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Details of Filing

Document Lodged:	Outline of Submissions
File Number:	NSD136/2021
File Title:	ALLIANZ AUSTRALIA INSURANCE LIMITED (ACN 000 122 850) v THE STAGE SHOP PTY LTD (FORMERLY VISINTIN PTY LTD) ACN 114 449 571
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

Dated: 3/09/2021 8:01:17 PM AEST Registrar

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NSD 135/2021
NSD 136/2021

Federal Court of Australia
District Registry: New South Wales
Division: General

Business Interruption Test Case #2

OUTLINE OF SUBMISSIONS IN REPLY
of ALLIANZ AUSTRALIA INSURANCE LIMITED

Proceedings NSD135/2021 (MAYBERG) and NSD 136/2021 (VISINTIN)

A Introduction

1 These submissions in reply address certain discrete issues raised in the insureds' Outline of Submissions served on 31 August 2021 (**Insureds' Submissions**) which are relevant to the two test cases involving policies issued by Allianz, NSD 135/2021 and NSD 136/2021.

2 Defined terms in these submissions have the same meaning as in Allianz's Primary Submissions unless otherwise defined.

B Visintin

B.1 Visintin POA Endorsement

Restriction of access to the Premises

3 Visintin all but concedes that the Authority Response-Visintin were not orders preventing or restricting access to the Premises (Insured's Submissions, [564] – [565])]. It follows that Visintin's reliance on the Visintin POA Endorsement must fail. However, given the nature of the case as a test case, it is as well to address Visintin's submissions on the construction of the POA Endorsement notwithstanding the concession as to its application on the facts before the Court.

4 Visintin seeks to equate the Visintin POA Endorsement with the Hiscox 1-4[1] wording considered in *FCA v Arch*. The Hiscox wording is more general. It is in these terms:

> **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:**

[1] The Court refers to "Hiscox 1-4" wording, but put to one side the differences in wording in Hiscox-4 (see *FCA v Arch,* [111]),

…

Public authority

13. **your inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance following:**

a. murder or suicide;

b. an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority;

c. injury or illness of any person traceable to food or drink consumed on the insured premises;

d. defects in the drains or other sanitary arrangements;

e. vermin or pests at the insured premises.

5 Importantly, that clause is framed in terms of the insured's "*inability to use*" the premises, as opposed to a restriction of "*access to*" the premises. Moreover, the restrictions contemplated by Hiscox 1-4 are not limited to those imposed as a result of the occurrence of disease at, or in the vicinity of, the premises. Rather, all that is required is that the restriction "*followed*" the occurrence of an infectious disease, wheresoever the disease occurred. Given that broad wording, the Supreme Court found that Hiscox intended to cover the effects on an insured business of cases of a disease, *wherever the disease occurred* (at [105]). And, having made that finding, it is unsurprising that the Supreme Court did not then limit the breadth of that cover by confining the restrictions contemplated by the Hiscox wording to restrictions imposed on the insured and the insured premises (at [128]).

6 The Visintin POA Endorsement is different. It relevantly provides:

> We will cover You for interruption to Your Business that is caused by an order of any legal authority **which prevents or restricts access to the Premises** provided that the order **result from threat of damage to property or persons within 50 kilometre radius of the Premises** and the prevention of access or restricted access to the Premises extends for a continuous period greater than 48 hours.

7 Thus, unlike the Hiscox wording, the Visintin wording does limit cover to threats of damage *in the vicinity of the premises* and it thus plainly contemplates only those restrictions that were imposed *on the insured's premises* – the words used are "access **to the Premises**". As explained in Allianz's Primary Submissions (at [45(a)], the Supreme Court in *FCA v Arch* (at [153]) accepted that "use of the premises" and "access to the premises" were two different concepts, and that restrictions on free movement (our emphasis) *"did not in themselves prevent access to the premises which remained open."* The burden of that observation was not the distinction between the "prevention" and "restriction"; but rather the difference between "*use of* the premises" and "*access to* the premises".

