

Submission

Inquiry into non-conforming building products

Implications of the use of non-compliant external cladding materials in Australia

In light of the tragic fire at the Grenfell tower in London, I am writing to draw your attention to the inquiry, and to invite you to make a brief submission in relation to the implications of the use of non-compliant external cladding materials in Australia. Noting the committee intends to hold public hearings in the second half of July, where possible could you please provide your submission by mid-July 2017.

Background:

The CFMEU have raised the issue of non-compliant use of cladding already in the course of this inquiry both within and outside of it. For example, in our original submission to the inquiry in September 2015 we stated that:

“The holding of a *Building Minister’s Forum* (July 31, 2015), and the placing of the item of nonconforming/non-compliant building products on the agenda by the Government (largely in response we suspect to the non-compliant Chinese made cladding which was used in the Lacrosse building in Melbourne’s Docklands and contributed to the rapid spread of fire) was a positive, long overdue step.”¹

At a public hearing of the inquiry in Canberra in November 2015 CFMEU representatives discussed the *Lacrosse* incident with the Committee in some detail warning about:

¹ CFMEU, “Submission 1”, September 2015, p 10, available online @ <http://www.aph.gov.au/DocumentStore.ashx?id=7e8a5c8f-5825-4a77-b1a5-8b26821be9d3&subId=403373>

Our “growing concern about the issue”... due to the fact that Lacrosse was not just ‘a one-off, isolated example’ and the fact that “this sort of cladding with the majority-polyethylene core—non-fire-resistant—is inappropriate for a high-rise building”²

It was in the morning that we provided the above evidence and our concerns continued to grow throughout the course of the hearing that day especially where hearing the evidence of Mr. Adam Dalrymple, Director, Fire Safety, *Metropolitan Fire Brigade*.

As reported by this committee in the interim report, Mr. Dalrymple:

“Described this incident as one that alone could have 'claimed hundreds of lives if things had turned out a little differently'. He told the committee: “We were probably really lucky that did not happen on that occasion. What we are saying here is that fire safety really should not be a matter of good luck. The fire started on a balcony from an unextinguished cigarette - an innocuous type of thing, you would think. This set fire to the cladding, and the panelling itself allowed the fire to travel the full extent of the building - 23 levels in 11 minutes. That is something we have never, really, seen before. We would say this should not have been allowed to happen. In 31 years as a firefighter and 20 years as a fire safety specialist I have never seen a fire like this—in my lifetime—and I have made it my business to study fires of this nature, so we can get a better outcome for firefighters in the community. We have grave concerns about the use of non-compliant product and that it may result in disastrous loss of life, and we cannot tell you when the next event is going to happen.”³

The CFMEU was so concerned after this that we raised the evidence privately with former Senator John Madigan who was one of the original founders of this inquiry.

² CFMEU, “Public Hearing”, Canberra, November 2015, p 24, transcript available online @ http://parlinfo.aph.gov.au/parlInfo/download/committees/commsen/0305d1e1-8ffc-40e3-944d-51eca7dd7f5d/toc_pdf/Economics%20References%20Committee_2015_11_13_3995_Official.pdf;fileType=application%2Fpdf#search=%22committees/commsen/0305d1e1-8ffc-40e3-944d-51eca7dd7f5d/0000%22

³ Mr Dalrymple @ *ibid*, p 69. Reproduced in the *Interim report* “Safety—‘not a matter of good luck’ 4 May 2016, p 13, available online @

http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Non-conforming_products/~/media/Committees/economics_ctte/Non-conforming_products/Interim_Report/report.pdf

We explained to Senator Madigan that we had written to the Federal Government and all State and Territory Governments in May 2015 requesting an audit of the potential non-compliant misuse of the product and that we had, by and large, received inadequate responses.

The core of our request in May 2015 included this as background:

“The *Fire Protection Association* Chief Executive described the issue as a “time bomb” with tens of thousands of apartment buildings nationwide at risk because of the widespread use of the *Alcuobest* and numerous other aluminium cladding products with a plastic core. Our information would suggest that the product and similar products which have a plastic core (specifically those with less than 70% mineral fibre in the core) is not of a fire resistant grade suitable for use in projects such as high rise buildings. The use of these products is of considerable concern.”⁴

And this call for action:

“As a matter of urgent public safety we are formally requesting that you direct the relevant government department to conduct an audit of the use of this product with a view to compelling building surveyors, builders, architects and designers to outline wherever the use of this product has occurred in your State/Territory.

