

## NOTICE OF FILING

This document was lodged electronically in the FEDERAL COURT OF AUSTRALIA (FCA) on 1/09/2021 8:25:04 AM 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:	Statement of Claim - Form 17 - Rule 8.06(1)(a)
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: 1/09/2021 9:08:08 AM 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.



Form 17  
Rule 8.05(1)(a)

## **Amended Statement of cross-claim**

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

**LCA Marrickville Pty Limited ACN 601 220 080**

Cross-claimant

**Swiss Re International SE ARBN 138 873 211**

Cross-respondent

### **The Parties**

1. The Cross-claimant (**LCA Marrickville**) is and was at all material times a company duly incorporated pursuant to the *Corporations Act 2001* (Cth) (***Corporations Act***) and capable of suing in its corporate name and style.
2. The Cross-respondent (**Swiss Re**) is and was at all material times a company registered under the *Corporations Act* and able to be sued in its corporate name and style.

### **The Policy**

3. On or about 17 July 2019, Swiss Re and LCA Marrickville entered into a written contract of insurance which comprised:

Filed on behalf of (name & role of party)	LCA Marrickville Pty Limited (ACN 601 220 080), the Cross-claimant
Prepared by (name of person/lawyer)	Christopher Michael Erfurt, Lawyer for the Cross-claimant
Law firm (if applicable)	Clayton Utz
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- a. a Policy Schedule and attached Endorsements dated 17 July 2019 (**Policy Schedule**); and
  - b. a policy wording described as "*Vertex Industrial Special Risks 0818*" dated August 2018 (**Policy Wording**),  
(collectively, the **Policy**).
4. The terms of the Policy relevantly include:
- a. the policy number was P23089.04-00 (page 1 of the Policy Schedule);
  - b. LCA Marrickville is listed as an "*Additional Named Insured*" in the Policy Schedule with the consequence that LCA Marrickville falls within the meaning of "*Insured*" for the purposes of the Policy (pages 1 and 8 of the Policy Schedule);
  - c. the Period of Insurance was from 30 June 2019 to 30 June 2020, 4:00 pm Local time (page 1 of the Policy Schedule);
  - d. the Policy Wording was described as "*Vertex ISR 0818*", being the Policy Wording described at paragraph 3(b) above (page 11 of the Policy Schedule);
  - e. the term "*Situation*" was defined in the Policy Wording to mean "the Situation or Situations shown in the **Schedule**. Where the **Situation** specified in the **Schedule** is other than a single address, each separate address at which the **Property Insured** is located shall be one **Situation** for the purposes of this **Policy**, particularly in relation to the **Limit of Liability** and Sub-Limits of Liability" (cl. 1.18 of the Policy Wording);
  - f. the term "*Situation*" was defined in the Policy Schedule to mean "Head Office Units 20 & 21, 39 Herbert St, St Leonards NSW 2065 and elsewhere in Australia including contract sites where the Insured has property or carries on business, has goods or other property stored or being processed or has work done." (page 2 of the Policy Schedule);
  - g. The Policy contained two sections of cover, namely:
    - i. Section 1 - Property Insurance; and
    - ii. Section 2 - Interruption Insurance (page 2 of the Policy Schedule);
  - h. within Section 2 — Interruption Insurance:

#### **"9. Extent of Cover**

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

...

9.1.2 is in consequence of:

9.1.2.1 closure or evacuation of the whole or part of the **Situation** by order of a competent public authority as a result of an outbreak of a notifiable human infectious or contagious disease or bacterial infection or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease or consequent upon vermin or pests or defects in the drains and/or sanitary arrangements at the **Situation** but specifically excluding losses arising from or in connection with highly Pathogenic Avian Influenza in Humans or any disease(s) declared to be a listed human disease pursuant to subsection 42(1) of the Biosecurity Act 2015" (the **Disease Clause**).

...

"9.1.2.4 any of the circumstances set out in Sub-Clauses 9.1.2.1 to 9.1.2.3 (inclusive) occurring within a 5 kilometer [sic] radius of the **Situation**" (the **Expansion Clause**).

...

"9.1.2.5 the action of a civil authority during a conflagration or other catastrophe for the purpose of retarding same" (the **Catastrophe Clause**).

...

"9.1.2.6 the action of any lawful authority attempting to avoid or diminish risk to life or **Damage** to property within 5 kilometres of such **Situation** which prevents or hinders the use of or access to the **Situation** whether any property of the **Insured** shall be the subject of **Damage** or not" (the **Prevention of Access Clause**).

...

"occurring during the **Period of Insurance**. Such events shall be deemed to be loss caused by **Damage** covered by Section 2 of this **Policy**";

- i. Swiss Re's liability to indemnify an "**Insured**" pursuant to cl. 9 of the Policy was subject to:
  - i. the "**Limits of Liability**" and any "**Sub-Limits of Liability**" referred to in the Policy Schedule;

- ii. the loss being calculated in accordance with the "*Basis of Settlement Clause*", being cl. 10 of the Policy Wording;
- iii. the Conditions set out in cll. 11 and 14 of the Policy Wording;

**Particulars**

Policy Wording, cl 9.4

Policy Schedule, pp 2-4

- j. "*Gross Profit*" is to be calculated as follows (the **Basis of Settlement Clause**):

*"10.1.1 in respect of reduction in **Turnover**, the sum produced by applying the **Rate of Gross Profit** to the amount by which the **Turnover** during the **Indemnity Period** shall, in consequence of the **Damage**, fall short of the **Standard Turnover**; and*

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

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

**Particulars**

Policy Wording, cll 1.2, 1.3, 8.5, 8.9, 8.14, 8.15, and 10.1

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

### Particulars

Policy Wording, cl 8

### Claim by LCA Marrickville

5. On or about on or about 15 July 2020, LCA Marrickville caused Swiss Re to be notified that LCA Marrickville sought to make a claim under the Policy (the **Claim**).

