

NOTICE OF FILING

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Details of Filing

Document Lodged:	Defence - Form 33 - Rule 16.32
File Number:	NSD137/2021
File Title:	CHUBB INSURANCE AUSTRALIA LIMITED (ABN 23 001 642 020) v PHILIP WALDECK
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



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

Dated: 25/08/2021 7:14:04 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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Defence to amended statement of claim filed on 20 August 2021

No. NSD 137 of 2021

Federal Court of Australia
District Registry: New South Wales
Division: Commercial and Corporations

Chubb Insurance Australia Limited (ABN 23 001 642 020)

Applicant

Mr Philip Waldeck

Respondent

In answer to the allegations in the amended statement of claim dated filed on 20 August 2021²⁴
~~February 2021~~ (ASOC), the Respondent (**Waldeck**) states as follows. Unless otherwise stated,
this Defence adopts the defined terms used in the ASOC.

The parties

1. Waldeck admits the allegations in paragraph 1 of the ASOC.
2. Waldeck admits the allegation in paragraph 2 of the ASOC.

The Policy

3. Waldeck admits the allegations in paragraph 3 of the ASOC, and states further that Waldeck also had a contract of insurance placed with Chubb issued on 15 March 2019 for the policy period 4:00pm 28 March 2019 to 4:00pm 28 March 2020.

Particulars

Insurance Policy EPM0018480

4. As to the allegations in paragraph 4 of the ASOC, Waldeck admits the allegations save as follows:
 - (a) as to paragraph 4(b) of the ASOC, says that the Named Insured was "Philip Waldeck";

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(b) as to paragraph 4(h) of the ASOC, says that:

(i) it was a term of the Policy that (page 24 of the Wording):

Cover

Provided this Section is shown as insured in the Schedule, We will pay the amount of loss resulting from interruption of or interference with Your Business resulting from Insured Damage to Property Insured at an Insured Location that occurs during the Policy Period.

Loss will be calculated in accordance with the Basis of Settlement, and subject to the Indemnity Period and applicable Sum Insured;

(ii) "Business Interruption" was shown as "Insured" in the Summary of Cover in the Schedule;

(c) as to paragraph 4(i) of the ASOC, says that it was a term of the Policy that (page 26 of the Wording):

1. Infectious Disease, Murder and Closure Extension

Cover is extended for loss resulting from interruption of or interference with the Insured Location in direct consequence of the intervention of a public body authorised to restrict or deny access to the Insured Location directly arising from an occurrence or outbreak at the premises of any of the following:

a) Notifiable Disease, or

b) the discovery of an organism likely to cause Notifiable Disease.

...

leading to restriction or denial of the use of the Insured Location on the order or advice of the local health authority or other competent authority;

(d) as to paragraph 4(j) of the ASOC, says that it was a term of the Policy that the term "*Notifiable Disease*" was defined to mean (page 23 of the Wording):

illness sustained by any person resulting from food or drink poisoning or any human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated must be notified to them.

Notifiable disease does not include any occurrence of any prescribed infectious or contagious diseases to which the Quarantine Act 1908 as amended applies; and

(e) as to paragraph 4(k) of the ASOC, says that (pages 23-24 of the Wording):

- (i) it was a term of the Policy that the term "*Trend in the Business*" was defined to mean:

adjustments to provide for the trend of Your Business and variations in other circumstances affecting that Business either before or after the Insured Damage or which would have affected that Business had the Insured Damage not occurred, so that the figures adjusted will represent as nearly as may be reasonably practicable the results which but for the Insured Damage would have been obtained during the relative period after the Insured Damage;

- (ii) it was a term of the Policy that the term "Insured Damage" was defined to mean:

physical loss, destruction or damage occurring during the Policy Period caused by an event insured under the Property Damage, Theft, Money, Glass or General Property Sections.

4A. As to paragraph 4A of the ASOC, Waldeck:

- (a) admits Mr Waldeck was a resident of the State of Victoria at the time of contract and at all relevant times;
- (b) admits that the Insured Location is located in the State of Victoria at the time of contract and at all relevant times;
- (c) admits the "Choice of Law Condition" (as defined in the ASOC) was a term of the Policy; and
- (d) otherwise denies the allegations in the paragraph.

COVID-19

- 5. Waldeck admits the allegations in paragraph 5 of the ASOC.
- 6. Waldeck denies the allegations in paragraph 6 of the ASOC and states further:
 - (a) there was an occurrence or outbreak of COVID-19 (involving a Notifiable Disease and/or the discovery of an organism, SARS-CoV-2, likely to cause Notifiable Disease) happening across Australia and Victoria; and
 - (b) the organism, SARS-CoV-2, was discovered in Victoria and was likely to cause Notifiable Disease at the premises.

Quarantine Act and Biosecurity Act

6A. Waldeck admits the allegations in paragraph 6A of the ASOC.

6B. Waldeck admits the allegations in paragraph 6B of the ASOC.

6C. Waldeck admits the allegations in paragraph 6C of the ASOC.

6D. Waldeck admits the allegations in paragraph 6D of the ASOC.

6E. Waldeck admits the allegations in paragraph 6E of the ASOC.

6F. Waldeck admits the allegations in paragraph 6F of the ASOC.