The purpose of the audit would be to ascertain the extent of the problem, then place the information on the public record along with a site-specific explanation to be shared with the at-risk public. This information would include the methods used to determine the products respective applications are safe and/or what remedial action will be taken to ensure that is the case.”⁵

⁴ CFMEU, ‘Correspondence to State Premiers, Territory Chief Ministers and the Federal Government’, May 26, 2015.

⁵ Ibid

Senator Madigan subsequently raised the issue in Senate *Question Time* in December 2015 asking the Government:

“If, when the Building Ministers' Forum convenes in February there is no commitment by state and territory governments to carry out comprehensive audits in their respective states and territories, will the federal government request that this occur, or alternatively begin work on the establishment of a national audit in the interests of ensuring that the ongoing risk to the lives of occupants and firefighters is abated?”⁶

Senator Sinodinos stated that:

“The Building Ministers' Forum agreed at its 31 July meeting to establish a working group to report to ministers within six months on strategies to minimise the risk to consumers, to businesses and to the community associated with the failure of building products to conform to relevant laws...

I can assure the Honourable Senator that, once we receive the report, in concert with our state colleagues we will move expeditiously to do what we can to deal with this issue, and I will follow up on his behalf.”⁷

The CFMEU wrote to Senator Sinodinos' assistant Minister at the time, Ms Karen Andrews. seeking a similar commitment for a national audit in lieu of the States and Territories appropriately committing to one by the February 2016 Building Ministers Forum (BMF). Unfortunately, Ms Andrews provided a similar response committing only that “the BMF will consider the Australian Building Codes Board's findings and recommendations in relation to this issue”⁸

⁶ Senator Madigan, Question Time, Australian Senate, December 3, 2016, 'Building and Construction Industry', available online @ <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2F63c5a341-7e3b-44d6-a47f-f31da7eb5049%2F0065;query=Id%3A%22chamber%2Fhansards%2F63c5a341-7e3b-44d6-a47f-f31da7eb5049%2F0078%22>

⁷ Minister Sinodinos, 'Responses to questions from Senator Madigan', *ibid.*

⁸ Ms Karen Andrews correspondence to the CFMEU, January 2016

In our view, audits have not been carried out to the specifications we requested in May 2015, if at all. We consider it necessary for audits of the nature we specified to be carried out, as soon as possible.

Regarding the Australian Building Code Board's (ABCB's) findings and recommendations which were presented in February 2016 to the BMF, they or a version of them were endorsed in December 2016 which was when the BMF was next held. We suggested to this committee earlier this year that:

“More transparency around the detail and justification behind the BMF's endorsement at the forum of the implementation of a package of measures to address the health and safety risks associated with the non-compliant use of cladding in high rise buildings (to be progressed through the Australian Building Codes Board {ABCB}) is required.

This is a necessary in order to give confidence to the community that risks associated with the widespread use of the non-compliant product is being appropriately mitigated.”⁹

In light of the Grenfell tragedy and a closer analysis of the “comprehensive package of reforms” agreed by the BMF in Perth in December 2016 it is obvious in our view that governments work in this space is far from complete.

There are two main issues as follows:

1. The Legacy Issue:

The worrying fact is that this product has been extensively used in the Australian construction industry for the last 25 years. Therefore the result of the audits we continue to call for need to be transparent.

We reiterate our call for comprehensive audits wherever the product has been used in a non-compliant manner and for:

⁹ CFMEU, 'Submission 2', January 2017, p 14-15 available online @ <http://www.aph.gov.au/DocumentStore.ashx?id=5c719b8c-9c77-4a71-8abe-2972280c9c4a&subId=462855>

“A site-specific explanation to be shared with the at-risk public. This information would include;

- the methods used to determine the products respective applications are safe and/or
- what remedial action will be taken to ensure that is the case”

In this regard the site-specific explanations need to be more robustly detailed than the publicly available information coming out of the *Victorian Building Authority’s* audit of some high rise buildings constructed in the last 10 years in the Melbourne CBD. For example:

