



Building Amendment Regulations (No. 2) 2018 – new applicable building standards for non-combustible external walls including some answered questions

The Building Amendment Regulations (No. 2) 2018 (the Amendment Regulations) were published in the Government Gazette on 5 October 2018. The Amendment Regulations create new regulation 31HA in the Building Regulations 2012 (the Regulations). Regulation 31HA prescribes new applicable building standards for non-combustible external walls. Refer to www.legislation.wa.gov.au for a current version of the Regulations incorporating regulation 31HA.

This bulletin intends to outline the Amendment Regulations **that come into effect from 6 October 2018** as well as answer some frequently asked questions.

The Amendment Regulations were made in response to the Building Ministers' Forum (BMF) decision of October 2017. The BMF communique released after that meeting included the following statement:

BMF Ministers recognise the public safety concern and clear risk arising around the use of cladding that does not comply with the National Construction Code (NCC). All Ministers agreed that they will use their available laws and powers to prevent the use of aluminium composite cladding with a polyethylene (PE) core for class 2, 3, or 9 buildings of two or more storeys, and class 5, 6, 7 or 8 of three or more storeys, until such time as they are satisfied that manufacturers, importers, and installers, working in collaboration with building practitioners, will reliably comply with:

- *the newly established standard setting test against which fire retardant cladding products are deemed to be reasonable for use in high rise settings; and*
- *an established and implemented system of permanent labelling on cladding products to prevent substitution.*

Regulation 31HA achieves the intent of the BMF decision using the powers that are available under the Building Act 2011 (the Act). This means that instead of banning a particular building product, regulation 31HA aims to control the performance of an external wall in relation to the potential spread of fire via that wall. It does that by:

- requiring external walls of buildings with type A and B construction to comply with the deemed to satisfy (DTS) requirements of the Building Code of Australia (BCA); or
- if a performance solution is proposed, requiring the performance solution to comply with Verification Method CV3 of the NCC which incorporates full scale fire testing of the wall system in accordance with AS 5113:2016 Fire propagation testing and classification of external walls of buildings; and
- preventing the use of any performance solution for demonstrating compliance with CP2 for avoiding the spread of fire via external walls that is not in accordance with the Verification Method CV3.

Building designers, building surveyors and builders need to ensure that their building designs, certifications and construction are in compliance with new regulation 31HA.

Building product suppliers and manufacturers should consider ensuring their products are either suitable to be used as DTS or are supported by evidence for use under Verification Method CV3.

Building practitioners are encouraged to familiarise themselves with the Amendment Regulations and regulation 31HA. The following questions and answers are provided for further general clarification.

Your questions answered:

1. What types and size of buildings are affected by these regulations?

These regulations affect new Class 2 to 9 buildings (or new building work in those buildings) that are identified by the DTS provisions of the BCA to be a Type A or B construction.

For example these include residential buildings such as apartment buildings having a rise in storey of two or more or an office building having a rise in storey of three or more.

These regulations do not affect new Class 2 to 9 buildings that are Type C construction.

2. How is regulation 31HA enforced?

The building surveyor is required under section 19 of the Act to state in a Certificate of Design Compliance that if the building that is the subject of the application is constructed in accordance with the application, it will comply with each applicable building standard.

Similarly, under section 37 of the Act, the builder is required to ensure the building complies with each applicable building standard.

Regulation 31HA is part of a suite of provisions in the Regulations that prescribe the applicable building standards mentioned in sections 19 and 37 of the Act. Both the builder and the building surveyor are responsible for ensuring compliance with regulation 31HA.

For a complete list of applicable building standards affected by 31HA refer to regulations under Part 4 Division 1 of the Building Regulations 2012 (also see Amendment Regulations 5 – 8).

3. I am planning to build a house next year. Do these regulations affect my plans?

No. These regulations do not affect plans for single residential dwellings as these are generally Class 1a buildings and are not captured by the scope of the Amendment Regulations.

4. Do these regulations only affect the cladding?

No. The new applicable building standard affects any performance solution in relation to Performance Requirement CP2 for avoiding the spread of fire via external walls of a building. This will capture each component of an external wall including the cladding, framing and insulation.

However, an exemption will apply to a proposal to do remedial work to an existing building with existing cladding that is proposed to undergo remedial works (refer question 12) if the primary purpose of the work is to ensure that an external wall complies with the fire resistance performance requirement (refer to new regulation 31HA(5)).

5. Do the Amendment Regulations affect all performance solutions in relation to Performance Requirement CP2?

No, the Amendment Regulations only affect performance solutions for avoiding the spread of fire via the external walls. Performance solutions for other aspects of CP2 are not affected.

6. Our high rise apartment was constructed last year. Do these new regulations affect us?

No. The Amendment Regulations will not affect you as they are not retrospective. However any new building work in an existing building may be affected.

7. Can I apply to the Building Commissioner to set aside or modify the new building standard?

Section 39 of the Act permits a person to apply to the Building Commissioner to set aside or modify a building standard. However the Building Commissioner is prevented from making a declaration unless satisfied that the declaration:

- would not result in an increased risk to people, property or the environment; and
- is in the public interest or is consistent with the purpose of any other written law or a Commonwealth law.

For more information refer to application form BA24 – Application for modification or non-application of building standards which can be found by an internet search for the term ‘BA24’.

8. My application for the building permit was lodged with the permit authority prior to the regulations coming into effect. Do the Amendment Regulations affect me?

