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Business Interruption Cover for COVID-19 related loss

Australian Update

13 July 2021

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3 Elements to a Successful BI Claim

1

Insured trigger: *Have circumstances triggered the cover?*

2

Which is not excluded: *Does a relevant exclusion apply?*

3

That causes loss: *Did the trigger cause the loss and what 'other circumstances' may be taken into account in demonstrating the 'Standard' turnover which the business would have achieved absent the insured trigger?*

Element 1 – Insured Trigger

Typically, the trigger for (Section 2) BI Cover is physical loss or damage to insured property (which is covered under Section 1):

*In the event of any insured property...being physically lost, destroyed or damaged by any cause or event not hereinafter excluded (loss, destruction or damage so caused being hereinafter termed "**Damage**" ...and the Business carried on by the Insured being in consequence thereof interrupted or interfered with, the Insurer(s) will... pay to the Insured the amount of loss resulting from such interruption or interference in accordance with the applicable Basis of Settlement.*

COVID-19 is not physical damage – but even if it was arguable, then claims would face further hurdles such as that it is:

- (a) not on many premises (so didn't 'damage' many insured's property – need a 25km radius clause);
- (b) only temporary (until cleaned) so, after cleaning, C19 'damage' is not a cause of loss;
- (c) 'damage' based claims would be subject to general exclusion 4(a) which excludes "*Damage occasioned by... disease*"

Element 1 – Insured Trigger

So only policies with “non-damage” extensions to trigger BI cover have potential to assist:

- a. Disease extensions
- b. Civil authority extensions
- c. Closure or prevention or hindrance of access extensions

Disease Clause (ICA test case)

“... will cover you for interruption to or interference with your business due to... **(b) an outbreak of an infectious or contagious human disease occurring at or within a 20 kilometre radius of the Premises...**”

Prevention of Access Clause (UK FCA test case)

“**Access to or use of the premises being prevented or hindered by... any action of government due to an emergency which could endanger human life or neighbouring property...**”

Hybrid Clause (Melbourne Café case)

“...**closure or evacuation of the whole or part of the premises by order of a competent government, public or statutory authority as a result of ... the outbreak of a notifiable human infectious or contagious disease occurring within a twenty (20) kilometre radius of the premises.**”

Civil Authorities Clause (The Star Casino case)

“The word ‘Damage’ under Section 2 of this Policy is extended to include loss resulting from or caused by **any lawfully constituted authority in connection with or for the purpose of retarding any conflagration or other catastrophe.**”

Loss of Attraction Clause

“Loss as insured by the Policy resulting from interruption of or interference with the Business:...

(b) by **the action of any lawfully constituted Authority attempting to avoid or diminish risk to life or property in the vicinity of such premises,**

which shall prevent or hinder the use thereof or access thereto, or which causes a fall in the number of potential customers attracted to the vicinity of the Premises, whether the premises or property therein shall be damaged or not, shall be deemed to be loss resulting from Damage to property used by the Insured at the Premises.”

Element 2 – Not Excluded

1. Biosecurity Act/Quarantine Act exclusion

Disease Extension (ICA test case)
 "... will cover you for interruption to or interference with your business due to...an outbreak of an infectious or contagious human disease occurring at or within a 20 kilometre radius of the Premises..."

2. General exclusion for damage by 'disease'

Outdated reference to legislation
 "...however the Quarantine Act 1908 (Cth) or... diseases declared to be quarantined under the Quarantine Act 1908 (Cth) and subsequent amendments irrespective of whether discovered on the Premises, or out-breaking elsewhere."

ICAus test case says not effective

Updated reference to legislation
 "... however liable for other infectious human diseases as defined in section 2 of the Quarantine Act 2015 (Cth) and subsequent amendments are excluded from this coverage."

Excludes claims based on disease extension (arguably shows wider intention?)

