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Litigation Forecast 2026

Shaping New Zealand's future

MinterEllisonRuddWatts.

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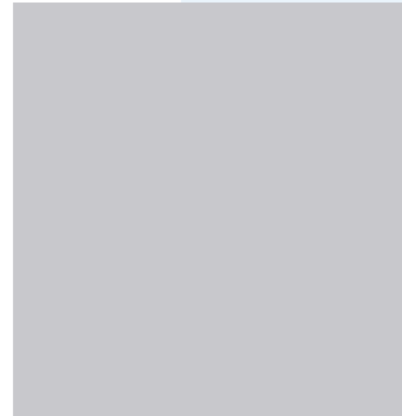


Introduction

Major changes are afoot for litigation and dispute resolution in 2026.
In our litigation forecast, our experts take an in-depth look at the following:

- New High Court Rules will deliver fundamental changes to the way in which court proceedings are conducted, intended to reduce the time and cost of litigation. Proportionality becomes the touchstone, factual evidence moves earlier, document discovery is more focused and cooperation is expected, shaping strategy and resourcing from day one.
- Regulatory settings are also shifting. Competition reforms will recalibrate merger control, market power and predatory pricing, while the interface with unconscionable conduct remains a live enforcement theme. CoFI deepens expectations around culture, systems, product governance, and remediation.
- A significant decision on eligible investor certificates has clarified the limits on the FMA's powers and underscores the limits of regulatory "guidance". Uncertainty on when licensed institutions should self-report issues keeps materiality front and centre.
- Health and safety policy points to fewer prosecutions, even as courts continue to refine key duties. At a practice level, employment law reforms, high income dismissal thresholds, a reframed approach to procedural fairness, exit negotiation safeguards, worker status tests and new privacy obligations are poised to spur test cases.
- Climate related disputes are also evolving with the prospect of civil liability claims against activists moving into sharper view. The courts are increasingly having regard to tikanga in a broadening range of cases. Technology and cyber disputes continue to pose increased risks for businesses.

Our Tier 1 Litigation and Dispute Resolution team brings deep experience to New Zealand's most significant and complex cases. With a turbulent year predicted by many economic commentators, we are looking forward to supporting clients through 2026 and beyond.

New rules for litigation

New High Court Rules:

The key changes and what they mean for business disputes

New High Court Rules

A new framework will govern ordinary civil proceedings commenced in the High Court from 1 January. The High Court (Improved Access to Civil Justice) Amendment Rules 2025 mark a significant shift in the conduct of civil litigation intended to streamline proceedings, reduce costs, and advance the proportionate and efficient resolution of civil proceedings in the High Court.

The new regime introduces a suite of reforms to the High Court Rules. The most notable of these are:

- a greater emphasis on proportionality;
- the evidence-first model, where written fact evidence is filed much earlier in a proceeding;
- enhanced disclosure obligations, front loading document disclosure and minimising the need for what has become a time consuming and expensive full discovery process; and
- a judicial issues conference involving the parties and their lawyers at an early stage of the proceeding.

But what does that mean for litigants? We outline the key changes below and offer our predictions for how they will reshape litigation strategy and practice in the years ahead.

Key changes

Overriding objective: Proportionality at the centre

The new regime places proportionality at the heart of procedural decision-making. While retaining the goals of just, speedy, and inexpensive resolution, the new rule provides that, when deciding how the overriding objective applies in any case, the court may consider:

- how best to fairly and expeditiously identify and resolve the issues in dispute;
- how best to deal with the proceeding in ways that are, and at a cost that is, proportionate to the nature of the dispute and the issues in dispute; and
- the need to allocate the Court's resources fairly across the its caseload.

This shift is expected to influence both new and existing discretions under the rules. We expect that the proportionality touchstone will be applied to disclosure from the outset, limiting cases in which full disclosure akin to 'discovery' is required. However, over time, parties, practitioners and the Court will likely apply it to other aspects of proceedings, such as witness statements and trial length.

Duty to co-operate

A new general duty of co-operation applies to parties and their legal representatives. It is embedded throughout the rules as a general requirement and at key procedural steps, including disclosure, judicial issues conferences, and preparation of the common bundle for trial. This duty is intended to encourage a broader cultural shift and reduce the procedural burden of the Court.

Parties and practitioners are expected to engage early and constructively to streamline proceedings, reduce unnecessary interlocutory disputes, and focus in on the core issues in contention.

Taking practical steps to adopt a more collaborative approach and engage constructively, particularly in the early stages of litigation, is in the best interests of parties. It can reduce costs and effort devoted to disputes on matters which could be resolved collaboratively. The Court has a range of tools available to ensure compliance, from procedural directions designed to enforce co-operation, to adverse costs orders.

Evidence first model: A procedural reversal

Perhaps most transformative is the introduction of an evidence-first model. Under the previous regime, discovery (now disclosure) and interlocutory skirmishes preceded the exchange of substantive evidence. This led to increasingly detailed evidence that often stepped through a lengthy chronology of discovered documents. Evidence far exceeded what a witness could recall and often strayed into events that were not directly relevant. The new rules reverse this sequence.

Parties will now be required to:

- **Complete enhanced initial disclosure** at the time of filing initial pleadings. This requires disclosure of all documents referred to or used when preparing the pleading (as per the previous rules) as well as any documents that the party intends, at that point in time, to rely on at trial (or other hearing). It also requires disclosure of "all adverse documents" that the party knows exist or has good reason to believe exist. For corporates, this belief will be attributed to them from officers and employees following the common law rules of attribution.[1] This is likely to require a "check", but not a "search" for known adverse documents.[2]

1. Access to Justice Sub-Committee Memorandum to the Rules Committee of 20 September 2024, at [11(i)].
2. Rules Committee Drafting Instructions for changes to the High Court Rules (9 February 2024) at [23].

- **Serve factual witness statements and the new draft chronology** early, ahead of any further document disclosure and most interlocutory applications. The plaintiff must file its factual evidence by the later of 25 working days after the service of the last "initial pleadings", (the last pleading responding to any affirmative defence or counterclaim), or resolution of any dispositive interlocutory applications. The defendant(s) (and any third party), will then need to file factual evidence by 45 working days later. The Court has discretion to give alternative directions as to timeframes and the order of events where it is satisfied that this will best achieve the overriding proportionality objective. Expert evidence is to be filed later.

Parties may seek further disclosure through targeted requests for documents. These are expected to be addressed between the parties, with the Court becoming involved only where agreement cannot be reached. The Court also retains a discretion to order further, detailed disclosure, akin to discovery, before witness statements are filed. This discretion is most likely to be exercised where it can be established that disclosure is necessary to plead or particularise pleadings or to prepare evidence.

This reversal is intended to encourage early engagement with the substance of a dispute, reduce delays in proceedings resulting from interlocutory applications, and enable the court to tailor directions based on a clearer understanding of the factual and legal landscape of the proceeding.

Dispositive Interlocutory Applications

The rules now distinguish between dispositive and non-dispositive interlocutory applications. Only the former may be determined before, and have the effect of delaying, factual evidence. Dispositive applications are those that would, if determined, either dispose of the proceeding or change the nature of, or parties to, the proceeding, such that it would be inefficient to require factual witness statements and chronologies in advance. They include protests to jurisdiction, summary judgment, strike-out applications and applications for security for costs.

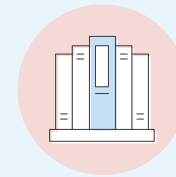
Judicial issues conference (JIC)

Following the service of factual evidence in a defended ordinary proceeding, a date will be set for a judicial issues conference. This is a substantive fixture designed to identify determinative issues and set the course for trial or alternative resolution.

The default agenda for JICs (which can be modified if a Judge directs otherwise) includes:

- identifying the key issues and the parties' positions on them;
- discussing potential steps to settle or minimise the dispute by means of facilitation, mediation or otherwise;
- timetabling and procedural matters to trial;
- whether any further disclosure is needed; and
- resolving, or timetabling and deciding the mode of hearing for, interlocutory matters.

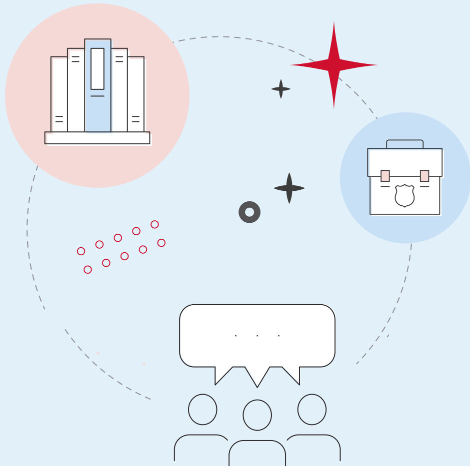
Parties are required to attend the judicial issues conference with their lawyers.



Changes to production of contemporaneous documents

The new regime places greater focus on contemporary documents as the primary source of factual evidence. There will no longer be an expectation that relevant documents need to be produced by witnesses. Instead, relevant documents will come before the court by way of:

- initial disclosure (discussed above);
- the parties' merged chronology (new);
- a narrative of events relied on in each party's opening submissions; and
- the common bundle.



Our predictions

In the short term, we expect a period of adjustment as parties, practitioners and the judiciary test the boundaries and application of the new rules. There is likely to be inertia in the first year or so of the regime before the required cultural shift occurs. Many cases, bought before 1 January, will still be working their way through the old process. We therefore expect a period of two to three years where practictioners and the Court are running two separate systems.

The most significant adjustment for parties and practitioners will be the additional procedural and substantive demands at the outset of a proceeding. Defendants in particular have tight timeframes for disclosure, including to complete checks for adverse documents. Parties and practitioners will need to engage deeply with the substance of their case earlier than under the current regime, with evidence and document review from the outset. We expect this "front loading" of substantive case preparation will:

- front load legal costs for parties, but should reduce the costs of proceedings overall;
- result in earlier resolution of disputes when litigants are faced with increased early costs and a better understanding of their own and other parties' cases, with assistance from Judges at the new JICs; and
- at least initially, result in various disputes over the scope and timing of additional document disclosure. We expect the Court will receive many applications to reverse the order of disclosure and factual evidence in the first year of the new regime until clear guidance has been set by the Court through decisions as to when reversal will be appropriate.

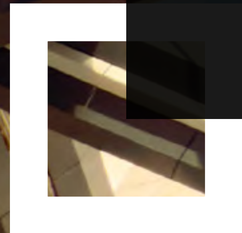
Although not immediately, over time, the new regime will reduce the number of mid-range disputes before the Court. Parties involved in disputes with values of $1 million or less are likely to be deterred from issuing tactical (though valid) proceedings to expedite settlement, given the heavy upfront costs of doing so.

Debt recovery proceedings will for the most part fall outside the scope of the new regime. It applies only to ordinary civil proceedings, not to bankruptcy or liquidation proceedings. Summary judgment applications are also excluded from its ambit. It is likely that proceedings in the Auckland Commercial List, largely being commercial cases with a value of more than $1 million, will be exempt from some aspects of the new regime.

Likewise, we expect parties to very high value and complex factual disputes to experience less of a sea-change. The flexibility embedded into various procedural stages means that these cases may be run in a way that mirrors the previous approach.

For organisations involved in High Court civil litigation, the new regime represents both a challenge and an opportunity. The shift toward early evidence, streamlined procedure, and documentary focus will require parties to engage more deeply, and earlier, with the substance of their case. Those who adapt quickly will be better positioned to manage risk, control costs, and shape proceedings to their strategic advantage. As the new rules come into force, proactive preparation and a clear understanding of the procedural landscape will be essential.

Regulatory and enforcement outlook



A Commerce Act shake-up and enforcement 'hotspot' set for 2026

2026 will see substantive changes to key provisions of the Commerce Act coupled with an ongoing focus on enforcement 'hot spots' such as the prohibition on unconscionable conduct.

Commerce Act shake-up

The Commerce Act changes set for mid-2026 are aimed at strengthening New Zealand's merger regime, addressing concentrated markets and predatory pricing, and streamline Commerce Act processes and reduce uncertainty. The Commerce Amendment Bill was introduced to Parliament in December 2025 and it is currently anticipated to be implemented mid-year.

The key amendments include:

- **Clarifying the substantial lessening of competition (SLC) test:** The SLC test will be clarified to include "creating, strengthening, or entrenching a substantial degree of market power in a market." The change follows recent similar amendments to the Australian legal test for mergers, but will also be carried through to the prohibition on anti-competitive arrangements and the misuse of market power prohibition which also use the SLC test.
- **Combatting predatory pricing:** A new objective economic test for predatory pricing will be introduced. Under this test, conduct by a person with substantial market power will be deemed a misuse of market power if, for a sustained period, it prices below Average Variable Cost (AVC) or Average Avoidable Cost (AAC) or if it prices above AVC or AAC but below long-run Average Incremental Cost or Average Total Cost if the pricing is for an exclusionary purpose. The Bill clarifies that short-term promotional pricing, and other short-term below-cost pricing, including one-off specials, de minimis discounts, or mistaken pricing, are not predatory pricing unless they are part of a pattern of below-cost pricing behaviour over a sustained period.
- **Introducing corrective action orders:** The court will have the power to make orders for corrective action where a person has breached the anti-competitive conduct prohibitions, including the cartel and misuse of market power prohibitions, to avoid or mitigate the adverse effects of the breach or to ensure the breach is not continued or repeated. Only the Commerce Commission can apply for these orders, and they can include making goods, services or information available for supply, reflecting the terms of the order in contracts, or acting in a non-discriminatory manner.
- **Changes to the merger regime:** Legal and procedural reforms to the merger regime will also be implemented as well as expanded powers for the Commission.

