

Removing impediments to building product substitution and variations

MBIE Targeted Consultation

February 2024



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Clarifying the definition of minor variation

1. Do you think these additions capture the relevant principles from MBIE's product substitution guidance? Why/Why not?

The respective roles of the parties are not captured in the principles and in particular the need to engage with Building Consent Authorities (BCAs) is absent.

2. Would the proposed principles appropriately clarify what a minor variation is? Why/Why not?

While the proposed principles are fine for product substitution, and we are not opposed to their inclusion, they are unlikely to be of genuine assistance to anyone trying to determine whether their situation – or the situation they are presented with – amounts to a minor variation.

The legislation is clear, as is the Guidance. We think the problems are a lack of education and training, a lack of engagement with BCAs and the lack of a national product register. These are at the heart of the issue.

Builders lack sufficient understanding of the requirements of the Building Code, and often have limited understanding of why a product has been specified in the first instance. They therefore have limited ability to carry out an equivalency test and assess the information provided about products and their performance. For example, builders often substitute materials such as an absorbent wrap for a non-absorbent one under non-absorbent cladding.

The involvement of designers is required and often this step is missed, despite being clearly provided for in the guidance. They are the party that signs the design memorandum so all changes should be run past them. In the experience of our members this is not occurring to the level it needs to – to enable appropriate product substitution.

The guidance is correct that owners often specify brands and have specific requirements and when the builder proposes substitutions, they can be unaware of these and the underlying

rationale for the choices. This is the reason BCAs request the owner's signature on variation forms.

We are unaware of any training that has been given on the product substitution guidance and consider that MBIE has a role to play in providing this training and insuring consistency of interpretation within the industry. This would be more effective and more relevant to the participants in the system than inserting principles into the regulations and we would like to see more emphasis from MBIE on how they support consistent decision making across the country.

BCAs can and do step up to the plate and demonstrate that they can apply the legislation as intended. MBIE need only look at the example where Christchurch, Selwyn, and Waimakariri councils all collaborated with a plasterboard manufacturer - when shortages existed in the region - and all agreed on the documentation required to support the product substitution being accepted as a minor variation. It is interesting to note that this collaboration was provided prior to the MBIE guidance being released on the matter.

We think it would be efficient for MBIE experts to test international products against the Building Code, the New Zealand context, and carry out the equivalency assessment and record their findings in a national product register. At the very minimum they could work with BCAs and manufacturers to define the documentation required to enable BCAs and the industry to efficiently assess compliance with the minor variation requirements.

We do not agree with the Commerce Commission that the key impediment to substitution is the requirement to obtain approval from the BCA for the product substitution – Commerce Commission report, Clause 10.82.

Often the decision to change materials is based on availability and cost. The plaster board situation is a case in point. Builders are not cognisant of the differing performance of products and their impact on the building system – for example impacts on bracing. They therefore do not see the need to provide documentation. This needs to change.

When manufacturers and suppliers understand the implications and put the work in to furnish appropriate documentation and demonstrate compliance before the product lands on the shelf – as in the case of the Canterbury regional collaboration mentioned above – there are successful results. It is simple for builders to make the change and lodge the appropriate documentation with the BCA.

There is a reason that Hardy's plasterboard is popular with designers. They make it easy to prove the suitability of their products with robust documentation, information and calculators. If the industry is to move away from specifying brands and schedule product types (for example Pink Batts R4.0 Roof Insulation to R4.0 thermal insulation) the issue is that all products are not created equal. A glass wool batt thickness will vary from one made from wool and then clearances, and other aspects of the design and building system change. The guidance is clear on the need to understand the building context. Inserting principles in regulation can reinforce this but is insufficient to achieve the behavioural shift required on site.

