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LAWYERS

Missing links in the '*Chain of Responsibility*' – Australia's varied response to the risks posed by Polyethylene core Cladding

2nd edition

Missing links in the '*Chain of Responsibility*' – Australia's varied response to the risks posed by Polyethylene core Cladding

Government response to the risks posed by non-conforming building products continues across the various Australian jurisdictions, albeit with limited uniformity. The legislation and preliminary audit processes have been prompted primarily by two Australian incidents – the 2014 Lacrosse Tower cladding fire in Melbourne and the 2015 national recall of Infinity electrical cabling – and, more recently, the tragic Grenfell Tower fire in London in 2017.

Those events have reinforced the need to ensure that buildings are safe from the risk of the rapid spread of fire, with a particular focus on the installation of potentially combustible cladding products, whether during original construction or any later refurbishment.

Commonwealth

Senate Economics References Committee

At the Commonwealth level, the Senate Economics References Committee (SERC) launched an inquiry into the use of non-conforming building products in Australia. The SERC released an interim report[1] on aluminium composite cladding on 6 September 2017, which has attracted only limited support from the Australian Government, as shown by its response[2] released in February 2018.

The interim report's primary recommendation was for an urgent and total ban on the importation, sale and use of Polyethylene core (**PE**) and Aluminium Composite Panelling (**ACP**) in Australia.

The Australian Government has rejected that proposal as being '*neither effective nor practical*' given:

- The difficulties which would be faced by border control officers in assessing the polyethylene content of an ACP core without destructive testing and a product design standard;
- ACP's can be imported as raw materials and non-finished forms, before undergoing further processing domestically;
- PE-ACPs are suitable for use in other applications, such as advertising signage and interior design;
- The tariff system could not differentiate between goods intended for building purposes and those intended for other (suitable) uses;
- Screening would impose a range of costs and delays on industry;
- Australia's obligation to abide by its international trade obligations; and
- A ban on the sale or use of PE-ACPs would place a disproportionate burden on the beginning of the supply chain (i.e. product manufacturers and suppliers), rather than making the entire building supply chain more responsible for ensuring fitness for purpose and use in compliance with the National Construction Code (**NCC**).[3]

Given the Government's response, there appears little prospect that the *Customs Amendment (Safer Cladding) Bill 2017* (Cth) will be passed. That Bill, introduced by a cross-bench Senator in September 2017, proposes the amendment of the *Customs Act 1901* to prohibit '*importation into Australia of polyethylene core aluminium composite panels*'.[4] The Bill does not in any event address what action would be taken in respect of non-compliant cladding that has already been imported or is currently in use in Australia.

[1] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Non-conforming45th/Interim_report_cladding.
[2] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Non-conforming45th/Government_Response.
[3] The National Construction Code incorporates all construction requirements into a single code to provide for the minimum necessary requirements for health and safety in the design and construction of building work in Australia.
[4] Section 41B.

Other recommendations contained in the SERC's interim report which are supported by Government, whether expressly or at least in principle, are:

- That the Building Ministers' Forum[5] (**BMF**) consider the introduction of nationally consistent measures to increase accountability for participants in the supply chain;
- That the Australian Government ensure free and easy access to Australian Standards and codes to reduce the cost of compliance and insurance;
- That the Australian Government undertake steps to combat illegal phoenix activity in the building industry; and
- That a nationally consistent statutory scheme should be created to impose a statutory duty of care for end users in the residential strata sector.

The committee's remaining recommendations are likely to depend upon the outcome of pending reports which have been commissioned by the BMF:

- Any establishment of a nationally-consistent licensing scheme for all building practitioners is regarded by the Government as a matter for the states and territories; and
- The proposal for a penalty regime for non-compliance with the NCC (including revocation of accreditation and a ban from tendering for Commonwealth-funded construction work) is also regarded as a matter for the states and territories, with the Commonwealth Government mindful of its constitutional constraints.

Although SERC was due to release its Final Inquiry Report by 30 April 2018, the time for delivery of the report has now been extended until 27 November 2018.

Building Minister's Forum

In July 2017, the BMF established a 'one-stop shop website'[6] to provide general information on non- conforming building products, and to collect public complaints or enquiries about particular products or materials.

The BMF commissioned a report on the Assessment of the Effectiveness of Compliance and Enforcement Systems for Building and Construction Industry across Australia[7] by independent experts Professor Peter Shergold AC and Ms Bronwyn Weir. The report's findings include:

- The nature and extent of issues with compliance and enforcement systems are significant and require a comprehensive response;
- A national compulsory product certification system should be established for high-risk building products; and
- Greater oversight of the installation and certification of fire safety systems in commercial buildings should be required.

The report made 24 recommendations surrounding:

- The registration and training of practitioners;
- The roles and responsibilities of regulators;
- The role of fire authorities in the building design and approval process;
- The integrity of private building surveyors;
- The collecting and sharing of building information;
- The adequacy of documentation and record-keeping;

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[5] The Building Ministers Forum is made up of Commonwealth, State and Territory Ministers and is responsible for overseeing governance of the building environment and policy issues that impact the building and construction industries.

[6] http://www.abcb.gov.au/NCBP/Non-Conforming-Building-Products.

