

Victorian Cladding Taskforce

Report from the Co-Chairs
July 2019



Environment,
Land, Water
and Planning

Acknowledgment

We acknowledge and respect Victorian Traditional Owners as the original custodians of Victoria's land and waters, their unique ability to care for Country and deep spiritual connection to it. We honour Elders past and present whose knowledge and wisdom has ensured the continuation of culture and traditional practices.

We are committed to genuinely partner, and meaningfully engage, with Victoria's Traditional Owners and Aboriginal communities to support the protection of Country, the maintenance of spiritual and cultural practices and their broader aspirations in the 21st century and beyond.



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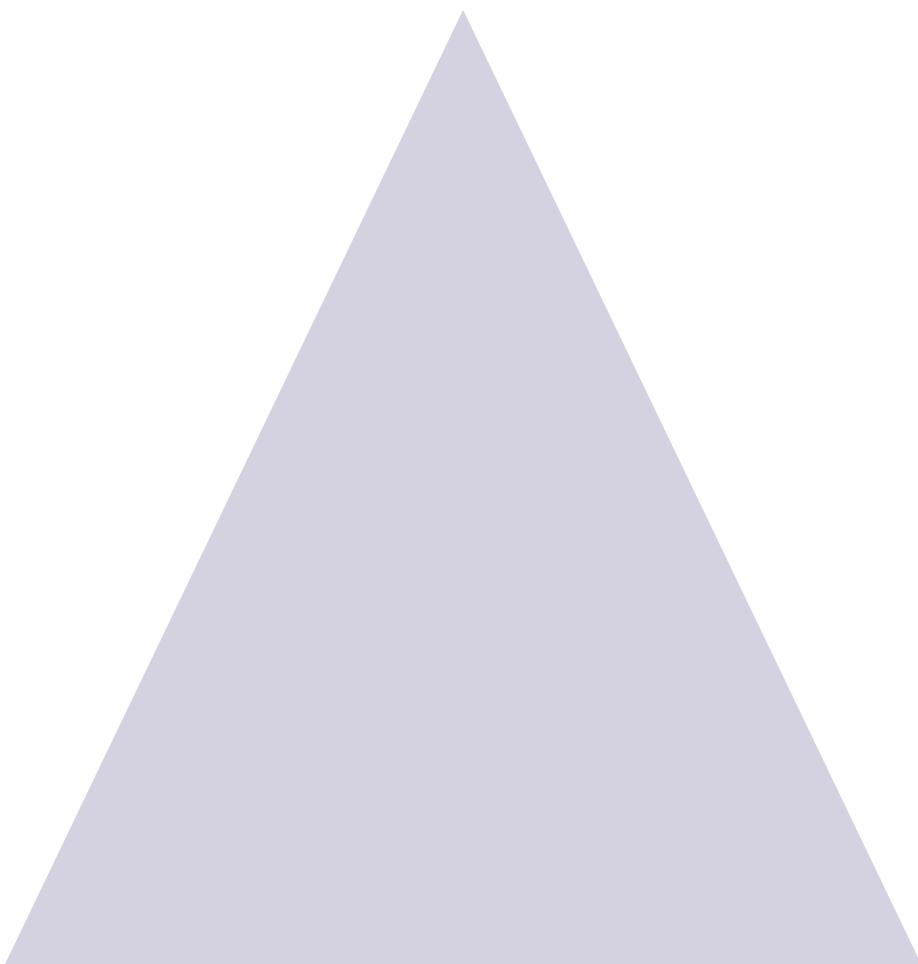
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Message from the Taskforce

We are pleased to present our report on the work of the Victorian Cladding Taskforce to the Minister for Planning.

This report sets out the important progress that has been made since we handed down our Interim Report on 1 December 2017, including providing an update on progress against each of our original recommendations. It sets out our further recommendations for how to ensure that the important task of rectifying buildings continues, and also outlines the issues we believe need to be addressed to prevent a problem like this from happening in the future.

Since the Taskforce was established, our overriding priority has been to ensure Victorians are safe in their homes. This safety focus underpinned the recommendations in our Interim Report and it underpins our new recommendations on how to promptly progress the next stage of building rectification while producing lasting positive change in the building industry.

This report presents the outcomes of the cladding audit work that has been undertaken to date. Despite the progress of this audit work, however, we are aware that the rectification of private buildings with combustible cladding continues to be a challenging and unacceptably difficult process for owners and residents. For this reason, we recommend that the Victorian Government take further steps to ensure the timely rectification of higher risk buildings, including through the establishment of a new authority. This authority

would work with owners through the rectification process and provide assistance to owners with the funding of rectification works.

We are also aware that the systemic issues identified in our Interim Report, most importantly the need for fundamental cultural change, continue to confront the building sector. For this reason, we also recommend further investment into fundamental reform of the regulation of the building industry.

We would like to acknowledge the significant effort that has gone into implementing many of the recommendations of our Interim Report by many parties and in particular the significant progress made by the Victorian Building Authority.



The Hon. Ted Baillieu

A blue ink signature of The Hon. Ted Baillieu, written in a cursive style.



Professor the Hon. John Thwaites

A blue ink signature of Professor the Hon. John Thwaites, written in a cursive style.

Recommendations

We recommend:

1. that the Victorian Building Authority (VBA) and City of Melbourne complete their comprehensive audits of priority buildings by the end of 2019, and continue to identify, inspect and assess buildings that may not have been captured in the initial priority list.
2. that the risk assessment tool developed for domestic buildings be made available for use in commercial and industrial buildings with any necessary modifications and with adequate training.
3. that consideration be given to requiring Annual Essential Safety Measure (ESM) Reports to be certified by a suitably qualified person.
4. that consideration be given to requiring registration of ESM maintenance contractors.
5. that the VBA engage with commercial and industrial building owners and the insurance industry to develop a strategy for identifying non-residential buildings containing combustible cladding and a process for rectification.
6. that consideration be given to the development and implementation of a protocol between the VBA and councils, which sets out accountabilities, mechanisms for cooperation and communication, strategic interventions and agreed procedures for referring enforcement actions.
7. that the VBA be given the appropriate powers to require a builder to rectify defective building works beyond the issuing of a certificate of final inspection or occupancy permit.
8. that the Department of Environment, Land, Water and Planning and the VBA review the current legislative and regulatory provisions relating to the disciplining of building, plumbing and architecture professionals with a view to reducing delays and improving the transparency of the processes. This could be progressed as part of a package of broader reform.
9. that DELWP closely monitors and assesses the effectiveness of the VBA's increased inspection and enforcement activity.
10. that the VBA continuously improves its approach to compliance activities, including implementation of a risk-based approach for targeting inspections.
11. that the VBA commence a program of random inspections to complement the proactive inspection program that aims to drive an ongoing increase in compliance across the sector.
12. that the VBA develop a strategy for oversight of building surveyors including potential auditing against a code of conduct.
13. that the Victorian Government establish a dedicated authority to support owners and occupants through the rectification process, including:
 - a. Providing funding for rectification works
 - b. Providing project management support
 - c. Ensuring proposed solutions are carried out in a timely and effective manner to bring buildings to an acceptable level of risk
 - d. Educating owners about how to mitigate fire risks until the cladding on their buildings is rectified.
14. that should the new authority be established within the VBA, any perceived conflict of interest should be managed appropriately.
15. that if rectification is to be achieved through partial removal of cladding and a performance solution, the solution be independently approved by the Building Appeals Board.
16. that the Victorian Government implement a process to seek recovery of costs of rectification from responsible parties.
17. that DELWP oversee a process of rectification of Victorian Government buildings with combustible cladding to ensure that rectification is completed in a timely, cost effective manner that achieves safety outcomes.
18. that should a new entity be created to drive rectification of buildings, oversight of the government rectification program should be transferred to that entity to ensure a joined-up, coordinated approach that minimises market impacts.
19. that the Victorian Government negotiate with insurers to make a substantial contribution to the cost of rectification.

20. that the Victorian Government seek a contribution to the management and cost of the program from the Commonwealth Government.
21. that the Victorian Government take a risk-based approach to prioritising buildings for funding in the program of rectification of private buildings.
22. that should a rectification authority be established, it develop a comprehensive communications and engagement strategy in consultation with relevant agencies, which includes:
 - a. Engagement with and communications for both owners and occupants of buildings to promote short-term fire safety measures ahead of rectification
 - b. Ongoing communications and engagement throughout the rectification process.
23. that consideration be given to strengthening disclosure requirements, including requirements of owners to inform tenants if there is non-compliant combustibile cladding on their building. This includes a requirement that residential leases contain information regarding any risk from combustibile cladding present on the building.
24. that a risk-based demand management strategy be developed and implemented to ensure that the highest risk projects are expedited, and resourced appropriately.
25. that a framework be developed and implemented to monitor, record and manage rectification costs.
26. that Victoria continues to play a leading role in reaching a national approach to dealing with combustibile cladding.
27. that building industry bodies, practitioners and professionals proactively seek to improve the culture within the construction industry.
28. that the Victorian Government consider introducing a statutory duty of care on building practitioners to protect occupants and consumers.
29. that all practitioners be required to undertake compulsory Continuing Professional Development on the National Construction Code.
30. that the Victorian Government give consideration to the restoration of the role of the clerk of works as part of its long-term reform strategy for the construction industry.
31. that the requirements around the use of performance solutions be strengthened, including provision for third party review of proposed performance solutions.
32. that the Victorian Government advocate for a national approach led by the Commonwealth Government to addressing building insurance and Professional Indemnity Insurance issues.
33. that Victorian Government undertake negotiations with insurers with a view to maintaining the market for Professional Indemnity Insurance.
34. that the Commonwealth and Victorian Governments explore fall-back options for providing Professional Indemnity Insurance.
35. that the VBA take a proactive interest in identifying emerging systemic issues.
36. that the Victorian Government work with the Commonwealth Government and other jurisdictions to establish the extent of any emerging systemic issues and to consider both solutions and future prevention measures.
37. that further reforms are undertaken to address key policy issues and place safety and consumer protection at the heart of the system.
 - a. The key objective of a review should be to provide a regulatory system that:
 - i. delivers safe, compliant, durable and sustainable buildings in an efficient and effective manner
 - ii. protects consumers and improves confidence in the industry and regulators
 - iii. supports skilled and experienced practitioners to carry out compliant and safe practices
 - iv. supports regulators to robustly and efficiently enforce compliance.

The role of the Victorian Cladding Taskforce

Since the release of our Interim Report in December 2017, the Victorian Cladding Taskforce Co-Chairs have provided strategic direction and oversight of the government's response to the Interim Report; and the Taskforce's focus has shifted from identifying problems and developing recommendations to implementing the recommendations.

Terms of reference

The Victorian Cladding Taskforce will provide strategic direction and oversight of the response to the Interim Report, in particular the work being led by the Department of Environment Land Water and Planning (DELWP) and the VBA).

Membership

The Taskforce is co-chaired by the Hon. Ted Baillieu and Professor the Hon. John Thwaites. The Taskforce's membership, which was revised after the release of the Interim Report, comprises state government departments and agencies directly involved in the work being undertaken. It is:

- The Hon. Ted Baillieu
- Professor the Hon. John Thwaites
- John Merritt, Special Advisor to the Minister for Planning

- Dr Owen Donald, Chair, VBA
- John Bradley, Secretary, DELWP
- Gayle Porthouse, Deputy Secretary, Department of Treasury and Finance
- Adam Dalrymple, Assistant Chief Fire Officer, Metropolitan Fire Brigade
- Rob Spence, Chief Executive Officer, Municipal Association Victoria (until August 2018)
- Kerry Thompson, Chief Executive Officer, Municipal Association Victoria (from August 2018).

Other agencies that have participated in the taskforce to date continue to be consulted as needed by DELWP and the VBA, to implement the government's response to the Interim Report.

Developments since our Interim Report

Since we handed down our Interim Report on 1 December 2017, there have been many significant developments at both the state and federal level on the issue of combustible cladding.

Growing out of the pilot audits conducted by the Taskforce in six municipalities, the VBA has continued to audit private buildings within the scope we established in our Interim Report. As at 5 July 2019, in Victoria 2227 buildings have been inspected. Of these buildings, 1069 buildings with cladding have been referred to the independent expert panels, which the VBA set up following the model established by the pilot audits conducted by the Taskforce.

The Victorian Government has also followed the recommendations of the Interim Report and taken steps to audit the buildings that it owns for combustible cladding. 384 government-owned buildings have been physically inspected of which 294 have been assessed by expert panels.

As part of the 2019-20 Budget the Victorian Government provided funds for the rectification of government-owned buildings and a process is underway to identify the best rectification solution for each building and commence works. This builds on the rectification works on a number of schools and hospitals that have already been completed or for which works have been procured.

A priority recommendation made by the Taskforce was to prevent the use of combustible cladding products on Victorian buildings. In March 2018, the Minister for Planning, the Hon Richard Wynne, announced restrictions on the use of specific cladding materials through the gazettal of *Minister's Guideline MG-14: Issue of building permits where building work involves the use of certain cladding products*.

At a national level, in mid-2017, the Building Ministers' Forum (BMF) commissioned an independent expert assessment of compliance and enforcement systems for the building and construction industry across Australia. In February 2018, the report prepared by Professor Peter Shergold AC and Ms Bronwyn Weir was provided to BMF. This report provided 24 recommendations for improving the construction industry, focussing on shortcomings found to exist in the implementation and enforcement of the National Construction Code (NCC).

The BMF also oversaw an amendment to the NCC adopted on March 13, 2018, introducing a comprehensive package of measures to improve fire safety in high-rise buildings. Changes to the NCC included:

- The introduction of a new Verification Method for testing of external wall assemblies for fire spread, including a new testing standard (AS 5113) to be used as part of the verification model.

