Attwood Marshall LAWYERS

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.

For many businesses who held Business Interruption Insurance, when trying to make a claim on their insurance policies, 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 A "quarantinable disease" under the Quarantine Act 1908 (cth) (act now repealed).

Any insurers who had exclusions that were relevant to an epidemic or pandemic were also excluded. This meant that the losses of COVID-19 were not covered by most Business Interruption Insurance policies.

In November 2020, the New South Wales Court of Appeal delivered a unanimous decision in an Insurance Council of Australian and Australian Financial Complaints Authority test case which was put before the Court to decide if insurers could rely on dated exclusions which referenced the now repealed Quarantine Act 1908 (and subsequent amendments). The decision was that insurers could not rely on an exclusion which referenced "the Quarantine Act 1908 (and subsequent amendments)', because it would not be reasonable for a person to think that the Quarantine Act 1908(and subsequent amendments) could extend to the new legislation, the Biosecurity Act 2015 (cth). For reference, COVID-19 is a human biosecurity emergency under the Biosecurity Act 2015 (cth) but cannot be classified as any disease under the Quarantine Act 1908 because the Quarantine Act 1908 has been repealed.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 the business is located.

COVID-19 was declared as a quarantinable disease under the Biosecurity Act, however for policies that still refer to the Quarantine Act 1908, which is no longer in existence, it is left to question if these insurances providers should be held accountable to pay claims made against these insurance policies.

What's next?

It is estimated that approximately 250,000 small business owners hold Business Interruption Insurance policies and may be impacted by legal actions, with a total sum of potential payouts estimated at around $10 billion.

The Insurers have now applied to the High Court of Australia for special leave to appeal the decision of the New South Wales Court of Appeal. We now await the High Court's decision as to if the Court of Appeal's decision will stand or will be determined by the High Court once again.

Key dates

25 June 2021 The Insurance Council of Australia awaits the outcome of a High Court application to appeal a NSW court decision in a first test case that found exclusions citing the Quarantine Act and subsequent amendments are not valid in denying cover for COVID-19.

September 2021 Second test case to be heard in Federal Court

November 2021 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 test cases are taking place. In fact, there are usually time limits in place through your policy to make a claim, so we recommend that you check your PDS and ensure that your claim is made.

If your claim relates to the issues being considered by the courts in the test cases, the insurer will notify you that they will not finalise your claim until the final test case determinations have been made.

Once final rulings have been made by the Courts, insurance providers will be committed to apply the relevant principles in a consistent, transparent way when assessing their customer's claims.