



File No. DOIA 1718-1450

10 MAY 2018

Mr Phil Pennington
phil.pennington@radionz.co.nz

Dear Mr Pennington

Thank you for your email of 11 April 2018 requesting the following information under the Official Information Act 1982 (the Act):

Clarification around the report in the SST quoting Anna Butler saying the ministry is in the early days of a review of New Zealand's building product regulation and assurance systems, including:

- *Releasing the latest report or advisory done under the piece of Nick-Smith-ordered work*
- *Advise what has become of Dr Smith's ordering that 3rd party accredited testing of all critical building products be looked at with a view to possible adoption*
- *What parts of any recommendations from that previous review will be covered in the new review*
- *Also pls detail the best estimate possible or firm figure of what the ministry has spent so far on the review ordered by Nick Smith*

I will respond to your request in four parts, relating to the four points in your email.

In response to the first part of your request, one document has been found within scope and is being released to you. Please find this document attached. Please note some information has been removed as it falls outside the scope of your request, and some information has been withheld under the following section of the Act:

9(2)(ba)(i) to protect information which is subject to an obligation of confidence and disclosure of which would be likely to prejudice the supply of similar information, or information from the same source, and it is in the public interest that such information should continue to be supplied.

In response to the second part of your request, the work on third party testing requested by the then Minister for Building and Construction, Hon Dr Nick Smith, in 2016 was included in the scope of a wider building products assurance review discussion with the then Minister on 23 June 2017. No decisions were made by the Minister following this meeting. No further advice was sought before the 2017 election.

In response to the third part of your request, following the change in Government, the Minister for Building and Construction, Hon Jenny Salesa, has directed MBIE to carry out a review of the building product regulatory and assurance systems.

Reliable and fit for purpose building products are central to the safety, durability and affordability of buildings. A risk-based product assurance-system is important to a high-performing Building Regulatory System.

The product-assurance system is complex – it extends from product design, manufacture and supply through to specification of products for use in building work, and their installation and maintenance. Product supply chains are national and international; as are the stakeholders involved in the process.

The Minister has directed that the review follow a robust and consultative process that identifies options for change. Any changes to a regulatory environment need to be carefully considered.

Due to the complex nature of the system, the review is expected to take 18 months, including a potential legislative process. Because work was never progressed on the previous review and the current work programme will be determined after engagement with the industry and wider sector any similarities or differences will emerge in time.

The fourth part of your request is refused under section 18(g) of the Act, as the information requested is not held by MBIE.

In terms of section 9(1) of the Act, I am satisfied that, in the circumstances, the decision to withhold information under section 9 of the Act is not outweighed by other considerations that render it desirable to make the information available in the public interest.

You have the right to seek an investigation and review of my decision by the Ombudsman, in accordance with section 28(3) of the Act. The relevant details can be found at:

www.ombudsman.parliament.nz

Yours sincerely



Anna Butler

General Manager, Building System Performance
Building, Resources and Markets, MBIE

Inside/outside regulation: the double life of building products

The Building Act is focused on building work and the performance of building practitioners.

This means it can be hard to judge the performance capability of a product. A product's compliance with the Building Act and Building Code usually depends on the use of the product and how it is installed.

Importantly, a raft of other regulatory and non-regulatory measures apply before a building product gets to enter the building regulatory system. These can include:

- voluntary use of New Zealand or international Standards for manufacturing products
- consumer and trader legislation such as the Fair Trading Act, requiring accurate statements about products and what they can do
- guidance from MBIE on voluntary product compliance documentation – product technical statement
- voluntary use of the CodeMark certification process or independent conformance assessment such as BRANZ.



CodeMark

Other Jurisdictions

Australia has a similar building regulatory system to New Zealand

- Regulation focuses on ensuring building work (including the use of products) complies with the performance-based building code.
- Generic consumer law prevents misleading conduct in trade.
- Insurers bear some liability that is borne by BCAs in New Zealand through generally compulsory Guarantees or Insurance Products (except in Tasmania).
- CodeMark is a Trans-Taman voluntary scheme for certifying building products as code-compliant.
- As Australia and New Zealand have different building codes, a CodeMark certificate only applies to one country.
- CodeMark Australia is changing its rules, resulting in a different scheme from the existing New Zealand scheme.
- Implications of this will be considered in MBIE's current review of CodeMark (more information on this review is provided on the next page).

Issues with non-compliant building products in Australia

In 2014, "Infinity" electrical cable was recalled as it posed a serious risk. Installed in up to 40,000 buildings, the recall costs were estimated at over \$160 million. In addition, non-compliant external cladding allowed fire to spread up 16 floors of the Lacrosse apartment building, placing inhabitants at risk. These issues contributed to sector concern about non-compliant building products. A report was produced by an Australia-wide "Senior Officers' Group", in support of Building Ministers and a Senate Inquiry.