General Perils Exclusion 4(a):

"The Insurer(s) shall not be liable under Sections One and/or Two in respect of:

4. Physical loss, destruction or damage occasioned by or happening through...

(a) moths, termites or other insects, vermin, rust or oxidation, mildew, mould, corrosion or pollution, wet or dry rot, corrosion, change of colour, dampness of atmosphere or other variations of temperature, evaporation, disease, inherent vice or latent defects..."

Issue: Does a general exclusion for physical damage occasioned by disease exclude the coverage granted by an extension for loss occasioned by the actions taken by authorities to prevent or minimise harm from a disease?

Will be decided in Star City case

ICA Test Case #1

Does an exclusion to the infectious diseases extension for “quarantinable diseases under the Quarantine Act 1908 (Cth) and subsequent amendments” exclude COVID-19?

NOTE: This is not a general exclusion – it is a limitation on an extension (but insurers says shows wider intent).

In a 5-0 judgment, a specially convened sitting of the NSW Court of Appeal unanimously held it did not.

On 25 June 2021, the High Court refused an application by insurers’ for special leave to appeal on the basis that the decision of the NSW Court of Appeal was ‘not attended by sufficient doubt to warrant the grant of special leave’.

Insurers argument #1 was that “*and subsequent amendments*” should be read as including replacement legislation, namely the *Biosecurity Act*

“*There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court.*”

Insurers argument #2 was that the reference to the *Quarantine Act* was a obvious mistake which should be corrected when interpreting what the parties intended by the policy [despite an admission that neither party had actually turned their mind to the clause at the time the policy was issued, so there was no “intent” at the relevant time]

“*The question is one of construction, and of the proper limits and extent to which a contractual document may be construed in a way which involves a departure from the actual words used by the parties, on their ordinary grammatical meaning. ... Orthodox principles of contractual construction are not so flexible as to admit of the insurers’ second argument.*”

This resolves the “Quarantine Act” issue as there are no further avenues for appeal. However, there is currently a further test case considering the effect of s61A of the *Property Law Act 1958* (Vic), which could result in a different position in Victoria compared to the other States AND policyholders still have to overcome causation issues.

BI Cover for COVID-19 related loss

What happened before the High Court in ICA#1?

Insurers Counsel : ...we submit the true intention of the parties was to pick up the federal mechanism for listing diseases operative during the period of the policy [and the error of the NSW Court was] to conclude that “what they [the parties to the insurance policy] did agree is not a clear mistake and, if it is, it does not rise to the level of absurdity”.

So, the case was decided on the basis of whether there was an absurdity, not on the basis of whether the true intention of the parties was not reflected in the literal language and, therefore, there should be a departure from the literal language...

we do not rely upon extrinsic evidence [of an intention by the parties]. We rely upon the policy language as evincing a true intention, which is not reflected in the literal language which was used...

KEANE J: Thanks, Mr Jackman. The Court will retire from the Bench for a moment to discuss the course it will take in this matter.

AT 12.23 PM THE COURT ADJOURNED [3 Judges – Keane, Edelman and Gleeson]

UPON RESUMING AT 12.24 PM:

KEANE J: The decision of the Court of Appeal of the Supreme Court of New South Wales is not attended by sufficient doubt to warrant the grant of special leave to appeal. The application should be dismissed with costs.

Element 3 – Causation (the adjustments clause)

$$\text{Loss} = (\text{Standard Turnover} \textit{ minus Actual Turnover}) \times \text{Rate of GP}$$

Standard Turnover = Turnover during the same period in previous year, *adjusted* by the **Trends Clause**

Trends Clause ...*such adjustments as may be necessary to provide for the trend of the Business and for variations in, or other circumstances affecting the Business, either before or after the Damage, or which would have affected the business had the Damage not occurred*"

The “Damage” to be ignored in the counterfactual is the typically the insured “Damage” or (where there is reliance on a non-damage trigger), ignore the insured trigger.

So, we ask - what would the results of the policyholder have been during 2020 had the relevant insured trigger not occurred but all other circumstances remained the same?

