

November 17, 2017

The Hon. (Matt) Matthew John Kean
Minister for Better Regulation
52 Martin Place
SYDNEY NSW 2000

Dear Minister Kean

RE: REQUEST FOR THE REINSTATEMENT OF DELETED CLAUSES INTO THE NSW BUILDING PRODUCTS (SAFETY) BILL 2017

I am writing to you on behalf of the Building Products Innovation Council (BPIC) to raise serious concerns about the Building Products (Safety) Bill 2017 tabled in the NSW parliament on November 16, 2017.

On February 16, 2016 at the Building Ministers Forum (BMF), the NSW government along with all other Australian jurisdictions, agreed to embark on improvements to the regulatory framework to enhance the powers of building regulators to respond to instances of non-conforming building products.

On July 10, as the Minister for Better Regulation, you released a 10 point plan with the first priority being to develop a comprehensive building product scheme that would prevent the use of dangerous products on buildings.

On October 6, 2017 representative from major building industry organisations (AIA, Engineers Australia, HIA, MBA AiG, BPIC, OCN, SCA and others) were invited to review a draft of the Bill that would have given effect to the NSW government's 10-point plan of committing to a comprehensive building product safety scheme that would prevent the use of non-compliant and non-conforming products on buildings. Industry came away from this meeting satisfied that the draft Bill included all of the key aspects of the model Non-conforming Building Products (NCBP) - Chain of Responsibility legislation that QLD had introduced and that were fully supported by all sectors of the industry.

On November 16, 2017 the NSW government introduced a heavily edited version of the Bill to parliament that is incapable of delivering on the government's commitment to the BMF, to the industry and incredibly, to your own 10 point plan.

On behalf of all building owners and the general public, the building products industry urgently calls for you to reinstate deleted clauses (see Attachment 1) from the tabled Bill to return it to its original intent and purpose, and so the resultant legislation is harmonious with other jurisdictions and lives up to the commitments the NSW government has publicly made to control non-conforming building product and non-compliant building work.

BPIC thanks you for your consideration and we look forward to your response.

Yours sincerely,



Rodger Hills
BPIC – Executive Officer

ATTACHMENT 1

The purpose of NCBP - Chain of Responsibility legislation and the reason that the BMF and the NSW government committed to introducing it, is that it places a 'duty of care' on everyone in the building supply chain to create a legally enforceable regime of responsibility for compliance.

With the introduction of the watered down Building Products (Safety) Bill 2017, all chain of responsibility measures have been removed, and the Bill will continue to prop up the same ineffective inspection regime that led to the Lacrosse apartment fire in Victoria and the Grenfell apartment fire in London, by leaving the checking of projects until the very final stage of construction. As the public knows only too well, this results in significant risk because by that time, NCBPs and non-compliant practices are often hidden away inside a building's structure. In addition to the difficulty in locating non-compliance, the cost of rectification is highest at the final construction stage.

On behalf of all building owners and the general public, the building products industry urgently calls for the already-drafted clauses of the Bill that would have helped protect consumers, de-risk the building supply chain and prevent the incidence of dodgy and unsafe building products, to be re-instated into the Bill.

In particular, all mention of non-conforming building product and non-compliant building work (including definitions and why it is important to control them) that has been deleted from the Bill should be reinstated under the heading Key Concepts.

Next, all five clauses related to defining the duties of persons in the chain of responsibility need to be reinstated. These clauses were the heart of the legislation and placed a duty on all parties in the building supply chain (product manufacturers, suppliers, importers, sellers, building designers, installers, etc) to provide evidence of product conformity to codes and standards, and made it an offence for people to use non-conforming or non-compliant building products. The following are the relevant clauses:

- Chain of responsibility
- Duty not to use non-conforming or non-compliant building products
- Intended improper use of building products to be reported
- Reportable events to be reported
- Compliance with information requirements.

The seven clauses that would have allowed the NSW government to issue building product declarations and warnings about non-complying or non-conforming building products needs to be reinstated in the Bill. As it stands the tabled Bill only gives the government the power to issues warnings about "unsafe" products. The following are the relevant clauses:

- Declaration of non-complying or non-conforming building product
- Contents declaration
- Effect of declaration under Act
- Duration of declaration
- Amendment or revocation of building product declaration
- Notice of intention to make building product declaration
- Requirement to publicise declaration

The nine clauses that would have allowed the NSW government to ban the supply of non-complying or non-conforming building products needs to be reinstated in the Bill. As it stands the tabled Bill has no preventative powers to intercede in the supply chain or curtail instances of product misrepresentation, except if the product is deemed "unsafe". These clauses also created a link between consumer protection law and building work. The following are the relevant clauses:

