NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 5/09/2021 5:48:49 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

Document Lodged:	Outline of Submissions
File Number:	NSD132/2021
File Title:	SWISS RE INTERNATIONAL SE v LCA MARRICKVILLE PTY LIMITED ACN 601 220 080
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 6/09/2021 8:36:13 AM AEST Registrar

Important Information

As required by the Court's Rules, this Notice has been inserted as the first page of the document which has been accepted for electronic filing. It is now taken to be part of that document for the purposes of the proceeding in the Court and contains important information for all parties to that proceeding. It must be included in the document served on each of those parties.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.

SWISS RE'S OUTLINE OF SUBMISSIONS IN REPLY

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

Introduction

1. This outline sets out Swiss Re's reply to some aspects of the Outline of Submissions served by LCA Marrickville and other insureds dated 31 August 2021 (***LCAM's Submissions***).

2. Not every aspect of LCAM's Submissions that warrants a reply is addressed below and Swiss Re has not sought to repeat or amplify matters addressed in its Outline of Submissions dated 19 August 2021 (***Swiss Re's Submissions***), or those of other insurers. Accordingly, it should not be taken that, because a particular submission is not addressed below, it is accepted by Swiss Re.

3. In this outline:

    a. for convenience only, the headings used in LCAM's Submissions have been adopted;

    b. paragraph references are to LCAM's Submissions unless otherwise indicated; and

    c. defined terms have the meaning given to them in Swiss Re's Submissions unless otherwise indicated.

A2. Scope of the Test Case: LCAM's Submissions [11]-[12] [O.009_0483 at 0491]

4. As to [11]-[12], the agreed List of Issues [C.001_0001] was drafted at a time when all issues save for quantum were envisaged as being dealt with in the test case. The failure of LCA Marrickville (and the

other insureds) to comply with orders for the service of evidence has made that course impossible. As a consequence, a number of issues have been deferred by the orders made on 24 August 2021, including "*loss or quantum*"[1]. However, at the time those orders were made it was recognised that the prospect of this Court dealing with issues of causation, trends, and adjustment was dependent upon receipt of sufficient evidentiary material from the insureds and Swiss Re (and other insurers) continued to press for the insureds to supply material supporting the claim for indemnity that they make.[2]

5. Unfortunately, Swiss Re has not received any substantive material from LCA Marrickville in furtherance of the "*claim preparation process*". The material available to Swiss Re is limited to a profit and loss statement (with no underlying supporting material or explanation, nor any other accounts or ledgers) and a schedule prepared by LCA Marrickville's solicitor (accompanied with some limited documentary material related to it)[3]) which identifies the various "*relief*" payments received (***Summary of COVID-19 Relief Schedule***).[4] Relevantly, the Summary of COVID-19 Relief Schedule records that LCA Marrickville received JobKeeper, a rental waiver/abatement, Small Business COVID-19 grants, and franchisor relief in the form of a reduction in royalty fees ordinarily payable and a "*reprieve*" on management fees ordinarily payable.[5]

6. The consequence of the state of LCA Marrickville's evidentiary case is that while some general issues concerning causation and adjustment are capable of being dealt with, a complete analysis of those issues is not possible. For example, it is not possible to ascertain the relevant "*Indemnity Period*" for the purposes of the Basis of Settlement Clause or the date on which any "*Damage*" started and ended.

7. Further, having regard to the limited material presently to hand, there is a very real question about whether LCA Marrickville suffered a "*loss*" in the sense contemplated by cl 9.1.2 of the Policy. [A.0001_0001 at 0034] Swiss Re has not been able to conclude its analysis of that issue given the state of the material provided thus far and the fact that the "*claim preparation process"* has not yet resulted in a submission having been received. Accordingly, Swiss Re does not accept that the limited material currently advanced is capable of establishing that a loss has been suffered, a prima facie entitlement to indemnity, or the "*timing of that loss vis-à-vis the occurrence of the insured perils*": compare, [11].

8. As a result, the "*questions of construction raised by the list of Issues*" in relation to causation, trends and adjustments that are capable of being resolved at present are limited to the treatment of amounts identified in the Summary of COVID-19 Relief Schedule, and the identification of the appropriate counter-factual for the application of the adjustments required by the Trends Clause. Issues such as the identification of the "*Indemnity Period*", and questions of aggregation, cannot be resolved and must now

[1] Order 1, 24 August 2021. [B.068_0513 at 0514]
[2] See T 13-14 (10 August 2021); T 7-6 (24 August 2021).
[3] Schedule attached to correspondence from Clayton Utz dated 27 August 2021. [P.083_0238] [P.084_0241]
[4] There is a short affidavit from LCA Marrickville's principal: Affidavit of Renee Irene Fairbanks, sworn 17 August 2021. That affidavit does not deal with the matters necessary to provide the factual basis for many of the issues which arise in the causation, trends and adjustments parts of the case.[E.045_0245]
[5] Summary of COVID-19 Relief Schedule, p 1. [P.083_0238 at 0238]

await a second round of hearings, should that be necessary. Given the somewhat unusual manner in which the issues for deferral have been expressed to accommodate LCA Marrickville's difficulties, Swiss Re respectfully contends that there needs to be precision as to the issues being dealt with and those which are to be deferred.

