

## **Re: Notice under Section 13 of the *Building Products (Safety) Act 2017***

The Property Council welcomes the opportunity to provide feedback on the notice under *Section 13 of the Building Products (Safety) Act 2017*.

The property industry acknowledges the gravity of the issues surrounding the unsafe use of combustible cladding and the need for action to mitigate the risk of fires. For this reason, in September 2017, the Property Council made a strong statement supporting the ban on the future importation and sale of 100 per cent polyethylene (PE) core aluminum composite panels (ACP) and promoted a clear-eyed approach to a systematic audit of existing buildings.

The Property Council and our members have been working proactively with governments across the country on audits of high-rise buildings. We've consistently advocated the need to engage expert fire safety engineers and take a safety-first approach to any rectification works. The Property Council also supported the introduction of an out-of-cycle amendment to the National Construction Code (NCC) which introduced clear guidance and requirements for the fire performance of external walls and cladding in new buildings.

### ***Alignment with the National Construction Code is essential***

Given the current state of play, any proposed product use regulation should harmonise with the NCC Volume 1, Building Code of Australia (BCA). An out-of-cycle amendment to the NCC came into effect on 12 March 2018 that included guidance regarding the fire performance of external walls and cladding in combination with permitted ancillary elements for buildings of Type A and B construction.

The NCC facilitates various cladding materials being able to meet the relevant fire performance provisions of the NCC either through a Deemed to Satisfy pathway or through a Performance Solution to demonstrate compliance with the relevant performance requirements. These performance provisions in and of themselves take into account factors such as different building classes, uses and types of buildings, number of storeys and distances from other buildings to ensure that the most appropriate solution is used on different classes of buildings. These principles and the performance-based approach should be sufficient to govern the use of cladding.

### ***Further evidence is required***

A body of knowledge must be acquired to quantify how widespread the use of cladding is, qualify what types of cladding are present and whether these are non-conforming products.

The 2018 amendment to the NCC provides clearer, more stringent requirements for the fire performance of external walls and cladding via a number of compliance pathways than the previous Code. This amendment should be implemented and enforced to complement other NSW legislation

(including recent amendments to the *Environmental Planning and Assessment Act* relating to fire safety practitioners and fire safety statement assessments).

The need for product use bans or rectification of existing buildings should always be based on compliance with relevant standards and advice from fire safety experts. We encourage NSW to examine evidence provided through its cladding audit and base any decision on a product ban in the context of products found to be non-conforming.

### ***There is merit in harmonisation***

Many of our member companies operate across the borders of Australian states and territories.

We note that other States and Territories have put in place appropriate measures to analyse the use of building products, primarily related to polyethylene core or extruded polystyrene. The following is a non-exhaustive list of relevant legislation or guidelines which have sought to implement that process of product analysis:

- a. Queensland | *Building Products (Safety) Act 2017*
  - i. Product use ban has been considered in the context of non-conformance rather than a generic products specific type use ban.
- b. Tasmania | *Director's Determination, Building Product Accreditation – High Risk Building Products*
  - i. Building products containing polyethylene or polystyrene must be accredited and approved for use on:
    1. Class 2, 3 or 9 buildings of 2 or more storeys; or
    2. Class 5, 6, 7 or 8 buildings of 3 or more storeys.
- c. South Australia | *Amendment to Development Act 1993 and Development Regulations 2008*
  - i. Building product of metal panel or lining (irrespective of core material) must be approved for use through a performance solution assessment, and Council notified through an invitation to inspect under construction, when used on:
    1. Class 2, 3 or 9 buildings of 2 or more storeys; or
    2. Class 5, 6, 7 and 8 buildings of 3 or more storeys
- d. Victoria | *Building Act 1993 – Ministers Guideline*
  - i. Building products containing a combustible core or lamina of 30% or more by mass of polyethylene, or an expanded polystyrene product used as an external insulation and finish (rendered) system must be assessed through a performance solution and approved by the Building Appeals Board prior to a building permit being issued for:

- (I) Class 2, 3 or 9 buildings of 2 or more storeys; or
- (II) Class 5, 6, 7 and 8 buildings of 3 or more storey

Any consideration of a product ban should be done in a nationally coordinated approach, leveraging data from state cladding taskforces and audits of building stock. A publicly available national register should also be established to avoid any confusion or inconsistency in practice rather than via states acting in isolation. This will allow companies to operate more easily across borders and deliver greater economic benefits through economies of scale.

