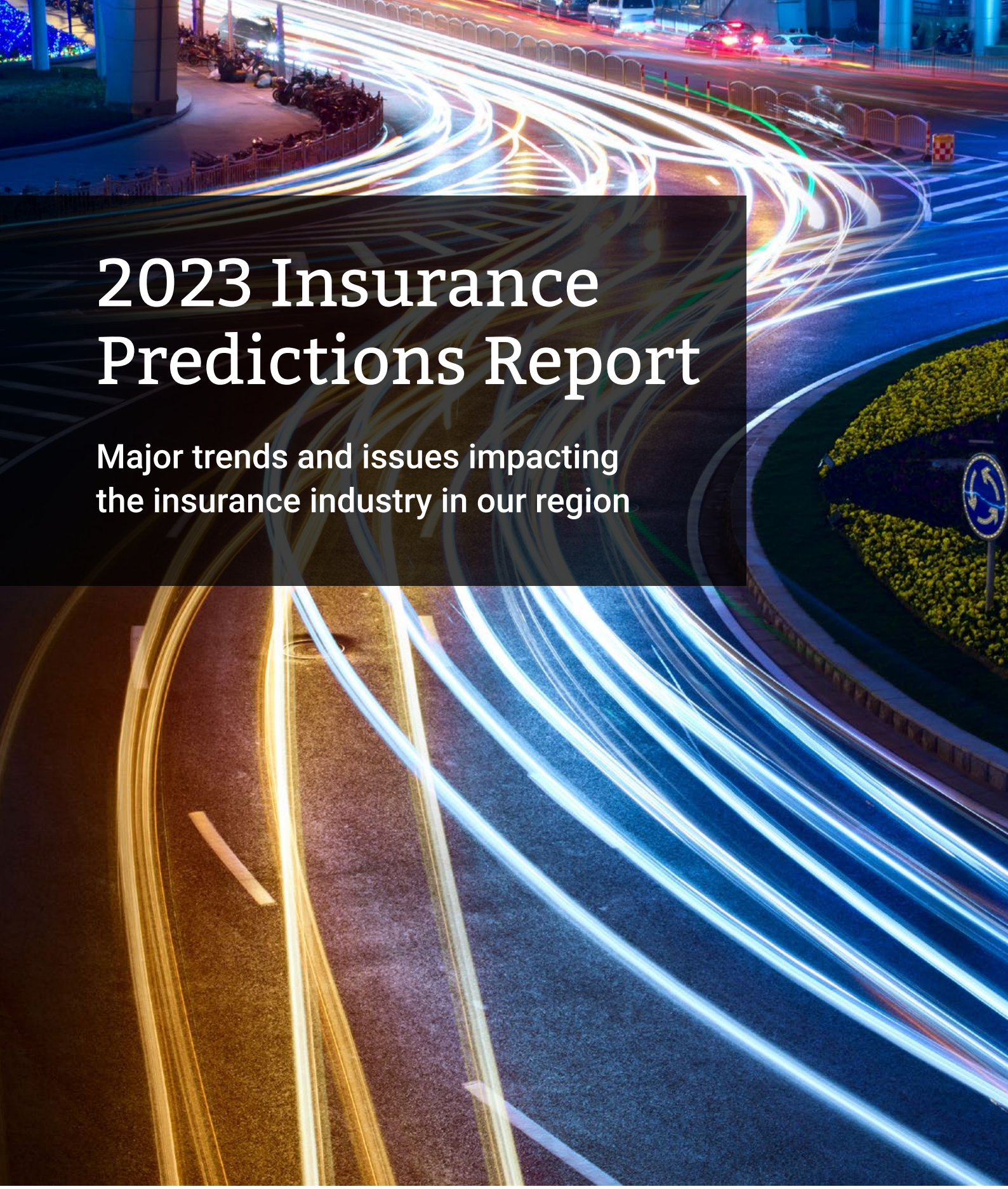

2023 Insurance Predictions Report

Major trends and issues impacting the insurance industry in our region

wotton kearney

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Contents

Welcome to Predictions

Wotton + Kearney is pleased to share our *2023 Insurance Predictions Report*, which looks at the major trends and issues we expect will remain in the spotlight for the insurance industry in our region this year.

This report addresses key trends across insurance lines, including the rise in class actions in Australia despite regulatory change and the rapidly evolving cyber exposure landscape.

We look at the way many longer-standing issues continue to evolve, including climate-related liabilities, product liability and professional indemnity exposures in New Zealand.

