Key Trends in Australian Insurance 2021

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Welcome

Clyde & Co's insurance specialists across Australia have pooled their collective insight to look at the trends and issues likely to impact the insurance industry, risk classes, customers and markets in 2021.

My colleagues and I are pleased to provide you with an overview of a number of trends and issues across the insurance market that we foresee will have significant impact in the year ahead. Reading through this analysis, one is immediately struck by the barrage of powerful influences converging at this point in time.

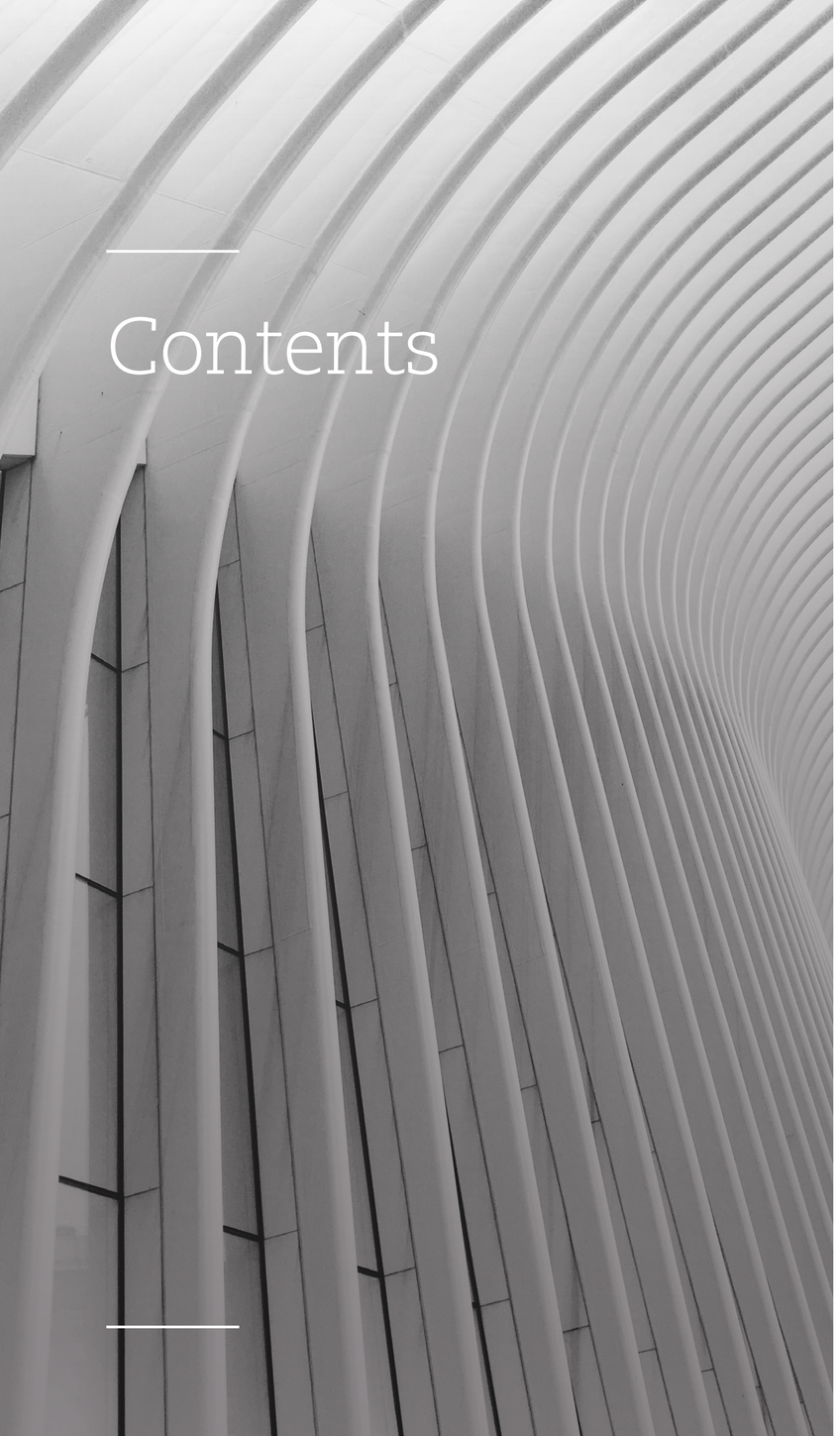
The key trends see a hardening market – business interruption claims as a result of the pandemic, a rise in class actions, significant legislative reforms and enhanced scrutiny from core regulators are amongst a number of trends influencing the insurance market in Australia. The pace at which major changes are hitting the market means it is more important than ever to stay ahead of these trends.

As a leading global insurance firm, Clyde & Co supports a number of international and domestic insurers in each of the areas highlighted in this special report, and we welcome your enquiries.

Our international scale and breadth of service offering allows us to be market leaders in analysing and sharing global intelligence, such as our recent global predictions for the insurance market in 2021.

In addition to effectively managing significant and complex claims for our insurer clients in Australia, we also work in partnership with insurers to develop long-term risk mitigation strategies to reduce the likelihood of such claims occurring.

Lucinda Lyons
Head of Insurance, Australia



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Business Interruption & COVID-19

COVID-19 remains a major driver of property claims in Australia.

