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Details of Filing

Document Lodged:	Defence - Form 33 - Rule 16.32
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File Title:	THE OWNERS - STRATA PLAN NO 91086 v FAIRVIEW ARCHITECTURAL PTY LTD ACN 111 935 963
Registry:	NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA



A handwritten signature in blue ink, reading "Sia Lagos".

Dated: 19/05/2020 9:23:04 AM AEST

Registrar

Important Information

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Amended Defence

[filed pursuant to order 1. made by His Honour Justice Wigney on 18 May 2020]

No. NSD940/2019

Federal Court of Australia

District Registry: New South Wales

Division: General

The Owners - Strata Plan No 91086

Applicant

Fairview Architectural Pty Limited (ACN 111 935 963)

Respondent

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Filed on behalf of (name & role of party) Fairview Architectural Pty Limited, Respondent

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PRELIMINARY MATTERS

In this Amended Defence, the Respondent adopts the definitions in the Applicant's Amended Statement of Claim filed on 3 March 2020 (**ASOC**), and defines further terms in paragraph 91 hereto.

A. PARTIES AND GROUP MEMBERS

A.1 The Group Members

1. As to paragraph 1, the Respondent:
 - (a) does not know and cannot admit the allegations therein;
 - (b) does not admit that the persons identified therein constitute a class for the purpose of a claim under the ACL or the TPA; and
 - (c) says that that it cannot plead to subparagraphs (b) and (d) because they are embarrassing.
2. The Respondent does not admit paragraph 2.

A.2 The Applicant

3. The Respondent admits paragraph 3.
4. The Respondent admits paragraph 4.

B. THE GOODS

B.1 ACPs and Vitrabond

5. In response to paragraph 5:
 - (a) as to subparagraph 5(a), the Respondent says that Vitrabond PE Core Cladding:
 - (i) are and were goods of a kind commonly known as "combustible aluminium composite panels" or "Combustible ACPs";
 - (ii) are not and were not goods of a kind commonly known as "non-combustible aluminium composite panels" or "Non-Combustible ACPs"; and
 - (iii) are more generally goods of a kind commonly known as "aluminium composite panels", "cladding" and "building products"; and
 - (b) the Respondent otherwise admits paragraph 5.

Particulars

Pages 6 and 8 of FVA.001.002.0106 and page 20 of FVA.001.003.0016 which, expressly state the words "Aluminium Composite Panel", "Vitrabond Aluminium Composite Panel", "Vitracore Non-combustible composite panel" and also include product logos distinguishing between combustible and non-combustible Fairview products in identical terms.

Further particulars will be provided after service of the Respondent's evidence.

6. In response to paragraph 6, the Respondent says that:
 - (a) different ACPs were commonly supplied and used in Australia for different purposes;

- (b) Vitrabond PE Core Cladding was commonly supplied in Australia for the purpose of being used in the design and construction of buildings in compliance with Applicable Legal Requirements as assessed and determined by Qualified Professionals involved in the said design and construction; and
- (c) Vitrabond PE Core Cladding required specialised knowledge, training and/or equipment to be used in compliance with Applicable Legal Requirements.

and otherwise does not admit the allegations therein.

Particulars

A. The Applicable Legal Requirements:

- (a) comprised Fire Resistance Performance Requirements;
- (b) regulated the use of ACPs (including Vitrabond PE Core Cladding) on buildings in Australia;
- (c) required Qualified Professionals to assess each use to ensure compliance with Applicable Legal Requirements;
- (d) precluded Combustible ACPs from being used in some situations that Non-Combustible ACPs could be used in.

B. Further particulars of the specialised knowledge, training and/or equipment will be provided following discovery and evidence, but includes the knowledge, training and/or equipment required to:

- (a) interpret architectural façade and or other construction drawings and technical information, including as prepared by Qualified Professionals; and
- (b) safely handle, cut, affix and seal large ACP units, in accordance with Applicable Legal Requirements including with respect to work, health and safety.

7. As to paragraph 7 the Respondent:

- (a) admits sub-paragraph (a);
- (b) admits sub-paragraph (b);
- (c) admits sub-paragraph (c), but says that any technical support it provided was limited.

Particulars

The Respondent refers to and repeats paragraph 47 of this Amended Defence. Further particulars will be provided following the service of the Respondent's evidence;

- (d) otherwise does not admit the allegations therein.

B.2 ACPs with PE Cores

8. The Respondent admits paragraph 8.

9. The Respondent admits paragraph 9.

C. STATE AND CONDITION OF THE GOODS (ALL BUILDINGS)

C.1 Combustibility and Fire Risk

10. The Respondent does not admit paragraph 10.
11. The Respondent does not admit paragraph 11.
12. The Respondent does not admit paragraph 12, save as to say that Vitrabond PE Core Cladding was and is combustible.

Particulars

The Respondent refers to paragraph 5 of the Amended Defence.

C.2 Risks associated with use of Vitrabond PE Core Cladding

13. The Respondent denies paragraph 13 and further says:
 - (a) Vitrabond PE Core Cladding, when fitted to a Relevant Building or Relevant Building Part to which the Fire Resistance Performance Requirements apply, was capable of allowing the Relevant Building or Relevant Building Part to satisfy the applicable Fire Resistance Performance Requirements;
 - (b) at all material times, Vitrabond PE Core Cladding was capable of complying with:
 - (i) one or more Deemed-to-Satisfy Provisions, including as an attachment to an external wall on a Type A, B or C construction (pursuant to C2.4 of Specification C1.1 of the BCA), or as part of an external wall on a Type C construction (pursuant to clause 5.1 of Specification C1.1 of the BCA), as assessed by a Qualified Professional; and/or
 - (ii) an Alternative Solution, including if on assessment by a Qualified Professional, it is determined that the use of Vitrabond PE Core Cladding complies with the relevant Performance Requirements in the BCA, including, inter alia, CP1, CP2 and CP4;
 - (c) whether Vitrabond PE Core Cladding satisfies the Fire Performance Requirements is contingent upon a number of project specific factors, including:
 - (i) whether the Vitrabond PE Core Cladding forms part of, or is attached to, an external wall;
 - (ii) the characteristics of the building on which it is used, including what other products are in the vicinity of the Vitrabond PE Core Cladding;
 - (iii) the location, geometry, orientation and size of the Vitrabond PE Core Cladding on the Relevant Building and/or Relevant Building Part,

which can only be assessed by Qualified Professionals on a case-by-case basis having regard to a particular project and use;
 - (d) in order for Vitrabond PE Core Cladding to be used on a building in compliance with the Applicable Legal Requirements, those requirements required each use to be assessed by a Qualified Professional; and
 - (e) Vitrabond PE Core Cladding, when used in compliance with the Applicable Legal Requirements, does not give rise to any of the material risks pleaded in subparagraphs 13(a)-(b), paragraph 33 or paragraph 34 of the ASOC.

Particulars

To be the subject of the Respondent's expert evidence.

14. The Respondent does not plead to paragraph 14.

C.3 Prohibition Risk Properties

15. As to paragraph 15, the Respondent:

- (a) admits subparagraph 15(d), but says that the alerts and guidelines particularised by the Applicant:
 - (i) have prospective effect from the date they commenced and in terms of what uses of Vitrabond PE Core Cladding they prohibit and restrict; and
 - (ii) only prohibit and restrict particular types of uses of Vitrabond PE Core Cladding on particular types of buildings;
 - (iii) do not apply to uses on buildings of a Type C construction 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.
- (b) denies paragraph 15(b).

Particulars

- A. Only some Vitrabond PE Core Cladding has 30% or greater PE.
 - B. The referenced "product bans" are directed at particular uses of the product.
16. The Respondent does not admit paragraph 16, and refers to and repeats 13 and 15(a) above.

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

D.1.1 Introduction: Relevant Requirements

17. The Respondent admits paragraph 17.
18. The Respondent admits paragraph 18.
19. The Respondent admits paragraph 19.
20. In response to paragraph 20, save that it denies that part A2.1 of the BCA contains any express reference to a "product".
21. The Respondent admits paragraph 21.

22. The Respondent admits that the Fire Resistance Performance Requirements applied to Class 2 to 9 Buildings, but otherwise denies paragraph 22.

D.1.2 Means of compliance with BCA Requirements

23. The Respondent admits paragraph 23.

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

24. The Respondent admits paragraph 24.
25. The Respondent admits subparagraphs 25(a) and 25(b) but otherwise does not admit paragraph 25.
26. The Respondent admits paragraph 26(a) and (b), but denies paragraph 26(c).

