



Australian Government

Senate Economics References Committee's Inquiry into Non-Conforming Building Products

Government Response to the Final Report: Non-conforming building products – the need for a coherent and robust regulatory regime

April 2020

GOVERNMENT RESPONSE

The Australian Government recognises the importance of maintaining confidence in the safety of our residential, commercial and public buildings. The Government welcomes the Committee's Inquiry Report into this important issue.

Under the Constitution, the Australian Government does not have the power to regulate the built environment. Instead, the state and territory governments regulate buildings, including through adoption of the National Construction Code (NCC).

However, the Australian Government plays an important role in leading collaboration across jurisdictions through the Building Ministers' Forum (BMF), a ministerial-level body consisting of Australian Government, State and Territory Ministers, which the Australian Government chairs.

As outlined in the Inquiry's Final Report, there are two key issues that are negatively impacting confidence in the building sector:

- The use of non-conforming building products, which are products or materials that claim to be something they are not; and
- The non-compliant use of building products, where products or materials have been used incorrectly and in a manner that does not comply with the requirements of the NCC.

The Australian Government, in concert with state and territory governments, has already taken a number of measures to reduce the prevalence of non-conforming building products, both independently and in response to the Committee's previous interim reports on asbestos and aluminium composite cladding. This includes creation of the Senior Officers' Group (SOG) to develop a national strategic response to address the issue of non-conforming building products and creation of a website through the BMF and Australian Building Codes Board (ABCB) to provide information on, and confidential reporting of, non-conforming building products.

However, addressing non-conforming building products in isolation is unlikely to be sufficient at raising the quality of construction in Australia's building industry. If products are used inappropriately, the risk remains that buildings will fail to meet community expectations and potentially create a safety risk.

For this reason, the Australian Government supported the BMF to commission Professor Peter Shergold AC and Ms Bronwyn Weir to examine compliance and enforcement problems across jurisdictions, culminating in their 2017 report, *'Building Confidence – Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia'* (Building Confidence report).

At the 18 July 2019 BMF, all Building Ministers agreed to a national approach to the implementation of the *Building Confidence* report recommendations¹. To achieve this, an implementation team has been established, reporting to the ABCB. This will ensure resources are dedicated to developing a national framework for the consistent implementation of recommendations in the *Building Confidence* report.

The strategic focus of the ABCB has been recast to better reflect the current challenges of the building sector. The Board will also be expanded to include greater industry representation.

¹ <https://www.industry.gov.au/sites/default/files/2019-07/bmf-communique-18-july-2019.pdf>

Adoption of the national framework and ultimate implementation of the *Building Confidence* report will remain the responsibility of the state and territory governments. However, the Australian Government will continue to help facilitate on the clear understanding that the states and territories have Constitutional power and responsibility for regulating building matters.

The BMF has also expedited a comprehensive package of measures to address concerns around external wall cladding and fire safety, including via an out of cycle amendment to the 2016 edition of the NCC and via actions taken by states and territory government regulators.

RESPONSE TO THE RECOMMENDATIONS

Recommendation 1

The committee recommends that the Building Ministers' Forum develop improved consultative mechanisms with industry stakeholders. In addition, the Building Ministers' Forum should amend the terms of reference for the Senior Officers' Group and the Building Regulators Forum to include annual reporting requirements on progress to address non-conforming building products.

Response – Supports in-principle

The Australian Government is committed to ensuring effective and appropriate consultation with industry stakeholders to inform decision-making. The Australian Government advocates this approach in the BMF and associated supporting groups, and has facilitated Industry Roundtable events with Building Ministers and over 20 peak industry bodies and associations to inform the BMF's consideration of the *Building Confidence* report. Future Industry Roundtables will be held as the BMF considers is required.

The Senior Officers' Group (SOG) and the Building Regulators Forum (BRF) provide regular and as needed reports to the Building Ministers' Forum on a range of issues, including on work to address non-conforming building products.

The Australian Government considers the current frequency and flexibility of reporting arrangements is appropriate. However, the Government understands the important contribution industry can make through open consultation and engagement. This is why the BMF is expanding the ABCB's Board membership to include another two representatives from industry.

Recommendation 2

The committee recommends that the Australian Government develop a confidential reporting mechanism through which industry and other stakeholders can report non-conforming building products.

Response – Noted

The Australian Government has worked with jurisdictions and the Australian Building Codes Board (ABCB) to provide a confidential reporting mechanism for concerns about non-conforming building products.

