21 June 2017

Committee Secretary
Public Works and Utilities Committee
Parliament House
George Street
Brisbane QLD 4000

By email: PWUC@parliament.qld.gov.au

Dear Committee Secretary,

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

Thank you for the opportunity to make a submission on the Building and Construction Legislation (Non-conforming Building Products – Chain of Responsibility and Other Matters) Amendment Bill 2017 (the Bill).

By way of background, the Queensland Law Society (the Society) is the peak professional body for the Queensland's legal practitioners. We advocate for good law and good lawyers. The Society is an independent, apolitical representative body upon which government can rely to provide advice which promotes good, evidence-based law and policy.

The Society deplores people and business who intentionally or recklessly use unsafe material in buildings and other places. These people breach consumer and safety laws and, most importantly expose the public to risk of harm. We are a strong advocate for effective regulation to ensure public safety. In making this submission, we understand that the right balance needs to be struck between imposing safety and other laws and ensuring that the rights of those working in the building industry are also protected. That is, QLS advocates against duplicated compliance regimes which lead to additional costs and confusion.

Hence, whilst we support the Government’s good intentions on this issue, we do see significant issues with the Bill which will need to be addressed to make the system effective. We raise our concerns as follows:-

Firstly, we note that clause 4 of the Bill amends the ‘Objects’ of the Queensland Building and Construction Commission Act 1981 (QBCC Act) by extending the mission of the Queensland Building and Construction Commission (the Commission) 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 of both sets of laws. We suggest that the scope of the new role given to the Commission be made clear in the Bill, considering the existing schemes.
Our next concern relates to clause 5 of the Bill which establishes a committee to provide advice on building products and related safety issues. We note that membership of this committee is to be dictated by regulation and, under proposed section 20B(2)(c), will have any other function prescribed by regulation. 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.

Collection and use of information for other purposes

Clause 8 of the Bill mandates that the Commission provide certain information to health and safety regulators. This information will then be used by these regulators for their own purposes. The Commission may enter into information-sharing arrangements with other relevant agencies and we note proposed section 28D(3) provides that under an information-sharing arrangement, the Commission 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. Clause 12 similarly provides the Commission with the power to use information from any entity including from a department or agency of the Commonwealth or State. As the information referred to in both clauses will be used for a purpose other than that which it was originally collected, we are concerned that these clauses may be inconsistent with the Information Privacy Principles (IPP).

In particular, we reference IPP 10 which provides that personal information must not be used for a purpose other than the particular purpose for which it was obtained, unless certain exceptions apply. IPP 11 provides that personal information must not be disclosed to a third party, unless certain exceptions apply. Whilst these exceptions do cover matters such as safety or welfare of an individual, or to public health, safety or welfare, there is still a concern that information, including personal and commercially sensitive information will be improperly disclosed and potentially cause the Commission to inadvertently be in conflict with the IPP.

Further, we note the term, “health and safety regulators” is defined in proposed section 28A(3) of the Bill to include an entity that is prescribed by regulation and “relevant agency” is similarly defined under proposed section 28B(4). We repeat our comments made above and submit that the Society is able to assist in the drafting of any subordinate legislation. We also note from clause 16 of the Bill that a decision to give information under proposed section 28A is not reviewable, and query whether this corresponds with the Commission’s IPP obligations.

Cancellation or suspension of a licence and disciplinary power

Clause 9 of the Bill allows the cancellation or suspension of a licence if the licensee is convicted of an offence under a relevant act (or other act prescribed by regulation) or if the commissioner decides that work on a building site under the licensee’s control may have caused death, grievous bodily harm or involved a serious risk to the health and safety of a person (our emphasis added). We are concerned that the use of the word “may” means that
serious action can be taken against a licensee when the matter has not been finally determined by a court or other appropriate body; should a contractor have its licence cancelled and subsequently be found not guilty of causing the death or harm, the detriment suffered by that licensee will not be able to be adequately redressed. The commissioner will be essentially making a judicial determination, and concerningly the effect of that determination will be to remove the contractor’s ability to earn a living. We suggest that the clause be amended to state that the building or other work was found to have cause death, grievous bodily harm or serious risk to a person’s health and safety.

