

MTECC

Melbourne TEC Chambers

Expertise in Construction Dispute Litigation

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CPD SEMINAR

MTECC warmly invites you to attend our CPD seminar

Date: Wednesday, 20 March 2019

Time: 5:30pm to 7:30pm

Venue: RACV Club, 501 Bourke Street, Melbourne

TOPICS:

“Rectification in construction contracts” by Nick Gallina

**“What has happened to Contract and the Australian
Consumer Law?”** by Laina Chan

“ACP cladding issues update” by Michael Whitten QC

ACP CLADDING ISSUES UPDATE

Michael Whitten QC

Chair of MTECC

Aluminium Composite Panels

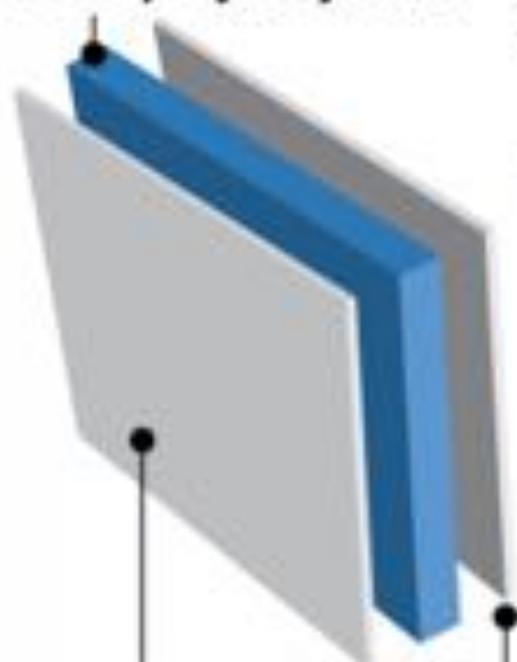
- two sheets of aluminium sandwiching an inner insulating core of either polyethylene (PE), polystyrene (EPS), polyurethane (PUR)
- more recently, fire-rated panels have a mineral core, or LDPE and mineral fibre
- lightweight, easy to install, and provide attractive metallic building finish
- typically from 4 to 6 mm in thickness, made up of two outer aluminium skins, separated by core
- Alucobond:
 - Origins in Germany in the 1960s.
 - Became synonym for aluminium composite panels all over the world.
 - first imported into Australia the late 1970s;
 - by early 1980s, specifically marketed to architects for facades
 - Sales increased from 100,000m² in 1998 to in excess of 500,000m² in 2008
- ACPs became much less expensive after patents ran out and other manufacturers were able to compete, e.g. Alpolic, Vitrabond and Alucobest

First concerns re problems with flammability

- concerns about flammability of the core material were identified as early as 1968
- PE similar combustible qualities to petrol – but denser than petrol therefore 1 kilogram of polyethylene will release the same amount of energy as about 1.5 litres of petrol.
- 1978-79: changes in fire regulations, particularly in Germany, increasingly demanded implementation of flame retardant products for specific architectural applications. Led to production of new range of products in Europe and USA.
- 1989: challenges presented by growing demand in Europe and Southeast Asia re fire classification, led to development of non-combustible panel: 'A2'
- Knowsley Heights Fire, Liverpool UK, 1991
- fire risks identified in Australia not long after sales of Alucobond began to accelerate in the late 1990s
- Garnock Court Fire, Scotland, 1999
- 2000: Fire Code Research Reform Program report titled 'Fire Performance of Exterior Claddings FCRC PR 00-03'. Intended for regulatory authorities, fire researchers, fire engineers and manufacturers of external cladding materials and systems. Discussed external vertical fire spread in multi-storey buildings with particular regard to the contribution made by combustible cladding systems.

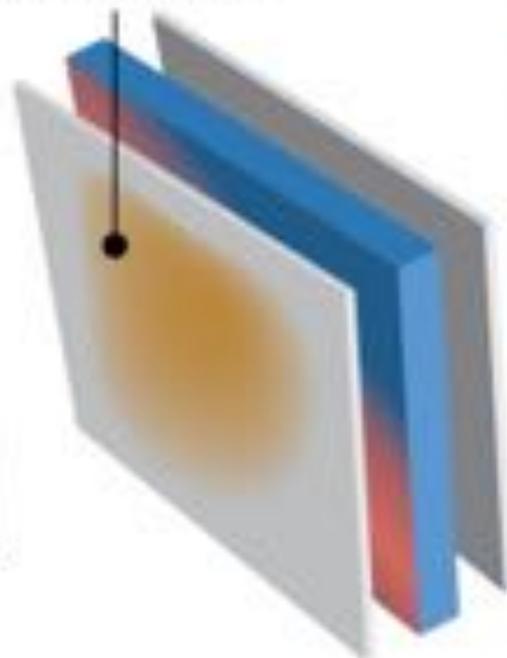
Aluminium composite panel Flammable core

Insulating core
2-5mm thick,
100% polyethylene



Surfaces
0.5mm thick
aluminium skin

Heat from a fire will
conduct quickly to the
core through thin
aluminium



Core loses ability to
bind, causing outer
skins to deform and
delaminate



**Core melts
and can ignite**

GRAPHIC: JAMIE BROWN

2008

- 2018 Qld govt taskforce report: “... the dangerous material was first noticed in the United States more than a decade ago after a fire at the Water Club in Atlantic City.”



2009

Television Cultural Centre Fire, China

- Started by fireworks on roof.
- Zinc alloy skin caught fire and burned, sending flames gradually cascading down the exterior of the building before igniting the interior.



2010

- **Sweden fire**
- February: ACT fire authorities told a local building industry meeting that PE-core aluminium composite panels did not meet building code combustibility requirements and without other risk-mitigating features a building using them could not be approved.
- July: ACT representatives raised the issue at a state and territory administrations meeting in that year.