We also consider emerging issues, such as the impact of the green hydrogen market, risks associated with power storage and regulatory requirements around ESG reporting.

If you have any questions, please get in touch with any of our key contacts listed at the back of this report.

Kind regards

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Class actions filings will continue to increase in Australia despite regulatory change

D&O, class actions

Class actions in Australia will be the subject of regulatory change. The Federal Government will formally respond to, and most likely adopt, many of the reforms recommended by the Australian Law Reform Commission in 2019. This will include introducing contingency fees for class action proceedings issued in the Federal Court. New South Wales will follow suit to avoid becoming irrelevant in the class actions space. It is likely the Federal Government will reject Recommendation 24 regarding a review of the substantive law governing securities class actions on the basis that the legal framework is operating fairly and efficiently.

Class actions filings will continue to increase, with consumer and government class actions driving those increases. Between 15 and 20 securities class actions will be commenced in line with recent historical averages. Directors and officers will be more regularly joined to securities class actions against small to mid-cap ASX-listed entities due to the lack of entity cover and the desire to access insurance. We may see directors and officers joined as third parties to securities class actions by the entity being pursued as another means of shifting the economic burden from the uninsured entity to D&O insurers.

There will be more entrants to the plaintiff class action market as contingency fees incentivise larger commercial firms that traditionally acted for defendants taking on plaintiff briefs.

Watershed year ahead for climate change legislation in Australia

D&O, regulation

In 2023, the climate risk landscape will shift dramatically again. We can expect formal disclosure guidelines on environmental risk disclosure to become law for publicly listed entities. This, ideally, will be accompanied by legislative reform directed at creating a more transparent and reliable carbon credit regime. The use of carbon credits in net zero plans will continue to be an area of contention and risk. The difficulties associated with Scope 3 emissions will also be a major issue for public companies.

We can expect climate activism to be a feature of the litigation landscape. Significantly, claims to date have largely been directed at declaratory relief with the aim to name, shame and change behaviour rather than to seek compensation. Whether we see a transformation in approach, where compensation becomes a feature of climate litigation, remains to be seen. This seems likely when a company's activities cause environmental harm and adversely impact the well-being and earning capacity of third parties.

Financiers and insurers will come under increasing pressure to align their activities with a net zero world. The relationship between insurance, capital and the transition to renewables will be a major focus for regulators, institutional investors and public interest groups alike. Ultimately, how effectively public companies manage their climate risk will be determined by their ability to properly scrutinise their climate risks (physical and transitional), critically analyse their strategic plans to work towards net zero (or some other stated goal), and be satisfied that they have a reasonable basis to disclose and maintain those representations.

Social and governance risk shouldn't be forgotten

D&O, regulation

While it is understandable that climate risk has dominated the spotlight this year, the US experience highlights the potential exposures that accompany poor social risk management. Gender diversity, racial diversity and poor supply chain due diligence are features of the litigation landscape in the US. There is no reason why the public interest activism we have observed regarding climate litigation can't be replicated in the social risk arena. Arguably, it will be inevitable.

Modern slavery legislation and supply chain social risk are likely to feature heavily in 2023 as public awareness and sensitivity to the role of corporates in driving social outcomes become more prominent. The cross-over between carbon credits and social risk is also likely to be a flashpoint, with question marks raised about links between key inputs for renewable technology and modern slavery considerations.

ASIC regulatory enforcement activity

D&O, regulation

ASIC held its Annual Forum in November 2022 with a clear take-home message – ASIC remains deeply committed to enforcement. ASIC's appetite for enforcement in a post-COVID world comes with increased penalties. Contraventions that occurred from 13 March 2019 onwards will be exposed to the strengthened penalties under the *Treasury Laws Amendment (Strengthening Corporate and Financial Sector Penalties) Act 2019* (Cth). These penalties can range from 10% of the annual turnover of the company, capped at 2.5 million penalty units, which equates to roughly $462 million on current penalty rates. While these penalties will only apply to the most egregious conduct, they remain a key tool in ASIC's regulatory toolkit.

Difficult business conditions increase exposure for NZ auditors

D&O, insolvency

Many New Zealand businesses are struggling. They are either still nursing a COVID-19 hangover or are battling the change in consumer habits caused by the lockdowns and remote working. They see no reprieve in the short-term outlook either, as consumer demand over the next 12-18 months is likely to decrease with the rising mortgage rates and money being spent overseas.

We predict more audit negligence claims as insolvency impacts the worst affected businesses, particularly where desperate managers trade insolvent (or worse) and auditors face claims that they should have identified the breaches.

