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### Details of Filing

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Registry: NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink that reads 'Sia Lagos'.

Dated: 7/05/2020 6:09:16 PM AEST

Registrar

### Important Information

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

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## Second Respondent's Defence to the Applicant's Amended Statement of Claim dated 3 March 2020

(amended pursuant to order of Wigney J made on 27 February 2020)

No. NSD 215 of 2019

Federal Court of Australia  
District Registry: New South Wales  
Division: Commercial & Corporations

### The Owners – Strata Plan 87231

Applicant

### 3A Composites GmbH and another

Respondents

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Filed on behalf of (name & role of party) Halifax Vogel Group Pty Limited ACN 104 808 853, Second Respondent

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**PRELIMINARY MATTERS**

- A. Headings are used in this Defence to the Amended Statement of Claim filed on 2 March 2020 (**Amended Claim**) for convenience only. They do not form part of the Second Respondent's Defence to the Amended Claim.
- B. In this Defence, the Second Respondent uses 'HVG' to refer to Halifax Vogel Group Pty Ltd (ACN 104 808 853).
- C. Except where expressly indicated, HVG adopts the defined terms used by the Applicant in the Amended Claim but does not admit any allegation of fact contained in or in any way implied by any such defined terms.
- D. In this Defence, unless otherwise stated, where reference is made to the BCA (as defined in paragraph 18 below) either in whole or in part, HVG relies upon the applicable version(s) of the BCA for its full force, terms and effect.

In response to the allegations in the Amended Claim, HVG says and pleads as follows:

## **A. PARTIES AND GROUP MEMBERS**

### **A.1 The Group Members**

1. As to paragraph 1, HVG:

- (a) admits that the Applicant purported to commence this proceeding as a representative proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976 (Cth)* on its own behalf and on behalf of Group Members;
- (b) does not thereby admit that the proceeding is appropriate to be brought as a representative proceeding pursuant to Part IVA of the *Federal Court of Australia Act 1976 (Cth)*;
- (c) says that to the extent the Applicant uses the defined term 'Alucobond PE Core Cladding' in this paragraph and otherwise in the Amended Claim:
  - (i) HVG does not admit any factual assertions contained in, or in any way implied by, that defined term by responding to it in this Defence;
  - (ii) adopts instead the terms 'Alucobond PE' and 'Alucobond Plus' as defined in the Amended Claim to respond to the allegations arising in respect of each of those products as appropriate throughout this Defence; and
- (d) denies that:
  - (i) any person meets the description in sub-paragraph (c); and
  - (ii) Alucobond PE or Alucobond Plus were supplied to consumers within the meaning of s. 3 of the ACL and s. 4B of the TPA,
- (e) in the premises of sub-paragraph (d) above, denies that there are any persons that meet the definition of Group Members; and
- (f) otherwise does not know and therefore does not admit paragraph 1.

2. As to paragraph 2, HVG:

- (a) repeats sub-paragraph 1(e) above; and
- (b) in the premises thereof, denies paragraph 2.

**A.2 The Applicant**

3. As to paragraph 3, HVG:

- (a) admits sub-paragraph (a);
- (b) admits sub-paragraph (b);
- (c) says in answer to sub-paragraph (c), that the Applicant is and has been the owners corporation of the strata scheme since 24 August 2012, when it was created by virtue of the registration of the strata plan 87231 in accordance with the SSFDA;
- (d) says in answer to sub-paragraph (d), that the Applicant is and has been the owners corporation of the residential building known as the Shore Building since 24 August 2012;
- (e) says in answer to sub-paragraph (e), that the Applicant is and has been the registered proprietor of the Shore Common Property since 24 August 2012; and
- (f) otherwise does not know and therefore does not admit paragraph 3.

**A.3 The Respondents**

4. In response to paragraph 4, HVG:

- (a) admits sub-paragraphs (a) and (b);
- (b) admits sub-paragraph (c) and says further that the First Respondent was known as Alcan Composites up until 11 March 2010;
- (c) admits sub-paragraph (d) (i) in respect of Alucobond PE and Alucobond Plus;
- (d) admits sub-paragraph (d) (ii), save that the applicable section in the TPA is s. 74A(3);
- (e) denies sub-paragraph (e) and says further that during the Relevant Period:
  - (i) the First Respondent had a place of business in Australia for the purposes of s. 7 of the ACL and s. 74A(4) of the TPA during a period of unknown duration but from at least 2008 until at least January 2011; and

- (ii) Alucobond PE and/or Alucobond Plus manufactured by the First Respondent and imported into Australia between about 2008 and about January 2011, was supplied to persons in Australia at various times during the Relevant Period including after January 2011.

**Particulars**

- A. Between 2008 and at least January 2011, Mr Campbell Hughes was employed in the position of “Sales Manager Australasia” by Alcan Alucobond (Far East) Pte Ltd.
- B. Alcan Alucobond (Far East) Pte Ltd is a wholly owned subsidiary of 3A Composites Holding AG, which is in turn owned by Schweiter Technologies AG. Alcan Alucobond (Far East) Pte Ltd is a related entity to the First Respondent.
- C. At all relevant times between 2008 and at least January 2011, Mr Hughes represented the First Respondent, either directly and/or through Alcan Alucobond (Far East) Pte Ltd, as agent for the First Respondent, in respect of products manufactured by the First Respondent and supplied to the Australian market.
- D. At all relevant times between 2008 and at least January 2011, Mr Hughes was domiciled at and worked from 2 Bowman Place, Mt Ommaney, Queensland.
- E. At all relevant times between 2008 and at least January 2011, Mr Hughes had an Australian mobile number with the prefix +61.
- F. At all relevant times between 2008 and at least January 2011, Mr Hughes’ distributed business cards with, inter alia, the above contact details in Australia.
- G. Further particulars may be provided following discovery and/or service of evidence.
- (f) as to sub-paragraph (f):
- (i) admits that the First Respondent engaged in conduct in Australia during the Relevant Period; and
- (ii) otherwise does not admit sub-paragraph (f); and
- (g) admits sub-paragraph (g).

5. In response to paragraph 5, HVG:

(a) admits sub-paragraph (a); and

(b) as to sub-paragraph (b):

(i) says that at all material times between at least 1 July 2007 and about 1 September 2010 the sole and exclusive importer to Australia and/or distributor in Australia of Alucobond PE and/or Alucobond Plus was Alucobond Architectural Pty Ltd ACN 126 787 746 (**AAPL**);

(ii) admits that since about 1 September 2010 HVG has imported and distributed Alucobond PE and Alucobond Plus to Australia pursuant to agreements as in place between HVG and the First Respondent from time to time (**Distributor Agreements**);

**Particulars**

A. Each of the Distributor Agreements is wholly express and in writing. The Distributor Agreements are dated 1 September 2010 and 1 September 2015 respectively.

B. HVG relies upon each of the Distributor Agreements referred to in A above for its full terms and effect.

(iii) says that each of HVG's Distributor Agreements provided, among other things, that HVG was to be the sole and exclusive distributor in Australia of products including Alucobond PE and Alucobond Plus; and

(iv) otherwise denies the allegations in sub-paragraph (b);

(c) as to sub-paragraph (c):

(i) denies the allegations pleaded therein and repeats paragraph 4(e) and sub-paragraph 0(b) above;

(ii) in the premises, says that at all material times HVG was not and is not a "manufacturer" of Alucobond PE and/or Alucobond Plus within the meaning of that term in s.7 of the ACL and s.74A(4) of the TPA; and

(iia) repeats paragraphs 4(c) to 4(e) inclusive above and says that the First Respondent is and was at all material times the "manufacturer" of Alucobond PE and/or Alucobond Plus within the meaning of that term in s.7 of the ACL and s.74A(4) of the TPA; and



- (d) otherwise denies paragraph 5.

**Particulars**

- A. In relation to sub-paragraph (b)(i), HVG refers to the Distribution Agreement between the First Respondent and AAPL dated 1 July 2007. HVG will rely upon a copy of that agreement at the hearing for its full terms and effect.
- B. In relation to sub-paragraphs (b)(ii), HVG refers to the Distributor Agreements between the First Respondent and HVG dated 1 September 2010 and 1 September 2015. HVG will rely upon a copy of that agreement at the hearing for its full terms and effect.
- C. In relation to sub-paragraphs (b)(iii), HVG refers to clause 1 of the Distributor Agreements between the First Respondent and HVG dated 1 September 2010 and 1 September 2015.
- D. Further particulars may be provided following discovery and/or service of evidence.

**B. THE GOODS**

***B.1 ACPs and Alucobond***

6. In response to paragraph 6, HVG:

- (a) says that at all material times each of Alucobond PE and Alucobond Plus is and was a good of a kind commonly known as “aluminium composite panels” (**ACPs**);
- (b) says further that at all material times there are and were goods of a kind commonly known as “non-combustible aluminium composite panels” or “Non-Combustible ACPs” (**NCACPs**);
- (c) says that NCACPs can be, and are, distinguished from ACPs by reason of the fact that the latter are combustible;
- (d) says that Alucobond PE and/or Alucobond Plus are not and were not commonly known to be NCACPs;
- (e) says that Alucobond PE and Alucobond Plus and other ACPs are more generally known as “cladding” and “building products”; and
- (f) otherwise does not admit the allegations in paragraph 6 of the Amended Claim and says that any reference to “ACPs” in this pleading is to be read together with the matters set out in sub-paragraphs 6(a) to 6(e) inclusive above.

