

Chapter 4

Accountability and enforcement

4.1 As noted in Chapter 2, the legal cases against the practitioners involved in the Lacrosse building fire, which occurred in 2014, have yet to be resolved. Nearly three years on, it is still unclear where legal and financial liability lies for this incident. While these issues remain unanswered, the building is still clad in the combustible cladding and there is no indication which party will be responsible for any remediation. There is clear need for a greater degree of accountability and enforcement for all building practitioners, as well as those involved in the building product supply chain.

Greater coordination and a national approach to reform

4.2 While the NCC provides a national overarching performance based framework for the built environment, in order to address the issues around non-compliant and non-conforming building products there remains a need for a nationally consistent approach to building regulation, inspections and auditing, including licencing and registration. This issue has been raised throughout the committee's inquiry and in particular in relation to the use of external Aluminium Composite Panel (ACP) cladding.

4.3 The necessity for cooperation across governments and industry to resolve these issues expeditiously was emphasised by Mr Timothy Tuxford, National President, Australian Institute of Building Surveyors (AIBS):

...the Australian public must be protected through safe, compliant buildings and that will only be achieved through buy-in by everyone involved in the building and construction industry working together to improve the system and the professional practices across the board.¹

4.4 Ignis Solutions considered that 'each state and territory should harmonise their building planning and construction regulations as well as licencing requirements for professional building designers, engineers as well as installers'.²

4.5 Mr Norman Faifer, Immediate Past National President, Australian Institute of Building, noted in relation to the regulatory framework:

...there are six states, two territories and a federal jurisdiction all overseeing building work and administering the Building Code of Australia. Each jurisdiction is a little bit different in what they want. Their criteria is a

1 Mr Timothy Tuxford, National President, Australian Institute of Building Surveyors, *Committee Hansard*, 19 July 2017, pp. 20–21.

2 Ignis Solutions, answers to written questions taken on notice received 10 August 2017, p. 4.

little bit different. Their licensing and their registration of builders and other practitioners in the industry are different.³

4.6 Mr Karl Sullivan, General Manager Risk and Disaster Planning for the Insurance Council of Australia highlighted the importance of a nationally consistent licencing:

The ability to have national compliance with licensing would be of great benefit to prevent somebody who has failed to build properly in, say, Queensland and has been found locally by the agencies there to have done that and has been penalised to then reappear in South Australia and start committing the same acts. So, some form of national compliance measures, which might involve national licensing, would certainly be of benefit.⁴

4.7 Mrs Denita Wawn, Chief Executive Officer of Master Builders Australia (MBA) believed the regulatory framework was an area of immediate concern noting there is 'inconsistency from jurisdiction to jurisdiction, with some inconsistencies within jurisdictions'.⁵

Need for greater enforcement of existing regulations

4.8 Mr Phillip Dwyer of the Builders Collective of Australia, a voluntary organisation, suggested that the reason Australia has 'such a ratbag building industry' is that existing regulation is not being enforced.⁶ Ignis Solutions considered that the enforcement and audit regime had failed 'at multiple levels'.⁷

4.9 The Australian Building Codes Board (ABCB) submitted that measures that have been developed through the Building Ministers' Forum (BMF) will go some way to help address the non-compliant use of external wall claddings and other products:

However, where deliberate decisions are taken on the part of those involved in the design and construction of buildings to use non-compliant products, the final recourse will be through enforcement actions by the appropriate authorities.⁸

4.10 Others like the Building Products Innovation Council (BPIC) have raised the issue of severe financial penalties that should be imposed across the supply chain where 'an organisation is knowingly selling non-compliant product, installing it, or importing it directly for use in Australia'. BPIC also recommended:

3 Mr Norman Faifer, Immediate Past National President, Australian Institute of Building, *Committee Hansard*, 19 July 2017, p. 47.

4 Mr Karl Sullivan, General Manager Risk and Disaster Planning, Insurance Council of Australia, *Committee Hansard*, 19 July 2017, p. 62.

5 Mrs Denita Wawn, Chief Executive Officer, Master Builders Australia, *Committee Hansard*, 14 July 2017, p. 45.

6 Mr Phillip Dwyer, National President, Builders Collective of Australia, *Committee Hansard*, 19 July 2017, p. 51.

7 Ignis Solutions, answers to written questions taken on notice received 10 August 2017, p. 2.

8 Australian Building Codes Board, *Submission 150*, p. 6.

...state-run schemes where buildings are inspected for product conformity and those found deliberately procuring, installing or certifying offending products are subject to legal action.⁹

4.11 Similarly, considering that there is a significant risk of loss of life with particular building types, the Australian Institute of Architects expressed concern that the issue of non-compliance in the construction industry is not taken as seriously as it should be. It argued where products have been substituted during building construction are found to be non-compliant, substantial fines should be imposed to provide a strong disincentive.¹⁰

