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Details of Filing

Document Lodged:	Outline of Submissions
File Number:	NSD133/2021
File Title:	INSURANCE AUSTRALIA LIMITED ABN 11 000 016 722 v MERIDIAN TRAVEL (VIC) PTY LTD ACN 111 480 883
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 18/08/2021 4:27:43 PM AEST Registrar

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Insurance Australia Ltd v The Taphouse Townsville Pty Ltd, Proceeding No NSD134/2021

Insurance Australia Ltd v Meridian Travel (Vic) Pty Ltd, Proceeding No NSD133/2021

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A INTRODUCTION AND OVERVIEW

1 The proceedings are test cases concerning the proper construction of common extensions to coverage contained in business interruption insurance policies in Australia and their responsiveness to losses arising from the COVID-19 pandemic.

2 The relevant extensions provide cover for business interruption losses resulting from (in summary):

(a) an outbreak of a disease at the insured's premises or within a defined radius (a **disease extension**);

(b) the prevention of access to business premises by action of a government or statutory authority (a **prevention of access extension**);

(c) a hybrid of the above extensions, i.e. restrictions imposed on the premises by an action of a government or statutory authority consequent upon discovery of a disease at the insured's premises or within a defined radius (a **hybrid extension**).

3 The test cases concern claims made under policies containing these extensions by the respondents (referred to hereafter as the **insureds**) for losses suffered in the context of the recent global COVID-19 pandemic and, more particularly, the Commonwealth, State and Territory government responses to that pandemic.

4 Those events have, undoubtedly, caused disruption to Australian businesses. The dispute between the parties, however, is not whether such disruption has in fact occurred. It is, in the first place, whether, on their proper construction, the insurers agreed to extend cover for the particular events relied upon by the insureds in circumstances where the policies do not, on any view, provide a general 'pandemic' cover. The coverage is instead expressly limited by reference to a series of specific pre-conditions that must occur in a specific causal sequence. The precise scope of that coverage differs between the individual test cases, but at a general level each of the insuring clauses is limited by the interconnected concepts of 'outbreak', 'discovery of an organism', 'closure or evacuation', 'prevention of access', 'within a 20 [or 50] kilometre radius of the premises' and 'at the premises'. The first dispute concerns the proper construction of these concepts in the context of the policies before the Court.

5 If the insureds are able to prove that the events relied upon by them are insured perils, then a further question arises as to whether the insured event (e.g. the relevant government orders) are the true cause of their business interruption losses or whether

those losses were in fact caused by other uninsured incidents of the pandemic (e.g. a loss of business due to travel restrictions on potential customers). This, again, is a question of policy construction and raises issues of 'proximate' and 'concurrent' causation as addressed further below. Finally, as business interruption insurance is only intended to cover a downturn in business by reason of the insured peril, further causation and adjustment issues arise in respect of the quantum of loss claimed.

6 The two test cases involving policies issued by Insurance Australia Ltd (trading as CGU Insurance) (**IAG**) are proceedings NSD134/2021 and NSD133/2021. They involve a bar and restaurant in Townsville, Queensland (the **Taphouse** test case) and a travel agency business in Heidelberg, Victoria specialising in the sale of cruise ship packages (the **Meridian** test case) respectively. The relevant insuring clauses in each of the two cases are a prevention of access extension and hybrid extension in the Taphouse test case and a disease extension and hybrid extension in the Meridian test case. The key issues for determination are set out in further detail below, but each of the 'outbreak', 'closure or evacuation', 'discovery of an organism' and 'prevention of access' issues arise in these test cases, together with the general issues of causation and adjustments.

7 These submissions are structured as follows. ***First***, the submissions address the general principles applicable to the construction of the business interruption policies, as well as providing some general commentary on recent decisions concerning related issues (Part B below). ***Second***, the submissions specifically address the Taphouse test case (Part C) and the Meridian test case (Part D) and the issues arising in those test cases. ***Third***, the submissions address an ancillary issue concerning the calculation of interest under section 57 of the *Insurance Contracts Act 1984* (Cth).

B BACKGROUND AND GENERAL PRINCIPLES

B.1 COVID-19

8 The background to the each of the test cases is the global COVID-19 pandemic. The basic facts concerning the discovery and spread of that disease are agreed, and set out at paragraphs [1]-[15] and [18]-[19] of the Statement of Agreed Facts (**SOAF**).

9 By way of summary:

(a) On 31 December 2019, the World Health Organisation (**WHO**) was informed of a series of cases of 'pneumonia of unknown etiology' detected in Wuhan, Hubei Province, China.

(b) On 9 January 2020, the WHO announced that initial information about the cases in Wuhan suggested that the cases were caused by a novel coronavirus pathogen.[1]

(c) On 19 January 2020, the first person with the novel coronavirus entered Australia.[2]

(d) On 21 January 2020, 'Human coronavirus with pandemic potential' was determined to be a listed human disease under the *Biosecurity Act 2015* (Cth).[3]

(e) On 6 February 2020, 'Human coronavirus with pandemic potential' was listed on the 'National Notifiable Disease List' under the *National Health Security Act 2007* (Cth).[4]

(f) On 11 March 2020, the WHO described ‘COVID-19’ as a pandemic.[5]

10 The ‘Human coronavirus’ referred to by the WHO and Commonwealth in the above announcements and instruments is what has come to be known as ‘COVID-19’. To be specific, COVID-19 is the name given to the disease and 'Severe acute respiratory syndrome coronavirus 2' (**SARS-CoV-2**) is the name given to the virus that causes the disease.[6] This distinction has some limited relevance to policies that refer to the discovery of an ‘organism’.

11 COVID-19 spreads primarily through the small liquid particles expelled by a person infected with COVID-19 when they cough, sneeze, speak, sing, or breathe heavily.[7] It spreads mainly between people who are in close contact with each other, typically within 1 metre, but it can also spread in poorly ventilated and/or crowded indoor settings, where people tend to spend longer periods of time.[8]

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[1] SOAF at [1]-[2].

[2] SOAF at [3].

[3] SOAF at [4].

[4] SOAF at [5].

[5] SOAF at [6].

[6] SOAF at [5].

[7] SOAF at [11].

[8] SOAF at [12].

B.2 Business interruption insurance

12 As explained in H Roberts, *Riley on Business Interruption Insurance* (10th ed, Thomson Reuters, 2016) at p. 3:

> All around the world, the delivery of goods and services almost invariably requires investment in buildings, plant and equipment, as well as people … Any enterprise, be it a commercial business, a government organisation, or even a charity, will look to an income stream to finance or repay that investment. All these types of enterprise (described above) stand to be affected as the result of damage caused by fire or an associated insured peril, their cash-flow interrupted and part of their future earnings lost. Insurance is therefore necessary to afford protection against that loss of future earnings: and in the event of a claim a method of measuring that loss of future earnings must be applied.

13 The response by the insurance market to this need has been to offer what is now known as 'business interruption' insurance (or less commonly 'consequential loss' insurance).

14 The general approach to providing business interruption cover in the United Kingdom and Australia is now the 'loss of turnover' approach. An alternative 'gross earnings' or 'business income' approach is adopted in the United States which is not relevant for present purposes. The 'loss of turnover' approach seeks to ascertain the proportionate effect of the relevant insured event (e.g. a fire) upon the earning capacity of the business by comparing the turnover in the months following the damage with that in the corresponding period prior to the insured event, subject to appropriate adjustments for special circumstances and trends of business: H Roberts, *Riley on Business Interruption Insurance* (10th ed, Thomson Reuters, 2016) at p. 3 [1.2]. It is essential to this type of cover to ascertain as accurately as practicable the hypothetical results which the business itself would have produced apart from the fire or other peril happening, and to determine what adjustments to the rate of gross profit, the annual turnover and the standard turnover figures would be equitable: *Australian Pipe & Tube Pty Ltd v QBE Insurance (Australia) Limited (No 2)* [2018] FCA 1450 at [115] (Beach J), citing WB Honour and GJR Hickmott, *Honour and Hickmott's Principles and Practice of Interruption Insurance* (4th ed, Butterworths, 1970) at 444.

15 As is apparent from the above explanation, the initial form of cover was limited to business interruption losses caused by material damage to property. The extension to cover the occurrence of 'disease' first occurred in the late 1980s following a recommendation by the Association of British Insurers. As further explained by H Roberts in *Riley on Business Interruption Insurance* at p. 247 [11.13]:

> In 1989, a standard form of cover was made available in the United Kingdom as part of the ABI recommended wording for notifiable disease, vermin, defective sanitary arrangements, murder and suicide… This extends the business interruption policy to include loss following the occurrence of a notifiable disease (as defined) at the premises or attributable to food or drink supplied from the premises, any discovery of an organism at the premises likely to result in the occurrence of a notifiable disease, the discovery of vermin or pests at the premises or any accident causing defects in the drains or other sanitary arrangements at the premises; any of which events causes restrictions on the use of the premises on the order or advice of the competent local authority …
>
> This form of cover can often be seen as an extension of existing insurances or in some cases can be purchased as standalone recall cover.

16 The cover was therefore an adjunct to a property policy and was primarily directed at interruption due to government orders restricting the use of premises when disease or some other form of contamination was identified at the premises or in goods supplied by the business.

17 The policy wording, as adopted in Australia, has since changed and evolved. In some policies cover has been extended to other circumstances including 'outbreak' of a disease within a certain radius of the business premises. In other policies, cover has been narrowed to cases involving a closure of premises, rather than a mere restriction on their use. Examples of each form of wording can be seen in the respective test cases before the Court. The particular wording used is obviously of key importance, as addressed below. Nevertheless, the concept of 'the premises' has remained central to these clauses, and the fundamental object of a 'disease' extension is to protect the business from localised occurrences of disease impacting upon the business occurring at the premises. An obvious example is an outbreak of Legionnaire's disease spread via an air-conditioning unit in a shopping centre, causing local government authorities to close the shopping centre. The coverage was never intended to be a general cover for pandemic 'disease', as reflected in the express limitations on the wording of the insuring clause.

18 The importance of these considerations was recently underlined by Allsop CJ in *Star Entertainment Group Limited v Chubb Insurance Australia Ltd* [2021] FCA 907 (***Star Entertainment***). In rejecting the applicant's broad interpretation of a 'catastrophe' clause, his Honour commented at [9]-[10]:

> Distilled to its essence Star submits that the Civil Authority Extension extends the word Damage from physical damage to damage by loss of use or custom or financial loss resulting from the many acts and orders of various governments in connection with, or for the purposes of retarding, the catastrophe of the COVID-19 pandemic.
>
> The fundamental difficulty with that distilled simplicity is that it provides cover, without any sub-limit, and so up to $4 billion, for the consequences of government activity in connection with or to retard a catastrophe which itself is not an insured peril. This is not catastrophe insurance. No provision provides cover for the business consequences brought about by the spread of COVID-19 or by a catastrophe of the spread of any disease. Yet the construction propounded by Star provides full cover for the business interruption caused by government orders in connection with, or to retard, the catastrophic spread of the disease, notwithstanding that the pandemic, being the posited catastrophe, is not an insured peril.

19 As developed further below, a similar dynamic can be seen to be at play in the present test cases. The insured in each case is seeking to take a series of specific coverage clauses and construe them so as to provide cover for the catastrophic spread of COVID-19, despite that not being an insured peril. In doing so, the insured seeks to ignore or read down the express pre-conditions to cover stated in the policy. The Court ought not adopt that approach unless it is clearly supported by the express words of the policy. Otherwise, it risks re-writing the parties' bargain and the allocation of risk upon which the insurance contract (and premium) was based: see *Liberty Specialty Markets v Icon Co (NSW) Pty Ltd* [2021] FCAFC 126 at [152]; *Australasian Correctional Services Pty Ltd v AIG Australia Limited* [2018] FCA 2043 at [17].

B.3 Principles of construction

20 The general principles applicable to the construction of a contract of insurance are well-known.

21 They were recently summarised by the Full Court in *Swashplate Pty Ltd v Liberty Mutual Insurance Company t/as Liberty International Underwriters* (2020) 381 ALR 648; [2020] FCAFC 137 at [58]-[62] as follows:

> It is well established that contracts of insurance are to be construed according to the same principles of construction that are applied to commercial instruments in general: *McCann v Switzerland Insurance Australia Limited* [2000] HCA 65; (2000) 203 CLR 579 at [22] (Gleeson CJ), [74] (Kirby J); and *Wilkie v Gordian Runoff Limited* [2005] HCA 17; (2005) 221 CLR 522 at [15] (Gleeson CJ, McHugh, Gummow and Kirby JJ).

The applicable principles were summarised in *Onley v Catlin Syndicate Ltd as the Underwriting Member of Lloyd's Syndicate 2003* [2018] FCAFC 119 at [33] (Allsop CJ, Lee and Derrington JJ) as follows:

> Necessarily, a policy of insurance is assumed to be an agreement which the parties intend to produce a commercial result … as such, it ought to be given a businesslike interpretation being the construction which a reasonable business person would give to it. The contract is naturally enough interpreted, in a temporal sense, as at the date on which it was entered into. The Courts frequently have regard to the contextual framework in which a contract is formed, to the extent to which it is known by both parties, to assist in identifying its purpose and commercial objective. It goes without saying that a construction that avoids capricious, unreasonable, inconvenient or unjust consequences, is to be preferred where the words of the agreement permit.
>
> (citations omitted)

In construing a commercial instrument, the Court gives effect to the common intention of the parties as manifested in the language they have chosen. It requires a consideration of the language used in the instrument, the circumstances addressed by the instrument and the commercial purpose or object that the instrument secures, and it requires a consideration of the instrument as a whole: *Mount Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd* [2015] HCA 37; (2015) 256 CLR 104 at [46]-[51], [59] (French CJ, Nettle and Gordon JJ); see also the summary of the principles in *Black Box Control Pty Ltd v Terravision Pty Ltd* [2016] WASCA 219 at [42].

22 See also *Liberty Mutual Insurance Company Australian Branch trading as Liberty Specialty Markets v Icon Co (NSW) Pty Ltd* [2021] FCAFC 126 at [151]-[152]; *Chubb Insurance Company of Australia Limited v Robinson* [2016] FCAFC 17; 239 FCR 300 at [98]-[106] and, in relation to the construction of commercial contracts generally, *Price v Spoor* [2021] HCA 20 at [27] (Kiefel CJ and Edelman J) and [60] (Steward J).

23 To these general principles may be added the following particular considerations that are germane to the issues presently before the Court.

24 ***First***, the language chosen by the parties is ultimately of central importance. As Meagher JA and Ball J explained in *HDI Global Specialty SE v Wonkana No. 3 Pty Ltd* [2020] NSWCA 296 (***HDI v Wonkana***) at [18]:

> Construing a written contract involves determining the intention of the parties as expressed in the words in which their agreement is recorded. As Lord Wright said in

> *Inland Revenue Commissioners v Raphael* [1935] AC 96 at 142: "It must be remembered at the outset that the court, while it seeks to give effect to the intention of the parties, must give effect to that intention as expressed, that is, it must ascertain the meaning of the words actually used".

25 Further, as six judges of the High Court recently said in *WorkPac Pty Ltd v Rossato* [2021] HCA 23 at [63], quoting the speech of Lord Mustill in *Charter Reinsurance Co Ltd v Fagan* [1997] AC 313 at 388:

> It is no part of the judicial function in relation to the construction of contracts to strain language and legal concepts in order to moderate a perceived unfairness resulting from a disparity in bargaining power between the parties so as to adjust their bargain. It has rightly been said that it is not a legitimate role for a court to force upon the words of the parties' bargain "a meaning which they cannot fairly bear [to] substitute for the bargain actually made one which the court believes could better have been made".

26 It follows that the Court's task is not to ascertain the most 'commercial' bargain that the parties may have reached. Rather, primacy is to be given to the words chosen by the parties. 'Commerciality' arises for consideration where the lack of commerciality of a particular construction is so pronounced (sometimes referred to as 'commercially absurd') that it indicates that some different construction must have been intended: *Rockment Pty Ltd t/a Vanilla Lounge v AAI Limited t/a Vero Insurance* [2020] FCAFC 228; 149 ACSR 484 at [54] (***Rockment***), citing *HDI v Wonkana* at [54]; [124]-[125]. Further, assertions of commerciality or lack of commerciality of a particular construction in a debate about the terms and reach of cover of a policy must be carefully assessed. A so-called 'lack of commerciality' may simply be the extent of the possible operation of the policy in respect of a claim that has in fact been paid for, by a higher or lower premium: *Australasian Correctional Services Pty Ltd v AIG Australia Limited* [2018] FCA 2043 at [17] (Allsop CJ).

27 ***Second,*** the Court must construe the contract as a whole and strive to give meaning and effect to all of the clauses in a contract: *Price v Spoor* [2021] HCA 20 at [60] (Steward J). Consistent with this approach, the Court should strain against a construction that has the result that a particular clause is nugatory, ineffective, inoperative or surplusage: *Chapmans Ltd v Australian Stock Exchange Ltd* (1996) 67 FCR 402 at 411; *Davuro Pty Ltd v Wilkins* (2000) 105 FCR 476 at [152] (Finkelstein J), [230] (Gyles J). This principle of construction does not operate as an invariable rule. However, it is generally only departed from where the construction that gives effect to each clause is inconsistent with

the other provisions or commercial purpose of the contract, or it appears that the additional words have been included out of abundant caution: *AFC Holdings Pty Ltd v Shiprock Holdings Pty Ltd* [2010] NSWSC 985; (2010) 15 BPR 28,199, at [13] (Ball J), cited with approval in *XL Insurance Co SE v BNY Trust Company of Australia Ltd* [2019] NSWCA 215 at [72]-[73] (Gleeson J; Bell P and Emmett AJA agreeing).

28 ***Third***, an aspect of the rule mentioned immediately above is a further rule of construction that specific provisions prevail over inconsistent general provisions concerning the same subject matter: *Hume Steel Ltd v A-G (Vic)* (1927) 39 CLR 455 at 465-466 (Higgins J; Gavan Duffy J agreeing); *Chapmans Ltd v Australian Stock Exchange Ltd* (1996) 67 FCR 402 at 411. This is a rule has been said to be 'based on sound common sense and appeals to everyone, layman or lawyer': *Hume Steel* at 466. As Hoffman LJ observed in *William Sindall plc v Cambridgeshire County Council* [1994] 1 WLR 1016 at 1024, it is 'particularly apposite if the effect of general words would otherwise be to nullify what the parties appear to have contemplated as an important element in the transaction' (cited with approval by the Victorian Court of Appeal in *Trust Co (Nominees) Ltd v Banksia Securities Ltd* [2016] VSCA 324 at [46] (the Court)).

29 The two principles outlined above are relevant to the present dispute because, as addressed further below, the insureds seek to place a broad construction on each limb of the relevant coverage extensions. If this construction is accepted, it would cause the express limitations on those insuring clauses to be rendered otiose. The Court ought to avoid such a construction as it tends to ignore the actual words used by the parties.

30 ***Fourth***, and finally, as Derrington J explained in *Evolution Precast Systems Pty Ltd v Chubb Insurance Australia Limited* [2020] FCA 1690 at [25]:

> …ascertaining the commercial purpose of the agreement and obtaining an appreciation of its purpose or objects is facilitated by an understanding of "the genesis of the transaction, the background, the context [and] the market in which the parties are operating": *Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640, 656 – 657 [35], citing *Codelfa Construction Pty Ltd v State Rail Authority* (NSW) (1982) 149 CLR 337, 350, citing *Reardon Smith Line v Hansen-Tangen* [1976] 3 All ER 570, 574. Indeed, this principle may apply with substantially more force in relation to insurance policies than in other areas of commerce.

31 The relevant commercial context and purpose extends to the market practice that is followed in arranging insurance in the relevant industry: see *Liberty Mutual Insurance Company Australian Branch trading as Liberty Specialty Markets v Icon Co (NSW) Pty Ltd* [2021] FCAFC 126 at [153]; *Swashplate Pty Ltd v Liberty Mutual Insurance Company*

t/as Liberty International Underwriters [2020] FCA 15; 141 ACSR 313 at [62]; and *Birla Nifty Pty Ltd v International Mining Industry Underwriters Ltd* [2014] WASCA 180; (2014) 47 WAR 522 at [57]-[59]. Relatedly, it should also always be recalled that a broad or a narrow meaning of a policy may reflect the breadth or the narrowness of cover that has been purchased by the premium: *Liberty Mutual* at [152].

B.4 *Contra proferentem* and construction from the perspective of the policyholder

32 A specific issue that could arise in the present case is the extent to which the Court can and should adopt *contra proferentem* reasoning when seeking to construe the relevant policies.

33 There are statements in some authorities to the effect that ambiguous clauses in an insurance policy ought to be construed against an insurer. This is generally because it is said that insurance policies are 'standard form' contracts that are not negotiated: *Hammer Waste Pty Ltd v QBE Mercantile Mutual Ltd* (2003) 12 ANZ Insurance Cases 61-553; [2002] NSWSC 1006 at [25]-[27]. These considerations have similarly led courts to construe insurance policies 'from the perspective of a reasonable person in the position of the offeree, in this case the prospective insured' (rather than from the perspective of a reasonable person in the position of the ***parties***, as would be the usual position). This reasoning has been evident in some of the recent COVID-19 decisions discussed below: see *HDI v Wonkana* at [21], [31] (Meagher JA and Ball J); *The Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] AC 649; [2021] UKSC 1 (***FCA v Arch***) at [77].

34 IAG does not dispute that these observations may have force when applied to standard form insurance policies presented by the insurer on a 'take it or leave it' basis: *Hammer Waste* at [25]. The application of this rule should, however, be approached with caution in the present case, for at least the following two reasons.

35 ***First***, as indicated above, the application of the *contra proferentem* 'rule' in the insurance context is premised upon the assumption that the insurer is the *proferens*, and the insurance contract is a 'standard form' that has not been negotiated: *Hammer Waste* at [25]; see also *HDI v Wonkana* at [31] citing *Halford v Price* (1960) 105 CLR 23 at 30 (Dixon CJ).

