

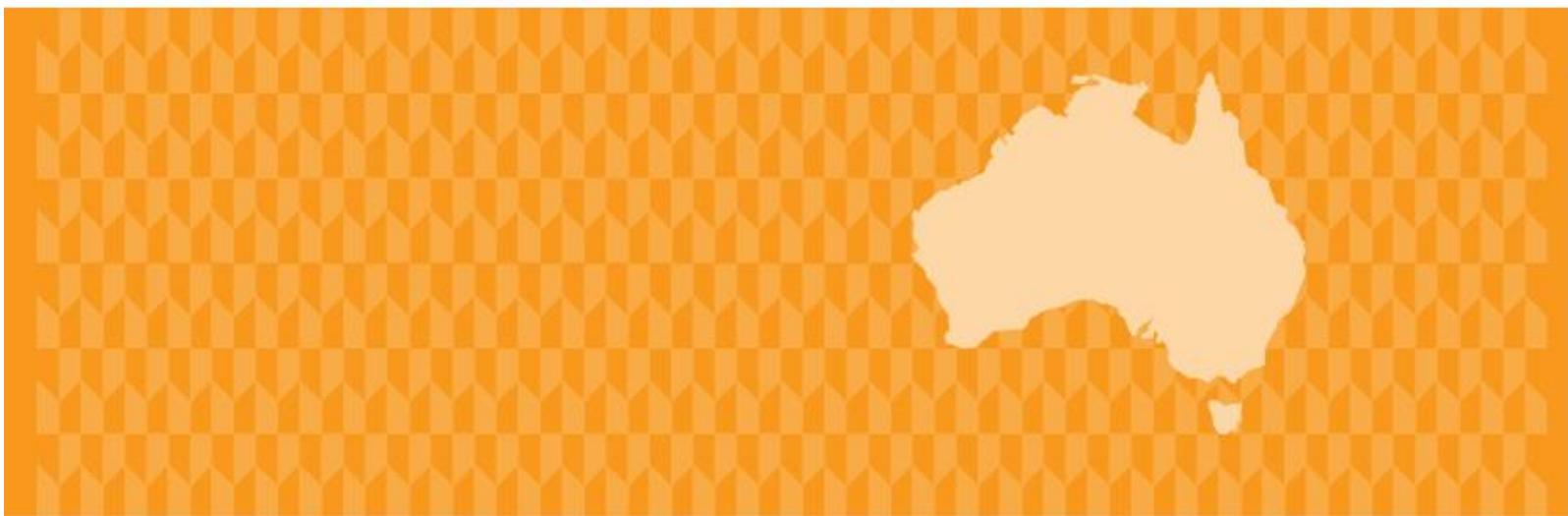
Master Builders Australia

Submission in response

to

Strategies to Address Risks Related to Non-Conforming Building Products

26 April 2016



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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 building and construction industry is a major driver of the Australian economy and makes a major contribution to the generation of wealth and the welfare of the community, particularly through the provision of shelter. At the same time, the wellbeing of the building and construction industry is closely linked to the general state of the domestic economy.

2 Background

- 2.1 The Building Ministers' Forum (BMF) at its meeting of 31 July 2015, recognised the problems associated with non-conforming building products (NCBP), whether domestically manufactured or imported, and that it represented a complex challenge of national significance impacting on the construction, manufacturing, trade and retail sectors.
- 2.2 The BMF at its 31 July 2015 meeting agreed to a range of initiatives, including an investigation into strategies that can minimise risks to the consumers, business and the community associated with the failure of building products to conform to relevant laws and regulations, including at the point of import.
- 2.3 A Senior Officers' Group (SOG) was specifically established to undertake this investigation. The SOG in completing its investigations tabled a range of strategies to the BMF at its meeting of 19 February 2016.
- 2.4 The SOG has been asked to consult widely on the strategies and recommendations.

- 2.5 Master Builders Australia welcomes the opportunity to respond to the seven specific recommendations that were put to the BMF on 19 February 2016. We appreciate the extension of time given to lodge our submission.
- 2.6 Master Builders notes and supports the separate submission prepared by the industry-wide Queensland alliance of which Master Builders Queensland is apart.

