

NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 23/04/2021 4:23:37 PM AEST and has been accepted for filing under the Court's Rules. Details of filing follow and important additional information about these are set out below.

Details of Filing

| | |
|------------------|---|
| Document Lodged: | Defence - Form 33 - Rule 16.32 |
| File Number: | NSD132/2021 |
| File Title: | SWISS RE INTERNATIONAL SE v LCA MARRICKVILLE PTY LIMITED ACN 601 220 080 |
| Registry: | NEW SOUTH WALES REGISTRY - FEDERAL COURT OF AUSTRALIA |



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

Dated: 23/04/2021 4:23:42 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.

The date and time of lodgment also shown above are the date and time that the document was received by the Court. Under the Court's Rules the date of filing of the document is the day it was lodged (if that is a business day for the Registry which accepts it and the document was received by 4.30 pm local time at that Registry) or otherwise the next working day for that Registry.



Defence

No. NSD 132 of 2021

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

Swiss Re International SE ARBN 138 873 211

Applicant

LCA Marrickville Pty Limited ACN 601 220 080

Respondent

In answer to the allegations in the statement of claim filed on 26 February 2021 (**SOC**), the Respondent (**LCA Marrickville**) states as follows. Unless otherwise stated, this Defence adopts the defined terms used in the SOC.

A. Background

1. LCA Marrickville admits the allegations in paragraph 1 of the SOC.
2. LCA Marrickville admits the allegations in paragraph 2 of the SOC.
3. LCA Marrickville admits the allegations in paragraph 3 of the SOC.
4. LCA Marrickville admits the allegations in paragraph 4 of the SOC, and refers to and repeats the matters pleaded in section D of this defence.
5. LCA Marrickville admits the allegations in paragraph 5 of the SOC, and refers to and repeats the matters pleaded in section B of this defence.
6. LCA Marrickville admits the allegations in paragraph 6 of the SOC, and refers to and repeats the matters pleaded in section C of this defence.
7. LCA Marrickville admits the allegations in paragraph 7 of the SOC, and refers to and repeats the matters pleaded in section C of this defence.
8. LCA Marrickville admits the allegations in paragraph 8 of the SOC.

Filed on behalf of (name & role of party)

LCA Marrickville Pty Limited, the Respondent

Prepared by (name of person/lawyer)

Christopher Michael Erfurt, Lawyer for the Respondent

Law firm (if applicable) Clayton Utz

Tel +61 7 3292 7799

Fax +61 7 3221 9669

Email cerfurt@claytonutz.com

Address for service
(include state and postcode)

Level 28 Riparian Plaza, 71 Eagle Street, Brisbane QLD 4000 Australia

9. LCA Marrickville admits the allegations in paragraph 9 of the SOC.

B. The COVID-19 Pandemic

10. LCA Marrickville admits the allegations in paragraph 10 of the SOC.
11. LCA Marrickville admits the allegations in paragraph 11 of the SOC.
12. LCA Marrickville admits the allegations in paragraph 12 of the SOC.
13. LCA Marrickville admits the allegations in paragraph 13 of the SOC.
14. LCA Marrickville admits the allegations in paragraph 14 of the SOC.
15. LCA Marrickville admits the allegations in paragraph 15 of the SOC.

Listed Human Disease

16. LCA Marrickville admits the allegations in paragraph 16 of the SOC.
17. LCA Marrickville denies the allegations in paragraph 17 of the SOC and states that the Determination (as that term is defined in paragraph 17 of the SOC) came into force on 16 June 2016.
18. LCA Marrickville admits the allegations in paragraph 18 of the SOC.
19. LCA Marrickville denies the allegations in paragraph 19 of the SOC and further:
 - (a) refers to and repeats paragraph 17 of this Defence; and
 - (b) states that, as at 16 June 2016, section 4 of the Determination set out seven human diseases which the Director of Human Biosecurity had determined to be listed human diseases pursuant to section 42(1) of the *Biosecurity Act*.
20. LCA Marrickville admits the allegations in paragraph 20 of the SOC.
21. LCA Marrickville admits the allegations in paragraph 21 of the SOC.
22. LCA Marrickville admits the allegations in paragraph 22 of the SOC.
23. LCA Marrickville admits the allegations in paragraph 23 of the SOC.

Public Health Orders

24. LCA Marrickville admits the allegations in paragraph 24 of the SOC.
25. LCA Marrickville denies the allegations in paragraph 25 of the SOC and states that Order No.1 (as that term is defined in paragraph 25 of the SOC) commenced at the beginning of 31 March 2020.
26. LCA Marrickville admits the allegations in paragraph 26 of the SOC.
27. LCA Marrickville admits the allegations in paragraph 27 of the SOC.

