

GL Trends Update: Towards 2022

Areas for claims managers, underwriters and brokers to keep an eye on in the general liability space across Australia and New Zealand in 2022 and beyond.

INTERACTIVE PDF



December 2021

W+K INSIGHTS

Welcome to GL Trends – Towards 2022

2021 presented the general insurance industry with many uncertainties. Our *2020 GL Trends Report* foreshadowed several trends that have impacted, and continue to impact, the general liability market in Australia and New Zealand, including historical abuse claims across different sectors, concussion and its impact on sport, as well as COVID-19 risks as they were developing.

In our latest GL Trends Update, we look at several general liability trends strengthening or emerging in 2021 that are likely to continue to impact insurers, underwriters and brokers in 2022.

The construction sector continues to experience on-going significant liability exposures. These include emerging risks relating to flooding, defect claims associated with reclaimed land, a critical shortage of building materials, as well as a high volume of construction-related personal injury claims.

Climate change risks remain a hot topic given the high levels of political, public and media attention on this global issue. Australia is one of the most active jurisdictions for climate litigation in the world and liability insurers will need to monitor duty of care decisions that may have broader application.

Analysis of recent case law shows the number of environmental prosecutions is also increasing, particularly in the mining and waste industries. This is an area in which we expect to see significant regulatory developments as managing pollution will remain a focus for governments at all levels.

Manufacturers, suppliers and retailers are facing heightened product liability risks due to recent regulatory activity and developments in legislation and case law. In this space, there has also been a concerning number of businesses taking advantage of the COVID-19 outbreak, which we expect will lead to increased product liability claims.

Many other pandemic-related issues are yet to play out for insurers, including construction liability waivers, mandatory vaccinations, mental health exposures and property access issues.

Concern is also growing around several significant liability risks being seen globally, including supply chain risks and the rising impact social inflation is having on claims generally.

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, please contact one of W+K's General Liability partners.



CONTENTS

- [Construction Risks & Injury Claims](#)
- [Climate Change Risks](#)
- [Environmental Liability](#)
- [Product Liability Risks](#)
- [COVID-19 Risks](#)
- [Global Supply Chain Risks](#)
- [Social Inflation](#)
- [W+K Key Contacts](#)

Charles Simon

Partner, General Liability Product Line Leader

T: +61 2 8273 9911
charles.simon@wottonkearney.com.au

Construction risks and injury claims

LAY OF THE LAND FOR RESIDENTIAL BUILDERS

Exposures for residential builders, particularly with a focus on large developments, is an area in which we expect to continue to see risks develop.

Flood prone areas

Floods in NSW, South East Queensland and Victoria early in 2021 put the spotlight on residential buildings in areas that are high risk flood areas. The clean-up cost of the floods was said to approach half a billion dollars, with NSW the hardest hit. A debate ensued about planning decisions regarding building in flood prone areas, with a particular focus on Western Sydney, and discussions about raising the Warragamba Dam wall were refocussed.

While planning decisions are unlikely to hit a liability portfolio, most states have a well-established residential builders' scheme that imposes stricter duties on residential builders than otherwise exist at law (eg. *Home Building Act 1989* (NSW), *Domestic Building Contracts Act 1995* (VIC), which have equivalents in other states and territories).

Over the coming years, with the proliferation of urban sprawl and building in more flood prone areas, it is not difficult to conceive of actions commencing with a claim against government instrumentalities for the approval process, or the residential builder.

Reclaimed land

Flood risks are not the only exposure. In Western Sydney, many residential projects are being built on reclaimed land requiring significant earthworks to bring the sites to a standard sufficient to support residential homes without footings to bedrock.

The ongoing settlement of deep fill in these areas can lead to destabilisation of home footings and, ultimately, lead to defect claims. The time lag involved in differential settlement means that claims take some time to manifest, and we are starting to see claims advanced regarding building projects commenced in 2015.



