Article

Risk Management & Insurance

Business Interruption Cover for Losses from COVID-19?

By Debra Lane

If you run a business, hold business interruption insurance and have suffered losses as a result of the COVID-19 pandemic, you will be very interested in whether your policy covers those COVID-19 related losses.

The insurance industry has long maintained that pandemics are not intended to be covered under most business interruption policies, and premiums were not collected by insurers to reflect the cost of cover for pandemics. Re-insurance was generally not available for pandemic cover, nor were reserves established for pandemic related claims.

It was decided that two test cases would be run before Australian Courts in order to provide greater clarity about whether insurance policies will cover business interruption losses arising from the COVID-19 pandemic.

Many business interruption policies in Australia sought to exclude cover for pandemics through a reference to the *Quarantine Act 1908 (Cth)*. The New South Wales Court of Appeal ruled in favour of the policyholders in November of 2020.

On 25 June 2021, the High Court of Australia refused special leave to appeal in the first test case dealing with exclusion clauses in business interruption insurance policies, particularly in relation to COVID-19.

The New South Wales Court of Appeal Decision handed down on 18 November 2020 is now the standing authority.[1]

Although the first test case was decided by the New South Wales Court of Appeal, the decision is relevant to all Australian claims regardless of location.

That decision found that where, in effect, the words "*declared to be quarantinable diseases under the Quarantine Act 1908 (Cth) and subsequent amendments*" appear in an exclusion wording in a business interruption policy, those words will not be construed to incorporate reference to listed diseases under the *Biosecurity Act 2015 (Cth)* - unless otherwise stated in the policy.

Without wanting to over-simplify the position, the *Quarantine Act 1908* was repealed in 2015 and replaced by the *Biosecurity Act 2015 (Cth)*, and the New South Wales Court of Appeal decided that the new *Biosecurity Act* did not amount to a "subsequent amendment" to the *Quarantine Act*. Accordingly, insurers cannot exclude COVID-19 claims on the basis of an exclusion wording referring to the now defunct *Quarantine Act* of 1908.

1 *HDI Global Speciality v Wonkana number 3 Pty Ltd t/as Austin Tourist Park* [2020] NSWCA 296 (the first test case)

continued overleaf...

There are now no further avenues of appeal available in relation to the first test case, but the New South Wales Court of Appeal decision must be treated carefully. The decision does not mean that all business interruption policies will cover COVID-19 related losses. It assists only those policyholders whose policies include the exclusion, which refers to the repealed *Quarantine Act* of 1908 and its subsequent amendments.

Because of the recent High Court decision referred to above, insurers cannot rely on references to the *Quarantine Act* to deny liability under policies written in the same terms as the policies considered in that first test case.

However, there are further interpretations of other aspects of business interruption policies that need to be resolved to establish whether policyholders will ultimately be covered.

That is why insurers and the Australian Financial Complaints Authority ("**AFCA**") agreed to a second test case being run in the Federal Court of Australia, which has commenced and will be heard from late August of 2021.

This second test case will determine the meaning of policy wordings around disease definition, COVID outbreak proximity, the impact of government mandates and other policy wording issues.

To allow for a comprehensive review of many of the outstanding policy issues, the second test case is made up of nine small business claims from a range of business sectors and locations lodged with AFCA as part of its dispute resolution process.

Unfortunately, the vast majority of business interruption claims will not be able to be finalised until further clarity is provided by the second test case.

Watch this space for further updates on the second test case.

MORE INFO
Debra Lane Director
p: +61 8 **8124 1806**
debra.lane@dwfoxtucker.com.au

DW Fox Tucker Lawyers
L14, 100 King William Street, Adelaide, SA 5000
p: +61 8 **8124 1811** e: info@dwfoxtucker.com.au **dwfoxtucker.com.au**