October: NSW fire authorities meeting:

- ACPs did not meet requirements
- advised jurisdictions to be aware the approval problems encountered may spread

12 October: meeting of State and Territory Administrations of the ABCB

- actively considering whether ACPs complied with the DTS provisions of the BCA, including combustibility
- action item from earlier meeting re “Fire Resistance of Composite Panel Wall Facing” ... development of a “National Advisory Note” advising on the requirements of the BCA

Late 2010: **Halifax Vogel Group**, owner of Alucobond in Australia, commissions report titled “**Proposal for Change**”

- “... Concerns have been raised in the (ACT) regarding whether the material complies with the (DTS) provisions of the (BCA). Given the economic, social and environmental impacts that have emerged from this issue it is important that the matter be readily resolved.”
- proposes sub-clause C1.12(g) be added to BCA, prescriptive requirements for use of ACPs as external wall lining including: “The mineral filled core contains not less than 70% non-combustible materials”.

15 November - Shanghai



- An exterior façade fire occurred in a 28-storey residential building in Shanghai Jing'an District on November 15 2010 killed 58 people, and injured over 70 people.
- This fire was believed to be caused by welding resulting in fire spread on polyurethane insulation to external walls.
- The fire engulfed the entire exterior of the building, causing Secondary fires on most of the floors.

2011

- April: ACT government representatives reported that the note was still under development.
- July: effort to draft separate note on cladding fire risks dropped – a single note covering all issues re external wall cladding would be drafted by Victorian members.
- 23 September: ABCB “Victorian Administration” working on advisory note relating to external wall cladding systems, but:
 - “formed the view that it would not be appropriate for the document to be issued by the ABCB”
 - instead, individual jurisdictions invited to use the draft note as a basis for advice to be issued within their jurisdictions
- draft advisory note did not expressly identify ACPs as “non DtS cladding systems”, but concentrated on weather-proofing and water resistance
- October: VBA issued “fact sheet” substantially in the form of the draft advisory note.

2012

Al Tayer Tower, Sharjah - April 2012





Tecom
Building,
Dubai –
October 2012

Mermoz building
in Roubaix,
northern France





Tamweel Tower, Dubai –
November 2012

2013

Alucobond:

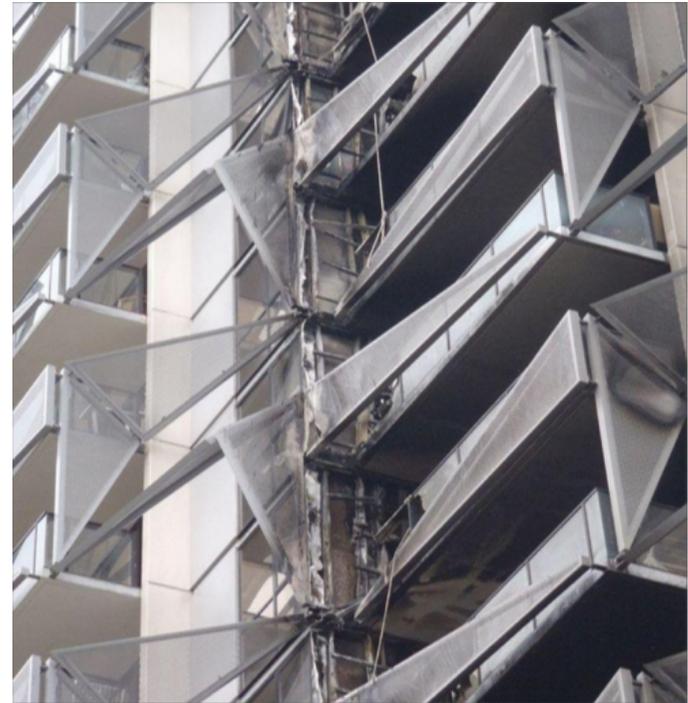
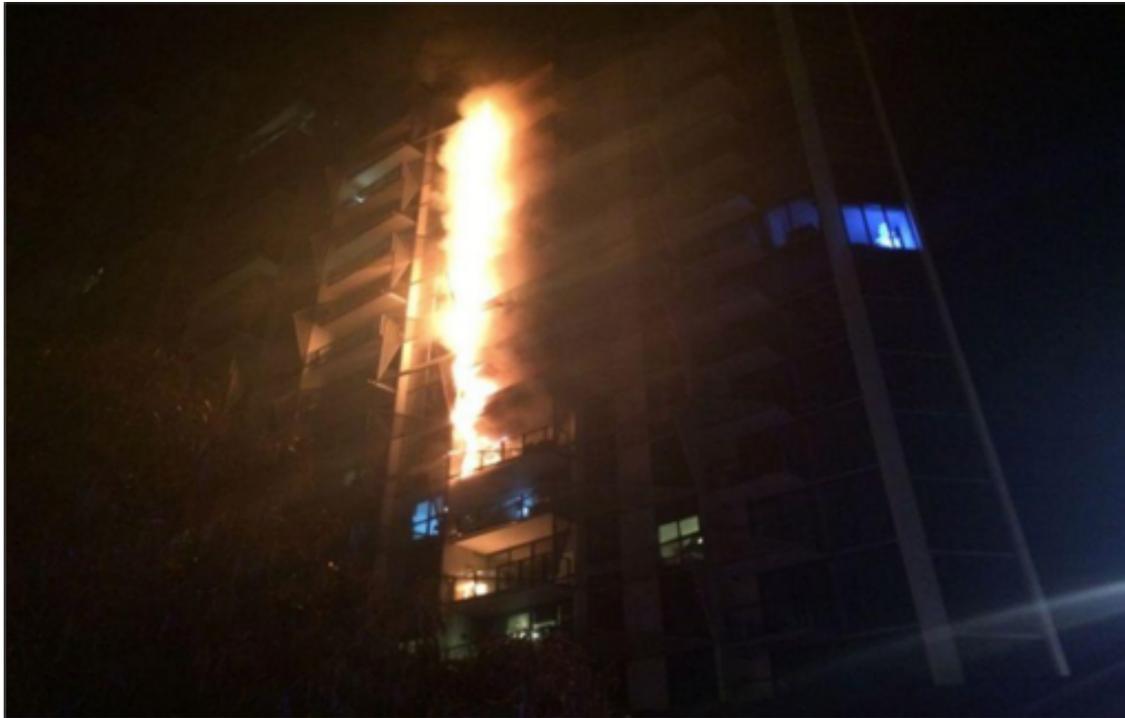
- began referring to the first product in the range as “Alucobond PE” (met DtS criteria in C1.12 of the BCA)
- 12 July 2013: obtained a Certificate of Conformity for ‘Alucobond PE’
- began selling products under the CodeMark Scheme operated by the ABCB.
- stopped selling ‘Alucobond’.