Tax claims arising from NZ's new trust disclosure rules

Professional indemnity

From the 2022 income year, all eligible trusts in New Zealand are required to comply with the new financial reporting and disclosure rules. However, Inland Revenue can request disclosure back to the 2015 income year. The objective of the new rules appears to be to facilitate the collection of data regarding how New Zealanders are using trusts following the personal tax rate increase to 39% for taxpayers earning in excess of $180,000. It is likely that the government will share the data with overseas tax jurisdictions that it has a double tax agreement with. There are about 40 countries involved, including the USA, Australia, UK, India, Singapore and Hong Kong. We expect ensuing investigations may lead to an increase in claims against accountants and lawyers who have been advising clients on tax efficiency.

CGT claims against advisors likely to arise under NZ's bright-line property rule

Professional indemnity

New Zealand's bright-line property rule has been in existence since October 2015. Since then there have been low interest rates, which have attracted many property investors. Most of the $89 billion lent to residential property investors in the past 1-3 years has been fixed at historically low interest rates. However, in the next 18 months, between $44 and $67 billion will be coming off fixed-term mortgages and will be repriced at interest rates 2-3 times higher. This is likely to lead to an increase in claims against solicitors and accountants as investors are required to pay tax on any capital gains.

Conflicts arising from intra-family house purchases

Professional indemnity, disciplinary complaints

Due to the sustained inflation in the housing market in New Zealand over the past 8-10 years, many first home buyers have only been able to purchase homes with help from their parents. Parents can do this in several ways, including by using the equity in their own home, offering a cash gift or providing a guarantee for the loan. Where this has occurred, the same solicitor has often acted for both the parents and children.

We predict there will be further claims arising out of disputes between the children and parents, including disciplinary complaints alleging breaches of the conflicting duties rules in the Lawyers: Conduct and Client Care rules.

Wholesale investment offers and self-certification likely to lead to claims

Professional indemnity, disciplinary complaints

New Zealand's Financial Markets Authority (FMA) has completed a well-publicised investigation into the use of the wholesale investor exclusion, investor self-certification and the practices of several property-related investment firms. The FMA found multiple instances of financial advisors confirming eligible investor certificates where there were no grounds to do so.

We predict that the FMA will start to refer more claims to the Financial Advisers Disciplinary Committee for breaches of the financial advisors' Code of Professional Conduct.

End of claim farming in Queensland likely to create positive impact on social inflationary pressures for insurers

Personal injury

Claim farming is the act of approaching, coercing or pressuring a potential plaintiff into making a personal injury claim. Once 'farmed', the file is often sold to a plaintiff legal practice for ongoing conduct.

On 22 June 2022, the Queensland Parliament passed new laws banning claim farming of personal injury claims in the state. *The Personal Injuries Proceedings and Other Legislation Amendment Act 2022* (PIPOLA) seeks to end the proliferation of claim farming in Queensland through amendments to the *Personal Injury Proceedings Act 2002* (PIPA), the *Workers' Compensation and Rehabilitation Act 2003* (WCRA) and the *Legal Profession Act 2007* (LPA). The PIPOLA specifically targets claim farming of general personal injury claims, including those involving institutional abuse and workers' compensation claims.

Due to the secretive nature of claim farming, there is limited data on how widespread the practice is. Any reduction is most likely to be seen in potential claims with limited liability prospects and/or low quantum, as those claims tend to be better candidates for claim farming. Given those types of claims have disproportionately high claims management and defence costs relative to indemnity exposure, any reduction in their volume should result in a modest positive impact on social inflationary pressures for insurers.

Vicarious liability for unlawful acts likely to be clarified

Personal injury

In two recent decisions, the courts have grappled with the difficult question of whether an employer should be found vicariously liable for the wrongful acts of an employee. This area of law was clarified in two historic child abuse claims in the Prince Alfred College decision. However, there remains an open question about whether the 'relevant approach' used in that decision has broader application.

In *Garrett*[1] and *Schokman*[2], two employees committed obvious wrongdoings but two different results were achieved. While these cases were fact-specific, the decisions could leave employers and their insurers wondering why – at the level of principle – they could be liable for acts of gross negligence by employees outside the formal employment role, yet not for intentional acts (excepting whether the employment role created the 'occasion' for the intentional act).

The fact that the recent cases had two different outcomes suggests that the law in this area requires further clarification. The appeal to the High Court from the *Schokman* decision should provide it.

