



STRATEGIES TO ADDRESS RISKS RELATED TO NON- CONFORMING BUILDING PRODUCTS

This report has been developed by the Senior Officers' Group which is comprised of representatives from the Commonwealth, states and territories.

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1. Executive summary

The issue of non-conforming building products (NCBP), whether domestically manufactured or imported, is an important and complex challenge of national significance, impacting on the construction, manufacturing, trade (imports) and retail sectors. It can have life safety, health, economic, legal and social consequences. Recognising concerns about health and safety risks posed by NCBPs, the Building Ministers' Forum (BMF) meeting of 31 July 2015 agreed to a number of actions.

This included establishing a Senior Officers' Group (SOG) to investigate strategies to minimise the risks to consumers, businesses and the community associated with the failure of building products to conform to relevant laws and regulations, including at the point of import. The SOG is comprised of senior officers from the Commonwealth, states and territories. It has undertaken investigations and identified a range of strategies that were presented to the BMF at its meeting on 19 February 2016.

HAVE YOUR SAY ON THE STRATEGIES FOR ADDRESSING NON-CONFORMING BUILDING PRODUCTS

As the current SOG Secretariat, the Department of Housing and Public Works, Queensland (the department) is coordinating feedback on the strategies to address NCBPs.

We encourage you to let us know your feedback by reviewing the SOG report's strategies and answering the following questions:

1. Do you have any feedback that would assist with implementing the recommendations/strategies?
2. Are you aware of any impediments to implementing the recommendations/strategies, and do you have any suggestions for overcoming them?

Written submissions

Please send written submissions by:

- Email: BCQ-NCPSOG@hpw.qld.gov.au
Feedback on the strategies to address NCBPs (as email subject line)
- Mail:
Feedback on the strategies to address NCBPs
GPO Box 2457
Brisbane QLD 4001

Submissions close **5pm, Monday 11 April 2016**. Submissions will not be accepted after this date.

2. Introduction

The Australian building and construction industry accounts for around 8 per cent of Australia's gross domestic product (GDP) and employs around 9 per cent of the workforce¹. In the 2011-12 financial year the industry contributed \$99.4 billion (B) to the Australian economy, generated \$305B in total income, incurred \$275.4B in total expenditure and employed 950,000 persons².

Given the economic significance of the building and construction industry, it is incumbent on all stakeholders, including Commonwealth, state and territory governments to work together to ensure the sector's health and growth. This includes developing effective responses to the challenges the industry faces. The issue of NCBPs is an important and complex challenge of national significance, impacting on the construction, manufacturing, trade (imports) and retail sectors. It can have life safety, health, economic, legal and social consequences.

This report by the SOG, a group established by the BMF to provide advice and recommendations to Building Ministers about NCBPs, outlines the weaknesses and gaps in the current system and makes recommendations, to address the issue of NCBPs.

The BMF comprises Commonwealth, state and territory Ministers responsible for building and plumbing regulation. The BMF asked the SOG to report within six months on strategies to minimise the risks to consumers, businesses and the community associated with the failure of building products to conform to relevant laws and regulations, including at the point of import.

The SOG Terms of Reference were as follows:

1. Outline state and territory regulatory responsibilities in building and construction that are relevant to product non-conformity.
2. Outline Commonwealth regulatory frameworks that are applicable to product non-conformity.
3. Identify any legislative and non-legislative gaps and weaknesses relevant to Commonwealth, state and territory jurisdictions for improving product conformity.
4. Identify regulatory and non-regulatory options, such as procurement, education or further research that could help to address some of the identified gaps and weaknesses.
5. Engage with relevant industry bodies, identified by the SOG, to:
 - a. understand what private initiatives exist or research is available in addressing product non-conformity;
 - b. obtain feedback on possible proposals developed by SOG; and
 - c. identify the role of industry in supporting an effective overall response.
6. Consider any other related matters.

¹ Australian Bureau of Statistics, 1301.0 - Year Book Australia 2012, 'Value of goods and services produced by Australian industry', 24 May 2012

² Australian Bureau of Statistics, 8772.0 - Private Sector Construction Industry – Australia 2011-12, Media Release 'Tradies lead the way in \$305 billion construction industry', 27 June 2013

TERMINOLOGY

NCBPs and materials

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.

Fraudulent documentation

A recorded claim that a product's performance meets specified standards or codes that, when used or tested, do not meet that performance claim. This may include falsified documentation e.g. fraudulent certification or test results

Product substitution

Product substitution can occur when a manufacturer, importer or supplier submits their product for third party certification testing and, after the certification is granted, alters it without retesting or recertifying the product. Product substitution can also occur when a seemingly identical (and potentially non-conforming) replacement building product is offered on a construction site or elsewhere.

Counterfeit building products

Products which are an unauthorised copy of a building product, often created with the intention to deceive. They are sold to suppliers, builders or even consumers as if the product is genuine.

Non-compliant building products and materials

Those that are used in situations where they do not comply with the requirements of the National Construction Code. A building product can be both non-conforming and non-compliant.

To date, a number of non-regulatory actions have been taken by industry and government to address NCBPs. Please see **Appendix 1** for a summary.

3. Background

The SOG Secretariat liaised with other jurisdictions to carry out analysis and research.

A range of information sources were considered by the SOG in making its recommendations, including:

- the 74 public submissions to the Senate Inquiry into NCBPs³
- an additional 31 submissions provided directly to the SOG from national organisations within the building product supply chain
- information provided by the DIBP and the Australian Competition and Consumer Commission (ACCC)
- a number of international models relevant to the issue of NCBPs.

A literature review was also conducted, though this did not identify national or international evidence clearly quantifying the extent of NCBPs in Australia or verify anecdotal evidence provided by the members of the Australian building and construction industry.

Desktop analysis of submissions to the Senate inquiry, did however identify a number of key themes. These are summarised in a table provided in **Appendix 2**.

³ On 23 June 2015 the Senate referred an inquiry into NCBPs to the Senate Economics References Committee for inquiry and report – the committee is scheduled to report by 10 May 2016. See: http://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Non-conforming_products

4. Building product supply chain

There are particular points of weakness in the building product supply chain which should be the focus of any action to address the issue.

The diagram at **Appendix 3** represents the traditional Australian building product supply chain, though procurement of building products may skip a number of links. It illustrates why building products are not effectively regulated at present e.g. the current system has no inbuilt mechanism to trace building products through the supply chain from manufacture to installation. This places heavy responsibility on the builder or building certifier/surveyor to ensure the product and its performance is safe and fit for purpose.

Project managers and consumers may also procure products directly from local or international manufacturers or importers. While manufacturers may undertake batch testing and require high risk building products to be third party certified, there are currently no legislative requirements for manufacturers to ensure their building products comply with any applicable Australian standards.