4 November: “An important message from the VBA”

- aware of poor practices ... potential to result in construction and occupation of non-compliant or unsafe buildings...
- problems re making of Alternative Solutions, particularly re fire performance requirements of the BCA
- concerned that building surveying industry treating fire safety engineering in a different manner to structural, mechanical or other engineering disciplines
- Alternative Solutions re fire performance requirements undertaken only by registered fire safety engineers, independently checked and certified by registered fire safety engineer
- Alternative: application to the BAB

2014

25 November: **Lacrosse Building fire**, Melbourne



- sparked by a cigarette left to burn in a plastic food container
- raced up ACPs on the building's exterior
- none of the approximately 400 people evacuated from the complex were hurt
- review by the MFB found the Alucobest cladding was not compliant
- cladding was supposed to have been "folded and mechanically fixed" to the sub- frame, instead the panels were stuck to the sub-frame with adhesive flat tape which "contributed to the quick spread of the fire"
- BAB ordered the cladding be removed (January 2017).
- owners commence legal action against builder, LU Simon, for more than \$12 million in damages
- other building professionals joined as respondents
- LU Simon:
 - "the use of Alucobest ... in buildings of this type has been a common practice across Australia for at least 40 years...
 - use of such panels has been routinely approved by the MFB, independent fire engineers, architects and building surveyors
 - the state of technical knowledge prior to the fire was such that any fire safety issue was not known in the industry."

2015

The Torch fire, Dubai

June: Senate Economics
References Committee inquiry
into non-conforming building
products

- report by 12 October 2015
- number of extensions granted
- inquiry lapsed at the dissolution of the 44th Parliament



Fire Protection Research Foundation research project report on “Fire Hazards of Exterior Wall Assemblies Containing Combustible Components”:

- statistics relating to exterior wall fires around the world reviewed
- exterior wall fires appear to account for somewhere between 1.3% and 3% of structure fires in the selected property types investigated.
- fires involving combustible exterior wall assemblies are low frequency events however the resulting consequences in terms of extent of fire spread and injuries and fatalities can be large
- examples where materials or installation methods have been used which would not be expected to meet regulations and test criteria in countries where control of combustible facades is well developed.

October: **Lambert Report**

- Michael Lambert, the former secretary of NSW Treasury, commissioned by the NSW government to look into the failings of building regulation in NSW, after a fire in a building in Bankstown in 2012 revealed shocking breaches of the building code.
- outlined a litany of problems in building regulation in NSW
- 150 recommendations on building safety and construction practices
- only those relating to fire safety were acted on.

Senate agreed that the inquiry be re-adopted in the 45th Parliament.

VBA External Wall Cladding Audit

- first of its kind in Australia
- to identify the extent of non-compliant use of external wall cladding materials in residential high rise buildings and public buildings
- “non-compliant” does not necessarily mean the building is unsafe to occupy
- rate of non-compliance was 51% - 101 published on VBA website, remainder with relevant MBS to independently determine whether other remedial action required.
- levels of non-compliance too high – however, generally do not pose a risk to safety
- whether type of cladding is “fit for purpose” not always properly understood
- BCA requirements for external walls inconsistently applied and poorly understood
- no single category of practitioner involved in design, approval or construction was consistently responsible for use of non-compliant cladding
- differing degrees of understanding of the requirements of the BCA and the specification for components of an external wall
- practitioners identified as being involved in multiple instances of noncompliance subject of further investigation and audit activity
- issue recognised as a national issue
- raised by the Victorian Minister for Planning at the Building Ministers’ Forum (BMF) in July 2015
- other States and Territories are following the VBA Audit closely to guide how they should proceed in their own jurisdictions.
- changes to Victorian regulations re sprinkler protection

2016

The Address, Dubai



February: **VBA Industry Alert**

- updated to include AS 5113 Fire propagation testing, classification of external walls and clarification of the meaning of 'external wall'
- audit identified that combustible materials including ACPs have been used in a manner that does not comply with BCA
- building designers, builders and building surveyors are failing to identify whether the material is being used as an integral part of an external wall, or used as an attachment to a complete wall system
- appropriate evidence of suitability in accordance with Clause A2.2 was commonly not being provided to, or sought by, relevant building surveyors
- designers specifying and RBSs approving 'generic' brand products such as "brand name or similar" where a particular model of that branded product may comply and another model would not
- assessments of the use of materials as an attachment not included assessment of requirements of cl 2.4 of Specification C1.1
- wall or attachment? BCA does not define 'wall'. VBA concludes external wall means the entire wall system and all components
- cl 2.4 of Specification C1.1 allows combustible materials that meet certain fire hazard properties to be conditionally used as an attachment to the outer element
- attachments include "a finish or lining to a wall or roof or other attachments, such as signs, sunscreens, blinds or awnings."
- a 'lining' should not be mistaken for a cladding.

