

Chapter 3

Government action on non-conforming building products

3.1 This chapter examines the ongoing work of the Building Ministers' Forum (BMF) to address the issue of non-conforming building products, including relevant progress by the Senior Officers' Group (SOG).

Role of the Commonwealth, states and territories

3.2 Under the Australian Constitution, governance of the built environment is the responsibility of state and territory governments. The roles, responsibilities and powers of the Australian Government are set out in the Australian Constitution. By standard convention, those matters that are not mentioned in the Constitution remain the responsibility of the states and territories. Matters regarding the safety, health and amenity of people in buildings are not mentioned in the Constitution and therefore, responsibility for them rests with the state and territory governments. This has led to eight separate Acts of Parliament and eight distinct building regulatory systems.¹

3.3 The regulatory responsibility for building product compliance and enforcement, as well as licencing of trades and regulation of construction sits with the relevant state and territory governments. The regulation of building products is covered by a range of state and territory legislative instruments that require building work to be carried out in accordance with the requirements of the National Construction Code (NCC) and be fit for purpose.²

3.4 Each jurisdiction has a building regulator, either established within a statutory body or a government department. Building regulators oversee licensees, including builders and building contractors in charge of installing building products and building certifiers/surveyors who certify work to the requirements of the NCC.³

3.5 While the Australian Government does not have a formal role in the administration of building, plumbing and construction works, it assists at the policy level, in particular through the Council of Australian Governments (COAG) to facilitate agreement and adoption of the nationally consistent building regulations expressed primarily through the NCC.⁴

3.6 There is Commonwealth legislation that, in some circumstances, can assist with enforcement in relation to non-conforming building products. The Australian Competition and Consumer Commission (ACCC) is the Commonwealth statutory

1 Australian Building Codes Board, 'BCA History', <https://www.abcb.gov.au/ncc-online/About/BCA-History> (accessed 28 November 2018).

2 Department of Industry and Science, *Submission 43*, p. 3.

3 Senior Officers' Group, *Strategies to address risks related to non-conforming building product*, p. 7, <http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsReport.pdf> (accessed 28 November 2018).

4 Department of Industry and Science, *Submission 43*, p. 3.

authority responsible for enforcing laws that promote competition, consumer protection and fair trading in Australia (Australian Consumer Law (ACL)). The ACL contains a number of generic consumer protections and prohibitions that may apply to individuals or businesses that supply building products in trade or commerce. For example, the ACL provides that a person must not, in trade or commerce, engage in conduct that is misleading or deceptive, or is likely to mislead or deceive.⁵

3.7 With regard to imported products, under the *Customs (Prohibited Imports) Regulations 1956* (PI Regulations), the Australian Border Force (ABF) has the power to detain goods where they are suspected of containing asbestos, including building products and a range of other goods. However, the ABF does not have any legislative powers to ensure that imported building products conform to building standards or performance levels. Accordingly, the ABF does not examine or inspect imported building products at the border to assess compliance with standards.⁶

3.8 The Commonwealth is also involved in a number of other areas that can be relevant to building products, such as the workplace health and safety and electrical safety regulatory frameworks.⁷

Building Ministers' Forum

3.9 The BMF is responsible for overseeing governance of the built environment, in relation to policy and regulatory issues impacting the building and construction industries. The Commonwealth works collaboratively with the states and territories through the BMF.

3.10 The BMF is made up of Australian Government and state and territory government ministers with responsibility for building and construction. The Hon. Karen Andrews MP, Minister for Industry, Science and Technology, is the current Chair of the BMF; with the Department of Industry, Innovation and Science providing secretariat support.

3.11 The BMF's work covers:

- harmonisation of building regulations and standards;
- collaboration on compliance and enforcement; and
- other policy issues affecting Australia's building and construction industries.⁸

5 Senior Officers' Group, *Strategies to address risks related to non-conforming building product*, p. 9, <http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsReport.pdf> (accessed 28 November 2018).

6 Department of Immigration and Border Protection, *Submission 56*, p. 3.

7 Senior Officers' Group, *Strategies to address risks related to non-conforming building product*, p. 7, <http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsReport.pdf> (accessed 28 November 2018).

8 Department of Industry, Innovation and Science, 'Building Ministers' Forum', <https://www.industry.gov.au/regulation-and-standards/building-ministers-forum> (accessed 15 November 2018).

