THE SECURITIES LITIGATION REVIEW

Sixth Edition

Editor
William Savitt

THE LAWREVIEWS

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PREFACE

This sixth edition of *The Securities Litigation Review* is a guided introduction to the international varieties of enforcing rights related to the issuance and exchange of publicly traded securities.

Unlike most of its sister international surveys, this review focuses on litigation – how rights are created and vindicated against the backdrop of courtroom proceedings. Accordingly, this volume amounts to a cross-cultural review of the disputing process. While the subject matter is limited to securities litigation, which may well be the world's most economically significant form of litigation, any survey of litigation is in great part a survey of procedure as much as substance.

As the chapters that follow make clear, there is great international variety in private litigation procedure as a tool for securities enforcement. At one extreme is the United States, with its broad access to courts, relatively permissive pleading requirements, expansive pretrial discovery rules, readily available class action principles and generous fee incentives for plaintiffs' lawyers. At the other extreme lie jurisdictions such as Sweden, where private securities litigation is narrowly circumscribed by statute and practice, and accordingly quite rare. As the survey reveals, there are many intermediate points in this continuum, as each jurisdiction has evolved a private enforcement regime reflecting its underlying civil litigation system, as well as the imperatives of its securities markets.

This review reveals an equally broad variety of public enforcement regimes. Canada's highly decentralised system of provincial regulation contrasts with Brazil's Securities Commission, a powerful centralised regulator that is primarily responsible for creating and enforcing Brazil's securities rules. Every country has its own idiosyncratic mixture of securities lawmaking institutions; each provides a role for self-regulating bodies and stock exchanges but no two systems are alike. And while the European regulatory schemes have worked to harmonise national rules with Europe-wide directives – an effort now challenged by the departure of the United Kingdom from the European Union – few countries outside Europe have significant institutionalised cross-border enforcement mechanisms, public or private.

We should not, however, let the more obvious dissimilarities of the world's securities disputing systems obscure the very significant convergence in the objectives and design of international securities litigation. Nearly every jurisdiction in our survey features a national securities regulatory commission, empowered both to make rules and to enforce them. Nearly every jurisdiction focuses securities regulation on the proper disclosure of investment-related information to allow investors to make informed choices, rather than prescribing substantive investment rules. Nearly every jurisdiction provides both civil penalties that allow wronged investors to recover their losses and criminal penalties designed to punish wrongdoers in the more extreme cases.

Equally notable is the fragmented character of securities regulation in nearly every important jurisdiction. Alongside the powerful national regulators are subsidiary bodies – stock exchanges, quasi-governmental organisations, and trade and professional associations – with special authority to issue rules governing the fair trade of securities and to enforce those rules in court or through regulatory proceedings. Just as the world is a patchwork of securities regulators, so too is virtually each individual jurisdiction.

The ambition of this volume is to provide readers with a point of entry to these wide varieties of regulations, regulatory authorities and enforcement mechanisms. The country-by-country treatments that follow are selective rather than comprehensive, designed to facilitate a sophisticated first look at securities regulation in comparative international perspectives, and to provide a high-level road map for lawyers and their clients confronted with a need to prosecute or defend securities litigation in a jurisdiction far from home.

A further ambition of this review is to observe and report important regulatory and litigation trends, both within and among countries. This perspective reveals several significant patterns that cut across jurisdictions. In the years since the financial crisis of 2008, nearly every jurisdiction reported an across-the-board uptick in securities litigation activity – an increase that will likely be recapitulated by the covid-19 pandemic currently roiling society and the global economy. Many of the countries featured in this volume have seen increased public enforcement, notably including more frequent criminal prosecutions for alleged market manipulation and insider trading, often featuring prosecutors seeking heavy fines and even long prison terms.

Civil securities litigation has continued to be a growth industry as a new normal has set in for the private enforcement of securities laws. While class actions are a predominant feature of US securities litigation, there are signs that aggregated damages claims are making significant inroads elsewhere. Class claims are now well established as part of the regulatory landscape in Australia and Canada, and there appears to be accelerating interest around the world in securities class actions and other forms of economically significant private securities litigation. Whether and where this trend takes hold will be one of the important securities law developments to watch in coming years.

This suggests the final ambition for *The Securities Litigation Review*: to reflect annually where this important area of law has been, and where it is headed. Each chapter contains both a section summarising the year in review – a look back at important recent developments – and an outlook section, looking towards the year ahead. The narrative here, as with the book as a whole, is of both convergence and divergence, continuity and change – with divergence and change particularly predominant in recent years, following political upheaval in the United States and the United Kingdom that has produced a sharp break from international cooperation and forceful government regulation in the global finance capitals of New York and London.

An important example is the matter of cross-border securities litigation, treated by each of our contributors. As economies and commerce in shares become more global, every jurisdiction is confronted with the need to consider cross-border securities litigation. The chapters of this volume show jurisdictions grappling with the problem of adapting national litigation systems to a problem of increasingly international dimensions. How the competing demands of multiple jurisdictions will be satisfied, and how jurisdictions will learn to work with one another in the field of securities regulation, will be a story to watch over the coming years. We look forward to documenting this development and other emerging trends in securities litigation around the world in subsequent editions.

Many thanks to all the superb lawyers who contributed to this sixth edition. For the editor, reviewing these chapters has been a fascinating tour of the securities litigation world, and we hope it will prove to be the same for our readers. Contact information for our contributors is included in Appendix 2. We welcome comments, suggestions and questions, both to create a community of interested practitioners and to ensure that each edition improves on the last.

William Savitt
Wachtell, Lipton, Rosen & Katz
New York
May 2020

Chapter 13

NEW ZEALAND

Chris Curran, Marika Eastwick-Field and Nathaniel Walker[1]

I OVERVIEW

i Sources of law

The primary source of securities law in New Zealand is the Financial Markets Conduct Act 2013 (FMCA). The FMCA is the culmination of a comprehensive reform of securities law in New Zealand, and entirely replaces the pre-existing regime.

The FMCA, together with the common law and other consumer protection legislation, provides the key source of law for securities litigation.[2] Regulations promulgated under the FMCA also contain important detail relevant to the securities regime.[3]

New Zealand's main securities exchange is the New Zealand Stock Exchange (NZX). The NZX Listing Rules and NZX-issued guidance are an important source of market regulation.[4]

ii Regulatory authorities

The Financial Markets Authority Act 2011 (FMAA) establishes the Financial Markets Authority (FMA), which is New Zealand's financial conduct regulator and provides licensing, compliance, supervision and systems oversight under a number of statutes, including the FMCA.

The FMCA and FMAA provide the FMA with a number of administrative, civil and criminal tools – escalating in severity and formality – to engage with market participants, with a focus on proportionality. The FMA has increased staff numbers and significantly increased budget over its predecessor, the Securities Commission, such that it has the resources to focus on market integrity and conduct.[5]

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1 Chris Curran, Marika Eastwick-Field and Nathaniel Walker are partners at Russell McVeagh. The authors wish to thank Hannah Bain, Fayez Shahbaz, Nicole Browne and Briana Walley for their assistance.

2 Other relevant legislation includes the Financial Markets Authority Act 2011; the Companies Act 1993; the Fair Trading Act 1986; and the Credit Contracts and Consumer Finance Act 2003.

3 See, for example, the Financial Market Conduct Regulations 2014.

4 See https://www.nzx.com/regulation/nzx-rules-guidance.

5 In 2019, the FMA had 212 staff and a budget of NZ$38 million (see https://www.fma.govt.nz/assets/Annual-reports/FMA-2019-Annual-Report.pdf (FMA Annual Report); https://www.budget.govt.nz/budget/pdfs/estimates/v1/est19-v1-buscin.pdf (Vote Business, Science and Innovation 2018)).

