

Combustible cladding class action has prima facie case against manufacturer, judge says



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A judge has allowed the applicant in a class action over allegedly dangerous combustible cladding to sue a German-based cladding manufacturer, saying there was a prima facie case the company violated the Australian Consumer Law.

Justice Michael Wigney ruled the William Roberts Lawyers-led class could join cladding manufacturer German 3A Composites to the representative proceeding, saying the evidence supplied supported an inference that the firm contravened the ACL and the Trade Practices Act by misrepresenting the quality of its Alucobond cladding.

“The material that the applicant has relied on in support of this application establishes that it has a prima facie case for the relief sought by it,” he wrote in a judgment delivered orally following a March 14 hearing but which was first published on Friday.

William Roberts launched the product liability class action in February this year against Australian distributor Halifax Vogel Group (HVG), which purchased and imported the cladding from 3A Composites. The cladding is installed in countless buildings across Australia.

Justice Wigney said the evidence supported a range of inferences against 3A Composites, including that the Alucobond cladding “was not fit for purpose or was not safe” and thus contravened the necessary consumer law quality guarantees.

The judge also said the evidence supported that 3A Composites had engaged in relevant conduct in Australia.

“[It] is open to infer from the material relied on by the applicant that 3A Composites engaged in relevant conduct in Australia because the guarantee and warranty it supplied in relation to the Alucobond Cladding was to be performed in Australia and, if not complied with, any rectification would need to be carried out in Australia given that the product was used on buildings in Australia,” Justice Wigney said.

3A Composites was also open to being sued as it carried on business within Australia as a “long-term partner” of HVG, Justice Wigney said.

However, the judge stressed that he had in no way made an ultimate finding with regards to the alleged contraventions the class had accused 3A Composites of.

“It should be emphasised that the findings that have been made in relation to the applicant’s prima facie case should not be taken to be findings of fact which will be determinative of the ultimate issues in the proceeding,” Justice Wigney said.

In HVG’s defence, filed May 17, [the firm denied that the cladding was dangerous](#), saying there was “no material risk” the Alucobond products could “cause or contribute to the rapid spread of a fire” or that they would increase the loss of life or risk of building damage.

Alucobond cladding, which is made of two aluminium cover sheets and a core of polyethylene (PE) or other materials, is used as part of or attached to an external wall in residential, commercial, public or government buildings.

HVG denied the material itself was unsafe, instead saying that its suitability for use in certain buildings would depend on an assessment by a builder, architect, or certifier.

“[The] suitable use of Alucobond PE or Alucobond Plus on a building must be determined by appropriately qualified professionals, responsible for the construction and certification of the relevant building, having regard to the particular characteristics and features of that building ... and the standards, codes and regulations applicable to the particular building at the relevant time,” the company said.

3A Composites is yet to file a defence or choose legal representation in the case.

The class is seeking damages, compensation, interest and costs. Primary losses include the cost taken to replace the PE cladding with suitable material and any other further costs to make a building fire safe.

IMF Bentham, which is funding the class action, is currently looking at potential representative proceedings against other PE cladding manufacturers.

Law firm Adley Burstyner is also mulling class actions to compensate property owners for the cost of removing highly combustible aluminium cladding. Maurice Blackburn, which conducted its own investigation into the matter, has decided not to pursue a class action of its own over the cladding.

The NSW government issued a retroactive ban on the use of certain aluminium cladding which took effect on August 15, 2018, and applies to cladding where the core is more than 30 percent PE. In Victoria, orders to remove and replace flammable cladding have been issued to owners of several buildings.

A future case management hearing has been scheduled for July 4.

The class is represented by Ian Roberts, SC, instructed by William Roberts Lawyers. Halifax Vogel Group is represented by Nicholas Owens, SC, and Nuala Simpson, instructed by Quinn Emanuel Urquhart & Sullivan.

The case is [The Owners – Strata Plan 87231 v 3A Composites GmbH & Anor](#).