Particulars

Properly construed, the relevant references to a "laminate" do not include the PE core

D1.4 Non-compliance with Deemed-to-Satisfy provisions

27. The Respondent denies paragraph 27, and refers to and repeats paragraphs 13 and 26 of this Amended Defence.

Particulars

To be the subject of expert evidence.

28. The Respondent denies paragraph 28, and refers to and repeats paragraphs 13 and 26 of this Amended Defence.

Particulars

To be the subject of expert evidence.

29. The Respondent denies paragraph 29, and refers to and repeats paragraphs 13 and 26 of this Amended Defence.

Particulars

To be the subject of expert evidence.

30. The Respondent's admits paragraph 30.

D1.5 Inability to form part of a compliant Alternative Solution

31. The Respondent denies paragraph 31.

D1.6 Non-compliance with BCA

32. The Respondent denies paragraph 32 and refers to and repeats paragraphs 27-31 above.
33. The Respondent denies paragraph 32 and refers to and repeats paragraphs 27-31 above.
34. The Respondent does not plead to paragraph 34.

D.2 BCA-Related Prohibition Risk

35. The Respondent does not admit paragraph 35, and refers to and repeats paragraph 16 above.

E. SUPPLY OF THE GOODS

E.1 Supply in trade or commerce for resupply (TPA s 74D(1)(a))

36. As to paragraph 36, the Respondent:

- (a) admits paragraph 36(a);
- (b) does not admit paragraph 36(b).

37. The Respondent admits paragraph 37.

38. The Respondent admits paragraph 38.

E.1 Supply to consumer otherwise than by sale by auction (TPA s 74D(1)(b), ACL s 54(1))

39. The Respondent denies paragraph 39 and says:

- (a) Vitrabond PE Core Cladding was not supplied to and acquired by the Applicant in trade or commerce, since:
 - (i) the Vitrabond PE Core Cladding was not supplied to or acquired by the Applicant by way of sale, exchange, lease, hire, hire-purchase or otherwise;
 - (ii) no consideration was provided by the Applicant for the Vitrabond PE Core Cladding, and there was no supply to (or acquisition by) the Applicant, whether as part of a bilateral and consensual process or otherwise;
 - (A) the Bigge Street Common Property vested in the Applicant pursuant to a statutory process;
 - (B) ownership of the Bigge Street Common Property vested in the Applicant upon registration of the strata plan, but that is not sufficient to constitute the supply of that cladding by a person in trade or commerce, or the acquisition of that cladding by the Applicant as a Consumer; and
 - (C) any supply of the Vitrabond PE Core Cladding on a Relevant Building or Relevant Building Part occurred prior to the date that the Applicant (and certain other Group Members, including those that are owners corporations) came into existence.

Particulars

- A. The Respondent refers to the particulars in paragraph 3 of the ASOC.
- B. Section 18 of the SSFDA, s 24 of the SSDA, and the definitions of 'supply' and 'acquire' in s 2(1) of the ACL and s 4(1) of the TPA; and
- (iii) alternatively, there were no Consumers from whom the Applicant acquired (or derived title to) the Vitrabond PE Core Cladding, since each person in the chain of supply acquired it (or held themselves out as acquiring it) for the purpose, in trade or commerce, of:

- (A) re-supplying it to one or more other persons; or
- (B) using it up or transforming it in the course of a process of production or in the course of treating other goods or fixtures on land.

Particulars

- A. The Respondent supplied the Vitrabond PE Core Cladding to the Bigge Subcontractor, who acquired it (or held themselves out as acquiring it) for the purpose of:
 - a. re-supply to one or more other persons in trade or commerce, including the Bigge Contractor and/or the Bigge Developer; and/or
 - b. using it up or transforming it, in trade or commerce, in the course of: a process of production of a façade, façade system or part thereof; or treating other goods or fixtures on land, namely the part of the external wall or Bigge Street Buildings to which the Vitrabond PE Core Cladding was attached.
 - B. The Bigge Subcontractor supplied the Vitrabond PE Core Cladding to the Bigge Contractor, who acquired it for one of the purposes specified in subparagraph 39(a)(iii) above, including for resupply to the Developers.
 - C. The Bigge Contractor supplied the Vitrabond PE Core Cladding to the Bigge Developer, who acquired it for one of the purposes specified in subparagraph 39(a)(iii) above, including for resupply to individual owners;
- (b) Group Members did not acquire (or derived title to) the Vitrabond PE Core Cladding, as or from Consumers, to the extent that a Group Member:
- (i) is an owners corporation, Developer or Contractor;
 - (ii) acquired (or derived title to) the Vitrabond PE Core Cladding from an owners corporation, Developer or Contractor;
 - (iii) is a Further Resupplier; or
 - (iv) is an Ultimate Consumer who paid more than \$40,000 for the Vitrabond PE Core Cladding (given Vitrabond PE Core Cladding is not a good of a kind ordinarily acquired for personal, domestic or household use or consumption).

Particulars

- A. Sub-section 3(1) and (3) of the ACL and 4B(1) of the TPA.
 - B. The invoices and delivery orders issued by the Respondent in respect of the supply of Vitrabond PE Core Cladding to the Bigge Subcontractor, who in turn re-supplied it for use on the Bigge Street Buildings, details of which are tabulated in Schedule 2 to this Amended Defence;
- (c) the Respondent does not know the circumstances in which other Group Members are said to have been supplied with and to have acquired the Vitrabond PE Core Cladding, and therefore does not admit any part of paragraph 36 as it applies to those other Group Members.

40. As to paragraph 40, the Respondent:

- (a) admits that the amount paid for Vitrabond PE Core Cladding was less than \$40,000 per panel;
- (b) admits that the amount paid for Vitrabond PE Core Cladding was less than \$40,000 per delivery batch of panels to the Applicant, but does not admit that it was less than \$40,000 per delivery batch for each Group Member;
- (c) denies that the amount paid for Vitrabond PE Core Cladding was less than \$40,000 for all panels purchased for the Bigge Street Building, and does not admit that it was less than \$40,000 for all panels purchased for each other Relevant Building.

Particulars

Refer to paragraph 39 of this Amended Defence, and the particulars to paragraph 39 of the ASOC.

41. The Respondent denies paragraph 41.

Particulars

Refer to paragraph 6 of this Amended Defence.

42. The Respondent:

- (a) denies paragraph 42 insofar as it applies to the Applicant, and Group Members of the type identified in paragraph 39(b) of this Amended Defence; and
- (b) otherwise does not admit paragraph 42.

Particulars

Refer to paragraphs 6, 39, 40 and 41 of this Amended Defence.

43. The Respondent:

- (a) denies paragraph 43 insofar as it applies to the Applicant, and Group Members of the type identified in paragraph 39(b) of this Amended Defence; and
- (b) otherwise does not admit paragraph 43.

Particulars

Refer to paragraphs 6, 39, 40, 41 and 42 of this Amended Defence.

44. The Respondent:

- (a) admits that the Applicant did not acquire Vitrabond PE Core Cladding by way of sale by auction;
- (b) otherwise does not admit paragraph 44, including because it does not know the circumstances in which the Group Members are said to have been supplied with and to have acquired the Vitrabond PE Core Cladding.

F. REASONABLE EXPECTATION AS TO QUALITY OF GOODS

F.1 The kind and nature of the goods

45. As to paragraph 45, the Respondent refers to and repeats the matters pleaded at paragraphs 5-9 above.

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

46. As to paragraph 46, the Respondent refers to and repeats paragraph 6 above and otherwise does not admit that paragraph.

F.3 Representations about the goods

F.3.1 Representations as to quality and use of goods

47. The Respondent denies paragraph 47 and says that:

- (a) Qualified Professionals involved in the design and construction of the Relevant Buildings and Relevant Building Parts (including those involved in the design and construction of the Bigge Street Buildings), made representations as to the suitability of Vitrabond PE Core Cladding for use in the design and construction of said buildings.

Particulars

To be the subject of evidence;

- (b) independent certification bodies independently assessed Vitrabond PE Core Cladding pursuant to governmental schemes and made relevant representations about its suitability for use and compliance with Applicable Legal Requirements.

