

CLYDE&CO

Financial aftermath of the COVID-19 BI Test Case and floods

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February 2023

Agenda

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- A person wearing a yellow raincoat is seen from behind, holding a large, light green umbrella. The scene is set in the rain, with water droplets visible on the umbrella's surface. The background is a soft, out-of-focus grey, suggesting a rainy day.
- COVID-19 Business Interruption Test Case
 - Other COVID-19 Business Interruption litigation
 - Key takeaways
 - 2022-23 Floods – Australia and New Zealand
 - The future

A photograph showing two healthcare workers in full personal protective equipment (PPE). They are wearing white hoods that cover their heads and faces, yellow gowns, and blue gloves. They appear to be working with a patient who is also covered in white PPE. The background is a clinical setting with some papers and equipment visible. The text '2020 COVID-19' is overlaid in large white letters across the bottom of the image.

2020 COVID-19

COVID-19 litigation – Second COVID-19 BI Test Case

Second COVID-19 Business Interruption Test Case is now resolved following special leave to appeal refused by the High Court of Australia in October 2022

It is now settled law that:



References to the *Biosecurity Act 2015 (Cth)* in exclusion clauses or carve-outs to cover are **effective** at excluding COVID-19 BI claims



COVID-19 is not capable of constituting **physical property damage**



Cover for COVID-19 BI claims is **limited to disease-specific clauses** (where present) and cannot fall for consideration under Prevention of Access, Catastrophe or Loss of Attraction clauses

COVID-19 litigation – Second COVID-19 BI Test Case

It is now settled law that:



State Government lockdown orders *were not proximately caused by* localised outbreaks of COVID-19, which is required by many Hybrid clauses – pending other COVID-19 litigation



For Disease clauses, the Insured still needs to prove causal connection between outbreak / Order and loss (more difficult if e.g. voluntary closure or other macroeconomic factors at play)



Basis of Settlement provisions displace general indemnity principle such that e.g. JobKeeper payments to insured may not be accounted for – may result in windfall to Insured and ‘sums saved’ clauses cannot be relied upon by insurer to account for JobKeeper receipts – may result in windfall to Insured

COVID-19 litigation – current litigation

Meridian proceeding and Disease Clauses

Additional benefits

For additional benefits 1 to 9 inclusive We will pay You (depending on the part of the section which is applicable to You) for:

...

2. Murder, Suicide or Disease

the occurrence of any of the circumstances set out in this Additional Benefit shall be deemed to be Damage to Property used by You at the Situation.

...

(c) The outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation.

COVID-19 litigation – current litigation

There are several other proceedings concerning COVID-19 BI claims currently on foot

Class actions:





COVID-19 business interruption

Interim position

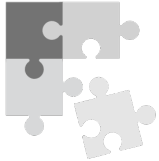
- Potentially more jurisprudence on COVID-19 related business interruption to come, but most COVID-19 BI claims can now be finally assessed and either declined or adjusted
- COVID-19 BI claims that are subject to complaints to AFCA are likely still pending, with AFCA working through a response

COVID-19 business interruption generally

What key takeaways have emerged from the litigation process?



AFCA's test case procedures were utilised for the first time, a benefit not only to the insurance industry but financial firms more broadly



Successful process was derived from collaboration and the critical support of an industry steering committee



There is a Protocol Agreement in place, AFCA agreeing at the outset to apply the legal principles derived from the Test Cases in its handling of complaints

COVID-19 business interruption generally

What key takeaways have emerged from the litigation process?