Outside of the test cases, major claims have tended to focus on the hospitality sector, with The Star Casino case listed for trial in Q1 of 2021. The Star Policy involves a Biosecurity Act Exclusion and is not relevant to the current test case.

Another claim, Rockment Pty Ltd t/a Vanilla Lounge v AAI Limited t/a Vero Insurance [2020] FCAFC 228 had a decision from the Full Federal Court in December concerning the causation element in the Biosecurity Act exclusion. The case has been referred back to the trial judge Allsop CJ.

The UK's BI Test Case has now concluded with the Supreme Court judgment handed down on 15 January 2021. Key points from the Supreme Court:

1. The reasoning of the majority of the Supreme Court has significantly rejected the "but for" test of causation and expanding the scope of proximate cause.
2. The Court allowed some limited aspects of the FCA's appeal under prevention of access extensions and hybrid extensions. Specifically the Supreme Court held that partial closure would be sufficient to trigger those clauses. So, for example, those restaurants which had operated a takeaway service would still have suffered a prevention of access in respect of their dining-in service.
3. The types of such extensions in scope provide cover for an "emergency" resulting in action taken or advice given by the Government leading to "prevention of access" to the premises.
4. The Court overturned the leading decision on trends clauses, Orient-Express Hotels, and held that trends clauses had no application to the effects of the COVID-19 pandemic as a whole. If an insurer insures any impact from the pandemic it cannot argue that some other (uninsured) facet of the pandemic would have reduced the loss.

First Test Case (Quarantine Act Exclusion):

The special leave application hearing lists for 12 March 2021 have been released. The First Test Case has not been listed. We are waiting to hear whether the application will be listed for hearing on the next available date of 16 April 2021 or if it will be dealt with on the papers.

Second Test Case (Other BI Trigger Issues):

All Insurers filed proceedings in the Federal Court on 24 February 2021, including both sets of Allianz and Guild cases. Insurers have written to the Registrar to request that all Test Cases are heard concurrently in the Insurance List. All Insurers are waiting for the proceedings to be accepted as filed by the Registry with an abridged timetable towards agreed facts, defences and other pre-hearing matters still to be confirmed.

Class Actions

In December the Joint Parliamentary Committee's final report on litigation funding and class actions was published. Whilst a large number of recommendations have been made, the timing of any reform and precise nature of any reforms to be implemented is currently uncertain.

The major recommendations include:

- Conferring exclusive jurisdiction on the Federal Court of Australia with respect to shareholder class actions (Recommendation 30) to eliminate the practice of competing shareholder class actions in different state courts;
- An express power being introduced to permit the Federal Court of Australia to resolve competing and multiple class actions, although the discretion to allow more than one class action with respect to the same dispute to continue (Recommendation 2), with mechanisms proposed to be introduced to resolve questions around which class action should advance by reference to what is in the best interests of group members (Recommendation 3);
- New legislation to address uncertainty in common fund orders (see below) (Recommendation 7);
- The appointment of an independent contradictor where there is the potential for significant conflicts of interest to arise or complex issues in the court approval process, with guidance being prescribed in the Federal Court of Australia Class Action Practice Notice on scenarios where conflicts are likely to arise (Recommendation 18). We are increasingly seeing the appointment of contradictors in the Federal Court and this is expected to continue;
- The requirement on funders and plaintiff lawyers alike to disclose conflicts of interest to the Federal Court (Recommendation 25);
- Prohibitions on solicitors, law firms and barristers having a financial or other interest in a third party litigation funder that is financing a particular class action in which those individuals are acting (Recommendation 26);
- Proposals in relation to reasonable, proportionate and fair legal costs (Recommendations 13, 14, 16), the capping of uplift fees (Recommendation 21), and consideration to be given to the imposition of a minimum return of the gross proceeds of a class action to group members (Recommendation 20), with commentary on contingency fees (which until recently were banned in all Australian states and territories, but from 1 July 2020 are permitted in the Australian state of Victoria in certain circumstances. Click here for our earlier update);
- That the Australian Government permanently legislate changes to continuous disclosure laws, consistent with the temporary changes introduced during the COVID-19 pandemic to introduce a fault based element into these laws (Recommendation 29).

The High Court of Australia has handed down their decision in Wigmans v. AMP Limited & Ors, which involves the lawfulness of "beauty parades" as a solution for competing class actions. In a narrow 3:2 decision, the High Court dismissed an appeal by one of the unsuccessful law firms and funders against the stay of their class actions against AMP Ltd. The High Court's decision confirms that Australian Courts are empowered to broadly investigate the merits of multiple class actions to approve the proposal that provides the best returns to group members. Read our full article on the decision **here**.

Construction PI & Cladding

Recent Legislation, Cladding and State Government's Response

Australia's recent crisis in residential construction works remains a catalyst for recent developments in the construction and insurance sectors. Read more of our analysis into legislative reforms in 2021, class actions against manufacturers of combustible Aluminium Composite Panels cladding and State Government actions to address the cladding crisis here.

Calls for a national approach: While States continue on a path of implementing their own systems for cladding rectification works, they also continue to made repeated calls to the Federal Government to coordinate a nationwide approach, with regards to rectification and legislation. The Federal Government is holding firm that building regulations falls under the State's remit.

