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Details of Filing

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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

Insurance Australia Ltd's Reply Submissions

A INTRODUCTION

1 These submissions are filed in reply to the submissions of the policyholders filed on 31 August 2021 (**PH**). They also briefly address some points raised in the submissions of the respondent in NSD308/2021 (**EWT**) concerning the application of s 61A of the *Property Law Act 1958* (Vic).

2 Terms defined in IAG's submissions filed on 18 August 2021 (**IAG**) have the same meaning in these reply submissions, unless otherwise indicated.

B GENERAL MATTERS

B.1 Approach to construction

3 The principles of construction are largely not in dispute. There are, however, two general matters the insureds have raised that IAG wishes to reply to.

4 **First**, contrary to **PH [17]**, the Court would not conclude that the Taphouse policy or Meridian policy were 'contracts of adhesion'. The only evidence before the Court concerning the preparation of the policy wording is the policies themselves. Those policies are jointly issued in the name of IAG (trading as CGU) and the insured's brokers IAA and Steadfast.[1] It should be inferred that, before agreeing to put their name to those policies, the brokers had some input in the policy wording and did so from the perspective of the insureds for whom they regularly act. It is therefore incorrect to describe these policies as 'framed by the insurers' or constituting 'their language': *cf HDI v Wonkana* at [30]. This observation applies equally to the submission at **PH [85]** that 'the insurer determines the limits of the cover by its policy terms'.

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[1] Court Book (**CB**) A: 83, 152.

5 **Second**, at **PH [18]-[19]** (and **[84]**), the insureds take issue with IAG's submission that the policies do not provide for pandemic cover. That is a fact. The cover is expressly confined by geographic limitations and exclusions that must be understood to reflect an objective intention to confine the limit of the cover. The objective intention of the parties was clearly **not** to provide (or purchase) pandemic cover, covering the consequences of an outbreak of disease wheresoever occurring or a government order in response to an occurrence of disease with no connection to the premises.

B.2 Prior authorities on BII policies

6 At **PH [19]-[41]**, the insureds address the recent case law considering the responsiveness of business interruption insurance to COVID-19 related losses. Three points may be made by way of reply to those submissions.

7 **First**, contrary to **PH [19]**, the Full Court in *Rockment* expressly accepted that pandemics would be a 'high risk' that would normally be excluded by an insurer or included only at an appropriately priced premium, and then took that consideration into account when construing the policy: at [59]. What the Full Court rejected was the submission (by both parties) that it should take into account, as a matter of commercial context, the financial consequences for the parties of a particular construction in the events which had then occurred: at [56], [62]. It was this submission that the Full Court described as irrelevant and said was not taken into account: at [63].

8 **Second**, at **PH [35]-[41]**, the insureds rely upon decisions of the High Court of Ireland in *Hyper Trust Limited t/as the Leopards Town Inn v FBD Insurance plc* [2021] IEHC 78 (***Hyper Trust No 1***) and *Hyper Trust Limited t/as the Leopards Town Inn v FBD Insurance plc (No 2)* [2021] IEHC 279 (***Hyper Trust No 2***), as to the meaning of the words 'outbreak' and 'closure'. Two observations may be made about those decisions and their limited usefulness to the questions now before the Court:

(a) *First*, the meaning given to the word 'outbreak' in *Hyper Trust No 1* was taken from the definition used by the (Irish) Health Protection Surveillance Centre. This was because it was considered to be the 'competent body in the State for the surveillance of communicable disease': at [178]-[179]. Plainly, this Irish authority is not a 'competent body' in Australia. Any guidance given by it could hardly be relevant to the interpretation of the word 'outbreak' as used in an insurance policy between two Australian parties.

(b) *Second*, the extended meaning given to the word 'closure' in *Hyper Trust No 2* (in particular, at [23]) is at odds with local authority on the meaning of that word

when used in a business interruption policy. As observed at **IAG [164]** (and in the other insurers' submissions), in *Cat Media Pty Ltd v Allianz Australia Insurance Ltd* (2006) 14 ANZ Ins Cas 61-700; [2006] NSWSC 423 at [59]-[60], Bergin J held that 'closure' in that context had its ordinary meaning and required a prohibition on physical access to a whole or part of the premises. It is telling that the insureds do not refer to this authority anywhere in their submissions, let alone explain why Bergin J's reasoning was wrong.

9 **Third**, at **PH [45]-[46]**, the insureds criticise the 'but for' analysis adopted in *Orient Express,* which they say suffers from 'fallacy of reasoning' when applied to concurrent causes of the same loss. This fallacy is said to be exposed by considering the example of 'an order requiring closure of a restaurant because of vermin'. This criticism is repeated at **PH [219]**.

10 Those submissions do not fairly represent the Court's reasoning in *Orient Express* or IAG's position in this case, for the following reasons:

(a) In *Orient Express*, Hamblen J held that the trends clause required a counter-factual analysis to be undertaken that considered the position the business (there, a hotel in New Orleans) would have been in had there been no insured damage (there, damage to the hotel itself) but the underlying cause of that damage still occurred (there, Hurricanes Katrina and Rita). The answer was that insured would still have suffered a complete loss of business due to the destruction of New Orleans by the hurricanes regardless of the damage to its property. The trends clause therefore required adjustments to be made to give proper effect to the indemnity intended to be provided – namely, to indemnify for loss resulting from the business interruption suffered in consequence of property damage: at [45]. Relevantly, the occurrence of a hurricane was no part of the insured peril.

