

ANSWERS TO QUESTIONS OF NOTICE

QUESTION 1.

The CHAIR: So to go back to that data, what is shows is that when a corporate entity holds the licence and they can no doubt put themselves into liquidation if things become problematic, that is pretend regulation. The actual individuals involved need to be the focus. Is that your point?

Ms STILES: I can give you 42 anonymised examples of repeat offenders from when we did that research. I can table that.

The CHAIR: Consider this a question on notice.

OCN Sample Analysis of 42 Building Companies with Repeat Claims

This table is an analysis of 43 building company licence holders with directors of multiple licensed entities and repeat insurance claims. Building companies make up 18% of the licence holders but account for 85% of claims. This sample analysis was provided to the NSW Government as an annexure to OCN submission on reform to the home building compensation fund conducted in February 2016.

Table: Analysis of a sample of recent home owners warranty claims involving companies

No.	Observations
1.	Licence ended 08/07. Two directors have been the directors of a 2nd licenced company with the same name except for 1 letter since 04/06. That 2 nd company has been eligible for insurance since 04/10. The same 2 directors have also been the directors of a 3 rd licenced company since 12/08. It also has a similar name and has been eligible for insurance since 10/12.
2.	Licence ended 08/10. A director and the supervisor have been operating through another licenced company since 06/10 which is not eligible for insurance. Same director also operating through a 3 rd licenced company since 11/15 which is not eligible for insurance.
3.	Licence ended 05/14 (<u>5 insurance claims paid</u>). Two directors still operating through a 2 nd licenced company which has been eligible for insurance since 12/13.
4.	Licence ended 03/10 (<u>7 insurance claims paid</u>). One of the directors is operating through similarly named licenced company since 02/09 which has been eligible for insurance since 01/11.
5.	Licence ended 01/06. No ongoing company licences.
6.	Licence ended 08/10. The director and supervisor operated through a 2 nd licenced company from 11/10 to 11/13 which was not eligible for insurance.
7.	Licence ended 05/06 (<u>3 insurance claims paid</u>). No ongoing company licences
8.	Licence ended 02/14. (<u>8 insurance claims paid</u>) No ongoing company licences.
9.	Licence ended 02/12. No ongoing company licences.
10.	Licence ended 08/13. The director and supervisor have been operating through a 2nd licenced company since 08/14 that has been eligible for insurance since 07/15.
11.	Licence ended 12/07 (<u>6 insurance claims paid</u>). Directors operated through a 2nd licenced company from 08/07 to 08/13 which had insurance eligibility from 07/09. One director still operating through a 3 rd licenced company (with a similar name to the second) from 04/13 which has had insurance eligibility since 10/13.

12.	Licence ended 07/12. No ongoing company licences.
13.	Licence ended 11/09 (<u>3 insurance claims paid</u>). The director and supervisor have been operating through a 2 nd licenced company from 05/07 which has been eligible for insurance since 01/09 and a third licenced company (with a similar name to the 2 nd licenced company) since 08/09 which has not been eligible for insurance.
14.	Licence ended 02/11 (<u>10 insurance claims paid</u>). No ongoing company licences.
15.	Licence ended 05/08. Director and supervisor operating through 2 nd licenced company (with similar name) from 04/08 to 04/15 that did not have insurance eligibility and now through a 3 rd licenced company (with another similar name) from 03/15 which has been eligible for insurance since 10/15.
16.	Licence ended 03/11. The supervisor and one-time director have been operating (as supervisor only) through a 2 nd licenced company since 03/12 which has had insurance eligibility since 6/12.
17.	Licence ended 08/11 (<u>5 insurance claims paid</u>). A director has been operating through a 2 nd licenced company which has not had insurance eligibility since 11/12 and a 3 rd licenced company which has not had insurance eligibility since 11/14.
18.	Licence ended 05/07. A supervisor has been operating through a second licenced company since 02/07 which has been eligible for insurance for most of that time and is currently eligible.
19.	Licence ended 02/11 (<u>6 insurance claims paid</u>). No ongoing company licences.
20.	Licence ended 12/05. The director and supervisor operated from 08/11 to 08/15 through a 2 nd licenced company that was not eligible for insurance.
21.	Licence ended 05/06. No ongoing company licences.
22.	Licence ended 08/08 (<u>3 insurance claims paid</u>). A director and supervisor operated through a 2 nd licenced company that was eligible for insurance from 10/08 to 10/12 and has operated through a 3 rd licenced company from 09/11 which was eligible for insurance from 10/11 to 06/15.
23.	Licence ended 01/06. No ongoing company licences.
24.	Licence ended 10/05. Director and supervisor operated through 2 nd licenced company (#25 below) from 06/07 to 06/12 (5 insurance claims paid). He had a 3 rd licenced company from 08/11 to 08/12 which did not obtain eligibility for insurance.
25.	Licence ended 06/12 (<u>5 insurance claims paid</u>). Director and supervisor operated through a 2 nd licenced company from 08/11 to 08/12 which did not obtain eligibility for insurance.
26.	Licence ended 04/07. No ongoing company licences.
27.	Licence ended 04/14. A director and supervisor have been operating through a 2 nd licenced company since 03/13 which has been eligible for insurance since 01/14.
28.	Licence ended 06/06. No ongoing company licences.
29.	Licence cancelled 07/15 (notice of resolution to wind up lodged with ASIC in 04/15). Director and supervisor operating through a 2 nd licenced company since 02/15 which became eligible for insurance in 02/16.
30.	Administrator appointed 07/12. Licence still on register. No other ongoing company licences.
31.	Licence ended 03/10. The director and supervisor for most of the company's duration has been operating since 11/11 through a 2 nd licenced company that has not had insurance eligibility.

