

Insurance Alert

Full Court dismisses appeal in Antarctic oil spill case

Commonwealth of Australia v Vero Insurance Limited [2013] FCAFC 152

WHAT YOU NEED TO KNOW

- The Full Court of the Federal Court of Australia handed down judgment in this matter on 6 December 2013. The Court (Dowsett, Logan JJ concurring; Jagot J dissenting) dismissed the appeal brought by the Commonwealth of Australia against the earlier decision of Justice Yates.
- The appeal concerns the liability of the respondent (Vero) pursuant to a policy of insurance issued to Comcover, a self-managed insurance fund within the Department of Finance & Deregulation.
- The Court considered the proper construction of the contract of insurance between the Commonwealth and Vero. There was a secondary issue relating to the application of the provisions of the *Limitation Act 1969* (NSW) to the Commonwealth's claim under the contract of insurance.
- The Court ultimately held, on the first question, that the policy did not extend to cover damage to the land in the Australian Antarctic Territory. As to the second question, the Court held that the Commonwealth's claim was brought within the limitations period.
- The case has implications as to how Courts are now likely to consider the construction of insurance contracts. In particular, the Full Court agreed with the earlier reasoning of Justice Yates which had the effect of limiting the scope of cover by reference to the clause in the policy which determined the measure of cover.
- The decision also reinforces the view that the proper date for the accrual of a cause of action, for the purposes of the limitations period, is the date on which an insurer notifies acceptance of a claim.

Background

Vero issued to Comcover an Ultimate Net Loss Insurance Policy (UNL Policy) on 13 July 1999, the insured being noted as "The Commonwealth of Australia through its self-managed fund known as Comcover". Comcover issued the Australian Antarctic Division (AAD) with a Schedule of Cover in conjunction with the general terms and conditions in the Comcover Manual.

On 20 July 1999, there was a fuel oil spill at Casey Base Station, a scientific research station within the Australian Antarctic Territory. The AAD did not notify Comcover of the spill until August 2004. Comcover initially declined to cover the event, but later agreed to indemnify the AAD. However, by that time, Vero had declined Comcover's claim against Vero under the UNL Policy.

Primary judgment

On the question of scope of cover, the primary judge (Yates J, *Commonwealth of Australia v Vero Insurance Limited* (2012) 291 ALR 563; [2012] FCA 826) dismissed the Commonwealth's claim that the insuring clause in the Comcover Manual covers damage to the land at Casey Base Station caused by the fuel oil spill, instead limiting the cover to real property in the form of buildings or structures capable of replacement and personal property.

On the question of the limitations period, the primary judge held that the action by the Commonwealth fell within the 6 year limitation period, as the cause of action accrued at the time Comcover informed the AAD (on 21 June 2005) that it accepted the fuel oil spill as an insured event. The Commonwealth commenced its action on 14 June 2011.

The insurance contract

The Full Court observed that the Comcover Manual is "a relatively informal document" (at [102]).

The Comcover Manual contains a provision, in "Part 1" which is expressed as follows:

Basic principle of cover

Comcover provides broad cover for all classes of general insurance normally available in the commercial insurance market. It covers all risks for which it has been able to make a proper provision by way of, for example, levying a fund member, setting excesses, and arranging reinsurance protection.

For all property claims

In general, the amount payable by Comcover will be equivalent to the actual replacement cost of a similar item or building, or the repair cost, such that the item or building is reinstated to a condition equal to, but not better than, its original, new condition.

The "insuring clause" is contained at pages 20 and 21 of Part 2 of the Comcover Manual:

Property loss, destruction or damage

If your property is lost, destroyed or damaged

where property means the Fund Member's real and personal property but excluding watercraft more than 15 metres in length and aircraft, which is in your possession, care, custody or control, or your responsibility

This includes watercraft up to and including 15 metres in length

Motor vehicles are not covered under this Insurance > see page 23

and

the event that caused the property to be lost, destroyed or damaged occurred during your period of cover;

and

Special terms and conditions, to be specified in your Schedule of Cover, apply to watercraft

over 15 metres in length and to aircraft, in your possession, care, custody or control.

Comcover will not cover any claim arising from the use of watercraft that is greater than 15 metres in length or aircraft unless:

- You have provided Comcover with full details of that watercraft or aircraft; and
- Comcover has annotated those details on the terms and conditions to your Schedule of Cover

then we will pay:

- ***the actual replacement value of the property lost, destroyed or damaged***

For the purposes of this class of cover, the replacement value is the amount equivalent to the actual replacement cost of a similar item or building, or the repair cost, such that the item or building is reinstated to a condition equal to, but not better than, its original, new condition.