(b) The insured event in the present test cases is not interruption by reason of property damage, as it was in *Orient Express*, but rather interruption by reason of a causally-linked chain of events, generally an 'outbreak of infectious disease' within a certain radius of the premises or the imposition of government orders in response to identified threats or circumstances. In that context, the *Orient Express* approach requires the counter-factual enquiry to consider the position the business would have been in **but for** the relevant outbreak within the radius or the sequence of events resulting in the imposition of the government order.

(c) Applying that reasoning to the insured's 'vermin' example, the correct counter-factual is not that the business remains open but is overrun by vermin. It is that the business remains open unaffected by the presence of vermin or the order imposed in consequence of the premises of the vermin (which events, in combination, represent the insured peril) but everything else remains the same. Therefore, if the insured suffers a loss of trade due to adverse publicity in the relevant dining district due to the discovery of vermin in adjacent buildings, then this must be taken into account in reducing the indemnity as this is a loss that the insured would have incurred regardless of the closure order. To hold otherwise would extend the indemnity beyond cover for government orders as a result of the presence of vermin **at the premises** to general cover for all business interruption losses suffered connected in any way with vermin.

C TAPHOUSE

C.1 Taphouse's claims

11 At **PH [90]**, Taphouse sets out the list of 'Authority Responses' it relies upon for the purposes of its claim. This list is narrower than the list identified in its Outline Document and Amended Concise Statement in Response. IAG is proceeding on the basis that it is only the government orders identified in **PH [90]** that are now relied upon, and that any claim based upon any other orders has been abandoned.

C.2 'Assessing the act of the legal authority'

12 At **PH [91]-[105]**, the insureds address what they described as an 'important question' – namely, whether it is necessary to go beyond the statutory instruments and their 'relevant legal context' to determine whether a particular action of a legal authority was **as a result of** an event or circumstance specified by the policy.

13 However, the real dispute between the parties (at least on Taphouse's 'primary case') is actually a fine constructional dispute, namely:

(a) Taphouse submits that because the orders were expressed to apply to 'all of Queensland', this is sufficient to engage the coverage clause because Townsville is in Queensland: **PH [167]**;

(b) IAG, on the other hand, submits that an order applying to 'all of Queensland' is not an order **as a result of** an outbreak of disease or threat of damage to persons within 20-50 kilometres of Taphouse's premises absent **any** suggestion (within the statutory instrument, explanatory notes or otherwise) that the Chief Health

Officer was imposing the restrictions in response to events or circumstances in Townsville. In IAG's submission, the 'relevant legal context' referred to in **PH [110]-[115]** merely serves to confirm that the powers granted to the Chief Health Officer were broad powers to address the spread of COVID-19 by imposing measures to contain the virus.

14 Contrary to the tenor of Taphouse's submissions, it is IAG's approach that is consonant with the policy wording and commercial context of the bargain. In contrast, Taphouse is seeking to construe an insurance coverage directed at government responses to specific events or circumstances occurring **within** a defined radius in a way that extends coverage to government responses to events or circumstances occurring **outside** that radius. This is pandemic cover by any other name and does not fairly represent the bargain struck between the parties.

15 Finally, the suggested difficulties faced by insureds in proving the cause of government orders (see **PH [95]**, **[105]-[106]**) are a distraction. The policy coverage is triggered by the occurrence of specified events. The policy does not purport to identify the nature or sufficiency of evidence that the insured is required to adduce to prove the occurrence of those events. In truth, the event that triggers an insuring clause of this nature (e.g. a health order in response to a local outbreak of Legionnaire's Disease) would ordinarily not be contentious or difficult to prove. Australian governments typically explain publicly why they are seeking to restrict the ordinary freedoms of their citizens. The difficulties of proof that the insureds say they are now facing are not as a result of the insurer's construction of the policy (*cf* **PH, [106]**). Rather, they are a result of the attempt by the insureds to stretch the coverage beyond its reasonable bounds to encompass events and circumstances with the most tenuous of connections to the premises of the insured.

C.3 Prevention of access clause

16 The parties have largely joined issue with respect to the construction of the Taphouse prevention of access extension. IAG makes the following points by way of reply.

17 **First**, Taphouse has not convincingly explained why the Court would adopt a construction of the prevention of access extension that is likely to render the hybrid extension largely (if not wholly) redundant. This is not a case of mere surplusage in wording, which is the circumstance being addressed in the authorities cited at **PH [173]** (see, e.g., *HDI v Wonkana* at [44] (citing *Big River Timbers Pty Ltd v Stewart* [1999] NSWCA 34 at [16])). Taphouse's construction of the prevention of access clause would

have the result that an entirely separate extension of cover dealing specifically with 'infectious disease' is rendered otiose.

18 **Second**, in terms of the other construction issues raised with respect to this extension:

(a) The submission at **PH [123]** that the clause is not directed at government orders that prevent or restrict access to the premises by 'the public', but responds to a restriction on 'anyone at all', leads to absurd results. It would mean that an order of a legal authority directed at a single person could trigger a policy response. For example, on Taphouse's construction, it would be entitled to cover if the police arrested its chef as a result of him threatening to injure another person within 50 kilometres of the business premises. That is a circumstance far removed from the evident purpose of this clause, which is to respond to government orders requiring the exclusion of the public in response to physical threats to property or life occurring within the defined radius.

(b) Relatedly, Taphouse says it did not understand the submission at **IAG [152]**. That submission was directed at the passage from *FCA v Arch* reproduced and relied upon by Taphouse at **PH [133]**. In that passage, Lord Hamblen and Lord Legatt pose the hypothetical question: "Once … it is conceded – as is inevitable – that continued access to the premises for some purposes is compatible with there being cover, then question becomes: for what purposes?". The answer IAG gave to that question at IAG [152] was that, as the cover responds to an order preventing or restricting access to the premises by the public, it makes no difference whether any other person (e.g. the proprietor or a handyman engaged by the proprietor) can still access the premises. For so long as there is a prevention or restriction of access to the premises **by the public** as a result of the specific event then the clause responds.