3.12 Taking account of any COAG agreements, together with societal needs and expectations, the BMF sets the strategic policy direction for the:

- Australian Building Codes Board (ABCB)⁹;
- Senior Officers' Group (SOG); and
- Building Regulators' Forum (BRF).¹⁰

3.13 The BMF may direct the ABCB, the SOG and the BRF, to work collaboratively on specific national issues affecting the building and construction industries.¹¹

3.14 The BMF's next meeting is scheduled for December 2018.¹²

Senior Officers' Group on non-conforming building products

3.15 On 31 July 2015, shortly after this inquiry started, the BMF established a Senior Officers' Group (SOG) to address the issue of non-conforming building products. The SOG was tasked with reporting back to the BMF on strategies to 'minimise the risks to consumers, businesses and the community associated with failure of building products to conform to relevant laws and regulations and at the point of import'.¹³ The SOG comprises two senior officers from each state and territory as well as the Commonwealth.¹⁴

3.16 The SOG prepared a consultation report, *Strategies to address risks related to non-conforming building products* (SOG Report), in 2016, and following consultation, it released its *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products* (SOG Implementation Plan) in September 2017, including a number of recommendations relevant to this inquiry.

9 The ABCB is the standards writing body responsible for the National Construction Code (NCC) which comprises the Building Code of Australia (BCA) and the Plumbing Code of Australia (PCA). The Commonwealth is one of nine government members on the ABCB; Department of Industry and Science, *Submission 43*, p. 1.

10 Department of Industry, Innovation and Science, 'Building Ministers' Forum Charter', <https://www.industry.gov.au/sites/g/files/net3906/f/building-ministers-forum-charter.pdf> (accessed 15 November 2018).

11 Department of Industry, Innovation and Science, 'Building Ministers' Forum Charter', <https://www.industry.gov.au/sites/g/files/net3906/f/building-ministers-forum-charter.pdf> (accessed 15 November 2018).

12 Building Ministers' Forum, *Building Ministers' Forum: 10 August 2018—Communiqué*, https://www.industry.gov.au/sites/default/files/August%202018/document/pdf/building_ministers_communique_-_august_2018.pdf (accessed 1 November 2018).

13 Building Ministers' Forum, *Communiqué for the Building Ministers' Forum—31 July 2015*, https://www.industry.gov.au/sites/default/files/July%202018/document/extra/building_ministers_forum_communique_-_july-2015.pdf (accessed 1 November 2018).

14 Queensland Department of Housing and Public Works, 'Non-conforming building products', last updated 29 March 2016, http://www.hpw.qld.gov.au/construction/Building_Plumbing/Building/Pages/NonConformingBuildingProducts.aspx (accessed 1 November 2018).

3.17 The recommendations from these reports included the following:

- Improve 'the regulatory framework to enhance the powers of building regulators to respond to incidents of NCBPs [non-conforming building products] e.g. providing the ability to conduct audits of existing building work or take samples from a building for testing'.¹⁵
- Establish 'a national forum of building regulators to facilitate greater collaboration and information-sharing between jurisdictions'.¹⁶
- Improve 'collaboration between building and consumer law regulators and consistency in the application of the "false and misleading claims" aspect of the Australian Consumer Law'.¹⁷
- Develop 'a "one-stop-shop" national website to provide a single point of information for consumers and building product supply chain participants, including examining arrangements for hosting and maintaining a website'.¹⁸
- Develop 'mechanisms that ensure that, where all states and territories prohibit the use of a NCBP, evidence is provided to the Commonwealth enabling proportionate action to be taken based on the risk posed by the product'.¹⁹
- Implement 'an information sharing arrangement where import data collected by the Department of Immigration and Border Protection can be provided to state and territory regulators to facilitate compliance and enforcement activities for NCBPs'.²⁰
- Initiate 'a review, with the ABCB and Standards Australia, of Australian Standards related to high risk building products referenced under the NCC, including assessing the costs and benefits of mandating third party certification and establishing a national register for these products'.²¹

3.18 Progress on the implementation of these recommendations is outlined below.

15 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, Recommendation 2, p. 3.

16 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, Recommendation 3B, p. 5.

17 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, Recommendation 2, p. 3.

18 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, Recommendation 3D, p. 6.

19 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, Recommendation 4A, p. 7.

20 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, Recommendation 4B, p. 7.

21 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, Recommendation 5, p. 8.

The Queensland Building and Construction Legislation (Non-conforming Building Products—Chain of Responsibility and Other Matters) Amendment Act 2017

3.19 The SOG Report found that the current building regulatory system in Australia does not provide an overarching framework for identifying and addressing non-conforming building products. The SOG Implementation Plan noted:

Building regulator powers are focussed primarily on active building sites and practitioners. While some regulators, such as electrical safety regulators, have powers to compel documents, undertake inspections or instigate recalls in response to identified issues, building regulators generally do not have these powers.²²

3.20 The Queensland Government took the lead on the SOG Report's recommendation to seek ways to improve 'the regulatory framework to enhance the powers of building regulators to respond to incidences of NCBPs e.g. providing the ability to conduct audits of existing building work or take samples from a building for testing'.²³

3.21 The Australian Government response to the committee's interim report on aluminium composite cladding noted that the Australian Government, through the BMF and the SOG, has been working with the states and territories to improve accountability across the building supply chain. The government response noted that the *Queensland Building and Construction Legislation (Non-conforming Building Products—Chain of Responsibility and Other Matters) Amendment Act 2017* (the Queensland legislation) is an example of how jurisdictions can improve regulatory oversight of the building product supply chain.

