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Details of Filing

Document Lodged:	Outline of Submissions
File Number:	NSD144/2021
File Title:	GUILD INSURANCE LIMITED ACN 004 538 863 v GYM FRANCHISES PTY LTD ACN 611 474 947 & ANOR
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA

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Important Information

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

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GUILD INSURANCE LIMITED
OUTLINE OF SUBMISSIONS

No. NSD144 of 2021
No. NSD145 of 2021

Federal Court of Australia
District Registry: New South Wales
Division: Commercial and Corporations National Practice Area (Insurance List)

Guild Insurance Limited (ACN 004 538 863)
Applicant in NSD144 of 2021 and NSD145 of 20211

Gym Franchises Australia Pty Ltd (ACN 611 474 947) and another
Respondents in NSD144 of 2021

Dr Jason Michael t/as Illawarra Paediatric Dentistry
Respondent in NSD145 of 2021

A. INTRODUCTION

1. These proceedings are test cases concerning the proper construction of extensions to coverage contained in business interruption insurance policies issued by the applicant (**Guild**) and their responsiveness to losses arising from the COVID-19 pandemic.

2. Guild insures the first respondent (**Gym Franchises**) and second respondent (**Mr Reason**) in Proceeding No. NSD144 of 2021 (the **Gym Franchises Test Case**) and the respondent (**Dr Michael**) in Proceeding No. NSD145 of 2021 (the **Dr Michael Test Case**).

3. Gym Franchises operates a gym known as "Reinvigr8 Health and Fitness" (the **Gym Franchises Business**), and Mr Reason is one of the directors of Gym Franchises. The gym was originally located at Shop 3, 1 Brygon Creek Drive, Upper Coomera,

Queensland. Since 17 April 2020, the gym has operated from 34-38 Signato Road, Helensvale.

4. Dr Michael operates a paediatric dentistry practice called Illawarra Paediatric Dentistry (the **Dr Michael Business**), located at Level 2, 172-174 Keira Street, Wollongong, New South Wales.

5. Gym Franchises and Dr Michael made claims on Guild for business interruption under a prevention of access extension in their respective policies due to the effect on their business of the measures implemented by the Federal Government, state governments and relevant industry bodies in response to the COVID-19 pandemic.

6. Guild has denied those claims and contends that the prevention of access extension does not respond to the claims made by Dr Michael and Gym Franchises.

7. These submissions first address the issues in the Dr Michael Test Case (Part B, commencing on p.2) and then the issues in the Gym Franchises Test Case (Part C, commencing on p.188). There are common issues in both cases, in particular in relation to the construction of the prevention of access extension. While we address the test cases separately, we have sought to avoid the repetition of submissions on issues of construction by cross-referencing where possible. Issues relating to causation and to adjustments are addressed only briefly in Part D. Those issues will be subject to further submissions once the insureds have articulated their alleged loss. In Part E, we address the issue of the calculation of interest under s 57 of the *Insurance Contracts Act 1984* (Cth).

8. The general principles applicable to the construction of a contract of insurance (along with other preliminary matters) have been helpfully set out by IAG in its written submissions in Proceedings Nos. NSD134/2021 and NSD133/2021 (at part B). Guild adopts those submissions.

B. THE DR MICHAEL TEST CASE

B.1. The Policy

9. Dr Michael's claim is made under a Dentists Business Insurance Policy P00076362 issued to Dr Michael by Guild on 30 September 2019 (the **Dr Michael Policy**). The

period of cover under the Dr Michael Policy was 10 October 2019 to 4pm on 10 October 2020.

10. The Dr Michael Policy is "multiform" in nature, providing cover in respect of a range of first-party and third-party risks. The 'Business Interruption' section, under which Dr Michael seeks indemnity, is tied to the 'Business Property' section, and provides first-party cover. The Business Property section of the Dr Michael Policy provides indemnity, subject to its terms and conditions, for *"Damage to Business Property at the Business Premises which occurs during the Period of Cover"* (p. 40). The term 'Damage' is, in turn, defined to mean: *"accidental **physical damage** to or destruction of Business Property"* (emphasis added) (p. 25).

11. The Dr Michael Policy provides, under the Business Interruption section, an extension of cover titled **'Prevention of Access'** (pg. 53). In the 'Cover Summary' (p. 7), Prevention of Access is described as an 'Additional Benefit'. The 'Cover Summary' also describes the Business Interruption section as providing cover for:

> *"…Loss of Income or Loss of Rent following an interruption to Your Business resulting from an insured Loss which is Covered under Section – Business Property."*

12. The Prevention of Access Extension relevantly provides as follows:

> *"We will Cover You for Your inability to trade or otherwise conduct Your Business at the Business Premises in whole or in part during the Period of Cover caused by:*
>
> …
>
> *(c) the closure or evacuation of the whole or part of the Business Premises by order of a competent government or statutory authority arising directly or indirectly from:*
>
> - *vermin or other pests, or defects in drains or other sanitary arrangements, occurring at the Business Premises;*
> - *poisoning directly caused by the consumption of food or drink provided on Your Business Premises;*
> - *murder or suicide occurring at your Business Premises or in the immediate vicinity of Your Business Premises; or*

- *human infectious or contagious diseases or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises.*

13. The 'Business' is defined by reference to the Schedule as 'Dentist'. The 'Business Premises' is defined by reference to the Schedule as "*Level 2, l 172-174 Keira Street, Wollongong NSW 2500"*.

B.2. Dr Michael's claim

14. Dr Michael contends that from February 2020, Commonwealth and New South Wales (and other state and territory) authorities made a number of orders which had the effect of closing or evacuating his business (CSR, at [3]).

15. Dr Michael collectively refers to the "orders" as the "**Authority-Response-Dr Michael**". A table summarising the 26 communications that make up the Authority Response-Dr Michael is annexed to these submissions.

16. On 27 March 2020, Dr Michael made a claim under the Dr Michael Policy asserting an entitlement to payment under the Prevention of Access Extension in response to what he says was a loss of income due to the Authority-Response-Dr Michael (the **Dr Michael Claim**).

B.3. Issues for determination

17. Guild contends that the Prevention of Access Extension does not respond to the Dr Michael Claim because:

(a) none of the communications that comprise the "Authority Response-Dr Michael" constitute an *order* of a *competent government or statutory authority* (see **Part B.4**);

(b) none of the communications that comprise the "Authority Response-Dr Michael" required the *closure or evacuation* of the whole or part of the Business Premises (see **Part B.5**);

(c) if, contrary to (a) and (b) above, any of the communications that comprise the Authority Response-Dr Michael constituted an order by a competent

government or statutory authority requiring the closure or evacuation of the whole or any part of the Business Premises, such order did not arise directly or indirectly from human infectious or contagious diseases or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises (see **Part B.6**).