7. In response to paragraph 7, HVG:

- (a) repeats paragraph 6 above;
- (b) says that at all material times, Alucobond PE and/or Alucobond Plus were supplied on a wholesale basis in Australia for purposes including:
  - (i) shopfitting;
  - (ii) signage;
  - (iii) corporate identity;
  - (iv) digital printing;
  - (v) laminating;
  - (vi) exhibition stand construction;
  - (vii) building interior walls and linings;
  - (viii) bus sides;
  - (ix) caravans;
  - (x) houseboats;
  - (xi) photo album covers;
  - (xii) emergency vehicle bodies;
  - (xiii) train carriage construction;
  - (xiv) kitchen splashbacks;
  - (xv) bird houses;
  - (xvi) public art;
  - (xvii) screening and perforated screening;
  - (xviii) portable buildings;
  - (xix) rubbish bins;
  - (xx) planter boxes;
  - (xxi) sporting equipment;
  - (xxii) light vehicle trailers;
  - (xxiii) truck trailer bodies;
  - (xxiv) solar powered go karts;
  - (xxv) model planes;

- (xxvi) barbeque covers;
  - (xxvii) cupboard doors in alfresco kitchens;
  - (xxviii) restaurant menu cards; and/or
  - (xxix) the Relevant Uses (defined in sub-paragraph 7(c) below);
- (c) admits sub-paragraphs (a) and (b) but only to the extent that, at all material times, Alucobond PE and/or Alucobond Plus were supplied to Qualified Professionals (as defined in paragraph 7(f) below) in the Construction Industry Market (defined in paragraph 0(g) below) for use:
- (i) as part of an external wall or an attachment to an external wall,  
on:
  - (ii) high rise buildings (as defined in the BCA); or
  - (iii) low rise buildings (as defined in the BCA),  
where such buildings were intended to be used for:
  - (iv) residential, commercial or public or government administration purposes (collectively, **Relevant Uses**);

#### **Particulars**

- A. The use of products in the construction of buildings in NSW, including ACPs, is constrained by, inter alia, the *Environment Planning & Assessment Act 1979 (NSW)* (**EP&A Act**) and *Environment Planning & Assessment Regulations 2000 (NSW)* (**EP&A Regulations**). Equivalent legislation exists in other States and Territories.
  - B. The EP&A Act and EP&A Regulations impose obligations on, inter alia, principal contractors, landowners, certifying authorities and consent authorities.
  - C. Further particulars may be provided following discovery and/or the service of evidence.
- (d) says further that at all material times any Alucobond PE and/or Alucobond Plus supplied by HVG in Australia for the Relevant Uses (or any of them) was supplied for purposes of being used in the design or construction of buildings (as defined in the BCA) by appropriately Qualified Professionals (as defined in paragraph 7(f) below) in a safe manner, compliant with all relevant standards, codes and legislation or regulations applicable to the design and/or construction of buildings in Australia as in force at the relevant time;

- (e) says further that different ACPs were commonly supplied in Australia for different purposes;
- (f) says further that at all material times, those persons to whom HVG supplied any Alucobond PE and Alucobond Plus for any one or more of the Relevant Uses and/or the manufacture of Third Party Products (as defined in paragraph 7(h) below) were persons having responsibility to assess the use of ACPs on buildings (as defined in the BCA and/or whether as part of design, specification, construction or certification) (**Qualified Professionals**);

**Particulars**

- A. Qualified Professionals include fire safety engineers, certifying authorities, architects and façade engineers as well as any developers and licenced contractors/subcontractors, fabricators or installers.
- B. In respect of the Applicant, the Qualified Professionals involved in the design and construction of the Shore Building included Modernise Installations.
- C. Further particulars may be provided following discovery and/or service of evidence.
- (g) says further that to the extent that HVG supplied any Alucobond PE and/or Alucobond Plus for any one or more of the Relevant Uses, those products were supplied only to Qualified Professionals in Australia (**Construction Industry Market**) and, at all material times, were not supplied to any person who is or was a “consumer” within the meaning of s. 4B of the TPA and/or s. 3 of the ACL;

**Particulars**

- A. At all material times HVG has marketed and promoted its products to the Construction Industry Market by way of:
- (1) attending industry trade fairs at which it offered the brochures particularised at paragraph 8 of the Amended Claim from time to time; and/or
- (2) placement of advertisements in industry publications.
- B. Further particulars may be provided following discovery and/or service of evidence.
- (h) says further that, at all material times, wherever any one or more of the Relevant Uses of Alucobond PE and/or Alucobond Plus involved the design and/or construction of a building product or system manufactured by a person other than HVG:

- (i) which incorporates cut, routed, sealed or otherwise altered flat sheets of Alucobond PE and/or Alucobond Plus together with other products, devices and substances including, without limitation, frames, sealants, adhesives, insulation, and attaching devices (including without limitation the fixed cassette method depicted on pp12-14 of the brochure titled “Alucobond Beyond Facades” particularised under paragraph 52 of the Amended Claim (**Beyond Façades Brochure**) and/or any other method); or
  - (ii) which comprise cassettes (including building products of the sort described at pp12-14 of the Beyond Façades Brochure) or other systems (in whole or in part) incorporating cut, routed, sealed and folded or otherwise altered sheets of Alucobond PE and/or Alucobond Plus together with other products, devices and substances including without limitation, frames, sealants, adhesives, insulation, and attaching devices
- ((i) and (ii) together or separately, “**Third Party Products**”), do not and did not constitute products supplied by HVG;

- (i) says further that at all material times, the use of Alucobond PE and/or Alucobond Plus for any of its intended purposes, including without limitation the Relevant Uses, is not (and was not) possible without specialised knowledge and/or training and/or specialised equipment which at all material times is not (and was not) sold or available to the general public; and

#### **Particulars**

- A. The specialised knowledge referred to includes and at all material times included:
  - (1) Interpretation of architectural drawings.
  - (2) Use of the “Fixed Cassette” fixing system for installation of Alucobond PE and/or Alucobond Plus.
- B. The specialised training referred to includes and at all material times included:
  - (1) Certificate III in Wall and Ceiling Lining.
  - (2) Certificate III in Signs and Graphics.

- C. The specialised equipment referred to includes and at all material times included:
  - (1) Vertical panel saws.
  - (2) CNC routers.
  - (3) Electric and air-powered hand tools including power saws, routers, drills, milling machines and/or dust extractors.
  - (4) Trolleys.
- D. Further particulars may be provided following discovery and/or service of evidence.
- (j) otherwise denies paragraph 7.

8. In response to paragraph 8, HVG:

- (a) as to sub-paragraph (a), says that at all material times HVG supplied a standard range of Alucobond PE and/or Alucobond Plus products to the Construction Industry Market which standard range varied from time to time as to the sizes, thicknesses and/or colours of each product offered to the Construction Industry Market;
- (b) admits sub-paragraph (b);
- (c) as to sub-paragraph (c), says the plea is embarrassing in that it fails to state any material fact said to constitute “technical support” (as that phrase is employed in sub-paragraph (c)), otherwise define the alleged content of that phrase and/or state any material fact capable of supporting the allegation that Alucobond PE and/or Alucobond Plus was “the subject of” any such alleged “technical support”;
- (d) repeats paragraph 5(b) above; and
- (e) otherwise does not admit paragraph 8.

## **B.2 ACPs with PE Cores**

9. In response to paragraph 9, HVG:

- (a) says that at all material times the core of Alucobond PE was constituted of 100% PE;
- (b) says that at all material times the core of Alucobond Plus is and was constituted of less than 30% PE (by weight);
- (c) admits that ACPs have aluminium cover sheets surrounding a “core”;
- (d) admits that different ACPs have cores comprised of a variety of materials which may include PE; and

(e) otherwise does not admit the allegations in paragraph 9.

10. In response to paragraph 10, HVG:

(a) repeats paragraph 9 above; and

(b) otherwise does not admit paragraph 10.

## **C State and Condition of the Goods (All Buildings)**

### **C.1 Combustibility and Fire Risk**

11. In response to paragraph 11, HVG:

(a) admits sub-paragraph (a) to the extent that PE is flammable, being a thermoplastic polymer; and

(b) otherwise does not admit paragraph 11.

12. In response to paragraph 12, HVG:

(a) admits sub-paragraph (a) to the extent that the aluminium cover sheets of Alucobond PE and/or Alucobond Plus are approximately 0.5mm thick;

(b) as to sub-paragraph (b), repeats paragraph 7(h) above but otherwise does not know and cannot admit sub-paragraph (b); and

(c) as to sub-paragraph (c), says that the heat within a building fire is dependent upon various factors including the type of fuel, building construction and/or environmental factors; and

(d) otherwise does not admit paragraph 12.

13. In response to paragraph 13, HVG:

(a) repeats paragraphs 6, 11 and 12 above;

(b) repeats paragraph 7(h) above and says that any Third Party Products do not comprise Alucobond PE or Alucobond Plus;

(c) repeats paragraph 26 below; and

(d) otherwise denies paragraph 13.

### **C.2 Risks associated with use of Alucobond PE Core Cladding**

14. In response to paragraph 14, HVG denies the allegations pleaded therein and says further:

(a) the suitable use of Alucobond PE or Alucobond Plus on a building (as defined in the BCA) must be determined by those Qualified Professionals with responsibility for the design, construction and/or certification of that building, having regard to

the particular characteristics and features of that building (including but not limited to other products used in the construction of the building in conjunction with the ACPs the subject of the Amended Claim) and the Relevant Codes and Standards (as defined in paragraph 18(a) below) applicable to that particular building at the relevant time;

- (b) it is and at all material times was reasonable to expect that, prior to using or installing Alucobond PE or Alucobond Plus on a building (as defined in the BCA), each of those Qualified Professional involved in the design and/or construction of that building would consider whether the product is or was appropriate for the intended use, having regard to the characteristics of that particular building, including but not limited to other products being used in the construction of the building; and
- (c) it is and at all material times was reasonable to expect that, prior to issuing any certification for a building (as defined in the BCA), the relevant Qualified Professional involved in the certification of that building would consider whether all products used on the building, including any Alucobond PE or Alucobond Plus, had been used in a safe way, in compliance with all Relevant Codes and Standards (as defined in paragraph 18(a) below), having regard to the characteristics of that particular building.