COVID-19 AND PROJECT IMPACTS

Australia is presently facing a critical shortage of building materials and skilled labour. Construction timber is highly demand-impacted, with materials like bricks and windows not far behind. Key drivers are increased residential construction and renovations during the pandemic and timber stockpile shortages following the devastating 2020 bushfires.

Many major Australian cities and regions have also suffered through lockdowns and COVID-19 restrictions that have added further disruption to the ability of contractors and trades to attend site.

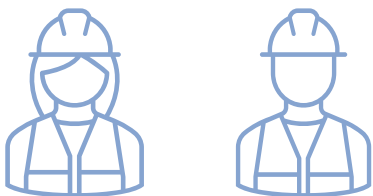
This cocktail of unprecedented challenges has resulted in widespread construction delays and material price hikes. So, what could go wrong from a liability risk profile perspective? Only time will tell, but we can expect that these pressures will inevitably have bearing on the future liability claims profile of construction industries participants, for example:

- prolonged site exposure to the elements during construction (eg. moisture ingress)
- product substitution with inferior, cheap, untested or incompatible materials, and
- potential latent defects from 'staggered' / interrupted trades and supervisory work on site, all of which have the potential to cause resultant damage at some later stage.

WORKER TO WORKER CLAIMS

The risk of a high volume of personal injury claims by labourers and tradespeople is a continuing one for any liability underwriters placing in the construction space. Those claims are associated with high quantum and defence cost exposures, due to the involvement of multiple defendants, potential workers' compensation recovery action and the typical plaintiff profile (young, high relative earnings and disproportionate impact on employment capacity of even modest injuries).

This risk is presently compounded by a lack of labour mobility due to lockdowns and border closures, meaning insureds may have to rely on inexperienced or inadequately qualified labour, potentially from outside the construction industry. That labour force profile will inevitably lead to more 'time lost' injuries and associated liability claims against contractors and principals.



NEW ZEALAND DEVELOPMENTS

New Zealand has seen an increasing number of class action construction lawsuits in recent years. These lawsuits have included claims against building product manufacturers and suppliers and have typically been paid for by litigation funders.

The continued appetite of litigation funders to bankroll such claims is questionable in view of several high-profile claims which came to inglorious ends in 2021.

In June, an action on behalf of 134 homeowners against cladding manufacturer Carter Holt Harvey (CHH), seeking damages of between NZD40-50 million, was withdrawn. It was reported that costs were paid to CHH.

In August, an action against cladding manufacturer James Hardie, with a quantum exceeding NZD200 million, came to an abrupt halt mid-trial. It was reported the litigation funders had paid James Hardie NZD1.25 million as part of the settlement.

Less than two weeks later, the High Court handed down judgment in a different action on behalf of 144 claimants against James Hardie. "The homeowners' case", stated the Court in its judgment, "fails in its entirety".

These developments, at the very least, are likely to give pause to those litigation funders contemplating fresh class actions against those involved in the construction industry in the years ahead.



These developments are likely to pause litigation funders contemplating fresh class actions against those involved in the NZ construction industry.



Climate change risks

While climate change risks have long been associated with weather related events impacting the property insurance sector, general liability insurers should remain alert to exposures (both direct and indirect) as well as judicial activism in Australia.

In the US, general liability insurers are starting to see third party liability claims brought against insureds alleging their actions contributed to climate change, which caused weather related events causing property damage and/or injury.

These claims have focussed on the gas and oil sectors and their historical operations impacting the environment. As those litigations play out, and observed by Australian lawyers who have a tendency to follow the US lead notwithstanding the obvious causation issues that feature, insurers need to take stock of historical accounts where an insureds' operations may have contributed to high levels of greenhouse gases.

Insurers should remain cognisant of the flow on effect that weather related events may have on broader liability portfolios. Whether it is consequential losses from a bushfire, property damage from spills of waste or oil from a burnt depot or terminal, spoilages from shut down operations caused by a storm, or defects in constructions, those who have suffered harm will look to trigger liability from occupiers of premises of the source of ignition, or who may have contributed to the damage which manifested following a climatic event.