32.	Licence ended 09/15. The supervisor has since then been the supervisor for a 2 nd licenced company which became eligible for insurance in 10/15.
33.	Licence ended 05/14. Director and supervisor were operating through a 2 nd licenced company from 10/14 to 02/16 when that company's licence was cancelled due to the 1 st company's external administration.
34.	Licence ended 05/14. Director and supervisor have been operating through a 2 nd licenced company which has not had insurance eligibility since 05/14.
35.	Licenced ended 04/06. Nominated supervisor has been operating through his own company since 01/02 which has had insurance eligibility at various times including since 04/11.
36.	Licenced ended 07/14 (9 insurance claims paid). A director and supervisor have been operating through a 2 nd licenced company that has not had insurance eligibility since 10/13.
37.	Licence cancelled 11/15. No ongoing company licences.
38.	Licence cancelled 01/16. No ongoing company licences.
39.	Liquidator appointed 10/15 (register lists licence as active). No other ongoing company licences.
40.	Licence ended 05/15. Director and supervisor operated through a 2 nd licenced company that was not eligible for insurance from 02/13 to 02/16 and has been operating through a 3 rd licenced company since 02/06 which has been eligible for insurance since 09/09.
41.	Licenced ended 04/13. Some of the directors and a supervisor have been operating through a 2 nd licenced company with the same name except for one letter since 07/13. The 2 nd company has not had insurance eligibility.
42.	Licence was from 03/00 to 03/13. One of the directors also operated a 2 nd licenced company with similar name from 02/09 to 02/16 which was eligible for insurance throughout that period.
43.	Licence ended 09/05 (<u>4 insurance claims paid</u>). A director and a supervisor operated through a 2 nd licenced company with a very similar name from 06/05 to 06/06. That company did not obtain insurance eligibility. That director also operated through a 3 rd licenced company from 1988 to 02/11 which did not have insurance eligibility since 02/2000.

ANSWERS TO QUESTIONS ON NOTICE – Q.2

Ms STILES: The Federal Government has a part to play here. They were warned by industry in 2015 that there was a tsunami of non-compliant products coming into the country and to my knowledge, nothing was done about that. I am happy to table that letter.



Australian
Institute of
Architects



Master Plumbers'
Association of Queensland



TIMBER
QUEENSLAND
We build Queensland

7 May 2015

Hon Karen Andrews MP PO
Box 6022

House of Representatives
Parliament House
Canberra ACT 2600

Dear Mrs Andrews

Subject: Non-conforming products: Queensland proposal

Thank you for taking the time to meet with us on the 15 April 2015, to discuss solutions to the very serious issue of non-conforming products in the building and construction industry.

The prevalence of non-conforming products is a major concern for the Queensland building and construction industry. Our key concern is for consumer safety and better supporting industry in meeting its obligation to provide buildings that are safe.

We share a broad consensus of the urgent need to reform the current system to provide specifiers, purchasers, installers and certifiers with a clear mechanism to determine whether products are fit-for-purpose as defined under the National Construction Code.

More must also be done to remove non-conforming products at the point of sale and to proactively identify and remove from our buildings non-conforming products that slip through the net. Collectively we need to send out a message of 'not on our watch'.

