



INFORMED INSURANCE 2020 PREDICTIONS

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OVERVIEW

Wotton + Kearney is pleased to provide our regional version of the latest Legalign Global publication **Informed Insurance: 2020 Predictions**.

Aimed at supporting the global insurance market in preparing for the opportunities and challenges ahead, the report includes over 80 predictions across all insurance lines by senior lawyers at the Legalign Global alliance firms to provide global insights on emerging market issues.

Six key themes emerged with this year's predictions: Class Actions, Climate Change, Global Risk, Modernising the Workplace, Regulation and Technology. All of these highlight the changing nature of risk and why insurance must change with it.

This publication features the predictions made by Wotton + Kearney. They address issues that will impact insurers in the Australian and NZ region including cyber risks in smart homes and offices, privacy risks in the context of health tech and the impact of climate risks.

It would be remiss of me at this time not to highlight the predictions in relation to Climate Change. Our thoughts are very much with those individuals and communities impacted by the Bushfires Crisis which has unfolded in Australia over the past 2 months. Moving forward, we look forward to assisting insurers to provide timely responses to affected individuals and businesses.

You can also view all of the global predictions individually on the [Informed Insurance microsite](#) hosted by our Legalign Global colleagues, DAC Beachcroft.

I hope you enjoy reading our predictions report. Our authors and team of insurance specialists are available to discuss any of these issues with you.

Kind regards



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Legalign Global is a closely integrated alliance of the world's leading insurance law firms. The alliance was founded on the principle of offering clients uniform and unrivalled levels of legal excellence and service across all major commercial insurance lines. Each member firm has built a significant reputation for delivering high-quality legal services through decades of investment in the global insurance industry. Legalign Global offers the distinct advantage of independent advice from established lawyers in more than 60 offices worldwide throughout Europe, Latin America, Australasia, Asia Pacific and the United States. It is the largest team of specialists of its kind, understanding the risks and complexities of the global market, responding with world class service quality and efficiency.

BLD Bach Langheid Dallmayr, a German firm with close associations throughout Europe.
DAC Beachcroft, an international firm with coverage across the UK, Ireland, Spain, Latin America and Asia Pacific.
Wilson Elser, a US firm with offices across the United States and another in London.
Wotton + Kearney, an Australian firm operating in the Asia Pacific region with a focus on Australasia.

CLASS ACTIONS

A feature of the US legal system for years, the momentum behind class actions is picking up speed.



The appetite of litigation funders and class action lawyers will not abate despite a favourable 12 months for defendants

Despite defendants experiencing a relatively positive 12 months with a series of favourable interlocutory decisions regarding competing class actions, the recent landmark Australian Federal Court decision in the Myer class action and litigation funders being squeezed by plaintiff law firms taking on class actions on a 'no win-no fee basis', it seems clear that litigation funders and plaintiff law firms are becoming more adventurous and have an appetite to take on class actions well beyond the securities sphere. The post Hayne Royal Commission environment has spawned numerous class actions which confirm that group proceedings will be a prominent feature of Australia's litigation landscape regardless of whether or not legislative reform occurs in the securities arena.



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D&O wordings are poised to undergo a substantial tightening in response to the lack of insurer appetite to write side C cover

Australian D&O wordings are broad with many of the safeguards in respect of pre-contractual disclosure and wilful or dishonest conduct heavily qualified or waived. This will change as listed Australian companies seek side C cover to protect their balance sheets but are met with a substantially decreased appetite from the D&O insurance market. The Australian experience is likely to mirror what occurred in the US in the mid 1990s with wordings tightening significantly as D&O insurers attempt to confine and share the risk with their insureds.



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US class actions around glyphosate, opioids, silicosis and talcum powder will influence claims in Australia

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.

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. The litigation seen in the US will migrate to Australia once plaintiff firms assess disclosures in US trials, particularly regarding each manufacturer’s knowledge of the risk of causing cancer.



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Regulators will continue to take on digital platforms over privacy concerns and class actions will follow

At the end of October 2019, the Australian Competition and Consumer Commission (ACCC) announced it is suing Google over misleading consumers about its collection and use of personal location data. This action was widely expected following the publication of the ACCC’s Digital Platforms Inquiry Final Report earlier in the year.