1 *Garrett v Victorian WorkCover Authority* [2022] VSC 623

2 *Schokman v CCIG Investments Pty Ltd* [2022] QCA 38

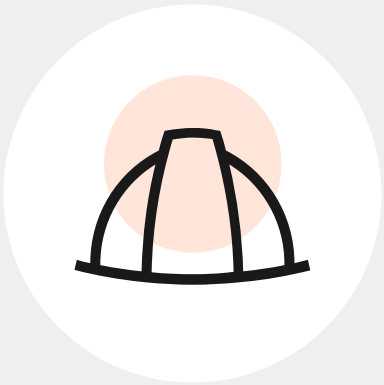
FIFO mental harm

Personal injury

The WA Parliamentary Enquiry in June 2022 into sexual harassment and assault in the mining industry highlighted horrific behaviour against women in the course of their employment at FIFO mine sites. The report described the "devastation and despair" experienced by female FIFO staff as a result of harassment from their co-workers and stated that it represented a "failure of the industry to protect its workers."[3]

This potentially exposes entities using a FIFO workforce to mental harm claims arising out of sexual harassment, particularly in light of the growing public discussion of this issue since the report's release (which may encourage more employees to come forward with their experiences). Entities should take care to implement effective preventative policies to avoid instances of harassment and take appropriate action when responding to reports by staff.

As knowledge of workplace mental health continues to improve in the community, insurers need to be aware that more claims for stress and mental harm may become commonplace in the future.



'Third wave' dust disease claims

Personal injury

A 'third wave' of dust disease claims from those who are exposed to asbestos and silica products during home renovations and constructions is now emerging.

It is estimated that around 584,050 Australian workers are currently exposed to respirable crystalline silica (RSC) dust particles, with between 83,090 – 103,860 of those expected to turn into silicosis cases.[4] An additional 10,000 are expected to develop lung cancer.[5] The risk is not limited to miners or workers involved in the production of manufactured stone since silica is used in such a wide range of products. Therefore, occupational exposure to RSC may occur in various industries.

In late 2020, a Perth father became the first person in WA to commence legal action against four different companies where he worked as a stonemason. The action is ongoing, but the outcome of this case and others like it will shed light on what insurers can expect in coming years.

Unlike asbestos-linked diseases, such as mesothelioma, silicosis can appear within a couple of years, rather than decades. Not only does this mean claims will arise sooner, but they will also be brought by younger people who would otherwise have many years of earning capacity ahead of them. The available statistics don't account for the uncertain number of home renovators who have been exposed to RSC, particularly the high levels found in artificial kitchen and bathroom benchtops. We expect this number to rise in response to the many people who used the numerous COVID-19 lockdowns as an opportunity to undertake home renovations, often doing them 'DIY' to avoid having tradespeople enter the home.

3 https://www.parliament.wa.gov.au/Parliament/commit.nsf/(Report+Lookup+by+Com+ID)/F1DFA3F5DF74A848258869000E6B32/$file/20220621%20-Report%20No%202.pdf (iii)_

4 According to a study conducted by Curtin University in April 2022 < https://www.curtin.edu.au/about/wp-content/uploads/sites/5/2022/07/FEFreport_formatted.pdf>

5 According to a study conducted by Curtin University in April 2022 < https://www.curtin.edu.au/about/wp-content/uploads/sites/5/2022/07/FEFreport_formatted.pdf>

The demise of the dangerous recreational activity defence?

Personal injury

In 2022, the High Court issued its decision in *Tapp v Australian Bushmen's Campdraft & Rodeo Association Limited* [2022] HCA 11 (*Tapp*). It addressed the dangerous recreational activity defence under the *Civil Liability Act 2002* (NSW). With similar provisions in Queensland, Tasmania and Western Australia, the decision has wide-ranging implications.

There is a perception that the *Tapp* decision makes the defence far more difficult to prove. While there is no doubt that the High Court's decision reframes the way a court will look at dangerous recreational activity defences, time will tell whether the result in *Tapp* was due to its peculiar facts or whether the case heralds a broader shift in defendants' prospects of making out the defence.

In the short-term, we expect the perception of a simpler path home for claimants will lead to a rise in cases against operators of sport, leisure and recreation businesses. Insurers will need to focus on questions of duty, breach and causation before embarking on statutory defences that have been previously used to defeat a claim.

