

**NSW Legislation Update  
Combustible Cladding**

**Adele Carr  
Greenway Chambers**

1. In response to the ongoing tranches of legislative and regulatory reform regarding combustible cladding across Australia, New South Wales has recently banned the use of certain cladding material and passed legislation requiring the identification of buildings that have combustible cladding.

*Building Products (Safety) Act 2017*

2. On 15 August 2018, the Commissioner for Fair Trading, imposed a building product use ban on aluminium composite panels with a core composition of greater than 30 per cent polyethylene by mass.<sup>1</sup> The product ban relates to the use of the product in any external cladding, external wall, external insulation, façade or rendered finish in specified classes of buildings with certain storeys, including residential and commercial buildings. The product ban, however, does not relate to the product which has passed particular Australian Standard tests.
3. The product ban was introduced after a call was made by the Commissioner on 23 March 2018 for public submissions as to whether a building product use ban was warranted for the use of aluminium composite panels and/or polystyrene products,<sup>2</sup> noting that similar bans are also in place in other states.<sup>3</sup>
4. Importantly, the product ban is retrospective.<sup>4</sup> The Commissioner may issue a building notice to the owners and occupiers of a building affected by the product use ban.<sup>5</sup> That notice is also provided to the local council and Fire and Rescue NSW and may be acted upon by those bodies to issue a building product rectification order, requiring a building

---

<sup>1</sup> *Building Products (Safety) Act 2017* (commenced 18 December 2017), s 9(1). Notice of the ban was given on 10 August 2018, pursuant to s 14; see

[https://www.fairtrading.nsw.gov.au/\\_\\_data/assets/pdf\\_file/0007/392821/Section-91-Notice-SIGNED.PDF](https://www.fairtrading.nsw.gov.au/__data/assets/pdf_file/0007/392821/Section-91-Notice-SIGNED.PDF).

<sup>2</sup> *Building Products (Safety) Act 2017*, s 13.

<sup>3</sup> *Minister's Guideline MG-14: Issue of building permits where building work involves the use of certain cladding products* (commenced 22 March 2018), pursuant to *Building Act 1993* (Vic), s 188; *Building Amendment Regulations (No. 2) 2017* (Tas) (19 December 2017); *Director's Determination – Building Product Accreditation – High Risk Building Products* (27 December 2017), pursuant to *Building Act 2016* (Tas), ss 18, 20.

<sup>4</sup> *Building Products (Safety) Act 2017*, s 17.

<sup>5</sup> *Building Products (Safety) Act 2017*, s 18.

owner to eliminate or minimise a safety risk posed by the banned building product and remediate or restore the building.<sup>6</sup> A building product rectification order may be appealed,<sup>7</sup> and is enforceable until revoked.<sup>8</sup>

5. It is imperative that all residential owners, developers and builders are apprised of banned building products under the Act, as the use of a banned building product is a 'major defect' for the purpose of the statutory warranties under the *Home Building Act 1989*.<sup>9</sup>

*Environmental Planning and Assessment Amendment (Identification of Buildings with Combustible Cladding) Regulation 2018*

6. On 22 October 2018 the *Environmental Planning and Assessment Amendment (Identification of Buildings with Combustible Cladding) Regulation 2018* will come into effect requiring owners of specified classes of buildings with certain storeys and with external combustible cladding, to provide details of the building to the Secretary of the Department of Planning and Environment.
7. The regulation slightly differs to that initially proposed and put to public submission in December 2017.<sup>10</sup> In particular, the definition of 'combustible cladding' is more prescriptive and a 'cladding statement' is not required.
8. External combustible cladding comprises metal composite panels, including aluminium, zinc and copper, and any insulated cladding system, including polystyrene, polyurethane or polyisocyanurate.<sup>11</sup> The owner of a building with external combustible cladding will be required to provide details of their building, including the classification of the building under the *Building Code of Australia* and the description and extent of the external combustible cladding to the Secretary.<sup>12</sup> Notwithstanding this general obligation, the Secretary, an authorised fire officer or the local council may direct a building owner to provide the relevant information.<sup>13</sup>

---

<sup>6</sup> *Building Products (Safety) Act 2017*, s 20.

<sup>7</sup> *Building Products (Safety) Act 2017*, s 22.

<sup>8</sup> *Building Products (Safety) Act 2017*, s 25.

<sup>9</sup> *Home Building Act 1989*, s 18E(4)(c).

<sup>10</sup> [http://planspolicies.planning.nsw.gov.au/index.pl?action=view\\_job&job\\_id=8923](http://planspolicies.planning.nsw.gov.au/index.pl?action=view_job&job_id=8923).

<sup>11</sup> *Environmental Planning and Assessment Regulation 2009*, reg 3.

<sup>12</sup> *Environmental Planning and Assessment Regulation 2009*, reg 186S(1), (2).

<sup>13</sup> *Environmental Planning and Assessment Regulation 2009*, reg 186T.

9. Building owners will be required to submit the relevant details through an online portal.<sup>14</sup> The Secretary will maintain a register of buildings from that submitted material and can make that register available to Fire and Rescue NSW, any council or the general public.<sup>15</sup>
10. For existing buildings, building owners will have until 22 February 2019 to provide the relevant information.<sup>16</sup> Otherwise, building owners have four months after the building is first occupied to provide the relevant information.<sup>17</sup>
11. Failure to provide registration details of buildings and its cladding will attract a fine of \$1500 for individuals and \$3000 for corporations. If a building owner fails to provide the relevant information after directed to do so by the Secretary, an authorised fire officer or the local council, the fines double.<sup>18</sup>
12. The recent building product use ban under the Act falls within the definition of external combustible cladding under the Regulation. Consequently, the building register may inform future building product use bans or expand the definition of external combustible cladding.

---

<sup>14</sup> The portal has not yet been created, however, owners can register for updates <http://www.planning.nsw.gov.au/Policy-and-Legislation/Under-review-and-new-Policy-and-Legislation/Combustible-cladding>.

<sup>15</sup> *Environmental Planning and Assessment Regulation 2009*, reg 186U.

<sup>16</sup> *Environmental Planning and Assessment Regulation 2009*, reg 186S(3)(a).

<sup>17</sup> *Environmental Planning and Assessment Regulation 2009*, reg 186S(3)(b).

<sup>18</sup> *Environmental Planning and Assessment Regulation 2009*, Sch 5.