8 Allianz does not contend that an order restricting "*access to the Premises*" is necessarily limited to an order restricting *all* physical access to the Premises (cf. Insureds' Submissions [133]-[134]). But at the very least, what is required is that the order be *directed towards the Premises* and not merely towards the public at large, so that it is merely incidental that the insureds' customers did not visit the shop.

9 In addition, it may be accepted that the closure of *part* of a premises, as opposed to a complete closure of the *entirety* of a premises, is sufficient to constitute a restriction of access to the premises. But that analysis is inapt in the context of Visintin's business. We are not here concerned with a restaurant who has been ordered to close its dining area, but is permitted to conduct a takeaway trade (cf. FCA v Arch, [148] – [152]). What we have here is a shop that is under no orders to close any part of the premises at all.

10 Visintin faintly submits that social distancing orders restricted access to the premises, in that the orders restricted the number of people who would ordinarily be able access the premises (Insureds' Submissions [564] – [565]). That is not an order about "access to" the premises, which remained open. Further, none of the matters comprising the Authority Response-Visintin that gave rise to social distancing orders (by way of prohibitions on mass gatherings or prohibited gatherings) applied to retail stores. Similarly, none of the matters comprising the Authority Response-Visintin that gave rise to social distancing orders (by way of requiring persons to "*use their best endeavours*" to comply with physical distancing) mandated a reduction in the number of people allowed to enter the premises. Of the latter, those directions did not first enter force until 28 March 2020 and after Visintin's alleged interruption is said to have commenced. In any event, there is no evidence of the number of customers that were queued up outside, or any other evidence supporting a finding that had it not been for the social distancing orders, more customers would have entered the premises and purchased stock.

"As a result of damage to or threat of damage to … persons within a 50 kilometre radius"

11 In any event, the social distancing orders did not *"result from"* a *"threat of damage to property or persons within 50 kilometre radius of the Premises."*

12 As explained more fully in Allianz's Primary Submissions (at [47] – [52]), the phrase *"damage to property or persons"* in the Visintin POA Endorsement is intended to refer to physical damage as the result of a peril or event of a type that would have been insured under the primary section of the policy, had the damage occurred on the Premises, rather than merely in the vicinity of the Premises. Contrary to the Insureds' Submissions (at [157]), the word "damage" is inapt to describe "illness".

13 Visintin contends, by reference to *Star*, that it is no ground for objection that the construction arrived at "*would involve some overlap in coverage*" (at [570]) between the Visintin ID Extension and the Visintin POA Endorsement. So much may be true, but that is a disingenuous

characterisation of the interaction between the two clauses on Visintin's interpretation. We are not dealing with *"some overlap in coverage*" (*Star,* [166]). What we are concerned with here is a *complete* overlap so that if the Visintin POA Endorsement is given the meaning for which Visintin contends, the clear intention of the parties manifested in the Visintin ID Extension will be wholly defeated (see further Allianz's Primary Submissions at [50]).

14 The insureds' repeated reliance on *Teele v Federal Commissioner of Taxation* (1940) 63 CLR 201 (Insureds' Submissions, [571]) is misplaced. That case concerned the construction of a will. The testator had bequeathed the residuary of his estate to such charitable or religious causes as his trustees might in their discretion determine. It was argued that by using the word "religious", the testator had showed that he did not mean "charitable" to bear its ordinary meaning, since that meaning was subsumed within the concept of "religious" and would render "charitable" redundant. That argument was rejected. Dixon J was satisfied that the testator simply wanted to be sure that his trustees would consider religious causes. Plainly, this is a very different case. We are not concerned with the possibility that a clause may have been added for an abundance of caution.