36 The Court could not make that assumption in the present test case. By way of example, each of the Taphouse and Meridian policies bear the names of both an insurer and a broker acting for the insured. Taphouse's broker was Insurance Advisernet Australia Pty Ltd (**IAA**), described in the policy documentation as 'the largest member of the publicly

listed Austbrokers Group, who have $2.5 billion of gross written premium under management and ranks within the top general insurance broking groups in Australia'.[9] Meridian's broker was a member of the Steadfast Group,[10] another large and experienced group of insurance brokers. Neither party is putting forward evidence that the other was the *proferens* of the policy or any relevant policy wording. There is accordingly no room for the application of the *contra proferentem* rule: *Pollak v Yapp* [2019] NSWCA 150; 19 BPR 39,467 at [15] (White JA).

37 ***Second***, and in any case, the *contra proferentem* 'rule' is a doctrine of last resort: *HDI v Wonkana* at [31]; *Ingham v ACN 000 333 844 Ltd (in liq)* [2006] NSWCA 63 at [6] (Giles JA). It has been described as having some 'continuing but limited vitality': *HDI v Wonkana* at [118] (Hammerschlag J). Therefore, before resorting to any mechanical formulae based on who proffered the wording, the Court must 'struggle with the words actually used as applied to the unique circumstances of the case and reach their own conclusions by reference to the logic of the matter': *McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 at [74] (Kirby J). This means that even if the Court were to find that the insurer was the relevant *proferens*, before there can be any *contra proferentem* construction, the Court first needs to be satisfied that the language used by the parties is sensibly capable of bearing more than one meaning ***and*** that any such ambiguity is not otherwise resolved by having regard to other textual indicators, the commercial purpose of the agreement, and the context in which the agreement was entered into. In IAG's submission, the text and context of the relevant policies is such that there is no room for this 'doctrine of last resort' in the present case.

B.5 Recent COVID-19 decisions

38 The present test cases follow three recent appellate decisions on the construction of business interruption policies and their applicability to COVID-19 related losses:

(a) the NSW Court of Appeal's judgment in *HDI v Wonkana*;[11]

(b) the Full Court's judgment in *Rockment*; and

(c) the Supreme Court of the United Kingdom's judgment in *FCA v Arch*.

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[9] Taphouse policy booklet, p. 3 (under the heading 'About IAA').

[10] Meridian policy booklet, p. 1 (under the hearing 'About Steadfast').

[11] Special leave to appeal to the High Court was refused.

39 Neither of the Australian decisions considered the scope of the insuring clause, being a primary question for determination in the present test case. The UK *FCA v Arch* decision did consider similar issues, albeit in the context of differently worded policies.

40 The specific aspects of the *HDI v Wonkana*, *Rockment* and *FCA v Arch* decisions that are relevant to the determination of the issues in the Taphouse and Meridian test cases are addressed in Parts C and D below. It is appropriate, however, by way of background to make some general observations about those decisions, particularly concerning the commentary provided in those cases on the type of insurance under consideration and the approach to the constructional issues.

B.5.1 HDI v Wonkana

41 *HDI v Wonkana* concerned the narrow issue of the proper construction of the *Quarantine Act* exclusion in the policies before the Court of Appeal. The Court unanimously held that the language used by the parties could not be construed as extending or referring to listed human diseases under the *Biosecurity Act 2015* (Cth). Due to erroneous drafting, the exclusion therefore did not exclude claims that were otherwise validly made under the insuring clauses for COVID-19 related events.

42 The Court of Appeal in *HDI v Wonkana* was not asked to, and did not, construe the scope of the insuring clauses or determine whether the policies responded to the types of losses claimed in that case. That is the task for this Court. Nevertheless, three aspects of *HDI v Wonkana* are relevant for present purposes.

43 ***First***, in terms of general principle (and as mentioned above), the Court of Appeal in *HDI v Wonkana* confirmed that a 'commercial construction' cannot be used to replace the words chosen by the parties or to re-write the policy. The relevant passages are mentioned above. Meagher JA and Ball J made this point emphatically at the conclusion of their reasons on the construction question, quoting the same passage from the speech of Lord Mustill in *Charter Reinsurance Co v Fagan* as the High Court quoted in *WorkPac Pty Ltd v Rossato*. The passage, in full, reads:

> There comes a point at which the court should remind itself that the task is to discover what the parties meant from what they have said, and that to force upon the words a meaning which they cannot fairly bear is to substitute for the bargain actually made one which the court believes could better have been made. This is an illegitimate role for a court.

44 This is important for the Court to bear in mind when it comes to consider the insureds' arguments as to how certain clauses of the policies should be construed, particularly the

arguments concerning the meaning that words such as 'outbreak', 'closure' and 'evacuation' should bear.

45 ***Second***, the Court of Appeal held that it was not appropriate to have regard (by way of commercial context) to events that neither party was aware of at the time of contracting. In that case, the relevant fact that was disregarded was the fact of the repeal of the *Quarantine Act*: *HDI v Wonkana* at [55]-[60] (Meagher JA and Ball J).

46 The relevance of this point to the present case is that the policies in issue were generally issued ***prior to*** COVID-19 being recognised as a pandemic. The Taphouse policy, for example, was issued on 24 September 2019,[12] before the first case of COVID-19 was reported. The Meridian policy was issued on 17 February 2020.[13] This is before the WHO described COVID-19 as a pandemic and over one month prior to any of the Commonwealth or State government measures relied upon in the present case.[14] The Court must therefore construe the present policies without the benefit of hindsight concerning, for instance, the extent and nature of the business disruption that has subsequently been caused by COVID-19 measures.

B.5.2 Rockment

47 *Rockment* was similar to *HDI v Wonkana* in that it concerned another narrow question of construction of an exclusion clause.

48 The question concerned the proper construction of an exclusion for claims arising from a human biosecurity emergency declared under the *Biosecurity Act 2015* (Cth). The Full Court held that for a claim to be excluded by that clause it needed to be consequent upon the relevant 'biosecurity emergency' declared by the Commonwealth. The fact that the closure may have arisen from the occurrence of the same disease as prompted the biosecurity emergency (here, COVID-19), rather than the broader 'biosecurity emergency', was held to be insufficient: at [65]-[68].

49 The applicability of a *Biosecurity Act* exclusion in this form does not arise in any of the test cases before the Court. The *Rockment* decision is important, however, as it

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[12] Taphouse Business Insurance Renewal Invitation dated 24 December 2019.

[13] Meridian Business Insurance Renewal Schedule dated 16 February 2020.

[14] SOAF, [6], Annexures A-E.

represents the most recent consideration by the Full Court of business interruption policies in closely analogous circumstances.

50 Three matters of relevance may be derived from the Court's reasons.

51 ***First***, the Full Court adopted the general principles of construction set out in *HDI v Wonkana*, emphasising the importance of having regard to the words of the contract: at [53]-[57]. In this regard, the Court made the following pertinent observations concerning the limits of recourse to 'commercial purpose' in cases such as the present (at [56]-[57]):

> … references to a commercial result are not intended to invite a consideration of the actual financial consequences for each of the parties of a particular construction in the events which have occurred by the time that a dispute arises. Such inquiries would quickly descend into an assessment with hindsight as to what a fair and reasonable contract might provide given the circumstances that have unfolded. It would be contrary to the very certainties that the law of contract seeks to provide as to the allocation of risks, rights and obligations, if the meaning of agreements were to be adjudicated by reference to such an imprecise foundation.

52 ***Second***, the Full Court accepted that the following considerations formed relevant commercial context for the construction of business interruption policies with a disease extension (at [59]):

> Cover for loss arising from the consequence of a pandemic disease could for an insurer be, as in the case of pollution, a high risk which would normally be excluded: Derrington D and Ashton R, *The Law of Liability Insurance* (3rd ed, LexisNexis, 2013) 10-2 p 1828: or specifically included only at an appropriately priced premium. The risk could be heightened by the indeterminacy of the period during which a highly infectious disease might disrupt business and, consequently, the amount of loss which the insured might suffer.

53 Similar comments were made at [63], where it was noted that the Court 'could expect that insurers are not likely to offer high-risk cover for matters such as pollution or pandemics, save pursuant to express provisions'. In each case, the Court was willing to infer this context from the terms of the policies and general background facts.

54 On the other hand, the Full Court rejected a submission that it could simply assume, in the absence of evidence, that the parties were mutually aware of the existence of Commonwealth, State and Territory legislation allowing for drastic action to be taken in response to a public health emergency: at [60]-[61]. A construction that sought to impute to the parties (again, without evidence) knowledge of the intricacies of Commonwealth

and State intergovernmental agreements to support a particular construction was described as 'untenable': at [61]. This observation reinforces the point derived from *HDI v Wonkana* above, which is that care should be taken to construe the policies according to their terms and commercial purpose (as identified at paragraph [24] above), rather than the specific events that have occurred since March 2020 with respect to COVID-19.

55 ***Third***, the Full Court briefly considered the interaction between the insuring clause and the exclusion clause in a business interruption policy, noting that it is well known that policies sometimes exclude matters which are not within the cover as a means of informing the insured, or out of an abundance of caution: at [40]. This is relevant to the present case. The Court ought not reason that just because the *Quarantine Act* exclusion has (by reason of erroneous drafting) failed in certain policies (including the Taphouse policy) to exclude pandemics which engage the *Biosecurity Act* machinery, including COVID-19, it follows that the objective intention of the parties was that the insuring clause should otherwise cover perils of this nature. The insuring clause should be construed in accordance with its own language. That is not to say the existence of the exclusion is irrelevant (particularly in those test cases that have the *Biosecurity Act* language or involve the *Property Law Act 1958* (Vic) issue), but simply that its importance as a matter of construction must be appropriately weighed against the other textual indicators in the policy wording.

B.5.3 FCA v Arch

56 The recent decision in *FCA v Arch* was a decision of the Supreme Court of the United Kingdom in a series of test cases concerning business interruption insurance and COVID-19. To the extent the Supreme Court's reasons touched upon specific arguments that are raised again in the Taphouse and Meridian test cases, that Court's reasoning is addressed below in Parts C and D. At this juncture, however, the following general observations can be made.

57 ***First***, there are important differences in text and context between the policies presently under consideration and those considered in *FCA v Arch*. By way of example, the Supreme Court's consideration of a hybrid clause focused on what was referred to as the 'Hiscox 1-4' wordings which provided:

> What is covered We will insure you for your financial losses and other items specified in the schedule, resulting solely and directly from an interruption to your activities caused by: …

> 13. your inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance following:
>
> …
>
> b. an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority;

58 This wording is significantly different to the wording employed in many of the test cases before the Court. Notably, the clause responds to an 'inability to ***use*** the insured premises due to restrictions imposed' (emphasis added) rather than 'closure or evacuation' of the premises by a public authority. The clause also responds to government action following 'an occurrence of any infectious or human contagious disease' rather than an 'outbreak' of the disease. As developed further below, the express wording in many of the Australian policies (including the Taphouse and Meridian policies) is plainly stricter than the 'Hiscox 1-4' wording and therefore intended to provide coverage for a narrower range of circumstances.

59 ***Second***, the policies considered in *FCA v Arch* did not include a pandemic exclusion for quarantinable disease (*cf* explicit exclusions for AIDs and avian influenza: see [90]). The Supreme Court therefore appeared to construe at least some of the policies as providing true pandemic cover. This point was made starkly in the reasons of Lord Briggs (Lord Hodge agreeing) at [316], where it was said:

> The consequence…is that, on the insurers' case, the cover apparently provided for business interruption caused by the effects of a national pandemic type of notifiable disease was in reality illusory, just when it might have been supposed to have been most needed by policyholders. That outcome seemed to me to be clearly contrary to the spirit and intent of the relevant provisions of the policies in issue.

60 This can be contrasted with the comments made by Allsop CJ in *Star Entertainment*, as quoted at paragraph [18] above.

61 Similarly, Lord Hamblen and Lord Legatt (with whom Lord Reed agreed) observed at [103] in relation to the Hiscox wording that:

> Hiscox has renewed on its appeal an argument rejected by the court below that, despite the absence of any radius provision or other words which require the occurrence of disease to be within a specified distance of the insured premises, the word "occurrence" in this wording means something limited, small-scale, local and specific to the policyholder or its business or premises and thus does not apply to the COVID-19 pandemic.

62 These observations led Lord Hamblen and Lord Legatt to conclude (at [104]) that Hiscox had agreed to cover the effects on the insured business of cases of notifiable diseases 'irrespective of where they occur'. This form of reasoning is not applicable to the present test cases. The insuring clauses before the Court that specifically respond to 'disease' are generally explicit in that they only cover the outbreak of disease at the premises or within a specified distance of the premise. The insurers also sought to exclude pandemics. The starting point should therefore be that the objective intention of the parties was to concern themselves with localised outbreaks of disease.

63 Taking the above matters into account, while aspects of the Supreme Court's reasoning may be persuasive, particularly on legal questions, care must be taken not to treat it as authority on the proper construction of specific clauses, unless the language and the circumstances are substantially identical: *Re Calf & Sun Insurance Office* [1920] 2 KB 366. If the meaning of the policy before the Court is plain when considered in its specific context, it is of limited significance that another court has held that similar words in another policy were to be construed as having different meanings: *Australian Casualty Co v Federico* (1986) 160 CLR 513 at 525. It is of even less significance if the words in the other policy were not similar at all.

B.6 Causation

64 The general principles outlined above primarily concern the question of identification of the insured event. That is, whether the events relied upon by the insureds (e.g. occurrences of disease or relevant government measures) are events that fall within the relevant insuring clause. However, the test cases also raise issues of causation. The causation issue arises in two distinct ways:

(a) ***First***, several of the insuring clauses contain a causal element within them. For example, the hybrid clause in the Taphouse test case (discussed further below) requires the closure or evacuation of the insured's premises by a legal authority ***as a result of*** an outbreak of an infectious disease within a 20km radius of the premises.

(b) ***Second***, if all of the elements of the insuring clause are satisfied, the insured needs to establish that the claimed business interruption loss was the result of (or in some policies, the 'direct result of') the insured peril.

65 The causal nexus required in each case depends upon the proper construction of the policy wording: *Lasermax Engineering Pty Limited v QBE Insurance (Australia) Limited*

[2005] NSWCA 66; (2005) 13 ANZ Insurance Cases 61-643 at [34]-[35] (McColl JA; Ipp and Tobias JJ agreeing). As Lord Briggs put it in *FCA v Arch* at [320]:

> The question whether particular consequential harm to a policyholder is subject to indemnity is as much a part of the process of interpreting their bargain as is the identification of the insured peril… Both the insured peril and the covered loss lie at the very heart of the contract of insurance, and the process of construction requires that they be addressed together.

66 Nevertheless, it has long been accepted that words such as 'result of', 'direct result of' or 'direct cause' have a settled meaning in contracts of insurance that will ordinarily be applied unless clearly displaced. Those words require what has been described as a 'proximate' or 'direct' cause: *Lasermax* at [39]-[44]. In this context, 'proximate' means proximate in efficacy rather than in time with the Court having regard to the 'reality, predominance and efficacy of the cause': *Lasermax* at [44], citing *HIH Casualty & General Insurance Limited v Waterwell Shipping Inc* (1998) 43 NSWLR 601 at 608 (Sheller JA); see also *FCA v Arch* at [164]-[168]. The addition of the word 'direct' or 'directly' is not ordinarily understood to displace this accepted meaning: *Lasermax* at [46]-[47]; see also *FCA v Arch* at [162].

67 While decisions in this area are not always entirely consistent, the majority of cases (including the appellate decisions cited above) have construed the phrase 'resulting from' as meaning 'proximate cause' in an insurance context. See *Sheehan v Lloyds Names Munich Re Syndicate Ltd* [2017] FCA 1340 at [77], [81], where Allsop CJ construed the words 'caused by or resulting from' as meaning 'proximate cause'. See also *S & Y Investments (No. 2) Pty Ltd (in liq) v Commercial Union Assurance Co of Australia Ltd* (1986) 44 NTR 14 at 20-22 (Kearney J). In *Star Entertainment* at [95], Allsop CJ recorded a submission from the insurer that the relational prepositional phrase 'resulting from' is wider than proximate cause, requiring a common-sense evaluation of a causal chain, citing *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 at 463–464. That distinction, to the extent it was accepted by Allsop CJ, does not appear to have been critical to the resolution of the case. In any case, *Kooragang* was a workers compensation case and in holding that 'resulting from' was a wider concept than 'proximate cause' Kirby P was careful to distinguish between the common law principles of causation and principles applicable to workers compensation legislation: 463D. In particular, his Honour expressly had regard to the fact that a workers compensation statute should not be construed narrowly because it provides benefits which are extremely important to those affected: at 461F.

68 Issues with proximate cause most often arise where it is contended that there are two concurrent proximate causes. The proper approach to the resolution of such issue was considered in detail by Allsop J (as his Honour then was) in *McCarthy v St Paul International Insurance Co Ltd* [2007] FCAFC 27; 157 FCR 402 (***McCarthy***) at [88]-[115] (Kiefel and Stone JJ agreeing on this issue). As his Honour explained at [91], it is to be resolved primarily by reference to the contractual terms. If, applying commonsense principles and recognising the commercial nature of the insurance policy that is the context of the question, two causes can be seen as proximate and efficient, the terms of the policy must then be applied to those circumstances.

69 In practice, this requires the following reasoning process to be adopted. ***First***, the Court must determine whether each cause is truly a proximate cause of the loss. If there is only one true proximate cause, the issue resolves itself. The question is simply whether that sole cause is the subject of indemnity. ***Second***, if it is determined that there are two proximate causes of equal efficacy and one falls within the policy whereas the other is simply not covered by the terms of the policy, then a question of contractual construction arises. As a general rule, it is usually held in these circumstances that the policy responds subject to there being any relevant exclusion: *McCarthy* at [91]; *FCA v Arch* at [171]-[173]. This general rule may however be displaced if the terms of the policy evince an intention that the insured cause must be the sole cause of the loss: *McCarthy* at [114]. ***Third***, if, on the other hand, it is determined that there are two proximate causes and the policy expressly ***excludes*** coverage for one of those causes then the better construction is ordinarily that the intention was to exclude the loss despite the concurrent insured cause. This is sometimes referred to as the '*Wayne Tank* principle', named after *Wayne Tank & Pump Co Ltd v Employers Liability Assurance Corporation Ltd* [1974] QB 57. However, as Allsop J explained in *McCarthy* at [96], the true principle from *Wayne Tank* is that it can be inferred from the terms of the exclusion that the parties did not intend to extend coverage to that loss, and therefore this is simply an instance of 'the policy [being] applied according to its terms as found'. See also *McCarthy* at [114]; *FCA v Arch* at [174].

70 It is necessary at this point to say something further about the UK Supreme Court's approach to questions of causation in *FCA v Arch*. That issue was addressed in some detail by Lord Hamblen and Lord Legatt at [160]-[250]. After considering the authorities on 'proximate cause' (including *McCarthy*) their Lordships ultimately concluded that each individual case of COVID-19 was an equally effective cause of the actions taken by the UK government and the ensuing business interruption. It accordingly followed that for

radius-based clauses, it was sufficient to trigger the cover that there was at least one case of COVID-19 within the radius.

71 Particular aspects of this reasoning are addressed below in respect to the causation issues arising on the individual test case policy wordings. There are, however, some overarching points that can be made at the outset as to the difficulties in applying this type of analysis to the present case.

72 ***First***, the analysis builds on the anterior finding that the insured peril was a singular occurrence of COVID-19: at [161]. As developed further below, the Court would not find that to be the insured peril in the present cases. Under most of the policy wordings in issue, there must be an 'outbreak' of COVID-19 which, as the UK Supreme Court recognised, is a different event: see [107]. The causal inquiry must therefore start with a determination as to whether or not the relevant government order and resulting interruption were caused by an 'outbreak' falling within the insuring clause.

73 ***Second***, it was found ***as a fact*** in the *FCA v Arch* litigation that the relevant national government measures were taken in response to information about ***all*** the cases of COVID-19 in the country as a whole, and that the response was national because the outbreak was so widespread: at [176], [179]. This finding was important because the majority's causation analysis expressly depended on 'a finding of concurrent causation involving causes of approximately equal efficacy': at [244]; see also [172]-[173] (and the cases cited therein) in relation to the general principles applicable. That is, it was a necessary component of the majority's reasoning that each occurrence of COVID-19 was an approximately equally efficacious cause of the national government response leading to the claimed business interruption loss.

74 The decision in *FCA v Arch* would have been different if it had been found that the 'sole proximate cause of the loss was the COVID-19 pandemic' rather than the individual instances of COVID-19 covered by the policies under consideration, as Lord Hamblen and Lord Legatt further explained at [244]. The following illustrative example was given:

> … a travel agency which lost almost all its business because of the travel restrictions imposed as a result of the pandemic. Although customer access to its premises might have become impossible, if it was found that the sole proximate cause of the loss of its walk-in customer business was the travel restrictions and not the inability of customers to enter the agency, then the loss would not be covered.

75 This reasoning is obviously directly applicable to the travel agent test cases before the Court, as developed further below. It is also of general application where the true sole

proximate cause of the insured's loss can be said to be something other than the insured peril.

76 ***Third***, as part of their reasoning, Lord Hamblen and Lord Legatt rejected a submission that 'but for' was a minimum requirement for causation. Their Lordships accepted that a 'but for' test was a relevant causal inquiry in the 'vast majority of insurance cases', but held it was not a necessary pre-condition to a finding of causation in all cases: at [181]-[183]. IAG does not contest this statement as a matter of principle. It accepts that under Australian law the 'but for' test is not the sole or minimum requirement to establish causation under an insurance contract. Indeed, as recognised in *FCA v Arch* at [187], Allsop J's decision in *McCarthy* (being a case concerning the recoverability of defence costs incurred in respect of two claims, only one of which was insured) is one example where the Court has been willing to find loss was caused by a particular event even though the 'but for' test could not be satisfied. The inefficacy of a 'but for' test in cases of multiple sufficient causes is well known. That, however, is not to deny that in many cases (if not most) a 'but for' analysis is a useful and important way of testing whether a particular event is a proximate or efficient cause of loss.

