

NOTICE OF MOTION

COURT DETAILS

Court	Supreme Court of New South Wales
Division	Common Law
List	Common Law General
Registry	Sydney
Case number	2020/359004

TITLE OF PROCEEDINGS

Plaintiff	DANNY MARIELLE MOUSSA
First Defendant	CAMDEN COUNCIL
Second Defendant	CORNISH GROUP SPRING FARM PTY LTD ACN 120 837 381
Third Defendant	SMEC TESTING SERVICES PTY LTD (IN LIQUIDATION) ACN 101 164 792
Fourth Defendant	SMECTS HOLDINGS PTY LTD ACN 063 746 823

FILING DETAILS

Person seeking orders	DANNY MARIELLE MOUSSA , Plaintiff
Filed in relation to	Plaintiff's Claim
Legal representative	André Joseph Adams, Mayweathers
Legal representative reference	210733
Contact name and telephone	André Joseph Adams, 02 8020 5720
Contact email	andre.adams@mayweathers.com.au

PERSON AFFECTED BY ORDERS SOUGHT

**LIBERTY MUTUAL INSURANCE COMPANY, TRADING IN AUSTRALIA AS LIBERTY
SPECIALTY MARKETS AUSTRALIA, ARBN 086 083 605, ABN 61 086 083 605,**
Respondent

HEARING DETAILS

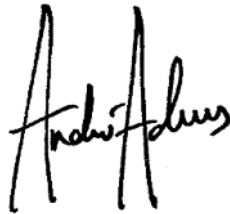
This motion is listed at:

ORDERS SOUGHT

- 1 The Plaintiff be granted leave pursuant to s 5 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) to bring proceedings pursuant to s 4 of that Act against Liberty Mutual Insurance Company, trading in Australia as Liberty Specialty Markets Australia, ARBN 086 083 605, ABN 61 086 083 605, (**LMIC**), with respect to the liability of the Third Defendant asserted in these proceedings.
- 2 The Plaintiff be granted leave to file its proposed Further Amended Statement of Claim in the form annexed hereto and marked 'A', by a date to be fixed by the Court.
- 3 LMIC to pay the costs of and incidental to this motion if it opposes the making of order 1.
- 4 Such other ancillary orders as the Court sees fit.

SIGNATURE

Signature of legal representative

A handwritten signature in black ink, appearing to read "Andrew Adams". The signature is written in a cursive style with a large initial 'A'.

Capacity

Solicitor on Record

Date of signature

24 June 2022

FURTHER DETAILS ABOUT RESPONDENT

Respondent

Name

**LIBERTY MUTUAL INSURANCE COMPANY TRADING
IN AUSTRALIA AS LIBERTY SPECIALTY MARKETS
AUSTRALIA
ABN 61 086 083 605**

Address

Level 26, 181 William Street,
Melbourne VIC 3000

FURTHER AMENDED STATEMENT OF CLAIM

Amended pursuant to leave granted by His Honour Justice Garling on

COURT DETAILS

Court	SUPREME COURT OF NEW SOUTH WALES
Division	COMMON LAW
List	GENERAL
Registry	SYDNEY
Case number	2020/00359004

TITLE OF PROCEEDINGS

Plaintiff	DANNY MARIELLE MOUSSA
First defendant	CAMDEN COUNCIL
Second defendant	CORNISH GROUP SPRING FARM PTY LTD ACN 120 837 381
Third defendant	SMEC TESTING SERVICES PTY LTD (In Liquidation) ACN 101 164 792
Fourth defendant	SMECTS HOLDINGS PTY LTD ACN 063 746 823
<u>Fifth defendant</u>	<u>LIBERTY MUTUAL INSURANCE COMPANY TRADING IN AUSTRALIA AS LIBERTY SPECIALTY MARKETS AUSTRALIA</u> <u>ARBN 086 083 605, ABN 61 086 083 605</u>

FILING DETAILS

Filed for	DANNY MARIELLE MOUSSA , plaintiff
Legal representative	André Joseph Adams, Mayweathers
Legal representative reference	210733
Contact name and telephone	André Joseph Adams, (02) 8020 5720
Contact email	andre.adams@mayweathers.com.au

TYPE OF CLAIM

Torts - negligence - property damage.

RELIEF CLAIMED

The Plaintiff claims on his own behalf and on behalf of each of the Group Members:

- A Damages at common law;
- B Damages under s 236 of the *Australian Consumer Law* in Schedule 2 of the *Competition and Consumer Act 2010* (Cth);
- C ~~Costs;~~ An order pursuant to s 4(1) of the *Civil Liability (Third Party Claims Against Insurers) Act 2017* (NSW) that the Fifth Defendant pay the Plaintiff and any Group Members entitled to damages against the Third Defendant those damages subject to the limit of indemnity of the relevant insurance policy/ies;
- D ~~Interest on damages and costs pursuant to s100 of the *Civil Procedure Act 2005* (NSW); and~~ Costs;
- E ~~Such further orders as the Court deems fit;~~ Interest on damages and costs pursuant to s100 of the *Civil Procedure Act 2005* (NSW); and
- F Such further orders as the Court deems fit.

PLEADINGS AND PARTICULARS

The Parties

- 1 The Plaintiff:
 - (a) is the registered owner of Lot 4127 in DP 1195599 known as 37 Wagner Road, Spring Farm in New South Wales 2570 (**the Property**);
 - (b) has suffered loss and damage in the nature of property damage and economic loss due to the Property being unfit for residential buildings due to the unsound condition of soil on the Property;
 - (c) commences these proceedings as a representative proceeding pursuant to s 157 of the *Civil Procedure Act 2005* (NSW) (**the CPA**) on behalf of all persons (**Group Members**), who or which:
 - (i) own or owned land located in whole or in part within any of the areas delineated in blue on the map **attached** to this Further Amended Statement of Claim and marked **Annexure B (the Cornish Masterplan Area)** and where that person acquired the land after 31 December 2010 and who or which claim to have suffered damage to property or economic loss as a result of damage to residential buildings located on their properties and/or their properties being in a defective condition, because the land owned by them is not fit for residential building

development or construction due to the unsound condition of the soil, (a state hereafter referred to as **unsound for building**), in particular due to the widespread presence at significant depths of inadequately compacted or uncompacted fill, or fill otherwise unsuitable due its type, density and/or moisture content, (**uncontrolled fill**);

- (ii) own or owned land located within the area delineated on the corresponding maps **attached** to this Further Amended Statement of Claim and marked **Annexure A, (the Spring Farm Area)** and where that person owned the land as at 1 January 2018 or acquired the land after 1 January 2018, and who or which claim to have suffered economic loss as a result of a reasonable apprehension that some land within the Spring Farm Area is unsound for building,

due to the conduct of the Defendants pleaded in this Amended Statement of Claim;

- (iii) are the legal personal representatives of the estates of any person who would be a Group Member but for their death after the date of their suffering damage to property or economic loss in the form described in the previous sub-paragraphs; and

- (iv) are not any of the following:

- A a related party (as defined by s 228 of the *Corporations Act* 2001 (Cth) (**Corporations Act**) of the Second, Third or Fourth Defendants;
- B a related body corporate (as defined by s 50 of the *Corporations Act*) of the Second, Third or Fourth Defendants;
- C an associated entity (as defined by s 50AAA of the *Corporations Act*) of the Second, Third or Fourth Defendants;
- D an officer or a close associate (as defined by s 9 of the *Corporations Act*) of the Second, Third or Fourth Defendants; or
- E the Commonwealth or a State or a body corporate, minister or officer acting in the capacity of an officer of the Commonwealth or a State.

- 2 Immediately prior to the commencement of these proceedings, seven or more persons have claims against the Defendants on the bases set out in paragraph (1)(c) above, within the meaning of s 157 of the CPA.
- 3 The Plaintiff and Group Members have the same interest in these proceedings, by reason of the fact that the Plaintiff and each Group Member claim the same type of relief against the Defendants in negligence and for misleading or deceptive conduct and require a resolution of at least the common issues of law or fact identified under separate heading in this Further Amended Statement of Claim.
- 4 The First Defendant (**Camden Council**) is and was at all relevant times:
- (a) a Local Government Council constituted pursuant to Chapter 9, Part 2, Division 1 of the *Local Government Act* 1993 (NSW), liable to be sued in its own name;
 - (b) formerly the owner of some or all of the land comprising the Spring Farm Area, including the Council Land (as defined in paragraph 8 below);
 - (c) an authority vested with statutory powers under the *Environmental Planning and Assessment Act* 1979 (NSW) (**EPAA**) relating to the certification and approval of subdivision of and development on the land comprising the Spring Farm Area; and
 - (d) pursuant to s 109E of the EPAA (as in force at the time of the relevant times), the principal certifying authority for the subdivision of land located in whole or in part within the Cornish Masterplan Area.
- 5 The Second Defendant (**CGSF**) is and was at all relevant times:
- (a) a body corporate incorporated pursuant to the Corporations Act entitled to be sued in its corporate name;
 - (b) formerly the owner of some or all of the land comprising the Spring Farm Area until subdivided lots thereon began to be sold;
 - (c) conducting a business involving the purchase, subdivision, development and sale of land, including land in the Spring Farm Area; and
 - (d) the developer of residential lots in the Cornish Masterplan Area.

