



The decision in Pirmax Pty Ltd v Kingspan Insulation Pty Ltd [2022] FCA 1340

Late last year, the Federal Court handed down a decision in proceedings between Pirmax Pty Ltd (Pirmax) and Kingspan Insulation Pty Ltd (Kingspan), both of whom manufacture thermal insulation panels. The judgment is 160 pages reflecting a complex set of facts and technical issues heard over 6 days of hearing in mid 2021. This case note summarises some of the key issues. To read the full decision go [here](#).

Background – technical matters

The building products involved in this case are thermal insulation boards, commonly used as part of wall and ceiling linings to improve energy efficiency in buildings. Similar types of insulation boards have been used globally since the late 90s. Whilst different products will have different properties and materials, the products are usually made of plastics which not only makes them combustible but also causes them to release toxic fumes when burned.

The case examined the requirements relating to fire hazard properties for internal wall and ceiling linings in Specification C1.10 of Australia's National Construction Code (NCC). In short, the deemed to satisfy (DTS) requirements of the NCC provide that linings for walls and ceilings must achieve a specified 'group number'. The group number reflects the fire performance of the product. Group numbers range from 1 to 4 with a group number 1 being the most fire resistant and therefore the safest for use as an internal wall or ceiling lining. The group number for of any given product can be determined following a test to a specified standard undertaken by a NATA accredited laboratory.

In 2016, the test standard referenced in the NCC changed from AS ISO 9705-2003 to AS 5637.1. The transitional arrangements provided that if a product had a test report indicating a group number determined under versions of the BCA before 1 May 2016, it would remain valid until 1 May 2019.

Under AS ISO 9705-2003, a test room comprising walls and a ceiling is constructed and lined with the product being tested. The test room is then subjected to flames at specified temperatures. The performance of the product is determine based on the time within which the test room reaches 'flashover' being the point at which the heat released is 1000 kW. In simplified terms, if flashover does not occur within 20 minutes, the product will achieve a group 1 rating. If flashover occurs in less than 2 minutes, the product it will achieve a group 4 classification. Products with a group number of 1 can be used on all internal wall and ceiling applications those with a group number of 2 or 3 can be used on some applications and products with a group number of 4 cannot be used at all.

For the purpose of this case, the difference between the testing requirements before 1 May 2016 and after was that prior to 1 May 2016 under the AS ISO 9705 test, the proponent had the flexibility of setting up the test room using the material they wanted to test on all the walls as well as the ceiling or, just on the walls, or, just on the ceiling. Under AS 5637.1, testing was still required to be carried out under ISO 9705, however, AS 5637.1 required that the product being tested must be used on all walls as well as the ceiling of the test room.

The case concerns 2 thermal insulation panel products sold by Pirmax, the **HR Panel Product** and the **ISO3 Product**. The majority of the decision concerns the HR Panel Product.

The Representations by Pirmax – HR Panel Product

Dealing first with the case relating to the HR Panel Product, the product technical information for the HR Panel Product published by Pirmax said it achieved a group number 1 classification under clause C1.10 of the NCC. Various versions of the Pirmax technical information were considered by the court,



some of which included a statement that the silver and white version of the product were group number 1 whilst the black version was group number 3. Some versions also stated that the product was 'Group 1 complaint under AS 5637.1'. The product technical information also referred to typical applications of the product as "Soffit (Carpark Applications), Wall systems, Raised Underfloor, Ground Floor Slabs, Ceiling Systems, Roofs, Domestic and Commercial Ducting".

The Pirmax technical information was based on a series of documents which included:

- the AS ISO 9705-2003 test report from Warrington Exova (Exova) first issued on 9 May 2016 relating to a test conducted on 14 April 2016. The Exova report stated that test involved the use of the product on the ceiling only and for that reason the report stated that Exova were unwilling to recommend that the data be used to determine a group number;
- a report by Acronem Consulting based on the Exova test report, attributing a group number of 1 to the HR Panel Product;
- various certificates issued by Ignis Solutions (Ignis) attributing a group number of 1 to the white and silver versions of the product and 3 to the black version of the product.

Kingspan's counter-marketing efforts – HR Panel Product

Kingspan has been manufacturing thermal insulation panels for 40 years and selling them in Australia since 2009. The court heard evidence that Kingspan had a practice of investigating the product performance claims by competitors and testing competitor's products from time to time to ensure they are competing on a level playing field. They disputed the claims made by Pirmax about the HR Panel Product. They argued the Exova test could not be used because it did not provide a group number for the product and was dated after 1 May 2016 and that the test did not comply with AS 5637.1. They also conducted their own preliminary testing of the HR Panel Product which caused them to doubt that the thermal performance of the product claimed by Pirmax.

