

INSURANCE

DO I HAVE A CLAIM FROM LOCKDOWN?

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Bellrock.

***Today's
Talking
Points***

- **What types of policies might I have?**
Common types of construction policies
- **Could any of these cover lockdown loss?**
Things to consider when looking at your policies
- **How do I make a claim?**
Key elements to consider before claiming
- **What else should I be looking at?**
Common policy conditions
- **Q & A**

[The necessary footnote | disclaimer: Obviously, this isn't legal advice but a guide to what can be considered! If you'd like some legal advice, please reach out – we're here to help.]

What types of policies might I have?

- Business Interruption
- Contract Works
- Public Liability
- Professional Indemnity
- ISR

Could any of these policies cover lockdown loss?

Things to consider....

BI/ALOP

- Contractors generally do not purchase cover for business interruption due to cost.
- Insurers have sought to avoid losses associated with infectious disease outbreaks since the SARS outbreak in 2002.

ISR

- Insurers have sought to exclude business losses arising out of pandemics since SARS.
- There are currently a number of legal challenges in relation to the wording of exclusions – even if successful it is unlikely to provide cover unless there is an outbreak of COVID at your premises

CAR

- All Contract works policies have an express exclusion for costs associated with delays – howsoever caused.
- If loss or damage occurs to the works under contract whilst the site is closed, the cost of reinstatement will be covered if you have complied with the terms of your policy.

***Could any of these
policies cover
lockdown loss?***

- *HDI Global Specialty SE v Wonkana No. 3 Pty Ltd* [2020] NSWCA 296
- The NSWCA found for policyholders on the basis that COVID-19 was not declared to be a quarantinable disease under the *Quarantine Act 1908* (Cth) and the exclusion in the policy was not enlivened.
- Decision turned on the fact that the *Quarantine Act 1908* (Cth) was repealed and replaced with the *Biosecurity Act 2015* (Cth).
- The HCA subsequently refused special leave to appeal.

*Could any of these
policies cover
lockdown loss?*

- There is a Second Test Case being run in the Federal Court.
- It involves 6 different insurers across 10 proceedings being heard together to determine the meaning of policy wordings around disease definition, COVID outbreak proximity, the impact of government mandates, and other policy wording matters.
- Set down for hearing in August and any subsequent appeal will be dealt with in November so final determinations can be made by December.
- In the meantime, Insurers will usually deal with claims if the issue has been determined, otherwise they will await the outcome of the Second Test Case.

Could any of these policies cover lockdown loss?

- FCA v Arch Insurance (UK) Ltd and Ors [2021] UKSC 1
- UK decision which has already dealt with issues arising under common non-damage clauses used in business interruption property insurance policies.
- Found in favour of policy holders, as set out in the table.
- Difficult to predict what this means for the Second Test Case here as there are obviously differences between the cases.

<i>Issue</i>	<i>Determination</i>
Interpretation of “disease clauses” which relate to BI losses on the occurrence of a notifiable disease within a specified distance of the insured premises.	Each illness sustained is a separate occurrence and disease clauses only cover cases within the relevant radius.
The interpretation of “prevention of access clauses” (where BI occurs because the insured is unable to access their business premises due to restrictions imposed by a public authority) and “hybrid clauses” (contain both disease and prevention of access elements).	An instruction by a public authority that restricts access to premises will amount to a “restriction imposed” if it carries the imminent threat of legal compulsion or is in mandatory and clear terms and indicates that compliance is required without recourse to legal power. “Inability to use” will cover situations where there is an inability to access a discrete part of the premises and will cover a discrete activity that cannot be undertaken.
Causal link that must be shown between the BI and the relevant event, ie the COVID-19 pandemic and public health measures.	Policyholders need only establish that there was at least one case of COVID-19 within the relevant geographical area set out in the policy.
The effect of “trends clauses” used to determine the effect of BI on the business by considering previous or regular trading patterns, and the significance of quantifying losses on the basis of trading patterns before the insured event (“pre-trigger losses”).	These clauses should not be construed with the effect that they take away cover provided by the insuring clauses. The trends for which clauses require adjustment (ie COVID-19) do not include circumstances arising out of the same underlying or originating cause as the insured peril (ie COVID-19).

***How do I make
a claim?***

- Ensure you maintain accurate records of all costs associated with any loss.
- Document direct and indirect costs.
- Your insurer must make a determination on whether to accept or deny cover – any claim you make should be referred to insurers and not declined by your broker.
- If you are not satisfied with a determination, contact your broker and legal representatives to discuss your options.

*What else should I
be looking at?*

- Policies often restrict or exclude cover for unoccupied premises or where there has been cessation of work. Usually the exclusion applies after a period of time.
- CHECK your policy to ensure cover remains in place during any enforced lockdown.
- You have obligations to use reasonable endeavours to protect your property. Whilst you must act within health orders, you may be asked to provide evidence of what steps were taken to protect your property.

Questions?



*Coming
Tomorrow...*

- **10am Thursday 22 July:**
Director Duties

Directors and businesses in the construction industry need to continue to manage their obligations under the Corporations Act.

Georgia Marjoribanks and Sally Banks will be speaking with Dan Mills, Director – Business Advisory, at William Buck, around what directors should be on top of during the latest Sydney lockdown and construction shutdown. This session will also include any updates or changes to around the NSW orders.

- **2pm Thursday 22 July:**
Insolvency Risk

Finding the safe harbour – managing business risk through the Sydney shutdown. The shutdown of the construction industry in Sydney will have a devastating effect on businesses – big and small.

Matthew Bryan, will be speaking with Chad Rapsey, Founder of Rapsey Griffiths Turnaround + Advisory, around what steps businesses should be taking to steady the ship through the construction shutdown, and what options may be open to them, including the safe harbour regime under the Corporations Act.