

This information sheet presents and summarises complex information from a variety of sources, noted below. While some policies will clearly not provide cover for business interruption losses arising from COVID-19, others may, depending on policy wording. If clients lodge what they consider may be a valid claim and it is rejected by their insurer or broker, they should be encouraged to pursue the matter with the Australian Financial Complaints Authority (AFCA) and/or seek legal advice.

What is business interruption insurance?

Business interruption (BI) insurance provides compensation to businesses for losses incurred for a period of time arising from certain specified events.

It is usually an add-on to other business insurance such as physical loss or damage cover, public liability and professional indemnity insurance.

The policy terms will specify what events are covered (and what are not), over what period of time from the event the cover applies, and whether any excess or maximum (capped) payments apply, amongst other things.

What is an insured event for BI insurance?

Common specified events include: natural disasters; government lockdowns or closures; infectious diseases within X kilometres of the insured premises; etc.

Events may be expressly excluded. For example, many policies exclude 'diseases declared to be quarantinable diseases under the Quarantine Act 1908 (Cwth) and subsequent amendments.'

Was COVID-19 a specified insured event triggering BI insurance?

There is no doubt that many businesses incurred substantial losses due to lockdowns and other impacts of COVID-19. The question is whether COVID-19 was covered or excluded under common types of BI insurance policies.

Many BI policies included the Quarantine Act exclusion noted above. Insurers argued that COVID-19 was therefore excluded from policy cover. However, the Quarantine Act was replaced by the Biosecurity Act 2015 (Cwth) in 2016. While COVID-19 is a 'listed human disease' under the Biosecurity Act, it is not a 'quarantinable disease' under the Quarantine Act. It appears that many policies had simply not had their terms updated with the relevant legislation.

A test case on this matter was determined in November 2020. The NSW Court of Appeal ruled that the Quarantine Act exclusion did not apply to COVID-19. Insurers' application to appeal to the High Court was rejected. Accordingly, insurers cannot rely on the Quarantine Act exclusion (where it exists in policies) to refuse to pay COVID-19 related claims for BI.

There are therefore different versions of exclusion wordings that you should look for. In order of 'best to worst', these are:

1. Exclusions for 'listed human diseases' declared under the Quarantine Act. These exclusions do not apply to COVID-19.
2. Exclusions for 'biosecurity emergencies' declared under the Biosecurity Act. These exclusions may not apply to COVID-19.
3. Exclusions for 'quarantinable diseases' declared under the Biosecurity (Consequential Amendments and Transitional Provisions) Act. These exclusions may not apply to COVID-19.
4. Exclusions for 'listed human diseases' declared under the Biosecurity Act. These exclusions will apply to COVID-19.

It is therefore important to check the wording of the exclusion clause carefully and seek legal advice.

So does that mean that all BI insurance policies with reference to the Quarantine Act cover losses associated with COVID-19?

This will depend on the facts of the individual claim. There are a range of other factors in policy wording that need to be considered before determining if COVID-19 related losses are covered by a BI insurance policy, including the Quarantine Act exclusion.

In early 2021, a second test case (addressing common terms in ten policies) was commenced in the Federal Court. There was an appeal to the Full Federal Court on some issues. Subsequent applications to the High Court to allow further appeals were rejected by the High Court in October 2022.

What are the implications for BI test cases for COVID-19 related losses?

Five key outcomes from the second test case are:

1. If a BI policy includes coverage for the outbreak of a disease within a radius of X (typically 20) kilometres of the insured premises ('disease clause'), it may cover losses arising from COVID-19. However, the policyholder needs to show that the 'outbreak' (being at least one case within the specified radius) led to business losses, rather than the losses arising from other reasons, including broader government actions (such as the closure of international borders).
2. If a BI policy includes cover for government orders closing the business (in whole or in part) because of the outbreak of a disease within a radius of X (typically 20) kilometres of the insured premises ('hybrid clause'), the policyholder will need to show, in addition to the requirements of 'disease clauses', that the government orders were made because of those outbreaks within the insured radius (rather than in response to a general concern about the threat of COVID-19 in the state). This will turn on the facts of each particular claim and the type and location of the policyholder's business.
 - In Victoria the key dates are March 2020 (the first lockdown) and July 2020 (the second lockdown).
3. 'Prevention of access' clauses in BI policies are unlikely to cover losses arising from COVID-19 where the policy also includes a 'disease clause' or 'hybrid clause' (which is usually the case).
4. The Federal Court did not consider COVID-19 was a 'catastrophe' (within the meaning of the policy it considered). Given this, clauses covering interruption caused by a 'catastrophe' are unlikely to cover COVID-19 related losses.
5. If a policyholder has a claim for COVID-19 related losses, the claimable loss is generally not offset by any JobKeeper payments, rent deferrals or government grants the policyholder received. The loss may also not be offset by rent waivers in some circumstances.

That doesn't sound too promising for my client?

If the policy includes the Quarantine Act exclusion, the next step is to consider the other terms of the policy. The most likely potential coverage is if the policy has a 'diseases clause' – although the client then needs to demonstrate that the 'outbreak within the radius' led to the losses. This can usually be demonstrated by showing the business experienced a decline in revenue or profit prior to government closure orders and restrictions.

The Court outcomes are based on the ten policies given consideration in the second test case, and may not cover all possible policy terms. However, insurers and AFCA have agreed to follow the reasoning behind the Court decisions for claims or complaints lodged with them.

Nonetheless, while the Court decisions provide authoritative guidance, insurance claims will ultimately be determined on the particular facts and wording of the specific policy.

If my client makes a claim for BI, what is required?

In addition to identifying the basis of coverage in the policy, the client will need to provide their insurer documentation supporting calculation of financial losses incurred in the relevant period/s. Generally, this will include:

1. Monthly profit and loss statements covering the 12 months prior to the start of the loss and the 6, 12 or 24 months after the loss commences (depending on the indemnity period which the policyholder has cover for).
2. Weekly revenue figures over the same period.
3. Details of the business' increased costs of working (if they have this cover included in the policy) incurred because of the COVID-19 outbreaks or lockdowns. For example, additional cleaning fees, face mask and sanitiser purchases, and work from home expenses.

A policyholder may have cover for 'claims preparation expenses' or 'accountant fees' that may cover the cost of obtaining documents and financial records to prove the loss. This can also sometimes cover any legal fees to pursue the claim. You will need to check the policy schedule and policy wording to see if this is included.

Information sources for this summary include:

COVID-19 business interruption insurance claims: the outcome of the Test Case process, **Clayton Uz**, 1 November 2022, <https://www.claytonutz.com/knowledge/2022/november/covid-19-business-interruption-insurance-claims-the-outcome-of-the-test-case-process>

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Business Interruption Insurance Test Cases, **AFCA**, 27 October 2022, <https://www.afca.org.au/news/current-matters/business-interruption-insurance-test-cases>

Final decision on COVID-19 business interruption insurance test cases, **Minter Ellison**, 17 October 2022, <https://www.minterellison.com/articles/final-decision-on-covid-19-business-interruption-insurance-test-cases>

Business Interruption Insurance and COVID-19, dot points provided by **Berrill & Watson Lawyers**, 23 February 2023 (not published)