Enforcement 'hotspot': The interface between unconscionable conduct and misuse of market power

Unconscionable conduct is one of only six Commerce Commission priorities for 2025/2026 and is expected to be in the spotlight this year. The Commission defines unconscionable conduct as business activity which is a substantial departure from New Zealand's generally accepted or expected standards of business conduct[1]. It has publicly signalled its desire for a precedent-setting case.

In particular, we expect investigations in circumstances where both unconscionable conduct and misuse of market power may be at issue – potentially giving the Commission two bites of the same apple. This approach mirrors recent Australian trends where the overlap between these prohibitions has been tested in litigation.

Australian developments: Lessons from Epic Games and Quantum Housing

In August 2025, the Australian Federal Court handed down its first contested set of decisions under the misuse of market power prohibition, finding Apple and Google breached the law.

Epic Games, the creator of Fortnite, alleged Apple and Google misused their market power and engaged in unconscionable conduct (amongst other matters) in relation to their mobile app distribution and in-app payment systems on their respective platforms. Epic Games argued that:

- Apple and Google had substantial market power which they misused by requiring all apps to be distributed solely through their own app stores and the use of their proprietary in-app payment systems while charging a commission. Apple also prohibited alternative app stores and payment processors and Google hindered alternative app stores and inappropriately imposed Google's payment systems; and
- Apple's and Google's conduct was unconscionable due to their imposition of non-negotiable agreements, exploiting developers' lack of bargaining power and enforcing terms that are unbalanced and not reasonably necessary to protect legitimate business interests.

The Court found that Apple and Google breached the misuse of market power prohibition but rejected the unconscionable conduct claim. It reaffirmed that conduct should only be condemned as unconscionable if it falls, as stated in the Apple decision, "outside societal norms of acceptable commercial behaviour [so] as to warrant condemnation as conduct that is offensive to conscience". In the case against Apple, factors such as Epic's scale, the revenue it derives from non-iOS platforms, its voluntary entry into the contractual arrangements, breaches of its agreements and acceptance of the same terms as it had agreed with Apple on other platforms, weighed against a finding of unconscionability. The Court also found (amongst other reasons) that Apple did not engage in duplicitous behaviour, the terms agreed with Epic were the same as agreed with all developers, Apple was entitled to pursue its legitimate interests in obtaining a return on its investments in building the tools and technologies it makes available to developers, and agency relationships built on standardised terms are a fact of ordinary commercial dealing.

1. Commerce Commission "Unconscionable conduct" (2026).

By contrast, in *ACCC v Quantum Housing Group* (2021), the Federal Court upheld the ACCC's appeal, finding that QHG engaged in unconscionable conduct when dealing with investors in relation to the National Rental Affordability Scheme (NRAS). QHG had devised and implemented a plan to encourage investors to transfer the management of properties that qualified for incentives under the NRAS to property managers who had commercial associations with QHG. The Federal Court noted that the conduct was planned, deliberate and sustained; it exploited the circumstances of the NRAS; it involved a concerted effort to trick investors into switching property managers; and was not a single course of conduct given that the 'plan' developed over time. Notably, the decision acknowledged the interface between, or crossover of standards of business conscience behind the prohibition on unconscionable conduct and the misuse of market power as noted in the article "Two sides of the same coin: Reigniting the interface between Australian competition and consumer protection law" published in the Australian Competition and Consumer Law Journal. The Federal Court characterised Quantum's conduct as, "misusing [its] superior bargaining power," and commented on the interface between unconscionable conduct and misuse of market power:

"Surely to predate on vulnerable consumers or small business people is unconscionable. But why is it not also unconscionable to act in a way that is systemically dishonest, entirely in bad faith in undermining a bargain, ... using a superior bargaining position, [or] ... using significant market power in a way to extract an undisclosed benefit that will harm others who are commercially related to the counterparty?"[2]

New Zealand context

Here in New Zealand, the intersection between unconscionable conduct and misuse of market power emerged in 2024 when IRS International Pty Ltd, an Australian refrigerated containers company, obtained an interim injunction against depot owners, preventing them from increasing their depot access levies for container technicians. IRS International alleged misuse of market power arguing that the defendants were vertically integrated and the access charge squeezed out competitors in the downstream market, and unconscionable conduct arguing that the levy was initially imposed for health and safety costs but the reasons had expanded to include recouping for infrastructure which could not be justified as it does not occur at other depots in Australasia. The High Court acknowledged that while concurrent claims under both prohibitions are uncommon, they are not unprecedented in Australia and the policy underlying the prohibitions is related.

What to expect

The Commerce Commission has indicated, including in its webinar on 2025/26 enforcement priorities, that it has unconscionable conduct cases in the pipeline, particularly involving misleading sales tactics and vulnerable consumers, and will be actively looking for others.

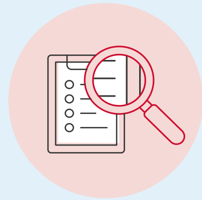
2. *Australian Competition and Consumer Commission v Quantum Housing Group Pty Ltd* [2021] FCAFC 40 at [91].

Regulatory guidance under review:

Lessons from the Eligible Investor Case Stated

2025 saw a greater focus on regulatory guidance with the Financial Markets Authority (FMA) taking the unusual step of asking the High Court to confirm the FMA's guidance on eligible investors (a subset of wholesale investors). The FMA brought a "case stated" application with this being only the second time in the FMA's history that it has sought clarification from the courts in this way.

The decision of the High Court demonstrated a gap between the legislative purpose and plain wording and the FMA's views as to how eligible investor certificates should work. There is inherent difficulty facing regulators in attempting to give guidance to the industry (which is desirable) while not overstepping the boundaries of the legislative regime. This is especially challenging where the law is novel and where there is no judicial guidance yet available. In 2026 and going forward, we may see regulators sticking more closely to the plain wording and purpose of the legislation they administer.



Background to the case stated proceeding: Thematic review of use of the wholesale investor exclusion

Following an increase in complaints and concerns about wholesale offers of financial products, the FMA published its *Thematic review of use of the wholesale investor exclusion* in October 2022. This included its findings on eligible investor certificates, under which investors may qualify as wholesale investors if they certify that they have previous experience in acquiring or disposing of financial products that allows them to assess the merits of the transaction or class of transactions, and to assess their own information needs in relation to the transaction. The certification regime has a confirmation component: a financial adviser, qualified statutory accountant or lawyer must, having considered the investor's grounds for certification, confirm that:

- they are satisfied that the investor has been advised of the consequences of the certification; and
- the confirmer has no reason to believe that the certification is incorrect, or that further information or investigation is required as to whether the certification is correct.

In this thematic review, the FMA detailed the market practices it considered undesirable and issued guidance to address them. Relevantly, the FMA commented that it had found:

- the market relying on incomplete eligible investor certificates including some with grounds that were not capable of supporting the matters certified; and
- evidence of non-compliance with the requirements relating to confirmation of self-certification for eligible investor certificates.

The FMA proceeded to issue guidance to address these concerns, including advice to the market that:

- to meet the eligible investor requirements, an offeror must ensure that the prospective investor's experience is relevant;
- while offerors are not required to independently verify the information provided in an eligible investor certificate, the investor's stated grounds needed to show a clear link between their prior experience with financial products and the transaction in question; and
- there must be no reason to believe the investor lacks the experience certified.

This guidance purported to impose a positive obligation on offerors to assess the adequacy of the investor's previous experience, as set out in the certificate, in acquiring or disposing of financial products and whether that would allow them to assess the merits of the investment and their information needs.

The case stated proceedings: Back to the black letter of the law

In December 2024, the FMA filed a case stated proceeding, seeking clarification from the High Court on the use, confirmation, and acceptance of eligible investor certificates. This proceeding squarely addressed whether the FMA's previous guidance as to an offeror's obligations was legally correct.

MinterEllisonRuddWatts acted for two interveners in the case who intervened to provide a view from the industry as to the correct interpretation. The Court did not accept the FMA's interpretation of the eligible investor provisions in the Financial Markets Conduct Act (FMCA). In short, the Court favoured the interveners' interpretation and held that offerors can rely on eligible investor certificates unless the certificate is clearly invalid (for example, if the stated grounds do not demonstrate the investor has any relevant experience with acquiring or disposing of financial products). The certificate does not need to set out the investor's experience in great detail, or explain how that experience enables them to assess the investment. It must simply state grounds which *could* support the certification. It is only if an offeror has actual knowledge that an investor lacked the requisite experience that they cannot rely on the certificate.

In reaching its decision, the Court emphasised the role of the confirmer in the eligible investor regime. Where the grounds stated in the certificate are "thin" but not clearly incapable of supporting the certificate, the confirmer may seek clarification from the investor. If the confirmer proceeds to confirm the certificate, the offeror is entitled to rely on it.

The Court's decision was essentially an exercise of statutory interpretation. The Court noted that it was not its role to assess policy matters and outcomes, and if there was a need to "re-balance" the eligible investor regime, that was a matter for Parliament.

The issues with regulatory guidance

The Court's decision prompts an important discussion on the role of regulatory guidance and the extent of its influence. Regulatory guidance is published without the checks and balances of the legislature and yet can assume the status of de facto law, as regulated entities work to comply with guidance to avoid being on the wrong side of their regulator – and yet it may be outside the four corners of the law.

While the Court declined to read in the additional duties argued for by the FMA in the case stated proceeding, the Minister of Commerce and Consumer Affairs has separately warned the FMA that its regulatory expectations must reflect the law. In the annual letter of expectations to the FMA for 2024/25, then Minister Andrew Bayly said that the FMA must ensure *"market participants have a clear understanding of their legal obligations, and the distinction between legal obligations and guidance, and that regulatory expectations set by the FMA are properly founded in the law."*

Concerns about the status of guidance were also seen in the market reaction when consulted on the FMA's draft guide on *Fair Outcomes for Consumers and Markets.* Affected industries voiced concerns as to the legal basis and practical effect of this guide, and in particular raised queries as to whether the draft guide would create new rules or compliance obligations. The FMA then stated it had considered industry feedback and intended to clarify its regulatory approach, explaining how its outcomes-based focus will guide prioritisation and enforcement going forward.

Will regulators adopt a more cautious approach?

Given the Court's decision on this case stated proceeding, the expectations set by the previous Minister and concerns voiced within the industry, we may expect to see regulators take a more circumspect approach to the issue of guidance heading into 2026.

CoFI's deep roots: A hot topic for 2026

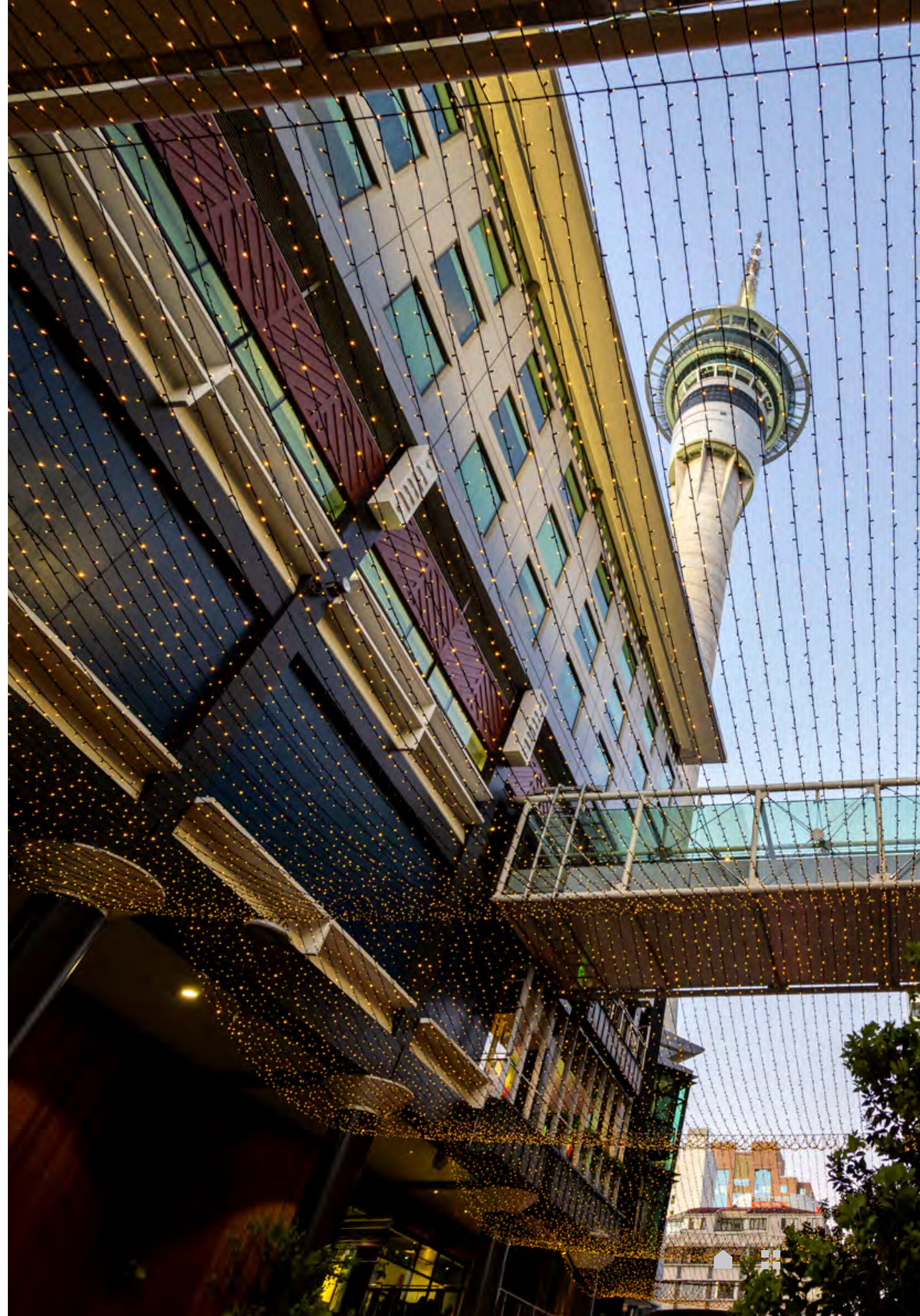
With the Financial Markets (Conduct of Institutions) Amendment Act 2022 (otherwise known as CoFI) coming up to its first birthday soon, the potential breadth of its application is a hot topic for 2026. The FMA will be keen to explore the new ways in which its regulatory remit has expanded.