15. HVG does not admit paragraph 15.

## **C.2 Prohibition Risk Properties**

16. In response to paragraph 16, HVG:

- (a) admits that since March 2018, those ACPs with a core of PE content of 30% or more, have been the subject of safety alerts and Ministerial Guidelines prohibiting or restricting their use in buildings in certain jurisdictions across Australia;
- (b) will rely upon any safety alerts or Ministerial Guidelines (or other such document or legislation) for its full terms, meaning and effect;
- (c) says further that such alerts and Ministerial Guidelines apply to Alucobond PE by reason of its PE Core with a PE content of 30% or more;
- (d) says further that the alerts and Ministerial Guidelines:
  - (i) have prospective effect from the date they commenced and in respect of what uses of Alucobond PE they prohibit or restrict;
  - (ii) only prohibit or restrict particular types of uses of Alucobond PE on particular types of buildings; and



### Particulars

- A. The “Building Product Use Ban” issued on 10 August 2018 pursuant to s. 9(1) of the Building Products (Safety) Act 2017 (NSW).
  - B. The Victorian Minister for Planning’s “Ministerial Guideline” issued on 13 March 2018 pursuant to s. 188 of the Building Act 1993 (Vic).
  - C. The Government of Western Australia’s Department of Fire & Emergency Services DFES Built Environment Branch Guideline (GL) 17.
  - D. Further particulars may be provided following discovery and/or service of evidence.
- (e) says further that the use of Alucobond Plus is not prohibited by the alerts and Ministerial Guidelines referred to in sub-paragraph 16(d) above; and
  - (f) otherwise denies paragraph 16.

17. HVG denies paragraph 17.

## D STATE AND CONDITION OF THE GOODS (CLASS 2 TO 9 BUILDINGS)

### D.1 Non-compliance with BCA

#### D.1.1 Introduction: Relevant requirements

18. In response to paragraph 18, HVG:

- (a) admits that at all material times, the design and/or construction of buildings (as defined in the BCA) were subject to applicable standards, codes, legislation and/or regulations, including the Building Code of Australia (**BCA**) and/or the National Construction Code (**NCC**), each as amended from time to time (collectively, **Relevant Codes and Standards**); and
- (b) otherwise does not admit paragraph 18.

19. HVG admits paragraph 19.

20. In response to paragraph 20, HVG:

- (a) says the version of the BCA which came into force on 1 May 2010 (**2010 BCA**) is the only version applicable to Alucobond PE fitted to “Class 2” to “Class 9” (inclusive) buildings (as defined in the BCA) (collectively, **Class 2 to 9 Buildings**) between 18 February 2009 and 1 May 2016;

**Particulars to (a)**

- A. The applicable version of the BCA is determined by the date on which the application for a construction certificate or complying development certificate is made: ss. 136A and 145(b) of the EP&A Regulations.
  - B. An application for a construction certificate in respect of the Shore Building was lodged on 6 November 2010.
- (b) admits that at all material times Class 2 to 9 Buildings for the purposes of the 2010 BCA included:
- (i) all residential buildings, such as apartment buildings and townhouses, other than single dwelling houses or boarding houses, guest houses or hostels with less than 12 residents;
  - (ii) office buildings;
  - (iii) retail buildings, such as restaurants, cafes, bars, shops and kiosks;
  - (iv) factories and warehouses;
  - (v) buildings of a public nature, such as health care and aged care building; and
- (c) otherwise denies paragraph 20.

21. In response to paragraph 21, HVG:

- (a) admits sub-paragraph (a) to the extent that clause 1.5 of the 2010 BCA provides that, subject to clause 1.6, Class 2 to 9 Buildings must be so designed and constructed that they comply with the relevant provisions of Sections A to J (inclusive) of the 2010 BCA.
- (b) admits sub-paragraph (b); and
- (c) otherwise does not admit paragraph 21.

22. In response to paragraph 22, HVG:

- (a) repeats paragraph 20(a) above;
- (b) admits sub-paragraphs (a)(i) and (ii) but only to the extent that the relevant building for the purposes of the 2010 BCA is a Class 2 or 3 Building or a Class 4 part of a building;
- (c) admits sub-paragraphs (a)(iii) and (iv);
- (d) as to sub-paragraph (b):

- (i) admits that CP4 of the 2010 BCA provides that a material and an assembly must, to the degree necessary, resist the spread of fire to limit the generation of smoke and heat, and any toxic gases likely to be produced, appropriate to:
    - A. the “evacuation time” (as defined); and
    - B. the number, mobility and other characteristics of occupants; and
    - C. the function or use of the building;
    - D. any active “fire safety systems” (as defined) installed in the building; and
  - (ii) otherwise does not admit sub-paragraph (b);
  - (e) admits sub-paragraph (c);
  - (f) as to sub-paragraph (d):
    - (i) says that CP9 of the 2010 BCA provides that access must be provided to and around a building, to the degree necessary, for fire brigade vehicles and personnel to facilitate fire brigade intervention appropriate to:
      - A. the function or use of the building; and
      - B. the fire load; and
      - C. the potential fire intensity; and
      - D. the fire hazard; and
      - E. any active fire safety systems installed in the building; and
      - F. the size of any fire compartment; and
    - (ii) otherwise does not admit sub-paragraph (d);
  - (g) says that the phrase “Fire Resistance Performance Requirements” does not appear in any version of the BCA; and
  - (h) says further that requirements relating to “fire resistance” (as that phrase is employed in the BCA) have been amended from time to time in successive versions of the BCA; and
  - (i) otherwise does not admit paragraph 22.
23. HVG denies paragraph 23 and repeats paragraphs 22(g) and 22(h) above.

### D.1.2 Means of compliance with BCA requirements

24. In response to paragraph 24, HVG:

- (a) repeats paragraphs 20(a), 20(b), 21(a) and 22 above; and
- (b) says that for purposes of the 2010 BCA the performance requirements that a Class 2 Building was required to satisfy in respect of its fire resistance were those requirements prescribed by the 2010 BCA with respect to Class 2 Buildings requiring “Type A” construction;

#### Particulars to (b)

- A. Clauses A.0.2(b), A0.3(c), A3.2, C1.1 and Performance Requirements CP1, CP2, CP4 and CP6 to CP9 of the 2010 BCA.
- (c) says further that Class 2 Buildings requiring “Type A” construction (including, *inter alia*, the Applicant’s Shore Building), could have satisfied the performance requirements relating to fire resistance in the 2010 BCA by:
  - (i) complying with the “Deemed-to-Satisfy Provisions” (as that phrase is defined in the 2010 BCA); or
  - (ii) having a solution which complies with the performance requirements relating to fire resistance other than through complying with the Deemed-to-Satisfy Provisions (**Alternative Solution**) or is shown to be at least equivalent to the Deemed-to-Satisfy Provisions in the 2010 BCA; or
  - (iii) a combination of both 24(c)(i) and 24(c)(ii) above;
- (d) otherwise does not admit paragraph 24.

### D.1.3 Alucobond PE Core Cladding is “combustible” within the meaning of the BCA

25. In response to paragraph 25, HVG:

- (a) admits that Alucobond PE does not pass the AS 1530.1 combustibility test;
- (b) admits that Alucobond Plus does not pass the AS 1530.1 combustibility test; and
- (c) otherwise does not admit paragraph 25.

26. In response to paragraph 26, in respect of Alucobond PE and Alucobond Plus, HVG:

- (a) admits those products are deemed “combustible” for purposes of the 2010 BCA and BCA 2016 Amendment 1;

- (b) consequently, are not “non-combustible” for purposes of the 2010 BCA and 2016 BCA Amendment 1;
- (c) admits that an external wall of a Class 2 to 9 Building constructed wholly or in part using those products is deemed “combustible” for purposes of the 2010 BCA and 2016 BCA Amendment 1;
- (d) consequently, an external wall of a Class 2 to 9 Building constructed wholly or in part using those products is not “non-combustible” for purposes of the 2010 BCA and 2016 BCA Amendment 1; and
- (e) otherwise does not admit paragraph 26.

27. In response to paragraph 27, HVG:

- (a) admits that each of Alucobond PE and Alucobond Plus could comprise a “bonded laminate material” as that term is and was used in C1.12 of the BCA;
- (b) repeats paragraph 26 above; and
- (c) otherwise denies paragraph 27.

#### **D.1.4 Non-compliance with Deemed-to-Satisfy provisions**

28. In response to paragraph 28, HVG:

- (a) repeats paragraph 27 above; and
- (b) otherwise denies paragraph 28.

29. In response to paragraph 29, HVG:

- (a) repeats paragraph 27 above;
- (b) otherwise denies paragraph 29.

30. In response to paragraph 30, HVG:

- (a) repeats paragraph 26; and
- (b) otherwise denies paragraph 30

31. In response to paragraph 31, HVG:

- (a) repeats paragraphs 28 to 30 inclusive above; and
- (b) denies paragraph 31.

#### **D.1.5 Inability to form part of a compliant Alternative Solution**

32. In response to paragraph 32, HVG:

- (a) denies the allegations contained in paragraph 32;

- (b) says the verification methods contained in CV3 and AS 5113 were first introduced on or about 12 March 2018, being the date on which BCA 2016 Amendment 1 came into effect;
- (c) says further that at all material times Alucobond PE and/or Alucobond Plus:
  - (i) were suitable for the purposes identified in paragraph 0(b) and the Relevant Uses referred to in paragraph 7(c) above; and
  - (ii) further and in the alternative, at all material times were capable of being used by Qualified Professionals fitted to Class 2 to 9 Buildings for any of the Relevant Uses as part of an Alternative Solution and/or as part of a solution involving a combination of Deemed-to-Satisfy and Alternative Solution in accordance with the obligations imposed on those Qualified Professionals by the Relevant Codes and Standards.

**Particulars**

- A. HVG repeats paragraphs 0 and 14 above.
- B. Further particulars may be provided following discovery and/or service of evidence.

**D.1.6 Non-compliance with BCA**

- 33. In response to paragraph 33, HVG:
  - (a) repeats paragraph 7, 14 and 24, 31 and 32 above; and
  - (b) otherwise denies paragraph 33.
- 34. In response to paragraph 34, HVG:
  - (a) repeats paragraph 33 above; and
  - (b) otherwise denies paragraph 34.
- 35. HVG does not admit paragraph 35.