15 The policy must be read as a whole. As Leeming JA said in *Zhang v ROC Services (NSW) Pty Ltd* (2016) 93 NSWLR 561 at [89], *"[i]t is not only permissible but mandatory to have regard to how the potential legal meanings fit with the other provisions of the contract."* His Honour described this process of construction more fulsomely in *HP Mercantile Pty Ltd v Hartnett* [2016] NSWCA 342 at [134]:

> …it is trite that the contract must be construed as a whole, with a view to the legal meaning reflecting a measure of internal coherence: thus 'preference is to be given to a construction supplying congruent operation to the various components of the whole.': *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522; [2005] HCA 17 at [16]. In a case such as the present, where the difficulties are real, that involves what Lords Neuberger and Mance have described as an 'interative process' – 'checking each of the rival meanings against the other provisions of the document and investigating its commercial consequences': see *Re Sigman Finance Corp (in administrative receivership)* [2009] UKSC 50; [2011] 1 WLR 2900 at [28] and *Richmond v Moore Stephens Adelaide Pty Ltd* [2015] SASCFC 147 at [98]. Lord Grabiner has, in my view rightly, regarded this as 'fundamental' … The process of working through the consequences of the competing literal or grammatical meanings enables a court to assess whether either party's preferred legal meaning gives rise to a result that is more or less internally consistent and avoids commercial absurdity.

16 Allianz does not propound "*tongue and groove textual cabinet making*" (*Star,* [164]); only that the meaning given to the two clauses in question *"gives rise to a result that is more or less internally consistent and avoids commercial absurdity."*

17 For the reasons set out above and in Allianz's Primary Submissions, there is no genuine ambiguity as to the meaning of the Visintin POA Endorsement, once the clause has been construed by reference to the words used; its context as an adjunct to property insurance; and to its purpose, and thus there is no opportunity for the application of the *contra proferentum*

principle: *Zhang v ROC Services (NSW) Pty Ltd* (2016) 93 NSWLR 561, [140] (Leeming JA, Sackville AJA agreeing).

B.2 Visintin ID Extension

Closure or evacuation

18 Apart from describing it as "*plain*" (Insureds' Submissions, [580]), Visintin does not explain why the words *"closure or evacuation"* contemplate a voluntary closure. For the reasons set out in Allianz's Initial Submissions, [26] – [29], *"closure or evacuation"* must mean a closure or evacuation as a result of an order or direction by an appropriate authority. Neither party to the policy would have supposed that the insured was at liberty to decide when and for how long to close the business to prevent serious public health consequences from an "outbreak" – it is the public health authorities that are charged with that task. That interpretation is supported by the presence of the word "evacuation", the ordinary meaning of which (in the context of evacuating a premises) is suggestive of official action, rather than voluntary action taken by a proprietor.

Outbreak

19 The meaning of "outbreak" is not elucidated by reference to external materials that were not in existence at the time the policies were issued. In any event, the insureds' citation from the CDNA National Guidelines for Public health Units (V 4.4-7) (2021) at 42 is incomplete. The full citation provides that *"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."* Moreover, the insureds have been selective in their reference to contemporary material: they may well have cited the Commonwealth Department of Health's *"COVID-19 Australia: Epidemiology Report – Last updated 10 August 2021"* which defines "Outbreak" in these terms:

> **"Outbreak"** in relation to COVID-19 refers to two or more cases (who do not reside in the same household) among a specific period of time where illness is associated with a common source (such as an event or within a community). Some states and territories may report a single case associated with a residential aged care facility as an outbreak.

20 That definition supports Allianz's position. In any event, including for the reasons set out in section B.5 of Allianz's Primary Submissions, Allianz maintains that for the purposes of this case, the appropriate definition of an "outbreak" is an instance of community transmission in an uncontrolled environment.

