National Fire Industry Association

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

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EXECUTIVE SUMMARY

The NSW Government has released draft legislation that aims to reduce the risks around the use of combustible external wall cladding. When finalised, the regulation will require owners of buildings with combustible cladding on all or part of the external walls to register their building details with the government within three months of the regulation commencing. After that they will need to submit a statement about the cladding material used on the building, whether the cladding presents a risk to safety, and what actions might be necessary to address those risks.

The National Fire Industry Association is pleased to provide comment on the draft Environmental Planning and Assessment Amendment (Identification of Buildings with Combustible Cladding) Regulation 2017.

The National Fire Industry Association (NFIA) is an Australia-wide community of commercial fire protection contractors, their staff, suppliers and industry stakeholders representing a wide and varied membership from the smallest sub-contractor through to large Australia-wide design, install and service businesses. Our members work at the frontline of fire protection in Australia with an estimated 80 per cent of the fire protection work undertaken in NSW completed by members of NFIA.

Our mission is to partner with our members in building a better Industry through Training, Quality and Professionalism thereby creating better outcomes for customers and rewarding career opportunities for the Industry's people, as well as making Australia safer.

NFIA congratulates the NSW Government for addressing the important issue of combustible cladding on buildings. However we would like to raise some issues with the current proposed legislation:

1. The definition of ‘combustible’ should be aligned with the National Construction Code via AS1530.1
2. Owners may not be able to identify whether their building contains combustible cladding and therefore will not register their building or follow up with a cladding statement.
3. While a qualified person is not required at the registration phase, owners must at this stage describe the combustible cladding applied to the building which many will not be in a position to do.
4. Definition of Cladding needs to be clarified with regard to the extent and type of attachments and whether it captures only attachments and structure associated with the attachments or the entire wall assembly.
5. The Legislation calls for a competent person to conduct the fire risk assessment of the cladding but does not define what a ‘properly qualified person’ is.
6. The legislation mandates what is required to be contained within the cladding statement but gives no direction as to a matrix to ensure some uniformity and consistency between statements
7. The legislation puts the onus of proof onto owners of multi-residential properties that potentially have combustible cladding.

INTRODUCTION

A staggering number of people die or are seriously injured as a result of fires in domestic and commercial properties in Australia every year. Following is a breakdown of those deaths by State from 2001 to 2013 (Source: The National Coroners Information Service).

Year	ACT	NSW	NT	QLD	SA	TAS	VIC	WA	TOTAL
2001	2	**22**	-	10	12	4	16	8	**74**
2002	-	**37**	2	19	10	5	32	10	**115**
2003	4	**39**	2	17	10	6	22	12	**112**
2004	1	**35**	1	14	8	9	20	4	**92**
2005	1	**43**	2	14	5	3	25	6	**99**
2006	2	**28**	-	25	14	1	21	5	**96**
2007	-	**20**	3	15	9	4	26	12	**89**
2008	-	**20**	1	22	8	7	26	8	**92**
2009	1	**26**	1	13	8	5	32	6	**92**
2010	-	**29**	1	12	5	-	16	10	**73**
2011	-	**22**	2	26	7	4	23	6	**90**
2012	-	**25**	2	8	4	1	16	13	**69**
2013	1	**18**	1	21	10	-	9	7	**67**
TOTAL	**12**	**364**	**18**	**216**	**110**	**49**	**284**	**107**	**1160**

Besides the human risk, there is also a substantial financial cost to the community due to building fires. Fire costs Australian business millions of dollars due to property damage, fines, compensation, and insurance premiums. Many businesses find that they are not able to recover from the effects of a fire.

The Australian Fire Protection Industry

Fire protection in Australia is typically achieved via three means:

- Active fire protection (fire sprinklers, fire hydrants and fire alarm systems);
- Passive fire protection (fire rated walls, floors and ceilings and fire sealing); and
- Education.

The Fire Protection Services industry contributes over $2.5 billion to the Australian economy every year. Over 2000 businesses pay $700 million in wages each year and industry revenue is projected to grow by an annualised 1.6% over the five years through 2020-21 to reach $2.7 billion.

