HALL CHADWICK
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COVID-19 AND BUSINESS INTERRUPTION CLAIMS

What happened?

In November 2020, Insurance Australia Group Limited (**IAG:AU**) announced it would raise up to $750 million in new equity capital. The move taken by IAG was in response to the Supreme Court of New South Wales Court of Appeal (**NSWCA**) 18 November judgment on a business interruption insurance test case.

In a unanimous decision, the NSWCA determined pandemic exclusions that refer to the Quarantine Act and subsequent amendments, rather than the Biosecurity Act, are not effective to exclude cover for business interruption losses associated with COVID-19.

Although the test case was decided by the NSWCA, the decision is relevant to all Australian claims, regardless which state a business is located.

Given the NSWCA's decision, IAG has notified the market that it intends to recognise a post-tax provision of $865 million and is taking action to strengthen its balance sheet via a fully underwritten institutional placement of $650 million and a non-underwritten share purchase plan to raise up to $100 million.

As a result, IAG has advised the market the post-tax provision of $865 million covers:

- All policies with wordings that include the Quarantine Act and without specific reference to the Biosecurity Act, which replaced the Quarantine Act
- All policies with prevention of access extensions used on certain broker platforms which reference the Biosecurity Act. Prevention of access clauses vary in terms but generally operate when actions of governments or other legal authorities cause business interruption by preventing or restricting access to premises.

In other recent developments, QBE Insurance Group Limited (**QBE:AU**) has moved to increase its provisions for COVID-19 losses from US$600 million to US$785 million. In explaining its move to the market, QBE cited the decision of the UK Supreme Court in respect of an appeal in a test case undertaken by the UK Financial Conduct Authority (**FCA**).

How did we get here and what are the test cases about?

Many business interruption policies sought to exclude cover for pandemics through a reference to "a quarantinable disease under the Quarantine Act 1908 and subsequent amendments", however, the Quarantine Act was repealed in 2015 and replaced by the Biosecurity Act.

In July 2020, insurers and the Australian Financial Complaints Authority (**AFCA**) agreed on a test case to determine whether references to the Quarantine Act in some business interruption policies excluded claims made as a result of the COVID-19 pandemic.

In November 2020, the NSWCA ruled in the test case that Quarantine Act references in policies did not exclude the two claims in the test case. Although the test case was decided by the NSWCA, the decision is relevant to all Australian claims, regardless which state a business is located.

The UK Supreme Court upheld the (UK) High Court's ruling in favour of policyholders with respect to one of QBE's notifiable disease policy wordings and reversed a ruling in favour of QBE with respect to the other two of QBE's three notifiable disease policy wordings examined.

Understandably, the verdict of the UK Supreme Court in the FCA test case has generated considerable reaction not just in the UK but across global insurance markets.

What happens next?

As part of the agreement to run a test case, the Australian insurers and AFCA agreed that the NSWCA's decision could be appealed. In December 2020, the Insurance Council of Australia (**ICA**) lodged an application with the High Court of Australia for special leave to appeal the NSWCA judgment.

If special leave to appeal the NSWCA decision is granted, the ICA will ask for the matter to be heard by the High Court of Australia as quickly as possible with an outcome expected in calendar year 2021.

If the High Court decides not to hear the appeal or does not allow the appeal, Quarantine Act references in policies written in the same terms as the policies considered in the first test case will not exclude insurers' liability.

How does it affect my business?

As has been noted, insurers are now making provisions worth billions of dollars in the expectation of compensating policyholders for losses by businesses in Australia.

For some businesses a business interruption claim could provide a lifeline, allowing them to trade beyond the coronavirus crisis.

Lodge a claim

The ICA has advised business interruption policyholders to lodge their claims even though the test case is still running. Further, the ICA notes that if a business interruption policy contains a Quarantine Act carve-out, insurers will await the final resolution of the test case before considering how the Quarantine Act carve-out will apply to claims. Once there is a final resolution of the test case, insurers will assess claims that contain a Quarantine Act carve-out on a case-by-case basis.

If the Quarantine Act carve-out does not exclude COVID-19

If the final resolution of the test case is that the Quarantine Act carve-out does not exclude COVID-19, then cover may potentially be available under an infectious diseases benefit for loss arising from COVID-19, subject to satisfaction of other policy trigger requirements and proof of loss. In these circumstances, insurers will probably need further information from claimants, including:

- Whether an outbreak of COVID-19 has occurred in the vicinity or a specified radius of the business
- How the business has been affected financially by COVID-19
- The cause of any financial loss to the business, and
- The details of the loss claimed.

Insurers will contact claimants to ask for the specific information that will have to be provided to substantiate any claim submitted.

If the Quarantine Act carve-out does exclude COVID-19

If the final resolution of the test case is that the Quarantine Act carve-out applies to COVID-19, then cover will not be available under an infectious diseases benefit for losses arising from COVID-19 where the policy contains a Quarantine Act carve-out. It will depend on the terms of each policy whether a business may have a claim under another part of the relevant policy.

A successful insurance claim requires solid evidence of how much the policyholder acutally lost.

What should we do about it?

- First, read the policy. If you are unsure about the coverage it provides have an independent adviser such as your accountant, lawyer or an insurance adviser take a look at your policy to see how best to frame your claim.
- Second, pay close attention to deadlines and filing requirements. Policies often require claims to be filed within a relatively short time after a loss. Often claims need to be submitted on a particular form, often with specific accompanying information and documents. Again, read the policy. Do exactly what your policy requires.
- Third, collate the documentary evidence to prove the amount of business lost as a result of the business interruption. Ideally, the collation of business records should happen during the period while the business suffers its losses, while memories and documentation are fresh, as opposed to being reconstructed many months after the fact. A successful insurance claim requires solid evidence of how much the policyholder actually lost.
- Fourth, work with someone who knows how the insurance system works and how insurers deal with claims. That can be a trusted adviser such as a lawyer, your Hall Chadwick engagement partner, the Hall Chadwick Forensic Accounting team, a consultant or an independent insurance advisor.

For more information or assistance with your application please contact us:

07 3212 2500 | general@hallchadwickqld.com.au | Level 4, 240 Queen Street, Brisbane, QLD, 4000