The New Zealand Markets Disciplinary Tribunal (the Tribunal) is a regulatory body, separate to the NZX, which undertakes an essentially judicial role to determine whether breaches of the NZX Listing Rules have occurred and, if so, what consequences should follow (e.g., to revoke or suspend a market participant's designation or issue a penalty).[6]

iii Common securities claims

Although relatively few proceedings have been brought under the FMCA since its enactment, these cases are beginning to increase in volume.[7] In addition, there is an existing body of case law applying the preexisting statutory regime (the Securities Act 1978 (SA) and the Securities Markets Act 1988 (SMA)),[8] which, together with Australian decisions, provide guidance on the interpretation and application of the FMCA.

The most significant example of private securities litigation in New Zealand is that of *Houghton v. Saunders*, involving representative claims (primarily under the SA) by shareholders of Feltex Carpets Limited against parties associated with that failed company.[9]

False or misleading statements and omissions in disclosure

A focus of the liability regime under the FMCA (as was the case under the SA) is on defective disclosure in offer documents.[10] One of the key prohibitions in the FMCA is on the offeror[11] making or continuing to make an offer where the product disclosure statement[12] or register entry for a financial product contains false or misleading information, or omits required

6 See https://www.nzx.com/regulation/nzmd-tribunal-regulation; the Tribunal is not responsible for identifying (potential) breaches, as that responsibility lies with the NZX itself. The NZX has dedicated teams for this purpose.

7 See, for a recent example, civil proceedings brought against CBL Corporation Limited and its directors for, inter alia, breaches of the FMCA. Two of those proceedings were brought by the FMA and the remaining two were brought by separate litigation-funded class actions. Further discussion of these proceedings is set out in the Year in Review section.

8 See, for example, *R v. Moses HC Auckland CRI-2009-004-1388*, 8 July 2011; *R v. Graham* [2012] NZHC 265; *Jeffries v. R* [2013] NZCA 188; *Graham v. R* [2014] NZSC 55; *Houghton v. Saunders* [2014] NZHC 2229; [2015] NZLR 74 (*Houghton* (HC – substantive)); *Houghton v. Saunders* [2016] NZCA 493, [2017] 2 NZLR 189 (*Houghton* (CA)); and *Houghton v. Saunders* [2018] NZSC 74 (*Houghton* (SC)). There is still the potential for securities claims under the SA for securities issued under that regime (issuers of securities could choose to make an offer pursuant to the SA (notwithstanding its repeal) within two years (in the case of continuous issue securities) or 12 months (in any other case) from the commencement of the FMCA. (See FMCA, Schedule 4, Clauses 5–6). The limitation period for actions under the SA is generally six years, so proceedings with respect to certain offerings could still be brought pursuant to the liability regime in the SA until at least 2022.

9 *Houghton* (HC – substantive), note 8. The High Court of New Zealand in 2014 found in favour of the defendants. The Court of Appeal in turn upheld the High Court judgment: *Houghton* (CA), note 8. The Supreme Court, however, allowed the appellant's appeal to a limited extent and has left the questions of reliance, loss and defences for resolution at a stage 2 hearing: *Houghton* (SC), note 8.

10 Sections 82, 99 and 427 of, and Clause 27 of Schedule 1 to, the FMCA.

11 The 'offeror' for securities on issue is the issuer.

12 The product disclosure statement (PDS) is the New Zealand equivalent of an investment statement. The PDS is a consumer-focused disclosure subject to page limits, and is supplemented by disclosures on an electronic register.

information, or a new circumstance has arisen since the launch of the offer that has not been disclosed (in each case if the relevant matter is materially adverse from the point of view of the investor).[13] Where this prohibition is contravened:

a the offeror will have strict civil liability for the contravention;

b each director of the offeror at the time of the contravention will be deemed to have contravened the provision and will have strict civil liability;[14]

c the offeror and its directors can be criminally liable for a knowing or reckless contravention;[15] and

d others (e.g., joint lead managers, underwriters and professional advisers) can have civil liability for 'involvement' in the contravention[16] (or criminal liability as a party to offending).[17]

There is also a presumption of loss, meaning that if a person acquires financial products that have declined in value following a contravention of the above prohibition, the person must be treated as having suffered loss or damage because of the contravention.[18] A defendant can rebut this presumption through proof that the decline in value was caused by something other than the relevant statement or omission.[19] There is no separate requirement under the FMCA that a plaintiff demonstrate reliance.

The FMCA contains a number of statutory 'due diligence'-style defences for contraventions of civil liability provisions, including in relation to defective disclosure. Relevant defences include:

a that the contravention was because of reasonable reliance on information supplied by another person;[20]

b that all reasonable enquiries were made and that, after making such enquiries, the defendant believed on reasonable grounds that the statement was not false or misleading or that there had been no omission, or the defendant was unaware of the new circumstance;[21] and

c in respect of directors who are deemed to have contravened, or persons 'involved' in a contravention, that they took all reasonable and proper steps to ensure that the offeror complied with its obligations.[22]

13 FMCA, Sections 82 and 101.

14 FMCA, Section 534.

15 FMCA, Section 510.

16 FMCA, Section 533.

17 Crimes Act 1961, Section 66. There is also a separate criminal offence under Section 512 of the FMCA, under which any person will be criminally liable if, with respect to a document required by or for the purposes of the FMCA, they make or authorise the making of a statement in that document that is false or misleading in a material particular, knowing it to be false or misleading.

18 FMCA, Section 496. This presumption applies in relation to defective disclosure under Sections 82 and 99 of, or Clause 27 of Schedule 1 to, the FMCA.

19 FMCA, Section 496.

20 FMCA, Section 499. Note that 'another person' does not include a director, employee, or agent of the party in contravention.

21 FMCA, Section 500.

22 FMCA, Sections 501 and 503.

Fair dealing provisions

The fair dealing provisions in the FMCA prohibit, generally, misleading or deceptive conduct in relation to financial products and services.[23] The making of unsubstantiated representations in relation to financial products or services is also prohibited.[24]

The fair dealing prohibitions apply broadly to all financial products and services, not just regulated offers. The fair dealing provisions do not apply to conduct that contravenes more specific prohibitions in the FMCA (e.g., in relation to defective offer documents),[25] but can apply to other materials, for example, advertisements or road show presentations, and to advertising material for non-regulated offers.

Market manipulation and insider trading

Civil or criminal liability can be imposed for market manipulation or insider trading. The market manipulation prohibitions in the FMCA apply to any quoted financial product, and focus on disclosure-and trade-based manipulation.[26] Disclosure-based manipulation consists of disseminating false or misleading information calculated to materially affect the price or to induce a person to trade in the financial product.[27] The claimant must show that a material aspect of the information disseminated was false or misleading and that the defendant knew, or ought to have known, that this was the case.[28]

Trade-based manipulation involves an act or omission that will have, or is likely to have, the effect of creating a false or misleading appearance of the extent of active trading or the market for a financial product.[29] The defendant must know or ought to have known that their act or omission will, or is likely to, have such an effect.[30] A defence exists if the defendant can prove that the trading or offer to trade in financial products was in line with market practice and for a proper purpose.[31] The FMCA deems 'wash sales' and 'matched orders' to constitute manipulation.[32]

An 'information insider' under the FMCA is someone with information not generally available to the market who knows or ought to know that the information is material and not available to the market.[33] An information insider is prohibited from direct trading, disclosing

23 FMCA, Sections 17–38.

24 FMCA, Section 23. Note this prohibition does not apply to the content of offer documents – Section 26 of the FMCA.

25 FMCA, Section 28.

26 FMCA, Sections 240–269.

27 FMCA, Section 262.

28 FMCA, Section 262.

29 FMCA, Section 265.

30 FMCA, Section 265.

31 FMCA, Section 268.

32 FMCA, Section 267.

33 FMCA, Section 234.

information to others who are likely to trade, or advising or encouraging others to trade in the relevant financial product.[34] The FMCA and regulations provide exemptions to the insider trading prohibitions.[35]

