

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

21 June 2017



Introduction

Master Electricians Australia appreciates the opportunity to contribute to the Senate inquiry into non-conforming building products.

Master Electricians Australia (MEA) is a dynamic and modern trade association representing electrical contractors. A driving force in the electrical industry and a major factor in the continued success and security of electrical contractors, MEA is recognised by industry, government and the community as the electrical industry's leading business partner, knowledge source and advocate. The organisation's website is: www.masterelectricians.com.au.

Below are our comments on the Inquiry's terms of reference that are of most relevance to the electrical industry.

Policy objectives

MEA supports the overall objective of the draft bill which creates responsibilities for chain of responsibility holders of building products. MEA supports the alignment of powers of the QBCC to be consistent with Work Health and Safety Queensland (WHS Qld) and Electrical Safety Office (ESO).

Identifying the broader issue

MEA has over many years, advocated State and Federal Governments for improvements in nonconforming products. This Bill is specifically structured at building products, and by definition including electrical building products, however, consumer products pose a real and imminent threat as well. MEA believes that this draft bill could assist formulate better policy at state and federal level to ensure the safety of all Australians in product situations as well.

Our view however, is that this bill does not fulfil the real policy objective in relieving the final builder / tradesman / consumer of the total accountability, impost or cost when a non-conforming product is installed. We have formed this view considering our experience and that of our members during the following major issues within the electrical industry.

Infinity cable

The Infinity cable recall revealed significant inadequacies in the way the recall of non-conforming products is handled in Australia.

Fair Trading NSW was the first regulator to issue a recall of the dangerous cable in October 2013. It then took ten months for the ACCC to announce a national safety recall on 27 August 2014. Further to this, the recall on 27 August 2014 still excluded cable installed in "inaccessible areas" of a home. This ambiguity left electrical contractors in a difficult position with consumers wanting the cable removed and the contractor having no recourse for the time and expense involved in performing the work.

Contractors had the choice to either absorb the costs involved to perform the work or refuse to do so and risk losing customer goodwill. Most electrical contractors also take their responsibility to the safety of their customers very seriously and could not in good conscience fail to act on the recall notices issued by the ACCC and state regulators. This is an ongoing issue for contractors who installed cable in what are deemed to be inaccessible areas and those contractors having an obligation to make attempts to remove it.

The NSW Supreme Court has fined the Director \$18,000 and ordered them to pay \$15,000 in court costs. However, there is still **2 Million meters** of cable that has not been identified or rectified in as many as 22 000 homes.

Avanco Isolators

The Avanco isolator recall is a further example of the impact that non-conforming products can have on the financial viability of electrical contractors.

The impacted isolator was sold from the 1 January 2012, however it was not until 9 May 2014 that the Queensland Government Gazette recalled the isolators. The distributor of the faulty Avanco branded DC isolators, Advancetech, refused to recall the isolators after faults were identified. This then led to the Queensland Attorney-General's office announcing a mandatory recall.

Soon after, the company went into liquidation and subsequently changed hands, trading under a different Director. This left electrical contractors in a difficult position with customers wanting the isolators replaced and the contractors having no immediate recourse to the distributor for the costs involved in performing this service for their customers.

MEA is aware of at least four contractors who were forced to close their businesses due to the costs they incurred in replacing Avanco isolators. With 27,000 suspect devices sold by Advancetech in more than 13,000 properties across Queensland and New South Wales, many other contractors are sure to have suffered the same fate. Considering that the majority of electrical contractors are small businesses with tight profit margins, many cannot absorb the added costs involved and are themselves forced to go into liquidation. The impact of non-conforming building products can be widespread and highly damaging to the electrical contracting industry.

2009 Home Insulation Program.

This program had many faults as detailed in the Royal Commission Report, including product not fit for purpose, installed in a manner that did not consider the risks of the installation setting, lack of education and regulatory oversight were all significant contributing factors. It took 10 Months and 4 deaths to finally halt the program and initiate a recall and rectification program of the unfit material.

These examples clearly demonstrate the speed at which Government reacts to warnings and takes them seriously is crucial in minimising the adverse impact on installers builders and consumers. In the above examples 6 months, 10 months and more than a year are the time frames by which recalls were actioned.

The above examples show us the following issues need to be considered in any legislative attempt to curb this growing problem.