- 28. LCA Marrickville admits the allegations in paragraph 28 of the SOC.
- 29. LCA Marrickville admits the allegations in paragraph 29 of the SOC.
- 30. LCA Marrickville admits the allegations in paragraph 30 of the SOC.
- 31. LCA Marrickville admits the allegations in paragraph 31 of the SOC.
- 32. LCA Marrickville admits the allegations in paragraph 32 of the SOC.
- 33. LCA Marrickville admits the allegations in paragraph 33 of the SOC.
- 33A. In further answer to paragraphs 24 to 33 of the SOC, LCA Marrickville states further that from February 2020, Commonwealth and New South Wales (and other state and territory) authorities intervened with the effect of closing or evacuating the whole or part of the Situation (as defined in the Policy) (**Authority Response-LCA Marrickville**).

Particulars

The matters comprising the Authority Response-LCA Marrickville will be contained in the Agreed Facts.¹

C. LCA Marrickville's claim on the Policy

- 34. As to the allegations in paragraph 34 of the SOC, LCA Marrickville:
 - (a) admits it sent a letter to Aon dated 3 July 2020;
 - (b) otherwise does not know and cannot admit the allegations in the paragraph.
- 35. LCA Marrickville admits the allegations in paragraph 35 of the SOC.
- 36. LCA Marrickville admits the allegations in paragraph 36 of the SOC.
- 37. LCA Marrickville admits the allegations in paragraph 37 of the SOC.
- 38. LCA Marrickville admits the allegations in paragraph 38 of the SOC.
- 39. LCA Marrickville admits the allegations in paragraph 39 of the SOC.
- 40. LCA Marrickville admits the allegations in paragraph 40 of the SOC.
- 41. LCA Marrickville admits the allegations in paragraph 41 of the SOC.

D. The Policy

- 42. LCA Marrickville admits the allegations in paragraph 42 of the SOC.
- 43. LCA Marrickville admits the allegations in paragraph 43 of the SOC.
- 44. LCA Marrickville does not know and cannot admit the allegations in paragraph 44 of the SOC.

¹ References to the Agreed Facts are to the statements of agreed facts (paragraph 5 of the Order dated 16 March 2021).

45. LCA Marrickville does not know and cannot admit the allegations in paragraph 45 of the SOC.
46. LCA Marrickville admits the allegations in paragraph 46 of the SOC.
47. LCA Marrickville admits the allegations in paragraph 47 of the SOC.
48. LCA Marrickville admits the allegations in paragraph 48 of the SOC.
49. LCA Marrickville admits the allegations in paragraph 49 of the SOC.
50. LCA Marrickville admits the allegations in paragraph 50 of the SOC.
51. LCA Marrickville admits the allegations in paragraph 51 of the SOC.
52. LCA Marrickville admits the allegations in paragraph 52 of the SOC.
53. LCA Marrickville admits the allegations in paragraph 53 of the SOC.
54. LCA Marrickville admits the allegations in paragraph 54 of the SOC.
55. LCA Marrickville admits the allegations in paragraph 55 of the SOC.
56. LCA Marrickville admits the allegations in paragraph 56 of the SOC.

E. The proper construction of the Policy

The Disease Clause

57. As to the allegations in paragraph 57 of the SOC, LCA Marrickville:
 - (a) admits the allegations in sub-paragraph (a);
 - (b) admits the allegations in sub-paragraph (b);
 - (c) admits the allegations in sub-paragraph (c);
 - (d) denies the allegations in sub-paragraph (d), and states further that:
 - (i) *"closure or evacuation of the whole or part of the Situation"* includes restriction of access or use of the entirety or a part of the Situation for the purpose of carrying on the whole or a part of the policyholder's business activities;
 - (ii) *"order of a competent public authority"* includes orders comprising the Authority Response-LCA Marrickville;
 - (iii) *"outbreak of a notifiable human infectious or contagious disease ... or any discovery of an organism likely to result in the occurrence of a notifiable infectious or contagious disease ... at the Situation"* includes a single instance or a widespread phenomenon extending to the vicinity of the Situation;

- (iv) “notifiable human infectious or contagious disease” includes COVID-19;
- (v) “organism likely to result in the occurrence of a notifiable human infectious or contagious disease” includes SARS-CoV-2;
- (vi) there was an outbreak of COVID-19 (involving a Notifiable Disease and/or the discovery of an organism, SARS-CoV-2, likely to cause Notifiable Disease) happening from (at least) 25 January 2020;
- (vii) “the discovery of an organism likely to result in ...” means the discovery of an organism in any location, where that organism is likely to result in human infectious or contagious disease anywhere (including at the Situation); and
- (viii) denies the allegations in sub-paragraph (e) and states further that COVID-19 is not a listed human disease for the purposes of the Policy.

