

Chain of Responsibility laws introduced in Queensland for Non Conforming Building Products

INTRODUCTION

In response to the Lacrosse Fire in Melbourne in 2014, the recall of faulty and potentially dangerous infinity electrical cables in 2015 and more recently the Grenfell fire in June 2017 the Queensland Government implemented the *Building and Construction Legislation (Non-Conforming Building Products – Chain of Responsibility and Other Matters) Amendment Act 2017* (Qld) ("the NCBP Act") which commenced on **1 November 2017**.

The NCBP Act amends the Queensland Building and Construction Commission Act 1991 (QBCC Act) and the Queensland Building and Construction Regulation 2003, the Plumbing and Drainage Act 2002, and the Building Act 1975 in relation to non-conforming building products.

OBJECTIVE OF NCBP ACT

The objective of the amendments is to eliminate the use of a non-conforming building products (NCBPs) from the outset by imposing non-transferable duties and obligations on supply chain participants including manufacturers, importers, retailers and installers to ensure so far as reasonably practicable that NCBPs are not used in buildings.

To provide guidance on how to comply with the new changes introduced by the NCBP Act; the Queensland Government has produced the *Non Conforming Building Products Code of Practice*.¹

The purpose of this paper is to provide an overview of the new changes.

OVERVIEW OF THE NCBP ACT

What does the NCBP Act do?

In summary; the NCBP Act:

- a) expands the compliance and enforcement powers of the QBCC to deal with NCBPs including increased investigative powers to enter existing buildings and other places to gather evidence of NCBPs.²
- b) establishes a '*chain of responsibility*' between each industry participant.
- c) provides that each participant in the chain will be held responsible for their respective contribution to the final product
- d) increases the accountability of participants in the supply chain to the QBCC through a series of obligations aimed to enable the QBCC to identify and address a point of failure in the supply chain.
- e) makes all building supply chain participants responsible to ensure that non-conforming building products are not used on building sites in Queensland;
- f) implements notification requirements for licensees and new information sharing arrangements between the QBCC and other regulatory agencies;
- g) creates new offences extending the scope of disciplinary action that can be taken by the QBCC.

WHAT ARE THE KEY DEFINITIONS?

The NCBP Act introduces a number of important definitions to the QBCC Act including the following:

- a) **building product** means any material or other thing associated with, or that could be associated with, or installed for the purposes of a building;

The definition of building product is extremely broad and could be in effect be any material or other thing that is or could be incorporated into or connected with a building

- a) a building product is regarded as **non-conforming for an intended use** if the product:

- is not or will not be safe;
- does not or will not comply with the relevant regulatory provisions (e.g. the National Construction Code),
- performance does not meet the claimed standard or performance.
- claims to be something it is not and
- is marketed and supplied with the intent to deceive consumers.

- b) “**Intended use means**” for a building product, means a use for which the building product is intended to be, or is reasonably likely to be, associated with a building.³

- c) “**safe**” is defined under s74AA of the QBCC Act, to mean:

All risks of injury or illness to a person have been removed, so far as reasonably practicable; or if it is not reasonably practicable to remove a risk of injury or illness, the risk has been minimised so far as reasonably practicable.

- d) “**safety risk**” means a risk that the association of a building product with a building for an intended use is not, or will not be, safe.

- e) **Persons in the chain of responsibility** include⁴:

- Designers
- Manufacturers
- Importers
- Suppliers

of building product and who know, or are reasonably expected to know, that the building product will or is likely to be associated with a building.⁵

Installers are also persons included in the definition.

As set out in the Explanatory Notes to the NCBP Act; each of these persons have been included because they can each influence the safety compliance and performance of the products before they are used.⁶

This is because they are required to ensure, so far as is reasonably practicable, that products that are designed, made, imported, supplied and installed are safe, fit for their intended purpose and comply with relevant standards.

What are the non-transferable duties imposed by the amendments?

The non transferable duties imposed by the amendments on the participants in the supply chain include:

- a) a primary duty that the product is not a non conforming product⁷;
- b) a duty to provide “*required information*” for the product⁸;
- c) a duty to comply with requirements of a recall order⁹;
- d) a due diligence duty on Executive Officer to ensure the company within the chain of responsibility complies with its duty under the Act¹⁰;
- e) a duty to not make false and misleading representations about building products¹¹; and
- f) a duty to notify the QBCC of a non conforming building product¹².

PRIMARY DUTY – section 74AF

What does the primary duty involve?