[7] https://www.industry.gov.au/sites/g/files/net3906/f/July 2018/document/pdf/building_ministers_forum_expert_assessment_-_building_confidence.pdf.

- Inspection regimes;
- Building product safety; and
- The best method to implement the recommendations, which is anticipated within three years.

In October 2017, the BMF indicated[8] that all Ministers have agreed to use available laws and powers to prevent the use of ACPs with a polyethylene core:

- For class 2, 3, or 9 buildings of two or more storeys;[9] or
- For class 5, 6, 7 or 8 buildings of three or more storeys,[10]

until they are satisfied that manufacturers, importers, and installers will reliably comply with:

- The newly established standard setting test against which fire retardant cladding products are deemed to be reasonable for use in high rise settings; and
- An established and implemented system of permanent labelling on cladding products to prevent substitution.
- The Commonwealth is to regularly provide the states and territories with import data on ACP and other building products, with a view to tracking movements of cladding and to ensure the use of such products in compliance with the NCC.

The BMF has additionally commissioned a report from the Senior Officers' Group (SOG – comprised of representatives from the Commonwealth, States & Territories) with the aim of establishing a new system of permanent labelling for cladding products. The SOG has identified potential requirements such as visible external façade information plates on high rise building and permanent stamps on cladding products. The SOG is presently considering submissions from interested parties, with a report hopefully to be published soon.

[8] https://www.industry.gov.au/sites/g/files/net3906/f/July 2018/document/extra/building_ministers_forum_communique_-_october-2017.pdf.

[9] Class 2 buildings are multi-unit residential buildings. Class 3 buildings include long term and transient living spaces, including boarding houses, hostels, backpackers, hotels, motels and student accommodation. Class 9 buildings are public buildings and include hospitals, schools, universities, childcare centres, sporting facilities and aged care buildings.

[10] Class 5 buildings are dwellings or residences within a building of a non-residential nature. Class 6 buildings are shops, restaurants and cafes. Class 7 buildings are carparks, warehouses and storage facilities. Class 8 buildings are laboratories and factories.

Queensland

Chain of Responsibility Legislation

Queensland was the first State to initiate legislative changes targeting the use of non-compliant cladding materials, as part of the broader regulation of unsafe and non-compliant building products. The *Building and Construction Legislation (Non-conforming Building Products—Chain of Responsibility and Other Matters) Amendment Act 2017* (Qld) (**Qld Act**) commenced operation on 1 November 2017.

The Qld Act amended the *Queensland Building and Construction Commission Act 1991* to establish a *chain of responsibility* for *non-conforming building products*, with each industry participant responsible for their individual contribution to the final product. The Queensland response reflects a similar approach taken in 2016 to state environmental laws,[11] and seeks to increase the accountability of each contributor in the supply chain, including importers, manufacturers, suppliers, builders, tradespeople and installers. The Qld Act imposes a primary duty on all individuals in the *chain of responsibility* (including executive officers of companies) and then additional, subsequent duties specific to each role within the chain.

The Qld Act substantially widens the scope of authority of the Queensland Building and Construction Commission (QBCC) to investigate and undertake enforcement action in respect of parties who are not required to hold a building licence – such as designers and manufacturers of building products.

The Qld Act introduces new penalties for non-compliance. These include maximum fines of $126,150.00 for breaching any primary or additional duty or for making false representations about the use of a product, and $6,307.50 if a contributor in the chain of supply fails to report to the QBCC any suspicion or knowledge about the use of non-compliant building materials.

The Qld Act contains a retrospective provision, whereby the Minister can make a recall order for non-compliant building products associated with a building or structure installed or in use before the commencement date.

The Qld Act also establishes a Building Products Advisory Committee to advise the Minister on issues relating to the use of non-compliant building products, including the suitability and safety of particular materials, the safety of buildings associated with the inappropriate material and strategies to promote the use of safe materials and raising awareness about non-compliant materials.

Building Regulations - Cladding

The *Building and Other Legislation (Cladding) Amendment Regulation 2018* (Qld) (**Regulation**) came into effect on 1 October 2018. The Regulation amends the *Building Regulation 2006* (Qld) by imposing new obligations on owners of certain buildings affected by combustible cladding.

The Regulation applies to owners of buildings classified within classes 2 – 9 of the Building Code of Australia[12], which notably excludes certain residential dwellings (including detached houses, town houses and particular boarding houses) and non-habitable structures such as private garages.

Where a building is made up of two or more lots (for example, multi-residential buildings made up of separate units), the body corporate for the building is taken to be the '*owner*' who is responsible for complying with the Regulation. Developers are likely to be held responsible for compliance with the Regulation where they own, or have an interest in, the majority of lots or otherwise control the body corporate.

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[11] *Environmental Protection (Chain of Responsibility) Amendment Act 2016* (Qld).

[12] Class 2 buildings are multi-unit residential buildings. Class 3 buildings include long term or transient living places for unrelated persons (for example, boarding houses, hostels, hotels, motels, student accommodation). Class 4 buildings are dwellings in a building that is Class 5-9 if it is the only dwelling the building. Class 5 buildings include an office building used for commercial or professional purposes, excluding Class 6-9 buildings. Class 6 buildings are shops, restaurants and cafes. Class 7 buildings are carparks, warehouses and storage facilities. Class 8 buildings are laboratories and factories, whilst Class 9 buildings are public buildings such as hospitals, schools and aged care facilities.

