

DE-CLADDING VICTORIA: ANDREWS GOVERNMENT ANNOUNCES NEW AGENCY TO ADDRESS THE COMBUSTIBLE CLADDING CRISIS

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On 16 July 2019, the Andrews Victorian State Government announced that it will establish a new, world-first agency to address the cladding crisis that has swept the Victorian construction industry over at least the past five years.

The new agency, Cladding Safety Victoria (CSV), will have access to a A\$600 million package from the State Government to fund rectification works on private residential buildings across the State which have been clad with combustible materials and are classified as 'high-risk'.

The State Government has committed to directly fund half of this A\$600 million package, and plans to introduce changes to the building permit levy to raise the remaining A\$300 million over the next five years.

It is proposed that CSV will work with affected

owners' corporations from start to finish. Specific details of the proposed structure and operating methodology for this new agency are yet to be released. However, as the announcement of CSV's establishment coincided with the delivery of the Victorian Cladding Taskforce's Final Report, it is unsurprising that the establishment of this agency was one of the Taskforce's key recommendations.

We expect that CSV's structure and operating methodology will be largely informed by the Taskforce's recommendations,¹ which suggest the agency should, or could, take the following form:

Purpose

- To support owners and occupants through the rectification process.

Functions

- Provide funding for rectification works.
- Provide project management support.
- Ensure proposed solutions are carried out in a timely and effective manner to bring buildings to an acceptable level of risk.
- Educate owners about how to mitigate fire risks until the cladding on their buildings is rectified.

Approach/ Methodology

- Adopt a risk-based approach to prioritising buildings for rectification funding – higher-risk buildings eligible for earlier funding and rectification.
- Require private owners to transfer their legal recovery rights to CSV as a condition of receiving funding, to allow the State to seek to recover rectification costs from responsible parties.

Commercial and legal challenges facing CSV

For many, the establishment of CSV and the announcement of its A\$600 million fund will be a welcome development. If successful, the CSV could set a positive precedent and be adopted across the country, and possibly beyond.

However, given that CSV is the first agency of its kind and has a complex and widespread issue to tackle, it is likely to face a number of commercial and legal challenges.

While not insurmountable, the following seven issues will require careful management in order to ensure CSV operates effectively:

1. Prioritising buildings for rectification.

While it is sensible to prioritise the rectification of the highest-risk buildings over lower-risk buildings, there could be inherent difficulties in the prioritisation process. The State Government will need to ensure its method for prioritisation of buildings is consistent across the State and is based on appropriate assessment criteria. It will also

need to carefully consider where to draw the line between buildings that are eligible for funding and those that are not. Rectification (or recovery proceedings) that have commenced on high priority buildings should also be addressed. There is a related issue associated with disclosure of buildings to be rectified and the impact on prospective sales of those properties.

2. Limited funding. CSV's rectification fund is, at least at this stage, limited to A\$600 million, meaning it is possible it could be exhausted relatively quickly. The State Government should consider whether it will 'top up' the fund if/when it has been exhausted.

3. Quality Control. It is assumed that CSV will not directly procure the rectification work, however it will need to take steps to ensure the work is delivered in a consistent and cohesive way and that all relevant standards are met. Part of this may be ensuring the work is not rushed and that design for the rectification is completed before work commences.



4. Insolvency of responsible practitioners may limit recovery. The construction industry is a volatile market – particularly in light of recent developments in cladding-related insurance. CSV may face difficulties recovering from responsible parties if those parties have since become insolvent or wound up.

5. Limitation periods. A number of affected buildings will likely have either reached the statutory limitation period, or be approaching it. CSV will need to commence any recovery proceedings quickly in order to ensure it is not time-barred.

6. Documentary issues. If CSV takes over the legal rights of owners' corporations to seek recovery against responsible parties, it may face practical difficulties obtaining the necessary documents to establish the claims, as standards of document retention may differ widely between owners' corporations.

7. Limited experts to support recovery claims. Given the current climate in the construction industry, there is a widespread experience of experts (such as fire engineering experts) being unavailable to give evidence in support of claims by owners against other building professionals. This might cause delays or create other hurdles to CSV commencing proceedings to recover rectification costs.

8. Time and cost for recovery. Proceedings in VCAT and the Supreme Court can take years from start to finish. This could result in the State Government using up the rectification fund without any prospect of recovering those costs in the short term (unless early negotiated outcomes can be reached). Further, the costs of investigating, commencing and running multiple recovery proceedings are likely to be significant.

9. Impact on the market. Victoria's infrastructure boom has resulted in capacity shortages for existing projects. A large-scale rectification program for hundreds of buildings will place further strain on the market's capacity.

If planned carefully and executed effectively, the establishment of CSV could be a game-changer in the world of cladding.

End Notes

¹ Victorian Cladding Taskforce Report from the Co-Chairs dated July 2019, available here:

https://www.planning.vic.gov.au/_data/assets/pdf_file/0019/426034/DELWP0124_Victorian_Cladding_Taskforce_Final_Report_July_2019_v9.pdf

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