



COVID-19 BI Test Case Update

XL Insurance Company SE, Australia branch and Catlin Australia Pty Ltd (together **AXA XL**) note the decision delivered by the NSW Court of Appeal on 18 November 2020 (**First Judgment**) in the First Test Case concerning policies with exclusions which refer to diseases declared under the Quarantine Act 1908 (Cth) "and subsequent amendments".

In the First Judgment, the Court determined that exclusions worded in that way would not be effective to exclude disease listed pursuant to section 42(1) of the Biosecurity Act 2015 (Cth), such as COVID-19. An application for Special Leave to Appeal to the High Court of Australia was ultimately refused.

The First Judgment does not necessarily mean that policyholders with policies referencing the Quarantine Act are entitled to cover for business interruption loss they may have suffered as a result of the COVID-19 pandemic and government action. The availability of cover in each case will depend on the terms of the policy and the particular circumstances of each policyholder's claim.

Simultaneously and in a Second Test Case, a number of insurers commenced proceedings in the Federal Court of Australia to consider and seek the Court's determination on a broad range of issues including the meaning of "outbreak", proximity of an outbreak to a business, and prevention of access to premises due to government orders.

The Second Test Case was heard from 6 September 2021 to 15 September 2021, and a decision was handed down by the Federal Court on 8 October 2021 (**Second Judgment**).

AXA XL notes the decision delivered by the Federal Court in the Second Judgment. The Second Judgment found nine of the ten policies under consideration in the Second Test Case did not respond to business interruption losses as a result of the COVID-19 pandemic and government action. The availability of cover in the tenth case will depend on further evidence. The Federal Court also found that various payments received by policyholders such as JobKeeper, Cash Flow Boost and rental relief are to be taken into account when loss is assessed under any policies which do provide cover.

The Federal Court granted the parties leave to appeal the Second Judgment. The appeal hearing commenced on 8 November 2021 in the Full Federal Court of Australia and comprised of six different claims for business interruption losses stemming from the COVID-19 pandemic. Of these six claims, five were appeals from the Second Judgment. The sixth claim is an appeal of *The Star v Chubb* judgment which was delivered by Chief Justice Allsop on 5 August 2021. The appeal judgment is expected to be delivered between December 2021 and February 2022.

The majority of claims lodged with AXA XL and other insurers to date cannot be finally assessed until the final non-appealable outcome in the Second Test Case is known. AXA XL is working hard with claimants to review business interruption claims lodged and arising from COVID-19, however AXA XL and insurers will await the final determination of issues in the Second Test Case before finalising consideration of those.

Please contact your broker if you wish to discuss making a claim.

Further information about the Second Test Case can also be found at: <https://insurancouncil.com.au/issues-in-focus/bi-test-cases/>

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