Tort

It is not settled in New Zealand whether a duty of care in tort is owed to investors for the content of financial product disclosure and advertisements. In *Houghton v. Saunders*, the High Court held there was no special relationship for the purposes of a negligence claim because issuers' and promoters' obligations to the plaintiffs were already defined by the existing statutory scheme (the SA).[36] The negligence claim was abandoned on appeal.[37]

Secondary liability and gatekeepers

Other than in respect of the offeror and its directors, civil liability under the FMCA for defective disclosure will turn on whether a person was 'involved in the contravention'.[38] In criminal securities proceedings, secondary liability will turn on the party liability provision in the Crimes Act 1961 (Crimes Act).[39]

A person is involved in a contravention if they aid, abet, counsel, procure, induce (by threats or otherwise), are knowingly concerned in (directly or indirectly), or have conspired with others to effect the contravention.[40] The secondary liability provisions are similar to those in at least two existing New Zealand statutes, Section 43(1) of the Fair Trading Act 1986 (FTA) and Section 83 of the Commerce Act 1986, and Australian legislation, all of which will be helpful to practitioners applying them in practice.[41] The category most open to debate is the threshold of being 'knowingly concerned' in a contravention. Issues will arise as to what form of knowledge is required and what a person must have knowledge of (i.e., the essential facts that constitute the contravention). The provision could, potentially, capture anyone engaged in the offer process, whether they are a joint lead manager, underwriter or any other third party in the preparation of the disclosure. Liability will depend on the particular facts as to whether the relevant person was involved in the contravening conduct[42] and had knowledge of the essential matters comprising a contravention.[43] This will be, ultimately, a question of fact and degree in each case, and could be particularly difficult to determine where the underlying contravention involves evaluative judgments as opposed to simple untruths.

34 FMCA, Sections 241–243.

35 FMCA, Sections 245–256. These circumstances include where trading is required under an enactment; where the disclosure of information is required in the preparation of a PDS or other offer document; trading with knowledge of the trader's own intentions (for example, dealing in products of a target company prior to a takeover); and executing trades on specific trading instructions.

36 *Houghton* (HC – substantive), note 8; and see also *Tait v. Austin* (2000) 8 NZCLC 262,167 (HC).

37 *Houghton* (CA), note 8, at [34].

38 FMCA, Section 533. Directors, officers and other participants could also face direct liability for other common law (e.g., tort) and statutory claims (e.g., breach of directors' duties), as well as direct criminal liability under the Crimes Act, which is preserved by Section 542 FMCA.

39 Crimes Act 1961, Section 66.

40 FMCA, Section 533 defines the term involved in a contravention.

41 See, for example, *Yorke v. Lucas* (1985) 158 CLR 661 and *Ng v. Harkness Law Ltd* [2015] NZCA 411.

42 For example, assisted in preparing the PDS.

43 For example, knowledge that a statement in a PDS was misleading.

II PRIVATE ENFORCEMENT

i Forms of action

In addition to private individual actions, securities litigation can take the form of representative actions and shareholder derivative actions.

Representative actions

Until recently, representative actions had not been a significant feature of New Zealand's legal landscape. One reason for this slow development is the current absence of clear rules for such litigation.[44] Despite the lack of a developed statutory framework, a group can bring litigation by way of representative proceedings action under the High Court Rules (HCR).[45] Significant litigation has been brought in this way,[46] and there has been a notable rise in representative proceedings in recent years particularly in 2019.[47] The HCR provide that a person may sue 'on behalf of, or for the benefit of, all persons with the same interest in the subject matter of a proceeding', with the consent of the represented parties or as directed by the court on application.[48]

Securities representative actions in New Zealand will likely see continued growth in the future as a result of the presumption of loss in the FMCA, which will make it easier to establish causation in actions by the FMA and other plaintiffs on behalf of a large number of investors.

Derivative actions

Shareholders can also bring derivative actions under the Companies Act 1993 (CA).[49] Shareholders can seek leave from the court to bring a claim in the name, and on behalf, of the company. Typically, proceedings of this nature are brought against company directors in respect of breaches of directors' duties.

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44 In 2008, the Rules Committee released a draft Class Actions Bill and Rules for consultation. Although the Commerce Committee recommended in 2012 that the Government give priority to the introduction of a class actions regime, no real progress was made until a reference to the Law Commission in 2017. In 2018, the Law Commission announced it would review both class actions and litigation funding and, in December 2019, it released its terms of reference. The Law Commission intends to publish a detailed consultation document in 2020 and will report to the Minister with its recommendations by the end of 2021. At the time of writing, no consultation document has been published. See https://www.lawcom.govt.nz/our-projects/class-actions-and-litigation-funding.

45 HCR, Rule 4.24.

46 See, for example, *Houghton* (HC – substantive), note 8, as well as the discontinued proceedings against various retail banks in respect of bank fees.

47 Claims launched recently include: a claim by insurance policyholders against an insurer in relation to insurance recoveries following the Canterbury earthquakes (2018); claims by investors in a failed asset management company against a major retail bank for its role as banker to that asset management company (2019); claims by home/building owners against manufacturers in relation to defective cladding products (one filed in 2015 and another announced 2019); and two class actions brought under the FMCA against CBL Corporation Limited and its directors (2019).

48 HCR, Rule 4.24.

49 CA, Section 165.

ii Procedure

The procedural features of a private securities claim are largely governed by the HCR, which, alongside the Senior Courts Act 2016, form a procedural code.[50] Private proceedings under the FMCA are ordinary civil proceedings and the usual rules of procedure and evidence apply.[51]

Claims are commenced when a claimant files a statement of claim and a notice of proceeding in the High Court.[52] Assuming that the defendant intends to defend the claim and does not dispute the court's jurisdiction, it will file and serve a statement of defence. Typically, the parties are then required to disclose documents to each other in a discovery process.

A key feature of litigation in New Zealand is that courts typically require unsuccessful parties to pay the successful party's costs.[53] These sums can be significant and act as a deterrent to bringing speculative claims.

Litigation funding, although not regulated by statute, is becoming increasingly common in New Zealand. Outside the representative context, the Supreme Court has stated that it is not prepared to take on the role of general regulator of funding arrangements.[54] The Supreme Court concluded that a funded party should, however, disclose the following information to the court and other parties when funded proceedings commence:

a the fact that there is a litigation funder;
b the funder's identity and location;
c the funding agreement itself where relevant;[55] and
d whether the funder is subject to the jurisdiction of the New Zealand courts.