77 For this reason, it is important to have regard to the reason why a 'but for' test was not applied in *FCA v Arch*. The specific reason given (at [179]) was that a 25-mile radius (being the relevant radius in the disease clauses there being considered) covered a significant proportion of England and Wales. This meant, in turn, that it would be a difficult if not impossible task for the insured to demonstrate that, but for the cases of COVID-19 within the particular 25-mile radius of its insured premises, the relevant government restrictions would not have been introduced and the interruption to business would have been any less: at [179]. The prior case law on concurrent causes was distinguished expressly on this basis: at [180] ('The facts of the present case are distinguishable ***in this respect*** from the facts in the cases referred to above…' (emphasis added)).

78 Those geographic considerations plainly do not apply equally to Australian conditions. A 20km or 50km radius from a regional location (as is the case in the Taphouse test case, concerning Townsville) will not encompass a significant proportion of the Australian land-mass or population.[15] Unlike the position in the United Kingdom, there is accordingly nothing unreasonable in requiring the insured to demonstrate, as a matter of causation,

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[15] See SOAF, [73]-[74].

that the government measures they rely upon were truly caused by an outbreak of COVID-19 within the defined radius from their business. Applying a 'but for' analysis (i.e. would the measures have been implemented but for any local outbreak?) is a convenient way to test that proposition.

79 ***Fourth***, and finally, at [190], Lord Hamblen and Lord Legatt made the important observation that:

> Whether an event which is one of very many that combine to cause loss should be regarded as a cause of the loss is not a question to which any general answer can be given. It must always depend on the context in which the question is asked. Where the context is a claim under an insurance policy, judgements of fault or responsibility are not relevant. All that matters is what risks the insurers have agreed to cover.

80 While in *FCA v Arch* this reasoning led to the conclusion (at [191]) that a series of otherwise insignificant and insufficient insured perils (there, individual cases of COVID-19) could be regarded as a proximate cause of a loss, the conclusion was necessarily dependent on the anterior finding as to the nature of the insured peril insured (see paragraph [72]). As explained above and developed further below, the Court ought to find that the risk that IAG agreed to cover was not pandemics or State or Territory-wide responses to the potential spread of a pandemic, largely untethered from any local outbreak of a disease. Keeping this in mind, applying the above reasoning results in a rather different conclusion on the relevant scope of the causation inquiry.

B.7 The burden of proof

81 Finally by way of introduction, it is necessary to say something about the burden of proof.

82 IAG accepts that the ordinary position is that a party seeking declaratory relief bears the burden of satisfying the Court of facts which would justify a grant of that relief: *Massoud v NRMA Insurance Ltd* [2005] NSWSC 241; 62 NSWLR 653 at 660, [7]. This is, however, not an inflexible rule. It is based upon the general proposition that a party making an allegation of fact generally, for reasons ultimately justified by reference to experience and considerations of fairness, bears the burden of proving that fact: *Russell Gould Pty Limited v Ramangkura* [2013] NSWSC 1114 at [102] (Lindsay J) (this decision was upheld on appeal, but these particular observations regarding onus were not the subject of comment: see *Russell Gould Pty Ltd v Ramangkura* [2014] NSWCA 310; 87 NSWLR 552). The onus of proof therefore depends on questions of substance, not form: *Russell Gould* at [104] (Lindsay J).

83 In the present case, both parties are seeking declarations. The insurers seek declarations that the policies do not respond, the insureds seek declarations that they do. The difference, however, between the parties' positions as a matter of substance is that it is the insureds that are propounding allegations of fact that, they say, bring their claims within the insurer's promise of indemnity under the policies. As a matter of substance and fairness, they should bear the onus of proof. As in any civil case, that onus must be discharged on the balance of probabilities.

84 The Court should therefore apply the ordinary (and generally invariable) rule that in a coverage dispute the insured must prove such facts as are necessary to establish that the loss was covered by the contract (sometimes referred to as falling within the "insurer's promise"), being:

(a) the insured event;

(b) the subject matter of the insurer's promise (which may be a class of persons); and

(c) the cause of loss (usually referred to as the risk).

(*Wallaby Grip Ltd v QBE Insurance (Australia) Ltd* [2010] HCA 9; 240 CLR 444 at [28]-[29]; *Ocean Harvester Holdings Pty Ltd v MMI General Insurance Ltd* (2004) 13 ANZ Ins Cas 61-592; [2004] QCA 41 at [12]).

85 The procedural quirk that the insurers have commenced these proceedings ought not alter this position. As the insureds are aware, that circumstance arose by way of agreement with the insureds and relevant government authorities interested in the present test cases. It would self-evidently be unfair to determine the present case on the basis that the insurers bear an onus to disprove the factual matters that are the subject of the claims made by the insureds. A further reason that this is so is it would mean that any outcome in these test cases based upon a reversal of the usual onus of proof could not then be applied to other cases in which the insured is the moving party. To apply anything other than the usual onus would therefore reduce the efficacy of these test cases as test cases.

86 The insured's onus extends to proving that, where there is more than one possible cause of the loss, the insured event was a 'proximate cause' of the loss in the sense described above. It is not for the insurer to seek to disentangle the losses (if any) arising from any insured event from other losses that the insured may have incurred. The insured bears the onus of proving, at least on a *prima facie* basis — in the sense that, absent other evidence put forward by the insurer, the evidence is sufficient to establish causation on

the balance of probabilities — what component of its loss is attributable to the insured event: *PMB Australia Ltd v MMI General Insurance Ltd* (2002) 12 ANZ Ins Cas 61-537; [2002] QCA 361 at [19]-[23].

C THE TAPHOUSE TEST CASE

C.1 Taphouse claim

C.1.1 Taphouse's business

87 Taphouse is a craft beer and restaurant business located at 373 Flinders Street, Townsville City, Queensland 4810.

88 It contends in this proceeding that it has indoor and outdoor areas, with a floor space of approximately 116 square metres and capacity for up to 100 customers (Outline Document, [4]-[5]). As at the date of these submissions, Taphouse has not led any evidence to prove these matters.

C.1.2 Queensland response to COVID-19

89 On 29 January 2020, the Queensland Minister for Health and Ambulance Services made an order under section 319 of the *Public Health Act 2005* (Qld) declaring a public health emergency in relation to COVID-19. The 'public health emergency area' specified in the order was 'all of Queensland'.

90 Up until 22 March 2020, the only public health directives issued by the Queensland Government were directives prohibiting mass gatherings of over 100 persons.[16] This changed following a meeting of the National Cabinet in the evening of Sunday, 22 March 2020. The outcome of that meeting, as explained in a press release issued by the Prime Minister, was that the Commonwealth, State and Territory governments had agreed to a range of new measures (explicitly including placing restrictions on pubs and clubs) to:

(a) 'slow the spread of coronavirus (COVID-19) to save lives' because '[e]very extra bit of time allows us to better prepare our health system and put measures in place to protect Australian lives'; and

(b) 'reduce the spread of the virus, to flatten the curve and to save the lives of fellow Australians'.[17]

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[16] See, e.g., the *Non-essential Indoor Gatherings Direction* (19 March 2020) and the *Mass Gatherings Direction* (19 March 2020).

[17] Prime Minister's Media Statement, 'Update on Coronavirus Measures' (22 March 2020).

91 From 23 March 2020, the Queensland Chief Health Officer issued a series of mandatory directions under section 362B of the *Public Health Act 2005* (Qld).[18] It is these directions that Taphouse relies upon for the purpose of its claim. The relevant directions are:

(a) the *Non-essential Business Closure Direction* dated 23 March 2020;

(b) the *Home Confinement Direction* dated 29 March 2020;

(c) the *Non-essential Business, Activity and Undertaking Closure Direction (No. 10)* dated 15 May 2020;

(d) the *Restrictions on Businesses, Activities and Undertakings Direction* dated 1 June 2020;

(e) the *Restrictions on Business, Activities and Undertakings Direction (No. 3)* dated 1 July 2020;

(f) the *Restrictions on Business, Activities and Undertakings Direction (No. 5)* to *Restrictions on Business, Activities and Undertakings Direction (No. 23)* dated 25 July 2020 to 8 August 2021;[19]

(g) the *Restrictions for Impacted Areas Direction (No 6)* dated 29 June 2021; and

(h) the *Restrictions for Impacted Areas Direction (No 8)* dated 3 July 2021,

(defined by Taphouse in its Amended Concise Statement in Response and Outline Document as the **Authority Response – Taphouse**).

92 Each of the directions applied to 'all of Queensland' and on each occasion the directions were imposed the Chief Health Officer declared that:

> I, Dr Jeannette Young, Chief Health Officer, reasonably believe it is necessary to give the following direction pursuant to the powers under s 362B of the *Public Health Act 2005* to assist in containing, or to respond to, the spread of COVID-19 within the community.

93 The direction identified in paragraph (b) above (the *Home Confinement Direction*) prohibited all persons in Queensland from leaving their residence except for permitted

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[18] Section 362B was a new COVID-specific power granted to the Chief Health Officer pursuant to amendments to the *Public Health Act 2005* made by the *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* (Qld) which received assent on 19 March 2020.

[19] The *Restrictions on Business, Activities and Undertakings Direction (No. 24)* is the most recent direction and it came into effect on 8 August 2021.

purposes (which purposes included obtaining food or other essential goods and services) (the **Home Confinement Order**). It was only in place from 29 March 2020 to 2 April 2020.[20] There was no further 'lockdown' in Queensland during the policy period.

94 The effect of the directions identified in paragraphs (a) and (c)-(f) above was relevantly that:

(a) from 23 March 2020 to 15 May 2020, Taphouse was only allowed to provide take-away food and drink (subject to compliance with social distancing requirements) and operate a bottle-shop (the **Takeaway Only Order**);[21] and

(b) on and from 15 May 2020, Taphouse was able to re-commence in-house service with the following increasing occupant density limits:

(i) from 15 May 2020 to 1 June 2020, up to 10 patrons;[22]

(ii) from 1 June 2020 to 3 July 2020, up to 20 seated patrons;[23]

(iii) from 3 July 2020 to 2 October 2020, up to one person per 2 square metres (up to a total of 50 persons);[24]

(iv) from 2 October 2020 to 14 November 2020, up to one person per 2 square metres (up to a total of 50 persons indoors, and no limit for outdoor venues and spaces (including beer gardens));[25]

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[20] The direction was revoked on 2 April 2020 by the *Home Confinement, Movement and Gathering Direction* (2 April 2020).

[21] *Non-essential Business Closure Direction* (23 March 2020), paragraphs 5 and 6. The *Takeaway liquor authority number: 1* issued under s 235D(2)(a) of the *Liquidator Act 1992* (Qld) allowed Taphouse to sell takeaway liquor, to the extent it was not otherwise permitted to do so.

[22] *Non-essential Business, Activity and Undertaking Closure Direction (No. 10)* (15 May 2020), paragraphs 6 and 8 (item for 'Pubs, registered and licensed clubs, RSL clubs, licensed premises in hotels and bars').

[23] *Restrictions on Businesses, Activities and Undertakings Direction* (1 June 2020), paragraph 14 (item for 'Pubs, registered and licensed clubs, RSL clubs, licensed premises in hotels and bars').

[24] *Restrictions on Business, Activities and Undertakings Direction (No. 3)* (3 July 2020), paragraph 6. Taphouse contends that its premises are approximately 116 square metres (Outline Document, [4]), meaning that the relevant restriction is the one found in paragraph 6(b)(i) of the direction. The restrictions in the *Restrictions on Business, Activities and Undertakings Direction (No. 5)* (25 July 2020) were relevantly the same.

[25] *Restrictions on Businesses, Activities and Undertakings Direction (No. 7)* (2 October 2020). IAG notes that this direction is not relied upon by Taphouse expressly.

(v) from 17 November 2020 to 25 June 2021, up to one person per 2 square metres (with no total limit);[26]

(vi) from 25 June 2021 to 28 June 2021, up to three persons per 4 square metres (with no total limit);[27]

(vii) from 28 June 2021 to present, up to one person per 2 square metres (with no total limit).[28]

(together, the **Occupancy Limit Orders**).

95 As is apparent from the gradual easing of the Occupancy Limit Orders, Queensland did not experience multiple 'lockdowns' during 2020 or early 2021 as occurred in other States. The initial restrictions imposed in late March 2020 were, for the most part, removed as the transmission of COVID-19 within the State was brought under control.

96 A more limited tightening of restrictions was re-imposed in areas of Queensland, including Townsville, from 29 June 2021 to 2 July 2021 by the *Restrictions for Impacted Areas Direction (No 6)* and the *Restrictions for Impacted Areas Direction (No 8)* (the **June-July 2021 Orders**) in response to recent cases of the 'delta' variant of the virus being detected in Queensland. Taphouse has recently amended its Concise Statement in Response to include these orders as part of the Authority Response – Taphouse. However, it is not apparent to IAG how Taphouse could contend that any interruption caused by these orders was covered by the policy. Taphouse's policy expired on 23 September 2020. The June-July 2021 Orders were not an extension of the Occupancy Limit Orders previously in place. They were imposed in response to a separate occurrence of a particular strain of COVID-19 in Queensland, unconnected to the original occurrences from March 2020. Even if these orders were 'insured perils' for the purposes of the policy, they occurred after the end of the policy period and the policy therefore does not respond. Further, and in any case, the indemnity period under the policy was limited to 12 months.[29] Accordingly, even if the Authority Response – Taphouse is considered to be the occurrence of one extended peril, the indemnity period in respect

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[26] *Restrictions on Business, Activities and Undertakings Direction (No. 9)* (17 November 2020), paragraph 7.

[27] *Restrictions on Business, Activities and Undertakings Direction (No. 20)* (25 June 2021), paragraph 7 and 8.

[28] *Restrictions on Business, Activities and Undertakings Direction (No. 21)* (28 June 2021), paragraph 7; *Restrictions on Business, Activities and Undertakings Direction (No. 24)* (8 August 2021), paragraph 7.

[29] Taphouse policy schedule.

of an interruption by reason of that peril ended 12 months after the 23 March 2020 restrictions were put in place.

C.1.3 Taphouse's insurance claim

97 On 24 March 2020, Taphouse made a claim (through its broker) under its 'Business Insurance Policy' with IAG (Policy Number 15T8202892) (the **Taphouse policy**).

98 The basis of the original claim was a reduction in trade due to certain announcements made by the Commonwealth Government in March 2020.[30] The claim now advanced in this proceeding relies on the Authority Response – Taphouse as outlined above, being the Queensland health directives identified above.

99 In its Outline Document, Taphouse has contended that the basis for its loss claim is that it closed its premises on 23 March 2020 (despite the Takeaway Only Order not requiring closure of the premises). It says it then re-opened on 28 March 2020 to provide takeaway beer only, and from 22 May 2020 progressively re-commenced its ordinary business activities in accordance with the occupancy limits and other restrictions contained in Occupancy Limit Orders. This is said to have resulted in a downturn in trading activity. None of these contentions is supported by evidence as at the date of these submissions.

100 On 17 June 2020, IAG declined the claim.[31] That declinature was affirmed on 10 July 2020.[32] IAG maintains that the policy does not respond for the reasons outlined below.

C.2 The Taphouse policy

C.2.1 Policy documentation

101 The Taphouse policy is made up of two documents:

(a) a policy schedule (titled 'Renewal Schedule') issued on 24 September 2019;[33]

(b) a 62-page 'Business Insurance Policy' booklet (CV459 REV3 8/15).[34]

102 The policy was renewed for the period from 23 September 2019 to 23 September 2020 by Taphouse's broker, IAA.

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[30] Email from IAA to IAG dated 24 March 2020: Taphouse Outline Documents, Tab 11.

[31] Letter from IAG dated 17 June 2020: Taphouse Outline Documents, Tab 15.

[32] Letter from IAG dated 10 July 2020: Taphouse Outline Documents, Tab 17.

[33] Taphouse Outline Documents: Tab 1.

[34] Taphouse Outline Documents: Tab 2.

103 The policy schedule identifies that the cover taken out was 'Insurance Advisernet Business Insurance' and that Taphouse had, relevantly, included 'Section 2 – Business Interruption' as part of its cover (on a gross profits basis). Taphouse also included coverage under Section 1 ('Property') and a series of other specific cover sections.

104 The policy wording (referred to as the 'Insurance Advisernet Business Insurance Wording' in the policy schedule) is contained in the booklet. There were no relevant endorsements to the Taphouse policy. References to page numbers below are therefore references to pages in the booklet.

C.2.2 Policy wording

105 The Taphouse policy is a comprehensive business insurance policy containing a number of sections, covering property damage, public liability, and other specialist forms of cover under the one policy.

106 The first section of the policy (Section 1 ('Property')) provides indemnity for physical loss or destruction of any real or personal property at the insured premises (p. 11). This cover is then extended by Section 2 ('Business Interruption') to cover business interruption in certain circumstances.

107 The primary insuring clause in the 'Business Interruption' section (p. 20) reads:

> If the *business* carried on by *you* is interrupted or interfered with as a result of *insured damage* occurring during the *period of insurance*, *we* will after taking account any sum saved during the *indemnity period* in respect of such charges and expenses of the *business* as may cease or be reduced in consequence of the *interruption* or interference, indemnify *you* in respect of the loss arising from such *interruption* or interference in accordance with the Basis of settlement clause, where the *schedule* notes that cover has been selected.

108 The words in italics are defined. Relevantly, '*insured damage'* means (p. 19):

> 1. In relation to your property, *insured damage* means *damage* to *your* property when both the property that is *damaged* and the cause of the damage are covered by:
>
> a) your policy under one or more of the following *cover sections*…
>
> b) another insurance policy that insures *your* property and names *you* as the insured…
>
> …

109 *Damage* means (p. 19):

> …accidental physical damage, destruction or loss. Damaged has a corresponding meaning to damage.

110 The primary coverage is therefore for business interruption losses caused by the destruction or loss of property that is otherwise covered under the policy or some other policy, most likely the 'Property' section. That primary coverage is, however, extended to encompass a series of specific additional insured perils.

111 The 'Extensions of cover' are identified at pp. 21-23. The clause relevantly provides that:

> This section is extended to include the following additional benefits. Additional benefits 1 to 11 inclusive are payable provided that the *sum insured* expressed against the relevant item(s) in the *schedule* is not exhausted.
>
> *We* will pay *you* (depending on the part of this section which is applicable to *you*) for:
>
> a) item 1 Gross profit, or
>
> b) item 2 Payroll, or
>
> c) item 6 Gross rentals, or
>
> d) item 7 Weekly income, or
>
> e) item 8 Gross revenue
>
> resulting from *interruption* of or interference with your *business* as a result of *insured damage* occurring during the *period of insurance* to, or as a direct result of:
>
> …
>
> **7. Prevention of access by public authority**
>
> *We* will pay for loss that results from an *interruption* of *your business* that is caused by any legal authority preventing or restricting access to *your premises* or ordering the evacuation of the public as a result of *damage* to or threat of *damage* to property or persons within a 50-kilometre radius of *your premises*.

> **8. Murder, suicide & infectious disease**
>
> *We* will pay for loss that results from an *interruption* of your business that is caused by:
>
> a) any legal authority closing or evacuating all or part of the *premises* as a result of:
>
> i. the outbreak of an infectious or contagious human disease occurring within a 20-kilometre radius of *your premises*, however, there is no cover for highly pathogenic Avian influenza or any disease declared to be a quarantinable disease under the *Quarantine Act 1908* (as amended) irrespective of whether discovered at the location of *your premises*, or outbreaking elsewhere
>
> …

112 Taphouse's claim relies on the additional benefits identified at Item 7 and Item 8(a).

113 The extension referred in Item 7 is referred to in these submissions as the ***prevention of access*** extension. In summary, it responds to losses resulting from business interruption caused by legal authorities ***preventing or restricting access*** to or ordering the ***evacuation of the public from*** Taphouse's premises as a result of damage or threat of ***damage to property or persons*** within a ***50-kilometre radius***.

114 The extension in Item 8 above is referred to in these submission as the ***hybrid*** extension. In summary, it responds to losses that result from business interruption caused by legal authorities ***closing or evacuating all or part of*** Taphouse's premises as a result of an ***outbreak*** of an infectious disease occurring within a ***20-kilometre radius*** of Taphouse's premises. As noted above, the hybrid extension is subject to an express exclusion for diseases declared to be quarantinable diseases under the *Quarantine Act 1908* (Cth). Following the decision in *HDI v Wonkana*, IAG does not rely on this exclusion in the present test case (c.f. the position in the Meridian test case where the *Property Law Act 1958* (Vic) issue is raised).

C.3 Issues for determination

115 The issues for determination in the Taphouse test case are addressed at paragraphs [12]-[14] of the list of issues for determination filed on 18 July 2021 (the **List of Issues**). For convenience, in the submissions that follow these issues have been grouped into categories of issues that apply across all or some of the test cases.

116 For the ***prevention of access*** extension (addressed in Section C.4 below), the coverage issues are as follows:

(a) Does the prevention of access extension apply to an outbreak of COVID-19 in light of the separate hybrid clause (i.e. does a government response to actual or threatened 'damage…to persons' include a response to disease)? (the **Scope of Cover Issue**)

(b) Was there a 'threat of damage' to persons within a 50 kilometre radius of Taphouse's premises? (the **Threat of Damage Issue**)

(c) Did the Authority Response – Taphouse involve any legal authority preventing or restricting access to Taphouse's premises or ordering the evacuation of the public? (the **Prevention of Access Issue**)

117 For the ***hybrid*** extension (addressed in Section C.5 below), the coverage issues are as follows:

(a) Was there an outbreak of COVID-19 within a 20-kilometre radius of Taphouse's premises? If so, when? (the **Outbreak Issue**)

(b) Was all or part of Taphouse's premises closed or evacuated by the Authority Response-Taphouse? (the **Closure or Evacuation Issue**)

118 For each extension (addressed in Section C.6 below), the following further causation and adjustment issues (the **Causation Issues**) arise:

(a) Was the Authority Response – Taphouse a result of an outbreak of COVID-19 or threat of damage to persons occurring within a 20 kilometre or 50 kilometre radius of Taphouse's premises?

(b) Was the insured peril the cause of the interruption or interference claimed by Taphouse?[35]

(c) Should any adjustment be made to Taphouse's business interruption loss by reference to uninsured events relating to the COVID-19 pandemic?

(d) On what dates did the indemnity period/s start and end?

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[35] For the reasons outlined above in Part B, IAG submits that the correct test for causation is 'proximate' cause. The issue in paragraph [14(a)] of the List of Issues accordingly does not arise for consideration.

