

Chapter 5

Other measures to address non-conforming building products

5.1 This chapter considers ways to make information regarding non-conforming building products more available and explores various deterrent options. This chapter examines the development of national databases, Commonwealth funded building work and the enforcement of the *Code for the Tendering and Performance of Building Work 2016*, and mandatory recall insurance for high-risk products. The last section of this chapter discusses some of the issues arising from the committee's interim report on asbestos.

National databases

5.2 The committee received evidence from a range of submitters that the development of a consolidated national database of conforming and non-conforming products could provide a useful tool to assist industry participants to address the issue of non-conforming building products. Such a national database would go further than the one-stop-shop website which has already been established (discussed in Chapter 3), which provides general information on non-conforming building products.

5.3 Master Builders Australia argued for the development of an information portal that consolidates existing information about certified products and their appropriate use:

There is a common lack of guidance information on how to use a building product in practice and no information about what is the best evidence or way to educate a consumer as to how a product should be used. Were this information made mandatory and done so in a way that is produced consistently, industry participants would be better placed to address NCPs.¹

5.4 The National Electrical and Communications Association (NECA) also supported the development of a national database, suggesting:

Given concerns relating to the authenticity and accuracy of test certificates, NECA believes the database use could be extended to include the verification of test certificates to maintain an imported product's proof of compliance. Test certificates are generally accepted by importers as proof of a product's legitimacy but in certain cases, certificates have been found to be illegitimate or counterfeit. In order to enhance this process, verification could be based off a list of legitimate, accredited test labs that are subject to an audit regime based upon track record and level of risk.²

5.5 SAI Global noted that it conducts over 100 000 global audits annually and has experience in supply chain control, auditing and assessing against standards across a

1 Master Builders Australia, *Submission 125*, p. 26.

2 National Electrical and Communications Association (NECA), *Submission 60*, p. 7.

large number of industries. In its view, the enforcement of the standards and data collection across the supply chain is not well managed and, where registers are kept of certification, they are isolated and difficult for consumers to find and use. As such, SAI Global expressed the view that central management of supply chains is necessary to ensure compliance. It noted:

The sheer number of products and the lack of a single database to be able to check batches / shipments leaves the process and subsequent product open to Economically Motivated Adulteration (EMA) where substitution occurs either in the manufacturing process or in the supply chain. The product verification can be further inhibited by fraudulent documentation.³

5.6 SAI Global considered the centralised database should be self-funded by industry participants, noting:

Economic benefits to the suppliers result from finding non-conforming product earlier in the supply chain, preferably prior to shipment from the manufacturing point thus lowering economic risk and product release.⁴

5.7 The Housing Industry Association (HIA) indicated it had moved on from plans to develop a national database as it had not received government funding for its development:

There are a number of other groups that have undertaken work in the register space. Some of those are private; some of those are government based. NATSPEC⁵ is a group that has produced a register. What we have seen so far have been very simple attempts at collecting information about a product, putting that in one space and allowing someone to find that information. What no-one has done yet is establish a register that says whether a product is good or not good, and it's a challenging thing. So without support for HIA to do that, and we always knew that was a significant task, we have now looked to see if there are other ways to solve that problem and we're not actively looking to develop a register.⁶

5.8 The Department of Industry, Innovation and Science noted that there are a number of industry led initiatives which provide tools and resources; however, the department itself is not involved in the development of a national register or database to facilitate people getting access to accurate information about products.⁷

3 SAI Global, *Submission 6*, p. 2.

4 SAI Global, *Submission 6*, p. 3.

5 NATSPEC is a national not-for-profit organisation, owned by government and industry objective is to improve the construction quality and productivity of the built environment through leadership of information.

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

7 Mr Rodney Harris, Acting Manager, Building Industry Section, *Department of Industry, Innovation and Science*, *Committee Hansard*, 2 August 2018, p. 29.