21 Visintin states (Insureds' Submissions, [587]) that the material produced under subpoena in respect of Visintin is *"sufficient to establish that a person contracted COVID-19 from another person in the Community within a 20km radius of Visintin's premises on or before 23 March 2020."* That is incorrect. The only material produced in respect of Visintin comprises two spreadsheets produced by the South Australian Department of Health. There is no explanation of the spreadsheets, including of how the data was collected and the conventions used to record

it. The spreadsheet titled "Cases up to 24 April 2020" *appears* to list COVID-19 cases in South Australia up to 24 April 2020. It purports to identify 434 cases, 29 of which are recorded as having been acquired in South Australia by reference to a known contact or cluster before 28 March 2020. For each case, the spreadsheet apparently records a residential city, residential postcode, isolation address postcode, isolation address suburb, estimated postcode of acquisition, first notified date, "calculated onset date" and a "start of infectious period" date. It is not clear what part of the data Visintin wishes to rely on. But for example, the "estimated postcode of acquisition" does not establish anything without evidence of who "estimated" the postcode. Was it the acquirer who has estimated the place of infection, or contact tracers? Plainly, the reliability of the data is heavily dependent upon its source and transmission cannot be established on the data as presented. The second spreadsheet is titled "Suburbs cases visited" and true to name, it purports to record the dates that persons with COVID visited suburbs. But it does not purport to record contacts made by those infected persons, or to match the visits to suburbs with subsequent infections. Obviously then, that spreadsheet does not establish transmission either.

B.3 Causation

22 In order to be entitled to indemnity, Visintin is required to prove that:

(a) it suffered loss;

(b) the loss was caused by the *"closure or evacuation"* of the premises; and

(c) the *"closure or evacuation"* of the Premises was *"as a result of"* the outbreak.

23 It has failed to establish each of those requirements.

24 First, Visintin has not even articulated (cf. Insureds' Submissions, [590]), let alone proved, the loss claimed. The monthly profit and loss statements[2] are unexplained. For example, while it may be accepted that there was a drop in Gross Profit in April and May 2020 below that of any previous month in 2019-2020, it is not clear from the high level figures to what the drop is to be attributed as a matter of accounting. For instance, at least in April 2020, substantial trading appeared to continue, because the cost of goods sold was $13,514.77 (a higher figure than for April 2019 and about the same as December 2019), but the sales were low. In any event, any reduction was short lived – the Gross Profit appears to have recovered in June 2020 to normal levels, having regard to the figures for 2019.

25 Secondly, assuming there was some loss (which is not conceded and which is not established on the evidence), the loss was not caused by the *"closure or evacuation".* Allianz's primary position is that there was no *"closure or evacuation"* for the reasons set out above at [18] above

[2] Affidavit of Lesley Visintin dated 20 August 2021 (**Visintin Affidavit**), [27]-[29], LCV-3, LCV-4.

and at [26] to [29]] of Allianz's Primary Submissions. But even accepting for a moment that a voluntary closure was sufficient to satisfy that requirement, it is difficult to see how the voluntary closures of The Stage Shop caused the loss of which Visintin now complains. Ms Visintin deposes that she closed the shop between 28 March 2020 to 2 April 2020. It is not clear how Visintin contends that the alleged loss of Gross Profit is to be attributed to those days of supposed lost trading. Certainly, there is no evidence that the shop would profitably have traded on those days had it remained open. After all, the voluntary closure followed a series of government directions forcing Visintin's customers (so it is said) to close or stay at home. Similarly, even if it were accepted (which it is not) that reduced opening hours constituted a *"closure or evacuation"* for the purposes of the Visintin ID Extension, it is not obvious how any loss of Gross Profit was attributable to those lost hours.

26 Thirdly, even if Visintin's voluntary closures or reduced opening hours constituted a *"closure or evacuation"* (which they did not), the "*closure or evacuation"* was not "*as a result of*" an outbreak within a 20km radius of the Premises. Ms Visintin had no special knowledge of a particular "outbreak" in the area. Rather, she decided to close the shop in response to government directions that affected Visintin's customer base. That is not sufficient to provide the necessary causal link.