**D.2 BCA-Related Prohibition Risk**

- 36. In response to paragraph 36, HVG:
  - (a) admits that at all material times Alucobond PE and/or Alucobond Plus used as part of or as an attachment to an external wall or other building element of a Class 2 to 9 Building:
    - (i) could be determined by relevant government authorities to be non-compliant with Relevant Codes and Standards; and

- (ii) could be the subject of a legally-binding direction to be removed and/or replaced at the cost of the owner or leaseholder (as applicable);
- (b) repeats paragraph 32(c) above; and
- (c) otherwise denies paragraph 36.

## **E SUPPLY OF THE GOODS**

### ***E.1 Supply in trade or commerce for resupply***

37. In response to paragraph 37, HVG:

- (a) repeats paragraph 5(b) above;
- (b) admits the allegations contained in paragraph 37 to the extent that they:
  - (i) relate to supply of Alucobond PE and/or Alucobond Plus to the Construction Industry Market; and
  - (ii) such products were supplied pursuant to the 2010 Distributor Agreement or the 2015 Distributor Agreement; and
- (c) otherwise does not admit paragraph 37.

38. In response to paragraph 38, HVG:

- (a) repeats paragraph 37 above; and
- (b) to the extent of the supplies referred to in paragraph 37 above, admits paragraph 38 (**HVG Supplies**).

39. In response to paragraph 39, HVG:

- (a) admits that, in respect of the Alucobond PE and/or Alucobond Plus the subject of the HVG Supplies, HVG acquired those products from the First Respondent for the purpose of re-supplying them, in a non-altered form or condition, to Qualified Professionals within the Construction Industry Market;
- (b) says further that those Qualified Professionals who acquired Alucobond PE or Alucobond Plus referred to in paragraph 39(a) above acquired those products for the purpose of transforming, manipulating or fabricating them, or partially doing so, into Third Party Products, which did not comprise Alucobond PE or Alucobond Plus;
- (c) further or alternatively, says that those Qualified Professionals who acquired Alucobond PE or Alucobond Plus referred to in paragraph 39(a) above acquired those products for the purpose of:

- (i) using them up or transforming them, in trade or commerce in the course of a process; or
- (ii) in the course of repairing or treating other goods or fixtures on land;

**Particulars**

A. Any such Alucobond PE or Alucobond Plus was acquired for the purpose of using them up or transforming them, in trade or commerce, in the course of a process of production or manufacture or in the course of repairing or treating other goods or fixtures on land, within the meaning of s. 3(2) of the ACL and/or s. 4B(1) of the TPA, or were otherwise transformed such that they did not comprise Alucobond PE or Alucobond Plus.

(d) otherwise denies the allegations in paragraph 39.

40. In response to paragraph 40, HVG:

- (a) says the plea is embarrassing to the extent it makes allegations as to Relevant Buildings and/or Relevant Building Parts other than the Shore Common Property;
- (b) does now know and cannot admit that any Alucobond PE and/or Alucobond Plus was fitted on the Relevant Buildings and/or Relevant Building Parts owned, previously owned, and/or leased or previously leased by the Applicant and each Group Member;
- (c) cannot plead further to any specific allegation in paragraph 40 but in any event relies upon the following matters;
- (d) repeats paragraphs 37 to 39 above;
- (e) repeats paragraph 1 above and says that if (which is not admitted) any Third Party Products were fitted on the Relevant Buildings and/or Relevant Building Parts owned, previously owned and/or leased or previously leased by the Applicant and each Group Member:
- (f) such Third Party Products did not comprise Alucobond PE or Alucobond Plus; and
- (g) any Alucobond PE and/or Alucobond Plus employed to produce or manufacture such Third Party Products were not the subject of any relevant supply or re-supply;

**Particulars**

A. HVG repeats the particulars subjoined to paragraph 39(c) above.

(h) otherwise denies paragraph 40.

***E.1.2 Supply by HVG for resupply***



41. In response to paragraph 41, HVG:
- (a) repeats paragraph 39 above;
  - (b) admits sub-paragraph (a) but only to the extent that it relates to the HVG Supplies to the Qualified Professionals referred to in paragraph 39(a) above; and
  - (c) otherwise denies paragraph 41.
42. In response to paragraph 42, HVG:
- (a) repeats paragraph 5(b) above; and
  - (b) admits the allegations in paragraph 42 but only to the extent that they relate to HVG Supplies to the Qualified Professionals referred to in paragraph 39(a) above; and
  - (c) otherwise denies paragraph 42.
43. In response to paragraph 43, HVG:
- (a) repeats paragraphs 4(e), 5(b), 7(a) and 41 to 42 above;
  - (b) says further that, at all material times:
    - (i) Qualified Professionals within the Construction Industry Market were the only persons to whom HVG supplied Alucobond PE and/or Alucobond Plus under the HVG Supplies;
    - (ii) the Qualified Professionals referred to in subparagraph (i) above acquired any Alucobond PE and/or Alucobond Plus the subject of the HVG Supplies for the purpose of any of the Relevant Uses and/or the manufacture of any Third Party Products ;
  - (c) admits that the supplies of Alucobond PE and/or Alucobond Plus referred to in sub-paragraph (b) above were made in trade or commerce;
  - (d) says that by reason of the matters pleaded in paragraph 4(e) above, HVG is not deemed to have manufactured any of the Alucobond PE and/or Alucobond Plus supplied by it during the period from at least 2008 up until at least January 2011;
  - (e) otherwise denies paragraph 43.

**E.2 Supply to consumer otherwise than by sale by auction**

44. In response to paragraph 44, HVG:
- (a) says the plea in sub-paragraph (a) is embarrassing to the extent it relates to Group Members in that it fails to plead any material fact capable of supporting the

allegation that any Group Member was supplied with Alucobond PE and/or Alucobond Plus:

- (i) as a consumer within the meaning of the TPA and/or the ACL; or
  - (ii) at all;
- (b) says the plea in sub-paragraph (b) is embarrassing to the extent it relates to Group Members in that it fails to plead any material fact capable of supporting the allegation that any Group Member derived any ownership or leasehold interest in a Relevant Building or Relevant Building Part fitted with Alucobond PE and/or Alucobond Plus:
- (i) from a predecessor in title who was a consumer within the meaning of the TPA and/or the ACL; or
  - (ii) at all;
- (c) cannot plead further to any specific allegation in paragraph 44, but in any event HVG relies upon the following matters;
- (d) repeats paragraphs 0 and 8 above;
- (e) says further that each of Alucobond PE and/or Alucobond Plus is not a good of a kind ordinarily acquired for personal, domestic or household use or consumption within the meaning of s. 3 of the ACL or s. 4B of the TPA;
- (f) says further that any person within the Construction Industry Market to whom HVG supplied Alucobond PE or Alucobond Plus for the purpose of any of the Relevant Uses and/or the manufacture of any Third Party Product is not and was not a consumer within the meaning of s. 3 of the ACL or s. 4B of the TPA
- (g) further and in the alternative, if either Alucobond PE or Alucobond Plus is a good of a kind ordinarily acquired for personal, domestic or household use or consumption within the meaning of s. 3 of the ACL or s. 4B of the TPA (which is denied) then, in respect of the Applicant:
- (i) HVG supplied the Alucobond PE panels to Modernise Installations, who acquired the panels for the purpose of re-supply within the meaning of s 3(2)(a) of the ACL, and further or in the alternative, for the purpose of manufacturing Third Party Products and/or using up or transforming that Alucobond PE within the meaning of s. 3(2)(b) of the ACL;
  - (ii) by reason of the matter pleaded in sub-paragraph (g)(i) above, Modernise Installations referred to in (g)(i) was not a consumer within the meaning of s. 3 of the ACL;

- (iii) says that the Alucobond PE referred to in paragraph 44(g)(i) became a Third Party Product on a date no later than 1 August 2012 and therefore does not comprise Alucobond PE;

**Particulars**

- A. HVG repeats paragraphs 7(h) and 39(c) above.
- B. HVG refers to the Occupation Certificates particularised at D subjoined to paragraph 3 of the Amended Claim.

- (h) if (which is denied) any Alucobond PE or Alucobond Plus was acquired by the Applicant, denies that the Applicant acquired those products as, or from, a consumer or that it derived title to the products through or under a consumer;

**Particulars**

- A. Upon registration of strata plan 87231, the Shore Common Property (including any Alucobond PE or Alucobond Plus) vested in the Applicant as common property of the Shore Building pursuant to section 18(1) of the *Strata Schemes (Freehold Development) Act 1973* (NSW) without any act on the part of the Applicant or on the part of any other person including any “supply” within the meaning of the ACL or TPA.
- B. Neither Ronnstar Pty Limited nor Lawtow Pty Limited was a consumer, as it acquired any Alucobond PE or Alucobond Plus for the purpose of re-supply, further or in the alternative, for the purpose of using up or transforming the Alucobond PE or Alucobond Plus within the meaning of s. 3(2)(b) of the ACL.
- C. Further particulars may be provided following discovery and/or evidence.

- (i) further and in the alternative, repeats paragraph 7(h) above and says that any Alucobond PE and/or Alucobond Plus fitted to the Shore Building is and was at all material times a Third Party Product; and

**Particulars**

- A. HVG repeats sub-paragraphs (g) above and particular B of paragraph 7(f) above.
- B. Further particulars may be provided following discovery and/or service of evidence.

- (j) otherwise denies paragraph 44.

45. In response to paragraph 45, HVG:

- (a) says the plea is embarrassing to the extent it relates to Group Members in that it fails to plead any material fact capable of supporting the allegation that Group

Members were supplied with Alucobond PE and/or Alucobond Plus as alleged or at all;

- (b) cannot plead further to any specific allegation in paragraph 45 in relation to Group Members, but in respect of the Applicant:
  - (i) admits sub-paragraph (a) to the extent any Alucobond PE panels supplied by HVG were supplied at a cost of less than \$40,000 per panel, but otherwise denies sub-paragraph (a);
  - (ii) denies sub-paragraphs (b) and (c); and
- (c) otherwise does not admit paragraph 45.

46. In response to paragraph 46, HVG:

- (a) repeats paragraphs 44(e) to 44(g) inclusive above; and
- (b) denies paragraph 46.

