

# The “Building (Building Products and Methods, Modular Components, and Other Matters) Amendment Bill”.

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## A Submission from C R Prouse

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### In effect the Bill proposes 6 proposals:

1. better information on products
2. a new manufacturer certification and registration scheme
3. a strengthened product certification scheme
4. higher maximum penalties and a longer period to file a charge
5. widening the scope of the building levy
6. a change to allow public notifications to be carried out online

### Comments on each of the above:

1. better information on products

#### The explanation provided in the Bill states:

Quality building products are central to safe and durable buildings. Good product information, clear responsibilities, and stronger investigative powers for the central regulator are needed to support the building and construction sector to make good decisions about the use of building products.

>> “Quality” is a relative term. The issue of safety and durability is not solely dependent on “quality” - these are separate functions related to other factors. In any event, the current legislation already requires adequate information on building products - as do Building Consent Authorities at the time of a building consent application. Currently, building products considered to have ‘a high risk’ have some form of third-party certification which addresses concerns about adequate information, safety and durability. The building sector is unaware of any need for change in this regard. The Bill’s explanatory notes fail to articulate an obvious shortfall and therefore the need for change. Unless there is better evidence, this recommendation can be removed from the Bill.

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2. a new manufacturer certification and registration scheme

#### The explanation provided in the Bill states:

Using new manufacturing approaches and methodology can lift productivity and reduce building costs and delays. However, there are difficulties gaining building consents for

modern methods of construction such as prefabrication and **off-site manufacturing**.

Modern methods of construction (MMC) processes use automation...

Under the current scheme, BCAs can have difficulty assuring themselves of build quality and code compliance when traditional inspection practices are difficult, as is the case with many buildings and components manufactured using MMC.

Manufacture of these components can occur some distance (either off-site or offshore) from where the component will ultimately be installed, or manufactured products may arrive at a building site already enclosed, limiting the effectiveness of visual inspections.

This Bill addresses those issues by providing for the establishment of a voluntary certification scheme, based on a conformity model...

>>Strictly speaking, the current product certification scheme (with needed revision) or the MultiProof scheme, could be used to demonstrate compliance for off-site manufacturing, as has previously been proposed by others. However, few, if any product certification bodies, possess the experience and skills to perform such assessments, in a robust and consistent manner.

Therefore, such as new scheme, attendant with appropriate guidelines and rules, could be useful. The test would be to demonstrate its advantages over the current mechanisms. Any new scheme will need to provide both the framework (as per the proposed changes to the Act) as well as a well thought out set of Scheme Rules. In my view, any new Scheme Rules, like formal Standards, ought to be derived from an industry developed document such as a Code of Practice, rather than be stuck in any Act or Regulation. As the industry sector is finding, Codes of Practices are slowly replacing traditional Standards. This concept needs to be allowed for in any new scheme as well.

A second key issue that will need to be addressed, is the need for checks and balances over interpretation of how the scheme ought to operate. The new scheme will need to include a third part dispute resolution process, to enable disputes of interpretation over acceptability or compliance. The current product certification scheme currently lacks such a mechanism - which is why some product certification bodies have incorrectly lost their accreditation. This should not be overlooked in any new scheme.

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### 3. a strengthened product certification scheme

The explanation provided in the Bill states:

The existing product certification scheme (known by the brand name CodeMark) is designed to provide assurance that products comply with the building code. However, there is currently a lack of confidence in the scheme. To address these concerns, the existing product certification scheme will be strengthened and brought into line with recommended best practice by enabling MBIE to administer registers of product *certification* bodies (PCBs) and product certificates.

>>Interestingly, the Bill provides no clue as to what is “recommended best practice” or how it is to be developed. In practice, there are no published papers on best practice. Best practice comes from the experience of product certification bodies. Research will uncover that there are a number of product certification schemes around the world, used for the ‘certification’ of building products. Some are more credible than others. The scheme in Australia for example, have requirements which are impractical by product certification bodies, adding unnecessary costs, as was agreed at a conference of the PCBs in 2017.

In my view the usefulness of a product certification scheme is dependant on the quality of the 'Scheme Rules', including a new dispute resolution process. Such Scheme Rules need to be developed in a collaborative manner including all affected parties and those with specialist knowledge, to have credibility. The Bill needs to make it clear how future scheme rules are to be designed and agreed to by affected parties. Failure in this area will add further frustration to the sector.

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#### **4. higher maximum penalties and a longer period to file a charge**

The explanation provided in the Bill states:

It is important that product manufacturers, building professionals, tradespeople, and other people comply with the obligations placed on them under the Building Act 2004. New offences have been created to support compliance with the MCM and product certification schemes.

Additionally, many of the current maximum fines set out in the Building Act 2004 have not been adjusted since its enactment. This means that the deterrent value of the penalties has eroded over time. To improve compliance and deter poor or illegal behaviour, the Bill amends the maximum penalties on conviction to a level that reflects the seriousness of the offences.