The IBISWorld Industry Report OD5424 Fire Protection Services in Australia (April 2016), claims that despite the presence of vertically integrated multinational giants, the industry has a low level of market share concentration as the top four players are estimated to account for about 26.8% of industry revenue. The two major companies have a combined market share of only 19.8%. Twenty years ago, the two major companies are estimated to have had 80% of the market.

There are now a large number of State, regional and local players that construct, install and service fire protection systems to small, medium and major buildings across the full scope of

class 2 to 9 buildings as well as higher risk facilities such as fuel depots, harbours and similar developments. Over half the industry enterprises employ between one and 19 people (53.1% in 2014-15) and a further 44.4% have no directly employed labour. As the minor players have increased their share of the total market, the industry has become more diverse, while also growing substantially.

The National Fire Industry Association (NFIA)

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NFIA is responsible to a National Board of Directors comprised of representatives from fire protection contractor companies from each state. The NFIA organisation is supported by a highly professional national office and senior supporting staff throughout the country. NFIA also utilises the resources of other Australian and International industry organisations and associations.

Our mission is to partner with our members in building a better Industry through Training, Quality and Professionalism thereby creating better outcomes for customers and rewarding career opportunities for the Industry's people, as well as making Australia safer.

The Problem

As per our corporate profile, NFIA's imperative is to save lives and minimise fire damage. NFIA is committed to the delivery of competent, skilled persons for the fire protection industry.

The 2014 fire at the Lacrosse building in Docklands highlighted the fire safety risks arising from the non-compliant use of cladding products – specifically aluminium composite panels – as external wall cladding on high rise residential buildings. While the fire started on an eighth-floor balcony it took just 11 minutes to travel up 13 floors to the building's roof.

Over the past 20 years there have been at least 20 high rise fires internationally that spread through exterior wall assemblies (cladding, insulation, wall) containing combustible components. The 2009 Lakanal House fire in a tower block in South London led to six deaths and at least twenty injured. An inquest "found the fire spread unexpectedly fast, both laterally and vertically, trapping people in their homes, with the exterior cladding panels burning through in just four and a half minutes." The 2010 Shanghai fire destroyed a 28-storey high-rise apartment building, killing at least 58 people and combustible polyurethane insulation applied to the outside of the building was reported to have been a possible contributory factor. The 2012 Al Tayer Tower and Tamweel Tower fires in Dubai are said to have both spread so quickly because of the combustible cladding.

The 2014 fire at the Lacrosse building in Docklands highlighted the fire safety risks arising from the non-compliant use of cladding products – specifically aluminium composite panels – as external wall cladding on high rise residential buildings in Australia. The most recent tragedy at Grenfell Tower, London which claimed 71 lives has also put a focus back on this

issue as the growth of the fire is believed to have been accelerated by the building's exterior cladding.

External cladding products are typically fixed to the exterior of buildings to be decorative, provide weatherproofing or contribute to energy efficiency outcomes. The cladding is usually not load-bearing and most products are considered light weight and relatively easy to install. A frequently used external cladding product in Australia and internationally is the Aluminium Composite Panel (ACP).

Aluminium composite panels are sandwich-type panels consisting of two aluminium faces and a core material, typically being polyethylene, mineral-based material, or a combination of both. Panel thicknesses typically range between 3 and 5 mm. Many of these products are marketed as architectural building panels.

Aluminium composite panels are sandwich-type panels consisting of two aluminium faces and a core material. The core can be a polymeric material such as polyethylene or polyurethane or a mineral-fibre based material, or a combination thereof. Panel thicknesses typically range between 3 and 5 mm. Many of these products are marketed as architectural building panels. There are a number of different products on the market that appear outwardly similar but use different core materials. The core material significantly affects the fire performance of the panel. Materials with a higher proportion of non-combustible mineral fibre core have better fire performance than those with a pure polymer core or lower proportion mineral fibre core.

Tall building façades clad with panels where a thin veneer of aluminium is fixed either side of a polyethylene or similar polymeric core, can potentially transfer a fire very quickly from one floor to the next, with severe consequences.

