

FULL FEDERAL COURT COMMENTS ON OPERATION OF EXCLUSION CLAUSE TO VICTORIAN LOCKDOWN LOSSES

3 FEBRUARY 2021 | GENERAL INSURANCE

IN ISSUE

The applicant claimed indemnity from the respondent insurer for losses resulting from COVID-19 lockdowns in Victoria. The question posed to the Full Court of the Federal Court concerned the proper construction of an exclusion clause in circumstances where the exclusion referred to a declaration made under the Commonwealth's *Biosecurity Act 2015* (Cth) but the lockdowns were imposed by the Victorian State Government.

THE BACKGROUND

The applicant operated a café in Victoria, which was affected by State Government lockdowns imposed in response to the COVID-19 pandemic. It held a policy with the respondent insurer, which included cover for losses resulting from government-ordered closures arising from infectious or contagious human disease. The applicant sought indemnity for business interruption losses it claims it suffered following the lockdowns. It sought the determination of a separate question as to the operation of an exclusion in the policy. The exclusion removed from cover:

...any claim that is directly or indirectly caused by or arises from, or is in consequence of or contributed by...any biosecurity emergency or human biosecurity emergency declared under the Biosecurity Act 2015 (Cth)...

The applicant and respondent disagreed about the causal trigger to the exclusion. The respondent's primary contention was that the operation of the exclusion was triggered by the existence of a listed human disease the subject of a declaration under the *Biosecurity Act*, being COVID-19. The applicant argued the causal trigger in the exclusion was confined to the making of a declaration under the *Biosecurity Act*, being action taken by the Commonwealth whereas the business interruption losses it suffered were a result of Victoria's directions under State legislation.

The specific question posed to the Court was whether it was sufficient to exclude cover under the exclusion for the claim to have been caused by or have arisen from a human disease specified in a declaration under the *Biosecurity Act*.

THE DECISION AT TRIAL

The Court answered the specific question posed to it in the negative. It held that the exclusion was triggered by an emergency, and in particular, that the emergency must be serious enough to warrant a declaration as a biosecurity emergency or human biosecurity emergency under the *Biosecurity Act*. The reference to the *Biosecurity Act* in the exclusion limited the kind of emergency to which the exclusion might apply but did not confine the operation of the exclusion to losses arising from the Commonwealth declaration.

Accordingly, the policy excluded from cover any claim for loss arising from a government-ordered closure of the applicant's premises caused by the declared emergency. Whether the claim is caused by the declared emergency is a matter of fact to be answered in the circumstances of each particular case. The Court acknowledged the language of the exclusion permitted a remote causal relationship between the claim and the declared emergency. In obiter comments, the Court noted that the remote causal connection between the declared emergency and any governmental action could mean that once a declaration was made, it might be difficult to deny its causative impact on subsequent claims. It would not matter whether the government action was at State, Federal or local level.

In reaching its conclusion, the Court rejected the submissions made on behalf of both the applicant and the respondent as to their preferred constructions of the exclusion.

IMPLICATIONS FOR YOU

Ultimately, the Court adopted a construction of the exclusion closer to that contended on behalf of the respondent insurer. That construction acknowledges limitations to the extent of cover by way of exclusion clauses where the magnitude of the risk to the insurer could be very substantial and less capable of anticipation and pre-assessment by an insurer.

In determining the proper construction to be given to the exclusion, the Court emphasised:

- Giving primary consideration to the text of the policy, particularly the clause extending cover and the exclusion clause;
- Deriving the purpose of the document from the words used by the parties, rather than the intentions of the parties not founded in the policy nor supported by evidence at hearing;
- Adopting the ordinary meaning of the words used by the parties to the policy;
- Reading the exclusion as a whole, rather than fragmenting phrases within the exclusion.

[Rockment Pty Ltd t/a Vanilla lounge v AAI Limited t/a Vero Insurance \[2020\] FCAFC 228](#)

GET IN TOUCH





EWA CHOLINSKA
SENIOR ASSOCIATE

ewa.cholinska@bnlaw.com.au