With varying and frequently changing legislation across state borders, there are concerns in the market about rising premiums and the ability for practitioners to maintain an appropriate level of Professional Indemnity Insurance, extending to retiring practitioners who are encountering difficulties in obtaining much needed runoff insurance without exemptions or special conditions.

Building Approval Trends

The Australian Bureau of Statistic data from December 2020 has revealed that the combination of all-time low interest rates and the Federal Government's AUD25,000 grant for homebuilders has led to a 16% increase in approval of house construction from November 2020 and a 50% increase on December 2019. Conversely, there was a 19% reduction in building approvals for apartments over the year. This trend coincides with the lethargic increase in the value of apartments compared to freestanding accommodation which has seen a surge in the backend of 2020.

Non-residential building, including commercial office space, health and industrial property has also trended lower over the year by nearly 20% on a direct comparison with the same period in 2019.

This has generally been caused by a number of factors but the key focus seems to be with respect to the uncertainty over commercial office space having regard to the success of the community working from home during the pandemic.

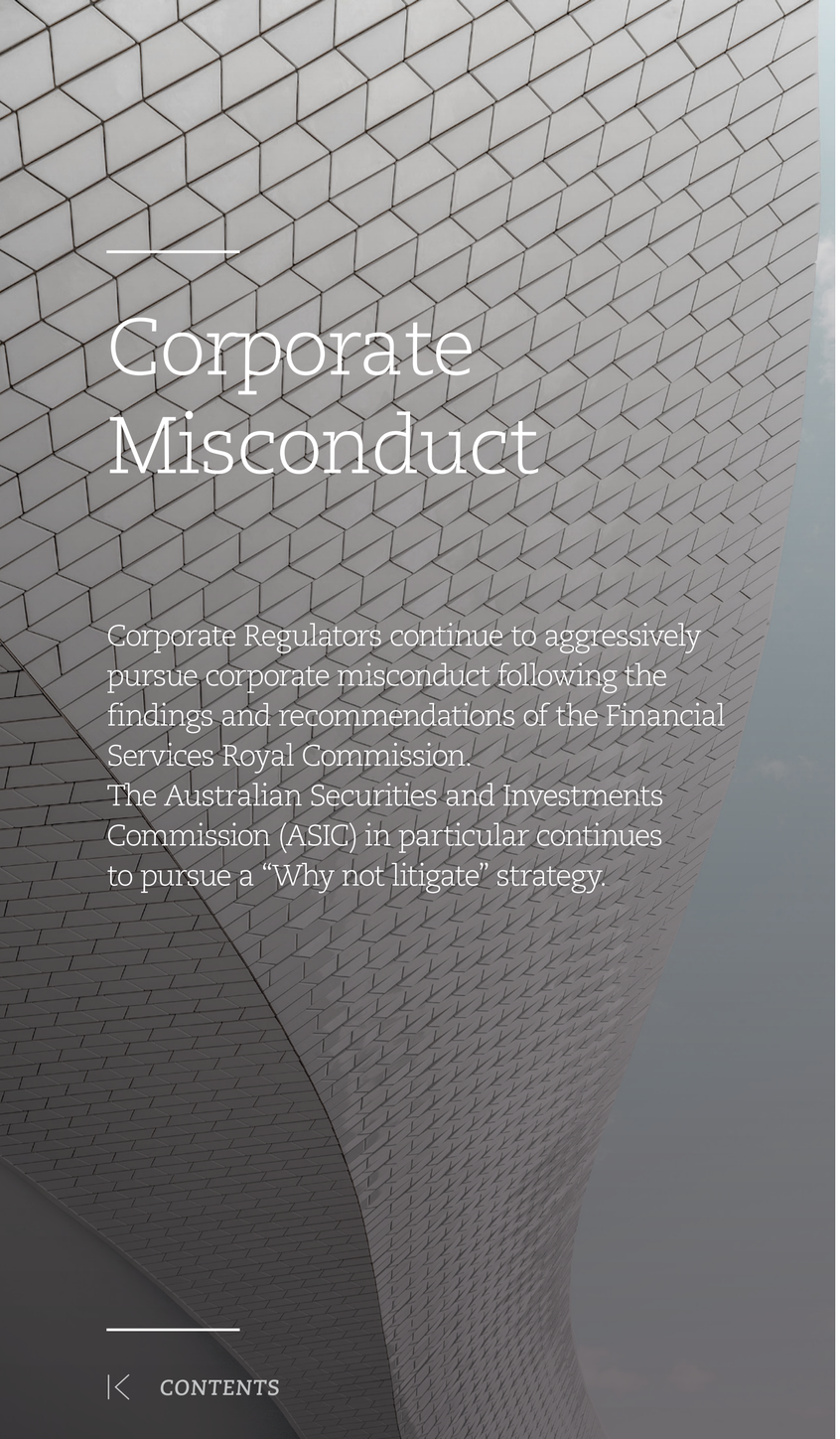
The increase in house construction (highest levels seen since 2000) will likely positively impact the revenue of SME construction professionals, while there may be some contraction for the larger consultants with a focus on structural engineering.

Infrastructure Investment

The Federal Government announced in October 2020 its commitment to AUD110 billion of investment in infrastructure over a 10 year period from 2020-2021. Rail, road, ports and airports have been slated for inclusion in the investment program.
This is in addition to the already record investment that the Federal Government has undertaken and which has been driving the Australian economy for a significant period.

