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Details of Filing

Document Lodged:	Outline of Submissions
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File Title:	SWISS RE INTERNATIONAL SE v LCA MARRICKVILLE PTY LIMITED ACN 601 220 080
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SWISS RE'S OUTLINE OF SUBMISSIONS

No: NSD 132 of 2021

Federal Court of Australia

District Registry: New South Wales

Division: General

Swiss Re International SE ARBN 138 873 211

Applicant/Cross-Respondent

LCA Marrickville Pty Limited ACN 601 220 080

Respondent/Cross-Claimant

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1 INTRODUCTION

1.1 The Respondent (***LCA Marrickville***) claims indemnity under a policy of insurance issued by Swiss Re International SE (***Swiss Re***).

1.2 LCA Marrickville's claim is for losses allegedly sustained from the interruption of its business that it says arose from various Public Health Orders made in New South Wales following the emergence of COVID-19.

1.3 General matters concerning the emergence of COVID-19, its features, and some of the government responses to it are set out in the Statement of Agreed Facts.[1] Additional features of that response are highlighted in Schedules A – C to this outline. It is clear enough that the emergence of COVID-19 was a significant global event. However, that fact – along with the general features of COVID-19 and the responses of various levels of government to it – do not overcome the conclusion that when the words of the Policy are properly construed, there is no cover.

1.4 LCA Marrickville's claim on the Policy must fail, and its cross-claim should be dismissed. The relief sought in the Originating Application should be granted.

2 GENERAL PRINCIPLES

2.1 An analysis of the background circumstances, as well as the general concepts and legal principles, that are relevant to the each of the proceedings is set out in Section B of Insurance Australia Ltd's outline of submissions (***IAG's Submissions***).

2.2 For the purposes of this outline, Swiss Re adopts those general aspects of IAG's Submissions and, save for some limited amplification or supplementation below, they are otherwise not addressed in detail.

3 THE ISSUES

3.1 The issues that arise in the context of LCA Marrickville's claim for indemnity (at this stage of the proceedings) are identified in the questions set out in the List of Issues for Determination filed on 18 July 2021 (***List of Issues***).

3.2 The issues set out in the List of Issues, as they relate to LCA Marrickville's claim, fall into the following general categories:

3.2.1 The "*Disease Clause*": List of Issues, [1];

[1] Statement of Agreed Facts at [1]-[44].

3.2.2 The "*Biosecurity Act Exclusion*": List of Issues, [2];

3.2.3 The "*Expansion Clause*": List of Issues, [3];

3.2.4 The "*Conflagration/Catastrophe Clause*": List of Issues, [4]

3.2.5 The "*Prevention of Access Clause*": List of Issues, [5];

3.2.6 The construction of cl 9.1.2: List of Issues, [6];

3.2.7 Causation, Adjustment, and Basis of Settlement: List of Issues, [7]; and

3.2.8 Interest: List of Issues, [8].

3.3 In this outline, those issues are addressed within the following framework:

3.3.1 The Swiss Re Policy – Section 4.

The framework of the Swiss Re Policy is analysed. Its property insurance genesis is outlined. The manner in which limited extensions to cover are granted for non-property damage related business interruption is explained. The importance of the "*Situation*" (i.e., LCA Marrickville's physical place of business) to the scope of cover is identified.

3.3.2 The Disease Clause and the Expansion Clause (Issues 1 and 3) – Section 5.

The key integers of those insuring clauses are examined under the following headings:

3.3.2.1 The structure of the Disease Clause;

3.3.2.2 Geographical connection;

3.3.2.3 Closure or evacuation;

3.3.2.4 Order of a competent public authority;

3.3.2.5 As a result of an outbreak at the Situation or within the Radius;

3.3.2.6 Notifiable disease; and

3.3.2.7 Discovery of an organism.

3.3.3 The Biosecurity Act Exclusion (Issues 2 and 7) – Section 6.

The three issues identified by the parties are discussed under the following headings:

3.3.3.1 Ambulatory operation;

3.3.3.2 Ambit of the exclusion (including the construction of cl 9.1.2 generally); and

3.3.3.3 Section 54 of the *Insurance Contracts Act 1984* (**Cth)** (***ICA***).

3.3.4 The Prevention of Access Clause (Issue 5) - Section 7.

Swiss Re advances its reasons as to why the Prevention of Access Clause does not respond to the claim made by LCA Marrickville in respect of the "*Authority Response – LCA Marrickville*".

3.3.5 The Conflagration/Catastrophe Clause (Issue 4) – Section 8.

Swiss Re advances its reasons as to why the proper construction of the Conflagration/Catastrophe Clause involves a consideration of the phrase "*conflagration or other catastrophe*" and why that does not extend to the claim made by LCA Marrickville in respect of the "*Authority Response – LCA Marrickville*".

3.3.6 Causation, Adjustment and Basis of Settlement (Issue 7) – Section 9.

General issues relating to causation and adjustment are discussed to the extent possible at the time of writing.

3.3.7 Interest (Issue 8) – Section 10.

3.4 It has not been possible for Swiss Re to engage in a detailed analysis of some issues (particularly those under the heading of "*Causation, Adjustment and Basis of Settlement*") in circumstances where, at the time of writing, LCA Marrickville has not completed service of the material it relies upon in its case. In accordance with the position agreed at the Case Management Conference on 10 August 2021, this outline addresses such issues in a general way and Swiss Re reserves its position to supplement its submissions on them in due course.

4 THE SWISS RE POLICY

(a) General features of the Policy

4.1 The Policy was issued on about 17 July 2019 and comprises:

4.1.1 a policy wording – being the Aon Risk Services Australia Ltd (***Aon***) Industrial Special Risks "*Vertex Policy Wording*" dated August 2018 (***Wording***);

4.1.2 a schedule (***Schedule***) (also prepared by Aon); and

4.1.3 endorsements to the Policy (set out in the Schedule) (***Endorsements***).[2]

4.2 The Policy was arranged on behalf of the "*Insureds*", including LCA Marrickville, by an insurance broker, Aon.

4.3 The "*Period of Insurance*" is between 30 June 2019 to 30 June 2020.[3]

4.4 "*Insured*" is defined in the Wording as "*described in the Schedule…*".[4] The Schedule lists a number of entities as the "*Insured*", including those "*Additional Named Insured's [sic] and Interested Parties as outlined by endorsement*".[5] The relevant Endorsement lists LCA Marrickville as an "*Additional Named Insured*".[6] It follows that there is no issue in these proceedings that LCA Marrickville is an "*Insured*" under the Policy.[7]

4.5 The "*Limit of Liability*" expressed in the Schedule was varied by endorsement as follows[8]:

> *"The amount(s) set out hereunder represent the Insurer(s) maximum Limit(s) of Liability any one loss or series of losses arising out of any one event at any one Situation used by the Insured, subject to any lesser Limit(s) of Liability specified elsewhere in this Policy. The Policy Limit(s) and Sub Limit(s) are to apply in excess of the relevant deductible(s).*
>
> *Section 1 & 2 Combined $25,000,000 in respect of the Laser Clinics and Skinstitut Head Office - Units 20 & 21, 39 Herbert Street St Leonards NSW 2065;*
>
> *Section 1 & 2 Combined $10,000,000 in respect of each other locations*"

4.6 That "*Limit of Liability*" is subject to various sub-limits set out in the Schedule. Significantly for the purpose of LCA Marrickville's claim, a sub-limit of $500,000 in the aggregate applies to cl 9.1.2.1 (referred to as the "*Disease Clause*" below) (***Disease Sub-Limit***).[9] The obvious effect of the Disease Sub-Limit is that the cover purchased by LCA Marrickville in relation to the indemnity extended by the Disease Clause is limited to 5% or less of the total "*Limit of Liability*" of $10 million.

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[2] Schedule, p 1; Wording, cl 1.4.
[3] Schedule, p 2.
[4] Wording, cl 1.9.
[5] Schedule, p 1.
[6] Schedule, pp 7-8; Wording cl 1.11.
[7] Statement of Claim, [47]; Defence, [47].
[8] Schedule, p 10.
[9] Schedule, pp 2-4.

(b) The structure of the Policy

4.7 The Policy is structured as follows:

4.7.1 Section 1, headed "*Property Insurance*", deals with property damage;

4.7.2 Section 2, headed "*Interruption Insurance*", contains:

4.7.2.1 primary business interruption cover for "*loss*" resulting from the "*interruption of or interference with the Business*" caused by "*Damage*" to property occurring during the Period of Insurance (cl 9.1.1); and

4.7.2.2 a limited extension of cover for "*loss*" resulting from the "*interruption of or interference with the Business*" in consequence of certain events occurring during the Period of Insurance which shall be "*deemed to be loss caused by damage*".

(i) Section 1

4.8 The cover set out in Section 1 of the Policy is for "*Damage occurring to the Property Insured during the Period of Insurance*".[10] It is in the nature of all-risks cover in that the insuring clause (cl 2) provides general cover for "*Damage occurring to the Property Insured during the Period of Insurance*" subject to (inter alia) the exclusion of certain items of property identified in cl 5 and "*Damage*" that occurs in the circumstances identified in cl 6 (i.e., "*perils*" exclusions).

4.9 "*Damage*" is defined in the Policy as meaning "*physical loss, damage or destruction*".[11] "*Property Insured*" is defined as meaning[12]:

> **"***all tangible property both real and personal of every kind and description belonging to the* ***Insured*** *or for* ***Damage*** *to which property the* ***Insured*** *is legally responsible or for which the* ***Insured*** *has assumed responsibility to insure prior to the occurrence of any* ***Damage****…*"

4.10 Section 1 also provides "*Additional Cover*" for costs associated with: "*Professional Fees*"[13]; "*Government or other Statutory Authority Fees*"[14]; "*Removal of Debris*"[15]; "*Demolition, Dismantling*

[10] Wording, cl 2.
[11] Wording, cl 1.3.
[12] Wording, cl.1.16.
[13] Wording, cl 3.1.1.
[14] Wording, cl 3.1.2.
[15] Wording, cll 3.1.5 and 3.1.6.

and Shoring Up"[16]; and "*Removal of Undamaged Property*"[17], in circumstances where "*Damage to Property Insured occurs in circumstances giving rise to indemnity*" under Section 1 of the Policy and where those costs are "*necessarily and reasonably incurred*". Similarly, cl 3.2 of the Policy extends cover for other "*additional costs which are reasonably and necessarily incurred*", such as: "*Personal Property*"[18]; "*Fire Extinguishing Costs*"[19] and "*Replenishing Fire-fighting Appliances*"[20]. Those additional costs or expenses are of a character incidental to dealing with, or responding, to an incidence of property damage.[21]

4.11 As noted above, cl 6 of the Policy sets out the perils exclusions applicable to Section 1. Clause 6.1 provides that Section 1 does not "*cover Damage to any Property Insured caused directly or indirectly by or in connection with or arising from or occasioned through*" those matters identified in the sub-clauses. Relevantly for present purposes, those matters include (cl 6.1.2):

> "*…any order of any government, public or local authority involving the confiscation, nationalisation, requisition or Damage of any property, except acts of destruction at the time and for the purpose of preventing the spread of fire or any other cause not excluded from cover by Clause 6, unless such order involves the demolition of property deemed unsafe following Damage not occurring in circumstances which are excluded from cover by Clause 6*".

4.12 However, immediately following that exclusion, the Policy goes on to provide that indemnity under Section 1 is extended for:

> *"…Damage caused by the action of a civil authority during a conflagration or other catastrophe for the purpose of retarding same and/or for the reasonable cost of removal of Property Insured at the Situation for the purpose of preventing or diminishing imminent Damage by, or inhibiting the spread of, fire or any other cause not excluded under this Policy and for Damage resulting from removal carried out in those circumstances"*.

4.13 The effect of cl 6.1.2 is therefore to:

4.13.1 first, exclude from Section 1, cover for "*Damage*" to any "*Property Insured*" occasioned though a relevant order of a government, public or local authority involving "*Damage*" to

[16] Wording, cl 3.1.7.
[17] Wording, cl 3.1.8.
[18] Wording, cl 3.2.1.
[19] Wording, cl 3.2.2.
[20] Wording, cl 3.2.3.
[21] That cover is subject to particular sub-limits: Schedule, pp 2-3.

the "*Property Insured*", save certain limited acts including "*actions of destruction at the time and for the purpose of preventing the spread of fire*", and

4.13.2 secondly, write back into the indemnity provided by Section 1 "*Damage…caused by the action of a civil authority during a conflagration or other catastrophe for the purpose of retarding same*".

4.14 Further, cl 6.2.4 excludes from cover in Section 1 of the Policy, "*Damage to any Property Insured caused by or occasioned through…disease*".

(ii) Section 2

4.15 As noted above, Section 2 is divided into two parts. The insuring promise in respect of Section 2 (under which LCA Marrickville makes its claim) is set out in cl 9.1 of the Policy, which provides (underlined emphasis added):

> "***9. Extent of Cover***
>
> *9.1 The Insurer will indemnify the Insured in accordance with the provisions of Clause 10 (Basis of Settlement) against loss resulting from the interruption of or interference with the Business, provided the interruption or interference:*
>
> *9.1.1 is caused by Damage occurring during the Period of Insurance to:*
>
> *9.1.1.1 any building or any other property or any part thereof used by the **Insured** at the **Situation** for the purposes of the **Business**;*
>
> *9.1.1.2 any property belonging to the **Insured** or for **Damage** to which the **Insured** is responsible, while such property is at any storage premises within Australia or at any situation within Australia where the **Insured** has any work or process carried out by others;*
>
> *9.1.1.3 any communication link and/or any electric power station or sub-station, steamworks, gasworks (including any land-based premises of any gas supply undertaking or of any natural gas producer linked directly therewith) or water works including the distributive system from which the **Insured** obtains electric current, steam, gas or water which is situated anywhere in Australia or any sewerage works including the distributive system that services the **Situation**;*

*9.1.1.4 computer installations, including ancillary equipment and data processing media utilised by the **Insured** anywhere in Australia;*

*9.1.1.5 property at or in the vicinity of the **Situation** which prevents or hinders the use of or access to the **Situation** (whether any property of the **Insured** shall be the subject of **Damage** or not);*

*9.1.1.6 property at or in the vicinity of premises of the **Insured's** suppliers, manufacturers, processors or storers of components, goods, materials or equipment, or customers situated anywhere in Australia;*

*9.1.1.7 property in any commercial complex of which the **Situation** forms a part or in which the **Situation** is contained which results in cessation or diminution of trade, including any cessation or diminution of trade due to temporary falling away of potential custom (whether any property of the **Insured** shall be the subject of **Damage** or not);*

*9.1.1.8 a special attraction, being another business or facility in the immediate vicinity of the **Situation**, that the **Business** depends upon to attract people to the area which results in cessation or diminution of trade, including any cessation or diminution of trade due to temporary falling away of potential custom;*

*9.1.1.9 property within a twenty kilometre radius of the **Situation** which results in cessation or diminution of **Business** due to temporary falling away of potential custom;*

*9.1.1.10 any registered vehicles or trailers which are owned or operated by the Insured, while such vehicles or trailers are at the **Situation**, but not while any such vehicles or trailers are being used on any public highway or thoroughfare;*

9.1.2 <u>is in consequence of</u>:

9.1.2.1 <u>closure or evacuation of the whole or part of the Situation by order of a competent public authority as a result of an outbreak of a notifiable human infectious or contagious disease</u> or bacterial infection <u>or any discovery of an organism likely to result in the</u>

*occurrence of a notifiable human infectious or contagious disease or consequent upon vermin or pests or defects in the drains and/or sanitary arrangements at the Situation but specifically excluding losses arising from or in connection with highly Pathogenic Avian Influenza in Humans or any disease(s) declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015; [(**Disease Clause**)]*

*9.1.2.2 murder or suicide or attempted suicide or violent crime or armed robbery occurring at the Situation;[(**Murder/Suicide Clause**)]*

*9.1.2.3 injury, illness or disease arising from or likely to arise from or traceable to foreign or injurious matter in food or drink provided from or on the Situation; [(**Food/Drink Clause**)]*

*9.1.2.4 any of the circumstances set out in Sub-Clauses 9.1.2.1 to 9.1.2.3 (inclusive) occurring within a 5 kilometer radius of the Situation; [(**Expansion Clause**)]*

*9.1.2.5 the action of a civil authority during a conflagration or other catastrophe for the purpose of retarding same; [(**Conflagration/Catastrophe Clause**)]*

*9.1.2.6 the action of any lawful authority attempting to avoid or diminish risk to life or Damage to property within 5 kilometres of such Situation which prevents or hinders the use of or access to the Situation whether any property of the Insured shall be the subject of Damage or not, occurring during the Period of Insurance. [(**Prevention of Access Clause**)]*

during the Period of Insurance. Such events shall be deemed to be loss caused by Damage covered by Section 2 of this Policy. Furthermore Clauses 12 and 13 shall not apply to the cover provided by this Clause 9.1.2."

4.16 "*Situation*" is defined for the purposes of the Policy as:

"*the Situation or Situations shown in the **Schedule**. Where the **Situation** specified in the Schedule is other than a single address, each separate address at which the **Property Insured***

is located shall be one ***Situation*** *for the purposes of this Policy, particularly in relation to the* ***Limit of Liability*** *and Sub-Limits of Liability*".[22]

4.17 The Schedule specifies the "*Situation*" to be:

> "*Head Office Units 20 & 21, 39 Herbert St, St Leonards NSW 2065 and elsewhere in Australia including contract sites where the Insured has property or carries on business, has goods or other property stored or being processed or has work done.*"[23]

4.18 In the context of the present case, the "*Situation*" is LCA Marrickville's store located at Shop 45, Marrickville Metro Shopping Centre, 20 Smidmore Street, Marrickville NSW 2204[24].

(c) The boundaries of cover

4.19 Critically, the indemnity extended by Section 1 is solely concerned with physical loss, damage or destruction of the "*Property Insured*". Section 2 then operates to extend that cover for "*loss resulting from the interruption of or interference with the Business*" in two ways.

4.20 First, the primary interruption insurance contained in cl 9.1.1 requires "*Damage*" to certain property "*During the Period of Insurance*". Like Section 1, that aspect of the business interruption cover is in the nature of "*all risks*" cover in that it does not identify the particular perils insured against, but rather identifies the particular property insured for the purposes of the primary business interruption cover. That cover is then subject to exclusions 12 and 13, which pick up and apply aspects of cll 5 and 6 of the Policy.

