

10 June 2021

Ms Pothida Youhorn  
Acting Committee Secretary  
PO Box 6100  
Parliament House  
CANBERRA ACT 2600

Dear Ms Youhorn

**Inquiry into Oversight of ASIC, the Takeovers Panel and the Corporations  
Legislation No.1 of the 46th Parliament**

I refer to the Committee's letter dated 8 June 2021. I note Senator O'Neill's request that AFCA provide a brief prior to the hearing, including responding to a number of questions on business interruption insurance complaints and test cases.

Attached is AFCA's brief, as requested.

Please do not hesitate to contact us if you any queries or require clarification on the information provided.

Yours sincerely

**David Locke**  
**Chief Executive Officer**  
**Australian Financial Complaints Authority**

# Business Interruption Insurance Complaints Brief

## Background

AFCA is an independent external dispute resolution body and does not have the jurisdiction to bring a test case to determine issues of policy coverage against a broad group of financial firms (such as a group of insurers). AFCA is also not a party to test case proceedings.

Under the AFCA Rules a financial firm must request AFCA's consent to have a complaint treated as a test case. One of the factors considered before agreeing to allow a financial firm to treat a complaint as a test case is whether there are important issues of law to be decided.

The financial firm must meet the AFCA requirements, in particular by agreeing to pay the complainants' legal fees incurred in the test case. AFCA does not provide any financial support, legal support or other resources to the running of a test case, beyond working with the parties to agree and approve the request for a test case and, once agreed, AFCA does not have any direct involvement in the running of the test case or any appeals.

## Where are the test cases, as outlined in the AFR article, up to?

### Business Interruption Insurance Test Case 1

In line with the AFCA Rules, an insurer made a request for a test case in relation to a complaint. The primary issue was whether references in a policy to a quarantinable disease under the Quarantine Act 1908 (repealed) should be construed as a reference to a listed human disease under the Biosecurity Act 2015.

AFCA and the Insurance Council of Australia (ICA) identified the particular issue as one of broader significance. Discussion identified other complaints that raised the same issue. The issue affected up to 60% of policies issued to small businesses containing business interruption. Treasury, ASIC, APRA, ACCC and industry were also involved in discussions over a potential test case.

AFCA agreed to allow a test case considering the application of infectious diseases cover in business interruption policies. On 13 August 2020, the Insurance Council of Australia commenced proceedings in the NSW Court of Appeal.

The case was heard by the Court of Appeal on 2 October 2020. In November 2020 the court unanimously ruled that reference to the Quarantine Act could not be considered reference to the Biosecurity Act

In December 2020 the insurers lodged an application with the High Court of Australia for special leave to appeal the judgment of the NSW Court of Appeal. The application for special leave is to be considered by the High Court on 25 June 2021.

## Business Interruption Insurance Test Case 2

AFCA received a request for a second test case from several insurers, in relation to providing guidance on the covering provisions found in many business interruption policies. The issues raised relate to the so called trigger clauses, such as prevention of access, government announcements, meaning of outbreak and radius.

Again, following discussion with industry, the ICA, Treasury, APRA and ASIC, AFCA agreed, under its Rules, that a second test case involving 9 complaints could be submitted to the Federal Court. The second test case will provide guidance on trigger clauses, including those that relate to the impact of government announcements on small business, closure and the proximity of an outbreak to a small business.

On 24 February 2021, insurers lodged this test case in the Federal Court. Allsop CJ ordered finalised statements of agreed facts be provided to the Federal Court by 18 June 2021 with a further case management date to be fixed by the Court after that date. It is anticipated the test case may be heard in September 2021.

We understand that separate proceedings have also been issued in matters outside AFCA's jurisdiction.

## How many business interruption complaints did AFCA receive and investigate in 2018-19, 2019-20, and 2020-21 financial years?

FY Period	Business Interruption Insurance Complaints Received **	Business Interruption Insurance Complaints Closed**
1/7/2020-8/6/2021	161 (120 COVID related)	32 (10 COVID related)
1/7/2019-30/6/2020	90 (42 COVID related)	57 (11 COVID related)
1/7/2018-30/6/2019*	46	46

\* Numbers for the financial year 1/07/2018-30/06/2019 include matters received by AFCA's predecessor scheme, FOS. AFCA started operations on 1/11/2018.

\*\* Business interruption insurance complaints received and closed include both COVID and non-COVID related complaints.

## How many business interruption complaints is AFCA currently investigating?

As at 8 June 2021, AFCA had 163 open business interruption insurance complaints, 142 of which were COVID related complaints.

## Progress of business interruption complaints

AFCA continues to accept business interruption insurance complaints. The investigation of complaints that may be affected by the outcome of the test cases is currently on hold, so AFCA can apply the courts' final decisions to those matters as required by its Rules.

Complaints that are not affected by the outcome of the test cases continue to be progressed in the usual way.

AFCA has communicated directly with relevant complainants and firms who have complaints with us, and which may be affected by the outcomes of the test cases. We have also developed a fact sheet to assist small businesses prepare relevant documents to support a claim for business interruption and the calculation of loss. Discussions have commenced with the ICA and the National Insurance Brokers Association to streamline claims once the courts' final decisions have been delivered.