The evidence available indicates that the earlier in the supply chain NCBP issues can be identified (e.g. at the time the product is manufactured, distributed or procured) the more effective the intervention will be.

Traditional product supply chains are being seriously challenged by a variety of factors. Globalisation, procurement via the internet, reduction in the barriers to trade, more innovative products and increased competition have all impacted on the flow of the supply chain. Zurich Australia's January 2013 *Strategies for managing risk of counterfeit products* guide highlights the impact of globalisation on the supply chain, particularly in safety-critical areas such as construction and electrical products. The guide recommends that manufacturers, contractors, distributors and retailers strengthen procurement processes and regularly screen for counterfeit products.

In addition, the International Chamber of Commerce's Counterfeiting Intelligence Bureau estimates that counterfeiting accounts for between 5 and 7 per cent of world trade, valued at an estimated \$600B a year⁴. The 2011 *Counterfeit Construction Products From Low-Cost Sourcing Countries* international study concluded that counterfeit construction products have caused significant negative impacts to safety, project schedules, overall costs and quality of construction and that more research is needed.⁵

⁴ <http://www.iccwbo.org/products-and-services/fighting-commercial-crime/counterfeiting-intelligence-bureau/>

⁵ <http://misbe2011.fyper.com/proceedings/documents/18.pdf>.

5. State and territory building regulatory frameworks

The Australian building and construction industry is governed by a complex legislative framework consisting of requirements imposed by the Commonwealth, states and territories and local governments. The requirements relating to building products and materials include the National Construction Code (NCC), Australian Standards, workplace health and safety requirements, importation requirements and jurisdictional laws.

State and territory laws:

- provide standards for the construction and maintenance of buildings
- ensure home owners have adequate contractual protection when undertaking works
- provide insurance schemes to protect home owners⁶ against financial loss
- regulate building practices and promote a licensing or permit system
- manage dispute resolution.

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. If there are any post-construction issues, building regulators are able to begin disciplinary procedures against licensees.

Builders and building contractors are generally responsible for remedying and replacing NCBPs after installation, regardless of any evidence that the product was deemed fit for purpose and made available for sale in Australia. Most jurisdictions provide a home warranty scheme for defective building work, though these are subject to limitations and restrictions, such as prescribed timeframes for making a claim.

The fundamental concept underpinning building regulatory frameworks is that a building certifier/surveyor has statutory responsibility for ensuring the building's construction is compliant and conforming. A building certifier/surveyor may accept certification from other parties (e.g. engineers for structural work), but they must be satisfied the person is appropriately qualified to provide the relevant certification. However, building certifiers/surveyors do not have the capacity to check every product.

Realistically, Australian building regulators are currently unable to investigate every case of suspected NCBPs, nor can they easily identify where a proven NCBP may be (e.g. the marketplace, building sites or completed buildings). Building regulators also do not have the ability to remove a confirmed NCBP from the marketplace.

The current building regulatory powers that have some application to the issue of NCBPs are heavily focussed on directions to rectify and disciplinary processes directed at licensees. These powers are ineffective in addressing the issue of NCBPs.

Workplace health and safety legislation may also be relevant in relation to some instances of NCBPs. Similarly, electrical and gas safety regulatory regimes may also be relevant.

⁶ Generally, 'home owners' refers to owners of Building Code of Australia class 1 buildings e.g. a detached house.

There are general civil, administrative and criminal law remedies available to regulators that may also be pertinent to addressing NCBPs. These include:

- written warnings, infringement notices and enforceable undertakings
- declarations, injunctions and public warning notices
- civil pecuniary penalties, fines and criminal convictions.

6. Commonwealth regulatory frameworks

There is Commonwealth legislation that in some circumstances can assist with enforcement in relation to NCBPs. 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 Australian Consumer Law (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.

In addition, building products from overseas must pass through Australian customs. Australian custom and quarantine laws are applicable to imported goods. Although there are no specific requirements for building products⁷, the Australian Border Force (ABF) as the operational arm of the DIBP has the legislative power to detain goods if they contain asbestos, which can include building products. However, DIBP/ABF does not have legislative powers to ensure imported building materials conform to building standards or performance levels.

Identifying and addressing NCBPs when they enter Australia may be difficult due to the way in which building products are imported. They are often imported without an intended purpose being specified and could have a number of uses, including non-construction uses or for building work not regulated by the NCC.

There are also a number of other areas with Commonwealth involvement that can be relevant to building products, such as the workplace health and safety and electrical safety regulatory frameworks.

6.1 THE NATIONAL CONSTRUCTION CODE (NCC) AND THE AUSTRALIAN BUILDING CODES BOARD (ABCB)

The NCC is the national, performance-based building code that is adopted in each state and territory through relevant building laws and regulations. The NCC was established through an Inter-governmental agreement (IGA), which requires the Commonwealth and each state and territory to contribute to the funding of the Australian Building Codes Board (ABCB), which maintains the NCC on behalf of all parties.

The NCC comprises the Building Code of Australia (BCA) and the Plumbing Code of Australia (PCA). It provides the minimum necessary requirements for health, safety (including structural safety and safety from fire), amenity and sustainability in the design and construction of new buildings. Australian Standards may be referenced in the NCC, as well as in the ACL or state and territory regulations.

The NCC does not address NCBPs; rather, it addresses compliance with the relevant minimum requirements mentioned above. State and territory laws also apply the requirements in the NCC to certain alterations and additions to existing buildings.

The ABCB also administers two product certification schemes to provide a nationally consistent quality of materials and products: the voluntary CodeMark building product certification scheme and the mandatory WaterMark plumbing and drainage product certification scheme.

⁷ Other than those related to asbestos.

7. Current gaps and weaknesses that impact on addressing non-conforming building products

The SOG identified the following key gaps and weaknesses that impact on addressing NCBPs in Australia.

7.1 EVIDENTIARY ISSUES

Lack of clear and independently verified evidence

The SOG was unable to find sufficient independent and quantitative evidence regarding the prevalence of NCBPs in Australia*.

**Refer to Recommendation 6 for a proposed response to this issue.*

The SOG considered available information and invited industry to present further evidence of NCBPs. However, 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.

The SOG identified examples of confirmed NCBPs, though these were not sufficient to demonstrate the extent of the issue.

Barriers to reporting or collecting data

The SOG identified that there are a number of barriers preventing the collection and reporting of data on NCBPs in Australia*.

**Refer to Recommendation 6 for a proposed response to this issue.*

These barriers include:

- 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
- no central register or data collection framework, nor an information-sharing mechanism between state and territory building regulators.

