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Details of Filing

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

Dated: 3/09/2021 4:07:42 PM AEST

Registrar

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

Nos. NSD 132-137 and
144-145 of 2021

Swiss Re International SE (ARBN 138 373 211) and others
Applicants

LCA Marrickville Pty Limited (ACN 601 220 080) and others
Respondents

SUBMISSIONS ON BEHALF OF THE POLICYHOLDERS

A. INTRODUCTION

1. These proceedings are a "Test Case" commenced in accordance with the rules of the Australian Financial Complaints Authority (**AFCA**) in relation to the proper construction of certain contracts of insurance colloquially known as "Business Interruption Insurance Policies" (**BII Policies**).[1] The respondents have each made claims under their BII Policies, which have been denied.

2. This is the second Test Case commenced under the AFCA Rules. The first related to whether the words "quarantinable disease" under the "Quarantine Act (as amended)", commonly contained in exclusion clauses or writebacks in BII Policies, should be construed as "listed human disease" under the "Biosecurity *Act*". The matter was decided in favour of the policyholders by the Court of Appeal of the Supreme Court of New South Wales: *HDI Global Specialty SE v Wonkana No. 3 Pty Ltd* [2020] NSWCA 296 (***Wonkana***); special leave refused: [2021] HCATrans 117.

3. This Test Case relates to the broader issues of construction concerning coverage, causation and assessment of loss that arise under the BII Policies.[2]

4. These submissions are structured as follows. In this Section A, we introduce the types of insuring clauses in issue in the Test Case and the scope of what is to be decided by

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[1] Australian Financial Complaints Authority (**AFCA**), *Complaint Resolution Scheme Rules,* Rule A.7.2(b).

[2] The parties have agreed that certain questions be deferred for a subsequent hearing (insofar as an answer to those questions be necessary / not be resolved by the present hearing). This arrangement is reflected in order 1 of the orders made on 24 August 2021 and is addressed below.

the Court. In Section B, we set out the principles of construction relevant to contracts of insurance, as well as the authorities specifically relevant to BII Policies. In Sections C and D we address construction issues common to the proceedings. In Section E we outline the nature of the evidence before the Court as relevant to all proceedings. In Sections F to M we consider each policyholder in turn, and address the clauses and evidence specific to that policyholder.

A1. THE INSURING CLAUSES

5. There are four types of insuring clause under consideration in these proceedings. Although the precise wording of each varies, there are broad similarities within each category of clause.[3]

6. The first are **Prevention of Access Clauses.** These clauses indemnify the policyholder for loss where there are "orders" of a competent authority preventing or restricting access to premises because of a risk to persons (often within a specified radius of the insured premises).

7. The second are **Infectious Disease Clauses.** These provide a broad cover for loss that arises from either infectious diseases simpliciter, or the "outbreak" of an infectious disease at the premises or within a specified radius of the insured premises.

8. The third are conveniently described as **Hybrid Clauses**. These provide cover for orders closing or restricting access to premises, but only where those orders are made in consequence of infectious disease, or the outbreak of infectious disease within a specified radius of the premises.

9. The fourth are **Catastrophe Clauses.** These indemnify the policyholder for loss resulting from the action of a civil authority during a "catastrophe" for the purpose of dealing with that catastrophe.

10. As to the question of assessment of loss, there is a further question of the construction of **Adjustment Clauses.** These generally take the form of a defined term in the basis of settlement clauses for a BII Policy. The definition provides for adjustments to be made to the shortage in the business's turnover to take into account "*trends of the business"* and variations in the circumstances affecting the business in calculating loss payable to the insured.

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[3] The respondents accept that this description of the clauses does not precisely reflect the wording of the specific clauses in issue. The purpose of the taxonomy outlined here is to provide a general introduction to these types of insuring clauses. The precise wording is dealt with in the body of these submissions.

A2. SCOPE OF THE TEST CASE

11. The quantum of any indemnity is not the subject of the Test Case before this Court, but is currently subject of a separate claims resolution process. The parties ask only that the Court resolve the questions of construction raised by the pleadings and the list of issues (subject to the separate questions outlined below), and make declarations as to the policyholder's entitlement to an indemnity. Evidence in the form of profit and loss statements has been put before the Court to establish that loss has been suffered (and therefore a *prima facie* entitlement to an indemnity), the timing of that loss vis-à-vis the occurrence of the insured perils, and to resolve the issue of the date from which when interest ought be calculated. That information is sufficient to resolve the questions of construction raised by the List of Issues.

12. The parties have also agreed to defer certain separate questions dealing with certain factual issues,[4] given difficulties in obtaining evidence during the ongoing pandemic in Australia. Practically speaking, the purpose is to enable as many issues as possible to be determined at the hearing commencing on 6 September 2021, without prejudice to the ability of the policyholders to have the issues determined on the basis of all the evidence, should that become necessary.

B. SOME GENERAL MATTERS

B1. CONSTRUCTION OF CONTRACTS OF INSURANCE

13. The principles that apply to the construction of insurance policies are uncontroversial and need not be restated at length. The "essential considerations" were set out by the Full Court in *Todd v Alterra at Lloyds Ltd* (2016) 239 FCR 12 at [42]:

> the policy is to be given a businesslike interpretation, paying attention to the language used by the parties in its ordinary meaning, and to the commercial, and where relevant, the social purpose and object of the contract, in the context of the surrounding circumstances, including the market or commercial context

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[4] The separate questions as ordered by Order 1 of the Orders of Jagot J made on 24 August 2021 are:

"Pursuant to Rule 30.01, the following questions be heard in these proceedings separately from and subsequent to the issues identified in the "List of Issues for Determination" filed on 21 July 2021:

Would the answer to any of such issues which necessarily involve consideration of:

a. the location, prevalence or transmission of COVID-19 cases; and/or

b. the characteristics and transmissibility of COVID-19; and/or

c. in the case of LCA Marrickville only, the alleged "conflagration or other catastrophe"; and/or

d. loss or quantum,

be different if evidence were adduced of documents which are sought in the subpoenas issued to date (or any further subpoena issued in terms no wider than the subpoenas issued to date) and expert evidence based on those documents and the expert's own knowledge and/or expert evidence in relation to (c) above? In the event and to the extent that the answer is "yes", what is the answer to that issue?".

> in which the parties are operating, by assessing how a reasonable person in the position of the parties would have understood the language. Preference is to be given to a construction supplying a congruent operation to the various components of the whole.

14. There are three particular matters of note.

15. The **first** is that there is no strict "rule of construction" in commercial contracts "that specific provisions prevail over inconsistent general provisions"[5] Rather, as the Court made clear in *Trust Co (Nominees) Ltd v Banksia Securities Ltd (receivers and managers appointed) (in liquidation)* [2016] VSCA 324 at [53], construction lies "not in identifying a specific and a general provision and then applying the principle giving the specific provision precedence, but in determining whether either of the competing provisions, taken alone, gives effect to an object important to the transaction".

16. Moreover, any "interpretive presumption" as to specific and general clauses operates weakly in the case of insurance contracts, which may be constructed by "bolting on" clauses from different precedents at different times. For example, in *Birla Nifty Pty Ltd v International Mining Industry Underwriters Ltd* [2013] WASC 386 at [67] the BII Policy in issue was described by Hall J as the "product of a mix and match exercise … a collection of various different documents, variously entitled conditions, memoranda, schedules and exclusions". Hall J concluded that "having gathered together the various component parts no-one has made an effort to ensure that they can be read together as a coherent whole".[6] It is not the role of the Court, by construction, to rewrite the policy as if it were a masterpiece of consistency. As Allsop CJ recognised in *Star Entertainment Group Limited v Chubb insurance Australia Ltd* [2021] FCA 907 (***Star***) at [166], "[t]hat there may be overlap between different clauses of a policy does not require the business person to give meaning to the different clauses to eliminate their overlap with refined precision".

17. The **second** is the relevance of the doctrine *contra proferentem.* Guild (in respect of Dr Michael and GFA) and Allianz (in respect of Visintin and Mayberg) accept that the policy wording comprised the insurer's standard terms and conditions and were not the subject of negotiation. The present is an appropriate case, if there be ambiguity as to construction, for the application of the *contra proferentem* principle: see *Wonkana* at [31], [118]. These were contracts of adhesion. As Meagher JA and Ball J noted in *Wonkana* at [30], in *Halford v Price* (1960) 105 CLR 23 at 30, Dixon CJ cited with

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[5] Cf IAG at [28].

[6] See also *Birla Nifty Pty Ltd v International Mining Industry Underwriters Ltd* [2014] WASCA 180 at [19] per McClure P, Buss and Newnes JJA agreeing: "[t]he policy is not particularly user friendly".

approval this statement in *Halsbury's Laws of England* (3rd ed, vol 22) at 214:

> The printed parts of a non-marine insurance policy, and usually the written parts also, are framed by the insurers, and it is their language which is going to become binding on both parties. It is therefore their business to see that precision and clarity is attained and, if they fail in this, any ambiguity is resolved by adopting the construction favourable to the assured ...

18. The **third** is that in the context of each of the BII Policies at issue in this case, there is no general exclusion for "pandemics" (**cf IAG at [59]**), nor is there *any* basis to find that the reference to the *Quarantine Act* was due to "erroneous drafting" (**cf IAG [41]**), nor could the Court accept that the insurers sought to "exclude pandemics" (**cf IAG [62])**.[7] Whilst this might be a convenient mantra to dissuade claims, it is not one reflected in the words of the policies. That simple fact ought not be overlooked. There is no exclusion in any of the policies under consideration for "pandemics". That word is not used at all: insurers seek to take a word they wish they had included and act as if they had in fact done so. Moreover, the insurers' repeated assertion distracts attention from the real issues, because the question for this Court is not whether "pandemics" are covered under the policies. It is whether in the context of each specific clause, the events the policyholders say give rise to indemnity are in fact insured perils.

19. In any event, this argument has already been run and lost by insurers in *Rockment Pty Ltd t/a Vanilla Lounge v AAI Limited t/a Vero Insurance* (2020) 149 ACSR 484; [2020] FCAFC 228 (***Rockment***). Contrary to what is suggested by IAG[8] the Court in fact rejected the contention by Vero Insurance that the Court should accept it would be "uncommercial for insurers to provide cover against losses arising from pandemics" as a matter of "background facts on which the Court might rely to construe the policy". The Court stated there was "no evidence from which they might be established. They were clearly not background facts" (at [62]). The Court concluded that "[n]one of these submissions are relevant to the Court's decision and <u>they have not been taken into account</u>" (emphasis added) (at [63]).

B2. CONSTRUCTION OF BII POLICIES

20. There are four recent decisions on the construction of BII Policies in the context of COVID-19. Reference has already been made to the two decisions of this Court, being *Star*[9] and *Rockment.* The Supreme Court of the United Kingdom has heard a similarly

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[7] In fact, no insurer has ever sought to lead evidence to suggest that this was "erroneous drafting": see *Wonkana* at [3] per Bathurst CJ and Bell P.

[8] IAG at [52]-[53].

[9] A notice of appeal was filed in *Star* on 31 August 2021.

constituted “test case” brought by the Financial Conduct Authority on behalf of policyholders: *The Financial Conduct Authority v Arch & Ors* [2021] UKSC 1 (***FCA v Arch***). The High Court of Ireland has also heard a “test case” in relation to a Prevention of Access Clause in BII policies issued to publicans in Ireland, and delivered two judgments on the construction of the Hybrid Clause in those policies: *Hyper Trust Limited t/as the Leopards Town Inn & Ors v FBD Insurance plc* [2021] IEHC 78 (***Hyper Trust No 1***); *Hyper Trust Limited t/as the Leopards Town Inn & Ors v FBD Insurance plc (No 2)* [2021] IEHC 279 (***Hyper Trust No 2***).

21. As to *Star,* that case dealt with a policy in relation to which the physical loss or damage to property was at the “core of the Policy”: at [6]. The conclusion in that case on questions of coverage is of limited use in the context of the BII Policies in this case, which are not concerned with “physical” damage in the same way. Insurers’ attempt to analogise the BII Policies in this case to that in *Star* are addressed in dealing with each of the policies below.

22. As to *Rockment,* the Full Court there was asked to deal with a separate question as to the scope of an exclusion clause that referred to diseases specified in a declaration under the *Biosecurity Act 2015* (Cth). Again, this issue does not arise,[10] so the decision is of limited relevance to the questions in dispute.

23. Both the United Kingdom and Irish Test Cases involve questions of construction that are broadly analogous to those that this Court must consider. Plainly, the questions of construction in any case will turn on the wording of the specific clause considered in the context of the policy as a whole. It is nevertheless instructive to consider the approach of Courts in relation to similar or analogous wordings. It is only instructive to do so, however, by reference to those specific wordings.

(a) *FCA v Arch*

24. In the *FCA v Arch* case, the Prevention of Access and Hybrid Clauses in issue were in the following terms:

    a. **Arch:** “loss … resulting from … Prevention of access to the Premises due to the actions or advice of a government or local authority due to an emergency which is likely to endanger life or property”;

    b. **RSA1:** ““loss as a result of closure or restrictions placed on the Premises as a

[10] There is an exclusion relating to “*listed human disease*” under the “*Biosecurity Act 2015*” in LCA Marrickville’s Policy, but the issue in *Rockment* does not arise in the same way due to material differences in the wording of the policies.

result of a notifiable human disease manifesting itself at the Premises or within a radius of 25 miles of the Premises"; and

c. **Hiscox 1-4**: "losses resulting solely and directly from an interruption to your activities caused by your inability to use the insured premises due to restrictions imposed by a public authority during the period of insurance following an occurrence of any human infectious or human contagious disease, an outbreak of which must be notified to the local authority".

25. As to the question of coverage, the critical points of reasoning in relation to Hiscox 1-4 were as follows:

a. The term "restrictions imposed" does not require a restriction to have "force of law". Rather, "a mandatory instruction may be given by a public authority in the anticipation that legally binding measures will follow shortly afterwards, or will do so if compliance is not obtained … that is capable of being a "restriction imposed"" (at [116]-[117]).

b. It is not necessary that the term "restrictions imposed" be directed to the policyholder or the insured premises, as those terms are "general and unqualified". They may be satisfied by a restriction which "keeps the public out" (at [128]).

c. The term "inability to use" requires an inability, not an "impairment or hindrance" (at [136]). But it does not have to be an "inability to use any part of the premises for any business purpose" (at [136]). Rather, the requirement is satisfied either "if the policyholder is unable to use the premises for a discrete part of its business activities or if it is unable to use a discrete part of its premises for its business activities. In both those situations there is a complete inability of use" (at [137]).

d. There is only cover for that part of the business for which the premises cannot be used: if a restaurant which also offers a takeaway service decides to close the *whole* business, it could only claim in relation to the restaurant part (at [141]).

26. The critical points as to coverage under the Arch wording were:

a. The "prevention of access" does not have to be "physical". For example, if the policyholder is able to enter and carry out essential maintenance, that would not mean the clause does not apply (at [150]).

b. The clause uses the term "prevention", which means "stopping something from

happening or making an intended act impossible and is different from mere hindrance" (at [151]).

c. It is "inevitable" that continued access to the premises for some purposes is compatible with there being cover (for example, to enter and carry out essential maintenance) (at [150]). The question is then "for what purposes?" (at [150]). There is no good reason to construe "the premises" as referring only to the entire premises rather than as encompassing part of the premises (at [150]). The wording may cover "prevention of access to a discrete part of the premises and/or for the purpose of carrying on a discrete part of the policyholder's business activities". In either case, access to a "discrete part of the premises or access to the premises for a discrete purpose will have been completely stopped from happening" (at [151]).

27. The Court concluded that "in principle" the same analysis applied to the other prevention or denial of access wordings (at [156]).

28. *As to causation,* the Court noted the "proximate" cause analysis required in determining causation in insurance policies (at [162]-[170]). The Court explained this approach as follows:

> The starting point for the inquiry is to identify, by interpreting the policy and considering the evidence, whether a peril covered by the policy had any causal involvement in the loss and, if so, whether a peril excluded or excepted from the scope of the cover also had any such involvement. The question whether the occurrence of such a peril was in either case the proximate (or "efficient") cause of the loss involves making a judgment as to whether it made the loss inevitable - if not, which could seldom if ever be said, in all conceivable circumstances - then in the ordinary course of events. For this purpose, human actions are not generally regarded as negativing causal connection, provided at least that the actions taken were not wholly unreasonable or erratic.

29. The Court considered that the important question is not whether the loss caused by the insured peril satisfied the "but for" test (at [181]) but rather "what risks the insurers have agreed to cover" (at [190]). This is a question of contractual interpretation which "must accordingly be answered by identifying (objectively) the intended effect of the policy as applied to the relevant factual situation" (at [190]). The Court concluded there was nothing *in principle* which precluded an insured peril in combination with other similar uninsured events bringing about a loss with a "sufficient degree of inevitability" to be regarded as a "proximate cause", and concluded at [191]:

> Whether that causal connection is sufficient to trigger the insurer's obligation to indemnify the policyholder depends on what has been agreed between them.

30. Turning to the specific clauses, the Court considered the issue in the context of a clause

with a "radius" requirement, and reasoned at [194]:

> The parties to the insurance contracts may be presumed to have known that some infectious diseases … can spread rapidly, widely and unpredictably. It is obvious that an outbreak of an infectious disease may not be confined to a specific locality or to a circular area delineated by a radius of 25 miles around a policyholder's premises. Hence no reasonable person would suppose that, if an outbreak of an infectious disease occurred which included cases within such a radius and was sufficiently serious to interrupt the policyholder's business, all the cases of disease would necessarily occur within the radius. It is highly likely that such an outbreak would comprise cases both inside and outside the radius and that measures taken by a public authority which affected the business would be taken in response to the outbreak as a whole and not just to those cases of disease which happened to fall within the circumference of the circle described by the radius provision.

31. The Court concluded that it was not reasonable to attribute an intention that the causation of business interruption losses was to be answered by asking whether such losses would, but for the insured peril, have been suffered by disease occurring outside the radius of the premises. The Court reasoned that "the parties could not reasonably be supposed to have intended that cases of disease outside the radius could be set up as a countervailing cause which displaces the causal impact of the disease inside the radius" (at [195], see also conclusion at [212]).

32. As to the correct counterfactual for assessing loss, the Court rejected the argument that it was one that involved changing nothing but the restriction that applied to the particular policyholder's business (at [224]). This was because the policy wordings did not "restrict the scope of the indemnity to interruption of the business which is proximately caused by an insured peril and has no other concurrent proximate cause" (at [228]). Rather, the Court explained (at [237]):

> It is inherent in a situation where the elements of the peril insured under the public authority clause occur in the required combination to cause business interruption that there has been an occurrence of a notifiable disease which has led to the imposition of restrictions by a public authority. It is entirely predictable and to be expected that, even if they had not led to the closure of the insured premises, those elements of the insured peril would have had other potentially adverse effects on the turnover of the business. We have already expressed our view that <u>it would undermine the commercial purpose of the cover to treat such potential effects as diminishing the scope of the indemnity.</u> The underlying reason, as it seems to us, is that, although not themselves covered by the insurance, such effects are matters arising from the same original fortuity which the parties to the insurance would naturally expect to occur concurrently with the insured peril. They are not in that sense a separate and distinct risk. [Emphasis added].

33. The Court concluded that the insured risk in the Hybrid Clauses was "all the risk … of all the elements of the insured peril acting in causal combination" to cause loss, but

"regardless of whether the loss was concurrently caused by other (uninsured but non-excluded) consequences of the COVID-19 pandemic" (at [243]). The Court concluded that this interpretation "gives effect to the [Hybrid Clause] as it would reasonably be understood and intended to operate" (at [244]). The Court pointed out that the consequence of their interpretation was that if the insured peril (being the action of the public authority) could not be regarded as a proximate cause of loss, and rather, the sole proximate cause of loss was in fact the "COVID-19 pandemic" generally, then loss would not be covered (at [244]).

34. Finally, the court dealt with the "trends clauses". It was the insurers' contention that the trends clauses had the effect that they were not liable to indemnify policyholders for losses which would have arisen because of the wider consequences of the COVID-19 pandemic (at [251]). The Court rejected the premise, stating that the trends clauses were a "quantification machinery" that must be construed consistently with the insuring clauses and not so as to deprive the cover provided by them (at [262]). The Court concluded that the way to achieve consistency was to construe trends clauses, absent clear wording to the contrary, "by recognising that the aim of such clauses is to arrive at the results that would have been achieved but for the insured peril and circumstances arising out of the same underlying or originating cause" (at [268]). The construction of these clauses is dealt with in more detail in Section C below.

(b) The *Hyper Trust* cases

35. In *Hyper Trust No 1,* the Court dealt with the primary question of whether the insurer was liable to cover losses suffered by policyholders following the imposed closure of public houses. The relevant clause provided for an indemnity for loss:

> as a result of the business being affected by: (1) Imposed closure of the premises by order of the Local or Government Authority following …. Outbreaks of contagious or infectious diseases on the premises or within 25 miles of same.

36. McDonald J made a number of comments as to the proper construction of the clause. *First,* that an "outbreak" was "capable of consisting of a relatively small number of cases, or where the pathogen is particularly serious, a single instance of disease" (at [143]). The policy could not be construed as extending *solely* to closures following an "outbreak of disease in the specified localised area and not beyond that area" (at [145]). McDonald J then considered the construction of the words "following" and "by" in the policies (which are words not used in the BII Policies in this case). His Honour concluded that the FBD policy should be construed as requiring that the outbreak of disease should be a cause, but not necessarily the dominant cause, of the imposed closure (at [175]).

37. McDonald J adopted the same approach as the UK Supreme Court in assessing the counterfactual at [220]:

> [T]o the extent that the effects of the existence of the Covid-19 outside the relevant 25 mile radius may be established to be a concurrent proximate cause of the plaintiffs' losses alongside the closure following the outbreaks within that radius, that concurrent factor, in the absence of a relevant exclusion in the FBD policy, must also be stripped out of the counterfactual.

38. Consistently with the UK Supreme Court, McDonald J accepted that there are limits to what will be excluded, and losses which have no "sufficient connection to the composite peril will not be excluded from the counterfactual", such as the refusal of a renewal of a license or the departure of a key member of staff (at [221]). Similarly, McDonald J again accepted that the interpretation of the trends clause should not be read to cut down on the indemnity available in respect of an explicit insured peril (at [249]).

39. In *Hyper Trust (No 2),* the Court addressed three additional questions, one of which is of present relevance. That was the interpretation to be given to the word "closure" in the prevention of access clause, which referred to "imposed closure of the premises by order". McDonald J considered that "a reasonable person would understand the word 'closure' is not confined to a total shutdown of the insured's premises but also extends to a closure of part of the premises" (at [19]). This was because (a) in the other contextual extensions, which referred to "suicide" or "vermin", the word "closure" could readily apply where there has been a closure of the kitchen or an upstairs but not downstairs area, (b) the types of public houses insured are not all single room bars but might contain multiple distinct areas, and (c) the basis of settlement clause, which referred to the "gross profit earned during the indemnity period", and "additional expenditure" incurred to avoid or diminish the reduction in gross profit, envisages that the insured premises *can* be open to some extent during the relevant indemnity period (at [19]).

40. McDonald J went on to consider potential factual scenarios. He concluded that where the terms of a Government imposed measure meant the only form of business permitted is a takeaway service, "there is undoubtedly a shutting down or closure of the premises, or, at a minimum, a part of the premises" (at [23]). His Honour continued at [23]:

> In my view, a reasonable person would regard a public house premises restricted to carrying on a takeaway service as closed. Even if one could enter a door of the premises for the purposes of placing a takeaway order, the premises would, in my opinion, be regarded by a reasonable person as closed. At minimum, it would be regarded as the closure of a substantial part of the premises.

41. The position where the effect is to close a part of the premises (for example, for the

purposes of a “bar trade” as compared to a “restaurant trade”) was determined by McDonald J to constitute a “closure” at [25]:

> Likewise, if a discrete area of a pub is closed to patrons as a consequence of the impact of the Regulations or any other conditions imposed by the Government, it seems to me that, subject to the evidence that will be led at the next phase of these proceedings, such a part of the premises would be regarded as closed for the purposes of extension 1(d).

C. TRENDS / ADJUSTMENT CLAUSES

42. Common to most of the BII Policies in issue in these cases is a “trends” or “adjustments” clause that operates as part of the Basis of Settlement clauses in the policies. For example, the policy in GFA (NSD144/2021) provides that:

> 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.

43. The issue arose for determination in both *FCA v Arch* and *Hyper Trust.* In *FCA v Arch* the insurers sought to argue that the existence of COVID-19 outside the relevant territorial radius of the insured peril was a circumstance that should be taken into account in adjusting the loss claimed by the insured. The Court considered that unless the policy wording otherwise requires, a trends clause — which is not part of the “insuring” clause but rather part of the calculation of loss — should not be construed so as to “take away cover for losses prima facie covered by the insuring clauses on the basis of concurrent causes of those losses” (at [264]). The Court made the following general comments as to the nature of such clauses at [260]-[262]:

> First, the trends clauses are part of the machinery contained in the policies for quantifying loss. They do not address or seek to delineate the scope of the indemnity. That is the function of the insuring clauses in the policy.
>
> Second, in accordance with the general principle referred to earlier (see para 77 above), the trends clauses should, if possible, be construed consistently with the insuring clauses in the policy.
>
> Third, to construe the trends clauses consistently with the insuring clauses means that, if possible, they should be construed so as not to take away the cover provided by the insuring clauses. To do so would effectively transform quantification machinery into a form of exclusion.

44. As to how the trends clause should be interpreted, the Court was clear that it does not involve a counterfactual on the basis that only one individual element — namely, the outbreak of COVID-19 with the radius — had not occurred (at [267]). Rather, the trends

clause should be construed as recognising that the aim is to arrive at the results that "would have been achieved but for the insured peril and circumstances arising out of the same underlying or originating cause" (at [268]). McDonald J agreed with this construction in *Hyper Trust (No 1)*, concluding that it would be "contrary to the nature of an insurance policy as a contract of indemnity, to allow the effects of the insured peril to reduce the payment to be made to an insured who has the benefit of cover for that peril" (at [236]). McDonald J in *Hyper Trust (No 2)* held further that quantifying the indemnity by reference to a hypothetical world where COVID-19 is prevalent elsewhere in the world but not in Ireland would be an "exercise of such impractical complexity and artificiality that it cannot form part of a reasonable interpretation of [the] policy" (at [59]).

45. The Supreme Court in *FCA v Arch* declined to follow the earlier decision *Orient-Express Hotels Ltd v Assicurazioni Generali SpA* [2010] Lloyd's Rep IR 531, which was an appeal from an arbitral award relating to wind and water damage to a hotel in New Orleans suffered as a result of Hurricanes Katrina and Rita. The trends clause in issue in that case provided for adjustments to take into account "the trend of the Business and for variations in or special circumstances affecting the Business … which would have affected the Business had the Damage not occurred". Hamblin J reasoned that the clause was concerned with "damage, not with the causes of the damage" and that the Tribunal was entitled to treat the Trends Clause as providing for a "but for" approach to causation. Importantly, that decision was a limited appeal under s 69 of the *Arbitration Act 1996* on questions of law "arising out of an award". The Supreme Court of the United Kingdom in *FCA v Arch* considered that it was wrongly decided and should be overruled (at [308]).

46. The Supreme Court noted that the error in *Orient Express* occurred when "considering causation under the insuring clause", by reasoning that because loss was caused because (a) the hotel was damaged and (b) the city was damaged by the hurricane, each cause was sufficient to cause the interruption. On a pure *but for* analysis, without the damage to the hotel, the loss would still have occurred. This was an error because it suffers from the same fallacy of reasoning that where two hunters simultaneously kill a hiker, and either would have killed the hiker instantly, the "but for" analysis would produce the result that neither hunter's shot caused the hiker's death: see *FCA v Arch* at [182]. This same fallacy is attracted by the insurers' submissions in this case.[11] It needs only an example to unravel: on the insurers' construction of the trends clause, an order requiring closure of a restaurant because of vermin would have to take into

[11] See, eg, IAG at [217].

account that *but for* the order, the restaurant would have been overrun by vermin, and no-one would have eaten there anyway.

D. THIRD PARTY PAYMENTS

47. With the exception of Waldeck, each respondent received payments or other forms of relief by way of JobKeeper, grants from the Commonwealth or their respective State governments, or from private arrangements such as a rental waiver or abatement (together, **Third-Party Payments**). The respondents did not receive identical Third-Party Payments. The specific Third-Party Payments received by each respondent – and the important question of how they are to be treated *under the terms of the relevant policy* – are addressed later in these submissions.

48. It is convenient, however, to set out a few matters of general application, as well as the basis for each of the Third-Party Payments.

49. Each insurer (save for Chubb given Waldeck did not receive a Third-Party Payment) asserts that the Third-Party Payments must be taken into account in the assessment of loss.[12]

50. These submissions are addressed where relevant in each proceeding, but the short point is as follows. Reference to historical case law and general principles[13] should not introduce a false premise by obscuring the start and end of the inquiry: the words of the particular policy in question. Here, the critical words in each policy – which represent the contractual bargain of the parties – are contained in the basis of settlement clause, and the particular integers used for the agreed calculation of cover.

51. In the event and to the extent that the intent of the payor is relevant (to the exclusion of the expressly agreed contractual bargain), the Court of Appeal of Victoria in *Insurance Australia Limited v HIH Casualty & General Insurance Limited (in liq)* (2007) 18 VR 528 explained that:[14]

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

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[12] IAG at [241], [247], [250], [252], [256] (Taphouse) and at [343], [344], [347]. [348], [350] (Meridian); Guild at [89] (Dr Michael and GFA), Allianz at [98] (Mayberg and Visintin), Swiss Re at [9.7] (LCA Marrickville).

[13] Cf IAG at [226]-[232].

[14] (2007) 18 VR 528 at [160] per Ashley JA, Chernov JA and Redlich JA agreeing, referring to *Burnand v Rodocanachi* Sons & Co (1882) 7 App Cas 333 (***Burnand***); *Merrett v Capitol Indemnity Corporation* [1991] 1 Lloyd's Rep 169.

52. Ashley JA referred to the explanation of Lord Blackburn in *Burnand*:

> The first question is this. There had been a policy of insurance and a total loss by capture and destruction of the property insured and a payment of the full value insured — a payment of the total loss under that policy. Subsequently to that payment there came the Treaty of Washington; and afterwards, in consequence of an Act of Congress, a sum of money was paid to the persons who had received payment under the policy; and the question, I apprehend, comes to be, Was that sum or was it not paid so as to be a reduction or diminution of their loss?[15]

53. The question, if it is to be asked, is therefore this: was the relevant Third-Party Payment made so as to reduce or diminish the relevant loss suffered, that loss being – for the reasons set out elsewhere in these submissions – the loss caused by the insured peril. That loss is *not*, for the avoidance of doubt, the loss caused by the underlying reason for the insured peril: as IAG says "*it is important to note what the insured peril is not. It is not the occurrence of pandemic*".[16]

54. Aspects of the different Third-Party Payments are addressed further in **Annexure A** to these submissions.

E. THE EVIDENCE

55. The evidence on behalf of the respondents before the Court is comprised of:

    a. A Statement of Agreed Facts (**SOAF**) filed 18 July 2021 in each proceeding;

    b. An affidavit on behalf of each policyholder (except in the case of Waldeck (NSD 137/2021), where Chubb has agreed to the tender of the Outline Document filed on behalf of Waldeck and Waldeck's profit and loss statement for the period 1 July 2020 to 5 April 2021);

    c. Subpoenaed material in relation to Taphouse (NSD134/2021) and Visintin (NSD 136/2021);

    d. Certain additional documentary material relevant to third-party payments made to the policyholders; and

    e. Material obtained from each of the state government websites as they existed during the relevant period (largely, prior to March 2020) as to the nature and seriousness of COVID-19 and its risks to human health in Australia.

56. For the sake of good order, the Court also has the "Outline Document" filed on behalf of each policyholder, which defines the relevant "Authority Response" (that is, the

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[15] This is also the thrust of the quote from Lord Selborne at IAG [228].

[16] IAG at [122].

government orders that each policyholder relies on as the insured peril). The parts of these documents that are disputed by the insurers have been superseded by affidavit evidence, and the Court has versions of the Outline Documents that are "struck through" to reflect that which is disputed by the insurers.

57. In each proceeding, a Notice to Admit has been filed. The Insurers have filed inconsistent Notices of Dispute. The matters admitted by each insurer are set out in their respective sections below.

58. The facts relating to the discovery, nature, prevalence and transmission of COVID-19 are set out in the SOAF at [1]-[15], [18]-[27]. It is conceded by each insurer that the disease COVID-19 is an infectious and/or contagious human disease and that SARS-CoV-2 is an "organism", and the infective agent that causes COVID-19.[17]

59. The SOAF contains certain facts relating to the occurrence of cases of COVID-19 ascertainable by reference to publicly available data published by the state and territory health authorities.

F. TAPHOUSE (NSD 134/2021)

F1. THE POLICYHOLDER

60. The respondent in NSD 134/2021, The Taphouse Townsville Pty Ltd (**Taphouse**) is the insured under a "Business Insurance Policy" number 15T8202892 (**Taphouse Policy**) placed with the applicant, Insurance Australia Limited (**IAG**).

61. Taphouse operates a craft beer bar and restaurant in the City Lane Arcade, 373 Flinders Street, Townsville City Queensland 4810. It has both indoor and outdoor areas, and an ordinary capacity for 100 customers.[18] Prior to 28 March 2020, it did not provide any takeaway food or alcohol services. It was a dine-in, drink-in licensed establishment.[19]

F2. THE POLICY

62. The Taphouse Policy comprises a policy schedule (**Taphouse Schedule**)[20] and wording (**Taphouse Wording**).[21] The period of insurance is 23 September 2019 to 23 September 2020.[22] The insured "Situation" is Lot 4, City Lane, 343 Flinders Street

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17 SOAF at [2].

18 Affidavit of Mark Graham Rugg filed 18 August 2021 at [4] (**Rugg Affidavit**).

19 Rugg Affidavit at [9].

20 [CB Pt A 212].

21 [CB Pt A 150].

22 Taphouse Schedule at 1 [CB Pt A 212].

Townsville Queensland 480 (being the site of the craft beer bar and restaurant).[23]

63. The classes of insurance taken under the policy were identified in the Taphouse Schedule as:[24]

    a. Section 1 – Property;

    b. Section 2 – Business Interruption;

    c. Section 3 – Part A Theft of Property, Part B Money;

    d. Section 4 – Glass;

    e. Section 5 – Public Liability, Products Liability;

    f. Section 7 – Machinery, Goods in Cold Chambers;

    g. Section 8 – Part A Computer Systems/Electronic Equipment, Part B Business Interruption.

64. The "cover details" for "Section 2 – Business Interruption" are stated in the Taphouse Schedule as an indemnity period of 12 months, with limits of cover as follows:

    a. Gross Profit, in the sum of $[redacted];

    b. Additional increased cost of working, in the sum of $[redacted]; and

    c. Accountants' Fees in the sum of $[redacted].[25]

65. The relevant terms of the policy for these proceedings are contained in Section 2 — Business Interruption.[26]

66. Within Section 2, the terms are organised under headings[27] including:

    a. "Definitions";[28]
    b. "Cover";[29]
    c. "Basis of settlement";[30]
    d. "Extensions of cover".[31]

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[23] Taphouse Schedule at 1 [CB Pt A 212].

[24] Taphouse Schedule at 1 [CB Pt A 212].

[25] Taphouse Schedule at 3-4 [CB Pt A 214-5].

[26] Commencing at 19 of the Taphouse Wording [CB Pt A 174].

[27] Headings, however, do not form part of the policy: see Taphouse Wording at 3 [CB Pt A 158].

[28] Taphouse Wording at 19 [CB Pt A 174].

[29] Taphouse Wording at 20 [CB Pt A 175].

[30] Taphouse Wording at 20-21 [CB Pt A 175-176].

[31] Taphouse Wording at 21-23 [CB Pt A 176-178].

67. Under the heading "Cover", the policy provides:[32]

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

68. This clause thus applies where the interruption or interference was "as a result of insured damage". "Insured Damage" is defined as applying in relation to "property".[33]

69. Under the heading "Extensions of cover", the policy provides:[34]

> **Extension of cover**
>
> This section is extended to include the following additional benefits. Additional benefits 1-11 inclusive are payable provided that the *sum insured* expressed against the relevant item(s) in the *schedule* is not otherwise exhausted.
>
> *We* will pay *you* (depending on the part of this section which is applicable to *you*) for:
>
> a) item 1 Gross Profit …
>
> resulting from *interruption* of or interference with your *business* as a result of *insured damage* occurring during the *period of insurance* to, or as a direct result of [additional benefits 1-11].

70. This clause is thus capable of applying in two different situations:

    a. The ***first*** is where the interruption or interference was "as a result of *insured damage* occurring to … [any of the matters specified in additional benefits 1-11]". Having regard to the definition of "insured damage", this limb of the insuring clause was apt to pick up those additional benefits which had as their subject matter property capable of being damaged.

    b. The ***second*** is where the interruption or interference was "a direct result of [any of the matters specified in additional benefits 1-11]." This second limb was not predicated on "insured damage". Accordingly, it could be engaged without there being any damage to property in respect of those additional benefits that do not (or do not necessarily) have "insured damage" to "property" as their subject matter. As shall be seen, the additional benefits under which Taphouse claims (additional benefits 7 and 8) are within this category.

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32 Taphouse Wording at 20 [CB Pt A 175].

33 Taphouse Wording at 19 [CB Pt A 174].

34 Taphouse Wording at 21-22 [CB Pt A 176-177].

71. Another difference between the two limbs is that the first uses the expression "as a result of" whereas the second uses the expression "as a direct result of".

72. Additional benefits 1-5 are directed to damage to various kinds of property.[35] Additional benefit 6 provides cover for "prevention of access" by reason of damage to various kinds of property. Thus additional benefits 1-6 are apt to be picked up by the first limb.

73. Additional benefits 7 and 8, which are the clauses directly in issue in this proceeding, are expressed differently and are apt to be picked up by the second limb.

74. Additional benefit 7 is a **Prevention of Access Clause.** It is in the following terms:[36]

> **7. Prevention of access by a public authority**
>
> *We* will pay for loss that results from an *interruption* of *your business* that is caused by any legal authority preventing or restricting access to your premises or ordering the evacuation of the public as a result of *damage* to or threat of *damage* to property or persons within a 50-kilometre radius of *your premises*.

75. This provision may be engaged in the case of damage or threat of damage to "property **or persons**" within the specified radius. Accordingly, it may be engaged without there being any damage or threat of damage to property.

76. Additional benefit 8 is a **Hybrid Clause.** It is in the following terms:[37]

> **8. Murder, suicide & infectious disease**
>
> *We* will pay for loss that results from an *interruption*[38] of *your business* that is caused by:
>
> (a) any legal authority closing or evacuating all or part of the premises as a result of:
>
> (i) the outbreak of an infectious or contagious human disease occurring within a 20-kilometre radius of your premises, however, there is no cover for highly pathogenic Avian Influenza or any disease declared to be a quarantinable disease under the Quarantine Act 1908 (as amended) irrespective of whether discovered at the location of your premises, or out-breaking elsewhere.

77. Additional benefit 8 is not in any way predicated upon damage to property.

78. Finally, the **Basis of Settlement Clause** provides, in respect of the "Gross Profit", as

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35 Taphouse Wording at 22 [CB Pt A 177].

36 Taphouse Wording at 23 [CB Pt A 178].

37 Taphouse Wording at 23 [CB Pt A 178].

38 The term "interruption" is defined to mean "interruption or interference: Taphouse Wording at 19 [CB Pt A 174].

follows:[39]

> In the event of a claim for an item specified below, *We* will pay
>
> **1. Gross profit**
>
> a) the amount produced by applying the *rate of gross profit* to the amount by which the *turnover* during the *indemnity period* in consequence of *damage* falls short of the *standard turnover*, and
>
> b) the additional expenditure necessarily and reasonably incurred by *you* for the sole purpose of avoiding or minimising the reduction in *gross profit* during the *indemnity period* in consequence of the *damage,* but not exceeding the reduction in *gross profit* thereby avoided.
>
> If, during the *indemnity period,* services are rendered other than at the *premises,* for the benefit of the *business,* either by *you* or by others on *your* behalf, the money received or receivable in respect of those services will be brought into account in arriving at the amount of the *gross profit* during the *indemnity period.*

79. The italicised terms in the Basis of Settlement Clause are defined in "Section 2, Definitions"[40] as follows:

    a. **Rate of Gross Profit** means the rate of gross profit, expressed as a percentage, earned on the *turnover* during the financial year immediately before the date of the *damage.*

    b. **Gross Profit** means the amount by which the sum of the *turnover* and the amount of the closing *stock* and work in progress, exceeds the sum of the opening *stock* and work in progress and the amount of the *uninsured working expenses.*

       The amount of the opening and closing *stocks* will be arrived at in accordance with *Your* normal accounting methods, due provision being made for depreciation.

    c. **Turnover** means the amount (less discounts allowed) paid or payable to *you* for goods sold and delivered, and for services rendered in the course of *your business* at the *business premises.*

    d. **Standard Turnover** means the turnover during that period in the twelve (12) months immediately before the date of the *damage* which corresponds with the

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39 Taphouse Wording at 20 [CB Pt A 175]. The word "damage" is also defined, but IAG accepts that it must be read in this context as the "insured peril": see IAG at [203].

40 Taphouse Wording at 19-20 [CB Pt A 174-1775].

indemnity period (appropriately adjusted where the *indemnity period* exceeds twelve or is less than (12) months

e. **Indemnity Period** means: 1. starts with the occurrence of the *damage*; and 2. ends not later than the number of weeks or months stated in the *schedule* [relevantly defined in the schedule as 12 months] after the date of the *damage* during which the results of *your business* are affected as a consequence of the *damage*.

80. At this point, the following preliminary observations may be made about the structure and terms of the policy.

81. ***First***, contrary to IAG's submission,[41] the Taphouse Policy cannot be characterised properly as having as its "primary" or "core" coverage physical loss of or damage to property. To the contrary, the policy provides a number of different classes of cover, some only of which are predicated on damage to property. Others, including the critical clauses at issue in the present case, are expressly untethered from damage to property.

82. ***Secondly***, again contrary to IAG's submission,[42] it follows that the critical clauses at issue in the present case should not be read through the prism of, or given a narrow or restricted meaning so as to conform to, a false notion as to what is at the "core" of the policy.

83. ***Thirdly***, consistently with IAG's submission as to the primacy of the text,[43] the focus must be on the language actually used by the parties in the critical clauses. That language expressly directs attention to the actions of a "legal authority". There is no dispute that the actions relied upon by Taphouse were those of a "legal authority".[44] Instead, the dispute is as to whether the actions of the "legal authority" otherwise fall within the language of the critical clauses.

84. ***Fourthly***, IAG's proposition that the "pandemic" or "COVID-19" is not an insured peril[45] distracts attention from the task of interpreting and applying the language actually used by the parties. That task is not to be undertaken by reference to abstract notions as to whether pandemic or COVID-19 cover is or should be provided under the policy. Rather, it is to be undertaken by determining whether the actions of the legal authority fall within

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41 IAG at [107], [110], [133].

42 IAG at [107], [110], [133].

43 IAG at [26], [151].

44 IAG at [138]-[139].

45 IAG at [18], [19], [59].

the language of the critical clauses.