47. In response to paragraph 47, HVG:

- (a) says the plea is embarrassing to the extent it relates to Group Members in that it fails to plead any material fact capable of supporting the allegation that:
  - (i) Alucobond PE and/or Alucobond Plus was supplied to any Group Member, Original Consumer Owner, and/or Original Consumer Lessee as alleged or at all; or
  - (ii) any Group Member, Original Consumer and/or Original Consumer Lessee did not acquire such Alucobond PE and/or Alucobond Plus (which alleged acquisition is not admitted) for any of the purposes identified in paragraph 47;
- (b) cannot plead further to any specific allegation in paragraph 47 in relation to Group Members, but in respect of the Applicant:
  - (i) repeats paragraph 44(g)(i) above and says further that Modernise Installations did acquire any Alucobond PE and/or Alucobond Plus for the purpose or purposes referred to in paragraph 47 of the Amended Claim and not as a “consumer” within the meaning of the TPA and/or CCA and/or ACL;
  - (ii) says that HVG did not supply any Alucobond PE and/or Alucobond Plus to the Applicant as alleged or at all; and
- (c) otherwise does not admit paragraph 47.

48. In response to paragraph 48, HVG:

- (a) repeats paragraphs 45 and 46 above and in the premises thereof says the plea is embarrassing to the extent it relates to Group Members;
- (b) cannot plead further to any specific allegation in paragraph 48 in relation to Group Members, but in respect of the Applicant:
  - (i) repeats paragraphs 45 to 47 inclusive above;
  - (ii) says further that the Applicant did not acquire any Alucobond PE and/or Alucobond Plus as a “consumer” as that term is used in the TPA and ACL in that the Applicant did not come into existence until a time after any “supply” (as that term is used in the TPA and/or ACL) had occurred;

**Particulars**

- A. HVG repeats paragraphs 3, 0, 43(b) and 44(e) to 44(h) inclusive above.
- B. Further particulars may be provided following discovery and/or service of evidence.

- (c) further and in the alternative, says that the Applicant did not acquire any Alucobond PE and/or Alucobond Plus as a “consumer” as that term is used in the TPA and ACL in that the statutory process pleaded in paragraph 3 of the Amended Claim does not constitute any “supply” or “acquisition” (as those terms are used in the TPA and/or ACL) of those products; and

**Particulars**

- A. HVG repeats the particulars subjoined to sub-paragraph (c) above.
- B. Further particulars may be provided following discovery and/or service of evidence.

- (d) otherwise does not admit paragraph 48.

49. In response to paragraph 49, HVG:

- (a) says the plea is embarrassing to the extent it relates to Group Members in that it fails to plead any material fact capable of supporting the allegation that:
  - (i) any Group Member or Original Consumer Owner or Original Consumer Lessee acquired any Alucobond PE and/or Alucobond Plus as alleged or at all; or
  - (ii) any Group Member or Original Consumer Owner or Original Consumer Lessee did not acquire Alucobond PE and/or Alucobond Plus (which alleged acquisition is not admitted) by way of auction;

- (b) cannot plead further to any specific allegation in paragraph 49 in relation to Group Members, but in respect of the Applicant repeats paragraph 48 above; and
- (c) otherwise denies the allegations in paragraph 49.

## **F REASONABLE EXPECTATION AS TO QUALITY OF GOODS**

### ***F.1 The kind and nature of the goods***

50. In response to paragraph 50, HVG repeats paragraphs 6 to 10 inclusive above and otherwise does not admit paragraph 50.

### ***F.2 Purposes for which goods were commonly supplied in Australia***

51. In response to paragraph 51, HVG:

- (a) repeats paragraph 0 above; and
- (b) otherwise denies paragraph 51.

### ***F.3 Representations about the goods***

#### **F.3.1 Representations as to quality and use of goods**

52. As to paragraph 52, HVG:

- (a) says the plea is embarrassing and that save as set out below, HVG is unable to plead to it;
- (b) says that, during the Relevant Period, it represented to those persons constituting the Construction Industry Market that Alucobond PE and Alucobond Plus were suitable for the purposes identified in paragraph 7 of this Defence;

#### **Particulars**

- A. The representations referred to in sub-paragraph (a) are expressly and/or impliedly contained in, inter alia, the words and images of the brochures referred to in the particulars to paragraph 52 of the Amended Claim.
- B. Further particulars may be provided after discovery and/or the service of evidence.
- (c) says that, during the Relevant Period, it represented to those persons constituting the Construction Industry Market that Alucobond PE and Alucobond Plus were capable of being used on or fitted to buildings by Qualified Professionals for the purposes identified in paragraph 32(c) above in accordance with the obligations imposed on those professionals by Relevant Codes and Standards, including without limitation the BCA and/or the NCC, as in force at the relevant time;

#### **Particulars**

The representation referred to in sub-paragraph (b) is to be inferred from the following matters:

- A. The use of products in the construction of buildings in NSW, including ACPs (including Alucobond PE and/or Alucobond Plus), is constrained by, inter alia, the EP&A Act and the EP&A Regulations. Equivalent legislation exists in other States and Territories.
- B. The EP&A Act and EP&A Regulations impose obligations on, inter alia, principal contractors, landowners, certifying authorities and consent authorities.
- C. The obligation to use building products, including ACPs, in a safe manner, in compliance with all relevant standards, codes and regulations, is on the builder, architect and/or the developer in respect of a building, and each of these person(s) must independently perform their duties in accordance with such standards, codes and regulations.
- D. The ultimate responsibility for ensuring building products, including ACPs, have been used in a safe manner, in compliance with all relevant standards, codes and regulations is on the certifying authority.
- E. HVG made information available to Qualified Professionals including without limitation installers, builders, architects, developers and certifiers in relation to the use of Alucobond PE and Alucobond Plus, including through its website.

(d) says further that, by using any one or more of the terms or phrases:

- (i) "PE";
- (ii) "polyethylene";
- (iii) "flammability"; and/or
- (iv) "normal flammability";

in connection with Alucobond PE in its brochures, HVG represented expressly or by implication or otherwise disclosed to the Construction Industry Market that Alucobond PE was flammable, or and/or "combustible" for purposes of the BCA, and/or was not "non-combustible" for purposes of the BCA, in that it contained PE;

#### **Particulars**

- A. The representation was express in so far as it contained the term(s) or phrase referred to in (i) to (iii) inclusive.
- B. The representation was implied by reason of the circumstances referred to in paragraphs 0 to 11 inclusive above.

- C. HVG refers to particular C subjoined to paragraph 52 of the Amended Claim and further or alternatively, the:
- 1) "Alucobond – At a Glance" brochure at p. 10.
  - 2) "Alucobond – Beyond Facades" brochure at pp. 8, 9 & 16.
  - 3) "Alucobond – 40 years of excellence" brochure at pp. 10, 11, 12 and 95.
  - 4) "Alucobond – Vision Materialized" brochure at pp. 14, 16 and 17.
  - 5) "Alucobond – The Face of Tomorrow Today" brochure at pp. 1 & 6.
  - 6) "Alucobond – The Face of Tomorrow Today" brochure at pp. 1, 6 and 8.
  - 7) "Alucobond – Façade Fascination" at p. 36.
  - 8) "Alucobond – Façade Fascination" at p. 36.
  - 9) "Alucobond – Now CodeMark Certified" flyer.
- D. Further particulars may be provided following discovery and/or service of evidence.

- (e) says that each of the representations referred to in sub-paragraphs (b), (c) and/or (d) above was conveyed only to the Construction Industry Market;
- (f) relies upon each of the documents particularised under paragraph 52 of the Amended Claim for its full terms and effect; and
- (g) otherwise denies paragraph 52.

53. As to paragraph 53, HVG says that:

- (a) admits that it represented to the Construction Industry Market in Australia from time to time that Alucobond PE and Alucobond Plus could be fabricated by Qualified Professionals prior to (or as part of being fitted to) buildings (as defined in the BCA), including by the Fabrication Methods; and
- (b) otherwise denies paragraph 53.

### ***F.3.2 Representations as to fire performance***

54. In response to paragraph 54, HVG:

- (a) repeats paragraphs 52 above;
- (b) admits that it made available to the Construction Industry Market in Australia from time to time, including through its website, test results demonstrating that Alucobond PE and/or Alucobond Plus had passed the following specified Australian or international fire safety tests; and



**Particulars**

- A. In respect of Alucobond PE, the tests that HVG represented that Alucobond PE had passed (from to time time) include the following:

<b>Country</b>	<b>Test</b>	<b>Result</b>
EU	EN 13501-1	Class D
Germany	DIN 4102-1	Class B2
	DIN 4102 Part 7 (VDIN ENV 1187)	Passed
Austria	ÖNorm A 3800	Class B1, TR1, Q1
	ÖNorm B 1301-1	Class D
Switzerland	VKF	Class 4.2
France	NF P 92-501	Class M1
	NF F 16-101	Class F0
Italy	CSE RF 2/75/A, RF3/77	Class 1
Scandinavia	NT-Fire 002	hardly inflammable
British Standards	BS 476, Part 6	Index $I \leq 12$ $i \leq 6$
	BS 476, Part 7	Class 1
		Therefore meets Class 0  (National Building Regulations)
Czech Republic	CSN 73 0862	Class B
Malaysia	Approved for external wall cladding up to 18 m height.	
Singapore	Approved for external wall cladding up to 10 m height.	
Japan	JIS A 1231	QNC
	JIS A 1321	Class 2
	JIS K6911	incombustible (F)

Republic of Korea	KSF 2257	Passed 30 min heating time (in combination with rock wool and gypsum board)
Australia	AS 1530, Part 3	Ignitability Index 0 Heat evolved Index 0 Spread of flame Index 0 Smoke developed Index 0-1
	AS 3837	Ignitability Index 0 Heat evolved Index 0 Spread of flame Index 0 Smoke developed Index 0-1
USA	UBC 17-5	passed
	ASTM E-162	Flame spread Index 0
	ASTM E-108	Passed
	modified	
	ASTM E-84	
	- Flame spread	Index 0
	- Fuel contribution	Index 0
	- Smoke density	Index 0

