

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 23/04/2021 4:18:53 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:	NSD135/2021
File Title:	ALLIANZ AUSTRALIA INSURANCE LIMITED (ACN 000 122 850) v MAYBERG PTY LTD ACN 011 024 070
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



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

Dated: 23/04/2021 4:18:55 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. NSD135 of 2021

Federal Court of Australia

District Registry: New South Wales

Division: Commercial and Corporations National Practice Area (Insurance List)

**Allianz Australia Insurance Limited (ACN 000 122 850)**

Applicant

**Mayberg Pty Ltd (ACN 011 024 070)**

Respondent

### A. IMPORTANT FACTS GIVING RISE TO THE CLAIM

#### The Respondent's business and insurance policy

1. The respondent (**Mayberg**) is a dry-cleaning business, specialising in the cleaning of corporate, casual and formal wear, as well as alterations. It has four locations in Queensland (being at: (a) Shop 24, 2-34 Bunker Road, Victoria Point; (b) 66-68 Bloomfield Street, Cleveland; (c) 681 New Cleveland Road, Gumdale; and (d) 64 Tingal Road Wynnum). The majority of Mayberg's business is the dry-cleaning of professional work attire, and special occasion attire. It also provides commercial dry-cleaning to local and national customers across industries. Mayberg's commercial clients included Qantas.<sup>1</sup>
2. Subject to some matters of detail, there is no dispute as to the material terms of Mayberg's insurance policy (**Policy**) with the applicant (**Allianz**).<sup>2</sup>

<sup>1</sup> Further particulars as to Mayberg'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.

<sup>2</sup> The reference to "*New Cleveland Street*" ought be a reference to "*New Cleveland Road*" (cf [5(d)]); the reference to "*infectious disease*" ought be a reference to "*infectious or contagious human disease*" (cf [5(f)(i)]); the reference to "*no cover was provided for any disease under the Quarantine Act 1908 (as amended)*" ought be a reference to there being "*no cover for highly pathogenic Avian Influenza or any disease declared to be a quarantinable disease under the Quarantine Act 1908 (as amended)*" (cf [5(f)(i)]); the reference to "*discovered at the premises*" ought be a reference to "*discovered at the location of Your Premises*" (cf [5(f)(i)]).

Filed on behalf of (name & role of party)

Mayberg Pty Ltd, the Respondent

Prepared by (name of person/lawyer)

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## 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 Mayberg's business (**Authority Response-Mayberg**). The Authority Response-Mayberg includes what Allianz describes as the "Government Measures", but is broader. The orders which Mayberg says comprise the Authority Response-Mayberg will be contained in the Agreed Facts.<sup>3</sup>

## Mayberg's claim

4. On or about 24 March 2020, following the Authority Response-Mayberg, Mayberg made a claim under the Policy. Mayberg claimed it was entitled to indemnity under the business interruption cover of the Policy, because it had experienced a reduction in trade due to the Authority Response-Mayberg. It stated, among other things, that this was due to social distancing restrictions and restrictions on mass gatherings and non-essential travel and business.
5. Allianz has denied Mayberg's claim.

## Construction and response of the Policy

6. Mayberg claims that the Murder, Suicide and Infectious Disease clause (**Disease Clause**), and the Prevention of Access by a Public Authority endorsement (**POA Endorsement**) provide cover for the reasons set out below.

## Disease Clause

7. In the Disease Clause, the word(s):
  - a. "*any legal authority*" include action by way of legislation, announcements, declarations, directions and other orders, of the type adopted in the Authority Response-Mayberg;
  - 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. "*infectious or contagious human disease*" include COVID-19.
8. The Disease Clause responds to Mayberg's claim, and Mayberg is entitled to indemnity, because:

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<sup>3</sup> References to the Agreed Facts are to the statements of agreed facts (paragraph 5 of the Order dated 16 March 2021).

- a. there was interruption or interference with Mayberg's Business due to closure or evacuation of the whole or part of the Premises, since the Authority Response-Mayberg closed off the Premises to Mayberg's customer base and the public (due to the stay-at-home orders), caused a closure of part of the Premises (due to the social distancing rules), and had the effect of disabling Mayberg from servicing its customer base (due to the border closures); and
  - b. the interruption 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) 22 February 2020 (in respect of the Wynnum premises) and from (at least) 16 March 2020 (in respect of each of the other premises), there were cases of COVID-19 within the radius of each of the locations pleaded at paragraph 1 above.
9. Although Allianz's concise statement refers to disputes as to whether COVID-19 is a "*quarantinable disease[s] under the Quarantine Act 1908 (as amended)*", those matters are not in dispute. For the avoidance of doubt, it is Mayberg'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.
10. Further and in any event, pursuant to section 54 of the *Insurance Contracts Act 1984* (Cth), Allianz may not refuse to pay Mayberg's claim by reason of the Director of Human Biosecurity's decision to determine that COVID-19 be a listed human disease.

### **POA Endorsement**

11. In the POA Endorsement, the word(s):

- a. "*legal authority*" include the authorities who promulgated the Authority Response-Mayberg;
- 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 of 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, of the type adopted in the Authority Response-Mayberg;
- 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

- 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.

12. The POA Endorsement responds to Mayberg’s claim, and Mayberg is entitled to indemnity, because:

- a. there was an interruption to the Business caused by “*legal authority preventing or restricting access to [the] Premises*”, in that the Authority Response-Mayberg prevented or restricted access to the Premises for the purpose of carrying on the policyholder’s business activities, in the form of preventions and restrictions on Mayberg’s customers, the public and at the Premises via the social/physical distancing directions;
- b. further and alternatively, there was an interruption of Mayberg’s Business caused by a “*legal authority ... ordering the evacuation of the public*”, including because the orders required most of Mayberg’s customer base to evacuate businesses and their workplaces, and to work from home and stay at home; and
- c. the orders resulted from damage, or threat of damage, to persons within a 50-kilometre radius of the Premises, namely loss or harm from COVID-19 (or the threat thereof).

#### **Trends and Adjustments Clause**

13. Contrary to paragraph 15(a) of Allianz’s Concise Statement, Mayberg 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-Mayberg, 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, Mayberg is entitled to a complete indemnity where there are insured and uninsured (but not excluded) causes.

14. Further, contrary to paragraph 15(b) of Allianz’s Concise Statement, 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 (AND AGAINST WHOM)**

15. Mayberg seeks:

- a. a declaration that Allianz Australia Insurance Limited is liable to indemnify Mayberg Pty Ltd under Extensions of Cover 6 of the Business Pack Policy 141AN06566COM;
- b. a declaration that Allianz Australia Insurance Limited is liable to indemnify Mayberg Pty Ltd under the Prevention of Access 48 hours minimum interruption – Prevention of Access by a Public Authority endorsement of the Business Pack Policy 141AN06566COM;
- 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
- d. a declaration that Mayberg Pty Ltd is entitled to interest pursuant to section 57 of the *Insurance Contracts Act 1984* (Cth) on any amount for which Allianz Australia Insurance Limited is liable under the Business Pack Policy 141AN06566COM to pay Mayberg Pty Ltd in respect of the claim, calculated from the date Allianz Australia Insurance 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**

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

## **D. THE ALLEGED HARM SUFFERED**

17. By reason of the interruption of or interference with its business, Mayberg 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