85. ***Fifthly,*** the insurer determines the limits of the cover by its policy terms, including these limitations and other limitations, such as sub-limits, which the insurer can set to limit its exposure to particular events or losses, or exclusions. If "pandemics" were not intended to be covered it would have been a simple matter to include an express exclusion to that effect.

86. ***Sixthly***, contrary to another theme running through IAG's submissions,[46] this case does not raise the spectre of re-writing the policy so as to provide indeterminate cover disproportionate to the premium.[47] The Taphouse Policy was provided to a small business, with a relatively modest limit of $[redacted] and an indemnity period of 12 months.

F3. THE CLAIM

87. Taphouse has made a claim for indemnity under the Taphouse Policy. That claim was denied by IAG.[48] In these proceedings, Taphouse contends that both the Prevention of Access and Hybrid Clauses respond to its loss.

88. The insured peril under the Prevention of Access Clause is "any legal authority preventing or restricting access to your premises or ordering the evacuation of the public as a result of damage to or threat of damage to property or persons within a 50-kilometre radius of your premises". To fall within this clause, the legal authority must have:

    a. prevented or restricted access to your premises; **or**

    b. ordered the evacuation of the public; **and**

    c. done one (or both) of those things "as a result of damage to or threat of damage to property or persons within a 50-kilometre radius of your premises".

89. The insured peril under the Hybrid Clause is "any legal authority closing or evacuating all or part of your premises as a result of the outbreak of an infectious or contagious human disease occurring within a 20-kilometre radius of your premises". To fall within this clause, the legal authority must have:

    a. closed or evacuated all or part of your premises; **and**

    b. done so "as a result of the outbreak of an infectious or contagious human

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46 IAG at [19], [26], [31], [52]-[53].

47 IAG at [32].

48 Taphouse Concise Statement filed 26 February 2021 at [2]-[3]; Taphouse Amended Concise Statement in Response filed 9 August 2021 at [4]-[5].

disease occurring within a 20-kilometre radius of your premises".

90. Taphouse contends that both clauses are engaged by reason of the following statutory instruments (**Authority Response-Taphouse**) (save that it does not say the 29 March 2020 *Home Confinement Direction* is insured under the Hybrid Clause):

    a. **The 23 March 2020 *Non-Essential Business Closure Direction*.**[49] This direction provided that a person who "owns, controls or operates a non-essential business or undertaking in the State of Queensland must not operate the business or undertaking". The term "non-essential business or undertaking" was defined to mean "registered and licensed clubs, licenses premises in hotels" and "restaurants, cafes, fast-food outlets, food courts (together **retail food services**) except for provision of food or drink by way of provision of takeaway or hotel room service".

    b. **The 29 March 2020 *Home Confinement Direction*.**[50] Part 1 of the direction had as its stated purpose to "prohibit persons from leaving their residence except for permitted purposes; and groups of more than two persons who are not members of the same household from gathering in any place except for permitted purposes". Clause 6 provided that a "person who resides in Queensland must not leave their principal place of residence except for, and only to the extent reasonably necessary to accomplish, the following permitted purposes". The permitted purposes included "to obtain food or other **essential goods or services**". That term was defined as "food and other supplies, and services, that are needed for the necessities of life and operation of society, such as food, fuel, medical supplies and other goods".

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[49] SOAF Annexure D at #9.

[50] SOAF Annexure D at #17. IAG incorrectly asserts that there was no further "*lockdown*" in Queensland during the policy period once the 29 March 2020 *Home Confinement Direction* was revoked on 2 April 2020. In fact, the restriction on leaving home except for a permitted purpose remained in force until 1 June 2020. The *Home Confinement Direction* was expressed to apply "*until the end of the declared public health emergency, unless they are revoked or replaced*". The directions were replaced, by the *Home Confinement, Movement and Gathering Direction* made on 2 April 2020, the *Home Confinement, Movement and Gathering Direction (No 2)* made on 26 April 2020, the *Home Confinement, Movement and Gathering Direction (No 3)* made on 1 May 2020, the *Home Confinement, Movement and Gathering Direction (No 4)* made on 8 May 2020, the *Home Confinement, Movement and Gathering Direction (No 5)* made on 15 May 2020, and the *Home Confinement, Movement and Gathering Direction (No 6)* made on 19 May 2020: see SOAF Annexure D. The restriction on movement except for a "*permitted purpose*" did not cease until the enactment of the *Movement and Gathering Direction* on 1 June 2020. For the purposes only of this Test Case, Taphouse pleads the *first* enacted "*lockdown*" direction as comprising the Authority Response-Taphouse but not all subsequent directions because that is sufficient to engage the question of construction for the purposes of a test case and all subsequent directions were relevantly in the same terms. However, it claims loss arising from the various government directions that required people to remain in their homes: see Taphouse Outline Document at [20](a)]. If the policy responds to the first "*lockdown*" direction, it necessarily responds to the subsequent ones.

c. **The 15 May 2020 *Non-Essential Business, Activity and Undertaking Closure Direction (No.10)*.**[51] This order provided that a "person who owns, controls or operates a non-essential business, activity or undertaking in the State of Queensland … must not operate the business, activity or undertaking" subject to particular exceptions in Clause 8. That Clause defined "non-essential business, activity, or undertaking" as the "business, activity, undertaking, premises or place" listed in Column 1, subject to the exception in Column 2 of that Clause. "Restaurants" and "pubs, registered and licensed clubs, RSL clubs, licensed premises in hotels and bars" were each listed in Column 1. The "exceptions" provided that those premises could provide "seated dining" for up to 10 patrons at a time, with no more than one patron per 4 square metres and social distancing observed. Alcohol could be served only in accordance with seated dining, with "no bar service".

d. **The 1 June 2020 *Business, Activities and Undertakings Direction.***[52] This order provided that a "person who owns, controls or operates a restricted business, activity or undertaking in the State of Queensland" may "operate the business, activity or undertaking" only "to the extent permitted in Column 2 of the table at paragraph 14". That column provided that "restaurants" and "pubs, registered and licensed clubs, RSL clubs, licensed premises in hotels and bars" could operate for up to 20 seated patrons a time, in compliance with a COVID Safe Checklist with no more than one patron per 4 square metres and social distancing observed. In addition, alcohol could only be provided when patrons were seated, with "no bar service".

e. **The 3 July 2020 *Restrictions on Business, Activities and Undertakings Direction (No. 3).***[53] This order provided that a "person who owns, controls or operates a restricted business, activity or undertaking in the State of Queensland" may "operate the business, activity or undertaking" "in accordance with the restrictions listed in Column 2 of paragraph 16, and on the basis of that the "occupant density" is no more than one person per 2 square metres (up to a total of 50 people) for venues or spaces of 200 square metres or less.

f. **The 24 July 2020 *Restrictions on Business, Activities and Undertakings***

[51] SOAF Annexure D at #38.

[52] SOAF Annexure D at #40.

[53] SOAF Annexure D at #46.

***Direction (No. 5*).**[54] This order provided that a "person who owns, controls or operates a restricted business, activity or undertaking in the State of Queensland" may "operate the business, activity or undertaking" "in accordance with the restrictions listed in Column 2 of paragraph 17, and on the basis that the "occupant density" is no more than one person per 2 square metres (up to a total of 50 people) for venues or spaces of 200 square metres or less. The restrictions listed in Column 2 required that the "restaurants" and "bars" could operate for seated patrons only.

g. **The 17 November 2020 *Restrictions on Business Activities and Undertakings Direction (No. 9).***[55] This order provided that a "person who owns, controls or operates a restricted business, activity or undertaking in the State of Queensland" may "operate the business, activity or undertaking" "in accordance with the restrictions listed in Column 2 of Schedule 1, and on the basis that the "occupant density" is no more than one person per 2 square metres.

F4. ASSESSING THE ACT OF THE LEGAL AUTHORITY

91. Before turning to the construction and application of the particular clauses, it is necessary to deal with an important question common to each of them.

92. Each clause raises a question as to whether the act of the legal authority was "as a result" of something else. In the present case, the question arises in the context of acts which take the form of statutory instruments made under the *Public Health Act 2005* (Qld).

93. One issue that divides the parties is whether, in order to answer this question, it is necessary to go beyond the statutory instruments and their relevant legal context.

94. IAG appears to contend that it is, asserting that in order for an insured to qualify for cover under these clauses, the insured must demonstrate by evidence *dehors* the statutory instrument that:

    a. In the case of the prevention of access clause (inter alia):

        i. there was an actual threat of damage to property or persons;

        ii. the threat was to property or persons within a 50 km radius of the

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[54] SOAF Annexure D at #50.

[55] SOAF Annexure D at #69.

insured's premises;

iii. the legal authority was subjectively aware of that threat;

iv. the action of the legal authority was "as a result" of that threat.

b. In the case of the hybrid clause (inter alia):

i. there was an actual outbreak of an infectious or contagious human disease;

ii. the outbreak was occurring within a 20 km radius of the insured's premises;

iii. the legal authority was subjectively aware of that outbreak;

iv. the action of the legal authority was "as a result" of that outbreak.

95. On this approach:

a. the insured would not be entitled to cover unless it could establish these matters by evidence (being evidence not likely to be readily available to an insured);

b. even if the statutory instrument, or the relevant legal context, conveyed that the instrument was made in response to ("as a result of") a threat or outbreak, the insured would not be entitled to cover if there was **in fact** no such threat or outbreak. Put another way, if the legal authority evidently (according to the text and legal context of the instrument) proceeded upon the basis that there was a threat or outbreak, the insurer would nonetheless be entitled to insist upon proof that the posited basis was in fact correct, and could avoid cover by mounting a collateral attack upon the instrument.

96. By contrast, Taphouse's primary argument is that, at least where the act of the legal authority is by way of a written statutory instrument, the question may be resolved by reference to the text of the statutory instrument and its relevant legal context.

97. A number of considerations suggest that Taphouse's construction should be preferred over that of IAG.

98. ***First***, the text of each clause makes it clear that the key element of the insured peril is the act of the "legal authority". Although "legal authority" is not defined, it is common ground that it is broad enough to encompass one who makes a statutory instrument pursuant to legislation such as the *Public Health Act*. Accordingly, each clause contemplates that the relevant act of the legal authority may be in the nature of a statutory instrument. In other words, each clause contemplates that the key element of

the insured peril may be in the nature of a statutory instrument.

99. ***Secondly***, statutory instruments usually speak for themselves. They are to be interpreted in accordance with the ordinary principles applicable to statutes; and they are to be placed in their statutory context (which includes the legislation under which they were made): *Master Education Services Ltd Pty Ltd v Ketchell* (2008) 236 CLR 101 at [19]. The question of Parliament's intention is resolved by recognition of the fact that Parliament manifests its intention by the use of language, "and it is by determining the meaning of that language, in accordance with principles of construction established by the common law and statute, that courts give effect to the [fiction of] legislative will": *Wilson v Anderson* (2002) 213 CLR 401 at [8]. Similarly, the question of the intention of a legal authority which has made a statutory instrument is to be determined by the meaning of the language used in the statutory instrument, assessed in its legal context. The question as to whether the statutory instrument was made by the legal authority "as a result" of a particular thing may also be capable of being answered by the meaning of the language used in the statutory instrument. Much will depend upon the language of the particular instrument. But if the language does supply the answer, that should be sufficient.[56]

100. ***Thirdly***, in cases where the language of the instrument does supply the answer, it should not be necessary for the insured to adduce evidence from the relevant legal authority as to its subjective intention when, or reasons for, making the statutory instrument. Moreover, it is not permissible for the insurer to contradict the language of the instrument. This would involve a lack of coherence with the principles of construction applicable to statutory instruments. It would also lack commercial common sense. The parties are not likely to have assumed that legal authorities would be readily available to provide evidence in support of the insured's claim. Instead, they are likely to have intended that the insured's claim could be supported by the terms of the statutory instrument or other measure promulgated by the legal authority. The inconvenience to small businesses of the insurer's interpretation is obvious. They may never be in a position to obtain such evidence from the legal authority, such that they may never know whether or not they are covered.

101. ***Fourthly***, even if one were to accept that it is necessary for an insured to establish the subjective state of mind of the legal authority as to what caused it to promulgate the

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[56] If the language of the instrument in its legal context does not supply the answer then it remains open to an insured to establish that connection by reliance on a broader range of material, that might include broader matters of context and matters of evidence (including, in some contexts, direct evidence from the decision-maker).

measure, that could still be done by reference to the text of the instrument and its relevant legal context. This would be an application of the principle stated by Mason CJ in *Walton v R* (1989) 166 CLR 283 at 288:

> … evidence of a relevant out-of-court statement is admissible evidence of the maker's knowledge or state of mind when he made the statement in a case where such knowledge or state of mind is a fact in issue or a fact relevant to a fact in issue: *Reg. v. Blastland* (14). Similarly, a person's statements or declarations are an accepted means of proving his intentions in circumstances where it is material to prove what those intentions were. As Mellish L.J. remarked in *Sugden v. Lord St. Leonards* (15):
>
> > "[W]herever it is material to prove the state of a person's mind, or what was passing in it, and what were his intentions, there you may prove what he said ...."
>
> The point is that the making of the statement is itself evidence of the author's intentions at the time the statement was made.

102. ***Fifthly***, the clauses do not require the underlying reason for the legal authority's act to be established as a matter of fact. As has already been observed, the key element of the insured peril in each clause is the act of the legal authority. The language that follows in each clause is descriptive of the character of the act of the legal authority. If the act of the legal authority possesses those characteristics, then that is sufficient to engage the clause.

103. So, to take the prevention of access clause by way of illustration, if on consideration of the language of the instrument and its legal context, it can be concluded that the instrument purports to have been made "as a result of … threat of damage to … persons within a 50-kilometre radius of your premises" then:

    a. that is sufficient to engage the clause;

    b. it is not necessary for the insured to go a step further and establish that there was **<u>in fact</u>** such a threat;

    c. it is not permissible for the insurer to contradict the instrument by seeking to establish that, contrary to what the instrument conveys, there was **<u>in fact</u>** no such threat.

104. This accords with the language and structure of the clause. The clause does not purport to require the insured to establish each of a number of cumulative conditions as an independent objective fact in order to qualify for cover. Instead, it requires the insured to establish an act of a legal authority which possesses the characteristics described in the clause.

105. It also accords with commercial common sense. It would not make commercial sense for an insured to be deprived of cover if the legal authority had acted on the basis that there was a threat within the meaning of the prevention of access clause, but later discovered that it happened to be wrong about the existence of the threat such that, in hindsight, the measure it promulgated turned out to be unnecessary. The insured still suffered interruption or interference caused by the act of the legal authority, and should still be covered accordingly.

106. A particular feature of the hybrid clause warrants mention here, namely the nature of the infectious or contagious human diseases to which it is directed. The parties' objective intention was to exclude only a static and certain list of existing diseases declared under the former *Quarantine Act 1908* (Cth): *HDI Global Specialty SE v Wonkana No. 3 Pty Ltd* [2020] NSWCA 296 at [129]. The corollary is that *new* and *emerging* diseases were intended to be covered by the hybrid clause. It would not make commercial sense to require that an insured put on expert evidence as to the location of cases, prevalence, virology or epidemiology of such diseases. Such evidence is unlikely to ever be available at the time a claim is made, noting that one purpose of Business Interruption Insurance is to provide a timely capital injection into an interrupted business to, in effect, "keep the lights on" whilst the insured peril continues. The Court would not construe the policy as requiring evidence from a policyholder that will, in general, be impossible or impractical for it to obtain in respect of the class of new and emerging diseases covered by the clause. Indeed, the difficulties faced by the insureds in the present proceedings are instructive: with all the cooperation and funding associated with a test case, it has remained difficult to obtain expert evidence in a timely fashion. That suggests something has gone wrong with the insurers' construction.

F5. THE STATUTORY INSTRUMENTS IN THEIR LEGAL CONTEXT

107. Each of the statutory instruments comprising the Authority Response-Taphouse was made by the Chief Health Officer of Queensland under s 362B of the *Public Health Act*.

108. They are statutory instruments to which the *Statutory Instruments Act* 1992 (Qld) applies.

109. The relevant legal context includes at least:

    a. the enabling statute;

    b. the extrinsic material in relation to the enabling statute;

    c. prior instruments made under the enabling statute which are referred to in the instrument under consideration.

110. **The Public Health Act.** The primary Queensland legislation in issue is the *Public Health Act.* Chapter 8 of that Act is headed "Public health emergencies", with "public health emergency" being defined in s 315 as "an event or a series of events that has contributed to, or may contribute to, serious adverse effects on the health of persons in Queensland" (emphasis added). Section 319 permits the Minister to declare a "public health emergency" by signed written order if satisfied "there is a public health emergency" and that "it is necessary to exercise powers under this chapter to prevent or minimise serious adverse effects on human health" (emphasis added). On 29 January 2020, the Queensland Minister for Health made a declaration pursuant to s 319 of the *Public Health Act*.[57] It stated:

> I, Steven Miles MP, the Queensland Minister for Health and Minister for Ambulance Services, am satisfied there is a public health emergency due to an outbreak of the coronavirus '2019 n-CoV' within China, its pandemic potential due to cases spreading to other countries and the public health implications within Queensland resulting from recently arrived travellers from the epicentre of the outbreak.
>
> To help control the threat and prevent or minimise serious adverse effects on human health in Queensland additional emergency powers will be required by the Queensland Government. Therefore, by this order, I declare a public health emergency under the Public Health Act 2005 in all of Queensland.
>
> This order is effective immediately and ends at midnight on Thursday, 6 February 2020.
>
> Steven Miles MP
>
> Minister for Health and Minister for Ambulance Services
>
> 29 January 2020
>
> Please note: '2019 n-CoV' should read as '2019–nCoV'

[emphasis added]

111. **The Amending Act.** On 19 March 2020, the *Public Health Act* was amended by the *Public Health and Other Legislation (Public Health Emergency) Amendment Act 2020* (Qld). The amendments involved the insertion of a new Part 7A entitled "Particular

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[57] This order has been extended and remains in force: see *Public Health (Further Extension of Declared Public Health Emergency—Coronavirus (2019-nCoV)) Regulation 2020; Public Health (Further Extension of Declared Public Health Emergency—Coronavirus (2019-nCoV)) Regulation (No. 2) 2020; Public Health (Further Extension of Declared Public Health Emergency—COVID-19) Regulation (No. 3) 2020; Public Health (Further Extension of Declared Public Health Emergency—COVID-19) Regulation (No. 4) 2020; Public Health (Further Extension of Declared Public Health Emergency—COVID-19) Regulation (No. 5) 2020*; *Public Health (Further Extension of Declared Public Health Emergency—COVID-19) Regulation (No. 6) 2020; Public Health (Further Extension of Declared Public Health Emergency—COVID-19) Regulation 2021; Public Health (Further Extension of Declared Public Health Emergency—COVID-19) Regulation (No. 2) 2021.*

Powers for COVID-19 Emergency". The term "COVID-19 emergency" was defined in s 315 as "the public health emergency declared by the Minister on 29 January 2020 under s 319(2), as extended and further extended under s 323". Section 326B was introduced into the Act. This conferred the new power to make a "public health direction" on the Chief Health Officer in the following terms:

> (1) This section applies if the chief health officer reasonably believes it is necessary to give a direction under this section (a ***public health direction***) to assist in containing, or to respond to, the spread of COVID-19 within the community.
>
> (2) The chief health officer may, by notice published on the department's website or in the gazette, give any of the following public health directions:
>
> (a) a direction restricting the movement of persons;
>
> (b) a direction requiring persons to stay at or in a stated place;
>
> (c) a direction requiring persons not to enter or stay at or in a stated place;
>
> (d) a direction restricting contact between persons;
>
> (e) any other direction the chief health officer considers necessary to protect public health.
>
> (3) A public health direction must state:
>
> (a) the period for which the direction applies; and
>
> (b) that a person to whom the direction applies commits an offence if the person fails, without reasonable excuse, to comply with the direction.
>
> [emphasis added]

112. The Explanatory Notes that accompanied the Bill for the Amending Act stated that "COVID-19 represents a significant risk to the health and wellbeing of many Queenslanders" and that the Bill ensured there was "clear legal authority to make the interventions necessary to mitigate the spread of COVID-19 in the community".[58] With specific reference to the amendments to the *Public Health Act,* the Explanatory Notes confirmed that it was necessary to "strengthen the powers of the Chief Health Officer and emergency officers appointed under the Act to implement social distancing measures, including regulating mass gatherings, isolating or quarantining people to

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[58] Explanatory Notes, Public Health and Other Legislation (Public Health Emergency) Amendment Bill 2020 (Qld) at 2.

assist in containing the spread of COVID-19".[59] The "policy objectives" referred to the declaration of COVID-19 as a "global pandemic", and the cases as at 18 March 2020, being "414 confirmed cases of COVID-19 and five confirmed deaths, with 94 confirmed cases in Queensland".[60]

113. In accordance with s 38 of the *Human Rights Act 2019* (Qld), the Minister made a statement of compatibility in respect of the Bill for the Amending Act.[61] It was stated that the purposes of the Bill could not be achieved through any reasonably available and less restrictive means, because:[62]

> [R]ates of infection are quickly and steadily rising, with 94 confirmed cases in Queensland as of 17 March 2020. Experience abroad underscores that voluntary containment measures are inadequate to arrest the spread of COVID-19 and that governments must proactively pursue more prescriptive approaches to respond effectively to this unprecedented public health emergency.

114. **The Authority Response-Taphouse.** On each occasion that an order comprising the Authority Response-Taphouse was made, it was expressly stated to apply to either "the State of Queensland" or to a person who "resides in Queensland". On each occasion, the Chief Health Officer of Queensland stated that:

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

115. Further, on each occasion, the Chief Health Officer referred back to the declaration by the Minister for Health of a public health emergency in relation to COVID-19, and its emergency area of "all of Queensland". It will be recalled that this Order was made "to help control the threat or minimise serious adverse effects on human health in Queensland".

F6. PREVENTION OF ACCESS CLAUSE

116. As has already been observed, to fall within this clause, the legal authority must have:

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[59] Explanatory Notes, Public Health and Other Legislation (Public Health Emergency) Amendment Bill 2020 (Qld) at 3 [emphasis added].

[60] Explanatory Notes, Public Health and Other Legislation (Public Health Emergency) Amendment Bill 2020 (Qld) at 1.

[61] Statement of Compatibility, Public Health and Other Legislation (Public Health Emergency) Amendment Bill 2020 (Qld).

[62] Statement of Compatibility, Public Health and Other Legislation (Public Health Emergency) Amendment Bill 2020 (Qld) at 21.

a. prevented or restricted access to your premises; **or**

b. ordered the evacuation of the public; **and**

c. done one (or both) of those things "as a result of damage to or threat of damage to property or persons within a 50-kilometre radius of your premises".

117. Taphouse relies upon the prevention or restriction of access limb of this clause (not the evacuation of the public limb).

118. Accordingly, in logical sequence, the issues are:

a. ***First***, whether the legal authority prevented or restricted access to Taphouse's premises within the meaning of the clause.[63]

b. ***Secondly***, whether that was done "as a result of damage to or threat of damage to property or persons within a 50-kilometre radius of your premises".[64]

c. ***Thirdly***, whether the Prevention of Access Clause is capable of applying in light of the separate Hybrid Clause.[65]

Legal authority prevented or restricted access to Taphouse's premises

Construction

119. There is no dispute as to the ordinary meaning of the verbs "prevent", "restrict" and "evacuate", and Taphouse does not contend that they bear some special meaning in the context of the policy.[66]

120. Further, Taphouse agrees with IAG that the clause concerns "the effect" of the relevant instruments, and in particular whether they have "the effect of hindering … or limiting access" to Taphouse's premises.[67]

121. Preventing includes hindering, which encompasses something less than stopping completely. Similarly, restricting includes limiting, which encompasses something less than stopping completely.

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[63] Paragraph 13(b) of the List of Issues for Determination. Paragraph 116(c) of IAG's submissions.

[64] Paragraph 13(c) of the List of Issues for Determination. This is different from the formulation in IAG's submissions at 116(b)-(c). IAG's formulation does not reflect the terms of the policy or paragraph 13(c) of the List of Issues for Determination. Further, it reflects an assumption that Taphouse must prove as an independent objective fact that there was a threat of damage. For the reasons addressed above, Taphouse's primary position is that this assumption is incorrect.

[65] Paragraph 13(a) of the List of Issues for Determination.

[66] IAG at [141]-[142].

[67] IAG at [142].

122. Thus, contrary to IAG's submission,[68] the clause does not speak "to orders that **stop** the public from entering the premises". Instead, it expressly encompasses hindering or limiting access, which is something less.

123. A further problem with IAG's submission in this regard concerns its reading of the words "any legal authority preventing or restricting access to your premises or ordering the evacuation **of the public**". IAG rightly accepts that this comprises two limbs.[69] However, IAG wrongly contends that the words "**of the public**" condition the first limb. As to this:

    a. The first limb is comprised of the words "preventing or restricting access to your premises".

    b. The second limb is comprised of the words "ordering the evacuation of the public".

    c. The words "of the public" form no part of the fist limb. Instead, they condition only the second limb.

    d. There is sound reason for this.

    e. The clause does not limit the class of persons whose access may be prevented or restricted so that it may encompass anyone at all, including the proprietors. Loss may be suffered if members of the public had their access prevented or restricted. However, loss may also be suffered if for some reason the proprietors (but not members of the public) had their access prevented or restricted. The first limb allows for this.

    f. The second limb is, however, confined to evacuation of the public. Notably, the members of the public need not necessarily be at, or evacuated from, the premises. Instead, they must simply be evacuated "as a result of damage to or threat of damage to property or persons within a 50-kilometre radius of your premises". The evacuation of the public from the area surrounding the premises may well cause loss, even if the proprietors, or indeed the public, are not ordered to evacuate the premises. One can, for instance, conceive of an order that required those within closed buildings to remain there, whilst members of the public were evacuated from the surrounding streets. The second limb allows for this.

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68 IAG at [143].

69 IAG at [143].

124. IAG's formulation also uses the expression "**entering** the premises".[70] However, the clause does not use the term "entering". Its express criterion of operation is "access" rather than entry. Access may be prevented or restricted even if physical entry is not. If those in the surrounding streets are prevented or restricted from making their way to the premises, their access to the premises will be prevented or restricted. There is no additional requirement that there be a barrier to physical entry at the door of the premises. The Court should not accept IAG's attempt to narrow the operation of the clause to the concept of physical entry or exit.

125. Further, the Court should not accept IAG's submission[71] that the clause posits a distinction between "orders that concern whether the public may physically enter or exit the premises and those that merely concern what the insured or patrons may do inside the premises."

126. ***First***, the distinction is built upon the misconceptions discussed immediately above, *viz.* that:

    a. the first limb is conditioned by the words "of the public" (which it is not);

    b. the second limb is concerned with evacuation or exit from the premises (which it is not);

    c. the clause is concerned with physical entry or exit (which it is not).

127. ***Secondly***, the distinction otherwise has no foothold in the text or structure of the policy. It has been conjured by IAG from nothing.

128. ***Thirdly***, it distracts attention from the real question that arises under the clause, *viz.* whether the relevant instrument had "the effect of hindering … or limiting access" to Taphouse's premises.[72]

129. ***Fourthly***, it involves an unconvincing attempt to distinguish *FCA v Arch*.[73]

130. Before discussing *FCA v Arch* on this point, it is convenient to identify a feature of the Taphouse policy that bears on this question. The term "premises" is used in the Prevention of Access Clause, which is defined as the "premises at the situation shown in the schedule". The premises is the place occupied by the "business" insured under the policy. Accordingly, the question whether the order has the practical effect of

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[70] IAG at [143].

[71] IAG at [144]-[145].

[72] As recognised in IAG's submissions at [142].

[73] IAG at [146]-[152].

"preventing" or "restricting" access to the premises arises in a context where:

a. the purpose of the policyholder in accessing the premises is to carry on the business;

b. the commercial purpose of the policy is to provide cover for *business interruption.*

131. *FCA v Arch* relevantly concerned what was described as:

a. the **Hiscox 1-4 Wording** ("inability to use the insured premises due to restrictions imposed by a public authority");

b. the **Arch Wording** ("prevention of access to The Premises due to the actions or advice of a government or local authority due to an emergency which is likely to endanger life or property").

132. In respect of the Hiscox 1-4 Wording, Lord Hamblen and Lord Leggatt (with whom Lord Reed agreed) stated (at [137]):

> We consider that the requirement is satisfied either if the policyholder is unable to use the premises for a discrete part of its business activities or if it is unable to use a discrete part of its premises for its business activities. In both those situations there is a complete inability of use. In the first situation, there is a complete inability to carry on a discrete business activity. In the second situation, there is a complete inability to use a discrete part of the business premises. To that extent the question is indeed binary.

133. Their Lordships then turned to the Arch Wording. Importantly, their Lordships indicated at [150]:

> As Mr Lockey accepts, <u>the prevention of access does not have to be physical</u> so that if, for example, the policyholder was able to and did enter the premises to carry out essential maintenance, that would not mean that the clause does not apply if access was prevented by law for the purposes of carrying on the business. <u>Once, however, it is conceded – as is inevitable – that continued access to the premises for some purposes is compatible with there being cover, then question becomes: for what purposes?</u> Furthermore, there is again no good reason to construe "the premises" as referring only to the entire premises rather than as encompassing part of the premises.
>
> [emphasis added]

134. The point is the prevention of access does not have to be physical; prevention of access for the purpose of carrying on the whole or a discrete part of the business will suffice.

135. Accordingly, their Lordships stated (at [151]):

> In our view, for essentially the same reasons as given in relation to Hiscox 1-4, the Arch wording may, depending on the facts, cover prevention of access to a discrete part of the premises and/or for the purpose of carrying on a discrete part of the policyholder's business activities. We agree with Arch that prevention means stopping something from happening or making an intended

> act impossible and is different from mere hindrance. In both the situations contemplated, however, <u>access to a discrete part of the premises or access to the premises for a discrete purpose</u> will have been completely stopped from happening.
>
> [emphasis added]

136. Then, in observations pertinent to the present case, their Lordships gave the example of a restaurant which offers a takeaway service as illustrating the "commercial sense of this interpretation" (at [152]):

> The distinction drawn by Arch, and accepted by the court below, between continuing to operate such a service (where it is said that there would be no prevention of access or inability to use the premises) and starting a new takeaway service after closing the restaurant for dining is an unsatisfactory and arbitrary distinction. It is also illogical. If the premises can be put to such use, then it can be said that there is an ability to use them and that access to the premises for the purposes of carrying on the policyholder's business is not prevented. <u>A more realistic view is that there is prevention of access to (and inability to use) a discrete part of the premises, namely the dining area of the restaurant, and prevention of access to (and inability to use) the premises for the discrete business activity of providing a dining in service</u>.
>
> [emphasis added]

137. The present case is in fact stronger than *FCA v Arch* because:

    a. The Taphouse Prevention of Access Clause encompasses preventing or restricting, whereas the Arch Wording encompassed only prevention.

    b. Accordingly, on the Taphouse Wording access need not be completely stopped. As discussed above, it need only be hindered or limited.

    c. It follows that, on the Taphouse Wording, it is even clearer that a prevention or restriction of access to the premises for the purposes of a discrete business activity is compatible with cover, as access to the premises is being hindered or limited.

138. IAG claims that the reasoning in *FCA v Arch* should be discounted because it was "abbreviated".[74] But brevity is a virtue, and it was not necessary for their Lordships to labour the point beyond the compelling reasons they gave. The point is a relatively straightforward one. If access is prevented for the purposes of a discrete business activity, access is prevented. (And *a fortiori* in the context of the Taphouse Wording, as it is hindered or limited, and therefore prevented or restricted.) This conclusion is not surprising in the context of a policy providing cover for *business interruption*.

139. IAG's submission in [149] seeks to distinguish *FCA v Arch* on the basis that the

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[74] IAG at [147].

Taphouse Prevention of Access Clause “refers only to prevention of access to your premises”, and does not refer “all or part of your premises”. These are not valid points of distinction. As to this:

a. IAG starts by misstating the terms of the Prevention of Access Clause. The clause refers to “preventing **or restricting** access” (not “only to prevention of access”).

b. These words (preventing or restricting) encompass (inter alia) hindering or limiting. They are therefore apt to pick up a partial denial of access.

c. The different drafting adopted in the Hybrid Clause (which deals with a different but potentially overlapping peril) does not alter his conclusion.

d. Further, and in any event, the Arch Wording considered in *FCA v Arch* did not refer to “all or part of the premises”; it referred simply to “The Premises” (the wording appears in *FCA v Arch* at [147]). It is therefore materially indistinguishable from the Taphouse Wording on this point.

140. IAG’s submission in [150] seeks to attack *FCA v Arch* upon the footing that it is predicated upon a supposed assumption of functional equivalence between “inability to use” and “prevention of access”. This is not a valid criticism. As to this:

a. IAG’s criticism is built upon the misconception (discussed above) that the prevention “must mean physical access”.

b. In any event, their Lordships did not assume any such equivalence. IAG does not point to any passage in which their Lordships stated or implied that they had made any such assumption.

c. Upon proper analysis, their Lordships proceeded in an entirely orthodox manner: they gave each clause its appropriate field of operation having regard to the text and purpose of the policy. The construction they arrived at would involve some overlap in coverage under the two clauses. But that is hardly a ground of objection or surprising.

141. IAG’s submission in [150] seeks to imply that in *FCA v Arch* their Lordships made the notion of “commercial sense” do more work than it can bear, or more work than it should bear in the context of Australian law. However, IAG offers no substantive analysis to make good the implication. It is a criticism without substance, and does not render *FCA v Arch* distinguishable or unpersuasive.

142. Finally, it is difficult to know precisely what point is being made in [152] of IAG’s

submissions. However:

a. To the extent that IAG is implying that the term "access" was not given its usual meaning in *FCA v Arch*, or that Taphouse is seeking to give it an unusual meaning in the present case, the submission is incorrect. There is nothing unusual about saying that if you cannot access premises for the purpose of a discrete business activity, your access is being prevented or restricted (hindered or limited).

b. IAG repeats the misconception (addressed above) that the class of persons who must be prevented from accessing the premises is "the public".

c. In the end, nothing in paragraph [152] of IAG's submissions renders *FCA v Arch* distinguishable or unpersuasive.

<u>Application</u>

143. Each of the orders comprising the Authority Response-Taphouse had the effect of either "preventing" or "restricting" access to the premises of Taphouse.

144. The **23 March 2020 *Non-Essential Business Closure Direction*** required Taphouse to close entirely. At that time, Taphouse did not provide any takeaway food or alcohol services to its customers.

145. Taphouse was later permitted to reopen, but only after taking additional steps to commence, for the first time, the discrete business activity of providing take-away. Further, Taphouse was not permitted to provide take-away alcohol services, until a change to its liquor licence was implemented by the Office of Liquor and Gaming.[75]

146. The commencement of the take-away services did not alter the fact that access was still not permissible for the discrete business activity of providing dine-in services. (It may also be noted that the steps in relation to the provision of take-away services were taken consistently with the Taphouse Policy — to minimise the reduction in gross profit during the indemnity period.)[76]

147. This direction prevented or restricted access by the public to Taphouse's premises, even in the context of the provision of take-away services. The "requirements for the provision of takeaway" imposed by Clause 7 of the direction were that:

> Additional requirements for the provision of takeaway are as follows:
> a. social distancing, including keeping 1.5 metres between people must be

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75 Rugg Affidavit at [13]-[14].

76 Taphouse Policy, Basis of Settlement, 1. Gross Profit (at 20).

accommodated, implemented and monitored by employees or contractors of the retail food service provider;

b. gathering for the purposes of ordering or collecting must not exceed one person per 4 square metres;

c. the retail food service provider may only operate to the extent they are not promoting or facilitating persons consuming takeaway food or drink on or adjacent to their premises –

Example: tables and chairs should be removed and all reasonable steps taken by the retail food service to direct persons from gathering to consume takeaway food or drink on or adjacent to, the relevant premise.

148. That is, the order prevented or restricted the access of the public:

a. to enter the premises;

b. to sit inside the premises;

c. to remain in the premises after collecting their takeaway food or drink.

149. Indeed, access to discrete parts of Taphouse's premises (in substance, the dining area) was prevented within the meaning of the policy.

150. In the result, this was an order "preventing or restricting access" to Taphouse's premises. IAG's distinction between orders that concern physical access and what the insured and patrons may do inside the premises is one without a difference: what matters is the substance of the order and its substance was to both prevent and restrict access to Taphouse's premises.[77]

151. Similarly, the **29 March 2020 *Home Confinement Direction*** expressly prohibited persons from leaving their homes to access Taphouse's premises. It provided that a person could not leave their home except for "essential goods or services". Even if craft beer and pub food falls within the definition of "essential goods or services … that are needed for the necessities of life and the operation of society", the direction still restricted persons from accessing Taphouse's premises. It expressly provided that persons could not leave their home, even to obtain essential goods and services "except for, and only to the extent reasonably necessary to accomplish" that permitted purpose.[78]

152. That the *Home Confinement Direction* constitutes a "restriction" on access accords with the reasoning of the Court in *FCA v Arch.* There, the Court held that restrictions on movement could *not* constitute a *prevention* of access to premises that remained open, because "a prevention needs to be established; hindrance does not suffice" (at [154]).

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[77] Cf IAG at [145].

[78] *Home Confinement Direction,* Clause 6.

But here the terms of the policy extend not only to prevention but also restriction, and thus to hindrance. Perforce of the Court's reasoning in FCA v Arch, restrictions on movement do constitute a hindrance and are therefore within the broader concept of prevention or restriction. The order is specifically directed to restricting the circumstances and purposes for which a person can access "food". That reasoning applies with even greater force for dine-in drinking.

153. The same logic applies for each of the subsequent directions, which imposed limits on the capacity of Taphouse's premises and the manner in which those premises could be accessed (i.e. with only a certain number of patrons and with service only in a certain way). Each has "restricted" access *by the public* to Taphouse's premises. That is the foundation of Taphouse's loss: people were not able to access its premises and purchase the food and drink that it offered. Either at all — in the initial period — or in part from 15 May 2020 onwards.

154. Looking at the practical consequence, for example, of the 15 May 2020 order, which permitted Taphouse to offer seated dining for 10 patrons at a time. The necessary consequence of allowing *only* 10 patrons is that the remaining 90 patrons who might ordinarily be able to access Taphouse are *prevented or restricted from entering.* The same follows for the 4 per square metre patron rule, and then the 2 per square metre patron rule.

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

Construction

155. The clause applies to measures taken by a legal authority as a result of:

   a. damage which has actually been suffered;

   b. a threat of damage, which damage may not yet have commenced, and may (or may not) be suffered in the future.

156. Further, it applies to damage, and the **threat of damage**, not only to property, but also **to persons**. It follows that a threat of damage to persons would be capable of engaging the clause.

157. In the context of its submissions as to the scope of cover under the Prevention of Access Clause in light of the Hybrid Clause,[79] IAG points out that "damage" is defined in the policy to mean "accidental physical damage, destruction or loss", and goes on to

[79] IAG at [127].

contend that the contraction of a disease is not “accidental physical damage, destruction or loss”. However:

a. IAG’s submission fails to engage with the notion of possible future damage which is embedded in the concept of threat, and with the nature of the threat with which we are concerned.

b. A threat of disease (particularly a grave disease such as COVID-19) carries with it a threat of physical damage to persons.

c. IAG appears to accept as much in [127] of its submissions, where it says: “The disease may, in time, cause physical injury to a person due to its effect on the human body”.

d. Physical damage to persons caused by disease is thus characterised properly as “physical damage … to … persons” within the meaning of the clause.

e. Further, such damage will be characterised properly as “accidental”, as it is hardly to be supposed that persons will intentionally subject themselves to such physical damage.

f. In any event, the critical point is that a measure taken as a result of a threat of persons contracting COVID-19 will just as much have been taken a result of a threat of persons suffering accidental physical damage. The legal authority will be acting to protect those who may, absent the measure, accidentally contract the disease and thus accidentally suffer associated physical damage.

g. Moreover, it is difficult to accept the implication in IAG’s submission: that a legal authority would act only as a result of the threat of disease, without any concern for the associated physical harm to persons. In reality, the avoidance of physical harm to persons is likely to be at the forefront of the legal authority’s concern.

h. Finally, if IAG suggests that there is some difficulty because the physical damage may only happen “in time” after the contraction of the disease,[80] the suggestion is misplaced. The fact that the damage has not yet occurred is no objection. What matters is the threat of possible future damage, *viz.* damage which may (or may not) be suffered in the future. The clause imposes no temporal limit in respect of that possible future damage. Any attempt by IAG

[80] See IAG at [127].

to impose such a temporal limit should be rejected.

Application

158. **Taphouse's primary argument.** The language of the statutory instruments and their legal context support the conclusion that the instruments were made "as a result of … threat of damage to … persons within a 50-kilometre radius of [Taphouse's] premises", such that:

    a. that is sufficient to engage the clause;

    b. it is not necessary for the insured to go a step further and establish that there was **in fact** such a threat;

    c. it is not permissible for the insurer to contradict the instruments by seeking to establish that, contrary to what they convey, there was **in fact** no such threat.

159. The statutory instruments and their legal context are outlined in Section F3 and F5 above. For the purposes of the Prevention of Access Clause, Taphouse relies in particular on the following matters.

160. Section 315 of the *Public Health Act* defines "public health emergency" as "an event or series of events that has contributed to, or may contribute to, serious adverse effects on the health of persons in Queensland".

161. Section 319 permits the Minister to declare a "*public health emergency*" by signed written order if satisfied "there is a public health emergency" and that "it is necessary to exercise powers under this chapter to prevent or minimise serious adverse effects on human health".

162. On 29 January 2020, the Queensland Minister for Health made a declaration pursuant to s 319 of the *Public Health Act*, stating (inter alia) that:

    a. He was satisfied that there was a "public health emergency" (viz. an event "an event or series of events that has contributed to, or may contribute to, serious adverse effects on the health of persons in Queensland").

    b. the declaration was being made **"**[to] help control the threat and prevent or minimise serious adverse effects on human health in Queensland."

    c. The public health emergency existed "in all of Queensland".

163. Accordingly, from the outset, the concern of the Minister as stated in the statutory instrument was the threat of serious adverse effects on the health of persons in all of Queensland (which, of course, includes all of Townsville).

164. Next, on 19 March 2020, the *Public Health Act* was amended to include a definition of "*COVID-19 emergency*" as "the public health emergency declared by the Minister on 29 January 2020" (s 315). This is significant because:

   a. from 19 March 2020, the enabling statute, by its adoption of the Minister's declaration, expressly recognised the threat of serious adverse effects on the health of persons in all of Queensland (including all of Townsville);

   b. the statutory instruments comprising the Authority-Response Taphouse made pursuant to this enabling statute on or after 19 March 2020 are naturally to be regarded as having been made as a result of that recognised threat.