Particulars

- i. The residential lots in the Cornish Masterplan Area developed by CGSF include all lots listed in Schedule 1 to this Further Amended Statement of Claim;

- ii. The Plaintiff may seek to amend Schedule 1 to allow for consolidation, subdivision, re-classification, boundary adjustment and/or other variations to lots falling within the Cornish Masterplan Area, or other new information in relation to the history of lots.

6 The Third Defendant (**SMEC TS**) is and was at all material times:

- (a) a body corporate incorporated pursuant to the Corporations Act entitled to be sued in its corporate name;
- (b) conducting a business providing professional services in the nature of geotechnical investigation and related services;
- (c) wholly owned by the Fourth Defendant; and
- (d) a company with all the same directors as the directors of the Fourth Defendant.

7 The Fourth Defendant (**SMECTS Holdings**) is and was at all material times:

- (a) a body corporate incorporated pursuant to the Corporations Act entitled to be sued in its corporate name;
- (b) conducting a business providing professional services in the nature of geotechnical investigation and related services;
- (c) the owner of all issued share capital in SMEC TS; and
- (d) a company with all the same directors as the directors of SMEC TS.

7A The Fifth Defendant (**LMIC**) is and was at all material times:

- (a) a body corporate incorporated in the United States of America;
- (b) a foreign corporation registered with the Australian Securities & Investments Commission, with Australian Registered Body Number 086 083 605;
- (c) trading in Australia variously as Liberty International Underwriters, or Liberty Specialty Markets, in either case with Australian Business Number 61 086 083 605; and
- (d) conducting a business in Australia as an insurer.

Factual Circumstances

8 As at May 2007, Camden Council was the owner of parcels of real property formerly entitled Lots 1/158953, 2/158953, 3/158953, 4/620435, 5/620435 and Y/162529 within the Spring Farm Area, which was itself wholly within the Camden Council area, (such parcels together being **the Council Land**) and subject to confirmation from a surveyor

comprising the approximate area delineated in yellow on the map **attached** to this Amended Statement of Claim and marked **Annexure C**.

- 9 Prior to May 2007, the Council Land had been subject to substantial cutting and filling earthwork whilst owned by Camden Council.
- 10 As at May 2007, the Council Land was the subject of a Development Control Plan and a Local Government Environmental Plan, each of which expressly contemplated future residential building development for that land.
- 11 As at May 2007, and at all times thereafter:
 - (a) the Council Land was, in many places and generally, unsound for building; and
 - (b) the Cornish Masterplan Area was in many places unsound for building.
- 12 On or about 3 May 2007, Camden Council and CGSF entered into a Deed of Reciprocal Land Transfer, (**the Deed**), which embodied an agreement to swap the Council Land for other land then owned by CGSF.
- 13 It was expressly contemplated in the Deed that CGSF would subdivide and develop the Council Land for residential occupation upon acquisition.
- 14 CGSF took possession of the Council Land on or about 1 November 2010 for the purpose of carrying out remedial bulk earthworks.
- 15 As at 1 November 2010, the Council Land was still unsound for building.
- 16 As at 1 November 2010, Camden Council was aware, or ought to have been aware, that the Council Land was unsound for building.

Particulars

- (a) Camden Council was aware of the prior history of cutting and filling earthworks and the use of uncontrolled fill on the Council Land.
- (b) Camden Council was aware of the contents of at least one geotechnical investigation report which indicated that the Council Land was then currently unsound for building, namely the Site Fill Investigation Report prepared by GeoEnviro Consultancy dated 20 October 2010 commissioned by Camden Council (**the GeoEnviro report**).

- 17 As at 1 November 2010, CGSF was aware, or ought to have been aware, that the Council Land was unsound for building.

Particulars

- (a) CGSF was aware of the prior history of cutting and filling earthworks and the use of uncontrolled fill on the Council Land.
- (b) CGSF was aware of the contents of the GeoEnviro report.
- 18 The Council Land was transferred to CGSF pursuant to the Deed on or about 20 April 2012 (**the Council Land transfer**).
- 18A From in or about 2013, CGSF, or persons acting on its behalf or with its consent, were granted development approvals for the staged residential subdivision of the Cornish Masterplan Area, which included the Council Land (**Development Approvals**).

Particulars

- (a) The Development Approvals included at least Development Application DA50/2013 and Development Application DA754/2013.
- (b) Further particulars may be provided following the completion of interlocutory steps.
- 18B The Development Approvals included conditions that:
- (a) the entire development be designed and constructed in accordance with Council's Engineering Specification, being the specifications contained in the document entitled "Engineering Construction Specification adopted 10 February 2009" (**Engineering Specification**); and
- (b) a subdivision certificate would not be issued unless certain conditions were satisfied, including that:
- (i) all conditions of the development consent were satisfactorily addressed and all engineering works were complete; and
- (i) a Soil Classification Report prepared by a suitable qualified person in accordance with the AS 2870 'Residential Slabs and Footings', detailing the general classification of soil type generally found within the subdivision and for each lot within the subdivision.

- 18C The Engineering Specification included requirements to the effect that:
- (a) filling should be carried out in horizontal layers, extending to a dry density ratio in accordance with AS1289.5.4.1 'Dry Density Moisture Variation and Moisture Ratio' of not less than 95% standard in all areas (other than road pavement areas);
 - (b) the compaction of all filled areas in excess of 300 mm must be tested and certified by a NATA Registered Laboratory;
 - (c) the coordination of compaction testing including the placement, supervision, inspection and frequency of testing, shall be carried out in accordance with AS3798 'Guidelines on Earthworks for Commercial and Residential Developments – Appendix B, Level 2 Testing' as a minimum standard;
 - (d) the compaction and testing of earthworks was to be undertaken in accordance with requirements including those referred to in (a) to (c) above; and
 - (e) prior to the issue of a subdivision certificate, a 'Works-as-Executed' plan be prepared, such plan to include a fill plan certifying the extent, depth of fill and degree of compaction for all areas where the depth of fill exceeds 300mm.
- 19 On about 21 December 2012, Camden Council issued a series of Planning Certificates under s 149 of the EPAA with respect to the Council Land, each certificate stating that the land encompassed by the certificate was zoned General Residential, permitting development for dwelling houses with development consent.
- 20 Subsequent to 21 December 2012, CGSF caused to be created Plans of subdivision which proposed a subdivision of the Council Land into newly identified lots (**the new lots**).

Particulars

- (a) The Plans of subdivision included at least Deposited Plan DP1195584, Deposited Plan DP1195599, Deposited Plan DP1195585, DP1228464 and DP1228465.
- (b) Further particulars may be provided following the completion of interlocutory steps.

20A Subsequent to 21 December 2012, CGSF caused to be created plans of subdivision which proposed a subdivision of parts of the Cornish Masterplan Area into newly identified lots.

Particulars

(a) Particulars of the relevant plans for subdivision will be provided following the completion of interlocutory steps.

20B Pursuant to s 109E of the EPAA (as in force at the time of the subdivisions), the Council was the principal certifying authority for the subdivision of land in the Cornish Masterplan Area (including the Council Land).

20C The Council issued a subdivision certificate in respect of each of the subdivisions in the Cornish Masterplan Area, including the subdivisions of the Council Land to create the new lots.

20D By reason of s 109J of the EPAA (as in force at the time of the subdivisions), by issuing the subdivision certificates the Council certified in respect of each subdivision that each requirement specified in the relevant development approvals that, by its terms, was required to be complied with before a subdivision certificate may be issued in relation to the plan of subdivision had been satisfied.

21 At some time between December 2012 and January 2015, SMEC TS and/or SMECTS Holdings were engaged by CGSF to and did perform:

- (a) geotechnical investigation services; and
- (b) remedial bulk earthworks support services,

on or with respect to land in the Cornish Masterplan Area, including the Council Land, and each of the new lots, one of the primary purposes of the services being to ensure the new lots would not be unsound for building.

22 In about 2014, CGSF commenced a process of selling the new lots, although no Plan of subdivision creating the new lots had yet been registered.

22A From the time that CGSF commenced the process of selling the new lots, and at all material times since, CGSF has promoted the new lots, and all other lots in the Cornish Masterplan Area:

- (a) as part of a master planned residential development known in part as “Spring Farm Riverside” and in part as “Nepean Village Riverside” for which CGSF was responsible; and
- (b) as suitable for residential building.

Particulars

- (a) Statements contained on Cornish Group website.
- (b) Further particulars may be provided following completion of interlocutory steps.

23 As at the time CGSF commenced undertaking works for the staged residential subdivision of the Cornish Masterplan Area and as at the time CGSF commenced the process of selling the new lots, Camden Council was aware, or ought to have been aware, that the new lots and certain other parts of the Cornish Masterplan Areas were unsound for building.

Particulars

- (a) Camden Council had not satisfied itself adequately or at all that the Council Land, and certain other parts of the Cornish Masterplan Area, had been made suitable for residential building development since 1 November 2010;
- (a1) Council was aware as at and from some time prior to 1 November 2010 that the compaction and characteristics of the soil of the Council Land was at such times not suitable for residential building development;
- (a2) by reason of those features of the Council Land, and the historic use of the Spring Farm Area for quarrying and agriculture, it should be inferred that Council was aware as at and for some time prior to 1 November 2010 that the compaction and characteristics of the soil of other parts of the land within the Cornish Masterplan Area were at such times not suitable for residential building development; and
- (b) the terms and circumstances of the engagement of SMEC TS and/or SMECTS Holdings were ostensibly not such as to adequately achieve the purpose of ensuring the new lots, and certain other parts of the Cornish Masterplan Area, would not be unsound for building.