- Ban on supply of building products
- Grounds for ban - no safe use of building product
- Grounds for ban - misrepresentation of suitable use
- Contents of ban
- Duration of ban
- Amendment or revocation of ban
- Offence to contravene ban
- Notice of intention to make building product supply ban
- Requirement to publicise ban

A key component of any consumer protection and building regulatory legislation is the ability of the government to issue recall requirements for faulty, poorly designed or dangerous products. The nine clauses that would have allowed the NSW government to recall dodgy building products need to be reinstated in the Bill. As it stands the tabled Bill contains no product recall powers at all. The following are the relevant clauses:

- Compulsory recalls
- Recall of building products
- Contents of building product recall
- Compliance with building product recall
- Amendment or revocation of recall
- Compliance with recall
- Notice of intention to issue building product recall
- Voluntary recalls to be noted
- Voluntary recall

Another key component of any consumer protection and building regulatory legislation is the ability of the government to require those that have caused loss or damage through the supply or use of non-conforming building product and non-compliant building work should be required to remediate their actions. The nine clauses that would have allowed the NSW government to raise and enforce remediation orders need to be reinstated in the Bill. The following are the relevant clauses:

- Installed building product - meaning
- Remediation orders
- Persons to whom order may be given
- Notice to be given of proposed order
- Details of remediation order
- Offence to contravene remediation order
- Consent of occupier
- Planning approval
- Details of orders and notices to be given to councils

One of the things that industry was most impressed with was the draft Bill's link with NSW consumer protection law and safeguards, in particular the ability of people adversely affected by defective building work to seek civil justice. The twelve clauses that would have allowed NSW building owners to seek speedy and fair resolution of their building defect issues need to be reinstated in the Bill. The following are the relevant clauses:

- Definitions
- Defect - meaning
- Liability for loss or damage suffered by an injured individual

- Liability for loss or damage suffered by a person other than an injured individual
- Liability for loss or damage suffered by a person if other goods are destroyed or damaged
- Liability for loss or damage suffered by a person if land, buildings or fixtures are destroyed or damaged
- Proof of culpability required
- Effect of building product declarations
- Defences to defective building product action
- Time for commencing defective building product action
- Applications of ACL provisions
- Regulations

As part of the process of placing a 'duty of care' on everyone in the building supply chain, the NSW government needs the power to issue directions to people in the supply chain about how a product should or should not be used. This is an especially important power if public safety is at risk or there is potential loss or damage to property resulting from a product. The ten clauses that would have allowed the NSW government to issue building product directions need to be reinstated in the Bill. The following are the relevant clauses:

- Power to issue building product direction
- Appropriate persons to whom direction may be given
- Limitations on directions
- How direction is given
- Prior notice of direction not required
- Offence of failing to comply with requirement made by authorised officer
- Defence to contravention
- Revocation of variation of directions
- Exercise in conjunction with other powers
- Taking of required actions and recovery of costs

The tabled Bill will enshrine a reactionary process on the NSW government. In other words only after a dodgy product has been brought to the attention of the government, will it have the ability to act. However the draft Bill contained powers that allowed the government to be proactive and prevent the incidence of non-conforming building product and non-compliant building work by being able to conduct building audits. The three clauses that would have allowed the NSW government to audit buildings as a preventative measure need to be reinstated in the Bill. The following are the relevant clauses:

- Building Audits
- Secretary may authorise building audit
- Other powers of investigation not limited

A fundamental power of any building regulator should be the ability to seize suspect products and materials from a building site or throughout the supply chain, in order to run tests and determine product conformity. The draft Bill contained a clearly defined process as to how products, materials and relevant documentation could be seized and under what circumstances. The seven clauses that provided these processes need to be reinstated in the Bill. The following are the relevant clauses:

- Definitions
- Receipt of seized things
- Return of seized things
- Certification of inability to return seized thing
- Court order requiring delivery of seized thing

- Forfeiture of seized thing
- Dealing with forfeited things

In certain circumstances the ability to issue a product direction or even a product recall may not be enough, especially if a person in the chain of responsibility is engaged in ongoing and intentional misconduct (e.g. product misrepresentation, falsified product certification, etc). The draft Bill contained clearly defined offences and other proceedings for unlawful conduct and activity by people in the building supply chain. The five clauses that provided these powers need to be reinstated in the Bill. The following are the relevant clauses:

- Offences and other proceedings
- Trading prohibition orders
- Unlawful conduct
- Secretary may apply for trading prohibition order
- Procedural fairness
- Trading prohibition orders