

Recent fires in high-rise buildings, such as the 23-storey Lacrosse building fire in Melbourne, Australia, as well as the tragic loss of life at the 24-storey Grenfell Tower public housing flats in London, have rightly led to a nationwide review of the material used in external wall cladding.

Both of these fires are likely to have been accelerated by the use of either non-compliant or sub-standard cladding material.

In Australia, we have already seen an amendment to the 2016 version of the National Construction Code (**NCC**), which became effective on 12 March 2018.

Western Australia (**WA**) has focused on conducting a broad audit of multi-storey buildings with cladding attached. In contrast, other states have passed legislation regulating the types of building products used and imposing duties on supply chain participants to increase accountability.

Changes to the NCC

On 12 March 2018, the 2016 version of the NCC was amended, with the major changes being:

- More clarity on the evidence of suitability requirements for the use of materials, products, forms of construction or designs
- Provisions regarding non-combustibility, including:
 - “Deemed to satisfy” solutions being constructed wholly of materials that are not combustible (as determined by testing according to the new implementation of Australian Standard 1530.1)
 - Concessions for combustible materials for minor ancillary items on external walls (e.g. gaskets)
 - A list of materials deemed to be non-combustible on the basis that the material has a non-combustible core
- “CV3” – A new verification method to test fire performance of external cladding systems against the performance requirements under the NCC

Response in WA

In response to the Grenfell fire, the WA Building Commission has broadened the scope of an audit which was already underway to examine all high-risk, high-rise buildings which incorporate cladding.

The audit consists of three phases:

- **Phase 1** – The (now completed) planning phase, involving the formation of teams, plans and methodologies to carry out the audit.
- **Phase 2** – Which has commenced and involves the following six stages:
 - **Stage 1A** – Identification of buildings in the metropolitan area (complete) and in regional areas (almost complete) of the class and height falling within the audit scope
 - **Stage 1B** – Identification of buildings within stage 1A that have cladding attached (almost complete)
 - **Stage 2A** – Collation of data for preliminary assessments of buildings in the metropolitan area and regional areas (almost complete)
 - **Stage 2B** – A preliminary assessment of buildings in the metropolitan and regional areas to identify buildings requiring further investigation (almost complete)
 - **Stage 3A and 3B** – Gathering and assessment of building information and site inspections to decide whether action is required on the cladding; this may involve testing of façade materials (commenced)
 - **Stage 4** – Determination of buildings requiring remedial action (not yet commenced)
- **Phase 3** – The reporting phase, being the WA Building Commission’s report summarising findings from the audit.

There is no timeframe for completion of the audit, with the WA Building Commission stating that it will continue “*for as long as it takes to be satisfied the cladding meets the fire safety requirements*”.

As of June 2018, the WA Building Commission has identified 448 buildings with cladding, and of these, 240 are to undergo detailed risk assessments (stages 3A and 3B).

Legislative Amendments

The governments in New South Wales (**NSW**) and Queensland (**QLD**) introduced legislation last year to combat the use of unsafe building products in buildings across these states.

QLD introduced *The Building and Construction Legislation (Non-Conforming Products – Chain of Responsibility and Other Matters) Amendment Act* in August 2017. The legislation establishes a more even chain of responsibility for the supply chain, to ensure building products in QLD are safe and fit for purpose.

Specifically, the legislation:

- Defines non-conforming building products to be products that are not safe for use, do not comply with relevant regulatory provisions or are not capable of being used to the standard represented by the person responsible for the product
- Addresses non-conforming building products, whether manufactured locally or imported
- Imposes various duties regarding building products on parties in the “chain of responsibility” to ensure that a product is not a non-conforming product, and introduces new penalties for breaching these obligations
- Expands the compliance and enforcement powers of the QLD Building and Construction Commission and the responsible Minister

Similarly, NSW implemented the *Building Products (Safety) Act* in December 2017. The new laws give the Fair Trading Secretary in NSW powers to:

- Identify and ban building materials which are dangerous, and authorise investigations into specific products if deemed necessary
- Require manufacturers and suppliers to provide information relating to a particular product
- Determine and rectify existing buildings which incorporate unsafe building products
- Impose penalties on companies for using unsafe building materials, or falsely representing a building product as being suitable for use

Implications

At this stage, it is unclear what position WA will take, particularly pending the outcome of the state-wide cladding audit. We anticipate that WA and the remaining states will propose similar legislation to QLD or NSW.

Going forward, all parties involved in construction projects should keep the following considerations in mind to best protect their position in respect of building products used in construction:

- Insurance: Obtain and understand the scope of insurances, particularly in relation to the supply and installation of building materials.
- Procedures: Implement internal procedures to ensure that decisions on the design, manufacturing, supply or installation of building materials are appropriate and conform with applicable laws.
- Drafting: Ensure clear drafting of construction contracts setting out what constitutes a conforming or non-conforming building product, the steps to follow should non-conforming material be identified and who bears the responsibility for rectification.

The risks for those who do not properly address the issue include prosecution (in the states with applicable legislation) and civil ‘penalties’ (including exposure to class actions) – that is, on top of the obvious reputational risk.

Contacts

Gregory C. Steinepreis

Partner

T +61 8 9429 7505

E greg.steinepreis@squirepb.com

Arohi Kaila

Associate

T +61 8 9429 7421

E arohi.kaila@squirepb.com