



Property Predictions 2022

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1. COP26 :The clock is still ticking

At the end of COP26, the parties agreed to reconvene in Egypt in 2022 for COP27, where the focus will be on countries publishing their greenhouse gas reduction goals, known as Nationally Determined Contributions (NDCs). On the face of it, these measures sound like progress towards the all-important goal of a 1.5 degree temperature increase limit. But is it going to be enough? While the UN will be publishing regular reports on the countries that are doing well with their NDCs and calling out those that are not, it seems unlikely that this form of public shaming and praise alone will achieve the desired effect. To stand a realistic chance of reaching the climate goals, further measures such as carbon border tax adjustments (CBTAs) will be needed. CBTAs penalise high-carbon imports from countries without stringent climate targets. In the UK, the Treasury and Department for Business, Energy and Industrial Strategy have indicated that these penalties are under consideration but have cautioned they will take several years to implement and ideally would happen in collaboration with other governments. That might be ideal but the clock is still ticking.

2. Worth, another look at indemnity wordings?

Following NSW Court of Appeal's decision in *Worth v HDI* in August 2021, there will be renewed focus on the measure of indemnity where there is an absence of actual reinstatement or failure to reinstate within a reasonable time (i.e. with reasonable despatch). In *Worth*, a fire occurred in suspicious circumstances and at trial (over five years later) it was accepted that the insured had failed to reinstate with reasonable despatch. The NSW Court of Appeal ordered that the physical damage loss was to be calculated on an indemnity (rather than reinstatement) basis. The case shares similarities with *Endurance v Sartex* where, in 2020, the English Court of Appeal took the opposite view on similar policy wording. It found that, where a claim under the reinstatement provision could no longer be pursued (due to the insured's failure to reinstate within reasonable time or at all), under the insuring clause the insured was entitled to indemnity calculated on a reinstatement basis. It held this 'fully and fairly' indemnified the insured (who, at the time of the loss, stated it intended to reinstate), despite the insured not actually reinstating by the trial (over seven years later). It will be interesting to see whether UK courts are influenced by the "Worth" of this decision.

3. Misrepresentation and fair presentation - a deliberate line in the reckless sand?

Insurers will take a stronger line on deliberate or reckless misrepresentations. In the five years since the Insurance Act 2015 came into force there has not been the predicted avalanche of disputes. The recent decision in *Berkshire Assets v AXA* suggests that insurers will be successful in pursuing egregious breaches. This is supported by decisions in analogous matters such as *Young v RSA (Scottish Court of Session)*, *Zurich v Niramax* and those under the Consumer Insurance (Disclosure and Representations) Act 2012 (such as *Jones v Zurich*). *Berkshire Assets* is notable as one of the first reported decisions on "fair presentation" under the 2015 Act. *Jones* is also noteworthy as it comments on the scope of evidence an insurer needs to adduce to be successful. Recent decisions in Australia echo the position in UK, and the recent amendment to the Australian Insurance Contracts Act 1984 aligns the position for consumer insurance contracts with that under the 2012 Act. Care should be taken by policyholders, particularly by consumers given the increase of flex/hybrid working and "shoffices" (garden shed offices) blurring the line between business and domestic use of insured property.



4. The protection gap in flooding – considering all aspects of ESG

Flooding events have a devastating environmental impact, but the social impact cannot be understated. Moreover, not all people are affected in the same way. Research confirms that the largest group of people affected by flooding in poorer areas are tenants as they tend not to have alternative accommodation or the contents insurance that owner-occupiers usually take out together with building insurance. This creates a protection gap. Insurers will undoubtedly continue to play a key role in finding a solution to this gap and protecting vulnerable communities in line with Flood Re's "Build Back Better" campaign, which aims to ensure damaged properties are repaired so they are more resilient against future loss events. Across the world, climate change threatens a vicious circle of more severe flooding events and deepening inequality. Increasing insurance coverage among vulnerable communities can break this cycle, but the question remains where the responsibility should lie. Will it be down to society, the insurance industry, government or a combination of all three?

5. Beware of social unrest

In July 2021 the imprisonment of former South Africa president Jacob Zuma for contempt of court served as a catalyst for widespread rioting in parts of the country. Thousands of businesses were destroyed and lives lost. While the rioting may have been initiated by the former president's supporters for political reasons, the unrests were fuelled by other complex social issues, including high unemployment, the economic effects of the pandemic and frustration borne from political mismanagement. Unfortunately, this trend of social unrest is not limited to South Africa, as the underlying issues are common in a number of countries across the continent. We therefore expect further incidents of social unrest across the continent, fuelled by a growing unemployed and politically aware youth population who are disillusioned with a detached political elite and are able to mobilise using social media.