Particulars

The CodeMark Certificates;

- (c) the Respondent represented that Vitrabond PE Core Cladding had passed certain, but not all, of the fire safety tests (and had certain, but not all, of the certifications) required by relevant building codes and standards in Australia;
- (d) the Respondent could not (and did not) represent that Vitrabond PE Core Cladding had passed *all* of the fire safety tests (and had *all* of the certifications) required by relevant building codes and standards in Australia, because:
- (i) some of those tests and certifications required assessments to be made by Qualified Professional as to whether a particular use complied with Applicable Legal Requirements;
 - (ii) that assessment in turn required consideration of a range of factors as set out in the particulars to paragraph 13 of this Amended Defence (including the characteristics of the building on which it is used, the other products that are in the vicinity of the Vitrabond PE Core Cladding, and the location, geometry, orientation, and size of the Vitrabond PE Core Cladding); and
 - (iii) that assessment could only be made having regard to a particular project and use; and
- (e) the Respondent represented the extent to which Vitrabond PE Core Cladding had achieved certain test results and certifications (and had certain properties and

characteristics, with respect to fire safety and performance) so that a Qualified Professional could assess whether a particular use of Vitrabond PE Core Cladding complied with Applicable Legal Requirements (and therefore was suitable).

Particulars

The test results and certifications as determined by consultants and independent laboratories, and the public documents which recorded those test results, as set out in Schedule 1 hereto.

The Applicable Legal Requirements, which require Qualified Professionals involved in a building project to each independently perform duties including to ensure that building products like Vitrabond PE Core Cladding are used on buildings safely and in compliance with those Applicable Legal Requirements independently assessed Vitrabond.

48. As to paragraph 48, the Respondent:

- (a) admits paragraph 48(a); and
- (b) denies paragraphs 48(b).

Particulars

Refer to paragraph 47.

F.3.2 Representations as to fire performance

49. The Respondent denies paragraph 49, and repeats and refers to paragraph 47.

F.3.3 Representations as to compliance

50. The Respondent denies paragraph 50, and repeats and refers to paragraph 47.

F.4 No warning as to risks

51. The Respondent denies paragraph 51, and repeats and refers to paragraph 47.

52. The Respondent denies paragraph 52, and repeats and refers to paragraph 47.

53. The Respondent denies paragraph 53, and repeats and refers to paragraph 47.

54. The Respondent does not plead to paragraph 54.

55. The Respondent does not plead to paragraph 55.

F.5 Reasonable expectation as to fitness of goods

F.5.1 All buildings

56. The Respondent denies paragraph 56, and repeats and refers to paragraphs 45-50 of this Amended Defence.

F.5.2 Class 2 to 9 buildings

57. The respondent denies paragraph 57, and repeats and refers to paragraphs 45-50 of this Amended Defence.

G. GOODS NOT OF MERCHANTABLE OR ACCEPTABLE QUALITY

G.1 *Goods not of merchantable quality*

58. The Respondent denies paragraph 58, repeats paragraphs 56 and 57 above and says that the Vitrabond PE Core Cladding:

- (a) was not required to be of merchantable quality; and
- (b) was fit for all the purposes for which goods of the kind were commonly bought.

In the alternative to subparagraph (a) above, the Respondent says that if the Merchantable Quality requirements did apply (which is denied):

- (c) Vitrabond PE Core Cladding was required to be fit for the purpose or purposes for which goods of that kind are commonly bought as it is reasonable to expect having regard to:
 - (i) any description applied to the goods by the Respondent;
 - (ii) the price received by the Respondent for the goods (if relevant); and
 - (iii) all the other relevant circumstances.

Particulars

Subsection 74D(3) of the TPA;

- (d) subsection 74D(1) of the TPA does not apply:
 - (i) if the Vitrabond PE Core Cladding is not of merchantable quality by reason of:
 - (A) an act or default of any person (not being the Respondent or a servant or agent of the Respondent); or
 - (B) a cause independent of human control,

occurring after the Vitrabond PE Core Cladding has left the control of the Respondent;
 - (ii) as regards defects specifically drawn to the Consumer's attention before the making of the contract for the supply of the Vitrabond PE Core Cladding to the Consumer; or
 - (iii) if the Consumer examines the Vitrabond PE Core Cladding before that contract is made, as regards defects that the examination ought to reveal.

Particulars

Subsection 74D(2) of the TPA; and

- (e) Vitrabond PE Core Cladding is of merchantable quality within the meaning of s 74D of the TPA if it is fit for the purpose or purposes for which goods of that kind (namely Combustible ACPs) are commonly bought as it is reasonable to expect having regard to:
 - (i) any description applied to the goods by the Respondent;
 - (ii) the price received by the Respondent for the goods (if relevant); and

- (iii) all the other relevant circumstances.

Particulars

Subsection 74D(3) of the TPA;

- (f) the Vitrabond PE Core Cladding complied with the merchantable quality requirements, including because it was fit for all of the purposes for which goods of that kind (being Combustible ACPs) are commonly bought, as it is reasonable to expect having regard to the matters in s 74D(3) of the TPA.

Particulars

- A. The Respondent refers to and repeats subparagraph 65(a) of this Amended Defence.
- B. Section 74D(3) of the TPA;
- (g) the merchantable quality requirements do not apply to any alleged defects relating to fire safety since the Combustible nature of the Vitrabond PE Core Cladding was specifically drawn to the relevant Consumer's attention before the Consumer agreed to the supply.

Particulars

- A. The Respondent refers to and repeats subparagraph 65(b) of this Amended Defence.
- B. Section 74D(2)(b) of the TPA;
- (h) the merchantable quality requirements do not apply to the extent that Consumers acquiring the Vitrabond PE Core Cladding examined it before agreeing to the supply since the examination ought reasonably to have revealed that Vitrabond PE Core Cladding was a Combustible ACP, and was not of acceptable quality other than for use as a Combustible ACP.

Particulars

- A. The Respondent refers to paragraph 65(d) of this Amended Defence.
- B. Section 74D(2)(c) of the TPA;
- (i) the merchantable quality requirements do not apply to the extent that the Respondent's non-compliance arises only because of an act or default of any person other than the Respondent and its servants and agents.

Particulars

- A. The Respondent refers to and repeats subparagraph 65(e) of this Amended Defence.
- B. Section 74D(2)(a) of the TPA.
59. The Respondent denies paragraph 59 and repeats paragraph 58 above.
60. The Respondent denies paragraph 60, and repeats and refers to paragraph 58 of the Amended Defence.

- 61. The Respondent denies paragraph 61, and repeats and refers to paragraph 58 of the Amended Defence.
- 62. The Respondent denies paragraph 62, and repeats and refers to paragraph 58 of this Amended Defence.

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

- 63. The Respondent denies paragraph 63 of the ASOC, and repeats and refers to paragraphs 13, and 36 - 44 of this Amended Defence.
- 64. The Respondent denies paragraph 64 of the ASOC, and repeats and refers to paragraph 63 of this Amended Defence. In the alternative, the Respondent says that if the Acceptable Quality Guarantee or Acceptable Quality Requirement did apply (which is denied):
 - (a) Vitrabond PE Core Cladding was required, by reason of s 54(2) of the ACL, to be:
 - (i) fit for all the purposes which goods of that kind, being Combustible ACPs, are commonly supplied; and
 - (ii) acceptable in appearance and finish, free from defects, safe and durable, as a reasonable Consumer fully acquainted with the state and condition of the Vitrabond PE Core Cladding (including any hidden defects of the goods), would regard as acceptable having regard to the matters in s 54(3) of the ACL;
 - (b) the matters in s 54(3) of the ACL, are:
 - (i) the nature of the Vitrabond PE Core Cladding; and
 - (ii) the price of the Vitrabond PE Core Cladding (if relevant); and
 - (iii) any statements made about the Vitrabond PE Core Cladding on any packaging or label on the Vitrabond PE Core Cladding; and
 - (iv) any representation made about the Vitrabond PE Core Cladding by a supplier or manufacturer; and
 - (v) any other relevant circumstances relating to the supply of the Vitrabond PE Core Cladding;
 - (c) even if Vitrabond PE Core Cladding is or was not of acceptable quality for the purpose of s 54(2) of the ACL, it is taken to be of acceptable quality if the only reason or reasons why it is not of acceptable quality was specifically drawn to the Consumer's attention before the Consumer agreed to the supply.

Particulars

Subsection 54(4) of the ACL;

- (d) Vitrabond PE Core Cladding does not fail to be of acceptable quality, if:
 - (i) the Consumer acquiring the Vitrabond PE Core Cladding examined it before the Consumer agreed to the supply; and
 - (ii) the examination ought reasonably to have revealed that Vitrabond PE Core Cladding was not of acceptable quality.

Particulars

Subsection 54(7) of the ACL;

- (e) in the event of a breach of the guarantee under s 54 of the ACL, no remedy under s 271 of the ACL is available to the Applicant or a Group Member if the guarantee is not complied with only because of:
 - (i) an act, default or omission of, or any representation made by, any person other than the manufacturer or an employee or agent of the manufacturer; or
 - (ii) a cause independent of human control that occurred after the Vitrabond PE Core Cladding left the control of the manufacturer.