06/05/2016	Mixed Use/Residential	110348	601 Little Collins Street, Melbourne	Non-compliant use of cladding material identified and referred to MBS. MBS determined building safe for occupation and no further action required by the MBS.¹⁰
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The standard site-specific explanation provided above (bolded in column five) lacks appropriate detail and clarity about what matters were considered by the Municipal Building Surveyor (MBS) in making this determination and on what grounds the determination was made. Relevant information which might provide actual confidence for residents includes information about the reasons why the building was deemed safe by the MBS might include an explanation of:

- The use of fire resistant products
- Correct installation methods meaning there is lack of exposure to the cladding’s core
- Sprinklers installed (including protection of balconies, awnings and canopies)
- Electrical services in walling conforming with *Australian Standards*

¹⁰ For example see, Victorian Building Authority, “The findings on each of the buildings audited are published in the table below”, available online @ http://www.vba.vic.gov.au/_data/assets/pdf_file/0004/41647/Cladding-Audit-June-20174.pdf

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- Sarking materials being non-flammable
- Cavity protection and cavity barriers being in place
- Replacement of noncompliant cladding or other forms of remediation and/or;
- A combination of the above

Assistant Minister Laundry who chairs the BMF has recently stated that public confidence in the built environment is essential.

We contend that a full audit and subsequent disclosure of the detail of the findings as specified above is required as a pre-requisite for public confidence in the built environment being restored.

2. Future Builds:

In a Senate Question in response to a question in relation to the Grenfell tragedy and the state of Australia's built environment Minister Sinodinos responded in part by referencing the BMF's endorsed course of action by the ABCB :

“The package of measures includes referencing a contemporary and rigorous testing standard based on international best practice for full-scale testing of the fire performance of external facade systems; providing rigorous contemporary and clear NCC requirements to improve application and compliance; enhancing on-site checking, auditing and enforcement; and increasing industry awareness of the need to be cognisant of the risks associated with non-compliance.” ¹¹

The contemporary and rigorous testing standard based on international best practice which Senator Sinodinos is referring to is *Standards Australia* newly published standard AS 5113 which specifies tests to be undertaken on external cladding products to demonstrate the extent to which they resist the spread of fire. However, Minister Sinodinos neglected to mention that the use of this standard is

¹¹ Minister Sinodinos, *Question Time*, Australian Senate, 19 June 2017, 'Building and Construction Industry' available online @ <http://parlinfo.aph.gov.au/parlInfo/search/display/display.w3p;db=CHAMBER;id=chamber%2Fhansards%2F238b87ce-658c-42ae-bab2-7fc8b051f06e%2F0081;query=Id%3A%22chamber%2Fhansards%2F238b87ce-658c-42ae-bab2-7fc8b051f06e%2F0179%22>

“voluntary” and *may* be applied by the manufacturer or supplier of external cladding and *may* be demanded by the building practitioner.

At present, the new standard is not even referenced in the *Australian Construction Code*. Indeed according to the package the new Standard is not due to be referenced until 2019 at the earliest and even then it appears it will not be mandatory.¹²

In recent months the CFMEU has signaled that we will commence to play a more active role when it comes to the issue of non-conforming and non-complying building products on Australian construction sites.

For example when it comes to a lack of prosecutions of companies found to be importing asbestos in manufactured building products (and thus prosecutions not acting as an effective deterrent to this illegal activity) we have warned that:

“If this soft touch approach to prosecutions continues we’ll have no choice but to consider banning certain building products from certain countries on health and safety grounds until Minister Dutton is willing to take decisive action.”¹³

It is within workers’ rights to cease work in the face of “reasonable concern about an imminent risk to their health and safety”.

Indeed monitoring of the compliance and conformity of products and materials is not a new area for the CFMEU. Preventing our members from being exposed to industrial hazards (from wood dust to unstable scaffolding to non-compliant cranes) and the general public is a role that is core business for the CFMEU and a role which the CFMEU is proud to undertake.

