

Master Builders Australia

Submission to the Australian Competition and
Consumer Commission (ACCC)

on

*Criteria for Accepting International Standards and Risk
Assessments for Product Safety*

5 June 2015



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1 Introduction

- 1.1 Master Builders Australia is the nation's peak building and construction industry association which was federated on a national basis in 1890. Master Builders Australia's members are the Master Builder state and territory Associations. Over 125 years the movement has grown to over 33,000 businesses nationwide, including the top 100 construction companies. Master Builders is the only industry association that represents all three sectors, residential, commercial and engineering construction.
- 1.2 The prevalence of non-confirming products (NCPs) is of on-going concern to the building and construction industry. Master Builders is committed to the well-being of consumers and to supporting our industry to meet the regulatory requirements to ensure that buildings constructed across Australia are safe and perform well. This concern is given prominence in the submission now made.

2 Purpose of Submission

- 2.1 On 11 May 2015, the Australian Competition and Consumer Commission (ACCC) released the consultation paper *Criteria for Accepting International Standards and Risk Assessment for Product Safety* (Consultation Paper). The Consultation Paper highlights the federal Government's intention to review the regulatory regime with regard to products that are manufactured overseas, imported and used in Australia.
- 2.2 Following on from the Consultation Paper's release, the ACCC has sought submissions and comment from relevant stakeholders, with reference to its revised policy on the regulation of imported products.
- 2.3 The building and construction industry is increasingly sourcing the supply of building materials that are manufactured overseas. In doing so, the performance of these products is crucial in ensuring they comply with the requirements under the National Construction Code (NCC) and other Australian regulations and standards.
- 2.4 Master Builders takes the issue of product safety and compliance very seriously. Master Builders also shares the Government's objective of striving to alleviate the burden of regulatory red-tape. However there are a number of

practical issues outlined in this submission, where more detail is needed as to how foreign accreditation schemes are to be implemented and monitored, and that need to be considered before the criteria as proposed by the ACCC can be applied. This submission addresses each criterion in the Consultation Paper.

- 2.5 A recent survey found that across a variety of business sectors, nearly half of those surveyed indicated a market penetration by NCPs of between 11% and 50%.¹

3 Safety an industry priority

- 3.1 The increasing incidence of NCPs in the marketplace is an issue of great concern to Master Builders given the significant risks of injury, even death, to consumers as well as workers in the building and construction industry.
- 3.2 The recent fire at the Lacrosse Apartments in Melbourne's Docklands precinct on 25 November 2014, is an example.
- 3.3 Master Builders promotes the need for better systems of procurement so that those responsible for the purchase and installation of building products and materials can do so with confidence and know that the work they undertake is safe and compliant with the NCC and other relevant standards.

4 The financial cost of non-compliance

- 4.1 The commercial cost to the construction industry in remediating NCPs can be significant. A guide produced by the Australasian Procurement and Construction Council (APCC) has estimated that the costs associated with rework can, in some cases, be up to 2.5% of the overall contract value.²
- 4.2 The incidence of NCPs in the building supply chain creates enormous liabilities and risks for the industry and owners alike. For smaller builders in particular, the costs of remediation can be disastrous and cause significant financial distress which could ultimately lead to them being put out of business.

¹ The Australian Industry Group, *The quest for a level playing field The non-confirming building products dilemma*, 2013

² Australasian Procurement and Construction Council, *Procurement of Construction Products; A guide to achieving compliance* at pg 6