27 Visintin bears more than a *prima facie* onus to prove causation (cf. Insureds' Submissions, [593]) and it needed to do more than "point to its reduction in gross profit". What was required was a clear articulation and detailed evidence establishing first, the precise reduction in gross profit, and second, that the reduction was proximately caused by the *"closure or evacuation*" of the Premises, which in turn was caused by an outbreak within 20km of the Premises. Visintin's submission at [593] that it was open for Allianz to establish that some part of the lost gross profit was caused by something else is, with respect, not credible. Visintin's evidence (such as it is), including as to loss was served on 21 August 2021, that is, two days after Allianz filed its Primary Submissions. The bare profit and loss statements were provided just days before that. This is despite repeated and increasingly urgent calls for the insureds to provide documents relating to their loss in a timely fashion so that it could be properly considered. Instead, it was not served on time, and what was ultimately served is inadequate in terms of its form and admissibility. Allianz reserves its rights to adduce evidence relevant to the calculation of Visintin's loss at any further hearing of the separate question.

C Third party payments

28 In considering the treatment of third party payments, it is important to return to the structure of the Policy.

29 Part C of the Business Interruption section of the Visintin Policy provides that *"In the event of interruption of or interference with Your Business … We will pay You in respect of each item*

shown in the Schedule, the amount of the loss resulting from such interruption interference [sic]*"* (p 62).

30 Visintin was insured for item 1, being "Gross Profit". The calculation of that basis of payment requires a subtraction of *"any sum saved during the Indemnity Period in respect of such charges and expenses of Your Business payable out of Gross Profit as may cease or be reduced in consequence of the Damage."*

31 Visintin received the Commonwealth JobKeeper payment; the Federal Cash Flow Boost; the South Australian Government's Small Business Grant; and a rental waiver from its landlord. Each of those payments was made available to Visintin to reduce losses to gross profit, either by injecting cash or reducing an expense and thus each must be taken into account in assessing Visintin's claim.

Jobkeeper

32 The legislative basis for the JobKeeper payment is described in IAG's Primary Submissions at [233] – [234].

33 The *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth) provided (at s 7(1)) that the rules might make provision for Commonwealth payments. Part 2 of the *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) provided for JobKeeper payments. Section 5 of the *Rules* provided a simplified outline of the JobKeeper payment in the following terms (emphasis added):

> *The jobkeeper payment is intended to assist businesses affected by the Coronavirus to cover the costs of wages of their employees.*
>
> *The jobkeeper scheme starts on 30 March 2020 and ends on 28 March 2021.*
>
> *A business that has suffered a substantial decline in turnover can be entitled to a jobkeeper payment each fortnight for each eligible employee. It is a condition of entitlement that the business has paid salary and wages of at least the amount of the jobkeeper payment to the employee in the fortnight.*
>
> *A business that has suffered a substantial decline in turnover can also be entitled to a jobkeeper payment each fortnight for one business participant who is actively engaged in operating the business.*
>
> *A registered religious institution that has suffered a substantial decline in turnover can also be entitled to a jobkeeper payment each fortnight for each eligible religious practitioner who is active as a member of the institution.*
>
> *The jobkeeper scheme is administered by the Commissioner of Taxation.*
>
> *The Commissioner pays the jobkeeper payment to entities shortly after the end of each calendar month, for fortnights ending in that month.*
>
> *Some of the administrative arrangements for the scheme are set out in the Act.*

34 Section 7 of the *Rules* set out when an entity qualified for the JobKeeper scheme. Subject to the exceptions in s 7(2), qualification was dependent upon satisfying the decline in turnover test expressed in s 8.

35 It is plain from those provisions that the JobKeeper payment was intended to assist businesses to cover the costs of employee wages. Those are expenses that would, but for the circumstances giving rise to Visintin's claim (i.e. the widespread effects of the COVID-19 pandemic), would otherwise have been payable out of Gross Profit, and are of precisely the type that business interruption insurance is designed to cover. They are therefore *"a sum saved"* for the purposes of the calculation of Gross Profit. The same is true for the other government payments addressed below.

Federal Cashflow Boost

36 These payments, known as a *cash flow boost*, were made pursuant to the *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020* (Cth).

37 Eligible businesses who employed staff received between $20,000 to $100,000 in cash flow boost amounts by lodging their activity statements up to the month or quarter of September 2020. The cash flow boosts were delivered as credits in the 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 effect, this allowed the business to keep the amounts they had withheld from payments to employees for these periods (for example, for the purposes of PAYG tax). These payments are discussed in detail in IAG's Primary Submissions, [242] – [244].

