



## Combustible Cladding Update 2020

### THE CHALLENGE OF INNOVATION

Innovation in building design and materials has led to combustible cladding being used on the external walls of many Australian medium and high-rise buildings. However, fires in Melbourne's Lacrosse building (November 2014), London's Grenfell Tower in June 2017 and the Neo fire in Melbourne (February 2019) have revealed the latent fire risks associated with combustible cladding and consequent risk to public safety.

Across Australia various state governments have introduced a series of measures to address community concerns about public safety and to identify the extent of the issues posed by combustible cladding.

The wider picture presents a number of challenges. The issues raised by Opal Towers, at Sydney Olympic Park, and combustible cladding overlap because they expose systemic issues involving compromised design and broader building defects. These issues demand an urgent response.

The Building Ministers' Forum has sought to introduce a broader national approach to national building reforms while still giving state governments' regulatory powers. Despite this, the approach taken at National and State levels is fragmented and sanction based, instead of offering a uniform approach aimed at creating incentives for compliance. This is hardly comforting to industry participants and consumers, the ultimate end user.

This article highlights the following:

1. Recent developments in Victoria, NSW & Qld;
2. Challenges for consumers, the building industry and professional participants;
3. Implications for insurance cover for industry professionals.

### VICTORIA

#### Lacrosse Appeal: Mid 2020

Three of the respondents to the Lacrosse hearing, the building surveyor, Gardner Group, fire engineer Thomas

Nicolas and architect, Elenberg Fraser lodged an appeal with the Victorian Court of Appeal. They are arguing that the builder's liability should be increased saying the builder largely escaped its statutory obligations under the Domestic Building Contracts Act 1995 (VIC) and should be regarded as a "concurrent wrongdoer". The appeal is expected to be heard in/ around mid-2020.

### Cladding Rectification Guidelines

On 19 December 2019 the Victorian Government issued funding guidelines for the combustible cladding "Rescue package". Cladding Safety Victoria may provide funding for the rectification of external wall combustible cladding of some higher risk residential apartment buildings, as assessed by the Victorian State-wide Cladding Audit led by the Victorian Building Authority (VBA).

To be eligible for funding an owner or owners' corporation must be responsible for a residential building that has been:

- assessed as having combustible cladding through the Statewide Cladding Audit, and deemed to be of higher risk;
- subject to a Building Notice or Order related to combustible external wall cladding;
- referred to Cladding Safety Victoria (CSV) by either the VBA or a local council; and
- prioritised for rectification by CSV.

CSV will only fund works associated with cladding rectification. Any additional works will need to be financed by the building owners. The Guidelines provide funding at various stages including:

- **Design Stage:** pre-works commencement: seeks to develop a rectification solution to establish compliance with building notices or orders related to cladding.
- **Rectification Works Stage:** funding for construction

and materials for rectification, in line with the rectification solution, including appropriate disposal of waste material.

- **Design and Construct Stage:** for design, construction and materials where a building practitioner is retained to undertake a direct design and construct standard approach to fully remove and replace the combustible cladding from the building.

Funding is not available for any legal expenses incurred by an owners' corporation. However, it is available for cladding rectification to address fire safety risks. The costs charged must also be reasonable and the solution proposed is to be cost-effective.

### Cladding Rectification Levy

Effective from 1 January 2020 the Victorian State Government introduced a Cladding Rectification Levy (applicable to new buildings) to raise funds to assist in rectifying affected buildings in Victoria. Provisions for the levy were included in amendments to the Building Act 1993 in the Building Amendment (Cladding Rectification) Act 2019<sup>1</sup>.

The levy applies to:

- Building work in metropolitan areas (as defined in section 18(8) of the First Home Owner Grant Act 2000)
- With a cost of at least \$800,000, and
- Class 2 to 8 buildings under the National Construction Code.

### NSW

#### Design and Building Practitioners Bill 2019

In October 2019 the NSW Government released a draft of the Design and Building Practitioners Bill 2019 for public consultation. The draft Bill introduces a suite of new reforms to improve the quality and compliance of design documentation and strengthen accountability across the design, building and construction sector.

The reforms in the draft Bill are timely bearing in mind the findings of liability in the Lacrosse decision implicating non-compliance with the BCA and the duty of care owed to ensure that the relevant design was fit for purpose.

The NSW Government has indicated that it proposes to develop and consult upon draft regulations in 2020. The draft Bill once enacted will not apply to existing work or arrangements but only to new works or arrangements entered into after the commencement of the proposed Act.

The reforms will apply to multi-unit and multi-storey residential apartment buildings and certain categories of designs, which will be set out in the regulation.

