

MASTER BUILDERS SUBMISSION

Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and other matters) Amendment Bill 2017

A. SUMMARY

1 Master Builders strongly supports the objects of the Bill. The prevalence of non-conforming products
2 is a major concern for the Queensland building and construction industry.

3 The proposed legislation addresses a current gap in enforcement in providing for a “building product
4 regulator”. Consumer products are well provided for under Australian Consumer Law, as is the
5 construction of buildings under the *Queensland Building and Construction Commission Act 1991* and
6 the *Building Act 1975*, which calls up the National Construction Code (NCC).

7 The community and the industry expect that all building products sold are fit for purpose, however,
8 this expectation is not always met. This legislation is an important first step towards meeting that
9 expectation.

10 Master Builders supports the overarching framework provided in the Bill, as it:

- 11 • creates a chain of responsibility across the building and construction supply chain, introducing
12 accountability for building product designers, manufacturers and suppliers
- 13 • imposes specific duties on all parties in the supply chain that will help ensure only conforming
14 building products are supplied and that they are installed in the right way
- 15 • imposes appropriate penalties when the parties fail to meet their duties
- 16 • provides the Queensland Building and Construction Commission (QBCC) and the Minister with
17 the necessary range of powers to enable them to target all of the parties in the supply chain, and
18 not just licensed contractors who sit at the end of the chain.

19 However, we believe there are a range of concerns in the Bill that need to be addressed:

- 20 • The legislation includes provisions concerning safety that duplicate existing controls defined in
21 workplace health and safety legislation. We are concerned that two regulators sharing
22 jurisdiction for the same incident may form different conclusions. The double reporting will also
23 result in unnecessary red tape.
- 24 • There are definitions concerning safety that need to be provided and made consistent with other
25 regulations. For example, there is no definition of “serious risk” even though it can lead to a loss
26 of a licence. A non-conforming building product is vaguely defined as one that “is not safe” and
27 then specifically defined as one that meets the relevant regulatory provisions. Safety underpins

28 the relevant regulatory provision. This duplication is therefore unnecessary and will result in
29 confusion.

- 30 • The architects, building designers and engineers who specify building products must be explicitly
31 included in the chain of responsibility.
- 32 • Information requirements need to be practical and workable (recognising that there are 4,000
33 building products installed in an average home). For installers (contractors), the duty to provide
34 product information to owners should link to the existing building certification process.
- 35 • In determining who is held accountable in the event of a breach, it needs to be clear that the
36 parties can rely on the undertakings of those further up the chain.
- 37 • It will be important that the QBCC is appropriately resourced to properly undertake this role. It is
38 unreasonable to expect licence holders to cross-subsidise a product compliance regime. Further
39 to that, given the likely significant cost, it is necessary that a Regulatory Impact Statement be
40 undertaken.

41 Beyond the Bill, the regulation needs to provide the detail on the “required information” to be
42 shared across the chain and how it can be made robust and reliable. It needs to be provided by an
43 independent third party.

44 A number of third party product certification schemes already exist, including Watermark, CodeMark
45 and schemes run by manufacturer industry associations. These need to be relied on and could be
46 made more effective by bringing them together into a single third party certification system. That is
47 a system which is comprehensive, easy to navigate and regulates the minimum assessment and
48 auditing standards. The details of how this would work are provided in **Appendix A**.

B. COMMENTS ON THE PROVISIONS OF THE BILL

49 Our detailed response to specific provisions in the Bill is as follows. For clarity we have provided a
50 separate section outlining our concerns with the provisions dealing with safety.

Objects of the Act (Part 2, Clause 4)

51 Master Builders supports the expanded objects to “regulate building products”.

Committees (Part 2, Clause 5)

52 Master Builders supports the introduction of the Building Products Advisory Committee. In tackling
53 the problem of non-conforming building products the sharing of information is vital and must be
54 brought together in a central point.

55 Industry holds much of that information and has an essential role to play in the implementation of
56 any actions. They should therefore be represented on the Committee.

Exchange of information (Part 2, Clause 8)

57 Master Builders supports the exchange of information amongst regulators and relevant agencies
58 provided current proceedings are not affected and privacy considerations are addressed.

Role of the Commissioner (Part 2, Clause 6)

59 We support the Commissioner having power to “publish information about building products”. This
60 information must be timely widely communicated. Too often the regulator is aware of a product
61 that that is not fit for purpose and because that information is not shared it continues to be installed.