165. The 23 March 2020 *Non-Essential Business Closure Direction* provided:

> On 29 January 2020, under the *Public Health Act 2005*, the Minister for Health and Minister for Ambulance Services made an order declaring a public health emergency in relation to coronavirus disease (COVID-19). The public health emergency area specified in the order is for 'all of Queensland'. Its duration has been extended by regulation to 19 May 2020.
>
> Further to this declaration, I, Dr Jeannette Young, Chief Health Officer, reasonably believe it is necessary to give the following directions pursuant to the powers under s 362B of the *Public Health Act 2005* to assist in containing, or to respond to, the spread of COVID-19 within the community.
>
> …
>
> **PART 1 — DIRECTION - NON-ESSENTIAL BUSINESS OR UNDERTAKING**
>
> 3. These directions apply from Monday, 12pm on 23 March 2020 until the end of the declared public health emergency, unless they are revoked or replaced.
> 4. A person who owns, controls or operates a non-essential business or undertaking in the State of Queensland must not operate the business or undertaking during the period specified in paragraph 3, including operating at a private residence.
>
> [emphasis added]

166. This direction:

   a. expressly referred to the Minister's declaration, thus recognising the threat of serious adverse effects on the health of persons in all of Queensland (including all of Townsville);

   b. imposed measures that applied in all of Queensland (including all of Townsville);

   c. contained a declaration by the CHO satisfying the jurisdictional pre-requisite for the direction, *viz.* the reasonable belief on the part of the CHO that it was necessary to give the direction to "assist in containing, or to respond to, the spread of COVID-19 within the community" (s 326B).

167. In these circumstances, it should be found that:

   a. The 23 March 2020 *Non-Essential Business Closure Direction* was made as a result of the recognised threat of serious adverse effects on the health of persons in all of Queensland (including all of Townsville).

   b. This means that it was made as a result of "threat of damage to … persons" within a 50-kilometre radius of the Taphouse premises within the meaning of the Prevention of Access Clause.

   c. The same conclusion should follow in respect of the later directions comprising the Authority Response-Taphouse. That is because those directions also possess the characteristics identified in the preceding paragraph.

168. **Taphouse's secondary argument.** Taphouse's secondary argument is a factual one, responsive to IAG's submissions in [136]-[137].

169. IAG contends that there was **<u>in fact</u>** no threat because:

   a. "there was never any transmission of COVID-19 in the Townsville area";

   b. "there was never an outbreak of COVID-19 in Townsville and there was no threat of damage to persons by reason of the disease in the area".

170. Even assuming (contrary to Taphouse's primary argument) that it is necessary to show that there was **<u>in fact</u>** a threat, IAG's submissions should not be accepted because:

   a. IAG wrongly conflates the concepts of "threat" and "outbreak". The Prevention of Access Clause does not use the term "outbreak". By importing the concept of "outbreak" into the Prevention of Access Clause, IAG is seeking to impose a requirement for cover which does not exist under that clause.

   b. IAG also wrongly seeks to introduce a requirement that there in fact be "community transmission" before there can be a threat. A threat of possible future damage to persons does require the present existence of community transmission. Again, IAG is seeking to set the bar too high by reference to requirements that do not appear in the clause.

   c. To show that there was **<u>in fact</u>** a threat of possible future damage in the radius, one need only show that there was a real risk of such damage in the future, particularly if measures were not taken to address the risk.

   d. The evidence presently available is sufficient to demonstrate this.

   e. Prior to 24 March 2020, the publicly available data indicates 4 cases of COVID-

19 attributed to the Townsville HHS.[81] The material subpoenaed from the Townsville HHS establishes that there were in fact 11 confirmed cases of COVID-19 who tested positive in that region and that at least some of them were infectious in the community. The data establishes that all except one had a usual place of residence within 50 kilometres of the Taphouse premises. Noting the manner in which COVID-19 spreads from person to person,[82] and the severe human health consequences it can have, the Court can be satisfied that there was **in fact** a threat of damage to persons within that radius prior to 24 March 2020.

The existence of the Hybrid Clause does not deny the application of the Prevention of Access Clause

171. IAG contends that the existence of the Hybrid Clause denies the application of the Prevention of Access Clause.[83] This contention should not be accepted.

172. As has already been observed in the context of *FCA v Arch*, it is entirely orthodox for each clause to be given its appropriate field of operation having regard to the text and purpose of the policy. That the construction arrived at would involve some overlap in coverage under the two clauses is hardly a ground of objection or surprising. As noted in Section B1 above, Allsop CJ recognised as much in *Star* at [166].

173. IAG's main objection appears to be that the Hybrid Clause might be rendered nugatory or ineffective. Such "arguments of construction founded on tautology or redundancy are never strong": *Teele v Federal Commissioner of Taxation* (1940) 63 CLR 201 at 207. The presumption against redundancy or surplusage is of little weight in construing commercial contracts: *HDI Global Specialty SE v Wonkana No. 3 Pty Ltd* [2020] NSWCA 296 at [44]; *Beaufort Developments (NI) Ltd v Gilbert-Ash NI Ltd* [1999] 1 AC 266 at 273-274.[84] The position concerning policies of insurance, in which redundancy is almost conventional, is *a fortiori*: see, eg, *Central Australian Aboriginal Congress Inc v CGU Insurance Ltd* [2009] NTCA 1 at [47].

174. But there is a more fundamental problem with IAG's argument. The Prevention of Access and Hybrid Clauses have different terms and fields of operation. The former refers to an authority "preventing or restricting access". It requires "damage to or threat

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81 SOAF at [75].

82 SOAF at [11]-[13].

83 IAG at [128]-[132].

84 See also *XL Insurance Co SE v BNY Trust Company of Australia Limited* [2019] NSWCA 215 at [72], referring to *AFC Holdings Pty Ltd v Shiprock Holdings Pty Ltd* [2010] NSWSC 985; (2010) 15 BPR 28,199 at [13].

of damage to … persons". The latter requires the "closing or evacuating or all or part of the premises". It refers to the "outbreak of an infectious or contagious human disease" as the cause of the closure or evacuation order. It does not require there to be any view on the part of the legal authority that there is a threat of damage to persons (nor any such threat in fact). Accordingly, it is conceivable that the Hybrid Clause would respond in circumstances where the Prevention of Access Clause would not. It may depend upon the nature of the disease. Assume the outbreak of a disease within the premises that is not perceived by the legal authority to give rise to a threat of physical damage to persons, but nonetheless to warrant closure or evacuation of the premises.

175. To the extent that IAG contends that the "threat" within the Prevention of Access Clause should be read as though it excluded a threat from disease, that contention should not be accepted. There is no limitation on the "threat" of damage to persons in the Prevention of Access Clause. As noted above, a threat from disease (particularly a disease such as COVID-19) may readily be regarded as a threat of physical damage to persons. The parties could expressly have excluded disease or other matters that might cause "*damage*" to persons. They did not. The Court cannot rewrite the parties' bargain and the allocation of risk upon which the insurance contract (and premium paid) was based: see *Liberty Specialty Markets v Icon Co (NSW) Pty Ltd* [2021] FCAFC 126 at [152].

176. Further, IAG's submission as to the general and the specific should not be accepted. The clauses are not apt to be characterised in this way. They are dealing with overlapping rather than identical subject matter. And, in any event, as noted in Section B1 above, in the present context, there is no strict rule of construction that the specific prevails over the general, and any interpretive presumption is weak.

177. In the end, the fact that the present circumstances (largely, although not entirely)[85] fall within both clauses is not a reason to deny the application of each clause in accordance with its terms.

F7. HYBRID CLAUSE

178. As has already been observed, to fall within this clause, the legal authority must have:

    a. closed or evacuated all or part of your premises; **<u>and</u>**

    b. done so "as a result of the outbreak of an infectious or contagious human

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[85] Taphouse does not rely on the Home Confinement Direction as an insured peril under the Hybrid Clause.

disease occurring within a 20-kilometre radius of your premises".

179. Each of these elements[86] will be addressed in turn.

Closed or evacuated all or part of the premises

180. The terms and effect of the directions comprising the Authority Response-Taphouse meant that there was a "closure" of Taphouse's premises.[87]

181. The 23 March 2020 *Non-Essential Business Closure Direction*, in terms, required that a non-essential business or undertaking "must not operate", including operating "at a private residence". Its premises were required to be closed. The fact that the order is directed to the type of business is no objection. It is the type of order that would have been contemplated by the parties in inserting this clause in a business interruption insurance policy. It would be a triumph of form over substance to conclude that the order did not require closure because it was directed to types of business rather than addresses of premises. The substantive effect is the same: Taphouse was required to close its premises.

182. Nor does the fact it could reopen for 'takeaway' services negate the "closure". The parties chose to refer to "part" of the premises. The policy responds in two ways. First, there was a physical closure in "part". It was required to close its entire seating area. It was required to remove tables and chairs. And it was required to take steps to remove people from gathering to consume the food near or adjacent to the premises. That is, access to a discrete part of its physical premises has been completely stopped from happening. Second, and most significantly, its premises has been closed to the extent it operates a business or undertaking described in the *Non-essential Business Closure Direction.* Its licensed, restaurant premises were closed. Taking a "realistic view", there was a closure of a part of the premises, namely the dining area of the restaurant, and a closure of the premises for the discrete activity of providing a dining in and bar service: see *FCA v Arch* at [152].

183. Again, the same logic follows for each of the orders restricting the capacity of Taphouse's premises. The capacity restrictions had the effect of "*closing*" the part of the premises that Taphouse is otherwise lawfully permitted to operate. This follows naturally from the use of the expression "part of".

As a result of the outbreak of an infectious or contagious human disease occurring

86 Which are reflected in paragraph 12 of the List of Issues for Determination.

87 Taphouse does not rely on the Home Confinement Direction as an insured peril under the Hybrid Clause.

within a 20-kilometre radius of your premises

Construction

184. One issue of construction that divides the parties is the meaning of the term “outbreak” in the context of the Hybrid Clause.

185. IAG contends that:

    a. “the word ‘outbreak’ must involve something more than a single instance of COVID-19” (at [167]);

    b. for an “outbreak” to “occur” within the meaning of the clause there must be at least:

        i. “the identification of multiple active cases of COVID-19 within the defined radius occurring at or around the same time”; and

        ii. “evidence that those case have a common cause, being uncontrolled transmission of the virus from one person to another within the defined radius”.

186. IAG’s construction should not be accepted. It does not accord with the ordinary meaning of the term outbreak, unduly constraining its potential scope of operation.

187. Dictionary definitions of “outbreak” include the following:

    a. the Oxford English Dictionary defines the term as “a sudden occurrence of war, disease, etc”.[88]

    b. the Macquarie Dictionary defines the term as “a sudden and active manifestation”.[89]

    c. the Cambridge Dictionary defines the term as “a sudden appearance of something, esp. of a disease or something else dangerous or unpleasant”.[90]

188. There is nothing in these definitions to require multiple cases, or uncontrolled community transmission, in order for there to be an “outbreak”, or for an “outbreak” to “occur”.

189. The term “outbreak” is a flexible one, capable of accommodating different notions of prevalence depending upon the nature of the disease to which it is being applied.

190. The sudden appearance of a single instance of the ebola virus in a place where one

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88 *Shorter Oxford English Dictionary* (5th ed) ‘outbreak’.

89 *Macquarie Dictionary* (7th ed) ‘outbreak’.

90 *Cambridge Dictionary* (online) ‘outbreak’.

would not expect to see it may be characterised properly as an "outbreak". However, a single instance of the common flu in winter in Sydney would not warrant such a characterisation.

191. No party contends that "outbreak" bears a generally accepted scientific or medical meaning which was adopted in the terms of the policy. It is not a defined term in the policy.

192. However, Taphouse points to some particular usages in the public health context in order to demonstrate that the term is indeed a flexible one capable of accommodating single instances.

193. In *Hyper Trust (No 1)* at [178]-[179], the Court referred to a public health publication in the following terms:

> An outbreak of infection or foodborne illness may be defined as two or more linked cases of the same illness <u>or the situation where the observed number of cases exceeds the expected number</u>, <u>or a single case of disease caused by a significant pathogen (e.g., diptheria or viral haemorrhagic fever)</u>. Outbreaks may be confined to members of one family or may be more widespread and involve cases either locally, nationally or internationally.[emphasis added]

194. Closer to home, the Australian Government Department of Health defines an "outbreak" of COVID-19 as "a single confirmed case of COVID-19 in the community".[91]

195. This meaning is appropriate given:

    a. It is being applied to an entirely new and deadly virus that was not known to exist in humans prior to 31 December 2019.[92]

    b. The severity and virulence of COVID-19.[93]

    c. At all relevant times, there was no vaccine or cure for COVID-19.[94]

    d. One may comfortably describe the appearance of a single instance of COVID-19 as:

        i. sudden;

        ii. exceeding the previously expected number of cases of COVID-19 (which would have been zero);

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[91] CDNA National Guidelines for Public Health Units (v 4.4-7) (2021) at 42.

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

[93] SOAF at [11]-[19].

[94] SOAF at [10].

iii. a disease caused by a significant pathogen.

196. Thus Taphouse contends that an “outbreak” of a disease such as COVID-19 is constituted by at least one confirmed case of the disease in a given area.

Application

197. **Taphouse’s primary argument.** Taphouse relies in particular upon the following features of the statutory instruments and their legal context.

198. The Minister’s declaration on 29 January 2020 expressly referred to an “outbreak” of the virus within China, that travellers had recently arrived from the epicentre of the “outbreak”, and that this gave rise to a public health emergency in “all of Queensland”. The expressed concern was as to cases spreading “from the epicentre of the outbreak”.

199. The Minister’s statement of compatibility in respect of the Amending Act stated that “rates of infection are quickly and steadily rising, with 94 confirmed cases in Queensland as of 17 March”.

200. The CHO’s directions stated expressly that they applied to “all of Queensland” and were made to “assist in containing, or to respond to, the spread of COVID-19 within the community”.

201. The basis of the directions was thus that:

a. There was an outbreak of COVID-19.

b. The outbreak had spread.

c. The outbreak had spread to all of Queensland.

d. The measures were imposed on all of Queensland as a result of that outbreak.

202. Again, the fact that the outbreak was recognised to exist both inside and outside the radius does not matter. What matters is that there was a recognised outbreak inside the radius as required by the clause. IAG’s submission otherwise based on the apparently “tiny fraction” of cases attributable to Townsville misses the obvious point that the ratio of cases in Townsville to cases in Queensland (about 3%) approximates the ratio of Townsville’s population to the Queensland population (about 3.5%).

203. **Taphouse’s secondary argument**. The subpoenaed material also demonstrates that there was an “outbreak” of COVID-19 in Townsville at the relevant time.

204. It shows that there were a number of cases of COVID-19 in the community, and that not all of those persons were quarantining or isolating for their entire infectious period. The documents list “contacts” for each of the infected persons. It is not evident whether or

not they in fact passed on the virus to any other person. However, in light of the evidence as to the transmission and virology of COVID-19, it is certainly possible that they did. Expert evidence (which is not yet available) may bear on this question. But even if they did not, the presence of those cases is sufficient to constitute an "outbreak" in Townsville (and within 20km of the Taphouse premises) at the relevant time.

205. It is not necessary for there to be proof of confirmed community transmission for there to be an outbreak.[95] IAG's formulation of the "two minimum criteria"[96] required for an "outbreak" to "occur" finds no firm footing in the words of the policy. Moreover, it is inconsistent with the express provision in the policy for "words that have a special meaning": see General definitions at page 4 of the Taphouse Wording. The arguments set out above in support of Taphouse's primary argument apply with even greater force here. To require that an insured put on expert evidence, or to subpoena relevant health authorities, to demonstrate community transmission lacks commercial common sense. Moreover, it may not even be possible: the insured peril may extend to diseases where the state of science is such that one cannot determine how or where transmission took place. A construction that requires proof of such matters should not be accepted.

206. The evidence is sufficient for the Court to conclude, if it be necessary, that there was in fact an "outbreak" of COVID-19 within Townsville prior to 24 March 2020.

F8. CAUSATION

207. The causation questions under both the Prevention of Access and Hybrid Clauses are not as complex as IAG suggests.[97] Instead, they turn upon the words of causation used in the two clauses:

   a. For the Prevention of Access clause, it is whether there is "loss that results from interruption or interference <u>caused by</u>" the "legal authority['s]" order.

   b. For the Hybrid Clause, it is whether there is "loss that results from an interruption of your business that is <u>caused by</u>" the "legal authority['s]" order.

208. That is, the question starts and finishes with the insured peril: the order of the legal authority. The underlying reason for that order is not part of the causal question: as IAG says "it is important to note what the insured peril is not. It is not the occurrence of [a]

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[95] Cf IAG at [175].

[96] IAG at [301].

[97] IAG at [179]-[181].

pandemic".[98] It is incorrect to conflate the coverage issues (whether there is an order of the relevant kind) with the causation issues (whether the order caused interruption or interference). This is recognised at some points of the IAG submissions,[99] but ignored at others.[100]

209. The correct approach is:

   a. Was there loss?

   b. Did that loss result from interruption or interference with Taphouse's business?

   c. Was that interruption or interference caused by the Authority Response-Taphouse?

210. **Loss.** Importantly, the question of quantum of loss is not before the Court. However, Taphouse has put before the Court its profit and loss statements for the financial year ended June 2020 and for July 2020 to 31 March 2021.[101] As is apparent from those statements, Taphouse suffered a significant decline in gross profit from $ in March 2020 to $ in April 2020 and $ in May 2020.[102] This is to be compared with its gross profit of $ in April 2019 and $ in May 2019. This is sufficient for the Court to be satisfied, for the purposes of resolving the questions of construction in this case, that there was loss.

211. **Interruption or interference.** The Court can similarly be satisfied that the loss resulted from "interruption or interference" with Taphouse's business. The Rugg Affidavit makes clear that from late March to May 2020, Taphouse took steps in response to the Authority Response that interrupted its ordinary functioning as a sit-in restaurant and bar. Taphouse's ordinary functioning was interrupted and steps were taken in response to the Authority Response-Taphouse to comply with the requirements of those orders.

212. **Caused by.** There is no dispute between the parties that the causal inquiry in contracts of insurance is generally that of the "proximate" or "direct" cause: see *McCarthy v St Paul International Insurance Co Ltd* (2007) 157 FCR 402 at [88]-[89] per Allsop J (***McCarthy***). A proximate cause is determined based upon a judgment as to the "real", "effective", "dominant" or "most efficient" cause: see *Sheehan v Lloyds Names Munich Re Syndicate Ltd* [2017] FCA 1340 at [77] per Allsop CJ (***Sheehan***). There can be more

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98 IAG at [122].

99 IAG at [19].

100 IAG at [72].

101 Rugg Affidavit at 86-89 (MGR-8), 90-94 (MGR-9).

102 Rugg Affidavit at 86-89 (MGR-8).

than one dominant, proximate or effective cause giving rise to a loss: *McCarthy* at [90].

213. In the case of each of the orders comprising the Authority Response-Taphouse, the Court has evidence that Taphouse responded by acting in compliance with it. The question of what is the "proximate cause" is decided as a matter of judgment reached by applying the "common sense knowledge of a business person": *Sheehan* at [77] citing *The "Cendor MOPU"* [2011] I Lloyds Rep at 564 [19] per Lord Saville and 568 [49] and 576 [79] per Lord Mance. The compelling common sense judgment in the present case is that the Authority Response-Taphouse — which required Taphouse to close — was the dominant cause of its loss of gross profit.

214. Taphouse does not cavil with the proposition that it has *at least a prima facie* onus to prove the loss claimed. This requires it to point to its reduction in gross profit, and in circumstances where the proximate cause of that reduction is plainly the insured peril (the government orders), it has discharged that onus. If IAG seeks to establish that some part of its loss of gross profit was caused by something else, it was open for it to do so (but it has not).

F9. ADJUSTMENT CLAUSE

215. As IAG concedes, the "adjustments" clause in the policy does not in fact apply to the Gross Profit Basis of Settlement. IAG seeks to evade this difficulty by construing the word "damage" as requiring an inquiry equivalent to that for which the adjustments clause provides. IAG is thus inviting the Court to rewrite the parties' bargain. The Court should decline the invitation. By the express terms of their bargain, the parties chose not to apply the "adjustments" clause to the "Gross Profit" Basis of Settlement, but to apply it to the "Loss of Payroll" basis of settlement. They are bound by this choice. IAG now asserts there is "no rational basis" upon which the parties would agree to calculate Gross Profit in this way, but it does not assert mistake, nor does it seek rectification. Nor is it absurd that the clause does not apply. The "Gross Profit" clause should simply be applied according to its express terms when the assessment of loss is undertaken.

216. The real dispute between the parties is the extent to which the other effects of the COVID-19 pandemic are to be taken into account in determining its loss. IAG argues that the cover responds to an "outbreak" of COVID-19 or a "specific threat of damage to persons", within a defined radius. The "underlying cause" of government action is the "localised occurrence of the disease", and therefore any "broader impacts of the pandemic" must be ignored in determining the "trends and circumstances" to be ignored in the counter-factual.

217. IAG proceeds from a false premise. The cover does not respond to an "outbreak of COVID-19" or a "specific threat of damage to persons". Again, as IAG's submissions repeatedly assert, the insured peril "is not the occurrence of pandemic". Instead, the cover responds to government orders that restrict or prevent access, or require the closure of all or part of the premises. It might be that there are multiple proximate clauses of Taphouse's loss: both an order closing the premises but also people refraining from spending money due to a fear of COVID-19 (noting that IAG has not sought to prove any such other cause). As the Court reasoned in *FCA v Arch,* the "reason why such losses would have occurred in any event is that there are two (or more) causes each of which would have by itself have inevitably brought about the loss without the other(s)" (at [230]). In such a case, there is simply more than one proximate cause of loss. If there are both insured and uninsured causes, the insured may recover: *McCarthy* at [91].

218. It would undermine the commercial purpose of the cover to treat potential effects of the other elements of the clauses as diminishing or delineating the scope of the indemnity. Although those elements (here, the "outbreak" of COVID-19 itself) are not "themselves covered by the insurance", they arise from the "same original fortuity which the parties to the insurance would naturally expect to occur concurrently with the insured peril": *FCA v Arch* at [237]. The parties did not intend the consequences of the particular adverse event which are *inherently likely* to arise (because they are the reason the authority makes the order in the first place) should then restrict the scope of the indemnity.

219. This is because it would be destructive of the very indemnity provided under the policy, an outcome which was rejected in *Arch* (the reasoning was in relation to trends clauses but applies with equal force here). For example, consider a circumstance where there is a closure of premises as a result of vermin. In the absence of the closure, the insurer would be able to say the presence of vermin would have deterred customers in any event, and that "*trend*" should be taken into account in determining "*damage*". That is illogical. It is not what is contracted for. But that is the inevitable consequence of the analysis for which IAG contends.

F10. INDEMNITY PERIOD

220. Taphouse does not cavil with the proposition that the Indemnity Period commences upon the occurrence of the damage. As the definition of damage includes "loss", however, the indemnity period does not necessarily start on the date of the government order[103] but rather the date of the loss caused by the order. In this case, however, they

103 Cf IAG at [203].

are one and the same. The same is true for the end of the indemnity period: it is the date on which Taphouse's business ceased to be affected. The question of Taphouse's actual loss, and when it ceased, is a question for the separate loss adjustment process.

F11. THIRD PARTY PAYMENTS

221. The operation of the Commonwealth's "JobKeeper" payment and "Cash Flow Boost", and the Queensland Government's COVID-19 Grant has been set out in Annexure A to these submissions.

222. None of these payments reduce the amounts to be paid to Taphouse under the policy. The same is true for the rental abatements / waivers from Taphouse's landlord.

223. The question posed by IAG – "whether any of these payments or abatements are to be accounted for in calculating the loss suffered for the purposes of Taphouse's claims"[104] – introduces a false premise, that of "loss suffered".

224. In truth, Taphouse's policy does not provide an indemnity referable solely to loss where the claim is one for business interruption. Rather, the basis of settlement clause provides for a carefully calibrated calculation relevantly[105] comprising:

    a. the amount produced by applying the rate of *gross profit* to the amount by which the *turnover* during the *indemnity period* in consequence of damage falls short of the *standard turnover*; and

    b. the additional expenditure necessarily and reasonably incurred by *you* for the sole purpose of avoiding or minimising the reduction in *gross profit* during the *indemnity period* in consequence of the *damage*, but not exceeding the reduction in *gross profit* thereby avoided.

225. Neither of these integers, nor the defined terms within them, contain allowances for third party payments. Critically, the parties agreed that "Turnover" is to be calculated by determining the amounts paid or payable for goods sold and delivered and services rendered. That is, amounts paid in exchange for goods and services provided by Taphouse, and *not* any grants or third party payments made by the government (or another body). It follows that the extensive survey of historical case law does not assist IAG: the Court cannot rewrite the parties' bargain in the face of a precise contractually agreed calculation (and allocation of risk).

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[104] IAG at [225].

[105] Noting that there were no services provided by Taphouse other than at its premises.

226. IAG's reliance on the words "any sum saved" in the primary insuring clause[106] also does not assist it. This is because the sum saved must be due to the "such charges and expenses of the business as may cease or be reduced **in consequence of the interruption or interference**" (emphasis added). The emphasised words make clear that the reduction in expenditure must be due to the interference (that is, the order). The intent of the clause is clear: if a business does not have to purchase the raw materials for the provision of its goods and services, that must be accounted for in the cover. Indeed, this is the construction that works harmoniously with the definition of "Turnover", which only accounts for the income derived from sales, and not the cost of that sale.

227. Here, none of the orders causative of loss provide for third party payments to Taphouse. In particular, JobKeeper, the Cash Flow Boost, the COVID-19 Grant, and the rental abatements were conceptually distinct from, and factually different to, the orders giving rise to the interruption or interference.

F12. INSURANCE CONTRACTS ACT

228. Interest is payable from the period commencing on the day from which it was "unreasonable for the insurer to have withheld payment": *Insurance Contracts Act 1984* (Cth) s 57(2). As IAG acknowledges, the ordinary position is that interest runs from the date after a reasonable time has elapsed for the completion of the insurer's investigation of the claim, and not the determination of that claim by a Court.[107]

229. IAG says that the ordinary position must give way because Taphouse has changed the basis of its claim by adding new claims based on additional government orders and by providing further financial information, and because the claims were submitted without supporting information.

230. Leaving aside the fact that any reliance on "additional" government orders or the provision of "further financial information to support the claims" does not change the substance of the claim, it cannot be seriously suggested that IAG was not in a position to understand Taphouse's claim as one for losses resulting from government orders, or that IAG's response to the claim (a denial) would have been any different if the asserted "new" aspects of the claim had been incorporated in the claim when the claim was first made. The same is true of IAG's complaint that supporting information was not provided.

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[106] IAG at [253]-[256].
[107] IAG at [462].

231. The claim lodged on 11 March 2020 plainly indicated that Taphouse had "experienced a reduction in trade from 15/03/2020 following a declaration by a public authority" and "effective 23/03/2020 [Taphouse] has temporarily ceased trading in compliance with a further declaration by a public authority".[108] An interim response was provided on 7 April 2020, that "the policy doesn't respond" and "The policy generally requires a claim for physical loss or damage to the property".[109] There was no suggestion that IAG did not understand the basis of the claim, or that it needed more time to come to a position. That IAG did not need more time to complete its investigation is evident from its final decision on 17 June 2020[110] and the internal review of that decision,[111] both of which specifically addressed both the Prevention of Access Clause and the Hybrid Clause.

232. More importantly, these submissions ignore a simple fact: that IAG has already declined Taphouse's claim for indemnity,[112] and so there can be no suggestion that Taphouse needed time to complete its investigation of the claim.

233. On any view of the matter, the time which has elapsed is not a function of IAG needing to investigate and determine IAG's claim. Indeed, as Beach J has made clear, where the position "constitutes a refusal to pay the claim, in circumstances where a court has held that a liability to pay the claim does exist, such refusal cannot relevantly extend this period to the point of adjudication, regardless of whether that position was formed and held bona fide": *Australian Pipe & Tube Pty Limited v QBE Insurance (Australia) Limited (No 2)* [2018] 1450 at [291].

234. It follows that interest ought run from the date Taphouse's claim was declined.

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[108] Taphouse Outline Tab 11.

[109] Taphouse Outline Tab 14.

[110] Taphouse Outline Tab 15.

[111] Taphouse Outline Tab 16.

[112] Taphouse Concise Statement filed 26 February 2021 at [2]-[3]; Taphouse Amended Concise Statement in Response filed 9 August 2021 at [4]-[5].

G. MERIDIAN (NSD 133/2021)

G1. THE POLICYHOLDER

235. The respondent in NSD 133/2021, Meridian Travel (Vic) Pty Limited (**Meridian**) is the insured under a "Office Pack" insurance policy number 15T4227893 (**Meridian Policy**) placed with the applicant, Insurance Australia Limited (**IAG**).

236. Meridian operates a travel agency business with expertise in cruises, solo travel, tailored independent itineraries, exclusive group tours and special interest tours for music groups and dance troupes.[113]

237. Prior to March 2020, Meridian's business provided services in respect of both international and domestic travel bookings.[114] The international bookings comprised approximately 90% of Meridian's revenue (of which approximately 65% comprised international tours and international cruises), and the domestic bookings the remaining 10% of revenue.[115]

G2. THE POLICY

238. The Meridian Policy comprises a policy schedule (**Meridian Schedule**)[116] and wording (**Meridian Wording**).[117] The period of insurance is 22 February 2020 to 4pm on 22 February 2021.[118] The insured "Situation" is 159 Burgundy Road, Heidelberg, Vic 3084 (being the site of Meridian's travel agency).[119]

239. The classes of insurance taken under the policy were identified in the Meridian Schedule as:[120]

    a. Property (Including Theft and Accidental Damage);

    b. Business Interruption;

    c. Money;

    d. Glass; and

    e. Public Liability and Products Liability.

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113 Affidavit of Jodie Michele Quick filed 18 August 2021 at [5] (**Quick Affidavit**).

114 Quick Affidavit at [6].

115 Quick Affidavit at [7].

116 CB Vol A 143.

117 CB Vol A 81.

118 Meridian Schedule at 1 [CB Vol A 143].

119 Meridian Schedule at 3 [CB Vol A 145].

120 Meridian Schedule at 1 [CB Vol A 143].

240. The “Cover Details” for details for “Section 2 – Business Interruption” are stated in the Meridian Schedule as an indemnity period of 12 months, with limits of cover as follows:

a. Annual Revenue Basis, in the sum of $[redacted]; and

b. Additional increased cost of working, in the sum of $[redacted].

241. It is common ground that the reference to the “Annual Revenue Basis” should be taken as a reference to the “Gross Revenue Basis”.[121]

242. The relevant terms of the policy for these proceedings are contained in Section 2 – Business Interruption.[122]

243. Within that section, the terms are organised under headings including:

a. “Definitions”;[123]

b. “Cover”;[124]

c. “Settlement of claims”;[125]

d. “Additional benefits”.[126]

244. Under the heading “Cover”, the policy provides:

> If the Business carried on by You is interrupted or interfered with as a result of Damage occurring during the Period of Insurance, to:
>
> 1. Property Insured under any of the following sections of this Policy:
>
>   a) ‘Section 1 Property’; or
>
>   b) ‘Section 3 Theft of Money’; or
>
>   c) ‘Section 4 Glass’; or
>
>   d) ‘Section 8 Part A – Computer and electronic equipment’, for fire and perils or accidental Damage (as Defined in section 8); or
>
>   e) ‘Section 9 General Property’,
>
>   for which a claim has been paid or liability admitted, or such claim would have been paid or liability admitted but for the application of an Excess; or
>
> 2. property at the Situation, used by You but not owned by You:
>
>   a) for which You are not legally responsible, and for which You have not

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[121] Meridian Wording at 23 [CB Vol A 109]; IAG at [335]-[336].

[122] Meridian Wording at 21ff [CB Vol A 107ff].

[123] Meridian Wording at 21-22 [CB Vol A 107-108].

[124] Meridian Wording at 21 [CB Vol A 107].

[125] Meridian Wording at 22 [CB Vol A 108].

[126] Meridian Wording at 23ff [CB Vol A 109ff].

assumed a liability to insure; and

b) such Damage would have been insured under one of the sections of this Policy shown in 1 above had the property been owned by You; or

3. property insured by You under section 1, as a result of explosion or implosion of boilers (other than boilers used for domestic purposes only), economisers, or vessels under pressure, including their own explosion or implosion;

We will, after taking into account any sum saved during the Indemnity Period in respect of such charges and expenses of the Business as may cease or be reduced in consequence of the interruption or interference, indemnify You in respect of the loss arising from such interruption or interference in accordance with the settlement of claims clause to the sum insured expressed against the relevant item on the Schedule, where the Schedule notes that cover has been selected.

245. Under the heading "Additional benefits", the policy provides for the following:

This section is extended to include the following additional benefits.

Unless expressly stated in the additional benefit, additional benefits 1 to 13 inclusive are payable provided that the sum insured expressed against the relevant item in the Schedule is not otherwise exhausted.

For additional benefits 1 to 9 inclusive We will pay You (depending on the part of this section which is applicable to You) for:

a) 'Item 1 Gross profit'; or

b) 'Item 2 Payroll'; or

c) 'Item 6 Gross rentals'; or

d) 'Item 7 Weekly income'; or

e) 'Item 9 Gross revenue',

resulting from interruption of or interference with Your Business as a result of Damage occurring during the Period of Insurance to, or as a direct result of: [Additional Benefits].

246. The Meridian Schedule contains an **endorsement** which deleted Additional Benefit 2[127] and replaced it with the following:

8. Murder, Suicide or Disease

The occurrence of any of the circumstances set out in this Additional Benefit shall be deemed to be Damage to Property used by You at the Situation.

(a) Murder or suicide occurring at the Situation.

(b) Injury, illness or disease caused by the consumption of food or drink provided and consumed at the Situation.

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[127] The schedule refers to the deletion of Additional Benefit 8. It is common ground that this should be taken as a reference to Additional Benefit 2: see Meridian Concise Statement in Response at footnote 2; IAG at [280] fn 72.

(c) [the **Infectious Disease Clause**] The outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation.

(d) [the **Hybrid Clause**] Closure or evacuation of Your Business by order of a government, public or statutory authority consequent upon:

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

(2) vermin or pests at the Situation; or

(3) defects in the drains or other sanitary arrangements at the Situation.

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

247. Finally, the **Basis of Settlement Clause** (titled 'Settlement of Claims') provides, in respect of the "Gross Revenue Basis", as follows:[128]

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

248. The relevant capitalised terms in the Basis of Settlement Clause are defined in the applicable Definitions section as follows:

a. **Revenue** means the money paid or payable to You for services provided (and stock in trade, if any, sold) in the course of operation of Your Business at the premises.

b. **Standard Revenue** means the Revenue earned within that period during the twelve (12) months immediately before the date of the Damage which corresponds with the Indemnity Period.

c. **Indemnity Period** means the period beginning with the date of the occurrence of the Damage and ending not later than the last day of the period specified in

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[128] Meridian Wording at 23 [CB Vol A 109].

the Schedule, during which the results of the Business are affected as a consequence of the Damage.

249. As IAG submits,[129] the Meridian Policy is structured similarly to the Taphouse Policy. However, there is a fundamental disagreement between the parties as to just what that structure is. This is discussed in Section F2 above. In addition to the matters raised there, Meridian points to the following particular features of its policy.

250. ***First***, the Additional Benefit relied upon by Meridian was added by way of a specific endorsement in the Meridian Schedule.

251. ***Secondly***, the specific endorsement commences by providing that:

> The occurrence of any of the circumstances set out in this Additional Benefit shall be deemed to be Damage to Property used by You at the Situation

252. The adoption of this deeming technique:

   a. Recognises that the circumstances set out in the Additional Benefit would not ordinarily (absent the deeming provision) be "Damage to Property used by You at the Situation".

   b. Demonstrates that the parties expressly contemplated that cover would be provided in those circumstances even though they would not ordinarily be "Damage to Property used by You at the Situation".

   c. Reinforces the irrelevance of IAG's attempt to characterise the policy as one providing "primary" coverage for losses arising from physical damage to property.[130]

253. Even if (contrary to Meridian's submission) that characterisation was correct, it could not alter the operation of these specific clauses which expressly provide cover in circumstances that do not amount to "Damage to Property".

G3. THE CLAIM

254. Meridian has made a claim under the Meridian Policy. That claim was denied by IAG.[131] In these proceedings, Meridian contends that both the Infectious Disease Clause and the Hybrid Clause respond to its loss.

255. The insured peril under the Infectious Disease Clause "*The outbreak of [COVID-19]*

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[129] See IAG at [281].

[130] See IAG at [284].

[131] IAG Concise Statement filed 26 February 2021 at [2]-[3]; Meridian Concise Statement in Response filed 23 March 2021 at [6]-[7].

occurring within a 20 kilometre radius of the Situation".

256. Meridian contends that the Infectious Disease Clause is engaged by reason of an outbreak of COVID-19 occurring within a 20-kilometre radius of its premises.

257. The insured peril under the Hybrid Clause is "*closure or evacuation of Your Business by order of a government, public or statutory authority consequent upon… the discovery of an organism likely to result in a human infectious or contagious disease at the Situation*" To fall within this clause, the authority must have:

   a. closed or evacuated the Business; **<u>and</u>**

   b. done so "*consequent upon the discovery of an organism likely to result in [COVID-19] at the Situation*".

258. Meridian contends that the Hybrid Clause is engaged by reason of the following (**Authority Response-Meridian**):

   a. **The 25 March *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (Cth).** This instrument was made under section 477(1) of the *Biosecurity Act 2015* (Cth) and prohibited an Australian citizen or permanent resident from leaving Australia without an exemption.

   b. **The March 2020 to May 2020 *Stay at Home Directions*,**[132] These directions imposed lockdowns in Victoria for the period between 30 March 2020 to 31 May 2020. These were orders to "*address the serious public health risk posed to Victoria by Novel Coronavirus 2019*" by requiring everyone in Victoria to limit their interactions with others by: (a) restricting the circumstances in which they may leave the premises where they ordinarily reside; and (b) placing restrictions on gatherings. In effect, persons in Victoria were prohibited from leaving their home other than for a few specified reasons.

   c. **The July 2020 to October 2020 *Stay at Home (Restricted Areas) Directions*,**[133] **and October 2020 *Stay Safe Directions (Melbourne)*.**[134] These directions imposed lockdowns in Victoria for the period between 8 July 2020 and 27 October 2020. Like the March 2020 to May 2020 *Stay at Home Directions*, these were orders to "*address the serious public health risk posed*

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[132] SOAF Annexure C at #9, #10, #13, #15, #22, #23, and #25.

[133] SOAF Annexure C at #36, #38, #41, #45, #47, #52, #53, #54, #57, #58, #60, #62, #64, #65, #67, #70, #73, #75, and #78.

[134] SOAF Annexure C at #81, and # 82.

to Victoria by Novel Coronavirus 2019". Again, they did this by requiring everyone in Victoria to limit their interactions with others by: (a) restricting the circumstances in which they may leave the premises where they ordinarily reside; and (b) placing restrictions on gatherings. In effect, persons in Victoria were prohibited from leaving their home other than for a few specified reasons. The directions provided that they were to be read with, relevantly, various *Restricted Activity Directions* which, in substance, restricted certain businesses from operating. The evidence of one of the directors and owners of Meridian is that this was part of the reason Meridian shut down (at least in July 2020).[135]

d. **The February 2021 Stay Safe Directions.[136]** These directions imposed lockdowns in Victoria for the period between 12 and 17 February 2021 in the same manner as the earlier directions.

G4. INFECTIOUS DISEASE CLAUSE

259. IAG has accepted for the purposes of the Test Case that there was an outbreak within the radius by no later than 30 March 2020.[137]

260. For its part, Meridian:

   a. agrees that there was an outbreak within the radius by no later than 30 March 2020 (although it disagrees with IAG as to the meaning of outbreak);[138]

   b. says that, on the agreed facts, the outbreak was occurring within the radius by 1 March 2020 and continued throughout the policy period.[139]

261. Accordingly, the outbreak issue[140] should be resolved in favour of Meridian.

G5. HYBRID CLAUSE

262. As has already been observed, to fall within this clause, the authority must have:

   a. closed or evacuated the Business; **and**

   b. done so "consequent upon the discovery of an organism likely to result in [COVID-19] at the Situation".

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[135] Quick Affidavit at [12] and [13].

[136] SOAF Annexure C at #97, and #98.

[137] IAG at [303]-[304].

[138] Meridian relies upon the meaning of outbreak addressed above in respect of Taphouse.

[139] SOAF, para 63.

[140] List of Issues for Determination, para 9.

263. Each of these elements[141] will be addressed in turn.

Closed or Evacuated the Business

Construction

264. Contrary to IAG's submission,[142] the Meridian Policy does not require "Business" to be considered apart from the premises from which the "Business" is carried on. As to this:

    a. The policy defines:

        i. "Business" to include the ownership and occupation of the "Business Premises";

        ii. "Business Premises" as "the buildings … and land used by You for Your Business at the Situation".[143]

    b. The policy thus uses "Business" in a sense inclusive of the premises from which the "Business" is carried on.

    c. This is confirmed by the use within the clause of the expression "evacuation of Your Business". This expression does not make sense unless "Business" includes the premises from which it is conducted.

    d. Accordingly, the Court should not accept the strict distinction IAG seeks to draw between the Business and the premises from which it is conducted.

265. Further, the Court should not accept IAG's submission[144] to the effect that closure must be total in order for there to be cover. As to this:

    a. As noted in Section B2 above, in *Hyper Trust (No 2)*, McDonald J held that "a reasonable person would understand the word "closure" is not confined to a total shutdown". This accords with the reasoning in *FCA v Arch* discussed above in Section B2 and in respect of Taphouse.

    b. In the present context, if the effect of an order is the closure of a discrete part of a Business, there will be a closure within the meaning of the clause.

    c. Again, this result should not be surprising in a policy designed to provide cover in respect of *interruption or interference* with a business.

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[141] List of Issues for Determination, paras 10(a)-(b).

[142] IAG at [309].

[143] Meridian Wording at page 3.

[144] IAG at [310]-[314].

Application

266. The effect of the Travel Ban imposed on 25 March 2020 was to require Meridian to close a significant part of its business. IAG's submissions appear to accept that Meridian could no longer offer travel packages involving overseas travel.[145] International bookings had comprised approximately 90% of Meridian's revenue (of which approximately 65% comprised international tours and international cruises).[146]

267. The effect of the subsequent lockdown orders was to require Meridian to close a discrete part of its domestic travel business. Its business premises were closed, and its domestic customer base was diminished.[147] That it endeavoured to continue to trade online does not alter these basic facts.

Consequent upon the discovery of an organism likely to result in [COVID-19] at the Situation

Construction

268. Given that this clause contemplates that it may operate upon the promulgation of statutory instruments and similar measures, Meridian relies upon the primary argument advanced by Taphouse above.

269. A further issue of construction raised by IAG's submissions[148] is whether the language "consequent upon … the discovery of an organism likely to result in a human infectious or contagious disease at the Situation" should be construed:

    a. so that the organism itself must be discovered "at the Situation" (as IAG contends); or

    b. so that the discovery of the organism itself need not occur at the Situation; instead, it must simply be "likely to result in a human infectious or contagious disease at the Situation" (as Meridian contends).

270. Meridian's construction should be preferred for the following reasons.

271. ***First***, it accords with the language and structure of the clause:

    a. The discovery is conditioned, not by a requirement as to where it occurs, but rather by whether it is "likely to" have the result specified in the clause.

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145 IAG at [312].

146 Quick Affidavit at [7].

147 Quick Affidavit at [25] and [26].

148 IAG at [307], [315]-[323]

b. The result specified in the clause is "a human infectious or contagious disease at the Situation".

c. In this way, the words "at the Situation" form an essential (and limiting) part of the likely result – which is referrable to a **disease** at the Situation.

d. However, those words do not condition or dictate where the discovery of the causative **organism** must take place.