- That is easy when the trigger is, say, a **fire** at the Insured’s premises.
- It gets harder where there is **wide area damage** (eg cyclone or bushfire) that could have affected the results anyway.
- It gets even harder when there are **multiple causes** in the mix, including government responses to the trigger.

Element 3 – Causation (the adjustments clause)

Insurers are arguing:

1. (in disease claims) *even if there was no disease at or near Insured Premises...* the wider pandemic and government action would have depressed results anyway;
2. (in POA/action by authorities extensions) *even if the government took no action to close the Insured Premises...* the wider pandemic and broader lockdown would have meant no one was out and about to visit the insured's premises anyway.

This argument is based on a 10 year old English single judge decision called *Orient Express Hotels* (OEH or Hurricane Katrina case) – consider what would be the results of an undamaged hotel in a hurricane damaged city.

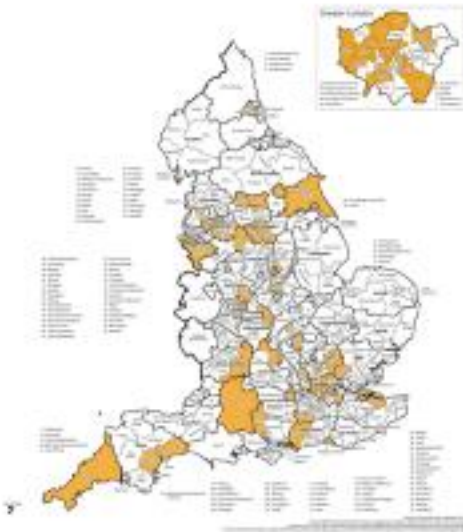
BUT, the UK Supreme Court recently overruled OEH (5-0) and effectively said that **concurrent causes** inevitably arising from the insured trigger cannot be a trend or other circumstance (**unless they are an excluded cause**) - so for some policies the counterfactual should be to **assume no disease and no action by authorities**.

This is not binding in Australia but the unanimous reasoning of England's highest court will be influential – HOWEVER we understand that insurers in Australia are contesting this decision in the Second ICA Test Case.

But remember ... England had a different COVID experience to Australia

These maps show weekly progression of reported cases in March 2020

Map showing which LTLAs had their first Reported Case of COVID-19 up to and including 2 March 2020



Map showing which LTLAs had their first Reported Case of COVID-19 up to and including 9 March 2020



Map showing which LTLAs had their first Reported Case of COVID-19 up to and including 16 March 2020



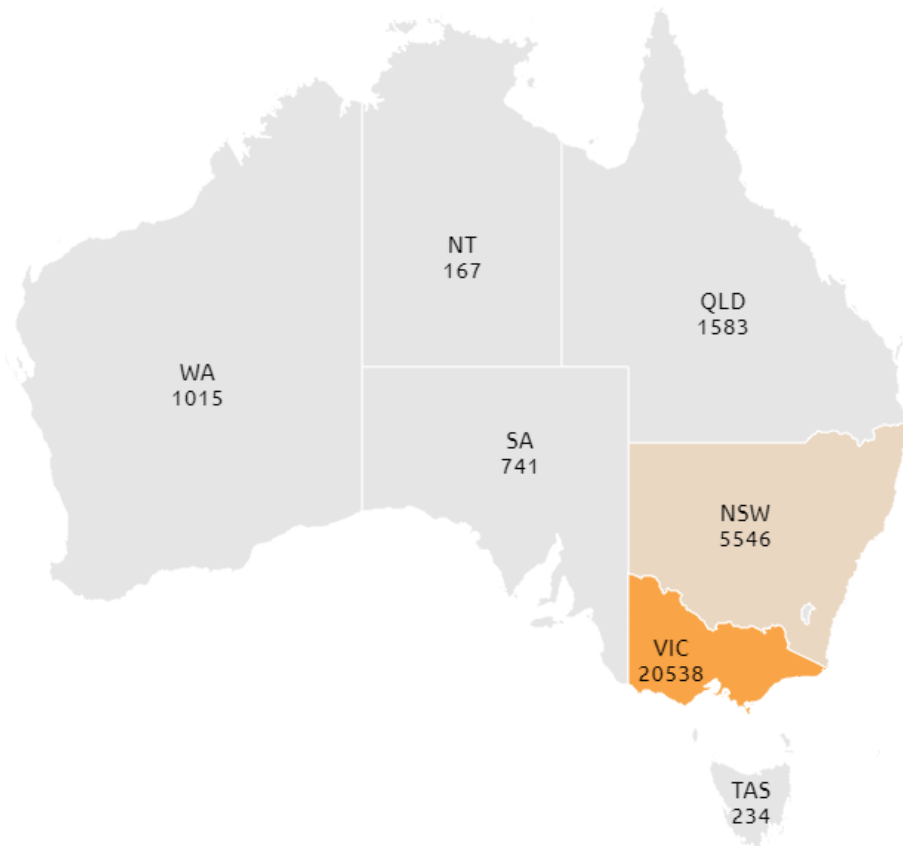
Map showing which LTLAs had their first Reported Case of COVID-19 up to and including 23 March 2020



