Mills Oakley

Combustible cladding and building reform update

Liability apportioned for combustible cladding: VCAT's Lacrosse judgment will impact all building professionals

By Scott Higgins, Partner, Lucy Hancock, Associate and Thomas Mangan, Lawyer

In November 2014, a 23 storey mixed-use building in Docklands, Melbourne **(the Lacrosse Building)** caught fire, which spread rapidly up the external face of the building, resulting in a substantive claim for damages in excess of $12 million.

In the first test case regarding liability for the installation of combustible cladding, the Victorian Civil and Administrative Tribunal (**Tribunal**) has determined that the use of aluminium composite panels (**ACPs**) with a highly combustible 100% polyethylene (PE) core to clad the façade of the Lacrosse Building did not comply with the Building Code of Australia (**BCA**)**.**

An appeal is highly likely and the decision is not binding on Courts in other jurisdictions. Caution must also be taken given the specific facts and contractual clauses that were pertinent to the finding. Nonetheless, the case, and particularly the underlying rationale for the decision, has wide-ranging implications for industry professionals. It presents a first look by the judiciary into a problem that is far more widespread than the Lacrosse Building and presents the best available guidance at this stage as to how these matters may well play out for owners seeking recovery of rectification costs, and for the potential liability of building professionals (and their insurers).

In this article, Mills Oakley explains the key issues for industry stakeholders.

The decision

The 211 applicants (the Owners) commenced civil proceedings in the Tribunal against the builder (**LU Simon**). Subsequently, a number of parties were joined to the proceedings, including the building surveyor (**Gardner Group**), the architect (**Elenberg Fraser**), the fire engineer (**Thomas Nicolas**), the superintendent (**Property Development Solutions**), the primary occupier of the flat where the fire originated (**Gyeyoung Kim**) and Jean-Francois Gubitta, who ignited the fire with an unextinguished cigarette butt.

Ultimately, LU Simon was held primarily liable to pay damages to the Owners, however it was successful in passing through that liability to its consultants in the following proportions:Thomas Nicolas (fire engineer) – 39% liability

- Gardner Group/building surveyor – 33% liability
- Elenberg Fraser (architect) – 25% liability

Mr Gubitta's liability was held to be the remaining 3% of the total, but no order for him to pay the amount was made, leaving LU Simon to cover that portion of liability to the Owners.

Highlights and takeaways from the decision

The 227 page judgment delivered by His Honour Judge Woodward (Vice President) is a captivating read and it shines a light on many of the issues that are presently perplexing industry stakeholders, regulators and policy makers.

We set out below some of the highlights of the decision and our thoughts on the wider industry implications.

All ACP is "combustible"

- Woodward J noted that the 100% polyethylene (PE) core *"has a calorific value of 44 MJ/kg, which is similar to petrol, diesel and propane*".
- The CSIRO testing "*established unequivocally (and dramatically) that the Alucobest panels [which were 100% PE core] was deemed combustible according to the test criteria specified in clause 3.4 of AS1530.1.*"[1]
- However, it was also uncontroversial between the parties that "*all ACPs (ignoring Alucore) are combustible (in that they would fail the test under AS1530.1)*"[2]
- Therefore, in order for any type of ACP with a polyethylene component to its core to be permissibly used in an external wall of Type A construction, in compliance with the BCA either:
    - an acceptable alternative performance-based solution would need to be implemented (none was implemented for the Lacrosse – so this option was not considered in the judgment – this is discussed in more detail at the end of the article); or
    - a DTS concession as to non-combustibility must be found.

The DTS concessions do not apply to ACPs

- Perhaps unsurprisingly, given the context of the BCA provisions and their overarching objectives in Section C regarding elements to "avoid the spread of fire"[3], the Tribunal rejected the invitation to adopt a very narrow view of the DTS concessions. Instead it concluded that:

[1] At [289]
[2] At [246]
[3] At [263]

- The ACP was a "bonded laminated material",[4] but section C12.1(f) also required each of the laminates (including the PE interlayer) to be non-combustible;
- the ACP cladding fixed with studwork and providing weatherproofing and acoustic benefits, was not a decorative "finish" (like a "paint, varnish, lacquer or similar finish"[5] and the concession at clause C2.4 of specification C1.1 was therefore not available.