CoFI introduces a new conduct licensing and oversight regime, targeted at consumer banking and insurance, into the Financial Markets Conduct Act 2013 regime which applies to institutions such as registered banks, licensed insurers and licensed non-bank deposit takers. CoFI focuses on conduct, culture and incentives and centres around the "fair conduct principle" which is defined as including:

- paying due regard to consumers' interests;
- acting ethically, transparently, and in good faith;
- assisting consumers to make informed decisions;
- ensuring that the relevant services and associated products that the financial institution provides are likely to meet the requirements and objectives of likely consumers (when viewed as a group); and
- not subjecting consumers to unfair pressure or tactics or undue influence.

The core duties under CoFI are to obtain and maintain a conduct licence, and within that to establish, implement and maintain an effective fair conduct programme with the key word being "effective" and a duty to comply with that programme. With hindsight being 20/20, the key risks arise where consumers are harmed and the FMA then reviews the entity's fair conduct programme to ascertain whether it was "effective".

There are a small number of obligations that extend to intermediaries as well, primarily relating to the payment of incentives in respect of sales and distribution relevant products issued by CoFI licensed entities.



Some overlap, but there is also expansion. Many breaches of CoFI are likely to also breach the fair dealing provisions in the Financial Markets Conduct Act (FMCA). For example, for misrepresentations, the fair dealing provisions are likely to be engaged as well as the obligation under CoFI to ensure that the methods by which relevant services and products are provided operate in a manner consistent with the fair conduct principle.

However, the fair conduct principle does not stop there. CoFI may allow the FMA to identify and pursue breaches which relate specifically to failures of processes, policies, systems and controls. For instance, it could be alleged that an entity's fair conduct programme is not "effective" relying on deficiencies in processes, policies, systems and controls as evidence. In line with this, the FMA has publicly signalled that it is particularly focussed on systems and controls, using as an example, the misapplication of multipolicy discounts due to system failures.

Australian assistance: What may constitute a breach of CoFI duties?

While there is no New Zealand case law on CoFI breaches yet, Australian case law provides a useful analogy. Under the Australian Corporations Act there is an obligation to do all things necessary to ensure that financial services are provided efficiently, honestly and fairly. There is some helpful case law based on this provision which identifies the types of things which may trigger a breach of CoFI obligations:

- In the case of *ASIC v Commonwealth Bank of Australia*[1], the Commonwealth Bank of Australia (CBA) had not provided its customers with fee waivers, interest rate discounts and bonus interest as part of its AA Plus Package. In addition to an admission of misleading and deceptive conduct, CBA also admitted that it had breached its obligation to *"do all things necessary to ensure that the financial services…were provided efficiently, honestly and fairly"* as required under Australian law. If this were to occur in New Zealand, it is possible that this could constitute a CoFI breach. It could be alleged that the fair conduct programme was not effective as the methods by which products were provided did not operate in a manner that is consistent with the fair conduct principle. This would also be a breach of the fair dealing provisions of the FMCA.
- In that same case, the Federal Court also found that CBA's complaints handling process was inadequate as it did not have systems in place to identify complaints about its AgriAdvantage Plus Packages. Again, this could be characterised as a CoFI breach because one of the minimum standards for the fair conduct programme is that records must be kept, to allow an assessment to be made of the financial institution's performance in complying with the fair conduct principle and regular reporting of risks and failures.
- CoFI also may have a role to play in relation to scams. In late 2024, ASIC issued proceedings against HSBC Australia for failing to have adequate controls in place to prevent and detect unauthorised payments and to investigate customer reports in a timely manner. This was alleged to be in breach of the obligation to do all things necessary to ensure that the financial service was provided efficiently, honestly and fairly. As yet there is no decision on this case. However, it is possible that a failure to review whether new technology and practices are reasonably available to protect consumers from scams and implement those measures

1. *Australian Securities and Investments Commission v Commonwealth Bank of Australia* [2020] FCA 790.

may constitute a failure to have in place an "effective" fair conduct programme. One of the requirements and objectives of likely consumers (when viewed as a group) is to have a service that is reasonably free from scams and it is possible that a failure to implement technology and practices that are readily available in the market without a good basis, could demonstrate a failure to have an effective fair conduct programme in place.

- CoFI also impacts product reviews. Failing to conduct a regular review of key indicia of distribution in circumstances where there is evidence that distribution methods were not operating in a manner consistent with the fair conduct principle may result in a breach of CoFI. ASIC brought a case against an Australian company offering credit cards where there were high levels of cancellation. The Court found that the high cancellations demonstrated that the distribution methods were not operating properly and that despite this, no review was undertaken, and the product continued to be offered. If this were to occur in New Zealand, this could be characterised as a breach of CoFI which requires effective policies, processes, systems and controls for regularly reviewing distribution methods to ensure these operate in a manner consistent with the fair conduct principle. The principles likely to be at issue are paying due regard to consumers' interests, acting ethically, transparently and in good faith and ensuring that the relevant services/products are likely to meet the requirements and objectives of likely consumers.
- The fair conduct principle also applies to any dealings or interactions with a consumer including responding to a complaint or handling a claim for insurance. How far this obligation goes is yet to be determined. But for instance, an issue could arise in a litigation dispute where an insurer has actual knowledge that a customer or its experts have made a mistake in relation to assessing the loss and whether it could take advantage of that mistake.

However, the scope of the CoFI regime is wider than the Australian counterpart, primarily because it mandates a principle-based "fair conduct" duty across the entire product lifecycle – from design to service, performance and termination. So it is important to keep across the guidance issued by the FMA too.

What's next

We expect that once the CoFI regime moves into its second year, the FMA will start to shift from its educative phase to a stronger focus on ensuring compliance. In its June 2025 Financial Conduct Report, the FMA made clear the 2025/26 year is focussed on banks and insurers proactively reviewing existing products and services to confirm they align with consumers' requirements and objectives. Where harm has occurred, the FMA expects firms to take action to stop further harm and prioritise any remediation. This includes investing in improvements to controls and technology to fix the root cause.

Having given that indication, it logically follows that the 2026/27 year is likely to herald a step up in expectations by the FMA, on the basis that the regime will have been bedded in. That makes it timely to invest in training and compliance audits now to stay ahead of that increase in focus.

When licensed firms should self-report under s 412 of the FMCA

When must entities regulated by the Financial Markets Authority (FMA) self-report breaches – or potential breaches – of their market services licensee obligations under section 412 of the Financial Markets Conduct Act 2013? The answer is not clear, and that uncertainty has led to a range of different approaches across the industry.

The obligation to self-report is triggered whenever a licensee "*has contravened, may have contravened, or is likely to contravene a market services licensee obligation in a material respect*." Reports must be made to the FMA *"as soon as practicable"* after the licensee forms the belief as to the above matters.

The materiality threshold is a source of confusion. Some entities have adopted a belt-and-braces approach, reporting every breach or possible breach, without regard to materiality while others agonise over materiality. The difficulties are particularly acute as we are yet to have any judicial guidance on the materiality threshold under the FMCA.

Some assess it case by case, weighing the modest benefits of self-reporting – usually just a 5% discount on any penalty that may be imposed – against the potential downsides of dealing with a breach. But caution is warranted. A deliberate decision not to self-report is treated as an aggravating factor if the breach is later discovered and, perhaps more importantly, can sour an entity's relationship with the FMA, which is difficult to repair once damaged. There is also always the risk that the FMA increases its supervision of such an entity.

Recognising the difficulties, the FMA has been carrying out targeted consultation with the industry with some regulated entities on whether agreement might be reached on certain thresholds for when a breach will be material and therefore reportable. Given this is likely to be a theme for 2026, we look at how overseas regulators have approached similar obligations. As we will discuss, however, their guidance is not much clearer, underscoring just how tricky it is to give content to an amorphous concept like materiality.

Australia

Australia's approach to self-reporting for financial services and credit licensees has evolved in a piecemeal fashion, with multiple revisions since the enactment of its breach reporting regime in October 2021. While the legislation is quite different to New Zealand's, it provides useful signposts for the types of things which a regulator would consider material.

Under chapter 7 of the Corporations Act 2001 (Cth), licensees must advise the Australian Securities and Investments Commission (ASIC) of "*reportable situations*" within 30 days once they know, or are reckless as to whether, there are reasonable grounds to believe a reportable situation exists [1].

"Reportable situations" include significant breaches of *"core obligations"*, and the legislation deems a number of breaches significant, including breaches involving criminal offences with certain maximum periods of imprisonment, civil penalty provisions, misleading or deceptive conduct, and any breach that results, or is likely to result, in *"material"* loss or damage to clients. The materiality threshold is not defined in the Corporations Act, however, guidance issued by ASIC says that regulated entities ought to have regard to certain comments made in the Explanatory Memorandum to the legislation, which include that:

- Loss or damage may be financial or non-financial.
- The financial circumstances of the affected person are relevant to determining whether the loss or damage is likely to be material to them [2].
- If a breach affects several people, significance may be established if just one of them suffers a material loss.
- Total loss should be considered, not merely individual losses.
- *"Likely to result in material loss or damage"* is intended to mean that there is a real and not remote possibility that loss or damage will occur as a result of the breach.

These markers still leave considerable room for firms' own judgement and assessment.

For breaches of core obligations, section 912D(5) provides that licensees must assess significance by having regard to:

a. the number or frequency of similar breaches;

b. the impact of the breach on the financial services licensee's ability to provide financial services covered by the licence;

c. the extent to which the breach indicates that the financial services licensee's arrangements to ensure compliance with those obligations are inadequate; and

d. any other matters prescribed by regulations.

Yet the legislation does not – and cannot – specify what number or frequency of breaches makes a matter significant, leaving firms to navigate ambiguity.

1. In some circumstances, licensees have 90 days to report to ASIC. This exception applies where a second reportable situation has underlying circumstances that are the same as, or substantially similar to underlying circumstances of the previously reported reportable situation (RG 78.84).
2. Although the financial circumstances of the affected are relevant to assessing materiality, this does not permit a licensee to delay reporting a breach while attempting to determine each individual client's specific financial position. Where only a small number of clients are affected, ASIC expects licensees to rely on information already within their knowledge to assess whether the loss is material for those clients (RG 78.44).

Canada

Canada's regulatory landscape is fragmented and differs depending on the type of organisation and whether it is regulated at a federal level only, or at both the provincial and federal level.

Banks are subject to reporting obligations under the Financial Consumer Agency of Canada (FCAC) Supervision Framework.[3] Notably, guidance issued by the FCAC provides that banks must report issues that meet the following criteria:

1. The issue must be a breach of a market conduct obligation.
2. The issue would normally be reported to the Bank's compliance division.
3. The issue meets, at a minimum, one of the following:
   - once detected by the Bank, it took longer or will take longer than 120 calendar days to fix and remediate the issue; or
   - the issue affected or affects more than 250 consumers; or
   - the issue was or is ongoing for more than 1 year before the Bank detected it.

These must be reported even though consumers may not have been affected financially or if the issue was caused by an individual employee.

3. Along with authorised foreign banks, trust and loan companies, and payment card network operators.

United Kingdom

In the United Kingdom, self-reporting obligations are principle-based and elastic. The touchstone is Financial Conduct Authority Principle 11. Similar to New Zealand, it requires dealing with regulators in "*an open and cooperative way*" and disclosure of anything of which the regulator would *"reasonably expect notice"*.