- B. In respect of Alucobond Plus, the tests that HVG represented that Alucobond Plus had passed (from to time time) include the following:

Country	Test	Result
EU	EN 13501-1	Class B, s1, d0

	BS8414	Pass
Germany	DIN EN 13501-1	Class B, s1, d0
	DIN 4102 Part 7 (VDIN ENV 1187)	Passed
Austria	ÖNORM EN 13501-1	Class B, s1, d0
Switzerland	VKF	Class 5.3
France	NF P 92-501	Class M1
British Standards	BS 476, Part 6	Index   $\leq 12$ i $\leq 6$
	BS 476, Part 7	Class 1
		Therefore meets Class 0
	BS8414	(National Building Regulations)
China	GB8625	Class B1
	GB8626	
	GB8627	
Malaysia	BS 476, Part 5	Class P
	BS 476, Part 6	Index 0
	BS 476, Part 7	Class 1
	Approved for any type of external wall cladding without restriction in height.	
Singapore	Approved for any type of external wall cladding without restriction in height.	
Australia	AS ISO 9705	Group 1
	EN 13501.1	Material
	NFPA 295	B-sl-dO
		Pass

	BS8414	Pass
USA	UBC 26-1 (ASTM D2015)	< 4708 BTU/lb.
	UBC 26-6 (ASTM D1929)	Self Ignition Temp. >
	UBC 26-7 (ASTM D635)	650 °F
	UBC 8-1 (ASTM E-84)	Passed
	- spread of flame index	Tested with exposed core:
	- smoke development index	≤ 15
	- spread of flame index	≤ 45
	- smoke development index	tested as composite
		≤ 5
		≤ 5
	UBC 26-9 (NFPA 285)	UBC Class 1
	(Intermediate Scale Multi-story Test)	Passed
	Combustion Toxicity Test, NY	Passed
	ASTM-E84	Class A
	NFPA 285	Passed
Canada	CAN/ULC-S 134-92 (Multi-story Test)	Passed

(c) otherwise denies paragraph 54.

### ***F.3.3 Representations as to compliance***

55. In response to paragraph 55, HVG:

- (a) repeats paragraph 52 to 54 inclusive above;
- (b) says that the representation sought to be implied is inconsistent with the contents of the documents particularised under paragraph 55 of the Amended Claim;

- (c) relies upon the documents particularised under paragraph 55 of the Amended Claim for their full terms and effect; and
- (d) denies paragraph 55.

**F.4 No warning as to risks**

56. As to paragraph 56, HVG:

- (a) repeats paragraphs 0, 14 and 52 to 55 inclusive above;
- (b) does not know and cannot admit that the fire behaviour of Alucobond PE or Alucobond Plus in any Relevant Building or Relevant Building Part in a fire was or is necessarily affected in any material way by the application of any of the Fabrication methods to Alucobond PE or Alucobond Plus;
- (c) denies that HVG or 3A was required to publicly disclose any of the Suitability Warning, Limitation of Use Warning or Fabrication Warning;
- (d) says further and in the alternative that at all material times the following were matters of common knowledge within the Construction Industry Market in Australia:
  - (i) that Alucobond PE and/or Alucobond Plus had not been tested under AS 1530.1 and/or could not pass the AS 1530.1 combustibility test;

**Particulars**

- A. HVG relies on the following documents as if set out in full:
  - i. Particulars A.a.i. to A.a.xiv. inclusive, and B.a.i. to B.a.v. inclusive, subjoined to paragraph 53 (b) of the Amended Claim.
  - ii. Particulars B.a.i. to B.a.vi. inclusive, B.b.i to B.b.ii inclusive, and C.a.i. to C.a.xiv. inclusive subjoined to paragraph 54 of the Amended Claim.
  - iii. Particulars B.a.x and B.a.xiii subjoined to paragraph 55 (b) of the Amended Claim;
  - iv. Particulars C.e.iii, D.a.iv to D.a.v inclusive and D.d.i to D.d.iii inclusive subjoined to paragraph 55 (b) of the Amended Claim;
- B. None of the documents referred to in A above contain any statement (either express or implied) to the effect that Alucobond PE and/or Alucobond Plus (and/or ACPs similar in composition to Alucobond PE and/or Alucobond Plus):
  - i. had been tested under AS 1530.1; and/or

ii. had passed, would pass, or could pass, the AS 1530.1 combustibility test.

C. Further particulars may be provided following discovery and/or service of evidence.

(ii) that, if any product proposed to be used as part of or as an attachment to an external wall of a Class 2 to 9 Building of either “Type A” and/or “Type B” construction could not be shown to comply with the Deemed-to-Satisfy fire performance requirements of the BCA, then it was necessary in respect of such products to obtain a performance assessment in the form of a fire engineered solution so as to ensure that the product could be employed as part of an Alternative Solution and/or a system comprising a combination of Deemed-to-Satisfy and Alternative Solution;

**Particulars**

A. In the design and/or construction of buildings (as defined in the BCA) the Construction Industry Market was required to, and was aware that it was required to, comply with applicable standards, codes and regulations, including the Relevant Codes and Standards.

B. Further particulars may be provided following discovery and/or service of evidence.

(iii) that a Qualified Professional in the Construction Industry Market proposing to use Alucobond PE and/or Alucobond Plus for the purpose of any of the Relevant Uses or otherwise in the design or construction of a building (as defined in the BCA) was not entitled to rely upon any document that contained no reference to AS 1530.1 as evidence that Alucobond PE and/or Alucobond Plus had been tested under AS 1530.1 and/or that either of those products had passed the AS 1530.1 test and/or that either of those products would, or could, pass the AS 1530.1 test;

**Particulars**

A. HVG repeats paragraph 0 above and particular A subjoined to subparagraph (ii) above.

B. Further particulars may be provided following discovery and/or service of evidence.

- (iv) since at least 2013, that Alucobond PE was certified under the CodeMark scheme for “Type C” constructions only for purposes of the 2010 BCA;

**Particulars**

- A. Alucobond PE “CodeMark Certificate of Conformity” dated 12 July 2013 (CMA-CM40022);
- B. Alucobond PE “CodeMark Certificate of Conformity” (CMA-CM40022 Rev March 2014);
- C. Alucobond PE “CodeMark Certificate of Conformity” (CMA-CM40022 Rev May 2015);
- D. Copies of all relevant Alucobond PE CodeMark Certificates were publicly available for download from the JAS-ANZ website during the Relevant Period;
- E. Further particulars may be provided following discovery and/or service of evidence.

- (v) that the fire behaviour of Alucobond PE and/or Alucobond Plus would (or could) be affected by matters including the type of building or construction for purposes of the 2010 BCA and the location or manner in which the products had been treated, fabricated and/or installed (including without limitation the Fabrication Methods) and/or any other building products or materials used on the particular building,

**Particulars**

- A. In the design and/or construction of buildings (as defined in the BCA) the Construction Industry Market was required to, and was aware that it was required to, comply with applicable standards, codes and regulations, including the Relevant Codes and Standards.
- B. Further particulars may be provided following discovery and/or service of evidence.

(collectively, **Known Fire Properties**); and

- (e) says further that at all material times it was reasonable to expect that Qualified Professionals in the Construction Industry were aware of the Known Fire Properties in relation to Alucobond PE and/or Alucobond Plus;
- (f) says further that, in any event, the representations and information substantially to the same effect as the Suitability Warning and Limitation of Use Warning were sufficiently conveyed by reason of the matters pleaded in paragraph 52(d) above

and HVG relies on the documents there particularised for their full terms and effect; and

(g) otherwise denies paragraph 56.

57. In response to paragraph 57, HVG:

(a) repeats paragraphs 12, 52 to 54 inclusive and 56 above; and

(b) denies the allegations in paragraph 57.

58. In response to paragraph 58, HVG:

(a) repeats paragraphs 52 to 54 inclusive and paragraph 56 above;

(b) denies the allegations in sub-paragraphs (a) and (b) to the extent they relate to HVG; and

(c) otherwise does not admit paragraph 58.

59. HVG does not admit paragraph 59.

60. HVG does not admit paragraph 60.

#### ***F.5.1 All buildings***

61. In response to paragraph 61, HVG:

(a) repeats paragraphs 0,14, 20, 32(c) above and 50 to 58 inclusive above; and

(b) denies the allegations in paragraph 61.

#### ***F.5.2 Class 2 to 9 buildings***

62. In response to paragraph 62, HVG:

(a) repeats paragraphs 0,14, 20, 32(c) above and 50 to 58 inclusive above; and

(b) denies the allegations in paragraph 62.

### **G. GOODS NOT OF MERCHANTABLE OR ACCEPTABLE QUALITY**

#### ***G.1 Goods not of merchantable quality***

63. In response to paragraph 63, HVG:

(a) says the plea is embarrassing to the extent it refers to any specific use of Alucobond PE and/or Alucobond Plus in the design or construction of any Relevant Building and/or Relevant Building Part whether as part of a Deemed-to-Satisfy solution, an Alternative Solution, or a combination of both;

(b) further and in the alternative, says the plea is embarrassing to the extent it refers to Alucobond Plus; and



- (c) therefore cannot plead further to any specific allegation in paragraph 63 and otherwise repeats paragraph 61 above.
64. In response to paragraph 64, HVG:
- (a) repeats paragraphs 63(a) and 63(b) above and in those premises says the plea is embarrassing; and
  - (b) therefore cannot plead further to any specific allegation in paragraph 64 and otherwise repeats paragraph 61 above.
65. In response to paragraph 65, HVG:
- (a) repeats paragraphs 63(a) and 63(b) above and in those premises says the plea is embarrassing; and
  - (b) therefore cannot plead further to any specific allegation in paragraph 65 and otherwise repeats paragraph 62 above.
66. In response to paragraph 66, HVG:
- (a) repeats paragraphs 63(a) and 63(b) above and in those premises says the plea is embarrassing;
  - (b) therefore cannot plead further to any specific allegation in paragraph 66, but in any event HVG relies upon the following matters;
  - (c) any Alucobond PE and/or Alucobond Plus fitted to a Relevant Building or Relevant Building Part is not and was not required to be of Merchantable Quality;

