FEDERAL COURT OF AUSTRALIA

Swiss Re International Se v LCA Marrickville Pty Limited (Second COVID-19 insurance test cases) [2021] FCA 1206

File number(s):	NSD 132 of 2021, NSD 133 of 2021 NSD 134 of 2021, NSD 135 of 2021 NSD 136 of 2021, NSD 137 of 2021 NSD 138 of 2021, NSD 144 of 2021 NSD 145 of 2021, NSD 308 of 2021
Judgment of:	**JAGOT J**
Date of judgment:	8 October 2021
Catchwords:	**INSURANCE** – business interruption insurance – COVID-19 – test cases – pandemic cover – hybrid clause – prevention of access clause – disease clause – catastrophe clause – competent government or statutory authority – outbreak – occurrence – discovery of an organism – at the premises – within a specified radius of the premises – by order of authority – competent authority – as a result of order of an authority – order – insured peril – causation – proximate cause – uninsured peril – same underlying cause or fortuity – interruption or interference – loss – adjustments – trends in the business – third party payment – indemnity for loss – reduction of loss – interest – utmost good faith. **STATUTORY INTERPRETATION** – s 61A *Property Law Act 1958* (Vic) – application to Acts of the Commonwealth – whether *Biosecurity Act 2015* (Cth) a re-enactment with modifications of *Quarantine Act 1908* (Cth) – s 61A applies to Victorian Acts only – *Biosecurity Act 2015* (Cth) not a re-enactment with modifications of *Quarantine Act 1908* (Cth). **STATUTORY INTERPRETATION** – s 54(1) of the *Insurance Contracts Act 1984* (Cth) – meaning of "some act of the insured or of some other person" – requires some act of a person who – has a relevant connection to the insured or the policy – Director of Human Biosecurity is a stranger to the policy under the *Biosecurity Act 2015* (Cth) Director of Human Biosecurity is a stranger to the policy and the insured – s 54(1) does not apply.
Legislation:	*Biosecurity Act 2015* (Cth) ss 42, 51, 475, 476, 477(1) *Biosecurity (Consequential Amendments and Transitional*

Provisions) Act 2015 (Cth) Sch 1

Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020 (Cth) ss 5, 6

Coronavirus Economic Response Package (Payments and Benefits) Act 2020 (Cth)

Coronavirus Economic Response Package Omnibus (Measures No 2) Act 2020 (Cth)

Fair Work Act 2009 (Cth) s 789GA

Insurance Contracts Act 1984 (Cth) ss 13(1), 14(1), 37, 54, 57, 71

Judiciary Act 1903 (Cth) s 79

National Health Security Act 2007 (Cth) s 11

Quarantine Act 1908 (Cth) ss 2B(1), 2B(2), 4, 13(1)(ca), 35A

Appropriation Bill (No. 5) 2019-20 (Cth)

Appropriation Bill (No. 6) 2019-20 (Cth)

Biosecurity (Consequential Amendments and Transitional Provisions) Bill 2014 (Cth)

Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020 (Cth)

Explanatory Memorandum, Biosecurity Bill 2014 (Cth)

Explanatory Memorandum, Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Bill 2020 (Cth)

Government Sector Finance Act 2018 (NSW) s 5.7

Health Practitioner Regulation National Law (NSW) ss 11, 23-25, 31, 31A, 32, 35, 41, 41B-41D

Public Health Act 2010 (NSW) ss 7, 81, Sch 2

Human Rights Act 2019 (Qld) s 38

Public Health Act 2005 (Qld) ss 64, 70, 315, 319, 362B, 362D

Public Health Regulation 2005 (Qld)

University of Queensland Act 1998 (Qld) s 32

Acts Interpretation Act 1915 (SA)

Emergency Management Act 2004 (SA) ss 3, 23(1), 24A, 25

South Australian Public Health Act 2011 (SA) ss 63, 87, 90

Acts Interpretation Act 1890 (Vic) s 27(1)

COVID-19 Omnibus (Emergency Measures) Act 2020

(Vic) s 15(4)

COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020 (Vic)

Interpretation of Legislation Act 1984 (Vic) ss 4(4), 16, 17, 38

Property Law Act 1958 (Vic) s 61A

Public Health and Wellbeing Act 2008 (Vic) ss 198, 199, 200(1)(b), 200(1)(d)

Public Health and Wellbeing Regulations 2019 (Vic)

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Anti-Doping Rule Violation Panel v XZTT [2013] FCAFC 95; (2013) 214 FCR 40

Australian Casualty Co Ltd v Federico [1986] HCA 32; (1986) 160 CLR 513

Australian Pipe & Tube Pty Ltd v QBE Insurance (Australia) Limited (No 2) [2018] FCA 1450

Australian Securities and Investments Commissioner v TAL Life Limited (No 2) [2021] FCA 193; (2021) 389 ALR 128

Axa Reinsurance (UK) plc v Field [1996] 1 WLR 1026; [1996] 3 All ER 517

Beaufort Developments (NI) Ltd v Gilbert-Ash Ltd [1999] 1 AC 266

Birla Nifty Pty Ltd v International Mining Industry Underwriters Ltd [2013] WASC 386

Board of Trade v Hain Steamship Co Ltd [1929] AC 534

Bonython v Commonwealth [1951] AC 201

Browne v Dunn (1893) 6 R 67

C E Heath Casualty & General Insurance v Grey (1993) 32 NSWLR 25

Cat Media Pty Ltd v Allianz Australia Insurance Ltd [2006] NSWSC 423; (2006) 14 ANZ Ins Cas 61-700

CGU Insurance Ltd v AMP Financial Planning Pty Ltd [2007] HCA 36; (2007) 235 CLR 1

Chapmans Ltd v Australian Stock Exchange Ltd [1996] FCA 474; (1996) 67 FCR 402

Charter Reinsurance Co Ltd v Fagan [1997] AC 313

Commissioner of Taxation (NSW) v Mutton (1988) NSWLR 104

Commonwealth of Australia v Aurora Energy Pty Ltd [2006] FCAFC 148; (2006) 235 ALR 644

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Insurance Commission of Western Australia v Container Handlers Pty Ltd [2004] HCA 24; (2004) 218 CLR 89

Jan de Nul (UK) Ltd v Axa Royale Belge [2002] EWCA Civ 209; [2001] 1 Lloyd's Rep 583

Jennifer B Nguyen v Travelers Casualty Insurance Company of America, 2021 WL 2184878 (W.D. Wash. May 28, 2021)

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Karlsson v Griffith University [2020] NSWCA 176; (2020) 103 NSWLR 131

Khoury v Government Insurance Office of New South Wales (1984) 165 CLR 622

Kooragang Cement Pty Ltd v Bates (1994) 35 NSWLR 452

Lasermax Engineering Pty Limited v QBE Insurance (Australia) Limited [2005] NSWCA 66; (2005) 13 ANZ Insurance Cases 61-643

Lend Lease Real Estate Investments Ltd v GPT RE Ltd [2006] NSWCA 207

Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd [1918] AC 350

Liberty Mutual Insurance Company Australian Branch trading as Liberty Specialty Markets v Icon Co (NSW) Pty Ltd [2021] FCAFC 126

Liberty Specialty Markets v Icon Co (NSW) Pty Ltd [2021] FCAFC 126

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Maxwell v Highway Hauliers Pty Ltd [2014] HCA 33; (2014) 252 CLR 590

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Newcastle City Council v Royal Newcastle Hospital [1957] HCA 15; (1957) 96 CLR 493

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PMB Australia Ltd v MMI General Insurance Ltd & Ors [2002] QCA 361

Prepaid Services Pty Ltd & Ors v Atradius Credit Insurance NV [2013] NSWCA 252; (2013) 302 ALR 732

Price v Spoor [2021] HCA 20; (2021) 95 ALJR 607

Promenade Investments Pty Ltd v State of New South Wales (1992) 26 NSWLR 203

Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd [2021] NSWCA 206

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Re Bradley and Essex and Suffolk Accident Indemnity Society [1912] 1 KB 415

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Renmark Hotel Inc v Federal Commissioner of Taxation [1949] HCA 7; (1949) 79 CLR 10

Reseck v Federal Commissioner of Taxation (1975) 133 CLR 45

Rizeq v Western Australia [2017] HCA 23; (2017) 262 CLR 1

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Swashplate Pty Ltd v Liberty Mutual Insurance Company trading as Liberty International Underwriters [2020] FCAFC 137; (2020) 381 ALR 648

Teele v Federal Commissioner of Taxation (1940) 63 CLR 201

The Sun Fire Office v Hart (1889) 14 App Cas 98

The Trust Company (Nominees) Ltd v Banksia Securities

	Ltd (receivers and managers appointed) (in liquidation) [2016] VSCA 324 *Todd v Alterra at Lloyds Ltd (on behalf of the underwriting members of Syndicate 1400)* [2016] FCAFC 15; (2016) 239 FCR 12 *Turner v York Motors Pty Ltd* (1951) 85 CLR 55 *Vero Insurance Pty Ltd v Australian Prestressing Services Pty Ltd* [2013] NSWCA 181 *Wallaby Grip Limited v QBE Insurance (Australia) Limited* [2010] HCA 9; (2010) 240 CLR 444 *Wayne Tank and Pump Co Ltd v Employers' Liability Assurance Corporation* [1974] QB 57 *Western Australian Turf Club v Federal Commissioner of Taxation* [1978] HCA 13; (1987) 139 CLR 288 *Wilkie v Gordian Runoff Ltd* [2005] HCA 17; (2005) 221 CLR 522 *Wonkana*, *Rockment*, *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2020] EWHC 2448 (Comm) *Woolworths Ltd v Lister* [2004] NSWCA 292 *WorkPac Pty Ltd v Rossato* [2021] HCA 23 *Worth v HDI Global Specialty SE* [2021] NSWCA 185 *XL Insurance Co SE v BNY Trust Company of Australia Limited* [2019] NSWCA 215; (2019) 20 ANZ Insurance Cases 62-211 *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351 *Zhang v ROC Services (NSW) Pty Ltd* [2016] NSWCA 370; (2016) 93 NSWLR 561
Periodicals:	Davies M, "Proximate Cause in Insurance Law*"* (1996) 7 ILJ 135
Division:	General Division
Registry:	New South Wales
National Practice Area:	Commercial and Corporations
Sub-area:	Commercial Contracts, Banking, Finance and Insurance
Number of paragraphs:	1152
Date of hearing:	6-15 September 2021
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Counsel for the Applicant in NSD 135 and 136 of 2021:	Mr E Muston SC and Ms A Smith
Solicitor for the Applicant in NSD 135 and 136 of 2021:	Clyde & Co
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Solicitor for the Applicant in NSD 308 of 2021:	Dentons
Counsel for the Respondent in NSD 308 of 2021:	Mr JP Slattery QC and Mr DF McAloon

Solicitor for the Respondent in NSD 308 of 2021:	Kelly Hazell Quill Lawyers

ORDERS

NSD 132 of 2021

BETWEEN:	**SWISS RE INTERNATIONAL SE** Applicant
AND:	**LCA MARRICKVILLE PTY LIMITED ACN 601 220 080** Respondent

NSD 133 of 2021

AND BETWEEN:	**INSURANCE AUSTRALIA LIMITED** Applicant
AND:	**MERIDIAN TRAVEL (VIC) PTY LTD** Respondent

NSD 134 of 2021

AND BETWEEN:	**INSURANCE AUSTRALIA LIMITED** Applicant
AND:	**THE TAPHOUSE TOWNSVILLE PTY LTD** Respondent

NSD 135 of 2021

AND BETWEEN:	**ALLIANZ AUSTRALIA INSURANCE LIMITED** Applicant
AND:	**MAYBERG PTY LTD** Respondent

NSD 136 of 2021

AND BETWEEN:	**ALLIANZ AUSTRALIA INSURANCE LIMITED** Applicant
AND:	**THE STAGE SHOP PTY LTD (FORMERLY VISINTIN PTY LTD)** Respondent

NSD 137 of 2021

AND BETWEEN:	**CHUBB INSURANCE AUSTRALIA LIMITED** Applicant
AND:	**PHILIP WALDECK** Respondent

NSD 138 of 2021

AND BETWEEN:	**CHUBB INSURANCE AUSTRALIA LIMITED** Applicant

AND:	**MARKET FOODS PTY LTD** Respondent
	NSD 144 of 2021
AND BETWEEN:	**GUILD INSURANCE LIMITED** Applicant
AND:	**GYM FRANCHISES AUSTRALIA PTY LTD** First Respondent
	DOUGLAS REASON Second Respondent
	NSD 145 of 2021
AND BETWEEN:	**GUILD INSURANCE LIMITED** Applicant
AND:	**DR JASON MICHAEL (T/A ILLAWARRA PAEDIATRIC DENTISTRY)** Respondent
	NSD 308 of 2021
AND BETWEEN:	**QBE INSURANCE (AUSTRALIA) LIMITED** Applicant
AND:	**DAVID COYNE IN HIS CAPACITY AS LIQUIDATOR OF EDUCATIONAL WORLD TRAVEL PTY LTD ACN 006 888 179 (IN LIQUIDATION)** First Respondent
	EDUCATIONAL WORLD TRAVEL PTY LTD ACN 006 888 179 (IN LIQUIDATION) Second Respondent
ORDER MADE BY:	**JAGOT J**
DATE OF ORDER:	**8 OCTOBER 2021**

THE COURT ORDERS THAT:

1. The separate questions be answered as set out in the reasons for judgment in *Swiss Re International Se v LCA Marrickville Pty Limited (Second COVID-19 insurance test cases)* [2021] FCA 1206 published today (the **judgment**).
2. In all proceedings other than NSD133/2021 (Insurance Australia v Meridian Travel), the parties confer and notify the chambers of Justice Jagot by 4.00pm on 12 October 2021 by email: (a) whether any party wishes to be heard further in respect of the making

of declarations in each matter as proposed in the judgment, or (b) if not, the terms of any declaration and other orders the party proposes should be made.

3. In proceeding NSD133/2021 (Insurance Australia v Meridian Travel), the parties confer and notify the chambers of Justice Jagot by 4.00pm on 12 October 2021 by email whether any further directions should be made in the proceeding before hearing of any appeal.

4. Leave to appeal be granted to all parties in each proceeding.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

JAGOT J:

1. INTRODUCTION

1 These proceedings are the second test case authorised to be taken by the Australian Financial Complaints Authority (**AFCA**) in accordance with cl A.7.2(b) of AFCA's Complaint Resolution Scheme Rules. The proceedings concern the proper construction and application of provisions in business interruption insurance policies. The issue is whether the policies apply to losses claimed to have been suffered by various businesses as a result of the effects of the COVID-19 pandemic in 2020.

2 In each case: (a) the insurer is the applicant and the insured is the respondent, (b) the insured has made a claim under the policy, (c) the insurer has not paid the claim, (d) by the proceeding it commenced the insurer seeks declarations to the effect that the insured is not entitled to indemnity under the policy or, alternatively, that if the insured is entitled to indemnity under the policy, the insured's loss is to be determined in a particular manner, and (e) the insured seeks declarations or findings to the effect that the insurer is liable to indemnify the insured.

3 The proceedings have been expedited. The parties have co-operated to ensure that, to the extent possible, the issues of construction can be resolved on the basis of agreed facts. As it has not been possible for all relevant facts to be agreed, the parties proposed an order for separate determination of the issues of construction, mindful of the need for these reasons for judgment to be founded upon a justiciable dispute ripe for determination. To this end, on 24 September 2021, I made the following order:

> 2. 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";
>
> be different if evidence were adduced of documents which are sought in the subpoenas issued as at 24 August 2021 (or any further subpoena issued in terms no wider than the subpoenas issued to that 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?

4 While most of the evidence is documentary, affidavits are also in evidence. The parties agreed that the rule in *Browne v Dunn* (1893) 6 R 67 should be taken not to apply. No party is to be precluded from putting a proposition contrary to evidence in an affidavit merely because the proposition was not put to the deponent of the affidavit. By exchange of detailed submissions in advance of the hearing all parties are on notice of the scope of the dispute and, accordingly, no unfairness is involved in adopting this course. Further, I ordered that evidence in one proceeding is evidence in each other proceeding.

5 It is also common ground that while the insurers are the applicants, it is the insureds which are propounding facts said to engage the liability of the insurers to indemnify them. In these circumstances, it is for the insureds to prove "such facts as bring the claim within the terms of the insurer's promise": ***Wallaby Grip*** *Limited v QBE Insurance (Australia) Limited* [2010] HCA 9; (2010) 240 CLR 444 at [28] citing *Munro Brice & Co v War Risks Association Ltd* [1918] 2 KB 78 at 88.

6 For the reasons given below I consider that, other than in proceeding NSD133/2021 (Insurance Australia and Meridian Travel), none of the insuring clauses in any of the policies apply in the circumstances. This conclusion would not be affected by any further evidence.

7 Accordingly, I would propose to make declarations to the effect that in each proceeding other than proceeding NSD133/2021 (Insurance Australia and Meridian Travel) the insurer is not liable to make any payment in response to the claim. In NSD133/2021 (Insurance Australia and Meridian Travel) an insuring clause in the policy (referred to as an infectious disease clause as it requires the outbreak of an infectious disease within a 20 kilometre radius of the insured situation) is satisfied on the agreed facts. However, it has not been proved (and may be impossible to prove) in that case that the insured peril was a proximate cause of any interruption or interference with the business. Meridian Travel will be given an opportunity to consider its position given these reasons for judgment.

8 I have answered the separate questions in each proceeding insofar as possible. The separate questions, as discussed below, tend to obscure rather than expose important aspects of the operation of the policies. Given the nature of the proceedings as a test case, I have also set out views assuming my primary conclusions about the proper construction of the provisions of the policies are wrong.

2. COVID-19

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

10 On 9 January 2020, the WHO announced that initial information about the cases of pneumonia in Wuhan provided by Chinese authorities pointed to a coronavirus as a possible pathogen causing this cluster. "Severe acute respiratory syndrome coronavirus 2" (**SARS-CoV-2**) is the infective agent that causes COVID-19. SARS-CoV-2 is an organism.

11 On 19 January 2020, the first person with COVID-19 entered Australia. This was announced on 25 January 2020.

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

13 From 6 February 2020, "Human coronavirus with pandemic potential" has been listed on the "National Notifiable Disease List" under the *National Health Security Act 2007* (Cth). COVID-19 is the name given to the disease and SARS-CoV-2 is the name given to the virus that causes the disease.

14 On 11 March 2020, the WHO described COVID-19 as a pandemic.

15 People with COVID-19 may be highly infectious before their symptoms show. Even people with mild or no symptoms can spread COVID-19.

16 There is presently no cure for COVID-19. From 25 January 2020 when the COVID-19 was first detected in Australia there was no vaccine for COVID-19. A vaccination program commenced in Australia on 22 February 2021 and is ongoing.

17 The COVID-19 virus spreads primarily through the small liquid particles expelled by a person infected with COVID-19 when they cough, sneeze, speak, sing, or breathe heavily.

18 The WHO has reported that SARS-CoV-2 spreads mainly between people who are in close contact with each other, typically within 1 metre (short-range). However, the virus can also spread in poorly ventilated and/or crowded indoor settings, where people tend to spend longer periods of time. This is because aerosols remain suspended in the air or travel farther than 1 metre (long-range).

19 A person can become infected with COVID-19 if they inhale or ingest a "sufficient load" of these liquid particles to cause infection, which can occur through: (a) close contact with an infectious person, (b) contact with droplets from an infected person's cough or sneeze, or (c) touching objects or surfaces that have droplets from an infected person and then touching their mouth or face.

20 Coronaviruses mutate frequently.

3. GENERAL PRINCIPLES

3.1 Construction

21 A number of the parties provided convenient summaries of the principles applicable to the construction of contracts of insurance. Those summaries are adopted and adapted as follows.

22 "Contracts of insurance are to be construed according to the same principles of construction that are applied to commercial instruments in general": ***Swashplate*** *Pty Ltd v Liberty Mutual Insurance Company trading as Liberty International Underwriters* [2020] FCAFC 137; (2020) 381 ALR 648 at [58].

23 "[T]he 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 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": *Todd v Alterra at Lloyds Ltd (on behalf of the underwriting members of Syndicate 1400)* [2016] FCAFC 15; (2016) 239 FCR 12 at [42].

24 "[A] policy of insurance is assumed to be an agreement which the parties intend to produce a commercial result … as such, it ought to be given a businesslike interpretation being the construction which a reasonable business person would give to it…a construction that avoids capricious, unreasonable, inconvenient or unjust consequences, is to be preferred where the words of the agreement permit": *Onley v Catlin Syndicate Ltd as the Underwriting Member of Lloyd's Syndicate 2003* [2018] FCAFC 119 at [33].

25 "[T]he Court gives effect to the common intention of the parties as manifested in the language they have chosen. It requires a consideration of the language used in the instrument, the

circumstances addressed by the instrument and the commercial purpose or object that the instrument secures, and it requires a consideration of the instrument as a whole": *Swashplate* at [60].

26 In *Liberty Mutual Insurance Company Australian Branch trading as Liberty Specialty Markets v Icon Co (NSW) Pty Ltd* [2021] FCAFC 126 the principles were expressed in these terms:

> The working out in a coherent and congruent fashion of the operation of a market specific insurance policy requires a businesslike interpretation to bring about a commercial result based on what a reasonable business person would have understood the policy to mean: *Electricity Generation Corp v Woodside Energy Ltd* [2014] HCA 7; 251 CLR 640 at 656–657 [35]. The principle that a policy is to be construed so as to avoid it "working commercial inconvenience": *Zhu v Treasurer (NSW)* [2004] HCA 56; 218 CLR 530 at 559 [82] and so as to bring about commercial efficacy and reflect common sense: *Gollin & Co Ltd v Karenlee Nominees Pty Ltd* [1983] HCA 38; 153 CLR 455 at 464 is to be given concrete operation, not passing lip-service. To the extent that words used in an insurance policy have the capacity for broader or narrower operation, such constructional choice or ambiguity will be resolved by appreciating the context, including the market, in which the parties are operating, and the extent to which a reading of the words may produce commercial inconvenience or commercial efficacy as part of the ascription of meaning that would be made by a reasonable businessperson considering the language used, the surrounding circumstances known to the parties and the commercial purpose or objects of the policy as a whole to be secured: *Electricity Generation Corp* 251 CLR at 656–657 [35]; *Homburg Houtimport BV v Agrosin Private Ltd (The Starsin)* [2004] 1 AC 715 at 737 [10]. It should always be recalled, however, that a broad or a narrow meaning of a policy may only reflect the breadth or the narrowness of cover that has been purchased by the premium: cf *Australasian Correctional Services Pty Ltd v AIG Australia Limited* [2018] FCA 2043 at [17].

27 In the first COVID-19 insurance test case, *HDI Global Specialty SE v* ***Wonkana*** *No. 3 Pty Ltd* [2020] NSWCA 296, Meagher JA and Ball J said:

> [18] Construing a written contract involves determining the intention of the parties as expressed in the words in which their agreement is recorded. As Lord Wright said in *Inland Revenue Commissioners v Raphael* [1935] AC 96 at 142: "It must be remembered at the outset that the court, while it seeks to give effect to the intention of the parties, must give effect to that intention as expressed, that is, it must ascertain the meaning of the words actually used".
>
> [19] That task is to be approached objectively. The meaning of the words used must be ascertained by reference to what a reasonable person would have understood the language of the contract to convey: *Toll (FGCT) Pty Ltd v Alphapharm Pty Ltd* (2004) 219 CLR 165; [2004] HCA 52 at [40*]; Electricity Generation Corporation v Woodside Energy Ltd* (2014) 251 CLR 640; [2014] HCA 7 at [35]. That is because the objective theory of contract requires that the legal rights and obligations of the parties turn "upon what their words and conduct would reasonably be understood to convey": *Equuscorp Pty Ltd v Glengallan Investments Pty Ltd* (2004) 218 CLR 471; [2004] HCA 55 at [34], citing Lord Diplock in *Gissing v Gissing* [1971] AC 886 at 906 and *Ashington Piggeries Ltd v Christopher Hill Ltd* [1972] AC 441 at 502.

28 Their Honours continued in these terms:

[21] Where the written contract evidences the terms on which a financial product or service is offered for acquisition, the meaning of its language is to be construed from the perspective of a reasonable person in the position of the offeree, in this case the prospective insured. This analysis was adopted in *Australian Casualty Co Ltd v Federico* (1986) 160 CLR 513; [1986] HCA 32.

…

[30] There remains the contra proferentem rule which provides that any ambiguity in a policy of insurance should be resolved by adopting the construction favourable to the insured: *Halford v Price* (1960) 105 CLR 23 at 30; [1960] HCA 38; *Darlington Futures* [*Darlington Futures Ltd v Delco Australia Pty Ltd* (1986) 161 CLR 500] at 510; *Johnson v American Home Assurance* (1998) 192 CLR 266 at 275 (Kirby J, dissenting); [1998] HCA 14; *McCann* [*McCann v Switzerland Insurance Australia Ltd* [2000] HCA 65; (2000) 203 CLR 579] at [74]. The justification for the rule is that the party drafting the words is in the best position to look after its own interests, and has had the opportunity to do so by clear words. It ought only be applied for the purpose of removing a doubt, and not for the purpose of creating a doubt, or magnifying an ambiguity: *Cornish v Accident Insurance Co Ltd* (1889) 23 QBD 453 at 456 (Lindley LJ).

[31] With acceptance of the principle that ambiguity can be resolved by reference to the surrounding circumstances, the contra proferentem rule is now generally regarded as a doctrine of last resort. However, it continues to have a role to play in insurance and other standard form contracts. That is so for two reasons. First, by their nature, standard form contracts are not negotiated between the parties, and the surrounding circumstances relevant to the entry into one contract or another are less likely to shed much light on the meaning of the written words. Secondly, the contra proferentem rule complements the principle that standard form contracts should be interpreted from the point of view of the offeree. The offeror has the opportunity to, and should, make its intentions plain. The point was made by Dixon CJ (at 30) in *Halford v Price*, citing with approval the following statement in *Halsbury's Laws of England* (Butterworth & Co, 3rd ed, 1958) vol 22, p 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 …

29 In ***Rockment*** *Pty Ltd t/a Vanilla Lounge v AAI Limited t/a Vero Insurance* [2020] FCAFC 228; (2020) 149 ACSR 484 Besanko, Derrington and Colvin JJ said at [54]:

> However, disputes as to contractual interpretation necessarily imply that the ordinary meaning of the words used do not satisfactorily expose any clear construction and, in part, those opposing constructions can sometimes be assayed by reference to the commercial result which they produce. In *Onley v Catlin Syndicate* [*Onley v Catlin Syndicate Ltd (as the underwriting member of Lloyd's Syndicate 2003)* [2018] FCAFC 119; (2018) 360 ALR 92] (at 100 – 101 [33]), the Full Court identified the principles on which insurance policies are construed, emphasising an approach that kept in mind that they are commercial agreements which the parties intend will produce a commercial result, consistent with a businesslike interpretation. In this respect, the context in which the policy is entered into, to the extent to which it is known by both parties, will assist in identifying its purpose and commercial objective*: McCann v Switzerland Insurance Australia Ltd* (2000) 203 CLR 579 [22] per Gleeson CJ; *Mount*

Bruce Mining Pty Ltd v Wright Prospecting Pty Ltd (2015) 256 CLR 104 (***Mount Bruce Mining v Wright Prospecting***) [47]; *Franklins Pty Ltd v Metcash Trading Ltd* (2009) 76 NSWLR 603 [19] per Allsop P; *Evolution Precast Systems Pty Ltd v Chubb Insurance Australia Ltd* [2020] FCA 1690 [25]. Nevertheless, considerations of the commerciality of any particular construction must be confined to their proper place. In *Mount Bruce Mining v Wright Prospecting* at 117 [50], French CJ, Nettle and Gordon JJ observed:

> Other principles are relevant in the construction of commercial contracts. Unless a contrary intention is indicated in the contract, a court is entitled to approach the task of giving a commercial contract an interpretation on the assumption "that the parties … intended to produce a commercial result". Put another way, a commercial contract should be construed so as to avoid it "making commercial nonsense or working commercial inconvenience".

This approach was recently applied by the Court of Appeal in New South Wales in *Wonkana* at [54] per Meagher JA and Ball J; [124] – [125] per Hammerschlag J, to the effect that an interpretation is commercial if it is not commercially absurd. In other words, the topic of commerciality of a particular construction is relevant only when the lack of commerciality is so pronounced that it will indicate that some different construction must have been intended.

30 Consistent with this approach their Honours said this at [56]:

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

31 These observations are consistent with the general principle of contractual construction emphasised in *WorkPac Pty Ltd v Rossato* [2021] HCA 23 at [63] citing *Charter Reinsurance Co Ltd v* ***Fagan*** [1997] AC 313 at 388 that "it is not a legitimate role for a court to force upon the words of the parties' bargain 'a meaning which they cannot fairly bear [to] substitute for the bargain actually made one which the court believes could better have been made'".

32 Similarly in *McCann v Switzerland Insurance Australia Limited* [2000] HCA 65; (2000) 203 CLR 579 Kirby J summarised the applicable principles at [74] as including:

> 2 …Without the authority of statute, no court is authorised to attribute a different meaning to the words of a policy simply because the court regards the meaning as otherwise working a hardship on one of the parties.
>
> …
>
> 4 … Courts now generally regard the *contra proferentem* rule (as it is called) as one of last resort because it is widely accepted that it is preferable that judges should struggle with the words actually used as applied to the unique circumstances of the case and reach their own conclusions by reference to the logic of the matter, rather than by using

> mechanical formulae. Nevertheless, dictionaries, facts and logic alone will sometimes not provide an answer to the contest before the court. In those cases:
>
> > "it is not unreasonable for an insured to contend that, if the insurer proffers a document which is ambiguous, it and not the insured should bear the consequences of the ambiguity because the insurer is usually in the superior position to add a word or a clause clarifying the promise of insurance which it is offering".

33 In *Darlington Futures Ltd v Delco Australia Pty Ltd* [1986] HCA 82; (1986) 161 CLR 500 at 510 the High Court said:

> … the interpretation of an exclusion clause is to be determined by construing the clause according to its natural and ordinary meaning, read in the light of the contract as a whole, thereby giving due weight to the context in which the clause appears including the nature and object of the contract, and, where appropriate, construing the clause contra proferentem in case of ambiguity.

34 In ***Dalby*** *Bio-Refinery Ltd v Allianz Australia Insurance Limited* [2019] FCAFC 85 the Full Court of the Federal Court said at [32]:

> …though one needs to be careful with reliance on the contra proferentem rule, especially when there has been an evident degree of negotiation of the policy, if there are two genuinely available alternatives preference should be given to one that limits rather than expands the exclusion. That is not to approach the matter other than as dictated by the Court in *Darlington v Delco* 161 CLR at 510.

35 A number of the insurers sought to exclude the potential operation of the contra proferentem rule on the basis that the insureds were represented by brokers. However, I consider that the insurers remained the profferers of the policies. In *Commonwealth of Australia v Aurora Energy Pty Ltd* [2006] FCAFC 148; (2006) 235 ALR 644 at [41] North and Emmett JJ said:

> Some reliance was placed by the parties before the primary judge on the doctrine expressed in the maxim *verba chartarum fortius accipiuntur contra proferentem* – the words of an instrument should be understood more strongly against the party advancing them. That maxim has nothing to do with the fortuity as to which of the parties actually composed the language in question. The construction of a promise in the common law does not depend upon who drafted the language. The maxim means simply that a promise is to be construed contrary to the interests of the person who makes the promise, irrespective of who the drafter might have been. The 'proferens' is, essentially, the promisor under the provision in question, whoever composes the language. The rationale for the maxim is that a party should look after its own interests in agreeing to make a promise. In the event of ambiguity, the promise is to be construed against the promisor.

36 There is also no basis upon which it could be concluded that any policy exhibits an "evident degree of negotiation": *Dalby* at [32]. I do not accept that the contra proferentem rule is excluded from operating in respect of any policy. However, it remains a rule of last resort. It cannot be used to introduce ambiguity where there is none. It is only if ambiguity exists that

the rule may have some role to play. It is only if there are "two genuinely available alternatives" that preference should be given to one that "limits rather than expands the exclusion": *Dalby* at [32]. Otherwise, ambiguities are to be resolved according to the applicable general principles which include the contra proferentem rule.

37 The parties also referred extensively to other decisions, including (in particular) *Wonkana*, *Rockment*, *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2020] EWHC 2448 (Comm) (***FCA v Arch EWHC***), *Financial Conduct Authority v Arch Insurance (UK) Ltd* [2021] UKSC 1 (***FCA v Arch UKSC***), as well *as Hyper Trust Limited t/as the Leopards Town Inn & Ors v FBD Insurance plc* [2021] IEHC 78 (***Hyper Trust No 1***), and *Hyper Trust Limited t/as the Leopards Town Inn & Ors v FBD Insurance plc (No 2)* [2021] IEHC 279 (***Hyper Trust No 2***). Given the use that was sought to be made of the other decisions, particularly *FCA v Arch UKSC*, certain observations in other cases identified by the respondent in NSD308/2021 should be noted.

38 In *In re Coleman's Depositories Ltd and Life & Health Assurance Association* [1907] 2 KB 798 at 812 Buckley LJ said "[t]he question is one of construction, and upon such a question authorities are of little or no value. Authorities may determine principles of construction, but a decision upon one form of words is no authority upon the construction of another form of words". In *In re an Arbitration between Calf and the Sun Insurance Office* [1920] 2 KB 366 at 382 Atkin LJ made the same point, saying "…on a question of construction I protest against one case being treated as an authority in another unless the language and the circumstances are substantially identical". In *Australian Casualty Co Ltd v* ***Federico*** [1986] HCA 32; (1986) 160 CLR 513 the High Court expressed the same view, saying at 525 that the task of construction required:

> …a consideration of what the words of the policy convey, as a matter of contemporary language read in the context of the whole policy, to a reasonable non-expert in this country. If that meaning is plain, it can be of but limited significance if, at other times and in other places, other courts, however eminent, have held that similar words in other policies were to be construed as having had some different meaning.

39 I also consider that the issues in dispute are not to be answered at the level of generality inherent in submissions made by the insurers such as "the policy is not intended to cover/exclude from cover the effects of a pandemic". Rather, consideration of the meaning of the relevant clauses of the policy is required without pre-conceptions about pandemics one way or another. I do not consider that the Full Court in *Rockment* intended to suggest otherwise when they said at [59] that:

> Cover for loss arising from the consequence of a pandemic disease could for an insurer be, as in the case of pollution, a high risk which would normally be excluded: Derrington D and Ashton R, *The Law of Liability Insurance* (3rd ed, LexisNexis, 2013) 10-2 p 1828: or specifically included only at an appropriately priced premium. The risk could be heightened by the indeterminacy of the period during which a highly infectious disease might disrupt business and, consequently, the amount of loss which the insured might suffer. In this sense, a construction which makes the presence of Avian Influenza or of the emergency the trigger of the Exclusion reasonably promotes its purpose. Conversely, that reasonably commercial purpose is not advanced by a construction which would confine the Exclusion to a narrow operation in relation to the presence of a highly infectious disease.

40 At [63] in *Rockment* the Full Court said "Courts could expect that insurers are not likely to offer high-risk cover for matters such as pollution or pandemics, save pursuant to express provisions". These observations, however, were made in the context of close consideration of the relevant provisions in the policy in issue in *Rockment*. They were not made as a free-standing statement of principle. The insureds' arguments in the present case are that the express provisions of the policies provide cover in the circumstances relevant to each insured. Whether that is so or not is not to be answered by applying any pre-conceived statement of general principle and without consideration of each relevant provision of each policy.

3.2 Causation

41 The insurance policies use various words to describe the causal relationship which must exist between the elements of the insured perils (in consequence of, consequent upon, as a result of, likely to result in, caused by, caused by or results from, resulting from, in direct consequence of, arising from, leading to, arising directly or indirectly from). The elements of the insured perils also require other relationships to exist which are not causal, such as temporal relationships (for example, during), spatial relationships (for example, at a location, within a specified radius), physical relationships (such as preventing, restricting), and substantive relationships (for example, by order).

42 In *FCA v Arch UKSC* at [320] Lord Briggs JSC said:

> The question whether particular consequential harm to a policyholder is subject to indemnity is as much a part of the process of interpreting their bargain as is the identification of the insured peril. It is therefore a quite distinct process from, for example, applying the law about causation and remoteness of loss for the purpose of identifying the harm liable to be made good by tortfeasors to their victims. In terms intelligible to non-lawyers, the question is: for what loss have the parties agreed that the insurers should compensate the policyholders as the result of the occurrence of the insured peril? Both the insured peril and the covered loss lie at the very heart of the contract of insurance, and the process of construction requires that they be addressed together.

43 Where a required relationship is causal, it is generally accepted that the parties to a policy of insurance intend that a proximate causal relationship will suffice even if the cause must be "direct". A proximate causal relationship involves a search for a "real", "effective", "dominant" or "most efficient" cause, even if there are other proximate causes. Depending on the words used, something less than a proximate causal relationship may also suffice (particularly if the contemplated causal requirement may be either direct or indirect). I have kept this in mind below where I refer to "cause" rather than proximate cause.

44 In ***Lasermax*** *Engineering Pty Limited v QBE Insurance (Australia) Limited & 2 Ors* [2005] NSWCA 66; (2005) 13 ANZ Insurance Cases 61-643 McColl JA (with whom Ipp and Tobias JJA agreed) summarised the applicable principles in these terms:

(1) [i]n the law of insurance it early became, and has remained, the rule to look to the proximate and not the remote cause of loss or damage in order to determine the liability of underwriters (*causa proxima non remota spectatur*) [the immediate cause, and not the remote cause, is to be considered]: [39];

(2) in this context, the words "proximate cause" and "direct cause" came to be used interchangeably: [41];

(3) as Gibbs CJ said in *Federico* at 521 "… the words 'caused by an accident' naturally refer to the proximate or direct cause of the injury, and not to a cause of the cause, or the mere occasion of the injury": [42];

(4) proximate in this context meant proximate in efficiency rather than in time: [44];

(5) the proximate cause rule was not divorced in the cases from the terms of the particular policy under consideration but was based upon the inferred common intention of the parties and would not apply if it would defeat the manifest intention of the parties: [45]; and

(6) it is consistent with this approach that the proximate cause rule is capable of applying even where the word "directly" expressly qualifies the word "cause" in a policy: [46].

45 In ***Sheehan*** *v Lloyds Names Munich Re Syndicate Ltd* [2017] FCA 1340 at [77] Allsop CJ summarised the relevant principles as follows:

> The causal inquiry in insurance law is directed to the proximate cause of the relevant loss or damage. This means proximate in efficiency, not the last in time*: Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 at 369 per Lord Shaw; *Global Process Systems Inc v Syarikat Takaful Malaysia Berhad (The "Cendor MOPU")* [2011] UKSC 5; 1 Lloyds Rep 560 at 564 [19] per Lord Saville and

568 [49] per Lord Mance. A proximate cause is determined based upon a judgment as to the "real", "effective", "dominant" or "most efficient" cause: see *Leyland Shipping* [1918] AC at 370 per Lord Shaw; *Wayne Tank and Pump Co Ltd v Employers Liability Assurance Corp Ltd* [1974] QB 57 at 66 per Lord Denning MR. What is the proximate cause is to be decided as a matter of judgment reached by applying the commonsense knowledge of a business person or seafarer: see *The "Cendor MOPU"* [2011] 1 Lloyds Rep at 564 [19] per Lord Saville and 568 [49] and 576 [79] per Lord Mance. There does not need to be a single dominant, proximate or effective cause of loss or damage: *McCarthy v St Paul International Insurance Co Ltd* [2007] FCAFC 28; 157 FCR 402 at 430 [90]. In *City Centre Cold Storage Pty Ltd v Preservatrice Skandia Insurance Ltd* (1985) 3 NSWLR 739 (referred to in *McCarthy* 157 FCR at 430 [90]), Clarke J at 745 approached the question as follows:

> … to determine in the first instance whether there is one effective cause. But, recognising that in the present case there are a number of contributing causes, I do not propose straining to isolate one if it seems to me that two or more causes operated with approximately equal effect.

46 In *FCA v Arch UKSC* Lord Hamblen and Lord Leggatt JJSC observed at [162] that:

> Many different formulations may be found in insurance policy wordings of the required connection between the occurrence of an insured peril and the loss against which the insurer agrees to indemnify the policyholder… We do not think it profitable to search for shades of semantic difference between these phrases. Sometimes the policy language may indicate that a looser form of causal connection will suffice than would normally be required, such as use of the words "directly or indirectly caused by": see e g *Coxe v Employers' Liability Assurance Corpn Ltd* [1916] 2 KB 629…. But it is rare for the test of causation to turn on such nuances. Although the question whether loss has been caused by an insured peril is a question of interpretation of the policy, it is not (unlike the questions of interpretation of the disease, hybrid and prevention of access clauses considered above) a question which depends to any great extent on matters of linguistic meaning and how the words used would be understood by an ordinary member of the public. What is at issue is the legal effect of the insurance contract, as applied to a particular factual situation.

47 In ***Coxe*** *v Employers' Liability Assurance Corpn Ltd* [1916] 2 KB 629 Scrutton J said at 633-634:

> …to all policies of insurance…the maxim causa proxima non remota spectator is to be applied if possible. The immediate cause must be looked at, and not one or more of the variety of the causes which if traced without limit might be said to go back to the birth of the assured. For that reason, when there are words which at first sight go a little further they are still construed in accordance with that universal maxim.
>
> …
>
> The words … "caused by" and "arising from" do not give rise to any difficulty. They are words which always have been construed as relating to the proximate cause… But the words which I find it impossible to escape from are "directly or indirectly". …I find it impossible to reconcile them with the maxim causa proxima non remota spectator…I am unable to understand what is an indirect proximate cause …the only possible effect which can be given to those words is that the maxim…is excluded and that a more remote link in the chain of causation is contemplated than the proximate and immediate cause.

But a line must be drawn somewhere.

48 Similarly, in ***Star*** *Entertainment Group Limited v Chubb Insurance Australia Ltd* [2021] FCA 907 Allsop CJ noted that "[t]he relational prepositional phrase 'resulting from' is wider than a proximate cause, requiring a common sense evaluation of a causal chain: ***Kooragang Cement*** *Pty Ltd v Bates* (1994) 35 NSWLR 452 at 463-464". See also Davies, M '*Proximate Cause in Insurance Law*' (1996) 7 *Insurance Law Journal* 135 in which the author said "[w]here the policy uses the words "results from" or "resulting from", it is not enough that the insured peril merely creates a predisposition for the loss to occur, but it is sufficient if there is an unbroken causal chain between peril and loss and if the peril provides the relevant causal explanation of the loss", citing *Kooragang Cement*.

49 In *FCA v Arch UKSC* Lord Hamblen and Lord Leggatt JJSC continued at [168]:

> The question whether the occurrence of such a peril was…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 circumstance - 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.

50 It is now orthodox that there may be more than one proximate cause of loss: ***McCarthy*** *v St Paul International Insurance Co Ltd* [2007] FCAFC 28; (2007) 157 FCR 402 at [88]-[92] per Allsop J (as he then was). As his Honour also explained, where there is more than one proximate cause of an event it is necessary to consider if the policy excludes cover for one of the proximate causes, referring to ***Wayne Tank*** *and Pump Co Ltd v Employers' Liability Assurance Corporation* [1974] QB 57. His Honour identified that:

(1) when an argument as to causation arises in respect of rival causes under a policy of insurance, the first task of the Court is to look to see whether only one of the causes can be identified as the proximate or efficient cause: [91];

(2) if, applying common-sense principles and recognising the commercial nature of the insurance policy that is the context of the question, two causes can be seen as proximate or efficient, the terms of the policy must then be applied to those circumstances: [91];

(3) if there are two concurrent causes one falling within the policy, the other simply not covered by the terms of the policy, the insured may recover: [91];

(4) if there are two concurrent causes, one falling within the policy, the other excluded from the policy, consideration must be given to the principle in *Wayne Tank*: [92];

(5) *Wayne Tank* concerned concurrent and interdependent causes (in that neither cause would have caused the loss but for the other cause), one within the policy and one excluded by the policy. Effect was given to the terms of the contract by applying the exclusion. This can be seen as a result of the fact that the concurrent causes were interdependent: [96];

(6) more difficulty will arise in a case involving independent concurrent causes one of which is within the policy and the other of which is excluded: [104]; and

(7) it is "always essential to pay close attention to the terms of any policy and the commercial context in which it was made, for it is out of these matters that the answer to the application of the policy to the facts will be revealed": [104]; and

(8) "[o]nce one concludes that, as a matter of construction of the contract, the insurer and insured have agreed that the cover does not extend to any loss caused by a particular cause, and that the loss was caused by that cause, the policy's lack of response can be seen as evident. It is only if one concludes that the parties have agreed that the policy will not respond if the excluded cause must be the sole cause, for the existence of a concurrent and not excluded cause to be relevant. Again this is a question of construction of the policy": [114].

51 The same approach is taken in *FCA v Arch UKSC* at [171]-[176].

52 In the present matter, other than in one case, NSD144/2021 Guild and Gym Franchises, none of the parties drew any distinction between the different causal connectors used in the various insuring provisions. They proceeded on the basis that the principle of proximate cause applied. In those cases, even if a somewhat lesser causal connection than proximate cause would suffice, that lesser causal standard could make no difference to the conclusions reached. The common-sense approach to causation in those cases indicates that there is not the requisite causal connection. In NSD144/2021 Guild and Gym Franchises, however, the causal connection required is much looser, being "arising directly or indirectly from". In that case, the difference is substantive, as indirect causation would encompass a far more expansive causal chain.

3.3 Causation in *FCA v Arch UKSC*

53 The parties relied on those parts of the reasoning in *FCA v Arch UKSC* which suited their purposes.

54 *FCA v Arch UKSC* contains much which is useful. However, it is necessary to recognise that their Lordships' reasoning depended on the proper construction of specific insuring clauses in the context of the policies as relevant in that case.

55 The relevant context in *FCA v Arch UKSC* includes that the United Kingdom has a unitary system of government. Relevant actions were taken by the UK Government and others taken applied, for example, to the whole of the United Kingdom, the whole of England, or the whole of Wales: see *FCA v Arch UKSC* at [9]-[35]. Further, England and Wales are small in area and densely populated. At [179] Lord Hamblen and Lord Leggatt JJSC said:

> As the FCA has pointed out, the area described by the disease clauses which refer to a radius of 25 miles of the business premises is an area of a little under 2,000 square miles. To put this in perspective, this is bigger than any city in the UK, more than three times the size of Surrey, roughly the combined size of Oxfordshire, Berkshire and Buckinghamshire, and around a quarter of the area of Wales. The FCA produced a map to show that the whole of England can be covered, more or less, by just 20 circles each with a 25-mile radius. Nevertheless, if - as the insurers submit - the relevant test in considering the Government measures taken in March 2020 is to ask whether the Government would have acted in the same way on the counterfactual assumption that there were no cases of Covid-19 within 25 miles of the policyholder's premises but all the other cases elsewhere in the country had occurred as they in fact did, the answer must, in relation to any particular policy, be that it probably would have acted in the same way. As already mentioned, the court below found as a fact (at para 112 of the judgment) that the Government response was a reaction to information about all the cases of Covid-19 in the country and that the response was decided to be national because the outbreak was so widespread. In these circumstances it is unlikely that the existence of an enclave with a radius of 25 miles in any one particular area of the country which was so far free of Covid-19 would have led to that area being excepted from the national measures or otherwise have altered the Government's response to the epidemic. That in turn means that in the vast majority of cases it would be difficult if not impossible for a policyholder to prove that, but for cases of Covid-19 within a radius of 25 miles of the insured premises, the interruption to its business would have been less.

56 It is an important part of the context of the decision in *FCA v Arch UKSC* that the outbreak of COVID-19 in the United Kingdom was "so widespread". It is in that context that their Lordships observed that:

> Thus, in the present case it obviously could not be said that any individual case of illness resulting from Covid-19, on its own, caused the UK Government to introduce restrictions which led directly to business interruption. However, as the court below found, the Government measures were taken in response to information about all the cases of Covid-19 in the country as a whole. We agree with the court below that it is realistic to analyse this situation as one in which "all the cases were equal causes of the imposition of national measures" (para 112).

57 They continued in these terms

> [181] We agree with counsel for the insurers that in the vast majority of insurance

> cases, indeed in the vast majority of cases in any field of law or ordinary life, if event Y would still have occurred anyway irrespective of the occurrence of a prior event X, then X cannot be said to have caused Y. The most conspicuous weakness of the "but for" test is not that it wrongly excludes cases in which there is a causal link, but that it fails to exclude a great many cases in which X would not be regarded as an effective or proximate cause of Y….
>
> [182] It has, however, long been recognised that in law as indeed in other areas of life the "but for" test is inadequate, not only because it is over-inclusive, but also because it excludes some cases where one event could or would be regarded as a cause of another event.

58 At [190] their Lordships made this fundamental point:

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

59 In other words, the text and the context of the particular policy is determinative.

60 Their Lordships also said this at [195]:

> We do not consider it reasonable to attribute to the parties an intention that in such circumstances the question whether business interruption losses were caused by cases of a notifiable disease occurring within the radius is to be answered by asking whether or to what extent, but for those cases of disease, business interruption loss would have been suffered as a result of cases of disease occurring outside the radius. Not only would this potentially give rise to intractable counterfactual questions but, more fundamentally, it seems to us contrary to the commercial intent of the clause to treat uninsured cases of a notifiable disease occurring outside the territorial scope of the cover as depriving the policyholder of an indemnity in respect of interruption also caused by cases of disease which the policy is expressed to cover. We agree with the FCA's central argument in relation to the radius provisions 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.

61 This passage is critical to understanding the reasoning in *FCA v Arch UKSC* about causation in respect of the actions of the UK Government. It discloses that the Court assumed or was confronted with a material number of cases of COVID-19 inside and outside of the relevant areas. On this basis, to infer that each and every case (both inside and outside the area) was an equally effective cause of the actions of the UK Government is rational. Given the facts in *FCA v Arch UKSC* of: (a) a small in area and densely populated country, (b) a national outbreak of COVID-19, (c) material numbers of cases inside and outside of the specified areas, their Lordships reasoned that: (d) even if there were no cases within the specified areas the UK

Government would still have taken the actions it did including in respect of those areas, and (e) by inference, the cases inside the specified areas would also have caused the UK Government to take the actions it did, at the least in respect of those areas. The issue was one of two concurrent sufficient causes of the UK Government actions.

62 In the present case, the policies were all made in the context of the Australian constitutional system. The Australian constitutional system is a federal system. The Commonwealth Government and the State and Territory Governments have their own fields of operation. The State and Territory Governments, in accordance with their constitutional mandates, act for the good governance of the State or Territory. The actions the Commonwealth Government is empowered to take are different from the actions the State and Territory Governments are empowered to take. The parties to the policy must be taken to have understood this fact.

63 In the context of the COVID-19 pandemic, the kinds of actions the Commonwealth Government was empowered to take included banning and restricting international travel and banning and restricting Australian residents from leaving Australia. The kinds of actions the State and Territory Governments were empowered to take included requiring businesses in the State or Territory to cease operating, requiring certain premises in the State or Territory to close, and requiring certain premises in the State of Territory to regulate the number of persons on the premises.

64 The policies were also made in the geographical context of Australia. Australia is large and in many areas is sparsely populated. A 5, 25 or 50 kilometre radius around premises may or may not include a densely populated area. The parties to the policy must also be taken to have understood this fact.

65 Further, and as the evidence discloses, the factual context of the presence of COVID-19 cases in Australia in 2020 was different from the widespread outbreak that occurred in the United Kingdom. The agreed facts include this information about cases of COVID-19 in Australia. The numbers are cumulative. The table does not distinguish between cases associated with community transmission, overseas acquisition, interstate acquisition or cases acquired or located in hospital, hotel quarantine or self-isolation.

Total COVID-19 cases (on a cumulative basis)					
Date (on or about)	Australia	NSW	VIC	QLD	SA
25-Jan-20	2	1	1	0	0
27-Jan-20	5	4	1	0	0
1-Mar-20	29	6	9	9	3
4-Mar-20	~70	21	10	11	5
9-Mar-20	80	54	17	15	7
12-Mar-20	~197	90	34	27	13
16-Mar-20	~300	196	78	68	30
23-Mar-20	~2,000	869	396	319	135
31-Mar-20	~4,200	2,153	956	743	338
30-Apr-20	6,735	3,016	1,361	1,033	438
31-May-20	7,195	3,095	1,649	1,058	440
30-Jun-20	7,834	3,189	2,159	1,067	443
31-Jul-20	16,905	3,756	10,577	1,083	450
31-Aug-20	25,746	4,050	19,080	1,122	463
30-Sep-20	27,078	4,224	20,169	1,157	468
31-Oct-20	27,590	4,421	20,347	1,171	501
30-Nov-20	27,904	4,577	20,345	1,202	562
31-Dec-20	28,408	4,923	20,368	1,253	576
31-Jan-21	28,811	5,104	20,448	1,310	597
28-Feb-21	28,970	5,177	20,481	1,329	613
31-Mar-21	29,304	5,291	20,484	1,467	655
30-Apr-21	29,801	5,477	20,518	1,559	724

66 Given the total population of Australia (say, 26 million people) it is apparent that it could not be said that the occurrence of COVID-19 cases in Australia was widespread. The numbers do indicate, however, the highly contagious nature of COVID-19.

67 As noted, it is also apparent in *FCA v Arch UKSC* that it was a given that there were cases of COVID-19 within the area identified by the policies (the radius as specified). This is apparent from the reasoning in *FCA v Arch UKSC* at [179]-[197]. The existence of cases of COVID-19 inside and outside of the specified areas (defined by a radius around the premises) was part of the assumed or undisputed context. On that basis, the actions of the government could be tested by asking would the government have acted as it did if there were no cases within the radius, to which their Lordships' answer in the circumstances was "yes". It is this fact which made the "but for" test inapplicable. The underlying fact which is also assumed in this reasoning is that there were enough cases of COVID-19 within the specified radius to have caused the Government to take the same actions with respect, at the least, to that area: see, in particular, the last sentence of [195] set out above.

68 None of these facts or assumptions apply in the present case. The context is materially different from that which underpins this aspect of the reasoning in *FCA v Arch UKSC*. As will be explained, it cannot be concluded in the context of these matters that each and every known case of COVID-19 in any location in a State was an equally effective cause of the State

government actions (in contrast to the threat or risk to each and every person in a State presented by known and unknown cases of COVID-19 given its highly contagious nature).

69 There is another important distinction between the circumstances in *FCA v Arch UKSC* and the present case. As noted, the context in *FCA v Arch UKSC* was events which justified the description of "the national outbreak of Covid-19": [219]. On that basis, Lord Hamblen and Lord Leggatt JJSC said at [220]:

> It seems to us that, having correctly identified the fortuity covered by the insurance as a situation in which all three interconnected elements are present, the court erred by adopting a test which does not reflect that fortuity. The effect of "stripping out" all three elements in considering what the position of the business would have been but for the occurrence of the insured peril is to ask what its position would have been if none of those elements had occurred - including, as the court said, the national outbreak of Covid-19. That, however, is to treat the insured peril as being, not the risk of all three elements occurring (in causal sequence), but the risk of any one or more of the elements occurring. That would include a situation where there was an outbreak of a notifiable disease which caused interruption and loss to the business but which did not lead to any restriction being imposed that resulted in inability to use the premises. That is not the indemnity which the insurer agreed to give.

70 This may readily be accepted; to do otherwise would be to re-write the insuring provisions.

71 Their Lordships continued to examine the causal requirements of the insuring provisions in these terms:

> [227] Once it is recognised that the approach for which Hiscox contends logically requires assuming in the counterfactual scenario the imposition of all the restrictions which were in fact imposed by the Government but that those restrictions did not require the insured premises to close, it can readily be seen that this approach is just as open to criticism as that of the court below. That is because it treats the insured peril as the risk that, if there was an outbreak of a notifiable disease sufficiently serious to lead a public authority to impose restrictions, the only effect of those restrictions (and of the outbreak of disease) would be to cause business interruption through inability to use the insured premises. On Hiscox's interpretation of its policy wording, to the extent that the imposition of the restrictions and/or the outbreak of disease would have caused business interruption anyway even if the policyholder had remained able to use the premises, the interruption is not covered by the policy. In the present case the indemnity is thus confined on this interpretation to loss that would have been avoided if Covid-19 and its consequences, including the imposition of the Government restrictions, had all occurred as they actually did save that the policyholder had (uniquely) been allowed to keep its premises open. No reasonable policyholder would have understood the insurance cover which it was getting to be insurance against such a narrow and fanciful risk. If Hiscox's interpretation were correct, it would make the public authority clause in the Hiscox policies a wholly uncommercial form of insurance which we cannot imagine that any insurer would see any sense in offering or that anyone running a business would see any sense in buying.
>
> …
>
> [239] We agree and consider the underlying explanation to be that, where insurance is

> restricted to particular consequences of an adverse event (such as in this example the discovery of vermin in the premises) the parties do not generally intend other consequences of that event, which are inherently likely to arise, to restrict the scope of the indemnity.
>
> …
>
> [243] The conclusion we draw is that, properly interpreted, the public authority clause in the Hiscox policies indemnifies the policyholder against the risk (and only against the risk) of all the elements of the insured peril acting in causal combination to cause business interruption loss; but it does so regardless of whether the loss was 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.
>
> [244] This interpretation, in our opinion, gives effect to the public authority clause as it would reasonably be understood and intended to operate. For completeness, we would point out that this interpretation depends on a finding of concurrent causation involving causes of approximately equal efficacy. If it was found that, although all the elements of the insured peril were present, it could not be regarded as a proximate cause of loss and the sole proximate cause of the loss was the Covid-19 pandemic, then there would be no indemnity. An example might be a travel agency which lost almost all its business because of the travel restrictions imposed as a result of the pandemic. Although customer access to its premises might have become impossible, if it was found that the sole proximate cause of the loss of its walk-in customer business was the travel restrictions and not the inability of customers to enter the agency, then the loss would not be covered.
>
> …

72 Their Lordships applied the same analysis to the trends in business clauses which required the loss to be calculated on a basis taking into account the trends and circumstances affecting the business excluding the insured peril. Their Lordships said:

> [268] How then are the trends clauses to be construed so as to avoid inconsistency with the insuring clauses? In our view, the simplest and most straightforward way in which the trends clauses can and should be so construed is, 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. Accordingly, the trends or circumstances referred to in the clause for which adjustments are to be made should generally be construed as meaning trends or circumstances unrelated in that way to the insured peril.
>
> …
>
> 287 For the reasons given, we consider that the trends clauses in issue on these appeals should be construed so that the standard turnover or gross profit derived from previous trading is adjusted only to reflect circumstances which are unconnected with the insured peril and not circumstances which are inextricably linked with the insured peril in the sense that they have the same underlying or originating cause. Such an approach ensures that the trends clause is construed consistently with the insuring clause, and not so as to take away cover prima facie provided by that clause.
>
> [288] We therefore reach a similar conclusion to the court below, by a slightly different route. We consider, as they did, that the trends clauses do not require losses to be adjusted on the basis that, if the insured peril had not occurred, the results of the

> business would still have been affected by other consequences of the Covid-19 pandemic.

73 In the present case, the insurers maintained that this approach should not be adopted. Rather, the "but for" the insured peril approach in ***Orient-Express*** *Hotels Ltd v Assicurazioni Generali SA* [2010] Lloyd's Rep IR 531 should be applied. For reasons which will be given, I consider the approach to causation and trends in business clauses in *FCA v Arch UKSC* to be compelling.

74 However, the persuasiveness of this aspect of their Lordships' reasoning depends on the fact of the cause or underlying fortuity giving rise to the insured peril being the **same** as the cause or underlying fortuity giving rise to the uninsured peril. It is the identity of those two matters which enabled it to be concluded that requiring causation of loss and the circumstances affecting the business to exclude the effects of the COVID-19 pandemic would make for "a wholly uncommercial form of insurance": *FCA v Arch UKSC* at [227]. Once there is not sameness or identity between the cause or underlying fortuity giving rise to the insured peril and the cause or underlying fortuity giving rise to the uninsured peril, there is nothing uncommercial in a policy operating to require that causation of loss and the circumstances affecting the business be assessed, including the effects of the uninsured peril.

75 On the facts in *FCA v Arch UKSC* the insured perils, as already noted, were characterised as the "national COVID-19 pandemic". This made sense in the factual and legal context in the United Kingdom. In the Australian context, however, we have the Commonwealth Government exercising Commonwealth powers and the State and Territory Governments exercising State and Territory powers. The criteria for the exercises of these powers are different and the geographical application of the exercise of these powers is also different. Further, on the facts in Australia, it is not possible to identify the cause of all exercises of governmental power at the same level of generality as in *FCA v Arch UKSC* as the "national COVID-19 pandemic".

76 As will be explained, in respect of relevant Commonwealth Government actions the uninsured peril was the existence of COVID-19 cases overseas and the threat this presented to Australia by reason of persons (including travelling Australian residents) from overseas entering Australia. In respect of State actions, the uninsured peril was the existence of COVID-19 cases in the State (known) and the associated threat or risk of COVID-19 to persons (from cases both known and unknown) across the State as a whole.

77 In respect of relevant Commonwealth Government actions it is not possible, in my view, to characterise the cause or underlying fortuity giving rise to the insured peril and the cause or

underlying fortuity giving rise to the uninsured peril as the same. Nothing in the text or context of the insuring provisions supports the conclusion that the cause of the insured peril is able to be characterised as the existence of COVID-19 cases overseas and the threat this presented to Australia by reason of persons (including travelling Australian residents) from overseas entering Australia.

78 I have reached a different conclusion in respect of the actions of the State Governments. In each case I have concluded, on the facts, that the cause of the State Government action was the existence of COVID-19 cases in the State (known) and the associated threat or risk of COVID-19 to persons (from cases both known and unknown) across the State as a whole. This characterisation has a number of important consequences.

79 First, it means that, on the basis of the facts, it has not been possible to conclude that any State Government action was caused by, or resulted from, or was in consequence of, the existence of any case of COVID-19 at the location or within area required by the insuring provisions. To the extent any insuring provision required the action of an authority to be caused by, to result from, or be in consequence of an occurrence or outbreak of COVID-19 at a specific location or within a specified area, I have been unable to reach such a conclusion. In particular, on the facts of each case, I am unable to conclude that each and every case of COVID-19, including any case within the area required by the insuring clause, was an equally effective cause of the taking of the State Government action.

80 Second, it means, on the basis of the facts, that I have concluded that the relevant State Government actions were caused by the existence of COVID-19 cases in the State (known) and the associated threat or risk of COVID-19 to persons (from cases both known and unknown) across the State as a whole. That is, I infer that the State Governments acted because they knew cases of COVID-19 existed in certain locations in the State (but not every location in the State) and because they considered that there was a threat or risk of COVID-19 to persons (from cases both known and unknown) across the State as a whole.

81 On this basis, in my view, the State Government actions were caused by or resulted from or were in consequence of the threat or risk of COVID-19 to persons in each and every part of the State including, logically, at or within the location or area required by the insuring provisions. Accordingly, an insuring provision requiring the action of the authority to be caused by or result from or be in consequence of the threat or risk of infectious or contagious disease at a

location or within a specified area is satisfied, as the threat or risk to each and every person is an equally effective cause of the action of the State Government.

82 Third, in dealing with the application of the principles of causation and trends in business clauses to the assessment of loss, this distinction between Commonwealth and State means that in the case of action of the Commonwealth Government the cause or fortuity underlying the insured perils is different from the cause or fortuity underlying the uninsured perils. The insured perils concern action of an authority caused by, resulting from or in consequence of infectious or contagious diseases at a location or within a specified area. That is not the same as the cause of the uninsured peril if that uninsured peril involves the actions of the Commonwealth Government, involving actions caused by the existence of COVID-19 cases overseas and the threat this presented to Australia by reason of persons (including travelling Australian residents) from overseas entering Australia.

83 These latter considerations matter (albeit in different ways) in NSD133/2021 Insurance Australia and Meridian Travel, NSD135/2021 Allianz and Mayberg, and NSD308/2021 QBE v Coyne (EWT).

3.4 Other important matters

3.4.1 Occurrence/outbreak and risk/threat

84 It will also become apparent that there is an important distinction to be drawn between insuring provisions which depend on an occurrence or outbreak of an infectious or contagious disease within an area and insuring provisions which depend on the threat or risk of an occurrence or outbreak of an infectious or contagious disease within an area. The two concepts are different. Care must be taken not to elide the difference between the two. In particular, as will be explained, where the geographical area is large and the relative number of cases of COVID-19 within the community has been small (at least compared to the widespread outbreak described in the United Kingdom in *FCA v Arch UKSC*), there is a difference between assessing whether government actions were taken in response to the actual outbreak or occurrence of COVID-19 within a specified area and assessing whether government actions were taken in response to the threat or risk of the spread of COVID-19 across a wide area such as a State.

3.4.2 Role of an authority in hybrid clauses

85 Another important matter is that hybrid clauses depend on the actions of an authority of some kind. Generally, the action must be a result of an occurrence or outbreak of an infectious or

contagious disease. In this context, it is important to recognise that the focus of the insuring clause is on the action of the authority. That action must result from the disease. There is a difference between an action resulting from a thing (a disease) and the existence of the thing (the disease). An action of an authority can result from a disease even if the authority is mistaken about the disease.

86 As discussed below, while I would not conclude that the parties to an insurance policy intended that the actions of an authority taken arbitrarily, capriciously or in bad faith would determine liability under the policy, subject to those matters, where parties have made an insuring provision depend on the action of an authority resulting from some or other thing, they have effectively committed themselves to accept the view of the authority about the thing. This is important because, while the thing in question (the disease) must logically exist before the action for the action to result from the thing, explaining a required causal sequence as starting with the objective existence of the thing (the disease), as the insureds do in these matters, is inaccurate because it suggests that it is the objective existence of the thing (the disease) which is determinative. It also suggests that the parties contemplated that they would be able to go behind the action of the authority to determine whether the authority was right or wrong about there being an occurrence or an outbreak of the disease.

87 I do not accept that this is how the insuring clauses were intended by the parties to operate. It does not accord with the language used (usually, action resulting from [disease as specified]) which, in its terms, focuses upon the reason the authority took the action. It does not accord with a common-sense and business-like interpretation of the provisions. The provisions are intended to operate where an authority takes action because of a thing which causes the interruption or interference to the business which causes loss. If an authority acts because of a thing, and the action does interrupt or interfere with the business, and loss is in fact suffered, on what basis could it be inferred that the parties to the policy intended to exclude loss merely because, acting in good faith, the authority is subsequently able to be proved to have made a mistake? In my view, there is no commercially sensible basis upon which it could be concluded that cover was to be excluded, subject only to some clear indication in the policy to the contrary. As noted, I accept that actions of an authority which have been taken arbitrarily, capriciously or in bad faith may not ordinarily have been intended by the parties to be covered, but those concepts are irrelevant in the present case.

88 For this reason, evidence of facts not known to an authority or not relied on by an authority in deciding to take action are likely to be of little use. In such provisions, it is the actions of the authority and what those actions in fact resulted from which are of central importance. Given the nature of the provisions as part of a contract of indemnity I would also conclude that parties intended that the causal requirement (an action of an authority resulting from some or other thing) would be objectively determined by reference to what he authority in fact did, what it sad about what it did at the time it took the action, and the contemporaneous circumstances as may be inferred to have been known to and considered by the authority at the time it acted. The parties could not have intended that they would be able to identify the subjective state of mind of the authority or, as I have said, that they would be able to go behind what the authority did to prove that the authority was wrong.

89 Accordingly, the question of what the actions of an authority resulted from is best answered by reference to what the authority did, why the authority said it did what it did, and other contemporaneous explanations and circumstances casting light upon the actions of the authority. It is not answered by subsequent unearthing of facts or opinions not known to or considered by the authority at the time it took the actions.

3.4.3 Occurrence and outbreak

90 The context within which these words appear will determine their meaning.

91 Absent a textual or contextual indicator that the words should be taken to be interchangeable, they have a different meaning. The meaning is disease dependent.

92 For COVID-19 key facts are: (a) COVID-19 is highly contagious in a non-controlled environment (that is, not in a hospital, quarantine or isolation), (b) people are likely to be infectious with COVID-19 before they become aware of symptoms, and (c) accordingly, the risk to public health was not from known cases of COVID-19 alone but was also from unknown cases of COVID-19.

93 These facts may be inferred to have been known to relevant authorities within Australia before they took action relating to COVID-19.

94 In a hybrid clause, the focus is not on the objective existence of an outbreak or occurrence of COVID-19 but on the causal relationship between the action of the authority and the circumstances relating to COVID-19 which caused the authority to act.

95 An "occurrence" of COVID-19 would mean an event or case of COVID-19 in any setting. That is, it would not matter if the case of COVID-19 was in a controlled environment (such as a hospital, quarantine or isolation). The fact that the risk of transmission of COVID-19 would be low due to the controlled setting would be immaterial.

96 An "outbreak" of COVID-19 would require more than an "occurrence" of COVID-19. The difference between my conclusions and the submissions of the insurers is that the insurers contended that an "outbreak" of COVID-19 requires a confirmed case of transmission in the community (that is, in a non-controlled setting) of COVID-19. I consider that an "outbreak" of COVID-19 requires only a case of active (that is, infectious) COVID-19 in the community (that is, in a non-controlled setting).

97 The requirement proposed by the insurers of at least a confirmed case of community transmission of COVID-19 does not reflect the fact that there is a probability that a person with active COVID-19 in a non-controlled setting will transmit the disease to other persons who are not able to be identified. Given the agreed facts about COVID-19, in every such case (of a case of active COVID-19 in a non-controlled setting), transmission to an unknown person is more probable than not. In the context of a contractual arrangement I would not infer that the parties to the policy intended that anything more than probabilistic reasoning would be required. I consider that in this regard the reasoning in *FCA v Arch UKSC* at [69] is not reflective of the nature of COVID-19 and the fact that it may be taken that the parties intended the insuring provisions to operate depending on the nature of the disease relevant to the particular case.

3.4.4 Common words in policies

98 Apart from these matters, it is important not to generalise because the same word may have a different meaning depending on the context within which the word appears. Recognising this, I will confine myself to the following further observations which relate to the terms of the particular policies under consideration (and which are subject to any contrary contextual indicator):

(1) "closure" of premises/a situation in the context of "closure or evacuation of" the premises/a situation, in the ordinary course, would extend to closure of a part of the premises or situation;

(2) "closure" of premises/a situation in the context of "closure or evacuation of" the premises/a situation is different from the prevention, restriction or hindrance of access

to the premises/situation. Closure requires that the whole or part of the premises/situation be closed off from entry by persons who otherwise would ordinarily be entitled to enter and remain on the whole or that part of the premises/situation;

(3) "closure" of premises/a situation in the context of "closure or evacuation of" the premises/a situation does not require physical impossibility of access to the whole or part of the premises/situation;

(4) "closure" of premises/a situation in the context of "closure or evacuation of" the premises/a situation does not require that each and every person is prohibited from entering and remaining upon the whole or part of the premises/situation. It requires that persons who would otherwise be entitled to do so, not be able to do so. This is to be applied in a common-sense way. As such, if a premises/situation involves a business catering to the public and the public is not able to enter and remain upon the whole of the premises/situation or a part of the premises/situation, the premises/situation may well be closed in whole or part;

(5) the insuring provision will dictate whether the closure may be voluntary or compelled. Where the required closure is "by order" of an authority the closure must be compelled or required by the order. "By" in this context ordinarily means "required by" and "caused by" and not just "caused by";

(6) closure of premises/a situation is different from closure of a business. However, it is not possible to apply any pre-conceived concept that a "mere" restriction on the operation of a business does not require a closure of the premises/situation. Whether the action of the authority does require closure of the premises/situation or not will depend on the facts;

(7) in the ordinary course, a restriction on the number of people who may enter and remain on premises at any one time does not involve closure of premises/a situation;

(8) an order of an authority which "prevents", "restricts" or "hinders" access to premises/a situation ordinarily would not require a physical (as opposed to a legal) prevention, restriction or hindrance of access to the premises/situation;

(9) in the ordinary course, a restriction on the number of people who may enter and remain on premises at any one time does involve prevention, restriction or hindrance of access to the premises/situation;

(10) a competent authority or body means an authority or body competent to take the action contemplated by the insuring clause;

(11) a "public authority", "statutory authority", "government authority", "civil authority", "lawful authority" or the like, in the context of the insuring provisions, means an authority, body or person authorised or empowered to take the action by reason of an Act, regulation or instrument of any kind under an Act, regulation or instrument, the action having some essentially public as opposed to private character. It does not mean an authority, body or person authorised or empowered to take the action by reason of a private arrangement such as a contract or by-laws of a body corporate;

(12) an "outbreak" of a disease takes its meaning from the nature of the disease. In the case of COVID-19 there can be an "outbreak" of COVID-19 within a specified area if there are active (in the sense of contagious) cases of COVID-19 within the community in that area who are not in a controlled setting (such as a hospital or isolation or quarantine), whether or not it can be proved that such a person transmitted COVID-19 to another person within the area. This is because of the highly contagious nature of COVID-19 (as evidenced by its rapid progress to worldwide pandemic status);

(13) an organism is "discovered" if it is found or ascertained; and

(14) whether the discovery of an organism must be at the premises/situation or not depends on the wording of the particular provision. No generalisation is possible.

4. THE PROVISIONS OF THE POLICIES

99 The insureds identified the relevant provisions of the policies as falling within four classes:

(1) **hybrid clauses**: these provide cover for loss from orders/actions of a competent authority closing or restricting access to premises, but only where those orders/actions are made or taken as a result of infectious disease or the outbreak of infectious disease within a specified radius of the insured premises;

(2) **infectious disease clauses**: these provide cover for loss that arises from either infectious diseases or the outbreak of an infectious disease at the insured premises or within a specified radius of the insured premises;

(3) **prevention of access clauses**: these provide cover for loss from orders/actions of a competent authority preventing or restricting access to insured premises because of damage or a threat of damage to property or persons (often within a specified radius of the insured premises); and

(4) **a catastrophe clause**: this provides cover for loss resulting from the action of a civil authority during a catastrophe for the purpose of retarding the catastrophe.

100 As will become apparent, while these classifications identify something that the provisions within each class have in common, there are differences between the words used in different policies, including policies issued by the same insurer.

101 The following tables summarise some of the key differences of the provisions. There are other differences, identified in the reasons relating to each matter, including in the cover clauses and the exclusions.

HYBRID CLAUSES	Required action	Required cause	Required location
Swiss Re and LCA Marrickville	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	at the Situation or within a 5 kilometer [sic] radius of the Situation
Insurance Australia and Meridian Travel	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
Insurance Australia and The Taphouse	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
Allianz and Mayberg	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
Allianz and The Stage Shop (Visintin)	interruption or interference with Your Business due to 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
Chubb and Waldeck	interruption of or interference with the Insured Location in direct consequence of the intervention of a public body authorised	Notifiable Disease or the discovery of an organism likely to cause Notifiable Disease	at the premises

	to restrict or deny access to the Insured Location directly arising from an occurrence or outbreak …and 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		
Chubb and Market Foods	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 of any of the following… 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	Notifiable Disease or the discovery of an organism likely to cause Notifiable Disease	at the premises
Guild and Gym Franchises	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
Guild and Dr Michael	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
QBE and Coyne (EWT)	closure or evacuation of all or part of the premises by order of a competent government, public or statutory authority as a result of… which shall prevent or hinder the use of your building or access thereto, or results in a cessation or diminution	a human infectious or contagious diseases	N/A

	of trade due to temporary falling away of potential customers		

PREVENTION OF ACCESS CLAUSES	Required action/effect	Required cause	Required location
Swiss Re and LCA Marrickville	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	the action of any lawful authority attempting to avoid or diminish risk to life or **Damage** to property	within 5 kilometres of such **Situation**
Insurance Australia and The Taphouse	preventing or restricting access to your premises or ordering the evacuation of the public	caused by any legal authority… as a result of damage to or threat of damage to property or persons	within a 50-kilometre radius of your premises.
Allianz and Mayberg	preventing or restricting access to Your Premises or ordering the evacuation of the public… provided the prevention of access or restricted access to the Premises extends for a continuous period greater than 48 hours	caused by legal authority… as a result of Damage to or threat of Damage to property or persons	within a 50-kilometer radius of Your Premises
Allianz and The Stage Shop (Visintin)	prevents or restricts access to the Premises… provided that the prevention of access or restricted access to the Premises extends for a continuous period greater than 48 hours	caused by an order of any legal authority…[that] result[s] from threat of damage to property or persons	within 50 kilometre radius of the Premises
Chubb and Market Foods	loss resulting from Business Interruption to property: (a) of a type insured by this Policy; and (b) at the locations described in points 1. to 8. directly below: 1. damage to any property within 50 kilometres of any Insured Location, which will prevent or hinder the access to or use of the Insured Location; or		

	3. property in any commercial complex of which the Insured Location forms a part or in which the Insured Location is contained which results in cessation or diminution of Your trade or normal business operations due to a falling away of potential custom; or 4. any legal authority preventing or restricting access to an Insured Location or ordering the evacuation of the public due to damage or a threat of damage to property or persons within 50 kilometres of any Insured Location.		

INFECTIOUS DISEASE CLAUSES	**Required action/effect**	**Required cause**	**Required location**
Insurance Australia and Meridian Travel	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	the outbreak of a human infectious or contagious disease	occurring within a 20 kilometre radius of the Situation

CATASTROPHE CLAUSE	**Required action/effect**	**Required cause**	**Required location**
Swiss Re and LCA Marrickville	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	is in consequence of… the action of a civil authority during a conflagration or other catastrophe for the purpose of retarding same	N/A

5. THE SECTION 61A ISSUE

5.1 Background

102 Three of the proceedings involve issues about the construction and application of s 61A of the *Property Law Act 1958* (Vic). Section 61A provides that:

> 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.

103 Section 61A is relevant because in NSD133/2021 Insurance Australia and Meridian Travel, NSD137/2021 Chubb and Waldeck, and NSD308/2021 QBE and Coyne (EWT), the insurers contend that: (a) the proper law of the contracts of insurance is the law of Victoria, (b) accordingly, s 61A of the Property Law Act applies to the contracts of insurance, (c) by operation of s 61A the reference in the exclusion provisions of the contracts of insurance to a "quarantinable disease under the *Quarantine Act 1908* (Cth)", now repealed, is to be construed as a reference to a "listed human disease under the *Biosecurity Act 2015* (Cth)", the Biosecurity Act being a re-enactment with modifications of the Quarantine Act, and (d) as a result, loss resulting from COVID-19, a listed human disease under the Biosecurity Act, is excluded from the scope of the cover under the contracts of insurance.

104 The exclusions which are relevant to the s 61A issues are as follows:

105 **NSD133/2021 Insurance Australia v Meridian Travel policy**:

> **Policy Schedule**
>
> …
>
> Under Section 2 – Business Interruption, Additional Benefit 8[sic] is deleted and replaced with the following:
>
> **8 Murder, suicide or disease**
>
> The occurrence of any of the circumstances set out in this additional benefit which shall be deemed to be Damage to Property used by You in the Situation.
>
> …
>
> (c) The outbreak of a human infectious or contagious disease occurring within a 20-kilometre radius of the Situation.
>
> (d) Closure or evacuation of Your Business by order of a government, public or statutory authority consequent upon:

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

…

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.

106 **NSD 137/2021 Chubb v Waldeck**:

SECTION 2 – BUSINESS INTERRUPTION

…

Definitions

Wherever appearing in this Section 2 – Business Interruption, the following definitions apply:

…

Notifiable Disease means illness sustained by any person resulting from food or drink poisoning or any human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated must be notified to them. Notifiable disease does not include any occurrence of any prescribed infectious or contagious diseases to which the Quarantine Act 1908 as amended applies.

…

…

Extension C: non damage

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.

…

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.

107 **NSD308/2021 QBE v Coyne (EWT) policy**:

3. Prevention of access

The indemnity under this section is extended to include interruption or interference with your business in consequence of:

> c. closure or evacuation of all or part of the premises by order of a competent government, public or statutory authority as a result of a human infectious or contagious diseases [sic]. 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,
>
> which shall prevent or hinder the use of your building or access thereto, or results in a cessation or diminution of trade due to temporary falling away of potential customers.
>
> …

5.2 Proper law of the policies

108 In NSD308/2021 QBE and Coyne (EWT) the parties agree that the proper law of the policy is the law of Victoria so that s 61A of the Property Law Act potentially applies to the policy.

109 In NSD133/2021 Insurance Australia v Meridian Travel and NSD137/2021 Chubb and Waldeck the insureds do not concede that the proper law of the policy is the law of Victoria. In both matters the parties agree that the relevant principle is that the applicable law is to be determined by reference to the legal system with which the transaction has its closest and most real connection: *Bonython v Commonwealth* [1951] AC 201 at 219.