119 Finally, for each extension (addressed in Section C.7 below), an issue of principle arises in relation to whether 'JobKeeper' payments and other government subsidies or rental abatements are to be taken into account in the assessment of loss (the **Quantum Issues**).

C.4 The Prevention of Access Extension

C.4.1 The insured peril

120 Before addressing the specific issues of construction, it is necessary to identify the 'insured peril' to which the prevention of access extension responds. A 'peril' in this sense is a specific cause of damage or injury. An 'insured peril' is a cause of damage or injury for which indemnity is provided: see *Star Entertainment* at [10].

121 The peril covered by the prevention of access clause is a 'legal authority preventing or restricting access to your premises or ordering the evacuation of the public as a result of damage to or threat of damage to property or persons within a 50-kilometre radius of your premises'.

122 Before moving onto the specific disputes between the parties, it is important to note what the insured peril is not. It is not the occurrence of pandemic. The policy does not provide general cover for the effects of a global pandemic such as COVID-19. Nor is the insured peril any regulation imposed by a government authority on the insured's business for any purpose. The policy does not provide general cover for interruption to the insured's business consequent upon government action. To engage this extension of the policy, the government order must prevent or restrict physical access to premises and must be as a result of actual or threatened damage to property or persons within a defined radius. It is, in that sense, a limited form of cover.

C.4.2 Scope of Cover Issue

123 The first issue with respect to the prevention of access extension is whether there is cover for losses caused by a government response to disease or the threat of disease at all, having regard, in particular, to the inclusion in the policy of a separate extension dealing expressly with that topic (the hybrid extension) (List of Issues, [13(a)]).

124 The resolution of this issue turns upon the breadth of meaning given to the phrase 'damage…to persons' and whether those words were intended to encompass the infection of a person by a disease.

125 IAG submits that they were not, for at least the following four reasons.

126 ***First***, the phrase 'damage …to persons' is inapt to capture the concept of exposure to an infectious disease. As noted above (paragraph [109]), 'damage' is defined in the policy to mean 'accidental physical damage, destruction or loss'. Read into the insuring clause (see *Halford v Price* (1960) 105 CLR 23 at 28), the prevention of access extension accordingly only responds to:

> … *interruption* of *your business* that is caused by any legal authority preventing or restricting access to *your premises* or ordering the evacuation of the public as a result of accidental physical damage, destruction or loss to or threat of accidental physical damage, destruction or loss to property or persons within a 50-kilometre radius of *your premises*.

127 As a matter of ordinary English, contraction of a disease is not 'accidental physical damage, destruction or loss' to a person. The disease may, in time, cause physical injury to a person due to its effect on the human body. But it is not itself physical damage or injury: see *Australian Casualty Co v Federico* (1986) 160 CLR 513 at 527 (Wilson, Deane and Dawson JJ); *Pass v Gerling Australia Insurance Company Pty Ltd* [2011] WASCA 93 at [48] (Mazza J).

128 ***Second***, the Taphouse policy has an extension that explicitly provides cover for the response of a public authority to a disease outbreak: the hybrid extension. This extension (as explained further below) has tighter pre-conditions to coverage including, most importantly, that the action of the public authority must be as a result of an outbreak occurring within 20-kilometres of the insured premises.

129 If 'damage…to persons' in the prevention of access extension is read as including 'contracting an infectious disease', then the hybrid extension would be otiose. An action of the nature described in the hybrid extension would necessarily also be an action preventing or restricting access to the insured premises as a result of the threat of 'damage…to persons' within a 50-kilometre radius. As explained in Part B above, the Court should strain against such an interpretation, as it would have the effect that the hybrid extensions' is 'nugatory or ineffective': *Chapmans Ltd v Australian Stock Exchange Ltd* (1996) 67 FCR 402 at 411 (Lockhart and Hill JJ).

130 This conclusion is buttressed by the general rule of construction referred to in Part B above (paragraph [28]) that specific provisions prevail over inconsistent general provisions concerning the same subject matter: *Hume Steel Ltd v A-G (Vic)* (1927) 39 CLR 455 at 465-466 (Higgins J; Duffy J agreeing).

131 If the words 'damage…to persons' are construed to include disease, then the prevention of access extension and hybrid extension do concern the same subject matter: namely, government responses to disease outbreaks. In that context, the prevention of access is the general provision. It provides cover for a broader range of government orders in response to events occurring within a 50-kilometre radius. The hybrid extension, on the other hand, is a specific provision that is directed at disease. It deals only with government action in response to disease outbreaks within a 20-kilometre radius. The inclusion of this specific extension, with tighter restrictions, is a strong indicator that the parties intended disease-related claims to be governed by that extension and not the general provision.

132 ***Third***, a related but more acute issue arises from the express exclusion from the hybrid extension of highly pathogenic avian influenza and diseases declared to be quarantinable diseases under the *Quarantine Act* irrespective of the location of the outbreak. That exclusion would be rendered otiose by a broad construction of 'damage' for the purposes of the prevention of access extension. The force of this point is not diminished by the fact that the exclusion failed to refer to the *Biosecurity Act*. The Court of Appeal in *HDI v Wonkana* explained that the exclusion could still have effect for highly pathogenic avian influenza and the various diseases which had been declared under the *Quarantine Act* before its repeal: *HDI v Wonkana* at [55], [130]. Yet if exposure to those diseases were a threat of damage for the purposes of the prevention of access extension, they would be covered by that extension notwithstanding their express exclusion from the hybrid extension. That consequence is avoided by construing exposure to disease as falling outside the threats of damage for which the prevention of access extension provides cover.

133 ***Fourth***, the broader architecture of the policy supports the narrower construction. As Allsop CJ recently explained in *Star Entertainment* at [92], [140]-[141], an extension to cover must be understood in the context of the scope of the primary cover that is being extended. The core coverage in the Taphouse policy, as it was in *Star Entertainment*, can be described as 'physical loss or destruction of or damage to revenue or turnover or profit generating property': *Star Entertainment* at [6]. This core coverage indicates that the primary commercial objective of the parties is to indemnify Taphouse for the cost of recovering its business after the physical loss of its premises or stock. Generic references to 'damage' or 'loss' are therefore generally to be read as relating back to the property or premises being insured and the forms of physical perils the subject of the primary coverage, unless otherwise indicated. If the parties had intended to extend cover

beyond this core area of concern to 'high-risk' perils such as disease (see *Rockment* cited at paragraphs [52]-[53] above) they would only do so by express words. And as identified above, the express coverage for disease is only found in the hybrid extension and not the prevention of access extension.

134 To be clear, none of the above submissions involve any unnatural 'reading down' or confinement of the prevention of access extension. They simply involve giving the words used in that extension, read in light of the definition of 'damage', their ordinary meaning. At most, the issue involves a constructional choice between two available interpretations, one narrower and one broader. The submissions above tend strongly in favour of the narrower.

135 If the Court accepts the above submissions, then the prevention of access extension does not apply to Taphouse's claim and this aspect of its claim must fail. In the event this argument is not accepted, the remaining arguments concerning the prevention of access extension are addressed below.

C.4.3 Threat of Damage Issue

136 If the phrase 'damage…to persons' extends to contracting COVID-19, a further factual question arises as to whether there was a 'threat of damage…to persons' within 50 kilometres of Taphouse's premises by reason of the COVID-19 pandemic at the time the relevant directives were issued.

137 In IAG's submission there was not. As addressed in greater detail below with respect to the 'outbreak' issue (paragraphs [172]-[178]) there was never any transmission of COVID-19 in the Townsville area. By reason of the State-wide measures introduced to contain outbreaks of the virus elsewhere, there was never an outbreak of COVID-19 in Townsville and there was no threat of damage to persons by reason of the disease in the area.

C.4.4 Prevention of Access Issue

138 If (contrary to the above submissions) the prevention of access extension is capable of applying, the next issue is whether the directions of the Queensland Chief Medical Officer constituting the Authority Response – Taphouse were 'order[s] of a public authority preventing or restricting access' to the insured's premises or 'ordering the evacuation of the public' (List of Issues, [13(b)]).

139 IAG does not contest that the directions involve 'an order of a public authority'. The directions were legally-binding public health directives, and a person committed an

offence if they failed without reasonable excuse to comply with the directions: *Public Health Act 2005* (Qld), s 362D. The question is whether those directions 'prevented or restricted access' to Taphouse's premises or required the 'evacuation of the public'.

140 The starting point for this analysis is the meaning of the phrases 'preventing or restricting access' and 'evacuation of the public' when used in the context of the policy. Those words must then be applied to the specific restrictions imposed by the Takeaway Only Order, Occupancy Limit Orders and the Home Confinement Order.

(a) 'Preventing or restricting access' and 'evacuation of the public'

141 The verbs 'prevent', 'restrict' and 'evacuate' are all ordinary words that have a well understood meaning. None is defined in the policy and there is no reason to think that the parties have adopted a meaning of those words that is peculiar to them: *LMI Australasia Pty Ltd v Baulderstone Hornibrook Pty Ltd [2003] NSWCA 74* at [74] (Young CJ in Eq).

142 To 'prevent' something is to hinder or stop it.[36] To 'restrict' something is to confine, bound or limit it.[37] In the present policy, the thing that must be 'prevented' or 'restricted' is access to the insured's premises. That is, the relevant orders must have the effect of hindering, stopping, confining, bounding or limiting ***access*** to those premises. The converse of preventing or restricting access is 'evacuation'. To 'evacuate' something is to empty it or remove persons from it.[38] An order requiring 'evacuation' must therefore require persons to physically leave the premises.

143 The expression 'preventing or restricting access to your premises or ordering the evacuation of the public' is therefore directed at measures that have the effect of preventing or limiting the ***public*** from ***accessing*** Taphouse's ***premises***. The first limb ('preventing or restricting access') speaks to orders that stop the public from entering the premises. The second limb ('evacuation of the public') speaks to orders that require persons already in the premises to leave. An obvious example that would cover both circumstances is an order issued by the police in response to a nearby gas leak requiring all persons to leave the premises and prohibiting persons from entering the premises until the danger has been addressed.

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[36] *Oxford English Dictionary* (2nd ed, 1989) 'prevent' (v, def II).

[37] *Oxford English Dictionary* (2nd ed, 1989) 'restrict' (v, def 1a).

[38] *Oxford English Dictionary* (2nd ed, 1989) 'evacuate' (v, def I).

144 The phrase does not encompass government regulation that merely impacts upon ***how*** the insured's business is operated ***within*** the premises. For example, an order prohibiting the service of alcohol before or after a certain time of the day in response to instances of alcohol-fuelled violence may, loosely, be described as an order restricting Taphouse's business as a result of a threat of damage to persons. However, as it does not prevent or restrict ***access*** to the premises, it would not be an order that falls within the scope of the extension. Such an order merely regulates the type of products that could be supplied to customers. That conclusion would not be altered even if it could be shown that the effect of the order was that fewer people attended Taphouse's premises as a result of the restriction on the service of alcohol mandated by the order. The order would still not be one preventing or restricting access to the premises.

145 The relevant distinction is therefore between orders that concern whether the public may physically enter or exit the premises and those that merely concern what the insured or patrons may do inside the premises. Only the former is an insured peril (assuming it is in response to the damage or threat of damage to property or persons within the requisite radius).

(b) FCA v Arch

146 A somewhat different conclusion was reached in relation to similar words in *FCA v Arch* at [146]-[156]. It was there held (overturning the decision of Butcher J and Flaux LJ at first instance) that the phrase 'prevention of access' in the 'Arch wording' did not require complete closure of the premises but extended to 'prevention of access to a discrete part of the premises or to the whole or part of the premises for the purpose of carrying on a discrete part of the policyholder's business activities.' A restaurant being prevented from providing dine-in services but still offering a takeaway service was given as an example of the latter circumstance, regardless of whether it provided takeaway services before or after the lockdown: at [152].

147 The reasoning on this issue (at [151]-[152]) is abbreviated. Their Lordships adopted their earlier comments on the proper construction of the words 'inability to use the premises' (at [151]) and then reasoned that a similar construction of the phrase 'prevention of access' made 'commercial sense' and was a 'more realistic view' (at [152]).

148 In IAG's submission, the Court would not find that reasoning persuasive in relation to the Taphouse policy, for at least the following reasons.

149 ***First***, at least so far as the Supreme Court referred to prevention of access to 'a discrete part of the premises', the conclusion cannot be applied to the prevention of access

extension. It refers only to prevention of access to 'your premises'. In contrast to the immediately adjacent hybrid extension, it does not refer to prevention of access to 'all ***or part*** of your premises' (emphasis added). Had it been intended that the prevention of access extension would apply to an order which affected only part of the premises, that would have been stated expressly, as in the hybrid extension.

150 ***Second,*** the reasoning of the Supreme Court is predicated on the assumption that the words 'inability to use premises' and 'prevention of access to premises' are functionally equivalent when they are not. An 'inability to use premises' directs attention to the uses to which the premises are put. For this reason, the phrase is capable of supporting the construction placed on it by the Supreme Court, which was that it implicitly meant 'a complete inability to use the premises for the purposes of the business' (additional words underlined by their Lordships) – with that implicit qualification further embracing inability to carry on a separate or distinct business purpose within the one premises (e.g. in-house dining): at [136]. In contrast, the phrase 'prevention of access to premises' focuses attention on the concept of 'access' to 'premises'. As explained above, this must mean physical access and not mere restriction on use, and it must apply to the whole of the premises rather than merely a part.

151 ***Third***, insofar as the Supreme Court had regard to general notions of 'commercial sense' in construing the words contrary to their ordinary meaning (see particularly at [152]), then that aspect of the reasoning must be treated with care. The recent Australian appellate decisions referred to above, particularly *HDI v Wonkana, Rockment* and *WorkPac*, have emphasised the primacy of the contractual language. The parties have chosen the words 'prevention of access' and it can hardly be said that a construction confining those words to orders that impact physical entry or exit to the premises produce a 'commercially absurd' result.

152 It is also incorrect, in the context of the Taphouse policy, to say that 'access' cannot have been intended to bear its usual meaning because that would mean the cover could not respond unless physical access was impossible for all reasons including, for example, the insured entering the premises for essential maintenance works: *FCA v Arch* at [150]. This form of reasoning is erroneous because (as identified above) the class of persons who must be prevented from accessing the premises is 'the public'. It is not necessary for all persons to be excluded. The cover responds to an order that prevents or restricts the ***public*** from entering the premises, even if the insured or contractors employed by the insured are still able to access the premises. Further, the clause applies not only when there is a prevention of access but also a restriction of access.

(c) Application to test case facts

153 Applying the above understanding of the policy wording to the facts of the Taphouse test case, none of the orders relied upon by Taphouse are orders of a public authority 'preventing or restricting access to [Taphouse's] premises or ordering the evacuation of the public'.

154 The ***Home Confinement Order*** was not directed to Taphouse or its premises. It was directed at all persons in Queensland and (for a period of four days) restricted the freedom of movement of persons by prohibiting them from leaving their residences except for permitted purposes (now commonly referred to as a 'lockdown'). One of those permitted purposes was to obtain food, including by purchasing that food from takeaway vendors such as Taphouse. A restriction of freedom of movement does not involve the prevention or restriction of access or the evacuation of premises: see *FCA v Arch* at [154], which also affirmed the similar statement in *The Financial Conduct Authority v Arch Insurance (UK) Limited* [2020] EWHC 2448 at [328].

155 The ***Takeaway Only Order*** undoubtedly restricted Taphouse's business operations. Instead of operating as a dine-in bar and restaurant, it could only sell take-away food and operate a bottle-shop. The order did not, however, prevent or restrict the public from physically entering the business premises or require the public to evacuate the premises. Patrons could still physically attend Taphouse's premises to order take-away food or purchase alcohol. They could enter the premises to do so. The restrictions were aimed at what the patrons could do inside the premises. Namely, they could not sit down to consume their food or beverages. This is not the form of restriction that the prevention of access extension covers.

156 The ***Occupancy Limit Orders*** did not prevent or restrict access to the premises either. Patrons could physically enter and exit Taphouse's premises, and could now also consume food and drink at the premises so long as occupancy limits were observed. Those limits were undoubtedly restrictive (starting at 10 persons and gradually increasing) but, in substance, they were no different from an ordinary government regulation concerning maximum occupancy (for example, as part of a liquor licence). They were orders directed at what persons could do inside the premises rather than physical access to the premises itself. That they might have had the effect of reducing the number of people who attended the premises does not mean that they are orders which fall within the prevention of access extension.

C.5 Hybrid extension

C.5.1 The insured peril

157 The insured peril in the hybrid extension is a 'legal authority closing or evacuating all or part of the premises as a result of the outbreak of an infectious or contagious human disease occurring within a 20-kilometre radius of your premises'.

158 The comments at paragraph [122] may also be repeated in respect of the hybrid extension. It does not provide pandemic cover. It is an extension to property cover directed at government orders in response to outbreaks of disease within a defined radius of the business premises.

C.5.2 Closure or Evacuation Issue

159 The first issue is whether the directions constituting the Authority Response- Taphouse were orders of a legal authority closing or evacuating all or part of Taphouse's premises (List of Issues, [12(a)]). For the reasons outlined at paragraph [138] above, IAG does not contest that those directions were orders of a legal authority. The dispute is whether those orders required the 'closure' or 'evacuation' of Taphouse's premises.

160 This issue raises similar considerations to those discussed in Section C.4.4 (paragraphs [138]-[156]) and those submissions are accordingly repeated. The following further points are made.

161 ***First***, the thing that must be 'closed' or 'evacuated' is all or part of Taphouse's 'premises'. 'Premises' is defined (p. 5 of the policy) as the 'situation shown in the *schedule*', being Lot 4, City Lane, 373 Flinders Street, Townsville. The policy therefore only responds to an order to close or evacuate all or part of the physical business premises at 373 Flinders Street, Townsville. For the reasons addressed above at [154]-[156], none of the Authority Response – Taphouse orders had this effect. In summary:

(a) The Home Confinement Order did not close or evacuate anything, it merely restrained the freedom of movement of the public.

(b) The Takeaway Only Order did not close premises as patrons were still free to enter the premises so long as they did not consume their food or drink while there.

(c) The Occupancy Limit Orders did not close premises as patrons could still enter the premises and consume food or drink in the premises, subject to compliance with occupancy limits and other COVID-safe guidelines.

162 ***Second***, this reasoning is not diminished by the inclusion of the reference to 'a part' of the premises in the insuring clause. It is 'a part' of the 'premises', being the physical location, that must be closed. The extension does not refer to a part of 'the business being carried on at the premises' being closed. The reasoning in *FCA v Arch* should therefore be distinguished, for the reasons addressed at paragraphs [147]-[152] above (and noting that the Supreme Court in *FCA v Arch* did not specifically consider the meaning of 'closure', despite there being an example of this form of wording in what was referred to as the 'RSA 1' wording).

163 ***Third*****,** the words 'closure' and 'evacuation' must be construed in light of the fact that other provisions of the policy (including other benefits in the same clause) use the broader concept of 'restricting access'. As Lord Diplock explained in *Prestcold (Central) Ltd v Minister of Labour* [1969] 2 WLR 89 at 97 (cited with approval in *Eureka Funds Management Limited v Freehills Services Pty Ltd* [2008] VSCA 156; 19 VR 676 at [52]):

> … the habit of a legal draftsman is to eschew synonyms. He uses the same words throughout the document to express the same thing or concept, and consequently if he uses different words the presumption is that he means a different thing or concept.

164 The choice of the narrower words of 'closure' and 'evacuation' (rather than 'restricting') in the hybrid extension should be considered a deliberate choice that limits the clause to government orders that physically shutter all or part the business premises or require its patrons to leave. This is consistent with the meaning given to similar words in *Cat Media Pty Ltd v Allianz Australia Insurance Ltd* (2006) 14 ANZ Ins Cas 61-700; [2006] NSWSC 423, where Bergin J held (at [59]-[60]) that an extension clause requiring closure or evacuation required 'prohibition on physical access to the whole or part of the Premises' and not merely the cessation of the insured's manufacturing processes.

C.5.3 Outbreak Issue

165 The next issue is whether there an 'outbreak' of COVID-19 'occurred' within 20-kilometres of Townsville's premises and, if so, when (List of Issues, [12(b)]).

(a) Meaning of 'outbreak'

166 The hybrid extension only provides cover for losses arising from a legal authority closing or evacuating all or part of Taphouse's premises as a result of 'the ***outbreak*** of an infectious or contagious human disease ***occurring*** within a 20-kilometre radius' (emphasis added).

167 The word ‘outbreak’ must involve something more than a single instance of COVID-19 as otherwise the word would be entirely otiose. The distinction between an ‘outbreak’ of disease and an ‘occurrence’ of disease was recognised by the UK Supreme Court in *FCA v Arch*, where the Hiscox wording under consideration only required that the business interruption be the result of a ‘Notifiable Disease’ (see [61]). As the majority stated at [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.

168 The fact that the ‘outbreak’ must ‘occur’ within the radius is also a relevant textual indicator of the type of peril that is covered. Where an insurance policy refers to an ‘occurrence’, this is ordinarily understood as something which happens at a time, and place, and in a particular way: *FCA v Arch* at [67].

169 As the UK Supreme Court recognised in *FCA v Arch*, a disease that spreads is not something that ordinarily occurs at a particular time and place or 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: *FCA v Arch* at [69]; cited with approval in *Star Entertainment* at [118]. That being the case, for an ‘outbreak’ of disease to ‘occur’ the individual instances of the disease constituting the outbreak must ‘have a sufficient degree of unity in relation to time, locality and cause’: *FCA v Arch* at [69].

170 Applying this formula to the present circumstances, in IAG’s submission an ‘outbreak’ of COVID-19 does not ‘occur’ within the 20-kilometre radius unless the two minimum criteria are met:

(a) the identification of multiple active cases of COVID-19 within the defined radius occurring at or around the same time; and

(b) evidence that those cases have a common cause, being the uncontrolled transmission of the virus from one person to another within the defined radius. [39]

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[39] By way of example, some forms of transmission, such as transmission within a household, should not be considered an 'outbreak'.

