Second BI Test Case- Appeal Judgment Summary

On 21 February 2022, the Full Court of the Federal Court of Australia delivered judgment in the second business interruption test case appeal.

This test case is an important step in providing clarity to insureds and insurers as to how business interruption policies are to be interpreted in relation to claims arising in connection with the COVID-19 pandemic.

The test case is comprised of ten small business claims from a range of business sectors and locations under policies issued by six insurers. Nine of these claims had been lodged with AFCA as part of its dispute resolution process and became part of the test case with AFCA's consent. The aim has been to examine the application of the relevant policy wordings in a range of illustrative factual scenarios.

The ten claims proceeded to a first instance trial in the Federal Court in September 2021 and a judgment in respect of each claim was delivered in October 2021. Policyholders filed appeals to the Full Court of the Federal Court in five of the test case matters and insurers filed cross-appeals and notices of contention in relation to those five matters. The other five matters in the test case were not appealed.

The appeals to the Full Court of the Federal Court were heard in November 2021. The judgment of the Full Court, delivered on 21 February 2022, substantially upheld the first instance judgment of the Federal Court.

In short, the outcome following the appeal to the Full Court was:

1 in nine of the ten cases (four of the cases that were appealed and the five that were not), the Court concluded that the insuring clauses do not apply, and that the insurers are not liable to indemnify the policyholders;

2 in one of the cases that was appealed, the Court concluded that one of the insuring clauses applied, but observed there are substantial issues as to whether the policyholder can prove that it is entitled to any indemnity. The parties to this case will be given an opportunity to consider their respective positions, and the insured may seek to further pursue its claim before the trial judge; and

3. insurers could not rely on a section of Victorian property legislation to exclude liability.

The parties to the Full Court proceedings have a period of 28 days after the judgment in which they may apply for special leave to appeal to the High Court.

Schedule 1: Outcome of Claims

Part A: Outcome of claims that were appealed

Parties	Business Type	Business Location	Outcome following appeal
Swiss Re International SE, Australia Branch v LCA Marrickville Pty Ltd - NSD132/2021	Beauty clinic	Sydney, NSW	**The insuring clauses do not apply. The insurer is not liable to indemnify the policyholder.** The finding that the Biosecurity Act exclusion was operative at all times and excluded cover in respect of COVID-19 was not challenged on appeal. Also not challenged on appeal was the finding that the 'hybrid' insuring clause did not apply because the relevant orders did not have a sufficient causal link to the circumstances at the premises or within the specified radius. That is, the orders effecting closure of the premises were not made as a result of the presence of COVID-19 at or in the radius of the insured premises, but in response to the existence and risk of COVID-19 in NSW generally. The Full Court confirmed that the other insuring clauses relied upon by LCA Marrickville (a 'prevention of access' clause and a 'conflagration or other catastrophe' clause) did not apply to diseases.
Insurance Australia Limited v Meridian Travel (Vic) Pty Ltd - NSD133/2021	Travel agent	Melbourne, VIC	**The 'infectious disease' insuring clause applies, but the Full Court confirmed there are substantial issues as to whether the policyholder can prove that it is entitled to any indemnity. The parties to this case will be given an opportunity to consider their respective positions – the insured may seek to further pursue its claim before the trial judge.** The insured peril under the 'infectious disease' clause is an outbreak of COVID-19 within a 20km radius of the situation. The Commonwealth travel ban and cruise ship ban are not part of the insured peril.

			As yet there is no evidence from which it would be inferred that the insured peril was a cause of any loss. The insured will have an opportunity to consider its position and whether it wishes to try to prove that the insured peril was a cause of any loss. The insured did not challenge the finding that the other insuring clause (a 'hybrid' clause) did not to apply because the policyholder's business was not closed by order of an authority. Although not determinative, the Full Court reached a different conclusion to the trial judge in relation to the 'discovery' element of this clause, concluding that it required the relevant discovery to occur at the policyholder's premises. The Full Court also reached different conclusions to the trial judge in relation to third party payments (concluding that JobKeeper and other third party payments are not to be taken into account in assessing the loss, based on the particular terms of the policy) and interest (concluding that this issue would require further evidence to determine, if the insured can establish an entitlement to indemnity).
Insurance Australia Limited v The Taphouse Townsville Pty Ltd - NSD134/2021	Bar/restaurant	Townsville, QLD	**The insuring clauses do not apply. The insurer is not liable to indemnify the policyholder.** The Full Court confirmed that the 'prevention of access' insuring clause did not extend to diseases. Diseases are governed exclusively by the 'hybrid' insuring clause. The Full Court also confirmed that the 'hybrid' clause did not apply because the relevant directions were not made as a result of the outbreak of disease within a 20km radius of the premises. Rather, the directions were responsive to the risk of COVID-19 in Queensland generally, with the object of preventing the spread of the virus.