110 In NSD133/2021 Insurance Australia and Meridian Travel the insured submitted that while it (the insured) is located in Victoria, the intermediary is identified as being in Sydney and IAG's registered office is in Sydney, NSW.

111 In NSD137/2021 Chubb and Waldeck the insured submitted that while the insured premises are in Victoria and Mr Waldeck is a resident of Victoria, the insurer is located in NSW.

112 I am satisfied that in both cases the proper law of the contract of insurance is the law of Victoria.

113 In NSD133/2021 Insurance Australia and Meridian Travel: (a) the renewal schedule identifies the insurer's location as in Victoria, and (b) the renewal schedule identifies the insured situations as in Victoria. While the postal address of the insured is identified as that of its intermediary in Sydney, the closest and most real connection between the contract of insurance and the legal system is the legal system of Victoria. Victoria is the location of the insured, the insurer as identified in the contract, and the insured premises. As to the location of the insurer, while the policy identifies the insurer as located in Sydney, Melbourne, Brisbane, Perth and Adelaide, the policy schedule records the location of the insurer for this policy is located in Melbourne.

114 In NSD137/2021 Chubb and Waldeck the contract of insurance identifies the insurer as located in Sydney. The policy schedule identifies that: (a) the insured is Mr Waldeck, agreed to be

resident in Victoria, (b) the broker is located in Victoria, and (c) the insured location is in Victoria. In these circumstances, again, the legal system with the closest and most real connection to the contract of insurance is Victoria.

5.3 Relevant facts

115 The Quarantine Act was repealed on 16 June 2016 "at the same time as section 3 of the Biosecurity Act 2015 commences": Sch 1 to the *Biosecurity (Consequential Amendments and Transitional Provisions) Act 2015* (Cth).

116 The Biosecurity Act, ss 3 to 645, commenced on 16 June 2016: s 2.

117 COVID-19 was not a disease declared to be a quarantinable disease under the Quarantine Act (as amended) before its repeal.

118 COVID-19 was declared to be a listed human disease under s 42 of the Biosecurity Act on 21 January 2020: *Biosecurity (Listed Human Diseases) Amendment Determination 2020*.

119 In NSD308/2021 QBE and Coyne (EWT), the policy commenced on 6 January 2020 and remained in force until 6 January 2021.

120 In NSD133/2021 Insurance Australia and Meridian Travel, the policy commenced on 22 February 2020 and remained in force until 22 February 2021.

121 In NSD137/2021 Chubb and Waldeck, the policy commenced on 28 March 2020 and remained in force until 28 March 2021.

5.4 Discussion

5.4.1 The issues

122 As a result of the claims of the insureds for interest under s 57 of the *Insurance Contracts Act 1984* (Cth) no issue was raised concerning the potential application of s 61A of the Property Law Act by reason of the proceedings being within federal jurisdiction. The reasoning in *Rizeq v Western Australia* [2017] HCA 23; (2017) 262 CLR 1 at [105] applies. Section 61A is a law "having application independently of anything done by a court. It is squarely within State legislative competence and outside the operation of s 79 of the" *Judiciary Act 1903* (Cth).

123 The issues about s 61A are whether: (a) "an Act or a provision of an Act" includes a Commonwealth Act or provision of a Commonwealth Act, (b) the Quarantine Act and provisions of that Act as specified in the policies have been repealed and re-enacted with

modifications in the Biosecurity Act, (c) s 61A applies only to Acts or provisions of Acts repealed and re-enacted after the contracts were entered into, (d) the terms of the policies disclose an express contrary intention to the application of s 61A, and (e) the application of s 61A has the effect for which the insurers contend in any event.

124 These issues arise in the context of the decision in *Wonkana*, which the insurers do not challenge in these proceedings. In *Wonkana* the NSW Court of Appeal held that the reference in a policy excluding cover for "diseases declared to be quarantinable diseases under the Australian Quarantine Act 1908 and subsequent amendments" could not be construed as extending or referring to "diseases determined to be listed human diseases under the Biosecurity Act". For policies to which the law of Victoria applies the insurers seek to rely on s 61A to operate so that the references in the policies to the Quarantine Act are to be construed as references to the Biosecurity Act.

125 I do not accept the insurer's arguments. Section 61A does not operate in respect of the exclusion provisions in the three policies in issue.

5.4.2 Meaning of "an Act or a provision of an Act" in s 61A

126 There is no definition of "Act" in the Property Law Act.

127 Section 38 of the *Interpretation of Legislation Act 1984* (Vic) provides that:

> In all Acts and subordinate instruments, unless the contrary intention appears—
>
> "Act" means an Act passed by the Parliament of Victoria;
>
> …
>
> "Commonwealth" means the Commonwealth of Australia;
>
> "Commonwealth Act" means an Act passed by the Parliament of the Commonwealth;
>
> …

128 Section 4(4) of the Interpretation of Legislation Act effected amendments to Acts mentioned in the Schedule which included, at paragraph 2, the insertion of what is now s 61A of the Property Law Act after s 61 of the Property Law Act. The Explanatory Memoranda relating to the *Interpretation of Legislation Bill 1984* said:

> Clause 2 of the Schedule amends the *Property Law Act* 1958 by making provision with respect to the construction of references in deeds, contracts, wills, orders and other instruments to Acts that have been repealed and re-enacted. The provision is similar to that made by clause 16(a) with respect to Acts and subordinate instruments. Section 7(1) of the *Acts Interpretation Act* 1958 contained a similar provision with respect to

all documents.

129 Section 16 of the Interpretation of Legislation Act provides that:

> 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 -
>
> (a) any reference in any Act or subordinate instrument to the repealed Act or provision shall be construed as a reference to the
>
> re-enacted Act or provision; and
>
> …

130 Section 16 may be contrasted with s 17 of the Interpretation of Legislation Act which in these terms:

> (1) A reference in an Act to that Act or to any provision of that Act or to any other Act or to any provision of any other Act or to any subordinate instrument or provision of a subordinate instrument shall, unless the contrary intention appears, be construed—
>
> (a) if the Act, subordinate instrument or provision in question has been amended, as a reference to the Act, subordinate instrument or provision as amended and in force for the time being;
>
> (b) if the Act, subordinate instrument or provision in question has been re-enacted or re-made (with or without modification), as a reference to the Act, subordinate instrument or provision as re-enacted or re-made and in force for the time being;
>
> (c) if the Act, subordinate instrument or provision in question has been re-enacted or re-made (with or without modification) and subsequently amended, as a reference to the Act, subordinate instrument or provision as re-enacted or re-made and as subsequently amended and in force for the time being; and
>
> (d) if the Act, subordinate instrument or provision in question has been repealed and not re-enacted or re-made, as a reference to the Act, subordinate instrument or provision as in force immediately before its repeal.
>
> …
>
> (2) In this section -
>
> (a) a reference to an Act includes a reference to—
>
> (i) a Commonwealth Act; and
>
> (ii) an Act or Ordinance of another State or of a Territory;
>
> (b) a reference to a subordinate instrument includes a reference to an instrument of a legislative character made or to be made under or pursuant to the provisions of—
>
> (i) a Commonwealth Act; and
>
> (ii) an Act or Ordinance of another State or of a Territory.

131 This legislative history indicates that the Victorian Parliament, in enacting s 61A, intended the reference in s 61A to "an Act or a provision of an Act" to mean an Act or a provision of an Act

of the Parliament of Victoria. This is apparent from the fact that: (a) s 61A was enacted at the same time as Interpretation of Legislation Act including ss 16 and 17, (b) s 16(a), like s 61A, deals with repeal and re-enactment of Acts, (c) s 16 may be contrasted with s 17 in that s 16 does not contain an internal definition of "Act" and, accordingly, unless a contrary intention appears the definition of "Act" in s 38 applies in s 16 ("Act" means an Act passed by the Parliament of Victoria), (d) s 17 applies to amendment, re-enactment, re-making and repeal of an Act, but not the repeal and re-enactment or re-making of an Act, and (e) s 17 contains an internal definition of "Act" which extends to Commonwealth Acts.

132 This context exposes a legislative choice made by the Parliament of Victoria in the making of the Interpretation of Legislation Act and insertion of s 61A in the Property Law Act. The apparent legislative choice is that, subject to a contrary intention:

(1) in an Act or subordinate instrument (s 16 of the Interpretation of Legislation Act) and in a deed, contract or instrument (etc) (s 61A of the Property Law Act) a reference to a repealed and re-enacted Act or provision is to be construed as a reference to the re-enacted Act or provision if the Act is an Act of the Parliament of Victoria,

(2) in an Act, provision of an Act or subordinate instrument (s 17 of the Interpretation of Legislation Act) a reference to an amended, re-enacted and re-made Act, provision of an Act or subordinate instrument is to be construed as a reference to the Act, provision of the Act or subordinate instrument as amended, re-enacted or re-made including an Act, provision of an Act or subordinate instrument of the Commonwealth and all other States and Territories, and

(3) in an Act, provision of an Act or subordinate instrument (s 17 of the Interpretation of Legislation Act) a reference to an Act, provision of an Act or subordinate instrument which has been repealed and not re-enacted or re-made is to be construed as a reference to the Act, subordinate instrument or provision as in force immediately before its repeal.

133 In other words, the Parliament of Victoria has chosen to treat a reference in a deed, contract or instrument (etc) (s 61A of the Property Law Act) and in an Act or provision of an Act (s 16 of the Interpretation of Legislation Act) to a repealed and re-enacted Act or provision of an Act as a reference to the re-enacted Act or provision only if the Act or provision is a law of the Parliament of Victoria. It has chosen to take a more expansive approach in s 17 of the Interpretation of Legislation Act to a reference to an Act, provision of an Act, or subordinate instrument to an Act, provision of an Act, or subordinate instrument which has been amended,

re-made or re-enacted or repealed, but not repealed and re-enacted. Other than for the latter, repeal and re-enactment, s 17 operates with respect to Acts, provisions of acts and subordinate instruments of the Commonwealth Parliament and all State and Territory Parliaments.

134 Given the legislative history and content of these provisions, it must be taken that the choice made by the Victorian Parliament was deliberate. Effect must be given to that choice which works no absurdity. The contrary arguments of the insurers, discussed below, are not persuasive.

135 The fact that s 17(2) of the Interpretation of Legislation Act was inserted in 1993 by the *Interpretation of Legislation (Amendment) Act 1993* (Vic) does not support the cases for the insurers. Had the Victorian Parliament wished to extend the operation of s 16 of the Interpretation of Legislation Act at that time, and thus also s 61A of the Property Law Act which was recognised at the time of its enactment to be a corresponding provision to s 16, then the Victorian Parliament could have done so, but did not.

136 The issue is not the capacity of the Victorian Parliament to have enacted a corresponding provision to s 17(2) in s 61A. The Victorian Parliament undoubtedly could have done so. The issue is the legislative choice which it can be discerned the Victorian Parliament made in enacting s 61A as it is.

137 Nor is the fact that that earlier legislation may have operated differently material in this case. The insurers pointed to the fact that s 27(1) of the *Acts Interpretation Act 1890* (Vic) provided that "[w]here any Act mentioned in the Second Schedule to this Act or any Act passed after the commencement of this Act repeals and re-enacts with or without modification any provisions of a former Act, references in any other Act or document to the provisions so repealed shall unless the contrary intention appears be construed as references to the provisions so re-enacted" and did not define "Act" and thus (the insurers said) was not confined to Victorian Acts only (in contrast to s 25 which referred to "[t]his Act and every other Act to be passed by the Legislature of Victoria"). Similarly, "Act" was not defined in the *Acts Interpretation Act 1915* (Vic), *Acts Interpretation Act 1919* (Vic), *Acts Interpretation Act 1928* (Vic), or *Acts Interpretation Act 1958* (Vic).

138 The meaning of "Act" under these previous incarnations of the Interpretation of Legislation Act are not material. The earlier legislation had to refer to Acts of different Parliaments because those Acts were in force in Victoria. The later Acts made their own legislative choices, as did

the Interpretation of Legislation Act in 1984. The Interpretation of Legislation Act represents its own legislative scheme including the insertion of s 61A into the Property Law Act. The legislative choice made by the Parliament of Victoria in 1984 and not subsequently relevantly amended must be given effect.

139 The legislative history does not disclose a contrary intention for the purposes of s 38 of the Interpretation of Legislation Act. The fact that the Victorian Parliament enacted the Interpretation of Legislation Act in 1984 and, in so doing, introduced a limitation on the meaning of "Act" which had not previously been part of earlier iterations of the legislation does not evince a contrary intention for the purposes of s 38. To the contrary, it evinces an intention that the (new) limitation of the meaning of "Act" should apply. To adapt the submissions for QBE, in this legislative context, there are "powerful reasons" for concluding that s 61A (like s 16 of the Interpretation of Legislation Act) was intended to operate by reference to the confined definition of "Act" in s 38 of the Interpretation of Legislation Act. The provisions as enacted expose careful consideration of the scope of s 61A and ss 16 and 17. Insofar as s 17 is concerned that legislative choice was changed in s 17 by the introduction of s 17(2) in 1993, but no such change was made to ss 61A or s 16. As the submissions for Coyne (EWT) put it:

> Adopting the approach in *Promenade Investments Pty Ltd v New South Wales* (1992) 26 NSWLR 203 (at 223-224), if the references to "Act" in s 61A were intended to include Commonwealth Acts, "it would have been a simple matter to say so". Section 17(2)(a) of the Interpretation of Legislation Act is an instance of where that was done.

140 The insurer's submission that there was no need to amend s 61A in 1993 because it was never intended to be confined to Victorian Acts is mere speculation.

141 The inconvenience to which the insurers refer does not provide a sufficient reason to depart from the apparent meaning of the provisions in question. Potential inconvenience in the operation of s 61A, by reason of its operation to update references to Acts and provisions made by the Victorian Parliament but not Acts and provisions and by other Parliaments including the Commonwealth, is insufficient to establish a contrary intention. For one thing, the potential inconvenience appears exaggerated. In *Wonkana* itself the outcome was not that the exclusion had no meaning at all. It was simply that the exclusion operated according to its terms to refer to the repealed Quarantine Act. That was undesirable from the insurer's perspective on the facts in *Wonkana*, but it did not render the clause unworkable. In any event, as the submissions for Coyne (EWT) explained:

> The onus of showing that a "contrary intention appears" for the purposes of s 38 of the *Interpretation of Legislation Act* is on the party asserting it… [*Anti-Doping Rule Violation Panel v XZTT* [2013] FCAFC 95; (2013) 214 FCR 40 at [92].] In *Deputy Commissioner of Taxation (NSW) v Mutton* (1988) NSWLR 104, Mahoney JA identified potential circumstances that might enable a Court to determine that a contrary intention appears to displace a definition such as "where the definition provides that one thing shall be done and the Act or section in question provides that another shall be done", "if, were the definition to be applied, the provisions of or the procedure established by the section would not appropriately work" or "if the result of the application of the definition to a section results in the operation of the section in a way which clearly the legislature did not intend".
>
> …the Victorian Parliament legislated a particular ambulatory consequence for references to Victorian legislation in certain documents that were subject to Victorian law… there is nothing, "difficult" or "unexpected and capricious" about such an interpretation.

142 As it was also submitted for Coyne (EWT):

> [The insurer's] submission to the effect that Victoria has had a provision similar to s 61A which applied to Commonwealth Acts since 1890 is highly doubtful. For instance, QBE seeks to rely on s 27(1) of the *Acts Interpretation Act 1890* (Vic) and the fact that the word "Act" was not a defined term in that act as supporting a submission that "s 27 was not limited to Victorian legislation only". However, in 1890 the Commonwealth of Australia did not exist such that there were no Commonwealth Acts to which that provision could possibly have been intended to apply.
>
> Further, even for the most recent legislation to which QBE refers which preceded s 61A of the *Property Law Act*, being s 7(1) of the *Acts Interpretation Act 1958* (Vic), it is by no means clear that the legislature intended the reference to "Act" in that provision to refer to anything other than Victorian Acts. Indeed, a reading of the Acts *Interpretation Act 1958* (Vic) as a whole clearly suggests that where that Act uses the term "Act", it is referring to Acts passed by the Parliament of Victoria.

143 Contrary to the insurer's submissions, it cannot be accepted that a contrary intention for the purpose of s 38 should be found because otherwise the legislative purpose of s 61A would be frustrated or because of the object, subject matter or history of the enactment (that is, of s 61A): *DRJ v Commissioner of Victims Rights (No 2)* [2020] NSWCA 242; (2020) 103 NSWLR 692 at [10]. The legislative purpose cannot be assumed to be effecting an ambulatory operation of all Acts, whether made by the Victorian Parliament or otherwise, where the Act is referred to in a relevant document. That is the legislative purpose that the insurers wish the Victorian Parliament had adopted. It is not the legislative purpose evinced by the statutory provisions themselves. Nor, for the reasons already given, do the object, subject matter or history of the enactment indicate any contrary intention to the conclusions above.

144 QBE's submission that the Victorian Parliament could not have extended s 16 of the Interpretation of Legislation Act to Acts of Parliaments other than the Parliament of Victoria misses the point.

145 First, there is no such constraint in respect of s 61A which could have been amended in 1993 when s 17(2) was added if the Victorian Parliament had so wished.

146 Second, if the Victorian Parliament had so wished, it could have amended s 16 to ensure that the references to "Act" or "provision of an Act" in the preamble to the section (but not (a) or (b)) were not confined to Victorian Acts, which would not have involved any Constitutional problem.

147 The relevant point is: (a) s 61A was enacted as part of the Interpretation of Legislation Act, (b) s 38 of the Interpretation of Legislation Act defined "Act" in a confined manner unless the contrary intention appears, (c) no contrary intention is apparent from the history, text or context of s 61A and, to the contrary, the history, text and context of s 61A all support the application of the definition in s 38 to the word "Act" in s 61A, and (d) when the Victorian Parliament amended s 17 by introducing s 17(2) in 1993 it could also have amended s 16 and s 61A but did not do so.

148 It may be accepted that as Chubb said, in enacting s 61A, "the Parliament of Victoria can be taken to have known that it operated as part of a federal system of government with legislation of the other states and territories as well as the Commonwealth necessarily having some effect or operation on contracts whose proper law was that of Victoria". The inescapable fact is that, in that context, the Victorian Parliament chose to confine s 61A and s 16 to Acts of the Victorian Parliament. Chubb's invocation of the proposition that when "dealing with beneficial legislation, the Court is free to depart from literalism to secure the intent of the relevant legislature" assumes that the Victorian Parliament intended something different from what it said without any apparent justification for so concluding.

149 Contrary to *George Hudson Ltd v Australian Timber Workers' Union* (1923) 32 CLR 413 at 436-437 it cannot be said that there is any "manifest intention" that "Act" in s 61A mean something other than an Act made by the Parliament of Victoria.

150 Contrary also to *Eichmann v Commissioner of Taxation* [2020] FCAFC 155 at [40] (citing *Khoury v Government Insurance Office of New South Wales* (1984) 165 CLR 622 at 638), the meaning of "Act" in s 61A for which the insurers contend is not consistent with the "actual language used" or "fairly open" on the text.

151 Accordingly, s 61A of the Property Law Act does not apply to the Quarantine Act and Biosecurity Act.

152 It is only necessary to consider the other submissions about s 61A if this conclusion is incorrect.

5.4.3 Repeal and re-enactment?

153 There is no doubt that the Quarantine Act has been repealed and the Biosecurity Act has replaced that Act. The Explanatory Memorandum to the Biosecurity (Consequential Amendments and Transitional Provisions) Bill 2014 (Cth) provided that the Bill "makes transitional and consequential provisions to support the commencement of the Biosecurity Bill as it replaces the Quarantine Act 1908 … as the Commonwealth's primary biosecurity legislation". This is consistent with the Explanatory Memorandum to the Biosecurity Bill 2014 (Cth) which says that "Australia's biosecurity risks have changed significantly since the Quarantine Act was first drafted over a century ago. Shifting global demands, growing passenger and trade volumes, increasing imports from a growing number of countries and new air and sea craft technology have all contributed to a new and challenging biosecurity environment". As noted, the substantive provisions of the Biosecurity Act came into force on the repeal of the Quarantine Act.

154 Accordingly, the issue is whether the Biosecurity Act is a re-enactment with modifications of the Quarantine Act within the meaning of s 61A of the Property Law Act.

155 The New South Wales Court of Appeal considered a provision similar to s 61A (68(3)(a) of the *Interpretation Act 1987* (NSW)) in ***Woolworths** Ltd v Lister* [2004] NSWCA 292. The issue was identified as whether the changes between the repealed and new legislation "are so radical that they cannot properly be characterised as 'modifications'": at [15]. At [17]-[18] Handley JA cited Sugerman P in *Hill v Villawood Sheet Metal Pty Ltd* [1970] 2 NSWR 434 at 437-438 as follows:

> The next question is whether the repealed enactment is 're-enacted, without or without modification' by the 1962 Act. This … is a question of substance and not of form. It is not necessary … that the re-enactment should be in words identical with those of the repealed 'enactment' or contained in a section whose contents are identical with those of the section in which the repealed 'enactment' was to be found. The 1962 Act deals substantially [with] the same subjects as the repealed Act, but the wording used to achieve the same or similar ends and the distribution of subject matters amongst sections are not always identical.
>
> …
>
> The remaining question … is … whether the effect of this difference is, not that there has been a re-enactment of the repealed enactment with modification, but rather that what is to be found in the 1962 Act is an entirely new and different enactment which is not a re-enactment at all of anything contained in the 1912 Act … this is entirely a question of first impression … The relevant definition of 'modification' in the Shorter

> Oxford Dictionary is 'the action of making changes in an object without altering its essential nature'. Here the essential nature of the object in question, which is a power to make regulations, is not altered … the enactment contained in the 1962 Act is not something entirely new and essentially different from the repealed enactment … It is a re-enactment thereof with a modification.

156 In *Karlsson v Griffith University* [2020] NSWCA 176; (2020) 103 NSWLR 131 Payne and White JJA applied *Woolworths* at [24]. At [22] they said:

> It is apparent from a comparison of the two Acts here in question that the *1955 Trade Marks Act*, in a broad sense, was re-enacted in 1995, albeit with extensive modifications to take account, in particular, of international developments in trade marks since the 1955 Act. The purpose of both *Trade Marks Acts* is to provide for the registration of trade marks and to set out the rights deriving from registration of a trade mark. In the 1995 Act, some changes have been made to reflect international trends toward uniformity and some attempts have been made to simplify language and to replace terms in the old legislation with simpler ones.

157 Their Honours also said at [24]:

> …despite these additional provisions (e.g. dealing with collective trade marks), and approached in the same way as Handley JA approached a similar problem in *Woolworths v Lister*, the *Trade Marks Act* 1995 is not an entirely new and different enactment. The 1995 Act does not alter the essential nature of the *Trade Marks Act* 1955. It deals at a high level with essentially the same subject matter to achieve the same or similar ends, namely, the regulation of trade marks.

158 In *Day v Adam; Ex parte Day* [1989] 2 Qd R 9 at 10-11 a similar approach was taken, recognising the issue is one of substance not form, and that the mere fact that the new legislation was successor legislation in a "loose sense" did not mean that it was a re-enactment of the repealed legislation given that it involved a "completely new statutory scheme and approach".

159 As submitted for Coyne (EWT), based on the authorities, a new Act will involve a re-enactment of a repealed Act, if it:

> "…deals substantially with the same subject matter to achieve the same or similar ends", cannot be described as an "entirely new and different enactment", does "not alter the essential nature" of the previous enactment and is not "so radical an alteration" to the previously existing legislation as to not fall within the meaning of the term "modification" being "the action of making changes in an object without altering its essential nature".

160 The policies refer to "any other diseases declared to be quarantinable diseases under the Quarantine Act 1908 and subsequent amendments", "of any prescribed infectious or contagious diseases to which the Quarantine Act 1908 as amended applies", and "any disease declared to be a quarantinable disease under the Quarantine Act 1908 (as amended)". The primary issue, accordingly, is whether the Biosecurity Act as a whole is a re-enactment with modifications of the Quarantine Act. The alternative approach, to ask whether a provision or provisions of the

Biosecurity Act, is or are a re-enactment with modifications of provisions of the Quarantine Act which declare or apply that Act to a disease may also be legitimate.

161 I do not consider the Biosecurity Act to be a re-enactment of the Quarantine Act. While the Biosecurity Act is successor legislation dealing in part with the same subject-matter, it is too different from the Quarantine Act to be anything other than an entirely new enactment. In *Wonkana* Hammerschlag J said:

> [106]… while its [the Biosecurity Act's] structure is different to the Quarantine Act, its objects of protecting against biosecurity risks align with those of the Quarantine Act. It is plain that the Biosecurity Act replaced the Quarantine Act, albeit that it has a more extensive reach in terms of its subject matter than the Quarantine Act.
>
> …
>
> [121] …The two enactments regulate the same subject matter and have the same general objects, but by different standards and procedures.

162 The Explanatory Memorandum for the Biosecurity Bill 2014 (Cth) highlights the differences between the two Acts, saying (pp 8-10):

> The Bill contains new powers that allow for the management of a wider range of pests and diseases already present in Australian territory, such as fruit fly, which can adversely affect a wide range of fruit crops grown in Australia, and noxious weeds which might pose a threat to agricultural industries or the environment. The Bill also extends the coverage of existing powers so that some of the biosecurity risks posed by invasive pests can be more effectively managed.
>
> …
>
> The Bill also modifies key operational provisions from the Quarantine Act that impose an unnecessary regulatory burden and are not required to manage biosecurity risks effectively. For example, the Quarantine Act does not allow goods to be unloaded from a conveyance automatically when it arrives in Australia. The Bill allows the goods to be unloaded, unless an officer instructs otherwise.
>
> …
>
> …a number of policies included in the Bill do not exist under the Quarantine Act. This includes the new powers in Chapter 6 and the enforcement provisions in Chapter 9.

163 The Minister's Second Reading Speech for the Biosecurity Bill (27 November 2014, Hansard p.13426-13427) also exposes the differences between the new Act and the repealed Act, referring to: (a) the need for a "new regulatory framework" to provide for "a safe and seamless transition of people and goods across Australia's borders … The century-old Quarantine Act was written in a completely different world, when today's technology was not conceived", (b) the Bill providing processes "for managing the threat of a serious communicable disease to human health will be better aligned with modern science", (c) the Bill modernising "overly

complex regulatory provisions and administrative practices under the Quarantine Act", (d) the introduction of a new scheme to manage Commonwealth-industry partnerships, known as the approved arrangement scheme, (e) the Bill introducing "a new range of enforcement options", and (f) the Bill containing "new powers to address the risk posed by people and companies".

164 Comparison between the two Acts shows that, amongst other things: (a) the Quarantine Act had no provisions equivalent to Ch 6 of the Biosecurity Act which contains provisions addressing the management of biosecurity risks posed by diseases or pests that may be in or on goods or premises in Australian territory, (b) the Quarantine Act had no provisions equivalent to Ch 7 of the Biosecurity Act which contains provisions for the Director of Biosecurity or the Director of Human Biosecurity to approve proposed arrangements enabling biosecurity industry participants to carry out activities to manage biosecurity risks associated with specified goods, premises or other things, and (c) Chapter 9 of the Biosecurity Act provides a range of enforcement options more extensive than those the subject of Part VIA of the Quarantine Act.

165 The provisions dealing with diseases are also different between the Quarantine Act and the Biosecurity Act.

166 Under the Quarantine Act: (a) s 13(1)(ca) provided that the Governor-General may by proclamation declare a disease to be a quarantinable disease, (b) no criteria were specified for the making of such a declaration, (c) s 2B(1) provided for the Governor-General to proclaim the existence of an epidemic or the danger of an epidemic if satisfied that an epidemic caused by a quarantinable disease or danger of such an epidemic exists, (d) by s 2B(2), upon the issue of such a proclamation, the Minister may give directions and take action as he or she thinks necessary to control and eradicate the pandemic or to remove the danger of the epidemic by quarantine measures and measures incidental to quarantine, (e) s 4 provided for quarantine measures including measures to isolate and segregate human beings and having as their object the prevention or control of the introduction, establishment or spread of diseases or pests that will or could cause significant damage to human beings, animals, plants, other aspects of the environment or economic activities, and (d) s 35A provided for the quarantine of persons who had been on board a vessel that had a case of a "communicable disease" even if the disease had not be proclaimed a quarantinable disease.

167 Under the Biosecurity Act: (a) s 42 provides that the Director of Human Biosecurity (the person who occupies, or is acting in, the position of Commonwealth Chief Medical Officer), after

consulting with the chief health officer (however described) for each State and Territory and the Director of Biosecurity, may determine that a human disease is a "listed human disease" if the Director considers that the disease may be communicable and cause significant harm to human health, (b) s 51 permits the Health Minister to impose biosecurity measures once a "listed human disease" is declared (a biosecurity measure is also a civil penalty provision), provided the Health Minister is satisfied that the biosecurity measure is appropriate and adapted to prevent, or reduce the risk of, the disease entering, or emerging, establishing itself or spreading in, Australian territory or a part of Australian territory, (c) s 475 provides that the Governor-General may declare that a human biosecurity emergency exists if the Health Minister is satisfied that a listed human disease is posing a severe and immediate threat, or is causing harm, to human health on a nationally significant scale and the declaration is necessary to prevent or control the entry of the listed human disease into Australian territory or a part of Australian territory or the emergence, establishment or spread of the listed human disease in Australian territory or a part of Australian territory, and (d) s 476 provides that during a human biosecurity emergency period, the Health Minister may give any direction, to any person, that the Health Minister is satisfied is necessary to prevent or control the entry of the declaration listed human disease into Australian territory or a part of Australian territory, the emergence, establishment or spread of the declaration listed human disease in Australian territory or a part of Australian territory, or to prevent or control the spread of the declaration listed human disease to another country, or to give effect to a recommendation made to the Health Minister by the World Health Organization under Part III of the International Health Regulations in relation to the declaration listed human disease.

168 In these circumstances I accept the submissions for the insureds that: (a) the process for determining that a disease is a "listed human disease" under the Biosecurity Act is entirely new and different and represents a radical alteration to the process for declaring that a disease is a "quarantinable disease" under the Quarantine Act, (b) the person making the determination as to whether a disease is a listed human disease under the Biosecurity Act is different from the person declaring that a disease is a "quarantinable disease" under the Quarantine Act, (c) the criteria for making the declaration are different, and (d) the legislative consequences of being a "listed human disease" under the Biosecurity Act are different.

169 On this basis I do not consider that the Biosecurity Act is a re-enactment with modifications of the Quarantine Act. It is successor legislation to the Quarantine Act dealing with some of the same subject-matter in a new and different manner and new subject-matter. The insurers'

contentions that this involves a triumph of form over substance and does not give effect to the beneficial nature of s 61A are not accepted. As to form and substance, both the form and substance of the statutes are different. The differences are too extensive and fundamental to constitute the re-enactment with modifications of the Quarantine Act. The Biosecurity Act is not the Quarantine Act in a modern drafting style. It is conceptually and substantively different. As to the beneficial nature of s 61A, its beneficence extends only to Acts which are repealed and re-enacted with modifications. If that conclusion cannot be reached, the provision does not operate.

170 I accept, however, that the fact that certain diseases identified as quarantinable diseases under the Quarantine Act are not identified as listed human diseases under the Biosecurity Act (cholera and rabies specifically) is immaterial. Both Acts enabled different diseases to be identified from time to time. It is the difference in the substantive provisions of the two Acts which leads to the conclusion that the Biosecurity Act is not a re-enactment with modifications of the Quarantine Act, but is a new Act.

171 The same conclusion applies to the provisions of the Biosecurity Act for listing human diseases. Those provisions are not a re-enactment with modifications of the provisions of the Quarantine act relating to proclaiming quarantinable diseases. They are new provisions.

172 For these reasons, if "Act" in s 61A included an Act of the Commonwealth, s 61A of the Property Law Act does not operate so that any reference to the Quarantine Act in the policies in issue is to be construed as a reference to the Biosecurity Act.

5.4.4 The timing issue

173 The insureds (or some of them) contended that s 61A applies only if the Act or provision is repealed and re-enacted after the date of the contract of insurance. The argument is that s 61A is a savings provision (which it is in a sense, but might be more accurately described as an updating provision). Where a provision exists at the time of the entry into the contract, it is said that s 61A saves that common intention should the provision be repealed and re-enacted after that date. Where, however, the provision has been repealed before the contract is entered into, it is said that "it is no longer safe to presume that the parties objectively intended a different statute or particular statutory provision (then already in existence) to govern the terms of their contractual relationship". As a result, it is said that "[s]uch an interpretation would not support the apparent purpose or object of s 61A, being the "saving" function described in Explanatory Memoranda relating to the Interpretation of Legislation Bill 1984".

174 I do not accept this argument. Section 61A operates "unless the contrary intention expressly appears". The argument is concerned with the attribution of intention to the parties to the contract rather than the construction of s 61A. Nothing in s 61A indicates that it is to operate by reference to the temporal relationship between the contract and the repeal and re-enactment of the Act or provision. Section 61A says nothing about the time of entry into the "deed, contract, will, order or other instrument". There is no basis for reading into the section a restriction so that it applies only to such instruments entered into after the date of the relevant repeal and re-enactment.

5.4.5 Express contrary intention?

175 As noted, s 61A applies "unless the contrary intention expressly appears". The argument for the insureds is that as the parties to the policy chose to refer to quarantinable diseases under the Quarantine Act when they could have referred to listed human diseases under the Biosecurity Act that evidences an express contrary intention in the requisite sense explained in *Mitchell v Latrobe Regional Hospital* [2016] VSCA 342; (2016) 51 VR 581 at [64] (that is, "expressly" means plainly, clearly, or by necessary implication).

176 I do not accept this argument. It assumes that the policies are to be construed on the basis that the insurer and insured both knew that the Quarantine Act had been repealed and re-enacted in the Biosecurity Act. That assumption cannot be made. No evidence supports it as an objective surrounding circumstance within which the policies were agreed. Without that assumption, there is nothing in the policies which indicates a contrary, let alone and express contrary intention to the effect that s 61A should not apply. The reference in the policies to "and subsequent amendments", "as amended", and "(as amended)" do not evince any contrary intention.

5.4.6 Effect of operation of s 61A

177 The insureds (or some of them) contended that even if they are incorrect as to each of the above propositions, s 61A does not assist the insurers because inserting the words "Biosecurity Act" into the policies where "Quarantine Act" appears renders that part of the policies meaningless. The policies refer to "other diseases declared to be quarantinable diseases under the Quarantine Act 1908 and subsequent amendments", "any prescribed infectious or contagious diseases to which the Quarantine Act 1908 as amended applies", and "any disease declared to be a quarantinable disease under the Quarantine Act 1908 (as amended)". The argument is that there

are no quarantinable diseases declared by or prescribed infectious or contagious diseases under the Biosecurity Act.

178 I would reject this argument to the extent it was made (if at all) in respect of the Chubb v Waldeck policy. This is because that policy refers to "any prescribed infectious or contagious diseases to which the Quarantine Act 1908 as amended applies". If s 61A applies I would have no difficulty in reading the reference to "prescribed" as adding nothing to the requirement that the Biosecurity Act apply to the disease – that is, a listed human disease under the Biosecurity Act would be construed as within the meaning of the phrase as to be construed by operation of s 61A, "any prescribed infectious or contagious diseases to which the Biosecurity Act 2015 (Cth) as amended applies".

179 The argument is more cogent in respect of the Insurance Australia and Meridian Travel policy and the QBE and Coyne (EWT) policy. In the former if s 61A applies, the provision in the policy would read "any other diseases declared to be quarantinable diseases under the Biosecurity Act 1915 (Cth) and subsequent amendments". In the latter if s 61A applies, the provision in the policy would read "any disease declared to be a quarantinable disease under the Biosecurity Act 1915 (Cth) (as amended)". There are no such diseases. The provisions are parts of exclusions from the scope of the indemnity. The fact that there may be no exclusion to that extent does not mean that the provision, construed in accordance with its ordinary meaning, is absurd in the sense described in *Wonkana* at [50]-[54], [117], [124]. On the ordinary meaning of the language it is not apparent how the provisions in these policies, construed as required by s 61A, identify any diseases. Leaving aside s 61A itself, I am unable to discern a legitimate process of construction by which "disease(s) declared to be quarantinable diseases" would be read to mean "diseases determined to be a listed human disease".

180 Section 61A, however, cannot be left aside. It refers to the repeal and re-enactment with modifications of an Act and a provision of an Act. If s 61A applies, then it would be necessary to read the references to "quarantinable disease" under the Quarantine Act as references to the provision of the Quarantine Act enabling such a declaration to be made. Section 61A, if it applies, must direct attention to the re-enactment of that provision with modifications which can only be s 42 of the Biosecurity Act and its mechanism for determining listed human diseases. The fact that this process is somewhat tortured reinforces my conclusion that the Biosecurity Act is not a re-enactment of the Quarantine Act with modifications. But in this part of these reasons I am assuming s 61A applies – so it then applies to both the Quarantine Act

and any provision of the Quarantine Act which has been repealed and re-enacted with modifications. The fact the policy clauses do not refer to any section of the Quarantine Act is immaterial. There is such a section. It was repealed. And on the necessary assumption it was re-enacted with modifications. As a result, the clauses in the policies would all be read as referring to listed human diseases under the Biosecurity Act if s 61A applies.

5.4.7 Conclusion

181 Section 61A of the Property Law Act does not apply to the three policies discussed above as contended for by the insurers. This is because: (a) the reference to "Act" in s 61A means an Act of the Parliament of Victoria in accordance with s 38 of the Interpretation of Legislation Act, and the Quarantine Act is a law of the Parliament of the Commonwealth, and (b) the Biosecurity Act is not a re-enactment with modifications of the repealed Quarantine Act.

6. NSD132/2021: SWISS RE INTERNATIONAL V LCA MARRICKVILLE

6.1 Agreed background

182 LCA Marrickville is an insured (being an additional named insured) under a "Vertex Industrial Special Risks" Policy P23089.04-00 placed with Swiss Re.

183 The LCA Marrickville policy comprises: (a) a policy schedule and attached Endorsements dated 17 July 2019; and (b) a policy wording described as "Vertex Industrial Special Risks 0818" dated August 2018.

184 The LCA Marrickville policy was issued on 17 July 2019 for the period 30 June 2019 to 30 June 2020 4.00pm local time.

185 LCA Marrickville is a laser therapy clinic. The business offers services such as laser hair removal, cosmetic injectables and skin treatments.

186 On 26 March 2020, the *Public Health (COVID-19 Gatherings) Order (No 2) 2020* (NSW) came into effect.

187 On 1 June 2020, the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3)* 2020 (NSW) came into effect.

188 On 7 December 2020, the *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 7) 2020* (NSW) came into effect.

189 LCA Marrickville made a claim through a letter dated 3 July 2020 addressed to Aon Risk Services Australia under the LCA Marrickville policy.

190 On 9 July 2020, Swiss Re acknowledged the claim.

191 On 29 September 2020, Swiss Re declined to indemnify LCA Marrickville in respect of its claim.

192 On 18 October 2020, LCA Marrickville requested that Swiss Re reverse its declinature and confirm indemnity under the LCA Marrickville policy.

193 On 21 October 2020, Swiss Re provided a partial response to LCA Marrickville's letter of 18 October 2020.

194 On 26 October 2020, LCA Marrickville filed a complaint in respect of Swiss Re's declinature with AFCA.

195 On 17 November 2020, Swiss Re notified LCA Marrickville that Swiss Re's Internal Dispute Resolution (**IDR**) review of its declinature decision was underway.

196 On 27 November 2020, Swiss Re confirmed its position following completion of its IDR review and declined indemnity for LCA Marrickville's claim under the LCA Marrickville policy.

6.2 Policy provisions - cover

197 The key provisions of the LCA Marrickville policy relating to cover are below.

> **1 Definitions**
>
> 1.2 **Business** means the business as specified in the **Schedule** carried on by the Insured at the **Situation**…
>
> 1.3 **Damage** (with **Damaged** having a corresponding meaning) means physical loss, damage or destruction.
>
> …
>
> 1.16 **Property Insured** means all tangible property both real and personal of every kind and description belonging to the **Insured** or for **Damage** to which property the **Insured** is legally responsible or for which the Insured has assumed responsibility to insure prior to the occurrence of any **Damage**…
>
> 1.18 **Situation** is the Situation or Situations shown in the **Schedule**. Where the **Situation** specified in the **Schedule** is other than a single address, each separate address at which the **Property Insured** is located shall be one **Situation** for the purposes of this **Policy**, particularly in relation to the **Limit of Liability** and Sub-Limits of Liability.

…

Section 1 – Property Insurance

…

Section 2 – Interruption Insurance

…

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:

9.1.1 is caused by Damage occurring during the **Period of Insurance** to:

[identified buildings, property and vehicles].

…;

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;

9.1.2.2 murder or suicide or attempted suicide or violent crime or armed robbery occurring at the Situation;

9.1.2.3 injury, illness or disease arising from or likely to arise from or traceable to foreign or injurious matter in food or drink provided from or on the Situation;

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 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. Furthermore Clauses 12 and 13 shall not apply to the cover provided by this Clause 9.1.2.

198 The Situation is defined in the Policy Schedule to mean the head office units at St Leonards and elsewhere in Australia including contract sites where the Insured has property or carries on business, has goods or other property stored or being processed or has work done. On the agreed facts, this means LCA Marrickville's store located at Shop 45, Marrickville Metro Shopping Centre, 20 Smidmore Street, Marrickville NSW 2204. The Policy Schedule also provides a Business Description, being the "provision of laser hair removal, skin treatments, cosmetic injection…". It is not in dispute that the store 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 square metres used for storage and not open to the public.

199 The Sub-Limits of Liability in the Policy Schedule for cl 9.1.2.1 include for "infectious diseases limited in the aggregate" - $500,000.

6.3 Hybrid clause – 9.1.2.1 and 9.1.2.4

6.3.1 Introductory comments

200 The cover in cl 9.1.2.1 (of itself and as extended by cl 9.1.2.4) is subject to the exclusion of "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".

201 It may be accepted that cl 9.1.2.1 is not concerned with physical damage to property. Contrary to LCA Marrickville's submissions, this does not mean that the context provided by the Policy and Policy Schedule as a whole, including the fact that Section 1 is concerned with damage to property, is irrelevant. While each policy is to be determined on its own terms, the overall context of a provision is relevant to its meaning: *Star* at [172]. That overall context may show that the policy functions as a coherent and integrated whole or that the policy comprises a patchwork of overlapping and potentially inconsistent provisions. Observations to the latter effect are policy dependent. It was the terms of the particular policy under consideration which caused Hall J to say in *Birla Nifty Pty Ltd v International Mining Industry Underwriters Ltd* [2013] WASC 386 at [67]:

> The policy document presents as being the product of a mix and match exercise. It is a collection of various different documents variously entitled conditions, memoranda, schedule and exclusions. This makes the policy document very difficult to read. The impression I have is 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. This

is notwithstanding the invocation at the start of the policy to read the various parts together.

202 The observation of Allsop CJ in *Star* at [166] that the fact of "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" is of broader application. Again, however, meaning ultimately depends on text and context. To the extent the insureds sought to propound construing provisions in isolation from their context, their submissions must be rejected. This does not mean, however, that they are necessarily incorrect about the proper construction of the various provisions in the different policies.

203 LCA Marrickville provided an accurate summary of the relevant orders. They are:

(1) the 26 March 2020 *Public Health (COVID-19 Gatherings) Order (No 2) 2020*: 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": cl 7(1)(i);

(2) the 1 June 2020 *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3) 2020*: 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. 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": cll 5(1) and 5(3); and

(3) the 13 June 2020 *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 3) 2020*: 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 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": cl 5(1), Schedule 1, item 16.

204 Otherwise, and as noted, I do not consider that the fact that a broker was involved on behalf of the insured in procuring the policy undermines the operation of the contra proferentem rule. The insurer remains the profferer of the contract of insurance. There is no evidence of the negotiation of any term of the policies.

6.3.2 The exclusion provision

205 It is logical to consider the exclusion provision first ("but specifically excluding 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").

206 When the policy was entered into COVID-19 was not a listed human disease under s 42 of the Biosecurity Act. Relevantly, (a) COVID-19 was determined to be a "listed human disease" by the Commonwealth Director of Human Biosecurity under s 42 of the Biosecurity Act on 21 January 2020, (b) COVID-19 was listed as a "notifiable disease" under s 81 and Schedule 2 of the *Public Health Act 2010* (NSW) on 21 January 2020, and (c) COVID-19 was made a "national notifiable disease" under s 11 of the National Health Security Act 2007 (Cth) on 6 February 2021.

207 It was not suggested that anything turned on the fact that cl 9.1.2.1 refers to a disease being "declared" to be a listed human disease when, under the Biosecurity Act, there is no declaration but rather a "determination". I accept that the making of a determination under s 42(1) of the Biosecurity Act must be taken to be a declaration as provided for in cl 9.1.2.1.

208 It is apparent that cl 9.1.2.1 distinguishes between a notifiable disease (which is not defined) and a listed human disease under s 42 of the Biosecurity Act. There are no criteria for the identification of a disease as a notifiable disease under the State Public Health Act. Notifiable diseases under the Public Health Act include infectious and non-infectious diseases (such as cancer and cystic fibrosis). In contrast, there are criteria for listing human diseases under s 42 of the Biosecurity Act, one of which is that the disease must be communicable and another of which is that the Director of Human Biosecurity must consider the disease may cause significant harm to human health. Similarly, the identification of a national notifiable disease under s 11 of the Commonwealth National Health Security Act is contingent on the Minister considering that an outbreak of the disease would be a public health risk, which indicates the disease must be communicable.

209 Leaving aside the concept of a "national notifiable disease" (as opposed to a notifiable disease which is the term used in cl 9.1.2.1) it is apparent that the clause is extending cover to orders resulting from notifiable diseases but excluding cover for orders resulting from listed human diseases. This distinction, in the context of the Public Health Act and the Biosecurity Act, makes sense. The diseases capable of being notifiable diseases under the Public Health Act are far more extensive than those capable of being listed human diseases under the Biosecurity Act. Further, in fact, the diseases which are notifiable diseases extend beyond the diseases which are listed human diseases and include such diseases as diphtheria, Legionnaires' disease, leprosy, measles, and pertussis (whooping cough).

210 On this basis, I consider that the reference to "notifiable disease" in this policy means a notifiable disease under the Public Health Act and not a national notifiable disease under the National Health Security Act. This is because: (a) the expression used in cl 9.1.2.1 is notifiable disease not national notifiable disease, (b) the distinction between notifiable diseases and listed human diseases under the Biosecurity Act makes sense if notifiable diseases are those regulated by NSW legislation given that many diseases, including contagious diseases, may be made notifiable diseases, and (c) the fact that there may be overlap between notifiable diseases and listed human diseases (which there is, including for COVID-19) does not undermine the rationality of the distinction given that many other contagious diseases would not satisfy the criteria for being made a listed human disease under the Biosecurity Act.

211 LCA Marrickville contended that the exclusion applies only to, relevantly, listed human disease determined under the Biosecurity Act as at the date of inception of the policy. The contention involves these elements: (a) the exclusion refers to "declared" which is not prospective, (b) the parties could have qualified "declared" by reference to "from time to time" but did not, (c) commercial considerations favour a static rather than an ambulatory construction as an ambulatory construction means that neither insures nor insureds would have certainty as to the scope of the exclusion, and (d) 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", as the text and context is different and there is no temporal context to the words "notifiable human infectious disease".

212 I do not accept LCA Marrickville's submissions. The relevant temporal requirement is an order of the requisite character causing loss during the Period of Insurance. The use of the word "declared" does not mean "declared" as at the inception of the policy. It means declared during

the Period of Insurance. If so declared, loss arising from or in connection with the declared disease which would otherwise be within cll 9.1.2.1 or 9.1.2.4 is excluded. In the present case COVID-19 was declared to be a listed human disease under the Biosecurity Act before the making of any order by a competent public authority. As a result, the exclusion operated at all times.

213 It is not to the point that there is no reference to "from time to time" qualifying the word "declared". In context, "declared" is tied only to the Period of Insurance. The policy speaks to losses occurring during the Period of Insurance from the specified circumstances (in effect, the order). The exclusion also speaks to circumstances in existence or which come into existence during the Period of Insurance. Commercial considerations do not favour a static construction. Commercial considerations are neutral. While it may be said that the parties would like to know the scope of the exclusion at inception of the policy, it may equally be said that they did not intend the cover to extend to declared diseases arising during the Period of Insurance. The fact that highly Pathogenic Avian Influenza in Humans is a known exclusion is no warrant for reading the reference to "any disease(s) declared to be a listed human disease" as confined to such diseases listed at the time of inception of the policy. The reference to "any" as the qualifier of "disease(s)" provides another indicator to the contrary. It encompasses the unknown at the time of inception of the policy. From a commercial perspective there are different levels of certainty. Knowing the diseases excluded is one kind of certainty. Knowing that diseases of a particular type (that is, declared) are or will be excluded is another type of certainty. The text and context do not support construing the clause as if it provided the first level of certainty. "Notifiable human disease" takes the same temporal connection. The disease must be a notifiable disease during the Period of Insurance and at the time the order of the competent public authority is made.

214 It is clear from the terms of cl 9.1.2.1 that the relevant causal connection is between the order and the disease and that the exclusion applies to an order as a result of, relevantly, an infectious or contagious disease declared to be a listed human disease under s 42 of the Biosecurity Act. The kind of causal considerations which underpinned the answer to the separate question in *Rockment* do not arise. In that case cover was excluded for a claim which is "directly or indirectly caused by or arises from, or is in consequence of or contributed to by" the human biosecurity emergency declared under the Biosecurity Act. As such, a claim "somehow causally connected to a human disease specified in a declaration of a human biosecurity

emergency" was not necessarily excluded as the required causal connection was between the claim and the emergency, not the disease: at [69].

215 Accordingly, if (as in the present case) an order results from any infectious or contagious disease declared to be a listed human disease under s 42 of the Biosecurity Act then the exclusion operates. The orders in the present case each resulted from such a disease. The title of the orders should be sufficient to prove that fact but if more is required the orders record that the grounds for making the order include the risk to public health from COVID-19: cl 4.

6.3.3 Section 54 Insurance Contracts Act

216 LCA Marrickville contends that if the exclusion is engaged then s 54(1) of the *Insurance Contracts Act 1984* (Cth) applies. Section 54 provides:

> (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.
>
> (2) Subject to the succeeding provisions of this section, where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim.

217 According to LCA Marrickville 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 policy would, but for s 54, permit Swiss Re to refuse to pay its claim.

218 There is no doubt that 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". But this does not mean that the Director of Human Biosecurity is "some other person" within the meaning of s 54(1) of the Insurance Contracts Act.

219 In *C E Heath Casualty & General Insurance v Grey* (1993) 32 NSWLR 25 at 47 the NSW Court of Appeal said "some other person" must be "a person who is entitled to a benefit under the policy". Giles CJ Comm Div referred to *C E Heath* in *Seery & Anor v John R Carr and Assoc* (SCNSW, unrep, 3 November 1995), saying "'Some other person' in s54(1) can not refer to anyone in the world, and must refer to a person interested in the contract of insurance either

as a party thereto or as a beneficiary thereunder by reason of s48(1)". In ***Antico*** *v Heath Fielding Australia Pty Ltd* [1997] HCA 35; (1996) 188 CLR 652 at 669-670 the High Court said:

> The legislation is expressed in broad terms and, on its face, there is no reason why the omission of the insured may not be a failure to exercise a right, choice or liberty which the insured enjoys under the contract of insurance. In any event, 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.

220 In *Greentree v FAI General Instance* [1998] NSWSC 544; (1998) 44 NSWLR 706 at 723-724, in the context of explaining that because "act" is defined in s 54(6) to include an "omission", Handley JA said:

> In my opinion it is used in s 54 in its secondary sense and refers to the failure of the insured or someone else to perform an act for the benefit of the insured under the policy. The other person need not be an agent of the insured. It may for example be the post office which fails to deliver a letter promptly or at all, or a facsimile transmission service which breaks down with the same result. The word does not cover failures to act by others having no relevant relationship or connection with the insured, whose interests are adverse to the insured.
>
> Thus in my opinion the failure by the claimants, Mr and Mrs Greentree, to claim against the insured while any of the relevant policies were in force was not an omission within s 54(1).

221 In *Hannover Life Re of Australasia Ltd v Farm Plan Pty Ltd* [2001] FCA 796 Lee J said at [35] that "the provisions of s 54(1) of the *Insurance Contracts Act 1984* (Cth) prevent the Insurer from refusing to pay the claim where the omission of the Trustee to pay the relevant premium is relied upon by the Insurer as the ground for refusal to pay the claim".

222 In *Maxwell (in his capacity as the authorised nominated representative on behalf of various Lloyds underwriters) v Highway Hauliers Pty Ltd* [2013] WASCA 115; (2013) 298 ALR 700 the failure of the insured's drivers to complete a relevant test was the act (being an omission) of some other person within the meaning of s 54(1): at [82], [118]-[122].

223 Having regard to the reasoning in these cases I agree with Swiss Re that while the "other person" need not be a party to the contract of insurance in order to fall within the scope of s 54(1), the person must have a relevant connection to the insured or the policy, whether as a beneficiary under the policy or by having some function in the performance of the insured's obligations under it. The Director of Human Biosecurity is a stranger to the policy. The Director has no connection with the insured nor any obligation under the policy. The Director's making

of the *Biosecurity (Listed Human Diseases) Amendment Determination 2020*, accordingly, is not an "act of some other person within the meaning of s 54.

224 The observations in *Prepaid Services Pty Ltd & Ors v Atradius Credit Insurance NV* [2013] NSWCA 252; (2013) 302 ALR 732 at [140] about the purpose of s 54 ("s 54 was intended to prevent reliance upon temporal exclusions, such as those considered in these two cases, as well as other 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: Law Reform Commission Report No 20, esp paras 217, 229 and Appendix A, cl 54, notes 3 and 4; and Explanatory Memorandum, paras 177 to 182") do not support a contrary conclusion. Notably, the pilot in *Johnson v Triple C Furniture & Electrical Pty Ltd* [2010] QCA 282; [2012] 2 Qd R 337 was connected to the insured and the obligation (to fly only if holding a particular licence) was required by the policy. On that basis, the conclusion in that s 54 did not apply to the omission of the pilot to hold the required licence is difficult to comprehend. But that is not the present case.

225 Nor is the fact that s 54 is concerned with substance and not form (*East End Real Estate Pty Ltd v CE Health Casualty & General Insurance Ltd* (1991) 25 NSWLR 400 at 403-404, *Antico* at 673) material to the resolution of the dispute issues in the present case. The requirement to focus on substance is not in dispute.

226 Swiss Re noted that in *FAI General Insurance Co Ltd v Australian Hospital Care Pty Ltd* [2001] HCA 38; (2001) 204 CLR 641 at [41] the High Court said:

> Section 54 does not permit, let alone require, the reformulation of the claim which the insured has made. It operates to prevent an insurer relying on certain acts or omissions to refuse to pay that particular claim. In other words, the actual claim made by the insured is one of the premises from which consideration of the application of s 54 must proceed. The section does not operate to relieve the insured of restrictions or limitations that are inherent in that claim.

227 In *Maxwell v Highway Hauliers Pty Ltd* [2014] HCA 33; (2014) 252 CLR 590 the High Court said:

> [23] The Insurers sought support for their argument from a statement of the plurality in *FAI* that the section "does not operate to relieve the insured of restrictions or limitations that are inherent in [the] claim". They misapply that statement in equating its reference to restrictions or limitations that are inherent in a claim with any restriction or limitation on the scope of the cover that is provided under the contract. A restriction or limitation that is inherent in the claim which an insured has in fact made, in the sense in which the plurality in FAI used that terminology, is a restriction or limitation which must necessarily be acknowledged in the making of a claim, having

> regard to the type of insurance contract under which that claim is made.
>
> [24] Thus, as explained in *FAI*, the making of a claim under a "claims made and notified" contract necessarily acknowledges that the indemnity sought can only be in relation to a demand made on the insured by a third party during the period of cover. The section does not operate to permit indemnity to be sought in relation to a demand which the third party omitted to make on the insured during the period of cover but made after that period expired. Similarly, the making of a claim under a "discovery" contract, of the type in issue in *FAI* itself, necessarily acknowledges that the indemnity sought can only be in relation to an occurrence of which the insured became aware during the period of cover.
>
> [25] The making of a claim under an "occurrence based" contract, the type of insurance contract in the present case, necessarily acknowledges that the indemnity sought can only be in relation to an event which occurred during the period of cover. That restriction or limitation is inherent in a claim which is made under such a policy…

228 Swiss Re submitted that:

> The claim brought by LCA Marrickville in these proceedings must necessarily acknowledge the nature and type of disease in the making of the claim, namely, that it is one that is sufficiently serious to be "notifiable" under cover, but not one that is so serious as to be "listed" under the Commonwealth legislation.
>
> Accordingly, the promulgation of the legislative instrument by which the listing of a disease occurs is not a relevant act for the purposes of section 54 of the [Insurance Contracts Act (**ICA**)] because it merely marks out the bounds of the claim, which must be acknowledged when the claim is made in the description of the seriousness of the relevant disease.

229 I agree with this conclusion, although I am not persuaded that the cases on which Swiss Re relied go so far. The reason I agree with the submission is that the making of the listed human disease determination has nothing to do with the insurer, the insured or the policy. The determination is a wholly extraneous circumstance which, if it occurs during the Period of Insurance and causes loss, is excluded from the scope of the indemnity. Whether that is characterised as a limitation inherent within the claim or not, the exclusion operates so that there is no occurrence during the Period of Insurance in respect of which any claim can be made.

230 Swiss Re also noted that s 54(2) provides that where the act could reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract, the insurer may refuse to pay the claim. The act is the making of the determination. According to Swiss Re because the policy and legislative response to COVID-19 occurred on a co-ordinated basis throughout Australia, including the orders on which LCA Marrickville relies for the operation of cl 9.1.2.1, COVID-19 being made as a "listed human

disease" could reasonably be regarded as being capable of causing or contributing to the loss claimed by LCA Marrickville.

231 I am not persuaded by this argument. The loss in respect of which cover is provided by cl 9.1.2.1 (and cl 9.1.2.4) must result from an order of the relevant kind. The determination under s 42 of the Biosecurity Act cannot reasonably be regarded as being capable of causing or contributing to a loss in respect of which insurance cover is provided by the contract. As LCA Marrickville submitted the listing under the Biosecurity Act "says nothing at all about what any State government may do in response to outbreak or risks within its own jurisdiction".

232 Accordingly, s 54(1) of the Insurance Contracts Act does not apply because the making of the determination under s 42 of the Biosecurity Act by the Director of Human Biosecurity is not the act of some other person by reason of which Swiss Re may refuse to pay LCA Marrickville's claim within the meaning of s 54(1).

233 To the contrary, the exclusion in cl 9.1.2.1 applies according to its terms.

6.3.4 Effect of exclusion in cl 9.1.2.1 on cll 9.1.2.5 and 9.1.2.6

234 Swiss Re contended that properly construed the loss resulting in consequence of an order as a result of "any disease(s) declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015" cannot be within the scope of cll 9.1.2.5 (the conflagration or other catastrophe clause) or 9.1.2.6 (the prevention of access clause).

235 Swiss Re's argument is that: (a) the policy must be read as a whole, so as to give the insuring promise in cl 9.1.2 a congruent application, (b) the Court should prefer a construction which gives each aspect of the clause a consistent operation, rather than one which would render parts of it nugatory or ineffective, (c) cl 9.1.2.1 represents the parties' specific agreement as to the basis on which cover in respect of the business interruption by reason of a relevant order by a public authority as a response to disease will be advanced, (d) cll 9.1.1.1 and 9.1.2.4 are subject to the specific $500,000 sub-limit but the other clauses are not, and (e) as a result, the specific agreement contained in the disease/hybrid clause (including the Biosecurity Act exclusion), cl 9.1.2.1, as to the types of disease capable of attracting cover represents the parties' specific agreement as to those matters and should prevail over any general provisions which follow.

236 In *Chapmans Ltd v Australian Stock Exchange Ltd* [1996] FCA 474; (1996) 67 FCR 402 at 411 Lockhart and Hill JJ said:

> It is an elementary proposition that a contract will be read as a whole giving weight to all clauses of it, where possible, in an endeavour to give effect to the intention of the parties as reflected in the language which they have used. A court will strain against interpreting a contract so that a particular clause in it is nugatory or ineffective, particularly if a meaning can be given to it consonant with other provisions in a contract. Likewise where there are general provisions in a contract and specific provisions, both will be given effect, the specific provisions being applicable to the circumstances which fall within them.

237 In *Greencapital Aust Pty Ltd v Pasminco Cockle Creek Smelter Pty Ltd* [2019] NSWCA 53 Leeming JA said:

> It is settled law that, as Sackville AJA said in *Park v Murray Irrigation Ltd* [2018] NSWCA 166 at [79], "a conflict between apparently inconsistent provisions is to be resolved on the basis that one provision qualifies the other and, hence, both have meaning and effect". In *Re Media, Entertainment and Arts Alliance; Ex parte Hoyts Corporation Pty Ltd* (1993) 178 CLR 379 at 386-387; [1993] HCA 40, the High Court explained that the principle was an aspect of the general rule that an instrument must be read as a whole. The same point was made in *Chapmans Ltd v Australian Stock Exchange Ltd* (1996) 67 FCR 402 at 411…

238 LCA Marrickville referred to *The Trust Company (Nominees) Ltd v Banksia Securities Ltd (receivers and managers appointed) (in liquidation)* [2016] VSCA 324 at [53]. In that case the Victorian Court of Appeal considered the proper construction of a trust deed. The trust deed was to be construed as a contract: [35]. The Court said:

(1) the principle traditionally called *generalibus specialia derogant*, or its obverse *generalia specialibus non derogant*, by either of which specific provisions will be given effect in preference to general provisions, or specific provisions are given greater weight than general provisions applying to the same subject matter, has been described as reflecting 'sound common sense'. On the other hand, when it is open to debate which provision is the more general and which the more specific, the utility of the principle is correspondingly limited. Hoffman LJ made the converse point in *William Sindall plc v Cambridgeshire County Council* [[1994] 1 WLR 1016, 1024], that the 'rule is particularly apposite if the effect of general words would otherwise be to nullify what the parties appear to have contemplated as an important element in the transaction': [46];

(2) ***Margetson v Glynn*** [1892] 1 QB 337 illustrates the importance of an objective or purposive analysis, rather than one which approaches the general/specific distinction in purely linguistic terms: [51]. On appeal Lord Herschell LC also looked at 'the main object and intent of the contract' and limited 'the general words used, having in view that object and intent': *Glynn v Margetson & Co* [1893] AC 351 at 355: [52]; and

(3) the approach taken in *Margetson v Glynn* suggests that the resolution of the question of construction now before the Court 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 which the trust deed embodies: [53].

239 LCA Marrickville submitted that the exclusion provision in cl 9.1.2.1 had no effect on the operation of the other clauses (leaving aside cl 9.1.2.4, the radius extension) as: (a) the parties chose, specifically, to only constrain cl 9.1.2.1 by the Biosecurity Act exclusion, (b) the argument is difficult to reconcile with the fact that cl 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, (c) each of the clauses have different terms and fields of operation and one is not more specific than another, (d) the clauses deal with overlapping subject-matter, (e) there is no strict rule of construction that the specific prevails over the general, and any interpretive presumption is weak, and (f) 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 losses consequent upon such disease is limited to the disease/hybrid clause (cll 9.1.2.1 and 9.1.2.4). However, the insured peril in each of these clauses is the "order" so that the exclusion of losses arising in connection with a particular disease does not have anything to say about whether there is cover under another clause which relates to action of an entirely different kind.

240 I consider that the focus of these submissions is too narrow. The issue is not whether the exclusion provision in cl 9.1.2.1 has the effect of excluding "any disease(s) declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015" from cover under the other clauses. It is whether the other clauses can apply to 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". This question involves consideration of all of the clauses as a whole.

241 Having regard to the applicable principles I consider that cll 9.1.2.1 and 9.1.2.4 exclusively provide for loss as a result of 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 where cl 9.1.2.3 is not applicable. That is, construing cl 9.1.2 as a whole it is apparent that cl 9.1.2.3 deals with the circumstance of,

relevantly, disease from or traceable to food or drink at the Situation. Clause 9.1.2.3 is specific to that circumstance. If the disease in question from or traceable to food or drink provided from or on the Situation was also a listed human disease under the Biosecurity Act, cl 9.1.2.3 would operate according to its terms. This is because cl 9.1.2.3 is focused on the subject-matter of disease from or traceable to food or drink at the Situation. Put in linguistic terms, cl 9.1.2.3 is a specific provision which operates independently from cl 9.1.2.4. That is not to say that circumstances might not engage cl 9.1.2.1 (as extended by cl 9.1.2.4 or otherwise) and cl 9.1.2.3. They might. The issue would then be the proximate cause of the loss, which might be one, the other or both circumstances.

242 The same cannot be said of cll 9.1.2.5 or 9.1.2.6. They deal with the same subject-matter as cl 9.1.2.1 (and cl 9.1.2.4). The subject-matter is loss resulting from the actions of an authority (public, civil or lawful – the focus of all is the legal capacity of the authority to take the action in issue). Insofar as the actions of an authority in respect of a disease is concerned the loss covered is loss in consequence of an order of a competent public authority as a result of an outbreak of a notifiable human infectious or contagious disease or discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease. The more general subject-matter of cl 9.1.2.5, if it is construed as capable of including disease at all (as to which see below), would be inconsistent with the specific provision of cl 9.1.2.1 because it would not: (a) be confined to notifiable diseases, (b) require an order of the authority, (c) require the order to involve closure or evacuation of the whole or part of the Situation, (d) exclude highly Pathogenic Avian Influenza in Humans or any disease(s) declared to be a listed human disease pursuant to s 42(1) of the Biosecurity Act 2015, or (e) be subject to the sub-limit on liability in aggregate of $500,000.

243 The same conclusion applies to cl 9.1.2.6 for the same reasons. Loss in consequence of the action of the lawful authority under cl 9.1.2.6, insofar as disease is concerned would not: (a) be confined to notifiable diseases, (b) require an order of the authority, (c) require the order to involve closure or evacuation of the whole or part of the Situation, (d) exclude highly Pathogenic Avian Influenza in Humans or any disease(s) declared to be a listed human disease pursuant to s 42(1) of the Biosecurity Act 2015, or (e) be subject to the sub-limit on liability in aggregate of $500,000.

244 In other words, construing cll 9.1.2.5 and 9.1.2.6 as applying to diseases generally would expunge the careful distinction drawn by cl 9.1.2.1 between notifiable diseases and listed

human diseases. That distinction would be meaningless. So too would the requirement for an order of an authority resulting from a notifiable disease. The inconsistency between the provisions would be profound. The result would not be reasonable and commercial operation of this part of the policy. The presence of cl 9.1.2.1 (and cl 9.1.2.3) in this part of the policy would be pointless.

245 I have considered that cl 9.1.2.1 applies to an authority responding to an outbreak of disease and cl 9.1.2.6 applies to a risk to life. I accept that this gives clause 9.1.2.6 a potentially wider field of operation than cl 9.1.2.1 when it comes to actions by an authority as a result of a disease. This does not cause me to conclude that cl 9.1.2.6 applies to the risk to life from a disease and that cl 9.1.2.1 applies to the actual outbreak of a disease. All of the identified incongruities would remain. Further, why would the parties have intended to treat authority action differently (and more expansively) in the case of a perceived risk of an outbreak of a disease and a perceived actual outbreak of disease? The fact that cl 9.1.2.6 deals with mere risk reinforces the conclusions reached that the clause does not apply to diseases at all.

246 Further, the policy, specifically cl 9.1.2, does not indicate that it involves bolted on provisions irrespective of their coherence or congruence as a whole. Rather, the provisions indicate a confined and structured approach to the extensions of cover. To construe cll 9.1.2.5 and 9.1.2.6 as applying to actions of an authority in response to a disease without the requirements of cll 9.1.2.1 or 9.1.2.3 being satisfied would be to render the specific provisions of cll 9.1.2.1 or 9.1.2.3 nugatory. To avoid that incoherence cll 9.1.2.5 and 9.1.2.6 should be construed as not extending to the subject-matter covered by cll 9.1.2.1 and 9.1.2.3.

247 LCA Marrickville's contrary arguments are not persuasive: (a) the presence of the Biosecurity Act exclusion in cl 9.1.2.1 alone indicates that cll 9.1.2.5 and 9.1.2.6 were not intended by the parties to apply to diseases, as does the sub-limit on liability for diseases, (b) cl 9.1.2.3 is specific and self-contained and operates according to its terms, (c) cl 9.1.2.1 is more specific than cll 9.1.2.5 and 9.1.2.6, (d) as a matter of construction, there can be overlap between cll 9.1.2.3 and 9.1.2.1, but not cll 9.1.2.5 and 9.1.2.6 and cl 9.1.2.1, (e) in this context, the interpretative presumption is not weak, and (f) the insured peril in cl 9.1.2.1 does include the order but it is an order resulting from the disease as described. The better analysis is that cl 9.1.2.1 identifies the extent which cover for disease other than in cl 9.1.2.3 is provided – that is, disease as described resulting in an order as described but not within the exclusion as described.

248 I also do not accept that the relationship between the provisions involves mere tautology or redundancy in the sense described in ***Teele*** *v Federal Commissioner of Taxation* (1940) 63 CLR 201 at 207. There is a difference between mere tautology or redundancy (common in insurance policies and legal documents of all kinds, *Beaufort Developments (NI) Ltd v Gilbert-Ash Ltd* [1999] 1 AC 266 at 274) and incoherence and incongruence. If construed as LCA Marrickville contends, the relevant provisions would suffer from profound incoherence and incongruence. Given the careful structuring of the provisions, it cannot be concluded that this was what the parties intended. Nor is what is involved in this case "mere surplusage", as referred to in *Wonkana* at [44]. Nor, for that matter, do I consider that the contra proferentem rule, which is a rule of last resort, has any material role to play. The construction issues are able to be resolved by the application of orthodox principles of construction.

249 Nor do I accept the submission that as the provisions have different fields of operation cll 9.1.2.5 and 9.1.2.6 should not be read as applying to diseases. It is the fact that cll 9.1.2.1 and 9.1.2.3 apply specifically to diseases, subject to specific restrictions, which supports reading cll 9.1.2.5 and 9.1.2.6, which are not subject to those restrictions, as not applying to diseases.

250 As Allianz submitted in respect of analogous circumstances, the policy must be read as a whole: *Zhang v ROC Services (NSW) Pty Ltd* [2016] NSWCA 370; (2016) 93 NSWLR 561 at [89]. Further, the observations of Leeming JA in *HP Mercantile Pty Ltd v Hartnett* [2016] NSWCA 342 at [134] are apt:

> …it is trite that the contract must be construed as a whole, with a view to the legal meaning reflecting a measure of internal coherence: thus 'preference is given to a construction supplying a congruent operation to the various components of the whole': *Wilkie v Gordian Runoff Ltd* (2005) 221 CLR 522; [2005] HCA 17 at [16]. In a case such as the present, where the difficulties are real, that involves what Lords Neuberger and Mance have described as an 'iterative process' – 'checking each of the rival meanings against the other provisions of the document and investigating its commercial consequences': see *Re Sigma Finance Corp (in administrative receivership)* [2009] UKSC 2; [2010] 1 All ER 571 at [12], and see *Rainy Sky SA v Kookmin Bank* [2011] UKSC 50; [2011] 1 WLR 2900 at [28] *and Richmond v Moore Stephens Adelaide Pty Ltd* [2015] SASCFC 147 at [98]. Lord Grabiner has, in my view rightly, regarded this as 'fundamental': 'The iterative process of contractual interpretation' (2012) 128 Law Quarterly Review 41 at 45-49 and 61. The process of working through the consequences of the competing literal or grammatical meanings enables a court to assess whether either party's preferred legal meaning gives rise to a result that is more or less internally consistent and avoids commercial absurdity.

251 Reading cll 9.1.2.5 and 9.1.2.6 as applying to diseases, given the text, context and purpose of the policy, would be commercially absurd.

252 It is also not the case that this conclusion depends on the fact that more than one insuring clause is engaged. A circumstance may readily fall within more than one insuring clause. The issue here is that if LCA Marrickville is correct the relevant provisions do not merely overlap, they become incongruent.

253 Accordingly, insofar as loss is consequent on the action of an authority resulting from disease, cll 9.1.2.5 and 9.1.2.6 are incapable of being engaged. The loss is either within the scope of cl 9.1.2.1 (as expanded by cl 9.1.2.4) or cl 9.1.2.3 or it is not.

254 As will be explained in the other cases, I reach the same conclusions for similar reasons. There is also another consideration which reinforces these conclusions. It is notable that the hybrid clauses concern human infectious or contagious diseases. The requirement in the policies other than the Chubb policies is for an order or action of an authority involving closure or evacuation of the premises/situation. The Chubb policies extend to restriction of the use of premises all other policies require "closure or evacuation". Leaving aside the Chubb policies, a requirement for the closure or evacuation of the premises/situation in the case of an order resulting from a human infectious or contagious diseases makes sense. It reflects the intention that persons who would otherwise ordinarily be entitled to enter and remain on the premises are precluded from doing so, thereby achieving the object of restricting the spread of the human infectious or contagious disease.

255 The prevention or restriction of access clauses concern damage or the threat or risk of damage to persons or property, not diseases. Providing cover for the effects of a prevention or restriction of access from damage or the threat or risk of damage to persons or property, in this context, makes sense. The damage or threat of damage contemplated is not of a kind that would spread such as in the case of a human infectious or contagious diseases. The inaptness of the concept of "damage" or the threat of "damage" to persons to apply to the risk presented by a disease reflects the fact that the contemplated damage or risk of damage is physical injury or death from physical injury and not the kind of harm caused by a human infectious or contagious diseases (even though that may also involve death).

6.3.5 Clauses 9.1.2.1 and 9.1.2.4

6.3.5.1 …"at the Situation"

256 In my view the words "at the Situation" in cl 9.1.2.1 qualify "outbreak of a notifiable human infectious or contagious disease" and "discovery of an organism likely to result in the

occurrence of a notifiable human infectious or contagious disease". They do not qualify the "discovery of an organism". That is, an organism may be discovered which is not at the Situation. If that discovered organism would be likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation, the clause may be engaged. I consider this the proper construction because: (a) the words "at the Situation" in cl 9.1.2.1 do not qualify "any discovery of an organism", but qualify instead the entire phrase "any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease", and (b) requiring discovery of the organism would make the requirement of "likely to result in" unnecessary because the organism, by definition, must be one likely to result in an infectious or contagious disease so that if such an organism is discovered at the Situation the requirement of "likely to result in" would be superfluous. The same reasoning applies to cl 9.1.2.4 which expands the relevant area to a 5 kilometre radius around the Situation.

6.3.5.2 Competent public authority

257 There is no dispute that the orders in question are orders of a competent public authority.

6.3.5.3 "…as a result of… outbreak or discovery of… likely to result in the occurrence"

258 The issue is whether the orders (or any of them) were as a result of "outbreak of a notifiable human infectious or contagious disease" or "discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease" at or within a 5 kilometre radius around the Situation.

259 LCA Marrickville (and other insureds) relied on two approaches – the first textual and the second evidentiary. The textual approach relies on the text of the orders and extrinsic material explaining the reasons why they were made. The second relies on proof of the existence of COVID-19 within the 5 kilometre radius around the Situation.

260 LCA Marrickville conceded that none of the orders relied upon "are specific enough to identify an outbreak in the terms used in the second line of 9.1.2.1. That is, within 5 kilometres of LCA Marrickville". That is, the textual approach does not enable an inference to be drawn that any of the orders were as a result of "outbreak of a notifiable human infectious or contagious disease" or "discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease" at or within a 5 kilometre radius around the Situation.

261 As Swiss Re submitted, the difficulty is that the insureds have otherwise explained why the textual approach is correct. In short, given the context and text of the insuring clauses, if an authority has made an instrument and the instrument explains on its face why it was made, there would need to be good reason to attempt to go behind the face of the instrument to ascertain if it might be inferred that some other reason was the or a cause of the making of the instrument. As it was put for Taphouse: (a) it is unlikely an insured could obtain evidence as to an authority's reasons for acting, (b) even if the insured could obtain that evidence, statutory instruments usually speak for themselves, (c) as with a statute, a statutory instrument evinces its intention by the language used, and (d) it is not permissible to contradict the language of the instrument.

262 Accordingly, if the order itself identifies why it has been made, either expressly or by implication, I doubt that a search for contrary or supplementary evidence is likely to be able to yield anything useful. If the order does not identify why it has been made, either expressly or by implication, then other evidence may be useful, provided it is evidence about what he authority knew and considered at the time it made the orders.

263 I should record that I accept the insured's submission that it is not necessary for an insured to prove any objective fact as to the existence of the relevant disease for a provision such as cl 9.1.2.1. The relevance of the objective fact as to the existence of the relevant disease is mediated through the order. This is because the relevant objective facts are the existence of the order and whether it resulted from the specified circumstances. The objective fact of the existence of the specified circumstances may assist in enabling inferences to be drawn about the cause of the order, but that is all.

264 In particular, an authority can wrongly issue an order and the requirements of cl 9.1.2.1 may nevertheless be satisfied. If it were otherwise cover could be denied even if the order merely because the authority made some kind of error that was reasonably open to it and discovered only subsequently. For example, assume a closure order resulting from the discovery of legionella in an air conditioning system. The premises are ordered to be closed while testing is carried out. The testing shows that the legionella bacteria are present but are inactive and harmless (which may not be scientifically possible but the point is still good). The order resulted from the authority considering that the legionella bacteria were "likely to result in the occurrence of a notifiable human infectious or contagious disease" at or within a 5 kilometre radius of the Situation. Clause 9.1.2.1 would be satisfied even if the testing subsequently

proved that the bacteria was not in fact "likely to result in the occurrence of a notifiable human infectious or contagious disease" at or within a 5 kilometre radius of the Situation.

265 It could not be taken that the parties intended that the insured would not be covered for acts of an authority in good faith which can objectively be characterised as resulting from the nominated circumstances even if it can be subsequently proved that the authority was in error. While there may be some limits to this conclusion, such as an order issued arbitrarily or capriciously or in bad faith, no such considerations on the part of any authority arise in the present case (or any of the cases).

266 In *Rockment* at [36] the Full Court noted that:

> Whilst it may not be useful to divert attention to the myriad alternative circumstances on which the clause might operate, it is true that a construction which connects the operation of the Exclusion to an objectively discernible fact has a degree of commercial rationality. But that is not what the Exclusion says, which is the primary consideration. In any event, a construction which identifies the relevant causal element as being the emergency state of affairs which is the subject of a declaration also attaches to an objective element.

267 I consider this supports the view I have reached. The objectively discernible fact is the making of the order which must be a result of the identified circumstances. The clause, in effect, submits the parties to the actions of the relevant authority as the required objective fact. This makes far more commercial sense than requiring the parties to ascertain (and potentially dispute) the existence or non-existence of the identified circumstances, including by reference to matters that were not known to or considered by the authority when it made the orders.

268 By the clause the parties are evincing a common intention that the objective actions of the authority determine the availability of cover. The parties must be taken to have understood that an authority with the requisite power would be bound to act lawfully and on a rational basis. But this does not mean that: (a) an authority might not later be proven to be wrong, or (b) subsequently available information proving more than the authority knew or more than the authority acted upon can be relevant. The parties are stuck with the actions of the authority taken in the circumstances known to the authority at the time as the determinant of cover. This is a commercially rational and sensible resolution of the operation of the clause.

269 This is important because it exposes why the various causal sequences which the insurers provided for assistance are fraught. The causal sequences all start with the identified or specified circumstance as if that has to exist as a matter of objective fact. That is not so for the reasons given. The start of the relevant causal sequence for hybrid clauses is the making of the

order by the authority. It is true that the cause for the making of the order must be as identified by the clause (so that the circumstance must exist before the order) but that does not mean that the parties are able to go behind the order to prove the authority wrong or to prove that another order, in different terms and for different reasons, could have been made.

270 This all said, one way or another, the insured must prove that the order resulted from the specified circumstances. The starting point (and, in my view in most cases, at least where the reason for the order is apparent on or may be inferred from the face of the order and accompanying extraneous material, the finishing point as well) must be the terms of the order and any accompanying contemporaneous explanatory material.

271 The orders were made under s 7 of the Public Health Act. Section 7 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 and enables the Minister to by order give such directions as the Minister considers necessary to deal with the risk and its possible consequences, including by declaring any part of the State of NSW a public health risk area and in that event to reduce or remove any risk to public health in the area, to segregate or isolate inhabitants of the area, or to prevent, or conditionally permit, access to the area.