B1. Construction of Contracts of Insurance: LCAM's Submissions [13]-[19] [O.009_0483 at 0491 to 0493]

9. As to [18], the insureds contend that the Court could not "*accept that the insurers sought to exclude pandemics*". [O.009_0483 at 0493] Whatever may be said about the deficient drafting in the policy referred to in *Wonkana*, or the wording of any of the other policies at issue in the test case (about which Swiss Re says nothing), that cannot apply to the Swiss Re Policy.

10. The Disease Clause, upon which LCA Marrickville relies, specifically excludes "*losses arising from or in connection with highly Pathogenic Avian Influenza in Humans or any diseas(s) declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015*". [A.0001_0001 at 0034]

11. By reason of the nature of the diseases so listed[6] and the statutory context in which that occurred, not only was there no general cover for the consequences of a disease, the Disease Clause goes further and records the specific intention of the parties to exclude diseases which may lead to a pandemic. That clear limitation of cover is expressly recorded in the bargain between insurer and insured.

12. As set out in Swiss Re's Submissions, and developed further below, there is no cover for pandemics (or disease at large). Further, in circumstances where the insured peril on LCA Marrickville's own case is not one for disease *per se*, its contention that there is no exclusion in any of the policies under consideration for "*pandemics*" is misplaced and misconceived.

13. As to [15]-[16], the Policy, and in particular cl 9.1.2, it cannot be said to be in the nature of a "*product mix and match exercise*" or represent a "*bolting on*" of provisions drawn from elsewhere. As set out further below, when viewed as a whole (with the exception of the Expansion Clause, which has a limited purpose), cl 9.1.2 of the Policy identifies particular and distinct perils and is not a clause that has an overlapping set of sub-paragraphs or one which *"no-one has made an effort to ensure that they can be read together as a coherent whole*": compare [15]. [O.009_0483 at 0492]

14. As to [17], as Swiss Re understands it, no suggestion is made that the doctrine of *contra proferentem* is capable of applying in relation to the Policy. That is for good reason. The Wording and Schedule were prepared by AON, the broker acting in the interests of each "*Insured*" under the Policy including LCA

[6] Including human influenza with pandemic potential, middle east respiratory syndrome, plague, severe acute respiratory syndrome (SARS), smallpox, viral haemorrhagic fevers, yellow fever.

Marrickville. In that context, there is no basis for a conclusion that Swiss Re was the *proferens*. [O.009_0483 at 0492]

C. Trends/Adjustment Clauses: LCAM's Submissions [42]-[46] [O.009_0483 at 0500 to 0502]

15. The Trends/Adjustment Clause in the Policy contains a clear "*but for*" concept. It requires adjustments to be made so as to identify what would have been the position but for the insured peril having occurred. It is trite that care is required in utilising observations in respect of other policies for the construction of a differently worded policy. The requirements of the Trends/Adjustment clause is to be construed in light of the Policy as a whole.

16. Further, to the extent that LCA Marrickville attempts to call in aid the reasoning of the Supreme Court of the United Kingdom in *Arch*, that reasoning is open to doubt for the reasons articulated by Chubb at [414]-[464] [O.004_0222 at 0271 to 0278] and IAG at [211]-[221] [O.002_0081 at 0135 to 0139]. The proper approach to the construction and application of the Trends Clause in the Policy is that set out in *Orient Express Hotels Ltd v Assicurazioni Generali SpA* [2010] Lloyd's Rep IR 531, which should be preferred to the divergent approach taken by the Supreme Court in *Arch*.

D/H12. Third Party Payments: LCAM's Submissions [47]-[54], [428]-[433] [O.009_0483 at 0502 to 0503; 0593]

17. It remains, in the absence of a formulated claim from LCA Marrickville, difficult to address the particular payments received by LCA Marrickville and their treatment. However, as a general proposition the critical question is the identification of "*loss*" to which the Policy responds. Should the Policy respond, LCA Marrickville is only entitled to be indemnified for its "*loss*" falling within the indemnity provided, and no more.

18. In this respect, the analysis in *Insurance Australia Limited v HIH Casualty & General Insurance Limited (In liq)* (2007) 18 VR 528) relied upon by LCA Marrickville does not support a conclusion that the various amounts identified as having been received by LCA Marrickville in the COVID-19 Relief Schedule ought not be accounted for in identifying the "*loss*" suffered, or the extent of any indemnity available. There is nothing in the approach adopted by the Court in that case that is inconsistent with the orthodox application of the indemnity principle.

19. Significantly, the substantive effect of each payment or benefit received was to replace lost income or or reduce ongoing expenses – both are matters to which the indemnity in Section 2 of the Policy is directed having regard to the content of the Basis of Settlement Clause and the adjustments required by the Trends Clause.

20. Each of the matters advanced in Annexure A to LCAM's Submissions [O.009_0483 at 0664 to 0674] are matters which rely significantly on the form of the payment or benefit, rather than its substantive

effect. That is not a proper approach to the analysis required by the indemnity principle, the Basis of Settlement Clause or the Trends Clause. The question is to be resolved as a matter of construction.

21. Any payments or benefits which were received by LCA Marrickville and which had the substantive effect of providing relief from the business interruption effects of the Authority Response-LCA Marrickville and the COVID-19 pandemic more generally must be taken into account when identifying the true indemnifiable loss through the application of both the Basis of Settlement Clause and the Trends Clause. In that respect, LCA Marrickville's quotation of the clause at [426] leaves out the important "*but for*" concept which is expressly contained within it. The Trends Clause provides (emphasis added):

> *"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."*
>
> [A.0001_0001 at 0032]

22. Further, the Trends Clause in the Policy differs from the sample quoted by LCA Marrickville at [46]. The Trends Clause in the Policy has express requirements for adjustment for "*other circumstances affecting the Business*" and an express "*but for*" criterion that the sample clause does not.