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So... policyholders should expect insurers to argue that different facts should lead to different causation outcomes

Australia's COVID-19 statistics



COVID-19 in Australia

State	COVID-19 cases	% of all cases in Australia	% of Australia's population	Deaths
NSW	5,546	18.5%	31.9%	54
VIC	20,538	68.6%	25.9%	820
QLD	1,583	5.3%	20.0%	7
WA	1,015	3.4%	10.3%	9
SA	741	2.5%	6.9%	4
TAS	234	0.8%	2.1%	13
ACT	124	0.4%	1.7%	3
NT	167	0.6%	1.0%	0
Totals	29,948			910

www.covid19data.com.au

Star Casino Test Case

Civil Authority Extension

*“The word “Damage” under Section 2 of this Policy is extended to include **loss** resulting from or caused by any lawfully constituted authority in connection with or for the purpose of retarding any conflagration or **other catastrophe**.”*

General Exclusion 4(a)

*“The Insurer(s) shall not be liable under Sections 1 and 2 in respect of:- physical loss, destruction or damage occasioned by or happening through.. **disease**...”*

Key Issues to be determined

1. Is “**loss**” limited to physical loss (as per the rest of the policy)?
2. Does “**other catastrophe**” in context include COVID19? [and did a catastrophe occur in Australia?]
3. Does **General Exclusion 4(a)** or the limitation excluding ‘*diseases listed in the Biosecurity Act 2015*’ in the Disease Extension apply to exclude cover for COVID19 generally (even if the claim is made under the Civil Authority extension)?

Disease Extension

“Damage is extended to include loss resulting from ...

Any occurrence of a Notifiable Disease (as defined below) at the Premises or a Notifiable Disease attributable to food or drink supplied at the Premises;

Definitions

*a) **Notifiable Disease** shall mean illness sustained by any person resulting from ...An occurrence of a human infectious or human contagious disease which the competent Local Authority has stipulated shall be notified to them, **with the exception of** any occurrence, whether directly or indirectly, arising from *Quarantinable disease listed in the Bio Security Act 2015*, which are all **specifically excluded hereunder**.*

Star Casino Case – Is loss limited to physical loss?

Civil Authority Extension (CAE)

*“The word “Damage” under Section 2 of this Policy is extended to include **loss** resulting from or caused by any lawfully constituted authority in connection with or for the purpose of retarding any conflagration or **other catastrophe**.”*

Insurers’ opening submission:

“The Applicant’s claim is based on the dubious proposition that insurers to a first party property policy agreed to underwrite the economic reverberations of the government response to the COVID-19 pandemic. The parties specifically considered cover in respect of diseases such as COVID-19 and agreed they should be specifically excluded from cover”

So... what do insurers argue is the intent of the CAE?

1. ISR typically requires physical loss or damage to trigger BI – loss means physical loss;
2. Purpose of CAE is to offer BI cover for loss arising from government actions which might otherwise be excluded by this:

Government Order Exclusion

“The Insurer(s) shall not be liable under Sections 1 and 2 in respect of:-

Physical loss, destruction or damage to the Property Insured...