Underwriting risk management

Proactive crisis response

Increased claims volume

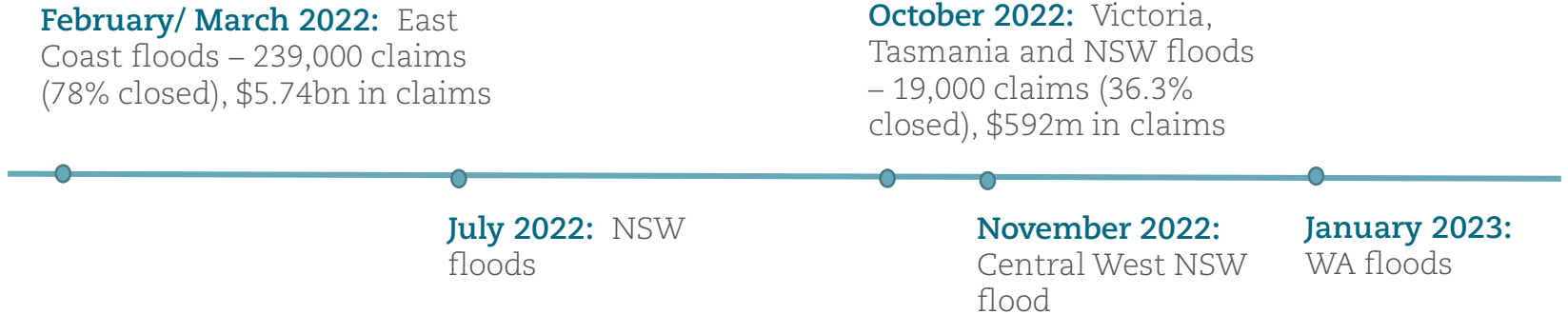
An aerial photograph showing a residential neighborhood completely inundated with floodwater. The houses, with their brown and grey roofs, are surrounded by deep, murky water. Some trees are partially submerged, and a few boats are visible in the water. The overall scene depicts significant flooding in a suburban area.

2022-23 FLOODS

2022 Floods - Australia

2022 was a devastating year in storms and heavy rain causing extensive flooding, predominantly across Eastern Australia

ICA declared catastrophes:



2022 Floods – February/ March 2022

Lismore



David Maurice Smith/ Oculi/ The Guardian, sourced from 'The never-ending fallout of the northern rivers floods: 'People are just worn down'.

2022 Floods – July 2022

Sydney region



Mark Baker/ AP, sourced in Guardian Australia, 'Weather tracker: La Nina and climate crisis behind recent Australia floods'



Mike Bowers/ The Guardian, sourced in Guardian Australia, "‘They shouldn’t have built houses here’: navigating disaster in the flood waters of Sydney’s north-west"

2022 Floods – October 2022

Echuca



Photo: Steve Huntley/ Riverine Herald, sourced from The Age, 'Cordon blue kicks off in Echuca as flood levee leaves a town divided', 18 Oct 2022



Photo: Jason South, sourced from Sydney Morning Herald, 'Line in the sand: How a makeshift levee divided a country town', 2 Nov 2022

2022-23 Floods – New Zealand

2022 was a devastating year in storms and heavy rain causing extensive flooding, predominantly across Eastern Australia

Flood events:

March 2022: North Island floods – 10,000 claims, \$NZ119.64 million (\$112.74 million)

February 2023: Cyclone Gabrielle

January 2023: Floods and “atmospheric river”

Flood – impact of floods on claims



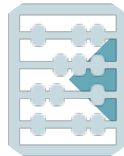
Delay in claim lodgement

- Duration of events, evacuation, loss of policy documents
- Fast-tracking claims decisions – GICOP
- Evidencing loss – e.g. disposal of flood-water damaged items



Considering coverage

- Flood cover present?
- Causation – expert opinion required?
- Obtaining expert evidence – often delays
- One expert opinion requires another – e.g. hydrology relies upon geotechnical report in the event of a landslip/ failure



Adjustment issues

- Multiple events – e.g. heavy rain causing floods, second flood event weeks or months later
- Getting to property – road closures
- Availability of builders and supplies – delays in rebuilding and increasing costs

2023 and beyond – impact of natural disasters

Key lessons from four years of disasters



Questions?

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