23. It is clear from the words used that the Trends Clause requires adjustments to be made such that only the loss caused by the insured peril is indemnifiable. Adjustments of that kind are required to put the "*Insured*" into the position that it would have been in had the insured peril not occurred. It does not result in cover for other circumstances that would have affected the business in any event. Thus, as noted above, the Trends Clause, expressly provides for a "*but for*" analysis in the identification of the loss falling within the indemnity.

24. In that context, there could be no suggestion that as a matter of construction the bargain struck between the parties which required "*other circumstances affecting the Business*" to be taken into account was confined to financial detriments, but not financial benefits and thus extended an indemnity for more than the true loss suffered by an insured.

25. The operative effect of the Basis of Settlement Clause and the Trends Clause is to extend indemnity (should the Policy otherwise respond) for a reduction in Turnover (in consequence of the "*Damage*") which is adjusted to account for any savings in relation to ordinary business and those circumstances which would have affected the business in any event but for the occurrence insured peril.

(a) JobKeeper

26. The circumstances in which JobKeeper was paid are set out in IAG's Submissions at [233]-[238]. [O.002_0081 at 0141 to 0143] Those payments were, in substance, a replacement for lost income (and were taxable as such) in the period that they were paid. Nothing advanced in Annexure A to LCAM's Submissions supports a contrary conclusion. [O.009_0483 at 0664 to 0674]

27. In those circumstances JobKeeper payments operate to reduce the "*loss resulting from the interruption or interference with the Business*" in respect of which cover is otherwise engaged: cl 9.1.2. [A.0001_0001 at 0033 to 0034] Thus, the analysis is not advanced against notions of "*loss simpliciter*" (compare [430]), but the "*loss*" indemnifiable under the Policy.

28. Amounts which are received as income fall to be considered in the ascertainment of "*Turnover*". The fact that JobKeeper was not paid by a customer for the sale of products or services does not deny it that character. It was paid as a replacement for lost income of that quality. It would be to prefer form over substance to conclude that because the payment was made by the government rather than a customer it was not in the nature of "*Turnover*" for the purposes of the Basis of Settlement Clause. If it were not treated in that way, LCA Marrickville would obtain indemnity in respect of amounts of income that had not been lost at all.

29. An alternative view of JobKeeper is that they were payments to offset the cost of wages. If characterised in that way, those wage expenses have plainly been saved and are amounts which would otherwise have be "*payable from Gross Profit*".[7] That savings in wage expenses are intended to be taken into account is made clear by cl 10.4 of the Policy[8], which sets out the clear intention of the parties that to the extent that the amount identified as being indemnifiable for "*Gross Profit*" included "*Payroll*", that indemnity does not include any amount which constitutes a "*saving…in the amount of Payroll paid*".

30. In addition to the requirement to take JobKeeper into account in the Basis of Settlement Clause, there is an additional requirement that such payments be taken into account for the adjustments required by the Trends Clause, as being a "*circumstance*", which affected the "*Business*" after the date of "*Damage*". It provided an offset to the business interruption losses, which needs to be taken into account to identify the value of the actual loss suffered.

(b) NSW Government Grants

31. It is apparent that LCA Marrickville received the Small Business COVID-19 Support Grant and, although unclear, perhaps also the Small Business COVID-19 Recovery Grant[9]. Like JobKeeper, those

[7] Wording, cl 10.1.3: CB A, p 35. [A.0001 at 0035] See also Allianz's Reply Submissions at [32]-[35] [O.011_0697 at 0705-0706]
[8] CB 1, p 36. [A.0001 at 0036 to 0037] See also Schedule at CB A, p 71. [A.0069 at 0071]
[9] Summary of COVID-19 Relief Schedule, p 1. [P.083_0238 at 0238]

grants were paid to businesses that experienced a decline in turnover: see Annexure A to LCAM's Submissions, [737]-[739]. They are of the same quality as JobKeeper in that the substantive effect of those payments was to offset lost income, or alternatively to offset ongoing expenses. Similarly, they must also be considered as part of the adjustments required by the Trends Clause for the reasons set out immediately above.

(c) Rental/Expenses waivers

32. LCA Marrickville has received franchisor relief in the form of reduction and reprieve of royalty and management fees[10], and rental relief through the waiver or abatement of rental payments[11]. On any view, those amounts have not been lost or wasted, because they were not required to be paid.

33. As to [432], LCA Marrickville's position resorts to form over substance. In circumstances where indemnity is triggered, the purpose of the Basis of Settlement Clause is to provide a calculation of the "*loss*" in respect of which cl 9.1.2 extends indemnity. It is entirely artificial to say that because the payor or grantor did not expressly tie the benefit to the particular trigger of indemnity (i.e., the order or action of a relevant authority) clause 10.1.3 has no significance. The purpose of cl 10.1.3 is to account for the reduction of such expenses to adjust the amount of indemnity for a "*reduction in Turnover*" so as to reflect the corresponding reduction in expenses in that same period. Further, for the reasons identified above, the adjustments required by the Trends Clause also require those "*circumstances*" to be taken into account.

