

Breaking News: Federal court of Australia rules in favour of Insurers in crucial test case on COVID-19 payouts

The Federal Court of Australia judgement on the second COVID-19 insurance test cases is out and overwhelmingly Insurers have carried the day.

Whilst the judgement is still to be dissected and considered in detail, at the heart of the judgement is the distinction between the factual circumstances arising in the UK and those that occurred in Australia.

In the UK the cause of loss was determined to be the National COVID-19 Pandemic as a result of the widespread nature of infections across its limited geography giving rise to the actions subsequently taken by the UK Government.

In *FCA v Arch UKSC* it was concluded that there were a material number of cases of COVID-19 inside and outside the geographical limits outlined in many insurance policies and because of this it was reasonable to infer that each and every outbreak was an equal and effective cause that gave rise to the actions of the UK Government.

The Australian judgement, in contrast, did not consider the outbreak of COVID-19 to be widespread and concluded that the actions of the respective State Governments could be characterised as occurring because of the existence of COVID-19 within a State and not as a result of an outbreak within any set geographical limits as outlined in most Australian insurance policies.

Separately, and importantly, the Federal Court considered arguments around the “but for” test laid out in the UK test case and agreed that it would be inappropriate to apply adjustments using the “trends” clause by drawing a distinction between the outcome of the various measures taken by the UK government as a result of the COVID-19 Pandemic.

The Federal Court did however draw a distinction between the separate actions of the Commonwealth and various State Governments, one being to prevent the spread of COVID-19 in Australia as a result of the incidence of COVID-19 overseas and the other to prevent the spread of COVID-19 within each State.

The outcome of this distinction is that even if the actions of each State triggered a policy response the “but for” test could be applied when considering the impact of the actions of the commonwealth on businesses.

Appeals are to be heard early in November which we await with interest.



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