Amendments to State Environmental Policies concerning Cladding

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Chair of a Strata Plan with Combustible Cladding

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I am the Chair of a Strata Committee which has a residential tower of 19 storeys with a total of 100 units where combustible cladding covers about 30% of the façade. I am making this submission in a personal capacity as an individual who has had to manage the cladding issue for the past two years. We had conducted initial inquiries following the La Cross fire but were advised by manufacturers and builders that the cladding was not of the same type and was safe.

Following the Grenfell fire, we researched more and better information to discover that the cladding was combustible PE and engaged a fire engineer to report. We had this report before the NSW Cladding Task Force was in place. Since then, tracking the developments, engaging with the original builder, architects, experts, owners and residents and Government, has become a long and demanding task. We remain far from having the solutions, or ways to pay for it, (see the **Indicative Cladding Rectification Budget** at the end of this submission).

In addition to commenting on the proposed legislation, this submission, sets out some of the financial and other challenges facing owners in the face of little or no legislative obligations on the regulators, builders and others whose decisions and actions allowed this problem to be dumped on innocent purchasers who had no way to discover this hidden problem.

Key changes to the draft legislation that should be considered:

Recommendation 1 - Procedure for authentication and verification of the authority of persons lodging registration.

Recommendation 2 - Procedure of removal of a building from the register when the building no longer met the criteria for registration.

Recommendation 3 - Requirement for registration of new buildings to be carried out by the original owner at the time of issue of occupancy certificate.

Recommendation 4 - Early establishment of standards and testing for the cladding system that can be relied upon.

Recommendation 5 - If the register is intended to remain up to date then provision should be made to obligate owners to update periodically, and there should be clear definition of "who" amongst the representative of owners should be charged with that task.

Rationale for Recommendations

Recommendation 1 – The suggested web site registration would not provide adequate traceability or authentication of the person making the registration and so would be open to abuse.

Recommendation 2 – If a building cannot be removed from the cladding register after cladding issues have been addressed, it may have adverse impact on property values. If there is a need to construct a permanent register of building owners that should be separate from the "cladding" register.

Recommendation 3 – The most accurate and complete information would be available from the builder at the time of completion. Much of the information will be difficult for owners to obtain later. If new buildings do contain "combustible cladding" then registration must be an obligation on the builder.

Recommendation 4 - Owners of buildings with combustible cladding as well as the industry have no proper guidance as to what products will be deemed "incombustible" until there is a standard, test method, and actual tests. The current vacuum leaves innocent owners open to an expensive quick fix that may later prove wanting.

Recommendation 5 - Contact information for owner's representative changes periodically, updates could be by way of a general obligation to report and a formal periodic update akin to the ASIC company return.

General Comments on the Legislation

The proposed policies do nothing to assist owners who purchased properties in good faith from reputable builders, complete with legitimate certification and fire certificates and who now face very significant and unavoidable costs because Government regulatory processes failed to prevent the installation of combustible cladding.

The Building Products (Safety) Act 2017, virtually allows any product to be deemed unsafe retrospectively. This means that unless extreme care is exercised in replacement of the now determined "combustible cladding", owners could find themselves again in a similar position requiring further replacement action at some time in the future, if it is discovered that the replacement, turns out to be unsafe.

The legislative instruments and amendments leave the way open for an "alternative solution" to be presented which means that future cladding systems may still be "combustible" but is deemed sufficiently safe to be approved under today's rules. One assumes that such buildings would need to be registered and remain so.

A cautious owner would well be advised to avoid completely any cladding system that was not certified and tested to meet the most stringent test of incombustibility. However, there are manufacturers/suppliers already marketing "incombustible" cladding, for which in the fine print says their product meets all current Australian Standards and were tested against the more recent and more stringent UK standards, but failed at least one part of the more stringent test. It makes no mention of the changes being proposed in Australia, and the failure (exceeding the debris limits) is

The current lack of information shows that most purchasers of buildings do not have access to documentation, history, and expertise, to be informed, and are now faced with the high costs of determining whether they have combustible cladding. The costs would be considerably lower if the onus fell back to the builder or the certifying authority. Given the great difficulty owners have in obtaining documentation, the legislation should compel builders to provide complete documentation rather than have cash strapped owners having to pursue such matters through the courts or undertake expensive independent investigations.

The definition of "incombustible cladding" applies to the complete cladding system. The information available at this time does not seem to demand that the manufacturer of a product must market that product as a system (waterproofing, insulation etc behind the cladding). This means that any certification of a cladding product for an owner is of little value unless it has been tested with a system identical to its proposed use.