More recently, the Supreme Court, and in particular the (now former) chief justice, has made remarks that could be interpreted as marking a shift towards a more supervisory role.[56] These comments may lead to future challenges to litigation funding arrangements. However, the third-party funding of litigation in New Zealand will be considered by the Law Commission as part of its review into class actions.[57]

Representative actions

The Supreme Court has imposed a relatively low threshold on the 'same interest in the subject matter' requirement in representative proceedings.[58] The relevant HCR (4.24) is interpreted purposively to allow representative proceedings to be a 'flexible tool of convenience in the

50 The relevant part of the HCR is Part 5.
51 FMCA, Section 509.
52 In some cases, such as derivative actions under the CA, shareholders may first need to obtain leave from the court.
53 HCR, Rule 14.2. Such payment of costs is on a scale rather than an indemnity basis.
54 *Waterhouse v. Contractors Bonding Limited* [2013] NZSC 89, [2014] 2 NZLR 91 at [28] and [76].
55 If disclosure is required of the agreement it must be relevant to the particular application before the court. In this case, redaction is allowed for sensitive information (for instance, the 'war chest' among other matters).
56 *PricewaterhouseCoopers v. Walker* [2017] NZSC 151, [2018] 1 NZLR 735.
57 See https://www.lawcom.govt.nz/our-projects/class-actions-and-litigation-funding.
58 *Credit Suisse Private Equity LLC v. Houghton* [2014] NZSC 37, [2014] 1 NZLR 541 at [2]. See also HCR, Rule 1.2, which provides that the objective of the HCR is to ensure the 'just, speedy and inexpensive determination of any proceeding or interlocutory application'.

administration of justice'.[59] To satisfy this 'same interest' requirement, it will be sufficient for the claimant party and represented parties to have 'a community of interest in the determination of some substantial issue of law or fact'.[60]

Representative actions have generally proceeded on an opt-in basis, with prospective members of the group needing to opt in within a set time period.[61] However, the Court of Appeal has recently approved an opt-out approach in an insurance representative action.[62] This means that all class members are automatically included in the proceeding, and are given the opportunity to opt-out. The Court anticipates that 'opt-out orders will be the norm, in the absence of cogent reasons to prefer either a universal approach or an "opt in" approach by reference to the twin goals of fairness and efficiency'.[63] This decision has been appealed to the Supreme Court but has not yet been heard by that Court.[64] Further detail in relation to this decision is set out in the Year in Review section.

Even in instances in which all represented persons consent, the High Court has noted that it is prudent for those bringing the representative proceeding to apply for directions confirming that they may act as representative plaintiffs.[65] Where not all persons to be represented consent to the proceeding, an application to the court for a representation order is necessary.[66] Members of a represented group will be bound by any judgment to the extent of common issues, and may face obligations with respect to discovery of documents, answering interrogatories or payment of adverse costs awards.[67]

A key question arising out of the Court of Appeal's decision to allow class actions on an opt-out basis is whether the courts will be willing to make common fund orders, requiring all members of a class to contribute to the funding of a class action out of the proceeds of the judgment. At the time of writing, no New Zealand court has made a common fund order. However, an application for a common fund order is, at the time of writing, currently before the High Court in the *Ross v. Southern Response Earthquake Services Limited* (*Ross v. SRES*) litigation, so clarity should be provided soon. The Court of Appeal did not comment on this point, but noted it was confident that the Court had the 'necessary tools to address any real unfairness in this context, whether under the High Court Rules or in the exercise of its inherent powers'.[68]

The procedure for representative actions, subject to the above, follows typical civil procedural rules.

59 *Credit Suisse*, note 58, at [2] citing *John v. Rees* [1970] Ch 345 (Ch) at 370.

60 *Credit Suisse*, note 58, at [2] citing *Carnie v. Esanda Finance Corp Ltd* (1995) 182 CLR 398 at 408 per Brennan J.

61 *Saunders v. Houghton* (No. 2) [2012] NZCA 545, [2013] 2 NZLR 652 at [75].

62 *Ross v. Southern Response Earthquake Services Limited* [2019] NZCA 431.

63 *Ross v. Southern Response Earthquake Services Limited* [2019] NZCA 431 at [109].

64 *Southern Response Earthquake Services Ltd v. Ross* [2019] NZSC 140 (leave decision).

65 *R J Flowers Ltd v. Burns* [1987] 1 NZLR 260 (HC) at 264.

66 HCR, Rule 4.24.

67 *Devcich v. Cowley Stanich & Co* (1997) 11 PRNZ 47 (HC); *Hedley v. Kiwi Co-Operative Dairies Ltd* (2000) 15 PRNZ 210 (HC); compare *Houghton v. Saunders* (2011) 20 PRNZ 509 (HC) ('the individual members of the representative class are not liable for any adverse costs').

68 *Ross v. Southern Response Earthquake Services Limited* [2019] NZCA 431 at [110].

Derivative actions

The court has discretion to grant an applicant shareholder leave to bring derivative proceedings. The court will have regard to the likelihood of success in the proceeding, the costs of the proceeding as against the likely relief, and any actions already taken with respect to the breaches.[69] Notice of an application for leave must be served on the company, and the company must inform the court as to whether it intends to progress the proceedings. The procedure for derivative actions under the CA is governed by Part 18 of the HCR and largely follows civil procedural rules.

iii Settlements

While there is no express requirement for judicial oversight of an agreement to settle civil securities actions in New Zealand, recent comments by the Court of Appeal in *Ross v. SRES* suggests such oversight will be appropriate particularly if a litigation funder is involved in the action.[70] A settlement agreement is a contract that provides for the terms of the settlement, typically being a release of all claims by the plaintiff along with a payment from the defendant or defendants to the plaintiff. The parties generally agree regarding the apportionment of legal costs.

There are no specific rules governing the settlement of representative actions in New Zealand. Therefore it remains open to parties to reach out-of-court settlements. However, and notably, the Court of Appeal in *Ross v. SRES* recently commented that as part of its supervision of litigation funders to ensure there is no abuse of process, the court will ensure that any proposed settlement does not involve unfairness to some subset of class members.[71] To achieve that objective, the Court of Appeal in *Ross v. SRES* amended the representation order made by the High Court to make it clear that the plaintiffs could only discontinue the proceeding with leave of the Court.[72] By requiring leave of the Court, the Court ensured it had an opportunity to review any proposed settlement. The decision has been appealed to the Supreme Court and but has not yet been heard by that Court.[73]

The terms of reference published by the New Zealand Law Commission for its review of class actions and litigation funding include reference to 'damages, costs, and settlement'. Therefore, the NZLC will presumably consider the Court of Appeal's comments in *Ross v. SRES* (especially if the judgment, and amended representation order, is upheld by the Supreme Court).

Shareholder derivative proceedings brought with leave of the court cannot be settled, compromised or discontinued without approval of the court.[74]

69 CA, Section 165(2).

70 *Ross v. Southern Response Earthquake Services Limited* [2019] NZCA 431 at [104].

71 *Ross v. Southern Response Earthquake Services Limited* [2019] NZCA 431 at [104].

72 At [104] and [138].

73 *Southern Response Earthquake Services Ltd v. Ross* [2019] NZSC 140 (leave decision).

74 CA, Section 168.

iv Damages and remedies

The primary remedy for private actions under the FMCA is compensation.[75] A court may make any order that it considers just in order to compensate any person who has suffered, or is likely to suffer, loss or damage.[76] It seems likely that a New Zealand court would calculate loss in the case of defective disclosure as the difference between the purchase price and a measure of 'market' or other value.[77] The exact methodology is yet to be tested.[78]

In addition to compensatory orders, the FMCA grants the New Zealand courts the power to make a wide range of civil liability orders under Section 498, including the power to require refunds of money, vary or cancel agreements and restrain the issue or transfer of financial products.

III PUBLIC ENFORCEMENT

i Forms of action

The FMA has a broad range of criminal, civil and administrative enforcement tools.[79]

The FMA can collect and disseminate information or research about financial markets, has the power to issue warnings, reports and guidelines and make comment about any matter relating to financial markets, and it can set frameworks and methodologies for market participants.[80]

The FMA can also issue (on an urgent basis, if necessary) orders or notices as follows:

75 FMCA, Section 494.

76 FMCA, Sections 494–495.

77 *Houghton* (HC – substantive), note 8, at [699]–[712]; *Houghton* (SC), note 8, at [134]–[136].

78 But is likely to be the subject of substantial consideration during the stage 2 hearing in the *Houghton v. Saunders* proceedings.