Particulars

The Policy was issued on 30 June 2019, and COVID-19 was determined to be a listed human disease on 21 January 2020.

58. LCA Marrickville denies the allegations in paragraph 58 of the SOC and:

- (a) refers to and repeats paragraph 57(e) above; and
- (b) states in the alternative that, pursuant to section 54 of the *Insurance Contracts Act 1984* (Cth), Swiss Re may not refuse to pay LCA Marrickville’s claim by reason of the Director of Human Biosecurity’s decision to determine that COVID-19 be a listed human disease.

The Expansion Clause

59. As to the allegations in paragraph 59 of the SOC, LCA Marrickville:

- (a) admits the allegations in sub-paragraph (a);
- (b) admits the allegations in sub-paragraph (b);
- (c) admits the allegations in sub-paragraph (c);
- (d) denies the allegations in sub-paragraph (d) and refers to and repeats paragraph 57(d) above; and
- (e) denies the allegations in sub-paragraph (e) and refers to and repeats paragraph 57(e) above.

60. LCA Marrickville denies the allegations in paragraph 60 of the SOC and refers to and repeats paragraphs 57 and 58 above.

Catastrophe Clause

61. As to the allegations in paragraph 61 of the SOC, LCA Marrickville:
- (a) admits the allegations in sub-paragraph (a);
 - (b) admits the allegations in sub-paragraph (b);
 - (c) admits the allegations in sub-paragraph (c); and
 - (d) denies the allegations in sub-paragraph (d).
62. LCA Marrickville denies the allegations in paragraph 62 of the SOC and states further that the outbreak of COVID-19 is within the meaning of "*conflagration or other catastrophe*".

Prevention of Access Clause

63. As to the allegations in paragraph 63 of the SOC, LCA Marrickville:
- (a) admits the allegations in sub-paragraph (a);
 - (b) admits the allegations in sub-paragraph (b);
 - (c) as to the allegations in sub-paragraph (c):
 - (i) admits that an insured is only entitled to indemnity if the action of the lawful authority was taken in an attempt to avoid or diminish risk to life or damage to property, within 5 kilometres of the Situation;
 - (ii) states that the Authority Response-LCA Marrickville was action taken by a lawful authority taken in an attempt to avoid or diminish risk to life or damage to property, within 5 kilometres of the Situation;
 - (iii) otherwise denies the allegations in sub-paragraph (c); and
 - (d) admits the allegations in sub-paragraph (d).

Cover for human infectious or contagious disease

64. LCA Marrickville denies the allegations in paragraph 64 of the SOC and further states the Disease Clause does not limit the coverage of the Expansion Clause, the Catastrophe Clause or the Prevention of Access Clause.
65. LCA Marrickville denies the allegations in paragraph 65 of the SOC and refers to and repeats paragraphs 57(e) and 58.

F. The Policy responds to LCA Marrickville's claim

66. LCA Marrickville admits the allegations in paragraph 66 of the SOC.

The Disease Clause

67. As to the allegations in paragraph 67 of the SOC, LCA Marrickville:

- (a) admits that, on 18 October 2020, it indicated to Aon there was no outbreak at the Situation;

Particulars

LCA October Letter (as that term is defined in the particulars subjoined to paragraph 38 of the SOC).

- (b) otherwise denies the allegations in the paragraph.

68. LCA Marrickville does not know and cannot admit the allegations in paragraph 68 of the SOC.

69. LCA Marrickville denies the allegations in paragraph 69 of the SOC.

70. LCA Marrickville denies the allegations in paragraph 70 of the SOC.

71. LCA Marrickville denies the allegations in paragraph 71 of the SOC.

72. LCA Marrickville denies the allegations in paragraph 72 of the SOC and states further:

- (a) LCA Marrickville suffered loss resulting from the interruption of or interference with its Business;
- (b) the interruption or interference was in consequence of closure or evacuation of the whole or part of the Situation;
- (c) the closure or evacuation was by an order made by a competent public authority, being the orders comprising the Authority Response-LCA Marrickville;
- (d) the Authority Response-LCA Marrickville was as a result of an outbreak of a notifiable human infectious or contagious disease or bacterial infection or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease at the Situation; and
- (e) in the premises, LCA Marrickville is entitled to indemnity under the Disease Clause.