April: CSIRO - Fire safety guideline for external walls in high-rise construction

- June 2014, CSIRO, in conjunction with University of Ulster, completed a research report for the National Fire Protection Association on combustible façades
- intended to aid building practitioners in understanding the fire hazards of combustible external wall materials and pathways to demonstrate compliance under BCA
- non-combustible defined by compliance with AS1530.1 standard combustibility test, a small-scale material fire test involving immersing a small sample of the material in a furnace held steady at 750°C
- CSIRO aware of some claims that AS 1530.1 test invalid or inappropriate for certain product types - “not applicable to products which are coated, faced or laminated ... tests may be carried out separately on the individual materials from which the product is formed...”
- External wall or attachment? - term not specifically defined in the code, common usage governs.
 - If the cladding is removed and the remaining structure no longer functions suitably as an external wall (for example, the remaining structure has no fire resistance level, is unable to prevent the penetration of water, is unable to resist wind loads, or in certain applications cannot meet acoustic requirements), then it is considered an integral part of the external wall, and BCA Specification C1.1, Sections 3.1(b) & 4.1 (b) applies.
 - If the cladding is removed and the remaining wall system still functions as an external wall then Spec C1.1 Clause 2.4 applies.
- there is little data correlating AS 1530.3 to fire performance of façades.
- Practitioners must take care interpreting AS 1530.3 test data. E.g. a spread of flame index of zero (0) does not indicate that the material will not spread flame in all fire situations.
- AS 1530.3 not applicable for attachments used as external wall finish, lining or cladding.

July: Sulafa Tower,
Dubai Marina



August: ABCB - Advisory Note - Fire Performance of External Walls and Cladding

- guidance to assist in interpreting the (NCC)
- **external walls** of buildings of Type A and Type B construction must be constructed wholly of materials that are not deemed combustible as determined by testing in accordance with AS 1530.1
- building element is part of an external wall if it is **integral** (i.e. is not ancillary) to the construction of the wall. For example, facade covering (e.g. external cladding)
- combustible materials that may be used wherever a non-combustible material is required... bonded laminated materials where each lamina, including any core, is non-combustible (as determined by AS 1530.1); and each adhesive layer does not exceed 1 mm in thickness; and the total thickness of the adhesive layers does not exceed 2 mm; and Spread-of-Flame Index and Smoke-Developed Index of the bonded laminated material as a whole do not exceed 0 and 3 respectively.
- core of a composite material is not an adhesive layer; it is one of the laminae.
- Verification Method for testing of external wall assemblies for fire spread (CV3)
- Australian Standard **AS 5113** sets out the procedures for the fire propagation testing and classification of external walls of buildings according to their ability to limit the spread of fire via the external wall and to adjacent buildings.
- A current **Certificate of Conformity** issued under the ABCB's voluntary CodeMark Australia or CodeMark Scheme is evidence that a building material, method of construction or design fulfils specific requirements of the NCC.

2017

VBA Victorian Cladding Taskforce audit - 17 February 2017

- similar findings to 2015 interim report - failings not merely administrative, or paper-based, but significant public safety issues, symptomatic of broader non-compliance across a range of areas within the industry
- 43 buildings as highest risk, 232 high risk, 228 moderate, 126 low risk
- VBA disciplinary actions against Lacrosse fire safety engineer, builder and RBS. Architects Registration Board determined not to proceed with any action against the architect.
- three factors: supply and marketing of inappropriate building materials, poor culture of compliance in the industry, and failure of the regulatory system to deal with these issues.
- potential causes of non-compliant use of cladding
- as products became more prevalent and visible in the industry, a general complacency or blind spot occurred as to the risks.

Recommendations included:

- continue Statewide audit and audit of all Victorian Government buildings and oversee audit of privately owned, residential, multi-unit buildings, three storeys and above and all public-use buildings two storeys and above
- prevent use of ACP with PE core and EPS cladding for class 2, 3, or 9 buildings of two or more storeys, and class 5, 6, 7 or 8 of three or more storeys.
- pilot audits in six councils to inform final inspection and assessment processes, including the finalisation of the Taskforce's Risk Assessment Tool
- write to owners of prioritised buildings, advising of their obligations and encouraging them to seek professional advice on the nature of their cladding
- development of rectification standard, to be used by VBA in audit and fire safety engineers and private building surveyors
- research options for financing building rectification
- VBA to significantly increase compliance and enforcement activities to deter future breaches
- amend Building Act to ensure building surveyors and fire safety engineers act independently, supported by a code of conduct developed by the VBA
- national standard to define and restrict the use of "FR" (Fire Resistant, Fire Retardant or Fire Rated) in the marketing of products
- statutory duty of care on building practitioners
- shared responsibility legislation to apply to manufacturers, importers and suppliers (similar to Qld product safety legislation introduced in August 2017)
- compulsory warranty insurance for residential multi-unit developments and insurance by commercial builders
- improvements to the current private surveyor model in Victoria
- strengthen the requirements for fire safety designs to be independently reviewed, inspected and approved

June: 2006 Building Regulations (Vic) revoked by the **Building Interim Regulations 2017**

- 101 Objectives: (h) to provide for matters relating to the accreditation of building products, construction methods, designs, components and systems connected with building work; and to prescribe qualifications and provide for other matters relating to registration of building practitioners;..
- 113 Fire performance requirements—performance solutions – qualifications required before RBS can determine whether a performance solution complies with fire performance requirements or relies on, inter alia, certificate from fire safety engineer or checking building surveyor, BAB determination, Certificate of Accreditation, Certificate of Conformity or report of the chief officer.
- 601 Testing of materials – RBS may require owner or builder to arrange for testing of any material by Accredited Testing Laboratory or Registered Testing Authority, and may prohibit use of any unsuitable or unfit material