79 See FMA Enforcement Policy (February 2019) (available at: https://www.fma.govt.nz/about-us/what-we-do/how-we-regulate/enforcement-policy/#) and FMA Regulatory Response Guidelines (August 2016) (available at: https://fma.govt.nz/assets/Policies/160824-Regulatory-response-guidelines-policy.pdf). Note that the FMCA also imposes governance obligations on certain entities. For example, Part 4 of the FMCA requires trust deeds for regulated offers of debt securities to comply with specific requirements and imposes legal duties on supervisors to supervise the issuer and to act in the best interest of investors. Part 4 also creates a register of managed investment schemes, including unit trusts and superannuation schemes under which a regulated offer has been made. Security trustees' compliance with oversight and monitoring obligations has been in the spotlight in New Zealand, particularly following the Supreme Court's decision in *Hotchin v. New Zealand Guardian Trust Company* [2016] NZSC 24, [2016] 1 NZLR 906, in which a majority of the court refused to strike out contribution claims by a director of a failed finance company against trustees for allegedly failing to take enforcement action to prevent loss to investors. See also *FMA v. Prince & Partners Trustee Company Ltd* [2017] NZHC 2059.

80 FMAA, Sections 8–9; FMCA, Sections 567–569; FMA Regulatory Response Guidelines (August 2016) (available at https://fma.govt.nz/assets/Policies/160824-Regulatory-response-guidelines-policy.pdf). See also, for example, the FMA's report on its investigation of disclosure breaches by the failed Wynyard Group Ltd (available at https://www.fma.govt.nz/assets/Investigations/Investigation-of-potential-disclosure-breaches-Wynyard.pdf), and public warning regarding Brian Ferguson, a registered financial adviser (available at https://www.fma.govt.nz/news-and-resources/warnings-and-alerts/brian-john-ferguson-fsp155185/). The FMA also has powers of designation (including the call-in of financial products) and exemption.

a stop orders: these may prohibit offers, issues, sales or other acquisitions or disposals of financial products; prohibit an offeror from accepting applications for financial products; or prevent the distribution of disclosure documentation.[81] The FMA can also issue, without notice, an interim stop order pending an exercise of its powers;[82]

b direction orders: these may direct a person to comply with the law; take steps to comply with the law or to avoid any potential or actual adverse effects of a contravention; or require a person to report to the FMA regarding implementation.[83] A direction order can also specify that a person may not rely on an exemption in the FMCA, prohibit the use of simplified disclosure and prohibit an offer under a recognition regime;[84] and

c infringement notices: these may be issued in a limited range of circumstances and provide the FMA with a flexible means for dealing with minor offences (such as a failure to send certain notices to security holders).[85]

The next level of intervention is the FMCA's civil liability regime, under which the FMA can apply to the High Court for a declaration of contravention, a pecuniary penalty order, a compensatory order or other civil liability order (as described above).[86]

The FMA can prosecute any proceeding under the FMCA and can:

a exercise and control a right of action on behalf of private litigants;[87] and

b with leave of the High Court, represent a class of persons if the persons have the same or substantially the same interest in relation to the proceedings.[88]

The FMA can accept enforceable undertakings (a form of negotiated settlement, which can include the payment of compensation), state a case for the opinion of the High Court and settle a case or investigation.[89] The FMA (or any other entitled person) may also seek banning orders[90] in the High Court.[91] On application of the FMA (or any other person), the court may grant injunctive relief.[92] In certain cases, the FMA may refer conduct to the Serious Fraud Office, the Commerce Commission, the Police or the Reserve Bank of New Zealand (RBNZ).[93]

At the highest level of intervention, a contravention of the FMCA coupled with knowledge or recklessness can lead to criminal prosecution by the FMA.[94]

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81 FMCA, Sections 462–467.

82 FMCA, Section 465.

83 FMCA, Sections 468–469.

84 FMCA, Sections 470–471.

85 FMCA, Sections 513–516.

86 FMCA, Section 484.

87 FMAA, Section 34. This would include, for example, the right to step in and bring claims for breaches of directors' duties. See, for example, *Prince & Partners*, note 79, which was the first case where the High Court was required to examine a case instituted under Section 34 and discussion in *Financial Markets Authority v. ANZ Bank Limited* [2018] NZCA 590.

88 FMAA, Section 39.

89 FMAA, Sections 44–48.

90 Such orders prohibit a person from either providing financial advice or broking services or being a director or a promoter of an entity. Breaching a banning order is an offence. See Sections 517–521 of the FMCA.

91 FMCA, Section 517. The FMA may also impose conditions on, or revoke, licences.

92 FMCA, Section 480.

93 FMA Conduct Outcomes Report 2017 (available at https://fma.govt.nz/assets/Reports/_versions/10491/Conduct-outcomes-report-2017.1.pdf).

94 FMA Prosecution Policy (available at https://fma.govt.nz/assets/Policies/prosecution-policy.pdf).

The FMA has a policy of publicising enforcement action unless there are policy, legal or other compelling reasons not to do so.[95] This is to maximise the 'visible deterrence' and to educate market participants.[96]

ii Procedure

Search powers

One of the key differences between public enforcement and private enforcement is the information gathering powers of the FMA. If the FMA considers it necessary or desirable it may (by written notice) require a person to supply the FMA with information, produce documents, reproduce information, appear before the FMA and give evidence.[97]

The FMA may authorise a specified person to enter and search a place, vehicle, or other thing.[98] The search may only occur if the occupier or person in charge consents or a warrant is obtained.[99]

Civil proceedings

The standard of proof for civil proceedings is the balance of probabilities, and the usual rules of evidence and procedure apply.[100] In *FMA v. Warminger*, a market manipulation case brought under the old regime (the SA), the High Court required 'strong evidence' to be satisfied that the elements of the statutory provisions were made out on the balance of probabilities.[101] It seems likely this approach will be carried over to civil proceedings under the FMCA.

The FMA has committed to act as a model litigant in civil proceedings. This leads to a number of (self-imposed) obligations, including acting honestly and fairly, but does not prevent the FMA from acting promptly, decisively and properly to protect its interests.[102]

Criminal proceedings

The FMA will only take criminal action where there is evidence of intentional, reckless or other serious unlawful conduct.[103] Rules governing the FMA's conduct of criminal litigation are also set out in the Solicitor-General's Prosecution Guidelines.[104]

95 FMA Enforcement Policy (available at: https://www.fma.govt.nz/about-us/what-we-do/how-we-regulate/enforcement-policy/#).

96 FMA Enforcement Policy (available at: https://www.fma.govt.nz/about-us/what-we-do/how-we-regulate/enforcement-policy/#).

97 FMAA, Section 25.

98 FMAA, Section 29.

99 FMAA, Section 29(3). When the FMA issues an infringement notice, Section 515 of the FMCA sets out the procedural requirements for doing so.

100 FMCA, Section 509.

101 *FMA v. Warminger* [2017] NZHC 327 [*Warminger (No 1)*] at [33].

102 FMA Model Litigant Policy (available at https://fma.govt.nz/assets/Policies/model-litigant-policy.pdf). The FMA must act honestly and with complete propriety, fairly and in accordance with the highest professional standards. More specifically, this includes responsibly spending public funds in relation to litigation, considering proposals of alternative dispute resolution and not pursuing appeals unless the FMA considers it has a reasonable prospect of success and, or the appeal is otherwise justified in the public interest.

103 See FMA Prosecution Policy (available at https://fma.govt.nz/assets/Policies/prosecution-policy.pdf).

104 Solicitor-General Prosecution Guidelines, Crown Law, 1 July 2013; FMA Model Litigant Policy (available at https://fma.govt.nz/assets/Policies/model-litigant-policy.pdf).

The standard of proof for criminal proceedings is beyond reasonable doubt, and procedure is governed by the Criminal Procedure Act 2011.