24 As at the time CGSF commenced undertaking works for the staged residential subdivision of the Cornish Masterplan Area and as at the time CGSF commenced

selling the new lots, CGSF was aware, or ought to have been aware, that the new lots and certain other parts of the Cornish Masterplan Area were unsound for building.

Particulars

- (a) CGSF had not satisfied itself adequately or at all that the Council Land, and certain other parts of the Cornish Masterplan Area, had been made suitable for residential building development since 1 November 2010;
 - (a1) CGSF was aware as at and from some time prior to 1 November 2010 that the compaction and characteristics of the soil of the Council Land was at such times not suitable for residential building development;
 - (a2) by reason of those features of the Council Land, and the historic use of the Spring Farm Area for quarrying and agriculture, it should be inferred that CGSF was aware as at and for some time prior to 1 November 2010 that the compaction and characteristics of the soil of other parts of the land within the Cornish Masterplan Area were at such times not suitable for residential building development; and
 - (b) the terms and circumstances of the engagement of SMEC TS and/or SMECTS Holdings were ostensibly not such as to adequately achieve the purpose of ensuring the new lots, and certain other parts of the Cornish Masterplan Area, would not be unsound for building.
- 25 In about January 2015, SMEC TS and/or SMECTS Holdings created and issued individual Site Classification Reports (**SCR**) with respect to each of the new lots, classifying each lot as either Class M, Class S or Class H1, in accordance with clause 2.5.3 of Australian Standard 2870-2011 – *Residential slabs and footings*, representing in effect that each new lot was not unsound for building.
- 25A On or about 24 February 2015, the Plaintiff entered into a contract for sale to purchase the Property (at the time being a proposed lot in an unregistered plan of subdivision) from Anvest Holdings Pty Ltd (**Contract for Sale**).

Particulars

- (a) Contract for the sale of land dated 24 February 2015 between the Plaintiff as purchaser and Anvest Holdings Pty Ltd as vendor.
- 25B The Contract for Sale contained a term to the effect that completion of the contract was conditional upon registration of the plan of subdivision creating the Property.

Particulars

- (a) Special Condition 31 of the Contract for Sale.
- 26 Some of the Group Members purchased some of the new lots or other lots in the Cornish Masterplan Area, either from CGSF or from an intermediate owner, subject to settlement of the Contracts for Sale of Land not completing unless and until the Plans of subdivision creating those lots were registered.
- 27 The Plaintiff and some of the Group Members each caused to be constructed residential buildings on their respective lots.
- 28 In purchasing their respective lots, and in causing residential buildings to be constructed on their respective lots, the Plaintiff and the relevant Group Members each proceeded on the assumption that their respective lots were not unsound for building.
- 29 The assumption of each of the Plaintiff and the relevant Group Members was made in reliance on the conduct and involvement of each of the Defendants as set out above.
- 30 At various times after construction, a number of the houses constructed by the Plaintiff and the relevant Group Members suffered structural defects and damage in the form of, but not limited to, visible cracking, lifting, sinking, and other separations (**the structural damage**).
- 31 The structural damage was in all cases caused directly by the fact that the new lots, or the lots in other parts of the Cornish Masterplan Area, were unsound for building.
- 32 Each of the new lots is, and some lots located in other parts of the Cornish Masterplan Area are, still unsound for building, and consequently are vulnerable to and prone to new or further structural damage.
- 33 Each of the new lots has, and certain other lots located in other parts of the Cornish Masterplan Area have, been injuriously affected in value as a result of the fact that they are unsound for building becoming manifest.
- 34 Some Group Members own, or have since the structural damage became manifest owned, properties in the Spring Farm Area other than the new lots or the parts of the Cornish Masterplan Area where there are lots located that are unsound for building.
- 35 As a consequence of it becoming public knowledge that the new lots, and certain other lots located in other parts of the Cornish Masterplan Area, are unsound for building, all

properties in the Spring Farm Area have become and are likely to remain, injuriously affected in value.

Particulars

- (a) the structural damage has become public knowledge since about 2018;
- (b) in the case of some of the properties, the structural damage has not been repaired and remains obvious to the public;
- (c) all properties in the Spring Farm Area have become stigmatised as a result of public knowledge that many properties in that area are unsound for building, as evidenced by the common use by sections of the public of the term “Sink Farm” for the Spring Farm Area;
- (d) the quantum of the adverse affectation on the value of the property will be particularised following service of the Plaintiff’s opinion evidence; and
- (e) the quantum of the adverse affectation on the value of the land of Group Members will be given following opt out, the determination of the Plaintiff’s claim and identified common issues at an initial trial and if and when it is necessary for a determination to be made of the individual claims of those Group Members.

Risk of Harm

35A If any land within the Cornish Masterplan Area was unsound for building, there was a risk of damage to property and economic loss being suffered by subsequent owners of any residential lots within the Cornish Masterplan Area, and within the Spring Farm Area, including the Plaintiff and Group Members (**Risk of Harm**).

Camden Council

36 At all relevant times prior to the Council Land transfer, Camden Council knew or ought to have known that the Council Land was likely to be used for residential building development.

37 As at the date of the Council Land transfer and at all material times thereafter (including the date of registration of the plans of subdivision creating residential lots in the Cornish Masterplan Area (including the Property)), Camden Council knew or ought to have known of the Risk of Harm.

38 At all material times, the Plaintiff and Group Members:

- (a) had no or no practicable ability to prevent, avoid or minimise suffering damage to property or economic loss as a result of undue settlement of the Council Land,

or the undue settlement of land located in other parts of the Cornish Masterplan Area, or of consequent stigmatisation of land in the Spring Farm Area;

- (b) were particularly vulnerable to any undue settlement of the Council Land, or the undue settlement of land located in other parts of the Cornish Masterplan Area, and consequent stigmatisation of land in the Spring Farm Area; and consequently
- (c) were dependent for the protection of their property and economic interests upon Camden Council taking precautions against the Risk of Harm.

39 As a result of the matters pleaded in paragraphs 36 to 38 above, Camden Council at all relevant times owed a duty to the Plaintiff and Group Members to exercise reasonable care and to take reasonable precautions against the possibility of the materialisation of the Risk of Harm.

40 At all relevant times the Risk of Harm was:

- (a) foreseeable to Camden Council; and
- (b) not insignificant.

Particulars

- (i) Camden Council was aware as at and for some time prior to 26 October 2010 that the compaction and characteristics of the soil of the Council Land was at such times not suitable for residential building development;
- (i1) by reason of those features of the Council Land, and the historic use of the Spring Farm Area for quarrying and agriculture, it should be inferred that the Council was aware as at and for some time prior to 26 October 2010 that the compaction and characteristics of the soil of other parts of the land within the Cornish Masterplan Area were at such times not suitable for residential building development;
- (ii) substantial earthworks were necessary as at 26 October 2010 for the Council Land, and certain other parts of the Cornish Masterplan Area, to be made suitable for residential building development;
- (iii) if such work was not done or was not adequately done there was a high risk that residential buildings constructed on lots on the Council Land, and certain other parts of the Cornish Masterplan Area, would suffer damage, such as the structural damage; and

- (iv) if a number of residential buildings constructed on lots on the Council Land, or other parts of the Cornish Masterplan Area, suffered damage, such as the structural damage, due to being unsound for building, property values in the area would likely be injuriously affected.

- 41 As a result of the matters pleaded and particularised in paragraphs 36 to 40 above:
- (a) there was a significant risk of harm if reasonable precautions were not taken against the Risk of Harm;
 - (b) the harm that could occur in the event that the Risk of Harm eventuated was serious in that it could involve significant damage to property and significant economic loss;
 - (c) the burden of taking reasonable precautions against the Risk of Harm was low or moderate or, in the alternative, was not unreasonable having regard to the probability that the Risk of Harm would eventuate and the potential seriousness of the harm if that occurred; and
 - (d) the social utility of Camden Council's relevant activities was not so great as to have impeded it from taking reasonable precautions against the Risk of Harm.
- 42 As a result of the matters pleaded and particularised in paragraphs 36 to 41 above, a reasonable person in the position of Camden Council at the material times would have taken the following precautions against the materialisation of the Risk of Harm:
- (a) properly conducting the works necessary to make the Council Land suitable for residential building development;
 - (b) properly supervising and inspecting the works necessary to make the Council Land, and certain other parts of the Cornish Masterplan Area, suitable for residential building development;
 - (c) taking reasonable steps to ensure that any material used for the works necessary to make the Council Land, and certain other parts of the Cornish Masterplan Area, suitable for residential building development would itself be suitable;
 - (d) arranging proper and adequate geotechnical investigation of the Council Land before transfer of the Council Land, and before approving subdivision of the Cornish Masterplan Area (including the Council Land), and before any approval of residential building development on the Cornish Masterplan Area (including

the Council Land) or individual lots comprising parts of the Cornish Masterplan Area (including the Council Land);

- (d1) in circumstances where Camden Council was the principal certifying authority for the subdivision of the Cornish Masterplan Area (including the Council Land), only issuing a subdivision certificate for the subdivision of the land if properly satisfied all conditions contained in the development consent permitting the subdivision were satisfied;
- (e) requiring CGSF to satisfy Camden Council that the Council Land was, and certain other parts of the Cornish Masterplan Area were, no longer unsound for building;
- (f) observing and complying with Camden Council's own Engineering Specification, with respect to the Cornish Masterplan Area, including the Council Land;
- (g) requiring CGSF to satisfy Camden Council that works had been done to the Council Land, and certain other parts of the Cornish Masterplan Area, in compliance with the Engineering Specification;
- (h) requiring CGSF to satisfy Camden Council that works had been done to the Council Land, and certain other parts of the Cornish Masterplan Area, in compliance with Australian Standard 3798-2007 – *Guidelines on earthworks for commercial and residential developments* – in particular sections 4 and 5;
- (i) requiring CGSF to satisfy Camden Council that works had been done to the Council Land, and certain other parts of the Cornish Masterplan Area, in compliance with Camden Council's Development Control Plan 2011, in particular Part B, section B1.2, control 19; and
- (j) instructing and advising any subsequent owners of the Council Land, and certain other parts of the Cornish Masterplan Area, or individual new lots on the Council Land, and certain other parts of the Cornish Masterplan Area, including but not limited to CGSF, the Plaintiff and the relevant Group Members, of the condition of the Council Land, and certain other parts of the Cornish Masterplan Area, and of the danger of undue settlement of the Council Land, and certain other parts of the Cornish Masterplan Area,

(together and separately, **the Council Reasonable Precautions**).

