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## Business Interruption Insurance – Can I make a COVID-19 claim?

### What's happening?

Given the uncertainties surrounding business interruption insurance policies in the context of COVID-19, clarification has been sought from the courts on the interpretation of business interruption insurance policy wordings. Clear guidance from the courts will help ensure greater certainty and consistency for insurers and policyholders in terms of what circumstances may trigger a claim to be paid under a business interruption insurance policy due to COVID-19.

Two business interruption test cases have been heard in the courts to assist with determining various aspects of Covid-19 related business interruption claims.

### Status of test cases

The First Business Interruption Test Case related to whether insurers could rely on references to the now repealed *Quarantine Act 1908* (Cth) in order to exclude coverage. In June 2021, the High Court upheld the decision of the NSW Court of Appeal which determined that insurers could not rely on references to the *Quarantine Act* to deny liability in business interruption insurance policies.

The Second Business Interruption Test Case is considering the interpretation of policy wordings regarding disease definitions, COVID-19 outbreak proximity, the impact of government orders, and various other issues.

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On 8 October 2021, the Federal Court of Australia handed down its decision on the Second Business Interruption Test Case. In nine out of the ten test cases, insurers were not liable to indemnify policyholders for claims under respective business interruption insurance policies as the relevant clauses were not triggered. In one test case, the Court stated that the infectious disease insuring clause applied but the Court was not yet in a position to find that the policyholder had proved that it was entitled to any indemnity.

Subsequently, policyholders appealed to the Full Court of the Federal Court on five of the test case matters. The appeal to the Full Court of the Federal Court concluded on 12 November 2021 and judgment was delivered on 21 February 2022. The ruling substantially upheld the earlier Federal Court judgment delivered in October 2021. The Full Court also upheld a ruling that insurers could not rely on a section of Victorian property legislation to exclude liability.

The judgment provides further clarity on key issues in respect of the wordings in business interruption policies such as disease definition, COVID-19 outbreak proximity, the impact of government mandates and other policy wording matters.

Applications for special leave to the High Court of Australia have been filed by two policyholders and one insurer to appeal parts of the recent judgment of the Full Court of the Federal Court of Australia in the second business interruption insurance test case.

### **What does this mean for me?**

Proclaim and our clients are committed to applying the reasoning of the final judgment in the test cases in its assessment of claims.

As a result, Proclaim is not in a position to finalise its assessment of any business interruption insurance claims relating to issues in the Second Business Interruption Test case until a decision from the High Court of Australia whether to grant leave to the various applicants has been delivered and if leave is granted, a final decision on any such appeals is delivered.

### **What should I do?**

If you believe that you may have a claim under your business interruption insurance policy, please consider lodging a claim. You can also speak with your insurance broker about your circumstances.

Each claim will be reviewed according to the terms of your business interruption insurance policy and the information you provide in support of your claim and evidence of the value of your loss.

To assist with efficiently assessing your COVID-19 related claim, please provide the following information and materials:

- a) details about any localised COVID-19 cases, outbreaks or cases at your premises;



- b) details about whether your business was ordered to close or alter its operations by a government authority;
- c) details of whether your business was able to operate, including at a reduced capacity, during COVID-19 lockdowns;
- d) financial losses, including any JobKeeper payments and other COVID-19 support grants;

A detailed list of materials is available [here](#).

### Further information

For more information regarding the business interruption test cases, please contact your broker or read the [Insurance Council of Australia's BI Frequently Asked Questions](#).

A link to the ICA's press release following the Full Bench judgment is at:

<https://insurancecouncil.com.au/resource/business-interruption-federal-court-appeal-judgment/>

A link to the judgment is at:

<https://www.judgments.fedcourt.gov.au/judgments/Judgments/fca/full/2022/2022fcafc0017>

A link to the ICA's latest update dealing with the applications for special leave to the High Court of Australia is at: <https://insurancecouncil.com.au/bi-test-cases/>

A link to the ICA's press release addressing the applications for special leave to appeal to the High Court is at: <https://insurancecouncil.com.au/resource/appeals-to-high-court-regarding-business-interruption-policies/>

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