The Regulation requires that all owners follow a new three stage process:

Stage 1

Owners must, by 29 March 2019 (or by an earlier date determined by the Queensland Building and Construction Commission (**QBCC**) if it considers that the cladding forming part of the relevant building poses an immediate risk of serious injury) (**the compliance period**) complete the checklist found at the Queensland Government's Safer Buildings website (**www.saferbuildings.qld.gov.au**).

A failure to comply with Stage 1 within the compliance period carries a maximum penalty of $2,611.00.

Stage 2

If the checklist reveals that the relevant building may contain combustible cladding, the owner must, by 29 May 2019 (unless extended) complete a further checklist and a statement prepared by a building industry professional (which includes building certifiers, builders, fire safety professionals, architects and engineers).

A failure to comply with Stage 2 within the compliance period carries a maximum penalty of $2,611.00.

Stage 3

If the results of the checklists completed in Stage 1 and Stage 2 are not completed or reveal that the relevant building may contain combustible cladding (or a QBCC investigator has reason to suspect that a completed checklist is false or misleading), the owner must:

(a) by 27 August 2019 (unless extended), engage a fire engineer (and notify the QBCC that a fire engineer has been engaged) or it will be liable to pay a penalty of up to $6,527.50; and

(b) by 3 May 2021 (unless extended), provide the QBCC with material reporting on the combustibility of the cladding, including a statement prepared by a fire engineer or it will be liable to pay a penalty of $21,540.75.

If an assessment by a fire engineer reveals that the relevant building contains combustible cladding then the owner must, within 60 business days, provide a copy of the required notice to the tenants and display the required notice in a conspicuous position on the building until the combustible cladding is removed or the building is certified to be compliant with the Building Code. If the owner fails to do so, it will be exposed to a maximum penalty of $3,916.50.

The Regulation does not impose substantive obligations on owners to rectify or remove non-compliant cladding. Owners are simply required to comply with the three stage process set out above and display a notice on buildings which have been identified as containing combustible cladding and provide the tenants with a copy of the notice.

It is unclear as to how the QBCC will react to combustible cladding that is not removed or brought into compliance with the Building Code if the penalty regime provided under the Regulation is not effective.

For instance, it is yet to be seen how the Regulation will operate in the context of existing duties arising under the *Queensland Building and Construction Commission Act 1991* (Qld) in relation to non-conforming building products. Builders, suppliers, installers and others who may be deemed to be in the chain of responsibility for non-conforming building products should be wary that the obligation for owners to notify the QBCC of the presence of combustible cladding may have the effect of causing the QBCC to investigate further to determine if the cladding is non-conforming. This may lead to the QBCC issuing a direction to the builder, supplier, installer (etc.) to take action to address the risks posed by the combustible cladding (which may include removal at that person's expense).

The Regulation will apply to both new and existing buildings regardless of whether:

(a) the relevant building was given development approval (that extended to the cladding); or

(b) the cladding for the building has a current certification.

What does this mean for developers and sellers?

From 1 October 2018, an owner who sells a building prior to completing the steps outlined above must provide, before completion of the sale, a notice in the approved form to the buyer about the extent to which the seller has complied with its obligations under the Regulation and also provide copies of the relevant documentation to the buyer. The owner is also obliged to provide a copy of the notice to the QBCC.

It should be noted that new owners will assume the obligations of the previous owner where the previous owner has not complied with the Regulation before the change in ownership.

Section 223 of the *Body Corporate and Community Management Act 1997* (Qld) imposes an obligation on sellers of strata titled properties to disclose latent or patent defects in common property to buyers that the seller is aware of or ought to be aware of. If sellers are aware, or ought to be aware, of combustible cladding issues at their complex, they therefore have a positive obligation to make full disclosure to buyers, otherwise they may face claims for breach of warranty or even termination of the sale contract.

New South Wales

NSW Act

The *Building Products (Safety) Act 2017 (NSW)*[13] (**NSW Act**) commenced on 18 December 2017, and is directed to the use of unsafe building products in buildings. Safety is defined in terms of any likely risk of death or serious injury to occupants of the building.

The NSW Act grants extensive powers to the Commissioner for Fair Trading to regulate building product use (including non-compliant ACP cladding materials). Those powers include prohibiting the use of unsafe materials, issuing affected building notices and building product rectification orders and providing general warnings about affected buildings. The NSW Act confers extensive investigative powers on the Commissioner to identify buildings clad in unsafe materials.

Rectification orders require the owner of a building to either eliminate or mitigate the safety risk posed by the non-compliant building materials, and to remediate the building following mitigation of the risk.

The NSW Act introduces new penalties for non-compliance. These include maximum fines of $1,100,000.00 for companies and $220,000.00 or two years imprisonment for individuals that use non-compliant materials in contravention of a product ban or represent that a non-compliant building product will be suitable for use. Continuing breaches attract daily penalties, and company officers can be liable under the *Executive Liability Offence* provisions.

The NSW Act, as passed, did not include a range of provisions which had earlier been advocated by opposition parties and a number of industry groups, which provisions included:

- Addressing supply chain accountability, building inspections and worker safety;
- Adopting a broader definition than '*unsafe*' products;
- A power to ban products before they had been used, by which time there is often a lengthy process involved in having the product removed or otherwise rectifying the problem; and
- A requirement to ensure that building products '*on the shelf*' are fit for purpose.