4.12 The Australian Institute of Building noted the lack of national consistency in enforcing the NCC, observing:

Whilst there is a common Building Code of Australia/National Construction Code throughout Australia it is left to the states and territories to administer, regulate, enforce and discipline their part of the industry. There are both subtle and distinct differences in the administration of the Code, its enforcement and in the licensing and/or registration of building practitioners from state to state. WA is the only state that licences painters, Victoria is the only state that registers Quantity Surveyors and there are differences between states in the licensing/registration of domestic and commercial builders; all of which make it just that little more difficult to promulgate and enforce uniform laws and regulations.¹¹

Committee view

4.13 The committee acknowledges that greater enforcement of existing regulations is needed. However, current building regulations appear inadequate and are too easily evaded, largely due to existing deemed-to-satisfy and performance-based pathways, which provide avenues to circumvent Australian Standards in the NCC. The committee supports the BMF's decision to establish an independent review to assess the broader compliance and enforcement problems within the building and construction systems across Australia. The committee is encouraged by the fact that the terms of reference include developing recommendations for a national best practice model for compliance and enforcement to strengthen the effective implementation of the NCC. The committee believes consideration should also be given to an expanded national role for the Commonwealth government across all elements of the building and construction industry, starting with the BMF.

National licencing schemes

4.14 The committee heard from both submitters and witnesses that while plumbers and electricians are nationally licenced many other trades are not. While all Australian states and territories practice mutual recognition of Australian Quality Training

9 Building Products Innovation Council, *Submission 83.1*, p. 4.

10 Australian Institute of Architects, *Submission 157*, p. 3.

11 Australian Institute of Building, *Submission 151*, p. 6.

Framework trade qualifications, there is no requirement for other trades to be registered under a national licencing regime.

4.15 The committee understands that licencing requirements vary across jurisdictions and Queensland is the only state that has a specific licence requirement for wall cladding installers. It was suggested to the committee that Brisbane may have fewer buildings compared to other capital cities that have been clad with PE core ACPs as a result of this licencing requirement.¹²

4.16 Mr Radley de Silva, Executive Director, Master Builders Association of Victoria observed that part of the problem with building non-compliance is the lack of consistency across Australia:

To give an example referring to that, talking about subcontractors, there is no requirement for trade registration in Victoria. I do not have a building background, but I could walk out of here and put a belt on and call myself a subcontractor. But in other states and jurisdictions you are required to be registered.¹³

4.17 AIBS observed that everyone in the building industry, including 'regulators, suppliers and basically all professionals involved, including building surveyors' need to continually 'improve to keep pace with the modern building industry'.¹⁴ For its part in ensuring best practice among building surveyors into the future:

Right now, AIBS is developing a professional standards scheme for building surveyors. We expect this scheme will provide increased consumer protection and contribute to an improved building regulatory system in Australia. A professional standards scheme will further establish the competencies and skills required of a building surveyor. At present, it varies from state to state and in some jurisdictions are not clearly defined. However, for the scheme to be successful, it needs to be supported by all governments and regulators.¹⁵

4.18 The Australian Institute of Architects recommended introducing nationally consistent licensing for all building practitioners such as drafters, building designers, and project managers in order to provide greater consumer protections. It noted:

While this split of service delivery is set by the market, there is no level of consumer protection applied to the services provided by those building professionals who are engaged for projects that may be outside their level of expertise. There are also no ethical/behavioural rules, via a code of

12 Mr Clint Gavin, National Sales manager, SGI Architectural, *Committee Hansard*, 31 July 2017, p. 52.

13 Mr Radley de Silva, Executive Director, Master Builders Association of Victoria, *Committee Hansard*, 14 July 2017, p. 50.

14 Mr Timothy Tuxford, National President, Australian Institute of Building Surveyors, *Committee Hansard*, 19 July 2017, p. 20.

15 Mr Timothy Tuxford, National President, Australian Institute of Building Surveyors, *Committee Hansard*, 19 July 2017, pp. 20–21.

conduct or similar long held measure, which apply to building and design professionals other than architects.¹⁶

4.19 Engineers Australia noted that fire safety engineering is not subject to a nationally consistent licensing and registration regime. Queensland is currently the only jurisdiction with an established registration regime for engineers:

Engineers Australia has established the National Engineering Register (NER) which provides minimum entry levels matched to Engineers Australia's standards, mandates for levels of Continued Professional Development (CPD) and transparency for consumers and users of engineering services across the country. The NER however voluntary and it is recommended that state governments make use of it as part of new co-regulatory scheme.¹⁷

Committee view

4.20 The committee considers that a national licencing scheme for all trades and professionals involved in the building and construction industry including: building surveyors, building inspectors, builders and project managers, would improve compliance and provide greater consumer protection and public safety outcomes. A national licencing scheme, including requirements for continuing professional development would ensure that building practitioners have the necessary skills and knowledge to operate in the building industry's complex regulatory environment.

