

Coronavirus Policy Coverage

An Australian Perspective

Policy Coverage Concerns

In light of the recent outbreak of the Novel coronavirus (COVID-19), it is timely for organisations to review their cover particularly their Property Damage/Business Interruption (PD/BI) and Public Liability/Commercial General Liability (CGL), Travel and Workers' Compensation (WC) policies.

Below we discuss the policies most likely to apply to the current situation, barring any bespoke solutions that you may have arranged.

Property Damage/Business Interruption (PD/BI)

Many property policies will contain an "infectious disease extension" clause (the "ID Extension") that will specifically write coverage for outbreaks emanating from the "Insured Premises" into the policy.

Such clauses will add closure of your business, or premises, due to an "order from a competent public authority as the direct and sole result of "... any infectious or human contagious disease...", to the definition of "loss" for the purposes of business interruption cover.

An ID Extension usually requires that the competent public authority order be the cause of your business or premises being shut down.



In the absence of such an order, coverage may not be afforded. As such, documentation of any competent public authority order should be obtained and preserved for use in establishing your insurance claim.

Typically in Australia, for coverage to be triggered in policies, it requires that the infection, disease or virus for which the closure occurs (again via competent public authority order) is actually "present" at the location or upon the premises insured and in some instances within radius, such as 15kms for example. In such circumstances policyholders must be certain of their policy requirements and that they have adequate documentation from authorities of: 1) when a closure is ordered; and 2) that such a closure is the result of the authority finding that the virus is actually present in the vicinity, or location, where it is required for policy coverage.

Closing your business as a precaution, without a virus actually present, may be prudent management to ensure safety of customers and employees, but may not trigger cover under the policy.

Another complication is the measurement of trading losses as insurers will likely factor in the wider reduction in trade across the country/region and seek to adjust any trading losses suffered against the current wider economic downward trends post virus outbreak.

Lastly, many policies carry a further restriction that removes all cover for highly infectious disease, virus or any notifiable or quarantinable disease listed under the Australian Biosecurity Act 2015 (Cth).

Commercial General Liability (CGL)

Generally, CGL policies may respond to pandemic events if the insured has been negligent in, or found legally liable for, failing to protect other persons/third parties from infection.

The term 'legally liable' is very broad although it envisages civil liability rather than criminal liability. Legal liability can arise at common law or under statute or a contract with a third party. Most common law liabilities involve a negligent act or omission, that would need to be proved.

We consider the possibility of such liability to be fairly difficult to prove if the insured acts reasonably to safeguard persons for which they have a duty to protect.

However, such coverage could be triggered if liability is legally present or established. The wording of the coverage/operative clause under these policies typically read (in summary) as follows:

Insurers will pay to or on behalf of the Insured all sums that the insured becomes legally liable for Compensation in accordance with the law of any country or assumed under contract or agreement for Personal Injury or Property Damage.

However some CGL policies contain a general exclusion for liability assumed under contract. Coverage is further qualified by:

- first happening during the Period of Insurance;
- within the Territorial limits;
- in connection with the Insured's Business or Products.

As can be seen from the coverage/operative clause, "legal liability" is necessary for this coverage to be triggered. If there is liability, then the policy will respond subject to the Policy's limits any other terms, conditions and exclusions.

A CGL policy does not typically include an infectious disease exclusion, however, policyholders should check their policies for any deviation from this norm, particularly the more bespoke and manuscript wordings.

That being said, the goal for all insureds should be to minimise their potential liability by taking reasonable precautions to protect customers, employees and third parties, thereby reducing the risk of a Personal Injury claim.

Most CGL wordings will impose obligations on the Insured, which will typically be referred to as either 'Insured's Duties' or 'Reasonable Precautions' (usually be found within the Conditions section of the policy). Such obligations may require insureds to take all reasonable steps, and at their own expense, to prevent a Personal Injury, caused by the spread of disease. Failure to do so could prejudice a claim.

Accordingly, it is important for insureds to respond appropriately to the risks after consulting with, for example, advice provided by the relevant country's Department of Health, and to review policy coverage as set out above in consultation with their insurance advisor.

Travel

One consequence of the coronavirus (COVID-19) outbreak has been the mass disruption to overseas travel. The situation remains fluid and is subject to change with little or short notice.

In Australia the coronavirus was declared a listed disease under the Biosecurity Act 2015 on 21 January 2020 and on 11 March 2020, the World Health Organisation (WHO) declared the coronavirus outbreak a pandemic. Many insurers classified the coronavirus outbreak as a 'known event' between 21-31 January 2020 and, in general, only unforeseeable events are intended to be covered under an insurance policy.

The Australian Government - Department of Foreign Affairs and Trade (DFAT), is monitoring closely the coronavirus (COVID-19) outbreak and its implications for overseas travel. As noted on its "Smartraveller" website, DFAT is keeping its travel advisories under close review in consultation with the Chief Medical Officer, the Australian Health Protection Principal Committee and its network of overseas embassies and consulates. The DFAT travel advisories for each country are considered by insurers in determining whether cover applies for any claim associated with the COVID-19 outbreak i.e. whether travel has been undertaken in accordance with DFAT travel advisories.

Other factors insurers may consider include the type of expense incurred (e.g. medical, loss of deposits, cancellation expenses etc.), the date travel and accommodation was booked and whether the insured person has conducted their

due diligence into any known entry restrictions, quarantine restrictions etc. that were in place of booking their travel arrangements. It is also critical an insured person pursue any other avenues available for recovery of lost deposits, cancellation or disruption expenses.

Additionally, there are differences in Travel policy wordings and the particular cover terms, conditions, limits and exclusions of each policy must be considered. The general approach adopted by individual insurers in relation to any claim may also vary.

For DFAT travel advisories and updates on the coronavirus go to the Australian Department of Foreign Affairs and Trade website www.smartraveller.gov.au

Workers' Compensation (WC)

WC coverage is another avenue where coverage could be afforded for losses arising as a result of the virus. Coverage under WC can be broad and Marsh would expect that, if tested courts will endeavour to find coverage where an employee, through no fault of their own, was exposed to the coronavirus at work in a demonstrable way. Again, the exposure would have to take place in an employment setting (as per local regulation definitions). Conversely, if an employee contracts the virus as a result of exposure outside an employment setting, WC coverage may not be available. Again, documentation of any infectious event, or exposure at work, would be prudent to help ensure that the employee receives medical care and compensation through your WC policy.

Find out more

From an insurance perspective, it is imperative that organisations conduct a detailed review of the terms, conditions and exclusions of their insurance policies so that they are familiar with the extent of coverage that may apply to this outbreak.

For more information about insurance coverage or other resiliency solutions from Marsh, please contact your local Marsh representative.

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