The Expansion Clause

73. LCA Marrickville denies the allegations in paragraph 73 of the SOC, and refers to and repeats paragraphs 57, 59 and 72 above.

74. LCA Marrickville denies the allegations in paragraph 74 of the SOC.

75. LCA Marrickville denies the allegations in paragraph 75 of the SOC.
76. LCA Marrickville denies the allegations in paragraph 76 of the SOC and refers to and repeats paragraph 57(d)(viii).
77. LCA Marrickville denies the allegations in paragraph 77 of the SOC and states further:
- (a) LCA Marrickville suffered loss resulting from the interruption of or interference with its Business;
 - (b) the interruption or interference was in consequence of closure or evacuation of the whole or part of the Situation;
 - (c) the closure or evacuation was by an order made by a competent public authority, being the orders comprising the Authority Response-LCA Marrickville;
 - (d) the Authority Response-LCA Marrickville was as a result of an outbreak of a notifiable human infectious or contagious disease within a 5 kilometre radius of the Situation or the discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease within a 5 kilometre radius of the Situation; and
 - (e) in the premises, LCA Marrickville is entitled to indemnity under the Expansion Clause.

The Catastrophe Clause

78. LCA Marrickville denies the allegations in paragraph 78 of the SOC.
79. LCA Marrickville denies the allegations in paragraph 79 of the SOC and states further:
- (a) LCA Marrickville suffered loss resulting from the interruption of or interference with its Business;
 - (b) the interruption or interference was in consequence of the action of a civil authority, being the orders comprising the Authority Response-LCA Marrickville;
 - (c) the action occurred during a catastrophe, being the outbreak of COVID-19, for the purpose of retarding that catastrophe; and
 - (d) refers to and repeats paragraphs 64, 65 and 78 above.

The Prevention of Access Clause

80. As to the allegations in paragraph 80 of the SOC, LCA Marrickville:
- (a) admits the allegations in paragraph 80(a) of the SOC; and
 - (b) denies the allegations in paragraph 80(b) of the SOC.

81. LCA Marrickville denies the allegations in paragraph 81 of the SOC and further states that:

- (a) LCA Marrickville suffered loss resulting from the interruption of or interference with its Business;
- (b) the interruption or interference was in consequence of the action of a lawful authority, being the orders comprising the Authority Response-LCA Marrickville;
- (c) the Authority Response-LCA Marrickville was taken in an attempt to avoid or diminish risk to life, within 5 kilometres of the Situation; and
- (d) the Authority Response-LCA Marrickville prevented or hindered the use of, or access to, the Situation.

The Policy responds

82. LCA Marrickville denies the allegations in paragraph 82 of the SOC, and states further:

- (a) the Policy responds to the Policy Claim (as that term is defined in paragraph 35 of the SOC); and
- (b) LCA is entitled to indemnity from Swiss Re under the Policy in respect of the matters the subject of the Policy Claim.

G. Swiss Re's alternative case

83. LCA Marrickville does not plead to paragraph 83 of the SOC.

The Basis of Settlement and Adjustments Clauses

84. LCA Marrickville admits the allegations in paragraph 84 of the SOC.

85. LCA Marrickville admits the allegations in paragraph 85 of the SOC.

86. LCA Marrickville denies the allegations in paragraph 86 of the SOC and states that the counter-factual required ignores the trends or circumstances arising out of the same underlying or originating cause of the interruption to the business.

87. LCA Marrickville denies the allegations in paragraph 87 of the SOC and refers to and repeats paragraph 86 above.

Section 57 of the *Insurance Contracts Act*

88. LCA Marrickville denies the allegations in paragraph 88 of the SOC and states that it is entitled to interest pursuant to section 57 of the *Insurance Contracts Act 1984* (Cth) calculated from the date Swiss Re should reasonably have paid the claim in accordance with its contractual obligation to do so.

H. Relief

89. LCA Marrickville denies the allegations in paragraph 89 of the SOC, including that Swiss Re is entitled to the relief sought in the Originating Application.

Date: 23 April 2021


Signed by Christopher Michael Erfurt
Lawyer for the Respondent

This pleading was prepared by Christopher Michael Erfurt, lawyer for the Respondent and settled by John Sheahan QC, Derek Wong, and Naomi Wootton, counsel for the Respondent.

Certificate of lawyer

I Christopher Michael Erfurt 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: 23 April 2021


Signed by Christopher Michael Erfurt
Lawyer for the Respondent