272 As noted, the orders identify the grounds for concluding that there is a risk to public health in cl 4. Clause 4 records that:

> 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 Australian jurisdictions, [including by means of community transmission].

273 The words "including by means of community transmission" did not appear in the 26 March 2020 order but do appear in subsequent orders including that of 1 June 2020.

274 The Explanatory Note to the 26 March 2020 order records that the object of the order is to "make further provision to deal with the public health risk of COVID-19 and its possible consequences".

275 Given this, I am unable to accept that the orders on which LCA Marrickville relied were as a result of anything in fact occurring at or within 5 kilometres of the Situation. They resulted from the Minister's concern about the public health risk COVID-19 presented to the State of NSW as a whole. There is a crucial difference between the "risk" or "threat" of an outbreak of COVID-19 and an outbreak of COVID-19. While the risk or threat is based on the existence of COVID-19 in some locations (not every location) in the State, it is only the risk or threat which relates to the State as a whole (and every person in the State). The existence of COVID-19 in certain locations (that is, the outbreak or occurrence of COVID-19) does not relate to the State as a whole.

276 The fact that the Situation and the area within 5 kilometres of the Situation is within NSW does not mean that it can be said that the orders resulted from COVID-19 at the Situation or within the 5 kilometre radius. To so conclude would be to render the causal connection between the order and the 5 kilometre radius around the Situation meaningless. The causal connection identified by the words "as a result of" link the order and circumstances within the 5 kilometre radius.

277 The text of the orders is inconsistent with any inference that the orders were a result of anything to do with the existence of COVID-19 (as an outbreak or otherwise) within the 5 kilometre radius. The orders resulted from the circumstances relating to COVID-19 in NSW generally. Those circumstances included: (a) the existence of COVID-19 in certain locations within NSW (but not at every location within NSW), and (b) the risk or threat of the spread of COVID-19 within NSW from both known and unknown cases of COVID-19.

278 LCA Marrickville submitted that 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". Importantly, and as noted, cl 9.1.2.1 is not about the threat or risk of disease. It is about an order as a result of an outbreak of a disease or discovery of an organism likely to result in the occurrence of a disease. This is an important difference from cl 9.1.2.6 which is focused on the action of an authority to avoid or diminish risk. The inference of recognition by the authority of an outbreak or discovery of the required kind within the radius cannot be drawn. Such reasoning might be legitimate for an order concerning a smaller area, but it is not legitimate when the order resulted from circumstances in the whole of NSW. As noted, if that were sufficient, the Situation and the

radius have no work to do in respect of the requirement of causality between the order and the disease.

279 The conclusion which must be reached on the textual approach is that the orders were not a result of an outbreak of disease at the Situation or within a 5 kilometre radius of the Situation or discovery of an organism likely to result in the occurrence of disease at the Situation or within a 5 kilometre radius of the Situation. The circumstances within the radius in terms of an outbreak or likely occurrence of a disease (as opposed to a risk or threat of disease across NSW as a whole) were not a proximate or any other kind of cause of any of the orders. The textual approach should be the end of the matter.

280 Proof of the fact of cases of COVID-19 at the Situation or within the 5 kilometre radius of the Situation before the orders were made does not prove that the orders resulted from an "outbreak" or "occurrence" of COVID-19 at the Situation or within the 5 kilometre radius of the Situation as it does not prove that the Minister may be inferred to have: (a) known of that circumstance before making the order, unless the proof is contemporaneous documents of which it may be inferred the Minister was aware (such as contemporaneous NSW Health records provided to the Minister), (b) taken into account that circumstance before making the order, or (c) acted in part on the basis of that circumstance. For this reason, the possibility of further non-contemporaneous epidemiological evidence being adduced is beside the point.

281 As discussed, the *FCA v Arch* and *Hyper Trust* cases take a different view but that is because those cases considered areas which included the majority of the population centres in each country. As Insurance Australia submitted:

> …as part of their reasoning, Lord Hamblen and Lord Legatt rejected a submission that 'but for' was a minimum requirement for causation. Their Lordships accepted that a 'but for' test was a relevant causal inquiry in the 'vast majority of insurance cases', but held it was not a necessary pre-condition to a finding of causation in all cases: at [181]-[183]. IAG does not contest this statement as a matter of principle. It accepts that under Australian law the 'but for' test is not the sole or minimum requirement to establish causation under an insurance contract. Indeed, as recognised in *FCA v Arch* at [187], Allsop J's decision in *McCarthy* [*McCarthy v St Paul International Insurance Co Ltd* [2007] FCAFC 28; (2007) 157 FCR 402] (being a case concerning the recoverability of defence costs incurred in respect of two claims, only one of which was insured) is one example where the Court has been willing to find loss was caused by a particular event even though the 'but for' test could not be satisfied. The inefficacy of a 'but for' test in cases of multiple sufficient causes is well known.
>
> … it is important to have regard to the reason why a 'but for' test was not applied in *FCA v Arch*. The specific reason given (at [179]) was that a 25-mile radius (being the relevant radius in the disease clauses there being considered) covered a significant proportion of England and Wales. This meant, in turn, that it would be a difficult if not

> impossible task for the insured to demonstrate that, but for the cases of COVID-19 within the particular 25-mile radius of its insured premises, the relevant government restrictions would not have been introduced and the interruption to business would have been any less: at [179]. The prior case law on concurrent causes was distinguished expressly on this basis: at [180] ('The facts of the present case are distinguishable in this respect from the facts in the cases referred to above…'
>
> …
>
> … finally, at [190], Lord Hamblen and Lord Legatt made the important observation that:
>
> > Whether an event which is one of very many that combine to cause loss should be regarded as a cause of the loss is not a question to which any general answer can be given. It must always depend on the context in which the question is asked. Where the context is a claim under an insurance policy, judgements of fault or responsibility are not relevant. All that matters is what risks the insurers have agreed to cover.

282 In particular, there is a fallacy in the argument for LCA Marrickville that 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", referring to *FCA v Arch UKSC* at [194] as follows:

> The parties to the insurance contracts may be presumed to have known that some infectious diseases including, potentially, a new disease (like SARS) can spread rapidly, widely and unpredictably. It is obvious that an outbreak of an infectious disease may not be concerned 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.

283 The first fallacy is that the submissions confuse the concepts of outbreak/occurrence of COVID-19 with the risk or threat of COVID-19. The insured peril in cl 9.1.2.1 is the fact of an outbreak or the fact of discovery likely to result in the occurrence of disease at or within the 5 kilometre radius of the Situation. It is not the risk or threat of COVID-19 at or within the 5 kilometre radius of the Situation. It is not the risk or threat of COVID-19.

284 The second fallacy is that the proposition assumes the result, that the order(s) were made in response to circumstances within the radius. The reasoning in *FCA v Arch UKSC*, if applied in the present case, would also assume how the policy is to operate. It is not that an order cannot relate to areas inside and outside of the radius. It is also not that the order must be a result solely of circumstances inside the radius. It is that the circumstances inside the radius must be a cause

of the order, even if circumstances outside of the radius are also a cause of the order (see further below) and the relevant cause in this case is not the risk or threat of COVID-19 but the fact of an outbreak or likely occurrence of COVID-19 as specified. In the present case no inference can be drawn that the circumstances inside the radius were a cause of the order in any sense. Accordingly, the submission for LCA Marrickville that 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" goes nowhere. Coverage only exists if the order with the requisite causal connection to the area within the radius exists. If it does, the fact that there may also be a causal connection to areas outside of the radius would not "displace coverage". In the present case, however, the requisite causal connection (as a result of) cannot be identified.

285 The insureds relied on *FCA v Arch* in respect of the meaning of "outbreak". Swiss Re submitted that an "outbreak" in the context of disease involves a sudden eruption, breaking out or an outburst of that disease and that a single instance of disease, or multiple instances with no connection to a common cause, does not constitute an "outbreak" within the ordinary meaning of the word. In *FCA v Arch UKSC* Lords Hamblen and Leggatt JJSC, with whom Lord Reed PSC agreed said at [69]:

> Nor for that matter could an outbreak of disease be regarded as one occurrence, unless the individual cases of disease described as an outbreak have a sufficient degree of unity in relation to time, locality and cause.

286 This was said in the context of a policy which referred to an "occurrence" and not an "outbreak" of disease.

287 In the present case there is a textual indicator that "outbreak" in cl 9.1.2.1 takes the same meaning as "occurrence". The order must result from either an "outbreak" of disease or the discovery of an organism likely to result in an "occurrence" of disease (at the Situation etc). There is no rational reason, in this context, to distinguish between the two circumstances. In fact, it would be irrational for there to be cover for an order resulting from discovering an organism likely to result in an occurrence of the notifiable disease at the Situation or within the radius and no cover for an order resulting from an actual occurrence of the notifiable disease at the Situation or within the radius merely because the occurrence does not have a sufficient degree of unity in relation to time, locality and cause to be classed as an "outbreak". The inference to be drawn is that cl 9.1.2.1 is treating "outbreak" as synonymous with "occurrence". An occurrence of a notifiable disease is an "event" of such a disease being "something which

happens at a particular time, at a particular place, in a particular way": *Axa Reinsurance (UK) plc v Field* [1996] 1 WLR 1026 at 1035.

288 Even if this incorrect, I do not accept that the reasoning in *FCA v Arch UKSC* at [69] is applicable. The issue in cl 9.1.2.1 is not whether there was in fact an outbreak of a disease as required. It is whether the authority made the order(s) as a result of what it considered to be an outbreak of the disease. I would infer that the Minister made the orders as a result of what he perceived to be an outbreak or outbreaks of COVID-19 in certain locations in NSW and the associated risk of COVID-19 across NSW. I reach this inference based on these circumstances: (a) the orders apply to the whole of NSW indicating that the Minister perceived a serious risk to human health, (b) it should be inferred that the Minister knew about the agreed facts relating to COVID-19 set out in section 2 above, (c) as such, it should be inferred that the Minister knew both that COVID-19 is highly contagious in a non-controlled environment (that is, not in a hospital, quarantine or isolation) and that people were likely to be infectious with COVID-19 before they became aware of symptoms, (d) accordingly, the risk to public health was not from known cases of COVID-19 alone but was also from unknown cases of COVID-19.

289 These facts about COVID-19 mean that it is unlikely the Minister acted as he did because of a mere "occurrence" as opposed to an "outbreak" of COVID-19.

290 But for the textual indicator in cl 9.1.2.1, however, I would accept that there is a difference between an "outbreak" of COVID-19 and an "occurrence of COVID-19.

291 Absent the specific context of cl 9.1.2.1, an "occurrence" of COVID-19 would mean an event or case of COVID-19 in any setting. That is, it would not matter if the case of COVID-19 was in a controlled environment (such as a hospital, quarantine or isolation). The fact that the risk of transmission of COVID-19 would be low due to the controlled setting would be immaterial.

292 Absent the specific context of cl 9.1.2.1, an "outbreak" of COVID-19 would require more than an "occurrence" of COVID-19. The difference between my conclusions and the submissions of the insurers is that the insurers contended that an "outbreak" of COVID-19 requires a confirmed case of transmission in the community (that is, in a non-controlled setting) of COVID-19. I consider that an "outbreak" of COVID-19 requires only a case of active (that is, infectious) COVID-19 in the community (that is, in a non-controlled setting).

293 I reach my conclusion on the basis of the same facts identified above, namely: (a) COVID-19 is highly contagious in a non-controlled environment (that is, not in a hospital, quarantine or

isolation), (b) people are likely to be infectious with COVID-19 before they become aware of symptoms, and (c) accordingly, the risk to public health was not from known cases of COVID-19 alone but was also from unknown cases of COVID-19.

294 In other words, with a known highly contagious disease like COVID-19 the risk of transmission by a person with active COVID-19 in the community (that is, in the non-controlled setting) is so high that it may readily be inferred that, in any such case, the person probably had transmitted COVID-19 to persons unknown before the person realised they had COVID-19. On this basis, proof of the fact of a person with active COVID-19 in the community (that is, in the non-controlled setting) is sufficient to prove an "outbreak" of COVID-19. The approach of the insurers involves ignoring the probability that a person with active COVID-19 in a non-controlled setting will transmit the disease to other persons who are not able to be identified. In the context of a contractual arrangement I would not infer that the parties to the policy intended that anything more than probabilistic reasoning would be required.

295 This also reflects my view that the parties must be taken to have intended that whether or not there is an "outbreak" is disease dependent. COVID-19 is one kind of disease, as described above. For other diseases, a confirmed case in a non-controlled setting may not be an "outbreak" of the disease.

296 I note that in *Hyper Trust No 1* at [143] McDonald J said:

> …"outbreak" is capable of consisting of a relatively small number of cases or, where the pathogen is particularly serious, a single instance of disease.

297 As discussed, for COVID-19, I agree.

298 I also consider that it would be unreasonable and uncommercial to confine the meaning of "outbreak" to a confirmed case of community transmission from one person to another person within the area. Because I consider "outbreak" to be disease dependent, I cannot see how it could be concluded that an action of an authority would not result from an outbreak of COVID-19 merely because the authority knew of a person within the community and in the area (and not in a controlled environment) with an infectious case of COVID-19, but did not know the person had in fact infected another person with COVID-19 in the area. The idea that only an action of an authority taken after the authority knows of community transmission of COVID-19 in the area is the result of an outbreak of COVID-19 is untenable given the highly infectious nature of the disease and the obvious risk of unknown cases of COVID-19. The authority must

consider the capacity for community transmission in the area to be present, but not necessarily the fact of community transmission, for there to be an outbreak of COVID-19.

299 I would reach the same conclusion if the issue of an "outbreak", under the policy was a matter for me to determine as an issue of objective fact (in contrast to a question whether the action of the authority was a result of an outbreak). In the case of a disease as contagious and potentially serious as COVID-19, the presence of a person within the community and in the area (and not in a controlled environment) with an infectious case of COVID-19 is an outbreak of COVID-19. It is an outbreak of COVID-19 because, unless the person is in a controlled environment, the disease is so readily transmissible and potentially serious. This is not to convert a potential "outbreak" into an "outbreak". It is to recognise that for a disease such as COVID-19 one active case in an uncontrolled setting is itself an "outbreak" of COVID-19.

300 This conclusion, I note, is consistent with the position of the Australian Government Department of Health CDNA (Communicable Diseases Network Australia) National Health Guidelines for Public Health Units which outlines minimum standards for the surveillance, contact-testing and management of COVID-19. The document defines an outbreak of COVID-19 as a single confirmed case of COVID-19 in the community. While the document was issued in May 2021, well after the events in question, it discloses that there is (and, by inference, was at the relevant time) a rational basis for an authority to consider that a single case of COVID-19 within the community constitutes an outbreak of COVID-19, provided that case is infectious while in the community. In terms of a clause depending on the actions of an authority, rationality of the action is sufficient.

301 As the insureds said, this makes sense given the following: (a) COVID-19 is a new and deadly virus that was not known to exist in humans before 2019, (b) the severity and virulence of COVID-19, (c) at the relevant times there was no vaccine or cure for COVID-19, and (d) the previously expected number of cases of COVID-19 would have been zero.

302 I recognise that the issue involve an inference about or attribution to an authority of a reason for acting. It is not possible to know whether the authority subjectively characterised the circumstances as an "outbreak" or an "occurrence" of COVID-19. This supports the conclusion that a commercially rational interpretation of the policy involves focusing on the action of the authority and a process of drawing inferences from that action and circumstances known to the authority at the time about the reasons for its actions as a matter of objectively inferred or objectively attributed fact.

303 This said, I agree that if the focus of the clause was the objective fact of an outbreak of COVID-19 then: (a) as noted, one case of COVID-19 in controlled circumstances such as quarantine, isolation or a hospital would not be an outbreak of COVID-19, and (b) as a practical matter, proving an outbreak of COVID-19 within the radius requires a person with COVID-19 capable of communicating COVID-19 to be present within the radius other than in a controlled situation such as quarantine.

304 It is not relevant, however, that guidelines about other diseases (Commonwealth Department of Health's 'Guidelines for the public health management of gastroenteritis outbreaks due to norovirus or suspected viral agents', last updated in 2010) require "[t]wo or more cases of diarrhoea and/or vomiting in a 24 hour period in an institution or among a group of people who shared a common exposure or food source should be suspected as constituting an outbreak and an assessment or investigation commenced". This is a different disease and what constitutes an outbreak, in my view, is disease dependent.

305 LCA Marrickville submitted that, on the agreed facts:

> …there were at least 19 COVID-cases as at 23 March 2020 that recorded postcodes wholly within the radius. There were 132 cases recorded in LGA's partly within the radius, 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. This is plainly sufficient, in the context of a disease of the characteristics, seriousness and virulence as COVID-19, to constitute an "outbreak" at that time and within the radius.

306 As I have said, in the context of actions of an authority, whether or not the cases of COVID-19 were the result of transmission within the 5 kilometre radius is sufficient but not necessary insofar as the requirement for an "outbreak" is concerned. Having COVID-19 and being infectious in non-controlled circumstances within the 5 kilometre radius is what is necessary because that fact alone proves the probability of transmission to other persons even if those other persons are not known or the fact of such transmission cannot be proved. An "outbreak" is not confined to cases of COVID-19 within the radius springing from one common source or multiple sources within the radius. It is the presence of a person with COVID-19 capable of being transmitted to another person who is not in a controlled situation such as quarantine, isolation or a hospital and who is within the radius that is required. I thus reject the submission of Swiss Re that there must be a unity of time, location and cause, in effect, involving multiple contemporaneous transmissions from a cause originating at, and between persons located at the Situation or within the radius at the time of transmission.

307 I note that the evidence discloses that by 23 March 2020 there were 832 cases of COVID-19 in NSW. As noted, of those total cases, 132 cases had a usual place of residence in a local government area partly within the 5 kilometre radius of the Situation and 19 had a usual place of residence in a postcode within the 5 kilometre radius of the Situation.

308 The issues, however, are that: (a) there is no evidence from which it would be inferred that the evidence of persons with COVID-19 within the radius had anything to do with the making of the orders, and (b) if this is wrong, the available evidence discloses only the usual place of residence of the person with COVID-19 and not that the person was within the radius when infectious with COVID-19 or was within the community (as opposed to being in controlled circumstances such as a hospital, in isolation or in quarantine).

309 Swiss Re submitted that the evidence does not "establish where a person was during their infectious period, or at any time, when that person had COVID-19 – i.e., whether the person was in hotel quarantine, hospital quarantine, wholly compliant with directions to quarantine at home or in the community and if so, for what periods and at what locations". This is true. But the evidence does establish that nine cases were "locally acquired" as opposed to "overseas". I infer this means those nine cases were acquired within Australia. I accept that I do not know that any one of these nine people were within the radius while they were capable of transmitting COVID-19 to another person. I also accept that I am unable to draw this inference as LCA Marrickville proposed, based on the available evidence.

310 For there to be an outbreak of COVID-19 within the radius there would need to be evidence of a person with COVID-19 in an non-controlled setting and capable of transmitting COVID-19 within the radius. There is no such evidence and no evidence capable of supporting a rational inference to this effect.

311 LCA Marrickville contended that this cannot be correct as it is too difficult to prove and the policy should be given a reasonable commercial operation. The problems with this submission are that, first, it supports the primary "textual" approach to determining whether the action of an authority resulted from the identified matter as discussed above (with which I agree) and, secondly, that it assumes cl 9.1.2.1 applies to: (a) a nationwide pandemic which is the very kind of disease most likely to be excluded by the biosecurity exclusion, and (b) an order which applies to the whole of NSW in response to a pandemic rather than an order resulting from an outbreak of a notifiable disease within the radius (whether or not it started within the radius or spread from elsewhere into the radius).

312 I do not repeat this level of detail below when dealing with the concept of an "outbreak" of COVID-19 in the context of other polices, but it forms part of my process of reasoning in each relevant case.

313 The alternative requirement is the discovery of an organism likely to result in the "occurrence" of a notifiable human infectious or contagious disease at the Situation or within the radius. There is no dispute that SARS-CoV-2, the cause of COVID-19, is an organism. As noted, I do not consider that the organism itself must be discovered at the Situation or within the radius. It must be discovered at a location so as to make it likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation or within the radius.

314 LCA Marrickville accepted that in this context "likely" means more likely than not or probable. On this basis, the evidence must enable an inference of likelihood of an occurrence of COVID-19 at the Situation or within the 5 kilometre radius. For this inference to be drawn there must be evidence of the order resulting from a person with COVID-19 and capable of communicating the disease at the Situation or within the 5 kilometre radius. There is no such evidence. I do not accept, however, that "this limb is not established merely by the 'discovery' of a person infected with COVID-19 having been present either at the 'Situation' or within the Radius", as Swiss Re would have it, provided that the person with COVID-19 is capable of communicating the disease to others (that is, they are still contagious).

315 As discussed, however, all of the above is theory only because the requirement is that the order of the authority result from either an outbreak of a notifiable human infectious or contagious disease at the Situation or within the radius or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation or within the radius. As noted, this is not proved by evidence of person(s) with COVID-19 at the Situation or within the radius or in the vicinity of the radius. It is proved by evidence of the reasons for the authority making the order. This is best proved by the terms of the order for the reasons already given. In the present case, by necessary implication, the orders disclose that they were not made as a result of an outbreak or occurrence of COVID-19 at the Situation or within the radius or in the vicinity of the radius. I do not see how further evidence, expert or otherwise, can alter that position.

6.3.5.4 Closure or evacuation by order

316 A further requirement is that there must have been closure or evacuation of the whole or part of the Situation by order of a competent public authority. As noted, the policy distinguishes

between the Situation (defined in the Policy Schedule to mean the head office units at St Leonards and elsewhere in Australia including contract sites where the Insured has property or carries on business, has goods or other property stored or being processed or has work done) and the Business (cl 1.2 - the business as specified in the Schedule carried on by the Insured at the Situation).

317 Swiss Re contended that for the requirement of closure to be satisfied "the "Situation" (being the physical premises identified in the Schedule) must be unable to be accessed or occupied "in any way". I disagree. The requirement is for closure of the whole or part of the Situation. At the least, inability to access a part of the Situation will satisfy the requirement.

318 It may be accepted that the requirement is not concerned with the manner in which the Business may be carried on at the Situation. It may also be accepted that "closure", like evacuation, is concerned with the physical presence of people. What I do not accept is that any restriction on the manner of operating the Business is necessarily incapable of also constituting a closure of the whole or part of the Situation. Whether that is so or not will depend on the nature of the restriction imposed by the order, the nature of the premises, and the nature of the business being conducted on the premises.

319 I do not consider that ***Cat Media*** *Pty Ltd v Allianz Australia Insurance Ltd* [2006] NSWSC 423; (2006) 14 ANZ Ins Cas 61-700 at [59]-[60] dictates a contrary conclusion. In that case Bergin J stressed the need for physical closure of the premises and said that closure did not encompass mere cessation of manufacture on the premises. So much may be accepted. But whether there has been closure of the Situation or not must depend on the inferred common understanding of the parties as to the nature of the Situation and permissible access to it. In the case of LCA Marrickville, the Situation was used for a business accessible by the public for beauty treatment. That Situation could be closed (and was closed) by an order, in substance, preventing the public from accessing the Situation.

320 In the present case, 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": cl 7(1)(i). This restriction did not merely restrict the operation of LCA Marrickville's business. It required the business premises to be closed. The fact that the focus of the order is "business premises" and not "business" reinforces that the effect of this order is to close the premises which necessarily involves closure of the Situation. In this case there was one Situation at Marrickville which was within the meaning

of a beauty salon as identified in the order. Clause 7(1)(i) of the 26 March 2020 order required it to close. That satisfies the requirement of cl 9.1.2.1 for closure of the Situation by the order. Even if a person could still access the office component of the Situation, that part of the Situation comprising the publicly accessible space was closed to the public. This is sufficient.

321 Swiss Re submitted that, if contrary to is case, the Situation was closed by order on 26 March 2020 then the 15 May 2020 *Public Health (COVID-19 Restrictions on Gathering and Movement) Order (No 2) 2020* (NSW) had the effect of ending that closure. That order added a proviso to cl 7(1)(i) "(except for the retail sale of goods and gift vouchers, including gift vouchers for services redeemable at a later date)".

322 By this exception it may be inferred that a member of the public could enter part of the Situation to purchase such goods and vouchers. It does not alter the fact, however, that cl 7(1)(i) otherwise required the business premises "not be open to members of the public" when, ordinarily, members of the public would be able to access the six treatment rooms for treatment. On this basis, it must again be inferred that at least part of the premises (being part of the Situation) remained closed.

323 The 15 May 2020 order, contrary to Swiss Re's submissions, did not constitute a mere restriction on the manner in which the business could be conducted. It required that part of the premises, in which treatment of the public would ordinarily be carried out, be closed to the public. While, in theory, retail sales might have been conducted from a treatment room, no such inference would be drawn when the premises involved a reception and a waiting area as well as six treatment rooms. The obvious inference which must be drawn is that the public were permitted to access the reception area to conduct any retail sale but not the treatment rooms where the public would have no legitimate reason to be other than for treatment.

324 The 1 June 2020 order enabled the part of the Situation ordinarily accessible by members of the public for treatment to again be accessible for treatment but subject to the restriction of the number of people being the lesser of 10 customers and 4 square metres of space for each person (including staff members) on the premises and a COVID-19 safety plan.

325 Contrary to LCA Marrickville's submissions I do not accept that the "same logic" applying to the earlier orders applies to the order of 1 June 2020. The 1 June 2020 order did not have the effect of closing the whole or any part of the business premises (as defined in the 1 June 2020 order in cl 3(2)). By cl 5(1) and Schedule 1 to the 1 June 2020 order it restricted the number of

persons who may access the premises as identified. In my view, that did not involve closure of the whole or part of the Situation. Under the 4 square metre rule the premises could accommodate a total of 24 people so that the premises could accommodate only the 10 customers and staff (being the lesser number). There is no evidence that LCA Marrickville had to close any part of the premises to comply with the 1 June 2020 order. There is no evidence that LCA Marrickville had to prevent any person from entering the premises to comply with the 20 June 2020 order. On this basis it cannot be concluded that there was any closure of the whole or part of the Situation by the 1 June 2020 order.

326 The same conclusion must apply to the 13 June 2020 order which increased the number of persons who could be on the premises to the lesser of 20 customers or the total under the 4 square metre rule.

6.3.6 Conclusions about cl 9.1.2.1

327 The exclusion in cl 9.1.2.1 applies. Accordingly, cl 9.1.2.1 (as expanded by cl 9.1.2.4) does not apply.

328 Alternatively, the orders did not result from either outbreak of a notifiable human infectious or contagious disease or bacterial infection at the Situation or within 5 kilometres of the Situation or discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation or within 5 kilometres of the Situation. In my view, this conclusion could not be affected by further evidence because it is apparent from the face of the orders.

329 Alternatively, there is no evidence from which it may be inferred that there was an outbreak of a notifiable human infectious or contagious disease or bacterial infection at the Situation or within 5 kilometres of the Situation or discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation or within 5 kilometres of the Situation. While this could be overcome by evidence showing that one person with COVID-19, while contagious, was at the Situation or within 5 kilometres of the Situation and was not in controlled circumstances it would not satisfy the requirement that the order(s) resulted from this fact so there is no utility in obtaining such evidence.

330 The Situation was closed by order of a competent public authority from 26 March until 1 June 2021. On and from 1 June 2021 the Situation was not closed in whole or part by any order.

331 Properly construed, the presence of cll 9.1.2.1 and 9.1.2.4 and 9.1.2.3 in the policy means that cll 9.1.2.5 and 9.1.2.6 cannot apply to the actions of an authority relating to diseases. By necessary implication, diseases are excluded from those provisions.

6.4 Clause 9.1.2.5

332 If my conclusion above that cl 9.1.2.5 cannot apply to actions of an authority relating to diseases by reason of cll 9.1.2.1, 9.1.2.4 and 9.1.2.3 is wrong, then in any event I consider that cl 9.1.2.5 has nothing to do with diseases.

333 The relevant actions must be "during a conflagration or other catastrophe for the purpose of retarding same". While those words in theory, could include actions to prevent the spread of an infectious disease they should not be so construed. Leaving aside cll 9.1.2.1, 9.1.2.4 and 9.1.2.3, the operative words are "conflagration or other catastrophe" and "retarding". I accept that a pandemic is a "catastrophe" in its ordinary sense: *Star* at [172]. While the policy is not directly analogous to that in *Star*, aspects of the reasoning in *Star* are relevant: (a) the operative words "conflagration or other catastrophe" and "retarding" suggest a physical event, in that a conflagration is a "large and destructive fire" (Macquarie Dictionary Online), (b) the catastrophe must be an "other catastrophe" and "retarding" means slowing, delaying, hindering or impeding (Macquarie Dictionary Online), and (c) the linking of "other catastrophe" with "conflagration" indicates that the other catastrophe is to be of a kind similar to a conflagration, which involves a physical event.

334 As in *Star* at [171] the "words "other catastrophe" do assist in understanding that the "catastrophe" is physical or apt to create physical damage. In *The Sun Fire Office v Hart* (1889) 14 App Cas 98 at 103–104, it was said:

> It is a well-known canon of construction that where a particular enumeration is followed by such words as "or other", the latter expression ought, if not enlarged by the context, to be limited to matters *eiusdem generis* with those specially enumerated. The canon is attended with no difficulty, except in its application. Whether it applies at all, and if so, what effect should be given to it, must in every case depend upon the precise terms, subject-matter, and context of the clause under construction.

335 In *Lend Lease Real Estate Investments Ltd v GPT RE Ltd* [2006] NSWCA 207 Spigelman CJ said:

> [30] The general principle of the law of interpretation that the meaning of a word can be gathered from its associated words – *noscitur a sociis* – has a number of specific sub-principles with respect to the immediate textual context. The most frequently cited such sub-principle is the *ejusdem generis* rule. The relevant sub-principle for the present case is the maxim propounded by Lord Bacon: *copulatio verborum indicat*

> *acceptationem in eodem sensu* – the linking of words indicates that they should be understood in the same sense. As Lord Kenyon CJ once put it, where a word "stands with" other words it "must mean something analogous to them". (*Evans v Stevens* (1791) 4 TR 224; 100 ER 986 at 987. See also W J Byrne (ed) *Broomes Legal Maxim* (9th ed) Sweet and Maxwell, London (1924) pp373-374.)
>
> [31] However, as Lord Diplock put it in *Letang v Cooper* [1965] 1 QB 232 at 247:
>
> > "The maxim noscitur a sociis is always a treacherous one unless you know the sosietas to which the socii belong."

336 Here, the group is defined by being like a "conflagration". That is a physical event requiring physical action to be retarded. A pandemic is not like a conflagration.

337 For these reasons cl 9.1.2.5 does not apply.

338 If these conclusions are incorrect, then I accept that the orders are actions of a civil authority during a catastrophe (the COVID-19 pandemic) to retard that catastrophe so that cl 9.1.2.5 applies.

339 While I accept Swiss Re's submission that "the Conflagration/Catastrophe Clause does not respond to any 'action of a civil authority' that is taken before a relevant 'conflagration or other catastrophe' manifests, including 'action' taken in an attempt to prevent the 'conflagration or other catastrophe' from occurring in the first place", on the evidence, the catastrophe of the COVID-19 pandemic started in Australia by no later than 20 March 2020 when Australia closed its borders to all non-citizens and non-residents. Further, by that time:

(1) the Prime Minister had announced on 13 March 2020 that "[b]ased on the expert medical advice of the Australian Health Protection Principal Committee (AHPPC), Commonwealth, State and Territory governments have agreed to provide public advice against holding non-essential, organised public gatherings of more than 500 people from Monday 16th March 2020… The recommendation to advise against non-essential, organised public gatherings of more than 500 people is precautionary and designed to reduce community transmission of COVID-19 in Australia" (that is, there was already community transmission in Australia);

(2) the Prime Minister had announced on 16 March 2020 that:

> A significant step-up to Australia's national response to the Coronavirus COVID-19 pandemic has been endorsed by the National Cabinet, comprising the Prime Minister, State Premiers and Territory Chief Ministers.
>
> Based on the advice of the Australian Health Protection Principal Committee (AHPPC), the National Cabinet agreed that our core objective now is to slow the outbreak of COVID-19 in Australia by taking additional steps to reduce

> community transmission. We must ensure our health system can care for the most vulnerable, in particular the elderly and those with pre-existing conditions.
>
> To help stay ahead of the curve, the Australian Government has imposed a universal precautionary self-isolation requirement on all international arrivals, effective as at 11:59pm Sunday 15 March 2020;

(3) the Prime Minister had also announced on 16 March 2020 that:

> The Australian Government has also banned cruise ships from foreign ports (including round trip international cruises originating in Australia) from arriving at Australian ports for an initial 30 days, effective as at 11:59pm Sunday 15 March 2020.
>
> This restriction will help avoid the risk of a cruise ship arriving with a mass outbreak of the virus and putting significant pressure on our health system;

(4) on 20 March 2020 the Prime Minister also announced that:

> Every Australian government is focused on slowing the spread of coronavirus to save lives.
>
> The Prime Minister, state and territory Premiers and Chief Ministers met today for the National Cabinet and agreed to further actions to protect the Australian community from the spread of coronavirus (COVID-19).
>
> The Chief Medical Officer provided the latest advice on the spread of COVID-19 globally and nationally. Leaders noted that Australia has one of the most comprehensive testing regimes in the world with over 100,000 Australian tests for COVID-19 having been undertaken. While the majority of COVID-19 cases in Australia continue to be from Australians returning from overseas, there have been a number of local outbreaks.
>
> Every Australian has a part to play in slowing the spread of coronavirus.
>
> All leaders reiterated the importance of Australians strictly adhering to social distancing and self isolation requirements, in particular for those who are unwell and for returned travellers. Not adhering to self isolation requirements when you are unwell puts the lives of your fellow Australians at risk;

and,

(5) on 18 March 2020 the NSW Minister for Health provided a COVID-19 update for NSW announcing that:

> NSW has moved to immediately ban non-essential indoor gatherings of 100 or more people as part of tough new national measures to curb the spread of COVID-19 in the community.
>
> Health Minister Brad Hazzard said he has today signed an Order under the emergency powers of the Public Health Act 2010 to protect its citizens in line with advice from health experts, as the number of diagnosed cases in the State increased to 267, including a fifth death related to COVID-19.
>
> "Banning non-essential indoor gatherings of 100 or more people is a safety measure recommended by the National Cabinet," Mr Hazzard said.

> "Most importantly, the community needs all of us to practise social distancing and vigilantly practise safe hand hygiene measures moving forward."
>
> Following advice from the AHPPC, the National Cabinet was unanimous in its decision to implement these health restrictions.

340 It will also be noted that the linking requirement in cl 9.1.2.5 between the action and the catastrophe is temporal (during) and not causal (as a result of). Accordingly, consideration of the cause of the action is immaterial.

341 Accordingly, if the COVID-19 pandemic is a catastrophe within the meaning of cl 9.1.2.5 (which I do not accept), the orders were made during the catastrophe for the purpose of retarding the catastrophe as required.

6.5 Clause 9.1.2.6

342 If my conclusion above that cl 9.1.2.6 cannot apply to actions of an authority relating to diseases by reason of cll 9.1.2.1, 9.1.2.4 and 9.1.2.3 is wrong, then in any event I consider that cl 9.1.2.6 has nothing to do with diseases.

343 The relevant actions must be of an authority to avoid or diminish risk to life within 5 kilometres of the 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. While the clause makes clear that the insured peril is not property damage, in the context of cll 9.1.2.1, 9.1.2.4 and 9.1.2.3, I do not accept that the clause is capable of applying to actions of an authority in response to a disease.

344 If I am wrong again, I accept that the making of the orders constituted actions of a lawful authority attempting to avoid or diminish risk to life within 5 kilometres of the Situation. I do not agree with Swiss Re that "there must be a demonstrable 'risk to life or Damage to Property' within the limited geographical area (here, within 5 kilometres of the Situation), and the relevant 'action' relied upon must be targeted to reducing that particular risk". This is incorrect because all that is required is that the action of the authority is an attempt to avoid or diminish risk to life within 5 kilometres of the Situation. This does not mean that the action must result from the attempt to avoid or diminish risk to life within 5 kilometres of the Situation. There is no causal requirement between the risk to life within 5 kilometres of the Situation and the action, at least not in the sense that the action must result from the perceived existence of the risk within 5 kilometres of the Situation. If the action can be reasonably described as an attempt to avoid or diminish a risk to life within 5 kilometres of the Situation then it does not matter

that the action is also capable of being reasonably described as an attempt to avoid or diminish risk to life outside of 5 kilometres of the Situation. The geographical requirement in cl 9.1.2.6 is thus different from the geographical requirement in cll 9.1.2.1 and 9.1.2.3.

345 Further, there is no causal requirement (as a result of) between the action and the risk. The action must simply involve an attempt to avoid or diminish the risk. Again, accordingly, the cause of the action does not arise for consideration.

346 The 26 March 2020 order, in its own terms, is an attempt to avoid or diminish risk to life in each and every part of NSW. This is clear from cl 4 which refers to COVID-19 being a potentially fatal condition which is also highly contagious and that a number of cases have been confirmed in NSW. It is also clear that cl 7(1) applies to the whole of NSW including the area within 5 kilometres of the Situation. The same may be said of the 1 and 13 June 2020 orders. In the 1 June 2020 order cl 4 is in the same terms as the 26 March 2020 order with the addition of the words "including by means of community transmission" in cl 4(c). Clause 5(1) applies to the whole of NSW. The 13 June 2020 order merely amends the 1 June 2020 order.

347 It is fanciful to suggest that in making the orders the Minister was not attempting to avoid or diminish risk to every life across the whole of NSW. As noted, the threat or risk to each and every lige in NSW is a proximate or equally effective cause of the making of the order. This is sufficient to satisfy the clause because it necessarily includes an attempt to avoid or diminish the risk to life within the 5 kilometre radius. Swiss Re's submission that the clause "is not engaged if the relevant '*action*' is directed to a risk to life existing elsewhere" ignores the fact that an attempt may be to avoid or diminish such risks over a large area, such as the whole of NSW, whether or not the risk exists or is likely to exist within the 5 kilometre radius.

348 It is wrong to import into the clause a requirement that there be proved to be a risk to life within the 5 kilometre radius before the action is taken. This is because the requirement is simply that the authority take the action attempting to avoid or diminish the risk. The authority may later be proved to be wrong about the risk but that is immaterial. This is why I cannot accept Swiss Re's submission that:

> A state-wide authority response to address a state-wide or national risk to life is outside the proper ambit of the clause. It would involve reading the clause without the geographic limitation which is one of its essential features. The geographical nexus is required both in respect of the risk and the response to the risk.

349 As discussed: (a) an attempt by an authority to avoid or diminish a risk to life across the whole of NSW is also an attempt to avoid or diminish that risk in each and every part of NSW,

(b) effect is given to the geographic limitation by requiring the action to be an attempt to avoid or diminish that risk within the 5 kilometre radius but that does not mean the attempt must relate only to the area within the 5 kilometre radius, (c) the geographical limitation also operates through the requirement that the action "prevents or hinders the use of or access to the Situation", and (d) the geographical nexus is not part of the existence of an objective fact. It is part only of the attempt by the authority, soundly based on objective facts or not.

350 There is no inconsistency between this approach to cl 9.1.2.6 and cl 9.1.2.1. The difference is that in cl 9.1.2.1 the order must result from the specified existing circumstances within the 5 kilometre radius. In the case of a NSW-wide order that causal requirement is difficult to satisfy and is not satisfied in the present case. The requirement in cl 9.1.2.6 is different. The action need not be the result of existing circumstances within the 5 kilometre radius. The action needs only to be an attempt to avoid or diminish a risk to life within the 5 kilometre radius. A NSW-wide order of the kind made in this case can readily be inferred to be an attempt to avoid or diminish the risk to life in each and every part of NSW including within the 5 kilometre radius. The requirements are different and thus the results are different.

351 There is a further requirement that the action prevents or hinders the use of or access to the Situation. The 26 March 2020 order prevented and hindered the use of and access to the Situation (see the discussion above). The 1 and 13 June 2020 orders did not prevent access to the Situation but they did potentially hinder the use of the Situation by imposing the limits on the number of persons who could be in the Situation. I say these orders potentially hindered the use of the Situation because there is no evidence that they in fact hindered the use of the Situation. For that to be so there would need to be evidence that the 10 (then 20) person limit on customers meant that LCA Marrickville could not use the Situation to provide some service that it otherwise could and would have provided.

352 Swiss Re's submissions to the contrary are unpersuasive. Swiss Re said:

> The Business Closure Direction did not render access or use of the "Situation" (being the physical premises) impossible or subject to obstacles that were particularly difficult to overcome. Rather, it was a limitation on the nature of the business that may be conducted while it was in force. As outlined above, the Policy does not insure against the risk that a particular business may not be able to be carried on, or a particular service may not be able to be provided.

353 This is fallacious. The 26 March 2020 prevented the use of the Situation altogether for its purpose of providing beauty treatments. It did not merely limit the nature of the business that could be conducted from the Situation. It prevented any use of the Situation for the business.

It also prevented access to the Situation by any member of the public. That was a prevention of access to the Situation.

354 While I accept that the subsequent orders did not prevent access to the Situation (or, at the least, there is no proof of any such prevention of access), they undoubtedly had the potential to hinder its use as described above. In this regard, "hinder" means something less than "prevent". "Hinder" means to check, to retard, to be an obstacle or impediment. The restriction on numbers of customers at any one time may have hindered the use of the Situation.

355 For these reasons, if I am wrong and cl 9.1.2.6 can apply to actions of a lawful authority relating to a disease, then: (a) the order of 26 March 2020 prevented and hindered access to the Situation, and (b) the subsequent orders may have hindered the use of the Situation.

6.6 Answers to questions – cover

356 Some of the agreed questions obscure the focus of the clauses on the actions of an authority and otherwise lack utility given the operation of the clauses as a whole. I answer them as best as I can below.

357 **1 Disease Clause (9.1.2.1) (page 31)**:

On the proper construction of the Disease Clause:

(a) Did the "Authority Response-LCA Marrickville" cause "closure … of the whole or part of the Situation"?

Answer: in respect of the order of 26 March 2020, yes. In respect of the orders of 1 and 13 June 2020, no.

(b) Was there a closure or evacuation of the whole or part of the Situation?

See 1(a) above.

In assessing:

(i) "closure", must there be physical prevention of access to the Situation (or part of it), or is it sufficient there was a restriction of LCA Marrickville's use of the Situation (or part of it) for its Business and if so, what restriction?

(ii) "evacuation", must there be a physical removal of persons from the Situation (or part of it), or is it sufficient if there was a restriction of LCA Marrickville's use of the Situation (or part of it) for its Business and if so, what restriction?

As to (i), there must be physical prevention of access to the Situation (or part of it) to those who would otherwise be able to obtain access (for example, members of the public).

As to (ii), this does not arise, but the answer would be yes.

(c) Was there an "outbreak" of COVID-19 at the Situation?

This cannot be answered on the evidence.

(i) Does a single person infected with COVID-19 entering the Situation constitute an "outbreak"?

Not necessarily. If the person is able to communicate COVID-19 to other people and is within the community (in the sense of not being in a controlled environment such as quarantine, isolation or a hospital) then, given the nature of COVID-19 and the associated probability of transmission including to persons unknown, a single person infected with COVID-19 entering the Situation who is in a non-controlled setting would constitute an "outbreak" of COVID-19.

(ii) With what degree of prevalence do instances of COVID-19 have to occur at the Situation (or elsewhere) in order to constitute an "outbreak" at the Situation?

See (c)(i) above.

(iii) Does the outbreak have to occur at the Situation or can it occur:

A. at the Situation and elsewhere and, if so, where?

B. elsewhere but not at the Situation and, if so, where?

This does not arise. The requirement of cl 9.1.2.1 is an order of a competent public authority as a result of an outbreak of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4) or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4). This depends not on objective facts but on the cause of the making of the order. The required cause must be an outbreak of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under

cl 9.1.2.4) or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4).

If yes to (c), was the "Authority Response-LCA Marrickville" "a result of" that "outbreak"?

No.

(e) Was there a "discovery of [SARS-CoV-2] likely to result in the occurrence of [COVID-19] … at the Situation"?

On the current evidence, no. However, this does not arise for the reasons set out at 1B above.

(i) Does SARS-CoV-2 have to be discovered at the Situation or is it sufficient if it is discovered elsewhere and, if so, where?

No. If SARS-CoV-2 is discovered elsewhere but is likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation or within the 5 kilometre radius that requirement of cl 9.1.2.1/9.1.2.4 will be satisfied. To satisfy the requirement of likelihood, however, evidence of a person with COVID-19 who is capable of communicating the disease to another person within the radius will be required. However, this does not arise for the reasons set out at B above.

(ii) Does SARS-CoV-2 have to be likely to result in the occurrence of COVID-19 at the Situation or is it sufficient if it is likely to result in the occurrence of COVID-19 elsewhere and, if so, where?

SARS-CoV-2 must be likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation or within the 5 kilometre radius.

(f) Was the "Authority Response-LCA Marrickville" "a result of" a "discovery of [SARS-CoV-2] likely to result in the occurrence of [COVID-19] … at the Situation"?

No.

(g) What if any "interruption" or "interference" occurred "in consequence of" any "closure … by order of a competent public authority"?

None.

(h) What is required for there to be an "occurrence" of COVID-19?

A single case of COVID-19 is an occurrence of COVID-19.

358 **2 Biosecurity Act exclusion (clause 9.1.2.1) (page 31)**

(a) Is COVID-19 a disease "declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015", in circumstances where it was determined to be a "listed human disease" after the Policy inception date and during the Policy Period?

Yes.

(b) If yes to (a), does section 54 of the *Insurance Contracts Act 1984* (Cth) (ICA) have the effect that the insurer cannot refuse to pay LCA Marrickville's claim by reason only of the determination and can only reduce its liability to the extent that its interests were prejudiced as a result of the determination?

No.

(c) {Swiss Re version; LCA Marrickville does not agree}: If yes to (b), was LCA Marrickville's loss caused or contributed to by the determination?

This does not arise.

(d) {LCA Marrickville version; Swiss Re does not agree}: If yes to (b), could the determination reasonably be regarded as being capable of causing or contributing to LCA Marrickville's loss?

This does not arise.

(e) If yes to (c) and/or (d), to what extent is Swiss Re entitled to refuse to pay the claim?

This does not arise.

(f) If yes to (b) but no to (c) and/or (d), what prejudice, if any, to Swiss Re resulted from the determination and to what extent (if any) should Swiss Re's liability in respect of the claim be reduced?

This does not arise.

(g) If the Biosecurity Act exclusion does apply to exclude LCA Marrickville's loss from cover under the Disease Clause and the Expansion Clause, can such loss be considered for cover under the Catastrophe Clause and/or the Prevention of Access Clause?

No.

359 **3. Expansion Clause (9.1.2.4) (page 31)**:

On the proper construction of the Expansion Clause:

(a) Issues 1(a), (b), (g), (h) and (i) and 2, above also arise in the context of the Expansion Clause.

The same answers apply as set out above expanded to the 5 kilometre radius.

(b) Was there an "outbreak" of COVID-19 within a five kilometre radius of the Situation?

This cannot be answered on the evidence.

In particular:

(i) Does a person infected with COVID-19 entering, or residing in, the area within five kilometres of the Situation constitute an "outbreak"?

Not necessarily. If the person is able to communicate COVID-19 to other people and is within the community (in the sense of not being in a controlled environment such as quarantine, isolation or a hospital) then, given the nature of COVID-19 and the associated probability of transmission including to persons unknown, a single person infected with COVID-19 entering the Situation who is in a non-controlled setting would constitute an "outbreak" of COVID-19.

(ii) With what degree of prevalence do instances of COVID-19 have to occur within five kilometres of the Situation (or elsewhere), or what other characteristics must such instances have, in order to constitute an "outbreak" within a five kilometre radius of the Situation?

See (b)(i) above.

(iii) Does the outbreak have to occur within a five kilometre radius of the Situation only or can the outbreak occur outside a five kilometre radius of the Situation as well and, if so, where?

This does not arise. The requirement of cl 9.1.2.1 is an order of a competent public authority as a result of an outbreak of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4) or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4). This depends not on objective facts but on the cause of the making of the order. The required cause must be an outbreak of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under

cl 9.1.2.4) or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation (or within the 5 kilometre radius under cl 9.1.2.4).

(c) Was the "Authority Response-LCA Marrickville" "a result of" an outbreak of COVID-19 within a five kilometre radius of the Situation?

No.

In particular, must the relevant order be made in direct response to the specific outbreak within a five kilometre radius of the Situation or is it sufficient if the relevant order is made in response to, or to prevent, the spread of COVID-19 more broadly (e.g. on a regional, state or nationwide scale)?

This depends on the terms of the order.

(d) Was there a "discovery of [SARS-CoV-2] likely to result in the occurrence of [COVID-19]" within a five kilometre radius of the Situation?

On the current evidence, no. *However, this does not arise for the reasons set out at 1B above.*

(i) Does SARS-CoV-2 have to be discovered within a five kilometre radius of the Situation or is it sufficient if it is discovered elsewhere and, if so, where?

No. If SARS-CoV-2 is discovered elsewhere but is likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation or within the 5 kilometre radius that requirement of cl 9.1.2.1/9.1.2.4 will be satisfied. To satisfy the requirement of likelihood, however, evidence of a person with COVID-19 who is capable of communicating the disease to another person within the radius will be required. However, this does not arise for the reasons set out at 1B above.

(ii) Does SARS-CoV-2 have to be likely to result in the occurrence of COVID-19 within a five kilometre radius of the Situation, or is it sufficient if it is likely to result in the occurrence of COVID-19 elsewhere and, if so, where?

SARS-CoV-2 must be likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation or within the 5 kilometre radius.

(e) Was the "Authority Response-LCA Marrickville" "a result of" a "discovery of [SARS-CoV-2] likely to result in the occurrence of [COVID-19]" within a five kilometre radius of the Situation?

No.

360 **4. Catastrophe Clause (9.1.2.5) (page 31)**:

On the proper construction of the Catastrophe Clause:

(a) {Swiss Re version; LCA Marrickville does not agree}: Was the outbreak of COVID-19 a "conflagration or other catastrophe"?

No.

(b) {LCA Marrickville version; Swiss Re does not agree}: Was COVID-19 and its impact a "conflagration or other catastrophe"?

No.

(c) When did any such "conflagration or other catastrophe" commence and end?

If COVID-19 is a catastrophe within cl 9.1.2.5 it commenced in NSW no later than 20 March 2020.

(d) Was the "Authority Response-LCA Marrickville" an "action of a civil authority" implemented "for the purpose of retarding" the "conflagration or other catastrophe"?

No.

(e) What "interruption" or "interference" occurred "in consequence of" any "action of a civil authority"?

None within the meaning of cl 9.1.2.5.

361 **5. Prevention of Access Clause (9.1.2.6) (page 31):**

On the proper construction of the Prevention of Access Clause:

(a) Was there a "risk to life … within five kilometres of [the] Situation"?

This does not arise. The requirement is action of a lawful authority attempting to avoid or diminish a risk to life within 5 kilometres of the Situation. There is no requirement to prove as an objective fact a risk to life within 5 kilometres of the Situation.

(i) Does the "risk to life" have to exist within five kilometres of the Situation only or can the "risk to life" exist in areas further then five kilometres from the Situation as well and, if so, where?

See (i) above.

(ii) Must the relevant order be made in direct response to the specific "risk to life" within five kilometres of the Situation, or is it sufficient if the relevant order is made as part of an attempt to "avoid or diminish risk to life" of a broader scope (e.g. on a regional, state or nationwide scale)?

There is no requirement in this regard other than action of a lawful authority attempting to avoid or diminish a risk to life within 5 kilometres of the Situation. It does not matter is the authority is also attempting to avoid or diminish a risk to life outside 5 kilometres of the Situation.

(b) Was the "Authority Response-LCA Marrickville" taken in an attempt to avoid or diminish the identified "risk to life"?

No, because cl 9.1.2.6 does not apply to actions of an authority relating to a disease. If this is wrong, yes.

(c) Was access to or use of the Situation prevented or hindered?

Yes. The 26 March 2020 order prevented access to and prevented the use of the Situation. The 1 and 13 June 2020 orders hindered use of the Situation.

In particular, must the use of or access to the Situation for any purpose be prevented or hindered or is it sufficient for use of or access to the Situation for the purposes of LCA Marrickville's Business, to be prevented or hindered?

It is sufficient if use of or access to the Situation for the purposes of LCA Marrickville's Business, is prevented or hindered.

(d) What, if any, "interruption or interference" occurred "in consequence of" any "action of any lawful authority"?

None because cl 9.1.2.6 does not apply to an authority's action in response to a disease.

(e) {LCA Marrickville presses for the underlined words in this paragraph} To what extent would LCA Marrickville's access to or use of the Situation have been prevented or hindered, regardless of the lawful authority's action, and to what extent (if any) does this affect indemnity?

This does not arise.

362 **6. Clause 9.1.2 (page 31):**

On the proper construction of clause 9.1.2:

(a) Is Swiss Re's obligation to indemnify an "Insured" in respect of loss resulting from the interruption of or interference with the "Business" in consequence of closure or evacuation of the whole or part of the "Situation" by order of a competent public authority as a result of:

(i) an outbreak of a notifiable human infectious or contagious disease; or

(ii) any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease,

confined to the terms of the Disease Clause and the Expansion Clause (as it applies to the circumstances of the Disease Clause)?

Clauses 9.1.2.5 and 9.1.2.6 do not apply to actions of an authority in response to a disease.

6.7 Policy provisions – causation, adjustment and basis of settlement

363 The key provisions of the LCA Marrickville policy relating to causation, adjustment and basis of settlement are:

> **Section 2 – Interruption Insurance**
>
> **8. Definitions**
>
> …
>
> 8.2 **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.)

8.3 **Gross Rentals** means the money paid or payable to the **Insured** by tenants in respect of rental of the **Situation** and for services rendered by or on behalf of the **Insured**.

8.4 **Gross Revenue** means the money paid or payable to the **Insured** for services rendered (and good sold, if any), which shall include the money paid or payable to the **Insured** by tenants (including amounts for services rendered to tenants and expenses from tenants) in respect of rental or lease of the **Situation** unless Item No. 3 (**Gross Rentals**) is shown in the **Schedule** as insured in the course of the **Business** at the **Situation**. If Item No, 4 (**Insured Payroll**) is shown in the **Schedule** as insured then **Gross Revenue** shall not include **Payroll**, **Payroll** being separately insured under Item No. 4.

8.5 **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**.

…

8.8 **Payroll** means the remuneration (including but not limited to payroll tax, fringe benefits tax, sick pay, bonuses, overtime, commission, holiday pay, workers' compensation insurance premiums, accident compensation levies, superannuation and pension fund contributions, long service leave pay, and the like) paid to all employees of the Insured other than employees who form part of corporate services being services provided to more than one operation/branch of the **Insured**. The **Payroll** for these employees being insured under Item 1 (**Gross Profit**) or Item 2 (**Gross Revenue**) as applicable.

8.9 **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**.

8.10 **Rate of Payroll** means the proportion which the **Payroll** bears to the **Turnover** during the financial year immediately before the date of the **Damage**.

…

8.12 **Standard Gross Rentals** means the **Gross Rentals** during that period in the twelve months immediately before the date of the **Damage** which corresponds with the **Indemnity Period** (appropriately adjusted where the **Indemnity Period** exceeds twelve months).

8.13 **Standard Gross Revenue** means the **Gross Revenue** during that period in the twelve months immediately before the date of the **Damage** which corresponds with the **Indemnity Period** (appropriately adjusted where the **Indemnity Period** exceeds twelve months).

8.14 **Standard Turnover** means the **Turnover** during that period in the twelve months immediately before the date of the **Damage** which corresponds with the **Indemnity Period** (appropriately adjusted where the **Indemnity Period** exceeds twelve months).

8.15 **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**.

…

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.

…

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 **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).

…

6.8 Causation, adjustment and basis of settlement

6.8.1 Causation and adjustment

364 This section assumes my conclusions about cll 9.1.2.1, 9.1.2.5 and 9.1.2.6 are wrong. It assumes that those clauses are satisfied in this case.

365 The required causal sequence is:

Clause 9.1.2.1 (and 9.1.2.4) or 9.1.2.5 or 9.1.2.6 (the insured peril) is satisfied

In consequence of the insured peril there is interruption of or interference with the Business

That interruption of or interference with the Business results in loss.

366 Swiss Re contended that it is loss resulting from the insured perils in cl 9.1.2 which is covered and not loss resulting from the effects of the COVID-19 pandemic generally and that, even if the insured peril is established to be a proximate cause of the loss (as opposed to the loss being caused by the COVID-19 pandemic), the adjustment clause operates to require the quantification of loss to be adjusted to "provide for the trend of the Business and for variations in or other circumstances affecting the Business".

367 By cl.9.1.2 "events" are deemed to be loss caused by Damage. While the reference to "loss caused by" here is probably redundant, the meaning is clear enough - the events in cl 9.1.2 are taken to be Damage which may cause interruption of or interference with the Business which may cause loss, and if so, the loss is covered "in accordance with the provisions of Clause 10 (Basis of Settlement)" which includes the adjustments clause.

368 In *FCA v Arch UKSC* Lord Hamblen and Lord Leggatt JJSC at [237] said:

> The other sense in which the elements of the insured peril are inextricably connected is that those elements and their effects on the policyholder's business all arise from the same original cause - in this case the Covid-19 pandemic. 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 it would undermine the commercial purpose of the cover to treat such potential effects as diminishing the scope of the indemnity. 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.

369 Their Lordships continued as follows:

> [243] The conclusion we draw is that, properly interpreted, the public authority clause in the Hiscox policies indemnifies the policyholder against the risk (and only against the risk) of all the elements of the insured peril acting in causal combination to cause business interruption loss; but it does so regardless of whether the loss was 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.
>
> [244] This interpretation, in our opinion, gives effect to the public authority clause as it would reasonably be understood and intended to operate. For completeness, we would point out that this interpretation depends on a finding of concurrent causation involving causes of approximately equal efficacy. If it was found that, although all the elements of the insured peril were present, it could not be regarded as a proximate

> cause of loss and the sole proximate cause of the loss was the Covid-19 pandemic, then there would be no indemnity. An example might be a travel agency which lost almost all its business because of the travel restrictions imposed as a result of the pandemic. Although customer access to its premises might have become impossible, if it was found that the sole proximate cause of the loss of its walk-in customer business was the travel restrictions and not the inability of customers to enter the agency, then the loss would not be covered.

370 As to the trends (or adjustment) clauses in that case, their Lordships said:

> [251] All the sample policy wordings considered in these proceedings contain clauses of a kind generally known as trends clauses. Such clauses are part of the standard method used in insurance policies that provide business interruption cover for quantifying the policyholder's financial loss… It is the insurers' contention that the trends clauses have the effect that they are not liable to indemnify policyholders for losses which would have arisen regardless of the operation of the insured perils by reason of the wider consequences of the Covid-19 pandemic.
>
> [252] In so far as such an argument is relied upon as excluding the loss from cover as a matter of "but for" causation it has been addressed above. The remaining question is whether, and if so how, the trends clause in the policies affects the position.
>
> …
>
> [259] In considering the proper interpretation of the trends clauses, we would emphasise the following points.
>
> [260] 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.
>
> [261] Second, in accordance with the general principle referred to earlier…, the trends clauses should, if possible, be construed consistently with the insuring clauses in the policy.
>
> [262] 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.
>
> …
>
> [268] How then are the trends clauses to be construed so as to avoid inconsistency with the insuring clauses? In our view, the simplest and most straightforward way in which the trends clauses can and should be so construed is, 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. Accordingly, the trends or circumstances referred to in the clause for which adjustments are to be made should generally be construed as meaning trends or circumstances unrelated in that way to the insured peril.

371 In so concluding the UK Supreme Court decided *Orient-Express* was wrong. The Court observed that *Orient Express*: (a) was decided on the basis of the arguments advanced, (b) was confined to an appeal on a question of law arising in an arbitration, and (c) was the subject of a further appeal which settled: at [304]-[310].

372 In the *Hyper Trust* cases the Courts took the same approach to these issues.

373 The purpose of an adjustments clause was explained by Beach J in ***Australian Pipe*** *& Tube Pty Ltd v QBE Insurance (Australia) Limited (No 2)* [2018] FCA 1450 at [114]-[115]:

> 114 The adjustment subclause is designed to give purpose to the principle of indemnity under the policy. As stated in Roberts H, *Riley on Business Interruption Insurance* (10th ed, Thomson Reuters, 2016) at 48:
>
> > Without this clause the policy cannot be regarded as fulfilling the basic principle of an insurance that is to indemnify, because the turnover, charges and profits which would have been realised during a period of interruption are hypothetical and never capable of absolute proof. By the use of this clause it is possible to make adjustments in a loss settlement to produce as near as is reasonably possible a true indemnity for an insured's loss, albeit within a restricted period, i.e. the maximum indemnity period and also limited to the sum insured.
> >
> > …
> >
> > The other circumstances clause seeks to accommodate all such influences on the business that would have occurred but for the incident itself. This may seem like an enormous, if not insurmountable challenge, but to ignore all these factors and merely rely on the previous year's trading would lead to a lottery in which the insured was either over or under indemnified.
>
> 115 Further, as was stated in Honour WB and Hickmott GJR, *Honour and Hickmott's Principles and Practice of Interruption Insurance* (4th ed, Butterworths, 1970) at 444:
>
> > It is essential to ascertain as accurately as practicable the hypothetical results which the business itself would have produced apart from the fire or other peril happening, as to determine what adjustments to the rate of gross profit, the annual turnover and the standard turnover figures would be equitable.

374 As to causation, if, contrary to my conclusions, cll 9.1.2.1 (and 9.1.2.4), 9.1.2.5 or 9.1.2.6 are satisfied, then it may be accepted that in the case of LCA Marrickville there is some evidence of loss and that the loss resulted from interruption of or interference with the Business. The issue is whether the loss resulted from interruption of or interference with the Business in consequence of the insured peril.

375 There is evidence from which it could be inferred that LCA Marrickville suffered loss resulting from interruption of or interference with the Business in consequence of the insured peril. LCA Marrickville's profit and loss statements show gross profit declined from $137,783.95 in February 2020 to $86,235.52 in March 2020, $9,227.76 in April 2020 and $1,732.18 in May 2020 be compared with its gross profit of $115,559.32 in March 2019, $118,744.81 in April 2019 and $126,576.91 in May 2019. In particular, it is common sense that the required closure of the Situation between 26 March 2020 and 1 June 2020 involved interruption of or interference with the Business in consequence of the insured peril.

376 In the case of LCA Marrickville it would be difficult to suggest that being required to close the Situation to members of the public between 26 March and 1 June 2020 would be other than a proximate cause of LCA Marrickville's loss. The fact that there may be another proximate cause of some part of the loss (such as the effect of COVID-19 generally or other orders requiring people to stay at home) does not change the fact that the insured peril is itself a proximate cause of the loss. Lord Hamblen and Lord Leggatt JJSC exposed the causation fallacy in *FCA v Arch UKSC* at [182]:

> It has, however, long been recognised that in law as indeed in other areas of life the "but for" test is inadequate, not only because it is overinclusive, but also because it excludes some cases where one event could or would be regarded as a cause of another event. An example given by Hart and Honoré in their seminal treatise on *Causation in the Law*, 2nd ed (1985), p 206 is a case of two fires, started independently of each other, which combine to burn down a property: see *Anderson v Minneapolis, St Paul & Sault Ste Marie Railway Co* (1920) 146 Minn 430; *Kingston v Chicago & Northwestern Railway Co* (1927) 191 Wis 610. It is natural to regard each fire as a cause of the loss even if either fire would by itself have destroyed the property so that it cannot be said of either fire that, but for that peril, the loss would not have occurred. Another example, adapted from the facts of the decision of the Supreme Court of Canada in *Cook v Lewis* [1951] SCR 830, is a case where two hunters simultaneously shoot a hiker who is behind some bushes and medical evidence shows that either bullet would have killed the hiker instantly even if the other bullet had not been fired. Applying the "but for" test would produce the result that neither hunter's shot caused the hiker's death - a result which is manifestly not consistent with common-sense principles.

377 As Insurance Australia put it, their Lordships reasoned that:

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

378 Their Lordships applied the same reasoning to the trends causes in *FCA v Arch UKSC*. It is true that reference was made in *FCA v Arch UKSC* to the trends clause being a machinery provision separate from the insuring clause. That cannot be said in the present case where the indemnity is expressed in cl 9.1 as being "in accordance with the provisions of Clause 10 (Basis of Settlement)". Nevertheless, the provisions of cl 10 are concerned with quantification. The mere fact that the reference to the required quantification is embedded in the insuring clause does not change its essential nature as a method of calculating loss. If cll 9.1.2.1 (and 9.1.2.4),

9.1.2.5 or 9.1.2.6 were satisfied then the effect of the trends clause would be to confine the effect of the indemnity so as to exclude losses in consequence of the same underlying cause as the insured peril.

379 As in *FCA v Arch UKSC*, the trends clause cannot be construed as requiring an adjustment for circumstances involving the same cause of loss as the insured peril. As a matter of construction of the policy, when the adjustments clause refers to adjustments to "provide for the trend of the Business and for variations in or other circumstances affecting the Business…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" they cannot be taken to have intended that the same underlying cause of insured and uninsured loss would be such a circumstance. Rather, such circumstances are intended to refer to matters which would have affected the business other than those central to those of insured peril (in the sense that the existence of COVID-19 was central to all of the actions of the authorities in the present case). The fact that the adjustments clause uses a "but for" requirement of causation is not sufficient to displace the persuasiveness of the reasoning in *FCA v Arch UKSC* if, contrary to my view, the insuring clauses are satisfied.

380 Consistent with this reasoning, I am unable to accept the insurers' submissions to the effect that, where a provision uses a "but for" requirement (as the adjustments clause in this case does), it would be to re-write the policy to conclude that the Damage only must be disregarded and the effects of COVID-19 generally must be taken into account as a circumstance that would have affected the business if the Damage had not occurred. The parties could not have intended that an uninsured circumstance which is also the same underlying cause of the Damage must be taken into account as a circumstance of the business under the adjustments clause. The emphasis here must be on the sameness of the underlying causes of the insured peril and the uninsured peril. The will depend, in part, on the nature of the insured peril. My point is that, depending on the nature of the insured peril, the concept of "all effects of COVID-19 generally" may not be the same underlying cause as the insured peril. This issue arises, for example, in the Meridian Gravel case below.

381 In this regard I would not accept the submission of Insurance Australia as follows:

> In the present case, however, it may not make a great difference whether the *FCA v Arch* or *Orient Express* approach is adopted. The question under the *FCA v Arch* approach is what constitutes the 'same originating cause' and whether the insured peril

> and the concurrent cause are truly concurrent, and equally efficacious, proximate causes of the loss suffered. As has been explained above, in *FCA v Arch* it was held that the relevant cover provided indemnity for government action in response to each and every occurrence of COVID-19. It was therefore straightforward to reason that the 'original cause' of the insured peril was the COVID-19 pandemic. Here, the cover responds to an 'outbreak' of COVID-19 or a specific threat of damage to persons, in each case within a defined radius. The underlying cause of government action in response to those perils is not the COVID-19 pandemic. It is the localised occurrence of the disease. Applying the Supreme Court's reasoning, the trends or circumstances that must be ignored when undertaking the counter-factual analysis are therefore at most those that arise from the specific outbreak or threat and not the broader impacts of the pandemic.

382 I would not accept this reasoning in the present case because the necessary assumption I am making is that (contrary to my conclusions) at least one of the insuring clauses is satisfied. On that basis, it must be taken that there is the relevant causal connection between circumstances within the radius and the relevant authority. If this were the case then, given the nature of the relevant action of the authority relied upon, it would follow that circumstances both within and outside of the radius had caused the authority's actions. Accordingly, the fact of all the cases of COVID-19 within NSW would be a proximate cause of the actions of the authority. The reasoning in *FCA v Arch UKSC* would then apply. As I have said, however, this kind of reasoning of Insurance Australia operates at an earlier stage in the analysis – determining whether the actions of the authority bear the required causal relationship to circumstances within the radius.

6.8.2 Basis of settlement – amounts saved

383 A further issue is the amounts saved clause, cl 10.1.3. Swiss Re contended that cl 10.1.3 requires to be deducted from the amount payable any sum saved in respect of such of the charges and expenses of the Business payable out of Gross Profit as a consequence of the Damage. According to Swiss Re this means that any sums received by way of governmental support in response to COVID-19 in the form of JobKeeper or otherwise. Swiss Re also submitted that this would be the case irrespective of cl 10.1.3 based on general principles applicable to contracts of indemnity. For this purpose Swiss Re adopted the submissions of Insurance Australia.

384 LCA Marrickville received JobKeeper payments, rental waiver from its commercial landlord, relief from its franchisor, and NSW Government grants.

385 As a general proposition, I do not accept LCA Marrickville's submission that the concept of "losses suffered" involves a false premise. By cl 9.1 Swiss Re agreed to indemnify LCA

Marrickville "in accordance with the provisions of Clause 10 (Basis of Settlement) against loss resulting from the interruption of or interference with the Business…". The concept of loss qualifies the application of cl 10. Further, cl 10.1 itself provides that the "Insured is indemnified with respect to loss of Gross Profit calculated in the following manner". As observed in *Wallaby Grip* at [30] and [31] "[i]ndemnity insurance involves payment for the loss actually suffered by the insured", and "it is necessary for an insured under a contract of indemnity insurance to prove the extent or amount of the loss claimed, but this is because the indemnity concerns only actual loss".

386 The fact that none of the integers of cl 10 refer to third party payments is beside the point. As discussed below, if those payments represent savings within cl 10.1.3 then they must be taken into account. If they represent payments reducing LCA Marrickville's loss they must also be taken into account. However, contrary to Swiss Re's submissions, this is not because any of the payments fall within "Turnover" (as the payments were not "money… 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"). It is because of the terms of cl 10.1.3 and the general law in respect of an indemnity. Nor is it because LCA Marrickville might otherwise gain a "windfall". The issue is to be decided by reference to the operative provisions of the policy and the general law applying to an indemnity not notions of windfall gains.

6.8.2.1 JobKeeper

387 LCA Marrickville accepted the summary of the Commonwealth JobKeeper program provided by Insurance Australia. That summary is set out below.

388 The Commonwealth payment known as JobKeeper was introduced as part of a package of four Acts: (a) the *Coronavirus Economic Response Package (Payments and Benefits) Act 2020* (Cth), (b) the *Coronavirus Economic Response Package Omnibus (Measures No 2) Act 2020* (Cth), (c) the *Appropriation Bill (No 5) 2019-20* (Cth), and (d) the *Appropriation Bill (No 6) 2019-20* (Cth).

389 An entity was eligible to participate if, as at 1 March 2020: (a) the entity carried on business in Australia or was a non-profit body that pursued its objectives principally in Australia, and (b) the entity's turnover has reduced by a relevant percentage ((i) 15 per cent – where the entity is a registered charity (other than certain educational institutions), (ii) 30 per cent – where the employer's aggregated turnover is less than $1 billion, or (iii) 50 per cent – where the

employer's aggregated turnover is at least $1 billion): *Coronavirus Economic Response Package (Payments and Benefits) Rules 2020* (Cth) ss 7-8.

390 To be eligible to receive the JobKeeper payment, an employer was required to pay an eligible employee a total of $1,500 (pre-tax) in each fortnight for which the employer was claiming the entitlement during the period March to September 2020. The $1,500 could include amounts that were salary sacrificed into superannuation as well as amounts dealt with in any other way on behalf of the employee as a substitute for their salary and wages (e.g. other salary packaging arrangements such as certain fringe benefits). Payments were then made to the employer monthly in arrears. During the extension phase of JobKeeper (28 September 2020 – 28 March 2021), the payment was tapered and targeted to those businesses that continued to be significantly affected by the economic downturn. Businesses were required to reassess their eligibility with reference to their actual turnover: Coronavirus Economic Response Package (Payments and Benefits) Rules ss 10, 15, 13, 7(c) and 8B.

391 The object of the Coronavirus Economic Response Package (Payments and Benefits) Act in s 3 "is to provide financial support to entities directly or indirectly affected by the Coronavirus known as COVID-19".

392 The Explanatory Memorandum that accompanied the Coronavirus Economic Response Package (Payments and Benefits) Bill 2020 and Coronavirus Economic Response Package Omnibus (Measures No. 2) Bill 2020 stated (p 12):

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

393 The Explanatory Memorandum continued at p 34:

> 2.8 Under the JobKeeper Payment, businesses significantly impacted by the Coronavirus outbreak will be able to access a subsidy from the Government to continue paying their employees. This assistance will help businesses to keep people in their jobs and re-start when the crisis is over. For employees, this means they can keep their job and earn an income – even if their hours have been cut.
>
> 2.9 The JobKeeper Payment is a temporary scheme open to businesses impacted by

> the Coronavirus. The JobKeeper Payment will also be available to the self-employed. The Government will provide $1,500 per fortnight per employee for up to six months. The JobKeeper Payment will support employers to maintain their connection to their employees. These connections will enable business to reactivate their operations quickly – without having to rehire staff – when the crisis is over.

394 I do not accept the submissions for LCA Marrickville that amounts received by it under the JobKeeper program are not within the scope of cl 10.1.3 (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).

395 LCA Marrickville said that while the purpose of JobKeeper is linked to the effect of COVID-19 it is not linked to the insured peril. I disagree. The reasoning as set out above in respect of causation and the adjustments clause must apply. Just as the proximate case of COVID-19 generally would not defeat the provision of the indemnity on the grounds of causation and the adjustments clause, the fact that the purpose of JobKeeper is to limit the adverse effects of COVID-19 does not mean that the causal requirement in cl 10.1.3 is not satisfied. LCA Marrickville received JobKeeper as a consequence of the Damage. The payments of JobKeeper would be a sum saved within the meaning of cl 10.1.3.

396 LCA Marrickville said that the purpose of JobKeeper was to assist employees, not businesses referring to the Coronavirus Economic Response Package Omnibus (Measures No. 2) Act which introduced Part 6-4C to the *Fair Work Act 2009* (Cth). Section 789GA provides "[t]he 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. LCA Marrickville submitted that these provisions demonstrate 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".

397 This submission is too reductive. The scheme was intended to assist businesses and workers. And it assisted workers by assisting businesses to pay the workers' wages. In so doing the

scheme both provided support to businesses and saved the businesses money in the form of wages that the business otherwise would have to pay. The scheme reduced losses of eligible businesses by subsidising their wages bill. While the Commonwealth may not have subjectively characterised this as compensatory scheme it had the effect and inferred purpose of compensating eligible business for losses that would otherwise be suffered – the cost of wages while revenue was suppressed by COVID-19 and all of its consequences (including authority actions).

398 The fact that the scheme does not explain its interaction with insurance policies is immaterial. That is a consequence of the objective character of the scheme and the provisions of each policy.

399 Further, LCA Marrickville cannot have it both ways. It cannot maintain, on the one hand, that the effects of COVID-19 are to be disregarded in assessing the circumstances of the business and, on the other hand, exclude the operation of cl 10.1.3 in respect of payments made to it in response to COVID-19.

400 Insurance Australia submitted that the same outcome would be reached irrespective of a provision such as cl 10.1.3 based on general principle. As a contract of insurance is a promise to indemnify loss, an insurer is only required to pay an amount by way of compensation for losses that the insured has (as a matter of fact) actually suffered. Insurance Australia submitted that under general law the issues are: (a) the intention of the person who made the voluntary payment to the insured, (b) if the person intended to compensate for the loss, the insurer is entitled to recover the payment, and (c) if the person intended to benefit the insured personally to the exclusion of the insurer, the insurer is not entitled to recover the payment.

401 This follows the reasoning in *Insurance Australia Ltd v HIH Casualty & General Insurance Ltd (in liq)* [2007] VSCA 223; (2007) 18 VR 528 (***Insurance Australia v HIH Casualty***) culminating in the conclusion at [159] that:

> 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.

402 Insurance Australia also referred to *Worth v HDI Global Specialty SE* [2021] NSWCA 185 at [179] in which the NSW Court of Appeal said:

> In *Globe Church Incorporated v Allianz Australia Insurance Ltd* (2019) 99 NSWLR 470; [2019] NSWCA 27, this Court (Bathurst CJ, Beazley P and Ward JA; Meagher

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

403 For these reasons Insurance Australia must be right that the insureds are not entitled to a "precise contractually agreed calculation" even if that calculation demonstrably exceeds the loss it has actually suffered and that the principle against double recovery applies. As Insurance Australia submitted, this is the same logic that underpins the law of subrogation (and recoupment), pursuant to which an insurer who indemnifies is entitled to receive the proceeds of an action against any third-party in respect of the same loss.

404 I accept the submissions of Insurance Australia to this effect:

> …the Commonwealth's purpose in making the 'JobKeeper' payment was to compensate businesses for losses they would otherwise suffer by continuing to pay employee wages, in circumstances where they may be suffering a downturn in business revenue. This is the very form of loss for which business interruption insurance provides cover, and the payments are therefore in the category of payments that are generally taken to reduce the amount of the indemnity.
>
> Further, there is no suggestion that 'JobKeeper' was intended to be retained by the insured to the exclusion of their insurer. The relevant explanatory materials make no mention of insurance arrangements. There is therefore no basis to assume that the legislature intended recipients of 'JobKeeper' payments to receive both those payments and business interruption insurance payments in respect of the same loss.
>
> On this basis, 'JobKeeper' payments must be taken into account for the purposes of calculating the loss recoverable. They reduce the loss suffered …and any amounts paid by the insurer in respect of those expenses would be a windfall gain….

405 I do not accept LCA Marrickville's submission that the general indemnity principle does not apply because the Basis of Settlement provisions specify how loss is to be assessed. Further, while the Commonwealth's purposes were multiple, it must be accepted that one if its purposes was, as Insurance Australia submitted, to enable eligible businesses to save on the cost of wages, thereby achieving its objective of keeping eligible businesses afloat and maintaining the employment relationship between the businesses and their staff. The fact of multiple purposes does not prevent the characterisation of the purpose of the payment as intended to compensate for the loss.

6.8.2.2 NSW Government grants

406 LCA Marrickville received payments under grants from the New South Wales State Government in respect of COVID-19, which took the form of a $10,000 grant and a $3,000 grant under s 5.7 of the *Government Sector Finance Act 2018* (NSW), being the "Small Business COVID-19 Support Grant" and the "Small Business COVID-19 Recovery Grant".

407 Section 5.7(1) of the Government Sector Finance Act provides that a Minister may, if satisfied that there are special circumstances or circumstances of a kind prescribed by the regulations, authorise an amount to be paid to a person on behalf of the State (an "act of grace payment") under this section even though the payment is not otherwise authorised by or under law, or required to meet an obligation.

408 While LCA Marrickville had regard to the guidelines for eligibility for determining whether these payments were intended to reduce its loss, in my view s 5.7 is determinative. Whatever the guidelines regulating eligibility these are act of grace payments. I am unable to accept that the NSW Government intended these payments to be other than acts of grace, in the sense of merciful beneficences to eligible businesses by the NSW Government. On this basis, I could not conclude that the NSW Government intended these payments to be taken into account by way of reduction of the insured's loss under an applicable contract of indemnity. Rather, these payments were received independently of the right of redress under the policy. That is their essential character as act of grace payments. Nor does the payment represent an amount saved within the meaning of cl 10.1.3. As a result, I do not accept that an assessment of LCA Marrickville's loss (if one of the insuring clauses is applicable) would have to allow for these amounts.

6.8.2.3 Rental waiver from landlord

409 LCA Marrickville received rental relief in accordance with the "National Cabinet mandatory code of conduct—SME commercial leasing principles during COVID-19". LCA Marrickville submitted that "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), but not if the other clauses respond".

410 I disagree. Consistent with the reasoning above, LCA Marrickville cannot have it both ways. Both under cl 10.1.3 and general law LCA Marrickville must account for the amounts it saved

by reason of the fact that it did not pay rent or the full amount of rent it was required to pay. It does not matter that the rental relief was caused by COVID-19 rather than the insured peril – they arise from the same underlying cause. The same underlying cause if essential to the Damage. On that basis, the rental relief cannot be disregarded in assessing LCA Marrickville's loss (assuming one of the insuring clauses responds, contrary to my conclusions).

6.8.2.4 Franchisor relief

411 LCA Marrickville received relief from its franchisor, being an $8,500 reduction from March 2020 in royalty fees, and a $9,000 reprieve on management fees in April and May 2020.