18. If the Court were to find that the Prevention of Access Extension responds to the Dr Michael Claim, Dr Michael is not entitled to a full indemnity because:

(a) the interruption or interference the subject of the claim would have occurred regardless of the communications that Dr Michael relies on, by reason of other (uninsured) impacts of the COVID-19 pandemic (**Part D.1**);

(b) Guild is entitled to adjust any payment for business interruption to reflect (uninsured) circumstances affecting the Business arising from the COVID-19 pandemic, so that payment reflects the result that, but for the insured events, Dr Michael would have obtained during the relevant period (**Part D.2**); and

(c) Dr Michael is obliged to account for savings made, additional Income received and other financial benefits obtained during the Indemnity Period, including on account of the Jobkeeper program, and any other grants, subsidies or schemes (Government or otherwise) that mitigated loss sustained by the Business or otherwise improved its financial position (**Part D.2**).

B.4. 'order of a competent government authority'

19. To engage the Prevention of Access Extension, the inability to trade or otherwise conduct the insured's business at their business premises must be caused by the closure or evacuation of the whole or part of the business premises by "*order of a competent government or statutory authority*".

20. The "Authority Response-Dr Michael" comprises 26 separate communications or releases. Those communications and releases can be grouped in the following way:

(a) Media Releases from the Prime Minister (Items 1, 8, and 16);

(b) Communications and releases from the Australian Dental Association (**ADA**), including the ADA NSW Branch (Items 2, 3, 5, 6, 9, 10, 15, 17, 19, 23, 25, and 26);

(c) Communications and releases from the Dental Board of Australia (**DBA**) (Items 4, 13, 14, 20 and 22);

(d) Communications and releases by the Australian Health Protection Principal Committee (**AHPPC**) (Items 7, 12 and 21); and

(e) Communications and releases from the Dental Council of NSW (Items 11, 18, and 24).

21. In relation to each communication, two questions arise:

(a) *first*, whether it was issued by a "competent government or statutory authority"; and

(b) *secondly*, whether it was an "order" for the purposes of the Prevention of Access Extension.

Meaning of "competent government or statutory authority"

22. Although not defined in the Dr Michael Policy, the term 'government' when construed in the Prevention of Access Extension would take on its natural and ordinary meaning to encompass any Federal, State or Local Government body.

23. The term "statutory authority" ought be construed as referring to any body established through legislation for a public purpose.

24. A statutory authority only has those powers conferred upon it by statute: Crimmins v Stevedoring Committee (1999) 200 CLR 1 at [34]. The qualification that either the government or statutory authority must be "competent" should be understood as requiring that, to attract cover, the government or statutory authority responsible for making any order relied upon must have been acting within power: see for example the approach of the Full Court of the Supreme Court of Queensland in Stevenson v Stephens [1990] 1 Qd. R 575 at 580 to 581. The Court would not attribute to the parties

to the Dr Michael Policy a mutual intention that cover was to be available where a government or statutory authority acts capriciously or beyond the scope of its powers.

Meaning of "order"

25. The term 'order' in the context of the Prevention of Access Extension should also take on its natural and ordinary meaning having regard to the context in which it appears. In Cat Media Pty Ltd v Allianz Australia Insurance Ltd (2006) 14 ANZ Ins Cas 61-700; [2006] NSWSC 423 at [31] (**Cat Media**), Bergin J observed that the term *order*, where used in a materially similar context to the Prevention of Access Extension, "must be considered in the context in which it appears, that is, not only with the expression 'of a competent public authority', but also in the context of the clause as a whole".

26. In the Prevention of Access Extension, the word 'order' appears alongside the expression 'of a competent government or statutory authority'. It ought to be construed having regard to its proximity to those words, the four bullet points in subparagraph (c), and the context of the Prevention of Access Extension as a whole, which is intended to provide cover where there is, inter alia, the closure or evacuation of the whole or part of the insured premises by order of a competent government or statutory authority arising from certain defined circumstances. In that context, the word 'order' ought be construed as encompassing an authoritative direction, command or mandate.

27. Further, read in the context of the clause as a whole, and in particular the preceding words "*closure or evacuation of the whole or part of the Business Premises by*", the word "*order*" contemplates an order about the Business Premises itself, being the property insured.

28. Mere advice or recommendations would not constitute an *order* unless expressed in mandatory terms. In this regard the plurality in *FCA v Arch Insurance (UK) Ltd & Ors* [2021] AC 649; UKSC 1 at [121] – having accepted that a restriction may not need to be legally enforceable – observed that the restriction must nevertheless "be in mandatory terms" and also "in clear enough terms to enable the addressee to know with reasonable certainty what compliance requires". As is developed further below,

none of the communications that comprise the Authority Response - Dr Michael had these qualities.

Were any of the items that comprise the Authority Response-Dr Michael an "order of a competent government or statutory authority"?

The Prime Minister's Media Releases (Items 1, 8, and 16)

29. Guild accepts that the Prime Minister represents the Federal Government, however, as outlined in the table annexed, none of the Prime Minister's media statements implemented any direction, command or mandate. They could not properly be described as an "*order*" for the purposes of the Prevention of Access Extension.

Communications and releases from the Australian Dental Association (ADA), including the ADA NSW Branch (Items 2, 3, 5, 6, 9, 10, 15, 17, 19, 23, 25, and 26)

30. The ADA is not created under statute and has no regulatory or other function granted under statute. As such, it is neither a government nor statutory authority; nor is its NSW Branch. As such, communications emanating from that body cannot be relied upon to attract cover under the Dr Michael Policy.

31. In any event, the ADA's communications and releases were merely advisory and, at the highest, amounted to the making of recommendations (see items 2, 3, 5, 6, 9, 10, 15, 17, 19, 23, 25, and 26 of the annexed table). None communicated any direction, command or mandate. They could not properly be described as an "*order*" for the purposes of the Prevention of Access Extension and, - as is developed further below – could not, on any view, be said to have required the evacuation or closure of Dr Michael's Business Premises.

Communications and releases from the Dental Board of Australia (DBA) (Items 4, 13, 14, 20 and 22)

32. Guild accepts that the DBA may be treated as a statutory authority for the purposes of communications relied upon by Dr Michael. However, as detailed in items 4, 13, 14, and 20 of the annexed table, none of the communications or releases from the DBA could be construed as directions, commands or mandates.

Communications and releases by the AHPPC (Items 7, 12 and 21)

33. The AHPPC was not created under statute and has no powers conferred upon it by any State or Commonwealth Act. It was established by the Council of Australian Governments on 2 July 2009 and provides advice and recommendations to the Australian Health Ministerial Advisory Council and National Cabinet on, *inter alia*, national health related matters.[1] It is not a "statutory authority" and is not a "government".

34. Further, as detailed in the annexed table (at items 7, 12, 21 and 22), the statements and releases from the AHPPC were recommendations, not directions, commands or mandates.

Emails from the Dental Council of NSW (Items 11, 18, and 24)

35. The Dental Council of NSW is a statutory body created under s.41B of the *Health Practitioner Regulation Law* (NSW); Guild accepts that, in these circumstances, it is a statutory authority. However, none of the emails Dr Michael received from the Dental Council of NSW (Items 11, 18 and 24) communicated a direction, command or mandate.