New South Wales, in particular, has committed to a significant number of motorways and rail projects to improve transportation in Sydney. The second airport in Sydney has already commenced construction, while the Western Harbour Tunnel and Beaches Link Projects has now been approved by the State Government and planning has commenced.

The contracting arrangements on these infrastructure projects incorporate an almost complete transfer of risk from the principal to the contractor. The contractor seeks to pass those obligations to the consultants as part of its risk management strategy. In such circumstances, consultants are focussed on project-specific professional indemnity policies to protect their corporate insurers. However, in a hardening market we are experiencing the tightening of terms and significant increases to premiums for such policies. As a result there is friction in the industry as to the allocation of cost for project specific cover. The relatively recent history of claims made by contractors impacting these policies looks likely to continue if the status quo remains under the standard contractual matrix.



Corporate Misconduct

Corporate Regulators continue to aggressively pursue corporate misconduct following the findings and recommendations of the Financial Services Royal Commission.
The Australian Securities and Investments Commission (ASIC) in particular continues to pursue a "Why not litigate" strategy.

- **Australian Securities and Investments Commission v Mitchell (No 2):** Mr Healy was not found to have breached his duties and Mr Mitchell was found to have breached his duties in a very limited manner. Beach J imposed a financial penalty on Mr Mitchell of AUD90,000. However the defence costs in the case would have been a significant cost to insurers (likely in the millions of dollars range). Insurers are experiencing significant claims for defence costs which will only continue to grow with ASIC's new strategy.
- One of the substantial wins for ASIC in 2020 was pursuit of brokers of Over-The-Counter (OTC) derivatives such as contracts for difference. In **ASIC v AGM Markets Pty Ltd (in Liq) (No 3) [2020] FCA**, the Federal Court imposed a civil penalty of AUD75 million, the highest penalty obtained by ASIC to date, against three related corporations who operated a business of providing OTC products to retail consumers. Justice Beach was highly critical of the defendants conduct and the broader OTC derivative market, describing the product as a "financial heroin hit" to participants in the market.
- **Australian Securities and Investments Commission v Youi Pty Ltd [2020]:** In this case, ASIC was successful in bringing an action for declarations that the insurer had breached their obligation of utmost good faith. Although no financial penalty was involved in that case, the Insurance Contracts Act now provides for significant financial penalties and confirms that claims management will become a special area of interest for ASIC in the coming years. All insurers need to review their licence arrangements and claims handling models to ensure that they comply with their s912A(1)(a) obligations.
- The Australian Transaction Reports and Analysis Centre's (**AUSTRAC**) record AUD1.3 billion civil penalty against Westpac for breaches of the The Anti-Money Laundering and Counter-Terrorism Financing Act demonstrates the significant risk that AUSTRAC regulatory actions place on financial services companies. The size of the fines is due to the significant number of affected transactions and the fact that compliance systems need to be automated to deal with the significant volume. Such automation can be difficult to reconcile with large and cumbersome legacy IT systems used by large financial institutions. However, the failure to ensure technology upgrades don't result in breach of the law will not be a defence to a prosecution.

Insurance companies have been facing a number of Australian Consumer Law class actions involving a range of Affinity products including insurance for credit cards, extended warranties, loan protection and tyre and rims.

A new target for class actions are against licensees of financial advisors for allegedly preferring life insurance policies linked to insurers in their corporate group rather than competitor policies alleged to be in the best interests of customers.

Directors & Officers

For many directors and officers there will never be a more challenging time, as they navigate their way through serious challenges to business continuity while having to adhere to stringent directors duties and be ever mindful of the interests of stakeholders including creditors, shareholders and investors. Directors of strong companies will continue to be challenged and those with existing weaknesses will be exposed.

The next 12 months are widely expected to bring an increase in claims against directors and officers as a result of the impact of COVID-19 on the economy. Intermittent State lockdowns, the international travel ban, limitations on movement between States and restrictions on business operations have had a devastating effect on many companies and their business model. Corporate insolvency will be a major catalyst for claims.

Given the 'long tail' nature of claims against directors and officers, however, it will be some time before any increase in claims trends becomes apparent.

Insolvency

Corporate insolvency will continue to be fertile ground for claims against directors and officers. While the Federal Government's temporary measures, including the coronavirus specific safe harbour protection from insolvent trading and JobSeeker subsidies, kept the expected tsunami of corporate insolvencies at bay during 2020, the consensus is that the impact of corporate insolvency will start to be felt during 2021 as these measures are rolled back.

With the expiry of the coronavirus specific temporary relief for directors from insolvent trading on 31 December 2020, directors once again face personal exposure for debts incurred while trading while insolvent.

While directors of well managed corporations will have availed themselves of the pre-existing and continuing safe harbour relief, many directors of SMEs will have not, and will face exposure.

It is generally accepted that there will be an uptick in claims for insolvent trading through 2021.

Directors duties

Directors must act in the best interests of the company as a whole, and this is something which ASIC made clear to the business sector throughout 2020, regardless of the COVID-19 temporary relief measures.

Claims for breach of directors duties are likely to increase in 2021 as the indirect result of financial crises and corporate collapse.

Directors are expected to face an increase in allegations for breach of their duties arising from arrangements with investors, dealings with creditors, equity raisings, day to day management decisions and decisions taken about the business model itself.