On 30 June 2017, the BMF launched the non-conforming building products webpage on the ABCB's website (www.abcb.gov.au). The ABCB hosts this content as the multi-jurisdictional standards writing body responsible for developing and maintaining the NCC, on behalf of all jurisdictions.

The webpage was developed in consultation with state and territory building jurisdictions and key industry stakeholders and provides information on:

- the requirements for compliance and conformance;
- individual responsibility;
- how to ensure that a product conforms;
- what to do with suspect non-conformance; and
- how to lodge a query or report a suspected non-conforming building product.

Any query or report lodged through this webpage is confidential and directed to the relevant state or territory building regulator for appropriate remedial action, including any appropriate referral to occupational, health and safety regulators. To respond to queries and address reports made, contact details are required.

Recommendation 3

The committee calls on the Building Ministers' Forum to expedite its consideration of a mandatory third-party certification scheme for high-risk building products and a national register for these products.

Response – Noted

The Australian Government is working to support the BMF's careful consideration of whether a mandatory third-party certification scheme is an efficient and effective option to address the issues identified with non-conforming building products.

To support the BMF's consideration, the SOG, in collaboration with the ABCB, continues to undertake research into non-conforming building products, including:

- the potential risks posed by non-conforming building products, and
- what may be considered a 'high risk building product'.

Under the NCC, products have to be able to demonstrate that they are fit to be used for their intended purpose. At present, consumers and building practitioners have access to a number of options to verify that a product conforms and complies with the NCC. This includes verification through a:

- certificate of Conformity from WaterMark, a mandatory certification scheme for plumbing and drainage products;
- certificate of Conformity from CodeMark, a voluntary third-party building product certification scheme;
- certificate of Accreditation from a State or Territory Accreditation authority;
- certificate from an appropriately qualified person such as an engineer;
- certificate from a product certification body accredited by the Joint Accreditation System of Australia and New Zealand (JAS-ANZ);
- report registered by a registered testing authority; and
- other documentary evidence, for example, a certificate through an industry scheme.

Recommendation 4

The committee recommends that where an importer intends to import goods that have been deemed high-risk, the Australian Government require the importer, prior to the importation of the goods, to conduct sampling and testing by a NATA accredited authority (or a NATA equivalent testing authority in a another country that is a signatory to a Mutual Recognition Arrangement).

Response – Noted

The Australian Government recognises the importance of ensuring the safety and quality of products imported into Australia, including through product testing where appropriate.

In the case of asbestos, the substance is well defined as it is directly hazardous to human health. The Australian Border Force (ABF) requires importers to have adequate assurance measures in place to demonstrate that the goods they are importing do not contain asbestos.

The types of measures an importer may put in place may include, but are not exclusive to, testing. Assurance can include a combination of processes, such as the identification and removal of at-risk components before import (for example, brake pads in vehicles), which would remove the necessity to test; collation of evidence through demonstrated knowledge of the supply chain (including the manufacturing process) and building assurances into contractual arrangements with suppliers.

When goods arrive at the Australian border, if the ABF is not satisfied with the importer's level of assurance, the ABF will direct the importer to have the goods tested for asbestos by a National Association of Testing Authorities (NATA) accredited laboratory.

However, mandatory testing is not always an efficient and effective way of providing assurance that the goods are conforming. Mandatory testing is also costly to industry, particularly for importers who are demonstrably compliant.

Product testing can be appropriate to identify the conformity of particular products, but it cannot determine how that product will actually be used. As noted under Recommendation 3, appropriate use of building products is regulated by the states and territories, including through the NCC.

Further, careful consideration would need to be taken not to unnecessarily create barriers to trade that may be more trade restrictive than necessary. Australia must act in a manner consistent with our international trade obligations, including the World Trade Organization (WTO) Technical Barriers to Trade Agreement. Relevant technical regulations and standards must not be more trade restrictive than necessary, and must not be applied discriminately (i.e. only to imports). This extends to conformity assessment practices.

Recommendation 5

The committee recommends that the Building Ministers' Forum, through the Senior Officers' Group, examine international approaches—including the European Union's regulations and processes—for testing of high-risk products prior to import and determine if they can be suitably adapted to benefit and enhance Australian requirements.

Response – Supported

The Australian Government supports consideration of international approaches to testing of building products. Consideration of international approaches to building product regulation, including the European Union's regulations and processes, informs the work of the BMF, SOG, BRF, ABCB and all states and territories.

