



# **Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Bill 2017**

**Report No. 43, 55<sup>th</sup> Parliament  
Public Works and Utilities Committee  
August 2017**

## **Public Works and Utilities Committee**

<b>Chair</b>	Mr Shane King MP, Member for Kallangur
<b>Deputy Chair</b>	Mr Rob Molhoek MP, Member for Southport
<b>Members</b>	Mr Jason Costigan MP, Member for Whitsunday
	Mr Matt McEachan MP, Member for Redlands
	Ms Joan Pease MP, Member for Lytton
	Mr Chris Whiting MP, Member for Murrumba

### **Committee Secretariat**

<b>Telephone</b>	+61 7 3553 6633
<b>Email</b>	<a href="mailto:pwuc@parliament.qld.gov.au">pwuc@parliament.qld.gov.au</a>
<b>Technical Scrutiny Secretariat</b>	+61 7 3553 6601
<b>Committee Web Page</b>	<a href="http://www.parliament.qld.gov.au/work-of-committees/committees/PWUC">www.parliament.qld.gov.au/work-of-committees/committees/PWUC</a>

### **Acknowledgements**

The committee acknowledges the assistance provided by the Department of Housing and Public Works and the Queensland Building and Construction Commission.

## Contents

<b>Abbreviations</b>	<b>iii</b>
<b>Chair’s foreword</b>	<b>iv</b>
<b>Recommendations</b>	<b>v</b>
<b>1 Introduction</b>	<b>1</b>
1.1 Role of the committee	1
1.2 Inquiry process	1
1.3 Policy objectives of the bill	1
1.4 Consultation on the bill	2
1.4.1 Consultation on non-conforming building product amendments	2
1.4.2 Consultation on building workplace safety amendments	3
1.5 Should the bill be passed?	3
<b>2 Examination of the bill</b>	<b>4</b>
2.1 Clauses 4 to 7 - non-conforming building products – regulatory oversight	4
2.1.1 Background	4
2.1.2 QBCC powers to regulate building products – Clause 4, section 3 (Objects of the Act)	6
2.1.3 Establish the Building Products Advisory Committee - Clause 5, section 20B	9
2.1.4 Role of Commissioner and the Commissioner’s relationship with the board – clauses 6 and 7, sections 20J and 20K	11
2.2 Building products - Clause 11, proposed new Part 6AA, sections 74AA to 74AZD	13
2.2.1 Overview of proposed new Part 6AA	13
2.2.2 Definitions - Part 6AA, division 1 – sections 74AA and 74AB	15
2.2.3 Duties applying to people in the chain of responsibility - Part 6AA, division 2, sections 74AC to 74AN	17
2.2.4 Enforceable Undertakings – sections 74AO to 74AU	30
2.2.5 Recall orders – sections 74AV to 74AZA and 74AH	31
2.2.6 Warning statements – Division 5, sections 74AZB to 74AZD	35
2.3 Clauses 12 to 20 - amendments to facilitate the extended role of the QBCC	35
2.3.1 Commission may investigate grounds for taking disciplinary action - section 74A	35
2.3.2 Grounds for taking disciplinary action against licensees/former licensees - section 74B	36
2.3.3 Grounds for taking disciplinary action against a person not a licensee - section 74C	37
2.3.4 Reviewable decisions - section 86	37
2.3.5 Decisions that are not reviewable decisions - section 86F	37
2.3.6 No stay by QCAT of particular decisions of commission - section 87A	38
2.3.7 Tribunal may conduct public examination - section 92	38
2.3.8 Expedited hearing of domestic building disputes - section 95	38
2.3.9 Stop orders - section 97B	38
2.4 Inspectors (Part 9 of the QBCC Act)	38
2.4.1 Clause 21, new Division 1 and Division 2	39
2.4.2 Entry of places by inspectors - clause 22, new Division 3, sections 105 to 105J	39
2.4.3 General powers of inspectors after entering places - clause 22, new Division 4, sections 105K to 105N	41

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

---

2.4.4	Other information obtaining powers of inspectors - clause 22, Division 5 – sections 105O to 105U	42
2.4.5	Seizure by inspectors and forfeiture - clause 22, Division 6, sections 106, 106A to 106N43	
2.4.6	Additional powers in relation to building products - clause 22, Division 7 - sections 106O to 106R	44
2.4.7	Evidential immunity for individuals complying with particular requirements - clause 22, Division 8 - section 107	45
2.5	Consequential and other minor amendments - clauses 23 to 34	46
2.5.1	Injunctions and stop work notices - clauses 24 and 25	46
2.5.2	Clause 30 – Schedule 1, insert new Part 14 (Transitional and validating provisions)	46
2.6	Building workplace safety – clauses 8 to 10. sections 28A and 28B, 48 and 54A	47
2.6.1	Background	47
2.6.2	Information sharing in relation to work health and safety – section 28A and 28B	47
2.6.3	QBCC power to cancel or suspend a licence – clause 9, section 48	49
2.6.4	Requirement for licensee to advise QBCC in relation to safety matters – Clause 10, section 54A	51
2.7	Implementation - costs and stakeholder education/engagement	53
2.7.1	Stakeholder education and engagement	53
2.7.2	Cost of implementation	55
<b>3</b>	<b>Compliance with the <i>Legislative Standards Act 1992</i></b>	<b>57</b>
3.1	Fundamental legislative principles	57
3.1.1	Rights and liberties of individuals	57
3.1.2	Institution of Parliament	63
3.2	Proposed new and amended offence provisions	64
3.3	Explanatory notes	74
	<b>Appendix A – List of submissions</b>	<b>75</b>
	<b>Appendix B – List of witnesses at public departmental briefing and public hearing</b>	<b>76</b>
	<b><i>Public departmental briefing held on 14 June 2017</i></b>	<b>76</b>
	<b><i>Public hearing held on 10 July 2017</i></b>	<b>76</b>

## Abbreviations

ACCC	Australian Competition and Consumer Commission
ACA	Australian Constructors Association
AIA	Australian Institute of Architects
ASI	Australian Steel Institute
bill	Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Bill 2017
BDAQ	Building Designers' Association of Queensland
BMF	Building Ministers' Forum
BOSMA	Bureau of Steel Manufacturers Australia
BCA	Building Code of Australia
Advisory Committee	Building Products Advisory Committee
BPIC	Building Products Innovation Council
committee	Public Works and Utilities Committee
CPA	Construction Product Alliance
DHPW/department	Department of Housing and Public Works
EWPAA	Engineered Wood Products Association of Australasia
FLPs	fundamental legislative principles
IPP	Information Privacy Principles
Minister	Hon Mick de Brenni MP, Minister for Housing and Public Works and Minister for Sport
Master Builders	Master Builders Queensland
MEA	Master Electricians Australia
MPAQ	Master Plumbers Association of Queensland
NCBP	non-conforming building product
NCC	National Construction Code
OQPC	Office of Queensland Parliamentary Counsel
OIR	Office of Industrial Relations
POAQ	Property Owners Association of Queensland
Product Committee	Queensland Building and Construction Product Committee
QBCC	Queensland Building and Construction Commission
QBCC Act	<i>Queensland Building and Construction Act 1991</i>
QBC Board	Queensland Building and Construction Board
QCAT	Queensland Civil and Administrative Tribunal
QLS	Queensland Law Society
SCA (Qld)	Strata Community Australia (Qld)
SLC	the former Scrutiny of Legislation Committee

## Chair's foreword

This report presents a summary of the Public Works and Utilities Committee's examination of the Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Bill 2017.

The committee's task was to consider the policy outcomes to be achieved by the legislation, as well as the application of fundamental legislative principles - that is, to consider whether the bill had sufficient regard to the rights and liberties of individuals, and to the institution of Parliament.

On behalf of the committee, I thank those individuals and organisations who lodged written submissions on the bill. I would like to especially thank the heartfelt contributions from family members at the public hearing where they talked to the committee about the tragic circumstances that resulted in the loss of their loved ones.

Every year when I attend Workers Memorial Day, we grieve the loss of workers who have died while doing their job. Nobody should go to work each day with any other expectation than to return home in the same physical and mental condition that they left in.

The committee hopes that if this bill is passed, lives will be saved and injuries prevented.

I also thank the committee's secretariat, the Department of Housing and Public Works and the Queensland Building and Construction Commission.

I commend this report to the House.



Mr Shane King MP

Chair

## Recommendations

**Recommendation 1** **3**

The committee recommends the Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Bill 2017 be passed.

**Recommendation 2** **52**

The committee recommends that the Queensland Building and Construction Commission develops a protocol with the Office of Industrial Relations to ensure that the notification requirements contained in section 54A of the bill do not result in licensees being required to make separate notifications to these agencies about the same matter.

**Recommendation 3** **56**

The committee recommends the Minister, in the second reading speech, provide advice on the estimated cost of implementing and enforcing the proposed legislation and what the likely impact will be on the Queensland Building and Construction Commission budget.



## 1 Introduction

### 1.1 Role of the committee

The Public Works and Utilities Committee (committee) is a portfolio committee of the Legislative Assembly which commenced on 27 March 2015 under the *Parliament of Queensland Act 2001* and the Standing Rules and Orders of the Legislative Assembly.<sup>1</sup>

The committee's primary areas of responsibility are:

- main roads, road safety, ports, energy and water supply, and
- housing, public works and sport.

Section 93(1) of the *Parliament of Queensland Act 2001* provides that a portfolio committee is responsible for examining each bill and item of subordinate legislation in its portfolio areas to consider:

- the policy to be given effect by the legislation
- the application of fundamental legislative principles (FLPs), and
- for subordinate legislation – its lawfulness.

On 25 May 2017, the Building and Construction Legislation (Non-conforming Building Products - Chain of Responsibility and Other Matters) Amendment Bill 2017 (the bill) was introduced into the House by the Hon Mick de Brenni MP, Minister for Housing and Public Works and Minister for Sport (Minister) and referred to the committee. In accordance with the Standing Orders, the Committee of the Legislative Assembly required the committee to report to the Legislative Assembly by 7 August 2017.

### 1.2 Inquiry process

On 26 May 2017, the committee wrote to the Department of Housing and Public Works (DHPW/the department) seeking advice on the bill, and invited stakeholders and subscribers to provide written submissions. The committee received 20 submissions on the bill (see Appendix A).

The committee held a public briefing with DHPW and the Queensland Building and Construction Commission (QBCC) on 14 June 2017 and a public hearing was held on the bill on 10 July 2017 (see Appendix B for a list of witnesses).

On 23 June 2017, 6 July 2017, 14 July 2017 and 25 July 2017, the committee received written advice from DHPW, including advice on issues raised in submissions.

Written advice from the department and transcripts from the public briefing and public hearing can be found on the committee's [website](#).

### 1.3 Policy objectives of the bill

The explanatory notes provided the purpose of the bill is to amend the *Queensland Building and Construction Act 1991* (QBCC Act) and other Acts to:

- confer responsibilities on the building product supply chain participants that ensure a building product, so far as reasonably practicable, is not a non-conforming building product
- enable the QBCC to ensure buildings are safe and better align its powers with those of other Queensland safety regulators
- facilitate safety on building and construction sites by requiring QBCC licensees to notify the QBCC about activities on a site that might present a work health and safety issue

---

<sup>1</sup> *Parliament of Queensland Act 2001*, section 88 and Standing Order 194.

- require the QBCC to report to regulatory agencies about work health and safety issues, where there is a serious injury or death
- enable the QBCC to enter into information sharing arrangements with other regulatory agencies, particularly in relation to work health and safety issues, and
- widen grounds for the QBCC to take disciplinary action against a licensee to include convictions relating to laws that can impact on health and safety or if the licensee's work on a building site may have caused a death, grievous bodily harm, or a serious risk to the health or safety of a person.<sup>2</sup>

#### **1.4 Consultation on the bill**

The department advised that on 1 June 2017, following the introduction of the bill into the House, DHPW hosted a targeted stakeholder meeting to discuss the bill with the following outcome:

*There was general support from all stakeholders for the bill, in particular there was strong support for the introduction of obligations on parties in the supply chain. Stakeholders identified a need for clear guidelines and governance for the implementation of the NCBP [non-conforming building product] amendments to ensure the transparency and consistency across the industry, including manufacturers, suppliers and installers.<sup>3</sup>*

##### **1.4.1 Consultation on non-conforming building product amendments**

The explanatory notes advised the issues and potential strategies relating to non-conforming products have been the subject of extensive national reviews over the past two years and consultation was also undertaken through the [Queensland Building Plan](#) discussion paper consultation process which commenced on 30 November 2016. The explanatory notes advised:

*Overall, the extensive consultation indicated that, particularly in the interests of public safety, building industry participants, stakeholders, homeowners and the community support proposals to impose duties on participants in the building product supply chain. There was also support for the QBCC to possess the necessary powers to investigate and address instances of non-conforming building products.<sup>4</sup>*

The department provided further advice that the following consultation on the Queensland Building Plan discussion paper took place with industry associations, peak industry bodies, union bodies and the general public:

- 15 consultation sessions were held across Queensland for industry stakeholders, consumers and the general public with over 1100 people attending these sessions
- feedback was also submitted via online surveys on the Queensland Building Plan engagement space and through the Queensland Government's Get Involved website, and
- 54 written submissions were received and 32 online surveys completed on the subject of non-conforming building products.<sup>5</sup>

DHPW provided the results of the consultation process to the committee:

*The majority of the responses confirm that this is a national issue requiring a coordinated national response. All respondents agree that it is essential that Queensland's buildings are safe and products used in their construction meet relevant standards.*

---

<sup>2</sup> Explanatory notes, p 1.

<sup>3</sup> Correspondence dated 6 July 2017, p 9.

<sup>4</sup> Explanatory notes, p 12.

<sup>5</sup> Correspondence dated 6 July 2017, p 8.

*There was no support for taking no action, but there was some conflicting feedback about the most appropriate mechanisms to be put in place to ensure successful outcomes. Responses generally supported the proposals to increase the powers of the QBCC so it can effectively identify and address instances of NCBPs but several submissions proposed far broader reforms at least in the longer term.*<sup>6</sup>

DHPW advised that the Ministerial Construction Council, comprising key stakeholders from the building construction industry, various unions, statutory bodies and representatives from DHPW, was also consulted during the process.<sup>7</sup>

#### **1.4.2 Consultation on building workplace safety amendments**

In relation to the amendments proposed on building workplace safety, the explanatory notes advised:

*There is a history of strong public concern and clearly expressed expectations that the QBCC requires proper access to the relevant information about failures to comply with workplace health and safety requirements when deciding whether to grant or renew licences.*<sup>8</sup>

DHPW further advised that while no formal consultation on these amendments had been undertaken, 'the tragic death of Mr Jason Garrels and the two fatalities that occurred at an Eagle Farm building site have highlighted the need for greater interagency co-operation and a higher level of notification to be provided to the QBCC'.<sup>9</sup>

#### **1.5 Should the bill be passed?**

Standing Order 132(1) requires the committee to determine whether or not to recommend the bill be passed.

After examination of the bill, including the policy objectives which it will achieve and consideration of the information provided by the department and from submitters, the committee recommends that the bill be passed.

#### **Recommendation 1**

The committee recommends the Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Bill 2017 be passed.

---

<sup>6</sup> Correspondence dated 6 July 2017, p 8.

<sup>7</sup> Correspondence dated 6 July 2017, p 8.

<sup>8</sup> Explanatory notes, p 12.

<sup>9</sup> Correspondence dated 6 July 2017, p 9.

## 2 Examination of the bill

### 2.1 Clauses 4 to 7 - non-conforming building products – regulatory oversight

#### 2.1.1 Background

The explanatory notes advised:

- the Australian building 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), which sets the minimum level of construction requirements and requires materials used in construction to be suitable for use, Australian Standards and jurisdictional laws, and
- responsibility for the NCC rests with the State and Territory Governments, and in Queensland, the *Building Act 1975* gives effect to the NCC and the QBCC is the regulator overseeing building and construction licensees.<sup>10</sup>

Non-conforming building products are products and materials that are claimed to be something they are not, do not meet the required standards for the use in which they are intended, or are marketed or supplied with the intent to deceive those who use them.<sup>11</sup> The explanatory notes advised:

*Non-conforming building products pose a significant risk to health and life safety, as their use threatens the integrity of a building, putting all those who enter and use the building or building site potentially at risk. The use of non-conforming building products within a building can also impose significant costs on owners to rectify damages or undertake remedial actions. Other consequences can also impact the construction, manufacturing, trade (imports) and retail sectors.<sup>12</sup>*

The Minister, in the explanatory speech, noted that in 2014 it took less than 15 minutes for a lit cigarette left on a balcony to cause 13 floors of the Lacrosse building in Melbourne to be engulfed in flames and that fire was a result of highly flammable non-conforming aluminium cladding, a cheaper imitation version of a conforming product. The Minister also advised:

*The proliferation of cheap, imported and often substandard products entering our nation is a risk to the health and safety of all Queenslanders. It is a risk to Queenslanders when they gather at events, when they gather at public places, when they go to work in a modern office tower, when they visit major shopping centres and even when they return to their homes at the end of a busy day. These products are often costly to rectify and they are often difficult to replace once they have been installed. These costs currently are falling on the builder, the installer, the building owner or the strata title community.<sup>13</sup>*

The explanatory notes to the bill advised:

- currently there is limited ability to effectively regulate building products at either the national or state level with the existing regulatory framework disproportionately focused on the end of the supply chain
- the existing building regulatory system does not have any mechanism to trace building products through the supply chain from manufacture to installation, and

---

<sup>10</sup> Explanatory notes, p 4.

<sup>11</sup> See explanatory notes, p 16.

<sup>12</sup> Explanatory notes, p 1.

<sup>13</sup> Queensland Parliament, Record of Proceedings, 25 May 2017, p 1448.

- globalisation of the supply chain has compounded challenges to ensure building products are suitable for their intended use.<sup>14</sup>

The explanatory notes also advised that the incident at the Melbourne Lacrosse Tower and the recall of Infinity and Olsent-branded cables in 2015 (which did not meet electrical safety standards) triggered two national reviews and extensive consultation into the shortcomings of the current mechanisms to address the use of non-conforming building products - a Senate Economics Committee inquiry and a Building Ministers' Forum (BMF) report.<sup>15</sup> On 19 February 2016, the BMF agreed in-principle that improvements should be made to the state and territory building regulatory frameworks to enable building regulators to effectively respond to incidences of non-conforming building products.<sup>16</sup> The Senate inquiry is ongoing and due to report by 31 October 2017, with an interim report due by 31 August 2017.<sup>17</sup>

In the explanatory speech, the Minister noted that the the single most effective way of dealing with the issue of non-conforming products would be for the Commonwealth to take some action to stop the importation of these products at the border; however:

*Despite significant pressure from the states, meaningful action to date has not been forthcoming. To protect Queenslanders, whether they be in the office or at the shops, at home or on a construction site, we are called to act.*<sup>18</sup>

The explanatory notes advised that legislative change is needed to clarify the remit of the QBCC to include building products and provide appropriate powers to investigate and address instances of non-conforming building products.<sup>19</sup> The bill proposes to:

- implement a chain of responsibility that places duties on supply chain participants for building products - specifically designers, manufacturers, importers, suppliers and installers - to ensure building products are safe<sup>20</sup>
- impose additional duties on parties in the chain of responsibility to ensure that building products are accompanied by appropriate information and require that parties not make false or misleading statements about a building product's performance,<sup>21</sup> and
- enable the government, through the administering Minister and Queensland's building regulator, the QBCC, to investigate and effectively respond to incidents of non-conforming building products.<sup>22</sup>

The explanatory notes advised that Queensland is 'leading the way with reforms of this nature' and that building ministers from other jurisdictions have provided in-principle support to review their building regulatory framework to address non-conforming building products.<sup>23</sup>

*Benefits include the potential for nationally consistent legislation in each state and territory regarding industry obligations and the ability for building regulators to effectively address instances of non-conforming building products.*

---

<sup>14</sup> Explanatory notes, pp 2-3.

<sup>15</sup> Explanatory notes, p 2.

<sup>16</sup> Explanatory notes, p 2.

<sup>17</sup> Explanatory notes, p 11.

<sup>18</sup> Queensland Parliament, Record of Proceedings, 25 May 2017, p 1448.

<sup>19</sup> Explanatory notes, p 5.

<sup>20</sup> Queensland Parliament, Record of Proceedings, 25 May 2017, p 1448.

<sup>21</sup> Queensland Parliament, Record of Proceedings, 25 May 2017, p 1448.

<sup>22</sup> Explanatory notes, p 1.

<sup>23</sup> Explanatory notes, p 12.

*The Building Ministers are considering complementary measures to support jurisdictional legislative amendments, including the establishment of a national building regulators forum to provide cross-jurisdictional advice about the identification and eradication of non-conforming building products.*<sup>24</sup>

### **2.1.2 QBCC powers to regulate building products – Clause 4, section 3 (Objects of the Act)**

#### Amendments proposed in the bill

Clause 4 of the bill proposes to amend the objects of the QBCC Act by inserting into section 3 (Objects of the Act) new subsections 3(e)(i) and (ii) to empower the QBCC to regulate building products. The explanatory notes advised:

*This will achieve improved consumer and public safety and fairness for building industry licensees by imposing duties on all participants of the building product supply chain and providing the QBCC with the ability to appropriately address instances of non-conforming building products throughout the building product supply chain.*<sup>25</sup>

The Minister, in the explanatory speech, advised the bill proposes to update the compliance and enforcement powers of the QBCC to:

- enable it to take a range of actions to address the conduct of those who breach their duties and make use of modern compliance tools, such as enforceable undertakings
- broaden powers of entry, for example, to pursue the removal or rectification of non-conforming building products from finished buildings, and
- enable it to direct or take remedial action to make a place safe and to take building products and samples for examination and testing.<sup>26</sup>

#### Stakeholder views

The majority of stakeholders generally endorsed the proposed amendments to enhance the responsibilities and powers of the QBCC to ensure building products are safe.<sup>27</sup> For example, the Australian Competition and Consumer Commission (ACCC) supported enabling the QBCC to investigate, and the government to more effectively respond to, unsafe building products through expansion of compliance and enforcement powers of the QBCC directly, and the powers of the administering Minister:

*The ability of the QBCC to access regulatory tools such as enforceable undertakings and broadened powers of entry, combined with the Minister's ability to issue a warning statement or recall action means that the Government can take swift and effective preventative action. This is further enhanced by the increased information sharing requirements, mandatory reporting of notifiable incidents, and the ability of the QBCC to take disciplinary action.*<sup>28</sup>

---

<sup>24</sup> Explanatory notes, p 4.

<sup>25</sup> Explanatory notes, p 13.

<sup>26</sup> Queensland Parliament, Record of Proceedings, 25 May 2017, p 1449.

<sup>27</sup> See for example, BDAQ, submission 1, p 4; Master Builders, submission 16, p 1; Property Council of Australia, submission 7, p 1; SCA (Qld), submission 8, p 1; CPA, submission 9, p 1; MEA, submission 11, p 1; ICPS Australia, submission 13, p 6; EWPAA, submission 14, p 1; AIA, submission 18, p 3; CSR, submission 19, p 3; ASI, submission 20, p 3 and Services Trades Queensland, public hearing transcript, 10 July 2017, p 37.

<sup>28</sup> Submission 3, p 3.