A building product ban under the NSW Act takes precedence over the NCC. This means that a building product that is compliant with the Code can still be banned by the Commissioner for Fair Trading.

Providing false or misleading information to the Commissioner about the use of a non-compliant building material will attract a fine of up to $11,000.00.

Building Product Use Ban

Pursuant to the NSW Act, the NSW Commissioner for Fair Trading has imposed a building product use ban[14] on ACPs with a core comprised of greater than 30% polyethylene by mass. The ban took effect from 15 August 2018 and applies retrospectively to all existing buildings, as well as to new buildings. It applies to ACPs used in any external cladding, external insulation, façade or rendered finish in:

- Class 2, 3 and 9 buildings of three storeys or more and Class 5, 6, 7 and 8 buildings of four storeys or more (Type A construction under the BCA); and

[13] https://www.legislation.nsw.gov.au/%23/view/act/2017/69.
[14] https://www.industry.gov.au/sites/g/files/net3906/f/July 2018/document/extra/building_ministers_forum_communique_-_october-2017.pdf.

- Class 2, 3 and 9 buildings of two storeys or more and Class 5, 6, 7 and 8 buildings of three storeys or more (Type B construction under the BCA).

Certain exceptions apply, including where the products have successfully passed testing in accordance with Australian Standards AS 1530.1 -1994[15] and AS 5113[16].

NSW Regulation

On 22 October 2018 the following new cladding regulations (**NSW Regulation**) commenced:

- *Environmental Planning and Assessment Amendment (Identification of Buildings with Combustible Cladding) Regulation 2018;* and
- *State Environmental Planning Policy Amendment (Exempt Development – Cladding and Decorative Work) 2018.*

Registration Required

The NSW Regulation requires owners of certain buildings with external combustible cladding which were occupied before 22 October 2018 to register their buildings with the NSW Government through an online portal by 22 February 2019. The owners of new buildings are required to register their buildings within four months of occupation.

The NSW Regulation applies to:

- Residential apartment blocks;
- Other residential buildings where unrelated people sleep e.g. hotels and student accommodation;
- Aged-care buildings, hospitals and day surgeries (and any associated single dwellings within the building); and
- Public assembly buildings e.g. theatres, cinemas, schools and churches (and any associated single dwellings within the building).

It applies to the following types of cladding[17]:

- Metal composite panes, including those consisting of aluminium, zinc or copper outer layers and a core material; or
- Insulated cladding systems, including those comprised of polystyrene, polyurethane, and polyisocyanurate.

There is also a provision requiring certain '*alternative solutions*' (under the Building Code of Australia) which incorporate external combustible cladding to be referred to Fire and Rescue NSW.

Penalties for Non-Compliance

Failure to register buildings with external combustible cladding via the NSW Planning Portal will attract penalties of $3,000.00 for companies and $1,500.00 for individuals.

Further, non-compliance with a direction to provide details about a building and its cladding via the NSW Planning Portal will attract penalties of $6,000.00 for companies and $3,000.00 for individuals.

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[15] '*Methods for fire tests on building materials, components and structures*'.
[16] '*Fire Propagation testing and classification of external walls of buildings*'.
[17] The definition of '*external combustible cladding*' captures the recent building product use ban on ACPs with a core comprised of greater than 30% polyethylene by mass.

No Cladding Statements

When the Department of Planning and Environment (**DPE**) released its *draft Environmental Planning and Assessment Amendment (Identification of Buildings with Combustible Cladding) Regulation 2017*[18] for public consultation in 2017 it proposed that a Cladding Statement[19] should be provided to the DPE by the owner of a building to which combustible cladding had been applied.

This is **not** a requirement of the NSW Regulation.

Exempt Development for Cladding

Various NSW State Environmental Planning Policies (**SEPPs**) were amended on 22 October 2018 so as to restrict the circumstances in which cladding can be used without development consent. The amended SEPPs include:

- SEPP (Exempt and Complying Development Codes) 2008;
- SEPP (Infrastructure) 2007;
- SEPP (Educational Establishments and Child Care Facilities) 2017;
- SEPP (Three Ports) 2013;
- SEPP (Affordable Rental Housing) 2009;
- SEPP (Mining, Petroleum Production and Extractive Industries) 2007;
- SEPP (Western Sydney Parklands) 2009; and
- SEPP (Kosciusko National Park – Alpine Resorts) 2007.

In general, the amendments insert a new development standard. It requires that any '*exempt development*' for new cladding, recladding and decorative work does not involve combustible cladding. Failure to achieve that standard will mean the development will not be an '*exempt development*' and the individual or company carrying out the development will have committed the offence of undertaking a development without consent. The maximum penalty for this offence is $5 million for companies and $1 million for individuals, if it was committed intentionally and caused, or was likely to cause, significant harm to the environment, or death or personal injury.

[18] http://www.planning.nsw.gov.au/Policy-and-Legislation/Under-review-and-new-Policy-and-Legislation/Combustible-cladding/Draft-regulation-for-cladding.

