UPDATE ON COVID-19 BUSINESS INTERRUPTION INSURANCE CLAIMS – AUSTRALIAN TEST CASES

06 November 2020 | Australia
Legal Briefings – By **Mark Darwin, Guy Narburgh and Travis Gooding**

In previous editions of Catalyst (here and here), we explained what was happening in the UK test case on business interruption insurance cover for financial losses associated with Covid-19 and the actions taken by authorities in response to Covid-19, which was largely resolved favourably to policyholders but is being appealed.

This week we consider how the UK decision might impact the outcome of Australian policyholders' claims and explain the 3 test cases being run in Australia.

UPDATE ON THE UK TEST CASE

The appeal to the UK Supreme Court (its highest court) will be heard via video link over 4 days commencing Monday 16 November 2020. Five Justices will hear the case – interestingly (and ominously) 2 of the 5 Justices decided the *Orient Express Hotels* (Hurricane Katrina) case (**OEH**) case – Lord Leggat when he was an arbitrator and Lord Hamblen who affirmed the appeal from the arbitrator's decision when he was on the (lower) High Court.

It should also be noted that some policy wordings are not being appealed – the FCA has released a table summarising the status of each of the wordings (here with a list of the wordings here).

IS THE UK DECISION BINDING ON AUSTRALIAN COURTS?

No, but English decisions (particularly once the UK Supreme Court has heard and delivered judgment in the appeal) are persuasive in Australian courts.

However, at least 2 of the insurers in the UK test case also operate in Australia – QBE and Zurich – and as part of their participation in the test case they agreed to be bound by that decision. It would therefore be curious if those companies would not consider themselves bound by the UK decision in other jurisdictions, including their Australian operations, even though they might reserve the right to argue that the widespread nature of the disease in the UK could mean that different outcomes might arise on the facts when applied to claims in Australia.

Most significantly, and beyond Covid-19 related claims, will be the Australian courts' response to the findings in relation to the application of the "trends clause" (the OEH case). The High Court found that OEH was wrongly decided, and that when assessing the policyholder's claim in relation to the hypothetical results it would have achieved '*but for the Damage*' we should assume not only that the *insured Damage* did not occur but also that the *insured peril* which caused that Damage did not occur. If these findings are upheld on appeal and followed by insurers in Australia, it could have beneficial implications for policyholders' claims arising from perils such as bushfires, cyclones, floods and earthquakes which have been adjusted downwards by insurers based on the OEH principle applying to the trends clause.

INSURANCE COUNCIL OF AUSTRALIA TEST CASE

Unlike the UK regulator, the Australian FCA is the adjudicator of insurance disputes in Australia lodged by policyholders, and does not have the power nor the legislative option to bring a test case itself. The ICA therefore worked with the AFCA to identify and fund a test case involving claims by 2 policyholders whose policies include cover for business interruption (BI) losses arising from infectious diseases at or with a vicinity of their premises but which exclude diseases notifiable "*under the Quarantine Act 1908 and subsequent amendments*".

Covid-19 was notified under the *Biosecurity Act 2015*, which replaced the *Quarantine Act* several years ago. Most policies have been updated to refer to the *Biosecurity Act*, but many apparently still refer to the "*Quarantine Act 1908 and subsequent amendments*". The key issue in the ICA test case is whether policies which still refer to the *Quarantine Act* – which was repealed and replaced not amended - should be interpreted as an intention to include its replacement legislation, namely the *Biosecurity Act*. If so, then at least claims based on the disease extension are probably excluded.

The ICA test case commenced was heard by a special sitting of the NSW Court of Appeal on 2 October 2020. Judgment has been reserved and we understand a decision is expected within weeks, following which both parties will have 28 days to decide whether it wishes to apply to the High Court for special leave to appeal.

It is hard to know how far reaching the outcome of this test case will be for Australian policyholders, regardless of who wins or loses. There are 2 reasons for that.

First, the success of the actions taken by authorities to limit the spread of Covid-19 in Australia means that, unlike the UK (with the exception of Victoria), not many Australian premises had Covid-19 on or within a relevant vicinity of their premises. That may mean that many policyholders may not even get to first base on triggering a claim based on the "disease extension", meaning arguments about the scope of the 'Quarantine Act' exclusion to that extension are only of academic relevance. In Australia, most of the BI losses have been caused not by the disease itself but by the **actions taken by authorities** to minimise the spread of the disease, such as ordering the closure of some business and placing restrictions on gatherings and the movement of the population.

Second, the *Biosecurity Act* exclusion (and if it applies the *Quarantine Act* exclusion) is in many policies only an exclusion to the disease extension - it is not (at least not explicitly) a general exclusion applying to other extensions of the coverage under which claims might be lodged (such as the extension for losses caused by the action taken by authorities). Whether the *Biosecurity Act* exclusion is relevant evidence of an intention which can apply more widely to the interpretation of other non-damage extensions will be tested in the Star City Casino claim.

STAR CITY CASINO CLAIM

The second 'test case' presently filed before the Courts in Australia deals with what we believe will be the more relevant non-damage trigger for the Australian market – namely BI cover for losses caused by the action taken by authorities to prevent the spread of the disease (the civil authorities extension).