3.22 The purpose of the Queensland legislation is to, among other matters:

- confer responsibilities on the building product supply chain to ensure building products, so far as reasonably practicable, conform to mandatory standards;
- expand the obligations of building practitioners (licensees) to notify the Queensland building regulator of work health and safety issues; and
- widen grounds for the Queensland building regulator to take disciplinary action against licensees.

3.23 The government response noted:

Queensland's legislation is based on principles agreed by the BMF, and is intended to be used by other jurisdictions as a model to be either adopted in full or revisited as appropriate to accommodate their existing regulatory structure.

While some of the powers and enforcement measures contained in Queensland legislation may already exist in other jurisdictions, the

22 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, p. 3.

23 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, p. 3.

legislation can be a 'best practice' approach to impose consistent obligations on participants of the building product supply chain and improve jurisdictional ability to detect and address non-conforming building products.²⁴

Establishment of the Building Regulators Forum

3.24 The SOG Report recommended establishing a national forum of building regulators to facilitate greater collaboration and information-sharing between jurisdictions. The SOG Implementation Plan noted that:

While national forums exist for other regulators such as electricity and consumer law regulators to help government agencies work more cooperatively and efficiently across jurisdictions and portfolios, there has been no similar forum for building regulators. While established forums exist through the Australian Building Codes Board (ABCB) for jurisdictions and building regulators to collaborate, these forums are focused on the development and maintenance of the National Construction Code (NCC).²⁵

3.25 The BRF was established in response to this recommendation to provide an intergovernmental forum for state and territory building regulators to work cooperatively and efficiently on regulatory responses to issues of national significance, in addition to providing the BMF with regulatory advice. The BRF enables building regulators to:

- share information on best practice regulation and enforcement activities;
- collaborate to deliver timely and coordinated responses to issues of national significance related to NCBPs and other matters as directed by the BMF; and
- consider and triage issues for escalation to relevant Commonwealth entities for response or the BMF for consideration.²⁶

3.26 The BRF is currently chaired by the Victorian Building Authority and consists of the senior regulator of each state and territory building authority, and representation from relevant Commonwealth agencies.²⁷

Improving collaboration between building and consumer law regulators

3.27 The SOG Report recommended improving collaboration between building and consumer law regulators and consistency in the application of the 'false and

24 Australian Government response to the *Interim report: Aluminium composite cladding*, February 2018, p. 11.

25 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, p. 4.

26 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, p. 4.

27 Australian Government response to the *Interim report: Aluminium composite cladding*, February 2018, p. 6.

misleading claims' aspect of the Australian Consumer Law (ACL). The SOG Implementation Plan noted that:

Consumer law regulators can play a valuable role when NCBPs are captured under the consumer law. While building products are not generally considered 'consumer goods' under the ACL, it is unlawful for a business to make false or misleading representations about goods or services (including building products) when supplying, offering to supply, or promoting them.²⁸

3.28 The measures to address this recommendation include establishing a Building and Consumer Law Working Group under the auspices of the BRF to collaborate on best practice regulation and enforcement activities on non-conforming building product matters.²⁹

One-stop-shop website for non-conforming building products

3.29 The SOG Report recommended developing a 'one-stop-shop' national website to provide a single point of information for consumers and building product supply chain participants, including examining arrangements for hosting and maintaining a website. The SOG Implementation Plan noted:

No overarching website or network hub exists with information such as a list of building regulators, government and industry building product schemes, or how to report NCBPs. In contrast, similar regulatory systems have a general website with information and links to relevant Commonwealth, state and territory regulators, e.g. the Australian Competition and Consumer Commission's website.³⁰

3.30 On 30 June 2017, the Commonwealth launched the national non-conforming building products webpage to provide information on non-conforming building products, key links to the non-conforming building product webpages of each state and territory building jurisdiction, and a mechanism for industry and consumers to report suspected non-conforming building products.

3.31 The one-stop-shop non-conforming building products webpage, hosted on the ABCB website, was developed in consultation with state and territory building jurisdictions and key industry stakeholders.³¹

28 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, p. 5.

29 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, p. 5.

30 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, p. 6.

31 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, p. 6.

