

NOTICE OF FILING

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Details of Filing

Document Lodged:	Concise Statement
File Number:	NSD133/2021
File Title:	INSURANCE AUSTRALIA LIMITED ABN 11 000 016 722 v MERIDIAN TRAVEL (VIC) PTY LTD ACN 111 480 883
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



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

Dated: 23/04/2021 4:17:56 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.

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 in Response

No. NSD133 of 2021

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

Insurance Australia Limited (ACN 000 016 722)

Applicant

Meridian Travel (Vic) Pty Ltd (ACN 111 480 883)

Respondent

A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

The respondent's business and insurance policy

1. The respondent (**Meridian**) is a travel agency in Heidelberg, Victoria, with expertise in cruises, solo travel and group tours. Prior to March 2020, a large proportion of Meridian's revenue was from international bookings, though some was also from domestic bookings. A substantial part of Meridian's approach to business generation was the conduct of in-person meetings to organise travel bookings for its clients. From late March 2020, Meridian's employees started working from home (mostly dealing with cancellations, re-bookings and refunds). In or about early November 2020, Meridian resumed the conduct of in-person meetings with its clients.¹
2. By its originating application filed 26 February 2021, the applicant (**CGU**) seeks declarations that it is not liable to indemnify Meridian under Additional Benefits 2(c) or 2(d) of Meridian's insurance policy (**Policy**) placed with CGU.
3. Additional Benefit 2 of the Policy is titled "Murder, suicide or disease". That provision was deleted and replaced by the provision titled "8. Murder, Suicide or Disease" (**Disease**

¹ Further particulars as to Meridian's business and the impact on it from COVID-19 will be in the Outline Document to be served on the applicant pursuant to paragraph 3.a. of the Order dated 16 March 2021.

Filed on behalf of (name & role of party)	Meridian Travel (Vic) Pty Ltd, the Respondent		
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Clause), set out under the heading "Policy Variations and Extensions" on page 5 of the Policy Schedule dated 17 February 2020 (**Schedule**).²

4. Further, as outlined below, there is an issue as to whether the Trends and Adjustments Clause applies. There is otherwise no dispute as to the material terms of the Policy.³

Authority response to COVID-19

5. From February 2020, Commonwealth and Victorian (and other state and territory) authorities made a number of orders which had the effect of closing or evacuating Meridian's business (**Authority Response-Meridian**). The Authority Response-Meridian includes what CGU describes as the "Travel Ban" and the "COVID-19 measures", but is broader. The orders which Meridian says comprise the Authority Response-Meridian will be contained in the Agreed Facts.⁴

Meridian's claim

6. On 15 July 2020, Meridian made a claim under the Policy. Meridian claimed that it was entitled to indemnity under the business interruption cover of the Policy, because it experienced a disruption of its business due to the Authority Response-Meridian. It stated that, amongst other things, due to the then current situation customers were cancelling travel bookings and requiring refunds.
7. CGU has denied Meridian's claim.

² The Schedule provides, relevantly: "*Under Section 2 - Business Interruption, Additional Benefit 8 is deleted and replaced with the following:*

8. Murder, Suicide or Disease

The occurrence of any of the circumstances set out in this Additional Benefit shall be deemed to be Damage to Property used by You at the Situation.

...
(c) The outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation.

(d) Closure or evacuation of Your Business by order of a government, public, or statutory authority consequent upon:

(1) the discovery of an organism likely to result in a human infectious or contagious disease at the Situation; or

...
Cover under Additional Benefits 8(c) and 8(d)(1) does not apply in respect of Highly Pathogenic Avian Influenza in Humans or any other diseases declared to be quarantinable diseases under the Quarantine Act 1908 and subsequent amendments."

The reference to "Additional Benefit 8" in the Schedule is plainly a mistake. Additional Benefit 8 is titled "Documents". It is plain that the intention was to delete and replace Additional Benefit 2, titled "Murder, suicide or disease".

³ The following items in CGU's Concise Statement should be noted. The reference to "arising from the interruption or interference..." in the chapeau to [4], ought be a reference to "resulting from interruption of or interference with..." The definition of adjustments is as follows (and is at page 21, not page 19): "adjustment as necessary to provide for the trend of the Business and variations in, or other circumstances affecting, the Business, either before or after the date of occurrence of the Damage, or which would have affected the Business had the Damage not occurred, 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".

⁴ References to the **Agreed Facts** are to the statements of agreed facts (paragraph 5 of the Order dated 16 March 2021).