It involves a claim by Star City Casino, which was one of the categories of businesses that was required to close under health regulations legislated as part of the national cabinet's agreed response to the threat presented by Covid-19. The Star policy contains the following civil authorities extension:[1]

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 conflation or other catastrophe"

The Star policy also contains the aforementioned infectious disease extension (but has been updated to exclude diseases notifiable under the *Biosecurity Act*, so the *Quarantine Act* point is not relevant). However, Star does not rely on the 'disease' extension for its claim, and argues that the *Biosecurity Act* exclusion to the 'disease' extension is not a general exclusion and so does not impact its claim under the 'civil authorities' extension.

Star's insurers (led by Chubb) have denied the claim alleging that in summary:

a. The purpose of the clause is to extend the meaning of 'Damage' and any loss covered by the clause must therefore be physical damage to be consistent with the meaning of Damage in the rest of the Policy;

b. In any event, Covid-19 is not an "other catastrophe" within the meaning of the clause (as they say it is limited to natural catastrophe and matters that were known to the parties at the commencement of the policy); and

c. The intent of the policy is not to cover pandemics, as exhibited by the *Biosecurity Act* exclusion in the 'disease extension'. They argue that it would be absurd to grant cover for the impact of pandemics under one extension when it is specifically excluded under another extension. *Note that a similar 'wider intention' argument to (c) was rejected in the UK test case, but arguments (a) and (b) were not dealt with in the UK test case.*

The Star case is being managed by Chief Justice Allsop on the Federal Court insurance list, and is presently progressing through the interlocutory stages to refine the issues to be heard.

Insurers had previous objected to the proceedings, arguing that they lack utility (on the basis that the concise statement did not demonstrate loss or causation). Since that time the applicant has amended its concise statement to provide more details of the nature of the loss and has also proposed a number of separate questions to be heard 'in advance of other issues'. These are questions of construction relating to:

- the effect of the civil authorities extension on the business interruption coverage – i.e. what effect extending the word 'Damage' has on the section 2 coverage;

- the meaning of the word 'loss', in particular whether it applies only to physical loss and whether it includes economic loss, loss of access / use and loss of custom; and

- the meaning of 'other catastrophe' – i.e. whether it includes the pandemic.

No further documents in response to these proposed separate questions have yet been filed. There is a directions hearing scheduled for 18 November at which time orders may be made confirming the separate questions to be heard and the matter may be allocated a hearing date (presumably in Q1 of 2021).

MELBOURNE CAFÉ CLAIM

A third 'test case', also being managed by Chief Justice Allsop on the Federal Court insurance list, contains elements of both the ICA case and in some respects the Star case.

A Melbourne café located about 15km from the Melbourne CBD (Vanilla Lounge) filed a claim in July 2020 seeking loss as a result of the '*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*'. Unlike the Star case, the closure by authorities, in this policy, needs to be a result of the disease within a radius of the premises, but like the ICA case the policy includes the *Biosecurity Act* exclusion.

It is currently anticipated that the Full Federal Court of Australia will hear a separate question on 27 November 2020 as to whether the *Biosecurity Act* exclusion represents a complete defence to the claim. The *Biosecurity Act* exclusion excludes *"claims directly or indirectly caused by or arising from 'any biosecurity emergency …declared under the Biosecurity Act 2015 (Cth) …irrespective of whether discovered at the premises or the breakout is elsewhere*'.

Important to the policyholder's argument is the fact that the *Biosecurity Act* is Commonwealth legislation, as we understand that the policyholder will be arguing that the exclusion does not apply because the interruption was caused by measures taken by the State government under State legislation, rather than pursuant to the *Biosecurity Act* or any other Commonwealth legislation. It is likely that by the time this test case is argued before the Full Federal Court, the NSW Court of Appeal judgment in the ICA case will have been delivered.

We will continue to monitor developments and keep updates coming as events unfold.

For further information and comment, please contact Mark Darwin on 0412 876 427 or mark.darwin@hsf.com or Guy Narburgh on 0447 393 645 or guy.narburgh@hsf.com

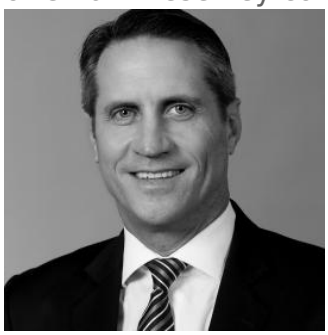
ENDNOTES

1. Note that Section 2 of the industry standard ISR Policy typically covers consequential business interruption loss arising from physical loss destruction or damage to insured

property (defined as “Damage”) covered under Section 1 of the Policy.

KEY CONTACTS

If you have any questions, or would like to know how this might affect your business, phone, or email these key contacts.



MARK DARWIN
PARTNER, BRISBANE

+61 7 3258 6632
Mark.Darwin@hsf.com

GUY NARBURGH
SPECIAL COUNSEL, SYDNEY
+61 2 9322 4473
Guy.Narburgh@hsf.com

LEGAL NOTICE