14 June: Grenfell Tower fire, London



Following Grenfell (and Lacrosse):

- Coalition expanded ongoing Senate inquiry into the use of dangerous materials in the building industry, to include flammable ACP panels. Inquiry eventually called for a total ban on the import and use of the flammable cladding. Recommendation rejected out of hand by the federal government.
- Planning and fire experts have reportedly said there may be more than 5,000 buildings in Victoria that contain non-compliant cladding.
- ABC's Four Corners program revealed Australian suppliers of cladding made with PE knew it was highly flammable a decade before the deadly London fire.
- ABCB working with Senior Officers' Group (SOG) to review NCC requirements related to high risk building products, assessing costs and benefits of mandating third party certification and establishing a national register for such products
- number of state and territory governments announced audits, although most generally restricted to respective central business districts and not broader metropolitan areas.
- NSW Minister for Better Regulation announced 10-point plan including Cladding Taskforce and Cladding Registration Regulation:
 - identification and collection of information about affected buildings
 - requires owners of certain buildings to check for external combustible cladding and register; failing which = fines.
 - applies to new and existing two or more storey buildings – e.g. residential, aged care, hospitals, public assembly
- Building Products (Safety) Act 2017 (NSW) - Commissioner of Fair Trading power to prohibit use of “unsafe” building products.
- South Australia government and City of Adelaide accelerated audit of cladding on 4,500 buildings of two storeys or more
- WA Building Commission initial audit following Lacrosse, broadening following Grenfell to include all high-risk, high-rise buildings in WA that have cladding attached
- Queensland established targeted Audit Taskforce with primary focus on buildings constructed between 1994 and 2004 using ACP cladding. Ordered removal from Princess Alexandra Hospital
- ACT Government announced taskforce to review amount of flammable cladding used in Canberra
- Tasmania government to conduct further audit of buildings where non-compliant use of external cladding materials could result in unacceptable risk to the community.

Senate Committee reports

- interim reports on 6 September 2017 and 22 November 2017

Committee **recommendations**:

- total ban on importation, sale and use of PE core ACPs as matter of urgency
- national licensing scheme, with requirements for continued professional development for all building practitioners
- nationally consistent measures to increase accountability for participants across supply chain
- making all Australian Standards and codes freely available
- penalties regime for non-compliance with NCC such as revocation of accreditation or a ban from tendering for Commonwealth funded construction work and substantial financial penalties
- expedite process to prevent directors from engaging in illegal phoenix activity
- nationally consistent statutory duty of care protection for end users in the residential strata sector
- 27 November 2018: Senate granted committee extension for final report to 4 December 2018.

December: *LU Simon Builders Pty Ltd & Ors v Victorian Building Authority* [2017] VSC 805 - VSC ruled that VBA could not force builders to undertake rectification works after an occupancy permit had been issued.

2018

February: **Shergold Weir report 'Building Confidence'**

- BMF commissioned Professor Peter Shergold AC and Ms Bronwyn Weir ' to assess compliance and enforcement problems within the building and construction systems across the country affecting implementation of the NCC.
- to “enhance public trust through effective implementation of building and construction standards that protect the interests of those who own, work, live, or conduct their business in Australian buildings.”

Summary of Recommendations:

- registration and training of practitioners
- roles and responsibilities of regulators
- role of fire authorities in the building design and approvals process
- integrity of private building surveyors
- collecting and sharing building information and intelligence
- better quality documentation and record keeping and improved oversight
- inspection regimes
- post-construction information management
- building product safety - compulsory product certification system for high-risk building products
- implementation of the recommendations

Australia's States agree to implement major recommendations.

- NSW retrospective ban on the use of any cladding with a core of more than 30% PE.
- Qld government to spend tens of millions of dollars to make dozens of government buildings safer. About 880 buildings need further investigation. At least 70 require rectification work. Taskforce to assess additional 12,000 privately owned buildings, including about 1,200 residential structures.
- Adley Burstyner investigating claims for apartment owners (and OCs), to achieve rectification and compensation. Devising solutions for financing claims (which may include no win / no fee options) and a way of conducting the claim which does not require all benefitting OCs to comply with requirements of Owners' Corporation Act 2016 re special resolution. Building inspection company Roscon has teamed up with the law firm to help prepare for the legal action, saying the situation in Victoria had left residents with no other choice.

March: VIC Planning **Minister** issues **Guideline MG-14: Issue of building permits where building work involves the use of certain cladding products**

- pursuant to s.188(1)(c) of the Building Act
- to reduce risks to life and property from inappropriate use of combustible materials in external cladding systems in some multi-storey buildings
- RBS should not be satisfied that proposed building work which includes the installation of a Prescribed Combustible Product as part of an External Wall (including as an attachment) would comply with the Act and Regulations unless the application for the building permit includes a determination of the BAB that the installation of the product complies.
- Prescribed Combustible Products means:
 - a panel that comprises a core of 30% or more PE by mass
 - expanded polystyrene product used in an external insulation and finish (rendered) system.

VBA to closely monitor compliance with Minister's Guideline MG-14, which applies to mid-range 'Fire Retardant' products (i.e. "30% polyethylene or greater" not "greater than 30%") and which:

- includes Alucobond Plus; Alpolic FR; Vitrabond FR; Larson FR; Cladex FR and Nu-Core FR.
- applies to products that have a CodeMark Certificate of Conformity or Building Regulations Advisory Committee (BRAC) accreditation (i.e. these require a determination by the Building Appeals Board)
- applies notwithstanding the concessions of Specification C1.1 clauses 3.10 and 4.3 (i.e. these require a determination from the Building Appeals Board).

Section 10 of the Building Act 1993 does not apply = Guideline is retrospective.