Closer to home climate-related liability has already been extended by the Australian courts to the government. In May 2021, Justice Bromberg of the Federal Court identified a novel duty of care owed by the Minister for the Environment to Australian children to consider potential personal injury to them due to climate change in deciding whether to approve the extension of a coal mine (*Sharma by her litigation representative Sister Marie Brigid Arthur v Minister for the Environment* [2021] FCA 560). The decision, in which Justice Bromberg agreed that climate change would cause catastrophic and "startling" harm to young people, is likely to set an important precedent.

Presently, climate change class actions are mostly being driven by activist legal firms on behalf of young people over government's alleged duties to protect against climate change harms. These lawsuits are often focussed on the courts making declarations about climate risks rather than on receiving compensation for actual loss. While this is likely to make these actions unappealing to litigation funders, perceptions of government inaction on climate change suggest this trend will continue. Liability insurers will need to watch this space as duty of care decisions may have broader application.



Insurers should remain cognisant of the flow on effect that weather related events may have on broader liability portfolios.

Environmental liability

Pollution and contamination issues create real risks for businesses in Australia across almost all industries, from construction and manufacturing through to food production and everything in between. Material harm from pollution or contamination can occur on-site, as well as in the environment beyond the premises where the pollution incident occurred.

Insureds face a wide array of environmental liability risks, some as eyebrow-raising as orange juice in waterways, mould in libraries, and legitimate occupiers finding themselves liable for the clean-up of premises that were formerly used as meth labs. Exposures can include emergency response costs, clean-up costs, bodily injury, property damage, nuisance claims, damage to biodiversity, fines and reputational damage.

Analysis of recent case law shows the number of environmental prosecutions is increasing, particularly in the mining and waste industries. We are also seeing some companies, particularly prior offenders and companies on the watch lists of environmental groups, being investigated based on lower thresholds.

As managing pollution remains a focus for governments at all levels, we expect to see the legislative and regulatory framework evolve to address this serious issue. A recent example of this was the *Industrial Chemicals Environmental Management (Register) Bill 2020* (Cth), which was passed on 18 March 2021. With regulatory activity on the rise, having appropriate environmental liability coverage in place remains a critical risk management strategy for many businesses.

Legislative change in New Zealand

New Zealand's environmental legislation, the *Resource Management Act 1991*, is being overhauled. The new regime will focus on achieving "environmental bottom lines" to be set by central government.

One of the New Zealand Government's express policy objectives is to increase the scope and severity of enforcement to deter offenders. We expect the new legislation will lead to an increase in both frequency and quantum of environmental liability claims.





Product liability risks

In Australia, manufacturers, suppliers and retailers are facing heightened risks due to recent regulatory activity and developments in legislation and case law.

There has been a concerning number of businesses taking advantage of the COVID-19 outbreak. The ACCC has received many complaints about a wide range of fake, unauthorised and unlicensed products.

In December 2020, it took high profile action against Lorna Jane Pty Ltd (Lorna Jane) regarding its LJ Shield Activewear, which was promoted to protect wearers from COVID-19. In July 2021, the Federal Court ordered Lorna Jane to pay AUD5 million in penalties and the ACCC's costs for making false and misleading representations to consumers and engaging in conduct liable to mislead the public. It is likely the regulator will actively pursue any similar transgressions.

The COVID-19 pandemic led to a global shortage in alcohol-based hand rubs so Australia relaxed legislation to make it easier for local businesses to rapidly produce it. This led to increased imports of methylated spirits containing methanol. There is now growing concern around the health effects of methanol, which has led to a proposed amendment to the poisons standard to include hand sanitisers containing more than 2% methanol. This may lead to a rise in sanitiser-related injury claims and product recalls.