3 Overview

- 3.1 Master Builders shares the deep concern of the BMF of non-conforming products (NCPBs) not only for the building industry, which encompasses manufacturers of building products, but also on the safety, health and well-being of the end consumer.
- 3.2 Master Builders reiterates its deep concern at the potential for catastrophic failures if the problem of NCPBs are not appropriately addressed. Having said that, Master Builders is concerned that any proposals for dealing with this complex matter be:
- Evidence based;
 - Practical and cost-effective;
 - Cognisant the risks are appropriately allocated and for there to be shared responsibility for its enforcement and compliance.
- 3.3 The consultation paper confirms that the Australian building and construction industry is already governed by a complex legislative framework at all three levels of government. Further, building products and materials also need to meet the requirements of the National Construction Code, Australian Standards, workplace health and safety requirements and other legislations and regulations.
- 3.4 Master Builders would ask the SOG to properly recognise the existence of a sophisticated legislative framework provides high level protections. This observation was well made in Section 5 of the Consultation Paper.
- 3.5 Section 5 of the Consultation Paper, at the same time highlights a number of gaps and limitations that should be further addressed.

- 3.6 Master Builders notes that in Section 5 the observations was made that “...*building certifiers/surveyors do not have the capacity to check every product.*” (P7).
- 3.7 Master Builders accepts that limitation but would emphasise that this also applies to builders who similarly do not have the capacity to check every product. The point relates to Master Builders’ concern that there be an appropriate allocation of risk and responsibility in the event where NCPBs become evident.
- 3.8 Section 7 specifically addresses current gaps and weaknesses. Master Builders notes that in Section 7.1 the cogent observation of a lack of clear and independently verified evidence and the barriers to collecting and/or reporting such data.
- 3.9 Master Builders notes the frustration in the lack of independent and quantitative evidence. Master Builders, in supporting measures to address NCPBs, expresses caution that whatever measures are taken are based on best practice public policy principles which are evidence-based and not based on “speculation”.
- 3.10 In saying this, Master Builders notes the comment on page 10 which notes that “...*after product failure due to an extreme event, such as fire or cyclone, it is difficult to ascertain whether the product was non-conforming, was non-compliant or incorrectly installed.*” (P10).
- 3.11 Master Builders notes the research that has been conducted including that by Zurich Australia and the International Chamber of Commerce Counterfeiting Intelligence Bureau Report. These are useful tools to assist our understanding and Master Builders notes in particular the comment by the International Chamber of Commerce saying that more research is needed.

4 Master Builders’ Response to Recommendations

- 4.1 Master Builders, in this section, sets out the specific responses to the seven relevant recommendations of the SOG Consultation Report.

- 4.2 We ask the SOG also take into consideration the key points made in Master Builders' submission to the Senate Economics References Committee Inquiry into Non-Conforming Building Products on 5 August 2015.
- 4.3 The key matters are contained in Attachment 1 of this submission. In relation to matters relating to consumer law we also ask that our comments at Attachment 2 to the Senate Inquiry be taken into account.
- 4.4 Separately, Master Builders supports the principles on non-conforming products prepared by the Australian Procurement and Construction Council (2014) "*Procurement of Construction Products: a Guide to achieving compliance*", Australian Procurement and Construction Council, Canberra.

Recommendation 1: Note the current legislative roles and responsibilities of the Commonwealth, states and territories, including the identified gaps and weaknesses, impacting on action in relation to NCBPs.

Master Builders wishes to emphasise the existence of a sophisticated and complex regulatory environment at all levels of government that has served the industry and clients well. We note in particular, the robustness of the National Construction Code and agencies such as Standards Australia.

It is important that this existing infrastructure is properly recognised and that consideration be given to provide additional resources to allow the respective agencies to have greater monitoring and compliance capabilities in dealing with NCPBs. Master Builders contends that there should not be a rush to a new regulatory or reporting overlay without first looking at enhancing the capabilities of the existing agencies such as the Australian Building Codes Board (ABCB), Standards Australia, Australian Competition and Consumer Commission (ACCC) and other key stakeholders in the building and construction supply chain.

Master Builders is strong on the development of evidence-based policy responses and strongly recommends that data and information gaps relating to NCPBs are first attended to so that an evidence-based policy response can be developed.

Recommendation 2: Provide in-principle support for improvements to the regulatory framework to enhance the powers of building regulators to respond to incidences of NCBPs e.g. providing the ability to conduct audits of existing building work or take samples from a building for testing.

Master Builders does not agree with this recommendation. We do not consider that sufficient evidence has been demonstrated that additional regulatory powers are needed for building regulators. We consider that building regulators already have extensive powers to conduct audits, as demonstrated by the recent audits of buildings by the Victorian Building Authority (VBA) in response to the Lacrosse fires.

In addition, the Recommendation implies that the solution is to impose more regulatory burdens and oversight upon builders and surveyors – through the building regulators. The SOG report evidences a large problem at the beginning of the supply chain – with insufficient processes to identify NCPBs before they are supplied or installed. Master Builders strongly endorses the discussion in Section 7.3 of the SOG Report, in which it is highlighted that:

“the current regulatory framework places a disproportionate burden on the end of the product supply chain for identifying NCPBs (builder, installer and building certifier/surveyor) and after a building product has already been paid for and/or installed.”