- Whilst the Tribunal pointed out that this matter turned on its facts and related to the use of ACP with a 100% polyethylene core, there is no reason to believe that the above findings would not apply in the same way to all ACPs regardless of the amount of PE contained within the core.
- It follows from this decision (if upheld on any appeal and if followed in other jurisdictions) that, in respect of high-rise buildings with external walls that are clad in ACP (even with a lower ratio of PE in the core), the DTS provisions of the BCA are unlikely to be available.

This means that, presently, there is a significant likelihood of non-compliance with the BCA unless there is an alternative performance-based solution that has been implemented and is considered, at law, to be acceptable.

It may well be that buildings clad in ACPs with a lower component of polyethylene in the core are more likely to be capable of satisfying an alternative solution, but that will depend upon a number of factors. Performance-based solutions are, by their nature, more subjective and for those buildings clad in ACPs with a lower PE composition, this is likely to be tested in litigation already underway or to be commenced across the country.

In the meantime, a practical problem that is presenting itself, however, is that insurers are reluctant to insure against buildings with any ACP (regardless of PE levels) or to insure the design, engineering or certification work of those building professionals that are approving such measures. Therefore the more nuanced position regarding certain ACPs being capable of compliance with the BCA via alternative solutions (which may yet be upheld in Courtrooms this year) is, practically, becoming a more difficult option to implement for many owners.

[4] At [257]
[5] At [277]

It is also worth noting that in His Honour's consideration of whether the relevant professionals had breached their contractual obligations and common law duties of care non-compliance with the BCA was a factor, but it was not the only factor. The use of 100% PE core ACP (as opposed to ACP with a lower ratio of PE) was highlighted throughout the decision as being relevant for the findings that each party breached their respective contractual obligations.

Breaches of absolute obligations by LU Simon, but no want of reasonable care

- The Owners were successful in seeking complete recovery from LU Simon for breaches of statutory warranties that are implied into domestic building contracts with respect to the suitability of materials, compliance with legislative requirements (in particular the BCA) and ensuring fitness for purpose.
- Under the proportionate liability regime, if the above breaches related to a failure to take reasonable care then LU Simon's liability to the Owners would have been diluted by reason of any contributory negligence of the Owners or the appointment of that liability between other concurrent wrongdoers.
- However, the Tribunal was able to ensure that Owners received judgment wholly against LU Simon by reason of its finding that the above warranties were not qualified or limited by any obligation to use reasonable care and skill. Instead they were considered 'absolute'. LU Simon either complied or it didn't.
- This was particularly useful because, other than the surveyor, the Owners would likely have struggled to show a direct duty of care owed by the other concurrent wrongdoers – a necessary precondition if there was no contractual or statutory 'line of sight' to these parties.

An example of effective contracting models

- Whilst many will point to the mere existence of litigation as a failing of the system, the ultimate decision in favour of the Owners, highlights the effectiveness of the design-and-construct (**D&C**) model as an effective transfer of risk wholly to a head contractor (and assisted by the statutory warranties) allowing the Owners in this case to obtain judgment wholly against LU Simon for their loss.

- It is also an example of effective contracting down the supply chain by reason of the head-contractor, LU Simon then wholly transferring its own risk down to other relevant building professionals using well-documented consultancy agreements.
- LU Simon was able to recover almost all of its liability from the architect, certifier and its fire engineer by reason of their breaches of the relevant contracts.
- As a legal tool of risk-transfer this case presents an excellent example of the model working extremely well and the same lessons apply for developers of commercial buildings also. It highlights the need by head contractors for effective contracting models and good drafting in order to effectively pass through all risk that it accepts under D&C contracts to those specialist contractors (regardless of whether they were first engaged by the Principal).
- As set out in the next section, the problem lay not with the contracting model itself, but with the naïve or misguided approach of the relevant building professionals who, in the Tribunal's opinion, fundamentally misunderstood their obligations.

