22 February 2018

Director
Environment and Building Policy
Department of Planning & Environment
GPO Box 39
Sydney, NSW 2001

Dear Director,

Draft regulation on buildings with combustible cladding
Draft changes to exempt development provisions – combustible cladding

Thank you for providing the opportunity to comment on the proposed legislative changes and for permitting our submission to be lodged after the close of the public exhibition period so it could be endorsed by our NSW/ACT Chapter Committee.

As demonstrated with the release of the 'AIBS Policy on Building Regulatory reform in Australia' last year (copy attached), AIBS strongly supports a nationally consistent building regulatory framework. What is being proposed with the draft regulation is an isolated state-based approach, which is far from desirable.

This is a national issue as confirmed by the Senate Enquiry into 'Non-Conforming Building Products' which illustrated both the enormity and complexity of the issue. It is our view that a national framework should be developed and implemented to address this significant public safety issue.

The draft regulation for combustible cladding has the potential to expose all practitioners involved in the approval and construction of buildings that are deemed affected. The regulation goes to identification and then the potential for councils or NSW Fire & Rescue to issue orders for rectification.

This approach could open the flood gates in terms of litigation and put unprecedented pressure on the insurance market. Accordingly, a more strategic approach is needed to achieve the ultimate goal of removing fire risk from buildings that are exposed due to the installation of non-complying products but doing so in a controlled, cost effective and efficient way.

Whilst the finger has been be pointed at building surveyors who may have approved buildings with combustible cladding, the interim Senate Enquiry report found that this was a systemic failure of building control and the building regulatory systems nationally. This is in line with AIBS's submission to the Enquiry which identified the following possible causes for this systemic failure;

- Incorrect marketing of the various products by the suppliers and wholesalers;
- A historic acceptance by building practitioners, including architects, builders, project managers and building surveyors that the material was non-combustible and compliant;

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- Confusion and inconsistency with the application of the National Construction Code (NCC) by building practitioners;
- Ambiguities in the NCC that permit differing interpretations eg. Cladding v Lining v Attachments v External Wall;
- Variations to the NCC over time with an increasing reliance on 'performance based solutions' in lieu of 'deemed-to-satisfy' provisions;
- Compliant products being specified and approved at the approval stage, being substituted with non-compliant products at the construction phase;
- Incorrect, fraudulent or inadequate documentation and certificates of adequacy;
- Lack of knowledge of building practitioners in the design, construction and inspection phases of the buildings; and
- Lack of on-site supervision and quality assurance with the demise of the former 'Clerk of Works' role.

To allow individuals to bear the professional and financial burden of this systemic failure is unreasonable. The impact will go beyond certifiers and will significantly impact on the major building companies, insurers and ultimately the building owners and all residents of the State.

Further, as pressure is put on insurance companies with claims for rectification, premises and PI insurance will become more expensive, if not totally unavailable in some circumstances, and this could lead to a slowing of the building and construction industry and a down turn in the State economy.

The liability and culpability of manufacturers, suppliers and marketers of these products need to be taken into consideration in terms of funding rectification and a government controlled funding model needs to be developed.

You do not want funds that could be used to make buildings safe spent on exorbitant litigation costs.

Accordingly, AIBS advocates for a more strategic, planned national approach including the development of a funding model for the required rectification works and we would appreciate the opportunity to discuss these issues with Government.

While not supporting the model proposed, the following specifically concerns are raised in response to the documents that were on public exhibition.

1.0 Draft regulation on buildings with combustible cladding

1.1 Definition of combustible cladding

The draft regulation provides no direction on how to deal with disputes over the primary issue of whether or not a particular cladding is combustible and assumes it will always be known.

The definition of *combustible cladding* needs to be more precise and linked to a simple test that can be conducted on a small sample of material by government approved facilities. This is particularly

important where there is no historic information held by councils, owners or certifying authorities to indicate, with a significant degree of certainty, what material has been installed on a building.

'Readily burning' is no more helpful and will in no way reduce disputes.

The existing tests listed in the Building Code of Australia (BCA) are not the answer and cannot be easily used on unknown composite cladding that is already affixed to a building. Time and cost are critical factors in obtaining a definitive answer on whether or not a cladding is combustible.

In addition, the new verification method to be introduced into the BCA is also not the answer and adds a further level of complexity that may be appropriate during the approval processes, but not for older existing buildings.

As stated, there must be a simple test developed that allows a small sample of an unknown composite cladding to be removed from a building to clarify if the material is or isn't combustible for the purpose of the regulation.

For any regulatory authority to be able to take any action they need to know, with certainty, that a material is combustible.