Particulars

Subsections 271(2)(a) and (b) of the ACL.

65. The Respondent denies paragraph 65 and repeats paragraphs 63 and 64 above. In the alternative, the Respondent says that if the Acceptable Quality Guarantee or the Acceptable Quality Requirements did apply (which is denied):
- (a) the Vitrabond PE Core Cladding complied with the Acceptable Quality Requirement, including because it was:
 - (i) fit for all of the purposes for which goods of that kind, being Combustible ACPs, are commonly supplied; and
 - (ii) acceptable in appearance and finish, free from defects, safe and durable, as a reasonable Consumer fully acquainted with the state and condition of the Vitrabond PE Core Cladding (including any hidden defects) would regard as acceptable having regard to the matters in s 54(3) of the ACL, including:
 - (iii) in relation to s 54(3)(a) of the ACL - the nature of the Vitrabond PE Core Cladding as a Combustible ACP which can safely be used (and has been and is safely used) for a variety of purposes in compliance with Applicable Legislative Requirements as assessed by Qualified Professionals (having regard to paragraphs 5, 6 and 36 of the Amended Defence);
 - (iv) in relation to s 54(3)(b) of the ACL - the price of the Vitrabond PE Core Cladding, which was lower than the price of Non-Combustible ACP Cladding;
 - (v) in relation to s 54(3)(d) of the ACL - the representations made about the Vitrabond PE Core Cladding:
 - (A) by the Respondent, including that Vitrabond PE Core Cladding was a type of Combustible ACP rather than a Non-Combustible ACP and was therefore suitable for the purposes which a Combustible ACP can safely be used in compliance with Applicable Legislative Requirements (having regard to paragraph 48 of the Amended Defence); and
 - (B) by CertMark, via the CodeMark Certificates;
 - (vi) in relation to s 54(3)(e) of the ACL - the following other relevant circumstances relating to the supply of the Vitrabond PE Core Cladding:

- (A) the Respondent had no practicable ability to control the end use of the Vitrabond PE Core Cladding;
- (B) the Respondent was not a Qualified Professional;
- (C) the Respondent did not have any legal obligation under the Applicable Legal Requirements to assess or verify whether the actual use to which Vitrabond PE Core Cladding was put on any individual project complied with the Applicable Legal Requirements;
- (D) the Qualified Professionals engaged in relation to individual projects had a legal obligation under the Applicable Legal Requirements to assess and verify whether the actual use to which Vitrabond PE Core Cladding was put on those projects complied with the Applicable Legal Requirements (particularly those persons with primary obligations as set out in subsection (a) of the definition of "Qualified Professional");
- (E) the Respondent did not have and was not given sufficient knowledge of individual projects to assess or verify whether the actual use to which Vitrabond PE Core Cladding was put on any individual project complied with the Applicable Legal Requirements (whereas the Qualified Professionals did have that knowledge);
- (F) independent certification bodies also assessed Vitrabond PE Core Cladding pursuant to governmental schemes and made relevant representations about its suitability for use and compliance with Applicable Legal Requirements (as to which the Respondent refers to and repeats to subparagraph 47(b) of the Amended Defence). Further, the Respondent relied upon those independent assessments and representations in making its own representations about Vitrabond PE Core Cladding;
- (G) the Respondent was aware of the above matters, and therefore assumed that Qualified Professionals would properly assess and verify whether the actual use of Vitrabond PE Core Cladding on each project complied with the Applicable Legal Requirements. Further, the Respondent relied upon those assessments and verifications (including the issuance of final occupation certificates) in making its own representations about Vitrabond PE Core Cladding; and
- (H) the fact that AS5113:2016 was not developed until 2016, and then was not incorporated into the BCA until CV3 commenced on 12 March 2018.

Particulars

To be the subject of evidence. Subsections 54(2) and 54(3) of the ACL;

- (b) if Vitrabond PE Core Cladding is or was not of acceptable quality for the purpose of s 54(2) of the ACL (which is denied), it is taken to be of acceptable quality, since the only reason or reasons why it is not of acceptable quality were specifically drawn to the relevant Consumer's attention before the Consumer agreed to the supply.

Particulars

- A. Subsection 54(4) of the ACL.

- B. The Respondent refers to and repeats paragraph 7 of this Amended Defence, including that Vitrabond PE Core Cladding was a type of Combustible ACP rather than a Non-Combustible ACP, and therefore was suitable for the purposes which a Combustible ACP can safely be used in compliance with Applicable Legislative Requirements.
 - C. In NSW, from 30 November 2017, cl 21 of schedule 4 of the NSW EPAR requires that planning certificates issued pursuant to s 149 of the NSW EPAA (or from 1 March 2018, s 10.7 of the NSW EPAA) to include a statement about whether any 'affected building notice' is in force (as that term is used in the Building Products Safety Legislation), or a statement of whether the building is the subject of a product rectification order. Such certificates would have been provided to prospective purchasers of land in NSW.
 - D. in Victoria, from 30 October 2018, part 8B of the *Local Government Act 1989* (Vic) permits cladding rectification agreements to be entered into with Council, which would need to be disclosed in a statement made pursuant to s 32 of the *Sale of Land Act 1962* (Vic).
 - E. Notifications provided to Group Members about the Vitrabond PE Core Cladding and its compliance with the Applicable Legal Requirements, including by documents such as strata or body corporate minutes of meeting, or correspondence like the 28 February 2018 Core Consulting Engineers' Cladding Identification letter which was received by the Applicant.
 - G. Further particulars to be provided following discovery and evidence;
- (c) if Vitrabond PE Core Cladding is (or was) not of acceptable quality for the purpose of s 54(2) of the ACL (which is denied), the only reason or reasons why it is (or was) not of acceptable quality were specifically drawn to the relevant Consumer's attention before the Consumer agreed to the supply (including at the time property interests were acquired by Group Members) insofar as:
- (i) in NSW, from 30 November 2017, cl 21 of schedule 4 of the NSW EPAR requires that planning certificates issued pursuant to s 149 of the NSW EPAA (or from 1 March 2018, s 10.7 of the NSW EPAA) to include a statement about whether any 'affected building notice' is in force (as that term is used in the Building Products Safety Legislation), or a statement of whether the building is the subject of a product rectification order. Such certificates would have been provided to prospective purchasers of land in NSW;
 - (ii) in Victoria, from 30 October 2018, part 8B of the *Local Government Act 1989* (Vic) permits cladding rectification agreements to be entered into with Council, which would need to be disclosed in a statement made pursuant to s 32 of the *Sale of Land Act 1962* (Vic); and
 - (iii) in Queensland, from 27 July 2018, notices were required to be displayed conspicuously on 'affected private buildings' (as that term is defined in s 160 of the *Building Regulations 2006* (Qld));
 - (iv) Combustible ACPs were the subject of safety alerts and regulations prohibiting or restricting particular uses (including as pleaded in paragraph 15 of the ASOC);
 - (v) Type A and B constructions in which Combustible ACPs were used, were the subject of affected building notices, rectification orders, council orders and other notices under the Building Products Safety Legislation;

- (vi) strata or body corporate minutes of meeting, consultants reports and other documents would have sufficiently notified Consumers of the reason or reasons why Vitrabond PE Core Cladding is (or was) not of acceptable quality (assuming it was not of acceptable quality which is denied); and
- (vii) at other times in which supplies occurred, since representations were made by the Respondent as to the characteristics and limitations of Vitrabond PE Core Cladding, as pleaded in paragraph 7 of this Amended Defence,

and consequently, Vitrabond PE Core Cladding is taken to be of acceptable quality pursuant to s 54(4) of the ACL.

Particulars

- A. Subsection 54(4) of the ACL.
 - B. Planning certificates issued pursuant to s 149 of the NSW EPAA or s 10.7 of the NSW EPAA from 30 November 2017.
 - C. Statements issued pursuant to s 32 of the *Sale of Land Act 1962* (Vic) from 30 October 2018, pursuant to part 8B of the *Local Government Act 1989* (Vic).
 - D. Affected private building notices required by s 16ZA of the *Building Regulations 2006* (QLD) to be conspicuously displaced and attached to affected building From 27 July 2018.
 - E The Building Products Safety Legislation and notices issued under it.
 - F. The Respondent otherwise refers to and repeats the particulars in paragraph 7 of this Amended Defence, and 15 of the ASOC.
 - G. The 28 February 2018 Core Consulting Engineers' Cladding Identification letter which was received by the Applicant.
 - H. Further particulars to be provided following discovery and evidence;
- (d) to the extent that Consumers acquiring the Vitrabond PE Core Cladding examined it before agreeing to the supply:
- (i) the examination ought reasonably to have revealed that Vitrabond PE Core Cladding was a Combustible ACP, and was not of acceptable quality other than for use as a Combustible ACP, including because the combustible PE Core of Vitrabond PE Core Cladding is apparent on inspection;
 - (ii) as a result, the Vitrabond PE Core Cladding does not fail to be of acceptable quality.

