

## Insurer Vero dragged into class action over combustible cladding



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A judge has ruled insurer Vero can be added to a class action over allegedly combustible cladding, finding removal of the cladding could be considered “property damage” under the wording of an insurance contract with cladding manufacturer Fairview.

In a judgment handed down on Thursday, Federal Court Justice Michael Wigney said the removal of allegedly flammable Vitrabond polyethylene cladding from two residential high-rise properties in Warwick Farm, NSW, including the Solis Apartments, would result in damage to the buildings, triggering coverage for cladding supplier Fairview Architectural under its contract with Vero.

“The panels will not be able to be removed without causing some damage to the existing top hat subframe that is affixed to the concrete wall and steel stud walls of the buildings,” the judge said.

A ‘top hat’ is a batten, most commonly made of steel, used in roofing and cladding as a support truss.

“The removal of the panels is also likely to damage some of the screws fixing the vertical and horizontal top hats together and some of the screws or anchors fixing the top hats to the cement and steel stud walls,” the judge said.

“I am satisfied that Fairview’s claim could properly be characterised as...’property damage’ happening during the period of insurance.”

## **Judge unimpressed with Vero’s ‘superficial’ expert evidence**

William Roberts Lawyers filed two class actions in 2019 — against 3A Composites GmbH and Halifax Vogel Group over Alucobond cladding and against Fairview Architectural over Vitrabond cladding — after major fires broke out in buildings that used polyethylene core cladding, most notably the 23 storey Lacrosse tower in Melbourne in 2014 and the Grenfell tower in London in 2017.

The Fairview case alleges the cladding manufacturer breached the Australian Consumer Law and Trade Practices Act in installing the cladding, and seeks compensation for loss and damage, including for the removal and replacement of the cladding.

The lead applicant is the owners corporation of two buildings in Warwick Farm, which were constructed between 2013 and 2015. Since that time, the NSW government has banned the use of aluminium cladding which is more than 30 percent polyethylene, and Victoria has ordered the owners of several buildings to remove and replace flammable cladding used.

Vero had resisted being joined to the case, with counsel Julian Sexton SC arguing the policy did not cover the risk of fire, and would only be triggered by an actual fire similar to the incidents in London and Melbourne.

In persuading Justice Wigney that removing the panels would constitute property damage, the class action relied on the evidence of facade engineers. The judge said he found their evidence to be far more convincing than that offered by Vero’s expert witnesses.

“Having read the witnesses’ reports and observed their evidence...I consider it to be highly unlikely indeed that the panels could be removed without causing any damage to the top hats or the wall structure, irrespective of what removal method is employed.”

He contrasted these findings with his view of Vero’s expert evidence, which he called “unpersuasive” and “superficial”.

“In contrast, Mr Sorial’s opinion concerning the ability to remove the panels without causing any damage was expressed at a very high level of generality and appeared to be based on a single site visit which involved the visual inspection of only one small area where a panel or two had been removed,” the judge said.

The judge said Sorial was unfamiliar with the common method of affixing cladding which had been used for the Warwick Farm buildings, something which “significantly undermined the reliability of his opinion”.

“Overall, I was considerably less impressed both with Mr Sorial’s report and his oral evidence concerning the prospect or likelihood of damage caused by the removal process.”

## **Exclusion clause argument rejected**

The judge said Vero could not claim to have been covered by an exclusion clause that was activated if Fairview recalled the cladding, saying this had never taken place.

“That clause excludes liability in respect of damages arising out of the insured’s ‘withdrawal, recall, inspection, repair, reconditioning, modification, reinstallation, replacement or loss of use’ of its products.”

“There is, however, no evidence that Fairview did any of those things in respect of any of its products. [Vero] contended that it may be inferred that Fairview had withdrawn or recalled Vitrabond panels from the fact that the authorities had ordered owners to remove the panels from its buildings. That submission is rejected.”

The class action will now amend its claims to include Vero as the second respondent, with the parties due to meet again for a case management hearing on August 16.

In his judgment, Justice Wigney noted that Fairview was not likely to be able to meet any monetary judgment against it in the class action. The class action was stayed in July 2020, after Fairview filed for voluntary administration. Under a deed of company arrangement, Fairview’s business was transferred to FVA Group and all

unliquidated claims against it extinguished, except to the extent that it held an insurance policy that responded to the claims.

In November 2020, the class action got approval to proceed against Fairview in light of the company holding insurance policies that would respond to the claims.

Last month, a Federal Court judge **ruled insurers must cover claims** against builder LU Simon over allegedly combustible cladding in Melbourne's Atlantis Towers.

In a statement to Lawyerly, a spokesperson for Vero said the company is "currently considering the judgement and our next steps in relation to this matter".

The class action is represented by Peter Braham SC and Jerome Entwisle, instructed by William Roberts Lawyers. Vero is represented by Julian Sexton SC, Charles Colquhoun SC and Maggie Kearney, instructed by Moray & Agnew.

The case is [The Owners – Strata Plan No 91086 v Fairview Architectural Pty Ltd ACN 111 935 963](#).