- Clarifying language within the code relating to the use of external wall claddings and attachments;
- Revision of the NCC's evidence of suitability provisions (including for cladding materials); and
- Increased stringency for the sprinkler protection of balconies of multi-storey residential buildings through referencing of a revised AS 2118 'Automatic Fire Sprinkler Systems - General Systems'.
- Updates to related materials including Advisory Note 2016-3 'Fire Performance of External Walls and Cladding', and 'The Evidence of Suitability Handbook 2019', in line with these changes.

In September 2018, the Victorian Parliament passed the *Building Amendment (Registration of Trades and Other Matters) Act 2018*, which made a series of key amendments to the *Building Act 1993* and the *Local Government Act 1989* in response to recommendations of the Interim Report. In particular, the Act:

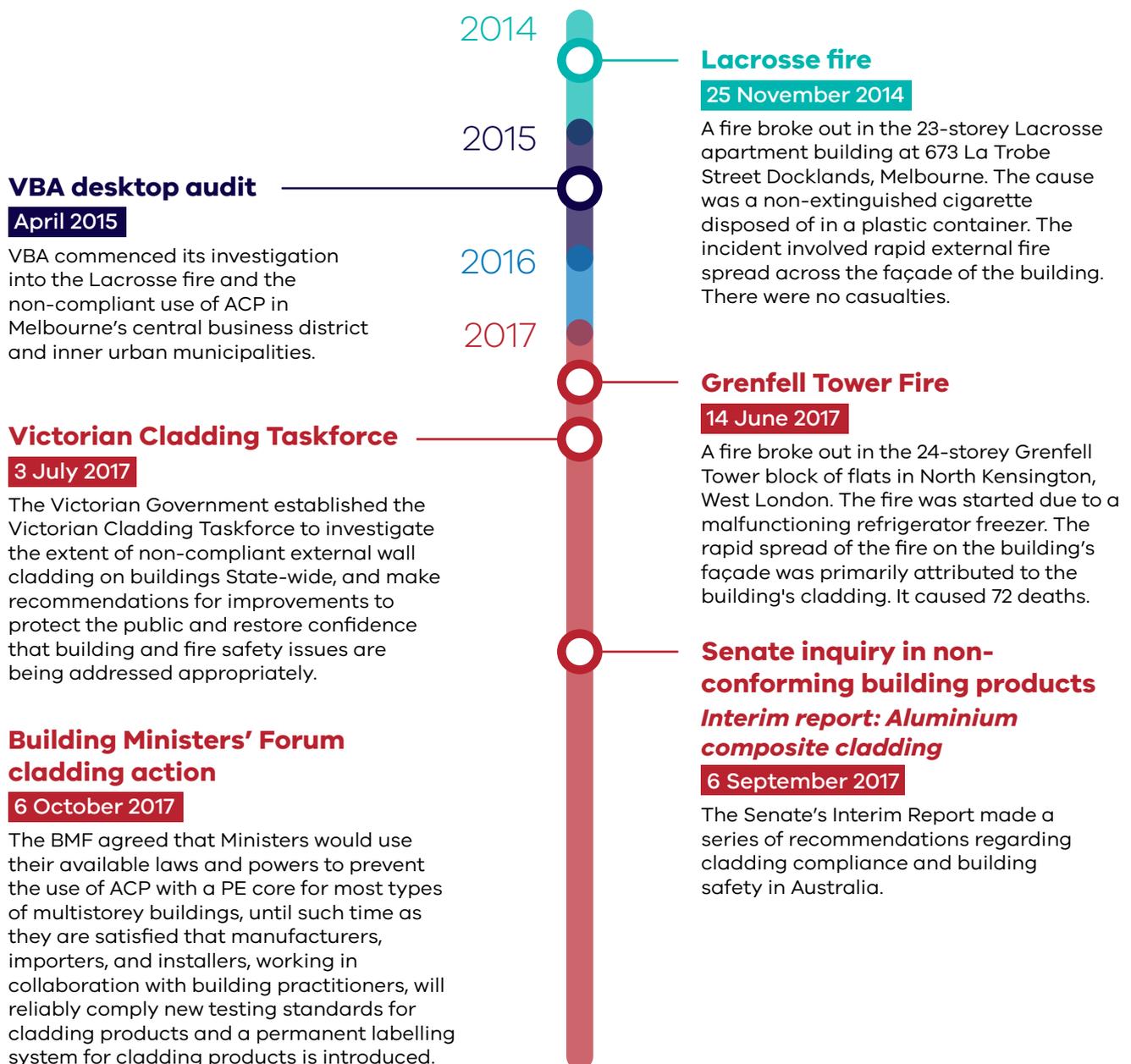
- Established Cladding Rectification Agreements (CRAs), which are tripartite agreements involving councils, owners or owners corporations and lenders, by which the rectification of cladding works can be funded through a loan which owners repay via their council rates.
- Provided a power to the Minister for Planning to declare a prohibition on the use of high-risk cladding products which will be enforced by the VBA and be subject to serious penalties for non-compliance.
- Provided the VBA with the power to immediately suspend building practitioners on public interest grounds where there has been repeated disregard for public health and safety and/or a lack of concern for potential damage to neighbouring properties.
- Required disciplinary bodies – including the VBA and VCAT - to cancel a practitioner's registration if they find the practitioner is not a fit and proper person to hold that registration.

Another key event since both our Interim Report in December 2017 and our Update of October 2018, was the handing down of a decision by VCAT in relation to the Lacrosse Building in February 2019. While VCAT was clear in its decision that the particular apportionment of liability between parties was specific to the particular building, a crucial part of the decision was the finding that both the cladding specified in the original design and the substituted aluminium composite panels (ACP) failed to comply with the requirements of the NCC at the time the Lacrosse building was built. This decision is important in the context of the ongoing debates about whether the use of combustible cladding such as ACP is,

or was, compliant with the NCC. In our view, in the vast majority of cases, the use of combustible cladding was not compliant with the requirements of the NCC, and we are pleased that further clarity has been provided in relation to this issue by the Lacrosse decision.

Finally, one of the most significant developments since our Interim Report is the cladding fire that occurred at the Neo200 building in Melbourne. In the early hours of 4 February 2019, a fire occurred at the Neo200 building at 182 -200 Spencer Street, Melbourne. While the Metropolitan Fire Brigade (MFB) is yet to release its

post-incident analysis, the fire is believed to have been started by a cigarette butt flicked from one balcony that landed on another. The fire is believed to have spread vertically via the building’s ACP cladding. As a result of the fire, 371 apartments were evacuated, and a number of residents continue to be unable to occupy their apartments. Thankfully, the MFB was able to extinguish the fire quickly, and no one was seriously injured. However, the fire is a stark reminder of the risks of combustible cladding and enormous impacts it can have on the lives of Victorians.







Jurisdictional comparison

Audit	Rectification	Funding	Forward facing – future construction, materials use & industry regulation
VIC			
<p>Action to date:</p> <p>Proactive inspection program (State-wide Cladding Audit) undertaken by the VBA. This includes physical inspection of each of the buildings, followed by assessment by an expert panel who assigns a risk rating to assist with prioritisation.</p> <p>We recommend:</p> <p>That the VBA and City of Melbourne audits of priority buildings be completed by the end of 2019 and continue to audit additional buildings.</p> <p>It is also recommended the VBA engage with commercial and industrial building owners, as well as the insurance industry to develop a strategy for identifying non-residential buildings containing combustible cladding.</p>	<p>Action to date:</p> <p>VBA has been declared as MBS for the highest risk buildings.</p> <p>We recommend:</p> <p>That powers of the VBA be expanded, enabling it to require builders to rectify defective building works beyond current limitations.</p> <p>It is also recommended a dedicated authority is established to support owners and occupants in rectifying buildings, through rectification. ensuring risks from cladding are brought to an acceptable level.</p>	<p>Action to date:</p> <p>Introduction of Cladding Rectification Agreements, which are tripartite agreements involving councils, owners or owners corporations and lenders, by which the rectification of cladding works can be funded through a loan which owners repay via their council rates.</p> <p>We recommend:</p> <p>That the establishment of a dedicated authority to support owners and occupants, include scope to provide owners with funding for rectification works, prioritising buildings based on buildings risks from cladding.</p> <p>It is also recommended a process be developed for recovery of costs from responsible parties, and contributions be sought from insurers for rectification.</p> <p>A contribution should also be sought from the Commonwealth Government for costs associated with any rectification program.</p>	<p>Action to date:</p> <p>Implemented Minister’s Guideline 14: Issue of building permits where building work involves the use of certain cladding products, which states that means that the relevant building surveyor should not be satisfied that proposed building work which includes the installation of a Prescribed Combustible Product as part of an External Wall (including as an attachment) complies with the Act and Regulations unless the application for the building permit includes a determination of the Building Appeals Board.</p> <p>Implemented a power for the Minister for Planning to declare a prohibition on the use of high-risk cladding products.</p> <p>Provided the VBA with the power to immediately suspend building practitioners on public interest grounds where there has been repeated disregard for public health and safety and/or a lack of concern for potential damage to neighbouring properties.</p> <p>We recommend:</p> <p>That the State Government review the current legislative and regulatory provisions relating to the training, compliance and discipline of industry practitioners, including consideration of a strategy for greater government oversight of building surveyors through a statutory code of conduct.</p> <p>It is also recommended building assessment and approvals processes be reviewed, considering options to strengthen requirements for use of performance solutions, and greater scrutiny of their application.</p>

Audit	Rectification	Funding	Forward facing – future construction, materials use & industry regulation
COMMONWEALTH GOVT.			
Nil.	Nil.	Nil.	<p>The Building Ministers’ Forum (BMF) commissioned Peter Shergold AC and Bronwyn Weir to undertake an assessment of the effectiveness of compliance and enforcement systems for the building and construction industry across Australia.</p> <p>Senate inquiry into non-conforming building products.</p> <p>The Building Ministers’ Forum gave in-principle agreement to restrict the unsafe use of ACPs with a PE Core for certain classes of buildings pending the outcome of a cost-benefit analysis.</p> <p>The Building Ministers’ Forum directed the Australian Building Codes Board (ABCB) to expedite changes to the NCC from a comprehensive package of measures for fire safety in high rise buildings.</p> <p>Commenced work on options for a new system of permanent labelling for cladding products through the Senior Officers Group.</p>
ACT			
The ACT Government is carrying out a review to determine whether combustible cladding materials have been used in a way that doesn’t comply with ACT building standards or poses an unacceptable risk to building occupants.	Nil.	Nil.	Nil.

Audit	Rectification	Funding	Forward facing – future construction, materials use & industry regulation
NSW			
<p>Building owners are required to inform the Department of Planning and Environment with details of any buildings where external combustible cladding has been identified.</p>	<p>Implemented legislation that empowers relevant enforcement authorities to issue building product rectification orders.</p> <p>Sent letters to building owners and residents with information on how to ensure cladding is properly assessed and how owners and residents can prioritise fire safety and reduce the risks of a fire.</p>	<p>Nil.</p>	<p>Issued a building product use ban under section 9(1) of the <i>Building Products (Safety) Act 2017</i>.</p>
NT			
<p>Written to owners of buildings with combustible cladding to requesting details of action taken.</p>	<p>Nil.</p>	<p>Nil.</p>	<p>Nil.</p>
QLD			
<p>Established Safer buildings to help identify buildings in Queensland that may have potentially combustible cladding.</p> <p>Introduced a requirement for owners of private buildings to register before 29 March 2019 using an online system and to complete an online checklist for their building.</p>	<p>Nil.</p>	<p>Nil.</p>	<p>Proposed a combustible cladding ban that extends to all ACP with a polyethylene core of greater than 30 per cent.</p>

Audit	Rectification	Funding	Forward facing – future construction, materials use & industry regulation
SA			
Audit process where councils are required to identify and investigate buildings that may have combustible cladding.	Regulations have been introduced to provide guidance to building practitioners and building owners as to what performance solution has to be met for the use of aluminum composite panels.	Nil.	Introduced new requirements for designated building products (including certain types of cladding) on designated buildings to ensure that accurate and detailed information about the product and its installation is provided in the documentation at the design and assessment stage, and that the product specified and approved for use is verified at the construction stage.
TAS			
Audit process where building surveyors were required to nominate buildings that met the audit criteria for review.	Nil.	Nil.	In Tasmania, the future use of polystyrene cladding or ACP with a polyethylene core have been limited in certain types of buildings following the introduction of the Director's Determination: Building Product Accreditation – High Risk Building Products.
WA			
Audit process where councils are required to identify and investigate buildings that may have combustible cladding.	Released a guidance note to guidance on elements of the process to be carried out by fire engineers when addressing the issues presented by a building with an apparently significant hazard to occupants in the event of a fire involving external cladding panels.	Nil.	WA has amended its legislation to prohibit the use of performance solutions involving combustible products (including ACPs) on the external walls of buildings with type A and B constructions.

Audit	Rectification	Funding	Forward facing – future construction, materials use & industry regulation
UNITED KINGDOM			
<p>Introduced a prohibition on combustible cladding on all new high rise buildings above 18 meters as well as hospitals, residential care homes, dormitories and student accommodation.</p>	<p>Nil.</p>	<p>Around £200 million (approx. \$360 million) will be made available to remove and replace unsafe aluminum composite material cladding from around 170 privately owned high-rise buildings.</p>	<p>Released the <i>Building a Safer Future</i> report prepared by Dame Judith Hackitt, which was commissioned in the wake of the tragic Grenfell Tower fire, and examines the building regulations in the UK.</p> <p>Published <i>Building a Safer Future: An Implementation Plan</i>.</p>

State-wide Cladding Audit

In our Interim Report we recommended that the VBA lead a State-wide cladding audit of privately owned, residential, multi-unit buildings of three storeys and above and all public-use buildings two storeys and above.

