

Aluminium Panel Cladding: The Saga Continues

Hello again,

This is our 3rd newsletter. Today we stay with the burgeoning problem of ACP cladding.

Last time we looked at the Victorian Court of Appeal decision in the Lacrosse matter. This time we are looking at the latest approach, this time from NSW, to dealing with that problem: The Hoffman Report”.

The report shows that, even with years of consideration around the work on this issue, we are nowhere near a conclusive view of the nature and extent of the ACP problem. It looks as though this issue will be with us for a long time to come.

Please enjoy the article and participate in the debate. If you have any inquires or want to add – please give me a call or send us a note.

On 30 March 2021, the NSW Cladding Product Safety Panel (CPSP) delivered its First Report, the Hoffman Report. The report could well be as metaphorically incendiary as the panelling itself.

The CPSP is described as an expert panel convened to support the NSW ‘Cladding

Taskforce’ playing the role of advising the NSW Government on ‘suitable products & systems to remediate combustible cladding’. It fills an adjunct role to the facilities & organisations involved in managing the NSW Government’s ‘Project Remediate’ – directed to assisting in rectifying those buildings that include combustible aluminium composite panel (ACP) cladding.

The panel adopted a ‘very low risk approach’ to the question of replacement products for defective ACP. It ultimately reached the surprising conclusion that the threshold for what it regarded as those panels that were too dangerous and required replacement as being those with greater than 8% combustible material mass. And further that, with some insignificant exceptions, all such cladding needs to be removed and replaced.

The product ban of 10 August 2018, issued pursuant to the *Building Products (Safety) Act 2017*, dealt with the prohibition of ACP ‘with a core comprised of greater than 30% polyethylene (PE) by mass’. This is the standard to which people have been

working, and remediating, since that time, almost 2 ½ years now.

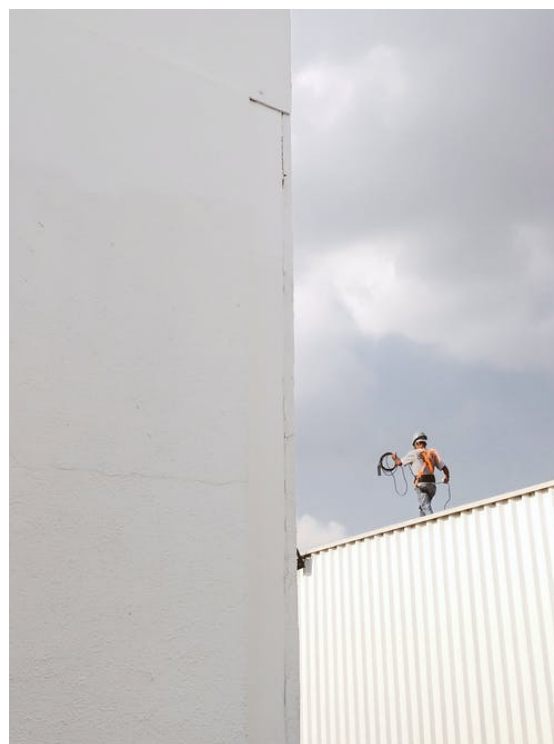
The CPSP report contemplates its use by local councils to issue ‘fire safety orders’ under the *Environmental Planning & Assessment Act 1979* reflecting its recommendations, effectively compelling owners and others to remove ACP that does not meet its standards, even though that same panelling is not subject of the ACP Product Ban. The Report accepts that its recommendations ‘exceed’ the requirements of the Building Code of Australia (BCA).

The report notes that, in issuing fire safety orders, Councils are not constrained by the requirements of the BCA. Effectively, it says that Councils can issue fire safety orders compelling compliance with this higher standard. One may ask: what council, with the Hoffman report on its desk, will be game enough not to issue such fire orders, and risk criticism?

There are a range of practical and other problems, though. Firstly, the measured and objective basis for the assumptions underlying the Hoffman Report: about risk and what is comprised by a ‘very low risk’ approach, and the justification for whatever that might mean, is not set out or otherwise justified in detail in the report. Those key elements are asserted, but little more.

Secondly, exactly how the 8% but not some other figure, is not adequately justified either. Thirdly, given its present circulation and use, it is not clear exactly what status

and effect are expected for the Hoffman Report. The Report acknowledges that the CPSP ‘does not have a regulatory or standard setting role’, that its conclusions are based upon the assumptions it has identified, without these being justified, and that its recommendations go beyond current thinking, and the ambit of the product ban.



Obviously, the number of buildings that would be affected by an 8% ACP threshold will be much greater than those falling within the 30% threshold identified by the ban. Meaning that the extent of the ACP problem in NSW will be much worse than is currently identified.

More importantly are the twin facts that: a large number of buildings have already had their 30% ACP cladding products

addressed, at large expense, where outcomes of that remediation work will now have to be revisited – at potentially catastrophic cost. And further, since the 8% ACP recommendation goes beyond the product ban and the scope of the BCA, the unfortunately apartment owners will very likely have to bear the cost of this rectification themselves – because it might be said that the builders / developers are not liable for the need to comply with a fire order that goes beyond the contemplation of the BCA.

NSW faces the nightmare that rectification of the ACP problem, by wholesale removal, may become so expensive, that the process becomes a money pit – meaning that too many residential apartment blocks will not be able to afford to replace all the 8% ACP without sinking into a debt cycle. The result could well be that there is less ACP replacement than even there would have been with the 30% ACP threshold – making a bad situation worse for everyone.

One can well see that the CPSP meant well with the Hoffman Report. And there is no suggestion that if the situation is really as the Hoffman Report suggests, that the point should not be promptly and publicly made. Of course it should. These kinds of problems only get worse when they are not properly faced and called for what they are.

However, given that the ACP problem is so great, and is charged with such emotion, it might have been better for the Hoffman Report, as it has been circulated, and so as

it is presented to the public at large, to have included a more thorough range of its sources, its reasoning, & its justifications. And it might have also included some suggestions as to how the fallout of the report might have been accommodated.

The tragedy of the ACP saga began with shortcomings in information about the product. These led to errors being made in identifying risk. Surely the solution should be driven by the circulation and use of thorough, objective, and reasoned analysis and information, so that whatever is presently bad for the NSW consumer public and the building industry may not necessarily become worse.



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