B.5. There was no 'closure or evacuation' of the whole or part of the Business Premises

36. To engage the Prevention of Access Extension, the inability to trade or otherwise conduct the insured's business must also have been "caused by the ***closure or evacuation*** of the whole or part of the Business Premises …" (emphasis added).

What does 'evacuation' mean in the context of the Prevention of Access Extension?

37. The word *evacuation* will take its natural and ordinary meaning having regard to the context in which it appears. According to the Macquarie Dictionary, *evacuation* is the removal of persons or things from a disaster or danger area to a place of greater safety. Recognising the limited utility of dictionaries as an aid to construction – as to which see Tal Life Ltd v Shuetrim (2016) 91 NSWLR 439 at 457 [80] – in this case the definition provided most likely reflects what an ordinary person in the position of

[1] "Australian Health Protection Principal Committee". Directory. Australian Government. 25 June 2021. Retrieved 5 August 2021.

Guild or the insured would have likely understood that word to mean when the Policy was incepted. None of the communications that comprise the Authority Response-Dr Michael can properly be characterised as having led to the evacuation of the Dr Michael's Business Premises.

What does 'closure' mean in the context of the Prevention of Access Extension?

38. Guild contends that the word *closure*, where used in the Prevention of Access Extension, requires the physical closure of the Business Premises. That construction is consistent with the approach taken in analogous circumstances in Cat Media Pty Ltd v Allianz Australia Insurance Ltd (2006) 14 ANZ Ins Cas 61-700; [2006] NSWSC 423 at [60] (**Cat Media**), where Bergin J concluded that the word *closure*, where used in a materially similar context to the Prevention of Access Extension, required the prevention of physical access to the whole or part of the relevant business premises.

39. Her Honour relevantly held:

> *[60] I am of the view that the term "closure" in the extension clause is the closure of the whole, or part of, the building or buildings comprising the Premises, that is, preventing physical access to the whole or part of the Premises. The word "closure" does not mean the cessation of manufacture pursuant to the suspension of Pan's Licence.*
>
> *[61] The purpose of the extension clause is to provide indemnity to the plaintiff for loss occasioned by the interruption to, or interference with, its business by reason of the unavailability of product caused by the closure or evacuation of Pan's Premises by reason of the events referred to in the extension clause. The Premises were not closed when the Licence was suspended. There was access to the Premises and product was manufactured for the purpose of training the staff and analysing and testing the product to meet the standards in the Manufacturing Principles. There was no "closure" of the Premises as that expression is to be understood within the extension clause of the Policy. This clause does not indemnify the plaintiff if there is an inability to manufacture product because the Licence permitting such manufacture has been suspended.*

40. None of the communications that comprise the Authority Response-Dr Michael go so far as to prevent physical access to Dr Michael's Business Premises; they did not require a *closure* of those premises in the relevant sense:

(a) The Media Statements from the Prime Minister (Items 1, 8 and 16):

(i) reported on restrictions that were going to be implemented through state and territory laws (Item 1);

(ii) notified of a suspension of non-elective surgery, but did not itself direct or implement that ban (Item 8); and

(iii) reported that National Cabinet had agreed that from 27 April 2020, to the recommencement of some elective procedures.

None of the media statements required (nor advised or recommended) the closure or Dr Michael's Business Premises.

(b) The communications and releases from the ADA, including the ADA NSW Branch (Items 2, 3, 5, 6, 9, 10, 15, 17, 19, 23, 25 and 26) were all advisory. None of them required (or even advised or recommended) the closure of the Business Premises. To the contrary, the communications and releases expressly contemplated that some dental services could continue to be provided from the Business Premises.

(c) The communications and releases from the DBA (Items 4, 13, 14, 20 and 22) were advisory, and conveyed the DBA's expectation that dental practitioners would abide by recommendations from the AHPPC. The communications and releases did not express any mandatory requirements and certainly did not require (nor advise or recommend) the physical closure of the Business Premises.

(d) The communications and releases by the AHPPC (Items 7, 12 and 21) were advisory and expressed recommendations. None of the AHPPC communications or announcements conveyed a mandatory requirement for the closure of Dr Michael's Business Premises, nor did they advise or recommend that Dr Michael close his Business Premises.

(e) The emails from the Dental Council of NSW (Items 11, 18 and 24), did not express any mandatory requirement or advice or recommendation that Dr Michael close the Business Premises.

41. Dr Michael does not contend that the Authority Response-Dr Michael required the physical closure or movement of persons from the Business Premises. He relies instead on the proposition that "*closure or evacuation of the whole or part of the Business Premises*" includes restriction of access or use of the entirety or a part of the Business Premises for the purpose of carrying on the whole or part of the policyholder's business activities and asserts that the Authority Response-Dr Michael restricted access or use of the entirety or part of the Business Premises for the purposes of carrying on the whole or a part of his business activities (CSR, [8.b.], [9.b.]).

42. As noted, none of the communications that comprise the Authority Response-Dr Michael prevented – or even materially restricted – access to the Business Premises. As such, Dr Michael's case must be that the words "*closure or evacuation of the whole or part of the Business Premises*" are apt to capture any restriction imposed upon the dental profession generally and, therefore, his capacity to practice as a dentist; whether from the Business Premises or elsewhere. They do not for at least the following reasons:

(a) ***First***, to interpret the clause in the way Dr Michael contends would be contrary to the plain and ordinary meaning of the words "*closure or evacuation of … the* ***Business Premises***". The clause does not refer to *closure* of the whole or part of the *Business*; a different defined term used in the Dr Michael Policy. It must also be recalled that the cover is triggered only where Dr Michael is unable to conduct his Business "*at the Business Premises"*. Viewed in this context, *closure* is clearly directed to the Business Premises and, in this sense, is concerned with the physical closure or restriction of access to those premises;

(b) ***Secondly***, the bullet points in sub-paragraph (c) of the Prevention of Access Extension each have a physical connection with the Business Premises and contemplate events that give rise to a potential need to physically close or evacuate the Business Premises (i.e. "vermin … occurring at the Business

Premises", "poisoning directly caused by the consumption of food or drink provided on Your Business Premises", "murder or suicide occurring at Your Business Premises or in the immediate vicinity of Your Business Premises"; "human infectious or contagious disease… at the Business Premises");

(c) ***Thirdly***, having regard to the context of the extension as an adjunct to property insurance, it can be inferred that the parties intended that the "*closure or evacuation of … the Business Premises*" be physically connected with a change to the Business Premises, being the property insured;

(d) ***Fourthly***, Dr Michael's construction is circular when regard is had to the chapeau to the Prevention of Access Extension:

> *We will Cover you for Your inability to trade or otherwise conduct Your Business at the Business Premises in whole or in part during the Period of Cover caused by:*
>
> *(c) [restriction of access or use of the entirety or a part of the Business Premises for the purpose of carrying on the whole or a part of the policyholder's business activities] by order of a competent government or statutory authority …*

On Dr Michael's construction the words "the closure or evacuation of the whole or part of the Business Premises by" in subparagraph (c) are wholly superfluous. That is not a construction that the Court would embrace; and

(e) ***Fifthly***, no reasonable insured would have supposed that the "*closure or evacuation of the … Business Premises"* for the purposes of the Prevention of Access Extension might be brought about by restrictions imposed on the insured's profession. If the clause applied in that way, it would mean that any restriction imposed on dentists would be capable of triggering cover, ignoring both the requirement for *'closure or evacuation'* and that the closure or evacuation be of the *'Business Premises'*.