Particulars

- A. Subsection 54(7) of the ACL;
- (e) in the event that it is established that the Respondent has not complied with the guarantee in s 54 of the ACL, the Respondent:
- (i) says that the Respondent's non-compliance arises only because of an act, default or omission of, or any representation made by, any person other than the manufacturer or an employee or agent of the manufacturer. In this regard, the Respondent refers to repeats paragraphs 85 to 88 of this Amended Defence; and

- (ii) accordingly, denies that any remedy under s 271 of the ACL is available to the Applicant or a Group Member.

Particulars

A. Subsection 271(2)(a) of the ACL.

- 66. The Respondent denies paragraph 66 and repeats paragraphs 63 to 65 above.
- 67. The Respondent denies paragraph 67 and repeats paragraphs 63 to 65 above.
- 68. The Respondent denies paragraph 68 and repeats paragraphs 63 to 65 above.
- 69. The Respondent denies paragraph 69 and repeats paragraphs 63 to 65 above.

H. MISLEADING OR DECEPTIVE REPRESENTATIONS AND CONDUCT

H.1 False or misleading representations about goods

- 70. The Respondent denies paragraph 70, and repeats and refers to paragraphs 13, 47-50, 70-76 of this Amended Defence.
- 71. The Respondent denies paragraph 71, and refers to paragraph 70 of this Amended Defence.
- 72. The Respondent denies paragraph 72, and refers to paragraph 70 of this Amended Defence.
- 73. The Respondent denies paragraph 73, and refers to paragraph 70 of this Amended Defence.
- 74. The Respondent denies paragraph 74, and refers to paragraph 70 of this Amended Defence.
- 75. The Respondent denies paragraph 75, and refers to paragraph 70 of this Amended Defence.
- 76. The Respondent denies paragraph 76, and refers to paragraph 70 of this Amended Defence.

H.2 Misleading conduct as to the nature of goods

- 77. The Respondent denies paragraph 76, and refers to paragraph 70 of this Amended Defence.

I. LOSS AND DAMAGE

I.1 Entitlement to compensation for non-compliance with consumer guarantees

- 78. The Respondent denies paragraph 78 and says further:
 - (a) the pleading is embarrassing and requires proper particulars;
 - (b) any loss and damage alleged to have been suffered by the Applicant and Group Members was not caused by the Vitrabond PE Core Cladding not complying with the Acceptable Quality Guarantee or the Merchantable Quality Requirement, but rather by failures by other persons.

Particulars

The Respondent refers to repeats paragraphs 85 to 88 of this Amended Defence.

- (c) the Group Members are defined in a way to include persons who have not suffered loss or damage.

Particulars

Definition of "Group Members" in the ASOC. The Respondent notes that the group of persons who have not suffered loss or damage, include any person who has (or has had) an ownership or leasehold interest in a Relevant Building or Relevant Building Part, where:

- A. the Relevant Building or Relevant Building Part is a Type C Building, or a Type A/B Building in which the use Vitrabond PE Core Cladding complies with the Applicable Legislative Requirements;
- B. that person disposed of its interest in the Relevant Building or Relevant Building Part without any diminution in the value of that interest as a result of the Vitrabond PE Core Cladding;
- C. that person acquired its interest in the Relevant Building or Relevant Building Part with knowledge that Vitrabond PE Core Cladding had been used on that building in a way that did not comply with the Applicable Legislative Requirements (for example via notices issued under the Building Products Safety Legislation, a s 149 certificate or s 10.7 certificate in NSW, or a s 32 notice in Victoria, or strata meeting minutes).

79. The Respondent denies paragraph 79 and says further that it was not reasonably foreseeable that the Applicant and Group Members would suffer any loss or damage as a result of the alleged failure by the Respondent to comply with the Acceptable Quality Guarantee (which is denied), given:

- (a) the roles and responsibilities of the Qualified Professionals involved in the Relevant Buildings including the Bigge Street Building; and
- (b) any representations made by the Respondent about the Vitrabond PE Core Cladding were such that it should have been apparent that Vitrabond PE Core Cladding was a Combustible ACP (rather than a Non-Combustible ACP), as a result of which loss and damage should not have been suffered.

Particulars

The Respondent refers to and repeats paragraphs 85 to 88 of this Amended Defence, and the matters set out in paragraphs 58 to 84 above.

80. The Respondent denies paragraph 80, and repeats and refers to paragraph 39 of this Amended Defence.

1.2 Entitlement to statutory compensation for misleading representations

81. The Respondent denies paragraph 81, and refers to and repeats paragraphs 13, 47-50, and 70-76 of this Amended Defence.

82. The Respondent does not admit paragraph 82, and refers to and repeats paragraphs 81 and 85-88 of this Amended Defence.

83. The Respondent does not admit paragraph 83, and refers to and repeats paragraphs 81 and 85-88 of this Amended Defence.

84. The Respondent denies paragraph 84 and refers to and repeats paragraphs 81-83 of this Amended Defence.

J. Proportionate liability

85. This Part J applies in the event that the Applicant or the Group Members have (or would but for this Part have) any entitlement to damages from the Respondent as pleaded in the ASOC.
86. Each of the Qualified Professionals who assessed and determined to use Vitrabond PE Core Cladding on the Relevant Buildings or Relevant Building Parts:
- (a) had responsibility for:
 - (i) the design, specification, installation, construction, evaluation, assessment, approval, verification, certification and/or other use of Vitrabond PE Core Cladding on the Relevant Buildings or Relevant Building Parts;
 - (ii) ensuring that Vitrabond PE Core Cladding was used in a way that was compliant with the Applicable Legislative Requirements, as relevant to the Relevant Buildings or Relevant Building Parts which the Applicant and/or Group Members have (or had) an interest in;
 - (b) was aware, or ought to have been aware, that the Applicant and/or Group Members (or other Qualified Professionals involved in the same project) would rely upon:
 - (i) each Qualified Professional performing their responsibilities to an appropriate standard of care; and
 - (ii) any assessment, recommendation, certificate, advice, drawing, specification, report or certificate produced by a Qualified Professional,

in determining whether a use of Vitrabond PE Core Cladding on a Relevant Building and/or Relevant Building Part was (or would be) compliant with the Applicable Legislative Requirements;
 - (c) were aware, or ought to have been aware, that a failure to discharge the responsibilities referred to in subparagraph (a) by a Qualified Professional, could cause loss and damage to the Applicant and/or Group Members;
 - (d) owed a duty to the Applicant and/or relevant Group Members to exercise the reasonable skill and care to be expected of an experienced Qualified Professional in respect of the matters set out in subparagraphs (a) and (b) above; and
 - (e) breached their duty of care referred to in subparagraph (d) above, to the extent that:
 - (i) the Vitrabond PE Core Cladding did not comply with the Acceptable Quality Guarantees, Acceptable Quality Requirements and/or Merchantable Quality requirements on a Relevant Building or Relevant Building Part; and
 - (ii) the use of Vitrabond PE Core Cladding in the design and construction of the Relevant Building and/or Relevant Building Part caused loss or damage.

Particulars

- A. Depending upon the scope of their engagements, and the application of Applicable Legislative Requirements:
- a. Fire Safety Engineers were (and are) responsible for the design, specification, evaluation, assessment, approval, verification and/or certification (including Alternative Solutions, Performance Solutions and/or the Deemed-to-Satisfy provisions of the BCA);

- b. Certifying Authorities were (and are) responsible for the evaluation, assessment, approval, verification and/or certification (including in the course of determining whether the Relevant Buildings are fit for occupation and/or use, assessing, evaluating and/or certifying compliance with the BCA and complying with the Certifier's Code);
- c. Architects were (and are) responsible for the design, specification, assessment, approval, verification and/or certification (including the type, location, geometry, orientation, and size of Combustible ACPs via drawings, specifications and advice);
- d. Superintendents can be responsible for the assessment, approval, verification and/or certification (depending upon the scope of their engagement by a Developer);
- e. Developers can be responsible for the design and/or specification (particularly where a Contractor is engaged on a 'construct only' basis) as well as use (particularly where Home Building Legislation is applicable); and
- f. Contractors and Subcontractors can be responsible for the design, specification, installation, construction, verification and/or certification (particularly where they are engaged on a 'design and construct' basis, where Home Building Legislation is applicable or where they otherwise have Design Responsibility),

of Vitrabond PE Core Cladding so that it is used in a way that is compliant with the Applicable Legislative Requirements.