Similarly, clause 13 of the Bill establishes new grounds for disciplinary action against a licensee and former licensee and uses the same language found in clause 9, specifically that the work may have caused death, grievous bodily harm or involved a serious risk to the health and safety of a person. We submit that this clause should also be amended as per our comments above in relation to clause 9.

Clause 11
Definitions

Clause 11 inserts a new Part 6A in the QBCC Act. 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.

In addition, proposed section 74AB defines ‘building product’ and ‘non-conforming building product’ again, quite broadly. A building product can be anything and a non-confirming building product is anything that is not or will not be safe or does not or will not comply with safety regulation or does not perform to the standard represented by anyone in the chain or responsibility.

This definition is problematic. Firstly, the use of the word “will” potentially means that the product cannot be supplied or used because at some point in the future, it might deteriorate and may no longer be safe. Providing the risk of deterioration is made clear to all relevant parties, this should not necessarily be a prohibiting factor; in addition, almost every building product has a designed lifetime, meaning that the definition could be interpreted to include almost any product. Further, proposed section 74AB(2)(b) sets out that a product will be non-conforming if anyone in the chain has made an incorrect representation about the product’s standard. If the installer or end-user of the product is informed of the correct information, then deeming the product as non-confirming will serve no purpose other than to disrupt the building work and add to the costs.

We request that these definitions be given further consideration.

Relationship with safety laws

The Society is concerned by proposed section 74AC which describes the relationship of this legislation with existing safety laws. 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 admissible against an individual.

Duties

The Society suggests that further consideration should be given and amendments made to several proposed sections which are inserted into the QBCC Act by clause 11. These proposed sections are as follows:

Section 74AD

We note 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.

Section 74AE

Proposed section 74AE establishes a chain of responsibility which includes a wide range of people who have designed, manufactured, imported or supplied the product with the only implicating factor being that they knew or reasonably were expected to know that the product might be associated with a building. Associated with a building means, per the definitions in proposed section 74AA, incorporated into, or connected to, a building by the carrying out of relevant work.

The Society is concerned 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 a product's design, safety features, use in or on particular building work or with other particular products. This imposes an inappropriate responsibility on a party that may not be required to hold the corresponding level of knowledge as part of their position or connection to the broader building process. It is impossible for all of these parties to determine whether a product is faulty or otherwise unsafe. An individual, dependent on their role and experience, may know that a product could be associated with a building, but that is the extent of actual knowledge. 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.

We suggest that at a minimum, the Commission should provide a guideline setting out these issues and clarifying the application of these requirements through examples.
**Proposed section 74AG**

Proposed section 74AG establishes a duty in relation to the provision of information by people in the chain of responsibility. The information required to be given can be adjusted by regulation, and is already very broad. Further, under sub-section (3), the term ‘gives’ has not been defined to confirm that it only relates to someone carrying on a business, and in sub-section (3)(b) extends further, to someone who facilitates the sale. We submit that the requirement to give information should be limited to someone ‘giving’ the product in the course of their business and who either has the capacity and authority to give the information or who has actually received the information from someone else in the chain who has this capacity and authority.

**Proposed section 74AH**

As to proposed section 74AH, we submit 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.

**Proposed section 74AI**

Proposed section 74AI imposes duties on company executives. In addition to our comments made above about the actual knowledge of people caught in the chain of responsibility, we advise that executive officers\(^1\) already have a range of duties under the Corporations Act 2001 (Cth) and consumer protection legislation including under the Australian Consumer Law. Again, we caution against unnecessary duplication of duties as this will create confusion and unnecessarily increase compliance costs.

**Proposed sections 74AK, 74AL and 74AM**

In respect of proposed section 74AK, we submit 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.

We consider that proposed sections 74AK and 74AL are overly prescriptive and are already comprehensively dealt with by federal consumer protection laws. Again, this will only serve to further complicate compliance obligations and increase costs.

Proposed sections 74AL and 74AM establish a duty to notify the Commission which is imposed on all parties in the chain, and mandate that notice to the Commission must be made.