Decision on appeal

Cover by Vero

Vero contended, on appeal, that the primary judge was in error in holding that the land within the Casey Base Station affected by the spill was "property" the subject of cover. Vero's submission that the insuring clause must be construed to refer to property owned by the Commonwealth "for the purpose of performing the functions" of the AAD.

The Court unanimously rejected this submission as "an impermissible gloss on the words of the cover" (at [98]). Jagot J noted that there can be no doubt that the Casey Base Station "is in the care, custody or control of the Commonwealth acting through the AAD and there is even less doubt that the Commonwealth acting through the AAD is responsible for the station" (at [99]).

However, the Court was split on the question of whether the insuring clause in the Comcover Manual covers damage to the land, which one judge described as "the more difficult question" (Jagot J, [101]). The problem was expressed as:

"... there is real ambiguity in the Comcover Manual. Land is real property. The promise of indemnity relates to all tangible real property..."

Land is patently capable of suffering damage by any one of a number of means, oil and other spills being one of the most obvious examples. Yet the measure of indemnity is expressed in terms not readily applicable to land." Jagot J, [109]

The majority (Dowsett and Logan JJ) supported the primary judge's findings, and held that the policy did not extend to cover damage to the land. Their Honours placed reliance on the extent of Cover, which was limited to paying "the actual replacement value of the property, lost, destroyed or damaged", which Vero submitted had the effect of limiting the cover for real property to buildings (at [32]). The Court rejected the Commonwealth's submission that "replacement value" should be read by reference to the "basic principle of cover" contained in Part 1 of the Comcover Manual, on the basis that the Manual clearly stated that Part 1 is not to be used to interpreting Part 2 or the Schedule of Cover.

Ultimately, the majority placed importance on the term "replacement value", noting that it was limited to "items" and "buildings". Dowsett J noted that it would be "straining language" to construe the word "item" as identifying the Australian Antarctic Territory or any part of it (at [41]). With respect to "land", Dowsett J observed:

"In my view, the cost of remediation for damage to land will only be covered if it is within the definition of the term "replacement value", or if there is some other, presumably implied promise to pay the cost of such remediation. As to replacement value, I doubt very much whether land can have a replacement cost. Land probably cannot really be destroyed or lost." Dowsett J, [38].

The Court also considered, but rejected, the Commonwealth's submission that the ambiguity had to be resolved by reference to a clause of the UNL Policy which provided that the Comcover Manual should be interpreted in such a way as to give the Fund Member "the broadest possible indemnity". The Court rejected this submission on the ground that there was no evidence to the effect that the cover for the cost of remediating one's own land from the effects of a spill would constitute a "normally insurable risk" (Dowsett J at [43]; Logan J at [58]; and Jagot J at [110]).

Additionally, Dowsett J and Jagot J both rejected the Commonwealth's submission that weight should be placed on the different fonts and text sizes of the Comcover Manual (at[35] and [107]).

Justice Jagot's dissenting judgment

Jagot J offered a dissenting view. Her Honour advanced six reasons why, in her view, there is real ambiguity in the Comcover Manual. Those reasons can be briefly summarised as follows:

- a. Her Honour considered that the definitions contained in the Manual are relevant. In respect of the definition of "property", her Honour noted that it means "all tangible real or tangible personal property".
- b. As noted above, her Honour rejected the Commonwealth's submission that the ambiguity had to be resolved by reference to a clause of the UNL Policy which provided that the Comcover Manual should be interpreted in such a way as to give the Fund Member "the broadest possible indemnity".
- c. Her Honour noted that "land" may be "lost, destroyed or damaged". Her Honour held that there is nothing in the Manual which would exclude "land" from the scope of cover.
- d. The repetition of the word "property" later in the Manual did not have the effect of limiting the earlier definition. Her Honour described this as "an example of redundancy rather than a different meaning being given to 'property'".
- e. As noted above, little, if any, weight should be placed on the different fonts and text sizes of the Comcover Manual.
- f. Clause of the contract identifying the measure of the indemnity (that is, what Comcover said it will pay), does have some bearing on the scope of the cover itself.

Ultimately, her Honour's conclusion was based on the following factors:

- a. The fact that the drafters of the Manual had expressly excluded two items from the definition of "property" (being watercraft over 15 metres in length and aircraft), but land was not one of the excluded items.
- b. The measure of indemnity provision should not be read to impliedly exclude land, as this "seems to achieve by a most indirect and obscure means that which was done directly for two items of personal property in the definition of property itself".

- c. The fact that the Manual expressly included cover for "sudden and accidental" pollution.

Limitation period

Vero contended that the primary judge was in error in his finding on the question of the limitation period. The Court was unanimous in its rejection of this contention and held that the primary judge's conclusion disclosed no error.

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