**Particulars**

- A. In respect of the Applicant, if any Alucobond PE fitted to the Shore Building was supplied to any consumer within the meaning of the TPA (which is denied), such supply was made on a date after 31 December 2010.
  - B. In respect of Group Members, further particulars will be provided following discovery and evidence
- (d) further, and in the alternative, to the extent paragraph 66 makes allegations in respect of:
- (i) any product other than the Alucobond PE panels fitted to the Shore Building owned by the Applicant; and/or
  - (ii) any Relevant Building and/or Relevant Building Part other than the Shore Building,
- (collectively, **TPA Claims of Group Members**),

the Amended Claim pleads no material facts in support of those alleged TPA Claims of Group Members, including without limitation:

- (iii) the State or Territory where the Relevant Building and/or Relevant Building Part is located;
- (iv) the class of the Relevant Building and/or Relevant Building Part and type of construction required for purposes of the 2010 BCA;
- (v) the product (or products) allegedly fitted to the Relevant Building and/or Relevant Building Part;
- (vi) the version of the BCA said to be applicable to the construction of the Relevant Building and/or Relevant Building Part;
- (vii) the identity of the alleged Consumer and/or Original Consumer Owner and/or Original Consumer Lessee; and
- (viii) when and how the alleged Consumer and/or Original Consumer Owner and/or Original Consumer Lessee is said to have been supplied with and/or acquired the relevant product(s),

such that paragraphs 66 is embarrassing in respect of the TPA Claims of Group Members and HVG cannot plead further to those allegations;

- (e) further and in the alternative, if the Alucobond PE fitted to the Shore Building was required to be (but was not) of Merchantable Quality (which is denied), the only reason or reasons why those goods were not of Merchantable Quality were specifically drawn to the consumer's attention before the consumer agreed to the supply, such that those goods are taken to be of Merchantable Quality.

**Particulars**

- A. At all material times, HVG's website and/or publicly available brochures identified Alucobond PE as containing a PE Core.
- B. Further particulars may be provided following discovery and/or service of evidence.

67. In response to paragraph 67, HVG:

- (a) repeats paragraphs 63 to 66 inclusive above; and
- (b) otherwise denies paragraph 67.

**G.2 Non-compliance with acceptable quality guarantee**

68. In response to paragraph 68, HVG:

- (a) admits that the Acceptable Quality Guarantee, as that term is defined in the Amended Claim, applies to goods supplied in trade or commerce to a consumer between 1 January 2011 and 14 February 2019;
  - (b) denies that the Acceptable Quality Guarantee, as that term is defined in the Amended Claim, applies to goods supplied in trade or commerce to a consumer before 1 January 2011;
  - (c) repeats paragraph 44 above; and
  - (d) otherwise denies paragraph 68.
69. In response to paragraph 69, HVG:
- (a) admits that subject to s. 54(4) of the ACL, in order for goods supplied in trade or commerce to a consumer to be in compliance with the Acceptable Quality Guarantee, the relevant goods are required to be:
    - (i) fit for all the purposes of which goods of that kind are commonly applied; and
    - (ii) acceptable in appearance and finish; and
    - (iii) free from defects; and
    - (iv) safe; and
    - (v) durable,as a reasonable consumer fully acquainted with the state and condition of the goods (including any hidden defects in the goods), would regard as acceptable having regard to the matters in s. 54(3) of the ACL;
  - (b) repeats paragraphs 44, 66 and 68 above; and
  - (c) otherwise denies paragraph 69.
70. In response to paragraph 70, HVG:
- (a) repeats paragraphs 63(a), 63(b) and 66(b) to 66(d) inclusive above and in those premises says the plea is embarrassing;
  - (b) therefore cannot plead further to any specific allegation in paragraph 70, but in any event HVG repeats paragraph 44 above; and
  - (c) otherwise denies the allegations in paragraph 70.
71. In response to paragraph 71, HVG:
- (a) repeats paragraphs 70(a) and 70(b) above; and

(b) otherwise denies paragraph 71.

72. In response to paragraph 72, HVG:

(a) repeats paragraphs 70(a) and 70(b) above; and

(b) otherwise denies paragraph 72.

73. In response to paragraph 73, HVG:

(a) repeats paragraphs 68 and 69 above;

(b) says further that to the extent paragraph 73 makes allegations in respect of:

(i) any product other than the Alucobond PE panels fitted to the Shore Building; and/or

(ii) any building other than the Shore Building,

(collectively, **ACL Claims of Group Members**),

the Amended Claim contains no factual allegations in respect of those ACL Claims of Group Members including without limitation the following:

(i) the State or Territory where the Relevant Building and/or Relevant Building Part is located;

(ii) the class of the Relevant Building and/or Relevant Building Part and type of construction required under the 2010 BCA;

(iii) the product (or products) allegedly fitted to the Relevant Building and/or Relevant Building Part;

(iv) the version of the BCA said to be applicable to the construction of the Relevant Building and/or Relevant Building Part;

(v) the identity of the alleged 'consumer' and/or the alleged 'affected person' and/or the alleged Original Consumer Owner and/or the alleged Original Consumer Lessee; and

(vi) when and how the alleged consumer and/or Original Consumer Owner and/or Original Consumer Lessee is said to have been supplied with or otherwise acquired the relevant product(s),

such that paragraph 73 is embarrassing in respect of the ACL Claims of Group Members and HVG cannot plead to those allegations;

(c) denies the allegations in respect of Alucobond PE fitted to the Shore Building; and

- (d) in the alternative, says that if the Alucobond PE fitted to the Shore Building was required to be (but was not) in compliance with the Acceptable Quality Guarantee (which is denied), the only reason or reasons why those goods did not comply were specifically drawn to the consumer's attention before the consumer agreed to the supply, such that those goods are taken to comply with the Acceptable Quality Guarantee; and
- (e) otherwise denies paragraph 73.

**Particulars**

- A. At all relevant times, HVG's website and/or publicly available brochures identified Alucobond PE as containing a PE Core.
- B. Further particulars may be provided following discovery and/or service of evidence.

74. In response to paragraph 74, HVG:
- (a) repeats paragraph 73 above; and
  - (b) otherwise denies paragraph 74.

**H. MISLEADING OR DECEPTIVE REPRESENTATIONS AND CONDUCT**

***H.1 False or misleading representations about goods***

75. In response to paragraph 75, HVG:
- (a) repeats paragraphs 52 to 54 inclusive and 56 above;
  - (b) otherwise denies the allegations in paragraph 75.
76. In response to paragraph 76, HVG:
- (a) repeats paragraph 75(a) above; and
  - (b) otherwise denies paragraph 76.
77. In response to paragraph 77, HVG:
- (a) repeats paragraphs 0, 52 and 56 above;
  - (b) admits that the representations referred to in paragraph 52 above were representations as to the suitability of Alucobond PE and/or Alucobond Plus for the uses referred to in paragraph 0, subject to the matters pleaded in paragraph 56(d) above; and
  - (c) otherwise denies paragraph 77.
78. In response to paragraph 78, HVG:
- (a) repeats paragraphs 53(a), 77(a) and 77(b) above;

(b) otherwise denies paragraph 78.

79. In response to paragraph 79, HVG:

(a) repeats paragraphs 53(a), 77(a) and 77(b) above;

(b) otherwise denies paragraph 79.

80. In response to paragraph 80, HVG:

(a) repeats paragraphs 53(a), 77(a) and 77(b) above;

(b) otherwise denies paragraph 80.

81. HVG denies paragraph 81.

## ***H.2 Misleading conduct as to the nature of goods***

82. In response to paragraph 82 HVG:

(a) repeats paragraphs 75 to 80 inclusive above; and

(b) denies the allegations in paragraph 82.

## **I. LOSS AND DAMAGE**

### ***1.1 Entitlement to compensation for non-compliance with consumer guarantees***

83. As to paragraph 83, HVG:

- (a) says that to the extent paragraph 83 makes allegations in respect of the ACL Claims of Group Members and/or the TPA Claims of Group Members, the Amended Claim contains no factual allegations in respect of those matters including but not limited to factual allegations regarding at least the matters referred to in paragraphs 66(d) and/or 73(b) above, such that paragraph 83 is embarrassing in respect of the ACL Claims of Group Members and the TPA Claims of Group Members and HVG cannot plead further to those allegations;
- (b) in any event repeats paragraphs 0, 8, 14, 24, 32, 44, 66, 68 and 73 above and denies that the Applicant or any Group Member has suffered loss and damage as alleged; and
- (c) in the alternative, says that the Applicant and Group Members have no suffered loss and damage as alleged to the extent that they could successfully apply to State government agencies for funding for the replacement of ACPs on a Relevant Building or Relevant Building Part.

#### **Particulars**

- A. Cladding Safety Victoria rectification funding guidelines reviewed 19 December 2019.