B.6. The Authority Response-Dr Michael did not arise, directly or indirectly, from 'human infectious or contagious diseases or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises'

43. Assuming, contrary to what we have put above, that there was a relevant order for the *evacuation* or *closure* of the Business Premises, the Prevention of Access Extension further requires the relevant *order* to have arisen directly or indirectly from "*human infectious or contagious diseases or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises*".

44. Guild accepts that COVID-19 is a *human infectious or contagious disease* and SARS-CoV-2 is *an organism likely to result in human infectious disease.*

45. Guild also accepts that each of the communications that comprise the Authority Response-Dr Michael arose directly or indirectly from human infectious or contagious diseases, namely COVID-19. But that is not enough to engage the Prevention of Access Extension.

46. Properly construed, the words *"at the Business Premises"* in the fourth bullet point of subclause (c) qualify all that appear before them. That is, for the final bullet point to be engaged, the *order* must arise directly or indirectly from "human infectious diseases" at the Business Premises or "the discovery of an organism likely to result in human infectious or contagious disease" at the Business Premises.

47. The objective intention to limit the fourth bullet point in that way is clear when the chapeau, subparagraph (c) and the four bullet points are considered together. Relevantly:

    (a) the first three bullet points in sub-paragraph (c) of the Prevention of Access Extension have a direct link the Business Premises (i.e. "vermin … occurring at the Business Premises", "… food or drink provided on Your Business Premises", "murder or suicide occurring at Your Business or in the immediate vicinity of your Business") which demonstrates an objective intention to limit the cover under the Prevention of Access Extension by reference to the happening of the relevant occurrence at or (in the case of a murder or suicide) in the immediate vicinity of the Business Premises;

(b) the words "closure or evacuation" – point to an objective intention to address an official response to occurrences that have a direct physical connection with the Business Premises; and

(c) again, the chapeau to the Prevention of Access Extension covers an inability to trade or otherwise conduct the Business at the Business Premises, which reinforces the proposition that it was intended that the occurrence triggering cover have a direct impact on the Business Premises specifically, not with the Business generally.

48. The parties to the Dr Michael Policy should be taken to have understood at the time of its inception that – much like the matters identified in the first two bullet points under subparagraph (c) – the occurrence of disease at the Business Premises or the discovery of a known pathogen at the Business Premises may naturally have led to an order for its closure or evacuation by health authorities. An objective intention to provide cover in these circumstances can and should be attributed to the parties through the words used in the fourth bullet point to subparagraph (c): Star Entertainment Group Limited v Chubb Insurance Australia Ltd [2021] FCA 907 at [159]. Nothing in the language used points to an intention to provide a broader form of cover, and particularly not cover of the type that would appear to be contended for by Dr Michael.

49. The words "*directly or indirectly*" qualify the words "arising" and "from", to permit a more remote link in the chain of causation than the immediate cause: Coxe v Employers' Liability Assurance Corporation [1916] 2 K.B. 629 at 634. There must nonetheless be some identifiable causal link (even if indirect) between the order and "*human infectious or contagious diseases or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises*". There is no such link here.

50. It is not enough to show, as Dr Michael contends, that the *closure* or *evacuation* "*arose directly or indirectly from discovery of SARS-CoV-2, which (due to its high transmissibility and rapid and wide spread across New South Wales and Wollongong) was likely to result in human infectious or contagious disease (namely COVID-19) at the Business Premises*" (CSR at [9.c]).

51. Dr Michael's contention misapplies the language, and in particular the words "likely to result in", in the fourth bullet point of subparagraph (c).

52. The components of the fourth bullet point in this regard are:

(a) the occurrence of "human infectious or contagious diseases" at the Business Premises; or

(b) "the discovery of an organism likely to result in human infectious or contagious disease" at the Business Premises.

53. The words "likely to" qualify the words "organism" and "result in human infectious or contagious disease". Those qualifying words are necessary: It would be superfluous to refer to an *organism* that results in human infectious or contagious disease "at the Business Premises" when the clause already engages where there is "human infectious or contagious disease" "at the Business Premises". The words "likely to" are objectively intended to permit two scenarios:

(a) firstly, where there is "human infectious or contagious disease "at the Business Premises"; and

(b) secondly, where there is the discovery of "an organism likely to result in human or infectious disease" at the Business Premises.

54. The language used in the fourth bullet point does not permit the construction Dr Michael contends, which requires the bullet point to be read in this way: "human infectious or contagious disease" or "the discovery of an organism" "likely to result in human infectious or contagious disease at the Business Premises". It is a nonsense to construe the final bullet point in that way, which permits it to be engaged where there is "human infectious disease" "likely to result in human infectious or contagious disease at the Business Premises". If that was intended, far clearer language could and would have been deployed, including by deleting the words "human infectious or contagious diseases or" at the beginning of the bullet point which, on Dr Michael's construction, are superfluous.

55. It is an agreed fact that Dr Michael was not, at any relevant time, aware of an occurrence of COVID-19 at his Business Premises or the discovery of SARS-CoV-2

at his Business Premises.[2] There is otherwise no evidence of either of these things having occurred.

56. To construe sub-paragraph (c) of the Prevention of Access Extension as providing cover where certain diseases or organisms are discovered other than at the Business Premises would be to depart from the fundamental nature of the Business Property and Business Interruption sections of the Dr Michael Policy, and the clear intention of sub-paragraph (c) to provide a limited form of non-damage cover which impacts the Business Premises as opposed to the Business generally.

57. Unlike sub-paragraphs (a) and (b) of the Prevention of Access Extension which incorporate 'damage' (either as a threat of such, or in a broader complex which the Business Property forms part of), sub-paragraph (c) provides a form of non-damage business interruption cover. It does so however in the context of a policy section which, like the insurance policy considered by this Court in Star Entertainment Group Limited v Chubb Insurance Australia Ltd [2021] FCA 907, is:

> *"…overwhelmingly founded upon the causing of physical loss, destruction or damage…"* (per Allsop CJ at [172]).

58. The Dr Michael Policy contains a general perils exclusion, applicable to all sections, which excludes cover *"directly or indirectly arising out of or in any way connected with…disease…"*. (p. 32). The disease perils exclusion reinforces the fundamental nature of the cover as being directed to physical loss or destruction of and damage to property: Star Entertainment Group Limited v Chubb Insurance Australia Ltd [2021] FCA 907 at [145]. Accordingly, the only cover that can be available under the Dr Michael Policy arising from a disease is that which is specifically written back through the wording.