4.21 Secondly, cl 9.1.2 then operates to provide a limited extension for certain business interruption losses that are "*in consequence of*" the various matters identified in the sub-clauses. That extension is expressed in a slightly different manner to the cover contained in Section 1 and the primary business interruption cover contained in cl 9.1.1. Clause 9.1.2 provides a limited extension of cover in respect of particular events, namely certain orders or actions of an authority "*occurring during the Period of Insurance*". It then uses the drafting device by which those "*events*" that engage cl 9.1.2 are then deemed to be "*loss caused by Damage*" (i.e., loss caused by physical damage or destruction of property) for the purpose of the Policy. The scope of those limited extensions is to be understood in the context where the primary cover afforded under the Policy is founded on physical damage or destruction to property: *Star Entertainment Group v Chubb Insurance Australia Ltd* [2021] FCA 907 at [92] and [172].

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[22] Wording, cl 1.18.

[23] Schedule, p 2.

[24] See Agreed Facts at [46].

4.22 Construed in its proper context, the limited extensions in cl 9.1.2 (pursuant to which LCA Marrickville's claim is made) do not advance general cover for the matters that are the subject of each sub-clause. Relevantly for present purposes:

4.22.1 the Disease Clause is confined to business interruption losses in consequence of a relevant order of a "*competent public authority"* requiring the "*closure or evacuation of the whole or part of the Situation*" in the limited circumstances (and only in respect of certain diseases) identified in that clause. No aspect of that extension provides general cover for the consequences of "*disease*".

4.22.2 the Conflagration/Catastrophe Clause, is confined to those business interruption losses that are "*in consequence of… action of a civil authority during a conflagration or other catastrophe for the purpose of retarding same"*. In its context, the clause does not extend general cover for the consequences of any "*conflagration or other catastrophe*".

4.22.3 the Prevention of Access Clause is confined to those business interruption losses that are "*in consequence*" of certain action of a "*lawful authority*" that "*attempts to avoid or diminish a risk to life or Damage to property*" within a 5 kilometre radius of the "*Situation*" which prevents or hinders the use of or access to the "*Situation*". Again, no aspect of that limited extension provides general cover for the consequences of a risk to life or "*Damage*" to property.

4.23 Accordingly, as explored further below, it is plain that the extension in cl 9.1.2 of the Policy does not provide business interruption cover in respect of disease, conflagration or other catastrophe, or a risk to life or "*Damage"* to property generally. Rather, the cover is directed to the particular "*orders*" or "*actions*" "*occurring during the Period of Insurance*" and which otherwise engage the clause.

4.24 The second and associated feature of the extension in cl 9.1.2 is its geographical limitation. That indemnity is firmly anchored to the location of the "*Situation*". For some extensions only, that geographical limitation on cover is relaxed to a 5 kilometre radius. But it is that 5 kilometre radius of the "*Situation*" that is the outer bounds by which the extension of cover is engaged.

(d) The integers of clause 9.1.2 of the Policy

4.25 As explained above, cl 9.1.2 operates as an extension to cover for "*loss resulting from the interruption of or interference with the* ***Business***", but only where that "*interruption or interference*" was "*in consequence of*" the matters identified in the relevant sub-clause relied upon. Accordingly, before one gets to a consideration of the components of the various sub-clauses to cl 9.1.2, it is necessary for LCA Marrickville to first establish that:

4.25.1 it suffered a "*loss*";

4.25.2 that "*loss result[ed] from*" the "*interruption of or interference with*" the "*Business*" (as defined in the Policy)[25];

4.25.3 that interruption of or interference with the "*Business*" was "*in consequence of*" the relevant "event" in the particular sub-clause under which the claim for indemnity is made (each such "*event*" is then deemed to be "*Damage*" for the purposes of the Policy); and

4.25.4 that "*event*" occurs during the "*Period of Insurance*".

4.26 Thus, there are two causal connections required in those aspects of cl 9.1.2.

4.27 In addition to those general aspects of cl 9.1.2, is also necessary to pay close attention to the structure of each of the sub-clauses on which LCA Marrickville bases its claim, those being the:

4.27.1 Disease Clause;

4.27.2 Expansion Clause;

4.27.3 Conflagration/Catastrophe Clause; and

4.27.4 Prevention of Access Clause,[26]

each of which have multiple integers that must also be satisfied before an entitlement to indemnity will arise. The features of those sub-clauses are addressed in context below.

(e) The Basis of Settlement

4.28 As set out in the opening words of cl 9, the extent of any indemnity available under Section 2 of the Policy is to be ascertained in accordance with cl 10 of the Policy (***Basis of Settlement Clause***).[27] Only if the relevant integers of those aspects of cl 9 that are relied upon are satisfied, and an amount that falls within the indemnity is ascertained in accordance with the Basis of Settlement Clause will the insured be entitled to indemnity.

4.29 The Basis of Settlement Clause contains ten "*items*", each specifying the nature and extent of the indemnity in the event that cover is triggered. The "*items*" that are insured are identified in the Schedule. In the present case, the Policy extends cover in respect of cll 10.1 (headed "*Gross Profit*"),

[25] There is no issue that LCA Marrickville's business satisfies the definition of "*Business*" for the purpose of the Policy: Wording, cl 1.2; Policy Schedule, p 1.
[26] Cross-Claim, [8]-[11].
[27] Wording, cl 10.

10.4 (headed "*Insured Payroll)*"[28], 10.6 (headed "*Additional Increased Cost of Working*") and 10.10 (headed "*Claims Preparation Costs*").[29]

4.30 As Swiss Re understands the position, LCA Marrickville's claim (assuming that cl 9.1.2 is otherwise engaged) is for alleged loss of "*Gross Profit*"[30] under cl 10.1 of the Policy. Clause 10.1 provides:

> "*The **Insured** is indemnified with respect to loss of **Gross Profit** calculated in the following manner, namely:*
>
> *10.1.1 in respect of reduction in **Turnover**, the sum produced by applying the **Rate of Gross Profit** to the amount by which the **Turnover** during the **Indemnity Period** shall, in consequence of the **Damage**, fall short of the **Standard Turnover**; and*
>
> *10.1.2 in respect of Increase in Cost of Working, the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in **Turnover** which, but for that expenditure, would have taken place during the **Indemnity Period** in consequence of the **Damage**, but not exceeding the sum produced by applying the **Rate of Gross Profit** to the amount of the reduction thereby avoided.*
>
> *10.1.3 There shall be deducted from the amounts calculated in 10.1.1 and 10.1.2 any sum saved during the **Indemnity Period** in respect of such of the charges and expenses of the **Business** payable out of **Gross Profit** as may cease or be reduced as a consequence of the **Damage** (excluding depreciation and amortisation).*"

4.31 "*Indemnity Period*" is defined at cl 8.5 as "*the period beginning with the occurrence of the **Damage** and ending not later than the number of months specified in the **Schedule** thereafter during which the results of the **Business** shall have been affected in consequence of the **Damage***."[31]

4.32 The operation of the Basis of Settlement Clause requires a consideration of various defined terms set out in it. Having regard to the fact that, at the time of writing, LCA Marrickville has not completed service of the material it relies upon to support its claimed "*loss*", it is not possible to engage in a meaningful analysis of those aspects of the clause. Some general aspects of the operation of the Basis of Settlement Clause are addressed in Section 9 below.

4.33 Significantly, in the context of LCA Marrickville's claim it can be seen that cll 9 and 10 of the Policy operate together to extend indemnity for a reduction in "*Turnover*" or an "*Increase Cost of Working*"[32]

[28] Subject to the amendment set out in the Schedule.
[29] Schedule, pp 3-4.
[30] Item 1 in the Basis of Settlement Clause.
[31] Policy, cl 8.5.
[32] Both of which fall to be ascertained in accordance with the terms of the Policy, and having particular reference to the various defined concepts used.

(i.e., "*Gross Profit*") that is "*in consequence of the Damage*", subject to adjustments for sums saved in respect of charges or expenses that cease or are reduced "*as a consequence of the Damage*".

4.34 Further, the extent of any indemnity for "*Gross Profit*" is to be determined by applying the following adjustment which appears in the *chaussette* to cl 8 of the Policy (***Trends Clause***):

> "*Adjustments shall be made to the **Rate of Gross Profit**, **Standard Turnover**, **Standard Gross Revenue**, **Standard Gross Rentals** and **Rate of Payroll** as may be necessary to provide for the trend of the **Business** and for variations in or other circumstances affecting the **Business** either before or after the date of the **Damage** or which would have affected the **Business** had the **Damage** not occurred, so that the figures as adjusted shall represent as nearly as may be reasonably practicable the results which, but for the **Damage**, would have been obtained during the relative period after the **Damage** occurred."*

4.35 Thus, the Trends Clause operates so as to limit the indemnity to only that "*Damage*" that engages cl 9.1.2. It achieves that by excluding from the indemnity the impact of the circumstances that would have affected the "*Business*" even if the "*Damage*" (i.e., the "*event*" that engaged cl 9.1.2) had not occurred. For present purposes, the "*Damage*" is those "*events*" constituted by the particular:

4.35.1 *"closure or evacuation of the whole or part of the Situation by order of a competent public authority"* (for the purposes of the Disease Clause and the Expansion Clause);

4.35.2 *"action of a civil authority"* (for the purposes of the Conflagration/Catastrophe Clause); and

4.35.3 *"action of a lawful authority"* (for the purposes of the Prevention of Access Clause),

relied upon by LCA Marrickville.

4.36 Accordingly, properly construed, it can be seen that it is the "*order*" or "*action*" that engages cl 9.1.2 that is the basis of the indemnity. Further support for that conclusion arises from the fact that to trigger cl 9.1.2, the relevant "*order*" or "*action*" must have been one "*occurring during the Period of Insurance*". Consistent with that feature of cl 9.1.2, the "*Indemnity Period*" commences on the "*occurrence of the Damage*".

4.37 Thus, to the extent that an indemnifiable "*loss*" has been suffered, cover only extends to "*Damage*" (here the "*order*" or "*action*" of a relevant authority that engages cl 9.1.2 and only that "*order*" or "*action*") and not the state of affairs or circumstances which resulted in that "*Damage*" (i.e., the state of affairs or circumstances which resulted in the relevant order being made, or the action being taken).

4.38 In that context, cl 9.1.2 does not operate to extend a general indemnity for the circumstances or matters in response to which the "*order*" was made, or the "*action*" was taken. It follows that there is no general indemnity for the consequences of a "*notifiable human infectious or contagious disease*", a "*conflagration or other catastrophe*", or a "*risk to life or Damage to property*".

4.39 That conclusion is consistent with the fact that cl 9.1.2 operates as a limited extension to the property damage cover afforded by the Policy.

5 THE DISEASE CLAUSE AND THE EXPANSION CLAUSE: LIST OF ISSUES [1] AND [3]

5.1 While the parties have described cl 9.1.2.1 of the Policy as "*the Disease Clause*" for convenience in the context of LCA Marrickville's claim, it is important to keep in mind that cl 9.1.2.1 does not provide general cover for "*disease*". Rather, the insured peril is the closure or evacuation of the "*Situation*" by order of a competent public authority. Clause 9.1.2.1 identifies a series of matters from which the "*order*" must result in order to engage its operation and an "*outbreak of a notifiable human or infectious disease*" is one such matter. As with any question of construction, it is important to focus on the words of the Policy and not be distracted by labels or nomenclature.

(a) The structure of the Disease Clause

5.2 A consideration of the structure and proper construction of the Disease Clause in the context of LCA Marrickville's claim requires an analysis of its various integers, and the concepts contained in them. Given that the Expansion Clause picks up the features of the Disease Clause and operates to expand the geographical limitation of cover contained in it (and operates to the same effect in relation to cll 9.1.2.2 and 9.1.2.3), it is convenient to consider both together.

5.3 In order to engage the Disease Clause (in addition to the general integers of cl 9.1.2 identified in paragraph 4.25 above) LCA Marrickville must establish that:

5.3.1 there was a "*closure or evacuation of the whole or part of the **Situation** by order of a competent public authority*"; and

5.3.2 that order was made "*as a result of an outbreak of a notifiable human infectious disease or contagious disease or bacterial infection or any discovery of an organism likely to result in the occurrence of a notifiable human infectious disease or contagious disease….at the **Situation***".

5.4 The Expansion Clause operates to extend the geographical limitation in the Disease Clause from "*at the Situation*" to a "*5 kilometer radius of the Situation*" (***Radius***).

5.5 Specifically excluded from the operation of the Disease Clause (and therefore the Expansion Clause) are "*losses arising from or in connection with…any disease(s) declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015*" (***Biosecurity Act Exclusion***). The Biosecurity Act Exclusion is considered in Section 6 below.

5.6 LCA Marrickville has not served sufficient evidence going to "*loss*" which enables a consideration of each integer of the Disease Clause set out above. The same applies in relation to the Conflagration/Catastrophe Clause and the Prevention of Access Clause.

(b) Geographical connection

5.7 It can be immediately observed that the operation of the Disease Clause is confined to:

5.7.1 an "*outbreak of a notifiable human infectious or contagious disease*" at the "*Situation*"; or

5.7.2 "*discovery of an organism likely to result in an infectious disease*" at the "*Situation*".

5.8 For the purposes of the Disease Clause the requisite "*outbreak*" of disease or "*discovery*" of an organism must occur "*at the Situation*" and not elsewhere. That essential link is clear on the face of the Disease Clause, and also appears in cll 9.1.2.2 and 9.1.2.3 (i.e., the Murder/Suicide and Food/Drinks Clauses).

5.9 That conclusion is supported by the inclusion of the Expansion Clause. The purpose served by the Expansion Clause is to extend the geographical limitation in the Disease Clause, and each of the Murder/Suicide and Food/Drinks Clauses, beyond the "*Situation*" to "*within a 5 kilometer radius of the Situation*". It otherwise picks up and applies the features of the clauses to which it applies. If the parties objectively intended that the relevant "*outbreak of a notifiable human infectious or contagious disease*" or "*discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease*" could occur anywhere whatsoever, no purpose is served by the inclusion of the Expansion Clause. The Court would not adopt a construction of cl 9.1.2 of the Policy that ignores the clear geographical limitations contained in it and renders the Expansion Clause redundant.[33]

5.10 The requirement for a geographical nexus is discussed further in section 5(d) below – in the context of the requirement for there to be an "*outbreak*" at the "*Situation*" or within the Radius. It also arises in the context of the Prevention of Access Clause (see section 7(b) below).

[33] See, e.g., *Chapmans v Australian Stock Exchange Ltd* (1996) 67 FCR 402 at 411 per Lockhart and Hill JJ.; IAG's Submissions at [27] - [29] and [130].

(c) Closure or evacuation

5.11 The words "*closure or evacuation of the whole or part of the Situation"* should be given their ordinary meaning paying due regard to the context in which they appear.[34]

5.12 The ordinary meaning of "*closure*" in the context of physical property is "*[t]he act or process of closing… a closed condition…*"[35] and "*[t]he act of closing or shutting…the state of being closed*"[36]. The related verb "*close*", in the same context, means "*to stop or obstruct the entrances, apertures, or gaps in…to refuse access or passage across…to bring to an end, to shut down either permanently or temporarily…*"[37].

5.13 Finally, the ordinary meaning of "*evacuation*" is "*remove (people) from a place of danger to stay elsewhere for the duration of the danger…empty (a place) in this way…*"[38], "*to leave empty; vacate…to move (persons or things) away from a place, disaster area, etc., to a place of greater safety*"[39] and "*the act of moving people from a dangerous place to somewhere safe*"[40].

5.14 It follows that for there to have been a "*closure or evacuation of the Situation*", the "*Situation*" (being the physical premises identified in the Schedule) must be unable to be accessed or occupied in any way.

5.15 The concept is not directed to the manner in which the "*Business*" of the "*Insured*" may be carried on. That is entirely consistent with the purpose of the cover afforded by the Policy. Critically, no aspect of the insured peril includes the risk that – by some action of a relevant authority – the "*Insured*" may not be able to carry on its "*Business*", either at all or in an unrestricted way, as a result of limitations or regulations imposed on it. For example, the cover set out in cl 9.1.2 is not directed to a risk that the "*Business*" may be affected by directions of a relevant authority banning the provision or particular services, or mandating the manner in which certain services are to be supplied. Risks of that kind are general business risks, and are not of a kind capable of engaging any aspect of cl 9.1.2, including the Disease Clause, which is directed to the "*Situation*" and not the "*Business*".

(d) Order of a competent public authority

5.16 In order to satisfy this aspect of the Disease Clause, the "*closure or evacuation of the whole or part of the situation*" must be caused by an "*order of a competent public authority*".

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[34] See, e.g., *Johnson v American Home Assurance Co* (1998) 192 CLR 266 at 272 per Kirby J.
[35] Australian Concise Oxford Dictionary
[36] Macquarie Concise Dictionary
[37] Macquarie Concise Dictionary
[38] Australian Concise Oxford Dictionary
[39] Macquarie Concise Dictionary
[40] Cambridge Dictionary

5.17 In the present case, the "*order[s] of a competent public authority*" relied upon by LCA Marrickville are described as the *"Authority Response-LCA Marrickville",* which comprises[41]:

5.17.1 *Public Health (COVID-19 Gatherings) Order (No 2)* 2020 (NSW), which came into effect on 26 March 2020 (***Gatherings Order No 2***)[42];

5.17.2 *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3)* 2020 (NSW), which came into effect on 1 June 2020 (***Restrictions on Gathering and Movement Order No 3***)[43];

5.17.3 *Public Health (COVID-19 Restrictions on Gathering and other Movement) (No 3) Amendment Order* 2020 (NSW), which came into effect on 12 June 2020 (***Amended Restrictions on Gathering and Movement Order No 3***)[44]; and

5.17.4 *Public Health (COVID-19 Gatherings) Order (No 7)* 2020 (NSW), which came into effect on 7 December 2020 (***Order No 7***)[45].

5.18 Swiss Re accepts, for the purposes of these proceedings, that those orders – having been made by the New South Wales Minister for Health under s 7 of the *Public Health Act* 2010 (NSW) (***Public Health Act***) – were orders "*of a competent public authority*" for the purposes of the Disease Clause.