Committee view

5.9 The committee agrees with views in submissions that the development of a consolidated national database of conforming and non-conforming products could provide a useful tool to assist industry participants to address the issue of non-conforming building products. The committee believes the government should consult with industry stakeholders to determine the feasibility of developing a national database of conforming and non-conforming products.

Recommendation 9

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

5.11 With regard to compliance, the committee notes that the Shergold and Weir Report recommended that 'each jurisdiction establishes a building information database that provides a centralised source of building design and construction documentation' (Recommendation 12).⁸ This recommendation is aimed at improving access to documentation to enable information sharing and data analysis to inform regulatory decision-making. The Shergold and Weir Report suggested the following information should be collected:

- the name of the appointed building surveyor or issuing authority;
- a description of the proposed building work;
- details of all practitioners engaged;
- details of design certificates relied on and any information about third party review;
- details of any performance solutions and any information about third party review;
- inspection records;
- enforcement actions taken;
- final approval information, including details of certificates relied on and fire safety maintenance requirements and any design assumptions that must be maintained or considered in future changes to the building; and
- details of compliance inspections/certificates issued in relation to ongoing maintenance obligations through the life of the building.⁹

8 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. 27.

9 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, pp. 27–28.

5.12 The committee gives in-principle support to the collection of detailed building construction and maintenance documentation for buildings to enable the audit of buildings in the instance of another incident of widespread use of non-compliant building products, such as has occurred with aluminium composite cladding.

Recommendation 10

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

Code for the Tendering and Performance of Building Work 2016

5.14 The *Code for the Tendering and Performance of Building Work 2016* (the Code) commenced on 2 December 2016.

5.15 The Code contains a range of requirements for code covered entities. The Code also places obligations on funding entities both during the procurement of Commonwealth funded building work and during the conduct of that work.

5.16 Building contractors or building industry participants, who are subcontracting Commonwealth funded building work are responsible for ensuring all expressions of interest, tenders and contractual documentation are consistent with the requirements of the Code. All subcontractors invited to express interest in, or tender for, Commonwealth funded building work must be informed of the application of the Code to the work.

5.17 The report of the committee's inquiry into the future of Australia's steel industry noted that the *Code for the Tendering and Performance of Building Work 2016* requires Commonwealth funding entities to only enter into building contracts with preferred tenderers where code-covered businesses can prove that their products comply with Australian Standards.¹⁰ It also noted that the 2017 Commonwealth Procurement Rules also require, where contracts are above a certain threshold, that if an Australian Standard exists for particular goods or services being procured, 'tender responses **must** demonstrate the capability to meet the Australian standard, and contracts **must** contain evidence of the applicable standards'.¹¹ The committee commented that:

The Code is an important instrument for government procurement, but the question of who holds responsibility for the enforcement of compliance with the Code is yet to be determined.¹²

10 Senate Economics References Committee, *Australia's Steel Industry: forging ahead*, 1 December 2017, p. 39.

11 Department of Finance, *Commonwealth Procurement Rules*, 1 March 2017, clause 10.10 (emphasis in original).

12 Senate Economics References Committee, *Australia's Steel Industry: forging ahead*, 1 December 2017, p. 57.

5.18 One of the key roles of the Australian Building and Construction Commission (ABCC) is to monitor the Code. Ms Cathy Cato from the ABCC noted that the Code is the only area of the ABCC's jurisdiction that relates to Australian Standard building products:

The code places requirements on funding entities who are procuring Commonwealth funded building work. Two of the requirements relate to the use of Australian standard building materials and products. Firstly, before entering into a contract, a funding entity must collect information from the preferred tenderer about whether the building materials to be used to undertake the building work comply with relevant Australian standards published by or on behalf of Standards Australia. Secondly, a funding entity must only enter into a contract with a code covered entity that only uses products in building work that comply with the relevant Australian standards published by or on behalf of Standards Australia.