272. ***Secondly***, IAG's construction lacks commercial sense. It would deny cover if the **organism** was discovered next door, even though the organism was "likely to result in a human infectious or contagious **disease** at the Situation". A government order responsive to this circumstance would be just as likely to cause interruption or interference to the business as an order responsive to a discovery of an organism at the Situation. There is no good commercial reason why the parties would have chosen to deny business interruption cover in this circumstance.

273. ***Thirdly***, IAG's suggested problems with Meridian's construction[149] are not persuasive. As to this:

a. The reference to "an organism" is neutral. There is no difficulty in the notion that it is referring to an organism likely to result in disease (as Meridian suggests).

b. The Infectious Disease Clause is no objection. It operates upon an actual outbreak of disease within the radius. The hybrid clause has a different focus – a government order consequent upon discovery of an organism likely to cause disease. The focus is on the order and the organism. Disease may or may not follow. There may never be any outbreak of disease. Indeed, a purpose of the government order would likely be to endeavour to prevent an outbreak. The clauses thus provide different cover. Each should be applied in accordance with its terms.

c. There is nothing incongruous about Meridian's suggested reading. It still involves a connection with the premises, *viz.* the likely result of "a human infectious or contagious disease at the Situation".

d. The notion of "discovery" is not problematic. In this context, it simply means found.

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[149] IAG at [319]-[323].

274. The final matter to mention here concerns the counterfactual inherent in the concept of “likely to”. It directs attention to what is likely given the organism in its natural state, uncontrolled by government intervention.

Application

275. **Meridian’s primary argument**. Meridian’s primary argument turns upon the statutory instruments in their legal context.

276. As to the Travel Ban (the *Biosecurity (Human Biosecurity Emergency) (Human Coronavirus with Pandemic Potential) (Overseas Travel Ban Emergency Requirements) Determination 2020* (Cth)):

    a. This determination was made under section 477(1) of the *Biosecurity Act 2015* (Cth), which permits the Health Minister to determine any requirement that he or she is satisfied is necessary to prevent or control: (i) the entry of the declaration listed human disease into Australian territory or a part of Australian territory; or (ii) the emergence, establishment or spread of the declaration listed human disease in Australian territory or a part of Australian territory;

    b. The explanatory statement stated that the determination “is in response to the COVID-19 pandemic, which continues to represent a severe and immediate threat to human health in Australia and across the globe, and it has the ability to cause high level of morbidity and mortality and to disrupt the Australian community socially and economically”.

    c. The determination may thus be regarded as conveying that it was made in consequence of the discovery of the organism that causes COVID-19, being an organism likely to result in the spread of COVID-19 throughout Australia. The determination thus accords with an assumption on the part of its maker that, uncontrolled by government intervention, the organism is ultimately likely to result in the spread of COVID-19 to places including the Situation.

277. As to the other statutory instruments comprising the Authority Response-Meridian:

    a. They were made by the Deputy Chief Health Officer (Communicable Disease), the Deputy Public Health Commander, or the Chief Health Officer under section 200(1)(b) and (d) of the *Public Health and Wellbeing Act 2008* (Vic).

    b. Section 198 permits the Minister to “*declare a state of emergency arising out of any circumsta*nce causing a serious risk to public health”.

    c. On 16 March 2020, the Minister for Health declared a state of emergency

"throughout the State of Victoria arising out of the serious risk to public health in Victoria from Novel Coronavirus 2019 (2019-nCoV)" (emphasis added).

d. Section 199 provides that where there is a state of emergency, the Chief Health Officer may authorise certain authorised officers to exercise any of the public health risk powers and emergency powers. Two of those powers are the power to restrict movement of any person or group of persons within the emergency area (section 200(1)(b)) and to give any other direction that the authorised officer considers is reasonably necessary to protect public health (section 200(1)(d)). These were the powers pursuant to which the orders comprising the Authority Response-Meridian (save for the Travel Ban) were made.

e. On each occasion one of these orders was made, the following was expressly stated:

   i. its purpose was to address the serious public health risk "posed to Victoria";

   ii. it required "everyone in Victoria" (or in respect of the Restricted Areas directions, "everyone who ordinarily resides in the Restricted Area") to limit their interactions; and

   iii. the requirement to stay home applied to a "person who is in Victoria" (or in respect of the Restricted Areas directions, a "person who ordinarily resides in the Restricted Area").

f. Again, in context, the orders convey that they were made in consequence of the discovery of the organism that causes COVID-19, being an organism likely to result in the spread of COVID-19 throughout Victoria (or the restricted areas). Again, they accord with an assumption on the part of their maker that, uncontrolled by government intervention, the organism is ultimately likely to result in the spread of COVID-19 to places including the Situation.

278. **Meridian's secondary argument**. The agreed facts[150] demonstrate that both the organism and the disease were prevalent around the Situation prior to the government orders, and that the disease did indeed spread significantly. Accordingly, if it be necessary, this is sufficient to show, as a matter of fact, that uncontrolled by government intervention, the organism was ultimately likely to result in the spread of COVID-19 to places including the Situation. Further, it may be inferred from the text and context of

[150] SOAF, para 63.

the government orders that they were in fact made in consequence of the discovery of this organism.

G6. SECTION 61A

279. IAG contends that the reference to the "quarantinable diseases under the Quarantine Act 1908 (Cth)" should be read as "listed human disease under the *Biosecurity Act 2015*" due to the operation of section 61A of the *Property Law Act 1958* (Vic) [**IAG at [352]**].

280. Section 61A is in the following terms:

> **Construction of references to repealed Acts**
>
> Where an Act or a provision of an Act is repealed and re-enacted (with or without modification) then, unless the contrary intention expressly appears, any reference in any deed, contract, will, order or other instrument to the repealed Act or provision shall be construed as a reference to the re-enacted Act or provision.

281. IAG's reasoning, adopted from QBE's submissions, is as follows. *First*, the proper law of the contract is Victoria; *second*, that the word "Act" in section 61A of the *Property Law Act 1958* (Vic) refers to Acts passed by the Commonwealth parliament as well as the parliament of Victoria; *third*, that the policy does not reveal a contrary intention, and *fourth* that the *Biosecurity Act* meets the description of a re-enactment of the *Quarantine Act*.

282. That reasoning should be rejected for the following reasons.

283. **First**, the words of the policy do indicate a contrary intention.[151]

284. The words of the clause are clear and unambiguous: cover it is only excluded for diseases that are "declared to be quarantinable diseases under the *Quarantinable Act 1908* and subsequent amendments". As explained by Meagher JA and Ball J, "the insurers have chosen a specific mechanism for determining which infectious or contagious human diseases should be excluded".[152] There is no evidence, and IAG does not suggest, that the reference to the *Quarantine Act* was a mistake, or that there was a mistake in the parties' language. The exclusion has work to do: as Hammerschlag J explained:[153] "the words used are not incoherent and the exclusion still has work to do because the diseases declared under the *Quarantine Act* to be quarantinable diseases were still identifiable and the repeal of the *Quarantine Act* did not affect or annul "anything duly done" under the repealed Act". That same reasoning compels the rejection of IAG's position: the reference to the *Quarantine Act* has work to do and, as

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[151] Cf QBE at [29].

[152] *Wonkana* at [37]. See, also, at [45].

[153] *Wonkana* at [125].

such, that is a contrary intention (and it would be wrong to rewrite the bargain struck to exclude a similar but not identical set of diseases). The matter can also be tested in this way – suppose the relevant disease was one that was listed in the *Quarantine Act* but not the *Biosecurity Act* (eg, cholera, rabies)?

285. The words "and subsequent amendments" lend force to Meridian's position. The clause records what changes to the law fall within the exclusion: which implicitly speaks against any Act applying in its place. The *Biosecurity Act* does not meet the description of an amendment to the *Quarantine Act* (as to which, see *Wonkana*).

286. **Second**, section 61A does not apply to Acts passed by the Commonwealth Parliament.

287. The starting point is section 38 of the *Interpretation of Legislation Act 1984* (Vic), which provides that, unless the contrary intention appears, the use of the word "Act" in statutes means an Act passed by the Parliament of Victoria.

288. There is no contrary intention at play here. The most that IAG can point to is some form of "inconvenience"[154] which may result from section 61A applying to Victorian acts but not the acts of other polities. That submission, however, ignores a critical fact: the *text* of section 61A does not reveal a contrary intention. Moreover, insofar as IAG can divine examples of inconvenient results should section 61A apply only to Victorian Acts,[155] inconvenient results in the other direction can readily be conceived. For example, the same policy – noting that it does not have an express choice of law words – could and would apply differently depending on what are notoriously uncertain questions of "*closest connection*" (in determining the law of the contrary).

289. *Third*, the *Biosecurity Act* does not answer the description of a re-enactment of the *Quarantine Act*. The two acts may have objects that align, and the *Biosecurity Act* may have replaced the *Quarantine Act*,[156] but it is not a re-enactment. Notably, the *Biosecurity Act* has a more extensive reach in terms of its subject matter.[157] The matter can again be tested this way – what if the relevant disease was one that was listed in the *Quarantine Act* but not the *Biosecurity Act*?

290. The policy was issued for one year, against the background that the *Quarantine Act* had been progressively amended more than 50 times and the *Biosecurity Act* was intended

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[154] QBE at [31].

[155] QBE at [32].

[156] *Wonkana* at [106].

[157] See *Wonkana* at [106].

to introduce a completely new regulatory framework.[158]

291. *Finally*, IAG asserts without evidence that the policy was issued in Victoria so as to engage Victorian law by virtue of the choice of law clause.[159] The position is not so clear given that the intermediary is identified as being in Sydney[160] and IAG's registered office is in Sydney, NSW.

G7. CAUSATION

292. As with Taphouse, the causation issues are less complex than IAG suggests.

293. For its claim under the Infectious Disease Clause, Meridian relies upon *FCA v Arch* at [212]:

> [On] the proper interpretation of the disease clauses, in order to show that loss from the interruption of the insured business was proximately caused by one or more occurrences of illness resulting from Covid-19, it is sufficient to prove that the interruption was a result of Government action taken in response to cases of disease which included at least one case of Covid-19 within the geographical area covered by the clause. The basis for this conclusion is the analysis of the court below, which in our opinion is correct, that each of the individual cases of illness resulting from Covid-19 which had occurred by the date of any Government action was a separate and equally effective cause of that action (and of the public response to it).

294. By parity of reasoning, each individual case (and thus the outbreak) within the radius was a cause of the government orders and the public response to them, sufficient to show that the loss from interruption was proximately caused by those cases (and thus the outbreak).

295. This is not answered by IAG's reliance upon the illustration from *FCA v Arch* at [244]. That passage was dealing with hybrid clauses, and the problem that would arise under such clauses if:

    a. All the elements of the insured peril under the hybrid clause were present, but they could not be regarded as the proximate cause of the loss.

    b. The sole proximate cause of the loss was the COVID-19 pandemic.

296. The "travel agency" example is to the effect that the loss of walk-in customers is unlikely to be proximately caused a government lockdown the subject of a hybrid clause, if it were preceded by travel restrictions which meant that there was nothing for the agency

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158 See Australia, House of Representatives, *Biosecurity Bill 2014,* Explanatory Memorandum at 7.

159 Meridian Wording at 6 [CB Vol A 92].

160 Meridian Schedule at 1 [CB Vol A 143].

to sell.

297. Turning to the hybrid clause in the present case:

a. The existence of the travel ban does not present a problem of the kind just discussed because it is one of the government measures within the scope of the cover.

b. In any event, it cannot be said that the sole proximate cause of Meridian's loss was something other than the insured peril.

c. As noted in part B2 above, it is no objection that the loss may have been "concurrently caused by other (uninsured but non-excluded) consequences of the COVID-19 pandemic" (which was the underlying or originating cause of the insured peril).

d. Even if the Cruise Ship Ban could be regarded as the sole proximate cause of some part of Meridian's loss, that could not deny cover for the other parts (other international travel and domestic travel).

e. On any view, the lockdown orders have causal potency in the context of domestic travel. One may have expected domestic travel to thrive after overseas travel was banned. But the lockdown orders promptly interrupted or interfered with that aspect of Meridian's business, causing further loss.

G8. ADJUSTMENT CLAUSE

298. As IAG concedes, the "adjustments" clause in the policy does not in fact apply to the Basis of Settlement clause applicable to Meridian.[161] IAG has repeated the submissions made in respect of Taphouse for the Meridian Policy,[162] and as such Meridian relies on those made in respect of Taphouse in response.

299. As to the Infectious Disease Clause, the "underlying cause" of government action (including the Travel Ban) remains the "occurrence of the disease" (both within and outside the radius) and therefore any "broader impacts of the pandemic" must be ignored in determining the appropriate adjustments to be made.

G9. INDEMNITY PERIOD

300. Meridian does not cavil with the proposition that the Indemnity Period commences upon the occurrence of the damage. As the definition of damage includes "loss", however,

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[161] IAG at [338].

[162] IAG at [338]-[339].

the indemnity period does not necessarily start on the date of the government order or outbreak[163] but rather the date of the loss caused by the order or outbreak. The same is true for the end of the indemnity period: it is the date on which Meridian's business ceased to be affected. The question of Meridian's actual loss, and when it ceased, is a question for the separate loss adjustment process.

G10. THIRD PARTY PAYMENTS

301. Meridian received payments from the operation of the Commonwealth's "JobKeeper" payment and Consumer Travel Support Program, the Victorian Government's Support Fund, and a rental waiver from its landlord. The operation of each of these have been set out in Annexure A. Meridian did not receive an "ATAC Grant".[164]

302. Meridian relies on the submissions put in respect of Taphouse in respect of these third party payments. It is necessary only to state the following.

303. The Basis of Settlement clause in the Meridian policy, like the Taphouse Policy, provides for a carefully calibrated calculation comprising:

    a. in respect of loss of Revenue, the amount by which the Revenue earned during the Indemnity Period falls short of the Standard Revenue in consequence of the Damage; and

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

304. It is (a) which is relevant to Meridian's claim.

305. "Revenue" (which is also the integer for calculating "Standard Revenue") is calculated by determining the money paid or payable for services provided in the course of operation of the business at the premises. That is, amounts paid in exchange for services provided by Meridian and *not* any grants or third party payments made by the

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[163] cf IAG at [340].

[164] The submission at IAG [342(d)] and [348] was made in reliance on an error in the information provided on behalf of Meridian on 17 July 2021.

government (or another body). Indeed, taking the Commonwealth's Consumer Travel Support Program as an example, any subsidy is provided because services were *not* (because they could not be) provided.

306. IAG's reliance on the words "any sum saved" in primary insuring clause[165] does not assist it for the reasons outlined in respect of the Taphouse Policy.

G11. INSURANCE CONTRACTS ACT

307. The principles concerning interest and section 57(2) of the *Insurance Contracts Act 1984* (Cth) have been set out above. For the same reasons set out in respect of Taphouse's claim, interest ought run from the date Meridian's claim was denied (being 11 August 2020).[166]

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[165] IAG at [349]-350].

[166] Quick Affidavit at [29].

H. LCA MARRICKVILLE (NSD 132/2021)

H1. THE POLICYHOLDER

308. The respondent in NSD 132/2021, LCA Marrickville Pty Ltd (**LCA Marrickville**) is the insured under a "Vertex Industrial Special Risks" Policy number P23089.04-00 (**LCA Policy**) placed with Swiss Re International SE (**Swiss Re**).

309. LCA Marrickville is a laser therapy clinic, offering services such as laser hair removal, cosmetic injectables and skin treatments.[167] It is located at Shop No 45A, 20 Smidmore Street Marrickville NSW, in the Marrickville Metro shopping centre.[168] Its premises comprises six treatment rooms, a reception area and waiting room area and storage space, with a floor space of approximately 98 square metres. Of that area, 77 square metres is open to the public, with 21 used for storage and not open to the public.[169]

H2. THE POLICY

310. The LCA Policy comprises a policy schedule (**LCA Schedule**)[170] and wording (**LCA Wording**).[171] The period of insurance is 30 June 2019 to 30 June 2020.[172] The "Insured" is certain named entities, and "Additional Named Insured's and Interested Parties as outlined by endorsement".[173] The endorsement lists "Additional Named Insureds", including "LCA Marrickville Pty Ltd".[174]

311. The insured "Situation" includes "contract sites where the Insured has property or carries on business, has goods or other property stored or being processed or has work done".[175] It is not in dispute that in the context of LCA Marrickville's claim, the "Situation" is LCA Marrickville's laser therapy clinic in the Marrickville Metro shopping centre.[176]

312. The LCA Schedule also contains a "Business Description" section. It describes the insured business, relevantly, as "Principally: The provision of laser hair removal, skin treatments, cosmetic injection … Owners, operators and managers of laser, skin care & cosmetic clinics … Property owners/occupiers, lessees of property, lessors of property,

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[167] LCA Marrickville Outline at [5].

[168] Affidavit of Renee Irene Fairbanks affirmed 17 August 2021 at [3] (**Fairbanks Affidavit**).

[169] Fairbanks Affidavit at [5].

[170] CB Vol A p 69.

[171] CB Vol A p 1.

[172] LCA Schedule at 1 [CB Vol A 69].

[173] LCA Schedule at 1 [CB Vol A 69].

[174] LCA Schedule at 8 [CB Vol A 75-76].

[175] LCA Schedule at 2 [CB Vol A 70].

[176] Swiss Re at [4.18].

tenants. … And any and all associated and/or related and/or incidental activities and/or occupations to all the aforementioned …”.[177]

313. The classes of insurance taken under the policy are identified in the LCA Schedule as: “Section 1 – Property Insurance Section” and “Section 2 – Interruption Insurance”.[178]

314. The “Limit of Liability” for “Section 1 and 2 Combined” is $[redacted].[179] This is limited by endorsement to $[redacted] in respect of each of the individual Situations, to “any one loss or series of losses arising out of any one event at any one Situation used by the Insured, subject to any lesser Limit(s) of Liability specified elsewhere in this Policy”.[180]

315. The “Sub-limits of Liability” for “Section 2 – Interruption Insurance” are stated in the LCA Schedule as providing for an indemnity period of 12 months,[181] with “Items Insured and Sub-Limits” of:[182]

   a. Gross Profit as “Applicable”,

   b. Insured Payroll as “Applicable”,

   c. A sub-limit for Clause 9.1.2.1 (the **Hybrid Clause**) of $[redacted].

   d. Additional increased Cost of Working in the sum of $[redacted];

   e. Claims Preparation Costs in the sum of $[redacted].

316. The relevant terms of the policy for these proceedings are contained in “Section 2 – Interruption Insurance”.

317. Within Section 2, the policy is divided into three main sub-sections, numbered 8-13, including:

   a. “8. Definitions”;[183]

   b. “9. Extent of Cover”;[184]

   c. “10. Basis of Settlement”;[185]

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177 LCA Schedule at 1 [CB Vol A 69].
178 LCA Schedule at 2 [CB Vol A a70].
179 LCA Schedule at 2 [CB Vol A 70].
180 LCA Schedule at 10 [CB Vol A 78].
181 LCA Schedule at 4 [CB Vol A 72].
182 LCA Schedule at 3-4 [CB Vol A 71-72].
183 LCA Wording at 28-29 [CB Vol A 31-32].
184 LCA Wording at 30-31 [CB Vol A 33-34].
185 LCA Wording at 32-35 [CB Vol A 35-38].

d. "11. Conditions Applying to Section 2";[186]

e. "12. Property Excluded";[187]

f. "13. Circumstances Where Cover is Excluded".[188]

318. Sub-section "9. Extent of Cover" commences with:

> 9.1 The Insurer will indemnify the Insured in accordance with the provisions of Clause 10 (Basis of Settlement) against loss resulting from the interruption of or interference with the Business, provided the interruption or interference …

319. It then provides for two different types of cover. The first, contained in Clause 9.1 and its sub-clauses, is for interruption "caused by **Damage** occurring during the **Period of Insurance** to" various types of physical property. "Damage" is defined in Clause 1.3 as "physical loss, damage or destruction". The second, contained in Clause 9.2 and its sub-clauses, refers to interruption "in consequence of" various events that do not involve damage to physical property, occurring during the "Period of Insurance". The tailpiece to Clause 9.1.2 provides that "such events shall be deemed to be loss caused by **Damage** covered by Section 2 of this **Policy**".

320. The "Interruption Insurance" section of the policy is thus capable of applying in two different situations, reflected in the two separate clauses in sub-section 9 (Clause 9.1.1 and its sub-clauses, as compared to Clause 9.1.2 and its sub-clauses):

a. The ***first,*** is where the interruption or interference was "caused by **Damage**" occurring to [any of the matters specified in sub-clauses 9.1.1.1 to 9.1.1.10]. Having regard to the definition of "Damage", this limb of the insuring clause relates to risks which have as their subject matter *property* capable of being physically damaged.

b. The ***second*** is where the interruption or interference is "in consequence of" [any of the matters specified in sub-clauses 9.1.2.1 to 9.1.2.6], which events are deemed to be "physical loss, damage or destruction" by the tailpiece to Clause 9.1.2. The Policy thus expressly contemplates that the subject-matter of Clause 9.1.2 are matters which would not otherwise be damage to property. The clauses under which LCA Marrickville claims (clauses 9.1.2.1, 9.1.2.4, 9.1.2.5 and 9.1.2.6) are within this category.

321. The LCA Policy contains a **Hybrid Clause** (Clause 9.1.2.1), a **Prevention of Access**

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[186] LCA Wording at 36-38 [CB Vol A 39-41].

[187] LCA Wording at 39 [CB Vol A 42].

[188] LCA Wording at 39 [CB Vol A 42].

Clause (Clause 9.1.2.6), and a **Catastrophe Clause** (Clause 9.1.2.5), in the following terms:[189]

> 9.1 The Insurer will indemnify the Insured in accordance with the provisions of Clause 10 (Basis of Settlement) against loss resulting from the interruption of or interference with the Business, provided the interruption or interference:
>
> …
>
> 9.1.2 is in consequence of:
>
> 9.1.2.1 closure or evacuation of the whole or part of the Situation by order of a competent public authority as a result of an outbreak of a notifiable human infectious or contagious disease or bacterial infection or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease or consequent upon vermin or pests or defects in the drains and/or sanitary arrangements at the Situation but specifically excluding losses arising from or in connection with highly Pathogenic Avian Influenza in Humans or any disease(s) declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015;
>
> …
>
> 9.1.2.4 any of the circumstances set out in Sub-Clauses 9.1.2.1 to 9.1.2.3 (inclusive) occurring within a 5 kilometer [sic] radius of the Situation;
>
> 9.1.2.5 the action of a civil authority during a conflagration or other catastrophe for the purpose of retarding same;
>
> 9.1.2.6 the action of any lawful authority attempting to avoid or diminish risk to life or Damage to property within 5 kilometres of such Situation which prevents or hinders the use of or access to the Situation whether any property of the Insured shall be the subject of Damage or not, occurring during the Period of Insurance. Such events shall be deemed to be loss caused by Damage covered by Section 2 of this Policy.

322. It will be noted that Clause 9.1.2.4 (**Expansion Clause**) expands cover in respect of the Hybrid Clause for circumstances occurring within a 5 kilometre radius of the Situation.

323. The **Basis of Settlement Clause** provides, in respect of "*Gross Profit*", for calculation of the loss payable as follows:[190]

> 10. Basis of Settlement
>
> 10.1 **Item No. 1 (Loss of Gross Profit Due to Reduction in Turnover and Increase in Cost of Working)**
>
> The **Insured** is indemnified with respect to loss of Gross Profit calculated in the following manner, namely:
>
> 10.1.1 in respect of reduction in **Turnover,** the sum produced by applying the **Rate of Gross Profit** to the amount by which the **Turnover** during the **Indemnity Period** shall, in consequence of the **Damage,** fall short of the

[189] LCA Wording at 31 [CB Vol A 34].

[190] LCA Wording at 32 [CB Vol A 35].

Standard Turnover; and

10.1.2 in respect of Increase in Cost of Working, the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in **Turnover** which, but for that expenditure, would have taken place during the **Indemnity Period** in consequence of the **Damage,** but not exceeding the sum produced by applying the **Rate of Gross Profit** to the amount of the reduction thereby avoided.

10.1.3 There shall be deducted from the amounts calculated in 10.1.1 and 10.1.2 any sum saved during the **Indemnity Period** in respect of such of the charges and expenses of the **Business** payable out of **Gross Profit** as may cease or be reduced as a consequence of the **Damage** (excluding depreciation and amortisation).

324. The relevant bolded terms in the Basis of Settlement Clause are defined in Clause 8 as follows:[191]

a. **"Gross Profit** means the amount by which:

the sum of the **Turnover** and the amount of the closing stock and work in progress shall exceed the sum of the amount of the opening stock and work in progress and the amount of the Uninsured Working Expenses as set out in the **Schedule**.

(The amounts of the opening and closing stocks and work in progress shall be arrived at in accordance with the **Insured's** normal accountancy methods, due provision being made for depreciation. Where insured expenses are included in the **Insured's** stocks and work in progress such amounts shall be excluded for the purpose of the **Gross Profit** Definition.)"

b. **"Turnover** means the money (less discounts if any allowed) paid or payable to the **Insured** for goods sold and delivered and for services rendered in the course of the **Business** conducted at the **Situation**."

c. "**Rate of Gross Profit** means the proportion which the **Gross Profit** bears to the **Turnover** during the financial year immediately before the date of the **Damage.**"

d. "**Indemnity period** means the period beginning with the occurrence of the **Damage** and ending not later than the number of months specified in the **Schedule** thereafter during which the results of the **Business** shall have been affected in consequence of the **Damage**."

e. "**Standard Turnover** means the **Turnover** during that period in the twelve

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[191] LCA Wording at 28-29 [CB Vol A 31-32].

months immediately before the date of the **Damage** which corresponds with the **Indemnity Period** (appropriately adjusted where the **Indemnity Period** exceeds twelve months)."

325. Clause 8 also contains an **Adjustment Clause**. It provides that:[192]

> Adjustments shall be made to the **Rate of Gross Profit**, **Standard Turnover**, **Standard Gross Revenue**, **Standard Gross Rentals** and **Rate of Payroll** as may be necessary to provide for the trend of the **Business** and for variations in or other circumstances affecting the **Business** either before or after the date of the **Damage** or which would have affected the **Business** had the **Damage** not occurred, so that the figures as adjusted shall represent as nearly as may be reasonably practicable the results which, but for the **Damage,** would have been obtained during the relative period after the **Damage** occurred.

326. At this point, the following preliminary observation may be made about the structure and terms of the policy.

327. Contrary to Swiss Re's submission, the LCA Policy cannot be characterised as having as its "primary" coverage physical damage or destruction to property.[193] To the contrary, "Section 2 – Interruption Insurance" delineates between those insured perils caused by physical damage (the sub-clauses to 9.1.1) and those not related in any way to physical damage (the sub-clauses to 9.1.2). It is those latter clauses that are in issue.

328. If there were any doubt that those clauses are not concerned with physical damage, it is a doubt resolved by the words of the policy. The tailpiece to Clause 9.1.2 recognises that the matters it covers are not capable of constituting "Damage" being, "physical loss, damage or destruction" and "[s]uch events shall be deemed to be loss caused by Damage".[194] This is explicitly recognised in relation to the Prevention of Access Clause, which makes clear that it applies "whether any property of the Insured shall be the subject of Damage or not".[195]

329. As for Swiss Re's reliance on the decision in *Star,* primacy must be given to the text and structure of this policy and the language actually used by the parties.[196] That another policy issued to another entity by another insurer was "built on physical loss or destruction" (*Star* at [172]) has very little, if anything, to say about the risks that Swiss Re agreed to insure by this Policy.

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192 LCA Wording at 29 [CB Vol A at 32].

193 Swiss Re at [4.21].

194 LCA Wording at 31 [CB Vol A at 33].

195 LCA Wording at 31 [CB Vol A at 33].

196 Swiss Re at [4.2.1].

H3. THE CLAIM

330. LCA Marrickville has made a claim for indemnity under the LCA Policy. That claim was denied by Swiss Re.[197] In these proceedings, LCA Marrickville contends that each of the Hybrid Clause as expanded by the Expansion Clause, the Prevention of Access Clause and the Catastrophe Clause respond to its loss.

331. The insured peril under the Hybrid Clause (as expanded by the Expansion Clause) is "closure or evacuation of the whole or part of the Situation by order of a competent public authority as a result of the outbreak of a notifiable human infectious or contagious disease", "occurring within a 5 kilometer radius of the Situation". The Hybrid Clause specifically excludes "losses arising from or in connection with … any disease(s) declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015". The operation of this exclusion is dealt with in Section H4 below. To fall within the Hybrid Clause, the competent public authority must have:

    a. closed or evacuated all or part of the Situation; **<u>and</u>**

    b. done so "as a result of an outbreak of a notifiable human infectious or contagious disease", "occurring within a 5 kilometer radius of the **Situation**".

332. It is convenient to note at this juncture that given the presence of the Expansion Clause, it is not necessary for the Court to consider whether coverage is enlivened under the Hybrid Clause read without the Expansion Clause.

333. The insured peril under the Prevention of Access Clause is "the action of any legal authority attempting to avoid or diminish risk to life or **Damage** to property within 5 kilometers of such **Situation** which prevents or hinders the use of or access to the **Situation** whether any property of the Insured shall be the subject of **Damage** or not". To fall within this clause, the legal authority must have taken "action", which:

    a. prevents or hinders <u>the use of</u> the Situation; <u>or</u>

    b. prevents or hinders <u>access</u> to the Situation; **<u>and</u>**

    c. have done one (or both) of those things in attempting to avoid or diminish risk to life or Damage to property within 5 kilometres of the Situation.

334. The insured peril under the Catastrophe Clause is "the action of a civil authority during a conflagration or other catastrophe for the purpose of retarding same".

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[197] LCA Outline at [19]-[26].

335. LCA Marrickville contends that all three clauses are engaged by reason of the following statutory instruments (**Authority Response-LCA Marrickville**):[198]

   a. **The 26 March 2020 *Public Health (COVID-19 Gatherings) Order (No 2) 2020.*[199]** This order provided that "business premises that are spas, nail salons, beauty salons waxing salons, tanning salons, tattoo parlours or massage parlours" "must not be open to members of the public".[200]

   b. **The 1 June 2020 *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3) 2020.*[201]** This order provided for particular "Restricted premises". Those types of premises were subject to the "limitation on the number of persons that may be on the premises at any time", "the condition that no person may be on the premises as part of an individual group of more than 10 person", and "any other restrictions set out" in the Schedule.[202] Item 16 of Schedule 1 described "Business premises that are used for nail salons, beauty salons, waxing salons and tanning salons". The limitation on the number of persons on premises was "[t]he lesser of" "10 customers and the business's staff members"; or "the total number of persons calculated by allowing 4 square metres of space for each person (including staff members) on the premises". These premises were subject to the further restriction of "Must have a COVID-19 Safety Plan".[203]

   c. **The 12 June 2020 *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3) 2020.*** [204] This order was in the same terms as the 1 June 2020 order, but provided that the number of persons that could be on "Business premises that are used for nail salons, beauty salons, waxing salons, tanning salons, spas, tattoo parlours and massage parlours" was the lesser of

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[198] LCA Marrickville does not rely on the 7 December 2020 *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 7) 2020* as an insured peril, as this order was made outside the policy period (see Outline Document at [14]).

[199] SOAF Annexure B at #12.

[200] 26 March 2020 *Public Health (COVID-19 Gatherings) Order (No. 2),* Clause 7(1)(i).

[201] SOAF Annexure B at #23.

[202] 1 June 2020 *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No. 3) 2020,* Clause 5(1).

[203] Clause 5(3) provided that: "If it is a condition that there must be a COVID-19 safety plan for the premises, the occupier or operator of the premises must— (a) develop and comply with a safety plan for the premises that addresses the matters required by the COVID-19 safety checklist approved by the Chief Health Officer in relation to the type of premises and published on an appropriate Government website, and (b) keep a copy of the COVID-19 safety plan on the premises and make it available for inspection by an authorised officer as requested."

[204] SOAF Annexure B at #23.

20 customers, excluding staff members or "the total number of persons calculated by allowing 4 square metres of space for each person (including staff members) on the premises".[205]

H4. THE BIOSECURITY ACT EXCLUSION

336. Before turning to construction and application of particular clauses, it is necessary to deal with two issues arising from the "*Biosecurity Act"* exclusion in the Hybrid Clause. The *first* is whether it operates to preclude recovery under the Hybrid Clause.[206] The *second* is whether if the exclusion does preclude recovery for loss, LCA's claim under the Prevention of Access and Catastrophe Clauses must also fail.[207]

(a) Is loss arising from COVID-19 excluded under the Prevention of Access Clause?

337. Swiss Re contends that the Hybrid Clause does not respond to LCA's loss because of the exclusion for "losses arising from or in connection with highly Pathogenic Avian Influenza in Humans or any disease(s) declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015". The insured peril under the Hybrid Clause is "closure or evacuation … by order of a competent public authority as a result of an outbreak of a notifiable human infectious or contagious disease" (emphasis added).

338. It is not in dispute that: (a) COVID-19 was determined to be a "listed human disease" by the Commonwealth Director of Human Biosecurity on 21 January 2020,[208] (b) COVID-19 was listed as a "notifiable disease" under the *Public Health Act 2010* (NSW) on 21 January 2020,[209] and (c) COVID-19 was made a "National Notifiable Disease" under the *National Health Security Act 2007* (Cth) on 6 February 2020.[210]

339. LCA contends that COVID-19 is not excluded under the Hybrid Clause for two reasons, which operate in the alternative. First, the exclusion is only enlivened in respect of listed human disease determined under the *Biosecurity Act 2015* (Cth) as at the date of inception of the policy.[211] Alternatively, if the exclusion is capable of being enlivened, Swiss Re is precluded from refusing to pay LCA's claim by operation of s 54 of the

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[205] 12 June 2020 *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No. 3) 2020,* Clause 5(1), Schedule 1, Item 16.

[206] As reflected in Issue 2 in the List of Issues for Determination.

[207] As reflected in Issue 2(g) of the list of issues for determination.

[208] *Biosecurity (Listed Human Diseases) Amendment Determination 2020* (Cth).

[209] *Public Health Amendment (Scheduled Medical Conditions and Notifiable Disease) Order 2020.*

[210] *National Health Security (National Notifiable Disease List) Amendment Instrument 2020* (Cth).

[211] LCA Marrickville Defence at [57](viii).

Insurance Contracts Act 1984 (Cth).

Listed Human Disease

340. The phrase "declared to be a listed human disease", in the context of the LCA Policy, means those diseases declared as at the time of inception of the policy (here, on 30 June 2019). Contrary to Swiss Re's submission, the phrase does not operate in an "ambulatory manner".

341. *First,* its temporal language "declared to be" is not prospective. The parties could have — but did not — include such diseases declared "from time to time". In the absence of such temporal extension, the words should not be given an extended operation.

342. *Secondly,* there is the inclusion of the words "highly Pathogenic Avian Influenza in Humans" immediately before the words "or any disease(s)". Highly pathogenic Avian Influeza, was, at the inception, a known infectious disease. The use of the word "other" as a qualifier to the "disease(s) declared" suggests that the latter term has the same quality as highly pathogenic Avian Influenza, namely, that they were known / declared diseases as at the date of the inception of the policy.

343. *Thirdly,* commercial considerations favour a static rather than an ambulatory construction. The diseases that are determined to be listed human diseases may vary within the policy period. If the exclusionary language in the policies is to be given an ambulatory effect, neither insures nor insureds would have certainty as to the scope of the exclusion.

344. *Finally,* it is no answer to say that if "declared to be a listed human disease" is to be given a static construction, so must "notifiable human infectious disease".[212] The terms appear in different parts of the clause, with different contextual text and different purpose. There is no temporal context to the words "notifiable human infectious disease". The language suggests a simple analysis of whether at the time the insured peril arises (namely, the authority takes the action), it was because of an outbreak of disease, that at the time, is "notifiable".

Section 54

345. If the Court concludes that COVID-19 is a "listed human disease" for the purposes of the Hybrid Clause, LCA contends that Swiss Re is precluded from relying on that exclusion by s 54 of the *Insurance Contracts Act.* Section 54(1) provides:

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[212] Swiss Re at [6.4]-[6.12].

> **Insurer may not refuse to pay claims in certain circumstances**
>
> (1) Subject to this section, where the effect of a contract of insurance would, but for this section, be that the insurer may refuse to pay a claim, either in whole or in part, by reason of some act of the insured or of some other person, being an act that occurred after the contract was entered into but not being an act in respect of which subsection (2) applies, the insurer may not refuse to pay the claim by reason only of that act but the insurer's liability in respect of the claim is reduced by the amount that fairly represents the extent to which the insurer's interests were prejudiced as a result of that act.

346. The decision of the Director of Human Biosecurity to list COVID-19 as a "listed human disease" is an "act of some other person", by reason of which the LCA policy would, but for s 54, permit Swiss Re to refuse to pay its claim.

347. *First,* it is not to the point, as Swiss Re asserts, that listing a human disease under the *Biosecurity Act* is the "making of a legislative instrument". It remains the case that it was the act of a person, and was required to be by s 42. That section is in terms that the "Director of Human Biosecurity may, in writing, determine that a human disease is a **listed human disease"** if the Director is satisfied that the jurisdictional pre-requisites in s 42 apply. It requires the act of a specified person, being the "Director of Human Biosecurity". The *Biosecurity (Listed Human Diseases) Amendment Determination 2020* (Cth) is in terms the act of a "person", stating "I, Professor Brendan Murphy, Director of Human Biosecurity, make the following legislative instrument".

348. *Second,* the Director of Human Biosecurity is capable of coming within the meaning of "some other person" in s 54(1). The High Court in *Antico v Health Fielding Australia Pty Ltd* (1996) 188 CLR 652 at 669-670 considered that "the legislation is expressed in broad terms … the act or omission may be that of a third party, 'some other person', who is unlikely to be a party to the contract of insurance in question".

349. The purpose of s 54 was to "prevent reliance upon … provisions which operated, because of an act or omission occurring after the insurance was entered into, to suspend cover or entitle the insurer to deny a claim irrespective of whether the insurer had suffered any prejudice as a result": *Prepaid Services Pty Ltd & Ors v Atradius Credit Insurance NV* (2013) 302 ALR 732 at 767 [140] per Meagher JA.

350. *Third,* as to the argument that s 54 does not operate to overcome "inherent limitations in the 'claim'",[213] it is important to note that s 54 does not depend on where a term appears or the language used. In *East End Real Estate Pty Ltd v CE Health Casualty & General Insurance Ltd* (1991) 25 NSWLR 400, Gleeson CJ (Clarke JA agreeing) noted

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[213] Swiss Re at [6.40].

that s 54 is concerned with the effect of a contract as a matter of substance, stating at 403-404:[214]

> In my view, by choosing words of generality and avoiding reference to the particular type of contractual provision that might produce the result that the insurer may refuse to pay a claim, the legislature has evinced an intention to avoid the result that the operation of s 54 depends upon matters of form. As a matter of ordinary language, it is perfectly appropriate to say in the present case that the effect of the contract of insurance is such that, but for s 54, the [insurer] may refuse to pay the [insured's] claim. The circumstance that this comes about because of the language of that part of the contract of insurance which defines the risk rather than by reason of a breach of a condition of the policy does not seem to me to be material.

351. In *Antico v Health Fielding Australia Pty Ltd* (1997) 188 CLR 652 at 673, the majority said that s 54(1) refers "not to precise concepts of form but to the effect of the contract and asks whether that effect is that the insurer may refuse payment 'by reason of' the relevant act or omission". Here, the plain effect of the listing by the Director is that Swiss Re (contends) it may refuse to pay any claim under the Hybrid Clause. Section 54(1) denies the Hybrid Clause that operation.

352. *Finally,* contrary to Swiss Re's submission, s 54(2) has no relevant operation. The listing of COVID-19 under s 42 cannot "reasonably be regarded as being capable of causing or contributing to a loss" in respect of which cover was provided. LCA's loss (as articulated below) arises by operation of the orders of the New South Wales government in response to the outbreak of COVID-19 in that State and the risk to life it posed. That has no credible connection at all with the listing of the disease by the Director of Human Biosecurity, the effect of which is to enliven certain powers under the *Biosecurity Act 2015* (Cth) in respect of areas of Commonwealth legislative responsibility. It says nothing at all about what any State government may do in response to outbreak or risks within its own jurisdiction.

(b) The ambit of the exclusion[215]

353. Contrary to Swiss Re's submission, even if LCA Marrickville's claim under the Hybrid Clause is precluded because of the *Biosecurity Act* exclusion, this does not operate to preclude its claims under the Catastrophe and Prevention of Access Clauses.[216]

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[214] See also *Antico v Health Fielding Australia Pty Ltd* (1997) 188 CLR 652; *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* (2001) 204 CLR 641.

[215] If the Court concludes that none of the Hybrid, Prevention of Access and Catastrophe Clause responds by reason of the *Biosecurity Act* exclusion in the Hybrid Clause, the Court should still determine the balance of the issues in dispute, given the purposes of the Test Case to provide broader guidance to policyholders and insurers.

[216] Swiss Re at [6.13]-[6.23].

354. *First,* its argument is met with the obvious answer that the parties chose, specifically, to only constrain Clause 9.1.2.1 by the *Biosecurity Act* exclusion. The choice to constrain its operation to the Hybrid Clause evinces an objective intention that only that clause should be so limited. Swiss Re invites the Court to rewrite the policy as if the exclusion was contained in the tailpiece to Clause 9.1.2, but it was not.

355. *Secondly,* the argument is difficult to reconcile with the fact that Clause 9.1.2.3 also relates to "disease" relating to food or drink provided on the premises, but is not limited by any exclusion referable to the *Biosecurity Act.* This stands in the way of Swiss Re's submission that the "business interruption extension is … only for those diseases which are defined in party by the exclusion [in the Hybrid Clause]".[217] It is not: the policy also responds to the diseases to which Clause 9.1.2.3 operates.

356. *Thirdly*, each of the clauses have different terms and fields of operation. The Hybrid Clause operates on orders made as a result of an outbreak within 5 kilometres (as expanded by the Expansion Clause). By contrast, the Catastrophe Clause requires there to be an event of a particular character — "conflagration or other catastrophe" — and action of a civil authority with the purpose of "retarding" that catastrophe. In that regard, the Catastrophe Clause is hardly a more "general" provision over which the Hybrid Clause should prevail. Rather, it requires the civil authority to be responding to an event of a particular threshold of seriousness in order to be engaged.

357. Similarly, the Prevention of Access Clause is only engaged where the legal authority is attempting to "avoid or diminish risk to life". The category of diseases that are of sufficient seriousness to invoke the Prevention of Access Clause may readily be regarded as narrower than those covered by the Hybrid Clause. The latter does not require there to be any view on the part of the legal authority that that there is a risk to life (nor any risk in fact). Accordingly, it is conceivable that the Hybrid Clause would respond in circumstances where the Prevention of Access Clause would not.

358. Further, Swiss Re's submission as to the general and the specific should not be accepted. The clauses are not apt to be characterised in this way. They are dealing with overlapping rather than identical subject matter. And, in any event, as noted in Section B1 above, in the present context, there is no strict rule of construction that the specific prevails over the general, and any interpretive presumption is weak.