We do not consider that the recommendations in the SOG Report sufficiently deal with the roles and responsibilities of the designers, architects and engineers who might incorrectly specify products. Nor does it sufficiently increase the oversight and regulation of manufacturers/suppliers.

Accordingly, Master Builders strongly disagrees with Recommendation 2 – and suggests that more needs to be done to ensure that NCPBs are not used in the first instance. That is before they are sold and definitely before they are installed.

The Australian Competition and Consumer Commission (ACCC) recently undertook a regulatory mapping exercise with respect to construction product conformity. We expect therefore that the ACCC and the other identified regulatory agencies are now in a position to better co-ordinate product compliance at point-of-sale. This should be the starting point in implementing improvements in the regulatory framework. Our recommended approach is detailed at Attachment 1, Section 10.

Recommendation 3: Provide in-principle support for improving Commonwealth, state and territory processes for addressing issues involving NCPBs by:

- a. *establishing a national forum of building regulators to facilitate greater collaboration and information-sharing between jurisdictions;***
- b. *improving collaboration between building and consumer law regulators and consistency in the application of the 'false and misleading claims' aspect of the Australian Consumer Law;***
- c. *developing education strategies to better inform consumers and building industry participants and to encourage greater responsibility in the safe use of building products; and***
- d. *considering the establishment of a 'one-stop-shop' national website to provide a single point of information for consumers and building product supply chain participants, including examining arrangements for hosting and maintaining a website.***

Addressing each point of Recommendation 3;

- a. Greater collaboration and information sharing is a critical element particularly in identifying NCPBs in the first instance. Master Builders' strong view is that greater efforts should be placed on stopping NCPBs being used in the first instance. We therefore believe it is important that there be formal engagement with the Australian Border Force to enable better data collection and/or matching as appropriate.

We further recommend that the national forum be appropriately expanded to include building practitioners and not be restricted to building regulators only. Including building practitioners would enhance the collaboration and information sharing on NCPBs.

- b. Master Builders supports the recommendation. It is important that the respective agencies at the Commonwealth and State levels be properly resourced to achieve consistency in the applications of false and misleading claims.
- c. Master Builders strongly supports education and awareness strategies. Once again, all levels of Government should work with industry and industry practitioners in education and awareness programs. Any education program will be more effective if the tools provided to specifiers, purchasers, installers and building surveyors to select conforming products are first improved.
- d. Master Builders supports this concept. We see this as the key component to the solution. Not only is there confusion with terms of reference, general

definitions, understanding of liabilities and responsibilities, there is a general nervousness over the integrity of certification documentation.

The current patchwork system is unwieldy. At last count, the Australasian Procurement and Construction Council reported on 34 different schemes and sources of information to establish product conformity. There is then, the great disparity amongst the schemes as to the quality of assessment, level of auditing and checking for fraudulent documentation. The complexity of the existing arrangements make it impossible to navigate with confidence.

A one-stop-shop in the form of a national website will be an important first step in bringing the current system together as a coherent whole. We recommend therefore that this be considered as a priority.

Master Builders would like to note that we are developing information modules that seeks to cover the following matters:

- definition of the terms of reference;
- liability and risk management;
- contractual obligations/protection instruments;
- transfer of warranties;
- responsibilities and due diligence;
- accreditation and Certification; and
- development of internal protocols.

Recommendation 4: Provide in-principle support for:

- a. mechanisms that ensure that, where all states and territories prohibit the use of a NCBP, evidence is provided to the Commonwealth enabling proportionate action to be taken based on the risk posed by the product***
- b. an information sharing arrangement where import data collected by the Department of Immigration and Border Protection (for the purposes of reporting, detecting and controlling the movement of goods across the Australian border) can be provided to state and territory regulators to facilitate compliance and enforcement activities in relation to NCBPs.***

Master Builders would support initiatives that improves the intelligence and information on NCPBs. We note the concern that currently it is impractical to identify NCPBs at the time of import. That limitation is acknowledged and any measure that can improve the import of NCPBs at source should be an aspirational goal in dealing with the problems of NCPBs.

We recommend that the Government consider a centralised, confidential reporting system to identify and report failures of construction products in Australia. We have detailed the benefits of the Queensland Building and Construction Product Committee and the Confidential Reporting on Structural Safety (CROSS) scheme at Section 9, Attachment 1.

Recommendation 5: Approve that the Working Group of Senior Officers and the Australian Building Codes Board work with Standards Australia to initiate a review of Australian Standards related to high risk building products referenced under the National Construction Code, with a view to assessing the costs and benefits of mandating third party certification and establishing a national register for these products.