To assist funding entities to comply with these code requirements, the ABCC has published model clauses that funding entities may include in tender and contract documentation when procuring Commonwealth funded building work. If the funding entity imposes the requirements and a contractor fails to use Australian standard building materials, the contractor could be in breach of its contract with the funding entity. The code also provides that, if satisfied a funding entity has not complied with the code, the ABCC commissioner may refer the matter or make a complaint to the secretary of the Department of Finance for investigation or further action.¹³

5.19 The role of the ABCC in relation to the Code is limited to making sure:

...that funding entities put these model clauses into their tenders and their contracts so that they are collecting the information that they should be so they can assess during that tender stage whether or not companies will use Australian standard building materials. Our proactive activities to date show that those model clauses are being used across the board and also that the contracts themselves contain that requirement.¹⁴

Committee view

5.20 While the compliance framework exists for Commonwealth funded building work, there appears to be limited recourse to penalise companies that do not comply with the Code.

5.21 The committee noted in its interim report on cladding that it did not consider that loss of accreditation to conduct Commonwealth funded building work to be a strong enough penalty for non-compliance with the NCC. The committee is of the view that a stronger penalties regime should be imposed.

13 Ms Cathy Cato, Deputy Commissioner, Operations and Code, Australian Building and Construction Commission, *Committee Hansard*, 2 August 2018, p. 10.

14 Ms Cathy Cato, Deputy Commissioner, Operations and Code, Australian Building and Construction Commission, *Committee Hansard*, 2 August 2018, p. 10.

Recommendation 11

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

Mandatory recall insurance for high-risk building products

5.23 The committee's interim report on asbestos noted concerns raised by stakeholders about the potential impacts of product safety recalls on the public and industry, and expressed the view that consideration should be given to introducing mandatory recall insurance to reduce the economic impact of such recalls. Concerns raised by stakeholders were not limited to recalls in relation to asbestos containing products, but product recalls for non-conforming building products more generally.

5.24 Master Electricians Australia (MEA) and the Furniture Cabinets and Joinery Alliance noted that in an ideal world, manufacturers, importers and suppliers of faulty electrical products would have a process in place to fund the removal and replacement of any faulty electrical equipment¹⁵. However, MEA noted:

Unfortunately, this is not always the case with companies often going into liquidation after a product they have manufactured, imported or supplied is identified as being unsafe.

Mandatory recall insurance would give security to consumers that any faulty or non-compliant electrical products purchased are removed and replaced without delay.¹⁶

5.25 NECA outlined how non-mandatory recall insurance might not work to protect consumers:

Whilst varying forms of product recall insurance exist within the electrical products supply chain within Australia, NECA understands that its take-up is often by the more reputable businesses within the sector. The uptake of recall insurance by those distributors/importers that arguably require it most is low. This was all too evident in the Infinity Cable case.¹⁷

5.26 The Queensland Proposal, an alliance of industry groups representing the Queensland building and construction industry, argued that more needs to be done to minimise the impact of a product safety recall on the public and industry. It recommended the government consider introducing:

Mandatory recall insurance where manufacturers, importers and suppliers of high risk products are required to have a process in place to fund the

15 Master Electricians Australia, *Submission 4*, p. 3; Furniture Cabinets and Joinery Alliance, *Submission 121*, p. 14.

16 Master Electricians Australia, *Submission 4*, p. 3.

17 National Electrical and Communications Association (NECA), *Submission 60*, p. 7.

removal and replacement of any product found to be faulty and/or not compliant to Australian Standards.¹⁸

Committee view

The committee acknowledges concerns raised by stakeholders about the potential impacts of product safety recalls on the public and industry, and is of the view that consideration should be given to introducing mandatory recall insurance to reduce the economic impact of such recalls. As noted in Chapter 3, the BMF is determining the feasibility of mandatory certification for high-risk building products. The committee believes that where building products are deemed to be high-risk, consideration should be given to requiring importers and suppliers to hold mandatory recall insurance.