Response to COVID-19

7. Waldeck admits the allegations in paragraph 7 of the ASOC, and states further that from February 2020, Commonwealth and Victorian (and other state and territory) authorities intervened with the effect of restricting or denying access to the Insured Location (**Authority Response-Waldeck**).

Particulars

The orders which Waldeck says comprise the Authority Response-Waldeck will be contained in the Agreed Facts.¹

8. Waldeck admits the allegations in paragraph 8 of the ASOC and states further that:
- (a) on or about 8 April 2020, Waldeck caused Chubb to be notified that Waldeck sought to make a claim for business interruption; and

Particulars

The notification was oral.

The notification occurred in a telephone conversation between Elle Mariconte and Mary Romeo on or about 8 April 2020.

- (b) Waldeck has updated his claim for indemnity since 9 April 2020.

Particulars

Email from Mary Romeo to "AUS Property Claims" (aus.propertyclaims@chubb.com) copied to, *inter alia*, Business Pack (Business.Pack@chubb.com) transmitted on 17 April 2020.

Further Particulars will be provided in the Outline Document to be served on Chubb pursuant to paragraph 3.a. of the Order dated 16 March 2021.

9. Waldeck admits the allegations in paragraph 9 of the ASOC.

¹ References to the Agreed Facts are to the statements of agreed facts (paragraph 5 of the Order dated 16 March 2021).

10. Waldeck admits the allegations in paragraph 10 of the ASOC.
11. Waldeck admits the allegations in paragraph 11 of the ASOC.

Interpretation of Extension C

12. Waldeck denies the allegations in paragraph 12 of the ASOC.
13. Waldeck denies the allegations in paragraph 13 of the ASOC, and states further that the words:
 - (a) “a public body authorised to restrict or deny access to the Insured Location” and “the local health authority or other competent authority” include authorities of the type involved in the Authority Response-Waldeck;
 - (b) “intervention”, “order” and “advice” include the interventions comprising the Authority Response-Waldeck;
 - (c) “restrict or deny access to the Insured Location” and “restriction or denial of the use of the Insured Location” are not limited to physical restriction or physical denial of access and use, but also include restriction or denial of access or use of the whole or part of the Insured Location for the purpose of carrying on the whole or a part of the policyholder’s business activities;
 - (d) “an occurrence or outbreak at the premises” includes a single instance or a widespread phenomenon extending to the vicinity of the premises;
 - (e) “Notifiable Disease” includes COVID-19; and
 - (f) “organism likely to cause Notifiable Disease” includes SARS-CoV-2.
14. Waldeck relies on the terms of section 61A of the Property Law Act 1958 (Vic) for their full force and effect and otherwise admits ~~As to the allegations in paragraph 14 of the~~ ASOC, Waldeck:
 - (g) ~~admits that Chubb contends that COVID-19 falls within the Exclusion (as that term is defined in paragraph 14 of the ASOC);~~
 - (h) ~~states that the issue of whether the Quarantine Act 1908 (Cth) is to be construed as a reference to the Biosecurity Act 2015 (Cth) such that a disease determined to be a listed human disease under the Biosecurity Act falls within the scope of the Exclusion was determined adversely to the insurer by the NSW Court of Appeal in HDI Global Speciality SE & Anor v Wonkana No 3 Pty Limited [2020] NSWCA 296, and that decision is presently the subject of a special leave application;~~

- (i) — ~~admits that AFCA has not given its consent to raise in these proceedings the question of whether section 61A of the *Property Law Act 1958* (Vic) applies to the Policy to the effect that the reference to the *Quarantine Act 1908* (Cth) is to be construed as a reference to the *Biosecurity Act 2015* (Cth) such that a disease determined to be a listed human disease under the *Biosecurity Act 2015* (Cth) falls within the scope of the Exclusion; and~~
- (d) — ~~otherwise denies the allegations in the paragraph.~~

14A. Waldeck denies the allegations in paragraph 14A of the ASOC.

14B. Waldeck denies the allegations in paragraph 14B of the ASOC.

14C. Waldeck denies the allegations in paragraph 14C of the ASOC.

14D. Waldeck denies the allegations in paragraph 14D of the ASOC.

14E. Waldeck denies the allegations in paragraph 14E of the ASOC.

Response of Extension C

15. Waldeck denies the allegations in paragraph 15 of the ASOC and refers to and repeats paragraphs 6 to 14E above.

Interpretation of the Trend Clause

16. Waldeck denies the allegations in paragraph 16 of the ASOC.
17. Waldeck denies the allegations in paragraph 17 of the ASOC.
18. Waldeck denies the allegations in paragraph 18 of the ASOC and states further that insofar as the Trend Clause has any application to the Disease Extension, the counter-factual required under the Trend Clause ignores the trends or circumstances arising out of the same underlying or originating cause of the interruption to the business.

Date: 23 April 25 August 2021



Signed by Christopher Michael Erfurt
Lawyer for the Respondent

This pleading was prepared by Christopher Michael Erfurt, lawyer for the Respondent and settled by Steven Finch SC, John Sheahan QC, Adam Pomerence QC, Derek Wong, and Naomi Wootton, counsel for the Respondent.

Certificate of lawyer

I Christopher Michael Erfurt certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: ~~23 April~~ 25 August 2021



Signed by Christopher Michael Erfurt
Lawyer for the Respondent