No, the Amendment Regulations do not affect you if you have already lodged a building permit application with the permit authority prior to the regulations coming into effect. However any proposed changes to the design of the external walls during construction and after the regulations come into effect may be affected by the Amendment Regulations.

9. We were planning to make our existing apartment building look more modern by cladding it with aluminium composite panels. Do these regulations affect our plans?

It depends. If the proposed new cladding complies with the DTS provisions of the BCA, your plans are not affected by the new regulations.

If the proposed cladding requires a performance solution to demonstrate compliance with Performance Requirement CP2 for avoiding the spread of fire via external walls of the building, then your plans may be affected as the new regulations require the performance solution to be verified in accordance with Verification Method CV3 as set out in the BCA Volume 1.

However, there are exemptions that apply to an existing building with existing cladding if it is proposed that it undergo remedial works (refer question 12).

10. The design of our high rise building is complete and we are ready to apply for a building permit. How are we affected by the Amendment Regulations?

If the design of the external walls complies with the DTS provisions of the BCA, the new regulations do not affect your design.

If the design has utilised Verification Method CV3 for demonstrating the compliance of its external walls with Performance Requirement CP2 for avoiding the spread of fire via external walls, then your building plans are not affected by the new regulations.

However, if your design intended to rely on a performance solution other than CV3 for demonstrating compliance with Performance Requirement CP2 for avoiding the spread of fire via its external walls then your plans are affected and you may wish to consider referring to your designer or building surveyor for advice before applying for a building permit.

11. Our building is already clad with a cladding that may be combustible. Do the regulations require the cladding to be removed?

No, the new regulations are not retrospective. However, the Act already allows permit authorities to require remedial work to be done to a building which is reasonably believed to be in a dangerous state or unfit for human occupation. This is a matter that the relevant permit authority needs to determine on a case by case basis (any order made by the permit authority may be subject to review by the State Administrative Tribunal).

12. Is there an exemption for remedial work to the external walls of an existing building to improve its fire resistance?

A performance solution associated with remedial work that is proposed to be carried out primarily for the purposes of ensuring that an external wall of an existing building complies with Performance Requirement CP2 for avoiding the spread of fire via external walls is not required to be in accordance with Verification Method CV3. This is an exemption built into the Regulations.

13. The proposed external wall for a new building includes a cladding that has been tested in accordance with AS:5113:2016. Can that cladding be used?

Not necessarily. If the external wall incorporating the cladding uses a performance solution demonstrating compliance with Performance Requirement CP2 for avoiding the spread of fire via external walls, then that performance solution must be in accordance with Verification Method CV3.

Testing and achieving the relevant classification under AS 5113:2016 Fire propagation testing and classification of external walls of buildings is only part of an assessment under Verification Method CV3. Therefore, while an AS:5113:2016 assessment of an external wall that incorporates the relevant cladding is a prerequisite; it is not the only consideration for demonstrating compliance with Verification Method CV3.

Furthermore the design of the external wall assembly tested needs to be consistent with the proposed wall assembly.

14. The proposed cladding for a new building meets all the requirements of Verification Method CV3 except for the debris criteria in AS 5113:2016. Is there a way of using that cladding?

For the purpose of Verification Method CV3, the Amendment Regulations provide that the debris criteria in AS 5113:2016 do not need to be complied with if it can be shown that, in the event of a fire in the external walls, the debris:

- will not prevent the safe evacuation of the building's occupants; and
- will not pose a risk to an officer or member of a permanent fire brigade under the Fire Brigades Act 1942 (refer new regulation 31HA(6)).

The building surveyor signing the certificate of design compliance needs to be able to justify compliance with the two dot point conditions above before deciding to sign the certificate for a building that may include a cladding that does not meet the debris criteria of AS 5113:2016. It is appropriate for the building surveyor to be seeking expert advice before making a decision.

15. How do the new regulations interact with CodeMark certificates?

The Amendment Regulations state that a CodeMark certificate must not be used for a performance solution demonstrating compliance with CP2 for avoiding the spread of fire via external walls unless the performance solution is verified in accordance with Verification Method CV3 (refer new regulation 31J(3)).

It is important to note that the exemption mentioned in question 12 does not apply to CodeMark certificates. This means a performance solution that may have been developed for exempt remedial work cannot rely on a CodeMark certificate.

16. How do the new regulations interact with other evidence of suitability under part A2.2 of the BCA?

In addition to a certificate of conformity i.e. CodeMark, Part A2.2 of the BCA sets out various other forms of documentary evidence that can be used to support a claim that a material, product, form of construction or design meets a Performance Requirement or a DTS Provision.

However, the documentary evidence must relate to a DTS Solution or a performance solution that uses Verification Method CV3. A building solution that relies on documentary evidence that purports to confirm compliance with the Performance Requirement CP2 for avoiding spread of fire via external walls, without demonstrating compliance with the DTS solution, is part of a performance solution and cannot be used.

17. Do the new regulations impact on the existing concession in the BCA for the use of timber in external walls?

The Amendment Regulations do not affect the DTS provisions of the BCA. This means the concessions for the use of timber can continue to be used in accordance with the DTS provisions of the BCA.

Disclaimer

The information contained in this bulletin is provided as general information only and should not be relied upon as legal advice or as an accurate statement of the relevant legislation provisions. If you are uncertain as to your legal obligations you should obtain independent legal advice.

October 2018

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