Recommendation 12

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

Building products containing asbestos

Removal and remediation of asbestos

5.28 The committee observed in its interim report that the removal of asbestos can be expensive, time consuming and dangerous; and while the aim of Australia's regulatory framework is to stop asbestos at the border, recent incidents highlight the reality that asbestos containing materials remain an ever-present threat to Australians.

5.29 The committee believed that Australia's work health and safety (WHS) legislation needs to be strengthened to specifically provide that, where illegally imported asbestos is discovered, it is mandatory that it be removed and disposed of, providing it is safe to do so, and that the costs of any such removal and disposal will be borne by the importer of the illegal asbestos. In addition, the committee considered that, in cases where illegally imported asbestos is not discovered during installation, mechanisms should be developed to clearly establish who has legal responsibility for remediation of sites. The committee was particularly concerned about cases where, at the time asbestos is discovered, the companies involved in the illegal importation of the asbestos, supply or fabrication have ceased to exist.¹⁹

5.30 As such, the committee recommended:

...that Commonwealth, state and territory governments work together to develop nationally consistent legal obligations to require the removal and/or disposal of illegally imported asbestos (if it is safe to do so following consideration of the hazards likely to be faced by the workers undertaking

18 Queensland Proposal, *Submission 102*, p. 4.

19 Senate Economics References Committee, *Interim report: protecting Australians from the threat of asbestos*, 22 November 2017, p. 60.

the work) and to make importers responsible for the cost of such removal and/or disposal of asbestos.²⁰

5.31 This recommendation was supported in the Australian Government response to the interim report:

Under the model WHS laws, all jurisdictional regulators have powers to deal with the removal and disposal of asbestos that has been unlawfully imported and then used in a workplace. SWA [Safe Work Australia] is currently reviewing these powers to determine whether they need to be strengthened. The issue is also being considered as part of the independent review of the model WHS laws which is due to report by the end of the year.

Should any issues with regulators' powers to deal with removal and disposal of asbestos be identified, amendments to the model WHS laws will be progressed through SWA's usual governance processes including consideration by Safe Work Australia Members and WHS ministers.²¹

Establishing a national portal for information on asbestos containing products

5.32 As noted in Chapter 3, following the recommendations in the SOG Report, the Commonwealth has launched a one-stop-shop, non-conforming building products webpage providing 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.

5.33 With regard to the illegal importation of non-conforming building products containing asbestos, the committee noted in its interim report that the information that is currently available online regarding this risk can be difficult to locate and recommended that the Asbestos Safety and Eradication Agency develop a one-stop-shop website to provide a single point for participants across the supply chain to access information regarding the illegal importation of asbestos.²²

5.34 The committee is pleased to note that the government supported this recommendation. The government response to the interim report advised:

The Government supports measures to improve public access to information about asbestos. ASEA updated its website on 2 February 2018 and provides access to a wide range of information about asbestos, including links to relevant agencies such as the Department of Home Affairs for more detailed advice. ASEA's website provides:

20 Senate Economics References Committee, *Interim report: protecting Australians from the threat of asbestos*, 22 November 2017, p. 60.

21 Australian Government response to the *Interim report: Protecting Australians from the threat of asbestos*, August 2018, p. 14.

22 Senate Economics References Committee, *Interim report: protecting Australians from the threat of asbestos*, 22 November 2017, p. 35.

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- comprehensive information about Australia's ban on importing asbestos, including a list of goods that are at risk of containing asbestos
 - information on who to contact for asbestos issues, including links to state and territory WHS and environmental regulators
 - consumer protection information including safety alerts and recall notices
 - identification and disposal information including links to relevant government agencies in each state/territory
 - information for homeowners
 - general asbestos information including asbestos related research.

ASEA will continue to refine its website to ensure it provides up-to-date links to comprehensive information that meets the needs of the public.²³

Offences and penalties

5.35 The committee's interim report on asbestos noted evidence received from a range of submitters that there is a need for a greater focus on enforcement, including prosecution and penalties to effectively deter the illegal importation of asbestos. While the committee acknowledged the challenges of enforcing the existing importation of asbestos offence, it held the view that a review of the relevant provisions of the *Customs Act 1901* (and other relevant legislation) should be conducted. In particular, the committee expressed concern that the 'mistake of fact' defence is not operating as intended and recommended that the current threshold required to make out the 'mistake of fact' defence should be increased.