Recommendation 2

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

The role and independence of building surveyors

4.22 The committee repeatedly heard about the role and independence of building surveyors in ensuring buildings are built in compliance with the NCC and the relevant Australian Standards. Since the early 1990's state and local governments have progressively privatised once in-house building surveyor services. While some building surveyors are still employed by local governments most functions are fully privatised. At the same time the role of building surveyors was privatised there was a shift to deregulation.

4.23 Mr Scott Williams, Fire Protection Association Australia (FPA Australia) was not opposed to privatisation but explained:

...you can't have privatisation but then a hands-off approach from the government, from the enforcement agencies, to say, 'It'll be fine.' So, there must be surveillance, there must be auditing, there must be compliance and

16 Australian Institute of Architects, *Submission 157*, p. 6.

17 Engineers Australia, *Submission 146*, p. 6.

there must be consequences through that process for behaviours that don't support the process.¹⁸

4.24 Similarly, Mr Christopher Stoltz, President of Engineers Australia considered that the shift to privatisation of the role of building surveyors was not in itself a bad thing, 'provided we have got the checks and balances to make sure that, if you like, the auditors are audited and that the competencies are there to make the decisions that they're making'.¹⁹

4.25 The AIBS felt that following the shift to privatisation, governments across Australia had not done enough to support and strengthen the system while the regulatory framework became increasing complex and varied across jurisdictions.²⁰

4.26 The committee also heard concerns about the difficulties faced by building surveyors and their ability to maintain the independence of their role. For example, Mr Slavery, ABCB, acknowledged the difficult position building surveyors have been placed in:

I think this is really difficult, because I empathise with the building surveyors, whether they are private or municipal—because it is not uniformly private around the country. They are in a very difficult position because, on the one hand, they have been given a responsibility to protect the public interest—that is, the regulatory—and, on the other hand, they have been given a commercial relationship with the client.²¹

4.27 Engineers Australia expressed concern that building surveyors are not always independent:

...as the building surveyor is often acting as a member of the building team, they cannot be truly independent of the team. For example, the RBS [relevant building surveyor] in Victoria is required to be appointed by the owner, but if the owner is a developer that RBS is often chosen based on cost and the ability to get the project completed as quickly as possible, and often based on past experience.²²

Need for greater on-site supervision and oversight

4.28 A further issue raised during the committee's inquiry was the reduction in the level of independent supervision and quality assurance for building sites over the last few decades. In the past a Clerk of Works would be the overseer of all that was done on a construction site.

18 Mr Scott Williams, Chief Executive Officer, Fire Protection Association Australia, *Committee Hansard*, 19 July 2017, p. 16.

19 Mr Christopher Stoltz, President, Victoria Division, Engineers Australia, *Committee Hansard*, 19 July 2017, p. 30.

20 Australian Institute of Building Surveyors, *Submission 124.1*, p. 7.

21 Mr Neil Savery, General Manager, Australian Building Codes Board, *Committee Hansard*, 14 July 2017, p. 40.

22 Engineers Australia, *Submission 146*, p. 4.

4.29 Mr Neil Savery of the ABCB, noted too that there has been a process of deregulation in Australia since the 1990s which has led to a reduction in regulatory requirements around mandatory inspections.²³

4.30 Mr Timothy Tuxford of AIBS and Mr Christopher Stolz of Engineers Australia both expressed disappointment at the loss of the Clerk of Works who had the traditional oversight function in ensuring the quality and compliance of construction projects. Mr Tuxford explained what this role was and when it disappeared:

The Clerk of Works was largely engaged by the architect or the owner and was on site to look after the interests of the owner. They largely had a quality assurance role. They supervised what was happening on site. There was a deregulation of the Institute of Clerk of Works in about 1984.²⁴

4.31 Mr Stoltz noted that many of his members at Engineers Australia lament the demise of the Clerk of Works. He explained that 'the Clerk of Works was responsible to the owner of the building to make sure that the builder was building the building as it went up, using the materials, fitting the material and constructing the building according to the design'.²⁵

4.32 Mr Tuxford also noted that it is not the role of the present-day building surveyor to oversee all construction work.²⁶

4.33 FPA Australia explained the impact of deregulation, including the reduction of mandatory inspections, over the past 30 years:

The consequence of not upholding a regime of auditing and checking is obviously that you can then have opportunistic, unscrupulous behaviour of individuals through different processes, and that includes the sourcing and supply of products and the installation of products and right through the process of commissioning certification and even post-construction maintenance that we were talking about before. So, clearly there must be a level—and a high level—of auditing and compliance to uphold the whole integrity.²⁷

4.34 Engineers Australia highlighted the lack of consistency across jurisdictions for mandatory construction phase inspections:

While there is one Building Code in Australia there are eight separate Building Acts, each of which makes a determination on how many

23 Mr Neil Savery, General Manager, Australian Building Codes Board, *Committee Hansard*, 14 July 2017, p. 40.

24 Mr Timothy Tuxford, National President, Australian Institute of Building Surveyors, *Committee Hansard*, 19 July 2017, p. 26.

25 Mr Christopher Stoltz, President, Victoria Division, Engineers Australia, *Committee Hansard*, 19 July 2017, p. 30.

26 Mr Timothy Tuxford, National President, Australian Institute of Building Surveyors, *Committee Hansard*, 19 July 2017, p. 26.

27 Mr Scott Williams, Chief Executive Officer, Fire Protection Association Australia, *Committee Hansard*, 19 July 2017, pp. 15–16.

mandatory construction phase inspections are to be undertaken for each class of building. This leads to inconsistency across the country.

In some states there are mandatory requirements for building surveyors to inspect on site, while other jurisdictions leave the decisions to the building surveyor under a risk based analysis.²⁸

4.35 Engineers Australia also highlighted the importance of involving qualified professionals in the construction process:

In a system that puts cost ahead of professionalism we have created an industry where margins are thin and corners are cut. Professionals are left out of the process and decisions are being made by those who do not have the experience or knowledge to make them. This in turn leads to unacceptable and unnecessary risks being taken in the construction of people's homes.²⁹

4.36 Engineers Australia explained that the inspection stages of a building's construction are meant to be the point where defects are identified and exposed. However, there is no mandatory requirement for fire safety engineers to be included in final inspections. In particular, Engineers Australia noted that fire safety engineers who have undertaken the design of a safety measure are 'not necessarily included in the final stage inspection prior to the closing up of key structural and service components in the construction phase'.³⁰ Engineers Australia also submitted that fire safety measures need to be inspected by a properly trained, experienced and registered fire safety engineer before the final close up of walls and ceilings. This would reduce the chances that fire safety measures may have been installed that are not compliant with the code and in turn reduce the level of fire safety risks to the public.³¹

4.37 Ignis Solutions also submitted that fire safety engineers should be part of the overall building safety design with requirements for mandatory inspections at critical stages in construction.³² It stated:

The lack of consistency across Australia as well as the lack of professional engineers involvement in the buildings construction and occupation results in the project Certifier/Surveyor being responsible for the fire safety measures of any fire engineering report being implemented. Typically, a fire safety engineer would produce a fire engineering report with specific requirements then not be required to provide guidance or inspection during the construction and not provide final review prior to occupation of the building.³³

28 Engineers Australia, *Submission 146*, pp. 3–4

29 Engineers Australia, *Submission 146*, p. 3.

30 Engineers Australia, *Submission 146*, pp. 3–4

31 Engineers Australia, *Submission 146*, p. 5.

32 Ignis Solutions, *Submission 153*, p. 4.

33 Ignis Solutions, answers to written questions taken on notice received 10 August 2017, p. 2.

4.38 Ms Amanda Leck, Australasian Fire and Emergency Service Authorities Council (AFAC), recommended the ongoing involvement of fire authorities and fire safety officers 'in checking for compliance, whether that is every building or random inspections or whether that is at the time of compliance or subsequent audits'.³⁴ Ms Leck noted that state and territory officials had been critical of fire authorities in recent years and they were perceived as:

...increasing the regulatory burden, holding things up, costing the building industry more and so on. But it is our contention that, given that our role is very clearly to uphold public safety and given the issues we are currently experiencing, we should still be an essential part of that building commissioning and signing off the compliance.³⁵

Committee view

4.39 The committee supports the implementation of nationally consistent mandatory on-site inspections throughout the construction process. Whether this is done through the reinstatement of the role of Clerk of Works or some other process is eventually a decision for governments. Either way, it is evident from the evidence received that there needs to be a central oversight role independent from industry to provide assurance to the public that structures are built according to the agreed national standards. The committee also endorses the inclusion of mandatory inspections by fire safety engineers and fire authorities to ensure buildings are compliant and public safety is upheld.