Consultants misunderstood the nature of their contractual obligations

The Architect

- As far as the Architect was concerned, the judgment reveals the Tribunal's surprise and frustration at the preoccupation of the Architect's legal team with LU Simon's design obligations to the Owner under its D&C contract to the exclusion of focusing on the Architect's own, very specific, obligations of design under its consultancy agreement.
- In reference to evidence led by the architect's expert witness, His Honour offered this rather stinging rebuke:

> *"For example…in oral evidence (after discussing "the way the industry works") and being asked about the role of the actual contract, he responded: "The contract's certainly important – the contract, I don't believe, can redefine basic professional roles".[T2221] The lawyers' response to this is, of course, yes it can."*[6]

[6] At [485]-[486]

- The approach in this instance was consistent with common practice whereby architects (and other design consultants) are involved in the preliminary design for the developer, with their agreements and services subsequently novated to the builder (i.e. to transfer the risk and responsibility away from the developer and as between those parties). Naturally, the Builder sought to protect itself and did so with a new consultancy agreement with the architect. The architect's role as head-designer continued and the consultancy agreement was explicit as to this arrangement.
- The Architect's involvement in drafting the specification that specified ACP (which then came to be included as a requirement for LU Simon under its D&C Contract) was particularly problematic along with its failure to correct this when it was contracted to the builder and also its approval of a sample of the particular ACP that was provided.

<u>The fire engineer</u>

- In the case of the fire engineer, the misunderstanding of the nature of his obligations was even more fundamental. The evidence suggested that the engineer saw his obligations as being very limited to being reactive and responsive only to specific requests from the building surveyor and not to try to identify possible non-compliances with the BCA. The Tribunal held as follows:

  "It may have been Mr Nicolas's usual practice to limit his assessment to matters identified for his consideration by the building surveyor, but the TN Consultant Agreement demanded more than this. Under that agreement, Thomas Nicolas assumed an express obligation at least to assess the construction materials for any fire hazards. The obligation may not have extended to undertaking "never ending searches…for non-compliances". But it at least required some proactive investigation and assessment of the principal building materials."[7]

- Ultimately the Tribunal found that the builder, the architect and the surveyor each had sufficient information about the potential combustibility of ACPs *"but, for a variety of reasons, they each failed to identify or conclude the ACPs were non-*

[7] At [481]

compliant".[8] The Tribunal then drew a distinction with the fire engineer – who bore the lion's share of liability – because it *"failed to conduct the investigations and assessments necessary to confirm the relevant features of the ACPs proposed for use [but] had it done so, it would have come to a different conclusion about compliance to that reached by these other parties"*.[9]

- His Honour offered this salutary lesson for Building Professionals:

> *"It is worth observing that the reason for this apparent disconnect between Mr Nicolas's evidence of what he understood his role to be, compared to the terms of the contract he signed, may have been hinted at by his reference to the use of templates. My impression generally of Thomas Nicolas's approach to the FERs and other documents, was that there were a number of instances of the use of template or "boilerplate" language (as well as reference to out-of-date guidelines), without much attention being given to what the words actually meant or required. Thomas Nicolas is, of course, not alone in this.*
>
> *It is often the case that diligent and competent professionals blithely reuse standard documents that have served them well over the years, focusing only on those parts that need to be tailored to each job. It is only when something goes wrong and the lawyers become involved, that any real attention is given to how that boilerplate language informs potential liability."*[10]

- The case serves as a reminder of the importance of building practitioners properly understanding and then discharging their functions in accordance with the standards that they have agreed to do under those contracts (which may indeed be higher than what they 'usually' would do).

<u>The Building Surveyor</u>

- The building surveyor sought to downplay its departure in exercising reasonable care as "minor" compared to that of the architect and the fire engineer. The Tribunal did not agree and considered that the surveyor:
  - "failed critically and robustly to examine the application of clause C1.12(f) of the BCA";[11] and

[8] At [497]
[9] At [497]
[10] At [487]
[11] At [592]

- held a significant "gatekeeper" role and therefore assumed a special responsibility to ensure that the design and materials complied with the BCA.