Misleading or deceptive conduct

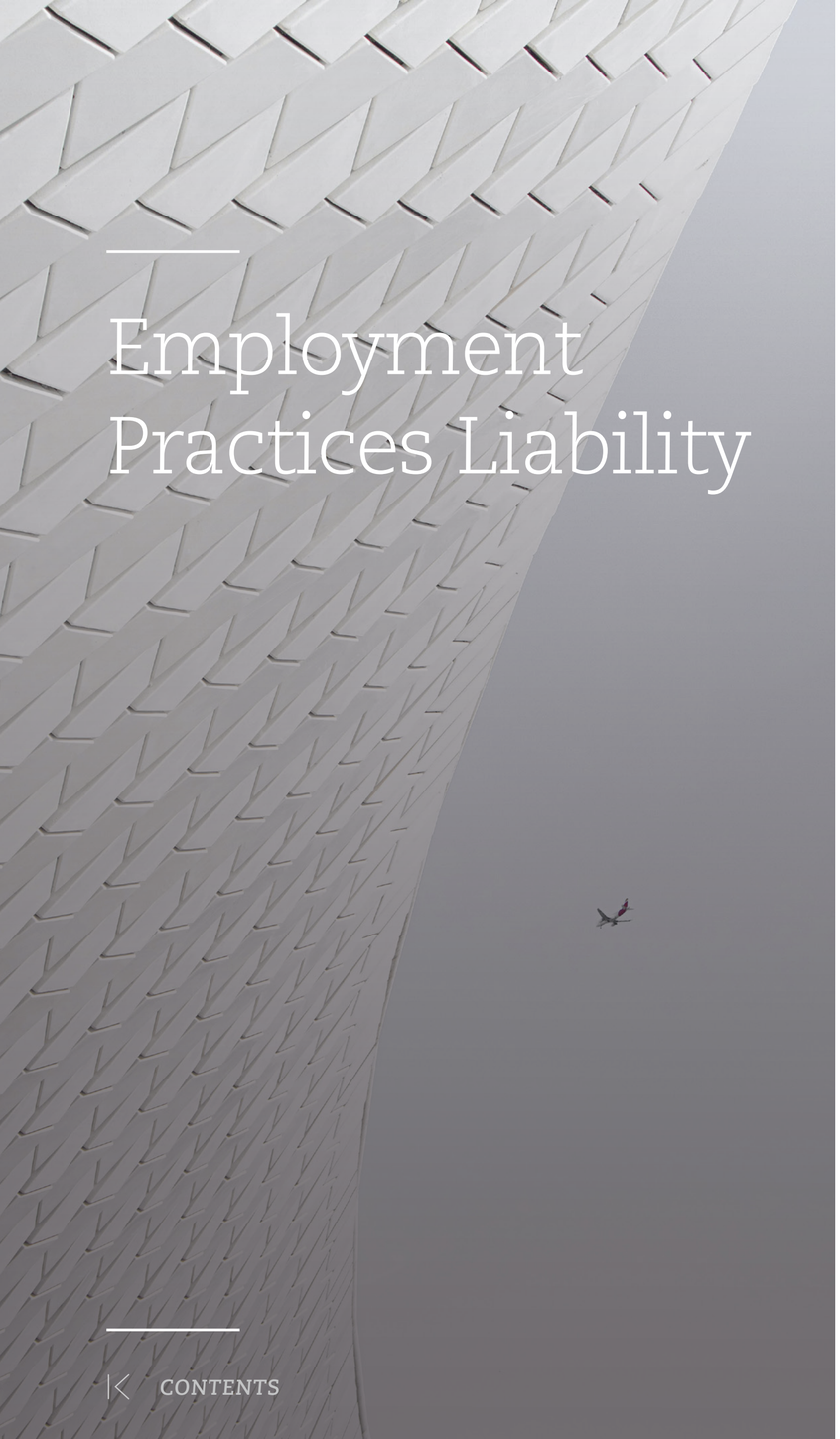
A perennial cause of action brought against directors and officers is that of misleading or deceptive conduct.

Amidst the COVID-19 impact throughout 2020, many directors and officers will have made written and verbal representations to stakeholders about such matters as the company's business model, contingency plans, its ability to continue to trade, its continuing solvency and its ability to repay loans. Investments will have been made, trading terms will have been offered and contracts entered into based on such representations.

As we move into 2021, and those arrangements falter and fail under financial pressure, it is expected that claims for misleading or deceptive conduct will follow.

Long tail

A significant proportion of claims against directors and officers will continue to be made by administrators, liquidators and receivers. It can take months if not years for potential claims to be investigated and funded, before they are made. It will therefore be some time before these claims trends become discernible.



Employment Practices Liability

Mandatory Vaccinations

With the Australian Government announcing that the coronavirus vaccine will not be made mandatory in Australia, this raises a number of legal questions, particularly in relation to the employer's primary duty of care, the employee's right to choose, whether a request to vaccinate from an employer to an employee is a lawful direction and whether an employer can terminate an employee for failing to vaccinate. In our recent update, we set out a number of considerations in relation to employers enforcing a mandatory vaccination policy for the coronavirus. We are bound to see a variety of employment practices liability claims arise as the vaccine rollouts commence.