Addressing the need for greater accountability

4.40 Mr Murray Smith, Acting Chief Executive Officer of the Victorian Building Authority (VBA), expressed the view that the responsibility for compliance and enforcement was too heavily weighted at the end of the supply chain:

Complex regulatory frameworks exist at both state and national levels that need to be considered in a holistic way. The issue of industry supply chains and import of goods into Australia need to be considered in addition to the regulation of the use of and building of construction projects. From the VBA's perspective, heavily weighting compliance and enforcement activities for these types of products at essentially the end of the supply chain, as currently is the case, is problematic and requires further thinking. Otherwise, our regulatory efforts will remain largely reactive rather than proactive.³⁶

4.41 Ms Liza Carroll, Director-General, Queensland Department of Housing and Public Works indicated that the Building and Construction Legislation (Non-conforming Building Products—Chain of Responsibility and Other Matters)

34 Ms Amanda Leck, Director, Information and Community Safety, Australasian Fire and Emergency Service Authorities Council, *Committee Hansard*, 19 July 2017, p. 16.

35 Ms Amanda Leck, Director, Information and Community Safety, Australasian Fire and Emergency Service Authorities Council, *Committee Hansard*, 19 July 2017, p. 14.

36 Mr Murray Smith, Acting Chief Executive Officer, Victorian Building Authority, *Committee Hansard*, 19 July 2017, pp. 75–76.

Amendment Bill 2017 had recently been introduced in Queensland. The purpose of the bill is to ensure that there are obligations on the entire chain of responsibility, so that a single building certifier is not left with the responsibility for building compliance.³⁷ The Queensland Department of Housing and Public Works informed the committee:

A key element of the Bill is to introduce responsibilities on participants of the building product supply chain (designers, manufacturers, importers, suppliers and installers) to ensure that a building product, so far as reasonably practicable, is safe and fit for its intended use.

The Bill also places a duty to exercise 'due diligence' on the executive officer of a company involved in the chain of responsibility for a building product, i.e. the executive officer for a company involved in the design, manufacture, import, supply or installation of a building product. The executive officer may be proceeded against and convicted for contravening this duty, whether or not the company has been proceeded against and convicted of contravening their duty.³⁸

4.42 Dr Darryl O'Brien, National Technical Committee representative from AIBS considered the proposed bill was a good starting point to address the need for greater accountability across the building industry and the supply chain. He noted the 'Queensland bill goes some way towards achieving this. It looks at a chain of responsibility that includes the product designer, the manufacturer, the supplier and the installer. If that could be picked up and harmonised across all states and territories'.³⁹

4.43 Mr Rodger Hills, Executive Officer from BPIC supported the Queensland government's bill as it was an attempt to 'spread the risk and the responsibility for compliance across the supply chain rather than leaving it to the very end'. Mr Hills considered the approach to be 'a very healthy, sane and intelligent way of going, and we are advocating that each state and territory should actually look at something like that'.⁴⁰

Committee view

4.44 The committee agrees that responsibility for building compliance is currently weighted too heavily at the end of the supply chain. Consequently, measures need to be put in place to ensure greater accountability across the supply chain. The committee considers that the Queensland bill will go some way to ensuring

37 Ms Liza Carroll, Director-General, Department of Housing and Public Works, *Committee Hansard*, 14 July 2017, p. 19.

38 Department of Housing and Public Works, answers to questions taken on notice from a public hearing on 14 July 2017, received 1 August 2017, p. 5.

39 Dr Darryl O'Brien, National Technical Committee representative, Non-Conforming Building Products, Australian Institute of Building Surveyors, *Committee Hansard*, 19 July 2017, p. 24.

40 Mr Rodger Hills, Executive Officer, Building Products Innovation Council, *Committee Hansard*, 19 July 2017, p. 6.

accountability is spread more evenly across the supply chain from designers, manufacturers, importers, suppliers and installers and supports the bill's intent. The committee also encourages other jurisdictions to examine the bill and consider developing similar approaches as a starting point to addressing this serious issue.

Recommendation 3

4.45 The committee recommends that the Building Minister's Forum give further consideration to introducing nationally consistent measures to increase accountability for participants across the supply chain.

Availability of Australian Standards

4.46 It was drawn to the attention of the committee that the cost of purchasing Australian Standards, which have been referenced in the NCC, act as a barrier to compliance. It was noted that Australian Standards currently 'cost a fortune and are not available for free online'.⁴¹

4.47 The Master Builders Australia (MBA) noted that the industry is required to comply with the NCC, which requires compliance with Australian Standards— known as 'Reference Standards'. There are over 100 primary 'Referenced Australian Standards' specified within the NCC and hundreds more 'Secondary Reference Standards'. The average cost of a Standard is \$120.00 per document which the MBA considers to be a significant barrier to compliance.

4.48 The MBA recommended that either governments subsidise the cost of regulated standards or make available to industry all referenced standards free to the user.

