

Cladding Compliance and Enforcement policy

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Policy

1. Purpose

The purpose of this policy is to set out how the Victorian Building Authority (VBA) will undertake compliance and enforcement activity in respect of building practitioners involved in the construction of buildings with combustible external wall cladding.

This policy is to be read in conjunction with the VBA's Compliance and Enforcement Policy.

The VBA's compliance and enforcement response under this policy includes investigations, practitioner audits, prosecutions and disciplinary actions the VBA may take in relation to building practitioners involved in the design and construction of buildings with combustible external wall cladding.

The State-wide Cladding Audit (SCA) coordinated by the VBA provides information to inform the VBA's compliance and enforcement activities under this policy.

The SCA program is also supporting the activities of municipal building surveyors (MBS) to inspect buildings and issue notices and orders requiring building works to remove combustible cladding or to determine that the buildings have reached an acceptable level of safety.

The compliance and enforcement activity associated with the SCA program is aimed at rectification or reassessment of buildings and is primarily concerned with the issuing of notices and orders to building owners. This policy is not intended to cover compliance and enforcement relating to notices and orders issued to owners by MBSs, including the VBA discharging MBS functions. The policy and procedure relating to those activities is contained in other documents.

2. Scope

This policy applies to all VBA employees and is of relevance to VBA Compliance and Enforcement staff.

The day to day implementation of this policy is the responsibility of the Director, Compliance and Enforcement, under the oversight of the Executive Director Operations.

3. Regulatory context

The VBA is Victoria's principal regulator of building and plumbing practitioners and building work.

The VBA has responsibility for monitoring and enforcing compliance with the *Building Act 1993* (Vic) (Act) and associated regulations (Regulations), including the National Construction Code (NCC) (collectively Building Legislation). 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.

State-wide Cladding Audit (SCA)

In November 2017, the SCA was established to identify buildings incorporating combustible external wall cladding, posing an unacceptable risk to human life.

The SCA process involves the identification and assessment of the risk that combustible cladding on a building poses to safety of any occupants or members of the public or to property.

The Council MBS or the VBA acting as the MBS, remains responsible under the Act for issuing notices and orders to building owners and taking enforcement action for breaches of the Act and Regulations where necessary. Cladding Safety Victoria has also been established to support owners of eligible Class 2 buildings to rectify their buildings by giving them project management advice and government funding.

The policy and procedure for cladding rectification is found in other VBA publications.

Practitioner discipline and enforcement

Separate to the issuing of notices and orders to owners and enforcement activities associated with cladding rectification, the VBA is responsible for monitoring the conduct of building practitioners.

The information collected as part of the SCA and in earlier audits by the VBA revealed that in many cases the design, approval and construction of buildings with combustible cladding did not comply with the Building Legislation.

Since early 2016, the VBA has issued information to building practitioners noting its concerns about the widespread misinterpretation of the NCC and advising of the VBA's position on the proper interpretation of relevant provisions in the NCC relating to external wall systems and combustible cladding.

The VBA can audit building practitioners, investigate their conduct, prosecute or take disciplinary action as part of its regulatory functions. This policy is concerned with decision making in relation to building practitioner discipline, prosecution and enforcement activities.

4. Guiding principles and objectives for enforcement decisions

The VBA has adopted a risk-based approach in discharging its regulatory functions under the Building Legislation. This means its compliance and enforcement efforts are targeted towards conduct by building practitioners which poses the highest risk to the Victorian community, and to outcomes that will have the most impact to reduce poor conduct and non-compliance within the industry in the future.

The availability of accurate information, difficulty of investigation and the passage of time, however, means it is not possible or necessary for the VBA to take enforcement action against every practitioner involved in the design and construction of buildings with non-compliant external wall cladding or fire systems, or indeed to investigate every such building practitioner.

The selection of sites and practitioners who will be the subject of compliance and enforcement action will be determined having regard to a range of factors, including:

- a building's construction history;

- the number and severity of alleged building defects.
- the outcomes of fire safety assessments.
- whether there has been a cladding fire or evacuation; and
- the number of problematic sites a given practitioner has been associated with.

