

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, the Insurance Council of Australia has sought clarity 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 business interruption insurance cover.

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The First Business Interruption Test Case related to whether insurers could rely on references to the now repealed *Quarantine Act 1908* (Cth) in order to exclude coverage.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 considered the interpretation of policy wordings regarding disease definitions, COVID-19 outbreak proximity, the impact of government orders, and various other construction issues.

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 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. On 21 February 2022, the Full Court delivered its decision, which substantially upheld the trial judge's findings. The Full Court overturned the trial judge's conclusion regarding Government support payments (e.g. JobKeeper), having regard to the wording of the policies and the support payments considered in the test case, and the construction of section 57 of the Insurance Contracts Act which relates to the calculation of interest.

Two of the policyholders and one of the insurers in the Second Business Interruption Test filed applications for special leave to appeal to the High Court of Australia on parts of the judgment of the Full Court. On 14 October 2022 the High Court declined the applications for special leave to appeal. That means that the decision of the Full Court stands and the test case process has concluded.

What does this mean for me?

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

As a result, Proclaim will now work with its clients to communicate its position on all relevant claims currently before it.

What should I do?

If you believe that you may have a claim under your business interruption insurance policy, you may still lodge 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, the decisions of the Full Court and the Federal Court 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 when submitting your claim:

- a) details about any localised COVID-19 cases at your premises or within the immediate vicinity;
- b) details about whether your business was ordered to close or alter its operations by a government authority and what that order was, or whether your business was voluntarily closed;
- c) details of whether your business was able to operate, including at a reduced capacity, during COVID-19 lockdowns; and
- d) financial losses, including whether any Government support payments were received (e.g. COVID-19 support grants but not including JobKeeper payments) or whether rental or franchise fee relief was provided, including the terms on which that relief was granted.

Depending on the circumstances of your COVID-19 related claim, Proclaim may request further information and documents from you prior to finalising the assessment of your claim.

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 at <https://insurancecouncil.com.au/issues-in-focus/bi-test-cases/>.

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