



Directors' Liability Survey 2022

Regional overview, Australasia

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The 2022 survey provides a fascinating insight into the liability concerns of Australian directors and officers. The results speak to a market that appears comfortable managing traditional risks, such as employment claims, insolvency and regulatory risk, and more concerned with emerging, less well-understood risks such as cyber attacks, data loss and cyber extortion.

Most interesting is that the significance of shareholder actions/disputes is lower when compared to other regions. This is despite Australia being one of the most litigious countries for securities class actions. Directors' sentiment may reflect their belief that recent government law reform of securities law and litigation funding will have the desired effect.

It may also indicate directors have faced the risk of securities actions in record numbers over the last ten years and have adapted to the environment with robust risk management. We hope this presents an example to directors and officers grappling with the emerging cyber and data loss risks. These risks can be managed with appropriate risk mitigation once correctly understood.

The risk of health and safety and environmental prosecutions was the fourth-highest regional risk behind cyber and data loss risks. Australia continues to be a jurisdiction that takes the health and safety of workers seriously, and health and safety regulators are active in ensuring compliance.

The impact of government responses to COVID-19, including vaccine mandates and prolonged lockdowns in Australia, may account for the heightened assessment of this risk. Australian businesses have needed to pay particular attention to ensure the safety of their workers during the pandemic.

The emergence of climate change as an area of significance is likely to reflect Australia's emergence as the tip of the spear for the extreme physical manifestation of climate impact. It has become one of the most active jurisdictions for climate change litigation activists.

Jill Stewart and Robert Weaver, WTW ***Securities Class Actions and Class Actions***

AU: 2021 saw a reduction in new filings and increased enthusiasm by the Government and regulators to control litigation funding and increasing class action activity. We expect continued disruption into 2022, with funder returns potentially being capped under a proposed bill, potential changes to the class action regulatory attitude following the Australian general election in mid-2022, and an early win in 2022 for a securities claim defendant. However, the confidence this win might have given corporates and their insurers has been muffled by the remission of another securities class action back for hearing on liability issues, and the first potential securities class action damages award following a Court of Appeal decision.

NZ: At present, New Zealand does not have a statutory class actions regime. Based on feedback received in response to two issues papers on litigation funding and class actions released in 2020 and 2021, Te Aka Mautua o te Ture Law Commission considers that New Zealand should introduce a statutory regime. The Commission is due to provide its final report in May 2022 and is expected to directly address the tension between the benefits of class actions and litigation funders and their impact upon the business environment in New Zealand. The report is also expected to bring clarity to procedural controversies such as the status of opt-out orders (the Supreme Court has unanimously allowed an opt-out class action to proceed for the first time, despite the lack of a specific statutory regime).

Side A and B claims

AU: In late February 2022, the High Court of Australia handed down a ruling that shareholders of a company in liquidation can use the public examination powers in Part 5.9 the Corporations Act 2001 (Cth) to investigate personal claims against the company's former directors and its auditor, even though those personal claims will not benefit the company or its creditors. Such examinations had previously been undertaken exclusively by liquidators and regulators. The High Court's decision opens up the public examination process to parties who may have a potential claim against the former directors and advisors of a company in liquidation.

Directors, D&O insurers, and professional indemnity insurers can now expect an increase in the use of public examinations by shareholders, and litigation funders, to investigate potential securities class actions against directors and advisors.

Defence costs

NZ: The Government is considering a new third-party claims regime that could repeal s.9 of the Law Reform Act 1936 (N.Z.). These reforms propose to place insurers in the shoes of the insured party during proceedings brought by a claimant against the policyholder. If this goes through, it will impose greater obligations on the insurer and insured with respect to claims made by an injured third party, and will challenge the need for separate defence cost limits.

Climate change/ESG

AU: Australia continues to be a market where activist-based litigation is a common feature, with environmental groups targeting ASX-listed company and carbon heavy companies with actions around misleading conduct, market disclosures and greenwashing (for example, *Australasian Centre for Corporate Responsibility v Santos Limited*, where an environmental advocacy group has alleged certain 'green' claims made by Santos are misleading and deceptive in breach of the Corporations Act 2001 (Cth)). Despite a setback with another case in March, where a novel duty of care to prevent intergenerational harm through climate change was successfully appealed, Australia is becoming the jurisdiction of choice for creative climate litigation.