(c) Further, the submissions at **PH [125]-[142]** do not convincingly explain why a clause directed at preventing or restricting 'access' to 'premises' is engaged by a requirement to change the mode of business inside those premises. It is repeatedly asserted that 'prevention of access does not need to be physical' (see **PH [134]** and **[138]**) but no real explanation is given as to how the wording of the policy supports this construction. Contrary to **PH [142]** it is frankly unusual, as a matter of ordinary English, to speak of an inability to 'access premises ***for the purpose of a discrete business activity***', where, in fact, what has occurred is that you can continue to access the premises freely but cannot use it for the same purposes as you did previously. An order prohibiting a barrister from tap-dancing

or singing loudly in their chambers so as not to disturb their neighbours can hardly be described as an order preventing or restricting access to those chambers.

19 **Third**, in response to the Taphouse's characterisation of the nature of the relevant government orders:

(a) Contrary to **PH [144]**, the '23 March 2020 *Non-Essential Business Closure Direction*' (being the first of the Takeaway Only Orders) did not require Taphouse to close entirely. It is true that it did not have a take-away liquor licence at that time. But the kitchen could have remained open and it could have continued serving takeaway food in compliance with the health order had it chosen to do so. In any event, by no later than 28 March 2020 (five days later) Taphouse did re-open and provided customers with take-away food and alcohol.[2] Despite the submission at **PH [148]-[149]**, there is no evidence that customers who came to purchase that food were in fact prevented or restricted from accessing any part of Taphouse's premises from 28 March 2020. Mr Rugg does not give any evidence to this effect.

(b) The submission at **PH [151]-[152]** that an order requiring potential customers to stay at home involves the relevant legal authority 'restricting access to your premises' is unconvincing. As was recognised in *FCA v Arch* at [153], 'restrictions on free movement imposed by regulation … did not in themselves prevent access to premises which remained open'. The addition of the phrase 'restricting access to your premises' does not broaden the scope of the clause to include orders of an entirely different nature, and does not mean the same thing as what Lord Hamblen and Lord Leggatt referred to as 'hindrance in the **use** of the premises' (emphasis added). The difference between 'use' and 'access' is explained at **IAG [150]**.

20 **Fourth**, as addressed above, the matters emphasised in **PH [158]-[167]** go no further than establishing that the 'Authority Response – Taphouse' orders were introduced in response to a concern to prevent the spread of COVID-19 in 'all of Queensland'. They do not show that those orders were directed at any credible threat to persons in Townsville. The suggestion at **PH [168]-[170]** that there was, in fact, such a threat ought to be rejected, as it is based on nothing more than mere assertion that the few cases of

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[2] Rugg, [15]-[16].

COVID-19 identified in Townsville posed a threat to the community – despite each of those persons contracting the virus outside of Townsville and Queensland Health's own data suggesting there was no transmission within the radius: see **IAG [175]-[178]**.

C.4 Hybrid clause

21 The parties have also largely joined issue with respect to the Taphouse hybrid extension. IAG makes the following brief points by way of reply.

22 **First**, the emphasis placed at **PH [181]-[182]** on the verbal formula used in the Takeaway Only Orders of providing that the business 'must not operate' and then providing exceptions to that general prohibition for 'takeaway' services does not detract from the net effect of the order: it was to limit the permissible activities that could be carried out by certain businesses at their premises. It did not 'close' the premises.

23 **Second**, Taphouse submits at **PH [189]-[195]** that the term 'outbreak' is 'flexible', and points to instances where that word is used to mean 'a single confirmed case of COVID-19'. The first example given is the example from *Hyper Trust (No 1)*. As addressed above, the Court in that case relied upon the definition used by the local Irish health authority. It cannot assist in interpreting the objective intention of parties to an Australian policy.

24 The second example given is a definition used by the Commonwealth Department of Health in the 'CDNA National guidelines for public health units' (v 4.4-7), published in around May 2021.[3] The full quote from that publication, which Taphouse has not reproduced, says:

> For the purposes of vaccination during outbreaks, an outbreak is defined as a single confirmed case of COVID-19 in the community. Individual jurisdictions' outbreak definitions may differ.

25 A number of observations may be made about this definition.

(a) *First*, it is not explained how this publication by the Department of Health in May 2021 sheds any light of the meaning of the words used by the parties in a policy incepted in September 2019, at a time when no-one was even aware of the existence of COVID-19.

(b) *Second*, the definition is plainly being used in a very specific context – namely, for planning vaccination strategies. That context also suggests that the words 'in

[3] See version history on second page and in Appendix F.

the community' in the definition must mean the transmission of the virus within the community, as the aim of vaccination is to prevent transmission of a disease. The definition does not appear to apply in a circumstance where the only cases of COVID-19 are in a controlled environment (e.g. quarantine or self-isolation).

(c) *Third*, as the full quote recognises, it is not the universally accepted definition of outbreak. By way of contrast, the Commonwealth Department of Health's 'Guidelines for the public health management of gastroenteritis outbreaks due to norovirus or suspected viral agents' (which were last updated in 2010, and therefore in existence at the time the policy was incepted) state that:

> Two or more cases of diarrhoea and/or vomiting in a 24 hour period in an institution or among a group of people who shared a common exposure or food source should be suspected as constituting an outbreak and an assessment or investigation commenced.[4]

26 In IAG's submission, the above definition better reflects the ordinary meaning of 'outbreak' when used in a disease clause that may apply to any number of infectious or contagious diseases. Consistent with the 'minimum criteria' explained at **IAG [170]**, it incorporates a sufficient degree of unity in relation to time (24-hour period), locality (institution or among a group of people) and cause (common exposure or food source) to meet the ordinary description of an 'outbreak': see *FCA v Arch* at [69].

