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COVID-19 INSURANCE UPDATE: ANOTHER WIN FOR AUSTRALIAN POLICYHOLDERS

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

Insurers have long maintained that pandemics are not covered under business interruption policies. Can the industry hold the line?

Policyholders have had another win in the ongoing test cases relating to insurance coverage for COVID-19 related business interruption.

Specifically, on Friday 25 June 2021, the High Court rejected insurers' application for special leave to appeal from the 5-0 decision of the NSW Court of Appeal in the first of the test cases run by the Insurance Council of Australia (on the meaning of the exclusion for diseases notified under the "*Quarantine Act 1908 (Cth) and subsequent amendments*").

THE FIRST ICA TEST CASE – RESOLVED

In the First ICA Test Case, insurers argued that exclusions to the disease extension exclude claims relating to diseases notified under the "*Quarantine Act 1908* (Cth) and subsequent amendments" should be read as including diseases listed under its replacement legislation, the *Biosecurity Act*. The *Quarantine Act*, which lists a number of diseases such as SARS, was repealed in 2015 and replaced by the *Biosecurity Act*, which introduced a similar but not identical regime for diseases to be "listed human diseases". COVID-19 is listed under the *Biosecurity Act*, but some policies had not been updated and still refer to the *Quarantine Act*.

In November 2020, a specially convened sitting of the NSW Court of Appeal unanimously held that insurers could not re-write the *Quarantine Act* exclusion as if it referred to the *Biosecurity Act*, as the later Act was a replacement, not an amendment to the earlier Act. Our summary of that decision is available here.

Insurers sought special leave to appeal this issue to the High Court, which was refused on 25 June 2021. Specifically, the High Court concluded that there were not sufficient prospects of success of any appeal such as to warrant an appeal to the High Court. This decision exhausts the insurers' appeal rights and brings the First ICA Test Case to an end.

That is not however the end of the matter for Victorian policyholders as QBE has filed a new case seeking to argue the point again based on a deeming provision in Victorian legislation (see Section 2 below).

Furthermore, a number of causation and other issues are to be decided in the Second ICA Test Case which is due to be heard in August 2021 (see Section 3 below).

QBE V EDUCATIONAL WORLD TRAVEL (IN LIQ) - *QUARANTINE ACT* EXCLUSION IN VICTORIA – ONGOING

QBE has commenced a separate Federal Court case (*QBE v David Coyne in his capacity as liquidator of Educational World Travel Pty Ltd (in liquidation)*) to test whether s61A of the *Property Law Act 1958* (Vic) changes the outcome of the First ICA Test Case. That section states:

> *Where an Act or a provision of an Act is repealed and re-enacted (with or without modification) then, unless the contrary intention expressly appears, any reference in any deed, contract, will, order or other instrument to the repealed Act or provision shall be construed as a reference to the re-enacted Act or provision.*

If QBE are successful, a different position may apply in Victoria to the rest of Australia for policies which exclude diseases notified under the *Quarantine Act*.

We understand that QBE are seeking to align the timetable of the matter with the Second ICA Test Case proposed by the ICA so that it can be heard with those proceedings.

THE SECOND ICA TEST CASE – ONGOING

Although the resolution of the First ICA Test Case is a positive step for policyholders, it does not resolve the ongoing dispute in relation claims of this kind. The First ICA Test Case had a very narrow scope – simply testing the operation of a single exclusion.

Following the decision of the NSW Court of Appeal, the ICA consulted its members (insurers) and AFCA to identify what they state to be 9 representative claims which will be run as test cases to seek the court's guidance on how the policy might respond on a range of issues.

The representative claims include:

a. A Queensland (Townsville) bar / restaurant affected by directions requiring social distancing and the closure of all but take-away services.

b. A Queensland gym / fitness health centre affected by social distancing requirements and business closure directions.

c. A Queensland dry-cleaning business affected by non-essential business closures, social distancing measures and restrictions on gathering sizes.

d. A NSW cosmetic treatment service provider in a shopping centre affected by a direction to shutdown beauty salons, then permitted to sell goods and vouchers (but not supply services), then restricted to a limited number of people in the store.

e. A NSW dentist affected by orders relating to social gatherings / restrictions on movement, and by recommendations from dental associations recommending modifications to dental practice to manage COVID-19.

f. A Victorian landlord suffering a 40% decrease in rent due to amendments to regulations on commercial leases.

g. A Victorian travel agent which had to cancel its business and refund clients due to travel restrictions.

h. A Victorian Gym affected by non-essential business closures, prohibited gathering directions, restricted activity directions and stay at home directions.

i. A South Australian stage and costume shop affected by is customers (theatre companies) being required to shut and also affected by stay at home directions.