This is the ACCC’s first case against a major digital platform. The Australian consumer watchdog’s action reflects similar approaches taken by regulators in other countries, including Germany and the United States. There’s no doubt government regulators worldwide will continue to champion consumers and uphold local privacy laws, with further investigations and antitrust reviews into companies like Apple, Amazon and Facebook already announced. As night follows day, class actions will leverage the regulators’ efforts.



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CLIMATE CHANGE

Facing up to climate change must now be top of the agenda for the insurance market. We discuss how best to respond to the challenge.



Climate risks will have a growing impact in coastal areas

Climate change is impacting coastal property risks as a result of erosion, sea level rises and storm surges. Modelling, including timeframe projections, is being done around coastal properties that may be affected by these changing risks and this issue is being considered by governments at all levels.

In Australasia, the insurance industry is calling on governments to help address the risks by strengthening building codes, planning practices and infrastructure that prevents further loss. The Insurance Council of Australia is also seeking to have tax disincentives on insurance products removed.

In New Zealand, climate risk does not currently appear to be incorporated into the price of residential coastal properties. But it is expected that higher insurance premiums and insurance retreat in coastal areas will soon have a material impact on private decision making.



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Climate change exposes infrastructure assets to heightened risks and makes resilience planning critical

Insurers will need to consider climate change impact on ageing and new infrastructure, as many assets are vulnerable to damage or loss with increasing occurrences of extreme weather, including drought, bushfires, rising sea levels, catastrophic storms and extreme temperatures. In Australia, we are already seeing the first of these claims involving relatively new assets, such as pipelines.

Climate-related infrastructure issues will include asset loss or damage, performance impacts and potential regulatory exposures for infrastructure asset owners, operators, manufacturers and designers. Insurers will need to identify the risks for each infrastructure asset, assess their materiality and work with the insureds on building climate resilience into their business plans. This is particularly important for essential service assets, such as transportation infrastructure, and energy, water and sewage assets.



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GLOBAL RISK

Extraordinary technological, geo-political and legal developments are just some of the factors shaping the global risks landscape.



Microplastics will lead to a range of insurance exposures and the issues will be complex

The prevalence of microplastics in the environment is widespread and will give rise to an entirely new class of insurance risk. The environmental impact of microplastics will go well beyond being limited to marine pollution, as it is now reported that microplastics are contaminating the food we eat, the water we drink and the air we breathe. Road surface runoff, fibres released from textiles, agricultural plastics, abrasion from footwear and artificial turf, as well as the pipes and other components in treatment plants themselves, are now known sources of microplastics. Estimates suggest that humans are already ingesting approximately 2,000 microplastic particles a week – which is about 5 grams (or the weight of a credit card).

The losses arising from microplastics will be diverse. Products contaminated by microplastics, subject of course to determining the extent to which they cause loss, will lead to an increase in product liability and property damage claims. The risk to humans via the ingestion of microplastics will increase the volume of personal injury and workers compensation claims, particularly for workers processing nylon flock, plastic fibres and synthetic textiles.

The composition of microplastics can be difficult to pinpoint, largely because they are microscopic and are classified as a group of substances identified generically rather than individually. But we can expect to see an increase in claims in a manner not dissimilar to what we have recently seen with silica dust and silicosis claims arising through the use of composite stone products.



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Cladding issues are “tip of the iceberg” for construction industry insurability problem

Legislative reform and increased public scrutiny in the wake of cladding issues and defect cases, like the Grenfell Towers in the UK and the Opal Tower and Mascot Towers in Australia, suggest the industry has now ended its “race to the bottom” and must improve.

The industry depends on its insurability and governments have recognised this. For example, after insurers pulled back from exclusion-free professional indemnity (PI) cover for building surveyors and fire engineers, most Australian state governments responded by allowing for cladding exemptions.

The next development will involve insureds facing difficulties in obtaining building insurance cover when the property is vacant due to severe structural defects, as owners’ corporations for strata schemes are legally obliged to keep buildings insured.