6. The Northern Ireland Protocol will cause a rise in the costs of property damage claims

As a consequence of Brexit and the implementation of the Northern Ireland Protocol, the costs of property damage claims in Northern Ireland will rise due to increased import tariffs and failure/delay of supply of essential repair materials. Anecdotal evidence from the trades suggests that the cost of materials, including timber and steel, is already increasing by up to 40%. We could also see a rise in alternative accommodation costs following delays in repair completion timeframes. The net effect of these increased costs will lead to larger pay-outs on property damage claims brought by home and business owners which may lead to some insurers opting to pull out of the Northern Irish market, leading, in turn, to a sharp rise in premiums for policyholders.

Contributed by our Belfast office.

7. Smart tech is only part of the solution for cities

Cities will need to marry an improving investment in smart technology with better planning, mapping and an understanding of the built environment in order to avoid future climate disasters. It was encouraging to hear Sadiq Khan, Mayor of London, highlight at COP26 that our cities are leading the way for national governments to follow, proving to be more nimble, progressive and responsive. However, while measuring footfall, rainfall, ground stability or pollution is a great step forward, it is not the whole solution. We are still seeing serious flooding in our cities, so now we need to join up the data with real action on response planning specific to each location. As shown in our thought leadership on the interconnectivity of solutions, a co-ordinated response with structured goals is the key to real results.



8. The lifecycle of subsidence claims is likely to lengthen

We predict an increase in subsidence claims beyond the historic hotspots as temperatures rise over the coming decades. The need to act now to protect the environment must impact how subsidence claims are handled and mitigated going forward. Competing needs of tree owners, local residents and owners of damaged properties will need to be carefully managed. The landscape will change further with the far-reaching Environment Act 2021. For subsidence claims, local authorities in England will have to consult before felling street trees, unless exempt. Historically, tree removal has been seen as an acceptable way to mitigate the loss and prevent subsidence damage. The main alternative is underpinning, which is not only expensive but also has environmental ramifications. Lifecycles for subsidence claims will lengthen as members of the public object to tree removal with the inevitable adverse publicity for this highly emotive topic. Collaboration between all the key stakeholders is again key.

9. Restarting operations after COVID-19

Many businesses, including mines, power and chemical plants and oil refineries, were forced to significantly curtail or pause operations during the pandemic due to access and supply issues and financial pressures. Maintenance activities were also significantly affected due to budget, access and resourcing issues. Highlighting this issue, Swiss Re reported oilfield maintenance budgets were cut by US\$20bn. Companies now ramping up operations after COVID may experience higher rates of major losses because of the heightened risks associated with starting-up operations after shutdowns or extended idle periods. These start-up risks, including heightened pressures on workers and equipment, combined with recent cutbacks in maintenance and inspection activities, have the potential to lead to machinery breakdown, fire, spills and explosions. Similar maintenance and human error risks will also be seen in other reactivated industries, such as aviation.

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10. The positives and negatives of battery technology

Efficient power storage is a key element of a low-carbon economy. Lithium-ion batteries are proving a popular solution as they are rechargeable, have a high energy density, no memory effect and low levels of self-discharge. However, they are also risky if damaged or incorrectly charged as they contain flammable electrolytes. Lithium-ion batteries have been linked to many fires, including a significant fire incident involving a Tesla battery project in Australia. These fires are intense and difficult to bring under control, so determining causation can also be complex. Lithium-ion battery transportation and disposal are other issues that are causing concern for insurers. While the search continues for ways to make battery technology more stable, risks are being managed with better quality products, active maintenance and fire prevention strategies.

Contributed by our Australian Legalign partner, Wotton + Kearney.

11. Environmental liability remains a critical risk in Australia

Analysis of recent case law shows environmental prosecutions are increasing in Australia, 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 also 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) Act 2021, 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.

Contributed by our Australian Legalign partner, Wotton + Kearney.



12. Climate-related liability precedent set in Australia

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*). 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.

Contributed by our Australian Legalalign partner, Wotton + Kearney.

13. Environmental liability exposures on the rise 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 Government's express policy objectives is to increase the scope and severity of enforcement in order to deter offenders. We expect the new legislation will lead to an increase in both the frequency and quantum of environmental liability claims.

Contributed by our New Zealand Legalalign partner, Wotton + Kearney.



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