In the present environment, practical solutions offering a truly "incombustible" retrofit for these light weight cladding products, are not available. It is not practical to do major structural work to replace the external cladding with a totally different system or products that will impact adversely on the building structural design the visual appearance. As mentioned earlier, much of this problem relates to the yet to be defined test standard and methods and one wonders how the few buildings currently undertaking remediation are going to guarantee compliance.

Replacement of cladding is being demanded by insurers and the consent authority as non-negotiable. Insurers are also demanding that they approve the replacement product and design. The timing of such a task is critical. It is not possible to remove the cladding without installing a replacement because it provides a rain and weather shield for the underlying water proofing. The underlying waterproof protection will often be combustible and require replacement to comply with the now defined test of "incombustibility". There is also the practical matter of raising funds to undertake the work. The requirement to obtain a DA for changing the cladding adds further time and cost.

Alternative solutions such as installation of external sprinklers are yet untested and could cost as much as cladding replacement. While they might reduce the spread of flame, it would require nor remove the combustible cladding but rather be permitted under an "alternative solution" and remain permanently on the register. Any building so equipped which had a cladding fire would undoubtedly have significant cladding damage before the sprinklers had much impact. This would not happen if the cladding is truly "incombustible"

Practical Implications for Owners

AS5113, which will establish the new testing and certification methods, is not yet available, I understand that it is scheduled for release in May 2018 but that it will take some time before a compliant test facility is set up and manufacturers have their products certified.

After the fire events of La Cross and Grenfell, Government agencies started take proactive action. Unfortunately, Government action seems directed more at being seen to have acted and inquired but has provided little in the way of practical advice and solutions and support for affected building owners.

Owners who innocently purchased into buildings that were legitimately certified as meeting all relevant standards. They now confront substantial special levies because of a regulatory framework that allowed shortcut solutions. Most of these had, or should have had, "alternative solution" certification would appear to have been the basis for its approval. But if no reports can be found, one can only assume that the certification authorities deemed the product to be safe. This can not be permitted to continue.

Specialist fire engineers have reported that the BCA as existed at the time of construction, should not have allowed the use of combustible cladding other than through an "alternative solution". Irrespective of what transpired, it appears that the owners have no reasonable avenue of recourse to any of the parties who enabled this to happen. The legislative changes do not alter this, and over time could lead to future owners facing the same issues.

Owners need to get on with addressing the problem directly (either from pressure from consent authority, insurer, or owners). Raising funds is a real difficulty in strata residential properties where many residents may be living on retirement income and limited or no capacity to borrow or repay loans or meet steep increases in Strata Levies.

Indicative Cladding Rectification Budget for a Residential Tower with Partial Cladding

In respect of single residential tower with cladding covering only 30% of the building the indicative cost estimates of dealing with the issue are set out below.

Consultant and associated costs to locate relevant material, review the information, approach various authorities and builder etc to establish facts to provide to Fire Engineer	$8,000
Managing communication with owners and residents on an ongoing basis for life of the project	$6,000
Fire Engineers Reports	$9,000
Legal Assistance in responding to draft Fire Orders Etc Consultancy costs in providing required information to Insurers and engaging with insurers on realistic time-frames and solutions	$4,000
Researching the market, builders, manufacturers to be sufficiently informed to approach builders and others about possible contributions and to develop a practical time-line for addressing the issues	$8,000
Consultancy with Architects, and Quantity Surveyors to establish realistic cost estimates	$9,000
Legal advice required by the owners in respect of liability, and allocation of costs	$15,000
Arranging and conducting multiple General Meetings of owners to approve arrangements to raise funds, and to approve expenditure	$4,000
Selection and Contracting of a project manager for the remediation (noting the requirement of the SSMA 2015 that multiple quotes are required for any expenditure over $30,000.	$2,000
Project Management Costs for Duration of the Project	$350,000
Preparation and processing of DA required for Consent to replace the cladding	$5,000
Tender process to select a contractor to strip, supply and install	$6000
Scaffolding and scaffolding permits	$700,000
Contractor Costs including removal, supply and install as necessary final inspections, certifications and documentation	$2,500,000
Updating register etc.	$1,500
Preliminary Total	**$3,627,500**

This could result in an average special levy of almost $40,000 per unit if this must be met by the 100-unit owners. It could cost up to $23,000, or more, to provide a reliable cladding report to the NSW government under the proposed EPAA legislation.

Those owners who cannot pay, face a statutory 10% per annum interest payment against unpaid levies. Borrowing by the Owners Corporation, is challenging because of the guarantees sought by lenders plus borrowing costs result in even higher costs to the owners. Those on pension or retirement incomes are certainly going to have extreme difficulty in paying their share. Hence, there could be a very significant social cost down-stream if unfortunate owners are forced to move and sell because they cannot pay.