Research to improve the evidence base relating to non-conforming building products

3.32 The SOG Report recommended that independent research should be undertaken, including manufacturer and random off-the-shelf product testing, to improve the evidence base relating to non-conforming building products. The SOG Implementation Plan noted:

Based on primarily anecdotal evidence presented during consultations, the SOG concluded that NCBPs exist in the Australian building and construction industry supply chain.

However, the SOG found it difficult to quantify the extent and impacts of NCBPs. While valuable information exists about the economic, commercial, social and legal impacts of individual NCBPs, independent quantitative analysis of overall consequences is required.³²

3.33 As part of the Western Australian (WA) State Government's contribution to the work of the SOG, the WA Building Commission is providing research funding to a major project which includes the completion of independent and quantitative research to improve the evidence base relating to non-conforming building products to help better determine the scale and prevalence of issues. The research will also involve the analysis of key supply chain factors, the evaluation of risk, relevant retrospective examination as well as some limited market testing. Following an open tender process, the lead researcher working on the project is Professor Russell Kenley from Swinburne University.³³

Information sharing arrangement for import data

3.34 The SOG Report recommended implementing an information sharing arrangement where import data collected by the Department of Home Affairs (formerly the Department of Immigration and Border Protection) can be provided to state and territory regulators to facilitate compliance and enforcement activities for non-conforming building products. The Implementation Plan noted:

Regulators currently have limited ability to stop known NCBPs entering Australia and making their way into the building product supply chain. Goods, including building products, are usually imported without an intended purpose specified (beyond what is listed in the tariff description).

The [Department of Home Affairs] collects customs data from import declarations and ensures any sharing of this official information complies with relevant legislative and privacy provisions.

The [Department of Home Affairs] and its enforcement arm, the Australian Border Force (ABF), does not have legislative powers to ensure imported

32 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, p. 9.

33 Government of Western Australia, 'Recent developments in non-conforming building products', last updated 26 July 2018, <https://www.commerce.wa.gov.au/building-commission/recent-developments-non-conforming-building-products> (accessed 1 November 2018).

building materials conform to building standards or performance levels and can't reliably determine at the border whether the building product will be used or installed correctly. The [Department of Home Affairs] also can't prevent entry of a good into Australia unless it is prohibited under legislation, even if it has been subject to a national recall.³⁴

3.35 The Department of Home Affairs has developed an Import Data Sharing Arrangement to address this recommendation, where import data collected can be provided to state and territory regulators.

3.36 The department advised the committee that this import data covers the tariff subheadings under which these building products are described within an import declaration. This covers:

- aluminium cladding;
- prefabricated buildings;
- plasterboard sheeting;
- tiles and panels; and
- insulated electrical cables.

3.37 The department advised that the data provided includes information on the declared goods description; importer and delivery details; the origin and date of import; the value of the goods; and details of the overseas supplier. The data includes products which may be used as external cladding following importation.

3.38 State and territory regulators can also make ad hoc requests to collect specific data where they identify a safety or compliance issue relating to an imported product. These types of requests assist the regulators to more efficiently respond to particular incidents.³⁵

Feasibility of a mandatory third-party certification scheme for high-risk building products and a national register

3.39 The SOG Report recommended a review, with input from the ABCB and Standards Australia, of Australian Standards related to high-risk building products referenced under the NCC, including assessing the costs and benefits of mandating third party certification and establishing a national register for these products. The SOG Implementation Plan noted:

At present, 162 primary Australian Standards are referenced in the NCC and over 3000 secondary referenced standards. The secondary standards typically contain product and testing standards.

34 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, p. 7.

35 Department of Home Affairs, answers to questions on notice, pp. 6–7 (received 13 August 2018).

Currently no framework exists to determine what constitutes a high risk building product and which referenced standards relate to such products. This recommendation will help the building industry, consumers and regulators determine whether a product is conforming, through potentially mandating third party certification and establishing a national register for these products.³⁶

3.40 The Department of Industry, Innovation and Science advised the committee that work is ongoing on the SOG Report's recommendation to examine the feasibility of a compulsory third party product certification scheme for high-risk building products and a national register for these products. This project is being led by the Victorian Government (in consultation with the Western Australian Government), on behalf of the SOG.³⁷

3.41 Following the Grenfell Tower fire, the BMF commissioned an independent assessment of the broader compliance and enforcement problems within the building and construction systems across Australia (the Shergold and Weir Report). Recommendation 21 of that report reiterated the SOG Report's recommendation, stating:

The product certification systems will need to include mandatory permanent product labelling and prohibitions against the installation of high-risk building products that are not certified. Once a common position is reached by the BMF, it should make it a priority to implement this through amendments to the NCC and/or through consistent reforms to each jurisdiction's legislation.³⁸

3.42 Mr Harris from the department observed that while the process is underway, determining which products were considered high-risk was not straight forward:

It's been a difficult and complex problem as it's taken some time to identify what would be considered a high-risk product. It's a difficult threshold to try and pin down, because of the complexity of the nature of the products and how they're used. It goes to the application of those products which will determine the level of risk associated with them, and therefore there are quite a few variables at play.³⁹

Views on progress

3.43 Mrs Tracey Gramlick from the Australian Window Association (AWA) expressed the view that, although some good preliminary work had been done to

36 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, p. 8.

