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23 August 2023

Mr Patrick Noone  
Director  
Costco Wholesale Australia Pty Ltd ACN 104 012 893  
17-21 Parramatta Road  
Lidcombe NSW 2141

Dear Mr Noone

#### **NOTICE OF ACCEPTANCE OF BUILDING PRODUCT UNDERTAKING**

The Queensland Building and Construction Commission (**Commission**) received a building product undertaking (**Undertaking**), pursuant to section 74AO(1) of the *Queensland Building and Construction Commission Act 1991 (Qld)* (**QBCC Act**) from Costco Wholesale Australia Pty Ltd (**Costco**) in connection with a matter relating to a contravention or alleged contravention of part 6AA of the QBCC Act. The Undertaking was in relation to the following products being supplied by Costco:

1. Yardistry Gazebo (Item No. 1500084); and
2. Yardistry Pavilion (Item No. 1185048).

(Collectively, **Products**)

In accordance with the Undertaking, Costco undertakes to:

1. Continue to supply the Yardistry Gazebo (Item No. 1500084) with an AUS-Cert Kit<sup>1</sup> on an ongoing basis.
2. Continue to supply the Products under the following certifications from David Beneke Consulting Pty Limited, dated 21 December 2020:
  - 4.2.1 Structural Proof Check of Yardistry Timber Gazebos and Pavilions Revision 2; and

<sup>1</sup> A kit that contains additional fittings and hardware that can be fixed to the Gazebo product for additional rigidity, as well as installation instructions.

4.2.2 Form 15 – Compliance Certificate for Building Design or Specification.

Decision and date building product undertaking takes effect

Pursuant to section 74AP of the QBCC Act, the Commission must give Costco written notice of the Commission's decision to accept or not accept the Undertaking and the reasons for the decision.

The Commission's decision is to accept the Undertaking from Costco.

The Undertaking is enforceable under part 6AA of the QBCC Act and does not constitute an admission of guilt by Costco for the contravention or alleged contravention to which the Undertaking relates.

The Undertaking takes effect on the day the Undertaking is executed by Costco.

Findings of material questions of fact

On 10 July 2020 the Commission received a complaint from a building certifier in the employ of the Western Downs Regional Council regarding a product being supplied by Costco (**Complaint**) namely, the Yardistry Gazebo (Item No. 1500084)(**Gazebo**).

The Complaint alleged that the Gazebo did not comply with the relevant Australian Standards for Construction, specifically AS 1684 which specifies requirements for building practices and the selection, placement and fixing of various structural elements used in the construction of timber-framed buildings.

On 21 March 2022 the Commission's Compliance and Enforcement Unit commenced an investigation into the Gazebo being supplied by Costco, which relevantly identified:

1. The following products being supplied by Costco were identified, namely:
  - a. the Gazebo (Yardistry Gazebo (Item No. 1500084)); and
  - b. the Yardistry Pavilion (Item No. 1185048).(Collectively, **Products**)
2. The Products are of timber construction with an aluminium roof.
3. The Products are classified as a Class 10a building as defined in the National Construction Code 2019 (**NCC**) because it is a non-habitable building being a private garage, carport or shed.
4. Pursuant to the performance requirement identified in Part 2.1.1 of the NCC Volume 2, the Products are required to meet specific structural stability and resistance requirements, including in relation to wind actions.
5. Additionally, the Products must comply with Part A5.2 of the NCC Volume 2, meaning that evidence of suitability is required to support that the use of the Product meets the performance requirement as identified in Part 2.1.1 of the NCC Volume 2.

6. Evidence of suitability may be in the form of a certificate or report from a professional engineer, permitted that the engineer is a Registered Professional Engineer of Queensland (**RPEQ**).
7. 21 units of the Products had been distributed in Queensland by Costco, prior to any RPEQ certification.

Following its investigation, the Commission determined:

1. the Products to be non-conforming building products, pursuant to section 74AB(2) of the QBCC Act because they did not comply with the relevant provisions of the NCC;
2. the business activities of Costco include importing, selling and distribution of the Products throughout Queensland via its franchise network;
3. Costco was part of the chain of responsibility, had a duty to ensure that the Products were not non-conforming building products for an intended use and are alleged to have contravened part 6AA of the QBCC Act.