Also, after product failure due to an extreme event, such as fire or cyclone, it is difficult to ascertain whether the product was non-conforming, was non-compliant or incorrectly installed. Unlike many consumer goods where failures become apparent during regular use, evidence

related to a NCBP is likely to receive attention only following product failure during an extreme event e.g. a fire.

7.2 REGULATORY ISSUES

Limited ability to regulate at the Australian border

There is currently limited ability for any regulator to stop known NCBPs entering Australia and making their way into the building product supply chain*.

**Refer to Recommendation 4 for a proposed response to this issue.*

The earlier in the supply chain that NCBPs are identified and addressed, the more effective the intervention will be. Ideally, this would mean preventing NCBPs from entering Australia. However, there are a number of impediments to this being achieved.

DIBP does not have legislative powers to ensure imported building materials conform to building standards or performance levels. DIBP is unable to prevent entry of a good into Australia unless it is prohibited under the *Customs (Prohibited Imports) Regulations 1956*, even if it has been subject to a national recall and prohibited from sale. For example, there are no import restrictions on the domestically banned Infinity cabling; however it could still find its way into the supply chain if it is imported and unlawfully sold. The sale of such products could take place lawfully in a foreign country followed by importation to Australia.

Identifying and addressing NCBPs when they enter Australia may be impractical or ineffective due to the way in which building products are imported. They are often imported without an intended purpose being specified and could have a number of uses, including non-construction uses or for building work not regulated by the NCC.

While enforcing building standards and performance levels at the border is problematic, sharing of import data will assist building regulators with their compliance and enforcement activities. The DIBP collects customs data from import declarations and disclosures of this data must comply with relevant provisions of the *Australian Border Force Act 2015* and the *Privacy Act 1988*. Where regulators have identified a NCBP, information sharing will assist states and territories to determine who else may have imported the product and in what quantities. Limited mechanisms for tracing building products through the supply chain means that states and territories currently have no way of knowing where a NCBP has been used and how much of it exists within Australia.

Limited building regulatory powers

State and territory building legislation primarily provides for regulating the licensing and conduct of builders not building products. This creates a genuine gap in the investigative and enforcement processes*.

**Refer to Recommendation 2 for a proposed response to this issue.*

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

Currently, building products are not effectively regulated until they are used in construction. The current system also has no in-built mechanism for tracing building products through the supply chain. As a result, the installing builder or contractor is certifying the performance of building work. The building certifier/surveyor does have responsibility for checking that building work complies with the NCC and building legislation, but this does not extend to verifying every building product used in a particular construction.

Where a building product fails to perform or is defective, it may be because the product is non-conforming and/or non-compliant. Alternatively, the product may be conforming and/or compliant but fails as the result of poor workmanship or incorrect product installation. In both cases, building regulators' powers are limited to pursuing the licensee involved or possibly ordering the building owner to remedy the work on safety or health grounds. This is appropriate for non-compliant use of products and workmanship issues, however, a practitioner who unintentionally installs a NCBP is still liable for any necessary rectification. Building regulators do not have the power to pursue other participants in the supply chain.

The ACCC, during consultation with the SOG and in its Senate inquiry submission, also identified the gap in state and territory building regulatory powers, noting stakeholder concerns that regulators do not have sufficient or consistent investigative and enforcement powers to address NCBPs. However, any regulatory analysis or proposed changes should note that the false and misleading claim provisions of the ACL and the related powers for investigation and enforcement, can still apply to building products. For this reason, it is important to maintain effective communication between jurisdictional ACL regulators and their building regulator counterparts.⁸

Lack of coordination between building regulators

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*.

**Refer to Recommendations 3 and 4 for a proposed response to this issue.*

There is currently no coordinated central communication between building regulators, unlike consumer product safety and gas and electricity regulators which generally have formal processes for collaboration and coordination of information and regulatory effort.

⁸ The ACCC confirmed to the SOG that ACL regulators can investigate circumstances of misleading and false advertising in conjunction with building regulators. The ACCC decides to take action based on evidence, factors, risk and priorities set out in their *Compliance & Enforcement Policy*, like significant public interest or concern, unconscionable conduct, and if the issue is industry-wide or has national or international significance e.g. when the ACCC assisted states and territories in coordinating the recall of Infinity electrical cables announced in August 2014.

There are proven benefits in establishing such forums e.g. in late 2014 an asbestos issue was identified in the Australian Capital Territory after a builder suspected their imported building material contained the banned substance. Through the national Heads of Workplace Safety Authorities (HWSA) Imported Materials with Asbestos Working Group, which has a Rapid Response Protocol⁹ between the Commonwealth, states and territories, national warnings were subsequently issued to industry to be diligent when ordering building products from overseas.

A similar model is used by ACL regulators, which involves formal processes and procedures for coordination and collaboration with a lead agency (in this case the ACCC) with respect to compliance and enforcement action. This approach provides for collaboration and coordination between consumer protection agencies while allowing resources to be better used.

Without a central, dedicated forum for building regulators, it is difficult for jurisdictions to establish effective, coordinated responses to issues involving NCBPs, which often have national implications.

Inconsistent application of the ACL and varying degrees of cooperation between consumer law and building regulators

The SOG found that consumer law regulators have varying degrees of cooperation with building regulators and different approaches to the treatment of building products under the ACL.

**Refer to Recommendation 3 for a proposed response to this issue.*

The ACL will not always capture building products under the definition of a ‘consumer good’ (i.e. under the consumer guarantees and product safety provisions). However, ACL protections against for ‘false and misleading claims’ may apply to building products e.g. where claims are incorrectly made that a product meets a particular standard.

Consumer law regulators can play a significant role where NCBPs are captured under consumer law, as unlike building regulators they have powers to remove unsafe products from the marketplace and to pursue manufacturers or suppliers. Consumer law regulators also have an established network and coordination capability that can respond quickly to issues as they arise.

During the SOG’s discussions it became apparent that different jurisdictional consumer law regulators may have differing views on responses to NCBPs under the ACL. In addition, while one state or territory building regulator may receive assistance from their consumer law regulator in responding to NCBPs, another may not. There is scope to improve communication and information sharing between building and consumer law regulatory bodies.

⁹ <https://www.asbestossafety.gov.au/managing-importation-asbestos-australia>

7.3 DISPROPORTIONATE RESPONSIBILITY AT THE END OF THE SUPPLY CHAIN

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*.

**Refer to Recommendation 3 for a proposed response to this issue.*

The current regulatory framework places a high level of responsibility on the builder, installer and building certifier/surveyor to ensure conforming products are used. The current building regulatory frameworks are based on enforcing compliance with the current standards, including ensuring adequate workmanship.