As a result of the changes the QBCC Act now provides that each of persons in the supply chain has a primary duty¹³ to ensure as far as **reasonably practicable**, that the product is not a non-conforming building product **for an intended use**.¹⁴

What does reasonably practicable mean?

The term ‘reasonably practicable’ is defined in section 74AA of the QBCC Act in relation to a duty to mean

“that which is, or was at a particular time, reasonably able to be done in relation to the duty, taking into

account and weighing up all relevant matters" including:

- the likelihood of a safety risk or non compliance risk happening;
- the harm that could result from the safety risk or non - compliance risk,
- what the person knows or ought reasonably to know about the safety risk or non compliance risk and ways of eliminating or minimise the safety risk;
- the availability and suitability of ways to eliminate or minimise the risk; and
- the cost associated with available ways of removing or minimising the safety risk or non-compliance risk, including whether the cost is grossly disproportionate to the risk.

How can the intended use be identified?

By way of further assistance; the Code provides the following guidelines in identifying whether building products are conforming or not for their intended use:

Step 1 – consider all aspects of the intended use including reference to design features that may impact on how the building product might need to be associated with the building or other building products, consequences of product failure, health and safety law, environmental considerations and conformity with relevant legislative requirements.

Step 2 - consider which building products meet relevant regulatory requirement (for eg National Construction Code (NCC)).

The will require evidence that a building product meets the "*deemed to satisfy*" provision or performance solutions specified in the NCC and could include:

- a current Certificate of Conformity or Accreditation issued by a product certification body, which has been itself accredited by Joint Accreditation System of Australia and New Zealand (JAS-ANZ); or
- a report issued by a Registered Testing Authority

- demonstrating that the product is fit for an intended use; or
- a certificate from a registered, professional engineer which certifies that a building product's design, composition and method of installation complies with the requirements of the NCC

Additional Duty – section 74AG

Further to the primary duty; a person in a chain of responsibility has additional duties to:

- a) provide 'required information' to accompany a building product as it passes from them to the next person in the building product supply chain¹⁵
- b) conduct due diligence investigation on the 'required information' they receive to ensure that the QBCC Act is being complied with.

Designers of products must ensure, so far as reasonably practicable, that if the designer gives the design to another person (who is to give effect to that design), the design is accompanied by the required information for the product.¹⁶

Manufacturers, importers or suppliers for the product must ensure that the product is accompanied by the 'required information' before the product is given to another person.¹⁷

This provision applies to persons that sell, supply or transfer the product and who also facilitate the sale, supply or transfer of the product.

Installers of a building product must ensure so far as reasonably practicable that the owner of the building is given the required information about the product.¹⁸

What is required information?

"Required information" means information as to¹⁹:

- a) the suitability of the product for the intended use and the particular circumstances of such use²⁰.
- b) According to the Code²¹ examples of compliance with this requirement could include:
 - evidence that the product legitimately meets the relevant standards in the NCC or other relevant regulatory provision, including

applicable Australian Standards.

- (details) if a product is only to be used in particular circumstances or conditions for eg only to be used in internal dry areas or not above certain heights prescribed by the NCC.
- a) instructions about how the product must be associated with a building to ensure it is not a non-conforming building product for the intended use.²²
- The example of compliance provided by the Code is in the case of a type of fastener, adhesive or other mounting system to be used with the product to ensure compliance with the NCC or other relevant standards.²³
- b) instructions about how the product must be used to ensure it is not a non-conforming building product for the intended use.²⁴

For example, as detailed in the Code²⁵, instructions on how the product must be used in order for it to comply with NCC (e.g. cladding that can only be used below certain heights should have this specified)

How can the required information accompany the building product?

The Code provides that the required information 'as far as reasonably practicable' can be provided in a number of ways including:

- the inclusion of the required information affixed to the product, or on or in the packaging for the building product;
- a website address, QR code or other means of linking to a website or other digital data repository where the required information is contained, affixed to the product, on or in the packaging;
- providing the required information at the point of sale or supply of to the next person in the chain of responsibility through the provision of printed material.

Where it is not reasonably practicable for the required information to accompany the building product; the Code states that the information should otherwise be made available to the next person in the chain of responsibility.

