COVID-19: (AUSTRALIA) COVID-19 BUSINESS INTERRUPTION CLAIMS MAY NOT BE SUBJECT TO PANDEMIC EXCLUSIONS

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SUMMARY

There was bad news for insurers seeking to exclude business interruption claims arising from COVID-19 last week when the NSW Court of Appeal held on 18 November 2020 that certain policies, with outdated exclusion clauses, may respond.

In a test case before the Court, two insurers sought orders that their policies be interpreted to exclude coverage for claims arising from COVID-19.

The policies excluded coverage for losses arising from circumstances involving diseases declared as "quarantinable diseases" under the *Quarantine Act 1908* (Cth) which had been repealed in 2016 (Repealed Act). The Repealed Act had been replaced by the *Biosecurity Act 2015* (Cth) an Act with a different name but the same substantive purpose and function (New Act). The relevant exclusion in the policies referred only the Repealed Act and not the New Act.

The insurers asserted that the reference to the Repealed Act should be read as including a reference to the New Act. The Court did not agree, and instead made declarations that:

- COVID-19 is not a quarantinable disease under the Repealed Act or subsequent amendments
- the exclusion under the relevant policies had not been enlivened.

IMPLICATIONS

As many insurance policies are worded similarly, the decision is likely to have a significant impact on insurers with a presence in the Australian insurance market.

The decision is being considered by the Insurance Council of Australia and is likely to be appealed to the High Court of Australia.

The potential impact of the decision can already be seen in the actions taken by insurers since the decision was handed down in November 2020. The most notable being IAG's announcement that it is aiming to raise AU$750 million to prepare for the potential claims arising from the impact of COVID-19.

Considered more broadly, the decision provides:

- a warning to insurers to ensure that policy wording reflects the intention of the insurer and/or that any specific references made in a policy to legislation or otherwise must be reviewed and updated on a regular basis to avoid catastrophic and costly consequences
- a notice to insured businesses to check their policy wording.

BACKGROUND FACTS

A tourist park business in Tamworth NSW and a health and nutrition store in Maribyrnong Victoria (the Insured) held business interruption insurance policies (the Policies) with HDI Global and Hollard Insurance respectively (the Insurers) for the periods February 2020 to February 2021, and May 2019 to May 2020 respectively.

The Policies:

- provided cover for interruption or interference caused by outbreaks of certain infectious diseases within a 20km radius of the Insured's premises
- were subject to an exclusion by which, inter alia, cover did not apply to any circumstances involving diseases declared to be quarantinable diseases under the Australian Quarantine Act 1908 (Cth) (Quarantine Act) and subsequent amendments (Exclusion).

The Insurers denied the Insured's claims pursuant to the Exclusion.

COVID-19 had not been declared a "quarantinable disease" under the Quarantine Act as the Quarantine Act was repealed in June 2016, at the same time that the *Biosecurity Act 2015* (Cth) (Biosecurity Act) came into force.

The Biosecurity Act did not provide for declarations of "quarantinable diseases" by the Governor-General of Australia, instead the Director of Biosecurity was able to determine a disease as a "listed human disease". COVID-19 has been a listed human disease under the Biosecurity Act since 21 January 2020.

ISSUES

On the proper construction of the respective Exclusion clauses, should the words "declared to be a quarantinable disease under the Quarantine Act and subsequent amendments" be read as including "determined to be listed human diseases under the Biosecurity Act" on the basis that:

- the Biosecurity Act constituted a "subsequent amendment" to the Quarantine Act
  or
- the references to the Quarantine Act were obvious mistakes which should be construed as if they were included the Biosecurity Act.

JUDGMENT

Was the Biosecurity Act a "subsequent amendment" to the Quarantine Act?

The Insurers argued that the objective intention of the parties was that "subsequent amendments" should be interpreted broadly to encompass changes that amount to a repeal and replacement of the Quarantine Act with the Biosecurity Act, being an act of the same substantive purpose and function. The Court rejected this assertion.

The Court considered that:

- the word "amendments" when used with reference to a specific Act refers to the legislative changes made to that Act (not a replacement act of another name)
- while the Insurer's perspective was that the purpose of the Exclusion was to exclude diseases which are sufficiently serious to attract a public health response, the insurer had not expressed the exclusion in that way
- to suggest the words "and subsequent amendments" include the enactment of new act of another name is many steps too far.

Were the references to the Quarantine Act obvious mistakes capable of being construed as including reference to the Biosecurity Act?

The Insurers argued that it is absurd to interpret the reference to the Quarantine Act as a reference to that Act when it has been repealed as the parties could not have intended the exclusion to operate by reference to an act that no longer exists.

Conversely, the insureds asserted that the repeal of the Quarantine Act did not affect the list of diseases declared as quarantinable diseases under that act prior to its repeal, and the Exclusion is still able to operate by reference to that list.

The Court held that:

- while over time reference to a list of diseases declared quarantinable diseases under a repealed act would fall short of its apparent purpose (being to exclude liability for losses suffered in connection with serious communicable diseases) and may therefore be regarded as sub-optimal or uncommercial it could hardly be said to be absurd
- the relevant principle in correcting a mistake is concerned only with correcting the imperfect expression of the parties' objective intention
- the parties could not have objectively intended to include reference to an Act they did not know about at the relevant time
- the Court has no power to correct an agreement to reflect what might have been agreed, or even what would have been agreed, had the parties not assumed that the Quarantine Act remained in force.

In view of the above, the Court rejected the Insurer's argument that the reference to the Quarantine Act could be corrected by construction.

FURTHER INFORMATION

If your business has been impacted by COVID-19, you may be entitled to claim under your business interruption policy. Please contact us if you have any questions about your insurance policy and/or your rights to indemnity.

KEY CONTACTS

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