue are alleged false and misleading statements in CBL's Initial Public Offering (IPO) documents from September 2015, and an ongoing continuous disclosure breach in failing to disclose information about CBL's financial position to the market.

A stage 1 liability phase for both proceedings was set down to be heard next year, but the Auckland High Court agreed on 9 June 2023 to discontinue the proceedings, subject to an out-of-court settlement agreed between the parties. The Court will hear further arguments on how to distribute the funds on 11 July.

Some of CBL's directors still face claims from the FMA.

Funding arrangements

Across the Tasman, we are also seeing "contingency" funding arrangements emerge more explicitly for shareholder and investor class actions in the absence of a litigation funder.

The first Australian a2 class action is not backed by a funder per se. Lawyers are acting in the proceeding on the basis the representative plaintiff will seek a "Group Costs Order", currently proposed as 24% (including GST).

If the Australian court grants the order, legal fees will be paid as a percentage of any settlement amount or award in the proceeding.

Climate change class actions a fast-evolving activist tool

Climate change class actions are an established tool of climate activists overseas. Although they are yet to reach New Zealand shores, they are surely coming.

We expect any successes in overseas actions will embolden litigants and shape any claims brought in New Zealand.

With that in mind, we identify key trends in climate litigation here and internationally to provide an insight into future risks and opportunities.

Widening range of targets

Government entities were the first targets of climate action across most jurisdictions, but claims are now being brought against a range of defendants, including private corporations, trustees and directors. A New Zealand example is the claim brought by Mike Smith, an activist and a spokesperson on climate issues for the Iwi Chairs Forum, against seven companies for their contribution to climate change.[7]

Climate change class actions specifically are following a similar trend overseas, with the range of targets widening from government entities to private corporations and directors.

Broadening scope of claims

Climate change litigation can involve a number of different points of attack.

- **Insufficient climate ambition**, resulting in failure to reduce emissions or to achieve emissions targets. The stand-out case in this regard was taken by Milieudefensie (Dutch "Friends of the Earth") in the Hague District Court, resulting in a finding that Royal Dutch Shell (RDS) failed to adequately reduce its carbon emissions in breach of an unwritten duty of care found in the Dutch Civil Code. RDS appealed that decision in July 2022.
- **Challenges to high emissions projects**. An example is the class action filed in 2020 on behalf of "young people everywhere" which applied (unsuccessfully) for an injunction to prevent the Australian Government from approving a coal mine extension. Other general climate-related proceedings have challenged decisions to approve an emissions-heavy project or the planning and permitting decisions that allowed the proposed development, or have sought to prevent a project approval being implemented.
- **Failures to disclose or manage climate change risk**. A class action was filed in 2020 against the Australian Government for allegedly failing to disclose the climate-related risks attached to its sovereign bonds. This action amalgamated actions based on allegations of inadequate financial disclosures related to climate change risk with class actions related to ASX disclosures. The introduction in New Zealand of extensive mandatory climate-related risk reporting requirements will create a new source of exposure for reporting entities. Investors may be able to place greater pressure on reporting entities under this framework and those that are not reporting may face even greater exposure.
- **"Greenwashing"**. Businesses are increasingly being scrutinized for the way they present their "green" credentials to consumers and investors. Claims about an entity's environmental sustainability that are unsubstantiated, exaggerated, false or misleading, whether deliberately or not, put their makers at risk of complaints, reputational damage, regulator involvement, and litigation risk.
- **Direct actions against directors.** Client Earth filed a "world-first" derivative action in 2022 against the Shell Board, alleging that the 11 directors had breached their legal obligations under the UK Companies Act by failing to adopt and implement an energy transition strategy that aligns with the Paris Agreement. The High Court of England and Wales initially dismissed the application. But Client Earth has confirmed it will ask the court to reconsider that decision by way of an oral hearing.

  The Client Earth claim was backed by institutional investors with shareholdings in RDS, including: UK pension funds Nest and London CIV; Swedish national pension fund AP3; French asset manager Sanso IS; Degroof Petercam Asset Management (DPAM) in Belgium, and Danske Bank Asset Management, Danica Pension and AP Pension in Denmark.

  New Zealand directors owe analogous duties as in the UK to promote the success of the company and to act with reasonable diligence, skill and care.

7. Chapman Tripp is acting in this proceeding.

Variety of remedies sought

Litigants in climate change proceedings will often be more interested in forcing changes of behaviour in their targets rather than seeking the recovery of damages or financial compensation. A wide range of remedies are potentially available, including:

- **Orders** – these will generally relate to climate commitments. The Hague District Court, for example, ordered RDS to reduce its global emissions, and those of the end-users of its products, by 45% against 2019 levels by 2030.
- **Declarations** – claimants have also sought declaratory remedies, asking the Courts to clarify climate-related rights and responsibilities.
- **Injunctive relief** – this is an important remedy in climate change litigation, albeit not a particularly successful one to date:
  - the High Court of England and Wales refused a mandatory injunction sought by Client Earth to require Shell to adopt and implement a climate risk strategy, ruling that it would be too imprecise to enforce; and
  - the New Zealand Court of Appeal declined to provide the injunctive relief Smith sought because it would not meaningfully address the harm alleged which would require institutional expertise, democratic participation and democratic accountability that the courts could not achieve.

Different funding behaviours

Climate change litigation, because it is not financially motivated and is not seeking direct, personal compensation, tends not to attract commercial litigation funders. Instead, these claims are often brought by environmental groups or charities, or advocacy organisations. As with Milieudefensie (a Dutch environmental organisation) and UK Client Earth (an environmental charity) for example, these groups will typically use a mix of applying to sympathetic funding bodies, appealing to individual donors and pursuing crowd funding techniques.

Where to from here?

The New Zealand Law Commission did not make any recommendations in its Class Actions and Litigation Funding report on whether a new regime may enable environmental groups to bring climate-related class actions, although at least one submitter suggested this was a possible outcome.

But we do not see the existence, or absence, of a formal regime as having any meaningful impact on whether litigants will bring a climate-related class action in the future here. The trends overseas demonstrate there are other opportunities available within the existing legal framework for climate change objectives to be pursued through the courts.

Given this, entities here should be actively assessing and managing litigation risks from climate change, including:

- formalising processes for identifying, assessing and managing climate-related risks at the executive and board level, including formal disclosure of risks if required within the new mandatory climate-related disclosure regime;
- contemplating climate-related litigation as within the entity's transition-related risk, including disclosing this in mandatory climate-related disclosures if required;
- providing regular training on the risks, responsibilities and duties associated with climate-related disclosures; and
- ensuring that directors of companies ensure that their businesses are identifying "nature-related risks" where these are foreseeable and material for their businesses, and equally take any such risks into account in their decision making.

Read our legal opinion: New Zealand director duties to manage nature-related risk and impact on natural capital.

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