GL Update

Key trends and emerging risks in general liability insurance

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WELCOME

Welcome to Wotton + Kearney's GL Update – a snapshot of the key trends and emerging risks in general liability insurance in Australia.

In this edition we look at the impact of recent significant matters, including the Lacrosse cladding fire litigation conducted by our Melbourne team, the ongoing risk of concussion claims and prison authority liability claims.

We also look at some emerging trends, including GoT - the next big three long tail risks, the Disability Royal Commission, the rise in non-compliance on construction sites and significant potential from silicosis claims. In addition, we feature a story about the need to keep pace with medical innovation, which includes links to our series of ANZIIF medicinal cannabis articles.

We will continue to bring you further updates and new developments as they arise. If you would like to discuss any of the articles in this update, or have any suggestions for future publications, please contact me or one of W+K's General Liability partners (see page 11).

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QUICK LINKS

Lacrosse fire litigation case passes on liability

On 28 February 2019, in *Owners Corporation No.1 PS613436T & Ors v LU Simon Builders Pty Ltd & Ors* [2019], His Honour Judge Woodward handed down Australia's first decision on the roles and responsibilities of builders and other building professionals regarding the use of combustible cladding.

In this case, aluminium composite cladding (previously seen by the industry as largely an aesthetic and non-functional problem) caused a simple fire on a balcony of the Lacrosse building to aggressively and rapidly spread – resulting in a major emergency.

As anticipated, the owners were 100% successful in their claim against the builder named on the Certificate of Occupation. Under the Domestic Building Contracts Act 1995 (Vic) there are deemed warranties between the owners and the builder, one of which requires building materials to comply with the Building Code of Australia.

As the cladding used on the Lacrosse building was non-compliant, the owners successfully recovered the costs of repairs to the building, the (as ordered) replacement of unburnt cladding, and lost rent.

The builder was effectively able to pass down 100% of its liability to others.

RESPONSIBILITY

39% FIRE ENGINEER
33% SURVEYOR
25% ARCHITECT
3% FIRE STARTER

The insurance industry's interest in the case has centred largely on the builder's ability to pass down 100% of its liability to parties responsible for compliance, namely the fire engineer (39%), the building surveyor (33%) and the architect (25%). The person who started the fire was only liable for 3%.

The case has highlighted compliance professionals' responsibilities in domestic property construction. As many other buildings contain aluminium composite cladding, it is anticipated there will be further litigation.

The insurance implications of the decision are significant and have resulted in additional restrictions being placed on coverage.

For more information, read our update:

Lacrosse fire litigation: builder and consultants found liable for combustible cladding – 1 March 2019

By **Robin Shute** (Partner)

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GoT – the next big three long tail risks

With all the hype surrounding the new season of *Game of Thrones*, it is timely to reflect on the other GoT that is spiking the interest of global casualty insurers – **glyphosate, opioids** and **talcum powder**.

Data analytics firm, Praedicat, has identified glyphosate, opioids and talcum powder as 'the next asbestos' for insurers. In a recent article published in *Intelligent Insurer*, Praedicat outlined these emerging risks with reference to extensive research that involved monitoring both litigation and scientific literature regarding the substances.

Certainly, in the US we have already seen the onset of litigation. More recently, a jury trial in America, on the published information, found that Monsanto knew that its proprietary weed killer, Roundup – containing glyphosate – was a cause of cancer and has awarded significant damages. Monsanto and its parent, Bayer, are apparently now facing 11,000 law suits in the US.

A key element in determining liability is the instructions for use that come with the product. Monsanto has gone on record to indicate that it considers its product is safe if used in line with the manufacturer's instructions. The jury that found for the plaintiff consumer, on the evidence, accepted that Roundup caused or contributed to his cancer. There must have been a significant foundation for that finding, however what that is not known to us at present. What we do know is that the plaintiff had used Roundup since the 1980s to kill weeds on his property.