The objective of taking disciplinary action is to:

- protect Victorian consumers against incompetent building practitioners or those who put profits ahead of occupant safety.
- protect the reputation of the construction industry in Victoria and restore public confidence in the industry to create conditions favourable for the industry to continue to thrive.
- deter other building practitioners from engaging in the same type of conduct and making the same mistakes moving forward; and
- facilitate a cultural shift in the industry to be more aware of, and focused on, fire safety related matters.

The following principles will inform VBA decisions made under this policy:

A focus on protection

Underpinning everything the VBA does in the combustibile cladding context is a focus on the safety of occupants and the public, which includes preventing harm and improving the safety of those exposed to buildings with combustibile external walls.

Proportionality

Penalties imposed on building practitioners because of the VBA's enforcement activities will be proportionate to reflect the serious nature of the misconduct involved. In this regard, the VBA will take into account any efforts made by a building practitioner to mitigate the impact of their behaviour from a safety and economic loss perspective, when determining the most appropriate enforcement tool to use and what penalties may be appropriate.

Consistency

In making decisions about its compliance and enforcement activities in the cladding context, the VBA will consistently apply a risk-based approach. It will also focus on ensuring that similar circumstances are treated in the same way, and that any penalties imposed because of enforcement activities are consistent across matters involving similar factual circumstances.

Transparency

Given the community interest in cladding related matters and the need to protect consumers from building practitioners who have put the safety of the public and economic interests of building owners at risk, the VBA will share information with our co-regulators and be transparent about informing those impacted by its compliance and enforcement decisions about the outcome of those decisions. This will include publishing the

outcome of enforcement actions taken by the VBA.

Evidence-based decisions

The VBA and its MBS delegates will make informed compliance and enforcement decisions in relation to building practitioners responsible for buildings with combustible cladding based on evidence and continually build insight to help deliver the best possible safety outcomes for Victorians. It will regularly evaluate its performance and outcomes achieved with relevant stakeholders to improve processes and ensure its actions are focused on reducing the greatest harms.

5. Monitoring compliance

The VBA will continue to identify buildings with combustible wall cladding in Victoria, which have not been part of the SCA to date. To achieve this objective, the VBA will identify those building practitioners responsible for buildings posing the greatest risk to occupants from a safety and economic loss perspective identified during the SCA and those responsible for the greatest number of buildings with combustible external wall cladding to direct its inspection and audit activities. The VBA will then use its legislative tools to collect documents and information about other building work those building practitioners have been involved in, with a view to identifying other building work which is non-compliant and poses a risk to the public.

Where penalties, conditions or restrictions are imposed on a building practitioner because of enforcement activities undertaken by the VBA, it will closely monitor the practitioner's compliance with those penalties, conditions or restrictions and their future conduct.

6. Enforcement action

As set out in the VBA's Compliance and Enforcement Policy, 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. Figure 1 from the VBA's Compliance and Enforcement Policy reproduced below reflects the VBA's approach to selecting an appropriate enforcement tool or tools, with an impact and severity that is commensurate with the seriousness of the alleged breach or conduct of building practitioners involved in the design, approval and construction of buildings with combustible external wall cladding.

Given the serious potential consequences of non-compliances in the cladding context, the VBA will consider its stronger enforcement options being the prosecution of, and disciplinary proceedings against, building practitioners responsible for buildings with combustible external wall cladding. This does not preclude the VBA from considering a combination of enforcement options that may be appropriate in the circumstances of each matter.

To protect Victorian consumers and the public, the VBA's compliance and enforcement efforts will be targeted towards identifying, and if necessary removing (at least for a period of time), those building practitioners from the industry whose actions or inactions have created the greatest risk to consumers and the Victorian public both from a health and safety and economic loss perspective.