412 I am not persuaded that a letter from the franchisor after the event on 27 March 2020 is relevant.

413 I agree with LCA Marrickville, however, that these cost reductions were not provided by the franchisor to compensate for LCA Marrickville's loss due to COVID-19. From the nature of the payments it must be inferred that the discount on royalties was to assist the business to survive and the discount on management fees was to allow for the reduction in required services from the franchisor and to assist the business to survive. If cl 10.1.3 were not part of the policy I would not conclude that LCA Marrickville would need to offset these savings against any losses. However, cl 10.1.3 is part of the policy. Both reductions are savings which, consistent with the approach taken above, were able to be made because of COVID-19 which would be a central element of the insured peril if one of the insuring clauses applied. On that basis, cl 10.1.3 would require these savings to be taken into account in assessing LCA Marrickville's loss.

6.9 Interest

414 Section 57(1) of the Insurance Contracts Act provides that where an insurer is liable to a person an amount under a contract of insurance, the insurer is also liable to pay interest on the amount to that person in accordance with s 57. By s 57(2) the period in respect of which interest is payable is the period commencing on the day as from which it was unreasonable for the insurer to have withheld payment of the amount and ending on, in effect, payment being made.

415 If, contrary to my conclusions, Swiss Re was liable to pay any amount to LCA Marrickville under the policy then I do not accept that it was unreasonable for Swiss Re to withhold payment from the date on which it denied the claim. As Swiss Re submitted: (a) the case is part of a test case proceeding with the co-operation of insurers, insureds, ACFA and other regulators, (b) AFCA agreed to this proceeding being dealt with as a test case, (c) LCA Marrickville has

been providing material to supplement and, in part, has changed the basis for its claim as part of this proceeding, and (d) it was not unreasonable for Swiss Re to deny cover in the circumstances which involved sufficient complexity to become the subject of the test case and would not be unreasonable for it to await the outcome of the test case (including any final determination on appeal).

6.10 Answers to questions – causation etc

416 These questions are also not well adapted to the actual operation of the clauses of the policy. To the extent possible I answer the questions below.

417 **7. Causation, Adjustment and Basis of Settlement**

If clause 9.1.2 of the Policy responds, on the proper construction of the adjustment clause (being the clause in the last sub-paragraph of Clause 8 on p. 29 of the Policy):

(a) Was there any interruption of or interference with LCA [Marrickville]'s Business in consequence of the relevant insured perils in the Disease Clause, the Expansion Clause, the Catastrophe Clause or the Prevention of Access Clause?

While the question does not arise I note that, if I am wrong about the proper construction of any of the insuring clauses, it should follow that there was interruption of or interference with LCA Marrickville's Business in consequence of the relevant insured perils in the applicable clause. The fact that LCA Marrickville may also have suffered loss generally from the existence and risk of COVID-19 in NSW would not mean that the action of the authority would not also be a proximate cause of LCA Marrickville's on the facts.

(b) What adjustment of the Rate of Gross Profit, Standard Turnover, Standard Gross Revenue, Standard Gross Rental and Rate of Payroll is necessary to provide for the "trend" of the Business, "variations" affecting the Business and/or "other circumstances" affecting the Business.

While the question does not arise I note that, if I am wrong about the proper construction of any of the insuring clauses, the adjustments clause does not require any adjustment to be made for the existence and risk of COVID-19 in NSW as it is an essential cause of the Damage.

(c) How, if at all, does adjustment take into account the effect that COVID-19 had on the Business (other than the effect of the "Authority Response–LCA Marrickville").

While the question does not arise I note that, if I am wrong about the proper construction of any of the insuring clauses, the adjustments clause does not require any adjustment to be made for the existence and risk of COVID-19 in NSW as it is an essential cause of the Damage.

(d) To what extent should account be made for grants, subsidies, abatements or other benefits received by LCA Marrickville when assessing its entitlement to be indemnified for its loss (if any) including but not limited to JobKeeper, other payments made to it by a Commonwealth or State Government and rental relief or rebates?

While the question does not arise I note that, if I am wrong about the proper construction of any of the insuring clauses, LCA Marrickville, either under the general law or cl 10.1.3 would have to account for payments received under the JobKeeper scheme, by way of rental relief, and franchisor relief. It would not have to account for the act of grace payments received from the NSW Government.

If clause 9.1.2 of the Policy responds, on the proper construction of the Basis of Settlement clause (clause 10):1

(e) What is the date of the 'Damage'?

While the question does not arise I note that, if I am wrong about the proper construction of any of the insuring clauses, the date of the Damage would be the date of the first action by an authority satisfying an insuring clause, which would be 26 March 2020.

(f) {LCA Marrickville does not agree that issue (f) should be included in this test case because the factual premise for this issue will be the subject of a separate loss assessment process} To the extent interruption of, or interference with, LCA Marrickville's business was caused by different matters comprising the "Authority Response-LCA Marrickville", to what extent is the resulting loss (if any) to be aggregated for the purposes of applying a limit, deductible and any other conditions of cover?

Insufficient submissions were made to enable this issue to be answered.

418 **8. Interest**

(a) Is interest payable by Swiss Re pursuant to section 57 of the ICA?

No.

(b) If yes to paragraph (a), from what date is any such interest payable?

This does not arise. If it did arise, interest would be payable from the date of final determination of this proceeding is Swiss Re is liable to pay under the policy.

6.11 Conclusions

419 The policy does not apply to the circumstances of LCA Marrickville's claims. This does not result from inadequate evidence, but from the proper construction of the relevant clauses of the policy. Specifically:

(1) the exclusion in cl 9.1.2.1 (any disease(s) declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015) applies so that cl 9.1.2.1 cannot be engaged;

(2) if the conclusion in (1) is wrong, in any event the relevant orders of the competent public authority were not as a result of an outbreak of a notifiable human infectious or contagious disease or bacterial infection at the Situation or within the radius or as a result of any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation or within the radius, so cl 9.1.2.1 is not engaged;

(3) the premises were closed by order of a competent public authority from 26 March 2020 until 1 June 2020;

(4) properly construed cll 9.1.2.5 and 9.1.2.6 do not apply to actions of an authority in response to a disease which is exclusively regulated by cll 9.1.2.1 and 9.1.2.4 (as well as cl 9.1.2.3);

(5) if the conclusion in (4) is wrong, in any event the orders do not constitute the action of a civil authority during a conflagration or other catastrophe for the purpose of retarding same as required by cl 9.1.2.5; and

(6) if the conclusion in (4) is wrong, the orders do constitute the action of any lawful authority attempting to avoid or diminish risk to life within 5 kilometres of such Situation which: (a) in the case of the 26 March 2020 order, prevents and hinders the use of or access to the Situation, and (b) in the case of the 1 June 2020 and 13 June 2020 hinders the use of the premises.

420 If my conclusions that the insuring clauses are not engaged is wrong, then:

(1) the order of 26 March 2020 would be a proximate cause of some loss;

(2) the other orders may be the proximate cause of some loss;

(3) the fact that the existence and risk of COVID-19 in NSW is also likely to have been a proximate cause of the same loss is immaterial as the causation requirement will be satisfied provided that the orders are also the proximate cause of loss;

(4) the effects of the existence and risk of COVID-19 in NSW on the business do not have to be taken into account as a circumstance that would otherwise have affected the business under the adjustments clause; and

(5) the savings resulting from JobKeeper, rental waivers and franchise cost relief have to be accounted for under cl 10.1.3 and otherwise under the loss provisions.

421 As further evidence cannot affect these conclusions, subject to any observations of the parties, I would make the declaration Swiss Re sought as follows:

> Declare that the respondent is not entitled to indemnity under the policy of insurance P23089.04-00 issued on or about 17 July 2019 in response to the claim under the policy for indemnity first made in July 2020.

422 I would also dismiss the respondent's cross-claim.

7. NSD133/2021: INSURANCE AUSTRALIA V MERIDIAN TRAVEL

7.1 Agreed background

423 Meridian Travel is the insured under a "Steadfast Office Pack Policy" 15T4227893 placed with Insurance Australia Ltd trading as CGU Insurance (**CGU**) (**Meridian Travel policy**).

424 The Meridian Travel policy comprises: (a) a renewal schedule issued on 17 February 2020, and (b) the Steadfast Office Pack Policy wording.

425 The Meridian Travel policy was issued on 17 February 2020 for the period 22 February 2020 to 22 February 2021 4:00pm.

426 Meridian Travel is located at 159 Burgundy Street, Heidelberg, Victoria, 3084 (**Meridian premises**).

427 From 13 April 2020 to 11 May 2020, Stay at Home Directions (No 4) to (No 6) entered into force and extended the First Victorian Lockdown to 31 May 2020. On 24 May 2020, the Stay at Home Directions (No 7) entered into force and ended the First Victorian Lockdown at 11:59pm on 31 May 2020.

428 On 8 July 2020, the Area Directions (No 3) entered into force.

429 Between 10 July 2020 and 18 October 2020, the Stay at Home Directions (Restricted Areas) (No 2) to (No 19) and Area Restrictions (No 4) to (No 9) entered into force.

430 On 12 February 2021, the Stay Safe Directions (Victoria) (No 14) entered into force.

431 Since 25 March 2020, Meridian Travel's customers have been unable to leave Australia without first obtaining an exemption under the *Biosecurity (Listed Human Diseases) Amendment Determination 2020*.

432 On 15 July 2020, Meridian Travel made a claim under the Meridian Travel policy via a telephone call to CGU.

433 On 11 August 2020, CGU denied indemnity for Meridian Travel's claim.

434 On 18 August 2020, Meridian telephoned CGU and requested that CGU's decision to deny indemnity be reviewed by CGU's customer relations team.

435 On 18 August 2020, Meridian received an email from CGU confirming that Meridian Travel's claim would be reviewed by CGU's customer relations team.

436 On 28 August 2020, CGU upheld its decision to deny indemnity for Meridian Travel's claim.

437 On 9 September 2020, Meridian Travel lodged a complaint against CGU with AFCA.

7.2 Policy provisions

438 The key provisions of the Meridian Travel policy are below (noting that cl 8 is substituted by the policy schedule for cl 2, there being no dispute that the "Additional Benefit 8" in the policy schedule is to be read as a reference to "Additional Benefit 2").

> **General definitions**
>
> …
>
> **Business** means:
>
> all activities stated in the Schedule including:
>
> a) the ownership and occupation of the Business Premises by the Insured;
>
> b) the provision of any sponsorship, charitable donations, or attendance at any charitable event or gala;
>
> c) canteen, social, sports, welfare, child care services or other activities for the Insured's employees;
>
> d) first aid, fire and ambulance services provided by the Insured for the Insured's own internal purposes; and

e) private work undertaken by employees for any director, partner, officer or executive of the Insured.

…

Damage (with 'Damaged' having a corresponding meaning) means physical loss, damage or destruction.

…

Property Insured means buildings, contents, specified items, stock, total contents, tobacco, cigars, cigarettes, and items listed on the Schedule and used in Your Business.

…

Situation means the locations set out as the situation in the Schedule.

'**You**', '**Your**', '**Yours**', '**Insured**' means the person or entity named in the Schedule as the insured.

…

Section 1

Property

…

Section 2

Business Interruption

…

Cover

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:

   …

2. Property at the Situation, used by you but not owned by You:

   …

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

Definitions

…

Adjustment means adjustment as necessary to provide for the trend of the Business and variations in, or other circumstances affecting, the Business, either before or after the date of occurrence of the Damage, or which would have affected the Business had the Damage not occurred, so that the figures thus adjusted represent, as nearly as may

be reasonably practicable, the results that, but for the Damage, would have been obtained during the relative period after the Damage.

…

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

…

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.

…

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. (Court Book, A.0108)

…

Settlement of claims

…

Item 9 – Gross revenue

This item is limited to loss of 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.

…

Additional benefits

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 the section which is applicable to You) for:

…

e) Item 9 Gross Revenue,

resulting from interruption or interference with Your Business as a result of Damage

occurring during the Period of insurance to, or as a direct result of:

…

2. Murder, Suicide or Disease

the occurrence of any of the circumstances set out in this Additional Benefit 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.

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

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

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

(ii) bomb threat; or

(iii) vermin or pests at the Situation; or

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

(e) Shark or crocodile attack occurring within a 20-kilometre radius of the Business Premises during the Period of Insurance.

Cover under Additional Benefits 2(c) and 2(d)(i) 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.

439 The policy schedule identifies the business as "Travel Agency Services (Excluding Tour Operators)". It identifies the Situation as 159 Burgundy Road, Heidelberg, Victoria. It is agreed that the fact that this incorrectly refers to "Road" instead of "Street" is immaterial.

7.3 Introductory comments

440 Insurance Australia relied on s 61A of the Property Law Act to read the exclusion as applying to COVID-19 as a listed human disease under the Biosecurity Act. For the reasons already given, I have rejected that argument. Accordingly, the exclusion to cl 8(c) and 8(d)(1) does not apply.

441 The parties referred to cl 8(c) as the disease clause or extension. They referred to cl 8(d) as the hybrid extension. It will be noted that cl 8(c) does not refer to any action by an authority. Clause 8(c) concerns the objective fact of an outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation. Observations made elsewhere in these reasons about provisions which depend on the action of the authority being a result of some

identified circumstance (such as an outbreak of a disease), and not as a result of the objective fact of an outbreak of a disease, are inapplicable to cl 8(c). However, as explained below, the interruption or interference with the business must be a result of the fact of the outbreak as specified. That causal requirement is not satisfied by subsequent evidence proving the existence of an outbreak within the 20 kilometre radius. It is proved by the contemporaneous circumstances as they existed at the time of the alleged interruption or interference from which the loss claimed arises.

442 The occurrence of the outbreak as specified in cl 8(c) is "deemed to be Damage to Property used by You at the Situation". This is a reference back to item 2 of the Cover section (2. Property at the Situation, used by you but not owned by You). Accordingly, the relevant condition to cover is "if the Business carried on by You is interrupted or interfered with as a result of [the occurrence of the circumstance set out in cl 8(c)] occurring during the Period of Insurance …We will… indemnify You in respect of the loss arising from such interruption or interference".

443 The same logic applies to cl 8(d) except that clause involves closure or evacuation of Your Business by order of a government, public or statutory authority consequent upon one of the specified matters. Consistent with my reasoning elsewhere, the circumstance in cl 8(d)(1) (the discovery of an organism likely to result in a human infectious or contagious disease at the Situation) are concerned not with whether the authority is right or wrong about the organism or its likelihood of resulting in infectious or contagious disease at the Situation, but with the character of the authority's actions - that is, whether the authority itself made or gave the order closing or evacuating the business consequent upon the discovery of an organism likely to result in a human infectious or contagious disease at the Situation. As such, again, subsequent evidence of the existence of such an organism at the Situation not known to the authority at the time it made the order is immaterial.

444 Under cl 8(c) the outbreak must occur within the 20 kilometre radius of the Situation.

445 Under cl 8(d)(1) the requirement is not an order consequent upon the discovery of an organism at the Situation. The requirement is an order consequent upon the discovery of an organism [anywhere] likely to result in a human infectious or contagious disease at the Situation. This is because the words "at the Situation", as a matter of ordinary English, qualify the whole of the preceding phrase and not the words "discovery of an organism".

446 Meridian Travel operated a travel agency business. 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.

447 Meridian Travel relied on and summarised the effect of the following instruments of authorities for the purposes of cl 8(d)(1):

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

(2) the March 2020 to May 2020 *Stay at Home Directions*. These directions imposed lockdowns in Victoria for the period between 30 March 2020 and 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;

(3) the July 2020 to October 2020 *Stay at Home (Restricted Areas) Directions* and October 2020 *Stay Safe Directions (Melbourne)*. 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 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; and

(4) the February 2021 *Stay Safe Directions*. These directions imposed lockdowns in Victoria for the period between 12 and 17 February 2021 in the same manner as the earlier directions.

448 The Overseas Travel Ban was made by the Commonwealth Health Minister. The Victorian directions were made by the Victoria Deputy Chief Health Officer under s 200(1)(d) of the *Public Health and Wellbeing Act 2008* (Vic). There is no dispute that both are a government, public or statutory authority as required by cl 8(d)(1).

7.4 Clause 8(c) – the disease clause

449 For the purpose of this proceeding, Insurance Australia accepted that there was an outbreak of COVID-19 within 20 kilometres of Meridian Travel's premises by no later than 30 March 2020, saying that the real issue is whether this was the proximate cause of Meridian Travel's loss. This concession is based on the agreed facts which at [60] show that a radius of 20 kilometres from Meridian Travel's premises captures the majority of metropolitan Melbourne. Further, at [63] the agreed facts record that there were approximately 29 cases attributed to the local government areas wholly within the radius and 38 cases attributed to the postcodes wholly within the radius. Based on this data, these numbers then increased exponentially from around 23 March 2020.

450 Meridian Travel contended that there was an outbreak of COVID-19 within the radius by 1 March 2020. Paragraph 63 does not prove that there was an outbreak of COVID-19 within the radius by 1 March 2020. I consider that "outbreak" takes the meaning already identified above. That is, contrary to Insurance Australia's arguments, a single case of a person with and capable of communicating COVID-19 in the community and within the radius is an outbreak of COVID-19. Paragraph 63 of the agreed facts does not prove that the 9 cases of COVID-19 in Victoria (five postcodes wholly within the radius) were in the community and within the radius.

451 Based on the evidence I am unable to find that there was an outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation before 30 March 2020 (a finding made possible because of Insurance Australia's concession). If anything depends on the difference between 1 and 30 March 2020 as the start of the outbreak within the meaning of cl 8(c) I will make that clear.

452 Otherwise, I would not infer from the evidence that the outbreak ceased by February 2021 as Insurance Australia proposed. If anything depends on the date at which the outbreak ended I will also make that clear.

453 For these reasons, cl 8(c) applies on the facts of this case from 30 March 2020 to at least the beginning of February 2021.

7.5 Clause 8(d)(1) – the hybrid clause

454 For the reasons already given, I do not accept that the organism must be discovered at the Situation. The words "at the Situation" qualify everything that precedes them which includes the likelihood of the discovered organism resulting in a human infectious or contagious disease at the Situation. They do not qualify the discovery of the organism itself. There is a fallacy apparent in Insurance Australia's submission that:

> …the proper construction of the phrase is that the thing that must be discovered 'at the Situation' is 'an organism likely to result in a human infectious or contagious disease'. That is, the organism itself must be discovered at Meridian's premises.

455 The submission inverts the wording so the phrase "at the Situation" appears at the beginning. This is not how the clause is worded and the change fundamentally affects the natural reading of the expression. As Meridian Travel submitted:

(1) 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;

(2) Insurance Australia'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;

(3) 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;

(4) the limitation in cl 8(d)(2) and (3) to the Situation does not give rise to any incongruity with cl 8(d)(1) which deals with a different subject-matter;

(5) there is no problem with the meaning of "discovery" which means simply "finding" or "ascertaining". It can be inferred that SARS-CoV-2 has been "discovered" at a location if a person with SARS-CoV-2 is found or ascertained to have been at that location during an infectious period. The issue is one of the order being consequent upon the composite phrase being satisfied;

(6) the disease clause, cl 8(c), does not indicate to the contrary. Clause 8(c) 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. 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 (as, I note, there is no incongruity between the two); and

(7) the counterfactual inherent in the concept of "likely to" directs attention to what is likely given the organism in its natural state, uncontrolled by government intervention.

456 It does not matter that there is a further requirement that the order be consequent on the discovery of an organism likely to result in disease at the situation. Insurance Australia rhetorically asked "then what is the geographical limit of the clause? Could it be triggered if the organism was discovered at the other end of the street? In another suburb? In another city? In another country? The effect of Meridian's construction is that there will almost certainly be a debate in each case as to whether the relevant order is in response to a discovery that was 'likely' to result in disease at the Situation".

457 This overlooks the fact that the requirement is for an order of the requisite kind (that is, involving Closure or evacuation of Your Business) resulting from discovery of an organism involving that likelihood. The issue is effectively resolved by the action of the authority. If it considers the likelihood requirement satisfied, it may issue the order. If it does not, it will not issue the order. It is not for the parties to collaterally challenge the order or the authority's basis for it.

458 Otherwise, it is agreed that severe acute respiratory syndrome coronavirus 2 (SARS-CoV-2), being the infective agent that causes COVID-19, is an "organism": agreed facts at [2].

459 The required closure by order of the authority is closure of the business (not the premises from which the business is conducted, in contrast, for example, to the Taphouse policy below). The business is the "Travel Agency Services (Excluding Tour Operators)" identified in the policy schedule conducted from the Situation. It must not be overlooked, however, that the business is defined to include "all activities stated in the Schedule including… the ownership and occupation of the Business Premises by the Insured".

460 Insurance Australia accepted that the closure or evacuation of physical business premises may constitute a closure or evacuation of the business in certain circumstances, but also submitted that in the event of closure of the premises it would need to be proved that the "business is unable to continue at different premises". Given that the business includes the occupation of

the business premises I would not go so far. I would accept that closure of the business premises may or may not involve closure of the business depending on the nature of the business and the premises required for its operation.

461 As to the requirement of closure of the business, I consider that the clause covers the closure of a business in part or whole. This is reinforced by the fact that the definition of business includes all activities stated in the Schedule. For example, assume the schedule identified the business as Travel Agency Services (Including Tour Operators). In that event, an order requiring closure of the Tour Operators part of the business would be a closure of that part of the Business. As a matter of ordinary English the business includes parts of the business. If a part of the business is closed this may involve a closure of the business satisfying cl 8(d)(1). In the case of a business identified as Travel Agency Services (Including Tour Operators), I consider that an order requiring closure of the Tour Operators part of the business would be a closure of that part of the business in a sense which could satisfy cl 8(d)(1). The same would not be true in respect of, for example, a single indivisible business such as a newsagency. An order preventing the sale of one product line at the newsagency, such as cigarettes, could not constitute closure of the business in part or whole. The operation of the requirement of closure, accordingly, depends on the facts.

462 The Overseas Travel Ban prevented an Australian citizen or permanent resident from leaving Australian territory as a passenger on an outgoing aircraft or vessel without an exemption: cl 5. It also prevented an operator of an outgoing aircraft or vessel from leaving Australian territory with any person who is an Australian citizen or permanent resident on board unless that person had an exemption: cl 6. The Overseas Travel Ban came into effect on 25 March 2020.

463 The Overseas Travel Ban did not close any part of Meridian Travel's business. It imposed obligations on Australian citizens and permanent residents and on operators of an outgoing aircraft or vessel. It did not impose any obligations on Meridian Travel. It had the consequence that an Australian citizen or permanent resident would not use Meridian Travel to make international travel bookings (unless they had an exemption) but that does not mean the Overseas Travel Ban closed any part of Meridian Travel's business. The fact that international bookings had comprised approximately 90% of Meridian Travel's revenue and the Overseas Travel Ban had the effect of curtailing or destroying Meridian Travel's business does not mean that the business, or part of it, was closed by an order as required by cl 8(d)(1). This is not affected by the evidence of the director and owner of Meridian Travel that customers were

unable to make bookings. An inability to make bookings (assuming inability, in contrast to the fact that customers would not make bookings unless they had an exemption) is not the same as the closure of the part or the whole of Meridian Travel's business. Nor is it affected by evidence of the director and owner that as a result of all of the orders relied upon Meridian Travel shut its premises on 8 July 2020. As the director and owner also said, Meridian Travel's employees started working from home on that day. In other words, Meridian Travel's business continued to remain open and did not close.

464 The fact that demand for international travel from customers in Australia may be inferred to have disappeared as a result of the Overseas Travel Ban does not satisfy the requirement for closure of a business by order of an authority in cl 8(d)(1). As Insurance Australia pointed out Meridian Travel continued to operate its business after the Overseas Travel Ban; for example: (a) on 16 May 2020, Meridian Travel promoted a virtual information session via Facebook which focused on Australian Coach Touring and invited participants to: "Explore 4-22 day tours within Australia & over the ditch in beautiful New Zealand", (b) on 1 September 2020, Meridian Travel promoted a flight over Antarctica on the Qantas 787 Dreamliner via Facebook and directed customers to contact Meridian Travel for more information, and (c) on 23 October 2020, Meridian Travel promoted Chimu Adventure charter flights via Facebook noting: "These flights do not cross state or international borders so no quarantine required!".

465 The Overseas Travel Ban, it may be inferred, would have had a devastating effect on Meridian Travel's revenue. What cannot be concluded is that the Overseas Travel Ban involved closure of the business by order of an authority.

466 Similarly, the lockdown directions did not close the whole or part of Meridian Travel's business. The evidence of the director and owner that as a result of all of the orders relied upon Meridian Travel shut its premises on 8 July 2020 does not prove that by the lockdown directions Meridian Travel's business was closed in whole or part. The fact that the lockdown directions may be inferred to have undermined demand for that part of Meridian Travel's business involving domestic travel (because they prevented Victorians from leaving their usual place of residence other than in limited circumstances) does not mean that by the directions a part or the whole of Meridian Travel's business was closed.

467 The operation of the lockdown directions may be contrasted with the operation of the 23 May 2020 *Non-Essential Business Closure Direction* (Vic). That direction required that certain businesses "must not operate" in Victoria between 23 March and 13 April 2020. A travel

agency was not such a business. The lockdown directions, in contrast, were not directed to the operation of any business. They were directed to people in Victoria. They provided that people in Victoria must not leave the premises where they ordinarily reside other than for limited reasons. People could leave their premises for work but only if it was not reasonably practicable for the person to work from their premises.

468 It is not possible to conclude that Meridian Travel's business, in whole or part, was closed by any of the lockdown directions.

469 Clause 8(d)(1) also requires that the order of the authority be consequent upon the discovery of an organism likely to result in a human infectious or contagious disease at the Situation.

470 If I am wrong that the qualifier "at the Situation" qualifies the likelihood of the disease and not the discovery of the organism, then it is common ground that there was in fact no discovery of COVID-19 or SARS-CoV-2 at Meridian Travel's premises. More to the point it could never be rationally concluded that any of the orders were consequent upon such discovery.

471 If I am right that the qualifier "at the Situation" qualifies the likelihood of the disease and not the discovery of the organism then the issue is whether or not the orders (or any of them) were consequent upon the discovery of an organism likely to result in a human infectious or contagious disease at the Situation. In this regard, there can be no doubt that all of the Victorian directions were orders consequent upon the discovery of the SARS-CoV-2 in Australia (the International Travel Ban) and in Victoria (the lockdown directions).

472 To my mind, however, the notion that the Overseas Travel Ban was consequent upon the discovery of an organism likely to result in a human infectious or contagious disease at the Situation is nonsensical. The Overseas Travel Ban was made under s 477 of the Biosecurity Act which required the Health Minister to be satisfied (relevantly) that the requirement is necessary to prevent or control the entry of the declaration listed human disease into Australian territory or a part of Australian territory or the emergence, establishment or spread of the declaration listed human disease in Australian territory or a part of Australian territory. The fact that it may be inferred that the Health Minister was trying to prevent the entry of COVID-19 and the emergence, establishment or spread of COVID-19 to any part of Australian territory does not mean that the Overseas Travel Ban was consequent upon the discovery of an organism likely to result in a human infectious or contagious disease at each and every part of Australia including the Situation or at the Situation. The discovery of an organism likely to result in a

human infectious or contagious disease at the Situation must be a cause of the order in the sense discussed elsewhere in these reasons. I cannot infer that the likelihood of COVID-19 at the Situation had anything to do with the Overseas Travel Ban.

473 I do not accept Meridian Travel's submission to the contrary that the terms of s 477(1) of the Biosecurity Act and the explanatory statement that the Overseas Travel Ban "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" mean that the Overseas Travel Ban:

> …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.

474 The fallacy is causal in nature. It is that the Health Minister's undoubted concern that COVID-19 may spread across or throughout Australia (logically, including the Situation) means that a cause of the order was the likelihood of COVID-19 at the Situation. That likelihood could not be inferred to have been a cause of the Overseas Travel Ban. This is not merely because the "but for" test would not be satisfied (that is, would the Overseas Travel Ban have been made but for the likelihood of COVID-19 at the Situation? Answer, yes). It is because I am unable to accept that a real or even any kind of cause of the Overseas Travel Ban was the Health Minister considering that otherwise, it was likely that COVID-19 would occur: (a) at each and every part of Australia, which would logically include the Situation, or (b) at the Situation. The focus of cl 8(d)(1) is not about the authority acting because of the risk that COVID-19 presents to people. It is different from clauses of that type. Clause 8(d)(1) focuses on the fact of discovery of an organism and the likelihood of disease therefrom at the Situation.

475 As to the lockdown directions, the same type of reasoning applies. The context of those orders was the concern of the authority about a risk to the health of every Victorian from COVID-19 as evidenced by:

(1) s 198 of the Public Health and Wellbeing Act which permits the Minister to "declare a state of emergency arising out of any circumstance causing a serious risk to public health";

(2) s 199 of the Public Health and Wellbeing Act which 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 (s 200(1)(b)) and to give any other direction that the authorised officer considers is reasonably necessary to protect public health (s 200(1)(d)). These were the powers pursuant to which the lockdown directions were made; and

(3) the content of the directions as, on each occasion a lockdown direction was made, the relevant direction provided that:

(a) its purpose was to address the serious public health risk "posed to Victoria";

(b) 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

(c) 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").

476 The problem is that I am unable to accept that any of the directions were consequent upon the discovery of an organism likely to result in a human infectious or contagious disease at each and every part of Australia including the Situation. As such, it does not follow that the directions expose an assumption that "uncontrolled by government intervention, the organism is ultimately likely to result in the spread of COVID-19 to places including the Situation".

477 As this is the conclusion which follows from the terms of the instruments and their contemporaneous context, for the reasons already given, I do not accept that evidence of the organism and its spread around the Situation is material. There is no suggestion that such information was a cause of any of the orders of the authorities.

478 For these reasons, cl 8(d)(1) is not satisfied and would not be satisfied even if further evidence about the location and prevalence of COVID-19 near the Situation became available.

7.6 Causation and adjustment

479 The causal requirement for cl 8(c) is the outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation (deemed to be Damage) occurring during the Period of Insurance and as a direct result of which the business is interrupted or

interfered with and from which loss arises – in which event the insurer will indemnify the insured in accordance with the settlement of claims clause.

480 The "direct result" requirement, as Insurance Australia correctly accepted, involves the concept of proximate cause.

481 Given the nature of Meridian Travel's business, without other evidence, I am unable to infer that the outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation was a proximate or any other kind of cause of Meridian Travel's loss. This is because I do not know what part of Meridian Travel's business was from walk-ins and what part was from telephone or internet contact. Meridian Travel's claim could not extend to any loss from that part of its business involving sales by telephone or internet contact. This is because, for that part of the business, the reasoning in *FCA v Arch UKSC* at [281]-[286] would apply. That is, any assessment of loss must be confined to the "those activities of the business which were interrupted by the operation of the insured peril". That part of the business involving sales of overseas and domestic travel by telephone or internet contact could not have been interrupted by the insured peril under cl 8(c). Given the lack of focus on this issue in the hearing I would be prepared to hear the parties further about it if appropriate.

482 Further, 90% of Meridian Travel's business was international travel. The Overseas Travel Ban must have been a, if not the sole, proximate cause of Meridian Travel's loss of revenue from international travel bookings. Similarly, to the extent that 10% of Meridian Travel's business was domestic travel, the lockdown directions must have been a, if not the sole, proximate cause of Meridian Travel's loss from domestic travel bookings.

483 The critical issue here is the nature of Meridian Travel's business. Assume all the other circumstances were the same but Meridian Travel's business was a typical suburban restaurant drawing much of its custom from within the 20 kilometre radius. In that event the outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation may well be a proximate cause of loss even if other proximate causes of loss also existed (such as stay at home orders arising from the same underlying cause). In those circumstances the relevance and commercial sense of the reasoning about causation and trends in *FCA v Arch UKSC* is best exposed. Assume also the making of a stay at home order as a result of the outbreak of the human infectious or contagious disease occurring within a 20 kilometre radius of the Situation. The reasoning in *FCA v Arch UKSC* is that, construed commercially as it must be, the parties could not have intended that consequences of the same disease affecting the

same area (such as a stay at home order) would be excluded from cover. The nature of the disease as a pandemic or not would not be relevant in this example provided that there was an outbreak of the disease within the 20 kilometre radius. That is, the fact that the outbreak might extend well beyond the 20 kilometre radius, in this example, is immaterial. This is because there is no requirement for anything other than the outbreak of the disease within the 20 kilometre radius.

484 I find this aspect of the reasoning in *FCA v Arch UKSC* persuasive because I agree that, in the example given, the commercial unreasonableness of the contrary result is clear. To exclude cover where the insured peril is a proximate cause of the loss merely because another proximate cause of loss arising from the very same circumstances exists makes no sense provided that the other proximate cause of loss is not itself clearly excluded from cover.

485 This exposes a further separate issue. Assume Meridian Travel can prove that the insured peril in cl 8(c) was a proximate cause of some loss. The issue which causes me concern is whether it could be said, consistently with the logic of the reasoning about causation and trends in *FCA v Arch UKSC*, that various actions of the Commonwealth Government were caused by the same underlying fortuity as the insured peril. I have in mind, in particular, the Overseas Travel Ban and the ban on cruise ships from foreign ports visiting Australia.

486 I have no conceptual difficulty with the proposition that an action, such as a State-wide closing or restriction on certain business premises operating, or a State-wide stay at home requirement because of the presence of COVID-19 in the State and the associated risk of the spread of COVID-19 throughout the State, involves the same underlying cause as the effects otherwise of the fact of the presence of COVID-19 in the State and the associated risk of the spread of COVID-19 throughout the State (including the area within the radius or at the insured situation). This is because the underlying cause is the presence or risk of COVID-19 in the State in all cases (including the area within the radius or at the insured situation). I find the reasoning in *FCA v Arch UKSC* about causation and trends clauses (subject, of course, to the particular wording of the trends clause) persuasive in such circumstances because it seems artificial, contrived and commercially irrational to attempt to distinguish between the insured and uninsured perils.

487 I do have a conceptual difficulty with the application of this form of reasoning to Commonwealth actions such as the Overseas Travel Ban and the ban on cruise ships from foreign ports visiting Australia. These actions are focused not on the presence of COVID-19 in

the State and the associated risk of the spread of COVID-19 throughout the State (including the area within the radius or at the insured situation). They are focused on the presence of COVID-19 overseas and the risk that an overseas traveller coming to Australia may bring COVID-19 into any part of Australia. While any part of Australia includes the area within the radius of, or at, the insured Situation, there is a real difference between such action and State-wide action involving closing, or placing restrictions on, certain businesses and/or stay at home requirements.

488 The underlying fortuity in the case of the Commonwealth action is not the same as the underlying fortuity of the presence of COVID-19 in the State and the associated risk of the spread of COVID-19 throughout the State (including the area within the radius or at the insured Situation). The underlying fortuities involve different subject-matter (the presence of COVID-19 overseas and the risk that an overseas traveller coming to Australia may bring COVID-19 into Australia). The fortuity underlying the Commonwealth actions involves only the most tenuous causal connection with the requirement of the insured peril for an outbreak of disease within the radius.

489 In these circumstances to identify the underlying fortuity as simply "COVID-19 generally", in my view, is logically unsatisfactory. The reasoning in *FCA v Arch UKSC* about the same underlying fortuity in the context of determining the cause of loss and the application of the trends clauses to loss, to my mind, is compelling because it is based on the fact that the insured and uninsured perils can truly be said to arise from the same underlying cause. Once the underlying causes become distant in any way from the insured peril, as in the case of the Overseas Travel Ban and the cruise ship ban compared to cl 8(c), I do not see how it can be said to be artificial, contrived and commercially irrational to distinguish between the insured and uninsured perils.

490 The problem becomes particularly acute when, as in this case, the insured peril is the outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation. The Overseas Travel Ban and the cruise ship ban, in reality, have nothing at all to do with the underlying cause of the insured peril. For these reasons, I would not apply the reasoning in *FCA v Arch UKSC* about causation and trends to the effects of the Overseas Travel Ban and the cruise ship ban or other Commonwealth actions of the same or similar kind.

491 In any event, if, as in this case, it cannot be concluded that the outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation was a proximate

or any other kind of cause of Meridian Travel's loss, the issue of concurrent causes of loss does not arise. That is, the reasoning in *FCA v Arch UKSC* about causation and trends clauses and the same underlying fortuity does not arise.

492 Contrary to Meridian Travel's submissions, *FCA v Arch UKSC* at [244] is relevant. Lord Hamblen and Lord Legatt JJSC there said:

> This interpretation, in our opinion, gives effect to the public authority clause as it would reasonably be understood and intended to operate. For completeness, we would point out that this interpretation depends on a finding of concurrent causation involving causes of approximately equal efficacy. If it was found that, although all the elements of the insured peril were present, it could not be regarded as a proximate cause of loss and the sole proximate cause of the loss was the Covid-19 pandemic, then there would be no indemnity. An example might be a travel agency which lost almost all its business because of the travel restrictions imposed as a result of the pandemic. Although customer access to its premises might have become impossible, if it was found that the sole proximate cause of the loss of its walk-in customer business was the travel restrictions and not the inability of customers to enter the agency, then the loss would not be covered.

493 The relevant interpretation here is as explained at [243] that the policy gave indemnity:

> …against the risk (and only against the risk) of all the elements of the insured peril acting in causal combination to cause business interruption loss; but it does so regardless of whether the loss was 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.

494 The propositions of relevance are that, first, the concept of the underlying or originating cause of the insured peril (also referred to as the "same underlying fortuity") is relevant only when there are proximate concurrent causes. The concept cannot transform a matter which is not a proximate or any other kind of cause of loss (such as the outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation) into a proximate or any other kind of cause of loss. Second, while the example at [244] concerns a form of hybrid clause and not a disease clause, the reasoning holds good. If the sole proximate cause of the loss is something other than the insured peril, then there is no cover.

495 It is for Meridian Travel to prove that the outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation was a proximate or any other kind of cause of its loss: ***PMB*** *Australia Ltd v MMI General Insurance Ltd & Ors* [2002] QCA 361 at [17]-[23].

496 I am unable to infer that the outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation was a proximate or any other kind of cause of any of Meridian Travel's loss on the current state of the evidence.

497 Even if there was an outbreak of a human infectious or contagious disease occurring within a 20 kilometre radius of the Situation by 1 March 2020 I would not infer from the current evidence that any decline in Meridian Travel's revenue resulted from that fact. By that time, a number of events had occurred likely to cause a decline in Meridian Travel's revenue including: (a) various Commonwealth travel restrictions on foreign nationals entering Australia indicating the presence of COVID-19 internationally, (b) the imposition of self-isolation requirements on persons arriving in Australia, (c) agreements about banning non-essential gatherings in the National Cabinet, and (d) the ban on cruise ships from foreign ports arriving at Australian ports, when a large part of Meridian Travel's business involved international cruises.

498 Contrary to Insurance Australia's submissions, the causal requirement for cl 8(d)(1) does not begin with the fact of discovery of an organism. As discussed in respect of Taphouse, this approach tends to obscure the fact that the clause is focused on the making of an order consequent upon the discovery of an organism likely to result in disease at the Situation. The problem with putting the discovery of an organism at the start of the causal chain is that it suggests that the objective fact of the discovery of an organism likely to result in disease at the Situation must exist. To the contrary, and as elsewhere discussed, the required objective fact is the order consequent upon the discovery of an organism likely to result in disease at the Situation. This is not to say that contemporaneous evidence of the circumstances as they existed when the order was made is irrelevant. They may be relevant if the order does not disclose the reason for its making (which is unlikely). But it does mean, as I have said, that subsequent evidence, not known to or considered by the authority when it made the order about the circumstances at the time the authority made the order, is immaterial. Subject to some possible irrelevant exceptions (such as an order made arbitrarily, capriciously or in bad faith), the order is to be taken at face value in deciding whether the clause applies.

499 Accordingly, the relevant starting point is the order not the objective fact of discovery of an organism likely to result in disease at the Situation. There must be an order consequent upon the discovery of an organism likely to result in a human infectious or contagious disease at the Situation by which the business is closed (deemed to be Damage) occurring during the Period of Insurance and as a direct result of which the business is interrupted or interfered with and

from which loss arises – in which event the insurer will indemnify the insured in accordance with the settlement of claims clause.

500 If my conclusion that cl 8(d)(1) does not apply is wrong and each of the instruments satisfies that clause then, given the nature of Meridian Travel's business, the Overseas Travel Ban may well have caused loss to Meridian Travel in respect of its international travel business. I would also accept that the lockdown directions which applied to Victoria as a whole or to an area within which the Meridian Travel business was located may have caused Meridian loss in respect of its domestic travel business.

501 However, it has not been proved that the Overseas Travel Ban or lockdown directions were in fact a cause of any loss. Further and consistent with the reasoning above, the actions of other governments and the presence of COVID-19 overseas would not be the same underlying cause as the insured peril in cl 8(d)(1). As discussed, in my view, it cannot be said that the actions of overseas governments and others in respect of the presence of COVID-19 outside Australia involves the same underling cause as the insured peril in cll 8(c) or 8(d)(1). On this basis Insurance Australia would be right that the following other effects of COVID-19 could not be disregarded:

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

(2) cruise ship operators voluntarily suspending operations in response to those international restrictions;

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

(4) from 15 March 2020, the cruise ship ban introduced by the Commonwealth government.

502 I also consider that, as Insurance Australia in part submitted:

(1) the Overseas Travel Ban is not an insured peril and there was no causal connection between the introduction of that ban and an outbreak of COVID-19 within 20 kilometres of Meridian Travel's premises or the discovery of an organism likely to cause COVID-19 at Meridian Travel's premises;

(2) the Overseas Travel Ban is not a proximate cause of Meridian Travel's claimed losses because Meridian Travel had already lost the core of its business by reason of the uninsured events identified above which occurred before the Overseas Travel Ban;

(3) this is not a case of an "over-determined" or "over-subscribed" result, or where a series of events combine to produce a particular result but no individual event was either necessary or sufficient by itself. The correct analogy as in *FCA v Arch UKSC* at [182] is that one hunter has shot and killed the hiker and then another hunter has shot the dead body. In such a case, the first shot is the only proximate cause of the loss; and

(4) the underlying cause of the Overseas Travel Ban is not the same as the underlying causes of the insured perils in cll 8(c) and 8(d)(1). To characterise the underlying cause as "the effects of COVID-19 generally wherever" is too broad.

503 The same reasoning would apply to the lockdown orders.

504 The definition of adjustment does not apply to the basis of settlement provisions (in common with Taphouse, discussed below). There is no rational and commercially sensible way to qualify the basis of settlement provisions by reference to the definition of adjustment. My reasoning in respect of Taphouse below applies in this regard. This said, as with Taphouse, the indemnity only operates in respect of loss. Further, under the basis of settlement provision the amount payable depends on the amount by which the Revenue earned during the Indemnity Period falls short of the Standard Revenue in consequence of the Damage.

505 Consistently with my reasoning in respect of Taphouse below, to the extent that the cause of any loss is unconnected to the underlying cause of the insured peril, the causal requirement means that loss in consequence of some other unrelated circumstance does not form part of the amount agreed to be paid by way of indemnity. Otherwise, I see nothing in this policy which would mean I am unable to conclude that the parties here intended to exclude cover in respect of the consequences of the same underlying cause as the existence of the insured peril (again, as reasoned below in relation to Taphouse). As noted, the insured peril is not "COVID-119 generally". It is the presence and risk of COVID-19 across Victoria.

506 As explained in the Taphouse case below, the indemnity period starts on the occurrence of the Damage (which must mean the insured peril) and ends when the results of Meridian Travel's business cease to be affected as a consequence of the Damage, such period not exceeding 12 months.

7.7 Third party payments

507 Meridian Travel received JobKeeper payments, the Federal COVID-19 Consumer Travel Support Program payments, the Victorian Government's Support Fund, and a rental waiver from its landlord. It did not receive an ATAC grant.

508 As in the Taphouse case below, the cover is predicated on the taking into account of "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". The general law principles applicable to indemnity also apply (see the discussion above and in relation to Taphouse below)

509 The reasoning in Taphouse below applies to the JobKeeper payments and the rental waiver. They reduced Meridian Travel's loss and must be taken into account.

510 Meridian Travel and Insurance Australia provided a summary of the Federal COVID-19 Consumer Travel Support Program. The program was introduced by the *Industry Research and Development (COVID-19 Consumer Travel Support Program) Instrument 2020* (Cth), made under the *Industry Research and Development Act 1986* (Cth).

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

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

513 Meridian Travel noted that the instrument 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": s 5(2). Meridian Travel said this dispels any suggestion that the payment is intended to compensate for losses caused by the insured peril.

514 I agree. The program is not readily characterised as one to reduce the losses of affected businesses, specifically travel agencies. It is more in the nature of a mercy payment for an industry hit hard by the effects of COVID-19. The payment was not made to reduce the losses suffered by the business. Unlike JobKeeper the payment was not a wage subsidy. While applicants were required to declare that they would make best endeavours to retain staff and meet their obligations to process refunds and travel credits to Australian consumers the very fact that the requirement was framed as a best endeavours clause indicates that the intention of the payment was a cash injection to assist the business to survive rather than a payment to reduce loss. As a result, I would not consider that Meridian Travel has to account for Federal COVID-19 Consumer Travel Support Program payments in any assessment of the amount to be paid to it by way of indemnity.

515 Meridian Travel and Insurance Australia provided a summary of the Victorian Government Support Fund. 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. The grants were made "to help Victorian businesses and workers survive the devastating impacts of the coronavirus pandemic". Consistent with my reasoning above, I characterise this as a form of mercy payment, and not a payment to reduce Meridian Travel's loss. As such, I would not consider that Meridian Travel has to account for Victorian Government Support Fund payments in any assessment of the amount to be paid to it by way of indemnity.

7.8 Interest

516 The reasoning below in relation to Taphouse applies. Insurance Australia has not unreasonably withheld payment under s 57 of the Insurance Contracts Act. It would not be unreasonable for Insurance Australia to withhold payment until a final determination of this case decides that Insurance Australia is so liable.

7.9 Answers to questions

517 The questions are not framed in terms that accurately disclose the relevant issues. Nevertheless I will do my best to answer them.

518 **NSD 133 of 2021 – Insurance Australia (CGU) and Meridian**

519 **9. Disease extension (policy schedule, paragraph (c) of the "Murder, Suicide or Disease" clause (page 5))**:

(a) Did an occurrence of an outbreak of COVID-19 occur within a 20 kilometre radius of the Situation? If so, when?

Yes. The outbreak occurred by no later than 30 March 2020. Further evidence may prove that the outbreak occurred earlier, by 1 March 2020.

520 **10. Evacuation and Closure extension (policy schedule, paragraph (d)(1) of the "Murder, Suicide or Disease" clause (page 5))**:

(a) Was Meridian's Business closed or evacuated by order of a government, public or statutory authority by reason of the "Authority Response-Meridian"?

No

(b) If yes to (a), were those orders consequent upon the discovery of an organism likely to result in a human infectious or contagious disease at the Situation?

This does not arise but, if it did, the answer would be no.

(c) {CGU disputes the inclusion of issues (c)-(f)} Did the discovery have to occur at the Situation or could it have occurred elsewhere and, if so, where?

Clause 8(d)(1) requires only that the order be consequent on discovery of an organism (anywhere) likely to result in a human infectious or contagious disease at the Situation.

(d) If the outbreak or discovery had to occur at the Situation, did it so occur at the Situation?

There is no requirement that the outbreak occur at the Situation – see cl 8(c). There is no requirement that the organism be discovered at the Situation – see cl 8(d)(1). It is agreed that there was no outbreak of COVID-19 or discovery of the SARS-CoV-2 organism at the Situation.

(e) What is required for there to be an "occurrence" of an outbreak [of] COVID-19?

The "occurrence" of an outbreak of COVID-19 means any event of that kind. An "outbreak" of COVID-19 is the occurrence of a single case of COVID-19 while a person is in the

community (that is, not in a controlled environment such as quarantine, isolation or a hospital) and who is capable of communicating COVID-19 to another person.

(f) What is required for there to be the "discovery" of SARS-CoV-2?

A "discovery" means finding or ascertaining the existence of SARS-CoV-2. It can be inferred that SARS-CoV-2 has been "discovered" at a location if a person with SARS-CoV-2 is found or ascertained to have been at that location during an infectious period.

521 **11. Causation, adjustments and loss (page 21)**:

If it is found that the Disease extension and/or the Evacuation and Closure extension responds to Meridian's claim:

(a) Was there any interruption of or interference with Meridian's Business which was a direct result of the relevant insured perils?

There is no evidence as yet from which I would infer that the insured perils were a proximate cause of any interruption of or interference with Meridian's business.

(b) If yes to (a), what losses claimed by Meridian resulted from that interruption of or interference with its Business?

This question cannot be answered on the current evidence.

(c) {CGU disputes the inclusion of this issue (c)} Is the term "Adjustment" in the Business Interruption section of the policy applicable to the calculation of Meridian's claim, having regard to the definitions used in the "Settlement of Claims" clause in the Business Interruption section of the policy.

No.

(d) {CGU version; Meridian does not agree}: Should any adjustment be made to Meridian's business interruption loss by reference to uninsured events relating to the COVID-19 pandemic?

Adjustments should not be made to Meridian's business interruption loss by reference to uninsured events caused by the same underlying fortuity as the insured peril. The fortuity underlying the insured peril is not "COVID-19 generally" but the presence and risk of COVID-19 in Victoria". Adjustments should otherwise be made to Meridian's loss.

(e) {Meridian version; CGU does not agree}: Should any adjustment be made to Meridian's business interruption loss by reference to events (other than the insured perils) relating to the COVID-19 pandemic?

Adjustments should not be made to Meridian's business interruption loss by reference to uninsured events caused by the same underlying fortuity as the insured peril. The fortuity underlying the insured peril is not "COVID-19 generally" but the presence and risk of COVID-19 in Victoria". Adjustments should otherwise be made to Meridian's loss..

(f) What loss is payable in accordance with the terms of the policy?

This question cannot be answered on the current evidence.

(i) Are JobKeeper or other government subsidies to be taken into account in the assessment of any loss and, if so, in what way?

JobKeeper – yes.

Federal COVID-19 Consumer Travel Support Program – no.

Victorian Government Support Fund – no.

Meridian would have to account for the full amounts paid to it under these schemes as operating to reduce its loss.

(ii) Should rental abatements be taken into account in assessing recoverable loss?

Yes.

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

The indemnity period starts on the occurrence of the Damage (which must mean the insured peril) and ends when the results of Meridian's business cease to be affected as a consequence of the damage, such period not exceeding 12 months.

(iv) Further quantum issues may be raised when Meridian provides the information that has been requested by CGU.

Noted.

(g) {Meridian disputes the inclusion of subparagraph (f), as those issues should not be included in this test case in circumstances where CGU has denied indemnity and because the factual

premise for these issues will be the subject of a separate loss assessment process} Has Meridian:

(i) provided sufficient information for CGU to determine any amount payable under the policy; and/or

Not to my knowledge.

(ii) failed to respond to reasonable requests for information from CGU?

Not to my knowledge.

(h) If it is found that the policy responds and CGU is liable to pay an amount to Meridian, from what date is interest under section 57 of the ICA payable?

The issue whether Meridian can establish that the insured peril in 8(c) was a proximate cause of any of its loss remains unanswerable on the current state of the evidence. On the current state of the evidence, Meridian has not proved that to be the case. As a result, s 57 has not yet been engaged.

7.10 Conclusions

522 For these reasons:

(1) it is agreed that from no later than 30 March 2020 there was an occurrence of an outbreak of COVID-19 within a 20 kilometre radius of the Situation within the meaning of cl 8(c);

(2) as yet there is no evidence from which it would be inferred that the insured peril in cl 8(c) was a proximate or any other kind of cause of any interruption to or interference with Meridian's business and from which loss arose;

(3) if it can be proved that the insured peril in cl 8(c) was a proximate or any other kind of cause of any interruption to or interference with Meridian Travel's business and from which loss arose then the existence of other proximate causes of loss arising from the same underlying cause (the presence and risk of COVID-19 in Victoria) would not exclude cover or diminish Meridian Travel's loss. The Overseas Travel Ban and cruise ship ban do not involve the same underlying cause as the insured peril in cll 8(c) or 8(d)(1);

(4) there is an issue about whether there was any interruption to or interference with that part of Meridian Travel's business involving telephone and internet sales. Meridian Travel has not proved any interruption to or interference with that part of Meridian Travel's business involving telephone and internet sales from the insured perils;

(5) Meridian Travel's business was not closed by order of an authority within the meaning of cl 8(d)(1);

(6) if this is wrong, (2) and (3) above apply also in relation to the insured peril in cl 8(d)(1);

(7) in assessing loss Meridian Travel would have to account for payments received under the JobKeeper program and rental payments saved, but not for payments received under the Federal COVID-19 Consumer Travel Support Program or the Victorian Government Support Fund; and

(8) s 57 of the Insurance Contracts Act does not yet apply.

523 In these circumstances I would not presently make the declaration that Insurance Australia seeks. Meridian Travel should have the opportunity consider its position and where it wishes to try to prove that the insured peril in cl 8(c) was a proximate cause of any loss.

8. NSD134/2021: INSURANCE AUSTRALIA V THE TAPHOUSE TOWNSVILLE

8.1 Agreed background

524 Taphouse is the insured under a "Business Insurance Policy" number 15T8202892 (**Taphouse policy**) placed with CGU.

525 The Taphouse policy comprises: (a) a renewal schedule issued on 24 September 2019, and (b) the Business Insurance Policy wording.

526 Taphouse is located in the City Lane Arcade, 373 Flinders Street, Townsville City, Queensland 4810 (**Taphouse premises**).

527 Taphouse operates a craft beer bar and restaurant.

528 On 23 March 2020, the Non-essential Business Closure Direction came into effect.

529 On 29 March 2020, the Home Confinement Direction came into effect.

530 On 15 May 2020, the Non-Essential Business, Activity and Undertaking Closure Direction (No. 10) came into effect.

531 On 1 June 2020, the Restrictions on Businesses, Activities and Undertakings Direction came into effect.

532 On 3 July 2020, the Restrictions on Business, Activities and Undertakings Direction (No. 3) came into effect.

533 On 24 July 2020, the Restrictions on Business, Activities and Undertakings Direction (No. 5) came into effect.

534 On 17 November 2020, the Restrictions on Business, Activities and Undertakings Direction (No. 9) came into effect.

535 On 24 March 2020, Taphouse made a claim via email under the Taphouse policy.

536 On 25 March 2020, Rob Langan of Bayinsure (Taphouse's broker) made a telephone call to CGU Insurance claims department and was advised that the claim had not been received. Mr Langan lodged Taphouse's claim over the telephone and received the claim number "CGU202468420".

537 On 25 March 2020, CGU acknowledged the claim.

538 On 26 March 2020, Bayinsure forwarded the email transmitted on 24 March 2020 to CGU.

539 On 7 April 2020, CGU provided its "interim response" denying cover.

540 On 17 June 2020, CGU declined Taphouse's claim.

541 On 30 June 2020, Bayinsure requested a review of CGU's indemnity decision.

542 On 10 July 2020, CGU confirmed its position declining cover.

8.2 Policy provisions

543 The key provisions of the Taphouse policy are below.

> …
>
> **General definitions**
>
> …
>
> **Business** means *your* business, occupation, trade or profession.
>
> …
>
> **Premises** means the premises at the situation shown in the *schedule*.

…

Schedule means the schedule document that *we* give *you* that attaches to and forms part of *your* policy.

…

You, **your** or **yours** means the person(s) or parties shown as the insured in the *schedule*, including all subsidiary companies, organisations and entities incorporated in Australia in which the insured has a controlling interest (exceeding 50%) engaged in the business described in the *schedule* and not for any other purpose or activity.

…

Section 1

Property

…

Section 2

Business Interruption

…

Definitions

Adjustment means adjustment as necessary to provide for the trend of the *business* and variations in, or other circumstances affecting, the *business*, either before or after the date of occurrence of the *damage*, or which would have affected the business had the *damage* not occurred, so that the figures thus adjusted represent, as nearly as may be reasonably practicable, the results that, but for the *damage*, would have been obtained during the relative period after the *damage*.

Adjustment shall also be made for any variation of normal trading during the *indemnity period* from increased sales of low margin goods.

…

Damage or **Damaged** means accidental physical damage, destruction or loss. Damaged has a corresponding meaning to damage.

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.

…

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* after the date of the *damage* during which the results of your *business* are affected as a consequence of the *damage*.

…

Insured damage means:

1 In relation to *your* property, *insured damage* means damage to *your* property when both the property that is *damaged* and the cause of the *damage* are covered by:

a) *your* policy…

…

Interruption means interruption or interference.

…

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*.

Standard Turnover means the *turnover* during that period in the twelve (12) months immediately before the date of the *damage* which corresponds with the *indemnity period* (appropriately adjusted where the *indemnity period* exceeds twelve or is less than (12) months).

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*.

…

Cover

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.

Basis of settlement

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*.

…

Extensions of cover

This section is extended to include the following additional benefits. Additional benefits 1 to 11 inclusive are payable provided that the *sum insured* expressed against the relevant item(s) in the *schedule* is not otherwise exhausted.

We will pay *you* (depending on the part of the 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:

…

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*.

8. Murder, Suicide & Infectious Disease

We will pay for loss that results from an *interruption* of *your business* that is caused by:

a) any legal authority closing or evacuating all or part of the *premises* as a result of:

i. the outbreak of an infectious or contagious human disease occurring within a 20-kilometre radius of *your premises*, however, there is no cover for highly pathogenic Avian Influenza or any disease declared to be a quarantinable disease under the *Quarantine Act 1908* (as amended) irrespective of whether discovered at the location of *your premises*, or out-breaking elsewhere

ii. vermin or other animal pests at the *premises*, or

iii. hygiene problems associated with drains or other sanitary arrangements at the *premises*

iv. bomb threat at or to the *premises*.

b) poisoning directly caused by the consumption of food or drink provided on the *premises*, and

c) murder or suicide occurring at or near the *premises*.

544 In the policy schedule the business is described as "Bar operation". The insured "Situation" is Lot 4, City Lane, 343 Flinders Street Townsville Queensland 480 (being the site of The Taphouse craft beer bar and restaurant). The policy schedule also identifies that the cover taken

out was "Insurance Advisernet Business Insurance" and that Taphouse had, relevantly, included "Section 2 - Business Interruption" as part of its cover (on a gross profits basis). Taphouse also included coverage under Section 1 ("Property") and a series of other specific cover sections.

8.3 Introductory comments

545 As Taphouse submitted, it is apparent that the agreement is for the insurer to pay the insured for the relevant item resulting from interruption of or interference with the business as a direct result of the specified matters in 1 to 11. There is no requirement for insured damage. This said, I do not accept that cll 1 to 11 are free-standing insuring clauses merely because they begin with the words "we will pay for…". The clauses are to be read as extensions to the cover otherwise provided in section 2 which involves cover for insured damage. To refuse to read cll 1 to 11 as extensions providing additional benefits (that is, additional to the benefits relating to insured damage) would be to ignore the text and context of the extensions of cover provision. Accordingly, while I accept that cll 7 and 8 are not tethered to property damage, they are part of a policy the focus of which is property damage. The text of the relevant provisions is to be construed in accordance with the principles identified above and without pre-conceived notions of what the parties might or might not have intended, including with respect to a pandemic.

546 Taphouse contended that the following actions of an authority satisfy cll 7 and 8 except that it accepts that the *29 March 2020 Home Confinement Direction* does not satisfy cl 8 (referred to as the hybrid clause, whereas cl 7 is referred to as the prevention of access clause):

(1) the 23 March 2020 *Non-Essential Business Closure Direction*. 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";

(2) the 29 March 2020 *Home Confinement Direction*. 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". As Insurance Australia noted, this direction was only in force from 29 March 2020 to 2 April 2020. There was no further "lockdown" in Queensland during the policy period;

(3) the 15 May 2020 *Non-Essential Business, Activity and Undertaking Closure Direction (No. 10)*. 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 cl 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";

(4) the 1 June 2020 *Business, Activities and Undertakings Direction*. 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";

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

(6) the 24 July 2020 *Restrictions on Business, Activities and Undertakings Direction (No. 5)*. 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; and

(7) the 17 November 2020 *Restrictions on Business Activities and Undertakings Direction (No. 9)*. 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.

547 These directions are each statutory instruments made under the *Public Health Act 2005* (Qld). They are made under s 362B of that Act by the Chief Health Officer. There is no dispute that the Chief Health Officer is a legal authority under cll 7 and 8.

548 Taphouse is correct that the issue is not whether, as a matter of objective fact, it can prove the existence of a threat of damage to persons within the 50 kilometre radius (cl 7) or the outbreak of an infectious or contagious human disease occurring within the 20 kilometre radius (cl 8). The issue is whether a legal authority prevented or restricted access to the premises as a result a threat of damage to persons within the 50 kilometre radius (cl 7) or closed the premises as a result of the outbreak of an infectious or contagious human disease occurring within the 20 kilometre radius (cl 8). The authority might be wrong but if the elements of each clause are satisfied that is sufficient. As noted above, there may be some limits to this conclusion (such as an authority acting arbitrarily, capriciously or in bad faith) but no such issue arises in the present case.

549 Taphouse is also correct that it is first necessary to consider the terms of the directions in order to ascertain if they result from the specified circumstances. If the directions or accompanying contemporaneous explanatory material, on their face, explain the circumstances from which

the directions result then, as discussed, I doubt any other evidence could undermine the inferences which should be drawn from the terms of the directions or the related explanatory material.

550 Taphouse is also right that, as a result of the reasoning in *Wonkana* which is not challenged in this case, it must be taken that the parties to this policy intended by cl 8 to exclude only a static and certain list of existing diseases declared under the former Quarantine Act. They did not intend by cl 8 or otherwise to exclude new diseases not so listed and not constituting highly pathogenic Avian Influenza.

551 Taphouse also summarised the relevant legislative background. That summary may be adopted. Chapter 8 of the Public Health Act is headed "Public health emergencies". A "public health emergency" is 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". 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". On 29 January 2020, the Queensland Minister for Health made a declaration pursuant to s 319 of the Public Health Act. The declaration said:

> 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.

552 This order has been extended and remains in force.

553 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 Pt 7A entitled "Particular 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.

554 The Explanatory Notes that accompanied the Bill for the Amending Act said that 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". 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 assist in containing the spread of COVID-19". 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". The statement of compatibility required under s 38 of the *Human Rights Act 2019* (Qld) said:

> [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.

555 On each occasion that a direction 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.

556 On each occasion, the Chief Health Officer also 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". As noted, this was made "to help control the threat or minimise serious adverse effects on human health in Queensland".

557 Otherwise, Insurance Australia is correct that subsequent orders in 2021 cannot be relevant given the period of the policy which expired on 23 September 2020.

558 The policy of insurance discloses that Taphouse obtained the policy through a broker. As discussed above, Insurance Australia remains the profferer. The principles identified in *Wonkana* at [30]-[31] apply. Further, and contrary to the submissions of Insurance Australia, there is no basis to infer that the brokers proposed any terms included in the policy.

8.4 Other evidence

559 There is unchallenged evidence that the Taphouse premises has 43.5 square metres of outdoor space and 72.5 square metres of indoor space open to the public, and a total floor space, including areas not accessible to the public, of 131 square metres.

560 Taphouse's liquor licence provided that Taphouse could have seating for not more than 60 patrons and that a total of 100 patrons only, seated or standing, could be on the premises. Before 28 March 2020 Taphouse did not provide any takeaway food or alcohol services. Taphouse closed its premises to the public on 23 March 2020. By 28 March 2020 Taphouse had obtained a licence enabling it to serve takeaway tap beer and adapted so that it could provide takeaway food. Taphouse opened on 28 March 2020 to provide takeaway tap beer and takeaway food. In compliance with the subsequent directions Taphouse also permitted 10 seated dining patrons from 22 June 2020, 20 seated dining patrons from 1 June 2020, 50 seated dining patrons from 3 July 2020 and bar service allowing patrons to purchase alcohol while standing, ceased bar service on 24 July 2020, resumed bar service on 3 October 2020, and permitted 58 seated dining patrons from 17 November 2020.

8.5 Clause 7 – prevention of access

8.5.1 Does cl 7 extend to diseases?

561 As a matter of construction of cl 7 in the context of cl 8, I consider that cl 7 does not apply to diseases which, instead, are regulated exclusively by cl 8. I reach this conclusion on the basis that the operation of the policy would otherwise involve profound incongruence and incoherence and not mere redundancy or tautology. I infer that the parties could not have intended that cl 7 would apply to an authority preventing or restricting access to the premises under cl 7 where the threat of damage to persons is from a disease. This is because, if that were so: (a) the requirement in cl 8 for an authority to close or evacuate the premises by reason of a disease would be circumvented, (b) the 20 kilometre radius in cl 8 would be circumvented and the 50 kilometre radius in cl 7 would apply, (c) the limitation in cl 8 to infectious or contagious human diseases would not apply, and (d) the exclusions of highly pathogenic Avian Influenza or any disease declared to be a quarantinable disease under the *Quarantine Act 1908* (as amended) in cl 8 would not apply to the circumstances in cl 7.

562 Further, the concept of "damage" to a person in the sense of "damage" used in the policy (accidental physical damage, destruction or loss) is not particularly apt to describe any form of harm to humans be it from physical injury or disease. The use of this word in "threat of damage to…persons" tends to suggest that the clause is concerned not with disease but with a kind of threat that could physically damage a building as well as a person. The harm which diseases cause to a person, while physical, does not fall readily and naturally within the concept of damage as it used in this policy. Contrast this with the harm caused by physical injury to a person, which does more readily and naturally accord with the concept of damage as it used in this policy.

563 I am not persuaded by the submissions for Taphouse that cll 7 and 8 have different terms and fields of operation so that cl 8 may respond to circumstances to which cl 7 does not depending on the nature of the disease. Taphouse said, 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 warrants closure or evacuation of the premises. The problem with this is that: (a) if damage includes the effects of disease, then the example is merely rhetorical – it may be asked, in what circumstance would an authority close premises due to a disease which causes no harm to people, and (b) all of the inconsistencies of operation identified above remain – none are resolved by reference to this hypothetical. Consistently with this, the fact

that cl 7 deals with threats and cl 8 deals with outbreaks does not lead to a different conclusion. To treat threats from diseases more expansively than outbreaks of diseases tends to reinforce that cl 7 was not intended to apply to diseases at all.

564 It is correct that there is no express limitation on the nature of the "threat" in cl 7. The limitations are contextual. First, the threat must be of damage to property or persons. Second, as a result of the reference to "damage" and "property or persons", it is apparent the threat must be apt to cause accidental physical damage, destruction or loss. Third, as a result of consideration of the relationship between cll 7 and 8, it is apparent that the concept of damage should not be construed as extending to harm to human health from disease. This does not involve the rewriting of the parties' bargain and the allocation of risk upon which the insurance contract (and premium paid) was based, as referred to in *Liberty Specialty Markets v Icon Co (NSW) Pty Ltd* [2021] FCAFC 126 at [152]. At [152] the Full Court identified that the task involved was to work out "in a coherent and congruent fashion" the operation of a policy of insurance so as to "bring about commercial efficacy and reflect common sense", understanding that "a broad or a narrow meaning of a policy may only reflect the breadth or the narrowness of cover that has been purchased by the premium".

8.5.2 If cl 7 applies to diseases

8.5.2.1 A result of the threat of damage to persons within a 50 kilometre radius

565 If this conclusion is incorrect and cl 7 is capable of applying to diseases then, as noted, I agree with Taphouse that the next issue is whether the directions involve an authority preventing or restricting access to the premises as a result of the threat of damage to persons within a 50 kilometre radius of the premises. I agree also with Taphouse that the first consideration in this regard must be the terms of the directions themselves and any contemporaneous accompanying explanatory material.

566 Taphouse's argument is that because the directions, on their own terms, apply to and were made in response to the threat of COVID-19 across the whole of Queensland they were necessarily made as a result of the threat of damage to persons within a 50 kilometre radius of the premises. I agree. A threat or risk of COVID-19 is different from the fact of an outbreak or occurrence of COVID-19. This difference is important in comparing cl 7 (which involves a threat) and cl 8 (which involves an outbreak).

567 The fact that the directions resulted from the threat of damage to persons across the whole of Queensland is clear from the facts on which Taphouse relied, namely, that:

(1) s 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";

(2) s 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";

(3) on 29 January 2020, the Queensland Minister for Health made a declaration pursuant to s 319 of the Public Health Act stating that: (a) he was satisfied that there was a "public health emergency" ("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", and (c) the public health emergency existed "in all of Queensland";

(4) 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" and all of the directions were made under this legislation and therefore are to be taken as having been made as a result of this threat;

(5) the 23 March 2020 direction provided that the public health emergency area specified in the order is for "all of Queensland" to "assist in containing, or to respond to, the spread of COVID-19 within the community" and applied to the State of Queensland; and

(6) the subsequent directions were also made on the same basis.

568 As discussed, in the context of a requirement for a threat or risk of damage, if that extends to harm from a disease, I would infer that the threat or risk to each and every person in Queensland from COVID-19 was an equally effective cause of the actions of the Chief Health Officer.

569 It is not to the point that Taphouse has not proven community transmission of COVID-19 within 50 kilometres of its premises. It would not be to the point if there was no evidence of COVID-19 within 50 kilometres of the premises. This is because it is clear from the terms and context of the directions that they resulted from the threat of harm to persons from COVID-19

(for this purpose, assumed to be a threat of damage) throughout Queensland. The mere fact that the threat was considered by the Chief Health Officer to exist throughout Queensland does not mean that the threat was not considered to exist in respect of persons within 50 kilometres of the premises. Clause 7 is not like cl 8 which requires the authority's action to be the result of the outbreak of an infectious or contagious human disease occurring within a 20 kilometre radius of the premises. If an act results from a threat of harm from a disease over a wide geographical area, such as a State, then it likely results from a threat of harm (damage) to persons within each and every part of that wide geographical area. The nature of COVID-19 as a highly infections and potentially fatal disease supports the conclusion that the Chief Health Officer made the directions as a result of such a threat to persons in each and every part of Queensland.

570 On this basis, I infer that the proximate cause of the directions was the Chief Health Officer's view that the directions were required to protect each and every person in Queensland from COVID-19. The threat or risk to each person is an equally efficacious cause of the actions taken as the threat or risk to every other person. It does not matter that it cannot be proved that there was community transmission of COVID-19 within the radius.

571 I would agree with Insurance Australia, however, that after the event epidemiological evidence would be irrelevant. Such evidence cannot have been a causal factor for the authority taking the action. I do not agree that the stated purpose of the directions to "assist in containing, or to respond to, the spread of COVID-19 within the community" means that the intention of the Chief Health Officer was to "respond" to identified instances of COVID-19 and "contain" the virus within the geographical areas in which it was then prevalent. If that had been so, I would infer that the directions would have been far more geographically targeted. The fact that the directions were State-wide supports the inferences available from their terms; that the Chief Health Officer considered that the outbreak was present (whether she knew where or not) and involved a threat to each and every person across the whole of Queensland. The fact that the context of the directions was the National Cabinet meeting on 22 March 2020 involving an announcement of the intention to "slow the spread", "better prepare the health system" and "flatten the curve" does not suggest to the contrary. It is consistent with the view of an outbreak that, without the directions, the virus could involve a threat to every person within Queensland. The lack of any specific reference to Townsville in the directions or otherwise is immaterial in this context. The causal requirement in cl 7 is satisfied.

572 The fact that the directions after 29 March 2020 involved an easing of restrictions is immaterial. The threat to each and every person in Queensland from COVID-19 including each and every person within the 20 kilometre radius of the premises remained proximate causes of the directions.

573 I also accept Taphouse's submissions that:

(1) cl 7 does not require an outbreak or even an occurrence of a disease within a 50 kilometre radius of the premises;

(2) there need not be community transmission of a disease at all or within a 50 kilometre radius of the premises for action to be taken as a result of a threat of damage to persons within that 50 kilometre radius; and

(3) the authority need not be right that there is a threat of damage to persons within a 50 kilometre radius of the premises – the action need only be a result of that threat as understood to exist by the authority.

574 In this case, there is evidence of a threat of damage to persons within a 50 kilometre radius of the premises before the making of the directions. As discussed, I do not consider this evidence to be material because the issue is not the objective existence of the threat, but the actions of the authority in relation to a threat as perceived by the authority at the time it took the action. To make this kind of evidence material, there would need to be evidence that it was known to and relied upon by the Chief Health Officer in making the directions. There is no such evidence. In any event, Taphouse identified that:

> Prior to 24 March 2020, the publicly available data indicates 4 cases of COVID-19 attributed to the Townsville HHS. 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, 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.

575 As noted, there is no suggestion that the directions were arbitrary, capricious or in bad faith. On that basis, the causal relationship between the threat to each and every part of Queensland, which the Chief Health Officer must be inferred to have perceived, and the directions which must be taken at face value, and are sufficient to satisfy the causal requirements of cl 7, if it applies at all to diseases.

8.5.2.2 Preventing or restricting access

576 In my view, access to premises is prevented if the persons ordinarily entitled to enter the premises are no longer physically permitted to do so. Access to premises is restricted if it becomes materially more difficult for the persons ordinarily entitled to enter the premises to do so. In both cases, the prevention or hindrance must be caused by a legal authority as a result of the specified threat. The terms are concerned with physical access to the premises (the act of entering the premises) just as evacuation is concerned with leaving the premises. Clause 7 does not require, however, that the cause of the preventing or restricting access itself be physical. The required cause is the action of a legal authority.

577 In the case of Taphouse, the persons ordinarily entitled to enter the premises included members of the public. If the directions prevented or restricted the public from entering the premises then they satisfied the requirements of cl 7 (assuming it applies to diseases). As discussed previously, there is no necessary and clear distinction between an action of an authority which prevents or restricts access to premises and an action which impacts upon how the insured's business is operated within the premises. An action which impacts upon how the insured's business is operated within the premises may also prevent or restrict access to premises. It all depends on the nature of the action and of the premises. If an action is properly characterised as concerning nothing more than what people may do once they have entered premises then it would be the case that the action does not prevent or restrict access to the premises. But whether or not the directions in this case can be so characterised is not answered by any pre-conceived distinction between an action preventing or restricting access and an action merely regulating conduct once access has been obtained.

578 While cl 7 refers to "your premises" the parties would not be taken to have intended that the prevention or hindrance of access of the relevant kind applying only to part of a premises would be excluded from cover. It may well be that the clause would not be engaged if an immaterial part only of the premises was unable to be accessed but it cannot be accepted that by "your premises" the parties did not have in mind each and every part of the premises which are ordinarily accessible. In *FCA v Arch UKSC* Lord Hamblen and Lord Leggatt JJSC said:

> [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, access to a discrete part of the premises or access to the premises for a discrete purpose will have been

completely stopped from happening.

> [152] The example of the restaurant which offers a takeaway service illustrates the commercial sense of this interpretation. 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. 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.

579 Insurance Australia submitted that this reasoning was not persuasive in relation to the Taphouse policy. I disagree.

580 As discussed, the reference to "your premises" must include each and every part of the premises so that if access to part only is prevented or restricted, the clause may be engaged. The fact that cl 8 refers to "all or part of the premises" should be taken to be a mere case of redundancy in cl 8. Had those words not appeared, it would have been natural to read "your premises" in cl 7 as meaning each and every part of "your premises". The specific reference to this in cl 8 should not be used to deprive the phrase of its natural meaning. As noted, redundancy is common in insurance policies. I would not infer that the parties intended cl 8 to apply to each and every part of the premises and cl 7 to apply to only a prevention or hindrance of access to the whole of the premises. There is no logical basis for that distinction. Applying such a distinction would involve a linguistic rigidity which is inapt for this policy which exhibits redundancy in multiple places (for example, the extensions of cover read with the additional benefits, if read literally, make no sense – but the literal reading is to be avoided).

581 I do accept, however, that the prevention or hindrance of access is not the same as an inability to use premises, at least in the sense that an inability to use might result from a prevention or hindrance on access, but also might not. For example, in the case of premises such as Taphouse, the purpose of which is to provide food and drink to the public, a direction requiring Taphouse to close to the public would involve a prevention of access to the premises (because the public ordinarily entitled to access the premises would be prevented from doing so) even if staff and contractors could enter the premises for other purposes. Insurance Australia accepted that cl 7 is concerned with the access of the public to Taphouse, given the nature of the premises. Again, everything depends on the character of the action of the authority and of the premises. Conceptual distinctions between prevention of access and prevention or restriction of use may

not be helpful if they distract from the proper characterisation of the action of the authority and its impact on the particular premises.

582 Clause 7 must be construed in the context of the policy as a whole including the nature of the insured premises. On this basis the 23 March 2020 direction, in my view, prevented the public from accessing the premises. For the period when Taphouse had no capacity to provide takeaway service (23 to 28 March 2020), the 23 March 2020 direction required that the business not operate at all. To comply with the direction Taphouse was required to close its premises to the public and did so. A requirement not to operate a business other than in a manner in which the business cannot operate, in circumstances where the business is the provision of food and drink to members of the public to be consumed within the premises (as for Taphouse), is in substance a requirement preventing the public from accessing the premises. The fact that the direction permitted takeaway food and drink is immaterial given that Taphouse could not provide takeaway food and drink between 23 and 28 March 2020.

583 The fact that Taphouse could provide takeaway food and drink from 28 March 2020 does not alter my conclusion. Access to the premises for all members of the public who would otherwise be entitled to enter and remain on the premises to consume food and drink remained denied. This access was prevented. At the least access was restricted. Persons who wished to enter the premises to consume food and drink were prevented from doing so. They could only enter for the purpose of buying and collecting takeaway food and drink. It is not fatal to the application of the clause that there is no evidence as to the part of the premises from which members of the public could obtain their takeaway food and drink. The material fact is that the public, ordinarily entitled to enter and remain on the premises to consume food and drink, could no longer do so. They could enter and remain on the premises only for the confined purpose of paying for and collecting their takeaway food and drink. This is sufficient to engage the clause.

584 I do not accept that the 29 March 2020 order was no more than a restriction on the use of premises in the sense that all the direction did was to prevent people from sitting down to consume their food and drink. The direction prevented people from entering the premises for any purpose other than paying for and collecting their takeaway food and drink. They could not remain on the premises after competing these actions. They were required to leave the premises or Taphouse would have contravened the order. Their access to the premises was thereby prevented and restricted.

585 The same can be said of all of the other directions which took effect during the period of the policy other than the 29 March 2020 direction. I do not accept that the 29 March 2020 direction prevented or restricted access to the premises. That direction prohibited people from leaving their residence except for nominated purposes which included obtaining food. While the effect of this direction may well have been to reduce the number of people coming to Taphouse for takeaway food and drink the direction cannot be characterised as one preventing or hindering access to the Taphouse premises. It had nothing to do with the Taphouse premises. The causal link to the Taphouse premises is too remote and tenuous to be satisfied by the 29 March 2020 direction.

586 The other directions, however, all prevented and restricted members of the public from entering the Taphouse premises by restricting the number of persons who could be present on the premises at any one time below that which could have been present leaving aside the direction. By this means persons who would have been able to enter and remain on the premises could no longer do so. Those persons were thereby prevented from entering the premises.

587 I do not accept the submissions for Insurance Australia to the contrary. The directions are different from the usual maximum occupancy requirements governments impose. Taphouse was already subject to maximum occupancy requirements. The directions imposed requirements as a result of the threat of damage to persons from COVID-19 (assuming I am wrong about the relationship between cll 8 and 7). The requirements prevented persons who otherwise would have been entitled to enter the premises and remain thereon to consume food and drink from doing so. I accept that the mere fact a direction has the effect of reducing the number of people on premises would be insufficient to engage cl 7. But if the effect is to prevent a person who would otherwise be able to enter the premises from doing so then that aspect of cl 7 is satisfied.

8.6 Clause 8 – hybrid clause

8.6.1 As a result of

588 Consistent with the reasoning above, the directions were made as a result of the threat or risk of harm to human health across the whole of Queensland by reason of COVID-19. It cannot be inferred, however, that the directions were a result of an outbreak of an infectious or contagious human disease occurring within a 20-kilometre radius of the premises.

589 As discussed, I do not see the different conclusions reached about cll 7 and 8 to be inconsistent. An action directed at protecting human health across a wide area such as a State (such as closing certain premises across a State) would ordinarily be taken to be a result of a perceived risk of harm to each and every person in the State if the action is not taken. By this means a clause which focuses on a risk of harm at premises or within a specified radius of premises is satisfied because the causal link is between the action and each and every person in the State. The risk to each person is a proximate cause of the action. However, an action directed at protecting human health across a wide area such as a State (such as closing certain premises across a State) would not ordinarily be taken to be a result of an outbreak of a contagious disease within a 20 kilometre radius of the premises. The causal link required between the risk of harm and the specified radius of premises is not satisfied. Putting it another way, it could not be said that any outbreak of COVID-19 within the 20 kilometre radius was a proximate (in the sense of real or efficacious) or, indeed, or any other kind of cause of the directions.

