

Small Business Regulation Review submission

June 2018

By email: Smallbiz.Review@ecodev.vic.gov.au

Master Builders Association of Victoria (Master Builders) welcomes the opportunity to provide feedback to the Department of Economic Development, Jobs, Transport and Resources on the *Small Business Regulation Review (Regulatory Interaction – Construction Sector)*.

About Master Builders

Master Builders is the peak body representing a range of stakeholders in Victoria's building and construction industry. Our 8500 members include suppliers and manufacturers, commercial and residential builders, tradespeople and apprentices.

Industry context

The building and construction industry is critical to the future prosperity of Victoria. As at May 2018, the construction industry generates around 331,209 jobs and is the largest full-time employer in the state. Around 281,503 construction jobs are full-time and part-time employment in the sector grew by 30.4 per cent over the 12 months to May 2018. The sector accounts for about 7 per cent of the state's total goods and services produced in FY 2016/17.

Particularly relevant to this review, there were a total of 99,238 firms in the Victorian construction industry as at the end of June 2017, or 16.8 per cent of the 590,820 businesses within the state.

Following consultation with key stakeholders, this submission will make observations on the following:

- Victorian Building Authority
- WorkSafe Victoria
- Local Councils
- Domestic Building Dispute Resolution Victoria
- Victorian Civil Administrative Tribunal
- Australian Tax Office
- Country Fire Authority

Key themes

This submission provides a number of instances of problematic interactions with regulators as reported by Master Builders' members. In preparing the submission, a number of themes relevant to the review were repeated by key stakeholders. We make these preliminary observations:

Scope of review

The scope of the review is aimed at *regulator interaction* and defined as the day-to-day things that small businesses undertake as part of being regulated. Nonetheless, improving interaction with regulators in the building and construction sector is a wider systemic issue. A business-to-government lens for the review is insufficient to understand all the challenges that small businesses face. There are many regulatory challenges associated with the existing rules and regulations that should also be the subject of review. For example, planning rules should be reviewed to reduce overlap with building regulation and rules around skills and training should be reviewed to ensure that small business are able to gain access to skilled apprentices and practitioners.

Where regulators share responsibility for the sector, the quality of their co-regulatory overlap is key. Interaction between small business and regulators involves multiple touch points. It is clear that some of the frustrations in dealing with regulators have their genesis in relationships between regulators themselves, a good example of this being the interaction between the Victorian Building Authority and the Victorian Managed Insurance Authority over the practical implications of registration and insurance.

Diminishment of technical expertise at regulators

Technical and operational in-house expertise within regulators appears to have diminished over recent years. This has led to two outcomes:

- a) Small businesses have less opportunity to clarify matters and seek technical or advisory information from regulators.
- b) Fewer operational experts within regulators results in a flow on impact for business because the understanding of the practical application and impact of proposed changes risks being under-estimated.

Communication between regulators

It is clear from feedback that we have received that regulators make effort to communicate with one another, but we stress the importance of regulators not only sharing data but spending time understanding how respective work plans or decisions might impact one another.

There is an important distinction between sharing information by way of updating on current activities and taking time to understand the implications or consequences of change on process, potential red tape



implication for end users and systems. As one stakeholder stated, there is a risk regulators ‘talk past each other.’

Consultation processes

Master Builders places high value on the consultation process with regulators, particularly early involvement in proposed change where our expertise can add value. The legislative process is enhanced when key stakeholders and legislators work on it together.

In one sense, construction in Victoria is a story of small business activity. The discussion paper recognises the value in “...*assisting small businesses to meet their compliance responsibilities, while recognising that regulatory compliance activities often impose a disproportionate cost on smaller firms.*” Changes to legislation can have a disproportionate or unintended impact on these businesses and regulators must keep a focus on how change will impact these businesses.

Improving industry structure: centralising control

Master Builders continues to advocate for a Victorian Minister for Building and Construction. The issues for small businesses in the construction industry and their interaction with regulators reiterate the importance of centralising responsibility for construction and building issues under a Ministerial portfolio. A dedicated role will mean that attention is focused on eliminating duplication.

In the next sections of the submission, we provide feedback on particular regulators and offer suggestions to improve process.



1. Victorian Building Authority (VBA)

1.1 Lack of proactive education and guidance on regulatory compliance

Builders are experiencing challenges with understanding recent changes to legislation, particularly the introduction of the *Building Regulations 2018*. There is a lack of certainty over new compliance requirements and unclear guidance or insufficient education from the VBA with regard to the Regulations, causing confusion for many small businesses.

