

Advisory Notices are issued to assist in the interpretation of the Planning, Development and Infrastructure Act 2016

PROFESSIONAL PRACTICE: Determining the suitability of materials in accordance with the National Construction Code

This Advisory Notice provides information about a recent decision made by the Federal Court of Australia regarding compliance with the 'evidence of suitability' requirements in the National Construction Code (NCC), in this case NCC 2019 – Amendment 1.

Background

The NCC provides specific direction on what 'evidence of suitability' can include. Part A5 (A5) outlines the methods used to demonstrate suitability for Volumes One and Two. Part A5.0 (A5G1) requires that the product must be fit for its intended purpose - which requires that it has evidence of suitability under Parts A5.1 (A5G2) and A5.2 (A5G3) for Volumes One and Two; and that it is constructed or installed in an appropriate manner.

The corresponding clauses for NCC 2022 appear in italics throughout this Notice for information purposes only and were not the subject of the Federal Court of Australia decision.

Recent Federal Court of Australia decision

A recent Federal Court of Australia decision in the case [Pirmax Pty Ltd v Kingspan Insulation Pty Ltd \[2022\]](#) highlights the importance of having suitable fire test reports to confirm compliance with the National Construction Code (NCC)*.

This decision considered compliance with clause C1.10 (C2D11) of the NCC 2019 Volume One Amendment 1 as a Deemed-to-Satisfy Solution. Clause C1.10 (C2D11) provides that internal linings, materials and assemblies are subject to meeting the fire hazard properties outlined in Specification C1.10 (Specification 7) which sets out the 'group number' that materials must achieve as determined in accordance with AS 5637.1-2015.

Part 5 of AS 5637.1-2015 provides requirements for testing to AS ISO 9705 -2003 to determine the group number, and clause 5.2.1 of that part states that "testing of **wall or ceilings alone** shall not be used for determining group number...".

The Court determined that it follows that where an internal lining, material or assembly has not been tested to AS ISO 9705-2003 in accordance with clause 5.2.1, it cannot be considered as achieving compliance with C1.10 and is not a Deemed-to-Satisfy Solution under the NCC 2019 Amendment 1.

Only materials that can be verified by one or more of the acceptable methods of suitability under NCC Part A5.2 (A5G3) can be accepted/used as a Deemed-to-Satisfy Solution.

* The referenced case has been included for information purposes only and the finding of the Federal Court of Australia may be subject to appeal.

Supply chain responsibilities

The Federal Court decision is a timely reminder for designers, builders, approval authorities and suppliers to exercise due diligence when considering the suitability of materials, and to ensure that the selection and use of materials is supported by the necessary documentation to verify compliance with the NCC 2019 Amendment 1.

Section 216 of the *Planning, Development and Infrastructure Act 2016* also states that any person, (including a designer, manufacturer, supplier or installer) that incorporates an item or material in a building that is found not to comply with the Building Rules, may be guilty of an offence.

Additional information

The Australian Building Codes Board produce a [Handbook: Evidence of suitability](#) (the Handbook) to assist NCC users better understand and apply the evidence of suitability provisions. The Handbook explains the various forms of documentary evidence that can be used to support a claim that a material, product, form of construction or design meets a Performance Requirement or a Deemed-to-Satisfy Provision.

South Australia will monitor whether this recent Federal Court of Australia decision will be appealed and will work with other States and Territories to understand what impacts the court decision may have on new and existing buildings, and parties in the building supply chain.

Further information

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This Advisory Notice is for general information only and should not be relied upon as legal advice or an accurate statement of the relevant legislation provisions. If you are uncertain as to your legal obligations, you should obtain independent legal advice.