

HOLDFAST COVID-19 BUSINESS INTERRUPTION CLAIMS FEDERAL COURT OF AUSTRALIA CLASS ACTION FREQUENTLY ASKED QUESTIONS

Are all insurers following the same process?

We are unable to comment on other insurers. ASIC and the Federal Court of Australia (The Court) clearly confirms its expectation that all insurers need to inform all policyholders who may or are likely to have a viable COVID-19 related claim. ASIC and The Court have also confirmed that this communication can be sent to the representatives of affected policyholders, including a broker where the customer is represented by one.

How will The Court correspondence be sent?

A third-party distribution agent (mailing house) has been ordered to separately send The Court notice to all policyholders with relevant policies direct, by both email (or post if no email available) and SMS (if a mobile number for the policyholder is available). The details for distribution have been provided by insurers to The Court.

What happens next after registering for the class action?

Policyholders who wish to register interest in the class action must do so by 29 March 2024. The class action is back in Court on 1 May 2024, for The Court to consider how many relevant policyholders have registered interest, when deciding whether or not the class action should continue. The appointed solicitors as noted in the correspondence will then contact all registered parties past that point.

What about claims already lodged with an insurer or if a policy holder still wants to lodge a claim with that insurer?

Should The Court decide the class action will not continue, this will not affect the claims already lodged with the insurer and an insured can still lodge new claims, at no cost to the policyholder. Insurers will still continue to assess all claims, including reassessment of claims previously declined, by applying the previous Federal Court decision in the BI test cases and any outcome of the class action should it continue.

Most insurers should have a dedicated established BI claims team handling claims, they will be well versed in understanding the outcomes and rulings from the test cases and how this applies to claims.

What information is required to submit a claim?

Answers to the following questions will assist with lodgement of a claim, along with the relevant completed claim form:

- What is the insured business and estimated loss?
- When and how did the insured business start to be interrupted (what downturn in trade)?
- If fully or partially closed, what dates and times were you closed and why?
- What portion of the business is foot traffic and what portion of the trade is conducted by appointment, online or by telephone?
- Were you aware of any specific outbreak of COVID-19 at or near your premises? Were there any confirmed positive cases within the insured premises? If so, any formal/documented confirmation of this outbreak or formal/documented instructions to close business and who from (excluding government advice)?

Can you provide more information on the test cases and impacted clauses?

The purpose of the test cases was to assist with determining key aspects of BI cover. Insurers have committed to applying the reasoning of the final judgments of the test cases in an efficient, transparent, and consistent way when assessing claims.

The first test case determined that certain policy exclusions that referred to a disease declared to be a quarantinable disease under the Quarantine Act 1908 (Cth) could not be applied to claims relating to COVID-19. The second test case was undertaken to determine various issues relevant to BI cover.

In summary, the final outcome of the test cases is:

- In nine of the ten cases that were the subject of the test case, The Court concluded that the insuring clauses did not apply, and that the insurers were not liable to indemnify the policyholders. Those nine cases involved a variety of different insuring clauses, including 'hybrid' (see Note 1), 'prevention of access' (see Note 2) and 'catastrophe' (see Note 3) types of insuring clauses.
- In one of the ten cases, The Court concluded that one of the insuring clauses (being a 'disease only' type of insuring clause – see Note 4) applied. However, The Court held that the policyholder must prove that it is entitled to any indemnity under that clause, including by showing that the losses it suffered were the result of the outbreak of COVID-19 within a 20-kilometre radius of its premises.
- Where a policy contains an exclusion clause that refers to a disease declared to be a 'listed human disease' under the Biosecurity Act 2015 (Cth), The Court concluded that this clause applies to exclude liability relating to COVID-19.

Note 1 - A 'hybrid' type of insuring clause is one that, in general, provides cover for loss from orders/actions of a competent authority in closing or restricting access to premises, but typically only where those orders/actions are made or taken as a result of infectious disease or the outbreak of infectious disease within a specified radius of the insured premises.

Note 2 - A 'prevention of access' type of insuring clause is one that, in general, provides cover for loss from orders/actions of a competent authority preventing or restricting access to insured premises because of damage or a threat of damage to property or persons (often within a specified radius of the insured premises).

Note 3 - A 'catastrophe' type of insuring clause is one that, in general, provides cover for loss resulting from the action of a civil authority during a catastrophe for the purpose of retarding the catastrophe.

Note 4 - A 'disease only' type of insuring clause is one that, in general, provides cover for loss that arises from either infectious disease or the outbreak of an infectious disease at the insured premises or within a specified radius of the insured premises.

A customer may be entitled to cover under a 'disease only' type insuring clause if it can be shown that the insured business suffered interruption as a result of an identified outbreak of COVID-19 within the specified radius of the insured premises.

A customer would only be entitled to cover under a 'hybrid' insuring clause if a competent authority closed or restricted access to the insured premises as a result of COVID-19 or an outbreak of COVID-19 at or within a specified radius of the insured premises, as relevant, that is sufficient to meet the requirements of the particular form of hybrid clause in the customer's policy.

Further information in relation to the test cases is available on the Insurance Council of Australia's website at <https://www.insurancecouncil.com.au/bi-test-cases/>

What if Holdfast Insurance Brokers are no longer the appointed broker?

Please advise us if you require support, however your new appointed broker should also be receiving the same communications and instructions as us. If you have elected to insure with the insurer directly, you will need to discuss with your insurer their processes or expectations relating to the class action or lodgement of a claim.