- B. The failure to discharge the responsibilities in Particular A will be evidenced by documents issued (or which should have but were not issued) by the Qualified Professionals which caused or contributed to the use of Vitrabond PE Core Cladding on the Relevant Building or Relevant Building Part. Further particulars will be provided following service of evidence and discovery.
- C. The loss and damage to the Applicant and Group Members, that Qualified Professionals should have been aware of, includes the loss or damage that is the subject of the ASOC.
- D. In respect of the Applicant, reference is made to the following documents prepared for the Bigge Street Buildings:
 - a. the Bigge Fire Engineer Report dated 16 April 2014 (Version C);
 - b. drawings prepared by the Bigge Architect, including North Elevation drawings (Job No. 8231 CC:120) dated June 2013, Browne Parade Elevation and South Elevation drawings (Job No 8231 CC:121) dated June 2013, and West Elevation and East Elevation drawings (Job No 8231 CC:122) dated June 2013. These specify 'Vitrabond Panelling' to the façade and were certified by Steven Saad of Certified Building Specialists Pty Ltd on 18 June 2014;
 - c. specifications prepared by the Bigge Architect (Job No. 8231 CC:100) dated June 2013 which specify "6mm VITRABOND PANELS (PE CORE)" and "6mm VITRABOND PANELS (FR CORE)" under the heading "Walling System"; and
 - d. the Final Occupation Certificate prepared by the Bigge Certifier dated 6 March 2015;

- e. Core Consulting Engineers' report titled 'External Wall Cladding Audit Report' dated 11 July 2018; and
- f. further particulars may be provided following discovery and/or service of evidence.

E. Further particulars may be provided following discovery and the service of evidence.

87. At all material times CertMark:

- (a) was accredited under the CodeMark Scheme by JAS ANZ, appointed as a Certification Body pursuant to the CodeMark Scheme and responsible for issuing CodeMark Certificates pursuant to the CodeMark Scheme.
- (b) had responsibility for the evaluation and certification of Vitrabond PE Core Cladding for use on Relevant Buildings and/or Relevant Building Parts (including the issuance and publishing of CodeMark Certificates);
- (c) was aware, or ought to have been aware, that Qualified Professionals, the Applicant and/or Group Members would rely upon the CodeMark Certificates in assessing whether to use Vitrabond PE Core Cladding on the Relevant Building and/or Relevant building part and whether such use complied with the Applicable Legislative Requirements;
- (d) owed a duty of care to the Applicant, and/or Group Members who have (or had) an interest in the Relevant Buildings or Relevant Building Parts, to exercise the reasonable skill and care in respect of the matters set out in subparagraph (b) above; and
- (e) breached the duty referred to in subparagraph (c) above, to the extent that:
 - (i) the Vitrabond PE Core Cladding did not comply with the Acceptable Quality Guarantees, Acceptable Quality Requirements and/or Merchantable Quality requirements on a Relevant Building or Relevant Building Part; and
 - (ii) the CodeMark Certificate caused or contributed to the use of Vitrabond PE Core Cladding on the Relevant Building or Relevant Building Part.

Particulars

A. The CodeMark Certificates in Schedule 2 hereto.

B. Further particulars may be provided following service of evidence.

88. In the above premises, each of the Qualified Professionals, CertMark and the Respondent were, at all material times persons whose acts or omissions (or act or omission) caused, independently of each other or jointly, the damage or loss that is the subject of the ASOC.

K. Limitations Periods

89. In the event that Vitrabond PE Core Cladding did not comply with the Acceptable Quality Guarantee or was not of Merchantable Quality (which is denied), then:

- (a) the Applicant and/or Group Members were or ought to have become aware of that non-compliance more than 3 years before the date that the ASOC was filed.

Particulars

- A. The 25 November 2014 fire at the Lacrosse Tower (673 La Trobe Street, Docklands), which was the subject of:
 - a. the April 2015 report by the City of Melbourne;
 - b. Metropolitan Fire and Emergency Services Board Post Incident Analysis Report No 1403134A dated 25 November 2014;
 - c. government releases such as the 3 August 2015 NSW Government Planning and Environment Building regulation advisory note reference BS 15-001; and
 - d. other publications, reports and news coverage.
 - B. The 4 May 2016 report by the Senate Economics References Committee titled "Non-conforming building products Interim report Safety—'not a matter of good luck' " as well as the public submissions, public hearings and other public documents referred to in that report.
 - C. Further particulars may be provided after filing of the Respondent's evidence or discovery;
- (b) as a result of subparagraph (a) above, the Applicant's and Group Members' claims the subject of the ASOC are out of time.

Particulars

Section 273 of the ACL and s 74J(1) of the TPA.

L. DEFINED TERMS

- 90. Where capitalised terms are not defined in this Amended Defence, they have the meanings given to them in the ASOC filed on 3 March 2020.
- 91. In this Amended Defence, the following defined terms are used:

ABCB means the Australian Building Codes Board.

Applicable Legal Requirements means the applicable legal requirements regulating the use of ACPs on buildings in Australia, including the Environmental Planning Legislation, Building Products Safety Legislation, the BCA (including the Fire Resistance Performance Requirements), the Home Building Legislation (in respect of residential or domestic construction work to which it applies) and other relevant building codes and standards such as AS1530 and AS5113.

Apportionable Claim:

- (a) (to the extent that the NSW Apportionment Legislation is applicable) has the meaning given to an 'apportionable claim' in Part 4 of the *Civil Liability Act 2002* (NSW); and
- (b) (otherwise, has a corresponding meaning to that in subclause (a) above), depending upon which Apportionment Legislation is applicable.

Apportionment Legislation means:

- (a) Part 4 of the *Civil Liability Act 2002* (NSW), to the extent that that legislation is applicable including because the Respondent was located in NSW, made all supplies from NSW and/or entered into contracts governed by NSW law; and
- (b) otherwise, depending upon where a Group Member is located: Part IVAA of the *Wrongs Act 1958* (Vic); Part 1F of the *Civil Liability Act 2002* (WA); Part 3 of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA); and Part 9A of the *Civil Liability Act 2002* (Tas).

Architect means a person possessing architectural qualifications who is engaged in the practice of architecture and is registered to do so pursuant to the *Architects Act 2003* (NSW), *Architects Act 1991* (Vic), *Architects Act 2002* (Qld), *Architectural Practice Act 2009* (SA), *Architects Act 2004* (WA), *Architects Act 2004* (ACT), *Architects Act 1929* (Tas) and *Architects Act 2004* (NT).

Bigge Architect means Zhinar Architects Pty Ltd (ACN 153 123 436).

Bigge Certifier means Certified Building Specialists Pty Ltd (ACN 151 732 928).

Bigge Contractor means MN Builders Pty Ltd, formerly MN Builders (Liverpool) Pty Ltd (ACN 165 156 178).

Bigge Developer means Estmanco Pty Ltd (ACN 135 768 035) and Creyke Pty Ltd (ACN 162 821 016) and Coronation Property Co Pty Ltd (ACN 163 703 839).

Bigge Fire Engineer means Holmes Fire Limited Partnership (ABN 156 630 661).

Bigge Subcontractor means Erector Group Pty Ltd.

Bigge Superintendent means the Superintendent or Principal's representative in respect of the contract between the Bigge Developer and the Bigge Contractor in respect of the Bigge Street Buildings.

Building Products Safety Legislation means depending upon where a Group Member is located, one of the following: the *Building Products (Safety) Act 2017* (NSW), *Building Act 1993* (Vic) and *Building Regulations 2018* (Vic), *Building Act 2011* (WA) and *Building Regulations 2012* (WA), *Planning, Development and Infrastructure Act 2016* (SA) and *Development (Building Cladding) Variation Regulations 2018* (SA), *Building Act 2016* (Tas) and *Building Regulations 2016* (Tas), *Building Act 1993* (NT) and *Building Regulations 1993* (NT), *Queensland Building and Construction Commission Act 1991* (Qld), *Queensland Building and Construction Commission Regulation 2003* (Qld), *Building Regulations 2006* (Qld), *Building Act 2004* (ACT) and *Building (General) Regulation 2008* (ACT).