March: **Lendlease Building Contractors v Philip Chun & Associates & ors** commenced in VSC

- Royal Womens Hospital demolition and reconstruction project
- 2005 to 2008.
- Defendants: building surveyors, architects, fire engineer, façade subcontractor.
- Hospital identified by 2015 VBA audit
- Claim for costs of recladding, approx. \$10m.
- Defences filed 15 March 2019.



VIC Building Regulations 2018

- June: Building Interim Regulations 2017 revoked by the Building Regulations 2018.
- 1. Objectives ... (h) to provide for matters relating to the accreditation of building products, construction methods, designs, components and systems connected with building work; and to prescribe qualifications and provide for other matters relating to registration of building practitioners; and
- 3. Commencement: 2 June 2018.
- 38. Building surveyor to document determination of performance solution
- 120. Testing of materials - RBS may require owner or builder to arrange for testing by Accredited Testing Laboratory or Registered Testing Authority of any material... may, as a result of tests, prohibit the use of any unsuitable or unfit material.
- 121. Fire performance requirements—performance solutions – qualifications of RBS, or reliance on others (same as 2017)
- 122, 123. Certificates of compliance
- 124. Registered building practitioner must document performance solutions in certificate of compliance
- 125. Evidence of suitability—certificate from professional engineer or other qualified person
- 172 Building surveyor must cause fire and smoke resisting building elements to be inspected ... any building element that is lightweight construction and that is required to resist the spread of fire in at least one sole-occupancy unit; ... the components of any building element ... when the building element is accessible and able to be clearly viewed.
 - does not apply in relation to building work carried out under a permit issued before 2 June 2018
 - lightweight construction means construction which incorporates or comprises sheet or board material, plaster, render, sprayed application, or other material similarly susceptible to damage by impact, pressure or abrasion.

- PART 17—BUILDING PRODUCT ACCREDITATION
- 239. Prescribed persons and bodies to accredit building products = ABCB or person or body authorised by ABCB.
- 241. Does not apply to a building product that complies with the relevant deemed-to-satisfy provisions of the BCA.
- 242. Application for accreditation to the Committee ... must provide appraisal of the product from an organisation or person that is recognised by the Committee as competent ... report from an Accredited Testing Laboratory or a Registered Testing Authority showing that the building product has been submitted to the tests listed in the report and setting out the results of those tests
- 243. Information in application to remain confidential
- 245. Certificate of accreditation
- 246. Revocation of accreditation - Committee may at any time revoke accreditation if it finds — fraud, misrepresentation or concealment of facts ... performance of the product is unsatisfactory ...
- 250. Offence to falsely claim product is accredited
- 251. Register of accredited products
- Division 2, Schedule 9: Prescribed qualifications for classes of building practitioner

VBA Building product accreditation

- Certificate of accreditation is proof that a product meets the performance requirements of the Building Regulations 2018 or the BCA.
- Once a product is accredited, there is no need to prove its suitability each time building work requires a building permit.
- It is mandatory for a building surveyor to accept the product, method, design, component or system if the use complies with the accreditation.
- [No Alucobond products listed]

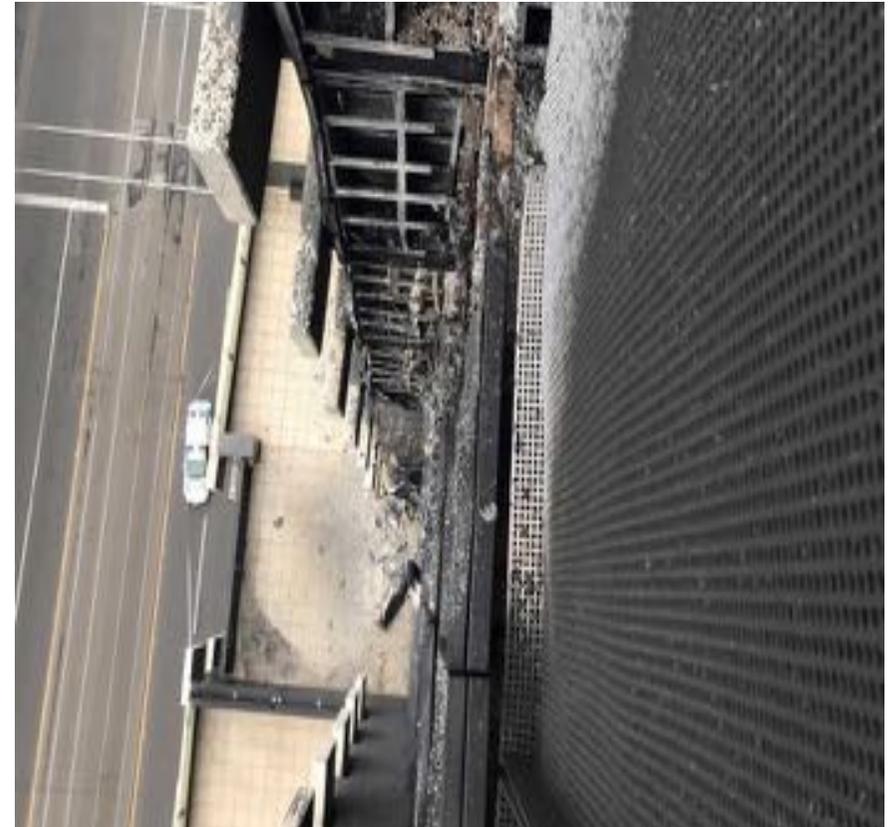
Steller Works Pty Ltd v Victorian Building Authority (No 2) [2018] VBAB 26 (23 August 2018) - subject to satisfactory completion of sprinkler remedial work, BAB approved use of Unitex EPS, Quick Tuff and Alpollic ACPs.

