

Article Information

Service: Projects & Construction

Sector: Infrastructure

Other States and the Commonwealth's response to 'non conforming building products'

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In November 2017, Piper Alderman released a publication entitled 'A New Month, A New 'Non-Conforming Building Products' in Queensland ([see link here](#)).

Pei Yau, Senior Associate now discusses the recent updates nationally.

Federal

As part of the broader inquiry into non-conforming building products, the Senate Economics References Committee resolved to inquire into the illegal importation of products containing asbestos. Three interim reports have already been published with the final reporting due on 30 April 2018. Relevantly, the interim report on aluminium composite cladding, published on 6 September 2017, contains eight recommendations:

1. implementation of a total ban on the importation sale and use of Polyethylene core aluminium composite panels;
2. establishment of a national licensing scheme;
3. introduction of nationally consistent measures to increase accountability for participants across the supply chain;
4. ensuring that the Australian Standards and codes are freely available;
5. penalties regime for non-compliance with the National Construction Code
6. ensuring that the Federal Safety Commissioner is adequately resourced;
7. implementation of the use of Director Identification Numbers; and
8. development of a nationally consistent statutory duty of care protection for end users in the residential strata section across state and territory governments.

Five days after the publication of the interim report, the *Customs Amendment (Safer Cladding) Bill 2017* was introduced on 11 September 2017 to amend the *Customs Act 1901* to prohibit 'importation into Australia of polyethylene core aluminium composite panels' (section 41B).

The Building Ministers' Forum (**BMF**) latest communiqué issued in October 2017 announced that, amongst other things, the ministers have agreed that:

1. they will prevent the use of aluminium composite cladding with polyethylene core for class 2, 3 or 9 buildings of two or more storeys, and class 5, 6, 7 or 8 of three or more storeys, until such time as they are satisfied that there will be reliable compliance with established standard setting test and system of permanent labelling; and
2. the powers set out in Queensland's *Building Construction (Nonconforming) Building Products - Chain of Responsibility and Other Matters) Amendment Act 2017* set a model for jurisdictions to consider.

The BMF is scheduled to reconvene in December 2017.

Victoria

On 3 July 2017, the Victorian Government announced that it will establish an expert taskforce to investigate the extent of non-compliant cladding on Victorian buildings and make recommendations in regards to building and fire safety issues.

Due to the considerable length of time required to prepare the audit methodology and rectification strategy, and in response to concerns regarding potentially unsafe cladding, the Victorian Cladding Taskforce published '*Advisory Note 1: Fire Safety Actions for Residents, Building Owners, Owners' Corporations and Facilities Managers*' on 28 September 2017 to ensure that there is clear guidance on actions to be taken.

On 1 December 2017, an interim report was published. The taskforce found systems failures have led to major safety risks and widespread non-compliant use of combustible cladding in the building industry across Victoria and made 27 recommendations. One of the 'priority recommendations' included the implementation of measures to prevent the use of aluminium composite panels with a polyethylene core (as agreed at the BMF) and expanded polystyrene cladding, for class 2, 3, or 9 buildings of two or more storeys, and class 5, 6, 7 or 8 of three or more storeys. These measures are to be highlighted in a product safety alert and remain in place until the Minister is satisfied with compliance with new testing standards and a permanent labelling system is introduced.

New South Wales

The *Environmental Planning and Assessment Amendment (Fire Safety and Building Certification) Regulation 2017* (NSW) came into effect on 1 October 2017 introducing reforms to improve fire safety for new and existing complex buildings. The reforms include:

- involvement of 'competent fire safety practitioners' in specific fire safety functions. While the NSW Government will eventually recognise industry schemes that will accredit 'competent fire safety practitioners', the following guides have been developed to assist building owners and certifiers in the meantime:
 - 'Selecting a competent fire safety practitioners'; and
 - 'Competent fire safety practitioners'.
- submission of endorsed plans and specifications for certain fire safety systems to the certifying authority before those systems are installed;
- requirements for the documenting, endorsing and checking of non-standard fire safety designs;
- limited exemptions from compliance with the Building Code of Australia for minor fire safety system works;
- new inspection powers for Fire and Rescue NSW for multi-unit residential building projects;
- new critical stage inspections targeting apartments and other buildings where people sleep; and
- assessment of the ongoing performance of essential fire safety measures must now be undertaken by 'competent fire safety practitioners'.

On 1 December 2017, the Secretary of the Department of Planning and Environment approved new forms of fire safety certificate required under the amending regulation. More recently, the Parliament enacted the *Building Products (Safety) Act 2017* to prevent the unsafe use of building products in buildings and to provide for rectification of affected buildings. Under this Act, the Fair Trading Secretary has extensive powers including to issue a ban on use of a specified building product (including cladding) if satisfied on reasonable grounds that the use is unsafe.

The proposed Act prevails over the National Construction Code (**NCC**) so that a building product may be banned even if it complies with the NCC.

If satisfied that a building is affected or may be affected by use of a banned product, an 'affected building notice' will be issued. A relevant enforcement authority may make a building product rectification order requiring the owner of a building to do all things necessary to:

1. eliminate or minimise a safety risk posed by the use in the building of a building product to which a building product use ban applies; and/or
2. remediate or restore the building following the elimination or minimisation of the safety risk.

Building owners can be required to comply with a rectification order even if the unsafe product was in use prior to the ban being issued, or where the authority has not received any 'affected building notice'.

South Australia

The Department of Planning Transport and Infrastructure is leading a building audit aimed at identifying aluminium composite panel cladding.

The audit is to be delivered in 3 phases, being:

1. **Phase 1** – identification of buildings that have or may have the relevant cladding of interest;
2. **Phase 2** – investigation of buildings identified in Phase 1 to determine whether the cladding is used in a manner that poses or is likely to pose a real risk to the safety of occupants;
3. **Phase 3** – response proportionate with the risk identified under Phase 2.

Phase 1 commenced in July 2017 across South Australia. Phase 1 has completed in the City of Adelaide and is expected to be completed across the rest of South Australia by early 2018. Phase 2 commenced in the City of Adelaide in August 2017 to investigate 77 buildings identified as warranting further consideration.

Tasmania

The Tasmanian Government has announced that the Director of Building Control will use his powers under the *Building Act 2016* to ensure that use of ACP for any commercial building above 2 storeys (Classes 2, 3 and 9) or 3 storeys (Classes 5, 6, 7 and 8) will require approval under a product accreditation scheme to be established by the Director with implementation expected by 1 February 2018.

Western Australia

Audits are being undertaken in Western Australia but at this stage, no recommendations have been made.

Conclusion

It is clear that the Federal and State Governments are cracking down on the use of non-confirming building products across Australia, and rightly so.

For more advice on how these changes may affect you, please do not hesitate to contact us.