In March, the ACCC published its list of product safety priorities:

- button batteries
- quad bikes
- online products
- infant sleeping products, and
- toppling furniture.

Changes affecting these product categories include: the June 2022 end of the transition period for mandatory safety and information standards for button/coin batteries and consumer goods containing them; and the implementation of Stage 2 of the Quad Bike Safety Standard on 11 October 2021, which requires all imported general use quad bikes sold in Australia to be fitted with operator protection devices and to meet minimum stability requirements.

Following the high-profile action against Amazon taken by the U.S. Consumer Product Safety Commission in July 2021, online platforms are waiting to see whether a precedent-setting ruling is made that Amazon is a distributor of consumer products under federal law. This would make Amazon responsible for the products it sells and expose it to future mandatory recalls on behalf of its sellers.

The ACCC has already been active in this space, implementing the Australian Product Safety Pledge in late 2020. It is designed to help remove dangerous products from e-commerce businesses and has voluntary signatories including AliExpress, Amazon Australia, Catch.com.au and eBay.

Increasing numbers of commercial supply transactions are likely to be subject to consumer guarantees under the Australian Consumer Law (ACL), following the July 2021 increase to the threshold for the value of goods from AUD40,000 to AUD100,000. We expect this will increase the volume of product liability claims brought under the ACL.



The ACCC has received many complaints about a wide range of fake, unauthorised and unlicensed products.

COVID-19 risks

The general liability landscape in Australia is evolving in light of the COVID-19 pandemic.

Australia's federal system of Government features significantly in how COVID-19 will impact the general liability space in Australia. The Australian constitution confers certain powers on states and territories, each with its own system of government, its own laws on matters such as health and education, and most critically, its own response to the pandemic. Although the Commonwealth government sought to harmonise the response to COVID-19 across the states and territories via a National Cabinet, the reality has been far from uniform.

Infection rates have varied between the states and territories, largely as a result of different strategies designed to suppress the spread of COVID-19 while the vaccine rollout takes shape. We've seen a variety of government measures intended to achieve this, including border closures, lockdowns, work from home mandates, the use of face masks and curfews. To a large extent the various state and territory government responses to the pandemic have been heavily influenced by a combination of political expediency and conservative medical advice.

Against this background then, how will COVID-19 impact the general liability space in Australia?

We have already seen class actions issued against a number of targets. These include:

- **A claim against Carnival Cruises** regarding a COVID-19 outbreak on the Ruby Princess
- **Claims against the proprietors of aged care facilities in Victoria** where COVID-19 was cited as the cause of death of hundreds of elderly people, and
- **Claims against the Victorian Government** as administrator of its hotel quarantine program, which resulted in outbreaks that led to the introduction of lockdowns and restrictions.

The various state and territory no-fault WorkCover schemes have seen successful claims being made by workers who have established they contracted COVID-19 in the course of employment. We are yet to see what flow on effect there will be for common law claims, including against non-employer entities.