[19] A statement by a properly qualified person that the cladding has been inspected and in that person's opinion the cladding presents a risk to the safety of persons or to the spread of fire, and recommended actions to address the risk.

Victoria

Victorian Cladding Taskforce

Following the Metropolitan Fire Brigade investigation that found ACP materials were the cause of the Lacrosse Building fire, the Victorian Building Authority (**VBA**) initiated the External Wall Cladding Audit to identify the extent of the use of non-compliant cladding in high-rise residential buildings.

The 2016 audit identified 170 high rise buildings in Melbourne that were clad in non-compliant materials. Although the audit[20] found that levels of non-compliance were too high (51%), the VBA stressed that they were not considered to pose a risk to safety. The VBA issued letters to building practitioners whose work was deemed to be non-compliant, detailing the action required to be taken to achieve compliance. Only one building required immediate emergency action.

On 3 July 2018, the Victorian Government announced a Victorian Cladding Taskforce to identify and report on:

- Buildings which fell outside the scope of the initial audit;
- Buildings which had recently come to the VBA's attention;
- Other buildings constructed by individuals with a history of non-compliance; and
- A targeted sample of buildings across the state.

The Taskforce's interim report[21] was published on 1 December 2017 and concluded that systems failures across Victoria led to major safety risks and widespread use of non-compliant cladding materials.

The issue was attributed to three key factors – the importation, supply and marketing of unsafe building materials, a poor culture of compliance in the building industry, and the failure of the enforcement and regulatory system to address these issues.

As a result of the report, the Victorian Government instructed the VBA to increase random compliance checks undertaken on construction sites and buildings. The VBA is undertaking an on-going audit to identify non-compliant buildings, after the interim report identified up to 1,400 buildings that may be at risk. Building classes 2, 3 and 9 constructed after March 1997 are currently being audited.

The Taskforce released their update report[22] in October 2018. The Taskforce reported that the VBA had completed its initial assessment of 1,369 building and planning permits where cladding had been specified as a construction material, finding that expanded polystyrene had been inappropriately used on a small percentage of low-rise buildings in major population areas, that the majority of higher risk buildings involving this material had inadequate fire safety measures, and that visually identifying combustible cladding and inappropriate materials was difficult, even for highly qualified building practitioners.

Emergency orders have been issued to the owners of 12 buildings for urgent short-term rectification work (including sufficient detection and warning systems, sprinklers, and removing ignition sources). The VBA has issued approximately 150 building notices to owners corporations, requiring them to show cause why any combustible cladding should not be removed. The VBA has also identified 43 buildings as being in a higher risk category and appointed themselves as the Municipal Building Surveyor for those buildings.

The Taskforce recommended that the Victorian government carry out an audit of its own buildings. In response, an intergovernmental Government Audit Working Group has been established to assess all government-occupied buildings in Victoria. Approximately 4,700 buildings have already been reviewed, with 384 being identified as having potentially combustible cladding.

In relation to longer-term reform, the Taskforce is currently nearing completion of a proposed rectification framework, which will set out the requirements for fixing both private and government buildings.

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[20] http://www.vba.vic.gov.au/__data/assets/pdf_file/0016/39103/VBA-External-Wall-Cladding-Report.pdf.
[21] https://www.planning.vic.gov.au/__data/assets/pdf_file/0016/90412/Victorian-Cladding-Taskforce-Interim-Report-November-2017.pdf.
[22] https://www.planning.vic.gov.au/__data/assets/pdf_file/0025/395404/Victorian-Cladding-Taskforce-Update-October-2018-FINAL.pdf.

Victorian Act

The *Building Amendment (Registration of Trades and Other Matters) Act 2018* (Vic) (**Vic Act**) was assented to on 25 September 2018. The following purposes of Vic Act are of relevance:

(a) make provision in relation to wall cladding products;

(b) strengthen the disciplinary powers of the VBA in relation to building professionals; and

(c) amend the *Local Government Act 1989* (Vic) to enable Councils to enter into agreements to rectify cladding on buildings and to levy a charge to fund the rectification.

The Victorian Minister for Planning is now empowered to declare, by Government Gazette, that an external wall cladding product is prohibited from being used, if they are satisfied that the product is or will likely cause occupants of the building (or their neighbours or members of the public) to be at risk of death of serious injury or the property to be at risk of severe damage. Such a declaration will generally not have retrospective effect, in circumstances where a building permit has already been issued.

The VBA now has the ability to immediately suspend a registered building practitioner on public interest grounds where there has been repeated disregard for public health and safety and / or lack of concern for potential damage to neighbouring properties. The amendments to the Vic Act also require the VBA and the Victorian Civil and Administrative Tribunal (**VCAT**) to cancel a practitioner's registration if they find the practitioner is not a fit and proper person to hold that registration.

The Vic Act provides for Cladding Rectification Agreements (**CRAs**) to be entered into by Councils. A CRA is an arrangement between owners (or owners corporations), lenders and local councils providing long term, low-interest loans to pay for building work to rectify cladding. Under the scheme, Councils levy a rateable charge on the property and use it to repay the lender the principal and interest.

Owners corporations can enter into a CRA subject to 75% owner approval. Liability for repaying the loan lies with individual unit owners. The scheme allows for the loan to be assigned to a purchaser, if a unit is sold.