Certifying Authorities means, as applicable:

- (a) (in New South Wales) an 'accredited certifier' within the meaning of s 3(1) of the *Building Professionals Act 2005* (NSW) entitled to issue construction and occupation certificates and carry out inspections of building work pursuant to the NSW EPAA and corresponding legislation relevant to that Group Member's state or territory or a 'consent authority' within the meaning of Division 4.2 of the NSW EPAA;
- (b) (in Victoria) a 'relevant building surveyor' within the meaning of s 3 of the *Building Act 1993* (Vic);
- (c) (in Western Australia) a 'building service practitioner' within the meaning of s 3 of the *Building Services (Registration) Act 2011* (WA);
- (d) (in South Australia) a 'building certifier' within the meaning of s 92 of the *Planning, Development and Infrastructure Act 2016* (SA);

- (e) (in Tasmania) a 'building surveyor' within the meaning of s 28 of the *Building Act 2016* (Tas);
- (f) (in the Northern Territory) a 'building practitioner' within the meaning of Part 3 of the *Building Act 1993* (NT);
- (g) (in the Australian Capital Territory) a 'building surveyor' under s 9 of the *Construction Occupations (Licensing) Act 2004* (ACT).

Certifiers' Code of Conduct means, as applicable:

- (a) (in New South Wales) the Code of Conduct for Accredited Certifiers which is set out at Schedule 4 to the Building Professionals Accreditation Scheme document published by the State of New South Wales (Department of Fair Trading) through the Building Professionals Board and is given statutory effect pursuant to s 4(2)(b) of the *Building Professionals Act 2005* (NSW);
- (b) (in Tasmania) the Occupational Licensing (Building Surveyors) Code of Practice 2018 (Tas) established by the Administrator of Occupational Licensing under s 53 of the *Occupational Licensing Act 2005* (Tas);
- (c) (in South Australia) the Accredited Professionals Scheme Code of Conduct (SA) established by the Minister of the Department of Planning, Transport and Infrastructure under Schedule 3 of the *Planning, Development and Infrastructure Act 2016* (SA);
- (d) (in Queensland) the *Code of Conduct for Building Certifiers* (Qld) established by the Department of Infrastructure and Planning under s 32 of the *Building Act 1975* (QLD).

CertMark means CertMark International Pty Ltd and/or CertMark Australasia Pty Ltd, an independent certification body which evaluated Vitrabond PE Core Cladding for compliance with certain parts of the BCA and issued the Respondent with CodeMark Certificates.

CodeMark Certificates means the certificates of conformity issued in respect of the Vitrabond PE Core Cladding by CertMark pursuant to the CodeMark Scheme as set out in Schedule 1 to this Amended Defence.

CodeMark Scheme means the CodeMark scheme for the certification of building products and systems managed by the ABCB, pursuant to which certification bodies are accredited and monitored by JAS ANZ and which is expressly recognised (prior to 1 March 2018) in r 224 of the NSW EPAR and s 85A of the NSW EPAA and (from 1 March 2018) in r 224 of the NSW EPAR and ss 4.15(4) and 4.28(4) of the NSW EPAA. The owner of the CodeMark scheme is the Commonwealth of Australia acting on behalf of the states of New South Wales, Queensland, Victoria, South Australia, Tasmania, Western Australia as well as the Australian Capital Territory and Northern Territory.

Combustible means "combustible" as that term is defined in Part A1.1 of the BCA.

Combustible ACP means ACP with a PE Core which is Combustible.

Concurrent Wrongdoer means, as applicable:

- (a) a 'concurrent wrongdoer' within the meaning of Part 4 of the *Civil Liability Act 2002* (NSW), s 43A of the *Civil Liability Act 2002* (Tas), s 5A1 of the *Civil Liability Act 2002* (WA), and s 24AH of the *Wrongs Act 1958* (Vic);
- (b) a 'wrongdoer' within the meaning of s 3(1) of the *Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001* (SA).

Consumer means a consumer within the meaning of:

- (a) section 3 of the ACL and for the purposes of s. 54 of the ACL; and/or
- (b) section 4B of TPA and for purposes of s. 74D of the TPA.

Contractor means a person who performs 'building work' (as that term is defined in the EPAA), but who is not a Subcontractor.

Design Responsibility means responsibility for the specification of Vitrabond PE design Core Cladding, or for a design of a Relevant Building Part that incorporates Vitrabond PE design Core Cladding.

Developer means an individual, corporation, partnership or other entity on whose behalf 'building work' (as that term is defined in the EPAA) is performed by Qualified Professionals or an owner-builder who performs building work.

EPAA mean, as applicable: the *Environmental Planning and Assessment Act 1979* (NSW), *Planning and Environment Act 1987* (Vic), *Environmental Assessment Act 1982* (NT), *Environment Protection Act 1993* (SA), *Planning, Development and Infrastructure Act 2016* (SA), *Land Use Planning and Approvals Act 1993* (Tas), *Environmental Management and Pollution Control Act 1994* (Tas), *Environmental Protection Act 1986* (WA), *Planning and Development Act 2005* (WA), *Planning and Development Act 2007* (ACT), *Environment Protection Act 1997* (ACT), *Planning Act 2016* (Qld) and *Environmental Protection Act 1994* (Qld).

EPAR means, as applicable: *Environment Planning & Assessment Regulations 2000* (NSW), *Planning and Development Regulations 2009* (WA), *Planning and Development (Local Planning Schemes) Regulations 2015* (WA), *Planning and Environment Regulations 2015* (Vic), *Environmental Assessment Administrative Procedures 1984* (NT), *Environment Protection Regulations 2009* (SA), *Planning, Development and Infrastructure (General) Regulations 2017* (SA), *Planning and Development Regulation 2008* (ACT), *Environment Protection Regulation 2005* (ACT), *Planning Regulation 2017* (Qld) and *Environmental Protection Regulation 2008* (Qld).

Environmental Planning Legislation means the EPAA and EPAR as applicable in each Group Members' state or territory.

Fire Safety Engineers means a person qualified to perform fire safety assessments and evaluations on construction projects to assess, amongst other things:

- (a) compliance the Applicable Legal Requirements;
- (b) compliance with the Deemed-to-Satisfy provisions of the BCA; and
- (c) Alternative Solutions (or Performance Solutions) to comply with the BCA.

Home Building Legislation means, as applicable the *Home Building Act 1989* (NSW), the *Home Building Regulation 2004* (NSW), the *Home Building Regulation 2014* (NSW), the *Building Act 1993* (Vic), the *Building Regulations 2018* (Vic) and the *Domestic Building Contracts Act 1995* (Vic), the *Building Act 2011* (WA), the *Building Regulations 2012* (WA) and the *Home Building Contracts Act 1991* (WA), the *Building Work Contractors Act 1995* (SA) and the *Planning, Development and Infrastructure Act 2016* (SA), the *Building Act 2016* (Tas) and the *Building Regulations 2016* (Tas), the *Building Act 1993* (NT) and the *Building Regulations 1993* (NT) the *Building Act 1975* (Qld), *Building Regulations 2006* (Qld), *Queensland Building and Construction Commission Act 1991* (Qld) and the *Queensland Building and Construction Commission Regulation 2003* (Qld), the *Building Act 2004* (ACT) and the *Building (General) Regulation 2008* (ACT).

JAS ANZ means the Joint Accreditation System of Australia and New Zealand established on 30 October 1991.

Non-Combustible means "non-combustible" as that term is defined in Part A1.1 of the BCA.

Non-Combustible ACP means ACP without a PE Core which is Non-Combustible.

person includes a natural person, body corporate or other incorporated or unincorporated entity.

Qualified Professionals means persons who have responsibilities under the Applicable Legal Requirements to assess the use of Combustible ACPs on buildings and other structures (whether as part of design, specification, construction or certification) and includes:

- (a) (in terms of persons who have primary responsibility) Fire Safety Engineers, Certifying Authorities, Architects and façade engineers as well as any Developers, Contractors and Subcontractors who had Design Responsibility;
- (b) (in terms of persons who have secondary responsibility) Superintendents and Developers, Contractors and Subcontractors who did not have Design Responsibility; and
- (c) (in relation to the Applicant) the Bigge Fire Safety Engineer, Bigge Certifier, Bigge Architect, Bigge Superintendent, Bigge Developers, Bigge Contractor and Bigge Subcontractor.

SSFDA means the *Strata Schemes (Freehold Development) Act 1973* (NSW).

Subcontractor means a person who performs 'building work' (as that term is defined in the EPAA) but is not a Contractor.