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Lithium-ion battery technology will keep driving efficiencies, but the risks must be better managed

Lithium-ion batteries will continue to be embraced as efficient and cost-effective ways to store energy as a power source. However, while the new technology is transforming many industries, it is not without risk.

Lithium battery failure and overheating results in a process called “thermal runaway”, which can produce enough heat to cause adjacent batteries to explode. An enormous issue is that these fires require specific training, planning, storage and extinguishing interventions as water makes the fire worse.

The challenge requires government agencies to better define safety standards and for manufacturers to rigorously test their products. If not, product recalls, liability, ISR and property claims will follow. Safety issues must also be addressed at the recycling phase, given the short life of the batteries.



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Static risks will blur the lines between property and marine coverage

Increasingly, inland marine insurance is being relied on to address storage, processing, transportation and logistics risks. This means marine insurers are covering static risks, essentially providing property cover when goods that are moving from A to B sit in a warehouse or storage yard for a period of time as part of that journey. This exposes them to risks ranging from fire to insect infestation and can blur the lines between property and marine coverage.

In Australia, there are also liability risk exposures for carriers and recovery options against carriers breaking limitation of liability clauses. Similarly, under Australian Consumer Law, carriers have service guarantee responsibilities. It’s likely Australian courts will also test the expansion of consumer rights in this space.



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MODERNISING THE WORKPLACE

From discrimination and mental health issues to health wearables, this is a significant industry issue.



Sexual harassment claims will continue to rise and regulatory frameworks will be reviewed

Sexual harassment complaints remain severely under-reported so EPL claims will rise significantly in 2020. The #MeToo movement has empowered more people to launch claims. It has also resulted in the creation of organisations such as Time's Up in the US and NOW in Australia, which are providing litigation funding and pro bono legal services.

Governments worldwide want to be seen as taking a strong stand in this area. Unreasonable behaviours at work are an emerging health and safety issue and the New Zealand Government will look at bullying, mental health and harassment when it reviews the Health & Safety at Work Act this year. This could include a new, low level disputes process to address issues at an early stage. In the meantime, WorkSafe is building its capability to deal with bullying and harassment and will investigate where a serious mental health condition has resulted.

The New Zealand Government is looking into the possibility of extending ACC (no fault workplace accident compensation) to the victims of sexual harassment (it already covers criminal sexual offences). The current Sexual Violence Legislation Bill further aims to support sexual violence complainants giving evidence, which could also result in more sexual claims being pursued.



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Private social media content will become fair game as evidence in EPL claims

Following a NSW Supreme Court decision (*Gavan v FSS Trustee Corporation*), Australian Courts now provide an avenue for EPL defendants to source private social media records to meet a claim. This form of evidence will become more common, making it important for insurers to quickly identify whether a claimant has a social media presence and be mindful of individuals managing multiple accounts, fake profiles and profiles with similar details.

Insurers need to determine the relevance of the records, make a copy of the records (including date and time stamps), and formulate strategies to fill in gaps or seek sanctions for litigants who knowingly destroy evidence. Employers will also need to address private social media content in their policies.



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The rise of flexible work arrangements will create new and heightened exposures for employers

Litigation funders looking for new sources of profit have found fertile ground in a number of recent employment law decisions in Australia. With a surge in employee class actions, insurers will not be immune to the trend.

Companies operating in the gig economy that are reliant on pools of “on-demand” workers, and those using independent contractors and casual workers, risk engagements being re-classified and workers attracting historic entitlements. EPL policies will not meet some of the new forms of pleading and should be assessed for coverage they provide.

With more people choosing agile working options, cyber exposures for employers will also rise as home wi-fi networks create gateways for ransomware leading to data theft from the office network.



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TECHNOLOGY

Technology is reshaping the insurance industry. From AI to generation Z, we discuss the developments you need to know about.



Silent cyber risks in smart homes and offices will become loud issues for insurers

Smart homes and offices create various data protection and privacy risks. Cybercriminals can potentially access voice-controlled command centres and use electricity surges to destroy appliances or breach physical security. Even online smart fridges sending delivery orders could be vulnerable to attack and expose insureds to personal data theft and identity fraud risks.