Further to the commitment made in the Government Response to the Interim report *Protecting Australians from the threat of Asbestos*, research has indicated that few countries have stricter controls on asbestos importation than Australia, including countries in the European Union.

Recommendation 6

The committee recommends that the Building Ministers' Forum give further consideration to introduce a nationally consistent approach that increases accountability for participants across the supply chain. Specifically, the committee recommends that other states and territories pass legislation similar to Queensland's Building and Construction Legislation (Non-conforming Building Products—Chain of Responsibility and Other Matters) Amendment Act 2017.

Response – Supported

The Australian Government supports the national principles to improve accountability across the building supply chain adopted by the BMF and reflected in Queensland's *Building and Construction Legislation (Non-conforming Building Products- Chain of Responsibility and Other Matters) Amendment Act 2017 (Qld)*. While regulation of the built environment is a matter for states and territories, this legislation is intended to be used by other jurisdictions as a model to be either adopted in full or modified as appropriate to accommodate their existing regulatory framework.

In addition, many of the *Building Confidence* report's recommendations, including those designed to increase accountability across a greater range of building practitioners and to improve documentation and data collection, will help to provide a record of products utilised in construction. Relevant *Building Confidence* report recommendations are now being progressed through a national approach to the implementation of the *Building Confidence* report, as agreed by all Building Ministers' on 18 July 2019.

Recommendation 7

The committee recommends that the Australian Government work with state and territory governments to establish a national licensing scheme, with requirements for continued professional development for all building practitioners.

Response – Noted

The Australian Government is supportive of measures to promote mobility and alignment of regulation across jurisdictions, noting that occupational licensing is the responsibility of the states and territories.

A consistent occupational licensing scheme across jurisdictions has been previously considered by the Council of Australian Governments (COAG). COAG agreed in 2013 that occupational licensing would remain a state and territory matter which would be addressed through the Council for the Australian Federation. This decision followed extensive state-based consultation, after which the majority of states decided not to pursue the proposed National Occupational Licensing Scheme reform.

The *Building Confidence* report recommends implementing consistent scopes of work and registration requirements for various types of building practitioners, and that all jurisdictions introduce a requirement for continuing professional development across all practitioner types. These *Building Confidence* report recommendations are now being progressed through a national approach, as agreed by all Building Ministers' on 18 July 2019.

Recommendation 8

The committee strongly recommends that the Australian Government consider making all Australian Standards freely available.

Response – Noted

The Australian Government notes this recommendation.

Like most developed economies, the provision of standards in Australia is based on a user pays model which supports the development, maintenance and distribution of current and future standards. Australian Standards are developed by Standards Australia, a non-government, not-for-profit body. Industry representatives, government officials and others also volunteer their time to the standards development process.

The publication and pricing of these standards has, until recently, been governed by a Publishing and Licensing Agreement between Standards Australia and SAI Global. While the Australian Government cannot direct Standards Australia to make changes to its commercial distribution arrangements, it has been made known to the organisation that the Government expects standards delivery to be based on principles of non-exclusive distribution, flexible digital access and competitive pricing. As a result, Standards Australia committed to these principles in its Memorandum of Understanding with Government signed in November 2018.

Standards Australia has been exploring a range of options to improve access to users. In February 2019, it moved beyond the exclusive distribution arrangements with SAI Global it had in place since 2003 – and announced Techstreet as a new service provider.

In November 2019, Standards Australia also released a new Distribution and Licensing Policy Framework. The Framework provides for innovation in standards delivery and increased channels to market, allowing more choice in how content is accessed. Over time, the Australian Government expects these changes will see improvements to the price, relevance and reach of Australian Standards.

Standards Australia has made a further commitment to seek to provide free access to its content for personal, domestic and household use by 2023. In the meantime, it will consider providing standards to users with a legitimate, non-commercial need on an individual basis.

Through the Regulatory Impact Analysis process, Australian Government regulators are also encouraged to consider making standards referenced in legislation accessible to the public. Standards Australia's new distribution arrangements should provide greater opportunities to make these standards more accessible.

Recommendation 9

The committee recommends that the Australian Government consult with industry stakeholders to determine the feasibility of developing a national database of conforming and non-conforming products.

Response – Noted

The Australian Government supports continued consultation with industry on options for reducing the incidence of non-conforming products, including the feasibility of the creation and maintenance of a national database of conforming and non-conforming products.