The ACCC also submitted that there is a need to improve the regulatory powers available to building regulators, there should be national consistency across Australia and ‘regulators need to have appropriate tools to take action against suppliers supplying unsafe building products, enforce compliance with regulations and the ability to compel product recalls and remediation.’<sup>29</sup>

While stakeholders endorsed the general objectives of the bill, a number of issues were raised. For example, the Queensland Law Society (QLS) noted that clause 4:

*... extends the mission of the QBCC beyond regulating the building industry, to regulating manufacturers and indeed to hold building contractors responsible for the negligence of manufacturers. This will likely see an overlap between the powers and functions of the Commission and of the Federal consumer law which will lead to confusion and potential unintended breaches of one or both sets of laws.*<sup>30</sup>

The HIA submitted that the proposed legislation should not duplicate requirements that are already covered by the *Building Act 1975* or the NCC and that it should rather refer to the primary legislation and create an appropriate framework for remedial action. The HIA submission recommended that the proposed wording in section 3(e) be amended accordingly.<sup>31</sup>

The ACCC submission advised that complaints in relation to false or misleading claims in respect of building products are infrequently raised with the ACCC:

*However, such complaints usually concern claims of compliance with a particular regulation, standard or the National Construction Code. Where these matters concern allegedly unsafe or non-conforming building products, they are unlikely to be pursued for enforcement action by the ACCC. This is as it is more appropriate that they be considered by building regulators for compliance under building-specific regulation.*<sup>32</sup>

The HIA submission also made a general comment drawing attention to comparable legislation that already exists being the *Mining and Quarrying Safety and Health Act 1997* (see sections 37 to 44):

*This Act contains similar provisions to the proposed Bill in the context of obligations of designers, manufacturers, importers and suppliers and installers and providing the required supporting information.*

*It is considered that it is a lot easier to read and understand than the provisions of the proposed Bill and there may be merit in further reviewing the Mining and Quarrying Safety and Health Act, for improvements in the language to the draft Bill.*<sup>33</sup>

While Master Builders Queensland (Master Builders) supported the expanded objects to regulate building products, it shared a number of stakeholder concerns about the duplication of existing controls included in workplace health and safety legislation.<sup>34</sup>

The HIA raised a concern with the significant duplication that the bill appears to have with the operation of existing workplace health and safety legislation. This duplication is, in its view, unnecessary and will lead only to confusion for builders and trade contractors:

*HIA has developed extensive knowledge on the gaps in the building products supply chain that have allowed non-conforming products to enter the Australian marketplace. Using this knowledge, HIA has identified a number of potential solutions at both the national and the state*

---

<sup>29</sup> Submission 3, p 3.

<sup>30</sup> Submission 17, p 1.

<sup>31</sup> Submission 12, p 3.

<sup>32</sup> Submission 3, pp 2-3.

<sup>33</sup> Submission 12, p 18.

<sup>34</sup> Submission 16, p 1 and p 2.

*level that could reduce the risk of non-conforming building products entering the supply chain. HIA's preference is that this bill focus only on non-conforming building products and leave the management of noncompliant use of building products to the Building Act, which already has sufficient provisions to reduce the risk, if enforced appropriately by building surveyors, local government and the Queensland Building and Construction Commission.<sup>35</sup>*

The Construction Product Alliance (CPA) submitted that the bill could be improved by deleting components that have the potential to create significant delays in the development and delivery of projects, as well as divert regulators and industry from addressing the key issues surrounding non-conforming and non-complying products.<sup>36</sup> The CPA submission fully supported action to provide for appropriate safety responses where non-conforming building products place persons at work sites or completed projects at risk regarding health and safety; however, it did not support the provisions in the bill that:

- establish the QBCC as a parallel safety regulator to the existing QLD safety regulatory agencies, or
- place reporting obligations on industry that duplicate similar responsibilities that already exist under other safety legislative regimes.<sup>37</sup>

While Master Electricians Australia (MEA) supported the objectives of the bill, it advised at the public hearing that it did not see this bill as the silver bullet or panacea to ensure contractors, tradesmen or consumers are safe from non-conforming building products and the bill and its objective need some urgent support and action in the form of change to consumer law to fully realise its objectives.<sup>38</sup>

The Bureau of Steel Manufacturers Australia (BOSMA) agreed in broad terms with the objectives of the bill but it had concerns that implementation could be problematic, complex and potentially costly to the construction industry and the broader supply chain if not subject to an effective engagement programme with pilot programmes and worked examples.<sup>39</sup> Specifically, BOSMA submitted:

*... there are components of the bill that have the potential to create significant delays in the development and delivery of projects and which could divert regulators and industry from addressing the key issues surrounding non-conforming and non-complying products. It is important the terms of the bill do not unnecessarily increase red tape, the cost of construction, or the time for undertaking and completing projects. Also it is important that investigations focus on major issues not minor operational or commercial matters.<sup>40</sup>*

Further, BOSMA advised that Third Party Certificates of Product Compliance provide a transparent level playing field for all steel mill suppliers of high risk products, an effective method for minimising the immense risks of non-conforming products, and a simple, effective due diligence mechanism for government and private sector purchasing officers:

- third party certification requirements do not increase regulation, but provide support for governments for the standards and systems already in place, which are driven by industry need and have a proven track record domestically and internationally

---

<sup>35</sup> Public hearing transcript, 10 July 2017, p 10.

<sup>36</sup> Submission 9, p 1.

<sup>37</sup> Submission 9, p 8.

<sup>38</sup> Public hearing transcript, 10 July 2017, p 15.

<sup>39</sup> Submission 2, p 6.

<sup>40</sup> Submission 2, p 6.

- steel suppliers have no problems in supplying third party verified certificates of compliance in response to these requirements, as frameworks such as independent third party certification are well understood and have been accepted by competent steel mills worldwide for many years, and
- third Party Certificates of Product Compliance are already accepted by construction industry stakeholders and steel suppliers as a simple, transparent and effective reduced red tape means of demonstrating compliance to Standards, correct test certificate data and identifying markings.<sup>41</sup>

The Australian Constructors Association (ACA) submission supported the bill's objective to regulate non-conforming building products but argued that this could be done through the more effective involvement of the existing regulatory system rather than through the development of a significant new and costly regulatory regime. The Association stated that regulatory structures need to be administratively efficient and implemented sensibly to achieve full effectiveness:

*Overly bureaucratic or inefficient approaches that tend to focus on matters of low level impact must be avoided if regulatory systems are to be successful in addressing critical issues.*<sup>42</sup>

The Engineered Wood Products Association of Australasia (EWPAA) recommended that the role of the QBCC and the role of industry be reviewed:

*The EWPAA recommends that promotion of conforming products and use remains with industry, and the role of the commission be to define the criteria for demonstrating conformity and applying penalties to those responsible for the supply and installation of non-conforming products.*<sup>43</sup>

### **2.1.3 Establish the Building Products Advisory Committee - Clause 5, section 20B**

The QBCC administratively established the Queensland Building and Construction Product Committee (Product Committee) in 2015 to investigate reports of non-conforming building products. The Product Committee is currently made up of representatives from the QBCC, Queensland Office of Fair Trading, Electrical Safety Office, Queensland Fire and Emergency Services, Petroleum and Gas Inspectorate (Department of Natural Resources and Mines), the ACCC, DHPW, and Workplace Health and Safety.<sup>44</sup>

#### Amendments proposed in the bill

Clause 5 of the bill proposes to replace section 20B (Committees) of the QBCC Act to legislatively establish the Building Products Advisory Committee (Advisory Committee) which will assist the Minister, the Queensland Building and Construction Board (QBC Board) and the Commissioner of the QBCC by providing advice about the following matters:

- the suitability of particular building products for particular uses
- the safety of particular building products, whether or not they are associated with an existing building
- the safety of a building with which a non-conforming building product has been associated

---

<sup>41</sup> Submission 2, pp5.

<sup>42</sup> Submission 10, p 2.

<sup>43</sup> Submission 14, p 1.

<sup>44</sup> <https://www.qbcc.qld.gov.au/about-us/queensland-building-construction-product-committee> (accessed 2 Jun 2017).

- how to promote the safe use of building products in the building industry
- how to raise awareness of non-conforming building products, and
- action under the Act that may be appropriate for dealing with non-conforming building products.

Proposed new section 20B also provides that the members of the Advisory Committee will be prescribed by regulation; the Advisory Committee has any other functions prescribed by regulation; has all the powers necessary for performing its functions, including obtaining expert advice from industry bodies and other persons; and the QBC Board, or the Minister, may appoint other committees to provide advice on particular subjects.

The explanatory notes advised that the establishment of the Advisory Committee will:

*.... assist the Minister, the Board of the QBCC and the Commissioner to effectively and efficiently perform their functions in relation to building products. It is intended to facilitate a coordinated investigation and response to non-conforming building products across multiple regulators if needed.*<sup>45</sup>

The department advised that the Advisory Committee will be a key source of information and guidance to the QBCC and the Minister about the issues relating to non-conforming building products and will 'mean working closely with key stakeholders in the development of governance material, guidance material, information, education and other materials to support the industry'.<sup>46</sup>

The explanatory notes advised that to support implementation of the bill, an engagement program will be delivered by the QBCC using existing engagement channels.<sup>47</sup>

#### Stakeholder views

A number of stakeholders supported the establishment of the Advisory Committee on the basis that industry representation is required.<sup>48</sup>

The BOSMA submission supported the establishment of the Advisory Committee, in-principle, and the proposed engagement program suggesting that a set of worked hypothetical examples on the scale and detail of operating the new laws would clarify implementation for participants.<sup>49</sup>

The Building Products Innovation Council (BPIC) and the EWPAA raised a number of concerns about the operation of the committee including adequate staffing, cost of operation, and political interference and influence on committee work.<sup>50</sup>

The Australian Constructors Association (ACA) submitted that it believes it is essential that the government commits to undertaking a full consultative process with industry before finalising the regulations under the legislation to ensure the provisions of the bill do not become an unnecessary administrative burden for the regulator and the industry.<sup>51</sup>

The QLS noted that the membership of the committee is to be dictated by regulation, and under proposed section 20B(2)(c), will have any other function prescribed by regulation:

---

<sup>45</sup> Explanatory notes, p 13

<sup>46</sup> Departmental briefing transcript, 14 June 2017, p 2.

<sup>47</sup> Explanatory notes, p 6.

<sup>48</sup> See for example, BDAQ, submission 1, p 5; Master Builders, submission 16, p 2.

<sup>49</sup> Submission 2, p 6.

<sup>50</sup> BPIC, submission 4, pp 2-3; and EWPAA, submission 14, pp 2-3.

<sup>51</sup> Submission 10, p 3.

*This description is extra-ordinarily wide and appears insufficiently restrained. We submit that the membership of the committee and of course, what the committee can do, will have significant impacts on the rights of the persons and businesses who will be subject to this new legislation. Accordingly, we request that the Society be consulted on the drafting of the regulation to this legislation to ensure the effect of the provisions are fair and reasonable.*<sup>52</sup>

The submission from the HIA indicated that it would be happy to participate on the Advisory Committee if invited to do so as it has 'extensive experience with the issue of building product conformance and have an extensive member base to draw relevant experience from'.<sup>53</sup>

#### Department advice

The department advised that the concerns raised by the EWPAA and the BPIC 'can be addressed through consultation' and that it is expected that DHPW and the QBCC will consult with industry and key stakeholders (including the QLS) in the implementation of the laws.<sup>54</sup>

DHPW also advised that the Advisory Committee will not be accrediting or reviewing conformance or safety of all products in the market as its role is to provide advice to the Minister, the QBC Board, and the QBCC.<sup>55</sup>

In relation to issue raised about staffing, the department advised that it is anticipated the Advisory Committee will be staffed by its existing members:

*Existing members are made up of senior state and Commonwealth government officials with the appropriate authority to provide advice on building products, including providing advice on the application of legislation relevant to their portfolio for example, electrical safety.*<sup>56</sup>

DHPW advised that it is anticipated the Advisory Committee will seek advice from industry experts and organisations where appropriate, and the QBCC is meeting with key industry representatives as part of a summit on national product supply chain, and this will provide invaluable information to the Advisory Committee.<sup>57</sup>

#### **2.1.4 Role of Commissioner and the Commissioner's relationship with the board – clauses 6 and 7, sections 20J and 20K**

##### Amendments proposed in the bill

Clause 6 of the bill proposes to amend section 20J(1) to insert new subsections to extend the role of the Commissioner of the QBCC to empower the Commissioner to:

- monitor, investigate and enforce compliance in relation to incidents and matters relating to non-conforming building products, and
- publish information about building products, including the uses for which particular building products are not suitable and how to use particular building products to ensure their use is safe and complies with relevant legislation.

---

<sup>52</sup> Submission 17, p 2.

<sup>53</sup> Submission 12, p 4.

<sup>54</sup> Correspondence dated 6 July 2017, p 14.

<sup>55</sup> Correspondence dated 6 July 2017, p 14.

<sup>56</sup> Correspondence dated 6 July 2017, p 14.

<sup>57</sup> Correspondence dated 6 July 2017, p 14.

Clause 7 of the bill proposes to insert new requirements into section 20K(2) of the QBCC Act to provide that certain decisions made by the Commissioner must be made independently of the Board:

- a decision to give information to a health and safety regulator under section 28A (Exchange of information between QBCC and other regulators)
- a decision to give a direction under section 74AN (Power to require remedial action)
- a decision about a building product undertaking under Part 6AA, division 3 (Enforceable undertakings relating to building products), and
- a decision to issue a stop work notice under section 108AI (Commissioner may issue stop work notice).

#### Stakeholder views and department advice

Master Builders supported the Commissioner having the power to publish information about building products, noting that this information must be timely and widely communicated as ‘too often the regulator is aware of a product that is not fit for purpose and because that information is not shared it continues to be installed’.<sup>58</sup>

The Master Plumbers Association of Queensland (MPAQ) supported the increase in powers of the QBCC as proposed in the bill in relation to non-conforming products.<sup>59</sup>

The HIA suggested changes to the examples contained in proposed section 20J(1) as it considered it would be more appropriate to publish information about a known non-conforming product and ways for building practitioners to protect themselves from non-conforming products. The HIA also did not consider it practical or necessary that the Commissioner take on the responsibility of publishing information about how a product should or should not be used as this should remain a matter for the manufacturer of that product and the submission suggested amendments to the section.<sup>60</sup>

The EWPA was of the view that the role of the Commissioner should not be expanded to include providing advice on how particular building products are used:

*The EWPA is strongly of the view that it is the responsibility of the supplier to provide this advice. If a product does not have adequate accompanying advice it is not the role of the commissioner to correct this failing. Instead, the commissioner’s role should be to define what information should be required for various applications, and if a supplier fails to provide that advice the commissioner’s role should be to publish advice that the product is inadequately supported to be used safely.*

*The EWPA also recommends that the commissioner should have a role in publishing information about how products can be identified as legitimate conforming products, and publish information about fraudulent claims.*<sup>61</sup>

The department advised that the intent of providing a role for the QBCC Commissioner in how to use building products is to ensure that the Commissioner can make public statements about the incorrect use of cladding (for example):

*This is an important part of providing supply chain participants with education about the potential non-compliant use of building products. It is acknowledged that suppliers and manufacturers already provide some technical guidance.*<sup>62</sup>

---

<sup>58</sup> Submission 16, p 3.

<sup>59</sup> Submission 15, p 1.

<sup>60</sup> Submission 12, p 4.

<sup>61</sup> Submission 14, p 3.

<sup>62</sup> Correspondence dated 6 July 2017, pp 14-15.

The BPIC submission supported proposed new sections 20J and 20K and suggested an amendment to section 20J(1) provide that the QBCC Commissioner also have a role in advising on how to verify legitimate product certification and installation information (fraudulent documents) and include relevant standards with legislation.<sup>63</sup> In response, DHPW advised that it considers that the definition of relevant legislation already captures the standards that are mandatory under the NCC and therefore, a reference to standards is considered unnecessary.<sup>64</sup>

## **2.2 Building products - Clause 11, proposed new Part 6AA, sections 74AA to 74AZD**

### **2.2.1 Overview of proposed new Part 6AA**

Clause 11 of the bill proposes to insert new Part 6AA, which contains proposed new sections 74AA to 74AZD to provide for legislative amendments relating to building products:

- sections 74AA and 74AB provide key definitions of key terms used in this Part
- sections 74AC to 74AM establish the duties and related offences for a person in the chain of responsibility for a building product
- section 74AN provides for a power to require remedial action if a duty relating to building products has been contravened
- sections 74AO to 74AU provide for enforceable undertakings relating to building products
- proposed sections 74AV to 74AZA provide for recall orders, and
- proposed sections 74AZB to 74AZD provide for warning statements.<sup>65</sup>

#### Stakeholder views on the policy objectives of proposed Part 6AA

As noted earlier, most stakeholders supported the overall objectives of the bill and considered it to be an opportunity for Queensland to lead change on building product regulation which would improve the safety of building products. Specific comments about the proposed chain of responsibility are provided below.

The ACCC supported the bill's proactive regulatory approach in conferring responsibilities on all building chain participants, so far as it is reasonably practicable, to ensure building products are safe and accompanied by appropriate information:

*It is apparent, as in the case of infinity cables, that building products, once installed, are difficult to recall and remediate, resulting in intensive regulator intervention to ensure effectiveness. Placing a positive safety obligation on the supply chain will help ensure that manufacturers, importers and/or suppliers are able to control and detect safety defects before products enter the market.*<sup>66</sup>

The Property Council of Australia welcomed and supported the approach taken in the bill to clearly define a 'chain of responsibility' back to the supplier, importer and manufacturer of products, stating:

*It is imperative that the issue of non-conforming building products is tackled at the point of supply or production as opposed to band-aid solutions during or after installation, and the responsibility being placed on the property owner who has had no, or very little involvement in the procurement of products.*<sup>67</sup>

---

<sup>63</sup> Submission 4, p 5.

<sup>64</sup> Correspondence dated 6 July 2017, p 14.

<sup>65</sup> Explanatory notes, p 15.

<sup>66</sup> Submission 3, p 1.

<sup>67</sup> Submission 7, p 2.

The BDAQ pointed to the major concerns with non-conforming products as currently being:

- the responsibility, liability, and duty of care that are not applicable to the importers, wholesalers and distributors of the products
- in most cases, the responsibility for checking non-conforming products lies with the builder, building designer and the certifier
- for most projects, the building materials are specified and checked for compliance during the design and certification stage to ensure that products being used have been appropriately tested and comply with the Building Code of Australia (BCA) and relevant standards, and
- the problem to be addressed begins at the start of the supply chain - long before the building designer has specified a product, before the certifier has approved a product and before the builder has placed an order for the product.<sup>68</sup>

The BDAQ submission stated that the major issue for industry is that currently importers, wholesalers, and retailers (suppliers) have free range to sell any products imported into the country whether they conform to the required standards or not:

*Very little responsibility or liability is accepted when the products are found to be non-conforming or fail in application. Until this is changed, suppliers will continue to import cheaper, inferior products to increase their profits without any responsibility and without fear of retribution.<sup>69</sup>*

The submission also provided the following example to illustrate another of the BDAQ's concerns about substitution of products:

*There are many circumstances where the building designer has specified an approved product and the builder has requested and ordered this product. However, the supplier has provided a product that does not comply with Australian Standards. Often the difference in the approved product and the substituted product is very difficult to detect. The builder installs the products on the basis that the approved product has been delivered and in many instances the delivery paperwork will show this to be the case.<sup>70</sup>*

The BDAQ submission supported the proposed chain of responsibility 'provided responsibilities are more clearly apportioned across the chain' and recommended:

- a checklist be developed to allow builders and suppliers to check whether a product is unlikely to meet performance requirements (such as lack of any National Association of Testing Authorities' testing data, etc.)
- a national register of suspect or proven non-compliant products and dubious brands be developed so that specifiers, suppliers and the public could access the register to avoid utilizing non-conforming products, and
- manufacturers indicate on their product information that any product sold in Australia is compliant.<sup>71</sup>

BOSMA supported the chain of responsibility in-principle but strongly suggested the need for effective pilot and engagement programs to ensure clarity of understanding, and to enable putting processes in place to minimise risk, such as third party certification.<sup>72</sup>

---

<sup>68</sup> Submission 1, p 1.

<sup>69</sup> Submission 1, p 5.

<sup>70</sup> Submission 1, p 1.

<sup>71</sup> Submission 1, pp 2-3.

<sup>72</sup> Submission 2, p 8.

## 2.2.2 Definitions - Part 6AA, division 1 – sections 74AA and 74AB

### Amendments proposed in the bill

Clause 11 proposes to insert new section 74AA which includes definitions for key terms used in Part 6AA, including the term ‘safe’ and new section 74AB which defines the terms ‘building product’ and ‘non-conforming building product’.

### Stakeholder views and department advice

Several of the submissions suggested amendments to the definitions in section 74AA and 74AB to clarify and better define terms used in the bill. The QLS submitted that ‘many of the terms used in this Part have been defined under proposed section 74AA but have been done so in such a way that the meanings are exceptionally broad and as such, may cause unintended consequences in their interpretation’.<sup>73</sup>

### Definition of the term ‘safe’ - section 74AA

A concern raised by a number of stakeholders was that the definition of ‘safe’ was too broad and may be an unnecessary duplication of the term currently used in the *Work Health and Safety Act 2011*. For example, the HIA submission recommended that ‘rather than using the term ‘safe’ which has other connotations, particularly in respect to work health and safety legislation, that the term ‘conformance’ should be used as this is what the bill is seeking to address’.<sup>74</sup>

The department advised that the definition is consistent with the definition ‘free from electrical risk’ in the *Electrical Safety Act 2002* and relies upon the test of reasonably practicable in the bill. DHPW is cognisant that this term may overlap with other Queensland legislation:

*This has been purposely drafted in this manner to avoid any gaps in the enforcement of NCBPs, for example, where a NCBP complies with a relevant standard but may still be unsafe and may not be subject to existing state or federal legislation. The BPAC is made up of key state and federal regulators who will convene and coordinate a response using the most appropriate legislation and enforcement for the identified issue.*

*The central policy driver of this Bill is to ensure that buildings are safe to occupy by ensuring that products used in construction are not non-conforming. As such it is critical that the term ‘safe’ is defined in this part as it relates to NCBPs. A recent example of this is the Grenfell tower fire where it has been clearly shown that agencies need to work together across jurisdictions to address complex NCBP matters.*<sup>75</sup>

### Definition of the term ‘reasonably practicable’ - section 74AA

The HIA recommended a number of changes to the proposed definition of ‘reasonably practicable’ and suggested there is a need for further clarity. While the HIA understood that the definition provides flexibility for the situation to be judged on its merits, it argued that it is ‘quite a critical term in the application of the bill and it is very open to interpretation’.<sup>76</sup>

### Definition of ‘non-conforming building product’ - section 74AB

Several submissions supported the proposed definition of a non-conforming building product.<sup>77</sup> A number of other stakeholders provided commentary and alternative suggestions for the definitions provided in section 74AB.

---

<sup>73</sup> Submission 17, p 3.

<sup>74</sup> Submission 12, p 3 and pp 6-7; see also AIA, submission 18, p 4.

<sup>75</sup> Correspondence dated 6 July 2017, p 16.

<sup>76</sup> Submission 12, p 7.

<sup>77</sup> See for example, BOSMA, submission 2, p 7; HIA, submission 12, p 7;

The HIA welcomed the inclusion of the definition in the legislation and recommended that proposed section 74AB(1) be extended to provide a more exhaustive list of what a building product is. The submission also considered it important to link the definition to only products that are required to comply with the Building Act, that is, incorporated in building work as the definition in the Act. The HIA also suggested amending ‘non-compliance risk’ to ‘non-conformance risk’ as product conformity is about the product itself conforming to the prescribed requirements in the Building Act, regulations and the NCC.<sup>78</sup>

Master Builders submitted that the definition part 74AB(2)(a)(i) ‘is not, or will not be, safe’ should be removed as safety is addressed in part (ii) by saying ‘does not, or will not, comply with the regulatory provisions’. The submission argues that ‘compliance, that is safety, will be better achieved by reinforcing the existing regulations, rather than introducing a new, difficult to measure and difficult to interpret requirement’.<sup>79</sup>

The BDAQ and the Property Council of Australia raised the same issue and recommended subsection 74AB(2)(a)(i) be removed or clearly defined.<sup>80</sup> The BDAQ also submitted that clarification is required about when a conforming product is ‘Fit for Purpose’ as a product may be a conforming product when used in one type of application but become non-conforming when used in another application.<sup>81</sup>

The Australian Institute of Architects (AIA) raised a concern that the broad wording in section 74B ‘could become a problem depending on the wording in the Regulation that nominates the products whose documentation is to be collected’.<sup>82</sup>

The QLS stated that many of the definitions are too broad and may result in unintended consequences, particularly the terms ‘building product’ and ‘non-conforming building product’.<sup>83</sup>

The department advised that these definitions were left deliberately broad to ensure that there was sufficient coverage across the entire product supply chain:

*To mitigate unintended consequences, practice standards are intended to be developed with industry and will provide for interpretation and guidance on how to best comply with the legislation, similar to the way the workplace health and safety codes of practice operate.*<sup>84</sup>

BPIC requested definitions be provided for ‘substituted product’ and ‘temporary structure and the EWPA also supported the term ‘temporary structure’ as part of the definition of ‘building’.<sup>85</sup> DHPW advised that the definition suggested by BPIC would capture temporary structures such as scaffolding and these types of structures are not captured by the building assessment provisions nor are they subject to the NCC or the Queensland Development Code and that it was expressly intended that these types of structures would not be captured.<sup>86</sup>

---

<sup>78</sup> Submission 12, pp 7-8.