34. If those savings were not considered, the amount payable under the Policy would be more than LCA Marrickville's true loss because they are otherwise amounts which would have been "*payable from Gross Profit*". No reasonable businessperson would consider that the indemnity would function in a way which results in the "*Insured*" receiving more than a true indemnity.

H2. The Policy: LCAM's Submissions [327]-[329] O.009_0483 at 0570]

35. As to [327]-[329], Section 1 of the Policy is wholly concerned with the physical loss, damage or destruction of the "*Property Insured*". Clause 9.1.1 provides business interruption cover where the interruption or interference is caused by the physical loss, damage or destruction of property. Clause 9.1.2 provides a limited extension for business interruption losses "*in consequence of*" the limited matters identified in it. Contrary to [320], the limited perils identified in cl 9.1.2 include those which may involve physical damage to property. For example, in relation to the Conflagration/Catastrophe

[10] Summary of COVID-19 Relief Schedule, p 1. [P.083_0238 at 0238]
[11] LCA Marrickville states that it received from its commercial landlord (Summary of Rental Relief Schedule): [P.084_0241 at 0241]

[redacted]

Clause the action of a civil authority may well involve some damage to property, whether or not it that damage is to property owned by the "*Insured*". The same observation applies in relation to the Prevention of Access Clause, which expressly contemplates that there may be physical damage to property, including that of the "*Insured*". That some perils identified in cl 9.1.2 (like the Disease Clause and the Murder/Suicide Clause) do not have those features, does not undermine the conclusion that the Policy is, overwhelmingly, one concerned with physical loss, damage or destruction to property.

36. It is trite that the words of the policy under consideration are paramount. Swiss Re does not suggest otherwise. However, that does not deny the relevance of the analysis identified in *Star Entertainment Group v Chubb Insurance Australia Ltd* [2021] FCA 907 in circumstances where the policy considered is of a similar type and has relevantly similar features to that in the present case.

H3. The Claim: LCAM's Submissions [330]-[335] [O.009_0483 at 0571 to 0572]

37. As to [332] (repeated in slightly different terms in [371]), LCA Marrickville's Claim under the Disease Clause insofar as it does not rely on the application of the Expansion Clause should be considered and resolved. There are a number of good reasons as to why the matter ought to proceed in that way, including that:

    a. Swiss Re's case is advanced on the basis that the Disease Clause (without the Expansion Clause) does not respond to LCA Marrickville's claim for indemnity[12]. That claim for relief is maintained;

    b. LCA Marrickville seeks indemnity under the Disease Clause (without the application of the Expansion Clause)[13]; and

    c. in circumstances where this proceeding forms part of an industry-wide test case framed with the intention of providing guidance and certainty to not only the parties to these proceedings, but to many other insurers, insureds, and regulators, that purpose is not advanced by leaving unresolved issues that otherwise legitimately arise between the parties.

H4. The Biosecurity Act Exclusion: LCAM's Submissions [356]-[359] [O.009_0483 at 0573 to 0578]

38. As to [341] the proposition advanced by LCA Marrickville requires "*declared to be a listed human disease"* to be understood as "*previously declared to be a listed human disease*" or as "*those diseases declared to be a listed human disease at policy inception*" (or similar). There is nothing about the words "*declared to be a listed human disease*" that introduce a temporal restriction in the way suggested.

[12] Statement of Claim, [72]. [B.002_0006 at 0026]
[13] Cross-Claim, [8]. [B.005_0048 at 0053 to 0054]

Rather, the words "*declared to be*" are (like the concept of "*notifiable human disease*") directed to the time at which the insured peril occurs.

39. As to [342], the inclusion of a particular disease in the exclusionary passage does not tell against an ambulatory operation. To the contrary, it is a powerful indicator that the parties did not intend the clause to only operate by reference to diseases that were known or declared as at the date of inception. If they did, a complete list of diseases could have been included. That the parties did not do so is telling. Rather, the drafting device chosen was one which identifies a category of particular, and circumscribed diseases, which is readily identifiable. That drafting device also recognises and accommodates the fact that the category of disease to which the Biosecurity Act Exclusion applies is subject to change, including after inception of the Policy. Similar observations also apply to the identification of a "*notifiable human disease*" which is a necessary integer of the Disease Clause.

40. It is notable that LCA Marrickville provides no rationale for the specific nomination of "*highly Pathogenic Avian Influenza in Humans"* in the exclusion unless the clause has an ambulatory operation. The exclusion would operate in respect of such a disease even if it were subsequently removed from the list of diseases "*declared to be a listed human disease under subsection 42(1) of the Biosecurity Act 2015*". In that way, the existence of the separate listing of a "*highly Pathogenic Avian Influenza in Humans"* in addition to being included by reference to its listing under the Biosecurity Act is explicable. What is not explicable, is why that disease is specifically listed if the clause was to have a static operation. The double listing would be surplusage.

41. Further, contrary to [342], the Biosecurity Act Exclusion does not use the word "*other*" as a qualifier between the identification of a "*highly Pathogenic Avian Influenza in Humans*" and "*disease(*s*) declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act*". Rather, the exclusion is expressed as follows (emphasis added):

> *"…but specifically excluding losses arising from or in connection with highly Pathogenic Avian Influenza in Humans <u>or any disease(s)</u> declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015"*

42. Accordingly, the apparent reliance by LCA Marrickville on canons of construction in the context of the exclusion is misplaced.