FWO's Eyes Set on Large Corporation Underpayments

In 2021 and for a number of years to follow, The Fair Work Ombudsman (FWO) will continue to prioritise targeting large corporate underpayments across a number of sectors, include fast food, restaurants and cafés, and horticulture.

Large corporations that are suffering financially due to the COVID-19 pandemic may therefore benefit from self-reporting any workplace breaches to the FWO during this year to allow the FWO to take this into account when considering their enforcement response.

The dramatically changed economic conditions brought about by the COVID-19 pandemic has impacted the FWO's compliance and enforcement work. This impact may result in more favourable outcomes for those large organisations that self-report workplace breaches than previously.

In these circumstances, insurers should consider ways they can assist their policyholders, especially large organisations, to immediately commence reviewing their workplace systems to ensure there has been no underpayment of employee entitlements.

Sham Contracting

Sham contracting continues to be a priority area for the FWO and it has established a Sham Contracting Unit targeting businesses who avoid their lawful obligations to pay workers who are wrongly classified as independent contractors. In 2019/20, the Sham Contracting Unit recovered AUD363,976 for sham contracting and misclassification matters.

Workplace Restructuring and Redundancies

With 31 March 2021 penned as the conclusion of the Government's JobKeeper scheme, we are likely to see businesses facing tough decisions about reductions in their workforce and potential redundancies. While a number of temporary provisions to the Fair Work Act were made in 2020 to address the impact on the Australian economy and ongoing viability of businesses and their employees, these amendments are subject to civil penalties if not correctly followed.

The Rise of Employee Class Actions in Australia

As we saw with the advent of securities class actions and then the Royal Commission related representative claims, these judgments and the 'underpayment' scandals reported nationwide in 2020, suggest large scale, high value employment representative actions will become a common feature of the Australian class action landscape.

The most significant judgements signalling this trend are Workpac v Rossato (permanent employees characterised and paid as casuals); Bywater v Appco Group Australia (sham contracting) and Augusta Ventures Limited v Mt Arthur Coal Pty Ltd (mass employee underpayment).

The High Court will soon hand down their decision in Victoria International Container Terminal Limited v. Lunt & Ors, which involves the use of a union "front man" in the approval of enterprise agreements.

Environmental Liability

As a result of the Royal Commission into National Disaster Arrangements in 2020, ambiguity around responsibility for debris clean-up costs has come to the forefront of environmental liability.

Confusion over debris clean-up arrangements was a particular concern during the 2019-2020 bushfire season.

This was partly caused by ambiguity as to who is ultimately responsible for covering clean up costs, with federal and state governments deciding to offer debris clean-up assistance to eligible destroyed properties as part of an 'opt-in' scheme, with the expectation that insurers would 'pass-on' the full amount of sum-insured cover to policyholders. While this was a win for policyholders, who could access their full funds available under residents' insurance policies to cover rebuild costs, the delay in announcements resulted in delays to clean-up, payments and rebuilding.

The Royal Commission into National Natural Disaster Arrangements Report (28 October 2020) called for Governments to create and publish standing policy guidance outlining the circumstances and timeframes over which they will or will not provide assistance for debris clean-up resulting from natural disasters.

Governments are concerned that committing to covering debris clean-up costs will shift the cost of risk to governments, and potentially result in policy-holders underinsuring or cancelling policies, with the expectation that Governments and charities will 'flip the bill'.

National clarity on recovery support needs to be developed in consultation with the insurance industry to avoid adverse impacts on consumers and insurance markets, to ensure that any policy guidance is fair and equitable for both insured and uninsured residences, and does not create incentives for policyholders to underinsure.

With the insurance industry facing rising exposure to natural disaster risk, new barriers to entry may emerge with the necessity for insurers to increase premiums. National policy guidelines addressing responsibility for clean-up costs would be a welcome message to insurers, potentially resulting in lower insurance premiums for policyholders if insurers can have confidence that this coverage will not be required as an aspect of their relevant insurance policies.

>2x

claims for natural disasers

According to the Reserve Bank of Australia, inflation-adjusted insurance claims for natural disasters in the current decade have been more than double those in the previous decade.

38.5k

2019-2020 bushfires claims

As at 27 August 2020, around 38,500 claims (including building, contents and commercial insurance claims) had been lodged as a result of the 2019-2020 bushfires, totalling an estimated AUD2.33 billion.

1.9bn

2019-2020 Cat Season claim loss (AUD)

2019/2020 Cat Season claims are still being finalised. Loss estimates are AUD1.9 billion. With Insurers facing regulatory pressure from ASIC to ensure that claims are processed in accordance with the duty of utmost good faith, insurers will be looking to further stream line their CAT claims processes in 2021.

How much do clean-ups cost?

Where there is significant damage to a home or a home is destroyed completely, clean-up costs can reach the tens of thousands of dollars.

- AUD46,000 is the average cost for debris removal
- AUD68,000 is the average cost for debris removal for asbestos properties

Source: IAG data from current debris removals after the 2019-2020 Christmas period fires.

Financial Services Climate Change Litigation

In 2018, Mark McVeigh filed a legal action alleging the trustee of his superannuation fund, the Retail Employees Superannuation Trust (REST), breached the duties owed to him by failing to adequately consider climate change risks.

