



Combustible Cladding – Recent Authorities

Presented by Ian Roberts SC and Faheem Anwar

19 March 2024

What is combustible cladding?

The BCA defines a combustible material to mean a material that is determined by AS 1530.1 Combustibility Tests for Materials.



CP1

A building must have elements which will, to the degree necessary, maintain structural stability during a fire appropriate to—

- (a) the function or use of the building; and
- (b) the fire load; and
- (c) the potential fire intensity; and
- (d) the fire hazard; and
- (e) the height of the building; and
- (f) its proximity to other property; and
- (g) any active fire safety systems installed in the building; and
- (h) the size of any fire compartment; and
- (i) fire brigade intervention; and
- (j) other elements they support; and
- (k) the evacuation time.



C1. 12 Non-combustible Materials

The following materials, though combustible or containing combustible fibers, may be used wherever a non-combustible material is required:

...

- (f) Bonded laminated materials where—
 - (i) each laminate is non-combustible; and
 - (ii) each adhesive layer does not exceed 1 mm in thickness; and
 - (iii) the total thickness of the adhesive layers does not exceed 2 mm; and
 - (iv) the Spread-of-Flame Index and the Smoke-Developed Index of the laminated material as a whole does not exceed 0 and 3 respectively.



2.4 Attachments not to impair fire-resistance

(a) A combustible material may be used as a finish or lining to a wall or roof, or in a sign, sunscreen or blind, awning, or other attachment to a building element which has the required FRL

if—

(i) the material is exempted under C1.10 or complies with the fire hazard properties prescribed in Specification C1.10; and

(ii) it is not located near or directly above a required exit so as to make the exit unusable in a fire; and

(iii) **it does not otherwise constitute an undue risk of fire spread via the facade of the building.**



Lacrosse Senate Inquiry

*The fire started on a balcony from an unextinguished cigarette - an innocuous type of thing, you would think. This set fire to the cladding, and **the panelling itself allowed the fire to travel the full extent of the building - 23 levels in 11 minutes.***

In 31 years as a firefighter and 20 years as a fire safety specialist I have never seen a fire like this - in my lifetime ...



Tanah Merah Vic Pty Ltd & Ors v Owners Corporation No.1 of PS613436T & Ors [2021] VSCA 72. (Lacrosse No.1)

Tanah Merah Vic Pty Ltd & Ors v Owners Corporation No.1 of PS613436T & Ors [2021] VSCA 122. (Lacrosse No.2)

Lacrosse No.1

The Tribunal found the builder and consultants liable and apportioned liability as follows:

- (a) Building surveyor - 33%;
- (b) Architect - 25%;
- (c) Fire engineer - 39%.



Lacrosse No.1

The construction of BCA clause C1.12(f)

- f) Bonded laminated materials where—
 - i. each **laminate** is non-combustible; and
 - ii. each adhesive **layer** does not exceed 1 mm in thickness; and
 - iii. the total thickness of the adhesive **layers** does not exceed 2 mm; and
 - iv. the Spread-of-Flame Index and the Smoke-Developed Index of the laminated material as a whole does not exceed 0 and 3 respectively.



Lacrosse No.1

The building surveyor argued that laminate meant:

an external layer used to cover another material in the process of lamination (being the application of a protective layer to a material), rather than either a single bonded product comprised of layers bonded together, or a description of each of the layers of a bonded product containing multiple layers.



Lacrosse No.1

At [224] the Court of Appeal rejected that meaning and added that:

‘Layer’ is deliberately used within requirements (ii) and (iii) of sub-cl (f) as a component of the phrase ‘adhesive layer’ and as distinct from the structural elements of the material comprising laminates which are bonded together to create the whole.



Lacrosse No.1

Apportionment under s.59(2) of the Wrongs Act Victoria.

Contrast s.59(2) of the Victorian Act with s.5O(2) of the NSW Act:

- (a) However, peer professional opinion cannot be relied on for the purposes of this section if the court determines that the opinion is **unreasonable**.*
- (b) However, peer professional opinion cannot be relied on for the purposes of this section if the court considers that the opinion is **irrational**.*

Lacrosse No.1

First, at [238]:

The ‘opinion ’which is in issue is the acceptance of the relevant practice not the underlying rationale for the practice. I think that is best understood by reference to the Tribunal’s description of the practice:

‘that otherwise experienced and diligent practitioners were beguiled by a longstanding and widespread (but flawed) practice into giving insufficient scrutiny to the rationale for that practice’.