- In reaching these findings there are a number of important considerations which are worth setting out in more detail as they have implications for the entire industry, particularly given the present reform focus that appears to the targeted at the certification regime.
- The Tribunal held that, whilst it was "finely balanced", the obligations under the Consultancy Agreement were not absolute and were instead qualified by and coextensive with the common law duty to exercise reasonable care. LU Simon was successful in arguing the surveyor failed to take reasonable care.
- Whilst His Honour described Mr Galanos as "an honest witness" his evidence was nonetheless very concerning in its descriptions of rather cursory treatment of important issues and did not demonstrate a great deal of professional diligence. If one wishes to get an insight into why there is so much consternation about the private certification regime, paragraphs [334]-[341] of the judgment present a rather troubling picture of what can go wrong under the current system.
- The surveyor sought to argue that the task of interpreting BCA C1.12(f) was "not straightforward" and that a "counsel of perfection" should not be imposed. The Tribunal emphatically rejected these arguments:

  "Indeed, a competent professional with experience in the building industry and a comprehensive understanding of the Objectives and Functional Statements in the BCA, was probably in the best position to land on the correct construction, without the need for "concentrated legal analysis based on statutory interpretation principles"."[12]
- The surveyor sought to rely heavily on the alleged "industry wide understanding that ACPs were BCA compliant" and for the purposes of the "reasonable peer professional opinion" defence to negligence (a version of which is applicable in most Australian jurisdictions).

[12] At [352]

- After finding that surveyors were professionals (so that the defence could be utilised), the Tribunal then considered whether the 'relevant practice' was widely accepted in Australia as competent professional practice by a significant number of building surveyors. After analysing the evidence of multiple witnesses and notwithstanding the evidence of several of the respected fire engineering experts offering differing opinions, the Tribunal found that on balance the compliance of ACPs with the BCA was a widely held peer professional opinion amongst surveyors.
- However, the surveyor's defence failed at the final hurdle – demonstrating that the peer professional opinion was "reasonably held".
- His Honour drew upon well-established principles of behavioural science to describe the approach of the surveyor (and the expert witnesses it led) to the task of assessing compliance with the relevant sections of the BCA as being *"infected by confirmation bias"*.

> *"Namely, that otherwise experienced and diligent practitioners were beguiled by a longstanding and widespread (but flawed) practice into giving insufficient scrutiny to the rationale for that practice."*[13]

- Essentially, a 'groupthink' mentality had developed, and in the absence of any serious attempt to scrutinise, confirm or test the approach, it was not considered to be reasonable.
- The need to seek input from fire engineers was confirmed by the evidence that was provided by one of the experts who described the building surveyor's role thus:

> *"[A] building surveyor is more like a general practitioner doctor or an auditor. We …know a little bit about a lot, but we don't know a lot about anything in particular. Each and every one of those standards, codes, or 95 per cent of them have a discipline behind them - so the mechanical engineering standard has a mechanical engineer, four years' training."*[14]

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[13] At [388]
[14] At [390] and citing the expert evidence of Mr Shane Leonard [T2524]

- His Honour highlighted that no evidence was provided of any building practitioner ever "seeking any kind of assessment or endorsement from a professional body or regulatory authority" and that there was "no evidence of any approach to the ABCB for guidance on the issue".[15]

Surveyor and Fire Engineer contravened the *Australian Consumer Law* by engaging in conduct which was misleading or deceptive

- The Tribunal referred to previous authority in support of the proposition that where negligence and misleading and deceptive conduct are pleaded from the same material facts they will tend to succeed or fail together.
- This allowed His Honour to deal with the contravention of the Australian Consumer Law in a fairly brief manner in the judgment, however, the findings of contravention are no less important for practitioners.
- Essentially the Tribunal held that, by issuing the Building Permit and the Fire Engineering Report, the surveyor and the fire engineer respectively represented to the Builder (who relied on those representations) that the design of the Lacrosse Building incorporating the use of ACPs in the external facade complied with the BCA. This was misleading or likely to mislead.

No duty of care owed by Superintendent

- Whilst dependent on the particular facts, it will still come as some relief to superintendents and project managers that the Tribunal held that there was no duty of care that was owed by the Superintendent to the Owners.