(b) resulting from confiscation, nationalisation, requisition or damage to property by or under the order of any Government or Public or Local Authority.

Notwithstanding the provisions of Perils Exclusion 1(b) the Insurer(s) shall be liable for the loss, destruction of or damage to, or the cost of removal of, sound property at the Premises for the purpose of preventing or diminishing imminent damage by, or inhibiting the spread of, fire or any other peril insured against under the policy.”

3. Disease exclusions show intent of parties when disease is the cause of government action – i.e. disease is excluded

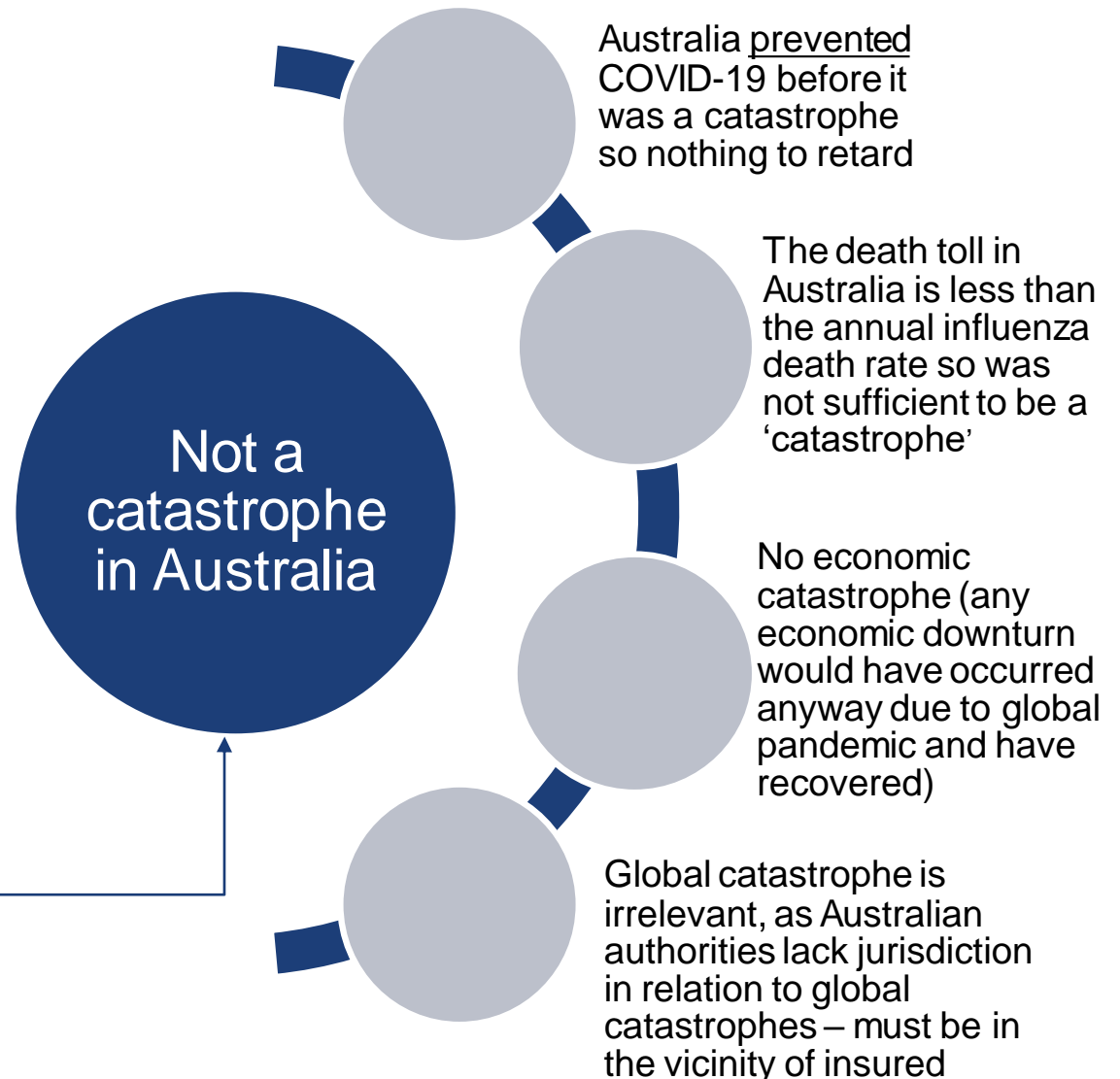
Star Casino Case – Does “other catastrophe” include COVID-19?