Builders

Builders are responsible for ensuring they have ordered and used products that conform to building standards. The HIA¹⁰ encourages builders to use the following tips to help ensure they are using conforming building products:

- when ordering products, stipulate the supply of conforming products and state the necessary Australian Standard where required
- order products from a reputable manufacturer or supplier with whom a long term relationship can be developed
- on receipt of products, check that the order has not been substituted without approval and that the necessary documentary evidence has been supplied
- where requested provide evidence to the building certifier/surveyor of a product's conformity with NCC performance requirements.

Other building practitioners (e.g. designers, architects and engineers) also have a responsibility to ensure their design will function correctly and that the appropriate building materials are specified.

Certifiers

The last line of defence to ensure buildings comply with the NCC is provided by building certifiers/surveyors. Building certification involves independently checking, approving, inspecting and certifying building designs. It also strives to ensure that building work complies with the safety, health, amenity and sustainability standards specified in legislation, building codes and standards.

Building certifiers/surveyors are involved in many aspects of the building industry. They generally:

- assess building development applications and grant or refuse building approvals
- inspect buildings at various stages to ensure that they meet minimum standards and comply with the building approval

¹⁰ http://nsw.hia.com.au/documents/2012/nat_mat_12_12_legal_statutory_obligations_building_products.pdf

- perform building compliance and enforcement roles by ensuring that the builder achieves compliance with the legislation and the building approval.

Generally, building certifiers/surveyors must adhere to standards of conduct, professionalism and act in the public interest. This requires them to take reasonable steps to obtain relevant facts when performing building certifying functions. They have a statutory responsibility to ensure the quality, safety and compliance of the building.

However, builders, installers and building certifiers/surveyors face the following challenges:

- fraudulent documentation may not be easily identifiable, particularly if a product is manufactured overseas
- NCBPs may not always be obvious at the time of purchase or installation, and product failures may only occur a number of years after installation
- critical attributes that ensure a fit for purpose building product may only be known to the manufacturer
- there are cost and resource imposts in undertaking private testing of suspected NCBPs.

A builder, installer and/or building certifier/surveyor may have believed that a product is conforming, but if it is subsequently identified as non-conforming, the contractors at the end of the product supply chain will be responsible for any rectification, usually at their own cost¹¹.

Manufacturers, suppliers and retailers

Market forces can encourage manufacturers, suppliers and retailers in the direction of ensuring their products are conforming and safe. Best practice encourages:

- architects and designers to specify the performance requirements to be met by building products and materials in their building designs
- manufacturers, importers and suppliers to undertake due diligence to ensure their products conform to Australian regulations.

However, a number of Senate inquiry submissions and industry submissions made to the SOG show a perception that participants early in the supply chain take minimal responsibility for ensuring their building products conform and comply with Australian building regulations. This is a serious concern as manufacturers are in the best position to ensure their products are safe and fit for purpose, as they know their products' designs and intended uses.

Suppliers may not be able to influence the safety of goods they supply, nor can they be expected to carefully scrutinise products, however they still have a general responsibility to undertake due diligence in ensuring products they buy are safe and conforming. In addition, under the ACL, suppliers that import consumer products are treated as a manufacturer for the purposes of consumer guarantees¹².

At present, there are few marketplace checks and balances that can pick up whether building products are changed by the manufacturer after the original prototype test. Manufacturers and

¹¹ Each jurisdiction has different enforcement powers. Some regulators only have power to direct the building owner to rectify while others have power to direct the builder or contractor to rectify and pursue the building certifier separately.

¹² <https://www.accc.gov.au/business/treating-customers-fairly/consumers-rights-obligations>

suppliers are not generally required to undertake regular testing of building products, unless they are specifically required to have regular third party certification. There are generally no powers for regulators to ask for batch testing or requirements for them to undertake audits of off-the-shelf products. The same issue exists for builders, installers and building certifiers/surveyors who rely on product information published by manufacturers.

Building product recalls have occurred due to diligence processes or tests by manufacturers that have found a fault in a product. For example, the Laminex Group found a single shipment of their Craftwood Fireguard fibreboard failed a test for fire resistance when undertaking regular batch testing. On 7 January 2015, the Laminex Group issued a product recall notice¹³. This demonstrates a proactive approach by a major manufacturer with good factory quality control systems.

No central point of information for industry or consumers

Industry and consumers have indicated in submissions to the Senate Inquiry and in consultation undertaken by the SOG that there is confusion regarding responsibilities and where to obtain information regarding NCBPs*.

**Refer to Recommendation 3 for a proposed response to this issue.*

There is currently no overarching website or network hub with information about building regulators; responsibilities of relevant agencies; government and industry building product schemes; how to report NCBPs or materials; or how to ensure that building products are conforming. Generally, information about recalls is placed on the ACCC website and electrical recalls are communicated to industry through alerts from ACL regulators.

By contrast:

- the Gas Technical Regulators Committee website provides information about its role; the gas industry; gas regulations; and links to jurisdictional gas regulators, associations, industry bodies and industry standards organisations
- the Electrical Regulatory Authorities Council's website provides information about the electrical regulatory system; Electrical Equipment Safety System; standards; licensing requirements; and links to the jurisdictional electrical regulators
- the Commonwealth maintains a website about the ACL, including information about consumer law provisions; public consultations; and links to jurisdictional consumer law regulators
- the ACCC's informative website also contains links to related consumer protection agencies and the industry ombudsmen
- Safe Work Australia administers an information website on behalf of Commonwealth, state and territory workplace health and safety regulators.

¹³ <https://www.recalls.gov.au/content/index.phtml/itemId/1066862>

8. Recommendations

A measured, responsible and proportionate risk-based approach to addressing the issue of NCBPs was recommended to the BMF. The various strategies outlined below are complementary and were considered by the BMF as a package.

The SOG advised that investigation and implementation of any of the below recommendations will adhere to the Council of Australian Governments (COAG) Principles of Best Practice Regulation.

Recommendation 1

Note the current legislative roles and responsibilities of the Commonwealth, states and territories, including the identified gaps and weaknesses, impacting on action in relation to NCBPs.

It was recommended that the current roles and responsibilities of the Commonwealth, states and territories in relation to building products; the gaps and weaknesses in the current regulatory framework as it applies to building products and the building supply chain; and that the current building regulatory framework does not provide an effective overarching framework for identifying and addressing NCBPs.

Recommendation 2

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.

The SOG recommended that building regulatory frameworks be reviewed to identify any deficiencies in specific powers that would enable the detection, intervention and management of NCBPs.

Existing building regulator powers are focused on building practitioners, rather than building products. Other state and territory regulators (e.g. fair trading, workplace health and safety, gas and electrical regulators) have more effective powers than building regulators for ensuring the safety of products within their jurisdiction.

