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AFCA test case to determine if exclusion clauses are effective amid COVID-19 business interruption claims

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Introduction

Many businesses are in the process of assessing how sustainable continued operations will be after the COVID-19 pandemic ends. With temporary protections under the Corporations Act, such as changes to the insolvency rules, coming to an end on 25 September 2020, businesses will have a better idea as to whether they can recover from the current economic shock.

Those with active insurance policies may have an additional safety net if the policy covers involuntary closures from government laws and/or pandemics. However, many small businesses are facing challenges in making claims due to exclusion clauses. These exclusion clauses attempt to exclude certain diseases from being covered by the policy, but have not accounted for the change in law.

The conflict between insurers and insureds has prompted the Australian Financial Complaints Authority (**AFCA**) to run a test case with the Insurance Council of Australia (**ICA**), the representative body of the general insurance industry in Australia. The court will be tasked with addressing one issue, should references to a repealed law in older policies be updated to mean the law currently in force.

Disputed Business Interruption Claims

Many insurance policies will not cover insureds for loss or damage arising from a pandemic. Prior to 2016 this was done by excluding any diseases listed in the Quarantine Act 1908 (Cth). In 2016 the Quarantine Act was replaced with the Biosecurity Act 2015 (Cth), but many insurers did not update their policies to reflect this.

The issue is that COVID-19 was not listed in the Quarantine Act, but is listed in the Biosecurity Act. Insureds that maintain policies which contain a reference to the Quarantine Act can argue that COVID-19 is not referenced in their policies exclusion clause, and that they can make claims for business interruptions as a result of the pandemic. Insurers hold the view that any reference to the Quarantine Act should mean the Biosecurity Act, and will not cover the pandemic in their policies.

The decision for many insurers to refuse business interruption claims has resulted in a large body of complaints being made to AFCA, which has prompted this test case. This test case will provide a binding decision which will guide parties in other similar disputes, so they do not have to litigate their disputes to understand how a court will decide.

Conclusion

The outcome of this test case will be highly anticipated amongst the thousands of insurers and insureds delaying any action pending a final decision. We will provide further updates when the case commences and in respect of any appeal. In the meantime, if you require advice regarding a dispute with your insurer, or an assessment of your insurance contract, please contact Chris Kintis on 02 8235 1251.