27 **Third**, at **PH [201]**, Taphouse asserts that the Chief Health Officer's directions were based on the consideration that '[t]he outbreak had spread to all of Queensland'. There is no factual basis for this submission. None of the relevant orders or other materials referred to suggest that the Chief Health Officer held that view (which would, in any event, have been incorrect). To the contrary, the suggestion in the health orders was that the COVID-19 outbreak had **not** spread to all of Queensland and that the measures were being introduced to 'contain' it within the areas where it was presently outbreaking. It is accordingly incorrect to submit at **PH [202]** that 'the outbreak was recognised to exist both inside and outside the radius'. The true position is that the 'outbreak' was entirely outside the radius and preventive measures were being introduced to stop further

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[4] Commonwealth Department of Health, 'Guidelines for the public health management of gastroenteritis outbreaks due to norovirus or suspected viral agents', Chapter 7: https://www1.health.gov.au/internet/publications/publishing.nsf/Content/cda-cdna-norovirus.htm-l~cda-cdna-norovirus.htm-l-7 [accessed 1 September 2021].

outbreaks. The submissions at **PH [203]-[205]** asserting that there was in fact an 'outbreak' in Townsville have been addressed in chief and above.

C.5 Causation and adjustments

28 The parties agree that it is not the Court's role to determine the quantum of Taphouse's loss (if any). The Court is, however, being asked to determine as a matter of principle whether certain categories of loss are recoverable, assuming Taphouse succeeds in establishing that it is entitled to any indemnity.

29 The following two points are made by way of reply to the issues raised by Taphouse in this respect.

30 **First**, contrary to **PH [213]**, it is not apparent on the evidence that the 'Authority Response – Taphouse' is necessarily the dominant cause of any losses suffered by Taphouse from March 2020. Townsville is a tourism centre and it can readily be inferred that the Travel Ban and border closures would also have impacted its business revenue regardless of the 'Authority Response – Taphouse'. In the absence of any detailed information about the nature of Taphouse's business operations, the untangling of any such losses (particularly once restrictions had eased) will have to be a matter for the loss adjustment process.

31 **Second**, in reply to **PH [217]-[219]**, to the extent the type of matters referred to above are considered to be a concurrent proximate cause of some or all of the loss suffered as a result of an insured event, then adjustments are required. To come to a determination as to the amount of loss Taphouse has suffered 'in consequence of the *damage*' by application of the principles explained at **IAG [206]-[210]**, the loss adjuster must exclude loss that would have occurred **but for** the occurrence of the insured peril. As it appears to be common ground that the insured peril is not the COVID-19 pandemic, it must follow that the adjustment process should seek to calculate the indemnity payment so as to put Taphouse in the position it would have been had the 'Authority Response – Taphouse' not been ordered but the decline in inter-state and international tourism by reason of the Travel Bans and border closures had still occurred.

32 **Third**, there does not appear to be any dispute that the start date of the indemnity period for Taphouse's claim is 23 March 2020 (assuming the Takeaway Only Order is accepted as triggering the indemnity): **PH [220]**. As Taphouse rightly observes, the end date depends upon when Taphouse ceased to be affected by the loss and is a question for the separate loss adjustment process (with that process to be informed by the judgment

in this case, including as to the identity of any insured events and their causal relationship to Taphouse's loss).

C.6 Third-party payments

33 The submissions at **PH [221]-[227]** regarding how the Court should approach third-party payments misapprehend the nature of a contract of indemnity.

34 The proposition advanced by Taphouse is that its policy does not provide an indemnity referrable solely to loss but instead simply provides for payment of an amount in accordance with a 'carefully calibrated calculation': **PH [224]**. However, Taphouse still appears to accept that the policy is a contract of indemnity. That could hardly be disputed.

35 Business interruption insurance of this nature provides an indemnity for loss; it is not a defined benefits policy. This is self-evident from the policy wording itself, which provides that IAG will 'indemnify *you* in respect of the loss arising from such *interruption* or interference in accordance with the Basis of settlement clause' (which cover is then extended by the 'Extensions of cover') (**CB A:176**). The nature of such a promise has been authoritatively explained in two recent decisions of the NSW Court of Appeal. As Meagher JA stated most recently in *Worth v HDI Global Specialty SE* [2021] NSWCA 185 at [179] (Macfarlan and McCallum JJA agreeing at [6] and [207]):

> In *Globe Church Incorporated v Allianz Australia Insurance Ltd* (2019) 99 NSWLR 470; [2019] NSWCA 27, this Court (Bathurst CJ, Beazley P and Ward JA; Meagher and Leeming JJA dissenting) held that an insurer's promise to indemnify is to be understood as **a promise "to hold harmless against loss" rather than as a promise on the happening of the insured event to make a payment reflecting the damage suffered as a result of that event, in accordance with the policy** and within a reasonable time. An insured's claim, in the judgment of the majority in *Globe Church*, is accordingly a claim to unliquidated damages which arises immediately on the happening of the insured event, "**albeit that the amount necessary to make good the loss is to be calculated in accordance with the basis of settlement clause** in the policy" (at [209]). That reflects the position in England at common law: see eg *Sprung v Real Insurance (UK) Ltd* [1999] 1 Lloyd's IR 111; *Versloot Dredging BV v HDI Gerling Industrie Versicherung AG* [2017] AC 1; [2016] UKSC 45. [emphasis added]

36 It follows that the basis of settlement clause is a 'mechanical' provision used to calculate the actual loss suffered. It does not provide for the payment of a set amount upon the happening of an insured event regardless of actual loss. To put this another way, the calculation is a proxy by which the parties have agreed to seek to calculate the actual

loss suffered – with that calculation always being subject to adjustments to ensure the underlying principle of indemnity is achieved: *Australian Pipe & Tube Pty Ltd v QBE Insurance (Australia) Limited (No 2)* [2018] FCA 1450 at [114]-[117]. The basis of settlement clause is the servant of the obligation to indemnify; not the master.