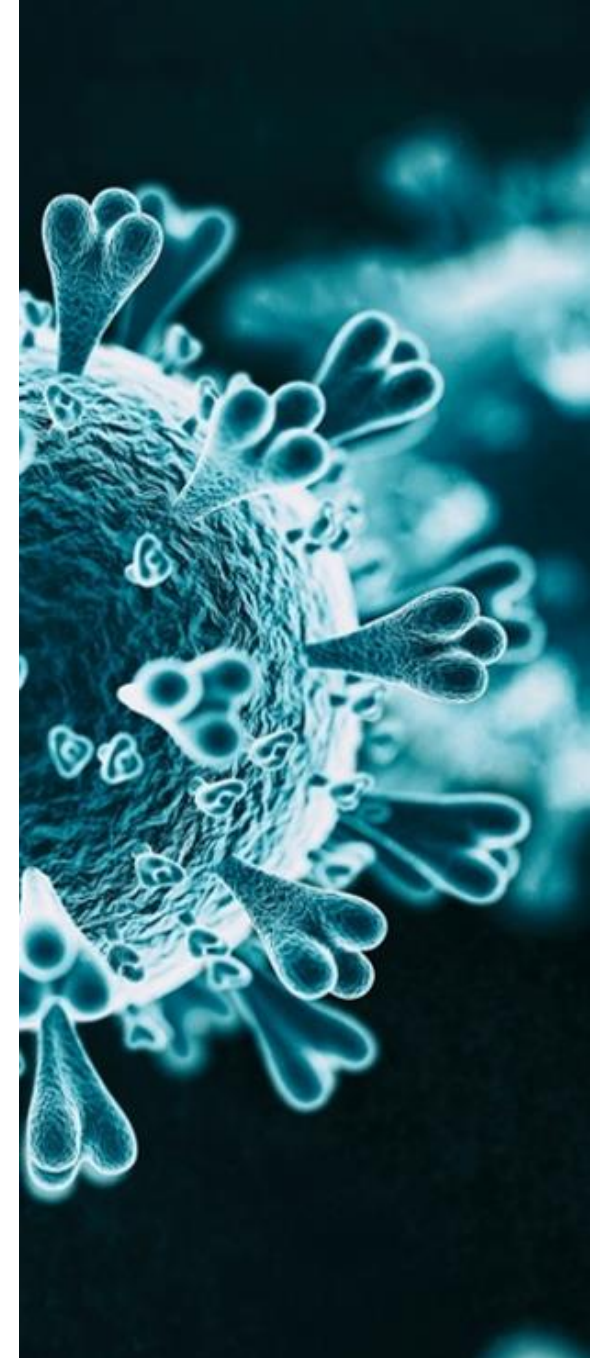
Many infection clusters in Australia have involved construction sites. This may lead to a rise in liability waivers or indemnities in contracts regarding the risk of transmission to protect project parties from third party liability claims. The robustness of these waivers is likely to be challenged.

To avoid the risk of common law liability being established, insurers should comply with the relevant state or territory health directives to avoid any alleged breach of duty.


Some governments and industries have mandated that vaccinations are compulsory in certain occupations (such as in aviation, health and in certain segments of the construction industry). There have already been legal challenges against these requirements, but at this stage, none of those challenges have succeeded. However, some sectors have not received clear government guidance on whether they should request proof of vaccination from third parties, such as customers, visitors, students, workers and contractors. We are likely to see claims for discrimination by those who are un-vaccinated.

Noting that the home has become the new office as a result of COVID-19, in the longer-term there is every chance that employers may face some exposure by failing to provide a safe place and system of work should there be some deficiency with the home office, which has caused or contributed to a work-related condition. We may also see claims related to a failure to implement COVID-19 safe return to work plans, or where insufficient direction has been provided about taking appropriate protections while commuting to and from the office.

Finally, the OECD has called for a "whole of society response" to the mental health risks posed by COVID-19. Its data showed that since March 2020, the prevalence of anxiety and depression in the community has significantly increased. Organisations engaging contractors should seek to manage their exposures to psychosocial hazards within their control, which might involve changes to the work environment, managing increased demand or managing the fallout from reduced job security.



Global supply chain risks



Globalisation has led to a wide diversity of supply chain options offering greater speed and interconnectedness. However, these rely on effective IT technologies and data sharing, visibility and control. Without those factors, it is difficult to assess and manage downstream risks associated with suppliers, manufacturers, warehouses and transport routes. Liability insurers need to be confident supply chain exposures are understood and managed. If they are opaque, insureds should be encouraged to shift their supply chain practices to better balance the commercial benefits and risks.

Logistic applications for big data, open data and digital technologies continue to evolve, as do other supply chain trends, such as the rise in micro freight. It will be critical that insurers continue to monitor these developments to understand changing risk profiles.