In line with the recommendations in the Interim Report, the VBA adopted a methodology similar to that developed by the Taskforce for the pilot audits. Buildings within scope of the audit are:

- Apartment buildings (class 2) – three storeys or higher
- Short-term accommodation buildings (class 3), such as hotels, motels and student accommodation that are three storeys or higher
- Public buildings (class 9), such as private hospitals, private schools and aged care facilities that are two storeys or higher

At a glance

Buildings constructed after March 1997 that fall into the following classes under the National Construction Code are in scope for this review.



Class 2 buildings

3 storeys or more

Apartments



Class 3 buildings

3 storeys or more

Hotels, motels, student accommodation



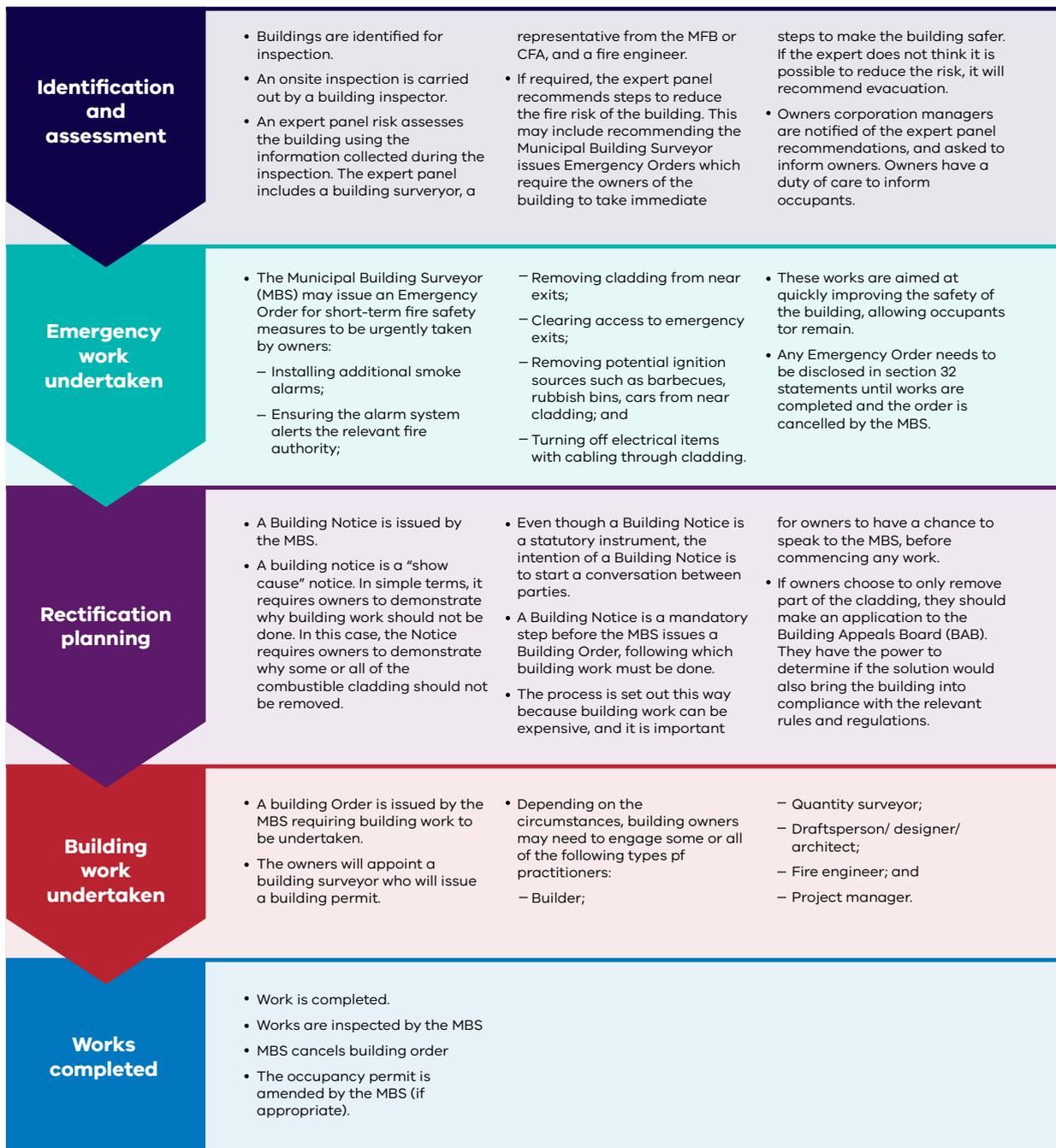
Class 9 buildings

2 storeys or more

Hospitals, schools, aged care facilities

Audit and rectification process

We note that Victoria is the only jurisdiction to have proactively sought to identify buildings with combustible cladding. In some other jurisdictions building owners have been required to declare whether they have combustible cladding – a process prone to delay, limited disclosure, failure to identify cladding and or malfeasance. Other jurisdictions again have left this as a matter for building owners.



State-wide Cladding Audit statistics

As at 5 July 2019, in Victoria 2227 buildings have been audited through the Taskforce Pilot Audit, the State-wide Cladding Audit, and ongoing audit work being undertaken by the City of Melbourne. This includes physical inspection of each of the buildings, followed by assessment by an expert panel who assigns a risk rating to assist the VBA and municipal building surveyor (MBS) with prioritisation. Of the buildings inspected, 1069 buildings have been found to have combustible cladding.

Table 1: Summary of private building inspections

Inspections	Proactive VBA audit	City of Melbourne audit	Priority permit (1369) audit	Pilot audit	Total
Inspected	1202	170	550 ¹	305 ²	2227
Expert panels³	615	74	204	305	1198

Of the buildings that have been inspected and assessed by an expert panel, to date 72 have been found to be in the extreme risk category and a further 409 in the high-risk category.

Table 2: Expert determinations – Private Buildings

Risk Ratings	Number of Buildings
Extreme risk⁴	72 (7%)
Highest risk	409 (38%)
Moderate risk	388 (36%)
Low risk	200 (19%)

1 VBA inspections included 361 post occupancy permits and 189 pre-occupancy permits.

2 This number has been revised since our October 2018 Update – the Pilot audit was closed as of 30 Jun 18; subsequent activity is captured in the Active VBA Audit column.

3 Only occupied buildings inspected and believed to have cladding are referred to expert panels.

4 All extreme risk buildings have undertaken works under an Emergency Order to reduce the fire risk to a tolerable level in the short-term.

The audit process includes kerbside inspections when this level of assessment will reliably confirm the presence or absence of combustible cladding. Where necessary, comprehensive inspections are conducted to thoroughly audit buildings for assessment by an expert panel. A total of 129 buildings were assessed as out-of-scope of the audit following a full inspection.

Under the *Building Act 1993*, MBSs have the responsibility to enforce compliance with the Building Regulations and the NCC. To date, the VBA has been appointed as MBS for a total of 327 buildings, and we expect the Minister for Planning to consider appointing the VBA as MBS for the remaining higher-risk buildings in the near future. Local council MBSs remain responsible for moderate and low risk buildings.

Enforcement Actions

The key role of the expert panel is to jointly review a comprehensive inspection report and apply that information to our risk assessment tool. The panel uses the results of the tool to determine whether the cladding presents such a high risk that evacuation should be considered, or whether immediate measures are available which, if taken, will reduce the risk to an acceptable level pending rectification.

Where the expert panel concludes that the degree of risk calls for immediate measures to be taken, this recommendation is immediately provided to the local council's MBS, who is nearly always present to observe the panel's deliberations. The recommendation generally takes the form of an Emergency Order requiring specific things to be done by owners to reduce the risk to occupants pending rectification.

The role of the panel is to support and advise the MBS in their independent decision-making. The local council's MBS remains the statutory authority responsible for addressing life and safety concerns arising from building conditions in that municipality, unless and until the Minister for Planning declares that the VBA should perform these functions for specific buildings.

Before any such Ministerial declaration, the VBA supports the MBS to issue and enforce any immediate requirements in an appropriate time frame. It is only after this triage and mitigation process that the VBA may be declared to perform MBS functions.

Where combustible cladding has been identified to present lesser risk to building occupants, expert panels have also provided more general recommendations that the cladding on these buildings should be rectified.

Rectification of these buildings will ensure that they are thoroughly assessed and that if necessary, enduring measures are taken to prevent the emergence of unacceptable risk over time. In many cases, we expect this to involve removal of some or all of the cladding, or the installation of other comprehensive fire safety systems to protect occupants during the life of the building.

The following enforcement actions are available to the MBS to give effect to the expert panel's recommendations:

1. **Evacuation Order:**

An Evacuation Order is issued when a building is deemed to be of such significant risk that it is unable to be occupied until works to reduce the immediate risk to occupants can be completed.

2. **Emergency Order:**

An Emergency Order often requires things to be done relatively quickly and easily. The actions are aimed at improving a building's safety in the short-term, ensure the buildings fire risk has been reduced to a tolerable level before the Emergency Order is removed. Examples of actions in an Emergency Order include:

- > Install additional smoke alarms.
- > Clear/unlock emergency exits.
- > Install smoke seals on front doors of apartments.
- > Install alarm equipment and ensure that fire indicator panels are linked to the fire brigade.
- > Turn off items that use electricity near cladding.
- > Remove potential ignition sources from areas with cladding.

Once the actions contained within the Emergency Order have been complied with, the building will be deemed safe for occupancy, but may still require further longer-term rectification.

3. **Building Notice:**

A Building Notice is a mandatory step before a Building Order may be issued and starts the conversation between building owners and the MBS about what should be done to rectify the building. It provides the owners with an opportunity to address the concerns of the MBS. Feedback from owners and their representatives will be considered by the MBS before deciding whether to issue a Building Order.

4. **Building Order:**

A Building Order may be issued by the MBS after they have considered any concerns raised by the owner in response to the Building Notice. The Building Order sets out the building work that needs to be completed within a certain timeframe.

The MBS will inspect the final building works to assess whether the works required by the Building Order have been completed. Once satisfied, the MBS will cancel the Building Order.

As at 5 July 2019, more than 50 buildings have required immediate measures to be taken to prevent evacuation. Expert panels have recommended that rectification is considered for most other buildings where combustible cladding has been identified. Careful, case-by-case analysis will need to be undertaken for each of these buildings to confirm whether and how much cladding should be removed, and whether additional safety measures will need to be installed.

The VBA has been declared to perform MBS functions for 327 of the highest risk buildings identified to date. Where local council MBSs issued building notices for these buildings, the VBA has assumed responsibility for enforcing those notices by working with building owners to help them understand their obligations in response to those notices. In other cases, the VBA has issued building notices to commence the rectification process.

Audit Findings

Consistent with our Update Report in October 2018, key findings of the audits undertaken to date include:

- Two categories of cladding product – ACP and Expanded Polystyrene (EPS) have been used on many Victorian buildings and present a significant potential fire risk.
- The Audit has observed a trend in the inappropriate use of EPS on lower-rise buildings (up to 10 storeys) in major population centres, such as suburban Melbourne and regional cities.
- Many higher risk buildings are less than 20 metres (six storeys) and are therefore not required to have sprinklers. Higher risk buildings may also have other inadequate fire safety measures, for example a single fire exit.
- Visually identifying ACPs with a polyethylene core and EPS is difficult – even for highly qualified and experienced building practitioners. Destructive testing is often necessary.
- The maintenance of Essential Safety Measures (ESMs) in multi-storey buildings requires improvement.
- Building owners face increased insurance premiums and reduced property values while combustible cladding remains on a building.

Essential Safety Measures

Essential Safety Measures (ESMs) form part of the fire safety systems within certain buildings (eg. apartments, hotels, aged care facilities and hospitals). An ESM is defined to include any item 'provided in relation to a building or place of public entertainment for the safety of persons in the event of fire'. ESMs include means of egress (exit), lighting, firefighting services and equipment, signs, emergency lifts, and air handling systems and ventilation, along with building elements required to satisfy prescribed fire-resistance levels or required to be non-combustible.

Occupancy permits, issued by the relevant building surveyor (RBS) are required to list all of the ESMs relating to the particular building, specify the required level of performance of those ESMs, and specify the frequency and type of maintenance required.

The ESM maintenance and reporting system operates under the expectation that owners and owners corporations will comply and proactively maintain their fire safety systems. Building owners are required to prepare an Annual ESM Report in line with a maintenance determination or the relevant occupancy permit. The Annual ESM Report must declare that the owner has complied with ESM maintenance obligations.

Our Interim Report raised a number of concerns regarding the expertise, training and qualifications of contractors involved in ESM maintenance including sprinkler systems. Through the State-wide Cladding

Audit the VBA has continued to find buildings with ESMs that have had little to no maintenance, and owners corporations who were unaware of their obligations to maintain these integral safety features. This issue requires further consideration to ensure those persons conducting inspections and maintaining these systems are appropriately qualified for the complexity and importance of this work. Owners corporations should not be expected to have this capacity.

Recommendations

In light of these findings, we recommend that:

- The VBA and City of Melbourne complete their comprehensive audits of priority buildings by the end of 2019, and continue to identify, inspect and assess buildings that may not have been captured in the initial priority list.
- Consideration should be given to require Annual ESM Reports to be certified by a suitably qualified person.
- Consideration be given to requiring registration of ESM maintenance contractors.

Audit of Victorian Government buildings

In our Interim Report, we recommended that the Victorian Government act as an exemplar and undertake a comprehensive audit of its own assets and leased buildings.

In response, the intergovernmental Government Audit Working Group was established and has developed a consistent approach to assessing cladding on all government occupied buildings. Led by the Department of Environment, Land, Water and Planning, the Working

Group oversaw the review of approximately 4,700 buildings to identify those likely to have ACP or EPS cladding. As a result of this initial review, 384 buildings were physically inspected and 294 subsequently assessed by expert panels.⁵

Table 3: Expert determinations – Government Buildings

Risk Ratings	Number of Buildings
Extreme risk	0
Highest risk	89 (30%)
Moderate risk	107 (37%)
Low risk	98 (33%)

In 2018-19, the Victorian Government provided \$20.5 million for the rectification of 16 school buildings and 7 hospitals. Works are already underway, and in some cases completed, on these buildings.

