

NEW LEGAL ISSUES FACING SUPPLIERS

BANNERMANS PRESENTATION | Wednesday, 19 February 2020





PRESENTER | David Bannerman

Start Time | 11:45am

Presenter | David Bannerman

Date | 19 February 2020

INTRODUCTION



ENGLAND'S RESPONSE TO THE GRENFELL TOWER

IMPROVE FIRE SAFETY: LEGAL PERSPECTIVE

NSW CLADDING TASKFORCE REQUEST

BUILDING PRODUCTS (SAFETY) ACT 2017

DISCLOSURE & REGISTRATION

MELBOURNE'S DECISION OF THE LACROSSE TOWER CASE

HOME BUILDING ACT 1989 NSW

CHAINS OF LIABILITY

FAILED & PROPOSED REFORM



England's Response to the Grenfell Tower

- £200 million fund accessible to owners on the condition that they take reasonable steps to recover from those liable.
- Class action lodged in Philadelphia against three American companies – Arconic (supplier), Celotex (manufacturer of the insulation) and Whirlpool (make of the fridge that started the fire) - are facing 143 counts of wrongful death and product liability.
- Criminal investigation underway – charges not expected to be laid for 2 years.

Image Source: Sky News





Melbourne's Response to the Lacrosse Fire

ABC NEWS LOCATION: Sydney, NSW [Change](#)

Just In Politics World Business Analysis Sport Science Health Arts Fact C

Bushfire warnings For information on the fires in Queensland check the Rural Fire Service's incident ma the fires in New South Wales, check the NSW RFS website.

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Flammable cladding to be stripped from buildings under Victorian Government plan

By state political reporter [Richard Willingham](#) and staff
Updated 16 Jul 2019, 5:31pm

VIDEO: Victoria is seeking a federal contribution to the \$600m cladding package. (ABC News)

Hundreds of millions of taxpayer dollars will be spent to deal with the flammable cladding crisis in Victoria, where about 500 buildings need rectification work to be made safe.

Premier Daniel Andrews has announced a \$600 million package to fund the work, and was asking the Commonwealth to cover half of that cost.

RELATED STORY: [When your home is a fire risk but you can't afford to fix it](#)

RELATED STORY: ['A huge crisis': Building industry may grind to a halt over lack of cladding insurance](#)

RELATED STORY: [Documents reveal what Melbourne council was told about building's risks before fire](#)

Image Source: ABC News



NSW Response After Grenfell Fire – Building Ministers Forum 30 June 2017

Comprehensive Package of Measures to Improve Fire Safety
in High Rise Buildings from a **Legal** Perspective

1. NSW Cladding Taskforce

- Audit buildings and write to owners
- Fire and Rescue NSW conduct Pre-Incident Plans for these buildings
- Undertake Home Fire Safety Checks to ensure installed fire safety equipment systems working

2. Environmental Planning and Assessment Amendment (Fire Safety and Building Certification) Regulation 2017 amending EP&A Act

- No more cowboy certifiers of alternative solutions and AFSS
- Traceable liability to CFSP for incorrect designs and certifications





NSW Response After Grenfell Fire – Building Ministers Forum 30 June 2017

Comprehensive Package of Measures to Improve Fire Safety in High Rise Buildings from a Legal Perspective

3. Building Product (Safety) Act 2017

- Increase government powers to deal with unsafe building products



4. Environmental Planning and Assessment Amendment (Identification of Buildings with Combustible Cladding) Regulation 2017

- Require buildings with cladding register, and prepare and submit a cladding statement.