Chubb Insurance Australia Limited v Market Foods Pty Ltd (t/as Market Cart) - NSD138/2021	Café/restaurant	Brisbane, QLD	**The insuring clauses do not apply. The insurer is not liable to indemnify the policyholder.** The Full Court confirmed that only one of the insuring clauses applied to diseases. This insuring clause was not engaged because it required an outbreak, occurrence or discovery at the premises, and there was no evidence that occurred. In any event, the relevant directions of the Queensland Government were not caused by circumstances at the premises, and directions made by the University of Queensland were not directions of the requisite character.
QBE Insurance (Australia) Limited v David Coyne in his capacity as liquidator of Educational World Travel Pty Ltd & Anor – NSD308/2021	Travel agent	Melbourne, VIC	**The insuring clause does not apply. The insurer is not liable to indemnify the policyholder.** The Full Court confirmed that, although there was a closure of the premises, this was not by any order as was required by the 'hybrid' insuring clause. This was because the Commonwealth travel ban (which was relevant to the insured's loss) did not require the closure of the premises. Instead, the policyholder decided to close the premises because of the effect of the travel ban. The premises had already been closed prior to the implementation of the Victorian Workplace Closure directions. The policy wording did not support voluntary closures.

Part B: Outcome of claims that were not appealed

Parties	Business Type	Business Location	Outcome
Allianz Australia Insurance Limited v Mayberg Pty Ltd - NSD135/2021	Dry cleaner	Brisbane, QLD	**The insuring clauses do not apply. The insurer is not liable to indemnify the policyholder.** Her Honour found that the 'hybrid' clause did not apply, as the relevant directions did not operate to close all or part of the premises, and were not made as a result of an outbreak of disease within a 20km radius of

			the premises. Rather, the directions were responsive to the existence and risk of COVID-19 in Queensland generally. Her Honour found the 'prevention of access' insuring clause does not apply to diseases or the threat of harm from diseases.
Allianz Australia Insurance Limited v Visintin - NSD136/2021	Costume shop	Adelaide, SA	**The insuring clauses do not apply. The insurer is not liable to indemnify the policyholder.** Her Honour found that the 'quasi-hybrid' insuring clause did not apply because the only closure of the premises was not as a result of the outbreak of disease within a 20km radius of the premises. Rather, the closure was the result of a combination of other things, including the effect on trade of directions and a 'stay home' announcement by the SA Premier (none of which themselves were the result of an outbreak within the relevant radius). Her Honour found that the 'prevention of access' insuring clause did not apply, as that clause does not apply to diseases.
Chubb Insurance Australia Limited v Philip Waldeck - NSD137/2021	Commercial landlord	Melbourne, VIC	**The insuring clauses do not apply. The insurer is not liable to indemnify the policyholder.** Her Honour found that the policy wording required an intervention of a public authority directly arising from the occurrence or outbreak as specified (i.e. the occurrence or outbreak must be at the premises) and that intervention must lead to restriction or denial of the use of insured location, on the order or advice of the local health authority or other competent authority. In this case, there was no intervention of a public authority directly arising from the occurrence or outbreak at the premises, and indeed there was no such occurrence or outbreak at the premises. In addition, there was no loss suffered by the policyholder resulting from a relevant interruption of or interference with the Insured

			Location. All of the policyholder's loss was caused by the Rent Relief Regulations (ie, the *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020* (Vic)), which was not an order of a competent authority leading to a restriction of denial of the use of the insured location.
Guild Insurance Limited v Gym Franchises Australia Pty Ltd (t/as Reinvigr8 & Fitness 24/7) and Douglas Reason - NSD144/2021	Gym	Gold Coast, QLD	**The insuring clauses do not apply. The insurer is not liable to indemnify the policyholder.** Her Honour found the 'hybrid' insuring clause required the relevant closure order to have been directly or indirectly caused by (i) human infectious or contagious disease at the premises or (ii) the discovery of an organism likely to result in human infectious or contagious disease at the premises. It could not be inferred that the relevant order closing the premises (or part of the premises) arose as a result of such circumstances.
Guild Insurance Limited v Dr Jason Michael (t/as Illawarra Paediatric Dentistry) - NSD145/2021	Dentist	Wollongong, NSW	**The insuring clauses do not apply. The insurer is not liable to indemnify the policyholder.** Her Honour noted that the conclusions reached in respect of the Gym Franchises proceeding apply equally in this matter. In addition, the insuring clause required that the applicable order impose a *requirement* for closure or evacuation (ie, a mandatory obligation rather than a choice). The actions relied on by the policyholder (including media releases from the Prime Minister and communications and releases from the Australian Dental Association, Dental Board of Australian Dental Council of NSW and Australian Health Protection Principal Committee), did not satisfy this requirement.