59. The fourth bullet point of sub-paragraph (c) of the Prevention of Access Extension provides such a write-back, in a way that effectively deems 'Damage'. It does so, however, in an intentionally narrow form, by confining cover to scenarios where certain diseases or organisms are discovered at the Business Premises.

[2] Statement of Agreed Facts at [55].

C. THE GYM FRANCHISES TEST CASE

C.1. The Policy

60. Gym Franchises' claim is made under a Fitness Centres Business Insurance Policy P00226450 issued by Guild on 10 October 2019 (the **Gym Franchises Policy**). The period of cover under the Gym Franchises Policy was 10 October 2019 to 4pm on 10 October 2020.

61. The Gym Franchises Policy provided, under the Business Interruption section, an extension of cover titled **'Prevention of Access'** in the same terms as the Dr Michael Policy (see paragraph 10 above) with one qualification. The cover provided under the Prevention of Access Extension in the Gym Franchises Policy was only available if:

> *"the infectious or contagious disease is not otherwise excluded from Cover provided under this Policy by general exclusion "Infectious and/or Transmissible Diseases"."*

62. The 'Infectious and/or Transmissible Diseases' exclusion provides that Guild will not be liable for any claim directly or indirectly arising out of or in any way connected with:

> *"a. Transmissible Spongiform Encephalopathy (TSC) including but not limited to Bovine Spongiform Encephalopathy (BSE) or new Variants Creutzfeldt-Jakob Disease (VCJD); or*
>
> *b. the existence or suspected existence of any infectious disease where an infectious disease is defined as Highly Pathogenic Avian Influenza or any other diseases which are deemed to be quarantinable diseases under the Australian Quarantine Act 1908 (Cth) and subsequent amendments irrespective of whether it was discovered on Your Business Premises or elsewhere…"*

63. At paragraph 58 above, reference is made to the policy structure where 'disease' is excluded through a perils exclusion, with sub-paragraph (c) of the Prevention of Access Extension providing a limited write-back. The 'Infectious and/or Transmissible Diseases' exclusion in the Gym Franchises Policy provides a further carve-out to cover with reference to Highly Pathogenic Avian Influenza or disease deemed to be quarantinable diseases under the *Quarantine Act 1908 (Cth)*. Guild does not seek to, and does not need to, rely on the 'Infectious and/or Transmissible

Diseases' exclusion to exclude the claim made by Gym Franchises in the absence of a relevant disease or organism having been found at the Business Premises.

64. Although the scope of cover afforded by sub-paragraph (c) is narrow under Guild's construction, it is intentionally so. It does not amount to an inappropriate circumscription of cover, but rather, has a very clear commercial purpose. That is so irrespective of whether the 'Infectious and/or Transmissible Diseases' exclusion applies.

65. Sub-paragraph (c) would respond to provide cover where, for example, the Business Premises were ordered to be closed, by a competent government or statutory authority, upon the identification of salmonella or legionnaires disease, or the organisms causing them, on site. In such a scenario, it might be expected that the Business Premises is closed or evacuated to facilitate a deep clean, with the insured suffering Loss during that closure period. Subject to the terms and conditions of the policy, it would be expected that cover is afforded for the Loss sustained by the insured whilst the premises are closed or evacuated. That is the case under both the Dr Michael Policy and the Gym Franchises Policy.

C.2. Gym Franchises Claim

66. On 23 March 2020, Gym Franchises made a claim under the Policy (the **Gym Franchises Claim**) asserting an entitlement to payment under the Prevention of Access Extension in response to a reduction in revenue due to the Authority Response-Gym Franchises (CSR at [4]).

67. Gym Franchises defines the "Authority Response-Gym Franchises" as the measures referred to in paragraphs 9(a) and 12 of the Respondent's Outline Document, namely:

(a) the *Non-essential Business Closure Direction*, which applied from 12pm, 23 March 2020; and

(b) the *Restrictions on Businesses, Activities and Undertakings Direction* which came into effect at 12pm on 1 June 2020.

(collectively the ***Directions***)

68. The *Non-essential Business Closure Direction* was issued by the Chief Health Officer pursuant to s.362B of the *Public Health Act 2005* (Qld) and relevantly provided that a person who owned, controlled or operated a non-essential business in the State of Queensland could not operate the business or undertaking from Monday, 12 pm on 23 March 2020 until the end of the declared public health emergency, unless the direction was revoked or replaced. Gyms were listed as a non-essential business.

69. The *Restrictions on Businesses, Activities and Undertakings Direction* was issued by the Chief Health Officer pursuant to s.362B of the *Public Health Act 2005* (Qld) and came into effect at 12pm on 1 June 2020. It relevantly provided that the owner of a gym could operate the business subject to a 20-person limitation and the requirements set out in paragraph 21 of the Direction or with greater numbers if they comply with the First Fitness Safe Plan.

C.3. Issues for determination

70. Guild contends that the Prevention of Access Extension does not respond to the Gym Franchises Claim because:

    (a) neither of the Directions that comprise the "Authority Response-Gym Franchises" required the *closure or evacuation* of the whole or part of the Business Premises (see **Part C.5**); and

    (b) if, contrary to (a), either or both Directions constituted an order by a competent government or statutory authority requiring the closure or evacuation of the whole or any part of the Business Premises, such order did not arise directly or indirectly from human infectious or contagious disease or the discovery of any organism likely to result in human infectious or contagious disease at the Business Premises (see **Part C.6**).

71. If the Court were to find that the Prevention of Access Extension responds to the Gym Franchises Claim, Gym Franchises is not entitled to a full indemnity because:

    (a) the interruption or interference the subject of the claim would have occurred regardless of Directions that Gym Franchises relies on, by reason of other (uninsured) impacts of the COVID-19 pandemic (**Part D.1**);

(b) Guild is entitled to adjust any payment for business interruption to reflect (uninsured) circumstances affecting the Business arising from the COVID-19 pandemic, so that payment reflects the result that, but for the insured events, Gym Franchises would have obtained during the relevant period (**Part D.2**).

(c) Gym Franchises is obliged to account for savings made, additional Income received, and other financial benefits obtained during the Indemnity Period, including on account of the JobKeeper program, and any other grants, subsidies or schemes (Government or otherwise) that mitigated loss sustained by the Business or otherwise improved its financial position (**Part D.2**).

C.4. 'order of a competent government authority'

72. Both Directions were issued by the Chief Health Officer pursuant to s.362B of the *Public Health Act 2005* (Qld).

73. Having regard to the above, and the nature of both Directions (see paragraphs 68 and 699 above), Guild accepts that both were:

(a) an "*order*"; and

(b) given by a "competent government or statutory authority".

C.5. 'closure or evacuation'

74. As to the construction of the words "evacuation or closure" in the Prevention of Access Extension, we refer to our submissions in respect of the Dr Michael Policy at section B.5.

75. Neither of the Directions could properly be characterised as having led to the *evacuation* of the Business Premises.

76. Gym Franchises contends (CSR at [8.b]) that *"closure or evacuation of the whole or part of the Business Premises"* includes not just physical closure or movement of persons from the Business Premises, but also restriction of access or use of the entirety or a part of the Business Premises for the purpose of carrying on all or a part of its business activities.