The report identified ambiguity about responsibilities, a lack of evidence and difficulty enforcing regulation. It recommended in principle:

- education campaigns on the safe use of building products
- forums and data sharing between regulators
- research into product performance e.g. random off-the-shelf sampling of building products
- gaining additional powers e.g. sampling existing buildings, requiring information from manufacturers, recalling products
- considering the costs and benefits of mandatory third-party certification for high-risk products.

Following the report, Queensland has introduced obligations for those in the supply chain to ensure a building product is used in a conforming way and information on how to do this is provided.

Party	Product Roles & Responsibilities
MBIE	<ul style="list-style-type: none"> • Central regulator and steward for the Building Regulatory System, including the Building Act and Building Code. • Operates the warnings and bans processes for building products. • Owns and administers the voluntary CodeMark building product certification process. • Standards New Zealand: Manages the process for developing and reviewing voluntary standards by a balanced committee of experts, using a consensus-based process consistent with international principles.
Commerce Commission	<ul style="list-style-type: none"> • Investigates and prosecutes breaches of the consumer and competition legislation (eg, Fair Trading and Commerce Acts).
Territorial Authorities/ Building Consent Authorities	<ul style="list-style-type: none"> • Runs the building consent process. • Approves building work, including use of products. • Inspects compliance related to consents. • Must accept CodeMark certified products as compliant with the Building Code.
Manufacturers/ suppliers	<ul style="list-style-type: none"> • Develop building products and/or bring products to market in New Zealand. • Can provide technical and installation information related to their products. This must be accurate, especially information about compliance with the building code.
Architects/ designers	<ul style="list-style-type: none"> • Produces building designs/plans, which can include the consideration and selection of building products. • Provides advice to tradespeople and homeowner/consumers on the use of building products in their building designs/plans and consents. This information must be accurate when advising about product compliance with the Building Code.
Tradespeople	<ul style="list-style-type: none"> • Conducts the building work and provides feedback to architects/designers and advice to homeowners about products. • Will be the lead person on any product substitution and related discussions with BCAs and BCOs. • Subject to implied warranties and defect remedy requirements in the Act, & the LBP scheme and disciplinary penalties.
Homeowner	<ul style="list-style-type: none"> • Engages and contracts building work, and is responsible for consents, approvals and certificates. • Can make decisions on building products based on advice provided by any of the parties listed above. • Maintains upkeep of built property and seeks remedy for any problems with building work, including product failure.

Some jurisdictions directly regulate building products

Schemes from two jurisdictions are shown below that place requirements on the manufacturing and sale of products.

In both cases, regulatory requirements are determined based on the level of risk associated with a product.

The local building and construction sectors recognise the value of the schemes, albeit with some concern about compliance costs.

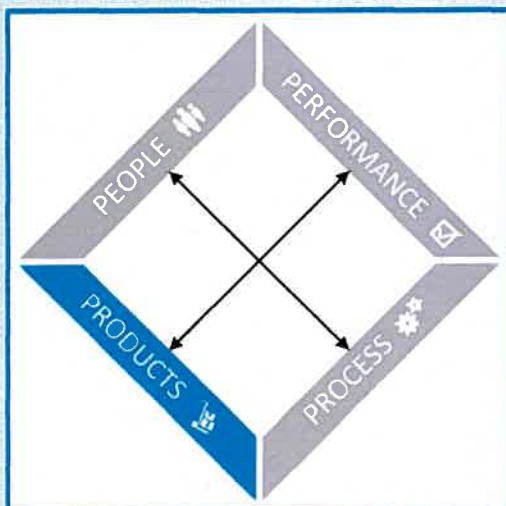
	WaterMark (Australia, plumbing products)	CE Mark (EU, all construction products)
Products must feature scheme mark	Higher-risk	All
Declare performance against standards	Higher-risk	All
Quality assurance requirements	Higher-risk	All
Warranty requirements	Higher-risk	Higher-risk
Third-party certification	Higher-risk	Higher-risk
Factory inspection and surveillance	Highest-risk	Highest-risk

MBIE's products complaints email has provided limited information about the overall state of building products

- MBIE has insufficient evidence to form strong conclusions about the impact of non-compliant building products in New Zealand.
- In 2016, MBIE launched a building products complaints email to improve its evidence (and take action where necessary).
- However, complaints received have made a limited contribution to MBIE's evidence around non-compliant building products. Few complaints have featured evidence of serious product issues, and subsequent requests for specific information have often not been met.
- MBIE is also constrained by a lack of powers to investigate product issues beyond asking for information to be voluntarily provided.
- Complaints received suggest the regulatory system is not fully understood by the sector. A number of complaints have concerned:
 - products that do not comply with well-known, but optional, compliance pathways (ie, non-compliance with a product standard does not necessarily mean non-compliance with the Building Code)
 - a lack of information from suppliers demonstrating their products comply with the Building Code.