Dealing with the NSW Cladding Taskforce Request

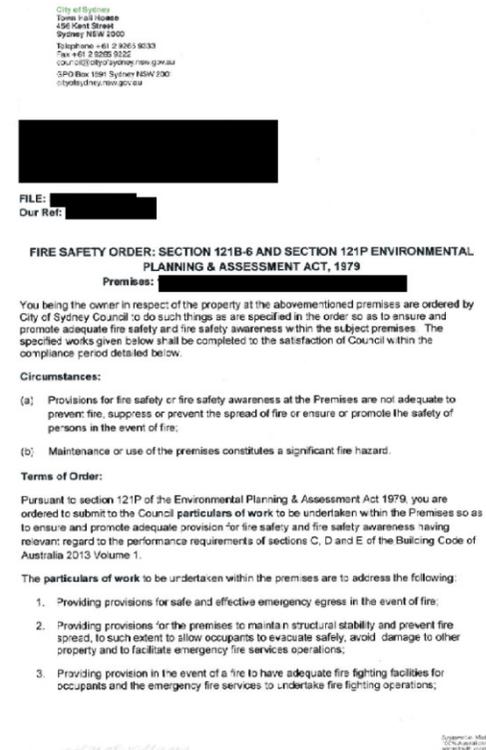
1. Arrange to inspect Council's records to obtain details of the type of cladding installed and the manner of installation.
2. Arrange for an audit and risk assessment to be conducted by a qualified expert.
3. Seek an expert's opinion on the best method available to make the building safe.
4. Consider if approval from a planning authority or an order from Council is required to be able to perform these scope of works.





Dealing with the NSW Cladding Taskforce Request

5. Disclose the existence of any non-complying cladding to the Home Warranty Insurer within 6 months.
6. If purchasing off the plan and you have concerns about the type of cladding used, report it to the developer, builder and certifier.
7. Register the buildings details at www.fairtrading.nsw.gov.au/buildingdefects
8. Carefully comply with the NSW taskforce requests.
9. Register building on the EPA website.
10. Expect a fire order from Council if you have cladding.





Building Products (Safety) Act 2017

The Building Products (Safety) Act 2017 ("Act") has been passed by the NSW government & commenced on December 18

Key issues include:

- NSW Fair Trading having enhanced investigative powers, including powers to require builders, suppliers, manufacturers and importers to produce records to facilitate identification of dangerous products.
- The Fair Trading Commissioner having power to ban use of unsafe building products when satisfied on reasonable grounds that the particular use is unsafe.





Building Products (Safety) Act 2017

The Building Products (Safety) Act 2017 ("Act") has been passed by the NSW government & commenced on December 18

Key issues include (continued):

- The Fair Trading Commissioner having power to issue affected building notices in relation to specific buildings or classes of building.
- Increased council powers to require rectification in case of use of dangerous products.



CITY OF SYDNEY

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Building Products (Safety) Act 2017

The Building Products (Safety) Act 2017 ("Act") has been passed by the NSW government & commenced on December 18

- Substantial penalties for non-compliance, up to \$1.1 million for corporations or \$220,000 or two years imprisonment or both for individuals. Further, an additional penalty may be imposed for each day an offence continues, being \$110,000 for corporations and \$44,000 for individuals.



Image Source: Google Images

Building Products (Safety) Act 2017

BUILDING PRODUCT USE BAN

NOTICE UNDER SECTION 9(1) OF THE *BUILDING PRODUCTS (SAFETY) ACT 2017*

I, Rosemary Ann Webb, Commissioner for Fair Trading, Department of Finance, Services and Innovation:

PROHIBIT the use of aluminium composite panels (ACP) with a core comprised of greater than 30 per cent polyethylene (PE) by mass ('the building product') in any external cladding, external wall, external insulation, façade or rendered finish in:

- o Class 2, 3 and 9 buildings with a rise in storeys of three or more and Class 5, 6, 7 and 8 buildings with a rise in storeys of four or more (Type A construction as defined in the Building Code of Australia); and
- o Class 2, 3 and 9 buildings with a rise in storeys of two or more and Class 5, 6, 7 and 8 buildings with a rise in storeys of three or more (Type B construction as defined in the Building Code of Australia),

subject to the following exceptions:

- a) the building product is not deemed combustible by successfully passing a test in accordance with Australian Standard 1530.1-1994 'Methods for fire tests on building materials, components and structures' (AS 1530.1);

or

- b) the building product and proposed external wall assembly has successfully passed a test for both the EW (external wall fire spread) and BB (building-to-building fire spread) classifications in accordance with Australian Standard 5113 'Fire Propagation testing and classification of external walls of buildings' (AS 5113) and the proponent of the use of the building product tested to AS 5113 documents by statutory declaration that the building product will be installed in a manner identical to the tested prototype wall assembly or façade,

and

- c) the AS 1530.1 or AS 5113 test results to be relied upon to except a building product from the ban are produced by an Accredited Testing Laboratory, and describe the methods and conditions of the test and the form of construction of the tested building product or prototype wall assembly or façade, and are dated on or after 1 July 2017.

This building product use ban commences Wednesday 15 August 2018 and remains in force until it is revoked.