171 If those criteria are met, then there may be a sufficient unity of time, locality and cause to describe the cases as an 'outbreak' occurring in the radius. If either criteria is not met, then the occurrence of COVID-19 in the radius is unlikely to be by reason of an 'outbreak'. The more likely explanation is that a person contracted the virus elsewhere and carried it into the radius.

(b) Outbreak in Townsville?

172 Taphouse's premises are located in the city centre of Townsville.[40] A 20-kilometre radius from those premises captures Townsville and its adjacent suburbs but no other major metropolitan centre. Brisbane is over 1,000 kilometres away.

173 The SOAF at [75]-[76] sets out the agreed facts in relation to the incidence of COVID-19 in what is described as the Townsville Hospital and Health Service (**HHS**) region. This is an area that, itself, extended up to 325 kilometres from Townsville.[41]

174 As set out in those paragraphs of the SOAF, there were only 31 cases of COVID-19 attributed to the Townsville HHS in the period from January 2020 to May 2021.[42] According to the data published by Queensland Health in relation to each of those cases:

(a) 30 are classified as 'overseas acquired';

(b) 1 is classified as 'interstate acquired';

(c) none are classified as 'locally acquired – contact known';

(d) none are classified as 'locally acquired – no known contact'; and

(e) none are classified as 'under investigation'.[43]

175 Based on this data (which presumably reflects the data the Chief Health Officer acted upon from time-to-time) there is no evidence of ***any*** person acquiring COVID-19 in Townsville or of any community transmission occurring in Townsville during the policy period (being 23 September 2019 to 23 September 2020).

176 The few cases of COVID-19 attributed to Townsville all involved a person contracting the disease elsewhere and then returning to Townsville, at which point they would appear to

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[40] SOAF, [71].

[41] SOAF, [72].

[42] SOAF, [75]-[76].

[43] SOAF, [76].

have gone into self-isolation or quarantine. There is certainly no evidence that any other person acquired the virus from them, as this would have been recorded as 'locally acquired' in the Queensland Health data.

177 The isolated nature of the Townsville cases is confirmed by the hospital records obtained by the insured under subpoena for all of the cases detected prior to 24 March 2021. A summary of that subpoena material is at **Annexure A** to these submissions. It shows that (consistent with the summarised health data) in all but one case the person acquired the virus overseas, mostly in Europe. The one exception is a person who travelled between Canberra, Brisbane, Cairns, Townsville and Sydney. This presumably is the person who Queensland Health conclude was 'interstate acquired', suggesting the infection occurred in Canberra or Sydney.

178 Based on the above information, the Court could not find that there was an 'outbreak' of COVID-19 occurring within 20 kilometres (or 50-kilometres) of Taphouse's premises at any time during the policy period (being 23 September 2019 to 23 September 2020).

C.6 Causation and adjustments

C.6.1 Approach to causation

179 The next set of issues concerns causation. As was observed in *FCA v Arch* at [97], insurance policies of the type under consideration involve a series of elements which are causally connected. To trigger an insurer's obligation to indemnify loss, the insured must demonstrate that those causally linked events have occurred in the prescribed order.

180 The elements of the prevention of access and hybrid extensions (see paragraphs [121] and [157] above) when set out in their correct causal sequence are as follows: (A) an outbreak of disease or threat of damage to property or persons, which causes (B) an order of a public or legal authority, which causes (C) the prevention or restriction of access or closure of the premises, which causes (D) an interruption or interference with the insured's business that is the direct cause of financial loss. This can be expressed diagrammatically (see *FCA v Arch* at [26]), with each arrow representing a causal connection, as follows:

$$A \rightarrow B \rightarrow C \rightarrow D$$

181 As explained in Part B above, the correct approach to each of these causation questions (i.e. the arrows in the diagram) is to look for the 'proximate' cause of the specific event or result. If there is only one direct and efficacious cause then that is the relevant cause. If there are multiple proximate causes, then an enquiry needs to be made as to whether

those causes are 'equally efficacious' and, if so, whether one of those causes is an excluded peril (in which case, the whole loss is excluded).

182 When the Court comes to the final causal link (C → D) a further question arises as to whether adjustments need to be made to ensure the claim represents the true loss suffered by the insured by reason of the insured peril. This is addressed below.

C.6.2 Cause of relevant government orders (A → B)

183 The first causation question is whether the directions constituting the Authority Response – Taphouse were:

(a) 'as a result of the outbreak of an infectious or contagious human disease occurring within a 20-kilometre radius'; or

(b) 'as a result of damage to or threat of damage to persons within a 50-kilometre radius' of Taphouse's premises,

as those phrases are used in the hybrid and prevention of access extensions respectively. For the purpose of this issue, IAG assumes (contrary to the submission put above) that the phrase 'damage to or threat of damage to…persons' in the prevention of access extension is interpreted to include the threat of contracting COVID-19.

184 The answer to this question largely turns upon what event or circumstances, as a matter of fact, caused the Queensland Chief Health Officer to issue each of the Home Confinement Order, Takeaway Only Order and Occupancy Limit Orders. Before addressing this factual question, it is first necessary to address two constructional questions raised by Taphouse in the List of Issues with respect to this aspect of the prevention of access clause.

(a) Taphouse issues of construction

185 The ***first*** question Taphouse raises is whether the phrase 'threat of damage' requires the relevant threat to exist within 50 kilometres of the premises only or whether it can exist in areas further than 50 kilometres from the premises (List of Issues, [13(d)]). The ***second*** question is whether the relevant order must be a 'direct response' to the specific 'threat of damage' within 50 kilometres of the premises, or whether it is sufficient that the relevant order is made as a result of 'threat of damage' both within the radius and of a broader scope (e.g. on a regional, state or nationwide scale). These questions, in effect, seek to adopt the *FCA v Arch* approach to determining causation, where each individual instance of COVID-19 was held to be an approximately equal and efficacious cause of the national government order.

186 In IAG's submission, both of these questions obscure the true inquiry that the Court needs to undertake. The task is to identify the ***proximate cause*** (in the sense of the 'real', 'effective' or 'direct' cause) of the order being made, and whether it was a relevant event or circumstance occurring within 50 kilometres of the insured premises. For the policy to respond, the relevant government authority (here the Queensland Chief Health Officer) must be seeking to address an identifiable occurrence of damage or threat of such damage within the defined radius. Otherwise, the 50-kilometre restriction is meaningless. This is not to say that there may not be multiple causes, some within the radius and some without. But if that is the case then the question for the Court is whether Taphouse has proved that the 'threat of damage' within the 50-kilometre radius is truly a proximate cause of the order and of 'approximately equal efficacy' to the other causes: see *FCA v Arch* at [244], and the discussion in Part B above.

(b) Application to test case facts

187 The evidence before the Court is clear. The Authority Response- Taphouse were ***not*** a result of an outbreak of COVID-19 within a 20-kilometre radius of Taphouse's premises or, alternatively, damage or threat of damage to persons or property within 50 kilometres of Taphouse's insured premises. This is for the following reasons.

188 ***First***, for the reasons addressed at paragraphs [172]-[178] above, there has been no outbreak of COVID-19 in Townsville. There was accordingly no real threat of damage to persons by reason of COVID-19 either. At the time the relevant directives were issued, the Chief Health Officer accordingly had no reason to consider there to be an outbreak to respond to in Townsville that needed to be contained or a threat of damage to persons that needed to be responded to.

189 To the extent Taphouse belatedly seeks to lead epidemiological evidence to demonstrate the likelihood of community transmission of COVID-19 within Townsville, the Court should reject that evidence. Not only is it likely to be speculative as compared to actual data gathered by Queensland's contract tracers (and confirmed by hospital records), but it can readily be inferred that the Chief Health Officer acted upon the Queensland Health data. Evidence from an expert after the fact that that data may have been wrong is therefore entirely beside the point, because that opinion evidence cannot have been the true cause of the Chief Health Officer's actions.

190 ***Second***, the express reason given by the Chief Health Officer for issuing each of the orders was to 'assist in containing, or to respond to, the spread of COVID-19 within the community'. Considering the relevant orders (other than the June-July 2021 orders) were

Queensland state-wide, this must be understood as meaning that her intention was to 'respond' to identified instances of COVID-19 and 'contain' the virus within the geographical areas in which it was then prevalent. The measures were not responding to an actual occurrence or threat of occurrence of the virus within an area where there was, at the time of the order, no known instance of community transmission.

191 The factual chronology which immediately precedes the issuing of the Takeaway Only Order and Home Confinement Order supports this conclusion. The timing of those orders immediately after the National Cabinet meeting on 22 March 2020 suggests they were introduced to give effect to the agreement reached at that meeting. As explained above (at paragraph [90]), the announced intention of the measures then agreed was to 'slow the spread', 'better prepare the health system' and 'flatten the curve'. This all suggests that the measures were precautionary, directed at slowing the spread of COVID-19 from then current 'hot spots', rather than in response to an occurrence or threat of occurrence of COVID-19 in a particular location. It goes without saying that there was no specific reference to Townsville in any of these communications.

192 The Occupancy Limit Orders that followed can then be seen as a gradual easing of the initial restrictions put in place in March 2020. The reason they took so long to be removed was entirely unrelated to what was happening in Townsville. As identified in the case numbers set out at SOAF, [75], Queensland's total cumulative cases grew to over 1,000 by 30 April 2020 before the growth slowed significantly. Only a tiny fraction of that growth is attributable to Townsville, which (as explained above) only recorded 31 cases in total by May 2021 – none of which was acquired in Townsville or its immediate radius.

193 The state-wide measures relied upon by Taphouse can be contrasted with the more recent health orders issued by State authorities that plainly do respond to outbreaks in specific locations, including regional areas. A recent example is the *Restrictions for Locked Down Areas (Cairns and Yarrabah) Direction* issued on 8 August 2021 in response to recent cases of COVID-19 in the Cairns area.

194 ***Third***, to the extent it is submitted that each individual incidence of COVID-19 (including the cases in isolation in Townsville) was an equally efficacious proximate cause of the relevant health orders, that submission must be rejected. To the extent that there were a few isolated cases in self-isolation quarantine in Townsville factored into the Chief Health Officer's reasoning at all (which is highly unlikely), it must have been a very subsidiary consideration that could not have been of 'approximately equal efficacy' to the more immediate concern of containing outbreaks elsewhere or implementing a national strategy of 'flattening the curve' so as to ease the pressure on the national health system.

195 The Court would accordingly decide this causation question against Taphouse, which is a further reason why its claims must fail.

C.6.3 Effect of relevant government orders (B → C)

196 This issue has been addressed above, at paragraphs [138]-[156] ('preventing or restricting access' and [159]-[164] ('closure or evacuation').

C.6.4 Causation of loss (C → D) and the Adjustment Issue

197 The final causation issue is whether government orders were causative of the business interruption losses claimed. For the purposes of this issue, IAG assumes (contrary to the submissions above) that Taphouse has otherwise established that it was impacted by an order of the nature referred to in the extensions. The question is whether that order was the true proximate cause of its loss, or whether that loss flowed from other circumstances.

(a) Calculation of 'Gross Profit' and adjustments

198 This question directs attention to the way in which the policy calculates loss, including how it accounts for adjustments that may need to be made so as to ensure the amount paid provides a true indemnity.

199 The calculation of the quantum of the claim is addressed in the 'Basis of settlement' part of Section 2 (p. 20). As Taphouse has selected the 'Gross profit' basis for its cover, the relevant calculation is as set out clause 1 which relevantly reads as follows:

> In the event of a claim for an item specified below, *We* will pay…
>
> …
>
> a) the amount produced by applying the *rate of gross profit* to the amount by which the *turnover* during the *indemnity period* in consequence of *damage* falls short of the *standard turnover*, and
>
> b) the additional expenditure necessarily and reasonable incurred by *you* for the sole purpose of avoiding or minimising the reduction in *gross profit* during the *indemnity period* in consequence of the *damage*, but not exceeding the reduction in *gross profit* thereby avoided.

200 As explained above, each of the italicised words is defined (pp. 19-20).

201 Applying those definitions, the gross profit calculation can be expressed by way of the following formula:

> GP = GP% x (ST – T)
>
> where:
>
> 'Rate of Gross Profit' (**GP%**) means the gross profit (as calculated in accordance with the definition of that term on p. 19) expressed as a percentage on turnover during the immediately preceding financial year (here, FY19).
>
> 'Standard Turnover' (**ST**) means the turnover during the 12 month period immediately before the date of the damage, appropriately adjusted to reflect the indemnity period.
>
> 'Turnover' (**T**) means the actual amount paid or payable to the insured for goods sold and delivered in the course of the business at the premises during the indemnity period.

202 Three aspects of this formula are noteworthy.

203 ***First***, the indemnity period is calculated as the period starting on the occurrence of the 'damage' and ending no later than 12 months after the date of the damage 'during which the results of your business are affected as a consequence of *damage*'. The use of the defined term 'damage' in this context is inapt, as the insured peril under each head of cover is not physical damage to property. 'Damage' in the present context must therefore be read as the insured peril meaning, in this case, the relevant government order causing the business interruption: *FCA v Arch* at [257]. The indemnity period therefore starts on the day of the order and ends on the day on which the *results* of the business cease to be affected by the order, being a period of no more than 12 months.

204 ***Second***, the calculation of 'Standard Turnover' (ST) less 'Turnover' (T) is expressly limited to differences 'in consequence of *damage*'. As is explained in H Roberts, *Riley on Business Interruption Insurance* (10th ed, Thomson Reuters, 2016) at [3.10], these words qualify the indemnity so that:

> … if the reduction is attributable wholly or in part to causes not connected with the incident which would have affected turnover irrespective of the incident, an adjustment must be made to the figures in order to reflect as accurately as possible the loss solely due to the incident.

205 The primary task under the basis of settlement clause is therefore to determine the extent to which any diminution in turnover during the indemnity period is attributable to the

relevant order as opposed to other causes. This is a proximate cause enquiry: *Riley* at [15.3]; *FCA v Arch* at [162]-[163].

206 ***Third***, to determine the extent to which any reduction in trade was ***a consequence*** of the insured peril, it is necessary to make adjustments to account for trends, variations and other circumstances. As has been explained in H Roberts, *Riley on Business Interruption Insurance* (10th ed, Thomson Reuters, 2016) at p. 49 [3.28], '[u]nless allowance is made for such circumstances an insured would be overindemnified contrary to the provisions … for loss of gross profit that is "in consequence of the Incident"'.

207 This is usually done by way of an 'adjustments' clause that allows adjustments to be made to the 'Standard Turnover' so that this figure represents (as near as reasonably practicable) the turnover that would have been achieved ***but for*** the occurrence of the insured peril (see definition of 'adjustment' at p. 19). This form of adjustment may work in favour of either the policyholder (e.g. by excluding specific events, such as strike, that may have abnormally depressed the prior year comparator results) or the insurer (e.g. by removing abnormal profits in a prior year, such as extraordinary trading due to the hosting of an event such as the Olympics, from the equation), but it is intended to be in the interests of both: *FCA v Arch* at [254].

208 IAG accepts that the calculation for the 'Gross profit' basis of settlement does not expressly use the defined term 'adjustment'. However, as observed above, that concept is inherent in the phrase 'in consequence of *damage*'. To not allow for such adjustments to be made would be contrary to ordinary underwriting practice for these forms of policy (see *Riley* at [15.3]) and would potentially lead to significant over or under indemnification. As Beach J explained in *Australian Pipe & Tube Pty Ltd v QBE Insurance (Australia) Limited (No 2)* [2018] FCA 1450 at [114]-[117]:

> The adjustment subclause is designed to give purpose to the principle of indemnity under the policy. As stated in Roberts H, *Riley on Business Interruption Insurance* (10th ed, Thomson Reuters, 2016) at 48:
>
> > Without this clause the policy cannot be regarded as fulfilling the basic principle of an insurance that is to indemnify, because the turnover, charges and profits which would have been realised during a period of interruption are hypothetical and never capable of absolute proof. By the use of this clause it is possible to make adjustments in a loss settlement to produce as near as is reasonably possible a true indemnity for an insured's loss, albeit within a restricted period, i.e. the maximum indemnity period and also limited to the sum insured.

> …
>
> The other circumstances clause seeks to accommodate all such influences on the business that would have occurred but for the incident itself. This may seem like an enormous, if not insurmountable challenge, but to ignore all these factors and merely rely on the previous year's trading would lead to a lottery in which the insured was either over or under indemnified.

Further, as was stated in *Honour WB and Hickmott GJR, Honour and Hickmott's Principles and Practice of Interruption Insurance* (4th ed, Butterworths, 1970) at 444:

> It is essential to ascertain as accurately as practicable the hypothetical results which the business itself would have produced apart from the fire or other peril happening, as to determine what adjustments to the rate of gross profit, the annual turnover and the standard turnover figures would be equitable.

209 To deny the ability to make adjustments to the payment calculation under the 'Gross profit' basis of settlement would also be incongruent with the other bases of settlement under the policy. By way of example, the 'Loss of payroll' basis of settlement (cl 2) refers to the defined term 'shortage in turnover' which expressly requires an 'adjustment' (as defined) to be made. There is no rational basis upon which the parties to the contract would agree that this form of settlement was to be adjusted (up or down) but the 'Gross profit' calculation was not.

210 The better construction is therefore that the policy requires a counterfactual enquiry that takes the actual turnover of the business for a period equivalent to the indemnity period in the 12 months prior to the insured peril, and then seeks to adjust that figure to represent (as nearly as reasonably practicable) the results that would have eventuated in the indemnity period ***but for*** the occurrence of the insured peril (here, the government order). In the present case, this involves enquiring into how Taphouse would have performed in the period from 23 March 2020 until its results recovered (a period ending no later than 23 March 2021) ***but for*** the relevant orders. A downturn in business that is not caused by the insured peril must be excluded in undertaking this exercise.

(b) FCA v Arch and Orient Express

211 Before turning to the facts, it is necessary to address the approach adopted by in *FCA v Arch* to the question of causation of loss and trends.

212 The Supreme Court there held that the question 'what would the financial position of the business have been but for the insured peril?' was the wrong question, as it inappropriately ignored (and sought to exclude) concurrent proximate causes: at [228]-[230]. However, as their Lordships then went on to explain at [231]:

> It is not every concurrent cause of loss, however, which (although not an expressly excluded peril) would not reasonably be regarded as limiting the scope of the indemnity provided by the public authority clause. Continuing with the restaurant example, counsel for the FCA postulated a case where the restaurant had a star chef who was due to leave on 1 April 2020 for reasons unrelated to the pandemic. In this case it would be unreasonable to require the insurer to indemnify the policyholder for loss of turnover resulting from inability to use the premises in so far as such turnover would have been reduced in any event by reason of the chef's departure.

213 To identify the concurrent causes that would fall within the indemnity, it was reasoned that where the elements of the insured peril and their effects on the insured's business all arose from the same original cause (there, the COVID-19 pandemic) then other potentially adverse effects arising from that cause were matters arising 'from the same fortuity' which the parties to the insurance would naturally expect to occur concurrently with the insured peril. In that case, there was not 'a separate and distinct risk' but rather consequences of the same event 'which are inherently likely to arise': at [237], [239]. The insured was therefore indemnified against the risk of all elements of the insured peril acting in causal combination to cause the business interruption loss (A → B → C → D), regardless of whether the loss was concurrently caused by other (uninsured but non-excluded) consequences of the COVID-19 pandemic which was the underlying cause of the insured peril: at [243]-[244].

214 The same reasoning was applied to the interpretation of the trends clauses so as not to take away the cover provided by the insuring clauses, unless the policy wording otherwise required: at [260]-[264]. The trends or circumstances referred to in the clause for which adjustments were to be made were therefore construed as meaning trends or circumstances that did not arise out of the same underlying or original cause and were 'unrelated in that way to the insured peril': at [268], [287]. This meant ignoring downward trends arising from the effects of the COVID-19 pandemic that were evident prior to the insured peril occurring, on the basis that those losses attributable to that trend were still 'proximately caused by uninsured (but non-excluded) perils': at [294]-[295]

215 The Supreme Court then addressed the earlier decision in *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* [2010] EWHC 1186 (Comm); [2010] Lloyd's Rep IR 531

(***Orient Express***). *Orient Express* concerned a claim for business interruption loss arising from damage to a hotel in New Orleans as a result of Hurricanes Katrina and Rita in 2005. The Court in that case accepted that the loss was required to be adjusted to account for the loss of business that would have been suffered in any case, even apart from the damage to the hotel, due to the devastation and mandatory evacuation of New Orleans as a result of the hurricanes. The Court held that the trends clause did not require the variations or circumstances to be 'something completely unconnected with the damage' because the 'assumption required to be made under the Trends clause is: "had the Damage not occurred"; not "had the Damage and whatever event caused the Damage not occurred"': at [57]. In reaching the conclusions explained above, the Supreme Court held that this was wrongly decided, because it did not take into account the possibility of concurrent proximate causes: at [308]-[310].

216 In IAG's submission, the Court ought to follow the *Orient Express* line of authority over the Supreme Court's recent restatement of principle in *FCA v Arch*. The express words of the policy under consideration here require adjustments to be made to determine the downturn in turnover of the business 'in consequence of *damage*' and to do so by comparing actual turnover to the hypothetical turnover that would have been recognised 'but for the *damage*'. As recognised in *Orient Express*, it is a significant gloss on the words used by the parties to exclude other results of the 'underlying cause' of the insured peril. As has been noted above, the Australian appellate decisions have been firm in requiring primary regard to be had to the words of the policy unless to do so would work a commercial nonsense.

217 In the present case, however, it may not make a great difference whether the *FCA v Arch* or *Orient Express* approach is adopted. The question under the *FCA v Arch* approach is what constitutes the 'same originating cause' and whether the insured peril and the concurrent cause are truly concurrent, and equally efficacious, proximate causes of the loss suffered. As has been explained above, in *FCA v Arch* it was held that the relevant cover provided indemnity for government action in response to each and every occurrence of COVID-19. It was therefore straightforward to reason that the 'original cause' of the insured peril was the COVID-19 pandemic. Here, the cover responds to an 'outbreak' of COVID-19 or a specific threat of damage to persons, in each case within a defined radius. The underlying cause of government action in response to those perils is not the COVID-19 pandemic. It is the localised occurrence of the disease. Applying the Supreme Court's reasoning, the trends or circumstances that must be ignored when

undertaking the counter-factual analysis are therefore at most those that arise from the specific outbreak or threat and not the broader impacts of the pandemic.