The Tribunal is the appropriate entity to interpret the BCA

- In a finding that will come as no surprise to lawyers, but may surprise some other building professionals who have become accustomed to a lack of oversight over matters of BCA interpretation, the Tribunal emphatically confirmed that:
    - pronouncements on the correct interpretation of the BCA are squarely within its jurisdiction; and

[15] At [377]

- such determinations are to be made "*according to law, not by reference to what may, or may not be, the opinion of an expert or an assumption about the practical operation of the BCA amongst fire control experts*".[16]

- One of the recommendations proposed by tMills Oakley in a submission to the Building Ministers Forum in 2018[17] was the implementation of a national body charged with quasi-judicial status for determining questions of interpretation of the BCA and relevant technical standards.

Such questions of interpretation undoubtedly arise frequently, but they are invariably determined within industry circles and without much (if any) useful guidance from relevant regulatory institutions like the Australian Building Codes Board (**ABCB**). The absence of judgments or guidance notes to which industry professionals can look to for guidance along the way (and the failure of certifiers and other professionals to seek such guidance or determinations – as found by the Tribunal in this case) is surely a major factor that has led to ACP products being used for so many years in ways that are now likely to be found to have been non-compliant with the BCA.

[16] At [38] and citing from the decision of Lindsay J in *The Owners – Strata Plan No 69312 v Rockdale City Council & Anor; Owners of SP 69312 v Allianz Aust Insurance* [2012] NSWSC 1244 at [111]

[17] The submission was titled 'Rebuilding Confidence: An Action Plan for Building Regulatory Reform' by the Building Products and Innovation Council (BPIC)

Personal liability for builders after Lacrosse fire: Lessons from the Victorian Building Practitioners Board sanction of LU Simon director

By Scott Higgins, Partner and John Hibbard, Lawyer

A director of the building company responsible for the construction of the ill-fated Lacrosse building in Melbourne's Docklands (previously discussed by us here) was reprimanded and ordered to pay costs by the Building Practitioners Board (BPB) in Victoria late last year.18 In its decision, recently made public following the lapse of appeal time periods, the Board ordered that Jim Moschoyiannis, a director of building company L. U. Simon Builders Pty Ltd be reprimanded and pay costs of $54,000.

The decision reads:

> *Jim Moschoyiannis - The Building Practitioners Board found the practitioner guilty of failing to comply with section 16 of the Building Act 1993 (the Act) in that, he carried out building work in relation to the construction of a building (the Building Work) which did not comply with the Building Regulations 2006 (the Regulations) in that the builder had installed Alucobest aluminium composite cladding on the external walls to the apartments which did not comply with the performance requirements of Building Code of Australia (BCA) and pursuant to Regulation 109 of the Regulations, the BCA is adopted by and forms part of the Regulations. As the practitioner was a director of the company that carried out the Building Work and as the registered builder named on the Building Permit, that failure was taken to be the practitioner's conduct and his failure to comply with section 16 of the Act.*

The BPB is also investigating several other practitioners in relation to the Lacrosse Building, though no decision has been made public as of writing. As discussed in our article above, L. U. Simon itself was the subject of recently concluded VCAT proceedings. Given the Tribunal's decision as to LU Simon's reliance on the architect, building surveyor and fire engineer and those parties' respective failures to comply with contractual requirements and to take reasonable care, one would assume that the reprimands issued by the Building Practitioner's Board for the individuals are likely to be significantly more severe than the sanction imposed on Mr Moschoyiannis.

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[18] Building practitioners in Victoria should note that the inquiry process and the BPB itself were replaced in 2016 by a slightly more passive and less resource intensive 'show cause' regime conducted by the Victorian Building Authority.

Comparison between current Victorian and NSW regimes

In NSW, an individual can receive personal sanctions for the improper conduct of a company, including suspension or cancellation of a licence to conduct residential building work and a fine of up to $11,000 under the Home Building Act 1989 (NSW).

A unique feature of the Victorian regime is that sanctions are published on a public register and remain publicly available for five years. There is currently no public sanctions register in NSW, though public warnings are issued in relation to a licensee that poses an immediate risk to the public.