NZ: N.Z. has passed the world first climate reporting legislation under the Financial Sector (Climate-related Disclosures and Other Matters) Amendment Act 2021. Climate-related disclosures are now mandatory for some organisations in N.Z., including large publicly listed companies and insurers.

These obligations will apply to around 200 entities, including all licensed insurers with greater than \$1b in assets or annual premium income over \$250m. Reporting will be against a standard that will be developed with reference to the governance, strategy, risk management, and targets of the relevant organisations.

Regulatory

AU: Australian Securities and Investments Commission (ASIC) key priorities for 2022 include the management of cyber risks, specifically around compliance with breach-reporting obligations, continuous disclosure obligations and regulatory action for breach of AFS license. Other priorities include climate change governance practices, and egregious governance failures or misconduct resulting in corporate collapse which are relevant in terms of insolvency trends detailed below. In relation to cyber security compliance, ASIC is positioned to take an 'active and targeted approach to enforcement', impacting AFSL holders and their authorised representatives.

A recent focus for clients has been understanding ASIC's views on AFSL requirements and wider gatekeeper and director-related obligations. ASIC analyses cybersecurity through the lens of whether an organisation has adequate risk management systems and adequate resources, such as technology resources whilst AFSL holders are also required under the Corporations Act 2001 (Cth) to comply with a range of obligations, including those in sections 912A and 912B. 2022 will also see the introduction of the new Financial Accountability Regime (FAR), which extends and replaces the Banking Executive Accountability Regime (BEAR).

At a high level, FAR will impose obligations on certain 'accountable persons' to ensure reasonable steps are taken to prevent material contraventions of financial services laws – it expressly recognises persons may be subject to civil penalties if they are found to have accessorial or ancillary liability to a contravention of the regime. Under the FAR, there is no prohibition on indemnification or insurance for accountable persons, noting there was a stringent prohibition for this under the previous regime (BEAR).

FAR will apply to banks and other ADIs from 1 July 2022, and to general insurers, life insurers, private health insurers and superannuation trustees from 1 July 2023. Continued tighter regulation of big tech - Australian regulators including the ACCC and the Australian Information Commissioner have joined forces to form the Digital Platform Regulators Forum, as pressure to rein in the tech giants builds globally. ACCC is to focus on supply chain competition, COVID-related disruptions and the protection of consumers, particularly relating to manipulative or deceptive advertising and marketing practices in the digital economy.

AUSTRAC has a continued focus on casinos and systemic non-compliance with anti-money laundering and counter terrorism financing laws. AUSTRAC recently commenced proceedings against two casinos owned by Crown Resorts. Interestingly, only the entities have been named as respondents, not any directors or officers. We expect increased regulation for fintechs, including BNPL and crypto exchanges and also an increased focus on consumer protections.

NZ: The FMA outlined its priorities in March, with a focus on revisions to the FMA's Conduct Guide to reflect legislative principles enabling the FMA's regulation of banks and insurers. The FMA also indicated priorities in monitoring climate-related disclosures and cyber resilience.

The FMA plans to release draft standards for consultation in relation to N.Z.'s new mandatory climate reporting regime and release an information sheet outlining the FMA's expectations of organisations in formulating their cyber security plans.

The New Zealand Court of Appeal has issued a 2021 decision not to impose a new tort of breach of duty to stop damage to the climate system. This could trigger tougher statutory liabilities on companies and their boards by regulators. The Court found climate change calls for a sophisticated regulatory response at a national level, supported by international co-ordination.

The Minister of Commerce and Consumer Affairs has provided their annual letter of expectations to the N.Z. Commerce Commission requesting action on new legislative instruments with respect to the enforcement of consumer credit, the fuel industry, cartel conduct regimes, and the contestability of dairy markets.