<sup>79</sup> Submission 16, p 3.

<sup>80</sup> BDAQ, submission 1, p 2 and Property Council of Australia, submission 7, p 2.

<sup>81</sup> Submission 1, pp 1-2.

<sup>82</sup> Submission 18, p 4.

<sup>83</sup> Submission 17, p 3.

<sup>84</sup> Correspondence dated 6 July 2017, p 17.

<sup>85</sup> BPIC, submission 4, p 7; and EWPA, submission 14, p 4.

<sup>86</sup> Correspondence dated 6 July 2017, p 17.

### **2.2.3 Duties applying to people in the chain of responsibility - Part 6AA, division 2, sections 74AC to 74AN**

#### Amendments proposed in the bill

Division 2 of proposed new Part 6AA introduces duties relating to building products. The explanatory notes advised:

*The purpose of this division is to introduce obligations on all building product supply chain participants by requiring reasonable actions to ensure building products are fit for the intended purpose, safe and compliant with relevant building assessment provisions.*

*Currently, there are no provisions that address duty of care requirements on the building product supply chain to ensure products and materials used in building work are safe. There are requirements placed on QBCC licensees to ensure that building work is not defective and of the appropriate standard, however this obligation does not extend to the use of non-conforming building products. While it is generally the responsibility of the builder and certifier to determine a building product's suitability when the product is used in construction, they are largely reliant on supporting material such as that provided by the importer, manufacturer or seller.*

*Division 2 enables the QBCC to effectively address a point of failure in the entire building product supply chain and pursue a broader range of offenders, rather than being limited to those at the end of the building product supply chain.<sup>87</sup>*

At the public briefing, the department advised that Australian standards are designed for safety and should be complied with at any stage in the chain of responsibility from manufacture to installation and the amendments proposed in the bill will ensure that all participants are held accountable for ensuring that the building products are suitable for their intended use.<sup>88</sup> The DHPW further advised that while Queensland already has very strong checks and balances in place to identify non-conforming building products during the certification process:

*... the issue with this is that it is often at the end of the building process. This legislation is about reducing the risks for builders and building certifiers and ensuring that other parties further up the chain of responsibility—including designers, manufacturers, importers and suppliers—uphold their responsibility. Suppliers must also, as far as reasonably practical, ensure that their products conform to the standards necessary for their intended use. This is an important step in ensuring that the information provided with building products allows for accurate and informed decisions about the product's future use.<sup>89</sup>*

#### Relationship with safety laws – section 74AC

Proposed section 74AC clarifies the relationship between Division 2 (Duties relating to building products) and other safety legislation (*Work Health and Safety Act 2011* and *Electrical Safety Act 2002*). The explanatory notes advised that in circumstances where a provision of this division and provision of a safety law deals with the same thing, and it is impossible to comply with both provisions, the safety law takes precedence and Division 2 ceases to have operative force.<sup>90</sup>

#### Stakeholder views

The HIA supported the proposed section if it only applies to a safety matter related to a non-conforming building product:

---

<sup>87</sup> Explanatory notes, pp 16-17.

<sup>88</sup> Departmental briefing transcript, 14 June 2017, p 2.

<sup>89</sup> Departmental briefing transcript, 14 June 2017, p 2.

<sup>90</sup> Explanatory notes, p 17.

*This will ensure that duplication of roles and responsibilities will be kept to a minimum between those of WorkSafe Queensland with the requirements contained in the Work Health and Safety Act 2011 and those proposed for the QBCC as part of this Bill.<sup>91</sup>*

The QLS raised a concern that this section will significantly increase ‘red tape’ by mandating compliance with both this legislation and with existing relevant laws, even if both acts deal with the same issue:

*We submit that this will increase the cost of performing building work and more importantly, will create confusion about compliance obligations.*

*Additionally, we are very concerned by sub-section (3) which declares, without qualification, that evidence of a contravention in this division can be admissible for other offences found in other safety laws. In addition to conflicting with proposed section 107, the Society takes the view that the use of derivative evidence should not be admissible against an individual.<sup>92</sup>*

BPIC recommended that the section be deleted as it is a duplication of powers already in existence in the other safety legislation.<sup>93</sup>

The AIA submitted that in cases where a provision of the safety law applies then it should be the only one that is to be complied with.<sup>94</sup>

#### Principles applying to duties – section 74AD

Proposed new section 74AD provides the general principles applying to duties for a person in the chain of responsibility for a building product. The explanatory notes advised ‘the provisions of the bill do not permit, directly or indirectly, any duty holders to avoid their health and safety responsibilities. Proper and effective coordination of activities between duty holders can overcome concerns about duplication of effort or no effort being made.’<sup>95</sup>

#### Stakeholder views

The QLS noted that proposed section 74AD applies the same duty on more than one person:

*The duty is not transferrable and the provision contains no apparent time limit with respect to the duty that is, the duty relating to a designer may extend after the product has been manufactured, distributed, sold and installed. We are also concerned by sub-section (5)(b)(ii) which will essentially prohibit delegating a duty to someone who has the appropriate knowledge and expertise on the matter.<sup>96</sup>*

The AIA raised a concern that this section seems to suggest that when you have a design team (involving a number of professionals) working on the design of a project then each person on the team is responsible for their part of the work:

*This is an unworkable arrangement. When developing a major building design, the design normally goes through a number of design changes so it would be very difficult to determine what part of a design each person did. When a design team is involved, a better arrangement would be to require that the person responsible overall for the project to be the person with the duty.<sup>97</sup>*

---

<sup>91</sup> Submission 12, p 8.

<sup>92</sup> Submission 17, p 4.

<sup>93</sup> Submission 4, p 8.

<sup>94</sup> Submission 18, p 4.

<sup>95</sup> Explanatory notes, p 17.

<sup>96</sup> Submission 17, p 4.

<sup>97</sup> Submission 18, p 4.

Who is a person in the chain of responsibility for a building product and their primary duty – sections 74AE and 74AF

Proposed section 74AE clarifies who is a ‘person in the chain of responsibility’ for a building product is a person who designs, manufactures, imports or supplies a building product; or a person who installs the product in a building. Section 74AF provides the primary duty of a person in the chain of responsibility.

Stakeholder views and department advice

The QLS submitted that ‘this very broad definition will mean that a person is responsible for a product when they need not, in their particular role, have any intricate or substantive knowledge of the product’s design, safety features, use in or on particular building work or with other particular products:

*If all of these people are to remain in the chain of responsibilities, the Society strongly advocates that their particular roles within the chain and their actual knowledge be taken into account when considering the imposition of duties and their breach.<sup>98</sup>*

The MEA and BPIC called for the definition of person in the chain of responsibility to be expanded to capture companies and other entities.<sup>99</sup> The department advised that this amendment is not considered necessary as section 32D of the *Acts Interpretation Act 1954* ensures that a reference to a person is also a reference to a corporation.<sup>100</sup>

The BDAQ submitted that there should be clear definitions of the terms ‘design’, ‘manufacture’, ‘import’, and ‘supply or install building products’ as this is not clear in the proposed definition.<sup>101</sup> The BDAQ also pointed out that ‘product designers’ are in a different category to ‘building designers’ and building designers rely on product specification information from the manufacturers to ensure they specify ‘fit for purpose’ products and materials.<sup>102</sup>

The EWPA and Australian Steel Institute (ASI) suggested creating a stronger reliance on building certifiers and third party certification of products.<sup>103</sup> The department advised that while building certifiers are currently regulated through the building regulatory system and provide strong checks and balances when it comes to non-conforming building products, this is at the end of the supply chain and non-conforming building products may have been installed in such a manner that are costly to replace or rectify:

*The amendments in the Bill will share this risk further up the supply chain to those who are best able to identify the products that may be non-conforming earlier, and also ensures others are held responsible, such as providing appropriate and accurate information.<sup>104</sup>*

The HIA submission repeated its earlier recommendation regarding linking the definitions to only products that are required to comply with the Building Act and removing the ‘intended use’ definition.<sup>105</sup> DHPW advised that the definition of ‘intended use’ is integral to the operation of the bill as it provides what the building product has to comply with.<sup>106</sup>

---

<sup>98</sup> Submission 17, p 4.

<sup>99</sup> MEA, submission 11, p 6; and BPIC, submission 4, p 8.

<sup>100</sup> Correspondence dated 6 July 2017, p 17.

<sup>101</sup> Submission 1, p 2.

<sup>102</sup> Submission 1, p 5.

<sup>103</sup> ASI, submission 20, p 3; and EWPA, submission 14, p 5.

<sup>104</sup> Correspondence dated 6 July 2017, p 17.

<sup>105</sup> Submission 12, pp 7- 9.

<sup>106</sup> Correspondence dated 6 July 2017, p 17.

The HIA and Master Builders supported the inclusion of new participants in the building product supply chain but raised a concern about the omission of other parties such as building designers, architects, building surveyors and building certifiers.<sup>107</sup> The EWPA also recommended that consideration be given to including specifiers and certifiers in the chain of responsibility ‘to ensure that “loose” product certification is not used as part of a defence of non-conforming product supply’.<sup>108</sup>

Master Builders also submitted that within the chain, accountability must be clearly allocated - ‘those in the chain must be able to rely on the undertakings of those further up the chain. Accountability needs to be allocated to the first person in the chain who breaches their duty’.<sup>109</sup>

The department noted there were a number of the concerns raised regarding the practical identification of responsible persons and its broad definition and advised that ‘it is intended that guidance will be provided through the development of practice standards or the like’.<sup>110</sup>

At the public hearing, the department provided further advice that the definition is broad and captures the relevant actors in that particular chain and that ‘architects and engineers are not necessarily part of the building products supply chain in the strictest sense that is included in the bill. Whether they are included would be a matter for government policy’.<sup>111</sup>

#### Accompanying information – section 74AG

Proposed section 74AG provides for an additional duty for a person the building product chain of responsibility to ensure that, as far as reasonable practicable, a building product is accompanied by required information (defined in section 74AG(6)) about how the product must be associated with a building and intended to be used.<sup>112</sup> This information is to be provided:

- by the product designer to another person who is to give effect to the design (section 74AG(1))
- by the manufacturer, importer or supplier of the product when the product is given to another person (section 74AG(2)), and
- by the installer of the product to the owner of the building (section 74AG(4)).

Proposed section 74AG(5) provides for a regulation, for subsection (4) or subsection (6) to be made to prescribe the matters that must be included or provided for in the information, matters that must not be included or provided, and the form in which the information must be given.

#### Stakeholder views

A number of stakeholders raised issues and made recommendations in relation to proposed section 74AG of the bill including those outlined below.

The ACCC submission noted that the supply chain for building products has evolved and diversified, with more products being imported, often directly by builders for particular projects in smaller lots:

---

<sup>107</sup> HIA, submission 12, p 8 and public hearing transcript, 10 July 2017, p 10; Master Builders, submission 16, p 3.

<sup>108</sup> Submission 14, p 2.

<sup>109</sup> Submission 16, p 3.

<sup>110</sup> Correspondence dated 6 July 2017, p 17.

<sup>111</sup> Public hearing transcript, 10 July 2017, p 48.

<sup>112</sup> Explanatory notes, p 18.

*In the absence of independent third party testing and supply chain vigilance, simply specifying physical or compliance requirements in purchasing contracts is unlikely to provide appropriate assurance that the products are safe and compliant. Reliance on self-certification is also problematic, particularly when overseas manufacturers or suppliers are not well known to the importer and supply is not part of an ongoing arrangement. These issues are exemplified by the national recall of Infinity and Olsent (Infinity) branded cables, which is ongoing.<sup>113</sup>*

EWPA raised a concern about fraudulent certification and documentation:

*In speaking with national plumbing and electrical association equivalents, they say that mandatory requirements for electrical products and plumbing products to conform either through WaterMark or the electrical schemes have been fantastic in some ways and absolutely awful in others, because it has driven a whole industry of fraudulent documentation and certification. Mandatory certification works but only if you address the issue of fraudulent certification. That is simply because any person doing due diligence in the supply chain or chain of responsibility is using those certificates for their basis of reasonably assuming that the material is appropriate for use.<sup>114</sup>*

BOSMA supported the intent of the requirement for accompanying information 'but strongly suggests the need for an effective pilot and final engagement programmes to ensure clarity of understanding, and enabling the need to put processes in place such as third party certification to minimise risk'.<sup>115</sup>

Master Builders agreed that new measures to ensure manufacturers and suppliers are providing appropriate information are required and suggested that the exact nature of the required information must be practical and reliable:

*For the contractor (installer) this needs to link into the certification process. For the manufacturer it needs to be generated by an independent third party. This has not been detailed in the bill and needs further consideration.<sup>116</sup>*

The AIA noted that requiring all in the building chain to confirm that building products are conforming building products will significantly increase the work load of designers, certifiers, builders and installers to obtain and verify the accuracy of product documentation supplied by manufactures and suppliers:

*Under this arrangement everyone pays the cost of additional work at each and every step in the supply chain. From a practical point of view, it will increase the paperwork to demonstrate that one's duty has been performed and all required information for each product, its intended use and its installation has been collected. The cost for this additional work will have to be passed onto building owners.<sup>117</sup>*

The submission from the AIA requested that the Institute be given the opportunity to comment on the wording of the proposed regulation as:

*This is an area where everyone in the chain of responsibility could be saddled with enormous unnecessary bureaucratic workload that does not support the aims of the proposed legislation. In a major project, this could involve extensive documentation to be collected.<sup>118</sup>*

---

<sup>113</sup> Submission 3, p 2.

<sup>114</sup> Public hearing transcript, 10 July 2017, p 36.

<sup>115</sup> Submission 2, p 8.

<sup>116</sup> Submission 16, p 4.

<sup>117</sup> Submission 18, p 3.

<sup>118</sup> Submission 18, p 5.

The CSR submission noted that the requirements under section 74AG(2), if implemented, would substantially increase ‘paperwork’ and cost required to evidence compliance of building products supplied and used in Queensland:

*... in many instances it is not practicable for CSR as a manufacturer to provide such product information for all building products installed in buildings along the chain of responsibility up to the owner...*

*Building product manufacturers have for a number of years adopted the practice of educating the industry through provision of detailed technical information being made widely available in both printed and digital form to industry participants.<sup>119</sup>*

The HIA submission agreed that requirements under proposed section 74AG, as currently drafted, have the potential to create significant regulatory burden by requiring product designers, suppliers, manufacturers, etc. to provide product information for the numerous building products that they are associated with:

*If we consider that in a single house there will be well over a thousand products the[y] need to provide product conformance documentation for this would be extremely onerous.*

*If the legislation proceeds the prescribed list of products required to provide conformance information is fundamental to determining how complex the process could become. If this is not managed effectively it may become unwieldy. Prior to the Bill proceeding it would be beneficial for the Government to outline what it intended to be prescribed in the future regulations.*

*In practice it also creates issues in terms of how this information is to be provided to the next person down the line particularly from a supplier to a person purchasing building products.*

*For example, if a builder went in to a hardware supplier to purchase a pack load of studs, some flooring, plasterboard, glue, screws, nails, packing, paint and a floor waste. As part of purchasing these items would the person behind the counter supplying these items need to hand over a product information sheet for each of these items?<sup>120</sup>*

The HIA recommended section 74AG be amended to include that the required information is ‘readily available’ rather than requiring the product to be accompanied by the required information.<sup>121</sup>

The CPA submission noted that the intent is that supporting regulation would prescribe which products are required to have product information, and what the information is to prescribe, but without having this available as part of the review this bill makes it difficult to comment on the feasibility of the proposal.<sup>122</sup>

At the public hearing, BPIC advised that it had heard concerns that adhering to the requirement of section 74AG may create a mountain of paperwork and place an unrealistic burden on those people in the supply chain to provide that information:

*To address those two concerns, BPIC believes that in this digital age it is appropriate for QBCC to be requiring this level of product information primarily because a lot of the information these days can be found in machine readable electronic format which can be modelled, specified, scanned, verified and securely stored. New Zealand has just established the benefits and feasibility of starting an electronic tracking system for building products, and its existing and efficient digital compliance solution is already available internationally.*

---

<sup>119</sup> Submission 19, p 3.

<sup>120</sup> Submission 12, pp 9-10.

<sup>121</sup> Submission 12, pp 10-11.

<sup>122</sup> Submission 9, p 6.

*With regard to the second point about perceived burden on builders and installers, it is worth reflecting that residential builders tend to build the same types of dwellings over and over. They tend to stick with a common building typology. They also commonly offer clients a limited supply of products for each particular building element such as roofs, wall cladding and so forth. Product compliance reporting done initially for one housing type should most likely prove to be applicable to other housing types of a similar nature.<sup>123</sup>*

#### Department advice

In response, the department advised that designers and manufacturers are best placed to determine the suitability and appropriate uses of the products they design and manufacture. When designing and manufacturing products, it is generally expected that a designer and manufacturer will create a product with an intended use in mind and have specifications readily available.

*This section simply requires them, in this circumstance, to ensure they pass the relevant information on in a true and correct manner so far as reasonably practicable. It is intended that practice standards or the like will describe how those in the chain of responsibility can discharge their duty. For example, HIA queried how a builder purchasing a range of building products from a large retailer can ensure they are able to obtain product information without additional burden. In this situation the retailer or the manufacturer can discharge their duty by making the information available on the product packaging or on a website, for example the standard that the product was tested against for that particular use.<sup>124</sup>*

#### Additional duties relating to recalls – section 74AH

Proposed new section 74AH places an additional duty on a person in the chain of responsibility of a building product to comply with the requirements relating to recall orders or corresponding recall orders, for that product. Section 74AH(3) provides that a ‘corresponding recall order’ means an order, however called, under the law of another State providing for the recall of a building product from use.

#### Stakeholder views

The MEA raised the following concern:

*Subsection (3) of clause 74AH mandates that interstate recalls "must" be complied with. In our experience in the electrical industry occasions have arisen where different jurisdictions have enacted recalls of product however in other states and circumstances no recall has been undertaken, and justifiably so. We would caution any blanket statutory provision which compels compliance with a recall that references an interstate statute that does not apply to a particular state.*

*We would suggest that the Minister be made aware and that QBCC, ESO or WHS Qld officers advise the relevant Minister as to the applicable nature of the recall in other states and make relevant comparison and make a recommendation based on Queensland legislation. Whilst we recognise that 99% of cases an interstate recall will be sufficient we believe that an adverse case may well harm business and employment opportunities unnecessarily or have other unintended consequences.<sup>125</sup>*

---

<sup>123</sup> Public hearing transcript, 10 Jul 2017, p 3.

<sup>124</sup> Correspondence dated 6 July 2017, pp. 17-18.

<sup>125</sup> Submission 11, p 6.

The QLS submitted that care will need to be taken to ensure that everyone in the chain of responsibility is aware of the recall order and that no action should be taken against a party if they are able to demonstrate that they did not know, or could not have reasonably known such an order had been issued.<sup>126</sup>

#### Duty of executive officer of company – section 74AI

Proposed new section 74AI proposes to place a duty to exercise ‘due diligence’ on the executive officer of a company involved in the chain of responsibility for a building product. The explanatory notes advised that the executive officer may be proceeded against and convicted of an offence under this section whether or not the company has been proceeded against and convicted of an offence under this division and that the Council of Australian Government principles and the *Directors’ Liability Reform Amendment Act 2013* were considered in the drafting of this section.<sup>127</sup>

#### Stakeholder views

Master Builders supported this amendment on the basis individual licence holders are already held to account and same should apply across the chain, and their submission also noted the expectation on executive officers to follow a process of ‘due diligence’ is reasonable.<sup>128</sup>

The HIA supports the ‘notion of companies exercising due diligence and having processes in place to minimise the risks of non-conforming product being used’. However, the Association noted:

*... that from the perspective of a small builder that may be a sole trader with one, two or maybe no employees, the obligation under 74AI to exercise due diligence to ensure that every product that they use in any building that they build will be a conforming product, is a significant obligation for parties at the end of the supply chain.*

*In reality, the builder will be reliant on the other people in the supply chain to be providing them with conforming products and appropriate evidence.*

*HIA understands that through the inclusion of the ‘people in the chain of responsibility’ obligations some concerns for builders and trade contractors to check conformance will be mitigated.*

*However, without clear guidelines of what a builder/sub-contractor is required to do to ensure they have exercised ‘due diligence’ the Bill still appears to apply a significant obligation on the parties to ensure they are not liable if non-conforming product is used.<sup>129</sup>*

The HIA added to its’ concerns raised about section 74AI by noting the substantial penalty for failure to exercise due diligence:

*For a small builder this would mean that their business would be untenable. Again we would stress that clear guidelines of what a builder/sub-contractor is required to do to ensure they have exercised ‘due diligence’ is required, particularly given the substantive penalty that could be incurred.<sup>130</sup>*

The MEA submission raised the following concern:

*Under 74AI (1) MEA has been unable to identify where within Subdivision 2 the duties of a company have been identified. Upon further examination of the QBCC Act, as currently enacted, we have been unable to identify any Duties required to be undertaken by a company.*

---

<sup>126</sup> Submission 17, p 5.

<sup>127</sup> Explanatory notes, p 18.

<sup>128</sup> Submission 16, p 4.

<sup>129</sup> Submission 12, p 12.

<sup>130</sup> Submission 12, p 13.

*As such we would query, if section 74AI "Duty of executive officer of company" is enacted. We would suggest that the definition of the "person in the chain of responsibility for a building product" be expanded to include Company however so described including but not limited to Partnerships, PTY Ltd, unincorporated entities and other entities.<sup>131</sup>*

The QLS noted the imposition of duties on company executives and reiterated its concerns about the actual knowledge of people caught in the chain of responsibility and also cautioned against unnecessary duplication noting that executive officers already have a range of duties under the *Corporations Act 2001* (Cth) and consumer protection legislation including under the Australian Consumer Law.<sup>132</sup>

#### Failing to comply with a duty – section 74AJ

Proposed new section 74AJ creates an offence for a person in the chain of responsibility for a building product that breaches a duty under subdivision 2. The maximum penalty for a contravention by a person is 1000 penalty units. The explanatory notes advised:

*It is considered that a penalty must be greater than those currently imposed by disciplinary action (as outlined in section 74D) and provide a sufficient deterrent. This approach to contraventions of duties appears to be common practice across similar safety regulatory frameworks outlined in the Work Health and Safety Act 2011 and the Electrical Safety Act 2002.<sup>133</sup>*

The explanatory notes advised that the bill creates new offences for contravening the obligations placed on participants in the building product supply chain to prevent and address non-conforming building products and also replicates and expands on the current offences in the QBCC Act for failing to comply with an order or direction of the QBCC and its inspectors.<sup>134</sup> With respect to the proposed penalties the explanatory notes advised:

*The penalties in the bill are proportionate and relevant to the seriousness of the conduct, as there is a risk to personal safety and potential loss of life arising from breaches. They are also maximum penalties and still allow a court to impose lesser penalties where appropriate.*

*While there are existing penalties in the QBCC Act, the Bill introduces additional penalties as an enforcement mechanism and to ensure a credible level of deterrence for violations when a non-conforming building product is used in a building, supplied, imported, manufactured and/or designed. For example, the penalty relating to failing to comply with a direction to remedy takes into account the potential life safety implications associated with a person who has a duty and fails to remedy the situation despite a direction from the QBCC.<sup>135</sup>*

The explanatory notes also advised that the offence provisions do not impose strict liability; for example, it will be a defence for a person charged with a breach of a duty that the person took reasonable precautions and care in the circumstances.<sup>136</sup>

---

<sup>131</sup> Submission 11, p 6.

<sup>132</sup> Submission 17, p 5.

<sup>133</sup> Explanatory notes, p 19.

<sup>134</sup> Explanatory notes, p 7.

<sup>135</sup> Explanatory notes, p 8.

<sup>136</sup> Explanatory notes, p 8.