The 2019-20 Budget provides \$150.3 for the rectification of State-owned buildings. DELWP is leading a process to identify the most appropriate and cost-effective solution for each building.

Work has commenced to identify the type of cladding on high and moderate risk buildings to determine the extent of cladding required to be removed to reduce risk to an acceptable level. Works are due to commence in late 2019 with the program expected to take up to four years to complete. All Government buildings identified as having combustible cladding, including Government-leased buildings, have had relevant fire safety measures put in place and have been assessed as safe to occupy.

Recommendations

- It is recommended that DELWP oversee a process of rectification of Victorian Government buildings with combustible cladding to ensure that rectification is completed in a timely, cost effective manner that achieves safety outcomes.
- Should a new entity be created to drive rectification of buildings, oversight of the government rectification program should be transferred to that entity to ensure a joined-up, coordinated approach that minimises market impacts.

⁵ While not State Government-owned, a number of university buildings were inspected and assessed through this process and are included in the figures provided here.

Commercial and industrial buildings

To date, the State-wide Cladding Audit has focused on identifying residential buildings and buildings with vulnerable occupants such as hospitals and schools. This has been consistent with the objectives of the Taskforce to prioritise community safety.

A number of owners of commercial and industrial buildings are carrying out investigations into whether their buildings have combustible cladding and what rectification is appropriate. This activity is being driven in part by insurance issues and market demand.

Commercial and industrial buildings were not within the scope of the State-wide audit of private residential and public use buildings as they generally present a lower risk because of the time and nature of their use. It is nevertheless important that occupants of these buildings are safe, and so a strategy for identifying commercial buildings with combustible cladding should be developed along with appropriate rectification. However, we believe that commercial and industrial building owners are in a position to take a more proactive role in this process than domestic owners.

Recommendations

- The VBA should engage with commercial and industrial building owners and the insurance industry to develop a strategy for identifying non-residential buildings containing combustible cladding and a process for rectification.
- The risk assessment tool developed for domestic buildings should be made available for use in commercial and industrial buildings with any necessary modifications and with adequate training.

Compliance, Enforcement and Discipline

Regulation of the building industry in Victoria

The VBA shares responsibility for the administration and enforcement of Building Legislation with Consumer Affairs Victoria, municipal councils, Energy Safe Victoria, Metropolitan Fire Brigade, Country Fire Authority and municipal and private building surveyors.

The VBA's ability to take effective enforcement action is dependent upon robust compliance monitoring, the accuracy of intelligence and the availability of reliable evidence to support the VBA's decision making.

The VBA becomes aware of potential breaches of Building Legislation or inappropriate conduct through:

- complaints from consumers, practitioners, industry bodies and members of the public;
- referrals from other regulators and bodies, including Consumer Affairs Victoria, Domestic Building Dispute Resolution Victoria, WorkSafe, municipal councils and interstate industry regulators; and
- the VBA's own monitoring and supervision activities, including via audits and inspections.

The VBA has a range of tools it can use to discharge its compliance and enforcement functions. Enforcement tools may be used independently or jointly.

Severity of enforcement response



A brief description of each of the enforcement actions available to the VBA is set out in Appendix 2.

The VBA can take enforcement action against companies and registered building practitioners or licensed plumbers bearing responsibility for building or plumbing work, even if the work was undertaken by a sub-contractor or employee.

The VBA conducts proactive building and plumbing inspections, as well as plumbing audits, to ensure that works are completed in accordance with the requirements of the Building Legislation. Proactive inspections focus on building and plumbing work during the construction phase.

Monitoring compliance

Victoria's building and construction industry needs to be underpinned by a best practice building system if it is to continue to be a major contributor to the state's economy and meet the needs of a growing population. In our Interim Report we made a number of recommendations in relation to the activities of the VBA. In addition to our recommendations relating to the State-wide audit, we recommended that the VBA:

- significantly increase its compliance and enforcement activities to deter future breaches; and
- review and consolidate its current compliance, enforcement and prosecution policies to more clearly reflect a risk-based compliance and enforcement approach.
- establish a State Building Surveyor within the VBA to provide authoritative compliance advice and technical guidance

In December 2017, following our Interim Report, the Minister for Planning directed the VBA to increase its level of proactive inspections to 10 per cent of building permits per annum. This represents a significant increase in inspection activity and more closely aligns VBA Inspections with the Inspections Regime of Worksafe.

In the 2017-18 financial year, the VBA inspected 2.5 per cent of new permits issued. Since the release of our Interim Report, the VBA has significantly increased its resources and level of inspection activity and is working towards the target of proactively inspecting 10% of building permits per annum.

Between 1 January 2019 and 30 June 2019, the VBA has conducted proactive inspections across 632 sites relating to 778 building permits, which equates to 9.8 per cent of new permits issued. This significant increase in the VBA's inspection activity is a welcome development

and we expect it to contribute to addressing some of the fundamental cultural issues we identified in the building sector in our Interim Report.

The VBA uses a risk-based approach to auditing buildings and continues to incorporate intelligence learned during the State-wide audit to drive site selection. The VBA's Practitioner Intelligence team provides intelligence coordination, analysis and advice to inform the design of all of the VBA'S monitoring programs, including the State-wide Cladding Audit. The approach prioritises auditing buildings known to involve high risk building and plumbing work, including the responsible practitioners. This ensures that VBA resources are directed to the areas of greatest risk to ensure improved safety and compliance outcomes for consumers.

In our Interim Report, we recommended the appointment of a State Building Inspector or State Building Surveyor within the VBA to provide authoritative compliance advice, provide technical guidance and provide interpretations of relevant standards. We were pleased to see that on 14 June 2019 a State Building Surveyor had been appointed and commenced in the role. The VBA has confirmed that the position will act as an authoritative industry leader for building surveyors and building practitioners across Victoria and will support the industry change required to ensure buildings are consistently well-built, safe and fit for purpose.

Enforcement and disciplinary action

For compliance and enforcement activity to provide a deterrent effect, there needs to be a credible risk of non-compliance being detected. Consequences have to be adequate to provide a real deterrence, as in the absence of public and moral consequences, the risks may be internalised as simply the 'cost of doing business'. Moreover, in the cases where non-compliance is detected, enforcement and punitive measures are most effective when they occur swiftly.

The VBA has recently demonstrated that it is willing to take disciplinary action where building and plumbing practitioners are found to be violating the rules. In 2017-18, the VBA:

- issued 136 show cause notices to registered building practitioners related to disciplinary matters
- held 25 disciplinary hearings of plumbing practitioners;
- completed 34 prosecutions against registered building practitioners and initiated another 31 prosecutions

- completed 24 prosecutions against plumbing practitioners and initiated another 8 prosecutions.

In the nine months between 1 July 2018 and 1 April 2019 the VBA has:

- received 1,359 complaints in relation to building and 1,562 complaints in relation to plumbing from the Victorian community
- investigated 556 individual matters
- taken disciplinary action against 135 practitioners and prosecuted a further 48 individuals.

Changes made to VBA enforcement & disciplinary powers

In our Interim Report, we recommended that the compliance and enforcement powers in the Building Act be reviewed to ensure that the VBA is equipped with a suite of comprehensive, fit for purpose tools that allow for quick, responsive, robust interventions. Subsequently the *Building Amendment (Registration of Trades and Other Matters) Act 2018* has improved the VBA's powers related to enforcement and discipline, including a power to enable the VBA to immediately suspend a registered building practitioner on public interest grounds.

The VBA has already used the public interest immediate suspension power once, and is investigating a number of building practitioners, including building surveyors, builders and fire engineers, who have been engaged in building work that includes combustible cladding. If, following a show cause process, the practitioners are found to have contravened regulatory requirements, the VBA has the power to impose appropriate penalties in line with the severity of the breach. Penalties available for consideration include financial penalties through to suspension and cancellation of registration.

Since the Interim Report, a decision of the Supreme Court of Victoria in *LU Simon Builders Pty Ltd v Victorian Building Authority [2017] VSC 805* (LU Simon Case), it was determined that the VBA's power to make directions to fix (and require a builder to rectify defective works) persists only until a relevant certificate of final inspection or occupancy permit is issued. This limitation presents a significant barrier to the extent of the VBA's powers beyond the construction phase of building works.

Role of Local Government in ensuring compliance

As noted in our Interim Report, Local Government has important statutory obligations with respect to compliance and enforcement of safety and building standards within key sections of the Building Act.

Local Governments also have an obligation to take proactive enforcement measures where a potential non-compliance issue comes to their notice. Enforcement functions include issuing of Building Notices, Orders or Emergency Orders where appropriate to require the rectification of non-compliant building work. The VBA plays a key role in supporting local governments to perform their role of MBS. On 26 February 2019 the VBA brought together more than 400 private and MSB, inspectors and representatives from local government to its inaugural Building Surveyors' Conference. With a theme of *Working together to deliver safe and compliant buildings for all Victorians*, the conference sought to identify and address issues affecting the state's building industry and surveyors in general, before exploring different perspectives on regulation and the role of industry participants, including the VBA.

Recommendation

To improve overall compliance in the sector, consideration should be given to the development and implementation of a protocol between the VBA and councils, which sets out accountabilities, mechanisms for cooperation and communication, strategic interventions and agreed procedures for referring enforcement actions.

We also recommend that the VBA be given the appropriate powers to require a builder to rectify defective building works beyond the issuing of a certificate of final inspection or occupancy permit.

Lacrosse Litigation and findings

The Taskforce Interim Report noted the systemic failures that led to major safety risks and widespread non-compliant use of combustible cladding across the State, with the 2014 Lacrosse building fire demonstrating the risks of such non-compliance.

At the time of writing the Interim Report, disciplinary proceedings had commenced against the building surveyor, the registered builder, and the fire safety engineer in connection with the Lacrosse fire, alleging various breaches of the Building Act, regulations and professional standards.

The Building Practitioners Board (BPB) proceedings against the builder have now been completed but the proceedings against the Building surveyor and the fire engineer have not.

Enforcement and disciplinary action needs to take place promptly in order to create a culture of compliance in the building industry. Since 2016 there have been changes made that now require disciplinary action to be taken by VBA directly, rather the BPB. This has resulted in a reduction in the time it takes for proceedings to be completed. It is also understood that the Architects Registration Board of Victoria is also pursuing inquiries into the parties.

Whilst those disciplinary proceedings were ongoing, the builder responsible for the building work sought and was granted a declaration in the Supreme Court of Victoria which prohibited the VBA from issuing a 'direction to fix' under section 37 of the *Building Act 1993*⁶. The Court held that the *power to issue a 'direction to fix' upon the builder ceases when an occupancy permit or certificate of final inspection has been issued in relation to the relevant building work.*

The judgment limits the ability of the State to require builders who are responsible for non-compliant building work to rectify that work after an occupancy permit or certificate of final inspection has been issued. The judgement restricts the ability of the State to require those builders responsible for cladding issues to rectify the risks identified during the audit.

The Lacrosse incident has also seen the affected apartment owners (211 Applicants including the relevant owners corporations and individual apartment owners), take legal action against those involved in the design, construction and management of the Lacrosse building. In *Owners Corporation v LU Simon*⁷, the Victorian Civil and Administrative Tribunal (VCAT) found the builder had breached a number of statutory warranties set out in the *Domestic Building Contracts Act 1995* and was therefore liable to pay damages to apartment owners. The Tribunal was also found that the ACP installed on the Lacrosse buildings did not comply with the deemed to satisfy provisions of the Building Code of Australia (BCA) when it was designed and built.

Importantly, while the builder was found liable to pay damages, various contractors associated with the buildings construction were required to reimburse the building as 'concurrent wrongdoers'. The Tribunal found that the following parties were to reimburse the builder in the following proportions:

- Building surveyor: 33%
- Architect: 25%
- Fire engineer: 39%
- Resident who failed to extinguish the cigarette resulting in the fire: 3%

The decision of VCAT in the Lacrosse case is currently subject to appeal proceedings and to date has taken more than 4 years to reach judgement. Despite the appeal proceedings, LU Simon as the original builder has voluntarily commenced a rectification program for the building.

Challenges in pursuing action against responsible parties

The Lacrosse example demonstrates some of the challenges in pursuing legal recourse from builders and other parties responsible for the design and construction of buildings with non-compliant cladding.

Challenges in pursuing action against responsible parties include:

- Where buildings were completed more than 10 years ago they cannot be the subject of 'building actions' for recovery of damages.
- Limited legal recourse exists for owners where builders are no longer operating or have been wound up. Builders involved in the original works may have since 'phoenixed' (wound up the entity under which works were carried out, now operating under a different entity).
- Proceedings are likely to be protracted and the likelihood of recovery is uncertain. Recovery mechanisms for building defects depend on the age of an individual building, the application of case law and the extent to which liable building practitioners are able to pay out losses.

⁶ LU Simon Builders Pty Ltd & Ors v Victorian Building Authority [2017] VS 805

⁷ Owners Corporation No.1 of PS613436T v LU Simon Builders Pty Ltd (Building and Property) [2019] VCAT 286

Legal actions relating to the rectification of combustible cladding are likely to trigger insolvency of some building companies, a tightening of Professional Indemnity Insurance and the possible withdrawal of insurers from the market.

No jurisdiction requires builder to carry warranty insurance in relation to work to construct buildings of three storeys or more. For buildings without insurance the bringing of claims may result in builder insolvency.