38 Plainly, a reduction of a tax payment is a reduced expenditure that would otherwise be payable out of Gross Profit had the circumstances giving rise to Visintin's claim not occurred.

South Australian Government COVID Small Business Grant

39 Visintin received $10,000 as part of the COVID Small Business Grant in May 2020, which was introduced as part of the SA Government's $650m Jobs Rescue Package.

40 The cash grants were available to help cover a business' ongoing or outstanding operating costs, such as rent, power bills, supplier and raw material costs and other fees: *Grant Guidelines.* The grant was therefore a saved expense that, but for the circumstances underpinning Visintin's claim (that is, the effects of the COVID-19 pandemic in South Australia), would have been payable from Gross Profit.

Rental waiver

41 Visintin received a partial rental waiver from April 2020 to January 2021. There is no evidence of the circumstances in which that rental waiver was provided by the landlord. In circumstances where Visintin might easily have adduced evidence to the contrary, it is open for the Court to infer that the rental waiver was provided to ameliorate the financial difficulties faced by Visintin caused by the government's reaction to the COVID-19 pandemic. It follows that the rental waiver

ought be taken into account in calculating the Gross Profit that Visintin would have earned had it not been for the government orders. Plainly, that waiver represents an expense that would have been paid out of Gross Profit were it not for the circumstances underpinning Visintin's claim.

D Mayberg Policy

D.1 Mayberg POA Endorsement

Restriction of access

42 The submissions made on behalf of Mayberg on the "restriction of access" question (Insureds' Submissions, [629]) mirror those made on behalf of Visintin and we refer to our reply submissions above at paragraphs [4] to [9].

43 Mayberg contends that the 29 March 2020 *Home Confinement Direction* had the effect of either *"preventing"* or *"restricting"* access to Mayberg's premises.

44 This direction provided that persons residing in Queensland could not leave their residence except for, and only to the extent reasonably necessary to accomplish, "permitted purposes". "Permitted purposes" were defined by clause 6 to include, inter alia, obtaining "essential goods or services". "Essential goods or services" were defined as including services needed for the necessities of life and operation of society, and was later changed so that obtaining "essential goods or services" meant obtaining goods from "an essential business, activity or undertaking". An "essential business, activity or undertaking" was defined as any business, activity or undertaking that was not prohibited by the Non-Essential Business, Activity and Undertaking Closure Directions (No. 3) (Qld). Relevantly, that direction prohibited the operation of "non-essential businesses, activities or undertakings". Clause 7 defined such businesses by reference to a list of businesses contained in that clause. That list did not include dry cleaning businesses.

45 Even if Mayberg was not a service needed for the necessity of life and operation of society, a stay-at-home direction would not comprise a "restriction of access to the Premises", because it is not an order directed towards the Premises; it is rather a direction targeting the public at large, which simply has the incidental effect that customers would not visit the shop.

46 Mayberg concedes that none of the other orders in the Authority Response-Mayberg can be characterised as a prevention or restriction within the meaning of the clause (Insureds' Submissions, [632]).

"As a result of damage to or threat of Damage to … persons within a 50 kilometre radius"

47 The submissions made on behalf of Mayberg on the "threat of Damage" question (Insureds' Submissions, [633]) mirror those made on behalf of Taphouse and Visintin and we refer to our

reply submissions above at paragraphs [11] to [17] above and to Allianz's Primary Submissions at section C.7. To these we add only that, in the case of the Mayberg POA Endorsement, the parties have adopted the word 'Damage' as it is defined in the Business Interruption section of the Mayberg Policy. The manner in which that term is defined makes plain that the the endorsement is not engaged where there is a threat of 'illness' as opposed to 'accidental physical damage, destruction or loss'.