Schedule 2: Key Findings of the Federal Court

1 Insuring clauses issues

1.1 Outbreak

(a) What constitutes an 'occurrence'?

- The Full Court did not disturb the trial judge's finding that an 'occurrence' of COVID-19 means an event or case of COVID-19 in any setting (meaning that it does not matter if COVID-19 was maintained in a controlled environment such as hotel quarantine).

(b) What constitutes an 'outbreak'?

- In the case of COVID-19, there can be an 'outbreak' of COVID-19 within a specified area if there is at least one active (in the sense of contagious) case of COVID-19 within the community in that area who is not in a controlled setting (such as a hospital or isolation or quarantine), whether or not it can be proved that such a person transmitted COVID-19 to another person within the area.

1.2 Closure or evacuation

(a) What amounts to a 'closure or evacuation' of the premises?

- In the context of 'closure or evacuation' of the premises, 'closure' does not require that each and every person is prohibited from entering and remaining upon the whole or part of the premises. It requires that persons who would otherwise be entitled to enter or remain on premises, not be able to do so. This is to be applied in a common-sense way. If a premises involves a business operating as a restaurant and bar, orders preventing the premises being used in that way are effectively a closure of that premises.
- The Full Court did not disturb the trial judge's findings that 'closure':
    - would extend to closure of a part of the premises;
    - is different from the prevention, restriction or hindrance of access to the premises;
    - requires that persons, who would ordinarily be entitled to enter and remain on the whole or that part of the premises, no longer be entitled either to enter or to remain on part of the premises;
    - does not require physical impossibility of access to the whole or part of the premises; and
    - in the ordinary course, does not embrace a restriction on the number of people who may enter and remain on premises at any one time (ie, ordinarily, social distancing orders will not amount to a closure of the premises).

(b) Closure 'by order'?

- Where the required closure is 'by order' of an authority, the closure must be both:
    - required by the order (ie, not a voluntary decision); and

- caused by the order (ie, not where the premises was closed due to a different cause).

1.3 Discovery of an organism

(a) What is the interpretation of clauses that refer to the discovery of an organism likely to result in a human infectious or contagious disease at the premises/situation?

- Whether the discovery of an organism must be at the premises/situation or not depends on the wording of the particular provision, read in context. That will not necessarily accord with the grammatically superior construction of the wording. In this respect the Full Court adopted a different approach to the trial judge.
- The 'discovery of an organism' clauses are a form of hybrid clause – that is, they require an order (etc) caused by the relevant discovery. See below for the principles relating to causation element.

1.4 Prevention of access

(a) Does a prevention of access clause apply to diseases?

- The prevention of access clauses were found not to apply to diseases.
- The key reason for this conclusion was that the relevant policies contained other insuring provisions (ie, disease clauses or hybrid clauses) that specifically dealt with diseases.
- In light of these other clauses, construing prevention of access clauses as applying to diseases would involve incongruence and incoherence in the operation of the policy, which should be avoided.

(b) What amounts to a prevention or restriction of access to / use of the premises?

- The Full Court did not disturb the trial judge's findings that:
  - Access to premises is prevented if the persons ordinarily entitled to enter the premises are no longer physically permitted to do so. Access to premises is restricted if it becomes materially more difficult for the persons ordinarily entitled to enter the premises to do so.
  - An order of an authority which 'prevents', 'restricts' or 'hinders' access to premises/a situation ordinarily would not require a physical (as opposed to a legal) prevention, restriction or hindrance of access to the premises/situation.
  - In the ordinary course, a restriction on the number of people who may enter and remain on premises at any one time does involve prevention, restriction or hindrance of access to the premises/situation.

1.5 Conflagration or other catastrophe

(a) What is the interpretation of a clause referring to 'the action of a civil authority during a conflagration or other catastrophe for the purpose of retarding same'?

- This clause was found not to apply to diseases.
- The key reason for this conclusion was that the relevant policy contained another insuring provision (ie, a hybrid clause) that specifically dealt with

diseases. In light of the other clause, construing the 'conflagration or other catastrophe' clause as applying to diseases would involve incongruence and incoherence in the operation of the policy, which should be avoided.