The draft Bill proposes the following key reforms, including:

- practitioners who prepare regulated designs issue a compliance declaration, must declare that the designs comply with the Building Code of Australia (BCA);
- variations to declared designs are prepared and declared by a design practitioner if they are in a building element or performance solution, or in any other case, documented by the building practitioner;
- a design, principal design or building practitioner who intends on making a compliance declaration is to be registered under a new registration scheme;

- a duty of care is owed for construction work to certain categories of 'owner' including owners' corporations and subsequent titleholders.

### QLD

On 3 July 2019 the Government introduced a 3-part compliance process following a meeting of the Ministerial Construction Council. This introduced a staged process to allow:

- Buildings to be registered and building owners to complete a cladding checklist by 29 March 2019;
- Building industry professional statement completed by 31 July 2019;
- Engage fire engineers and register by 31 October 2019;
- Complete a building fire safety risk assessment, fire engineer statement and cladding checklist by 3 May 2021.

The Qld framework provides a considerably longer time frame, compared to NSW and Victoria for the completion of a series of measures to promote fire safety risk assessment and cladding checklist. That said, bearing in mind the number of affected buildings, its time frame appears realistic to allow for the necessary assessments to be undertaken.

In contrast to the Victorian model of a Government sponsored fund and levy, QLD has forged a different path. It requires building owners (and their insurers) to be responsible to rectify their buildings and does not seek to pass this on to the public purse.

### BUILDING MINISTERS' FORUM

On 18 December 2019 the Building Ministers' Forum the Building Ministers' Forum issued a communique to progress a national approach to the implementation of the Shergold Weir Building Confidence report. The Forum introduced discussion points on a number of initiatives on building infrastructure including cladding and providing a coordinated response to professional indemnity insurance. Standards Australia is to develop a technical specification proposed for inclusion in the National Construction Code amendment for labelling aluminium composite panels.

In February 2020 a meeting of the Building Ministers is scheduled with the Insurance Council of Australia, to discuss measures to reduce the cost and improve the availability of professional indemnity insurance premiums for building industry practitioners. The Building Ministers will also meet with building surveyor and certifier industry associations to discuss implementing plans to establish a Professional Standards Scheme and raising standards within the industry.

### PRACTICAL IMPLICATIONS FOR BUILDING OWNERS AND PURCHASERS

The cladding crisis has impacted affected building owners and purchasers who face compliance obligations and potential issues with tightening lending criteria when seeking finance for cladding remedial work and some lenders reviewing all new lending to cladding affected apartments.

Property owners will also be required to undertake a risk assessment of their building to determine the level of rectification or precautionary steps required to discharge their

duty of care. They may be required to disclose to their insurers any non-compliant cladding, and if so, the steps they have taken to protect against such risk.

Where a fire or damage occurs as a result of non-compliant cladding, the typical insurance cover may offer no cover for rectification costs

Construction professionals are also seeing their PI insurers apply imposing cladding exclusions regarding combustible cladding and seeking to increase premiums to a point where the cost of insurance is prohibitive. This may cause professionals to breach statutory licensing requirements or contractual provisions requiring insurance to be held.

The issue with non-compliant cladding is already starting to impact whether PI insurers offer cover and remain in the market in Australia. In the interim, professionals potentially remain exposed to legal liabilities that may arise in relation to past projects.

## CONCLUSION

The changed regulatory landscape has introduced challenges for a number of parties, namely industry professionals, consumers and intending purchasers.

While it has set out a road map for reform including target time frames, it has highlighted different approaches between the States. For example, it remains to be seen whether other States adopt the Victorian model of introducing a compulsory levy to fund cladding remedial work, or allow the market time to address cladding on a self-funded basis.

Certainty and the involvement of qualified construction professionals at all levels is key for all industry players and consumers. It is also vital for the insurance market looking for a coordinated approach at a political level, as a basis to continue providing a safety net via cover for practicing industry professionals and consumers.

## CONTACT US

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1. <https://www.vba.vic.gov.au/news/news/2019/cladding-rectification-levy-to-commence-on-1-january-2020>

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### Developer Building Bonds

*Developers are now required to lodge a building bond with NSW Fair Trading to the value of 2 percent of the contract value for works to secure funding for the rectification of defective building work.*

**Click here to find out what you need to know**



### SOPA Amendments

*The amendments to the Building and Construction Industry Security of Payment Act 1999 (NSW) commenced on 21 October, 2019; posing significant changes upon the building and construction industry.*

**For more information on Combustible Cladding click here for links to earlier related articles:**

<https://kreisson.com.au/c/publications/cladding/>



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