(c) Application to facts

218 The difficulty in the present case is that Taphouse has not provided any evidence of the losses it has suffered, or how they were caused. Based on the contentions in the Outline Document, IAG understands that Taphouse contends that it closed its business from 23 March 2020 to 28 March 2020: Outline Document, [7]-[8], [20]. Its turnover for this period is therefore presumably nil. However, the proximate cause of that loss cannot have been the Takeaway Only Order as that order merely restricted the type of business that could be undertaken at the premises, as Taphouse's provision of takeaway beer and food from 28 March 2020 demonstrates. Nor was it caused by the Home Confinement Order or Occupancy Limit Orders, each of which post-dated Taphouse's closure.

219 The losses Taphouse says it suffered from 28 March 2020 (see Outline Document, [21]) are impossible to interrogate in the absence of evidence. IAG does not know, for example, whether Taphouse had a pre-existing takeaway business that was impacted by the COVID-19 pandemic regardless of the orders relied upon. Even on the *FCA v Arch* reasoning, that loss would not be recoverable. There is also the possibility that the Court would find that certain orders relied upon were relevant insured perils (e.g. the Takeaway Only Order and the Occupancy Limit Order) but others were not (e.g. the Home Confinement Order). In that case, applying the adjustments clause, it would be necessary to disaggregate and remove the losses that would have occurred ***but for*** the insured damage.

220 All of these are questions on which Taphouse bears the onus of proof. As explained by the Queensland Court of Appeal in *PMB Australia Ltd v MMI Insurance Ltd* [2002] QCA 361 at [17] and [19]-[23] (de Jersey CJ; Jerrard JA and White J agreeing), it falls to the person making the claim to establish at least a *prima facie* entitlement to the whole of the loss claimed. The facts in that case are instructive on this issue. They concerned a business interruption policy that covered injury, illness or disease arising from or traceable to foreign or injurious matter in food or drink provided from the premises. When a salmonella outbreak was located at the insured's premises, it made a claim for the cost of addressing the outbreak and introducing new compliance measures recommended by the health department: at [2]-[3]. The Court held that the latter losses (attributable to a 'new awareness' of the risk of salmonella contamination) did not arise from the particular salmonella outbreak that triggered the policy, and it was the insured's onus to (at least

on a *prima facie* basis) separately identify the portion of its claim that related to the insured damage.

221 The position in the present test case is similar. As IAG understands it, Taphouse is claiming the entirety of its loss of gross profit since the Takeaway Only Order was issued on 23 March 2020. It therefore has at least a *prima facie* onus to prove that this loss was caused by an insured peril. On the evidence presently served, it has not discharged that onus. IAG reserves its right to make further submissions on this point (including as to whether any late evidence should be admitted) if further evidence is served.

C.6.5 Indemnity period

222 The final causation question concerns the indemnity period. As explained above (paragraph [203]), that period commences upon the occurrence of the 'damage' (which must mean the insured peril) and ends when the results of Taphouse's business cease to be affected as a consequence of the damage, such period not exceeding 12 months. The causal inquiry is when Taphouse ceases to be affected by the consequence of the damage.

223 It is again impossible to resolve this question without evidence of Taphouse's losses. The 'summary' document served by Taphouse indicates that its revenue had recovered to the level from the prior year by around November of December 2020, despite the ongoing (albeit limited) restrictions imposed by the Occupancy Limit Orders. Further evidence would be needed, however, to show whether or not the depression of Taphouse's results from March 2020 until that point is properly attributable to any insured peril or whether the effect of any insured peril had ceased to depress the results of the business at some earlier point in time.

C.7 Quantum issues

C.7.1 The issues

224 Taphouse has acknowledged that it received the following payments or benefits from third parties by reason of the COVID-19 pandemic:

(a) the Commonwealth's 'JobKeeper' payment;

(b) the Commonwealth's 'Cash Flow Boost';

(c) the Queensland Government's COVID-19 Grant; and

(d) rental waivers or abatement from its landlord.

225 The final questions for determination are whether any of these payments or abatements are to be accounted for in calculating the loss suffered for the purposes of Taphouse's claims.

C.7.2 General principles regarding third party benefits

226 The starting point is that a contract of insurance is a promise to indemnify loss. Therefore, as a general rule, an insurer is only required to pay an amount by way of compensation for losses that the insured has (as a matter of fact) actually suffered.

227 Whether a payment received by an insured from a third party reduces the loss they have suffered (and therefore the entitlement to indemnity) is a question of characterisation of the payment. The following principles generally apply:

(a) the intention of the person who made the voluntary payment to the insured is critical;

(b) if the person intended to compensate for the loss, the insurer is entitled to recover the payment;

(c) if the person intended to benefit the insured personally to the exclusion of the insurer, the insurer is not entitled to recover the payment.

228 These principles can be sourced to long-standing English authority addressing payments from the King in recompense for the seizure of goods or ships during the Spanish wars: *Randal v Cockran* (1748) 1 Ves Sen 98; 27 ER 916; *Blaaupot v Da Costa* (1758) 1 Eden 130; 28 ER 633. In each case, the court held that the insurers were entitled to recover the payments as they were paid by way of recompense for the lost insured property. By way of contrast, in *Burnand v Rodocanachi Sons & Co* (1882) 7 App Cas 333, the insured was held to be entitled to retain a payment from the United States Government following the Civil War as it was properly characterised as 'an act of pure gift from the American Government' (at 336 per Lord Selbourne).

229 A similar distinction has been made by the High Court in the area of assessing damages under tort law. In *National Insurance Co of New Zealand Ltd v Espagne* (1961) 105 CLR 569 at 599-600, for example, Windeyer J observed that benefits 'by way of bounty, to the intent that he should enjoy them in addition to and not in diminution of any claim for damages' were not to be taken into account in the damage assessment. This was said to include 'purely charitable aid and ***some*** forms of relief given by the State' (emphasis added), with the decisive consideration being the intent of the person conferring the benefit. Accordingly, in *Zheng v Cai* (2009) 239 CLR 446, the High Court held that

payments made by a religious organisation to a passenger who suffered injuries in a car accident were not to be taken into account when assessing past and future economic loss. By way of contrast, in *Evans v Muller* (1983) 151 CLR 117, a majority of the High Court (Mason and Dawson JJ) held that unemployment benefits provided by the federal law had the character of a partial substitute for wages and should be deducted from an award of damages for loss of wages.

230 These two lines of authority were brought together and applied in *Insurance Australia Ltd v HIH Casualty & General Insurance Ltd (in liq)* [2007] VSCA 223; 18 VR 528, where the Victorian Court of Appeal held that payments made out of the 'HIH Support Scheme' reduced an obligation to indemnify the defendant. As Ashley JA held at [169]:

> In the present case, I consider that the circumstances, however they are considered, lead to a conclusion that what was paid was an indemnity which was not to be equated with a merciful subvention of the Commonwealth Government, or as something resembling social security payments, bushfire relief payments or the like. By that I mean that such a conclusion flows from application of the *Rodocanachi* line of authority; and that it flows also from the *Espagne* line of authority, assuming it to be any different.

231 The relevant considerations included that the subjective purpose of the Commonwealth in implementing the HIH Scheme was not simply to make an *ex gratia* payment, but in return for the assignment or rights against HIH: at [174], [177]. It was not considered determinative that the scheme had an element of discretion: at [176].

232 By way of summary, in a case such as the present the determinative factor is whether the payment is intended to compensate for the loss that is otherwise the subject of the promise of indemnity. If it is, then the payment reduces that loss and accordingly limits the amount that the insurer is required to pay.

C.7.3 JobKeeper

233 The Commonwealth payment known as 'JobKeeper' was introduced as part of a package of four Acts:

(a) the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020*;

(b) the *Coronavirus Economic Response Package Omnibus (Measures No 2) Act 2020*;

(c) the *Appropriation Bill (No 5) 2019-20*; and

(d) the *Appropriation Bill (No 6) 2019-20*.

234 An entity was eligible to participate if, as at 1 March 2020:

(a) the entity carried on business in Australia or was a non-profit body that pursued its objectives principally in Australia;[44] and

(b) the entity's turnover has reduced by a relevant percentage:

(i) 15 per cent – where the entity is a registered charity (other than certain educational institutions);

(ii) 30 per cent – where the employer's aggregated turnover is less than $1 billion; or

(iii) 50 per cent – where the employer's aggregated turnover is at least $1 billion.[45]

235 To be eligible to receive the JobKeeper payment, an employer was required to pay an eligible employee a total of $1,500 (pre-tax) in each fortnight for which the employer was claiming the entitlement during the period March to September 2020.[46] The $1,500 could include amounts that were salary sacrificed into superannuation as well as amounts dealt with in any other way on behalf of the employee as a substitute for their salary and wages (e.g. other salary packaging arrangements such as certain fringe benefits).[47] Payments were then made to the employer monthly in arrears.[48] During the extension phase of JobKeeper (28 September 2020 – 28 March 2021), the payment was tapered and targeted to those businesses that continued to be significantly affected by the economic downturn.[49] Businesses were required to reassess their eligibility with reference to their actual turnover.[50]

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[44] *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* s 7.

[45] Ibid s 8.

[46] Ibid s 6.

[47] Ibid s 10.

[48] Ibid s 15.

[49] Ibid s 13.

[50] Ibid ss 7(c), 8B.

236 The Commonwealth's purpose in making the 'JobKeeper' payments is revealed in the legislation itself and the explanatory materials. Relevantly, section 3 of the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* states:

> The object of this Act is to provide financial support to entities directly or indirectly affected by the Coronavirus known as COVID-19.

237 The Explanatory Memorandum that accompanied the Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 and Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020 then stated, under the heading 'How the Government is responding' (p. 12):

> The Government's consolidated package of $320 billion represents fiscal and balance sheet support across the forward estimates of 16.4 per cent of annual Gross Domestic Product. The support is designed to help businesses and households through the period ahead. This significant action has been taken in the national interest and has been updated in the light of the broader and more prolonged impact of the Coronavirus outbreak.
>
> The package provides timely support to workers, households and businesses through a difficult time. Building on the previous measures, this package will support those most severely affected. It is also designed to position the Australian economy to recover strongly once the health challenge has been overcome.

238 And then further (p. 34):

> 2.8 Under the JobKeeper Payment, businesses significantly impacted by the Coronavirus outbreak will be able to access ***a subsidy from the Government to continue paying their employees. This assistance will help businesses to keep people in their jobs and re-start when the crisis is over***. For employees, this means they can keep their job and earn an income – even if their hours have been cut.
>
> 2.9 The JobKeeper Payment is a temporary scheme open to businesses impacted by the Coronavirus. The JobKeeper Payment will also be available to the self-employed. The Government will provide $1,500 per fortnight per employee for up to six months. The JobKeeper Payment will support employers to maintain their connection to their employees. These connections will enable business to reactivate their operations quickly – without having to rehire staff – when the crisis is over. [emphasis added]

239 In IAG's submission, it is evident from the above statements that the Commonwealth's purpose in making the 'JobKeeper' payment was to compensate businesses for losses they would otherwise suffer by continuing to pay employee wages, in circumstances where they may be suffering a downturn in business revenue. This is the very form of loss for which business interruption insurance provides cover, and the payments are therefore in the category of payments that are generally taken to reduce the amount of the indemnity.

240 Further, there is no suggestion that 'JobKeeper' was intended to be retained by the insured to the exclusion of their insurer. The relevant explanatory materials make no mention of insurance arrangements. There is therefore no basis to assume that the legislature intended recipients of 'JobKeeper' payments to receive both those payments and business interruption insurance payments in respect of the same loss.

241 On this basis, 'JobKeeper' payments must be taken into account for the purposes of calculating the loss recoverable. They reduce the loss suffered by Taphouse and any amounts paid by the insurer in respect of those expenses would be a windfall gain to Taphouse.

C.7.4 The 'Cash Flow Boost'

242 The next form of government assistance received by Taphouse is what was known as the 'cash flow boost', administered by the Australian Taxation Office.

243 The 'cash flow boost' of between $20,000 to $100,000 was payable to eligible businesses and not-for-profit (**NFP**) organisations who employed staff. The 'boosts' were delivered as credits in the business' activity statement system and were generally equivalent to the amount withheld from wages paid to employees for each monthly or quarterly period from March to June 2020. In practice, this meant that the business kept the amounts they had withheld from payments (e.g. for PAYG tax) for these periods.[51]

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[51] Explanatory Memorandum, Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Bill 2020 (Cth), 56; *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020* (Cth) ss 5, 6.

244 Businesses (including sole traders, companies, partnerships or trusts) and NFP organisations were eligible to receive the cash flow boost if:

(a) they were a small or medium business entity or NFP of equivalent size (that is, an entity with aggregated annual turnover less than $50 million);

(b) they held an Australian business number (ABN) on 12 March 2020;

(c) they either:

(i) made payments to employees subject to withholding (even if the amount they were required to withhold was zero); or

(ii) were required to pay an amount in relation to alienated personal services income they received (even if the amount they were required to pay was zero); and

(d) on or before 12 March 2020, they lodged at least one of:

(i) a 2019 tax return showing that they had an amount included in their assessable income in relation to them carrying on a business; or

(ii) an activity statement or GST return for any tax period that started after 1 July 2018 and ended before 12 March 2020 showing that they made a taxable, GST-free or input-taxed sale.[52]

245 These temporary 'cash flow boosts' were designed to support small to medium businesses and NFP organisations during the economic downturn associated with COVID-19. Specifically, these cash flow boosts were intended to help employers retain employees, manage cashflow challenges, improve business confidence and support the activities of not-for-profits at a time when they may have faced increased demand for services.[53]

246 As with the 'JobKeeper' payment, the 'cash flow boost' was plainly intended to be a replacement for cashflow lost during the pandemic. It was additional revenue to help

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[52] Explanatory Memorandum, Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Bill 2020 (Cth), 54-5; *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020* (Cth) ss 5, 6.

[53] Explanatory Memorandum, Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Bill 2020 (Cth), 52; *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020* (Cth) ss 5, 6.

employers maintain staff and continue their business activities. This, again, is the form of loss that is at the core of business interruption insurance. There is also no indication that the Commonwealth (acting through the Australian Taxation Office) intended that the insured should retain the payments to the exclusion of the insurer. These payments should accordingly be taken into account in the assessment of loss.

C.7.5 Queensland COVID-19 grant

247 The Queensland 'COVID-19' grant program was established over two separate rounds, the first round running from 19 May 2020, and the second round running from 1 July 2020, each remaining open until the funding allocation has been exhausted. The available grant amount was a minimum of $2,000 and up to a maximum of $10,000 per eligible small or micro business.[54]

248 The purpose of the grant was expressed to be as follows:

> The Small Business Adaption Grant forms part of the Queensland Government's Worker Assistance Package, which aims to assist employees and businesses who have lost their jobs or incomes as a result of the COVID-19 pandemic.
>
> The grant program aims to support Queensland small businesses that fall below the payroll tax threshold of $1.3 million annually, and who have been forced into hibernation, or have experienced a significant structural adjustment or forced re-pivoting of their business operations due to the pandemic.[55]

249 The grants were treated as assessable income for tax purposes, unless exempted by law.[56]

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[54] Queensland Department of Employment, Small Business and Training, 'Small Business Adaption Grant: Guidelines': https://www.publications.qld.gov.au/dataset/b1c28e09-4d0d-472d-9ccd-6e41f42dc9b7/resource/502fb87a-d4b3-4c80-b492-e316af72a65b/download/small-business-adaption-grant-guidelines.pdf [accessed 11 August 2021].

[55] Queensland Department of Employment, Small Business and Training, 'Small Business Adaption Grant: Frequently Asked Questions': https://www.publications.qld.gov.au/dataset/small-business-adaption-grant/resource/f6c85784-84e7-4342-b2a6-ee33644915ab?truncate=30&inner_span=True [accessed 11 August 2021].

[56] Queensland Department of Employment, Small Business and Training, 'Small Business Adaption Grant: Frequently Asked Questions': https://www.publications.qld.gov.au/dataset/small-business-adaption-grant/resource/f6c85784-84e7-4342-b2a6-ee33644915ab?truncate=30&inner_span=True [accessed 11 August 2021].

250 These grants are analogous to the 'JobKeeper' and 'Cash Flow Boost' payments identified above. They are compensation payments (see reference to 'employees ***and businesses who have lost*** their jobs ***or incomes***' in the quote above) that form part of the taxable revenue the business. They must accordingly be accounted for in calculating the loss suffered for the purposes of the policy.

C.7.6 Rental abatement

251 Finally, Taphouse acknowledges that it received rental abatements or waivers during the period for which it is claiming indemnity. As at the date of these submissions, the terms of those rental abatement or waiver arrangements have not been disclosed. It is therefore not possible to comment upon the intention of the landlord in providing them.

252 It can be inferred, however, that the intention was to provide relief from rental costs during at least part of the period that Taphouse's business was affected by the relevant government orders. That being the case, a rental abatement is really nothing more than a positive trend in business expenses experienced during the policy period that needs to be adjusted for in calculating the 'standard turnover'. The basis for this calculation is discussed further in the following section of these submissions.

C.7.7 Alternate basis to address third-party payments – the coverage clause

253 If the Court finds that the relevant third-party payments do not reduce Taphouse's loss by application of the above principles, then there is a further basis upon which the policy takes the receipt of these amounts into account.

254 As set out above, the primary insuring clause (p. 20) provides:

> If the business carried on by you is interrupted or interfered with as a result of insured damage occurring during the period of insurance, we will ***after taking account any sum saved during the indemnity period in respect of such charges and expenses of the business as may cease or be reduced in consequence of the interruption or interference***, indemnify you in respect of the loss arising from such interruption or interference in accordance with the Basis of settlement clause, where the schedule notes that cover has been selected. [emphasis added]

255 The indemnity therefore excludes 'any sum saved' in respect of 'charges and expenses' which cease or reduced in consequence of the interruption or interference.

256 The third-party payments identified above would each be captured by this exclusion. Sums saved on rent by reason of rental abatements or waivers provided by landlords in

response to the COVID-19 pandemic are plainly 'charges and expenses of the business' that have ceased or reduced in consequence of the interruption or interference. The other government payments are of the same nature. They each seek to reduce the expenses of the business (particularly salary expenses) by means of government subsidies to counter-act the impact of any interruption or interference caused by the pandemic.

C.8 Conclusion on Taphouse test case

257 The Taphouse claim under each extension must fail for the reasons outlined above.

258 The Court should accordingly make the declarations sought in paragraphs 1 and 2 of IAG's Originating Application and not make the declarations sought in paragraphs 16(a) and (b) of Taphouse's Concise Statement in Response.

259 To the extent the Court finds that either extension responds, then the further declarations in paragraph 3 of IAG's Originating Application should be made so as to confirm the extent of any indemnity and the adjustments that may be made. IAG may wish to be heard further on the form of relief in that circumstance.

D MERIDIAN TEST CASE

D.1 Meridian's claim

D.1.1 Meridian's business

260 Meridian is a travel agency business located at 159 Burgundy Street, Heidelberg, Victoria 3084.

261 It contends in these proceedings that it operates a travel agency business with expertise in cruises, solo travel, exclusive group tours and special interest tours for music groups and dance troupes: Outline Document, [5]. As at the date of these submissions, Taphouse has not led any evidence to prove these matters including the proportion of business that relates to overseas cruise packages and the extent to which it transacted business online prior to the COVID-19 pandemic. These matters are both material to its claim, for the reasons explained below.

D.1.2 Relevant Commonwealth and Victorian responses to COVID-19

262 Meridian's claim relies upon a series of Commonwealth and Victorian State health orders. It is convenient to group these orders into the 'travel restrictions' and the 'lockdown' orders.

(a) Commonwealth and State travel restrictions

263 On 1 February 2020, the Commonwealth imposed travel restrictions on foreign nationals from mainland China entering Australia. These restrictions were extended to Iran from 1 March 2020, Korea from 5 March 2020 and Italy from 11 March 2020.[57]

264 On 16 March 2020, the Victorian Minister for Health acting under section 198(1) of the *Public Health and Wellbeing Act 2008* (Vic) declared a state of emergency throughout the State of Victoria arising out of the serious risk to public health posed by 'Novel Coronavirus 2019 (2019-nCOV)'. The declaration was said to be made on the advice of the Chief Health Officer and after consultation with the Emergency Management Commissioner.

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[57] Travel restrictions on foreign nationals from mainland China entering Australia; Extended travel restrictions on foreign nationals from mainland China entering Australia; Further extension on travel restrictions on foreign nationals from mainland China entering Australia; Travel restrictions on foreign nationals from Iran entering Australia; Travel restrictions on foreign nationals from the Republic of Korea entering Australia; Travel restrictions on foreign nationals from Italy entering Australia: see SOAF, Annexure A, Items 1 to 6.

265 On the same date, the Commonwealth issued 'a universal precautionary self-isolation requirement on all international arrivals' which, effective from 11:59 pm on 15 March 2020, required all international arrivals to undergo 14-days mandatory quarantine.[58] In the same announcement, the Commonwealth declared that it had also banned cruise ships from foreign ports (including round trip international cruises originating in Australia) from arriving at Australian ports for an initial 30 days, effective as at 11:59pm Sunday 15 March 2020' (the **Cruise Ship Ban**). The stated aim of this policy was to:

> …help avoid the risk of a cruise ship arriving with a mass outbreak of the virus and putting significant pressure on our health system.

266 The Cruise Ship Ban was formalised on 18 March 2020 by a series of determinations by the Commonwealth Health Minister under the *Biosecurity Act 2015* (Cth), which had the effect that no cruise ship could enter port in Australia unless it had permission from the Comptroller-General of Customs.[59] These restrictions remain in place to this day.[60]

267 On 18 March 2020, the Victorian Deputy Chief Health Officer (Communicable Disease) issued a series of directions under ss 200(1)(b) and (d) of the *Public Health and Wellbeing Act 2008* (Vic), implementing the 14-day quarantine requirement announced by the Commonwealth on 15 March 2020.

