

# Certain Underwriters at Lloyd's of London v Dural 24/7 Pty Ltd: a triumph of common sense

*Laina Chan* 2 SELBORNE CHAMBERS

In *Certain Underwriters at Lloyd's of London v Dural 24/7 Pty Ltd*,<sup>1</sup> the underlying issue was whether the policy underwritten by Certain Underwriters at Lloyd's of London<sup>2</sup> (the Policy) covered business interruption caused by the COVID-19 pandemic. The difficulty arose because the legislation referred to in the Policy defined diseases by reference to the repealed Australian Quarantine Act 1908 (Cth).<sup>3</sup> The Insurers therefore sought a declaration to the effect that “or other diseases declared to be quarantinable diseases under the Australian Quarantine Act 1908” meant “or other listed human diseases under the Biosecurity Act 2015 (Cth)”. The declaration was made.<sup>4</sup>

## Earlier cases on the relationship between the Quarantine Act and the Biosecurity Act

Prior to this case, the New South Wales Court of Appeal and the Full Federal Court had already considered the relationship between the Quarantine Act and the Biosecurity Act.

In *HDI Global Specialty SE v Wonkana No 3 Pty Ltd*<sup>5</sup> (*Wonkana*), the New South Wales Court of Appeal decided that a reference in an insurance policy to “other diseases declared to be quarantinable diseases under the Australian Quarantine Act 1908 and subsequent amendments” was not to be construed as meaning “diseases determined to be listed human diseases under the Biosecurity Act 2015 (Cth)”.

Unlike the policy in *Wonkana*, the Policy contained a conformity clause which said that “references to a statute law also includes all its amendments or replacements”.<sup>6</sup> The policy in *Wonkana* did not refer to “replacements”.<sup>7</sup>

In *LCA Marrickville Pty Ltd v Swiss Re International SE (LCA Marrickville or Swiss Re)* and *Star Entertainment Group Ltd v Chubb Insurance Australia Ltd*, the Full Federal Court had to consider whether or not the Biosecurity Act was a re-enactment of the Quarantine Act within the meaning of s 61A of the Property Law Act 1958 (Vic). The Full Federal Court said that it was not.<sup>8</sup>

## A quarantine proclamation has the status of statute law

Intuitively, the conclusion reached by Jagot J may not be surprising.<sup>9</sup> The success of the plaintiff however came down to the framing of the issue as the Quarantine Act has not been replaced by the Biosecurity Act. The process of reasoning adopted by Jagot J is revealing in this regard:

- *Wonkana*, *Swiss Re* and *LCA Marrickville* all considered the relationship between the Quarantine Act and the Biosecurity Act
- none of *Wonkana*, *Swiss Re* and *LCA Marrickville* contained a conformity clause in the terms contained in the Policy
- Jagot J construed the phrase “a statute law” from the point of view of a reasonable businessperson and applied common sense to find that the phrase was not a technical, legal term or a term of art. Instead, it is a descriptive term in which the subject matter is “law” and the kind of law described as “statute law”<sup>10</sup>
- Jagot J said that the making of a proclamation declaring a disease as a quarantinable disease established the legal status of a disease as a quarantinable disease under the Quarantine Act<sup>11</sup>
- the Quarantine Proclamation 1998 (Cth) is a “law” because it confers a certain legal status on the diseases declared to be a quarantinable disease<sup>12</sup>
- the Quarantine Proclamation is therefore a “statute law” and is as much a “statute law” as the Quarantine Act itself<sup>13</sup>
- whether the reference to “statute law” in “references to a statute law also includes all its amendments or replacements” — that is “other diseases declared to be quarantinable diseases under the Australian Quarantine Act 1908” — has been replaced by “other listed human diseases under the Biosecurity Act 2015 (Cth)” is to be answered in this context<sup>14</sup> and
- the old and the new statute laws are dealing with substantially the same subject matter. Namely, the

identification of human diseases so as to enable the taking of steps by public officials to control and eradicate the identified disease<sup>15</sup>

## Conclusion

Given the way, Jagot J framed the question, it is not surprising that the court answered the question posed in the affirmative.<sup>16</sup> The writer was initially not entirely comfortable with the conclusion reached by the court that the Quarantine Proclamation is itself a statute law. However, upon reflection, it is difficult to see what other status the Quarantine Proclamation could have other than as statute law. Most importantly, it is undeniable that the objective intention of the Policy has been given effect to by the construction adopted by the court.



**Laina Chan**

Barrister

2 Selborne Chambers

[laina.chan@selbornechambers.com.au](mailto:laina.chan@selbornechambers.com.au)

[www.2selborne.com.au](http://www.2selborne.com.au)

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## Footnotes

1. *Certain Underwriters at Lloyd's of London v Dural 24/7 Pty Ltd* [2022] FCA 206; BC202201559.
2. Sportspack Combined Wording II.18 (Policy).
3. The Australian Quarantine Act 1908 (Cth) had been repealed at the time that the Policy was inception.
4. Above n 1, at [2].
5. *HDI Global Specialty SE v Wonkana No 3 Pty Ltd* (2020) 104 NSWLR 634; [2020] NSWCA 296; BC202011344.
6. Above n 1, at [16].
7. Above n 5.
8. Above n 1, at [37].
9. Above n 1, at [2].
10. Above n 1, at [39]–[43]. Jagot J applied the principles of construction of insurances policies conveniently collected in *LCA Marrickville Pty Ltd v Swiss Re International SE* (2022) 401 ALR 204; [2022] FCAFC 17; BC202201019 at [2] and [56]–[103] and *Star Entertainment Group Ltd v Chubb Insurance Australia Ltd* (2022) 400 ALR 25; 158 ACSR 474; [2022] FCAFC 16; BC202201015 at [8]–[15], respectively. See also L Chan “A claims made and notified policy is not a chameleon: a case note on *Avant Insurance Ltd v Burnie*” (2022) 37(7&8) *ILB* 131.
11. Above n 1, at [44].
12. Above n 1, at [45].
13. Above.
14. Above n 1, at [47]. See also [56] and [57].
15. Above n 1, at [55]–[57].
16. Above n 1, at [55].