PFAS risks could expand to personal injury claims

Personal injury

The WA Department of Water and Environmental Regulation recently identified contaminated groundwater in the southwest town of Busselton[6] from per- and poly-fluoroalkyl substances (PFAS). Known as the 'forever chemicals', PFAS contamination in the groundwater is believed to be associated with the historical deposit of PFAS-containing waste products at the site during its former use as a landfill facility.[7]

Scientific knowledge of the effects of exposure and testing methods for PFAS is rapidly evolving globally. The US Environmental Protection Agency warns that exposure to PFAS can cause decreased fertility, developmental delays in children, increased risk of some cancers, reduced immune function, hormonal interference, and increased cholesterol and obesity risk.[8]

We have seen claims already arising for environmental damage regarding PFAS and pollution more generally (including oil spills and toxic waste). There are already several Australian class actions being brought against government departments for their use of PFAS-containing foam, including an action in Bullsbrook, WA. These actions involve property owners claiming economic loss resulting from the diminution in value of their contaminated land.[9]

This momentum may potentially expose insurers to other types of claims, such as personal injury claims against entities responsible for the production, use and disposal of these chemicals.

6 https://www.busselton.wa.gov.au/resident/publichealth-and-safety/rendezvous-road.aspx

7 https://cssbsr.dwer.wa.gov.au/40336

8 https://www.epa.gov/pfas/our-currentunderstanding-human-health-and-environmentalrisks-pfas

9 https://www.katherinetimes.com.au/story/6881229/cancer-concerns-as-class-actionprogresses-over-pfas-contamination/

Expected increase in psychiatric injury claims arising from the workplace

General liability

During the last 18 months, there has been an influx of decisions handed down in Australian courts relating to psychiatric injuries allegedly sustained by workers arising in the course of employment. In these claims, an employer is typically sued in negligence for breaching an alleged duty of care owed to the worker. The decisions canvass issues such as whether psychiatric injuries arising in a workplace are reasonably foreseeable, and whether an employer took reasonable steps to avoid the risk of a worker suffering psychiatric injury.

A common thread in the decisions is that while workers may be successful in establishing that sustaining psychiatric injury in a workplace is reasonably foreseeable, they are facing some difficulty in satisfying courts that such injury arose out of a failure of an employer to take reasonable steps to alleviate the risk of injury, or that the duty of care owed to the worker was breached. The decisions suggest that if an employer can adequately point to reasonable alleviating steps being taken to manage the worker, then that may be sufficient to successfully defend claims on the basis that the employer discharged its duty of care to the worker.

However, it is clear that there is an increase in workers pursuing claims relating to only psychiatric injuries and each case will turn on its facts. Psychiatric claims are notoriously more complex from a causation perspective when looking at the issue of disentanglement of cause.

We predict more psychiatric claims arising from the workplace including claims against non-employer entities who have a close relationship with the worker (for instance, labour-hire / contract arrangements) and, separately, more claims by 'secondary victims'. These are otherwise known as 'nervous shock' injuries arising from severe or fatal injuries to a primary victim.

Future nuisance cases involving infrastructure appear likely

General liability

The class action against Transport for NSW regarding business interruption caused by the Sydney Light Rail Project ran to completion in December 2022. The judgment is expected in the first half of 2023.

The way in which the NSW Supreme Court treats this claim is likely to affect the way future nuisance cases involving significant infrastructure are framed. With plaintiff lawyers always looking for novel causes of action in difficult matters, this impending decision will attract a lot of attention – particularly given the prior market noises about nuisance cases involving other significant social and transport infrastructure.

Focus on planning may result in rise in flood and subsidence claims

General liability

An increased focus on flood planning throughout Australia may lead to a sharper focus on the cause of prior floods. These planning enquiries are likely to consider human intervention that has changed the topography of the land and its role in contributing to the damage sustained in the area. The results of those reviews may trigger new claims in nuisance or negligence.

Similarly, subsidence claims involving infrastructure projects and wide-scale housing developments on reclaimed land continue to loom large. Any claims that play out – for example, the threatened WestConnex action – may lead to an increased focus on construction liability.

High Court permanent stay decisions may be a game changer in institutional abuse claims

Institutional abuse

In November 2022, the High Court of Australia granted special leave for the appellant to appeal the decision in *The Trustees of the Roman Catholic Church for the Diocese of Lismore v GLJ* [2022] NSWCA 78, in which the NSW Court of Appeal permanently stayed historical abuse proceedings.

The grant of special leave by the High Court illustrates the uncertainly of the law in this area, which continues to evolve in all Australian jurisdictions. Applications for a permanent stay of proceedings remain highly fact-specific and are exceptional remedies. The onus lies squarely on a defendant to satisfy a court that a stay ought to be granted considering all the circumstances of the case.