Opioids and talcum powder are also not immune from pharma tort litigation in the US. In March 2019, Purdue Pharma reached a $270m settlement to resolve a lawsuit brought by the State of Oklahoma accusing the drug manufacturer of fuelling an opioid abuse epidemic. There is another pending consolidated case that includes federal lawsuits brought by more than 1,500 counties, municipalities and hospitals against manufacturers.

Johnson & Johnson, the manufacturer of baby talcum powder, has long been defending allegations that talc products contain asbestos and that years of continuous exposure to talc has caused claimants to develop ovarian cancer and mesothelioma.

However, a Reuters report in December 2018 has disclosed that Johnson & Johnson knew of raw talc, Baby Powder and Shower to Shower products that tested positive for 'small amounts of asbestos', from 1971 onwards. Johnson & Johnson has denied the allegation but this "game changer" is now estimated to see the number of talc cancer claimants in the US double in 2019.

These risks have caused Praedicat to estimate the potential exposure from glyphosate, produced by Monsanto, to cost approximately $30.9 billion (just from US claims). The firm's estimated costs for opioids ranged from $56 billion to $721 billion for US claims, depending on a number of factors including the situations of individual claimants.

While estimated risk costs for talcum powder exposures were as much $106.9 billion from US claims. The research findings were shared at a recent Lloyd's of London event, where Praedicats CEO Robert Reville also highlighted other substances that could cause long-term impacts on the market, including BPA, DEHP and sugar.

Liability for dangerous consumer products is governed in Australia by the Australian Consumer Law. The test for liability is whether the safety of the goods is what people are entitled to expect. Whether the litigation seen in the US will migrate to Australia is uncertain, but it can be assumed that plaintiff firms will be looking carefully at what the US trials disclose, particularly regarding each manufacturer's knowledge of the risk of causing cancer.

Watch this space.

By **Charles Simon** (Partner)

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Keeping pace with medical innovation

The Australian biotechnology industry is ranked fifth in the world, with more than 140 life sciences companies listed on the ASX. The transfer to offshore manufacturing and the closure of many Australian mines, combined with an increased investment in health technology, makes the Australian life sciences sector rife for a boom.

The insurance industry will need to keep pace with rapid change in medical technology to provide the right insurance cover and to understand the relevant risks and opportunities.

Key advancements have included wearable robotics, nanotechnology, health tracking, genetic testing, 'Na Nose' technology and the use of big data in the detection of stroke. W+K's industry surveys revealed, by consensus, that two key areas of risk are the disclosure around the use of nanotechnology in everyday products and the insurance sector's under preparedness regarding big data and health tracking.

Another development is the so-called "Green Rush", which has been created by the legalisation of the manufacture, research and cultivation of cannabis for medical use in Australia. It comes with risks regarding product security, as well as liability for doctors providing diagnoses and prescriptions.

With Australia likely to follow in the footsteps of the US and Canada, there will be a need to share connections and information across the supply chain and for the insurance industry to protect those that supply the drug.

This is an exciting time for medical innovation, particularly with Australia at the forefront of many emerging technologies. Other developments we will be looking at shortly include the 2019 First-in-Human trial of the Stentrode – a device developed by Australian researchers that electrically stimulates the brain in people with paralysis and spinal cord injury.

We will also discuss the proposed National Clinical Trials Governance Framework and the likely impact of the classification of medical implants as Class III (high risk) devices.

For more information, you can read our series of articles published in partnership with ANZIIF:

The Future is Now: The Case for Wearable Robotics
Nanotechnology – is it insurable
Wearables and Health Tracking – An Insurer's Dream or Nightmare?
The 'Angelina Effect' – Genetic Testing Becomes a Global Phenomenon
On the Nose – Detecting Brain Injury
Big Names, Big Data and Stroke
Cannabis Chaos – Is it True?
The Science of Cannabis – A Dangerous Grey Area?
Cannabis and Big Business: The Stakes are High
Cannabis Dealings – Where is Your Supplier?

