

# NSW First Cladding Decision

## NSW's First Cladding Decision

The recent Tribunal decision in *SP92888 v Taylor Construction Group and Frasers Putney* [2019] NSWCAT has held that combustible external cladding installed on residential buildings is a major defect for the purposes of statutory warranties under the *Home Building Act 1989* (the **HBA**) and will have significant ramifications on owners of residential buildings wishing to explore cladding as a defect.

The Tribunal decision is analogous to and cites the Victorian decision in *Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property)* [2019] VCAT 2 286 which involved the fires in the Lacrosse Building.

## Background

The Building Code of Australia (**BCA**) contains specifications that cladding cannot be combustible and be for the purpose for which they are intended.

Under section 6.30 the *Environmental Planning and Assessment Act 1979*, an interim occupation certificate cannot be issued unless the works the subject of the certificate are compliant with the BCA.

The building subject of the dispute was classified as Type A under the BCA, and is required to have non-combustible external walls. The BCA requires the attachments to the external wall do not adversely affect the fire resistance of the external wall.

The Owners Corporation allege a "Biowood" cladding which was installed on the external walls did not comply with the specifications of the BCA and was in breach of the statutory warranties.

Recent amendments to the BCA have also abolished exemptions which permitted certain types of combustible cladding. At the time of the issue of the occupation certificate, the Biowood panels were certified as BCA compliant because they passed an alternate test under AS 1530.3 for fire spread. However, both experts agreed the Biowood was combustible.

## Contentions

The builder and developer were reluctant to acknowledge combustible cladding as a building defect, on the basis that at the time of approval, the relevant occupation certificates would have approved the use of the buildings as long as the preconditions to the certificates have been met.

The builder and developer argued the interim occupation certificate created irrefutable presumptions of law that the Biowood panels were suitable and that the Tribunal and the Owners Corporation were bound by the certificates.

The builder and developer also relied on competing expert evidence, which argued the Biowood cladding itself did not present an undue risk for fire spread because the heat produced from a burning panel was insufficient to set the other panels alight.

### **Decision**

The Tribunal did not accept the argument it was bound by the presumptions made in the issue of the interim occupation certificate.

The Tribunal also found the panels posed significant risk to the building due to its combustibility, the rate of fire spread and other fire safety measures implemented in the building.

On this basis, the Tribunal found the Biowood panels did not meet the specified standards required under the BCA, and was not fit for its intended purpose because it would decrease the fire resistance rating of the external walls of the building.

Therefore, the Tribunal found the builder and developer breached the statutory warranties at section 18B(1)(b) of the HBA.

### **Ramifications**

The Tribunal adopted a “common sense” approach in considering the purpose and type of building when determining the use of the Biowood constituted breach of the statutory warranties.

The decision confirms that an individual assessment of whether the panel itself was compliant with the relevant codes and standards will not be a sufficient defence against proceedings for breach of statutory warranty, and the owners of similar buildings should be aware of their rights when dealing with builders and developers may deploy these excuses as defences.

**Prepared by Bannermans Lawyers**

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