More specifically, under SUP 15.3.1 of the FCA Handbook,[4] a firm must notify the FCA immediately upon becoming aware, or having information which reasonably suggests, that any of the following has occurred, may have occurred or may occur in the foreseeable future (amongst other things):

2. *any matter which could have a significant adverse impact on the firm's reputation; or*
3. *any matter which could affect the firm's ability to continue to provide adequate services to its customers and which could result in serious detriment to a customer of the firm; or*
4. *any matter in respect of the firm which could result in serious financial consequences to the UK financial system or to other firms.*

Again, these criteria involve loose concepts of materiality, and significance or seriousness of the consequences, which are left to the judgement of the regulated entity.

Practitioner commentary throughout 2021–2022 characterised this self-reporting duty as a *"minefield"* that demands subjective judgement under uncertainty, prompting some firms to *"report everything"* to avoid hindsight based enforcement, while others take a stricter materiality line at the risk of under reporting. Public guidance pages and law firm notes acknowledge the breadth and vagueness of *"what the regulator would reasonably expect,"* contrasted with the FCA's readiness to sanction failures to notify (with examples of sizeable fines).

The UK's framework incentivises early dialogue rather than codified thresholds; helpful as an engagement principle, but less helpful to assess conduct by. For entities seeking clarity on when a breach crosses a reportability threshold, there are no bright lines.

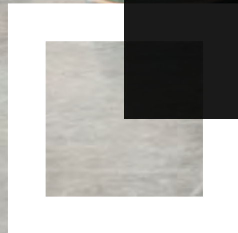
Key takeaways

Across jurisdictions, self-reporting obligations share a common challenge: ambiguity. Whether under section 412 in New Zealand, the Corporations Act in Australia, Canada, or the FCA's principles-based approach in the UK, regulated entities face uncertainty in applying concepts like materiality, significance, and seriousness.

While steps towards greater certainty are welcome, experience overseas shows that even detailed guidance rarely eliminates judgment calls. For now, firms should focus on robust internal frameworks, early engagement with regulators, and documenting decision-making processes. In an environment where bright lines are elusive, objective advice is an important step in the process.

4. A "rule" made pursuant to the Financial Services and Markets Act 2000 (UK).

Workplace and Health & Safety



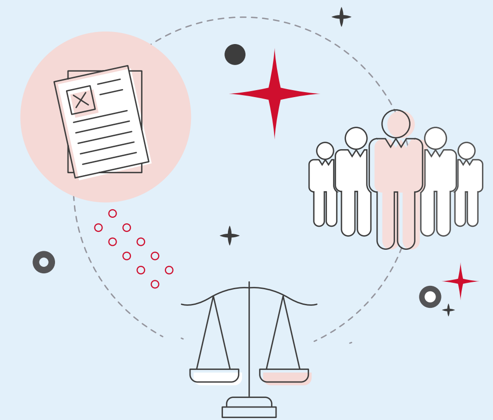
A new era of workplace disputes:

What 2026 holds for employment

New Zealand's employment law framework is on the cusp of its most significant transformation in decades. A suite of legislative reforms – led by the Employment Relations Amendment Bill and related changes – will reshape workplace rights, employer obligations, and dispute resolution pathways. While these reforms aim to modernise the system, they also introduce legal grey areas that will almost certainly be tested in the courts. The Bill will now move through its Second Reading, Committee of the Whole House, and Third Reading, with final passage expected early this year. We expect to see a surge in litigation as the new rules bed in.

High-income threshold to remove unjustified dismissal protections

One of the most controversial changes is the introduction of a high-income threshold. Prior to the Select Committee stage, employees earning a base salary of more than NZD180,000 were to lose the right to bring a personal grievance for unjustified dismissal. However, following the Select Committee process, the threshold has been increased to NZD200,000. In addition, the basis for the calculation has shifted from base "salary and wages" only to "total remuneration", meaning bonuses, commissions, and other comparable benefits are now included. The policy is designed to give employers greater flexibility in managing senior staff, but its implementation raises complex questions. A 12-month transitional period will allow employees captured by the threshold under existing employment agreements to decide whether they wish to opt back into dismissal protections or agree bespoke termination terms, such as enhanced severance.



We expect to see various streams of litigation arising from this change including:

Litigation around good faith obligations
Whether employers properly informed employees and negotiated fairly during the transition period. The principle of good faith will be tested in new ways as courts consider whether employers acted transparently and reasonably during these negotiations.

Compensation classification disputes
The change to "total remuneration", will likely create practical questions about remuneration elements such as bonuses and commission. These are often unknown or variable at the time of assessment, meaning employees may move above or below the threshold year to year depending on what bonus, commission, or other such payments are received.

The interpretation and enforceability of bespoke termination provisions
We expect the courts will test the fairness and validity of bespoke termination clauses. Breach of contract claims, and judicial scrutiny of opt-in mechanisms are almost inevitable. Employers should anticipate that bespoke dismissal terms will be closely examined for compliance with statutory requirements and fairness principles.

Alternative personal grievance claims
As in Australia, we expect employees who are captured by the high-income threshold to bring a range of alternative personal grievance claims, including unjustified disadvantage, breach of contract, and discrimination claims.

Remedy reductions for serious misconduct and contributory conduct

Another key legislative change that will be tested by the courts is the removal or reduction of remedies for employees who are dismissed for serious misconduct or otherwise contributed to the circumstances giving rise to their personal grievance claim.

Employees whose behaviour meets the threshold for serious misconduct will lose all remedies, regardless of procedural defects. However, "serious misconduct" is not defined in the Bill, so we expect litigation over what conduct qualifies, and whether the existing common law definition of "serious misconduct" remains fit for purpose. Will dishonesty, insubordination, or breaches of health and safety obligations meet the threshold? The courts will likely develop a more nuanced interpretation over time.

The courts will also need to interpret what it means for an employee to "contribute" to a grievance and how to quantify reductions in remedies (which can be reduced by up to 100 per cent). While the reform shifts the balance toward employers, procedural fairness will still matter. The courts will likely develop new standards for assessing employer errors and determining whether they undermine the lawfulness of a dismissal.

Procedural fairness redefined

The legislative reforms also redefine procedural fairness itself. The rigid checklist approach will be replaced by an assessment of fairness "in all the circumstances" – including consideration of an employee's behaviour during an employment process. This aims to reduce the impact of minor procedural errors where an employer's overall conduct was reasonable. We expect to see litigation over whether obstructive employee behaviour justifies procedural shortcuts. Consistency in applying comparative fairness across similar cases will be another area to watch.

Employers should not assume that procedural obligations will disappear. While the courts may adopt a more flexible approach, they will still expect employers to act fairly, reasonably and in good faith. The challenge will be determining what constitutes "reasonable" in high-stakes or contentious situations.

Exit negotiation protections to be introduced

Exit negotiations are also being reshaped. The Employment Relations (Termination of Employment by Agreement) Amendment Bill introduces safeguards for pre-termination negotiations, allowing employers to offer exit packages without triggering constructive dismissal claims.

While intended to facilitate smoother exits, disputes will focus on whether conversations fall within the protected scope, compliance with safeguards such as written agreements and access to legal advice, and claims of coercion or breach of good faith where standards are not met. The courts will likely scrutinise whether employees were given genuine opportunities to seek advice and whether negotiations were conducted without undue pressure.

Worker status gateway test: Legislation versus litigation

Worker classification remains a hot-button issue. The proposed gateway test will shield certain independent contracting arrangements from challenge if they meet five statutory criteria.

The Select Committee has clarified that under this gateway test "workers" (which now includes legal entities) should not be restricted from working for other businesses. Changes were also made to allow businesses to vet subcontractors for qualifications or criminal records where justified and confirmed contracts cannot be terminated solely because a worker declines additional work beyond what was agreed.

However, the Supreme Court decision in *Uber BV v E Tū Incorporated* adds complexity. In late-2025, the Court held that four Uber drivers were employees under the Employment Relations Act, emphasising substance over contractual form[1]. This landmark ruling strengthens arguments for employee status in gig economy cases and may conflict with the gateway test.

If the legislation overrides the decision, expect a period of uncertainty and litigation over transitional arrangements and interpretation – especially if there is no retrospective application. Businesses relying on contractor models should review their arrangements now, as the courts will continue to scrutinise the reality of working relationships rather than the labels applied.

Partial pay deductions for partial strikes

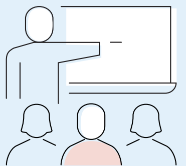
Partial strikes will also be a battleground. The Employment Relations (Pay Deductions for Partial Strikes) Amendment Act 2025 allows employers to deduct either a flat 10 per cent or a proportionate amount from pay during partial strikes. Key litigation risks include calculation methods, notice requirements for deductions, and challenges from unions arguing breaches of collective bargaining rights.

Recent Employment Court injunction cases show this will remain contentious in 2026, with unions likely to pursue litigation to narrow the scope of deductions.

Privacy litigation under new IPP3A

Privacy compliance is another emerging risk. From 1 May 2026, Information Privacy Principle 3A will require employers to notify individuals when collecting personal information indirectly, such as through reference checks or background screening.

Expect disputes over failure to notify individuals, especially where adverse decisions follow, breach of access rights if individuals cannot correct data, and what constitutes reasonable steps for notification. Employers must update privacy policies and onboarding processes to mitigate these risks.



Conclusion

The 2026 reforms represent a bold attempt to modernise New Zealand's employment law framework. But with greater flexibility comes greater complexity. Litigation will play a pivotal role in clarifying definitions, testing boundaries, and shaping the future of workplace rights. Employers should act now – review contracts, update policies, and prepare for a legal environment where proactive compliance is the best defence.

1. *Rasier Operations BV v E Tū Inc* [2025] NZSC 162.

Winds of change:

New case law, but (by design) a trend of reducing H&S prosecutions

Continuing the trend that emerged in 2024, 2025 has seen a number of significant judgments issued by the Courts regarding the application and interpretation of key duties in the Health and Safety at Work Act 2015 (HSW Act).

These have included:

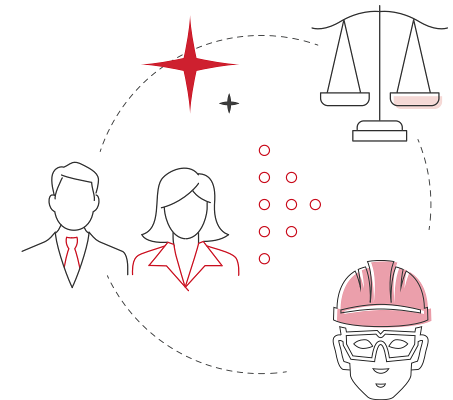
- the penalty decision in *Maritime New Zealand v Gibson* [2025] NZDC 5440 which followed the first successful conviction of an officer of a large corporate under the HSW Act;
- *Whakaari Management Limited v WorkSafe New Zealand* [2025] NZHC 288 in which the High Court considered the duty of a PCBU who manages or controls a workplace under the HSW Act, s 37; and
- *Safe Business Solutions Limited v WorkSafe New Zealand* [2025] NZHC 979 in which the High Court resolved conflicting authorities regarding the primary duty of care in the HSW Act, s 32.

We understand that *Gibson* is the only case of these that has been appealed. In *Gibson*, the appeal of the conviction and sentence was heard in the High Court in June and a judgment is yet to be issued.

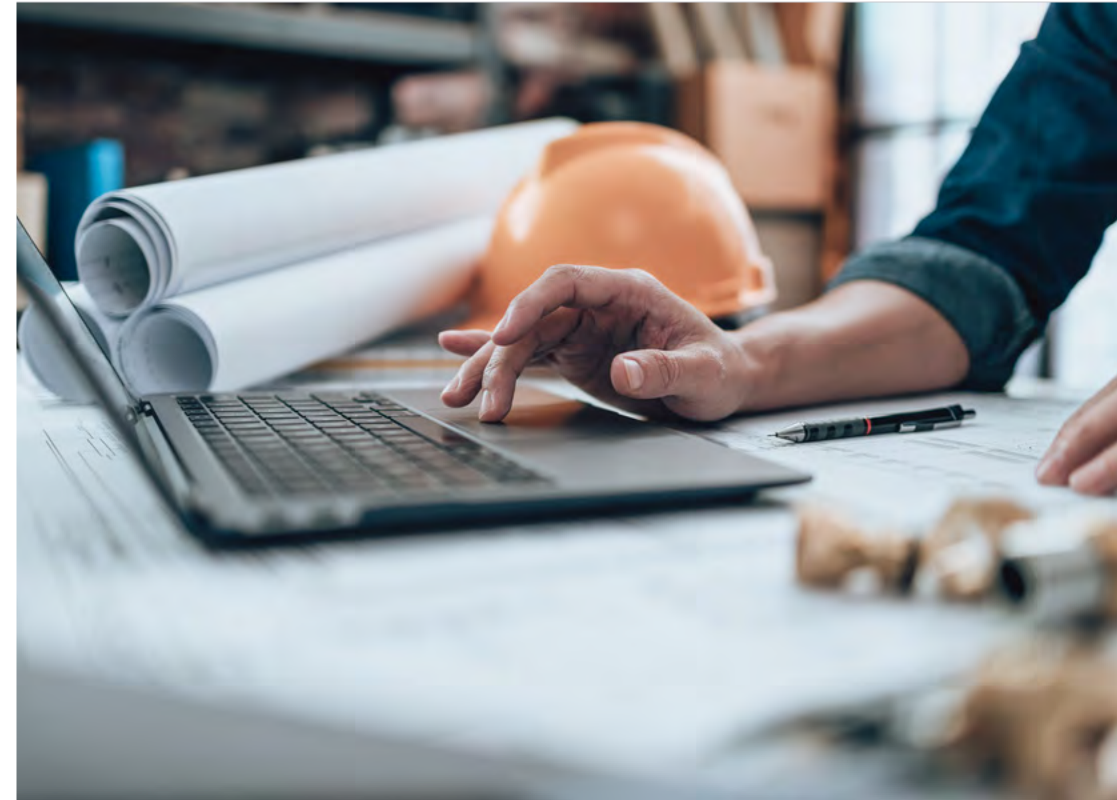
No material increase in officer prosecutions

While the *Gibson* appeal decision will be of significant interest to health and safety regulators, and those in and supporting the governance and executive management communities, we do not expect to see any increase in officer prosecutions to result. This is because:

- health and safety regulators have been slow to prosecute officers since the HSW Act came into force, with prior prosecutions focussing on small, closely held companies and similar organisations where those in governance roles were much closer to (if not personally involved in) the work;



- the circumstances that led to the prosecution of Mr Gibson were relatively unique. Port of Auckland operated in a high-risk industry, with a challenging health and safety record, including a number of fatalities and serious injuries during Mr Gibson's tenure; and
- as noted below, the main health and safety regulator, WorkSafe New Zealand, has been directed to change its focus from being an enforcement agency to one focussed on supporting PCBUs to achieve compliance with their obligations, with prosecution reserved for of clear negligence and causation.