Insolvency

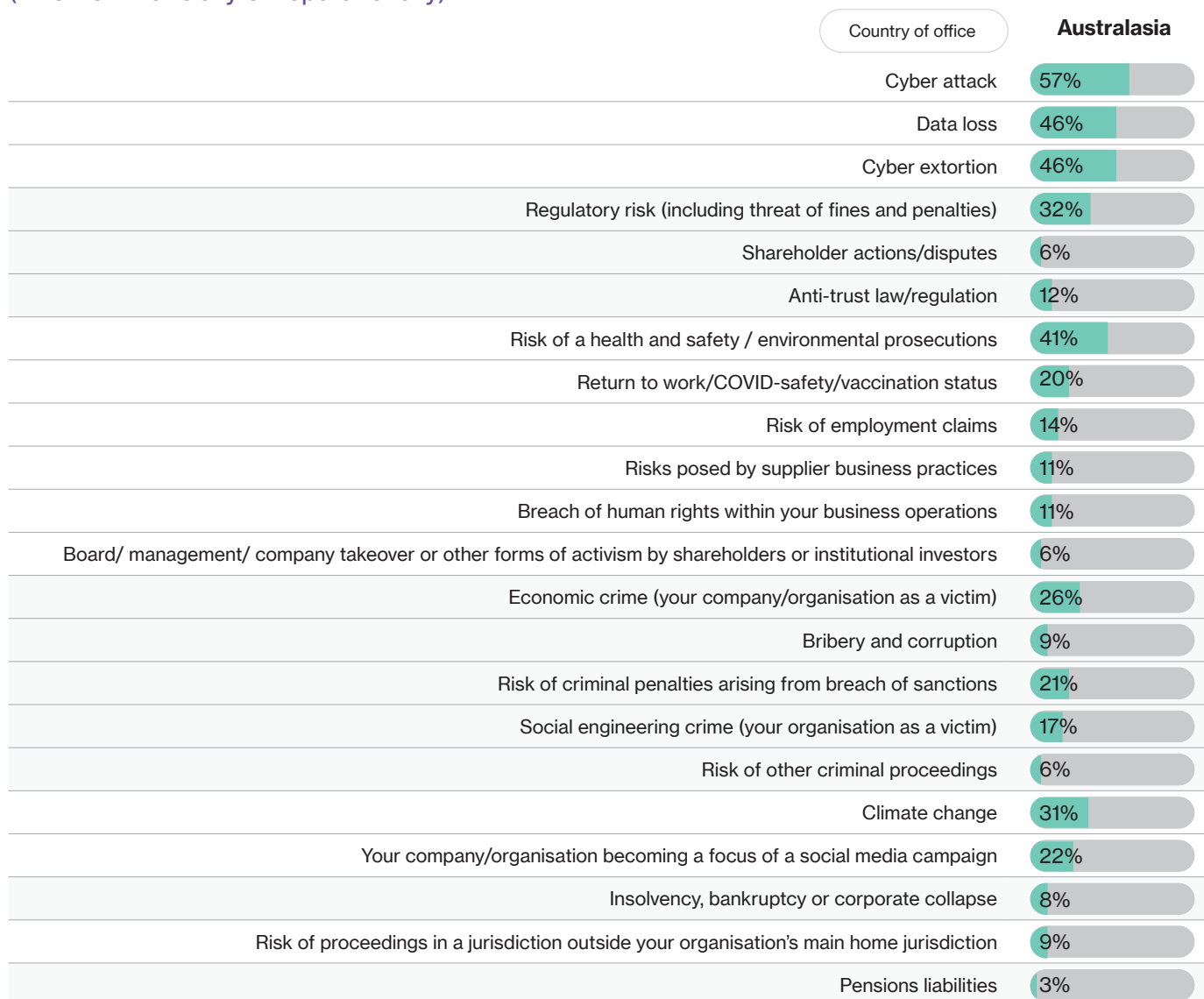
AU and NZ: Increasing risk in 2022 as government support is withdrawn and both the ATO and IRD recommence collections. Key industries at risk – construction, hospitality, and retail. Australia's construction industry has already seen one major company go insolvent this year, with more forecast to follow.

Challenges ahead include a shortage of employees, global supply chain issues and increasing interest rates.



Risk ranking overview – by region

How significant are the following risks for the directors and officers of your organisation (whether financially or reputationally).



(% of 'Very significant' or 'Extremely significant')

Source: Directors' Liability Survey 2022

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