Superintendent means a person appointed by the Developer to superintend the contract between the Developer and the Contractor involving the construction of the Relevant Building or Relevant Building Part.

92. In this Amended Defence, a reference to legislation is a reference to that legislation as amended or replaced from time to time.

Date: 18 May 2020



Signed by Julian Charles Lindley Mellick
Lawyer for Respondent

This pleading was prepared by Julian Mellick, lawyer.

Certificate of lawyer

I Julian Charles Lindley Mellick certify to the Court that, in relation to the Amended 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: 18 May 2020

A handwritten signature in black ink, appearing to read 'Julian Mellick', written in a cursive style.

Signed by Julian Charles Lindley Mellick
Lawyer for Respondent

Schedule 1

Vitrabond PE

1. The Respondent represented (from time to time) that Vitrabond PE had achieved test results, including the following:

Region	Test	Result
Australia	ASTM E 84	Class 2 or B Flame Spread Index: 45 Smoke Developed: 250
	A/NZS 3837	Group 4 - Pass
	AS 1530.3	Ignitability Index 0 Spread of Flame Index 0 Heat Evolved Index 0 Smoke Developed Index 0-1
Britain	BS BBA 4901	Pass
	BS 476.6	Index of overall performance 0.0
	BS 476.6 Class 1	Spread of Flame 0

2. The Respondent represented (from time to time) that Vitrabond PE had achieved certifications, including the following:

Vitrabond PE CodeMark Certificate No.	Date of Issuance and Revision
CMA-CM40080	11 Nov 2013
CMA-CM40080(Rev1)	11 Nov 2013 (revised Jan 2014)
CMA-CM40080(Rev2)	11 Nov 2013 (revised Sep 2014)

3. The above test results and certifications for Vitrabond PE are referred to in, amongst other things, the documents particularised in paragraphs 47 and 50 of the ASOC.

Vitrabond FR

4. The Respondent represented (from time to time) that Vitrabond FR had achieved test results, including the following:

Region	Test	Result	
Australia	ASTM E 84 Class 2 or B	Flame Spread Index: 45 Smoked Developed: 250	
	Specification C1.10 of BCA 2010	Can be used as an attachment to the external walls in compliance with the specification. This is on the basis that the product is not used near or above an exit.	
	A/NZS 3837	Group 3	
	AS 1530.3:1999	Ignitability Index 0 Spread of Flame Index 0 Heat Evolved Index 0 Smoke Developed Index 0-1	
	AS 1530.1-1994	Deemed combustible under Clause 3.4	
	AS 1530.3-1999 (core only)	Ignitability Index 11 Spread of Flame Index 0 Heat Evolved Index 2 Smoke Developed Index 3	
	AS ISO 9705-2003 and AS 5637.1:2015	Group 2 - Material that reaches flashover following exposure to 300 kW within 600s after not reaching flashover when exposed to 100 kW for 600 s.	
		SMOGRA RC	1.9 m ² s ⁻² x 1000
	ASTM E 84	Flame Spread Index: 10 Smoked Developed: 20	
International	ISO 5660.1-2015	Average Heat Release Rate (Mean): 44.4 kW/m ² Average Specific Extinction Area (Mean): 170.5 m ² /kg Irradiance (mean): 50 kW/m ² Exhaust flow rate (mean): 24 sec Time to sustained flaming (mean): 523 sec Test duration (mean): 2323 sec Peak heat release after ignition: (mean): 179.7 kW/m ² Average heat at 60 s (mean): 5.6 kW/m ² Average heat at 180 s (mean): 5.5 kW/m ² Average heat at 300 s (mean): 12.2 kW/m ² Total heat released (mean): 80.5 MJ/m ² Average effective heat of combustion (mean): 22.2 MJ/kg Initial thickness (mean): 10.0mm Initial mass (mean): 158.8g Mass remaining (mean): 125.2g Mass percentage pyrolysed (mean): 21.2% Mass loss (mean): 33.6g Average rate of mass loss (mean) 2.0 g/m ² .s	
	ISO 9705-2003	Group 2	
		SMOGRA RC	2.7m ² s ⁻² x 1000
Britain	BS 476, Part 6:1989 + A1: 2009	Index of overall performance, I (Fire propagation index) = 0.0 Subindex, i1 = 0.0 Subindex, i2 = 0.0 Subindex, i3 = 0.0	
	BS 476, Part 7: 1997	Class One Surface Spread of Flame	
European Standards	EN 13823	FIGRA 0.2MJ FIGRA 0.4MJ LFS THR 600s	≤ 120 W/s / Compliant - / - ≤ edge of specimen / Compliant ≤ 7.5 MJ / Compliant
		SMOGRA TSP600s	≤ 30 m ² /s ² / Compliant ≤ 50 m ² / Compliant
		Flaming droplets / particles ≤ 10s Flaming droplets/particles > 10s	Flaming ≤ 10s / Compliant Flaming > 10s / Compliant
	EN ISO 11925-2	Fs Flaming droplets/particles	≤ 150 mm within 60s / Compliant No ignition of paper / Compliant
USA	NFPA 285	Pass	

5. The Respondent represented (from time to time) that Vitrabond FR had achieved certifications, including the following:

Vitrabond FR Certificate No.	Issue / Revised Date
CMA-CM40079	11 Nov 2013
CMA-CM40079 Rev1	Issued 11 Nov 2013 (revised Sep 2014)
CMA-CM40079(Rcv2)	Issued 11 Nov 2013 (revised Oct 2015)
CMA-CM40079-I01-R03	11 Nov 2013 (revised Aug 2016)
CMA-CM40079-I01-R04	11 Nov 2013 (revised Sep 2016)
CMA-CM40079 Rev 5	11 Nov 2016
CMA-CM40079 Rev6	17 Dec 2018

6. The above test results and certifications for Vitrabond PE are referred to in, amongst other things, the documents particularised in the following documents:

- (a) the documents particularised by the Applicant in its ASOC at para 47(c);
- (b) CSIRO Report No. FNE12177 issued on 12 June 2018;
- (c) CSIRO Report No. FNC9696 issued on 9 March 2010;
- (d) AWTa Product Testing Report No. 16-001229 issued 29 March 2016;
- (e) EWFA Report No. CR56223700.1;
- (f) Exova Report No. 12-002-305(A) dated 25 April 2012;
- (g) AWTa Product Testing Report No. 18-000310 issued 31 January 2018;
- (h) EWFA Report No. 2601800.1, issued 10 February 2012 (re-issued revising typographical error on 6 March 2014);
- (i) TUV SUD PBS Report No. 7191023239-PIC12-YWA dated 19 July 2012;
- (j) TUV SUD PBS Report No. 7191037811-MEC12-OKH dated 19 July 2012;
- (k) BRE Global Test Report No. P101111-1000-3 Issue 1 dated 29 October 2015; and
- (l) Architectural Testing Report No. C1783.01-121-24, dated 15 October 2012.

Schedule 2

The table below lists the invoices and delivery orders issued by the Respondent in respect of the supply of Vitrabond PE Core Cladding to the Bigge Subcontractor for use on the Bigge Street Building:

Vitrabond PE invoices		
Quantity	Invoice Number	Invoice Date
100	73781	19 November 2014
16	73783	19 November 2014
45	73786	19 November 2014
10	73787	19 November 2014
130	73788	19 November 2014
26	73780	19 November 2014
21	73875	27 November 2014
59	73894	30 November 2014
35	73896	30 November 2014
42	73919	04 December 2014
89	73946	08 December 2014
74	73979	15 December 2014
3	73988	15 December 2014
39	73999	16 December 2014
9	74004	16 December 2014
55	74025	17 December 2014
25	74041	18 December 2014
1132	74042	18 December 2014
35	74072	07 January 2015
149	74131	20 January 2015
10	74137	21 January 2015
132.75	74150	22 January 2015
79	74154	23 January 2015
76	74273	16 February 2015
67	74272	16 February 2015
33.75	74290	30 March 2015
Vitrabond FR Invoices		
Quantity	Invoice Number	Invoice Date
70	73788	19 November 2014
45	73780	19 November 2014
36	73789	19 November 2014
48	73839	26 November 2014
22	73882	30 November 2014
19	73903	02 December 2014
43	73934	05 December 2014
3	73979	15 December 2014
8	73999	16 December 2014
19	74042	18 December 2014
Vitrabond PE and Vitrabond FR Delivery Orders		
	Delivery Order Number	Delivery Order Date
	S3551	5 December 2014
	S3554	8 December 2014
	4094	18 December 2014
	6071	20 January 2015