

## OPINION

# *Flammable cladding fracas: Apartment owners stranded in legal limbo*

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Columnist

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Sometimes, the law can be bewildering. Sometimes it is plain unfair. Battle-scarred veterans of our courts often have to cynically explain to their clients the distinction between “law” and “justice”. Sometimes those two seem to be barely acquainted with each other.

Living a legal and financial nightmare, 20 families residing in an apartment building in Melbourne’s eastern suburbs have been hit with a bill for \$2 million to remove and replace [flammable cladding](#) from the walls and facade of their building.



VCAT is but a shadow of its former self, no longer able to provide the quick dispute resolution it was created for. ILLUSTRATION BY MATT DAVIDSON

Despite years of fruitless litigation, over \$150,000 spent on lawyers and expert reports, and virtual mountains of emails pleading with bureaucrats, they are still searching for a resolution. As one despairing resident (I will call him Fred) representing his neighbours says, “it ends with either death or bankruptcy”.

As Fred’s plight enters its fifth year of stress and expense, he and his fellow occupants now are also staring at the prospect of massive penalties for not meeting mandated timelines for starting repairs. The delays are entirely caused by elements out of their control, but are no defence to threatened individual fines of \$80,000 and the prospect of a crippling impost on their body corporate of as much as \$450,000.

They cannot sell or re-finance their property because of the cladding, nor can they borrow against their equity to fund the urgent repairs. They are not the only people caught in this regulatory maze; a construction catch-22.

How did it come to this?

After the horrific [Grenfell Tower fire in London](#) in 2017 left 72 dead and hundreds more injured and homeless, building authorities around the world went into overdrive to deal with the alarming and serious problem of flammable building cladding.

In Victoria alone, 1600 buildings were identified as having some level of risk. Hundreds of those buildings [were classified as requiring immediate attention](#).

The state government established [Cladding Safety Victoria](#) in 2019 to fix the mess.

In an impressive surge of activity, CSV identified and examined 1066 buildings – the majority being 817 multi-storey apartment buildings, located across 31 local councils in 158 suburbs. The remainder, owned by the government, include schools, hospitals and sporting facilities.



Owners of apartments with flammable cladding are stuck in a catch-22. JOE ARMAO

Rectification is far from cheap and follows expensive auditing by specially qualified fire-safety engineers. In most instances there has been no valid insurance and often a bankrupt builder or importer, so the vast expense has fallen on the state, which established [a \\$600 million fund](#) to cover the most urgent category of repairs.

As so often happens, not every building with cladding is covered by the fund. Expert reports and municipal inspector's audits led to Fred's building being classified as needing non-urgent rectification. The state rescue fund only covers urgent works.

Initially, Fred expected the problems would be sorted out as he was bounced between the Victorian Building Authority, the local council and the newly established Cladding Safety Victoria. When his building was excluded from financial assistance from CSV, Fred and his neighbours sued their builder in the Victorian Civil and Administrative Tribunal, where domestic building disputes are supposed to be resolved.

The builder blamed a subcontractor and the litigation got adjourned multiple times to allow them both to prepare their defence. After long delays, just as it appeared there may be a result, VCAT was forced to abandon cases like this one because of a technical legal glitch in the interpretation of VCAT's powers.

According to the Court of Appeal – Victoria's highest legal authority – [VCAT is a tribunal, and a tribunal is not a court](#), and thus cannot act like a court in dividing up liability for compensation in a case like this one.

VCAT has also been hampered by another appeal [court decision, known as the Krongold decision, that removes VCAT's power when a federal law is invoked](#), such as the Trade Practices Act, insurance laws or other Commonwealth legislation. VCAT can make decisions about Victorian law, but not the law from other states or the Commonwealth. A third appeal decision

has ordered VCAT not to hear cases when one of the parties to a dispute resides outside Victoria.

The combined effect of these decisions is that VCAT is now but a shadow of its former self, no longer able to provide the quick and inexpensive dispute resolution and remedies it was created for.

What happens to Fred and his neighbours?  
Since VCAT cannot hear their case, they have been advised to start all over again in the County or Supreme courts.

The combined reserves of Fred and his neighbours are dwindling and their health is suffering. They are feeling abandoned and want the buck-passing to stop.

When the construction company [Porter Davis collapsed](#), the state government was quick to intervene and cobble together a solution. When the cladding crisis was unfolding, the reaction was swift and fit for purpose. But now that the urgent rectification projects have been mostly delivered, it is time to look at the next group of people impacted and to assist them too.

And VCAT's problems? The irony is that what was supposed to be a cheaper quicker alternative to the courts has become just like them. The public are not interested in why it has become a lawyer's picnic, they just want it fixed.

Attorney-General Jaclyn Symes said that she was aware of the implications that the Krongold decision might have on domestic building disputes involving federal legislation.

“We understand the distress that can be caused by a case being discontinued after much time, money and effort,” she said.

“I am working with the heads of jurisdictions and VCAT to understand the scope of the Krongold decision's impact so we can consider the next step in addressing people's concerns.”



Who pays for flammable building cladding? MATT DAVIDSON