The Victorian regime is also notable in that it applies to a broad range of building practitioners, including building surveyors (known as certifiers in NSW) and engineers. By contrast, the NSW regime is limited to builders and related subcontractors that are involved in residential building work, with certifiers and engineers regulated under a separate Act.

Recent proposals of substantial reform by the NSW government look set to change all that and bring better consolidation under a single NSW Building Commissioner with greater powers of audit, investigation and disciplinary action. These are discussed in our article below.

The incoming NSW Building Commissioner and his or her regulator counterparts in other jurisdictions may well find the Moschoyiannis decision by the Victorian Building Practitioners Board a useful guidepost for considering similar investigations and action.

Biggest overhaul of building laws in NSW History" – teaser released – what you should expect

By Scott Higgins, Partner, Luke Stirton, Lawyer and Callum Jubb, Paralegal

The NSW Government has recently released its response to the Building Confidence Report that was commissioned by the Building Ministers' Forum (**'BMF'**) in August 2017, authored by Professor Peter Shergold AC and Bronwyn Weir, and released in February 2018 (**'the Shergold Report'**) (here).[19]

This comes in the wake of the Opal Tower and combustible cladding crisis (our articles on these can be found here, here and here) which has seen confidence in our building regulatory system, and the construction industry as a whole, fall to an all-time low.

In its response, the NSW Government announced that it would support the majority of the Shergold Weir Report's recommendations and outlined four major reforms it intends to make across the construction industry.

This article will examine these proposed reforms in their broader context and whilst we await the outcome of the State election to see whether these reforms will be pursued.

New South Wales Reforms:

The NSW Government's response to the Shergold Weir Report included four major proposed reforms, being:

1. appointment of a Building Commissioner;
2. overhaul of compliance reporting;
3. requirement that building practitioners with reporting obligations be registered; and
4. creation of an industry wide duty of care to homeowners.

It is worth noting that the NSW Government has recently overhauled certifier regulation with the passing of the *Building and Development Certifiers Bill 2018* (NSW), which replaced the *Building Professionals Act 2005* (NSW).

Building Commissioner

The Building Commissioner appointed under the first reform will act as the consolidated regulator for the construction industry, leading and overseeing building regulation and administration in NSW.

A large part of the Building Commissioner's role will be to audit building plans, to monitor and scrutinise suspected incidents of wrongdoing and to take disciplinary

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action, such as suspension or cancelling of registrations, and order rectification of building works in circumstances of non-compliance.

Compliance Reporting

Under the second reform the NSW Government will require building designers, architects, engineers and other building practitioners who provide final designs and/or specifications of elements of buildings to declare that the building plans specify a building which will comply with the BCA as well as other relevant building regulations.

These plans will also need to be lodged in digital format with the Building Commissioner and builders will be required to declare that buildings are constructed in accordance with these plans. It will be an offence under the reforms to dishonestly or recklessly declare inaccurate plans or fail to lodge prescribed documents with the Building Commissioner.

Registration

For the third reform, the NSW Government will introduce registration schemes for currently unregistered designers and commercial builders who intend to make declarations. Only registered practitioners will be entitled to declare that plans and any proposed performance solutions comply with the BCA, and that a building has been constructed in accordance with its plans.

Duty of care

For the fourth reform, the NSW Government has announced that it will ensure that building practitioners owe a common law duty of care to owners' corporations and subsequent residential homeowners, as well as unsophisticated development clients.

This position is intended to overrule the decision of the High Court in *Brookfield Multiplex Ltd v Owners Corporation Strata Plan 61288 (2014) 254 CLR 185* and the *Woolcock Street Investments Pty Ltd v CDG Pty Ltd (2004) 216 CLR 515.*

Balancing act

Given the extent of these upcoming reforms and the potential for more reforms in the future, there is genuine industry concern that the increase in oversight and regulation may result in additional cost burdens and 'red tape' generally.

The Shergold and Weir Report promoted that its recommendations do not represent an "imposition of unnecessary red tape or bureaucratic overreach". More importantly, the authors concluded that "there is significant danger that without increased auditing and enforcement, the privatised building approvals process will lead to an ongoing decline in compliance standards."