- Further, the 'conflagration or other catastrophe' clause on its own terms was found to have nothing to do with diseases. In context, an 'other catastrophe' must be of a kind similar to a 'conflagration', which involves a physical event requiring physical action to be retarded. A pandemic is not like a conflagration.

1.6 Biosecurity Act exclusion

(a) What is the interpretation of a clause that excludes losses arising from or in connection with 'any disease(s) declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act'?

The insured did not challenge the first instance findings that:

- The exclusion applies in respect of COVID-19 as it is a listed human disease under the Biosecurity Act.
- The exclusion has an ambulatory operation. It operates even where the disease has been determined to be a 'listed human disease' after the commencement of the policy period.

(b) Does the insured have any relief from the operation of the exclusion pursuant to s54 of the Insurance Contracts Act?

The insured did not challenge the first instance findings that:

- The insured did not have any such relief under s54.
- Section 54 does not apply because the relevant declaration by the Director of Human Biosecurity under the Biosecurity Act is not an act of 'some other person' within the meaning of s54. The making of the determination has nothing to do with the insurer, the insured or the policy. The determination represents a wholly extraneous circumstance which is excluded from the scope of the indemnity.

1.7 Victorian Property Law Act issue

(a) What, if anything, is the effect of s61A of the *Property Law Act 1958* (Vic)? Does it mean that an exclusion which refers to the (now repealed) *Quarantine Act 1908* (Cth) can be interpreted as referring to the (currently in force) *Biosecurity Act 2015* (Cth)?

- Section 61A of the Property Law Act was found not to apply to these provisions.
- Section 61A applies only to references to Victorian legislation, and not to references to Commonwealth legislation such as the Quarantine Act.
- Further, the Biosecurity Act is not a 're-enactment with modifications' of the repealed Quarantine Act, as required by the terms of s61A.

2 Causation

2.1 Hybrid clauses

How does the causal element within a hybrid clause apply?

- A 'hybrid' clause requires the closure of the premises/situation by order/action of a competent authority as a result of human infectious or contagious disease:
  - at the premises/situation;
  - within a specified radius of the premises/situation; or
  - as a result of any discovery of an organism likely to result in the occurrence of a human infectious or contagious disease at the premises/situation.
- The start of the relevant causal sequence is the making of the order by the authority. The cause for the making of the order must be as identified by the relevant order. It is not for the parties to go behind the order to prove the authority wrong or to prove that the order could have been formulated differently. The fact or not of COVID-19 within the radius (or at the premises, etc) is not material if the actions of the authority did not result from those facts.
- Depending on the words of the clause, the causal requirement may be something less than 'proximate cause'. For example, the expression 'as a result of' merely requires something more than a remote causal link.
- The hybrid clauses were found not to apply because the relevant orders/actions by State Governments were not made as a result of outbreaks occurring within the relevant radius (etc). Rather, the relevant orders/actions were for the purpose of preventing the spread of the virus and the possibility of outbreaks.

2.2 Loss causation and adjustments

- For loss to be covered, the loss must be caused by the insured peril (which will depend on the terms of the insuring clause).
- If the insured peril is a proximate cause of the loss then it does not matter if there was another uninsured proximate cause of the loss arising from the same underlying cause.
- The same approach applies to adjustments.
- Adjustments should not be made by reference to uninsured events caused by the same underlying fortuity as the insured peril. The fortuity underlying the insured peril is not 'COVID-19 generally' but the presence and risk of COVID-19 in the relevant jurisdiction.
- A distinction was drawn here between the presence and risk of COVID-19 within the relevant State, and the presence/risk of COVID-19 within Australia generally and/or internationally. This would mean, for example, that if an action of a State Government was an insured peril, then:
  - an adjustment should not be made for the effects of the existence and risk of COVID-19 in the same State;

- but an adjustment should be made for the effects of COVID-19 internationally and the responses thereto by the Commonwealth Government.

3 Third party payments and relief

(a) Is the loss to be adjusted to take account of JobKeeper, government grants, rental abatements and other relief related to COVID-19?

- This will depend on the particular terms of the policy in question.
- This issue was determined in only one case in the test case. In that case, based on the particular wording, it was found that the loss was not to be adjusted to take account of JobKeeper and the other applicable government grants.

4 Interest

(a) When does interest run under s57 of the Insurance Contracts Act?

- The fact that these cases were being determined as a test case would not be enough to postpone the running of interest, nor would the existence of a bona fide view on the part of the insurer that indemnity is not available under the policy.
- Changes to the insured's claim or failures by the insured to provide information would be relevant factors.