### Stakeholder views

The BDAQ submission supported the proposed penalties on the basis they are proportionate to the significant risk posed by non-conforming building products but requested clarification about who the penalties are aimed at. The submission raised a concern that the penalties appear to be targeted at individuals and not companies.<sup>137</sup>

The MPAQ also supported the proposed penalties:

*Currently, the responsibility of policing the installation of unapproved products falls onto the installing licensed plumbing / drainage contractor whose responsibility should be concentrated on installation to the relevant Australian Standards. Unfortunately with the vast quantity of non-watermarked products available in many hardware stores, the handyman and DIY markets are not currently policed. This is why we hold the view that the previous penalties in this area were completely inadequate and we support the penalties as outlined in the Bill.*<sup>138</sup>

The submission from the BOSMA supported, in-principle, the proposed offence provisions on the basis that they will not impose strict liability.<sup>139</sup>

The MEA submission noted that the maximum penalty for a person is 1000 penalty units for various breaches and that in comparison, the *Work Health and Safety Act 2011* and the *Electrical Safety Act 2002* have maximum units as 30,000 for a body corporates and 6000 units for an individual and stated that ‘our observation is that the fines in the proposed bill are manifestly inadequate and well below community expectations as a form of deterrent’.<sup>140</sup>

Master Builders submitted that the significant penalty of 1000 penalty units is reasonable and consistent with other related penalties.<sup>141</sup>

### Duty about representations about building products – section 74AK

Proposed new section 74AK creates an offence for a person in the chain of responsibility for a building product to make a representation, or permit a representation to be made, about the intended use of the product that does not comply with requirements for the representation prescribed by regulation. The explanatory notes advised that prescribed representation must not be false or misleading and may include certain requirements, for example, supporting information regarding the intended use of the building product or exact wording, setting and type size required for the representation:

*To provide a sufficient deterrent, the maximum penalty for a contravention is 1000PU, which is consistent with the penalties contained in section 151 of the Competition and Consumer Act 2010 relating to the supply or possible supply of goods with false or misleading representations. The penalty acknowledges the importance of ensuring representations are not false or misleading, as subsequent participants in the supply chain for a building product rely on these representations.*<sup>142</sup>

### Stakeholder views

The HIA submission supported the inclusion of this section and noted ‘this should hopefully result in deterring the proliferation of substandard products entering the market place’.<sup>143</sup> The submission also recommended that subsection 74AK(1) be amended to ensure that representations/claims referred to

---

<sup>137</sup> Submission 1, p 1.

<sup>138</sup> Submission 15, p 2.

<sup>139</sup> Submission 2, p 7.

<sup>140</sup> Submission 11, p 5.

<sup>141</sup> Submission 16, p 4.

<sup>142</sup> Explanatory notes p 19.

<sup>143</sup> Submission 12, p 13.

in the clause 'be of the products conformity to a technical standard and/or NCC'.<sup>144</sup> The submission suggested that this should take the form of a 'Declaration of a Products Conformity' to the relevant regulatory provisions i.e. the NCC, an applicable standard or to a Queensland Development Code where one applies and advised that the HIA would be happy to provide examples of these declarations of conformity statements/certificates which are used in a number of countries currently and in particularly Singapore and Europe.<sup>145</sup>

Master Builders raised a concern that the legislation is silent on the extent that a person in the chain can rely on representations provided to them from those also in the chain and that this is a critical omission that needs to be addressed as those in the chain must be able to rely on the undertakings of those further of up the chain.<sup>146</sup>

The submission from the AIA stated that it is not clear from a legal point of view, the extent that a person in the design stage of a project is expected to reasonably rely on the accuracy of representations and information provided by manufacturers or suppliers and requested that this aspect be clarified.<sup>147</sup>

The QLS submission noted that the duty should stipulate that the person must not knowingly make a false and misleading representation:

*Again, we repeat our comments regarding the level of detail which is to be included in a regulation, including under this section, and request that this subordinate legislation be provided in draft form for its review and proper consultation, prior to its introduction.*<sup>148</sup>

#### Duty to notify non-conforming building product and notifiable incident – sections 74AL and 74AM

Proposed new subsections 74AL(1) to (4) creates a duty for a person in the chain of responsibility to notify the QBCC (as soon as practicable but within 2 days) if there is a reasonable suspicion or knowledge that a building product is a non-conforming building product for an intended use and the notice must include advice of any notifiable incident caused by the use of the building product.

Under proposed new subsections 74AL(4) to (6) if the QBCC determines the building product is or may be a non-conforming building product, the Commissioner may direct (by written notice) a person to take a stated action with a stated period to remove or minimise the risk and the person must comply with the direction.

Proposed new section 74AM requires a person in the chain of responsibility, who becomes aware that a notifiable event has been or may be caused by the use of a non-conforming building product, to notify the QBCC (as soon as practicable but within 2 days) of becoming aware of the situation.

#### Stakeholder views and department advice

A number of submissions commented on this section and there appeared to be some confusion between the application of proposed sections 74AL/74AM and proposed section 54A. The department clarified that sections 74AL and 74AM relate specifically to non-conforming building products and section 54A is related to the safety of workers on active building sites.<sup>149</sup>

---

<sup>144</sup> Submission 12, p 13.

<sup>145</sup> Submission 12, pp 13-14.

<sup>146</sup> Submission 16, p 4.

<sup>147</sup> Submission 18, p 5.

<sup>148</sup> Submission 17, p 5.

<sup>149</sup> Correspondence dated 6 July 2017, p 18.

Master Builders supported the duty to notify the commission if a person becomes aware or have reason to suspect that a building product is a non-conforming building product for an intended use but raised a number of issues:

*As the responsible person has a duty to provide this information within two days, we would expect that the commission has a similar obligation to act on the information in a timely manner. It is important that non-conforming building products are not only found early but also removed from the supply chain early.*

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

*This duty needs to be time bounded. A person in the chain cannot be expected to maintain records of their projects for an indefinite period.<sup>150</sup>*

Master Builders also welcomed the expanded powers for the QBCC to direct anyone in the chain of responsibility to remove or minimise safety risks and not just licenced contractors.<sup>151</sup>

The BDAQ submission did not support proposed section 74AL(3) which requires a person in the chain of responsibility to notify the QBCC if they become aware of a notifiable incident on the basis this duplicates work, health and safety provisions.<sup>152</sup>

The HIA recommended that, to assist in interpretation of the bill, section 74AL be split into the duty to notify and the duty to act to assist and that section 74AM be deleted ‘as it repeats section 74AL’.<sup>153</sup>

BPIC and EWPAA raised concerns about product certification organisations (if they were to be included in the chain of responsibility) having a duty to report products that do not meet the testing requirements, especially given confidentiality requirements.<sup>154</sup> DHPW advised that product certification organisations are not intended to be captured as part of the chain of responsibility and therefore do not have a duty to report failed testing results to the QBCC. However, the product certification company is not restricted from reporting a suspected non-conforming building product to the QBCC if they have knowledge that it has failed particular tests and is in the product supply chain purporting to comply.<sup>155</sup>

The MPAQ raised a concern that the provision:

*... requires licensees to effectively ‘dob in’ a business partner an organisation that they are likely to have an ongoing business relationship with. This creates numerous ongoing relationship and likely financial impacts upon the reporter. If this is to occur it is vital that the licensee reporting is able to remain anonymous to all those apart from the authority to which they report the incident to.<sup>156</sup>*

---

<sup>150</sup> Submission 16, p 4.

<sup>151</sup> Submission 16, p 5.

<sup>152</sup> Submission 1, p 2.

<sup>153</sup> Submission 12, p 14.

<sup>154</sup> BPIC, submission 4, pp 9-10; and EWPAA, submission 14, p 5.

<sup>155</sup> Correspondence dated 6 July 2017, p 18.

<sup>156</sup> Submission 15, p 2.

In response to a question from the committee following the public hearing, DHPW advised that while there is nothing specifically in this bill to protect whistleblowers 'it is silent to the point where the QBCC can make sure that they have robust protections in the administrative process'.<sup>157</sup> The QBCC provided further clarification:

*As a normal part of being an enforcement body the QBCC comes across a whole range of very confidential information. It might be minimum financial requirements that we get commercial information from a range of our licensees. We have strong measures in place. Obviously we are constrained within the requirements of the Australian Privacy Principles firstly. We have an obligation to make sure that we handle all information in accordance with those privacy principles. The second thing, as part of a general investigative process, is that we do not necessarily need to give information out to people in respect of where we got the information from. That is quite often the way it goes. Information may come to light, but that would generally be only if the matter was before a court or some other tribunal.*<sup>158</sup>

The QLS considered sections 74AK and 74AL are 'over prescriptive' and that the matters covered are already dealt with under federal consumer protection laws.<sup>159</sup> However, DHPW advised that it is of the view that the Australian consumer laws do not always apply to building products as they are not generally considered to be a consumer good and that this appears to be a gap in the current regulation that this bill is seeking to address.<sup>160</sup>

In relation to section 74AM, the MEA suggested an additional subsection (3) should be added to this clause to clarify that if the notifiable incident has already been made to WHS Qld or the ESO then penalty units do not apply. The submission also noted:

*An area for confusion within the draft bill relates to the definition of a notifiable incident. MEA would suggest that the draft bill be amended to refer to the definition of notifiable incidents as described in Work Health and Safety Act 2011 and the Electrical Safety Act 2002 as previously discussed.*<sup>161</sup>

#### Commission may require remedial action – section 74AN

Proposed new section 74AN provides that the QBCC may require remedial action if it reasonably believes a person is contravening a duty under subdivision 2 or has contravened such a duty and it is likely that the contravention will continue or be repeated.<sup>162</sup> The department advised that the proposed powers of the QBCC to respond to these issues are aligned with similar powers of other Queensland safety regulators such as Workplace Health and Safety and the Electrical Safety Office and that the QBCC and DHPW intend to work with stakeholder groups to ensure the smooth implementation of the bill with minimal disruption to the industry, which will mean putting in place strong governance arrangements within the QBCC.<sup>163</sup>

#### Stakeholder views

The Master Builders submission welcomed the expanded powers for the Commission direct anyone in the chain of responsibility and not just licensed contractors to remove or minimise safety risks.<sup>164</sup>

---

<sup>157</sup> Public hearing transcript, 10 July 2017, p 49.

<sup>158</sup> Public hearing transcript, 10 July 2017, pp 49-50.

<sup>159</sup> Submission 17, p 6.

<sup>160</sup> Correspondence dated 6 July 2017, p 18.

<sup>161</sup> Submission 11, p 6.

<sup>162</sup> Explanatory notes, p 19.

<sup>163</sup> Departmental briefing transcript, 14 June 2017, p 2.

<sup>164</sup> Submission 16, p 5.

Strata Community Australia (Qld) (SCA (Qld)) raised a concern that the bill does not require the consent of a body corporate or other person affected by an order to undertake remedial action and that the consequences for non-compliance with such orders appear to be limited to the imposition of a penalty:

*This means that whilst the person responsible for the use of a non-conforming building product may have a fine imposed (maximum fine of \$121,900) there is no avenue provided to enforce their compliance with the notice, to require that they pay rectification costs or to allow the Commission to step in.*<sup>165</sup>

#### **2.2.4 Enforceable Undertakings – sections 74AO to 74AU**

Division 3 of proposed new Part 6AA provides the ability and procedures for the QBCC to accept, vary and withdraw a written undertaking in relation to building products. The explanatory notes advised:

*An enforceable undertaking is a voluntary, written agreement given by a person which requires that person to take specified actions to “make good” a situation. The regulator has discretion whether or not to accept the undertaking as an alternative to prosecution. Enforceable undertakings can be a flexible, responsive, cost effective and tailored enforcement alternative where this may enable a better overall regulatory outcome.*<sup>166</sup>

Any issues raised by stakeholders regarding enforceable undertakings are provided below.

##### Commission may accept building product undertaking – section 74AO

Proposed new section 74AO provides that the QBCC may accept a written undertaking, called a ‘building product undertaking’ in relation to a contravention or alleged contravention of this new Part 6AA relating to non-conforming building products. The explanatory notes advised that the building product undertaking is not an admission of guilt by the person and explained that the QBCC may generally consider a building product undertaking if:

- the QBCC has obtained sufficient admissible evidence to establish a prima facie breach has occurred relating to new Part 9 (Building products)
- the person in relation to a contravention or alleged contravention of this Part agrees to the undertaking on terms which would be acceptable to the QBCC, and
- the QBCC considers the undertaking to be an appropriate regulatory outcome, having regard to the significance and impact or likely impact of the issues or building product.<sup>167</sup>

##### Stakeholder views and department advice

The HIA submitted that the purpose of the inclusion of section 74AO is unclear and requires clarity/justification as there is no definition of a building product undertaking and it is therefore unclear who is obligated to act and when an undertaking would arise.<sup>168</sup>

At the public briefing, DHPW provided the following example of where a problem may have been identified with a product being imported or sold:

*The QBCC will then have the power to undertake enforceable undertakings with that particular responsible person. That is how it is described in the legislation. That could mean changing how you distribute that product, what sort of information you give with that product, or ceasing to provide that product. Again for those people further up the chain those new powers do apply.*<sup>169</sup>

---

<sup>165</sup> Submission 8, p 4.

<sup>166</sup> Explanatory notes, p 20.

<sup>167</sup> Explanatory notes, pp 20-21.

<sup>168</sup> Submission 12, p 14.

<sup>169</sup> Public briefing transcript, 14 June 2017, p 6.

Contravention of building product undertaking – section 74AS

Proposed new section 74AS enables the QBCC to apply to the Magistrates Court when a person has contravened a building product undertaking. The explanatory notes advised that if the court is satisfied that the person has contravened the undertaking, it may:

- direct the person to comply with the undertaking
- discharge the undertaking, and
- impose any penalty, including costs of the proceeding, including legal costs, and the reasonable costs of the QBCC in investigating the contravention and monitoring compliance with the building product undertaking in the future.<sup>170</sup>

The QLS noted that under the proposed section the QBCC can obtain an order from the Magistrates Court for compliance with an enforceable undertaking and is not prevented from also commencing a proceeding to prosecute the breach of the undertaking:

*If the Commission is afforded these two options without adequate clarity of the process to be followed, a degree of uncertainty will be introduced, and could potentially create a perception that the Commission is “forum-shopping” if it is not successful in one proceeding. We submit that the Commission should elect one course of action and/or if one action is commenced, another cannot be started until the first action is finalised and the party has had the opportunity to comply in accordance with the orders of the first action.*

*In addition, we do not believe it is reasonable to seek costs for monitoring compliance under sub-section 74AS(3)(b)(ii) as this is part of the Commission’s normal functions.<sup>171</sup>*

**2.2.5 Recall orders – sections 74AV to 74AZA and 74AH**

Amendments proposed in the bill

The Minister advised in the explanatory speech that it is proposed that the responsible minister have the power to issue a warning statement about a product and to issue a recall order where deemed necessary. The Ministerial recall power is modelled on Division 2B of the *Electrical Safety Act 2002* and Division 3 of the *Competition and Consumer Act 2010*.<sup>172</sup>

Division 4 of Part 6AA proposes to introduce new sections 74AV to 74AZA which establish a Ministerial power and associated procedures, including a show cause process, to recall a batch or type of building product in certain circumstances and ensure that responsible persons must comply with the recall order.<sup>173</sup>

Proposed section 74AZ(2) clarifies that each responsible person to whom the recall order applies is liable for any cost incurred in relation to complying with the order, including costs incurred by a supplier or installer giving reasonable help in relation to the recall order under section 74AZA.

Proposed new section 74AH also places an additional duty on a person in the chain of responsibility not to supply or install a building product that is the subject of a recall order.

The explanatory notes advised that the recall powers are designed to protect building practitioners who, through no fault of their own, purchase a non-conforming building product:

---

<sup>170</sup> Explanatory notes, p 21.

<sup>171</sup> Submission 17, p 6.

<sup>172</sup> Queensland Parliament, Record of Proceedings, 25 May 2017, p 1449 and explanatory notes, p 9.

<sup>173</sup> Explanatory notes, p 22.

*To provide redress in such situations, the recall order may state what a responsible person, such as a supplier, must do to recall the building product. This can include prescribing actions such as repairing a building product to render it conforming, replacing a non-conforming product with conforming one or providing a refund for the non-conforming building product.*<sup>174</sup>

The explanatory notes also advised that the Minister's powers to recall and to issue warnings are not expected to be used routinely or often and will have a robust framework to ensure their appropriate use:

*For example, the Minister is required to issue a show cause notice to an affected party prior to issuing a recall order, inviting the person to show cause as to why the order should not be made. As such, prior to a recall being made or a warning being issued the principles of natural justice are to be upheld.*

*Before making a recall order, the Minister must also satisfy themselves that the product that is proposed to be the subject of a recall is a non-conforming building product for all its uses or that its proposed association with a building will expose persons to safety risks.*

*The issuing of a Ministerial recall order or warning statement will also be subject to judicial review and any decision can be reconsidered by the Minister on application.*<sup>175</sup>

#### Stakeholder views and department advice

A number of submissions supported the proposed amendments; for example, the HIA stated that it is a positive step and 'additionally, the corresponding recall order from another state or territory will strengthen the management of the supply chain nationally'.<sup>176</sup>

Other stakeholders raised issues and made recommendations in relation to the proposed ministerial recall powers. These are summarised below.

#### Application of division - Section 74AV

BPIC proposed a number of amendments including deleting section 74AV(1)(a)(ii) and substituting examples of things that come under the 74AV(1)(a)(i) in order to better define non-conforming building products to be recalled by the Minister.<sup>177</sup>

The EWPAAsubmitted that it is aware of examples of a product being sold with no claim of conformity to any standard, but the product is in every visible way identical to other products used for a particular life-safety application:

*The product is promoted without an intended use, but could reasonably be assumed to be for an intended use. EWPAAsupports a Ministerial recall when the product has been, is proposed to be, or in the absence of advice to the contrary could reasonably be assumed to be associated with a building for an intended use.*<sup>178</sup>

The QLS recommended that there should be mechanism for a person to take action to recover the costs from the at fault party where someone in the chain of responsibility, possibly the builder, is directed to remove a faulty product in circumstances where they may not be at fault.<sup>179</sup>

---

<sup>174</sup> Explanatory notes, pp 8-9.

<sup>175</sup> Explanatory notes, p 9.

<sup>176</sup> Submission 12, p 12.

<sup>177</sup> Submission 4, p 10.

<sup>178</sup> Submission 14, pp 5-6.

<sup>179</sup> Submission 17, p 6.

The AIA submitted that it is not clear how the decision will be made to determine who will be responsible for a recall.<sup>180</sup>

At the departmental briefing, the committee asked about situations where it is not clear whether a product failure, such as a retaining wall, is due to a non-conforming product or a failure in the installation of the product. The department advised that a number of agencies are involved in investigations to identify the cause of retaining wall collapses including the QBCC, the Board of Engineers Queensland, and local government authorities:

*... the bill is principally directed at identifying and responding to whether the product is non-conforming. If a product included as part of the design or installation of a retaining wall is found or suspected to be non-conforming then the QBCC could respond using the powers under the Bill. If investigations reveal that the failure of the retaining wall is due to a design or installation fault, then this would likely fall outside the scope of the legislation.*<sup>181</sup>

#### Section 74AW – Minister may make a recall notice

The HIA submitted that the requirements around recall orders 'are unclear as to how they would work in practice and how this would apply to a builder who installs the product and where they have relied upon the information of the supplier.'<sup>182</sup>

Master Builders raised a concern that the section does not set out how the commission will determine who will be accountable for a recall and suggests that 'only those who have breached their responsibilities under the duties should be held responsible for a recall'.<sup>183</sup>

BPIC made a number of suggested including a person 'who advertised/recommended/promoted' the product to the definition of a responsible person for a building product in section 74AW(4).<sup>184</sup>

SCA (Qld) raised an issue in its submission about the course of action that would be undertaken if a building product is declared non-compliant and found to have been used in existing buildings prior to the recall order. SCA (Qld) submitted that it has found it unacceptable that the full responsibility for repair has fallen onto the bodies corporate once the statutory warranty period has run out.<sup>185</sup>

At the public briefing on the bill, the committee asked the department to explain what powers the QBCC would have to act on non-conforming building products in a completed building, specifically in relation to the case of Infinity electrical cabling. The DHPW advised:

- *The Electrical Safety Office (Queensland), Office of Fair Trading (Queensland) and the Australian Competition and Consumer Commission (ACCC) have jurisdiction to appropriately respond and coordinate a recall of cabling and have all played a role in its recall.*
- *The powers proposed in the Bill would allow the QBCC to respond to issues related to infinity cabling. However, the QBCC is not the specialist regulator for electrical products, this is the Electrical Safety Office.*
- *A committee was established by the QBCC in 2015 for relevant Government regulators to meet and consider reports of potential non-conforming building products. It currently comprises of State and Federal regulators.*

---

<sup>180</sup> Submission 18, p 6.

<sup>181</sup> Correspondence dated 23 June 2017 (Answers to questions taken on notice), p 2.

<sup>182</sup> Submission 12, p 15.

<sup>183</sup> Submission 16, p 5.

<sup>184</sup> Submission 4, p 10.

<sup>185</sup> Submission 8, p 2.

- *Establishing a Building Products Advisory Committee in legislation will ensure that investigations of non-conforming building products will be coordinated efficiently and effectively between relevant regulators.*
- *It will be a key source of information and guidance to the QBCC and Minister about issues relating to non-conforming building products.*<sup>186</sup>

Nature of a recall notice - section 74AZ

Proposed new section 74AZ provides details about the nature of a recall order, including the reasons for the recall, duration and minimum requirements each 'responsible person' must meet to comply with the recall order. Subsection 74AZ(2) specifies that each responsible person to whom the recall order applies is liable for any cost incurred in relation to complying with the order.

SCA (Qld) noted that 'there do not appear to be direct consequences stipulated by the bill for a failure to comply with a recall order, except the penalty provision for a supplier or installer failing to provide reasonable help to a responsible person (section 74AZA – a maximum penalty of \$6,095.00).'<sup>187</sup>

Supplier or installer must help responsible person - section AZA

Master Builders appreciated the need to provide 'reasonable help' to the responsible person in the event of a recall but noted:

*It is important that privacy considerations are addressed so that there is no conflict in responsibilities. Reasonable time limits must also be in place so that record keeping does not become an onerous burden.*<sup>188</sup>

The HIA submitted that the intent of this requirement seems appropriate but it would benefit from further clarity regarding its purpose, and how this might work in practice.<sup>189</sup>

BPIC suggested including signs in other languages to assist the supplier or installer to help a responsible person and also suggested recycling recalled products, or safely disposing of them if recycling is not possible.<sup>190</sup>

The MEA supported the proposed section but noted that there is no guidance or responsibility for the installer or supplier to have systems in place to assist the recall notice:

*A significant issue during the Infinity cable recall was that Masters Home Improvement stores did not maintain a register of the electrical cable and to whom they sold it to. Electrical cable can only be installed by a licensed electrical contractor and his licensed electricians so it is imperative that where in the general industry building products are at high risk then a register of the supply should be kept for future recall. MEA believes this would not be onerous as currently in Queensland a requirement for all patrons in licensed premises to have ID scanned and even for the sale of spray cans that buyer have age confirmed on presentation of ID.*

*Currently electrical wholesalers, suppliers and most contractors do keep records of what product is sold in the event of a recall so they can undertake their responsibilities.*<sup>191</sup>

---

<sup>186</sup> Correspondence dated 23 June 2017 (Answers to questions taken on notice), p 1.

<sup>187</sup> Submission 8, p 4.

<sup>188</sup> Submission 16, p 5.

<sup>189</sup> Submission 12, p 15.

<sup>190</sup> Submission 4, p 11.

<sup>191</sup> Submission 11, p 7.

## 2.2.6 Warning statements – Division 5, sections 74AZB to 74AZD

### Amendments proposed in the bill

Division 5 of proposed new part 6AA establishes a Ministerial power and associated procedures to publish a warning statement regarding a batch or type of building product in certain circumstances:

- proposed new section 74AZB provides that the Minister may act in certain circumstances regarding a building product that the Minister believes is non-conforming
- proposed new section 74AZC enables the Minister to publish a warning statement and outlines the relevant procedures, and
- proposed new section AZD provides that each person in the chain of responsibility whose identity is known or reasonably ascertainable is advised of the Minister’s intention and reasons to publish a warning statement and provided an opportunity to show cause before a decision regarding whether or not to make a statement is published by the Minister.<sup>192</sup>

### Stakeholder views

The HIA submission noted whilst section 74AZB is expected to be rarely used, the requirements have significant implications for product manufacturers:

*The requirement is potential[ly] excessive and if used in conjunction with non-compliant use of a building product has the potential to create confusion for industry. Given the other powers of the Bill that require notification, recall notices, and the Commissioner publishing information it appears questionable if this additional element is required.*

*If the requirement is to remain it should be amended as per recommended changes to other sections to only deal with non-conformance as opposed to product use (compliance).<sup>193</sup>*

## 2.3 Clauses 12 to 20 - amendments to facilitate the extended role of the QBCC

Clauses 12 to 20 propose various amendments to the QBCC Act to facilitate the proposed extended role of the QBCC.