5.19 Gatherings Order No 2 relevantly provided (in part):

> "*The Minister directs that the following must not be open to members of the public except as provided in this clause—*
>
> *…*
>
> *(i) business premises that are spas, nail salons, beauty salons waxing salons, tanning salons, tattoo parlours or massage parlours,*
>
> *…*"
>
> (***Business Closure Direction***)

5.20 Properly understood, the Business Closure Direction affected the extent to which LCA Marrickville may carry on its "*Business*". It was not directed to the ability to access or occupy the "*Situation*"

[41] Outline Document: [6]-[8], [12], and [14].
[42] Agreed Facts, Annex B, Item 8.
[43] Agreed Facts, Annex B, Item 23.
[44] Agreed Facts, Annex B, Item 23.
[45] Agreed Facts, Annex B, Item 30.

(being the physical premises), or any part of it. Accordingly, the Business Closure Direction did not require the "*closure or evacuation*" of the whole or part of the "*Situation*" within the meaning of the Disease Clause.

5.21 Even if, contrary to the submission immediately above, it was concluded that the Business Closure Direction constituted an "*order of a competent public authority*" that required the "*closure or evacuation of the whole or part of the Situation*", that direction only remained efficacious until 14 May 2020.

5.22 On 15 May 2020, the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 2)* 2020 (NSW) (***Restrictions on Gathering and Movement Order No 2***) came into force. It had the effect of permitting "*business premises that are spas, nail salons, beauty salons, waxing salons, tanning salons, tattoo parlours or massage parlours*" to be open to the public for "*the retail sale of goods and gift vouchers, including gift vouchers for services redeemable at a later date*" (***Retail Sales Limitation***).[46] Thus, from 15 May 2020, such businesses were no longer required to be closed to the public.

5.23 On any view, the Retail Sales Limitation did not have the effect of requiring a "*closure or evacuation*" of the "*Situation*". To the extent that it imposed a limitation on the manner in which LCA Marrickville's business may be conducted, again that is not a matter that engages the Disease Clause.

5.24 On 1 June 2020, Restrictions on Gathering and Movement Order No 3 came into force.[47] It relevantly contained a direction by the Minister that "*business premises that are spas, nail salons, beauty salons, waxing salons, tanning salons, tattoo parlours or massage parlours"* were subject to[48]:

> *"(a) the limitation on the number of persons that may be on the premises at any time set out opposite the premises in column 2 of the Schedule, and*
>
> *(b) the condition that no person may be on the premises as part of an individual group of more than 10 persons, and*
>
> *(c) any other restrictions or conditions set out opposite the premises in column 3 of the Schedule.*"

5.25 The relevant "*limitations*" and "*other restrictions or conditions*" identified in Schedule 1 to Restrictions on Movement and Gathering Order No 3 as they related to "*business premises that are*

[46] *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 2)* 2020 (NSW), cl 7(1)(h).
[47] Order No 3, cl 15(1).
[48] Order No 3, cl 5(1).

spas, nail salons, beauty salons waxing salons, tanning salons, tattoo parlours or massage parlours" were that:

5.25.1 the "*lesser of … (a) 10 customers and the business's staff members or "(b) the total number of persons calculated by allowing 4 square metres of space for each person (including staff members) on the premises*" (***10 Person/4m2 Rule***) could be on the premises at any one time; and

5.25.2 LCA Marrickville must have a "*COVID-19 safety plan*" (***Safety Plan Rule***).[49]

5.26 Restrictions on numbers of persons on the premises do not amount to a "*closure or evacuation*" having regard to the ordinary meaning of those words. Directions of that kind go to the manner in which LCA Marrickville's business is to be conducted and say nothing as to whether the "*Situation*" or any part of it may be accessed or occupied. The same may be said about the Safety Plan Rule.

5.27 The same conclusion follows in relation to Amended Restrictions on Gathering and Movement Order No 3 and Gathering Order No 7. That is because:

5.27.1 Amended Restrictions on Gathering and Movement Order No 3 had the effect of increasing the number of customers, or the total number of people, who may be at "*business premises that are spas, nail salons, beauty salons, waxing salons, tanning salons, tattoo parlours or massage parlours"* from 10 to 20 (excluding staff members), or the total number of persons calculated by allowing $4m^2$ per person on the premises[50] (***20 Person/4m^2 Rule***); and

5.27.2 Order No 7 again increased the number of persons who may be present at the "*Situation*" at any one time through a direction that the:

> "*occupier of premises must not allow more than 25 persons on the premises if the size of the premises is insufficient to ensure there is at least 2 square metres of space for each person on the premises*" (***25 Person/2m^2 Rule***)

5.28 None of the Retail Sales Limitation, 10 Person/$4m^2$ Rule, 20 Person/$4m^2$ Rule, 25 Person/$2m^2$ Rule or the Safety Plan Rule fall within the concept of a "*closure or evacuation of the whole or part of the Situation*". It follows that from 15 May 2020, no "*order of a competent public authority*" required or caused the "*closure of evacuation of the whole or part of Situation"* within the meaning of the Disease Clause.

[49] Order No 3, Schedule 1, item 16.

[50] Amended Order No 3, sch 1, item 30.

(e) As a result of an "*outbreak*" at the "*Situation*" or within the Radius

5.29 In order to engage the Disease Clause, the "*order*" relied upon by LCA Marrickville must have been made "*as a result of an outbreak of a notifiable human or infectious disease"* either at the "*Situation*" or within the Radius. That requires LCA Marrickville to establish: first, that there was an "*outbreak of a notifiable human or infections disease*" at the Situation or within the Radius, and secondly, that the relevant order was made "*as a result*" of that "*outbreak*". LCA Marrickville has failed to establish either requirement.

(i) The meaning of "*outbreak*"

5.30 The ordinary meaning of "*outbreak*" is: a "*sudden eruption of anger, war, disease, rebellion etc*"[51];"*a breaking out; an outburst…a sudden and active manifestation*"[52]; "*a time when something suddenly begins, especially a disease or something else dangerous or unpleasant*"[53]. Properly understood, an "*outbreak"* in the context of disease involves a sudden eruption, breaking out or an outburst of that disease. A single instance of disease, or multiple instances with no connection to a common cause, does not constitute an "*outbreak*" within the ordinary meaning of the word.

5.31 That is consistent with the approach taken with respect to "*outbreak*" in *The Financial Conduct Authority v Arch Insurance (UK) Ltd & Ors* [2021] UKSC 1. Relevantly, Lords Hamblen and Leggatt, with whom Lord Reed agreed, held (emphasis added):

> "*66. …the insuring clause does not use the word "outbreak"; it uses the word "occurrence". **If the clause had referred to any "outbreak" of a Notifiable Disease, that would have created obvious problems of deciding what constitutes an "outbreak" and by what criterion it is possible to judge whether a large number of cases of a disease are all part of one outbreak or are part of or constitute a number of different outbreaks.***
>
> *…*
>
> *69. A disease that spreads is not something that occurs at a particular time and place and in a particular way: it occurs at a multiplicity of different times and places and may occur in different ways involving differing symptoms of greater or less severity. **Nor for that matter could an "outbreak" of disease be regarded as one occurrence, unless the individual cases of disease described as an "outbreak" have a sufficient degree of unity in relation to time, locality and cause. If several members of a household were all infected with COVID-19 when a carrier of the disease visited their home on a particular day, that might arguably be***

[51] Australian Concise Oxford Dictionary.
[52] Macquarie Concise Dictionary.
[53] Cambridge Dictionary.

described as one occurrence. But the same could not be said of the contraction of the disease by different individuals on different days in different towns and from different sources. *Still less could it be said that all the cases of COVID-19 in England (or in the United Kingdom or throughout the world) which had arisen by any given date in March 2020 constituted one occurrence…*"

5.32 The necessary and critical feature of unity of time, location and cause between cases also flows from the fact that the relevant "*outbreak*" contemplated by the Disease Clause must occur at the "*Situation*" or within the Radius. The Policy is a geographically rooted policy. It does not provide cover in respect of outbreaks of COVID-19[54] (or any disease) that occur outside the 5 kilometre radius of the "*Situation*". Thus, the "*outbreak*" must originate at those limited locations. A spread of disease (including one that spreads following an outbreak that occurs elsewhere) is of a fundamentally different character to an "*outbreak*" that occurs at a particular location, the latter being something that happens at a particular time and place: see *Axa Reinsurance (UK) plc v Field* [1996] 1 WLR 1026 at 1035; *FCA v Arch* at [69]; *Star Entertainment v Chubb* at [174].

5.33 It follows that, on the proper construction of the Disease Clause, in order for there to have been an "*outbreak*" of COVID-19 at the "*Situation*" or within the Radius, LCA Marrickville must establish that there were multiple persons infected with COVID-19 and that those infections were connected by each of:

5.33.1 time, in that they must have contracted COVID-19 at about the same time;

5.33.2 location, in that those infections must have occurred at the "*Situation*" or within the Radius and not elsewhere; and

5.33.3 cause, in that each of those infections must be linked to a common cause originating at the "*Situation*", or within the Radius.

5.34 In practical terms, the unity of time, location and cause requires multiple contemporaneous transmissions from a cause originating at, and between persons located at the Situation or within the Radius at the time of transmission.

5.35 That connection is not established by identifying a number of persons infected with COVID-19 who were ordinarily resident within the Radius, or even that a person infected with COVID-19 was actually present at the Situation or within the Radius while infectious (of which there is no evidence here). Significantly more is required.

[54] Even if it were capable of otherwise engaging the Disease Clause, which it is not in part due to the operation of the Biosecurity Act Exclusion.

(ii) Was there an "*outbreak*" of COVID-19 at the "*Situation*" or within the Radius?

5.36 The evidence does not establish that there was an "*outbreak*" of COVID-19 either at the "*Situation*" or within the Radius.

5.37 The only material advanced by LCA Marrickville in support of its case is data published by the New South Wales Government.[55] That data records the cumulative total of confirmed cases of COVID-19 since January 2020, the postcode of the usual place of residence of the person infected, and whether the "*likely source of infection*" was overseas or "*locally acquired*" (meaning within Australia – not local to their ordinary residence[56]). Critically, that data does not:

5.37.1 establish when a person first contracted COVID-19;

5.37.2 establish where a person first contracted COVID-19;

5.37.3 establish the source of the infection;

5.37.4 establish where a person was during their infectious period, or at any time, when that person had COVID-19 – i.e., whether the person was in hotel quarantine, hospital quarantine, wholly compliant with directions to quarantine at home or in the community and if so, for what periods and at what locations;

5.37.5 identify the number of "*active*" COVID-19 infections at any particular time;

5.37.6 identify whether a particular person was a source of transmission for other infections, and if so, whether those infections occurred within the Radius; or

5.37.7 for those postcodes which are partially within the Radius, establish whether the ordinary residence of that person was actually inside the Radius.

5.38 It follows that LCA Marrickville is not capable of establishing that there was an "*outbreak*" of COVID-19 at the "*Situation*" or within the Radius.

5.39 Those inherent limitations in the data relied upon by LCA Marrickville also preclude an assessment of whether the infections are connected to an "*outbreak*" that occurred outside the Radius. Take, for example, those cases that were linked to the *Ruby Princess*, which arrived in Sydney on 19 March

[55] Agreed Facts, [51] and Annex G.

[56] The data only distinguishes between the "*likely source of infection*" being "*overseas*" or "*locally acquired*". Thus "*locally acquired*" infections are those that were likely acquired within Australia. The data does not permit a more precise identification of the location of the "*likely source of infection*" to a particular location in Australia.

2020.[57] To the extent that individuals who acquired their infection onboard, or when coming into contact with the ship when it docked, were ordinarily resident within the Radius, that infection would show up in the data advanced by LCA Marrickville. However, in that example, it is clear the relevant "*outbreak*" occurred on or near the ship, and not at the "*Situation*" or within the Radius.

5.40 In any event, the data does not identify any significant prevalence of COVID-19 infections amongst those persons who resided in a postcode wholly within the Radius between January and 24 March 2020 (being the date on which it was resolved at National Cabinet to implement more extensive measures on a Nationwide basis[58]). In that period, the data relied on by LCA Marrickville records:

5.40.1 that a total of 29 persons ordinally resident in a postcode wholly within the Radius had been infected with COVID-19 in that period[59]; and

5.40.2 of those infections:

5.40.2.1 20 had a "*likely source of infection*" of "*overseas*";

5.40.2.2 9 had a "*likely source of infection*" of within Australia.[60]

5.41 Thus, the data establishes that there were very few infections amongst those persons who were ordinarily resident in a postcode that is wholly within the Radius. Even if the inherent limitations in the data identified in paragraph 5.37 above could be put to one side (which they cannot), that material supports a conclusion that there was not a sufficient number of cases capable of having the requisite degree of unity of time, location, and cause so as to constitute an "*outbreak*" at the "*Situation*" or within the Radius.

(iii) Notifiable human infections or contagious disease

5.42 The Policy does not define what constitutes a "*notifiable human infectious or contagious disease*".

5.43 There are "*notifiable*" disease or condition regimes at the Commonwealth and State and Territory Levels.[61] COVID-19 (whether described as a "*Human coronavirus with pandemic potential*", "*Novel Coronavirus – 2019*", "*COVID-19*" or "*2019 novel coronavirus (2019-nCoV)*") was not a "*notifiable*" disease at the time the Policy was incepted but was made a "*notifiable*" disease or condition under each of those regimes in the period between January and March 2020.[62]

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[57] "*Cruise ship passengers identified with COVID-19*", 20 March 2020, NSW Department of Health https://www.health.nsw.gov.au/news/Pages/20200320_03.aspx

[58] See paragraph 5.53 below.

[59] See the extract of data from Annex G to the Agreed Facts set out in Schedule D to this outline.

[60] See the extract of data from Annex G to the Agreed Facts set out in Schedule E to this outline.

[61] See, e.g., *National Health Security Act 2007* (Cth), s 7; *Public Health Act*, s 81.

[62] See Schedule A to this outline.

5.44 On the proper construction of cl 9.1.2, it is not the designation of COVID-19 as a "*notifiable*" or a "*listed human disease*" that must occur during the "*Period of Insurance*". Rather, the extension is directed to "*orders*" having the features identified in the Disease Clause that are made during the "*Period of Insurance*". It is the timing of such an order that is critical to the availability of cover – not when the disease became relevantly "*notifiable*" or a "*listed human disease*". Accordingly, Swiss Re accepts that the Disease Clause is capable of having an ambulatory operation however an operation of that kind must extend to both concepts – i.e., whether a disease is "*notifiable*" and whether it is a "*listed human disease*".

5.45 This issue arises because LCA Marrickville denies that COVID-19 is a "*listed human disease*" for the purposes of the Policy on the basis that the relevant determination under the *Biosecurity Act 2015* (Cth) was made after the Policy incepted. Therefore, it remains necessary to consider whether the operation of the Disease Clause – including the Biosecurity Act Exclusion – is static or ambulatory. In circumstances where COVID-19 first emerged and was designated as a "*notifiable*" disease during the Policy of Insurance, LCA Marrickville plainly advances its claim on the basis that the Disease Clause operates in an ambulatory way and attaches to diseases which were not "*notifiable*" (whether because they had not emerged or had not been designated as such) prior to the inception of the Policy.

5.46 That question of construction arises most conveniently when considering the Biosecurity Act Exclusion and will be dealt with in Section 6(a) below. As will be seen, whether the Disease Clause operates in a static or ambulatory way, the ultimate conclusion is the same – there is no cover for business interruption where the disease is COVID-19.

(iv) The causal nexus between the "*outbreak*" and the "*order of a competent public authority*"

5.47 In order to engage cl 9.1.2, the "*order of a competent public authority*" must be made "*as a result of*" the established "*outbreak*" at the "*Situation*" or within the Radius. Even if LCA Marrickville could establish that there was an "*outbreak*" at the "*Situation*" or within the Radius for the purposes of the Disease Clause (which it cannot), it must then establish that the "*order*" relied upon was made "*as a result of*" that "*outbreak*".

5.48 The search for that causal nexus requires an identification of the matters that caused the New South Wales Minister for Health to implement those aspects of the "*Authority Response – LCA Marrickville*" relied upon as engaging the Disease Clause. A consideration of the events leading up to those Public Health Orders identified in paragraph 5.17 above reveals that, on any view, there was no causal connection (of any quality) between any "*outbreak*" of COVID-19 at the "*Situation*" or within the Radius and the implementation of the Public Health Orders.

5.49 Relevantly, on about 13 March 2020, the Council of Australian Governments established the "*National Cabinet*".[63]

5.50 On 22 March 2020, the Prime Minister announced that the National Cabinet had determined to implement "*Stage 1*" restrictions, which included restrictions on certain businesses (including pubs, gyms, cinemas, restaurants, places of worship) from operating (***22 March National Cabinet Agreement***).[64] The Prime Minister's statement included the following (emphasis added):

> "*Australian governments are focused on working together to* ***slow the spread of coronavirus (COVID-19) to save lives****.*
>
> *Every extra bit of time* ***allows us to better prepare our health system and put measures in place to protect Australian lives****.*
>
> *We will be living with this virus for at least six months****, so social distancing measures to slow this virus down must be sustainable*** *for at least that long to protect Australian lives, allow Australia to keep functioning and keep Australians in jobs.*
>
> *The Prime Minister, state and territory Premiers and Chief Ministers met on 22 March 2020 as the National Cabinet. They* ***agreed to further actions to support social distancing measures already put in place and protect the Australian community*** *from the spread of coronavirus…*"

5.51 Similar announcements followed from State and Territory leaders, including the Premier of New South Wales, who released a statement on 23 March 2020 that included the following (emphasis added)[65]:

> "*Following the decisions made by National Cabinet, NSW Premier Gladys Berejiklian confirmed the shutdown to protect NSW citizens.*
>
> *"I understand many in the community are worried, and these changes will affect everyday lives, and may be upsetting," Ms Berejiklian said.*

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[63] *"Press conference with Premiers and Chief Ministers*", 13 March 2020, The Hon Scott Morrison MP, Prime Minister https://www.pm.gov.au/media/press-conference-premiers-and-chief-ministers-parramatta-nsw

[64] "*Update on coronavirus measures*", 22 March 2020, The Hon Scott Morrison MP, Prime Minister: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F7256002%22

[65] **ACT**: "*Statement of the ACT Chief Minister*", 23 March 2020: https://www.cmtedd.act.gov.au/open_government/inform/act_government_media_releases/barr/2020/statement-act-chief-minister2; **NSW**: "*New COVID-19 restrictions begin as schools move towards online learning*", 23 March 2020: https://www.nsw.gov.au/media-releases/new-covid-19-restrictions-begin-as-schools-move-towards-online-learning; **NT**: "*Statement from the NT Chief Minister*", 23 March 2020: https://newsroom.nt.gov.au/mediaRelease/32113; **QLD**: "*Business closures and restrictions*", 23 March 2020: https://statements.qld.gov.au/statements/89582; **WA**: "*Important new COVID-19 measures come into effect*", 23 March 2020: https://www.mediastatements.wa.gov.au/Pages/McGowan/2020/03/Important-new-COVID-19-measures-come-into-effect-.aspx;

"But these decisions will make us all safer, they are taken with the health of all citizens in mind, and they must be taken now.

