# 2nd COVID-19 Business Interruption Test Case – Update following Special Leave Application Hearing

This document provides an update on the judgment delivered by the Full Court of the Federal Court of Australia in Swiss Re International SE v LCA Marrickville Pty Limited [2022] FCAFC 17, being the Second COVID-19 business interruption Test Case.

On 14 October 2022, the High Court of Australia rejected the Special Leave to Appeal application that had been filed in the Second Test Case. This concludes the Second Test Case process.

## Background

The Second Test Case concerned common policy wordings in business interruption policies and sought judicial guidance on the application of those terms. The Second Test Case was heard by Justice Jagot at the Federal Court and involved ten matters. Five of those matters were subsequently appealed and heard by the Full Court of the Federal Court, with the appeal judgment delivered on 21 February 2022. The Appeal Judgment substantially upheld the findings at first instance, which favoured the arguments of insurers in four of the five matters. In those four matters, the Full Court found that there was no cover under the Policy and that Insurers did not owe any indemnity payments to Insureds.

Two policyholders and an insurer filed applications for special leave to appeal to the High Court of Australia on 21 March 2021. Star Entertainment Group Limited also filed a separate application for leave to appeal in a COVID-19 insurance claim that did not form part of the test case process. All four applications for special leave were rejected at the same hearing on 14 October 2022.

## Implications of the Second Test Case Judgment

Now that special leave to appeal has been refused, the Second Test Case process is concluded. Consequently, the appeal judgments are now final judgments and cannot be appealed.

The appeal judgments provide important judicial guidance for the application of common business interruption policy wordings, impacting various sectors and locations within Australia. Our previous press release in respect of the key findings can be accessed here.

This finality of the Second Test Case process will allow us to assess individual COVID-19 related business interruption claims fairly and efficiently and in a consistent manner across the insurance industry.

## Next Steps

AXA XL will now proceed to assess and make determinations in relation to those claims that remain open, having regard to the judgments delivered in the Second Test Case. AXA XL will provide individual updates to policyholders on relevant next steps in due course.

The availability of cover will ultimately depend on the specific policy wording issued to individual insureds, and their own factual circumstances.

Any questions about the Second Test Case can be directed to your broker or to our individual Claims Teams.

**XL Insurance Company SE, Australia Branch**
ABN 36 083 570 441
Angel Place, Level 28, 123 Pitt Street, Sydney NSW 2000, Australia

Telephone: +61 2 8270 1400  Fax: +61 2 8270 1799 axaxl.com