### 2.3.1 Commission may investigate grounds for taking disciplinary action - section 74A

#### Amendments proposed in the bill

Clause 12 proposes to insert new provisions into section 74A to enable an investigator to exercise powers under Part 9 (Inspectors) for an investigation under new Part 6AA (Building Products) and clarify that information can be obtained from any entity (including participants in the building industry and consumers) for an investigation under this part.

#### Stakeholder views and department advice

The QLS expressed concern that as the use of information will be used for a purposes other than that which it was originally collected the clause may be inconsistent with the Information Privacy Principles (IPP).<sup>194</sup> The department advised that it considers that the use of this information is consistent with the IPPs, in particular IPPs 10 and 11:

*Under IPP 10 an agency having control of a document containing personal information that was obtained for a particular purpose must not use the information for another purpose unless the agency is satisfied on reasonable grounds that use of the information for the other purpose is necessary to lessen or prevent a serious threat to the life, health, safety or welfare of an*

---

<sup>192</sup> Explanatory notes, p 24.

<sup>193</sup> Submission 12, p 15.

<sup>194</sup> Submission 17, p 2.

*individual, or to public health, safety or welfare or use of the information for the other purpose is authorised or required under a law.*

*IPP 11 relevantly provides that an agency having control of a document containing an individual's personal information must not disclose the personal information to an entity (the relevant entity), other than the individual the subject of the personal information, unless the agency is satisfied on reasonable grounds that the disclosure is necessary to lessen or prevent a serious threat to the life, health, safety or welfare of an individual, or to public health, safety or welfare or the disclosure is authorised or required under a law.<sup>195</sup>*

### **2.3.2 Grounds for taking disciplinary action against licensees/former licensees - section 74B**

#### Amendments proposed in the bill

Clause 13 proposes to amend section 74B to extend grounds for taking disciplinary action against licensees or former licensees to include:

- contravention of a relevant Act in relation to building work carried out under the licence
- circumstances involving building work that may have caused the death of, grievous bodily harm or involve a serious risk to the health or safety of a person
- failure to comply with a direction of the QBCC to rectify building work that is defective or incomplete, or to remedy consequential damage, and
- failure to comply with a direction given by the QBCC under section 74AN.<sup>196</sup>

The clause also defines the 'relevant Act' to include the *Fair Trading Act 1989*, the *Plumbing and Drainage Act 2002*, the *Work Health Safety Act 2011*, the *Electrical Safety Act 2002* and the *Public Health Act 2005*.

#### Stakeholder views and department advice

A number of stakeholders raised concerns in relation to the proposed amendment of section 74B.

The HIA raised the following concern:

*This clause brings in requirements from numerous other legislation which are extremely broad ranging. These requirements apply to work carried out on a building site under the control of the licensee for the site.*

*This clause should only be applicable to non-conforming building products which form part of building work. Requirements that cross-over or duplicate requirements in other legislation should be removed and only retained if a gap exists and the QBCC actually has oversight of the particular matter.<sup>197</sup>*

DHPW responded to the HIA submission by advising that the intent of this proposal is to expand the grounds of matters that the QBCC can consider, when undertaking disciplinary action, to include offences under relevant Acts related to building work and that it was not intended to limit this to the use of non-conforming building products.<sup>198</sup>

---

<sup>195</sup> Correspondence dated 6 July 2017, pp 15, 18.

<sup>196</sup> Explanatory notes, p 25.

<sup>197</sup> Submission 12, p 15.

<sup>198</sup> Correspondence dated 6 July 2017, p 18.

Master Builders supported the expansion of the provision to include a relevant Act in relation to building work carried out under the licence. However, its submission requested that the term ‘serious risk’ be defined and that before disciplinary action is taken a level of culpability must be established and the principles of natural justice must be upheld.<sup>199</sup>

The QLS also identified a need to ensure that culpability is fully determined before disciplinary action can be undertaken.<sup>200</sup>

### **2.3.3 Grounds for taking disciplinary action against a person not a licensee - section 74C**

#### Amendments proposed in the bill

Clause 14 proposes to insert new provisions into section 74C(1) to extend the grounds for taking disciplinary action against a person who is not licenced by the QBCC.

#### Stakeholder views and department response

The HIA submitted that it was unclear who this section would apply to and sought clarification about how it would work in practice.<sup>201</sup> The department clarified:

*This clause applies to any person who is not licensed by the QBCC, such as importers, manufacturers, retailers and the like. This clause amends an existing provision to expand it to cover matters relating to NCBPs. Licensees such as licensed installers and sub-contractors will be captured under the amended Clause 13 – Amendment of s 74B (Proper grounds for taking disciplinary action against a licensee and former licensee).<sup>202</sup>*

BPIC submitted that while the power to enter, seize, stop work, suspend/cancel licences is admirable:

*. it only allows the QBCC to take punitive action against the licensees it regulates. Therefore a different mechanism is required to pursue other miscreants in the chain of responsibility. BPIC recommends that the Bill incorporates some of the Offence and Enforcement powers articulated in the Queensland Planning Act 2016 specifically, the Offence Proceedings in Magistrates Court.<sup>203</sup>*

### **2.3.4 Reviewable decisions - section 86**

Clause 15 proposes to insert new provisions into section 86 which outline the decisions of the QBCC under the QBCC Act that are reviewable decisions.

### **2.3.5 Decisions that are not reviewable decisions - section 86F**

Clause 16 proposes to insert new provisions into section 86F to include a decision to give information to health or safety regulators under section 28A in the list of decisions that are not reviewable decisions.

#### Stakeholder views and department advice

The QLS raised a concern that a decision of the QBCC to give information under proposed section 28A will not be reviewable, and queries whether this corresponds with the Commission’s IPP obligations.<sup>204</sup> The department responded:

---

<sup>199</sup> Submission 16, p 6.

<sup>200</sup> Submission 17, p 3.

<sup>201</sup> Submission 12, pp 15-16.

<sup>202</sup> Correspondence dated 6 July 2017, pp 18-19.

<sup>203</sup> Submission 4, p 11.

<sup>204</sup> Submission 17, p 2.

*DHPW considers that it is not necessary for these decisions to be internally reviewed, as information that is shared between agencies will not necessarily include a licensee's details, nor will a licensee be aware that information has been shared. The Bill provides specific parameters on when information may be shared and the confidentiality requirements.*<sup>205</sup>

### **2.3.6 No stay by QCAT of particular decisions of commission - section 87A**

Clause 17 proposes to insert new provisions in section 87A which lists the decisions of the QBCC that are not able to be stayed by the Queensland Civil and Administrative Tribunal (QCAT) if a person applies to QCAT for a review. The explanatory notes advised that it is intended that these provisions are limited to emergency cases involving health and safety risks.<sup>206</sup>

### **2.3.7 Tribunal may conduct public examination - section 92**

Clause 18 proposes to insert a provision in section 92 to allow the QCAT to conduct a public examination when investigating whether a person has contravened a duty relating to building products under proposed new Part 6AA or a direction or requirement of an inspector under amended Part 9 relating to a building product that is, or suspected to be, a non-conforming building product for an intended use.

### **2.3.8 Expedited hearing of domestic building disputes - section 95**

Clause 19 proposes to amend section 95 to add certain decisions of the QBCC (relating to building products and work health and safety) to QCAT's jurisdiction to expedite hearings if they should involve undue hardship and are less complex issues.

#### Stakeholder views and department advice

The QLS noted that there are currently large delays at QCAT and raised a concern that expedited hearings will be affected. The QLS recommended that QCAT's resources be increased if this amendment is to be proceeded with.<sup>207</sup>

The department advised that it has consulted with QCAT officers in preparation of the bill and is continuing to work with them to identify any emergent issues.<sup>208</sup>

### **2.3.9 Stop orders - section 97B**

Clause 20 proposes to remove section 79B from the Act. The explanatory notes advised that removing this jurisdiction is intended to provide the QBCC with the ability to take action in a timely manner when the situation arises to protect health and safety, rather than through QCAT.<sup>209</sup>

## **2.4 Inspectors (Part 9 of the QBCC Act)**

Clause 22 proposes to insert new Division 3 (Entry of places by inspectors), new Division 4 (General powers of inspectors after entering places), new Division 5 (Other information-obtaining powers of inspectors) to allow for entry to places by inspectors, new Division 6 (Seizure by inspectors and forfeiture), new Division 7 (Additional powers for building products) and new Division 8 (Other provisions).

---

<sup>205</sup> Correspondence dated 6 July 2017, p 19.

<sup>206</sup> Explanatory notes, p 25.

<sup>207</sup> Submission 17, p 6.

<sup>208</sup> Correspondence dated 6 July 2017, p 19.

<sup>209</sup> Explanatory notes, p 26.

#### **2.4.1 Clause 21, new Division 1 and Division 2**

##### Amendments proposed in the bill

Clause 21 of the bill proposes to insert a new Division 1 Preliminary, new section 103G (Definitions for part) and Division 2 (general provisions about inspectors) in Part 9 (Inspectors). The explanatory notes advised that the purpose for the new Divisions is to create a more structured approach to Part 9.<sup>210</sup>

##### Stakeholder views and department advice

The HIA raised concerns about the placement of definitions in relation to clause 21:

*This part creates a number of new definitions that are not used elsewhere in the draft Bill. It is recommended that rather than create all new terms, that this part should use the terms used in the corresponding parts of the Bill and only include new definitions where there is a demonstrated need. In doing so any new definitions should as far as possible use common language used in the corresponding parts of the Bill.*

*An example is the newly introduced term ‘compliance purpose’. If this was considered a critical term then it should be included in the front end of the Bill. It is considered this term is equivalent to the meaning proposed with the term “intended use” and would in fact be preferable as it more accurately differentiates between the two issues being addressed by the Bill.<sup>211</sup>*

The HIA went on to recommend that all the terms in this part be reviewed and that this part should use or modify the terms used in the corresponding parts of the bill and only include new definitions where there is a demonstrated need.<sup>212</sup> The department advised the bill was drafted by the Office of the Queensland Parliamentary Counsel to reflect contemporary drafting practice.<sup>213</sup>

#### **2.4.2 Entry of places by inspectors - clause 22, new Division 3, sections 105 to 105J**

##### Amendments proposed in the bill

Proposed Division 3 outlines matters relating to entry of inspectors. The explanatory notes advised that these powers include the power to enter places with consent and the power to enter under a warrant and while entry may also be made outside these circumstances it is limited to public places, places of business of QBCC licensees, places of business of persons in the chain of responsibility for building products, and building sites:

*Generally, the power to enter these places is limited to when the places are open for entry. Additionally, an inspector may only enter for a compliance purpose, and cannot enter any residence without a warrant or consent. These entry powers will allow QBCC inspectors to ensure compliance early in the supply chain as well as maintain safety during the installation stage of a product’s life cycle. Without these powers, the QBCC will essentially remain limited to accessing building sites and focussing its investigatory capacity on building sites and QBCC licensees.<sup>214</sup>*

##### Stakeholder views and department advice

The BDAQ supports the proposed power to enter places, noting that others in the chain should be held to the same standards.<sup>215</sup>

---

<sup>210</sup> Explanatory notes, p 26.

<sup>211</sup> Submission 12, p 16.

<sup>212</sup> Submission 12, p 16.

<sup>213</sup> Correspondence dated 6 July 2017, p 19.

<sup>214</sup> Explanatory notes, p 26

<sup>215</sup> Submission 1, p 1.

The QLS raised concerns that the bill removes qualifications around the entry to building sites, in particular that safety issues may arise due to unauthorised and un-notified persons on site and there is potential for this power to be abused by investigating officers.<sup>216</sup> The department responded:

*DHPW considers that QBCC investigators require the appropriate powers to enter the site and are expected that they would do so in a safe manner that would not prejudice their own, or others, personal safety. For example, they would attend the site office to make themselves known and undertake any necessary on site inductions. The powers have been drafted deliberately wide to provide the QBCC and anyone assisting an investigator to act quickly and decisively to preserve evidence of any suspected offence.*<sup>217</sup>

The HIA submission noted that there may be a need for cross-jurisdictional cooperation to allow for circumstances where persons in the supply chain are located in other jurisdictions.<sup>218</sup> DHPW advised that it is conscious of this issue and will seek to address this through the Senior Officers Group proposed Building Regulators Forum.<sup>219</sup>

The Property Owners' Association of Queensland (POAQ) raised a number of concerns about the proposed amendments stating that it was concerned that these sections do not have any bearings on faulty building materials but will be used for other purposes and that it should be the owner of the building rather than the occupier who gives approval for entry.<sup>220</sup> The department responded by advising that it is quite appropriate that the 'occupier' should be subject of the powers in the bill, particularly where the 'owner' has leased the premises to the 'occupier' and has no control over the premises, other than what is stated under the lease.<sup>221</sup>

At the public briefing, the QBCC provided advice on how the powers provided to inspectors may be applied:

*If these proposals come forward, one key thing that we would put in place is to have regular reviews about how any potential new powers might be utilised by our inspection staff. The bill certainly does give the ability for staff to request access to sites where they have a reasonable belief that there might be a potential breach of the proposed bill.*

*If that authority is not given by the owners, then the bill also raises the potential for the QBCC to go to a magistrate and request a warrant. If the magistrate issues that warrant, the QBCC staff could execute that warrant. The first thing I would say about that is in order for an inspector to even think about applying for a warrant there would need to be some significant in-house briefing up through very senior staff, including the assistant commissioner and myself, before we would even think about utilising those powers.*

---

<sup>216</sup> Submission 17, pp 6-7.

<sup>217</sup> Correspondence dated 6 July 2017, p 19.

<sup>218</sup> Submission 12, pp 16-17.

<sup>219</sup> Correspondence dated 6 July 2017, p 19.

<sup>220</sup> Submission 6, p 2.

<sup>221</sup> Correspondence dated 6 July 2017, p 19.

*That really is a very important part. We need to have formed a view about where something may or may not be risky. It is as part of that that we would rely on industry information. We would want to make it easy for people to tell us if they do have a concern and then for us to go through a process to say, 'Is there a risk here or not?' There is a twofold answer to the question. It is very much about saying, 'Yes, we do have the capacity.' It is a risk based approach again. First we have to ask. If people do not give us access, then we need to think at a risk based level: is it appropriate for us to use those other powers such as the application for a search warrant? That would be done in consultation with very senior people within the organisation. If we then do go in we certainly have the ability, as Ms Carroll has said, to seize it and have it tested to make a determination.<sup>222</sup>*

### **2.4.3 General powers of inspectors after entering places - clause 22, new Division 4, sections 105K to 105N**

#### Amendments proposed in the bill

Proposed Division 4 outlines the general powers of inspectors after entering places. The explanatory notes advised that these powers after entry will allow an inspector to search an entered place and search for or seize documents and other evidence of offences, as well as request reasonable help to exercise a general power which will allow QBCC inspectors to effectively discharge their responsibilities as a safety regulator.<sup>223</sup>

#### Stakeholder views

The POAQ objected to sections 105M and 105N, recommending that they be removed.<sup>224</sup>

BPIC supported the entry and seize powers of the QBCC in relation to completed buildings:

*Provided the necessary privacy protocols are followed and the owner's consent is obtained, BPIC believes that it is entirely appropriate, and in fact desirable, that the QBCC has powers to enter and seize after a building is completed. The reasoning behind this is that most NCBPs are not discovered until after the building's completion and often not for some considerable time afterwards.*

*This power is particularly important for apartment owners and apartment buildings where the developer or the builder holds control of the building scheme until at least 75 per cent of the units are sold. It can often take from one to several years for building ownership to fully revert to strata owners. The new enter and seize powers that the QBCC will have as a result of this amendment bill could provide unit owners with a new and potentially more effective means to get non-conforming and noncompliant building works fixed in a timely manner.<sup>225</sup>*

The QLS raised concerns regarding section 105L, which in its view 'contains unfettered evidence gathering powers (for example, the power to seize material without payment); again, without the knowledge of the site controller'.<sup>226</sup> QLS also expressed concern with proposed sections 105M and 105N 'as they will abrogate a person's right with respect to self-incrimination':

*We submit that self-incrimination should be accepted as a reasonable excuse under proposed section 105N, to ensure that it does not conflict with the fundamental legislative principles set out in the Legislative Standards Act 1992.<sup>227</sup>*

---

<sup>222</sup> Public briefing transcript, 14 June 2017, p 8.

<sup>223</sup> Explanatory notes, p 27.

<sup>224</sup> Submission 6, p 3.

<sup>225</sup> Public hearing transcript, 10 July 2017, p 3.

<sup>226</sup> Submission 17, p 7.

<sup>227</sup> Submission 17, p 7.

#### **2.4.4 Other information obtaining powers of inspectors - clause 22, Division 5 -- sections 105O to 105U**

##### Amendments proposed in the bill

Proposed Division 5 (sections 105O to 105U) provide additional provisions for inspectors to obtain information. The explanatory notes advised that includes the power to require a name and address, and important powers to require the production of documents and power to require a person to provide information and that these powers 'are considered important, particularly in cases that involve risks to health and safety of persons and possible loss of life'.<sup>228</sup>

While the explanatory notes indicated that some of these powers abrogate a person's privilege against self-incrimination, the following justification was provided:

*... in most cases, a limited immunity from prosecution has been provided for information obtained using these powers. This is consistent with the broad intent of the Bill, which is to ensure that, as the QBCC transitions from an administrative regulator to a safety regulator, it is empowered to work with industry and facilitate the early and accurate flow of information between parties. This will, in turn, allow industry to learn from the information and encourage improved management and prevention strategies, particularly in relation to non-conforming building products. This will facilitate the QBCC and industry working collaboratively towards improving industry's compliance culture and reducing the safety concerns associated with non-conforming building products.*<sup>229</sup>

The explanatory notes also advised that the current provisions of the QBCC Act in relation to document production and certification requirements are to be replicated and expanded in the bill, including the current abrogation of privilege against self-incrimination without corresponding evidential immunity:

*The expansion, however, is limited by the definition of a compliance purpose, which includes ascertaining whether or not the Act has been complied with. This power could be used to require documents that a licensee or person in the chain of responsibility for a building product is required to keep under the Act. It is also important to note that the Act primarily regulates licensees, who, by virtue of participating in the statutory regime to date (through obtaining a licence) have generally accepted the enforcement provisions and thus waived the benefit of the privilege against self-incrimination.*<sup>230</sup>

##### Stakeholder views

The QLS noted that proposed section 105O gives an inspector powers, similar to those that police officers have, to require information from a person and section 105P makes it an offence not to provide the information:

*This is a concerning inclusion which the Society does not support. Police powers and conduct are subject to extensive checks and balances and we do not believe that inspectors, who are not subject to this same oversight, should be able to exercise the same level of coercive powers.*<sup>231</sup>

---

<sup>228</sup> Explanatory notes, p 28.

<sup>229</sup> Explanatory notes, p 28.

<sup>230</sup> Explanatory notes, p 28.

<sup>231</sup> Submission 17, p 7.

The submission from the QLS also raised a concern with section 105Q which requires a person to make something available for inspection at a ‘reasonable time and place nominated by the inspector’ as the subject of the requirement is afforded no recourse or review as to what is nominated to be reasonable by the inspector.<sup>232</sup>

#### **2.4.5 Seizure by inspectors and forfeiture - clause 22, Division 6, sections 106, 106A to 106N**

##### Amendments proposed in the bill

Proposed Division 6 (section 106, and 106A to 106N) outlines the circumstances and process for seizure by inspectors and forfeiture. The powers proposed to be given to inspectors under this section include:

- to seize evidence at a place if the inspector reasonably believes it is evidence of an offence against a relevant Act, and the seizure of the thing is consistent with the purpose of entry as explained to the occupier when asking for consent to enter, or evidence for which a warrant was issued or anything else at the place if the inspector reasonably believes the seizure is necessary to prevent the thing being hidden, lost or destroyed (section 106A)
- to seize a non-conforming building product or the product is the subject of a recall order (section 106B)
- to seize dangerous places, structures and things if the place is a building site or has a non-conforming structure on it and the inspector reasonably believes that the place, a part of the place or a building or other structure or other thing on the place, is hazardous to a degree likely to cause death or serious injury or illness to a person (section 106C)
- to seize a place, or part of a place, building, structure, or other thing, and exercise powers relating to it, despite a lien or other security of the thing claimed by another person (section 106D), and
- to direct and undertake certain remedial action to make a place safe in emergency situations, including restricting access to it or moving it (section 106E).

The explanatory notes advised that strong governance arrangements will be developed by the QBCC to administer this Division, for example, to address circumstances such as appeals for a seized thing.<sup>233</sup>

##### Stakeholder views and department advice

The HIA submission noted that section 106 provides an open power for an inspector to enter without a warrant or without consent and seize evidence and submitted:

*Given the broad ranging powers of the inspectors proposed under this Bill and the powers currently for Work Health Safety Inspectors and building certifiers where they see a potential hazard then it appears questionable as to the merits of this clause being included in the Bill.*

*It would appear that this clause gives extensive scope to an inspector to not comply with all the procedural aspects outlined in subsequent clauses. HIA would be concerned if this provision was used as the common practice in lieu of using the appropriate practices where a warrant is obtained. The Bill should avoid creating a dual pathway arrangement that has potential for misuse and could undermine natural justice if not adequately limited.<sup>234</sup>*

---

<sup>232</sup> Submission 17, p 7.

<sup>233</sup> Explanatory notes, p 29.

<sup>234</sup> Submission 12, p 17.

The QLS submission also raised a concern that section 106 provides ‘unfettered powers to seize things’.<sup>235</sup> The department responded that in addition to the commentary provided in the explanatory notes to the bill about the consideration of fundamental legislative principles, these powers have been deliberately drafted widely to provide the QBCC with extensive powers to respond quickly and effectively to emergent issues. The overarching governance frameworks to manage how these powers will be used in a manner appropriate to the circumstance will be developed by the QBCC.<sup>236</sup>

The POAQ supported sections 106 and 106B only if there was a court order, and it is issued to the owner of the business/property.<sup>237</sup>

In relation to section 106B, the HIA advised that it sees the section as a positive step, noting that ‘the ability to enter and seize products from a factory manufacturing building products though is a multi-faceted issue and requires further consideration as the draft wording may have inadvertent consequences’.<sup>238</sup>

The HIA also recommended that the definition of a ‘non-conforming structure’ should be removed from section 106C and that the broader definition of building work (in the building Act) should be used and linked to the definition of a non-conforming building product in this bill.<sup>239</sup>

In relation to section 106C, the POAQ noted:

*If the building site has a non-conforming structure and the inspector believes is hazardous to a degree and is likely to cause death or serious injury then the building site should be closed immediately until the problem is rectified. The decision to close the building site should be made by more than one qualified person.*<sup>240</sup>

The POAQ submission supported sections 106D to 106G if the building is under construction and made a number of other comments on sections in Division 6.<sup>241</sup>

#### **2.4.6 Additional powers in relation to building products - clause 22, Division 7 - sections 106O to 106R**

##### Amendments proposed in the bill

Proposed Division 7 (sections 106O to 106R) introduces additional powers in relation to building products, including the power (and processes) to:

- have products or samples examined, and for the QBCC to recover, as a debt, the reasonable costs of conducting an examination of a product if the person in the chain of responsibility has failed to comply with a duty under the proposed legislation (section 106O)
- give directions to the person in control of the building or structure relating to the use of a product if the product or its use is hazardous to a degree likely to cause death or serious injury or illness to a person (section 106P)
- give directions to the person in control of the place, or another person at the place, to take action to remove or minimise the risk, for example install temporary overhead protection for persons walking near a building found to have external glazing containing nickel sulphide that may cause the glass to fragment and fall (section 106Q), and

---

<sup>235</sup> Submission 17, p 7.

<sup>236</sup> Correspondence dated 6 July 2017, p 20.

<sup>237</sup> Submission 6, p 3.

<sup>238</sup> Submission 12, p 17.