The proposal for a Joint Working Group of ABCB and Standards Australia with the aim of reviewing high risk building products prima facie would have some merit. Similarly, establishing a National Register of NCBP products also has merit.

Master Builders, in broadly supporting such an approach is concerned at how risk in building products may be defined. It could be argued that every product, if inappropriately used, in other words not fit for purpose, can become a high risk building product. The product may well be compliant but may become a high risk where it is inappropriately applied, for instance, building materials that are combustible but are applied to purposes which require them to have fire rating properties. A further example would be a black steel bolt may well be complying but would fail where it was inappropriately used where a high tensile bolt instead should be used even though it may well comply with Australian Standards.

We also hold that a single national register will always be too large a task for any one entity, Government included. This issue links back to the 'one-stop-shop' and national website under Recommendation 3. Product manufacturers through their respective industry associations are already providing a wealth of product conformity information.

We recommend, therefore, that a better focus for Governments' efforts is to draw the current disjointed system together by providing a common front end (the 'one-stop-shop') and endorse the existing schemes which can demonstrate that they meet an acceptable standard of assessment, ensure that proper auditing is in place and then look for opportunities to fill the gaps. Building a national register will then become the more manageable task of aligning and monitoring the quality of the wealth of industry registers. This approach is detailed in the Action Agenda at Attachment 1 and a possible model at Section 8 Attachment 1.

The recommendation underscores Master Builders' concern that there must be a shared responsibility throughout the whole supply chain to avoid products being NCPBs and becoming a so-called high risk.

If this recommendation is proceeded with Master Builders would like the opportunity to be actively involved to ensure that the review takes an appropriate broader context in its consideration of what may be considered high risk building products.

Recommendation 6: Provide in-principle support for independent research to be undertaken, including manufacturer and random off-the-shelf product testing, to improve the evidence base relating to NCBPs.

The principle of off-the-shelf product testing could be considered as part of tackling the incidence of NCPBs. Master Builders notes the observation in the SOG Report that this issue must be risk and evidence based, proportionate and supported by relevant research.

Master Builders is of the view that a better approach might be to improve the efficacy and genuineness of product certification claiming compliance with Australian and other relevant standards. This is important in restoring confidence to everyone in the supply chain that the specification for building products do comply with Australian Standards.

Recommendation 7: Note the value and importance of existing building industry initiatives, such as industry third party certification schemes, in identifying instances of building product non-conformity.

Master Builders supports the proposition of the importance of industry and industry associations in identifying instances of building product non-conformity. They are an important complement in supporting Commonwealth and State agencies in the early identification and verification in complying/non-complying building products.

Master Builders notes in particular, the observations that industry can have an important role in maintaining confidence and being able to do so without undue regulatory intervention.

5 Conclusion

- 5.1 Master Builders appreciates the opportunity to put a submission to the SOG.
- 5.2 NCPBs in the building supply chain are a serious concern for the building and construction industry and we welcome the BMF commitment to addressing the challenges in ridding the industry of NCPBs.
- 5.3 Master Builders emphasizes the importance of the responsibility of all the stakeholders in the building supply chain to make sure the products specified and brought to market comply with Australian regulatory requirements. Against this background:
- architects, engineers and similar professionals need to be more disciplined in specifying designs and products;
 - suppliers need to be more diligent in ensuring the products they provide/sell conform with Australian regulations;
 - building certifiers need to have greater authority to reject suspect design and/or products; and
 - builders and tradespeople need to be alert to the potential presence of NCPBs in the building supply chain, practicing the golden rule of “*if in doubt, check it out*”.

Attachment 1

An Action Agenda

1. The previous section outlined some of the key dimensions of the NCP problem for the building and construction industry. This section outlines a number of suggested solutions for remedying the problem. The proposed solutions are not mutually exclusive, and could be implemented concurrently. Indeed, there may well be multiplier benefits in addressing the problem in a multifaceted way.
2. As highlighted earlier, the emergence of NCPs in the building supply chain has served to undermine the vital element of trust which is central to the Australian regulatory system. A key element in ensuring this trust must be greater clarity and transparency in the roles and responsibilities of key players at different stages of the design and construction process. In this context, there is a general responsibility for everyone in the building supply chain to make sure the products specified and brought to market comply with Australian regulatory requirements.
3. Against this background:
 - architects, engineers and similar professionals need to be more disciplined in specifying designs and products;
 - suppliers need to be more diligent in ensuring the products they provide/sell conform with Australian regulations;
 - building certifiers need to have greater authority to reject suspect design and/or products; and
 - builders and tradespeople need to be alert to the potential presence of NCPs in the building supply chain, practicing the golden rule of *if in doubt, check it out*.
4. Master Builders proposes seven items for an Action Agenda on NCPs in the building supply chain, focusing on:
 - greater consumer and industry awareness (see Section 5);
 - stronger consumer and industry decision-making (see Section 6);

- strengthening the existing Codemark Scheme (see Section 7);
- expanded oversight of Product Certification (see Section 8);
- enhanced confidential reporting (see Section 9);
- refocusing the ACCC and making the regulatory environment clearer (see Section 10); and,
- reducing variations to the National Construction Code (see Section 11).