D.2 Mayberg ID Extension

Closed or evacuated

48 Mayberg appears also to concede that the directions comprising the Authority-Response Mayberg did not close or evacuate the Premises (Insureds' Submissions, [645]). To the extent that Mayberg maintains that social distancing requirements could constitute a closure of the Premises, that must be wrong. Plainly, where the Premises (all parts of it) remain open, it could not be considered to be closed simply because it was subject to social distancing requirements. Further, none of the matters comprising the Authority Response-Mayberg that gave rise to social distancing orders (by way of prohibitions on non-essential mass gatherings and non-essential indoor gatherings) applied to dry cleaners (by way of their being either a retail store, shopping centre or workplace where the gathering is necessary for the normal business or operation of those premises). Similarly, none of the matters comprising the Authority Response-Mayberg that gave rise to social distancing orders (by way of requiring persons to socially or physically distance from others where possible) mandated a reduction in the number of people allowed to enter the store. Of the latter, those directions did not first enter force until 1 June 2020 and after Mayberg's alleged interruption is said to have commenced. In any event, there is no evidence of the number of customers that were queued up outside, or any other evidence supporting a finding that had it not been for the social distancing orders, more customers would have entered the premises to obtain services.

"As a result of the outbreak … occurring within a 20-kilometre radius of the Premises"

49 Mayberg contends that the relevant outbreak covered all of Queensland (Insureds' Submissions, [649]). Such a broad concept of "outbreak" is incongruent with the remainder of the clause, which contemplates an outbreak that occurs (wholly) *within* the designated area.

50 Including for the reasons set out in sections B.5 and C.5 of Allianz's Primary Submissions, Allianz maintains that for the purposes of this case, the appropriate definition of an "outbreak" is an instance of community transmission in an uncontrolled environment. It does not accept that one or more isolated cases within the radius constitutes an outbreak.

51 There is no basis for the Court to draw an inference that there were outbreaks within the relevant radii of the four Mayberg Premises based on the number of cases within the Metro South Hospital and Health Service district and the Metro North Hospital and Health Service district. This is especially so since (i) those districts included hospitals who might well be caring for

patients who resided in or acquired COVID-19 in suburbs outside of the designated area; (ii) to the extent that the table of cases record COVID-19 patients located in hospitals, those patients are isolating; and (iii) in any event, neither of those districts correspond to the designated area so that it is impossible to determine whether COVID-19 cases within the districts were located within or outside the 20 kilometre radii of the Mayberg Premises.

D.3 Causation

52 In order to be entitled to indemnity, Mayberg is required to prove that:

(a) it suffered loss;

(b) the loss was caused by the *Home Confinement Direction*; and

(c) the *Home Confinement Direction* must be *"as a result of"* an "o*utbreak*" occurring within 20 kilometres of the Premises, or a *"threat of Damage"* within 50 kilometres of the Premises.

53 It has failed to establish each of those requirements.

54 First, as with Visintin, Mayberg has not articulated (cf. Insureds' Submissions, [654]), let alone proved, the loss claimed. The monthly profit and loss statements[3] are unexplained. For example, while it may be accepted that there was a drop in Gross Profit in April 2020, it is not clear from the high level figures to what the drop is to be attributed as a matter of accounting.

55 Secondly, assuming there was some loss (which is not conceded and which is not established on the evidence), the loss was not caused by the Home Confinement Direction because that direction permitted Mayberg's customers to visit the stores (which were "essential businesses") to drop off and collect dry-cleaning. Mayberg's downturn in trade was caused by something else, which is undisclosed on the face of the evidence.

56 As to the third requirement, as explained above, it is disputed that there was an outbreak or a relevant threat of Damage.