¹² Australian Building Codes Board, “Building Ministers agree to comprehensive package of fire safety measures”, 20 December 2016, available online @ <http://www.abcb.gov.au/News/2016/12/19/Building-Ministers-agree-to-comprehensive-package-of-fire-safety-measures>

¹³ CFMEU, “Detection of illegal asbestos imports triple, but still no prosecutions’ June 2, 2017, available online @ <https://vic.cfmeu.org.au/news/detection-illegal-asbestos-imports-triple-still-no-prosecutions>

In regards to imported products and materials, CFMEU members and health and safety representatives were instrumental in identifying the asbestos in gaskets in a façade being installed at 1 William Street in Brisbane last year and the resultant stop work and remediation of the site. There was also the incident of workers identifying asbestos in roof panels at the John Holland Group site at the Perth Children's Hospital and the CFMEU having a sample of a roof panel independently tested to confirm the asbestos contamination (the committee has received evidence of this in a previous submission and public hearings in Brisbane and Perth held earlier this year). In addition, in recent years, the CFMEU has played a role in assisting building industry participants in identifying potentially non-compliant formwork due to the use of non-conforming imported form ply.

Regarding the cladding, given something as innocuous as a discarded cigarette was the ignition source for the Lacrosse fire and there is likely to be more exposure of flammable core of an aluminum composite panel during installation compared with a fully installed wall system, stopping work on these grounds is more than justified given the reasonable concern of imminent risk posed by suspicious cladding.

The CFMEU were a partner stakeholder with the previous Government on the issue of non-conforming and non-complying product. We were members of the former Prime Minister's Manufacturing Taskforce which identified:

“Australia has a strong standards infrastructure but one that is at risk of being undermined by non-conformity and, in some cases, misrepresentations about conformity.”¹⁴

The CFMEU as part of the *Manufacturers Leader Group* was subsequently appointed a member of the Steering Group on the Commonwealth Government (Department of Industry) funded project commissioned by the Australian Industry Group (AIG) which concluded in the report: “*The quest for a level playing field; The non-conforming building products dilemma,*” 92% of surveyed companies in

¹⁴ Non-Government Members, Report of the Prime Minister's Manufacturing Taskforce, August 2011, available online @ <http://www.digecon.info/docs/0114.pdf>

the steel, glass and aluminum, plastic pipes and engineered wood products industry found non-conforming products in their supply chains and the problem was widespread.¹⁵

In contrast, by the time the AIG's report was published in November 2013 the Government had changed and unfortunately the CFMEU has since been largely excluded from all discussions between industry and the Government on the issue in a number of forums which have taken place despite our obvious and unique interests and expertise on the topic.

In light of the continuing problem of non-conforming and non-compliant product we challenge the Government to accept our legitimate role of monitoring building products at the point of installation and other ideas for addressing the most serious issue, in addition to the recommendations we have made in our previous two submissions to this inquiry.

In this regards we make the following additional recommendations:

1. The *Code for the Tendering and Performance of Building Work 2016 (the Code)* acts as a barrier to workers and employers seeking assistance from union officials in identification of non-conforming and non-compliant products.

A perverse situation exists currently where a worker (or indeed a site manager) could invite a union official onto a building site to inspect a product's conformity or compliant use and face an exclusion order as a result due to provisions in the Code.

Restrictive Right of Entry provisions of the Code including Section 14 and 11 (p) must be repealed immediately.

¹⁵ Australian Industry Group, the "The quest for a level playing field; The non-conforming building products dilemma", November 2013, available online @ http://steel.org.au/media/File/29276_Quest_for_a_level_playing_field_AiGroup.pdf

Elements of the Code requiring successful tenderers to disclose whether the building materials to be used to undertake building work comply with relevant *Australian standards* published by, or on behalf of, *Standards Australia* is a poor substitute to an active regime of ground checking and monitoring at the point of installation (the Victorian Building Authority found that 20% of the cladding used in building was not as specified in contracts.¹⁶)

The limitations of the Government approach in isolation were on display in Senate Estimates when the ABCC provided evidence of how the requirements were being implemented¹⁷

Likewise, the Federal Safety Commissioner does not appear to be a body capable of providing ongoing compliance and monitoring of building products at the point of installation despite its new role.