By **Karen Jones** (Partner)

Silicosis claims are creating insurance exposures

Insurers should consider reviewing whether they, and their clients, have potential exposure to claims regarding silica dust diseases. The risk of silica dust disease claims is difficult to assess.

However, one study estimate is that 6.6% of all Australian workers have been exposed to crystalline silica dust, and that 3.7% have been heavily exposed. Given the recent media coverage, and steps taken by plaintiff law firms, it's likely claims numbers will rise.

"Some insurers may already have potential claims exposure for policies from the past 10-20 years."

The latency period for silicosis can be more than 10 years, which means some insurers may already have potential claims exposure for policies from the past 10-20 years.

While most silicosis claims are made by workers, there are risks for insurers providing public & product liability or professional liability insurance, including:

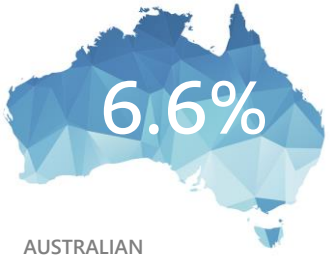
- manufacturers of masonry and stone products may face product liability claims or claims under the Australian Consumer Law – particularly if proper warnings and safety advice have not been given to consumers, and
- businesses that have operations that create high levels of silica dust on their premises may create exposure to non-employee entrants (i.e. customers, contractors) and environmental exposure claims by nearby residents.

There is also the possibility that statutory workers compensation insurers will look to recover compensation payments paid from liable third parties.

For more information, you can read:

The Australian Work Exposures Study: Prevalence of Occupational Exposure to Respirable Crystalline Silica

By **Allison Hunt** (Partner)
& **Greg Carruthers-Smith** (Partner)



AUSTRALIAN WORKERS EXPOSED TO CRYSTALLINE SILICA DUST

Construction risk non-compliance on the rise

Recent workplace incidents have highlighted the significance – and volume – of risks posed on construction sites.

In 2018, SafeWork NSW issued more than 1200 breach notices following inspections of 1000 construction sites in NSW.

Fall risks, electrical breaches and scaffold non-compliance were the top three categories of risk resulting in Safework's crackdown.

1,000

SITES INSPECTED

TOP 3 RISKS

FALL RISKS
ELECTRICAL BREACHES
SCAFFOLD NON-COMPLIANCE

In a statement published on 2 April, SafeWork NSW reinforced the "*widespread non-compliance*" across construction sites and, given fall risks and scaffold noncompliance features prominently, that it will "*continue to focus on scaffolding throughout 2019 under a new compliance program, Operation Scaff Safe*".

"Falls from heights is the number one killer on construction sites."

The program, which has already started, involves SafeWork Inspectors visiting sites "*to ensure businesses understand the safety requirements involved in creating a safe environment for workers using scaffolding and working from a height*".

IMPACT FOR UNDERWRITERS

Underwriters of construction risk will be alive to increasing claim costs in these and related worker to worker claims.

While SafeWork's increased focus sends a strong message that more rigorous inspections for code compliance is and will continue to take place (which bodes well for improved construction safety), underwriters in this space ought to be focusing their assessment of risks on historical compliance issues and remedial steps being taken on construction sites to ensure compliance of relevant regulations.

You can read more on SafeWork NSW's blitz at:

Blitz results in improved construction safety

By **Charles Simon** (Partner)

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Concussion claims – will insurers take a hit?

The past few weeks have seen controversial statements made about concussion in sport in Australia, which could cause concern for underwriters. However, developments in three class actions in the United States provide some degree of comfort and clues for underwriters of the type of claims that may arise in Australia.

While management of the NFL (American football) class action settlement is seeing claims being made and paid out faster than anticipated, the NFL case is unique given the nature of the sport and "protective" equipment worn by players. Rule changes in the NFL, and a shift in the way players are trained to tackle, are aimed at reducing head collisions in training and play as well as the risk of concussion and long-term brain trauma.