Declarations of contravention

Any person, including the FMA, can apply to the court for a declaration of contravention.[105] The purpose of a declaration of contravention is to lay the groundwork for a later applicant seeking a civil remedy, who can rely on the declaration of contravention as establishing the defendant's contravention of the FMCA.[106]

Collaboration with other regulators

The FMA has entered into memoranda of understanding with other regulators and agencies.[107] One relevant example is the memorandum of understanding between the FMA and the Commerce Commission. For matters relating to misleading and deceptive conduct, the FMA has primary regulatory responsibility in relation to financial products and financial services, with the Commerce Commission taking primary regulatory responsibility for other misleading and deceptive conduct.[108]

iii Settlements

The FMA can settle matters either prior to, or following the commencement of, proceedings. The FMA will, pursuant to its model litigant policy, consider proposals to avoid or resolve litigation, including by cooperation or other agreed resolution.[109]

When the FMA exercises a person's right of action and brings proceedings, those proceedings cannot be settled, compromised or discontinued without the court's approval.[110] The High Court recently issued the first such approval.[111] The Court assessed the settlement in light of the FMA's objective and functions,[112] and approved the settlement on the basis of the following reasons:

a the defendant's admissions;

b the settlement sum was accepted as being in a 'range commensurate' to the losses caused; and

c the settlement agreement was to be made public, including by way of public announcement.[113]

In criminal prosecutions, the parties can find a mutually beneficial compromise, which results in the defendant facing fewer charges or pleading guilty to certain charges, or both.

105 FMCA, Section 486.

106 FMCA, Section 487(1).

107 See https://fma.govt.nz/about-us/what-we-do/how-we-regulate/regulatory-co-operation/mous-with-other-financial-regulators-and-agencies/.

108 In particular in relation to consumer credit contracts.

109 See FMA Model Litigant Policy (available at https://fma.govt.nz/assets/Policies/model-litigant-policy.pdf).

110 FMAA, Section 41.

111 *Prince & Partners*, note 79.

112 *Prince & Partners*, note 79, at [8]–[12].

113 *Prince & Partners*, note 79, at [13]–[19].

iv Sentencing and liability

Criminal proceedings

The maximum sanctions for criminal offending under the FMCA are: for individuals, up to 10 years' imprisonment or a fine not exceeding NZ$1 million, or both; and for corporations, a fine not exceeding NZ$5 million.[114]

Pecuniary penalties in civil proceedings

Significant pecuniary penalties can be imposed under the FMCA. The maximum penalty applicable (e.g., for defective disclosure in regulated offers) is the greatest of:

a the consideration for the relevant transaction;
b three times the amount of the gain made or loss avoided by the contravention; and
c NZ$1 million for an individual or NZ$5 million in any other case.[115]

A person cannot be liable for more than one pecuniary penalty for the same conduct and cannot be ordered to pay a pecuniary penalty and a fine for the same conduct.[116]

In determining the appropriate pecuniary penalty, the court must have reference to a variety of relevant matters, including those listed in Section 492 of the FMCA. In *Warminger*,[117] the High Court adopted an approach to determining the appropriate pecuniary penalty that required the court to fix a starting point having regard to the relevant statutory criteria and then make deductions for personal circumstances. A similar approach is likely to be adopted under the FMCA.

Infringement notices

The maximum amount payable under an infringement notice[118] ranges from NZ$5,000 to NZ$20,000.[119] However, if an infringement offence is proceeded with summarily, the maximum fine is NZ$50,000.

IV CROSS-BORDER ISSUES

i Jurisdictional issues

Whether a New Zealand court will have jurisdiction over a foreign person or entity will turn on the regime for service out of jurisdiction in the HCR.[120] An originating document may be served out of New Zealand without leave of the High Court in a number of situations, including, relevantly, when the claim arises under an enactment and the enactment applies expressly or by implication to an act or omission that was done or occurred outside New Zealand in the circumstances alleged.[121]

114 FMCA, Section 510(3). Lesser sanctions apply for certain criminal offences under the FMCA.
115 FMCA, Section 490.
116 FMCA, Sections 506–507. This extends to fines under the FTA and the Financial Advisers Act 2008.
117 *FMA v. Warminger* [2017] NZHC 1471 [*Warminger* (No. 2)] at [13].
118 Infringement notices can be issued for infringement of approximately 30 FMCA provisions.
119 Financial Markets Conduct Regulations 2014, Schedule 22.
120 HCR, Rules 6.27–6.36.
121 HCR, Rule 6.27(2)(j). See generally Nathaniel Walker in Lawrence W Newman (ed) *Enforcement of Money Judgments* (2019, JURIS Arbitration Law).

If jurisdiction is challenged by the defendant, then the party effecting service is required to establish that there is a good arguable case that the claim falls within one of the specified grounds[122] and that the court should assume jurisdiction by reference to the following factors:

a there is a serious issue to be tried on the merits;

b New Zealand is the appropriate forum for the trial; and

c any other relevant circumstances support an assumption of jurisdiction.[123]

The New Zealand courts will continue to be guided by earlier authorities relating to *forum non conveniens*.[124]

ii Extraterritorial application of the FMCA

Certain provisions of the FMCA have extraterritorial effect:

a the fair dealing provisions apply to conduct in New Zealand and to conduct outside New Zealand by any person resident, incorporated, registered or carrying on business in New Zealand to the extent that that conduct relates to dealing in financial products, or the supply of a financial service, that occurs (in part or otherwise) within New Zealand;[125]

b the disclosure obligations in Part 3 apply to offers of financial products in New Zealand, regardless of where the resulting issue or transfer occurs or where the issuer is resident, incorporated or carries on business;[126] and

c the provisions regarding dealing in financial products on markets in Part 5, including insider trading and market manipulation, apply to conduct in relation to quoted financial products or listed issuers regardless of whether the conduct is in New Zealand or outside New Zealand.[127]

iii Mutual recognition scheme

The trans-Tasman mutual recognition scheme allows issuers of securities to offer specified financial products in New Zealand and Australia, using one disclosure document prepared under the fundraising laws in the issuer's home country.[128]

122 For example, the claim arises under an enactment and the relevant acts or omissions occurred in New Zealand.

123 HCR, Rule 6.29, and *Ivanishvili v. Credit Suisse AG* [2018] NZHC 1755, (2018) 4 NZTR 28-011.

124 *Wing Hung Printing Company Ltd v. Saito Offshore Pty Ltd* [2010] NZCA 502, [2011] 1 NZLR 754 at [43].

125 FMCA, Section 33(1). The fair dealing provisions also apply to a restricted communication that is distributed or to be distributed to a person outside New Zealand by any person resident, incorporated, registered, or having a principal place of business in New Zealand (Section 33(2)).

126 FMCA, Section 47.

127 FMCA, Section 239.

128 *FMA, Regulatory Guide 190*: *Offering financial products in New Zealand and Australia under mutual recognition December* 2016 at 4; Subpart 6 of Part 9 of the FMCA sets out the legislative scheme relevant to Australian issuers in New Zealand, while Chapter 8 of the Corporations Act 2001 (Aust) (and associated Regulations), sets out the same for New Zealand issuers.

V YEAR IN REVIEW

In October 2019, the FMA released its Annual Report for 2018–2019.[129] The FMA described 2019 as a 'watershed year', with the FMCA fully implemented, conduct regulation the new norm and the FMA applying a wider lens to review conduct across the financial sector.[130] The FMA noted the following highlights of 2019:[131]

a completing a joint review with the Reserve Bank of New Zealand of conduct and culture within retail banks and life insurers;

b continuing its enforcement action;[132] and

c guiding and engaging with the financial adviser industry in preparation for the FMA's licensing and monitoring obligations under the new financial advice regime.

i Guidance and reports

In 2019, the FMA and RBNZ completed their joint reviews of the conduct and culture of the retail banking and life insurance industries respectively. The reviews took place in the context of the Australian Royal Commission into Misconduct in the Banking, Superannuation and Financial Services Industry, which had identified failings in the treatment of customers of Australian financial institutions.[133]

The FMA/RBNZ review of retail banks identified weaknesses in the governance and management of conduct risks, and required each of the 11 banks reviewed to develop bespoke plans to address individual feedback provided to them by the regulators.[134]

The FMA/RBNZ review of life insurance identified 'extensive weaknesses' in the systems and controls of the 16 life insurers reviewed, as well as instances of conduct potentially in breach of the law.[135]

These reviews have led to regulatory reform, which is discussed further in the Legislation and Regulation section below.