"If you have the capacity to work from home, you should do so."

5.52 On about 23 March 2020, each State and Territory implemented public health measures to give effect to the 22 March National Cabinet Agreement. In New South Wales, those measures were reflected in the *Public Health (COVID-19 Places of Social Gathering) Order* 2020 (NSW). The measures implemented by the other States and Territories are summarised in Schedule B to this outline.

5.53 On 24 March 2020, the Prime Minister announced the decision of National Cabinet to implement "*new and enhanced social distancing measures, building on the measures that are in place*". Those measures included an expansion of the "*Stage 1*" measures announced on 22 March 2020, including an expansion of the categories of business that would be required to cease or limit their operations (***24 March National Cabinet Agreement***).[66] The Prime Minister's statement included the following (emphasis added):

"*The Prime Minister, state and territory Premiers and Chief Ministers met on 24 March 2020 as the National Cabinet.*

We are leading the world on testing with more than 161,000 Australians tested and around 2,000 Australians confirmed cases. ***In contrast to many countries, the majority of Australian cases of coronavirus have been from people returning overseas or direct contacts with people who had been overseas****.*

However, National Cabinet noted that there has been a significant growth in the number of cases in Australia, with a significant number of Australians returning from overseas and ***small community outbreaks associated with returned travellers****.*

National Cabinet reiterated that practicing good hygiene and keeping a healthy physical distance between individuals is our most powerful weapon in fighting this virus and saving lives.

The highest priority should be placed on social isolation measures as well as strict and rapid contact tracing of individuals. It is paramount that contact tracing occur quickly and thoroughly and that public data is available to support this effort."

66 "*Update on coronavirus measures*", 24 March 2020, The Hon Scott Morrison MP, Prime Minister: https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F7259116%22

5.54 Similar announcements were made by some State and Territory leaders.[67]

5.55 On about 25 and 26 March 2020, each State and Territory implemented measures to give effect to the 24 March National Cabinet Agreement. In New South Wales, that involved the Health Minister making *Public Health (COVID-19 Gatherings) Order (No 2)* 2020 (NSW) (i.e., Gatherings Order No 2 which included the Business Closure Direction). The Business Closure Direction was not directed to the "*Situation*" or the 5 kilometre radius around it. It applied to the whole of New South Wales. The terms of Gatherings Order No 2 included cl 4, which provided:

> "*It is noted that the basis for concluding that a situation has arisen that is, or is likely to be, a risk to public health is as follows—*
>
> *(a) public health authorities both internationally and in Australia have been monitoring international outbreaks of COVID-19, also known as Novel Coronavirus 2019,*
>
> *(b) COVID-19 is a potentially fatal condition and is also highly contagious,*
>
> *(c) a number of cases of individuals with COVID-19 have now been confirmed in New South Wales, as well as other Australian jurisdictions.*"

5.56 The steps taken by other States and Territories are summarised in Schedule C.

5.57 Accordingly, it can be seen that far from being a response to an "*outbreak*" at the "*Situation*" or within the Radius, the measures that flowed from the 22 March National Cabinet Agreement and the 24 March National Cabinet Agreement were taken as part of a national response.

5.58 It is no answer to that conclusion to say that the national response was taken as a result of all instances of COVID-19 existing throughout Australia thus those orders were made "*as a result of*" an "*outbreak*" at the "*Situation*" or within the Radius. Even if that were the case, that is not the causal connection required by the Disease Clause. What is required is a direct connection between an identified "*outbreak*" at the "*Situation*" or within the Radius (which is not established on the evidence) and the relevant "*order*" relied upon. There is no such connection here. As set out in paragraph 5.40 above, the data relied on by LCA Marrickville reveals that only 9 individuals who were ordinarily resident in a postcode that sits wholly within the Radius acquired COVID-19 within Australia between January and 24 March 2020. Even if the many inherent limitations in that data were ignored, there is no support in the evidence (or in logic) for a conclusion that those 9 cases had any influence whatsoever in the 22

[67] **TAS**: "*Additional coronavirus management measures*", Premier of Tasmania, 25 March 2020: https://www.coronavirus.tas.gov.au/media-releases/additional-coronavirus-management-measures; **VIC**: "*Statement from the Premier*", The Hon Dan Andrews MP, 25 March 2020: https://www.premier.vic.gov.au/statement-premier-63

March National Cabinet Agreement, the 24 March National Cabinet Agreement or any public health measure implemented in New South Wales as a result of those agreements, or otherwise.

(f) Discovery of an organism

5.59 For the purposes of these proceedings, there is no issue that SARS-CoV-2 is an "*organism*".

(i) Discovery

5.60 For the purposes of the Disease Clause, "*discovery*" should be given its ordinary meaning.[68]

5.61 The ordinary meaning of "*Discovery*" is "*the act or process of discovering or being discovered…an instance of this…a person or thing discovered*"[69], and the related verb "*discover*" is to "*find out or become aware of, whether by research or searching or by chance…make known…exhibit; manifest…*".[70]

5.62 In that sense, for there to have been a "*discovery*" of an organism "*at the Situation*" or within the Radius, the particular organism:

5.62.1 must have been present, in fact, at the "*Situation*" or within the Radius; and

5.62.2 must have been found there, in the sense that there is evidence of the organism being present and identified at the "*Situation*" or within the Radius.

5.63 There is no evidence in this case of a "*discovery*" of the organism at the "*Situation*" or within the Radius.

(ii) "*…likely to result…"*

5.64 This limb of the Disease Clauses requires that:

5.64.1 there be a causative link between the particular organism discovered "*at the Situation*" or within the Radius and the relevant disease. For the purposes of the present case, that requires an established causal nexus between a person having been exposed to the SARS-CoV-2 organism and that person then contracting COVID-19; and

[68] See, e.g., *Johnson v American Home Assurance Co* (1998) 192 CLR 266 at 272 per Kirby J.

[69] Australian Concise Oxford Dictionary; Macquarie Concise Dictionary.

[70] Australian Concise Oxford Dictionary; Macquarie Concise Dictionary.

5.64.2 the presence of that organism "*at the Situation*" or within the Radius is more likely than not to result in an "*occurrence*" of the relevant disease at that same "*Situation*" or within the Radius.

5.65 In context, an "*occurrence*" of the relevant disease can only sensibly be construed as requiring an instance of the disease in the sense of a contraction or development of the disease by a person. An "*occurrence*" for the purposes of contracts of insurance is recognised as being synonymous with an "*event*" and is "*something which happens at a particular time, at a particular place, in a particular way*": see *Axa Reinsurance (UK) plc v Field* [1996] 1 WLR 1026 at 1035. In *FCA v Arch (supra)*, the plurality considered that an "*occurrence*" of COVID-19 was represented by "*each case of illness sustained by an individual*".[71] The Disease Clause produces the same result.

5.66 There is no evidence in this case of any relevant causal connection between exposure to the organism and a contraction of COVID-19.

5.67 Critically, the extension is not engaged by the "*discovery*" of COVID-19 at the Situation or within the Radius. It requires both discovery of the organism and the likelihood of the result of disease to be established at the "*Situation*" or within the Radius. Even if as a matter of epidemiology, it was possible to say that there was a likely causal link between the organism and COVID-19 (a matter about which there is no evidence), this limb is not established merely by the "*discovery*" of a person infected with COVID-19 having been present either at the "*Situation*" or within the Radius.

(iii) Causal link between the "*discovery*" and the relevant order

5.68 Even if LCA Marrickville could establish the:

5.68.1 "*discovery*" of the organism at the "*Situation*" or within the Radius; and

5.68.2 that such discovery was more likely than not to result in the contraction of COVID-19 "*at the Situation*" or within the Radius,

LCA Marrickville would then need to establish a causal connection between that discovery and the relevant order that it says engages the Disease Clause.

5.69 For the reasons outlined in paragraphs 5.48 to 5.58 above, there is no evidence that is capable of supporting such a conclusion.

[71] [2021] UKSC 1 at [69].

6 THE BIOSECURITY ACT EXCLUSION: LIST OF ISSUES [2]

6.1 The Biosecurity Act Exclusion is contained in the Disease Clause, and provides that (underlined emphasis added):

> *"…closure or evacuation of the whole or part of the* ***Situation*** *by order of a competent public authority as a result of an outbreak of a notifiable human infectious or contagious disease or bacterial infection or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease or consequent upon vermin or pests or defects in the drains and/or sanitary arrangements at the* ***Situation*** *<u>but specifically excluding losses arising from or in connection with highly Pathogenic Avian Influenza in Humans or any disease(s) declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015</u>".*

6.2 There is no issue in these proceedings that COVID-19 was "*declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015*" on 21 January 2020. Nor is there any issue that any losses sustained by LCA Marrickville were "*in connection with*" COVID-19, those being "*words of widest import*": see, e.g., *New South Wales v Tempo Services Ltd* [2004] NSWCA 4 at [8].

6.3 Three primary issues arise in relation to the Biosecurity Act Exclusion. They are whether:

6.3.1 the exclusion operates in an ambulatory manner so as to attach to "*disease(s) declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015"* during the *"Period of Insurance";*

6.3.2 the exclusion operates to limit the cover for business interruption in respect of those types of diseases (if any) which might otherwise be captured by the Prevention of Access Clause and/or the Conflagration/Catastrophe Clause; and

6.3.3 s 54(1) of the ICA operates to prevent Swiss Re from refusing to pay the claim by reason of the listing of the disease pursuant to the *Biosecurity Act 2015* (Cth) (***Biosecurity Act***) during the "*Period of Insurance*".

(a) Ambulatory operation

6.4 This issue arises because LCA Marrickville denies that the Biosecurity Act Exclusion applies in circumstances where COVID-19 was "*declared to be a listed disease under s 42(1) of the Biosecurity Act*" only after the Policy was incepted. For the reasons outlined above, properly construed, the Disease Clause is not concerned with the date on which a disease became "*notifiable*" or was "*declared*

to be a listed disease under s 42(1) of the Biosecurity Act". Rather, it is only the relevant order that must be during the "*Period of Insurance*" in order to engage the Disease Clause.

6.5 If that conclusion were put to one side, the issue raised by LCA Marrickville's approach to the application of the Biosecurity Act Exclusion requires a consideration as to whether the Disease Clause is static in operation, or ambulatory. In particular, the question is whether:

6.5.1 so as to engage cover, the relevant disease had to have the status of a "*notifiable human infections or contagious disease*"; and

6.5.2 to trigger the Biosecurity Act Exclusion, the relevant disease had to have been "*declared to be a listed disease under s 42(1) of the Biosecurity Act*",

prior to the inception of the Policy, or whether diseases that emerged and were made "*notifiable*" and/or "*declared to be listed*" during the "*Period of Insurance*" are capable of triggering the relevant integers of the Disease Clause.

6.6 In the present case, the following features of the emergence and designation of COVID-19 are relevant to this stage of the analysis:

6.6.1 COVID-19 first emerged in November 2019, and the first reported case in Australia was in January 2020[72];

6.6.2 COVID-19 (as variously described) became a "*notifiable disease*" or a "*notifiable condition*" under the respective Commonwealth and State and Territory regimes in the period between January and March 2020[73]; and

6.6.3 COVID-19 (described as "*Human coronavirus with pandemic potential*") became a listed human disease under s 42(1) of the *Biosecurity Act* on 21 January 2020.[74]

6.7 As described in section 5(c)(ii) below, the Disease Clause carefully calibrates those diseases in respect of which cover is available to those which are "*notifiable*" (under Commonwealth or State legislation) but not "*listed*" under the *Biosecurity Act*. In so doing, it reflects a policy choice that cover will be available in respect of diseases which are sufficiently serious to be "*notifiable diseases*" under the

[72] Agreed Facts, [3].

[73] See Schedule A to this outline.

[74] Agreed Facts, [4].

State and Commonwealth legislation, but not those so serious or having characteristics that they become "*listed*" under the Commonwealth biosecurity legislation.[75]

6.8 Relevantly, COVID-19 was neither "*notifiable*" nor "*listed*" at the time the Policy was incepted.

6.9 LCA Marrickville relies on an ambulatory operation of the Disease Clause so as to bring itself within cover. If the Disease Clause does not operate in that way so as to attach to "*notifiable diseases*" that first emerge and are designated as "*notifiable*" after the inception of the Policy, there can be no cover. Both parts of the same clause should be construed in a congruent manner. If one part operates in a static manner, so should the other. If one operates in an ambulatory manner, so should the other. That approach is particularly compelling in circumstances where:

6.9.1 the determination that the disease be "*notifiable*" or "*listed*" mark out the bounds of the types of disease in respect of which cover may be available; and

6.9.2 both criteria are contained within the very same clause.

6.10 If the extension is capable of being triggered by diseases that first emerge and become notifiable during the "*Period of Insurance*", the exclusion must be capable of applying to those diseases which are the subject of a declaration under s 42(1) of the *Biosecurity Act* during the "*Period of Insurance*".

6.11 It lacks objective commercial sense for the parties to have intended that those concepts will operate in materially different ways. It would produce the absurd result that the same clause would be seen to be flexible enough to permit a newly emerging "*notifiable disease*" to engage cover, but if that same disease was also subject to a relevant declaration under the *Biosecurity Act*, the exclusion could not operate. The words used by the parties do not reveal such an intention, and it would not reflect a business-like interpretation of the Disease Clause as a whole.

6.12 Whichever approach is adopted, there is no cover. That is because if the Disease Clause:

6.12.1 operates in a static manner, then COVID-19 is not a "*notifiable disease*" to which the Disease Clause can apply; or

6.12.2 operates in an ambulatory manner, then the fact that COVID-19 was declared to be a listed disease under s 42(1) of the *Biosecurity Act* after the inception of the Policy does not affect the application of the exclusion which, on any view, otherwise applies to LCA Marrickville's claim.

[75] For example, at policy inception the "*notifiable diseases*" under the *Public Health Act* were 40 in number and included diseases such as "*gastroenteritis*", "*Legionnaires' disease*" and "[f]*oodborne illness in two or more related cases*". In contrast, there were only 7 listed diseases under the *Biosecurity Act*, being "*Human Influenza with pandemic potential*", "*Plague*"; "*SARS*", "*Middle East respiratory syndrome*", "*Smallpox*", "*Viral haemorrhagic fevers*", and "*Yellow Fever*".

(b) Ambit of the Exclusion

6.13 On the proper construction of cl 9.1.2, indemnity for losses suffered as a result of the interruption of or interference with the "*Business*" consequent upon "*notifiable human infectious or contagious disease or bacterial infection or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease*" is limited to that contained in the Disease Clause (and the Expansion Clause as it operates by reference to the Disease Clause).

6.14 To the extent that an "*Insured*" suffered a "*loss*" that *"aris[es] or [is] in connection with"* a relevant disease that the parties have specifically agreed to exclude from the indemnity extended by the Disease Clause (i.e., a disease that triggered the Biosecurity Act Exclusion), cover is not available under another limb of the same clause for that "*loss*".

6.15 In identifying the objective intention of the parties, the Policy must be read as a whole, so as to give the insuring promise in cl 9.1.2 a congruent application. That involves reading the relevant sub-clauses together, as expressing the parties' agreement as to this aspect of cover, rather than considering each sub-clause individually and divorced from the context in which it appears.[76] In doing so, the Court should prefer a construction which gives each aspect of the clause a consistent operation, rather than one which would render parts of it nugatory or ineffective.[77]

6.16 Construing cl 9.1.2 as a whole, it is plain that the Disease Clause represents the parties' specific agreement as to the basis on which cover in respect of the business interruption by reason of a relevant order by a public authority as a response to disease will be advanced. That agreement not only includes the insuring promise, but an exclusion which attaches to that cover and, importantly, a sub-limit applicable to the cover extended by the Disease Clause of $500,000 in the aggregate. To the extent that the Expansion Clause picks up the Disease Clause, it is also subject to that same sub-limit. In contrast to that specific agreement, the sub-clauses that follow do not have individual sub-limits.

6.17 In those circumstances, the specific agreement contained in the Disease Clause (including the Biosecurity Act Exclusion) as to the types of disease capable of attracting cover represents the parties' specific agreement as to those matters and should prevail over any general provisions which follow.

6.18 As a matter of general principle, where parties use specific words to express the object of an agreement as well as general words which would, if operative to the extent of their generality, be inconsistent with the main object of the agreement, those general words will be construed in a manner that is consistent with the main object of the parties: *Margetson & Co v Glynn* [1892] 1 QB 37 . The correct

[76] *Metropolitan Gas Co v Federated Gas Employees Industrial Union* (1925) 35 CLR 449 at 455 per Issacs and Rich JJ; *Wilkie v Giordian Runoff Ltd* (2005) 221 CLR 522 at [16]; IAG's Submissions at [27] - [29] and [130]

[77] *Chapmans Ltd v Australian Stock Exchange Ltd* (1996) 67 FCR 402 at 411; *GIO General Limited v Centennial Newstan Pty Ltd* [2014] NSWCA 13 at 115; IAG's Submissions at [27] - [29] and [130]

approach to construction applicable in circumstances where, like here, there are specific aspects of the agreement, accompanied by general provisions, is to construe the agreement as a whole, with the specific aspects of the agreement being applicable to those circumstances that fall within them and otherwise qualifying those general provisions which would be inconsistent with the object of that specific agreement: *Chapmans v Australian Stock Exchange Ltd* (1996) 67 FCR 402 at 411 per Lockhart and Hill JJ; *Greencapital Aust Pty Ltd v Pasminco Cockle Creek Smelter Pty Ltd* [2019] NSWCA 53, per Leeming JA at [51]-[52].