Reasons for the decision.

The Commission advises that it has accepted the Undertaking and its terms for the following reasons:

- (a) Upon the Commission's notification that the Products were being investigated in connection with a matter relating to a contravention or alleged contravention of part 6AA of the QBCC Act, Costco immediately ceased all sales of the Products and removed the Products from being sold at their stores.
- (b) Costco engaged an engineer to develop a retro fit bracing kit (the **AUS-Cert Kit**).
- (c) The AUS-Cert Kit ensures the Products are not non-conforming building products as defined by section 74AB of the QBCC Act because from 21 December 2020, the Products had obtained evidence of suitability in the form of a certificate from a Registered Professional Engineer of Queensland which made the Products compliant with Part A5.2 and Part 2.1.1 of the National Construction Code (NCC) Volume 2.
- (d) Costco only resumed selling products once they had made arrangements for an AUS-Cert Kit to be provided to consumers of all past and future Products.
- (e) Costco has undertaken to supply the Products with the AUS-Cert Kit which ensures the Products are not non-conforming building products.
- (f) On the basis of Costco's cooperation throughout the investigation in relation to the Products and Costco's engagement with the Commission to remedy the contravention or alleged contravention of part 6AA of the QBCC Act, the

Commission is of the view that accepting the Undertaking is the appropriate step to take.

Material considered by the Commission in making the decision

In reaching the decision, the Commission had regard to the following evidence or other material upon which the findings were based:

- a) *Queensland Building and Construction Commission Act 1991* (Qld);
- b) *Queensland Building and Construction Commission Regulation 2018* (Qld);
- c) Complaint in relation to the Products dated 10 July 2020;
- d) Correspondence to Costco from David King on behalf of the Commission dated 13 July 2021;
- e) Correspondence to the Commission from legal representative Julie Robb, partner of Banki Haddock Fiora, on behalf of Costco dated 30 July 2021;
- f) NCBP Audit Report prepared by David King dated 10 September 2021;
- g) NCBP Briefing Note prepared by David King dated 10 September 2021;
- h) NCBP Technical Precis and Recommendation regarding the Products;
- i) Correspondence to Costco from Jacqui Mowbray-Page on behalf of the Commission dated 5 April 2022; and
- j) Correspondence to the Commission from legal representative Julie Robb, partner of Banki Haddock Fiora, on behalf of Costco dated 29 April 2022.

Additional information

Pursuant to section 74AQ of the QBCC Act, the Undertaking takes effect and becomes enforceable on the day the Undertaking is executed by Costco.

It is an offence against section 74AR of the QBCC Act to contravene the Undertaking.

Pursuant to section 74AP(2) of the QBCC Act, the Commission will publish on its website notice of the decision to accept the Undertaking and the reasons for the decision.

Pursuant to section 74AS of the QBCC Act, if the Commission considers that Costco has contravened the Undertaking, the Commission may apply to a Magistrates Court for an order directing Costco to comply with the Undertaking or discharge the Undertaking.

Pursuant to section 74AT of the Act, Costco may at any time, with the written agreement of the Commission, withdraw or vary the Undertaking. However, the Undertaking cannot be varied to provide for a matter relating to a different contravention or alleged contravention of Part 6AA of the Act. Notice of withdrawal or variation of the Undertaking must be published on the Commission's website.

If you require any further information or have any queries in relation to this notice, please do not hesitate to contact Jacqui Mowbray-Page on (07) 3032 8170 or via [jacqui.mowbray-page@qbcc.qld.gov.au](mailto:jacqui.mowbray-page@qbcc.qld.gov.au).

Yours sincerely,

A handwritten signature in black ink, appearing to read 'Jacqui Mowbray-Page', with a long, sweeping horizontal stroke extending to the right.

**Jacqui Mowbray-Page**  
Principal Investigator  
Compliance and Enforcement  
Queensland Building and Construction Commission