Each of these is now dealt with in turn.

5. Greater Consumer and Industry Awareness

- a. Master Builders welcomes the growing awareness of the problem of NCPs in the building supply chain. This awareness is not limited simply to builders, regulators and suppliers. Consumers are becoming increasingly aware of the issue.
- b. Master Builders has taken active steps to promote greater awareness amongst members. A key element of this member-awareness raising was the development, and the distribution in June 2015, of a set of 'infographics' setting out in clear and easy to read format several key messages around the core theme of the serious consequences of using NCPs in a build.
- c. Key themes of the 'infographics' include:
 - be alert to the potential presence of NCPs in the building supply chain;
 - only use products which comply with Australian regulations and standards;
 - always check paperwork and other certification;
 - know your supplier;
 - NCPs create potentially large risks and liabilities for builders;

- consumer products have to meet the requirements of the Australian Consumer Law , in particular relating to acceptable quality and fitness for purpose;
 - if an NCP has been used, the first point of contact will usually be the builder; and,
 - practice the golden rule: “*if in doubt, check it out*”.
- d. Master Builders sees merit in government undertaking a wider consumer and industry awareness campaign to outline the key recommendations adopted from this inquiry. For example, if the Codemark system is enhanced, consumers, builders and industry generally should be made aware of the new system and how it can be used, which in turn will help make consumers aware of, and demand, products that comply with the new system.

6. Stronger Consumer and Industry Decision-Making

- a. Strengthening builder, supplier and consumer decision-making processes must be an integral element of any effective strategy to combat NCPs in the building supply chain.
- b. A substantial volume of work has already been done in this regard, most notably the publication of a valuable guidebook on the procurement of construction materials in Australia (APCC, 2014).¹ Master Builders contributed to the development of the guide.
- c. The guidebook summarises the inherent nature of the NCP problem, when it says (APCC, 2014: 5):
- ... for many ‘safety critical’ products there is often a lack of credible and accurate information available in Australia to assist stakeholders involved in construction products to verify construction product compliance and conformance, in order to determine whether or not a product is fit-for-purpose.*
- d. The guidebook also underscores the costs and consequences of the use of NCPs in the building and construction processes, noting in particular NCPs:

¹ <http://www.apcc.gov.au/SitePages/Home.aspx>

- add to construction costs and prices through, for example, higher incidences of rework;
 - diminish building durability through, for example, reducing the quality of the build, or the functional life expectancy of the construction; and
 - compound public and workplace safety concerns through, for example, failures during the construction or occupancy of key elements such as electrical systems or windows.
- e. These observations show that the problem of NCPs does not in the main contribute to catastrophic failure but would negatively impact the functionality of a building or structure.
- f. The guidebook published a set of twelve principles to assist those involved in procuring products in the building supply chain to deal with the NCP problem, the full text of which are reproduced in Attachment 3 . Master Builders, as a contributor to the development of the guidebook, has endorsed the principles and commends them to the wider building and construction industry.
- g. However, Master Builders would add a further principle, to the effect:
- Codemark certification should be actively considered by those in the building supply chain, and regarded as prima facie evidence of conformity where the product is properly used for an appropriate purpose.

7. Strengthening the Existing Codemark Scheme

- a. The Australian and the New Zealand Governments together operate the Codemark Accreditation Scheme. Codemark, as it is more widely known, aims to assist the building and construction industry by providing confidence to the market and regulators as to the conformity of certified products with the National Construction Code (NCC; Volumes 1 and 2). It is also intended to encourage the development and usage of new and innovative products in the building and construction industry.
- b. Under the Codemark scheme, approved certification bodies can issue Certificates of Conformity which certify a building product conforms to the

relevant provisions of the NCC. However, only a small number of Certificates of Conformity have been issued under the Codemark Scheme since its inception in 2005, with many of these being for the termite barrier industry.

- c. The Australian Government has initiated a review of the Codemark scheme, with the key terms of reference focusing on participation in and performance of the scheme, performance of similar schemes in other countries, and future options and their impacts for the scheme. We understand that the final report is due to be released soon.