43. As to [343]-[344], it is a commercial nonsense to suggest that the parties would have intended that the aspects of Disease Clause would operate in an inconsistent manner. The function and purpose of the Disease Clause as a whole is to identify the boundaries of the cover that is available for business interruption losses consequent upon public authority closure orders in respect of particular types of disease: namely, a "*notifiable human infectious or contagious disease… or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease*".

Fundamentally, the clause must be construed as a whole and given a congruent construction having regard to its purpose within the Policy. To say, as LCA Marrickville does, that the words are in a different part of the clause and have a different purpose misses the point and seeks to treat the clause as being capable of division into component parts which fall to be construed in isolation. As set out in Swiss Re's submissions at [6.11], the construction advanced by LCA Marrickville lacks objective commercial sense and produces anomalous results, inconsistent with the congruent construction of the clause as a whole given its context and purpose.

44. Further, if, the parties craved certainty as to the extent and scope of cover which could only only be achieved by an application of the exclusionary words to matters known or ascertainable at the time of policy inception, that certainty must also be taken to be necessary when identifying the particular disease capable of engaging cover. In that event, given that COVD-19 first emerged and became a "*notifiable*" disease during the Period of Insurance, there can be no cover available in respect of LCA Marrickville's claim under the Disease Clause.

45. As to [346]-[348], it is to be noted that LCA Marrickville ignores the authorities relied upon by Swiss Re which hold that the "*some other person*" to which s 54(1) of the ICA refers cannot be any person in the world, but must be a person with a connection with one of the parties the subject of the contractual bargain. Further, LCA Marrickville's position seeks to focus on the asserted "*act*" of declaration as that which triggers the Biosecurity Act Exclusion. It does not. Rather, it operates in relation to those particular diseases that have the feature of having been so declared. That fact demonstrates the significant stretch involved in LCA Marrickville's argument that a performance of a statutory function, which itself is not the trigger for the exclusion, is subject to s 54(1) of the ICA.

46. As to [353]-[359] generally, the structure of the Policy as a whole and the place of cl 9.1.2 within it reveals a limited list of additional perils for which cover is extended in circumstances where "*property damage*" is not an essential prerequisite.

47. Insofar as cover was extended for business interruption losses that had some relationship with "*disease*", the scope of cover was carefully calibrated. The business interruption either had to be in consequence of 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 (but not "*listed*") human infectious or contagious disease etc (cl 9.1.2.1)[14], or a 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 (cl 9.1.2.3).

48. The other limited extensions in cl 9.1.2 do not deal with disease at all.

[14] Including, in appropriate cases, circumstances involving the "*discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease…at the Situation*". [A.0001 at 0034]

49. Insofar as infectious or contagious diseases are concerned, the clear contractual intention was to not provide cover at all if they were diseases listed under the Biosecurity Act. There is good reason for that. Those are diseases which present a particular and significant risk, and one which is "*less capable of anticipation and pre-assessment*": *Rockment Pty Ltd v AAI Ltd* [2020] FCAFC 228; 149 ACSR 484 at [32].

50. Further, it is important to properly consider the content and purpose of each sub-clause in cl 9.1.2 when construing it as a whole. [A.0001_0001 at 0034] In this respect:

    a. Clause 9.1.2.1 (the Disease Clause) provides a limited extension for business interruption losses consequent upon the closure or evacuation of the whole or part of the Situation by order as a result of an outbreak of a "*notifiable human infectious or contagious disease…or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease",* which is constrained by the operation of the Biosecurity Act Exclusion. The subject matter of the Disease Clause is a class of diseases having particular features, but excluding those that present a particularly serious biosecurity risk and thus may have a pandemic potential.

    Contrary to [359], Swiss Re does not suggest that the insured peril is a *"[notifiable] human infectious or contagious disease*". However, it would be wrong to ignore the fact that the clause specifically identifies a particular category of disease in seeking to identify the objective intention of the parties. Properly construed in its context, and giving due regard to the purpose and content of the Biosecurity Act Exclusion and the specifically agreed sub-limit (the significance of the latter having been entirely ignored by LCA Marrickville) the Disease Clause identifies the limited extension to cover in relation to *"[notifiable] human infectious or contagious disease*".

    b. Clause 9.1.2.2 (Murder/Suicide Clause) deals with a narrow circumstance and does not deal with disease.

    c. Clause 9.1.2.3 (Food/Drink Clause), like the Disease Clause, identifies a limited extension for business interruption losses for a particular category of "*disease*" – that being, a "*disease likely to arise from or traceable to foreign or injurious matter in food or drink provided from or on the Situation*". Again, the parties have taken care to identify a particular category of disease to which the extension is directed. Contrary to [355], its inclusion does not undermine the construction for which Swiss Re contends. Rather, it reinforces the conclusion that the parties have identified, with specific clauses, those limited circumstances in which business interruption losses associated with diseases of a particular and limited kind will engage cover.

    d. Clause 9.1.2.4 (the Expansion Clause) does not provide a basis of indemnity in and of itself. Its only purpose is to expand the geographical nexus from "*at the Situation*" to the area within a 5 km radius of the Situation. It otherwise applies by reference to all of the features of each of the

Disease Clause (including, relevantly, the Disease Sub-Limit and the Biosecurity Act Exclusion), the Murder/Suicide Clause, and the Food/Drink Clause .