359. Finally, Swiss Re's submission suffers from the fallacy that the insured peril is "human infectious or contagious disease" and that therefore cover for business interruption

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[217] Swiss Re at [6.20].

losses consequent upon such disease is limited to the Hybrid Clause.[218] As explained in relation to Taphouse, the insured peril in each of these clauses is the "order" or "action" of the public authority. The clause provides cover in respect of losses suffered as a result of *orders* or *action* of a particular kind, not disease of a particular kind. The exclusion of *losses* arising in connection with a particular disease under the Hybrid Clause does not have anything to say about whether there is *cover* under another clause which relates to action of an entirely different kind.

H5. ASSESSING THE ACT OF THE AUTHORITY

360. LCA Marrickville refers to and repeats the matters set out above in relation to Taphouse. Its primary argument is that the question of cover may be resolved by reference to the text of the instruments comprising the Authority Response-Marrickville and the relevant legal context. Its secondary argument is that the evidence demonstrates that there was in fact an "outbreak" of COVID-19 within 5 kilometres of LCA's premises at the relevant time.

H6. THE STATUTORY INSTRUMENTS IN THEIR LEGAL CONTEXT

361. Each of the statutory instruments comprising the Authority Response-LCA Marrickville were made by the Minister for Health and Medical Research under s 7 of the *Public Health Act 2010* (NSW).

362. The relevant legal context includes at least:

    a. the enabling statute;

    b. the extrinsic material;

    c. prior instruments made under the enabling statute which are referred to in the instrument under consideration.

363. **The Public Health Act.** The primary New South Wales legislation in issue is the *Public Health Act 2010* (NSW). The objects of the Act include to "control the risks to public health" and "prevent the spread of infectious diseases" (s 3(1)(b), (d)). The "protection of the health and safety of the public is to be the paramount consideration in the exercise of functions" under the Act (s 3(1)(f)).

364. Section 7 provides:

7 Power to deal with public health risks generally

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[218] Swiss Re at [6.23].

(1) This section applies if the Minister considers on reasonable grounds that a situation has arisen that is, or is likely to be, a risk to public health.

(2) In those circumstances, the Minister—

(a) may take such action, and

(b) may by order give such directions,

as the Minister considers necessary to deal with the risk and its possible consequences.

(3) Without limiting subsection (2), an order may declare any part of the State to be a public health risk area and, in that event, may contain such directions as the Minister considers necessary—

(a) to reduce or remove any risk to public health in the area, and

(b) to segregate or isolate inhabitants of the area, and

(c) to prevent, or conditionally permit, access to the area.

365. **The Authority Response-LCA Marrickville.** On each occasion that an order comprising the Authority Response-LCA Marrickville was made, the Minister for Health made an express statement as to the "grounds for concluding that there is a risk to public health", so as to enliven the power under s 7 of the *Public Health Act.*

366. The Minister stated the grounds for concluding there was a risk to public health in the orders as follows:

> It is noted that the basis for concluding that a situation has arisen that is, or is likely to be, a risk to public health is as follows—
>
> (a) public health authorities both internationally and in Australia have been monitoring international outbreaks of COVID-19, also known as Novel Coronavirus 2019,
>
> (b) COVID-19 is a potentially fatal condition and is also highly contagious,
>
> (c) a number of cases of individuals with COVID-19 have now been confirmed in New South Wales, as well as other Australia jurisdictions, <u>including by means of community transmission.</u>

367. The 26 March 2020 *Public Health (COVID-19 Gatherings) Order (No. 2),* did not contain the underlined terms in (c) above (but all subsequent orders comprising the Authority Response-LCA Marrickville did contain those words). The "object" of the 25 March 2020 *Public Health (COVID-19 Gatherings) Order (No. 2)* was stated in its accompanying

explanatory note as being to “deal with the public health risk of COVID-19 and its possible consequences”.

368. Contemporaneously with each of these orders were orders made in parallel that prohibited a person from leaving their place of residence without reasonable excuse. The 30 March 2020 *Public Health (COVID-19 Restrictions on Gathering and Movement) Order 2020* provided for the “grounds for concluding that there is a risk to public health” in the same terms as set out at paragraph **Error! Reference source not found.** (that is, by reference to “community transmission”).

369. Each of the orders comprising the Authority Response-LCA Marrickville applied to the whole of New South Wales. This can be compared with later orders, which were directed to parts of New South Wales. For example, the *Public Health (COVID-19 Northern Beaches) Order 2020* expressed the third ground for concluding there was a risk to public health as:[219]

> a number of cases of individuals with COVID-19 have now been confirmed in the Northern Beaches local government area, including by means of community transmission, and there is an ongoing risk of continuing introduction of COVID-19 into the New South Wales community.

H7. HYBRID AND EXPANSION CLAUSES (9.1.2.1, 9.1.2.4)

370. To fall within this clause, the “competent public authority” must have:

    a. ordered the “closure” of the whole or part of the Situation; or

    b. ordered the “evacuation” of the whole or part of the Situation; **and**

    c. done one (or both) of those things “as a result of an outbreak of a notifiable human infectious or contagious disease” … “occurring within a 5 kilometer radius of the Situation”.

371. LCA Marrickville relies on the “closure” limb of this clause (not the evacuation limb). Further, given the operation of the Expansion Clause, LCA contends the Court can determine the matter by reference to the 5 kilometre radius. If the Expansion Clause operates to enliven cover, there is no need to consider whether cover would be enlivened without it.

372. Accordingly, in logical sequence, the issues are:

    a. ***First***, whether there was a “closure” of the “whole or part of the Situation” by

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[219] SOAF Annexure B at #31.

order of a competent public authority; and

b. ***Second,*** whether that was done "as a result of an outbreak of" of COVID-19 "occurring within a 5 kilometer radius of the Situation".

(a) Competent public authority closed a whole or a part of LCA's Situation

373. The terms and effect of the directions comprising the Authority Response-LCA Marrickville meant that there was a "closure" of the Situation.[220]

374. The 26 March 2020 Public Health (COVID-19 Gatherings) Order (No 2) 2020 directed that "the following must not be open to members of the public", and listed "business premises that are … beauty salons". LCA Marrickville's Situation was required to be closed. The fact the order is directed to types of business premises, is, for the reasons given in relation to Taphouse, no objection. The substantive effect was that LCA Marrickville was required to close its "Situation".

375. This construction is supported by the manner in which "Situation" is defined in the LCA Schedule, namely, "elsewhere in Australia including contract sites where the Insured has property <u>or carries on business</u> …" (emphasis added). The Policy is directed to the places where business is carried on. It is not directed at particular specified locations or premises (nor would those locations even be capable of being exhaustively known to the Insurer).

376. The evidence is that LCA's Situation remained closed until 1 June 2020.[221] The fact of the *Public Health (COVID-19) Restrictions on Gathering and Movement Order (No 2) 2020* (NSW) does not alter the position (contrary to Swiss Re's contention).[222] It remained the case that by the order, the "Minister directs that the following must not be open to members of the public", listing "beauty salons". The exception for the "retail sale of goods and gift vouchers" does not change the position that the order required closure.

377. In the context of LCA's Marrickville's premises, the majority of floor space was comprised of treatment rooms.[223] It remained the case that those treatment rooms were required to be closed. The parties chose to refer to "part" of the Situation. The policy therefore responds even following the 15 May 2020 order, in two ways. First, there was a physical closure of those treatment rooms, being "part" of the Situation. Access to a discrete part of LCA's Situation had been completely stopped from happening. Second,

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[220] Issue 1(b) in the List of Issues for Determination.

[221] Fairbanks Affidavit at [9].

[222] Swiss Re at [5.22]-[5.23].

[223] Fairbanks Affidavit at [5].

its premises had been closed to the extent it operated a beauty salon. Its premises were closed. Taking a "realistic view", there was a closure of a part of its premises, being all of that area that comprised its treatment area for the purposes of operating a beauty salon: see *FCA v Arch* at [152].

378. The same logic follows for each of the subsequent orders that restricted the capacity of LCA's premises. The capacity restrictions had the effect of "*closing*" the part of the premises that LCA is otherwise lawfully permitted to operate.

(b) As a result of the outbreak of a notifiable human infectious or contagious disease … occurring within a 5 kilometre radius of the Situation[224]

Construction

379. For the reasons given in relation to Taphouse, LCA contends that the term "outbreak" is constituted by at least one confirmed case of COVID-19 in the 5 kilometre radius.

Application

380. **LCA's primary argument.** LCA relies in particular upon the following features of the statutory instruments and their legal context. First, each of the orders comprising the Authority Response-LCA Marrickville applied within the whole of New South Wales, including to the 5 kilometre radius of Marrickville Metro. The Minister's grounds expressly referred to there being a "number of cases of individuals with COVID-19 … in New South Wales". The Minister concluded that there was a situation that was "likely to be, a risk to public health". In relation to most of the orders comprising the Authority Response-LCA Marrickville, and directions made on 30 March 2020, the Minister expressly stated that there were cases confirmed in New South Wales, "including by means of community transmission".

381. The basis of each of the directions was thus that:

   a. There was an "outbreak" of COVID-19;

   b. The outbreak was of a disease that was "highly contagious";

   c. The outbreak was in all of New South Wales;

   d. The measures were imposed on all of New South Wales as a result of that outbreak.

382. This is confirmed by contemporaneous statements made on behalf of the New South

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[224] Issue 1(d) of the List of Issues for Determination.

Wales Government as to the spread of COVID-19. In a media release on 19 March 2020, the Minister for Health referred to the creation of a State Emergency Operations Centre to "slow the spread of COVID-19".[225] Two days later, NSW Health released an update on confirmed cases, urging "people to practice social distancing" to slow the "spread of an epidemic through the community".[226]

383. The fact that the threat was recognised to exist both inside and outside the radius does not matter. What matters is that the orders were in response to an outbreak in the relevant area, which includes the radius.

384. **LCA's secondary argument.** The material contained in the SOAF and admissions made by Swiss Re in this proceeding also demonstrate that there was (in fact) an "outbreak" of COVID-19 within a 5 kilometre radius of LCA's premises at the relevant time.

385. LCA repeats its submissions as to what constitutes an "outbreak" made in relation to Taphouse. Contrary to Swiss Re's submission, its formulation of "outbreak" as requiring proof of multiple infections, and connection of those infections by "time", "location" and "cause", finds no support in the words of the policy.[227] Nor does it reflect commercial common sense: it appears to require not only the foray into subpoenaed material that has yet to conclude (and will be the subject of the deferred hearing, if necessary), but the additional tender of genomic sequencing information to establish its third requirement of "common cause". The evidentiary hurdles attending this construction suggests that something has gone wrong with the insurer's argument.

386. Returning to the evidence, the SOAF records that there were at least 19 COVID-cases as at 23 March 2020 that recorded postcodes wholly within the radius.[228] There were 132 recorded in LGA's partly within the radius,[229] and the Court can safely infer that it is more probable than not that at least some of those cases were within the radius. As is conceded by Swiss Re, at least 9 of the infections wholly within the radius had a likely source of infection within Australia.[230] This is plainly sufficient, in the context of a disease of the characteristics, seriousness and virulence as COVID-19,[231] to constitute an

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[225] *NSW COVID-19 response headquarters* (Media Release, Premier of New South Wales, 19 March 2020).

[226] *COVID-19 FAQs* (NSW Health, 22 March 2020).

[227] Swiss Re at [5.33].

[228] SOAF at [51].

[229] SOAF at [51].

[230] Swiss Re at [5.40.2].

[231] SOAF at [1]-[27].

"outbreak" at that time and within the radius.

387. It is important to note that the postcode and LGA recorded in the data in the SOAF is the location of "usual residence".[232] The Court should find that is more probable than not that the majority of those cases were actually located within the radius when infected or infectious. The scientific precision of data that is suggested as necessary by Swiss Re[233] is difficult to square with the nature of business interruption insurance and its purpose: to provide a timely capital injection whilst the insured peril continues. To the extent that the Court finds the material before it is not capable of being proving there was an "outbreak" in fact, LCA Marrickville has subpoenaed health authorities and sought to obtain expert evidence to establish that "outbreak". This will be the subject of the deferred hearing of the separate question.

H8. PREVENTION OF ACCESS CLAUSE (9.1.2.6)

388. To fall within this clause, the lawful authority must have:

   a. prevented the use of or access to the Situation; or

   b. hindered the use of or access to the Situation; **and**

   c. done one (or both) of those things in "attempting to avoid or diminish risk to life" within 5 kilometres of the Situation.

389. LCA relies on the "prevented" limb in respect of the first order in the Authority Response-LCA Marrickville, which required it to close. In relies on both the "prevented" and "hindered" limbs for the subsequent orders.

(a) Legal authority prevented or hindered the use of or access to LCA's premises

Construction

390. LCA Marrickville does not contend that the *words "prevents" or "hinders" have a special meaning. These words bear their ordinary meaning.*

391. The Court should not accept Swiss Re's submission that the clause posits a distinction between orders that render access or use of the "*physical premises*", for the reasons explained in relation to Taphouse. These arguments bear more force in the context of the LCA Policy, which expressly refers to orders which not only prevent or hinder access but also "use of". Those words are directed to the practical effect of the orders: noting that the purpose of the policyholder in accessing the premises is plainly to use it to carry

232 SOAF at [36].

233 Swiss Re at [5.37].

on a business. In circumstances where its business is directed not to open, the order "prevents or hinders the use of or access to the Situation".

Application

392. Each of the orders comprising the Authority Response-LCA Marrickville had the effect of either "preventing" or "hindering" the use of or access to its premises.

393. The 26 March 2020 *Public Health (COVID-19 Gatherings) Order (No 2) 2020* directed that "the following must not be open to members of the public", and listed "business premises that are … beauty salons". The order was directed to "business premises", in terms.

394. Each of the subsequent orders, including the order permitting LCA to sell gift vouchers, had the same effect. The orders "prevented" the use of its premises as a beauty salon. The later orders restricting capacity "hindered" its use of the Situation by imposing limitations on the number of persons who could attend it.

395. Looking at the consequences of the 1 June *Public Health (COVID-19 Restrictions on Gathering and Movement Order (No 3) 2020* (NSW), for example, LCA Marrickville was only capable of providing services for up to 5 customers at a time as a result of the capacity restrictions imposed by the order.[234] The order both "hindered" the "use of" the Situation, and "access" to the Situation was "prevented" in respect of the balance of clients who had to be excluded from the premises.

(b) Attempting to avoid or diminish risk to life within 5 kilometres of the Situation

Construction

396. The clause applies to action taken by a lawful authority attempt to "avoid or diminish risk to life … with 5 kilometres of" LCA Marrickville's premises.

397. That is, it applies to action taken:

    a. in attempt to avoid a risk to life, where the risk of harm to life has not yet commenced, and may (or may not) ever occur; and

    b. in attempt to diminish risk to life, where the risk to life has not yet occurred and may occur notwithstanding the action taken.

Application

398. **LCA Marrickville's primary argument.** The language of the statutory instruments and

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[234] Fairbanks Affidavit at [9].

their legal context support the conclusion that the instruments were made in "attempting to avoid or diminish risk to life" within 5 kilometres of the Situation, such that:

a. that is sufficient to engage the clause;

b. it is not necessary for the insured to go a step further and establish that there was **<u>in fact</u>** such a risk;

c. it is not permissible for the insurer to contradict the instruments by seeking to establish that, contrary to what they convey, there was **<u>in fact</u>** no such risk.

399. As explained above, the Minister expressly stated on each occasion an order was promulgated that there was a "risk to public health", including because of "a number of cases of individuals with COVID-19" that "have now been confirmed in New South Wales". The "object" of the 26 March 2020 *Public Health (COVID-19 Gatherings) Order (No. 2)* (which required LCA to close) was to "deal with the public health risk of COVID-19 and its possible consequences".[235]

400. In those circumstances, the Court can conclude that the action of the Minister was "attempting to avoid or diminish risk to life" within 5 kilometres of the Situation. Such was the expressly stated intention of the Minister. As to Swiss Re's contention that the lawful authority must be responding only to a localised risk (to the exclusion of broader risk), that argument should be rejected. The parties cannot reasonably be supposed to have intended that risks to life outside the particular radius could be set up so as to displace coverage. As the Court reasoned in *FCA v Arch* at [194], in respect of an "outbreak" within a radius"

> [N]o reasonable person would suppose that, if an outbreak of an infectious disease occurred which included cases within such a radius and was sufficiently serious to interrupt the policyholder's business, all the cases of disease would necessarily occur within the radius. It is highly likely that such an outbreak would comprise cases both inside and outside the radius and that measures taken by a public authority which affected the business would be taken in response to the outbreak as a whole and not just to those cases of disease which happened to fall within the circumference of the circle described by the radius provision.

401. If the risk exists within the radius, and the order is made in response to it, it is a red herring to say it might also exist outside that radius.

402. **LCA Marrickville's secondary argument.** Assuming, contrary to LCA's primary argument, that it is necessary to show that there was <u>in fact</u> a risk to life within the radius, the Court can be satisfied on the evidence that there was such a risk. There were cases

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[235] *Public Health (COVID-19 Gatherings) Order (No. 2),* Explanatory Note.

of COVID-19 within the radius prior to 26 March 2020, including 9 cases who acquired COVID-19 locally. In the context of the seriousness of COVID-19 to human health, there was a "risk to life" within the radius arising from the presence and spread of COVID-19.[236] This is further evidenced by contemporaneous documents published by NSW Health and the NSW Government, including the Premier, as to deaths as a result of COVID-19 prior to the introduction of orders comprising the Authority Response-LCA Marrickville.

403. If it is necessary to inquire into the mind of the authority, the Court can safely draw the inference that the action was taken as a result of the specific localised risk within 5 kilometres of LCA Marrickville's premises. The map depicting that 5km radius shows that it covers significant areas of inner Sydney, including Sydney Airport and a large proportion of the Sydney CBD.[237] As Swiss Re points out, of the 29 persons ordinally resident in a postcode wholly within the radius during the relevant period, 20 had a "likely source of infection" of "overseas".[238] It is more likely than not that international arrivals entered Sydney through the airport. Contemporaneous statements by the NSW Government indicated its concern for persons arriving into Sydney from other countries.[239] In addition, approximately 15% of cases in the entire state of NSW as at 23 March 2020 were attributed to LGAs partly within the 5km radius of LCA's premises. Thus, if it be necessary that there be a "causal relationship between the localised risk and the authority response to that risk",[240] the Court can safely find, by inference from the case numbers and the relative concentration in the 5km radius, this causal relationship existed.

H9. CATASTROPHE CLAUSE

404. The insured peril under the Catastrophe Clause is the "action of a civil authority during a conflagration or other catastrophe for the purpose of retarding same".

405. On 31 August 2021, the Court made orders granting LCA Marrickville leave to file an Amended Defence and Amended Statement of Cross-Claim.

406. By its amended pleadings, LCA Marrickville contends that the "catastrophe" is the "COVID-19 pandemic and its impacts", and relies on as particulars:

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[236] SOAF at [1]-[27].

[237] SOAF at [48].

[238] Swiss Re at [5.40.2].

[239] NSW Health, Media Release (3 March 2020).

[240] Swiss Re at [7.9].

i. the characteristics of COVID-19, including the kind and severity of its symptoms;
ii. COVID-19's fatality rate;
iii. COVID-19's transmissibility;
iv. COVID-19's prevalence both globally and nationally;
v. COVID-19's impact on mortality from other medical conditions;
vi. COVID-19 associated delays in treatment and screening for other medical conditions and supply of medical equipment and consequent prolongation of suffering
vii. the impact of COVID-19 and COVID-19-related government restrictions on the capacity of the general public to engage in work and leisure activities and the social and economic disruptions caused thereby;
viii. the economic consequences of COVID-19 and COVID-19-related government restrictions including increases in unemployment and declines in gross domestic product growth;
ix. the impact of COVID-19 and COVID-19-related government restrictions on the prevalence and severity of mental health conditions in the general public;
x. the impact of COVID-19-related restrictions on movement and gatherings, including for matters such as weddings and funerals; and
xi. the interruption to education caused by COVID-19-related restrictions.

407. Importantly, COVID-19 and the pandemic are not insured perils under the policy. What is an insured peril under the catastrophe clause are the actions of a civil authority during a catastrophe.

408. LCA Marrickville relies on the same analysis that the policyholders have undertaken in respect of Taphouse above: the question for this Court is not whether "pandemics" are covered under the Catastrophe Clause. It is whether the events the Authority Response-LCA Marrickville is an insured peril.

409. The Catastrophe Clause thus requires a consideration of the following three elements:

a. **First,** whether there was "action of a civil authority";

b. **Second,** whether it was taken "during a conflagration or other catastrophe", and

c. **Third,** whether it was "for the purpose of retarding" that "conflagration or other catastrophe".

410. Swiss Re accepts that the Authority Response-LCA Marrickville was the "action of a civil authority".[241] The second and third question are dealt with in turn.

(a) Conflagration or other catastrophe

411. LCA relies on the matters set out in the SOAF as to the nature, spread and seriousness

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[241] Swiss Re at [8.12].

of COVID-19.[242] It is contended that those matters are sufficient to comprise a "catastrophe" in the ordinary sense of those words. This is consistent with the construction given to the term by Allsop CJ in *Star* at [172]: "of course a pandemic of disease can in ordinary language be described as catastrophic or as a public health or economic catastrophe".

412. It is important to note that the construction of "catastrophe" as requiring physical loss in *Star* was premised on two primary features of the policy. The first was that the policy was "overwhelmingly founded upon the causing of physical loss, destruction or damage". The particular clause in question was a Memorandum entitled "Civil Authority Extension" attaching to the second section of the Policy. By way of contrast, the Catastrophe Clause is not contained in a separate memorandum. It is part of a sub-section of the Policy, the whole of which is directed to matters that have little to do with physical destruction, but rather relate to infectious or contagious diseases; murder or suicide, violent crime or robbery, injury and illness or disease arising from food or drink. The same constructional implication in *Star* does not arise in the context of the LCA Wording.

413. The second decisive feature in *Star* was the term "loss" which was containing within the Memorandum, which was in the following terms:

> The word "Damage" under Section 2 of this Policy is extended to include loss resulting from or caused by any lawfully constituted authority in connection with or for the purpose of retarding any conflagration or other catastrophe.

414. Allsop CJ concluded that the word "loss" within that clause could not be construed to mean "financial loss" because the indemnity clause would make no sense, reading as "financial loss causing interruption or interference with the Business" (at [170]). This second textual issue does not arise in this policy, because the structure of Clause 9.1 is to provide that Swiss Re is to indemnify against "loss resulting from the interruption of or interference with the Business", provided it is "in consequence of" the insured perils in Clause 9.1.2.

415. As for the relevance of the word "conflagration", it is not disputed that a "conflagration" is an extensive and destructive event such as a fire.[243] But it is not the case that this somehow limits the term "catastrophe" in this policy to something physical. The term "catastrophe" is wide. Many dictionaries define it as a sudden and widespread

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[242] SOAF at [1]-[27].

[243] See, eg, *Oxford English Dictionary* (12th ed), *Cambridge English Dictionary* (online) 'a large and violent event, such as a war, involving a lot of people'.

disaster,[244] but its ordinary usage extends more widely to extensive or notable disasters. The *Oxford Dictionary,* for example defines it as an "event causing great damage or suffering".[245] There is no basis for treating "conflagration" as confining the term "catastrophe": it does not establish a relevant "genus". A conflagration is just one of many things that may amount to a catastrophe.

416. It should also be noted that this reading of "catastrophe" does not extend the cover provided for by the policy to the indeterminate consequences of the COVID-19 pandemic. The cover is limited to that which is caused by the action of the civil authority. It is, in truth, relatively narrow in scope. Moreover, the fact that the COVID-19 pandemic is now ubiquitous is irrelevant to a consideration of whether it could properly be considered a "catastrophe" as at the date of the Authority Response-LCA Marrickville.

417. As to the question of whether the COVID-19 pandemic was a "catastrophe", the Court would accept that on the evidence before the Court as to the nature, prevalence and spread of COVID-19 during 2020 and its human health consequences, it was a "catastrophe" within the "ordinary meaning" of that word: see *Star* at [203]. It is aptly described as "sudden", noting that prior to 31 December 2019 it did not exist outside Wuhan, China.[246] By March 2020, it was described by the WHO as a "pandemic",[247] and by the end of March 2020 there were over 4000 cases in Australia of the disease.[248] It has caused great "suffering", both in terms of human health and economic impact. If further evidence is necessary to make good that proposition, LCA Marrickville intends to adduce that evidence at any deferred hearing.

(b) For the purpose of retarding the conflagration or catastrophe

418. The Authority Response-LCA Marrickville was aimed at retarding the COVID-19 pandemic in Australia. That was the expressly stated purpose of the 26 March 2020 *Public Health (COVID-19 Gatherings) Order (No 2) 2020:* to "deal with the public health risk of COVID-19 and its possible consequences".

419. All subsequent orders were for the stated purpose of dealing with the "risk to public health" arising from COVID-19, being a "potentially fatal" condition which is also "highly contagious". The substance of the orders was to close those premises where risk of transmission was highest and to limit the movement of persons around Sydney and New

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244 *Macquarie Dictionary* (online); *Macquarie Dictionary* (7th ed).

245 *Oxford English Dictionary* (12th ed).

246 SOAF at [1].

247 SOAF at [6].

248 SOAF at [34].

South Wales. The National Cabinet announcement prior to the introduction of the first order in the Authority Response-Marrickville expressly referred to working to "slow the spread of coronavirus to save lives".[249] The Court would be satisfied that the action of the NSW Government was done with the purpose of retarding the incipient domestic catastrophe associated with the spread of the global COVID-19 pandemic to New South Wales.

H10. CAUSATION

420. The Policy provides cover for "loss" <u>resulting from</u> interruption of or interference with the "Business", in consequence of each of the events the subject of the Hybrid, Prevention of Access and Catastrophe Clause. As with Taphouse, the correct approach to the question is:

    a. Was there loss?

    b. Did that loss result from interruption or interference with LCA Marrickville's business?

    c. Was that interruption or interference <u>in consequence of</u> the Authority Response-LCA Marrickville?

421. **Loss.** Importantly, the question of quantum of loss is not before the Court. However, LCA Marrickville has put before the Court its profit and loss statements for the period January 2019 to December 2019 and January 2020 to December 2020.[250] As is apparent from those statements, LCA Marrickville suffered a significant decline in gross profit from $[redacted] in February 2020 to $[redacted] in March 2020, $[redacted] in April 2020 and $[redacted] in May 2020.[251] This is to be compared with its gross profit of $[redacted] in March 2019, $[redacted] in April 2019 and $[redacted] in May 2019.[252] This is sufficient for the Court to be satisfied, for the purposes of resolving the questions of construction in this case, that there was loss.

422. **Interruption or interference.** The Court can similarly be satisfied that the loss resulted from "*interruption or interference*" with LCA Marrickville's business. The Fairbanks Affidavit makes clear that from late March to June 2020, LCA Marrickville took steps in response to the Authority Response, being to close and then to reopen but only at limited

[249] SOAF Annexure A at #17.

[250] Fairbanks Affidavit at RIF-1.

[251] Fairbanks Affidavit at RIF-1 at 2.

[252] Fairbanks Affidavit at RIF-1 at 1.

capacity. LCA Marrickville's ordinary functioning of business was interrupted by reason of the steps taken in response to the Authority Response-LCA Marrickville.

423. **In consequence of.** The principles are as set out in relation to Taphouse above. LCA Marrickville does not contend that the words "in consequence of" bespeak of a different test to that of "proximate" cause.

424. In the case of each of the orders comprising the Authority Response-LCA Marrickville, the Court has evidence that LCA Marrickville responded by acting in compliance with it. The compelling common sense judgment in the present case is that the orders that required LCA Marrickville to close or operate at a reduced capacity were the dominant cause of its loss.

425. LCA Marrickville does not contend, contrary to the suggestion made by Swiss Re,[253] that there is cover for the consequences of "notifiable human infectious or contagious disease", a "conflagration or other catastrophe" or a "risk to life or damage to property". The parties appear to be in furious agreement that the relevant matter for causation is the orders or action of the authority.

H11. ADJUSTMENT CLAUSE

426. The defined terms "Rate of Gross Profit" and "Standard Turnover" in the Basis of Settlement Clause are defined in Clause 8 for the purpose of Section 2. Each is conditioned by the Adjustment Clause, which provides that "adjustments shall be made to **Rate of Gross Profit, Standard Turnover** … as may be necessary to provide for the trend of the **Business** and for variations in other circumstances affecting the **Business** either before or after the date of the **Damage** which would have affected the **Business** had the **Damage** not occurred".

427. There is no dispute that the "Damage" is the Authority Response-LCA Marrickville.[254] Consistently with the argument made in respect of Taphouse, the Adjustment Clause is part of a quantification machinery. Broader impacts of the COVID-19 pandemic, being matters which arise out of the same "underlying or originating" cause as the insured peril are not excluded as "trends": this would take away cover for losses that might be concurrent proximate causes of loss, but are not excluded (see *FCA v Arch* at [264]). The trends clause should not be construed so as to take away from the cover in this way.

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253 Swiss Re at [9.2].

254 Swiss Re at [9.4].

H12. THIRD PARTY PAYMENTS

428. LCA Marrickville received Jobkeeper payments, rental waiver from its commercial landlord, relief from its franchisor, and NSW Government grants. The operation of each of these are set out in Annexure A.

429. None of these payments reduce the amount payable to LCA Marrickville under its policy.

430. The argument made by Swiss Re introduces a false premise, being "losses suffered". LCA Marrickville's policy does not provide an indemnity for loss *simpliciter*. Rather, the Basis of Settlement Clause provides for a carefully calibrated calculation, comprising:

    a. In respect of reduction in "Turnover", the sum produced by applying the "Rate of Gross Profit" to the amount by which the Turnover falls short of the "Standard Turnover"; and

    b. the additional expenditure necessary and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in "Turnover" which would have otherwise taken place because of the insured peril, but not exceeding the sum produced by applying the "Rate of Gross Profit" to the amount of the reduction thereby avoided.

431. None of these integers, nor the defined terms, contain allowances for third party payments. The parties agreed that "*Turnover"* is the "*money (less any discounts) paid or payable to the insured for goods and services delivered and for services rendered*". That does not account for grants or third party payments made by the government (or any other body).

432. Swiss Re's reliance on Clause 10.1.3 does not assist it.[255] This is because the "sum saved" must be "in respect of such charges and expenses of the Business payable out of Gross profit as may cease to be reduced <u>as a consequence of the Damage</u>" (emphasis added). The emphasised words make clear that the reduction in expenditure must be due to the interference (that is, the order). The commercial purpose of the clause is readily ascertainable: if a business does not have to purchase the raw materials for the provision of its goods and services, that must be accounted for. This construction works harmoniously with the definition of "Turnover", which only accounts for the income derived from the sales, and not the cost of that sale.

433. None of the orders causative of LCA Marrickville's loss provide for third party payments

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[255] Swiss Re at [9.15].

to it.

H13. INSURANCE CONTRACTS ACT

434. Interest is payable from the period commencing on the day from which it was "*unreasonable for the insurer to have withheld payment*". LCA contends that interest ought run from the day its claim was denied (18 September 2020)[256] for the reasons given in respect of Taphouse.

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[256] LCA Outline Document at [21].

I. DR MICHAEL

I1. THE POLICYHOLDER

435. The respondent in NSD 145/2021, Dr Jason Michael t/a Illawarra Paediatric Dentistry (**Dr Michael**) is the insured under a "Dentists Business Insurance" Policy placed with Guild Insurance Limited (**Guild**) (**Dr Michael Policy**). Dr Michael operates a dental practice located in Wollongong, NSW.[257]

I2. THE POLICY

436. The Dr Michael Policy comprises a policy schedule (**Dr Michael Schedule**)[258] and wording (**Dr Michael Wording**).[259] The period of insurance is 28 October 2019 to 28 October 2020.[260] The "Insured" is "Jason Michael", and the policy identifies his "Professional Services" and "Business" as "dentist".[261] The "Business Premises Address" is "Level 2, 172-174 Keira Street, Wollongong NSW 2500",[262] being the site of Dr Michael's dental practice.[263]

437. The classes of insurance taken under the policy were identified in the Dr Michael Schedule as:

    a. Business Property;

    b. Business Interruption;

    c. Theft;

    d. Machinery and Electronic Equipment Breakdown; and

    e. Glass.[264]

438. The "cover" is described on page 2 of the schedule. Under "Business Property", cover is "not taken" for buildings, business contents or business stock. The only cover taken is for "Business Contents", including for floods. Under the "Business Interruption"

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[257] The practice is operated through a service company: Illawarra Paediatric Dentistry Pty Ltd: Affidavit of Jason Michael sworn 18 August 2021 at [3] (**Michael Affidavit**).

[258] CB Vol A 828.

[259] CB Vol A 732.

[260] Dr Michael Schedule at 1 [CB Vol A 828].

[261] Dr Michael Schedule at 1 [CB Vol A 828].

[262] Dr Michael Schedule at 1 [CB Vol A 828].

[263] Michael Affidavit at [5].

[264] Dr Michael Schedule at 1 [CB Vol A 828]. Other classes of insurance *not* taken were "Money", "General Property", "Commercial Motor Vehicle", "Employee Dishonesty", "Tax Audit" and "Professional Indemnity".

section, the period of indemnity is “12 months”, with cover as follows:

a. Loss of Income Sum Insured: $[redacted];

b. Additional Increased Cost of Working: “Not Taken”;

c. Claims Preparation Costs Sum Insured: $[redacted];

d. Loss of Rent: “Not taken”;

e. Accounts receivable: “Not taken”;

f. Flood Cover: “Not Included”.

439. The relevant terms of the policy for these proceedings are contained in “Section — Business Interruption” which commences on page 50 of the Dr Michael Wording. The section commences with a series of definitions. It is then divided into four main sub-sections, entitled “What is Covered”,[265] “What is Not Covered”,[266] “Basis of Settlement”,[267] and “Additional Benefits”.[268]

440. The “What is Covered” section states that “We will Cover You for loss of Income during the Indemnity Period following interruption to or interference with the Business as a result of: a. Damage for which a Claim is Covered under Section — Business Property; b. Theft for which a claim is Covered under Section — Theft; c. Loss for which a claim is Covered under Section — money; d. Breakage for which a claim is Covered under Section — Glass; or e. Loss or Damage for which a claim is Covered under Section — General Property; and the Income ceasing or reducing as a direct result of the Damage, Theft, Breakage or Loss”.[269]

441. The “Additional Benefits" provides that “We will, subject to all of the provisions of this Policy, also Cover You in relation to the following additional benefits”. The penultimate listed benefit is the basis of Dr Michael’s claim in this proceeding, being a **Hybrid Clause.** It is in the following terms:[270]

> **Prevention of Access**
>
> 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:

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[265] Dr Michael Wording at 50 [CB Vol A 781].

[266] Dr Michael Wording at 50 [CB Vol A 781].

[267] Dr Michael Wording at 51 [CB Vol A 782].

[268] Dr Michael Wording at 51 [CB Vol A 782].

[269] Dr Michael Wording at 50 [CB Vol A 781].

[270] Dr Michael Wording at 53 [CB Vol A 784].

a. the intervention of any lawful authority resulting from threat of damage to property in the immediate vicinity of the Business Premises which prevents access to or hinders the use of the Business Premises;

b. damage to buildings in which the Business Property is contained or forms part of whether the Business Property forming part of or contained in the complex is damaged or not:

Provided that:

in respect of damage Covered under clauses a. and b. above, such damage, if it occurred at the Business Premises, would be Covered under Section – Business Property; or

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.

442. The **Basis of Settlement Clause** provides, in respect of the "Loss of Income" section, as follows:[271]

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;

ii. if, during the Indemnity Period, Business Stock shall be sold or services shall be rendered elsewhere than at the Location of Risk stated in the Schedule for the benefit of the Business, either by You or by others on Your behalf, the money paid or payable in respect of such sales or services shall be brought into account in arriving at Income lost during the Indemnity Period;

iii. if the Damage occurs before the completion of the first year's trading of Your Business at the Location of Risk We will calculate Your Income to mean the proportional equivalent for a period of twelve (12) months of the actual Income realised during the period between the commencement of the Business and the date of the Damage occurring; and

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[271] Dr Michael Wording at 51 [CB Vol A 782].

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.

443. The capitalised terms in the Basis of Settlement Clause are defined as follows:

a. **Income** means the money paid or payable to You for Business stock sold (less the net purchase cost of such business Stock) and/or for services rendered in the course of the Business at the Business Premises and any other income payable to the Business for the twelve (12) months immediately preceding the date of the Loss but excluding Rent.

b. **Indemnity Period** means 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; or

   b. the date when the Income of the Business or the Rent is no longer affected; whichever occurs first.

444. Importantly, there is a distinction between the type of cover provided in the Hybrid Clause by (a) and (b), as compared to (c). The cover under (a) and (b) is referable back to and confined by the tailpiece to physical damage that would be covered under the earlier Business Property section. By contrast, under (c), there is no tailpiece limiting cover in that way. Dr Michael claims under (c).

I3. THE CLAIM

445. Dr Michael has made a claim for indemnity under the Dr Michael Policy. That claim was denied by Guild.[272] In these proceedings, Dr Michael contends that the Hybrid Clause responds to his loss. The insured peril under the Hybrid Clause is "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 … human infectious or contagious diseases or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises".

446. To fall within the Hybrid Clause, the competent "government or statutory authority" must

[272] Michael Affidavit at [36]-[40].

have ordered:

a. the closure or evacuation of the whole or part of the Business Premises; **and**

b. that order must have arisen "directly or indirectly" from

i. "human infectious or contagious disease … at the Business Premises", **or**

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

447. Dr Michael contends that the Hybrid Clause is engaged because there has been an "order" of a "competent government or statutory authority" that:

a. arose "indirectly" from human infectious or contagious disease at the Business Premises; and/or;

b. arose "directly or indirectly" from the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises.

448. The Hybrid Clause is engaged by reason of restrictions imposed on dentists in New South Wales by the Australian Dental Association (**ADA**), the Dental Board of Australia (**DBA**), the Dental Council of NSW (**Dental Council**), and the Australian Health Protection Principal Committee (**AHPPC**) (**Authority Response-Dr Michael**). The restrictions imposed by these bodies are set out in Dr Michael's Further and Better Particulars filed 22 July 2021 (**Particulars**).

449. Dr Michael relies on the following:

a. The **Level 2 Restrictions** announced by the ADA on 23 March 2020. These restrictions required that all treatments likely to generate aerosols be deferred, all surgical extractions should be referred to specialists, and elective implant dental treatments to be deferred.[273]

b. The **Level 3 Restrictions** announced by the ADA on 28 March 2020. These restrictions required that only dental treatments that did not generate aerosols, or where treatments generating aerosols were limited to particular circumstances, were able to be performed. All other routine recall examinations and treatments for patients not fitting particular risk categories had to be deferred.[274]

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[273] Michael Affidavit at [18].

[274] Michael Affidavit at [23].

c. The **Level 2 Restrictions** announced by the ADA on 21 April 2020.

d. The **Level 1 Restrictions** announced by the ADA on 8 May 2020. These restrictions permitted normal clinical practice but required Dr Michael to screen patients and treat only those who did not meet risk factors for COVID-19.[275] Although Dr Michael contends that the Level 1 Restrictions are capable of constituting an insured peril, he does not rely on those restrictions for the purposes of this claim because he did not suffer any loss of income due to those restrictions.

450. The substance of the restrictions must be considered in determining whether they fall within the terms of the policy. Importantly, they are to be understood as not only imposed by the ADA but also ordered by the DBA, Dental Council, Ahpra and AHPPC, and so constitute orders of a "competent government or statutory authority". This is explained in Section I4 (a) below.

I4. THE HYBRID CLAUSE

451. As has already been observed, to fall within this clause, there must be a "closure or evacuation" of the "whole or part of the Business Premises by order of a competent government or statutory arising 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".

452. Each of these elements will be addressed in turn. In logical sequence, the issues are:

a. ***First,*** whether the Authority Response-Dr Michael constitutes the orders of "a competent government or statutory authority";

b. ***Second,*** whether the Authority Response-Dr Michael were orders for the "closure or evacuation" of the "whole or part of the Business Premises";

c. ***Third,*** the construction of the causative part of the clause.

(a) Order of a competent government or statutory authority

Competent government or statutory authority

453. Guild accepts that the Prime Minister "represents the Federal Government" (and presumably, that he is therefore capable of constituting a "competent government …

[275] Michael Affidavit at [30].

authority", although Guild does not appear prepared to expressly concede the point).[276]

454. It also accepts that the Dental Board of Australia "may be treated as a statutory authority", noting that board is created under the Uniform *Health Practitioner Regulation National Law:* see, eg, *Health Practitioner Regulation National Law (NSW),* Part 5 and *Health Practitioner Regulation National Law Regulation 2018,* reg 4.

455. It further accepts that the Dental Council of NSW is a "statutory authority", created under s 41B of the *Health Practitioner Regulation Law* (NSW).

456. Guild does not accept that the ADA or the AHPPC are "*competent government or statutory authorities*".[277] Dr Michael contends that the orders promulgated by the ADA and the AHPPC have the necessary quality of being "orders of a competent government authority" by reason of the backing given to them by the Dental Board of Australia, the Dental Council and the Prime Minister.

457. The Level Two Restrictions were announced by the ADA on 23 March 2020.[278] The ADA acknowledged that it was "not the regulator" but that it had "issued a clear recommendation in the interest of public and professional safety".

458. The Level Three Restrictions were announced by the ADA on 26 March 2020.[279] The AHPPC also published a recommendation that dental practices implement the Level 3 restrictions that the ADA had outlined.[280] Immediately preceding that announcement, the Dental Council of NSW provided an update, stating that the AHPPC had recommended that all dental practices implement Level 3 Restrictions. The DBA similarly released an "urgent alert" to dental practitioners referring to the ADA's restrictions and repeating what the ADA had said, namely that dentists "should only perform dental treatments that do not generate aerosols, or where treatment generating aerosols is limited", and that "all routine examinations and treatments should be deferred".[281]

459. On 2 April 2020, the DBA and Ahpra reiterated that "The board expects all dental practitioners … to follow the AHPPC's recommendation and apply it in their practice setting".[282] On 7 April 2020, the ADA confirmed that the level 3 restrictions were an

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276 Guild at [29].

277 Guild at [30], [33].

278 Particulars at #2

279 Particulars at #10.

280 Particulars at $12.

281 Particulars at #13.

282 Particulars at #14.

"expectation of the Dental Board".[283] There is no evidence that this was otherwise than correct: it is not suggested that the ADA was falsely representing the DBA's expectations.

460. In those circumstances, the restrictions imposed by the ADA, as adopted and given force by the DBA and Dental Council of NSW are capable of constituting orders of a "competent government or statutory authority". It is irrelevant that they orders were first promulgated by the ADA. What matters is they were given the quality of being "of" a competent government or statutory authority by adoption. This is consistent with the reasoning in *FCA v Arch* at [116], where the Court held that the term "restrictions imposed" does not require a restriction to have "force of law". Rather, "a mandatory instruction may be given by a public authority in the anticipation that legally binding measures will follow shortly afterwards, or will do so if compliance is not obtained".

<u>"Order"</u>

461. Each of the Level 2 and Level 3 restrictions were expressly framed in mandatory terms. So much is clear from their title of "restrictions".

