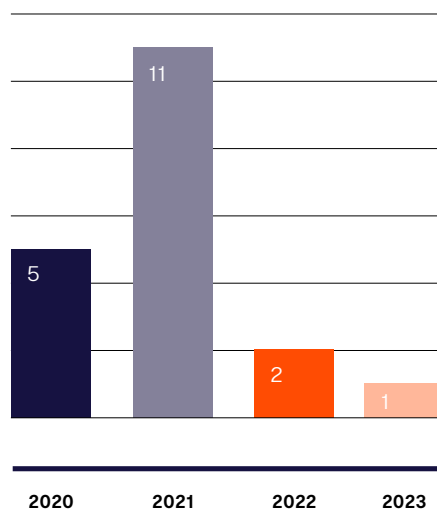


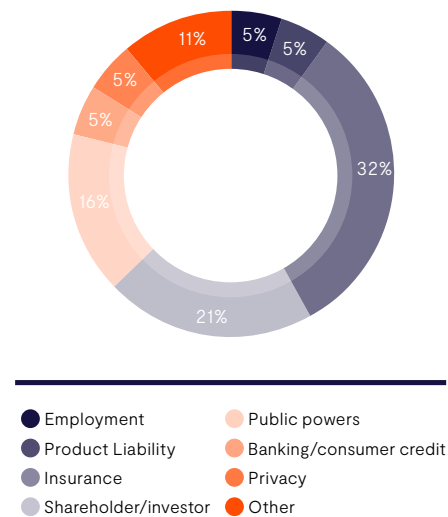
Class actions in New Zealand

2024 Update

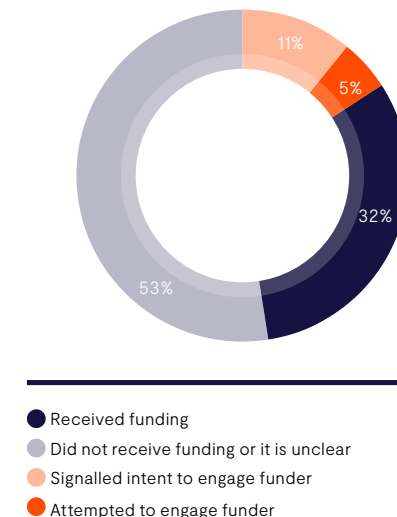
New class action proceedings filed
High Court or lower courts



Types of class action
2020-2023



Class action cases that received funding
2020-2023



A slowdown in new class action filings

There has only been one new class action filing in the past year.¹

Given the criteria for cases which a litigation funder will typically seek out – those involving a potentially *large* plaintiff class; where each potential plaintiff’s claim may be small on its own, but the *aggregate* of all plaintiff claims will be material; where unlawful conduct is clear or more easily proved, or even admitted by the target defendants; where *compensation for breach is not automatic*, or fully realised, by the relevant regulatory response; and with “*deep pocket*” defendants – we can expect that the number of new class action filings may be lumpy from year-to-year.

While activity over the past year may not necessarily have produced the kinds of scenarios that will attract a funder and result in a new class action filing, this may have been compounded by two key factors:

- **Pending high profile class action judgments with appellate courts:** at least two high profile class action proceedings made their way to the New Zealand Court of Appeal in the past year – *Body Corporate Number DPS 91535 v 3A Composites GMBH* (read our [commentary](#)) and *Simons v ANZ and ASB* (see below) – which litigation funders would have been watching; and
- **A general post-COVID backlog in the New Zealand justice system:** new class action claims may be yet to find themselves before a judge or have judgments released.

As such, we see the slowdown in new class action filings as reflective of New Zealand’s bespoke class action regime. The overall class actions environment remains active and overseas-based litigation funders are still interested in the New Zealand market – Court House Capital, an Australian-based litigation funder, announced it filed a class action against Toyota New Zealand in September 2023 (which has not yet resulted in a judgment nor been recorded in the statistics above).

1. Calculated based on the filing dates for class action proceedings where a judgment was released in the past year. But not necessarily a comment on whether the Court permitted it to be bought as a class action.

CFOs – a game-changing new judgment

The majority of class actions are not currently funded. That may start to change.

In the recently released *Simons v ANZ and ASB* judgment,² the Court of Appeal confirmed the courts have jurisdiction to make common fund orders (CFOs). CFOs impose the contractual terms of the funding arrangement between the representative plaintiff and the litigation funder on all members of the class – preventing the “free rider” behaviour that can otherwise occur in opt-out class actions. The Court of Appeal agreed with the High Court’s decision that the High Court Rules are broad enough to enable the court to issue a CFO, and went further, saying these could be granted at an early stage of the proceeding.

The Court of Appeal found the commercial viability of a litigation funding arrangement enhances access to justice by providing certainty in how representative proceedings are funded. This would:

“ensure the benefits of a successful representative proceeding is shared fairly between the representative plaintiff and all class members. Access to justice is best enhanced through the allocation of the fruits of a successful representative proceeding being agreed upon at an early juncture”,

giving litigation funders comfort that they will receive a return on their investment if the case succeeds.

Self-reporting and class actions – a clash

The FMA has long considered that self-reporting of non-compliance is a “minimum expectation”,³ with the Commerce Commission’s recent draft Self-Reporting Guidance for Lenders also encouraging lenders to provide highly detailed self-reports.⁴ But regulated industries are often a target for class actions, with regulator enforcement activity (including settlements) potentially creating a roadmap for private enforcement.

Even if there are no public documents created, self-reports are potentially accessible under the Official Information Act 1982. Although there may be conclusive reasons to withhold self-reports in some cases, the regulator will otherwise need to balance the reason for withholding information against the public interest in disclosure – meaning that regulators may decide to release information even if that will have a harmful effect on the entity who self-reported. Regulators may also form the view that it is an appropriate exercise of their functions to release information to potential private plaintiffs.⁵

In light of the risk presented by our developing class actions industry, we may see fewer entities self-reporting and instead remediating and taking the risk of a stronger enforcement action from regulators if their non-compliance is later discovered.



Read our 2023 report:
Class actions in New Zealand | Trends & Insights



What’s next?

Given the ongoing CCCFA reforms and a high-profile CCCFA claim already before the New Zealand Courts, we see the next key risk area for New Zealand entities and businesses as cyber and data security:

- 01** Cyber incidents are prolific with 80% of leaders surveyed by Kordia Cyber Security saying their business experienced some sort of cyber incident or attack in the past 12 months.⁶
- 02** Mitigation efforts appear to be lagging despite the uptick in cybercrime with 23% of businesses having not rehearsed an incident response plan in the past 12 months.⁷
- 03** System vulnerabilities were put on sharp display following the global disruption following an IT outage made by the CrowdStrike software update earlier this month.

With two data breach class actions – Optus and Medibank – still in the early stages before the Australian Courts, cyber and data breach class actions remain an area to watch going forward.

2. *Simons & Ors v ANZ and ASB* [2024] NZCA 330.

3. *Financial Markets Authority speech* (2021).

4. *Commerce Commission self-reporting guidance for lenders – consultation on draft* (April 2024).

5. For example, *FMA v ANZ* [2018] NZCA 590. Although this case concerned information acquired under compulsory powers, it demonstrates that regulators may wish to provide information to investors/potential plaintiffs – in the knowledge that this may result in private enforcement. (Chapman Tripp acted for ANZ in this matter.)

6. *Kordia Cyber Security Report* (2024) at 16.

7. *Kordia Cyber Security Report* (2024) at 16.

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