



# **RESPONSE TO THE NSW DRAFT REGULATION ON BUILDINGS WITH COMBUSTIBLE CLADDING**

*Environmental Planning and Assessment Amendment (Identification of Buildings with Combustible Cladding) Regulation 2017*

**FEBRUARY 2018**

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## ABOUT US



Consult Australia is the industry association representing consulting firms operating in the built and natural environment sectors. These services include design, engineering, architecture, technology, survey, legal and management solutions for individual consumers through to major companies in the private and public sector including local, state and federal governments. We represent an industry comprising some 48,000 firms across Australia, ranging from sole practitioners through to some of Australia's top 500 firms with combined revenue exceeding \$40 billion a year.

Some of our member firms include:



## SUMMARY

Consult Australia welcomes the opportunity to respond to the public consultation draft of the NSW Government's *Environmental Planning and Assessment Amendment (Identification of Buildings with Combustible Cladding) Regulation 2017*.

Consult Australia supports the proposal to create a register of buildings that have combustible cladding. We do however, have some concerns regarding the following:

- The proposed amendments fail to clearly define the levels of competency required for a person preparing a cladding assessment. We recommend that this is addressed by the Regulation.
- The lack of defined framework which supports the '*properly qualified person*' in determining the level of risk and whether it is an acceptable risk. We recommend that there is an explicit framework against which the properly qualified persons are being asked to determine the level of risk.
- A lack of clarity around approval pathways for the outcomes of cladding statements and risk assessment process. We recommend that the Regulation should not take effect until the related approvals pathway has been understood and clarified.
- The timeframes prescribed for providing details of the building and its cladding (3 months for initial report and 7 months for a cladding statement in some cases) presupposes that there are enough '*properly qualified persons*' to undertake the assessments. This may not be the case and we recommend that there be consideration given to capacity in the industry to undertake this work before the Regulation takes effect.
- The Professional Indemnity (PI) Insurance market has substantially contracted in terms of the availability of PI Insurance for building cladding work, since the Grenfell Tower and Lacrosse Tower fires. The lack of clarity in the drafting of the Regulation regarding competence, process, and risk assessment, may further compromise the level of PI cover available (particularly the lack of a definition of '*properly qualified person*'). The lack of adequate PI insurance cover will diminish industry's willingness (and capacity) to perform this work. We strongly recommend that the NSW Government review the availability of PI insurance for building cladding work in consultation with the insurance industry.

Consult Australia is concerned that these fundamental issues are resolved before the Regulation takes effect, to ensure that there is certainty regarding industry's obligations and to avoid unintended consequences.

In addition to these there are also a number of other issues arising, which are set out further in this submission together with our recommendations.

## RECOMMENDATIONS IN RESPONSE TO THE DRAFT REGULATION

### Recommendation re application of part, exclusions (167(1)(c))

A Class 5 (office) and Class 6 (shops) or Class 8 (production facility) have significantly different risk profiles. We recommend that there is a clear explanation of the rationale behind how these requirements were established in the regulation to ensure the intended objectives can be achieved.

### Recommendation re a definition of 'cladding' (186S)

'Cladding' should be a defined term, with reference to an established industry definition for consistency and certainty. This is because 'cladding' is made up of a whole assembly, including the outer most material, frame, insulation material, inner insulating material to the internal wall of the building. We would propose that the definition include reference to the external wall, and cover all the elements related materials of a wall and fixing methods.

### Recommendation re 'combustible cladding' (186S)

In defining combustible cladding, the clause refers to *'materials that are capable of readily burning'*.

Consult Australia recommends that this be amended to reflect any material which fails to meet the Australian Standard (AS)1530.1. Additionally, another way of defining combustible cladding may be as 'any external wall and façade system that incorporates materials that are non-combustible as defined in the Building Code of Australia (BCA)'.

We are concerned that the definition *'capable of readily burning'* is too subjective, and will lead to inconsistencies in interpretation. This is the very reason that Australian Standards are developed and which the BCA uses to determine what is reasonable in relation to such technical issues.

Furthermore, section 186S refers to *any* cladding material. This is a very broad definition leaving it open to inconsistency in interpretation. Given the technical nature of this subject, it is important that the definitions reduce the risk of uncertainty and unintended consequences. For example, should seals and gaskets be considered 'cladding'? We recommend that the Regulation consider what materials are excluded from the definition in order to provide greater consistency of application and certainty.

### Recommendation re obligations of building owners (186T (2))

Consult Australia recommends that the obligation includes confirmation of the evacuation procedures and whether the building has been installed with a sprinkler system.

### **Recommendation re obligations timeline for providing details of the building and its cladding (186T (2))**

We are concerned that capacity in the industry may impact on the ability to comply with a three-month timetable for this work. We recommend that consideration be given to industry capacity before the Regulations take effect.

### **Recommendation re obligation to provide details of the building and its cladding (186U)**

We recommend that the details provided include a description of the approvals method use for any cladding which was installed. For example, was it deemed compliant with the BCA's Deemed-to-Satisfy provisions, was a Codemark product, or was a Performance Solution developed.

### **Recommendation re Cladding Statement (186V (1))**

We recommend that an approval pathway is established. In reviewing the draft Regulation, it is not clear whether any approvals are required in relation to the outcomes of the cladding statement and if so, what the approvals' pathway is.