Recommendations

Despite the important progress demonstrated since our Interim Report, we continue to have concerns with the adequacy of disciplinary processes for building, plumbing and architecture professionals. The processes continue to be slow and largely opaque to consumers and the general public. In this context, we recommend that:

- DELWP and the VBA review the current legislative and regulatory provisions relating to the disciplining of building, plumbing and architecture professionals with a view to reducing delays and improving the transparency of the processes. This could be progressed as part of a package of broader reform.
- DELWP closely monitors and assesses the effectiveness of the VBA's increased inspection and enforcement activity.
- The VBA continuously improves its approach to compliance activities, including implementation of a risk-based approach for targeting inspections.
- That the VBA commence a program of random inspections to complement the proactive inspection program that aims to drive an ongoing increase in compliance across the sector.
- The VBA develop a strategy for oversight of building surveyors including potential auditing against a code of conduct.

Rectification of private buildings with combustible cladding

Complexity of rectification

Rectification of combustible cladding on buildings is complex and difficult – different solutions will be required for different buildings. There are many buildings requiring rectification and they come in many different sizes and types. Cladding may need to be removed to ensure safety in many but not all affected buildings. Rectification is a process that will take time, in large part due to the size and number of affected buildings and the nature of the building works to be carried.

Often owners corporations are large and are not geared up to deal with complex, large-scale building matters. It is difficult for many owners corporations to make prompt decisions about rectification and in many cases owners are likely to have difficulty funding the works. 'As constructed' documentation may not be available or accurate. It may be necessary to fully or even partially relocate Occupants to undertake works.

The volume of work required represents a challenge. The availability and capacity of practitioners and contractors will also need to be monitored. Even the administration and logistics of any project, and facilitating access will be a challenge for many owners corporations, particularly if other work is required at the same time

There is a strong case for further government intervention to support owners in timely rectification. This support will need to involve both funding and a coordinating role from government.

Principles for rectification process

Consistent with our prioritisation of the safety of building occupants, the focus of activity since we handed down our Interim Report has been on the identification and risk assessment of buildings with combustible cladding to ensure that, where necessary, urgent steps are undertaken to ensure that residents can stay in their homes.

Now that a significant number of buildings have been identified and assessed, the next step is to ensure that buildings can be rectified. In our view, it is critical that buildings be rectified:

- Taking a **risk-based approach**: ensuring buildings are prioritised based on risk, ensuring the highest risk buildings are rectified first, reducing risk to residents and the broader community.
- **To an appropriate standard**: long term rectification must bring buildings down to an acceptable level of risk. The appropriate standard ought to be determined by reference to the performance requirements set out in the National Construction Code.
- **In a cost-effective way**: given the volume of rectification work to be undertaken, there is a risk that the price of rectification works will increase and that owners corporations will not be well placed to assess the value offered by proposed works.
- **With minimal stress and disruption for occupants and owners**: those who own or live in buildings that have been identified as having combustible cladding are already under considerable stress. It is important that the rectification process seek to minimise additional stress and disruption on these individuals.

Rectification of combustible cladding on buildings should achieve the requirements of the *National Construction Code*. Rectification will vary from full replacement of all combustible cladding to no further action being needed in those buildings that have been deemed acceptable-risk. If a building retains some combustible cladding it should be required to seek approval from the Building Appeals Board of an acceptable performance solution. The approach needs to consider risk and prioritising works based on risk as a paramount consideration unpinning all program design elements.

Cost Management

Findings of the State-wide cladding audit, as well as rectification works undertaken to date of Government buildings have helped identify a number of key challenges and opportunities in anticipating and managing costs associated with rectification. Notably, the cost of rectification can vary considerably between buildings, posing a significant challenge in estimating the total cost of rectification and the extent of any funds that may be required for state intervention.

While cost estimates may be made based on the extent of cladding found on buildings audited to date, individual building characteristics, the relative risk ratings, and the availability of performance solutions (partial removal and/or other risk mitigation measures) mean these estimates are not necessarily scalable. Undertaking further pilot projects and further analysis of review outcomes will enhance understanding of specific building characteristics and variables likely to impact rectification costs, as well as program design mechanisms that may be used to manage costs through the process and deliver more efficient cost outcomes.

Further consideration should also be given to the role of any new entity in managing rectification costs, including any market response which may inflate the cost of rectification as a result of demand for services and any government intervention.

In the interest of ensuring any government funds made available for rectification are utilised effectively, access to funds should be risk-based, ensuring those buildings with the greatest risk from cladding are resourced first and rectification expedited. Owners Corporations should be encouraged to exercise fiscal discretion in decision making, and the allocation of funding interrogated through appropriate procurement and funding assessment processes.

There is a key role for government in determining reasonable amounts of funding to be made available to Owners Corporations, based on individual building circumstances and appropriateness of rectification solutions, assessed against benchmarked costs and quotes for works. Tender-like principles through the funding process will also help ensure costs remain competitive and limit any market disruption.

Program cost projections and rectification funding processes should also not act to limit market innovation by prescribing a single rectification solution. By ensuring any government rectification program adequately considers performance solutions, including any future innovations in both design and materials development.

If government intervention was to prescribe a single rectification solution, this may unnecessarily inhibit the emergence of new products to the market. Encouraging market innovation will also have a positive effect in reducing any supply chain and inflationary risks, as the demand for existing products and services increases.

Recommendation

That any government rectification program includes:

- A risk-based demand management strategy, ensuring the highest risk projects are expedited, and resourced appropriately.
- Development and implementation of a framework to monitor, record and manage rectification costs.

Challenges in achieving rectification

There are a number of challenges to achieving rectification. The most significant of those challenges are:

- The difficulty faced by owners corporations in making prompt decisions about complex matters such as which rectification solution to approve for a building (including the time required to reach the 75 per cent threshold for decisions)
- owners corporations who do not have the capacity and knowledge to manage such complex building issues and capital works projects
- the inability of some owners to fund rectification works.

To date, local council MBSs and the VBA have been using existing regulatory powers, in particular building notices and orders, to bring about the rectification of buildings that have been assessed as needing physical works to be made safe. Despite the best efforts of the VBA to date, very few private residential buildings identified with non-compliant cladding through the State-wide audit have commenced rectification. This means owners of apartments in these buildings continue to deal with increased insurance premiums, decreased property values and challenges selling their properties. Most significantly, building occupants continue to live with an unacceptably high level of risk.

In this context, it is clear that further intervention by Government is needed to bring about the prompt and consistent rectification of the private buildings identified as having combustible cladding and requiring rectification.

There are a number of serious risks if the Government does not intervene to ensure timely cladding rectification:

- **Catastrophic incidents involving deaths or injuries** in the event of a cladding fire.
- **Delay** due to owners corporations and owners being unable or unwilling to fund rectification or manage complex building works.
- **Litigation** involving claims by owners corporations and owners against builders with cross litigation against other building practitioners (building surveyors, fire engineers and architects) may result in significant delays to rectification. The Lacrosse case was not resolved until five years after the Lacrosse fire.
- **Limited legal recourse options** for owners where builders are no longer practising, and limited recourse under statutory (domestic building) insurance schemes.
- **Insurance risks.** In the absence of State intervention, widespread litigation against building practitioners is liable to lead to an increase in insurance premiums and threat of withdrawal of Professional Indemnity Insurance for building practitioners. An impact on building insurance where cladding remains present on buildings may affect property prices.
- **Increased disputes.** Potential for conflict with local government and owners corporations and delays as a result of disputes over responsibilities.
- **Emotional and financial risks to owners** who are faced with the challenge of working within the owners corporation to procure technically complex building works and finding funds to pay for rectification.

Improvements to the rectification process – establishing an authority

As outlined above, there have been significant challenges in progressing rectification. We also acknowledge the level of stress and mental anguish building owners and occupants have experienced to date.

Over the last 12 months we have been working with the Victorian Government to develop options for intervention to enable timely rectification of buildings given the significant risk to the community posed by combustible cladding.

To this end, we recommend that the Victorian Government establishes an authority to oversee and coordinate rectification of the highest risk buildings within a clear timeframe. The aim is to remove barriers to timely and appropriate rectification. The new authority should:

- Provide funding for rectification works and project management commencing with higher risk buildings
- Facilitate access to professionals who can prepare, design, approve and carry out the rectification works
- Provide technical support and procurement support to ensure value for money
- Monitor timeliness and effectiveness of progress of rectification

The objective of supporting rectification works is to ensure buildings are brought into compliance with any building notices or orders issued by the VBA or relevant MSB, and to be made safe.

In recognition of the huge task ahead, the new authority will be required to triage impacted buildings to sequence rectification activities. This could be done through assessing the risk to life safety, readiness to complete the works, and availability of practitioners to undertake design and rectification works.

We also believe that without financial intervention and support from government, access to funds to enable rectification work will remain a significant obstacle. Therefore, we recommend the Victorian Government to provide financial support for rectification, particularly for those buildings that are of the highest risk to life safety.

There are a number of precedents for government intervention, such as the Black Saturday Fires where both the Victorian Government and Federal Government made financial contributions to assist affected Victorians. Similarly, the New Zealand Government offered financial assistance to eligible homeowners to repair leaky homes, which was also due to widespread non-compliance with building legislation. While these precedents for intervention exist, it is important to recognise that any intervention by government in rectifying combustible cladding should be driven by community safety outcomes, and appropriately designed to mitigate any expectation of government intervention in building issues in the future.

Role of the Victorian Building Authority through rectification

Whilst the VBA should remain responsible for commencing enforcement actions, the new authority should be responsible for supporting owners to comply with the VBA's requirements. The new authority should provide support and guidance to owners and owners corporations committees and managers. Buildings should be made safe and the building's cladding should also be made compliant with the relevant regulatory requirements.

The rectification process should utilise the VBA's existing regulatory powers, to ensure cladding is made compliant through full removal and replacement of cladding with compliant materials, or through an approved performance solution (partial removal), which meets the performance requirements of the NCC. In our view any performance solution should require independent approval by the Building Appeals Board.

The new authority should not be responsible for those matters which are to be determined by the VBA within the scope of its regulatory responsibilities under the Building Act, including when appointed as MBS by the Minister for Planning. If the new authority is initially established within the VBA, appropriate steps will need to be taken to separate its administration from the regulatory role of the VBA in order to manage any perceived conflict of interest.

Role of Local Government through rectification

Local Government will retain a key role through the rectification process. For some buildings that are assessed as moderate and low risk, no substantive regulatory action or building works will be required. In these cases, building owners will be provided with educational information about how to maintain building safety, focusing on behavioural steps (such as keeping exits clear) rather than building works. The VBA process will provide peer support and technical guidance to MBS, if needed, to take any necessary action for these buildings.

The VBA should also continue to explore options to support councils to conclude processes for relevant buildings, including the establishment of ongoing collaborative arrangements between the VBA and MBS to manage any elevated risks posed to occupants due to the presence of combustible cladding.

Rectification should be prioritised on the basis of risk

The new authority should prioritise intervention on the basis of risk, dealing first with higher risk buildings. This is necessary in order to reduce the risk of catastrophic incidents. The VBA will be the MBS for most of the higher risk buildings while council MBSs will be responsible for lower risk buildings.

The VBA, acting as MBS for the higher risk buildings should prioritise the issuing of building notices and orders on the basis of risk. Council MBSs will be responsible for buildings classified as moderate or low risk through the audit process. Low risk buildings do not generally require cladding removal and an educational approach on fire safety will be appropriate for these buildings. Owners of low risk buildings with some cladding may seek a declaration from the Building Appeals Board under Section 160A of the *Building Act 1993* that their building complies with the Building Act. Buildings identified as moderate risk in the audit will need to be further assessed to determine if they require replacement of combustible cladding or whether other steps can be taken to enable them to be categorised as low risk and compliant with the Act.

Recovery of costs from other parties

Members of the public who purchase and live in residential buildings expect that they will be safe and comply with relevant building regulations. However we have found that in too many cases builders and building practitioners have failed to take sufficient account of safety and the requirements of the building regulations. In some of these cases this conduct may amount to breach of building warranties or negligence as VCAT found in respect of the builder, architect, fire engineer and building surveyor in the Lacrosse case.

There are a number of difficulties in recovering costs from wrongdoers and rectification should not be held up by the long and complex process of litigation. This is a key reason why we have recommended that government provide funding support to owners for rectification. However this does not mean that wrongdoers should be able to avoid all responsibility. This would do little to remedy the culture of non-compliance that has been a key reason the problem has arisen.

The Government should seek to offset the costs of the rectification program from wrongdoers. Given the challenges owners corporations and owners face in mounting litigation, it may be appropriate to require owners to transfer their legal recovery rights to the state

as a condition of receiving the rectification funding. Government should investigate a range of legal options for recovery including class actions. This process needs to be expedited as the opportunity to make claims is time limited.

Any action against building practitioners is likely to invoke claims against insurance. Insurers of building practitioners are now facing the risk of substantial claims from owners corporations for cladding removal. To the extent that government funds rectification, insurers receive a significant windfall gain. Government should negotiate with insurers with a view to a substantial contribution coming from them towards the cost of rectification.

Contribution by the Commonwealth Government

There are good reasons for the Commonwealth Government to contribute to resolving issue of combustible cladding on buildings. We believe that this should include contributing to costs of rectification. The construction industry is national, and builders and building practitioners operate across state borders. The construction industry is critical to the Australian economy and the public safety and insurance issues associated with cladding are decreasing trust and confidence in the building system. Unless these issues are addressed there is a real risk to the ongoing viability of the construction sector and its contribution to the Australian economy.

The Commonwealth plays an important role in the system of building safety in Australia through the Australian Building Codes Board and through its border controls. Many issues associated with the cladding issue can be much better addressed through a national approach. For example, the insurance industry is likely to be much more responsive to a national approach to these issues.

The public would expect that everything possible would be done by all levels of government to avoid catastrophic events like the Grenfell Tower fire in the United Kingdom.