October: Cladding Rectification Agreement scheme

- Building Amendment (Registration of Building Trades and Other Matters) Bill 2018
- commenced 30 October 2018
- Cladding Rectification Agreements (CRAs) are a three-way voluntary agreement between an owner or OC, lender and council to fund cladding rectification works.
- loan repayments made over time through council rates system
- ABC investigation (2/19): no loans granted yet
- only City of Melbourne, Manningham, Dandenong, Kingston, Yarra Ranges and Whittlesea councils have agreed to participate so far
- Stonnington: “Government's scheme is flawed” - resolved in December 2018 to opt out because of financial and legal risks involved, including administration costs and council's potential role as a debt collector if OCs default.
- Moonee Valley: ‘unfair to expect residents to bear the cost of replacing dangerous cladding ... onus should be on the builders or permit issuers’
- most other councils, including many with high numbers of buildings covered with flammable cladding, undecided.

2019

February: **Neo200 fire**, 200 Spencer Street, Melbourne



- 41 storeys, 372 apartments
- 750 metres from Lacrosse
- fire broke out on 22nd floor, sparked by burning cigarette, spread rapidly up five levels
- residents evacuated
- no casualties
- ACPs part of the balconies, contributed to spread of the fire
- residents remained locked out
- built by LU Simon
- construction completed in 2007
- awarded 2008 Master Builder Association's Excellence in Construction Award.
- VBA audit deemed Neo moderate risk and safe to occupy
- building notices served in July and October requesting owners to show cause why the cladding should not be removed.

Following Neo:

- VBA adopted a stricter assessment tool as part of statewide audit. Planning to inspect further 30 city apartment buildings.
- Premier Daniel Andrews insisted government would not change its current response to the cladding crisis but continue to follow proposals outlined by the state's Cladding Taskforce.
- Current estimates: about 250,000 owners and residents of some 1,400 apartments clad with combustible ACPs.
- Of 2,000 buildings audited so far, 360 high risk, 280 moderate, 140 low.
- State government has refused to publish the location of the "at risk" buildings.
- about 40 VIC state government owned buildings deemed high risk, 100 moderate and 100 low risk.
- Concerns re commercial impact on already rapidly declining Australian property market.
- Planning minister: removing flammable cladding from most high-risk buildings in Melbourne is a "complex problem which will take some time to fix properly."
- VBA: could take two years to remove and replace from high rise apartments and hotels around the city.
- 200 building notices issued most calling for cladding to be removed ... but rectifying "can be complicated."
- Victoria pushing for a national ban on the import of such panels and received in-principle agreement at the national building minister's forum, subject to industry consultation.
- NSW: inspected 2495 buildings, 447 could be high risk. Fire & Rescue NSW rapid response plans in the event of fire re high-risk buildings. 421 buildings referred to local councils as being high or low risk.

8 February: **meeting of BMF**

- committed to releasing joint implementation plan identifying which of the 24 Shergold-Weir recommendations would be implemented
- “Ministers agreed in principle to a national ban on the unsafe use of combustible ACPs in new construction ... *subject to a cost/benefit analysis*on the supply chain, potential impacts on the building industry, any unintended consequences, and a proposed timeline for implementation.”

BMF Implementation Plan for the Shergold-Weir recommendations:

- first insight into likely direction for building regulatory reform
- prioritised 6 of the recommendations considered would benefit from a national approach:
 - registration of specified categories of building practitioners involved in the design, construction and maintenance of buildings
 - prescribe consistent requirements for registration of building practitioners
 - minimum statutory controls to mitigate conflicts of interest and increase transparency of the engagement and responsibilities of private building surveyors
 - code of conduct for building surveyors ... grounds for disciplinary inquiry
 - provide private building surveyors with enhanced supervisory powers and mandatory reporting obligations
 - require building approval documentation to be prepared by appropriate categories of registered practitioners, demonstrating compliance with the NCC

Shore Dolls Point Apartments class action

- 18 February: Class action commenced in Federal Court
- William Roberts Lawyers, Ian Roberts SC and litigation funder IMF Bentham
- Applicants: OC for Shore Dolls Point Apartments. Built between 11/10 and 8/12. 4 storeys above ground. 17 apartments, basement carpark.
- against importer of Alucobond, Halifax Vogel Group, and its German manufacturer, 3A Composites
- cost of replacing the PE core cladding and associated costs
- misleading and deceptive conduct claims in contravention of TPA and ACL re representations that the cladding was suitable for purposes advertised; compliant with relevant building codes and standard; passed fire safety tests (AS1530.3). Also, breach of acceptable quality guarantee per s.54 ACL – not fit for purpose. Not of merchantable quality – s.74D(3) TPA
- targeting importer and manufacturer, may bypass issues about whether developers and/or builders bear liability for installing the cladding
- 447 buildings at risk in NSW – estimated claims may be hundreds of millions of dollars and may increase if other manufacturers sued

21 February: ABC: **nine more products non-compliant**

- CertMark International - Australia's leading building product accreditation agency that the ABCB relies upon to determine whether building products are compliant - withdraws support for nine cladding products: Ozone Panel Building Systems, Alpolic A2, Alpolic FR, Ultrabond FR, Vitrabond FR, Dulux Exsulite TM Kooltherm Façade System, Larson FR, Dulux Exsulite TM Thermal Façade non-cavity system and Cladex FR
- not just ACPs, also expanded polystyrene, common in many buildings fewer than three storeys
- industry experts stunned
- VBA issued alert - "cannot be relied upon as evidence of suitability", meaning they may no longer be regarded as compliant with building codes.
- CertMark has not clarified why - consequences unclear
- not retrospective - projects completed prior to withdrawal of certificates still covered by the withdrawn certificate
- Phil Dwyer, national president of the Builders Collective of Australia: "never seen anything as serious as this" in four decades as a builder, "We're in an incredible situation now where the industry is falling apart."
- national general manager of Roscon, Sahil Bhasin: estimates the certification changes could quadruple the number of building rectification orders issued in Melbourne.
- Australian Institute of Building Surveyors vice president, Wayne Liddy: "It's a system of regulatory failure"