4.49 MBA pointed out that the decision to make the NCC and its Guide freely available had a significant impact on industry compliance levels. Until 2015, access to the complete NCC and its Guide cost over \$300 dollars a year. Once it became freely available to the number of registered users jumped from 12,000 to 140,000.⁴²

4.50 Mr Hills of BPIC also considered that people are less likely to use the standards if they have to purchase them because it is a cost burden. Mr Hills also noted that Standards Australia's practice of selling the standards back to the industry serves as a disincentive to voluntary industry participation in standards development.

The difficulty we have, I suppose, is that the people who advise the standards committees are all voluntary people who come together at their own cost, their only expense, and who give their IP and their expertise. That then gets turned into a standard and then the standard gets sold to the industry, and people have to purchase the standard...It appears to be that IP is being collected and hoovered up from industry, turned into a standard

41 Mr Norman Faifer, Immediate Past National President, Australian Institute of Building, *Committee Hansard*, 19 July 2017, p. 47.

42 Master Builders Australia, *Submission 125.1*, p. 6.

and then sold back to industry again. We believe there needs to be a streamlined process within Standards Australia.⁴³

4.51 Mr Graham Attwood, Director of Expanded Polystyrene Australia, agreed that the standards process should be improved:

There is a disincentive for industry groups to participate because of the cost and the efficiency involved in inputting and participating in developing Australian standards. There's certainly a disincentive. It's not the highest priority, and, relatively speaking, it's a cumbersome way of actually getting best practice into a strongly organised conformance mechanism. The efficiency is not strong, and I guess it's not seen to be a priority for many organisations who are there trying to survive on a day-to-day basis.⁴⁴

4.52 In March 2017, the Senate Standing Committee on Regulations and Ordinances (R and O Committee) noted that Australian parliamentary scrutiny committees have expressed ongoing concerns about 'the issue of access to material incorporated into the law by reference to external documents, such as Australian and international standards'.⁴⁵

4.53 In August 2017, the R and O Committee noted that, in general, the committee will be concerned 'where incorporated documents are not publicly and freely available, because persons interested in or affected by the law may have inadequate access to its terms'.⁴⁶ The R and O Committee also noted that there appeared to have been a breakdown in negotiations between SAI Global and National and State Libraries for continued community access to Australian Standards. As such, online access to Australian Standards may no longer be available at these libraries. The R and O Committee has also expressed concerns that 'only the National Library of Australia may hold a comprehensive collection of Australian Standards in hardcopy, and that even this collection may not be complete'.⁴⁷

Committee view

4.54 The committee is dismayed that building practitioners are expected to pay unreasonable sums of money to access Australian Standards which are required to ensure they comply with the NCC. In the committee's view, making Australian Standards freely available would have a significant impact on building compliance. More importantly it will reduce the overall cost of compliance and insurance and most

43 Mr Rodger Hills, Executive Officer, Building Products Innovation Council, *Committee Hansard*, 19 July 2017, p. 3.

44 Mr Graham Attwood, Director, Expanded Polystyrene Australia, *Committee Hansard*, 19 July 2017, p. 3.

45 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation: Monitor 3 of 2017*, 22 March 2017, p. 104.

46 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation: Monitor 8 of 2017*, 9 August 2017, p. 61

47 Senate Standing Committee on Regulations and Ordinances, *Delegated Legislation: Monitor 8 of 2017*, 9 August 2017, p. 62

significantly, it will reduce the cost and impact on future state and territory emergency, fire and medical services.

4.55 The committee understands that SAI Global's contract with Standards Australia is coming up for renewal. The committee believes the Commonwealth government should give serious consideration to engaging with Standards Australia to explore possible options to providing free access to Australian Standards, including reinstating online access to the Standards through Australian libraries.

Recommendation 4

4.56 The committee strongly recommends that the Commonwealth government consider making all Australian Standards and codes freely available.

Role of the Federal Safety Commissioner

4.57 The committee was interested in the capacity of the Federal Safety Commissioner (FSC) to play a role in ensuring compliance with the NCC of Commonwealth funded construction work, particularly in the context of the use of external cladding materials.

4.58 Established in 2005, the FSC works with industry and government stakeholders towards achieving the highest possible occupational health and safety standards on Australian building and construction projects. The Office of the Federal Safety Commissioner (OFSC) is part of the Department of Employment.

