

SUBMISSION: QBCC GOVERNANCE REVIEW

BACKGROUND

Master Builders is Queensland's peak industry body for building and construction in Queensland and represents the interests of over 9,000 building and construction related members. Most members are licensed by the Queensland Building and Construction Commission (QBCC) and are directly impacted by its regulatory activities.

Our comments relate to all four focus areas of the QBCC Governance Review.

FOCUS AREA 1: STRATEGY AND PLANNING

Recommendation 1: industry consultation

Industry stakeholders should be consulted as part of the QBCC strategic planning process to ensure that its strategic plan targets real industry challenges and is aimed at achieving a financially viable, robust, and best practice industry.

Master Builders does not currently participate in the strategic planning activities of the QBCC. Accordingly, we are not able to offer commentary on the methodology and general approach that the QBCC takes in identifying current and future industry challenges and issues that may be relevant to its strategic plan.

However, it would seem reasonable that the QBCC should target its strategic priorities to make a positive and practical difference to the regulatory environment. Further, its strategic targets need to be focussed on addressing industry challenges and be otherwise consistent with ensuring the industry remains financially viable, robust, and committed to best practice.

Master Builders believes that the QBCC strategic planning processing would be enhanced if it considered industry views as to the current and forecasted challenges facing the building and construction sector, including its regulatory environment.

In the past, the regulator hosted a yearly QBCC and industry planning day. These planning days were particularly successful and were targeted at ensuring that the regulator's strategic planning targeted real industry challenges and was otherwise consistent with achieving a financially viable, robust, and best practice industry.

For example, the QBCC and industry planning day provided a structured forum to give QBCC, industry stakeholders and experts the opportunity to:

- Give their insights on current and pending issues likely to have major impacts on the building and construction industry regulatory and business environment.
- Discuss potential strategies to address these existing and emerging industry issues from a regulatory, co-regulatory and self-regulatory perspective.

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- Work together to ensure that the regulator's strategic plan was consistent with the objects of the QBCC Act and the need for Queensland to have a financially viable industry that strives to operate on best practice principles.

FOCUS AREA 2: CAPABILITY AND CULTURE

Recommendation 2: upskilling staff

QBCC should engage in a staff upskilling program to ensure that staff at all levels have the necessary knowledge and skills for QBCC to competently perform its legislative functions.

Since mid-2021 there has been a noticeable decline in the capability of the QBCC to perform many of its statutory functions and regulatory responsibilities. For example, over the last eight months the QBCC has:

- Ceased conducting qualification equivalency assessments for licensing applications as required under the QBCC Regulation.
- Ceased advising licensees and consumers about work that can be lawfully carried out under a licence scope of work.
- Removed all capability in its licensing functions to assist licensees and engage with stakeholder groups about licensing related technical matters associated with building construction and methods, health and safety obligations, supervision of building work, mechanical services, fire protection work and contractual arrangements.

The capability of the QBCC's compliance function to take appropriate investigative action for offences consistent with industry and community expectations has also in recent years been brought into question. For example, responses to Questions on Notice tabled in Parliament in 2021 indicate:

- In the 2019-21 financial years, 179 persons elected to have their penalty infringement notice for an offence under the QBCC Act dealt with by a court. In 99% of these cases the QBCC elected to drop the case, presumably because the compliance investigation was flawed or inadequate.
- Section 42E (*Avoidance of contractual obligations causing significant financial loss*) of the QBCC Act was inserted into the QBCC Act in 2017 to address contractors, subcontractors and consumers who breach their contractual obligations and cause significant financial loss to their corresponding contractual party. The QBCC has not undertaken any action against any contracting party under this provision. It seems likely that this may be due to the absence of appropriate skill sets to conduct the necessary investigation.

In addition, it is also evident that the QBCC has experienced major 'blow-outs' in its timeframes for attending inspections of alleged defective work. For example, Master Builders commonly

receives reports from members that the time for QBCC to attend an inspection ranges between four and six months from the date of consumer notifying the QBCC. These timeframes add unwarranted stress and anxiety to both the consumer and the builder. The delays may also result in the building defect becoming worse, which is both unfair to the builder and consumer.

Similarly, it is common for builder licence applications to take three months or more to process. Given the trade shortages in the industry at the moment, such delays are harming our industry and the community.

It is acknowledged that the above issues may also in part be caused by a lack of capacity due to staff shortages. Accordingly, in addition to skills development training, it would be appropriate to review QBCC operational staffing levels to ensure they are adequate.

