



**Submission to Public Works and
Utilities Committee**

**Building and Construction
Legislation (Non-Conforming
Building Products and Other
Matters) Amendment Bill 2017**

21 June 2017



CONSTRUCTION PRODUCT ALLIANCE

BUILDING AND CONSTRUCTION LEGISLATION (NON-CONFORMING BUILDING PRODUCTS – CHAIN OF RESPONSIBILITY AND OTHER MATTERS) AMENDMENT BILL 2017

SUBMISSION TO PUBLIC WORKS AND UTILITIES COMMITTEE

INTRODUCTION

The Steering Committee of the Construction Product Alliance (CPA) welcomes the opportunity to provide comments to the Public Works and Utilities Committee (the Committee) on the *Building and Construction Legislation (Non-Conforming Building Products – Chain of Responsibility and other Matters) Amendment Bill 2017* (the Bill).

The Bill contains proposals that have the potential to achieve significant improvement to the regulation of the building and construction industry in QLD, and the CPA is pleased to note that several the provisions of the Bill adopt concepts that have been recommended by the CPA for some time.

However, the CPA believes that the Bill could be improved by deleting components that have the potential to create significant delays in the development and delivery of projects as well as divert regulators and industry from addressing the key issues surrounding non-conforming and non-complying products.

The Construction Product Alliance

The CPA brings together a broad range of stakeholders who share an interest in the performance of building and construction products and ensuring their fitness for purpose.

The CPA aims to include representatives from the following stakeholder groups:

- Building product manufacturers and suppliers,
- Builders and constructors,
- Supply chain partners (trade supply outlets),
- Engineers, designers and architects,
- Building surveyors/inspectors/certifiers,
- Building Industry and professional body associations,
- Procurement entities (governments and private),
- Regulators (State building, electrical, plumbing, gas, consumer affairs and workplace health and safety authorities),
- Policy makers,
- Research bodies,
- Testing and certification bodies and their international affiliate organisations,
- Building management and maintenance, and
- Insurers.

There are currently over 40 organisations connected to the CPA. These organisations represent key stakeholders in the industry and they are dedicated to achieving a sustainable industry for the future of all industry participants. The CPA's functions are managed by a Steering Committee which consists of representatives from the following organisations:

- Australian Industry Group (Chair and Joint Secretariat with Building Products Innovation Council),
- Australian Institute of Building Surveyors,
- Australian Steel Institute,
- Australian Window Association,
- Australasian Procurement and Construction Council,
- Engineers Australia,
- Housing Industry Association,
- Insulation Council of Australia and New Zealand (ICANZ),
- Joint Accreditation System of Australia and New Zealand (JAS-ANZ),
- Master Builders Australia (National), and
- National Association of Testing Laboratories (NATA).

NON-CONFORMING BUILDING PRODUCTS AND NON-COMPLIANT BUILDING PRODUCTS

At the outset, and to understand the CPA's approach to the dilemma surrounding the effective management of the non-conforming product issue, the CPA considers it important to clarify what the concept of a "non-conforming product" means.

Understanding the concept of a non-conforming product and what it encompasses is a significant issue, because the concept has been incorrectly described by many to include products that are non-compliant. What must be understood is the difference between building products that:

- Do not conform to the relevant standard that governs their manufacture (non-conforming); or
- Do conform to an applicable standard but are installed in a manner or for a purpose that does not achieve compliance with relevant performance standards, such as the National Construction Code (non-compliant).

Non-Conforming Building Products – Infinity Electrical Cable

An example of the problems caused by a **non-conforming product** is the "Infinity Electrical Cable" experience.

According to the Australian Competition and Consumer Commission (ACCC) Infinity and Olsent-branded Infinity cables installed in up to 22,000 homes, residential and commercial premises failed to meet electrical safety standards due to poor quality insulation (plastic coating).

Testing found the insulation on the 'TPS' and 'orange round' range of cables will become brittle prematurely, which may present a safety hazard if the cables are disturbed and the insulation breaks. Cables exposed to prolonged high temperatures will degrade at a faster rate.

The ACCC has advised that once the insulation is brittle, physical contact with the cables could dislodge the insulation and lead to electric shock or possibly fires.

Non-Compliant Products – The Lacrosse Fire, Melbourne

An example of the potential problem caused by a **non-compliant product** arises from the circumstances surrounding an event known as the “Lacrosse Fire” in Melbourne.

