

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 9/08/2021 4:27:45 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:	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



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

Dated: 9/08/2021 4:29:50 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.



Amended Concise Statement in Response

No. NSD134 of 2021

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

The Respondent's business and insurance policy

1. The respondent (**Taphouse**) operates a bar and restaurant based in Townsville, Queensland, with premises comprised of indoor and outdoor areas and capacity for up to 100 customers. It has a mix of local and out-of-town patrons. In February 2020, a large stadium opened approximately 800 metres from its premises, hosting major events and adding to Taphouse's sales. Prior to 23 March 2020, Taphouse operated 7 days a week, 11 am until late, and prior to 28 March 2020, it did not provide takeaway food or alcohol.¹
2. Subject to some matters of detail and the matters outlined below in respect of the non-applicability of the adjustment clause, there is no dispute as to the material terms of Taphouse's insurance policy (**Policy**) with the applicant (**CGU**).

Authority response to COVID-19

3. From February 2020, Commonwealth and Queensland (and other state and territory) authorities made a number of orders which had the effect of preventing or restricting access to, and/or closing or evacuating Taphouse's premises (**Authority Response-Taphouse**). The Authority Response-Taphouse includes what CGU describes as the "Queensland

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

Filed on behalf of (name & role of party)	The Taphouse Townsville Pty Ltd, the Respondent
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Government Measures”, but is broader. The orders which Taphouse says comprise the Authority Response-Taphouse is contained in the Outline Document filed on 18 July 2021, as well as the following (which were promulgated since the Outline Document was served):

- a. Each of the Restrictions on Business, Activities and Undertakings Direction (No 5) to Restrictions on Business, Activities and Undertakings Direction (No 21); and
- b. Restrictions for Impacted Areas Direction (No 6) and Restrictions for Impacted Areas Direction (No 8) will be contained in the Agreed Facts.²

Taphouse’s claim

4. On 24 March 2020, Taphouse made a claim under the Policy. Taphouse claimed it was entitled to indemnity under the business interruption cover of the Policy, because it experienced a reduction in trade due to the Authority Response-Taphouse. It stated, amongst other things, that the direction made by the Government on 23 March 2020 required it to cease trading.
5. CGU has denied Taphouse’s claim.

Construction and response of the Policy

6. Taphouse claims that the Prevention of access by a public authority clause (**POA Clause**) and the Murder, suicide & infectious disease clause (**Disease Clause**) provide cover for the reasons set out below.

Prevention of access by a public authority clause

7. In the POA Clause, the word(s):
 - a. “any legal authority” include any authority of the type involved in the Authority Response-Taphouse;
 - b. “preventing or restricting access to your premises” are not limited to physical prevention or restriction of access, but also include prevention or restriction of access to the whole or part of the premises for the purpose of carrying on the whole or a part of the policyholder’s business activities;
 - c. “ordering” includes action by way of legislation, announcements, declarations, directions and other orders;
 - d. “the evacuation of the public” include not just physical closure or movement of persons from the premises, but also restriction of access or use of the entirety or a part of the premises for the purpose of carrying on the whole or a part of the policyholder’s business activities; and

² ~~References to the Agreed Facts are to the statements of agreed facts (paragraph 5 of the Order dated 16 March 2021).~~

- e. *“damage to or threat of damage to property or persons within a 50-kilometre radius of your premises”* include the actual or potential for loss or harm to people caused in whole or part by a disease, including COVID-19.
8. The POA Clause responds to Taphouse’s claim, and Taphouse is entitled to indemnity, because:
- a. Taphouse suffered loss that resulted from an interruption or interference of its business; and
 - b. that interruption or interference was caused by the Authority Response-Taphouse, which was a legal authority preventing or restricting access to its premises and/or ordering the evacuation of the public as a result of damage to or threat of damage to persons within a 50-kilometre radius of Taphouse’s premises.
9. Further, contrary to paragraph 13(a) of CGU’s Concise Statement, the coverage of the POA Clause is not limited by the Disease Clause.