<sup>239</sup> Submission 12, p 17.

<sup>240</sup> Submission 6, p 3.

<sup>241</sup> Submission 6, p 3-5.

- take any remedial action the inspector believes reasonable to remove or minimise the risk and for the QBCC to recover, as a debt, the reasonable costs of any remedial action taken under this section (section 106R).

#### Stakeholder views

The BDAQ supported the proposed powers to seize, test and recover the cost, noting that parties must have failed to comply with their duty of care before the cost can be recovered.<sup>242</sup>

In relation to section 106O, the HIA noted that given the broad ranging coverage of this requirement, the expectation is that if a product is suspected of being a non-conforming product then the Commission can recover costs from the person in the chain of responsibility for the testing, inspection, verification etc. The HIA submitted:

*If that product upon verification and testing is actually a conforming product, will the person in the chain of responsibility be able to recoup the costs from the Commission, that they may have outlaid and any costs that have occurred resulting from delays due to testing/verification? Alternatively HIA has supported arrangements where the regulator undertakes testing in the manner that they believe is most appropriate and that the person making a claim that a product is non-conforming is required to pay for that testing if the claim is incorrect, or the person responsible for supplying the product pays for the testing if the claim is found to be correct.*<sup>243</sup>

The HIA noted that section 160P(2)(b) introduces a new term not used anywhere else in the bill - that being 'to make the building product incapable of operation' and submitted:

*This concept needs clarity via a common term being used through the Bill. If it is determined that a new term is required then an appropriate definition should be included to clarify the term and preferably using concepts prescribed in related terms used in the Bill already.*<sup>244</sup>

In relation to section 160Q(5)(a)(ii), the HIA submitted the notion of the potential presence of a non-conforming building product needs to be included and in including this the sub-section should be revised to only deal with a product's non-conformance.<sup>245</sup>

#### **2.4.7 Evidential immunity for individuals complying with particular requirements - clause 22, Division 8 - section 107**

New Division 8 proposes to insert a new section 107 providing that evidence of and evidence derived from the information or documents supplied under new sections 105M and 105T will not be admissible in any proceedings to the extent that it incriminates a person. Subsection 107(3) would make an exception for proceedings related to the false or misleading nature of the information.

#### Stakeholder views

The QLS submitted:

*... proposed section 107 does not adequately protect someone from self-incrimination. Sub-section (1) should not limit the types of documents covered by this immunity. Further, we submit that sub-section (3) should be removed.*<sup>246</sup>

---

<sup>242</sup> Submission 1, p 4.

<sup>243</sup> Submission 12, p 18.

<sup>244</sup> Submission 12, p 18.

<sup>245</sup> Submission 12, p 18.

<sup>246</sup> Submission 17, p 8.

## **2.5 Consequential and other minor amendments - clauses 23 to 34**

Clauses 23 to 34 of the bill propose consequential and other minor amendments. Only those clauses that were considered by stakeholders are discussed below.

### **2.5.1 Injunctions and stop work notices - clauses 24 and 25**

Clause 24 amends the title of Part 9B and inserts a new division heading for injunctions.

Clauses 25 of the bill proposes to insert a new Division 2 (Stop work notices) into Part 9B of the QBCC Act to enable the Commissioner to issue stop work orders if they are satisfied that something is being done, or is about to be done, in contravention of a prescribed provision (section 108A1). The explanatory notes advised that the QBCC, as an independent regulator, will manage the issue of stop work orders administratively:

*Stop work orders is an effective and timely action to serious safety matters, particularly where attempts by an inspector to resolve a situation have not proven effective or are not available. The section provides for a show cause process prior to the stop work order being issued and an appeal mechanism is also available.*<sup>247</sup>

#### Stakeholder views and department advice

The BDAQ supported the amendment proposed by clause 25, noting that there is no change in practice from the current stop orders.<sup>248</sup>

DHPW provided advice at the public briefing on how these extended powers may be applied:

*... similarly to other safety regulators, there is the ability to stop work. That already exists under the QBCC Act for a whole range of matters. It has been expanded to this in certain circumstances. For example, if there is an electrical safety notice issued about a very serious matter, and nothing happens for whatever reason, there could be a number of reasons for that, but if the supervisor on site, the head contractor, becomes aware of it, then there is an obligation on that person to notify the QBCC. ... The goal there will be, if something that could cause serious injury, seriously bodily harm or death, is alive and on foot, now we have the building regulator who can now get involved and say, 'Look, this has to be shut down.' It is a double protection, particularly for when people might be exposed to a dangerous situation that could kill them.*<sup>249</sup>

### **2.5.2 Clause 30 – Schedule 1, insert new Part 14 (Transitional and validating provisions)**

Clause 30 proposes to insert new Part 14 that provides for transitional provisions for the Amendment Act. Part 14, section 71 provides that sections 28A and 28B apply in relation to information obtained by the commission before or after commencement.

#### Stakeholder views and department advice

The QLS raised concerns about transitional provisions in relation to information sharing of information obtained by the QBCC prior to the commencement of the provisions in the bill. The QLS stated that the laws being applied retrospectively 'may be unfair to parties whose information has been obtained without knowing that these changes will occur and who are currently under investigation'. The QLS raised concerns that it may adversely affect rights and liberties or impose obligations.<sup>250</sup>

---

<sup>247</sup> Explanatory Notes, p 32.

<sup>248</sup> Submission 1, p 4.

<sup>249</sup> Public briefing transcript, 14 June 2107, p 10.

<sup>250</sup> Submission 17, p 8.

The department responded that it is considered critical to the policy intent that any information received about non-conforming building products and safety matters prior to the laws commencing be able to be used for investigations or shared for safety reasons.<sup>251</sup>

## **2.6 Building workplace safety – clauses 8 to 10. sections 28A and 28B, 48 and 54A**

### **2.6.1 Background**

The Minister in his explanatory speech advised that the amendments proposed in the bill in relation to building workplace safety were influenced by the advocacy of Lee and Michael Garrels whose son Jason was fatally electrocuted when working on a building site in Queensland.<sup>252</sup>

The Central Coroner's report on Jason's death recommended that 'if the law does not already provide that the principal contractor, and building contractor are obliged to notify the QBCC of any death or serious injury on site, then the law needs to be amended to impose this obligation on them'.<sup>253</sup>

The explanatory notes advised that following the Coroner's findings, DHPW and the Office of Industrial Relations (OIR) examined methods to improve information sharing between agencies, including an amendment to the Electrical Safety Regulation 2013 to improve information sharing about notifiable incidents between OIR and the QBCC, and OIR providing the QBCC with information about Serious Notifiable Incidents; however:

*It is considered that more can be done to facilitate safety on building and construction work sites and to meet the Coroner's recommendation. The bill will achieve this by increasing the role of the QBCC in reporting work health safety issues, enabling the QBCC to consider these issues and expanding the grounds upon which the QBCC may take disciplinary action against a licensee, or suspend or cancel a licence.<sup>254</sup>*

Currently the QBCC can take disciplinary action, and suspend or cancel a licence if grounds for disciplinary action exist, that is, a breach of the QBCC Act. However, the QBCC is currently unable to take into consideration convictions under laws that relate to safety in the workplace, nor is it able to consider work that a licensee may have undertaken that caused death or grievous bodily harm to a person or involve serious risk to the health or safety of a person.<sup>255</sup>

Present legislative provisions allow information sharing in some circumstances on an administrative basis and 'it is considered that a more comprehensive legislative framework is needed to increase the range of information that can be shared to improve the health and safety on work sites'.<sup>256</sup>

### **2.6.2 Information sharing in relation to work health and safety – section 28A and 28B**

#### Amendments proposed in the bill

Clause 8 of the bill proposes to amend the QBCC Act to improve information sharing between QBCC and relevant agencies.

Section 28 of the QBCC Act requires that if the QBCC has reason to suspect that an offence resulting in a loss of money, or loss or damage to other property has been committed, the matter must be reported to the Auditor-General and the police. The bill proposes to insert new sections 28A and 28B.

---

<sup>251</sup> Correspondence dated 6 July 2017, p 20.

<sup>252</sup> Queensland Parliament, Record of Proceedings, 25 May 2017, p 1449.

<sup>253</sup> Explanatory notes, p 3 and DHPW, correspondence dated 6 July 2017, p 6.

<sup>254</sup> Explanatory notes, p 3.

<sup>255</sup> Explanatory notes, p 5.

<sup>256</sup> Explanatory notes, p 5.

New section 28A would impose an obligation on the QBCC to provide relevant information about a notifiable incident (i.e. ‘death or serious injury of a person’ or ‘an incident that exposes a person to a risk of serious injury or illness’) to a health and safety regulator, including the regulators under the *Electrical Safety Act 2002*, the *Work Health and Safety Act 2011* and the *Public Health Act 2005*. Under proposed section 28A(3)(d) this obligation can be extended to an entity that has functions similar to the QBCC and the health and safety regulators and that is prescribed by regulation for this section. DHPW advised :

*While a regulation may expand the number of bodies to which the QBCC must provide information, this expansion is limited to those entities that perform a similar function to the QBCC and the health and safety regulators listed in the Bill. As such, there is limited ability for a regulation to prescribe an entity outside Parliament’s intention. The amendment also provides flexibility to ensure that relevant parties are provided with information about deaths and serious injuries on building workplaces, which can then be used to improve safety outcomes, encourage better practices and potentially save lives.<sup>257</sup>*

Proposed new section 28B allows the QBCC to enter into an information sharing arrangement with a relevant agency, including a chief executive of a department, a health and safety regulator or a local government. Section 28B(4)(d) proposes to enable a regulation to prescribe information sharing arrangements with the Commonwealth, or another state (for example, border protection agencies or other building regulators). The department advised that while a regulation may expand the number of bodies with which the QBCC may share information, this expansion is limited to agencies of the Commonwealth or other states:

*As such, there is limited ability for a regulation to prescribe an entity outside Parliament’s intention. The amendment will also allow for a coordinated national approach to be taken on the issue of building workplace safety, which will promote positive safety outcomes across Australia and in Queensland.<sup>258</sup>*

The department further advised that the information sharing obligations and arrangements introduced by these sections may inevitably involve the disclosure of personal information and commercial in confidence information, but the disclosure is limited only to public sector agencies.<sup>259</sup>

#### Stakeholder views and department advice

A large number of the submissions received by the committee discussed matters relating to the proposed building workplace safety amendments.

The submission from BPEQ supported the proposed amendments stating:

*BPEQ believes an established information arrangement with other regulatory agencies will ensure better protection on work sites and for the public and more efficient regulation of engineers and other actors in the building and construction sector.<sup>260</sup>*

---

<sup>257</sup> Correspondence dated 6 July 2017, p 12.

<sup>258</sup> Correspondence dated 6 July 2017, p 12.

<sup>259</sup> Correspondence dated 6 July 2017, p 13.

<sup>260</sup> Submission 5, p 2.

The BDAQ and Master Builders submissions both supported the sharing of information, provided this power should not affect current proceedings or privacy.<sup>261</sup> In response, DHPW advised that to protect the privacy of licensees, the bill introduces new requirements for the confidentiality of information, with penalty provisions applying.<sup>262</sup> The explanatory notes also advised that it is expected that the agencies who receive the information ‘will be required to deal with the information in a confidential manner and in accordance with applicable legislative frameworks’.<sup>263</sup>

The EWPA and BPIC submissions both suggested expanding new section 28B to allow information to be shared in relation to a product that is the subject of fraudulent or misleading claims and BPIC also advocated for the disclosure of information to prevent property being destroyed or damaged.<sup>264</sup> The EWPA pointed out that this is particularly pertinent where a product claims a level of performance that it then fails to meet ‘for example, if a product claims to have a particular “maintenance-free” performance, but does not deliver on this, information should be freely able to be shared with ACCC’.<sup>265</sup>

In response to these concerns, the department reiterated that the intent of these provisions relates to workplace safety in relation to reporting and information sharing obligations and that ‘DHPW considers that such circumstances are already captured by the new provision, which allows for information-sharing in relation to the performance of the QBCC’s functions as well as protecting the health or safety of a person or property’.<sup>266</sup>

The HIA submitted that proposed section 28B is a positive step for greater collaboration and information sharing between relevant agencies and asked whether other agencies would also be required to make legislative changes for this to work effectively.<sup>267</sup> The department advised that it would need to ensure that any agency with which it intends to share information allows for such an arrangement and that the *Electrical Safety Act 2002* and the *Work Health and Safety Act 2011* already contain such provisions.<sup>268</sup>

The QLS raised concerns that the proposed amendment may conflict with the IPPs, which provide that personal information must not be used for a purpose other than that for which it was obtained, unless certain exceptions apply. QLS further noted the regulation-making power to prescribe further health and safety regulators under proposed section 28B(4) and asked to be consulted on the drafting of the regulation.<sup>269</sup>

DHPW responded that it considers that the provisions in the Bill are consistent with the IPPs, in particular IPPs 10 and 11 (see response provided regarding proposed [section 74A](#)).<sup>270</sup>

### **2.6.3 QBCC power to cancel or suspend a licence – clause 9, section 48**

Clause 9 of the bill proposes that section 48 of the QBCC Act (Cancellation or suspension of a licence) be amended to:

---

<sup>261</sup> BDAQ, submission 1, p 5; and Master Builders, submission 16, p 3.

<sup>262</sup> Correspondence dated 6 July 2017, p 15.

<sup>263</sup> Explanatory notes, p 14.

<sup>264</sup> EWPA, submission 14, p 4; and BPIC, submission 4, p 5.

<sup>265</sup> Submission 14, p 4.

<sup>266</sup> Correspondence dated 6 July 2017, p 15.

<sup>267</sup> Submission 12, p 4.

<sup>268</sup> Correspondence dated 6 July 2017, p 15.

<sup>269</sup> Submission 17, p 2.

<sup>270</sup> Correspondence dated 6 July 2017, p 15.

- replace section 48(f) to provide the QBCC with the power to suspend or cancel a licence if the licensee is convicted on an offence against the QBCC Act, the *Building Act 1975* or a relevant Act in relation to building work carried out under the licence (section 48(2) will provide that a relevant Act means the *Plumbing and Drainage Act 2002*, the *Work Health and Safety Act 2011*, the *Electrical Safety Act 2002*, the *Public Health Act 2005* or another Act prescribed by regulation), and
- insert a new section 48(ha) to provide the QBCC with the power to suspend or cancel a licence if building or other work on a building site under the licensee’s control may have caused the death of, or grievous bodily harm, to a person; or involved a serious risk to the health or safety of a person. The explanatory notes advised that this will provide for the QBCC ‘to consider workplace health and safety issues associated with building work when deciding whether to cancel or suspend a licence’.<sup>271</sup>

#### Stakeholder views and department advice

A number of submissions supported the proposed power but raised specific issues with the provisions.

BPIC supported the clause and suggested modifications to ‘enable the regulator to better control the use of building products and hold those in the supply chain accountable for their actions’:

*To action BPIC’s recommendation in its submission to the Queensland Building Plan consultation and for alignment with legislation in other jurisdictions, BPIC recommends that this clause also include measures to stamp out ‘phoenixing’; where a company closes down leaving large unpaid debts, only to re-emerge as a new company trading under a different name.*<sup>272</sup>

The EWPAA suggested the proposed section should be expanded to allow for the cancellation of licence in the event of installation of non-conforming building products which results in injury or risk to health and safety of the occupant, or results in damage or compromise of the building after completion of the installation.<sup>273</sup>

The department responded to the BPIC and EWPAA suggestions as follows:

*As the installation of an NCBP would constitute a breach of duty and therefore an offence under the QBCC Act, it is considered that further amendments are not required. In relation to cases of bankruptcy and insolvency, all licences are subject to the condition that the contractor satisfy the relevant financial requirements at all time. Grounds currently exist for the cancellation or suspension of a licence if the contractor contravenes a licence condition.*<sup>274</sup>

The BDAQ submission supported the proposed amendment on the basis that ‘rogue contractors should not be allowed to operate’ and suggested that levels of transgression for determining an offence need to be formulated. However, the Association raised a concern that there there is a ‘lack of due process’ and requested that ‘serious risk’ be defined to clarify to what extent this is a short term risk or long term.<sup>275</sup>

---

<sup>271</sup> Explanatory notes, p 14.

<sup>272</sup> Submission 4, p 6.

<sup>273</sup> Submission 17, p 4.

<sup>274</sup> Correspondence dated 6 July 2017, p 16.

<sup>275</sup> Submission 1, pp 4-5.

Master Builders sought clarification around what is regarded as an ‘offence’ under any relevant act in relation to building work carried out under a licence.<sup>276</sup> The department advised that in this context, ‘it refers to when a person is convicted of an offence and would not include, for example, when a person is merely issued an improvement notice under work and health safety legislation’.<sup>277</sup>

Master Builders and a number of other submitters also raised a concern that licences should not be cancelled or suspended until the case against them has been proved.<sup>278</sup> DHPW advised that examples of a serious risk may include the presence of live wires on a building site or the collapse of a building or structure and the department will ‘work with the QBCC to ensure operational policies and procedures are put in place so that the expanded powers granted under the bill are exercised fairly and consistently’.<sup>279</sup>

#### **2.6.4 Requirement for licensee to advise QBCC in relation to safety matters – Clause 10, section 54A**

Clause 10 proposes to insert new section 54A (Notification of particular safety matters) to require notification of particular safety matters by licensees. It requires a licensee who becomes aware that a notifiable incident has occurred on a building site which is under that licensee’s control or where the licensee is carrying out building work, to give the QBCC notice of the safety matter (section 54A(1)(a)). The licensee would also be required to notify the QBCC in the fastest way possible if they become aware that a person who is carrying out building or other work on a building site has contravened a notice or injunction under part 10 of the *Work Health and Safety Act 2011* or part 11A of the *Electrical Safety Act 2002* (section 54A(1)(b)).

##### Stakeholder views and department advice

While there was general support for improving information sharing between government agencies in relation to work health and safety issues on building and construction sites, a number of submissions raised concerns about unnecessary duplication with the existing provisions relating to work health and safety reporting.<sup>280</sup> These concerns are discussed below.

The BDAQ submission supported the proposed requirement in section 54A(1)(b); however, it stated this provision would be better placed in the *Work Health and Safety Act 2011* and requested advice on what power the QBCC would have over a non-licensed person.<sup>281</sup>

The MPAQ supported ‘widening the grounds’ for the QBCC to take disciplinary action against a licensee to include situations that can impact on health and safety or that if work may have caused death, grievous bodily harm or a serious safety risk’.<sup>282</sup>

However, a number of the stakeholders did not support the proposed requirement for a licensee who becomes aware that a notifiable incident to give the QBCC notice of the safety matter on the basis that it duplicates the *Work Health and Safety Act 2011*.<sup>283</sup> At the public hearing, the MPAQ made the following observations and suggestion:

---

<sup>276</sup> Submission 16, p 5.

<sup>277</sup> Correspondence dated 6 July 2017, p 16.

<sup>278</sup> See Master Builders, submission 16, p 5; MPAQ, submission 15, p 2; and QLS, submission 17, pp 2-3.

<sup>279</sup> Correspondence dated 6 July 2017, p 16.

<sup>280</sup> See for example, MPAQ, submission 15, p 2.

<sup>281</sup> Submission 1, p 4.

<sup>282</sup> Submission 15, p 3.

<sup>283</sup> See Master Builders, submission 16, p 6; HIA, submission 12, p 5; BPIC, submission 4, p 6; and MEA, submission 11, p 5.

*MPAQ would like to see these concerns addressed. It should be noted that this provision requires licensees to report the same matter to two separate government entities within the same government. We consider this duplication unnecessary, given that the proposed amendments provide for information sharing between the two relevant entities. This is around the Workplace Health and Safety Act and the QBCC. We believe this could be addressed by sending one email from both departments to have access to this information so it is not the contractor's responsibility to report to two.*<sup>284</sup>

The CPA submitted that while the Bill links safety issues to building industry licences by providing for disciplinary action to be taken in relevant circumstances, the bill also duplicates the existing powers, role and function of the Queensland safety regulators by providing parallel powers to the QBCC without adequately justifying the need for this action.<sup>285</sup>

The BDAQ submission suggested there should be a standard protocol developed for communication between the Work, Health and Safety Office.<sup>286</sup>

The department responded to these issues by advising that the amendments are intended to facilitate a multi-agency approach to improve work health safety on building and construction sites and to allow the QBCC to take immediate action in situations where there is a serious health or safety risk.<sup>287</sup>

#### Committee consideration

At the public briefing, the committee asked the department about the notification requirements contained in proposed section 54A. DHPW advised that the notification requirements in the QBCC Act are being expanded in certain circumstances:

*For example, if there is an electrical safety notice issued about a very serious matter, and nothing happens for whatever reason, there could be a number of reasons for that, but if the supervisor on site, the head contractor, becomes aware of it, then there is an obligation on that person to notify the QBCC. There is never intention to duplicate and impose extra red tape unnecessarily. We are working with our colleagues in OIR [Office of Industrial Relations] to ensure that this reporting piece is as less disruptive as possible. For example, it might be a single email address or something along those lines. The goal there will be, if something that could cause serious injury, seriously bodily harm or death, is alive and on foot, now we have the building regulator who can now get involved and say, 'Look, this has to be shut down.' It is a double protection, particularly for when people might be exposed to a dangerous situation that could kill them.*<sup>288</sup>

#### **Recommendation 2**

The committee recommends that the Queensland Building and Construction Commission develops a protocol with the Office of Industrial Relations to ensure that the notification requirements contained in section 54A of the bill do not result in licensees being required to make separate notifications to these agencies about the same matter.

---

<sup>284</sup> Public hearing transcript, 10 July 2017, p 17.

<sup>285</sup> Submission 9, p 7.

<sup>286</sup> Submission 1, p 4.

<sup>287</sup> Correspondence dated 6 July 2017, p 16.

<sup>288</sup> Public briefing transcript, 14 June 2017, p 10.

## 2.7 Implementation - costs and stakeholder education/engagement

### 2.7.1 Stakeholder education and engagement

#### Stakeholder views and department advice

A number of stakeholders recommended that the QBCC undertake effective education of the industry and clients/consumers in relation to non-conforming building products and their responsibilities in relation to the proposed legislation.<sup>289</sup>

While BOSMA agreed in broad terms with the objectives of the bill, it raised concerns that implementation could be ‘problematic, complex and potentially costly to the construction industry and the broader supply chain if not subject to an effective engagement programme with pilot programmes and hypothetical worked examples’.<sup>290</sup>

The ACA raised a concern that the current structure of the bill may involve the QBCC in processes that will potentially divert its limited resources into administrative compliance as opposed to operational compliance:

*Examples of this can be found in the reporting requirements to be placed on industry, and the extension of the QBCC’s charter into the field of safety which may duplicate reporting obligations, when there are existing regimes and processes that could be enhanced to be more efficiently implemented.*<sup>291</sup>

The MEA raised a concern that the need for an education campaign will mean time away from inspections and the normal day-to-day duties of the QBCC inspectors:

*If you try to maintain your current regulatory compliance issues but take on two others—this bill as well as the workplace health and safety expansion powers and investigations that they currently do not do—and if there is a major incident on site, such as the Eagle Farm deaths that happened earlier, it is taking resources away from the QBCC and what they do from day to day. That is what we are concerned about. There is nothing in the bill in terms of what that might mean.*<sup>292</sup>

BPIC also raised a concern that the processes suggested in the legislation for controlling the occurrence of non-conforming building products in the building supply chain ‘may be too complex or costly to work effectively in the real world’.<sup>293</sup> At the public hearing, BPIC advised that it would welcome working with the QBCC to ensure that subordinate regulations faithfully enact the intention of the legislation:

*BPIC wishes to avoid situations where compliance degenerates into a series of meaningless box-ticking exercises. We also wish to ensure that compliance solutions are either low cost or no cost so that they become ubiquitous and a happily accepted part of business, not a burden that pushes up costs.*<sup>294</sup>

In response to a question from the committee at the public briefing, DHPW advised that the department and the QBCC is developing strategies for ensuring affected parties are aware of their duties and obligations. DHPW provided, as an example, that they briefed a major contractors group that included importers in early June and the QBCC advised:

---

<sup>289</sup> See for example, ACA, submission 10, p 3; and MPAQ, submission 15, p 2.

<sup>290</sup> Submission 2, p 6.

<sup>291</sup> Submission 10, p 2.

