

Business Interruption Insurance & COVID-19 Claims

What has happened?

In 2020, the Australian government enforced lockdowns to help prevent the spread of COVID-19, causing thousands of Australian businesses to cease operating, which resulted in significant financial loss and emotional turmoil.

Many businesses held Business Interruption Insurance, however, most claims were denied on the basis that the policy had exclusions that referenced:

1. A disease under the *Biosecurity Act 2015* (Cth); or
2. A "quarantinable disease" under the *Quarantine Act 1908* (Cth) (Act now repealed).

Accordingly business losses caused by the lockdowns were not recoverable under most Business Interruption Insurance policies.

In November 2020, the New South Wales Court of Appeal delivered a unanimous decision in the case of *HDI Global Specialty SE & Anor v Wonkana No 3 Pty Ltd (2020)* which was a test case brought before the Court to decide if insurers could rely on dated exclusions which referenced the now repealed *Quarantine Act 1908* (Cth) (and subsequent amendments).

It was decided that insurers could not rely on an exclusion which referenced "the *Quarantine Act 1908* (Cth) (and subsequent amendments)", because it was considered unreasonable that an insured entity might assume that the *Quarantine Act 1908* (Cth) (and subsequent amendments) would extend to the new legislation, the *Biosecurity Act 2015* (Cth). Relevantly, COVID-19 is a human biosecurity emergency under the *Biosecurity Act 2015* (Cth) but it is not classified as any disease under the *Quarantine Act 1908* (Cth) because the *Quarantine Act 1908* (Cth) has been repealed.

Although the first test case was decided by the NSW Court of Appeal, this decision is relevant to all Australian claims, regardless of which state a business is located.

COVID-19 was declared as a quarantinable disease under the *Biosecurity Act 2015* (Cth), however for policies which still refer to legislation which no longer exists (the *Quarantine Act 1908* (Cth)), the question to be answered is whether these insurance providers should be held accountable to pay claims made against those insurance policies.

A significant result for insured businesses

It is estimated that approximately 250,000 small business owners hold Business Interruption Insurance policies and may have claims, with a total sum of potential payouts estimated at around \$10 billion.

Various applicable insurers lead by HDI Global Specialty SE, applied to the High Court of Australia for special leave to appeal the decision of the New South Wales Court of Appeal.

On Friday 25 June 2021, the High Court denied the insurer's application for special leave to appeal the decision. This is a significant result for covered businesses which suffered losses.

What's next?

If you believe that the NSW Court of Appeal decision may apply to you and your policy, please contact us for a complimentary policy check.

Unfortunately there are further test cases on foot in the Courts instigated by insurance companies which means insured businesses may still have to wait. These further test cases seek rulings on issues around exclusions and to the pandemic.

Read the press release from the Insurance Council at <https://insurancecouncil.com.au/issues-in-focus/bi-test-cases/> which discusses the first test case which found exclusions citing the *Quarantine Act 1908* (Cth) and subsequent amendments are not valid in denying insured business owners cover for COVID-19.

Key dates in 2021:

September Second test case to be heard in Federal Court.

November Any appeal of the decision made in the second test case to be dealt with by the Full Court of the Federal Court.

Can I make a claim in the meantime?

Yes. If you hold Business Interruption Insurance and believe you are eligible to make a claim, you can still lodge a claim with your insurer while the further test cases are running. In fact, there are usually provisions within policies setting out time limits for making claims, so we recommend that you check your policy terms to ensure that your claim is made within the required time. If your claim relates to the issues being considered by the Courts in the test cases, your insurer should explain to you that it will not finalise your claim until the final test case determinations have been made.