37 Two relevant matters flow from this for the purpose of dealing with third-party payments.

38 **First**, it is wrong to assert, as Taphouse does, that it is entitled to a 'precise contractually agreed calculation' even if that calculation demonstrably exceeds the loss it has actually suffered. The calculation of this loss must properly take into account third-party payments intended to supplement lost revenue and/or reimburse costs and expenses. The provisions of the policy dealing with savings and adjustments account for this: see **IAG [253]-[256]**.

39 **Second**, and in any case, there is a general principle of law that an insured cannot receive a 'double recovery' for the one loss. This principle is long-standing as addressed at **IAG [226]-[232]**, and is well captured by the following statement of the Lord Chancellor in *Randal v Cockran* (1748) 1 Ves Sen 89; 27 ER 916: 'The person originally sustaining the loss was the owner; but after satisfaction made to him, the insurer'.

40 Contrary to Taphouse's submissions, this principle is not confined to 'historical case law'. In *Insurance Australia Ltd v HIH Casualty & General Insurance Ltd (in liq)* [2007] VSCA 223; 18 VR 528, the Victorian Court of Appeal applied the principles in the context of a policy that did not say anything about giving credit for third-party payments, and in terms required the insured to '[p]ay on behalf of the Insured all sums which the Insured shall become legally obliged to pay': see [91]-[106]. As Ashley JA explained (at [160]):

> There is a broad principle, applicable at least in insurance law and torts law, that credit need not be given by an injured party for moneys received by it which are not to be characterised as extinguishing or reducing that party's loss, but are rather to be characterised as having been received independently of right of redress.

41 The converse of this statement is, obviously enough, that an insured must give credit for moneys that **are** received to extinguish or reduce that party's loss.

42 This is the same logic that underpins the law of subrogation, pursuant to which an insurer who indemnifies is entitled to receive the proceeds of an action against any third-party in respect of the same loss. It is relevant in this context that Taphouse does not dispute the characterisation of the third-party payments as recompense for loss, as set out in **IAG [233]-[252]**.

C.7 Insurance Contracts Act

43 Taphouse's submissions at **PH [228]-[234]** proceed on the factually incorrect premise that the claim it made on 24 March 2020 was in materially the same terms as the claim it is now advancing. That claim (which is found at **CB G:1**):

(a) identifies the claim as for a reduction in trade due to certain media statements made by the Prime Minister in March 2020; and

(b) only refers to the prevention of access extension, not the hybrid extension.

44 It is no longer contended that those statements by the Prime Minister were relevant government actions under the Taphouse policy. On that basis alone the claim was properly declined at that time, and there is no reason for the Court to find that IAG unreasonably refused to make an indemnity payment.

45 Further, IAG was not (and still is not) in a position to make a determination of the amount of any indemnity payable to Taphouse based on the financial information provided. It therefore cannot make a payment to Taphouse even if indemnity is confirmed. For that reason alone, it cannot be 'unreasonable' within the meaning of s 57 of the *Insurance Contracts Act 1984* (Cth) for IAG to withhold payment up until the issues the subject of this case are resolved and the claims adjustments process is complete.

D MERIDIAN

D.1 The Policy

46 At **PH [252]**, Meridian seeks to make something of the fact that the Meridian policy (unlike the Taphouse policy) adopts a 'deeming technique' to extend the primary business interruption coverage to the additional benefits, including the disease extension and hybrid extension.

47 The Court would not place any weight on that drafting technique. The effect of the clause is the same as the analogous clause in the Taphouse policy. The core coverage remains an indemnity for business interruption loss arising from property damage, which coverage is then extended to business interruption loss arising from other events or circumstances. Importantly, however, all of those events or circumstances listed in the extension are still tethered to the physical premises by means of 'radius' or 'at the premises' wording.

D.2 Disease extension

48 As the insureds observe at **PH [259]-[261]**, the true issue between the parties with respect to the Meridian disease extension is not that whether or not there was an outbreak of COVID-19 within 20 kilometres of Meridian's premises (IAG accepts, for the purpose of this test case, that there was). It is whether that event was a proximate cause of Meridian's claimed business interruption losses. This is discussed further below.

D.3 Hybrid extension

49 The parties have largely joined issue with respect to the Meridian hybrid extension. IAG makes the following brief points by way of reply.

50 **First**, with respect to the effect of the 'Authority Response – Meridian' orders:

(a) Regardless of whether the hybrid extension is considered to be directed at orders closing Meridian's 'business' or its 'premises' (see **PH [264]-[265]**), the Court would not accept the submission at **PH [266]** that the 'effect of the Travel Ban imposed on 25 March 2020 was to require Meridian to close a significant part of its business'. The Travel Ban was directed at residents of Australia. It prevented them from travelling. It said nothing about the business of travel agents. In no sense, was there a 'closure or evacuation' of Meridian's business 'by order of a government, public or statutory authority'.