DUTY TO COMPLY WITH RECALL NOTICES – section 74AH -

Section 74AH of the QBCC Act; places an additional duty on a person in the chain of responsibility of a building product to comply with the requirements relating to recalls for that product.²⁶

DUTY OF DUE DILIGENCE ON EXECUTIVE OFFICER – Section 74AI

An Executive Officer of a Company involved in the design, manufacture, import, supply or installation of a building product has a duty under the amendments to exercise due diligence to ensure that a company complies with its duty under the QBCC Act.

According to the Code this would require the Executive Officer taking reasonable steps to:

- a) acquire and keep up to date, knowledge of matters about the safe use of building products; and
- b) gain understanding of:
 - i. the nature of the company's business activities relating to building products; and
 - ii. safety risks and non-compliance risks associated with the building products; and
- c) ensure the company has, and uses, appropriate resources and processes to manage risks and to comply with the company's duties;
- d) ensure the company has, and implements, appropriate processes for receiving, considering and responding in a timely way to, information about the risks and any incidents arising from the risks and for complying with the company's duties;—
- e) verify the resources and processes mentioned above are being provided, used and implemented.

DUTY ON REPRESENTATIONS ABOUT BUILDING PROJECTS – 74AK

The amendments also provide that a person in the chain of responsibility for a building product must not:

- a) make a representation or,
 - b) permit a representation to be made²⁷,
- that the association of the product with a building for the use complies, or will comply, with the relevant regulatory provisions if that person knows, or ought reasonably to know:
- c) that the association of the product with a building for

- an intended use does not,
- d) or will not, comply with the relevant regulatory provisions
- b) must discharge the person's duty to the extent to which the person has the capacity to influence and control the matter;

These duties are not transferrable.

Failure to comply with duties

The reform introduces a number of penalties and offences to prevent and address non-conforming building products including for :

- a) failure to comply with a duty under the Act.
- b) The making of representations about the performance of a building product that that does not comply with the relevant regulatory provisions in circumstances where the person knows, or ought reasonably to know, that the building product does not comply
- c) Failure to notify the QBCC and notify the QBCC about a non-conforming building product where the person becomes aware, or reasonably suspects, that the building product is a non-conforming building product for an intended use.

The offences created by the QBCC Act for breach of duties carry penalties of up to 1,000 penalty units (\$126,150).

INVESTIGATION POWERS OF QBCC

The QBCC Act as amended; provides extensive powers for the QBCC to investigate and address the occurrence of non conforming building products.

These include powers to:

- a) enter both with consent and under a warrant, search and seize products and material
- b) inspect, examine and test anything on the premises
- c) accept and enforce undertakings relating to compliance

SOME OBSERVATIONS

The changes have introduced a positive accountability mechanism through the duties and obligations imposed on the participants in the product supply chain

It was expected that once the amendments were enacted that other jurisdictions would consider adopting similarly provisions in their respective regulatory frameworks consistent with the in principle support for the Queensland given by Building Ministers from other states and territories/

Surprisingly the latest reform in NSW did not adopt the approach taken in Queensland.

In other words; false and misleading statements must not be made about the use of a building product.

DUTY TO NOTIFY NON CONFORMING PRODUCT

A person in the chain of responsibility for a building product has a duty to report a non-conforming building product to the QBCC under s74AL of the QBCC Act if that person:

- a) becomes aware,
 - b) or reasonably suspects,
- that the building product is nonconforming for an intended use.

Notification in the approved form, must be given to the QBCC.

The notification must be made as soon as practicable but within two days after becoming aware or reasonably suspecting that the building product is non-conforming, unless the person has a reasonable excuse.

A duty to report a notifiable incident within two days also exists under s74AM of the QBCC Act if a person in the chain of responsibility becomes aware or reasonably suspects that a non conforming building product caused a death or serious injury or illness for any person or an incident that exposes a person to risk of serious injury or illness.

MULTIPLE DUTIES

There are number of duties prescribed by the amendments all of which must be satisfied.

Section 74AD of the QBCC Act sets out principles applying to the duties which include the following:

- A person may have more than 1 duty because of the functions the person performs or is required to perform.
- More than 1 person can concurrently have the same duty.
- Each person must comply with the duty to the standard required under subdivision 2 even if another person has the same duty
- If more than 1 person has a duty for the same matter, each person—
 - a) is responsible for the person's duty in relation to the matter; and

Although a chain of responsibility approach had been proposed in the initial draft Bill in NSW; those provisions were removed from the final version of the Act to the disappointment of industry groups.

WHAT ARE SOME LIMITATIONS OF THE REFORM?

Some key issues and concerns with the legislation have been identified by peak industry bodies during stakeholder consultation and inquiry.