77. For the reasons advanced in relation to Dr Michael's claim (see paragraph 422), that construction should be rejected.

78. Guild does not dispute that:

(a) whilst the *Non-essential Business Closure Direction* was in place, from 12pm, 23 March 2020 to 12 pm, 1 June 2020, Gym Franchises was unable to operate its Business; and

(b) whilst the *Restrictions on Business, Activities and Undertakings Direction* was in place, from 12pm, 1 June 2021, Gym Franchises could only operate its Business subject to certain operating restrictions.

79. Severe as the Directions were on the operation by Gym Franchises of its Business, the Directions did not require the evacuation of its Business Premises. For the same reasons as we have given above in relation to the Dr Michael Policy, the Directions – which did not prevent physical access to Gym Franchises' Business Premises – did not require the closure of Gym Franchises' Business Premises in the sense required to engage the cover.

C.6. The Authority Response-Gym Franchises did not arise, directly or indirectly, from 'human infectious or contagious diseases or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises'

80. For the reasons stated above in relation to the Dr Michael Claim (Section B.6), for the final bullet point of sub-clause (c) to be engaged, the order must arise directly or indirectly from "human infectious diseases" at the Business Premises or "the discovery of an organism likely to result in human infectious or contagious disease" at the Business Premises. Sub-clause (c) of the Prevention of Access Extension is not triggered by the discovery of SARS-CoV-2 or the occurrence of COVID-19 other than at the Business Premises.

81. There is no evidence of the discovery of SARS-CoV-2 or the occurrence of COVID-19 at the Business Premises.

82. Gym Franchises contends that the *closure* or *evacuation* "*arose directly or indirectly from discovery of SARS-CoV-2, which (due to its high transmissibility and rapid and*

wide spread across Queensland and the Gold Coast) was likely to result in human infectious or contagious disease (namely COVID-19) at the Business Premises" (CSR at [9.c]). For the same reasons as we have given above in response to the equivalent contention advanced by Dr Michael (see Section B.6.), that argument should be rejected.

D. CAUSATION AND ADJUSTMENTS

D1. Causation

83. To engage the Prevention of Access Extension, the inability to trade or otherwise conduct the insured business must be *caused by* the closure or evacuation of the business premises by order of a competent government or statutory authority, which itself must arise *directly or indirectly* from "human infectious or contagious diseases or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises".

84. At the time of drafting these submissions, the insureds had not yet served any evidence on questions of causation and loss and it is not useful to parse the various formulae in a factual vacuum.

85. It suffices to say here that in the event that the insureds establish that a government or statutory authority order had the effect of closing the Business Premises and the order arose directly or indirectly from "human infectious or contagious diseases or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises", the insureds must also show that the dominant proximate cause of their loss was the interruption flowing from that order. It is not the case that once the requirements of the insuring clauses have been satisfied, the insureds may recover the whole of the loss suffered as a result of the COVID-19 pandemic during the period of insurance.

D2. Adjustment

86. Further, in the event that the insureds are successful in establishing Guild's liability under the Prevention of Access Extension, adjustment should be made to reflect the

broader effects of the COVID-19 pandemic on each of the businesses during the indemnity periods.

87. Both policies include an adjustment clause which provides for the method of calculation of the loss payable under the relevant indemnities (Dr Michael Policy, pg.51; Gym Franchises Policy, pg.57):

> *"Loss of income*
>
> *We will pay You the amount by which the income during the Indemnity Period shall fall short of the Income which would have been received by You during the Indemnity Period if the Damage had not occurred:*
>
> ***Provided that:***
>
> *i. The amount we pay you will be reduced by any amount saved during the Indemnity Period in respect of charges and expenses of the Business which may cease or be reduced in consequence of the Damage;*
>
> …
>
> *iv. an adjustment shall be made as may be necessary to reflect the trend in the Business and any other variations in the Business or other circumstances affecting the Business, either before or after the Damage occurring, or which would have affected the Business had the Damage not occurred in order that the figures thus adjusted represent as nearly as may be reasonably practicable the Income which would have been received during the relative period after the Damage occurred."*

88. Relevantly, in each policy:

(a) 'Damage' is defined to mean "*accidental physical damage to or destruction of Business Property or Your Vehicle which occurs during the Period of Cover*";

(b) 'Income' is defined to mean "*the money paid or payable to you for … services rendered in the course of the Business at the Business Premises and any other income payable to the Business further twelve (12) months immediately preceding the date of the Loss but excluding Rent*"; and

(c) ‘Indemnity Period’ is defined to mean:

> *“the period stated in the schedule and commencing from the date of the Damage and ending not later than:*
>
> *a. the last day of the Indemnity Period during which period the Income of the Business or Rent shall be affected in consequence of the Damage;*
>
> *b. the date when the Income of the Business or the Rent is no longer affected;*
>
> *whichever occurs first.”*

89. We will address the precise adjustments that will need to be made once the insureds have articulated their loss, but by way of example, it will at least be necessary to take into account:

(a) JobKeeper payments and any other subsidies, grants or scheme benefits, whether Government or otherwise; and

(b) Rental abatements,

as variations in the Business, as other circumstances affecting the Business, or as savings made during the indemnity periods. This ensures that the adjusted figures represent as nearly as practicable the results which, but for the interruption, would have been obtained; either pursuant to subclause (iv) or (i) of the Basis of Settlement Clause.

E. INTEREST

90. Section 57 of the *Insurance Contracts Act 1984* (Cth) requires insurers to pay interest on unpaid claims. Interest is paid from the date on which it would be unreasonable to withhold payment on a claim to the day on which payment is actually made or posted, whichever is earlier.

91. Dr Michael and Gym Franchises made their claims on the respective policies nearly 18 months ago in March 2020. They have had ample time since making their claims to quantify their loss. As at the date of these submissions, they have made no attempt to do so.

92. Both the Dr Michael Policy (p. 37) and Gym Franchises Policy (p. 42) contain a Claims Cooperation Condition, applicable to all sections, which relevantly provides that:

> *"You must provide to Us any reasonable assistance We require to investigate, defend or settle any claim under this Policy.*
>
> *In particular, you are required to provide Us with:*
>
> *a. Your cooperation in assisting Us to handle any claim under this Policy on Your behalf including the gathering of all relevant information and Your attendance at court to give evidence; and*
>
> *b. at Your own expense, such books of account and other Business books, computer records and other documents, proofs, information, explanations and other evidence as We may require for the purpose of investigating or verifying a claim under this Policy."*

93. Additional cover is provided under the Business Interruption section of both the Dr Michael Policy and Gym Franchises Policy for 'Claims Preparation Costs' in the event that indemnity is afforded. Although Guild has denied indemnity, it proposed in April 2021 that claims preparation work be undertaken by Dr Michael and Gym Franchises, with the support of a recognised claims preparer, to provide further particulars of Loss. Dr Michael and Gym Franchise have been provided with an indemnity for that work.

