

ARTICLE

COVID-19 business interruption claims: what businesses need to know

The unanimous decision by the New South Wales (“NSW”) Court of Appeal rejecting the Insurance industry’s argument that policies should not cover COVID-19 pandemic-related losses has been a positive step and precedent for Australian businesses holding business interruption insurances.

As a result of the business test case, insurers that have denied a claim based on such exclusion will now have to reconsider their position

BUSINESS INTERRUPTION TEST CASE OFFERS HOPE FOR AUSTRALIAN BUSINESSES

In early 2020 the government introduced public health measures to limit the community transmission of the COVID-19 virus. This impacted a large number of Australian business, many of whom were forced to temporarily (and in some cases permanently) cease operations. Whether these measures were warranted continues to be debated, what isn’t debated, is the financial stress as a result of the COVID-19 pandemic.

The financial strain experienced by these Australian businesses, particularly those in the retail and hospitality sectors, has been further exacerbated by many insurers rejecting business interruption insurance claims due to clauses in their policies that exclude cover for losses suffered as a result of COVID-19 (on the basis COVID-19 is a “quarantinable disease” defined under the Quarantine Act 1908).

In August 2020¹, the Insurance Council of Australia (“ICA”) supported the commencement of a test case in the NSW Supreme Court to determine whether references to the Quarantine Act 1908 (now repealed) in some business interruption policies excluded claims made as a result of the COVID-19 pandemic.

¹ <https://insurancecouncil.com.au/news-hub/news-resources/>

The ruling, handed down by the NSW Court of Appeal on 18 November 2020², favoured the policyholder and confirmed that business interruption policies should cover COVID-19 pandemic-related losses (as COVID-19 has not been declared as a quarantinable disease under the Quarantine Act 1908).

This decision is relevant to all Australian claims, regardless of the state where a business is located. As a result of the business test case, insurers that have denied a claim based on such exclusion may now have to reconsider their position. It is important to note that insurers may still deny a claim as the test case did not address all provisions of an insurance policy.

A second business interruption test case consisting of nine separate small business claims lodged with the Australian Financial Complaints Authority (“AFCA”), as part of its dispute resolution process, is set to commence proceedings in the Federal Court of Australia³.

This second test case will determine the meaning of policy wordings in relation to the definition of a disease, proximity of an outbreak to a business, and prevention of access to premises due to a government mandate, as well as policies with a hybrid of these types of wordings.

Once final rulings have been handed down, business owners can expect better clarity regarding their positions in relation to business interruption claims and insurers’ likely responses.

IMPLICATIONS FOR AUSTRALIAN BUSINESSES AND NEXT STEPS

If your business experienced business interruption losses related to the COVID-19 pandemic, you may want to consider the following steps:

1. Check if you have business interruption insurance
2. Review the policy and identify potentially relevant policy provisions. Legal advice should be sought in relation to coverage, potential insurer responses to the fact, and circumstances of a loss
3. Claims may include (depending on the policy):
 - increased cost of working, such as ‘work-arounds’ in logistics, setting up online platforms, legal advice, and borrowing costs

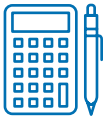
- loss of revenue, particularly a loss in margin
4. Identify and retain any information that may be required to support a claim, such as:
 - information to assist with proving lost revenue, including cancelled orders, contracts, refunds given, and any associated penalties or rebates paid
 - data supporting changes in volume or activity levels, such as measures of foot traffic
 - information detailing historical revenue levels substantiating what revenue would have been but for COVID-19
 - revenue forecast/budgets/business plans for 2020 prepared pre-COVID-19 (including associated schedules) and prior year’s comparisons of actual to forecast revenue
 - payroll records pre- and post-COVID-19 to substantiate any increase in staff costs or savings
 - invoices for any additional costs incurred and proof of payment
 - documentation and correspondence detailing increases to overheads (such as property costs and financing), as well as the reason these costs were incurred and that they would not have incurred in any event
 - management reports and board packs substantiating the impact and response
 - evidence of writing-off/having to destroy perishable stock, scrapping due to ‘out of season,’ excessive discounts given to clear stock or other evidence that stock will not be sold in any event
 - notices or correspondence requiring the business to cease operations
 5. Report potential claims promptly as policies may contain time limitations for claims reporting
 6. Consider consulting a forensic accountant (like FTI Consulting) on how to initiate and prepare for the claims process

² <https://www.caselaw.nsw.gov.au/decision/175d83c4c19face7f3e6bc2c>

³ <https://insurancecouncil.com.au/news-hub/news-resources/>

HOW WE CAN ASSIST

FTI Consulting has a successful track record in providing businesses and their advisors with support for insurance claims, including business interruption claims. We regularly assist with forensic accounting and commercial analysis to support insurance claims as follows:



Calculating the extent of the financial impact of COVID-19, maximising losses to be considered and included



Financial loss modelling, having regard to policy requirements, causation metrics, identification of loss drivers and aligning/allocating loss



Recommendations regarding the reasonableness of the claim to an insurer, plus analysis of a range of outcomes and timing, in order to set internal expectations around process and recovery



Forensic technology solutions to enhance data to support claims



Guidance around information and documentation required to substantiate a claim



Claims preparation, including, where needed, a preliminary loss estimate to accompany notifications and seek indemnity

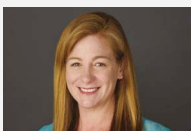


Strategic and other support dealing with the claims process, including any adjustments, rebuttals, and alternatives proposed by the insurer



Litigation support and expert testimony if the claim proceeds to litigation

Once the final ruling of the second test case has been handed down, we will provide a further update. In the meantime, please contact our team if you require further clarification or assistance with managing potential claims.



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