3.86 The committee also expressed concerns regarding by the apparent lack of enforcement of the importation ban since it came into force on 31 December 2003, and considers that there needs to be a greater focus on prosecutions for importing asbestos. The committee recommended that reviewing the quantum of penalties would have a significant deterrent effect on the illegal importation of asbestos.²⁴

5.36 The government response to the interim report noted that the Department of Home Affairs is 'preparing advice to support the review on changes to the offences and penalties for the unlawful import/export of asbestos, detailed in customs legislation, including in relation to the 'mistake of fact' defence'.²⁵

23 Australian Government response to the *Interim report: Protecting Australians from the threat of asbestos*, August 2018, p. 10.

24 Senate Economics References Committee, *Interim report: protecting Australians from the threat of asbestos*, 22 November 2017, p. 46.

25 Australian Government response to the *Interim report: Protecting Australians from the threat of asbestos*, August 2018, p. 11.

5.37 At a public hearing on 2 August 2018, Mr Joshua Hutton, from the Department of Home Affairs, noted that while the review process was ongoing, he was able to provide an update to the committee.

What we've actually received approval for from government is to list asbestos as a tier 1 good under the Customs Regulations. That means that, in a prosecutorial sense, in a legal sense, imprisonment of up to five years is now on the cards as a penalty for illegal importation of asbestos. As part of that process, we looked at things like the mistake of fact offence and absolute liability versus strict liability. For these types of offences, the strict liability and the presence of the mistake of fact defence is quite a core legal principle and so was going to be a hard threshold to get over. However, changing it to a tier 1 good, as listed under the Customs regs, does take away a small aspect of the strict liability and changes it to an absolute liability offence. However, the mistake of fact defence is still present and able to be used.²⁶

5.38 Mr Hutton stated further, 'the fact that it puts imprisonment, a term of up to five years, on the table for the penalty. In terms of the more egregious offenders and repeat offenders, we felt that that was an appropriate penalty to be used as a deterrent'.²⁷ Having received approval for this change, the next step for the department is the process of amending the regulations to reflect the change.²⁸

Committee view

5.39 The committee is encouraged by the Australian Government's support for the committee's recommendation to develop nationally consistent legal obligations for removal and remediation where asbestos containing products have been installed in buildings. The committee welcomes the review these powers by Safe Work Australia and the independent review of the model WHS laws. The committee looks forward to seeing the findings of these reviews.

5.40 The committee is also pleased that the government has actioned the recommendation to develop a one-stop-shop information portal to provide single point for participants across the supply chain to access information regarding the illegal importation of asbestos.

5.41 The committee supports the listing of asbestos as a tier 1 good under the Customs Regulations, and agrees that a term of up to five years imprisonment for more egregious offenders and repeat offenders is an appropriate penalty to be used as a deterrent. However, the committee notes that this change does not remove the 'mistake of fact' defence, which is still present and able to be used. The committee remains concerned that the 'mistake of fact' defence is not operating as intended and

26 Mr Joshua Hutton, Acting Assistant Secretary, Customs and Border Revenue Branch, Department of Home Affairs, *Committee Hansard*, 2 August 2018, p. 22.

27 Mr Joshua Hutton, Acting Assistant Secretary, Customs and Border Revenue Branch, Department of Home Affairs, *Committee Hansard*, 2 August 2018, p. 22.

28 Mr Joshua Hutton, Acting Assistant Secretary, Customs and Border Revenue Branch, Department of Home Affairs, *Committee Hansard*, 2 August 2018, p. 22.

reiterates its recommendation from the interim report on aluminium composite cladding.

Recommendation 13

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

Senator Chris Ketter
Chair