6.19 Speaking in a statutory context, Deane J (as he then was) in *Refrigerated Express Lines (Australasia) Pty Ltd v Australian Meat and Livestock Corporation* (1980) 29 ALR 333 at 347 described the approach to construction as being:

> "*As a matter of general construction, where there is repugnancy between the general provision of a statute and provisions dealing with a particular subject matter, the latter must prevail and, to the extent of any such repugnancy, the general provisions will be inapplicable to the subject matter of the special provisions.*"

6.20 Accordingly, cl 9.1.2 must be construed so as to give full effect to the parties' agreement reflected in it, including the Biosecurity Act Exclusion and the specifically agreed sub-limit. The business interruption extension to cover is not provided for all diseases. It is only for those diseases which are defined in part by the exclusion.

6.21 If the business interruption extension were construed such that a claim consequent upon a "*notifiable human infectious or contagious disease*" that did not engage the Disease Clause or is excluded from it by operation of the Biosecurity Act Exclusion, is nevertheless capable of triggering the later general provisions of cl 9.1.2, the Disease Clause (including the Biosecurity Act Exclusion) , together with the parties' agreement as to the applicable sub-limit, would be made redundant.

6.22 Not only would that approach be contrary to principle, but it would also fail to reflect the objective intention of the parties. Critically, it would lack any objective commercial sense for the parties to have intended that a claim consequent upon "*notifiable human infectious or contagious disease or bacterial infection or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease*" that did not fall within, or was excluded from the cover afforded by the Disease Clause, should be capable of engaging the later, general cover, thereby avoiding the exclusion and the specifically agreed sub-limit for such claims. That is particularly so when it is recognised that the Disease Clause and the applicable sub-limit reflects the limited cover purchased by LCA Marrickville for such claims. To construe cl 9.1.2 of the Policy in any other way would not represent a business-like interpretation of the parties' agreement.

6.23 For those reasons, the proper construction of cl 9.1.2 of the Policy is that cover for business interruption losses consequent upon "*human infectious or contagious disease*", or the discovery of an "*organism likely to result in the occurrence of a notifiable human contagious or infectious* disease" is limited to the Disease Clause (and the Expansion Clause as it operates in relation to the Disease Clause) only. No other aspect of cl 9.1.2 is capable of responding.

(c) Section 54 of the ICA

6.24 LCA Marrickville contends that pursuant to section 54 of the ICA, Swiss Re may not refuse to pay LCA Marrickville's claim by reason of the Director of Human Biosecurity's decision to determine that COVID-19 be a listed human disease.[78]

6.25 Section 54(1) of the ICA provides:

> "***Insurer may not refuse to pay claims in certain circumstances***
>
> *(1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.*

6.26 Section 54(1) of the ICA does not apply in the present case. That is for the following reasons.

(i) "*…some other person…*"

6.27 First, the making of a legislative instrument under the *Biosecurity Act* is not a relevant "*act of… some other person*" capable of engaging s 54(1) of the ICA. Rather, it a function of statute.

6.28 On 21 January 2020, "*Human coronavirus with pandemic potential*" was determined to be a listed human disease under the *Biosecurity Act*.[79] The mechanism by which that occurred was the making of a legislative instrument by the Director of Human Biosecurity under subsection 42(1) of the *Biosecurity Act.*[80] Section 42(3) of the *Biosecurity Act* provides that a determination made under s 42 is a legislative instrument.[81]. On the proper construction of Section 54(1) of the ICA, the making of a

[78] Defence [58(b)].

[79] Agreed Facts, [4].

[80] *Biosecurity (Listed Human Diseases*) *Amendment Determination 2020.*

[81] A legislative instrument is governed by the *Legislation Act 2003* (Cth).

determination that constitutes a legislative instrument is not an "*act of some other person*" – rather it is a function of statute.

6.29 That conclusion is not only supported by authority (referred to below) but also by logical necessity. Many, if not most, perils for which insurance is provided involve an act (defined to include an omission) of some person that causes cover to be triggered. That is particularly the case with an occurrence based policy.

6.30 The types of mischief that s 54 was designed to ameliorate are described in the *Explanatory Memorandum for the Insurance Contracts Bill* 1984 at [177]. The rationale for the provision was stated in [182] that:

> *"Rationale - The existing law is unsatisfactory in that the parties' rights are determined by the form in which the contract is drafted rather that by reference to the harm caused. The present law can also operate inequitably in that breach of the term may lead to termination of the contract regardless of whether or not the insurer suffered any prejudice as a result of the insured's breach. The proposed law will concentrate on the substance and effect of the term and ensure that a more equitable result is achieved between the insurer and the insured" (ALRC paras. 228-239 and 241-242).*

6.31 The Director of Human Biosecurity is not within the meaning of "*some other person*" for the purpose of s 54(1) of the ICA. The authorities which have considered the concept of "*some other person*" in section 54(1) make it plain that the expression is not capable of extending to the world at large. It requires a relevant connection to the insured or the policy, or an involvement in the performance of a function or obligation under it.

6.32 In *C E Heath Casualty & General Insurance v Grey* (1993) 32 NSWLR 25, Clarke JA (with whom Meagher JA agreed) at p 47 concluded that "*other person*" for the purposes of s 54(1) "*must, I think, be a person who is entitled to a benefit under the policy and who is given the right by s 48(1) to recover the amount of his or her loss*".

6.33 In *Seery & Anor v John R Carr and Assoc* (SCNSW, unrep, 3 November 1995), Giles CJ Comm D, referred to the conclusions of Clarke JA in *C E Heath*, and concluded that "*some other person*" for the purposes of s 54(1) "*cannot refer to anyone in the world, and must refer to a person interested in the contract of insurance either as a party thereto or as a beneficiary by reason of s 48(1)*".

6.34 In *Antico v Heath Fielding Australia Pty Ltd* (1996) 188 CLR 652, Dawson, Toohey, Gaudron and Gummow JJ concluded at p 669-670 that "*some other person*" for the purposes of s 54(1) of the ICA is "*unlikely to be a party to the contract of insurance in question*" but did not go on to identify the characteristics the "*other person*" must hold.

6.35 The relevant "*other person*" has subsequently been held to extend to agents and persons associated with the performance of contractual obligations. In *Greentree v FAI General Instance* (1998) 44 NSWLR 706, Handley JA observed (in additional remarks made in circumstances where his Honour agreed with the reasons of Mason P) that "*[t]he other person need not be an agent of the insured. It may for example be the post office which fails to deliver a letter promptly or at all, or a facsimile transmission service which breaks down with the same result. The word does not concern failures to act by other people having no relevant relationship or connection with the insured, whose interests are adverse to the insured*" (at 723-724).

6.36 In *Hannover Life Re of Australasia Ltd v Farm Plan Pty Ltd* [2001] FCA 796, a conclusion was reached that a failure by a superannuation trustee to pay the premium in respect of a policy of insurance for the benefit of the scheme was within the scope of "*other person*" for the purposes of s 54(1) of the ICA: at [35].

6.37 The Supreme Court of Western Australia, Court of Appeal in *Maxwell (in his capacity as the authorised nominated representative on behalf of various Lloyds underwriters) v Highway Hauliers Pty Ltd* (2013) 298 ALR 700; [2013] WASCA 115 analysed the relevant act or omission as being one of the insured or alternatively its employee drivers. To the extent that reliance was placed on the drivers, they fell within the concept of "*some other person":* per McLure P at [82] and Pullin JA at [118]-[122].[82]

6.38 Accordingly, while the "*other person*" need not be a party to the contract of insurance in order to fall within the scope of s 54(1), the person must have a relevant connection to the insured or the policy, whether as a beneficiary under the policy or by having some function in the performance of the insured's obligations under it.

6.39 Here, the Director of Human Biosecurity has no connection with either LCA Marrickville, or the Policy, nor does that officeholder have any role in the performance of any obligation arising under it. In those circumstances, to construe "*other person*" as extending to a statutory officeholder making a legislative instrument is to stretch s 54(1) beyond the bounds of its proper application.

(ii) Restrictions or limitations inherent in the insurance claim

6.40 Secondly, s 54(1) does not operate to overcome inherent limitations in the "*claim*" made on the Policy. That concept was first articulated in *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641 at [41] and explored by the High Court in *Maxwell* at [23]-[24].

[82] The decision was overturned on other ground in *Maxwell v Highway Hauliers Pty Ltd* (2014) 252 CLR 590, but the High Court did not consider the characteristics required of "s*ome other person*" for the purposes of s 54(1) of the ICA.

6.41 In *Australian Hospital Care*, the plurality held (at [41]) that s 54 "*does not operate to relieve the insured of restrictions or limitations that are inherent in [the] claim.*"

6.42 In *Maxwell* the plurality held (at [28]) that the concept involved "*a restriction or limitation which must necessarily be acknowledged in the making of a claim having regard to the type of insurance contract under which claim is made*". The making of a claim under an "*occurrence based*" contract, necessarily acknowledges that the indemnity sought can only be in relation to an event which occurred during the period of cover. That restriction or limitation is inherent in a claim made under such a policy.

6.43 Following *Maxwell*, a composite formulation of the operation of s 54(1) of the ICA is possible as follows[83]:

> "*Section 54 does not operate to relieve the insured of restrictions or limitations that are inherent in the insurance claim in fact made and which must necessarily be acknowledged in the making of the claim, having regard to the type of insurance contract under which that claim is made.*"

6.44 The Policy is an occurrence based policy, which under its primary insuring clauses requires "*property damage*" to occur within the "*Period of Insurance*". There is a limited extension in cl 9.1.2 of the cover to "*loss*" arising from business interruption in consequence of closure or evacuation of the "*Situation*" by order of a competent public authority as a result of an outbreak of certain types of disease where that order is made during the "*Period of Insurance*". The scope of cover is carefully calibrated so that the insured peril does not extend to all and every type of disease. The cover is only available for those diseases which are sufficiently serious to be "*notifiable*" but does not extend to those arising from or in connection with highly pathogenic avian influenza in humans or any other diseases determined to be "*listed human diseases*" pursuant to subsection 42(1) of the *Biosecurity Act*.[84]

6.45 In that way, the confinement of cover to "*notifiable diseases*" that are not "*listed human diseases*" marks out a key feature of the occurrence that must be within the "*Period of Insurance*" (i.e., the "*order of a competent public authority* [made] *as a result of an outbreak of a notifiable human infectious or contagious disease* …"). It also provides the restrictions or limitations that are inherent in the actual insurance claim in fact made. Cover is only provided for the prescribed consequences flowing from diseases of the particular type. Thus, the exclusionary words at the end of the Disease Clause (i.e., the Biosecurity Act Exclusion) mark out the bounds of the occurrence which must occur within the "*Period of Insurance*".

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[83] *Mann's Annotated Insurance Contracts Act*, 7th ed, [54.10.2].

[84] See f/n 75 above.

6.46 The claim brought by LCA Marrickville in these proceedings must necessarily acknowledge the nature and type of disease in the making of the claim, namely, that it is one that is sufficiently serious to be "*notifiable*" under cover, but not one that is so serious as to be "*listed*" under the Commonwealth legislation.

6.47 Accordingly, the promulgation of the legislative instrument by which the listing of a disease occurs is not a relevant act for the purposes of section 54 of the ICA because it merely marks out the bounds of the claim, which must be acknowledged when the claim is made in the description of the seriousness of the relevant disease.

(iii) Causal effect of the act – s 54(2) of the ICA

6.48 Subsection 54(1) of the ICA only applies to the extent that subsection (2) does not apply.

6.49 Subsection (2) provides that where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.

6.50 The relevant act is said to be the Director of Human Biosecurity's determination that COVID-19 be a "*listed*" human disease: Defence [58(b)]. The listing occurred pursuant to s 42 of the *Biosecurity Act* . Section 42(2) requires that before making the determination, the Director of Human Biosecurity[85] must consult with the chief health officer (however described) for each State and Territory.[86]

6.51 As is clear from Schedules A – C to this outline, the listing of COVID-19 under the *Biosecurity Act* and the Australian response to the public health risk posed by COVID-19 was a coordinated response at Commonwealth and State and Territory levels. COVID-19 became a "*listed human disease*" under the *Biosecurity Act* on 21 January 2020 (on the very same day COVID-19 was designated a "*notifiable*" human infection or contagious disease under the *Public Health Act)*.

6.52 The dates were no coincidence. In mid-January 2020, transmission of COVID-19 was being reported as having escaped the borders of China.[87]

6.53 On Thursday 19 January 2020, Professor Brendan Murphy issued a press statement that read:

> "*The Department of Health works in partnership with State and Territory Chief Health Officers, to ensure that we continue an evidence based response in Australia. The Chief Health*

[85] The Director of Human Biosecurity at the relevant time was Professor Brendan Murphy.

[86] The Chief Health Officer for NSW at the relevant time was Dr Kerry Chant.

[87] "*WHO statement on novel coronavirus in Thailand*", 13 January 2020, World Health Organisation https://www.who.int/news/item/13-01-2020-who-statement-on-novel-coronavirus-in-thailand
"*Novel Coronavirus (2019-nCoV) Situation Report – 1*", 21 January 2020, World Health Organisation, [page 1] https://www.who.int/docs/default-source/coronaviruse/situation-reports/20200121-sitrep-1-2019-ncov

Officers will be meeting early this week to further discuss the recent developments with this virus."[88]

6.54 On 20 January 2020, Chinese health authorities determined that COVID-19 would be included in the notifiable report of Class B infectious diseases, resulting in the enforcement of temperature checks, health care declaration and quarantine at transportation depots.[89]

6.55 On Thursday 21 January 2020, Professor Brendan Murphy held a media conference during which he stated:

> *"There have been significant developments over the last three or four days and we are updating our advice and analysis on a daily basis in partnership with the World Health Organization and very importantly in the Commonwealth in partnership with our state and territory health officials who have the primary health response in the public health arena*."[90]

6.56 The Commonwealth and NSW governments were the first governments to act.

6.57 On 21 January 2020, the Commonwealth response included adding "*human coronavirus with pandemic potential*" to the list of "*listed human diseases*" under the *Biosecurity Act*.[91] By reason of that amendment, a range of public health protection measures became available under the *Biosecurity Act*.[92]

6.58 Also, on 21 January 2020, the *NSW Public Health Amendment (Scheduled Medical Conditions and Notifiable Diseases) Order 2020* amended the *Public Health Act* to add the "*Novel Coronavirus 2019*" to various lists of notifiable requirements in respect of the disease. The list of medical conditions in Schedule 1A to the *Public Health Act* was amended to include the Novel Coronavirus 2019.

6.59 The other States and Territories quickly followed suit, adding COVID-19 to their lists of notifiable diseases or conditions on:

6.59.1 28 January 2020 – South Australia: Declaration under section 63(2) of the *South Australian Public Health Act 2011* (SA);

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[88] Commonwealth Chief Medical Officer, Chief Medical Officer's statement on novel coronavirus (Media Release, 19 January 2020) https://www.health.gov.au/news/chief-medical-officers-statement-on-novel-coronavirus

[89] "*Report of the WHO-China Join Mission on Coronavirus Disease 2019 (COVID-19)*", 16 – 24 February 2020, World Health Organisation, [page 14] https://www.who.int/docs/default-source/coronaviruse/who-china-joint-mission-on-covid-19-final-report.pdf

[90] Commonwealth Chief Medical Officer, 'Chief Medical Officer's media conference about novel coronavirus' (Media Conference, 21 January 2020), https://www.health.gov.au/news/chief-medical-officers-media-conference-about-novel-coronavirus

[91] *Biosecurity (Listed Human Diseases) Amendment Determination 2020.*

[92] Those measures are set out in Schedule A to this outline.

6.59.2 29 January 2020 – Western Australia: *Public Health (Notifiable Infection Diseases) Order 2020* (issued pursuant to section 90(2) of the *Public Health Act 2016* (WA);

6.59.3 29 January 2020 – Victoria: *Public Health and Wellbeing Amendment (Coronavirus) Regulations 2020* (Vic);

6.59.4 30 January 2020 – Queensland: *Public Health (Coronavirus (2019–nCoV)) Amendment Regulation 2020* (Qld);

6.59.5 5 February 2020 – Northern Territory: Declaration and Notification of Notifiable Disease Novel coronavirus (2019-nCoV) (issued pursuant to section 6 of the *Notifiable Diseases Act 1981* (NT)

6.59.6 5 February 2020 – Tasmania: Guidelines for Notifying 2019 Novel Coronavirus (2019-nCoV) (issued pursuant to section 184 of the *Public Health Act 1997* (Tas); and

6.59.7 14 February – ACT: *Public Health ('COVID-19' AKA 'Novel Coronavirus' –Temporary Notifiable Condition) Determination 2020 (No1) Disallowable Instrument DI2020-18*.

6.60 As summarised in Schedules B and C to this outline, in March 2020 various measures were implemented in each of the States and Territories in accordance with the 22 March National Cabinet Agreement and the 24 March National Cabinet Agreement. On 29 March 2020, the Prime Minister announced the decision of National Cabinet that States and Territories may implement such additional measures "*specific to their own region, including closing categories of venues, where medical advice supported this action. These measures would be risk-based and targeted at non-essential activities*".[93]

6.61 Accordingly, the steps taken from January to March 2020, including the listing of COVID-19 under the *Biosecurity Act* and the various measures implemented in New South Wales through Public Health Orders were part of a coordinated State and Commonwealth response.

6.62 In that manner, COVID-19 being made as a "*listed human disease*" could reasonably be regarded as being capable of causing or contributing to the loss claimed by LCA Marrickville.

7 THE PREVENTION OF ACCESS CLAUSE: LIST OF ISSUES [5]

7.1 For the reasons set out in paragraphs 6.13 to 6.23 above, on the proper construction of cl 9.1.2 of the Policy, cover for business interruption losses consequent upon "*human infectious or contagious*

[93] https://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;query=Id%3A%22media%2Fpressrel%2F7268091%22

disease", or the discovery of an "*organism likely to result in the occurrence of a notifiable human contagious or infectious disease*" is limited to the Disease Clause only.[94]

7.2 Accordingly, irrespective of how the individual issues that arise in relation to the construction and application of the Prevention of Access Clause are resolved, it does not respond to LCA Marrickville's claim. There are however additional reasons why the Prevention of Access Clause does not respond to the claim.