- 4.3 The problems created by NCPs are very real for the building and construction industry. For example, the prominent and serious Infinity Cables matter will have far-reaching implications, as a result of the four million metres of electrical cable installed in approximately 40,000 homes.³ Aside from the obvious safety concerns that have arisen as a result of the issue, the problem has the potential to cause significant financial damage. Master Builders, for example, is aware of a builder in south east Queensland who has expended \$180,000 to replace Infinity Cable in one house alone.
- 4.4 The issue of potentially faulty electrical cables continued when the ACCC listed and then withdrew a recall in relation to Ecables-branded wiring sold to electricians in NSW, Queensland, Victoria and Western Australia since the beginning of 2012. It was alleged the cabling only withstands half the temperature it is meant to, creating a fire or electrocution risk.⁴
- 4.5 The ACCC stated the reason for the withdrawal of the recall warning was the product was used in “commercial installations and is not assessed as being a consumer good”. That proposition does not and cannot detract from the seriousness of the issue or of the need for regulatory intervention.
- 4.6 NCPs also expose property owners to financial damage. The ACCC’s proposal to have stickers placed in power-boxes of homes where remediation of Infinity Cable has not occurred, or is not possible, does nothing to solve the problem of guaranteeing public safety of consumers. Such an approach will only affect property values as intending buyers are likely to be understandably concerned about the cabling remaining in situ in a property.
- 4.7 Master Builders is keen to reduce any regulatory red-tape that has the capacity to stifle productivity and growth in the building and construction industry. However, before endorsing the ACCC’s plan to streamline the assessment process of products manufactured abroad, Master Builders seeks clarification as to how the new system will work in practice to ensure NCPs do

³ ACCC, Product Safety Recalls Australia, Infinity Branded TPS & Orange Round Electrical Cables <http://www.recalls.gov.au/content/index.phtml/itemId/1061753>

⁴ See on-line article – News.com.au, Ecables-branded wiring sold to electricians since 2012 ‘dangerous’ 27 November 2014 - <http://www.news.com.au/finance/business/ecables-branded-wiring-sold-to-electricians-since-2012-dangerous/story-fnda1bsz-1227136114667>

not become prevalent, jeopardising community safety and creating further uncertainty with regard to liability; and loss of confidence in the accreditation system, as discussed below.

5 ACCC's reasoning for the review

- 5.1 In the Consultation Paper, the ACCC states it is seeking to reduce the regulatory process with regard to the assessment of imported products.⁵ The ACCC has proposed if a product has obtained accreditation by a recognised agency abroad, Australian regulators should not impose additional assessment criteria, if there is no apparent reason to do so. Master Builders notes the heavy reliance on the overseas agency and its credentials to complete the relevant accreditation.
- 5.2 The ACCC has argued by recognising the assessment of Overseas Regulatory Bodies (ORBs) the risk assessment and accreditation of products will be streamlined, removing the need for duplication of approvals and improving competition in the Australian marketplace. This is a laudable aim; however, recent examples have shown that its implementation and compliance are the key issues.

6 ACCC's proposed criteria for accepting international standards

- 6.1 The ACCC has stated it proposes to apply specific criteria to determine whether to recognise an accreditation of a product provided by what it considers to be a trusted international regulatory body.
- 6.2 In consultation with relevant stakeholders, the ACCC has stated it will develop criteria in accepting or adopting "trusted" international standards and risk assessments. In the consultation paper, an international standard, has been defined as "a mandatory or voluntary product safety standard developed overseas by recognised international standards bodies."⁶ As a result, three criteria have been proposed to be used when considering which international standards and risk assessments for product safety should be recognised in Australia.

⁵ ACCC, *Criteria for Accepting International Standards and Risk Assessments for Product Safety*, 11 May 2015 at p 3

⁶ *Ibid*

7 Criterion 1 - Addressing safety concerns

- *Do any international standards or risk assessments adequately address the consumer product safety concerns?*

7.1 There would be significant challenges in ensuring ORBs assess products against the same criteria to ensure they comply with the NCC and relevant Australian standards. In addition, where there is a failure in the assessment, a method of recourse is unclear.

7.2 Under the relevant regulatory regime in their State or Territory, the materials used in the building work must comply with the standards under the NCC for the materials in buildings of the kind being built or altered.⁷ In addition, procurers of building products have a range of obligations under the Australian Consumer Law to ensure that the goods are of acceptable quality.⁸

7.3 The NCC is updated annually and Australian Standards, of which there are thousands, are also reviewed and amended on a regular basis, some of which are called up in the NCC and mandated. For an international standard to adequately address any potential product safety concerns, ORBs would need to have mechanisms to ensure alignment with the Australian Standards and the NCC. How that might occur seems to be absent in the ACCC's current policy proposal. Equally important is how the standard is guaranteed at the point of production on a consistent basis.