- 44 In the circumstances, Camden Council breached its duty of care to the Plaintiff and the Group Members.

Causation and loss

- 45 Had Camden Council not breached its duty of care:
- (a) the Council Land would not have unduly settled;
 - (a1) certain other parts of the Cornish Masterplan Area would not have unduly settled;
 - (b) the new lots, and certain other lots in the Cornish Masterplan Area, would not have been unsound for building at the time of purchase by the Plaintiff and Group Members;
 - (c) properties owned by the Plaintiff and Group Members would not have sustained structural damage due to the undue settlement;
 - (d) the Plaintiff and the Group Members would not have sustained economic loss;
 - (e) property values in the Spring Farm Area would not have been injuriously affected by stigmatisation;
 - (e1) in the alternative, subdivision certificates would not have been issued for the plans of subdivision creating the properties owned by the Plaintiff and Group Members (and the properties would not have been created); and
 - (f) in the alternative, the Plaintiff and the Group Members would not have purchased their respective properties at all.
- 46 In the circumstances, the Plaintiff and the Group Members have suffered loss and damage as a result of Camden Council's breach of duty of care.

Particulars

- (a) the structural damage to their properties;
- (a1) costs of demolition of residential buildings located on the properties, costs of remediation of the properties to make those properties fit for residential building and costs of construction of replacement residential buildings on those properties;
- (b) in the alternative, cost of repairs of the structural damage to their properties;
- (c) costs associated with investigating or otherwise ameliorating the structural damage to their properties;

- (d) adverse affectation on the value of their properties;
- (e) in the alternative, on the basis that the Plaintiff or Group Members would not have purchased their respective properties, the cost of purchasing the properties, including the transaction costs in purchasing the properties and attempting to sell or selling the properties, including but not limited to stamp duty and conveyancing costs; and
- (f) inconvenience, distress and vexation.

Further particulars of the Plaintiff's loss and damage will be provided following the completion of expert evidence and the service of evidence, but will include the cost of demolition of the residential building constructed on the Property, the costs of remediation of the Property to make it fit for residential building and the cost of construction of a replacement residential building on the Property.

CGSF

Negligence

- 47 By no later than the date of the Council Land transfer and at all material times thereafter, CGSF knew or ought to have known of the Risk of Harm.
- 48 At all material times, the Plaintiff and Group Members:
- (a) had no or no practicable ability to prevent, avoid or minimise suffering damage to property or pure economic loss as a result of undue settlement of the Council Land, or the undue settlement of land located in other parts of the Cornish Masterplan Area, or of consequent stigmatisation of land in the Spring Farm Area;
 - (b) were particularly vulnerable to any undue settlement of the Council Land, or the undue settlement of land located in other parts of the Cornish Masterplan Area, and consequent stigmatisation of land in the Spring Farm Area; and consequently; and
 - (c) were dependent for the protection of their property and economic interests upon CGSF taking precautions against the Risk of Harm.
- 49 As a result of the matters pleaded in paragraphs 47 to 48 above, CGSF at all relevant times owed a duty of care to the Plaintiff and Group Members to exercise reasonable care and to take reasonable precautions against the possibility of the materialisation of the Risk of Harm.

50 At all relevant times the Risk of Harm was:

- (a) foreseeable to CGSF; and
- (b) not insignificant.

Particulars

- (i) CGSF was aware as at and for some time prior to 26 October 2010 that the compaction and characteristics of the soil of the Council Land was at such times not suitable for residential building development;
- (i1) by reason of those features of the Council Land, and the historic use of the Spring Farm Area for quarrying and agriculture, it should be inferred that CGSF was aware as at and for some time prior to 26 October 2010 that the compaction and characteristics of the soil of other parts of the land within the Cornish Masterplan Area were at such times not suitable for residential building development;
- (ii) substantial works were necessary as at 26 October 2010 for the Council Land, and certain other parts of the Cornish Masterplan Area, to be made suitable for residential building development;
- (iii) if such work was not done or was not adequately done there was a high risk that residential buildings constructed on lots on the Council Land, and certain other parts of the Cornish Masterplan Area, would suffer damage, such as the structural damage; and
- (iv) if a number residential buildings constructed on lots on the Council Land, and certain other parts of the Cornish Masterplan Area, suffered damage, such as the structural damage, due to being unsound for building, property values in the area would likely be injuriously affected.

51 As a result of the matters pleaded and particularised in paragraphs 47 to 50 above:

- (a) there was a significant risk of harm if reasonable precautions were not taken against the Risk of Harm;
- (b) the harm that could occur in the event that the Risk of Harm eventuated was serious in that it could involve significant damage to property and significant economic loss;
- (c) the burden of taking reasonable precautions against the Risk of Harm was low or moderate or, in the alternative, was not unreasonable having regard to the

probability that the Risk of Harm would eventuate and the potential seriousness of the harm if that occurred; and

- (d) the social utility of CGSF's relevant activities was not so great as to have impeded it from taking reasonable precautions against the Risk of Harm.

52 As a result of the matters pleaded and particularised in paragraphs 47 to 51 above, a reasonable person in the position of CGSF at the material times would have taken the following precautions against the materialisation of the Risk of Harm:

- (a) properly conducting the works necessary to make the Council Land, and certain other parts of the Cornish Masterplan Area, suitable for residential building development, including all works necessary to satisfy all conditions contained in the development consents permitting subdivision of the Council Land (including the Property);
- (b) properly supervising and inspecting the works necessary to make the Council Land, and certain other parts of the Cornish Masterplan Area, suitable for residential building development;
- (c) taking reasonable steps to ensure that any material used for the works necessary to make the Council Land, and certain other parts of the Cornish Masterplan Area, suitable for residential building development would itself be suitable;
- (d) arranging proper and adequate geotechnical investigation of the Cornish Masterplan Area, including the Council Land, before conducting any sales process of the lots contained in the Cornish Masterplan Area;
- (e) satisfying itself that the Council Land was, and certain other parts of the Cornish Masterplan Area were, no longer unsound for building;
- (f) observing and complying with the Engineering Specification, with respect to the Cornish Masterplan Area, including the Council Land and the new lots;
- (g) satisfying itself that works had been done to the Council Land, and certain other parts of the Cornish Masterplan Area, in compliance with Australian Standard 3798-2007 – *Guidelines on earthworks for commercial and residential developments* – in particular sections 4 and 5;
- (h) satisfying itself that works had been done to the Council Land, and certain other parts of the Cornish Masterplan Area, in compliance with Camden Council's

Development Control Plan 2011, in particular Part B, section B1.2, control 19; and

- (i) instructing and advising any subsequent owners of the Council Land, and certain other parts of the Cornish Masterplan Area, or individual lots on the Council Land, and certain other parts of the Cornish Masterplan Area, including but not limited to the Plaintiff and relevant Group Members, of the condition of the Council Land, and certain other parts of the Cornish Masterplan Area, and of the danger of undue settlement of the Council Land, and certain other parts of the Cornish Masterplan Area,

(together and separately, **the CGSF Reasonable Precautions**).

53 CGSF failed to take any of the CGSF Reasonable Precautions.

54 In the circumstances CGSF breached its duty of care to the Plaintiff and Group Members.

Australian Consumer Law

55 Further, in the factual circumstances pleaded above, at all material times CGSF was engaging in conduct in trade or commerce for the purposes of the *Australian Consumer Law* in Schedule 2 of the *Competition and Consumer Act 2010 (Cth)* (**ACL**).

55A At all material times since at least 2014, CSGF has represented to:

- (a) the Plaintiff; and
- (b) members of the public who are purchasers or potential purchasers of residential lots in the Cornish Masterplan Area (including some Group Members),

that the residential lots located in the Cornish Masterplan Area were, and remain, suitable for residential building (**Suitability representation**).

Particulars

- (a) the Suitability representation is, at least, implied by statements contained on the Cornish Group website and in other marketing and promotional material prepared by CSGF since at least 2014 to encourage persons to purchase residential lots in the Cornish Masterplan Area for residential purposes, including for the purpose of building residential dwellings on those lots.
- (b) further particulars will be provided following completion of interlocutory steps.

- 55B Contrary to the Suitability representation, by reason of the use of uncontrolled fill and the subsequent settlement, or risk of settlement, of that uncontrolled fill, some or all of the residential lots located in the Cornish Masterplan Area are unsuitable for residential building.
- 56 In the factual circumstances pleaded above, CGSF engaged in conduct that was misleading and deceptive in breach of s 18 of the ACL.

