



THE BIG PICTURE: Class actions

What's ahead in 2018?

Class action litigation continues to rise in New Zealand, with a number of high profile class actions filed in recent years.

The question remains: how closely will New Zealand follow overseas developments? Fuelled by litigation funding, class actions in countries like the US and Australia have spread across a wide range of categories, involved millions of people and cost businesses billions of dollars. Here are the five key trends to look for in 2018.

Legislative reform

The Law Commission announced late last year that it would be reviewing the law relating to class actions and litigation funding. It remains to be seen whether the new government will prioritise this review. If it does, will the light-handed status quo prevail? Will new prescriptive legislation be proposed? Could we see a code of conduct or regulation for litigation funders? With all options on the table, the Commission's conclusions will be closely watched.



Regulation of litigation funders

The courts may well review their role in supervising litigation funders this year. Historically, the courts would only intervene if a funding arrangement amounted to an abuse of process. However, a recent judgment from the Chief Justice suggests a possible change of approach, indicating that the courts may subject funders to greater scrutiny in the future.



Since the Supreme Court's 2013 decision in *Waterhouse v Contractors Bonding Ltd*, the courts have taken the position that it is not their role to regulate litigation funding arrangements, or to give prior approval to litigation funding arrangements.

In *PricewaterhouseCoopers v Walker*, the Chief Justice signalled a possible change of approach, commenting that it was "well-arguable" that the funding agreement in that case was "contrary to law" due to the level of control that the funder had over the proceedings.



Product liability claims

The James Hardie class actions remain in the spotlight. Product liability claims have dominated the Australian class action regime and, if the James Hardie claims are successful in New Zealand, they may open the door to further product liability class actions here. The Court of Appeal ruled in September 2017 that one of the James Hardie claims, which raises novel issues as to whether a cladding manufacturer may be liable for pure economic loss resulting from alleged defects in its product, could proceed as a class action.



Securities claims

To date, there has been surprisingly little in the way of securities class actions in New Zealand. That may be because the largest recent securities claim, concerning Feltex, failed at trial and on appeal. The Supreme Court's decision is pending. There has been a significant increase in securities class actions in Australia, with shareholder claims now said to comprise 20% of all class actions. We expect New Zealand to follow suit, with a focus on companies' continuous disclosure obligations and on statements made in public offer documents.



Cyber security claims

There has been increased focus on data and cyber security recently, leading to the introduction in Australia and the United States of legislation requiring businesses to publicly notify data breaches. While businesses are not obliged to notify data breaches in New Zealand, widespread breaches gain considerable publicity. A high profile data breach could give rise to a class action if a number of customers or third parties are affected by a problem.



CONTACTS

Bell Gully has extensive experience acting in class action proceedings and our team has been involved in a number of major class actions to have reached the courts.

We acted for the defendant directors of Feltex Carpets in the only securities class action to have gone to trial in New Zealand. We advised a major trading bank on a class action claim by customers that they paid too much in fees, and we are currently acting on a class action claim against Southern Response Earthquake Services brought by customers with earthquake insurance claims.

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