51. Pausing there, in those four sub-clauses the parties have identified a specified set of circumstances in which the extension in cl 9.1.2 responds, including in relation to two limited categories of disease. A construction that incorporates business interruption from disease where cover would not be available under the Disease Clause nor the Food/Drinks Clause fails to give effect to that limited cover and would stand cl 9.1.2 on its head. Despite LCA Marrickville's attempt to identify "*overlap*" in between the sub-clauses – they have been carefully drafted to make plain that none exists.

52. Relevantly, cl 9.1.2.5 (the Conflagration/Catastrophe Clause) deals with an entirely different set of circumstances. It says nothing about disease. LCA Marrickville strains for a construction that sees it capable to applying to the present case however, that construction fails to give effect to the agreement of the parties, including by failing to recognise that the parties have identified the particular circumstances in which types of disease, and (in the case of the Food/Drinks Clause) their cause that will be capable of engaging the extension (if all other integers are met). It lacks commercial sense that the parties would have agreed upon the limited scope of cover for business interruption losses falling within those clauses, only to then provide for an expansive cover for those matters in the general provisions that follow.

53. In relation to the Disease Clause, such a construction would undermine the specific agreement of the parties which includes the sub-limit that applies to it. It lacks objective commercial sense for the parties to have identified their specific agreement, including a sub-limit of $500,000 in the aggregate (significantly lower than the total limit of liability otherwise available), if they intended that cover for business interruption losses consequent upon orders or actions of a relevant authority related to "*human infectious or contagious disease*" would be available under other sub-clauses which were not the subject of that specially negotiated sub-limit. To construe the Policy in that way would be to defeat the parties' agreement, and would (in the circumstances of this case), render the Disease Clause and the specific agreement contained in it, otiose. That approach is not only unsupported by the words of the Policy, it is contrary to principle.

54. The submission at [356] highlights the tension in LCA Marrickville's construction. It is said by LCA Marrickville that the Conflagration/Catastrophe clause is not general in operation because it requires a that there be an event of a "*particular character*". Yet, LCA Marrickville contends that the meaning of "*catastrophe*" is at large and thus capable of applying to circumstances of disease which would not engage the specific cover agreed in the Disease Clause (which, significantly includes the sub-limit) or the Food/Drinks Clause. If "*catastrophe*" is construed in the manner for which LCA Marrickville contends (which it ought not be), then it is plainly a clause which has a significantly wider degree of generality than those which precede it.

55. Similarly, cl 9.1.2.6 (Prevention of Access Clause) is expressed in general terms referring to a "*risk to life*" or a risk of "*Damage to Property Insured*". It is not directed to disease at all. For the same reasons as set out immediately above in relation to the Conflagration/Catastrophe Clause, the construction for which LCA Marrickville contends fails to give effect to the specific and limited agreement of the parties reflected in the extension.

56. The bare assertion in [358] lacks merit. As set out above, properly construed, the clauses identify a limited and carefully circumscribed set of circumstances which engage a limited extension of cover for particular perils. The sub-clauses in cl 9.1.2 do not provide overlapping cover. An acceptance of LCA Marrickville's construction requires the Court to ignore the clear intention of the parties and cast aside orthodox principles of construction with the inevitable consequence that aspects of the parties' agreement will be defeated. That approach ought not be embraced.

H7. Hybrid and Expansion Clauses: LCAM's Submissions [370]-[387] [O.009_0483 at 0580 to 0584]

57. As to [373]-[378], the construction for which LCA Marrickville contends treats "*Situation*" as synonymous with "*Business*". They are plainly distinct concepts for the purposes of the Policy[15] and are used in different ways within cl 9.1. If the parties had intended that the extension would be engaged by orders requiring the closure of the "*Business*" (as opposed to the physical premises at which that "*Business*" was carried on), the parties could have readily expressed that agreement and the Disease Clause would have been drafted very differently.

58. As to [377]-[378], no part of the Authority Response-LCA Marrickville had the effect that *"[a]ccess to a discrete part of LCA's Situation…[was] completely stopped from happening*". Any restrictions imposed were directed to the "*Business*" being carried on, and not the access to or use of the physical premises (i.e., the "*Situation*"). As much is clear in the period when LCA Marrickville resumed trading. Whilst subject to limits for the amount of persons capable of being at the premises, there was no restriction on access to or use of any part of the "*Situation*". That reflects the fact that a limitation on persons entering a premises is of a fundamentally different character to an order that requires a "*closure*" – i.e., the "*physical closure*" - of premises or part thereof. No part of the extension is directed to the general risk that the "*Business*" may not be able to be carried on without restriction, or indeed at all, through government intervention.

59. As to [379] (and [184]-[196]), LCA Marrickville's concept of an "*outbreak…at the Situation*" (or within a 5 km radius) fails to conform with the ordinary understanding of the concept. A few examples suffice to demonstrate the vice in LCA Marrickville's construction.

60. At [196] and [379], Taphouse (and subsequently, LCA Marrickville) contends that an "*outbreak of a disease such as COVID-19 is constituted by at least one confirmed case of a disease in a given area*".

