

Article Information

Authors: Megan Calder, Scott Coffey

Service: Construction Litigation, Projects & Construction

Sector: Infrastructure

The Cladding Safety Victoria Bill 2020 provides owners relief but set to retrospectively increase the building industry's liability

The Victorian Parliament has recently introduced a bill to establish a new governing body to oversee the cladding rectification program for residential and public buildings and to retrospectively amend the Building Act 1993 in order to extend the limitation period to bring an action against building practitioners from 10 years post occupancy permit to 12 years where that action is a 'cladding building action' within the meaning of the bill.

The Cladding Safety Victoria Bill 2020 (Vic) (CSV Bill)

The CSV Bill establishes Cladding Safety Victoria as a separate body corporate, transferring the responsibility for overseeing the rectification program from the Victorian Building Authority (VBA) to the new entity, which was previously a business unit under the VBA.

In addition to establishing Cladding Safety Victoria, the CSV Bill will also:

- prescribe the process under which Cladding Safety Victoria will administer the rectification program, which includes the provision of financial assistance to building owners to facilitate rectification works for buildings identified under the program (likely to be outlined in further detail in future regulations);
- amend section 137F of the *Building Act 1993* (**Building Act**) to allow the State of Victoria to step into the shoes of building owners where financial assistance is provided and bring legal proceedings to recover damages from the building practitioners who approved or installed the non-compliant cladding; and
- critically, amend section 134 of the Building Act to retrospectively extend the limitation period for bringing a building action from 10 years to 12 years if the action is a 'cladding building action' (within the meaning of the CSV Bill) and has become time-barred in the period between 16 July 2019 to 12 months after the commencement of the relevant section of the CSV

The rectification program

The rectification program starts with the identification of buildings requiring rectification works to non-compliant cladding. The CSV Bill permits municipal building surveyors to notify Cladding Safety Victoria of relevant buildings.

Once identified, Cladding Safety Victoria will determine what residential buildings will be granted financial assistance to facilitate rectification works and enter funding agreements with the affected owner or owners corporation for those works to take place. Buildings previously determined under the current scheme will be carried over.

Cladding Safety Victoria will facilitate the completion of rectification works, including procuring building practitioners to undertake cladding rectification work, monitoring completion of the works, and engaging technical design and project management services. Once rectification works are completed, Cladding Safety Victoria will then notify the Minister, the VBA and the relevant municipal building surveyor.

Subrogation

If financial assistance has been provided to building owners by Cladding Safety Victoria, the Crown obtains rights of

subrogation, empowering the State of Victoria to bring proceedings against the relevant building practitioners responsible for the installation of non-compliant cladding. This will allow the recovery of the rectification costs granted in financial assistance.

Extension of limitation period

To facilitate anticipated recovery proceedings by Cladding Safety Victoria and the State of Victoria, s 53 of the CSV Bill amends s 134 of the Building Act to extend the period in which a building action may be brought from 10 years to 12 years where the building action is a “*cladding building action*”.

The extended period relates only to “*cladding building actions*” that would otherwise have been time-barred in the period between 16 July 2019 to 12 months after the CSV Bill is passed (note: the CSV Bill’s default commencement date is currently 1 July 2021) and s 53 comes into force.

A cladding building action under the CSV Bill means, “*a building action in connection with, or otherwise related to, a product or material that is, or could be, a non-compliant or non-conforming external wall cladding product.*” It is not limited in any way to flammable or combustible cladding claims.

Conclusion

In the midst of a stage 4 lockdown and in circumstances where COVID is making it increasingly difficult for the construction industry to be paid whilst at the same time the industry is absorbing significant additional risks and costs for projects, the Victorian Government has sought to introduce legislation to retrospectively extend limitation periods. Obviously safety is important and the extension only pertains to “*cladding building actions*”. However, the issues associated with cladding have been known for at least six years, which in normal circumstances would be the limitation period. It is accordingly difficult to see any justification for legislation that retroactively denies basic protections that would normally be available to the construction industry simply to bestow on the Government subrogation rights that otherwise had already expired.

The CSV Bill is in the final stages of review, with the second reading speech having been moved in the Legislative Assembly 4 September 2020, and is expected back before Parliament soon.

Key takeaways

If passed, the CSV Bill will establish Cladding Safety Victoria as a separate body corporate, responsible for overseeing the cladding rectification program.

- The rectification program will include, among other things, the provision of financial assistance to building owners to facilitate rectification works and, where financial assistance is provided, will grant the Victorian Government subrogation rights in order to commence recovery proceedings.
- The CSV Bill will retrospectively extend the limitation period for bringing a building action from 10 years to 12 years if the action is a ‘*cladding building action*’ and has become time-barred in the period between 16 July 2019 to 12 months after the commencement of the CSV Bill.