<sup>292</sup> Public hearing transcript, 10 Jul 2017, p 17.

<sup>293</sup> Submission 4, p 1.

<sup>294</sup> Public hearing transcript, 10 Jul 2017, p 3.

*The way that we anticipate that we would roll out the proposed reforms is using the facilitative regulatory approach. It is about a couple of key things. No. 1, it is about educating the industry. As Ms Carroll and Mr Timms have said, we would do that in consultation with both the department and industry associations. The QBC board has established over a number of years an industry reference group and there are key industry associations that sit on that group. We would see that as a key means of actually having a two-way conversation about articulating what the proposed laws mean and, importantly, getting feedback through the QBC board about any concerns that might exist.*

*The second thing is we have an education and engagement function. That function would be very much engaged with dealing directly with licensees throughout the state about any proposed changes to the reforms or any new implementation of new reforms. Of course, we have around 40 to 50 building inspectors who are out on site dealing specifically with licensees on a daily basis. One of the key things that those inspectors do is not necessarily just look for defective products et cetera but also engage with licensees about what the law means to them and what their compliance obligations are.*

*We also have a compliance and enforcement group. As part of the facilitative regulatory approach we anticipate that the key focus for us over the first period of time would be to engage through those mechanisms I said and then go out using our compliance methodology and actually help people understand what their obligations are. That is in effect the way that we would anticipate making sure that key people in the sector are aware of what the proposed law reform might mean.<sup>295</sup>*

At the committee's Estimates Hearing on the Housing and Public Works portfolio, held on 27 July 2017, the Minister further advised that the department had recently convened a summit of participants in the building product supply chain:

*That summit was designed to increase awareness across the building and construction sector of the possibility of nonconforming building products and provide advice and guidance to the regulatory authorities on the task force, including the Queensland Building and Construction Commission, the Department of Housing and Public Works, and Queensland Fire and Emergency Services.<sup>296</sup>*

The QBCC also advised that as part of the redesign of the organisation over the last 12 months the commission has been moving from a reactive approach to regulation to a proactive approach which has resulted in many hundreds of visits and interactions with licensees.<sup>297</sup>

*We do focus predominantly on where most of the building work is taking place at this point in time. The way we would use our compliance and proactive inspections moving forward is a risk based approach. Wherever there is the greatest risk, that is where we would do the most important part of our education and proactive compliance work.<sup>298</sup>*

In response to a question from the committee at the public hearing, the QBCC advised that a QBCC and DHPW implementation working group has been established to ensure the policy initiatives are reflected appropriately in the operational piece and, as part of that, they will be work through exactly how they will undertake the education program.<sup>299</sup>

---

<sup>295</sup> Public briefing transcript, 14 June 2017, p 4.

<sup>296</sup> Queensland Parliament, Record of Proceedings, 27 July 2017, p 54.

<sup>297</sup> Public briefing transcript, 14 June 2017, p 4.

<sup>298</sup> Public briefing transcript, 14 June 2017, p 5.

<sup>299</sup> Public hearing transcript, 10 July 2017, p 50.

## 2.7.2 Cost of implementation

The explanatory notes advised:

- the bill is not expected to significantly impose greater costs on businesses, as they should already ensure that building products are safe, fit for the intended use and comply with the relevant building assessment provisions,
- however, it is expected to have some impact on the QBCC, particularly in relation to resourcing, if there are several instances of non-conforming building products requiring investigation and that the QBCC is funded from its own source revenue (insurance and licence revenue) and the costs will be borne by the QBCC.<sup>300</sup>

### Stakeholder views

The Property Council of Australia submitted that ‘the success of the legislation will be dependent on how well resourced the regulators are to identify or respond to non-conforming building products’.<sup>301</sup>

The MPAQ submission noted that the QBCC will require additional resources in order to deal with all of the matters contained within the bill and it supported this additional expenditure; however:

*We do not support a rise in plumbing license fees in order to ensure compliance by other trade contractors whose work is not related to plumbing in any way. Further, we note the provision within the Plumbing and Drainage Act that all fees raised under that Act must be used for the administration of that Act. We strongly oppose any amendment to this requirement.*<sup>302</sup>

Master Builders agreed, advocating that: ‘it will be important that the QBCC is appropriately resourced to properly undertake this role. It is unreasonable to expect licence holders to cross-subsidise a product compliance regime’.<sup>303</sup> They raised this concern again at the public briefing.<sup>304</sup>

Services Trades Queensland noted that the *Plumbing and Drainage Act 2002* has a provision that requires fees raised by the act to be spent on matters that fall under that act and they strongly opposed any changes to that provision. However, they went on to provide evidence:

*... that the Service Trades Council and an assistant commissioner office and role have been implemented within the QBCC under current leadership in a way that is efficient and therefore I assume fairly cost effective. Given this track record, we do not hold overwhelming concerns of implementation cost blow-out.*<sup>305</sup>

At the public hearing, the MEA added that it had some concerns about the comments from the QBCC Commissioner at the departmental briefing that the current QBCC budget would cover the costs and that the QBCC may be underestimating the costs:

*We find it hard to balance those statements against the potential increase in responsibility across multiple statutes and to implement them effectively to be a deterrent and ensure compliance within the industry.*

*. For this bill to be effective and not just another piece of red tape, we suggest that a full regulatory cost impact statement be undertaken. This should include an estimate of the number of products from different classes that would be tested each year and proactive enforcement of those investigations. Those estimates then need to be compared to the current funding of the*

---

<sup>300</sup> Explanatory notes, pp 5-6.

<sup>301</sup> Submission 7, p 2.

<sup>302</sup> Submission 15, 3.

<sup>303</sup> Submission 16, p 2.

<sup>304</sup> Public hearing transcript, 10 Jul 2017, p 10.

<sup>305</sup> Public hearing transcript, 10 July 2017, p 37.

*QBCC or other agencies to ensure the bill achieves the objectives. The comments we make are not a criticism of the QBCC and their evidence. However, we do not wish to see this important imperative hampered by a lack of resources.*<sup>306</sup>

#### Committee consideration

At the public briefing, the committee asked the QBCC what the impact of the new legislative requirements would have on the QBCC resourcing. The department responded by advising that the 2017-18 DHPW Service Delivery Statement provides budgetary information about the QBCC and that QBCC has factored education and compliance costs and any staffing increases into its funding envelope. In addition DHPW advised 'should the QBCC need, as part of enforcement action, to undertake significant legal actions, consideration will be given to how it will fund those actions'.<sup>307</sup>

#### **Recommendation 3**

The committee recommends the Minister, in the second reading speech, provide advice on the estimated cost of implementing and enforcing the proposed legislation and what the likely impact will be on the Queensland Building and Construction Commission budget.

---

<sup>306</sup> Public hearing transcript, 10 Jul 2017, p 16.

<sup>307</sup> Correspondence dated 23 June 2017 (Answers to questions taken on notice), p 3.

### 3 Compliance with the *Legislative Standards Act 1992*

#### 3.1 Fundamental legislative principles

Section 4 of the *Legislative Standards Act 1992* states that FLPs are the ‘principles relating to legislation that underlie a parliamentary democracy based on the rule of law’. The principles include that legislation has sufficient regard to:

- the rights and liberties of individuals, and
- the institution of Parliament.

The committee has examined the application of the FLPs to the bill and brings the following to the attention of the House.

##### 3.1.1 Rights and liberties of individuals

Section 4(2)(a) of the *Legislative Standards Act 1992* requires that legislation has sufficient regard to the rights and liberties of individuals.

##### Clause 8, proposed new sections 28A and 28B

Clause 8 proposes to insert new sections 28A (Commission must give particular information to health and safety regulator) and 28B (Exchange of information between commission and relevant agencies) into the QBCC Act.

Section 28A(1) applies if the QBCC considers information obtained by the QBCC in the performance of a function to be a notifiable incident.

Pursuant to section 28A(2) the QBCC must give the information to the health and safety regulator. Section 28A(3)(a)-(c) provides that the regulator includes a regulator under the *Work Health and Safety Act 2011*; the regulator under the *Electrical Safety Act 2002*; the chief executive of the department in which the *Public Health Act 2005* is administered; and a chief executive officer of a local government (but only in relation to the chief executive’s or chief executive officer’s functions under the *Public Health Act 2005*).

Section 28B(1) provides that the QBCC may enter into an information-sharing arrangement with a relevant agency for the purpose of sharing or exchanging information held by the QBCC or the relevant agency or to which the QBCC or the relevant agency has access. Pursuant to section 28B(2), an information-sharing arrangement may relate only to information that helps the commission perform the QBCC’s functions under the Act; or the relevant agency perform its functions; or where the disclosure of the information is reasonably necessary for protecting the health or safety of a person or property.

Section 28B(3) provides that under an information-sharing arrangement, the QBCC and the relevant agency are, despite another Act or law, authorised to ask for and receive information held by the other party to the arrangement or to which the other party has access; and disclose information to the other party. By way of section 28B(4), a ‘relevant agency’ is defined as: the chief executive of a department; or a health and safety regulator within the meaning of section 28A; or a local government; or an agency of the Commonwealth, or another State, prescribed by regulation.

Clause 16 amends section 86F (Decisions that are not reviewable decisions) to provide that a decision to give information to a health or safety regulator under section 28A is not reviewable.

Clause 28 inserts new section 110 (Confidentiality of Information). Pursuant to section 110(2)(a), a person must not disclose to anyone else the information; or the contents of or information contained in a document. Section 110(2)(b) also provides that a person must not give access to the document to anyone else and use the information or document for any purpose pursuant to section 110(2)(c). The maximum penalty for breaching these provisions is 100 units.

However, pursuant to section 110(3)(e), subsection (2) does not apply to the disclosure of information, or the giving of access to a document or the use of information or a document that is required or authorised under a law, including, sections 28A or 28B.

#### Potential FLP issues

In disclosing certain information by way of sections 28A and 28B, the personal information of individuals may also be released to health and safety regulators. Pursuant to clause 16, the disclosure of this information is not reviewable. In allowing for the exchange of information between the commission and other agencies, clause 8 potentially breaches section 4(2)(a) of the *Legislative Standards Act 1992*, which provides that legislation should have sufficient regard to rights and liberties of individuals. The former Scrutiny of Legislation Committee (SLC) considered the disclosure of private or confidential information as a relevant consideration of whether legislation has sufficient regard to individual's rights and liberties. However, it also considered the rationale behind the legislation as important when considering provisions which may affect an individual's privacy.<sup>308</sup>

The explanatory notes recognised the potential FLP and address the issue as follows:

*The information-sharing obligations and arrangements introduced by sections 28A and 28B respectively may inevitably involve the disclosure of personal information and commercial in confidence information. However, the disclosure is limited to only to public sector agencies, that are prescribed in these sections and it is expected that confidentiality provisions will apply to these agencies. As outlined, the amendments are intended to facilitate a multi-agency approach to improve work health safety on building and construction sites.*

*New section 110 introduces requirements for the confidentiality of information, with penalty provisions applying. The new section provides for certain circumstances that may warrant the giving of access or disclosure of information, such as immediate safety reasons relating to the use of a non-conforming building product necessitating a public statement or warning or a requirement by a court or tribunal to produce a document or answer questions. Information may also be disclosed to a Minister. New section 110 mirrors the confidentiality provisions of the administering Acts of other health and safety regulators and the exceptions, including the ability to disclose information to a Minister, are considered necessary to enable persons, such as departmental and QBCC officers or a Minister, to effectively administer the QBCC Act and further its policy objectives.<sup>309</sup>*

#### Committee consideration

Sections 28A and 28B provide significant power for the QBCC to share information with other public sector agencies in relation to a notifiable incident. A decision to give information to a health or safety regulator by the QBCC under section 28A is not reviewable. Section 28B(4) also widens the scope of the Commonwealth and State agencies which may receive information as prescribed by regulation. The explanatory notes concede that information sharing may lead to personal information and commercial in confidence information being shared among agencies however, 'it is expected that confidentiality provisions will apply to these agencies'.

While the new sections allow for sensitive information to be forwarded to the appropriate agencies, this needs to be considered against the public interest rationale behind the provisions, as noted by the SLC. In this case, section 28A allows information to be exchanged due to a notifiable incident which is defined as the death or serious injury or illness of a person; or an incident that exposes a person to a risk of serious injury or illness. The committee noted that confidentiality provisions pursuant to section

---

<sup>308</sup> OQPC, Fundamental Legislative Principles: *The OQPC Notebook*, p 113.

<sup>309</sup> Explanatory notes, p 10.

110 will apply in certain circumstances and should a regulation prescribe that another agency may receive information then this will be subject to disallowance and come before the committee for its consideration.

#### Clause 22 – power to enter premises

Clause 22 proposes to insert new section 105 (General power to enter places) into the QBCC Act.

Section 105(1)(a)-(d) provides the circumstances in which an inspector, for a compliance purpose, may enter a place. This includes with the consent of the occupier pursuant to section 105C; if it is a public place and the entry is made when the place is open to the public; the entry is authorised under a warrant; and it is a place of business of a licensee or a person in the chain of responsibility for a building product.

However, section 105(e) provides that an inspector may enter a building site where building work is being carried out on the site.

Proposed new section 105L outlines the general powers available to an inspector after entering a place. For example, section 105L(1)(b) provides that an inspector may take for examination a thing, or a sample of or from a thing, at the place without payment. Pursuant to section 105L(1)(d) an inspector may take an extract from, or copy, a document at the place, or take the document to another place to copy. Section 105L(1)(e) allows an inspector to produce an image or writing at the place from an electronic document or, to the extent it is not practicable, take a thing containing an electronic document to another place to produce an image or writing.

Proposed new section 106 provides that an inspector who enters a place without the consent of an occupier of the place and without a warrant, may seize a thing at the place if the inspector reasonably believes the thing is evidence of an offence against a relevant Act.

Section 106D(1) provides that an inspector may seize a place, part of a place, building, structure or other thing, and exercise powers relating to the place, part of the place, building, structure or thing, despite a lien or other security over it claimed by another person. Pursuant to section 106D(2), the seizure does not affect the other person's claim to the lien or other security against a person other than the inspector or a person acting under the direction or authority of the inspector.

Sections 106H to 106J provide for how a seized thing is to be dealt with. Pursuant to section 106I, an owner must be provided access to a seized thing while section 106J sets out how a seized thing is to be returned.

#### Potential FLP issues

In setting out the general powers for an inspector to enter premises, section 105 provides that a warrant and the consent of an occupier is required. However, there does not appear to be any such condition with regard to section 105(e) in circumstances where an inspector enters a building site when building work is being carried out.

Section 105L allows for the seizure of items without payment and potentially without the knowledge of the building controller. Section 106 provides an inspector with the power to enter a premises without consent and without a warrant, if the inspector 'reasonably believes' there is evidence of an offence against an Act.

Sections 105(e), 105L and 106 potentially breach section 4(3)(e) of the *Legislative Standards Act 1992* which provides that legislation should confer power to enter premises, and search for or seize documents or other property, only with a warrant issued by a judge or other judicial officer. The OQPC Notebook provides that this principle supports a long established rule of common law that protects the property of citizens. The power to enter premises should generally be permitted only with the occupier's consent or under a warrant issued by a judge or magistrate. Strict adherence to the principle may not be required if the premises are business premises operating under a licence or premises of a public authority. Of concern in this context is the range of additional powers that become exercisable after entry without a warrant or consent.<sup>310</sup>

The OQPC Notebook further states that, 'FLPs are particularly important when powers of inspectors and similar officials are prescribed in legislation because these powers are very likely to interfere directly with the rights and liberties of individuals'.<sup>311</sup>

In its submission to the committee, the QLS expressed concern in relation to sections 105 and 106:

*In addition to entry by consent or warrant, power is granted to enter any active building site (s105(e)). We note that no qualifications are placed on this power, not even a requirement to notify the site controller. We find this troubling. In addition to the obvious safety issues which arise from having unauthorised and un-notified persons on an active building site, there is the potential for this power to be abused by investigating officers.*

*We reiterate this point with respect to proposed section 105L which in our view contains unfettered evidence gathering powers (for example, the power to seize material without payment; again without the knowledge of the site controller.*

*The Society is very concerned by proposed section 106 which gives unfettered powers to seize things. Further, pursuant to proposed section 106D, an inspector can seize something even if the property is subject to security, even though the seizure does not defeat security. This provision requires amendment to adequately restrain this power and ensure a reasonable degree of certainty in this process is afforded to both parties.<sup>312</sup>*

The explanatory notes have acknowledged the potential FLP in relation to entry powers and provide the following justification:

*These powers include the power to enter places, both with consent and under a warrant. Entry may also be made outside these circumstances but is limited to public places, places of business of licensees, places of business of persons in the chain of responsibility for building products and building sites. Generally speaking, the power to enter these places is limited to when the places are open for entry. Additionally, an inspector may only enter for a compliance purpose, and cannot enter any residence without a warrant or consent. These entry powers will allow QBCC inspectors to ensure compliance early in the supply chain as well as maintain safety during the installation stage of a product's life-cycle. Without these powers, the QBCC will essentially remain limited to accessing building sites and focussing its investigatory capacity on building sites and licensees.<sup>313</sup>*

The explanatory notes have also addressed the potential FLP in relation to the seizure of documents:

---

<sup>310</sup> OQPC, Fundamental Legislative Principles: *The OQPC Notebook*, p 45.

<sup>311</sup> OQPC, Fundamental Legislative Principles: *The OQPC Notebook*, p 45.

<sup>312</sup> Submission 17, p 7.

<sup>313</sup> Explanatory notes, p 6.

*Powers after entry will also allow an inspector to search an entered place and search for or seize documents and other evidence of offences, as well as non-conforming building products and dangerous places. They will also be empowered to direct and even undertake remedial action to make a place safe in emergency situations. Safeguards have been included and these powers are generally similar to those provided for under similar safety legislation. The powers will allow QBCC inspectors to effectively discharge their responsibilities as a safety regulator.*<sup>314</sup>

#### Committee consideration

The committee noted the powers provided to inspectors pursuant to sections 105 and 106 to enter places without a warrant or consent and in some instances seize documents and also noted the concerns raised by the QLS in relation to these sections.

The committee noted:

- the explanatory notes justify the entry powers afforded under section 105(e) as being the business premises of the licensee
- while section 105L provides broad seizure powers to inspectors, items or documents seized must be returned as soon as practicable, and
- while section 106 provides an inspector the discretion to enter a property to seize a thing should they reasonably believe it to be evidence of an offence it is presumed that an appointed inspector would have the necessary experience to determine whether an item should be seized for evidentiary purposes.

#### Clause 22 – abrogation of right to self-incrimination

Clause 22 proposes to insert several sections which abrogate the right to self-incrimination.

Section 105N(1) provides that a person of whom a help requirement has been made must comply with the requirement unless the person has a reasonable excuse.

Pursuant to section 105R(1), a person of whom a document production requirement has been made must comply with the requirement unless the person has a reasonable excuse.

Section 105S(1) provides that a person of whom a document certification requirement has been made must comply with the requirement unless the person has a reasonable excuse.

Pursuant to section 105U(1), a person of whom a requirement is made under section 105T(2)(a) (provide information related to an offence to an inspector within a reasonable time) must comply with the requirement unless the person has a reasonable excuse.

Pursuant to sub-section (2) of all of these sections, reasonable excuse is a defence, however, it is not a reasonable excuse for a person to fail to comply with the requirement on the basis that complying might tend to incriminate the person or expose the person to a penalty.

#### Potential FLP issues

The aforementioned sections, while providing the defence of reasonable excuse, potentially breach section 4(3)(f) of the *Legislative Standards Act 1992* by failing to provide appropriate protection against self-incrimination. The OQPC Notebook states, ‘this principle has as its source the long established and strong principle of common law that an individual accused of a criminal offence should not be obliged to incriminate himself or herself’.<sup>315</sup> The SLC commented that denial of the protection afforded by the self-incrimination rule is only potentially justifiable if:

---

<sup>314</sup> Explanatory notes, p 6.

<sup>315</sup> Office of the Queensland Parliamentary Counsel, *Fundamental Legislative Principles: The OQPC Notebook*, p 52.

- (a) The questions posed concern matters that are peculiarly within the knowledge of the persons to whom they are directed and that would be difficult or impossible to establish by any alternative evidential means; and
- (b) The legislation prohibits use of the information obtained in prosecutions against the person; and
- (c) In order to secure this restriction on the use of the information obtained, the person should not be required to fulfil any conditions (such as formally claiming a right).<sup>316</sup>

The Queensland Legislation Handbook provides that the abrogation of the self-incrimination privilege should only be contemplated when it is more important to know the facts leading to the contravention than to prosecute the contravention. This may be the case if knowledge will allow action to be taken that may save lives or prevent injury in the future.<sup>317</sup>

#### Committee consideration

The committee noted that the explanatory notes acknowledged the potential FLP breach and provided the following justification:

*The current provisions of the QBCC Act in relation to document production and certification requirements have been replicated and expanded in the Bill. This includes the current abrogation of privilege against self-incrimination without corresponding evidential immunity. The expansion, however, is limited by the definition of a compliance purpose, which includes ascertaining whether or not the Act has been complied with. This power could be used to require documents that a licensee or person in the chain of responsibility for a building product is required to keep under the Act. It is also important to note that the Act primarily regulates licensees, who, by participating in the statutory regime to date (through obtaining a licence) have generally accepted the enforcement provisions and thus waived the benefit of the privilege against self-incrimination. To claim privilege in relation to such records would also thwart the purpose of the legislation, which is ultimately to ensure a safe and fair construction industry in Queensland.*<sup>318</sup>

#### Clause 30 – transitional provisions

Clause 30 proposes to insert new Part 14 providing transitional provisions.

Proposed new section 71 provides that sections 28A and 28B will apply to information obtained by the commission before or after commencement.

Section 28A imposes an obligation on the QBCC to provide relevant information about a notifiable incident (i.e. a death or serious injury) to a health and safety regulator. Section 28B allows the QBCC to enter into information sharing arrangements with relevant agencies to help the QBCC or the relevant agency perform their functions.

#### Potential FLP issue

Section 71 will allow information obtained prior to commencement to be used after commencement. This potentially breaches section 4(3)(g) of the *Legislative Standards Act 1992* which provides that legislation should not adversely affect rights and liberties, or impose obligations retrospectively.

---

<sup>316</sup> Alert Digest 2000/1, p 7, para 57; Alert Digest 1999/31; and Alert Digest 1999/4, p 9, para 1.60.

<sup>317</sup> Queensland Legislation Handbook, Department of Premier and Cabinet.

<sup>318</sup> Explanatory notes, p 7.

The explanatory notes do not comment on this potential FLP issue, but advise that sections 28A and 28B are required to facilitate a multi-agency approach to improve work health safety on building and construction sites and to address immediate safety issues which may have implications for the community.

### **3.1.2 Institution of Parliament**

Section 4(2)(b) of the *Legislative Standards Act 1992* requires legislation to have sufficient regard to the institution of Parliament.

#### Clause 5 – Building Products Advisory Committee

Clause 5 proposes to insert section 20B, establishing the Building Products Advisory Committee. Section 20B(2)(a) provides that the Advisory Committee consists of members prescribed by regulation.

Pursuant to section 20B(2)(b), the Advisory Committee has a primary function of giving the Minister, commissioner and board advice about the following matters:

- (i) the suitability of particular building products for particular uses;
- (ii) the safety of particular building products, whether or not they are associated with an existing building;
- (iii) the safety of a building with which a non-conforming building product has been associated;
- (iv) how to promote the safe use of building products in the building industry;
- (v) how to raise awareness of non-conforming building products; and
- (vi) action under this Act that may be appropriate for dealing with non-conforming building products.

Section 20B(2)(c) provides that the Advisory Committee has any other functions prescribed by regulation.

#### Potential FLP issues

In allowing Advisory Committee's functions to be prescribed by regulation, section 20B(2)(c) provides a broad discretion as to its role and the work it will be able to carry out. It may also be argued that the make-up of the Advisory Committee should be known to the building industry to provide certainty, and not contained in a regulation pursuant to section 20B(2)(a). It may be argued that the matters delegated to regulation by clauses 20B(2)(a) and 20B(2)(c) are of such significant importance that they should be contained in the primary Act.

Section 4(4)(a) of the LSA requires that a Bill allow the delegation of legislative power only in appropriate cases and to appropriate persons. Section 4(5)(c) of the LSA provides that subordinate legislation should contain only matters appropriate to that level of legislation.