This decision suggests permanent stay decisions put under the High Court's microscope may be a game changer in institutional abuse claims.

Microplastics create systemic risks across insurance lines

Environmental liability

The prevalence of microplastic pollution puts the risk of insurance exposures at a systemic level. A report by Australia's Mindaroo Foundation, researched with UN support, predicts that plastic industry litigation could cost USD $20 billion over the next eight years in the US alone.

Microplastic pollution impacts our marine and land environments. It can lead to environmental and loss of income claims, as well as product liability claims involving microplastic-shedding products. As a corporate sustainability risk, it also poses a liability threat.

There are also related risks to human and animal health, which could lead to personal injury claims, workers compensation claims (particularly for workers processing nylon flock, plastic fibres and synthetic textile) and product liability claims.

Unlike silica dust, microplastics are a group of substances identified generically, rather than individually. This is likely to lead to issues of causation and liability, as well as highly contested expert evidence regarding economic loss.

Geographical isolation could cause supply chain headache for New Zealand and increase product liability claims

Product liability

New Zealand is geographically isolated from much of the world. With great isolation comes great vulnerability for product manufacturers, distributors and retailers.

In 2023, supply to New Zealand will continue to be heavily impacted by shipping delays, long lead times and port congestion. Shipping routes to New Zealand may become less frequent as disruption results in shipping companies prioritising more profitable routes, which often involve core customers who are located closer to the exporters.

With delays and shortages, manufacturers may be tempted to use out-of-specification parts and ingredients more frequently. If they do, this will increase the risk of product recalls, product liability claims and cross-border recovery issues.

As New Zealand has limited onshore industries, it may also become increasingly difficult to source alternative parts and products. This will result in an increase in the cost of product recalls, as replacement and repair options are likely to become more difficult to source and may take some time to arrive in the country.

It is expected the supply chain disruptions are likely to impact New Zealand during the current peak exporting period (summer and autumn), which amplifies the risks.

WestConnex class action?

Property damage

Dentons and litigation funder Omni Bridgeway continue to call for interest in a class action for those who say they have suffered property damage as a result of the WestConnex motorway project. Several websites seek interest and registrations from parties affected by the project. Watch this space…

Green hydrogen will fuel a new energy insurance market

Energy

Analysts have estimated the green hydrogen market could be worth USD $10 trillion by 2050. Given the market potential and the many green hydrogen projects already planned, including the USD $32 billion Asian Renewable Energy Hub in Australia's Pilbara region, energy insurers should expect to see a significant increase in global demand associated with constructing and operating green hydrogen plants and pipelines.

Green hydrogen developments are a positive news story for the world, particularly in the wake of the IPCC's recent Climate Change Reports. However, the new technology comes with risks that underwriters will need to carefully consider. For example, green hydrogen is highly flammable and is difficult to store and transport.

While these issues are being addressed through extensive global research and development, insurers will need to stay on top of these developments. This includes monitoring how the marine industry embraces ammonia, a fuel derived from green hydrogen, as a potential transportation solution.

The positives and negatives of battery technology

Energy

Efficient power storage is a key element of a low-carbon economy. Lithium-ion batteries are proving a popular solution as they are rechargeable, have a high energy density, no memory effect and low levels of self-discharge. However, they are also risky as they contain flammable electrolytes.

Manufacturing defects, physical damage/abuse and incorrect charging have been linked to uncontrolled thermal venting/runaway of cells. Lithium-ion batteries have been linked to many fires, including a significant fire incident involving a Tesla battery project in Australia. These fires are intense and difficult to bring under control, so determining causation can also be complex. Lithium-ion battery storage and transportation, including issues associated with dangerous goods classifications for sea carriage, and disposal are other issues that are causing concern for insurers.

While the search continues for ways to make battery technology more stable, risks are being managed with quality products, active maintenance and fire prevention strategies.

Latent Defects Insurance likely to be a game changer in NSW

Property

A new insurance product, Latent Defects Insurance (LDI), is set to transform the insurance framework for high-rise residential buildings – especially if it becomes mandatory in New South Wales. This major development is aimed at restoring consumer confidence in the NSW residential construction industry in the context of the state's "building compliance crisis" and its sweeping legislative and regulatory reforms.

