

Insurance Council of Australia Questions on Notice from Public Hearings on 25 June 2021

1. ICA09QON – Cybercrime and Ransoms, Wilson

With regards to the payment of ransoms as a consequence of cyberattacks we have not been advised by our members of any payments made by them in relation to a cyberattack:

- on their general insurance businesses; or
- on the businesses of their customers.

With regards to the policy position in the United Kingdom we understand that the official advice is to avoid making ransom payments, but that it is not illegal for businesses which experience a cyberattack to do so. Insurance companies are also permitted to make claim payments in respect of ransomware attacks. However, they are required to undertake due diligence on the entities that the payment will go to. This is to comply with Anti-Money Laundering/Counter-Terrorism Financing (AML/CTF) requirements which make it illegal to make ransom payments to entities that are on a relevant sanctions list or are a listed terrorist organisation.

In relation to the policy position in Australia, the advice of the Australian Government's Cyber Security Industry Advisory Committee is not to make ransom payments and that payments may be illegal in certain circumstances. Those circumstances are where the ransom payment "will become an instrument of crime" under the Criminal Code or, as in the UK, the payment breaches CTF rules.

2. ICA10QON – Business Interruption, Murphy

In the testimony provided by Andrew Hall, CEO of the Insurance Council of Australia (ICA) on 25 June 2021, he stated that¹:

- the COVID-19 pandemic has been such a major unprecedented event, and it has tested policies in a way that was not anticipated and we believed there was a lot more certainty around; and
- the business interruption policies contain a range of exclusions that haven't been tested in the context of a pandemic, particularly in the context of the experience we've had in Australia.

Business interruption policies written in Australia did contemplate that at some stage there could be a pandemic as they contain specific exclusions in respect of "quarantinable diseases" under the *Quarantine Act 1908* (Cth) and "a listed human disease" under the *Biosecurity Act 2015* (Cth). (COVID-19 was determined to be a listed human disease under the Biosecurity Act on 21 January 2020.)

What was not predicted is the uncertainty around the interpretation of the different wordings in business interruption policies where a claim is made in connection with a pandemic, and specifically for loss as a result of the outbreak of COVID-19 in Australia. These wordings have not been tested before in the context of claims for loss arising from a pandemic, reflecting the insurance industry's long held view that pandemics are not intended to be covered under most business interruption policies.

However because of the High Court's decision, insurers cannot rely on references to the Quarantine Act to deny liability in policies written in the same terms as the policies considered in the first test case. But the uncertainties on the interpretation of further aspects of business interruption policies still need to be resolved to establish whether policyholders

¹ page 8 of the transcript of the hearing on 25 June 2021

will ultimately be covered. These matters of construction and interpretation are not clear cut and there are important reasons why the legal principles to be used to resolve any disputes should be clarified by a court.

3. ICA11QON – Pandemic Definitions, Mulino

A survey of members suggests that broadly similar – but clearly distinguishable – definitions of “pandemics” are being used. Each approach reflects an attempt to design a unique offering that meets customers’ needs, reflects the insurer’s risk appetite, and support the provision of a financially viable product.

A non-exhaustive list of illustrative examples

<i>Insurer A</i>	<p><i>Pandemic</i> means an Epidemic that is expected to affect an unusually large number of people or involves an extensive geographic area.</p> <p><i>Epidemic</i> means a fast-spreading contagious or infectious disease or illness in an area as documented by a recognised public health authority.</p>
<i>Insurer B</i>	<p><i>Pandemic</i> means a geographically widespread outbreak of a contagious or infectious disease that causes serious illness in humans as declared by the World Health Organisation or national public health authority.</p> <p><i>Epidemic</i> means a rapidly spreading contagious or infectious disease or illness in a region as declared by the World Health Organisation or a national public health authority.</p>
<i>Insurer C</i>	<p><i>Pandemic:</i> An epidemic that is expected to affect more than one country or declared to be a pandemic by a public health authority.</p> <p><i>Epidemic:</i> A fast spreading infectious or contagious disease or illness documented by a public health authority</p>
<i>Insurer D</i>	<p><i>Epidemic</i> means a sudden development and rapid spreading of a contagious disease in a region where it developed in a simply endemic state or within a previously unscathed community.</p> <p><i>Pandemic</i> means a geographically widespread outbreak of an infectious disease that causes serious illness in humans.</p>