Following the enactment of the legislation, an increasing number of builders report being threatened with on-the-spot fines and other compliance penalties during proactive inspections. New regulatory standards may be unclear and a much better solution would be to enhance VBA guidance via education campaigns. Master Builders considers that proactive inspections, in conjunction with the VBA's own communication channels, should be used as an educative tool for the industry as much as a disciplinary tool.

An example is the concern that many builders have on being potentially subject to on-the-spot fines for not adhering to Reg 41(1) of the new *Building Regulations 2018*, which states that builders must ensure that certain documentation (e.g. the copy of the building permit and plans, etc) is accessible on site. In practice, this regulation is unworkable as residential construction sites often do not have site huts or places to hold these documents. Builders are left storing such documents in inadequate places such as meter boxes which poses issues regarding privacy and intellectual property. Master Builders members have noted that VBA inspectors are already threatening to issue on-the-spot fines despite the impossibility for compliance of Reg 41(1).

Clarity is key to good regulation. While the explanation above assists, the following issues remain:

- There is no written information sheet or guidance from the VBA and therefore the means of compliance is very unclear (and organisations like Master Builders cannot educate their members if there is nothing in writing to provide them).
- It has been difficult to determine from the VBA whether "electronic" documents can be brought to site and satisfy the rule. In practice, some inspectors have not accepted electronic forms of documents, so there is inconsistency in the application of enforcement of the regulation. This leads to confusion.
- There may not be a computer at all times, therefore the VBA needs to provide a notice of inspection to the builder to allow them the opportunity to "make accessible" the required documentation.

Master Builders advocates for efficient and realistic solutions for building industry professionals "on the ground" via a consultation process. We are strongly of the view that any sanctions imposed by the VBA or other regulators must be preceded by a dedicated education campaign and a process of onsite education. This must be supported by operational willingness to treat inspections as educational rather than a

means of punishing practitioners. Regulator flexibility and practical application of the regulations will go a long way to improving the outcomes in this process.

Many issues have arisen from the regulations that came into effect on 2 June 2018. New inspection stages relating to fire safety and pools are equally problematic and will also require proactive guidance from the regulator as issues arise in the industry.

1.2 Need for a State Building Inspector

In November 2017, the Victorian Cladding Taskforce Chairs handed down their Interim Report, making a number of recommendations, including a priority recommendation *“that a State Building Inspector or State Building Surveyor is established within the VBA to provide authoritative compliance advice, provide technical guidance and provide relevant interpretations of relevant standards.”*

It has been six months since the recommendations (and subsequent endorsement from the Andrews Government) .Given that there are already very clear and arising issues of compliance from the Regulations (in addition to the existing issues of cladding and other issues arising from the NCC and Australian Standards), then the lack of action in the appointment of a State Building Inspector should be addressed immediately.

The State Building Inspector should have the power to oversee a broad and formalised program of information, education, technical advice and support from the VBA for the industry. This requires the appropriate resources and formalised consultation frameworks to ensure that industry trends, views and experiences are captured.

1.3 New company registration requirements

There has been insufficient clear and targeted information for business regarding the new building company registration requirements and it appears that government departments such as the Victorian Managed Insurance Authority (VMIA), may also have had less information than optimal.

The information supplied about this process has resulted in significant confusion. MBA Insurance Services acts as an insurance broker between domestic builders and the VMIA when builders apply for Domestic Builders Insurance (DBI). The resulting changes to company registration requirements has meant that company information about builders that broker agents and the VMIA hold (such as insurance certificates) will not correspond with the VBA’s. This will hugely impact inactive domestic builders wanting to commence building work as they will be left in limbo. MBA Insurance Services has informally acted as a conduit between the VBA and the VMIA in navigating this bureaucratic process. MBA Insurance Services welcomes the opportunity to assist, but note that this issue could have been mitigated.

A key concern for Master Builders is to ensure Victoria is the most competitive state for efficient regulation in Australia, and the current logistics for business operations from regulators are appropriately



minimal. We acknowledge that bureaucratic overlap can be inadvertent and the solution requires a partnership with industry.

In addition, the guidance provided to small businesses on company registration requirements is excessive and complex, exemplified in the 6-page letter provided to builders by the VBA detailing requirements. This adds further complications for inactive domestic builders, in which many are small businesses, wanting to apply for company registration. The application process for builders to apply is also unwieldy and complex, with the application itself being as long as fifteen pages and only made available from 1 June 2018, giving limited time for builders to apply. Furthermore, the requirement to fill a Director's Declaration for every director in the business is cumbersome.