2. In response to our notification to the *Master Builders Association* about our advice to our members to, should they be asked to install suspect cladding, cease installing it immediately and to seek assistance from the CFMEU we acknowledge their prompt response that :

“We accept your invitation to meet with you and CFMEU officials to discuss these matters as a first step but ultimately *it will be essential that discussions involve all stakeholders in the supply chain so that we can collectively work to strengthen the system.*” (Our emphasis)

¹⁶ Australian Building Codes Board, ‘Non-compliant use of External Cladding Products on Buildings Regulation Impact Statement for Consultation’ August 2016, available online @ <http://www.abcb.gov.au/Resources/Publications/Consultation/Non-compliant-use-of-External-Cladding-Products-on-Buildings-Consultation-RIS>

¹⁷ Senate estimates, Education and Employment Legislation Committee, ABCC, 30 May 201, p 119, available online @ http://parlinfo.aph.gov.au/parlInfo/download/committees/estimate/ed704318-571c-42b1-b7e0-c4e8e53bc415/toc_pdf/Education%20and%20Employment%20Legislation%20Committee_2017_05_30_5127.pdf;fileType=application%2Fpdf#search=%22committees/estimate/ed704318-571c-42b1-b7e0-c4e8e53bc415/0000%22

We call on the Federal Government to host an urgent roundtable of governments, regulators, fire bodies and services and industry. Unlike previous forums and discussion between the Government and stakeholders on this issue, unions including the CFMEU should not be excluded from these discussions for purely ideological and political reasons in clear breach of the public interest as has occurred in the past.

3. The Government mentioning *Standards Australia's* newly published standard AS 5113 in Parliament is not enough. 'Referencing' the new Standard in the Australian Construction Code (in 2019) is also insufficient.

The new standard, which we understand to be robust but not unduly punitive, needs to become mandatory for Aluminum Composite Panels and similar products used in high rise buildings.

This is the standard that the CFMEU has advised our members they need to look for when making an assessment as to whether the Aluminum Composite Panel they are being asked to install is safe for use in a high rise constructions.

We challenge the Government to endorse this position as soon as possible.

4. The Victorian Government has raised concerns that Certificates of Conformity (with the Building Code of Australia performance requirements) "are not always explicit in respect of the range of use or circumstances in which a product may be relied upon to be fit for purpose."

As part of the actions to be taken by the ABCB following the BMF, the *CodeMark* Certificates of Conformity “will be made clearer as to what particular products can be used for, as part of a package of improvements to the voluntary building product certification scheme”.¹⁸

This work needs to be accelerated so that builders, contractors, workers and their unions are clear as to what applications a certain product can be used for in accordance with the Australian Construction Code and what conditions need to prevail in installation and accompanying structural and/ or external work and fittings.

5. A more active approach at the border to cladding and other products is required.

The CFMEU acknowledges the complexities surrounding treatment at the border of products and materials which are not “non-conforming” but could be compliantly used in some situations such as the cladding product with a polyethylene core which could be used for, for example , signage etc. However the Government is not impotent in this regard despite this complication.

For example, the Government (for goods imported under this tariff code) could require extra information in the Import Declaration such as whether the product had a polyethylene core in which case *Border Force* would be better equipped to provide useful information to State and Territories through their information sharing protocol agreed at the BMF.

This requirement could mean that Border Force could look out for suspicious (in terms of an agreed risk profile such as volume or by a certain importer with a bad record which indicated it was going to be used in non-compliant manner etc.) and provide information forthwith.

¹⁸ Interim report, “Safety—‘not a matter of good luck’, 4 May 2016, p 10

An alternative approach would be to impose a condition that the Import Declaration includes a signed declaration that it was the responsibility of the importers to ensure that the product would not be used in a non-compliant manner such as high rise buildings.

Ultimately, if necessary, interim import bans on the product could be put in place until systems were established to provide the public with confidence that products of this type were going to be used appropriately and compliantly only.

Such actions would be consistent with Australia's international obligations. The World Trade Organisation's Agreement on Technical Barriers to Trade states:

"No country should be prevented from taking measures necessary to ensure the quality of its exports, or for the protection of human, animal or plant life or health, of the environment, or for the prevention of deceptive practices, at the levels it considers appropriate"¹⁹

Ends

¹⁹ World Trade Organisation, TBT Agreement, available online @ https://www.wto.org/english/docs_e/legal_e/17-tbt_e.htm