- Recall delays
- Impact of partial recalls
- Supplier liquidation
- Imported building / consumer product

Upon examination of the current draft bill MEA cannot identify any action that would address any of these problems. Queensland has eagerly taking the lead on this issue for the COAG Building Ministers forum then presumably supportive amendments to federal legislation should be sort to support such changes, rather than legislation in isolation.

Possible improvements to the current regulatory frameworks and proposed bill for ensuring that building products conform to relevant standards.

Electrical Equipment Safety System

MEA strongly recommends the full implementation of the Electrical Equipment Safety System (EESS) that has been developed by Electrical Regulatory Authorities Council (ERAC).

The current electrical equipment safety arrangements can work to protect consumers within particular jurisdictions, however they are deficient in many respects, including that they are reactive, are not pervasive in terms of covering the range of problem products, and are jurisdictional specific.

The Infinity cable incident is a prime example of the flaws in this kind of approach. The cables were identified deficient by third party manufactures rather than a systemic approach to ensuring product quality and consumer protection. Further, after the NSW Government removed from sale two of the three categories of Infinity product, other States only emulated this after considerable political and media coverage was gained on the matter. The ACCC only issued a full national recall on October 2014; ten months after NSW took action.

Infinity is just one of many examples where non-compliant electrical product has entered into Australia as is sold without any checks and balances. In the absence of a national system, the Australian public is being exposed to the dangers of faulty imported electrical goods.

The EESS promises to be this national system with features including:

- A national database where all suppliers and certain types of electrical equipment must be registered prior to being offered for sale;
- Risk based classification of equipment with differing requirements for each level;
- A self-funding, user-pays system where registration fees fund improved compliance, surveillance and post-market enforcement activities.
- Registration of a 'Responsible Supplier', who is a manufacturer or importer of in-scope electrical equipment, is a legal entity in Australia or New Zealand and has the onus of responsibility for ensuring the safety of the electrical equipment they sell.

The EESS has commenced in Queensland and is being progressively implemented across Victoria, Western Australia, South Australia, Tasmania, Northern Territory and the Australian Capital Territory. Notably, the EESS is not being implemented in New South Wales. MEA is concerned that New South Wales is the only state in Australia that has decided not to implement the EESS. The system requires national consistency if the industry and community are to have confidence in both the enforcement of safety standards and the Regulator.

The recently signed Free Trade Agreements with Japan, South Korea and China have the potential to increase the quantity of faulty electrical equipment sold across Australia. It is critical that the NSW implement the EESS as a priority. We are optimistic that the outcomes of this inquiry will compel the NSW government to follow the lead of the other states and territories around Australia in the interests of product safety.

We believe that the Queensland State Government should examine this and incorporate a similar model either through the Building Code or other such mechanisms.

Non-conforming product safety recall strategy

A strategy needs to be put in place to minimise the impact of a non-conforming product safety recall both on the general public and industry. We propose the following:

1. Product tracking

It is imperative that manufacturers, importers and suppliers of all electrical equipment / high risk building product supplied in Australia have processes and procedures in place to enable the tracking and tracing of product which is found to be faulty and/or non-compliant to the relevant Standards.

2. The introduction of a register of electrical products / high risk building products

Sellers of electrical products would be obliged to maintain a register of electrical products that require installation by an electrician. The register would be used to contact purchasers in the event of a product safety recall

Introducing a register would assist the regulator to identify the location of any equipment of this type that was later subject to a recall. This would facilitate a ready means to contact those at risk to ensure they take the steps to remove the product from their homes.

A mandatory system of this type would also provide more effective support to suppliers when they are required to withdraw unsafe or non-compliant product from the market.

Additionally, requiring purchasers to provide their details could act as a deterrent to those who are intending to perform unlicensed electrical work or other licensed building work.

3. Mandatory recall insurance

Ideally, the manufacturers, importers & suppliers of faulty electrical goods would have a process in place to fund the removal and replacement of any faulty electrical equipment.

Unfortunately, this is not always the case with companies often going into liquidation after a product they have manufactured, imported or supplied is identified as being unsafe.

Mandatory recall insurance would give security to consumers that any faulty or non-compliant electrical products purchased are removed and replaced without delay.

This strategy also deals with those companies that enter into liquidation on the basis they do not have the financial resources to cover the recall amount and associated costs. This

also assist small subcontractors not to have to bear the full cost of the consumer claim once the product is recalled but the supplier is no longer in business.