Civil Authority Extension

“The word “Damage” under Section 2 of this Policy is extended to include **loss** resulting from or caused by any lawfully constituted authority in connection with or for the purpose of retarding any conflagration or **other catastrophe.**”

A range of arguments were run in relation to this point, but essentially insurers argued that:

1. The ‘catastrophe’ in context had to be physical or be like a ‘conflagration’ (fire) and had to be a sudden, large scale event which causes widespread physical damage.
2. Even on a wider meaning there was no relevant ‘catastrophe’ in Australia to be ‘retarded’ because:



Second ICA test case – Key issues

9 test cases involving small businesses, said to be chosen as a representative sample of the range of cases. Key recurring issues include:

1. Has cover been triggered?

- Has there been the required restriction on the business (i.e. ‘prevention’, ‘hindrance’, ‘closure’, ‘evacuation’)?
- If reliant on Disease extension - did the disease occur at premises or within the relevant area?
- Does it make a difference whether the extension is triggered by an ‘outbreak’ or an ‘occurrence’?
- If requiring government action - does it matter that the action by the authority was responding to the broader pandemic, not the specific instance or local outbreak in the vicinity of the insured?

2. Is cover excluded?

- Does the *Biosecurity Act* exclusion/general exclusion apply generally (to show intent to exclude)?
- Does s61A of the *Property Law Act 1958* in Victoria mean that – for Victorian policyholder at least - the *Quarantine Act* exclusion can be read as the *Biosecurity Act* as its replacement legislation?

3. Did the trigger cause loss? How should loss be calculated?

- How does the trends and other circumstances clause operate?
- Do insurers accept that OEH is overruled, or will they accept its reasoning but argue that one of the concurrent causes (disease) is excluded, or that the Indemnity Period ends when the lockdown ends (as after that the CAE ceases to be a concurrent cause of the loss)?

Second ICA Test case example extensions

Prevention of Access Clause (NSD132/21)

“The action of any lawful authority attempting to avoid or diminish risk to life or Damage to property within 5 kilometres of such Situation which prevents or hinders the use of or access to the Situation whether any property of the Insured shall be the subject of Damage or not.”

Hybrid Clause - Disease (NSD132/21)

“Closure or evacuation of the whole or part of the Situation by order of a competent public authority as a result of an outbreak of a notifiable human infectious or contagious disease... at the Situation but specifically excluding losses arising from or in connection with... a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015.”

Hybrid Clause – Organism (NSD133/21)

“Interruption or interference with the business as a direct result of closure or evacuation of the business by order of a government, public or statutory authority consequent upon the discovery of an organism likely to result in a human infectious or contagious disease at the premises.”

Prevention of Access Clause (NSD116/21)

“The indemnity under this section is extended to include interruption or interference with your business as a result of:...

- 3. an order of any legal authority which prevents or restricts access to the location.*

The indemnity will apply if this loss or damage prevents or hinders the use of your location or access thereto, or results in a cessation or diminution of trade due to temporary falling away of potential customers.”

Civil Authorities Clause (NSD132/21)

“The action of a civil authority during a conflagration or other catastrophe for the purpose of retarding the same.”

Disease Clause (NSD116/21)

Deems the outbreak of a notifiable human infectious or contagious disease occurring within a 20km radius of the Location as being Damage to Insured Property.