590 As discussed, this has nothing to do with the concept that an outbreak might exist both within and outside of a radius. If that is the case, and it can be said that the outbreak within the radius is a cause of the action, the causal requirement in cl 8 would be satisfied. The extension of the outbreak beyond the radius or the existence of other outbreaks beyond the radius would be immaterial. This is one reason why I do not accept any generalised notion of the policies not providing cover for pandemics. The problem for Taphouse is that the same material on which it relied to prove that the directions resulted from the perceived risk of harm to each and every person in Queensland also establishes that those directions had nothing to do with a perceived outbreak of COVID-19 within a 20 kilometre radius of its premises. This is so whether "outbreak" means a single occurrence of COVID-19 or multiple occurrences unified in time and space involving community transmission within the radius.

591 Contrary to Taphouse's submissions, the contextual material and directions referred to above do not support the inference that there was an outbreak of COVID-19 across the whole of Queensland. The context exposes that the focus was cases of COVID-19 within Queensland which had the potential to spread across the whole of Queensland. There was no sense in which the authorities were saying that there was an outbreak of COVID-19 in each and every part of Queensland. The directions were made to prevent that possibility, not as a result of the authorities having perceived that to be the existing fact. Clause 8 does not respond to action as a result of the risk of an outbreak of a contagious disease within a 20 kilometres radius of the premises. It requires the action to result from the fact perceived by an authority of an outbreak

within that radius. There is no hint in the directions or the context within which they were made that they resulted from a perceived outbreak of COID-19 within a 20 kilometre radius of the premises.

592 The fact that the Minister said in the statement of compatibility (referred to above) that "rates of infection are quickly and steadily rising, with 94 confirmed cases in Queensland as of 17 March" says nothing about the circumstances within a 20 kilometre radius of the premises. Nor does the fact that the directions were to "assist in containing, or to respond to, the spread of COVID-19 within the community".

593 Taphouse's so-called secondary argument that there was evidence of an outbreak of COVID-19 within a 20 kilometre radius of the premises does not assist it. As noted, even if there was such evidence, it does not assist in proving that the directions resulted from those matters. Accordingly, it may be accepted that the evidence discloses that: (a) there were people with COVID-19 whose usual place of residence was within a 20 kilometre radius of the premises, and (b) some of those cases were a result of community transmission occurring somewhere. Even if there was evidence of community transmission within the radius that still would not prove that the directions resulted from that fact. In other words, as reasoned in other cases, the fact or not of COVID-19 or community transmission of COVID-19 within the required area is not material if the authority's actions did not result from those facts.

594 In any event, the evidence discloses that Queensland Heath's records show that by 23 March 2020 there were 319 cases of COVID-19 in Queensland. Of that total, only 4 cases were within the Townsville Hospital and Health Service (**HHS**) region which extended well beyond the 20 kilometre radius. There is no evidence that the material subpoenaed from the Townsville HHS showing 11 cases within that region was known to the Chief Health Officer at the time of the making the directions. Whether it be 4 or 11 cases, the evidence does not support the conclusion that the cases within the radius (the number of which remains unknown) were an equally effective cause of the making of the directions.

8.6.2 Outbreak?

595 The Taphouse policy uses only the word "outbreak". It does not use that word interchangeably with "occurrence". That said, I remain of the view that what constitutes an "outbreak" of a disease depends on the disease, and my conclusions in NSD132/2021 Swiss Re and LCA Marrickville about the meaning of an "outbreak" of COVID-19 applies.

596 In respect of a policy such as that of Taphouse it depends on how the authority taking the action should be inferred to have characterised the disease. In accordance with my general approach to the provisions in issue, I do not accept that the parties intended that they would need to go behind the terms of or apparent explanation for action by an authority. What the authority says and does in taking the action is determinative (subject, perhaps, to concepts of arbitrary, capricious and bad faith actions as discussed above). For example, if an authority says it is taking action as a result of an outbreak of a contagious disease then subsequent evidence showing that: (a) the disease was not contagious or as contagious as the authority believed, or (b) there was no outbreak of the disease because, of its nature, a single case of the disease could not involve an outbreak, then I do not consider that anything in the relevant clauses contemplates that either party would be able to deny the fact of action or what it resulted from.

597 As I have reasoned above, a single case of COVID-19 within the community within an area capable of communicating COVID-19 to another person and not in a controlled environment (such as quarantine, isolation or a hospital) is a proper foundation for an authority to consider that there is an outbreak of COVID-19 within that area. If I was determining the existence of an outbreak of COVID-19 in an area as a matter only of objective fact it would be sufficient for there to be a person with and capable of communicating COVID-19 to be within the community (that is, not in a controlled situation such as quarantine, isolation or a hospital) and within the area.

598 It should be inferred that the Chief Health Officer, in making the directions, considered that there was an outbreak or outbreaks of COVID-19 in Queensland. This is not to say that the Chief Health Officer made the direction as a result of an outbreak of COVID-19 within a 20 kilometre radius of the premises. She did not. Nor is it to say that the Chief Health Officer considered that there was an outbreak of COVID-19 in each and every part of Queensland. That inference is also not open on the face of the directions or their contemporaneous context. As Insurance Australia submitted, the inference that must be drawn is to the contrary – the Chief Health Officer considered that there was an outbreak or outbreaks of COVID-19 in Queensland in various locations (not all of which, in my view, the Chief Health Officer would have considered she knew) and the directions were the result of an intention to confine the outbreak to those locations and for the outbreak not to spread to other locations across Queensland. There is no evidence from which it can be inferred that the area within the 20 kilometre radius of the premises was one of those locations the Chief Health Officer considered to be subject to an outbreak of COVID-19 or that her actions resulted from such an outbreak.

599 I do not agree with Insurance Australia that a single case of COVID-19 in the community is incapable of being an outbreak of COVID-19 within the meaning of the clause, subject to my observations that it is the actions of an authority rather than the objective fact which is the required focus. On this basis:

(1) "outbreak" is not otiose in cl 8 if it applies to a single instance of a contagious disease – the clause covers all infectious or contagious human diseases except those expressly excluded. The word "outbreak" simply takes its meaning from the particular disease in question, or more accurately, from the authority's consideration of the particular disease in question;

(2) for the reasons already given, I do not accept the approach adopted in *FCA v Arch UKSC* determines the meaning of "outbreak";

(3) I consider that there would be an outbreak of COVID-19 within the 20 kilometre radius if it could be proved that there was a single case of a person in the community (that is, not in a controlled environment) with and capable of transmitting COVID-19 within the radius; and

(4) an outbreak of COVID-19 does not require proof of multiple active cases of COVID-19 within the defined radius occurring at or around the same time and that those cases have a common cause, being the uncontrolled transmission of the virus from one person to another within the defined radius.

600 As I have emphasised, however, this is all a matter of theory because the issue is the action of the authority and what it resulted from, not the facts with respect to the existence of people with COVID-19 within the radius.

601 In the event that all of this reasoning is wrong, I note that there is evidence that: (a) the Townsville HHS region extended up to 325 kilometres from Townsville, and (b) there were 31 cases of COVID-19 attributed to the Townsville HHS in the period from January 2020 to May 2021 of which 30 are classified as "overseas acquired" and one is classified as "interstate acquired", none are classified as "locally acquired – contact known", none are classified as "locally acquired – no known contact", and none are classified as "under investigation". There is no evidence, however, that there was a single case of a person within the 20 kilometre radius who was in the community with COVID-19 at a time when the person was capable of communicating the disease to others.

8.6.3 Closing premises

602 The action of the authority must involve the closing or evacuation of all or part of the premises. The requirement of closing the premises is to be considered in the context of the policy as a whole including the nature of the insured premises, being a restaurant and bar, which are ordinarily accessible by the public for the purpose of consuming food and drink on the premises. Further, the fact that the directions are focused on the operation of the business does not mean they are incapable of requiring closure of the premises or part of the premises.

603 Insurance Australia submitted that the "choice of the narrower words of 'closure' and 'evacuation' (rather than 'restricting') in the hybrid extension should be considered a deliberate choice that limits the clause to government orders that physically shutter all or part the business premises or require its patrons to leave". This submission goes too far. A closure may be effected by a requirement that a business cease operating or operate only in a particular way if it is necessary, in order to comply with the requirement, for the insured to prevent persons who would otherwise be entitled to enter and remain on the premises from doing so. Closure is thus dependent on the nature of the authority's requirement and the nature of the premises. I would accept that the prevention of access by the insured must be necessary to comply with the government requirement. A voluntary decision of an insured to close the whole or part of its premises would not satisfy cl 8. However, in the case of Taphouse, its closure of the premises in response to the 23 March 2020 direction was not voluntary. It could not provide take-away food and drink and therefore could not operate at all until it had made arrangements enabling it to provide take-away food and drink.

604 On this basis the 23 March 2020 direction closed the premises by not permitting the public to access the premises other than for takeaway food and drink which Taphouse could not provide until 28 March 2020. If the requirement of the direction as it applies to the insured is to prevent the business from operating at all then the direction has closed the premises because persons ordinarily would be entitled to enter and remain on the premises only pursuant to the implied licence resulting from the operation of the business. If the business is not operating because of the direction, no member of the public would be entitled to enter and remain on the premises. The premises are closed to them by the legal authority. The circumstances are not analogous to *Cat Media* which involved a manufacturing premises. In that context, it could not be concluded that the required cessation of manufacturing closed the premises: [60]. A restaurant and bar is different. The public may ordinarily enter and remain on the premises under an implied licence to do so while the business is operating. An order requiring the business not to

operate closes the premises to those members of the public. The fact that the owner and others may enter and remain on the premises for purposes other than operating the business (such as arranging for the business to prove take-away food and drink) does not mean the premises are not closed. They are closed – to all of the person who would ordinarily be entitled to enter and remain on the premises.

605 From 28 March 2020 until the next relevant direction it is possible (but not proved) that the 23 March 2020 direction closed the premises to any member of the public who would otherwise have been entitled to access the premises for the purpose of consuming food and drink on the premises. I say the 23 March 2020 direction possibly had the effect of closing the premises in whole or part because the existing evidence does not permit that conclusion to be reached. However, it may be that evidence could be adduced to the effect that the public could access only parts of the premises to obtain their takeaway food and drink. Closure of any part of the premises to comply with the 23 March 2020 direction, be it the bar area, the seating area, the toilet facilities or any other area which the public could ordinarily access, in my view, would constitute closure of that part of the premises.

606 I am not persuaded that the subsequent directions would have closed the premises in whole or part. While it is the substantive effect of the directions, not their form, which is relevant the directions involved a mere restriction on the number of people who could enter and remain on the premises. This is a restriction on or hindrance to access to the premises, but it is not a closure of any part of the premises. It would not be a potential closure of any part of the premises unless in order to comply with the direction Taphouse in fact had to (rather than chose to) prevent access by the public to some part of the premises they would otherwise ordinarily be entitled to enter. There is no evidence suggesting this to be the case.

8.7 Causation and adjustment

607 Insurance Australia submitted that:

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

608 This tends to obscure the fact that what is required is an action of an authority of the relevant type which results from the specified circumstances. It tends to suggest that the specified circumstances must in fact exist rather than that the action must result from the specified circumstances which indicates that it is the state of mind of the authority which is relevant, which should be determined objectively based on the acts and statements of the authority at the time it takes the action.

609 If my conclusions above to the effect that cll 7 and 8 do not apply are incorrect, then I would be prepared to infer that Taphouse suffered some loss that results from an interruption of its business caused by a legal authority: (a) preventing or restricting access to the premises, and/or (b) closing all or a part of the premises. I would accept that the directions other than the 29 March 2020 would constitute a proximate cause of the interruption of the business because they directly impacted on the capacity of members of the public to enter and remain on the premises. There is also evidence of decreased turnover after the directions which I would infer was the result of the proximate case of the insured peril.

610 I agree that the reference to "damage" in the definition of "standard turnover", in the context of the relevant extensions of cover, must be read as a reference to the insured peril as in *FCA v Arch UKSC* at [257]. Thus, the standard turnover is to be assessed by reference to the 12 months immediately preceding the first direction because, on the facts of this case, the direction resulted in immediate closure of the premises and thus loss. In theory, however, the date of the loss from the insured peril may differ from the date of the action. Further, the indemnity period, as defined, starts on the date of the loss caused by the insured peril and not later than 12 months later or the date during which the results of the business are affected as a consequence of the loss.

611 I agree also that the amount to be paid includes 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. If the proximate cause of this difference between turnover and standard turnover is the interruption of the business in consequence of the insured peril, then the loss provision responds.

612 Insurance Australia submitted that while the basis of settlement clause does not refer to any requirement for an adjustment (as defined) nevertheless adjustment as defined is required because the loss covered is in "consequence of" the insured peril. Insurance Australia said: (a) this is a necessary result of the contract being one of indemnity, and (b) it would otherwise

be incongruent with the other basis of settlement provisions, such as loss of payroll which, by referring to the definition of "shortage in turnover" includes the requirement of "after adjustment", and there is no rational basis upon which the parties to the contract would agree that this form of settlement was to be adjusted (up or down) but the "Gross profit" calculation was not.

613 The fact, however, is that the adjustments provision does not apply, in terms, to the basis of settlement for gross profit. That it does not do so may or may not be rational, but it does not do so. To apply it to the basis of settlement for gross profit would be to re-write this part of the policy. But this conclusion as explained below, does not matter given the causation requirement.

614 The adjustments requirement operates on the hypothetical circumstances to allow for the trend of the business and other circumstances affecting the business either before or after the date of the damage (the loss caused by the insured peril) which would have affected the business had the damage not occurred. Insofar as these matters are embedded in the standard turnover for the 12 month period before the damage occurs then they will determine the amount of the standard turnover. If they are not embedded in the standard turnover, however, the basis of settlement for gross profit requires the amount to be paid to be 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. If the insured peril is not a proximate cause of the shortfall at all then the amount produced will be zero. If the insured peril is not a proximate cause of some part of the shortfall then the amount produced cannot include that part. If there are multiple proximate causes of the shortfall, one of which is the insured peril, then the amount produced will be the whole of the shortfall. As discussed, if there are multiple proximate causes of the shortfall, one of which is the insured peril and one of which is an excluded peril, the policy may or may not evince an intention to exclude coverage in those circumstances: *McCarthy* at [96].

615 Taphouse does not confront the fact that the basis of settlement clause for gross profit itself requires the difference in turnover to be a consequence of the damage. In my view, at least to the extent that the cause of any loss is not the same as the underlying cause of the insured peril, the causal requirement means that loss in consequence of some other unrelated circumstance does not form part of the amount agreed to be paid by way of indemnity.

616 Otherwise, for the reasons already given, I see nothing in this policy which would lead to a different view from that reached in *FCA v Arch UKSC*. As in that case, I am unable to conclude that the parties here intended to exclude cover in respect of the consequences of the same underlying cause as the existence of the insured peril. That is, as Taphouse submitted, I am unable to accept that the parties intended that 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. This would be destructive of the very indemnity provided under the policy. It follows that the words "in consequence of" in the basis of settlement clause for gross profit, in my view, should be construed as extending to the insured peril and the circumstances giving rise to the insured peril, which in this case is not "COVID-19 generally" but the presence and risk of COVID-19 throughout Queensland. Again, however, this depends on the underlying causes of the concurrent causes of loss being the same at a level of granularity which is apt to properly characterise the cause of the insured peril.

617 As discussed, I do not accept that this involves re-writing the policy as opposed to construing the policy. First, the policy has to be construed to mean "the insured peril" rather than damage in the basis of settlement clause for gross profit to the extent it applies to cll 7 and 8 in any event. Second, as in the present case, the relationship between the insured peril (the actions of the authority as described) and the underlying cause of the insured peril may be so close as to make any distinction between the two artificial and spurious; in the present case the underlying causes of the insured and uninsured perils, the presence and risk of COVID-19 throughout Queensland, are identical. Third, as in the present case, it could not otherwise be concluded that the insured peril was not a proximate cause of loss.

618 Consistently with my reasoning above, I would apply this approach to both the requirement for causation (that is, that the loss be in consequence of the insured peril) and the operation of the adjustments clause (if it applied to gross profits separately from the causation requirement, which I consider it does not).

619 Otherwise:

(1) the 23 March 2020 direction required Taphouse's closure until 28 March 2020. But for the 23 March 2020 direction Taphouse would have continued operating and could not do so because it had no capacity to serve takeaway food and drink which the direction permitted. This does not mean that the 23 March 2020 did not require Taphouse's closure until 28 March 2020;

(2) it would still be necessary to confine the amount to be paid to the loss in consequence of the insured peril and the circumstances underlying the existence of the insured peril, which cannot be assessed; and

(3) Taphouse would have the onus of proving its loss as a consequence of the insured peril and the circumstances underlying the existence of the insured peril: *PMB* at [17]-[23].

8.8 Third party payments

620 Taphouse received the Commonwealth's JobKeeper payment, the Commonwealth's Cash Flow Boost, the Queensland Government's COVID-19 Grant, and rental waivers or abatement from its landlord.

621 I do not accept that the general cover clause in section 2 of the policy does not apply to the loss claimed relating to cll 7 and 8. That is, I do not accept that those clauses are self-contained insuring provisions. They are to be read subject to the cover provision. While I accept that this involves repetition and redundancy if the provisions are read literally, this is readily resolved by reading the words "[w]e will pay" in cll 7 and 8 as "we will pay in accordance with the cover provision" which in turn provides for quantification in accordance with the applicable basis of settlement provision. As a result, the requirement in the cover provision (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) applies to the indemnity provided.

622 I do not accept that the concept of the loss suffered introduces a false premise. It is clear from the terms of the cover provision and cll 7 and 8 that the provisions respond to loss caused by the interruption to the business. As reasoned above, if there is a third party payment by way of reduction of the loss then, on general legal principles, that is to be taken into account. This results from the nature of a contract of indemnity, not the definition of turnover which does not include third party payments of the type under consideration.

623 Further, the amount saved provision is also potentially applicable. If the amount paid by a third party means that an expense of the business is reduced, then that reduction must be taken to be in consequence of the interruption or interference unless the payment is incapable of being so characterised. Again, an insured cannot have it both ways. If the cover extends to the circumstances underlying the insured peril, then the expenses saved must also extend to the circumstances underlying the insured peril.

624 For the reasons already given, JobKeeper payments reduce the insured's loss and expenses in the form of saved wages' payments. The rental relief reduces the insured's loss and expenses in the form of saved rent payments.

625 The Commonwealth's Cash Flow Boost is described by Taphouse and Insurance Australia. The "Cash Flow Boost" was provided under the *Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Act 2020* (Cth). Sections 5 and 6 of the Cash Flow Boost Act provide for a "Cash Flow Boost" for eligible businesses. The boosts were delivered as credits in the business' activity statement system and were generally equivalent to the amount withheld from wages paid to employees for each monthly or quarterly period from March to June 2020. In practice, this meant that the business kept the amounts they had withheld from payments (e.g. for PAYG tax) for these periods. The payments were "intended to support employment by providing Commonwealth support for employers through the tax system": Explanatory Memorandum, Boosting Cash Flow for Employers (Coronavirus Economic Response Package) Bill 2020 (Cth). As Insurance Australia submitted:

> As with the 'JobKeeper' payment, the 'cash flow boost' was plainly intended to be a replacement for cashflow lost during the pandemic. It was additional revenue to help employers maintain staff and continue their business activities. This, again, is the form of loss that is at the core of business interruption insurance. There is also no indication that the Commonwealth (acting through the Australian Taxation Office) intended that the insured should retain the payments to the exclusion of the insurer. These payments should accordingly be taken into account in the assessment of loss.

626 I do not accept that the payments under the Commonwealth's Cash Flow Boost were not intended to compensate businesses for loss in the form of wages that had to be paid to retain employees as employees. The fact that the intention was to do so by supporting employment by providing Commonwealth support for employers through the tax system does not mean that the Commonwealth was not intending to reduce the losses of businesses.

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

(1) the grant "forms part of the Queensland Government's Worker Assistance Package, which aims to assist employees and businesses who have lost their jobs or incomes as a result of the COVID-19 pandemic" and 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"; and

(2) the grant aims to see small and microbusinesses:

(a) prepare for the safe resumption of trading in the post COVID-19 recovery;

(b) access digital technologies to rebuild business operations and transition to a new way of doing business;

(c) respond to online opportunities, where possible, to sustain employment and maintain potential for longer-term growth;

(d) upskill and reskill business owners and staff to benefit from new technologies or business models;

(e) embrace business diversification to adapt and sustain operations; and

(f) create or retain employment.

628 While a business could use the funds for any purpose associated with the business including paying wages and rent, I am unable to conclude that these grant payments were intended to reduce the insured's loss, despite a cause of the payment being the loss of income businesses had suffered. They were specific payments for any business related purpose. They were payments to assist a business to jump-start operations when they were permitted to do so. They were payments to support, but not to compensate the business. They were akin to the act of grace payments that occurred in NSW. They are not akin to the JobKeeper and Cash Flow Boost payments which were both supportive and compensatory in nature.

629 The savings clause must also be considered, however. I do not consider that clause operates in respect of the Queensland COVID-19 grant program payments as those payments were not an amount saved in respect of any expense of the business.

630 For these reasons under both general law and the savings provision, Taphouse would have to account for JobKeeper payments, the Commonwealth's Cash Flow Boost, and rental waivers or abatement from its landlord. Neither the general law nor the saving provision would require Taphouse to account for the Queensland Government's COVID-19 Grant payments.

8.9 Interest

631 Consistent with the reasoning above, Insurance Australia has not unreasonably withheld payment under s 57 of the Insurance Contracts Act. The observation in *Australian Pipe* at [291] is inapplicable. Beach J there said:

> Under s 57(2), the period in respect of which the insurer is required to pay interest commences on the day on which it became unreasonable for the insurer to refuse to pay the claim. An objectively determined reasonable period is to be given to the insurer to investigate the claim and determine its position. But where that 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 (see *Fitzgerald & Anor v CBL Insurance Ltd* [2014] VSC 493 at [415] and [416] per Sloss J). In short, the award of interest is to be calculated taking into account a reasonable time for completion of the insurer's investigation of the claim.

632 This does not apply because I have not found that Insurance Australia is liable to pay the claim. As such, it would not be unreasonable for Insurance Australia to withhold payment until a final determination of this case decides that Insurance Australia is so liable.

8.10 Answers to questions

633 The questions are not framed in terms that accurately disclose the relevant issues. Nevertheless I will do my best to answer them.

634 **12. Disease clause** (clause 8, page 23):

(a) Was all or part of Taphouse's premises closed or evacuated by any legal authority by reason of the "Authority Response-Taphouse"?

No.

(b) If yes to (a), was that closure or evacuation as a result of the outbreak of COVID-19 occurring within a 20 kilometre radius of Taphouse's premises?

No.

635 **13. Prevention of access (POA) clause** (clause 7, page 23):

(a) Does the POA clause apply to an outbreak of COVID-19 in light of the separate disease clause?

No.

(b) If yes to (a), did the "Authority Response-Taphouse" involve any legal authority preventing or restricting access to Taphouse's premises or ordering the evacuation of the public?

This does not arise. If it did, then yes, except for the 29 March 2020 order.

(c) If yes to (a) and (b), were those orders as a result of damage to, or the threat of damage to, property or persons within a 50 kilometre radius of Taphouse's premises?

This does not arise.

(d) {CGU disputes the inclusion of this paragraph} Alternatively to (c), how are the words "as a result of … damage to or threat of damage to … persons" to be construed? In particular:

(i) Does the "threat of damage" have to exist within 50 kilometres of the premises only or it exist in areas further than 50 kilometres from the premises as well and, if so, where?

The threat of damage within the 50 kilometre radius must be a proximate cause of the action of the authority. It may be such a cause if the authority considers the threat exists anywhere provided it also considers it exists within the 50 kilometre radius.

(ii) Must the relevant order be made in direct response to the specific "threat of damage" within 50 kilometres of the Situation, or is it sufficient if the relevant order is made as a result of "threat of damage" both within the radius and of a broader scope (e.g. on a regional, state or nationwide scale)?

See (i) above.

636 **14. Causation, adjustments and loss** (page 19)

If it is found that the Disease clause and/or the POA clause responds to Taphouse's claim:

(a) Does the interruption of or interference with Taphouse's business have to be "a direct result" of or "result from" or be "caused by", the relevant insured perils, and if not, what is the relevant test?

The insured peril has to be a proximate cause of the interruption of or interference with Taphouse's business.

(b) Was there any interruption of or interference with Taphouse's business which satisfies the test of causation identified in the answer to (a)?

No. If, however, I am wrong about the application of cll 7 and 8 then Taphouse has proved some loss (reduced turnover evidence) which should be inferred to be result of the relevant proximate cause.

(c) If yes to (b), what losses claimed by Taphouse resulted from that interruption or interference of Taphouse's business?

This cannot be answered on the evidence but the loss would exclude savings from the JobKeeper payments, the Commonwealth Cash Flow Boost and rental waivers or abatement from Taphouse's landlord, but not the Queensland Government's COVID-19 Grant.

(d) {CGU disputes the inclusion of this issue (d)} Is the term "Adjustment" in the Business Interruption section of the policy applicable to the calculation of Meridian's [sic, Taphouse's] claim, having regard to the definitions used in the "Settlement of Claims" clause in the Business Interruption section of the policy.

No, but the loss must be in consequence of the damage.

(e) {CGU version; Taphouse does not agree}: Should any adjustment be made to Meridian's [sic, Taphouse's] business interruption loss by reference to uninsured events relating to the COVID-19 pandemic?

Not if the uninsured events are a result of the same underlying cause as the insured peril, in this case being the presence and risk of COVID-19 in Queensland.

(f) {Taphouse version; CGU does not agree}: Should any adjustment be made to Meridian's [sic, Taphouse's] business interruption loss by reference to events (other than the insured perils) relating to the COVID-19 pandemic?

See (e) above.

(g) What loss is payable in accordance with the terms of the policy?

See (c) above.

(i) Are JobKeeper or other government subsidies to be taken into account in the assessment of any loss and, if so, in what way?

See (c) above.

(ii) Should rental abatements be taken into account in assessing recoverable loss?

Yes

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

The indemnity period started on the date Taphouse suffered loss from the insured peril and ended 12 months later provided that Taphouse's business continued to be affected as a consequence of the insured peril.

(iv) Further quantum issues may be raised when Taphouse provides the information that has been requested by CGU.

Noted.

(h) {Taphouse does not agree that this issue be included in this test case in circumstances where CGU has denied indemnity and because the factual premise for these issues will be the subject of a separate loss assessment process} Has Taphouse:

(i) provided sufficient information for CGU to determine any amount payable under the policy; and / or

(ii) failed to respond to reasonable requests for information from CGU?

These questions cannot be answered.

(i) If it is found that the policy responds and CGU is liable to pay an amount to Taphouse, from what date is interest under section 57 of the ICA payable?

This does not arise, but it would not be unreasonable for Insurance Australia to withhold payment unless and until it is finally determined to be liable to make payment in this proceeding.

8.11 Conclusions

637 For these reasons:

(1) cl 7 does not apply to diseases which are exclusively regulated by cl 8;

(2) if cl 7 applies to diseases then all of the directions were made as a result of a threat of damage to persons within a 50 kilometre radius of the premises as provided for in cl 7;

(3) if cl 7 applies to diseases then the directions, other than the 29 March 2020 direction, prevented or restricted access to the premises;

(4) if cl 7 applies to diseases then the directions caused an interruption to Taphouse's business which caused it loss;

(5) cl 8 does not apply as the directions were not a result of the outbreak of an infectious or contagious human disease occurring within a 20-kilometre radius of the premises;

(6) if cl 8 applies then the 23 March 2020 direction but not the directions resulted in the closure of all or part of the premises;

(7) if cl 8 applies then the directions caused an interruption to Taphouse's business which caused it loss;

(8) the provisions of the policy do not require loss from the underlying cause of the presence and risk of COVID-19 in Queensland to be disregarded in assessing loss because that is the same underlying cause as the existence of the insured peril; and

(9) in assessing loss, allowance would need to be made for loss to be reduced by the amounts of JobKeeper payments, the Commonwealth Cash Flow Boost and rental abatements and waivers, but not the payments under the Queensland Government's COVID-19 Grant scheme.

638 As further evidence cannot affect these conclusions, subject to any observations of the parties, I would make the declaration Insurance Australia sought as follows:

> Declare that the applicant is not liable to indemnify the respondent under extensions 7 or 8 of the respondent's business insurance policy 15T8202892 in response to the respondent's claim first made in March 2020.

9. NSD135/2021: ALLIANZ V MAYBERG

9.1 Agreed background

639 Mayberg is the insured under a "Business Pack" insurance policy number 141AN06566COM placed with Allianz (**Mayberg policy**).

640 The Mayberg policy comprises: (a) an insurance schedule issued on 24 November 2019, and (b) the Business Pack Product Disclosure Statement and Policy Document.

641 The period of insurance under the Mayberg policy is 24 November 2019 to 4:00pm 24 November 2020.

642 Mayberg has four locations in Queensland: (a) Shop 24, 2-34 Bunker Road, Victoria Point 4165; (b) 66-68 Bloomfield Street, Cleveland 4163; (c) 681 New Cleveland Road, Gumdale 4154; and (d) 64 Tingal Road, Wynnum 4178 (**Mayberg premises**).

643 On 24 March 2020, Mayberg made a claim under the Mayberg policy via Rob Langan of Bayinsure (**Mayberg's broker**).

644 On 27 March 2020, Allianz sent a letter to Bayinsure rejecting the claim.

645 On 30 March 2020, Bayinsure sent an email to Allianz disputing Allianz's rejection.

646 On 31 March 2020, Allianz sent a letter to Bayinsure maintaining that the claim was not covered.

647 On 3 April 2020, Bayinsure sent an email to Allianz again disputing its denial of the claim.

648 On 11 April 2020, Bayinsure sent an email to Allianz requesting the matter be escalated to Allianz's internal dispute resolution (**IDR**) team.

649 On 13 May 2020, Allianz sent its IDR response maintaining its denial of the claim.

9.2 Policy provisions

650 The key provisions of the Mayberg policy are below.

> **General definitions**
>
> …
>
> **Business** means Your Business, occupation, trade or profession as shown in the Schedule.
>
> …
>
> **Endorsement** means an individual endorsement document that We give You that attaches to and forms part of Your Schedule. An Endorsement varies the terms and conditions of the Policy.
>
> …
>
> **Premises** means the premises stated as Situation in the Schedule.
>
> **…**
>
> **Schedule** means the schedule document that We give You that attaches to and forms part of Your Policy.
>
> …
>
> **We**, **Us**, **Our** means Allianz Australia Insurance Limited AFS Licence No. 234708, ABN 15 000 122 850 of 2 Market Street, SYDNEY NSW 2000.
>
> …
>
> **You**, **Your**, **Yours**, **Yourself** means either the person or the entity named as Insured in the Schedule, including all subsidiary companies, organisations and entities in which the Insured has a controlling interest but only to the extent that each of them is engaged

in carrying on the Business or activities which are substantially of the same kind or related to that Business. For the purpose of this definition, a "controlling interest" shall, in the case of a company, mean the beneficial ownership of shares carrying more than 50% of votes capable of being cast

…

Our Agreement

Subject to all of the terms and conditions contained in Your Policy…, We will provide You with the cover shown in the Cover Sections of Your Policy up to the amounts shown in the Schedule or other limits shown in Your Policy.

…

Business Interruption

- **Income**

…

Definitions

…

Damage or **Damaged** means accidental physical damage, destruction or loss.

…

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.

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 as a consequence of the Damage.

Insured Damage means:

1. In relation to Your property, Damage to Your property when both the property that is Damaged and the cause of the Damage are covered by:

    a. Your Policy under one or more of the following Cover Sections:

        i. Fire – Gold;

ii. Burglary;

iii. Money;

iv. Glass;

v. Business Special Risks;

vi. Electronic Equipment – Part A (Material Loss or Damage); or

b. another insurance policy that insures Your property and names You as the insured. Provided that:

i. We receive written confirmation of the extent of cover from the insurer who issued this other policy; and

ii. cover for both the property that is Damaged and the cause of the Damage would have been covered under one of the Cover Sections shown in 1.a. above had that Cover Section formed part of Your Policy.

Where the Damage is below the Excess applicable under any insurance mentioned in 1.a. and 1.b., such Damage shall be deemed to be Insured Damage and covered for the purpose of this definition.

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

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.

Interruption means interruption or interference.

Loss of Income means loss or reduction of Your Income that occurs during the Indemnity Period.

…

Cover

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.

Basis of Settlement

1. Loss of Income

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 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.

…

Extensions of Cover

Provided that the total Sum Insured shown in the Schedule for this Cover Section is not exceeded:

…

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:

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;

   ii. vermin or other animal pests at the Premises; or

   iii. hygiene problems associated with drains or other sanitary arrangements at the Premises;

b. poisoning directly caused by the consumption of food or drink provided on the Premises; or

c. murder or suicide occurring at or near the Premises.

The definition Insured Damage does not apply to this Extension of Cover.

651 The Schedule includes:

…

Endorsement

Prevention of Access 48 hours minimum interruption

The Extensions of Covers 8. Prevention of Access and 9. Prevention of Access by a Public Authority under Business Interruption Income Cover Section and 6 Prevention of Access and 7, Prevention of Access by a Public Authority under Business Interruption Weekly Income Cover Section are deleted and replaced by following:

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.

652 Under the Schedule the Situations are at four locations in Queensland, 64 Tingal Road, Wynnum, Queensland 4178, Shop 5, 66-68 Bloomfield Street, Cleveland, Queensland 4163, Victoria Point Shopping Centre, Shop 24E, 2-34 Bunker Road, Victoria Point, Queensland 4165, and Shop 3, 681 New Cleveland Road Gumdale, Queensland 4154.

653 In respect of all situations the classes of insurance taken under the policy are identified in the Schedule as Liability, Business Interruption, Fire, Burglary (other than for Situation 4), and Glass.

9.3 Introductory comments

654 Mayberg specialised 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. Mayberg also provided a commercial dry-cleaning and laundry service and its commercial customer base

included local and national customers (such as Qantas), heavy industrial and mechanical, education and the medical sector.

655 Clause 6ai is a hybrid clause. It depends on 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 the premises. The observations above in relation to the primary objective fact being the action of the authority apply.

656 The exclusion in cl 6ai does not apply, in accordance with the reasoning in *Wonkana*.

657 The specification that "[t]he definition Insured Damage does not apply to this Extension of Cover" ensures that loss is not confined to loss of "income that results from an interruption of Your Business caused by any Insured Damage that happens at the Premises" in accordance with the principal cover clause. In the Basis of Settlement, Damage must also mean the insured peril.

658 As a result, for cl 6ai, the indemnity operates in respect of loss that results from an Interruption of Your Business that is caused by the insured peril in cl 6ai which is to be calculated in accordance with the Basis of Settlement clause.

659 The Endorsement includes the second-mentioned prevention of access clause. The prevention of access clause operates in respect of Loss of Income that results from an Interruption of Your Business that is caused by a legal authority preventing or restricting access to Your Premises or ordering the evacuation of the public as a result of Damage to or threat of Damage to property or persons within a 50 kilometre radius of Your Premises. The observations above in relation to the primary objective fact being the action of the authority apply.

660 As a result, for the Endorsement, the indemnity operates in respect of loss that results from an Interruption of Your Business that is caused by the insured peril in prevention of access clause which is to be calculated in accordance with the Basis of Settlement clause.

661 The minimum period of interruption of 48 hours is immaterial on the facts of the case.

662 Mayberg identified the relevant actions of an authority as:

(1) the 19 March 2020 *Mass Gathering Direction*. 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;

(2) the 19 March 2020 *Non-essential Indoor Gatherings Direction*. 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;

(3) the 23 March 2020 *Non-essential Business Closure Direction*. This required persons who own, control, or operate a non-essential business or undertaking in Queensland not to operate the business or undertaking;

(4) the 25 March 2020 *Border Restrictions Direction*. This required persons (with limited exceptions) arriving in Queensland from interstate to self-quarantine for 14 days;

(5) the 29 March 2020 *Home Confinement Direction*. 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);

(6) the 14 May 2020 *Non-essential Business, Activity and Undertaking Closure Direction (No 10)*. 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); and

(7) the *Restrictions on Business, Activities and Undertakings Directions (No 1), (No 3), (No 5), (No 6),* and *(No 9)*. 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.

663 The directions were made by the Chief Health Officer under s 362B of the Public Health Act. As noted, directions are each statutory instruments. There is no dispute that the Chief Health Officer is a legal authority as referred to in the hybrid and prevention of access clauses. The relevant legislative background and context is the same as that discussed in respect of Taphouse above. In summary, the directions applied to the State of Queensland and were made in the context of the Ministerial declaration to "help control the threat or minimise serious adverse effects on human health in Queensland".

664 The policy of insurance discloses that Mayberg obtained the policy through a broker. As discussed above, Allianz remains the profferer. The principles identified in *Wonkana* at [30]-[31] apply.

9.4 Clause 6ai – hybrid clause

665 Mayberg's business was not a non-essential business as referred to in the directions. As a dry-cleaning/laundry business, Mayberg was always permitted to operate.

666 The requirement of an authority closing all or part of the premises is not satisfied. Mayberg virtually conceded this to be so. As Allianz submitted:

> None of those directions were imposed directly on Mayberg, and indeed Mayberg does not contend that it was ordered by the government to close or evacuate the Premises. Rather, it claims that there was a "closing or evacuating" of "all or part of the Premises" in that the Stay-at-home Directions "closed off" the Premises to Mayberg's customer base and the public; the Social Distancing Rules caused a "closure" of part of the Premises; and the Border Restrictions had the effect of "disabling Mayberg from servicing its customer base"…

667 Mayberg said that 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 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".

668 Mayberg's business is not a restaurant or bar which might ordinarily accommodate numerous people. It is a dry-cleaner/laundry. There is no evidence that any person who might otherwise have entered and remained on Mayberg's premises could not do so by reason of any of the directions. The affidavit of Ms Hopper, Mayberg's operations manager, said that due to its size customers had to wait outside the Victoria Point store. Ms Hopper does not say this occurred at any other store. It should be inferred that it did not occur at those other stores. On this basis, it could not be said that, on either a restrictive or expansive view of the concept of "closing", the directions closed any part of Mayberg's premises at those three other stores. In respect of the Victoria Point store a requirement that customers wait outside (I infer to collect or complete laundry or dry cleaning) does not mean that the premises were closed. The premises continued to operate for their intended purpose.

669 Consistent with the reasoning in relation to Taphouse, none of the directions were a result of the outbreak of an infectious or contagious human disease occurring within a 20 kilometre radius of Mayberg's premises. The facts that: (a) the public health emergency was "in all of Queensland", and (b) the directions made by the Chief Health Officer applied to "all of Queensland" and were to made to "assist in containing, or to respond to, the spread of COVID-19 within the community" does not mean that any of the directions were a result of the outbreak

of an infectious or contagious human disease occurring within a 20 kilometre radius of Mayberg's premises (whatever meaning is given to "outbreak").

670 Consistent with the reasoning in relation to Taphouse, the so-called secondary argument of the existence of an outbreak of COVID-19 within the radius is of no assistance. That is, the fact or not of COVID-19 or community transmission of COVID-19 within the required area is not material if the actions of the authority did not result from those facts.

671 Allianz accepted that:

(1) as to Situations 1 and 4, before 23 March 2020:

(a) there were at least two people with COVID-19 who had been within the 20 kilometre radius;

(b) 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) 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 capable of infecting another person with COVID-19;

(2) the 20 kilometre radius around Situation 2 is located partly within the Metro South 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 radius around Situation 2. 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; and

(3) 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. 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.

672 The problem is that, on this evidence, it could not be inferred that the cases within each radius were an equally effective cause of the making of the directions as the cases outside of the radius. The evidence does not disclose: (a) the number of cases within each 20 kilometre radius, or (b) whether these cases involved people who were in non-controlled circumstances. More importantly, it does not disclose any matter from which it could properly be inferred that a

cause of the Chief Health Officer, in making the directions, was an outbreak of COVID-19 within each or any 20 kilometre radius.

673 On my interpretation of "outbreak", the fact of people with COVID-19 capable of communicating COVID-19 to another person within the radius and not self-isolating would be sufficient for me to conclude that there was an outbreak of COVID-19 within the radius. For the reasons discussed, I would not require evidence of community transmission occurring within the radius. Accordingly, if it were a matter for me, I would be satisfied that there was an outbreak of COVID-19 within the radius. However, it is not a matter for me for the reasons already given. It is a question of the causal relationship between the circumstances and the directions. As discussed, there is no such apparent causal relationship.

674 The agreed facts at [87] also cannot assist. As Allianz submitted, the "case numbers do not distinguish between cases associated with community transmission, overseas acquisition, interstate acquisition or cases acquired or (for the most part) located in hospital, hotel quarantine or self-isolation, and so do not establish an 'outbreak' within the designated areas surrounding each Premises".

9.5 Endorsement – prevention of access clause

675 Consistent with my reasoning above, I do not consider that the "threat of Damage" within the meaning of the prevention of access clause includes a threat of harm to humans from disease. To so construe the clause would result in incongruity and incoherence in that: (a) cl 6ai deals with an actual outbreak of disease and confines cover to a closure or evacuation of the premises as a result of an outbreak of an infectious or contagious disease occurring within a 20 kilometre radius of the premises, subject to the exclusions, (b) if the prevention of access clause includes a threat of harm to humans from disease, that clause can operate: (i) without an actual outbreak, (ii) if the threat relates to persons within a 50 kilometre (not 20 kilometre) radius, (iii) in respect of diseases other than infectious or contagious diseases, and (iv) not subject to the exclusions in cl 6ai.

676 On this basis, for example, if there was an actual outbreak of highly pathogenic Avian Influenza within the 20 kilometre radius by reason of which an authority closed the premises, cover under cl 6a1 would be excluded yet cover under the prevention of access clause would be available. That makes no sense.

677 The fact that the prevention of access clause refers to the threat of Damage to persons within the 50 kilometre radius also indicates that this clause was not intended to apply to the threat of harm to humans from a disease. See the reasoning relating to the same issue in Taphouse above. Fundamentally, the issue is not one of mere redundancy or tautology. It is one of profound incongruence and incoherence which is to be avoided: see also *Price v Spoor* [2021] HCA 20; (2021) 95 ALJR 607 at [60], *Wilkie v Gordian Runoff Ltd* [2005] HCA 17; (2005) 221 CLR 522 at [16].

678 If this is wrong, then I would accept that all of the directions were made as a result of a threat of Damage to persons within a 50 kilometre radius of the premises. I do not accept Allianz's submission that:

> … it is plain that the only intended difference between the two parts of the clause [the prevention of access clauses in the Endorsement] is that the first half contemplates damage in the vicinity of the Premises, such that it might physically hinder access to the Premises, whereas the second half contemplates damage up to 50km away, such that it might hinder access to the Premises indirectly by the medium of a legal order. There is no sensible reason why the concept of "Damage" would differ as between each of those two parts of the clause.

679 The problem for Allianz in this regard is that the first prevention of access clause in the Endorsement refers to "Loss of Income that results from an Interruption of Your Business that is caused by Insured Damage", whereas the second prevention of access clause in the Endorsement refers to "Damage". The two are different concepts. While the use of "Damage" supports my conclusions about the second prevention of access clause not applying to a disease it does not support Allianz's argument as framed above.

680 If the prevention of access clause can apply to a disease, I would also accept that there was in fact a threat of Damage to persons within the radius from COVID-19 given Allianz concedes that, before 23 March 2020: (a) 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 (b) 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.

681 However, in respect of the three stores other than the Victoria Point store, there is no evidence that the directions operated to prevent or restrict any person who could and would otherwise have entered Mayberg's premises from doing so. The possible arguments to that effect about the Home Confinement direction and the social distancing requirements in the directions are

not tenable in respect of those other three stores. In respect of the Victoria Point store, there is evidence that the social distance requirements prevented and restricted people (customers) who could and would otherwise have accessed (in the sense of entered and remained in to complete their transaction) that store from doing so. This is a prevention and restriction on access to the premises. However, there is no evidence that any person did not transact business with Mayberg at the Victoria Point store as a result of the social distance requirements. On this basis, the fact that customers had to wait outside of that store to collect or complete their laundry (that is, the fact of the prevention and restriction of access) could not have been a cause of any loss.

682 I do not accept Allianz's submissions that none of the social distancing requirements in the directions applied to Mayberg's premises. For example, the 2 April 2020 direction defined social distancing as including remaining at least 1.5 metres away from other persons: cl 31. Clause 13 required a person in control of premises to "take reasonable steps to encourage occupants of, and visitors to, the premises to practise social distancing to the extent reasonably practicable". It was an offence to fail to comply with this requirement: s 362D of the Public Health Act. This requirement was capable of preventing or hindering access to premises. There is evidence this requirement (or equivalent requirements which appeared in other directions) prevented or hindered access to Mayberg's Victoria Point store. The same requirement appeared in the 26 April 2020, 1 May 2020, 8 May 2020, 15 May 2020, 19 May 2020, and 1 June 2020 directions (and continued thereafter). Allianz is correct, however, that there is no evidence of the number of customers that were queued up outside, or any other evidence supporting a finding that had it not been for the social distancing orders, more customers would have entered the premises to obtain services.

683 The Home Confinement direction did not prevent or restrict access to Mayberg's premises. It prevented and restricted people from leaving their usual place of residence. While the Home Confinement direction may have had the effect that a person who could and would otherwise have entered Mayberg's premises could not or did not do so, that effect was not achieved by preventing or restricting access to Mayberg's premises. It was achieved by preventing and restricting people from leaving their home. A direction which prevents and restricts people from leaving their home cannot be converted into a direction that prevents and restricts people from accessing another location. This is whether or not accessing dry-cleaning would or would not be within one of the exemptions from the stay at home requirement. The broader meaning of "restricting" compared to "preventing" does not assist. The restriction must still be on access to Mayberg's premises.

9.6 Causation and adjustments

684 Mayberg submitted that:

> Mayberg has put before the Court its profit and loss statements for the periods July 2018 to June 2019, July 2019 to June 2020, and July 2020 to June 2021. Those statements are sufficient to be satisfied, for the purposes of resolving the questions of construction in this case, that there was loss.
>
> …
>
> The Court can similarly be satisfied that the loss resulted from "interruption or interference" with Mayberg's business. The Hopper Affidavit [H.017] makes clear that there was a significant decline in Mayberg's business after the directions promulgated by the Queensland Government.
>
> …
>
> The compelling common sense judgment in the present case is that the relevant directions – in particular, the Home Confinement Directions [D.217] – was the dominant cause of Mayberg's loss of profit.
>
> 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).

685 There are problems with these submissions.

686 The affidavit of Ms Hopper, Mayberg's operations manager, discloses that Mayberg's work for QANTAS declined by an average of 65% after the Commonwealth Government closed Australia's borders to all non-citizens and non-residents in March 2020. While Ms Hopper also said that Mayberg scaled down its operations in response to various actions in March 2020, those actions included the actions of the Commonwealth Government and not merely the directions made by the Queensland Government relied upon by Mayberg.

687 The obvious inference is that Mayberg's work for QANTAS declined because of the actions of the Commonwealth Government. Ms Hopper said that the most precipitous decline was in respect of QANTAS international cabin crew uniforms (97%). This must have been caused by the Commonwealth border closures, and not by the Queensland directions. The same would be true insofar as Mayberg provided dry cleaning services to other businesses dependent on international travel.

688 I accept that Mayberg also suffered a loss of trade from dry cleaning for corporations and special occasions (for example, weddings). No doubt the directions, or some of them, interfered

with that part of Mayberg's business and were a proximate cause of that loss (but not as a result of any closure or prevention or restriction of access as required). The evidence does not permit me to identify that loss. To the extent that such loss was also a result of the concurrent proximate cause of the existence and risk of COVID-19 in the radius I would accept that constitutes the same underlying fortuity which resulted in the making of the directions. Consistent with my reasoning in Meridian Travel, I would not reach the same conclusions about the actions of the Commonwealth Government.

689 I would reach the same conclusions about the trends clause which, in this case, applies ("the Income You would have earned during the Indemnity Period had the Damage not occurred… will be adjusted to take into account any… trends of the Business and other influences that would vary the Income"). That is, as in Meridian Travel, the effects of the existence and risk of COVID-19 in Queensland is the same underlying cause as the insured perils (because it must be assumed I am wrong about the operation of the relevant clauses to get to this point). But, as discussed, the existence and risk of COVID-19 in Queensland is not the same underlying cause for the actions of the Commonwealth Government with respect to international travel. An adjustment should not be made for the effects of the existence and risk of COVID-19 in Queensland, being the same underlying cause as the insured perils. An adjustment would have to be made for the effects of COVID-19 internationally and the responses thereto by the Commonwealth Government.

690 Accordingly, the submission for Mayberg that "that any adjustment ought not take into account the presence and effect of COVID-19 generally" is too sweeping and I do not accept it.

9.7 Third party payments

691 Mayberg received payments from the operation of the Commonwealth's "JobKeeper" scheme, the Queensland Government's COVID-19 grant program, and a rental waiver from its landlord.

692 I do not agree with Mayberg that the starting point is not the concept of loss. Loss is the relevant starting point given that: (a) the relevant clauses both say "We will pay for Loss of Income that results from…" and Loss of Income is defined as "loss or reduction of Your Income that occurs during the Indemnity Period", and (b) the Basis of Settlement clause is merely a method of calculating that loss had the Damage not occurred.

693 On this basis, the definition of Income is not determinative. In accordance with the general principles applying to a contract of indemnity, allowance must be made for any payment

reducing the loss. For the reasons already given JobKeeper payments and rental abatements operate to reduce loss and must be taken into account, but the Queensland Government's COVID-19 grant program need not be taken into account.

694 However, the definition of "Income" includes any "Government approved incentives, subsidies or market development allowances". JobKeeper payments and the Queensland Government's COVID-19 grant program are clearly a subsidy and thus fall within Income.

695 Further, the Basis of Settlement clause requires there to be taken into account "savings made during the Indemnity Period that reduce the cost of running Your Business". JobKeeper payments and rental abatements are such savings.

9.8 Interest

696 In accordance with my reasoning elsewhere, s 57 of the Insurance Contracts Act is not yet engaged. It would not be unreasonable for Allianz to withhold payment until a final determination of this case decides that Allianz is liable to do so.

9.9 Answers to questions

697 The questions suffer from the usual problems. Insofar as possible, they are answered below.

698 **15. Disease clause** (clause 6(a)(i), page 59):

(a) During the policy period, was all or part of Mayberg's Premises closed or evacuated by any legal authority (by virtue of any one or more of the matters comprising the "Authority Response-Mayberg")?

No.

(i) Was the order or announcement relied upon by Mayberg made by a "legal authority"?

It was not in dispute that the directions made by the Chief Health Officer of Queensland on which Mayberg relied were made by a legal authority as required.

(ii) Were all or part of Mayberg's Premises closed or evacuated by the order or announcement?

Mayberg's premises were not closed by the directions made by the Chief Health Officer of Queensland on which Mayberg relied.

(iii) Subject to determination of (i) and (ii), when did that closure or evacuation commence and when did it conclude?

This question does not arise.

(b) If yes to (a), was that closure or evacuation the result of an outbreak of COVID-19 occurring within a 20 kilometre radius of Mayberg's Premises? More particularly:

This question does not arise. If I am wrong in this regard, the answer is no.

(i) Has there been an "outbreak" occurring within a 20 kilometre radius of Mayberg's Premises?

The relevant question would be whether any legal authority closed or evacuated all of part of Mayberg's premises as a result of an outbreak of an infectious or contagious human disease occurring within a 20-kilometre radius of the premises. The answer to this question is no.

(ii) Did any order or announcement compelling the closure or evacuation of Mayberg's Premises result from that outbreak?

No.

(iii) If so, when did that "outbreak" commence and when did it conclude?

This question does not arise.

(c) If yes to (a) and (b), does the Loss of Income claimed by Mayberg result from an Interruption of Mayberg's "Business" caused by that closure or evacuation?

This question does not arise.

699 **16. Prevention of Access (POA) endorsement** (clause 9, policy schedule page 11):

(a) Does COVID-19 constitute Damage to persons or threat of Damage to persons?

No.

(b) If yes to (a), did that Damage to persons or threat of Damage to persons exist within a 50 kilometre radius of Mayberg's Premises? In particular: (i) Does the "threat of Damage" have to exist within 50 kilometres of the premises only or may it exist in areas further than 50 kilometres from the premises as well and, if so, where?

This question does not arise. If I am wrong in this regard, the answer would be yes but that the requirement is only that the action of the legal authority preventing or restricting access to the premises is a result of a threat of damage to persons within the 50 kilometre radius. It does not

matter if the action of the legal authority is also a result of a threat of damage to persons anywhere outside of the 50 kilometre radius.

(ii) Must the relevant order be made in direct response to the specific "threat of Damage" within 50 kilometres of the premises, or is it sufficient if the relevant order is made as a result of "threat of Damage" within the radius and of a broader scope (e.g. on a regional, state or nationwide scale)?

See (b)(i) above.

(c) If yes to (b), during the policy period, did any legal authority prevent or restrict access to Mayberg's Premises as a result of that Damage or threat of Damage?

No.

More particularly:

(i) Was the order or announcement relied upon by Mayberg made by a "legal authority"?

It was not in dispute that the directions made by the Chief Health Officer of Queensland on which Mayberg relied were made by a legal authority as required.

(ii) Was access to Mayberg's Premises prevented or restricted by the order or announcement?

Access to Mayberg's Victoria Point Store was prevented or restricted by the social distancing requirements imposed by the directions. Otherwise, access to Mayberg's other premises was not prevented or restricted by the directions.

(iii) If so, when did the prevention or restriction of access commence and when did it conclude?

The evidence does not permit this question to be answered.

(d) If yes to (a),(b) and (c), did the Loss of Income claimed by Mayberg result from an Interruption of Mayberg's "Business" caused by the prevention or restriction of access imposed by the relevant announcement or order?

No.

700 **17. Causation and Adjustments clause** (clause 1(b), page 58):

If it is found that the Disease clause and/or the POA endorsement responds to Mayberg's claim:

(a) Was there any interruption of Mayberg's Business caused by the relevant insured perils?

No.

(b) If yes to (a), what losses claimed by Mayberg resulted from that interruption of Mayberg's Business?

This question does not arise.

(c) Should any adjustment be made to Mayberg's business interruption loss by reference to events (other than the insured perils) relating to COVID-19?

This question does not arise but, if it did, I would conclude that adjustments should not be made if the uninsured peril arises from the same underlying cause as the insured peril. However, the relevant underlying cause cannot be characterised as COVID-19 generally wherever it might exist or present a threat. To be the same underlying cause as the insured peril the existence or threat of COVID-19, as relevant, must be a proximate cause of the insured peril. On a practical level this means Commonwealth actions involving overseas travel bans and the like caused by the presence of COVID-19 overseas and the risk that would present to Australia are not the same underlying cause as the proximate cause of the making of the Queensland directions relied on by Mayberg.

(d) What Loss of Income is payable in accordance with the terms of the policy?

None.

More particularly:

(i) Are JobKeeper or other government subsidies to be taken into account in the assessment of any loss and, if so, in what way?

Yes, see the reasons above.

(ii) Should rental abatements be taken into account in assessing recoverable loss?

Yes.

701 **18. Interest**

(a) If it is found that the policy responds and Allianz is liable to pay an amount to Mayberg, from what date is interest under section 57 of the ICA payable?

This does not arise, but it would not be unreasonable for Allianz to withhold payment unless and until it is finally determined to be liable to make payment in this proceeding.

9.10 Conclusions

702 For these reasons:

(1) cl 6ai does not apply as the directions did not close all or part of Mayberg's premises and were not a result of an the outbreak of an infectious or contagious human disease occurring within a 20-kilometre radius of the premises;

(2) the second prevention of access clause in the Endorsement does not apply as that clause does not apply to diseases or the threat of harm from diseases;

(3) if (2) is wrong, all of the directions were made as a result of a threat of Damage to persons within a 50 kilometre radius of the premises;

(4) excluding the Victoria Point store, none of the directions prevented or restricted access to Mayberg's other three premises;

(5) the social distancing requirements in the directions prevented or restricted access to Mayberg's Victoria Point store;

(6) the social distancing requirements were not a proximate cause of any loss in respect of Mayberg's Victoria Point store; and

(7) if, contrary to these conclusions, Mayberg suffered loss as a result of any insured peril, then Mayberg's loss would be reduced by the amounts it received in JobKeeper payments and the Queensland Government's COVID-19 grant program, as well as rental abatements.

703 Given that these conclusions are not capable of being affected by additional evidence, subject to any observations of the parties, I would make a declaration as follows:

> Declare that the applicant is not liable to indemnify the respondent under respondent's business insurance policy 141AN06566COM in response to the respondent's claim first made in March 2020.

10. NSD136/2021: ALLIANZ V THE STAGE SHOP (VISINTIN)

10.1 Agreed background

704 Visintin is the insured under a "Business Pack" insurance policy number 152RN00078COM placed with Allianz (**Visintin policy**).

705 The Visintin policy comprises: (a) the insurance schedule issued on 30 July 2019, and (b) Business Pack Policy Document.

706 The period of insurance under the Visintin policy is 30 July 2019 to 4:00pm 30 July 2020.

707 On 24 April 2020, John Corletto of GIA Insurance Brokers (**Visintin's broker**) submitted an online claim on behalf of Visintin.

708 On 24 May 2020, Allianz sent a letter to John Corletto of GIA rejecting the claim.

709 On 26 May 2020, John Corletto of GIA sent an email to Allianz disputing Allianz's rejection of the claim.

710 On 24 July 2020, Allianz sent its IDR response to John Corletto maintaining its denial of the claim.

711 On 28 July 2020, John Corletto of GIA made a complaint to AFCA on behalf of Visintin.

10.2 Policy provisions

712 The key provisions of the Visintin (subsequently the Stage Shop) policy are below.

> **Words with special meaning**
>
> …
>
> **Business** means the business shown and described in the Schedule.
>
> …
>
> **Endorsement** means an individual clause that We give You that attaches to and forms part of Your Schedule. An Endorsement varies the terms and conditions of the Policy.
>
> …
>
> **Period of Insurance** means the Period of Insurance shown in the Schedule or any subsequent period for which We have agreed to renew or extend cover. Any subsequent period is a separate period of any prior period.
>
> **Policy** means this Policy Document, the Schedule and any other documents We agree with You that form part of the terms and conditions of Our contract with You (such as any special conditions or Endorsements issued to You in written form).
>
> …
>
> **Premises** means the places listed in the Schedule as the Situation at which and from which You operate Your Business. The Premises includes Buildings and land within the legal boundaries.
>
> …
>
> **We**, **Us**, **Our, Allianz** means Allianz Australia Insurance Limited AFS Licence No.

234708, ABN 15 000 122 850 of 2 Market Street, SYDNEY NSW 2000.

…

You, **Your**, **Yours**, **Yourself** means the person(s), companies or firms named on the Schedule as the "Insured".

…

Property Damage

…

Business Interruption

…

Definitions

…

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.

Damage means physical loss, destruction or damage (occurring during the Period of Insurance) from the operation of a peril or Event insured against under the "Property Damage" Section, the "Theft" Section, the "Money" Section, the "Glass" Section or the "General Property" Section of Your Policy.

…

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.

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.

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.

…

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.

…

Standard 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.

…

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.

…

Part C – Insurable Gross Profit Basis

What You are covered for

In the event of interruption of or interference with Your Business in consequence of Damage to any Property Insured or any part thereof or 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 or interference.

Provided that:

a. the payment is in accordance with "What We Pay" provision for the item;

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 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.

…

What We pay

Item 1. Gross Profit

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 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.

…

Extra covers

This section is extended to include the following extra covers. The extra covers 1 to 5 inclusive are payable provided hat 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).

…

713 The Schedule includes:

…

Endorsement

Prevention of Access 48 hours minimum interruption

The Extra cover 6. Prevention of access under the Business Interruption Section is deleted and replaced by following:

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.

714 In the Schedule the relevant situation, situation 1, is identified as 3 Leigh Street Adelaide, South Australia, 5000. The business is identified as clothing retailing including boutique.

10.3 Introductory comments

715 Until 8 March 2021, Visintin operated its business from 3 Leigh Street Adelaide, South Australia, 5000.

716 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. 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.

717 Clause 4(b) requires closure or evacuation of the whole or part of the premises, not as the result of any action of an authority, but as a result of the outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the premises.

718 The exclusion based on the Quarantine Act does not apply consistent with the reasoning in *Wonkana*.

719 The prevention of access clause (the second appearing in the Endorsement) requires an order which prevents or restricts access to the premises that results from a threat of damage to property or persons within a 50 kilometre radius of the premises (subject to the 48 hours requirement which is not in issue).

720 Visintin relied on the following directions as orders for the purpose of the prevention of access clause:

(1) the 18 March 2020 *Direction of the Chief Executive of the Department for Health and Wellbeing in relation to Mass Gatherings* 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;

(2) the 22 March 2020 directions, *Declaration of a Major Emergency*, and *Mass Gatherings Directions (No 2)* which comprised:

(a) 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

(b) a declaration pursuant to s 23(1) of the *Emergency Management Act 2004* (SA) that a Major Emergency is occurring in respect of "The outbreak of the Human Disease named COVID-19 within South Australia";

(3) the 23 March 2020 *Non-Essential Business (and Other Gatherings) Closure Direction 2020*. 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;

(4) the 25 March 2020 *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;

(5) 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*. This included:

(a) 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; and

(b) the *Emergency Management (Gatherings) (COVID-19) Direction 2020* which provided that a person who owns, controls or operates a place must not 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;

(6) the 4 April 2020 media announcement of the Premier of South Australia which urged all South Australians to stay home over Easter and to follow the advice of health experts; and

(7) the June 2020 *Emergency Management (Public Activities (COVID-19) Directions 2020*. These directions prohibited certain activities save as otherwise permitted under the direction.

721 The directions identified above were made under the *South Australian Public Health Act 2011* (SA) and/or the Emergency Management Act by the Chief Executive of the Department for Health and Wellbeing or the Commissioner of Police as State Co-ordinator under the Emergency Management Act. They are statutory instruments to which the *Acts Interpretation Act 1915* (SA) apply. There is no dispute that the Chief Executive and the State Co-ordinator are a "legal authority" within the meaning of the prevention of access clause.

722 Part 11 of the South Australian Public Health Act 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. "Emergency" has the same meaning as in the Emergency Management Act: s 3. Under s 3 of the Emergency Management Act an emergency means an event (whether occurring in the State, outside the State or in and outside the State) that causes, or threatens to cause, relevantly the death of, or injury or other damage to the health of, any person.

723 Under s 90 of the South Australian Public Health Act on the declaration of a public health emergency certain provisions of the Emergency Management Act apply in relation to the emergency.

724 On 15 March 2020, the Chief Executive of the Department of Health and Wellbeing declared, pursuant to s 87 of the South Australian Public Health Act, 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".

725 Section 24A of the Emergency Management Act provides that an emergency may be declared to be a major emergency. Section 25 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) 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 (s 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 (s 25(2)(fb)).

726 On 22 March 2020, a declaration was made pursuant to s 23(1) of the Emergency Management Act that a Major Emergency is occurring in respect of "[t]he outbreak of the Human Disease named COVID-19 within South Australia".

727 All directions applied to South Australia as a whole. All directions made by the Commissioner of Police as State Co-ordinator recorded his opinion that the direction was necessary to achieve the purposes of the Emergency Management Act, being to establish an emergency management framework for the State that promotes prompt and effective decision-making associated with emergencies and makes provision for comprehensive and integrated planning in relation to emergencies and to promote community resilience and reduce community vulnerability in the event of an emergency.

10.4 Clause 4(b) – a quasi-hybrid clause

728 The closure of the premises is not required to be by any action of an authority. The causal requirement is that the closure must be a result of the outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the premises.

729 According to the affidavit of Ms Visintin, manager and director of Visintin, although the 23 March 2020 direction did not require Visintin to close its premises, it required other premises which Visintin serviced (such as theatres, dance schools, and entertainment venues) to close and Visintin's walk-in traffic reduced from early March 2020 and was "almost non-existent after 23 March 2020". Further directions and an announcement of the Premier on 4 April 2020 followed. On 28 March 2020 Ms Visintin closed Visintin's business and it remained closed until 2 April 2020. Ms Visintin re-opened the premises and business on 3 April 2020 with reduced hours and by appointment only until 25 May 2020. From 25 May 2020 until November 2020 Visintin operated reduced hours without appointment (that is, the premises were open to walk-in trade) and subject to ensuring customers maintained 1.5 metres distance from other people. This continued until the sale of the assets in March 2021. Visintin also took phone

orders and offered home delivery between March and December 2020. While Visintin tried to establish an online ordering system this proved difficult due to the closure of suppliers in Victoria.

730 Visintin submitted that it closed its business (in whole) between 28 March 2020 and 2 April 2020. 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). Further, Visintin submitted that it may be open to conclude that the social distancing requirements constituted a closure of a part of Visintin's premises.

731 Clause 4(b) requires closure or evacuation of the whole or part of the premises. Based on Ms Visintin's evidence I infer that Visintin both ceased to operate its business and closed its premises between 28 March 2020 and 2 April 2020.

732 I do not accept Allianz's contrary submissions which assume that a closure must be a result of a legal obligation to close. Clause 4(b) imposes no such requirement. It encompasses a closure of premises (whether voluntary or legally required) provided the closure is a result of the outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the premises. Allianz submitted that:

> Plainly, it is the role of the government and other public authorities to protect the public interest, including by ordering the closure or evacuation of certain premises if necessary. Neither party to the insurance policy would have supposed that the insured was best placed to make decisions as to how best to protect the public interest by closing the premises on which the business was conducted.

733 The policy, however, says precisely this – it is for the insured to take the action of the closure. The relevant control is causal – is the closure a result of the relevant matter? That action either will or will not be as a result of the outbreak as specified. It is the causal requirement that protects the insurer. The determinative issue is not the voluntariness or otherwise of the closure. The determinative issues are the fact of closure and the causal requirement.

734 Allianz submitted that:

> If the phrase "closure … of the Premises … as the result of an outbreak" did contemplate voluntary closures at the discretion of the policyholder, the question of whether a given closure was "as a result of" an identified COVID-19 outbreak would depend solely on the subjective state of mind of the policyholder. The causation test would be satisfied in every case in which an insured held the opinion that an outbreak of a notifiable disease within the designated area justified the closure of the business. Such an interpretation is implausible. It is most unlikely that an insured would have

> understood that it was at liberty to close or evacuate the Premises and recover under the policy whenever there was an outbreak within the designated area, even where the government and other authorities permitted the insured to continue operating the business from the Premises.

735 Matters are not as dire as Allianz seems to consider if voluntariness of closure is not a disqualifying fact. If, on the contemporaneously available material, there was no outbreak as specified then a real question would arise as to whether the closure was a result of the outbreak as specified or not. An insured cannot imagine a state of affairs (an outbreak etc) and then close the premises based on that imagined state of affairs and claim cover. The clause is not wholly subjective in that sense.

736 As discussed above, I consider that even a hybrid clause requiring action of an authority with duties under statutes (making it unlikely that the authority would act arbitrarily, capriciously or in bad faith) may not be satisfied by an act of an authority taken arbitrarily, capriciously or in bad faith. An arbitrary, capricious or bad faith voluntary closure of premises, in my view, also could not be said to be a result of the specified outbreak. The proximate cause of the closure would not be the outbreak but something else. The objective fact or otherwise of the existence of an outbreak as specified or not will be relevant to the determination of whether the outbreak was or was not a proximate cause of the closure. The causal requirement, accordingly, provides the insurer with substantial protection. On this basis, it is not implausible or uncommercial that a voluntary closure is not excluded from the operation of cl 4(b) for that reason alone.

737 Allianz submitted:

> The purpose of the provision was to insure against losses caused by the closure of a business premises, where the closure was imposed by a relevant authority in an effort to avoid the transmission of a notifiable human infectious or contagious disease: see *Cat Media*, [56]…

738 Clause 4(b) does not require a closure imposed by a relevant authority. Accordingly, that cannot be the purpose of cl 4(b). Rather, the purpose of cl 4(b) was to insure against losses caused by the closure of business premises (whether voluntarily or by legal obligation) as a result of a relevant outbreak.

739 *Cat Media* at [56] concerns a hybrid clause depending on closure or evacuation by an order of a competent public authority (see at [15]). In that context, Bergin J said the "evacuation or closure of the Premises in such circumstances is obviously intended to impede the spread of the disease".

740 No doubt in the present case the parties appreciated that if there was an outbreak as specified it may be necessary or appropriate for there to be a closure of the premises including to impede the spread of the disease. But the relevant causal requirement is not confined to this as it requires only that the closure be a result of the specified outbreak.

741 I do not accept Allianz's submission that the fact that the directions imposed restrictions on third parties, and not on Visintin, means that there was no closure of the premises. In the context of cl 4(b), this involves a non-sequitur. The directions are immaterial to cl 4(b) other than to the extent they might help to prove the existence of an outbreak of a notifiable human infectious or contagious disease.

742 I accept, however, that a closure of the whole or part of premises requires the whole or part of premises not to be open to people who would ordinarily be able to enter and remain upon the premises. That was the case for Visintin between 28 March and 2 April 2020. It does not matter that Ms Visintin closed the premises voluntarily. This does not mean, however, that the closure was a result of the outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the premises as required.

743 In the case of Visintin, the reduced hours of operation could not be characterised as a closure of the premises. The premises were open, but Ms Visintin decided to reduce the hours of operation. The fact that, outside those reduced hours, it may be inferred that the premises were closed, does not mean that there was a closure of the whole or part of the premises. Being closed outside business hours is not the same as a closure of the premises.

744 Nor do I consider that operating by appointment only and not taking walk-in customers involved a closure of the premises. It involved a different mode of operation of the business, but the premises remained open, I infer, whenever an appointment was made.

745 The social distancing requirements also did not involve a closure of the premises. There is no evidence that any person who could or would otherwise have entered the premises did not do so as a result of the social distancing requirements.

746 On this basis, the only closure of Visintin's premises was between 28 March and 2 April 2020.

747 The next issue is whether the closure was a result of the outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the premises.

748 My views about "outbreak", in the context of this policy, remain as set out above – there will be an outbreak of COVID-19 within a 20 kilometre radius of the premises if there is one person with COVID-19 within the radius, in the community (that is, not in a controlled environment such as quarantine, isolation or a hospital), and who is capable of communicating COVID-19 to another person.

749 Allianz admitted that:

(1) prior to 18 March 2020, there were at least two people with COVID-19 who had been within a 20 kilometre radius of the premises;

(2) 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

(3) prior to 18 March 2020, 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 capable of infecting another person with COVID-19.

750 This is sufficient to prove an outbreak of COVID-19 within the radius before the closure of the premises, but again that fact does not prove the causal requirement in cl 4(b).

751 Allianz did not suggest that COVID-19 was not a notifiable disease merely because the policy started before COVID-19 was known to exist. Section 63 of the South Australian Public Health Act enables notifiable conditions (which includes diseases) to be identified by two methods (by regulation or, in urgent circumstances, by Ministerial declaration). COVID-19 became a notifiable disease by a declaration under s 63(2) on 28 January 2020. As noted, Allianz did not suggest that the "notifiable" requirement was not satisfied by reason of any temporal limitation on the operation of cl 4(b). Allianz's acceptance that cl 4(b) is ambulatory in its operation so that it applies to diseases which become notifiable diseases during the term of the policy is correct. However, there is another temporal requirement in cl 4(b). It is that the disease must be a notifiable human infectious or contagious disease at the time of the closure or evacuation of the whole or part of the premises said to be the result of the outbreak of a notifiable human infectious or contagious disease. This temporal requirement is satisfied.

752 Allianz submitted that an "outbreak" requires at least a confirmed community transmission of COVID-19 within the radius. As discussed above, I disagree. To adopt my views to Allianz's language, an outbreak of COVID-19 requires only a confirmed risk of community transmission

of COVID-19 within the radius. This will be satisfied by a single case of COVID-19 within the community (not in a controlled environment) capable of communicating COVID-19 to another person and within the radius.

753 Allianz's contrary submissions insisting on a confirmed case of community transmission within the radius are not persuasive:

(1) the use of the word "outbreak" in the *National Health Security Act 2007* (Cth) (the Minister may include a disease on the National Notifiable Disease List "if the Minister considers that an outbreak of the disease would be a public health risk", s 11(2)) is not inconsistent with my conclusions;

(2) I agree the word "outbreak" should be construed by reference to its public health meaning: *Vero Insurance Pty Ltd v Australian Prestressing Services Pty Ltd* [2013] NSWCA 181 at [40];

(3) Allianz said "the purpose and context therefore suggest … that an 'outbreak' must be capable of giving rise to a public health risk of the kind that would attract government orders to close a premises". As noted, cl 4(b) does not require any action of an authority. But it would be surprising if an authority did nothing at all as a result of the outbreak of a notifiable human infectious or contagious disease, wherever it might occur;

(4) I agree that single instances of COVID-19 occurring in a controlled environment do not qualify as "outbreaks". I agree that confirmed cases of COVID-19 that have been acquired overseas or interstate and confirmed cases that have been acquired or are located in hospital, hotel quarantine or self-isolation, would not constitute an "outbreak" unless there had been uncontrolled transmission of COVID-19 within those settings;

(5) for the reasons given I disagree that to satisfy the requirement for an "outbreak", what is required is at least a confirmed community transmission of COVID-19. A community transmission is where one confirmed case of COVID-19 transmits it to another person in an uncontrolled environment. I consider there is an outbreak of COVID-19 if there is a least one person with COVID-19 who is capable of transmitting COVID-19 to another person within the community (that is, in a non-controlled environment). For there to be an "outbreak" within the radius, such a person must be within the radius in those circumstances (that is, capable of transmitting COVID-19 and not in a controlled environment);

(6) contrary to Allianz's submissions a single person with COVID-19 who is capable of transmitting COVID-19 to another person within the community (that is, in a non-controlled environment) does pose the kind of risk likely to attract the actions of an authority given the nature of COVID-19. As I have said, the idea that the policy provisions contemplate that an authority must await a confirmed case of community transmission of COVID-19 before the authority would be acting as a result of an outbreak of COVID-19 is untenable. The risk of uncontrolled community transmission arising from a single person with COVID-19 who is capable of transmitting COVID-19 to another person within the community (that is, in a non-controlled environment) is not a mere threat of an outbreak of COVID-19. Given the nature of COVID-19 the presence of that person in the non-controlled environment is itself an outbreak of COVID-19;

(7) the reasoning in *FCA v Arch UKSC* at [69] to the contrary was in the context of ascertaining the meaning of an "occurrence" of COVID-19;

(8) Allianz said the words "outbreak … occurring within" are not apt to describe "a widespread phenomenon extending to the vicinity of the Premises". This involves an incorrect focus. The required focus is the area within the radius. An outbreak may readily spread from outside the radius to inside the radius or from inside the radius to outside the radius. The direction of spread is immaterial. All that is required is an outbreak within the radius. It does not matter where that outbreak starts or if that outbreak is part of a larger outbreak or not. Provided it can be said there is an outbreak within the radius the outbreak requirement is satisfied;

(9) Allianz said it apprehended that Visintin hopes to establish by that contention that it is entitled to indemnity for loss caused by COVID-19 wherever and whenever it occurred, on the condition that there was a confirmed case inside the 20 kilometre radius. That might be right, but a confirmed case of COVID-19 within the radius will not establish an outbreak of COVID-19 within the radius because the case may not ever have been active while within the radius or because the person may always have been in a controlled environment while within the radius. This approach does not involve re-writing the bargain of the parties contrary to principle: *Fagan* at 388;

(10) the observations in *FCA v Arch UKSC* at [86] concerned an attempt to read out the radius requirement altogether (see [83]-[86]). That attempt was rejected. The Court below had rejected the insurer's submission that the clause in issue was confined to a

case of the disease manifested within the radius. The Court below had confined the requirement of "manifestation" to an adjectival description, not a geographically bound limitation. It is that reading of the clause which Lord Hamblen and Lord Legatt JJSC found commercially implausible. That may readily be accepted. Properly understood it does not suggest my conclusion is wrong; and

(11) I agree with Allianz that cl 4(b) does not cover interruption caused by community transmissions of COVID-19 occurring outside of the 20 kilometre radius. If community transmission of COVID-19 outside of the 20 kilometre radius is all that occurred, the Visintin premises could not have been the subject of closure as a result of the outbreak of a notifiable human infectious or contagious disease occurring within the 20 kilometre radius. But that is not that all that occurred in this case. In this case there were people capable of transmitting COVID-19 in an uncontrolled environment within the radius. That satisfies the "outbreak" requirement, but not the causal requirement.

754 Contrary to Visintin's submissions, if my conclusions above are wrong, it is not apparent to me that the subpoenaed material proves a case of community transmission within the radius. The spreadsheets might or might not prove that fact depending on the location of the event of community transmission. Visintin may be able to prove community transmission within the radius by further evidence if my conclusions are incorrect.

755 The real issue is whether there was closure of Visintin's premises as a result of the outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the premises. Visintin submitted:

> 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).

756 As noted, the only closure of Visintin's premises was between 28 March and 2 April 2020. The evidence does not support an inference that this closure was a result of the outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the premises. Even if I am wrong about closure, Ms Visintin's evidence is far too vague to draw any inference that any closure of Visintin's premises was a result of the outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the premises. The actual closure of the premises between 28 March and 2 April 2020 and the purported

subsequent partial closures, on Ms Visintin's evidence, were a result of a combination of the effect of COVID-19 on businesses buying Visintin's products and the effect of the directions on those other businesses, as well as the Premier's announcement. As Allianz also submitted, "Ms Visintin had no special knowledge of a particular 'outbreak' in the area. Rather, she decided to close the shop in response to government directions that affected Visintin's customer base. That is not sufficient to provide the necessary causal link".

757 Consistent with my reasoning in other cases above, none of the directions themselves could be characterised as a result of the outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the premises. While the authority may have been aware that before 18 March 2020 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 capable of infecting another person with COVID-19, by 18 March 2020 there were 37 cases of COVID-19 in South Australia. By 22 March 2020 there were 100 cases. I am unable to infer that the directions were a result of the outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the premises, in contrast to such an outbreak outside of the 20 kilometre radius. The reasoning I have applied in the other cases above remains apt. That is, where the action of an authority discloses on its face that it involves a response as a result of a State-wide threat from COVID-19, including the existence of cases of COVID-19 in undisclosed locations, it is one thing to infer that the action is a result of an intention to prevent harm to each and every person within the State. It is another to infer that the action is a result of an outbreak of COVID-19 within any particular area. As discussed, the reasoning which led to a different conclusion in *FCA v Arch UKSC* is inapplicable to the geographical context of Australia.

758 Further, as discussed, this conclusion is not altered by evidence of the presence of COVID-19 within the 20 kilometre radius including if that evidence was known to the authority at the time it made the directions. I would infer that the authority did know about the COVID-19 cases within the 20 kilometre radius at the time but that does not alter the fact that the directions were made in response to the existence and risk of COVID-19 State-wide. This is not sufficient to infer that an outbreak of COVID-19 within the 20 kilometre radius was a cause of the directions. Even if that could be inferred, the circumstances involve three causal steps – an outbreak of COVID-19 within the radius caused the directions → the directions caused other businesses to close → the closure of the other businesses caused a precipitous decline in Visintin's trade → as a result of the precipitous decline in Visintin's trade Ms Visintin closed the Visintin premises. Unless a provision encompasses the concept of indirect causation (for

example, by permitting the cause to be indirect in some way) then the cause of a cause of a cause is not itself a relevant cause: see *Federico* at 521 and the discussion below relating to NSD144/2021 Guild and Gym Franchises. Clause 4(b) does not extend to indirect causation of this kind as it uses the words "as a result of".

759 Given the terms of cl 4(b) (which do not involve any action of an authority) the fact that none of the directions were a result of an outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the premises does not mean that the closure of the premises by Ms Visintin was itself not a result of such an outbreak. The problem, however, is that Ms Visintin's evidence is that the closure between 28 March and 2 April 2020 was the result of the directions before that date (the effect of which had been to reduce walk-in customers to "almost non-existent") and the announcement of the South Australian Premier urging South Australians to stay at home during the Easter period. Given that these directions (and announcement which also applied State-wide) were not a result of an outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the premises, the closure of the premises also could not have been a result of such an outbreak.

760 The same reasoning applies to the subsequent reduced trading from the premises. It did not result from an outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the premises. It resulted from the effect of the directions on trade from the premises.

761 For these reasons cl 4(b) is not satisfied.

10.5 Endorsement – prevention of access

762 My reasoning above applies. That is, I am unable to accept that this part of the Endorsement covers damage or the threat of damage from disease because that would involve profound incongruity and incoherence (not mere tautology or redundancy) in the operation of the policy. This is so despite the fact that the exclusion of "Highly Pathogenic Avian Influenza in Humans or any other disease declared to be a quarantinable disease under the Quarantine Act 1908 (including amendments)" applies only to cll 4(a) and (c), and not 4(b).