(a) The structure of the Prevention of Access Clause

7.3 In order to engage the Prevention of Access Clause, in addition to the general integers applicable to cl 9.1.2 (discussed in paragraph 4.25 above) LCA Marrickville must establish that:

7.3.1 there was "*action of any lawful authority*"; and

7.3.2 that "*action*":

7.3.2.1 was an attempt to "*avoid or diminish risk to life or Damage to property within 5 kilometres*" of the "*Situation*"; and

7.3.2.2 "*prevents*" or "*hinders*" the "*use of or access to the Situation*".

7.4 The additional issues raised in relation to the Prevention of Access Clause largely turn on:

7.4.1 the question of whether the relevant "*action*" of a "*lawful authority*" must be directed to a "*risk of life or Damage to property within 5 kilometres of the Situation*", or whether the relevant action may be directed to such a risk more generally, in order to engage the indemnity; and

7.4.2 the width of the concept of prevention or hindrance.

(b) A localised risk

7.5 The Prevention of Access Clause, like the Disease Clause and the Expansion Clause contains an essential geographical limitation. It is focussed on the "*Situation*" and the 5 kilometre radius around it.

7.6 Having regard to the language used - and consistently with the operation of the cover extended by cl 9.1.2 as a whole – there must be a demonstrable "*risk to life or Damage to Property"* within the limited

[94] To the extent relevant, that includes the Expansion Clause which operates in the same way as the Disease Clause, save for the expansion of the geographic limitation.

geographical area (here, within 5 kilometres of the Situation), and the relevant "*action*" relied upon must be targeted to reducing that particular risk. In this respect:

7.6.1 First, as set out above, a critical feature of the cover extended by cl 9.1.2 is that it is directed to relevant losses "*consequent*" upon certain matters which are localised to the particular geographical location specified. No aspect of the cover extends to those circumstances as they may occur anywhere in the world, the nation or the state. The focus of the Prevention of Access Clause is the area within a 5 kilometre radius of the "*Situation*".

7.6.2 Secondly, consistent with that essential feature of the cover, the words "*within 5 kilometres of the Situation*" in the Prevention of Access Clause are plainly intended to limit the cover to only those actions taken in respect of a "*risk to life or damage to property*" in the area specifically nominated. To construe the clause as applying to the action of a "*lawful authority*" directed to a risk to life or damage to property anywhere in the world, in the nation, or in the State – rather than at the specified location - is contrary to the overall intention of the parties revealed by the Policy as a whole.

7.7 It follows that the Prevention of Access Clause is not engaged if the relevant "*action*" is directed to a risk to life existing elsewhere. Further, the "*action*" must be taken to "*avoid or diminish*" the particular "*risk to life*" that must exist at the particular location prior to the action being taken.

7.8 In approaching the interpretation of such a clause, it is necessary to observe that it was not one specifically designed with COVID-19 in mind. The reasonable businessperson applying his or her mind to the clause at policy inception would recognise the geographical limitations that are a feature of the Prevention of Access Clause, the Disease Clause and the Expansion Clause. Such a person would recognise that the cover was focused on the Situation and the 5 kilometre radius around it.

7.9 The clause operates by linking the regulatory response ("*the action of a lawful authority attempting to avoid or diminish…*") to a localised event or state of affairs ("*…a risk to life within 5 kilometres of such situation*"). It is that risk to life to which the authority's response must be linked. The "*attempt*" to avoid or diminish risk to life is directed to the risk within the Radius. Thus, there must be a causal relationship between the localised risk and the authority response to that risk.

7.10 That feature applies both to risk to life and "*Damage*" to property. In the property context the property itself must be within 5 kilometres of the Situation. That feature helps focus on the continued importance of the location when considering risk to life. Examples of the operation of the Prevention of Access Clause might be a fire or gas leak in a nearby building, or a property occupied by terrorists engaged in making bombs. In those cases, the threat is at least primarily a local one and the action of

the lawful authority would be a regulatory response directed to the local threat. There might be incidental benefits outside the Radius – e.g., the attempt to avoid or diminish risks locally might incidentally mean they are avoidable more broadly (the fire or the gas is less likely to escape the Radius, the terrorist is less likely to utilise the bomb elsewhere in the country). But what would attract the operation of the clause is the targeted action of the lawful authority to the localised risk.

7.11 A similar approach to the application of the Prevention of Access Clause should apply in the case of a communicable disease. The Policy would be capable of applying to authority responses to the lockdown of an apartment building or shopping centre in an effort to stop local transmission. The fact that that response could have broader community benefits extending beyond the Radius would not prevent the clause from operating. But what is required to engage the clause is a specific targeted attempt to avoid or diminish a localised risk.

7.12 A state-wide authority response to address a state-wide or national risk to life is outside the proper ambit of the clause. It would involve reading the clause without the geographic limitation which is one of its essential features. The geographical nexus is required both in respect of the risk and the response to the risk.

(c) Prevention or hindrance of access

7.13 The relevant principles involved in the construction of the words "*prevents or hinders*" are considered below in relation to the approach to be taken to the words "*conflagration or other catastrophe*" that are used in the Conflagration/Catastrophe Clause.[95] An application of those general principles of construction provides that "*hinder*" in the context in which it appears is of the same character as "*prevent*". The word "*hinder*" cannot be construed in such a way that would result in the associated word "*prevent*" being rendered redundant.

7.14 That result also follows from giving the words their ordinary meaning in any event. In this respect, the ordinary meaning of "*prevent*" is to: "*stop from happening or doing something; hinder; make impossible*"[96] and "*keep from occurring; hinder*"[97].

7.15 The ordinary meaning of "*hinder*" is: "*to impede, delay, prevent*"[98] and "*to interrupt, check, retard…to prevent from acting or taking place, stop…to be an obstacle or impediment*"[99].

[95] See section 8(d) below.
[96] Australian Concise Oxford Dictionary
[97] Macquarie Concise Dictionary
[98] Australian Concise Oxford Dictionary
[99] Macquarie Concise Dictionary

7.16 Thus "*prevent*" contemplates a complete inability to access or use the Situation and "*hinder*" contemplates a substantial prevention of use of or access to the Situation. That is consistent with the approach to construction of the concepts approved of in *FCA v Arch (supra)*, where the High Court concluded (at [431][100]) that "*the touchstone of prevention is impossibility, whereas hindrance connotes that access is rendered particularly difficult*".

7.17 Accordingly, the relevant "*action*" must make the use of, or access to, the "*Situation*" either impossible, or impose obstacles to that access or use which are particularly difficult to overcome.

7.18 The Business Closure Direction did not render access or use of the "*Situation*" (being the physical premises) impossible or subject to obstacles that were particularly difficult to overcome. Rather, it was a limitation on the nature of the business that may be conducted while it was in force. As outlined above, the Policy does not insure against the risk that a particular business may not be able to be carried on, or a particular service may not be able to be provided.

7.19 Similarly, Public Health Orders which had the effect of imposing other restrictions, including as to the number of persons at the premises, do not fall within the Prevention of Access Clause. For example, The Retail Limitation permitted access to and use of the "*Situation*" for retail sales. Order No 3 further relaxed the restrictions by allowing beauty salons to open subject to the 10 Person/4m^2 Rule and the Safety Plan Rule. Neither the 10 Person/4m^2 Rule nor the Safety Plan Rule prevented or hindered access to or use of the "*Situation*". The same observations may be made as to the 20 Person/4m^2 Rule and the 25 Person/2m^2 Rule introduced by Amended Order No 3 and Order No 7 respectively.

7.20 It follows that no aspect of the "*Authority Response-LCA Marrickville*" had the effect of "*preventing or hindering*" the access to or use of the "*Situation*" within the meaning of the Prevention of Access Clause.

8 THE CONFLAGRATION/CATASTROPHE CLAUSE: LIST OF ISSUES [4]

8.1 For the reasons set out in Section 5 above, on the proper construction of cl 9.1.2 of the Policy, cover for losses consequent upon "*notifiable human infectious or contagious disease*", or the discovery of an "*organism likely to result in the occurrence of a notifiable human contagious or infectious disease*" is limited to the Disease Clause only.

8.2 Accordingly, irrespective of how the issues identified in relation to the Conflagration/Catastrophe Clause are resolved, it will not respond to LCA Marrickville's claim.

[100] See also [324]. That aspect of the High Court's reasoning was unaffected by the Supreme Court's Judgment.

(a) The structure of the Conflagration/Catastrophe Clause

8.3 In addition to the general integers applicable to cl 9.1.2 (set out in paragraph 4.25 above), in order to engage the Conflagration/Catastrophe Clause, LCA Marrickville must also establish that:

8.3.1 there was "*action of a civil authority*";

8.3.2 that "*action*" was taken:

8.3.2.1 "*during a conflagration or other catastrophe*"; and

8.3.2.2 "*for the purpose of retarding*" that "*conflagration or other catastrophe*".

8.4 Central to the various issues identified in relation to the Conflagration/Catastrophe Clause is the proper construction of the words "*conflagration or other catastrophe*" as they appear in the Conflagration/Catastrophe Clause.

(b) The "*catastrophe*" relied upon

8.5 LCA Marrickville has advanced its case on "*catastrophe*" in various ways.

8.6 In its Defence and Cross-Claim, it pleads that the "*the outbreak of COVID-19*" is a "*catastrophe*" for the purposes of the Conflagration/Catastrophe Clause.[101]

8.7 In the List of Issues, LCA Marrickville advances a different description of the "*catastrophe*" it asserts arose – namely, "*COVID-19 and its impact*".[102]

8.8 In correspondence, LCA Marrickville asserts that the "*impact*" referred to in its formulation of paragraph 4(b) of the List of Issues is to the "*associated human health consequences*" of COVID-19.

8.9 On 9 August 2021, LCA Marrickville indicated (for the first time) an intention to seek leave to amend its Defence and Cross-Claim to propound the "*catastrophe*" relied upon as the "*outbreak of the COVID-19 Pandemic and its impacts*", the impacts relied upon being:

8.9.1 "*the characteristics of COVID-19, including the kind and severity of its symptoms*";

8.9.2 "*COVID-19's fatality rate*";

8.9.3 "*COVID-19's transmissibility*";

[101] Defence, [62]; Cross-Claim, [10(c)].
[102] List of Issues: [4(b)].

8.9.4 "*COVID-19's prevalence both globally and nationally*";

8.9.5 "*COVID-19's impact on mortality from other medical conditions*";

8.9.6 "*COVID-19 associated delays in treatment and screening for other medical conditions and supply of medical equipment and consequent prolongation of suffering*";

8.9.7 "*the impact of COVID-19 and COVID-19 related government restrictions on the capacity of the general public to engage in work and leisure activities and the social and economic disruptions caused thereby*";

8.9.8 "*the economic consequences of COVID-19 and COVID-19 related government restrictions including increases in unemployment and declines in gross domestic product growth*";

8.9.9 "*the impact of COVID-19 and COVID-19 related government restrictions on the prevalence and severity of mental health conditions in the general public*";

8.9.10 "*the impact of COVID-19 related restrictions on movement and gatherings, including for matters such as weddings and funerals*"; and

8.9.11 "*the interruption to education caused by COVID-19 related restrictions.*"

8.10 On any view, that is a very different case to that identified on the pleadings and transforms LCA Marrickville's case from one of construction to one in respect of which evidence is required.[103]

8.11 In any event, the difficulty that LCA Marrickville has had in identifying the particular "*catastrophe*" it says triggers its entitlement to indemnity is demonstrative of the fundamental difficulty with its claim. That is, on the proper construction of the Conflagration/Catastrophe Clause, none of the formulations advanced is capable of falling within the meaning of a "*conflagration or other catastrophe*" for the purposes of the Policy.

(c) Action of a civil authority

8.12 Swiss Re accepts that Public Health Orders made pursuant to s 7 of the Public Health Act are within the meaning of "*action of a civil authority*" for the purposes of the Conflagration/Catastrophe Clause.

8.13 However, that action must be taken "*during a conflagration or other catastrophe*". That is, the "*conflagration or other catastrophe*" must have manifested before the relevant action was taken, and

[103] Swiss Re reserves its position concerning the proposed amendment pending a resolution of the precise issues that are to be determined in the hearing commencing on 30 August 2020.

the action must be directed to "*retarding*" that particular "*conflagration or other catastrophe*". The word "*during*" imposes a temporal element which can only be satisfied if the "*conflagration or other catastrophe*" was occurring at the time the relevant action was taken.

8.14 It follows, as a matter of ordinary construction of the words used, that the Conflagration/Catastrophe Clause does not respond to any "*action of a civil authority*" that is taken before a relevant "*conflagration or other catastrophe*" manifests, including "*action*" taken in an attempt to prevent the "*conflagration or other catastrophe*" from occurring in the first place.

(d) Conflagration or other catastrophe

8.15 A threshold issue is whether COVID-19 and its public health impact is properly described as a "*conflagration or other catastrophe*" within the meaning of the Conflagration/Catastrophe Clause.

8.16 The ordinary meaning of "*conflagration*" is a "*great and destructive fire*".[104] Similarly, the ordinary meaning of catastrophe is "*a great and usually sudden disaster*".[105] Critically, the combined linguistic effect of the words "*conflagration or other catastrophe*" is that the "*catastrophe*" must have the same essential character as a "*conflagration*". Both are in the nature of a physically destructive event.

8.17 The use by the parties of the connection "*or other*" makes clear that the parties intended that the "*catastrophe*" have the same genus as a "*conflagration*". The consequence is that "*catastrophe*" is to be read *ejusdem generis* with "*conflagration*". The relevant principle was described in *Lend Lease Real Estate Investments Ltd & Anor v GPT Re Ltd* [2006] NSWCA 207 at [30]-[32] as follows (emphasis added):

> "30. *The general principle of the law of interpretation that the meaning of a word can be gathered from its associated words – noscitur a sociis – has a number of specific sub-principles with respect to immediate textual context. The most frequently cited such sub-principle is the ejusdem generis rule. The relevant sub-principle for present case is the maxim propounded by Lord Bacon…**the linking of words indicates that they should be understood in the same sense**. As Lord Kenyon CJ once put it, **where a word "stands with" other words it "must mean something analogous to them…***
>
> *31. However, as Lord Diplock put it in Letang v Cooper [1964] EWCA Civ 5; [1965] 1 QB 232 at 247:*

[104] Australian Concise Oxford Dictionary; *Star Entertainment v Chubb (supra)* at [171].
[105] Australian Concise Oxford Dictionary.

> *"The maxim noscitur a sociis is always a treacherous one unless you know the sosietas to which the socii belong."*
>
> *32. There is no such difficulty here. Unless the expression "assumption of obligations" is confined to "alienation", most of the adjoining words would be otiose.* ***The reading down of general words is one of the most common mechanisms applied in the course of legal interpretation. The Court should not give one word in an interrelated, overlapping list of expressions a meaning that is so broad as to be inconsistent with adjoining words or that renders those words irrelevant****."*

8.18 The maxim, while not determinative, is an available "*instrument for getting at the meaning of the parties*"[106], and reinforces the conclusion that arises from the ordinary construction of the words used in their context. In particular, the use of the words "*or other*" between "*conflagration*" and "*catastrophe*" demonstrates the parties' intention that "*catastrophe*" stands with "*conflagration*" in the sense that it "*must mean something analogous*" to a "*conflagration*".

8.19 In *Star Entertainment Group Ltd v Chubb Insurance Australia Ltd* [2021] FCA 907, Allsop CJ considered the meaning of the words "*conflagration or other catastrophe*", and relevantly concluded:

> "*171. A conflagration is a great and destructive fire. The natural and common sense steps to retard a fire are likely to be physical such as the creation of firebreaks by destruction. Conflagrations are not retarded by restrictions on access or use of premises. The words "other catastrophe" do assist in understanding that the "catastrophe" is physical or apt to create physical damage…*
>
> …
>
> *172. Debate took place as to the canons of construction: noscitur a sociis and ejusdem generis. I respectfully agree with Mr Herzfeld and Mr Prince in their valuable work Interpretation (Thomson Reuters, 2nd ed, 2020) at 506 [24.20] that the former maxim simply reflects the importance of using context to determine meaning. Likewise, I agree with what those authors say in the next paragraph as to the ejusdem generis rule: that it is an application of the noscitur a sociis maxim and simply involves the construction of words in the context of surrounding words. Strictly for the ejusdem generis maxim there should be a list or enumeration. Here there are the words "or other" after "conflagration". In the Policy so overwhelmingly founded upon the causing of physical loss, destruction or damage and so*

[106] *Cody v JH Nelson Pty Ltd* (1947) 74 CLR 629 at 639 per Dixon J.

contextually close to "conflagration", the natural meaning of "other catastrophe" is an event or occurrence apt to cause violent physical change or damage."

8.20 While in that passage the Chief Justice observed that in applying the cannon "*there should be a list or enunciation*", the absence of a list does not deny its utility. In *Telstra Corporation Ltd v Australian Performing Right Association Ltd* (1996) 191 CLR 140, McHugh J considered the construction of the words "*broadcast or other matter*" and observed that:

"*…there are numerous reported cases where the courts have read the word "other" to mean "other like" even when, as here, the specified genus itself comprises only one category*".

8.21 In reaching the conclusion that "*matter*" was to be read *ejusdem generis* with "*broadcast*", his Honour cited *Stag Line Ltd v Foscolo, Mango & Co Ltd* [1932] AC 328, in which Lord Buckmaster considered a charterparty which gave liberty to the vessel "*to call at any ports in any order, for bunkering or other purposes*". Relevantly, his Lordship concluded that:

"*The word 'bunkering' must have some demonstrative and limiting effect, and the phrase 'or other purposes' following it cannot be so construed as to disregard the effect of the first example and assume that any purpose is thereby permitted. If that were so, the word 'bunkering' might be left out.*"

8.22 The same applies here. If there was no intended connection between the two, the inclusion of "*conflagration*" was unnecessary, and the word "*catastrophe*" could have been used alone. To construe "*catastrophe*" as being so broad as to encompass a disease, or a disease and its "*impact*", is to render the inclusion of the preceding words "*conflagration or other*" irrelevant. Such a construction is contrary to principle.

