



INFORMATION SHEET

BUILDING & PLANNING SERVICES

Ref: LEG 18-10
Current at November 2018

Combustible Cladding Changes – Update (NSW)

The NSW Government has made a raft of changes to various pieces of legislation for the purpose of dealing with combustible cladding. This information sheet has been drafted to give a snap shot of the changes and how they may affect you.

Some of the amendments and new pieces of legislation are designed to deal with existing buildings that may have combustible cladding, while other amendments have been made to prevent the use of combustible cladding on new buildings.

Importantly the majority of these changes only apply to Class 2-9 buildings (apartments, hotels and health care and mixed use buildings) and where these buildings are required to be of Type A or Type B Construction (non-combustible construction). In saying this some of the changes are applicable to all classes of buildings, so it is important to be across the various changes and how they may affect you.

It should also be noted that changes were also introduced into the National Construction Code (NCC) in March of this year, but this information sheet is limited to NSW Legislation. For more information on the NCC changes click [here](#)

Overview of the legislative changes

The NSW legislation which has been amended or introduced recently includes:

- *Environmental Planning and Assessment Regulation 2000* (the Regulation)
- *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* (Codes SEPP) and other State Environmental Planning Policies
- *Building Product (Safety) Act 2017*
- *Home Building Amendment (Cladding) Regulation 2018*.

It should be noted that whilst there are common themes amongst the different legislative changes, they should however, be considered in their own right and the context to which they apply.

The following is a brief description regarding each of the above changes.

Changes under the Environmental Planning and Assessment Regulation 2000

- **Environmental Planning and Assessment Further Amendment (Miscellaneous) Regulation 2018**

This Regulation was published on 31 August 2018 and has a very broad scope.

The amendment clarifies that a building product or system is accredited for the purposes of the relevant provisions of the EP&A Act only if:

- a) the building product or system has been issued with a certificate of conformity under the CodeMark scheme (a CodeMark certificate); and
- b) use of the building product or system is not prohibited under the *Building Products (Safety) Act 2017*.

Essentially this change clarifies that a CodeMark certificate is overridden where a product use ban has issued under the Building Products (Safety) Act 2017. i.e. even though the product may have a CodeMark certificate of conformity under the national scheme, the product use ban would override the product certification.

The amendments commenced on 1 September 2018.

DISCLAIMER - The above is intended to provide general information in summary form. The contents do not constitute specific advice and should not be relied upon as such. Formal specific advice should be sought by members with respect to particular matters before taking action.

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

This Regulation was published on 31 August 2018 and provides for the identification of, and collection of information about buildings which external combustible cladding has been applied.

The Regulation defines external combustible cladding (in relation to a building) as:

“(a) any cladding or cladding system comprising metal composite panels, including aluminium, zinc and copper, that is applied to any of the building’s external walls or to any other external area of the building, or

(b) any insulated cladding system, including a system comprising polystyrene, polyurethane or polyisocyanurate, that is applied to any of the building’s external walls or to any other external area of the building”.

The types of buildings subject to these provisions are:

Classes 2, 3 and 9 (2 storeys and above) and Class 4 where part of a Class 9 building (2 storeys and above).

The amendments establish a register of buildings with external combustible cladding, maintained by the Secretary of the Department of Planning and Environment. Building owners are required to register their building within the planning portal website if it is the class of building mentioned above and if it has ‘combustible cladding’ as defined by the regulation.

New offences have been created regarding failure of building owners to supply information to the Secretary when required.

A new requirement was added requiring certifying authorities to provide the Fire and Rescue NSW (FRNSW) with a copy of any construction certificate for the building types identified in the Regulation.

Additional conditions on the use of combustible cladding

The Regulation also places an additional condition on the approval of Performance Solutions for the use of combustible cladding on Class 2, 3, 9 and Class 4 parts of a building where part of a Class 9 building.

The Regulation will require that a Performance Solution to meet Performance Requirement CP2 in NCC Volume One, for buildings of Type A and B Construction, and where the Verification Method CV3 is not used in full, then the Performance Solution must be referred to FRNSW for approval.

The use of Verification Method CV3 includes testing of the cladding/external wall system to the new façade assembly testing standard AS 5113. For further information on this Verification Method click [here](#)

These amendments commenced on 22 October 2018.

Changes to State Environmental Planning Policies (SEPPs)

This instrument was published on 31 August 2018 and makes amendments to *State Environmental Planning Policy (Exempt and Complying Development Codes) 2008* and 7 other State Environmental Planning Policies (SEPP) that allow exempt development to be carried out.

