

Cladding appeal decision provides further clarity about the ‘attachment’ exception

Taylor Construction Group Pty Ltd v Strata Plan 92888 t/as The Owners Strata Plan 92888

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AT A GLANCE

- A recent decision to uphold a NCAT appeal decision has provided a useful judicial articulation of some of the relevant clauses from the Building Code of Australia regarding cladding compliance.
- The decision provides further clarity about the ‘attachment’ exception which, in certain circumstances, permits the use of combustible cladding.
- The decision also endorsed the Tribunal’s approach that a material’s compliance with Specification C1.10 will not necessarily mean the material can be used as an ‘attachment’.

BACKGROUND

A threshold issue that will arise in any combustible cladding case is whether the cladding in question has been used in a way that complies with the Building Code of Australia (BCA).

It is well understood that there can be a number of different pathways to BCA compliance. Navigating those pathways can be tricky and, as the decision in *Lacrosse* illustrates, especially so where combustible cladding is involved.¹

One pathway that is routinely explored by litigants in cladding cases is the ‘attachment’ exception which, in certain circumstances, permits the use of combustible cladding as a finish, lining or attachment to a building element.

THE DECISION

The decision in *Taylor* regarded an appeal from a decision of an Appeal Panel in NCAT. Taylor Construction Group Pty Ltd (Taylor Construction) was the builder of two multi-storey residential buildings in Ryde, NSW.

¹ *Owners Corporation No. 1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property)* [2019] VCAT 286

It was alleged that Taylor Construction had constructed the buildings using ‘Biowood’, a combustible material made from 70% reconstituted timber and 23% PVC, as architectural attachments to the external walls in a way that did not comply with the BCA.

The buildings in question were required to be of Type A construction and, as such, their external walls were required to be non-combustible.

However, the issue arose as to whether the ‘Biowood’ had been used as an ‘attachment’ in a way that attracted an exemption from the requirement that the external walls be non-combustible under clause 2.4(a) of Specification C1.10 of BCA 2014.²

Clause 2.4(a) permits the use of combustible ‘attachments’ in certain prescribed circumstances, including that the attachment “not otherwise constitute an undue risk of fire spread via the façade of the building”.

In determining the appeal, Henry J considered the approach for determining whether a material [did] “not otherwise constitute an undue risk of fire spread via the façade of the building”, finding:

- “the determination as to whether the risk is undue (or unwarranted or excessive) involves an evaluative task that requires consideration of the circumstances and context in which the Biowood combustible cladding is used...”
- the evaluative assessment would involve “ensuring the safety of people from fire, the BCA requirement that external walls in Type A buildings are to be constructed using non-combustible material, the possibility of fire spread eventuating, and the gravity of the risk from such use”, and
- there is relevance in the ignitibility of the material, rate of fire spread, material location and the building’s safety features.

² Cl 2.4(a) of Specification C1.1 was removed in the 2016 Amendment 1 version of the BCA.

As such, her Honour described the approach as a multi-factorial one.

Importantly, her Honour endorsed the Tribunal’s approach that a material’s compliance with Specification C1.10, for example AS1530.3 (the test for ignitibility, flame propagation, heat release and smoke release), will not necessarily mean the material can be used as an attachment under clause 2.4(a).

IMPLICATIONS FOR THE INDUSTRY

In our view, this approach is consistent with an interpretation of the BCA focusing on the text of the BCA and recognising it “as a formal document designed to define standards, for the promotion of public safety, in the construction of buildings”³.

It is also consistent with the principles espoused in the International Fire Engineering Guidelines which, in many cases, require a holistic approach when undertaking a fire engineering assessment of a building.

There may be some debate among building surveyors/certifiers and fire engineers about whether the starting point for the evaluative assessment is one where there is a fire already in existence, or whether what needs to be considered is the possibility of fire ‘occurring’ and spread ‘eventuating’. Her Honour’s decision did not provide any specific guidance on this issue.

³ As per the dicta of Lindsay J in *The Owners – Strata Plan No 69312 v Rockdale City Council & Anor* [2012] NSWSC 1244

Need to know more?

For more information please contact us.



Marcus Saw

Special Counsel, Melbourne

T: +61 3 9116 7827

E: marcus.saw@wottonkearney.com.au



Nick Lux

Partner, Melbourne

T: +61 3 9604 7902

E: nick.lux@wottonkearney.com.au



Andrew Brennan

Partner, Melbourne

T: +61 3 9604 7933

E: andrew.brennan@wottonkearney.com.au



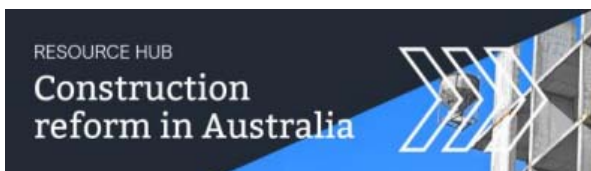
Robert Finnigan

Partner, Sydney

T: + 61 2 8273 9850

E: robert.finnigan@wottonkearney.com.au

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