Particulars

- (a) advertising, marketing and/or promoting the sale of the new lots without having taken the CGSF Reasonable Precautions.
 - (b) conducting a sales process of the new lots without having taken the CGSF Reasonable Precautions.
 - (c) expressly and/or implicitly representing to prospective purchasers of the new lots that they were not unsound for building when that was not the case.
- 57 Further, in the factual circumstances pleaded above, in connection with the sale or grant, or the possible sale or grant, of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land, CGSF:
- (a) made false or misleading representations concerning the characteristics of land; and
 - (b) made false or misleading representations concerning the use to which the land is capable of being put or may lawfully be put;
- in breach of s 30 of the ACL.

Particulars

- (a) expressly and/or implicitly representing to prospective purchasers of the new lots that they were not unsound for building when that was not the case.
- 57A The Plaintiff and some Group Members relied on the Suitability representation, the false or misleading representations made in breach of s 30 of the ACL, and the conduct of CGSF pleaded in paragraph 56 above, in purchasing residential lots in the Cornish Masterplan Area.

Causation and loss

- 58 Had CGSF not breached its duty of care and ss 18 and 30 of the ACL:
- (a) the Council Land would not have unduly settled;
 - (a1) certain other parts of the Cornish Masterplan Area would not have unduly settled;
 - (b) the new lots, and certain other lots in the Cornish Masterplan Area, would not have been unsound for building at the time of purchase by the Plaintiff and Group Members;
 - (c) properties owned by the Plaintiff and Group Members would not have sustained structural damage due to the undue settlement;
 - (d) the Plaintiff and the Group Members would not have sustained economic loss;
 - (e) property values in the Spring Farm Area would not have been injuriously affected by stigmatisation; and
 - (f) in the alternative, the Plaintiff and the Group Members would not have purchased their respective properties at all.
- 59 In the circumstances the Plaintiff and the Group Members have suffered loss and damage as a result of CGSF's breach of duty of care and breach of ss 18 and 30 of the ACL.

Particulars

- (a) the structural damage to their properties;
- (a1) costs of demolition of residential buildings located on the properties, costs of remediation of the properties to make those properties fit for residential building and costs of construction of replacement residential buildings on those properties;
- (b) in the alternative, cost of repairs of the structural damage to their properties;
- (c) costs associated with investigating or otherwise ameliorating the structural damage to their properties;
- (d) adverse affectation on the value of their properties;
- (e) in the alternative, on the basis that the Plaintiff or Group Members would not have purchased their respective properties, the cost of purchasing the properties, including the transaction costs in purchasing the properties and

attempting to sell or selling the properties, including but not limited to stamp duty and conveyancing costs; and

- (f) inconvenience, distress and vexation.

Further particulars of the Plaintiff's loss and damage will be provided following the completion of expert evidence and the service of evidence, but will include the cost of demolition of the residential building constructed on the Property, the costs of remediation of the Property to make it fit for residential building and the cost of construction of a replacement residential building on the Property.

SMEC TS and SMECTS Holdings

Negligence

60 At all relevant times prior to issuing the SCRs, SMEC TS and SMECTS Holdings knew or ought to have known that the Cornish Masterplan Area, including the Council Land, was likely to be used for residential building development.

61 As at the time of their geotechnical investigation works on the Cornish Masterplan Area and/or the Council Land and/or the new lots, SMEC TS and SMECTS Holdings knew or ought to have known of the Risk of Harm.

62 At all material times the Plaintiff and Group Members:

- (a) had no or no practicable ability to prevent, avoid or minimise suffering damage to property or pure economic loss as a result of undue settlement of the Council Land, or the undue settlement of land located in other parts of the Cornish Masterplan Area, or consequent stigmatisation of land in the Spring Farm Area;
- (b) were particularly vulnerable to any undue settlement of the Council Land, or the undue settlement of land located in other parts of the Cornish Masterplan Area, and consequent stigmatisation of land in the Spring Farm Area; and consequently,
- (c) were dependent for the protection of their property and economic interests upon SMEC TS and SMECTS Holdings taking precautions against the Risk of Harm.

63 As a result of the matters pleaded in paragraphs 60 to 62 above, SMEC TS and SMECTS Holdings at all relevant times owed a duty of care to the Plaintiff and Group Members to exercise reasonable care and to take reasonable precautions against the possibility of the materialisation of the Risk of Harm.

- 64 Further, at all relevant times due to the relationship between SMEC TS and SMECTS Holdings, SMECTS Holdings owed an independent duty of care to the Plaintiff and Group Members, arising from and analogous to that owed by SMEC TS set out above.

Particulars

- (a) SMECTS Holdings owned all the issued share capital in SMEC TS;
- (b) SMEC TS and SMECTS Holdings had entirely common directorships;
- (c) SMECTS Holdings was at all times aware of all of the activities of SMEC TS relevant to the matters pleaded in this Further Amended Statement of Claim; and
- (d) in the circumstances, in all of the activities of SMEC TS relevant to the matters pleaded in this Further Amended Statement of Claim SMEC TS acted as a conduit of SMECTS Holdings.

- 65 At all relevant times the Risk of Harm was:

- (a) foreseeable to SMEC TS and SMECTS Holdings; and
- (b) not insignificant.

Particulars

- (a) SMEC TS and SMECTS Holdings, in conducting businesses providing professional services in the nature of geotechnical investigation, were or ought to have been aware of:
 - (i) the significant risks of damage to buildings constructed on land that was unsound for building; and
 - (ii) the potential adverse effect on residential property value where the land was or might be perceived to be unsound for building.

- 66 As a result of the matters pleaded and particularised in paragraphs 60 to 65 above:

- (a) there was a significant risk of harm if reasonable precautions were not taken against the Risk of Harm;
- (b) the harm that could occur in the event that the Risk of Harm eventuated was serious in that it could involve significant damage to property and significant economic loss;

- (c) the burden of taking reasonable precautions against the Risk of Harm was low or moderate or, in the alternative, was not unreasonable having regard to the probability that the Risk of Harm would eventuate and the potential seriousness of the harm if that occurred; and
- (d) the social utility of SMEC TS and SMECTS Holdings' relevant activities was not so great as to have impeded them from taking reasonable precautions against the Risk of Harm.

67 As a result of the matters pleaded and particularised in paragraphs 60 to 66 above, a reasonable person in the position of SMEC TS and SMECTS Holdings at the material times would have taken the following precautions against the materialisation of the Risk of Harm:

- (a) properly conducting the works necessary to make the Council Land, and certain other parts of the Cornish Masterplan Area, suitable for residential building development;
- (b) properly supervising and inspecting the works necessary to make the Council Land, and certain other parts of the Cornish Masterplan Area, suitable for residential building development;
- (c) taking reasonable steps to ensure that any material used for the works necessary to make the Council Land, and certain other parts of the Cornish Masterplan Area, suitable for residential building development would itself be suitable;
- (d) conducting proper and competent geotechnical investigation of the Council Land, and certain other parts of the Cornish Masterplan Area, with due care and skill;
- (e) drilling to an appropriate depth for soil sampling when conducting geotechnical investigation of the Council Land, and certain other parts of the Cornish Masterplan Area;
- (f) providing proper and competent remedial bulk earthworks support services on the Council Land, and certain other parts of the Cornish Masterplan Area, with due care and skill; and
- (g) exercising due care and skill in the preparation and issuance of the SCRs, (together and separately, **the SMEC Reasonable Precautions**).

68 SMEC TS and SMECTS Holdings failed to take any of the Reasonable Precautions.

69 In the circumstances, SMEC TS and SMECTS Holdings breached their duty of care to the Plaintiff and Group Members.

Australian Consumer Law

70 Further, in the factual circumstances pleaded above, at all material times SMEC TS and SMECTS Holdings were engaging in conduct in trade or commerce for the purposes of the ACL.

70A By preparing and issuing the SCRs, SMEC TS and/or SMECTS Holdings represented to:

- (a) the Plaintiff; and
- (b) members of the public who are purchasers or potential purchasers of residential lots in the Cornish Masterplan Area (including some Group Members),

that the residential lots in the Cornish Masterplan Area (or some of them), including the Property were Class M (or Class S or Class H1), in accordance with clause 2.5.3 of Australian Standard 2870-2011 – *Residential slabs and footings*’ (**Class representation**).

Particulars

(a) The Class representation is express and contained in the SCRs.

70B Contrary to the Class representation, by reason of the use of uncontrolled fill and the subsequent settlement, or risk of settlement, of that uncontrolled fill:

- (a) the Property; and
- (b) some or all of the other residential lots located in the Cornish Masterplan Area, were and are properly characterised as Class P, in accordance with clause 2.5.3 of Australian Standard 2870-2011 – *Residential slabs and footings*’.

71 In the factual circumstances pleaded above, SMEC TS and SMECTS Holdings engaged in conduct that was misleading and deceptive in breach of s 18 of the ACL.

Particulars

(a) preparing and issuing the SCRs without having taken the SMEC Reasonable Precautions.

- (b) failing to advise CGSF, Camden Council, the Plaintiff or the Group Members that the new lots were unsound for building.
- (c) implicitly or expressly representing that the new lots were not unsound for building when that was not the case.