37 Department of Industry, Innovation and Science, answers to questions on notice, p. 2 (received 10 August 2018).

38 Peter Shergold and Bronwyn Weir, *Building Confidence—Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, February 2018, p. 36.

39 Mr Rodney Harris, Acting Manager, Building Industry Section, Department of Industry, Innovation and Science, *Committee Hansard*, 2 August 2018, p. 30.

address the issue of dealing with non-conforming building products through the work of the BMF, there was still a lot of work to be done. She noted:

There is some good stuff that has been done. Queensland has stood up and made a very good start... We work very closely with them. It has been quite effective in identifying where issues are. State by state, you would probably give different scores. This year, I have been looking at non-conforming products for 15 years, and it has got worse and worse over the 15 years. The AiG report was published in 2013 and it is now 2018. There is so much more building stock in the country since then, so I would have to say that it has been very slow.⁴⁰

3.44 The Housing Industry Association (HIA) noted that much of the BMF's focus appeared to be on using products properly and non-compliance, rather than on non-conforming building products.⁴¹ Mr Gover, from the Engineered Wood Products Association of Australia (EWCAA), also noted that 'beyond the Queensland legislation, very little appears to have changed, unless it is asbestos or cladding related'.⁴²

3.45 HIA also observed that a single national approach is critical in 'this age of a global supply chain for building products'.⁴³ It noted that while some progress had been made to address the issue of non-conforming building products through the work of the BMF and various working groups, 'more is required to give builders or trade contractors confidence'.⁴⁴ Mr Simon Croft from HIA stated:

Despite the Infinity Cable case and issues considered by this committee in relation to asbestos, which are both examples of non-conforming building products, action is yet to be taken to include building products as a consumer safety issue, and there is no connection between a finding that a building product has been supplied to the market with false and misleading information and the potential recall of that product. These types of changes must occur at a national level. This has left our industry with ongoing uncertainty about which agency or which entity they should go to for a resolution.⁴⁵

40 Mrs Tracey Gramlick, Executive Director and Chief Executive Officer, Australian Window Association, *Committee Hansard*, 2 August 2018, p. 2.

41 Ms Kristin Brookfield, Chief Executive, Industry Policy, Housing Industry Association, *Committee Hansard*, 2 August 2018, p. 17.

42 Mr David Gover, Chief Executive Officer, Engineered Wood Products Association of Australasia, *Committee Hansard*, 2 August 2018, p. 6.

43 Mr Simon Croft, Executive Director, Building Policy, Housing Industry Association, *Committee Hansard*, 2 August 2018, p. 17.

44 Mr Simon Croft, Executive Director, Building Policy, Housing Industry Association, *Committee Hansard*, 2 August 2018, p. 17.

45 Mr Simon Croft, Executive Director, Building Policy, Housing Industry Association, *Committee Hansard*, 2 August 2018, p. 16.

Australian Consumer Law

3.46 As noted at paragraph 3.27, the SOG Report recommended improving collaboration between building and consumer law regulators and consistency in the application of the 'false and misleading claims' aspect of the ACL. The SOG Implementation Plan states:

Consumer law regulators can play a valuable role when NCBPs are captured under the consumer law. While building products are not generally considered 'consumer goods' under the ACL, it is unlawful for a business to make false or misleading representations about goods or services (including building products) when supplying, offering to supply, or promoting them.⁴⁶

3.47 The SOG Implementation Plan indicated that a Building and Consumer Law Working Group would be established under the auspices of the BRP to collaborate on best practice regulation and enforcement activities on non-conforming building product matters.⁴⁷

3.48 HIA's view is that the solutions lie with consumer protection and need to begin with changes to the ACL to enable the ACCC at the Commonwealth level, and the relevant state and territory agencies, to address instances where a building product has been supplied to the market with false and misleading information. Ms Brookfield explained HIA's view:

The impediment is the legislation as it stands today, rather than what could be the roles of either state or federal agencies. The definition of a consumer product is essentially the same at the state and federal level, and therefore the limitation that we talk about—that a building product is not a consumer product—means, therefore, that the remedies that exist under the Australian Consumer Law can't be used. That is across both state and federal. That could be changed by changing the legislation, by creating either a secondary definition that a building product is a consumer product, and when these things occur this is the process to be used. That process, I would suggest, would be a mirror of the current process when there is a non-conforming pram or a non-conforming child's toy. We're looking for the same things to be possible, for penalties to occur, for investigations to happen, for products to be taken off sale.⁴⁸

Accountability across the supply chain

3.49 Submissions to the inquiry highlighted the fact that responsibility and accountability for addressing the issue of non-conforming building products is weighted too heavily at the end of the supply chain.