462. The 23 March update which preceded the Level 2 Restrictions stated that the "ADA's advice is that dental practices should immediately restrict dental treatment". It then stated that state and territory health departments may place "further restrictions on dental practices".[284] Immediately following this, the Level 2 Restrictions were released and were in terms of "Services that can be performed" and contained a direction to "defer all treatments that are likely to generate aerosols".[285]

463. Similarly, the Level 3 Restrictions were framed in terms that dentists "should only perform dental treatments that do not generate aerosols" and instructed that "all routine examinations and treatments should be deferred".[286]

464. It would be a triumph of form over substance if a communication could only meet the description of an order if it used the word "must" or "require", in circumstances where the order had the backing of the relevant disciplinary body, was intended to be received in mandatory terms, and was understood by the recipient to be mandatory.[287]

465. A failure to follow the recommendation of a statement that applies to medical

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[283] Particulars at $15.

[284] Particulars at #2.

[285] Particulars at #3.

[286] Particulars at #13.

[287] Michael Affidavit at [14].

practitioners is capable of constituting unsatisfactory professional misconduct: see, eg, *Health Care Complaints Commission v Reid* [2018] NSWCATOD 162 at [169]. Section 41 of the *Health Practitioner Regulation National Law (NSW)* states expressly that a "code or guideline" approved by a National Board is admissible in proceedings "as evidence of what constitutes appropriate professional conduct or practice for the heath profession".

466. Taking the point to its logical conclusion: if a dentist did not comply with the Level 2 and Level 3 restrictions with consequences for patient health, it is not difficult to envisage a Tribunal making a finding as to the character of that conduct falling within the concept of "unsatisfactory professional conduct" or "professional misconduct" and producing disciplinary consequences.

(b) Closure or evacuation of a whole or part of the Business Premises

467. The clause requires that the orders have the effect of the "closure or evacuation" of the whole or part of the Business Premises.

468. The arguments as to whether the premises were "closed" are set out at paragraphs [38] to [42] of Guild's submissions. There is force in these submissions. Perhaps all that can be said against them is that it may be open to conclude that the "closure" of the Business in respect of some operations constitute a closure of a "part" of the Business premises.

(c) The causative element

<u>Construction</u>

469. The Hybrid Clause employs the term "directly or directly" in respect of the causative aspect. The text and context of the clause demonstrate that a broader nexus will satisfy the causative requirement. In particular, the clause specifically employs a broader connector than, for example, the poisoning clause ("poisoning directly caused by the consumption food"), the public utilities clause ("as a result of"), or the prevention of access-damage to property clause ("resulting from").

470. To fall within the Hybrid Clause, the order need only arise either "directly" <u>or</u> "indirectly" from: "human infectious or contagious diseases at the business premises" **<u>or</u>** the "discovery of an organism likely to result in human infectious or contagious disease at the business premises".

471. Orders may meet this description in two ways.

472. ***First***, if they "indirectly" arise from "human infectious or contagious diseases at the business premises". This requires something less than such disease at the premises.

For example, an order will "indirectly" arise from such disease at the business premises if it relates to such disease at the business premises despite there not being actual occurrence. An order preventing the threat of transmission of such disease at the business premises is one apt to fit this description.

473. It can readily be accepted that an order arising "directly" from human infectious or contagious disease" requires there to be COVID-19 *at the premises.* But in order for the term "indirectly" to have some further operation, something less must engage the clause – that being the construction described above.

474. ***Second***, the order can arise "directly or indirectly" from the discovery of an organism that is likely to result in COVID-19 at the business premises. This is the grammatical reading of the phrase, which connects the "business premises" to the "likely to result", not the "discovery". If Guild's construction were correct, the policy would instead read "discovery of an organism at the business premises that is likely to result in human infectious or contagious diseases".

Application

475. On a plain reading of the Level 2 Restrictions and Level 3 Restrictions, each arose "indirectly" from COVID-19 at the business premises. On a purposive reading of these orders, they were directed to the risk of COVID-19 at the business premises. For example, the ADA Dental Service Restrictions referred to reducing "transmission risks for COVID-19".

476. The restrictions also arose from the "discovery" of SARS-CoV-2, which was likely to result in COVID-19 at the business premises. Consistently with the argument in Taphouse , Dr Michael's *primary* argument is that the restrictions are capable of being read as directed to that purpose. The restrictions were aimed at dental practices, being high risk areas for the transmission of COVID-19. This is demonstrably clear by the focus on "aerosols",[288] and the risk of aerosol transmission of COVID-19.[289]

477. Dr Michael's secondary argument is that there was SARS-CoV-2 discovered in Wollongong, NSW, which was likely to result in COVID-19 at his premises. This is demonstrated by the cases of COVID-19 in the suburb of Wollongong at the relevant

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[288] *ADA Dental Service Restrictions in COVID-19* (25 March 2020).

[289] SOAF at [12].

time,[290] and the virulence and transmissibility of the disease.[291]

I5. CAUSATION

478. The causation questions under the Hybrid Clause turn on the words of causation used in the clause, namely: whether there is loss that results from "your inability to trade or otherwise conduct Your business" caused by the closure or evacuation by the relevant order. As with Taphouse, the correct approach is:

    a. Was there loss?

    b. Did that loss result from the inability to trade or otherwise conduct the business?

    c. Was that inability caused by the Authority Response-Dr Michael?

479. **Loss**. Dr Michael intends to tender his profit and loss statements for the periods January 2019 to June 2021.[292] Dr Michael also gives evidence that 74 appointments were cancelled due to the COVID-19 restrictions, and only 39 patients attended appointments.[293] That evidence is sufficient for the Court to be satisfied, for the purposes of resolving the questions of construction in this case, that there was loss.

480. **Inability to trade**. The Court can similarly be satisfied that the loss resulted from the "inability to trade or otherwise conduct the business".

481. **Caused by.** The compelling common sense judgment in the present case is that the relevant directions were the dominant cause of Dr Michael's loss of profit. Dr Michael does not cavil with the proposition that it has *at least a prima facie* onus to prove the loss claimed. This requires it to point to its reduction in gross profit, and in circumstances where the proximate cause of that reduction is plainly the insured peril (the government orders), it has discharged that onus. If Guild seeks to establish that some part of its loss of gross profit was caused by something else, it was open for it to do so (but it has not).

I6. ADJUSTMENT CLAUSE

482. The proper approach to construing adjustment and trends clauses has been addressed elsewhere in these submissions, and it is unnecessary to repeat those submissions here. It is sufficient to note that any adjustment ought not take into account the presence

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[290] SOAF at [57].

[291] SOAF at [11]-[19].

[292] Subject to persuading the court to make an order preserving the confidentiality of those statements.

[293] Michael Affidavit at [20].

and effect of COVID-19 generally.[294]

I7. THIRD PARTY PAYMENTS

483. Dr Michael received payments from the operation of the Commonwealth's "JobKeeper" payment and the "Federal Cash Flow Boost". The operation of each of these has been set out in Annexure A. Dr Michael did not receive any rental abatements.[295]

484. From the outset, for the reasons set out in respect of Taphouse, the starting point is *not* the calculation of loss, or whether the third party payments reduced the loss suffered by Dr Michael.

485. In truth, Dr Michael's policy does not provide an indemnity referable solely to loss where the claim is one for business interruption. Rather, the basis of settlement clause provides for a carefully calibrated calculation relevantly limited to 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"

486. The critical integer in calculating the quantum of cover is "Income". That integer, however, does not contain an allowance for third party payments. Critically, the parties agreed that "Income" is to be calculated, relevantly, by determining the money paid or payable for services rendered in the course of the Business. That is, amounts paid in exchange for goods and services provided by Dr Michael, and not any grants or third party payments made by the government.

I8. INSURANCE CONTRACTS ACT

487. The principles concerning interest and section 57(2) of the *Insurance Contracts Act 1984* (Cth) have been set out in relation to Taphouse. For the same reasons set out in respect of Taphouse's claim, interest ought run from the date Dr Michael's claim was denied (being 1 April 2020).[296]

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[294] Cf Guild at [86].

[295] The submission at Guild [89] was made in reliance on an error in the information provided on behalf of Dr Michael on 19 August 2021.

[296] Michael Affidavit at [37].

J. GFA (NSD 144/2021)

J1. THE POLICYHOLDER

488. The first respondent (Gym Franchises Australia Pty Ltd) and second respondent (Douglas Reason) (collectively, **GFA**) in NSD 144/2021, are the insureds under a "Fitness Centres Business Insurance Policy" placed with Guild Insurance Limited (**Guild**) (**GFA Policy**). GFA operates a gym trading as "Reinvigr8 Health & Fitness".[297] The gym operates on a 24 hour basis, and offers various classes of membership.[298]

J2. THE POLICY

489. The GFA Policy comprises a policy schedule (**GFA Schedule**)[299] and wording (**GFA Wording**).[300] The period of insurance is 10 October 2019 to 10 October 2020.[301] The "Insured is "Gym Franchises Australia PTY LTD" and "Douglas Reason".[302] The "Business" is "Gym/Fitness Health Centre Operator excluding Solarium".[303] The "Business Premises Address" is "Shop 3, 1 Brygon Creek Drive, Upper Coomera QLD 4209" (**Upper Coomera**). By way of a policy change issued on 14 April 2020, the insured premises was amended to "Shop 10, 34-38 Siganto Drive, Helensvale 4212" (**Helensvale**).[304]

490. The gym was located at Upper Coomera until 1 April 2020. From 17 April 2020, it was relocated to Helensvale.[305]

491. The classes of insurance taken under the policy were identified in the GFA Schedule as:

    a. Business Property;

    b. Business Interruption;

    c. Theft;

    d. Machinery and Electronic Equipment Breakdown;

    e. Glass;

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297 Affidavit of Douglas Reason affirmed 18 August 2021 (**Reason Affidavit**) at [2].

298 Reason Affidavit at [12], [14].

299 CB Vol A 610.

300 CB Vol A 726.

301 GFA Schedule at 3 [CB Vol A 728].

302 GFA Schedule at 3 [CB Vol A 728].

303 GFA Schedule at 3 [CB Vol A 728].

304 Reason Affidavit at 138.

305 Reason Affidavit at [16]-[17].

f. Tax Audit;

g. Professional Indemnity; and

h. Public and Products Liability.[306]

492. The "Cover for Shop 3 1 Brygon Creek Drive, Upper Coomera 4209" is listed on page 3 of the GFA Schedule.[307] Under the "Business Interruption" section, the period of indemnity is "12 Months", with cover as follows:[308]

a. Loss of Income Sum Insured: $;

b. Additional Increased Cost of Working: "NOT TAKEN";

c. Claims Preparation Costs Sum Insured: $;

d. Loss of Rent: "NOT TAKEN";

e. Accounts receivable: "NOT TAKEN";

f. Flood Cover: "Not Included".

493. The relevant terms of the policy for these proceedings are contained in "Section — Business Interruption" which commences on page 56 of the GFA Wording. The section commences with a series of definitions.[309] It is then divided into four main sub-sections, entitled "What is Covered",[310] "What is Not Covered",[311] "Basis of Settlement",[312] and "Additional Benefits".[313]

494. The "What is Covered" section states that "We will Cover You for loss of Income during the Indemnity Period following interruption to or interference with the Business as a result of: a. Damage for which a Claim is Covered under Section — Business Property; b. Theft for which a claim is Covered under Section — Theft; c. Loss for which a claim is Covered under Section — money; d. Breakage for which a claim is Covered under Section — Glass; or e. Loss or Damage for which a claim is Covered under Section — General Property; and the Income ceasing or reducing as a direct result of the Damage,

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[306] GFA Schedule at 3 [CB Vol A 728]. Other classes of insurance *not* taken were "Money", "General Property", "Commercial Motor Vehicle", "Employee Dishonesty", and "Management Liability".

[307] GFA Schedule at 3 [CB Vol A 728].

[308] GFA Schedule at 3 [CB Vol A 728].

[309] GFA Wording at 56 [CB Vol A 665].

[310] GFA Wording at 57 [CB Vol A 666].

[311] GFA Wording at 56 [CB Vol A 665]

[312] GFA Wording at 57 [CB Vol A 666].

[313] GFA Wording at 58 [CB Vol A 667].

Theft, Breakage or Loss”.[314]

495. The “Additional Benefits" provides that “We will, subject to all of the provisions of this Policy, also Cover You in relation to the following additional benefits”. The penultimate listed benefit is the basis of GFA’s claim in this proceeding, being a **Hybrid Clause.** It is in the following terms:[315]

> **Prevention of Access**
>
> 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:
>
> a. the intervention of any lawful authority resulting from threat of damage to property in the immediate vicinity of the Business Premises which prevents access to or hinders the use of the Business Premises;
>
> b. damage to buildings in which the Business Property is contained or forms part of whether the Business Property forming part of or contained in the complex is damaged or not:
>
> **Provided that:**
>
> in respect of damage Covered under clauses a. and b. above, such damage, if it occurred at the Business Premises, would be Covered under Section – Business Property; or
>
> 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.

496. The **Basis of Settlement Clause** provides, in respect of the “Loss of Income” section, as follows:[316]

> **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

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[314] GFA Wording at 56 [CB Vol A 665].

[315] GFA Wording at 59 [CB Vol A 668].

[316] GFA Wording at 57 [CB Vol A 666].

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;

ii. if, during the Indemnity Period, Business Stock shall be sold or services shall be rendered elsewhere than at the Location of Risk stated in the Schedule for the benefit of the Business, either by You or by others on Your behalf, the money paid or payable in respect of such sales or services shall be brought into account in arriving at Income lost during the Indemnity Period;

iii. if the Damage occurs before the completion of the first year's trading of Your Business at the Location of Risk We will calculate Your Income to mean the proportional equivalent for a period of twelve (12) months of the actual Income realised during the period between the commencement of the Business and the date of the Damage occurring; and

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.

497. The capitalised terms in the Basis of Settlement Clause are defined as follows:

a. "**Income** means the money paid or payable to You for Business Stock sold (less the net purchase cost of such Business Stock) and/or for services rendered in the course of the Business at the Business Premises and any other income payable to the Business for the twelve (12) months immediately preceding the date of the Loss but excluding Rent."

b. "**Indemnity Period** means 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; or

b. the date when the Income of the Business or the Rent is no longer affected;

whichever occurs first."

498. Importantly, there is a distinction between the type of cover provided in the Hybrid Clause by (a) and (b), as compared to (c). The cover under (a) and (b) is referable back to and confined by the tailpiece to physical damage that would be covered under the earlier Business Property section. By contrast, under (c), there is no tailpiece limiting

cover in that way. GFA claims under (c).

J3. THE CLAIM

499. To fall within the Hybrid Clause, the competent "government or statutory authority" must have ordered:

  a. the closure or evacuation of the whole or part of the Business Premises; **and**

  b. that order must have arisen "directly or indirectly" from

    i. "human infectious or contagious disease … at the Business Premises", **or**

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

500. GFA contends that the Hybrid Clause is engaged because there has been an "order" of a "competent government or statutory authority" that:

  a. arose "indirectly" from human infectious or contagious disease at the Business Premises; and/or;

  b. arose "directly or indirectly" from the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises.

501. GFA contends that the Hybrid Clause is engaged by reason of the following orders made by the Chief Health Officer of Queensland:

  a. **The 23 March 2020 *Non-essential Business Closure Direction*.**[317] This direction provided that a person who "owns, controls or operates a non-essential business or undertaking in the State of Queensland must not operate the business or undertaking". The term "non-essential business or undertaking" was defined to mean (inter alia) "Gyms, fitness centre and indoor sporting centres".[318]

  b. **The 28 June 2020 Fitness Industry COVID Safe Plan,** read with the **1 June 2020 *Restrictions on Business, Activities and Undertakings Direction***.[319] This direction provided that an "indoor sporting centre, including gyms" was permitted to operate only in accordance with the Industry COVID Safe Plan,[320]

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[317] SOAF Annexure D at #9.

[318] *Non-essential Busines Closure Direction,* Clause 5(b).

[319] SOAF Annexure D at #41.

[320] Reason Affidavit at [19], DR-5.

and in accordance with certain conditions, including that it could only be "open if supervised [sic] and staff are available to conduct regular cleaning and enforce social distancing", there is "minimal use of communal facilities", and "no spectators".[321] The first Fitness Industry COVID Safe Plan provided that "showers and change room facilities must be remain [sic] closed",[322] and that "unsupervised facilities and services must not operate".[323]

J4. ASSESSING THE ACT OF THE AUTHORITY

502. GFA repeats the arguments set out in relation to Taphouse, that it is unnecessary to go beyond the statutory instrument and its legal context.

J5. THE AUTHORITY RESPONSE IN LEGAL CONTEXT

503. The legal context of the Authority Response is set out in relation to Taphouse, (noting that the Authority Response-GFA was also made pursuant to the *Public Health Act 2005* (Qld)).

J6. THE HYBRID CLAUSE

504. As has already been observed, to enliven an indemnity under this clause, there must be a "closure or evacuation" of the "whole or part of the Business Premises by order of a competent government or statutory arising 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".

505. Each of these elements will be addressed in turn. In logical sequence, the issues are:

    a. **First,** whether the Authority Response-GFA constitutes the orders of "a competent government or statutory authority";

    b. **Second,** whether the Authority Response-GFA were orders for the "closure or evacuation" of the "whole or part of the Business Premises";

    c. ***Third,*** the construction and application of the causative part of the clause.

506. Guild accepts that the Authority Response-GFA were orders of a competent authority.[324] Only the second and third issues arise.

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[321] *Restrictions on Business, Activities and Undertakings Direction,* Clauses 6, 7, 21.

[322] Reason Affidavit at 160.

[323] Reason Affidavit at 7.

[324] Guild at [72]-[73].

(a) Closure of a whole or part of the Business Premises

507. GFA relies on the "*closure*" limb of the Hybrid Clause. The terms and effect of the directions comprising the Authority Response-GFA meant that there was a "closure" of its premises. The 23 March 2020 *Non-Essential Business Closure Direction*, in terms, required that a non-essential business or undertaking "must not operate". Its premises were required to be closed. The fact that the order is directed to the type of business is no objection. It is the type of order that would have been contemplated by the parties in inserting this clause in a business interruption insurance policy. It would be a triumph of form over substance to conclude that the order did not require closure because it was directed to *types of business* rather than *addresses of premises.* The substantive effect is the same: GFA was required to close its premises.

508. The 1 June 2020 restrictions similarly amount to a "closure", albeit of "part" of the premises. The evidence is that the first Fitness Industry COVID Safe Plan required that the gym be staffed whilst open (which had the effect of requiring it to close for part of the day).[325] In addition, it imposed capacity restrictions, which had the effect of "*closing*" the part of the premises that GFA was otherwise lawfully permitted to operate.

(b) The causative element

<u>Construction</u>

509. The Hybrid Clause employs the term "directly or directly" in respect of the causative aspect. The text and context of the clause demonstrate that a broader nexus will satisfy the causative requirement. In particular, the clause specifically employs a broader connector than, for example, the poisoning clause ("poisoning directly caused by the consumption food"), the public utilities clause ("as a result of"), or the prevention of access-damage to property clause ("resulting from").

510. To fall within the Hybrid Clause, the order need only arise either "directly" <u>or</u> "indirectly" from: "human infectious or contagious diseases at the business premises" **<u>or</u>** the "discovery of an organism likely to result in human infectious or contagious disease at the business premises".

511. Orders may meet this description in two ways.

512. ***First***, if they "indirectly" arise from "human infectious or contagious diseases at the business premises". This requires something less than such disease at the premises.

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[325] Reason Affidavit at [24].

For example, an order will “indirectly” arise from such disease at the business premises if it relates to such disease at the business premises despite there not being actual occurrence. An order preventing the threat of transmission of such disease at the business premises is one apt to fit this description.

513. It can readily be accepted that an order arising “directly” from human infectious or contagious disease” requires there to be COVID-19 *at the premises.* But in order for the term “indirectly” to have some further operation, something less must engage the clause – that being the construction described above.

514. ***Second***, the order can arise “directly or indirectly” from the discovery of an organism that is likely to result in COVID-19 at the business premises. This is the grammatical reading of the phrase, which connects the “business premises” to the “likely to result”, not the “discovery”. If Guild’s construction were correct, the policy would instead read “discovery of an organism at the business premises that is likely to result in human infectious or contagious diseases”.

Application

515. GFA’s primary argument is that the orders arose indirectly from human infectious or contagious diseases at its premises, because the orders were designed to prevent the threat of transmission of COVID-19 at such premises. This was the intended purpose: to close those premises at which there was a high likelihood of transmission. Similarly, the orders can readily be understood to have arisen from the discovery of SARS-CoV-2, that was “likely to result” in COVID-19 “at the premises”.

516. GFA’s secondary argument is that as a matter of fact, there was the discovery of SARS-CoV-2 in the vicinity of GFA’s premises that was likely to result in COVID-19 at its premises. It is admitted that there were at least two cases of COVID-19 within the Gold Coast Hospital and Health Service region (being the applicable region for the GFA premises for COVID-19 diagnoses), in persons who were not self-isolating after having contracted COVID-19 and prior to being diagnosed with it.[326] In addition, the publicly available COVID-19 data indicates that there were 46 cases of COVID-19 in the Gold Coast HHS region as at 23 March 2020, with 319 in Queensland generally.[327]

517. Having regard to the nature and virulence of COVID-19,[328] the Authority Response-GFA

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[326] Notice of Dispute filed 13 August 2021.

[327] SOAF at [95].

[328] SOAF at [11]-[19].

is capable of being seen as arising indirectly from COVID-19 at the business premises, or directly from the discovery of SARS-CoV-2 in Queensland that was likely to result in COVID-19 at the premises (absent orders closing GFA's premises to slow the spread).

J7. CAUSATION

518. The causation questions under the Hybrid Clause turn on the words of causation used in the clause, namely: whether there is loss that results from "your inability to trade or otherwise conduct Your business" caused by the closure or evacuation by the relevant order. As with Taphouse, the correct approach is:

    a. Was there loss?

    b. Did that loss result from the inability to trade or otherwise conduct the business?

    c. Was that inability <u>caused by</u> the Authority Response-GFA?

519. **Loss**. GFA has put before the Court its profit and loss statements for the 2019 and 2020 calendar years, as well as the 2021 calendar year up to and including June 2021.[329] That evidence is sufficient for the Court to be satisfied, for the purposes of resolving the questions of construction in this case, that there was loss.

520. **Inability to trade**. The Court can similarly be satisfied that the loss resulted from the "inability to trade or otherwise conduct the business".

521. **Caused by.** The compelling common sense judgment in the present case is that the relevant directions were the dominant cause of GFA's loss of profit. GFA does not cavil with the proposition that it has at least a prima facie onus to prove the loss claimed. This requires it to point to its reduction in gross profit, and in circumstances where the proximate cause of that reduction is plainly the insured peril (the government orders), it has discharged that onus. If Guild seeks to establish that some part of its loss of gross profit was caused by something else, it was open for it to do so (but it has not).

J8. ADJUSTMENT CLAUSE

522. The proper approach to construing adjustment and trends clauses has been addressed elsewhere in these submissions, and it is unnecessary to repeat those submissions here. It is sufficient to note that any adjustment ought not take into account the presence

[329] Reason Affidavit at [29].

and effect of COVID-19 generally.[330]

J9. THIRD PARTY PAYMENTS

523. GFA received payments from the operation of the Commonwealth's "JobKeeper" payment and the "Federal Cash Flow Boost". The operation of each of these has been set out in Annexure A. GFA did not receive any rental abatements.[331]

524. From the outset, for the reasons set out in respect of Taphouse, the starting point is not the calculation of loss, or whether the third party payments reduced the loss suffered by GFA.

525. In truth, GFA's policy does not provide an indemnity referable solely to loss where the claim is one for business interruption. Rather, the basis of settlement clause provides for a carefully calibrated calculation relevantly limited to 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"

526. The critical integer in calculating the quantum of cover is "Income". That integer, however, does not contain an allowance for third party payments. Critically, the parties agreed that "Income" is to be calculated, relevantly, by determining the money paid or payable for services rendered in the course of the Business. That is, amounts paid in exchange for goods and services provided by GFA, and not any grants or third party payments made by the government.

J10. INSURANCE CONTRACTS ACT

527. The principles concerning interest and section 57(2) of the *Insurance Contracts Act 1984* (Cth) have been set out in relation to Taphouse. For the same reasons set out in respect of Taphouse's claim, interest ought run from the date GFA's claim was denied (being 23 March 2020).[332]

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[330] Cf Guild at [86].

[331] The submission at Guild [89] was made in reliance on an error in the information provided on behalf of GFA on 19 August 2021.

[332] Reason Affidavit at [31].

K. VISINTIN (NSD 136/2021)

K1. THE POLICYHOLDER

528. The respondent in NSD 136/2021, the Stage Shop Pty Limited (formerly Visintin Pty Limited) (**Visintin**) is the insured under a "Business Pack" insurance policy number 152RN00078COM (**Visintin Policy**) placed with the applicant, Allianz Australia Insurance Limited (**Allianz**).

529. Until 8 March 2021, Visintin operated its business from 3 Leigh Street Adelaide, South Australia 5000.[333] Visintin provided services to a range of clients in the performing arts industry of South Australia and rural parts of Australia, as well as the general population, including selling costumes, uniforms, makeup, props, shoes and other items, making costumes and decorating tutus for customers to wear in stage performances, running make-up advice and workshops, fitting pointe shoes for country schools, supplying shoes and make-up to the Australian Ballet for their performances, and selling make-up.[334] Visintin's premises was located in the Adelaide's CBD, and its business relied in part on foot traffic generated by people shopping for gifts and other items in the city.[335]

K2. THE POLICY

530. The Visintin Policy comprises a policy wording (**Visintin Wording**)[336] and schedule (**Visintin Schedule**).[337] The period of insurance is 30 July 2019 to 4pm on 30 July 2020.[338] The insured "Premises" include 3 Leigh St, Adelaide South Australia 5000 (being the site of Visintin's shop).[339]

531. The classes of insurance taken under the policy were identified in the Visintin Schedule.[340] In respect of 3 Leigh St, this comprised:

    a. Public and Products Liability;

    b. Business Interruption;

    c. General Property;

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[333] On 9 March 2021, Visintin sold its stock, shop fittings, signage and the rights to use the name "The Stage Shop" to Adelaide State Holdings Pty Limited: Affidavit of Lesley Christina Visintin filed 21 August 21 at [6] (**Visintin Affidavit**).

[334] Visintin Affidavit at [4].

[335] Visintin Affidavit at [5].

[336] CB Vol A 365.

[337] CB Vol A 458.

[338] Visintin Schedule at 1 [CB Vol A 458].

[339] Visintin Schedule at 2 [CB Vol A 459].

[340] Visintin Schedule at 3 [CB Vol A 460].

d. Property Damage;

e. Theft;

f. Money; and

g. Glass.

532. The details for Business Interruption cover are listed in the Visintin Schedule as follows:

a. Cover type: Insurable Gross Profit basis;

b. Indemnity Period: 12 Months

c. Gross Profit, in the sum of $[redacted];

d. Additional increased in cost of working, in the sum of $[redacted];

e. Accounts Receivable, in the sum of $[redacted]; and

f. Claim preparation expenses, in the sum of $[redacted].

533. The relevant terms of the policy for these proceedings are contained in the Business Interruption section.[341]

534. Within that section, the terms are organised under headings[342] including:

a. "Definitions";[343]

b. Under "Part C – Insured Gross Profit basis", "What You are covered for";[344]

c. Under "Part C – Insured Gross Profit basis", "What We pay";[345] and

d. "Extra covers".[346]

535. Under "What You are covered for", the policy provides:

> In the event of interruption of or interference with Your Business in consequence of Damage to any Property Insured or any part thereof used by You at the Premises for the purpose of 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.
>
> Provided that:
>
> a. the payment is in accordance with the "What We pay" provision for the item;

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[341] Visintin Wording at 60ff [CB Vol A 426ff].

[342] Headings, however, do not form part of the policy: Visintin Wording at 6 [CB Vol A 372].

[343] Visintin Wording at 60 [CB Vol A 426].

[344] Visintin Wording at 62 [CB Vol A 428].

[345] Visintin Wording at 63 [CB Vol A 429].

[346] Visintin Wording at 65 [CB Vol A 431].

b. We have paid for or admitted liability in respect of such Damage under the relevant Section of Your Policy, or another insurer has paid for or admitted liability in respect of such Damage;

c. We would have paid for or admitted liability in respect of such Damage under the relevant Section of the Policy, or another insurer would have paid for or admitted liability in respect of such Damage, but for the application the application of an Excess; and

d. Our liability in no case will exceed in respect of each item the Sum Insured shown in the Schedule for that item.

536. This clause thus applies where the interruption or inference was "in consequence of Damage to any Property Insured".

537. Under the heading "Extra covers", the policy provides for the following **Infectious Disease Clause**:[347]

> This Section is extended to include the following extra covers. The extra covers 1 to 5 inclusive are payable provided that the Sum Insured expressed against the relevant item(s) in the Schedule is not otherwise exhausted.
>
> …
>
> **4. Infectious disease, etc**
>
> We will also pay You for interruption or interference with Your Business due to closure or evacuation of the whole or part of the Premises during the Period of Insurance:
>
> a. by order of a competent government, public or statutory authority as a result of vermin or pests or defects in the drains or other sanitary arrangements, occurring at the Premises;
>
> b. as a result of the outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the Premises;
>
> c. as a result of injury, illness or disease caused by the consumption of food or drink supplied at or from Your Premises during the Period of Insurance;
>
> d. as a result of murder or suicide occurring at the Premises; or
>
> e. as a result of shark or crocodile attack occurring within a 20 kilometre radius of the Premises during the Period of Insurance.
>
> However, there is no cover under extra cover 4. a. and c. due to Highly Pathogenic Avian Influenza in Humans or any other disease declared to be a quarantinable disease under the Quarantine Act 1908 (including amendments).

538. The Visintin Schedule contains an endorsement which deleted the "Prevention of access" clause in the Visintin Wording and replaced it with the following **Prevention of**

[347] Visintin Wording at 65-66 [CB Vol A 431-432].

Access Clause:[348]

Prevention of Access 48 hours minimum interruption

We will cover You for interruption to Your Business that is caused by or results from damage in the vicinity of the Premises which shall prevent or hinder the use or access to the Premises provided that:

a. the damage would have been covered under Property Damage if the property in the vicinity of the Premises has been insured under that Section;

b. the damage prevents or hinders the use of or access to the Premises for a continuous period greater than 48 hours; and

c. the damage results in the interruption of or interference with Your Business.

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.

539. The Visintin Prevention of Access clause is not limited to damage to property: it expressly provides for cover orders which result from the threat of damage to property *or* persons.

540. Finally, the **Basis of Settlement Clause** provides, in respect of the "Gross Profit", as follows:[349]

This item is limited to the loss of Gross Profit due to a reduction in Turnover and Your increase in the cost of working.

The amount payable as indemnity under this item will be:

a. in respect of reduction in Turnover:

   the sum produced by applying the Rate of Gross Profit to the Shortage in Turnover during the Indemnity Period, and

b. in respect of the increase in cost of working: the additional expenditure necessarily and reasonably incurred for the sole purpose of avoiding or diminishing the reduction in Turnover which, but for the additional expenditure, would have taken place during the Indemnity Period in consequence of the Damage, but not exceeding the sum produced by applying the Rate of Gross Profit to the amount of reduction thereby avoided,

less 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.

Provided that if the Sum Insured for this item at the commencement of each Period of Insurance is less than the sum produced by applying the Rate of Gross Profit

[348] Visintin Schedule at 6 [CB Vol A 463].

[349] Visintin Wording at p 63 ("What We pay") [CB Vol A 429].

to eighty percent (80%) of the Annual Turnover (or its proportionately increased multiple where the Indemnity Period exceeds twelve months), the amount payable will be reduced so that We will be liable for no greater proportion of the loss under this item than that which the Sum Insured bears to eighty percent (80%) of the Annual Turnover (or its proportionately increased multiple, if appropriate).

This provision will not apply if the amount of the claim does not exceed 10% of the Sum Insured for this item.

541. The relevant capitalised terms in the Basis of Settlement Clause are defined in the applicable Definitions section as follows:[350]

a. **Turnover** means the amount (less discounts allowed) paid or payable to You for goods sold and delivered and for services rendered in the course of Your Business at the Premises

b. **Rate of Gross Profit** means the Rate of Gross Profit, expressed as a percentage, earned on the Turnover during the financial year immediately before the date of the Damage to which such adjustments will be made as may be necessary to provide for the trend of Your Business and for variations in or other circumstances affecting Your Business either before or after the Damage or which would have affected Your Business had the Damage not occurred, so that the adjusted figures will represent as nearly as may be reasonably practicable the results which, but for the Damage, would have been obtained during the relative period after the Damage.

c. **Shortage in Turnover** means the amount by which the Turnover during a period will, in consequence of the Damage, fall short of the part of the Standard Turnover which related to that period.

d. **Standard Turnover** (referred to in the definition of Shortage in Turnover) means the Turnover during that period in the twelve months immediately before the date of the Damage which corresponds with the Indemnity Period to which such adjustments will be made as may be necessary to provide for the trend of Your Business and for variations in or other circumstances affecting Your Business either before or after the Damage or which would have affected Your Business had the Damage not occurred, so that the adjusted figures will represent as nearly as may be reasonably practicable the results which, but for the Damage, would have been obtained during the relative period after the Damage.

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[350] Visintin Wording at pp 60-61 [CB Vol A 426-427].

e. **Indemnity Period** means the period beginning from the time when the interruption or interference affects the results of Your Business in consequence of the Damage and ending at the expiration of the maximum period specified in the Schedule or, in the case of Weekly Revenue, ending at the earliest of either the expiration of the maximum period specified in the Schedule or when Weekly Revenue during that period equals or exceeds 95% of Standard Weekly Revenue.

f. **Annual Turnover** means the Turnover during the twelve months immediately before the date of the Damage to which such adjustments will be made as may be necessary to provide for the trend of Your Business and for variations in or other circumstances affecting Your Business either before or after the Damage or which would have affected Your Business had the Damage not occurred, so that the adjusted figures will represent as nearly as may be reasonably practicable the results which, but for the Damage, would have been obtained during the relative period after the Damage.

g. **Gross Profit** means the amount by which the sum of the Turnover and the amount of the closing Stock and work in progress exceeds the sum of the opening Stock and work in progress and the amount of the Uninsured Working Expenses.

Note: The amount of the opening and closing Stocks in trade will be arrived at in accordance with Your normal accounting methods, due provision being made for depreciation.

542. At this point, the following preliminary observations may be made about the structure and terms of the policy.

543. ***First***, contrary to Allianz's submission,[351] the Visintin policy cannot be characterised properly as having as its "primary" cover losses resulting from business interruption caused by damage to property. To the contrary, the policy provides a number of different classes of cover, some only of which are predicated on damage to property. Others, including the critical clauses at issue in the present case, are expressly untethered from damage to property.

544. ***Secondly***, it follows that the critical clauses at issue in the present case should not be read through the prism of, or given a narrow or restricted meaning so as to conform to,

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351 Allianz at [8] and [52].

a false notion as to what is the "primary" cover provided by the policy.

545. ***Thirdly***, consistently with the need to focus on the text and context of the terms of the policy, the focus must be on the language actually used by the parties in the critical clauses. In respect of the Infectious Disease Clause, that language expressly directs attention to whether the closure or evacuation was as a result of the outbreak of [COVID-19]. In respect of the Prevention of Access Clause, the language expressly directs attention to an order of "any legal authority". There is no dispute that the actions relied upon by Visintin were those of a "legal authority".[352] The dispute is as to whether the order resulted from the threat of damage to persons within the relevant radius.

K3. THE CLAIM

546. Visintin has made a claim for indemnity under the Visintin Policy. That claim was denied by Allianz.[353] In these proceedings, Visintin contends that both the Prevention of Access Clause and the Infectious Disease Clause responds to its loss.

547. The insured peril under the Prevention of Access Clause is "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". To fall within this clause, the legal authority must have:

   a. prevented or restricted access to the Premises for a continuous period greater than 48 hours; **and**

   b. resulted from threat of damage to property **or** persons;

   c. such threat of damage be within a 50-kilometre radius of the Premises.

548. The insured peril under the Infectious Disease Clause is "closure or evacuation of the whole or part of the Premises during the Period of Insurance… as a result of the outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the Premises [and not be due to Highly Pathogenic Avian Influenza in Humans or any other disease declared to be a quarantinable disease under the *Quarantine Act 1908* (including amendments)]". To fall within this clause, there must have been:

   a. a closure or evacuation of the whole or part of the Premises;

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[352] Allianz at [44]-[45].

[353] Allianz Concise Statement filed 26 February 2021 at [2]-[3]; Visintin Concise Statement in Response filed 23 April 2021 at [4]-[5].

b. such closure or evacuation been "as a result of the outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the Premises".

549. Visintin contends that the Prevention of Access Clause is engaged by reason of the following (**Authority Response-Visintin**):

   a. **The Direction of the Chief Executive of the Department for Health and Wellbeing in relation to Mass Gatherings.**[354] which directed that "1. a person who is in a position to do so in relation to a place or premises must not allow a mass gathering to occur on or at the place or premises. 2. A person must not organise a mass gathering or a gathering that is reasonably likely to be a public gathering … 3. A person must not attend a mass gathering on or at a place or premises". A mass gathering included any gathering of five hundred or more persons in a single undivided outdoor space at the same time, and any gathering of one hundred or more persons in a single undivided indoor space at the same time.

   b. **The 22 March 2020 directions, declaration of "*Major Emergency*", and *Mass Gatherings Directions (No 2)*.**[355] This comprised:

      i. the *Mass Gathering Directions (No 2)* which replaced the 18 March 2020 direction and directed that "5. A person who owns, controls or operates premises… must not allow a mass gathering to occur on the premises. 6. A person must not organise a mass gathering on premises… 7. A person must not attend a mass gathering on premises". The direction imposed social distancing requirements on indoor spaces by making an addition to the definition of mass gathering, which was "a gathering of fewer than 100 persons in a single undivided indoor space, unless: the total number of persons present in the indoor space at the same time does not exceed one person per 4 square metres"; and

      ii. a declaration pursuant to section 23(1) of the *Emergency Management Act 2004* that a Major Emergency is occurring in respect of "The outbreak of the Human Disease named COVID-19 within South Australia".

   c. **The 23 March 2020 *Non-Essential Business (and Other Gatherings)***

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[354] SOAF Annexure E at #3.

[355] SOAF Annexure E at #4, #5, and #6.

Closure Direction 2020.[356] This required any person who owns, controls or operates a "defined premises" to close the premises insofar as it is necessary to prohibit access to members of the public; and directed any member of the public not to enter into "defined premises". Although a "defined premises" did not include Visintin, it included many of the businesses Visintin serviced.[357]

d. **The 25 March 2020 directions and *Non-essential Business (and Other Gatherings) Closure Direction (No 2)*.**[358] This comprised;

    i. The *Non-Essential Business (and Other Gatherings) Closure Direction (No 2)* which replaced the 23 March 2020 direction and directed that any person who owns, controls or operates a "defined premises" to close the premises insofar as it is necessary to prohibit access to members of the public; and directed any member of the public not to enter into "defined premises". It also directed any person who conducts "defined work or operations" to stop the defined work or operations; and directed any consumer or member of the public not to participate in defined work or operations. Although a "defined premises" and "defined work or operations" did not include Visintin, it included many of the businesses Visintin serviced.[359]

e. **The 28 March 2020 announcements, the *Emergency Management (Non-Essential Business and Other Activities) (COVID-19) Direction 2020* and the *Emergency Management (Gatherings) (COVID-19) Direction 2020*.**[360] This comprised:

    i. The *Emergency Management (Non-Essential Business and Other Activities) (COVID-19) Direction 2020* which expanded the definition of a "defined premises" and "defined work or operations". Although a "defined premises" and "defined work or operations" did not include Visintin, it included many of the businesses Visintin serviced;[361]

    ii. The *Emergency Management (Gatherings) (COVID-19) Direction 2020* which provided that a who owns, controls or operates a place must not

[356] SOAF Ann E #9.

[357] Visintin Affidavit at [13(a)].

[358] SOAF Ann E #10 and #11.

[359] Visintin Affidavit at [13(a)].

[360] SOAF Ann E at #11, #12, and #13.

[361] Visintin Affidavit at [13(a)].

allow a prohibited gathering to occur at the place; that a person must not organise a prohibited gathering at a place; a person must not attend a prohibited gathering; and a person present at a gathering (whether or not a prohibited gathering) must use their best endeavours to comply with the social distancing principles. A "prohibited gathering" included a gathering of more than 10 persons or a gathering of 10 or less persons that does not comply with certain density requirements.

f. **The 4 April 2020 directions.**[362] This was a media release from the Premier of South Australia which urged all South Australians to stay home over Easter and to follow the advice of health experts.

g. **The June 2020 *Emergency Management (Public Activities (COVID-19) Directions 2020*.**[363] These direction prohibited certain activities save as otherwise permitted under the direction.

550. Visintin also contends that the Infectious Disease Clause is engaged by reason of an outbreak of COVID-19 occurring within a 20-kilometre radius of the premises.

K4. THE STATUTORY INSTRUMENTS IN THEIR LEGAL CONTEXT

551. Save for the 22 March 2020 declaration of a major emergency,[364] each of the statutory instruments were made under section 87 of the *South Australian Public Health Act 2011* (SA) or section 25 of the *Emergency Management Act 2004* (SA).

552. These are statutory instruments to which the *Acts Interpretation Act 1915* (SA) apply.

553. The relevant legal context includes:

a. the enabling statute;

b. the extrinsic material in relation to the enabling statute; and

c. prior instruments made under the enabling statute which are referred to in the instrument under consideration.

554. **The South Australian Public Health Act.** Part 11 of the *South Australian Public health Act 2011* (SA) is headed "Management of significant emergencies". Section 87 permits the Chief Executive, with the approval of the Minister, to declare an emergency as a public health emergency. An "emergency" is defined by reference to the *Emergency*

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[362] SOAF Ann E #16.

[363] SOAF Ann E #26, #29, and #31.

[364] This declaration was made under section 23(1) of the *Emergency Management Act 2004* (SA).

Management Act 2004 (SA). Section 3 of that act defines an emergency as

> an event (whether occurring in the State, outside the State or in and outside the State) that causes, or threatens to cause—
>
> (a) the death of, or injury or other damage to the health of, any person; or
>
> (b) the destruction of, or damage to, any property; or
>
> (c) a disruption to essential services or to services usually enjoyed by the community; or
>
> (d) harm to the environment, or to flora or fauna;
>
> **Note –**
>
> > This is not limited to naturally occurring events (such as earthquakes, floods or storms) but would, for example, include fires, explosions, accidents, epidemics, pandemics, emissions of poisons, radiation or other hazardous agents, hijacks, sieges, riots, acts of terrorism and hostilities directed by an enemy against Australia

555. Section 90 of the *South Australian Public Health Act* provides that the effect of declaring a public health emergency is to enliven certain provisions of the *Emergency Management Act 2004* (SA).

556. It will be recalled that, on 15 March 2020, Dr Chris McGowan, the Chief Executive of the Department of Health and Wellbeing declared, pursuant to section 87 of the *South Australian Public Health Act 2011*, that “an emergency which threatens to cause the death of, or injury or other damage to the health of any person is occurring or about to occur in relation to the transmission of Covid-19” and declared “the emergency to be a public health emergency”.

557. **The Emergency Management Act.** Section 24A of the *Emergency Management Act 2004* (SA) provides that an emergency may be declared to be a major emergency. Section 25 then provides that, on the declaration of a major emergency, “the state Co-ordinator must take any necessary action to implement the SEMP [State Emergency Management Plan] and cause such response and recovery operations to be carried out as he or she thinks appropriate”. Section 25(2) then provides for a non-exhaustive list of matters that the State Co-ordinator or an authorised officer may cause to be done. The list includes the prohibition of movement of persons (section 25(2)(f)) and directing a person to remain isolated or segregated from other persons or to take other measures to prevent the transmission of a disease or condition to other persons (section 25(2)(fb)).