ROSEMARY ANN WEBB
COMMISSIONER FOR FAIR TRADING
DEPARTMENT OF FINANCE, SERVICES AND INNOVATION



Building Products (Safety) Act 2017

The Building Products (Safety) Act 2017 ("Act") has been passed by the NSW government & commenced on 18 December 2018

Implications for strata schemes include:

- Details of any outstanding building product rectification order will need to be disclosed in certificates issued under Section 184 of the Strata Schemes Management Act 2015.
- Lot owners selling lots the subject of an outstanding building product rectification order will need to disclose to the purchaser, as it constitutes an adverse affectation for the purpose of the implied warranties under the Conveyancing (Sale of Land) Regulation 2017.
- The use of a building product in contravention of the Act will be listed as a "major defect" for the purpose of proceedings for a breach of statutory warranties under the Home Building Act 1989 ("HBA").





Disclosure & Registration

Environmental Planning & Assessment Regulation 2000

- Registration required by 22 February 2019 for buildings occupied on or before 22 October 2018 or otherwise within 4 months of first occupation.
- Penalty for non compliance \$3,000 for corporations and \$1,500 for individuals.
- Regulation 186S imposes this obligation on the owner of a building that has “external combustible cladding”, Regulation 3 defining this as:



Image source: Google images



Disclosure & Registration

Environmental Planning & Assessment Regulation 2000

- Any cladding or cladding system comprising metal composite panels, including aluminium, zinc and copper, that is applied to any of the building's external walls or to any other external area of the building; or
- Any insulated cladding system, including a system comprising polystyrene, polyurethane or polyisocyanurate, that is applied to any of the building's external walls or to any other external area of the building.



Image source: Google images

Owner tests optional at Sydney buildings with fire-risk cladding

EXCLUSIVE

By **ANDREW CLENNELL**
NSW POLITICAL EDITOR
Follow [@aclennell](#)

12:00AM JUNE 5, 2019

 14 COMMENTS



Victoria Tower at 197-199 Castlereagh Street, Sydney, is one of 341 buildings on the cladding register.

More than 340 buildings in central Sydney have been identified as having cladding that poses a potential fire risk.



The Lacrosse Tower Case



The Lacrosse Tower Case

UPDATE: VCAT DECISION 28 FEBRUARY 2019
OWNERS PS613436T & Ors v LU SIMON BUILDERS P/L & Ors

Liability: The Builder, LU Simon, is to pay the Owners \$5,748,233.28 for breach of statutory warranties (Domestic Building Contracts Act 1995 (Vic.))

However: The Builder is to be almost wholly compensated by Consultants as follows:

Certifier	33%
Architect	25%
Fire Engineer	<u>39%</u>
	<u>97%</u>



Image source: Google images

- The Tribunal found the person whose cigarette butt started the fire was 3% responsible, but did not have to compensate the Builder, because the Builder had failed to seek such orders.



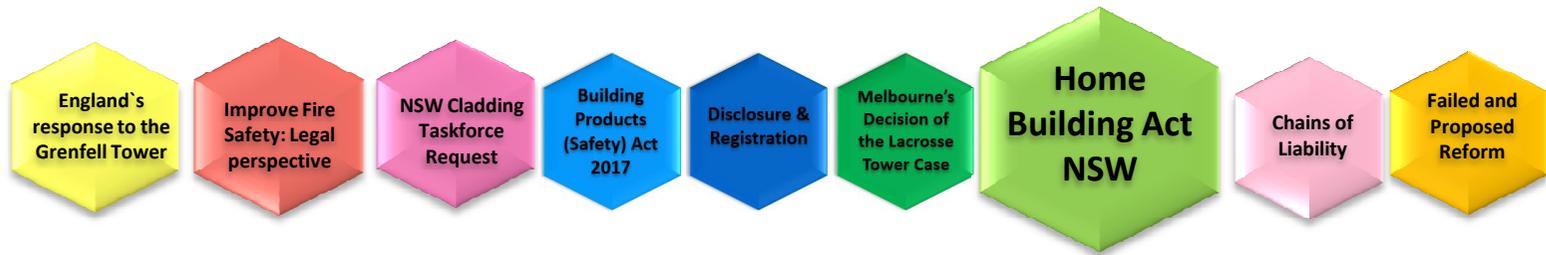
The Lacrosse Tower Case

UPDATE: VCAT DECISION 28 FEBRUARY 2019
OWNERS PS613436T & Ors v LU SIMON BUILDERS P/L & Ors

- The amount payable pursuant to this award only covers reinstating the building to its pre-fire state. Including project manager and strata manager fees.
- There is a further \$6.8M in damages yet to be resolved (increase to insurance premiums, “compliance cost” of replacing unburnt cladding, anticipated future costs such as loss of rent and emergency accommodation).
- The Certifier, Architect & fire engineer are appealing this decision, claiming that the builder should bear some responsibility.