On 21 July 2014, the Commonwealth's *Regulatory Powers (Standard Provisions) Act 2014* received assent. This Act provides a framework of standard regulatory powers that may be exercised by Commonwealth agencies. These powers are for general application across regulatory schemes for Commonwealth laws, including monitoring, investigations and enforcement. The monitoring and investigative powers under the Act include the ability to enter premises with consent or under a warrant and being able to gather evidence and material. Enforcement provisions include civil penalties, infringement notices, enforceable undertakings and injunctions.

Most of these powers appear to correlate with those of state and territory regulators, other than building regulators. The introduction of similar powers for building regulators would enhance their ability to identify and monitor building product performance. This would include enabling building regulators to:

- conduct audits in conjunction with completed or existing building work
- seize evidence or take samples for testing
- compel manufacturers or suppliers to provide documentation e.g. testing certificates or records of transactions
- restrict the sale or installation of unsafe building products
- seek injunctions if they become aware of an immediate building safety risk e.g. to prevent occupation of a building in which a NCBP is installed.

This proposed strategy is *proactive* in nature and will address 7.2 *Regulatory issues - Limited building regulatory powers*.

Recommendation 3

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
- 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.

3a. Establishing a national forum of building regulators

The SOG recommended that a national forum of building regulators be established.

There is currently no interjurisdictional forum of building regulators. While the ABCB administers the NCC, it is not a regulator and it does not have any enforcement powers. A stand-alone forum for building regulators focused on the operational aspects of identifying, enforcing and potentially recalling NCBPs would facilitate greater collaboration and information sharing between building regulators in all jurisdictions.

It is envisaged the regulator forum would meet regularly and could contribute to a number of non-regulatory initiatives that the SOG has recommended for consideration, including:

- facilitating information sharing between the DIBP and state and territory jurisdictions

- developing a website and other education initiatives.

The SOG is aware that similar forums already exist for gas, liquor, electricity and consumer law regulators and that these have proven to be valuable in assisting government agencies to work more cooperatively and efficiently across jurisdictions and portfolios.

This strategy is *proactive* in nature and will address *7.2 Regulatory issues - Lack of coordination between building regulators* and *7.2 Regulatory issues - Inconsistent application of the ACL and varying degrees of cooperation between consumer law and building regulators*.

3b. 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

Better information-sharing and collaboration between consumer law regulators and building regulators would improve responses to identified NCBPs.

Consumer law regulators have comprehensive powers to remove unsafe products from the marketplace and take action against manufacturers or suppliers. At present, building regulators do not have equivalent powers and as such are required to rely on the powers available to consumer law regulators¹⁴.

The SOG suggested establishing a mechanism for improving the working relationship between the consumer law regulators and building regulators.

This strategy is *proactive* in nature and will address *7.2 Regulatory issues - Inconsistent application of the ACL and varying degrees of cooperation between consumer law and building regulators*.

3c. Developing an education strategy

The SOG recommended an education strategy to be developed to better inform consumers and building industry participants and to encourage greater responsibility in ensuring the use of safe building products. This proposed strategy will:

- raise awareness of the need to ensure safe and fit for purpose building products are used
- remind participants in the supply chain of their obligations to ensure relevant building product information is accurate and kept with the product
- ensure the market is aware of the potential consequences if NCBPs are used or discovered.

The proposed strategy would target the whole supply chain, from manufacturers and suppliers, to building practitioners, and consumers or homeowners.

For manufacturers and suppliers a guide, similar to that of the New Zealand Department of Building and Housing’s *Using the Product Assurance Framework to support Building Code compliance – a guide for manufacturers and suppliers of building products*¹⁵, may assist in

¹⁴ Some jurisdictions have reported good working relationships with their consumer law regulator. For example, Queensland has formed the Queensland Building and Construction Product Committee (QBCPC) to undertake a more coordinated approach identifying and managing NCBPs. The QBCPC was established in May 2015 by the Queensland Building and Construction Commission (QBCC) and is comprised of the QBCC, the Queensland Office of Fair Trading and the Electrical Safety Office. The Committee receives reports of potentially NCBPs and investigates whether the products conform to Australian standards.

¹⁵ <http://www.building.govt.nz/codewords-42-6>

improving understanding of the benefits and responsibilities associated with providing conforming and fit for purpose building products.

Other fact sheets and guides could be developed for retailers, building practitioners, contractors, consumers and homeowners. These could address responsibilities within the building product supply chain; responsibilities of building regulators versus other regulators; how to ensure building products meet relevant laws and standards; and building product technical information.

Other aspects of an education strategy could include:

- a national website (see proposed 'one-stop-shop' website strategy below)
- collaboration with industry on events and materials
- regular bulletins.

This proposed strategy is *proactive* in nature and will address 7.3 *Disproportionate responsibility at the end of the supply chain - No central point of information for industry or consumers.*

3d. Considering the establishment of a 'one-stop-shop' national website

The SOG recommended considering the establishment of a national 'one-stop-shop' website to provide a central point of information for consumers and participants in the building product supply chain. This will assist consumers, building practitioners and building certifiers/surveyors in knowing how and where to report suspect building products. Consideration would also include examining arrangements for hosting and maintaining the website.

A national website on NCBPs could provide information to the Australian building product supply chain and consumers about:

- responsibilities within the building product supply chain and regulatory mechanisms at each stage
- the identified and proven risks associated with particular building products e.g. structural versus non-structural
- what to look for to ensure building products are conforming
- how to report suspected NCBPs
- how to contact jurisdictional regulators
- the peak bodies involved in the building supply chain.

The website would improve consumer awareness and may encourage greater understanding of the issues involving NCBPs. It could also target participants in the building product supply chain and encourage greater awareness and responsibility for those involved early in the supply chain e.g. manufacturers, importers, suppliers and retailers.

This proposed strategy is *proactive* in nature and will address 7.3 *Disproportionate responsibility at the end of the supply chain - No central point of information for industry or consumers.*

Recommendation 4

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
- 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.

4a. Enhanced intelligence regarding NCBPs

Identifying NCBPs at the time of import is impractical due to a range of factors (refer to 7.2 *Regulatory Issues - Limited ability to regulate at the Australian border*). It was recommended that mechanisms be developed to allow for states and territories to provide evidence to the Commonwealth regarding NCBPs, so the Commonwealth may consider further appropriate action.

This proposed strategy would require the Commonwealth, states and territories to work together regarding NCBPs, aided by a national forum (recommendation 3a.) and would benefit from enhanced powers given to building regulators (recommendation 2).

This proposed strategy is *reactive* in nature and will address 7.2 *Regulatory issues - Limited ability to regulate at the Australian border* and 7.3 *Disproportionate responsibility at the end of the supply chain*.