### ***Cladding Audits must be led by Government***

There is an urgent need for a Government led program to audit our building stock to get the evidence base for any proposed use ban on cladding. We urge the Government to align with other states and territories and to deliver the audits as a government funded program.

The NSW Government released a draft of the *Environmental Planning and Assessment Amendment (Identification of Buildings with Combustible Cladding) Regulation 2017* which suggested that building owners conduct audits on their own buildings.

Having a government-led program presents several clear advantages which are integral to the success of any future policy:

- The draft regulation states that an owner must determine whether their building has combustible cladding or not. At this point no clear definition has been provided for 'combustible cladding' which leaves space for interpretation. The validity of audits will only be preserved if they are conducted in a consistent manner across NSW.
- The draft regulation prescribes that owners must engage a properly qualified person to provide a report on whether the cladding presents a risk and detail actions required to rectify it. However, this qualified opinion is subject to be overturned by Fire and Rescue NSW or local councils – which brings the question of why audits would not be handled by the ultimate decision maker in the first instance.
- Insurance companies are reticent to provide professional indemnity insurance to professionals providing advice on flammable cladding which will lead to unendurability or high premiums which will be passed on to building owners.
- In situations where owners have already conducted audits on their buildings, government should avoid replicating these efforts wherever possible. If an audit has been conducted, the method used should be assessed to determine its validity. Many building owners in the industry have already audited their buildings and acted to rectify fire risks. The audit process described in the draft regulation is prescriptive and previous efforts do not appear to have been given a status. This would force building owners to replicate their efforts and bear the cost of engaging a properly qualified person. We request that retrospective provisions for assessing the validity of previously conducted audits be included.

### ***Confidentiality is essential***

The draft of the *Environmental Planning and Assessment Amendment (Identification of Buildings with Combustible Cladding) Regulation 2017* allows for audit results from buildings to be collated and the register made public.

Section 186W (3) states the following:

*"(3) The Secretary may do any or all of the following:*

- (a) make the register, or any part of it, available to Fire and Rescue NSW, any council, or any other person,*
- (b) make the register, or any part of it, available to the public,"*

This is potentially problematic as it could lead to a misuse or misinterpretation of the data. There is a genuine risk that non-experts will misinterpret a register leading to unnecessary public concern being generated. Should a register be established, it would need to have strict rules around access. As drafted, "any other person" or "the public" seems too broadly drafted. To gain access to the register, one should need to demonstrate a genuine need which should be determined according to guideline and the Secretary should be required to seek the views of any parties who might be adversely affected by such a release. There should also be penalties associated with inappropriate use or release.

### **Additional comments**

Certain circumstances of specific ACP usage should constitute blanket exceptions. For example, freestanding ACP (i.e. not connected to base-build) or minor ACP signage annexed to an appropriately fire-rated exterior wall, in most circumstances, be unlikely to constitute a significant threat to safety. As such, we consider that these low-risk items should be considered as exceptions to any ACP product ban.

We are concerned by the potential inclusion of '*polystyrene products*' and/or '*other similar products*' – this lacks specificity, and does not assist relevant stakeholders (asset owners or authorities) in carrying out reviews of asset cladding or understanding obligations. It also may involve the use ban of a series of products which do not constitute a life-safety threat being unnecessarily queried.

### **In summary**

In summary, the Property Council recommends that the audits be conducted as an initial step to address the information gap we are currently facing. When more information is available on the penetration and types of cladding in use, industry consultation should take place on the potential for target use bans.

Should you wish to discuss this submission any further, please contact Tim Wheeler, Senior Policy Advisor on [twheeler@propertycouncil.com.au](mailto:twheeler@propertycouncil.com.au) or 02 9033 1909.

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