The following promotional material was seen in 'CCN - Combustible Cladding News Australia February 2018 Vol. 3'. While AIBS in no way endorses or supports the promotional material, or Excelplas, it has been included below to illustrate what type of simple testing may be available and should be considered;

> "***Is your Building Cladding Safe?***
> *ACP – Aluminium Composite Cladding – Assessment & Investigation Service*
>
> ***An Easy 3-Step Process:***
>
> ***STAGE 1 - Site Inspection and Sample Extraction:***
>
> *An ExcelPlas Australia representative visits the property, inspects the type and style of external walls, looks at the available architectural documents and takes a series of cladding samples from different locations on the wall. Samples are 50mm in diameter and are taken from different locations to reduce visual impact and for ease of access. Samples are sealed and sent to ExcelPlas' Melbourne Laboratory for testing.*
> *http://www.excelplas.com/*
>
> ***STAGE 2 - ExcelPlas Sample NATA Testing:***
>
> *ExcelPlas examines the character of each sample core material by:*
> - *Metal analysis of the sheeting on either side of the core*
> - *X-ray elemental identification analysis of the core components*
> - *Infrared spectroscopy of chemical make-up*
>
> *http://www.excelplas.com/*
>
> *Wall cladding typically falls into two main categories as defined by the combustion of its core material:*
> - *Combustible – A high or low percentage of polyethylene (PE) or polyurethane (PU) or polystyrene (PS) is present in the sample*

- *Non-combustible – The sample is a mineral wool or other non-combustible compound comprised primarily of mineral content.*

STAGE 3 - ACP wall cladding report on combustibility:

As your test results identify your sample(s) of the ACP cladding are combustible, our report will outline the results and conclusions from the ExcelPlas testing and analysis."

The recommended simply testing regime needs to be supplement by a centralised register of all known products declared to be combustible for the purpose of the regulation, listed by product name and manufacturers.

The register and testing regime must be in place before any regulation of this nature comes into force.

1.2 Owners' knowledge

Having regard to the large number and variety of buildings that will be captured by the regulation, it is considered that there will be a high number of owners who will not be able to readily respond to the details contained in the regulation. Uninformed owners will not;

- understand building classification in accordance with the BCA;
- be able to identify combustible cladding in all circumstances;
- be able to describe how much combustible cladding is installed on a building; or
- be able to meaningfully describe where combustible cladding has been used on a building eg. as an attachment, on spandrels, over exits, etc.

1.3 Direction provisions

The 'direction' to provide details to the Secretary can be given when it is known that a building has combustible cladding and the owner has not entered the details of the building on the proposed register. However, as identified above, there is likely to be numerous circumstances where the status of the material on an existing building will be unknown.

Accordingly, the 'direction' provisions need to be expanded to allow a 'direction' to be given requiring confirmation that a material is or is not combustible, as ultimately defined by the regulation.

1.4 Properly qualified person

'Properly qualified person' needs to be clearly defined before the commencement of any regulation and must be determined based on the skillset required and not the timeframes list in the draft regulation. Timeframes should be amended to match the availability of the nominated professionals and experts.

In that regard a properly qualified person should be limited to an accredited A1 or C10 person, otherwise the competencies of such people will be unchecked and will vary greatly. Further A1 and C10 accredited certifiers will hold appropriate PI insurance, and councils must be permitted to rely on the certification/statements issued without any further assessment or vetting. Such protection for councils must be included in any regulation.

1.5 Miscellaneous issues

- Clause 167 (1)(c)
  Class 10 buildings should be listed in the class of buildings that the regulation does not apply to.

- Number of storeys
  Should there be a correlation between 'number of storeys' in the regulation and 'rise in storeys' in the BCA?

- New developments
  The requirements of the draft regulation are not limited to existing buildings and would apply to buildings after construction and the issue of an occupation certificate.

  To ensure the correct information is collected on any new building, and given the Principal Certifying Authority (PCA) would have all the necessary documentation on the cladding attached, it may be appropriate for the registration of the building to be required before (or as part of) the occupation certificate process.

2.0 Draft changes to exempt development provisions – combustible cladding

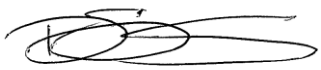
The proposed amendments to the various *State Environmental Planning Policies* detailed in the 'Explanation of Intended Effect' paper are generally supported. However, only permitting 'cladding and decorative work' on class 1a and 10 buildings as exempt development when the materials used are non-combustible is onerous and would preclude maintenance of existing domestic buildings clad in combustible material such as weatherboard.

Accordingly, the current exempt development work should be permissible for class la and 10 buildings with the qualification that external 'cladding and decorative work' must be located 900mm or more from the boundary of the property or another building. This will remove the need for 'mum and dad' owners to try and decide whether or not a product is combustible or non-combustible.

Furthermore, if the above modification is made, any proposed external 'cladding and decorative work' that is less than 900mm from the boundary of the property or another building would be subject to at least a complying development certificate, whereby the certifying authority can adjudicate on whether or not the nominated material complies with the BCA.

AIBS thanks you for the opportunity to comment on these important legislative changes. Please do not hesitate to contact us if you require clarification or further information with regard to any of the above comments. AIBS looks forward to continuing to work with the Department to make improvements to the building regulation framework and reiterates our offer to meet with the Government to detail our concerns with the current exhibited changes.

Yours faithfully
Australian Institute of Building Surveyors



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