4b. Information sharing arrangement with the Department of Immigration and Border Protection (DIBP)

DIBP proposed an information sharing arrangement between it and states and territories to support these authorities in undertaking compliance and enforcement activities in relation to NCBPs e.g. at the July 2015 BMF meeting; in DIBP's Senate inquiry submission; and at the second SOG meeting. The DIBP's proposed information sharing arrangement could make an important contribution to the regulatory activities of the Commonwealth, state and territory authorities.

The arrangement would allow import data collected by DIBP, for the purpose of reporting, detecting and controlling the movement of goods across the Australian border, to be provided to regulators to facilitate their work on building products. For example DIBP could, in consultation with states and territories, arrange for automatic reporting (of a particular type of product or entity) to be provided regularly (e.g. quarterly) to allow regulators to understand the volumes and sources of particular products of interest.

Further, where a state or territory regulator identifies a safety/compliance issue relating to an imported product, the regulator could request specific information from the DIBP to assist in its compliance activities. Under this scenario, if DIBP was provided with information about certain

goods of concern imported by a particular entity or sold by an identified supplier, DIBP could use this information to identify:

- who else in Australia the supplier may have provided the same or similar products to
- when those goods were supplied
- the quantity of those goods imported and their port of entry.

DIBP has advised the SOG that a mechanism (e.g. amending the *Australian Border Force (Secrecy and Disclosure) Rule 2015* and establishing ongoing authorisations) could be utilised to give effect to this arrangement and to enable regular data-sharing with states and territories.

This proposed strategy is *reactive* in nature and will address 7.2 *Regulatory issues - Limited ability to regulate at the Australian border*) and 7.3 *Disproportionate responsibility at the end of the supply chain*.

Recommendation 5

Approve that the Working Group of Senior Officers and the Australian Building Codes Board 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.

There are a number of ways of demonstrating conformity with the performance requirements of the NCC. A building certifier/surveyor must assess whether the building documentation proves that the building proposal will comply with the performance requirements of the NCC. The proposal may meet the performance requirements by proving compliance with the 'deemed-to-satisfy' provisions or through an alternative solution. Assessment methods include evidence of suitability, verification methods, comparison with the deemed-to-satisfy provisions, and expert judgement.

By allowing flexibility in providing evidence that a building product is conforming, manufacturers, building certifiers/surveyors and industry are able to assess their building product to the relevant deemed-to-satisfy provisions or an alternative solution, based on the risks associated with a product's use.

Evidence of suitability within the NCC (commonly known as A2.2), except certain aspects of fire safety performance¹⁶, can be demonstrated in any of the following ways:

- a report issued by a registered testing authority i.e. registered with National Accredited Testing Authorities (NATA) or an authority recognised by NATA, that show results of testing in accordance with a relevant Australian Standard
- a 'Certificate of Conformity' issued under CodeMark or a WaterMark (based on third party certification by a Conformity Assessment Body)
- a certificate from an engineer or other appropriately qualified person

¹⁶ The fire safety performance of many products must be demonstrated through NCC Specification A2.3 and A2.4 which effectively mandates that this performance be a third party test or other specific means with a known performance.

- a certificate issued by a product certification body that has been accredited by Joint Accreditation System of Australia and New Zealand (JAS-ANZ), to certify products to the applicable standard e.g. an Australian Standard (commonly known as third party accreditation)
- other documentary evidence.

Various Australian Standards, notably those pertaining to structural and glazing products, contain specific requirements for product testing and include a range of options for demonstrating product conformity with the Standard. The requirements within the Australian Standards for ongoing production quality are important in maintaining the structural safety of the built environment, particularly for key structural and civil works components.

While the building certifier/surveyor will use the evidentiary provisions in the NCC to decide whether the completed structure complies, the evidence they accept for overall structural compliance will usually be the professional structural engineer's certificate stating that the structural frame complies with relevant Australian Standards under the NCC. For most commercial scale projects, the building certifier/surveyor does not directly assess the conformity of every piece of reinforcing steel or structural bolt. Therefore, the requirements within the individual structural standards for these smaller, but crucial, structural elements are the front line for determining product conformity.

Construction industry professionals such as structural engineers play a critical role in ensuring the conformity of structural building components with the relevant Australian Standard. However, an engineer cannot compel a manufacturer to undergo third party testing or certification if the Standard enables other options for demonstrating compliance, unless the individual project documentation specifically requires a certain level of evidence under the contract.

The SOG concluded that while there is not enough evidence to determine the prevalence of NCBPs in Australia, there are substantial life safety, legal, commercial and economic risks associated with particular products. Also, a product's non-conformity may only become apparent when it is called upon to perform in an extreme event e.g. fire or cyclone.

Accordingly, the SOG recommended a review of the Australian Standards referenced in the NCC relating to high risk building products such as those related to the structural integrity of high risk buildings. The review should be conducted by Standards Australia in conjunction with the SOG, ABCB and industry and assess whether current methods of demonstrating suitability are stringent enough. The SOG noted that third party certification provides the most rigorous method of demonstrating conformity.

A national register of high risk building products that require third party certification would assist building certifiers/surveyors and regulators in determining whether a product is conforming. However there is a high level of complexity in defining a high risk building product as this is dependent on its use. There is also an element of risk transfer to government, in terms of verifying and publishing certificates of conformity. Resources will also be required to establish and maintain the national register.

This proposed strategy is *proactive* in nature and will address 7.3 *Disproportionate responsibility at the end of the supply chain*.

Recommendation 6

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.

Based on the evidence presented to date, it can be concluded that NCBPs exist in Australia. However, the SOG found it difficult to quantify the extent and impacts of the problem, as much of the evidence is anecdotal. While valuable information exists about the economic, commercial, social and legal impacts of individual NCBPs, there is not enough independent quantitative analysis of overall consequences.

The SOG believes that strategies to address this issue must be risk and evidence-based, proportionate and supported by relevant research. Without adequate evidence, additional regulatory burden and costs on the building and construction industry, consumers and government agencies in Australia is difficult to justify.

The SOG therefore recommended varied research to ascertain the prevalence and impact of NCBPs in the building supply chain. This research should be independent and thorough, using different modes of collection to increase the quantity and quality of information obtained and analysed. The research could be conducted by a higher education or research organisation e.g. the Sustainable Built Environment national research centre (SBEnc), a body that emphasises industry-government-research collaboration. Research findings could be provided to the BMF through the SOG for consideration about any actions (including regulatory changes) that are required.