The changes impose new restrictions to the carrying out of exempt development to limit the use of external combustible cladding in certain situations. Exempt development is work that can be undertaken without building approval.

In short the changes mean that any building materials which fall within the definition ‘combustible cladding’ outlined in the regulation cannot be used without building approval. (For example; aluminium cladding on any class of building could not be replaced without building approval).

Introduction of the Building Product (Safety) Act 2017

In December last year new building product safety legislation was introduced in NSW. The Building Product (Safety) Act 2017 gives the Secretary of the Department of Fair Trading the ability to issue a ‘building product use ban’ for a particular building product or ban its use for a particular application or type(s) of buildings.

Where a ban is issued it can override a provision of the Building Code of Australia (BCA) if it did permit the

use of the particular product. The ban can also be retrospective in that any existing building that has a product on it that is subject to a ban, then the building is considered an affected building.

It is not yet known what the direct implications are for a building that is an affected building. However, the intent is that it will eventually be 'made safe'.

The Act also gives the Department of Fair Trading investigative powers and the ability to issue rectification orders in certain circumstances.

Building product use ban

On 10 August 2018, the Commissioner for Fair Trading gave notice of her intention to impose a building product use ban regarding certain external combustible cladding in accordance with Section 9 of the Building Products (Safety) Act 2017. The ban commenced on 15 August 2018.

The ban applies to the use of:

“aluminium composite panels (ACP) with a core comprised of greater than 30% polyethylene by mass in any external cladding, external wall, external insulation, façade or rendered finish in:

- *Class 2, 3 and 9 buildings with a rise in storeys of three or more and Class 5, 6, 7 and 8 buildings with a rise in storeys of four or more (Type A Construction as defined in the BCA) and;*
- *Class 2, 3 and 9 buildings with a rise in storeys of two or more and Class 5, 6, 7 and 8 buildings with a rise in storeys of three or more (Type B Construction as defined in the BCA)”.*

Further information on the new building product safety laws can be found by clicking [here](#)

Amendment - Home Building Amendment (Cladding) Regulation 2018:

The Home Building Regulation 2014 was amended on 20 April 2018 by the insertion of a new clause concerning external cladding. The amendment commenced on 20 April 2018.

The amendments involve the following:

- identify external cladding as a major defect under Section 18E(4) of the Home Building Act 1989.

For external cladding of a building to be considered a major defect it must cause or be likely to cause a threat to the safety of any occupants of the building if a fire occurs in the building.

The following table sets out how the above changes effect both existing buildings and new building work.

<p>Existing Buildings</p>	<p>An existing building which has cladding that is subject to the ban in force under the <i>Building Products (Safety) Act 2017</i> is now an 'affected building'.</p> <p><u>Building owners</u> are required to provide details of the building to the Department of Planning & Environment for inclusion on a register, where the building has "<i>combustible cladding</i>", as defined by the Regulation, is a building where people sleep and is of Type A or B Construction.</p> <p>If banned cladding exists on a building, it is now classed as a major defect and if the statutory warranties under the <i>Home Building Act 1989</i> have not expired, rectification work associated with a banned cladding product <u>may</u> be the responsibility of the builder.</p>
<p>New Buildings</p>	<p>A building that is constructed after the commencement of these amendments must not use any cladding product that is subject to a ban under the <i>Building Products (Safety) Act 2017</i>.</p> <p>Any construction certificate issued for a new building cannot indicate use of any building product or system prohibited under the <i>Building Products (Safety) Act 2017</i>.</p> <p>The use of external <i>combustible cladding</i> cannot be installed on any building using exempt development provisions (without building approval).</p>

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	<p>Performance Solutions to meet BCA Performance Requirement CP2 for buildings of Type A and B Construction, must comply with Verification Method CV3, but if CV3 not used in full, then the Performance Solution must be referred to FRNSW for approval.</p> <p>A CodeMark Certificate of Conformity cannot be relied upon where it indicates compliant uses for a product which would contravene a product subject to a <i>Building Product Use Ban</i> (In other words the <i>Ban</i> overrides a CodeMark Certificate).</p>
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Further information

Further information on these legislative changes can be found on the NSW Department of Fair Trading and Department of Planning and Environments websites.

HIA will also continue to monitor legislation related to combustible cladding and will provide further detail on how the changes referred to in this document may operate, as the information becomes available.

HIA members can contact HIA’s Planning and Building Services staff on 1300 650 620 or email nsw_technical@hia.com.au with any questions about the changes