1.4 Complex building registration processes

Master Builders considers that the current amount of paperwork associated with the registration process for both Domestic (DBU/DBL) and Commercial Builders (CBU/CBL) is overly excessive and complicated. Currently, to register as a DBU/DBL or CBU/CBL, applicants are required to complete copious amounts of paperwork and answer questions that ask for practical experience in performing tasks that are often outside the scope of their trade profession. For example, an applicant with a trade background in carpentry that wants to register as a DBU is required to answer how many times they have performed bricklaying work. A more logical approach is to have questions that seek whether the applicant has had supervisory experience concerning tasks outside of their scope of their trade profession, rather than practical experience. Additionally, many Master Builders members have voiced concerns over the complexity associated with builder registration requirements. Applicants are required to complete not only an application form, but also a National Police Check Consent Form, reference report, work history document, and to also provide numerous pages of evidence detailing previous work. Applicants are then required to conduct an online multiple choice examination at the VBA, as well as a 2-4 hour face-to-face interview with an assessor. It is clear this is excessive when compared to other jurisdictions such as Queensland.

Systemic efficiencies created by regulators can often result in the total application process spanning nine to twelve months. Turnaround for registration is far in excess of guidelines and far too complicated. The risk here is clear: the Victorian registration process will prevent efficient and adequate supply of much needed skilled builders in an industry marked by skill shortages. Opportunities exist to make the registration process far simpler yet nevertheless remain stringent in its assessment.

1.5 Greater technical expertise required

The degree of complexity and duplication in the building registration process, as well as the inefficient use of opportunities to educate the industry (eg through proactive building inspections), is indicative of a broader problem; the lack of technical building expertise within the VBA. Having greater technical experts will allow for the implementation of policies for the industry that is manageable and practical.



Master Builders recommends that:

- a) the VBA provides greater proactive education and guidance on regulatory compliance to small businesses in the industry;
- b) a State Building Inspector is appointed as soon as possible;
- c) greater consultation is undertaken with industry stakeholders when changes to regulatory requirements occur;
- d) the builder registration process is made simpler and more streamlined while remaining comprehensive in its assessment;
- e) greater technical expertise within the VBA is achieved.

2. WorkSafe Victoria

2.1 Lack of consultation on legal compliance

It is possible to provide good examples of regulators tackling challenges for small business. Master Builders considers that past reviews on OHS regulations have reduced much of the red tape burden for Victorian businesses with regard to OHS compliance. The review of the *OHS Regulations 2017* reduced regulatory burden concerning high risk work licensing and record keeping for designers and manufacturers of plant.¹ In addition, the review into the *OHS Amendment Regulations 2014* consequently saved Victorian businesses more than \$30 million per annum in compliance costs.²

The key issue for builders is the lack of consultation with WorkSafe Victoria on issues relating to legal compliance. Builders often come into contact with the regulator in the form of reactive prosecutions in response to accidents and fatalities. Master Builders asserts that greater strategic enforcement is required from WorkSafe Victoria so that a more proactive, rather than a reactive, approach is created for workplace safety. This can be done via the greater enforcement of the requirements for Safe Work Method Statements, as well as greater provision of awareness campaigns and educational workshops for small business across Victoria. Indeed, a more proactive approach will reduce the need for reactive prosecutions.

¹ Worksafe, <https://www.worksafe.vic.gov.au/news/notices/ohs-regulations-reform-2017>

² Worksafe, <http://www.worksafe.vic.gov.au/stakeholders2017/ohs-regulation-reform>



Master Builders recommends that:

- a) the Government should investigate the means by which WorkSafe Victoria is required to take a proactive approach to enforce the requirements for Safe Work Method Statements;
- b) WorkSafe Victoria engages in greater education and awareness raising on OHS duties with small businesses and to engage in more strategic enforcement so as to reduce the number of reactive prosecutions.

3. Local councils and permit delays

3.1 Permit delays

Builders are experiencing significant problems in having local councils approve building and planning permits in a timely manner. Indeed, the problem is worsening and is pervasive across councils. The average gross number of days it takes for a final outcome is 125 and only 62 per cent of applications were completed within the required 60-day time frame in 2016-17. This is down from 64 per cent the previous year.³ A core issue is local councils' discretionary ability to dictate planning processes that conflicts with Plan Melbourne's proposal for greater urban densification to meet population growth. Implementing a centralised planning scheme or further expanding as-of-right codification for common building types like secondary dwellings are solutions to this.