72 Further, in the factual circumstances pleaded above, in connection with the sale or grant, or the possible sale or grant, of an interest in land or in connection with the promotion by any means of the sale or grant of an interest in land, SMEC TS and SMECTS Holdings:

- (a) made false or misleading representations concerning the characteristics of land; and
- (b) made false or misleading representations concerning the use to which the land is capable of being put or may lawfully be put;

in breach of s 30 of the ACL.

Particulars

- (a) representing in each of the SCRs that the respective new lot was not unsound for building when that was not the case.

72A The Plaintiff and some Group Members relied on the Class representations, the false or misleading representations in breach of s 30 of the ACL and the conduct of SMEC TS and SMECTS Holdings pleaded in paragraph 71 above, in purchasing residential lots in the Cornish Masterplan Area, including because the preparation and issuing of SCRs which characterised the land other than as Class P, in accordance with clause 2.5.3 of Australian Standard 2870-2011 – *Residential slabs and footings*, was required for the land to be subdivided, such that the Plaintiff could not have acquired the Property, and some Group Members could not have acquired other lots, in the absence of the SCRs being prepared and issued by SMEC TS and/or SMECTS Holdings.

Causation and loss

73 Had SMEC TS and SMECTS Holdings not breached their duty of care and s 18 and s 30 of the ACL:

- (a) the Council Land would not have unduly settled;
- (a1) certain other parts of the Cornish Masterplan Area would not have unduly settled;

- (b) the new lots, and certain other lots in the Cornish Masterplan Area, would not have been unsound for building at the time of purchase by the Plaintiff and Group Members;
- (c) properties owned by the Plaintiff and Group Members would not have sustained structural damage due to the undue settlement;
- (d) the Plaintiff and the Group Members would not have sustained economic loss;
- (e) property values in the Spring Farm Area would not have been injuriously affected by stigmatisation; and
- (f) in the alternative, the Plaintiff and the Group Members would not have purchased their respective properties at all.

74 In the circumstances, the Plaintiff and the Group Members have suffered loss and damage as a result of SMEC TS and SMECTS Holdings' breaches of duty of care and breaches of s 18 and s 30 of the ACL.

Particulars

- (a) the structural damage to their properties;
- (a1) costs of demolition of residential buildings located on the properties, costs of remediation of the properties to make those properties fit for residential building and costs of construction of replacement residential buildings on those properties;
- (b) in the alternative, cost of repairs of the structural damage to their properties;
- (c) costs associated with investigating or otherwise ameliorating the structural damage to their properties;
- (d) adverse affectation on the value of their properties;
- (e) in the alternative, on the basis that the Plaintiff or Group Members would not have purchased their respective properties, the cost of purchasing the properties, including the transaction costs in purchasing the properties and attempting to sell or selling the properties, including but not limited to stamp duty and conveyancing costs; and
- (f) inconvenience, distress and vexation.

Further particulars of the Plaintiff's loss and damage will be provided following the completion of expert evidence and the service of evidence, but will include the cost of demolition of the residential building constructed on the Property, the costs of

remediation of the Property to make it fit for residential building and the cost of construction of a replacement residential building on the Property.

Claim against LMIC

Insurance Cover

74A SMEC TS was insured at various times for professional indemnity liability under policies of insurance issued by LMIC (the Policies).

Particulars

- (a) Policy numbered PL-SY-18-507222 for the period 12 June 2018 to 12 June 2019, (extended to 31 August 2019), adopting the “AON Professional Indemnity Vertex Policy Wording”, (Vertex Wording).
- (b) Policy numbered PL-SY-17-507222 for the period 12 June 2017 to 12 June 2018, adopting the Vertex Wording.
- (c) Policy numbered PL-SY-16-507222 for the period 12 June 2016 to 12 June 2017, adopting the Vertex Wording.
- (d) The Plaintiff is continuing to investigate insurance covering SMEC TS issued by LMIC and may particularise further policies in due course.

74B The insuring clause in the Vertex Wording was Clause 1, which provided as follows:

“The Insurer will pay to or on behalf of the Insured any Loss for civil liability arising from the performance of the Insured Services by or on behalf of the Insured, and which arises from a Claim first made or commenced against the Insured and notified to the Insurer during the Policy Period or any applicable Discovery Period.”

74C The Insured Services were defined in the Vertex Wording at clause 3.10 to be the services set out in the Schedule.

74D The Schedule for Policy numbered PL-SY-18-507222 for the period 12 June 2018 to 12 June 2019 listed the Insured Services as:

“Geotechnical Consulting
Environmental Consulting”

Claims and notifications

74E On or about 16 May 2019, SMEC TS submitted to LMIC via an insurance broker a Renewal Application for Policy numbered PL-SY-18-507222 (**Renewal Application**).

74F Question 42 of the Renewal Application comprised the following questions and answers:

Questions: "Is the Proposer including any of its partners, directors or employees aware of any facts which might give rise to a professional liability claim against any of them? If "Yes", please provide details."

Answers: "Yes", and, "Email received by SMEC Testing Services from Cornish Group dated (sic) 31 Wagner Road, Spring Farm. Email states that the dwelling at the subject site has experienced significant structural damage that is indicative of pool (sic) earthworks practices. SMEC Testing Services has provided certification for the bulk earthworks and a Site Classification to AS2870 for the subject lot. To date no stagement (sic) of claim has bee (sic) received. SMEC Testing Services did not respond to the email and there has been no subsequet (sic) correspondence from Cornish Group."

74G The facts notified by SMEC TS in answer to Question 42 of the Renewal Application as set out above, relate to the same works, certification and Site Classification as are the subject of the claims against SMEC TS set out in paragraphs [60] to [74] above.

74H The Plaintiff is still investigating the possibility of other claims and notifications to LMIC relating to its coverage of SMEC TS under the Policies relating to the same works, certification and Site Classification as are the subject of the claims against SMEC TS set out in paragraphs [60] to [74] above.

Entitlement to cover

74I In the circumstances, SMEC TS is entitled to be indemnified by LMIC under one or more of the Policies with respect to the Plaintiff's and the Group Members' claims against SMEC TS in the proceedings (**Plaintiff's Claims**).

Particulars

(a) The Plaintiff's Claims fall within the insuring clause/s of the Policies, on the bases set out in (b), (c) and (d) below.

- (b) The Plaintiff's Claims are for loss for civil liability arising from the performance of SMEC TS's insured services, (as defined in the Policies), by or on behalf of SMEC TS.
- (c) The Plaintiff's Claims are for loss for civil liability which arises from a claim first made or commenced against SMEC TS and notified to LMIC during the relevant policy period of the Policies.
- (d) In the alternative to (c) above, the Plaintiff's Claims are for loss for civil liability in circumstances where SMEC TS gave notice in writing to LMIC of facts that might have given rise to the Plaintiff's Claims against SMEC TS as soon as was reasonably practicable after SMEC TS became aware of those facts but before the insurance cover provided by the Policies expired, such that, pursuant to s 40(3) of the *Insurance Contracts Act 1984 (Cth)*, LMIC is not relieved of liability under the Policies in respect of the claim, when made, by reason only that it was made after the expiration of the period of the insurance cover provided by the Policies.
- (e) Further particulars of the making or commencing of relevant claims against SMEC TS, and notification of claims, and of facts that might have given rise to the Plaintiff's Claims, will be provided after discovery and production of documents in the proceedings relevant to this issue.
- (f) The Schedule/s to each of the Policies specify that the Limit of Liability is \$10,000,000.
- (g) The Schedule/s to each of the Policies specify that the Deductible is \$50,000.

74J In the circumstances, SMEC TS has an insured liability to the Plaintiff and the Group Members, being the liability asserted against it by the Plaintiff's Claims (**the insured liability**).

74K The Plaintiff and the Group Members are entitled to recover the amount of the insured liability from LMIC pursuant to s 4 of the *Civil Liability (Third Party Claims Against Insurers) Act 2017 (NSW)*.

Common Questions of Law or Fact

- 75 The questions of law or fact common to the claims of the Plaintiff and each Group member are:
- (a) whether the Risk of Harm existed;
 - (b) whether the Defendants owed a duty of care to the Plaintiff and Group Members;
 - (c) the nature, scope and content of any duty of care;
 - (d) whether the Risk of Harm was foreseeable;
 - (e) whether a reasonable person in the position of the respective Defendants would have taken the Council Reasonable Precautions, the CGSF Reasonable Precautions or the SMEC Reasonable Precautions;
 - (f) whether the Defendants breached their duty of care in the manner alleged or at all;
 - (g) whether the alleged breaches of duty of care caused or contributed to undue settlement of the land and consequent damage to the properties;
 - (h) whether CGSF, SMEC TS or SMECTS Holdings engaged in misleading or deceptive conduct in trade or commerce in breach of s 18 of the ACL;
 - (i) whether CGSF made false or misleading representations in breach of s 30 of the ACL;
 - (j) whether any breach of s 18 of the ACL by CGSF, SMEC TS or SMECTS Holdings, or of s 30 of the ACL by CGSF, caused loss or damage;
 - (k) whether there has been stigmatisation of properties in the Spring Farm Area as a result undue settlement of the land and consequent damage to some properties;
 - (l) whether there has been adverse affectation on the value of properties in the Spring Farm Area as a result undue settlement of the land and consequent damage to some properties;
 - (m) the extent of any adverse affectation on the value of properties in the Spring Farm Area; ~~and~~
 - (n) the principles for identifying and measuring compensable loss suffered by the Plaintiff and Group Members resulting from the alleged breaches of duty of care and misleading and deceptive conduct; and

(o) whether SMEC TS has a liability to the Plaintiff and the Group Members, being the liability asserted against it in the proceedings, which is insured by LMIC.