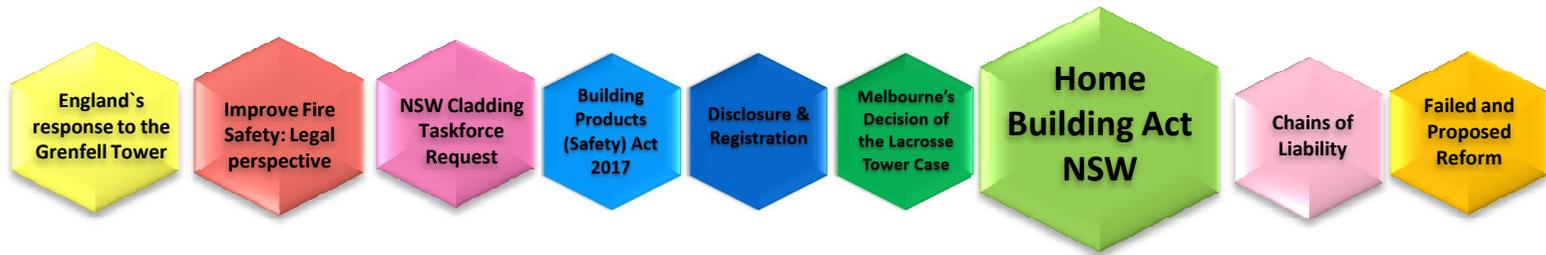
Image source: Google images



Warranty Periods

- There are still 7, 6 and 2 year warranty periods.
- The key date for working out which period applies is 1 February 2012.



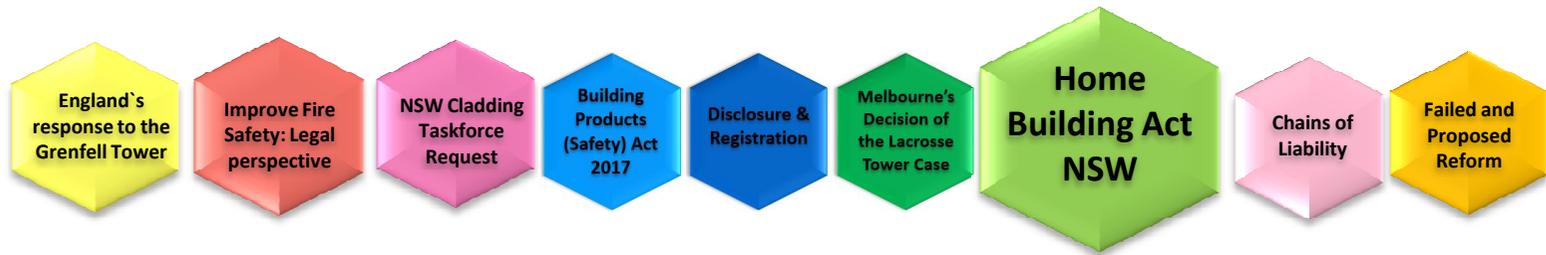


2% Bond Scheme

- No inspectors appointed.
- Accreditation courses for inspectors not yet underway.
- Only for 4 or more storey buildings commenced under a contract after 1 January 2018. If no building contract because the same builder/developer, where works commence after 1 January 2018.

2%

Image source: Google Images



Inspector Appointments

- Inspector appointments due in 2020.
- OFT still to work out who is to cost the defects to be deducted from the bond.
- It should be the inspector, who is best placed for this.
- 2% bonds or payments to the Owners Corporation could be clawed back by the liquidation of developers.



Image source: Google Images



Home Owners Warranty Insurance will only apply if the liable Builder and or Developer have either:

- Died,
- Disappeared,
- Become Insolvent, or
- Had their Licence Suspended due to an outstanding judgment or money order from NCAT.