8. Expanded Oversight of Product Certification

- a. Master Builders proposes the Building Ministers in the first instance examine the veracity of existing product certification schemes, and of vesting in an established national agency (say the ACCC) to administer and, where found deficient consider the option of, a single, co-ordinated production certification system.
- b. Key elements of such a system would:
 - define minimum standards of product conformity and testing;
 - have broad product coverage;
 - be simple and easy to navigate (especially for industry and consumer users); and,
 - include auditing and surveillance functions.

This proposal has arisen out of growing recognition within the building and construction industry of the essentially unwieldy nature of the current patchwork system of assessment schemes. In particular, there is a concern amongst industry practitioners at the disparate quality of assessment, level of auditing, and effectiveness of fraud mitigation measures amongst the various schemes. Practitioners also indicate they have difficulties with the incomplete coverage of, and the lack of transparency in, the various schemes, which in turn diminishes user confidence and trust relations.

- h. Against this background, the challenge is to ensure the various individual schemes satisfy, at least, agreed minimum thresholds of

performance, with sufficient transparency to allow users (actual and potential) to recognise when relevant performance benchmarks have been achieved (or surpassed).

- i. As such, the role for government in this regard is to ensure the individual schemes operate within an overall product certification system, itself a sub-set of a broader regulatory framework which is better co-ordinated, risk-based and where compliance is proportional, simpler and more transparent.
- j. A schematic of how better co-ordination could be achieved is at Figure 1.



- k. Consideration should be given towards how a federal agency can co-ordinate, monitor, survey and assist those agencies, as well as provide a consistent means by which consumers, industry and regulators can understand the system.

9. Enhanced Confidential Reporting

- a. Another option now proposed is for the federal and State and Territory Governments adopting an integrated system of confidential reporting to identify and report NCPs, and the failure of building products which affect safety or structurally critical elements of a building.

- b. Such an initiative could be developed and progressed jointly by key federal Government agencies (such as the ACCC, and the Department of Industry) in consultation with industry.
- c. Master Builders notes there are already two such initiatives in place, on which a broader Australian reporting model could be framed, namely the:
 - Queensland Building and Construction Product Committee (QBCPC); and
 - Confidential Reporting on Structural Safety (CROSS) scheme,² operating in the United Kingdom, which is now absorbed into the agency known as Structural Safety.
- d. The QBCPC initiative is a mechanism for capturing in a central location, and sharing amongst interested parties, information on NCPs in the building supply chain. The effectiveness of the QBCPC model would be greatly enhanced by the establishment of similar mechanisms in other Australian jurisdictions, with appropriate information sharing and actioning arrangements. This could be achieved with the co-operation of building control regulators in each State and Territory.
- e. The CROSS scheme collects and analyses information, and publishes reports, on structural failures and safety to allow building professionals (in this case, primarily engineers but with the information available to all) to learn from experiences.
- f. Reflecting the 'lessons learned' (rather than blame attribution) approach of CROSS, when a pattern of structural failures/safety shortcomings is identified, appropriate changes are promoted to practices, legislation and/or regulation.
- g. While the CROSS scheme is focused on structural safety, its design and operation build on antecedents in domains such as aviation and maritime safety. It is a model which could be easily adapted to Australia, building on the existing work of the ABCB in this area, to deal with both NCPs and other matters affecting the safety of buildings and other structures.

² <http://www.structural-safety.org/>

10. Refocusing the ACCC and making the regulatory environment clearer

- a. Another important initiative would involve a role change by refocusing the ACCC away from its current 'ex post' approach of dealing with any NCPs after they are identified (for example, Infinity Cables), toward a more proactive, ex ante approach emphasising prevention.
- b. The ACCC should be charged with preventing products that are not compliant with the NCC from entering the building supply chain. Failing that vesting of jurisdiction, it should be charged with the earliest possible detection and removal of such products from the domestic supply chain. We also refer to the role of co-ordinator of current product certification set out at section 7.9 of this submission.
- c. The ACCC has put to Master Builders at the July 2015 NCP workshop that it does not believe that it has a more comprehensive role:

The ACCC is not the agency responsible for building product regulation. Specialist regulators are responsible for building products, as well as food products, drugs and therapeutic goods, motor vehicles and industrial and agricultural chemicals.

The Australian Building Codes Board administers the National Construction Code, which includes the Building Code of Australia. State and territory building authorities adopt and enforce the Building Code through various building acts and regulations.

The ACCC doesn't normally intervene in safety issues where there are specialist regulators responsible for those goods, or where the goods are not primarily consumer goods. This is to prevent duplication of the activities of other regulators and minimise compliance costs for businesses. Concerns about non-compliant products in these areas of specialist regulation should be raised with the specialist regulator for action," Dr Schaper said.