Products with a high proportion mineral fibre core may have increased fire performance, but may still be considered combustible, unless they have been tested and proven to be non-combustible. Furthermore, assemblies of ostensibly non-combustible material may still substantially contribute to fire spread via combustible sarking and gaskets as well as by creating vertical flue spaces between the cladding and the wall or other membrane to which it is fixed.

In response to the Lacrosse fire the VBA undertook an audit of the external cladding used on many high rise residential and public buildings in Melbourne. The VBA audit of external cladding used on 170 high rise residential and public buildings in Melbourne that were constructed in the past 10 years, found a non-compliance rate of 51%. The NSW Department of Planning and Environment (10/9/15 Agenda Paper) estimated that between 1800 – 2500 buildings contain combustible cladding. The Western Australian Building Commission / City of Perth identified 70 high-risk buildings (June 2015). The ABCB also conducted a review of compliant cladding being used in a non-compliant way as was the case in the Lacrosse fire.

ENVIRONMENTAL PLANNING AND ASSESSMENT AMENDMENT (IDENTIFICATION OF BUILDINGS WITH COMBUSTIBLE CLADDING) REGULATION 2017

NSW Government has released draft legislation that aims to reduce the risks around the use of combustible external wall cladding. Also included in the package is an explanation of intended effect, which limits the use of combustible cladding as exempt developments.

When finalised, the regulation will require owners of buildings with combustible cladding on all or part of the external walls to register their building details with the government within three months of the regulation commencing. After that they will need to submit a statement about the cladding material used on the building, whether the cladding presents a risk to safety, and what actions might be necessary to address those risks.

The regulation will require owners to engage an expert (at the cladding statement stage) to do a fire risk assessment of the cladding. This is someone the building owners considers qualified and competent to advise on whether the combustible cladding presents a fire risk to people or to the spread of fire and recommend on any necessary follow up actions.

The National Fire Industry Association is pleased to provide comment on the draft Environmental Planning and Assessment Amendment (Identification of Buildings with Combustible Cladding) Regulation 2017 and would like to highlight the following areas of concern.

1. Definition of Combustible

The dictionary definition of 'combustible' – 'able to catch fire and burn easily' is inappropriate in these circumstances and the list of examples may result in unintentional limitation to materials substantially similar to those and exclusion from consideration aluminium faced composite panels of the type which initiated the recognition of this problem in the first place. The regulation should reference (as does the National Construction Code) Australian Standard 1530.1 in defining combustibility.

2. Owners must identify whether their building contains combustible cladding

The regulation will require owners of buildings with combustible cladding on all or part of the external walls to register their building details with the government within three months of the regulation commencing.

According to the draft regulations:

Clause 186T
Owners of building with combustible cladding must provide details of building and its cladding
(1) The owner of a building with combustible cladding must provide the Secretary with details about the building and its cladding.

Many building owners will be ignorant of whether their building has combustible cladding and therefore may not register their building. This will mean that they will not be required to engage an expert to suggest rectifications if in fact it does have combustible cladding. NFIA would like to suggest that any supplementary information (such as Guides or Explanatory notes) includes some examples of what building owners should look for.

3. Owners must describe the combustible cladding applied to the building.
According to the Regulations:

186T
Owners of building with combustible cladding must provide details of building and its cladding
(1) The owner of a building with combustible cladding must provide the Secretary with details about the building and its cladding.
(2) The following details are required to be provided under this clause:
(e) a description of any combustible cladding applied to the building, including the materials of which the cladding is comprised,

While the Legislation does not call for a fire risk assessment at the cladding statement stage the information required to be provided by the owner include "a description of any combustible cladding applied to the building, including the materials of which the cladding is comprised." NFIA argues that owners should not be expected to know this without having engaged an expert. NFIA would like to suggest that Clause186T Part 2e be removed.