Murder, suicide & infectious disease clause

10. In the Disease Clause, the word(s):
- a. *“any legal authority”* include any authority of the type involved in the Authority Response-Taphouse;
 - b. *“closing or evacuating all or part of the premises”* include not just physical closure or movement of persons from the premises, but also restriction of access or use of the entirety or a part of the premises for the purpose of carrying on the whole or a part of the policyholder’s business activities;
 - c. *“outbreak”* includes a single instance or a widespread phenomenon extending to the vicinity of the premises; and
 - d. *“an infectious or contagious human disease”* include COVID-19.
11. The Disease Clause responds to Taphouse’s claim, and Taphouse is entitled to indemnity, because:
- a. there was an interruption or interference of Taphouse’s business that was caused by a legal authority (in particular, the Queensland Government) closing or evacuating all or part of Taphouse’s premises, because the Authority Response-Taphouse required Taphouse to close its premises entirely for a period; close its premises save for the provision of takeaway; and close its premises in part to comply with density and social distancing laws; and
 - b. that was *“as a result of the outbreak of an infectious or contagious human disease occurring within a 20-kilometre radius of [the] Premises”* because from (at least) 15 March 2020, there was at least one case of COVID-19 within that radius and, further or alternatively, there were cases of COVID-19 within Townsville and Queensland.

12. Although CGU's Concise Statement refers to disputes as to whether "*COVID-19 falls within the exclusion for any disease declared to be a quarantinable disease under the Quarantine Act 1908 (as amended)*", those matters are not matters in dispute. For the avoidance of doubt, it is Taphouse's position that COVID-19 is not a quarantinable disease under the *Quarantine Act 1908* (Cth) (as amended), consistent with the NSW Court of Appeal's unanimous decision in *HDI Global Speciality SE v Wonkana No 3 Pty Limited* [2020] NSWCA 296.
13. Further and in any event, pursuant to section 54 of the *Insurance Contracts Act 1984* (Cth), CGU may not refuse to pay Taphouse's claim by reason of the Director of Human Biosecurity's decision to determine that COVID-19 be a listed human disease.

Trends and Adjustments Clause

14. Contrary to paragraph 15(a) of CGU's Concise Statement, Taphouse 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-Taphouse, 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, Taphouse is entitled to a complete indemnity where there are insured and uninsured (but not excluded) causes.
15. Further, contrary to paragraph 15(b) of CGU's Concise Statement, Taphouse is entitled to a complete indemnity. This is because:
- a. the adjustment clause in the Policy is not applicable to the quantification of indemnity for gross profit under the Basis of Settlement clause (Policy p.20);
 - b. alternatively, if the adjustment clause does apply, 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. Taphouse seeks:
- a. a declaration that Insurance Australia Limited is liable to indemnify The Taphouse Townsville Pty Ltd under Section 2, extension 7 of the Business Insurance Policy 15T8202892;

- b. a declaration that Insurance Australia Limited is liable to indemnify The Taphouse Townsville Pty Ltd under Section 2, extension 8 of the Business Insurance Policy 15T8202892;
- c. a declaration that the applicable bases of settlement under Section 2 of the Business Insurance Policy 15T8202892 are not subject to any adjustment;
- d. in the alternative to paragraph c, a declaration that the counter-factual required under the adjustment clause in Section 2 of the Business Insurance Policy 15T8202892 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 The Taphouse Townsville 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 Business Insurance Policy 15T8202892 to pay The Taphouse Townsville 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, Taphouse has suffered loss. Particulars as to loss are will be in the Outline Document (which has been supplemented by a summary and comparison of Taphouse's gross profit and revenue from April 2021 to June 2021).

Certificate of lawyer

I, Christopher Michael Erfurt, certify to the Court that, in relation to the Amended 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~~ 9 August 2021


Signed by Christopher Michael Erfurt

Lawyer for the Respondent