Ideally this would be a system consisting of:

- A. A third party product certification system that is robust, transparent, easy to navigate, covers all product types and extends to auditing, surveillance and enforcement.
- B. A strong enforcement regime so products found not to meet Australian regulatory requirements are quickly removed from sale and/or can be effectively located and recalled.
- C. Equity with a level playing field, for products manufactured both locally and overseas

This is not just a Queensland problem but a significant national issue that cannot be resolved overnight. We therefore argue in favour of a pragmatic approach that is focused, in the first instance, on actions that are achievable in the short-term and will have the greatest impact.

We regard this as an on-going journey and this letter seeks to set out the first steps in that journey.

The Proposal

We do not need more regulation. There is a good, robust National Construction Code and Australian Standards. The Australian government has developed quality conformance infrastructure setting out accreditation and verification paths using the Joint Accreditation System of Australia and New Zealand (JAS-ANZ) and the National Association of Testing Authorities (NATA).

Industry is already doing a lot towards addressing the problem in building an extensive array of third party product certification schemes of varying quality and scope. Some industry associations even have accredited inspection and auditing processes.

We therefore recommend the federal government consider the following immediate next steps towards a solution:

1. Government endorsement and common labelling of existing third party product certification schemes that meet the following minimum requirements:
 - a. accredited through the JAS-ANZ;
 - b. includes product conformity requirements for type or batch (ongoing) testing to Australian or International Standards as appropriate, as well as a process for ongoing, periodic auditing; and
 - c. undertakes market surveillance to identify and weed out fraudulent activity.

For the construction industry the current patchwork system of assessment schemes is unwieldy. There is great disparity amongst the schemes as to the quality of assessment, level of auditing and checking for fraudulent documentation.

While there are very good schemes, users of the system cannot say with confidence which of the existing schemes undertakes testing to the appropriate standard and which have strong enough checks to counter misinterpretation and fraud. The complexity of the existing arrangements also make it impossible to navigate with confidence. Much needs to be done to ensure that the individual schemes are meeting an agreed minimum benchmark and to make it easier to recognise when that benchmark has been met.

There is a role for government to ensure that the individual schemes work within an overall product certification system that has a regulated framework, is better coordinated and is easier to assess the validity of compliance.

This framework could be given a lot of weight by requiring third party certification of products used on government projects.

2. The development of new schemes within an overall certification system, both by government and industry, should be supported and encouraged until we have a comprehensive system that covers all the key product types.

CodeMark, WaterMark and the Electrical Equipment Safety System should be seen as being part of the overall product certification system and should be resourced to provide effective certification for the products that they cover.

We therefore welcome the work of the Australian Building Codes Board (ABCB) in reviewing the contribution that CodeMark and WaterMark can make to a certification system and ask that it continue.

3. We ask that the government consider a centralised, confidential reporting system to identify and report failures of all structural and safety critical construction products in Australia.

The Queensland Government has recently established the *Queensland Building & Construction Product Committee*. The Committee is currently the only centralised reporting mechanism for non-conforming products in Queensland (maybe even Australia) and as such it has the potential to serve as a tool in capturing and sharing instances of non-conforming products. We hope it will eventually come to play an essential role in ensuring that instances of non-conforming products are reported and addressed in Queensland. Queensland is not a closed market however, and to be fully effective we need to be able to share and act on information across all Australian and even international jurisdictions.

There is an opportunity in the international CROSS (Confidential Reporting on Structural Safety) scheme operating out of the United Kingdom. The scheme, international in scope, collects, analyses and publishes reports about failures and the safety of structures so that engineers can learn from the experiences of others. Names of authors are confidential and identifying features are removed. When a trend is detected, action is taken to influence changes in culture and, when possible, in UK standards or legislation. A search of the CROSS database already returns examples of product failures that have occurred in Australia. Engineers Australia has undertaken research into the application of CROSS in an Australia context and would be happy to share its findings.

The Australian government already operates a confidential reporting scheme for the aviation industry. REPCON is the Aviation Confidential Reporting Scheme run by the

Australian Transport Safety Bureau and could serve as an example for a similar scheme covering construction product failures.

4. More needs to be done to minimise the impact of a product safety recall on the public and industry. The Infinity cable recall revealed significant inadequacies in the way product safety recalls are managed across Australia.

We therefore ask that the government consider the following regulatory steps:

- a. Product tracking where manufacturers, importers and suppliers of all high risk products, such as electrical, are required to have processes and procedures in place to enable the tracking and tracing of product found to be faulty and/or not compliant to Australian Standards.
- b. Register of high risk products where sellers of high risk products are required to maintain a register of products sold. For example, a register of electrical products that require installation by an electrician.
- c. Mandatory recall insurance where manufacturers, importers and suppliers of high risk products are required to have a process in place to fund the removal and replacement of any product found to be faulty and/or not compliant to Australian Standards.