This is consistent with the approach taken by major sporting codes in Australia to reduce risk and improve diagnosis, treatment and safer return to play at all levels.

Settlement of the NHL (ice hockey) class action was at a far lower level than the NFL settlement. This was driven by the inability of the players' lawyers to have a class of players certified (due to a lack of interest from former players) and the NHL taking a robust position on causation.

"Future claims will be manageable if sporting organisations have an implemented policy in place."

This is instructive, as reports suggest lawyers acting for former AFL (Australian football) players are struggling to form a class. Even if they identify enough players, they are concerned a Court may not allow the claim to proceed as a class action.

A recent appeal also revived a class action against USA Water Polo. The lead plaintiff is the mother of a player who alleges having post-concussion syndrome after being concussed during a match, sent back into play, and being concussed again.

The trial judge dismissed the claim on the ground that head injuries and concussion are risks of playing water polo.

However, the appeal court found USA Water Polo did not have a policy or protocol in place to address concussion treatment, management and return to play – giving rise to an arguable cause of action.

Accordingly, we may see claims by individuals alleging injuries suffered because of poor concussion management due to the absence of policies or protocols, or a failure to educate on the policies or protocols.

While there remains a risk of class actions at an elite level, there are various defence arguments. With individual claims at any level it's unlikely we will see many historic claims and future claims will be manageable if sporting organisations have an implemented policy in place.

By **Richard Johnson** (Partner)
& **Paul Spezza** (Partner)

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Disabilities Royal Commission announced

The Royal Commission into Violence, Abuse, Neglect and Exploitation of People with Disability has recently been established and five Commissioners and The Hon. Ronald Sackville AO QC as Chair have been appointed. The Federal Government has committed more than $500 million over five years in the 2019-2020 budget to this Royal Commission.

An interim report is due by 30 October 2020 and its final report by 29 April 2022. Its terms of reference are to:

- prevent and protect people with disabilities from violence, abuse, neglect and exploitation
- achieve best practice in reporting, investigating and responding to the violence, abuse, neglect and exploitation of people with disabilities, and
- promote a more inclusive society that supports the independence of people with disabilities and their right to live free from violence, abuse, neglect and exploitation.

The Royal Commission will consider all forms of violence, abuse, neglect and exploitation regarding all disabilities in all settings and circumstances. We anticipate the Royal Commission will require extensive documentary evidence and oral testimony from schools, institutions, families, carers, workplaces, service providers and other community bodies, before handing down its final report in 2022.

We expect the Royal Commission will soon be issuing notices seeking documentary evidence before proceeding to public hearings. At this stage, no announcements have been made about when and where hearings will be conducted. Before responding to any request from a Royal Commission or market regulator the following steps should be taken.

Check it carefully	Notify relevant stakeholders	Draft a response	Speak to an expert	Make a copy
Understand exactly which entity or officeholders it relates to. This is particularly important if you have several companies or entities in your business.	Identify who within your organisation needs to be notified about the request.	Your response should be open, honest and comply directly and only with the request.	Wotton + Kearney has decades of experience advising clients on how to respond to public enquires.	Have a record of what you have sent them. You may also need some of the documents to continue running your business.

By **Meisha Tjiong** (Special Counsel)
& **Greg Carruthers-Smith** (Partner)

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Key drivers of liability in government and private prisons

In the first week of April, an inmate at Silverwater Correctional Complex was murdered by his cellmate. That tragic event has prompted our review of two recent decisions[1] from the NSW Supreme Court, which have drawn attention to the key drivers of liability in both government and private prisons.

Coincidentally, both sets of proceedings revolved around serious injuries inflicted by one prisoner on another using a sandwich press.

As has been noted in several recent authorities regarding the liability of prison authorities,[2] prison authorities are charged with the custody of people held involuntarily. Within that population, violence is – to a lesser or greater degree – often on the cards. No one except the prison authority can protect inmates from the violence of other inmates.