Complaints received

- More serious complaints we have received included the following cases.
 - A complaint about the performance of ShadowClad external cladding in a school. The Ministry of Education estimates a cost of \$1.3 billion to remedy leaky school buildings using ShadowClad. MBIE has not investigated further, as the issue is before the courts.
 - A complaint alleging misrepresentation of the brand of external cladding. Complaints about misrepresentation are referred to the Commerce Commission.
- Top sources of complaints are building owners, industry groups, competitors and tradespeople.
- Products with higher levels of complaints are exterior cladding (10), timber (8), plumbing (8) and glass (7).



Breakdown of complaints

Source of Complaint	Number	Type of Product	Number	Outcome of Complaint	Number
Building Owner	19	Exterior Cladding	10	Monitoring, no evidence yet of systemic problems	7
Industry Group	13	Timber	8	No response received to request for information	5
Competitor	9	Plumbing	8	Guidance to be issued to industry/public	4
Building Consent Authority	6	Glass	7	No evidence of non-compliance with the Building Code	3
Designer/Architect	5	Heating	6	Complaint/allegations unsubstantiated	3
Builder	5	Insulation	6	Complaint not product specific (general in nature)	3
Engineer	3	Wall and Wall Linings	5	Issue is due to incorrect installation or lack of maintenance	2
Building/Property Manager	3	Steel	4	Lack of product technical information - guidance provided to supplier	2
		Windows, Doors and Joinery	3	Non-compliance with common pathways - AS/VM and/or Standards	2
		Fixings and Fastenings	3	Product no longer available	2
		Safety Products (Fire)	3	Withdrawn by person who raised it	2
		Flashings	3	Issue is before the Courts	1
		Roofing	3	Matter for Commerce Commission (e.g. misrepresentation)	1
		Waterproofing	2	Referred to Standards NZ (complaint about Standards)	1
		Electrical	2	Resolved between supplier and person who raised issue	1
		Safety Products (Access)	1	Referred to Product Certification Body	1
		Prefabricated Buildings/ Components	1	Total	40
		Foundation Systems	1	Source of product	Number
Total	76	Total	76	Imported product	29
				New Zealand manufactured product	28
				Total	57

The Path Forward: The Building Products Review Project

MBIE's objectives in the products space

The building and construction sector needs building products that are:

- reliable
- fit for purpose
- competitively priced.

MBIE is at the early stages of understanding problems with building products

- There are ongoing issues and concerns with building products, but a real lack of systemic evidence about those problems.
- The system is not well placed to respond to new building products and building product systems.
- MBIE lacks direct regulatory levers (beyond warnings and bans), or a framework to identify higher-risk products or products commonly used in higher-risk applications.
- Issues with existing CodeMark scheme highlighted by review (see box below).

Key challenges relating to products

- It is generally difficult to assess product compliance before a product is installed or used.
- Overseas jurisdictions are facing similar issues and challenges.
- There are volume and scale issues – eg, sector capacity to deliver additional testing or certification if required.
- Any new regulatory requirements will have impact on price and competition, and could flow into affordability.

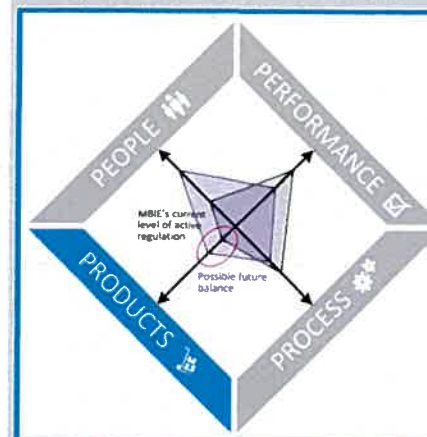
A fundamental review of settings has started

- Start by continuing to understand the gaps in the system and to develop a risk framework.
- Will need to investigate a full range of regulatory and non-regulatory levers (eg, greater use of third-party certification and conformance requirements), and work to:
 - analyse the feasibility and cost-benefit analysis into the impact any new or improved levers might have on competition; and
 - consider ways to improve the recognition of internationally certified building products.

Examples of issues MBIE will consider – seeking your views on where MBIE should focus

- To what extent is there an appetite for additional direct regulation of products?
- Should we introduce requirements for manufacturers or suppliers to provide information about products and how they can comply with the Building Code?
 - current legislation only requires that any information provided is accurate; and
 - additional requirements are likely to increase prices or reduce the number of products on the market.
- Should MBIE have improved ability to investigate products issues?
 - MBIE has limited levers to investigate products when issues are brought to its attention and limited ability to understand how widespread issues are;
 - sampling or investigating products could be highly resource intensive and will increase expectations on MBIE to respond, which may undermine other processes

Out of Scope



CODEMARK

MBIE commissioned a review of the CodeMark scheme

- The review found high levels of support for a scheme like CodeMark, however, it was recognised the scheme needs improvement to function effectively.
- Concerns included low uptake (approx. 129 CodeMarks granted) and varying confidence in the scheme.

MBIE's response focuses on medium term work to improve the effectiveness of CodeMark

- Improving the operation and management of the scheme, including monitoring and reporting requirements
- Reviewing the Scheme Rules to improve the quality of certification (eg looking at what information is included on a certificate)