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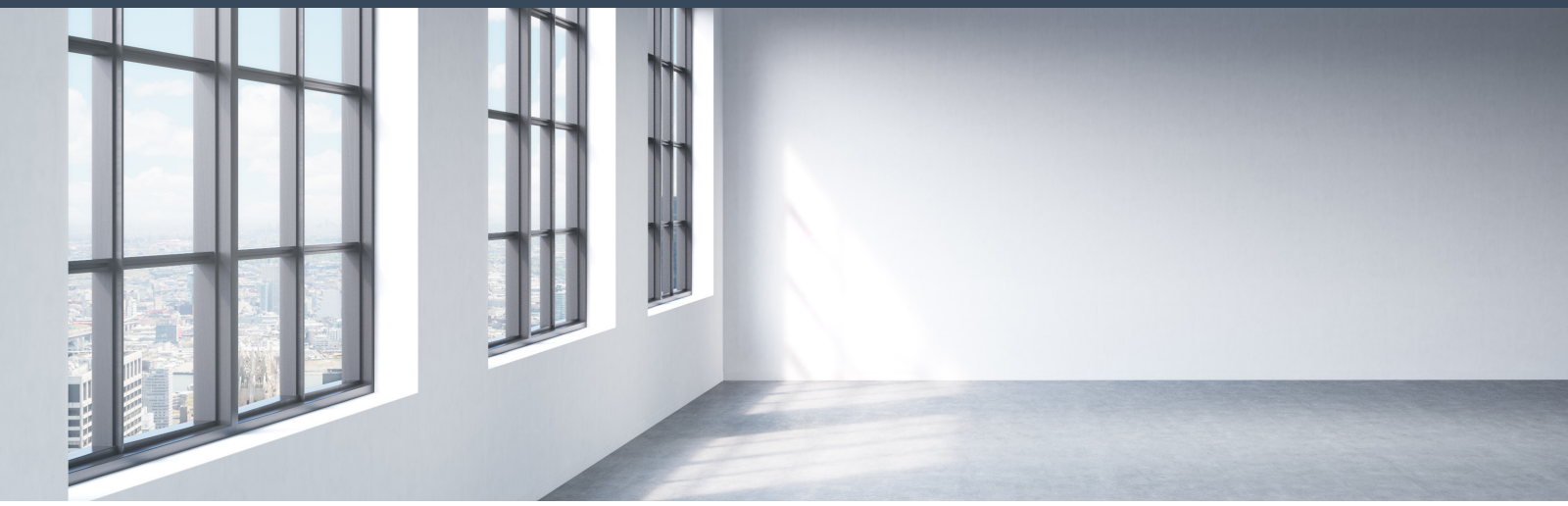

Building and Other Legislation (Cladding) Amendment Regulation 2018

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The Grenfell tower disaster in Britain last year has (quite rightly) focused attention on fire risk in buildings.

Whilst the fire risk issue may be common throughout the building and construction industry in Australia, each state individually takes responsibility for identifying solutions and implementing appropriate legislation.

As reported by the ABC's Josh Bavis in a post on 17 May 2018, apart from the Queensland Government spending millions of dollars to make government buildings safer, privately owned buildings (including about 1,200 residential buildings) will now also need to be assessed.

The primary aim of the new laws, passed as an amendment to the *Building Regulations 2006* and which came into effect on 1 October 2018, will be to introduce a requirement for privately owned buildings to undergo rectification works where a fire risk is identified.

These have important ramifications for buildings in community titles schemes.

A private building that has combustible cladding forming part of, or attached or applied to, an external wall or another external part of the building other than the roof will be an 'affected private building', for the purposes of the new laws.

There are several issues to consider, including when the building development approval was issued and what type of construction applies. Approvals issued after 1 January 1994 but before 1 October 2018 and buildings of type A or type B construction (buildings higher than 3 or more storeys) will be caught.

The new legislation is to be rolled out in three stages of compliance, as follows:

> **Stage 1** – the buildings must be registered and the Combustible Cladding Checklist (Part 1) must be completed;
>
> **Stage 2** – the building professional assessment of compliance is to be completed along with the Combustible Cladding Checklist (Part 2);
>
> **Stage 3** – a fire risk assessment is to be conducted by a fire engineer, with the Combustible Cladding Checklist (Part 3) to be completed pending the results of the assessment.

The risk assessment involved in Stage 3 will only be necessary where a building is an 'affected private building', as defined earlier. That assessment will ultimately determine whether rectification works will need to be carried out. Stage 1 must be completed by 29 March 2019, Stage 2 by 29 May 2019 and Stage 3 by 27 August 2019, with the final report to QBCC by 3 May 2021.

There is still a lot to learn about how this legislation will work and the effects it will have on bodies corporate.

Meeting requirements on time is obvious and should not be ignored.

The biggest issue, of course, will be, if rectification is required, who will bear the rectification costs. Clearly that will be a body corporate responsibility (bearing in mind the statutory obligations applying to maintenance and repair of the building in a community title scheme) but then the question will arise about whether there is a right to recover any of those costs from those involved in the construction of the building.

Hoary questions like limitation periods and standards of work and specifications applicable at the time will come to the fore.

The consequential effects of this legislation are far-reaching and beyond the obligations of bodies corporate and allocation of risk and responsibility.

Under regulation 116ZB, if there is a body corporate roll kept for the building that is subject to the legislation, the owner must give a copy of the building fire safety risk assessment to each lot owner and each lease-hold interest holder for a lot in the building. If a building fire safety risk assessment for an owner's private building states the building is an affected private building then an affected private building notice must be displayed.

This, in turn, will have the potential to seriously impact the value and saleability of lots in affected private buildings.

Quite apart from that, lot owners should not ignore the obligation imposed currently under section 223 of the BCCMA. Disclosure obligations include disclosing to buyers latent or patent defects in common property that the seller is aware of or ought to be aware of.

The door will be open to the risk of significant disputes between sellers and buyers in circumstances where a building has non-conforming cladding and where that is not disclosed in a sale contract by the seller.

In circumstances where bodies corporate ignore obligations to comply with the new cladding legislation, litigation is more likely inevitable rather than hypothetical.

For body corporate managers, there is little comfort in knowing that under regulation 16ZO (in proceedings for an offence against part of the new laws) an act done or omitted to be done for an owner by an agent of the owner within the scope of the agent's actual or apparent authority, is taken to have been done or omitted to be done also by the owner, unless the owner proves the owner could not have, by the exercise of reasonable diligence, prevented the act or omission.

Body corporate managers are no doubt working hard to understand how the new legislation impacts upon body corporate management responsibilities and there will be the practical issue of who will actually need to complete the relevant checklist for Stage 1 (and under what authority).

Summary

Vigilance and diligence, as always, is the key. If you do not understand what this new legislation means, seek advice. Many law firms and body corporate managers have already published material to help you. Importantly, if you think there is a likelihood that rectification works may be required for your building, start budgeting to pay for rectification and talk to your insurer. Make sure you hold a committee meeting to address the body corporate's new legal obligations under this legislation.

For assistance or more information about these matters, please contact Michael Byrom.

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