Consideration of sections 26 to 30 of the Building Act – where the Chief Executive can issue warnings and bans – would be an issue if the requirement to obtain approval from the BCA for the product substitution was removed. If the BCAs don't know the product specified, they

cannot locate affected projects and pre-empt the product being used. Nor can they respond to the question of how many projects are affected – for example through responding to MBIE surveys. We need to strike the right balance when it comes to the detail.

Amending the regulations to include the principles is therefore not the most efficient or effective way to remove impediments to product substitution, clarify the definition of minor variations, or make product substitution easier, while ensuring building safety and performance.

It may however provide some guidance that the High Court and MBIE Determinations will follow.

3. Is there anything we have missed?

We think MBIE could do more.

- Education and training.
- Development of guidance – as per the Commerce Commission report

Clauses 10.90 and 10.91 state

“In November 2021, MBIE published general guidance on product substitution for designers and builders.

This guidance includes specific examples of the process for considering substitutions for plasterboard wall lining, exterior cladding and insulation. In addition, MBIE has recently provided, product-specific guidance to BCAs in relation to plasterboard substitutions, given supply shortages for this product in recent times.

Similar guidance could be issued for other key building supplies commonly specified by brand, to increase confidence in the use of competing products.”

“This approach to guidance could complement the approaches noted above and might also facilitate a more consistent approach to ‘minor variation’ substitutions for specific products across BCAs. It is possible, through further guidance and training, that some BCAs might be encouraged to accept more brand-neutral product substitutions. However, their willingness to consider substitutions may also ultimately be assured through regulation in combination with guidance, or through more clear compliance pathways that facilitate brand-neutral specification, for example, by specifying product performance measures.

Any initiatives should be focused on providing greater clarity and certainty for BCAs interpreting applicable requirements.”

We encourage MBIE to provide the guidance alongside facilitating the clear compliance pathway, product performance measures, and provision of documentation and information required to enable BCAs to have certainty that the substitution is suitable for consideration as a minor variation.

- The development of a national product register. We recommend that a small group of experts including local government are brought in to assist MBIE develop the register.
- Supporting the BCA in its role and ensuring effective engagement with it.

4. Do you have any other feedback on the definition of minor variation?

We also note that the proposed principles focus only on product substitution and not the suite of instances that give rise to likely minor variations. Therefore, they are unlikely to clarify what is a minor variation in its wider sense. It is far more common that a minor variation will be required for not following the building consent.

Defining minor customisation

5. What (non-exhaustive) examples of minor customisation should be included in the regulations? What are your views on changing a room's layout or changing a design's layout as examples of a minor customisation? Why/Why not?

What constitutes a minor customisation needs to be clearly defined. While we are not opposed to changing a room's layout being included, the definition of what this covers needs to be very clear to avoid an interpretation that would enable internal walls to be moved – which we don't think is intended nor should it be enabled. Ventilation, natural light and other Building Code clauses are affected by the movement of these walls and if wall movement was enabled it would have unintended consequences.

6. Do you think the new proposed regulations – definition and accompanying principles – would appropriately define and identify what a minor customisation is? Why/Why not?

The principles are okay and, as mentioned above, the devil is in the detail for the drafting of the legal definition of minor customisation. Guidance, education and training would all be required.

7. What do you think the accompanying minor customisation guidance should include or help clarify?

8. Is there anything we have missed?

Multiproof is underutilised by the sector and there are improvements that can be made to what is approved under the Multiproof in the first instance that would allow for some customisations without further involvement of the BCA. For example, it could approve multiple cladding types for a building to allow a choice of claddings without having to go through an amendment or minor customisation process. Investment at the front end of the

process – in the original Multiproof approval could avoid unnecessary customisations later in the development process.

The number of minor customisations as a proportion of the BCA work in larger councils is likely to be low – if we take the Auckland Council situation it amounts to about 10 a year.

If Council incurs any liability as part of verifying compliance for a proposed customisation then there is an argument that the application processing time should be extended to 20 working days or preferably that MBIE (being the better party to assess the customisation as it approved the original MultiProof certificate) should process the minor customisation.



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