(b) Nor would the Court accept the submission at **PH [267]** that the 'subsequent lockdown orders … require[d] Meridian to close a discrete part of its domestic travel business'. This submission simply reveals the faulty premise that underlies Meridian's claims, which is that a government order that deprives a business of the product it wishes to sell involves a 'closure or evacuation of Your Business'. Not only is this an unnatural construction of the language used in the policy, but it results in a fundamentally different form of coverage. On Meridian's construction, the hybrid extension would be triggered by a compulsory recall of a contaminated product sold by the insured, because this would be 'closure or evacuation' of a 'discrete part' of a retail business by reason of the discovery of an organism that was 'likely to result in a human infectious or contagious disease at the Situation'. This is not the cover that was purchased.

51 **Second**, contrary to **PH [272]**, construing the words 'consequent upon … the discovery of an organism likely to result in a human infectious or contagious disease at the Situation' to require the organism to be discovered 'at the Situation' does not lack commercial sense. Meridian posits the example where an organism was discovered next

door and says there is 'no good commercial reason why the parties would have chosen to deny business interruption cover in this circumstance'. This submission, however, ignores the fact that all of the insuring clauses in dispute in these test cases involve some form of geographic limiting factor which represents the limit of the indemnity the insurer agreed to provide and the insured was willing to pay for. It is no answer to the application of the 20 kilometre radius requirement in the Meridian disease extension to say there is 'no good commercial reason' why an outbreak 20.1 kilometres from the premises is not covered but an outbreak 19.9 kilometres from the premises is covered. The limitation in the clause simply reflects the bargain struck and the extent of risk assumed by the insured for the premium paid.

52 Further, if the hybrid extension is not limited to discovery 'at the Situation' then what is the geographical limit of the clause? Could it be triggered if the organism was discovered at the other end of the street? In another suburb? In another city? In another country? The effect of Meridian's construction is that there will almost certainly be a debate in each case as to whether the relevant order is in response to a discovery that was 'likely' to result in disease at the Situation.

53 **Third**, with respect to the cause of the 'Authority Response – Meridian' orders:

(a) The matters identified at **PH [276]** merely serve to confirm IAG's submission that the Travel Ban was not as a result of any organism discovered at Meridian's premises or (to the extent relevant) that was likely to result in disease at Meridian's premises. That order was outward looking. It was a restriction on **travel** in and out of Australia. It was directed at preventing a disease that had been discovered outside of Australia from spreading into Australia.

(b) The matters identified at **PH [277]** establish, in a generic sense, that the Lockdown Orders were in response to the threat of the spread of COVID-19 in Melbourne. So much may be accepted. They do not, however, establish any link between those orders and the 'discovery of an organism likely to result in a human infectious or contagious disease at the Situation'. By the time those orders were imposed, COVID-19 had clearly already been 'discovered' by Victorian health authorities (and not at Meridian's premises) and the Lockdown Orders were directed at controlling the spread of the virus in Victoria.

D.4 Section 61A

54 The insured's submissions at **PH [279]-[291]** are primarily directed at the submissions made by QBE, which IAG has adopted. IAG only wishes to make the following brief points

by way of reply and will otherwise rely upon QBE's reply submissions. It is also convenient at this juncture to make some remarks by way of reply to the submissions at **EWT [15]-[71]**.

55 **First**, it is wrong to suggest (**PH [291]**) that IAG has not identified any evidence that the Meridian policy was issued in Victoria. The policy schedule is in evidence and it identifies IAG's business address as 181 William Street, Melbourne, Victoria 3000 and the insured's address 159 Burgundy Road, Heidelberg, Victoria: **CB A: 143, 145**. The contact details at the back of the Meridian policy also give a mailing address of 'GPO Box 9902 **in your capital city**', and then list IAG's business addresses in each capital city (including Melbourne): **CB A:142**. The inference the Court would draw from this evidence is that IAG issued the policy out of its Melbourne office to the insured at its Melbourne location.

56 Meridian observes that its broker (being an agent of the insured) had listed a postal address in Sydney but does not explain how this displaces the inference referred to above. Meridian has not led any evidence from that broker that all of its dealings were with IAG's Sydney office. Meridian also refers to the fact that IAG's registered office for the purposes of the *Corporations Act 2001* (Cth) is in Sydney, but again does not explain why that is a relevant consideration. None of these are matters that would lead the Court to find that the policy was issued somewhere other than Victoria.

57 **Second**, the insureds and EWT primarily submit that section 61A of the *Property Law Act 1958* (Vic) does not apply because the policies express a 'contrary intention': **PH [283]-[285]**. There are a number of responses to this:

(a) Section 61A applies unless the contrary intention 'expressly appears'. As the Victorian Court of Appeal explained in *Mitchell v Latrobe Regional Hospital* (2016) 51 VR 581 at [56]–[64], while this does not require express words, it does require more than would be required if s 61A was simply subject to any contrary intention. It requires that the contrary intention appear 'plainly', 'clearly' or 'by necessary implication'.

(b) The reasoning at **PH [284]** that the reference to the *Quarantine Act* itself expresses a contrary intention is circular. Section 61A operates upon contracts or other documents that refer to legislation that has been repealed and re-enacted. If the mere reference to the repealed act is taken to be evidence that the parties intended the reference to be static, then the section would never have any work to do.

(c) Further, there is no principled reason to confine the operation of this savings provision to references to legislation repealed **after** entry into the contract: **EWT [60]-[64]**. That approach would mean that section 61A cannot operate to save a contractual provision where it refers to legislation that, unbeknownst to the parties, was repealed and re-enacted hours (or even minutes) before they executed their contract.

