

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 17/09/2021 5:41:21 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Submissions
File Number:	NSD138/2021
File Title:	CHUBB INSURANCE AUSTRALIA LIMITED (ABN 23 001 642 020) v MARKET FOODS PTY LIMITED (ABN 48 604 308 581)
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 17/09/2021 5:41:22 PM AEST

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.

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Swiss Re International SE v LCA Marrickville Pty Ltd

Chubb Insurance Australia Limited v Market Foods Pty Ltd

NSD 132 & 138 of 2021

**Joint outline of submissions in reply to Market Foods' Supplementary Outline of Argument
for Hearing dated 15 September 2021**

1. This joint outline responds to Market Foods' Supplementary Outline of Argument dated 15 September 2021 (**MF Supplementary Outline**) addressing the treatment of "Third Party Payments" and in particular, JobKeeper.
2. Swiss Re and Chubb join in this reply as the MF Supplementary Outline addresses the arguments advanced by Swiss Re on that issue, which were adopted by Chubb.
3. As identified in Swiss Re's Submissions in Reply at [20] (O.014H_754 at 0757), the treatment of payments to or benefits received by Market Foods is to be resolved as a question of construction of the particular policy. As much appears to be accepted by Market Foods: MF Supplementary Outline at [38]. However, Market Foods is wrong to then attempt to divorce that constructional task from the context in which it must be performed – that is, that the policies are contracts of indemnity: compare MF Supplementary Outline at [38]-[40]. Rather, the constructional task must proceed having regard to the trite proposition a contract of indemnity provides an insured with an indemnity in respect of the loss covered by the policy and no more.
4. Here, properly construed, both the Swiss Re and Chubb policies operate in a way that accords with the indemnity principle. In this respect, Swiss Re and Chubb repeat what is set out in Swiss Re's Outline of Submissions in Reply at [17]-[34] (O.0014H_757-760). Nothing said in those paragraphs is undermined by what is advanced in the MF Supplementary Outline.
5. The attempt to draw support from principles drawn from other areas of the law to the construction and application of the policies in question should be rejected: compare MF Supplementary Outline at [27]-[35]. None of the authorities from which Market Foods seeks to draw support for its position (namely, *The National Insurance Company of Australia v Espagne* (1961) 105 CLR 569, *Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd* [2021] NSWCA 206, or *Blundell v Musgrave* (1956) 96 CLR 73) considered the entitlements of an insured under a contract of indemnity. Each was concerned with the calculation of common law damages. That is a fundamentally different exercise to one of contractual construction.

6. Similarly, calling in aid the perceived purpose of the payor or grantor has the potential to distract from the task at hand particularly where the policy (such as in the case of Swiss Re and Chubb) has a number of contractual provisions that squarely deal with the issue: compare MF Supplementary Outline at [47]-[52]. In such cases, it is not to the point that the payor or grantor may not have intended that the payment or benefit may impact upon the extent to which the recipient is entitled to be indemnified under a policy of insurance.¹ Considerations of that kind say nothing about how, properly construed, the relevant contract of indemnity responds in circumstances where such payments or benefits have been received.
7. Ultimately, as advanced in Swiss Re's Reply at [34] (O.014H_760), properly construed, no reasonable businessperson would consider that the indemnity granted by the Swiss Re or Chubb policies operates such that the insured is entitled to receive more than a true indemnity in respect of the insured loss. Failing to bring to account payments or benefits which had the substantive effect of increasing income, or defraying ongoing expenses, in the present context would have that effect. Nothing advanced by Market Foods overcomes that fundamental proposition.
8. Finally, and critically, the MF Supplementary Outline fails to engage with the language of the trends/adjustments clauses, the "*but for*" concept expressed within them, and the requirement to adjust for "*other circumstances*" affecting the business: see Swiss Re's Reply at [21]-[25], [30] (O.014H_0758-0759). Chubb's policy contains similarly worded clauses: A.0556-0557. Any benefits received by LCA Marrickville, or Market Foods, must be brought to account in that adjustment process.

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17 September 2021

¹ For the avoidance of doubt, Swiss Re and Chubb do not accept that the various matters advanced as informing the government's decision to introduce the JobKeeper program is an accurate identification of the intention behind it.