268 On 25 March 2020, the Commonwealth Health Minister issued the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (Cth) (the **Travel Ban**). The explanation given by the Prime Minister for this measure was as follows:

> Leaders noted that the Commonwealth Government will implement a 'do not travel' ban on Australians travelling overseas under the *Biosecurity Act 2015*.

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[58] Citizens, residents and visitors required to self-isolate for 14 days upon arrival in Australia (16 March 2020): SOAF, Annexure A, Item 9.

[59] Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Determination 2020; Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Amendment Determination (No. 1) 2020; Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements) Amendment Determination (No. 2) 2020; Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Determination 2020; Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Emergency Requirements for Cruise Ships) Amendment (No. 1) Determination 2020.

[60] Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) Variation (Extension No. 2) Instrument 2021.

> This will help avoid travellers returning to Australia with coronavirus and the risks of spreading coronavirus to other countries.
>
> Exemptions, which will be managed by the Australian Border Force, will apply to a range of categories of travellers, including for those citizens ordinarily resident overseas, where travel is essential or necessary, where travel is in our national interest, and on compassionate and humanitarian grounds.
>
> This prohibition is aligned with the Government's decision to raise the Smartraveller Travel Advice to Level 4 - Do Not Travel overseas.[61]

269 The Travel Ban is the first government order relied upon by Meridian in its claim. It had the effect of, inter alia, preventing Australian citizens and permanent residents leaving Australia. It remains in force to this day.

(b) Victorian 'lockdown' measures

270 The next set of government measures relied upon by Meridian is the series of *Stay at Home Directions* issued by the Victorian State Government from 30 March 2020. These may be summarised as follows:

(a) the **First Victorian Lockdown** from 30 March 2020[62] to 24 May 2020;[63]

(b) the **Second Victorian Lockdown** from 8 July 2020[64] to 27 October 2020,[65] which initially covered an area of Greater Melbourne (including Meridian's premises) and was then extended to the State of Victoria; and

(c) the **Third Victorian Lockdown** from 12 February 2021[66] to 17 February 2021,[67]

(together, the **Lockdown Orders**).

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[61] Prime Minister Media Statement, 'Update on Coronavirus Measures' (24 March 2020): SOAF, Annexure A, Item 17.

[62] Stay at Home Direction (30 March 2020).

[63] Stay at Home Directions (No 7) (24 May 2020), ending the First Victorian Lockdown at 11:59 pm on 31 May 2020.

[64] Stay at Home Directions (Restricted Areas) (7 July 2020) and the Area Directions (No 3) (8 July 2020).

[65] Stay Safe Directions (Melbourne) (27 October 2020), ending the Second Victorian Lockdown.

[66] Stay Safe Direction (Victoria) (No 14) (12 February 2021).

[67] Stay Safe Direction (Victoria) (No 15) (17 February 2021).

271 The purpose of the Lockdown Orders was, in each case, expressed to be 'to address the serious public health risk posed to Victoria by Novel Coronavirus 2019 (2019-nCoV)' by requiring everyone in Victoria to limit their interaction with others. During each period the Lockdown Orders were in force, Victorians were required not to leave the premises at which they ordinarily reside, other than for specified reasons, and gatherings were restricted. Attending a travel agency to book a holiday was not an exception to the stay-at-home order.

272 The Lockdown Orders were generally accompanied by *Restricted Activity Directions* which had the effect of restricting the operation of certain businesses.[68] These directions are not relied upon by Meridian. Meridian instead relies upon the effect of the Lockdown Orders on its employees and customers.

273 In its Concise Statement in Response and Outline Document, Meridian refers to the Travel Ban and the Lockdown Orders as the **Authority Response – Meridian.**

D.1.3 Meridian's insurance claim

274 On 15 July 2020, Meridian made a claim under its 'Office Pack Insurance Policy' (Policy Number 15T4227893) (the **Meridian policy**).

275 Meridian's stated basis for the original claim was a significant loss of revenue by reason of the travel restrictions, which (it said) required it to cancel all of its business and refund costs back to clients.[69] This claim has now expanded to include the Lockdown Orders as identified above.

276 In its Outline Document, Meridian has contended that the basis for its loss claim is that since 25 March 2020 its customers have been unable to leave Australia without first obtaining an exemption from the Travel Ban. It also claims losses for cancelled bookings and refunds, as well as the impact on its business of its employees and customers being under lockdown: Outline Document, [23]-[29]. None of these contentions is supported by evidence as at the date of these submissions.

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[68] See, e.g., Restricted Activity Direction (30 March 2020).

[69] See CGU Claim File Note extract (page 23) referring to telephone call from CGU (Ms Sara Chamathri, Business Claims Consultant) to insured on 5 August 2020.

277 On 11 August 2020, IAG declined the claim.[70] That declinature was affirmed on 28 August 2020.[71] IAG maintains that the policy does not respond for the reasons outlined below.

D.2 The Meridian policy

D.2.1 Policy documentation

278 The Meridian policy is made up of two documents:

(a) a policy schedule (titled 'Renewal Schedule') issued on 17 February 2020;

(b) a 62-page 'Office Pack Insurance Policy' booklet (CID0361 REV1 06/17).

279 The policy was renewed for the period from 22 February 2020 to 22 February 2021 by Meridian's broker, Gow-Gates Insurance Brokers Pty Ltd (a member of the Steadfast group of brokers). The policy schedule identifies that the cover taken out was 'Steadfast Office Insurance Package' and that Meridian had, relevantly, included 'Section 2 – Business Interruption' as part of its cover (with coverage based on annual revenue and additional increased cost of working).

280 The booklet contains the relevant policy wording (referred to as the 'Steadfast Office Insurance Package' and the 'IAG Office Insurance wording' in the policy schedule). The schedule made one relevant amendment to this wording, inserting a new 'Murder, Suicide and Disease' additional benefit. The policy wording reproduced below reflects that amendment.[72]

D.2.2 Policy wording

281 The Meridian policy is structured similarly to the Taphouse policy.

282 It includes a number of sections commencing with a general 'Property' Section. This cover is then extended by Section 2 ('Business Interruption') to cover business interruption in certain circumstances.

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[70] Letter from IAG dated 11 August 2020: Meridian Outline Documents, Tab 39.

[71] Letter from IAG dated 28 August 2020: Meridian Outline Documents, Tab 41.

[72] The policy schedule (p. 5) states that "Under Section 2 – Business Interruption, Additional Benefit 8 is deleted and replaced'. It is not in dispute that this replacement provision intended to refer to 'Additional Benefit 2' and should be read as such.

283 The main insuring clause is found on p. 21 of the policy booklet under the heading ‘Cover’. It provides:

> If the Business carried on by You is interrupted or interfered with as a result of Damage occurring during the Period of Insurance, to:
>
> [Identified ‘Property Insured’ and ‘property at the Situation’]
>
> We will, after taking account any sum saved during the Indemnity Period in respect of such charges and expenses of the Business as may cease or be reduced in consequence of the interruption or interference, indemnify You in respect of the loss arising from such interruption or interference in accordance with the settlement of claims clause to the sum insured expressed against the relevant item on the Schedule, where the Schedule notes that cover has been selected.

284 The capitalised terms are defined and, as with the Taphouse policy, the primary coverage is confined to business interruption losses arising from physical damage to property.

285 That coverage is then extended by a number of ‘Additional Benefits’ listed at pp. 23-25 of the policy booklet. That clause (as amended by the endorsements) relevantly provides that:

> This section is extended to include the following additional benefits.
>
> Unless expressly stated in the additional benefit, additional benefits 1 to 13 inclusive are payable provided that the sum insured expressed against the relevant item in the Schedule is not otherwise exhausted.
>
> For additional benefits 1 to 9 inclusive We will pay You (depending on the part of this section which is applicable to You) for:
>
> a) ‘Item 1 Gross profit’, or
>
> b) ‘Item 2 Payroll’, or
>
> c) ‘Item 6 Gross rentals’, or
>
> d) ‘Item 7 Weekly income’, or
>
> e) ‘Item 8 Gross revenue’
>
> resulting from interruption of or interference with Your Business as a result of Damage occurring during the Period of Insurance to, or as a direct result of:
>
> …

2. Murder, suicide or disease

The occurrence of any of the circumstances set out in this additional benefit which shall be deemed to be Damage to Property used by You in the Situation.

…

(c) The outbreak of a human infectious or contagious disease occurring within a 20-kilometre radius of the Situation.

(d) Closure or evacuation of Your Business by order of a government, public or statutory authority consequent upon:

(1) the discovery of an organism likely to result in a human infectious or contagious disease at the Situation;

…

286 As can be seen from the extracts reproduced above, the extensions are drafted somewhat differently to the extensions in the Taphouse policy. Rather than providing separate coverage, the clause deems interruptions resulting for certain specified events to be 'Damage to Property' for the purposes of the primary insuring clause. The effect, however, is the same as the wording of the Taphouse policy.

287 The extension referred to in Item 2(c) above is referred to in these submission as the **disease** extension. In summary, it responds to losses that result from business interruption caused by an ***outbreak*** of an infectious disease occurring within a ***20-kilometre*** radius. This is what is sometimes known as a 'pure' disease clause because it does not require the intervention of a government authority as a pre-condition to cover.

288 The extension referred to in Item 2(d)(1) is referred to in these submission as the **hybrid** extension. In summary, it responds to losses that result from business interruption caused by a government, public or statutory authority ***closing or evacuating*** Meridian's premises as a result of the ***discovery of an organism*** likely to result in a human infectious or contagious disease ***at the premises***.

289 The amendments introduced by the policy schedule also introduced an exclusion for diseases declared under the *Quarantine Act 1908* (Cth). The exclusion reads:

> Cover under Additional Benefits 8(c) and 8(d)(1) does not apply in respect of Highly Pathogenic Avian Influenza in Humans or any other diseases declared to be quarantinable diseases under the *Quarantine Act 1908* and subsequent amendments.

290 The reference to 'Additional Benefit 8(c) and 8(d)(i)' must be read as a reference to Items 2(c) and 2(d)(1). There is a patent numbering error in the schedule, where the 'Murder, Suicide and Disease' clause is referred to a 'Additional Benefit 8' rather than 'Additional Benefit 2'.

291 In the Meridian test case, IAG relies upon the exclusion clause (which applies to both extensions) on the basis that the reference to the *Quarantine Act* is to be read as a reference to the *Biosecurity Act* by reason of s 61A of the *Properly Law Act 1958* (Vic). This is addressed further below.

D.3 Issues for determination

292 The issues for determination in the Meridian test case are addressed at paragraphs [9]-[11] of the List of Issues. For convenience, as with the Taphouse submissions above, the submissions that follow have been grouped into categories of issues that apply across all or some of the test cases.

293 For the ***disease*** extension (addressed in Section D.4 below), the only coverage issue is whether an occurrence of an outbreak of COVID-19 occurred within a 20-kilometre radius of Meridian's premises? If so, when? (the **Outbreak Issue**).

294 For the ***hybrid*** extension (addressed in Section D.5 below), the coverage issues are as follows:

(a) Was Meridian's Business closed or evacuated by order of a government, public or statutory authority? (the **Closure or Evacuation Issue**)

(b) If yes to (a), were those orders consequent upon the discovery of an organism likely to result in a human infection or contagious disease at Meridian's premises? (the **At The Premises Issue**)

295 For each extension (addressed in Section D.6 below), the following further causation and adjustment issues (the **Causation Issues**) arise:

(a) Was the insured peril the cause of the interruption or interference claimed by Meridian?

(b) Should any adjustment be made to Meridian's business interruption loss by reference to uninsured events relating to the COVID-19 pandemic?

(c) On what dates did the indemnity period/s start and end?

296 For each extension (addressed in Section D.7 below), an issue of principle arises in relation to whether 'JobKeeper' payments and other government subsidies or rental

abatements are to be taken into account in the assessment of loss (the **Quantum Issues**).

297 Finally, for each extension (addressed in Section D.8 below), the question arises as to whether IAG can rely upon the *Quarantine Act* exclusion, by reason of the operation of s 61A of the *Property Law Act 1958* (Vic) (the **Property Law Act Issue**).

D.4 The Disease Extension

D.4.1 The insured peril

298 The peril covered by the disease extension is '[t]he outbreak of a human infectious or contagious disease occurring within a 20-kilometre radius of the Situation.' The 'Situation' as defined is Meridian's business premises.

299 Unlike the extensions discussed in the Taphouse case, it is accurate to describe the disease extension as providing coverage for the effect of disease outbreak. The outbreak must, however, occur within a 20-kilometre radius. The cover is not at large, responding to the consequences of any outbreak of disease anywhere in Australia or the world. This is particularly important for Meridian's claim insofar as it relies on the Travel Ban.

D.4.2 The Outbreak Issue

(a) Meaning of 'outbreak'

300 IAG repeats the submissions made at paragraphs [166]-[171] concerning the meaning of 'outbreak' when used in an insurance policy of this nature.

301 For the reasons there set out, an 'outbreak' of COVID-19 does not 'occur' within the 20-kilometre radius unless two minimum criteria are met:

(a) the identification of multiple active cases of COVID-19 within the defined radius occurring at or around the same time; and

(b) evidence that those cases have a common cause, being the uncontrolled transmission of the virus from one person to another within the defined radius.

302 Isolated and unconnected instances of virus will be insufficient, as they do not have the necessary unity of time, locality and cause: *FCA v Arch* at [69].

(b) Was there an 'outbreak' in Melbourne?

303 For the purpose of this test case proceeding, IAG accepts that there was an outbreak of COVID-19 within 20-kilometres of Meridian's premises in 2020. The real question is

when, and whether this was the proximate cause of Meridian's loss. The causation issue is addressed in Section D.6 below.

304 The relevant facts concerning the occurrence of COVID-19 in the Melbourne area are addressed at SOAF, [60]-[63]. The diagram at [60] demonstrates that a radius of 20-kilometres from Meridian's premises captures the majority of metropolitan Melbourne. Based on the data set out at [63], in mid-March 2020, there were approximately 29 cases attributed to the local government areas wholly within the radius and 38 cases attributed to the postcodes wholly within the radius. Based on this data, these numbers then increase exponentially from around 23 March 2020. For the purpose of this test case proceeding, IAG accepts that there was an 'outbreak' within the radius by no later than 30 March 2020, being the date of the First Victorian Lockdown.

305 A more difficult question is when that 'outbreak' ended and whether there were any further 'outbreaks' within the policy period. The agreed data (which presents a cumulative total of current and historical cases, including cases that are no longer active) suggests that cases within the radius flat-lined by around September 2020 and did not increase materially at any point up until 30 April 2021. This indicates that by the time of the Third Victorian Lockdown (in February 2021), there was no 'outbreak' in the defined radius.

D.5 The Hybrid Extension

D.5.1 The insured peril

306 The insured peril under the Meridian hybrid extension is '[c]losure or evacuation of Your Business by order of a government, public or statutory authority consequent upon … the discovery of an organism likely to result in a human infectious or contagious disease at the Situation'.

307 This is similar to the hybrid extension in the Taphouse policy, and the comments at paragraph [158] apply equally. The cover is, however, even narrower than the Taphouse policy. Rather than specifying a radius in which the outbreak of disease must occur, as explained further below, it is limited to the discovery of an organism at the premises. IAG notes that it is an agreed fact that 'Severe acute respiratory syndrome coronavirus 2' (**SARS-CoV-2**), being the infective agent that causes COVID-19, is an 'organism': SOAF, [2].

D.5.2 Closure and Evacuation Issue

308 IAG repeats the submissions made at paragraphs [159]-[164] concerning the meaning of 'closure' and 'evacuation' when used in an insurance policy of this nature. There are,

however, some important textual differences between the wording of the Taphouse hybrid extension and the Meridian hybrid extension.

309 ***First***, unlike the Taphouse policy, the thing that must be 'closed' or 'evacuated' for the extension to be triggered is 'Your Business'. 'Your' is defined as the insured (p. 4) and 'Business' is defined as 'Your Business at the Situation and specified in the Schedule' (p. 21). The policy schedule identified 'The Business' as 'Travel Agency Services (Excluding Tour Operators)'. This policy therefore only responds to government orders requiring the closure or evacuation of the business itself, being the travel agency services provided by Meridian. It may be that the closure of evacuation of physical business premises constitutes a closure or evacuation of the business in certain circumstances, but only if the ***business*** is unable to continue at different premises.

310 ***Second***, the words 'closure' and 'evacuation' mean something more than a mere restriction of business. As was the case with the Taphouse policy, the deliberate choice of those words may be contrasted with the words used in the 'prevention of access' extension that immediately follows (p. 24), which extension refers to 'Damage to property within 50 kilometres of the Situation which prevents or hinders access to, or use of, the Property'.

311 Applying this understanding to the Authority Response – Meridian, it is evident that none of the orders relied upon by Meridian involved 'closure' or 'evacuation' of the business in the relevant sense. It is convenient to address the two sets of orders separately.

312 The ***Travel Ban*** did not require Meridian to close or evacuate its 'Business'. It certainly curtailed the services that Meridian could offer. However, Meridian was still free to offer travel packages that did not involve overseas travel. The evidence is that this is precisely what it did. By way of example:

(a) on 16 May 2020, Meridian promoted a virtual information session via Facebook which focused on Australian Coach Touring and invited participants to: '*Explore 4-22 day tours within Australia & over the ditch in beautiful New Zealand*';

(b) on 1 September 2020, Meridian promoted a flight over Antarctica on the Qantas 787 Dreamliner via Facebook and directed customers to contact Meridian for more information; and

(c) on 23 October 2020, Meridian promoted Chimu Adventure charter flights via Facebook noting: '*These flights do not cross state or international borders so no quarantine required!*'[73]

313 The ***Lockdown Orders*** did not require Meridian to close or evacuate its 'Business' either. The Lockdown Orders were not directed at Meridian or its business. They were directed at individual Victorians. As was the case with the Home Confinement Order discussed in the Taphouse test case, they curtailed the freedom of movement of those individuals – not the business operations of Meridian.

314 Further, Meridian continued to provide services online. The extent of these services is not apparent, as Meridian has not served any evidence. It appears, however, that during each of the 'lockdown' periods Meridian closed its business premises but maintained its 'Business' online. This again indicates that there was no 'closure' or 'evacuation' for the purposes of the policy.

D.5.3 At The Premises Issue

315 The next issue that arises on the Meridian case is the proper construction of the phrase 'consequent upon the discovery of an organism likely to result in a human infectious or contagious disease at the Situation'. As is evident from the disputed List of Issues at [10(a)]-[10(f)], two competing constructions are put forward by the parties.

316 IAG submits that the proper construction of the phrase is that the thing that must be discovered 'at the Situation' is 'an organism likely to result in a human infectious or contagious disease'. That is, the organism itself must be discovered at Meridian's premises. As it is not in dispute that there was no discovery of COVID-19 or SARS-CoV-2 at Meridian's premises, the claim must fail.

317 Meridian, on the other hand, seeks to side-step this issue by construing the clause so that the phrases 'discovery of an organism' and 'likely to result in a human infectious or contagious disease at the Situation' are read disjunctively. On this reading, the clause is triggered regardless of where COVID-19 or SARS-CoV-2 is discovered, so long as the organism discovered is 'likely to result in a human infectious or contagious disease at the Situation'.

318 There are four major difficulties with Meridian's proposed construction.

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[73] Screenshots of these facebook posts will be tendered at the hearing.

319 ***First***, a construction that requires discovery 'at the Situation' is consistent with the singular reference to discovery of '***an*** organism'. This wording suggests that the clause is directed at the discovery of a particular thing at a particular location, and not government responses to general outbreaks of virus.

320 ***Second***, this conclusion is reinforced by the inclusion of the separate disease extension in the policy. If the hybrid extension responds to any government response to the discovery of disease anywhere in the world, then it is difficult to see why the parties agreed to a narrower disease extension that only responds to disease outbreaks within 20-kilometres of the premises. For the reasons addressed at paragraphs [128]-[130], the Court would not prefer a construction that has the effect of rendering a specific clause dealing with the same subject matter largely otiose.

321 ***Third***, Meridian's expansive reading is inconsistent with the balance of the additional benefit extensions in Item 2(d). That extension provides cover for government responses to a specific list of events occurring at or closely connected to the business premises, namely:

> Closure or evacuation of Your Business by order of a government, public or statutory authority consequent upon:
>
> (1) the discovery of an organism likely to result in a human infectious or contagious disease at the Situation; or
>
> (2) vermin or pests at the Situation; or
>
> (3) defects in the drains or other sanitary arrangements at the Situation.

322 Plainly, sub-paragraphs (2) and (3) are confined to the occurrence of specified events at the 'Situation'. It would be incongruent to read sub-paragraph (1) as providing for a broader cover for a closure or evacuation order arising from events that did not occur 'at the Situation', and the Court would not adopt this construction.

323 ***Fourth***, Meridian has raised an issue as to what the word 'discovery' means: List of Issues, [10(f)]. If IAG's construction is adopted then this does not arise. 'Discovery' must mean identification of an organism at the business premises, and there is no dispute that no COVID-19 or SARS-CoV-2 organism was found at Meridian's premises. If, however, Meridian's broad construction is adopted, then the Court is faced with a real difficulty as to what 'discovery' means in this context. Must this involve the first identification of the organism in Victoria, Australia or the world? The difficulty in giving meaning to the word

'discovery' in this context is another reason why the Meridian construction ought to be rejected.

D.6 Causation and adjustments

D.6.1 Approach to causation

324 IAG repeats the submissions at paragraphs [179]-[182] regarding the proper approach to questions of causation.

325 The elements of the disease and hybrid extensions in the Meridian test case are somewhat different. The elements of the disease clause in their correct causal sequence are: (A) an outbreak of disease within the defined radius, which causes (B) an interruption or interference with the insured's business that is the direct cause of financial loss. This can be expressed diagrammatically as follows:

$$A \rightarrow B$$

326 The elements of the hybrid extension when set out in their correct causal sequence are as follows: (A) the discovery of an organism at the premises, which causes (B) an order of a government, public or statutory authority, which causes (C) the closure or evacuation of the business, which causes (D) an interruption or interference with the insured's business that is the direct cause of financial loss. This can be expressed diagrammatically as follows:

$$A \rightarrow B \rightarrow C \rightarrow D$$

327 As explained above, the correct approach to each of these causation questions (i.e. the arrows in the diagram) is to look for the 'proximate' cause of the specific event or result. When the Court comes to the final causal link (A → B for the disease extension and C → D for the hybrid extension) a further question arises as to whether adjustments need to be made to ensure the claim represents the true loss suffered by the insured by reason of the insured peril. This is addressed below.