In addition to contributing to costs of rectification, the Commonwealth should contribute to resolving the cladding and broader building issues through:

- A national approach to Identification and auditing of buildings with combustible cladding
- An urgent national and even international resolution of the emerging insurance issues and the negotiation of funding solutions/trade offs with the Insurance Industry.

- Recovery of government funding and legal costs from responsible parties
- Continued improvements to the National Construction Code
- Management of other emerging systemic building defects issues – particularly product defects and system inadequacies
- Support for further research on building safety
- Product standards and supply chain issues
- Funding assistance for rectification of the most urgent rectification projects
- Identification, auditing and rectification of Commonwealth owned Buildings

Recommendations

To this end, we recommend that:

- The Government establish a dedicated authority to support owners and occupants through the rectification process, including:
 - Providing funding for rectification works
 - Providing project management support
 - Ensuring proposed solutions are carried out in a timely and effective manner to bring buildings to an acceptable level of risk
 - Educating owners about how to mitigate fire risks until the cladding on their buildings is rectified.
- Should the new authority be established within the VBA, any perceived conflict of interest should be managed appropriately.
- If rectification is to be achieved through partial removal of cladding and a performance solution, the solution should be independently approved by the Building Appeals Board.
- The Victorian Government implement a process to enable recovery of the cost of rectification from responsible parties.
- The Victorian Government negotiate with insurers to make a substantial contribution to the cost of rectification.
- The Victorian Government seek a contribution to the management and cost of the program from the Commonwealth Government.
- The Victorian Government take a risk-based approach to prioritising buildings for funding in the program of rectification of private buildings.

Communication with residents, owners and building managers

It is important that there be clear communication with residents, owners and occupants of buildings that contain combustible cladding. They should understand the risks associated with cladding on their building, steps the VBA and other authorities are taking to audit and rectify their building, options for rectification and their individual and collective roles in reducing risk of fire and improving building safety.

Communication about risk reduction steps should include:

- extinguishing all cigarettes safely
- maintaining the buildings essential safety measures
- reporting any issues concerning the safety of the building to their owners corporation manager
- knowing the building's fire escape plan
- removing all obstructing clutter hallways and fire exits and emergency stairwells
- not removing, covering or obstructing smoke detectors/alarms
- not covering or obstructing air conditioning units with clothes or other combustible material
- keeping balconies clear of combustible material, including clothes and boxes; and
- not using BBQ's and heaters near combustible materials.

Communications undertaken to date

The VBA has undertaken significant communications activities to ensure that owners, owners corporations, and residents are kept informed of any combustible cladding that might have been used in the construction of their buildings.

In 2018 the VBA wrote to approximately 3,400 residents from priority list buildings directly advising of their building's risk assessment, and providing fire safety tips appropriate to the building's risk rating. The letter also provided the expert panel's recommendation.

As part of the VBA's ongoing audit processes, the VBA liaises with owners corporation managers to schedule inspections. At this point, the VBA requests that managers review the building's essential safety measures and recommends steps for owners and

occupiers to reduce the risk of fire spread. Following an inspection and panel review, the VBA informs owners corporations managers of the expert panel's risk assessment and findings. The VBA requests that managers inform occupants of the risk assessment and provide them with fire safety tips.

Where extreme risks have been identified, the VBA has often taken additional steps, including directly delivering fire safety tips to residents by either the MBS, VBA staff or owners corporation representatives. Additionally, owners corporations are asked to display the panel outcome letter in a communal space within the building to ensure all residents are aware of the cladding and positive fire safety practices.

It is difficult to access accurate data about who is occupying buildings, and there is frequent turnover of residents. This makes communicating with residents challenging. Owners corporation managers and committees are therefore critical for effective communications to owners and residents.

As of March 2019, the VBA has been declared as MBS for 327 higher risk buildings around the State as assessed through its cladding audit program. A VBA Community Liaison Officer (CLO) has been appointed to assist the owners of each of these buildings. The CLO acts as the VBA key contact for each building, and is able to be contacted directly by owners, the owners corporation manager and residents, as they support them through the challenging process of rectifying buildings.

In many cases it is the MBS from local government who issues building notices or orders. VBA shares templates and factsheets with councils to assist their direct communications.

Advice to prospective purchasers and tenants

Prospective purchasers and tenants should be able to obtain information about whether the building they propose to occupy has combustible cladding. The VBA has proceeded on the basis that all genuine purchasers and tenants should be informed about cladding and any related building orders.

There has been controversy about whether the VBA or Government should publicly release certain lists of buildings, which may have combustible cladding. The Government received advice from the Metropolitan Fire Brigade that such lists should not be released as it may increase the risk of arson and threaten public safety. Further a number of such lists of buildings were preliminary only and contained many addresses, which on inspection were found not to contain cladding.

There are however other ways relevant information can be communicated.

A large amount of cladding information is made available via the VBA website for a variety of audiences, including; residents, owners, owners corporations, potential purchasers and tenants and the general public. This information is accessible at www.vba.vic.gov.au/cladding.

Vendors are required to give notice of cladding on a building for sale to prospective purchasers in section 32 statements. Owners corporations are required to display.

The owner of an apartment building must ensure that a copy of the occupancy permit is displayed at a prominent location approved by the relevant building surveyor.⁸ This is important for owners and residents because occupancy permits specify the essential safety measures for the building.⁹ We consider it important for apartment owners and residents to know about essential safety measures and understand that they need to be maintained to ensure ongoing occupant safety.

An owners corporation must also ensure that copies of building notices and orders are provided to each lot owner affected by any such notice or order.¹⁰

The VBA receives many enquiries from residents, owners and those looking to purchase or occupy specific properties. The VBA has a database of buildings with cladding based on the audit inspections and will share this information with genuine purchasers and potential tenants.

However, it is likely that many prospective tenants are not aware of cladding on buildings or how they can find

out about it. Landlords are not currently required to give notice of cladding on leases and this is an area that should be considered for reform.

Future communications and the rectification process

A key priority for the rectification authority that we have recommended is to develop a comprehensive communications and community engagement strategy to achieve the objectives of improving safety and effectively rectifying buildings.

Engagement and communication objectives should include:

- increased public awareness of combustible cladding
- ensuring owners and tenants feel supported and informed about rectification processes and timeframes
- giving owners and tenants confidence that experts will ensure their building is rectified and brought to the appropriate standards of safety
- restoring community confidence in the value of buildings impacted by combustible cladding
- reaching agreement between stakeholders on the best ways to achieve safe and compliant buildings; and
- supporting residents to live safely with combustible cladding while waiting for rectification to occur.

Recommendations

We recommend that:

- The rectification authority develop a comprehensive communications and engagement strategy which includes:
 - Engagement and communications for both owners and occupants of buildings to promote short-term fire safety measures ahead of rectification
 - Ongoing communications and engagement throughout the rectification of process
- Consideration be given to strengthening disclosure requirements, including requirements of owners to inform tenants if there is non-compliant combustible cladding on the building. This includes a requirement that residential leases contain information regarding any risk from combustible cladding present in the building.

⁸ Regulations 197 and 198, Building Regulations 2018 (Vic)

⁹ Regulation 194, Building Regulations 2018 (Vic)

¹⁰ Section 236(4D), Building Act 1993 (Vic)

Reducing the risk of future non-compliance

We are pleased to acknowledge the work the Victorian Government has already undertaken to reduce the risk of non-compliance.

The *Building Amendment (Registration of Building Trades and Other Matters) Act 2018* (the 2018 Act) amended the *Building Act 1993* to:

- establish a framework for the registration of trades and sub-contractors to prescribe types of building work that can only be carried out by people who hold the requisite skills and experience.
- provide for the Minister to specify classes of buildings for which the VBA can act as a MBS, in particular to manage cladding rectification
- enhance the VBA's enforcement powers, including enabling destructive testing where necessary to assess compliance.
- provide the framework for Cladding Rectification Agreements, a three-way voluntary agreement between an owner or owners corporation, lender and municipal council to fund cladding rectification works.
- allow the Minister the power to ban high-risk cladding products.

Product safety regulation

Following our Interim Report, the Minister for Planning introduced *Minister's Guideline MG-14: Issue of building permits where building work involves the use of certain cladding products* (MG-14). This provides that a building surveyor should not issue a building permit for proposed building work which includes the installation of certain high-risk products unless the Building Appeals Board has determined that the proposed application complies with the Building Act and Building Regulations.

At the Building Minister's Forum meeting on 8 February 2019 Ministers agreed in principle to support a national ban on the unsafe use of combustible ACPs in new construction, subject to a cost/benefit analysis being undertaken on the proposed ban, including impacts on the supply chain, potential impacts on the building industry, any unintended consequences, and a proposed timeline for implementation. This proposed ban would go above and beyond the current requirements in the NCC by seeking to put beyond doubt the types of products that are combustible (and how such combustibility is determined and tested) and therefore when such products can safely be used, if at all.

We understand that the Victorian Government is playing a lead role in the implementation of a national ban, and we support the Minister for Planning's continued advocacy for a national approach to dealing with combustible cladding.

Culture of non-compliance in the building industry

In our Interim Report we discussed the prevalence of non-compliance across the building industry, resulting in the wide-spread use of combustible cladding. Victoria is not alone in this regard as similar patterns and concerns have arisen in other jurisdictions, but nevertheless the level of non-compliance is of serious concern.

While the Government has a role to play in detecting non-compliance and enforcing the rules and regulations, the onus of compliance clearly rests on professionals and practitioners who are carrying out works. Building industry bodies, practitioners and professionals have a significant role to play in changing the culture within the industry.

Clerk of works

In the past a clerk of works would oversee the construction process on behalf of either the architect or the owner, undertaking a quality assurance role in the interests of the owner. This role has largely disappeared despite the increasing complexity of construction and building products.

In our Interim Report we recommended that DELWP undertake consultation on the restoration of the role of Clerk of Works to oversee building works and the provenance of building products. Since this time, we understand that the role of the proof expert in Germany is being considered across Australia as a possible approach to introducing greater oversight of high-risk construction, particularly in relation to fire safety and structural engineering. We recommend that this be considered as part of the proposed longer term reform of the building industry.

Statutory General Duty of Care

In our Interim Report we recommended that the Victorian Government consider introducing a statutory duty of care on building practitioners to protect occupants and consumers. This would require all parties involved in the construction of a building, including architects, designers, building surveyors, fire engineers and builders, to take reasonable practicable safety measures.

The concept of duty of care has been a successful model in OHS legislation for decades where failure to comply is regarded as an indictable offence subject to improvement and prohibition notices, enforceable undertakings, prosecution, high fines and even imprisonment. More recently a general duty of care has also been introduced in Environment Protection legislation. Having a duty of care is consistent with the notion of shared responsibility and aims to complement other regulatory provisions, not replace them.

By its nature, this duty is overlapping, concurrent and non-delegable. It is a positive duty on all parties whose acts or omissions are capable of affecting the safety and health of others. The duty should also be qualified by an objective test of what is reasonably practicable which ensures the obligation is risk-based, proportionate and related to the actual circumstances of the practitioner.

A shared responsibility for preventing harm provides a mechanism for a modern regulatory scheme and a framework for a cultural shift in favour of prevention of risks and the protection of occupants and consumers. The duty should be constructed to reflect contemporary legislative practice so that it spreads the responsibility for safety more evenly rather than focusing narrowly on a small number of individuals.

A general duty is flexible, enduring and able to apply to new hazards that emerge in the future. Importantly, it is able to fill any safety gaps where no specific requirement exists in current legislation.

The duty would essentially involve identifying and assessing possible risks, and then implementing mitigation measures. The regulator would be able to take pre-emptive action if practitioners failed to take steps to prevent the risk of harm (rather than taking action after a harm has occurred and then having to prove the harm to establish a breach).

Having an enforceable statutory general duty of care will benefit the VBA's regulatory effort from dealing reactively after an incident has occurred, to acting proactively, reducing the safety risks before an incident can occur.

The Taskforce acknowledges that this will present major reform to the current regulatory scheme and will require extensive communication, education, guidance and information campaigns for it to be effective. It should also be considered in the context of the longer-term reform of the building industry.

Skills training and registration

The Interim Report findings sought to highlight a general need to increase skills and capabilities among building practitioners, noting the inexperience of some professionals and variability of workmanship. The Shergold Weir report recommended that all practitioners be required to undertake compulsory Continuing Professional Development on the National Construction Code.

DELWP has commenced work to establish a framework for a Continuing Professional Development (CPD) scheme to be set out in the Building Regulations and the Plumbing Regulations. The scheme will seek to improve ongoing training, knowledge, and the development of further professional skills for registered and licensed plumbers, registered building practitioners, and licensed building employees. Consistent with the Shergold Weir recommendation there should be compulsory CPD focused on improving the understanding of the NCC and ensuring its effective implementation.

Recent amendments to Building Legislation have laid the groundwork for professional development requirements to be prescribed and enforced. 2016 amendments to the Building Act established that the VBA 'may have regard to' whether a registered practitioner has complied with any prescribed CPD requirements in considering whether registration is renewed.

Further amendments to the legislation in 2018 sought to strengthen this position, establishing non-compliance with any prescribed CPD requirements as grounds for disciplinary action, as well as clarifying non-compliance as grounds for refusing a licence renewal. The *Building Amendment (Registration of Building Trades and Other matters) Act 2018*, also established a framework to prescribe types of building work that can only be carried out by registered tradespeople, which together with a CPD enforcement framework, will ensure only those with the requisite skills and training are able to carry out those works.

Notably, similar amendments were made to the Plumbing Regulations 2018, providing a framework for compliance with CPD requirements in the plumbing industry.

Frameworks for requirement of CPD compliance for both building and plumbing practitioners continue to be developed and will be set out in the Building Regulations 2018 and the Plumbing Regulations 2018.

