



16 February 2018

Director, Environment and Building Policy  
GPO Box 39  
SYDNEY NSW 2001  
AUSTRALIA

**Environmental Planning and Assessment Amendment (Identification of Buildings with Combustible Cladding) Regulation 2017- Response to Call for Submissions**

1. I refer to the public call for submissions regarding the proposed *Environmental Planning and Assessment Amendment (Identification of Buildings with Combustible Cladding) Regulation 2017 (the regulation)*.

**General**

2. To foster a strong and healthy construction industry, the regulation should harmonise with the National Construction Code (NCC) Volume 1, *Building Code of Australia (NCC- BCA)*. To that end, the regulation does not appear to address compliance with the BCA in circumstances where it can be possible for combustible cladding to meet the relevant performance provisions at the appropriate time of construction, either through deemed to satisfy or through an alternative/performance solution.
3. We consider that the regulation will pose a significant challenge for owners, and the building / construction industry if insurers introduce exclusions about what services they will insure industry professionals for.
4. Further, given the potential enormity of the task within proposed tight timeframes, it is unclear whether the required skilled practitioners, both in NSW and Australia generally, will be available to assist owners.

**Explanatory Note**

5. We note that the regulation proposes a number of authorities to each separately request information of owners.
6. This creates uncertainty for owners as to which regulatory authority has the appropriate jurisdiction. It may also increase time and cost for owners who would be required to comply with directions and requests from multiple authorities as well as creating the potential for conflicting and inconsistent requirements for owners.

## Section 186S – Definition of ‘Combustible Cladding’

7. Combustible cladding is defined at section 186S to mean ‘*any cladding comprised of materials that are capable of readily burning*’. Despite the regulation setting out the types of materials that constitute ‘*readily burning*’ the regulation does not provide a definition of what it means for those specified materials to readily burn.
8. We consider it appropriate to include a definition of ‘*readily burning*’, which refers to either:
  - a. AS1530.1; or
  - b. NCC-BCA.
9. Alternatively, we propose the term ‘*readily burning*’ be removed from the definition of ‘*combustible cladding*’ in its entirety, where the focus would remain on the materials specified. However, we also note that such a proposal may be impracticable in circumstances where owners (and their properly qualified practitioner) are required to conclusively determine the materials used in the cladding without carrying out destructive investigation.
10. If the definitions proposed above at paragraph 8 are not what is intended, the regulation could instead adopt the definition of ‘High Risk Building Products’ as used in the *Building Act 2016* and *Building Regulations 2016* (Tas), which means:
  - a. an aluminium composite panel containing a polyethylene (PE) core used as an external building cladding; or
  - b. a polystyrene product used in an external insulation and finish (rendered) system.
11. The inclusion of all elements of the “external wall” relative to a constructed wall will potentially pose difficulties to owners and associated experts to conclusively confirm every individual element without destructive testing.
12. Further, it would be of benefit to owners, if there was a distinction or exemption that a very minor trim on an awning canopy or under an awning sign did not fall within the definition.

## Sections 186T(3) and 186U(4) - Timing

13. Section 186T(3) proposes that owners with combustible cladding on their building must provide details of their building within 3 months of the commencement of the clause if the building is occupied or, in any other case, within 3 months after the building is occupied.

14. Despite a 'cladding statement' not being required at this stage (addressed further below), owners are, however, required to provide technical details of the external cladding applied to their building. In particular, owners are required to provide:
  - a. the classification of the building under the BCA;
  - b. a description of any combustible cladding applied to the building, including the materials of which the cladding is comprised; and
  - c. a description of the extent of application of combustible cladding to the building and the parts of the building to which it is applied.
15. The technical requirements set out above, will require input from a competent, qualified person. Therefore, the ability of owners to meet the requirements of section 186T(3) rely on the availability of those third party professionals to inspect the building and provide a report meeting the requirements of 186T(2).
16. In the event that a building owner has engaged a third party to provide the requirement information but, that third party is unable to provide the required details of section 186T(2) within 3 months, the proposed section does not enable an extension of the timeframe without a penalty.
17. Given that section 186T is directed to obtaining accurate information in the first instance, we consider that provision be made to extend time for owners to provide the required information set out at section 186T(2).
18. Similarly, there should be provision to extend the timeframe imposed at section 186U(4) for the reasons set out above.

#### **Section 186V(2) – Definition of 'Properly Qualified Person'**

19. Section 186V(2) proposes that a cladding statement is prepared by a 'properly qualified person'. However, there is no definition or guidance as to whom may meet the definition of being 'properly qualified'.
20. In a regulated industry, it is imperative that persons who are retained to meet legislative requirements, particularly in circumstances where safety is being evaluated, to possess a prescribed minimum qualification level.
21. We consider that the regulation should clearly set out a definition of 'properly qualified person'. That definition may include a list of minimum qualifications required to be held and any memberships of professional bodies.

#### **Section 186V(3) – Cladding Statement**

22. The contents of the proposed cladding statement at section 186V(3) does not provide owners with an opportunity to address the usage of materials at the time of construction. Owners are thereby deprived of demonstrating that the materials used at the time of construction were suitably reviewed and verified in accordance with the NCC, thereby confirming that the building is safe to occupy.



### **Section 186V(6) – Progress Report**

23. Section 186V(2) proposes that, in the event a cladding statement has not been provided within the required time, a progress report on a cladding statement must be provided.
24. Unlike the details set out in the regulation of what constitutes a cladding statement, similar details have not been provided of what constitutes a progress report. It is assumed that the purpose of a progress report is to inform the Secretary of whom has been retained to prepare the cladding statement and how long it will take to finalise the statement.
25. We consider that the regulation should clearly set out a definition of ‘progress report’, which may include:
  - a. retained author’s name;
  - b. qualifications held by the retained author;
  - c. date of retention;
  - d. what date/s the author has or intends to view the building;
  - e. any preliminary findings or opinions of the author;
  - f. reason for the delay in preparing the cladding statement; and
  - g. timing required to complete the cladding statement.
26. Although section 186V(6) anticipates that a cladding statement may not be prepared within the required time, as noted above, the regulation does not provide anywhere for an extension of time to be granted.
27. We consider that the regulation should clearly set out how an extension of time can be granted, whether the progress report forms the basis of the application, the matters the Secretary may take into account in granting an extension of time and what review can be undertaken of the Secretary’s decision.

### **Section 186W - Register**

28. Section 186W(3)(c) proposes that, the Secretary may publish a register of buildings, or any part of it, on a website maintained by the Department.
29. A publicly available list of buildings with combustible cladding will ensure transparency. However, it is imperative that any list remains current, to ensure the accuracy of information provided to the public.
30. We consider that, if the Secretary maintains a register of buildings that the register is updated on a weekly basis and dated to inform the public when the last update occurred. If regular and accurate updates are not maintained, any information contained in the register may be misused.

31. Further, to avoid any misunderstanding regarding the information contained in the register, we consider it necessary that there is a clear delineation between buildings that are unsafe to occupy and those buildings that may contain material that fall within the definition of combustible cladding but meet the requirements of the NCC/BCA and are safe to occupy.

We thank you for the opportunity to contribute to the development of the regulation and are available to discuss our submission further if required.

Yours sincerely

A handwritten signature in black ink, appearing to read "Melissa Chandler".

**Melissa Chandler**  
**Technical Manager Building Compliance, Applied Insight, Building**  
**Australia**