\(^1\) "executive officer" of a body corporate means a person who is concerned in, or takes part in, the management of the body (regardless of the person's designation and whether or not the person is a director of the body). - Corporations Act 2001
within 2 days. This timeframe is extremely short and will likely not allow a person to obtain any advice on the situation, including legal advice. Further, a maximum of 2 days may lead to unnecessary reporting as parties are faced with an inadequate period of time to ascertain if the issue in question has the characteristics of a properly reportable matter. This will undoubtedly lead to the Commission receiving an influx of unnecessary reports.

The Society submits that the period of 2 days should be removed, so that the requirement is to notify the Commission "as soon as is practicable".

Further, the Bill should prescribe some form of protection for a person who notifies under these provisions so that they are not penalised for complying with their duty, including in circumstances where the product is found to conform or if the notifiable incident is found not to have been caused by the building product.

**Proposed section 74AS**

Proposed section 74AS allows the Commission to take action in respect of a contravention of a building project undertaking. Under these proposed amendments, the Commission 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.

**Proposed sections 74AV and 72AW**

Proposed sections 74AV and 74AW establish ministerial recall powers where someone in the chain of responsibility, possibly the builder, will be directed to remove a faulty product in circumstances where they may not be at fault. We therefore submit that there should be a mechanism for a person who takes such action to recover the costs of this action from the at fault party. We make the same comment with respect to proposed section 74AZA.

Clause 19 of the Bill includes certain reviews to be included in expedited hearing regime under section 95 of the QBCC Act. We are concerned that this amendment will be problematic given the delays in QCAT at present. We call for an increase in QCAT's resources if this amendment is to be proceeded with.

**Clause 22**

Proposed section 105 contains the entry powers of inspectors. 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 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*.

We note that proposed section 105O gives an inspector powers, similar to those that police officers have, to require information from a person. 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.

We express concerns with proposed section 109Q which requires a person to make something available for inspection at a "reasonable time and place nominated by the inspector". The subject of the requirement is afforded no recourse or review as to what is nominated to be reasonable by the inspector.

As to proposed sections 105R and 105S, and as stated in respect to sections 105M and 105N, this clause waives the right against self-incrimination. A breach of a fundamental right such as the right to claim privilege against self-incrimination, should be a last resort and we see no justification for it in this Bill. Fundamental rights of this nature underpin the rule of law and the justice system as a whole. Proposed sections 105R and 105S should be amended to protect this fundamental right. We repeat these comments and our concerns with respect to proposed sections 105T and 105U.

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. Similar amendment is required to proposed section 106E to ensure that these powers do not go beyond those which are set out under the workplace health and safety laws.

As to proposed sections 106H to s106J, which govern how seized things are to be dealt with, we say again that these powers are extraordinarily wide and largely unfettered. We observe that notice provisions do not need to be personally served on an owner and can be delayed for the duration of the investigation. This is confusing and does not allow an impacted party to understand and respond to the actions taken by the Commission. We have the same concerns in respect of sections 106K, 106L and 106O.
The Society is concerned that 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.

Finally, with respect to clause 30 of the Bill, which deals with transitional provisions, proposed section 71 allows information obtained prior to commencement to be used after commencement. Similarly, proposed section 74, allows for the new powers in this Bill to be used in investigations which were underway prior to its commencement.

The Society opposes these amendments being applied retrospectively on the basis that this is unfair to parties whose information has been obtained without knowing that these changes will occur and who are currently under investigation. The adoption of the amendment may create unjust and unforeseeable outcomes and thus is contrary to section 4(3)(g) of the Legislative Standards Act 1992.

Thank you for the opportunity to provide comments on the Bill. The Society would be pleased to be consulted on any of the issues raised above and on the Bill more generally, including any subordinate legislation which may arise out of the proposed amendments to the QBCC Act.

Please do not hesitate to contact our Policy Solicitor, Kate Brodnik on (07) 3842 5871 or k.brodnik@qls.com.au if you wish to discuss the content of this letter.

Yours faithfully

Christine Smyth
President