A significant change in regulatory settings leading to a reduction in prosecutions generally

The factors most likely to shape 2026 are the Minister's expectations of WorkSafe and regulatory reform.

As has been well publicised, the Minister of Workplace Relations and Safety issued a Letter of Expectations to the Chair of WorkSafe in June 2025. The letter directs WorkSafe to shift its focus towards being a regulator that supports duty-holders to manage their risks through early engagement with duty holders and by providing a greater amount of guidance to them about how to discharge their duties.

Additionally, the Minister has signalled a change in WorkSafe's appropriation so the Government can more closely control its activities and performance through funding. This includes a specific appropriation category relating to enforcement activities. It will be of interest to note how much of WorkSafe's appropriation is directed towards such activities and how much is directed towards engagement activities in Budget 2026.

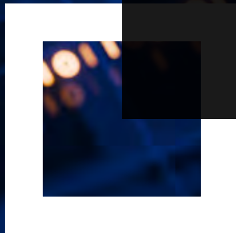
The Government introduced a Bill to amend the HSW Act on 10 February 2026.

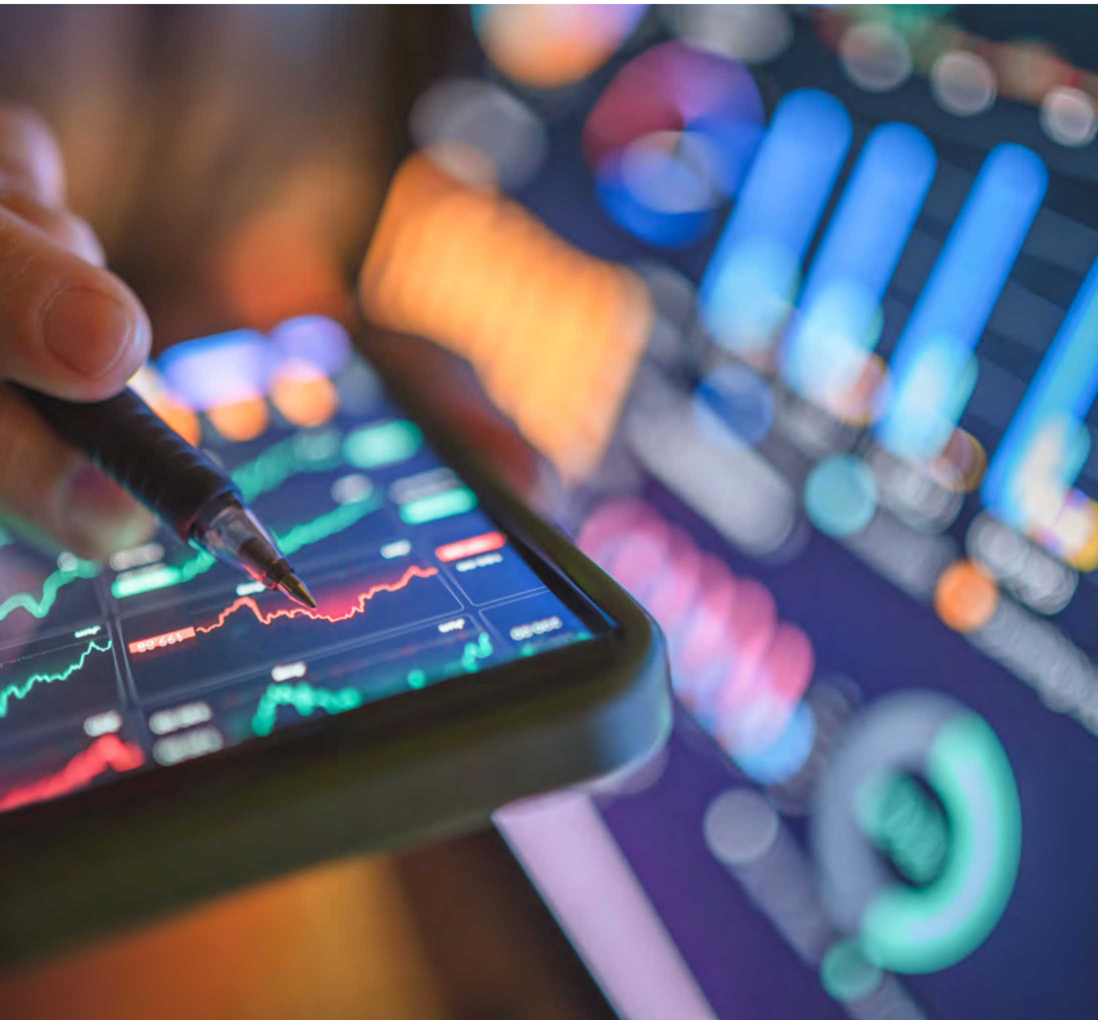
The Bill contains a number of proposed amendments to the HSW Act which, when enacted, will likely result in fewer prosecutions being taken. This is because the bill proposes:

- sharpening the HSW Act's primary purpose to focus on critical risks. Most enforcement action is already focussed on incidents that happen in connection with critical risks, but a narrower regulatory focus on those risks that may cause serious injury, illness or death should give PCBUs confidence that this is where their primary effort should be directed;
- limiting the circumstances in which incidents must be notified to the regulator by introducing language that qualifies what amounts to a notifiable injury or illness. We expect this will result in fewer health and safety incidents coming to the attention of the regulator and being subject to any investigatory action (and, therefore, prosecution or other enforcement); and
- enabling both the regulator, worker representatives, employer representatives and industry/sector representatives to develop approved codes of practice (ACoP) which will provide greater certainty as to what 'so far as is reasonably practicable' means for particular industries. We anticipate this will result in an increase in the number of ACoPs being published. ACoPs will result in a greater number of 'safe harbours' being available to PCBUs to achieve compliance (although it may also be easier for regulators to establish non-compliance when something goes wrong and the benchmark in an ACoP has not been met, and no equivalent level of protection for workers in in place).

Overall, we anticipate the change in expectations, appropriation and regulatory settings is likely (as intended) to result in a reduction in the number of prosecutions commenced by health and safety regulators generally in the coming year. We started to see the signs in late 2025, with a number of investigations concluding with no further action being taken by WorkSafe in circumstances where we would, in the past, have expected to have been served with charging documents.

Technology





Technology, cyber and AI litigation

In 2025, a litigation analytics and research firm, Solomonic, reported that the trend in the number of UK technology disputes showed a significant increase, having doubled in the five years from 2020 to 2024. This was based upon a survey they conducted of technology firms, including 163 firms they identified as most actively engaged in English High Court proceedings.

The rapid growth of the technology sector and the increasing use of AI is reflected in an increasing number of large-scale technology projects, alongside rapid business change. With this comes an increasing risk that projects will fail and problems will occur, resulting in claims and disputes.

We expect that technology-related issues and risks will continue to be a major concern for businesses. While project failures continue to be a major cause of loss, cyber risks and data privacy are increasingly seen as the primary business risks arising from technology, with data breaches and resulting class action claims seldom out of the news. The dramatic increase in the use of AI also introduces new risks.

We are seeing developments in disputes in the following technology-related areas:

- a continued increase in disputes arising from failed or cancelled IT projects;
- claims continuing to arise from cyber-crime, including large-scale claims for breach of privacy; and
- claims arising from the use of AI, including regulatory action and civil claims.

Technology project failures and disputes

We continue to see disputes and claims arising from large-scale IT projects that are cancelled or run well over budget. These claims are becoming more frequent.

Solomonic reported that contract disputes were the most common type of technology disputes, with competition and breach of statutory duty claims (likely to include misrepresentation claims) coming in a close second. This reflects our experience. Most of the technology disputes we see are contract and misrepresentation disputes. We are also seeing new issues and new types of claims.

Solomonic found that the sector producing the most technology disputes in the period from 2020 to the first quarter of 2025 was – unsurprisingly – the technology, media and telecoms sector. Interestingly, this was true of the plaintiff side of claims as well as the defendant side, if claims against individuals are excluded. Technology, media and telecoms firms were not only the primary targets of claims from customers and others – they were the main protagonists as well.

This shows that a significant proportion of technology disputes do not involve a customer bringing a claim against a technology provider – the situation is more nuanced. Increasingly, it seems, technology firms may be willing to sue when they consider their rights are infringed.

The second largest sector giving rise to technology claims is the public sector. This accords with our experience in New Zealand, where the public sector has an unfortunate history of failed technology projects and resulting litigation. The third most common sector is consumer products, then professional services, with manufacturing, banking and finance and construction all having a broadly similar number of claims.

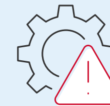
The increase in technology disputes reflects the increasing role and development of technology. It is also likely to reflect the challenges of keeping up. Projects are often complex and may involve new or developing project methodologies or solutions that are bespoke or are being developed as they are implemented.

Other challenges arise from the growing complexity of technology systems and the challenges of integrating them with legacy systems, especially when a solution has not been implemented with a particular suite of legacy systems before. These are added to the challenges, present in all major projects, of identifying and recording a customer's requirements, identifying those that can readily be delivered by the proposed solution, and working with new requirements as they emerge during the build.

Litigation often results when major projects fail or go well over budget. This is because the stakes are high-delays, cost increases and failed implementations can cost millions in wasted costs and can seriously impact businesses. When this happens, executives responsible for the projects may point fingers at suppliers or other parties and seek to justify their criticisms by making formal claims. The large amounts at stake means that the substantial cost of litigation can be justified.

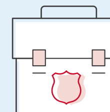
Examples of common technology disputes

Contract disputes



Project terminations

Misrepresentation claims



Arbitration and mediation

Several types of disputes commonly arise in technology projects

Contract disputes

As Solomonic identified in their survey, contract disputes remain the most common type of disputes in technology claims. They encompass a broad range of issues, but the following is a typical story: an organisation selects a technology vendor based on a request for proposal and a formal response, it engages the vendor to deliver the solution, but the implementation fails or becomes too costly or the final product falls short of the organisation's expectations. When this happens, disputes normally involve issues as to whether the vendor took reasonable care to deliver the solution to the agreed specifications, on time and on budget. The vendor's response to a complaint will typically be that the problems were caused by the customer's failure to identify and clarify its requirements, provide resources to the project, be flexible in using processes offered by the solution rather than insisting that the solution flex to the customer's existing processes, and otherwise cooperate to provide information and assistance.

Technology project contracts often feature limitations and exclusions of liability, which assume considerable importance when substantial claims are made. The New Zealand courts generally give these terms their full effect when they are entered into between commercial parties. Many claims that might otherwise have been meritorious are not pursued because of contractual liability limitations that render them uneconomic.

Third-party subcontractors are also increasingly involved in technology project disputes. Their involvement complicates matters, as the contractual arrangements are more complex and disputes involving multiple parties take longer to determine. Settlement discussions are also more complicated.

Well-drafted contracts assist enormously in avoiding disputes and resolving them when they arise. This is particularly important when multiple parties are involved.

Project terminations

Whether and how to terminate a technology project contract when a project has run into difficulty is an important decision. Getting it wrong, especially by terminating (or purporting to terminate) the relevant contracts on an unsound basis, can have serious consequences, especially if the counterparty is able to treat this as an unjustified 'repudiation' and sue for damages.