763 Specifically, if the prevention of access clause covers disease then: (a) the disease under the prevention of access clause would not need to be a notifiable disease to attract cover in contrast to cl 4(b), (b) the disease would not need to be the subject of an outbreak within the 20 kilometre radius, and (c) the mere threat of damage from any disease within the 50 kilometre

radius would be sufficient to trigger cover. Again, this makes no sense. There is no commercial or other logic in confining cover in cl 4(b) to an actual outbreak of a notifiable disease within a 20 kilometre radius and then expanding cover under the prevention of access clause to a threat of any disease within a 50 kilometre radius.

764 The prevention of access clause (the second in the Endorsement) refers to damage rather than Damage. If "damage" takes its ordinary meaning of "injury or harm" (Macquarie Dictionary Online) it could not be said that the use of the word indicates an intention to exclude the concept of harm from a disease (in contrast to the other cases above where damage is a defined term). I would not read "damage" in this clause as "Damage" given that other defined terms (Your Business, Premises) are used in the clause. In this regard I do not accept Allianz's submissions to the contrary given that "damage" rather than "Damage" is used. Specifically:

(1) the fact that the first endorsement refers to "the damage would have been covered under Property Damage if the property in the vicinity of the Premises [had] been insured under that Section" emphasises that the second endorsement is not so limited;

(2) while there may be no apparent sensible reason why the concept of "damage" would differ as between each of those two parts of the clause, effect must be given to the text of the provision in context, the context including that defined terms are identified by capital letters as in "Damage"; and

(3) if necessary, the contra proferentem rule would apply so that the prevention of access endorsement could not be read as confined to damage of the type that would be covered under the primary cover were it to occur on the premises.

765 This said, the considerations set out above remain, and cause me to conclude that the prevention of access clause does not apply to diseases or the threat of diseases.

766 If this is wrong, I would accept that the directions were all made as a result of a threat of damage to persons within the 50 kilometre radius. Again, as reasoned above, I conclude that the directions were made as a result of a threat of harm from COVID-19 to each and every person within South Australia. This satisfies the causal requirement that the directions (which may be taken to be orders under the clause) were all made as a result of a threat of damage to persons within the 50 kilometre radius.

767 If this is wrong, and consistent with my reasoning above, I do not see how evidence of what is now known about COVID-19 cases within the 50 kilometre radius is relevant to the actions of an authority taken by reference to information known to it at the time.

768 However, I do not consider that there was any prevention or restriction of access to the premises "by order of any legal authority". The only possible direction affecting access to the premises is the obligation to use best endeavours to comply with social distancing requirements. However, the premises were a retail store. There is no evidence that the social distancing requirements prevented or restricted any person accessing the premises who would otherwise have been entitled to do so. To the contrary, the evidence is that walk-in custom had evaporated before any social distancing requirement was imposed. The other actions taken by Visintin (by appointment only, reduced trading hours) were not the result of any order of an authority. They were commercial decisions made by Ms Visintin. An order involves a mandatory requirement: *Cat Media* at [29].

769 I also note that the 4 April 2020 media announcement of the Premier of South Australia was not an order. The Premier urged all South Australians to stay home over Easter but urging some action and mandating the action are different matters. The South Australian Premier was also not a "legal authority" in the sense used in the prevention of access clause. A "legal authority", in context, must mean an authority with power to prevent or restrict access to the premises. I also consider that to be a "legal authority" the power must be of a particular kind – the power must be public in nature and derived from an Act, regulation or statutory instrument of some kind. I say this despite recognising that cl 4(b) refers to "a competent government, public or statutory authority" and the prevention of access refers to a legal authority. If it had been intended that any person with any kind of power (contractual power for example) could trigger the prevention of access clause by exercising that kind of power to prevent or hinder access then the words "legal authority" would be inapt. The clause could simply refer to "an order of a competent person". The fact that the clause refers to a "legal authority', to my mind, indicates that the relevant area of discourse is public (not private) power and public power is derived from Acts, regulations and statutory instruments (howsoever those instruments may be classified).

770 In *Cat Media* Bergin J referred to cases concerning the meaning of "competent public authority" as relevant in that case. The policies in issue in the present case use a variety of formulations including ones wider than a "public authority". The cases include: (a) *Renmark*

Hotel Inc v Federal Commissioner of Taxation [1949] HCA 7; (1949) 79 CLR 10 – the performance of statutory duties and the exercise of public functions were indicative of "the nature of the attributes which a personal body must have in order to be a public authority", (b) *Federal Commissioner of Taxation v Silverton Tramway Company Ltd* [1953] HCA 79; (1953) 88 CLR 559 at 565-566 – "an agency or instrument set up to exercise control or execute a function in the public interest whether as an emanation of the general government or as an adjunct of local government or as a specially constituted officer or body", (c) *Western Australian Turf Club v Federal Commissioner of Taxation* [1978] HCA 13; (1978) 139 CLR 288 at 294 – the concept involves the exercise of powers and functions not possessed by the ordinary citizen and which have been conferred by statute and are essentially of a public nature, and (d) *Re Anti-Cancer Council of Victoria; Ex Parte State Public Services Federation* [1992] HCA 53; (1992) 175 CLR 442 at 450 – "[t]he question whether a body is a public authority is one of fact and degree which often requires a balancing of the various features of the body concerned".

771 A "competent" authority, in my view, means only that the authority is competent (in the sense of empowered or authorised) to take the action nominated in the relevant provision.

772 It follows that the prevention or restriction of access requirement by order of a legal authority is not satisfied.

773 Further, as Allianz submitted:

(1) the words "an order … which prevents or restricts access to the Premises" are not apt to describe an order imposing restrictions on third parties (such as Visintin's customers), which only incidentally results in fewer people visiting the premises: see *FCA v Arch UKSC* at [149]-[153];

(2) the wording of the clause in this case is not analogous to the Hiscox 1-4 wording considered in *FCA v Arch UKSC* at [111] ("inability to use…premises due to restrictions….following…");

(3) the Visintin wording requires the prevention or restriction to be to the premises themselves, not other premises; and

(4) while my reading of the Emergency Management (Gatherings) (COVID-19) Direction 2020 made on 28 March 2020 is that the social distancing requirements applied generally from that date (see cl 3(4)), there is no evidence of the number of customers

that were queued up outside, or any other evidence supporting a finding that had it not been for the social distancing orders, more customers would have entered the premises and purchased stock.

774 For these reasons the prevention of access clause is not satisfied.

10.6 Causation and adjustments

775 If I am wrong above and cl 4(b) is satisfied then:

(1) there is no evidence that an outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the premises was a cause of interruption or interference with the business causing loss. Rather, the causes of the interruption or interference with the business causing loss were the effect of the directions (not being the result of an outbreak within the 20 kilometre radius) on other businesses which used Visintin's services, the announcement of the Premier, and, perhaps, the effect of COVID-19 generally in discouraging people from using Visintin's services; and

(2) unless Visintin could prove that the outbreak within 20 kilometres was a cause of loss then there is no scope for the operation of any principle about concurrent causes of loss involving the same underlying cause not being excluded from cover.

776 If I am wrong and the prevention of access clause is satisfied then:

(1) any prevention or restriction, to be relevant, must be a prevention or restriction applying to the premises, not a prevention or restriction applying to other premises (such as the premises which, under the directions could not open and which may otherwise have used Visintin's services or stay at home directions);

(2) there is no evidence that the directions said to prevent or restrict access in fact were a cause of any interruption or interference with the business causing loss;

(3) there is no evidence that people who would otherwise have gone to the premises were prevented or restricted from doing so by the directions; and

(4) a social distancing requirement, to be relevant, must be able to be inferred to have prevented or restricted the capacity of some person to enter and remain on the premises when they otherwise would have done so. There is no such evidence in the present case.

777 The evidence of Visintin's profit and loss statements for the periods July 2018 to August 2020, and August 2020 to March 2021 is not sufficient to infer that either of the insured perils was a cause of loss in the circumstances as described. Unless that can be proved, as I have said, the concept of concurrent causes, including a concurrent cause of the existence and threat of COVID-19 across South Australia not excluding cover, can have no application. If, however, an insured peril was a cause of the loss then the existence and threat of COVID-19 across South Australia does constitute the same underlying cause as the cause of the insured perils. On that basis, excluding that same underlying cause from the concept of the circumstances "had the Damage not occurred" would be commercially irrational and not reflective of the intention of the parties.

778 The same conclusions would apply to the concept of adjustments embedded within the definitions of Annual Turnover, Rate of Gross Profit and Standard Turnover. If, contrary to my conclusion, Visintin could prove that either insured peril was a cause of the interruption or interference to its business causing loss then I would accept that the existence and threat of COVID-19 across South Australia is the same underlying cause of the insured perils. On that basis the adjustments clause would not operate to require the loss to be adjusted to take into account the effect of that same underlying cause. The issue affecting any loss of Mayberg, for example, which included actions resulting from a different underlying cause (COVID-19 overseas) does not arise in Visintin's case.

10.7 Third party payments

779 The policy provisions in Item 1 Gross Profit provide that the payable as indemnity under this item will be as specified "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".

780 On this basis and in accordance with the general law of indemnity contracts, Visintin would have to account in the calculation of loss for JobKeeper payments, the Commonwealth's Cash Flow Boost and the rental abatement from its landlord. My reasoning above applies. As with the Mayberg policy the notion that the policy does not provide an indemnity for loss only is untenable – see: (a) What You are covered for – "…We will pay You in respect of each item shown in the Schedule, the amount of the loss resulting from such interruption or interference", and (b) Item 1. Gross Profit – "This item is limited to the loss of Gross Profit…".

781 Further, the JobKeeper payments and rental abatements represent a sum saved in consequence of the interruption or interference. As elsewhere, Visintin could not have it both that the effects of COVID-19 across South Australia are not to be taken into account in respect of causation and adjustments because they arise from the same underlying cause as the insured perils, and then also maintain that JobKeeper and rental abatements are not in consequence of the interruption or interference.

782 In any event, as I have said, the same result would be reached on the application of general principles of law applying to contracts of indemnity where it is only loss that is covered and any payment made in reduction of loss is to be taken into account.

783 Visintin also received money under the South Australian Government's Small Business Grants program. Visintin received the "$10,000 emergency cash grants for small businesses impacted by COVID-19". The accompanying media release said:

> 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 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.

784 In contrast to my conclusions thus far about other State cash grants, I would characterise this grant as intended to reduce a business's loss from restrictions imposed on business due to COVID-19. This is because the purpose of the South Australian Government in making the payments was to reduce losses that businesses had suffered. On this basis, I would conclude that this cash payment must also be taken into account in assessing Visintin's loss.

10.8 Interest

785 In accordance with my reasoning elsewhere, s 57 of the Insurance Contracts Act is not yet engaged. It would not be unreasonable for Allianz to withhold payment until a final determination of this case decides that Allianz is liable to do so.

10.9 Answers to questions

786 The questions suffer from the usual problems. Insofar as possible, they are answered below.

787 **19. Disease clause** (clause 4(b), page 66):

(a) During the policy period, was the whole or part of Visintin's Premises closed or evacuated?

Yes, the whole of the premises was closed between 28 March and 2 April 2020.

(b) If so, when did that closure or evacuation commence and when did it conclude?

See (a) above.

(c) If so, was that closure or evacuation the result of an outbreak of COVID-19 occurring within a 20 kilometre radius of Visintin's Premises?

No.

More particularly:

(i) Did an "outbreak" occur within a 20 kilometre radius of Visintin's Premises?

Yes.

(ii) If so, when did that "outbreak" commence and when did it conclude?

On the evidence it can be said only that the outbreak commenced before 18 March 2020.

(d) If yes to (a), (b) and (c), is the loss claimed by Visintin attributable to the interruption or interference with Visintin's "Business" due to the closure or evacuation?

No.

788 **20. Prevention of access (POA) endorsement** (policy schedule, page 6):

(a) Does COVID-19 constitute a threat of damage to persons?

Not within the meaning of the prevention of access clause.

(b) If yes to (a), did that threat of damage to persons exist within a 50 kilometre radius of Visintin's Premises?

If I am right about (a), no. If I am wrong about (a), yes.

(c) If yes to (b), during the policy period, did any legal authority prevent or restrict access to Visintin's Premises as a result of that threat of damage to persons?

No, even if I am wrong about (a).

More particularly:

(i) Was the order or announcement relied upon by Visintin made by a "legal authority"?

The directions were made by a legal authority. The Premier's announcement of 4 April 2020 was not an order within the meaning of the prevention of access clause. Without a basis to conclude that the Premier was empowered to make a legal requirement preventing or restricting access to Visintin's premises (and there is no such evidence) the Premier was not a "legal authority" within the meaning of the prevention of access clause.

(ii) Was access to Visintin's Premises prevented or restricted by the order or announcement?

No.

(d) If yes to (a), (b) and (c), did the loss claimed by Visintin result from interruption of Visintin's "Business" caused by any announcement or order relied upon by Visintin?

No. Further, the relevant loss is not loss from "any announcement or order relied upon by Visintin".

789 **21. Causation and Adjustments clause** (item 1, page 63):

If it is found that the Disease clause and/or the POA endorsement responds to Visintin's claim:

(a) Was there any interruption of or interference with Visintin's Business in consequence of the relevant insured perils?

No.

(b) If yes to (a), what losses claimed by Visintin resulted from that interruption of or interference with Visintin's Business?

This does not arise.

(c) Should any adjustment be made to Visintin's business interruption loss by reference to events (other than the insured perils) relating to COVID-19?

This does not arise but if it did I would conclude that no adjustment is required in respect of the existence and threat of COVID-19 across South Australia which is the same underlying cause is the cause of the insured perils.

(d) What loss of Insurable Gross Profit is payable in accordance with the terms of the policy?

None.

More particularly:

(i) Are JobKeeper or other government subsidies to be taken into account in the assessment of any loss and, if so, in what way?

Yes, in that they reduce the loss.

(ii) Should rental abatements be taken into account in assessing recoverable loss?

Yes, in that it reduces the loss.

790 **22. Interest**

(a) If it is found that the policy responds and Allianz is liable to pay an amount to Visintin, from what date is interest under section 57 of the ICA payable?

This does not arise, but it would not be unreasonable for Allianz to withhold payment unless and until it is finally determined to be liable to make payment in this proceeding.

10.10 Conclusions

791 For these reasons:

(1) clause 4(b) does not apply as the closure of the premises between 28 March and 2 April 2020 was not a result of the outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the premises, and there was no other closure of the premises;

(2) if (1) is wrong, there was an outbreak of a notifiable human infectious or contagious disease occurring within a 20 kilometre radius of the premises but the closure of the premises did not result from that outbreak;

(3) the prevention of access clause does not apply as that clause does not apply to diseases;

(4) if (3) is wrong, the prevention of access clause does not apply as there was no order of a legal authority which prevented or restricted access to the premises;

(5) if (3) and (4) are wrong, there was a threat of damage to persons within a 50 kilometre radius of the premises and the directions were made as a result of that threat;

(6) the insured peril in cl 4(b) was not a cause of Visintin's loss;

(7) the insured peril in the prevention of access clause was not a cause of Visintin's loss; and

(8) if, contrary to these conclusions, Visintin suffered loss as a result of any insured peril, then Visintin's loss would be reduced by the amount it received in JobKeeper payments, the Commonwealth's Cash Flow Boost and the rental abatements, as well as the money it received under the South Australian Government's Small Business Grants program.

792 Given that these conclusions are not capable of being affected by additional evidence, subject to any observations of the parties, I would make a declaration as follows:

> Declare that the applicant is not liable to indemnify the respondent under respondent's business insurance policy 152RN00078COM in response to the respondent's claim first made in April 2020.

11. NSD137/2021: CHUBB V WALDECK

11.1 Agreed background

793 Mr Waldeck is the insured under a "Chubb Business Pack" EPM0018480 placed with Chubb (**Waldeck policy**).

794 The Waldeck policy comprises: (a) Chubb Business Pack Insurance Schedule dated 25 March 2020, and (b) Chubb Business Pack Product Disclosure Statement published 03/2019 and numbered Chubb16-156-0319.

795 The Waldeck policy was issued on 25 March 2020 for the period 28 March 2020 to 28 March 2021, both 4:00PM Standard Time at the Address of the Named Insured shown in the Schedule.

796 Mr Waldeck is the registered proprietor of a property located at 1197 Toorak Road, Camberwell, Victoria (**Waldeck premises**).

797 From 29 June 2012 until on or about 22 October 2020, Mr Waldeck leased the Ground Floor of the Waldeck premises (Ground Floor) to Going Venture Pty Ltd (Going Venture) (**Lease**), which occupied the Ground Floor as a coffee shop trading as "Coffee & Soul" (**Café**).

798 During the period 23 March 2020 to 22 October 2020, the following requirements applied to the Café:

(1) from 23 March 2020 to 31 May 2020, the Café was required to cease accepting dine-in customers and only provide takeaways, deliveries and phone order sales;

(2) from 1 June 2020 to 7 July 2020, the Café was only permitted to accept dine-in customers in accordance with the 4 square metre rule; and

(3) from 8 July 2020 to 22 October 2020 (given that the Lease was surrendered on 22 October 2020 in accordance with the Deed of Surrender dated 26 October 2020) the Café was required to cease accepting dine-in customers and only provide takeaways, deliveries and phone order sales.

799 Mr Waldeck was required to provide relief from rent payments and outgoings to Going Venture for the period 1 April 2020 to on or about 22 October 2020 pursuant to the *COVID-19 Omnibus (Emergency Measures) (Commercial Leases and Licences) Regulations 2020* (Vic) (the **Rent Relief Regulations**).

800 Pursuant to the Regulations, Mr Waldeck provided rental relief to Going Venture for the period 1 April 2020 to on or about 22 October 2020 which included some of the rent payable under the Lease being waived and deferred.

801 Mr Waldeck incurred loss of rent following Going Venture surrendering the Lease on 22 October 2020.

802 On 9 April 2020, Mr Waldeck, via email from his broker, made a claim under the Waldeck policy.

803 On 17 April 2020, Chubb declined Mr Waldeck's claim. This was also communicated by letter on 22 April 2020.

804 By letter dated 23 April 2020, Mr Waldeck requested that Chubb reconsider its assessment of his claim.

805 On 8 May 2020, Mr Waldeck made a complaint to AFCA in relation to Chubb's handling of the claim under the Waldeck policy.

806 On 26 May 2020, Chubb stated that it was unable to offer financial assistance in respect of Mr Waldeck's claim.

11.2 Policy provisions

807 The key provisions of the Waldeck policy are below.

Introduction

…

All parts of this Policy, along with the Schedule and any endorsements should be read together and considered as one contract.

The operative Sections of this Policy are as indicated in the Schedule. Unless a particular Section is identified in the Schedule as being 'Insured', it is of no effect and no cover is granted under it.

…

Headings

Headings have been included for ease of reference and it is understood and agreed that the terms and Conditions of this Policy are not to be construed or interpreted by reference to such headings.

General definitions

…

Building(s)

means buildings, including landlords' fixtures and fittings, alterations and decorations therein and thereon including fixed glass (including its framework lettering or any intruder alarm foil attached to it), foundations, walls, gates, fences, car parks, yards, pavements, drains, sewers, piping, cabling, wiring and associated control equipment and accessories only to the extent of Your responsibility and liability.

Business

means the Business described in the Schedule.

…

Insured Location

means the Insured Location(s) stated in the Schedule.

…

Schedule

means the Schedule issued with this policy wording.

…

Section 1 –

Definitions

Property Damage

Wherever appearing in this Section 1 – Property Damage, the following definitions apply:

…

Damage or **Damaged**

means accidental physical damage, destruction or loss.

…

Cover

Provided this Section is shown as insured in the Schedule, We will pay for Damage occurring during the Policy Period and happening at the Insured Location to Property Insured caused by or resulting from a cause not otherwise excluded. How We will settle Your claim is explained in 'How We will pay' within this Section 1.

…

Exclusions

The following exclusions apply to Section 1 of this Policy except where expressly varied.

…

Excluded causes

Section 1 of this Policy does not cover Damage directly or indirectly caused or occasioned by or arising from:

…

2. a) moths, termites or other insects, vermin, rust or oxidation, mildew, mould, contamination or pollution, wet or dry rot, corrosion, change of colour, dampness of atmosphere or other variations in temperature, evaporation, disease, inherent vice or latent defect, loss of weight, change in flavour texture or finish, smut or smoke from industrial operations;

…

Section 2 –

Business interruption

…

Definitions

Wherever appearing in this Section 2 – Business Interruption, the following definitions apply:

…

Business Interruption

means the interruption of or interference with Your Business in consequence of Insured Damage that occurs during the Policy Period.

…

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.

…

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.

Insured Damage

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.

Notifiable Disease

means illness sustained by any person resulting from food or drink poisoning or any human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated must be notified to them. Notifiable Disease does not include any occurrence of any prescribed infectious or contagious diseases to which the Quarantine Act 1908 as amended applies.

…

Rent Receivable

means the amount of the rent received or receivable from the letting of all or part of the Insured Location(s).

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.

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.

…

Cover

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.

Basis of Settlement

…

B. Gross Revenue

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.

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.

…

Extension C: non damage

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."

808 In the Schedule the Business is identified as "Commercial Property Owner – Other". The Insured Location is 1197 Toorak Road, Camberwell, Victoria. The Schedule shows Mr Waldeck took out cover for Property Damage, Business Interruption, Glass and Public and Products Liability.

11.3 Introductory comments

809 Mr Waldeck relied on the following actions:

(1) the March 2020 to July 2020 *Non-Essential Business Closure Directions*, *Non-Essential Activity Directions*, and *Restricted Activity Directions*. The purpose and effect of these instruments was to "prohibit the operation of non-essential businesses 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;

(2) the July 2020 to October 2020 *Restricted Activity Directions (Restricted Areas)*. The purpose of these instruments was also to "restrict the operation of certain businesses and undertakings in the Restricted Areas 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; and

(3) the Rent Relief Regulations. Mr 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.

810 Extension C says cover "is extended for loss" as described. This is necessary as such loss would not otherwise fall within the Cover provision under the heading "Business Interruption" which says that the insurer will pay for "loss resulting from interruption of or interference with Your Business resulting from Insured Damage to Property Insured at an Insured Location". As Insured Damage 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", unless Extension C is read as extending cover in a manner separate and distinct from the requirement for Insured Damage, the extension would be meaningless and provide no cover at all. For this reason, to the extent Chubb seeks to rely upon a requirement of Insured Damage as qualifying Extension C, I would reject that argument.

811 Clauses 1(a) and (b) are hybrid clauses – they require the intervention of a public body authorised to restrict or deny access to the Insured Location. The intervention must be one 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. The intervention must directly arise from

an occurrence or outbreak at the premises of, relevantly, a Notifiable Disease or the discovery of an organism likely to cause a Notifiable Disease.

812 The preamble to the clause distinguishes between the Insured Location and the premises. To the extent Chubb asserted that the two are the same I disagree. The Insured Location is a defined term. The premises is not a defined term. The Insured Location is as stated in the Schedule. The meaning of the premises is left at large. As Chubb appeared to accept in its oral submissions, the Insured Location may be part of a more extensive premises. For example, in the case of Waldeck the Insured Location is 1197 Toorak Road, Camberwell, Victoria. If (which is not suggested to be the case) that Insured Location formed part of a larger complex which, for example, shared access arrangements then it might be concluded that the premises meant the larger complex, and not just the Insured Location. Whether this would be so or not would be fact-dependent. In the case of Waldeck (as opposed to Market Foods) this issue does not arise. In the case of Waldeck there is no basis to infer other than that the Insured Location and the premises within the meaning of the preamble to cll 1(a) and (b) are one and the same.

813 On this basis, it is clear that the occurrence or outbreak of the Notifiable Disease must be at the premises in cl 1(a). Further, under cl 1(b) there must be an occurrence at the premise of the discovery of an organism likely to cause a Notifiable Disease. That is, unlike in other cases thus far, the occurrence (being the discovery) of the organism likely to cause Notifiable Disease must be an occurrence (being the discovery) of the organism at the premises. The likelihood of disease is not geographically restricted but the occurrence (being the discovery) of the organism is geographically restricted to the premises. This is because of the grammatical structure of cl 1(b) where the words "at the premises" come before and not after the words "the discovery of an organism likely to cause Notifiable Disease". The ordinary English meaning of the sentence structure used in the Chubb and Waldeck policy is that the discovery of an organism must be at the premises and the likelihood of disease may be anywhere.

814 The interruption or interference must be with the Insured Location as a consequence of an intervention of the specified kind (restriction or denial of the use of the Insured Location on the order or advice of the local health authority or other competent authority), as opposed to with the Business or with the premises. There must be loss resulting from that interruption or interference.

815 The requirements of "resulting from", "in direct consequence of", and "directly arising from" are all to be understood, in context, as involving a causal relationship, in the senses already

discussed (that is, a proximate cause or perhaps something looser, but not so loose as to encompass an indirect cause).

816 The definition of Notifiable Disease also requires illness sustained by any person resulting from, relevantly, any human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated must be notified to them. That is, in the context of cll 1(a) and (b), the intervention of the authority must have been in direct consequence of the authority's view of a person being or having been person with the Notifiable Disease at the premises (not at the Insured Location). In the case of cl 1(b), for the organism discovered at the premises to be likely to cause Notifiable Disease, the intervention must involve the authority's view that the organism is present at the premises and is capable of causing Notifiable Disease (that is, the organism is still infectious). Consistent with my conclusions elsewhere, the focus is the cause of the intervention of the authority. That cause, which is to be determined from the nature of the intervention and its contemporaneous surrounding circumstances, are determinative. The parties did not intend that one or other may collaterally challenge the intervention of the authority, subject only perhaps to issues involving arbitrariness, capriciousness or actions in bad faith by the authority.

817 The exclusion of any occurrence of any prescribed infectious or contagious diseases to which the Quarantine Act 1908 as amended applies from the definition of Notifiable Disease does not engage s 61A of the Property Law Act, for the reasons discussed above. *Wonkana* is indistinguishable; the exclusion does not apply to COVID-19.

818 The parties did not focus on the "Notifiable" part of the definition of Notifiable Disease ("…an outbreak of which the competent local authority has stipulated must be notified to them"). Under s 126 of the Public Health and Wellbeing Act, the Governor in Council may by Order in Council declare an infectious disease to be a notifiable condition. Alternatively, given the definition of "notifiable condition" under s 3(1), an infectious disease may be prescribed (by the regulations) as a notifiable condition. In that event, under s 127 a registered medical practitioner must notify the Secretary of required notification details if the practitioner has reasonable grounds to believe that a patient has, or may have, a notifiable condition or has, or may have, died with a notifiable condition. On 29 January 2020, the *Public Health and Wellbeing Amendment (Coronavirus) Regulations 2020 No 4* (Vic) amended the *Public Health and Wellbeing Regulations 2019* (Vic) to add COVID-19 as a notifiable condition.

819 Consistent with my reasoning above, it would not matter that a disease became a notifiable condition after the inception of the policy. The temporal requirement in cll 1(a) and (b) is only that the disease/organism be or be likely to cause a Notifiable Disease at the time of the intervention of the authority. That temporal requirement would be satisfied.

11.4 Clauses 1(a) and (b) – hybrid clauses

820 Mr Waldeck accepted that he is not aware of any occurrence or outbreak of COVID-19 at the Insured Location or (if it means something broader such as the building as a whole) the premises. He also accepted that he is not aware of any occurrence of a discovery of the SARS-CoV-2 organism (which had it been discovered I would have accepted was likely to cause Notifiable Disease) at the Insured Location or the premises.

821 Consistent with my reasoning above, however, this is not the real issue. The real issue is whether there was an 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 Notifiable Disease or the discovery of an organism likely to cause Notifiable Disease (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).

822 On the facts of the present case this requirement is also not satisfied. There is no suggestion that any authority intervened directly (or otherwise) arising from an occurrence or outbreak at the premises as required. My observations above would apply (that is, that an authority may act on an incorrect factual basis and cover may still be available), but none of the facts support any such characterisation in the present case. The necessary inference is that none of the interventions relied upon had anything to do with an occurrence or outbreak at the premises as required.

823 The directions also did restrict or deny the use of the Insured Location on order of a competent authority. It will be noted that the requirement is not for closure or a prevention or restriction or hindrance on access to the premises of the Insured Location. It is a requirement only involving a restriction or denial of use of the Insured Location. On this basis, directions requiring that the business: (a) must not operate, (b) may only operate subject to a limited number of people within the Insured Location, or (c) may only operate subject to social distancing requirements are all capable of constituting a restriction or denial of the use of the Insured Location on the order of a local health authority or competent authority (that is, a body or person authorised to restrict or deny access to the Insured Location under any Act,

regulations or any form of statutory instrument). While these requirements would be satisfied, the fundamental causal requirement (an intervention directly arising from an occurrence or outbreak at the premises) is not satisfied.

824 It was submitted for Mr Waldeck that the Rent Relief Regulations also restricted or denied the use of the Insured Location on order of a competent authority. The argument is that by operation of the Rent Relief Regulations: (a) Going Venture was not in breach of its lease even if it did not pay the full rent agreed upon in its lease (cl 9(1)), (b) Mr Waldeck could not evict or attempt to evict Going Venture for failure to pay the full rent (cl 9(2)), (c) Mr Waldeck could not re-enter or recover the premises, or have recourse to security, for failure to pay the full rent (cl 9(3), (4)), (d) Mr Waldeck was required to provide rent relief to Going Venture (cl 10). He provided rental relief for the period 1 April 2020 to on or about 22 October 2020, and (e) Mr Waldeck was required to provide relief from outgoings to Going Venture (cl 15).

825 It was submitted that 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".

826 I consider the submission misconceived. The concept of "use of the Insured Location" in cl 1 means physical use in the sense described in *Newcastle City Council v* ***Royal Newcastle Hospital*** [1957] HCA 15; (1957) 96 CLR 493 of "physical acts by which the land is made to serve some purpose" (at 508), even if the physical acts do not extend across the whole of the land (in this case, the Insured Location). The use of land or premises is thus different from the advantage obtained from land or premises (at 506). As Fullagar J said in *Royal Newcastle Hospital* a person who uses land derives an advantage from it but a person deriving an advantage from the land is not necessarily using the land (also at 506).

827 In the present case the person using the Insured Location was the tenant, Going Venture. The relevant use was a café. Mr Waldeck was not using the Insured Location in any physical sense. He was merely deriving an advantage from it. The Rent Relief Regulations did not deny or restrict any use of the Insured Location by Mr Waldeck. There was no relevant use which the Rent Relief Regulations acted upon. The Rent Relief Regulations merely prevented Mr Waldeck from taking full advantage of the rights he had as lessor and owner of the Insured

Location under the lease. That effect of the Rent Relief Regulations did not involve any restriction or denial of the use of the Insured Location within the meaning of cl 1.

828 I have agreed with Mr Waldeck above that the Insured Location is not necessarily the same as the premises. The Insured Location may form part of a larger premises. The required occurrence or outbreak must be at the premises, not at the Insured Location. The interruption or interference, however, must be an interruption to or interference with the Insured Location. Given the nature of the insured perils in cl 1 this makes sense as: (a) the Insured Location may be part of a larger premises, (b) the insured perils at the premises may give rise to the required intervention of an authority depending on the circumstances, (c) as submitted for Mr Waldeck, "[e]ach 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)".

829 It was also submitted for Mr Waldeck that 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 at 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".

830 This submission may or may not be right depending on the facts. The relevant facts would be the physical nature of the shopping centre in question, including the means of access to and from the Insured Location forming part of the larger shopping centre. It may be that the Insured Location does form part of one overall premises (the shopping centre) or it may be that the shopping centre itself involves multiple premises and the Insured Location forms part of only one of those premises. As noted, in the present case, there is no basis upon which to distinguish between the Insured Location and the premises.

831 Otherwise, I would accept Chubb's submission that "at the premises" does not mean somewhere in the vicinity of the premises. Premises may or may not involve only a building. *Turner v York Motors Pty Ltd* (1951) 85 CLR 55 at 75 does not suggest that premises may not include more than a building. On this basis, depending on the facts, there may be an occurrence of COVID-19 at the premises without there being an occurrence of COVID-19 within a building. It depends on the nature of the premises.

832 The limits on the use of health data described above apply. First, it is not the case that this data proves that intervention by an authority directly arose from anything in the data relevant to an occurrence or outbreak of COVID-19 near or in the vicinity of the premises (and there is no such data in the present case). Second, the residential postcodes are the only address details provided by a person during contact tracing. They do not reflect the location of the person when or while infected.

833 I would otherwise construe "outbreak" in cl 1 as synonymous with "occurrence". It is used interchangeably with "occurrence". That is, one is to read the insured peril as an "occurrence" or "outbreak" as against the nature of the insured peril as best makes sense without the word "outbreak" imposing any greater requirement than "occurrence" given the way in which the clause is structured.

834 Finally on this issue, I would infer that Mr Waldeck would be aware if there was any occurrence or outbreak at the premises of COVID-19 or discovery of an organism likely to cause COVID-19, as a result of which there was an intervention leading to restriction or denial of the use of the Insured Location on the order of a competent authority. The fact that Mr Waldeck is not so aware is evidence there was no such occurrence or outbreak. The fact that Mr Waldeck may be able to discover now or later that a person with COVID-19 did visit the premises would not change the conclusions reached unless it could also be established that the intervention of the authority leading to restriction or denial of the use of the Insured Location arose directly from (in the sense of was a proximate cause of) such an occurrence or outbreak. Based on the terms of the directions I consider this effectively impossible.

835 Neither cl 1(a) nor cl 1(b) is satisfied.

11.5 Causation and adjustments

836 The only cause of Mr Waldeck's loss was the Rent Relief Regulations. If I am wrong that cll 1(a) and (b) are not satisfied, the issue is whether the directions involving restriction or denial of the use of the Insured Location were also a concurrent cause of the interruption of or interference with the Insured Location resulting in loss.

837 It was submitted for Mr Waldeck 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".

838 However, this ignores the requirements that: (a) the required intervention of the authority is one leading to restriction or denial of the use of the Insured Location on the order of a competent authority, (b) the interruption of or interference with the Insured Location must be a direct consequence of the intervention, and (c) loss must result from that interruption of or interference with the Insured Location. In my view, Mr Waldeck fails at each hurdle.

839 The Rent Relief Regulations were made under s 15 of the *COVID-19 Omnibus (Emergency Measures) Act 2020* (Vic). By s 15(4) the "Minister for Small Business may only recommend that regulations be made under this section if the Minister is of the opinion that the regulations to be made on the recommendation are reasonably necessary for responding to the COVID-19 pandemic". That is, it may be accepted that the effect of the COVID-19 pandemic was the cause of the making of the Rent Relief Regulations. This does not mean that the directions involving restriction or denial of the use of the Insured Location were also a concurrent proximate cause of the interruption of or interference with the Insured Location resulting in loss.

840 As discussed, before any notion of concurrent proximate causes is in play it must be proved that the insured peril was a proximate cause of the interruption or interference from which the loss resulted. That conclusion cannot be reached in the present case. While the existence and threat of COVID-19 in Victoria was the proximate cause of both the directions and the Rent Relief Regulations, the only cause of Mr Waldeck's loss was the Rent Relief Regulations. A cause of a cause of interference or interruption resulting in loss is not itself a cause of interference or interruption resulting in loss. This is consistent with *Federico* at 521 in which the High Court said:

> …the words "caused by an accident" naturally refer to the proximate or direct cause of the injury, and not to a cause of the cause, or to the mere occasion of the injury.

841 The same conclusions as discussed above in other cases would apply to the application of the Trend in the Business clause which must be allowed for in the definition of Standard Gross Revenue. If, contrary to my conclusions, a proximate cause of Mr Waldeck's loss was either insured peril then the underlying cause of the insured peril and the other circumstances affecting the business would be the existence and risk of COVID-19 in Victoria. On that basis, that same underlying cause of both would not need to be taken into account under the Trend in the Business clause. As otherwise noted, the submission for Mr Waldeck that "any adjustment cannot take into account the presence and effect of COVID-19 generally" is too broad as it is

only the presence and risk of COVID-19 in Victoria which could be said to involve the same underlying cause of both the insured peril and the other circumstances affecting the business.

11.6 Interest

842 In accordance with my reasoning elsewhere, s 57 of the Insurance Contracts Act is not yet engaged. It would not be unreasonable for Chubb to withhold payment until a final determination of this case decides that Chubb is liable to do so.

11.7 Answers to questions

843 The questions suffer from the usual problems. Insofar as possible, they are answered below.

844 **23. Disease Extension** (Extension C:1 - page 26)

(a) {Waldeck version; Chubb does not agree} Was there an occurrence or outbreak at the premises of COVID-19?

No. In any event, the relevant issue is the intervention of an authority leading to restriction or denial of the use of the Insured Location on the order of a competent authority directly arising from an occurrence or outbreak at the premises of COVID-19 or discovery of an organism likely to cause COVID-19.

(b) {Chubb version; Waldeck does not agree} Was there an occurrence or outbreak at the premises of illness sustained resulting from COVID-19?

No. If by this Chubb means a person with COVID-19 at the premises must be experiencing symptoms of illness I would disagree. Otherwise my comments under (a) apply.

(c) Was there an occurrence or outbreak at the premises of the discovery of SARS-CoV-2?

No. Otherwise my comments under (a) apply.

(d) In relation to (a) and (b), did the occurrence or outbreak have to occur at the Insured Location or could it have occurred elsewhere and, if so, where?

No. The requirement involves the intervention of a competent authority leading to restriction or denial of the use of the Insured Location directly arising from an occurrence or outbreak at the premises of COVID-19 or discovery of an organism likely to cause COVID-19. The premises may be more extensive than the Insured Location. The occurrence or outbreak of

COVID-19 or discovery of the SARS-CoV-2 organism causing COVID-19 must be at the premises.

(e) If the answer to (a) or (b) is 'yes', was there an intervention of a public body authorised to restrict or deny access to the Insured Location directly arising from such occurrence or outbreak at the premises?

No.

(f) If the answer to (e) is 'yes', did such intervention 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 authority?

No. If, however, I am wrong in this regard then the directions of a competent authority did deny and restrict the use of the Insured Location.

(g) If the answer to (f) is 'yes', was there interruption of or interference with the Insured Location in direct consequence of the intervention referred to in (e)?

No.

(h) {Chubb disputes the inclusion of this paragraph} What is required for there to be an "occurrence" of COVID-19?

An event or case of COVID-19 at the premises capable of being transmitted to another person.

(i) {Chubb disputes the inclusion of this paragraph} What is required for there to be the "discovery" of SARS-CoV-2?

An event or case of COVID-19 at the premises capable of being transmitted to another person.

845 **24. If the answer to 23(g) is 'yes', was there any loss resulting from such interruption of or interference with the Insured Location?**

No. The only proximate cause of Mr Waldeck's loss was the Rent Relief Regulations.

846 **25. If the answer to 24 is 'yes', does this loss include**:

(a) any relief from rent payments and outgoings provided to Going Venture in respect of the Insured Location by reason of the Regulations?

No. In any event, the Rent Relief Regulations did not involve restriction or denial of the use of the Insured Location.

(b) the loss of rent following the surrender of the lease of the Insured Location by Going Venture on 22 October 2020?

No.

(c) are JobKeeper or other government subsidies to be taken into account in the assessment of any loss and, if so, in what way?

This does not arise on the facts of this case.

(d) Should any adjustment be made to Waldeck's loss otherwise covered by Extension C, clause 1 by reason of the operation of the adjustment clause at page 24 of the policy?

This does not arise.

847 **26. If it is found that the policy responds and Chubb is liable to pay an amount to Waldeck, from what date is interest under section 57 of the ICA payable?**

This does not arise, but it would not be unreasonable for Chubb to withhold payment unless and until it is finally determined to be liable to make payment in this proceeding.

11.8 Conclusions

848 For these reasons:

(1) the premises and the Insured Location are not synonymous in cl 1. Depending on the facts, they may be co-extensive as in the present case, but that is a result of the facts of this case indicating no difference between the two. Specifically, depending on the facts, an Insured Location may form a part of a larger premises;

(2) there must be an intervention of a public authority directly arising from the occurrence or outbreak as specified (that is, under cl 1(a) the occurrence or outbreak of the Notifiable Disease must be at the premises and under cl 1(b) the occurrence (being the discovery) of the organism likely to cause Notifiable Disease must be an occurrence (being the discovery) of the organism at the premises) and that intervention must lead 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;

(3) there was no intervention of a public authority directly arising from the occurrence or outbreak at the premises as specified;

(4) there was no occurrence or outbreak at the premises as specified;

(5) there must be loss resulting from interruption of or interference with the Insured Location in direct consequence of the intervention leading to restriction or denial of the use of the Insured Location on the order of a competent authority;

(6) there was no loss which Mr Waldeck suffered resulting from interruption of or interference with the Insured Location in direct consequence of the intervention leading to restriction or denial of the use of the Insured Location on the order of a competent authority;

(7) all of the loss which Mr Waldeck suffered was caused by the Rent Relief Regulations which were not an order of a competent authority leading to restriction or denial of the use of the Insured Location;

(8) Mr Waldeck did not suffer or incur loss resulting from interruption of or interference with the Insured Location in direct consequence of the intervention of a public body of the required kind (leading to an order of a competent authority leading to restriction or denial of the use of the Insured Location); and

(9) the Trend in the Business clause does not arise. If my conclusions are wrong and cll 1(a) or (b) is engaged then I would conclude that the underlying cause of the insured peril and the circumstances affecting the business would be the same, being the presence and risk of COVID-19 in Victoria. On that basis, if I am otherwise wrong, I would not make an adjustment for that same underlying cause. However, it is not the case that the underlying cause can be characterised as COVID-19 generally. This would be too broad given that there is a material difference between the existence and threat of COVID-19 across a State and the existence and threat of COVID-19 overseas and, thereby, potentially to Australia as a whole.

849 Given that these conclusions are not capable of being affected by additional evidence, subject to any observations of the parties, I would make a declaration as follows:

> Declare that policy no. EPM0018480 issued by the applicant to the respondent does not respond to the claim for indemnity by the respondent the subject of complaint no. 721608 made to the Australian Financial Complaints Authority.

850 I would also dismiss the respondent's cross-claim.

12. NSD138/2021: CHUBB V MARKET FOODS

12.1 Agreed background

851 Market Foods is the operator of three hospitality venues in Brisbane.

852 Market Foods has two policies which span a combined policy period of 31 August 2019 to 31 August 2021 (the **Market Foods policies**).

853 The Insured Locations under the Market Foods Policies are 15 Butterfield Street, Herston, Queensland, 4006 (the **Herston Insured Location**), 1 William Street, Brisbane, Queensland, 4000 (the **William Street Insured Location**), and Level 2, Room 215 at the University of Queensland, Chancellors Place, Saint Lucia, Queensland, 4067 (the **UQ Insured Location**).

12.2 Other facts

854 The following facts are agreed or not in dispute (see the Chubb and Market Foods agreed facts).

855 The Herston Insured Location contains a medical office building complex directly opposite the Royal Brisbane Women's Hospital (**Herston building**). The café operated by Market Foods is on the ground floor of the Herston building. From the agreed facts it is apparent that the Herston building is not physically connected to the Royal Brisbane Women's Hospital buildings.

856 The William Street Insured Location contains a 46-storey office building complex (**William Street building**). Before late August 2020 Market Foods conducted a café, restaurant and bar business from a leased premises in the William Street building. The café was on the ground floor, the restaurant was on the first floor and the bar was on the second floor. From the agreed facts it is apparent that the William Street building is a modern multi-storey tower.

857 The UQ Insured Location is a licenced area in the University of Queensland (**UQ**) Food Court. From the agreed facts it is apparent that the UQ Insured Location is one shop in a larger building with other food outlets and tables and chairs available in common areas. A broader map of UQ shows that it involves what might be thought of as a typical university campus consisting of numerous separate and inter-connected buildings. The UQ Insured Location is within building 63.

858 In the Taphouse case above I identified that the Chief Health Officer could make directions under s 362B of the Public Health Act. I also identified a number of those directions and their effects. Market Foods relied on:

(1) the 23 March 2020 *Non-Essential Business Closure Direction*. 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";

(2) the 29 March 2020 *Home Confinement Direction*. 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". As Insurance Australia noted, this direction was only in force from 29 March 2020 to 2 April 2020. There was no further "lockdown" in Queensland during the policy period; and

(3) each of the subsequent directions as set out in Annexure D to the agreed facts.

859 Market Foods also relied on a so-called UQ direction. This is an announcement on 15 March 2020 by the Vice Chancellor and President of UQ as follows:

> I apologise for the lateness of this notification. You are likely to have heard the new measures announced by the Government this afternoon to slow the speed of community transmission of COVID-19 and, most importantly, protect those most vulnerable in our community.
>
> In response to this, I have made the decision to pause all coursework teaching at the University, including lectures and tutorials in person and online, at the University from Monday 16 March for **one week only**. Teaching will resume on Monday 23 March.
>
> We are using the week to accelerate a number of activities to facilitate students completing their studies this academic year. The work underway aims to:
>
> • Ensure the vast majority of lectures and tutorials are available online from Monday 23 March
>
> • Amend course delivery to meet the new social distancing guidelines
>
> • Assess if practicals and lab sessions need to be amended or rescheduled

• Make adjustments to the academic calendar, which may include rescheduling graduation ceremonies and assessments

Students studying in an external mode program, HDR students and students on placement or internships should not be impacted by this pause.

I want to be clear, **our campuses remain open**. Our facilities, including libraries, study spaces and eating areas, are all operating as normal and our staff will be working.

The potential rescheduling of July graduation ceremonies will allow us to extend the semester, if required, for a few weeks. This buffer will help students complete their course requirements to UQ standards should the unprecedented global COVID-19 situation further disrupt our normal program delivery.

This is a big call, and one I have not taken lightly. We offer more than 300 programs and around 3300 courses, and the scale and complexity of achieving these changes are significant.

With the confirmation this afternoon from Queensland Health that another student has been confirmed with COVID-19, I encourage you to adhere to the Government guidelines on social distancing and healthy hygiene habits. We understand Queensland Health are commencing contact tracing.

I believe the decision to pause teaching for one week will ensure our students continue to receive a world-class education from Australia's best teachers and secure your academic success this year."

12.3 Policy provisions

860 The key provisions of the Market Foods policy are below.

…

Introduction

…

All parts of this Policy, along with the Schedule and any endorsements should be read together and considered as one contract.

The operative Sections of this Policy are as indicated in the Schedule. Unless a particular Section is identified in the Schedule as being 'Insured', it is of no effect and no cover is granted under it.

…

Headings

Headings have been included for ease of reference and it is understood and agreed that the terms and Conditions of this Policy are not to be construed or interpreted by reference to such headings.

…

General definitions

…

Building(s)

means buildings, including landlords' fixtures and fittings, alterations and decorations therein and thereon including fixed glass (including its framework lettering or any intruder alarm foil attached to it), foundations, walls, gates, fences, car parks, yards, pavements, drains, sewers, piping, cabling, wiring and associated control equipment and accessories only to the extent of Your responsibility and liability.

Business

means the Business described in the Schedule.

…

Insured Location

means the Insured Location(s) stated in the Schedule.

…

Property Insured

means property as described in the Schedule that belongs to You or is held by You in trust or on commission for which You are responsible.

…

Schedule

means the Schedule issued with this policy wording.

…

Section 1 –

Property Damage

Definitions

Wherever appearing in this Section 1 – Property Damage, the following definitions apply:

…

Damage or **Damaged**

means accidental physical damage, destruction or loss.

…

Cover

Provided this Section is shown as insured in the Schedule, We will pay for Damage occurring during the Policy Period and happening at the Insured Location to Property Insured caused by or resulting from a cause not otherwise excluded. How We will settle Your claim is explained in 'How We will pay' within this Section 1.

…

Exclusions

The following exclusions apply to Section 1 of this Policy except where expressly

varied.

…

Excluded causes

Section 1 of this Policy does not cover Damage directly or indirectly caused or occasioned by or arising from:

…

2. a) moths, termites or other insects, vermin, rust or oxidation, mildew, mould, contamination or pollution, wet or dry rot, corrosion, change of colour, dampness of atmosphere or other variations in temperature, evaporation, disease, inherent vice or latent defect, loss of weight, change in flavour texture or finish, smut or smoke from industrial operations;

…

Section 2 –

Business interruption

…

Definitions

Wherever appearing in this Section 2 – Business Interruption, the following definitions apply:

…

Business Interruption

means the interruption of or interference with Your Business in consequence of Insured Damage that occurs during the Policy Period.

…

Gross Profit

means the amount by which:

- the sum of the amount of the Turnover and the amounts of the closing Stock and work in progress shall exceed;
- the sum of the amounts of the opening Stock and work in progress and the amount of the Uninsured Working Expenses.

The amounts of the opening and closing Stock and work in progress shall be arrived at in accordance with the Insured's normal accountancy methods due provision being made for depreciation. The words and expressions used in this definition that are not defined in this Policy shall have the meaning usually attached to them in the books and accounts of the Insured.

…

Increased Cost of Working

means the additional expenditure necessarily and reasonably incurred for the sole

purpose of avoiding or diminishing the:

1. reduction in Turnover, if Gross Profit is the applicable Basis of Settlement in the Schedule;

2. reduction in Gross Revenue, if Gross Revenue is the applicable Basis of Settlement in the Schedule; or

3. reduction in Rent Receivable, if Rent Receivable is the applicable Basis of Settlement in the Schedule;

and which, but for that expenditure, would have taken place during the Indemnity Period.

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.

Insured Damage

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.

Notifiable Disease

means illness sustained by any person resulting from food or drink poisoning or any human infectious or human contagious disease, an outbreak of which the competent local authority has stipulated must be notified to them. Notifiable Disease does not include any occurrence of any prescribed infectious or contagious diseases to which the Quarantine Act 1908 as amended applies.

Rate of Gross Profit

means the rate of Gross Profit earned on the Turnover during the financial year immediately before the date of the Insured Damage allowing for the Trend in the Business.

…

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.

Turnover

means the money paid or payable to You for goods sold and delivered and for services rendered in the course of Your Business at the Insured Location(s).

…

Cover

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.

Basis of Settlement

A. Gross Profit

Loss will be calculated by:

a) applying the Rate of Gross Profit to the difference between Turnover during the Indemnity Period and the Standard Turnover;

b) adding the Increased Cost of Working incurred during the Indemnity Period, but only to the extent that the reduction in Gross Profit 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 Profit as may cease or be reduced in consequence of the Insured Damage.

If the Sum Insured for Gross Profit at the beginning of each Policy Period is less than the sum produced by applying the Rate of Gross Profit to eighty percent (80%) of the Annual Turnover (or its proportionately increased multiple where the Indemnity Period exceeds twelve months), We will pay a proportion of the loss of Gross Profit.

The proportion that We will pay will be the same as the proportion that the Sum Insured for Gross Profit bears to eighty per-cent (80%) of the Annual Turnover (or its proportionally increased multiple if appropriate).

This provision will not apply if Your claim is for less than 10% of the Sum Insured for Gross Profit.

If You hold a salvage sale during the Indemnity Period, the Turnover from the salvage sale shall be deducted from any reduction in Turnover.

…

Extensions B: Following damage at locations not occupied by you

Cover under Section 2 is extended to include loss resulting from Business Interruption to property: (a) of a type insured by this Policy; and (b) at the locations described in points 1. to 8. directly below;

1. Denial of Access

damage to any property within 50 kilometres of any Insured Location, which will prevent or hinder the access to or use of the Insured Location. This extension will not apply to property of any supply undertaking from which You obtain electricity, gas, water or telecommunication services.

…

3. Property in a Commercial Complex

property in any commercial complex of which the Insured Location forms a part or in which the Insured Location is contained which results in cessation or diminution of

Your trade or normal business operations due to a falling away of potential custom.

4. Public Authority

any legal authority preventing or restricting access to an Insured Location or ordering the evacuation of the public due to damage or a threat of damage to property or persons within 50 kilometres of any Insured Location.

…

Extension C: non damage

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.

…

861 The Policy Schedule for the period 31 August 2019 to 31 August 2020 identifies the Insured Locations as 15 Butterfield Street, Herston, Queensland, 4006, 1 William Street, Brisbane, Queensland, 4000, and Level 2, Room 215, University of Queensland, Chancellors Place, Saint Lucia, Queensland, 4067. The cover is for Property Damage, Business Interruption, Theft, Money, Glass, and Public and Products Liability. In respect of the Property Damage there is no cover for Buildings. There is cover for contents and stock.

862 An Endorsement Schedule for the period 31 August 2020 to 31 August 2021 identifies the Insured Location as 15 Butterfield Street, Herston, Queensland, 4006. The cover remains the same.

12.4 Introductory comments

863 The approach of the parties in their written submissions, which focus on the agreed questions, involved an unhelpful atomising of the relevant clauses. Most of the agreed questions suffer from deficiencies of the kind already identified in other cases – they break down composite provisions into segments as though those segments exist in isolation from their context, when they do not. The problem is particularly acute in the Market Foods case. This incorrect focus should be avoided.

864 The primary cover under Section 2 of the policy is cover for "loss resulting from interruption of or interference with Your Business resulting from Insured Damage to Property Insured at an Insured Location". Insured Damage 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". "Property Insured" means "property as described in the Schedule that belongs to you or is held by You in trust or on commission for which You are responsible".

865 In the case of Market Foods the events insured under the Property Damage section are confined to Contents and Stock and do not include Buildings. The Property Insured as referred to in the cover provision of Section 1, accordingly, is the Contents and Stock (which are described in the Schedule) that belongs to Market Foods. The cover provided is for "Damage occurring during the Policy Period and happening at the Insured Location to Property Insured…". Given the definition of Damage this means that Market Foods, under Section 1, would be covered for accidental physical damage, destruction or loss of, relevantly, Contents and Stock belonging to it. But Market Foods was not covered under Section 1 for Damage to any Building.

866 Because of the reference to Property Insured in the cover provision of Section 2 (Business Interruption), the extent of cover under Section 1 remains relevant. The "Insured Damage to Property Insured", accordingly, is confined to an "event insured under the Property Damage, Theft, Money, Glass or General Property Sections" to property as described in the Schedule that belongs to Market Foods. That property is confined to Contents and Stock, Money and Glass, and does not include any building.

867 On this basis, the primary cover provision in Section 2 provides cover for the amount of loss resulting from interruption of or interference with Your Business resulting from Insured Damage to Property Insured at an Insured Location. Accordingly, and for example, if at one of its three Insured Locations Contents or Stock or Glass owned by Market Foods was the subject

of physical loss, destruction or damage (as otherwise covered by the relevant sections relating to those kinds of property) then Market Foods would be covered for loss resulting from interruption of or interference with its business resulting from that event.

868 Extension B provides that this cover (being the cover under section 2) is extended to "include loss resulting from Business Interruption to property: (a) of a type insured by this Policy; and (b) at the locations described in points 1. to 8. directly below". "Business Interruption" means "the interruption of or interference with Your Business in consequence of Insured Damage that occurs during the Policy Period". "Insured Damage", it will be recalled, 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".

869 Accordingly, Extension B is concerned with Business Interruption to property of a type insured by this Policy. The reason that the word "property", a non-defined term, is used is because Extension B is focused on "Insured Damage". The focus in not on property owned by Market Foods, which is insured. Rather, the focus is on what would be Insured Damage to property not owned by Market Foods. Further, that property must be at a location described in points 1 to 8.

870 That is, Extension B extends cover to include loss resulting from "the interruption of or interference with Your Business in consequence of physical loss, destruction or damage that occurs during the Policy Period caused by an event insured under the Property Damage, Theft, Money, Glass or General Property Sections" to property not owned by You which is (a) of a type insured by this Policy and (b) at the locations described in points 1 to 8.

871 The types of property potentially within this extension of cover are the types capable of being insured otherwise under the policy. These include Buildings, Contents and Stock, Money and Glass. The "property" which is then referred to in each section is the type of property which is in fact insured under the policy. It is not the type of property capable of being insured under this policy. In the case of Market Foods, property of the type in fact insured under the policy does not include buildings but does include Contents and Stock, Money and Glass.

872 In the context of Extension B, the principal (but admittedly not sole) purpose of points 1 to 8 is to identify the required location of the property of a type which is insured under the policy which is not owned by Market Foods. The locations under the relevant items 1, 3 and 4 are: (1) property within 50 kilometres of any Insured Location, (3) property in any commercial

complex of which the Insured Location forms a part or in which the Insured Location is contained, and (4) property or persons within 50 kilometres of any Insured Location.

873 There are undoubted infelicities in the terms of, at least, items 1 and 4. Before turning to those specific infelicities some other observations are appropriate.

874 Whatever its infelicities, the better view is that Extension B is concerned with Business Interruption as defined to property other than that owned by the insured. This requires Insured Damage which involves physical loss, destruction or damage to that property. Even if item 4 is read as extending that concept to include the threat of physical loss, destruction or damage to property and the threat of physical loss, destruction or damage to persons whether caused by the threat of physical loss, destruction or damage to property or not (as to which see below), the central concept remains that Extension B is concerned with physical loss, destruction or damage to property other than that owned by the insured. It is in this sense, that it extends to effects on the Business caused by physical loss, destruction or damage to property other than that owned by the insured, that Extension B provides for an extension to the cover under Section 2 (Section 2 being confined to physical loss, destruction or damage to property belonging to the insured). In both cases, however, the cover is confined to property that is in fact covered (if it belongs to the insured) or would be covered (if it does not belong to the insured) – (a) for property belonging to the insured, being property covered under the policy other than under Section 2, and (b) for property other than property belonging to the insured, being property of a type insured by the policy.

875 These considerations indicate that Extension B does not provide cover for the effects of a disease. A disease does not involve physical loss, destruction or damage to property or the threat of physical loss, destruction or damage to property of the kind contemplated by Extension B. It would be profoundly inconsistent and incongruous with the entire context of Extension B to understand it as applying to potential damage to property from a disease or potential harm to persons from a disease. In this context, "physical damage" should be construed as requiring something more than the mere presence of a virus which, on the evidence, will become inactive over time and can be cleaned away. This conclusion results from the entire context of Extension B and not the mere words "physical damage" in isolation (as to which see further below).

876 *Ralph Lauren Corporation v Factory Mutual Insurance Company*, 2021 WL 1904739 (D.N.J. May 12, 2021) and *Jennifer B Nguyen v Travelers Casualty Insurance Company of America*,

2021 WL 2184878 (W.D. Wash. May 28, 2021) reached a similar conclusion in respect of requirements for "physical damage".

877 The presence of item 4, and its reference to "damage or a threat of damage to property or persons", does not indicate to the contrary. As I have said, there are difficulties with the drafting of Extension B, but the first obligation is to attempt to construe the whole of Extension B in accordance with the ordinary principles of construction. Those principles include, as a principle of last resort, the contra proferentem rule. As discussed above, I do not accept the submissions of the insurers, including Chubb, that there is no scope for the operation of the contra proferentem rule merely because Market Foods was represented by a broker. Chubb remained the profferer of the policy. There is no evidence of the negotiation of any term of the policy.

878 There are other indications that Extension B does not apply to a disease. Extension B is expressly tied to "loss resulting from Business Interruption to property: (a) of a type insured by this Policy". Section 1, relating to property damage, excludes cover for Damage directly or indirectly caused or occasioned by or arising from disease. Accordingly, disease is not a kind of damage to property of a type that is insured by the policy.

879 Further, Extension B is to be read in the context of Extension C. Unlike Extension B, Extension C is not tied to "loss resulting from Business Interruption to property: (a) of a type insured by this Policy". Rather under Extension C the cover in Section 2 is "extended for loss resulting from interruption of or interference with the Insured Location in direct consequence of" the specified circumstances. Clauses 1(a) and (b) specifically deal with Notifiable Diseases "at the premises".

880 If Extension B could apply to diseases then Extension C would be meaningless as: (a) Extension B would apply to any disease and not only a Notifiable Disease, (b) the exclusion in the definition of Notifiable Disease would not apply so that Extension B would apply to "any prescribed infectious or contagious diseases to which the Quarantine Act 1908 as amended applies", and (c) the requirement in Extension C for the outbreak or occurrence of a Notifiable Disease and an occurrence of the discovery of an organism likely to cause Notifiable Disease would not be limited to such an outbreak or occurrence at the premises. Under Extension B the occurrence or outbreak of any disease or discovery of any organism involving a threat of disease would be covered under at least item 4 of Extension B.

881 As noted for other policies, this does not involve mere tautology or redundancy. It would involve profound incongruence and incoherence between provisions of the policy. The provisions should not be construed so as to involve such incongruence and incoherence. The contra proferentem rule should not be used to identify the existence of an ambiguity or doubt about the operation of Extension B when, construed in context, there is no such ambiguity or doubt. It cannot have been the intention of the parties that Extension B applies to a disease as that would render both the exclusion of diseases in Section 1 and the cover for Notifiable Diseases in Extension C meaningless. The parties could not have intended such commercial irrationality and absurdity. As such, Extension B is not to be tortured into a provision which covers diseases. So read, drafting infelicities remain but they are not insuperable.

882 One infelicity involves mere redundancy. In item 1 the opening words "damage to" are superfluous. Given that the preamble to Extension B means "Cover under Section 2 is extended to include loss resulting from the interruption of or interference with Your Business in consequence of 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 that occurs during the Policy Period to property: (a) of a type insured by this Policy; and (b) at the locations described in points 1. to 8. directly below", the words "damage to" at the beginning of item 1 are redundant.

883 Another infelicity relating to item 4 is more difficult to resolve. Whatever the difficulty, it is not a good reason to pretend that the preamble to Extension B simply does not exist. That would be to re-write the contract between the parties. Market Foods relied on various provisions of the Insurance Contracts Act to support an argument that the disease (and other) exclusions in Section 1 of the policy cannot apply to the operation of Section 2 of the policy. Because these arguments assume that Extension B can apply to a disease or organism involving a threat of a disease, contrary to my view that the presence of Extension C alone is sufficient to conclude to the contrary, not much is to be gained by discussing them at length. Chubb seemed to think that this aspect of Market Food's case involved an allegation of bad faith against it. That is not so, as the contention is only that certain provisions of the Insurance Contracts Act operate.

884 Section 13(1) of the Insurance Contracts Act provides:

> A contract of insurance is a contract based on the utmost good faith and there is implied in such a contract a provision requiring each party to it to act towards the other party, in respect of any matter arising under or in relation to it, with the utmost good faith.

885 The dispute in this case about the meaning and operation of provisions in the policy does not involve Chubb in failing to act towards Market Foods in the utmost good faith. Market Foods' rhetoric about such things in the policy as "myriad" complexities, unintelligibility, and exclusions "buried in a quagmire of internally referential clauses", is unhelpful. The infelicities in Extension B are not such as to make it a failure to act with the utmost good faith for Chubb to rely on the terms of the policy as drafted.

886 The requirement of utmost good faith is concerned with "commercial standards of decency and fairness": *CGU Insurance Ltd v AMP Financial Planning Pty Ltd* [2007] HCA 36; (2007) 235 CLR 1 at [15]. It has been said to underlie the operation of the contra proferentem rule: *Re Zurich Australian Insurance Limited* [1998] QSC 209; [1999] 2 Qd R 203 at [38], citing *Re Bradley and Essex and Suffolk Accident Indemnity Society* [1912] 1 KB 415 at 430. The issue of breach of the duty is fact specific because "[f]airness, decency and fair dealing are normative standards judged by reference to community expectations": *Australian Securities and Investments Commissioner v* ***TAL Life*** *Limited (No 2)* [2021] FCA 193; (2021) 389 ALR 128 at [173]. Dishonesty is not required: *TAL Life* at [172].

887 Chubb's reliance on the policy does not involve any lack of the utmost good faith towards Market Foods. Even if the issue as to whether Extension B did involve ambiguity incapable of resolution without resort to the contra proferentem rule, Chubb's arguments to the contrary in this test case do not involve any lack of the utmost good faith towards Market Foods. As it is, however, the ordinary principles of construction dictate that Extension B not be read as applying to diseases as a form of damage within the meaning of the items in Extension B, irrespective of the disease exclusion in Section 1 of the policy.

888 Accordingly, s 13(1) of the Insurance Contracts Act is not engaged.

889 Nor is s 14(1) relevant. Section 14(1) provides that "[i]f reliance by a party to a contract of insurance on a provision of the contract would be to fail to act with the utmost good faith, the party may not rely on the provision". I am unable to discern from the lengthy submissions of Market Foods how any reliance by Chubb on the terms of the policy involves any failure to act with the utmost good faith.

890 Section 37 provides that:

> An insurer may not rely on a provision included in a contract of insurance (not being a prescribed contract) of a kind that is not usually included in contracts of insurance that provide similar insurance cover unless, before the contract was entered into the

> insurer clearly informed the insured in writing of the effect of the provision (whether by providing the insured with a document containing the provisions, or the relevant provisions, of the proposed contract or otherwise).

891 It is not apparent that Extension B involves any provision of a kind that is not usually included in contracts of insurance that provide similar insurance cover. This would require evidence apart from the evidence of the other policies (which are also in evidence in the Market Foods proceeding). The only material difference between the other policies and this policy is the existence of Extension B. The prevention of access clause in the Guild policies (discussed below) has a similar proviso to the Chubb policies in that the clauses are confined to damage to property otherwise insured under the policies. This indicates that the Chubb provision does not satisfy the requirement of being of a kind that is not usually included in contracts of insurance that provide similar insurance cover. The fact that Chubb has chosen to provide cover under Extension B in these terms cannot mean that it would be a breach of Chubb's duty of utmost good faith to rely on the terms of that Extension, even if they involve ambiguity. The ambiguity is to be resolved according to the ordinary principles of construction and, as a last resort, the contra proferentem rule.

892 Nothing said in *Hammer Waste Pty Ltd v QBE Mercantile Mutual Ltd* [2002] NSWSC 1006; (2003) 12 ANZ Ins Cas 61-553 at [25]-[28] leads me to a different view. The restatement of principle there does not change the fact that the contra proferentem rule cannot be used to discern ambiguity and, if ambiguity exists, is a rule of construction of last resort.

893 Because I consider that Extension B does not apply at all to damage or the threat of damage from a disease, anything I say about item 4 in Extension B is obiter dicta. Attempting to frame the operation of item 4 by reference to damage or the threat of damage from a disease is necessarily fraught with difficulty given that I do not consider the clause applies to a disease at all. Once this is accepted, the difficulty in reconciling the preamble to Extension B with item 4 becomes more manageable.

894 Assume that, contrary to the fact, Market Foods had taken over cover under Section 1 for buildings. In that event, item 4 could apply to damage or a threat of damage to a building not owned by Market Foods within 50 kilometres of an Insured Location as a result of which any legal authority prevented or restricted access to an Insured Location. Further, if damage or a threat of damage to a building not owned by Market Foods within 50 kilometres of an Insured Location also involved a threat of damage to a person within 50 kilometres of an Insured Location as a result of any legal authority preventing or restricting access to an Insured

Location, then item 4 could also apply. These are two ways in which item 4 can be reconciled with the preamble to Extension B.

895 On this basis I would accept that item 4 ordinarily requires: (a) contents, stock, money or glass, (b) that contents, stock, money or glass must have suffered physical damage, (c) that physical damage is the "damage to property: (a) of a type insured by this Policy" in the preamble to item 4, (d) that physical damage must involve physical damage or the threat of physical damage to either other property (of any kind) within 50 kilometres of any Insured Location or to persons within 50 kilometres of any Insured Location, and (e) due to that physical damage or the threat of physical damage to other property or persons, the legal authority to prevent or restrict access to any Insured Location.

896 This description is different from Chubb's submissions in that it recognises that it is the "damage or a threat of damage to property or persons" not the "property: (a) of a type insured by this Policy" which must be within 50 kilometres of any Insured Location. It also recognises that it is only "property" as referred to in the preamble which is qualified by the requirement that the property be of a type that is insured by the policy. This better reflects the language of item 4 than Chubb's formulation.

897 My description above does not re-write item 4 if item 4 is read with the preamble as it is required to be read. Further:

(1) there is textual support for narrowing the scope of property to contents, stock, money or glass – that is required by the words in the preamble "property: (a) of a type insured by this Policy";

(2) Market Foods overlooks that there must be "Business Interruption to property: (a) of a type insured by this Policy" and the definition of "Business interruption" requires "Insured Damage" which requires physical damage;

(3) I agree with Market Foods that it is the damage or threat of damage to other property or persons which must be within 50 kilometres of any Insured Location, not the physical damage to "property: (a) of a type insured by this Policy";

(4) it is not absurd for item 4 to require both physical damage to property of a type insured by the policy and damage or the threat of damage to other property or persons within 50 kilometres of any Insured Location. Item 4 is a standard clause. It is intended to apply to the full potential range of property of a type that is insured by the policy. The

absurdity or otherwise of the clause should not be assessed by reference to every type of property within that range. The words "property…of a type insured by" must be given meaning. "Insured by" must mean in fact insured by the particular policy the insured has chosen to purchase. It cannot mean "potentially insured by…". On this basis, the intent of item 4 is only to extend cover to damage to property not belonging to the insured of a type that is in fact insured by the policy if that damage involves damage or the threat of damage to persons or other property (of any kind) within 50 kilometres of any Insured Location due to which a legal authority prevents or restricts access to an Insured Location. The underlying logic is that the insured only gets the extension of cover if the initial physical damage is to property of a type insured by the policy. While Market Foods proposes that only the "most stupefied obscurantist" could contemplate item 4 having this meaning, that is what item 4 says. The fact that it might be difficult (but by no means impossible) to conceive of circumstances which might engage item 4 if the property insured by the policy is limited does not mean that item 4 is commercially absurd;

(5) there is an issue with item 4 which Market Foods has identified, which is whether the property the subject of the damage or threat of damage in the substance of item 4 can be the same property as "property: (a) of a type insured by this Policy" in the preamble. The fact that this ambiguity exists does not make item 4 commercially absurd. It is an ambiguity to be resolved according to orthodox principles and, if necessary, by application of the contra proferentem rule as a rule of last resort. I consider that provided the property is of a type insured by the policy and is within 50 kilometres of an Insured Location, damage or the threat of damage to that property which causes a legal authority to prevent or restrict access to that property would be sufficient to engage item 4. On this basis, the relevant property could be one and the same. Otherwise the ordinary meaning of item 4 as set out above applies. I say this because the one property could satisfy all requirements – it would be property of a type insured by the policy, it would be property the subject of physical damage, it would be property also the subject of damage or the threat of damage, it would be property within 50 kilometres of an Insured Location, and it would be property the subject of damage or the threat of damage which causes a legal authority to prevent or restrict access to an Insured Location. On that basis, to require two separate properties seems commercially nonsensical and;

(6) the issue is not whether a commercial person could "dream up a scenario in which the provision could apply". It is whether this is a business-like interpretation. If item 4 is recognised as an extension of cover which otherwise requires interruption or interference with a business caused by physical damage to property insured, it is not commercially absurd to extend cover to physical damage to property not belonging to the insured of the same type which involves damage or a threat of damage to property or persons within a specified radius; and

(7) it does not involve a lack of the utmost good faith for Chubb to rely on the terms of item 4 even if, as I have concluded, part of Chubb's interpretation is not to be preferred.

898 I do not consider that, consistent with the ordinary principles of construction, item 4 and the preamble can be read as providing cover in relation to "any legal authority preventing or restricting access to an Insured Location…due to…a threat of damage to … persons within 50 kilometres of any Insured Location". This would re-write the cover to remove the preamble altogether. The contra proferentem rule, in my view, would not operate to justify that re-writing if the clause can otherwise be made to work. It can otherwise be made to work by construing the preamble and item 4 together to require the threat of damage to persons within 50 kilometres of any Insured Location to be causally connected to the words in the Preamble "Business Interruption to property". That is, the threat of damage to a person must be connected to physical loss, destruction or damage of property of a type that is insured by the policy.

899 The fact that Market Foods chose not to take cover for Buildings means that Extension B has a lesser scope of operation. This is because the "property" the subject of the physical loss, destruction or damage, for Market Foods, does not include buildings and only includes contents, stock, glass, and money. But that limitation is no reason to conclude that Extension B is a provision of a kind that is not usually included in contracts of insurance that provide similar insurance cover.

900 For these reasons, s 37 of the Insurance Contracts Act is not engaged. It would not be engaged in any event as s 71 of the Insurance Contracts Act provides that "[a] provision of this Act (other than subsection 58(2)) for or with respect to the giving of a notice or other document or information to an insured before a contract of insurance is entered into does not apply where the contract was arranged by an insurance broker, not being an insurance broker acting under a binder, as agent of the insured". Market Foods' policies were arranged by a broker, General Security Australia Insurance Brokers Pty Limited, as disclosed in the Schedule to the policies.

901 In conclusion, I consider that:

(1) Extension B does not apply to diseases at all;

(2) rather, diseases are exclusively regulated by Extension C;

(3) if this is wrong, Extension B is confined in the case of Market Foods to physical loss, destruction or damage of property of a type that is insured by the policy;

(4) property of a type that is insured by the policy is contents, stock, glass and money but not buildings;

(5) item 4 applies to (relevantly) any legal authority preventing or restricting access to an Insured Location due to damage to property and an associated or causally connected threat of damage to property of a type that is insured by the policy (being contents, stock, glass and money) or damage to property and an associated or causally connected threat of damage to property of a type that is insured by the policy which is associated or causally connected with damage or a threat of damage to persons, if both the property and the persons are within a 50 kilometre radius of an Insured Location;

(6) the only ambiguity in Extension B which may be resolved contra proferentem is that if the one property is of a type insured by the policy and is within 50 kilometres of any Insured Location and damage to that property will prevent or hinder the access to or use of the Insured Location, I would be prepared to conclude that cl 1 of Extension B is satisfied;

(7) I do not accept that item 4 can be construed as providing cover for any loss caused by interruption to or interference with Market Foods' business caused by any legal authority preventing or restricting access to an Insured Location due to damage or a threat of damage to persons within 50 kilometres of any Insured Location. That would involve writing the preamble to Extension B out of existence; and

(8) in the context of Extension B as a whole, the presence of the SARS-CoV-2 virus on property cannot constitute Insured Damage which requires physical damage to the property.

902 If I am wrong and Extension B is capable of applying to a disease then, on the basis set out above, Market Foods would still face insuperable difficulties in its claims for cover.

903 For example, in item 1 of Extension B the factual/causal requirement "will prevent or hinder" exposes that what is required is physical damage to tangible property which will, in and of

itself, physically prevent or hinder access. For example, assume Market Foods had cover for buildings. Assume the building next door to the Insured Location collapsed and the rubble physically prevented or made it more difficult to access or use the Insured Location. Subject to any other exclusion, item 1 of Extension B would be satisfied. This makes sense. Attempting to contort the effect of a disease into a prevention or hindrance of access is nonsensical. Extension B item 1 is concerned with physical damage to property which physically prevents or hinders access to the Insured Location.

904 It is only if all of my conclusions above are wrong that any aspect of Market Foods' case about Extension B can be considered.

12.5 Extension B item 1

905 This section assumes that everything I have said in the preceding section is wrong.

906 On this basis, item 1 still requires "damage to any property within 50 kilometres of any Insured Location, which will prevent or hinder the access to or use of the Insured Location". If property is not confined to property of a type insured by the policy then the terms should be given its ordinary meaning of a thing which can be owned and not its legal relational meaning: *Yanner v Eaton* [1999] HCA 53; (1999) 201 CLR 351 at 365-367 at [17]–[21]. Property within the meaning of Extension B is thus something tangible which is capable of being owned. If damage is not confined by the reference in the preamble to "Business interruption" which picks up the definition of Insured Damage then "damage" too should be given its ordinary meaning of "injury or harm that impairs value or usefulness" (Macquarie Dictionary Online). On the ordinary meaning of the phrase "damage to property", accordingly, the cover concerns some physical harm done to some physical thing.

907 In ***Ranicar*** *v Frigmobile Pty Ltd* [1983] Tas R 113 at 116 Green CJ said that "'damage to' when used in relation to goods, is a physical alteration or change, not necessarily permanent or irreparable, which impairs the value or usefulness of the thing said to have been damaged", but accepted at 117 that a foodstuff (scallops) could be damaged by something which did not cause any physical change to the foodstuff.

908 In ***R&B Directional Drilling*** *Pty Ltd (in liq) v CGU Insurance (No 2)* [2019] FCA 458; (2019) 369 ALR 137 Allsop CJ considered the meaning of "physical damage or destruction of…tangible property" and said: (a) the proposition that any material impairment of functionality or purpose amounts to physical injury is unpersuasive: [134], and (b) the

placement of materials within the tunnel that were defective, requiring their removal from the tunnel, did not involve physical damage to the tunnel: [136].

909 I accept that in other contexts a "damage" to property requirement has been held to apply to circumstances capable of remediation as in *Jan de Nul (UK) Ltd v Axa Royale Belge* [2002] EWCA Civ 209; [2001] 1 Lloyd's Rep 583 (the relevant property was a river bed and the cause of damage was siltation which could be removed) and *Lojinska Plovidba v Transco Overseas Ltd (The Orjula)* [1995] 2 Lloyds Rep 395 (the relevant property was a ship and the damage was a leak of hydrochloric acid which could be cleaned from the surface of the ship without changing its physical quality). However, this approach does not reflect the weight of authority in Australia. Further, COVID-19 is different from siltation and hydrochloric acid. COVID-19 is a virus. It can subsist on property "for varying durations of time" and cause infection to persons who come into contact with it (Chubb and Market Foods agreed facts at [22]), but it does not remain infectious on property indefinitely. If not infectious to persons, there is no suggestion in the evidence that the virus is capable of doing any harm to persons (noting that it is not apparent from the evidence whether the virus is detectable at all on property if it is no longer infectious).

910 The issue in the present case is damage to property as a result of fomites. As noted, the Chubb and Market Foods agreed facts include that the SARS-CoV-2 virus subsists on property for varying durations of time and, if a person comes into contact with the SARS-CoV-2 virus while it is subsisting on property, there is a risk that the person could become infected with the COVID-19 disease: [22]. Market Foods' case theory is that: (a) the SARS-CoV-2 may be inferred to have been present on property not belonging to it within 50 kilometres of any Insured Location, (b) this involved damage to that property, and (c) this damage was a proximate cause of preventing or hindering the access to or use of the Insured Location.

911 Given the agreed fact that the SARS-CoV-2 virus subsists on property for varying durations of time involving a risk of transmission of the virus to a person coming into contact with the virus on the property, it does not take the expert evidence of Dr Shiers or Dr Shaban to draw conclusions about the relevant issue. It may be accepted, as Dr Shiers said, that the coating of the virus has no chemical activity or enzymatic properties that can cause a physical or chemical alteration to or degradation of materials. The virus stays on the surface due to electrostatic and ionic interactions with the surface which do not physically alter the surface. What Dr Shiers (and Dr Shaban) cannot legitimately do is purport to answer the question whether, within the

meaning of item 1, the presence of the SARS-CoV-2 virus on the surface of property is capable of constituting damage to property within the meaning of item 1 of Extension B.

912 I do not consider that the presence of the SARS-CoV-2 virus on the surface of property is capable of constituting damage to property. Market Foods would thus fail at this step. Only if "damage to property" appeared in a different and more expansive context than Extension B would I conclude that the presence of the SARS-CoV-2 virus on the surface of property is capable of constituting damage to property within the meaning of that clause. This would be because, while there is no permanent physical alteration to the property, the presence of the SARS-CoV-2 virus on the surface of the property means: (a) there is a temporary physical alteration to the property in that its surface now has present on it the SARS-CoV-2 virus, (b) for some period of time there is a potential for persons coming into contact with the SARS-CoV-2 virus on the surface of the property to become infected by the virus and suffer harm as a result, and (c) to avoid that risk of harm during that period of time it may be necessary to expend money to remove the presence of the SARS-CoV-2 virus from the surface of the property. Depending on context, these circumstances might be capable of involving damage to property but, as I have said, this is not so in the context of Extension B.

913 Further, the inferred presence of the SARS-CoV-2 virus on the surface of property within 50 kilometres of any Insured Location (a factual issue to which I shall return), on any view of item 1, is not the insured peril. The insured peril includes "damage to any property within 50 kilometres of any Insured Location, which will prevent or hinder the access to or use of the Insured Location". The relevant causal requirement here is "will", not "may" or "is likely to". Viewed from the present day, the issue is - was there SARS-CoV-2 virus on the surface of property within 50 kilometres of any Insured Location which, in fact, prevented or hindered the access to or use of the Insured Location?

914 The correct answer to this question, in my view, is always "no" because the fact that there was or may be inferred to have been SARS-CoV-2 virus on the surface of property within 50 kilometres of any Insured Location could never prevent or hinder access to any Insured Location in the sense required. That is, the presence of the SARS-CoV-2 virus on the surface of property could never involve any form of physical prevention or physical hindrance of access to or use of any Insured Location within the meaning of item 1 of Extension B. On this basis, Market Foods would again fail at this step.