### Particulars

Letter from LCA Marrickville dated 3 July 2020.

6. Swiss Re has denied the Policy responds to the Claim.

### Particulars

Letter from Swiss Re to LCA Marrickville dated 29 September 2020.

### Response to COVID-19

7. 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 (**Authority Response-LCA Marrickville**).

### Particulars

The orders which LCA Marrickville says comprise the Authority Response-LCA Marrickville will be contained in the Agreed Facts.<sup>1</sup>

### Response of the Disease Clause

8. The Disease Clause responds to the Claim because:
  - a. LCA Marrickville has suffered loss resulting from interruption or interference with LCA Marrickville's Business;

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

### **Particulars**

Particulars will be provided in the Outline Document to be served on the applicants pursuant to paragraph 3.a. of the Order dated 16 March 2021.

- 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; and
- 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.

### **Response of the Expansion Clause**

9. The Expansion Clause responds to the Claim because:

- a. LCA Marrickville has suffered loss resulting from the interruption or interference with LCA Marrickville's Business;

### **Particulars**

Particulars will be provided in the Outline Document to be served on the applicants pursuant to paragraph 3.a. of the Order dated 16 March 2021.

- 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; and
- d. the Authority Response-LCA Marrickville was as a result of an outbreak of a notifiable human infectious or contagious disease (including within a 5-kilometre radius of the Situation) or bacterial infection or any discovery of an organism likely to result in the occurrence of a notifiable human infectious or contagious disease (including within a 5-kilometre radius of the Situation).

### **Response of the Catastrophe Clause**

10. The Catastrophe Clause responds to the Claim because:

- a. LCA Marrickville has suffered loss resulting from the interruption or interference with LCA Marrickville's Business;

**Particulars**

Particulars will be provided in the Outline Document to be served on the applicants pursuant to paragraph 3.a. of the Order dated 16 March 2021.

- b. the interruption or inference was in consequence of the action of a civil authority, being the orders comprising the Authority Response-LCA Marrickville; and
- c. the action occurred during a catastrophe, being the outbreak of the COVID-19 pandemic and its impacts, for the purpose of retarding that catastrophe.

**Particulars**

LCA Marrickville relies upon the following matters:

- i. the characteristics of COVID-19, including the kind and severity of its symptoms;
- ii. COVID-19's fatality rate;
- iii. COVID-19's transmissibility;
- iv. COVID-19's prevalence both globally and nationally;
- v. COVID-19's impact on mortality from other medical conditions;
- vi. COVID-19 associated delays in treatment and screening for other medical conditions and supply of medical equipment and consequent prolongation of suffering;
- vii. the impact of COVID-19 and COVID-19-related government restrictions on the capacity of the general public to engage in work and leisure activities and the social and economic disruptions caused thereby;
- viii. the economic consequences of COVID-19 and COVID-19-related government restrictions including increases in unemployment and declines in gross domestic product growth;



- ix. the impact of COVID-19 and COVID-19-related government restrictions on the prevalence and severity of mental health conditions in the general public;
- x. the impact of COVID-19-related restrictions on movement and gatherings, including for matters such as weddings and funerals; and
- xi. the interruption to education caused by COVID-19-related restrictions.

### **Response of the Prevention of Access Clause**

11. The Prevention of Access Clause responds to the Claim because:

- a. LCA Marrickville has suffered loss resulting from the interruption or interference to LCA Marrickville's Business;

#### **Particulars**

Particulars will be provided in the Outline Document to be served on the applicants pursuant to paragraph 3.a. of the Order dated 16 March 2021.

- 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 or damage to property, within 5 kilometres of the Situation;
- d. the Authority Response-LCA Marrickville prevented or hindered the use of, or access to, the Situation.

### **Adjustments Clause**

- 12. Insofar as the Adjustments Clause has any application to the Disease Clause, Expansion Clause, Catastrophe Clause and/or Prevention of Access Clause (which is denied) the counter-factual required under the Adjustments Clause ignores the trends or circumstances arising out of the same underlying or originating cause of the interruption to the business.

### **Test Case**

- 13. The Claim is the subject of a complaint to the Australian Financial Complaints Authority (AFCA).

**Particulars**

Complaint no. 763734.

14. These proceedings have been commenced with the consent of AFCA under Rule A7.2(b) of the Complaint Resolution Scheme Rules issued by AFCA dated 25 April 2020.

Date: 23 April 2021

Amended on: 31 August 2021



Signed by Christopher Michael Erfurt  
Lawyer for the Cross-claimant

This pleading was prepared by Christopher Michael Erfurt, lawyer for the respondent and cross-claimant and settled by ~~John Sheahan~~ Steven Finch SC QC, Adam Pomerence QC, Derek Wong and Naomi Wootton of counsel.

**Certificate of lawyer**

I Christopher Michael Erfurt certify to the Court that, in relation to the statement of cross-claim filed on behalf of the cross-claimant, the factual and legal material available to me at present provides a proper basis for each allegation in the pleading.

Date: 23 April 2021

Amended on: 31 August 2021



Signed by Christopher Michael Erfurt  
Lawyer for the Cross-claimant