Prisoners are vulnerable and reliant on the prison authority to take reasonable care for their safety. In both the Watt and O'Connor cases, Garling and Lonergan JJ found for the respective plaintiffs on the questions of breach of duty and causation. Both judgments turn on their unique facts.

In Watt, the two fundamental findings were that the prison guard should have observed that a sandwich press had been placed by the assailant inmate inside a pillow case, which was readily observable and simply missed by the guard.

More importantly though, the trial Judge criticised the prison for placing a prisoner known for his serious violence and unpredictable behaviour with relatively new, non-violent prisoners without any plan to manage the risk that this particular prisoner mix generated.

In O'Connor, the prison authority had been put on notice about a potential bashing attack on the claimant after prisoners had been overheard discussing the plan and the conversation had been reported.

Steps were taken to address the risk, including briefing senior, weekend and intelligence team staff, and heightening surveillance and senior staff reporting.

The Court found that those steps were insufficient to discharge the prison authority's duty of care and failed to consider the immediacy of the threat.

The Court found that the simple step of segregating the claimant would have avoided the risk of injury.

Recent discussions with claimant's lawyers confirm that injured prison inmates are a target area for new work.

Watt and O'Connor's cases confirm that the Courts will find against the prison authority when it doesn't adequately address the risk posed by placing differing types of prisoners in custody together (Watt) and respond adequately to known threats of specific harm (O'Connor).

By **Sean O'Connor** (Partner)

[1] **Watt v State of New South Wales** [2018] NSWSC 1926 per **Garling J and O'Connor v GEO Group Australia Pty Ltd** [2019] NSWSC 202 per Lonergan J.
[2] **New South Wales v Bujdoso** [2005] HCA 76 and Cekan v Haines (1990) 21 NSWLR 296.

W+K news & events

SENIOR PROMOTIONS

We were pleased to welcome two new General Liability partners, Lesley Woodmore and Stan Tsaridis, who were promoted on 1 January 2019.

Lesley assists clients across a wide range of industries, including consumer goods, construction and infrastructure, and property and energy. She specialises in personal injury and property damage claims as well as professional negligence claims.

Stan specialises in defending public liability claims for government departments and retail shopping centre owners. He is known for his ability to navigate the complex nature of government matters, and resolve injury claims swiftly and commercially for his corporate clients.

Congratulations also to Special Counsel Scott Macoun and Senior Associates Jackson Pannam, Joe Vermiglio and Sam McNally who were also promoted in the Australian General Liability team on 1 January.

CLIENT PANEL EVENT – 8 MAY

We invite you to our panel discussion with insurance experts across all product lines from Wotton + Kearney, as we talk about the positive impact that changes to today's insurance industry will have on the market in the coming decade. We will also identify where you need to be focusing today to position yourself to take advantage of these opportunities in the future.

If you have not received an invitation and would like to attend, please email us on:

Events.Sydney@wottonkearney.com.au

COMMUNITY FOOTPRINT

On 8 March, we hosted a breakfast panel in our Sydney office to recognise International Women's Day. It was great to hear stories that celebrate womens' achievements in their careers, at home and in the community.

W+K's Chief Executive Partner David Kearney (Left) and Pro Bono Partner Heidi Nash-Smith (Right) are pictured above with our panellists, Trish Carroll (Galt Advisory), Stan Tsaridis (W+K Partner), Jane Pochon (Immediate Past President of AIG's Women & Allies Employee Resource Group), and Nicole Yade (General Manager of Lou's Place).

LEGALIGN GLOBAL UPDATE

W+K was pleased to take part in a series of *Legalign Global* client presentations, meetings and planning sessions in Germany last week, hosted by our alliance partner BLD Bach Langheid Dallmayr.

We look forward to sharing the global trends and opportunities identified during the week which included a presentation on global trends to over 35 senior clients in Munich, with contributions from W+K's Paul Spezza, Cain Jackson and Nick Lux. Pictured above are our Chief Executive Partner David Kearney and BDM Director Joshua Box with fellow *Legalign Global* firm leaders in Cologne.

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