NSW Chains of Liability

An owner of land who contracted with the relevant parties may be able to claim against:

1. Breach of contract
2. Builder for breach of statutory warranties.
3. Home Building Compensation Fund.
4. Professionals, such as, architects, engineers and certifiers in breach of contract, negligence or misleading and deceptive conduct.
5. Importers and manufacturer for product liability under The Consumer Law.



NSW Chains of Liability

A successive owner of the land owner may be able to claim against:

1. Builders and developers for breach of statutory warranty.
2. Home Building Compensation Fund.
3. Professionals, such as architects, engineers and certifiers in misleading and deceptive conduct and possibly negligence (very limited, if at all, detailed more below due to high court decisions in Brookfield & Woolcott).
4. Manufacturers and importers for product liability and breach of The Consumer Laws.





NSW Chains of Liability

The builder and developer may be able to claim against:

1. Subcontractors for breach of statutory warranty.
2. Professionals, such as architects, engineers and certifiers in breach of contract, negligence or misleading and deceptive conduct.
3. Manufacturers and importers for product liability and breach of The Consumer Laws.

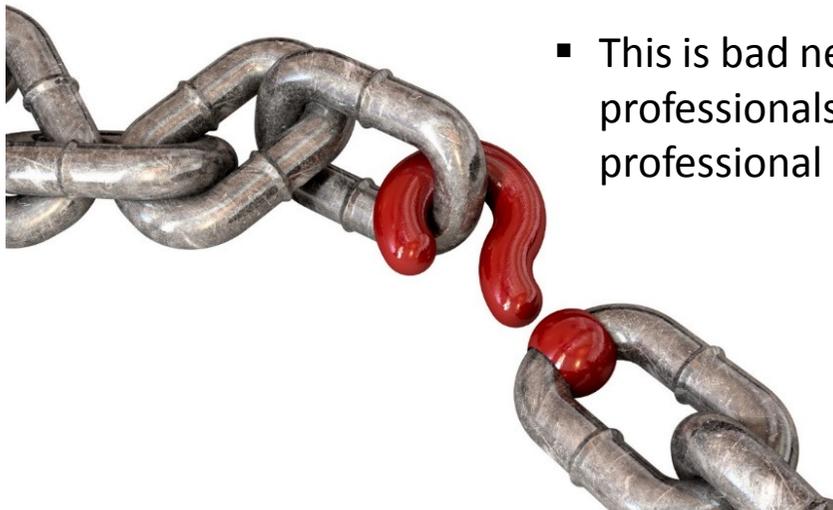
The chains go on and on and on...





Missing Links in the Chains - Professional Indemnity Void

- The number of A1 and C10 Certifiers skilled certifiers is shrinking due to increased difficulties or expense in obtaining professional indemnity insurance.
- For instance, from July 2019 some professional indemnity insurers no longer cover claims for negligent certification of fire cladding previously undertaken by a certifier unless already notified.
- This is bad news for those seeking to claim on such professionals with the hope of being able to rely on professional indemnity cover to cover their losses.





Comparison with Certifiers

- Concurrent with the development of a new regulatory regime for builders and designers, the government has also reviewed the regime with respect to building certifiers. Notably, the government has not extended the duty of care owed by building certifiers in the way it has with builders and designers.
- The private certification regime remains with no substantive attempt to mitigate the commercial conflict involved in developers selecting their own certifiers.
- This is expected to cause problems with claims under the *Design and Building Practitioners Bill 2019*.



Image source: Google Images



Product Liability Class Actions?

- The media reports that William Roberts Lawyers in Victoria are investigating the viability of two Federal Court Proceedings, commenced before July 2019.
 - Against the manufacturers of Alucobond PE Cladding
 - Against the manufacturers of Vitrabond PE cladding
- The claims are being run as class actions with litigation funding from IMF Bentham. IMF Bentham are still inviting owners effected to register their interest in the class action.

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Product Liability Class Actions?

- The defendants have claimed that liability is apportionable to other parties eg. builders, designers, certifiers, and others, and the matters need to be run separately.
- This means that blame will be laid at the feet of designers, certifiers, engineers and others.
- Actions will need to be brought against that individual.