The term silent cyber, the exposure to cyber incidents contained in traditional policies, will start to get a lot more attention as technology is increasingly relied on. Insurers will start to exclude silent cyber risks in traditional policies in the property and liability insurance markets.



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Malware will target information, public sector, education, healthcare, banking and professional services industries

New strains of malware, such as the trojan malware Emotet, are evolving and continue to expose organisations holding sensitive information to cyber-attack. The recent strain of Emotet was so widespread it triggered an investigation by the Australian Cyber Security Centre.

Malicious emails, often containing attachments with viruses, will remain one of the favoured channels of attack for hackers. As the malware can spread very quickly through an organisation's network, it's critical that businesses respond quickly to contain and fix the problem. They also need to quickly assess information security and potential privacy breaches, as well as communicate promptly with affected individuals and regulators.



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Health tech will improve risk data and fraud exposures, but privacy will remain the big issue

There is a wide range of health tech, including wearables, insertables and connected health monitors, contributing to the global pool of health data. New health tech will keep coming. For example, Google's sister company, Verily, is looking to turn contact lenses into devices that monitor diabetics' glucose levels.

Insurers will compare an individual's health data to big data sets to assess their health risks. This will result in better risk modelling, new products including "just-in-time" cover, and improved fraud protection. Individual health data will also be used in court proceedings as evidence of activity levels or injury.

Privacy will remain the big issue and the main legal battlegrounds will involve device security and the current ambiguities in privacy law.



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Insurers will invest heavily in tech, disrupting existing actuarial, insurance distribution and claims management activities

Insurers will continue to embrace tech for all of the myriad of advantages it offers. We will see increased reliance on blockchain-enabled smart contracts being used across insurance categories to improve customer access, transparency and data security.

Customers will use smart devices to directly interact with insurers' software bots, disrupting existing distribution and claims management activities with a service that is responsive, accurate and less costly. Insurers will also use big data and sophisticated analytics to model risk, predict claims outcomes, inform pricing decisions and minimise fraud. This will lead them to rely on an individual's data and the comparative set, rather than actuarial modelling.

For insurers, backing the right tech, securing investment funding and managing privacy risks will be the key issues.



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REGULATION

Regulation in all its forms is a key issue for our clients. Here we set out the developments you need to be aware of.



New Zealand's new privacy framework will just be the start of legislative reform

New Zealand organisations will finally follow the rest of the OECD and brace themselves for notifying and managing data breach losses with its Privacy Commissioner regulator when the long-awaited legislative overhaul to the country's privacy framework commences on 1 March 2020. It contains a comprehensive suite of reforms, including modest fines (\$10,000), but more importantly mandatory reporting. Cyber and statutory liability insurance claims notifications and costs will escalate to meet those obligations.

Even before the new regime is rolled out, the NZ Government has alluded to the fact that the "right to data portability" and the "right to be forgotten" represent data privacy best practice and could be introduced in an update to the privacy regime in the coming years.



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2020 PREDICTIONS SUMMARY

Australian & New Zealand Commentary

Class Actions

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D&O wordings are poised to undergo a substantial tightening in response to the lack of insurer appetite to write side C cover

US class actions around glyphosate, opioids, silicosis and talcum powder will influence claims in Australia

Regulators will continue to take on digital platforms over privacy concerns and class actions will follow

Climate Change

Climate risks will have a growing impact in coastal areas

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Global Risk

Microplastics will lead to a range of insurance exposures and the issues will be complex

Static risks will blur the lines between property and marine coverage

Cladding issues are “tip of the iceberg” for construction industry insurability problem

Lithium-ion battery technology will keep driving efficiencies, but the risks must be better managed

Modernising the Workplace

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The rise of flexible work arrangements will create new and heightened exposures for employers

Regulation

New NZ privacy framework will just be the start of legislative reform

Technology

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Health tech will improve risk data and fraud exposures, but privacy will remain the big issue

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