915 If I am wrong about this as well, and the requirement of "will prevent or hinder" does not require any form of physical prevention or hindrance of access to or use of any Insured Location, then it must be the case that the issue is to be answered by reference to the concept of proximate cause. That is, if the presence of the SARS-CoV-2 virus on the surface of property within 50 kilometres of any Insured Location was a proximate cause of prevention or hindrance of access to or use of the Insured Location, the requirement will be satisfied. I should say, however, that this now seems to me to be so far from the text of item 1 of Extension B as to be meaningless. Given the submissions of the parties and the nature of the proceedings as a test case, however, I continue in any event.

916 On this (in my view, wrong) basis, the Chubb and Market Foods agreed facts as follows are relevant:

> 29. With respect to the Queensland Government Directions:
>
> (a) at the time they were issued, the CHO [Chief Health Officer] Qld was aware (among other things):
>
> (i) of the known COVID-19 disease cases at that time (by number and location) by reference to the data published on the Queensland Health website and the Queensland media releases;
>
> (ii) that the SARS-CoV-2 virus subsisted on property for varying durations of time and that, if a person came into contact with the SARS-CoV-2 virus while it was subsisting on property, there was a risk that the person could become infected with the COVID-19 disease (fomite transmission); and
>
> (iii) that the subsistence of the SARS-CoV-2 virus on property was (at least) possible in locations that had been frequented by COVID-19 infected persons;
>
> (b) the considerations which informed the making of the Queensland Government Directions included the considerations outlined in paragraphs 29(a)(i) to 29(a)(iii) above;
>
> (c) the purpose of the Queensland Government Directions was to assist in containing, or to responding to, the spread of COVID-19 within the community – including containing, and responding to, the spread of COVID-19 via both fomite and person-to-person transmission; and
>
> (d) [not agreed].
>
> 30. The Queensland Government Directions were actions of a legal authority within the meaning of Extension B(4) of the policy.
>
> 31. The Initial Business Closure Direction, Subsequent Business Closure Directions and Business Operation Directions:
>
> (a) involved the interventions of a public body authorised to restrict or deny access to the Insured Location;44
>
> (b) involved the restriction or denial of the use of the Insured Location on the order or

advice of the local health authority or competent authority;45 and

(c) had the direct consequence of interrupting or interfering with the Insured Location.46

917 The known COVID-19 disease cases at that time, on the agreed facts, included a total of 319 cases of COVID-19 in Queensland by 23 March 2020: [17]. Paragraph 18 of the agreed facts records that the following COVID-19 cases occurred in the City of Brisbane and the Brisbane Metropolitan Area between 22 February 2020 and 21 March 2020 (noting that the Insured Locations are all in the City of Brisbane):

Date	Event/s
22.02.20	On about 22 February 2020, two Queensland women, aged 54 and 55, who had been passengers aboard the vessel *Diamond Star*, were medically evacuated to the PC Hospital with the COVID-19 disease
03.03.20	A 20-year-old male from the suburb of Toowong, Brisbane, being a student at the UQ campus, was confirmed with the COVID-19 disease and transferred to isolation at the RBW Hospital
04.03.20	A 26-year-old male from Logan was confirmed with the COVID-19 disease and transferred to isolation at the PA Hospital
05.03.20	A 29-year-old female from Brisbane with a confirmed case of the COVID-19 disease commenced self-isolation
06.03.20	A 28-year-old male from Brisbane was confirmed with the COVID-19 disease and transferred to the PA Hospital
10.03.20	A 22-year-old male was confirmed with the COVID-19 disease on the UQ campus and placed in isolation at the PC Hospital
	A 46-year-old female from Brisbane with confirmed COVID-19 disease was placed in isolation at the RBW Hospital
12.03.20	One COVID-19 disease case (**case**) at the RBW Hospital
	Two cases at the PC Hospital
	Two cases at the PA Hospital
14.03.20	Three cases managed by the Brisbane Metro North PHU
	One case was managed by Brisbane Metro South PHU
15.03.20	Three cases managed by the Brisbane Metro North PHU
	Three cases managed by the Brisbane Metro South PHU
	One further case managed by the Brisbane Metro North PHU or the Brisbane Metro South PHU
16.03.20	Three cases managed by the Brisbane Metro North PHU on about 16 March 2020
	Three cases managed by the Brisbane Metro South PHU
17.03.20	One case managed by the Brisbane Metro North PHU
	Six cases managed by the Brisbane Metro South PHU
18.03.20	Three cases managed by the Brisbane Metro South PHU
19.03.20	Seventeen cases managed by the Brisbane Metro North PHU
	Fifteen cases managed by the Brisbane Metro South PHU
20.03.20	Twelve cases managed by the Brisbane Metro North PHU
	Thirteen cases managed by the Brisbane Metro South PHU
21.03.20	Sixteen cases managed by the Brisbane Metro North PHU
	Six cases managed by the Brisbane Metro South PHU

918 In this table a PHU is a Public Health Unit.

919 The agreed facts do not go so far as to say that the presence of the SARS-CoV-2 virus on the surface of property within 50 kilometres of any Insured Location was a proximate cause of prevention or hindrance of access to or the use of any Insured Location. The agreed facts are confined to: (a) the Chief Health Officer was aware of the risk of fomite transmission and this awareness, amongst others, "informed the making of the Queensland Government Directions", and (b) the purpose of the Queensland Government directions was to assist in containing, or to responding to, the spread of COVID-19 within the community – including containing, and responding to, the spread of COVID-19 via both fomite and person-to-person transmission

920 Given the agreed facts as set out above, it is impossible to avoid the conclusion that the presence or potential presence of the SARS-CoV-2 virus on the surface of property within 50 kilometres of any Insured Location was a (but not necessarily the only) proximate cause of the Queensland Government directions. Given the Queensland Government health data, taken with the agreed facts, it must be inferred that the Chief Health Officer knew about the COVID-19 cases within 50 kilometres of the Insured Locations (see the Chubb and Market Foods agreed facts at [6]-[8] for the areas covered), knew that persons with COVID-19 could deposit the virus on to surfaces, and knew that the presence of the virus on surfaces could result in transmission to other people, and that these matters were a proximate cause of the making of the Queensland Government directions.

921 From the agreed facts as identified I would infer only that the SARS-CoV-2 virus was present on various surfaces of property within 50 kilometres of each of the Insured Locations at some time. On the assumptions made, the fact that Market Foods cannot identify which surface would be immaterial. Under item 2, on my present assumptions, it does not need to do so. All that is required is an available inference of the presence of the SARS-CoV-2 virus on the surface of property within 50 kilometres of each of the Insured Locations. That is sufficient to satisfy this requirement (that is, on the assumption I am otherwise wrong in my primary conclusions).

922 However, there is yet another hurdle for Market Foods. The fact that the presence of the SARS-CoV-2 virus on the surface of property within 50 kilometres of each of the Insured Locations was a proximate cause of the Queensland Government directions does not mean that this presence was also necessarily a proximate cause of the prevention or hindrance of the access to or use of any Insured Location. As discussed, a proximate cause X of a proximate cause Y

which is a proximate cause of Z does not mean that X is a proximate cause of Z. Putting it another way, the presence of the SARS-CoV-2 virus on the surface of property within the required 50 kilometres (X) may be accepted to be a proximate cause of the making of the Queensland Government directions (Y) which may also be accepted to be a proximate cause of the prevention or hindrance of the access to or use of any Insured Location (Z). What does not necessarily follow is that the presence of the SARS-CoV-2 virus on the surface of property within the required 50 kilometres (X) was a proximate cause of the prevention or hindrance of the access to or use of any Insured Location (Z).

923 I am unable to wrest from the circumstances the conclusion that the presence of the SARS-CoV-2 virus on the surface of property within the required 50 kilometres at some unknown time was itself a proximate or any other kind of cause of the prevention or hindrance of the access to or use of any Insured Location. Item 1 does not include as a requirement the act of an authority which resulted in the prevention or hindrance of the access to or use of any Insured Location. It is the very damage to property itself (on the required assumptions, the SARS-CoV-2 virus on the surface of property) within the 50 kilometres of any Insured Location which must, in and of itself, prevent or hinder the access to or use of any Insured Location. The inferred presence of the SARS-CoV-2 virus on the surface of property within the required 50 kilometres at some unknown time did not, on any view, have any effect on the access to or use of any Insured Location. It certainly did not prevent or hinder the access to or use of any Insured Location. How could it have done when the time that it was present is unknown? To the contrary, it was the Queensland Government directions that had that effect.

924 The same conclusion would apply, of course, if the "property" was confined to the type of property for which Market Foods was insured. Indeed, if I am right that this is a requirement, then Market Foods' case theory becomes all the more untenable. In short: (a) could it be concluded that the Chief Health Officer had in mind not buildings, but contents, stock, glass and money as a potential source of fomite transmission when making the Queensland Government Directions, and (b) could it be concluded that the inferred presence of the SARS-CoV-2 virus on the surface of contents, stock, glass and money within the required 50 kilometres prevented or hindered access to or use of any Insured Location? The answer to both questions would have to be in the negative.

925 The case of Market Foods is even weaker in respect of the UQ direction. There is no evidence that the Vice Chancellor and President of UQ had in mind the risk of fomite transmission when

making his announcement. As such, it could not be said that the risk of fomite transmission was a proximate or any other kind of cause of the UQ direction. The fact that only the teaching of courses was suspended, not access to or use of the entire campus, speaks against any such concern. Under the UQ direction all eating areas remained open. As such, it could not be said that the presence of the SARS-CoV-2 virus on the surface of any property prevented or hindered access to or use of any Insured Location. Suspending teaching presumably reduced the number of potential customers for Market Foods but that has nothing to do with the insured peril in item 1.

926 On this basis, even if all my primary conclusions are wrong, I remain unable to conclude that item 1 of Extension B is satisfied.

12.6 Extension B – item 3

927 It is impossible to read item 3 without the preamble to Extension B. On this basis, the preamble applies in the manner I have said (requiring "loss resulting from Business Interruption to property: (a) of a type insured by this Policy"). The limitation to contents, stock, glass and money thus applies. On this basis, the required Business Interruption is to the "property in any commercial complex of which the Insured Location forms a part or in which the Insured Location is contained". This requires Insured Damage which requires physical loss, destruction or damage to that property (of a type insured by this policy). For all of the reasons set out in respect of item 1 above, the idea that the putative physical damage (that the presence of the SARS-CoV-2 virus on the surface of any property creating the risk of fomite transmission) caused loss from the interruption of, or interference with, the business at the other property (that is, the commercial complex) is untenable.

928 Insofar as I can understand the proposition, it is that as the presence of the SARS-CoV-2 virus on the surface of any property creating the risk of fomite transmission was a proximate cause of the Queensland Government directions (which I accept on the agreed facts) and of the UQ direction (which I do not accept) and those directions interrupted or interfered with other businesses (which I would accept in the case of the Queensland Government directions by a process of inference, but would not accept in the case of the UQ direction) in commercial complexes of which the Insured Location forms a part or in which the Insured Location is contained and there was a resulting "cessation or diminution of Your trade or normal business operations due to a falling away of potential custom", item 3 of Extension B is satisfied

929 For the same reasons as set out above these propositions do not follow. Even if property is not limited to property of a type insured by the policy and extends to buildings, the physical damage to that property must result in the cessation or diminution of trade. That is, there is no scope within item 3 for anything other than a direct causal relationship between the physical damage to the other property and the cessation or diminution of trade at the Insured Location. There is no such causal relationship between the inferred presence of the SARS-CoV-2 virus on the surface of any property in any relevant commercial complex creating the risk of fomite transmission and the cessation or diminution of trade at the Insured Location. This would be so even for the UQ Insured Location assuming that the entire UQ campus constitutes a single "commercial complex of which the Insured Location forms a part or in which the Insured Location is contained". My reasoning above applies that the only cause of any effect on the Insured Locations was the Queensland Government directions and, for the UQ Insured Location, the UQ direction (recognising that in the case of the UQ direction the risk of fomite transmission cannot be concluded to have been a cause of the direction in any event).

930 Further, I would conclude that: (a) the Herston Insured Location forms part of a single commercial complex which is constituted by that building and does not include the separate Royal Brisbane Women's Hospital, (b) the William Street Insured Location forms part of a single commercial complex which is constituted by the 46-storey office building complex, and (c) the UQ Insured Location forms part a commercial complex contained within building 63 on the UQ campus. The entirety of the UQ campus is not itself a "commercial complex". It is a series of commercial complexes.

931 A commercial complex would include but not be limited to a shopping centre or office tower. Government buildings, hospitals and university campuses may constitute a commercial complex or contain commercial complexes. I would reject Chubb's submission that the "term 'commercial complex' connotes a shopping precinct or commercial estate whereas the Insured Locations are situated in government buildings and on a university campus".

932 Even if I was prepared to infer that there was the presence of SARS-CoV-2 virus on the surface of any property within each of the commercial complexes of which the Insured Locations form part, I would not conclude that that (asserted) physical damage to property resulted in any cessation or diminution of Market Food's trade at any Insured Location. This is because the mere presence of SARS-CoV-2 virus in this way was not a proximate cause of anything to do

with the trade at the Insured Locations. That trade was not diminished by the fact of the presence of SARS-CoV-2 virus on any surface as required but by the directions.

933 In any event, I would not be prepared from the evidence to infer the presence of SARS-CoV-2 virus on the surface of any property within each of the commercial complexes of which the Insured Locations form part. Relevantly:

(1) the presence of the SARS-CoV-2 virus on the surface of any property within the Royal Brisbane Women's Hospital does not mean that it can be inferred that the virus was also present at the nearby but separate Herston Insured Location. These are two entirely separate commercial complexes. There is no evidence of the presence of the SARS-CoV-2 virus on the surface of any property within the commercial complex of which the Herston Insured Location forms part;

(2) there is no evidence of the presence of the SARS-CoV-2 virus on the surface of any property within the 46-storey office building complex of which the William Street Insured Location forms part; and

(3) there is no evidence of the presence of the SARS-CoV-2 virus on the surface of any property within building 63 of which the UQ Insured Location forms part.

934 Further, as to UQ, if (as Market Foods would have it) the entire campus is a "commercial complex" of which the UQ Insured Location forms part (which I would not accept), then while the presence of students on the campus subsequently diagnosed with COVID-19 would support an inference that at some time it is likely that some surface within the campus which an infectious student touched would have the SARS-CoV-2 virus present on it, it could never be said that presence resulted in the cessation or diminution of trade from the UQ Insured Location. It cannot be inferred that the Vice Chancellor and President of UQ had fomite transmission in mind at all when making the announcement on 15 March 2020.

935 On this basis, even if all my primary conclusions are wrong, I remain unable to conclude that item 3 of Extension B is satisfied.

12.7 Extension B – item 4

936 If all of my primary conclusions are wrong, then I would accept that the Queensland Government directions involve a legal authority preventing or restricting access to the Insured Locations due to damage or a threat of damage to property or persons within 50 kilometres of each Insured Location. My reasoning would be that: (a) the Insured Locations include a

café/restaurant and bar, (b) people would ordinarily be able to enter and remain in the Insured Locations to consume food and drink, (c) the Queensland Government directions prevented people from entering and remaining in the Insured Locations to consume food and drink altogether insofar as the take-way only directions are concerned, which involves a prevention of or, at the least, a restriction on access to the Insured Locations, and (d) the Queensland Government directions by reason of the maximum occupancy requirements, also may be inferred to have prevented or, at the least, restricted people from entering and remaining in the Insured Locations to consume food and drink who would otherwise have been entitled to do so.

937 The UQ direction on 15 March 2020, however, did not prevent or restrict access to the UQ Insured Location for the reasons set out above. Nor is the Vice Chancellor and President of UQ a "legal authority" within the meaning of item 4. As discussed elsewhere, in context, a "legal authority" within item 4 does not extend to a person exercising day-to-day operational and management powers over a place such as the UQ campus (see the discussion below about the status of the Vice Chancellor of UQ). What item 4 requires is a person or body who, under some Act, regulation or instrument, is vested with a power of a public (not private) kind to prevent or restrict access to the Insured Location.

12.8 Extension C

938 There is no dispute that COVID-19 is a Notifiable Disease. Chubb does not raise any temporal issue about the operation of Extension C. As discussed elsewhere the only temporal requirement is that the disease be a Notifiable Disease at the time of the intervention by the public body.

939 On 30 January 2020, the *Public Health (Coronavirus (2019–nCoV)) Amendment Regulation 2020* (Qld) amended the *Public Health Regulation 2005* (Qld) by making "coronavirus 2019–nCoV" a notifiable condition. This involved an exercise of power under s 64 of the *Public Health Act 2005* (Qld). Under s 70 of that Act a doctor must notify the chief executive if an examination of a person by the doctor indicates that the person has or had a clinical diagnosis notifiable condition or has or had a provisional diagnosis notifiable condition. The Notifiable Disease requirement, accordingly, is satisfied.

940 There is no issue that the Queensland Government directions led to restriction or denial of the use of the Insured Locations as required.

941 There is no issue that the Queensland Government directions involved the intervention of a public body authorised to restrict or deny access to the Insured Location.

942 The issue is whether the Queensland Government directions directly arose from an occurrence or outbreak at the premises of a Notifiable Disease or the discovery of an organism at the premises likely to cause Notifiable Disease. My comments above in NSD137/2021 Chubb and Waldeck apply to the use of "outbreak" and "occurrence" within cl 1.

943 I agree with Market Foods that the requirement that the intervention "directly arise" from the occurrence or outbreak means nothing different from "proximate cause", consistent with the principles at [162]-[211] of *FCA v Arch UKSC*. The adverb "directly" does not alter the nature of the causal requirement. This does not mean the reasoning otherwise in those paragraphs which depends on the facts of those cases is applicable in the present case (as to which, see below).

944 I discussed the meaning of the "premises" in the Waldeck case above. In the present case I consider that the "premises" means:

(1) in the case of the Herston Insured Location, the Herston building;

(2) in the case of the William Street Insured Location, the William Street building; and

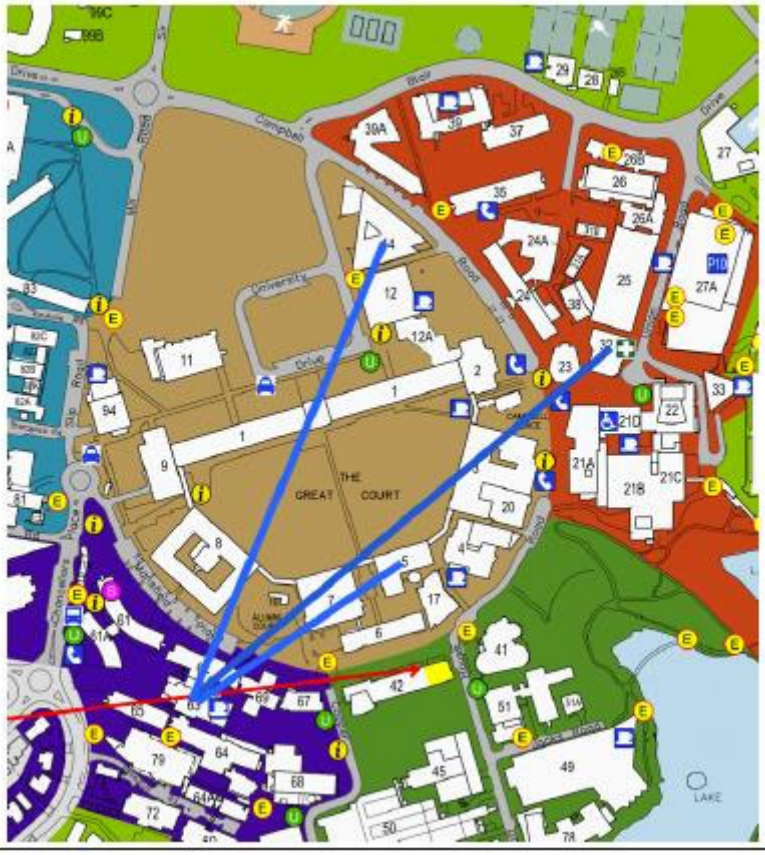
(3) in the case of the UQ Insured Location, building 63.

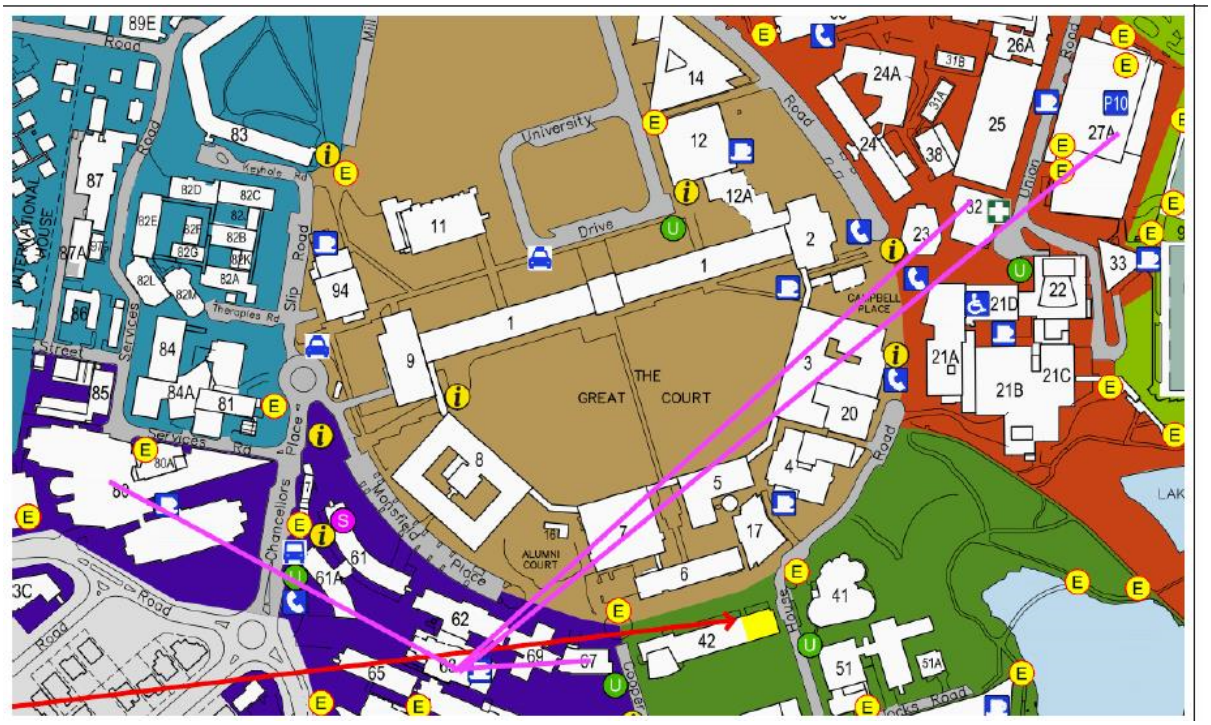
945 There is no evidence suggesting that the Queensland Government directions or the UQ direction were made because of an occurrence or outbreak of COVID-19 or the discovery of the SARS-CoV-2 virus at these premises. There is also no evidence of an occurrence or outbreak of COVID-19 or the discovery of the SARS-CoV-2 virus at these premises.

946 I do not accept Market Foods' argument that "premises" extends to land in the vicinity of the Insured Locations. Specifically I do not accept that land beyond the immediate curtilages of the Herston building and the William Street building form part of the premises. The premises in these cases are defined by the extent of the buildings. For example, the mere fact that a person with COVID-19 walked past the outside of these buildings on the footpath would not establish that there was an occurrence or outbreak of COVID-19 at the premises. Nor would it establish that there was an occurrence of the discovery of the SARS-CoV-2 virus at the premises. For the same reasons I do not accept that a relevant outbreak or occurrence within the "area" around the buildings satisfies the requirement that the occurrence or outbreak be at the premises.

947 As discussed, I also do not accept that in the case of the UQ Insured Location the relevant "premises" is the whole of the UQ campus. There is no ambiguity about the meaning of the word "premises" which should be resolved contra proferentem. The word takes its ordinary meaning of "2. (plural) a. the property forming the subject of a conveyance. b. a house or building with the grounds, etc., belonging to it" (Macquarie Dictionary Online).

948 Market Foods provided an aide memoire showing diagrams of the UQ campus. Given that this was provided by Market Foods it can have no objection to me relying on it. The diagrams show by blue and pink lines the relationship between building 63 (where the UQ Insured Location is situated) and the buildings visited by two students subsequently diagnosed with COVID-19. Those diagrams are below.





949 The UQ campus diagram reinforces my view that, for the purposes of Extension C, the UQ campus is not a single premises. Buildings 62 and 63 and their immediate surrounds may be a single premises as they are physically interconnected, but that conclusion would require further evidence. What cannot be concluded is that the entire UQ campus is a single premises as envisaged by Extension C. This is because Extension C involves a restriction or denial of use of the Insured Location because of a relevant outbreak or occurrence. This requires a common-sense view to be taken of the likely extent of any "premises". If a single entity occupies a large tract of land, occupied by separate and distinct buildings, it is unlikely that a relevant outbreak or occurrence in one building could affect the status or safety of another separate and distinct building.

950 Extension C, accordingly, is not satisfied.

951 If this is wrong, and the entire UQ campus is the one premises, it still cannot be concluded that the intervention of the Chief Health Officer in the form of the Queensland Government directions directly arose from the outbreak or occurrence as required on those premises. Before the Queensland Government directions were made there were three known cases of COVID-19 who had visited the UQ campus. However, there were many more cases outside of the UQ campus (144 cases by 19 March 2020 and 319 cases by 23 March 2020, in Queensland). On this basis, I cannot draw an inference that the three known cases of COVID-19 who had visited the UQ campus were a proximate cause of the Queensland Government directions.

952 Nor, given the size of Queensland, can I apply the reasoning in *FCA v Arch UKSC* at [179]-[197] to the Queensland Government directions. Extension C requires the outbreak or occurrence (as specified) to be at the premises. The intervention must directly arise from that circumstance. In *FCA v Arch UKSC* the "but for" approach to causation could not be logically applied because the 25 mile radius under consideration included such a large part of the country: see at [179]. Lord Hamblen and Lord Leggatt JJSC reasoned at [179] that if the area within the 25 mile radius had been free from COVID-19 cases the Government measures would still have been made applying to that area given the widespread nature of the outbreak. On that basis, "it would be difficult if not impossible for a policyholder to prove that, but for cases of Covid-19 within a radius of 25 miles of the insured premises, the interruption to its business would have been less". This reasoning also assumes that the measures affecting the area within the 25 mile radius would have been taken if there had been no cases outside of the radius. That assumption is reasonable given that the radius covered around 2,000 square miles of a densely populated country.

953 The same assumption could not be made in the present case. That is, it could not be assumed or inferred that the Queensland Government directions would have been made as a result of the three known cases of COVID-19 being students who had visited UQ. Putting it another way, those three known cases were not a proximate or any other kind of cause of the Queensland Government directions. It cannot be inferred that each and every case of COVID-19 was a proximate cause of the Queensland Government directions. No one known case was a sufficient cause of the Queensland Government directions. It is not even apparent that the known cases themselves would have been a sufficient cause. It must be inferred that it was the risk presented by both known and unknown cases that was a proximate cause of the Queensland Government directions. Extension C, however is not a risk-based provision. It does not respond to an intervention relating to a mere risk of a Notifiable Disease. It responds to the required outbreak or occurrence at the premises (which, if it involved discovery of an organism, is likely to cause the Notifiable Disease) being a proximate cause of the intervention.

954 While, consistent with the reasoning in *FCA v Arch UKSC* at [194], a reasonable person would not suppose that an outbreak or occurrence of a Notifiable Disease necessarily would be isolated to the premises and that an intervention in response, accordingly, would also be confined to the premises, Extension C requires that the outbreak or occurrence at the premises to be a proximate cause of the intervention. The difference between this case and *FCA v Arch UKSC* is that there the issue was whether uninsured cases of COVID-19 outside of the radius

deprived the insured of cover for insured cases inside the radius. This positing of the relevant question makes sense on an assumption that the cases inside the radius would have been a sufficient cause for the Government measures. This assumption is apparent from the observation at [195] that:

> We agree with the FCA's central argument in relation to the radius provisions 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.

955 That is, the "causal impact of the disease inside the radius" is taken as a given. It is this factual context which enabled the conclusion in *FCA v Arch UKSC* at [212] "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", explained to be "a conclusion about the legal effect of the insurance contracts as they apply to the facts of this case". The facts of the present case are different and do not support a similar conclusion.

956 The causal impact of the outbreak or occurrence at the premises in the present case (assumed to be UQ) cannot be assumed or inferred. It has to be proven. However, there is no evidentiary foundation enabling me to infer that the known cases at UQ (if it can be the premises, contrary to my view) were a proximate cause of the making of the Queensland Government directions.

957 It also cannot be inferred that the three known cases of COVID-19 on the UQ campus were a proximate or any other kind of cause of the UQ direction. The UQ direction was made on 15 March 2020. While each of the three UQ cases was known by this time, the terms of the UQ direction do not support the inference that this is why the direction was made. Rather, the terms of the direction record that the Vice Chancellor and President of UQ had decided to suspend coursework teaching in response to the new measures announced by the Queensland Government. The Vice Chancellor and President of UQ made clear that the UQ campus, including all services, remained open. Had the occurrence and outbreak at the UQ campus been a proximate or any other kind of cause of the direction it would be reasonable to expect that: (a) the Vice Chancellor and President would have said so, and (b) the direction would have prevented people from attending the UQ campus. Instead when mentioning the most recent COVID-19 case who had attended the UQ campus, the Vice Chancellor and President said only "[w]ith the confirmation this afternoon from Queensland Health that another student has been confirmed with COVID-19, I encourage you to adhere to the Government guidelines on social

distancing and healthy hygiene habits". None of this supports an inference that the Vice Chancellor and President of UQ acted because of the cases of COVID-19 on the UQ campus.

958 In any event, as I have said, the UQ direction did not involve a "restriction or denial of the use of the Insured Location".

959 Nor do I accept that the Vice Chancellor and President of UQ was "a public body authorised to restrict or deny access to the Insured Location". Nor did the intervention by the Vice Chancellor and President of UQ involve a "restriction or denial of the use of the Insured Location on the order or advice of the local health authority or other competent authority".

960 A competent authority (to take the broadest term) has to be understood in the context of Extension C as a whole. In that context, it is clear that a competent authority is a body or person who has a statutory (in the sense of under any Act, regulation or instrument) power or authority to restrict or deny use of and access to the Insured Location by reason of the outbreak or occurrence or risk of outbreak or occurrence of a Notifiable Disease. It does not mean a person who is able to make an operational decision affecting premises because they hold a position or status unconnected to legislative and public powers concerning Notifiable Diseases. That is, an owner or manager of a building is not a body or authority within the meaning of Extension 4 merely because they have operational powers derived from non-statutory sources. This must follow from the text of Extension C with its references to "public body authorised to restrict or deny access to the Insured Location" and "restriction or denial of the use of the Insured Location on the order or advice of the local health authority or other competent authority".

961 While UQ is regulated by the *University of Queensland Act 1998* (Qld) and the Vice Chancellor has functions under that Act (s 32), it is apparent that in making the UQ direction the Vice Chancellor was acting as the chief executive officer of UQ under s 32(4) and not as an authority of the kind referred to in Extension C.

962 For these reasons, Extension C is not satisfied.

12.9 Causation and adjustments

963 None of these issues arise given that none of the extensions are engaged.

964 If all my conclusions are wrong and one or more of the Extensions does apply, then I would adopt the same reasoning as I have set out in other cases. That is:

(1) the loss must result from the insured peril: (a) in the case of Extension B this is interruption of or interference with the business caused by physical loss, destruction or damage to a type of property insured by the policy which satisfies at least one of the relevant items 1, 3 or 4, and (b) in the case of Extension C this is interruption of or interference with the Insured Location caused by an intervention of the kind specified in Extension C (a) and (b);

(2) if the insured peril is a proximate cause of the loss then it does not matter if there was another uninsured proximate cause of the loss arising from the same underlying cause. On the assumption my primary conclusions are wrong, it would follow that the presence and risk of COVID-19 in Queensland would be the same underlying cause as the insured peril so that would not operate to undermine satisfaction of the causation requirement; and

(3) the same approach would be taken to the operation of the Trend in the Business definition forming part of the meaning of Rate of Gross Profit – that is, an adjustment would not be made for the presence and risk of COVID-19 in Queensland.

12.10 Third party payments

965 The reasoning applied in the other cases applies.

966 Market Foods received JobKeeper payments and rental reductions.

967 I consider that both kinds of payments reduced Market Foods' loss and must be taken into account on that basis under item C of the Gross Profit provision with loss to be calculated by "subtracting any sum saved during the Indemnity Period in respect of such of the charges and expenses of Your Business payable out of Gross Profit as may cease or be reduced in consequence of the Insured Damage" or under the general law applicable to contracts of indemnity.

968 Market Foods' submissions to the contrary are not persuasive:

(1) the context of the rental reductions is immaterial to the operation of Gross Profit provision as one way or another a rental reduction, no matter how negotiated or in what terms, is a sum saved as described;

(2) similarly, for the operation of the general law, Ms Harcourt's characterisation of the arrangement as "rental reductions from landlords", given Ms Harcourt is the sole

director of Market Foods, is sufficient to enable the conclusion to be reached that the reductions reduced Market Foods' loss, which is all that is required;

(3) the conclusions are only hypothetical in the sense that they assume I am otherwise wrong. Given (1) and (2) above they are not hypothetical because of the sparse evidence about them – contrary to Market Foods' submission, the fact that Ms Harcourt said Market Foods received JobKeeper payments and rental reductions from landlords is all that is required to enable a conclusion to be reached without offending judicial principles;

(4) *National Insurance Company of New Zealand Limited v* ***Espange*** (1961) 105 CLR 569 does not involve analogous circumstances. As was there said at 573 a disability pension is paid for the benefit of the disabled person and not to give relief of any liability in others to fully compensate the person. In contrast to *Espange* at 600 I am unable to conclude that JobKeeper payments or rental reductions were given "by way of bounty so that the insured might enjoy them and not have loss diminished accordingly". That conclusion is inconsistent with the inferred purpose for which the payments and reductions were made; and

(5) *Queensland Bulk Water Supply Authority t/as Seqwater v Rodriguez & Sons Pty Ltd* [2021] NSWCA 206 involved apportionment in the context of damages. In any event, the same principle, focusing on whether the benefit was conferred independently of any right of redress, was involved: at [727].

12.11 Interest

969 In accordance with my reasoning elsewhere, s 57 of the Insurance Contracts Act is not yet engaged. It would not be unreasonable for Chubb to withhold payment until a final determination of this case decides that Chubb is liable to do so.

12.12 Answer to questions

970 The questions suffer from more than the usual problems. Insofar as possible, they are answered below.

1. Are Extensions B1, B3, B4 or C of the policy, or any of the components or elements thereof, patently uncertain, ambiguous or flawed?

No. Some provisions are merely ambiguous but all are capable of being given meaning in accordance with orthodox principles.

2. If the answer to 1 is "yes":

(a) how, and to what extent, does such patent uncertainty, ambiguity or flaw affect the construction of Extensions B1, B3, B4 or C of the policy?

This does not arise.

(b) does s 37 of the *Insurance Contracts Act 1984* (Cth) have any application having regard to s 71 and, if so, is s 37 enlivened factually?

No and *no*.

(c) is Chubb precluded from relying on the parts of the policy affected by such patent uncertainty, ambiguity or flaw by virtue of ss 13, 14 or 37 of the *Insurance Contracts Act 1984* (Cth)?

No.

EXTENSION B1

3. Was there "Business Interruption… to property: (a) of a type insured by this Policy; and (b) at the location… described in" Extension B1?

No.

(a) Sub-Issue #1: Does the subsistence of the SARS-CoV-2 virus on property, if proven, constitute "physical loss, destruction or damage… to property" (Property Damage)?

Not in the context of Extension B.

(b) Sub-Issue #2: If the answer to Sub-Issue #1 is "yes", did the Property Damage "occur… during the Policy Period"?

This does not arise.

(c) Sub-Issue #3: If the answer to Sub-Issue #2 is "yes", was the Property Damage "caused by an event insured under the Property Damage, Theft, Money, Glass or General Property Sections [of the policy]" or is it excluded by Excluded Cause 2(a)?

This does not arise.

(d) Sub-Issue #4: If the answer to Sub-Issue #3 is "yes", was the Property Damage "at the location… described in" Extension B1?

This does not arise.

4. If the answer to 3 is "yes", does the subsistence of the SARS-CoV-2 virus on property, if proven, constitute "damage to any property"?

This does not arise.

5. If the answer to 4 is "yes", was there damage to any property "within 50 kilometres of any Insured Location" during the Policy Period?

This does not arise.

6. If the answer to 5 is "yes", did such damage "prevent or hinder the access to or use of the Insured Location"?

This does not arise.

(a) Sub-Issue #1: Market Foods contends that the subsistence of the SARS-CoV-2 virus on property caused the Queensland Government Directions and/or UQ Direction - which, in turn, "prevent[ed] or hinder[ed] the access to or use of the Insured Location". If this can be established, is this element of the insuring clause satisfied or must the damage to property prevent or hinder the access to or use of the Insured Location as opposed to the response to such damage by the Queensland Government and/or UQ?

No. The damage to any property within 50 kilometres of any Insured Location must physically prevent or physically hinder the access to or use of the Insured Location.

(b) Sub-Issue #2: If the answer to Sub-Issue #1 above is "yes", did the subsistence of the SARS-CoV-2 virus on property, if proven, cause the Queensland Government Directions and/or UQ Direction?

This does not arise.

(c) Sub-Issue #3: If the answer to Sub-Issue #2 above is "yes", did the Queensland Government Directions and the UQ Direction "prevent or hinder the access to or use of the Insured Location"?

This does not arise.

7. If the answer to 6 is "yes", was there "loss resulting from" the Business Interruption?

This does not arise.

EXTENSION B3

8. Was there "Business Interruption… to property: (a) of a type insured by this Policy; and (b) at the location… described in" Extension B3?

No.

(a) Sub-Issue #1: Does the subsistence of the SARS-CoV-2 virus on property, if proven, constitute "physical loss, destruction or damage… to property" (Property Damage)?

Not in the context of Extension B.

(b) Sub-Issue #2: If the answer to Sub-Issue #1 is "yes", did the Property Damage "occur… during the policy Period"?

This does not arise.

(c) Sub-Issue #3: If the answer to Sub-Issue #2 is "yes", was the Property Damage "caused by an event insured under the Property Damage, Theft, Money, Glass or General Property Sections [of the policy]" or is it excluded by Excluded Cause 2(a)?

This does not arise.

(d) Sub-Issue #4: If the answer to Sub-Issue #3 is "yes", was the Property Damage "at the location… described in" Extension B3?

This does not arise.

9. If the answer to 8 is "yes", does the subsistence of the SARS-CoV-2 virus on property, if proven, constitute "[damage to] property"?

This does not arise.

10. If the answer to 9 is "yes", was there "damage to property in any commercial complex of which the Insured Location forms a part or in which the Insured Location is contained…"?

This does not arise.

(a) Sub-Issue #1: Does the phrase "commercial complex" extend beyond complexes in the nature of shopping centres or industrial complexes?

Yes.

(b) Sub-Issue #2: If the answer to Sub-Issue #1 is "yes", were the William Street Building, the Herston Building and the UQ Campus (or, alternatively, the UQ Food Court or, alternatively, the Licensed Premises in the UQ Food Court) "commercial complex[es] of which the Insured Location forms a part or in which the Insured Location is contained"?

William Street Building – yes; Herston Building – yes; UQ campus – no. UQ Food Court – yes if the food court is within building 63. Licensed Premises in the UQ Food Court – the meaning of this is unclear.

(c) Sub-Issue #3: If the answer to Sub-Issue #2 is "yes", did the SARS-CoV-2 virus subsist on property in the commercial complexes during the Policy Period?

Not proven.

11. If the answer to 10 is "yes", did the damage "result in cessation or diminution of [Market Foods'] trade or normal business operations due to a falling away of potential custom"?

This does not arise.

(a) Sub-Issue #1: Market Foods contends that the subsistence of the SARS-CoV-2 virus on property caused the Queensland Government Directions and/or UQ Direction - which, in turn, "result[ed] in [the] cessation or diminution of [Market Foods'] trade or normal business operations due to a falling away of potential custom". If this can be established, is this element of the insuring clause satisfied or must the resultant "cessation or diminution of [Market Foods'] trade or normal business operations due to a falling away of potential custom" be caused by the damage to property as opposed to the response to such damage by the Queensland Government and/or UQ?

No. The physical damage to property must be a proximate cause of the cessation or diminution of trade.

(b) Sub-Issue #2: If the answer to Sub-Issue #1 above is "yes", did the subsistence of the SARS-CoV-2 virus on property cause the Queensland Government Directions and/or UQ Direction?

This does not arise.

(c) Sub-Issue #3: If the answer to Sub-Issue #2 above is "yes", did the Queensland Government Directions and the UQ Direction "result in [the] cessation or diminution of [Market Foods'] trade or normal business operations due to a falling away of potential custom".

This does not arise.

12. If the answer to 11 is "yes", was there "loss resulting from" the Business Interruption?

This does not arise.

EXTENSION B4

13. Was there "Business Interruption… to property: (a) of a type insured by this Policy; and (b) at the location… described in" Extension B4?

No.

(a) Sub-Issue #1: Does the subsistence of the SARS-CoV-2 virus on property, if proven, constitute "physical loss, destruction or damage… to property" (Property Damage)?

Not in the context of Extension B.

(b) Sub-Issue #2: If the answer to Sub-Issue #1 is "yes", did the Property Damage "occur… during the policy Period"?

This does not arise.

(c) Sub-Issue #3: If the answer to Sub-Issue #2 is "yes", was the Property Damage "caused by an event insured under the Property Damage, Theft, Money, Glass or General Property Sections [of the policy]" or is it excluded by Excluded Cause 2(a)?

This does not arise.

(d) Sub-Issue #4: If the answer to Sub-Issue #3 is "yes", was the Property Damage "at the location… described in" Extension B4?

This does not arise.

14. If the answer to 13 is "yes", was there "any legal authority preventing or restricting access to an Insured Location"?

This does not arise.

(a) Sub-Issue #1: Were the Queensland Government Directions and the UQ Direction actions of a "legal authority"?

Queensland Government directions – yes; UQ direction – no.

(b) Sub-Issue #2: If the answer to Sub-Issue #1 is "yes", did the Queensland Government Directions and the UQ Direction "prevent… or restrict… access to an Insured Location"?

Queensland Government directions – yes; UQ direction – no.

15. If the answer to 14 is "yes", were the Queensland Government Directions and the UQ Direction "due to damage or a threat of damage to property or persons within 50 kilometres of any Insured Location…"?

No.

(a) Sub-Issue #1:

(i) Does the subsistence of the SARS-CoV-2 virus on property, if proven, constitute "damage… to property"?

Not in the context of Extension B.

(ii) Does the risk of the SARS-CoV-2 virus subsisting on property, if proven, constitute "a threat of damage to property"?

This does not arise.

(iii) Does a person having contracted the COVID-19 disease constitute "damage to… persons"?

This does not arise.

(iv) Does the risk of a person contracting the COVID-19 disease constitute "a threat of damage… to persons"?

This does not arise.

(b) If the answer to any of the issues in Sub-Issue #1 is "yes", were the Queensland Government Directions and the UQ Direction due to such damage or threat of damage within 50 kilometres of any Insured Location?

This does not arise.

16. If the answer to 15 is "yes", was there "loss resulting from" the Business Interruption?

This does not arise.

EXTENSION C

17. Was there "an occurrence or outbreak [of a Notifiable Disease] at the premises" during the policy period?

No.

(a) Sub-Issue #1: Does the term "premises" mean "Insured Location"? If not, what were the relevant "premises"?

No. The premises are the Herston building, the William Street building and building 63 on the UQ campus.

(b) Sub-Issue #2: In order for there to be an occurrence of the COVID-19 disease at the premises, can this be established:

(i) absent a person infected with the COVID-19 disease attending on the premises; or

No.

(ii) by the premises being part of, or in an area where, there has been an occurrence of the COVID-19 disease?

No.

(c) Sub-Issue #3: In order for there to be an outbreak of the COVID-19 disease at the premises, can this be established:

(i) absent a person infected with the COVID-19 disease attending on the premises; or

No.

(ii) by the premises being part of, or in an area where, there has been an outbreak of the COVID-19 disease?

No.

(d) Sub-Issue #4: Having regard to the conclusions reached in respect of Sub-Issues #1 to #3 above, was there "an occurrence or outbreak [of the COVID-19 disease] at the premises" during the Policy Period?

No.

18. If the answer to 17 is "yes", was there an "intervention of a public body authorised to restrict or deny access to the Insured Location directly arising from" such occurrence or outbreak at the premises?

This does not arise. *If it arose, the answer would be no*.

(a) Sub-Issue #1: Were the Queensland Government Directions and UQ Direction "intervention[s] of … public bod[ies] authorised to restrict or deny access to the Insured Location"?

This does not arise. *If it did arise, Queensland Government directions – yes; UQ direction – no*.

(b) Sub-Issue #2: If the answer to Sub-Issue #1 is "yes", did such interventions "directly aris[e] from" the occurrence or outbreak at the premises?

This does not arise. *If it did arise, no.*

19. If the answer to 18 is "yes", did such interventions "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 authority"?

This does not arise.

(a) Sub-Issue #1: Did the Queensland Government Directions and UQ Direction "lead to the restriction or denial of the use of the Insured Location"?

This does not arise. *If it did arise, Queensland Government directions – yes; UQ direction – no*.

(b) Sub-Issue #2: If the answer to Sub-Issue #1 is "yes", did the Queensland Government Directions and UQ Direction constitute the "order[s] or advice of the local health authority or other competent authority"?

This does not arise. If it did arise, Queensland Government directions – yes; UQ direction – no.

20. If the answer to 19 is "yes", was there "interruption of or interference with the Insured Location in direct consequence of the [Queensland Government Directions and the UQ Direction]"?

This does not arise.

21. If the answer to 20 is "yes", was there any "loss resulting from such interruption of or interference with the Insured Location"?

This does not arise.

TREND CLAUSE

22. If Market Foods is entitled to indemnity under the policy, does the counter-factual required under the Trend Clause only ignore the Insured Damage and permit account to be taken of the presence and effect of COVID-19 other than in respect of the Insured Damage?

This does not arise. If it did arise, the presence and risk of COVID-19 in Queensland would not be taken into account under the Trend in Business clause as that is the same underlying cause as the insured peril.

12.13 Conclusions

971 For these reasons:

(1) Extension B does not apply to diseases;

(2) if this is wrong, Extension B requires Insured Damage (physical loss, destruction or damage) to property of a type insured by the policy;

(3) in the context of Extension C, the presence of the SARS-CoV-2 virus on property does not constitute physical damage to property;

(4) item 1 of Extension B requires the Insured Damage to physically prevent or hinder the access to or use of the Insured Location;

(5) item 3 of Extension B requires the Insured Damage (physical loss, destruction or damage) to property of a type insured by the policy to result in the cessation or diminution of trade;

(6) item 4 of Extension B requires Insured Damage (physical loss, destruction or damage) to property of a type insured by the policy, but I would accept that the damage or threat of damage to property in the substantive part of item 4 can apply to the same property;

(7) Extension C requires the relevant occurrence or outbreak to be at the premises. In the case of a separate building, the building and its immediate curtilage is the premises. The premises does not extend to land in the vicinity or area of the premises outside of the immediate curtilage; and

(8) Extensions B and C do not apply in the present case.

972 Given that these conclusions are not capable of being affected by additional evidence, subject to any observations of the parties, I would make a declaration as follows:

> Declare that policy no. EPM0000224 issued by the applicant to the respondent does not respond to the claim for indemnity by the respondent the subject of complaint no. 779676 made to the Australian Financial Complaints Authority.

973 I would also dismiss the respondent's cross-claim.

13. NSD144/2021: GUILD V GYM FRANCHISES

13.1 Agreed background

974 Gym Franchises and Mr Reason are the insureds under a "Fitness Centres Business Insurance Policy" P00226450 placed with Guild (**Gym Franchises policy**).

975 The Gym Franchises policy comprises: (a) Policy Schedule and Addendum, and (b) Product Disclosure Statement and Fitness Centre Business Insurance Policy wording.

976 The Gym Franchises policy was issued on 10 October 2019 and covers the period 10 October 2019 to 10 October 2020.

977 From 11 October 2016, the gym was located at Shop 3, 1 Brygon Creek Drive, Upper Coomera, Queensland (**Coomera premises**). Subsequently (on a date in 2020 not agreed) the gym moved to Shop 10, 34-38 Siganto Drive, Helensvale (**Helensvale premises**) and the policy schedule was amended accordingly on 14 April 2020.

978 On 23 March 2020, Mr Reason made a claim on the Guild website under the Gym Franchises policy which was allocated claim number PRP2000073062 (**Claim**).

979 On 23 March 2020, Mr Reason received a call from a representative of Guild who informed him that the Gym Franchises Policy would not cover losses associated with COVID-19. Mr Reason was advised that if he was dissatisfied with Guild's decision, he should contact AFCA.

980 In around early April 2020, Mr Reason lodged a complaint against Guild with AFCA, which was allocated case number 711855.

981 On 4 April 2020, AFCA sent confirmation of the Complaint.

982 On 6 April 2020, Guild declined the Claim.

983 In around early-mid April, Mr Reason made an oral request for AFCA to review Guild's indemnity decision.

984 On 6 May 2020, Guild confirmed its position declining cover.

13.2 Policy provisions

985 The key provisions of the Gym Franchises policy are below.

> …
>
> **General Definitions**
>
> …
>
> **Basis of Settlement**
>
> means the method and/or manner in which We will settle Your claim under this Policy.
>
> This will be in accordance with the Cover You have selected and as specified in the Schedule or as otherwise stated in the relevant Section of this Policy.
>
> …
>
> **Building**
>
> means the building, outbuilding and structural improvements at the Location of Risk and includes:
>
> a. foundations, car parks, sealed driveways and pathways, aprons, permanently paved areas, shelters, exterior blinds, awnings, gangways, walls, gates and fences;
>
> b. all services to the Building;
>
> c. external lights, masts, antennae, aerials, satellite dishes, Glass, Signs, lifts, elevators and escalators;
>
> d. in-ground swimming pools, in-ground saunas and in-ground spas including fixed attachments or fixed accessories to any of such items; and
>
> e. permanently fixed water, storage and fuel tanks:

but does not include:

i. Business Contents;

ii. Business Stock;

iii. Specified Items;

iv. plant and machinery;

v. fixtures and fittings, whether belonging to You or otherwise, attached to or on the Building and which are or could be Covered as Business Contents;

vi. land, unsealed driveways, unsealed paths, dams, bridges, canals tunnels, wharves, docks and piers; or

vii. carpets of any description.

Business

means the business described in the Schedule and conducted by You at and from the Business Premises.

For Section:

> Public and Products Liability;

'Business' has a different definition and You should refer to that Section for the particular definition of 'Business' in that Section.

…

Business Premises

means the Buildings, yards and land used by You for Your Business at the Location of Risk.

…

Damage, Damaged

means accidental physical damage to or destruction of Business Property or Your Vehicle which occurs during the Period of Cover.

…

Insured

means the natural person, entity or Corporation named in the Schedule whom We have agreed to insure.

…

Location of Risk

means the address of each of the situations of the Business Premises stated in the Schedule.

Loss

for Sections other than:

- Professional Indemnity;
- Public and Products Liability; and
- Management Liability;

means the financial loss sustained by You which is covered under a particular Section or part of a Section or additional benefit.

For Section – Management Liability:

'Loss' has a specific definition and You should refer to that Section for the particular definition of 'Loss'.

…

Period of Cover

means the period of time stated in the Schedule for which We agree to provide You with Cover under any Section of this Policy as stated in the Schedule unless this Policy is cancelled in which event the Period of Cover will end on the effective date of the cancellation.

…

Sum Insured

for Sections other than:

> Glass;

> Professional Indemnity;

> Public and Products Liability;

> Management Liability;

> Commercial Motor Vehicle in respect of legal liability Cover provided under Part C – Third Party Property Damage Cover; and

> Business Property;

means the maximum amount We will pay under each relevant Section or part of a Section of this Policy as stated in the Schedule other than any additional amount provided for in any relevant additional benefit under any Section…

…

General Exclusions

General Exclusions Applicable to All Sections

The following general exclusions apply to all Sections of this Policy unless otherwise provided under any Section. Please read them carefully.

There are additional general exclusions which only apply to specific Sections of this Policy.

Other exclusions may be contained in a particular Section of this Policy and which apply only to that specific Section.

This Policy does not Cover and We will not be liable for any claim under this Policy

for, directly or indirectly arising out of or in any way connected with:

…

Infectious and/or Transmissible Diseases

a. Transmissible Spongiform Encephalopathy (TSE) including but not limited to Bovine Spongiform Encephalopathy (BSE) or new Variant Creutzfeldt-Jakob Disease (VCJD); or

b. the existence or suspected existence of any infectious disease where an infectious disease is defined as Highly Pathogenic Avian Influenza or any other diseases which are deemed to be quarantinable diseases under the Australian Quarantine Act 1908 (Cth) and subsequent amendments irrespective of whether it was discovered on Your Business Premises or elsewhere:

Provided that:

this exclusion shall not apply to the Cover provided under Section - Professional Indemnity or Section - Public and Products Liability.

…

Section – Business Property

…

Section – Business Interruption

…

Basis of Settlement

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 Your 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.

…

Additional Benefits

We will, subject to all of the provisions of this Policy, also Cover You in relation to the following additional benefits.

Our liability will be limited to the amount stated in the relevant additional benefit or, if no amount is stated, to the Sum Insured stated in the Schedule.

…

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; or
- poisoning directly caused by the consumption of food or drink provided on Your Business Premises; or
- 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:

Provided that:

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

986 The policy schedule identifies the insured, the business (gym/fitness health centre) and the business remises addresses as identified above. The Business Property cover taken does not include buildings.

13.3 Introductory comments

987 For the reasons given above the infectious diseases exclusion does not apply, consistent with the reasoning in *Wonkana*.

988 The prevention of access clause (a) and (b) is similar to Extension B in the Market Foods policy in that it is confined to circumstances where "such damage, if it occurred at the Business Premises, would be Covered under Section – Business Property" (see the proviso under the prevention of access clause). This indicates that a clause of this kind is not unusual in the context of such policies (see the argument of Market Foods rejected above). There is no equivalent limitation in clause (c). Gym Franchises claims under clause (c) only.

989 In respect of clause (c), which is a form of hybrid clause, the requirement is for an 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 which involves closure or evacuation of the whole or part of the Business Premises.

990 In regard to cl (c):

(1) the principal requirement is the order of an authority of the requisite type;

(2) accordingly, the issue is not so much whether there was "human infectious or contagious diseases or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises" but is whether the order arose directly or indirectly from "human infectious or contagious diseases or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises";

(3) the authority might be wrong in considering that there was "human infectious or contagious diseases or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises" but provided it has not acted arbitrarily, capriciously or in bad faith, that will not mean the circumstances fall outside of the cover;

(4) whether there was or was not "human infectious or contagious diseases or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises" is relevant as mediated through the causal relationship which is required between the required order and the required circumstances;

(5) on this basis, information contemporaneous with the making of the order about the circumstances known to the authority will be relevant but subsequently discovered information about the circumstances is unlikely to be relevant;

(6) the best source of evidence about the cause of the order is the order itself and the context in which it was made including associated contemporaneous explanatory material;

(7) the clause does not contemplate that parties will go behind the order to ascertain some other cause of the order if the cause is disclosed on the face of the order or in associated contemporaneous explanatory material;

(8) the requirement of "at the Business Premises" qualifies the "human infectious or contagious diseases" and the "discovery of an organism likely to result in human infectious or contagious disease". It does not qualify the "discovery of an organism" alone. That is, there is no requirement for the organism to be discovered at the Business Premises. The requirement is only that the order result from the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises;

(9) the Business Premises means the "Buildings, yards and land used by You for Your Business at the Location of Risk", and the Location of Risk means "the address of each of the situations of the Business Premises stated in the Schedule";

(10) "closure" is to be construed in the context of not only the word "evacuation" (that is, the physical removal of people from the Business Premises), but also the preamble which refers to "inability to trade or otherwise conduct Your Business at the Business Premises in whole or in part" and the fact that the required closure is if the whole or part of the Business Premises. As such, "closure" in this clause permits closure of the part or the whole of the Business Premises either by requiring physical closure of the Business Premises or by preventing people who would otherwise be able to enter and remain on the whole or part of the Business Premises from doing so; and

(11) the requirement that the order arises "directly or indirectly" from the specified circumstance permits indirect causation in the sense described above (that is, that a cause X of a cause Y which is a cause of Z would not ordinarily mean that X is a cause

of Z, but in the case of indirect causation being permitted X would be an indirect cause of Z): *Coxe* at 633-634.

991 Gym Franchises relied on the following actions as orders of the requisite character:

(1) the 23 March 2020 Non-essential Business Closure Direction. 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"; and

(2) the 28 June 2020 Fitness Industry COVID Safe Plan, read with the 1 June 2020 Restrictions on Business, Activities and Undertakings Direction. This direction provided that an "indoor sporting centre, including gyms" was permitted to operate only in accordance with the Industry COVID Safe Plan, 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". The first Fitness Industry COVID Safe Plan provided that "showers and change room facilities must be remain [sic] closed", and that "unsupervised facilities and services must not operate".

992 As noted, the 23 March 2020 Non-essential Business Closure Direction and the 1 June 2020 Restrictions on Business, Activities and Undertakings Direction were issued by the Chief Health Officer under s 362B of the Public Health Act. The Chief Health Officer is a competent government authority within the meaning of (c).

993 The 28 June 2020 Fitness Industry COVID Safe Plan, I infer, was prepared by the fitness industry. The 1 June 2020 Restrictions on Business, Activities and Undertakings Direction, in cl 7, permitted a person to operate a restricted business with more than the maximum number of persons specified in the applicable table if they operate in compliance with, relevantly, an Industry COVID Safe Plan as approved by the Chief Health Officer. I infer that the Chief Health Officer approved the 28 June 2020 Fitness Industry COVID Safe Plan. On the basis of cl 7 of the 1 June 2020 Restrictions on Business, Activities and Undertakings Direction, read with the definitions in cll 29 and 30, I consider that the 28 June 2020 Fitness Industry COVID Safe Plan satisfies the requirement of an by order of a competent government authority.

13.4 Clause (c) – the hybrid clause

994 As discussed, I do not accept that the requirement of "at the Business Premises" qualifies "the discovery of an organism". That does not reflect the ordinary grammatical meaning of the sentence. If that were so the words "at the Business Premises" would appear immediately after the word "organism". The words "at the Business Premises" instead appear at the end of the sentence. As such, their natural grammatical meaning is to qualify both "human infectious or contagious diseases" and "discovery of an organism likely to result in human infectious or contagious disease". This also makes commercial sense because the causal requirement is between the order and the "discovery of an organism likely to result in human infectious or contagious disease at the Business Premises" and not between the order and the discovery of an organism at the Business Premises. In context, the controlling concept is the likelihood of causing disease at the Business Premises.

995 The same logic applies to my conclusion that the phrase "at the Business Premises" also qualifies "human infectious or contagious diseases". It would make no sense for such a clause to extend to closure from human infectious or contagious diseases anywhere when the discovery of an organism requires the likelihood of a human infectious or contagious disease at the Business Premises. This would also be inconsistent with the context of the whole of (c) which is focused on things at or on the Business Premises. When the clause intended to extend the scope beyond the Business Premises it did so through the additional words "or in the immediate vicinity of" in the murder/suicide clause.

996 Guild accepted that: (a) whilst the Non-essential Business Closure Direction was in place, from 12.00pm, 23 March 2020 to 12.00pm, 1 June 2020, Gym Franchises was unable to operate its Business, and (b) whilst the Restrictions on Business, Activities and Undertakings Direction was in place, from 12.00pm, 1 June 2021, Gym Franchises could only operate its Business subject to certain operating restrictions.

997 The Non-essential Business Closure Direction involved a closure of the whole of the Business Premises.

998 The Restrictions on Business, Activities and Undertakings Direction involved a closure of part of the Business Premises. Specifically, under the Fitness Industry COVID Safe Plan that part of the Business Premises comprising the change rooms and showers had to remain closed. I infer that gym users could not physically access the change rooms and shower facilities. That satisfies the requirement for a closure in part of the Business Premises. As I have said, the

prevention of access to any part of the premises by people who would otherwise be able to enter that part of the premises (in this case, subscribers to the gymnasium) satisfies the requirement of closure of a part of the premises.

999 Further, without the Restrictions on Business, Activities and Undertakings Direction and approved Fitness Industry COVID Safe Plan the evidence is that: (a) the gym was open 24 hours a day, including whilst unsupervised, with users accessing the Business Premises using a swipe card, and (b) only one person per 7 square metres of floor space capped at a total of 20 people at one time were permitted in the Business Premises.

1000 The Restrictions on Business, Activities and Undertakings Direction and approved Fitness Industry COVID Safe Plan only permitted the Business Premises to operate if there were staff supervising the use of the Business Premises. As in the ordinary course staff were only present on the Business Premises during limited hours, the Restrictions on Business, Activities and Undertakings Direction and approved Fitness Industry COVID Safe Plan required the Business Premises to be closed to users outside of those hours. In the context of cl (c) this also constitutes a closure in part of the Business Premises.

1001 Unlike in the Visintin case, Gym Franchises did not voluntarily close its premises to gym users other than in hours where staff were present. It was required to do so by the operation of the Restrictions on Business, Activities and Undertakings Direction and approved Fitness Industry COVID Safe Plan. While Gym Franchises could have made staff available to supervise gym users on a 24 hour basis, this is not the point. The point is that the order of a competent government or statutory authority required the closure of the whole of the premises while staff were not present to supervise gym users. I consider this sufficient to satisfy the requirement for closure by order of a competent government authority.

1002 The restriction on numbers and cap on numbers of people who could be in the premises at the one time, consistent with my reasoning in Taphouse, did not involve any closure of the premises. I infer that the whole of the premises were open to accommodate these gym users even if the total number of gym users was less then would ordinarily be the case. A legal restriction on the maximum number of people on premises does not involve the closure of the premises.

1003 Gym Franchises submitted that "an order will 'indirectly' arise from … 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".

1004 I disagree. An order does not arise directly or indirectly from human infectious or contagious diseases at the Business Premises unless the authority considers that there is such disease at the Business Premises. It cannot be inferred that the Chief Health Officer considered that there was a person with COVID-19 at the Business Premises and there is no evidence that a person with COVID-19 was in fact present at the Business Premises. The capacity for indirect causation does not extend the substance of that part of the clause from human infectious or contagious diseases at the Business Premises to a mere threat or risk of from human infectious or contagious diseases at the Business Premises. That is not the application of indirect causation. It is a re-writing of the clause.

1005 Gym Franchises submitted 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". I agree that it may be inferred that the orders were intended to prevent the threat of transmission of COVID-19 throughout Queensland including at the Business Premises. However, this does not mean that the orders arose directly or indirectly from human infectious or contagious diseases at the Business Premises. As discussed, indirect causation cannot change the substance of the insured peril from human infectious or contagious diseases at the Business Premises into a mere threat or risk of from human infectious or contagious diseases at the Business Premises.

1006 Gym Franchises submitted that 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".

1007 I disagree. The requirement is an order directly or indirectly arising from a discovery of SARS-CoV 2 anywhere which is likely (in the sense of probably) to result in human infectious or contagious disease at the Business Premises.

1008 There is no basis upon which it might be inferred that the orders resulted from a discovery of SARS-CoV 2 anywhere which was likely to result in human infectious or contagious disease (COVID-19) at the Business Premises. Further, there is no evidence of the discovery of SARS-CoV-2 or the occurrence of COVID-19 at the Business Premises.

1009 The fact that there were at least two cases of COVID-19 within the Gold Coast Hospital and Health Service region who were not self-isolating after having contracted COVID-19 and prior

to being diagnosed does not prove that it was likely that these cases were likely to result in human infectious or contagious disease at the Business Premises. Nor, more to the point, does it prove that the Chief Health Officer made the directions and approved the Fitness Industry COVID Safe Plan directly or indirectly arising from the any possible causal relationship between those cases and the potential for disease at the Business Premises. Nor does the other data on which Gym Franchises relied indicating that there were 46 cases of COVID-19 in the Gold Coast Hospital and Health Service region in total and, as at 23 March 2020, 319 cases of COVID-19 in Queensland generally.

1010 For these reasons cl (c) is not satisfied.

13.5 Causation and adjustments

1011 The inability to trade or otherwise conduct the Business must be caused by the requisite closure of the whole or part of the Business Premises.

1012 If cl (c) was satisfied I would be able to infer from the evidence, including Gym Franchises' profit and loss statements, that the orders which closed the whole or part of the Business Premises were a proximate cause of loss. In that event, for the reasons given, I would not find causation undermined by the presence and risk of COVID-19 in Queensland. I also would not find that loss caused by the presence and risk of COVID-19 in Queensland had to be disregarded as this is the same underlying cause as the cause of the insured peril.

1013 I would apply the same approach to the trends clause in the Basis of Settlement provision. That is, a relevant "circumstance affecting the Business" would not include the presence and risk of COVID-19 in Queensland, consistent with the reasoning in *FCA v Arch UKSC* as discussed above.

13.6 Third party payments

1014 Gym Franchises received "JobKeeper" payment and the Commonwealth's Cash Flow Boost.

1015 Both types of payment have been considered above. Both would have to be taken into account under item i of the Basis of Settlement provision ("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") and under general principles applying to contracts of indemnity.

13.7 Interest

1016 In accordance with my reasoning elsewhere, s 57 of the Insurance Contracts Act is not yet engaged. It would not be unreasonable for Guild to withhold payment until a final determination of this case decides that Guild is liable to do so.

13.8 Answers to questions

1017 The questions suffer from the usual problems. Insofar as possible, they are answered below.

1018 **27. Prevention of access (POA) extension** (page 59)

(a) Does the "Authority Response-Gym Franchises" constitute an order of a competent government or statutory authority?

Yes.

(b) If yes to (a), was the Business Premises closed or evacuated by reason of the "Authority Response-Gym Franchises"?

Yes.

(c) If yes to (b), did the closure or evacuation of the Business Premises arise, directly or indirectly, from the discovery of SARS-CoV-2 or the occurrence of COVID-19 at the Business Premises?

No.

(d) If no to (c), can sub-clause (c) of the POA Extension be triggered nonetheless by the discovery of SARS-CoV-2 or the occurrence of COVID-19 other than at the Business Premises, and if so, where and when must that discovery be made or that occurrence happen?

The order of the authority must arise directly or indirectly from a discovery of the SARS-CoV-2 organism anywhere which is likely to result in human infectious or contagious disease at the Business Premises.

Alternatively, the order of the authority must arise directly or indirectly from COVID-19 at the Business Premises.

(e) If COVID-19 had to occur or SARS-CoV-2 had to be discovered at the Business Premises, did that occur?

No.

(f) If yes to (c) or (d), did that cause an inability to trade or otherwise conduct the Business in whole or in part during the relevant period?

No.

(g) If yes to (f), does the loss claimed by Gym Franchises follow interruption of or interference with the Business as a result of the insured peril?

No.

(h) What is required for there to be the "discovery" of SARS-CoV-2?

A "discovery" means finding or ascertaining the existence of SARS-CoV-2.

1019 **28. Basis of settlement** (page 57)

(a) If Gym Franchises is entitled to cover for the claim:

(i) What is the date of "Damage" for the purposes of Item (i) of the Basis of Settlement (Loss of Income) clause?

This does not arise. If it did arise, I would read "Damage" in the Basis of Settlement provision as meaning the insured peril. The date would be the date the insured peril (the order) first causes an inability to trade or otherwise conduct the business.

(ii) Is Guild entitled to reduce any loss claimed by Gym Franchises under the policy on account of the receipt of payments, by Gym Franchises, under any financial support programs including but not limited to JobKeeper or other subsidies?

This does not arise. If it did arise, the answer would be yes.

(iii) Should any adjustment be made to Gym Franchises' loss otherwise covered by the POA extension by reason of the operation of the adjustment clause at page 57 of the policy?

This does not arise. If it did arise, I would not make an adjustment for the circumstance affecting the business being the presence and threat of COVID-19 in Queensland, this being the same underlying cause as the cause of the insured peril.

(iv) From what date is interest under section 57 of the ICA payable?

This does not arise, but it would not be unreasonable for Guild to withhold payment unless and until it is finally determined to be liable to make payment in this proceeding.

13.9 Conclusions

1020 For these reasons:

(1) in cl (c) the words "at the Business Premises" qualify "human infectious or contagious diseases" and "the discovery of an organism likely to result in human infectious or contagious disease". They do not qualify "the discovery of an organism";

(2) as a result, it is immaterial whether or not the organism is discovered at the Business Premises or elsewhere. The requirement is for the discovery of the organism to be likely to result in human infectious or contagious disease at the Business Premises;

(3) these requirements are mediated through the central requirement for an order of a competent government or statutory authority. That is, the requirement of "human infectious or contagious diseases or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises" does not function as a required objective fact, but as a cause of the order;

(4) the causal requirement, arising directly or indirectly from, means that an order may arise indirectly and thus operates to encompass a cause of a cause as sufficient to engage the clause;

(5) the requirement for "closure" of the Business Premises by order is to be construed in the context of not only "evacuation" (that is, the physical removal of people from the Business Premises), but also the fact that the cover is for "inability to trade or otherwise conduct Your Business at the Business Premises in whole or in part". It is also to be construed in the context of the fact that the "closure" of the Business Premises may itself be "in whole or part";

(6) accordingly, the requirement for "closure" in whole or part of the Business Premises is satisfied by: (a) the physical closure that occurred between 23 March and 1 June 2020, (b) the subsequent closure of the change rooms and showers, and (c) the fact that the Business Premises had to be closed if staff were not present to supervise users. It is not satisfied by the restrictions on the maximum number of people who could be present on the premises at the one time;

(7) the 23 March 2020 Non-essential Business Closure Direction, the 1 June 2020 Restrictions on Business, Activities and Undertakings Direction, and the approved Fitness Industry COVID Safe Plan were each orders of a competent government authority. The Fitness Industry COVID Safe Plan was approved by the Chief Health

Officer under the 1 June 2020 Restrictions on Business, Activities and Undertakings Direction and, in accordance with that direction, Gym Franchises had to comply with the Fitness Industry COVID Safe Plan;

(8) an order does not arise directly or indirectly from human infectious or contagious diseases at the Business Premises unless the authority considers that there is such disease at the Business Premises;

(9) there is no evidence from which it could be inferred that the authority considered that there was a person with COVID-19 present at the Business Premises and no evidence that a person with COVID-19 was in fact present at the Business Premises;

(10) it cannot be inferred that the order arose directly or indirectly from the discovery of the SARS-CoV 2 anywhere which was likely to result in COVID-19 at the Business Premises. There is also no evidence the discovery of the SARS-CoV 2 anywhere which was in fact likely to result in COVID-19 at the Business Premises; and

(11) it follows that cl (c) is not satisfied.

1021 Given that these conclusions are not capable of being affected by additional evidence, subject to any observations of the parties, I would make a declaration as follows:

> Declare that the applicant is not liable to indemnify the respondent under respondent's business insurance policy P00226450 in response to the respondent's claim first made in March 2020.

14. NSD145/2021: GUILD V DR MICHAEL

14.1 Agreed background

1022 Dr Michael is the insured under a Dentist Business Insurance Policy numbered P00076362 placed with Guild (**Michael policy**).

1023 The Michael policy comprises: (a) Renewal Invitation and Policy Schedule, and (b) Product Disclosure Statement and Dentist Business Insurance Policy wording.

1024 The Michael policy was issued on 30 September 2019 and covers the period 28 October 2019 to 28 October 2020.

1025 Illawarra Paediatric Dentistry (**IPD**) is located on Level 2 at 172-174 Keira Street, Wollongong, New South Wales 2500 (**IPD premises**).

1026 On 27 March 2020, Dr Michael made a claim on the Guild website under the Michael Policy, which was allocated claim number PRP200003192 (**Claim**).

1027 On 1 April 2020, Dr Michael made a telephone call to Guild claims department and was advised by Curt Bosnich, Product and Underwriting Coach, that the Claim had been denied because there had not been a case of COVID-19 at IPD.

1028 Following the call, Dr Michael received an email from Mr Bosnich, which attached a copy of the Michael policy and directed him to the Prevention of Access clause.

1029 On 1 April 2020, Dr Michael lodged a complaint with AFCA which was allocated case number 711779 (**Complaint**).

1030 On 6 April 2020, Guild declined Dr Michael's claim.

1031 On 22 April 2020, AFCA confirmed that the Complaint had not been resolved.

14.2 Policy provisions

1032 The key provisions of the Michael policy are below.

> …
>
> **General Definitions**
>
> …
>
> **Basis of Settlement**
>
> means the method and/or manner in which We will settle Your claim under this Policy.
>
> This will be in accordance with the Cover You have selected and as specified in the Schedule or as otherwise stated in the relevant Section of this Policy.
>
> …
>
> **Building**
>
> means the building, outbuilding and structural improvements at the Location of Risk and includes:
>
> a. foundations, car parks, sealed driveways and pathways, aprons, permanently paved areas, shelters, exterior blinds, awnings, gangways, walls, gates and fences;
>
> b. all services to the Building;
>
> c. external lights, masts, antennae, aerials, satellite dishes, Glass, Signs, lifts, elevators and escalators;
>
> d. in-ground swimming pools, in-ground saunas and in-ground spas including fixed attachments or fixed accessories to any of such items; and
>
> e. permanently fixed water, storage and fuel tanks:
>
> **but does not include**:

i. Business Contents;

ii. Business Stock;

iii. Specified Items;

iv. plant and machinery;

v. fixtures and fittings, whether belonging to You or otherwise, attached to or on the Building and which are or could be Covered as Business Contents;

vi. land, unsealed driveways, unsealed paths, dams, bridges, canals, tunnels, wharves, docks and piers; or

vii. carpets of any description.

Business

means the business described in the Schedule and conducted by You at and from the Business Premises.

…

Business Premises

means the Buildings, yards and land used by You for Your Business at the Location of Risk.

…

Damage, Damaged

means accidental physical damage to or destruction of Business Property or Your Vehicle which occurs during the Period of Cover.

…

Insured

means the natural person, entity or Corporation named in the Schedule whom We have agreed to insure.

…

Location of Risk

means the address of each of the situations of the Business Premises stated in the Schedule.

Loss

for Sections other than Management Liability:

means the financial loss sustained by You which is Covered under a particular Section or part of a Section or additional benefit.

…

Period of Cover

means the period of time stated in the Schedule for which We agree to provide You with Cover under any Section of this Policy as stated in the Schedule unless this Policy

is cancelled in which event the Period of Cover will end on the effective date of the cancellation.

…

Sum Insured

for Sections other than:

> Glass;

> Management Liability;

> Commercial Motor Vehicle in respect of legal liability Cover provided under Part C – Third Party Property Damage Cover; and

> Business Property;

means the maximum amount We will pay under each relevant Section or part of a Section of this Policy as stated in the Schedule other than any additional amount provided for in any relevant additional benefit under any Section.

…

General Exclusions

General Exclusions Applicable to All Sections

The following general exclusions apply to all Sections of this Policy unless otherwise provided under any Section. Please read them carefully.

There are additional general exclusions which only apply to specific Sections of this Policy.

Other exclusions may be contained in a particular Section of this Policy and which apply only to that specific Section.

This Policy does not Cover and We will not be liable for any claim under this Policy for, directly or indirectly arising out of or in any way connected with:

…

Wear, Tear or Inherent Defect

…

d. rust, corrosion,…..mould, mildew, rotting, disease…

…

Section – Business Property

…

Section – Business Interruption

…

Definitions

…

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.

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.

…

Basis of Settlement

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

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.

…

Additional Benefits

We will, subject to all of the provisions of this Policy, also Cover You in relation to

the following additional benefits.

Our liability will be limited to the amount stated in the relevant additional benefit or, if no amount is stated, to the Sum Insured stated in the Schedule.

…

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;
- murder or suicide occurring at 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.

1033 The policy schedule identifies the insured, the Business (Dentist) and the Business Premises Address. The Business Cover insurance taken does not include buildings.

14.3 Clause (c) – the hybrid clause

1034 The introductory comments relating to the Gym Franchises case above apply.

1035 I do not accept that a "statutory authority" needs to be a body constituted under statute. In the context of cl (c), a statutory authority includes a body constituted under statute and a person holding a position under statute. A "government authority" also includes a body constituted under statute and a person holding a position under statute. By "under statute" I also mean under any Act, Regulation, or statutory instrument of any kind. In both cases the body must be "competent". In context, this means competent (in the sense of authorised or empowered by

any Act, regulation or instrument made under any Act or Regulation) to close or evacuate the Business Premises in one or more of the circumstances identified in cl (c).

1036 Guild submitted that the Court would not attribute to the parties to the policy "a mutual intention that cover was to be available where a government or statutory authority acts capriciously or beyond the scope of its powers". I have said above in other cases that I do not consider that the parties to any of the policies intended that either one of them would be able to go behind the order to test or undermine the authority's express or inferred reason for making it except, perhaps, in the case of an order made arbitrarily, capriciously or in bad faith. None of the orders are suggested to invoke this possible principle. I would leave the question of whether an order made arbitrarily capriciously or in bad faith could satisfy the requirement of cl (c) (and other insuring clauses) for decision in another case where it arises on the facts.

1037 The action required by cl (c) is an "order". The requirement is closure or evacuation "by order". The requirement of "by" the order means that the order itself must directly impose the requirement for closure or evacuation. This reinforces that an "order" involves a mandatory obligation, not a choice. The obligation need not be enforceable by any particular means (such as punishment by imprisonment, fine or penalty) but it must be able to be characterised as mandatory in the sense of not permitting an option as to whether or not to comply: see to a similar effect *FCA v Arch UKSC* at [121]. I agree with Guild that a recommendation or guidance or advice would not constitute an order. Further, while the order need not impose that obligation solely on the Business Premises (that is, the order can apply to any number of premises), the order must impose the obligation on the Business Premises.

1038 Relevant bodies in the case of Dr Michael are the Australian Dental Association (**ADA**), the Dental Board of Australia (**DBA**), the Dental Council of NSW (**Dental Council**), the Australian Health Protection Principal Committee (**AHPPC**), and the Australian Health Practitioner Regulation Agency (**AHPRA**), as well as the Prime Minister.

1039 Dr Michael relied on 26 actions in respect of the requirement of an "order of a competent government or statutory authority" which Guild characterised in these terms by reference to a table of particulars (which will be reproduced below):

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

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

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

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

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

1040 It is not in dispute that the ADA is not "a competent government or statutory authority" within the meaning of cl (c). It is a professional association with no statutory powers. Dr Michael's argument is that actions of the ADA became actions of a competent government or statutory authority by subsequent actions of a competent government or statutory authority.

1041 The DBA is a competent government or statutory authority within the meaning of cl (c). It is a National Health Practitioner Board continued under cl 4 of, for example, the *Health Practitioner Regulation National Law* (NSW) as required by s 31 of the *Health Practitioner Regulation National Law* (NSW). The following provisions of the Health Practitioner Regulation National Law are relevant:

(1) section 31(1): the regulations must provide for a National Health Practitioner Board for each health profession;

(2) section 31A(2): a National Board represents the State;

(3) section 32(1): a National Board has the powers necessary to enable it to exercise its functions; and

(4) section 35(1): the functions of a National Board include developing or improving standards, codes and guidelines for the health profession, including the development and approval of codes and guidelines that provide guidance to health practitioners registered in the profession.

1042 The Dental Council is a "competent government or statutory authority". The Dental Council is established by s 41B of the Health Practitioner Regulation National Law. The provisions of that legislation which follow are also relevant:

(1) section 41C: a Council has all the powers of an individual and, in particular, may do anything necessary or convenient to be done in the exercise of its functions; and

(2) section 41D: a Council has and may exercise the functions conferred or imposed on it by or under this Law or another Act.

1043 As Guild submitted, the AHPPC was established by the Council of Australian Governments (**COAG**) on 2 July 2009 and provides advice and recommendations to the Australian Health Ministerial Advisory Council and National Cabinet on, inter alia, national health related matters: "Australian Health Protection Principal Committee". Directory. Australian Government. 25 June 2021. Retrieved 5 August 2021. It is not a "statutory authority" and is not a "government authority" competent to make orders within cl (c). Dr Michael does not disagree but, as with the ADA, argued that the advice of the AHPPC, became an order when adopted by other competent statutory or government authorities.

