

30 August 2017

Our ref: David Bannerman
Your ref: The Responsible Officer

Principal: **David Bannerman**
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The Hon. Matthew John Kean MP
Minister for Innovation and Better Regulation
25-29 Hunter Street
Hornsby NSW 2077
BY EMAIL

Dear Minister,

SUBMISSION ON REFORMS AND THE HOME BUILDING ACT 1989 (NSW) TO ADDRESS EXTERNAL ALUMINUM CLADDING

Our office has made many submissions about the inappropriate amendments in respect of statutory warranties in the *Home Building Act 1999* (NSW) (**HB Act**) effective on 1 February 2012.

You should now be aware the Supreme Court has taken the narrow definition of the term “structural defects” (see *AAI Ltd t/as Vero Insurance v Kalnin Corporation Pty Ltd; Kalnin Corporation Pty Ltd v AAI Ltd t/as Vero Insurance* [2017] NSWSC 548).

Anticipating the Courts may apply the narrow definition of “structural defects” to the new definition of major defects, it is obvious that items such as defective aluminum cladding will only attract a two year statutory warranty because they are not a major element such as waterproofing, fire safety system or a load-bearing structural component in the building.

Section 18E of the HB Act identifies a major defect as:

- (a) *a defect in a major element of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these), and that causes, or is likely to cause:*
 - (i) *the inability to inhabit or use the building (or part of the building) for its intended purpose, or*
 - (ii) *the destruction of the building or any part of the building, or*
 - (iii) *a threat of collapse of the building or any part of the building, or*
- (b) *a defect of a kind that is prescribed by the regulations as a major defect.*

A major element is defined in section 18E of the HB Act as:

major element of a building means:

- (a) *an internal or external load-bearing component of a building that is essential to the stability of the building, or any part of it (including but not limited to foundations and footings, floors, walls, roofs, columns and beams), or*
- (b) *a fire safety system, or*
- (c) *waterproofing, or*
- (d) *any other element that is prescribed by the regulations as a major element of a building.*

External aluminum cladding does not constitute a load bearing component of the building. Furthermore the HB Act and the *Home Building Regulation 2014 (HB Regulation)* do not define fire safety systems.

You can expect the Courts to continue to adopt a narrow approach to the amendment of the definition and when considering the definition of a fire safety system, consider the items specifically identified in Fire Safety Statements, such as sprinklers, fire collars and fire dampers to be fire safety systems. If this approach is followed, the cladding will not be considered a fire safety system.

There is no definition of fire safety system in the HB Act or *Environmental Planning and Assessment Regulations 2000 (EPAR)*. However, there is a definition of fire safety requirement in the EPAR, which adopts the definition of a fire safety system as defined in the Building Code of Australia (the **BCA**), now incorporated in the NCC.

The NCC defines fire safety systems as:

Fire safety system means one or any combination of the methods used in a building to—

- (a) *warn people of an emergency; or*
- (b) *provide for safe evacuation; or*
- (c) *restrict the spread of fire; or*
- (d) *extinguish a fire,*

and includes both active and passive systems.

The definition in the NCC excludes external aluminum cladding as a fire safety system, as it is not used “in a building”.

Even if the Court considers the definition in the NCC to include external aluminum cladding, it may also be reluctant to apply the definitions of the NCC when construing the HB Act.

We note the Minister's ten point plan as referenced in July 2017 failed to address this inappropriate scenario.

We note section 18E of the HB Act allows for the HB Regulation to prescribe further items of major elements in a building. The Minister should change, or if you are already of the view, clarify the position through amendment of the HB Regulation to include cladding as a major element of a building.

We suggest your office without delay amend the HB Regulation to include noncompliant aluminum cladding and rule this retrospective in the interests of all owners.

Given your stated position that external cladding already falls within a major element of a building under s18E of the HB Act, the prescription of external cladding will not have any effect on the Home Building Compensation Fund as you claim it is already included. However, it will clarify the issue and remove the Court's ability to interpret the Act contrary to your intended position, to the detriment of consumers.

This will greatly assist consumers and any homeowners seeking to address this issue with builders, developers and the Compensation Fund.

We have consulted two very experienced fire engineers, who will be happy to comment on this and their details are below.

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We are happy to meet with you to discuss any of the issues in our submission or generally.

Yours faithfully
BANNERMANS



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