Ministerial Guidelines

On 13 March 2018 the Victorian Minister for Planning issued Minister's Guideline MG-14 pursuant to section 188(1)(c) of the *Building Act 1993* (Vic). The Guidelines restrict the issuing of building permits on proposed building works by building surveyors, in the case of buildings of Type A or Type B Construction. Where one of those types of buildings includes the installation of a Prescribed Combustible Product[23] as part of an external wall, the Guidelines stipulate that the relevant building surveyor should not be satisfied that the work complies with the Building Act (and related Regulations) *unless* there has been a favourable determination by the Building Appeals Board.

[23] Defined to include a panel that comprises a PE or ACP product.

Western Australia

The Building Commission has broadened the scope of an existing program to include a state-wide cladding audit of ACP installations in all high-risk, high-rise buildings.

Phase 1 of the audit (Planning) is complete.

Phase 2 (Execution) entails:

- The identification of relevant buildings in the metropolitan area and in regional areas;
- The collation of data for preliminary assessments of buildings in the metropolitan area and in regional areas (almost complete);
- The preliminary assessment of buildings in the metropolitan and in regional areas to determine buildings that require further investigation (almost complete);
- Determination of whether any action is required in relation to the existence of cladding on particular buildings, including any necessary testing of façade materials (about to commence); and
- Determination of buildings requiring remedial action (not yet commenced).

Phase 3 (Publication of audit report and recommendations) will then follow.

South Australia

In South Australia, a building audit directed at ACP cladding has been initiated by the Department of Planning, Transport and Infrastructure[24]. The audit is directed to assessing the risk posed by ACP arising from its use as external cladding or facades, insulation, signage and in internal applications.

The audit commenced in July 2017 and comprises three phases:

- Phase 1 – Identification
- Phase 2 – Investigation
- Phase 3 – Response

Phase 1 (Identification of buildings of concern which have - or may have - relevant cladding) was finalised state-wide by early 2018. Priority was given to residential buildings over 2 storeys, including hotels, motels and apartments, aged care facilities, hospitals, schools, assembly buildings and buildings with occupants who may be unfamiliar with the means of escape or require assistance to escape.

Phase 2 comprises the investigation of specific buildings identified during phase 1 as being of concern. For those buildings, the type of ACP and the installation method used are reviewed to determine whether an unacceptable risk is posed to the safety of occupants. Phase 2 commenced in the City of Adelaide in August 2017 and, in conjunction with remaining local councils, state-wide in early 2018.

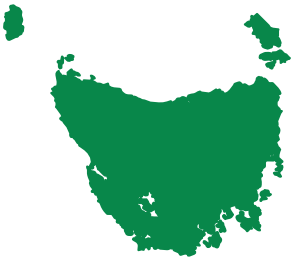
Phase 3 will require that buildings identified as posing an unacceptable risk be rectified, including by:

- Removal of part or all of the ACPs as a matter of urgency;
- Replacement of the ACPs as part of the general ongoing maintenance; and
- The installation of barriers to prevent fire spread, should an ACP catch fire.

For privately owned buildings, local authorities are to be responsible for ensuring that buildings of concern are adequately addressed by owners. Government will be responsible for ensuring the safety of its own buildings.

Phase 3 will also comprise any legislative response by the government, once the nature and magnitude of existing risks have been assessed.

[24] http://www.saplanningportal.sa.gov.au/current_planning_system/building_policy/aluminium_composite_panel_building_audits.



Tasmania

Audit

On 19 January 2018, following an audit of the extent of ACP cladding in Tasmania, the Department of Justice (Consumer, Building and Occupational Services) released its Tasmanian Aluminium Composite Panel Audit Summary report.

The audit process determined that:

- Tasmanian building services providers primarily use '*Alucobond*' and '*Vitrabond*' branded ACP;
- Manufacturers of ACP produce a variety of different products with varying fire-resistance properties. For example, the Alucobond products ranged from a polyethylene-dense panel through to a more mineral based infill branded '*Alucobond Plus*' and '*Alucobond A2*' (the latter two being subject to testing certification); and
- Concerns exist in respect of PE-ACP (polyethylene-densecore) cladding installed at Launceston General Hospital, although any risk is currently mitigated.

The Tasmanian Government has announced that the Director of Building Control will regulate the use and certification of ACP under the *Building Act 2016*, which requires building work to be performed in compliance with the National Construction Code – Building Code of Australia (**BCA**).

The BCA specifies the 'Type' of construction required in relation to fire performance, based on the use and number of storeys of a building. Higher risk buildings (Type A construction) generally use non- combustible cladding.

Building Regulations - high risk building products

The Building Regulations 2016 (Tas) have been amended[25] to insert a new section 30A dealing with *high risk building products*:

- An offence is created for using a high risk building product in building work unless the product is accredited under s 18 of the *Building Act 2016*; and
- It is declared, for the avoidance of doubt, that a high risk building product is not accredited solely on the basis of compliance with assessment methods, performance requirements or deemed-to-satisfy provisions specified in the NCC.

The Director of Building Control is empowered[26] to make determinations as to whether a product is a high risk building product, and for related accreditation, installation and use requirements.