The explanatory notes provide further information about the functions of the Advisory Committee:

*The committee's primary function is to assist the Minister, the Board of the QBCC and the Commissioner to effectively and efficiently perform their functions in relation to building products. It is intended to facilitate a coordinated investigation and response to non-conforming building products across multiple regulators if needed.*

*The committee is empowered to provide timely, independent and expert advice regarding building products and their safety or suitability. Matters may be referred to the committee by the Commissioner, the QBCC's Board or administering Minister or be generated by the committee.*

*The committee may invite other individuals or organisations such as content experts or relevant industry bodies as necessary to assist with investigations or development of responses to non-conforming building products. The committee may also liaise with other relevant committees or regulators in other jurisdictions to address or coordinate matters relating to non-conforming building products.*

*The committee has already been administratively established by the QBCC in 2015 as a forum for Queensland Government regulators to share information and collaborate when a potential non-conforming building product has been identified. Current members of the committee include the QBCC, Queensland Office of Fair Trading, Electrical Safety Office, Australian Competition and Consumer Commission, Petroleum and Gas Inspectorate and Queensland Fire and Emergency Services. The clause provides that this committee is legislatively enshrined with members to be prescribed by regulation.<sup>319</sup>*

### Committee consideration

The committee has noted the QLS request that it be consulted in the drafting of any regulation pursuant to section 20B(2)(c). The committee has also noted that while sections 20B(2)(a) and 20B(2)(c) will allow potentially significant matters to be prescribed by regulation, all such regulations will come before the committee and be subject to disallowance.

### **3.2 Proposed new and amended offence provisions**

Clause	Offence	Proposed maximum penalty
<p><b>10</b></p>	<p><b>Amendment of QBCC Act</b></p> <p><b>Insertion of new s54A Notification of particular safety matters</b></p> <p>(1) This section applies if a licensee becomes aware of either of the following (each a <i>safety matter</i>)—</p> <p>(a) a notifiable incident has occurred on a building site under the licensee’s control or on which the licensee is carrying out building work;</p> <p>(b) a person carrying out building or other work on a building site under the licensee’s control, or on which the licensee is carrying out building work, has contravened or is contravening—</p> <p>(i) a notice or injunction under the <i>Work Health and Safety Act 2011</i>, part 10; or</p> <p>(ii) a notice or injunction under the <i>Electrical Safety Act 2002</i>, part 11A.</p> <p>(2) The licensee must give the commission notice of the safety matter as required under this section.</p> <p>(3) The notice must be given in the fastest way possible in the circumstances—</p> <p>(a) by telephone; or</p> <p>(b) in writing.</p>	<p>80 penalty units</p>

<sup>319</sup> Explanatory notes, p 13.

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

	<p><i>Example—</i></p> <p>The written notice can be given by facsimile, email or other electronic means.</p> <p>(4) A person giving notice by telephone must—</p> <p>(a) give the details of the safety matter requested by the commission; and</p> <p>(b) if required by the commission, give a written notice of the safety matter within 48 hours of that requirement being made.</p> <p>(5) A written notice must be in a form, or contain the details, approved by the commission.</p> <p>(6) If the commission receives a notice by telephone and a written notice is not required, the commission must give the person—</p> <p>(a) details of the information received; or</p> <p>(b) an acknowledgement of receiving the notice.</p>	
<b>11</b>	<p><b>Amendment of QBCC Act</b></p> <p><b>Insertion of s74AJ Failing to comply with duty</b></p> <p>A person commits an offence if—</p> <p>(a) the person has a duty under subdivision 2; and</p> <p>(b) the person fails to comply with the duty.</p>	1000 penalty units
<b>11</b>	<p><b>Insertion of s74AK Duty about representations about building products</b></p> <p>(1) A person in the chain of responsibility for a building product must not make a representation, or permit a representation to be made, about an intended use of the product that does not comply with requirements for the representation prescribed by regulation.</p>	1000 penalty units
<b>11</b>	<p><b>Insertion of s74AL Duty to notify non-conforming building product</b></p> <p>(1) Subsection (2) applies if a person in the chain of responsibility for a building product becomes aware, or reasonably suspects, that the building product is a non-conforming building product for an intended use.</p> <p>(2) As soon as practicable but within 2 days after becoming aware or reasonably suspecting, the person must give the commission notice of the matter in the approved form, unless the person has a reasonable excuse.</p> <p>(3) If the person is aware of a notifiable incident that was or may have been caused by the use of the building product for the intended use, the notice under subsection (2) must also include notice of the notifiable incident.</p>	50 penalty units

<p><b>11</b></p>	<p>(4) Subsection (5) applies if the commission is satisfied—</p> <ul style="list-style-type: none"> <li>(a) the building product is or may be a non-conforming building product for an intended use; and</li> <li>(b) there are safety risks arising from the product being a non-conforming building product for the intended use.</li> </ul> <p>(5) The commission may, by written notice given to a person in the chain of responsibility for the building product, direct the person to take stated action within a stated period to remove or minimise the safety risks.</p> <p>(6) A person given a direction under subsection (5) must comply with the direction.</p>	<p>50 penalty units</p>
<p><b>11</b></p>	<p><b>Insertion of s74AM Duty to notify notifiable incident</b></p> <p>(1) This section applies if—</p> <ul style="list-style-type: none"> <li>(a) a building product is a non-conforming building product for an intended use; and</li> <li>(b) a person in the chain of responsibility for the building product becomes aware, or reasonably suspects, that a notifiable incident was or may have been caused by the use of the building product for the intended use.</li> </ul> <p>(2) As soon as practicable but within 2 days after becoming aware or reasonably suspecting, the person must give the commission notice of the notifiable incident in the approved form, unless the person has a reasonable excuse.</p>	<p>100 penalty units</p>
<p><b>11</b></p>	<p><b>Insertion of s74AN Commission may require remedial action</b></p> <p>(1) This section applies if the commission reasonably believes a person—</p> <ul style="list-style-type: none"> <li>(a) is contravening a duty under subdivision 2; or</li> <li>(b) has contravened a duty under subdivision 2 in circumstances that make it likely the contravention will continue or be repeated.</li> </ul> <p>(2) The commission may, by written notice given to the person, direct the person to do the following within the period stated in the direction—</p> <ul style="list-style-type: none"> <li>(a) remedy the contravention;</li> <li>(b) take stated steps to prevent the contravention from continuing or being repeated.</li> </ul> <p>(3) The period stated in the direction must be at least 28 days unless the commission is satisfied that, if the direction is not required to be complied with within a shorter period—</p> <ul style="list-style-type: none"> <li>(a) a substantial loss will be incurred by, or a significant hazard will be caused to the health or safety of, a person because of the contravention; or</li> </ul>	

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

	<p>(b) the contravention will cause a significant hazard to public safety or the environment generally.</p> <p>(4) A person given a direction under subsection (2) must comply with the direction.</p>	1000 penalty units
<b>11</b>	<p><b>Insertion of s74AR Compliance with building product undertaking</b></p> <p>A person must not contravene a building product undertaking made by the person that is in effect.</p>	500 penalty units
<b>11</b>	<p><b>Insertion of s74AZA Supplier or installer must help responsible person</b></p> <p>(1) This section applies if a responsible person to whom a recall order applies, other than a supplier or installer of a building product—</p> <p>(a) produces a copy of the recall order to a supplier or installer of a building product the subject of the order; and</p> <p>(b) asks the supplier or installer for help in relation to the recall order.</p> <p>(2) The supplier or installer must give the responsible person reasonable help in relation to the recall order.</p> <p><i>Examples of reasonable help by supplier—</i></p> <ul style="list-style-type: none"> <li>• ceasing the supply of the recalled building product</li> <li>• putting up a sign about the recall at the supplier’s place of business</li> <li>• providing a collection point for recalled building products</li> <li>• identifying or contacting persons supplied with the recalled building product</li> <li>• giving the responsible person information about the number of items of recalled building products sold, in stock or returned by customers</li> </ul> <p><i>Examples of reasonable help by installer—</i></p> <ul style="list-style-type: none"> <li>• identifying or contacting owners of the buildings in which the building product has been installed</li> <li>• giving the responsible person information about the building products the installer has removed from buildings</li> </ul>	50 penalty units
<b>22</b>	<p><b>Section 105N Offence to contravene help requirement</b></p> <p>(1) A person of whom a help requirement has been made must comply with the requirement unless the person has a reasonable excuse.</p> <p>(2) It is not a reasonable excuse for a person to fail to comply with the requirement on the basis that complying might tend to incriminate the person or expose the person to a penalty.</p> <p>(3) Subsection (2) does not limit what may be a reasonable excuse.</p> <p>(4) The inspector must inform the person, in a way that is reasonable in the circumstances, that—</p>	50 penalty units

	<p>(a) the person must comply with the requirement even though complying might tend to incriminate the person or expose the person to a penalty; and</p> <p>(b) if the person is an individual—under section 107, there is a limited immunity against the future use of the information or document given in compliance with the requirement.</p> <p>(5) If the person is an individual and the individual fails to comply with the requirement when the inspector has failed to comply with subsection (4), the individual cannot be convicted of the offence against subsection (1).</p>	
<b>22</b>	<p><b>Insertion of s105P Offence to contravene personal details requirement</b></p> <p>(1) A person of whom a personal details requirement has been made must comply with the requirement unless the person has a reasonable excuse.</p> <p>(2) A person may not be convicted of an offence under subsection (1) unless the person is found guilty of the offence in relation to which the personal details requirement was made.</p>	50 penalty units
<b>22</b>	<p><b>Insertion of s105R Offence to contravene document production requirement</b></p> <p>(1) A person of whom a document production requirement has been made must comply with the requirement unless the person has a reasonable excuse.</p> <p>(2) It is not a reasonable excuse for a person to fail to comply with a document production requirement on the basis that complying with the requirement might—</p> <p>(a) tend to incriminate the person or expose the person to a penalty; or</p> <p>(b) disclose commercial in confidence information or expose the person to a risk of financial loss.</p> <p>(3) The inspector must inform the person, in a way that is reasonable in the circumstances, that the person must comply with the document production requirement even though complying with the requirement might—</p> <p>(a) tend to incriminate the person or expose the person to a penalty; or</p> <p>(b) disclose commercial in confidence information or expose the person to a risk of financial loss.</p> <p>(4) If the person fails to comply with the document production requirement and the inspector has failed to comply with subsection (3), the person cannot be convicted of the offence against subsection (1).</p> <p>(5) If a court convicts a person of an offence against subsection (1), the court may, as well as imposing a penalty for the offence,</p>	200 penalty units

	order the person to comply with the document production requirement.	
22	<p><b>Insertion of s105S Offence to contravene document certification requirement</b></p> <p>(1) A person of whom a document certification requirement has been made must comply with the requirement unless the person has a reasonable excuse.</p> <p>(2) It is not a reasonable excuse for a person to fail to comply with a document certification requirement on the basis that complying with the requirement might—</p> <p>(a) tend to incriminate the person or expose the person to a penalty; or</p> <p>(b) disclose commercial in confidence information or expose the person to a risk of financial loss.</p> <p>(3) The inspector must inform the person, in a way that is reasonable in the circumstances, that the person must comply with the document certification requirement even though complying with the requirement might—</p> <p>(a) tend to incriminate the person or expose the person to a penalty; or</p> <p>(b) disclose commercial in confidence information or expose the person to a risk of financial loss.</p> <p>(4) If the person fails to comply with the document certification requirement and the inspector has failed to comply with subsection (3), the person cannot be convicted of the offence against subsection (1).</p>	100 penalty units
22	<p><b>Insertion of s105U Offence to contravene information or attendance requirement</b></p> <p>(1) A person of whom a requirement is made under section 105T(2)(a) must comply with the requirement unless the person has a reasonable excuse.</p> <p>(2) For subsection (1), it is not a reasonable excuse for a person to fail to comply with the requirement on the basis that complying with the requirement might tend to incriminate the person or expose the person to a penalty.</p> <p><i>Note—</i> See, however, section 107.</p> <p>(3) A person of whom a requirement is made under section 105T(2)(b) must not fail, without reasonable excuse, to—</p> <p>(a) attend as required by the notice; and</p> <p>(b) answer a question the person is required to answer by the inspector; and</p>	

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

	<p>(c) produce a document the person is required to produce by the notice.</p> <p>(4) For subsection (3), it is not a reasonable excuse for a person to fail to answer a question or produce a document on the basis that answering the question or producing the document might tend to incriminate the person or expose the person to a penalty.</p> <p><i>Note—</i> See, however, section 107.</p>	50 penalty units
<b>22</b>	<p><b>Insertion of s106F Offence to contravene seizure requirement</b></p> <p>A person must comply with a requirement made of the person under section 106E(2)(c) unless the person has a reasonable excuse.</p>	50 penalty units
<b>22</b>	<p><b>Insertion of s106G Offence to interfere</b></p> <p>(1) If access to a seized thing is restricted under section 106E, a person must not tamper with the thing or with anything used to restrict access to the thing without—</p> <p>(a) an inspector’s approval; or</p> <p>(b) a reasonable excuse.</p>	100 penalty units
<b>22</b>	<p>(2) If access to a place, part of a place or building is restricted under section 106E, a person must not enter the place, part of the place or building in contravention of the restriction or tamper with anything used to restrict access to the place, part of the place or building without—</p> <p>(a) an inspector’s approval; or</p> <p>(b) a reasonable excuse.</p>	100 penalty units
<b>22</b>	<p><b>Insertion of s106O Power to have building products or samples examined</b></p> <p>(1) This section applies if an inspector takes for examination a building product, or a sample of or from a building product, under section 105L(1)(b).</p> <p>(2) The commission may have the building product or sample examined.</p> <p>(3) A person must not, with intent to adversely affect the examination of a building product or a sample of or from a building product—</p> <p>(a) tamper with a building product before an inspector takes it, or a sample of or from it, for examination; or</p> <p>(b) tamper with a building product or a sample of or from a building product after it is taken by an inspector for examination.</p> <p>(4) An examination under this section must be conducted by a person of a class, and in the way, prescribed by regulation.</p>	100 penalty units

	<p>(5) The commission must obtain a certificate or report stating the outcome of an examination under this section from the person conducting the examination.</p> <p>(6) The commission may recover, as a debt, the reasonable costs of conducting an examination of a building product, or a sample of or from a building product, under this section from a person in the chain of responsibility for the product who has failed to comply with a duty under part 6AA, division 2 in relation to the product.</p>	
<p><b>22</b></p>	<p><b>Insertion of s106P Direction about use of non-conforming building product associated with a building or other structure</b></p> <p>(1) This section applies if an inspector reasonably believes—</p> <p>(a) a building product associated with a building or other structure is, or may be, a non-conforming building product; and</p> <p>(b) the building product, or using the building product in a particular way or for a particular use, is hazardous to a degree likely to cause death or a serious injury or illness to a person.</p> <p>(2) The inspector may, by written notice given to the person in control of the building or structure, direct the person—</p> <p>(a) to not use the building product or to not use the building product in a stated way or for a stated use; or</p> <p>(b) to make the building product incapable of operation.</p> <p>(3) A person to whom a notice is given under subsection (2) must comply with the notice, unless the person has a reasonable excuse.</p>	<p>100 penalty units</p>
<p><b>22</b></p>	<p><b>Insertion of s106Q Direction about action at place where non-conforming building product is present</b></p> <p>(1) This section applies if an inspector reasonably believes—</p> <p>(a) circumstances causing, or likely to cause, an immediate risk of serious injury or illness have arisen at a place; and</p> <p>(b) the circumstances are, or involve, the presence of a building product at the place, whether or not the building product has been associated with a building or other structure.</p> <p>(2) The inspector may direct the person in control of the place, or another person at the place, to take action the inspector considers necessary to remove or minimise the risk.</p> <p><i>Example of direction—</i></p> <p>An inspector reasonably believes the association of a particular building product with a medium-rise building at a place may cause pieces of glass to fragment and fall, creating a risk of injury to persons walking near the building. The inspector may direct the person in control of the place to install temporary overhead protection for persons walking near the building.</p>	

	<p>(3) The direction under subsection (2) may be given orally, but must be confirmed by written notice given to the person as soon as practicable.</p> <p>(4) The person must comply with—</p> <p>(a) the direction under subsection (2); and</p> <p>(b) the notice under subsection (3).</p> <p>(5) The notice must state—</p> <p>(a) the inspector believes that—</p> <p>(i) circumstances causing, or likely to cause, an immediate risk of serious injury or illness have arisen at the place; and</p> <p>(ii) the circumstances are, or involve, the presence of a building product at the place; and</p> <p>(b) briefly, the circumstances that have caused or are likely to cause the risk; and</p> <p>(c) if the inspector believes the circumstances involve a contravention, or likely contravention, of a provision of an Act—the provision contravened or likely to be contravened; and</p> <p>(d) the action the person must take to remove or minimise the risk.</p>	<p>100 penalty units</p>
<p><b>25</b></p>	<p><b>Insertion of s108AI Commissioner may issue stop work notice</b></p> <p>(1) This section applies if the commissioner is satisfied that something is being done, or is about to be done, in contravention of a prescribed provision.</p> <p>(2) The commissioner may issue a notice (a <b>stop work notice</b>)—</p> <p>(a) prohibiting the person who is doing, or about to do, the thing from starting or continuing the thing; and</p> <p>(b) directing the person to take any other action the commissioner considers necessary—</p> <p>(i) to give effect to the prohibition under paragraph (a); or</p> <p>(ii) to ensure the contravention of the prescribed provision is not repeated or does not happen in the future.</p> <p>(3) Before issuing a stop work notice to a person, the commissioner must—</p> <p>(a) give the person written notice of the commissioner’s intention to issue the notice and the reasons for issuing the notice; and</p> <p>(b) ask the person to show cause why the commissioner should not issue the notice.</p>	

	<p>(4) If a person wishes to show cause why the stop work notice should not be issued, the person may make written submissions to the commissioner within 5 days after receiving the notice under subsection (3) from the commissioner.</p> <p>(5) The commissioner must consider any written submissions made by a person within the period mentioned in subsection (4) before issuing a stop work notice.</p> <p>(6) A person must not contravene a stop work notice.</p> <p>(7) In this section—</p> <p><b>prescribed provision</b> means a provision of—</p> <p>(a) this Act; or</p> <p>(b) the <i>Building Act 1975</i>; or</p> <p>(c) the Building Code of Australia.</p>	500 penalty units
28	<p><b>Insertion of s110 Confidentiality of information</b></p> <p>(1) This section applies if a person obtains information or gains access to a document in exercising a power or performing a function under this Act.</p> <p>(2) The person must not do any of the following—</p> <p>(a) disclose to anyone else—</p> <p>(i) the information; or</p> <p>(ii) the contents of or information contained in the document;</p> <p>(b) give access to the document to anyone else;</p> <p>(c) use the information or document for any purpose.</p> <p>(3) Subsection (2) does not apply to the disclosure of information, or the giving of access to a document or the use of information or a document—</p> <p>(a) about a person, with the person’s consent; or</p> <p>(b) that is necessary for the exercise of a power or performance of a function under this Act; or</p> <p>(c) that is made or given by the commission or a person authorised by the commission if the commission reasonably believes the disclosure, access or use—</p> <p>(i) is necessary for administering, or monitoring or enforcing compliance with, this Act or the <i>Building Act 1975</i>; or</p> <p>(ii) is necessary for the administration or enforcement of another Act prescribed by regulation; or</p> <p>(iii) is necessary for the administration or enforcement of another Act or law, if the disclosure, access or use is</p>	100 penalty units

	necessary to lessen or prevent a serious risk to public safety; or	
	(d) that is required by any court, tribunal, authority or person having lawful authority to require the production of documents or the answering of questions; or	
	(e) that is required or authorised under a law, including, for example, section 28A or 28B; or	
	(f) to a Minister.	

### 3.3 Explanatory notes

Part 4 of the *Legislative Standards Act 1992* relates to explanatory notes. It requires that an explanatory note be circulated when a bill is introduced into the Legislative Assembly, and sets out the information an explanatory note should contain.

Explanatory notes were tabled with the introduction of the bill. The committee noted that the notes are fairly detailed and contain the information required by Part 4 and a reasonable level of background information and commentary to facilitate understanding of the bill's aims and origins.

A number of minor errors were identified, including:

- page 25 (clause 16) – ‘regulation’ should be ‘regulator’, and
- page 26 (clause 21) – the words ‘about inspectors’ is repeated.

## Appendix A – List of submissions

<b>Sub #</b>	<b>Submitter</b>
001	Building Designers Association of Queensland
002	Bureau of Steel Manufacturers Australia Ltd
003	Australian Competition and Consume Commission
004	Building Products Innovation Council
005	Board of Professional Engineers
006	Property Owners' Association of Queensland
007	Property Council of Australia
008	Strata Community Australia
009	Construction Product Alliance
010	Australian Constructors Association
011	Master Electricians Australia
012	Housing Industry Association
013	ICPS Australia
014	Engineered Wood Products Association of Australasia
015	Master Plumbers Association of Queensland
016	Master Builders Queensland
017	Queensland Law Society
018	Australian Institute of Architects Queensland Chapter
019	CSR Australia
020	Australian Steel Institute

## **Appendix B – List of witnesses at public departmental briefing and public hearing**

### **Public departmental briefing held on 14 June 2017**

#### **Department of Housing and Public Works**

- Ms Liza Carroll, Director-General
- Mr Don Rivers, Assistant Director-General, Building Industry and Policy
- Mr Logan Timms, Executive Director, Building Industry and Policy

#### **Queensland Building and Construction Commission**

- Mr Brett Bassett, Commissioner

### **Public hearing held on 10 July 2017**

#### **Australian Constructors Association and Construction Product Alliance**

- Mr Lindsay Le Compte, Executive Director, ACA and Chair, CPA

#### **Queensland Law Society**

- Ms Kate Brodrik, Policy Solicitor
- Mr Shane Budden, Ethics Solicitor
- Mr Ross Williams, Chair – Construction and Infrastructure Law Committee

#### **Building Products Innovation Council**

- Mr Rodger Hills, Executive Officer

#### **Housing Industry Association**

- Ms Kristin Brookfield, Chief Executive – Industry Policy
- Mr Michael Roberts, Acting Regional Executive Director - Queensland

#### **Master Builders Queensland**

- Mr Grant Galvin, CEO
- Mr Paul Bidwell, Deputy CEO
- Ms Melanie Roberts, Manager – Workplace Health and Safety Employee Policy
- Mrs Dyan Johnson, Manager – Policy and Economics

#### **Master Plumbers Association of Queensland**

- Ms Penny Cornah, Executive Director
- Mr Ernie Kretschmer, Technical Services Manager

#### **Master Electricians Australia**

- Mr Jason O'Dwyer, Manager Advisory Services
- Mr Gary Veenstra, State Manager

#### **Board of Professional Engineers of Queensland**

- Mr Jon Gormley, Principal Legal Officer

**Individuals**

- Mr Don Sager
- Mrs Julie Sager

**Building Designers Association of Queensland**

- Mr Brenden Creed, Brisbane Branch Delegate/Secretary
- Mr James Dunstan, Technical Sub-Committee Chairperson

**Australian Institute of Architects, Queensland Chapter**

- Mr Jack Williamson
- Mr Kevin Green, Principal ICE Architects (QLD)

**Bureau of Steel Manufacturers of Australia Limited**

- Mr David Armston, Executive Director and Secretary

**Australian Steel Institute**

- Mr John Gardner, National Education Manager, Technical State Manager, Queensland and Northern Territory
- Mr Ian Cairns, National Manager – Industry Development and Government Relations

**Engineered Wood Products Association of Australasia**

- Mr Andy McNaught, Technical Manager

**Services Trades Queensland**

- Mr Glen Chatterton, Operations Manager

**Property Owners' Association of Queensland**

- Ms Margaret Price, President – Queensland
- Ms Roslyn Wallace, Secretary - Queensland

**Strata Community Australia, Qld**

- Mr Jason Carlson, Board Director and Legislation Committee Member

**Individuals**

- Mr Michael Garrels
- Mr Dan Kennedy
- Mrs Debbie Kennedy

**Queensland Building and Construction Commission**

- Mr Brett Bassett, Commissioner

**Department of Housing and Public Works**

- Mr Don Rivers, Assistant Director-General, Building Industry and Policy
- Mr Logan Timms, Executive Director, Building Industry and Policy