Previous consultations with industry suggest that implementation of such a database would be impractical and costly to implement, in part due to the large number of building products on the market. Further, providing a list of conforming and non-conforming building products may create risk to the administrator of the database and impact upon innovations in building products. There are also several publically available product registers that are developed and maintained by industry associations.

Recommendation 10

The committee gives in-principle support to Recommendation 12 of the Shergold and Weir Report '[t]hat each jurisdiction establishes a building information database that provides a centralised source of building design and construction documentation' so regulators are better placed to identify where non-compliant building products have been installed.

Response – Supported

The Australian Government notes that the establishment of databases to provide information on building design and construction documentation are matters for State and Territory governments.

The Australian Government supports all the recommendations in the *Building Confidence* report. The BMF has agreed a national approach to the implementation of the *Building Confidence* report recommendations including Recommendation 12.

Recommendation 11

The committee recommends the Australian Government consider imposing a penalties regime for non-compliance with the National Construction Code such as revocation of accreditation or a ban from tendering for Commonwealth funded construction work and substantial financial penalties.

Response – Noted

The Australian Government notes this recommendation.

State and Territory governments have responsibility for regulating building and construction activities in their respective jurisdictions, which includes penalising non-compliance with the NCC. There are constitutional limitations on the extent to which the Australian Government could regulate matters that the NCC deals with.

In relation to Commonwealth-funded building work, the *Building and Construction Industry (Improving Productivity) Act 2016* requires that the Australian Government only enter into contracts with builders accredited under the Australian Government building and construction industry Work Health and Safety Accreditation Scheme (the Scheme).

The Federal Safety Commissioner administers the Scheme and imposed a condition of accreditation on all accredited companies in January 2017, requiring they comply with the NCC performance requirements in relation to buildings materials.

The Federal Safety Commissioner has the power to suspend or revoke accreditation under the Scheme, affecting a company's eligibility to enter into contracts for building work funded directly and indirectly by the Commonwealth or corporate Commonwealth entities.

The Scheme also applies to participants in regional grant programs, such as the National Stronger Regions Fund, Community Development Grants, Building Better Regions Fund and the Regional Growth Fund. For projects that reach the legislation's threshold requirements, relevant clauses are included in the funding agreements and compliance is required before contracts can be entered into.

Recommendation 12

The committee recommends that the Australian Government consider the merits of requiring manufacturers, importers and suppliers to hold mandatory recall insurance for high-risk building products.

Response – Not supported

The Government does not support this recommendation. Obtaining recall insurance should remain a commercial decision for each business.

The Government notes that this recommendation is an adjunct to Recommendation 22 of the Asbestos Interim Report, which recommended that the Australian Competition and Consumer Commission conduct compulsory recalls for products with asbestos, which the Government also does not support.

Recommendation 13

The committee recommends that the Australian Government review the Customs Act 1901 (and other relevant legislation) to address the challenges of enforcing the existing importation of asbestos offence, with the aim to close loopholes and improve the capacity of prosecutors to obtain convictions against entities and individuals importing asbestos. This review should include consideration of increasing the threshold required to use 'mistake of fact' as a legal defence.

Response – Noted

The Australian Government notes this recommendation.

Subsequent to the commencement of this Inquiry, the Department of Home Affairs (Home Affairs) completed a review of offences and penalties for unlawful asbestos importation, including in relation to the mistake of fact defence. This review noted the importance of mistake of fact as a fundamental legal principle with regard to the question of 'intent'. This review found that creating an amendment to the existing mistake of fact defence provisions to differentiate the treatment of asbestos importation would be at odds with other criminal law offences in Australia.

Home Affairs and the ABF have continued to work with importers and industry to increase awareness of measures required pre-border to reduce the risk of unlawfully importing asbestos. To successfully utilise the mistake of fact defence, importers are required to demonstrate that they formed a mistaken, but honest and reasonable belief that the goods did not contain asbestos prior to import. Given the efforts in this space and the level of educational material available, importers may be less likely to be able to show that the mistake was reasonable in cases where they only undertake minimal efforts to reduce the risk of asbestos in their supply chain. These ongoing importer education efforts have reinforced that ignorance of the law will not be sufficient to establish a defence of mistake of fact.

Additionally, in March 2019, Home Affairs made changes to the Customs Regulation 2015 to prescribe asbestos, and goods containing asbestos, as Tier 1 goods. This reform will have the practical effect of increasing deterrence of asbestos importation offences by allowing a court to impose a penalty of up to five years imprisonment for asbestos importation offences.