Performance solutions

The NCC allows for building works to be undertaken that do not comply with Deemed-to-Satisfy (DtS) provisions, provided that an appropriate performance solution is approved. In the rectification process for affected buildings requiring rectification, any performance solution proposed for rectifying a building's cladding, such as partial removal of cladding, will require determination from the Building Appeals Board.

The flexibility offered by performance solutions is an important element of the NCC, and at its best encourages innovative design. When the best practice processes for a performance solution are followed, including third party review by a peer or specialist, then it is likely to operate as intended. However, current regulations permit performance solutions to be approved by a single expert, such as a fire safety engineer. In these instances, where a proposed solution has not undergone robust scrutiny by multiple qualified parties, it has been found that the performance solution is often inadequate or non-compliant.

Recommendations

We recommend that:

- Victoria continue to play a lead role in reaching a national approach to dealing with combustible cladding.
- Building industry bodies, practitioners and professionals proactively seek to improve the culture within the construction industry.
- The Victorian Government consider introducing a statutory duty of care on building practitioners to protect occupants and consumers.
- All practitioners be required to undertake compulsory Continuing Professional Development on the National Construction Code.
- The Victorian Government give consideration to the restoration of the role of the clerk of works as part of its long-term reform strategy for the construction industry.
- The requirements around the use of performance solutions be strengthened, including provision for third party review of proposed performance solutions.

Other notable reports into the building sector

Building Confidence: Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia

In mid-2017 the Building Ministers' Forum (BMF) commissioned Professor Peter Shergold AC and Bronwyn Weir to undertake an assessment of the effectiveness of compliance and enforcement systems for the building and construction industry across Australia. The findings of the *Building Confidence* report are consistent with our findings, in particular that there are broad cultural and regulatory issues in the building sector, with systemic failures across:

- the product supply chain from manufacturing, marketing, import, supply, sale and purchase
- the building and construction process from design, specification, procurement, installation, building and construction and maintenance
- regulation itself, particularly in the level and adequacy of compliance and enforcement.

In our view the *Building Confidence* report makes many important recommendations that will increase the likelihood that the building industry will deliver compliant and safe buildings in the future. The report should form the basis of a national best practice model for all jurisdictions including Victoria.

Ahead of the *Building Confidence* report's publication in 2018, the Victorian Government had already delivered against some of the recommendations following recommendations in our Interim Report. This included improving transparency in the engagement of surveyors/certifiers and providing the VBA with broader compliance powers.

We draw attention to some of the key recommendations in the *Building Confidence* report, which will require further attention in the context of the long-term reform strategy for the construction industry:

- Recommendation 3 – compulsory Continuing Professional Development on the national Construction Code
- Recommendation 6 – a broad suite of powers to be given to regulators to monitor buildings so they can take strong compliance and enforcement action. The VBA has been given broader powers but the long-

term reform should consider whether these should be extended. For example the MBS has certain powers that the VBA does not have (unless declared MBS).

- Recommendation 7 – each jurisdiction to make public its audit strategy for regulatory oversight of the construction of commercial buildings with annual reporting on audit findings and outcomes
- Recommendation 10 – each jurisdiction put in place a code of conduct for building surveyors. This could be the basis on which building surveyors could be audited and if necessary disciplined.
- Recommendations 14, 15 and 17 – adequate documentation, approval processes and potential third party review of performance solutions. Performance solutions allow more innovative approaches to be implemented but poorly documented and inadequate performance solutions present a major safety risk.

The Victorian Government's response to the *Building Confidence* Report can be found here: <https://www.industry.gov.au/data-and-publications/building-confidence-report-implementation-plan>.

Building a Safer Future Independent Review of Building Regulations and Fire Safety: Final Report

Only two weeks after the release of the *Building Confidence* Report, the UK Government released the *Building a Safer Future* report prepared by Dame Judith Hackitt, which was commissioned in the wake of the tragic Grenfell Tower fire, and examines the building regulations in the UK.

While the building regulation scheme in the UK is considerably different to ours here in Victoria, observations about building practices, culture and regulatory oversight are similar. The key findings of the report can be summarised as follows:

- a general ignorance of the regulations and guidance
- a lack of priority on safety measures for the sake of keeping costs low
- a lack of clarity on roles and responsibilities
- inadequate regulatory oversight and enforcement.

Essentially, the issues governments face in building regulation across the world are in many respects the same. The complexity will continue to challenge governments as they strive to rebuild trust and confidence in their building and construction sectors.

Senate report on non-conforming building products

On 23 June 2015, the Senate referred an inquiry into non-conforming building products to the Senate Economics References Committee. The inquiry was brought about following a number of industry-led forums that highlighted the growing body of evidence of the use of non-conforming building materials in the Australian construction industry.

The inquiry examined a range of issues surrounding the production, sourcing and use of non-conforming and non-compliant building products. The Committee was tasked with this inquiry following the Lacrosse fire in Melbourne in 2014 and in response to escalating concerns regarding the use of non-conforming building materials in the Australian construction industry. Three

Interim Reports were tabled by the Committee, relevantly, an Interim Report on ACP in September 2017. That Interim Report made a number of recommendations, including:

- a proposed ban on the importation, sale and use of polyethylene core ACP
- a national licencing scheme for all trades and professionals and professionals
- making all Australian Standards and codes freely available
- the imposition of a penalties regime for non-compliance with the National Construction Code
- the development of a nationally consistent statutory duty of care protection for end users in the residential strata sector.

The final report contains a further thirteen recommendations directed at overcoming systemic deficiencies in the construction industry's regulatory framework, which also have direct synergies with the findings of our Interim Report.

Emerging issues

When we handed down our Interim Report, we noted the significant amount of evidence regarding safety issues in the building and construction industry, including broader concerns over non-compliance with the *Building Act 1993* that extend much further than the use and impacts of non-compliant cladding. Information was shared by concerned individuals and practitioners of serious defects in the construction of buildings that were not compliant and some that posed health, safety and amenity risks. It is also arguable that in past years insurers have not been recovering sufficient premiums to cover the level of claims.

Recently, building industry standards have again been called into question again due to the issues facing the owners of the Opal Tower and Mascot Tower buildings in NSW. These are only the next in a long line of issues and crisis to come if there is no change to the culture in the building industry, building regulation and oversight. The Victorian Government needs to be prepared, and the response to the crisis presented by combustible cladding will set a precedent for future wide-spread issues within the sector. Cladding is not the first issue, and it will not be the last.

Over the last 12 months we have heard many instances of insurance premiums increasing significantly or insurers who have refused cover for buildings that have been identified as having combustible cladding. While this has presented a significant challenge to owners of buildings, it has also been the main contributor in driving voluntary activation by owners corporations.

We have also been told of a practice that has developed of building surveyors 'dumping' notification of potential cladding claims on their existing Professional Indemnity insurer before their policy expires and then swapping to a new insurer.

We have also recently seen the insurance market respond to the prevalence of non-compliance in the building industry through the withdrawal of a number of providers of Professional Indemnity Insurance. While this is not a direct response to just the issue of combustible cladding on buildings, this issue has played a major role in further exacerbating the already volatile market. Some insurers are requiring exclusion of cladding related matters in Professional Indemnity Insurance. This has resulted in a number of building surveyors unable to gain the required level of insurance.

The *Building Act 1993* requires building surveyors to hold Professional Indemnity Insurance without exclusions in order to practice in Victoria. This is an important consumer protection provision. However, if Building Surveyors are unable to practise as a result of an inability to obtain insurance, the construction industry could grind to a halt. It is therefore reasonable to grant an exemption allowing exclusion of cladding related claims in Professional Indemnity Insurance until the overall issues around insurance can be resolved.

Two issues that affect insurers in granting Professional Indemnity Insurance are liability for cladding related claims on existing buildings and the potential liability for cladding on buildings to be built in the future. Given the changes that are being made to ban or limit combustible cladding for future buildings, liability for these buildings should be able to be managed.

If government funds and coordinates rectification as we have recommended, the liability of insurers for existing buildings is likely to be reduced. Accordingly it is reasonable for government to negotiate with insurers with a view to their remaining in the market. Further to the extent that government provides funds for rectification, insurers receive a significant windfall gain. It is therefore reasonable for them to make a substantial contribution towards the costs of rectification.

While rectification of buildings with combustible cladding will provide some reassurance to insurers, this issue requires a solution beyond that of any one jurisdiction, and it is important that the Victorian Government continues to advocate for national consistency in the treatment of these issues. It would be appropriate for the Commonwealth Government in partnership with the states to negotiate with insurers to maintain Professional Indemnity Insurance and to make a contribution to the cost of rectification.

Governments should also explore fall-back options for providing Professional Indemnity Insurance to building professionals if satisfactory arrangements cannot be reached with insurers.

We recommend that:

- The Victorian Government advocate for a national approach led by the Commonwealth Government to building insurance and Professional Indemnity Insurance issues.
- Negotiation be undertaken with insurers with a view to maintaining the market for Professional Indemnity Insurance.
- Governments explore fall-back options for providing Professional Indemnity Insurance.

Emerging systemic issues

Although the work of the Taskforce has been limited to dealing with the issue of non-compliant cladding, we have also identified a number of issues arising as a result of systemic failure. These include the continuing issues of:

- concrete cancer
- asbestos

And the developing issues of:

- wiring
- defective glazing
- plumbing
- structural issues
- inadequate ventilation
- fire protection systems

The Victorian Government has already acted to prevent silicosis in employees of stonemasonry workshops. This included implementation of a number of priority measures such as a ban on dry cutting of materials that contain crystalline silica dust, a new compliance code for business working with silica, and an awareness campaign to highlight the risks of working with engineered stone.

While these issues are only just emerging, and it is yet to be seen how widespread the impact will be. Only longer-term reform and changes to the culture within the building industry (for both practitioners and regulators) will bring about real change and protect the safety of Victorians.

In this regard we recommend:

- VBA take a proactive interest in identifying these problems
- Work with the Commonwealth and other States to establish the extent of any issues and to consider both solutions and future prevention measures

Commonwealth advocacy

In our Interim Report we recommended that the Minister for Planning continue to encourage the Building Ministers' Forum and Australian Building Codes Board to improve the clarity and readability of the National Construction Code (NCC). It is our view that such a review would reduce the number of subjective standards included in the Code and improve consistency of language used to describe compliant performance standards. While some improvements have been made to the NCC, we strongly encourage the Minister for Planning to continue to advocate for continued improvements to the NCC.

Since the release of the Interim Report, we have also formed the opinion that the Commonwealth is best placed to lead on several further important emerging issues. These are issues which affect most or all other states and territories, present a significant risk to the sustainability of the building industry in Australia, and would benefit from a consistent national approach. These include:

- Professional Indemnity Insurance: as discussed above
- Building insurance for common property: Buildings known to have combustible cladding are in some cases experiencing dramatic premium increases and in several instances struggling to secure building insurance policies.
- A financial contribution to regulatory reform: The benefits of a comprehensive reform program would extend nationally, improving Australia's built environment over the long term and meriting a Commonwealth contribution.
- Widespread systemic defects: A national approach for addressing emerging, widespread systemic defects would allow for a coordinated response to issues becoming apparent in buildings across the country, which have the potential to undermine confidence in the Australian building system.

Longer term reform

There is wide-spread recognition that systemic issues undermine the delivery of an efficient, robust building sector in Victoria and only significant reform of the building system will begin to address the underlying problems affecting the industry. Systemic review is required so that building system proactively responds to risk to deliver a quality and safer built environment for Victorians in an efficient and effective manner.

In our Interim Report we outlined a number of significant reform issues that should be addressed so that the building system can proactively address risks in a predictable way, supporting safety, secure investment and productivity. We identified concerns across the range of building system stakeholders that cladding was symptomatic of broader underlying levels of non-compliance and pointed to a misalignment of current legislation and the building and construction process. This has led to:

- gaps in the framework for dealing with risks, which are compounded by historic low levels of compliance and enforcement,
- overloading of existing compliance and mechanisms, which are poorly equipped to deal with the significant increase in products sourced offshore and changes in construction practices and culture.

Victoria's urban form is undergoing significant transition to meet the increasing demands of population growth. Yet there is increasing evidence the building system is not fit for purpose and consumers are largely experiencing the fall-out from the failure of the system to adequately respond to this shift.

A new home, whether free-standing or part of an apartment block, is often the most significant investment for consumers and housing construction or renovation is a significant driver of growth in the Victorian economy. Many consumers have experienced defective and low-quality buildings that pose a significant public safety and amenity issue. Not only do such failures impose a high emotional cost on consumers, but remediation and rectification of defective buildings also imposes a high productivity cost on society.

The Victorian Government has a key role in supporting an efficient, responsive and accountable building system. There are many indications that the current building system could be improved, including several recent reviews that highlight failures in the building regulatory system. There are also suggestions of an industry culture where non-compliance with legislative requirements has been 'normalised'.

Reforms undertaken in 2016, 2017 and 2018 were the most significant reforms since the introduction of the *Building Act 1993*. However, these reforms focused on the most critical and urgent short-term consumer protection and enforcement measures. While there has been a lot of progress so far, it is clear that there is more that needs to be done.

Recommendations

We recommend that further reforms are undertaken to address key policy issues and place safety and consumer protection at the heart of the system.

The key objective of a review should be to provide a regulatory system that:

- delivers safe, compliant, durable and sustainable buildings in an efficient and effective manner
- protects consumers and improves confidence in the industry and regulators
- supports skilled and experienced practitioners to carry out compliant and safe practices
- supports regulators to robustly and efficiently enforce compliance.

The review should focus on achieving the following outcomes and features:

- a regulatory system that addresses market failures, with appropriate incentives and penalties to influence behaviour change
- buildings are delivered in conformity with regulatory and contractual requirements at reasonable cost
- buildings are maintained and used consistently with regulatory requirements
- disputes are prevented from arising, as far as practicable
- where disputes do arise, they are resolved early, expediently, fairly and inexpensively
- regulatory responsibilities, requirements and processes are transparent and efficient
- roles, responsibilities and accountabilities are clear.