4.59 The functions of the FSC are described in Section 38 of the *Building and Construction Industry (Improving Productivity) Act 2016* and include:

- promoting workplace health and safety (WHS) in relation to building work;
- auditing compliance with National Construction Code performance requirements in relation to building materials;
- administering the Australian Government building and construction industry WHS Accreditation Scheme;
- promoting the benefits of the WHS Accreditation Scheme; and
- disseminating information about the WHS Accreditation Scheme.⁴⁸

4.60 The OFSC is a small office with 25 staff. The OFSC has expertise in the field of WHS on construction sites. It has no expertise in the regulation of building design, engineering, planning approval, material procurement processes and certifier processes for signing off on building materials and construction. The FSC's powers are limited to companies that choose to become accredited in order to undertake Commonwealth-funded work. There are currently approximately 420 accredited companies.

48 Office of the Federal Safety Commissioner, *Fact Sheet: Federal Safety Commissioner*, last updated 13 April 2017, <http://www.fsc.gov.au/sites/FSC/Resources/AZ/Documents/FederalSafetyCommissioner.pdf> (accessed 22 August 2017).

4.61 The *Building and Construction Industry (Improving Productivity) Act 2016* added a new function to the FSC—auditing compliance with National Construction Code performance requirements in relation to building materials. Mr Alan Edwards, the FSC, explained that this function relates to the non-compliant use of materials more so than non-conforming products. Following the passage of the legislation the FSC made compliance with the NCC a condition of accreditation. This means that accredited companies now risk losing Commonwealth funded work if they fail to comply with the performance specifications of building materials under the NCC.⁴⁹

4.62 Mr Edwards applauded moves by state and territory building regulators to conduct audits to identify the use of non-compliant cladding materials. He advised the committee that while he did not have the legislative powers or expertise to test compliant use of cladding materials or cover the whole industry, 'what I can do is to add some weight to ensure that, when these things are identified, my accredited companies rectify them.'⁵⁰

4.63 Mr Edwards advised the committee his office does not have the capacity or the expertise to conduct audits of the compliant use of cladding materials, and any such audits would be limited under the relevant legislation to accredited companies only. Mr Edwards advised:

[Accredited companies] are the only ones under the legislation I have any influence over, and the auditing I will be doing will be in response to problems identified by the regulators in the states and territories. So I will be auditing any noncompliance identified by others and auditing the responses those companies undertake.⁵¹

Committee view

4.64 The committee considers that the FSC has an important role in ensuring compliance with the NCC of Commonwealth funded construction work. The committee is concerned that the FSC does not appear to be adequately resourced to carry out its newly legislated function to audit compliance with NCC performance requirements in relation to building materials. Mr Edwards advised the committee that his office does not have the resources or the expertise to conduct audits

4.65 In addition, the committee believes that loss of accreditation to conduct Commonwealth funded work is not a strong enough penalty for non-compliance with the NCC. The committee is of the view that a stronger penalties regime should be imposed.

49 Mr Alan Edwards, Federal Safety Commissioner, Office of the Federal Safety Commissioner, *Committee Hansard*, 14 July 2017, pp. 10–11.

50 Mr Alan Edwards, Federal Safety Commissioner, Office of the Federal Safety Commissioner, *Committee Hansard*, 14 July 2017, p. 11.

51 Mr Alan Edwards, Federal Safety Commissioner, Office of the Federal Safety Commissioner, *Committee Hansard*, 14 July 2017, p. 12.

Recommendation 5

4.66 **The committee recommends the Commonwealth 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.**

Recommendation 6

4.67 **The committee recommends the Commonwealth government ensure the Federal Safety Commissioner is adequately resourced to ensure the office is able to carry out its duties in line with the new audit function and projected work flow.**

Illegal phoenix activity in the building and construction industry

4.68 The committee is concerned that illegal phoenix activity in the building and construction industry has the potential to undermine any measures that are introduced to ensure greater accountability for non-compliance.

4.69 In its 2015 report, 'I just want to be paid': Insolvency in the Australian construction industry, the committee stated:

To register a company a person must lodge an application with ASIC. Under section 117(2) of the Corporations Act, the application must include the name and address of each director of the company. However, little is done to verify that information and consequently there is a lack of transparency surrounding the identity of company directors.

The inability of regulators and participants in the building and construction industry to identify and track individuals suspected of illegal activity is a significant cause of the incidence of illegal phoenix activity.

A lack of transparency around company directors means that regulators are slower in clamping down on illegal phoenix operators and therefore more innocent participants are caught up in schemes, suffering significant economic and social effects.⁵²

4.70 The committee's 2015 report included two recommendations in relation to Director Identification Numbers (DIN).

Recommendation 36

The committee recommends that section 117 of the *Corporations Act 2001* (Cth) be amended to require that, at the time of company registration, directors must also provide a Director Identification Number.

Recommendation 37

The committee recommends that a Director Identification Number should be obtained from ASIC after an individual proves their identity in line with the National Identity Proofing Guidelines.

