

Chapter 1

Introduction

Referral of inquiry

1.1 On 23 June 2015, the Senate referred the matter of non-conforming building products to the Economics References Committee for inquiry and report by 12 October 2015.¹ On 15 September 2015, the Senate granted an extension to the committee to report by 3 December 2015.² On 23 November 2015, the committee was granted a further extension to report by 16 March 2016³ and subsequently by 10 May 2016.⁴

1.2 Under its terms of reference, the committee was to give particular reference to:

- (a) the economic impact of non-conforming building products on the Australian building and construction industry;
- (b) the impact of non-conforming building products on:
 - (i) industry supply chains, including importers, manufacturers and fabricators,
 - (ii) workplace safety and any associated risks,
 - (iii) costs passed on to customers, including any insurance and compliance costs, and
 - (iv) the overall quality of Australian buildings;
- (c) possible improvements to the current regulatory frameworks for ensuring that building products conform to Australian standards, with particular reference to the effectiveness of:
 - (i) policing and enforcement of existing regulations,
 - (ii) independent verification and assessment systems,
 - (iii) surveillance and screening of imported building products, and
 - (iv) restrictions and penalties imposed on non-conforming building products; and
- (d) any other related matters.⁵

1 *Journals of the Senate*, No. 100, 23 June 2015, p. 2766.

2 *Journals of the Senate*, No. 116, 15 September 2015, p. 3120.

3 *Journals of the Senate*, No. 127, 23 November 2015, p. 3419.

4 *Journals of the Senate*, No. 146, 15 March 2016, p. 3944.

5 *Journals of the Senate*, No. 100, 23 June 2015, p. 2766.

Conduct of inquiry

1.3 The committee advertised the inquiry on its website and in *The Australian*. It also wrote to relevant stakeholders and interested parties inviting submissions.

1.4 The committee received 75 submissions. The submissions and answers to questions on notice are listed at Appendix 1. On 13 November 2015, the committee held a public hearing in Canberra and on 15 February 2016 in Melbourne. A list of witnesses is at Appendix 2.

1.5 The committee has agreed to table this interim report and to request an extension to present a final report no later than 30 September 2016.

Acknowledgements

1.6 The committee thanks all those who assisted with the inquiry, especially those who made written submissions.

Background

1.7 The Australian building and construction industry accounts for around 8 per cent of Australia's gross domestic product and employs around 9 per cent of the workforce. The industry contributed \$108.4 billion to the Australian economy in the 2013–14 financial year. At the end of June 2014, the building and construction industry generated \$359 billion in total income and employed 1,073,000 persons.⁶

Definition of non-conforming building products

1.8 Although the terms of reference relate to non-conforming building products the committee also received evidence relating to non-compliant building products.

- Non-conforming building products are 'products and materials that claim to be something they are not; do not meet required standards for their intended use; or are marketed or supplied with the intent to deceive those who use them'.
- Non-compliant building products are products that are 'used in situations where they do not comply with the requirements of the National Construction Code [NCC]. A building product can be both non-conforming and non-compliant'.⁷

1.9 The Australian Building Codes Board (ABCB) illustrated the distinction between non-conforming and non-compliant building products, with the following example:

A building product that is labelled or described as being non-combustible but which is combustible is a non-conforming product. A building product that is combustible, and described as such, but is used in a situation where a

6 Ai Group, *Submission 46*, p. 7.

7 Senior Officers' Group, *Strategies to address risks related to non-conforming building product*, p. 4, <http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsReport.pdf> (accessed 22 April 2016).

non-combustible product is required under the NCC, is not fit for purpose (it is a non-complying product).⁸

1.10 A product that is non-conforming and/or non-compliant can pose serious risks to the integrity of a building and the safety and welfare of those on the construction site and the ultimate inhabitants of the building. For example, the Building Ministers' Forum (BMF) recognises:

The issue of non-conforming building products (NCBP), whether domestically manufactured or imported is an important and complex issue. It can have life safety, health, economic, legal and social consequences.⁹

1.11 The issue of non-conforming building products affects a range sectors—construction, manufacturing, imports and retail.