Areas of research may include:

PHASE	FEATURES
Retrospective examination	<ul style="list-style-type: none">• Identify known recent significant incidences of NCBPs within the Australian building and construction supply chain and investigate the circumstances surrounding the product entering the chain.• This could include:<ul style="list-style-type: none">– examination of the product– establishing the product lifecycle through the supply chain from point of manufacture through to point of entry (if not domestically produced), installation and ultimate failure– an investigation to obtain all the factors that contributed to the product entering the market– calculating the total cost implications (e.g. economic, social and legal)– interviews with relevant regulators, importers, retailers, consumers, contractors and manufacturers where relevant.

	<ul style="list-style-type: none"> • This work will give insight as to where in the supply chain intervention could have occurred and what the roles and responsibilities of each participant along the supply chain are or should be.
Future data collection	<ul style="list-style-type: none"> • There are a number of potential barriers that prevent data collection in Australia. Those identified by the SOG are outlined in the gaps and weaknesses section of this report. • Identifying these barriers, subsequent research and mapping of a framework for data collection related to NCBPs may increase investigations. Enforcement actions may encourage information sharing; collaboration between jurisdictions; and inform future policy directions. • Data collection options could include: <ul style="list-style-type: none"> – obtaining data from legal cases where a NCBP was found – the use of data from other countries – obtaining data from regulators regarding complaints and any actions taken – collaboration with builders – collecting data on the percentage of products that currently demonstrate conformity e.g. those that have already received third party certification.
Academic research	<ul style="list-style-type: none"> • The SOG undertook a desktop literature review. • More detailed investigation undertaken by an independent research centre would be able to produce quantitative, empirical, peer-reviewed research and longitudinal studies. • This could include research into the occurrence and impact of NCBPs in the building supply chain; regulatory and non-regulatory options to address NCBPs; and any stakeholder consultation that may be required. • The research could also identify: <ul style="list-style-type: none"> – total cost implications associated with the failure of building materials – the potential economic, social and legal costs of proposed actions to address non-conformity – gaps between consumer and building laws – international regulatory issues regarding building code conformity – training and ongoing professional development needs of building surveyors and builders.
Market testing	<ul style="list-style-type: none"> • The SOG received a number of reports and claims of NCBPs currently in the marketplace. • The SOG recommended that it would be beneficial to examine a number of randomly selected products and independently test these to determine whether they meet the claims made regarding their conformity with labelling, third party certification or other requirements. • It is suggested that this research initially focus on high risk products.
Evaluation of risk	<ul style="list-style-type: none"> • The SOG was not able to readily identify an independently researched risk matrix for building products to be able to draw relevant conclusions about health, safety, life, legal and economic risks and their consequences for industry and the community.

- A product vulnerability index could be developed that includes information such as regulatory requirements, building product properties, risks associated with different building classes, potential consequences of building product failure, supplier performance, failure records and associated costs, and levels of trust.
- Risk mitigation strategies could also be developed and validated.

This proposed strategy is *proactive* in nature and will address 7.1 Evidentiary issues - Lack of clear and independently verified evidence and 7.1 Evidentiary issues - Barriers to reporting or collecting data.

Recommendation 7

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.

Industry has an important role in preventing NCBPs making their way into the Australian building product supply chain and being used in building and construction.

To date, industry organisations have raised concerns about perceived penetration of NCBPs in the Australian building product supply chain. In 2012 the HIA suggested a product register be created to assist manufacturers and suppliers listing their products and providing compliance information to the marketplace. The HIA sought funding from the Federal Industry Innovation Fund to continue this work; however this fund was not retained after the 2013 Federal election.

Industry organisations have developed educational and best practice documents for their members, providing a range of information on what to look for, request and consider. This assists in ensuring that the products used in the building industry are conforming, compliant and reliable e.g. the HIA and MBA have a number of information sheets available on their websites.

There have been a number of industry reports on NCBPs and member surveys have been undertaken by the HIA, Master Builders (Qld) and the Ai Group. The Construction Product Alliance has also developed an action plan related to NCBPs, with industry task groups formed to investigate the five areas of research, certification, surveillance, engagement and education¹⁷.

A number of building and construction product industry associations also choose to operate certification schemes to assist their members in offering high quality and conforming products to the market. This assists building industry participants to reduce the risk of selecting NCBPs.

These essentially self-regulatory industry schemes have a number of positive benefits:

- participating manufacturers or suppliers may be seen more favourably by retailers and/or consumers
- confidence may be improved in a particular industry where a scheme operates

¹⁷ <http://productalliance.com.au/en/What-we-do/Action-plan.aspx>

- industry has greater scope to influence and raise standards without regulatory intervention.

Recommendation 8

Approve the release of a consultation draft of this report for stakeholder consultation following the Building Ministers' Forum's endorsement of the Working Group of Senior Officers' recommendations.

Appendix 1 –Action taken by industry and government

DATE	MILESTONES
March 2012	HIA conducted an online survey of its members regarding building products and held a national summit <i>Building Products: A compliance free zone?</i> ¹⁸
November 2013	Release of Ai Group Report “The quest for a level playing field: the non-conforming building product dilemma.”
March 2014	National industry forum convened to discuss Ai Group Report. Construction Product Alliance formed.
30 May 2014	BMF discussed the NCBP issue.
17 June 2014	Master Builders Queensland published the results of a member survey on the NCBP issue.
20 August 2014	Master Builders organised a Non-conforming Products Queensland Forum.
1 September 2014	Australasian Procurement and Construction Council (APCC) released the <i>Procurement of Construction Projects: A guide to achieving compliance</i> . A second edition was released in November 2015.
26 November 2014	The Honourable Bob Baldwin MP, then Parliamentary Secretary to the Minister for Industry, convened an industry roundtable on NCBPs.
20 April 2015	Industry Non-conforming Products Queensland Forum held.
7 May 2015	Queensland industry representatives provide a Queensland proposal on NCBPs to the Parliamentary Secretary for Industry, Innovation and Science.
23 June 2015	The Senate referred an inquiry into NCBPs to the Senate Economics References Committee. The inquiry is due to report by 10 May 2016.
31 July 2015	The BMF asked the ABCB to investigate options for a possible mandatory third party certification scheme in relation to non-compliant building products and established the SOG to investigate strategies to address NCBPs.
19 February 2016	<p>The BMF agreed in-principle to:</p> <ul style="list-style-type: none"> • work cooperatively to implement a range of measures to address safety issues associated with high risk building products • the ABCB further developing actions to address the wider issue of non-compliant use of building products - this is to include senior officers working with the ABCB to review the NCC related to high risk building products with a report to be provided to the next BMF • the strategies set out in the SOG report aimed at addressing the risks associated with NCBPs e.g. improving intergovernmental cooperation; enhancing industry and consumer awareness of NCBPs; and establishing information sharing between the Commonwealth, states and territories with a resolution to fast track and report within two months • in-principle support for improvements to the regulatory framework to enhance the powers of building regulators to respond to instances of NCBPs; develop education strategies to better inform consumers and building industry participants; and encourage greater responsibility in the safe use of building products.