Unscrupulous suppliers remain one of the biggest problems and can lead to risks associated with Modern Slavery obligations and product safety. Insureds need to manage how varying safety standards across jurisdictions can impact their end products. They also need visibility across the supply chain, including understanding insurances held by all parties, to protect potential recovery positions.

Insureds need to understand how their goods are being transported. The stranding of the Ever Given in the Suez Canal for six days in March 2021 highlighted the significance of transportation risks. According to tracking data from Lloyd's List Intelligence, 372 vessels were stalled due to that incident. The issue didn't end when the delayed ships arrived in port either, as many had nowhere to dock or unload. This led to lengthy delays and spoiling. Piracy also remains a very real risk associated with shipping.

Suitable storage of goods also needs to be assured, including cold storage solutions and storage options for delicate or dangerous components. The expected increase in demand for cold chain solutions, fuelled by a rise in demand for quality groceries from around the world and multiple delivery channels, may put pressure on these options and lead to product spoilage, injury claims and product recalls.

An associated risk is the appropriateness of liability terms in the warehousing arrangements. This was highlighted by ACCC's recent concerns about GrainCorp's grain warehousing agreement with small business grain growers. Under the agreement, GrainCorp had limited liability to growers to AUD100,000, even where the loss was caused by GrainCorp and the value of grain stored was considerably higher. GrainCorp has since agreed to amending 19 terms in the agreement.



Unscrupulous suppliers remain one of the biggest problems and can lead to risks associated with Modern Slavery obligations and product safety.

Social inflation

Rising insurance claim costs due to social, political, legal and economic developments is a major risk the insurance industry will face in the immediate future.

General trends driving social inflation include increased litigation, distrust for large corporations (news and social media contributing to this sentiment), growth in litigation funding, larger compensation awards, broader definitions of liability and more plaintiff-friendly legal decisions.

Large public companies are particularly vulnerable to the impacts of social inflation in the product liability, D&O and E&O space (for example pharmaceutical, food manufacturers/distributors and medical device manufacturers). In Australia (like the US) there are a number of potential liabilities that will be driven largely by social inflation, for example, those related to opioids, obesity, football concussions, climate change, electronic cigarettes, weed killers and polyfluoroalkyl substances.

It is expected the effects of the COVID-19 pandemic will likely exacerbate social inflation. In Australia through 2020 and 2021, staff have generally had to work from home and most of the court systems were significantly curtailed because of the lockdowns and social distancing measures. Court closures have slowed the resolution of cases and resulted in a backlog. It's expected the backlog and delays will have an effect on the value of the cases resulting in larger settlements and judgments.

There have also been two class actions that have recently been filed in Australia against insurers for failing to cover business interruption losses during extended lockdowns and we expect an increase in claims in the coming years.

Response by insurers

Insurers have been watching closely the impact of social inflation and considering the need to prepare for it. The issue for insurers with social inflation is it can take years to discover that the loss trends are higher than anticipated at pricing when the policy was originally written. Increasing premiums and expanding exclusions "is not proactive exposure management". Further, premiums rising faster than claims costs has been linked to social inequality, which will present a danger for the insurance industry in the future in terms of public trust in the sector.