1044 The AHPRA is the National Agency established by s 23 of the Health Practitioner Regulation National Law. Other relevant provisions include:

(1) section 11: the Ministerial Council (the COAG Health Council) may give directions to the National Agency about the policies to be applied by the National Agency in exercising its functions under this Law;

(2) section 24: the National Agency has all the powers of an individual and, in particular, may, do anything necessary or convenient to be done in the exercise of its functions; and

(3) section 25: the functions of the National Agency include establishing procedures for the development of accreditation standards, registration standards and codes and guidelines approved by National Boards, establishing and administering an efficient procedure for receiving and dealing with applications for registration as a health practitioner, establishing an efficient procedure for receiving and dealing with notifications against persons who are or were registered health practitioners, providing advice to the Ministerial Council in connection with the administration of the national registration and accreditation scheme, and any other function given to the National Agency by or under this Law.

1045 On this basis I would characterise the AHPRA as a statutory authority and a government authority within the meaning of cl (c). However, it is not a competent statutory authority or government authority because it has no power by order to close or evacuate any premises. Dr Michael does not disagree but, as with the ADA, argued that the advice of the AHPRA became an order when adopted by other authorities.

1046 Guild accepted that the Prime Minister represents the Federal Government. In *FCA v Arch UKSC* at [120] announcements by the Prime Minister were characterised as a "clear, mandatory

instruction given on behalf of the UK Government". Accordingly, those announcements were capable of being a "restriction imposed" (relevantly, by a public authority) whether or not they could be legally enforced.

1047 In the Australian Constitutional system there is more difficulty in attempting to characterise announcements by the Prime Minister as orders of a competent government or statutory authority within the meaning of cl (c). This is because it is apparent that: (a) the Prime Minister held no legal power or authority to order that any premises be closed or evacuated for any reason identified in cl (c), (b) the Prime Minister's announcements, on their face, represented statements about agreements reached at the National Cabinet, (c) in the Australian Constitutional system, relevant legal power and authority to effect the closure or evacuation of premises as identified in cl (c) was accepted by National Cabinet to be vested in the States and Territories, and (d) the Prime Minister's announcements expressly said that the requirements would be implemented under State and Territory laws.

1048 On this basis I would not characterise the Prime Minister's announcements as announcements of a competent government or statutory authority within the meaning of cl (c). These announcements, accordingly, do no more than provide context.

1049 The 26 actions relied upon by Dr Michael, and as summarised on his behalf, follow.

No.	Date	Measures promulgated by various government / statutory authorities	Dr Michael's response
23 March to 26 March 2020 - Level 2 restrictions			
1.	22 March 2020	The Prime Minister released a media statement regarding COVID-19 restrictions: *National Cabinet agreed to move to more widespread restrictions on social gatherings.* *Premiers and Chief Ministers agreed to implement, through state and territory laws, new Stage 1 restrictions on social gatherings, to be reviewed on a monthly basis.* *The following facilities will be restricted from opening from midday local time 23 March 2020:* • *Pubs, registered and licenced clubs, hotels (excluding accommodation)* • *Gyms and indoor sporting venues* • *Cinemas, entertainment venues, casinos and night clubs* • *Restaurants and cafes will be restricted to takeaway and/or home delivery* • *Religious gatherings, places of worship or funerals* *Leaders noted that these enhanced measures build on existing measures to slow the virus and save lives:* • *No non-essential gatherings of more than 500 people outside or more than 100 people inside.* • *All non-essential indoor gatherings of less than 100 people must have no more than one person per 4sqm. All Australians should expect their local businesses to be following this rule.* • *Where possible, keep 1.5 metres between yourself and others* • *Avoid non essential travel* • *Restrictions on entering aged care homes to protect older Australians*	
2.	23 March 2020	The ADA released a COVID-19 update regarding restrictions on dental practice: *Over the last few days, the ADA has been providing expert advice to the Australian Health Protection Principal Committee (AHPPC) and the Chief Medical Officer on a framework to support the continuation of essential dental service.* *…*	

		It appears the government will continue to consider dental services as essential as long as they are provided safely. The ADA's advice is that dental practices should immediately restrict dental treatment to non-aerosol generating procedures and consider the type of patients that receive treatment wherever possible (Level 2) restrictions as per this framework. *State and territory health departments may place further restrictions on dental practices and we strongly advise you to keep abreast of both the Federal ADA and your state or territory Branch advice which will include specific guidance on the type of services that can be provided at a state level.* *...* *It's important to practice safely and level two restrictions are necessary in order to do so at this time. We are providing this advice to members having consulted the regulator and government. The decision to issue this advice has not been taken lightly. We are fully aware of the challenging situation it puts all of us in, but with the rate of infection continuing to grow and the spread of COVID-19 via asymptomatic patients, the ADA leadership unanimously agree we must take this proactive step.* *Personal Protective Equipment* *With the global shortage of masks and access to some other PPE being rationed or becoming more difficult to secure, it is imperative you maintain our usual high infection control standards to minimise the risk of transmission. If you do not have all PPE required to practice safely you should apply Level 5 restrictions and contact the ADA to see if we can help connect you with what you need.* Dr Michael also received emails from the ADA and the ADA NSW Branch, recommending that dental practitioners immediately implement Level 2 Restrictions.	Dr Michael adopted the Level 2 restrictions on and from 23 March 2020.
3.	23 March 2020	The ADA released a framework for dental service restrictions in COVID-19: *Level 2 Restrictions include:* *<u>Services that can be performed</u>* *Provision of dental treatments that are unlikely to generate aerosols or where aerosols generated have the presence of minimal saliva/blood due to the use of rubber dam.* *This includes:* • *examinations* • *simple non-invasive fillings without the use of high-speed handpieces* • *restorative procedures using high speed handpieces only*	

		provided with the use of rubber dam • *non-surgical extractions* • *hand scaling (no use of ultrasonic scalers)* • *medical management of soft tissue presentations (such as ulcers)* • *temporomandibular dysfunction management* • *denture procedures* • *preventative procedures such as the application of topical remineralising agents e.g. fluoride* • *orthodontic treatment* *<u>Restricted services, defer treatment</u>* *Defer all treatments that are likely to generate aerosols which may include the use of:* • *high-speed handpieces without the use of rubber dam* • *ultrasonic scalers* • *surgical handpieces* *All surgical extractions should be referred to specialist oral surgeons/oral and maxillofacial surgeons who will undertake these procedures using transmission based precautions* *Elective implant dental treatment should be delayed* On 23 March 2020, Dr Michael was provided a link to the framework in both emails from the ADA / ADA NSW Branch at No. 2 above.	
4.	24 March 2020	The DBA released an update to dental practitioners on COVID-19: *On 23 March 2020 the Australian Health Protection Principal Committee placed limits on organised gatherings and visits to vulnerable groups.* *The Prime Minister Scott Morrison subsequently announced that non-essential gatherings are suspended for an initial four weeks to reduce the risk of spreading COVID-19.* *The Board is working with the Australian Health Practitioner Regulation Agency (Ahpra) to provide helpful information…* *The Board also notes that the Australian Dental Association is making its COVID-19 resources publicly available.*	
5.	25 March 2020	The ADA released an updated framework for dental service restrictions in COVID-19.	
6.	25 March 2020	The ADA released the "Managing COVID-19 Guidelines", which set out how to manage patients at risk of, or confirmed with, COVID-19 who require urgent dental care.	Dr Michael adopted these Guidelines on 26 March 2020.
7.	25 March 2020	The AHPPC released a statement recommending the cancellation of all elective surgery: *The national supply of personal protective equipment (PPE) remains of great concern with continued depletion of the National Medical Stockpile.*	

		The Commonwealth has significant orders placed but cannot guarantee supply due to international considerations. *At this time, it is inappropriate to continue to do elective surgery.* *AHPPC therefore recommends cancellation of all non-urgent elective procedures in both the public and private sector.* *It is recommended that only Category 1 and some exceptional Category 2 surgery proceed.*	
8.	25 March 2020	The Prime Minister issued a media release, advising that all non-elective surgery would be temporarily suspended: *The National Cabinet is acting on the advice of the Australian Health Protection Principal Committee that from 11.59pm (local time) on 25 March 2020, all non urgent elective surgery will be temporarily suspended. Only Category 1 and some exceptional Category 2 surgery will continue until further notice.* *This will apply in both the public and private health systems.* *Every patient waiting for elective surgery is assessed by their treating medical professional as Category 1, 2 or 3 per the following definitions:* • *Category 1 – Needing treatment within 30 days. Has the potential to deteriorate quickly to the point where the patient's situation may become an emergency* • *Category 2 – Needing treatment within 90 days. Their condition causes pain, dysfunction or disability. Unlikely to deteriorate quickly and unlikely to become an emergency* • *Category 3 – Needing treatment at some point in the next year. Their condition causes pain, dysfunction or disability. Unlikely to deteriorate quickly.* *Decisions on the category of patients are at the discretion of their treating medical professional.*	
9.	26 March 2020	The ADA released a COVID-19 update clarifying the restrictions on dental practice and recommending Level 2 restrictions: *In the absence of a government mandate, the ADA's* [sic] *has issued a recommendation nationally to apply level 2 restrictions. These recommendations have been made in the interest of minimising the risk to our ourselves* [sic]*, our staff, and our communities.* *Because the public system in some state and territories have implemented more stringent restrictions, some ADA Branches may, in the interest of members in their state, make a recommendation to increase to be consistent in private practice.* *It is important to remember that the ADA is not the regulator. However, we have issued a clear recommendation in the interest of public and professional safety. If you are in a state where your ADA Branch has recommended a higher level than you have in place nationally, you should consider this recommendation with respect to the risk profile of your own specific circumstances.*	

		... *We have been working closely with the Australian Health Protection Principal Committee to ensure a phased and proportionate scaling down of dental services that minimises impact on the profession while reducing risk to the public. This will also ease the pressure on the overburdened public health system by ensuring private dental practices are able to safely provide appropriate services, so patients do not have to be redirected to emergency departments.*	
10.	26 March 2020	Dr Michael received an email from the ADA advising him that the Government will announce Level 3 restrictions. The email advised that the AHPPC recommends that all dental practitioners implement the level 3 restrictions as outlined in the ADA's guidance.	Dr Michael adopted the Level 3 restrictions on and from 28 March 2020.
27 March to 20 April 2020 - Level 3 restrictions			
11.	28 March 2020	Dr Michael received an email from the Dental Council of NSW providing an update on COVID-19 and the move to Level 3 restrictions: *The Australian Health Protection Principal Committee (AHPPC), is the key decision making committee for health emergencies and is comprised of all State and Territory Chief Health Officers and chaired by the Australian Chief Medical Officer. This committee has been advising the National Cabinet on the options for the progressive scale up of some actions in response to the COVID-19 outbreak.* *The AHPPC has now recommended the adoption of 'Managing COVID-10 Guidelines' published by the ADA and further the AHPPC recommends that all dental practices implement Level 3 restrictions as outlined in the ADA's guidance document.*	Dr Michael adopted the Level 3 restrictions on and from 28 March 2020
12.	28 March 2020	The AHPPC recommended that all dental practices implement Level 3 restrictions: *AHPPC recommends adopting the 'Managing COVID-19 Guidelines' published by the ADA and implementing a triage system for dental practice. AHPPC recommends that all dental practices implement level 3 restrictions as outlined in ADA's guidance. That is, dentists should only perform dental treatments that do not generate aerosols, or where treatment generating aerosols is limited. All routine examinations and treatments should be deferred.*	
13.	28 March 2020	The DBA released an urgent alert to dental practitioners: *On March 27, The Australian Health Protection Principal Committee (AHPPC) released new advice to dental practitioners about managing COVID-19.* *Their advice reads: "AHPPC recommends adopting the 'Managing COVID-19 Guidelines' by the Australian Dental Association (ADA) and implementing a triage system for dental practice. AHPPC recommends that all dental practices implement level 3 restrictions as outlined in the ADA's*	

		guidance. That is, dentists [sic] should only perform dental treatments that do not generate aerosols, or where treatment generating aerosols is limited. All routine examinations and treatments should be deferred."*	
14.	2 April 2020	The DBA and AHPRA released an update: *On 27 March, the Australian Health Protection Principal Committee (AHPPC) released advice to dental practitioners about managing COVID-19.* *...* *The Board expects all dental practitioners, including oral health therapists, dental therapists, dental hygienists, dental prosthetists and dentists, to follow the AHPPC's recommendation and apply it in their practice setting.*	
15.	7 April 2020	The ADA released an update on Government announcement of Level 3 restrictions for dentistry: *Level 3 restrictions are now in force, following a recommendation by the Australian Health Protection Principal Committee that all dental practices implement level 3 restrictions. This has been accepted by the National Cabinet and is an expectation of the Dental Board.*	
21 April to 7 May 2020 - Level 2 restrictions			
16.	21 April 2020	The Prime Minister released a media statement, outlining a move back to Level 2 restrictions and changes to elective surgery: *As result of Australia's success in flattening the curve, our low rates of COVID related hospitalisation and new data on stocks of PPE, National Cabinet agreed that from 27 April 2020, category 2 and some important category 3 procedures can recommence across the public and private hospital sectors.* *National Cabinet further agreed to the Australian Dental Association recommendation that dentists move to level 2 restrictions (such as fitting dentures, braces, non-high speed drill fillings and basic fillings), allowing a broader range of dental interventions to occur where the risk of transmission can be managed and PPE stocks procured by the private sector.*	Dr Michael adopted the Level 2 restrictions on and from the 27 April 2020.
17.	21 April 2020	The ADA released an update regarding the Prime Minister's announcement of a move back to Level 2 restrictions: *The Prime Minister has announced a move back to Level 2 restrictions…effective 27th April* *This is a positive move for the profession and is a proportionate response based on the evolving community context, which will allow for the treatment of patients beyond emergencies as outlined in the ADA's framework for dental restrictions during COVID- 19.* *The easing of restrictions is a consequence of an assessment of risk by the Australian Health Protection Principal Committee*	

		(AHPPC) and the National Cabinet using the framework the ADA put forward initially to the AHPPC, and after consultation with the ADA over the last few days. Both the National Cabinet and AHPPC are regularly reviewing the community context and will scale restrictions with respect to transmission risk and the needs of the broader community. Dr Michael also received an email from the ADA advising that the Prime Minister had announced a move back to Level 2 restrictions.	
18.	22 April 2020	Dr Michael received an email from the Dental Council of NSW advising of the move to Level 2 restrictions: *I am pleased to advise that the National Cabinet has from 27 April 2020 recommended the relinquishing of Level 3 dental service restrictions and the move to Level 2 restrictions, as outlined in the ADA's Managing COVID-19 Guidelines.* *…* *We must also continue to adhere to the government recommendations that are in place to help reduce the spread of COVID-19 in both clinical and also non-clinical areas such as waiting rooms and reception areas.* *The Council appreciates that this has been a difficult and stressful time for dental practitioners and it thanks you for your cooperation in adhering to the level 3 restrictions that were in place and your continued observance of the level 2 restrictions from 27 April 2020. Our adherence to these restrictions has, and will no doubt, continue to assist in ensuring the safety of not only our patients and staff, but others as well.*	
19.	23 April 2020	The ADA NSW Branch released an update, sharing a SMH article on lifting of restrictions on dental practice: *Since late March, dentists have been limited to treating only patients with emergency cases such as severe pain or serious damage due to trauma in a bid to preserve medical supplies and stop the spread of COVID-19.* *However, the federal government has now announced the level three restrictions will be eased from April 27 as the national stockpile of personal protective equipment has been boosted and the transmission rate of COVID-19 remains low.* *Australian Dental Association NSW president Dr Kathleen Matthews said the relaxing of restrictions would ease pressure on hospitals.* *Dentists will be on level two restrictions from Monday, with procedures that are likely to generate aerosols still restricted.*	
20.	23 April 2020	The DBA and AHPRA released an update regarding the move to Level 2 restrictions: *The AHPPC has announced that 'it supports the current recommendation by the ADA that dentists now move to level 2 restrictions which will allow a broader range of interventions to be undertaken, including all dental treatments that are unlikely to generate aerosols…'*	

		The Board expects all dental practitioners to follow the AHPPC's advice. *...* *While the Managing COVID-19 guidelines published by the ADA are not Board- approved guidelines, the Board expects all dental practitioners, including oral health therapists, dental therapists, dental hygienists, dental prosthetists and dentists, to follow the AHPPC's recommendation and apply its advice in their practice setting.* Dr Michael also received an email from the DBA and Ahpra advising of the move to Level 2 restrictions.	
21.	24 April 2020	The AHPPC released a statement on the restoration of elective surgery and the recommendation that dental services move to Level 2 restrictions: *AHPPC supports the current recommendation by the Australian Dental Association (ADA) that Dentists now move to level 2 restrictions, which will allow a broader range of interventions to be undertaken, including all dental treatments that are unlikely to generate aerosols or where aerosols generated have the presence of minimal saliva/blood due to the use of rubber dam.*	
8 May 2020 to 12 July 2021 - Level 1 restrictions			
22.	8 May 2020	The DBA and AHPRA released a COVID-19 update outlining the AHPPC's advice to move to Level 1 restrictions: *Today's update highlights the AHPPC's latest advice, agreeing to move to level 1 restrictions.* *...* *The AHPPC agreed at its meeting on 7 May that 'moving dental practice to level 1 restrictions was appropriate in the current epidemiology and with the restoration of supply of surgical masks.'*	Dr Michael adopted the Level 1 restrictions on and from the 8 May 2020.
23.	8 May 2020	The ADA released an update that National Cabinet approved the move to Level 1 restrictions: *Level 1 means that dental professionals must continue to screen patients and only treat those who do not meet the epidemiological and clinical risk factors for COVID-19. It is critical that the profession remains vigilant in its application of Level 1 restrictions and ensure the safety of dental teams and patients alike.* Dr Michael also received an email from the ADA advising that the National Cabinet approved the move to Level 1 restrictions.	
24.	8 May 2020	Dr Michael received an email from the Dental Council of NSW providing an update on COVID-19 and the move to Level 1 restrictions. The email advised practitioners of the importance of ensuring that appropriate pre-screening continues for all patients.	
25.	9 May 2020	Dr Michael received an email from the ADA NSW Branch advising that all dental practitioners can move to level one restrictions.	

26.	14 May 2020	The ADA NSW Branch released an update, outlining that restrictions on dentists have been eased further: *The ADA NSW President Dr Kathleen Matthews said all NSW and ACT dentists can now safely help patients with a full list of treatments available, although precautions while visiting dental practices may still apply.* *"ADA NSW continues to work closely with NSW Health and ACT Health to support our members and to ensure treatment for the public remains safe," Dr Matthews said. "Level One restrictions involve screening patients for COVID-19 risks, and introducing social distancing in waiting rooms, among other changes patients can expect to see at their next appointment."*	

1050 My further observations about whether the 26 actions constitute an order (in the required sense of a mandatory obligation) of a competent statutory authority or government authority closing premises are contained in the table below.

No.	Date	Measures promulgated by various government / statutory authorities	Dr Michael's response
23 March to 26 March 2020 - Level 2 restrictions			
2.	23 March 2020	*The ADA released a COVID-19 update regarding restrictions on dental practice.* The ADA's statement is said to be "advice" only. It does not mandate any action. The advice does not involve the closure of any premises. It is advice about the kinds of treatment that should not be undertaken (aerosol generating treatment). The ADA is not a competent government or statutory authority within the meaning of cl (c).	Dr Michael adopted the Level 2 restrictions on and from 23 March 2020.
3.	23 March 2020	*The ADA released a framework for dental service restrictions in COVID-19.* The framework is said to be "Guidance on Dental Treatment during COVID-19 Pandemic". The framework includes that dentists "should exercise clinical judgment to determine whether to provide care to patients" in the context of identified matters. As a result, the framework does not mandate any action and does not involve any order. The advice does not involve the closure of any premises. It is advice about the kinds of treatment that should and should not be undertaken.	

		The ADA is not a competent government or statutory authority within the meaning of cl (c).	
4.	24 March 2020	*The DBA released an update to dental practitioners on COVID-19.* The update does not involve any mandatory obligation and is not an order. The update does not require the closure of any premises.	
5.	25 March 2020	*The ADA released an updated framework for dental service restrictions in COVID-19.* See comments above about 23 March 2020 framework.	
6.	25 March 2020	*The ADA released the "Managing COVID-19 Guidelines", which set out how to manage patients at risk of, or confirmed with, COVID-19 who require urgent dental care*. The document involves guidelines and does not impose any mandatory obligation. The document does not involve any requirement to close premises. The document provides recommendations about kinds of treatment that should and should not be performed. The ADA is not a competent government or statutory authority within the meaning of cl (c).	Dr Michael adopted these Guidelines on 26 March 2020.
7.	25 March 2020	*The AHPPC released a statement recommending the cancellation of all elective surgery.* The statement is a recommendation and advice to National Cabinet and does not impose any mandatory obligation. The statement relates to surgery and not dental treatment. The statement does not require the closure of any premises. The AHPPC is not a competent government or statutory authority within the meaning of cl (c).	
8.	25 March 2020	*The Prime Minister issued a media release, advising that all non-elective surgery would be temporarily suspended*. The announcement reflects an agreement by National Cabinet. The announcement does not impose any mandatory obligation. The announcement relates to surgery and not dental treatment. The statement does not require the closure of any premises. The Prime Minister is not a competent government or statutory authority within the meaning of cl (c).	

9.	26 March 2020	*The ADA released a COVID-19 update clarifying the restrictions on dental practice and recommending Level 2 restrictions*. The update is said to involve recommendations. The update does not impose any mandatory obligation. The update states that it "is important to remember that the ADA is not the regulator". The update does not require the closure of any premises. The ADA is not a competent government or statutory authority within the meaning of cl (c).	
10.	26 March 2020	*Dr Michael received an email from the ADA advising him that the Government will announce Level 3 restrictions. The email advised that the AHPPC recommends that all dental practitioners implement the level 3 restrictions as outlined in the ADA's guidance.* The email involves advice about future matters. The email refers to AHPPC recommendations. The email does not impose any mandatory obligation. The email does not require the closure of any premises. The ADA is not a competent government or statutory authority within the meaning of cl (c). The AHPPC is not a competent government or statutory authority within the meaning of cl (c).	Dr Michael adopted the Level 3 restrictions on and from 28 March 2020.
27 March to 20 April 2020 - Level 3 restrictions			
11.	28 March 2020	*Dr Michael received an email from the Dental Council of NSW providing an update on COVID-19 and the move to Level 3 restrictions*. The email refers to AHPPC recommendations. The email does not impose any mandatory obligation. The email does not require the closure of any premises. The AHPPC is not a competent government or statutory authority within the meaning of cl (c).	Dr Michael adopted the Level 3 restrictions on and from 28 March 2020
12.	28 March 2020	*The AHPPC recommended that all dental practices implement Level 3 restrictions*. The statement contains AHPPC recommendations. The email does not impose any mandatory obligation. The email does not require the closure of any premises. The recommendations concern the kinds of treatment that should and should not be carried out within dental premises.	

		The AHPPC is not a competent government or statutory authority within the meaning of cl (c).	
13.	28 March 2020	*The DBA released an urgent alert to dental practitioners*. The alert concerns the AHPPC recommendations – see above.	
14.	2 April 2020	*The DBA and AHPRA released an update.* The update concerns the AHPPC recommendations – see above. The update expresses an "expectation" that dentists would follow the AHPPC recommendations. It does not impose any mandatory obligation.	
15.	7 April 2020	*The ADA released an update on Government announcement of Level 3 restrictions for dentistry*. The update concerns the AHPPC recommendations – see above. The update expresses the DBA's expectation that all dental practices implement the restrictions. It does not impose any mandatory obligation. The ADA is not a competent government or statutory authority within the meaning of cl (c).	
21 April to 7 May 2020 - Level 2 restrictions			
16.	21 April 2020	*The Prime Minister released a media statement, outlining a move back to Level 2 restrictions and changes to elective surgery*. The statements reflects an agreement of National Cabinet. The statement does not impose any mandatory obligation. The level 2 restrictions do not require closure of any premises. They regulate the kinds of treatment that should and should not occur within dental premises. The elective surgery requirement does not concern dental practices. The Prime Minister is not a competent government or statutory authority within the meaning of cl (c).	Dr Michael adopted the Level 2 restrictions on and from the 27 April 2020.
17.	21 April 2020	*The ADA released an update regarding the Prime Minister's announcement of a move back to Level 2 restrictions*. The update concerns the Prime Minister's announcement – see above. The ADA is not a competent government or statutory authority within the meaning of cl (c).	
18.	22 April 2020	*Dr Michael received an email from the Dental Council of NSW advising of the move to Level 2 restrictions*.	

		The email concerns the Prime Minister's announcement – see above. The email says dentists "must also continue to adhere to the government recommendations". The adherence is to recommendations. As such, the email does no impose any mandatory obligation. The recommendations do not require closure of any premises. They regulate the kinds of treatment that should and should not occur within dental premises.	
19.	23 April 2020	*The ADA NSW Branch released an update, sharing a SMH article on lifting of restrictions on dental practice.* The update concerns the recommendations – see above. The ADA is not a competent government or statutory authority within the meaning of cl (c).	
20.	23 April 2020	*The DBA and AHPRA released an update regarding the move to Level 2 restrictions*. The update concerns the recommendations – see above. The update says the DBA "expects" dentists to follow the AHPPC advice. It does not impose any mandatory obligation.	
21.	24 April 2020	*The AHPPC released a statement on the restoration of elective surgery and the recommendation that dental services move to Level 2 restrictions*. The statement expresses the AHPPC's support for the ADA recommendation about dentists moving the level 2 restrictions – involving the AHPPC recommendations – see above.	
8 May 2020 to 12 July 2021 - Level 1 restrictions			
22.	8 May 2020	*The DBA and AHPRA released a COVID-19 update outlining the AHPP's advice to move to Level 1 restrictions*. The release relates to the "AHPPC's latest advice". The release does not impose any mandatory obligation.	Dr Michael adopted the Level 1 restrictions on and from the 8 May 2020.
23.	8 May 2020	*The ADA released an update that National Cabinet approved the move to Level 1 restrictions*. The level 1 restrictions involve AHPPC recommendations – see above. While the ADA said that "dental professionals must continue to screen patients and only treat those who do not meet the epidemiological and clinical risk factors for COVID-19" it imposed no mandatory obligation. The AHPPC recommendations do not require closure of any premises. They regulate the kinds of treatment that should and should not occur within dental premises.	

24.	8 May 2020	*Dr Michael received an email from the Dental Council of NSW providing an update on COVID-19 and the move to Level 1 restrictions*. The level 1 restrictions involve AHPPC recommendations – see above.	
25.	9 May 2020	*Dr Michael received an email from the ADA NSW Branch advising that all dental practitioners can move to level one restrictions*. The level 1 restrictions involve AHPPC recommendations – see above. The ADA is not a competent government or statutory authority within the meaning of cl (c).	
26.	14 May 2020	*The ADA NSW Branch released an update, outlining that restrictions on dentists have been eased further*. The update does not impose any mandatory obligation. The update does not require closure of any premises. The ADA is not a competent government or statutory authority within the meaning of cl (c).	

1051 I am unable to accept the submissions for Dr Michael that:

(1) the restrictions imposed by the ADA, as adopted and given force by the DBA and Dental Council, are capable of constituting orders of a "competent government or statutory authority": the reality is that the actions of all remained at the level of recommendations, guidelines and advice. While there was a common expectation of the bodies that dentists would comply, the actions did not constitute mandatory obligations. All actions remained subject to the professional judgment by the individual dentist in the case of the individual patient;

(2) concluding to the contrary of Dr Michael's case would involve a triumph of form over substance: it is a matter of characterisation of the actions as involving an "order" or not. An order must convey a mandatory obligation. It cannot convey a choice, even if the choice is constrained by the recommendations and professional considerations. An expectation of compliance is not the same as the imposition of a requirement of compliance. The very fact that the bodies conveyed their expectation of compliance underscores the non-mandatory nature of their recommendations. Dr Michael's understanding that the actions involved mandatory obligations cannot change the character of the actions; and

(3) concluding to the contrary of Dr Michael's case would overlook that failing to comply with 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": s 41 of the Health Practitioner Regulation National Law and *Health Care Complaints Commission v* ***Reid*** [2018] NSWCATOD 162 at [169]. It must be recalled that the guidelines and recommendations were subject to the exercise by the dentist of professional judgment in each individual case. This is also reflected in *Reid* at [169] where this was said:

> Whilst strict compliance with the statement was not mandatory (in the sense of being a legally enforceable obligation) it represented best practice;

1052 Even if the conclusions above are incorrect, the submissions for Dr Michael acknowledged the difficulty of finding that the actions required the closure of the Business Premises. It was submitted that:

> 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.

1053 This is another case where the difference between a mere restriction on the use of premises and the closure of premises is critical. While I have accepted that in the context of cl (c) the concept of "closure" includes both physical closure and preventing people who would otherwise be able to enter and remain on the premises from doing so (see the discussion above in relation to Gym Franchises relating to the same clause), the evidence is that: (a) Dr Michael's premises never closed, (b) no-one who was otherwise entitled to enter and remain on the premises was prevented from doing so, and (c) Dr Michael's compliance with the recommendations and guidelines prevented him from carrying out certain kinds of treatments on patients.

1054 I am unable to characterise the circumstances as involving "the closure or evacuation of the whole or part of the Business Premises by order of a competent government or statutory authority". As Guild submitted:

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

> that give rise to a potential need to physically close or evacuate the Business Premises (i.e. "vermin … occurring at the Business Premises", "poisoning directly caused by the consumption of food or drink provided on Your Business Premises", "murder or suicide occurring at Your Business Premises or in the immediate vicinity of Your Business Premises"; "human infectious or contagious disease… at the Business Premises");
>
> …
>
> Fourthly, Dr Michael's construction is circular when regard is had to the chapeau to the Prevention of Access Extension:
>
> We will Cover you for Your inability to trade or otherwise conduct Your Business at the Business Premises in whole or in part during the Period of Cover caused by:
>
> > (c) [restriction of access or use of the entirety or a part of the Business Premises for the purpose of carrying on the whole or a part of the policyholder's business activities] by order of a competent government or statutory authority …
>
> On Dr Michael's construction the words "the closure or evacuation of the whole or part of the Business Premises by" in subparagraph (c) are wholly superfluous. That is not a construction that the Court would embrace; and
>
> Fifthly, no reasonable insured would have supposed that the "closure or evacuation of the … Business Premises" for the purposes of the Prevention of Access Extension might be brought about by restrictions imposed on the insured's profession. If the clause applied in that way, it would mean that any restriction imposed on dentists would be capable of triggering cover, ignoring both the requirement for 'closure or evacuation' and that the closure or evacuation be of the 'Business Premises'.

1055 I do not agree with Guild's third point, which suggests that some physical change to the Business Premises is required to effect closure, but that is immaterial.

1056 Dr Michael's case also cannot be sustained by reference to the requirement that the order arise directly or indirectly from human infectious or contagious diseases or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises. My conclusions above in respect of the case of Gym Franchises apply.

1057 Accordingly:

(1) it cannot be inferred that any kind of causal connection existed between any of the actions and either human infectious or contagious diseases at the Business Premises or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises;

(2) there is no evidence of either human infectious or contagious diseases at the Business Premises or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises at the time the actions were taken;

(3) the capacity for indirect causation does not transform the requirements into the mere risk of human infectious or contagious diseases at the Business Premises or the discovery of an organism likely to result in human infectious or contagious disease at the Business Premises;

(4) the fact that the actions are aimed at dental practices, involving a clear risk of the transmission of COVID-19, does not transform the actions into ones caused, in any sense, by any circumstance, existing or probable, at the Business Premises;

(5) the "secondary" argument 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 time, and the virulence and transmissibility of the disease" cannot be accepted as:

(a) the requirement is for the order to arise directly or indirectly from the specified matters;

(b) it would not be inferred that the persons and bodies involved in the actions had any knowledge of COVID-19 in Wollongong; and

(c) even if it could be proved that the persons and bodies involved in the actions had any knowledge of COVID-19 in Wollongong it would not be inferred that they considered this created a likely risk of disease at the Business Premises.

1058 For these reasons, cl (c) is not satisfied.

14.4 Causation and adjustments

1059 While Dr Michael did experience an inability to conduct his practice in part due to his compliance with the recommendations and guidelines as referred to in the preamble to the prevention of access clause of which cl (c) forms part, this inability was not caused by 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 a matter specified in cl (c).

1060 It follows that Dr Michael's evidence that 74 appointments were cancelled due to the COVID-19 restrictions, and only 39 patients attended appointments does not prove loss of the relevant kind. If it did, I would apply the same approach to causation and the trend in the business provision in the Basis of Settlement clause as set out above in relation to Gym Franchises.

14.5 Third party payments

1061 Dr Michael received JobKeeper payments and the Commonwealth's Cash Flow Boost.

1062 Both types of payment have been considered above. Both would have to be taken into account under item i of the Basis of Settlement provision ("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") and under general principles applying to contracts of indemnity.

14.6 Interest

1063 In accordance with my reasoning elsewhere, s 57 of the Insurance Contracts Act is not yet engaged. It would not be unreasonable for Guild to withhold payment until a final determination of this case decides that Guild is liable to do so.

14.7 Answers to questions

1064 The questions suffer from the usual problems. Insofar as possible, they are answered below.

1065 **29. Prevention of access (POA) extension** (page 53)

(a) {Guild's position is that there is insufficient detail in paragraphs 11 to 13 of the Outline Document for Dr Michael} Do the restrictions set out at paragraphs 11 to 13 of the "Authority Response-Dr Michael" constitute an order of a competent government or statutory authority?

No.

(b) {Guild's position is that there is insufficient detail in paragraphs 11 to 13 of the Outline Document for Dr Michael} If yes to (a), was the Business Premises closed or evacuated by reason of the "Authority Response-Dr Michael"?

This does not arise. If it did arise, the answer would be no.

(c) If yes to (b), did the closure or evacuation of the Business Premises arise, directly or indirectly, from the discovery of SARS-CoV-2 or the occurrence of COVID-19 at the Business Premises?

This does not arise. If it did arise, the answer would be no.

(d) If no to (c), can sub-clause (c) of the POA Extension be triggered nonetheless by the discovery of SARS-CoV-2 or the occurrence of COVID-19 other than at the Business Premises, and if so, where and when must that discovery be made or that occurrence happen?

The order of the authority must arise directly or indirectly from a discovery of the SARS-CoV-2 organism anywhere which is likely to result in human infectious or contagious disease at the Business Premises.

Alternatively, the order of the authority must arise directly or indirectly from COVID-19 at the Business Premises.

(e) If COVID-19 had to occur or SARS-CoV-2 had to be discovered at the Business Premises, did that happen?

No.

(f) If yes to (c) or (d), did that cause an inability to trade or otherwise conduct the Business in whole or in part during the relevant period?

This does not arise. If it did arise, the answer would be yes.

(g) If yes to (f), does the loss claimed by Dr Michael follow interruption of or interference with the Business as a result of the insured peril?

No.

(h) What is required for there to be the "discovery" of SARS-CoV-2?

A "discovery" means finding or ascertaining the existence of SARS-CoV-2.

30. Basis of settlement (page 51)

(a) If Dr Michael is entitled to cover for the claim:

(i) What is the date of "Damage" for the purposes of Item (i) of the Basis of Settlement (Loss of Income) clause?

This does not arise. If it did arise, I would read "Damage" in the Basis of Settlement provision as meaning the insured peril. The date would be the date the insured peril (the order) first causes an inability to trade or otherwise conduct the business.

(ii) Is Guild entitled to reduce any loss claimed by Dr Michael under the policy on account of the receipt of payments, by Dr Michael, under any financial support programs including but not limited to JobKeeper or other subsidies?

This does not arise. If it did arise, the answer would be yes.

(iii) Should any adjustment be made to Dr Michaels loss otherwise covered by the POA extension by reason of the operation of the adjustment clause at page 51 of the policy?

This does not arise. If it did arise, I would not make an adjustment for the circumstance affecting the business being the presence and threat of COVID-19 in NSW, this being the same underlying cause as the cause of the insured peril.

(iv) From what date is interest under section 57 of the ICA payable?

This does not arise, but it would not be unreasonable for Guild to withhold payment unless and until it is finally determined to be liable to make payment in this proceeding.

14.8 Conclusions

1066 For these reasons:

(1) conclusions (1) to (6) and (8) to (11) in the Gym Franchises case also apply in this case;

(2) for cl (c), the order itself must impose the requirement for closure or evacuation;

(3) an "order" involves a mandatory obligation, not a choice; and

(4) the actions relied on by Dr Michael do not satisfy the requirements of cl (c).

1067 Given that these conclusions are not capable of being affected by additional evidence, subject to any observations of the parties, I would make a declaration as follows:

> Declare that the applicant is not liable to indemnify the respondent under respondent's business insurance policy P00076362 in response to the respondent's claim first made in March 2020.

15. NSD308/2021: QBE V COYNE (EWT)

15.1 Agreed background

1068 Education Work Travel Pty Ltd (**EWT**) operated a travel agency which primarily arranged outbound tours for Australian secondary school students to international destinations (the **EWT Business**).

1069 The EWT Business was based at premises situated at Suite 2, Level 1, 441 Canterbury Road, Surrey Hills, Victoria (the **Location**).

1070 EWT engaged a related company, Australian Cultural Tours Pty Ltd (**ACT**), to provide services to the EWT Business.

1071 The policy was issued under QBE's Office Package 'Business Pack Insurance Policy' QM208 with Policy Number 41A843909BPK (the **policy**).

1072 ACT was a co-insured under the policy.

1073 On 30 November 2020, the members of EWT resolved to appoint the Liquidator to EWT, from which date EWT ceased to trade.

1074 On 22 December 2020, EWT's broker submitted a claim notification to QBE.

1075 On 25 March 2021, EWT made a claim to QBE.

1076 On 30 March 2021, QBE denied the claim which EWT had made.

15.2 Policy provisions

1077 The key provisions of the EWT policy are below.

Property section

…

Business interruption section

Definitions which apply to this section

Gross income	The money paid or payable to you for goods sold, services rendered or for rental received in the course of your business less the cost of purchasing stock.
Indemnity period	Begins when the loss or damage occurs and ends on the earlier of the following: • the expiry of the period listed in the Policy Schedule; or • when the business ceases to be affected as a result of the loss or damage.
Standard income	• The gross income during the period immediately before the date that the loss or damage occurred which corresponds with the indemnity period; • adjusted to reflect the trend in the business and any other relevant circumstances; • in order to calculate the gross income that your business would have earned had the loss or damage not occurred.

Cover

This section insures:

- loss of income during the indemnity period;
- which results directly from the effect on the business of loss or damage to property which is insured and for which you would have been entitled to indemnity (if no excess had applied) under either:
    - the 'Property, Crime or General property' sections of this Policy (unless otherwise shown), or
    - any other Policy which provides the same insurance cover as provided under these sections of the Policy.
- for the amounts set out below.

You may choose to insure your loss of income in a number of ways:

Cover 1 is for loss of gross income,

Cover 2 is for loss of weekly income,

Cover 3 is for additional cost of working,

Cover 4 is for accounts receivable,

The cover(s) you have chosen is shown in the Policy Schedule.

We also provide some additional benefits. Depending on what cover you choose, you are automatically entitled to these benefits.

What we will pay

We will pay the amounts set out below only if you have chosen the relevant cover.

Cover 1. - Gross income

If you have chosen to insure gross income we will pay you:

a. the difference between the standard income and the gross income earned by you during the indemnity period, and

b. any amount that you expend with our consent for the sole purpose of minimising any reduction of gross income as a result of the loss or damage.

However we will not pay any more than the amount by which reduction in gross income is minimised less any expenses saved as a result of the loss or damage.

...

Cover 3. – Additional cost of working

If you have chosen to insure the additional cost of working we will pay the additional expenditure you reasonably incur to minimise the effect of the loss or damage to the business during the indemnity period.

We will not pay any more than the sum insured for additional cost of working shown in the Policy Schedule. This cover is additional to the cover provided under the Property section, additional benefit 'Additional cost of working'.

…

Additional benefits

1. Claim preparation costs

…

If you have chosen to insure gross income or weekly income under this section, we will also pay the following, provided the sum insured for that cover is not exhausted:

2. Electronic equipment

…

3. Prevention of access

The indemnity under this section is extended to include interruption or interference with your business in consequence of:

a. damage by any insured event covered by the Property section to property within a twenty (20) kilometre radius of your premises or to property forming part of or contained in a complex of which the location forms part,

b. bomb threat,

c. closure or evacuation of all or part of the premises by order of a competent government, public or statutory authority as a result of a human infectious or contagious diseases. 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,

d. closure or evacuation of all or part of the premises by order of a competent government, public or statutory authority as a result of:

i. food poisoning, murder or suicide within a twenty (20) kilometre radius of your premises;

ii. vermin or other animal pests at the location;

iii. incorrect operation of drains or other sanitary arrangements at the location;

which shall prevent or hinder the use of your building or access thereto, or results in a cessation or diminution of trade due to temporary falling away of potential customers.

…

1078 The policy schedule identifies that the policy of insurance was obtained through a broker. The Situation is identified as 441 Canterbury Road, Surrey Hills, Victoria, 3127. As noted, this does not mean that the contra proferentem rule is excluded from operation. QBE remained the profferer of the terms of the policy. There is no evidence of the negotiation of any terms of the policy. The cover is for Business property, Business interruption, Crime and Public and products liability.

15.3 Additional facts

1079 There is no dispute that EWT carried on business as a travel agency, specifically arranging tours for secondary school students to international destinations. The business was carried on from premises at 441 Canterbury Road, Surrey Hills, Victoria.

1080 The business premises were open to members of the public but were not operated as a "walk in" retail travel agency. EWT also operated its business online through a website.

1081 In or around late March 2020, EWT closed the business premises. Between June and October 2020 the business premises remained closed except when the director of EWT and his daughter accessed the business premises from time to time to process refunds.

1082 On 30 November 2020 EWT ceased to trade and the liquidator, Mr Coyne, was appointed.

15.4 Introductory comments

1083 As discussed, s 61A of the Property Law Act does not apply. Accordingly, the exclusion in cl 3(c) is immaterial as concluded in *Wonkana*.

1084 Clause 3(c) requires an order of a competent government, public or statutory authority as a result of a human infectious or contagious diseases. The order must involve closure or evacuation of all or part of the premises. The order must prevent or hinder the use of the building or access thereto, or result in a cessation or diminution of trade due to temporary falling away of potential customers. If these requirements are satisfied the indemnity under the section is extended to interruption or interference with the business in consequence of such an order.

1085 Accordingly:

(1) the required focus is the order of a competent government, public or statutory authority;

(2) a competent government, public or statutory authority is a person or body empowered or authorised under any Act, regulation or any instrument under any Act or Regulation to make an order of the kind identified in the clause;

(3) the closure or evacuation required is of all or part of the premises;

(4) "premises" is not a defined term in the policy. It means the premises on or at or in which the business is located;

(5) consistent with the reasoning in Market Foods above, the "premises" involves an issue of fact. In the present case, no such issue arises – the premises is the building within which EWT was located;

(6) the premises must be closed or evacuated by the order – that is, the effect of the order must be the closure or evacuation of the premises;

(7) the order must be a result of human infectious or contagious diseases. The requirement for "human infectious or contagious diseases" is thus mediated through the order. Consistent with the reasoning above, the requirement is an order resulting from human infectious or contagious diseases. The objective fact of the existence or not of human infectious or contagious diseases is relevant to determining whether the order resulted from those diseases;

(8) the required connection between the order and the "human infectious or contagious diseases" is causal (the order must be a result of human infectious or contagious diseases), not locational. There is no requirement that the "human infectious or contagious diseases" be at or within a certain radius of the premises; and

(9) the requirement concerns "human infectious or contagious diseases". There is an issue as to whether this requires the order to be a result of the existence of a human infectious or contagious disease or whether the mere threat or risk of a human infectious or contagious disease is sufficient. I consider that cl (c) requires the order to be a result of the existence of a human infectious or contagious disease. In this regard:

    (a) the clause contains an error insofar as it refers to "of a human infectious or contagious diseases";

    (b) the error may be the indefinite article "a" or it may be the plural "diseases";

    (c) if the phrase was "a human infectious or contagious disease" this may lend support to the requirement being a specific and existing human infectious or contagious disease;

    (d) if the phrase was "human infectious or contagious diseases" this may lend support to the requirement including the threat or risk of such diseases;

    (e) however, it is not possible to discern which involves error – the inclusion of "a" or the use of the plural in "diseases";

    (f) the exclusion supports the requirement being a specific and existing human infectious or contagious disease because it refers to the exclusion applying

"irrespective of whether discovered at the location of your premises, or out-breaking elsewhere". This assumes that the cover otherwise applies to an existing disease and not a mere threat of disease; and

(g) if the parties to the policy had intended it to apply to the threat or risk of diseases they could readily have made that apparent but did not do so.

15.5 Clause 3(c) – the hybrid clause

1086 EWT relied on the following actions as an order of a competent government, public or statutory authority:

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

(2) the March 2020 to May 2020 Stay at Home directions. These directions imposed lockdowns in Victoria for the period between 30 March 2020 and 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;

(3) the Victorian Stay at Home Directions were replaced on 31 May 2020 by the Stay Safe Directions which provided that a person may leave their residence to attend work only where it was not reasonably practicable for them to work from that residence or another premise that was not their employer's premises. On the same day, *Restricted Activity Direction (No. 9)* was made which provided that an employer must not permit an employee to perform work at the employer's premises where it is reasonably practicable for the employee to work at the employee's place of residence or another premises which is not the employer's premises. The Victorian Stay Safe Directions were extended until 5 August 2020; and

(4) on 5 August 2020 *Restricted Activity Directions (Restricted Areas) (No. 6)* (**Victorian Workplace Closure direction**) was issued. The effect of the Victorian Workplace Closure direction was that a person who controlled or operated a "Closed Work

Premises" in the "Restricted Area" must not permit persons to attend that premises during the "specified activity period". The premises was a "Closed Work Premises" situated in the "Restricted Area". The Victorian Workplace Closure direction was re-made and continued and were not lifted in relation to the premises until 9 November 2020 (**Victorian Workplace Closure directions**).

1087 QBE identified other directions which EWT did not identify in its submissions as orders said to require closure or evacuation of the premises. These are: (a) the Non-Essential Activity directions which prohibited the operation of certain non-essential businesses. It is agreed that these directions did not mandate that travel agents cease operating, (b) the Mass Gatherings directions which had the consequence that gatherings of 100 or more people in a single undivided indoor space at the same time were prohibited and introduced a density quotient for indoor spaces, and (c) the Prohibited Gatherings directions which had the consequence that persons who owned, controlled or operated a premises in Victoria were not permitted to allow a mass gathering to occur on the premises, and effectively replaced the Mass Gatherings directions. EWT did not suggest in its submissions that these directions caused the closure of the premises. EWT relied on the Overseas Travel Ban as a proximate cause of the closure of the premises.

1088 There is no issue between the parties about the various instruments having been made by a "competent government, public or statutory authority", at least in the sense that each body and person was empowered by an Act, regulation or instrument made under an Act or regulation to make the instrument they made.

1089 QBE submitted that "closure or evacuation" within the meaning of cl 3(c) requires a prohibition of physical access to the whole or part of the premises. QBE said a prohibition or restriction on the whole or some part of the business operations carried out in the premises is not a "closure" within the meaning of cl 3(c). Implicit in QBE's submission is that the prohibition on physical access must be absolute in the sense that no person is permitted to access the premises.

1090 Consistent with my reasoning above, I consider it fraught to express matters like this (which are fact and context specific) as statements of general principle. A restriction on an aspect of a business operation, depending on how it is framed, may or may not prevent access to the whole or part of a premises. It depends on the terms of the order. As EWT submitted:

> The fact that "closure" has a broader meaning than simply a prohibition of physical access is also evident from its use in sub-paragraph (d) of Additional Benefit 3.

> Imagine there was a government order for the "closure" of restaurant premises due to "food poisoning" or because of the presence of "vermin … at the location". There is no reason why such an order would be accompanied by an order for "evacuation" within the meaning of the sub-paragraph. Nor is there any reason why that order for "closure" would prevent the owners of the business from attending the premises to undertake other tasks such as, for example, eradicating the "vermin" or addressing the source of the "food poisoning" at the premises. Yet on QBE's interpretation of the word "closure", when used in the context of Additional Benefit 3, the insured would not be entitled to any indemnity because the order "closing" the business did not prohibit all physical access.
>
> That example could be applied equally to sub-paragraph (c) of Additional Benefit 3 in circumstances where, for example, a business was "closed" by government order due to the presence of a confirmed case of COVID-19 and yet required to undergo "deep cleaning". Surely the fact that physical access was permitted for that purpose would not take the "closure" outside the scope of the cover provided. Accordingly, and contrary to the submissions of QBE, the nature of all the events contemplated in Additional Benefit 3 is not such as to require "a prohibition on physical access to the whole or part of the Location".

1091 EWT's competing statement of principle is that "closure" encompasses the ceasing or stopping of the operation of the business from the premises. This is equally fraught.

1092 The better view is that the requirement of "closure or evacuation of all or part of the premises… which shall prevent or hinder the use of your building or access thereto, or results in a cessation or diminution of trade due to temporary falling away of potential customers" is to be resolved by reference to the terms of the order understood in the context of the nature of the premises and the business being conducted on the premises.

1093 In the present case the proposed orders effecting closure are the 5 August 2020 Victorian Workplace Closure directions. The Victorian Workplace Closure directions provided that:

(1) their purpose is to restrict the operation of certain businesses and operations in the Restricted Area to limit the spread of COVID-19: cl 1;

(2) a person who owns, controls or operates a Closed Work Premises in the Restricted Area must not permit persons to attend that premises during the restricted activity period: cl 7(1); and

(3) despite cl 7(1) a person who owns, controls or operates a Closed Work Premises in the Restricted Area may permit persons to attend that premises or operate the premises for identified purposes (including essential maintenance, ensure the premises is closed safely, in an emergency, as required or authorised by law): cl 7(2).

1094 The subsequent Victorian Workplace Closure directions were in consistent terms.

1095 It was (correctly) not suggested that the Victorian Stay at Home or Stay Safe directions involved any closure of the premises.

1096 I have no difficulty in accepting that the Victorian Workplace Closure directions required the closure of the premises. It did not merely prevent business operations from being carried out on the premises. It required that EWT "must not permit persons to attend that premises" other than in the limited circumstances identified. That is a closure of premises by order of a competent authority.

1097 QBE's submission that a prevention of physical access by persons may be accepted. That requirement, however, is satisfied. In particular, in the context of cl 3(c): (a) the prevention of physical access required for closure of premises need not itself be physical – the required cause of the prevention of physical access is the order, (b) the prevention of physical access required for closure of premises need not be a prevention of access to the whole of the premises – a prevention of physical access to part of the premises by an order is sufficient, (c) the prevention of physical access required for closure of premises need not prevent such access by every and any person – it is sufficient if the prevention of physical access applies to people who would otherwise ordinarily be entitled to enter and remain on the premises, and (d) the confined rights of access given under the Victorian Workplace Closure directions (including essential maintenance, ensure the premises are closed safely, in an emergency, as required or authorised by law) prevented access by all other persons who would otherwise ordinarily be entitled to enter and remain on the premises – that constitutes a closure of the premises by order.

1098 The Victorian Workplace Closure directions operated in the same manner between 5 August and 9 November 2020.

1099 QBE noted that cl 3(c) also required that the closure of the premises by the order "shall prevent or hinder the use of your building or access thereto, or results in a cessation or diminution of trade due to temporary falling away of potential customers". I agree that this means the closure must prevent or hinder the use of the building in which the premises are located. I do not agree that the reference to "temporary falling away of potential customers" says anything relevant about the application or otherwise of the policy to a pandemic as: (a) the requirement involves alternatives - prevent or hinder the use of your building or access thereto or cessation or diminution of trade due to temporary falling away of potential customers. These are not cumulative requirements. This makes sense because the preamble to cl 3(c) requires "inability

to trade or otherwise conduct Your Business at the Business Premises in whole or in part", and (b) a pandemic, presumably, may be temporary.

1100 QBE raised other relevant issues.

1101 The closure must be "by order". EWT submitted that this involves two possible meanings - either "caused by" or "required by". EWT contended that the former meaning of "caused by" is to be preferred as it involves the orthodox concept of the order being a proximate cause of the closure which it is taken that the parties would have intended to apply unless the wording of the policy provides otherwise: *Lasermax* at [45]-[46], *FCA v Arch UKSC* at [163]. The focus is thus on the effective or dominant cause, whether or not the sole cause: *Government Insurance Office of New South Wales v RJ Green & Lloyd Pty Limited* (1965) 114 CLR 437 at 447, *Federico* at 521, *Lasermax* at [101]-[103].

1102 I am not persuaded by EWT's submission that the concept of closure "by order" calls for a distinction between the concepts of "caused by" and "required by". The preposition "by" is capable of a wide range of meanings. The intended meaning is determined by the context within which the preposition appears. In cl 3(a) "by" clearly means "caused by" as the phrase is "damage by any insured event". In cll 3(c) and 3(d) the closure or evacuation must be "by order" and that circumstance must "prevent or hinder the use of your building or access thereto, or results in a cessation or diminution of trade due to temporary falling away of potential customers". In this context, a closure "by" order is a closure required by the order. The concept of "required by" captures both the nature of the order that is required by cll 3(c) and 3(d) (an order mandating the closure) and the substantive requirement (that the order, in and of itself, must require the closure). Giving the word "by" in cll 3(c) and (d) the meaning of "caused by" and not "required by", in my view, would write out the requirement that the closure or evacuation be "by" the order. It would extend the operation of those clauses to include a voluntary decision made by an insured to close premises in response to some or other order which did not require the premises to be closed. I am unable to accept that those clauses operate in this regard as EWT proposed.

1103 The QBE policy in cll 3(c) and 3(b) may be contrasted with the NSD136/2021 Allianz and Visintin policy discussed above. In the Allianz and Visintin policy the provision required "closure or evacuation… as a result of the outbreak of a notifiable human infectious or contagious disease". There was no requirement for closure or evacuation by an order which was a result of a disease. The difference is critical. In the Allianz and Visintin policy the

required relationship is between the closure and the disease and the required relationship is causal (as a result of). In the QBE policy there are two required relationships, one between the closure and the order and the other between the order and the disease. The first relationship, between the closure and the order, is determined by the use of the word "by" which involves the order imposing the requirement of closure. The second relationship is determined by the words "as a result of" which involves a causal requirement. If the parties had wanted the relationship between the closure and the order to be only causal they could have the used the same words "as a result of" but did not. This supports the conclusion that "by" means "required by".

1104 Mr Camfield, the sole director of EWT, said that EWT's primary product was a tour to the United States for Australian secondary school students. This product accounted for about 80% of EWT's business. From mid-March 2020, as a result of the Overseas Travel Ban and COVID-19, EWT experienced **changed trading conditions** as follows:

> i) uncertainty arose regarding the EWT Business' ability to undertake pre-booked tours and to offer future tours to international travel destinations, including the United States of America;
>
> ii) Sales Representatives were unable to attend schools to carry out Promotional Activities, as schools were either closed or not taking visitors and interstate travel ceased or was restricted;
>
> iii) customers of the EWT Business that were booked on tours scheduled for departure in April 2020 and onwards were unable to depart Australia on those tours;
>
> iv) schools began to cancel or defer their travel arrangements; and
>
> v) the EWT Business received, in respect of tours that had been booked by its customers but had not departed, an unprecedented number of cancellations and requests for refunds of amounts paid by customers in respect of tours.

1105 Mr Camfield closed the premises on or around 31 March 2020 because the Stay at Home directions and Stay Safe directions actively encouraged working from home and the changed trading conditions meant that staff working from the premises had or were likely to have insufficient tasks to occupy them and/or require their attendance at the premises on a full-time basis. Mr Camfield said that from August 2020 he understood that the closure of the premise was required by the Victorian Workplace Closure directions.

1106 EWT submitted that:

(1) the premises were closed in March 2020 and remained closed until 6 August 2020 because of a combination of the Stay at Home/Stay Safe directions and the changed trading conditions;

(2) of those two causal factors, the evidence suggests that it was the changed trading conditions that were of greater weight because the evidence, and QBE and Coyne (EWT) agreed facts (at [47(b) and [56]), suggest that the reduced custom associated with the changed trading conditions made it "reasonably practicable" for EWT's staff to work from home as they were actively encouraged to do under the Stay at Home/Stay Safe directions;

(3) the fact that the changed trading conditions were the "last" cause contributing to the closure of the premises during the pre-6 August period, does not mean that they were the "proximate cause" of the closure of the premises during that period. The proximate cause of the closure of the Location during the pre-6 August period was the Overseas Travel Ban which led "as a natural consequence" or "natural sequel" to the changed trading conditions and the resulting closure: see *Leyland Shipping Co Ltd v Norwich Union Fire Insurance Society Ltd* [1918] AC 350 at 355 and 364 and *Board of Trade v Hain Steamship Co Ltd* [1929] AC 534;

(4) the Overseas Travel Ban was an order of a competent government authority made as a result of a human infectious or contagious disease therefore forming part of the composite insured peril; and

(5) when the "real", "effective", "dominant" or "most efficient" cause of the closure of the premises during that pre-6 August period is sought to be identified, it is clear that, for the purposes of the Policy, that closure was caused by the Overseas Travel Ban.

1107 I do not doubt that: (a) the Overseas Travel Ban was made by a competent government authority, being made by the Health Minister under s 477(1) of the Biosecurity Act, (b) a proximate cause of the making of the Overseas Travel Ban was the human infectious disease COVID-19, and (c) the Overseas Travel Ban was a proximate cause of Mr Camfield's decision to close the premises. However, I do not accept that the circumstances on which EWT relied can satisfy cl 3(c).

1108 This is because the closure must be "by" order of a competent government, public or statutory authority. That is, as explained above, the closure must be required by the order. The Overseas Travel Ban did not require the closure of the premises. Mr Camfield decided to close the

premises because of the deleterious effect of the Overseas Travel Ban on the business. Clause 3(c) does not contemplate a closure other than by an order. It does not contemplate a closure undertaken by an insured in response to changed trading conditions caused by an order which does not itself require closure of the premises. This may be contrasted again with the Allianz and Visintin policy which covered closure as a result of an outbreak of disease. The Allianz and Visintin policy, on my conclusions, covers voluntary closures. The QBE policy does not.

1109 As noted, I accept that the Victorian Workplace Closure directions required the premises to be closed from 6 August to 9 November 2020. This raises another issue about the meaning of "by" in cl 3(c). Mr Camfield had closed the premises in March 2020 as a result, primarily, of the Overseas Travel Ban. The premises remained closed when the Victorian Workplace Closure directions came into force. If "by" means "caused by" then there is an issue as to whether the Victorian Workplace Closure directions were a proximate cause of the closure. EWT submitted that they were and QBE submitted that they were not. Further, if "by" means "required by" there is an issue whether the closure of the premises was required by the order given that they were already closed by decision of Mr Camfield unconnected to the terms of the Victorian Workplace Closure directions.

1110 EWT made this submission:

> The fact that the Location had been closed in the Pre-6 August Period (by reason of the Commonwealth Travel Ban and Victorian Stay at Home/ Stay Safe Directions) does not change that conclusion. The correctness of that position can be illustrated by considering one of the other perils insured under Additional Benefit 3. Sub-paragraph (d)(ii) of Additional Benefit 3 refers to cover in the event of the "closure or evacuation of all or part of the premises by order of a competent government, public or statutory authority as a result of…vermin or other animal pests at the location". If, upon detecting the presence of vermin at business premises that presented a public health risk, an insured closed the premises to the public in advance of a government or public authority making an order mandating such a closure, it could not sensibly follow that coverage could be denied when such an order was subsequently made on account of the subject premises being "already closed" (on account of the insured taking preventative measures "of its own volition", rather than waiting until the government or public authority took action in respect of a key element of the insured peril: namely, the presence of the vermin at the location).

1111 QBE submitted that cl 3(c) requires: (**A**) a human infectious or contagious disease, which causes (**B**) an order of a competent government, public or statutory authority, which causes (**C**) the closure or evacuation of the all or part of the premises and thus prevents use of or access to the premises, which causes (**D**) an interruption or interference with the insured's business that is the direct cause of financial loss. This can be expressed diagrammatically with each arrow representing a causal connection, as follows: A → B → C → D.

1112 The reservation which I have about these kinds of descriptions is that they de-emphasise the significance of the order. As discussed, they (wrongly) suggest that the focus is the objective fact of a human infectious or contagious disease rather than an order as a result of a human infectious or contagious diseases – a requirement which would permit the authority to be wrong at least provided that it did not make the order arbitrarily, capriciously or in bad faith.

1113 In any event, QBE contended that in the present case what occurred was: (**A**) occurrence of COVID-19 domestically and globally, which caused (**B**) orders of both Australian and foreign governments, which caused (**X**) restrictions on movement and gatherings of people including the Overseas Travel Ban and restrictions on access to other countries by non-citizens, which caused (**Y**) a decrease in demand for international travel packages from Australia, which caused (**D**) interruption to EWT's business and financial loss to EWT (i.e. A → B → X → Y → D).

1114 This kind of analysis can obscure the operation of the clause. All that is required is an order as a result of a human infectious or contagious disease that requires closure or evacuation of premises and thereby prevents or hinders the use of the building or access thereto, or results in a cessation or diminution of trade due to temporary falling away of potential customers.

1115 The Overseas Travel Ban resulted from a human infectious or contagious disease but it did not require the closure of the premises. Contrary to QBE's submission the additional requirement (which shall prevent or hinder the use of the building or access thereto, or results in a cessation or diminution of trade due to temporary falling away of potential customers) is a neutral factor because while it could not be said that the Overseas Travel Ban prevented or hindered the use of the premises, the Overseas Travel Ban did result in a cessation or diminution of trade due to temporary falling away of potential customers. The key fact is that the closure of the premises was not by (in the sense of required by) the Overseas Travel Ban, despite the Overseas Travel Ban being a proximate cause of the closure.

1116 This leaves the fact that the premises were closed when the Victorian Workplace Closure directions came into force. The Overseas Travel Ban also remained in force. If EWT is right that "by" involves only a causal requirement the question arises – are the Victorian Workplace Closure directions a proximate cause of the closure in these circumstances?

1117 The vermin analogy of EWT obscures this issue. The issue on the vermin analogy is, if the insured has closed the premises to eradicate the vermin and an order is then made requiring the closure of the premises due to the vermin, is the order a proximate cause of the closure? EWT

appears to accept that the order is not a proximate cause of the initial closure. This must be right. An order not yet made cannot be a proximate cause of the closure. The proximate cause of the initial closure is the vermin. Implicit within EWT's vermin analogy is that the order becomes a proximate cause of the closure once the order is made. But is that so? If the vermin are still present and have not yet been eradicated, there can be no doubt that the vermin remain a proximate cause of the order. Further, if the insured was satisfied the vermin had been eradicated and wanted to re-open the premises but the order remained in force, there can be no doubt that the order would be a proximate cause of the closure from the time when the insured was otherwise ready to re-open the premises.

1118 This exposes that the problem is in the liminal period – the time when both the vermin which caused the closure remain uneradicated and the order is in force. The vermin analogy submission of EWT does not answer the question about the liminal period. In the present case, the equivalent to the vermin is the Overseas Travel Ban which effectively destroyed EWT's business. The Overseas Travel Ban was the proximate cause of the closure and it remained in force at the time of and after the coming into force of the Victorian Workplace Closure directions.

1119 It seems to me that the issue about the liminal period is to be resolved as one of fact. If the search is for the proximate (that is, essential or dominant, not necessarily the last) cause or causes of the relevant circumstance, recognising that there may be more than one such proximate cause. On the evidence in the present case I am unable to conclude that the Victorian Workplace Closure directions were a proximate cause of the closure of the premises. It is clear that the "but for" test would not be satisfied – the question "but for the Victorian Workplace Closure directions would the premises have been opened?" must be answered in the negative on the evidence. The evidence indicates that, given the nature of the business, the premises would not have re-opened but for the Victorian Workplace Closure directions. The premises would have remained closed because the Overseas Travel Ban, in effect, destroyed the business. While the "but for" test is not determinative, it is indicative of the proper characterisation of the essential causes of the closure.

1120 If the question is asked, were the Victorian Workplace Closure directions a proximate or any other kind of cause of the closure of the premises, my view is that the answer must be "no". They were not a proximate or any other kind of cause of the closure, not merely because the premises were already closed, but because the proximate cause of that closure, the Overseas

Travel Ban, remained in force and effect. There is no foundation in the evidence to infer that that the Victorian Workplace Closure directions, on making, became a proximate or any other kind of cause of the closure of the premises because there is no evidence that the premises otherwise could or would have been re-opened. The Victorian Workplace Closure directions were causally irrelevant to the closure or re-opening of the business. The example proposed by Insurance Australia based on *FCA v Arch UKSC* at [182] applies on the facts of the present case – that is, the Overseas Travel Ban (hunter 1) shot and killed the business and then the Victorian Workplace Closure directions (hunter 2) shot the dead body. The sole cause of death is hunter 1, the Overseas Travel Ban. The Overseas Travel Ban was and remained a sufficient cause of the closure. There was no scope for any other cause to operate.

1121 If, as I consider, the required relationship between the closure and the order is not causal but substantive (that is, the order must require closure of the premises) another problem arises for EWT. If premises are and otherwise would remain closed can it be said that the continued closure is required by the order? I consider the answer to this question to be no. The requirement attaches to circumstances where premises would otherwise, excluding the order, not be closed. That is not the present case.

1122 I also agree with QBE that the Overseas Travel Ban could never be said to have prevented or hindered the use of the premises or access thereto. But the Overseas Travel Ban did result in a cessation or diminution of trade due to temporary falling away of potential customers. As noted, this requirement in the tailpiece to the clause involves two alternatives, either one of which is sufficient if satisfied.

1123 On this basis, the reason that the Overseas Travel Ban cannot satisfy cl 3(c) is that it did not involve any closure of the premises "by order". If cl 3(c) had said "closure or evacuation of all or part of the premises [as a result of] order of a competent government, public or statutory authority as a result of a human infectious or contagious diseases…which shall …or results in a cessation or diminution of trade due to temporary falling away of potential customers" then I would have concluded that cl 3(c) was satisfied. But cl 3(c) says "closure or evacuation of all or part of the premises by order of a competent government, public or statutory authority as a result of a human infectious or contagious diseases… which shall …or results in a cessation or diminution of trade due to temporary falling away of potential customers". This clause is not satisfied.

1124 The Victorian Workplace Closure directions cannot satisfy cl 3(c) because the closure of the premises (that is, the closure in fact in the particular case) must be by the order. The closure in this case was not by the order. It was a closure by the insured in response to, primarily, the Overseas Travel Ban.

1125 Further, the order must in fact "prevent or hinder the use of your building or access thereto, or results in a cessation or diminution of trade due to temporary falling away of potential customers". In the present case, the Victorian Workplace Closure directions did not in fact prevent or hinder the use of the premises because the insured had already closed the premises.

1126 Further again, the Victorian Workplace Closure directions did not in fact result in a cessation or diminution of trade due to temporary falling away of potential customers because the trade had been destroyed by the Overseas Travel Ban. Nor did they cause any interruption or interference with the business which was already effectively defunct (on the evidence, the only activities being carried out after the closure of the premises were processing refunds) well before the Victorian Workplace Closure directions came into force.

1127 In this regard, the observations in *FCA v Arch UKSC* at [243]-[244] (concerning a required inability to use premises) are worth repeating:

> [243] The conclusion we draw is that, properly interpreted, the public authority clause in the Hiscox policies indemnifies the policyholder against the risk (and only against the risk) of all the elements of the insured peril acting in causal combination to cause business interruption loss; but it does so regardless of whether the loss was 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.
>
> [244] This interpretation, in our opinion, gives effect to the public authority clause as it would reasonably be understood and intended to operate. For completeness, we would point out that this interpretation depends on a finding of concurrent causation involving causes of approximately equal efficacy. If it was found that, although all the elements of the insured peril were present, it could not be regarded as a proximate cause of loss and the sole proximate cause of the loss was the Covid-19 pandemic, then there would be no indemnity. An example might be a travel agency which lost almost all its business because of the travel restrictions imposed as a result of the pandemic. Although customer access to its premises might have become impossible, if it was found that the sole proximate cause of the loss of its walk-in customer business was the travel restrictions and not the inability of customers to enter the agency, then the loss would not be covered.

1128 These observations concern a policy providing cover for an inability to use premises due to restrictions following an occurrence of a notifiable disease (at [96]). The reasoning is that if a business is destroyed by a travel ban, then a separate prevention of access requirement cannot be said to be a proximate cause of loss.

1129 In the present case, the requirement is for closure by an order of the specified type and in the specified circumstances. By analogy to *FCA v Arch UKSC* [243]-[244] (see also at [141]) if the business has been destroyed by the Overseas Travel Ban then the subsequent Victorian Workplace Closure directions do not satisfy any of the requirements of cl 3(c).

1130 The other directions also do not satisfy cl 3(c) because they did not close the premises and did not prevent or hinder the use of the premises or result in a cessation or diminution of trade due to temporary falling away of potential customers.

1131 If my conclusions about the Overseas Travel Ban are wrong then I would accept that the Overseas Travel Ban both resulted in a cessation or diminution of trade due to temporary falling away of potential customers and interrupted and interfered with the business. As I have said, I would not draw this inference about any of the Victorian directions given that EWT's business did not involve walk-in trade and the premises were a form of administrative hub only.

15.6 Causation and adjustments

1132 If my conclusions about the Overseas Travel Ban are wrong then it is relevant that cl 3(c) would need to be read as saying "closure or evacuation of all or part of the premises [as a result of] order of a competent government, public or statutory authority as a result of a human infectious or contagious diseases…which shall …or results in a cessation or diminution of trade due to temporary falling away of potential customers". The interruption or interference with the business must be "in consequence of" that circumstance. The words "in consequence of" involve the concept of a causal relationship between the interruption or interference with the business and the circumstance. I do not accept EWT's submissions that these words contemplate indirect causation (in the sense of extending to encompass a mere cause of a cause) but I agree that the causal requirement of "in consequence of" is less than an effective, dominant, essential or proximate cause.

1133 This is supported by cases to which EWT referred including *Reseck v Federal Commissioner of Taxation* (1975) 133 CLR 45 at 51 ("in consequence of" involves "follows as an effect" even if not the dominant cause), *Insurance Commission of Western Australia v Container Handlers Pty Ltd* [2004] HCA 24; (2004) 218 CLR 89 at [45] ("[a]lthough 'consequence' involves notions of causation, the term 'consequence' - with its emphasis on effect - places less emphasis on the proximity of cause and effect than the term "cause" may do in various contexts"), and *XL Insurance Co SE v BNY Trust Company of Australia Limited* [2019] NSWCA 215; (2019) 20 ANZ Insurance Cases 62-211 at [62] ("[t]he words require that there be some causal

connection between the 'Loss' the subject of the claim for indemnity and the specified matters, but the required nexus is less than a direct or proximate relationship as required by the words "caused by""). Further, in *Star* at [95] Allsop CJ said the "relational prepositional phrase 'resulting from' is wider than a proximate cause, requiring a common sense evaluation of a causal chain: *Kooragang Cement Pty Ltd v Bates* (1994) 35 NSWLR 452 at 463–464".

1134 *FCA v Arch UKSC* at [281]-[286] is relevant. In those paragraphs their Lordships reasoned by reference to a fashionwear business. The business has two sales methods – from the shop and from a website. The insured peril involves a prevention or restriction on use of the premises. The prevention and restriction on use results from COVID-19. That part of the business involving sales from the shop is interrupted. The insured suffers loss as a result of the interruption. On the approach to causation and trends in *FCA v Arch UKSC* the fact that the shop would have suffered loss in any event by reason of COVID-19, irrespective of the prevention and restriction on use, does not change the fact that the insured peril is a proximate cause of loss in that part of the business. The effect of COVID-19, another proximate cause of the same or some of the same loss, does not mean that the loss caused by the insured peril is excluded because: (a) both the insured peril and COVID-19 are concurrent proximate causes of the loss, and (b) COVID-19 is the same underlying cause of both the insured peril (the prevention and restriction on use) and the uninsured peril (that people are less likely to leave home and enter a shop due to COVID-19). Their Lordships applied the same reasoning to the trends clauses.

1135 However, that part of the business involving sales from the website was not affected by the insured peril. There was no interruption with or interference with that part of the business. *FCA v Arch UKSC* at [281]-[286] explains that the cover provided does not respond at all to any diminution of sales from the website. This is because the insured peril (Government restrictions on use of the premises) have no effect on sales from the website. There is no relevant interruption or interference with that part of the business. Accordingly, the fact that COVID-19 might also have caused a diminution in sales from the website is immaterial. No claim can be made for such diminution. It is not loss having anything to do with the insured peril.

1136 This makes sense in the context of a business with two or more components only one of which is affected by the insured peril. EWT's business did not have two components. It sold overseas tours. In so doing it used the premises as the administrative centre from which the sale was effected but no sales were transacted by a person entering the premises given the nature of the

business (involving marketing of tours to schools). The Overseas Travel Ban effectively destroyed that business. It did so not by closing the business premises but by eliminating demand for EWT's products. This reinforces my conclusion above that the Overseas Travel Ban cannot be characterised as closing the premises. It also focuses attention on the reason for the interruption or interference with the business (the "in consequence off" requirement). I am unable to escape the conclusion that interruption to and interference with EWT's business followed on from or was an effect of the Overseas Travel Ban eliminating demand for EWT's products, not by the Overseas Travel Ban causing the closure of the business.

1137 The inescapable fact is that if the Overseas Travel Ban and the reasons why it was made (the presence and risk of COVID-19 outside of Australia) had not eliminated the demand for EWT's products then EWT's business could and, I infer, would have continued irrespective of the closure of the premises. While access to the premises was required for some functions to be performed, the business could have operated with a combination of working from home and work in the premises which could not have been done from home (which was always permissible). This did not occur because the demand for EWT's products had been destroyed by the Overseas Travel Ban.

1138 Accordingly, even if the Overseas Travel Ban caused the closure of the premises, and this is sufficient to satisfy cl 3(c), the requirement for interruption or interference with the business in consequence of the closure would not be satisfied. The interruption or interference with the business would not follow from or be an effect of the closure. It would follow from and be an effect of the operation of the Overseas Travel Ban and the reasons for it and not from the closure of the premises.

1139 It is only if I am wrong about everything above, that the requirements of cl 3(c) would be satisfied. If that is so then (and only then) might it be possible to conclude that there was interruption or interference with the business in consequence of the closure by order of a competent authority as a result of a human infectious or contagious disease which prevented or hindered the use of the premises or access thereto, or resulted in a cessation or diminution of trade due to temporary falling away of potential customers. If that conclusion is possible (and I do not accept that it is) the reasoning in *FCA v Arch UKSC* about causation and trends as discussed above would apply. The underlying cause of the presence and risk of COVID-19 (anywhere in the world as cl 3(b) contains no locational requirement in respect of the disease) would be the cause of both the insured peril and of the uninsured peril. The effect of COVID-

19 generally across the world would not need to be disregarded in assessing the requirement of causation. The evidence is clear that the Overseas Travel Ban was a proximate cause of the loss (contrast the facts in Insurance Australia and Meridian Travel where COVID-19 overseas and other COVID-19 responses had destroyed the business before the Overseas Travel Ban came into force). On this basis, the effects of COVID-19 generally do not undermine that causal relationship.

1140 Further, and on the same basis, the "Standard Income" would not be "adjusted to reflect the trend in the business and any other relevant circumstances" by reason of COVID-19 generally.

1141 If my conclusions about the other directions are wrong then I remain unable to conclude that there was any proximate causal relationship between the interruption or interference with the business and the circumstance described in cl 3(c) by reference to those directions. As such, the requirement that the interruption or interference with the business be in consequence of the circumstance described in cl 3(c) would not be satisfied on the basis of those directions.

15.7 Interest

1142 In accordance with my reasoning elsewhere, s 57 of the Insurance Contracts Act is not yet engaged. It would not be unreasonable for QBE to withhold payment until a final determination of this case decides that QBE is liable to do so.

15.8 Answers to questions

1143 To the extent possible I answer the questions as follows.

1144 **Property Law Act**

1. Does section 61A of the *Property Law Act 1958* (Vic) apply to the policy, such that the reference to the repealed *Quarantine Act 1908* (Cth) is to be construed as a reference to the *Biosecurity Act 2015* (Cth), and such that a disease determined to be a "listed human disease" under the *Biosecurity Act 2015* (Cth) falls within the scope of the exclusion from cover for business interruption?

No.

1145 **Prevention of access (POA) extension** (page 12)

2. Was there "closure or evacuation of all or part of the [insured's] premises" within the meaning of the policy?

No.

3. If the answer to 2 is 'yes', was it due to any one or more of the directions as set out in Annexures A and B of the Statement of Agreed Facts?

No.

4. If the answer to 3 is 'yes', was it an order by a competent government, public or statutory authority as a result of a human infectious or contagious disease?

This does not arise, but if it did arise all of the actions on which EWT relied were orders of a competent government, public or statutory authority as a result of a human infectious or contagious disease.

5. If the answer to 3 and 4 is yes, did the "closure or evacuation of all or part of the premises":

(a) prevent or hinder the use of the insured's building or access thereto; or

No.

(b) "result in" a cessation or diminution of trade "due to" the temporary falling away of potential customers?

No.

6. Was there "interruption or interference with" the insured's business within the meaning of the policy?

No.

7. If the answer to 6 is yes, was the interruption or interference "in consequence of" closure or evacuation of all or part of the premises within the meaning of the policy?

No.

1146 **Loss**

8. Whether, having regard to the answers to issues 1 – 7 above, the Policy responds to EWT's claim for indemnity.

No.

1147 **Concurrent Causes**

9. If the answer to issue 8 is "yes", whether:

(a) the appropriate counter-factual for the purposes of the "Standard Income" definition in the Policy may take into account the presence and effect of COVID-19 as relevant circumstances, so that any payment to be made reflects the results that but for the insured events, would have been obtained during the relevant period (less any expenses saved as a result of the loss or damage); or

This does not arise.

(b) to the extent EWT suffered loss that was caused concurrently by events or circumstances referable to the outbreak of COVID-19 other than as a consequence of the matters set out in 2 to 7 above, the Prevention of Access Extension in the Policy covers EWT for the loss resulting from any such concurrent causes of that loss.

This does not arise.

1148 **Interest**

10. Is interest under section 57 of the Insurance Contracts Act payable? If so from what date is interest payable?

This does not arise, but it would not be unreasonable for QBE to withhold payment unless and until it is finally determined to be liable to make payment in this proceeding.

15.9 Conclusions

1149 For these reasons:

(1) s 61A of the Property Law Act does not apply, contrary to QBE's contentions;

(2) while there was a closure of the premises, the closure was not by any order as required by cl 3(c);

(3) as such, there was no interruption or interference with the business in consequence of a closure of all or any part of the premises by an order as required by cl 3(c);

(4) even if it is sufficient to satisfy cl 3(c) that the closure be caused by an order and not required by an order (which I do not accept), the only order which was a proximate cause of the closure was the Overseas Travel Ban;

(5) in that event, the interruption or interference with the business was not in consequence of a closure of all or any part of the premises by an order as required by cl 3(c). The

interruption and interference was in consequence of the operation of the Overseas Travel Ban having nothing to do with closure of the premises;

(6) none of the other orders EWT relied upon required closure of the premises except the Victorian Workplace Closure directions. The fact that these directions permitted limited access to the premises does not mean that they did not require closure of the premises;

(7) however, the closure of the premises was not by the Victorian Workplace Closure directions. The premises had already been closed and the coming into force of the Victorian Workplace Closure directions was not a cause of closure of the premises or required by the Victorian Workplace Closure directions. The terms of cl3(c) mean that the order must require closure of the premises in the sense that, leaving aside the order, the premises would otherwise not be closed;

(8) in any event, there was no interruption or interference with the business in consequence of a closure of all or any part of the premises by the Victorian Workplace Closure directions; and

(9) cl 3(c) is not engaged.

1150 Given that these conclusions are not capable of being affected by additional evidence, subject to any observations of the parties, I would make a declaration as follows:

> Declare that the applicant is not liable to indemnify the respondent under respondent's business insurance policy 41A843909BPK in response to the respondent's claim first made in December 2020.

16. OTHER MATTERS

1151 Given the context of the proceedings as test cases anticipated to be the subject of an appeal hearing in November, I propose to grant all parties leave to appeal to the extent necessary given that I am not able to make final orders on publication of these reasons for judgment. I will also make directions to enable finalisation of these proceedings as appropriate having regard to these reasons.

1152 As stated above, I consider that in all proceedings other than NSD133/2021 Insurance Australia and Meridian Travel declarations can and should now be made to the effect that the policies do not respond to the claims. Other than in NSD133/2021 Insurance Australia and Meridian Travel no further evidence can affect the ultimate conclusions I have reached.

I certify that the preceding one thousand one hundred and fifty

two (1152) numbered paragraphs are a true copy of the Reasons for Judgment of the Honourable Justice Jagot.

Associate: 

Dated: 8 October 2021