

Case Alert

Shaping the future of insurance law

The combustible cladding crisis continues with Biowood

The Owners Strata Plan 9288 v Taylor Construction Group Pty Ltd and Frasers Putney Pty Ltd [2019] NSWCATCD 63

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AT A GLANCE

- Combustible cladding risks continue to develop – this time caused by a product called Biowood.
- In a recent decision, *Taylor Construction*, NCAT accepted that Biowood is a combustible material that poses an undue fire risk and the respondents were ordered to rectify the building.
- The *Taylor Construction* decision has had widespread coverage within the residential strata property industry and owners' corporations will be alerted to this problem.
- Insurers, particularly those that cover commercial and residential strata buildings, and construction professionals, need to recognise and manage this ongoing risk.

Melbourne's *Lacrosse* fire brought into sharp focus the risks associated with Aluminium Composite Panels (APCs). London's Grenfell Tower tragically and dramatically brought home the magnitude of those risks. The subsequent *Lacrosse* litigation¹ resulted in the first major decision in Australia concerning ACPs. Now the New South Wales Civil and Administrative Tribunal (NCAT) decision of *Taylor Construction*² has put the spotlight on another form of combustible cladding – Biowood.

Biowood has not been the subject of a serious incident like the *Lacrosse* fire. It did not fail any tests to indicate

that it was a fire risk. However, NCAT accepted that it is a combustible material that poses an undue fire risk and found that the material was non-compliant with the Building Code of Australia (BCA). This meant that the builder and developer had breached the Home Building Act's (HBA) implied warranties.³ NCAT ordered the builder and developer to rectify the defect.

BACKGROUND

Strata Plan 9288 owned common property in a Type A building, which is a high-rise residential building. The first respondent (Taylor Construction) was the builder and the second respondent (Frasers Putney) the developer.

¹ *Owners Corporation No. 1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property)* [2019] VCAT 286

² *The Owners Strata Plan 9288 v Taylor Construction Group Pty Ltd and Frasers Putney Pty Ltd* [2019] NSWCATCD 63

³³ Section 18B of the *Home Building Act* (NSW) 1989

Biowood was attached as an architectural feature to the external walls of the building. Strata Plan 9288 alleged that the combustibility of Biowood meant that it was non-compliant with the BCA and in breach of the HBA implied warranty that building materials be suitable for purpose.

In assessing Biowood, the experts agreed that the risk of fire spread was a function of three factors:

- combustibility of the material;
- rate of flame spread; and
- other safety measures.

Biowood is made of 70% reconstituted timber and 23% PVC. There was some dispute amongst the experts about the flame spreading qualities of Biowood. However, it was undisputed that Biowood was combustible and had a 'flame spread index' of 0. Alucopanel (the ACP used on *Lacrosse*) also had a flame spread index of 0. Biowood had not undergone enough testing for the experts to reach a consensus. The testing that had been done was on limited areas of panelling and, like ACPs, Biowood had never been subjected to a full-scale façade test. What was clear was that Biowood had been assessed as a combustible timber material.

THE DECISION

The approach applied in both *Lacrosse* and *Taylor Construction* was a common-sense test that considered the purpose and the type of building in question. The test is informed by the BCA. Crucially, the BCA requires that Type A buildings have non-combustible external walls, common walls and floors – this building requirement is obviously intended to contain the spread of fire within high rise buildings. The question before NCAT turned on whether the fire properties of Biowood, particularly the spread of flame, were compliant with the intent of the BCA.

The test imposed by NCAT on Biowood was quite high – any risk that Biowood could support the spread of fire between the floors of the building amounted to an undue risk. Practically, this meant that once it was conceded that Biowood was combustible, it had to be shown that Biowood could not support fire spread for it to be acceptable as cladding in a Type A building.

The respondents tried to distinguish *Lacrosse* on the basis that that case involved APCs as part of an external wall, whereas in this case Biowood was an attachment to an external wall. NCAT rejected that argument. It took a common-sense approach to this point – it did not matter whether the material was part of a wall, or an attachment to a wall, if the material could spread fire

between building levels then it can be characterised as an undue risk. NCAT concluded that when used as an attachment to the façade of a building, Biowood breached the HBA statutory warranties because it was not suitable for that purpose. NCAT found that Biowood posed an “undue risk of fire spread via the façade of the building” – this was the very risk that the BCA intended to avoid.

The respondents were ordered to rectify the building. This meant removing and replacing the Biowood with something that complies with the intent of the BCA.

THE BIGGER PICTURE

Combustible cladding risks are part of a much bigger problem within Australia's building and construction industry. The media have termed this bigger problem a “building crisis”. The crisis has been brought about by the confluence of drivers including:

- the incentive for developers and builders to construct apartment blocks as cheaply and quickly as possible (without adequate disincentives to avoid defects), and
- a historical judicial retreat from expansive notions of duty of care, coupled with legislative shortcomings to protect consumers.

The introduction of new materials and construction techniques has always been a feature of the building and construction industry. However, the incentive to construct cheaply and quickly has seen an increase in cheaper sub-standard building products and undercooked building techniques being used. This has led to an increase in construction defects – combustible cladding is one example of this problem.

IMPORTANCE OF NCAT'S DECISION IN TAYLOR CONSTRUCTION

The *Taylor Construction* decision makes it clear that combustible cladding, whether part of an external wall or attached to an external wall, will be in breach of the BCA. Once cladding is found to be combustible, the only way that it can be shown to meet the BCA requirements is if it is not of undue risk of fire spread. This will need to be demonstrated by rigorous testing and is a very high hurdle to get over.

The full extent of Biowood use in Australia is yet to be determined. However, it is clear that it has been used in hundreds of buildings. Property insurers may need to re-evaluate Biowood risks at renewal or when accepting new proposals.

The *Taylor Construction* decision has had widespread coverage within the residential strata property industry, which means owners' corporations will be alerted to this problem. Builders and developers, and possibly building professionals, may be liable for the cost of replacing Biowood facades in line with the *Taylor Construction* decision.

However, after the Lacrosse fire, most professional indemnity insurers inserted combustible cladding exclusions into their policies. Biowood will likely be

caught by those exclusions. If it is not, some insurers may start receiving a flurry of Biowood notifications. For those insurers with combustible cladding exclusions, this is a good time to review the efficacy of those exclusions.

If the HBA implied warranties and Limitation Act periods have expired, Biowood remediation costs will fall to building owners.

NEED TO KNOW MORE?

For more information please contact us.



Andrew Moore

Partner, Sydney

T: +61 2 8273 9943

E: Andrew.Moore@wottonkearney.com.au



Robert Finnigan

Special Counsel, Sydney

T: +61 2 8273 9850

E: Robert.Finnigan@wottonkearney.com.au



Tim Holmes

Associate, Sydney

T: +61 2 8273 9854

E: Tim.Holmes@wottonkearney.com.au

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