It is clear that wholesale reform is required and not just to the certification regime, but there is concern about ensuring the reforms are targeted and effective.

On their own, the imposition of duties on professionals to 'sign-off' on designs is unlikely to make substantial inroads to the present compliance problem. Such obligations already exist under many contracts and the private certification process contains much of the same. Coupled with clearer liability routes (via duties of care and

disciplinary action under the registration and licencing scheme), however, we may see this step in the process taking on more significance.

The consolidation of building regulation and regulatory oversight is long overdue in NSW and were a key plank in reforms recommended in the Lambert review in 2015 as explained in one of our previous articles. Better enforcement is a key requirement and this requires funding and resources to be committed.

In regards to the planned imposition of a duty of care by all building practitioners, great care should be taken to avoid unintended consequences with such a reform.

In the Lacrosse decision (see our article above), the absence of a direct duty of care owed by certain building practitioners made the Tribunal's decision much easier to allow complete recovery for the Owners against the head-contractor, LU Simon (with LU Simon bearing the risk of recovering from the architect, surveyor and fire engineer – which it did successfully).

Litigators experienced in managing construction and defect cases will be all too familiar with the benefits and pitfalls that the proportionate liability legislation presents for plaintiffs.

Whilst widening the scope of duties of care may allow for greater avenues of recovery for owners where a head contractor and developer are insolvent, where those parties are available or where insurance would step in, it would be a curious turn of events if owners were instead forced by the new laws to sue everyone in the supply chain (and bear significant additional costs and risks that come with such multi-party proceedings) simply to obtain recovery.

The fact is that duties of care are already imposed upon developers and builders under the statutory warranties in the *Home Building Act* and for the benefit of owners. It is only in circumstances where the limitation period for commencing such actions has expired or where those parties are insolvent or no longer exist that owners need to think further afield for recovery. These issues, and the application and availability of home warranty insurance (along with its exceptions) should be considered alongside any consideration of extending the duty of care.

The NSW Government will no doubt be looking to the Queensland experience. In Queensland ,the *Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and other Matters) Amendments Act 2017* (QLD) (**'the Act'**) introduced a duty of care for all those involved in the supply chain in regard to building products. A more detailed analysis of this can be found in the articles here and here.

What to expect

What can be taken away from the NSW Government's recent announcement is that we can expect a stricter regulatory environment with a great deal more regulatory oversight. There will inevitably be a cost impost and increased risks of liability, however, there is clearly a strong public and industry sentiment that reforms are required to drive greater compliance and improvements in building practices.

With a NSW state election on 23 March 2019, there is no telling how much, if any, of the NSW Government's response will be implemented. Regardless, we will see no new legislation until the new NSW Parliament sits, at a date that's yet to be determined.

Mills Oakley will keep you informed of developments as more details come to light regarding any new legislative changes.

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Combustible cladding and building reform update

Class actions and product bans – cladding suppliers now feeling the heat

By Scott Higgins, Partner and John Hibbard, Lawyer

While regulators announce their intentions to impose fresh liabilities on building practitioners, the prospect of litigation is stalking manufacturers and suppliers of combustible cladding products.

On 14 February 2019 a class action relating to the supply of combustible cladding was launched in the Federal Court of Australia against the manufacturer and supplier of Alucobond ACP under the Australian Consumer Law (not to be confused with the unrelated Alucobest product mentioned above). In Victoria, expressions of interest are being sought for another possible class action to claim rectification and compensation for losses caused by the defective cladding.

The impetus for regulatory reform provided by Lacrosse and the Grenfell Tower fire in the UK has now been further propelled by recent events. A final report into the damage to the Opal Tower (see our previous article here) was released on 19 February 2019 and will be the subject of a future article.

More generally, the Hayne Royal Commission's scathing rebuke of banking and finance regulators has contributed to a growing sense that regulators in all areas undertaking their roles with increased fervour, perhaps fearful that a fresh commissioner may soon be forensically analysing their decisions.

2019 is shaping up to be a huge year for regulation of the building and construction industry. We will keep you abreast of developments.