8.23 Rather, proper application of uncontroversial constructional principles – aided, but not controlled by the maxim – require a conclusion that the "*catastrophe*" contemplated by the phrase "*conflagration or other catastrophe*" is one which shares the characteristics of a conflagration. Fundamentally, that is an event of destructive, physical force. On any view, none of the formulations of "*catastrophe*" advanced by LCA Marrickville[107], are matters of that kind.

8.24 That conclusion is fortified by the fact that disease (including COVID-19) is not an insured peril under the Policy. As observed above, no aspect of cover extends indemnity for "*disease*" or "*catastrophe*" generally. That same feature was significant to the construction of "*conflagration or other catastrophe*" adopted in *Star Entertainment v Chubb (supra)*. In this respect, the Chief Justice held:

[107] See paragraph 8.9 above.

> *"173. Also, not insignificantly, the pandemic or disease of COVID-19 is not an insured peril. There is every commercial reason to extend cover for the consequences of the actions of a lawfully constituted authority in connection with or to retard a conflagration or other catastrophe which may physically destroy property and lead to indemnity…But if "other catastrophe" is to include catastrophic disease in the nature of a pandemic, memorandum 7 is available to provide consequential loss cover for the actions of the authority to retard the peril, but that peril is not itself an insured peril.*"

8.25 Additionally, as outlined above, the matters identified in cl 9.1.2 must occur during the "*Period of Insurance*" to engage the cover and are described as "*events*" in the deeming provision. As observed above, it is well settled that an "*event*" in the insurance context is synonymous with an "*occurrence*" and is "*something which happens at a particular time, at a particular place, in a particular way*".[108] That description is apt to capture the taking of "*action*", but not a state of affairs such as the emergence and spread of pandemic of disease, including COVID-19 "*and its impact*": *Star Entertainment Group v Chubb (supra)* at [174], [179].

8.26 Finally, the reliance on the Conflagration/Catastrophe Clause also encounters the fatal difficulty considered above in relation the Biosecurity Act Exclusion discussed in Section 5. It calls on the general provision (i.e., the Conflagration/Catastrophe Clause) to prevail over that which reflects the specific agreement of the parties that deals with the very circumstance in contemplation. Such an approach does not reflect the proper construction of the Policy as a whole for the reasons set out above.

8.27 For those reasons, an outbreak of COVID-19 (of any kind), whether considered together with its "*impacts*" or "*associated human health consequences*" (whatever they may be) is not within the meaning of "*conflagration or other catastrophe*" for the purpose of the Conflagration/Catastrophe Clause.

9 CAUSATION, ADJUSTMENT, AND BASIS OF SETTLEMENT: LIST OF ISSUES [6]

9.1 Given that LCA Marrickville has not yet served material which would permit a detailed analysis of the issues of "*Causation, Adjustment, and Basis of Settlement*", the submissions that can presently be made are limited to general concepts.

9.2 Critically, the cover extended by cll 9 and 10 only extends to "*loss*" caused by "*Damage*" and does not indemnify LCA Marrickville in respect of the general state of affairs or circumstances which resulted in that "*Damage*" (i.e., the state of affairs or circumstances which resulted in the relevant order being made, or the action being taken). It follows that there is no general indemnity provided

[108] See, e.g., *Axa Reinsurance (UK) plc v Field* [1996] 1 WLR 1026 at 1035.

by the Policy for the consequences of a "*notifiable human infectious or contagious disease*", a "*conflagration or other catastrophe*", or a "*risk to life or damage to property*".

(a) The appropriate counterfactual for the purposes of the Trends Clause

9.3 Consistent with the overall construction of the cover extended by cl 9.1.2 of the Policy, the relevant counterfactual for the purposes of the Trends Clause requires a consideration of what would have been the position had the "*Damage*" (and only the "*Damage*") not occurred.

9.4 In the context of LCA Marrickville's claim, the relevant "*events*" (and thus the "*Damage*") are those aspects of the "*Authority Response-LCA Marrickville*" (i.e., the relevant "*order*" or "*action*") that engages cl 9.1.2 of the Policy.[109] For example, if it is concluded (contrary to the submission advanced above) that the Business Closure Direction triggered cover, the Trends Clause requires that the cover only extend to the effect that the Business Closure Direction had, and requires the relevant integers to be adjusted so as to take into account the general circumstances that would have prevailed even if the Business Closure Direction had not been made.

9.5 In the context of LCA Marrickville's claim, the Trends Clause requires adjustments to be made that remove from the amount indemnified the general effect of COVID-19, including the effect of other steps taken by government or authorities in relation to it (including those aspects of the "*Authority Response-LCA Marrickville*" that do not engage cover) but which themselves did not constitute "*Damage*" for the purposes of the Policy.[110] There is simply no cover for the effect of those matters on the "*Business*" – it is only the effect of the "*Damage*" that is capable of falling within the indemnity.

9.6 Thus, the counterfactual required by the Basis of Settlement and Trends Clause requires a comparison with a hypothetical world in which the only element that is removed is that aspect of the "*Authority Response-LCA Marrickville*" that actually engages cover. In that sense, it can be seen that the Policy only provides cover to the extent that the "*Damage*" that triggers cover has been causative of the "*loss*" that must have been suffered so as to engage cl 9.1.2 of the Policy.

(b) The treatment of JobKeeper and other support payments/benefits

9.7 In determining "*Gross Profit*" for the purposes of the Basis of Settlement Clause, LCA Marrickville must account for any government or other support payments it received, such as JobKeeper and rental reductions.

[109] Critically, it is only those aspects of the "*Authority Response-LCA Marrickville*" that actually engage cover (relevantly, in cl 9.1.2) that will be capable of falling within the meaning of "*Damage*" for the purposes of the Policy.

[110] That includes those other aspects of the relevant Public Health Orders that did not, themselves, engage the cover.

9.8 At the time of writing, it is unclear whether LCA Marrickville received any such payments and benefits, and if so to what extent. It is also unclear whether LCA Marrickville resists the proposition that they must be taken into account. Notwithstanding that uncertainty, it is clear that any such payments or benefits that LCA Marrickville received must be taken into account in ascertaining the extent of indemnity available under the Policy in the event that cover were otherwise available. That conclusion arises not only from the integers of cl 9.1.2 outlined above (the first of which is that the "*Insured*" must have suffered a "*loss*"), but also as a matter of principle.

9.9 Fundamentally, an insured is only entitled to be indemnified for losses suffered by it *Castellain v Preston* (1883) 11 QBD 380 at 386, per Brett LJ; *British Traders Insurance Co Ltd v Monson* (1964) 111 CLR 86 at 94-95. In *Wallaby Grip Ltd v QBE Insurance* (2010) 240 CLR 444, the High Court held (at 457-458) (references omitted, emphasis added):

> *"**Indemnity insurance involves payment for the loss actually suffered by the insured**…it is said that it is necessary for an insured under a contract of indemnity insurance to prove the extent or amount of the loss claimed, but this is because **the indemnity concerns only actual loss**."*

9.10 Accordingly, an insurer's obligation to indemnify an insured arises only to the extent that an actual loss has been suffered and is established: *West Wake Price & Co v Ching* [1957] 1 WLR 45 at 49.

9.11 In the present case, to the extent that LCA Marrickville has received JobKeeper or other support payments or benefits, it will not have suffered any "*loss*" to the value of those payments or benefits. Benefits such as JobKeeper were in the nature of income support payments.[111] They are taxable as ordinary income. Similarly, other government support payments and benefits received by LCA Marrickville operate so as to defray any "*loss*" that may have otherwise been sustained. Accordingly, it cannot be said that there was a "*loss*" to the extent of those payments.

9.12 That conclusion arises not only through the application of general principle, but on the proper application of the Basis of Settlement Clause. In applying that clause, such payments or benefits fall to be considered in two ways.

9.13 First, they fall to be considered in ascertaining an Insured's "*Turnover*". "*Turnover*", is defined for the purpose of Section 2 of the Policy as meaning[112]:

> "*the money (less discounts if any allowed) paid or payable to the Insured for goods sold and delivered and for services rendered in the course of the Business conducted at the Situation.*"

[111] See the background to the introduction of JobKeeper set out in IAG's Submissions at [233] – [238].

9.14 Thus "*Turnover*" can be seen to be directed to identifying amounts in the nature of income of the "*Business*". To the extent that any amount or benefit was received by LCA Marrickville that is in the nature of income (whether as a supplement to or replacement of income), any such payment or benefit is within the category of receipts that must be taken into account in ascertaining "*Turnover*".

9.15 Secondly, to the extent that any such payments or benefits result in a reduction of expenses, they must also be taken into account in accordance with cl 10.1.3 of the Policy, which provides that:

> "*There shall be deducted from the amounts calculated in 10.1.1 and 10.1.2 any sum saved during the* ***Indemnity Period*** *in respect of such of the charges and expenses of the* ***Business*** *payable out of* ***Gross Profit*** *as may cease or be reduced as a consequence of the* ***Damage*** *(excluding depreciation and amortisation).*"

9.16 Any payments or benefits made or given to LCA Marrickville which have the substantive effect of reducing the "*charges and expenses*" of the Business (such as a rent rebate or reduction) are captured by that clause and must be taken into account in the calculation of "*Gross Profit*".

9.17 Were those two categories of payment or benefit not taken into account the cover would extend to provide indemnity in respect of amounts which LCA Marrickville had not lost, resulting in a windfall. That is not consistent with the indemnity principle, and it is not consistent with the operation of the indemnity provided by the Policy.

9.18 Until such time as LCA Marrickville completes service of its evidence, including as to its claimed "*loss*", it is not possible to engage in a more meaningful analysis of those issues.

(c) Other adjustments

9.19 As noted above, in applying the Basis of Settlement Clause, it may be necessary to have regard to the various concepts used in it.

9.20 One such matter that may necessitate an adjustment to LCA Marrickville's claim are those "*Uninsured Working Expenses*" identified in the Schedule.[113] Those "*Uninsured Working Expenses*" must be taken into account when ascertaining "*Gross Profit*" – an integer of the Basis of Settlement Clause.[114]

9.21 Whether or not any issue as to those matters, or any other aspect of the Basis of Settlement Clause, will arise is presently unclear.

[113] Schedule, p 5.
[114] Policy, cl 8.2.

10 INTEREST: LIST OF ISSUES [8]

10.1 Section 57 of the ICA relevantly provides:

> "*(1) Where an insurer is liable to pay to a person an amount under a contract of insurance or under this Act in relation to a contract of insurance, the insurer is also liable to pay interest on the amount to that person in accordance with this section.*
>
> *(2) The period in respect of which interest is payable is the period commencing on the day as from which it was unreasonable for the insurer to have withheld payment of the amount and ending on whichever is the earlier of the following days:*
>
> *(a) the day on which the payment is made;*
>
> *(b) the day on which the payment is sent by post to the person to whom it is payable.*"

10.2 In the event that LCA Marrickville is entitled to indemnity under the Policy, for the purposes of determining whether Swiss Re is also liable for interest, and if so in what amount, it is necessary to identify the "*day as from which it was unreasonable for the insurer to have withheld payment"* for the purposes of s 57(2) of the ICA.[115] It is only from that day that Swiss Re will be liable to pay interest.

10.3 What constitutes a "*reasonable*" time for an insurer to have made a payment under the Policy is a question to be determined in the circumstances of the particular case. Accordingly, the particular periods identified in other cases are of little assistance in determining what is reasonable in this case.

10.4 This case has a number of unique features that support a conclusion that it will not have been "*unreasonable for [Swiss Re] to have withheld payment*" in relation to LCA Marrickville's claim (should the Policy be found to respond) until the conclusion of these proceedings, including quantum issues and any appeals.

10.5 First, LCA Marrickville's claim for indemnity under the Policy arises in unique circumstances. Those circumstances have resulted in its claim being included as part of an industry test case, advanced with the co-operation of insurers, the Insurance Council of Australia, the Australian Financial Complaints Authority (***AFCA***), and other industry regulators. Those cases (of which LCA Marrickville's claim is one) are of significant utility to the insurance market, and other insurers and insureds with similar claims. Accordingly, LCA Marrickville's claim – and these proceedings in relation to it – have greater significance than an orthodox claim on a policy.

[115] Issues concerning the quantification of any interest that may be payable do not presently arise.

10.6 Secondly, and relatedly, in dealing with the complaint made to it by LCA Marrickville in relation to its claim, AFCA agreed to this proceeding being dealt with as a test case.

10.7 Thirdly in order to advance the objectives of the test cases, the proceedings were commenced by Swiss Re at an early stage and have been advanced expeditiously to enable the prompt determination of the issues and any appeals.

10.8 Fourthly, as at the time of writing, LCA Marrickville has not completed service of the material it relies upon in support of its claim for "*loss*" in respect of which indemnity is sought under the Policy. The manner and order in which the particular issues arising from its claim for indemnity are to be determined have not yet been resolved. LCA Marrickville's case on "*conflagration or other catastrophe*" has changed significantly during the conduct of the proceedings, most recently with LCA Marrickville foreshadowing an amendment of its Defence and Cross-Claim to materially alter the alleged "*catastrophe*" on which it relies.

10.9 In that context, even if the compelling and unique features of the test case were absent, Swiss Re is entitled to a reasonable period of time to properly consider and evaluate all of the material which is relied on in support of the claim made. That reasonable period cannot have expired prior to LCA Marrickville finally articulating its claim and providing Swiss Re with all material necessary to permit consideration of that claim.

10.10 For those reasons, and having regard to the particular features of this case:

10.10.1 it has not been unreasonable for Swiss Re to "*withhold payment*" in respect of LCA Marrickville's claim; and

10.10.2 it will not be unreasonable for it to "*withhold*" any such payment until the resolution of all issues and appeals.

11 CONCLUSION

11.1 For those reasons, the Policy does not respond to LCA Marrickville's claim.

11.2 Accordingly:

11.2.1 the relief sought in the originating application should be granted; and

11.2.2 the cross-claim must be dismissed.

19 August 2021

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SCHEDULE A

NOTIFIABLE AND LISTED DISEASE

Jurisdiction	Date	Instrument	Features
Federal	21 January 2020	*Biosecurity (Listed Human Diseases) Amendment Determination 2020*[116] made under s 42(1) of the *Biosecurity Act 2015* (Cth)	The Commonwealth Director of Human Biosecurity determined "*human coronavirus with pandemic potential*" to be a "*listed human disease*" under the *Biosecurity Act 2015* (Cth).
New South Wales	21 January 2020	*Public Health Amendment (Scheduled Medical Conditions and Notifiable Diseases) Order 2020*[117] made under the *Public Health Act 2010* (NSW)	Amended the *Public Health Act 2010* (NSW) to include "*Novel Coronavirus 2019*" to: • the list of medical conditions in Schedule 1 "*that must be notified by medical practitioners and pathology laboratories to the Secretary of the Ministry of Health, and for which the Secretary of the Ministry of Health may direct a person to undergo a medical examination, and for which authorised medical practitioners may make a public health order*"; • the list of medical conditions in Schedule 1A "*for which authorised medical practitioners may make a public health order*"; and

[116] Accessible at: https://www.legislation.gov.au/Details/F2020L00037

[117] Accessible at: https://legislation.nsw.gov.au/view/pdf/asmade/sl-2020-17

Jurisdiction	Date	Instrument	Features
			• the list of "*notifiable diseases*" in Schedule 2 "*that must be notified by health practitioners providing care or treatment in hospitals to the chief executive officer of the hospital, and that must be notified by the chief executive officer of a hospital to the Secretary of the Ministry of Health.*"
South Australia	28 January 2020	South Australian Government Gazette 30 January 2020[118]	Declaration by the Minister for Health and Wellbeing that "*human coronavirus with pandemic potential*" is a "*notifiable and a controlled notifiable condition*" under s 63(2) of the *South Australian Public Health Act 2011* (SA), "*in the interests of public health because of urgent circumstances*".
Victoria	29 January 2020	*Public Health and Wellbeing Amendment (Coronavirus) Regulations 2020*[119] made under the *Public Health and Wellbeing Act 2008* (Vic)	Amended the *Public Health and Wellbeing Regulations 2019* (Vic) to add "*Novel coronavirus 2019 (2019-nCoV)*" to the list of "*notifiable conditions*" in Schedules 3 (Registered Medical Practitioners) and 4 (Pathology Services) of those Regulations "*as a notifiable condition requiring notification as soon as practicable*".

[118] Accessible at: https://governmentgazette.sa.gov.au/sites/default/files/public/documents/gazette/2020/January/2020_011.pdf, [page 199]

[119] Accessible at: https://www.legislation.vic.gov.au/as-made/statutory-rules/public-health-and-wellbeing-amendment-coronavirus-regulations-2020

Jurisdiction	Date	Instrument	Features
Western Australia	29 January 2020	*Public Health (Notifiable Infectious Diseases) Order 2020*[120] made under the *Public Health Act 2016* (WA)	Declaration by the Minister for Health that "*Human coronavirus with pandemic potential*" is "*a notifiable infectious disease*" and "*an urgently notifiable infectious disease*" under s 90(2) of the *Public Health Act 2016* (WA).
Queensland	30 January 2020	*Public Health (Coronavirus (2019–nCoV)) Amendment Regulation 2020* (Qld)[121]	Amended the *Public Health Regulation 2018* to include "*2019-nCoV*" on the list of "*notifiable conditions*" in Schedule 1 and "*coronavirus (2019-nCoV)*" as a "*condition for immediate notification*" in Schedule 2.
Tasmania	5 February 2020	Notice by the Director of Public Health, 'Medical practitioners and laboratories to notify 2019 novel coronavirus', 5 February 2020 Tasmanian Government Gazette [122]	Declaration by the Director of Public Health, effective 6 February 2020, that "*2019 novel coronavirus (2019-nCoV)*" is a "*notifiable disease*" for the purposes of s 40 of the *Public Health Act 1997* (Tas).
Northern Territory	5 February 2020	Declaration and Notification of Notifiable Disease Novel coronavirus (2019-nCoV) infection in the Northern	Declaration by the Minister for Health under s 6 of the *Notifiable Diseases Act 1981* (NT) that "*Novel coronavirus (2019-nCoV) infection*

[120] Accessible at: https://www.legislation.wa.gov.au/legislation/prod/gazettestore.nsf/FileURL/gg2020_017.pdf/$FILE/Gg2020_017.pdf?OpenElement, [page 251]

[121] Accessible at: https://www.legislation.qld.gov.au/view/whole/html/asmade/sl-2020-0001

[122] Accessible at: http://www.gazette.tas.gov.au/editions/2020/february_2020/21944_-_Gazette_05_February_2020.pdf [page 55]. Access to 'Guidelines for Notifying 2019 Novel Coronavirus (2019-nCoV)' of the same date referred to therein are no longer available due to repeal.