Some project cancellations can be cynical. It is not unknown for a change in management in a customer to result in the cancellation of large and expensive technology projects that would require a lengthy period to achieve a return on investment, resulting in an immediate apparent improvement in the customer's financial position. This can be combined with attempts to justify the cancellation by reference to challenges and disputes that have arisen in the project.

Misrepresentation claims

We are seeing an increase in claims of misrepresentation or misleading conduct when projects have not delivered to expectations or have failed altogether. These claims are usually made alongside claims for breach of contract, but they are increasingly becoming the primary cause of action, particularly where the contract has been drafted in the interests of the technology provider.

These claims rely on statements or predictions made to a customer during the procurement phase about what it will be able to deliver to meet the customer's requirements as they are understood at the time. In most cases, this concerns specific functionality and performance requirements, although in practice the provider's ability to manage the project – and the customer – are also crucial for success. Statements made in the sales process may prove to be unrealistic, particularly where a customer does not have a clear understanding of its own requirements and processes – which is common with older legacy systems – and replacing them proves more challenging or complex than expected. Specific requirements confirmed as deliverable by a sales teams may cause problems later if the provider is unable to deliver them in the time and for the cost estimated, due to the circumstances of the project.

A reason for the popularity of misrepresentation claims, alongside the ubiquity of contractual limitation or exclusion clauses, is that in New Zealand, misrepresentation claims under the Fair Trading Act are not always subject to those limitations and exclusions, depending on the way they are drafted and the circumstances of the parties. Where a supplier seeks to rely upon limitation or exclusion clauses in defence of an action under the Fair Trading Act, the Court will investigate whether it is fair and reasonable for the supplier to rely on those clauses, whether any relevant rights have been

waived, and whether the exclusions should apply to all of the claims made or only some of them.

Arbitration and mediation

Arbitration in the technology sector is increasingly popular as an alternative to litigation in the courts. The London Court of International Arbitration has reported that approximately six per cent of its annual caseload now involves parties in the technology sector. The advantages of arbitration include the ability for the parties to agree upon an arbitrator with relevant expertise rather than having a judge imposed upon them, relative speed and efficiency, and most importantly, confidentiality of the process and the outcome. Arbitration can be agreed if both parties to a dispute are willing, even where the contract does not contain an arbitration clause.

Mediation is also commonly used to seek an agreed resolution of technology disputes, for similar reasons. The key difference with mediation is that it is non-binding and requires the parties to agree a solution.

Cyber-crime litigation

The National Cyber Security Centre publishes an annual cyber threat report. Its latest report, published in December 2025, identified the following key threats for businesses and individuals in New Zealand:

- State-sponsored actors are actively targeting New Zealand.
- The commercialisation of cybercrime means cybercriminals have more tools – including ‘ransomware-as-a-service’ or RaaS, which has commercialised cybercrime, allowing criminals to ‘rent’ effective attack tools. Ransomware continues to be the most damaging cyber-criminal activity, with direct financial losses recorded during the year of $26.9 million, a significant increase from the previous year, and this is only the reported loss.
- ‘Hacktivists’ are increasingly targeting New Zealand organisations as global conflicts escalate. Distributed denial-of-service attacks have been linked to political events overseas, including actions taken by the New Zealand Government on international conflicts. Financial institutions, media outlets, utilities and transport providers were among the sectors affected, causing reputational harm.
- Cyber criminals are increasingly attacking weak links in supply chains, such as crucial service providers.

Some recent examples include the September 2025 ransomware cyber-attacks upon airports across Europe which caused severe disruptions to check-ins. There were also cyber-attacks in the UK on Marks & Spencer in April 2025 and on Jaguar Land Rover in September 2025, which required them to suspend some operations, and are reported to have resulted in hundreds of millions in losses.

While many cyber-attacks result in some form of loss to the target, such as trading losses when systems fail, those most likely to result in litigation are cyber-attacks that result in confidential customer information being accessed and improperly used. These can result in both substantial fines for breaches of privacy as well as private class action litigation in which compensation is sought on behalf of very large numbers – potentially millions – of people whose data has been compromised. While no significant class actions resulting from a cyber breach have been brought yet in New Zealand, these claims are increasingly common in overseas jurisdictions, including a number of substantial claims brought in the courts of Australia.

Claims and disputes arising from the use of AI

The widespread adoption of AI carries the risk of errors in its outputs, particularly where it is unclear how the relevant AI algorithms work or the AI ‘hallucinates’ an output that is wrong or invented, and where outputs are created by AI without human involvement or a human check of the final work product. This can result in loss and liability. Breaches of legal obligations and rights may also arise in relation to data protection, data ownership, copyright infringement and protection of confidential or privileged information.

From recent conversations we had with insurers in London, one of their biggest concerns is whether businesses – particularly those that provide professional services – are using AI without properly checking and verifying the outputs. The question often asked is: are they using it only as a useful tool, or are they allowing it to generate work product which they rely upon? We are increasingly hearing of instances in which businesses and professionals have been caught out by relying too heavily upon AI without ensuring that a human being checked its output.

From the legal profession, there have been cases in which AI-drafted documents have been relied upon in court that contained non-existent case law. In the UK, in *Ayinde v The London Borough of Haringey*[1], a lawyer cited cases in argument that did not exist. A wasted costs order was made against the lawyer and she narrowly missed contempt proceedings when she unwisely denied using AI. Similarly, in *Al-Haroun v Qatar National Bank*[2] the Judge found that correspondence and witness statements provided by a client to his lawyers made numerous references to cases that did not exist or cited them for propositions they did not support. The lawyers admitted that they had used the material without checking it and the Court referred them to the Solicitors Regulatory Authority for further investigation.

These risks are not confined to the legal profession. Recently, Deloitte Australia agreed to partially refund a substantial fee it had received from the Department of Employment and Workplace Relations after a junior staff member added references to a 2025 report which were found to contain AI-generated errors, including a fabricated quote and non-existent research. While Deloitte reportedly advised its client that it was using AI and the report's conclusions remained unchanged, the reputational damage was done.

Where professionals use AI tools to generate work product without a proper review, the consequences can be serious and can result in costly regulatory action or compensation claims. For example, if a lawyer relies on AI to prepare advice upon which a client relies, this could result in a significant liability claim. Similarly, accountants may face claims for financial losses, and engineers or architects could be liable for design failures requiring costly remediation.

Other organisations are also at risk from unfettered AI systems offering advice and recommendations. In the US, the National Eating Disorders Association reportedly had to withdraw its chatbot after it made potentially dangerous suggestions to users relating to eating disorders, including recommending weight reduction, calorie tracking and body fat measurements.

There are also significant risks from allowing AI tools to access confidential information. We find that confidentiality provisions in some third-party contractor agreements may no longer be adequate, particularly where third parties unknowingly breach their obligations by uploading confidential information into free or unsecured AI services.

Dealing with the increased risk of technology claims

As technology develops, problems arising from it will continue to raise new, claims and disputes. At present, we see technology project failures as giving rise to the most significant litigation, with cyber-crime and resulting claims also on the rise. AI-related losses and claims are occurring in increasing numbers and while their values have been relatively small to date, there is potential for them to increase.

Organisations may take steps to avoid liabilities arising from these issues and the resulting claims and losses by making sure they are aware of the risks, investing in good contract processes, avoiding actionable representations, investing in good cyber-security and cyber insurance, and taking care with their use of AI.

1. [2025] EWHC 1383.
2. [2025] EWHC 1588.

Tikanga

Tikanga and Aotearoa New Zealand law, āke āke āke?

The role of tikanga within Aotearoa New Zealand's legal system remains a focal point of legal and political debate. In 2025, the Minister of Justice signalled his concern that New Zealand is developing a "bespoke" and "unpredictable" legal system because of application of tikanga by the Courts[1] and indicated the Government's willingness to legislate over court decisions where necessary.

We have already seen this in action with the enactment in October 2025 of the Marine and Coastal Area (Takutai Moana) Amendment Act, which reset (with some retrospective effect) the statutory test for holding customary marine title (which included reference to holding customary marine title in accordance with tikanga) to "undo" an otherwise broad interpretation of the test by the Courts.[2]

> "Judicial recognition of tikanga has been careful, principled, and incremental. It is anchored in the same legal standards of fairness, reasonableness, good faith, and proportionality that underpin all judicial reasoning."[3]

But experts in tikanga and Aotearoa New Zealand law reject claims of unpredictability, emphasising that tikanga is principled and discernible through precedent, evidence, and expert testimony. Its adaptability is a strength, not a flaw.

We see this view being reflected in the quiet ongoing momentum in the Courts towards recognition of tikanga as a New Zealand legal norm, despite the challenges. Tikanga is now applied as a matter of course "where relevant" in the employment and resource management jurisdictions. The Supreme Court (on an appeal from the Environment Court) has recognised that eminent mātanga (experts) in tikanga, like experts in any system of law, may be called upon to apply familiar and accepted tikanga principles to new facts and test the appropriateness of that application through argumentation – and that through this process different experts will have different perspectives. The Courts may be called upon (and are) choosing which expert evidence may best be reconciled with the overall evidence in a case.[4]

However, recent decisions show the general Courts are integrating tikanga more cautiously, establishing boundaries around its application beyond the "relevance" threshold and need for clear expert evidence. Judges are continuing to exercise care over their place in determining and

1. Hanly, L. (2025, September 27). Justice Minister Paul Goldsmith warns government prepared to remove tikanga Māori from court rulings. RNZ.
2. The preamble to the Act cites the Supreme Court case of *Whakatōhea Kotahitanga Waka (Edwards) v Ngāti Ira o Waioweka, Ngāti Patumoana, Ngāti Ruatākenga and Ngāi Tamahaua (Te Kāhui Takutai Moana o Ngā Whānau Me Ngā Hapū o Te Whakatōhea)* [2025] NZSC 104, which made findings on interpretation of the Marine and Coastal Area (Takutai Moana) Act 2011. The preamble states that the purpose of the amending legislation is to make amendments to provisions of the Marine and Coastal Area (Takutai Moana) Act 2011 to *"ensure that they have the effect, and maintain the balance, that Parliament intends"*.
3. Hanly, L. (2025, September 29). Māori lawyers reject Goldsmith's comments over tikanga Māori court rulings. RNZ.
4. *Sustainable Ōtākiri Inc v Whakatāne District Council* [2025] NZSC 158 (12 November 2025) at [194] to [202].

applying tikanga even when plainly relevant to a dispute. Business, government and not-for-profit organisations remain likely to be engaged in disputes involving the proper role and application of tikanga – if any – in a wide range of circumstances. Those that are proactive about understanding tikanga as a system of principles with their own legal force will be best placed to respond when the need arises.

The appropriate forum for determining and applying tikanga in dispute resolution among iwi, hapū and whānau Māori may not be the Courts – at least not in the first instance

One such boundary is emerging in circumstances where tikanga is clearly the controlling body of law (it is clearly "relevant"), but there is a point at which a court ought to consider 'staying' the proceeding (i.e. putting it on hold for a period of time) where it is satisfied there is an alternative more appropriate forum available to resolve the dispute for those parties – such as through a tikanga-based dispute resolution process mandated under an iwi/hapū trust deed.

This was the case in *Hata v Attorney-General*[5], a case challenging decisions made by the Crown and the pre and post settlement trusts relating to the Treaty settlement for eastern Bay of Plenty iwi Te Whakatōhea. The applicant argued certain decisions were inconsistent with the hapū tikanga of one of six hapū of Te Whakatōhea, Ngāti Irapuaia o Waioweka (Ngāti Ira). Ngāti Ira sought forward-looking declarations against the Crown and Te Tāwharau Trust (the post settlement governance entity of Te Whakatōhea), to regulate any further dealings between Ngāti Ira and those parties by defining the obligations of them both based on Ngāti Ira's tikanga as law. Ngāti Ira also sought declarations against Te Tāwharau that it had no basis in tikanga to purport to represent Ngāti Ira, together with a direction under s 127 of the Trusts Act "restraining Te Tāwharau from making further decisions which purport to represent or bind Ngāti Ira…".

Justice Isac declined the declarations and identified four themes from recent authority about tikanga as law:

- **Context matters:** Tikanga loses meaning when described "in the abstract".[6]
- **Integrated principles:** Tikanga is a weave of values; principles interact and may conflict.[7]
- **Process and substance**: Tikanga governs both outcomes and decision-making; court intervention may itself breach tikanga unless tikanga-based resolution is unfeasible.[8]
- **Preserve tikanga's autonomy:** Courts must avoid undermining tikanga institutions or their mana. While acknowledging the flexibility of the common law and the bi-jural development taking place in Aotearoa, the Courts should be careful not to impair the operation of tikanga in its own right.[9]

Justice Isac noted stays may be appropriate where tikanga processes exist, but not where none are available, urgency exists, or resolution through tikanga is unrealistic. Courts may also weigh a party's refusal to engage in tikanga processes when granting relief.[10]

Tikanga is no more amenable to abstract declaratory relief than any other area of law

Another limit on the courts' application of tikanga is the orthodox approach to declaratory relief, reinforced in the context of tikanga-based declarations.