Context of the inquiry

1.12 Prior to the referral of this inquiry, industry had already taken steps to address the issue of non-conforming building products, including:

- In 2012, the Housing Industry Association held a national summit, *Building Products: A compliance free zone*, which raised the profile of product compliance as an industry issue.¹⁰
- In November 2013, Ai Group released a research report on non-conforming building products, *The quest for a level playing field: The non-conforming building product dilemma*. The Ai Group's report analysed the steel, electrical, glass, aluminium, engineered wood and paint sectors to gauge the scale of the problem and its causes. In brief, the report found that the product conformance framework—including the regulators, regulation, codes of practice and standards—does not operate effectively. This results in an uneven playing field whereby companies, including importers, manufacturers and fabricators that are 'playing by the rules' are adversely affected by suppliers of non-conforming building products.¹¹
- In March 2014, following the release of the report, Ai Group convened a forum, including government and industry stakeholders, to determine an action plan to address the matters identified in the report. The Construction Product Alliance was formed to facilitate industry involvement.¹²

8 Australian Building Codes Board, *Submission 49*, p. 4.

9 Department of Industry Innovation and Science, 'Building Ministers' Forum', <http://www.industry.gov.au/industry/IndustrySectors/buildingmetalsandconstruction/Pages/Building-Ministers-Forum.aspx> (accessed 19 April 2016).

10 Housing Industry Association, *Submission 30*, p. 11.

11 Ai Group, *The quest for a level playing field: The non-conforming building product dilemma*, November 2013, p. 6.

12 Construction Product Alliance, *Submission 33*, p. 2.

- In September 2014, the Australasian Procurement and Construction Council (APCC) together with 30 key industry stakeholders developed and launched the *Procurement of Construction Products—A guide to achieving compliance*. The guide was produced in response to the increasing evidence of, and concerns about, the market penetration of non-conforming construction products, particularly for many 'safety critical' products.¹³

Lacrosse apartment building fire

1.13 On 25 November 2014, a fire occurred at the Lacrosse apartment building in Docklands, Melbourne. The fire started on an eighth floor balcony, and affected 'two floors below and extended upward to all floors in the building to the roof, engulfing 16 levels in 15 minutes'. The Metropolitan Fire Brigade found that the use of aluminium cladding was a contributing factor to the rapid vertical spread of the fire. The CSIRO conducted tests on the cladding and found it to be combustible and non-compliant with National Construction Code standards for use in buildings of three or more storeys.¹⁴

1.14 The Victorian Building Authority (VBA) launched an external wall cladding audit in Melbourne following the Lacrosse fire. The audit found that 'non-compliance in the use of external wall cladding materials is unacceptably high'.¹⁵

1.15 This high profile incident drew attention to poor building practices.

Building Ministers' Forum

1.16 The building conformance framework for non-conforming building products centres primarily on the constitutional authority held by state and territory governments and enacted through their building legislation. As such, compliance and enforcement is ultimately a matter for each state and territory to review and address.¹⁶

1.17 The Commonwealth works collaboratively with the states and territories through the BMF. The BMF oversees the implementation of nationally consistent building and plumbing regulation through the Intergovernmental Agreement for the ABCB. The BMF meets annually or on a needs basis.¹⁷

1.18 On 31 July 2015, shortly after this inquiry started, there was a meeting of the BMF. The BMF released a communique following its meeting, noting that it shared the concerns of industry about the 'health and safety risks posed by potentially non-

13 Australasian Procurement and Construction Council, *Submission 1*, p. 1.

14 Victorian Government, *Submission 57*, p. 3.

15 Victorian Building Authority, 'VBA Releases External Wall Cladding Audit Report', Media Release, 17 February 2016, http://www.vba.vic.gov.au/_data/assets/pdf_file/0015/39102/VBA-External-Wall-Cladding-Report-VBA-Media-Release.pdf (accessed 22 April 2016).