94. As at the time of drafting these submissions, neither Dr Michael nor Gym Franchises have provided Guild with the claim submissions envisaged by the claim preparation process. It is no clearer today than it was 18 months ago what Loss has been sustained by Dr Michael and Gym Franchises, and how such Loss is claimed (with reference to heads of cover) under their respective policies.

95. It is not unreasonable, for the purposes of s 57 of the *Insurance Contracts Act*, for Guild to withhold payment of the claims made by Dr Michael and Gym Franchises in circumstances where those claims have not been fully articulated, or the Loss submitted. Having regard to the claims cooperation obligations of Dr Michael and Gym Franchises, as well as the claims preparation process recognised in their policies,

it is also not unreasonable for Guild to withhold payment until such time as the claims cooperation obligations have been satisfied, and it has had an opportunity to consider and verify the Loss once submitted with the support of a recognised claims preparer.

Date: 18 August 2021

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Annexure A

AUTHORITY RESPONSE – DR MICHAEL

No.	Date	Issued by	Content and effect
1.	22 March 2020	Prime Minister	This was a media statement from the Prime Minister reporting that the National Cabinet had agreed to move to more widespread restrictions on social gatherings. It indicated that those restrictions would be implemented through State and Territory laws and would come into effect from midday local time, 23 March 2020. This was not itself an order, command or mandate.
2.	23 March 2020	The Australian Dental Association (**ADA**)	This was a release from the ADA regarding COVID-19. In it the ADA observed that the government will continue to consider dental services as essential as long as they are provided safely. Dr Michael also received emails from the ADA and the ADA NSW Branch, recommending that dental practitioners immediately implement Level 2 Restrictions. The ADA's release was advisory, not mandatory.
3.	23 March 2020	ADA	Items 3, 5 and 6 relate to a triage framework prepared by the ADA setting out the services that could be performed at three different levels of restrictions and those services that were restricted at each level. The framework itself did not constitute any kind of order, command or mandate from the ADA.
4.	24 March 2020	The Dental Board of Australia (**DBA**)	This was an update from the DBA in the following terms: *On 23 March 2020 the Australian Health Protection Principal Committee placed limits on organised gatherings and visits to vulnerable groups.*

No.	Date	Issued by	Content and effect
			The Prime Minister Scott Morrison subsequently announced that non-essential gatherings are suspended for an initial four weeks to reduce the risk of spreading COVID-19. *The Board is working with the Australian Health Practitioner Regulation Agency (Ahpra) to provide helpful information…* *The Board also notes that the Australian Dental Association is making its COVID-19 resources publicly available.* The update did not itself order, mandate or direct dental practitioners to do anything.
5.	25 March 2020	ADA	This was an updated framework for dental service restrictions in COVID-19. As with Items 3 and 6, the framework itself did not constitute any kind of order, command or mandate from the ADA.
6.	25 March 2020	ADA	The ADA released "Managing COVID-19 Guidelines", which set out how to manage patients at risk of, or confirmed with, COVID-19 who require urgent dental care. As with Items 3 and 5, the framework itself did not constitute any kind of order, command or mandate from the ADA.
7.	25 March 2020	The Australian Health Protection Principal Committee (**AHPPC**)	The AHPPC released the following statement recommending the cancellation of all elective surgery (our emphasis): *The national supply of personal protective equipment (PPE) remains of great concern with continued depletion of the National Medical Stockpile.* *The Commonwealth has significant orders placed but cannot guarantee supply due to international considerations.* *At this time, it is inappropriate to continue to do elective surgery.* ***AHPPC therefore recommends** cancellation of all non-urgent elective procedures in both the public and private sector.* *It is recommended that only Category 1 and some exceptional Category 2 surgery proceed.*

No.	Date	Issued by	Content and effect
			This statement expressed a recommendation of the AHPPC in relation to elective surgery. It was not an order, command or mandate by the AHPPC.
8.	25 March 2020	Prime Minister	This was a media statement from the Prime Minister reporting that National Cabinet, on the advice of the AHPPC, would suspend all non-urgent elective surgery from 11.59pm on 25 March 2020. The media statement notified the suspension of non-urgent surgery but did not itself direct or implement that suspension.
9.	26 March 2020	ADA	This was an update from the ADA in the following terms (our emphasis): *In the absence of a government mandate, the ADA's* [sic] *has* ***issued a recommendation*** *nationally to apply level 2 restrictions. These recommendations have been made in the interest of minimising the risk to our ourselves* [sic], *our staff, and our communities.* *Because the public system in some state and territories have implemented more stringent restrictions, some ADA Branches may, in the interest of members in their state, make a recommendation to increase to be consistent in private practice.* *It is important to remember that the ADA is not the regulator. However, we have issued a clear recommendation in the interest of public and professional safety. If you are in a state where your ADA Branch has recommended a higher level than you have in place nationally, you should consider this recommendation with respect to the risk profile of your own specific circumstances.* … *We have been working closely with the Australian Health Protection Principal Committee to ensure a phased and proportionate scaling down of dental services that minimises impact on the profession while reducing risk to the public. This will also ease the pressure on the overburdened public health system by ensuring private dental practices are able to safely provide appropriate services, so patients do not have to be redirected to emergency departments.* The update was expressed as a recommendation only.

No.	Date	Issued by	Content and effect
10.	26 March 2020	ADA	This was an email Dr Michael received from the ADA advising him that the Government will announce Level 2 restrictions. The email advised that the AHPPC recommends that all dental practitioners implement the Level 3 restrictions as outlined in the ADA's guidance. This was stated to be a recommendation, not an order, command or mandate to implement Level 3 restrictions.
11.	28 March 2020	Dental Council of NSW	This was an email Dr Michael received from the Dental Council of NSW providing an update on COVID-19 and the move to Level 3 restrictions. The email advised Dr Michael that the AHPPC had recommended the adoption of 'Managing COVID-19 Guidelines' published by the ADA and that the AHPPC recommends that all dental practitioners implement Level 3 restrictions. The email did not express an order, command or mandate for dentist to implement Level 3 restrictions: rather, it conveyed AHPPC's recommendation in that regard.
12.	28 March 2020	AHPPC	This was a statement from the AHPPC which recommended that all dental practices implement Level 3 restrictions (our emphasis): ***AHPPC recommends*** *adopting the 'Managing COVID-19 Guidelines' published by the ADA and implementing a triage system for dental practice. AHPPC recommends that all dental practices implement level 3 restrictions as outlined in ADA's guidance. That is, dentists should only perform dental treatments that do not generate aerosols, or where treatment generating aerosols is limited. All routine examinations and treatments should be deferred.* The statement did not convey an order, direction or mandate.
13.	28 March 2020	DBA	This was a news alert published by the DBA which repeated, verbatim, the following advice from the AHPPC: "*AHPPC recommends adopting the 'Managing COVID-19 Guidelines' by the Australian Dental Association (ADA) and implementing a triage system for dental practice. AHPPC recommends that all dental practices implement level 3 restrictions as outlined in the ADA's guidance. That is, dentists* [sic] should only perform dental treatments that do not generate aerosols, or where treatment generating aerosols is limited. All routine examinations and treatments should be deferred*."

