

The future of cladding claims

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At a glance

- The NSW Government's framework to address high-risk combustible cladding remains a live issue plagued by confusion around the application of the product ban on combustible Aluminium Composite Panels (ACPs).
- The NSW Auditor General's recent report found that uncertainty persists around compliance and how councils have interpreted the product ban. This has resulted in costly and potentially avoidable wholesale replacement of external cladding on some buildings.
- In the insurance context, combustible cladding policy exclusions, which are now "standard form", mean owners' corporations often bear the cost of replacing non-compliant ACPs. This has resulted in numerous litigation actions.
- A more workable rectification solution may be fire-engineered solutions, rather than adoption of the current default position of wholesale replacement of cladding.

Cladding Taskforce

Following the Grenfell Tower fire in 2017, the NSW Government implemented a 10-point plan that included establishing the NSW Government's Fire Safety and External Wall Cladding Taskforce (Cladding Taskforce) to facilitate the remediation of combustible cladding on Class 2 residential apartment buildings through Project Remediate.

The Cladding Taskforce was charged with identifying buildings that might be affected by the product ban implemented under the Building Products (Safety) Act 2017 (BPS Act). The ban prohibits the use of ACPs with a core containing more than 30 per cent polyethylene on new buildings. The exception to the ban is where the proposed use is subject to independent fire propagation testing of the specific product and method of application in line with relevant Australian Standards (Product Ban).

Over the past 4-5 years, the Cladding Taskforce has identified many of the impacted buildings, and building owners have rallied to have ACPs removed and replaced. However, practically speaking,

most impacted buildings remain un-remediated because of the prohibitive costs involved. The media is littered with reports of owners of strata properties who face financial hardship because of the high costs associated with ACP replacement work. A difficult design and approval regime, a shortage of materials and labour exacerbated by the pandemic, and the high cost of providing safe access to high-rise facades have proven to be insurmountable obstacles for many affected building owners.

The prohibitive costs are largely linked to the default requirement for removal and replacement of entire facades. There appears to be a misconception that any building with an ACP facade containing polyethylene will be dangerous and non-compliant unless entirely removed and replaced. However, it's clear that in assessing risk in a holistic way, the fire performance of a facade and the fire behaviour characteristics of the cladding material are only two of many relevant elements that need to be considered in determining an effective and cost-effective solution.

The NSW Auditor General recently published its report on the regulatory response to combustible external cladding issues in NSW (Report). One of the key findings highlighted by the Report is the ongoing confusion among council staff, strata managers, building managers and other stakeholders regarding the application and interpretation of the Product Ban.

The practical result of this confusion appears to be that buildings will remain unrectified until either their owners can find the funds to do so, or until a more workable solution is devised. While Project Remediate offers apartment owners' corporations 10-year interest-free loans to fund rectification works, the loans are opt-in and the government has only recently appointed a finance company to manage the scheme. The delays in Project Remediate are bumping into rectification orders issued to many owners' corporations, and some have already commenced proceedings against building industry professionals for the recovery of rectification costs. It goes without saying that the prevailing confusion and disparate approaches to remediating the problem are far from ideal, as they have unnecessarily increased the total cost to address the issue across the state.

Recommendations

The Report recommended that, by October 2022, the relevant government departments should:

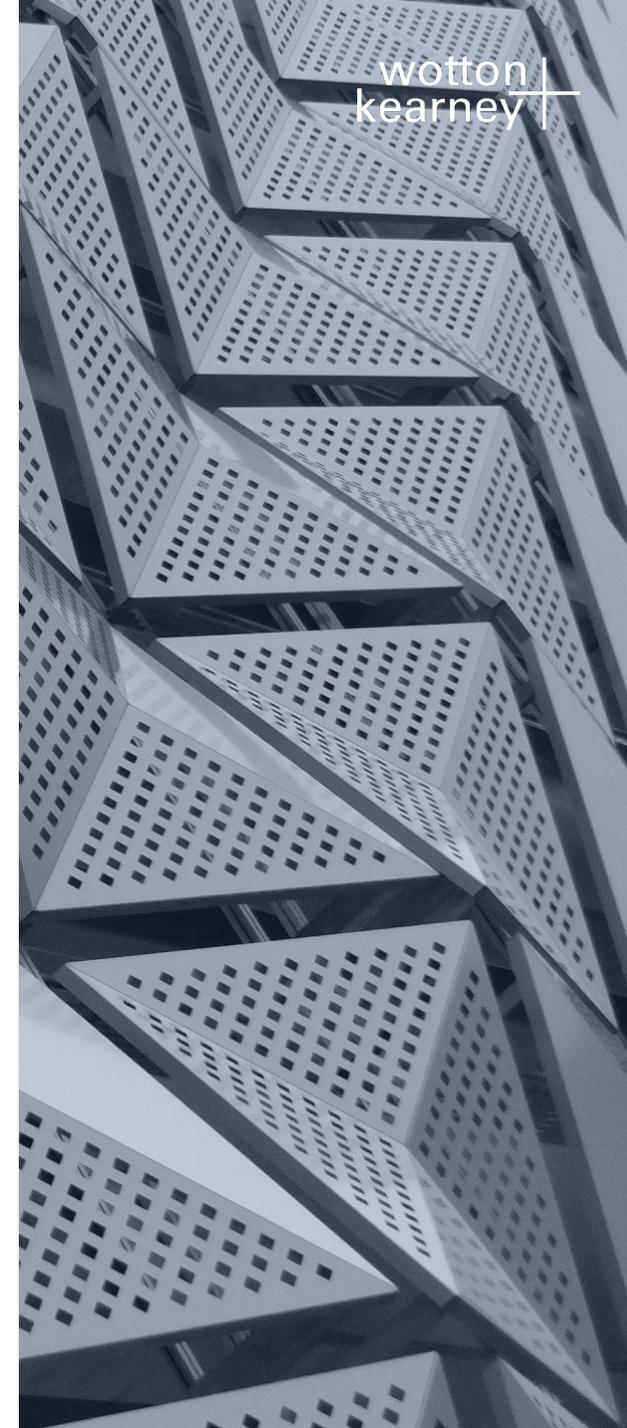
- address the confusion surrounding the application of the Product Ban by ensuring that councils and government departments have risk assessments conducted for existing buildings with combustible external cladding that are holistic in nature and relevant to the particular circumstances of each specific building
- consider the type, location, arrangement, installation method and amount of combustible external cladding installed on the subject building, and
- ensure that the Cladding Taskforce develops an action plan, which considers cost versus benefit and risk, to address buildings with combustible external cladding assessed by Fire and Rescue NSW as low-risk.

The Report also recommended that, by December 2022, the relevant departments should improve information systems to ensure there is an accurate, timely and complete history of how buildings with combustible external cladding have been identified, assessed and (where necessary) remediated.

Impact on insurers and a future solution

Around 2017, insurers began withdrawing or restricting cover to building industry professionals through combustible cladding exclusions. This left some building professionals without adequate insurance and unable to operate, notwithstanding the widespread issuing of "blanket notifications" following Grenfell. Further, building insurers have increased premiums for buildings perceived as higher risk and buildings that have been identified as high-risk by the Taskforce have had restrictions on cover introduced, or are, in some cases, almost prohibitively expensive to insure at all.

The flow-on effects to owners' corporations and insurers have been dramatic where rectification orders have been issued by councils for the removal and replacement of ACPs.



In many cases, owners' corporations are left to bear the cost of replacement with little alternative than to litigate against those who originally designed, constructed and certified the building. The cost of increased insurance premiums has become a prevalent head of loss in such claims.

The Report highlights that the construction industry, public and local authorities, and owners remain uncertain about what compliance with the Product Ban and the BCA entails. This has significant cost implications for owners, councils and insurers.

In our view, there's a need for all stakeholders to get comfortable with moving away from the "compliant – non-compliant" dichotomy, which is focussed on complete removal and replacement, and moving toward a more holistic approach that explores the availability of fire-engineered solutions. This will potentially offer a cheaper, more effective alternative to meeting the requirements of the Product Ban, BCA compliance and critical life safety considerations.

For example, such solutions may include limited removal and replacement of certain panels to break up uninterrupted banks of combustible panels, particularly across floors, installation of fire rated spandrels or other separations, internal fire sprinkler system and egress measures, and drenchers over windows. The goal is providing a building that effectively limits fire spread, ensures first responders are not exposed to unacceptable risks, and allows residents to evacuate safely in an emergency fire situation.

The Report highlights the need for cohesion between the Cladding Taskforce, fire engineers, councils and strata managers to identify relevant buildings and avoid unnecessary costs. The recommendations outlined in the Report provide a clear framework for addressing the buildings identified. However, it is too early to judge the positive impact this may have on cladding-related claims.

The Report's recommendations and the rectification impediments to date suggest that a workable solution may be for stakeholders to embrace fire-engineered solutions, rather than seeking complete removal and replacement of facades as the default solution. This will likely require a campaign to address public fear and misconceptions regarding ACPs. However, in the long run, this approach will mean residents will have safer buildings faster.

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