Jurisdiction	Date	Instrument	Features
		Territory Government Gazette[123] made under the *Notifiable Diseases Act 1981* (NT)	*(the Novel coronavirus)*" is a "*notifiable disease*" for the purposes of the Act.
Federal	6 February 2020	*National Health Security (National Notifiable Disease List) Amendment Instrument 2020* (Cth)[124] made under s 12(1) of the *National Health Security Act 2007* (Cth)	Amended the *National Health Security (National Notifiable Disease List) Instrument* 2018 by adding "*Human coronavirus with pandemic potential*" to the "*National Notifiable Disease List*".
Australian Capital Territory	14 February 2020	*Public Health ('COVID-19' AKA 'Novel Coronavirus' – Temporary Notifiable Condition) Determination 2020 (No 1)*[125] made under the *Public Health Act 1997* (ACT)	Pursuant to s 101 (a) and (b) (Notifiable Conditions – Temporary Status) of the *Public Health Act 1997* (ACT), "*suspected cases of the disease first identified by Chinese authorities on 7 January 2020, and now referred to as COVID-19*", were declared to be a "*transmissible notifiable condition*".

[123] Accessible at: https://nt.gov.au/__data/assets/pdf_file/0007/792331/s2.pdf

[124] Accessible at https://www.legislation.gov.au/Details/F2020L00111

[125] Accessible at: https://www.legislation.act.gov.au/View/di/2020-18/current/PDF/2020-18.PDF

SCHEDULE B

STATE AND TERRITORY PUBLIC HEALTH MEASURES IMPLEMENTING THE 22 MARCH NATIONAL CABINET AGREEMENT

Jurisdiction	Date	Instrument	Features
New South Wales	23 March 2020	*Public Health (COVID-19 Places of Social Gathering) Order 2020*[126] made under s 7 of the *Public Health Act 2010* (NSW)	Included a direction by the Minister for Health that certain businesses "*must not be open to members of the public*", subject to identified exceptions: cl 5.
Australian Capital Territory	23 March 2020	*Public Health (Closure of Non-Essential Business or Undertaking) Emergency Direction 2020*[127] made under s 120 of the *Public Health Act 1997* (ACT)	Included a direction by the Chief Health Officer that "*a person who owns, controls or operates a non-essential business or undertaking … must not operate that business or undertaking*": cl 1. Defined a "*non-essential business or undertaking*": cl 2.
South Australia	23 March 2020	*Direction of the State Co-Ordinator: Non-Essential Business (and other gatherings) Closure Direction*[128] made under s 23 of the *Emergency Management Act 2004* (SA)	Included a direction by the State Co-ordinator that a person who "*owns, controls or operates*" a defined premises must "*close those premises in so far as it is necessary to prohibit access to the members of the public*", subject to identified exceptions: cl 3. Provided the definition of a "*defined premises*": cl 2.

[126] https://legislation.nsw.gov.au/file/Public%20Health%20(COVID-19%20Places%20of%20Social%20Gathering)%20Order%202020.pdf

[127] https://www.legislation.act.gov.au/View/ni/2020-169/20200323-73519/PDF/2020-169.PDF

[128] https://legislation.sa.gov.au/web/information/CV19/EMA-CEASED/Non-Essential%20Business%20and%20Other%20Gatherings%20Closure%20Direction_23.3.2020_CEASED.pdf

Jurisdiction	Date	Instrument	Features
Victoria	23 March 2020	*Non-essential Business Closure Direction*[129] made under ss 190(1)(a) and 200(1)(d) of the *Public Health and Wellbeing Act 2008* (Vic)	Included a direction by the Deputy Chief Health Officer that "*a person who owns, controls or operates a non-essential business or undertaking … must not operate that business or undertakin*g": cl 3. Defined a "*non-essential business or undertaking*": cl 4.
Western Australia	23 March 2020	*Closure of Certain Places of Business, Worship and Entertainment Directions*[130] made under s 71 of the *Emergency Management Act 2005* (WA)	Included a direction by the Commissioner of Police and State Emergency Coordinator that "[e]*very owner, occupier or person apparently in charge of an affected place must close that place to the public*": cl 3. Defined an "*affected place*": cl 4.
Queensland	23 March 2020	*Non-essential Business Closure Direction*[131] made under s 362B of the *Public Health Act 2005* (Qld)	Included a direction by the Chief Health Officer that a person who "*owns, controls or operates a non-essential business or undertaking … must not operate the business or undertaking*": cl 4. Defined a "*non-essential business or undertaking*": cl 5.

[129] http://www.gazette.vic.gov.au/gazette/Gazettes2020/GG2020S144.pdf

[130] https://www.wa.gov.au/government/publications/revoked-closure-of-certain-places-of-business-worship-and-entertainment-directions

[131] https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/non-essential-business-closure-direction-23-03-2020

Jurisdiction	Date	Instrument	Features
Tasmania	23 March 2020	Direction made under s 16 of the *Public Health Act 1997* (Tas) in the Tasmanian Government Gazette[132]	Included a direction by the Director of Public Health that a "*person who owns, controls or operates*" specified premises "*must not open or operate the premises*": cl (a).
Northern Territory	23 March 2020	*COVID-19 Directions (No. 6) 2020 – Directions for Closure of Certain Businesses to the Public and to Cease Certain Business and Other Activities*[133] made under s 52 of the *Public and Environmental Health Act 2011* (NT)	Included a direction by the Chief Health Officer that the proprietors of certain businesses either "*must not open the business to the public*" (cl 3) or must not open except as specified (cll 4 – 6).

[132] http://www.gazette.tas.gov.au/editions/2020/march_2020/21954_-_Special_23_March_2020.pdf [page 143]

[133] https://coronavirus.nt.gov.au/__data/assets/pdf_file/0008/806840/CHO-Directions-No-6-Closure-of-certain-businesses-and-cease-certain-businesses-SIGNED.pdf

SCHEDULE C

STATE AND TERRITORY PUBLIC HEALTH MEASURES IMPLEMENTING THE 24 MARCH NATIONAL CABINET AGREEMENT

Jurisdiction	Date	Instrument	Features
New South Wales	25 March 2020	*Public Health (COVID-19 Gatherings) Order (No 2) 2020*[134] made under s 7 of the *Public Health Act 2010* (NSW)	Revoked *Public Health (COVID-19 Places of Social Gathering) Order 2020* (made on 23 March 2020): cl 9. Included a direction by the Minister for Health that certain business "*must not be open to members of the public*", subject to identified exceptions: cl 7. The categories of business that were subject to that direction were expanded from those in the order made on 23 March 2020.
Australian Capital Territory	25 March 2020	*Public Health (Closure of Non-Essential Business or Undertaking) Emergency Direction 2020 (No 2)*[135] made under s 120 of the *Public Health Act 1997* (ACT)[136]	Revoked the *Public Health (Closure of Non-Essential Business or Undertaking) Emergency Declaration 2020* (made on 23 March 2020): cl 5.

[134] https://legislation.nsw.gov.au/file/Public%20Health%20(COVID-19%20Gatherings)%20Order%20(No%202)%202020.pdf

[135] https://www.legislation.act.gov.au/View/ni/2020-178/20200325-73532/PDF/2020-178.PDF

[136] https://www.legislation.act.gov.au/a/1997-69/

Jurisdiction	Date	Instrument	Features
			Included a direction by the Chief Health Officer that "*a person who owns, controls or operates a non-essential business or undertaking … must not operate that business or undertaking*": cl 1. Expanded the definition of "*non-essential business or undertaking*" from that in the *Public Health (Closure of Non-Essential Business or Undertaking) Emergency Declaration 2020* (made on 23 March) to capture a wider range of businesses: cl 2.
South Australia	25 March 2020	*Direction of the State Co-ordinator: Non-Essential Business (and other gatherings) Closure Directions (No 2)*[137] made under s 25 of the *Emergency Management Act 2004* (SA)	Revoked the *Non-Essential Business (and Other Gatherings) Closure Direction 2020* (made on 23 March 2020): cl 2. Included a direction by the State Co-ordinator that, subject to identified exceptions, "*any person who owns, controls or operates a defined premises [is] to close the premises in so far as it is necessary to prohibit access to consumers or members of the*

[137] https://legislation.sa.gov.au/web/information/CV19/EMA-CEASED/Non-Essential%20Business%20and%20Other%20Gatherings%20Closure%20Direction%20(No%202)_25.3.2020_CEASED.pdf

Jurisdiction	Date	Instrument	Features
			public; and any consumer or member of the public not to enter into defined premises": cl 4. Expanded the definition of "*defined premises*" from that in the *Non-Essential Business (and Other Gatherings) Closure Direction 2020* (made on 23 March 2020) to include a wider range of businesses: cl 3.
Victoria	25 March 2020	*Non-Essential Activity Directions*[138] made under ss 190 and 200 of the *Public Health and Wellbeing Act 2008* (Vic)	Revoked the *Non-Essential Business Closure Direction* (made on 23 March 2020). Included directions by the Deputy Chief Health Officer that "*a person who owns, controls or operates*" specific categories of facilities/businesses could not operate that facility/business. Established 11 categories of businesses or undertakings and applied restrictions to the same on a category-by-category basis: cl 4-14.

[138] http://www.gazette.vic.gov.au/gazette/Gazettes2020/GG2020S156.pdf [page 4]

Jurisdiction	Date	Instrument	Features
Western Australia	25 March 2020	*Preventative Restriction of Activities Directions*[139] made under ss 157(1)(k) and 190(1)(p) of the *Public Health Act 2016* (WA)[140]	Included directions by the emergency officer that a person: • *"must refrain from undertaking or engaging in an affected activity*": cl 4; • "*must not organise an affected activity*": cl 5; and • "*must not attend an affected activity*": cl 6. Defined an "*affected activity*" with reference to 5 categories: cl 7.
Western Australia	25 March 2020	*Closure of Certain Places of Business, Worship and Entertainment Directions (No. 2)*[141] made under s 71 of the *Emergency Management Act 2005* (WA)	Added to the *Closure of Certain Places of Business, Worship and Entertainment Directions* (made on 23 March 2020): cl 3. Included a direction by the Commissioner of Police and State Emergency Coordinator that "*every owner*,

[139] https://www.wa.gov.au/sites/default/files/2020-03/Restriction%20of%20Activities%20Direction_1.pdf
[140] https://www.legislation.wa.gov.au/legislation/statutes.nsf/main_mrtitle_13791_homepage.html
[141] https://www.wa.gov.au/sites/default/files/2020-04/Closure%20of%20Places%20Direction%202_0.pdf

Jurisdiction	Date	Instrument	Features
			occupier or person apparently in charge of an affected place must close that place to the public": cl 5. Defined an "*affected activity*" with reference to 22 categories: cl 7.
Queensland	25 March 2020	*Non-essential business, activity and undertaking Closure Direction*[142] made under s 362B of the *Public Health Act 2005* (Qld)[143]	Replaced the *Non-essential Business Closure Direction* made on 23 March 2020: cl 2. Included a direction by the Chief Health Officer that "*a person who owns, controls or operates a non-essential business, activity, or undertaking … must not operate the business, activity or undertaking*": cl 6. Expanded the definition of "*non-essential business or undertaking*" from that contained in the *Non-essential Business Closure Direction* (made on 23 March) to capture a wider range of businesses: cl 7.

[142] https://www.health.qld.gov.au/system-governance/legislation/cho-public-health-directions-under-expanded-public-health-act-powers/revoked/non-essential-business-closure-direction-25-03-2020

[143] https://www.legislation.qld.gov.au/view/html/inforce/current/act-2005-048

Jurisdiction	Date	Instrument	Features
Tasmania	26 March 2020	Direction under section 16 (of the *Public Health Act 1997* (Tas)) in the 27 March 2020 Tasmanian Government Gazette[144]	Revoked the direction given by the Director of Public Health on 23 March 2020 in respect of gatherings and premises: cl (k). Included a direction by the Director of Public Health that "*each person who owns, controls or operates a premises specified in Schedule 1 … must not open or operate the premises*": cl (a). Schedule 1 comprised 15 categories of undertakings. The categories of business that were subject to that direction were expanded from those in the direction made on 23 March 2020.
Northern Territory	25 March 2020	*COVID-19 Directions (No. 10) 2020 – Directions for Further Closure and Cessation of Public Places, Services and Activities*[145] made under s 52 of the *Public and Environmental Health Act 2011* (NT)	Included a direction by the Chief Health Officer that an "*occupier of a place and a proprietor of a business*" identified in the direction must "*close to the public*" and "*cease conducting with, or providing*

[144] http://www.gazette.tas.gov.au/editions/2020/march_2020/21957_-_Special_27_March_2020.pdf.pdf [page 162]

[145] https://coronavirus.nt.gov.au/__data/assets/pdf_file/0004/809032/cho-directions-no-10-signed.pdf

Jurisdiction	Date	Instrument	Features
			to, the public any activity or service specified in direction 4": cl 3. Defined the places, activities and services to be closed to the public: cl 4.

SCHEDULE D

NSW GOVERNMENT COVID-19 CASE DATA: COVID-19 CASES FOR USUAL RESIDENTS IN POSTCODES WHOLLY WITHIN RADIUS UP TO AND INCLUDING 24 MARCH 2020[146]

Notification Date	Postcode	Likely Source of Infection	Local Health District 2010 Code	Local Health District 2010 Name	Local Government Area Code19	Local Government Area Name19
4/03/2020	2042	Locally acquired - linked to known case or cluster	X700	Sydney	17200	Sydney (C)
9/03/2020	2043	Overseas	X700	Sydney	17200	Sydney (C)
13/03/2020	2015	Overseas	X700	Sydney	17200	Sydney (C)
14/03/2020	2008	Overseas	X700	Sydney	17200	Sydney (C)
15/03/2020	2015	Overseas	X700	Sydney	17200	Sydney (C)
17/03/2020	2042	Overseas	X700	Sydney	17200	Sydney (C)
18/03/2020	2048	Overseas	X700	Sydney	14170	Inner West (A)
19/03/2020	2037	Overseas	X700	Sydney	17200	Sydney (C)
20/03/2020	2042	Locally acquired - linked to known case or cluster	X700	Sydney	17200	Sydney (C)
21/03/2020	2042	Locally acquired - no links to known case or cluster	X700	Sydney	17200	Sydney (C)
21/03/2020	2038	Locally acquired - linked to known case or cluster	X700	Sydney	14170	Inner West (A)
22/03/2020	2016	Overseas	X700	Sydney	17200	Sydney (C)
23/03/2020	2038	Overseas	X700	Sydney	14170	Inner West (A)

[146] Extracted from Agreed Facts, Annex G (with second column filtered to include only postcodes wholly within the radius).

Notification Date	Postcode	Likely Source of Infection	Local Health District 2010 Code	Local Health District 2010 Name	Local Government Area Code19	Local Government Area Name19
23/03/2020	2043	Locally acquired - linked to known case or cluster	X700	Sydney	17200	Sydney (C)
23/03/2020	2017	Overseas	X700	Sydney	17200	Sydney (C)
23/03/2020	2015	Overseas	X700	Sydney	17200	Sydney (C)
23/03/2020	2048	Overseas	X700	Sydney	14170	Inner West (A)
23/03/2020	2038	Overseas	X700	Sydney	14170	Inner West (A)
23/03/2020	2037	Overseas	X700	Sydney	17200	Sydney (C)
24/03/2020	2007	Locally acquired - linked to known case or cluster	X700	Sydney	17200	Sydney (C)
24/03/2020	2007	Locally acquired - linked to known case or cluster	X700	Sydney	17200	Sydney (C)
24/03/2020	2050	Overseas	X700	Sydney	17200	Sydney (C)
24/03/2020	2015	Overseas	X700	Sydney	17200	Sydney (C)
24/03/2020	2016	Overseas	X700	Sydney	17200	Sydney (C)
24/03/2020	2042	Locally acquired - linked to known case or cluster	X700	Sydney	17200	Sydney (C)
24/03/2020	2016	Overseas	X700	Sydney	17200	Sydney (C)
24/03/2020	2016	Locally acquired - no links to known case or cluster	X700	Sydney	17200	Sydney (C)
24/03/2020	2017	Overseas	X700	Sydney	17200	Sydney (C)
24/03/2020	2017	Overseas	X700	Sydney	17200	Sydney (C)

SCHEDULE E

NSW GOVERNMENT COVID-19 CASE DATA: COVID-19 CASES LOCALLY ACQUIRED FOR USUAL RESIDENTS IN POSTCODES WHOLLY WITHIN RADIUS UP TO AND INCLUDING 24 MARCH 2020[147]

Notification Date	Postcode	Likely Source of Infection	Local Health District 2010 Code	Local Health District 2010 Name	Local Government Area Code19	Local Government Area Name19
4/03/2020	2042	Locally acquired - linked to known case or cluster	X700	Sydney	17200	Sydney (C)
20/03/2020	2042	Locally acquired - linked to known case or cluster	X700	Sydney	17200	Sydney (C)
21/03/2020	2042	Locally acquired - no links to known case or cluster	X700	Sydney	17200	Sydney (C)
21/03/2020	2038	Locally acquired - linked to known case or cluster	X700	Sydney	14170	Inner West (A)
23/03/2020	2043	Locally acquired - linked to known case or cluster	X700	Sydney	17200	Sydney (C)
24/03/2020	2007	Locally acquired - linked to known case or cluster	X700	Sydney	17200	Sydney (C)
24/03/2020	2007	Locally acquired - linked to known case or cluster	X700	Sydney	17200	Sydney (C)

[147] Extracted from Agreed Facts, Annex G (with second column filtered to include only postcodes wholly within the radius and the third column filtered to exclude cases acquired overseas).

Notification Date	Postcode	Likely Source of Infection	Local Health District 2010 Code	Local Health District 2010 Name	Local Government Area Code19	Local Government Area Name19
24/03/2020	2042	Locally acquired - linked to known case or cluster	X700	Sydney	17200	Sydney (C)
24/03/2020	2016	Locally acquired - no links to known case or cluster	X700	Sydney	17200	Sydney (C)