No.	Date	Issued by	Content and effect
			The news alert updated dental practitioners of the recommendation from the AHPPC which, notably, was expressly stated to be a recommendation.
14.	2 April 2020	DBA and Australian Health Practitioner Regulation Agency (**AHPRA**)	This was an update from the DBA and AHPRA which expressed an expectation, from the DBA, that practitioners would follow AHPPC's recommendation to adopt the Managing COVID-19 guidelines issued by the ADA and implement Level 3 restrictions as outlined in the ADA's guidance.
15.	7 April 2020	ADA	This was an update from the ADA which relevantly provided "*Level 3 restrictions are now in force, following a recommendation by the Australian Health Protection Principal Committee that all dental practices implement level 3 restrictions. This has been accepted by the National Cabinet and is an expectation of the Dental Board*". The update included an excerpt from the advice provided by the AHPPC, which provided "*AHPPC recommends adopting the 'Managing COVID-19 Guidelines' published by the ADA and implementing a triage system for dental practice. AHPPC recommends that all dental practices implement level 3 restrictions as outlined in ADA's guidance*". Whilst the use of the words "Level 3 restrictions are now in force" suggests a mandatory directive or order, those words were not apt to describe what the ADA was reporting on, namely the recommendation of the AHPPC to implement level 3 restrictions. At no stage were level 3 restrictions mandated by the AHPPC, or any other body.
16.	21 April 2020	Prime Minister	This was a media statement from the Prime Minister that reported that National Cabinet had agreed that from 27 April 2020, category 2 and some important category 3 procedures (as defined in the Item 8 media statement) could recommence across the public and private hospital sectors. Dr Michael also received an email from the ADA advising that the Prime Minister had announced a move back to Level 2 restrictions. This media statement notified the lifting of certain restrictions on elective surgery. It did not itself implement any direction, command or mandate. It was not expressed in mandatory terms.

No.	Date	Issued by	Content and effect
17.	21 April 2020	ADA	This was an update from the ADA reporting on the Prime Minister's announcement of a move back to Level 2 restrictions, effective 27 April 2021 (the Prime Minister's announcement is Item 16). Dr Michael also received an email from the ADA advising that the Prime Minister had announced a move back to Level 2 restrictions. It was not in any way a directive or order from the ADA.
18.	22 April 2020	Dental Council of NSW	This was an email Dr Michael received from the Dental Council of NSW on 22 April 2020 in the following terms: *I am pleased to advise that the National Cabinet has from 27 April 2020 recommended the relinquishing of Level 3 dental service restrictions and the move to Level 2 restrictions, as outlined in the ADA's Managing COVID-19 Guidelines.* … *We must also continue to adhere to the government recommendations that are in place to help reduce the spread of COVID-19 in both clinical and also non-clinical areas such as waiting rooms and reception areas.* *The Council appreciates that this has been a difficult and stressful time for dental practitioners and it thanks you for your cooperation in adhering to the level 3 restrictions that were in place and your continued observance of the level 2 restrictions from 27 April 2020. Our adherence to these restrictions has, and will no doubt, continue to assist in ensuring the safety of not only our patients and staff, but others as well.* The email did not communicate an order, mandate or direction from the Dental Council of NSW.
19.	23 April 2020	ADA NSW Branch	This was the reproduction of an article that had been published by the Sydney Morning Herald titled "Dentists ready to welcome patients back as restrictions ease from Monday". The ADA reproduction and link to an article published by the Sydney Morning Herald could not on any view be considered an order or directive.

No.	Date	Issued by	Content and effect
20.	23 April 2020	DBA and AHPRA	The DBA and AHPRA released an update regarding the move to Level 2 restrictions in the following terms: *The AHPPC has announced that it 'supports the current recommendation by the ADA that dentists [sic] now move to level 2 restrictions which will allow a broader range of interventions to be undertaken, including all dental treatments that are unlikely to generate aerosols…'* *The Board expects all dental practitioners to follow the AHPPC's advice.* … *While the Managing COVID-19 guidelines published by the ADA are not Board-approved guidelines, the Board expects all dental practitioners, including oral health therapists, dental therapists, dental hygienists, dental prosthetists and dentists, to follow the AHPPC's recommendation and apply its advice in their practice setting.* Dr Michael also received an email from the DBA and Ahpra advising of the move to Level 2 restrictions. This communication did not extend beyond expressing an expectation that practitioners would follow the AHPPC's advice and recommendations. Item 20 did not convey a direction, order or mandate by the DBA.
21.	24 April 2020	AHPPC	The AHPPC released the following statement on the restoration of elective surgery and the recommendation that dental services move to Level 2 restrictions (our emphasis): ***AHPPC supports the current recommendation** by the Australian Dental Association (ADA) that Dentists now move to level 2 restrictions, which will allow a broader range of interventions to be undertaken, including all dental treatments that are unlikely to generate aerosols or where the aerosols generated have the presence of minimal saliva/blood due to the use of rubber dam.*
22.	8 May 2020	DBA and AHPRA	The DBA and AHPRA released a COVID-19 update outlining the AHPPC's advice to move to Level 1 restrictions which relevantly provided:

No.	Date	Issued by	Content and effect
			Today's update highlights the AHPPC's latest advice, agreeing to move to level 1 restrictions. … *The AHPPC agreed at its meeting on 7 May that 'moving dental practice to level 1 restrictions was appropriate in the current epidemiology and with the restoration of supply of surgical masks.*
23.	8 May 2020	ADA	The ADA released an update that National Cabinet approved the move to Level 1 restrictions: *Level 1 means that dental professionals must continue to screen patients and only treat those who do not meet the epidemiological and clinical risk factors for COVID-19. It is critical that the profession remains vigilant in its application of Level 1 restrictions and ensure the safety of dental teams and patients alike.* Dr Michael also received an email from the ADA advising that the National Cabinet approved the move to Level 1 restrictions.
24.	8 May 2020	Dental Council of NSW	Dr Michael received an email from the Dental Council of NSW providing an update on COVID-19 and the move to Level 1 restrictions. The email advised practitioners of the importance of ensuring that appropriate pre-screening continues for all patients.
25.	9 May 2020	ADA NSW Branch	Dr Michael received an email from the ADA NSW Branch advising that all dental practitioners can move to level one restrictions.
26.	14 May 2020	ADA NSW Branch	The ADA NSW Branch released an update, outlining that restrictions on dentists have been eased further: *The ADA NSW President Dr Kathleen Matthews said all NSW and ACT dentists can now safely help patients with a full list of treatments available, although precautions while visiting dental practices may still apply.* *"ADA NSW continues to work closely with NSW Health and ACT Health to support our members and to ensure treatment for the public remains safe," Dr Matthews said. "Level*

No.	Date	Issued by	Content and effect
			One restrictions involve screening patients for COVID-19 risks, and introducing social distancing in waiting rooms, among other changes patients can expect to see at their next appointment."