129 FMA Annual Report (available at https://www.fma.govt.nz/assets/Annual-reports/FMA-2019-Annual-Report.pdf).

130 FMA Annual Report at 5 (available https://www.fma.govt.nz/assets/Annual-reports/FMA-2019-Annual-Report.pdf).

131 FMA Annual Report at 3 (https://www.fma.govt.nz/assets/Annual-reports/FMA-2019-Annual-Report.pdf).

132 Indeed, the FMA far exceeded its litigation budget in 2018/2019, but funded the overspend from its reserves. The FMA successfully obtained an increase to its litigation fund for the 2019/2020 financial year and onwards, with the New Zealand government announcing, on 29 October 2019, an increase to the FMA's budget of NZ$4 million, taking its litigation fund annual budget to $6 million: See https://www.fma.govt.nz/news-and-resources/releases-from-the-minister-of-commerce/4-million-increase-in-fmas-litigation-fund-to-strengthen-enforcement-capability/.

133 FMA/RBNZ Bank Conduct and Culture Review (available at https://www.fma.govt.nz/assets/Reports/_versions/11883/Bank-Conduct-and-Culture- Review.1.pdf).

134 FMA/RBNZ Bank Conduct and Culture Review at pages [6] and [8] (available at https://www.fma.govt.nz/assets/Reports/_versions/11883/Bank-Conduct-and-Culture-Review.1.pdf).

135 FMA/RBNZ Life Insurer Conduct and Culture Review at 5 (available at https://www.fma.govt.nz/assets/Reports/_versions/12147/Life-Insurer-Conduct-and-Culture-2019.1.pdf).

ii FMA enforcement action

Insider trading

The FMA filed charges against a former VMob Ltd (now Plexure Group) executive in October 2017 relating to insider trading and failing to disclose relevant interests under the SMA.[136] On 13 March 2019, the executive pleaded guilty to a charge of failing to disclose a relevant interest under Section 19T of the SMA and provided an enforceable undertaking to the FMA not to be involved in the management of a public issuer for a period of five years and to pay the FMA NZ$150,000, all in exchange for the FMA withdrawing its insider trading charge. In April 2019, the High Court convicted the executive on the remaining non-disclosure charge and ordered him to pay a fine of NZ$12,000.[137]

Further criminal prosecutions

Following a mistrial in May 2017,[138] the FMA pursued its prosecution against three former directors of the Viaduct and Mutual finance companies in a retrial that commenced in August 2018. The revised charges in the retrial included theft by a person in a special relationship,[139] making false statements as a promoter[140] and making false statements to a trustee.[141] All three directors were found guilty of multiple charges in verdicts delivered on 5 February 2019. On 27 March 2019, one director was sentenced to a term of three years and two months imprisonment, while the other two directors received sentences of home detention. In August 2019, the Court of Appeal set aside convictions against the director imprisoned on two charges (but upheld the other four charges) and reduced his term to 11 months home detention, taking into account the two trials and the time he had already spent in custody. One of the other directors was acquitted and the final director's appeal against conviction was dismissed.[142] In a separate sentence appeal, the final director had his home detention reduced to 10 months.[143]

The FMA also obtained convictions for Crimes Act charges brought against two men in the Tauranga District Court for defrauding two elderly women of NZ$645,000, who believed they were investing in a software company.[144] Both were sentenced to four years and six months in prison.

The FMA also charged a director and his company with offences under the Crimes Act (obtaining by deception and dishonesty using a document) for contacting people and convincing them to invest by transferring money into bank accounts he controlled and later, after incorporating a company, further cold-calling other people to promote a foreign exchange investment service that did not exist in circumstances where neither he nor his company were authorised or licensed by the FMA. Charges were also brought under the

136 https://www.fma.govt.nz/news-and-resources/cases/mr-talbot/.

137 *R v. Talbot* [2019] NZHC 773.

138 *R v. Bublitz* [2017] NZHC 1059.

139 Crimes Act 1961, Section 220.

140 Crimes Act 1961, Section 242.

141 Companies Act 1993, Section 377(2).

142 *Bublitz v. R* [2019] NZCA 364, [2019] 3 NZLR 533. See https://www.fma.govt.nz/news-and-resources/cases/viaduct-capital-and-mutual-finance-case/.

143 *McKay v. R* [2019] NZCA 493.

144 See https://www.fma.govt.nz/news-and-resources/cases/south-and-provan/.

FMAA for obstructing the FMA's powers during the investigation by giving false evidence. A hearing was scheduled for 12 June 2019, but at the time of writing no judgment has been issued.[145]

CBL Corporation Limited

In December 2019, the FMA commenced two sets of civil proceedings against CBL Corporation Limited (CBL), its directors and chief financial officer, alleging multiple breaches of the FMCA. The first proceeding alleges breaches of the FMCA in the context of CBL's Initial Public Offering (IPO).[146] The second proceeding alleges (1) failure to comply with CBL's continuous disclosure requirements and (2) misleading and deceptive conduct and or unsubstantiated representations regarding a market announcement in 2017.[147]

In addition, in October 2019 two litigation-funded class actions were announced against CBL and its directors seeking compensation for investors as a result of alleged defective disclosures.[148] At the time of writing, the FMA's proceedings and the two class actions against CBL are ongoing.[149]

iii Ross Asset Management class action

In July 2019, a litigation-funded class action on behalf of eligible investors in a failed asset management company, Ross Asset Management (RAM), was filed against a major retail bank in relation to its role as banker. David Ross, the former director of RAM, was jailed in 2013 after pleading guilty to fraud that left investors NZ$115m out of pocket when RAM collapsed in 2012. In bringing the class action, the authors understand that the claimants relied on information shared by the FMA, which in turn had compelled that information from the relevant bank under its statutory information gathering powers. In March 2020 the High Court heard an application to strike out the claim against the bank, and judgment is awaited.

The FMA has confirmed that, since RAM investors are pursuing their private claims against the bank by way of class action, there was no need for the FMA to determine whether to use its statutory powers to pursue an action on their behalf.[150]

iv Ross v. Southern Response Earthquake Services Limited

In September 2019, the Court of Appeal released its landmark decision in *Ross v. SRES*, which has confirmed the availability of representative actions that proceed on an opt-out basis, as outlined in Section II.[151] Prior to *Ross v. SRES*, representative actions generally proceeded on an opt-in basis.

145 See https://www.fma.govt.nz/news-and-resources/cases/rodney-mccall/.

146 The alleged breaches include failure to disclose related party transactions, and false and or misleading statements in respect of solvency ratios and the use of IPO proceeds.

147 See https://www.fma.govt.nz/news-and-resources/cases/cbl/.

148 https://www.imf.com.au/cases/register/cbl-corporation-ltd-shareholder-class-action-overview; https://www.cblclassaction.co.nz/ and https://lpfgroup.co.nz/claims-we-are-funding/.

149 See CBL Investigation Update (available at https://www.fma.govt.nz/news-and-resources/media-releases/cbl-investigation-update-2/).

150 See https://www.fma.govt.nz/news-and-resources/media-releases/fma-comments-on-ross-asset-management-investor-proceedings/.