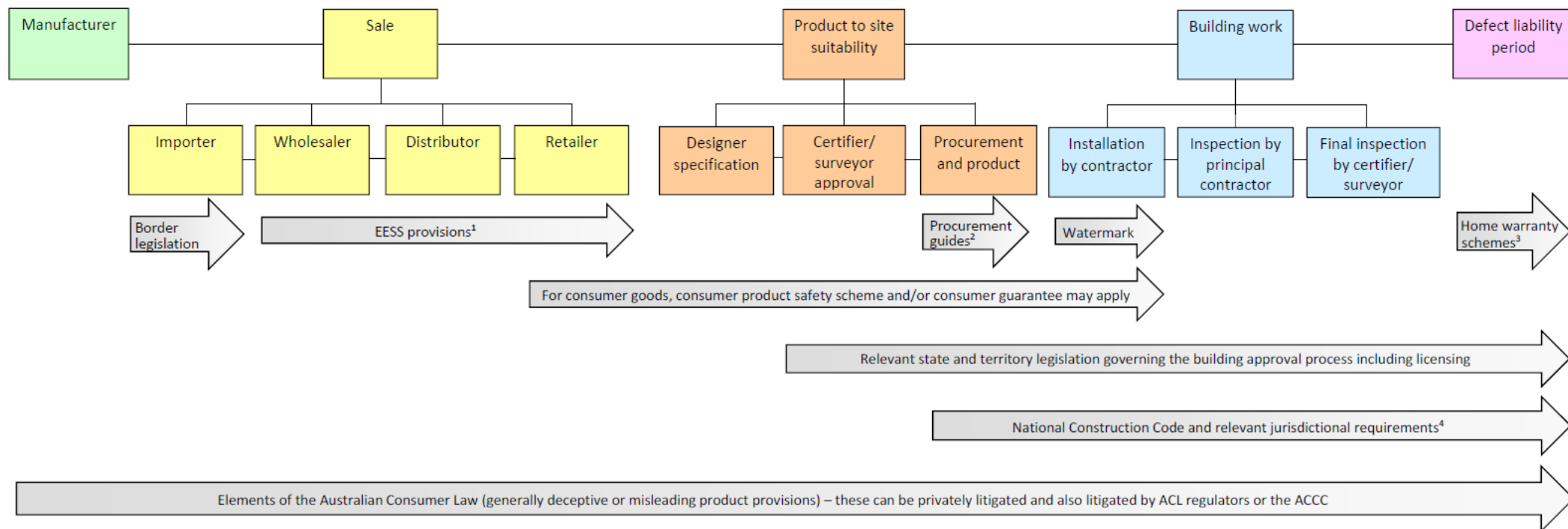
¹⁸ https://hia.com.au/~media/HIAper cent20Website/MiniSite/Summit/PDF/Archived/Building_prod_Summit.aspx

Appendix 2 – Desktop analysis of Senate Inquiry submissions

ISSUE	KEY COMMENTS FROM SUBMISSIONS
Workplace safety risks	While these are obvious, there are no cited injuries or deaths.
Public safety risks	While these are obvious, there are no cited injuries or deaths. That the Lacrosse Docklands fire had no severe injuries or fatalities was arguably luck and sprinklers
Economic affects e.g. local suppliers bear the costs of investigating fraudulent certificates, unfair playing field, significant repair costs	No hard data on fraudulent (as opposed to deficient) certificates. Some examples of false markings on products but most certification is obviously first party only.
Certification fraud (and will still be an issue if mandatory certification is introduced)	One plywood example given. Most non-conforming building products seem to be unlabelled or first party certified.
Application of recall process to components of buildings	This needs better coordination.
Level of surveillance	There is no ability to spend the effort required on any batch of goods to make this worthwhile. Only a reactive approach is affordable.
Level and consistency of enforcement	This is a major theme and the extent of the current problem largely flows from the existing system not being enforced.
Consumer impacts: inadequately informed / costly dispute process / increased costs	These also affect parties who did not build but bought later e.g. tenants and visitors.
Inadequate information / evidence to inform actions	Any certifier without evidence to satisfy themselves should not certify. Commercial imperatives risk driving compromises into the only point of regulation.
Builder / building surveyors/certifiers inappropriately shoulder the burden	Some certifiers feel pressure to balance statutory obligations to ensure buildings are safe and fit for purpose, with business pressures. Certifiers are

	not able to fully research or test suspect products or suspected fraudulent certificates.
Current conformity/evidence assessment process is inadequate	The builder is not always told what AS applies, does not always check it or the plans against the product delivered and the certifier is left with ordering them to remove it or accepting it under NCC clause A2.2(a)(vi).
No overall visibility of the supply chain	The supply chain is probably fairly short. The size and status of any supplier is unknown to the consumer.
Inadequate testing	Move to a 3 tier system e.g. EESS.
Inadequate accountability	Move to a 3 tier system e.g. EESS.
Product substitution	The buyer needs to specify what they want and to check they get it.
Inadequate legislative and educative flexibility to adapt to new building technologies/practices and a global market	If anything the current system is too flexible at the lower end.
Inadequate whistleblowing options	
Inadequate Australian Standards	Review them all with a view to ensuring they properly deal with non-conforming building products.

Appendix 3 – Building product supply chain



¹ EESS provisions are adopted under the relevant state and territory legislation. It is illegal to sell an electrical product that does not comply with the scheme.

² Only mandatory for government projects. The APCC guideline also provides principles that are not mandatory but are endorsed by state and territory governments.

³ Each state and territory has differing home warranty schemes (these generally only cover buildings up to 3 storeys). NSW has passed legislation that will increase protections for owners of class 2 buildings involved in a strata title scheme. Other relevant state and territory legislation covering post building issues and requirements may also apply.

⁴ For example, final inspection of installed product.

Glossary

ABCB	Australian Building Codes Board
ACCC	Australian Competition and Consumer Commission
ACL	Australian Consumer Law
Ai Group	Australian Industry Group
APCC	Australasian Procurement and Construction Council Inc.
BCA	Building Code of Australia
BMF	Building Ministers' Forum
COAG	Council of Australian Governments
CROSS	Confidential Reporting on Structural Safety
DIBP	Department of Immigration and Border Protection
EESS	Electrical Equipment Safety System
HIA	Housing Industry Association
ICB	Independent Compliance Body
QBCPC	Queensland Building and Construction Product Committee
MBA	Master Builders Australia
NATA	National Association of Testing Authorities
NCC	National Construction Code
SA	Standards Australia
SOG	Working Group of Senior Officers