8 Criterion 2 – Comparable jurisdiction to Australia

- *Is the international standard or risk assessment published or developed by a legitimate standards body or government agency from an economy or nation with comparable economic and regulatory processes to Australia?*

8.1 Master Builders has a number of concerns about the practicality of this criterion. Without the policy having been implemented, there is presumably very little objective data to substantiate whether an ORB has a credible track record with regard to the assessment of products exported to Australia. This is

⁷ See, for example, section 42 (1)(a)(b) of the *Building Act 2004* (ACT)

⁸ Section 54(1) of the *Australian Consumer Law*

important in the context of a global economy where production inputs into a final product are sourced from different countries.

- 8.2 Even if the ORB is recognised by the Joint Accreditation System of Australia and New Zealand (JAS-ANZ), it is arguable those ORBs will necessarily have had experience in assessing products against specific Australian industry standards.
- 8.3 Master Builders is also concerned at the risk for falsified accreditations. Performance based measures and regular checks by Australian regulatory authorities of ORBs would need to form part of any reform to the current procurement process, protocols which would need careful design.
- 8.4 In addition, Master Builders advocates for the strengthening of penalties to both individuals and corporations who generate or knowingly use fraudulent approval documentation. There may, however, be practical issues in enforcing penalties if the offence occurs in an overseas jurisdiction. Obviously the Infinity Cable matter demonstrates where an overseas supplier goes into liquidation, there is little or no recourse to enforce penalties or recover damages despite the substantial human and monetary costs that might arise. Similarly this may also be the case even where the supplier remains in existence but where the justice system is not robust.
- 8.5 Another concern is that an international standard may be country or region specific and potentially a non-tariff barrier. There is also a risk that an international standard could be drafted in favour of commercial entities in the region.

9 Criterion 3 – *Applicability to the Australian context*

- *Is the international standard or risk assessment applicable to the Australian context?*

- 9.1 Although in the Consultation Paper the ACCC has outlined a number of broad strategies that claim to address this issue, Master Builders is concerned these strategies do not go far enough to guarantee products entering our shores comply with Australian safety standards. In particular, there is no detail in the discussion paper with regards to ongoing quality assurance, subsequent to a product's initial approval.

- 9.2 As already mentioned in this submission, Australian Standards and the NCC are updated regularly. The framework for implementation of the proposal made by the ACCC does not identify how international standards will continue to be deemed to comply, if and when the Australian Standards change.
- 9.3 The Product Safety Branch of the ACCC conducted a webinar on 12 May 2015. The subject matter of the session was “Sourcing safe products under the Consumer Law”. A recurring message amongst the panel of experts during the session was the importance of identifying the requirements of the relevant product in the context of their use.
- 9.4 It is essential that products are assessed as to whether they are fit for purpose so that they reflect changing Australian practices, which may differ from the product’s uses overseas. For example, a product may be deemed safe and fit for purpose structurally, but depending on its application, may be non-compliant with Australian fire safety and combustibility standards.
- 9.5 The experts who spoke during the webinar session also stressed that those who import products manufactured overseas must exercise their own vigilance in assessing the manufacturing and subsequent testing processes. The panel stressed the importance of having on-the-ground intelligence of the local production methods and to scrutinise how product samples are chosen and tested for safety compliance, so that the products meet Australian safety standards.
- 9.6 Whilst a product may, for example, be acceptable for low rise construction e.g. certain types of cladding, it may be unacceptable when used in high rise construction. Compliance with international standards per se cannot address the issue of multifaceted regulatory requirements, and multiple applications, that may confine product use because of safety elements.

10 Liability issues

- 10.1 As discussed at paragraph 7.2, builders are required by law to use products that are compliant with the NCC: see Table 1. However, builders must have confidence in the integrity of the product compliance regime. In any one building there would be hundreds of products and services that have to be compliant and where other parties are involved in their certification that also must take responsibility.