The ACCC encourages builders and their representatives to work closely with their building regulators to complement the ACCC's consumer product safety initiative to encourage safe product stewardship. Our building regulator colleagues' interest in securing safe outcomes for householders mirrors that held by the ACCC for consumer products.³

- d. Clearly, the ACCC is not the sole regulator in dealing with NCPs. The ACCC is currently engaged in a regulatory mapping exercise where all

³ ACCC Address to Master Builders Australia 22 July 2015

agencies associated with regulation of building products and their various functions are to be outlined. Now that exercise is complete it is timely for government to examine ways in which greater co-operation and a larger number of regulatory initiatives might be established to look at the problem.

11. Reducing Variations to the National Construction Code

- a. State, Territory and local governments can also play an active role by at very least, making transparent, and then winding back the nature and the incidence of their variations to the National Construction Code, and other uniform regulatory programs (for example, Australian Standards).
- b. Such variations only add to regulatory uncertainty for builders, and the costs of housing and other construction for home-buyers. Although the NCC is portrayed as an instrument which creates a uniform system for building structures, that is not the case.
- c. A study by the ABCB (ABCB, 2008) made a number of noteworthy findings, inter alia:
 - such variations and related regulatory interventions *significantly impact on housing affordability* (ABCB, 2008: 1); and
 - many of the issues being regulated by local government interventions would best be left to market mechanisms.
- d. Of the nine more detailed case studies examined in the ABCB study, the local government variations et al added, on (unweighted) average around 5.3 per cent to the cost of construction – or around \$18,600 in current dollar terms - to the average Australian dwelling.
- e. The large number of local variations create confusion as to what constitutes ‘conformity’ – that is, what regulations are builders meant to comply with? Looked at another way, ‘what is this product non-conforming with?’ Which rules and regulations?
- f. This latter question is made even more relevant when it is considered that the NCC is a minimum legal requirement when building structures: see Table 1 below.

Table 1 – State and Territory Building Legislation referencing the NCC⁴

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)

- g. To this end, Master Builders recommends each and every State, Territory and local Government publish on their (most relevant) website a definitive and exhaustive list of such variations, with an explanation for the decision to depart from the NCC. There should be a positive rationale published in respect of that decision.

Attachment 2

Optimising the Australian Consumer Law Review

1. The federal Government (Billson, 2015) has announced a major review of the Australian Consumer Law (ACL) to commence in 2016.
2. The review is intended to:
 - assess the impact of the ACL on protecting consumers;

⁴ Australasian Procurement and Construction Council, *Procurement of Construction Products; A Guide to Achieving Compliance*, 2014 at p11

- examine approaches to streamlining regulatory requirements for business; and
 - consider the effectiveness of the collaborative enforcement model adopted by regulators responsible for administering the ACL.
3. Master Builders considers the ACL review to be an important mechanism in the broader approach to dealing with NCPs in the building supply chain.
 4. The consequences of a statutory guarantee of express contractual warranties are central to a number of concerns that Master Builders has with the new regime, a matter that will be centrally addressed in the ACL review. The remedy provisions are, like much of the ACL, rather complicated. The availability of particular remedies depends upon whether a breach of a consumer guarantee is a 'major failure'⁵ the existence of which entitles the consumer to compensation for a reduction in value in the goods, to recover damages, or to reject the goods. The latter option depends on whether or not the 'rejection period' as defined⁶ has lapsed. The ability to reject goods for breach of an 'express warranty', expansively defined under the ACL,⁷ arguably extends to breaches of mere statements of fact, remedies previously available at common law only for contravention of essential terms.
 5. Worryingly, builders acting in their role as contractors for re-supply of goods are unable to limit their liability⁸ under the ACL. As Carter has noted in this regard:

*It would be a major step to declare void all exclusions or limitations of liability in contracts under which consumers acquire goods for personal use. It is nothing short of remarkable that the freedom of contract in relation to such terms should also be denied to suppliers supplying to commercial acquirers of goods.*⁹
 6. The activities of builders constitute both supply of goods and services and are subject to the consumer guarantee regime. It is also often unclear to

⁵ See sections 259-260

⁶ See subsection 262(2)

⁷ See section 3

⁸ Section 64

⁹ JW Carter "The Commercial Side of Australian Consumer Protection Law" (2010) 26 JCL 221

contractors whether or not they are providing goods to an end user (i.e. a consumer) or not. Certainly, it will not be obvious to many in the marketplace that a corporation may be entitled to protections under the ACL, which can easily distort the risk-management and insurance arrangements of small business and even large business suppliers.