Lacrosse No.1

Secondly, at [239]:

The question was *whether the acceptance of that practice was unreasonable (ie whether the peer professional opinion as defined was unreasonable)*.



Lacrosse No.1

Thirdly, at [240]:

The relevant practice was unreasonable (and by necessary implication that its acceptance was unreasonable) in the sense that it lacked a logical basis.



Lacrosse No.2

New apportionment

- (a) The fire engineer - 42% (up from 39%);
- (b) The building surveyor - 30% (down from 33%); and
- (c) The architect - 25% (remained the same).



Lacrosse No.2

There are two main points Lacrosse:

- (a) The construction of BCA clause C1.12(f); and
- (b) The relevant responsibilities of those involved in the construction.

[although that is something that will depend on the circumstances of each project]



Lacrosse No.2

Owners Strata Plan 92450

v

JKN Para 1 Pty Ltd [2023] NSWCA 114



Lacrosse No.2

s.18B(c):

(a) A warranty that the work will be done in accordance with, and will comply with, this or any other law.



Lacrosse No.2

It was common ground that:

- (a) At [35] the ACPs **did not comply** with the deemed to satisfy provisions because there there was no evidence of an AS1530.1 test report.
- (b) At [36] there was **no alternative or performance solution** prior to the issue of the construction certificate

Lacrosse No.2

The Trial Judge:

- (a) Did not consider the wholesale removal and replacement was reasonable as the owners did not establish that an alternative solution would not have been available;
- (b) Found that there was no evidence that the cladding was combustible by a test pursuant to AS 1530.1 as the definition of combustible in the BCA required; and
- (c) Proceeded on the basis that the owners had an onus to establish that an alternative solution could not then or now be performed.



Lacrosse No.2

Court of Appeal said at [71]:

- (a) The burden of proof for establishing loss lies on the claimant, in this case, the Owners Corporation.
- (b) By contrast, the party in breach of contract has the onus of displacing the prima facie rule for assessing damages as the cost of reinstatement:

And at [80]-[81] having established the breach, the owners did not have to prove that an alternative solution “could not then or now be performed”.



Lacrosse No.2

Despite the speculation that an alternative solution might have been possible the respondents:

did not adduce evidence which, if accepted, would have shown that an alternative solution that would satisfy the performance requirements of the BCA ... could have been formulated, assessed, and certified prior to the issue of the construction certificate, or could now be formulated, assessed, and certified



Lacrosse No.2

The Court said:

- (a) at [106] there is no distinction between a formal and substantive breach of the warranties; and
- (b) at [109] it is not necessary to find a fire will occur only that there given the noncompliance, there is a real risk of damage.