16 Department of Industry and Science, *Submission 43*, pp. 2–3.

17 Department of Industry Innovation and Science, 'Building Ministers' Forum', <http://www.industry.gov.au/industry/IndustrySectors/buildingmetalsandconstruction/Pages/Building-Ministers-Forum.aspx> (accessed 19 April 2016).

conforming building products and materials making their way into the Australian building and construction supply chain and the non-compliant use of building products'.¹⁸

1.19 To address the issue of non-conforming building products, the BMF established a Senior Officers' Group (SOG) which was tasked with reporting back to the BMF in six months 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'.¹⁹ The SOG comprises two senior officers from each state and territory as well as the Commonwealth.²⁰

1.20 With regard to non-compliant products, particularly in the wake of the Lacrosse building fire in Melbourne, and in order to 'ensure that community health and safety is effectively maintained', the BMF also agreed that the ABCB would investigate 'options for a possible mandatory scheme for high risk building products with life safety implications and report to Ministers within six months'.²¹

Senior Officers' Group report

1.21 In determining its recommendations, the SOG considered a range of information sources, including the submissions made to the committee's inquiry.²²

1.22 The current secretariat for the SOG, the Queensland Department of Housing and Public Works, coordinated feedback on implementing the strategies in the SOG's report to address non-conforming building products. A consultation draft of the SOG's *Strategies to address risks related to non-conforming building products* report has

18 Building Minister's Forum, *Communiqué*, 31 July 2015, http://productalliance.com.au/~media/HIA%20Website/MiniSite/CPA/PDF/BMF_Communique31July2015.ashx (accessed 22 April 2016).

19 Building Minister's Forum, *Communiqué*, 31 July 2015, http://productalliance.com.au/~media/HIA%20Website/MiniSite/CPA/PDF/BMF_Communique31July2015.ashx (accessed 22 April 2016).

20 Queensland Department of Housing and Public Works, 'Non-conforming building products', last updated 29 March 2016, <http://www.hpw.qld.gov.au/construction/BuildingPlumbing/Building/Pages/NonConformingBuildingProducts.aspx> (accessed 22 April 2016).

21 Building Minister's Forum, *Communiqué*, 31 July 2015, http://productalliance.com.au/~media/HIA%20Website/MiniSite/CPA/PDF/BMF_Communique31July2015.ashx (accessed 22 April 2016).

22 Senior Officers' Group, *Strategies to address risks related to non-conforming building product*, p. 4, <http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsReport.pdf> (accessed 22 April 2016).

been released. The closing date for written submissions providing feedback on SOG report's proposals was 11 April 2016.²³

1.23 In its consultation draft, the SOG explained that it considered available information and invited industry to present further evidence of NCBPs. It was able to identify examples of confirmed NCBPs, though these were not sufficient to demonstrate the extent of the issue. In its view:

...the resulting primarily anecdotal evidence was insufficient for the SOG to confidently assess the prevalence of NCBPs in the Australian building and construction industry supply chain, nor was it enough to assess the current impact of NCBPs.²⁴

1.24 Even so, the SOG made a number of pertinent observations, including that there were a number of barriers preventing the collection and reporting of data on NCBPs in Australia such as:

- contractual obligations or commercial relationships that may prevent or discourage reporting of NCBPs;
- fear of litigation from manufacturers or suppliers of NCBPs;
- confusion and misinformation about where to report NCBPs;
- lack of time, resources and support for building professionals to verify or report the non-conformity of building products or that claims made about products are false or misleading;
- lack of powers for state and territory building regulators to act on reports of suspected NCBPs under the current regulatory framework; and
- no central register or data collection framework, nor an information-sharing mechanism between state and territory building regulators.²⁵

1.25 Worryingly, the SOG also found that there was limited ability for any regulator to stop known NCBPs entering Australia and making their way into the building-product supply chain. Among its other findings, the SOG noted:

- there is a gap in the investigative and enforcement processes for building products whereby the state and territory building legislation primarily

23 Queensland Department of Housing and Public Works, 'Non-conforming building products', last updated 29 March 2016, <http://www.hpw.qld.gov.au/construction/BuildingPlumbing/Building/Pages/NonConformingBuildingProducts.aspx> (accessed 22 April 2016).

24 Senior Officers' Group, *Strategies to address risks related to non-conforming building product*, p. 10, <http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsReport.pdf> (accessed 22 April 2016).