'High risk building products' are defined[27] as:

(a) An aluminium composite panel, containing a polyethylene (PE) core, which is to be used as a building cladding on –
  (i) a class 2, 3 or 9 building of 2 or more storeys; or
  (ii) a class 5, 6, 7 or 8 building of 3 or more storeys;

(b) A polystyrene product used in an external insulation and finish system on –
  (i) a class 2, 3 or 9 building of 2 or more storeys; or
  (ii) a class 5, 6, 7 or 8 building of 3 or more storeys.

[25] By the Building Amendment Regulations (No 2) 2017.
[26] Section 8 of the Building Regulations 2016.
[27] Section 3 of the Building Regulations 2016.

ACT

The ACT Health Department undertook an assessment of the use of combustible cladding on ACT health buildings. The assessment is currently in its phase two, which involves an internal audit of all facilities built prior to 2008 and reassessing suspect buildings to confirm the compliance of all materials used. Five public health buildings were discovered to be clad with combustible materials, including the Radiation Oncology and Emergency, Diagnostics and Treatment buildings at Canberra Hospital.

The ACT Government also undertook an audit of government-owned public buildings, finding that several schools in Canberra had buildings clad in combustible materials. The audit findings are yet to be released to the public.

Despite the undertaking to examine public health buildings, the ACT Government has not yet committed to an audit examining residential buildings for non-compliant cladding, despite calls for action from Unions ACT, the Property Council, relevant stakeholders and the parliamentary opposition.

At this stage, the ACT has not moved to make any legislative changes in response to the issue of PE cladding.

Summary

Updates provided by the BMF indicate that all Commonwealth, State and Territory Ministers are committed to preventing the use of PE-ACPs in high risk applications until they are satisfied that manufacturers, importers, and installers will reliably comply with:

1. The newly established standard test for fire retardant cladding products in high rise settings; and
2. An effective system of permanent labelling on cladding products to prevent substitution.

To date, however, the Australian response to the risks posed by non-compliant building products including PE-ACPs has been inconsistent and, in some states, merely investigative and preliminary.

> Further direction is anticipated following the SERC's Final Inquiry Report, which is due by 27 November 2018. The Australian Government's response to the SERC's interim report suggests some support for the '*chain of responsibility*' approach taken by the Queensland parliament, as it better spreads responsibility for building product fitness for purpose and NCC compliance across the entire building supply chain.

Costs associated with inspecting and rectifying existing buildings are, however, likely to lie primarily with building owners, subject to any rights an owner may have against builders or other parties associated with the building's design, construction and approval.

Insurance Position

PE-ACP Concerns Raised by Insurers

The risks posed by non-conforming building products, and by PE-ACP cladding in particular, are a matter of serious concern for insurers as well as for those in the building chain including building owners. Particular issues facing insurers are apparent from various submissions made to the SERC[28].

The Insurance Council of Australia (**ICA**) made a submission recommending a strict regime of monitoring, identification and rectification of non-compliant cladding materials. It advocated a national regulation framework to ensure consistency amongst the States and Territories. The SERC's Interim Report acknowledged the ICA's submissions and highlighted some of the implications for the insurance industry. The ICA noted that the use of non-compliant building materials '*critically undermines the ability for an insurer to rely upon the safety and performance of the building*', which impacts an insurer's ability to accurately price premiums in insurance policies.

[28] https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Non-conforming45th/Submissions.

In its submission to the SERC, Insurance Australia Group (**IAG**) made similar comments, stating that the use of non-compliant building materials places increasing pressure on premium prices for customers and again, provides uncertainty around assessing risk. Where there is increased risk, increased premiums must follow. This uncertainty is resulting in some insurers restricting policy cover on buildings found to be clad with non-compliant material. The ICA predicted this response, indicating that there could be several different types of response from the market where a building is detected to have non-compliant building materials and the risk has not been adequately mitigated by the owner. These include reluctance to enter into new insurance policies, pulling out of existing policies at renewal time, reduction of the scope of cover (which will force the insured to seek co-insurers), significant premium and deductible price hikes and an increase of associated costs passed on to customers.

The Australian Institute of Building Surveyors (**AIBS**) expressed concern around professional indemnity insurance, as they had been advised that insurers were placing cladding and non-compliant building product exclusion clauses into professional indemnity insurance policies. The impact of these types of exclusions on licensed building certifiers is that they may hold a professional indemnity policy that does not fulfil their statutory obligation to maintain compliant professional indemnity cover.

There may be a significant liability for insurers who cover a number of stakeholders exposed to claims after a cladding fire. Contractors, directors, property managers and landlords, builders, architects and engineers may all be exposed for loss suffered, following a casualty event.

With the legislation that is being introduced across the various States and Territories those in the building chain should also give consideration as to whether they have insurance that provides cover for statutory liability and the cost of defending regulatory claims.

The flow-on effect will present additional challenges for those undertaking remedial work to ensure requisite insurance cover for that scope.

Insurance brokers will need to work with their clients to clearly identify risks to be covered and avoid gaps in cover. Attention must be given to understanding the exclusions for combustible cladding that may be introduced by insurers and whether they are blanket all-encompassing exclusions (similar to most asbestos exclusions) or whether compliance with the *Residual Hazard Identification Protocol* discussed below can assist with maintaining continued cover.

