

NOTICE OF FILING

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Details of Filing

Document Lodged: Concise Statement
File Number: NSD134/2021
File Title: INSURANCE AUSTRALIA LIMITED ABN 11 000 016 722 v THE
TAPHOUSE TOWNSVILLE PTY LTD ACN 603 252 482
Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF
AUSTRALIA



Sia Lagos

Dated: 26/02/2021 12:18:20 PM AEDT

Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

Concise Statement

No.



Federal Court of Australia
 District Registry: New South Wales
 Division: General

Insurance Australia Limited (ACN 000 016 722)

Applicant

The Taphouse Townsville Pty Ltd (ACN 603 252 482)

Respondent

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM*A.1 Summary*

1. The applicant trading as CGU Insurance (**CGU**) is the insurer of the respondent (**Taphouse**). Taphouse operates a bar and restaurant in Townsville, Queensland.
2. Taphouse made a claim on CGU for business interruption alleged to be due to the effect on Taphouse's business of the measures implemented by the Queensland Government to deal with the COVID-19 pandemic.
3. CGU has denied the claim. CGU has also received similar claims involving this form of policy wording. The proceeding is a test case as to the correctness of the bases upon which CGU has denied Taphouse's claim.

A.2 The Policy

4. The relevant policy is Business Insurance Policy 15T8202892 (the **Policy**). Section 2 of the Policy provides for Business Interruption Insurance which, relevantly, covers:
 - (a) loss that results from an interruption of Taphouse's business that is caused by any legal authority preventing or restricting access to Taphouse's premises or ordering the evacuation of the public as a result of damage to or threat of damage to

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property or persons within a 50-kilometre radius of Taphouse's premises (***Prevention of Access Extension***) (Extension 7 (Booklet, p. 23))

- (b) loss that results from an interruption of Taphouse's business that is caused by any legal authority closing or evacuating all or part of Taphouse's premises as a result of the outbreak of an infectious or contagious human disease occurring within a 20-kilometre radius of the premises, however there is no cover for "any disease declared to be a quarantinable disease under the *Quarantine Act 1908* (as amended)" irrespective of whether discovered at the location of Taphouse's premises, or out-breaking elsewhere (***Disease Extension***) (Extension 8 (Booklet, p. 23)).

5. The Policy also provides for the adjustment as necessary of various integers relevant to the quantification of any indemnity so that the figures thus adjusted represent, as nearly as may be reasonably practicable, the results that, but for the damage, would have been obtained during the relative period after the damage (definition of "adjustments" (Booklet, p. 19)).

A.3 *COVID-19 measures*

6. On 29 January 2020, under the *Public Health Act 2005* (Qld), the Queensland Minister for Health declared a public health emergency in relation to the coronavirus disease (**COVID-19**) for "all of Queensland". That declaration has subsequently been extended.
7. From March 2020, the Queensland Government introduced a series of measures to address the COVID-19 situation. On 19 March 2020, the Queensland Government introduced the *Non-essential Indoor Gatherings Direction* (Qld) which, relevantly, implemented social distancing requirements (including a four square metres per individual rule) for places such as social venues and pubs. On 23 March 2020, the Queensland Government further introduced the *Non-essential Business Closure Direction* (Qld) which, relevantly, required restaurants to close, with the exception of providing takeaway services and home delivery. These directives were later modified by further directives. The requirements and directives referred to in this paragraph are referred to in this concise statement as the **Queensland Government Measures**.
8. The stated aim of the Queensland Government Measures was to "assist in containing, or to respond to, the spread of COVID-19 within the community". At the time the Queensland Government Measures were first introduced in March 2020 there were 319 confirmed cases of COVID-19 in Queensland and 1 confirmed case of COVID-19 attributed to the

Townsville area.¹ There have since been 1300 confirmed cases in Queensland and 31 confirmed cases attributed to the Townsville area.²

A.4 *Taphouse's Claim*

9. When the Queensland Government Measures were introduced in March 2020, Taphouse made a claim under the Policy (the **Claim**).
10. It claimed it was entitled to an indemnity under its business interruption cover because it had experienced a reduction in trade due to the Queensland Government Measures. In particular, it stated that the 23 March 2020 direction had required it to close its dine-in restaurant and bar business, and limit or change its business activities to serving takeaway food, selling off-licence liquor and making home deliveries.
11. On 17 June 2020, CGU declined the Claim. Taphouse does not accept CGU's denial of the Claim.

A.5 *Policy wording disputes*

12. CGU contends that neither extension applies for one or more of the following reasons.
13. Prevention of Access Extension
 - (a) The extension does not respond to an interruption caused by a legal authority preventing or restricting access as a result of an outbreak of an infectious or contagious human disease, as such events are addressed by the Disease Extension.
 - (b) The Queensland Government Measures did not constitute a legal authority preventing or restricting access to Taphouse's premises.
 - (c) The Queensland Government Measures were not "a result of damage to or threat of damage to property or persons within a 50-kilometre radius" of Taphouse's premises.

¹ Data as at 23 March 2020 as reported by Queensland Health: <https://www.health.qld.gov.au/news-events/doh-media-releases/releases/queensland-novel-coronavirus-covid-19-update8>.

² Data as at 22 January 2021 as reported by Queensland Health. Cumulative COVID-19 cases are recorded by Queensland Health: <https://www.qld.gov.au/health/conditions/health-alerts/coronavirus-covid-19/current-status/statistics#cumulative>

14. Disease Extension

- (a) COVID-19 falls within the exclusion for “any disease declared to be a quarantinable disease under the *Quarantine Act 1908* (as amended)”.³
- (b) The Queensland Government Measures did not constitute a legal authority closing or evacuating all or part of Taphouse’s premises.
- (c) The Queensland Government Measures were not the result of an “outbreak of [COVID-19] occurring within a 20-kilometre radius” of Taphouse’s premises.

15. Further, if the Court were to find that either Extension responded, CGU contends that Taphouse is not entitled to a complete indemnity because:

- (a) the interruption or interference the subject of the claim would have occurred, at least to some extent, regardless of the Queensland Government Measures, by reason of the other (uninsured) impacts of the COVID-19 pandemic;
- (b) the integers relevant to the quantification of any indemnity must be adjusted to reflect (uninsured) circumstances affecting the business arising from the COVID-19 pandemic, so as to reflect the results that, but for the insured events, would have been obtained by Taphouse during the relevant period.

16. Finally, if the Court were to find that the Policy responds to the Claim, CGU contends that interest only runs pursuant to section 57 of the *Insurance Contracts Act 1984* (Cth) from date of the adjudication of the Claim.

B. THE RELIEF SOUGHT FROM THE COURT

17. CGU seeks relief in the nature of declarations as to the proper interpretation of the Policy.

C. PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

18. The primary legal ground for the relief sought is section 21 of the *Federal Court of Australia Act 1976* (Cth).

³ This issue has been the subject of the test case determined adversely to the insurer by the NSW Court of Appeal in *HDI Global Specialty SE & Anor v Wonkana No 3 Pty Limited* [2020] NSWCA 296. The decision is presently subject to a special leave application. On this issue, CGU will abide by the result of the determination of the NSW Court of Appeal if special leave is not granted, and the determination of the High Court of Australia if special leave is granted.

Certificate of lawyer

I, Guy Foster, certify to the Court that, in relation to the statement of claim filed on behalf of the Applicant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 24 February 2021

M Stephens

Signed by Guy Foster *by his partner, Malcolm Stephens*

Lawyer for the Applicant