In *Delamere v Minister of Immigration*[11], Tuariki Delamere, an experienced immigration advisor and former Minister of Immigration, sought judicial review of the refusal by Immigration New Zealand (INZ) to reconsider immigration policy to take account of tikanga principles of whanaungatanga (kinship or a sense of familial connection and relationships)[12] and manaakitanga (to care for a person's mana and wellbeing).[13] Mr Delamere argued that INZ was required to consider relevant tikanga principles when it makes visa decisions. He claimed that INZ was

5. *Hata v Attorney-General* [2025] NZHC 519.
6. Above n.5 at [102] to [126].
7. Te Aka Matua o te Ture New Zealand Law Commission, He Poutama NZLC SP24, September 2023 at [3.16]; *Ellis v R (continuance)* [2022] NZSC 114; [2022] 1 NZLR 239 at [85] and Statement of Tikanga of Sir Hirini Moko Mead and Professor Pou Temara (SC 49/2019, 31 January 2020 at at [3.9]–[3.10].
8. *Ngāti Whātua Ōrākei Trust v Attorney-General* (No 4) [2022] NZHC 843; [2023] 3 NZLR 601.at [368].
9. Above n.7 He Poutama, Part Three, "Future Engagement" at [2].
10. *Hata v Attorney-General*, above n.5 at fn 99.
11. *Delamere v Minister of Immigration* [2025] NZHC 3008.
12. Above n.7 He Poutama, Part One, at [3.36].
13. Above n.7 He Poutama, Part One, at [3.120].

Tikanga may play a role in developing the law, but the Court's decision does not mean clear and settled law must change."[15]

not giving sufficient consideration to the integrity of whānau in their decisions, and sought declarations that would compel INZ to review its immigration instructions and decision-making processes to ensure they align with tikanga. INZ maintained that tikanga could be considered on a case by case basis where it was relevant.

Justice Boldt struck out the application, finding that Mr Delamere was not seeking to challenge a particular decision or exercise of public power, making his claim untenable. The Court did not therefore address whether INZ was engaging with tikanga in an appropriate manner, but noted the Supreme Court decision in *Ellis*[14] (which confirmed that tikanga Māori is properly regarded as a source of law in Aotearoa New Zealand) does not require wholesale revision of existing law and policy.

Ultimately, the Court confirmed it can only apply tikanga to specific factual circumstances, not issue broad or abstract declarations.

The Courts will not determine the tikanga of one iwi or hapū prevails over the tikanga of another iwi or hapū – it will only evaluate the strength of relationships in particular places and points in time

A further now well established boundary around the Courts' engagement with tikanga is a clear awareness that it is not the role of the Courts to give primacy to the tikanga of one iwi or hapū over another (as opposed to the expert evidence of one mātanga over another). Courts may only assess the relative strength of different iwi/hapū relationships with each other and the environment in a specific rohe (area) and at a particular time.

Primacy of tikanga is an issue that has arisen primarily in Resource Management Act case law where multiple iwi or hapū claim ancestral connections to land subject to development. But it could also arise in commercial disputes involving Māori trusts, land transactions, or insolvency where parties whakapapa to different iwi or hapū.

In 2025, in *Ngāti Whātua Ōrākei Whai and Maia Ltd v Auckland Council*,[16] the Environment Court considered conditions imposed by the consent authority on a grant of resource consent. The Court was asked to consider statutory obligations to Māori in circumstances where there are several hapū or iwi claiming relationships to the area being developed (in this case, Auckland's Westhaven's marina).

The Environment Court confirmed that only the High Court and Māori Land Court can declare tikanga-based rights in state law (per the High Court's earlier Ngāti Maru decision in 2020),[17] but that it could make a finding of the relative strength of iwi relationships with a certain area at a certain time. After reviewing extensive historical material, the Court found Ngāti Whātua's connection with its ancestral lands and water at Westhaven was stronger in character than others. It stressed this was not preferring one parties' tikanga over another, but evaluating relationships at a point in time and in a particular area.[18]

Relevant to the first limit we have noted, the Court also considered that in this case a hui or other tikanga means of kōrero would be unable to reach a final outcome on how to recognise the tikanga of Ngāti Whātua as "the disputes seem to us to run too deep for that to occur."[19] They took a "tentative but quite firm view that [it would] need to set final conditions for cultural recognition and mitigation in prescriptive form after input from parties."[20]

14. *Ellis v R* [2022] NZSC 114, [2022] 1 NZLR 239.
15. *Delamere v Minister of Immigration, above n.11, at [15].*
16. *Ngāti Whātua Ōrākei Whai and Maia Ltd V Auckland Council* [2025] NZEnvC 228; BC202562194 at [9] (Interim decision of the Environment Court as to evidential findings about relative tikanga-based rights, powers and/or authority, as relevant to the discharge of obligations to Māori under the RMA).
17. *Ngāti Maru v Ngāti Whātua Ōrākei Whai Maia Ltd* (Ngāti Maru) [2020] NZHC 2768.
18. Above n.17 at [318].
19. Above n.17 at [320].
20. Above n.17 at [324].

Conclusion

Standing back from these emerging boundaries around when and how the Courts will apply tikanga principles in resolution of disputes, some themes for its positive application are emerging from the cases too:

(1) Judges are keenly aware of the need for care to preserve the integrity and mana of tikanga principles and processes

(2) Applying tikanga as law can involve ensuring the right forum for resolution, not just applying principles to facts, and

(3) where application of tikanga is relevant to resolution of a specific dispute utilising the forum of the Court and there is appropriate expert evidence available for the Court to consider, Judges are increasingly comfortable applying it – including in novel situations reflecting modern life rather than traditional Māori society.

In this context, the judiciary seems likely to be well ready to consider the relevance of tikanga in the formulation of broadly framed tort and equity claims and an assessment for claims of loss and damage to the environment by the time the much awaited *Smith v Fonterra* case[21] comes back before the High Court (the hearing is currently scheduled to begin in April 2027).[22]

In the meantime, parties to litigation where tikanga principles may be relevant – and we continue to expect to see more of these in 2026 and beyond, and in a wider range of legal contexts – should plan ahead for its impact on both forum and outcome. The Law Commission's He Poutama Study Paper 24[23] remains an excellent resource on tikanga and its engagement with state law. It highlights the existing breadth of application of tikanga as part of New Zealand law. Cases since its release in 2023 are continuing that trend.

21. By way of reminder, in *Smith v Fonterra Co-Operative Group Ltd* [2024] NZSC 5 the Supreme Court held (rejecting a strike out application) that tikanga is relevant to consideration of Mr Smith's claims in tort (in particular public nuisance). The Court said that aspects of tikanga will need to be addressed at trial, in terms of the plaintiff's relationship with the relevant land and how that may impact on any loss and damage suffered in ways that are not necessarily financial or economic. The case has been referred back to the High Court for determination.

22. MinterEllisonRuddWatts acts for BT Mining Limited a defendant in the *Smith v Fonterra* case.

23. Above n.7.

Climate change

Climate change litigation in New Zealand:

Civil liability for climate activism?

The civil proceeding *Smith v Fonterra* remains the most prominent piece of 'climate change litigation' in New Zealand, it being a claim in tort targeting corporate greenhouse gas emitters (and suppliers of fossil fuels) for alleged public nuisance. However, such climate change-related litigation may not just be a one-way street. While not yet seen in New Zealand, globally civil cases against climate activists appear to be increasing.

Recent overseas cases demonstrate this trend. In March 2025, a United States jury in North Dakota awarded significant damages against defendants connected to a protest which disrupted the construction of an oil pipeline. (*Energy Transfer LP v Greenpeace*). Similar claims are legally tenable under New Zealand law, including, but not limited to, civil claims for the tort of trespass. As patience with the economic cost of business disruption caused by activists waned, and corporates seek to protect critical infrastructure, the emergence of such litigation here seems likely.

Global trends

As of 30 June 2025, 3,099 climate-related cases had been filed worldwide spanning 55 jurisdictions and 24 international or regional adjudicatory bodies.[1] Globally, there has been a decline in climate-related filings since these peaked at over 300 new filings in 2021.[2]

The Grantham Research Institute's 2025 Snapshot provides further insight: 226 cases were filed worldwide in 2024, including 164 in the United States.[3] Of these, 60 cases (or 27%) involved "non-climate-aligned arguments", 88% of which were filed in the United States.[4] This marks an increase from 2023, where 21% of around 233 cases involved "non-climate-aligned arguments" and 1% involved both aligned and non-aligned arguments.[5]

These trends suggest a growing diversification in climate litigation, with actions not being limited to plaintiffs using proceedings for the purposes of protest and to challenge climate policies.

1. UN environment programme, Climate Change in the courtroom: Trends, impacts, and emerging lessons.
2 At 6.
3. Grantham Research Institute on Climate Change and the Environment Global trends in climate change litigation: 2025 litigation (25 June 2025) at 3.
4. At 7.
5. Grantham Research Institute on Climate Change and the Environment Global trends in climate change litigation: 2024 litigation (27 June 2024) at 40.

Suits against climate activists

Although we have seen a slight global decline in the rate of new climate related litigation, civil and criminal suits against climate activists have been trending upwards, reflecting political pushback.

A notable example of this is the 2025 decision of *Energy Transfer LP v Greenpeace*.[6] On 19 March 2025, a jury awarded USD667 million in compensatory and exemplary damages to Energy Transfer against Greenpeace defendants (Greenpeace International, Greenpeace Inc. USA, and Greenpeace Fund Inc). A judge later reduced damages to USD345 million, which Energy Transfer says it intends to appeal.[7]

Energy Transfer alleged that the Greenpeace defendants had unlawfully conspired to obstruct the construction of the Dakota Access Pipeline, an 1,886km underground oil pipeline that runs from North Dakota to Illinois. A section of the pipeline runs adjacent to the Standing Rock Sioux Reservation, where it crosses under Lake Oahe, north of the reservation's boundary. From April 2016 to February 2017, the main protests against the pipeline were conducted. The protests involved protestors camping near the reservation land or in some cases entering onto Energy Transfer's pipeline construction sites, peaceful marches, prayer and ceremony, and campaigning on social media. There were incidents of protestors damaging Energy Transfer's property and nonviolent direct actions, including protestors chaining themselves to construction equipment. Multiple groups were involved in the protest.

Energy Transfer advanced twelve causes of action, involving trespass to land and chattel, conversion, nuisance, defamation, tortious interference, and aiding and abetting those torts, namely conversion, nuisance, and trespass. Energy Transfer alleged, among other things, that Greenpeace encouraged and orchestrated trespass, vandalism, and other illegal acts by protestors, resourced and trained protest groups, and spread misinformation about Energy Transfer.[8]

Following the case being determined in favour of Energy Transfer, Greenpeace intends to request a new trial and appeal. Separately, Greenpeace International has brought an anti-intimidation suit ("anti-SLAPP" suit) in the Netherlands, alleging false statements by Energy Transfer and claiming damages.[9]

Another significant 2025 climate-related decision comes again from the United States, in the criminal space. In April 2025, two climate activists, Timothy Martin and Joanna Smith, were charged with conspiracy to commit an offence against the United States and damage to federal property, after smearing washable finger paint on the glass of a famous sculpture in the National Gallery of Arts. Each felony carries a maximum penalty of a USD250,000 fine and five years' imprisonment. Smith entered a plea deal for a 60-day sentence, fines and restrictions, while Martin was convicted at trial and sentenced to 18 months' imprisonment – a severe sentence for civil disobedience.[10]

6. *Energy Transfer LP v Greenpeace International* 30-2019-CV-00180 (ND Dist Ct).
7. "USA: Judge reduces damages to be paid by Greenpeace to Energy Transfer over Dakota Access Pipeline protests to USD345 million" Business and Human Rights Resource Centre (29 October 2025).
8. *Energy Transfer LP v Greenpeace International*, above n 6.
9. Greenpeace International "Greenpeace International's landmark anti-SLAPP case going forward after North Dakota judge rejects Energy Transfer request for anti-suit injunction" (10 September 2025).
10. "US climate activists condemn 18-month jail term for nonviolent art museum protestor" The Guardian (30 October 2025).

New Zealand context: Civil liability

Civil claims in tort – similar to *Energy Transfer LP v Greenpeace* – are legally viable in New Zealand. On comparable facts, they would seem to carry with them a similar prospect of success against those who cause loss by knowingly trespassing on the property of others (or damaging or obstructing infrastructure).

Additionally, such tort claims could target multiple tortfeasors, including secondary parties who knowingly assist primary actors engaged in unlawful or tortious acts. Three conditions must be met for joint liability. The defendant must have assisted the commission of an act by the primary tortfeasor, the assistance must have been pursuant to a common design on the defendant's part, and the act must constitute a tort as against the claimant.[11]

Assistance must be substantial, not trivial. That said, liability is not avoided merely because the primary tortfeasor's contribution was greater, or because assistance was indirect. It makes no difference that the tort would have been committed regardless of the defendant's assistance.[12]

No cases have yet been brought against secondary parties linked to protests in New Zealand, but proceedings have been brought against primary actors. In *Leason v Attorney-General*[13], three peace activists were sued in trespass for damages for entering government property and deflating a satellite dome cover at the Government Communications Security Bureau facility. The High Court granted summary judgment for trespass. The Court of Appeal upheld liability and rejected defences of self-defence or defence of another, common law necessity, and ex turpi causa (where the cause of action is linked to illegality). With regard to the latter, the appellants argued that the facility's activities were linked to supporting foreign wars, including the Iraq War, and contributed to the deaths of civilians.