- 10.2 Recently on the 7:30 report, National Master Builders CEO Wilhelm Harnisch has said working out who he is responsible for NCPs is not easy.
- 10.3 Using the example of a fire at a 21-storey apartment building in Melbourne's Docklands last November, allegedly triggered by a cigarette that quickly set alight Alucobest wall cladding, Mr Harnisch said, "The buck has to obviously stop with someone, but finding who that someone is, is very complex in a legal context."
- 10.4 Mr Harnisch went on to say "yes, the builders do have a responsibility, but so do the designers, so do the people who install it, so do the people who finally approve it. There are all these checks and balances all along the way." Before the proposal proceeds, more evidence of appropriate checks and balances should be in place.

Table 1 – State and Territory Building Legislation referencing the NCC⁹

| State | Provision | Section of Act | Regulation |
|-------|--|---|--|
| ACT | <i>Building Act 2004</i> | Section 136 Plus Section 49 which describes the Building Code of Australia as a minimum standard | Issued from time to time e.g. Building (Publication of Building Code) Notice 2010 (No 1) |
| NSW | <i>Environmental Planning and Assessment Act 1979</i> | Section 80A | |
| | <i>Home Building Act 1989</i> | Section 7E and Section 16DE | |
| | <i>Environment Planning and Assessment Regulation 2000</i> | | Clauses 7 and 98 |
| | <i>Home Building Regulations 2004</i> | | Clause 12 and Schedule 2 Part 1 Clause 2(1)(a) |
| NT | <i>Building Act 1989</i> | Section 52 | |
| | <i>Building Regulations</i> | | Regulations 2 and 4 |
| QLD | <i>Building Act 1975</i> | Sections 12, 14 and 30 | |
| SA | <i>Development Act 1993</i> | Sections 36 | |
| | <i>Development Regulations 2008</i> | | Regulation 4 |
| TAS | <i>Building Act 2000</i> | Sections 55 | |
| VIC | <i>Building Act 1993</i> | Section 9 | |
| | <i>Building Regulations 2006</i> | | Regulation 109 |
| WA | <i>Building Act 2011</i> | Section 37 | |
| | <i>Building Regulations 2012</i> | | Regulation 31A(2) |

- 10.5 If an accreditation is provided by an ORB and the product is found to be defective when tested here or when used here, there could also be jurisdictional issues associated with dispute resolution, in the event that a party seeks to recover damages if a product is found not to meet the

⁹ Australasian Procurement and Construction Council, *Procurement of Construction Products; A Guide to Achieving Compliance*, 2014 at p11

Australian safety standard. The work of the ACCC in seeking to liberalise the area in question should not compound the problems of liability by blame or risk shifting behaviours.

- 10.6 Further there needs to be greater clarity in the regulatory requirements and which regulatory agency should take the responsibility for enforcement at different stages of product importation and the incorporation into structures. We refer to Master Builders' letter dated 24 April 2015 to the ACCC (Attachment A) in relation to Master Builders' confidential feedback on its *Safety of building and construction products – summary of regulatory framework*. We look forward to the publication of this document which should also take into account any issues which might arise in the current context.

11 Conclusion

- 11.1 Master Builders supports, in principle, the proposition of greater integration of accepted and recognised international standards into Australia's regulatory regime, provided they are consistent with Australian conditions, practice and requirements.
- 11.2 Although the plan to reduce regulation is supported by Master Builders in principle, in the matter of NCPs the government's objective should be to focus on the introduction of appropriate, rather than simply less, legislation.
- 11.3 The current criteria however, proposed by the ACCC, do not go far enough to reassure industry that the accreditation methods applied by ORBs will ensure that products are safe and compliant with the NCC.
- 11.4 On-going consultation with business and industry is essential to avoid the loss of confidence, amongst both procurers of building products as well as consumers, especially in the current climate created by a number of media commentary on this problem.
- 11.5 Master Builders would be happy to discuss this submission with the ACCC.



24 April 2015

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By email: nigel.ridgway@accc.gov.au

Dear Nigel

Regulatory Mapping – Feedback on Draft

Thank you for your email dated 17 April 2015 that enclosed a document entitled *Safety of building and construction products – summary of regulatory framework* (Framework Doc). We provided initial feedback on the Framework Doc by email dated 20 April 2015 with a promise to provide further more detailed comment.