Initial Case Conference – Practice Note SC Gen17 clause 4.2(e)

76 These proceedings are listed for an initial case conference at 9.00 a.m. on the Wednesday after the expiration of 42 days following the filing of the originating process, being

SIGNATURE OF LEGAL REPRESENTATIVE

I certify under clause 4 of Schedule 2 to the *Legal Profession Uniform Law Application Act 2014* that there are reasonable grounds for believing on the basis of provable facts and a reasonably arguable view of the law that the claim for damages in these proceedings has reasonable prospects of success.

I have advised the plaintiff that court fees may be payable during these proceedings. These fees may include a hearing allocation fee.



Signature

Capacity

Date

Solicitor on record

24 June 2022

NOTICE TO DEFENDANT

If you do not file a defence within 28 days of being served with this statement of claim:

- **You will be in default in these proceedings.**
- **The court may enter judgment against you without any further notice to you.**

The judgment may be for the relief claimed in the statement of claim and for the plaintiff's costs of bringing these proceedings. The court may provide third parties with details of any default judgment entered against you.

HOW TO RESPOND

Please read this statement of claim very carefully. If you have any trouble understanding it or require assistance on how to respond to the claim you should get legal advice as soon as possible.

You can get further information about what you need to do to respond to the claim from:

- A legal practitioner.
- LawAccess NSW on 1300 888 529 or at www.lawaccess.nsw.gov.au.
- The court registry for limited procedural information.

You can respond in one of the following ways:

- 1 If you intend to dispute the claim or part of the claim,** by filing a defence and/or making a cross-claim.
- 2 If money is claimed, and you believe you owe the money claimed,** by:
 - Paying the plaintiff all of the money and interest claimed. If you file a notice of payment under UCPR 6.17 further proceedings against you will be stayed unless the court otherwise orders.
 - Filing an acknowledgement of the claim.
 - Applying to the court for further time to pay the claim.
- 3 If money is claimed, and you believe you owe part of the money claimed,** by:
 - Paying the plaintiff that part of the money that is claimed.
 - Filing a defence in relation to the part that you do not believe is owed.

Court forms are available on the UCPR website at www.ucprforms.justice.nsw.gov.au or at any NSW court registry.

REGISTRY ADDRESS

Street address	Supreme Court of New South Wales Law Courts Building 184 Philip Street SYDNEY NSW 2000
Postal address	GPO Box 3 SYDNEY NSW 2000
Telephone	1300 679 272

AFFIDAVIT VERIFYING

Name Danny Marielle Moussa
 Address 37 Wagner Road, Spring Farm NSW 2570
 Occupation Electrician
 Date 24 June 2022

I say on oath:

- 1 I am the plaintiff.
- 2 I believe that the allegations of fact in the statement of claim are true.

SWORN at Spring Farm, NSW

Signature of deponent



Name of witness

Rebecca Panovski

Address of witness

~~Level 31, 201 Elizabeth~~ The Mezzanine, 12 O'Connell Street Sydney NSW 2000

Capacity of witness

Australian Legal Practitioner

And as a witness, I certify the following matters concerning the person who made this affidavit (the **deponent**):

- 1 I saw the face of the deponent.
- 2 I have known the deponent for at least 12 months.

Signature of witness


DECLARATION

I, Rebecca Panovski, solicitor employed at Mayweathers attest that this affidavit was signed and witnessed over audio visual link in accordance with s 14G of the Electronic Transactions Act 2000.

PARTY DETAILS

PARTIES TO THE PROCEEDINGS

Plaintiff

Danny Marielle Moussa

Defendants

Camden Council, First Defendant

Cornish Group Spring Farm Pty Ltd
ACN 120 837 381, Second Defendant

SMEC Testing Services Pty Ltd (In Liq)
ACN 101 164 792, Third Defendant

SMECTS Holdings Pty Ltd
ACN 063 746 823, Fourth Defendant

Liberty Mutual Insurance Company trading in
Australia as Liberty Speciality Markets
Australia
ARBN 086 083 605 ABN 61 086 083 605.
Fifth Defendant

FURTHER DETAILS ABOUT PLAINTIFF

Plaintiff

Name Danny Marielle Moussa
Address 37 Wagner Road, Spring Farm NSW 2570

Legal representative for plaintiff

Name André Joseph Adams
Practising certificate number 54345
Firm Mayweathers
Address ~~Level 31, 201 Elizabeth~~ The Mezzanine, 12 O'Connell Street
SYDNEY NSW 2000
Telephone (02) 8020 5720
Fax (02) 9012 0146

Email andre.adams@mayweathers.com.au
 Electronic service address andre.adams@mayweathers.com.au

DETAILS ABOUT DEFENDANTS

First Defendant

Name **Camden Council**
 Address 70 Central Avenue
 ORAN PARK NSW 2570

Second Defendant

Name **Cornish Group Spring Farm Pty Ltd ACN 120 837 381**
 Address 7 Ferncreek Court
 KELLYVILLE NSW 2155

Third Defendant

Name **SMEC Testing Services Pty Ltd (In Liquidation)**
ACN 101 164 792
 Address C/- Mr Bruce Gleeson & Mr Daniel Robert Soire,
 Partners
 Jones Partners
 Level 13, 189 – 197 Kent Street
 SYDNEY NSW 2000

Fourth Defendant

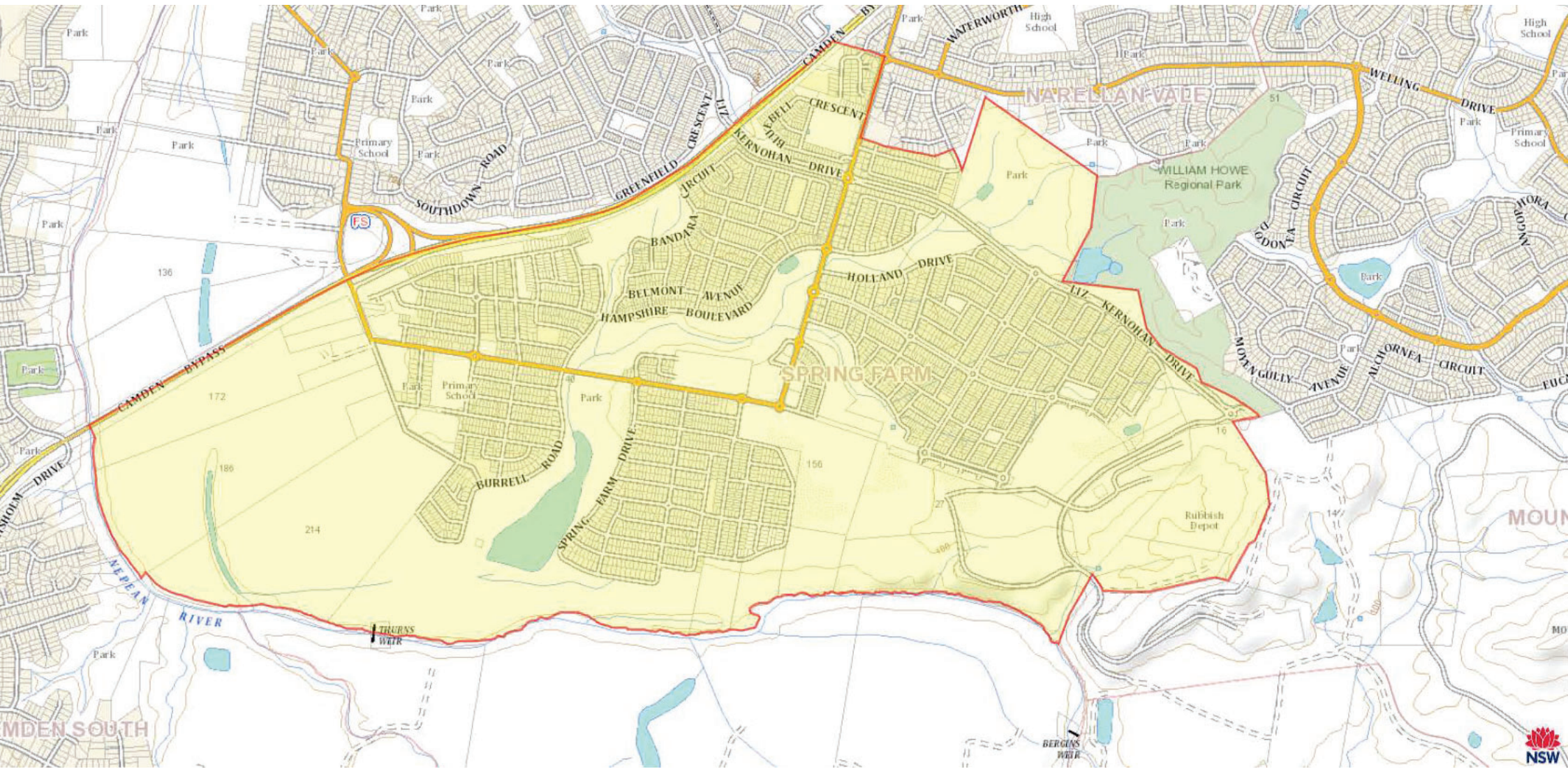
Name **SMECTS Holdings Pty Ltd ACN 063 746 823**
 Address C/- MKP Associates Pty Ltd
 Level 5, 219-223 Castlereagh Street
 SYDNEY NSW 2000

