



**Climate related adaptation,  
mandatory disclosures and litigation:  
Update on law and policy**

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# Overview

1. Practical insights for insurers preparing mandatory climate-related disclosures
2. Update on climate change litigation in NZ and overseas
3. Implications of climate risk for director liability and D&O insurance
4. Climate adaptation policy development



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# **Practical insights for insurers preparing mandatory climate-related disclosures (CRD)**

# Mandatory climate-related disclosures

- Annual climate statements to be required from c. 200 reporting entities in NZ (large listed issuers, banks, insurers, fund managers)
- Forward looking disclosures of climate change-related physical + transition risk
- Mandatory Climate Standards with extensive content
- Audience for reporting “primary users” (current and potential investors, lenders, creditors)
- First disclosures for FY24; GHG disclosures require external assurance from FY25
- Penalty regime aligned with Financial Markets Conduct Act (FMCA)

- **Climate Standards:**

- NZ CS 1, 2 and 3
- All Sector Guidance

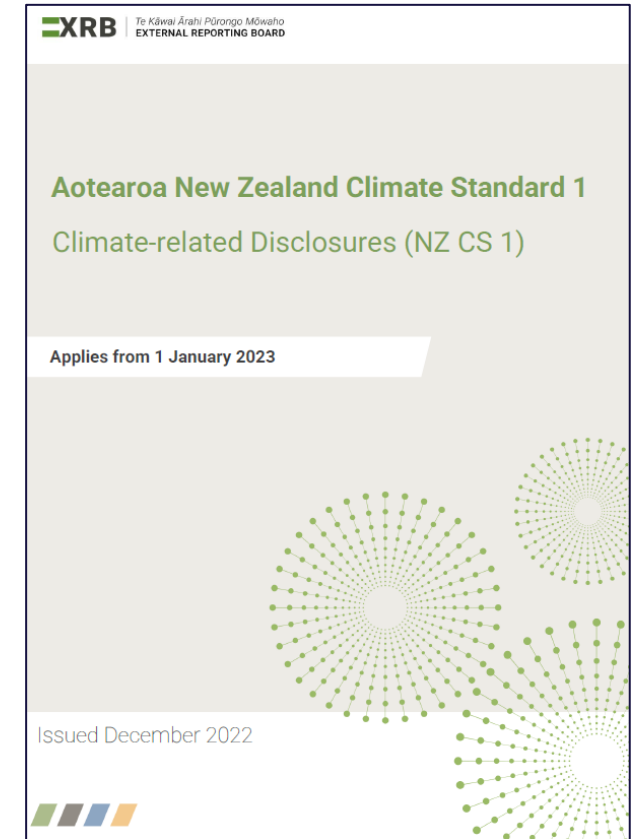
- **Australian Developments:**

- Released its second consultation
- First reporting period likely to be 2024-2025



# Content of NZ CS 1 - overview

- **Governance** – oversight of climate-related risk and opportunities (governance body responsible, processes, relevant expertise, role of management)
- **Strategy** – climate-related impacts and anticipated impacts (physical and financial), scenario analysis, risk and opportunity identification, transition planning
- **Risk management** – process for identification, assessment, prioritisation and management of climate risk, and integration into overall risk management process
- **Metrics and Targets** – measurement and management of climate risk and opportunity: mandatory metrics (scope 1,2,3 emissions, emissions intensity, vulnerability to physical/transition risk etc) and targets disclosures (incl alignment to 1.5 degrees, reliance on offsetting)



# Emerging market expectations for CRD

- Clear demonstration of **governance** of climate-related risks and opportunities (board / management)
- Publication of emissions reduction **targets** aligned with 1.5°C (e.g. SBTi)
- Inclusion of **scope 3** (“value chain”) emissions in disclosures
- Emerging expectation of a **Transition Plan** for low-emissions world
- Understanding and application of **scenario analysis**
- Low but increasing expectations on **quantification** of climate-related impacts
- Queries re: dependence on **offsetting** to reach an entity’s targets
- FMA: Focus on integration with **financial statements**
- **For insurers: policy impacts and investment portfolio impacts**