Image source: Google Images

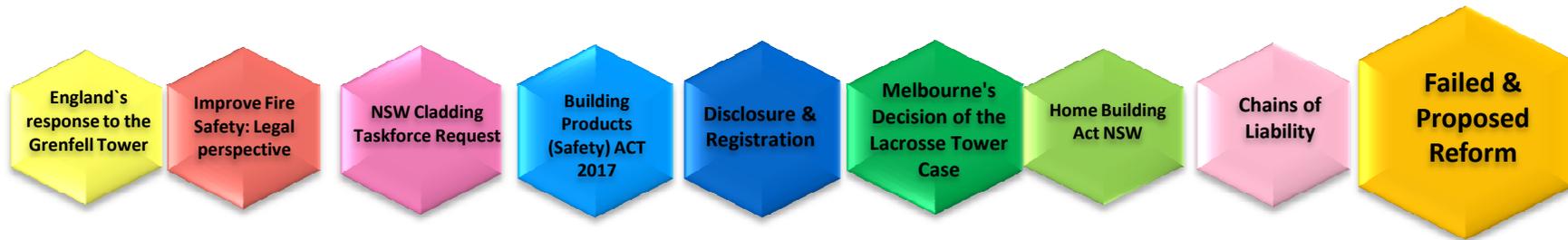


Failed : Design & Building Practitioners Bill 2019

The Design & Building Practitioners Bill which the Building Commissioner heralded as bill to create a lot of power for himself and to require designers to be registered as well as their designs failed in Parliament in 2019 due to lack of political support, which was in part due to the inadequate attempt at reform to address the real problems.

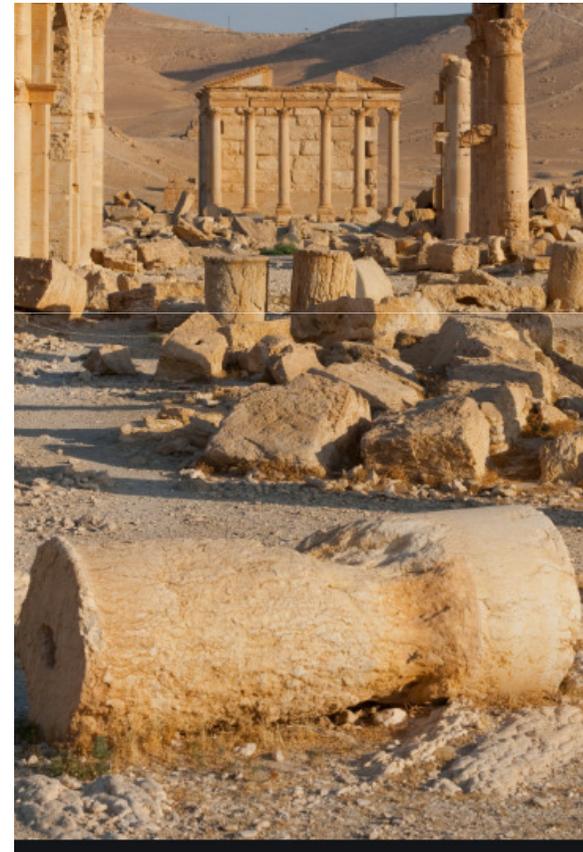
With that failed bill, so to went the proposed duty of care to subsequent owners. So subsequent owners of building works will have a great deal of difficulty suing a designer in negligence.





Proposed 6 pillars of reform in NSW

- NSW Fair Trading and the Building Commissioner are in the wake of the failed Design Bill proposing 6 pillars;
 1. Building a better regulatory framework
 2. Building rating systems
 3. Building skills & capabilities
 4. Building better procurement methods
 5. Building a digital future
 6. Building the reputation for quality research



IN CONCLUSION

1. There is rapid reform occurring but the quality improvements in the building industry will have to wait for the next cycle.
2. Responses to matters such as the cladding crisis, have been reactive, rather than coordinated. The overall effect is still emerging.
3. The defect crisis is also emerging at the same time, quite separate to the cladding one.
4. Again all responses are reactive.
5. Again, NSW Fair Trading refuses to offer the only sensible solution, which is home warranty insurance for all strata owners.



Image source: Google Images

DISCLAIMER

- This is not a legal advice and you should seek legal advice regarding any of the issues referred to.
- This area of law is regularly amended and new cases decided, requiring updated information.
- This presentation does not include all possible steps, remedies and time limitations.

Thank you

Legal advice should be sought in relation to any matters relating to the contents of this presentation or these slides.

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