Draft Legislation Comments

General Observations – Penalties

The Bill indicates that the maximum penalty for a person is 1000 units for various breaches. This equates to a maximum fine of some \$121,900 based on the Queensland Governments Gazetted penalty unit values of \$121.90 per point from 1 July 2016. In comparison, the Work Health and Safety Act 2012 and the Electrical Safety Act 2002 have maximum units as 30,000 for a body corporates and 6,000 units for an individual. This equates to \$3.6 Million and \$731,400 respectively. Our observation is that the fines in the proposed bill are manifestly inadequate and well below community expectations as a form of a deterrent.

MEA has also not been able to identify in the draft bill what number of penalty units apply to a body corporate for breaching responsibilities.

Section 48

Section 48 (ha) (ii) states “*involved a serious risk to the health or safety of a person*”. Referring to the “relevant Acts” in section 48 carries a broad cross section of acts and topics. It is imperative that this definition is consistent across all Acts. We note that the definitions within this act include similar definitions to the WHS Act 2012 however no mention is made or attempt to cross reference those definitions in the Electrical Safety Act 2002 (ES Act). The ES Act has been named as a relevant Act. We believe the Bill should be altered to better reflect those serious incidents in other legislative instruments to maintain consistency.

Section 54A

MEA views this section as an unnecessary duplication of the WHS Act Qld 2011 and Electrical Safety Act where relevant officers are required to report notifiable incidents. A licensee as described by the amendments conducting or in control of building works would simple be considered a PCBU as defined by the WHS Act 2012 and the Electrical Safety Act 2002. The WHS Act applies to all licensees as described under the current QBCC Act.

Section 74AG

Section 74AG additional duty relating to accompanying information. 74AG (1) and (2) refer to “*the required information for the product*”. Subsection (6) describes what information must be supplied however the required information does not identify or detail the possible relevant Australian Standard or Building Code requirement just that it is “suitable”. We believe it is foreseeable that this may be included in regulation however we believe it is preferable to include these two particular references in the draft bill and subsequent legislation rather than just the regulation.

74AH

Subsection (3) of clause 74AH mandates that interstate recalls “must” be complied with. In our experience in the electrical industry occasions have arisen where different jurisdictions have enacted recalls of product however in other states and circumstances no recall has been undertaken, and justifiably so. We would caution any blanket statutory provision which compels compliance with a recall that references an interstate statute that does not apply to a particular state.

We would suggest that the Minister be made aware and that QBCC, ESO or WHS Qld officers advise the relevant Minister as to the applicable nature of the recall in other states and make relevant comparison and make a recommendation based on Queensland legislation. Whilst we recognise that 99% of cases an interstate recall will be sufficient we believe that an adverse case may well harm business and employment opportunities unnecessarily or have other unintended consequences.

74AI

Under 74AI (1) MEA has been unable to identify where within Subdivision 2 the duties of a company have been identified. Upon further examination of the QBCC Act, as currently enacted, we have been unable to identify any Duties required to be undertaken by a company. As such we would query, if section 74AI “Duty of executive officer of company” is enacted. We would suggest that the definition of the “person in the chain of responsibility for a building product” be expanded to include Company however so described including but not limited to Partnerships, PTY Ltd, unincorporated entities and other entities.

74AM

MEA suggests that an additional subsection (3) should be added to this clause to clarify that if the notifiable incident has already been made to WHS Qld or the ESO then penalty units do not apply.

An area for confusion within the draft bill relates to the definition of a notifiable incident. MEA would suggest that the draft bill be amended to refer to the definition of notifiable incidents as described in Work Health and Safety Act 2012 and the Electrical Safety Act 2002 as previously discussed.

74AZA

MEA agrees with section 74AZA that reasonable help must be provided however there is no guidance or responsibility the installer or supplier have systems in place to assist the recall notice.

A significant issue during the Infinity cable recall was that Master Home Improvement stores did not maintain a register of the electrical cable and to whom they sold it to. Electrical cable can only be installed by a licensed electrical contractor and his licensed electricians so it is imperative that where in the general industry building products are at high risk then a register of the supply should be kept for future recall. MEA believes this would not be onerous as

currently in Queensland a requirement for all Patrons in licensed premises to have OD scanned and even for the sale of spray cans that buyer have age ID confirmed. Currently Electrical wholesalers, suppliers and most contractors do keep records of what product is sold in the event of a recall so they can undertake their responsibilities.

MEA appreciates the opportunity to contribute to the committees review of the bill and is available should the Committee wish to ask further questions regarding our submission.