Recommendation 3: customer service training

QBCC should require compliance and licensing staff to participate in relevant training programs to ensure that they develop and maintain appropriate customer service skills and engage in fair and reasonable investigative practices.

While there are many operational staff at QBCC who have sound customer service skills, it is also evident that there are staff that require upskilling.

For example, some licensing investigation officers refuse, as a matter of practice, to verbally communicate with licensees who are being investigated for licensing breaches. Specifically, these officers require all communication to be exclusively in writing. This can be particularly stressful, alienating and frustrating to affected licensees who are not used to communicating in this way or are not familiar with emails and notices that contain legal jargon, public service speak and unfamiliar legal procedure.

Master Builders is also aware that some QBCC investigators routinely cold canvass licensees about a complaint, with the telephone interview recorded. The affected licensees, many of whom have had no experience with the regulator, are caught off-guard and give evidence under duress without the benefit of legal counsel or due consideration of their rights.

Another practice by some QBCC investigators is to fail to inform licensees that the evidence supplied by the licensee in a compliance investigation for an offence is also intended to be used for a separate licensing investigation. In these circumstances the licensee typically does not afford themselves the benefit of their ordinary legal rights or consult with legal counsel because they believe that they are only likely to receive a fine or formal warning. However, the reality is the investigation may lead to them having their licence cancelled and their ability to make a living removed, regardless of whether they are fined or if no action at all is taken for the alleged offence.

For QBCC to be a respected regulator it needs to avoid any temptation to engage in unfair practices to obtain a favourable compliance or licensing investigation outcome. For example, an important part of any regulatory framework is the rehabilitation of those found in breach of the

legislation. Such rehabilitation is made far more difficult if the regulator engages in “under the table” practices to obtain the “win”.

In view of the above, it is recommended that the QBCC require compliance and licensing staff to regularly participate in relevant training programs to ensure that they:

- develop and maintain appropriate customer service skills; and
- conduct investigations in a way that is fair and reasonable to the licensee, as well as the complainant.

FOCUS AREA 3: STRUCTURE AND PROCESS

Recommendation 4: governance framework

The QBCC commission model should be disbanded and replaced by an independent office holder model located within a government department.

It is well known that the QBCC has been the subject of widespread criticism at an industry and community level, which has intensified over the last eight months. This criticism has escalated to such a level that its reputation as an effective regulator has been substantially compromised.

The reasons for the criticism have been reported in the media and include:

- Regulatory decisions that appear inconsistent with community expectations
- A perceived lack of independence of the Board
- Allegations that the regulatory operations of the QBCC are being inappropriately influenced by political considerations and vested interests of individual Board members
- The departure of many senior and experienced staff due to alleged work culture issues
- Reduced licensing and information related services to licensees and the community caused by an apparent lack of capability.

To restore faith in its regulation of the industry, it is recommended that the QBCC’s current commission model be abandoned and replaced by an independent office holder model located within a government department.

The benefits of moving to an independent office holder model within a department include:

- It would give the regulator a fresh start, including an opportunity to refocus and realign its administration, structure, culture, and regulatory priorities in line with its governing legislation
- It would remove the need for the regulator to have duplicated support services (e.g. human resources and financial administration services), thereby leading to cost savings in its administration
- It would remove the current disconnect that exists between policy development and the regulator

- The regulator head would remain independent from Government.

Notably, a regulatory office holder model is currently in place for other like industry regulators in Queensland. These regulators appear to be working relatively well when compared to the QBCC. Examples include: Electrical Safety Office, Office of Fair Trading and Office of Industrial Relations.

Under the revised model there would be no need for a governing board. However, there would still be a role for an advisory board on industry policy.

Recommendation 5: policy board to replace governing board

The QBCC governing board should be replaced by a policy board comprising wide industry representation.

In 2013 legislative amendments transitioned the former Queensland Building Services Authority (BSA) to the QBCC. As part of the transition, the regulator's Board changed in substance from a policy board to a governing board. This change in board function aligned with a government decision to remove all policy development functions from the regulator and transfer these functions to the administering department.

An issue that has emerged in recent years is that the government has appointed representatives from specific industry associations and unions (and in one case a licensed company) as members of the QBCC's governing board. These members include representatives from the National Fire Industry Association and industry unions.

Having representatives of industry associations and unions on the QBCC's governing board creates understandable distrust of the regulator. It also leaves the QBCC vulnerable to accusations of impartiality in its regulatory decision making and setting of regulatory priorities.