57 As was the case with Visintin, Mayberg bears more than a *prima facie* onus to prove causation (cf. Insureds' Submissions, [657]) and we make the same points in response to that submission. Mayberg needed to do more than "point to its reduction in gross profit". What was required was a clear articulation and detailed evidence establishing first, the reduction in gross profit, and second, that the reduction was proximately caused by the Home Confinement Direction. Mayberg's submission at [657] that it was open for Allianz to establish that some part of the lost gross profit was caused by something else is, with respect, not credible. As with the other insureds, Mayberg's evidence, including as to loss was served on 20 August 2021, that is, the

[3] Affidavit of Alice Hopper dated 20 August 2021 (**Visintin Affidavit**), [25]-[27], AH-4.

day after Allianz filed its Primary Submissions despite repeated requests for the insureds to provide documents relating to their loss in a timely fashion so that it could be properly considered. Instead, it was not served on time, and what evidence has been adduced is inadequate in terms of its form and admissibility. Allianz reserves its rights to adduce evidence relevant to the calculation of Mayberg's loss at any further hearing of the separate question.

D.4 Third party payments

58 The basis of settlement clause provided for the calculation of the quantum of cover: *"Loss of Income will be calculated by subtracting the Income earned during the Indemnity Period from the Income You would have earned during the Indemnity Period had the Damage not occurred".* That amount was to be adjusted to *"take account of any savings made during the Indemnity Period that reduced the cost of running [the] Business."*: Mayberg Wording, p 58. "Income" is defined in the following terms:

> 1. income received from the renting or leasing of any part of the Premises including monies paid by the lessee as outgoings under the terms of the rental or leasing agreement; and
>
> 2. income from Your Business at the Premises for goods sold, work done, electrical power generated and sold, services rendered or any Government approved incentives, subsidies or market development allowances You are entitled to in relation to Your Business, less:
>
>> a. working expenses for freight, packing, bad debts, and the purchase of goods, materials, components, or Stock;
>>
>> b. any other Uninsured Working Expenses; and
>>
>> c. Payroll if this is shown in the Schedule.

59 Mayberg received a Jobkeeper payment (the statutory basis and character of which are described above), a Queensland State Government COVID-19 - Small Business Adaption Grant Scheme (Round 2) and a rental waiver from its landlord. All of those payments ought be taken into account in calculating the appropriate quantum of Mayberg's claim. Mayberg does not contend to the contrary (Insureds' Submission, [663] – [664]).

Queensland Government Grant

60 As to the Queensland Government Grant, this was established as an "approved scheme" pursuant to the *Rural and Regional Adjustment Regulation 2011* (Qld), which is subsidiary to the *Rural and Regional Adjustment Act 1994* (Qld). The objective of the Act was to establish the Queensland Rural and Industry Development Authority (**Authority**) to administer schemes to give assistance to, amongst others, small businesses: s 3. The Act provides that:

(a) the Authority may give financial assistance only under (relevantly) an "approved scheme", which includes an "approved assistance scheme": s 10, and schedule 1 definitions of "approved scheme".

(b) "approved assistance schemes" will be described in detail in the regulations: s 11(2).

61 The COVID-19 - Small Business Adaption Grant Scheme (Round 2) is described in detail in Schedule 27 of the Regulation. That schedule provides that:

(a) the objective of the scheme is to "*help small businesses seriously disrupted by a closure or restrictions direction to sustain, adapt or develop the resilience of, their operations*": cl. 1; and

(b) the purpose of the assistance is to provide grants to help with meeting the expenses associated with "eligible activities". "Eligible activities" include obtaining professional advice, conducting marketing, developing a digital or IT strategy, conducting training, paying a capital expense resulting from business's compliance with the direction, or paying an operational expense: cll. 2 and 4.

62 The documents provided by the insured suggest that the money was to be spent on digital marketing. Specifically, the confirmation letter indicates the money was to be paid for services from MarkMade Pty Ltd, a digital marketing company.

63 It follows that both the JobKeeper payment and the Queensland Government Grant are both "subsidies" within the meaning of the definition of "income" in the Mayberg Wording, and would be taken into account in determining the quantum of Mayberg's claim. It is submitted that the JobKeeper payment would also be characterised as a saving, because Mayberg was relieved of the obligation to pay its employees' salaries.

Rental waiver

64 The rental waiver would also be taken into account as *"a saving made during the Indemnity Period that reduced the cost of running [the] Business".*

65 Allianz otherwise relies on its Primary Submissions.

Date: 3 September 2021

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