7. The “squeeze” on builders as suppliers of goods and providers of services is compounded by the carve-out for architects and engineers in section 61 ACL. This provision mandates that suppliers guarantee services will be fit for any “particular purpose for which the services are being acquired”, that has been impliedly or expressly made known to the supplier by the consumer. The rationale for the continuance of the carve-out for architects and engineers was identified in the Supplementary Explanatory Memorandum:

The Government amendments reinstate the exemption for services of a professional nature provided by qualified architects and engineers from the requirement that their services are fit for purpose or achieve a result made known to them by a consumer as recommended by Coalition Senators who are members of the Senate Economics Committee. The Coalition Senators’ Recommendation was motivated by a number of arguments put forward by representatives of architects and engineers. Those arguments include that:

- *architects or engineers might be held responsible for actions of third parties, such as builders, if the relevant guarantees apply to those occupations; [emphasis added]*
- *insurance costs will rise if the relevant guarantees apply to those occupations;*
- *architects and engineers often experience difficulties ascertaining the wishes of consumers when contracted to provide the relevant services; and*
- *consumers are adequately protected by other sources of redress, such as actions for negligence and the guarantee of due care and skill, when services do not meet the standard that consumers are entitled to expect.¹⁰*

8. Consumers continue to be unable to obtain statutory remedies for failures by architects and engineers to supply services in a manner fit for a purpose previously made known to them by the consumer, an incident of the prior law. However, as noted in the relevant Supplementary Explanatory Memorandum

¹⁰ [Supplementary Explanatory Memorandum](#)

the exemption only applies to professional architectural and engineering services and does not exclude common law remedies.

9. The exemption does not apply to excuse architects or engineers from this, or any other, liability that may arise from services provided that do not fall within their respective areas of professional expertise. For example, the exemption would not apply if an engineer contracted to provide building services to a consumer in addition to providing engineering services.
10. It is unclear whether architects and engineers would necessarily be liable for the actions of builders even were the consumer to invoke the common law but it is certain that under the ACL, builders may be liable for the mistakes of architects and engineers. This is because section 61 of the ACL effectively ensures that only the builder may be sued for breach of a consumer guarantee in a construction contract where issues of fitness for purpose arise; this is inequitable and designers should be required to produce designs which are fit for purpose. Master Builders will continue to lobby to have the guarantees apply equally to all on a fair and equitable basis in the 2016 review.
11. The existing ACL has a substantial footprint in the area of NCPs, most notably through its provisions dealing with:
 - guarantees as to acceptable quality (Section 54);
 - guarantees as to the fitness for any disclosed purpose (Section 55); and,
 - requirements not to make false or misleading representations (Section 29).
12. Master Builders will be making a careful, detailed and substantial submission to the ACL review, key elements of which will address NCP-related matters.

Attachment 3

APCC 2014 - Principles

Principle 1: All relevant legislation must be complied with including, but not limited to, building, workplace health and safety, and consumer laws.

Principle 2: Contract documentation should clearly specify product standards and the required evidence of conformity. Product standards should refer to relevant Australian Standards. Where there are no relevant Australian Standards, relevant international standards or authoritative industry sources should be utilised.

Principle 3: All construction products procured should conform to the requirements in the contract documentation.

Principle 4: The selection of the required evidence of conformity should be based on the intended use and risk exposure (likelihood and consequence of failure) of each construction product.

Principle 5: Construction product conformity requirements should refer to relevant Australian Standards. Where there are no relevant Australian Standards, appropriate international standards or authoritative industry sources should be utilised.

Principle 6: Evidence of construction products meeting specified standards should be demonstrated by conformity assessment including, but not limited to, product certification, testing or inspection, as set out in the contract documents.

Principle 7: Evidence of the source of construction products and their authenticity should be obtained and retained.

Principle 8: Project managers should obtain and retain contemporary and credible documentary evidence to demonstrate conformity of all construction products.

Principle 9: Responsibility for managing conformity assessment outcomes at each stage of the project should be appropriately allocated in the contract documentation.

Principle 10: Where third party conformity assessment bodies are relied upon to provide evidence of conformity, they should be accredited by:

- ~ Joint Accreditation System of Australia and New Zealand (JAS-ANZ) – for product certification, management systems, certification and inspection bodies
- ~ National Association of Testing Authorities, Australia (NATA) – for testing and calibration laboratories and inspection bodies
- ~ Accreditation bodies that are signatories to relevant international multilateral/mutual recognition arrangements and have the relevant scope associated with the conformity assessment activity.

Principle 11: Where construction products are supplied without required evidence of conformity, or where doubt exists about product conformity, product testing to an appropriate level may assist in ascertaining construction product quality.

Principle 12: Without adequate evidence of product conformity, the product should not be used in construction.