From mid 2016, Kingspan embarked on a campaign to discredit the HR Panel Product whilst simultaneously putting forward its own product as a more reliable alternative. Kingspan's actions included writing to Pirmax questioning the validity of the Exova test report. In response, Pirmax published responses to Kingspan's allegations on its website and lodged a complaint about Kingspan's conduct with the Small Business Commission. Pirmax pointed out that Kingspan's K10 thermal panel product also relied on the transitional provisions that applied before 1 May 2016 and yet Kingspan advertised K10 as complying with AS 5637.1. Kingspan conceded it had an error in its marketing but said it corrected that error as soon as Pirmax drew it to their attention.

This caused Kingspan to escalate its attack on Pirmax including having its lawyers send a warning letter to Pirmax demanding that it change its technical information and conduct testing in accordance with relevant standards. Pirmax's lawyers denied the allegations. Kingspan also wrote to Ignis questioning the certificates it had issued and published 'testing alerts' asking 'Are you getting the product you've been sold?'. In addition to arguing that the Exova test could not be relied on, Kingspan alleged that the description of the product referred to in the Exova test was different to the product being sold in reliance on that test report.

Kingspan later commissioned independent testing of the HR Panel Product by Exova under AS ISO 9705 and AS 5637.1. It also commissioned a report by Basic Expert Pty Ltd who attended during the test and later reviewed the Kingspan Exova Test Report. Basic Expert concluded that the panel tested had a group number of 4, meaning it could not be used as a wall or ceiling lining under the DTS provisions of the NCC. The Basic Expert report went on to allege that the Ignis evaluation of the HR



Panel Product was wrong and that the information published by Pirmax was false and misleading. Pirmax disputed the findings saying it was their product that was tested by Kingspan.

Kingspan went on to develop a 'strategic document' entitled 'Project Shield and Sword' to instruct its senior management and sales team as to the manner in which it was to convey the Kingspan Exova Test Report and Basic Expert Report. It included 'scripted emails' and 'Verbally Quotable Points' to be used when communicating with clients which included claims that the HR product was 'unsafe and dangerous'. Kingspan also published a narrated video of its Exova Test explaining the outcomes of that test and saying that 'Whilst this product is being widely promoted by its manufacturer as Group 1 complaint under AS 5637.1 the test determined it to be group 4 and not fit for purpose as an insulated soffit lining under the Australian or New Zealand construction codes'. Kingspan also lodged complaints with building regulators in NSW, Victoria and Western Australia.

Pirmax commences litigation

The Kingspan campaign ensued over a 3 year period. Pirmax eventually issued legal proceedings alleging that the material published by Kingspan and Basic Expert's report about the Pirmax products were false and misleading. Pirmax also alleged that Kingspan had committed the 'tort of injurious falsehood' in that its representations were false, were made maliciously, and had the effect of causing damage to Pirmax's business. Kingspan counter claimed saying that the Pirmax marketing material and technical information was false and misleading.

The legal issues to be decided by the court in relation to the HR panels were:

- whether Pirmax's reliance on the Exova, Acronem and Ignis reports meant that the representations it made were not false, misleading or deceptive;
- whether the transitional provision of the NCC meant that Pirmax could rely on the April 2016 testing by Exova in support of its representations;
- whether Kingspan had made false and misleading representations about the HR Panel Product; and
- whether Kingspan's conduct was malicious amounting to the tort of injurious falsehood.

The Pirmax ISO3 Product

In early 2019, Pirmax developed its ISO3 Product which was similar to the HR panel product but with a thicker aluminium foil facing.

The product information published by Pirmax about its ISO3 Product was based on:

- a AS ISO 9705:2003 and AS 5637.1:2015 test report of the silver coloured version of the product undertaken by Exova dated 18 March 2019;
- reports prepared by the AWTA;
- a report by Acronem relating to seismic fixing requirements;
- a series of reports by Ignis.

The ISO3 Exova Report concluded that the silver version of the product which was tested had achieved a Group number of 3.

Kingspan took issue with the Pirmax information. It said that the Pirmax marketing material stated that the silver, white and black versions of the ISO3 Product achieved a Group number 3, when only the product with the silver finish had been tested.



Kingspan proceeded to have Exova test the white version of the ISO3 Product and again, commissioned Basic Expert to write a report. According to these reports, the white version of the ISO3 Product achieved a group number 4. On this basis Kingspan argued that Pirmax was not entitled to market the white and black versions of their ISO3 Product as achieving a group number 3.

The legal issue to be decided by the Court in relation to the ISO3 panels was how the exemption in Clause C1.10(c)(viii) of NCC 2019 applied. That exemption provides that the requirement in C1.10(a) that the fire hazard properties of (among other things), wall linings and ceiling linings in a class 2 to 9 building must comply with Specification C1.10 does not apply to a material or assembly if it is a paint, varnish, lacquer or similar finish, other than nitro-cellulose lacquer. Pirmax contended that the exemption meant that it was not necessary to test each of the colour variations of the panels, because Specification C1.10 does not apply to the paint finish on the panel.

The Decision

In relation to the HR Panel Product, the Federal Court found in favour of Kingspan, holding that the representations made by Pirmax were misleading or deceptive, in breach of Australian Consumer Law.