Construction and response of the Policy

8. Meridian claims that paragraphs 8(c) and 8(d)(i) of the Disease Clause provide cover for the reasons set out below.

Paragraph 8(c) of the Disease Clause (Disease Extension)

9. In the Disease Extension, the word(s):
- a. “*outbreak*” includes a single instance or a widespread phenomenon extending to the vicinity of the Premises; and
 - b. “*human infectious or contagious disease*” includes COVID-19.
10. The Disease Extension responds to Meridian’s claim, and Meridian is entitled to indemnity, because:
- a. Meridian suffered loss that resulted from interruption of or interference with its business; and
 - b. that interruption of or interference with Meridian’s business was a direct result of the outbreak of a human or infectious or contagious disease, being COVID-19, occurring within a 20 kilometre radius of the Situation. This is because, from (at least) 25 January 2020, there were cases of COVID-19 within that radius.
11. Although CGU’s concise statement refers to disputes as to whether “*diseases declared to be quarantinable diseases under the Quarantine Act 1908 (Cth) and subsequent amendments*” and the applicability of section 61A of the *Property Law Act 1958 (Vic)*, those matters are not matters in dispute. For the avoidance of doubt, it is Meridian’s position that COVID-19 is not a quarantinable disease under the *Quarantine Act 1908 (Cth)*, consistent with the NSW Court of Appeal’s unanimous decision in *HDI Global Speciality SE v Wonkana No 3 Pty Limited* [2020] NSWCA 296, and that section 61A has no application.

Paragraph 8(d)(i) of the Disease Clause (Closure or Evacuation Extension)

12. In the Closure or Evacuation Extension, the words:
- a. “*closure or evacuation of Your Business*” are not limited to physical closure or movement of persons, but also include restriction of access or use for the purpose of carrying on the whole or a part of the policyholder’s business activities. The words of the Policy refer to closure or evacuation of “*Your Business*” (rather than to “*the Situation*” or “*the premises*”), and “*Business*” is defined as “*Travel Agency Services (Excluding Tour Operators)*”;
 - b. “*order of a government, public or statutory authority*” include action by way of legislation, announcements, declarations, directions and other orders, of the type adopted in the Authority Response-Meridian and any authority of the type involved in the Authority Response-Meridian, including (but not limited to) the Australian Commonwealth, State and Territory governments;

- c. “*organism likely to result in a human infectious or contagious disease*” include SARS-CoV-2;
- d. “*the discovery of an organism likely to result in ...*” mean the discovery of an organism in any location, where that organism is likely to result in a human infectious or contagious disease at the Situation;
- e. “*human infectious or contagious disease*” includes COVID-19; and
- f. “*the Situation*” means its definition in the Policy, namely “*the locations set out as the situation in the Schedule*”.

13. The Closure or Evacuation Extension responds to Meridian’s claim, and Meridian is entitled to indemnity, because:

- a. Meridian suffered loss that resulted from an interruption of or interference with its business, in that from March 2020, Meridian’s business activities including in relation to arranging travel slowed and then almost entirely ceased; and
- b. that interruption or interference was a direct result of the Authority Response-Meridian, which was an order of a government, public or statutory authority closing or evacuating the business consequent upon the discovery of an organism likely to result in a human infectious or contagious disease at Meridian’s premises.

Trends and Adjustment Clause

14. Contrary to paragraph 24(a) of CGU’s Concise Statement, Meridian is entitled to complete indemnity. This is because:

- a. the loss was caused by one indivisible cause (being COVID-19, which comprises the COVID-19 pandemic, the Authority Response-Meridian, and individual and public responses to COVID-19);
- b. alternatively, the loss was caused by multiple effective concurrent causes of loss; and
- c. in any case, Meridian is entitled to a complete indemnity where there are insured and uninsured (but not excluded) causes.

15. Further, contrary to paragraph 24(b) of CGU’s Concise Statement:

- a. the applicable bases of settlement under the Policy are not subject to any adjustment; and
- b. alternatively, the counter-factual required under the adjustment clause ignores the insured peril and also trends or circumstances arising out of the same underlying or originating cause as the insured peril, namely the COVID-19 pandemic.

B. THE RELIEF SOUGHT FROM THE COURT

16. Meridian seeks:

- a. a declaration that Insurance Australia Limited is liable to indemnify Meridian Travel (Vic) Pty Ltd under additional benefit 8(c) of the Steadfast Office Pack Policy 15T4227893;
- b. a declaration that Insurance Australia Limited is liable to indemnify Meridian Travel (Vic) Pty Ltd under additional benefit 8(d) of the Steadfast Office Pack Policy 15T4227893;
- c. a declaration that the applicable bases of settlement under the Steadfast Office Pack Policy 15T4227893 are not subject to any adjustment;
- d. in the alternative to paragraph c, a declaration that the counter-factual required under the adjustment clause ignores the insured peril and trends or circumstances arising out of the same underlying or originating cause as the insured peril, namely the COVID-19 pandemic; and
- e. a declaration that Meridian Travel (Vic) Pty Ltd is entitled to interest pursuant to section 57 of the *Insurance Contracts Act 1984* (Cth) on any amount for which Insurance Australia Limited is liable under the Steadfast Office Pack Policy 15T4227893 to pay Meridian Travel (Vic) Pty Ltd in respect of the claim, calculated from the date Insurance Australia Limited should reasonably have paid the claim in accordance with its contractual obligation to do so.

C. THE PRIMARY LEGAL GROUNDS FOR THE RELIEF SOUGHT

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

D. THE ALLEGED HARM SUFFERED

18. By reason of the interruption of or interference with its business, Meridian has suffered loss. Particulars as to loss will be in the Outline Document.

Certificate of lawyer

I, Christopher Michael Erfurt, certify to the Court that, in relation to the Concise Statement in Response filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for each allegation in the Response.

Date: 23 April 2021



Signed by Christopher Michael Erfurt

Lawyer for the Respondent