46 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, p. 5.

47 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, p. 5.

48 Ms Kristin Brookfield, Chief Executive, Industry Policy, Housing Industry Association, *Committee Hansard*, 2 August 2018, p. 18.

3.50 HIA expressed concern that the building products supply chain in Australia, combined with the current building approval administrative framework, leaves those at the end of the supply chain—the builder, the trade contractor and the home owner—with all the responsibility. HIA noted that although the Queensland legislation is intended to be a model for other states to follow, no other state has moved to introduce similar provisions. Mr Croft from the HIA noted:

The Queensland legislation, while containing many good concepts, in particular around shared accountability across the building product supply chain, is still settling issues around the practical implementation and on the ground. These issues would need to be resolved before this legislation was implemented nationally; hence a trial period in Queensland is likely to be a useful exercise.⁴⁹

3.51 HIA supported Queensland legislation being extended to other jurisdictions, with some amendments. It noted:

That legislation fails to address building designers and it fails to address building certifiers' role in the approval of plans and therefore the selection of products. It's also unclear right now how many products are captured by that legislation. At the moment we understand Queensland's taking a fairly measured approach, and only a small number of products are on their radar. Also that legislation is reactive in a sense—there needs to be a potential threat to safety for something to proceed. We would prefer to have legislation which brought it back to the beginning of the supply chain where something is manufactured or put on the shelf.⁵⁰

3.52 Mr David Gover, from the EWPA, was also broadly supportive of the Queensland legislation and believed that other states should follow suit. However, he commented that:

I was really disappointed when the New South Wales government had prepared legislation, had consulted with industry and had feedback from industry that the legislation was supportive of our concerns, and then, somewhere between consulting with industry and presenting that to the chamber in New South Wales, it had been completely gutted. Some fervent work by industry advocates attempted to get amendments back into that legislation, but they were all blocked. My interpretation of the amendments from the New South Wales building act is that it's pretty gutless in terms of trying to counter non-conforming building products.⁵¹

49 Mr Simon Croft, Executive Director, Building Policy, Housing Industry Association, *Committee Hansard*, 2 August 2018, p. 16.

50 Ms Kristin Brookfield, Chief Executive, Industry Policy, Housing Industry Association, *Committee Hansard*, 2 August 2018, p. 17.

51 Mr David Gover, Chief Executive Officer, Engineered Wood Products Association of Australasia, *Committee Hansard*, 2 August 2018, p. 7.

3.53 HIA considered the New South Wales Government's legislation to be 'essentially more reactive than proactive'.⁵²

Due diligence requirements for participants in the supply chain

3.54 The committee's interim report found that recent incidents of illegal importation of asbestos in building products have highlighted the weakness in the due diligence systems of importers and contractors. The committee notes the Queensland legislation included due diligence requirements for participants across the supply chain in relation to non-conforming building products.⁵³

3.55 If a company has a duty under the Queensland legislation in relation to non-conforming building products, then an executive officer of the company must exercise due diligence to ensure compliance.

3.56 Due diligence is defined in the Queensland legislation as taking reasonable steps to:

- acquire and keep up to date knowledge of matters about the safe use of building products;
- gain an understanding of the nature of the company's business activities relating to building products and safety risks and non-compliance risks associated with them;
- ensure the company has and uses appropriate resources and processes to manage risks and to comply with the company's duties;
- ensure the company has, and implements appropriate processes for receiving, considering and responding in a timely way to, information about the risks and any incidents arising from the risks and for complying with the company's duties; and
- verify the resources and processes mentioned above are being provided, used and implemented.⁵⁴

Penalties for non-conforming building products

3.57 Many submitters drew the committee's attention to the need for regulators to be able to issue meaningful penalties to address the issue of non-conforming building products. For example, the Victorian Building Action Group stated:

No punishment and no penalties mean that in reality there are 'NO LAWS'.
No matter the breaches, no matter the injuries or deaths, no matter the serial

52 Mr Simon Croft, Executive Director, Building Policy, Housing Industry Association, *Committee Hansard*, 2 August 2018, p. 17.

53 Senate Economics References Committee, *Interim report: protecting Australians from the threat of asbestos*, 22 November 2017, p. 54.