What is a building product and non-conforming building product (Part 2, Clause 11)

62 We welcome a definition of non-conforming building product that links the product with its intended
63 use. Separating a product from how it is intended to be used has been a loop-hole that has allowed
64 products that are not fit for purpose to be sold and installed.

65 However, within the definition part 74AB (2)(a)(i) “is not, or will not be, safe” should be removed.

66 Safety is addressed in the next part (ii) by saying “does not, or will not, comply with the relevant
67 regulatory provisions.” Amongst these regulations are the NCC and the *Electrical Safety Act 2002*
68 which have safety at their core. Compliance, that is safety, will be better achieved by reinforcing the
69 existing regulations, rather than introducing a new, difficult to measure and difficult to interrupt
70 requirement.

Duties (Subdivision 2)

Chain of Responsibility (74AE)

71 The “chain of responsibility” is the right approach as it clearly provides obligations to building
72 product manufacturers, suppliers, importers etc. The providers of building projects need to be held
73 to the same standard licence holders.

74 The role of specifiers (architects, building designers, engineers) needs to be explicitly defined in the
75 chain. As the legislation is currently drafted these important roles are not included.

76 Master Builders would also like to better understand how the chain of responsibility will work in
77 cases where building products are brought in from outside Queensland. The industry operates in a
78 global market and there are few building products that have their entire supply chain in Queensland.

Primary duty of person in the chain of responsibility (74AF)

79 Under this section each person in the chain has an equal and shared responsibility for ensuring “a
80 product is not a non-conforming building product for an intended use”.

81 Within the chain, accountability must be clearly allocated. Those in the chain must be able to rely on
82 the undertakings of those further of up the chain. Accountability needs to be allocated to the first
83 person in the chain who breaches their duty.

84 Installers (contractors) at the end of the chain should not continue to carry the brunt of the
85 responsibility even when they have undertaken due diligence and relied on information in good faith.

Additional duty relating to accompanying information (74AG)

86 This is an important requirement and something that has been missing in many cases where there
87 has been a product failure.

88 The Bill recognises the different information requirements of those in the chain of responsibility and
89 the owner of the building. The distinction is important. Information requirements for licensed
90 contractors (installers), are already comprehensively addressed by way of the building certification
91 process. This already provides the necessary information to building owners and should continue.

92 On the other hand, new measures to ensure manufacturers and suppliers are also providing
93 appropriate information are necessary.

94 The exact nature of the “required information” must be practical and reliable. For the contractor
95 (installer) this needs to link into the certification process. For the manufacturer it needs to be
96 generated by an independent third party. This has not been detailed in the Bill and needs further
97 consideration.

Duty of executive officer of company (74AI)

98 Individual licence holders are already held to account. The same should apply across the chain. The
99 expectation on executive officers to follow a process of ‘due diligence’ is reasonable.

Offences relating to duties (Subdivision 3)

Failing to comply with duty (74AJ)

100 Provides for a significant penalty of a 1000 penalty units. This is consistent with other related
101 penalties and is reasonable.

Duty about representations about building products (74AK)

102 The legislation is silent on the extent that a person in the chain can rely on representations provided
103 to them from those also in the chain. This is a critical omission that needs to be addressed. Those in
104 the chain must be able to rely on the undertakings of those further of up the chain.

Duty to notify non-conforming building product (74AL)

105 Master Builders supports the duty to notify the commission if they become aware or have reason to
106 suspect that a building product is a non-conforming building product for an intended use. As the
107 responsible person has a duty to provide this information within two days, we would expect that the
108 commission has a similar obligation to act on the information in a timely manner. It is important that
109 non-conforming building products are not only found early but also removed from the supply chain
110 early.

111 We also support the requirement that a regulator be notified in the case of a “notifiable incident”.
112 In the interests of joined up government this should be to either the commission or Work Safe
113 Queensland. Requiring two notifications to two Queensland regulators will at best create
114 unnecessary duplication and worst conflict and confusion in the required action.

115 This duty needs to be time bounded. A person in the chain cannot be expected to maintain records
116 of their projects for an indefinite period.

117 We welcome the expanded powers for the commission to direct anyone in the chain of responsibility
118 to remove or minimise safety risks and not just licensed contractors.

Duty to notify notifiable incident (74AM)

119 This section appears to be a repeat of the earlier section, *74AL Duty to notify non-conforming*
120 *building product*, with the only exception being the penalty units which are 50 and 100 respectively.