[15] See the definitions of those terms in the Wording at cll 1.2 and 1.18. [A.0001 at 0004; 0006]

That contention immediately runs into the problem identified by Lords Hamblen and Leggatt (Lord Reed agreeing) in *Arch* that:

> "66. *…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.*

61. LCA Marrickville's construction would mean that a person who becomes infected as part of an "*outbreak*" remote from the Situation and outside the Radius constitutes a new outbreak merely by travelling into the Radius, or visiting the Situation. To take the example of passengers who were part of an "*outbreak*" on the *Ruby Princess*, LCA Marrickville's construction would result in any such person who travelled to or through the Radius as constituting a new outbreak wherever he or she had been present. Similarly, an overseas passenger who was infected as part of an "*outbreak*" overseas who arrives at Sydney Airport and who travels through part of the Radius, or to a location within it, does not constitute a new "*outbreak*" of the disease (within the meaning of the Policy) at each part of the journey or the ultimate destination. The concept of a person who moves from place A to place B constituting a new and discrete "*outbreak*" at every location along that journey does not accord with any common sense concept of "*outbreak*".

62. As to [380]-[383], no part of the public health orders themselves establish an "*outbreak*" either at the Situation or within the Radius. Generalised statements made in those orders do not establish any "*outbreak*" at the "*Situation*" or within the Radius. As explained in Swiss Re's Submissions, a critical component of the Disease Clause (and other aspects of cl 9.1.2) is the geographical connection required by its terms. That important part of cl 9.1.2 must be satisfied so as to engage cover.

63. As to [384]-[387] generally, it is entirely unremarkable that LCA Marrickville must establish – including by evidence – that the Disease Clause responds to its claim. Its claim that, in the particular circumstances of the present case, it will need to "*foray into subpoenaed material*" or adduce expert evidence is a function of the particular circumstances of the case, including the approach that it has taken to seeking to prove its claim.

64. In the case of a real "*outbreak*", no difficulty of proof arises. The commonality of cases linked by time, location and cause is relatively clear. The difficulties of proof arise because of a tendentious approach on the part of LCA Marrickville to what constitutes an "*outbreak*" when the publicly available information does not reveal one. None of those circumstances are capable of affecting the proper construction of the Policy. To construe the clause as being capable of being engaged when evidence sufficient to engage its terms is lacking, merely because the evidence might include material obtained from other parties or require expert evidence, finds no support in principle.

65. As to [386]-[387], LCA Marrickville does not address the inherent limitations in the data on which it relies: see Swiss Re's submissions at [5.36]-[5.41].[16] Given those matters, there is no proper evidentiary basis for the inferences that LCA Marrickville would have the Court draw as to location and prevalence of cases of COVID-19, including as to where any person was while infectious or where they acquired the disease. That conclusion finds support in the fact that, on 10 August 2021, it was submitted on behalf of LCA Marrickville that it was "*dubious*" that the data presently relied upon supports inferences as to matters such as the location of any person while infectious and where they acquired the disease.[17] Nothing has changed.

66. Further, there is nothing about the nature of business interruption insurance generally that means that an insured is not obliged to bring itself within the insuring clause in accordance with ordinary principles. The debatable proposition that the purpose of business interruption insurance is to provide a "*timely capital injection whilst the insured peril continues*" does not advance LCA Marrickville's position. The insured must establish an entitlement to cover. That entitlement, and thus the matters which an insured must establish, are determined by the words of the insuring clause. The meaning of those words is not determined by resort to subjective considerations of how easy or difficult a particular insured might find it to discharge that burden. It is the words of the insuring promise that are determinative. In any event, that in the present case issues have had to be deferred is not a function of the difficulties of proof arising from the construction of the Disease Clause, but is the result of the manner in which LCA Marrickville has conducted its case and the absence of data demonstrating an "*outbreak*".

67. LCA Marrickville's complaint about having to overcome evidentiary "*hurdles*" reveals the fundamental weakness in its case (and the consequences of the forensic choices it has made in advancing it) rather than any matter which is capable of supporting a construction of the Policy which relieves an "*Insured*" of bringing itself within the insuring promise.

H8. Prevention of Access Clause: LCAM's Submissions [388]-[403] [O.009_0483 at 0584 to 0587]

68. LCA Marrickville fails to engage with one of the central issues in relation to the Prevention of Access Clause. The clause does not mention disease at all (see [47]-[56] above). As a matter of construction of cl 9.1.2 as a whole, it ought not be inferred that the parties intended that such a clause would provide cover in respect of business interruption losses for diseases when other sub-paragraphs specifically provide for the possibility of such cover subject to carefully prescribed criteria.

69. As to [391], the inclusion of the words "*use of*" does not undermine the force of the proposition that, like the Disease Clause, the Prevention of Access Clause is directed to the access to or use of the physical

[16] As to [387], that the data records usual place of residence alone, and not any other features, including where the disease was contracted flows from the Agreed Facts at [50]-[51]. [C.002_0017 at 0027 to 0028] That in turn is supported by the notations to that data when published by the NSW Government: see https://data.nsw.gov.au/search/dataset/ds-nsw-ckan-97ea2424-abaf-4f3e-a9f2-b5c883f42b6a/details?q=

[17] T 4-7 (10 August 2021).

premises (i.e., the "*Situation*"), and not the manner in which the "*Business*" is conducted (see also [57]-[58] above). A clause which provides cover for the action of an authority that prevents or hinders the "*Business*" from being carried on is of a very different kind to an action which prevents or hinders access to or use of a physical premises. The Prevention of Access Clause is the latter, yet LCA Marrickville seeks to apply it as if it were the former.