Together these will improve the recall system and act as a deterrent for non-licensed installers. They will counter the business costs of not being able to find these products that are recalled. For this reason reputable suppliers will often already be carrying these costs.

5. More needs to be done to police product compliance at the point-of-sale.

Policing of conformance to current regulated requirements should be clarified for all stakeholders so that the agency responsible is known to the industry and their policy in relation to enforcement is widely publicised. The Australian Competition and Consumer Commission (ACCC) is currently undertaking a regulatory mapping exercise with respect to construction product conformity. Once this exercise has been completed, the ACCC and the other identified regulatory agencies should be able to better co-ordinate product compliance at point-of-sale.

Further consideration should also be given to increasing the penalties for non-compliance, in particular deliberate misrepresentation. We ask that you consider the introduction of surveillance programs such as those used in some jurisdictions in the United States.

6. We ask that government better promote existing government information and schemes.

Each of the signatories is working with their respective membership to improve understanding of the risk, liability and mitigation with respect to non-conforming products. The government needs to be doing the same. There are already existing resources that can be shared more widely with industry, in particular:

- a. Australasian Procurement and Construction Council (APCC) recently published “Procurement of Construction Products: A guide to achieving compliance” as an overview of conformity schemes and aid for industry stakeholders.
 - b. Technical information developed by the Australian Technical Infrastructure Committee (ATIC). This is valuable advice for all the building industry and not just those working on public infrastructure.
7. The Australian Standards covering safety critical or structural product standards for use in Australian buildings should be revised to include definitive product compliance and identification of conforming products.

Currently, many standards, including those referenced in the National Construction Code, include only ‘informative’, broad guidance for demonstrating product compliance. The Standards must be explicit and ‘normative’ in the case of safety critical or structural products.

There may also be an opportunity to improve the conformance framework through changes to the National Construction Code and Workplace Health and Safety Codes. We suggest that this be considered in more detail.

Together these actions will constitute an important first step and we look forward to discussing them with you further.

Kind regards

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Scott Gibson
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ANSWERS TO QUESTIONS ON NOTICE – QUESTIONS 3

Application of Australian Consumer Law to Defects

Ms HEARN: Actually, I might just take the opportunity at this point to comment on something I believe was in the Government's submission in relation to the application of consumer law generally. I believe the submission suggested that general consumer law was of use to owners' corporations. This is just simply inaccurate. We are happy to provide some additional information to clarify that point. However, essentially an owners' corporation is not a customer of a developer or even a builder. The individual lot owner might be able to be the consumer that uses consumer law, but you would have to join all of the lot owners together and it does not apply to the common property. It is just misleading. I am sorry, but it is just misleading to suggest that it is of any value at all.

The CHAIR: Ms Hearn, I think we will be getting them back.

Ms HEARN: Yes.

The CHAIR: So it is all right. If you give us that detail on notice we would appreciate that. We have unfortunately run out of time.

1. It have been submitted to the Inquiry that the Australian Consumer Law (ACL) provides an effective source of consumer protection and remedy for owner corporations seeking redress for buildings defects. OCN disagrees for the following reasons.
2. The guarantee provisions set out in clauses 51 – 61 of the ACL apply in relation to goods and services provided to a consumer. In the context of an owner corporation, the builder supplies its good and services to a developer, which does not meet the meaning of consumer in clause 3 of the ACL. See clauses 51-61 in the ACL.¹
3. Further, the owners' corporation cannot sue a developer under the ACL as the developer never supplies anything to the owners corporation. It only registers the strata plan and supplies/sells lots to lot owners.
4. Lot owners who did not buy at auction or with notice of defects may have rights against the developer under the ACL for lot property defects. However, the developer does not supply the common property to them and even if it did in some way, a class action by lot owners for common property repair costs would face the problem of whether they are the proper plaintiff.
5. ACL may only help where an owners corporation has paid a remedial builder to carry out repairs and that repair work fails. However, even then, a remedial builder could argue that an owners corporation (as opposed to lot owners) is not a "consumer" as defined in the ACL.
6. This leaves the owners corporation with the inadequate protections of the Home Building Act.

¹ http://www.austlii.edu.au/cgi-bin/viewdoc/au/legis/cth/consol_act/caca2010265/sch2.html