

Continuous cover in Australia - CIMIC Group Ltd v AIG Group Ltd & Ors

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The recent Australian decision of *CIMIC Group Ltd v AIG Group Ltd & Ors* [1] gave useful guidance as to the interpretation of continuous cover clauses in that jurisdiction.

Facts of case

The policyholder, CIMIC was structured in various business divisions, each with its own Chief Operating Officer (COO). In November 2019, a divisional COO made a file note of conversation with another COO. The file note included sensitive information suggesting CIMIC had won a tender in Iraq by way of unlawful payment. The divisional COO later became the CEO.

The file note was identified during the FY12 policy period and was notified to insurers as a potential claim, arising from the failure to disclose the relevant conduct.

Notably, no notifications had been made during the FY11 policy despite the divisional COO having acquired knowledge of the file note, during that earlier policy period.

The FY11 and FY12 policies were on very similar terms. However, cover under the FY11 policy programme had been significantly eroded.

CIMC claimed a total of 45.7 million for the defence costs, defence, investigations, and shareholder class action. Insurers argued that the matter should have been notified to the FY11 policy year.

Judgment

The court held that CIMC failed to disclose the file note prior to renewal. However, the court went on to conclude that the claim was captured under the new policy because of the extension provided in the continuity of cover clause:

5.3 Notwithstanding Exclusion 3.2 (Prior Claims and Circumstances), cover is provided under this policy for any Claim, or circumstance, which could or should have been notified under any earlier policy, provided always:

1. the Claim or circumstance, could and should have been notified after the Continuity Date; and
2. the Claim shall be dealt with in accordance with all the terms, conditions, exclusions and limitations of the policy under which the Claim, or circumstance, could and should have been notified.

The court concluded that the criteria of the above clause were met and that the claim was covered, subject to the 2010 policy terms. Despite the eroded limit of the earlier policy, the purpose of a continuous cover clause is to provide cover for claims that might have been

made earlier but were not. Further, there was no mechanism in the 2011 policy for the 2010 insurers to notify the 2011 insurers of payments they made under the earlier policy.

Considerations for underwriters and insurers

Whilst underwriters are often keen to provide continuous cover and similar clauses to provide comfort and protection to policyholders, they should be mindful of the potentially significant impact of such clauses in terms of their ability to undermine remedies that might otherwise have been available to them.

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