52 Senate Economics References Committee, *I just want to be paid': Insolvency in the Australian construction industry*, December 2015, pp. xxv–xxvi

4.71 On 14 June 2017, the Government tabled a response to the 2015 report in which in it states:

These recommendations align with recommendation 15.6 of the Productivity Commission's Report on Business Set-up, Transfer and Closure. The Government will give further consideration to Director Identification Numbers as part of its ongoing work to combat illegal phoenix activity in Australia.⁵³

4.72 The Productivity Commission presented its final report for the inquiry into Business Set-up, Transfer and Closure to the government on 30 September 2015 and it was published on 7 December 2015.⁵⁴

Committee view

4.73 The committee is concerned that it has been nearly two years since its report on insolvency in the construction industry was tabled and the Productivity Commission's report was released and considers that a DIN initiative should be considered as a matter of urgency. A DIN initiative would go some way to preventing directors engaging in illegal phoenix activity. The committee also considers that the potential for a DIN initiative to assist credit reporting agencies in identifying individuals who engage in illegal phoenix activity is worth further investigation. The committee is encouraged by the government's willingness to give further consideration to DIN's, it is concerned by the lack of a clear timeframe for consideration.

Recommendation 7

4.74 The committee welcomes the Commonwealth government's decision to give further consideration to Director Identification Numbers and recommends that it expedites this process in order to prevent directors from engaging in illegal phoenix activity.

Increasing protections for end users

4.75 Engineers Australia considered that the current regulatory regime in Australia is letting consumers down as multi storey apartment buildings are not being constructed to the standards that the Australian public expects. It noted that 'people who purchase an apartment expect that—for the many hundreds of thousands of dollars they have invested—the quality of their apartment is fault free. Unfortunately, the system is not meeting those expectations'.⁵⁵

4.76 Mr Stephen Goddard, spokesperson for the Owner's Corporation Network (OCN) went further, stating:

53 Australian Government, *Australian Government response to the Senate Economics References Committee Report: Insolvency in the Australian Construction Industry, May 2017*, tabled 14 June 2017, p. 19.

54 Productivity Commission, 'Business Set-up, Transfer and Closure, Inquiry Report', <http://www.pc.gov.au/inquiries/completed/business/report> (accessed 31 August 2017).

55 Engineers Australia, *Submission 146*, p. 3.

There's a greater duty of care in the sale of a refrigerator than in the delivery of people's homes.⁵⁶

4.77 The number of people living in strata titled dwellings is growing, with two million people living in this type of dwelling in NSW alone. OCN noted that 'within 20 years it is expected that half of [NSW's] population will be living or working in a strata or community title scheme'.⁵⁷

4.78 The OCN explained that there is a 'disconnect between end user and builder' which is unique to the residential strata sector within the building industry. It explained that it is the developer, not the end user, who contracts with the builder and controls builder payment. If there is an issue with building compliance, the builder will have received full payment under the building contract by the time the strata plan is registered and the end user must then rely upon statutory warranties to recover the minimum constructions standards prescribed by the BCA.⁵⁸

4.79 The solution put forward by the OCN was consideration of 'a statutory duty of care extended to the end user, the victim, the person who buys into a strata building unable to see the invisible absence of fire dampers and fire collars and now the existence of flammable cladding'.⁵⁹

Committee view

4.80 The committee believes there needs to be a greater awareness and protection for consumers in the residential strata sector. The committee considers there is an urgent need to provide a statutory duty of care to cover the discovery of non-compliant or non-conforming building products for the increasing number of the Australian public who purchase residential apartments.

Recommendation 8

4.81 The committee recommends that state and territory governments work together to develop a nationally consistent statutory duty of care protection for end users in the residential strata sector.

Next steps for the committee

4.82 The committee anticipates that significant changes will arise from the reforms that the Commonwealth, state and territory governments will undertake as a result of this serious issue. The committee intends to keep a close eye on how these reforms are developed and the eventual timeliness of their implementation as this continues to be a significant shortcoming across all governments.

56 Mr Stephen Goddard, Spokesperson, Owners Corporation Network, *Committee Hansard*, 19 July 2017, p. 44.

57 Owners Corporation Network, *Submission 88.1*, p. 1.

58 Owners Corporation Network, *Submission 88.1*, p. 4.

59 Mr Stephen Goddard, Spokesperson, Owners Corporation Network, *Committee Hansard*, 19 July 2017, p. 42.

4.83 The committee urges, as a matter of the utmost importance, to work effectively together and to get the job done expeditiously. The committee will also continue to monitor the progress of the BMF, its review, and also its ongoing work on the issues of non-conforming and non-complaint building products. The committee will present an interim report on the illegal importation of asbestos on 31 October 2017 and its final report for the broader inquiry by 30 April 2018.

Senator Chris Ketter

Chair