GREENWAY CHAMBERS

Taylor Construction Group Pty Ltd v Owners of Strata Plan 92888

[2021] NSWSC 1315

Taylor Construction

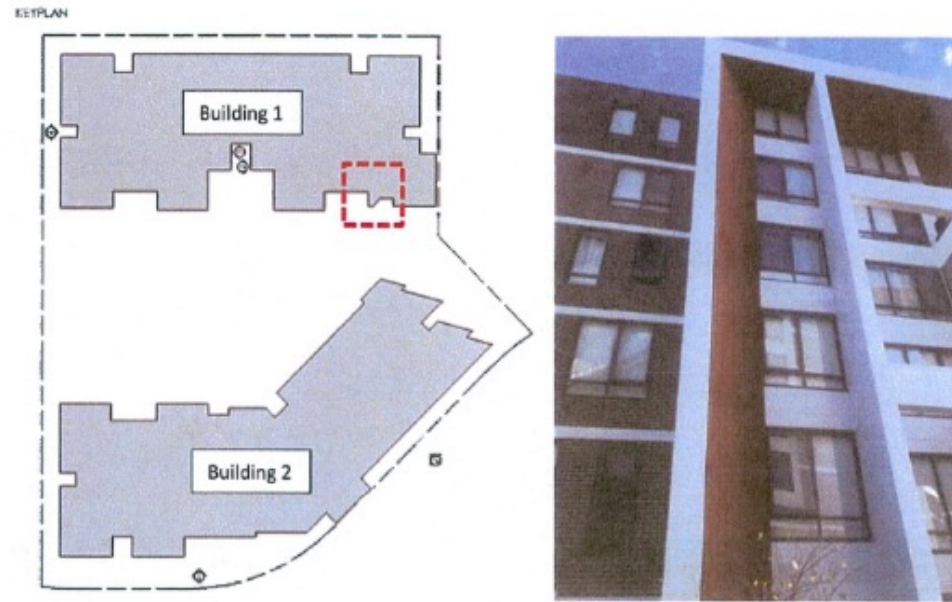


Figure 7: Site Plan – Biowood Location 1



Figure 8: Southern Elevation of Building 1 – Biowood cladding

Taylor Construction

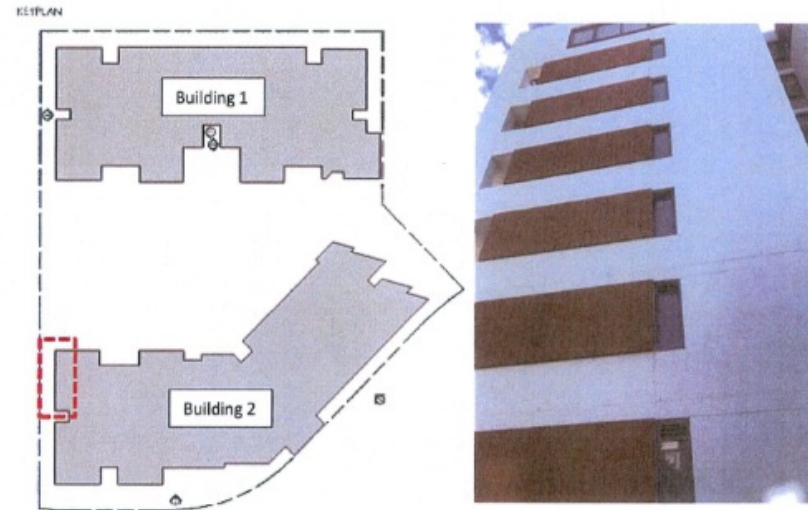


Figure 11: Site Plan – Biowood Location 3



Taylor Construction

BCA 2016

2.4 Attachments not to impair fire-resistance

A combustible material may be used as a finish or lining to a wall or roof, or in a sign, sunscreen or blind, awning, or other attachment to a building element which has the required FRL if—

- (i) the material is exempted under C1.10 or complies with the fire hazard properties prescribed in Specification C1.10; and*
- (ii) it is not located near or directly above a required exit so as to make the exit unusable in a fire; and*
- (iii) it does not otherwise constitute an undue risk of fire spread via the facade of the building.*



Taylor Construction

Henry J

1. The determination as to whether the risk is undue (or unwarranted or excessive) involves an evaluative task that requires consideration of the circumstances and context in which the Biowood combustible cladding is used as an attachment to the external walls of the Buildings. **[141]**
2. The evaluative exercise in assessing undue risk inevitably requires the balancing of factors and judgment. **[153]**



Taylor Construction

Henry J

1. Factors that need to be considered include **[141]**
 - a. the objective of Section C of the BCA of ensuring the safety of people from fire; the BCA requirement that external walls in Type A buildings are to be constructed using non-combustible material
 - b. the possibility of fire spread eventuating
 - c. the gravity of the risk from such use
2. Factors such as the ignitability of the combustible material and the likely rate of fire spread, the location of the material, and relevant safety features of the Buildings would also be germane to consider. **[141]**



Taylor Construction

Henry J

1. A material's compliance with AS1530.3 and a low Spread of Flame index is not determinative of whether that material presents an 'undue risk' **[144]**





GREENWAY CHAMBERS

Owners of Strata Plan 84411 v Council of the City of Sydney

[2021] NSWLEC 1347

Council of City of Sydney

BPS Act, s 20

A building product rectification order is an order that requires the owner of a building to do such things as are necessary:

- 1. to 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.*



Council of City of Sydney

BPS Act, s 26

For the purposes of this Part, a building is made safe if the safety risk that is posed by the use of a building product to which a building product use ban applies, as identified by the Secretary in an affected building notice, is eliminated or, if it is not reasonably practicable to eliminate the safety risk, is minimised as far as practicable.



City of Sydney Council

Takeaways

1. In order to determine what work should be carried out under a building rectification order, it is necessary to consider s 26 of the BPS Act
2. If you are appealing building rectification order, you need to have expert evidence explaining why it is not reasonably practicable to eliminate the risk