Residual Hazard Identification Protocol

Through the ICA, Australian insurers have agreed upon a *'Residual Hazard Identification Protocol'*[29] to assist building owners to identify non-conforming ACP cladding, and to enable insurers to better assess risk and set premiums. Compliance with the protocol is intended to be considered sufficient for ongoing underwriting of the building.

The Protocol looks to both identify the material used in a building's construction and the installation methodology, adopting a reporting structure as follows:

Step 1 – Identification of materials

1. Who has carried out inspections and testing of the cladding material, what are their relevant competencies, qualifications and experience and what testing laboratories were used to test the samples?
2. What category(s) of ACPs are present on the building?
   A. 35%-100% Organic Polymer and 0-65% inert - BRE Appendix Category 3
   B. 8-34% Organic Polymer and 92-66% inert - BRE Appendix Category 2
   C. 1-7% Organic Polymer and 93-99% inert materials - BRE Appendix Category 1
   D. 0% Organic Polymer and 100% inert - BRE Appendix Category 1
3. What quantity of the material is present and extent of coverage?
4. What substrate or insulation is present behind the ACP?
5. What potential ignition sources exist for the ACP given the configuration of the building?

[29] http://www.insurancecouncil.com.au/issues-submissions/issues/insurance-industry-aluminium-composite-panels-residual-hazard-identificationreporting-protocol.

Step 2 – Evaluating the exposure

6. What exposures exist to the safety of the occupants based on the Step 1 outcomes?
7. Is the building compliant, with regard to ACPs, the National Construction Code and associated Australian Standards?
8. What are the exposures to the property and consequential business interruption risk of a fire involving the ACP?
9. What exposures exist to the reputation, image and market value of the building as a result of the ACP identified?

Step 3 – Remedial actions for consideration

10. What remedial actions are necessary (if any) to address unacceptable risks to the building due to the presence of an unsuitable ACP?

L.U. Simon Builders Pty Ltd v Victorian Building Authority

We are yet to see if, and how, insurance concerns will materialise across Australia, but the recent decision in *L.U. Simon Builders Pty Ltd v Victorian Building Authority*[30] may provide some comfort to insurers in Victoria.

L.U. Simon had been responsible for the construction of the Lacrosse Building in Melbourne that caught fire in 2014 and which incorporated combustible external cladding. The VBA sought to take action in respect of six other multi-storey towers which L.U. Simon had erected over the previous nine years. The VBA purported to direct the company to rectify the cladding on those six towers pursuant to its powers under section 37B of the *Building Act 1993* (Vic), which authorises a direction to fix building work if the VBA is satisfied that the work is not compliant with the Act or with building regulations.

L.U. Simon sought a declaration in the Supreme Court of Victoria to the effect that the VBA was not entitled to rely upon section 37B to direct the fixing of the six other towers.

[30] [2017] VSC 805. http://www8.austlii.edu.au/cgi-bin/viewdoc/au/cases/vic/VSC/2017/805.html.

The Supreme Court granted the declaration sought by L.U. Simon and held that:

- The power to direct a fix under section 37B lasted only during the construction period, and lapsed once an occupancy permit for the building had been issued. References in the Act to the *'builder'* are couched in the present tense, which indicates that the Act's application should endure only so long as the original building works were being undertaken; [31]
- To allow the VBA an indefinite time frame to issue directions could operate unfairly:
  - '*a direction to fix could be issued long after the event to a person who was no longer a builder or who bore absolutely no responsibility or blame for the alleged defect(s) or who answered both of those descriptions; or who, because of the passage of time, could no longer enforce any rights of contribution the person may have otherwise have had*';[32] and
  - Once a builder has completed its contract and departed the site, it has relinquished any right to be on the premises. After that time, no legal power is available to the builder, or even to the State authorities, to compel the owner of the building to co-operate with any rectification work which might be directed to be performed by the builder.[33]

The decision in L.U. Simon reinforces the general principle that it is the owner of a building who is primarily responsible for ensuring its safety, and for funding necessary rectification costs to bring the building up to any prescribed standard.

In another action against L.U. Simon, the owners of the Lacrosse Building commenced proceedings in VCAT for damages of $24 million including the cost of rectifying the non-compliant cladding. The damages sought include an estimated $10.7 million in recladding costs, $1 million in lost rent and emergency accommodation costs and over $500,000.00 in insurance premium hikes. L.U. Simon, without admitting liability, had agreed earlier to cover the upfront costs of replacing the materials as a gesture of good faith.

The six-week hearing concluded on 11 October 2018, with the decision presently reserved. L.U. Simon has joined the architectural firm, a fire engineer and a building surveyor for failing to raise any issues over the use of the combustible cladding. The engineering firm in turn joined the building superintendent, arguing that it failed to detect L.U. Simon's use of inappropriate cladding materials.

VCAT's decision is awaited with interest by stakeholders, and not least by professional indemnity insurers and industry participants, who may potentially bear liability associated with rectifying non-compliant cladding on buildings in Australia. The potential impact from an insurance perspective extends across various types of insurance cover including professional indemnity, contract works, product recall, ISR, public and products liability and property policies.

[31] Ibid [53].
[32] Ibid [56].
[33] Ibid [57].

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Note: This article was originally published in Carter Newell's Constructive Notes in April 2018. This version has been updated to account for legislative developments up to 9 November 2018. Original article written by Luke Preston and Ben Hall, Partners.

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