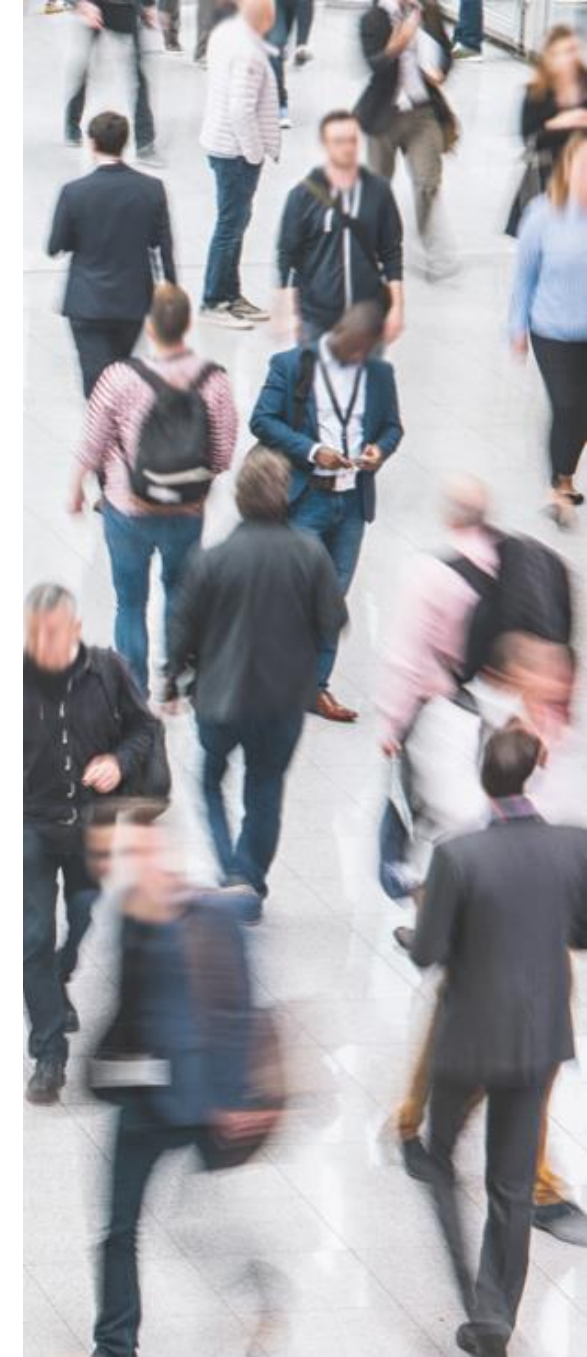
There are a number of tools insurers are developing to manage the impact of social inflation. It is crucial for insurers to consider social inflation in all aspects of the business from pricing, underwriting and actuarial projections, through to case reserves and ultimately payouts of liability claims.

At an organisational level, insurers have identified that promoting a desirable insurer culture leads to good outcomes for insurers and policyholders, reduces the potential for widespread misconduct and maintains public trust and confidence.

An insurer's values, objectives, strategies, leadership, accountability, communication, positive reinforcement, incentive structures and diversity and inclusion will all promote a desirable culture leading to good outcomes. A sound culture will also contribute to an insurer's ability to adapt to changing and stressful situations. In Australia, for example, insurers have had to deal with COVID-19 at the same time as natural disasters, including bushfires, hailstorms and floods. They adopted a number of practices to demonstrate a customer-centric culture, including proactively contacting customers and waiving some documentation requirements. Responses such as this increases public trust and moderates the impact of social inflation.

Other tools to manage the impact of social inflation include the use of technology to identify emerging risks and quantify exposures, implementing trial and litigation strategies, empathetic claims handling, understanding the plaintiff's objective / expectation early, insurer representation at trials and mediations (personalising the company), developing alternative theories of liability in the case, successfully appealing verdicts, presenting a reasonable quantum value to the Court and combatting third party funding.

In Australia, a government committee has recently recommended temporary rules designed to insulate companies and their executives against class actions during the COVID-19 pandemic be made permanent. The committee was scathing of the litigation funding sector, accusing it of using the justice system for the primary motive of generating a return on investment.