# Liability under new disclosure regime

- Liability for insurers, directors, key employees
- Existing liability for omissions/misrepresentation: **Part 2 FMCA**
- New mandatory climate-reporting regime: **Part 7A FMCA**
  - Civil liability for failing to comply with Climate Standards. Deemed liability for directors.
  - Criminal liability for *knowingly* misleading, failing to comply
- Defences:
  - **Reasonable reliance on information** supplied by third party (CRE, directors and employees involved)
  - Cause **beyond CRE's control** and reasonable precautions and due diligence taken (CRE only)
  - All **reasonable steps taken to avoid contravention by CRE** (deemed director and "involved" employee liability only, not CRE itself)
  - No defence for *knowingly* making misleading statements or knowingly failing to comply with Climate Standards

# Key legal risks from climate disclosures

- Unsubstantiated or unrealistic GHG reduction targets
- False claims / misrepresenting disclosures (fall-out from investment)
- Not disclosing enough (criticism / litigation re: failure to disclose)
- Disclosing too much too soon (misaligned with strategy / other messaging)
- Overstating ability to manage / respond to risks
- Greenwashing (overstating “green” credentials)
- Increased focus on trends in GHG emissions (~ COVID impact)



# Climate litigation and greenwashing: regulator focus

## Shell directors sued for 'failing to prepare company for net zero'

Environmental law organisation ClientEarth brings action and urges other shareholders to join



## Commonwealth Bank shareholders drop suit over nondisclosure of climate risks

Guy and Kim Abrahams say case does not need to proceed after changes in bank's 2017 annual report



## Gas giant Santos accused of 'greenwashing' clean energy claims, in Federal Court case

## Paris and New York join climate litigation against TotalEnergies

EURACTIV.com with Reuters 22 Sept 2022

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## Supreme Court agrees to hear climate case

*In 'Strongest' Climate Ruling Yet, Dutch Court Orders Leaders to Take Action*

Glencore faces Australian challenge over net-zero strategy

POLITICS / ENVIRONMENT

Climate Change Minister taken to court over emissions trading scheme Cabinet decision

Court orders Shaw to reconsider ETS settings

Attempted climate case against Shell's directors dismissed

Environmental groups sue TotalEnergies for misleading the public over Net Zero

Fossil fuel industry faces surge in climate lawsuits

Number of climate-related lawsuits globally has doubled since 2015, with quarter filed in past two years