To preserve the public image and credibility of the regulator, it is recommended that functions of the Board should be changed to that of a policy board comprising a broader membership of industry representative groups.

Recommendation 6: change to home warranty scheme model

The Home Warranty Scheme should be administered separately from the QBCC.

The QBCC is responsible for both regulatory functions (licensing, compliance enforcement and dispute resolution) and the administration of the Home Warranty Scheme. The conflict of interest associated with the QBCC being both the industry regulator and the industry insurer continues to be an ongoing source of criticism.

To address this issue, an option worthy of policy consideration is for the Scheme to be administered separately from the QBCC. Such an approach would ensure decisions about licensing and directions to rectify building work (and the disputes that follow) have no regard to the financial impacts of those decisions on the Scheme.

Recommendation 7: remove duplicate health and safety functions

The QBCC should cease duplicating functions already provided by Workplace Health and Safety Queensland.

The principal regulator for health and safety on building sites is Workplace Health and Safety Queensland (WHSQ).

However, in 2017 the QBCC Act was amended to provide the QBCC with additional regulatory powers associated with serious risks to health and safety on a building site under a licensee's control. These amendments allowed the QBCC in appropriate circumstances to:

- Cancel or suspend a licensee's licence under section 48 of the QBCC Act, or
- Take a disciplinary action against a licensee under Part 6A of the QBCC Act.

To assist QBCC in the exercise of these new powers a statutory obligation was also placed on licensees to notify the QBCC of certain safety matters that occur on a licensee's building site (see section 54A, QBCC Act).

Unfortunately, the expanded role of QBCC in health and safety matters has resulted in both QBCC and WHSQ conducting inquiries and investigations into the same safety incident at the same time. This duplication of effort is pointless. This is particularly evident when taking into account that the QBCC only has capability to conduct desktop investigations into health and safety incidents and does not have dedicated or trained safety investigators.

Given the above, it is not surprising that QBCC's investigations into safety incidents have produced minimal regulatory outcomes to improve safety in Queensland. Since 2017 Master Builders is only aware of one licensee who has had their licence cancelled under section 48 of the QBCC Act for a health and safety matter. Further, there have been no disciplinary actions for a safety incident or any prosecutions/fines issued under section 54A during this time.

There is also significant confusion within the industry as to the role of QBCC in safety matters generally. This has been compounded by the fact that QBCC often asks licensees and applicants for health and safety related information in circumstances where there has been no safety incident (e.g. at time of granting or considering a licence application). The legislative provisions that authorise the QBCC to seek this information is unknown and appears to be a possible example of regulatory overreach by QBCC.

To streamline processes, remove regulatory duplication and reduce unnecessary and unproductive burden on licensees, it is recommended that the QBCC cease duplicating the functions of WHSQ.

It is acknowledged that there may be cases where it is appropriate for QBCC to take licensing or disciplinary action against a licensee who has negligently or recklessly caused a serious safety incident on a building site. However, we propose that QBCC should only take such regulatory action once WHSQ has completed its investigation and the licensee's alleged actions have been proven through a successful prosecution under the WHS Act. This recommended approach would also seem to better align QBCC processes with its obligations under the *Human Rights Act 2019*.

Further, it is recommended that QBCC should put in place a process to ensure that where a licensee notifies WHSQ of an incident, this notification also serves to advise QBCC of the notifiable incident for the purposes of section 54A of the QBCC Act. Notably, a process of this kind has long been in place for other Queensland regulators with ancillary WHS responsibilities. There appears to be no logical reason for QBCC not to take the same approach.

Recommendation 8: update to processes and procedures

QBCC processes should be amended to align with its governing legislation and best regulator practice.

An ongoing concern with the QBCC is that it has processes and procedures that at times appear misaligned with its legislated obligations. The causes of the misalignment appear to be a combination of an unwillingness to change, a lack of understanding of its governing legislation, and preference being given to administrative expedience over proper decision-making.