558. It will be recalled that on 22 March 2020, a declaration was made pursuant to section 23(1) of the *Emergency Management Act 2004* that a Major Emergency is occurring in respect of “The outbreak of the Human Disease named COVID-19 within South Australia”.

559. **The Authority Response-Visintin.** The statutory instruments that comprise the Authority Response-Visintin applied to persons or places in “South Australia”. On each occasion that a statutory instrument was made pursuant to the *Emergency Management Act 2004* (SA), the Commissioner of Police (being the State Co-ordinator for the State of South Australia) declared that he was of the opinion that the direction “is necessary to achieve the purposes of the Act”. Those purposes are to “(a) to establish an emergency management framework for the State that— (i) promotes prompt and effective decision-making associated with emergencies; and (ii) makes provision for comprehensive and integrated planning in relation to emergencies; and (b) to promote community resilience and reduce community vulnerability in the event of an emergency”.

K5. PREVENTION OF ACCESS CLAUSE

560. To fall within this clause, the legal authority must have:

    a. prevented or restricted access to your premises for a continuous period greater than 48 hours; ~~**or** ordered the evacuation of the public~~; **and**

    b. done one (or both) of those things ~~“~~as a result of ~~Damage o~~r threat of damage to property or persons within a 50-kiometre radius of your premises~~”~~”.

561. ~~Visintin relies upon the prevent or restriction of access limb of this clause (not the evacuation of the public limb~~).

562. Accordingly, in logical sequence, the issues are:

    a. ***First***, whether the legal authority prevented or restricted access to Visintin’s premises for a continuous period greater than 48 hours within the meaning of the clause;[365]

    b. ***Secondly***, whether that was done ~~“~~as a result of ~~Damage or~~ threat of damage to property or persons within a 50-kiometre radius of your premises”~~.~~[366]

Legal authority prevented or restricted access to Visintin’s premises

Construction

563. Visintin relies upon the submissions set out above in respect of the construction of the Prevention of Access Clause in the Taphouse Policy, and adds the following:

    a. “Preventing” and “restricting” both encompass something less than stopping

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[365] Allianz [44]-[45].

[366] Allianz [49]-[51].

completely.

b. The text of the clause does not specify who must be prevented or restricted from accessing the premises so that it may encompass anyone at all, including the proprietors, and the general public.[367] There is good reason for this: there is no distinction between losses suffered as a result of the proprietors being prevented or restricted from accessing the premises and those suffered as a result of the public being so prevented or restricted. The policy contemplates and allows for both scenarios.

c. As noted above, the assertion that the "wider context of the clause [is] an extension to property cover"[368] is wrong and it ought not artificially narrow the cover offered by the clause.

d. Insofar as there is any ambiguity, the *contra proferentem* principle applies because the policy wording comprised Allianz's standard terms and conditions and were not the subject of negotiation.[369]

<u>Application</u>

564. The arguments as to whether the various direction comprising the Authority Response-Visintin prevented or restricted access of the premises are set out in section B.6 and annexure 1 to Allianz's submissions.

565. There is force in these submissions. The most that can be said against them is that the requirement to comply with social distancing requirements prevented or restricted the access of the public to Visintin's premises. This is because they prevented people from accessing the premises once the maximum capacity had been reached, and social distancing requirements per se amount to a restriction of access in that they restrict the number of people who would ordinarily be able to access the premises. Put another way, the direction limited the manner in which the premises could be accessed (with only a certain number of customers and service only in a certain way). The requirements for social distancing extended for a period greater than 48 hours.

(a) As a result of threat of damage to … persons within a 50-kilometre radius

<u>Construction</u>

566. Again, Visintin relies upon the submissions set out above in respect of the construction

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[367] Allianz at [45].

[368] Allianz at [45(b)].

[369] SOAF at [98].

of the Prevention of Access Clause in the Taphouse Policy, and adds the following:

a. The clause applies to measures taken by a legal authority as a result of damage which has actually been suffered, or threat of damage, which damage may not yet have commenced, and may (or may not) be suffered in the future.

b. It applies to damage and the threat of damage not only to property but also to persons and, as such, a threat of damage to persons is capable of engaging the clause.

c. Again, the assertion that the "wider context of the clause [is] an extension to property cover"[370] is wrong and it ought not artificially narrow the cover offered by the clause. The critical point is that a measure taken as a result of a threat of persons contracting COVID-19 will just as much have been taken a result of a threat of persons suffering accidental physical damage. The legal authority will be acting to protect those who may, absent the measure, accidentally contract the disease and thus accidentally suffer associated physical damage.

d. Insofar as there is any ambiguity, the contra proferentem principle applies.[371]

567. **Allianz's submissions**. Allianz does not dispute that there was COVID within a 50 kilometre radius of Visintin's premises. Rather Allianz asserts that "COVID-19 did not constitute a threat of damage to persons" within the meaning of the Visintin Policy.[372] This assertion, which requires some torturing of language, should not be accepted.

568. ***First***, it has no textual basis. That is, there is no textual basis for ignoring or reading down the expression "Damage to … persons".

569. ***Secondly***, it has no contextual basis. The immediately preceding clause is tethered to damage to property. That it requires the damage "would have been covered under Property Damage…" underscores Visintin's point: where the parties intended to limit the damage to damage to property, they specified the limitation; where it is not so limited, it is not. Allianz seeks to overcome this by saying "it is clear that the only intended difference between the two parts of the clause is that the first half contemplates damage in the vicinity of the Premises". If that be so, the parties could and would have said so for both clauses. They did not.

570. ***Thirdly***, the existence of the Infectious Disease Clause does not deny the application of

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370 Allianz at [45(b)].

371 SOAF at [98].

372 Allianz [46]-[52].

the Prevention of Access Clause.[373] As has already been observed in the context of FCA v Arch, it is entirely orthodox for each clause to be given its appropriate field of operation having regard to the text and purpose of the policy. That the construction arrived at would involve some overlap in coverage is hardly a ground of objection or surprising. As noted in Section B1 above, Allsop CJ recognised as much in *Star* at [166].

571. Again, the contention that the Disease might be rendered nugatory or ineffective is one based on tautology or redundancy and, in the words of Dixon J, such arguments are "never strong".[374] Any presumption against redundancy or surplusage is of little weight.[375]

572. Moreover, the more fundamental problem identified in respect of IAG's contention applies here. The argument bears repeating. The Prevention of Access Clause and the Infectious Disease Clauses have different terms and fields of operation. The former refers to an authority "*p*reventing or restricting access". It requires "damage to or threat of damage to … persons". The latter requires the "closing or evacuating or all or part of the premises". It refers to the "outbreak of an infectious or contagious human disease" as the cause of the closure or evacuation. It does not require there to be any order. Accordingly, it is conceivable that the Infectious Disease Clause would respond in circumstances where the Prevention of Access Clause would not.

<u>Application</u>

573. **Visintin's primary argument.** The language of the statutory instruments and their legal context support the conclusion that the instruments were made "as a result of … threat of damage to … persons within a 50-kilometre radius of each of Visintin's premises", such that:

    a. that is sufficient to engage the clause;

    b. it is not necessary for the insured to go a step further and establish that there was **<u>in fact</u>** such a threat;

    c. it is not permissible for Allianz to contradict the instruments by seeking to establish that, contrary to what they convey, there was **<u>in fact</u>** no such threat.

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[373] Cf Allianz [50].

[374] *Teele v Federal Commissioner of Taxation* (1940) 63 CLR 201 at 207.

[375] *HDI Global Speciality SE v Wonkana No. 3 Pty Limited* [2020] NSWCA 296 at [44]; *Beaufort Developments (NI) Limited v Gilbert-Ash NI limited* [1999] 1 AC 266 at 273-274; *XL Insurance Co SE v BNY Trust Company of Australia Limited* [2019] NSWCA 215 at [72], referring to *AFC Holdings Pty Ltd v Shiprock Holdings Pty Ltd* [2010] NSWSC 985; (2010) 15 BPR 28,199 at [13]; *Central Australian Aboriginal Congress Inc v CGU Insurance Limited* [2009] NTCA 1 at [47].

574. Taphouse's primary argument applies with equal force here, such that the Court ought find that the social distancing requirements were made as a result of the recognised threat of serious adverse effects on the health of persons in all of South Australia (including at each of Visintin's premises). This means that it was made as a result of "threat of damage to … persons" within a 50-kilometre radius of Visintin's premises within the meaning of the Prevention of Access Clause.

575. **Visintin's secondary argument.** Insofar as it be necessary to demonstrate there was in fact damage or a threat of damage to persons within the radius, the evidence permits the Court to be satisfied that that exists. This is because Allianz accepts that prior to 18 March 2020:[376]

    a. there were at least two people with COVID-19 who had been within a 50-kilometre radius;

    b. that there were at least two people with COVID-19 who were not self-isolating whilst within the radius after having contracted COVID-19 but prior to being diagnosed with COVID-19; and

    c. that there were at least two people with COVID-19 who were not self-isolating whilst within the radius during a period in which they were capable of infecting another person with COVID-19.

576. Further and in any case, 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.

K6. INFECTIOUS DISEASE CLAUSE

577. As has already been observed, to fall within this clause, there must have been:

    a. a closure or evacuation of the whole or part of the Premises;

    b. such closure or evacuation been "as a result of the outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the Premises".

578. Each of these are addressed in turn.

(a) Closure or evacuation of the whole or part of the Premises

579. Visintin's premises were closed in whole or in part for the following reasons.

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[376] Notice of Dispute filed by Allianz on 13 August 2021.

580. ***First***, there is no requirement that the closure be pursuant to an order. That is plain from the text of the Infectious Disease clause (cf other clauses in these proceedings which require the closure to be the result of a legal or other competent authority).

581. ***Second*,** Visintin closed its business (in whole) between 28 March 2020 and 2 April 2020.[377] It also closed part of its business by operating at reduced hours (thereby closing the business for the remaining parts of the day when it would ordinarily be open) and by operating by appointment only (thereby closing part of the premises by not permitting walk-ins).

582. ***Third***, it may be open to conclude that the social distancing requirements constituted a closure of a part of Visintin's premises.

(b) As a result of the outbreak of COVID-19 occurring a 20-kilometre radius

Construction

583. Allianz contends at paragraph 35 of its submissions that an outbreak requires there to be "at least a confirmed community transmission of COVID-19", said to be "where one confirmed case of COVID-19 transmits it to another person in an uncontrolled environment". The location of the outbreak is "the location at which the transmission event occurred".

584. This construction ought be rejected for the same reasons set out in respect of the Taphouse Policy. The construction does not accord with the ordinary meaning of the term "outbreak" and unduly constrains its potential scope of operation.

Application

585. The available evidence also allows the Court to be satisfied there was an "outbreak" within a 20-kilometre radius of the situations. This is because Allianz admits:[378]

   a. prior to 18 March 2020, there were at least two people with COVID-19 who had been within a 20km radius of 3 Leigh Street, Adelaide SA 5000;

   b. prior to 18 March 2020, there were at least two people with COVID-19 who were not self-isolating whilst within that radius after having contracted COVID-19 but prior to being diagnosed with COVID-19; and

   c. prior to 18 March 2020, that there were at least two people with COVID-19 who were not self-isolating whilst within that radius during a period in which they

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377 Visintin Affidavit at [17(a)].

378 Notice of Dispute filed by Allianz on 13 August 2021.

were capable of infecting another person with COVID-19.

586. As was said in respect of the Taphouse Policy, it is not necessary for there to be proof of confirmed community transmission for there to be an outbreak.[379] To require that an insured put on expert evidence, or to subpoena relevant health authorities, to demonstrate community transmission lacks commercial common sense. Moreover, it may not even be possible: the insured peril may extend to diseases where the state of science is such that one cannot determine how or where transmission took place. A construction that requires proof of such matters should not be accepted.

587. Further and in any case, 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.

588. **Visintin closed its premises as a result of the outbreak.** The evidence of the director of Visintin is that she closed the whole or part of the premises as a result of the government directions and the associated impacts on Visintin's customers. It is open for the Court to find that the decision to close the premises is so inextricably linked to the outbreak so as to say it was as a result of the outbreak (noting that the clause does not require it to be a direct result or the only cause).

K7. CAUSATION

589. As with Taphouse, the correct approach is:

    a. Was there loss?

    b. Did that loss result from the interruption or inference with Visintin's business?

    c. Was that interruption or interference <u>caused by</u> the Authority Response-Visintin (the Prevention of Access Clause) or the outbreak (Infectious Disease Clause)?

590. **Loss**. Visintin has put before the Court its profit and loss statements for the periods July 2018 to August 2020,[380] and August 2020 to March 2021.[381] Those statements are sufficient to be satisfied, for the purposes of resolving the questions of construction in this case, that there was loss.

591. **Interruption or interference.** The Court can similarly be satisfied that the loss resulted from "interruption or interference" with Visintin's business. The Visintin Affidavit makes

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379 cf Allianz at [35], [76].

380 Visintin Affidavit at [28].

381 Visintin Affidavit at [29].

clear that there was a significant decline in Visintin's business the outbreak and / or directions promulgated by the South Australian government.[382]

592. **Caused by.** The compelling common sense judgment in the present case is that the relevant directions and outbreak were the cause of Visintin's loss of profit.

593. Visintin does not cavil with the proposition that it has at least a prima facie onus to prove the loss claimed. This requires it to point to its reduction in gross profit, and in circumstances where the proximate cause of that reduction is the insured peril, it has discharged that onus. If Allianz seeks to establish that some part of its loss of gross profit was caused by something else, it was open for it to do so (but it has not).

K8. ADJUSTMENT CLAUSE

594. The proper approach to construing adjustment and trends clauses has been addressed elsewhere in these submissions, and it is unnecessary to repeat those submissions here. It is sufficient to note that any adjustment ought not take into account the presence and effect of COVID-19 generally.[383]

K9. THIRD PARTY PAYMENTS

595. Visintin received payments from the operation of the Commonwealth's "JobKeeper" payment and "Federal Cash Flow Boost", the South Australian Government's Small Business Grants, and a rental waiver from its landlord. The operation of each of these have been set out in Annexure A.

596. From the outset, for the reasons set out in respect of Taphouse, the starting point is not the calculation of loss, or whether the third party payments reduced the loss suffered by Visintin. In truth, Visintin's policy does not provide an indemnity referable solely to loss where the claim is one for business interruption. Rather, the basis of settlement clause provides for a carefully calibrated calculation relevantly "limited to the loss of Gross Profit due to a reduction in Turnover and Your increase in the cost of working".

597. The critical integers to calculating the reduction in Turnover are the "Rate of Gross Profit" and the "Shortage in Turnover". Neither of these integers, nor the defined terms within them, contain allowances for third party payments. Critically, the parties agreed that "Turnover" is to be calculated by determining the amounts paid or payable for goods sold and delivered and services rendered. That is, amounts paid in exchange for goods and services provided by Visintin, and not any grants or third party payments made by

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[382] Visintin Affidavit at [17]ff.

[383] Cf Allianz at [93].

the government (or another body).

598. Allianz's reliance on the words "any sum saved"[384] also does not assist it. This is because the sum saved must be due to the "such charges and expenses of Your Business payable out of Gross Profit as may cease or be reduced **in consequence of the interruption or interference**" (emphasis added). The emphasised words make clear that the reduction in expenditure must be due to the interference. The intent of the clause is clear: if a business does not have to purchase the raw materials for the provision of its goods and services, that must be accounted for in the cover. Indeed, this is the construction that works harmoniously with the definition of "Turnover", which only accounts for the income derived from sales, and not the cost of that sale.

599. Here, none of the matters causative of loss provide for third party payments to Taphouse. In particular, JobKeeper, the Cash Flow Boost, the Small Business Grant, and the rental abatements were conceptually distinct from, and factually different to, the orders giving rise to the interruption or interference.

K10. INSURANCE CONTRACTS ACT

600. The principles concerning interest and section 57(2) of the *Insurance Contracts Act 1984* (Cth) have been set out above. For the same reasons set out in respect of Taphouse's claim, interest ought run from the date Visintin's claim was denied (being 24 May 2020).[385]

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[384] Visintin at [95].

[385] Visintin Outline at [30].

L. MAYBERG (NSD 135/2021)

L1. THE POLICYHOLDER

601. The respondent in NSD 135/2021, Mayberg Pty Limited (**Mayberg**) is the insured under a "Business Pack" insurance policy number 141AN06566COM (**Mayberg Policy**) placed with the applicant, Allianz Australia Insurance Limited (**Allianz**).

602. Mayberg operates a family owned and run dry-cleaning and garment alterations business, from the following four locations:[386]

    a. Victoria Point, located at Victoria Point Shopping Centre, Shop 24E, 2-34 Bunker Road, Victoria Point, Queensland 4165;

    b. Cleveland, located at Shop 5, 66-68 Bloomfield Street, Cleveland, Queensland 4163;

    c. Gumdale, located at Shop 3, 681 New Cleveland Road Gumdale, Queensland 4154; and

    d. Wynnum, located at 64 Tingal Road, Wynnum, Queensland 4178.

603. Mayberg specialises in the cleaning of corporate, casual and formal wear, as well as offering an alterations service, with 80% of its business for corporate and special occasion dry-cleaning, and dry-cleaning of professional work attire being the most popular service.[387] Mayberg also provides a commercial dry-cleaning and laundry service and its commercial customer base includes local and national customers (such as Qantas), heavy industrial and mechanical, education and the medical sector.[388]

L2. THE POLICY

604. The Mayberg Policy comprises a policy schedule (**Mayberg Schedule**)[389] and wording (**Mayberg Wording**).[390] The period of insurance is 24 November 2019 to 4pm on 24 November 2020.[391] The insured "Premises" are the following:[392]

    a. Situation 1: 64 Tingal Rd Wynnum Qld 4178;

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[386] Affidavit of Alice Hopper filed on 20 August 2021 at [4]-[5] (**Hopper Affidavit**).

[387] Hopper Affidavit at [6]

[388] Hopper Affidavit at [7].

[389] CB Vol A 349.

[390] CB Vol A 241.

[391] Mayberg Schedule at 1 [CB Vol A 349].

[392] Mayberg Schedule at 2 [CB Vol A 350].

b. Situation 2: 66-68 Bloomfield St Cleveland Qld 4163;

c. Situation 3: Shop 24 2-34 Bunker Rd Victoria Point 4165; and

d. Situation 4: 681 New Cleveland Rd Gumdale Qld 4154.

605. The classes of insurance taken under the policy were identified in the Mayberg Schedule.[393] In respect of all situations, this comprised:

a. Liability;

b. Business Interruption;

c. Fire;

d. Burglary (other than for Situation 4); and

e. Glass;

606. The details for Business Interruption cover are listed in the Mayberg Schedule as follows:[394]

a. Description: Business Interruption – Income;

b. Indemnity Period: 12 Months

c. Income, in the sum of $[redacted];

d. Additional increased in cost of working, in the sum of $[redacted];

e. Claim preparation expenses, in the sum of $[redacted].

607. The relevant terms of the policy for these proceedings are contained in the Business Interruption – Income section.[395]

608. Within that section, the terms are organised under headings[396] including:

a. “Definitions”;[397]

b. “Cover”;[398]

c. “Basis of Settlement”;[399] and

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393 Mayberg Schedule at 3-5 [CB Vol A 351-353].

394 Mayberg Schedule at 10 [CB Vol A 358].

395 Mayberg Wording at 57ff [CB Vol A 299ff].

396 Headings, however, do not form part of the policy: Mayberg Wording at 8 [CB Vol A 250].

397 Mayberg Wording at 57 [CB Vol A 299].

398 Mayberg Wording at 58 [CB Vol A 300].

399 Mayberg Wording at 58 [CB Vol A 300].

d. "Extensions of Cover".[400]

609. Under "Cover", the policy provides:

> We will pay in accordance with the Basis of Settlement, for Loss of Income that results from an Interruption of Your Business caused by any Insured Damage that happens at the Premises.
>
> Provided that this Insured Damage happens during the Period of Insurance shown for this Business Interruption – Income Cover Section.

610. This clause thus applies where the interruption was "caused by any Insured Damage that happens at the Premises". "Insured Damage" is defined as:

> 1. in relation to Your property, Damage to Your property when both the property that is Damaged and the cause of the Damage is covered by [certain sections of the policy];
>
> 2.a. in relation to property referred to in this Cover Section under the heading Extensions of Cover, Damage to such property located in Australia; and
>
> 2.b. in relation to property referred to in this Cover Section under the Optional Extensions of Cover, Insured Damage means Damage to property located in Australia at the premises of the specified customers and specified suppliers who are shown in the Schedule of this Cover Section.
>
> Provided that this Damage would have been covered under one of the Cover Sections shown in 1.a. above had such property been insured under that Cover Section as part of Your Policy when the Damage happened.

611. Under the heading "Extensions of Cover", the policy contains the following **Hybrid Clause**:[401]

> **6. Murder, Suicide and Infectious Disease**
>
> We will pay for Loss of Income that results from an Interruption of Your Business that is caused by:
>
> f. any legal authority closing or evacuating all or part of the Premises as a result of;
>
> a. the outbreak of an infectious or contagious human disease occurring within a 20-kilometre radius of Your Premises, however, there is no cover for highly pathogenic Avian Influenza or any disease declared to be a quarantinable disease under the Quarantine Act 1908 (as amended) irrespective of whether discovered at the location of Your Premises, or out-breaking elsewhere;
>
> b. vermin or other animal pests at the Premises; or
>
> c. hygiene problems associated with drains or other sanitary arrangements at the Premises;

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[400] Mayberg Wording at 59-60 [CB Vol A 301-302].

[401] Mayberg Wording at 59-60 [CB Vol A 301-302].

g. poisoning directly caused by the consumption of food or drink provided on the Premises; or

h. murder or suicide occurring at or near the Premises.

The definition of Insured Damage does not apply to this Extension of Cover.

612. The Mayberg Schedule contains an endorsement which deleted the "Prevention of Access" and "Prevention of Access by a Public Authority" clauses in the Mayberg Wording and replaced them with the following:[402]

Prevention of Access

We will pay for Loss of Income that results from an Interruption of Your Business that is caused by Insured Damage:

a. to any property within a retail complex when Your Business is located within a multi-tenanted retail complex; or

b. to property in the vicinity of the Premises which shall prevent or hinder the use or access the Premises, for a continuous period greater than 48 hours.

Prevention of Access by a Public Authority

We will pay for Loss of Income that results from an Interruption of Your Business that is caused by legal authority preventing or restricting access to Your Premises or ordering the evacuation of the public as a result of Damage to or threat of Damage to property or persons within a 50-kilometer radius of Your Premises provided the prevention of access or restricted access to the Premises extends for a continuous period greater than 48 hours.

613. The second of these (under the heading "Prevention of Access by a Public Authority") is relevant to the present case.

614. It will be observed that the Hybrid Clause is not limited to damage to property (and there is an express term that the definition of Insured Damage – which is tied to property damage – does not apply to that extension of cover).

615. Similarly, the Prevention of Access Clause is not conditioned on there being damage to property: the damage or threat of damage can be to property <u>or</u> persons.

616. Finally, the **Basis of Settlement Clause** provides, in respect of the "Loss of Income", as follows:[403]

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.

Provided that the Income You would have earned during the Indemnity Period had

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[402] Mayberg Schedule at 10-11 [CB Vol A 358-359].

[403] Mayberg Wording at p 58 [CB Vol A 300].

the Damage not occurred:

a. will be calculated by reference to the Income for:

   i. a period of the same duration as the Indemnity Period that starts a year prior to the date of the Damage; or

   ii. a period of Your normal Business operations that corresponds most closely to the Indemnity Period if Your Business has operated for less than a year at the start of the Indemnity Period; and

b. will be adjusted to take into account any:

   i. trends of the Business and other influences that would vary the Income;

   ii. variation of normal trading whereby Income is maintained during the Indemnity Period from increased sales of low margin goods;

   iii. changes to how Stock, materials, finished goods or partially finished goods are used, purchased or sold including salvage sales of Stock following Insured Damage; and

   iv. savings made during the Indemnity Period that reduce the cost of running Your Business.

617. The relevant capitalised terms in the Basis of Settlement Clause are defined in the applicable Definitions section as follows:[404]

a. **Income** means:

   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.

b. **Uninsured Working Expenses** means those expenses that You declare to Us as Uninsured Working Expenses at the time of applying for cover under this Business Interruption –Income Cover Section.

c. **Indemnity Period** means the period that starts on the date of the Damage and ends not later than the number of weeks or months stated in the Schedule after the date of the Damage during which the results of Your Business is affected

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404 Mayberg Wording at p 299 [CB Vol A 299].

as a consequence of the Damage.

d. **Damage** means accidental physical damage, destruction or loss.

618. At this point, the following preliminary observations may be made about the structure and terms of the policy.

619. ***First***, contrary to Allianz's submission (**Allianz at [58])**, the Mayberg policy cannot be characterised properly as having as its "primary" cover losses resulting from business interruption caused by damage to property. To the contrary, the policy provides a number of different classes of cover, some only of which are predicated on damage to property. Others, including the critical clauses at issue in the present case, are expressly untethered from damage to property.

620. ***Secondly***, it follows that the critical clauses at issue in the present case should not be read through the prism of, or given a narrow or restricted meaning so as to conform to, a false notion as to what is the "primary" cover provided by the policy.

621. ***Thirdly***, consistently with the need to focus on the text and context of the terms of the policy, the focus must be on the language actually used by the parties in the critical clauses. In respect of the Hybrid Clause, the focus is on whether the closure or evacuation by the legal authority was as a result of an outbreak within a 20-kilometre radius. In respect of the Prevention of Access Clause, the focus is on whether the order preventing or restricting access resulted from the threat of damage to persons within a 50-kilometre radius.

L3. THE CLAIM

622. Mayberg has made a claim for indemnity under the Mayberg Policy. That claim was denied by Allianz.[405] In these proceedings, Mayberg contends that both the Hybrid Clause and the Prevention of Access Clause responds to its loss.

623. The insured peril under the Prevention of Access Clause is "legal authority preventing or restricting access to Your Premises or ordering the evacuation of the public as a result of Damage to or threat of Damage to property or persons within a 50-kilometer radius of Your Premises provided the prevention of access or restricted access to the Premises extends for a continuous period greater than 48 hours". To fall within this clause, the legal authority must have:

a. prevented or restricted access to the Premises for a continuous period greater

[405] Allianz Concise Statement filed 26 February 2021 at [2]-[3]; Mayberg Concise Statement in Response filed 23 April 2021 at [4]-[5].

than 48 hours; **or** ordered the evacuation of the public; **and**

b. such prevention or restriction been as a result of Damage or Threat of Damage to persons within a 50-kilometre radius of the Premises.

624. The insured peril under the Hybrid Clause is "any legal authority closing or evacuating all or part of the Premises as a result of the outbreak of an infectious or contagious human disease occurring within a 20-kilometre radius of Your Premises [and not be from highly pathogenic Avian Influenza or any disease declared to be a quarantinable disease under the Quarantine Act 1908 (as amended)]". To fall within this clause, the legal authority must have:

a. closed or evacuated all or part of the Premises; **and**

b. such closure resulting from the outbreak of COVID-19 occurring within a 20-kilometre radius of the Premises.

625. Mayberg contends that the Prevention of Access Clause and the Hybrid Clause may be engaged by reason of matters including (**Authority Response-Mayberg**):

a. **The 19 March Mass Gathering Direction**.[406] This directed a person who owns, controls or operates premises in Queensland not to allow a non-essential mass gathering of 500 persons or more to occur on the premises. It also prevented persons from organising or attending such a gathering.

b. **The 19 March Non-essential Indoor Gatherings Direction**.[407] This directed a person who owns, controls or operates premises in Queensland not to allow a non-essential indoor gathering of 100 persons or more to occur on the premises. It also prevented persons from organising or attending such a gathering.

c. **The 23 March 2020 Non-essential Business Closure Direction**.[408] This required persons who own, control, or operate a non-essential business or undertaking in Queensland not to operate the business or undertaking.

d. **The 25 March 2020 Border Restrictions Direction**.[409] This required persons (with limited exceptions) arriving in Queensland from interstate to self-quarantine for 14 days.

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[406] SOAF Annexure D at #5.

[407] SOAF Annexure D at #4.

[408] SOAF Annexure D at #9.

[409] SOAF Annexure D at #12

e. **The 29 March 2020 Home Confinement Direction**.[410] This required all people to stay in their homes except for shopping for essentials, medical or health care needs, exercise (with no more than one other person), providing care or assistance to an immediate family member, or work and study (if it was not possible to work or learn remotely).

f. **The 14 May 2020 Non-essential Business, Activity and Undertaking Closure Direction (No. 10)**.[411] This required persons who own, control, or operate a "non-essential business, activity or undertaking" in Queensland not operate that business, activity or undertaking (other than online).

g. **The Restrictions on Business, Activities and Undertakings Directions (No 1), (No 3), (No 5), (No 6), and (No 9).**[412] These directions imposed restrictions on the manner in which a "non-essential business, activity or undertaking" in Queensland could be operated. Businesses, Activities and Undertakings could generally operate, but with physical / social distancing requirements.

L4. PREVENTION OF ACCESS CLAUSE

626. As has already been observed, to fall within this clause, the legal authority must have:

a. prevented or restricted access to your premises for a continuous period greater than 48 hours; **or** ordered the evacuation of the public; **and**

b. done one (or both) of those things "as a result of Damage or threat of damage to property or persons within a 50-kiometre radius of your premises".

627. Mayberg relies upon the prevent or restriction of access limb of this clause (not the evacuation of the public limb).

628. Accordingly, in logical sequence, the issues are:

a. ***First***, whether the legal authority prevented or restricted access to Mayberg's premises for a continuous period greater than 48 hours within the meaning of the clause;[413]

b. ***Secondly***, whether that was done "as a result of Damage or threat of damage

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[410] SOAF Annexure D at #17.

[411] SOAF Annexure D at #38.

[412] SOAF Annexure D at #41, #46, #50, #60, and #69.

[413] Allianz at [81]-[82], referring to [44]-[45].

to property or persons within a 50-kiometre radius of your premises”.[414]

(a) Legal authority prevented or restricted access to Mayberg’s premises

Construction

629. Mayberg relies upon the submissions set out above in respect of the construction of the Prevention of Access Clause in the Taphouse Policy, and adds the following:

    a. “Preventing” and “restricting” both encompass something less than stopping completely.

    b. The text of the clause does not specify who must be prevented or restricted from accessing the premises so that it may encompass anyone at all, including the proprietors, and the general public.[415] There is good reason for this: there is no distinction between losses suffered as a result of the proprietors being prevented or restricted from accessing the premises and those suffered as a result of the public being so prevented or restricted. The policy contemplates and allows for both scenarios.

    c. The condition imposed on the second limb (“evacuation of the public”) confirms this position. Where the cover is confined by reference to certain classes of persons, the limitation is imposed expressly.

    d. As noted above, the assertion that the “wider context of the clause [is] an extension to property cover”[416] is wrong and it ought not artificially narrow the cover offered by the clause.

    e. Insofar as there is any ambiguity, the *contra proferentem* principle applies because the policy wording comprised Allianz’s standard terms and conditions and were not the subject of negotiation.[417]

Application

630. The 29 March 2020 *Home Confinement Direction* had the effect of either “*preventing*” or “*restricting*” access to the premises of Mayberg. It provided that a person could not leave their home except for “essential goods or services”. Even if dry cleaning or alterations fall within the definition of “essential goods or services… that are needed for the necessities of life and the operation of society”, the direction restricted persons from

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[414] Allianz at [83]-[88], incorporating [49]-[51].

[415] Allianz at [45].

[416] Allianz at [45(b)].

[417] SOAF at [82].

accessing Mayberg's premises. It expressly provided that persons could not leave their home, even to obtain essential goods or services "except for, and only to the extent reasonably necessary to accomplish" that permitted purpose.[418]

631. That the *Home Confinement Direction* constitutes a "*restriction*" on access accords with the reasoning in *Arch*. The policy extends not only to prevention but also to restriction and thus to hindrance. The reasoning in Arch is that restrictions on movement do constitute a hindrance and are therefore within the broader concept of prevention or restriction. The order specifically directs attention to how and when a person may leave their home and, insofar as they do, they are only permitted to the extent necessary to obtain essential goods and services. That is a restriction on if, how and when a person may obtain dry-cleaning or alterations.

632. It is more difficult to characterise the other matters comprising the Authority Response-Mayberg (set out above and in Annexure 2 of Allianz's submissions) as giving rise to a prevention or restriction within the meaning of the clause.

(b) As a result of threat of damage to … persons within a 50 kilometre radius

<u>Construction</u>

633. Again, Mayberg relies upon the submissions set out above in respect of the construction of the Prevention of Access Clause in the Taphouse Policy, and adds the following:

    a. The clause applies to measures taken by a legal authority as a result of damage which has **<u>actually</u>** been suffered, or **<u>threat</u>** of damage, which damage may not yet have commenced, and may (or may not) be suffered in the future.

    b. It applies to damage and the threat of damage not only to property but also to persons and, as such, a threat of damage to persons is capable of engaging the clause.[419]

    c. Again, the assertion that the "wider context of the clause [is] an extension to property cover"[420] is wrong and it ought not artificially narrow the cover offered by the clause. The critical point is that a measure taken as a result of a threat of persons contracting COVID-19 will just as much have been taken a result of a threat of persons suffering accidental physical damage. The legal authority will be acting to protect those who may, absent the measure, accidentally

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[418] Clause 6.

[419] Cf Allianz at [47].

[420] Allianz at [45(b)].

contract the disease and thus accidentally suffer associated physical damage.

d. Insofar as there is any ambiguity, the *contra proferentem* principle applies.[421]

634. **Allianz's submissions.** Allianz does not dispute that there was COVID within a 50 kilometre radius of Mayberg's premises. Rather Allianz asserts that "COVID-19 did not constitute a threat of damage to persons" within the meaning of the Mayberg Policy.[422] This assertion, which requires some torturing of language, should not be accepted.

635. ***First***, it has no textual basis. That is, there is no textual basis for ignoring or reading down the expression "Damage to … persons" .

636. ***Secondly***, it has no contextual basis. The immediately preceding clause **is** tethered to damage to property. That it uses the defined term "Insured Damage" underscores Mayberg's point: where the parties intended to limit the damage to damage to property, the defined term "Insured Damage" is used; where it is not so limited, it is not. Allianz seeks to overcome this by saying "it is plain that the only intended difference between the two parts of the clause is that the first half contemplates damage in the vicinity of the Premises".[423] If that be so, the parties could and would have used the term "Insured Damage" for both clauses. They did not.

637. ***Thirdly***, the existence of the Hybrid Clause does not deny the application of the Prevention of Access Clause.[424] As has already been observed in the context of *FCA v Arch*, it is entirely orthodox for each clause to be given its appropriate field of operation having regard to the text and purpose of the policy. That the construction arrived at would involve some overlap in coverage is hardly a ground of objection or surprising. As noted in Section B1 above, Allsop CJ recognised as much in *Star* at [166].

638. Again, the contention that the Hybrid Clause might be rendered nugatory or ineffective is one based on tautology or redundancy and, in the words of Dixon J, such arguments are "never strong".[425] Any presumption against redundancy or surplusage is of little weight.[426]

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421 SOAF at [82].

422 Allianz at [83]-[88].

423 Allianz at [87].

424 Cf Allianz at [88], referring to [49]-[51].

425 *Teele v Federal Commissioner of Taxation* (1940) 63 CLR 201 at 207.

426 *HDI Global Speciality SE v Wonkana No. 3 Pty Limited* [2020] NSWCA 296 at [44]; *Beaufort Developments (NI) Limited v Gilbert-Ash NI limited* [1999] 1 AC 266 at 273-274; *XL Insurance Co SE v BNY Trust Company of Australia Limited* [2019] NSWCA 215 at [72], referring to *AFC Holdings Pty Ltd v Shiprock Holdings Pty Ltd* [2010] NSWSC 985; (2010) 15 BPR 28,199 at [13]; *Central Australian Aboriginal Congress Inc v CGU Insurance Limited* [2009] NTCA 1 at [47].

639. Moreover, the more fundamental problem identified in respect of IAG's contention applies here. The argument bears repeating. The Prevention of Access Clause and the Hybrid Clauses have different terms and fields of operation. The former refers to an authority "preventing or restricting access". It requires "damage to or threat of damage to … persons". The latter requires the "closing or evacuating or all or part of the premises". It refers to the "outbreak of an infectious or contagious human disease" as the cause of the closure or evacuation order. It does not require there to be any view on the part of the legal authority that there is a threat of damage to persons (nor any such threat in fact). Accordingly, it is conceivable that the Hybrid Clause would respond in circumstances where the Prevention of Access Clause would not. It may depend upon the nature of the disease. Assume the outbreak of a disease within the premises that is not perceived by the legal authority to give rise to a threat of physical damage to persons, but nonetheless to warrant closure or evacuation of the premises.

<u>Application</u>

640. **Mayberg's primary argument.** The language of the statutory instruments and their legal context support the conclusion that the instruments were made "as a result of … threat of damage to … persons within a 50-kilometre radius of each of [Mayberg's] premises", such that:

    a. that is sufficient to engage the clause;

    b. it is not necessary for the insured to go a step further and establish that there was <u>**in fact**</u> such a threat;

    c. it is not permissible for Allianz to contradict the instruments by seeking to establish that, contrary to what they convey, there was <u>**in fact**</u> no such threat.

641. Taphouse's primary argument applies with equal force here, such that the Court ought find that the 29 March 2020 *Home Confinement Direction* was made as a result of the recognised threat of serious adverse effects on the health of persons in all of Queensland (including at each of Mayberg's premises). This means that it was made as a result of "threat of damage to … persons" within a 50-kilometre radius of the Mayberg premises within the meaning of the Prevention of Access Clause. The same conclusion follows for each of the directions constituting the Authority Response-Mayberg made under the *Public Health Act* 2005 (Qld).

642. **Mayberg's secondary argument.** Insofar as it be necessary to demonstrate there was <u>**in fact**</u> damage or a threat of damage to persons within the radius, the evidence permits the Court to be satisfied that that exists. This is because, for all Situations, Allianz

accepts that, prior to 23 March 2020:[427]

a. there were at least two people with COVID-19 who had been within a 50-kilometre radius;

b. that there were at least two people with COVID-19 who were not self-isolating whilst within the radius after having contracted COVID-19 but prior to being diagnosed with COVID-19; and

c. that there were at least two people with COVID-19 who were not self-isolating whilst within the radius during a period in which they were capable of infecting another person with COVID-19.

L5. HYBRID CLAUSE

643. As has already been observed, to fall within this clause, the legal authority must have:

a. closed or evacuated all or part of the Premises; **and**

b. such closure resulting from the outbreak of COVID-19 occurring within a 20-kilometre radius of the Premises.

644. Each of these are addressed in turn.

(a) Closed or evacuated all or part of the premises

645. The arguments as to whether the various directions comprising the Authority Response-Mayberg closed or evacuated all or part of the premises are set out in section C.4 of Allianz's submissions.

646. There is force in these submissions. Perhaps all that can be said against them is that it may be open to conclude that the social distancing requirements[428] constitute a closure of a part of Mayberg's premises. This would be consistent with the reasoning in *Hyper Trust*: a reasonable person would understand closure to extend to closure of a part of the business.

(b) As a result of the outbreak of COVID-19 occurring within a 20-kilometre radius

Construction

647. Allianz contends at paragraph 35 of its submissions[429] that an outbreak requires there to be "at least a confirmed community transmission of COVID-19", said to be "where one

[427] Notice of Dispute filed by Allianz on 13 August 2021.

[428] See, in particular, the *Restrictions on Business, Activities and Undertakings Directions (No 1), (No 3), (No 5), (No 6), and (No 9)*: SOAF Annexure D at #41, #46, #50, #60, and #69.

[429] This is repeated in respect of Mayberg: see Allianz at [76].

confirmed case of COVID-19 transmits it to another person in an uncontrolled environment". The location of the outbreak is "the location at which the transmission event occurred".

648. This construction ought be rejected for the same reasons set out in respect of the Taphouse Policy. The construction does not accord with the ordinary meaning of the term "outbreak" and unduly constrains its potential scope of operation.

Application

649. **Mayberg's primary argument**. The argument in respect of Taphouse's primary argument applies with equal force here. It is sufficient to reiterate that the public health emergency was "in all of Queensland", that the directions made by the Chief Health Officer applied to "all of Queensland" and where to made to "assist in containing, or to respond to, the spread of COVID-19 within the community". The basis for the directions were thus that:

    a. There was an outbreak of COVID-19.

    b. That outbreak had spread.

    c. That outbreak had spread to all of Queensland.

    d. The measures were imposed on all of Queensland as a result of that outbreak.

650. Again, it is immaterial that the outbreak was recognised as both within and outside the radius – the salient point is that there was an outbreak recognised inside the radius as required by the clause.

651. **Mayberg's secondary argument.** The available evidence also allows the Court to be satisfied there was an "outbreak" within the radii of each of the situations.

    a. As to Situations 1 and 4, Allianz accepts that, prior to 23 March 2020:[430]

        i. there were at least two people with COVID-19 who had been within a 20-kilometre radius;

        ii. that there were at least two people with COVID-19 who were not self-isolating whilst within that radius after having contracted COVID-19 but prior to being diagnosed with COVID-19; and

        iii. that there were at least two people with COVID-19 who were not self-isolating whilst within that radius during a period in which they were

[430] Notice of Dispute filed by Allianz on 13 August 2021.

capable of infecting another person with COVID-19.

b. The 20 kilometre radius around situation 2 is located partly within the within the Metro South Hospital and Health Service (**HHS**) and partly within the Metro north HHS, although each of the Metro South HHS and Metro North HHS are larger than the 20 kilometre radii around situation 2.[431] By 23 March 2020, there were 319 cases of COVID-19 in Queensland, with 63 new cases in the Metro South HHS in that week alone.[432] It is submitted that the Court may safely draw an inference that there was an "outbreak" within the radius by that time. If the Court is not willing to make that inference, then the determination of this issue ought wait the subsequent hearing.

c. The 20 kilometre radius around situation 3 is located entirely within the Metro South HHS, although the Metro South HHS is larger than the 20 kilometre radius.[433] By 23 March 2020, there were 319 cases of COVID-19 in Queensland, with 63 new cases in the Metro South HHS and 76 new cases in the Metro North HHS in that week alone.[434] It is submitted that the Court may safely draw an inference that there was an "outbreak" within the radius by that time. If the Court is not willing to make that inference, then the determination of this issue ought wait the subsequent hearing.

652. As was said in respect of the Taphouse Policy, it is not necessary for there to be proof of confirmed community transmission for there to be an outbreak.[435] To require that an insured put on expert evidence, or to subpoena relevant health authorities, to demonstrate community transmission lacks commercial common sense. Moreover, it may not even be possible: the insured peril may extend to diseases where the state of science is such that one cannot determine how or where transmission took place. A construction that requires proof of such matters should not be accepted.

L6. CAUSATION

653. As with Taphouse, the correct approach is:

a. Was there loss?

b. Did that loss result from the interruption or inference with Mayberg's business?

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431 SOAF at [86].

432 SOAF at [87].

433 SOAF at [86].

434 SOAF at [87].

435 cf Allianz at [35], [76].

c. Was that interruption or interference caused by the Authority Response-Mayberg?