25 Senior Officers' Group, *Strategies to address risks related to non-conforming building product*, p. 10, <http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsReport.pdf> (accessed 22 April 2016).

provides for regulating the licensing and conduct of builders not building products;²⁶

- there is no central coordinating mechanism or forum for building regulation that could provide a central point of contact for building regulators or industry, nor a mechanism to encourage information-sharing and collaboration between jurisdictions;²⁷
- consumer law regulators have varying degrees of cooperation with building regulators and different approaches to the treatment of building products under the Australian Consumer Law;²⁸ and
- the current regulatory framework places a disproportionate burden on the end of the product supply chain for identifying NCBPs (builder, installer and building certifier/surveyor) and after a building product has already been paid for and/or installed.²⁹

1.26 The SOG's report also reflected concerns raised in the committee's inquiry that 'there is confusion regarding responsibilities and where to obtain information regarding NCBPs'.³⁰

1.27 In its recommendations to the BMF, it highlighted the importance of taking a measured and proportionate risk-based approach to addressing the issue of NCBPs and suggested a number of complementary strategies that should be considered as a package. Firstly it noted the 'current legislative roles and responsibilities of the

26 Senior Officers' Group, *Strategies to address risks related to non-conforming building product*, p. 11, <http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsReport.pdf> (accessed 22 April 2016).

27 Senior Officers' Group, *Strategies to address risks related to non-conforming building product*, p. 12, <http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsReport.pdf> (accessed 22 April 2016).

28 Senior Officers' Group, *Strategies to address risks related to non-conforming building product*, p. 13, <http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsReport.pdf> (accessed 22 April 2016).

29 Senior Officers' Group, *Strategies to address risks related to non-conforming building product*, p. 14, <http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsReport.pdf> (accessed 22 April 2016).

30 Senior Officers' Group, *Strategies to address risks related to non-conforming building product*, p. 16, <http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsReport.pdf> (accessed 22 April 2016).

Commonwealth, states and territories, including the identified gaps and weaknesses, impacting on action in relation to NCBPs'.³¹ It made the following recommendations:

- Provide in-principle support for improvements to 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.
- Provide in-principle support for improving Commonwealth, state and territory processes for addressing issues involving NCBPs by:
 - (a) establishing a national forum of building regulators to facilitate greater collaboration and information-sharing between jurisdictions;
 - (b) improving collaboration between building and consumer law regulators and consistency in the application of the 'false and misleading claims' aspect of the Australian Consumer Law;
 - (c) developing education strategies to better inform consumers and building industry participants and to encourage greater responsibility in the safe use of building products; and
 - (d) considering the establishment of 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.
- Provide in-principle support for:
 - (a) 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; and
 - (b) an information sharing arrangement where import data collected by the Department of Immigration and Border Protection (for the purposes of reporting, detecting and controlling the movement of goods across the Australian border) can be provided to state and territory regulators to facilitate compliance and enforcement activities in relation to NCBPs.
- Approve that the Working Group of Senior Officers and the ABCB work with Standards Australia to initiate a review of Australian Standards related to high risk building products referenced under the National Construction Code, with a view to assessing the costs and benefits of mandating third party certification and establishing a national register for these products.

31 Senior Officers' Group, *Strategies to address risks related to non-conforming building product*, p. 17, <http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsReport.pdf> (accessed 22 April 2016).

- Provide in-principle support for independent research to be undertaken, including manufacturer and random off-the-shelf product testing, to improve the evidence base relating to NCBPs.

1.28 It also recommended that the BMF:

- Note the value and importance of existing building industry initiatives, such as industry third party certification schemes, in identifying instances of building product non-conformity.³²

1.29 On 19 February 2016, the BMF met to consider the SOG's report, which it endorsed. Following the meeting, the Queensland Minister for Housing and Public Works, the Hon Mick de Brenni, announced that 'for the first time we have a national approach to non-conforming building products'.³³

1.30 The Ai Group welcomed the commitment made by the BMF to address non-conforming building products. It noted the 'increasing incidence of non-conforming product in the market place—including recent reports of up to 64 building sites with asbestos-tainted concrete fibre sheeting—show that the problem is only worsening'.³⁴

Non-compliant building products

1.31 In response to the Lacrosse fire and the subsequent VBA audit's findings, the BMF agreed to work cooperatively to implement a range of measures to address safety issues associated with high risk building products, as well as the wider issue of non-compliance. The ABCB will support measures to address the risks specifically associated with cladding used in high-rise buildings, as well as developing proposed additional actions to address the wider issue of non-compliant use of building products.³⁵ This includes the ABCB working with the SOG to review NCC requirements related to high risk building products with a view to assessing the costs

32 Senior Officers' Group, *Strategies to address risks related to non-conforming building product*, pp. 17–27, <http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsReport.pdf> (accessed 22 April 2016).