All three defences failed due to requirements of imminent harm and proportionality, and absence of a link to illegality. The decision demonstrates that such defences cannot succeed merely based on protesters' moral or political motivations.

Conclusion

The state of climate change litigation in New Zealand continues to evolve. Our law does allow for the possibility of civil claims in tort against activists, and to which associated organisations may be joined. Given global trends and the high-profile decision in *Energy Transfer LP v Greenpeace*, the prospect of a similar action in New Zealand is increasingly plausible.

11. *Sea Shepherd UK v Fish & Fish Limited* [2015] UKSC 10 at [55].
12. *Sea Shepherd UK v Fish & Fish Limited* at [57].
13. *Leason v Attorney-General* [2013] NZCA 509; [2014] 2 NZLR 224.

Vexatious litigants

Obsessive and vexatious litigants

Increasingly, people are experiencing the cost, stress and inconvenience of having to deal with obsessive and vexatious litigants or complainants. As litigation lawyers, we see many of these cases.

They seem to be increasing. The availability of AI appears to have encouraged obsessive and vexatious litigants. AI tools are helping them identify strategies to further their grievances as well as generating content for their complaints and legal proceedings.

It is important for those who are targeted by vexatious complainants or litigants to be aware of the strategies and options available to respond.

Who are these people?

Obsessive complainants and litigants are individuals who use formal complaint processes or legal proceedings to advance causes that are meritless, irrational, or intended to harass. They may broadly be grouped into three main types.

Unsuccessful defendants

As lawyers, we often deal with complainants whose obsession began as a result of legal processes in which they were unsuccessful. Many of them have lost positions, properties or businesses through court proceedings. Their defence of those claims having been unsuccessful, they embark on claims or proceedings against whom they see as responsible for their misfortunes.

Their targets can include lawyers who acted for the successful parties, individuals within those organisations, judicial officers and others. One individual, for example, brought multiple proceedings and appeals against a well-known insolvency professional who was appointed as receiver of the complainant's business. This action continued for many years, even after the insolvency professional and his firm successfully sued the complainant in defamation and bankrupted him, with a brief pause for a few years when he was declared a vexatious litigant by the courts. The Court in one decision observed that:

"The litigation has grown almost exponentially and on a scale not previously seen in New Zealand to include claims against the receiver and his company, other lawyers, the Solicitor General, the Attorney General, judges who heard and determined the cases (...) and the Judicial Conduct Commissioner."[1]

There is an important distinction between vexatious litigants who initiate and pursue complaints or causes, and those who merely seek to defend claims against them by raising meritless arguments. Most

1. *Attorney-General v Siemer* [2014] NZHC 859 at [4].

lawyers will have experience of the latter, who cause reputable parties to incur further costs but are otherwise relatively harmless. They include adherents to the 'sovereign citizen' movement and those who raise other pseudo-law arguments to the effect that laws and court procedures do not apply to them, normally on the basis that they have not consented to be subject to them. They often rely on materials published online which cite overseas case law and statutes that have no relevance to the New Zealand legal system. These people are invariably unsuccessful in defending the cases brought against them and judgment and enforcement normally brings an end to the matter.

We are concerned here about those litigants who cannot take "no" for an answer and never give up. Typically, they are driven by obsessive beliefs that their cause is just, or that they are victims of injustice. They file multiple proceedings or applications and appeal every decision against them, often over many years.

Campaigners for a cause

Many companies and other incorporated bodies have attracted unwanted attention from campaigners who have a grievance or political viewpoint, not necessarily related to their personal interests, which they seek to advance by using Companies Act mechanisms for putting resolutions to meetings, or litigation in the courts. One such person, for instance, repeatedly put resolutions to the annual general meeting of a listed New Zealand company in the oil and gas sector, seeking to compel it to increase the prices it charged its customers for services. When that strategy was unsuccessful, he made repeated complaints to the Serious Fraud Office, Financial Markets Authority and Ministry for Business, Innovation and Employment, among others, as well as complaints to the Law Society about the company's lawyers and appeals from decisions dismissing his complaints. While all of his complaints were unsuccessful, they required considerable time, effort and legal cost to deal with.

Abusive or malicious

A small, but significant, category comprises those who deliberately use legal or formal complaint processes to harass and intimidate others. For instance, in the "Veronica" case (not her real name), an abusive ex-husband is reported to have filed over a hundred court applications and appeals against his former wife in the course of Family Court proceedings, causing her to incur around $250,000 in legal fees.

Legal remedies

Unfortunately, the legal remedies available to prevent vexatious litigants from misusing the court process are limited. The main problem is that the bar to have a person declared a vexatious litigant is high, and even when it is satisfied, orders preventing a person from issuing new proceedings are often restricted in time and scope.

Section 166 of the Senior Courts Act empowers the High Court to make an order restricting a person from commencing or continuing a civil proceeding. Three types of orders are available:

- **A limited order:** This is an order which restrains a party from commencing or continuing civil proceedings on a particular matter, but does not prevent them commencing proceedings in other matters, including related matters. This order will seldom be of much use, because vexatious litigants are usually ingenious in finding indirect ways to progress their campaigns.
- **An extended order:** This is an order which restrains a party from commencing or continuing civil proceedings on a particular or a related matter. This is more useful than a limited order, although what is "related" may be unclear and vexatious litigants will exploit any loopholes.
- **A general order:** This restrains a party from commencing or continuing any civil proceedings. This is intended to address vexatious litigants who have no particular axe to grind but who misuse the courts' processes by bringing actions for unrelated reasons.

The powers conferred by this section are an improvement upon the former powers under s 88B of the Judicature Act to control vexatious litigants. Those powers were available only on the application of the Attorney-General and an order would be made only where there had been a "persistent" initiation of vexatious proceedings. The section also permitted persons who were subject to an order to apply to the court for leave to issue further proceedings, which they often did.

The bar for obtaining orders is still high, as the courts are reluctant to impose barriers upon access to justice. In "Veronica's" case, the victim applied for an order under s 166 of the Senior Courts Act. At that time, her ex-husband had made 88 applications, all of which had been unsuccessful and some had been dismissed as an abuse of process. Unfortunately, the Court felt obliged to decline to make the order on the basis that at least two proceedings were required, and her ex-husband had not filed any new proceedings but had merely filed multiple applications, albeit all of them

hopeless, in an existing proceeding. Another problem was that he had not initiated the Family Court proceedings in which those applications were made, which "Veronica" had been obliged to begin.

However, the judge acknowledged the hardship that the ex-husband was causing, and, ingeniously, used ancillary powers to order that he take no further steps in the proceeding until he had paid the costs he owed her, then around $98,000. Unfortunately, that did not provide an effective solution, because he appealed that order and later sought to appeal further, all the while filing new applications in the appellate courts.

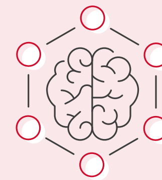
Some jurisdictions have introduced laws that may be more effective to prevent this sort of conduct, at least for family law cases. The US state of Tennessee empowers judges to bar people from filing proceedings for up to six years if they have brought lawsuits intended to harass or maliciously injure a domestic partner or other family member.

In the case involving the receiver, referred to above, the Court made an order under the former s88B regime, but when it lapsed after 3 years, the complainant started his campaign again. There is an argument for indefinite bans for serial vexatious litigants.

Challenges from AI

Vexatious litigants are increasingly using AI tools to identify ways to advance their causes, such as identifying legal methods to challenge decisions. In addition, AI tools enable them to identify potential causes of action and to draft submissions and other court documents.

While AI might be thought to be a helpful aide to self-represented litigants who do not have access to qualified lawyers, the reality is that the output is generally so inaccurate that it does more harm than good. AI tools do not generally enable vexatious litigants – or indeed any litigants – to identify truly relevant legal principles and draft accurate and compelling submissions. More usually, they produce confidently expressed but misguided legal analysis, and legal submissions that are not only misconceived but unduly lengthy.



Specific problems include the following:

AI tools produce documents with references to principles and case authorities that suffer from 'hallucinations', i.e. they do not cite relevant case law or sources for the propositions they advance, but refer to irrelevant authorities or so-called 'authorities' that are complete inventions.

AI generated legal documents are likely to give false encouragement to self-represented litigants by expressing what appear to be well-reasoned arguments for conclusions that accord with the litigants' wishes, but which are misconceived.

AI tools tend to generate voluminous documents. Judges have expressed frustration about very lengthy AI-drafted documents from lay litigants which take considerable time to unpick and address.

Strategies for dealing with obsessive complainants and vexatious litigants

In almost all cases, obsessive complainants and vexatious litigants are not rational actors. They will not be persuaded that their claims are without merit and should be abandoned. It is futile to try.

It is helpful to understand a few things about their psychology:

- Many are complaining or litigating because they have lost something of great importance to them, be it a job or position, a relationship, a property or a business. With it, they may have lost their status and authority. The agency that is the subject of their complaint cannot usually solve this.
- Not all have been unsuccessful in a claim or dispute. Many are retired men who once occupied senior positions and are struggling to come to terms with the loss of status and importance that has come with their retirement. The solution is to find a hopeless cause to fight for.
- By bringing complaints using a formal process, or litigation, they reclaim a sense of control or agency. This does not require them to succeed in that process, as long as they can prolong it by appeals or other challenges.
- They are often angry, emotional, and irrational. They may be deluded, but they may also know that they will not succeed yet are not prepared to give up their fight.

Their engagement with organisations often follows a typical pattern:

- The initial complaint is listened to politely and rejected in a measured manner which expresses understanding or sympathy for their views or position. They take this as affirmation and disregard those parts of the response that are not consistent with their own views.
- They escalate their complaint – often by contacting senior people (such as a chief executive or board members) directly – and deal with a series of new people within the organisation. These people are polite and courteous at first, knowing that they are dealing with a difficult person. The complainant takes this as affirmation and believes they have found someone who is willing to consider their position and will come to see things as they do. This hope is dashed when the new person eventually rejects the complaint. The complainant then feels betrayed and becomes hostile to those people, often making personal complaints or other criticisms of them. Often this process is repeated a number of times as new people become involved.
- This is not helped when senior people step in to help because they are confident of their ability to persuade and influence others. They have developed this confidence through their success in dealing with rational actors, but dealing with irrational people requires a different approach.

Unfortunately, it is very difficult to shake off a determined complainant or litigant. We often recommend the following strategies:

- Initially, listen to them politely, remain neutral, keep any responses factual and do not become defensive.

- Be realistic about what you are likely to achieve by engaging with them further. It is a mistake to think that you are likely to persuade them that their complaint has no merit. Accept that you cannot control their views and you can do little to control their actions without taking expensive steps.
- Once the engagement has resulted in a decision that should resolve the issue, it is time to starve the complainant of the oxygen of attention. Without it, they may turn elsewhere and leave your organisation alone.
- Limit engagement to the absolute minimum. It is not necessary to respond to every email or phone call once a substantive response has been provided. It is acceptable to inform them that you will not respond further.
- Nominate a single point of contact and insist that only that person deals with the complainant. Warn all likely points of contact within your organisation that the complainant may contact them and instruct them not to engage. Block telephone numbers and redirect emails where possible.
- If more than one person may deal with the complainant, have a clear position in response to each element of the claim or complaint and ensure consistency in communications.
- Ensure that all information provided is accurate. If an error is made, correct it promptly in writing. Errors, no matter how minor, may be seized upon as a new issue for dispute.
- If documents containing information about the complainant are requested, consider whether this should be treated as a request under the Privacy Act.
- Make sure reception staff can identify the person. If you are concerned about anyone's safety, take appropriate steps immediately. Make a Police report if threats are made and take legal steps, such as applying for restraining orders or injunctions, if appropriate. There may be options under the Harassment Act 1997 and the Harmful Digital Communications Act 2015.

In addition to how you deal with the complainant, think about the following:

- Keep in mind the potential reputational impact, particularly if the complainant goes to the media, and how to manage this.
- Keep records of all communication. This may be helpful to rebut allegations about the way your organisation has handled the complaint or dispute.
- Make sure your staff do not create insulting or other potentially embarrassing emails or other internal documents about the complaint or the complainant.
- Consider pre-warning likely recipients of complaints, such as media and industry regulators, of the matter.
- If complaints are made to external bodies, keep responses brief and to the point, and do not respond to additional material provided by the complainant unless necessary.

When to engage external counsel? External lawyers will not necessarily have any more success in persuading an obsessive complainant or litigant to go away, and they often become a target of complaints themselves. They can, however, help in the following ways:

- Taking the pressure off your organisation so you are not distracted.
- Helping with strategies for dealing with the complaint, with independent and dispassionate advice.
- Dealing with external bodies such as regulators.
- Protecting documents with legal privilege.
- Defending proceedings and taking proactive action to seek restraining orders as necessary.

Obsessive complainants and vexatious litigants can cause ongoing stress, disruption and cost that is disproportionate to the importance of the issues they raise, and their prevalence appears to be increasing. It is important to have a clear strategy in place to deal with them.

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