Second ICA test case - scenarios

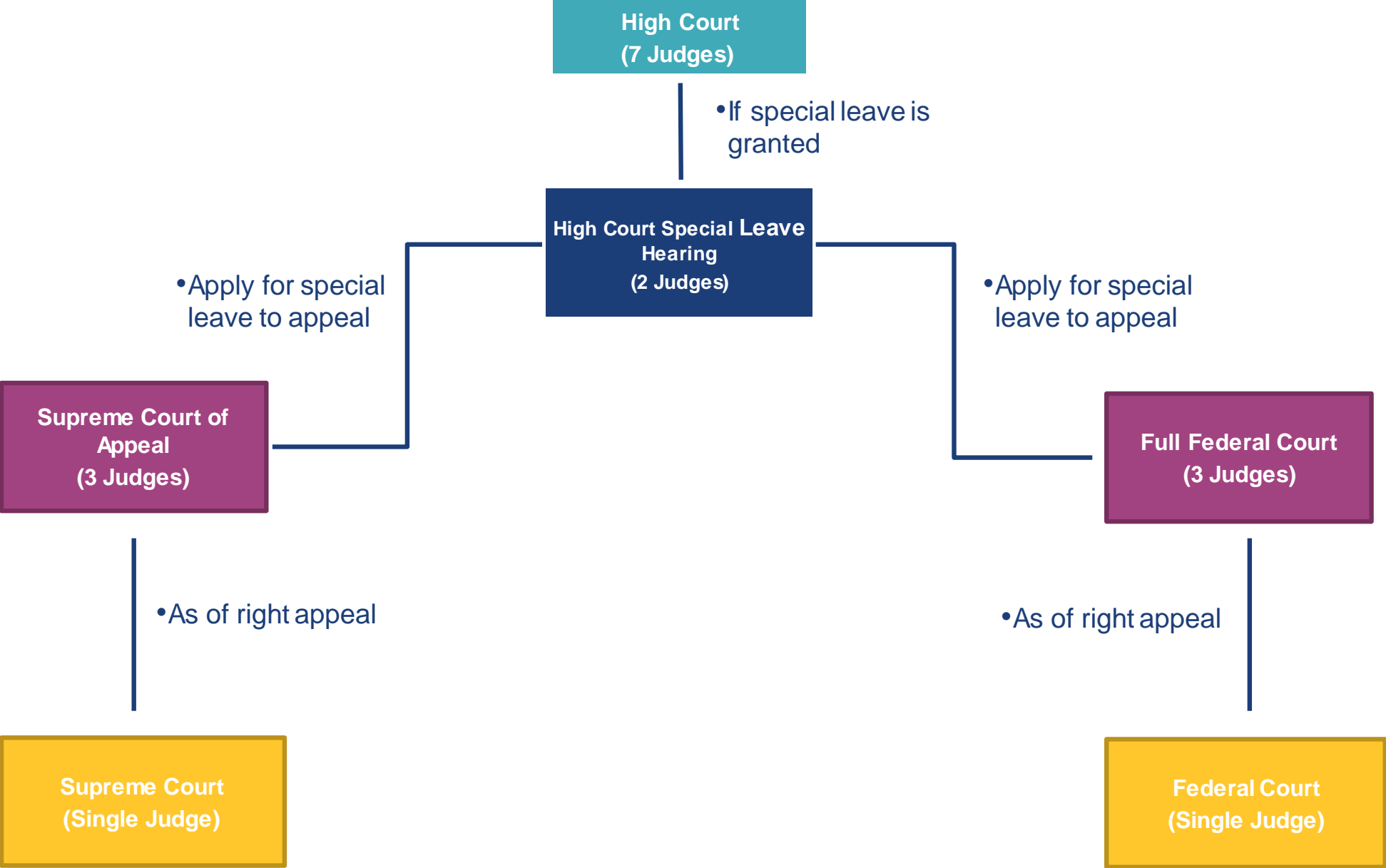
No.	Scenario	Extension(s)?	Exclusion?	Trends clause
1	A Victorian gym affected by stay at home directions, business closure directions, and restricted activity directions.	Disease Prevention of Access	Quarantine Act	✘
2	A Queensland (Townsville) bar / restaurant affected by directions requiring social distancing and the closure of all but take-away services.	Hybrid Prevention of Access	Quarantine Act	✔
3	A NSW cosmetic treatment service provider in a shopping centre affected by a direction to shutdown beauty salons, then permitted to sell goods and vouchers (but not supply services), then restricted to a limited number of people in the store.	Hybrid Prevention of access Conflagration or other catastrophe	Biosecurity Act	✔
4	A Queensland gym / fitness health centre affected by social distancing requirements and business closure directions.	Hybrid Prevention of Access	Quarantine Act	✔
5	A NSW dentist affected by orders relating to social gatherings / restrictions on movement, and by recommendations from dental associations recommending modifications to dental practice to manage COVID-19.	Hybrid Prevention of Access	Quarantine Act	✔
6	A Victorian landlord suffering a 40% decrease in rent due to amendments to regulations on commercial leases.	Hybrid	Quarantine Act	✔
7	A Victorian travel agent which had to cancel its business and refund clients due to travel restrictions.	Disease Hybrid	Quarantine Act	✔
8	A Queensland dry-cleaning business affected by non-essential business closures, social distancing measures and restrictions on gathering sizes.	Hybrid Prevention of Access	Quarantine Act	✔
9	A South Australian stage and costume shop affected by its customers (theatre) being required to shut and also affected by stay at home directions.	Disease Prevention of Access	None	✘