70. As to [403], it is a significant stretch to say that the Authority Response-LCA Marrickville was an attempt to avoid a risk to life in the Radius represented by persons arriving from Australia through Sydney International Airport. There is no proper basis for that inference and it ought not be drawn. Not only does the data on which LCA Marrickville relies have significant limitations which do not support the generalised conclusions that it advances, but it is clear that the steps taken between January and March 2020 were taken as part of a nationwide, co-ordinated response rather than a response to a particular, localised risk within the Radius: see Swiss Re's Submissions [6.51]-[6.61].

H9. Catastrophe Clause: LCAM's Submissions [404]-[419] [O.009_0483 at 0587 to 0591]

71. Once again, LCA Marrickville fails to engage with the absence of any reference to disease in the Conflagration/Catastrophe Clause. Like the Prevention of Access Clause, it does not mention disease at all. For the reasons set out above, it ought not be inferred that the parties intended that such a clause would provide cover in respect of business interruption losses for diseases when other sub-paragraphs specifically provide for the possibility of such cover subject to carefully prescribed criteria.

72. As to [411]-[417], despite rejecting the significance of the conclusions in *Star* due to the differences in the policy considered there, LCA Marrickville nevertheless advances a construction of "*catastrophe*" which is based on the conclusions reached in that case – conclusions which were based, at least in significant part, on evidence not adduced by it.

73. In any event, none of the matters advanced in those paragraphs directly engage with the construction contended for by Swiss Re, and which is dependent solely on the proper construction of the words used in the Policy arrived at through the application of general principle. Tellingly, the bare statement that "*There is no basis for treating "conflagration" as confining "catastrophe"*" sits in direct contrast to LCA Marrickville's (misplaced) attempt to confine the operation of the Biosecurity Act Exclusion (see [41]-[42] above, and LCAM's Submissions at [342]). It remains unexplained why if appropriate to treat "*other*" (which did not in fact appear in the Disease Clause) as having the effect of qualifying what follows, there can be "*no basis*" for the application of that principle of construction in the Conflagration/Catastrophe Clause in circumstances where the words actually appear in a formulation well recognised in authority.

74. The use of that language ("*or other catastrophe*") is as important here to the issue of construction as it was to the resolution of the construction question in *Telstra* ("*other like*") and *Stag Line* ("*or other purposes*") discussed in Swiss Re's Submissions at [8.20]-[8.21].

75. Further, contrary to [416], for the purposes of the Conflagration/Catastrophe Clause, the relevant "*action*" must have been taken "*during*" the "*conflagration or other catastrophe*". That aspect of the clause necessarily requires that the "*conflagration or other catastrophe*" is on foot (and thus, be identifiable as such) at the time of the "*action*" which engages the extension. Accordingly, it is plainly a relevant "*consideration of whether [the COVID-19 pandemic] could properly be categorised as a catastrophe as at the date of the Authority Response-LCA Marrickville*".

H10. Causation: LCAM's Submissions [420]-[425] [O.009_0483 at 0591 to 0592]

76. As to [421], the indemnifiable "*loss*" for the purposes of the Policy is not identified merely by a comparison of selected months from a profit and loss statement, particularly one which shows an overall increase in gross profit in the 2020 calendar year.

77. Rather, the indemnifiable "*loss*" is ascertained in accordance with the application of the Basis of Settlement Clause, which requires an identification of the "*Indemnity Period*" (see cl 8.5). The production of a profit and loss statement does not enable the "*Indemnity Period*" to be ascertained, and thus the mere comparison of figures does not support a conclusion that an indemnifiable loss has been suffered. That is very much a live issue, which cannot be resolved until LCA Marrickville provides a complete articulation of its claim.

H11. Adjustment Clause: LCAM's Submissions [426]-[427] [O.009_0483 at 0592]

78. As to [426]-[427], Swiss Re does not concede that the "*Authority Response-LCA Marrickville*" constitutes "*Damage*" for the purposes of the Policy. It is only those aspects of it that otherwise engage cl 9.1.2 that are "*events*" which are then deemed to be "*loss caused by Damage*", and to which the Basis of Settlement Clause, and the necessary adjustments required by the Trends Clause, are then applied: see Swiss Re's Submissions at [4.35]-[4.39].

79. For the reasons advanced in IAG's Submissions at [211]-[221] and Chubb's Submissions at [414]-[464] (which Swiss Re adopts for the purposes of these proceedings) the approach to proper construction and application of the Trends Clause is reflected in *Orient Express Hotels Ltd v Assicurazioni Generali SpA* [2010] Lloyd's Rep IR 531, which should be preferred to the divergent approach taken by the Supreme Court in *FCA v Arch*.

H13. Insurance Contracts Act: LCAM's Submissions [434] [O.009_0483 at 0594]

80. The position remains that LCA Marrickville's claim is yet to be fully articulated, and no identification of the amount claimed or the basis on which it has been claimed is possible.

81. The result is, even if LCA Marrickville was entirely successful on all issues to be determined in the hearing commencing 6 September 2021, the amount which Swiss Re would be liable to pay is not capable of being ascertained. In those circumstances, it cannot have been unreasonable for Swiss Re to have "*withheld payment*".

5 September 2021

David L Williams

Ross D Glover

Nick Riordan

Counsel for Swiss Re