The basis for the claim was that REST had breached its obligations in the Corporations Act by failing to provide information related to climate change business risks and its plans to address those risks. Mr McVeigh sought declaratory relief that REST violated the Corporations Act and an injunction requiring REST to provide that information. Mr McVeigh also sought a declaration and injunction in equitable jurisdiction. The claim was then extended to also claim a breach of Superannuation Industry (Supervision) Act which requires trustees to act with care, skill and diligence and to perform their duties in the best interests of beneficiaries.

On 2 November 2020, the proceedings settled just before trial. The terms of settlement are confidential but REST released a press statement agreeing to comply with Task Force on Climate-related Financial Disclosures (TCFD) recommendations on disclosure and risk assessment, including conducting "stress tests" on its investment portfolio. REST has also agreed to incorporate climate change risks in its investments and implement a net-zero by 2050 footprint goal.

The same law firm (Environmental Justice Australia) that assisted Mark McVeigh has also brought proceedings against the Commonwealth Government in relation to the issue of Sovereign Bonds.

The claim seeks declarations that the Commonwealth has breached the law by failing to disclose the material risk that climate change presents to the value of the Bond over time. It also seeks an injunction from the Federal Court to prevent further promotion of bonds without informing investors about climate change risks.

The Australian Prudential Regulation Authority and the Reserve Bank of Australia gear up to put banks and insurers through a tough new climate change "stress test".

The Carney international taskforce was endorsed in December 2019 by Kenneth Hayne QC, who warned that company directors have a legal duty to action on climate risk and report on it to investors.

In 2019, the Australian Securities and Investments Commission announced companies will face court action if they fail to tell shareholders and customers about climate-related financial risks – like owning stock in agriculture and construction companies that could be forced out of business by drought, fires or floods supercharged by climate change.

Health, Disability & Aged Care

Aged Care

The Aged Care Sector is likely to see a spike in claims in the post-Royal Commission, post COVID-19 era.

Already, separate class actions have been filed on behalf of the residents in two Melbourne nursing homes: Epping Gardens and St Basil's. A further class action investigation into Cumberland Manor in NSW has been publicised by a leading plaintiff law firm.

In November 2020, the Royal Commission handed down a Special Report. The report highlighted the lack of infectious disease training amongst staff. It also recommended increasing the provision of allied and mental health services to people living in aged care during the pandemic to prevent further deterioration in resident's physical and mental health.

The final report of the Royal Commission into Aged Care Quality and Safety was published on 1 March 2021. The Final Report's conclusions are stark: substandard care is widespread in Australia's aged care system. The system is unacceptable and unsustainable in its current form and "is not worthy of our nation". See our full analysis here.

Telemedicine

Huge advantages but risks need to be considered.

The COVID-19 pandemic is likely to accelerate the demand for telemedicine services in the Asia Pacific region, as people are reluctant to attend hospitals or medical clinics in person.

With the adoption of any new technology, health care providers should consider whether using telemedicine as an alternative to in-person care could expose themselves to medical malpractice claims. The increase in telehealth consultations has the potential to result in an increase in claims, particularly against GPs who are often relied upon to diagnose serious conditions from non-specific symptoms.

Regulators in and Australia have issued guidelines to practitioners in respect of telemedicine consultations. A key theme emphasised is there should be no difference in the standard of care between face to face and telemedicine services. Doctors should consider whether telemedicine is clinically appropriate in each circumstance and ensure that proper arrangements are put in place to ensure continuity of care.

Read our full coverage of this issue in Clyde & Co's global Insurance 2021: the year ahead report

Australian Medical Liability: Year in Review

Clyde & Co's health law liability team look at the most significant medical liability cases impacting Australian healthcare providers throughout 2020 and the likely future implications of their rulings:

- High Court Provides Timely Reminder About Standard of Care
- Epidemiology Studies Can Be Important Strands in a Circumstantial Case
- Time of Causation a Critical Element in Wrongful Birth Case
- Inference of Causation
- Costs of Commercial Surrogacy Recoverable: UK Supreme Court
- Farlow Damages an Increasing Worry
- Court Clarifies the Limitations on Bystanders in Pure Mental Harm Claims
- Causation Difficult to Establish in Infection Claims
- Good Procedures Provide Good Defence to Claim

Institutional Abuse Claims

In 2020, a number of significant decisions were handed down by the Courts in Australia in relation to institutional abuse claims. The ability to now wind-back settlements presents a number of issues for the industry, particularly regarding notification and potential reinsurance disputes which may arise.

There remains uncertainty in the market as to what different Australian Courts will consider "just and reasonable".

Insurers and reinsurers with exposure are likely to see a significant increase in high value claims over the next 5 years and should be considering reserving accordingly.