Together these cases will test a range of issues in relation to (broadly) three kinds of clauses providing coverage:

1. Disease wordings: which provide cover for business interruption in consequence of an “outbreak” of a notifiable disease within a specified radius of the insured premises.

2. Prevention of access / Action by Authority wordings: which provide cover where a government action has in some way prevented or hindered access to the insured premises or premises in the vicinity.

3. Hybrid wordings: which provide cover where a government action has in some way prevented or hindered access to the insured premises or premises in the vicinity due to an outbreak of a disease.

We understand that a final agreed list of issues is being finalised, but some of the key issues being considered include:

a. what constitutes an "action" by an authority?

b. is there a difference between coverage for an "outbreak" than from coverage for an "occurrence"? The UK ICA Test Case considered policies using the term "occurrence", whereas the term in "outbreak" is more common in Australia. Insurers contend this makes a difference due to the lower number of occurrences of the disease in Australia (which they will argue did not reach outbreak levels, or at least not for all policyholders).

c. where government action is required – does it matter that the action by the authority was responding to the broader (global) pandemic, not a specific local outbreak within the vicinity of the insured premises?

d. how do considerations of causation and the trends and other circumstances clause operate – i.e. should the claimants loss be reduced to reflect the broader effect of the pandemic or (as the UK FCA test case decided) are concurrent causes of loss to be disregarded as 'trends or other circumstances' when considering adjustments in the appropriate counterfactual?

Insurers' position on the last of these issues demonstrates how fiercely insurers are fighting liability for claims of this kind. Namely, insurers maintain that the broader effects of the pandemic need to be taking into account when calculating business interruption – i.e. a claim is limited to the revenue a business could have achieved in a pandemic stricken world where all businesses other than the policyholder were locked down while the policyholder was disease free and open for business.

Historically, the test of "an undamaged hotel in a damaged world" was the position in the insurance industry, based on the 2010 UK High Court decision of *Orient Express Hotels* (the Hurricane Katrina case). However this authority was closely considered and expressly (and unanimously) overturned by the Supreme Court as wrong in the UK ICA Test case, including by the 2 judges who had originally decided the OEH case. Our summary of that decision is available here). While there may be factual differences which insurers in Australia could seek to rely upon to distinguish the outcomes of claims here, it is seems unlikely that insurers here will be able to persuade an Australian court to reject the decision of the UK's highest court and instead follow the decision of a lesser court that has been expressly rejected by the very judges who decided that case.

The Second ICA Test is being expedited, with the intention that it will be heard by the Federal Court in first instance in August 2021 and any appeal to the Full Federal Court to be heard in November 2021. Following this either party would have the ability to apply for special leave to appeal to the High Court.

STAR CITY CASINO CLAIM – ONGOING, JUDGMENT RESERVED

In April 2021, the Federal Court considered a number of legal issues relating to a claim based on the following clause:

> *"....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 case considers a number of issues in relation to this clause, in particular whether it only applies to physical losses (i.e. not COVID-19) and whether COVID-19 is an 'other catastrophe' for the purpose of the clause.

The case is limited to considering issues relating to whether the clause is triggered. As a result it does not consider the issues raised in the Second ICA Test Case. If Star succeeds at first instance, some of the issues in the Second ICA Test Case will be relevant to claims based on this clause (in particular the application of the *OEH* decision).

The parties are currently awaiting judgment, though there is an obvious likelihood that the unsuccessful party could appeal from the first instance decision to the Full Federal Court. The unsuccessful party on that appeal could then apply for special leave to appeal to the High Court.

WHAT IS NEXT

In short, although there have been a number of wins for policyholders, there are still a number of test cases which will need to be decided in favour of policyholders before insurer are likely to meaningfully engage with claims. With appeals still to be argued and judgements reserved, we believe it is unlikely that there will be any significant movement by insurers this calendar year.

However, that does not mean that policyholders should be idle. There are steps that they should be taking now in order to protect their interest and position themselves for any future claim they wish to make. We are happy to discuss these steps and how policyholders can best prepare for their claim.

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