In the Lacrosse Fire event, it seems that a product that may have been manufactured in accordance with a specific standard (in this case external cladding) was subsequently incorporated into a building in a manner or for a purpose that did not comply with relevant codes or standards such as the National Construction Code. It is said that the combustibility of the cladding added to the potential danger that arose following a fire that started on a balcony of the building.

Following the fire, the Victorian Building Authority (VBA) undertook an audit of 170 buildings in Melbourne. The Audit Report notes that in the case of the Lacrosse building fire, the Metropolitan Fire Brigade (MFB) identified it was the **non-compliant use of the building’s external cladding material that contributed most to the spread of fire.**

Are All Non-Conforming Products Safety Risks?

There is no doubt that a non-conforming product, or a conforming product that is incorporated into a building in a non-compliant manner, has the potential in certain circumstances to pose a safety risk, and such risks cannot be underestimated in terms of their potential impact.

Both examples identified above have led to safety issues, but it may also be said that it is possible for a product that has not been manufactured in conformity with the relevant standard, or installed contrary to compliance requirements, to still perform in a manner that will not raise safety issues.

Equally, price and quality of building products are not determinants of conformity or compliance in terms of installation or use. Further, the country of manufacture of a product may not be a determining factor as to conformity or compliance. What matters is:

- The mechanisms implemented by manufacturers to ensure that their products conform with applicable standards,
- The systems, checks and balances implemented downstream from manufacture to determine whether a product conforms (this is further complicated through problems with individual batches or production runs),
- The action taken by building designers and contractors to satisfy themselves that products conform to standard, or are specified or used for their intended purpose to comply with the building code, and
- The evidence and processes adopted by building certifiers to satisfy themselves that a building complies with relevant approved plans and approval processes, bearing in mind that building certifiers are not responsible for quality control of construction activities.

Understanding the above context is important because of the potential impact of various aspects of the Bill which may have unintended consequences for clients, building participants and consumers.

SUMMARY OF CPA POSITION ON NON-CONFORMING PRODUCTS

The CPA supports the development and implementation of appropriate, harmonised, regulatory structures across Australia. It seeks to achieve this outcome because the industry is a national one, the third largest in the country, and one that generates in value added terms approximately 20% of gross GDP.

The CPA's view is that the current state and federal regulatory systems across Australia applicable to the management of building product conformance and compliance with relevant national standards are not as effective as they ought to be.

Proposals aimed at enhancing the efficiency and effectiveness of the regulatory system are supported provided they:

- ✓ Are harmonised with regulatory systems operating across Australia.
- ✓ Operate on a proactive rather than reactive basis, i.e. prevention is better than cure and action taken after products are manufactured and embedded in structures is too late, especially if offending entities are no longer accessible for regulatory or commercial recovery action.
- ✓ Do not duplicate other regulatory systems operating within individual jurisdictions or create confusion for industry participants, clients and the community.
- ✓ Do not unnecessarily increase the cost of construction.
- ✓ Are effective in ensuring that the incidence of non-conforming or non-compliant products is reduced.
- ✓ Result in appropriate action being taken against those responsible for importing, distributing or installing non-conforming or non-compliant products.

CPA SUBMISSION TO BUILDING MINISTERS' FORUM 31 JULY 2015

The CPA has made several submissions at a state and federal level as to the approach that should be taken to address the non-conforming products dilemma. The submissions have been made to entities such as the Building Ministers Forum (BMF), of which QLD is a member, and the Senate Committee inquiring into non-conforming building products.

In its 2015 submission to the BMF, the CPA argued for a holistic approach to the issues surrounding non-conformance on the basis that construction products are imported or manufactured for distribution across the country, so an ad hoc approach to the problem taken at an individual jurisdictional level will not be successful in resolving national regulatory inadequacies.

Notwithstanding the above, the CPA recognises and respects that individual jurisdictions have developed their regulatory frameworks over time having regard to their specific areas of interest, or in response to local issues that have arisen.

However, this approach is, in part, one reason why the problems associated with non-conforming and non-compliant products continue to exist and will require greater coordination in future as the extent of imported products and materials increases and the capacity of the building and construction industry to ensure that products comply with relevant standards becomes more difficult.

SPECIFIC COMMENTS ON THE BILL

General

The CPA supports in principle the following proposals in the Bill:

- The establishment of obligations across building product supply chain participants.
- Empowering the QBCC to investigate and address instances of non-conforming building products.
- Provision of appropriate information sharing powers.
- Ministerial power to issue recall orders and publish warning statements.
- Establishment of a Building Products Advisory Committee.