The ability of insurers to assess and price risk in the NSW construction industry is likely to strengthen as the legislative reforms change the culture of the industry and rating systems like iCERT provide greater transparency and certainty about developer performance. These improvements will give LDI insurers the ability to accurately assess, rate and price the risk associated with a particular building. LDI policies, and the associated iCERT rating, are also likely to help the government deliver its objective of restoring consumer confidence in the high-rise apartment sector.

Next round of NSW building reforms will bring further significant change

Property

The New South Wales building industry is now moving at speed into a highly regulated phase, which will see greater transparency and certainty, and will eventually result in a much better risk profile for insurers. The NSW Government's initial reform strategy was to focus on the high-rise residential sector, as this was where the most pressing problems had coalesced.

The next phase has now commenced with the introduction of four proposed changes to the legislative framework: Building Bill 2022, Building Compliance and Enforcement Bill 2022, Building and Construction Legislation Amendment Bill 2022, and Building and Construction Legislation Amendment Regulation 2022.

The next legislative steps will see a consolidation of the building reforms and an expansion beyond the residential sector. The reforms are intended to create end-to-end accountability for NSW building professionals. While the proposed legislation is intended to improve the regulatory framework and enhance compliance, the ultimate objective is to ensure that only safe, compliant and resilient buildings are constructed in NSW.

Cyber piracy a key concern for shipping companies

Marine

Cyber risk is now front and centre for the shipping industry following high-profile incidents, such as the Petya cyber-attack, the 2020 cyber-attack on CMA CGM's systems, the ransomware attack against the Colonial Pipeline in the US in May 2021 and, most recently, the cyber-attack on global logistics company Expeditors in March 2022.

The issue is also a key focus of regulatory guidance from the International Maritime Organisation. With the increased interconnectivity between vessels and shore-based systems, use of automated systems, and the development of unmanned or autonomous vessels, the spectre of a significant physical damage loss at sea looms larger.

To date, most cyber-attacks in the shipping industry have focused on onshore operations, but it is conceivable that cyber criminals could take control of vessels at sea. A common vulnerability is the industry's generally low level of preparedness for cyber incidents, including low levels of risk awareness, ineffective procedures and high levels of human error in offshore security breaches.

Changes and reforms to the Australian Privacy Act

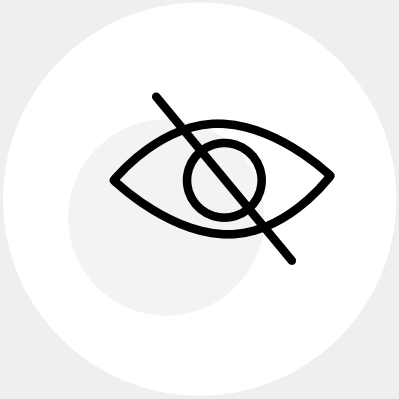
Cyber, data security, privacy

Following the spate of high-profile breaches affecting large organisations in Australia (Optus, Medibank, Woolworths and Energy Australia have all recently fallen victim to cyber-attacks resulting in loss of personal information), changes and reforms to the Australian Privacy Act are due to be urgently implemented in 2023. These changes have been flagged since 2019, but have inexplicably remained on the backburner until now.

While there has been much fanfare about the scope of these reforms, particularly around increased penalties, we are likely to see the Privacy Act being more closely aligned with global privacy laws. In addition to greater penalties being levied for privacy breaches, we will also see previously exempt small businesses being subject to the Act, individuals having greater rights (including a right of direct action for privacy interference) and regulators having greater enforcement powers.

We will also see heightened scrutiny of organisations and the way that personal information is being collected, held and disclosed. These changes will consequently result in higher risks for insurers, particularly for third-party liability claims, class action lawsuits and directors' and officers' liability.

As the third-party liability landscape continues to evolve, some specific risks under cyber policies may need to be carved out into stand-alone policies to cater for specific phases of a cyber-attack. This may include separate policies for first-party costs and third-party cyber liability policies, or specific policies/endorsements for ransomware cover.



Technology professionals – the cyber blame game continues and recoveries are on the rise

Cyber, data security

We will continue to see an increase in claims against IT professionals following cyber events, as well as a rise in software provider cyber-attacks that result in more significant aggregation risk for insurers. Although these claims arise in several ways, we are likely to see more claims against managed services providers (MSPs) and cloud services providers (CSPs) that are responsible for hosting the data of their clients, and are themselves a victim of a cyber-attack. In this way, the cyber-attacks gain a greater impact surface to leverage against the victim.