151 *Ross v. Southern Response Earthquake Services Limited* [2019] NZCA 431 (*Ross* (CA)).

In *Ross v. SRES* the Court of Appeal confirmed that there was no jurisdictional barrier to making an opt-out order under Rule 4.24.[152] The opt-out order made in that case, however, applied only in respect of stage one of the trial (which would determine the representative plaintiff's claim in its entirety and the common issues in respect of the entire class). For the second stage trial (which would determine the remainder of the claim), claimants would have to take active steps to establish their individual claims (i.e., opt in and provide all relevant evidence).[153] The Court considered that opt-out orders are likely to significantly enhance access to justice and strengthen incentives for insurers and other large entities dealing with the public to comply with the law.[154]

In December 2019, the Supreme Court granted leave to hear an appeal.[155] If the Supreme Court agrees with the Court of Appeal that opt-out orders may be made in representative proceedings, a new era of representative actions is likely to occur in New Zealand, with significant implications for securities litigation. It remains to be seen whether the New Zealand Law Commission will recommend the same approach approved by the Court of Appeal in *Ross v. SRES* (especially if it is upheld by the Supreme Court) during its review of class actions and litigation funding in New Zealand.

VI OUTLOOK AND CONCLUSIONS

Securities litigation and regulatory enforcement continues to be a significant risk facing market participants.

The FMA aims to take an 'intelligence-led and harm-based' approach to regulation, analysing the information it receives as a means of identifying and assessing the areas of greatest harm to investors, customers, and financial markets, and the drivers of that harm.[156] Market participants who fail to comply with their obligations will receive a response proportionate to the level of harm identified by the FMA.[157] Conduct and culture across a number of industries remained a key focus of the FMA in 2019; in particular, its joint review of conduct and culture within retail banks and life insurers, which was the 'single largest thematic review' the FMA has undertaken.[158]

i Pending cases

In April 2019, the FMA filed 15 causes of action against four current and former executives of Oceania Natural Limited (ONL) for alleged breaches of the market manipulation prohibitions and disclosure obligations in the FMCA. This followed a referral by the NZX in December 2016 regarding trading in ONL shares. This case is currently before the courts.[159]

152 *Ross* (CA), note 151 at [81], [83] and [111].

153 *Ross* (CA), note 151 at [35].

154 *Ross* (CA), note 151 at [98] and [99].

155 *Southern Response Earthquake Services Ltd v. Ross* [2019] NZSC 140.

156 FMA Annual Report at 16 (available at https://www.fma.govt.nz/assets/Annual-reports/FMA-2019-Annual-Report.pdf).

157 FMA Annual Report at 5 and 10 (available at https://www.fma.govt.nz/assets/Annual-reports/FMA-2019-Annual-Report.pdf).

158 FMA Annual Report at 5 (available at https://www.fma.govt.nz/assets/Annual-reports/FMA-2019-Annual-Report.pdf).

159 See https://www.fma.govt.nz/news-and-resources/cases/onl/.

ii Legislation and regulation

The Financial Services Legislation Amendment Act 2019 (FSLAA) received royal assent, passing it into law, on 8 April 2019 and introduces a new regulatory regime for financial advice that is currently scheduled to come into force on 29 June 2020. FSLAA amends a number of New Zealand Acts, including the FMCA, in particular repealing the Financial Advisers Act 2008 and bringing financial advisers under the ambit of the FMCA.[160] The FMA sees FSLAA as an 'opportunity for customer-centric conduct to be permanently embedded in the culture of the financial sector', particularly in light of recent FMA reports into conflicted conduct and replacement business issues in the insurance industry.[161] The FSLAA introduces licensing, disclosure and conduct obligations for financial service providers (a new concept based on the provision of regulated financial advice). Financial service providers currently have until 29 June 2020 to obtain a transitional licence, and a further two years to comply with the obligations introduced by FSLAA. However, as a result of the significant disruption and other impacts of the covid-19 pandemic, an intention to defer the start date of the new financial advice regime set out in the FSLAA from 29 June 2020 to early 2021 has been signalled.

The Financial Markets (Derivatives Margin and Benchmarking) Reform Amendment Act 2019 was also given royal assent on 30 August 2019. The Act also amends a number of statutes so as to enable New Zealand financial market participants to comply with international rules, and continue to enter into derivatives and other types of financial instruments with overseas financial entities. The Act introduces a new licensing regime for administrators of financial benchmarks under the FMCA, which aims to enable those benchmarks to be referenced in financial instruments with international counterparties.

Following the RBNZ and the FMA's joint review into the conduct and culture of banks and life insurers in New Zealand,[162] the Financial Markets (Conduct of Institutions) Amendment Bill was introduced into Parliament on 11 December 2019 in response to findings that certain institutions 'lack focus on good customer outcomes for customers and have ineffective systems and controls to identify, manage and remedy conduct issues'.[163] Key changes will include a new licensing regime[164] and the introduction of a 'fair conduct principle' to treat consumers fairly, including by paying due regard to their interests.[165]

As noted above in respect of FSLAA, many of the regulatory initiatives due for consultation or implementation in the near future have been deferred as a result of the evolving circumstances surrounding the covid-19 pandemic.

160 Financial Services Legislation Amendment Act 2019, Schedule 2.

161 See NZ Adviser 'Lack of time or experience 'no excuse' for non-compliance - FMA' (available at https://www.nzadviseronline.co.nz/news/lack-of-time-or-experience-no-excuse-for-noncompliance-fma-256673.aspx), and FMA Annual Report at 7 (available at https://www.fma.govt.nz/assets/Uploads/181025-FMA-Annual-Report-2017-18-full.pdf). See also QFE insurance providers' replacement business practices (available at https://www.fma.govt.nz/assets/Reports/_versions/11082/180717-QFE-insurance-providers-replacement-business-practices.1.pdf).

162 Life Insurer Conduct and Culture: Findings from an FMA and RBNZ review of conduct and culture in New Zealand life insurers, January 2019 (available at https://www.fma.govt.nz/assets/Reports/Life-Insurer-Conduct-and-Culture-2019.pdf) and Bank Conduct and Culture: Findings from an FMA and RBNZ review of conduct and culture in New Zealand retail banks, November 2018 (available at https://www.fma.govt.nz/assets/Reports/Life-Insurer-Conduct-and-Culture-2019.pdf).

163 Financial Markets (Conduct of Institutions) Amendment Bill, explanatory note.

164 Financial Markets (Conduct of Institutions) Amendment Bill, Sections 6 and 8.

165 Financial Markets (Conduct of Institutions) Amendment Bill, Section 9.

Appendix 1

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Chris practises in commercial and public law litigation and has a particular interest in class actions, complex commercial disputes and securities law. A former New Zealand Rhodes Scholar and appellate judge's clerk, Chris has appeared as an advocate at every level of the New Zealand court system. Chris recently acted for a multinational client in the successful trial defence of a NZ$200 million securities class action in the New Zealand High Court, the first such proceeding in the New Zealand legal system.

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Marika is a commercial litigator with particular expertise in banking and financial markets, real estate disputes and insurance. Marika represents clients in the courts and in arbitrations on a variety of complex commercial disputes, and also advises issuers and other industry participants on recommended processes under financial markets legislation. Marika brings a commercial and strategic approach to disputes and is valued for her ability to avoid and efficiently resolve issues for her clients.

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Nathaniel's practice spans all aspects of commercial litigation and dispute resolution, with a particular focus on trusts and equitable claims, financial services regulation and insurance law, and disputes with a cross-border dimension. He has significant experience in regulatory investigations, and also regularly provides compliance, law reform and other pre-litigation advice. Nathaniel rejoined Russell McVeagh in late 2017, having spent more than two years in New York practising at Cravath, Swaine and Moore LLP and completing his LLM at Columbia.

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