121 For clarity and ease of interpretation this duty would be better expressed once in *Subdivision 2*
122 *Duties*.

Commission may require remedial action (74AN)

123 We welcome the expanded powers for the commission direct anyone in the chain of responsibility
124 and not just licensed contractors to remove or minimise safety risks.

Ministerial recall orders (Division 4)

125 While this section details that a recall order may be made against “2 or more responsible persons”, it
126 does not set out how the commission will determine who will be accountable for a recall. Only those
127 who have breached their responsibilities under the duties should be held responsible for a recall.

128 Master Builders appreciates the need to provide “reasonable help” to the responsible person in the
129 event of a recall. It is important that privacy considerations are addressed so that there is no conflict
130 in responsibilities. Reasonable time limits must also be in place so that record keeping does not
131 become an onerous burden.

SAFETY

Exchange of information (Part 2, Clause 8)

132 Master Builders supports the exchange of information amongst regulators and relevant agencies
133 provided current proceedings are not affected and privacy obligations are addressed.

Cancellation or suspension of licence (Part 2, Clause 9)

134 We support the expansion of this provision to include any “relevant Act in relation to building work
135 carried out under the licence”.

136 We seek clarification as to what is regarded as an “offence” under each of these acts. For example is
137 a Provisional Improvement Notice or a Prohibition Notice under the *Work Health and Safety Act 2011*
138 regarded as an “offence” and therefore become grounds for losing a licence?

139 The second proposed change to Section 48 is a concern. Contractors should not be at risk of having
140 their licence suspended or cancelled unless there has been a case proven against them. The
141 principals natural justice must be upheld.

142 The current draft of the Bill does not provide this protection but rather allows the regulator to cancel
143 or suspend the licence of whoever is in control of that site if any work occurs on the site that results
144 in death, grievous bodily harm or serious risk.

145 The term “serious risk” must be defined, or preferably amended to be consistent with related terms
146 across the relevant legislation.

Notification of particular safety matters (Part 2, Clause 10)

147 Notification should be occurring once to one regulator. Requiring two notifications is an unnecessary
148 duplication that is likely to lead to unnecessary confusion and red tape. If the regulation is to be
149 successfully enforced there must be clear lines of responsibility and accountability.

Duty to notify notifiable incident (74AM)

150 This section appears to be a repeat of the earlier section, *74AL Duty to notify non-conforming*
151 *building product*, with the only exception being the penalty units which are 50 and 100 respectively.

152 For clarity and ease of interpretation this duty would be better expressed once in *Subdivision 2*
153 *Duties*.

Proper grounds for taking disciplinary action against a licensee and former licensees (Clause 13, amend s74B)

154 We support the expansion of this provision to include a “relevant Act in relation to building work
155 carried out under the licence”.

156 The second proposed change to Section 74B is a concern. Before disciplinary action is taken a level
157 culpability must be established. The principals natural justice must be upheld.

158 The current draft of the Bill does not provide this protection but rather allows the regulator to take
159 disciplinary action against whoever is in control of that site if any work occurs on the site that results
160 in death, grievous bodily harm or serious risk.

161 The term “serious risk” must be defined and be consistent with related terms across the relevant
162 legislation.

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APPENDIX A

Third party product certification

Numerous third party product certification schemes already exist of varying quality and scope. For the construction industry however, this patchwork system of assessment schemes is unwieldy.

There is great disparity amongst the schemes as to the quality of assessment, level of auditing and checking for fraudulent documentation and there are gaps. While there are very good schemes, users of the system cannot say with confidence which of the existing schemes undertakes testing to the appropriate standard and which have strong enough checks to counter misrepresentation and fraud. The complexity of the existing arrangements also renders it impossible to navigate with confidence.

There is a role for government to ensure that the individual schemes work within an overall product certification system that has a regulated framework, is better coordinated, is easier to assess the validity of compliance and access the technical information on the products that have been certified.

That is a third party product certification system that is robust, transparent, easy to navigate, covers all product types and extends to auditing, surveillance and enforcement.

Master Builders sees such a system as having a suite of third party certification schemes brought in under one umbrella. There would be an accreditation body (for example JAS/ANZ or NATA) which ensures that minimum standards were upheld and consistent. There would be a government agency with oversight of the system, responsibility for providing a single, central information portal and the authority to take enforcement action. Ideally this would be a federal agency but the Queensland government's Building Products Advisory Committee could take on the role.

This approach would allow for both consistency and flexibility across the product types, while bringing greater transparency and certainty to the process of establishing evidence of suitability.

