

24 April 2018

The Commissioner
NSW Fair Trading
2 Rawson Place
SYDNEY NSW 2000

NCBP@finance.nsw.gov.au

Dear Ms Rose

SUBMISSION ON BUILDING PRODUCTS USED AS CLADDING

Introduction

The Owners Corporation Network of Australia (OCN) represents owners and residents of residential strata schemes, many of whom are directly affected by the combustible cladding issues and face very substantial costs to rectify properties they purchased in good faith.

The 2017 changes to the Building Products Safety Act, and the Draft Regulations concerning Building Fire Safety and Certification have established a context to regulate future uses of combustible cladding, but strata owners are still left with little recourse to recover the costs of replacement from the parties responsible for its original installation.

Summary

1. The purpose of the OFT reference is difficult to understand given the blanket provisions of the legislation in respect of all combustible cladding:
 - a. The Regulations already make provision for some use of combustible cladding classes of buildings of less than the prescribed height but prohibit its use on other buildings. The threshold definition as to whether a product is banned or not appears to hinge on the cladding system being certified as compliant with AS5113.
 - b. The recent changes to the BCA and the Australian Standard AS 5113 prescribe what may and may not be used for cladding and the testing regime.
 - c. The use of cladding in extant buildings is to a large part the product of lax rules and somewhat unrestrained options for alternative solutions.

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2. NSW Legislation would appear to be more stringent than that of any other state. The problem surely requires a national approach as well as uniform application of relevant standards and allowable “deemed to satisfy” certification across the different administrations within NSW.
3. The significant issue facing owners who have building affected by the cladding ban, is the lack of reliable information, and non-availability of cladding systems that have been tested and deemed compliant.
 - a. Owners being directed to remove combustible cladding are very concerned about the legislated powers to retrospectively deem products to be unsafe in the future, which means owners must be prudent to install only replacement systems that are certified as non-combustible to remove the downstream risk.
 - b. Some cladding manufacturers are promoting their products as incombustible where it has already been determined from overseas tests that they would not meet AS 5113.
4. Relaxation of rules and exemptions will lead to different outcomes from different certifying authorities and will almost certainly result in less than satisfactory outcomes.

NSW Fair Trading Reference

We were unable to determine where the NSW Fair Trading reference fits in relation to the extensive consultation process that has already taken place in respect of the Legislation and Regulations. Is it intended that the reference look to have the regulations amended? While we agree there should be some consideration of risks associated with different products, this seems to be addressed by the recent amendments to the BCA and AS 5113 but are not completely contemplated in the Draft Regulations.

On the other hand, the NSW approach of a total ban on combustible cladding of any type appears to be out of step with the standards adopted by other States and to some extent the recent amendments to the BCA which do allow some element of combustibility and set limits based on flame spread and smoke index. It remains uncertain as to whether products that may be permitted by the BCA which meet the criteria would pass the standard set by AS 5113 for debris.

The NSW approach of a total ban is not supported by evidence-based assessments under which certain types of cladding (eg high mineral core percentage), coupled with appropriate fire protection arrangements for occupants may pose little risk to life. In many instances, such assessments will have been made in the past by fire engineers presenting a “deemed to satisfy” solution.

Under the NSW rules which may be applied retrospectively, owners cannot rely on any past certification. Taken into the future, the owners could face the same expensive replacement demands should some of the assumptions prove wanting later. If there were a clear evidence and test-based compliance proof for “deemed to comply” solutions, then owners should never face this downstream risk. This probably requires manufacturers/suppliers to market their cladding products as a complete system. This is currently the testing model required by the Regulations.

Issues for Owners

Owners are currently being directed by the Department and or Insurers to remove combustible cladding. Furthermore, few Fire Engineers are prepared to sign of any certificate for cladding that has not been proven incombustible. Additional inquiries such as the current OFT reference, place additional doubt (or hopes) in the minds of owners faced with multi-million-dollar replacement that has never been contemplated in their capital works funds. Owners need certainty and clear direction at this point as well as reliable information.

Some cladding suppliers have been promoting their product as the “ideal” replacement, stating it complies with all relevant standards (UK or European of which some are superseded), yet they have not been tested against AS 5113. Further, as the Regulations require that testing be conducted as a complete system (cladding, insulation, waterproofing), this will further complicate the standards approval process. Owners, do need better guidance from a reputable Government source on these matters.

There seem to be very few avenues of redress for this serious hidden defect, short of expensive legal action against many potentially responsible parties.

Exceptions and Relaxation of Rules

The issues of combustible cladding result from the rules being sufficiently lax to allow exceptions and any documentation on a formal process of “alternative solutions” for PE clad buildings is hard to find.

Seemingly, the industry chose to believe it to be zero risk even though there was ample evidence of flammability even up to the most recently completed buildings. Providing further avenues of discretionary exceptions risks seeing a repeat of the issues in years to come.

Allowing for demonstrated evidence-based exclusions for “deemed to comply” solutions could provide realistic solutions for cladding systems that are considered to be zero or low-risk. The requirement for minimum performance standards and fire assessments supporting “deemed to comply solutions needs to be spelt out in the standards and BCA. It appears that the “deemed to comply” requirements set out in the BCA would not be permitted in NSW given the total ban on any level of combustibility.

As the key consumer voice, OCN is happy to engage with government and other stakeholders on any aspect of this submission, to develop solutions to the issues identified.

Yours sincerely
Karen Stiles
Executive Officer