33 The Honourable Mick de Brenni, Minister for Housing and Public Works, 'Collaborative national approach to improving building safety standards', Media statements, 25 February 2016, <http://statements.qld.gov.au/Statement/2016/2/25/collaborative-national-approach-to-improving-building-safety-standards> (accessed 22 April 2016).

34 Ai Group, 'Welcome action ahead on non-conforming building products', *Media release*, 22 February 2016, <http://productalliance.com.au/~media/HIA%20Website/MiniSite/CPA/PDF/Building%20Ministers%20Non%20conforming%20products%20220216.ashx> (accessed 22 April 2016).

35 Building Minister's Forum, *Communiqué*, 19 February 2016, <http://productalliance.com.au/~media/HIA%20Website/MiniSite/CPA/PDF/Building%20Ministers%20Forum%20communiqué%2019022016.ashx> (accessed 22 April 2016). The ABCB published a list of the measures undertaken on its website: 'Actions to be taken on Fire Safety in High Rise Buildings, 24 February 2016, <http://www.abcb.gov.au/News/2016/02/24/Actions-to-be-taken-on-Fire-Safety-in-High-Rise-Buildings> (accessed 22 April 2016).

and benefits of mandating third party certification and establishing a national register for such products.³⁶

1.32 The Victorian government raised concerns that Certificates of Conformity (with the Building Code of Australia performance requirements), 'are not always explicit in respect of the range of use or circumstances in which a product may be relied upon to be fit for purpose'.³⁷

1.33 As part of the actions to be taken by the ABCB following the BMF, the CodeMark Certificates of Conformity 'will be made clearer as to what particular products can be used for, as part of a package of improvements to the voluntary building product certification scheme'.³⁸

Information sharing

1.34 A further outcome of the latest BMF meeting was the acceptance of an offer from the Department of Immigration and Border Protection, with assistance from the Australian Competition and Consumer Commission, 'to establish relevant information sharing between the Commonwealth, states and territories with a resolution to fast track and report within two months'.³⁹

1.35 In response, the Ai Group applauded the move to improve information sharing between government agencies while reiterating its support for the Construction Product Alliance's call for the establishment of a confidential reporting system.⁴⁰

1.36 Ai Group considered it should be a priority to assess the feasibility of establishing a confidential reporting system, such as the Confidential Reporting of Structural Safety (CROSS) that is operated in the UK, to facilitate the reporting of non-conforming building products.⁴¹

36 Australian Building Codes Board, 'Actions to be taken on Fire Safety in High Rise Buildings, 24 February 2016, <http://www.abcb.gov.au/News/2016/02/24/Actions-to-be-taken-on-Fire-Safety-in-High-Rise-Buildings> (accessed 22 April 2016).

37 Victorian Government, *Submission 57*, p. 3.

38 Australian Building Codes Board, 'Actions to be taken on Fire Safety in High Rise Buildings, 24 February 2016, <http://www.abcb.gov.au/News/2016/02/24/Actions-to-be-taken-on-Fire-Safety-in-High-Rise-Buildings> (accessed 22 April 2016).

39 Building Minister's Forum, *Communiqué*, 19 February 2016, <http://productalliance.com.au/~media/HIA%20Website/MiniSite/CPA/PDF/Building%20Ministers%20Forum%20communique%2019022016.ashx> (accessed 22 April 2016).

40 Ai Group, 'Welcome action ahead on non-conforming building products', *Media Release*, 22 February 2016, <http://productalliance.com.au/~media/HIA%20Website/MiniSite/CPA/PDF/Building%20Ministers%20Non%20conforming%20products%20220216.ashx> (accessed 22 April 2016).

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

Committee view

1.37 The committee commends the concerted effort industry stakeholders have made to bring this serious issue to the attention of Commonwealth, state and territory governments and ensure it is at the centre of the Building Ministers' Forum's agenda. The committee supports a coordinated national approach to addressing the complex issues around non-conforming building products and encourages the Commonwealth, state and territory governments to take definitive action. The committee is interested in the outcome of the consultation on the SOG report.