- On 22 September 2020, Judicial Registrar Clayton handed down a decision in Levey v Bishop Paul Bernard Bird [2020] VSC 615, regarding costs of complying with subpoenas in an institutional abuse case involving the Catholic Church. The two parties that had been subpoenaed, CCI and Towards Healing, sought awards of AUD28,000 and AUD37,000 respectably for the legal costs of complying with the subpoenas. The Judicial Registrar held that it was reasonable for the institutions to claim compliance costs but that the amounts sought was unreasonable.
- On 26 August 2020, a decision was handed down in Victoria in Perez v Reynolds & Anor [2020] VSC 537. Forbes J awarded damages of AUD1,552,725 to a plaintiff who was abused by his teacher. The State of Victoria admitted direct liability and the case proceeded on the basis of an assessment of damages. The decision shows that even where a plaintiff has worked over the years, a claim for significant economic loss can be sustained, and that where a plaintiff has not sought ongoing medical treatment, they can still be awarded compensation for pain and suffering. The payment was reported as being a record in Victoria.
- Under amendments to the Limitation of Actions Act, previous settlements entered into involving allegations of institutional abuse can be set aside if the Court considers them to be "just and reasonable".
- In December 2020 the Victorian Court of Appeal handed down the decision of Roman Catholic Trust Corporation for the Diocese of Sale v WCB [2020] VSCA 328 upheld the primary judge's determination, finding the setting aside of the application was "just and reasonable".
- In contrast, on 7 September 2020, the Queensland Court of Appeal handed down a decision in TRG v The Board of Trustees of the Brisbane Grammar School [2020] QCA 190. The Court refused the application to set aside finding that the settlement was reasonable in the circumstances and this was upheld by the Queensland Court of Appeal.

SME Market

The Australian Small Business and Family Enterprise Ombudsman (**ASBFEO**) released its final report into the insurance industry's practices that impact small businesses on 9 December 2020.

You can read our full analysis of the report here.

The Ombudsman concluded that far too many small businesses are on the brink of collapse because they cannot secure the insurance products necessary for their operation. The report addresses what the Ombudsman believes is an imbalance in the insurance market, one which requires a multi-faceted and focused response.

The Ombudsman makes a suite of recommendations designed to provide clarity and certainty for small businesses, rebalance risks for insurers, and allow businesses greater access to the insurance products they require.

The report and its findings should give all general insurers pause to consider their SME portfolios, the issues raised by Ombudsman and potential solutions to these issues. The report is also likely to provide the industry with some much-needed data into the customer experience and satisfaction levels for the insurance products that SME businesses use.

In their submission to the Inquiry, the Insurance Council of Australia (ICA) accepted that issues of affordability and availability of key insurance products are real concerns for small business. They also stated that any solution would require open collaboration and innovation between the insurance industry, governments and small businesses.

The answers to these issues are likely to be far-reaching and involve the use of technology designed to streamline claims processes, increased public-private partnerships and review of state government's taxation on insurance products.

The affordability and availability of public liability was a central issue for the Inquiry. A substantial proportion of claims expenses come from legal costs. Clyde & Co is well equipped to be part of the conversation around providing innovative solutions to try and lower claims costs and to consider how to improve business customer satisfaction levels.

Key takeaways from the report include:

- the need for further tort law reforms;
- whether the government has a further role to play as an insurer of last resort;
- whether the Australia Reinsurance Pool should be further expanded to include reinsurance for all natural disasters for commercial property insurance;
- regulating the insurance industry's conduct, particularly in improving the disclosure of coverage and fees and to improve the timeliness;
- providing AFCA with further powers to deliver improved dispute resolution and enforcement;
- consideration of alternative insurance arrangements for small business and industries including Discretionary Mutual Funds.

Warranty & Indemnity Insurance

The trends in Warranty & Indemnity (W&I) policies largely flow as a consequence of COVID-19 and the effect of the pandemic on the economy.

Synthetic W&I Policies

In the current economic climate, Synthetic W&I Policies are being sought out by buyers of liquidated or distressed companies. In these policies, the insured warranties are separately negotiated between the buyer and the insurer, and are not given by the seller in the underlying transaction document.

Synthetic W&I policies raise interesting issues about whether there is an insurable interest (i.e. as there is no recourse for breach of warranty in the underlying transaction document, what is being insured?), as well as whether the policy is another form of financial product (for example, a derivative) which triggers a requirement to have an appropriate financial services licence to underwrite.

JobKeeper Overpayment & Wage Underpayment Claims

Potential misuse of government support programs and packages by a seller (at a point where the seller obtained that support at short notice and at a time when many businesses were facing significant uncertainty), for example the JobKeeper program, and the potential requirement for the buyer to have to subsequently pay back any overpayment, could be an area of focus for due diligence by underwriters.

In a similar vein, there has been a steady volume of media reports relating to underpayment of employee wages, which should continue to be a focus for W&I underwriters.

Material Adverse Effect Clauses

Over the course of the past year events have moved rapidly. W&I underwriters should be carefully considering the terms for offering cover for breaches of warranties which first occur between signing and completion and are discovered by the buyer, as this may present a material risk for the period between signing and completion. The drafting of any "Material Adverse Effect" (**MAE**) carve-outs as they apply to this extension of coverage will become increasingly important for W&I underwriters, as buyers in the COVID-19 environment are likely to seek inclusion of such MAE conditions to provide them with an exit from the transaction if the target company's business deteriorates between signing and completion of the transaction.

A recent example (although not a W&I Claim) is Travelport Ltd and Others v WEX Inc [2020] EWHC 2670 in which WEX backed out of a USD1.7 billion transaction after being able to successfully trigger a MAE. The companies subsequently renegotiated the sale at USD577 million. The claim turned on the interpretation of the word "industry" in the MAE, and shows the importance of careful drafting of such clauses in the current environment.

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440

Partners

1,800

Lawyers

4,000

Total staff

50+

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*includes associated offices

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