This letter provides that detail whilst emphasising the point in our earlier email that primary sources and/or non-aligned authors should be used for authority when propositions are sought to be authenticated. Master Builders fully supports the completion of this project which will be a useful resource for regulators and industry participants alike.

In making comment, we refer to the individual paragraphs of the Framework Doc. It would assist if the paragraphs in the Framework Doc were numbered.

Comments

1. **Under Executive summary, Figure 1**, the panel headed “State and Local Authorities” insert a dot point that says “Create and implement variations to the National Construction Code”. We note that the regulatory framework is confounded by the number of local government variations to the NCC.
2. **Page 2, paragraph 2, under the heading ‘Regulatory Framework’**. Our understanding is that whilst Standards have no legal status per se, there should be a statement to the effect that compliance with the Standards referred to in the BCA results in construction that is deemed to be satisfactory. Hence failure to comply with the BCA or the referenced Australian Standard does not in itself establish negligence but clearly a breach is integral to proof of negligence. Perhaps the statement could be made that “Standards are relevant but not decisive in ascertaining the standard of care and skill at common law to be applied to whether a product is non-conforming.

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3. **Page 3, fourth paragraph from the top.** We note the statement “regardless of the origin of the manufacturer, the product when used in the building work is required to comply with the BCA”. That statement should be given proper authority. In this context a number of domestic building statutes require a minimum compliance with the BCA. As well, the statutes relating to building control generally require the BCA as a minimum requirement when planning/building permits are issued.
4. **Same paragraph, page 3.** We note that the referencing relates to publications produced by the Housing Industry Association. Whilst these are informative it is better to reference a primary source or the Australasian Procurement and Construction Committee document referred to in Master Builders email dated 20 April 2015.
5. **Page 3, first paragraph under “Building Code of Australia”.** After the words “regulatory framework” in the third line, insert “that establish minimum standards for structures. The BCA is administered by” and add after State “and Territory as well as local” governments.
6. **Page 3, last paragraph.** Delete the word “generally” from the first line. At the end of the paragraph provide an authority other than from the Housing Industry Association publication.
7. **Page 4, the first substantial paragraph,** delete the words “can assert” and replace with “is able to show”.
8. **The second paragraph under the heading “Building Surveyors or Certifiers”:** in this paragraph the point about the requirements of obtaining approval for meeting the terms of the BCA should be inserted.
9. **Under the heading “State and Territory Responsibilities”,** the Framework Doc recognises at the last paragraph on page 5 “State regulators are increasingly electing to step outside the BCA ... and also introducing ad hoc building regulations through the planning system.” In this context, we make the following comments:
 - The Framework Doc does not give this important point sufficient weight;
 - The current narrative makes ‘stepping outside the BCA’ appear innocuous, and of little consequence, when the reality is quite the opposite;
 - The large and growing incidence of variations to the National Construction Code only serve to undermine the clarity of the regulatory framework, and the consistency of enforcement; and
 - At very least, the Framework Doc should say something to the effect “There is no single comprehensive register of the specific State, Territory and Local Government variations to the Building Code of Australia, which results in a serious gap in any regulatory mapping exercise which this document will assist to bridge.”
10. **Under the heading “Product Certification Schemes” on page 7** a single example of private sector product certification is given. It would have been useful to have several more examples, such as those from the windows and wood products areas.

To date the ACCC has produced a good overview of the area but the Framework Doc does not actually attribute regulatory responsibility to particular agencies. That appears to be a substantial omission. We would hope that the ACCC could provide a clearer description and analysis of key features impacting the regulatory framework that particularly relate to the safety of building and construction products as well as determining the role of agencies such as Customs (the role does seem to exist as the interface with imported products) and work health and safety authorities. We would be happy to provide any further comments on a more detailed draft and, as stated earlier, fully support the aim of this project.

Kind regards

A handwritten signature in black ink, appearing to read 'Richard Calver', written in a cursive style.

Richard Calver
Legal Counsel