

Polyethylene/Aluminium Composite Cladding – MECON’s Response

Much has already been written about:

- Australia’s Lacrosse fire;
- London’s Grenfell fire;
- Polyethylene/aluminium composite cladding (“PE Cladding”); and
- The Government’s response.

This article doesn’t address these things. It deals solely with the likely response to the PE Cladding issues from MECON’s viewpoint (and its policies), which do not include Professional Indemnity.

Matters to Consider:

1. The PE Cladding, while present, causes no injury or damage. It is stable and will not spontaneously combust. It requires an independent ignition source for it to catch fire.
2. The Government has not yet banned its use because it is (considered to be) useful for some applications.
3. Once alight, the flammable nature of the PE Cladding makes it dangerous to lives and property – particularly in high-rise buildings.
4. Buildings containing composite PE Cladding have been, or are being, identified and their owners notified.
5. Now that the potential dangers of the PE Cladding are known, and the Government is potentially moving to restrict/ban use, from what time would the entity who approved its use for a completed building become legally liable – or could they ever become legally liable for specifying a product like this?

Discussion:

Assuming the PE Cladding may no longer be a material used in construction – except perhaps for Governmentally approved applications – the policy issue to consider is liability arising from the use of the PE Cladding in completed buildings (i.e. “products liability”).

Who, if anyone, is legally liable for the presence of the PE Cladding in a product? Is it the PE Cladding supplier, the building owner or the specifier of the PE Cladding (i.e. architect, engineer or builder)?

It is not possible to speak with certainty on how the Courts will discern legal liability, but historical precedence is often relied upon in Courts. To this end, asbestos cladding is possibly the closest parallel to the PE Cladding issue.

- Both are stable themselves, but are potentially dangerous given the right circumstances.
- Both were promoted and authorised for use as a building material.
- Both were identified as dangerous before their use was restricted/banned.
- Both were specified for use by a number of different entities in the construction (or supply) chain.
- Both exist today in buildings, but that in itself has not triggered a legal obligation to remove it.
- The prime differences are:
 - > The PE Cladding is flammable but asbestos is not
 - > Asbestos was manufactured in Australia but the PE Cladding was imported
 - > Asbestos is more of an OH&S issue than the PE Cladding

With asbestos, litigation was successful against the (Australian-based) manufacturer. No claims are known to have been successfully litigated against the entities who specified the use of asbestos in buildings. However, and importantly, claims for injury or damage arising out of the disturbance of asbestos have been successful against the entity who disturbed it.

It is therefore reasonable to deduce that potential legal liability for injury or damage resulting from the use of the PE Cladding might attach to the manufacturer or perhaps the local supplier of the PE Cladding (because the manufacturers are overseas). It is unlikely that legal liability would attach to any entity that specified use of the PE Cladding (before its dangers became publicised) or to any entity who installed it.

MECON's Response:

Note that policy response is triggered by an insured's legal liability.

Using asbestos cladding as a guide:

- The mere existence of the PE Cladding in a product, where liability from it is insured by MECON, would not trigger a payment under the policy - other than indemnification of defence costs in the event of a claim.
- If injury or damage is exacerbated by the existence of PE Cladding in a product, but an insured party did not cause its ignition, this would not trigger a payment under the policy - other than indemnification of defence costs in the event of a claim.
- If injury or damage is exacerbated by the existence of PE Cladding in a product, and the ignition source was caused through the negligence of an insured party, then the policy would respond to indemnify that party. However in such a circumstance, where the presence of the PE Cladding was known, the potential for contributory negligence on the part of an insured would be a significant factor in determining indemnity. That is to say (just as in the case where asbestos is known to be present) the threshold to apply prudent risk management procedures for (hot) work undertaken would be far higher than work on brick cladding for example.
- While unlikely, given the asbestos experience/precedents, if a Court finds an insured negligent (and therefore liable) for specifying the use of PE Cladding or installing it, and MECON's Cover Advantage Endorsement was in place, the policy would indemnify the insured up to the limit of liability provided by the endorsement. Alternatively, the buy-back on exclusion 8.11 (policy versions SP/AP 1017) would see indemnity for injury and damage provided up to the total limit of liability of the policy.