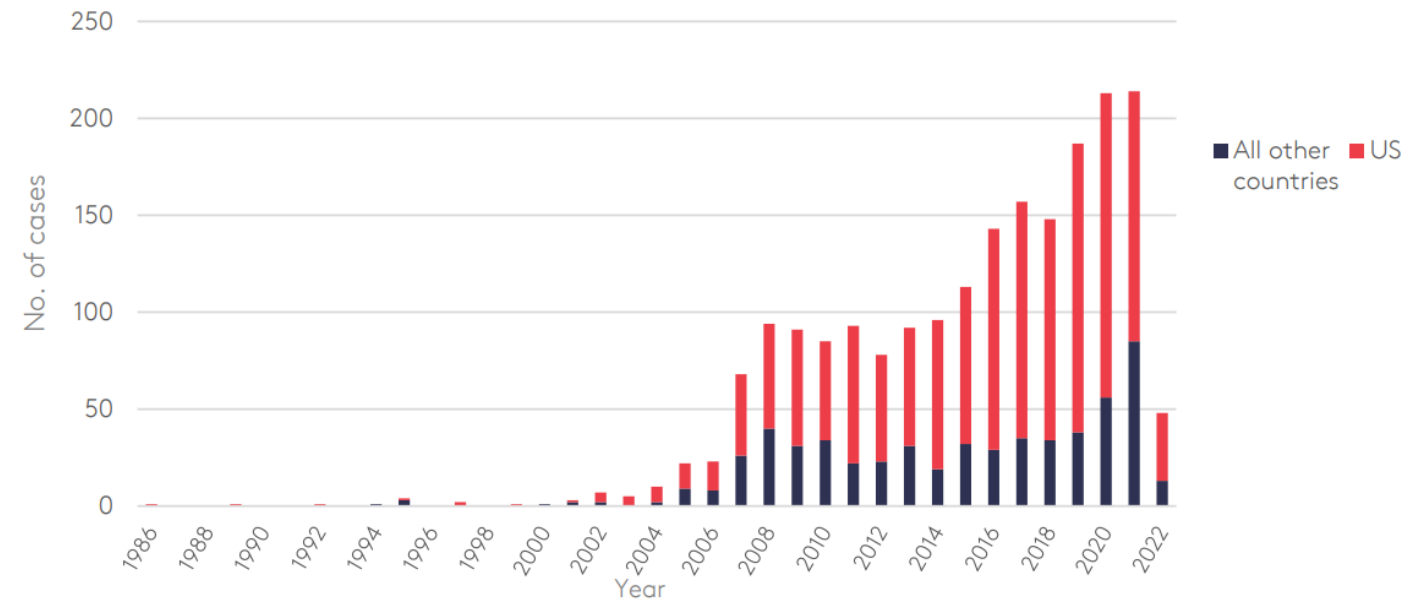


Australian oil company Santos is one of many to face legal challenges in recent years.  
Photograph: Darren England/AAP

# Climate litigation trends

- **Claims against Governments**
  - failure to act on mitigation / adaptation
  - judicial review of project decisions
  - human rights / constitutional challenges
- **Claims against corporates**
  - tort liability + damages
  - lack of disclosure
  - greenwashing / misrepresentation

Figure 1.1. Total climate change cases over time, US and non-US (up to 31 May 2022)



Source: Authors based on CCLW and Sabin Center data

# Climate litigation of interest for insurers

- ***Weir v Kapiti Coast DC*** – 2013. Challenge to LIM reports disclosing sea level rise
- ***Smith v Fonterra*** – CA decision 2021 – SCt leave application pending
- ***LCANZI v Climate Change Commission*** – Challenge to CCC methodology
- ***Commonwealth Bank of Australia*** – Settlement following failure to disclose climate risk. Further decision to disclose internal analysis of risk.
- ***O'Donnell v Australia*** – settlement recognising climate risk impact on value of sovereign bonds
- ***McVeagh v Retail Australian Employees Trust*** – disclosure of pension fund risk
- ***Santos Energy*** – First corporate claim to net zero targets
- ***US caselaw*** re: insurance claims for climate related “occurrences”

# Greenwashing focus for regulators

## *New Zealand*

- Commerce Commission – 2020 **Guidance on environmental claims** and 2023 **Collaboration and Sustainability Guidelines**
- FMA – 2020 **Disclosure framework for integrated financial products** (e.g. green bonds) and 2022 **Review of disclosure by managed funds** (e.g. ethical funds)
- FMA - 2023 - Major focus on greenwashing

## *Australia*

- ASIC – June 2022 – **ASIC Guidance on avoiding greenwashing by managed funds. Infringement notices. First proceedings underway.**

## *UK*

- Jan 2023 – **Consultation** on new guidance on environmental claims
- March 2023 – **FCA warning** to ESG index providers over



# Climate, director liability and D&O Insurance



# ESG and claims against directors

- Climate-related disclosures
- Greenwashing
- Companies Act duties
  - Aotearoa Circle – Climate risk tool kit for directors
  - Section 131 – best interests
  - New s 131(5): in considering best interests, directors may consider ESG matters
  - Section 137 – reasonable skill and care



# ClientEarth v Shell

**First case globally seeking to challenge corporate directors directly over their failure to prepare for the energy transition**

## **Claim:**

- ClientEarth claim that Shell's Board's energy transition strategy was flawed
- Sought permission to bring the claim against directors
- Asserted breaches of the UK Companies Act:
  - Section 172 - duty to promote the success of company
  - Section 174 - duty to exercise reasonable skill, care and diligence

## **Decision:**

- The UK High Court refused to allow the action against the directors to proceed:
  - directors not subject to specific "climate risk" duties
  - failed to show prima facie case that directors' breached their duties
  - ClientEarth's ulterior motive
  - orders sought too imprecise and required court oversight