(d) The only other indication that insureds rely upon as disclosing a 'contrary intention' are the words 'and subsequent amendments': **PH [285]**. However:

(i) The obvious implication is that by including these words the parties were intending to **broaden** the scope of *Quarantine Act* exclusion, not narrow it. The Court could not conclude that by inserting those words the parties should be understood as intending to exclude the operation of section 61A and narrow the scope of what the exclusion would have otherwise covered if it simply referred to the *Quarantine Act*. The mere use of the words of extension 'and subsequent amendments' does not carry any necessary implication that the parties sought to **exclude** the operation of general legislation which also covered repeals and re-enactments.

(ii) That is especially so since the words 'and subsequent amendments' are broad enough to contemplate the repeal and re-enactment of the legislation: see *Mathieson v Burton* (1971) 124 CLR 1 at 20-21 (Gibbs J); *Beaumont v Yeomans* (1934) 34 SR (NSW) 562 at 570 (Jordan CJ). The fact that the NSW Court of Appeal found those words insufficient to allow the reference to the *Quarantine Act* to be read as a reference to the *Biosecurity Act 2015* (Cth) does not detract from this submission. The finding was that the words by themselves (read in the context of the policy) were not sufficient to allow the Court to construe the clause contrary to its literal meaning, in circumstances where the alternate construction was not commercially absurd. There was no finding that those words were so clear as to carry a necessary implication that a general provision such as s 61A should be excluded.

58 **Third**, it is submitted by both the insureds and EWT that section 61A does not apply to Commonwealth legislation: **PH [288]**; **EWT [29]-[42]**. The insureds, in particular, posit that extending section 61A to Commonwealth legislation leads to 'inconvenient results', referring to the possibility that the same policy wording could apply differently depending

on which law applied to the policy. But this consequence arises on either construction. Even if section 61A is confined to Victorian legislation (as the insureds and EWT contend) the effect of the provision is still that a reference to Victorian legislation in a contract is ambulatory if governed by Victorian law but may be static if governed by the law of another jurisdiction that does not have an analogous statutory provision.

59 **Fourth**, it is further submitted by both the insureds and EWT that the *Biosecurity Act* is not a re-enactment of the *Quarantine Act*: **PH [289]-[290]**; **EWT [50]-[59]**. If this submission were to be accepted, it would be a triumph of form over substance. The relevant legislative history was addressed in QBE's submissions in chief. The fact is that the Commonwealth regime for identifying and responding to highly contagious diseases that was previously provided for in the *Quarantine Act* is now found in the *Biosecurity Act*. The insureds ask hypothetically: 'what if the relevant disease was one that was listed in the *Quarantine Act* but not the *Biosecurity Act*?' (**PH [290]**). The obvious answer is that the disease would not fall within the exclusion clause. The operation of section 61A is that the policy has an ambulatory effect and covers the most up-to-date list of diseases of concern, being the diseases presently identified as having pandemic potential, rather than a historical list of diseases that are unlikely to be a cause of significant concern in the near future.

D.5 Causation and adjustments

60 Meridian addresses causation issues on its test case at **PH [292]-[300]**. The gist of the submission is that the Travel Ban and/or Victorian Lockdowns were **a** proximate cause of Meridian's loss, even if there were other concurrent proximate uninsured causes including the Cruise Ship Ban: see **PH [297]**. Meridian therefore says, in accordance with the principles addressed at **IAG [68]-[69]** and the decision in *FCA v Arch* it is entitled to an indemnity for those losses.

61 IAG disputes this. IAG's position on the question of causation is as follows:

(a) Prior to the pandemic, Meridian's business involved the sale of cruise ship packages and other international travel. Domestic travel only formed approximately [redacted] of its business: Quick, [5], [7] (**CB F:622-623**).

(b) [redacted]

This is recorded in the profit and loss statements annexed to Ms Quick's affidavit (see Exhibit JMQ-3, p. 101 (**CB F:34**)) and an email from Ms Quick to her landlord on 7 April 2020 in which Ms Quick states that '[redacted]' (**CB F:582**).

(c) [redacted] suggesting that it was providing refunds to customers for this point in time.[5]

(d) (**Uninsured events**) Based on the evidence that IAG will take the Court to at the hearing, it is apparent that the proximate cause of Meridian's business interruption was the withdrawal of Meridian's main business product by reason of:

(i) commencing from the end of January 2020, travel destinations around the world beginning to impose restrictions on travel,[6] including closing ports to cruise ships and borders to international travellers[7];

(ii) cruise ship operators voluntarily suspending operations in response to those international restrictions[8];

(iii) from mid-February 2020, increasing negative publicity surrounding the risk of the spread of COVID-19 on cruise ships and internationally[9]; and

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[5] [redacted]. This has not been explained in Ms Quick's affidavit. This [redacted] is not inconsistent with the points made in this paragraph, as it may be explained by a brief increase in business as Australian citizens sought to return home or, alternatively, by the reversal of transactions (including associated costs accrued) that had already been booked as profit based on cruise or tour packages that would now no longer go ahead. [redacted].

[6] See, e.g., the UN World Tourism Organization report titled 'COVID-19 Related Travel Restrictions: A Global Review for Tourism' (16 April 2020), pp. 8-9: 'Within less than 10 weeks, between the end of January 2020 and 6 April 2020, 209 destinations have implemented measures, restricting travel in reaction to the COVID-19 outbreak. This amounts to 96 % of all destinations worldwide' and 'By mid-February 2020, only two weeks after COVID-19 was declared a Public Health Emergency of International Concern (PHEIC), a total of 62 destinations had implemented travel restrictions. Out of those destinations, more than half were from Asia and the Pacific region.' (**CB F: 171-172**).

