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CLADDING AND THE WARRANTY PERIOD — HOW CAN YOU MINIMISE YOUR RISK?

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CLADDING AND THE WARRANTY PERIOD - HOW CAN YOU MINIMISE YOUR RISK?

The cost of fixing the unfolding national building crisis involving building defects including the use of dangerous combustible cladding, could soar past \$6.2 billion, according to a new economic analysis.

Independent research conducted by Equity Economics for the CFMEU has identified 3461 residential apartment blocks across the country with potentially flammable exterior cladding – this figure covers more than 170,000 apartments mostly constructed in the last 10 years.

Under section 17 of the *Building Products (Safety) Act 2017*, a building is an ‘affected building’ even if the ban on a product was introduced after it was used in the building. In this way, the ban operates retrospectively. As a result, certificates of compliance for many cladding products have been revoked.

Raising Funds to Fix Cladding Outside of the Warranty Period

Buildings outside of the statutory warranty period are put in a difficult position of having to raise the funds to replace a cladding product that was previously approved but now banned because it is unsafe. This issue is fairly straightforward in these affected buildings in the sense that they need to raise the funds to remove the banned product and make the building safe. Funds are usually raised at the lot owners’ expense via [special levies](#). Ideally, the NSW Government will take the lead of Victoria and set up a [cladding fund](#) to financially assist building owners in affected buildings.

Fixing Cladding within the Warranty Period

However, where does all this leave affected buildings that are still within the statutory warranty period? There is some uncertainty as to whether or not builders and developers that installed cladding that was certified compliant as at the date of installation have breached the statutory warranties where that certification has been revoked. It is arguable that if a building is retrospectively an “affected building”, the installation of the product at the date of construction is technically a breach of the statutory warranties because the product used does not comply with the law, which retrospectively makes the building an affected building. Alternatively, the product is not suitable for the purpose for which it is used if it carries a high safety risk and therefore also breaches the statutory warranties.

In my view the statutory warranties should be available to protect successors in title of affected buildings. However, this issue has not yet been determined in NSW by a decision of NCAT or a Court. It will be interesting to see how this issue is dealt with in NSW.



Restrict Fire Hazards

So, what else can you do in the meantime?

Your strata scheme can mitigate and minimize risk by implementing by-law restrictions prohibiting the use of barbecues and smoking on balconies and other potential fire hazards such as gas lamps and other highly flammable materials, for example, artificial plants, astro turf and the like. Your strata scheme may want to restrict the hanging of washing on the balcony of a building. It's not unusual for certain strata schemes to restrict the type of balcony furniture which may be used on a balcony, and generally this is done by making sure that such furniture is in keeping with the overall appearance of the building. Perhaps consideration ought to be given to the use of materials that are less flammable and combustible, for example, no plastic chairs and tables.

While such by-laws do not ultimately address what will be a costly problem for the owners corporation, they may assist in the meantime in mitigating and minimising risk.

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About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy recovery.

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