HERBERT SMITH FREEHILLS

THE BIG RED BASH FAILS TO RECOVER UNDER EVENT CANCELLATION INSURANCE FOLLOWING COVID-19 RELATED CANCELLATION

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Legal Briefings – By **Mark Darwin and Travis Gooding**

The Federal Court of Australia has upheld the denial of an event cancellation insurance claim based on a communicable disease exclusion which was held to apply, despite there being no directive to the festival itself and no sign of COVID-19 in the vicinity of the festival venue itself.

Communicable disease exclusions have become industry standard since the beginning of COVID-19 and the realisation by the insurance industry of its potential exposure and the need to expressly exclude claims arising from a pandemic. This decision provides guidance on the interpretation of such clauses and progresses the growing body of Australian authorities relating to COVID-19 business interruption insurance claims.

BACKGROUND – THE BIG RED BASH

The policyholder runs an annual music festival, the Big Red Bash, at the Big Red Dune – a remote location west of Birdsville in Queensland. In 2020, the event was scheduled to occur in July and was expected to attract 10,000 attendees, the majority of whom would come from interstate.

On 3 April 2020, as the pandemic began to impact life as we know it, the policyholder announced that it had decided to cancel the event so as to '*focus on ensuring the health and safety of everyone involved in the event*'. The minutes recording the decision show that there were a variety of reasons for the cancellation including:

- health and safety risks associated with COVID-19 (for example that the available Queensland Ambulance service in the remote region would be insufficient for medical needs in the event there was an outbreak of the disease at the festival);
- operational risks, such as the limited available air travel service and concerns that there would be a high rate of attendees dropping out due to fear of contracting COVID-19;
- the concern that the Queensland Government's border closures, though expected to be lifted prior to the event, may be extended;
- local Councils had requested the cancellation of the event to protect the health of residents from visitors bringing COVID-19 to the area; and
- that there would be reputational damage to running the event during the pandemic.

The policyholder had obtained an 'Event Cancellation Insurance Policy'. It provided insurance for loss '*should any Insured Event(s) be necessarily Cancelled*'. However, the coverage was subject to the following exclusion:

This Insurance ***does not cover any loss directly or indirectly arising out of****, contributed by, or resulting from…*

[6.20] ***any communicable disease*** *or threat or fear of communicable disease (whether actual or perceived)* ***which leads to****:*

[6.20.1] ***the imposition of quarantine or restriction in movement*** *of people or animals* ***by any national or international body or agency****;*

[6.20.2] any travel advisory or warning being issued by a national or international body or agency. [emphasis added]

Insurers originally denied the claim on the basis that the insuring clause did not trigger the cover, and in any event that the exclusion applied. However, when challenged, the insurer only sought to argue that the exclusion applied.

The policyholder raised a number of arguments against the operation of the exclusion including:

- the disease itself caused the cancellation, not the '*imposition of quarantine or restriction in movement'* measures imposed by government; and
- the measures imposed by government were by State Governments, not 'national' or 'international' bodies or agencies.

DECISION OF THE FEDERAL COURT

Although not in issue, Allsop CJ directly concluded that the closure was a matter of necessity and that therefore the insuring clause was engaged. However, his Honour went on to hold that the exclusion clause did apply.

THE GOVERNMENT RESTRICTIONS DID NOT NEED TO BE IMPOSED ON THE FESTIVAL

His Honour held that the policyholder had misconstrued the exclusion clause as requiring the following sequence of events:

- a communicable disease;
- which causes either 6.20.1 or 6.20.2 – e.g. causing the imposition of quarantine or restriction in movement by any national or international body; and
- which causes loss.

Allsop CJ held that this sequence was flawed because it inverted the order of the clause. What the clause actually required was that:

- the loss directly or indirectly arise out of a communicable disease; and

the communicable disease be of a certain nature or character – namely, be a disease which leads to either 6.20.1 or 6.20.2. For example, a disease which leads to the imposition of quarantine or restriction in movement by any national or international body.

It was not necessary that there be a causal link between the loss and the imposition of quarantine or restriction in movement. That is, the restriction need not be imposed on the policyholder or the event itself – just that the communicable disease was serious enough that measures were imposed as a result of it.

Furthermore, even if that were not the case, all that the exclusion required is that the excluded peril 'contributed to' the loss. While this would require a 'material contribution', his Honour considered that the State border closures and travel restrictions had materially contributed to the decision to cancel the event. Therefore, the exclusion would have applied anyway.

THE RESTRICTIONS ETC WERE IMPOSED BY A NATIONAL BODY

His Honour observed that:

- the restrictions, advisories and warnings specified in the exclusion did not need to have force of law for the exclusion to apply; and
- the word 'national' was used in contrast to 'international' (i.e. implying a domestic body – as opposed to distinguishing between State and Federal bodies).

Although the National Cabinet was a co-ordination of governments giving effect to its decisions by way of State Government power, the Court held that this co-ordinated effort satisfied the expression 'national body or agency' when contrasted to 'international body or agency'. Advice from the National Cabinet was therefore that of a national body. At least some of the travel advisories and restrictions on movements were the product of decisions made by the National Cabinet and therefore the requirements of the exclusion were satisfied.

KEY TAKEAWAYS FOR POLICYHOLDERS

This decision progresses the growing body of Australian authorities relating to business interruption insurance claims resulting from COVID-19. In particular, the findings that (at least in this policy):

- the restrictions did not need to have force of law (in this case, the restrictions were part of an exclusion but in some policies this reasoning could assist in triggering cover under prevention of access clauses in business interruption insurance cover); and
- the National Cabinet was a 'national body'.

While useful for some assistance in interpreting policies, the decision is unlikely to resolve many (if any) of the business interruption claims currently being progressed before the courts. Most of those claims will have been progressed because the policies in question do not contain a communicable disease exclusion. Instead these claims continue to await the outcome of the Second ICA Test case (see our summary of that case here).

However, since the emergence of the pandemic, communicable disease exclusions have become industry standard and are now applied to most business interruption policies. The case therefore provides insight into the operation of such exclusions and the scope of coverage in existing policies. In particular, the case highlights the importance of understanding what risks are excluded – whether it is only loss occasioned by government action or all forms of loss caused by COVID-19.

In addition, the decision also provides useful guidance on the meaning of the broad causal language used in the exclusion '*directly or indirectly arising out of, contributed by, or resulting from'.* This phrase is becoming increasingly common in a range of exclusion clauses. For example, the LMA5400, which excludes certain cyber related risks and is increasingly added as endorsements to Industrial Special Risks policies, also uses this language. By accepting that this language only required that there be a 'material contribution', Allsop CJ both:

- understandably acknowledged that this phrase applies a lower standard than the 'proximate cause' test; but
- qualified the scope of the language by requiring, despite the apparently wide scope of the nexus required, that any contribution to the loss must still be 'material'.

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