28 February: Lacrosse decision

Owners Corporation No. 1 of PS613436T v LU Simon Builders Pty Ltd [2019] VCAT 286 – Judge Woodward

- builder (LU Simon) breached warranties of suitability of materials, compliance with the law and fitness for purpose in its D&C contract
- building surveyor (Gardner Group and Stasi Galanos) failed to exercise due care and skill in issuing the relevant building permit and thereby approving the specification calling up ACPs “indicative to Alucobond” and failed to notice and query the incomplete description of the cladding systems in the Fire Engineering Report
- architects (Elenberg Fraser) failed to remedy defects in its design (the Alucobond Specification) that caused the design to be non-compliant with the BCA and not fit for purpose, and failing to ensure that the Alucobest sample provided by LU Simon was compliant with their design intent
- fire engineer (Thomas Nicolas) failed to conduct a full engineering assessment in accordance with the requisite assessment level dictated within the IFEG, failed to include the results of that assessment in the fire report, failed to recognise that the ACPs proposed did not comply with the BCA, and failed to warn of that fact.
- no adverse finding against the occupier of apartment 805 (Kim) in relation to whether the storage of items on the balcony contributed to the ignition of the Alucobest or subsequent fire spread.
- Gubitta breached a duty of care to the Owners by failing to ensure that his cigarette was fully extinguished before leaving it in a plastic container, which started the fire.
- claim against the superintendent (Property Development Solutions) settled shortly before the hearing, but no responsibility found in any event
- Alucobest did not satisfy the DtS provisions of the BCA by operation of clause C1.12(f) (or on any other basis)
- defences under s. 59 Wrongs Act that interpretation of BCA was reasonable and supported by peer professional opinion rejected as interpretation ‘would not withstand logical analysis, and therefore the practice was unreasonable’
- damages payable by LU Simon to Owners apportioned between Gardner Group: 33%, Elenberg Fraser: 25%, Thomas Nicolas: 39% and Gubitta: 3%.
- \$12.7 million claimed: \$4.8M agreed, \$8M not agreed and yet to be resolved
- “... reasons should not be read as commentary generally on the safety or otherwise of ACPs and their uses” ... many findings informed by the particular contracts between the parties and events occurring in the course of the Lacrosse project that may or may not be duplicated in other building projects.”

14 March: Yuanhong Jinjiang Community residential building fire

Sydney researchers develop a computer program for fire risk assessment of combustible exterior cladding

Australian National Testing Laboratory – Exelplas - now offering 24 hrs testing service for testing and assessing combustible cladding



ISSUES

Remediation costs

- CRAs not appear to be working
- costs fall on owners
- Lacrosse potentially paves way for recovery against building practitioners
- claims more than 10 years post Occupancy Permit out of time
- Dame Judith Hackitt, head of UK inquiry into Grenfell:
 - “Governments could hold others to account or fund remediation themselves but would likely have to at least partially fund rectification
 - Government will have to provide some sort of support, undoubtedly
 - You can’t leave people in buildings where they don’t feel safe.”
- RMIT University urban planning expert Michael Buxton: “state governments should use some of the revenue raised through property taxes to fund a state-wide cladding rectification program. Last year's state budget papers show Victoria is forecast to earn more than \$10 billion in revenue from land tax and stamp duty this financial year. "The Government has botched this."
- Fire engineer, Dr Jonathan Barnett: consequences of governments’ failure to act is clear ... 10 years of construction of buildings that may have these non-compliances and now the resultant costs”.
- The revelations would force governments to pay for rectification, one industry figure said.

Property values

- Brokerage Credit Suisse:
 - cladding issue looming as a risk for the listed real estate investment trusts.
 - “While liability risk is shifting away from REITs to construction companies, we expect disruption as this is resolved in the courts,”
 - “In the meantime, moderate risk to the value of (property) assets exposed if potential buyers view a building to be dangerous and needing costly remediation in the future but with inherently uncertain liability for the costs.”

Insurance

Insurance Council of Australia:

- non-compliant products 'critically undermines the ability for an insurer to rely upon the safety and performance of the building' ... directly impacts insurer's ability to establish risk exposure which influences the setting of insurance premiums
- some insurers would now refuse to cover buildings and apartments made with the materials
- Many insurers will insure but may apply stringent conditions on coverage, or very high premiums or excesses

Australian Institute of Building Surveyors (AIBS) expressed concern surrounding professional indemnity insurance

More class actions?

- William Roberts Lawyers: more importers and manufacturers of other similar products could also be targeted by similar lawsuits

Building practitioner insolvency

- Claims could bankrupt builders and other building professionals
- Roscon: average cost to replace cladding on most apartment blocks \$3-10 million. Builders used to \$0.5-1 million in defect claims. "... could lead to large builders going into liquidation"
- 2018, Hickory subsidiary - H Buildings - into administration two days before a scheduled VCAT claim by apartment owners over cladding was due to begin. Facing up to 13 claims for rectification works, four re-cladding (total over \$30m). First major builder to go into administration since the audit.
- January 2019, NSW building certifier Watson Oldco put a business unit into administration, avoiding a possible raft of claims over combustible cladding.

More regulatory reform?

Barbaro and Marfella, authors of “Back to the Past – Future Challenges for Better, Safer, Building Design and Construction”, suggest:

- regulatory reform to achieve national consistency
- resolve the “contradiction” inherent in the prescriptive versus performance outcomes approaches at the core of the NCC, thereby balancing public and private interests
- two tiered “system based” approach to building regulation premised on the redefinition of “ ‘acceptable risk’ in light of the new world we live in” – requiring higher standards be met in “the methods and materials used for construction”.
- “test ought to be innovation that ensures public safety and compliance, not merely speedy construction and the reduction of building costs”