Australian general liability contacts



Charles Simon

General Liability Practice Leader (Sydney)
T: +61 2 8273 9911
charles.simon@wottonkearney.com.au



Belinda Henningham

Partner (Sydney)
T: +61 2 8273 9913
belinda.henningham@wottonkearney.com.au



William Robinson

Partner (Perth)
T: +61 8 9222 6909
william.robinson@wottonkearney.com.au



Andrew Seiter

Partner (Melbourne)
T: +61 3 9604 7906
andrew.seiter@wottonkearney.com.au



Paul Spezza

Partner (Brisbane)
T: +61 7 3236 8701
paul.spezza@wottonkearney.com.au



Sean O'Connor

Partner (Sydney)
T: +61 2 8273 9826
sean.oconnor@wottonkearney.com.au



Greg Carruthers-Smith

Partner (Sydney)
T: +61 2 8273 9965
greg.carruthers-smith@wottonkearney.com.au



James Clohesy

Partner (Sydney)
T: +61 2 9064 1816
james.clohesy@wottonkearney.com.au



Meisha Tjong

Partner (Sydney)
T: +61 2 8273 9936
meisha.tjong@wottonkearney.com.au



Stan Tsaridis

Partner (Sydney)
T: +61 2 8273 9810
stan.tsaridis@wottonkearney.com.au



Angela Winkler

Partner (Sydney)
T: +61 2 8273 9983
angela.winkler@wottonkearney.com.au



Lesley Woodmore

Partner (Sydney)
T: +61 2 8273 9934
lesley.woodmore@wottonkearney.com.au



Aisha Lala

Partner (Melbourne)
T: +61 3 9604 7916
aisha.lala@wottonkearney.com.au



Jonathan Maher

Partner (Melbourne)
T: +61 3 9604 7919
jonathan.maher@wottonkearney.com.au



Hope Saloustros

Partner (Melbourne)
T: +61 3 9604 7908
hope.saloustros@wottonkearney.com.au



Robin Shute

Partner (Melbourne)
T: +61 3 9604 7905
robin.shute@wottonkearney.com.au



Chantal Van Grieken

Partner (Melbourne)
T: +61 3 9604 7900
chantal.vangrieken@wottonkearney.com.au



Scott Macoun

Partner (Brisbane)
T: +61 7 3236 8713
scott.macoun@wottonkearney.com.au

New Zealand general liability contacts



Richard Flinn
Partner (Wellington)
T: +64 4 472 6962
richard.flinn@wottonkearney.com



Mathew Francis
Partner (Auckland)
T: +64 9 280 0528
mathew.francis@wottonkearney.com



Hugh King
Special Counsel (Auckland)
T: +64 9 280 0522
hugh.king@wottonkearney.com



Natasha Cannon
Senior Associate (Wellington)
T: +64 4 974 5759
natasha.cannon@wottonkearney.com



Luike Knights
Senior Associate (Auckland)
T: +64 9 600 5656
luke.knights@wottonkearney.com



FOR MORE INDUSTRY INSIGHTS, VISIT:
www.wottonkearney.com.au/knowledge-hub

Australian Offices

Sydney

Level 26, 85 Castlereagh Street
Sydney NSW 2000
T: + 61 2 8273 9900

Melbourne

Level 15, 600 Bourke Street
Melbourne VIC 3000
T: +61 3 9604 7900

Brisbane

Level 23, 111 Eagle Street
Brisbane QLD 4000
T: +61 7 3236 8700

Perth

Level 49, 108 St Georges Terrace
Perth WA 6000
T: +61 8 9222 6900

New Zealand Offices

Auckland

Level 18, Crombie Lockwood Tower
191 Queen Street, Auckland 1010
T: +64 9 377 1854

Wellington

Level 13, Harbour Tower
2 Hunter Street, Wellington 6011
T: +64 4 499 5589

www.wottonkearney.com.au

© Wotton + Kearney 2021

This publication is intended to provide commentary and general information. It should not be relied upon as legal advice. Formal legal advice should be sought in particular transactions or on matters of interest arising from this publication. Persons listed may not be admitted in all states and territories. Wotton + Kearney Pty Ltd ABN 94 632 932 131, is an incorporated legal practice. Registered office at 85 Castlereagh St, Sydney, NSW 2000

wotton
kearney+

A founding member of LEGALIGN
GLOBAL