Unless an approvals pathway is described then scope of the cladding statement is unclear. Meaning that the person conducting the inspection will not know the parameters within which to prepare a cladding statement, and then address any actions specified in a cladding statement.

For example, where a cladding statement recommends building works, that work would likely need to be carried out under either a Development Application or Complying Development pathway.

Any element of new building works will require compliance with the BCA, and unless found Deemed-to-Satisfy, the whole building will require assessment against the Performance Requirements as if built today. This is likely to result in a significant number of buildings needing to be re-clad.

Alternatively, a Fire Order or an approval process (like that introduced when sprinklers were made mandatory for aged-care facilities) would provide a pathway for meaningful improvements in fire safety that may be more cost effective.

If a cladding statement concludes that no physical work is required and that the risk can be mitigated through management provisions alone, a clear approvals pathway and a means for reviewing the effectiveness of the management provisions would be appropriate. The management provisions would be included in the fire safety schedule to provide a mechanism for periodically recording and ensuring that the provisions are in place (taking corrective actions if they are not).

If an approvals pathway is not established then any actions specified in the cladding statement are likely to be linked back to compliance with Performance focused requirements. If this is not understood at the time of the cladding statement being prepared, it could lead to abortive work.

We recommend that the Regulation should not take effect until the related approvals pathway have been understood and clarified.

### Recommendation re Properly Qualified Person (186V (2))

We recommend that there be clarity around what an 'properly qualified person' means within the definitions, with reference to experience and qualifications. Given the nature of the assessment, competency we would recommend that the person should be either:

- a) A registered fire safety engineer; or
- b) A Registered Building Surveyor (RBS), or
- c) A façade design engineer or façade materials engineer or structural engineer that has also completed the *Graduate Certificate in Performance Based Building and Fire Codes* from the Victoria University of Technology or equivalent<sup>1</sup>.

### Recommendation re Cladding Risk (186V(2))

Clause 186V states that a cladding statement must include *'a determination as to whether or not, in the opinion of that person, the cladding presents a risk to the safety of persons or to the spread of fire, in the event of a fire.'*

This fails to recognise that all cladding, combustible or not presents some level of safety risk. It is important therefore that there are clearly defined parameters for an acceptable level of risk. It is Consult Australia's recommendation that this been resolved before the Regulations take effect.

### Recommendation re inspection of cladding (186V(2))

Section 186V (2) also states that the cladding must have been inspected. It is important to note that inspection of the cladding material on its own is insufficient to understand and determine safety risks.

Therefore, any complete risk assessment needs to include a thorough fire safety review of the entire building and installed fire prevention and control countermeasures. Greater clarification is required as to what type of inspection and investigative process is required (e.g. desktop, non-intrusive surveys, destructive laboratory testing etc).

It should also be noted that external cladding is often part of a building façade system. The building façade system often provides other functions such as thermal comfort, weather protection, etc. Hence, fire risk assessments should be conducted in consultation with the façade engineer to ensure that a holistic approach is being undertaken, and fire risk mitigation measures are not compromising other façade functions.

### Recommendation re description of the combustible cladding (186 V(2)(d))

The draft Regulation requires that a description of the combustible cladding applied to the building be provided.

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<sup>1</sup> Victorian Building Authority, 'Practice Note 2014-37', June 2014, [http://www.vba.vic.gov.au/\\_data/assets/pdf\\_file/0017/20393/PN-37-2014-Fire-Performance-Requirements-of-Volumes-One-and-Two-of-the-National-Construction-Code-Series.pdf](http://www.vba.vic.gov.au/_data/assets/pdf_file/0017/20393/PN-37-2014-Fire-Performance-Requirements-of-Volumes-One-and-Two-of-the-National-Construction-Code-Series.pdf), pg. 1.

We recommend that the Regulation be clear about what level of evidence is required regarding the materials. For example, would (as-built) drawings suffice or would samples be required and material composition testing undertaken?

### **Recommendation re the safety risk to persons (186V(2)(g))**

Section 186V (2) (g) references determining the safety risks '*of persons*'. This is very broad, and allows for uncertainty because there are a number of ways in which this could be interpreted. It could include people occupying the building, people outside of the building and in adjacent buildings, emergency responders etc. We recommend that clearer terminology be used, again this could be done by 'exception'.

### **Recommendation re the details of actions necessary to address the risk (186V(2)(b))**

Risks can vary significantly depending on building type from a fire and risk perspective. We recommend that the method for risk assessment should be more clearly defined. This should include whether the risk needs to be eliminated or the level of risk mitigation required. Without this there will be significant variance in outcomes and level of community safety.

### **Recommendation re reasons for choosing the specified actions (186V(2)(h))**

Section 186V 2 (h) specifies '*an explanation of the reasons for choosing the specified actions necessary to address the risk*'. The lack of process and reasoning in this requirement opens further questions regarding what approvals or discussions are necessary.

Consult Australia recommends that the Regulation more clearly articulate the process for development of the cladding statement, which should include this issue within it.

### **Recommendation re timetable for cladding statement (186V(5))**

We are concerned that capacity in the industry may impact on the ability to comply with a seven-month timetable for this work. We recommend that consideration be given to industry capacity before the Regulations take effect.

## **CONTACT**

We would welcome any opportunity to further discuss the issues raised in this submission. To do so, please contact Jody McGann, NSW State Manager, Consult Australia on (02) 8252 6708 or at [jody@consultaustalia.com.au](mailto:jody@consultaustalia.com.au).