54 Queensland Department of Housing and Public Works, *Non-Conforming Building Products: Code of Practice*, October 2017, p. 10.

offending, there are no consequences for any of the incalculable number of recalcitrant rogues operating with license to kill and maim with impunity.⁵⁵

3.58 Lighting Council Australia agreed that there was a need for greater penalties:

Industry considers that the penalties imposed for product non-conformance generally are not tough enough and investigations insufficiently rigorous.⁵⁶

3.59 The Australian Glass and Glazing Association considered that:

Any policing and enforcement regime must have meaningful penalties and restrictions that can be applied effectively to different parties in the supply chain, both in Australia and overseas.⁵⁷

3.60 HIA observed that in order for voluntary industry schemes to be effective, there needs to be government support to impose penalties:

The other significant element in operating such schemes is the need to have strong surveillance and reporting processes, and to have penalties that can be applied. Voluntary industry schemes, such as those operated by the AWA and Engineered Wood Product Association of Australasia (EWPAA) include surveillance and reporting processes. However, the application of penalties in voluntary schemes is more difficult. Products can be removed from the scheme, but any acts of fraud or misleading conduct or legal recourse must be managed through the appropriate channels.

Effective enforcement and penalties can only exist with the support of governments.⁵⁸

3.61 Ai Group recommended that the states and territories 'improve surveillance and audit activities and implement stronger penalty regimes to improve conformance with the National Construction Code (NCC) and other building regulations'.⁵⁹

3.62 Ai Group also informed the committee that its members are willing to support regulatory regimes by funding their own surveillance and testing initiatives if regulators ensure that there are meaningful penalties and consequences for those supplying the non-conforming building product into the market.⁶⁰

Increased regulator powers

3.63 The Shergold and Weir Report found that recent cladding audits in high rise buildings had raised the issue of whether authorities have the necessary powers to require rectification, recall products or issue warnings about products. As such, it recommended that 'each jurisdiction give regulators a broad suite of powers to

55 Victorian Building Action Group, *Submission 136*, p. 3 (emphasis in original).

56 Lighting Council Australia, *Submission 32*, p. 13.

57 Australian Glass and Glazing Association, *Submission 24*, p. 6.

58 Housing Industry Association, *Submission 30*, p. 21.

59 Ai Group, *Submission 46*, p. 5.

60 Ai Group, *Submission 120*, p. 12.

monitor buildings and building work so that, as necessary, they can take strong compliance and enforcement action'.⁶¹

3.64 The Shergold and Weir Report considered that each jurisdiction requires a minimum range of legislated powers, including:

- powers of entry for monitoring compliance;
- powers of entry where there is a reasonable belief of the commission of an offence or grounds for disciplinary inquiry;
- powers to require the production of documents or information;
- powers to investigate following a complaint or proactively;
- powers to seize documents and test and seize materials;
- powers to evacuate, make all necessary orders, or stop works;
- powers to negotiate voluntary undertakings;
- powers to undertake disciplinary processes;
- performance audit powers over all registered practitioners (including architects); and
- infringement notice and prosecution powers.⁶²

3.65 Ai Group noted that the SOG Report included a recommendation to improve 'the regulatory framework to enhance the powers of building regulators to respond to incidents of NCBPs e.g. providing the ability to conduct audits of existing building work or take samples from a building for testing'.⁶³

3.66 Ai Group considered that this recommendation 'addresses the issue that building regulatory frameworks are focused on building practitioners rather than building products'.⁶⁴ Ai Group considered that the increased powers of the Queensland Building and Construction Commission established under the Queensland legislation would ensure the regulator is 'better able to address the current gaps with product surveillance, check testing and enforcement'.⁶⁵

61 Peter Shergold and Bronwyn Weir, *Building Confidence—Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, February 2018, p. 21.

62 Peter Shergold and Bronwyn Weir, *Building Confidence—Improving the effectiveness of compliance and enforcement systems for the building and construction industry across Australia*, February 2018, p. 21.

63 Senior Officers' Group, *Implementation Plan: Strategies to Address Risks Related to Non-Conforming Building Products*, September 2017, Recommendation 2, p. 3.

64 Ai Group, *Submission 120*, p. 8.

65 Ai Group, *Submission 120*, p. 8.

Committee view

3.67 The committee is encouraged by the collaborative approach of the BMF and SOG, and supports the BMF's strategies to address non-conforming building products, but also notes concerns from stakeholders that progress has been slow. The committee is aware, however, that since the Grenfell Tower fire, issues around the non-compliant use of building products have shifted the focus away from addressing non-conforming building products.