UK FCA data on COVID-19 related BI claims

UK FCA Data as at 14/6/2021

No. of claims accepted by the insurer	37,702
No. of claims where decision is pending	9,152
No. of claims where interim payment made	4,188
No. of claims paid in full	16,159
Total value of interim payments made	£289,595,404
Total value of final settlements have been agreed and paid	£467,251,258

Australian Court Hierarchy



What about all this talk of class actions?

Jul 1, 2021 - 6.02pm

QBE, Lloyd's slapped with pandemic insurance class actions

Lloyds and QBE declined to comment on the cases, which are funded by Omni Bridgeway. The class action targeting QBE's Australian arm is brought by gym chain Strand Fitness and three retailers on behalf of affected businesses. The National Opal Collection is the lead applicant in the class action on behalf of gem and jewellery merchants against Lloyds.

Gordon Legal is still investigating class actions against other insurers.

At least six law firms have been investigating cases in the wake of the NSW Court of Appeal ruling on November 18 that found insurers could not use the Quarantine Act to reject business interruption claims.

Bannister Law, Shine Lawyers and Slater & Gordon have opened their doors to individual cases for businesses who have had claims rejected because of the COVID-19 pandemic.

Maurice Blackburn's class action investigation is limited to Victorian business owners who were denied claims for business interruption insurance during the pandemic.

Is a class action the most appropriate way forward?

FEDERAL COURT OF AUSTRALIA ACT 1976 - SECT 33C

Commencement of proceeding

(1) Subject to this Part, where:

- (a) 7 or more persons have claims **against the same person**; and
- (b) the claims of all those persons are in respect of, or arise out of, the same, **similar or related circumstances**; and
- (c) the claims of all those persons **give rise to a substantial common issue of law or fact**;

a [proceeding](#) may be commenced by one or more of those persons as representing some or all of them.

(2) A [representative proceeding](#) may be commenced:

(a) whether or not the relief sought:

- (i) is, or includes, equitable relief; or
- (ii) consists of, or includes, damages; or
- (iii) **includes claims for damages that would require individual assessment**; or
- (iv) is the same for each person represented; and

(b) whether or not the [proceeding](#):

- (i) **is concerned with separate contracts** or transactions between the [respondent](#) in the [proceeding](#) and individual [group members](#); or
- (ii) involves separate acts or omissions of the [respondent](#) done or omitted to be done in relation to individual [group members](#).

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