- B. Victorian government cladding rectification agreements.
  - C. Further particulars will be provided following discovery and/or service of evidence.
84. HVG denies paragraph 84.
85. As to paragraph 85, HVG:
- (a) repeats paragraphs 0, 8, 14, 24, 32, 66, 68 and 73 above;
  - (b) in respect of each Group Member:
    - (i) denies that any Group Member is an “affected person” within the meaning of s. 2 of the ACL;
    - (ii) otherwise denies that each Group Member is entitled to recover damages from HVG in accordance with s. 271 and/or s. 272 of the ACL;
    - (iii) denies the allegations in paragraphs 85(b)(i) and (ii); and;
    - (iv) otherwise denies that each Group Member is entitled to be compensated by HVG in accordance with s. 74D of the TPA;
  - (c) in respect of the Applicant:
    - (i) denies that the Applicant is an “affected person” within the meaning of s. 2 of the ACL;
    - (ii) otherwise denies that the Applicant is entitled to recover damages from HVG in accordance with s. 271 and/or s. 272 of the ACL;
    - (iii) denies that the Applicant is a Consumer or a person who acquired the goods for the purposes of s. 74D(d) of the TPA; and
    - (iv) otherwise denies that the Applicant is entitled to be compensated by HVG in accordance with s. 74D of the TPA;
  - (d) in the alternative, says that if Alucobond PE or Alucobond Plus was required to (and did not) comply with Acceptable Quality Guarantee (which is denied), that:
    - (i) the reason the Acceptable Quality Guarantee was not complied with is only because of an act, default or omission of, or a representation made by: one or more of the person(s) responsible for using the Alucobond PE and / or Alucobond Plus on the Relevant Building or Relevant Building Part and/or certifying the Relevant Building;
    - (ii) by reason of the matters pleaded in paragraph 85(d)(i) above, s. 271(1) of the ACL does not apply to any claim for loss or damage by the Applicant or any Group Member; and

- (iii) HVG is not liable for damages under s. 272 of the ACL;

**Particulars**

- A. In respect of the Applicant, the persons responsible for using the Alucobond PE on the Shore Building include the architect, builder, installer and/or the certifier.
- B. HVG repeats the particulars subjoined to paragraph 44(i) above.
- C. Further particulars may be provided following discovery and/or the service of evidence.
- (e) further and in the alternative says that if Alucobond PE or Alucobond Plus were required to be (and were not) of Merchantable Quality (which is denied), that:
- (i) the Alucobond PE or Alucobond Plus were only not of Merchantable Quality by reason of an act or default of a person or persons occurring after the goods had left the control of HVG;
- (ii) by reason of the matters pleaded in paragraph 85(e) above, s. 74D(1) of the TPA does not apply to any claim for loss or damage by the Applicant or any Group Member; and
- (iii) HVG is not liable for compensation under s. 74D(1) of the TPA.

**Particulars**

- A. HVG repeats the particulars subjoined to sub-paragraph (d)(iii) above.
- B. Further particulars may be provided following discovery and/or the service of evidence.

***1.2 Entitlement to statutory compensation for misleading representations***

86. In response to paragraph 86, HVG:

- (a) repeats paragraphs 0 and 52 to 56 inclusive above; and
- (b) denies paragraph 86.

87. In response to paragraph 87, HVG:

- (a) says the plea is embarrassing in that it fails to state any material fact capable of supporting any allegation that any person in the Relevant Market (as that term is used in in paragraph 87(a) of the Amended Claim) would have designed, specified, certified or used, any building product, material, system or solution other than Alucobond PE and/or Alucobond Plus and/or any ACP similar to those products;



- (b) therefore cannot plead further to any specific allegation in paragraph 87, but in any event HVG relies upon the following matters;
- (c) HVG repeats paragraph 44 and says that:
  - (i) the Applicant did not acquire any Alucobond PE and/or Alucobond Plus as a consumer within the meaning of the TPA and/or ACL;
  - (ii) any Alucobond PE and/or Alucobond Plus supplied to Modernise Installations in respect of the Shore Building is and was at all material times subsequent to that supply a Third-Party Product; and
  - (iii) denies that any Group Member acquired any Alucobond PE and/or Alucobond Plus as an “Ultimate Consumer” (as that term is used in the Amended Claim) or alternatively as a consumer within the meaning of the TPA and/or ACL; and
- (d) otherwise denies the allegations in paragraph 87.

88. In response to paragraph 88, HVG:

- (a) repeats paragraph 87 above; and
- (b) otherwise denies the allegations in paragraph 88.

89. In response to paragraph 89, HVG:

- (a) repeats paragraph 83 above;
- (b) says that state government schemes may wholly or partly provide compensation or other funding for costs associated with rectification of ACPs including Alucobond PE and/or Alucobond Plus and/or Third Party Products; and

#### **Particulars**

- A. HVG repeats the particulars subjoined to paragraph 83(c) above.
- (c) otherwise denies paragraph 89.

#### **J. EXPIRY OF RELEVANT LIMITATION PERIOD UNDER ACL OR TPA**

90. If (which is denied) either of Alucobond PE or Alucobond Plus did not comply with the Acceptable Quality Guarantee as alleged in paragraphs 73 and 74 of the Amended Claim (**Acceptable Quality Breach**), in so far as the Applicant or any Group Member claims damages within the meaning of s. 271 of the ACL, HVG says that:

- (a) if any such action for damages is not commenced within 3 years after the day on which the affected person first became aware, or ought reasonably to have been aware, that the guarantee to which the action relates has not been complied with within the meaning of s. 273 of the ACL, that action is time barred; and

- (b) the Applicant or any Group Member knew, or alternatively ought reasonably to have known of the Acceptable Quality Breach (which is denied) by a date no later than November 2015.

**Particulars**

- A. On 25 November 2014, the fire referred to as the “Lacrosse Tower fire” occurred in a building situated at Docklands in Melbourne, which had been fitted with ACPs containing a PE core referred to and known as “Alucobest”.
- B. In or about November 2015 the Senate Economic References Committee held public hearings concerning, among other things, the Lacrosse Building fire referred to in particular A above.
- C. Further particulars may be provided following discovery and/or service of evidence.

91. Further and in the alternative, if (which is denied) either of Alucobond PE or Alucobond Plus was not of Merchantable Quality as alleged in paragraphs 66 and 67 of the Amended Claim, in so far as the Applicant or any Group Member claims compensation within the meaning of s. 74D of the TPA, HVG says that:

- (a) an action under s. 74D may only be commenced within 3 years after the day on which the cause of action accrued being the day on which the consumer or person who acquired the goods from, or derived title to the good through or under, the consumer first became aware, or ought reasonably to have become aware that the goods were not of merchantable quality: s. 74J(1) and s. 74J(2)(a)(iii);
- (b) the Applicant or any Group Member became aware, or ought reasonably to have become aware that Alucobond PE and/or Alucobond Plus were not of merchantable quality by a date no later than November 2015; and

**Particulars**

- A. HVG repeats the particulars subjoined to paragraph 90 above.
- (c) it is a defence to an action under s. 74D if the action was not commenced within 10 years of the time of the first supply to a consumer to which the action relates: s. 74J(3).

92. Further and in the alternative to paragraph 91 above, if (which is denied) any Alucobond PE and/or Alucobond Plus was not of Merchantable Quality as alleged in paragraphs 66 and 67 of the Amended Claim, in so far as the Applicant or any Group Member claims compensation within the meaning of s. 74D of the TPA, HVG:

- (a) repeats paragraph 91(c) above;
- (b) says that any claims of the Applicant and/or the Group Members that Alucobond PE and/or Alucobond Plus were not of Merchantable Quality based upon the:
  - (i) Prohibition Risk Properties; and/or
  - (ii) BCA Non-compliance Risk Properties; and/or
  - (iii) BCA-related Prohibition Risk Properties,
 (as those terms are used in the Amended Claim), were introduced on 3 March 2020 and do not arise out of the same or alternatively substantially the same facts as pleaded in the Applicant's Statement of Claim filed on 14 February 2019; and
- (c) those claims are out of time for the purposes of any such claim arising on or before 3 March 2010.

93. Further and in the alternative, if (which is denied) HVG engaged in the Misleading Conduct as alleged in the Amended Claim, in so far as the Applicant or any Group Member claims damages under the ACL, HVG says that:

- (a) any such action may be commenced at any time within 6 years after the day on which the cause of action that relates to the conduct accrued: s. 236(2);
- (b) any such action that is not commenced within 6 years after the day on which the cause of action that relates to the conduct accrued is time-barred;
- (c) in respect of the Applicant, any cause of action (if any) in respect of the alleged Misleading Conduct accrued on a date no later than 24 August 2012 and accordingly any such action is time-barred; and

**Particulars**

- A. HVG repeats paragraph 3(c) above.
- (d) in respect of Group Members, any cause of action (if any) in respect of the alleged Misleading Conduct accrued on a date no later than the date on which the subject Alucobond PE and/or Alucobond Plus was fitted to the Relevant Building or Relevant Building Part, or alternatively, in the case of any Group Members that are bodies corporate under the SSMA in New South Wales (or cognate legislation in other States or Territories), the date of registration of the relevant body corporate.

**Particulars**

- A. Particulars will be provided following discovery and/or service of evidence at the time of determination of any Group Member's individual claim.
94. Further and in the alternative, if (which is denied), HVG engaged in the Misleading Conduct as alleged in the Amended Claim, in so far as the Applicant or any Group Member claims damages under the TPA, HVG says that:
- (a) any such action must be commenced within 6 years after the day on which the cause of action that relates to the conduct accrued: s. 82(2);
  - (b) any such action which is not commenced within 6 years after the day on which the cause of action that relates to the conduct accrued is time-barred;
  - (c) further and in the alternative, in respect of Group Members, any cause of action (if any) in respect of the alleged Misleading Conduct accrued on a date no later than the date on which the subject Alucobond PE and/or Alucobond Plus was fitted to the Relevant Building or Relevant Building Part, or alternatively, in the case of any Group Members that are bodies corporate under the SSMA in New South Wales (or cognate legislation in other States or Territories), the date of registration of the relevant body corporate; and
  - (d) further and in the alternative, if any cause of action under ss. 53 of 55 of the TPA and/or ss. 29 or 33 of the ACL in respect of Group Members accrued before 3 March 2014, HVG relies upon ss. 82(2) and 87(1CA) of the TPA and/or ss. 236(2) and 237(3) of the ACL and says that the cause of action is not maintainable.

**Particulars**

- A. HVG repeats the particulars subjoined to paragraph 93(d) above.

Date: 7 May 2020



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Signed by Wesley Andrew Edwin Rose  
Lawyer for the Second Respondent

This pleading was prepared by Sparke Helmore and settled by Sam Adair, Nuala Simpson and Nicholas Owens SC of Counsel.

### Certificate of lawyer

I Wesley Andrew Edwin Rose certify to the Court that, in relation to the defence filed on behalf of the Respondent, the factual and legal material available to me at present provides a proper basis for:

- (a) each allegation in the pleading; and
- (b) each denial in the pleading; and
- (c) each non admission in the pleading.

Date: 7 May 2020

A handwritten signature in black ink, appearing to read 'W Rose', is written over a light blue horizontal line. The signature is enclosed within a faint, light blue oval shape.

Signed by Wesley Andrew Edwin Rose  
Lawyer for the Second Respondent