There are several aspects of the Bill that are primarily operational in nature and in respect of which the CPA does not propose to provide specific comments as individual members of the CPA will respond to those issues in the context of their impact on the operations of the businesses or roles of those members.

However, in an overarching context, the CPA would like the Committee to reflect on the terms of the Bill, considering the need for its terms to avoid unnecessarily increasing red tape, the cost of construction or the time for undertaking and completing projects.

The CPA's concern is to ensure that the many excellent concepts in the Bill do not result in the establishment of systems or processes that are counterproductive in terms of enabling the regulatory system to operate efficiently and effectively in addressing the primary risks arising out of non-conforming products.

As the Bill is currently drafted, there is potential for the regulatory structure to become enmeshed in a plethora of investigations into minor issues, or commercial matters that may require many months (if not years) and money to establish whether an issue exists and who may be responsible for it.

What Approach to Assessing Product Conformance is Sensible?

The provisions of the Bill as currently drafted apply to all building products, not just those that may clearly cause catastrophic outcomes if non-conforming. Accordingly, tens of thousands of products will be captured by the terms of the legislation.

If processes contemplated under the Bill are not implemented carefully and sensibly, it is quite possible that the implementation of product testing regimes and other product verification processes may result in enormous cost and operational disruption for manufacturers, industry and clients.

In this context, it is important to understand that products may themselves be comprised of many component parts manufactured both in Australia and overseas. Their conformance as part of a larger product may often only be determined through costly destructive testing or other analysis.

While the Bill contains provisions that enable building industry participants to determine conformance through being satisfied to a 'reasonably practicable' degree, the CPA considers that the purpose of this approach would be enhanced if government and industry jointly agreed a set of regulatory guidelines that provide clarity as to the processes by which conformance can be identified.

Further, the Bill as currently drafted has the potential to create significant regulatory burden by requiring product designers, suppliers, manufacturers, importers and installers to provide product information for all building products installed in buildings to the next person down the line, with the installer being required to provide this information to the owner.

The legislation will also prescribe the required information that needs to be provided to enable use of the product in the building. Whilst not explicitly stated in the Bill, in effect builders and installers will need to ensure the information being provided by others contains the required information as prescribed in the legislation.

Applying the above complexities to a residential housing project would result in product conformance documentation being required with respect to well over a thousand products. This would be extremely onerous for all parties in the supply chain. Additionally, the checking of the information being provided for these products brings with it significant burden for the builder/installer which should rightly be shared by the building certifier.

Extrapolating this situation to large building projects would make the reporting requirements for the industry unmanageable. Accordingly, if the legislation proceeds, a manageable prescribed list of products in respect of which conformance information is required will be needed to ensure a rational approach is achieved.

Guidance for government regulatory agencies and industry in the above structure will ensure that the regulatory regime and industry responsibilities properly focus on key risks while providing the flexibility to adjust quickly as emerging risks are identified and addressed. This approach also provides greater clarity for executive officers and senior management of businesses who may face significant legal obligations under the Bill.

We understand that the intent is that supporting regulation would prescribe which products are required to have product information, and what the information is to prescribe, but without having this available as part of the review this Bill makes it difficult to comment on the feasibility of the proposal.

Safety

All legitimate building industry participants and building licensees regard safety as a primary responsibility in their business operations, and significant action is being taken by building industry participants and their associations to improve the culture applicable to safety within the industry.

Unfortunately, the CPA Steering Committee considers that the extensive provisions in the Bill that provide significant powers to the QBCC relating to safety, as well as the duplication of reporting responsibilities to be placed on building industry participants, may result in significant confusion within the industry and militate against expeditious and effective regulatory action regarding non-conforming products.

In general terms, it is accepted across industry participants, workers and the public that workplace health and safety issues are regulated pursuant to nationally consistent safety legislation implemented by specialist safety regulatory agencies in every jurisdiction. This system is well understood.

The CPA notes that the Bill provides significant powers to the QBCC based on the findings and recommendations of the State Coroner arising from the unfortunate electrocution of a young male at a building site.

The Explanatory Notes to the Bill indicate that the government has already identified and implemented safety information sharing processes across relevant regulatory agencies covering the building industry. The effective and consistent implementation of the information exchange regime ought to ensure that all relevant government regulators can efficiently and effectively coordinate their efforts to address safety risks and incidents, to enable expeditious and appropriate responses.