Fifth Defendant

Name **Liberty Mutual Insurance Company trading in Australia**
as Liberty Specialty Markets Australia
ARBN 086 083 605 ABN 61 086 083 605,

Address **Level 38, Governor Phillip Tower**
1 Farrer Place
SYDNEY NSW 2000

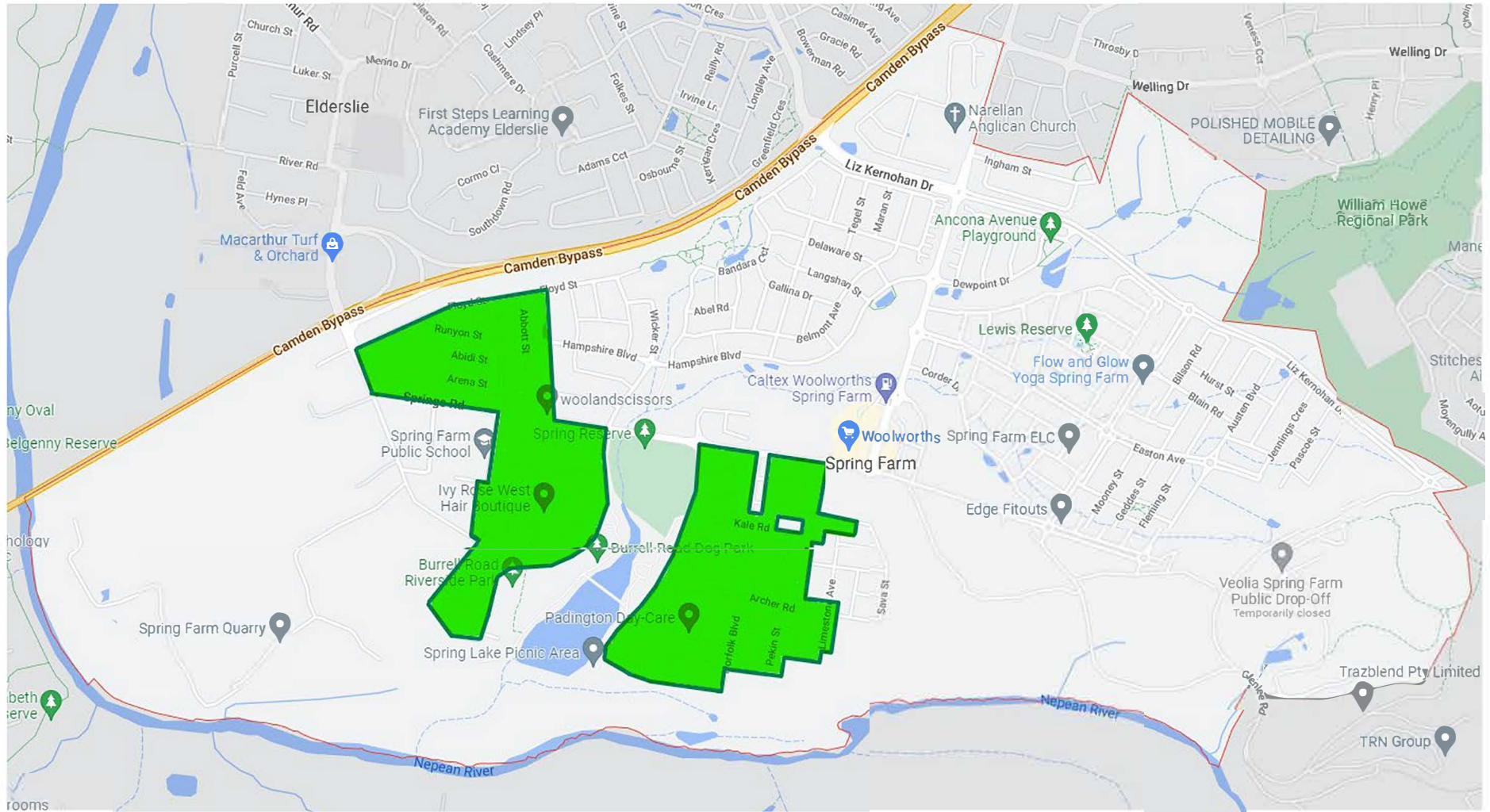
ANNEXURE A



ANNEXURE A



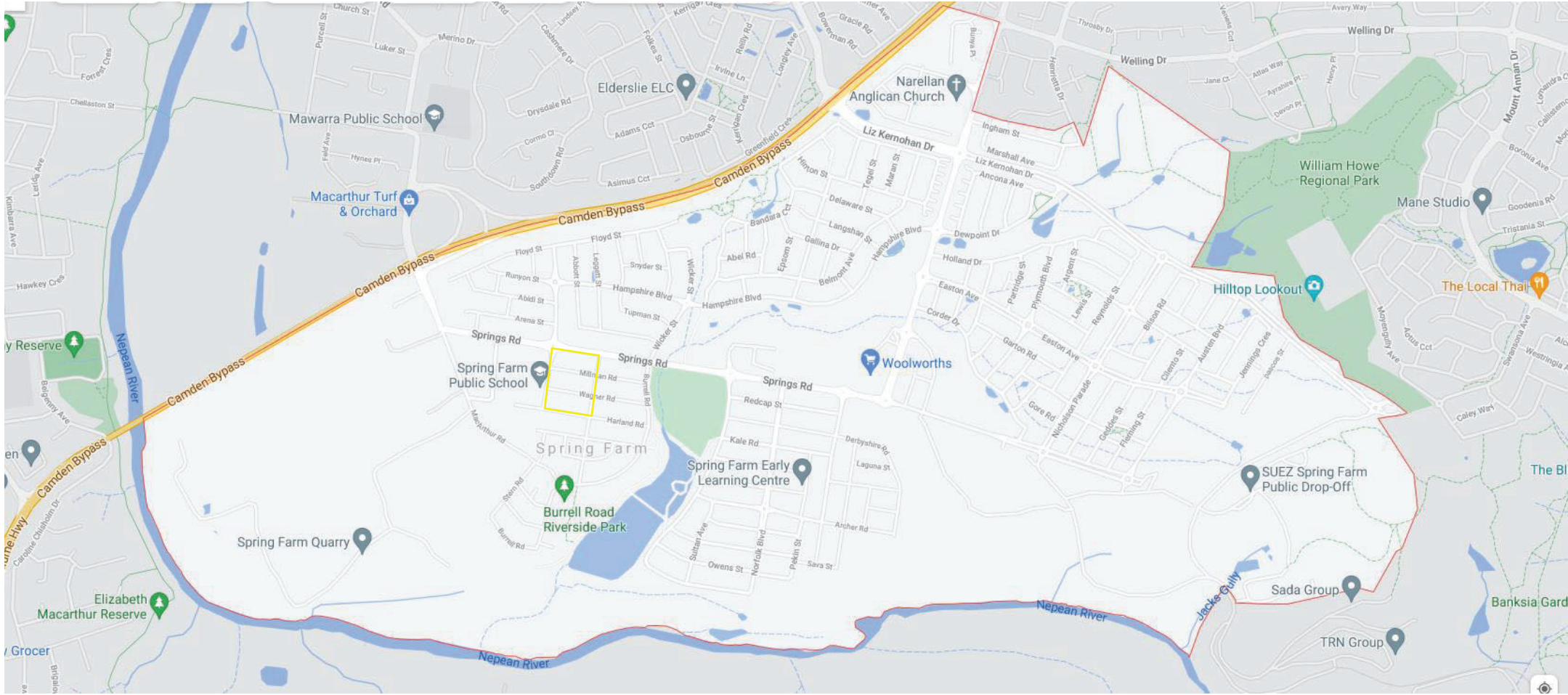
ANNEXURE B



ANNEXURE B



ANNEXURE C



ANNEXURE C



SCHEDULE 1

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714 Lot 3330 in DP1180107

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716 Lot 3358 in DP1190901

717 Lot 3359 in DP1190901

718 Lot 3360 in DP1190901

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762 Lot 3501 in DP1204217

763 Lot 3502 in DP1204217

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773 Lot 5210 in DP1184392

774 Lot 5211 in DP1184392

775 Lot 5212 in DP1184392

776 Lot 5216 in DP1184392

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779 Lot 5219 in DP1184392

780 Lot 5220 in DP1184392

781 Lot 5221 in DP1184392

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783 Lot 101 in DP1256770

784 Lot 100 in DP1247154

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787 Lot 5303 in DP1210459

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795 Lot 5319 in DP1210429

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798 Lot 5322 in DP1210429

799 Lot 5323 in DP1210429

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802 Lot 410 in DP1245100

803 Lot 409 in DP1245100

804 Lot 408 in DP1245100

805 Lot 407 in DP1245100

806 Lot 406 in DP1245100

807 Lot 405 in DP1245100

808 Lot 404 in DP1245100

809 Lot 403 in DP1245100

810 Lot 402 in DP1245100

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816 Lot 5133 in DP1179258

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971 Lot 304 in DP1230898

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1001 Lot 334 in DP1230898

1002 Lot 335 in DP1230898

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1004 Lot 337 in DP1230898

1005 Lot 338 in DP1230898

1006 Lot 339 in DP1230898

1007 Lot 340 in DP1230898

1008 Lot 341 in DP1230898

1009 Lot 342 in DP1230898

1010 Lot 343 in DP1230898

1011 Lot 344 in DP1230898

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1014 Lot 347 in DP1230898

1015 Lot 348 in DP1230898

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