[7] See, e.g., Proclamation by the President of the United States of America on 11 March 2020, 'Suspension of Entry as Immigrants and Nonimmigrants of Certain Additional Persons Who Pose a Risk of Transmitting 2019 Novel Coronavirus' (**CB F:527**).

[8] See, e.g., Viking Cruises 'Specific Itinerary Cancellations – Updated July 7, 2021' referring to suspensions from 11 March 2020 (**CB F: 525**); Princess Cruises 'Princess Cruises Announces a Voluntary and Temporary Pause Of Global Operations (60 Days)' referring to a suspension from 12 March 2020 (**CB F: 531**); Norwegian Cruise Line Holdings Ltd 'Norwegian Cruise Line Holdings Ltd. Announces Voluntary Suspension of Voyages' referring to a suspension from 13 March 2020 (**CB F: 533**); Seabourn 'Seabourn Announces Updated Restart Dates' referring to a suspension from 14 March 2020 (**CB F: 536**); Carnival Cruises 'Carnival Cruise Line Announces Pause In Service' referring to a suspension from 13 March 2020 (**CB F: 537**); Royal Caribbean Cruises 'Royal Caribbean Announces Global Suspension of Cruising' referring to a suspension from 14 March 2020 (**CB F: 540**). .

[9] See, e.g., 'Coronavirus: Are cruise ships really "floating Petri dishes"' *BBC News* (12 February 2020) (**CB F: 448**) and '"Terrifying": Melbourne cruise ship passenger stranded in Japan with coronavirus' *The Age* (12 February 2020) (**CB F:458**); 'Floating incubators: Cruise ships weak link in containing coronavirus' *The Sydney Morning Herald* (14 February 2020) (**CB F:474**)

(iv) from 15 March 2020, the Cruise Ship Ban introduced by the Commonwealth government: see **IAG [265]-[266]**.

None of these matters are said by Meridian to be insured events. It is therefore not in dispute that the policy does not respond to losses caused solely by those events.

(e) (**Travel Ban**) IAG accepts that, had none of the events identified above occurred, the Travel Ban introduced on 25 March 2020 would have caused Meridian loss. However:

(i) The Travel Ban was not an insured event either for the reasons addressed in IAG's submissions in chief and elaborated upon above. Namely, there is no causal connection between the introduction of that ban and **(i)** an outbreak of COVID-19 within 20 kilometres of Meridian's premises; or **(ii)** the discovery of an organism likely to cause COVID-19 at Meridian's premises.

(ii) Further, and in any case, the Travel Ban is not a proximate cause of Meridian's claimed losses because Meridian had already lost the core of its business by reason of the Uninsured Events identified above. A simple 'but for' analysis demonstrates that the Travel Ban was not a proximate cause. It is not appropriate to disregard the 'but for' analysis in this context as, in contrast to the circumstances considered in *FCA v Arch* at [182]-[185], this is not a case of an 'over-determined' or 'over-subscribed' result, or where a series of events combine to produce a particular result but no individual event was either necessary or sufficient by itself. To take up the hiker's death example (relied upon by the insureds at **PH [46]**), this is not a case where two hunters have simultaneously shot and killed a hiker. Rather, to extend the insureds' example to the present case, the analogy would be that one hunter has shot and killed the hiker and then another hunter has shot the dead body. In such a case, the first shot is plainly the only proximate cause of the loss.

(iii) Finally, even if the Travel Ban was an insured event and a proximate cause of Meridian's loss (which is denied), adjustments need to be made for the Uninsured Events. The loss would have occurred regardless of the Travel Ban because Meridian would still have had nothing to sell, by reason of international events and the Cruise Ship Ban.

(f) (**Lockdown Orders**) IAG does not accept that the Lockdown Orders were a proximate cause of the main business interruption losses claimed by Meridian:

(i) To the extent the Lockdown Orders impacted Meridian's business at all (considering it maintained an online presence) they were not a proximate or equally efficacious cause of Meridian's main business losses. The direct cause of its loss was the Uninsured Events above and, subsequently (to the extent the business had not already been lost), the Travel Ban.

(ii) Even if the Lockdown Orders were a proximate concurrent cause (which is denied), adjustments need to be made for the matters identified at paragraph [61(d)] above and (to the extent the Court finds the Travel Ban was not an insured event) the Travel Ban. The losses would almost certainly have occurred regardless of the Lockdown Orders because Meridian still had nothing to sell even if it could have had customers at its physical business premises.

62 As indicated above, the adjustments issue therefore only arises if the Court rejects IAG's submissions on coverage and causation. If the Court does come to consider adjustments (e.g. the circumstance described in [61(e)(iii)] or [61(f)(ii)]) then the relevant counterfactual is not that there had been no 'occurrence of the disease (both within and outside the radius) (*cf* **PH [299]**), it is that there had been no outbreak within 20 kilometres of Meridian's premises and/or no discovery of COVID-19 at the premises or (to the extent relevant) in another location with the likelihood that it would cause disease at the premises. Neither of these counterfactuals require the Court to exclude international outbreaks of COVID-19, international restrictions on travel or travel bans directed at stopping disease coming into Australia.

D.6 Other matters

63 As to the indemnity period (**PH [300]**), third party payments (**PH [301]-[306]**) and the *Insurance Contracts Act* (**PH [307]**), IAG repeats its submissions at paragraphs [32], [33]-[42] and [43]-[45] above.

3 September 2021

I Jackman

P Herzfeld

J Entwisle