Examples of this misalignment include:

- Imposing licence conditions on licensees alleged to have breached an offence provision in the QBCC Act notwithstanding that these licensees have not been successfully prosecuted or even given a penalty infringement notice for the breach.
- Cancelling licences of individuals on fit and proper grounds based on an allegation that the individual has committed an offence under the QBCC Act that has not been the subject of a successful prosecution or an uncontested penalty infringement notice.
- Routinely and knowingly informing company directors in specified circumstances of internal review rights that do not apply in their situation.
- Routinely refusing to make a qualification equivalency assessment for a licence application, as required under the QBCC Regulation, and instead referring applicants to a registered training organisation to make the assessment (at the applicant's expense).
- Routinely issuing formal warning notices for alleged proven breaches of the QBCC Act (approximately 30% of cases), notwithstanding this regulatory outcome is not provided for in the QBCC Act, is not able to be internally or externally reviewed, and appears to have been made up by the QBCC.

It is recommended a review be conducted of the QBCC's regulatory processes and procedures to ensure that they:

- Align with their governing legislation, and
- Otherwise comply with best practice regulatory decision-making as recommended by the Queensland Ombudsman.

FOCUS AREA 4: PERFORMANCE

Recommendation 9: amended regulatory approach

QBCC should amend its regulatory approach to ensure that its regulatory outcomes are fair and proportionate to the harm it is seeking to address.

The QBCC currently takes a very limited approach when exercising its compliance powers under the QBCC Act. In most cases, the compliance powers exercised by the QBCC are limited to cancelling/suspending licences under section 48 of the QBCC Act, issuing penalty infringement notices and issuing formal warning notices (see above discussion about these notices).

Notably the QBCC has a long history of declining to use its licensee disciplinary powers against licensees who have been found to breach their statutory obligations. The reasons for this are unknown. One of the benefits of using its disciplinary powers to address offending behaviour is that it allows the QBCC to tailor its regulatory response to ensure that it is proportionate to the harm it is seeking to address and level of offending behaviour.

For example, prior to acting against a licensee to cancel their licence and remove their livelihood, it is appropriate that the QBCC at least consider whether there are less impactful disciplinary options available to it that could instead be used to effectively address the licensee's behaviour and prevent reoffending.

The tailoring of regulatory responses to ensure they are proportionate to the seriousness of the alleged breach of the QBCC Act would also assist in reducing internal and external reviews about regulatory actions.

Recommendation 10: amended approach for directions to rectify

The QBCC should amend its regulatory and resolution approaches, including the issuing of directions, to ensure that all licensed contractors are held accountable where they are responsible for carrying out defective work or breaching their statutory and contractual obligations.

The QBCC has a long history of declining to hold licensed subcontractors accountable where they carry out defective work or fail to comply with their contractual obligations (including contractual obligations to rectify defective work). Despite having broad compliance and resolution powers to intervene and assist in these situations to ensure a fair result for both the contractor and subcontractor, the QBCC as a matter of practice refuses to take any action against any party but the head contractor.

For example, where a consumer complains of defective work the QBCC rarely issues a direction to the licensed subcontractor who performed the work or even a joint direction to both the head contractor and subcontractor. In all cases a direction to rectify is issued only to the head contractor with no accountability assigned to the licensed subcontractor, regardless of the merits of the situation.

Further, the QBCC regularly uses its licensing powers to assist subcontractors who have breached their contractual obligations, including those associated with payment. However, the QBCC as a matter of practice refuses to use its regulatory powers to assist a head contractor where a licensed subcontractor unlawfully breaches their subcontract and obligations in contravention of the QBCC Act.

Recommendation 11: remedial professional development

The QBCC should introduce a remedial professional development program targeted at appropriate licensees who have a proven history of defective work, late payment of debts, or other breaches of QBCC administered legislation.

In the experience of Master Builders, many proven breaches of legislation by licensees arise from inadequate skill groups and poor knowledge of legislative requirements. This is particularly so in the context of breaches associated with unrectified defective work, contractual matters, and payment practices.

Subject to proper grounds existing, the QBCC has express licensing powers in the QBCC Act to require licensees to *“complete course modules included in technical or managerial national competency standards relevant to the building industry”*. These licensing powers operate in the form of a condition on the licence. However, the powers are currently rarely exercised.

Master Builders believes there would be substantive benefit in the QBCC using its licensing powers to develop and implement a remedial professional development program to upskill licensees who have breached their legislative obligations. It is believed such a program would substantively assist in reducing future re-offending behaviour by addressing its root causes.

It is recommended that selected licensees for the program would initially be given the opportunity to undertake the remedial training without the imposition of a condition on their licence. In addition to reducing administrative cost on the QBCC, this approach would promote buy-in and commitment by the licensee. The imposition of a condition would only be used where the licensee failed to take reasonable action to enrol or complete the relevant module in a reasonable time.

7 March 2022