D.6.2 Cause of relevant government orders (A → B)

328 This is only relevant to the hybrid extension.

329 To establish cover, Meridian must prove that the orders constituting the Authority Response – Meridian were the result of the discovery of an organism at the premises. For the reasons identified above (at paragraphs [315]-[323]) this causal chain must fail in relation to both the Travel Ban and the Lockdown Orders. The Travel Ban was not responsive to any occurrence of disease in Australia; it was aimed at preventing the

spread of the disease from persons overseas. The Lockdown Orders were also not in response to any specific discovery of COVID-19, let alone a discovery at Meridian's premises.

D.6.3 Effect of relevant government orders (B → C)

330 This is only relevant to the hybrid extension. It has been addressed above, at paragraphs [308]-[314] ('closure or evacuation').

D.6.4 Causation of loss (A → B; C → D) and the Adjustment Issue

(a) No proof loss caused by insured events

331 To establish indemnity, Meridian must show that the insured peril under either or both of the extensions was the proximate cause of its business interruption. It has not done so.

332 Considering the nature of Meridian's business, it may readily be inferred that most if not all of its business losses during the indemnity period were caused by the Cruise Ship Ban (which is not relied upon by Meridian as a relevant event) or the Travel Ban. This is a case where the sole and proximate cause of Meridian's loss was those events, not an insured peril. As already noted, at [244] of *FCA v Arch,* Lord Hamblen and Lord Legatt gave the example of:

> …a travel agency which lost almost all its business because of the travel restrictions imposed as a result of the pandemic. Although customer access to its premises might have become impossible, if it was found that the sole proximate cause of the loss of its walk-in customer business was the travel restrictions and not the inability of customers to enter the agency, then the loss would not be covered.

333 Those comments are directly applicable to the present case.

334 To the extent Meridian claims that the Lockdown Orders were a concurrent proximate cause of its loss, then it bears the onus of showing what part (if any) of its loss is attributable to those orders as opposed to the Travel Ban or Cruise Ship Ban: see *PMB Australia Ltd v MMI Insurance Ltd* [2002] QCA 361 at [17] and [19]-[23] (de Jersey CJ; Jerrard JA and White J agreeing). IAG is not required to accept that the Lockdown Orders were an equally effective cause of loss without proof.

(b) Calculation of 'Additional Revenue' and adjustments

335 Meridian's business interruption policy was taken out on an 'Annual Revenue Basis'.[74]

336 This appears to be a reference to the 'Gross revenue' basis of settlement (policy booklet, p. 23). That clause provides:

> The amount payable as indemnity under this item will be:
>
> a) in respect of loss of Revenue, the amount by which the Revenue earned during the Indemnity Period falls short of the Standard Revenue in consequence of the Damage; and
>
> b) in respect of increase in cost of working, the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the loss of Revenue which, but for the additional expenditure, would have taken place during the Indemnity Period in consequence of the Damage. However, Our payment will not exceed the amount of reduction in Revenue thereby avoided, less any sum saved during the Indemnity Period in respect of such charges and expenses of Your Business payable out of Revenue as may cease or be reduced in consequence of the Damage.

337 Although focused on 'Revenue' rather than 'Gross Profit' the calculation is roughly the same as that required under the Taphouse policy, summarised at paragraph [199]-[206] above. It requires the determination of the amount by which the 'Revenue' of the business earned during the indemnity period falls short of the 'Standard Revenue' '***in consequence of the Damage***'. 'Indemnity Period' (p. 21) is also defined consistently with the Taphouse policy as commencing on the 'occurrence of the Damage' and ending when the results of the business are no longer affected as 'as a consequence of the Damage', with that period being no longer than 12 months.[75]

338 As is the case in the Taphouse policy, the definition of the terms 'Revenue' and 'Standard Revenue' does not refer expressly to the defined term 'Adjustments' (p. 21). However, adjustments for trends, variations and other circumstances are necessary to give effect to the purpose of the indemnity under the policy, which is to compensate for lost revenue

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[74] Meridian policy schedule, p. 4.

[75] Meridian policy schedule, p. 4, identifies the indemnity period as '12 months'.

only ‘in consequence of the Damage’. The submissions at paragraphs [206]-[210] are repeated in this respect.

(c) Adjustments

339 To the extent Meridian has suffered any loss by reason of an insured peril, that loss must be adjusted to account for the impacts of uninsured events. This includes, importantly, the impact of the Cruise Ship Ban, the Travel Ban and any other restrictions to travel which were imposed. To the extent the Court follows the *FCA v Arch* approach to adjustments, it cannot be said that those events arise from the ‘same underlying or original cause’ as any loss suffered by reason of the Lockdown Orders. Those orders (if covered) must have been caused by an outbreak of a disease in the radius or discovery of an organism at the premises. Those are events far removed from the imposition of travel restrictions, as recognised in the quote from *FCA v Arch* in paragraph [332].

D.6.5 Indemnity period

340 The final causation question concerns the indemnity period. As explained above (paragraph [337]), that period commences upon the occurrence of the ‘Damage’ (which must mean the insured peril) and ends when the results of Meridian’s business cease to be affected as a consequence of the damage, such period not exceeding 12 months.

341 It is impossible to resolve this question without further evidence of Meridian’s losses. IAG may wish to make further submissions on this issue should Meridian lead further evidence of its losses.

D.7 Quantum Issues

D.7.1 Third party payments

342 Finally, Meridian acknowledges that it has received the following third-party payments as a result of the COVID-19 pandemic:

(a) ‘JobKeeper’;

(b) rental waiver/abatements;

(c) the Federal ‘COVID-19 Consumer Travel Support Program’; and

(d) the ATAC Grant.

343 The first two issues are addressed above and the submissions made at paragraphs [224]-[252**Error! Reference source not found.**] are repeated. The following further submissions are made specifically in respect of Meridian’s other receipts.

D.7.2 Rental waiver/abatement

344 In addition to the submissions made above in respect of the Taphouse test case, the reduced cost of working arising from rental waivers or abatements is also accounted for under the Meridian policy through the calculation of 'Gross revenue'. As set out above, that calculation is expressly to be adjusted for 'any sum saved during the Indemnity Period in respect of such charges and expenses of Your Business payable out of Revenue as may cease or be reduced in consequence of the Damage' (p. 23). If 'Damage' is read to mean 'insured peril' (as it must be) then rental abatements in response to COVID-19 issues would need to be removed from the calculation of 'Gross Revenue'.

D.7.3 COVID-19 Consumer Travel Support Program

345 The COVID-19 Consumer Travel Support Program provided travel agents and tour arrangement service providers with funding to help them remain viable. The grant was intended to provide funding for expenditure that assisted them to continue to trade and process refunds and credits to Australian consumers for travel they were unable to undertake due to the impacts of COVID-19.[76] There have been two rounds of this program, with the first launched on 14 December 2020 and closed on 13 March 2021, and the second launched on 2 May 2021 and closed on 12 June 2021. Each round of the program involved a one-off grant of between $1,500 and $100,000 in the first round, and a subsequent grant of between $7,500 and $100,000 in the second round.[77]

346 To be eligible, a travel agent or tour operator had to meet a number of requirements including having an annual turnover starting from $50,000 up to a maximum of $20 million, and having received a 'JobKeeper' payment.[78] Applicants were also required to declare that they would make best endeavours to retain staff and meet their obligations to process refunds and travel credits to Australian consumers.[79]

347 As with the Taphouse payments described above, this grant program is plainly intended to compensate tour operators for losses suffered. This is most evident from the

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[76] COVID-19 Consumer Travel Support Program: https://business.gov.au/grants-and-programs/COVID19-Consumer-Travel-Support-Program.

[77] COVID-19 Consumer Travel Support Program: https://www.austrade.gov.au/australian/tourism/tourism-and-business/grants/covid-19-consumer-travel-support-program.

[78] COVID-19 Consumer Travel Support Program Guidelines, 4 January 2021.

[79] COVID-19 Consumer Travel Support Program Fact Sheet, 31 May 2021.

requirement to be receiving JobKeeper (which is, in effect, a requirement to prove loss of revenue before being eligible for the grant) and the express declaration that staffing costs and refunds to consumers will be met. These were therefore not *ex gratia* gifts but recompense for the loss that was covered by the insurance policy. The grants should be taken into account in the loss calculation.

D.7.4 ATAC Grant

348 Meridian says it also received something known as the 'ATAC Grant'. IAG is not aware of the nature of this grant and no evidence has been served by Meridian to explain what this grant constitutes. The money received should be accounted for in calculating Meridian's loss unless it proves that this was a 'gift' not referable to losses that it suffered.

D.7.5 Coverage clause

349 As was the case with the Taphouse policy, there is an alternate basis upon which the third-party payments outlined above may be excluded from the calculation of Meridian's loss.

350 The primary coverage clause in the Meridian policy (p. 21) excludes 'any sum saved during the Indemnity Period in respect of such charges and expenses of the Business as may cease or be reduced in consequence of the interruption or interference'. A similar carve-out is also included in the 'Gross revenue' basis of settlement (p, 23) for 'charges and expenses of Your Business payable out of Revenue as may cease or be reduced in consequence of the Damage'. For the reasons set out at paragraph [255]-[256] those exclusions have the effect of removing the benefit of third-party payments of the type addressed above from the calculation of Meridian's loss.

D.8 The Property Law Act Issue

351 As noted above, the Meridian policy includes an exclusion clause that provides that the disease and hybrid extension:

> …does not apply in respect of highly pathogenic avian influenza in humans or any other diseases declared to be quarantinable diseases under the *Quarantine Act 1908* and subsequent amendments.

352 The NSW Court of Appeal has held in *HDI v Wonkana* that the words 'and subsequent amendments' cannot be read as including the *Biosecurity Act 2015* (Cth). However, s 61A of the *Property Law Act 1958* (Vic) deems a reference to an Act or a provision of an Act that is repealed and re-enacted (with or without modification) to be a reference to the re-enacted Act or provision. IAG adopts QBE's submissions in the *QBE v EWT* test

case as to the application and operation of s 61A in the present circumstances. For the reasons set out in those submissions, 'quarantinable diseases under *the Quarantine Act 1908'* should be construed as though it said 'listed human disease under the *Biosecurity Act 2015'*. As COVID-19 was a listed human disease under the *Biosecurity Act 2015*, the relevant extensions do not respond.

353 The *Property Law Act 1958* (Vic) applies to the Meridian policy because the proper law of the contract is Victoria. The policy includes a jurisdiction and choice of law clause (p. 6) that provides:

> Any dispute arising from this Policy will be determined by Australian courts, and in accordance with the laws of the state or territory of Australia in which the Policy was issued.

354 The policy was issued in Victoria. The policy schedule states that the policy was issued on 17 February 2020 and refers to the insurer as Insurance Australia Ltd trading as CGU Insurance with a business address of 181 William Street, Melbourne, Victoria 3000.[80] Meridian's business address is also in Melbourne, Victoria, as identified above.

355 In addition, even ignoring the jurisdiction and choice of law clause, the proper law would be the law of Victoria because that is the jurisdiction with which the policy has its 'closest and most real connection' or 'natural seat and centre of gravity'.[81] Not only is Victoria the location of the business address of the insurer and the insured, but it is also the location of the insured risk, which is a 'powerful factor' in determining the proper law of an insurance contract.[82]

D.9 Conclusion on Meridian test case

356 The Meridian claim under each extension must fail for the reasons outlined above.

357 The Court should accordingly make the declarations sought in paragraphs 1 and 2 of IAG's Originating Application and not make the declarations sought in paragraphs 16(a) and (b) of Meridian's Concise Statement in Response.

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[80] Meridian policy schedule, p. 1.

[81] *Bonython v Commonwealth* (1950) 81 CLR 486 at 500; *Akai Pty Ltd v People's Insurance Co Ltd* (1996) 188 CLR 418 at 437; *Ryan Wealth Holdings Pty Ltd v Baumgartner* [2018] NSWSC 1502 at [887].

[82] *Carillion Construction Ltd v AIG Australia Ltd* (2016) 19 ANZ Insurance Cases 62-115; [2016] NSWSC 495 at [90].

358 To the extent the Court finds that either extension responds, then the further declarations in paragraph 3 of IAG's Originating Application should be made so as to confirm the extent of any indemnity and the adjustments that may be made. IAG may wish to be heard further on the form of relief in that circumstance.

E INSURANCE CONTRACTS ACT ISSUE

359 The final issue concerns the application of s 57 of the *Insurance Contracts Act 1984* (Cth).

360 That section is in the following terms:

> (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.
>
> (3) The rate at which interest is payable in respect of a day included in the period referred to in subsection (2) is the rate applicable in respect of that day that is prescribed by, or worked out in a manner prescribed by, the regulations.
>
> (4) This section applies to the exclusion of any other law that would otherwise apply.
>
> (5) In subsection (4):
>
> ***law*** means:
>
> (a) a statutory law of the Commonwealth, a State or a Territory; or
>
> (b) a rule of common law or equity.

361 The question for determination is, if the Court finds that either of the policies respond, from what date is IAG obliged to pay interest.

362 IAG accepts that the ordinary position is that interest under s 57 runs from the date that commences after a reasonable time has elapsed for completion of the insurer's investigation of the claim, and not the adjudication of that claim by a Court: *Australian Pipe & Tube Pty Ltd v QBE Insurance (Australia) Ltd (No 2)* [2018] FCA 1450 at [291] (Beach J); *Fitzgerald* v *CBL Insurance Ltd* [2014] VSC 493 at [415]-[420] (Sloss J).

363 However, the position outlined above is not an inflexible rule. In each case, the Court must apply the statutory words of s 57 and determine whether the insurer has acted unreasonably by withholding payment. In this case, there are two reasons why the Court would find that the date should run from the date of adjudication.

364 ***First***, the insureds have significantly changed the basis of the claim since it was first submitted, including to add new claims based on additional government orders and to provide further financial information to support the claims. In a number of respects, the claims now advanced bear only a passing resemblance to the original claims that were made. That being the case, IAG is not in a position to reasonably investigate these claims prior to the Court's adjudication. It therefore was not 'unreasonable for the insurer to have withheld payment' pending adjudication, for the purposes of s 57(2): see *Fitzgerald* v *CBL Insurance Ltd* [2014] VSC 493 at [436] (Sloss J).

365 ***Second***, the claims were submitted without the supporting information that IAG needs to reasonably investigate and make a decision on those claims. That information is still not forthcoming, even though it has been requested repeatedly by IAG in the course of this litigation. This is despite the policies expressly requiring the insured to provide IAG with such books of account and other business records as IAG may require for the purpose of investigating or verifying the claim (Taphouse policy, p. 8; Meridian policy, p. 8).

F CONCLUSION

366 Meridian and Taphouse's claims must be dismissed and the declarations sought by IAG granted.

367 The insurance policies Meridian and Taphouse claim under do not provide general pandemic cover and neither insured has demonstrated that the events relied upon constitute an insured peril under any of the insuring clauses or, to the extent they do constitute such perils, that they were the true proximate cause of the loss claimed. Further, even if the insuring clauses did respond, it is necessary to make a series of adjustments to the losses claimed by Meridian and Taphouse to account for the other uninsured impacts of COVID-19 and the receipt of third-party payments or benefits by reason of the pandemic.

18 August 2021

I Jackman
Eight Selborne

P Herzfeld
Eleven Wentworth

J Entwisle
Banco Chambers

Annexure A

Analysis of subpoena documents from Townsville Hospital and Health Service: confirmed COVID-19 cases before 24 March 2020

Case	NID	Date of case confirmed	Date of symptoms	Usual place of residence	Movement / locations visited	Exposure period[83]	Date of isolation	Place acquired	Other information recorded
1	3138537	12 March 2020	10 March 2020	Hermit Park, 4812 [Within 20km radius]	• France, London • Singapore to Brisbane: 12.03.2020	25 February to 10 March 2020	From 14 March 2020	Other country - France	• 'Isolated Wellington NZ' • Returned to Australia 12 March 2020 via Brisbane • Two household contacts 'monitoring' (daughter and wife) • Contact with two work colleagues on 12 March 2020 (dance teachers) • Attended GP clinic
2	3136313	13 March 2020	12 March 2020	North Ward, 4810	• Canberra: 01.03 to 06.03 • Brisbane; 06.03 to 07.03	26 February to	16 to 18 March 2020	Unknown	• Hospitalised 13 March 2020 to 17 March 2020 • 1 household contact (in isolation)

[83] Calculated as Onset date – 14 days.

Case	NID	Date of case confirmed	Date of symptoms	Usual place of residence	Movement / locations visited	Exposure period[83]	Date of isolation	Place acquired	Other information recorded
				[Within 20km radius]	• Cairns: 07.03 to 08.03 • Townsville: 08.03 to 09.03 • Brisbane: 09.03 to 10.03 • Sydney: 10.03 to 11.03 • Arrived in Townsville 11 March 2020, 'remains in Tsv isolation (AM) Flight'.	'11 February 2020' [sic: should be 11 March]			• 7 close contacts • 2 casual contacts
3	3156627	21 March 2020	20 March 2020	Bohle Plains, 4817 [Within 20km radius]	• TSV to SYD: 11.03 • NZ/Noumea cruise: 18.03 • SYD to BNE: 19.03 • BNE to TSV: 19.03	6 March 2020 to 20 March 2020	From 22 March 2020	Other country - Cruise ship (Ovation of seas cruise)	• Hospitalised 22 March to 9 April 2020 • Two household contacts each returned two negative tests • 2 'other' contacts on 19 March 2020 in Quarantine (friends who picked up contact from airport)

Case	NID	Date of case confirmed	Date of symptoms	Usual place of residence	Movement / locations visited	Exposure period[83]	Date of isolation	Place acquired	Other information recorded
4	3157846	23 March 2020	21 March 2020	Idalia, 4811 [Within 20km radius]	• NZ cruise 19.03 – Ruby Princess • SYD to BNE: 19.03 • BNE to TSV: 19.03	7 to 21 March 2020	From 19 March 2020	Other country - NZ Cruise	• Suspected contact with '? positive cases on cruise ship – Ruby Princess New Zealand Cruise' • Hospitalised 23 March 2020 • 'No contacts at airport pickup, drove own car home, self-quarantined on return' • 1 close contact, returned two negative tests
5	3161842	23 March 2020 (Tested 21 March 2020)	12 March 2020	Kelso, 4815 [Within 20km radius]	• London: 24.02 to 28.02 • Contiki: 28.02 to 14.03 • Returned to Australia: 21.03	27 February to 12 March 2020	From 21 March 2020	Other country - Austria – unknown place acquisition'	• Presented to GP on 14 March 2020 with 'sore throat commenced on 12 March 2020' • Hospitalised 24 March 2020 • Close contact with suspected case: 'Contiki winter wanderer' (28

Case	NID	Date of case confirmed	Date of symptoms	Usual place of residence	Movement / locations visited	Exposure period[83]	Date of isolation	Place acquired	Other information recorded
									February to 14 March 2020) • Contacts: 'Nil Townsville contacts'
6	3156622	23 March 2020 (Negative result 21 March 2020)	20 March 2020	Rupertswood, Qld [Not within 20km radius]	• TSV to SYD: 11.03.20 • NZ/Noumea Cruise: 18.03.20 • Syd to BNE: 19.03 • BNE to TSV: 19.03	7 to 21 March 2021	From 24 March 2020	Other country Cruise ship (Ovation of Seas cruise)	• Three household contacts: 1 test *2 negative, other two advised to quarantine
7	3162363	23 March 2020	22 March 2020	Duke of York Square, England [Not within 20km radius]	• England to Perth: 21.03 • Perth to SYD: 22.03 • SYD to TSV: 22.03	8 to 23 March 2020	From 24 March 2020	Other country - England	• Hospitalised 24 March 2020 • Isolated at home yes, 4806 • Three casual contacts, self-monitoring 'casual family members who have been near for under 15 mins with minimal contact'

Case	NID	Date of case confirmed	Date of symptoms	Usual place of residence	Movement / locations visited	Exposure period[83]	Date of isolation	Place acquired	Other information recorded
8	3163464	25 March 2020	24 March 2020	Saunders Beach, 4818 [Not within 20km radius]	• London: 21.03 • UAE: 22.03 • MEL: 23.03 • TSV: 23.03	10 to 24 March 2020	From 23 March 2020	Other country – Europe - Spain or United Kingdom	• 1 Household, self-quarantine: two negative swabs. • 1 close contact – also acquired overseas.
9	3163462	25 March 2020	22 March 2020	Saunders Beach, 4818 [Not within 20km radius]	• London: 21.03 • UAE: 22.03 • MEL: 23.03 • TSV: 23.03	8 to 22 March 2020	From 23 March 2020	Other country - Spain, Europe or UK	• 1 Household, self-quarantine: two negative swabs. • 1 close contact – also acquired overseas.
10	3163394	24 March 2020	18 March 2020	Kirwan Townsville, 4817 [Within 20km radius]	• Top Deck: 06.03 • London: 18.03.20 • Abu Dhabi: 19.03 • BNE: 19.03 • TSV: 19.03	4 to 18 March 2020	From 19 March 2020	Unknown - Extensive Europe Travel	• Hospitalised 25 March to 3 April 2020 • Had close contact with suspected COVID case: 'partner – also travelled overseas' • 'Discussed exposure period with PHP. PT was unclear onset date. Likely exposure overseas'

Case	NID	Date of case confirmed	Date of symptoms	Usual place of residence	Movement / locations visited	Exposure period[83]	Date of isolation	Place acquired	Other information recorded
									• 1 Household, also acquired overseas • Travel contacts unknown – escalated to SHECC
11	3163497	24 March 2020	22 March 2020	Kirwan, 4817 [Within 20km radius]	• Top Deck: 06.03 • London: 18.03.20 • Abu Dhabi: 19.03 • BNE: 19.03 • TSV: 19.03	8 to 22 March 2020	From 19 March 2020	Other country - Extensive Europe Travel	• Hospitalised 25 March 2020 • 1 Household, also acquired overseas • Partner of case 10 (above)