These claims are usually founded in an allegation that the MSP or CSP did not have adequate cybersecurity measures in place to prevent attacks. It is often also alleged that the MSP or CSP did not comply with its contractual obligations regarding backups. The affected clients typically seek compensation for the costs of responding to the incident, reconstituting/recovering their data and business interruption.

We are also seeing an increased appetite amongst cyber insurers for subrogated recoveries against IT professionals, as cyber insurers look to mitigate their costs of assisting insureds to respond to cyber incidents.

Ransomware and ransomware regulation

Cyber, data security

The OAIC's latest Notifiable Data Breaches Report has noted that ransomware attacks are the leading source of data breaches (41% of data breaches are caused by cyber incidents and 31% of those are ransomware attacks).

The Home Affairs Minister has indicated the Australian Government is considering regulating the payment of ransom to threat actors. At first blush, this might appear to be a prudent strategy to reduce the inducement for threat actors to target Australian victims (and the cost of ransom payments and cyber insurance claims). However, data-based analysis will be needed to understand whether a reform like this will achieve its aim.

Among other things, criminalising ransomware payments risks further punishing the business victims of cybercrime. It seems likely to disproportionately expose smaller or more vulnerable businesses to further risk of prosecution or regulatory action as they are less able to afford comprehensive cybersecurity resilience and recovery programs, and, as a result, could often end up paying ransoms.

WHS penalty prohibition likely to see more insureds challenge charges

Workplace

Victoria has joined New South Wales and Western Australia in prohibiting the insurability of penalties in prosecutions initiated by the regulator. This means that, while legal costs can still be insured, any penalties imposed by the court cannot be insured and must be paid by the policyholder.

We are already seeing an increase in the number of insureds electing to challenge the charges and run contested hearings in the hope of securing a not guilty verdict to avoid the penalty, rather than entering an early plea of guilty as has often been done until now. This is coupled with a steep increase in penalties being ordered by the courts over the past 12 months.

Employers risk claims as recession looms in New Zealand

Workplace

Economic and social issues will increasingly affect the workplace over the next two years.

The Reserve Bank is currently forecasting recession for mid-2023. We predict claims for unjustified dismissal will increase as redundancies build and unemployment rises during the second half of 2023 and into 2024. Claims will likely initially affect the SME, construction and hospitality sectors. It is likely that financial pressures will result in more gig workers, contractors and volunteers claiming employment status following the Employment Court's findings that Uber drivers, a building contractor and religious community members were employees.

Workplace support for menopause

Workplace

Older women are growing in power and numbers in the workplace, which is resulting in movements to destigmatise menopause. We predict increasing awareness of how menopause affects employees. We also anticipate discrimination and disadvantage claims where employers fail to provide adequate workplace support for menopausal women.

Sexual harassment scrutiny

Workplace

In 2017, the #MeToo movement started an important conversation and attitude change about sexual harassment and workplace relations. Since then, investigations have revealed a harmful environment in the music and media industries – among others – still exists. Several New Zealand lawyers have also been sanctioned for sexual misconduct and the New Zealand Law Society has beefed up its conduct rules around bullying and harassment. Despite this, there is building frustration that consistent safety and equality is lacking in many workplaces. With work-related socialising back on the agenda, we predict intense scrutiny of employers' obligations and legal risks.

Telehealth services are here to stay

Health

Telehealth services subsidised by the Medicare Benefits Schedule are here to stay. This means telehealth will now be a permanent feature of Australia's health system and not just a temporary COVID-19 pandemic measure. This reflects the enormous uptake of telehealth consultations by medical practitioners and allied health professionals. The risks of this and implications for insurers are captured in our earlier article. We tipped it in this March 2021 article – we said that telehealth is almost certainly here to stay and it's a trend that healthcare practitioners and insurers should not ignore.

Rise in COVID-19 vaccine-related enquiries and claims

Health

As the issues of mandatory vaccinations and public health directives recede, the staggering mental health toll of the COVID-19 pandemic is front and centre. It is very likely that mental health services will continue to experience acute shortages in 2023, including extensive waiting periods for psychology consultations. This issue is likely to have an impact on the entire health sector and present an ongoing funding challenge.

Cosmetic surgery inquiry

Health

Cosmetic surgery will remain a prominent issue following extensive media coverage and an independent review of the sector in 2022. AHPRA and the Medical Board have committed to a crackdown on advertising and streamlining complaint handling processes about cosmetic surgery. We anticipate a significant upswing in disciplinary complaints and civil litigation in light of the intense focus on cosmetic surgery practices and outcomes.

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