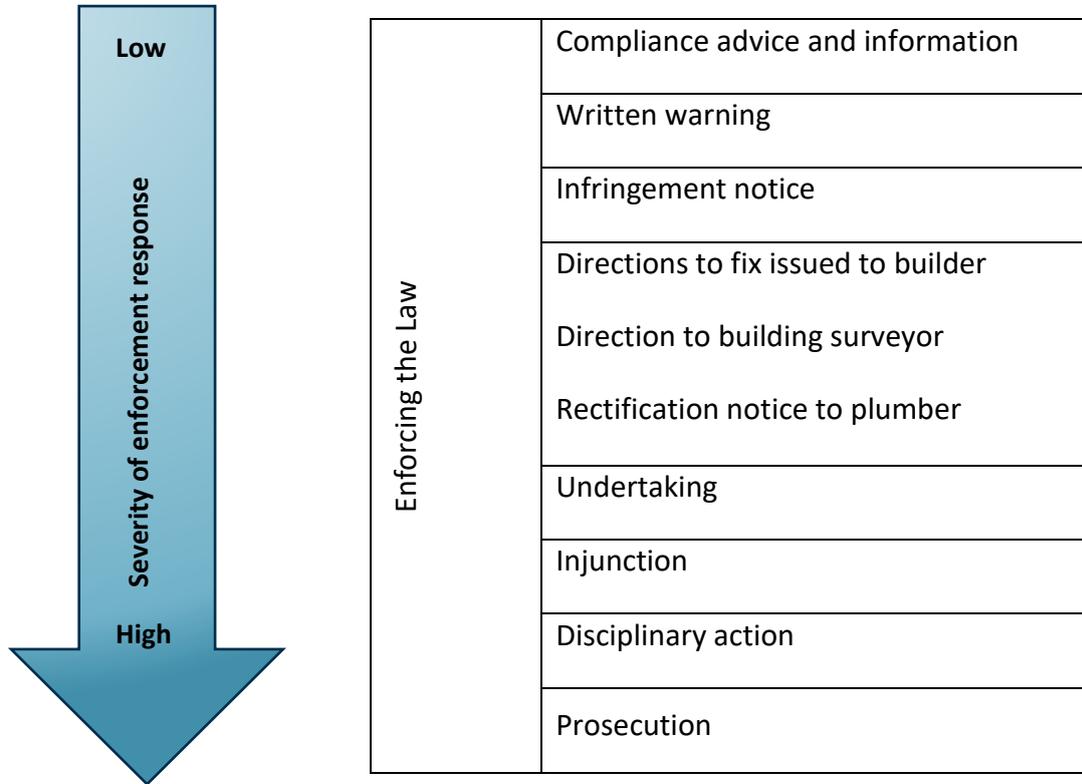
Enforcement action taken by the VBA will be aimed at deterring other building practitioners from engaging in conduct which puts the safety of occupants of buildings and the community at risk, by imposing penalties which clearly communicate that this type of conduct is not acceptable and mandating safety focused further training for building practitioners where appropriate.

To achieve the above objectives, the VBA's enforcement efforts in the cladding context will be focused on prosecuting building practitioners involved in combustible external wall cladding wherever possible when warranted by the available evidence. Prosecutions will be considered where:

- the commission of the alleged offence against the Act occurred less than 3 years ago; or
- it is less than 2 years after the commission of the alleged offence first came to the attention of the VBA but less than 10 years after commission of the alleged offence, whichever is the later.

Where the limitation period to prosecute the building practitioner has expired but the VBA nevertheless is of the view that enforcement action needs to be taken against the practitioner, it will commence disciplinary proceedings (which are not subject to a limitation period).

Figure 1 – The VBA’s enforcement tools



7. Definitions

Term	Meaning
Building Legislation	means the <i>Building Act 1993 (Vic)</i> , the <i>Domestic Building Contracts Act 1995 (Vic)</i> , associated regulations and the National Construction Code.
Staff	means VBA employees, agents and contractors.

8. Document History

Version Number	DCR Number	Description	Date
1.0		Original draft	August 2020
1.1		Revised draft post Board meeting on 7 September 2020	21 September 2020