3.2 Inconsistency between councils

Some local councils are also developing electronic portals for lodging building permits. However, many builders have found that rather than enhancing efficiency, having each council launching individual portals has added user complexity for builders operating in multiple jurisdictions. This also results in added cost for builders, as in some circumstances, councils may be charging builders over \$100 to electronically lodge building permits.

We understand this problem may be accentuated by a number of councils that are initially refusing to accept paper-based applications and directing builders to lodge documents via their electronic portal. Not only is this adding unnecessary cost to builders, but this contravenes with the existing legislation which stipulates that the lodging of building permits can be done in any format.

³ Department of Environment, Land, Water and Planning, 'Planning Permit Activity Annual Report: 2016-17'



3.3 Bushfire Management Overlays

Master Builders understands the importance of adhering to strong building standards in areas that are prone to bushfires. We do, however, consider that the current process could be streamlined.

Currently, where projects are located in a Bushfire Management Overlay (BMO), then a planning permit is required (unless exemptions apply) which generally uses a consultant to prepare the documentation and sign-off by the Relevant Fire Authority, such as the Country Fire Authority (CFA) in most cases. Builders are finding this process to be lengthy and associated with costly delays.

Master Builders considers that where an Accredited Bushfire Consultant is used to produce the documentation, because they have appropriate skills, qualifications and very likely Professional Indemnity Insurance, a planning permit is therefore not required. It is also not necessary for documentation to be forwarded to the Relevant Fire Authority for approval. Instead, the building permit process administered by the Relevant Building Surveyor should suffice in lieu of the planning permit.

However, where a person other than an Accredited Bushfire Consultant is used, then the current process should remain.

Master Builders recommends that:

- a) the Government introduces a centralised planning authority for certain planning decisions (eg complex, above a monetary threshold and/or which haven't been decided within statutory timeframes);
- b) the Government implements a comprehensive codified assessment system for common building types;
- c) the Government restate clearly to Councils that builders retain the option of lodging their building permit in paper form;
- d) where an Accredited Bushfire Consultant is used to produce the BMO planning permit documentation, a planning permit is therefore not required and it is not necessary for documentation to be forwarded to the Relevant Fire Authority for approval.

4. Domestic Building Dispute Resolution Victoria (DBDRV)

4.1 Length of approval for conciliation application



Master Builders, in principle, supported the creation of the DBDRV and its objectives. In its current form, outcomes are slow. Members have noted that the time taken for an approval of an application for conciliation is far too long, with some reporting that it has taken as long as six months. The level of consumer and builder demand for this service was underestimated, resulting in significant accumulation of backlog. As such, greater resources, fast tracking systems and funding for the DBDRV is required to allow alleviate demand – which the DBDRV acknowledges and is attempting to rectify.

4.2 Greater technical expertise required

Similar to members' observations about the VBA, many members have voiced frustration over the limited technical building resource and expertise in the DBDRV. This lack of technical knowledge of the building and construction industry may be resulting in the production of inefficient outcomes in the conciliation process.

4.3 Lack of on-site conciliation

Master Builders notes that the lack of on-site conciliation has been expressed as an inconvenience to builders. This process was seen in the past as an efficiency for small business as many practitioners do not have the time to venture to the DBDRV's main metro office, particularly those in regional areas. The DBDRV's predecessor, the Building Advice Conciliation Victoria (BACV), conducted on-site conciliations and this was of great convenience to builders and consumers.

Master Builder recommends that:

- a) **the Government provides greater resources and funding towards the DBDRV to meet current levels of demand;**
- b) **the Government provides more technical expertise knowledge and resources in the DBDRV;**
- c) **the Government allows the DBDRV to conduct on-site conciliation, which is essentially reinstating a former practice which our members considered had high value – resulting in speedy resolution of disputes.**

5. Victorian Civil Administrative Tribunal (VCAT)

5.1 Expensive application fees

Master Builders considers that VCAT application fees are too expensive for builders. Consequently, this has created significant demand for DBDRV free conciliation services, resulting in significant backlog for the DBDRV.



Master Builders recommends that:

- a) VCAT decreases its application fees for builders.

6. Australian Tax Office (ATO)

6.1 Auditing of subcontractors requirements

Master Builders' members have reported that they feel overly audited as a result of the requirement for builders to report the total payments made to each subcontractor employed by them. Builders are required to report the following for each subcontractor:

- Australian business number (ABN), if known
- Name
- Address
- The gross amount paid to them for the financial year
- The total GST included in the gross amount paid

For small builders that employ a number of subcontractors throughout the financial year, this creates significant regulatory burden for them.

Master Builders recommends that:

- a) the Federal Government allows subcontractors to report their own taxable payments.