The current 6-month time frame to investigate a potential offence against the Building Act 2004 is too short given the complexity of investigating potential offences and the number of people involved. Therefore, this Bill extends that time frame to 12 months to allow more time to properly investigate potential breaches, gather evidence, and where appropriate allow for multiple enforcement avenues to be pursued to encourage greater compliance before prosecuting.

>> The explanatory note states the intention of this change is to “deter poor or illegal behaviour”. Presumably, the Government is intending to head off a new and yet not widely appreciated wrongdoing by a growing number of entities operating in the building marketplace. My question to the Government, is where is the evidence for this? While there may well be occasional abuse of the Act or Regulations, how does this warrant *significant* increases. The statement that the deterrent value of the penalties has eroded over time, has to be weighed against the lack of sector education, training and especially effective quality control requirements - from design through to final sign-off. Research in the sector will readily underline the need for more education at the regulatory level – but little seems to be done about this. The Government appears to overlooked these key factors in this Bill. Could the Bill consider these factors and reconsider the level of penalties?

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#### **5. widening the scope of the building levy**

The explanation provided in the Bill states:

The building levy provides funding for the performance by MBIE's chief executive of functions under the Act.

The scope of the levy is being amended so that the chief executive can use it for wider purposes. The Bill provides that the chief executive may use building levy revenue for a wider purpose within the building sector, provided it is for the exercise of a function by the

chief executive under this Act or another Act that relates to the building sector. This will enable MBIE to fund the performance of functions and activities that relate to monitoring, overseeing, or improving the performance of the building sector or any part of the building sector, or regulatory systems under other relevant Acts that relate to the building sector, for example, occupational regulation of the building sector.

>>This explanation is insufficient. “What “wider purposes” does the Bill envisage? Exactly what does “occupational regulation of the building sector” mean? Until the Government provides the public with a full and clear explanation of what is intended and what issues the new purpose is correcting, this part of the Bill should be removed and dealt with at a later time.

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## **6. a change to allow public notifications to be carried out online**

The explanation provided in the Bill states:

This Bill also removes the requirement to publish in newspapers various matters that relate to the exercise of certain powers by MBIE’s chief executive or the Building Practitioners Board, to respond to changes in technology and better reflect how the public accesses information.

>>A sensible update.

## **7. Other issues raised in the Bill**

### **The definition of the term Building Product**

The explanation provided in the Bill states:

Currently, the Building Act 2004 does not provide a clear definition of what a building product or building method is...

>>A separate paper has been written in response to this claim. Refer Appendix 1. In summary, the Bill has not demonstrated a need for a change. Moreover, the question about what role a building product plays, is self-evident. Buildings are constructed from building products. Since 1991 that has been the sector’s understanding and the Bill fails to articulate why this meaning should not continue.

### **Changing building definitions or requirements by way of Order in Council**

>>The explanations provided in the Bill for such a requirement, are inadequate.

The concept that key, legislated definitions or terms or requirements, such as for building products, which have enormous legal and other implications, could be changed without public consultation, by way of an Order in Council, is both unnecessary and undemocratic! Additionally, allowing changes on the fly to words or terms already agreed to in legislation approved by Parliament, is illogical and most certainly raise the ire of the sector. All such references to allowing for changes or definitions to be created by Order in Council need to be removed from this Bill.

## **Chief Executive Initiating an Investigation**

### The Bill proposes:

“If the chief executive believes on reasonable grounds that there may be grounds for disciplinary action against a disciplinable entity, the chief executive may decide to investigate the matter without a complaint being made.”

>>The Bill goes to propose that the Chief Executive “notify the respondent of that decision”. However, it is unusual for there to be only one party involved in such matters; therefore, it is essential that all related parties are informed with reasons. As has been demonstrated in the past, MBIE don’t always have the full picture. Involving other related parties enables a quicker understanding of the circumstances to which the investigation is directed. Such a change will need monitoring by the Government and sector for possible refinement or correction.

## **Resolution of Differences of Opinion with the Chief Executive**

Currently there is no regulated process to have an independent assessment of an opinion held by the Chief Executive. For there to be natural justice, every authority needs to have checks and balances. From a reading of this Bill, the only recourse for challenging any action or decision by the Chief Executive, appears to be by way of the Courts. In my view this is both unfair and not timely.

It is unfair since the process of making a challenge through a Court is likely to be expensive - with all the unintended consequences!

Use of the Courts can be slow; another reason why use of the Court process could be unfair and potentially placing an unrealistic burden on the challenger.

In my view, the Bill needs to include a new form of dispute resolution, such as use of the Arbitration Act, where legal professionals, experienced in building matters, can be involved. Such a process would provide a much less costly, greater certainty of timing and consistency of findings.

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A submission made by Colin R Prouse

Director – BEAL – a body providing Testing, Assessment and third party product certification services to the Australasian building and construction sector, since 2004.