3.68 In order to improve the confidence of industry stakeholders that progress is being made on non-compliant and non-conforming issues, the BMF should develop improved consultative mechanisms with industry stakeholders. The committee also believes the BMF should amend the terms of reference for the SOG and BRF to include annual reporting requirements on progress to address non-conforming building products to provide greater transparency and accountability.

Recommendation 1

3.69 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.

3.70 The committee commends the establishment of a 'one-stop-shop' national website as a single point of information for consumers and building product supply chain participants, and notes that the Australian Building Codes Board now performs this function.

3.71 The committee's steel report supported the inclusion of a reporting mechanism for non-conforming building products as part of the ABCB's one-stop-shop website in accordance with the recommendation from the SOG report. The committee noted, however, that the current reporting mechanisms require submitters to provide various forms of identifying information. The committee expressed the view that there should be an option for confidential reporting so that businesses are not accused of breaching contracts. As such, the report included a recommendation that the Australian Government develop a confidential reporting mechanism through which industry and other stakeholders can report non-conforming steel products.⁶⁶

3.72 The committee's 2016 interim report⁶⁷ noted the Ai Group's support for the Construction Product Alliance's call for the establishment of a confidential reporting system. Ai Group considered it should be a priority to assess the feasibility of establishing a confidential reporting system, such as the Confidential Reporting of

66 Senate Economics References Committee, *Australia's Steel Industry: forging ahead*, 1 December 2017, p. 52.

67 Senate Economics References Committee, *Interim report, Safety—'not a matter of good luck'*, 4 May 2016, p. 10.

Structural Safety (CROSS) that is operated in the UK, to facilitate the reporting of non-conforming building products.⁶⁸

3.73 The committee considers that a confidential reporting mechanism for non-conforming building products would enable stakeholders to raise concerns without fear of retribution.

Recommendation 2

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

3.75 The committee notes the progress on the SOG Report's recommendation to determine the feasibility of a mandatory third-party certification scheme for high-risk building products and a national register appears to have stalled, with the Shergold and Weir Report calling for the BMF to settle its position on the issue. The committee considers that settling this issue, including defining a high-risk product, should be a matter of priority.

3.76 The committee notes that its interim report on asbestos recommended mandatory product testing for imported products deemed to be high-risk of containing asbestos. The committee believes that, in determining the feasibility of mandatory third-party certification scheme for high-risk building products more broadly, the SOG should consider including requirements for importers—for example, products deemed to be high-risk of containing excessive levels of formaldehyde—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).

3.77 The committee notes that the issue of non-conforming building products is not limited to Australia. As such, the committee believes there is value in the SOG examining the international approaches—including regulations and processes in the European Union—relating to certification and testing of high-risk products prior to import and determine if they can be suitably adapted to benefit and enhance Australian requirements.

Recommendation 3

3.78 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.

Recommendation 4

3.79 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

68 Ai Group, Answers to questions on notice from a public hearing held in Canberra on 13 November 2015 received on 27 January 2016, p. 3.

by a NATA accredited authority (or a NATA equivalent testing authority in another country that is a signatory to a Mutual Recognition Arrangement).

Recommendation 5

3.80 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.

3.81 As previously noted in the committee's interim reports on asbestos and aluminium composite cladding, the committee continues to consider that responsibility for building compliance in general is currently weighted too heavily at the end of the supply chain and measures need to be put in place to address this. Consequently, the committee reiterates its recommendation that the BMF consider introducing nationally consistent measures to increase accountability across the entire supply chain.

3.82 The committee considers that the Queensland legislation goes some way to ensuring responsibility and accountability is spread more evenly across the supply chain from designers to manufacturers, importers, suppliers and installers. The committee supports the intent of the Queensland legislation and believes that it provides a model for best practice 'chain of responsibility' that should be adopted by other states and territories.

3.83 Evidence to this inquiry clearly showed that the level of penalties and the application of penalties are currently inadequate in providing effective deterrence of the importation and supply of non-conforming building products. The committee notes the willingness of industry to support surveillance and testing, but it is clear that the scope and level of penalties available to state building regulators requires action. The committee notes the Queensland legislation introduced additional penalties as an enforcement mechanism for the Queensland Building and Construction Commission and 'to ensure a credible level of deterrence for violations when a non-conforming building product is used in a building, supplied, imported, manufactured and/or designed'.⁶⁹

3.84 The committee also supports the introduction of increased regulator powers and due diligence requirements in the Queensland legislation.

3.85 The committee previously recommended that the other states and territories should include provisions such as those in the Queensland legislation which incorporate due diligence requirements for participants across the supply chain in relation to non-conforming building products.

69 Building and Construction Legislation (Non-conforming Building Products—Chain of Responsibility and Other Matters) Amendment Bill 2017, *Explanatory Notes*, p. 8.

Recommendation 6

3.86 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*.