Appendix 1: Status of recommendations from the Interim Report

RECOMMENDATION	STATUS
1. That the Taskforce continues its work, at the Minister's discretion and oversees with DELWP the State-wide audit and audit of all Victorian Government buildings until completion.	COMPLETE TRANSITION TO RECTIFICATION
2. That the Minister for Planning implement as a priority measures to prevent the use of aluminium composite panels (ACP) with a polyethylene core (as agreed at the Building Ministers' Forum) and expanded polystyrene (EPS) cladding, for class 2, 3, or 9 buildings of two or more storeys, and class 5, 6, 7 or 8 of three or more storeys. These measures should be highlighted in a product safety alert and remain in place until he is satisfied with compliance with new testing standards and a permanent labelling system is introduced.	MG-14: COMPLETE IN PROGRESS: work on ban currently being developed – as part of building ministers forum work
3. That the Taskforce oversee the completion of pilot audits in six councils to inform final inspection and assessment processes, including the finalisation of the Taskforce's Risk Assessment Tool.	COMPLETE TRANSITION TO RECTIFICATION See Recommendation 1
4. That the Victorian Government act as an exemplar and undertake a comprehensive audit of its own assets and leased buildings, overseen by the Taskforce.	COMPLETE TRANSITION TO RECTIFICATION See Recommendation 1 The 2019-20 Victorian State Budget provides funding for the rectification of government owned buildings.
5. That the Victorian Government uses its procurement powers to stop future use of aluminium composite panels (ACP) with a polyethylene core on government buildings.	COMPLETE
6. That the VBA lead a State-wide audit overseen by the Taskforce of privately owned, residential, multi-unit buildings, three storeys and above and all public-use buildings two storeys and above, and that: <ol style="list-style-type: none"> the audit prioritise buildings identified by the Taskforce as likely to have either ACP or expanded polystyrene cladding the VBA develop a resourcing model for the audit, including consideration of inspection workforce options and likely budget impacts to ensure that the work is properly funded the Taskforce and/or the VBA write to the owners of prioritised buildings, advising of their obligations and encouraging them to seek professional advice on the nature of their cladding. 	COMPLETE – priority audit complete STATE-WIDE AUDIT CONTINUES TO IDENTIFY FURTHER BUILDINGS TRANSITION TO RECTIFICATION FOR BUILDINGS FOUND TO HAVE COMBUSTIBLE CLADDING See Recommendation 1

RECOMMENDATION	STATUS
<p>7. That a State Building Inspector or State Building Surveyor is established within the VBA to provide authoritative compliance advice, provide technical guidance and provide interpretations of relevant standards</p>	<p>COMPLETE – appointment of Andrew Cialini announced 14 June 2019</p>
<p>8. That the Taskforce complete the development of a rectification standard, to be used by the VBA in its audit as well as fire safety engineers and private building surveyors. The rectification standard will set out appropriate action for rectifying buildings with non-compliant external wall cladding based on a safety risk assessment, stakeholders will be asked to promote it as part of the voluntary activation of the private sector.</p>	<p>IN PROGRESS</p>
<p>9. That the Taskforce work with the Department of Treasury and Finance to further consider and research options for financing building rectification.</p>	<p>COMPLETE See Recommendation 17 for low cost financing</p> <p>The 2019-20 Victorian State Budget provides \$15m over two years for 15 evaluation projects to manage and improve rectification outcomes.</p>
<p>10. That the Taskforce oversees an independent review of the VBA's post-Lacrosse audit and its findings.</p>	<p>COMPLETE</p>
<p>11. That the VBA:</p> <ol style="list-style-type: none"> significantly increase its compliance and enforcement activities to deter future breaches review and consolidate its current compliance, enforcement and prosecution policies to more clearly reflect a risk-based compliance and enforcement approach ensure that private building surveyors do not have prohibited exclusions from their Professional Indemnity Insurance policies work to ensure practitioners have greater understanding of the NCC and building legislation so compliance is taken more seriously immediately resource planned improvements to its data collection and analysis capabilities develop a resourcing model and business case to allow it to effectively discharge these functions. 	<p>ONGOING</p> <p>See Recommendation 21 for increased VBA powers under the Act</p> <p>The 2019-20 Victorian State Budget funds the VBA to continue working to meet inspections of 10 per cent of building permits annually to improve safety and quality outcomes in relation to this recommendation.</p>

RECOMMENDATION	STATUS
<p>12. That bodies responsible for disciplinary action against professionals in the building industry, including the Architect Registration Board Victoria, Building Practitioners Board and the VBA ensure that hearings take place expeditiously into matters of professional conduct.</p>	<p>ONGOING</p> <p>Significant VBA disciplinary processes underway.</p> <p>The VBA has exercised its new power to immediately suspend a practitioner on public interest grounds.</p> <p>OTHER MEASURES PART OF LONGER-TERM PRIORITY REFORM FOR 2019/20</p>
<p>13. That consideration be given to amending the Building Act to ensure building surveyors and fire safety engineers act independently, supported by a code of conduct developed by the VBA.</p>	<p>MEASURES PART OF LONGER-TERM PRIORITY REFORM FOR 2019/20</p>
<p>14. That the Minister for Planning advocate nationally to develop a standard that would define and restrict the use of 'FR' (Fire Resistant, Fire Retardant or Fire Rated) in the marketing of products.</p>	<p>MEASURES PART OF LONGER-TERM PRIORITY REFORM FOR 2019/20</p>
<p>15. That relevant authorities collaborate to educate the community on risks associated with excessive occupancy levels and to undertake enforcement where appropriate.</p>	<p>ONGOING AS PART OF RECTIFICATION</p>
<p>16. That the regime for establishing, maintaining and enforcing Essential Safety Measures (ESM) and the qualifications of those inspecting such systems, in multi-storey buildings be strengthened.</p>	<p>IN PROGRESS</p>
<p>17. That the Taskforce further explore options for low cost financing be explored to allow owners corporations to fund works and allow for any long-term costs that are borne by owners to be distributed over time.</p>	<p>COMPLETE: cladding rectification agreements framework established October 2019</p>

RECOMMENDATION	STATUS
<p>18. That DELWP develop a discussion paper and undertake consultation on:</p> <ul style="list-style-type: none"> a. introducing a statutory duty of care on building practitioners (including architects and designers) to protect occupants and consumers in the residential strata sector b. introducing shared responsibility legislation that would apply to manufacturers, importers and suppliers of building products along similar lines to product safety legislation introduced in Queensland in August 2017 c. introducing compulsory warranty insurance for residential multi-unit developments and insurance by commercial builders. d. the range of the other measures outlined in this report to improve the regulation of building product safety e. introducing a requirement to seek approval of significant variations to plans, and to lodge drawings and specifications with councils that reflect building plans and specifications ‘as built’ f. the restoration of the role of Clerk of Works to oversee building works and provenance of building products. 	<p>MEASURES PART OF LONGER-TERM PRIORITY REFORM FOR 2019/20</p>
<p>19. That consideration be given to improvements to the current private surveyor model in Victoria to ensure an effective and efficient model that would improve levels of compliance, the rigour of inspection and clarify and improve the effectiveness of enforcement of building laws.</p>	<p>COMPLETE: role of RBS post-occupancy clarified in legislation</p> <p>OTHER MEASURES PART OF LONGER-TERM PRIORITY REFORM FOR 2019/20</p>
<p>20. That consideration be given to reconsidering and clarifying the role of the VBA relative to local government and the MBS.</p>	<p>COMPLETE : evacuation and escalation protocol (policy)</p> <p>COMPLETE: clarification of role of VBA and MBS in rectification framework</p> <p>OTHER MEASURES PART OF LONGER-TERM PRIORITY REFORM FOR 2019/20</p>
<p>21. That DELWP review the compliance and enforcement powers in the Building Act to ensure that regulators are equipped with a suite of comprehensive, fit for purpose tools that allow for quick, responsive, robust interventions.</p>	<p>COMPLETE: some proposed legislative measures with increased VBA powers for immediate suspension</p> <p>OTHER MEASURES PART OF LONGER-TERM PRIORITY REFORM FOR 2019/20</p>

RECOMMENDATION	STATUS
<p>22. That DELWP, with input from the VBA, analyse the penalties under the Building Act and consider whether maximum penalties and sentencing practices are adequate.</p>	<p>COMPLETE: some proposed legislative measures</p> <p>OTHER MEASURES PART OF LONGER-TERM PRIORITY REFORM FOR 2019/20</p>
<p>23. That the Government consider measures to strengthen of the requirements for fire safety designs to be independently reviewed, inspected and approved:</p> <ul style="list-style-type: none"> a. requiring that fire safety related performance solutions be peer reviewed by a second fire safety engineer who is truly independent to the design process b. requiring that a registered fire safety engineer inspect and approve the works carried out pursuant to their fire safety designs at specific mandatory notification stages c. introducing an additional mandatory inspection stage for fire safety designs d. expanding the scope of fire safety matters that require the report and consent of the Chief Officer e. increasing the time allowed for the Chief Officer to make a determination on an application for report and consent 	<p>D-E: COMPLETE</p> <p>A-C: MEASURES PART OF LONGER-TERM PRIORITY REFORM FOR 2019/20</p>
<p>24. Prescribing additional matters that would requiring the Chief Officer's consent and that the Minister promote through the Building Ministers' Forum (BMF) the adoption of the rectification standard as a national model.</p>	<p>MEASURES PART OF LONGER-TERM PRIORITY REFORM FOR 2019/20</p>
<p>25. That the Minister continue to encourage the BMF and ABCB to improve the clarity and readability of the NCC. Such a review should reduce the number of subjective standards included in the Code and improve consistency of language used to describe compliant performance standards.</p>	<p>ONGOING</p>
<p>26. That the Minister write to the Commonwealth Minister urging the Commonwealth to make arrangements that would allow Australian Standards to be made available free of charge.</p>	<p>IN PROGRESS</p>
<p>27. That the Taskforce continue to work with peak bodies and professional associations to disseminate its advisory notes to owners.</p>	<p>ONGOING</p>
<p>28. That the Taskforce website continues and is updated and maintained by DELWP and added as a landing page to the VBA website.</p>	<p>COMPLETE</p>
<p>29. That direct communications with tenants and the general public be rolled out and visual aids be developed to improve the understanding of the NCC.</p>	<p>COMPLETE</p> <p>ANY OTHER MEASURES PART OF LONGER-TERM PRIORITY REFORM FOR 2019/20</p>

Appendix 2: Compliance and enforcement tools

The VBA has a range of tools at its disposal to respond to non-compliance with the Building Legislation. Each of these enforcement tools is described briefly below.

Compliance advice and information

The VBA may provide general advice, information and access to educational programs to a person that engages in low risk non-compliance as a means to educate the person and correct their behaviour to ensure future compliance.

Written warning

Where non-compliant work warrants less severe enforcement action, any individual or company that is alleged to have breached the Building Legislation or engaged in inappropriate conduct may be issued with a written warning.

Infringement notices

An infringement notice can be issued by the VBA for prescribed infringement offences. They enable the VBA to impose a fine on a person without needing to go to court. The VBA will issue an infringement notice where there is a breach of a prescribed infringement offence and the VBA decides that an infringement notice is the most appropriate way of responding to the breach. Non-payment of the fine set out in an infringement notice may result in a prosecution and/or disciplinary proceedings if the infringement notice was issued to a registered or licensed building or plumbing practitioner.

Direction to fix (building work only)

The VBA may issue a direction a MBS or a private building surveyor to carry out his or her functions in accordance with the Building Legislation or within a specified period.

Direction to building surveyor (building work only)

The VBA may issue a direction a municipal building surveyor or a private building surveyor to carry out his or her functions in accordance with the Building Legislation or within a specified period.

Rectification notice/plumbing notices and orders (plumbing work only)

The VBA may issue a rectification notice to a plumber who has carried out noncompliant plumbing work. Failure by a registered or licenced plumber to comply with a rectification notice may result in prosecution and/or disciplinary action. The VBA can also issue a plumbing notice and subsequent order to the owner or occupier of a property where non-compliant plumbing work has been undertaken. If an owner fails to comply with a plumbing order, the VBA may prosecute the owner or occupier and/or seek recovery of any costs incurred in carrying out the work from the owner or occupier.

Undertakings

The VBA may accept a written undertaking given by a person in connection with a matter in relation to which the VBA has a function under the Act. If the person fails to comply with the undertaking the VBA may apply to a court for an order directing the person to comply with the undertaking, carry out building work or pay an amount reflecting any financial benefit gained or other appropriate order.

Injunction

The VBA may apply to the court for an injunction to:

- restrain a person from doing something or engaging in a certain type of behaviour
- require a person to do something, such as bringing non-compliant building work into compliance.

Disciplinary action

Disciplinary action is one of the VBA's key enforcement tools to hold registered building or plumbing practitioners to account and to enforce compliance with the Building Legislation. The VBA will take disciplinary action where a registered practitioner is alleged to have engaged in conduct that raises significant concerns about that practitioner's competency, professionalism and/or compliance with Building Legislation.

If the alleged conduct is also an offence, disciplinary action can be taken instead of or in addition to a prosecution. Disciplinary action can result in:

- formal reprimand
- directions to do or not do a specified thing
- requirement to successfully complete a specified course of training within a specified period
- financial penalties
- imposition of conditions on the practitioner's registration or licence
- suspension of registration or licence
- cancellation of registration or licence
- disqualification for a specified period of up to 3 years from being registered or licensed.

Prosecution

The VBA will commence criminal prosecutions against individuals who contravene offence provisions of the Building Legislation where it is in the public interest. The VBA will exercise its discretion to prosecute in a consistent way, by having regard to the Director of Public Prosecutions Victoria's guidelines on prosecutorial discretion and based on the facts and circumstances of each individual case.