Some of these issues and concerns include:

- That it is unclear what products will be directly captured under the new laws.²⁸
- The notion that the laws apply to each and every product of the thousands of products in a building is not realistic nor practical.
- According to HIA; the suggestion also that each and every product needs to have the new ‘required information’ which is passed on to each person in the supply chain is not realistic.²⁹
- Further in the case of a residential project product conformance documentation being required with respect to well over a thousand products which would be extremely onerous for all parties in the supply chain.
- That an installer (builder, trade contractor, or other) is expected to check the product information and that the certificates demonstrating the compliance of purchased and installed materials align with the certification documents and building approval is heavy obligation which should be shared by the building certifier.
- As noted by the Master Builders Association Installers (contractors) “*at the end of the chain should not continue to carry the brunt of the responsibility even when they have undertaken due diligence and relied on information in good faith.*”³⁰
- The reach of the legislation appears does not extend to overseas manufacturers or manufacturing processes.
- The Act would, for example have no jurisdiction on an overseas manufacturer for non-conforming products detected in Australia
- The legislation is state based and unless other states and territories wish to adopt elements of the Queensland reform; the changes will be confined to stand-alone State-based legislation.

- The issues of non-conformance relate to construction products imported or manufactured for distribution across the country.
- An individual jurisdictional approach with different regulatory frameworks is incapable of resolving national regulatory inadequacies.
- The preferred approach supported by various industry groups is for the development and implementation of appropriate, harmonised, regulatory structures across Australia³¹

HOW TO MANAGE THE RISKS?

The amendments establish new risks and obligations which need to be managed.

Some of the ways to manage these risks include:

- Reviewing insurance policies to make sure that potential liabilities are covered to the extent possible.
- Conduct an audit of your suppliers. Only deal with suppliers of good reputation.
- Look for materials, products and systems that have widely recognised industry certification or accreditation.
- Ensure that contracts contain appropriated indemnities from suppliers to enable the recovery of loss and damage as a result of any breach of the Act.
- Review duties and compliance under amended QBCC Act and Code.
- Obtain conformance information including any limitations for each product and material.
- Ensure that the intended use and information for building products is clearly described in your contract.
- Seek legal advice on future contract and on managing risks under existing contracts.

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¹<http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsCodeOfPractice.pdf> see also section 74ADA of the QBCC Act as amended.

²Previously the QBCC could only enter active Building Sites

³Section 74AA of the QBCC Act

⁴Section 74AE of the QBCC Act

⁵See section 74AE of the QBCC Act

⁶Page 17 of Explanatory Notes

⁷Section 74AF of the QBCC Act

⁸Section 74AG of the QBCC Act

⁹Section 74AH of the QBCC Act

¹⁰Section 74AI of the QBCC Act

¹¹Section 74AK of the QBCC Act

¹²Section 74AL of the QBCC Act

¹³Section 74AF of the QBCC Act

¹⁴Section 74AF of the QBCC Act

¹⁵Section 74AG of the QBCC Ac

¹⁶Section 74AG(1) of the QBCC Act

¹⁷Section 74AG(2) of the QBCC Act

¹⁸Section 74AG of the QBCC Act

¹⁹Section 74AG of the QBCC Act

²⁰Section 74AG(6) (a)(i) of the QBCC Act

²¹<http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsCodeOfPractice.pdf> page 7

²²Section 74AG(6)(a)(ii) of the QBCC Act

²³<http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsCodeOfPractice.pdf> page 8

²⁴Section 74AG(6)(a)(iii) of the QBCC Act

²⁵<http://www.hpw.qld.gov.au/SiteCollectionDocuments/NonConformingBuildingProductsCodeOfPractice.pdf> page 8

²⁶Section 74AH of the QBCC Act

²⁷Section 74AK of the QBCC Act

²⁸<https://hia.com.au/-/media/HIA-Website/Files/InformationSheets/Legalinfo/LEG17-07.pdf> page 2

²⁹<https://hia.com.au/-/media/HIA-Website/Files/>

InformationSheets/Legalinfo/LEG17-07.pdf page 2

³⁰Master Builders Australia Supplementary Submission to the Senate Economics References Committee 1 August 2017.

³¹<http://productalliance.com.au/-/media/HIA-Website/MiniSite/CPA/PDF/CPA-Submission-QLD-NCP-Bill-210617.pdf?la=en&hash=8CD35ABFCF767D1A751DA35853F9596E121>

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