

NSW Supreme Court Clarifies Cladding Compliance, Design Responsibility and Insurance Recovery

The Supreme Court of New South Wales has delivered an important decision for owners corporations, developers, builders, and insurers dealing with combustible cladding claims.

In *The Star Entertainment Sydney Properties Pty Ltd v Buildcorp Group Pty Ltd trading as Buildcorp Interiors* [2026] NSWSC 27, the Court considered:

1. whether aluminium composite panel (ACP) cladding complied with the Building Code of Australia (BCA).
2. who bore responsibility for any non-compliance; and
3. whether insurance responded to the resulting loss.

The decision confirms that combustible cladding is not inherently defective and underscores the importance of contractual risk allocation and insurance arrangements in the resolution of construction defect disputes.

The Legislative Framework

Under the *Environmental Planning and Assessment Act 1979* (NSW), building works must comply with the version of the BCA that is in force at that time. A key issue in the proceedings concerned former BCA clause C1.12, which required certain external walls of Class 2–9 buildings to be constructed using non-combustible materials.

Importantly, the clause also recognised exceptions, including for certain "attachments" to external walls. The dispute centred on whether the ACP cladding formed part of the external wall itself or could properly be characterised as an 'attachment'.

The BCA also permitted compliance through an Alternative Solution pathway, allowing a building product or system to be used where it could be demonstrated that it achieved the required level of performance, even if it did not satisfy the Deemed-to-Satisfy provisions.

The Decision

The Star Entertainment Sydney Properties sought to recover \$4 million from Buildcorp in relation to three (3) remediation projects undertaken between 2014 and 2016.

The Court reached different conclusions in relation to each project:

- **Project 1:** The claim failed because Buildcorp did not carry the relevant design responsibility under the contract.
- **Project 2:** The claim failed because the ACP cladding was capable of falling within the BCA's attachment exception and was therefore compliant.
- **Project 3:** The owner succeeded because the cladding did not comply with the BCA and no valid Alternative Solution had been established.

Is Combustible Cladding Automatically Defective?

No. One of the most significant aspects of the judgment is the Court's confirmation that the presence of combustible cladding does not, of itself, automatically amount to a breach the BCA.

Relying extensively on expert evidence from architects, fire engineers and façade specialists, the Court accepted that, in certain circumstances, cladding may be characterised as an attachment to an external wall rather than forming part of the external wall itself.

The decision reinforces the fact specific nature of cladding disputes. Whether combustible cladding complies with the applicable BCA, will depend on a range of factors, including the applicable BCA provisions, the building's design, the available compliance pathway and the supporting expert evidence.

Design Responsibility Remains Critical

The decision also demonstrates that liability in cladding disputes often depends on contractual risk allocation as much as it does on technical compliance.

A significant portion of the owner's claim was unsuccessful because responsibility for the relevant design issues had not been allocated to the builder under the contract.

For builders, developers and owners corporations, the case serves as a reminder that contractual provisions dealing with design responsibility can significantly affect the outcome of multimillion dollar defect claims.

Insurance Implications

The Court also considered whether the installation of non-compliant ACP cladding constituted "property damage" for the purposes of a liability insurance policy.

Justice Rees held that the installation of combustible ACPs physically altered the buildings by rendering them unsafe and unsuitable for their intended use. That physical alteration, together with the remediation work required to rectify the issue, was sufficient to constitute property damage under the policy.

Importantly, the Court confirmed that property damage is not confined to visible deterioration or structural failure. A building may suffer property damage where the incorporation of a defective product compromises its safety, performance or functionality.

The decision is consistent with recent Federal Court authority recognising that defective building products can give rise to compensable property damage when incorporated into a larger structure.

Why This Decision Matters

For many years, owners, builders and developers have grappled with the question of whether façade cladding forms part of an external wall or can be characterised as an attachment for the purposes of the BCA.

This decision provides important guidance and highlights three (3) key issues that continue to shape the outcome of cladding disputes:

1. Technical compliance, supported by expert evidence;
2. The contractual allocation of design responsibility; and
3. The availability of insurance cover for resulting loss or damage.

While the attachment exception may be critical in determining whether cladding is compliant under the BCA, liability will often turn on broader considerations, including who assumed responsibility for the design, specification and certification of the cladding system, and whether any resulting loss is covered by insurance.



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How We Can Help

We regularly advise owners corporations on cladding disputes, building defects, statutory warranty claims, fire safety compliance, insurance recovery and construction related contractual issues.

If your building is affected by combustible cladding, requires remediation works, or is the subject of a defect claim, early legal advice can be critical. We can assist in assessing compliance obligations, identifying potential avenues of recovery, allocating responsibility among project participants, and navigating complex insurance issues. Please contact us on 02 9929 0226 or

enquiries@bannermans.com.au.

Key takeaways

- The NSW Supreme Court ruled that combustible cladding is not automatically defective under the BCA.
- Contractual risk allocation significantly impacts liability in cladding disputes.
- The decision underscores the importance of expert evidence in determining compliance with building regulations.
- Insurance implications arise from whether non-compliant cladding constitutes 'property damage'.

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12 June 2026



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