# Approach to directors' duties – Mainzeal

## Supreme Court guidance to directors

### Context:

- Breaches of Companies Act directors' duties in insolvency context:
  - Section 135 – reckless trading
  - Section 136 – incurring obligations
  - Section 301 – relief

### Guidance:

- Supreme Court “accessible” guidance for directors:
  - Ongoing obligation to monitor performance and prospects
  - Deal directly with issues
  - Independent professional advice
  - Reasonable time to assess risks and make decisions
  - Acknowledge more than one reasonable course of action



# Insurance response

## General

- More D&O cover
- Percentage of NZ organisations with D&O cover: \*
  - 2020 – 78.5%
  - 2021 – 85%
  - 2022 – 89%
- Questions and scrutiny on ESG when applying for insurance

## Coverage issues

- Exclusions for:
  - Claims by the company
  - Claims by major shareholders
- Other policies - statutory liability
- Ongoing development of terms

\*See: Institute of Directors New Zealand and EY's "[2022/23 Director's Fees Report](#)" and "[2021/22 Director's Fees Report](#)".

# Climate adaptation policy development

# Disaster recovery

- Cyclone Gabrielle – community and insurance impact
- Event or area specific approach:
  - Canterbury Residential Red Zone
  - Cyclone Gabrielle and Auckland Floods - community led buy outs, flood mitigation and protection
  - South Dunedin

# Managed retreat

- Climate change impact on severe weather events...
- Adapting to climate by moving people and communities from higher-risk to lower risk locations
- Aims to replace ad hoc and post-event natural disaster responses with standardised and pre-event managed retreat

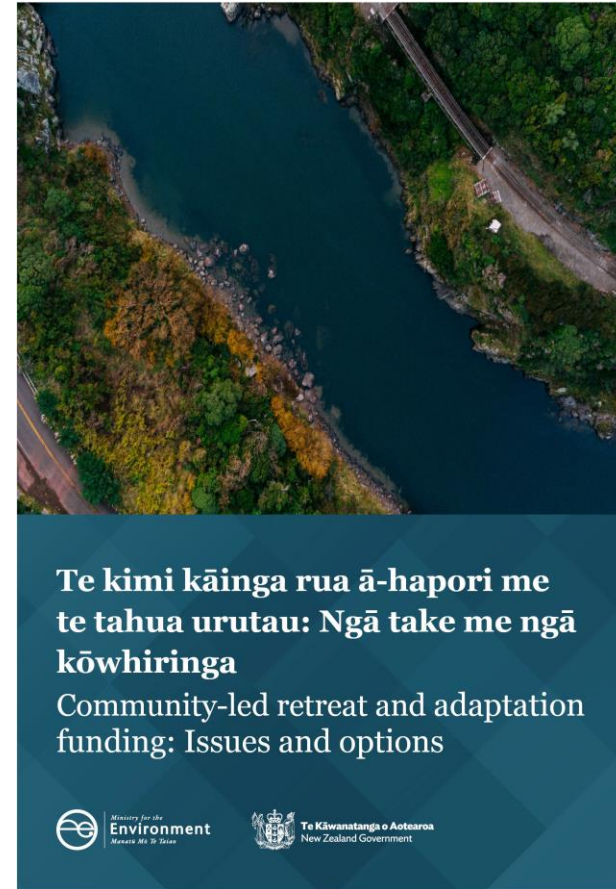
# The National Adaptation Plan

- sets out Government policies to address climate risks
- covers a broad range of aspects of climate adaptation, including –
  - Climate conscious decision-making
  - RMA reforms
  - Potential national flood insurance
- managed retreat legislation was a key priority for the 2022 – 2024 period



# Recent developments

- Expert Working Group paper
- Ministry for the Environment Issues and Options Paper
- Select Committee inquiry



# Key issues

- Approach to assessment of risk
- Mandatory relocation
- Compensation
- Funding
- Insurance:
  - Compulsory insurance in at risk areas
  - National flood insurance

# Next steps

- Election



- Submissions due 1 November
- 2024 - Climate Adaptation Bill
- 2025 or later - implementation



# Discussion



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