While the Bill links safety issues to building industry licences by providing for disciplinary action to be taken in relevant circumstances, the Bill also duplicates the existing powers, role and function of the QLD safety regulators by providing parallel powers to the QBCC without adequately justifying the need for this action.

The Explanatory Notes to the Bill indicate that the Bill will provide a positive obligation on QBCC licensees to notify the QBCC about **any activity on a site that might present a work health safety issue** (emphasis added).

The Explanatory Notes also state that QBCC licensees have a **positive obligation to notify the QBCC if the licensee believes that a person has failed to comply with an order or notice issued by the Electrical Safety Office** (emphasis added).

In addition, the Explanatory Notes to the Bill also provide a positive obligation on the QBCC to report to health and safety agencies about a notifiable incident. A notifiable incident is defined in the Bill as **“the death or serious injury of a person”** or **“an incident that exposes a person to a risk of serious injury or illness”** (emphasis added).

If the above obligations are aligned in a safety context to the issue of non-conforming or non-compliant building products, the potential impact of the notifiable incident provisions could result in:

- Industry being required to provide vast amounts of information about product safety issues to multiple agencies at significant cost with the potential threat of disciplinary action for minor issues or administrative errors.
- The QBCC and other agencies being required to exchange that same information amongst themselves whilst knowing that industry participants already have obligations to provide that very information to those same agencies.
- Agencies commencing and then discontinuing multiple reviews or investigations based on information circulated, rather than concentrating on a coordinated effort to address key safety issues arising from non-conforming or non-compliant products.
- Industry participants being obliged to allocate significant internal or external resources to respond to multiple inquiries into reports about any activities on a site that “might” present a work health safety issue, or a notifiable incident, rather than devoting resources to improving the culture of the industry.

The Bill recognises the precedence of the existing safety legislation and on this basis, it would be appropriate to reduce the ‘red tape’ arising from these new processes by retaining the obligation to notify of an incident under safety legislation through creating a reporting obligation to the QBCC by the safety regulator if there is a suspected non-conforming building product or non-compliant use of a building product. The QBCC can then use their authority to investigate and/or prosecute building practitioners captured by the QBCC legislation and the Building Act.

Definitions

As outlined above, the legislation is seeking to capture two discrete issues in relation to non-conforming building products and the non-compliant use of building products. The legislation has included these two very different scenarios under the same definition and included safety as part of the definition.

This approach raises two issues. Firstly, not all non-conforming products will have a potential 'safety' risk and the CPA has been seeking support for governments to address non-conformance regardless of the safety risks, to ensure that competent building product manufacturers have a level playing field.

Secondly, non-compliant use of a building product is a matter already captured under the *Queensland Building Act* and relevant checks and balances under that Act should be referred to in the operation of this Bill.

It would be preferable that two definitions were used in the Bill to refer distinctly to the two concerns of industry and to correctly align the potential responses by the QBCC with the *Queensland Building Act* and safety legislation.

CONCLUSIONS AND RECOMMENDATIONS

The CPA supports the key objectives in the Bill designed to improve the detection of and prevent the use of non-conforming products in the building industry.

The CPA also supports the chain of responsibility and exchange of information provisions in the Bill as important components of an effective regulatory regime to assist building industry regulators and licensees to appropriately satisfy themselves that products conform.

While the CPA fully supports action to provide for appropriate safety responses where non-conforming building products place persons at work sites or completed projects at risk regarding health and safety, the Steering Committee does not support the provisions in the Bill that:

- Establish the QBCC as a parallel safety regulator to the existing QLD safety regulatory agencies.
- Place reporting obligations on industry that duplicate similar responsibilities that already exist under other safety legislative regimes.

The CPA recommends that the Bill be amended as follows:

- Provision be made for distinct definitions relating to non-conforming building products and non-compliant use of building products.
- The QBCC not be provided with the additional functions applicable to a safety regulator.
- Provisions that increase or duplicate reporting responsibilities of industry on safety not be included in the Bill.
- Ensure appropriate guidance criteria are developed in conjunction with industry to assist industry as to acceptable requirements for establishing product conformance.
- Develop a focused and manageable schedule of products in respect of which conformance information is required.

- Provide for a more administratively efficient range of products and approach to the requirement to notify and/or provide product conformance information across the chain of responsibility culminating in the building owner.

Lindsay Le Compte

Chair, CPA Steering Committee

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