4. Definition of Cladding

According to the Regulations:

Part 9, Division 7C
Building with combustible cladding means any building that has combustible cladding applied to any of its external walls or to any other external area of the building, other than a roof. Combustible cladding means any cladding comprised of materials that are capable of readily burning (such as timber, polystyrene, vinyl or polyethylene) and includes any cladding system that incorporates elements that are capable of readily burning (such as combustible framing or insulation behind the surface cladding).

It is not entirely clear whether this definition is intended to also capture entire wall assemblies which are combustible or just attachments to the wall which are combustible. There is also a question as to what the extent of a combustible attachment may be – for example a sign or an awning manufactured of a combustible material attached to the external wall would be captured by this requirement – which may or may not have been the intention.

5. The Legislation calls for a 'competent person' to conduct the fire risk assessment of the cladding.

According to the Regulations:

186V
Owners of building with combustible cladding must follow up with cladding statement

(1) The owner of a building with combustible cladding must provide the Secretary with a cladding statement, or progress report on a cladding statement, for the building, as required by this clause. (2) A cladding statement is a statement to the effect that the cladding applied to a building has been inspected by a ***properly qualified person***

NFIA is concerned that the "properly qualified person" is not defined.

6. The legislation mandates what is required to be contained within the cladding statement but gives no direction as to a matrix to ensure some uniformity and consistency

NFIA is concerned that each properly qualified person conducting the cladding statements will have their own measure of risk and there will be a lack of consistency as to the extent of the problem. NFIA submits that, like in Victoria, the NSW Government conduct the assessments or at the very least provide a matrix like the Victorian Cladding Taskforce has done.

7. The legislation puts the onus of proof onto owners of multi-residential properties that potentially have combustible cladding.

According to the Regulations:
186V Owners of building with combustible cladding must follow up with cladding statement
(2) A cladding statement is a statement to the effect that the cladding applied to a building has been inspected by a properly qualified person and must include:
(b) if that person is of the opinion that the cladding could present a risk to the safety of persons or to the spread of fire, in the event of a fire— details of actions that are necessary to address the risk.

There are many reasons why a building may have non-compliant cladding. Some of these include:

- incorrect or misleading labelling and/or marketing of products;
- historic acceptance of materials or methods that are no longer compliant, but were compliant at the time of installation;
- The addition of cladding or attachments to buildings subsequent to construction, self assessed as not being work for which a building approval was required;
- confusion, inconsistency and ambiguities in the application of the National Construction Code (NCC);
- variations in regulations and codes and their interpretation over time;
- substitution of non-compliant products between the approval phase and the construction phase;
- poor quality workmanship or inexperienced professionals and/or practitioners;
- lack of product or system knowledge;
- competitive commercial pressures which incentivise the taking of shortcuts;
- privatisation of the building surveyor role;
- inadequate onsite inspection, supervision and quality assurance;
- incorrect, inadequate or fraudulent documentation;
- absence of visible deterrents and consequences and long-time delays in enforcement proceedings;

- increasing reliance on performance-based solutions instead of deemed-to-satisfy provisions; and
- insistence on provision of compulsory industry-wide insurance.

The question who will be liable for the substantial costs that may be incurred if rectification is required remains unanswered. The QLD Government recognises that responsibility lies with all parties in the supply chain. The QLD Building and Construction Legislation (Non-conforming Building Products—Chain of Responsibility and Other Matters) Amendment Act 2017 (PDF, 628KB) establishes a chain of responsibility, placing duties on building supply chain participants (including designers, manufacturers, importers, suppliers and installers) to ensure building products used in Queensland are safe and fit for intended purpose

While there are likely to be legal avenues (under contract, statute and duties of care under the common law) to recover the costs of rectification as between, developers, builders, suppliers, installers, architects, fire safety engineers or building certifiers (and of course insurers) it appears that in the first instance NSW building owners will have to pay.

Perhaps the NSW government could consider financing mechanisms to mitigate the financial impact of rectification on building owners. For example, it may be possible to facilitate the development of low-cost financing mechanisms to allow owners' corporations to both fund works while awaiting the outcomes of any legal proceedings against building practitioners, and to allow for any long-term costs that are borne by owners to be spread out over time and between numerous owners.