The Court agreed with Kingspan that Pirmax was not entitled to represent that the HR panels had attracted a Group 1 classification, because the testing carried out in April 2016 did not indicate any group number for the product and, although the testing was carried out prior to 1 May 2016, the test report was dated after 1 May 2016. Further, the representation that the HR panels had been tested in accordance with AS 5637.1 was incorrect, because that standard did not permit ceiling-only tests.

In relation to the claims by Kingspan that the HR Panel was 'unsafe and dangerous' and 'not fit for purpose', the court said that the mere fact that the Exova test report relied by Pirmax could not be used, did not mean that the product was unsafe or dangerous or that it would not achieve an appropriate group number if it was tested to AS 5637.1. However, given that Kingspan had conducted independent testing of the product to AS 5637.1 which concluded that it achieved a group number 4, it was not misleading for Kingspan to make representations that the product was unsafe or dangerous.

In relation to the ISO3 panels, it was agreed by the various experts who gave evidence in the proceeding that variants in colour facing may lead to a variation in the fire performance of a lining system. However, the experts did not agree on whether the exemption in C1.10(c) operates such that the coloured facing needs to be included when testing for the purpose of determining group number.

The court held that C1.10(c)(vii) does not operate to mean that the paint on a wall or ceiling lining product is irrelevant when determining the group number. The Court said that exemption only applies to paint or varnish as a stand-alone material, which is applied to a wall or ceiling lining after it has been installed into the building. It does not mean that the paint which is part of the manufactured panel itself should not form part of the testing process.

It followed that each coloured variant of the ISO3 product was required to be tested under AS5637.1 in order to determine the group number. Testing only the silver variant did not provide a sufficient basis to represent that the ISO3 product in all finishes achieved a Group 3 classification. The Court held that Pirmax should be restrained from making representations that:

- for the purpose of NCC2016, its HR panel products had a group 1 classification;
- its HR panel products complied with the DTS provisions of the NC 2016 for use in internal ceilings as an exposed or concealed soffit lining; and
- for the purpose of NCC 2019, all its ISO3 products have a Group 3 classification.



In relation to the tort of injurious falsehood, Pirmax had alleged that the conduct of Kingspan over the 3 year period was malicious and had affected its business and reputation. Kingspan defended these claims on the basis that any representations it made were not false and that it was merely trying to ensure there was a 'level the playing field.' Kingspan said there was nothing improper about testing the claims of competitors and it had escalated its response appropriately including setting out its position in detail to Pirmax in writing.

The court held that Pirmax's tortious claim failed at the first hurdle. For the reasons already explored in the decision, the statements that it claims were false were, in fact, not false. The court noted that Kingspan's efforts to engage with Pirmax went largely ignored and there was no evidence that its conduct over the 3 years was done out of malice.

With regard to Pirmax's claims that Kingspan were also selling thermal panels relying on the 'less stringent' pre May 2016 test and the transitional position, the court noted that Kingspan was properly relying on a test report issued before 1 May 2017 to sell its product and said that whilst Kingspan's conduct might have been opportunistic but it was permissible.

A note about Grenfell

In preparing this case note I could not help but notice that Kingspan's actions in challenging the claims made by Pirmax were occurring between 2016 and 2020. The Grenfell Tower refurbishment containing a small amount of Kingspan's thermal board product K15 was completed in 2016. In late 2020 and early 2021 revelations came to light as part of public inquiry into the Grenfell Tower fire about the conduct of Kingspan's UK company and parent company, Kingspan Group PLC headquartered in Ireland.

The Grenfell inquiry was told that Kingspan UK continued to sell its K15 thermal panel (including for the Grenfell refurbishment) using a test result from a previous version of the product in circumstances where the version being sold had performed very poorly when tested. Representatives from the company who gave evidence admitted they were involved in a 'deliberate deceit aimed at achieving the best possible sales for its insulation products.' When a company wrote to a Kingspan technical manager and questioned Kingspan's approach, the manager wrote to friends to say they had confused him 'with someone who gives a damn.'

Following the evidence the Kingspan Group released public statements saying its conduct was 'unacceptable' and apologising unreservedly. It says it supports the Grenfell Inquiry and significant actions have been taken to underpin their commitment to fire safety and professional conduct. A summary of Kingspan evidence and subsequent statement is found in a [BBC article from February 2021](#).

The irony of what was occurring at Kingspan UK and the actions of its Australian entity in this case reflects a complex culture that exists in the building product manufacturing sector. The UK has recently released the [Independent Review of the Construction Product Testing Regime](#) by Paul Morrell OBE and Anneliese Day KC. The report was commissioned following the evidence given at the Grenfell inquiry from Kingspan and other product manufactures including Arconic and Celotex. The report will inform the implementation of significant reforms to the regulation of the building products in the UK.

Bronwyn Weir, Director & Frances Hall, Special Counsel
Weir Legal & Consulting
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