654. **Loss**. Mayberg has put before the Court its profit and loss statements for the periods July 2018 to June 2019,[436] July 2019 to June 2020,[437] and July 2020 to June 2021.[438] Those statements are sufficient to be satisfied, for the purposes of resolving the questions of construction in this case, that there was loss.

655. **Interruption or interference.** The Court can similarly be satisfied that the loss resulted from "interruption or interference" with Mayberg's business. The Hopper Affidavit makes clear that there was a significant decline in Mayberg's business after the directions promulgated by the Queensland Government.[439]

656. **Caused by.** The compelling common sense judgment in the present case is that the relevant directions – in particular, the *Home Confinement Directions* – was the dominant cause of Mayberg's loss of profit.

657. Mayberg does not cavil with the proposition that it has *at least a prima facie* onus to prove the loss claimed. This requires it to point to its reduction in gross profit, and in circumstances where the proximate cause of that reduction is plainly the insured peril (the government orders), it has discharged that onus. If Allianz seeks to establish that some part of its loss of gross profit was caused by something else, it was open for it to do so (but it has not).

L7. AJDUSTMENT CLAUSE

658. The proper approach to construing adjustment and trends clauses has been addressed elsewhere in these submissions, and it is unnecessary to repeat those submissions here. It is sufficient to note that any adjustment ought not take into account the presence and effect of COVID-19 generally.[440]

L8. THIRD PARTY PAYMENTS

659. Mayberg received payments from the operation of the Commonwealth's "JobKeeper" payment, the Queensland Government's COVID-19 Grant, and a rental waiver from its landlord. The operation of each of these have been set out in Annexure A.

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[436] Hopper Affidavit at [25].
[437] Hopper Affidavit at [26].
[438] Hopper Affidavit at [27].
[439] Hopper Affidavit at [16]ff.
[440] cf Allianz at [93].

660. From the outset, for the reasons set out in respect of Taphouse, the starting point is *not* the calculation of loss, or whether the third party payments reduced the loss suffered by Mayberg.

661. The basis of settlement clause provides for a 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".[441] The policy carefully calibrates this calculation by specifying how the "income You would have earned … had the Damage not occurred" is to be calculated.

662. The critical integer to the calculation is the definition of "Income", which is:

> 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.

663. It follows that JobKeeper and the Queensland Government's COVID-19 Grant will be taken into account if the Court is satisfied that they are a subsidy.

664. The rental waiver received from Mayberg's landlord, however, is not taken into account because it does not fall within any of the integers above. It may, however, be taken into account if the Court is satisfied that it was a saving that "[reduced] the cost of running Your Business".

L9. INSURANCE CONTRACTS ACT

665. The principles concerning interest and section 57(2) of the *Insurance Contracts Act 1984* (Cth) have been set out above. For similar reasons to those given in respect of Taphouse's claim, interest ought run from the date Mayberg's claim was denied (being 31 March 2020).[442]

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[441] Mayberg Wording at 299 [CB Vol A p 299].

[442] Mayberg Outline at [28].

M. WALDECK (NSD 137/2021)

M1. THE POLICYHOLDER

666. The respondent in NSD 137/2021, Mr Philip Waldeck (**Waldeck**) is the insured under a "Chubb Business Pack" insurance policy number EPM0018480 (**Waldeck Policy**) placed with the applicant, Chubb Insurance Australia Limited (**Chubb**).

667. Waldeck is the registered proprietor of a property located at 1197 Toorak Road, Camberwell, Victoria.[443] From 29 June 2012 until on or about 22 October 2020, Waldeck leased the ground floor of the property to Going Venture Pty Limited (**Going Venture**), which occupied the Ground Floor as a coffee shop.[444]

M2. THE POLICY

668. The Waldeck Policy comprises a policy schedule (**Waldeck Schedule**)[445] and wording (**Waldeck Wording**).[446] The period of insurance is 4pm 28 March 2020 to 4pm 28 March 2021.[447] The "Insured Location' is 1197 Toorak Road, Camberwell Victoria 3124 Australia.[448]

669. The classes of insurance taken under the policy were identified in the Waldeck Schedule as:[449]

    a. Property Damage;

    b. Business Interruption;

    c. Glass; and

    d. Public and Products Liability.

670. The detail for the "Business Interruption Section" are stated in the Waldeck Schedule as an indemnity period of 12 months, with the sums insured as follows:

    a. Gross Revenue, in the sum of $[redacted]; and

    b. Additional increase in Cost of Working, in the sum of $[redacted].

671. The relevant terms of the policy for these proceedings are contained in Section 2 –

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[443] Waldeck Outline Document filed on 18 July 2021 at [4] (**Waldeck Outline**).

[444] Waldeck outline Document at [5].

[445] CB Vol A 527.

[446] CB Vol A 467.

[447] Waldeck Schedule at 3 [CB Vol A 529].

[448] Waldeck Schedule at 3 [CB Vol A 529].

[449] Waldeck Schedule at 4 [CB Vol A 530].

Business Interruption.[450]

672. Within that section, the terms are organised under headings[451] including:

a. "Definitions";[452]

b. "Cover";[453]

c. "Basis of Settlement";[454] and

d. "Extension C: non damage".[455]

673. Under the heading "Cover", the policy provides:[456]

> Provided this Section is shown as insured in the Schedule, We will pay the amount of loss resulting from interruption of or interference with Your Business resulting from Insured Damage to Property Insured at an Insured Location that occurs during the Policy Period.
>
> Loss will be calculated in accordance with the Basis of Settlement, and subject to the Indemnity Period and applicable Sum Insured.

674. This clause thus applies where the interruption or interference was "resulting from Insured Damage to Property". "Insured Damage" means "physical loss, destruction or damage … caused an event insured under the Property Damage, Theft, Money, Glass or General Property Sections".[457]

675. There are also a number of extensions of cover, which comprise:

a. "Extensions A: Following Insured Damage", which includes cover for "Accounts Receivable", "Additional Increase in Cost of Working" and "Contractual Penalties";[458]

b. "Extensions B: Following damage at locations not occupied by You", which includes cover for "Denial of Access", "Property in Transit", "Property in a Commercial Complex", "Public Authority", "Public Utilities and Computer Installations", "Registered Vehicles", "Roads, Bridges and Railway Lines",

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450 Waldeck Wording at 23 [CB Vol A 490].

451 Headings, however, do not form part of the policy: see Waldeck Wording at 8 [CB Vol A 475].

452 Waldeck Wording at 23 [CB Vol A 490].

453 Waldeck Wording at 24 [CB Vol A 491].

454 Waldeck Wording at 24 [CB Vol A 491].

455 Waldeck Wording at 26 [CB Vol A 493].

456 Waldeck Wording at 24 [CB Vol A 491].

457 Waldeck Wording at 23 [CB Vol A 490].

458 Waldeck Wording at 25 [CB Vol A 492].

"Suppliers and Customers";[459] and

c. "Extension C: non damage", which contains the **Hybrid Clause** the subject of the present proceedings.[460]

676. The Hybrid Clause is in the following terms:

> **1. Infectious Disease, Murder and Closure Extension**
>
> Cover is extended for loss resulting from interruption of or interference with the Insured Location in direct consequence of the intervention of a public body authorised to restrict or deny access to the Insured Location directly arising from an occurrence or outbreak at the premises of any of the following:
>
> a) Notifiable Disease, or
>
> b) the discovery of an organism likely to cause Notifiable Disease.
>
> c) the discovery of vermin or pests;
>
> d) an accident causing defects in the drain or other sanitary arrangement;
>
> e) murder or suicide;
>
> f) injury or illness sustained by any person resulting from food or drink poisoning or arising from or traceable to foreign or injurious matter in food or drink provided on premises;
>
> leading to restriction or denial of the use of the Insured Location on the order or advice of the local health authority or other competent authority.
>
> Cover under this Extension does not include the costs incurred in cleaning, repair, replacement, and recall or checking of property.

677. Finally, the **Basis of Settlement Clause** provides, in respect of the "Gross Revenue" basis, as follows:[461]

> Loss will be calculated by:
>
> a) determining the difference between Gross Revenue during the Indemnity Period and the Standard Gross Revenue;
>
> b) adding the Increased Cost of Working incurred during the Indemnity Period, but only to the extent that the reduction in Gross Revenue is reduced; and
>
> c) subtracting any sum saved during the Indemnity Period in respect of such of the charges and expenses of Your Business payable out of Gross Revenue as may cease or be reduced in consequence of the Insured Damage.
>
> If the annual Sum Insured for Gross Revenue is less than eighty per-cent (80%) of Gross Revenue during the year immediately prior to the Insured Damage, We will pay a proportion of the loss of Gross Revenue.

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[459] Waldeck Wording at 25-26 [CB Vol A 492-493].

[460] Waldeck Wording at 26 [CB Vol A 493].

[461] Waldeck Wording at 24-5 [CB Vol A 491-492].

The proportion that We will pay will be the same as the proportion that the annual Sum Insured for Gross Revenue bears to eighty per-cent (80%) of the Gross Revenue for the year immediately prior to the Insured Damage.

This condition will not apply if Your claim is less than 10% of the Sum Insured for Gross Revenue.

678. The relevant capitalised terms in the Basis of Settlement Clause are defined in the applicable Definitions section as follows:[462]

a. **Gross Revenue** means the money paid or payable to You for services rendered and/or goods sold in the course of Your Business at the Insured Location(s), including any Rent Receivable.

b. In turn **Rent Receivable** means the amount of the rent received or receivable from the letting of all or part of the Insured Location(s).

c. **Indemnity Period** means the period beginning with the occurrence and ending no later than the Indemnity Period specifically set out in the Schedule [12 months] during which the results of Your Business will be affected in consequence of the Insured Damage.

d. **Standard Gross Revenue** means the Gross Revenue during that period in the twelve months immediately before the date of the Insured Damage which corresponds with the Indemnity Period allowing for the Trend in the Business.

e. In turn **Trend in the Business** means adjustments to provide for the trend of Your Business and variations in other circumstances affecting that Business either before or after the Insured Damage or which would have affected that Business had the Insured Damage not occurred, so that the figures adjusted will represent as nearly as may be reasonably practicable the results which but for the Insured Damage would have been obtained during the relative period after the Insured Damage.

f. **Insured Damage**, as outlined above, means physical loss, destruction or damage occurring during the Policy Period caused by an event insured under the Property Damage, Theft, Money, Glass or General Property Sections.

g. There is no definition of “**Loss**” in this section (or in the general definitions of the Waldeck Wording).

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[462] Waldeck Wording at 23-4 [CB Vol A 490-491].

M3. THE CLAIM

679. Waldeck has made a claim under the Waldeck Policy. That claim was denied by Chubb.[463] These proceedings raise questions as to the proper construction of the particular **Hybrid Clause** in the Waldeck Policy, and as to whether it is engaged by reason of the following (**Authority Response-Waldeck**):

    a. **The March 2020 to July 2020 *Non-Essential Business Closure Directions,*[464] *Non-Essential Activity Directions*,[465] and *Restricted Activity Directions*.**[466] The purpose of these instruments was to "prohibit the operation of non-essential business and undertakings in order to limit the spread of Novel Coronavirus 2019". These instruments prohibited persons who owned, controlled or operated a food and drink facility (which included cafes) in Victoria from operating that facility (until June) and restricted how persons could operate the food and drink facility.

    b. **The July 2020 to October 2020 *Restricted Activity Directions (Restricted Areas)*.**[467] The purpose of these instruments was also to "restrict the operation of certain businesses and undertakings in the Restricted Areas[468] in order to limit the spread of Novel Coronavirus 2019". These instruments prohibited persons who owned, controlled or operated a food and drink facility (which included cafes) in Victoria from operating that facility, save for takeaway.

    c. **The *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences)* Regulations *2020* (Vic) (*Rent Relief Regulation*).[469]** Waldeck was required to provide rent relief from rent payments and outgoings to Going Venture for the period 1 April 2020 to on or about 22 October 2020.[470]

M4. HYBRID CLAUSE

680. The form of Hybrid Clause in the Waldeck Policy is materially narrower than other Hybrid Clauses. It is also ungrammatical.

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[463] Chubb Amended Statement of Claim filed 20 August 2021 at [8]-[9]; Waldeck Defence to Amended Statement of Claim filed 25 August 2021 at [8]-[9].

[464] SOAF Ann E at #3, #4, and #5.

[465] SOAF Ann E at #4, and #5.

[466] SOAF Ann E at #8, #12, #14, #16, #18, #20, #21, #24, 26, #28, #31, #34, #39, #43, #46, and #49.

[467] SOAF Ann E at #35, #40, #44, #50, #51, #55, #59, #61, #66, #69, #72, #74, and #77.

[468] The Restricted Areas were defined by reference to the Area Directions: SOAF Ann E at #37, #42, #48, #56, #63, #68, and #76.

[469] SOAF Ann E at #19.

[470] Waldeck Outline at [7].

681. The features of the clause which render it materially narrower than the others include:

a. The requirement that the interruption or interference be "**with the Insured Location**".

b. The requirement that such interruption of interference be in "**direct consequence** of the intervention of a public body".

c. The requirement that the intervention be one "**directly** arising from an occurrence or outbreak **at the premises**" of:

i. "Notifiable Disease"."the discovery of an organism likely to cause Notifiable Disease."

682. As Chubb has noted, Mr Waldeck frankly accepts that he is not aware of any such occurrence or outbreak **at the premises**.[471]

683. This poses obvious challenges for Mr Waldeck's claim.

684. Nonetheless, Mr Waldeck's claim gives rise to some important issues requiring resolution.

685. In logical sequence, they arise as follows:

a. ***First***, whether there was an "interruption or interference with" the Insured Location in direct consequence of the intervention of a public body authorised to restrict or deny access to the Insured Location, and whether that intervention directly led to the restriction or denial of the use of the Insured Location on the order or advice of the local health authority or other competent authority.[472]

b. ***Secondly***, whether that intervention was in direct consequence from an occurrence or outbreak "at the premises" of SARS-CoV-2 or COVID-19.[473]

c. ***Thirdly***, cover is excluded by operation of section 61A of the *Property Law Act 1958* (Vic).[474]

(a) Interruption or interference with the Insured Location

686. With one exception, Chubb accepts that each of the statutory instruments comprising the Authority Response-Waldeck lead to the restriction or denial of the use of the Insured Location on the order or advice of the local health authority or other competent

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[471] Chubb at [191].

[472] List of Issues for Determination [23(f)], [23(g)]

[473] List of Issues for Determination [23(a)]-[23(e].

[474] Chubb at [122]-[171].

authority,[475] and that restriction or denial led to interruption or interference with the Insured Location.[476]

687. The exception concerns the *Rent Relief Regulation*. Chubb contends that regulation did not restrict or deny the use of the Insured Location as it only affected the contractual relationship between Waldeck and Going Venture.[477]

688. The short answer to Chubb's submission is that the effect of the *Rent Relief Regulation* was as follows:

   a. Going Venture was not in breach of its lease even if it did not pay the full rent agreed upon in its lease (clause 9(1));

   b. Waldeck could not evict or attempt to evict Going Venture for failure to pay the full rent (clause 9(2));

   c. Waldeck could not re-enter or recover the premises, or have recourse to security, for failure to pay the full rent (clause 9(3), (4));

   d. Waldeck was required to provide rent relief to Going Venture (clause 10). Waldeck provided rental relief for the period 1 April 2020 to on or about 22 October 2020;[478] and

   e. Waldeck was required to provide relief from outgoings to Going Venture (clause 15).

689. Each of the above constituted a restriction of Waldeck's right as registered proprietor to use the Insured Location. The fact that the contractual relationship between Waldeck and Going Venture was affected by the *Rent Relief Regulation* concisely demonstrates the point: without that regulation, Waldeck had an unfettered right to use the Insured Location in the manner he saw fit – in his case, by renting it, for an agreed fee, to Going Venture. The effect of the *Rent Relief Regulation* was that he did not.

(b) Intervention which directly arising from an occurrence or outbreak at the premises

690. Chubb contends that:

   a. the phrase "at the premises" must be read interchangeably with the "Insured

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475 Chubb at [217].

476 Chubb at [220].

477 Chubb at [218]. See, also, Chubb at [222].

478 Waldeck outline at [8].

Location" in the policy;[479]

b. Waldeck's claim must fail because there is no occurrence or outbreak at the Insured Location.[480]

691. It is then said, in any case, the matters comprising the Authority Response-Waldeck did not directly arise from the occurrence or outbreak.

The "Insured Location" and "the premises"

692. This is an important issue of construction.

693. Contrary to Chubb's submission, the preferable construction is that they are not interchangeable.

694. *First*, the parties could have used the words "at the Insured Location" rather than "at the premises". They did not.

695. *Second*, the clause discloses an intention to distinguish between them. The text and context require the interruption or interference to be tethered to the Insured Location. Similarly, it is use of the Insured Location that must be restricted or denied. That is in contrast to the cause of that interruption, interference, restriction or denial of use **of that location**. That cause is tethered to something else: being an occurrence or outbreak **at the premises**. It is unsurprising that the two concepts are intended to be, and are, distinct. Each of the matters at (a)-(f) in the clause can affect the Insured Location despite not occurring on the Insured Location. For example, a clog in a drain could occur at the Insured Location (assuming the part of the drain clogged was in the Insured Location), or outside it (assuming the clog was at the main). An analogy closer to the present pandemic would be a detected case of COVID-19 in one shop in a shopping centre: this would be "at the premises" (being the centre or building), but not the "Insured Location" (being the particular shop). Cover ought not be excluded by altering the bargain reached between the parties and reading "at the premises" narrowly.

696. *Third*, in the event and to the extent that "premises" is to be read as "Insured Location", the use of the phrase "occurrence or outbreak" suggests that it is the occurrence of COVID-19 or SARS-CoV-2 that has to be at the premises, whereas the outbreak can be in an area which affects the premises. If that were not the case, then the use of the

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[479] Chubb at [176], [187].

[480] Chubb at [190]-[191].

word "outbreak" would be superfluous.[481]

Occurrence or outbreak at the premises

697. On the foregoing construction, it would not be necessary for Mr Waldeck to show an occurrence or outbreak at the "Insured Location". Instead, it would be necessary for him to point to such an occurrence or outbreak "at the premises" to which the "Insured Location" is connected (e.g., because it is within the centre or building comprising "the premises").

698. On the evidence presently available to Mr Waldeck, he cannot point to such an occurrence or outbreak at the premises.

(c) Section 61A

699. Chubb contends that the reference to the "quarantinable diseases under the *Quarantine Act 1908 (Cth)*" should be read as "listed human disease under the *Biosecurity Act 2015*" due to the operation of section 61A of the *Property Law Act 1958* (Vic).[482]

700. Chubb's reasoning is not materially different from that of IAG and QBE. Mr Waldeck relies upon the response to those submissions set out above in respect of Meridian.

701. Further, there is again doubt as to whether the proper law of the contract is that of Victoria. The policy provides disputes will be determined "in accordance with the law of Australia and States and Territories thereof" and that the parties "agree to submit to the jurisdiction of any competent court in a State or Territory of Australia".[483] As Chubb acknowledges,[484] the parties have made no express or implied choice as to the laws of which State or Territory will apply. The applicable law must therefore turn on the system of law with which the transaction has its closest and most real connection (*Bonython v Commonwealth* [1951] AC 201, 219).

702. While it is true that the insured premises are in Victoria, and Mr Waldeck is a resident of Victoria, Chubb is located in New South Wales.[485]

M5. CAUSATION AND LOSS

703. This is the issue 24 of the List of Issues for Determination and addressed at paragraph

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[481] As submitted at Chubb at [194], an "*occurrence*" is synonymous with a particular event "*which happens at a particular time, **at a particular place** and in a particular way.*

[482] Chubb at [122]-[171].

[483] Waldeck Wording at 7 [CB Vol A p 474].

[484] Chubb at [141].

[485] Waldeck Wording at 3-5 [CB Vol A p 469-471].

225 and following of Chubb's submissions.

704. Chubb contends any loss (including that of rent payments, outgoing and Going Venture's surrender of the lease)[486] suffered by Waldeck did not result from any interruption or interference with the Insured Location but rather "by a decision by the State of Victoria to intrude on the private contractual relationship between Mr Waldeck and his tenant",[487] and that this alteration of contractual rights does not meet the description of interruption or interference with the Insured Location.[488]

705. As addressed above, the short answer to these contentions is that the interference with the private contractual relationship between Waldeck and Going Venture is *precisely* the interruption or interference with the Insured Location. It is also the precise cause of Waldeck's loss: he provided rental relief to Going Venture pursuant to the *Rent Relief Regulation*.[489]

M6. ADJUSTMENT CLAUSE

706. The proper approach to construing clauses such as the "Trend in the Business" clause has been addressed elsewhere in these submissions, and it is unnecessary to repeat those submissions here. It is sufficient to note that any adjustment cannot take into account the presence and effect of COVID-19 generally.[490]

M7. INSURANCE CONTRACTS ACT

707. The principles concerning interest and section 57(2) of the *Insurance Contracts Act 1984* (Cth) have been set out above. For the reasons set out in respect of Taphouse's claim, any interest ought run from the date Waldeck's claim was denied (being 17 April 2020).[491]

Date: 31 August 2021

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Tenth Floor Chambers

D T W Wong
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486 Chubb at [233]-[234].

487 Chubb at [229].

488 Chubb at [230].

489 Waldeck Outline at [8].

490 Cf Chubb at [464].

491 Waldeck Outline at [11].

ANNEXURE A: THIRD PARTY PAYMENTS

(a) JobKeeper

708. Save for Waldeck, each insured received payments under the Commonwealth "JobKeeper" program.

709. The introduction of and legislative background to the "JobKeeper" program is set out at **IAG [233]-[235]** and it is unnecessary to repeat that here.

710. IAG, Guild, Allianz and Swiss Re each say that "JobKeeper" payments must be taken into account in the assessment of loss: **IAG at [241]** (re Taphouse) **and [343]** (re Meridian), **Guild at [89]** (re Dr Michael and GFA)**, Allianz at [98]** (re Mayberg and Visintin), **Swiss Re at [9.7]** (re LCA Marrickville).

711. Insofar as the intention of the Commonwealth legislature is relevant:

    a. As IAG accepts at **IAG [236]**, the Commonwealth's purpose in making the payments is "*to provide financial support directly or indirectly to entities that are directly or indirectly affected by the Coronavirus known as COVID-19*" .[492] While this purpose is *linked to* the effects of the virus, properly analysed, its purpose is *not* linked to the effects of the insured peril. Notably, nowhere is it suggested that the payments were made in response to *losses* – rather it seeks to provide "*support*" to entities.

    b. The *Coronavirus Economic Response Package Omnibus (Measures No. 2) Act 2020* (Cth) further demonstrates the point. That act introduced Part 6-4C to the *Fair Work Act 2009* (Cth). Section 789GA is a guide to the part, and provides, "*The purpose of this Part is to assist employers who qualify for the jobkeeper scheme to deal with the economic impact of the Coronavirus… This Part authorises an employer who qualifies for the jobkeeper scheme to give a jobkeeper enabling stand down direction to an employee (including to reduce hours of work)*". Section 789GB records the object of the part, which is to "*(a) make temporary changes to assist the Australian people to keep their jobs … (b) help sustain the viability of Australian businesses… (c) continue the employment of employees; and (d) ensure the continued effective operation of occupational health and safety laws… (e) help ensure that, where reasonably possible, employees: (i) remain productively employed … and (ii) continue to contribute to the business of their employer …*". These provisions demonstrate

[492] *Coronavirus Economic Package (Payments and Benefits) Act 2020* (Cth).

that the payments were intended to assist employees – workers – and *not* the business. And it is all the more clear they are not linked to the *losses* of small business, or to the losses arising from the insured peril.

c. These two Acts share an explanatory memorandum, which again suggests that the purpose of the payment was not to compensate loss but rather to provide support. The amendments to the *Fair Work Act* are to "*keep Australians employed*" (at p 3); the acts "*provides a framework for financial support [not compensation]… to assist businesses and their employees through the downturn*" (at p 4); the "*support is designed to help businesses and households through the period ahead [not compensate for the actual losses suffered*" (at p 12). Again, each extract discloses a (laudable) attempt to support Australian employees, and to support employers' attempts to maintain the employment of those persons, *not* compensation of loss. Certainly, there is no mention of any order by a competent authority causative of loss for which the payments are designed to compensate / ameliorate. Indeed, the emphasised words in **IAG [238]** ("*[2.8] … businesses… will be able to access a subsidy from the government to continue paying their employees. This assistance will help businesses to keep people in their jobs*") concisely demonstrate the point: the payment is to facilitate employment, *not* compensate for loss.

712. The absence of any mention of insurance arrangements in the explanatory materials is of no assistance. It is not possible to infer from that absence that the payments were intended to be in lieu of insurance arrangements (cf **IAG [240]**). The same is true of the suggestion that the payments were "*the very form of loss for which business interruption insurance provides cover*" (that loss being "*continuing to pay employee wages, in circumstances where [the business] may be suffering a downturn in business revenue*") (**IAG at [239]**). This is because a proper analysis of the terms of the interruption policy discloses that insured peril is *not* downturn in business or payment of wages. As IAG helpfully – and repeatedly – states, "*it is important to note what the insured peril is not. It is not the occurrence of pandemic*" (**IAG at [122]**). Nor, one might add, is it the "effects" of the pandemic.

(b) Commonwealth Cash Flow Boost

713. Dr Michael, Taphouse, GFA, and Visintin received payments under the Commonwealth "Cash Flow Boost".

714. The "Cash Flow Boost" was provided under the *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020* (Cth) (***Cash Flow Boost Act***).

Sections 5 and 6 of the *Cash Flow Boost Act* provide for a "Cash Flow Boost" for eligible businesses. The eligibility criteria are set out at **IAG [244]** and it is unnecessary to repeat them here given there is no dispute between the parties as to whether Dr Michael, Taphouse, GFA and Visintin were eligible to receive a "Cash Flow Boost".

715. The payment of the "Cash Flow Boost" to a business is "*generally … made on the lodgement of the activity statement notifying the Commissioner of their withholding liabilities for the period and can be provided as a credit against tax liabilities*" [*Explanatory Memorandum to the Cash Flow Boost Act* at [3.12]; see *Cash Flow Boost Act* ss 9(1)(b), 9(2)].

716. Guild, Allianz and IAG each say that the "Cash Flow Boost" must be taken into account in the assessment of loss [**Guild at [89]** (Dr Michael and GFA), **Allianz at [98]** (Visintin) and **IAG at [246]** (Taphouse)].

717. Insofar as the intention of the Commonwealth legislature is relevant, the Explanatory Memorandum makes clear that the payments are intended "*to support employment by providing Commonwealth support for employers through the tax system*" [see [3.20]]. This demonstrates that the payments were intended to ensure that small businesses retain their employees, and for not the avoidance of loss to small business. Critically, the payment was *not* intended to "*compensate for the loss*" (to adopt the taxonomy at **IAG [227]** but, if anything, to benefit the employee.

718. This also answers the suggestion at **IAG [246]** that "*There is also no indication that the Commonwealth… intended that the insured should retain the payments to the exclusion of the insurer*": the intention was that the insured retained the payments to pay their employees.

719. It follows that should the characterisation of the payments of the "Cash Flow Boost" are to be considered, those payments ought not form part of the calculation of loss. Here, the relevant losses suffered by Dr Michael, Taphouse, GFA and Visintin were losses arising from (orders causing) an inability to operate their business (the insured peril), a loss quite separate from a grant to pay employees (*not* the insured peril).

(c) Queensland State Government COVID-19 Grant

720. Taphouse and Mayberg received payments under grants from the Queensland State Government COVID-19 Grant.

721. There were a number of grants made by the Queensland State Government in response to COVID-19. Of relevance to Taphouse and Mayberg is the "Small Business Adaption Grant".

722. IAG and Allianz each say that such grants must be taken into account in the assessment of loss (**IAG at [247]-[250]** (Taphouse), **Allianz at [98]** (Mayberg)).

723. Insofar as the intention of the Queensland State Government (being the payor of the grant) is relevant, it is plain from the guidelines to the "Small Business Adoption Grant"[493] that the moneys paid under the grant do not extinguish or reduce the losses suffered by Taphouse or Mayberg. The guidelines record the following:

    a. the grant will "*assist small businesses in Queensland with a payroll less than $1.3 million who have been forced into hibernation, or those who have experienced a significant structural adjustment or forced re-pivoting of their business operations as a result of the pandemic*" [p 1];

    b. the grant "*aims to see small and microbusinesses:*

        1. prepare for the safe resumption of trading in the post COVID-19 recovery;
        2. access digital technologies to rebuild business operations and transition to a new way of doing business;
        3. respond to online opportunities, where possible, to sustain employment and maintain potential for longer-term growth;
        4. upskill and reskill business owners and staff to benefit from new technologies or business models;
        5. embrace business diversification to adapt and sustain operations; and
        6. create or retain employment" [p 1]; and

    c. "*Grant funds can be used towards the following activities:*

        1. *Financial, legal or other professional advice to support business sustainability and diversification;*
        2. *strategic planning, financial counselling or business coaching aligned to business sustainability and diversification;*
        3. *building the business through marketing and communications activities, such as content development (web pages, mobile apps, visual and audio media etc.);*
        4. *digital/technological strategy development;*
        5. *digital training or re-training to adapt to new business models;*
        6. *capital costs associated with meeting COVID-19 safe requirements;*
        7. *specialised digital equipment or business specific software to move business operations online (e.g. logistics program for online ordering); and*
        8. *meeting business costs, including utilities, rent*" [p 2].

724. It is plain from the terms of the guideline that the preponderance of the grant is to permit businesses to adapt and change their business models and technologies, and not to compensate for the loss of turnover or income (cf **IAG at [250]**)

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[493] https://www.publications.qld.gov.au/dataset/b1c28e09-4d0d-472d-9ccd-6e41f42dc9b7/resource/502fb87a-d4b3-4c80-b492-e316af72a65b/download/small-business-adaption-grantguidelines.pdf

(d) Rental waiver / abatements

725. Save for Waldeck, GFA[494] and Dr Michael,[495] each insured received some form of rental waiver or abatement.

726. IAG, Guild, Allianz and Swiss Re each say that such relief must be taken into account in the assessment of loss: **IAG at [252]** (re Taphouse) **and [343]** (re Meridian) **Guild at [89]** (re Dr Michael and GFA)**, Allianz at [98]** (re Mayberg and Visintin), **Swiss Re at [9.7]** (re LCA Marrickville)].

727. Taphouse received rental relief under the *Retail Shop Leases and other Commercial Leases (COVID-19 Emergency Response) Regulation 2020* (Qld). Insofar as the intention of the lessor is relevant, its intention would – plainly – have been to comply with the regulatory framework. Section 3 of the regulation provides that the "*main purposes of the regulation are – (a) to mitigate the effect of the COVID-19 emergency on lessors and lessees under affected leases by giving effect to the good faith leasing principles set out in the national code; and (b) to establishing a process for resolving – (i) small business tenancy disputes; and (ii) affected lease disputes*". The reference to the National Code is a reference to the "National Cabinet mandatory code of conduct—SME commercial leasing principles during COVID-19", which has at its core the effects of the COVID-19 pandemic (but not the access to the relevant premises). None of this demonstrates an intent to compensate Taphouse for the losses arising from the imposed closure.

728. LCA Marrickville, Mayberg and Meridian received rental relief in accordance with the "National Cabinet mandatory code of conduct—SME commercial leasing principles during COVID-19". Again, insofar as the intention of the grantor (the lessor) is relevant, none of the material demonstrates an intent to compensate for losses arising from the closure of its premises but rather due to the effects of COVID-19. This means that it ought be taken into account if the catastrophe clause responds (LCA Marrickville only),

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[494] No rental relief was provided by GFA by its landlord. In April 2020, GFA entered into a new lease with Fanbang Pty Limited (the lessor of the Helensvale Premises, which was not the lessor of the Coomera Premises). The terms of the new lease provided for a rent-free period from 14 April 2020 until the date that the Coronavirus embargo on the operation of gyms and indoor recreation areas is lifted by the relevant authority (defined as the "end of embargo date"), and a further rent-free period for three months from the end of embargo date (item 16). The lease also provided for a rent reduction period for six months from the end of all rent-free periods (item 16A). These were not "waivers" or "abatements". Rather they were terms of the contract between the parties. This is so notwithstanding the fact that the initial rent-free period was defined by reference to the embargo on the operation of gyms: the underlying reason for the rent-free or rental abatements does not change the character of them as contractual terms.

[495] No rental relief was provided to Dr Michael by his landlord. In June 2020, Dr Michael signed a new 5-year lease (with the same landlord). The terms of the new lease involved a 3 month rent-free period. This was not a "waiver" or "abatement". Rather the rent-free period was a term of the contract between the parties.

but not if the other clauses respond.

729. Visintin received rental relief as required under the *COVID-19 Emergency Response (Commercial Leases) Regulations 2020* (SA). Those regulations were made under section 19(2) of the *COVID-19 Emergency Response Act 2020* (SA), which permits regulations to provide for the "*adverse impacts on a party to a lease resulting from the COVID-19 pandemic, including by making provision for any measures to regulate the parties to a lease or the provisions of a lease*". The legislative intention, then, was to address the effects of the COVID-19 pandemic, and not the insured peril.

(e) **Franchisor Relief**

730. LCA Marrickville received relief from its franchisor, which took the form of a $[redacted] reduction from March 2020 in royalty fees, and a $[redacted] reprieve on management fees in April and May 2020.

731. Swiss Re says that such relief must be taken into account in the assessment of loss (**Swiss Re at [9.7]**)

732. Payment of royalty fees and management fees are set out in clauses 7.4 and 7.5 of the Franchising Agreement dated 18 September 2019. The basis of the relief is set out in a letter from Laser Clinics Australia dated 27 March 2020.

733. Insofar as the intention of the franchisor is relevant, the letter from Laser Clinics Australia discloses the following:

   a. the relief was part of an attempt to "*do everything in our capacity to support you through this crisis s situation. We are… working around the clock in recent weeks to protect the health and ongoing viability of our businesses*";

   b. Laser Clinics Australia has made decisions including:

      1. *Standing down the majority of the support office…*

      2. *Suspending global expansion …*

      3. *Suspending Director Fees to the LCA Board.*

   c. Laser Clinics Australia "*continue[s] to support a number of measures to enable cost mitigation at the clinic level, including:*

      1. *Labour optimisation measures in the weeks leading up to the government announcement, and clinic labour and contractor stand down provisions support*

      2. *Rent abatement negotiations with landlords, with the goal of*

securing a three-month rent-free period

3. *Supplier negotiations (i.e. Allergan, Candela) to defer or suspend ongoing payments*".

d. Laser Clinics Australia introduced the measures with the aim to "*preserve cash on the clinic balance sheet and protect the ongoing viability of our clinics during this period*":

734. The above demonstrates that the relief granted was not for compensation for loss arising out of the insured perils, but rather because the franchisor was not providing some of the services under the franchise agreement, and because the franchisor was attempting to protect the ongoing viability of its franchisees.

(f) New South Wales Government Grants

735. LCA Marrickville received payments under grants from the New South Wales State Government in respect of COVID-19, which took the form of a $[redacted] grant and a $[redacted] grant made as an "act of grace" payment under section 5.7 of the *Government Sector Finance Act 2018* (NSW).

736. Swiss Re says that such relief must be taken into account in the assessment of loss (**Swiss Re at [9.7]**).

737. There were a number of grants made by the New South Wales State Government in response to COVID-19. Of relevance to LCA Marrickville is the "Small Business COVID-19 Support Grant" and the "*Small Business COVID-19 Recovery Grant*".

738. If the intention of the New South Wales State Government is relevant, the guidelines to the "*Small Business COVID-19 Support Grant*" suggests that the moneys paid should be taken into account in assessing loss, but the "*Small Business COVID-19 Recovery Grant*" should not. This is because, in contradistinction to the "*Small Business COVID-19 Recovery Grant*" and other grants the subject of submissions above, the payment under the "*Small Business COVID-19 Support Grant*" is specifically linked to the impacts of the government restrictions, as set out below.

    a. The grant is part of the "*NSW Government Small Business Support Fund*" and is to "*ease the pressure on thousands of small business that have been affected by the COVID-19 pandemic*" (p 1).

    b. The criteria for eligibility include that the business "*highly impacted by the NSW Government Covid-19 Restrictions on Gathering and Movement) [sic] Order 2020 issued on 30 March 2020, defined as a decline in turnover of 75 per cent*

compared to the equivalent period (of at least two weeks in 2019)" and "*have unavoidable business costs not otherwise the subject of other NSW and Commonwealth Government financial assistance measures*" (p 2).

c. The grants are "*provided to support eligible businesses that have been impacted by the shutdown restrictions enacted by Government, due to COVID-19. Grant funds could be used, for example, on:*

    1. *meeting business costs, including utilities salaries, rent*
    2. *seeking financial, legal or other advice to support business continuity planning*
    3. *developing the business through marketing and communications activities*
    4. *other supporting activities related to the operation of the business*" (p2)

739. In contrast, the guidelines to the "*Small Business COVID-19 Recovery Grant*" record the following:

"*The NSW Government is gradually lifting the restrictions on movement and business trading that were designed to reduce the spread of COVID-19. This means some businesses can now reopen.*

If your small business or not-for-profit organisation has experienced a decline in turnover as a result of COVID-19, you may be eligible for a small business recovery grant of between $500 and $3000.

This grant helps *small businesses meet the costs of safely reopening or up-scaling operations. These expenses include, but are not limited to:*

- *fit-out changes and temporary physical changes (for example, plastic barriers at checkouts)*
- *staff training and counselling*
- *business advice and continuity planning*
- *cleaning products and additional cleaning services*
- *additional equipment necessary to comply with social distancing or other public health measures*

- *marketing, communications and advertising*
- *digital solutions (for example, e-commerce or business websites)*".

740. This demonstrates this grant is designed to address the effect of COVID-19 and *not* the restrictions imposed by the government. Indeed, the expenses that the grant monies may be spent on have little or nothing to do with the restrictions imposed by the government. It follows that should the intention of the New South Wales government be relevant, the grant ought be taken into account if the catastrophe clause responds, but not if any of the other clauses respond (because the peril insured by those clauses is *not* the catastrophe).

741. It ought be noted that LCA Marrickville's primary position is both grants are not taken into account regardless of which clause responds because the basis of settlement clause in the policy exhaustively governs how the quantum of cover is calculated (as to which see above).

(g) South Australian Government Grants

742. Visintin received payments under grants from the South Australian State Government in respect of COVID-19, which took the form of a $[redacted] grant.

743. Allianz says that such relief must be taken into account in the assessment of loss (**Allianz at [98]**).

744. There were a number of grants made by the South Australian State Government in response to COVID-19. Of relevance to Visintin is the "$10,000 emergency cash grants for small businesses impacted by COVID-19".

745. If the intention of the South Australian State Government is relevant, the media release announcing that grant[496] suggest that the moneys paid *may* – but not in all circumstances – be taken into account in assessing loss. This is because that media release makes clear that the payment is specifically linked to the impacts of the government restrictions, as set out below:

> The major investment – funded from the State Government's $650m Jobs Rescue Package – will assist an estimated 19,000 small businesses and not-for-profits that have suffered a significant loss of income or been forced to close as a result of necessary coronavirus-related restrictions …
>
> The cash grants will be available to help cover a business' ongoing or outstanding operating costs, such as rent, power bills, supplier and raw materials costs and

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[496] Media Release, Steven Marshall MP "$10,000 emergency cash grants for small businesses impacted by COVID-19 (9 April 2020) <https://www.premier.sa.gov.au/news/media-releases/news/$10,000-emergency-cash-grants-for-small-businesses-impacted-by-covid-19>.

other fees.

…

"That's why we are offering emergency cash grants of $10,000 to local small businesses who have had their earnings significantly impacted by the coronavirus or been forced to close as a result of the necessary trade, travel and social gathering restrictions imposed to help limit its spread.

746. The reason the grant will not necessarily be taken into account in all cases is because it is responsive to more than one restriction and so it will be necessary to examine, in each case, why the grant was made to the particular insured. Resolution of that issue must await the placing of the factual materials before the Court.

747. In any case, Visintin's primary position is that the grant is not taken into account because the basis of settlement clause exhaustively governs how the quantum of cover is calculated (as to which see above).

(h) Commonwealth COVID-19 Consumer Travel Support Program

748. Meridian received payments under the Commonwealth COVID-19 Consumer Travel Support Program.

749. The travel support program was introduced by the *Industry Research and Development (COVID-19 Consumer Travel Support Program) Instrument 2020* (Cth) under the auspices of the *Industry Research and Development Act 1986* (Cth). The background to and eligibility requirements for that program are set out at **IAG [345]-[346]** and it is unnecessary to repeat that here.

750. IAG says that such payments must be taken into account in the assessment of loss (**IAG at [347]**).

751. Insofar as the intention of the Commonwealth legislature is relevant:

   a. The legislative instrument expressly provides that the "*purpose of the program is to alleviate the negative economic impacts of the coronavirus known as COVID-19 on the travel industry by providing immediate, short-term financial support to travel agents, and tour arrangement service providers, that qualify for the jobkeeper scheme*" [*Industry Research and Development (COVID-19 Consumer Travel Support Program) Instrument 2020* (Cth) s 5(2)]. This, of itself, dispels any suggestion that the payment is intended to compensate for losses caused by the insured peril. Again, as IAG has indicated, the insured peril is "*not the occurrence of pandemic*" [**IAG at [122]**].

   b. Indeed, as IAG points out at **IAG [345]**, the grant was "*intended to provide funding for expenditure that assisted them [travel agents and tour arrangement*

service providers] to continue to trade and process refunds and credits to Australian consumers for travel they were unable to undertake due to the impacts of COVID-19". To that the Court would add: "*and not to compensate for losses from restrictions closing the premises*".

752. It follows that, should the Commonwealth intention be relevant, the grant ought not be taken into account if the hybrid clause in the Meridian policy responds (because the insured peril is the closure by order of competent authority), but ought be taken into account if the disease clause responds (because the insured peril is the occurrence of the disease).

753. For the avoidance of doubt, Meridian's primary position is that both grants are not to be taken into account because the basis of settlement clause exhaustively governs how the quantum of cover is calculated (as to which see above).

(i) Victorian Government Support Fund

754. Meridian received payments under the Victorian Government Support Fund.

755. These payments were part of the "*Economic Survival Package to Support Businesses and Jobs*" announced by the Victorian Government on 21 March 2020, and were made by way of payroll tax refunds for the 2019-20 financial year.[497]

756. The grants were made "*to help Victorian businesses and workers survive the devastating impacts of the coronavirus pandemic*".

757. If the intention of the Victorian State Government is relevant, the grant ought not be taken into account if the hybrid clause in the Meridian policy responds (because the insured peril is the closure by order of competent authority).

758. It also ought not be taken into account if the disease clause responds because the intention was not to compensate for loss but rather to assist Victorian businesses and workers survive the impacts of the pandemic, which is *not* the insured peril (**IAG at [122]**).

759. In any case, again, Meridian's primary position is that the payment is not to be taken into account because the basis of settlement clause exhaustively governs how the quantum of cover is calculated (as to which see above).

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[497] The Hon Daniel Andrews MP, 'Economic Survival Package to Support Businesses and Jobs' (Mediad Release, 21 March 2020) <https://www.premier.vic.gov.au/economic-survival-package-support-businesses-and-jobs>.