

# Non-Conforming Building Products

## Code of Practice

October 2017

### Foreword/Legislative Framework

This Code of Practice is designed to provide additional guidance to the building and construction industries on how to ensure compliance with recent amendments to the *Queensland Building and Construction Commission Act 1991* (QBCC Act) and the *Queensland Building and Construction Regulation 2003* (QBCC Regulation) in relation to non-conforming building products.

These amendments were effected through the passage and proclamation of the *Building and Construction legislation (Non-conforming Building Products – Chain of responsibility and Other Matters) Amendment Act 2017*.

### How to use this Code of Practice

This Code of Practice is designed to provide additional, technical advice on how to achieve compliance with the recent amendments to the *Queensland Building and Construction Act 1991*, the *Plumbing and Drainage Act 2002*, and the *Building Act 1975* in relation to non-conforming building products.

This Code of Practice should be read in conjunction with the relevant parts of the aforementioned Acts and the *Queensland Building and Construction Regulation 2003* which apply to non-conforming building products.

# 1. Introduction

Non-Conforming Building Products (NCBPs) pose a grave risk to health and life safety, as their use threatens the integrity of buildings, putting all those who enter and use the building or building site potentially at risk. The use of NCBPs within a building can also create significant costs for owners, who often bear the burden of rectifying problems and/or undertaking remedial actions. Damages claims and legal liability from the installation of NCBPs can also flow through to supply chain to the construction, manufacturing, trade (imports) and retail sectors.

Two recent national examples have highlighted this issue: a fire in a Melbourne high-rise apartment building in 2014; and the identification, and subsequent recall of faulty and potentially dangerous electrical cable in 2015.

Following these incidents, the Building Ministers Forum (comprising Commonwealth, state and territory Ministers responsible for building and plumbing matters) undertook in February 2016 that in-principle improvements should be made to state and territory building regulation frameworks. Specifically, they saw the need to improve the ability of specialist building regulators, such as the Queensland Building and Construction Commission to respond to incidences related to non-conforming building products.

The Queensland Government also consulted with industry and other stakeholders through the *Queensland Building Plan: A discussion paper for industry and consumers* on possible regulatory responses in relation to non-conforming building products, amongst other matters.

Prior to the recent legislative amendments, regulatory responsibility for ensuring that building products are conforming to regulatory requirements and standards in Queensland had disproportionately fallen on the installers of the products, usually tradespeople, with other people in the supply chain not held responsible for their role in bringing non-conforming building products into the market.

Queensland has led State and Territory governments across Australia in developing improved regulation to prevent and detect non-conforming building products and hold to account all of those people in the supply chain responsible for the design, manufacture, importation, supply and installation of these often-dangerous building products.

## 2. Key Definitions

### 2.1 What are building products?

A building product is any material or other thing associated with, or that could be associated with, a building.

### 2.2 What are non-conforming building products?

Building products are regarded as non-conforming for an intended use if, when associated with a building:

- the product is not, or will not be, safe; or
- does not, or will not, comply with the relevant regulatory provisions; or
- the product does not perform, or is not capable of performing, for the use to the standard it is represented to conform by or for a person in the chain of responsibility for the product.

Non-conforming building products do not include appliances, such as a stove, that are installed in a building. Australian Consumer Law applies to appliances and is administered by the Australian Competition and Consumer Commission (ACCC).

## 2.3 What is an 'intended use' of a building product?

The QBCC Act (s74AA) defines intended use for a building product as meaning a use for which the building product is intended to be, or is reasonably likely to be, associated with a building.

## 2.4 What does 'associated with' a building mean?

The QBCC Act (s74AA) defines 'associated with' in relation to a building, means incorporated into, or connected to, a building by the carrying out of relevant work.

### Example 1:

A sheet of glass has an intended use as a window pane in a building. It is associated with a building by way of its incorporation into the building's structure by appropriate framing materials.

### Example 2:

A piece of formwork has an intended use as temporary support for a concrete slab in a building. It is associated with a building by way of determining the shape and dimensions of the concrete slab used in the building.

## 2.5 What are relevant regulatory provisions?

The QBCC Act (s74AA) defines relevant regulatory provisions as meaning, depending on the type of relevant work, the building assessment provisions under the *Building Act 1975* or the Standard Plumbing and Drainage Regulation under the *Plumbing and Drainage Act 2002*. These Acts provide linkages back to the appropriate parts of the National Construction Code (NCC) relating to the relevant building, plumbing or drainage work.

## 2.6 What does 'safe' mean under the Act?

The term 'safe' is defined under s74AA of the Act, which states:

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.

## 2.7 What is a Chain of Responsibility?

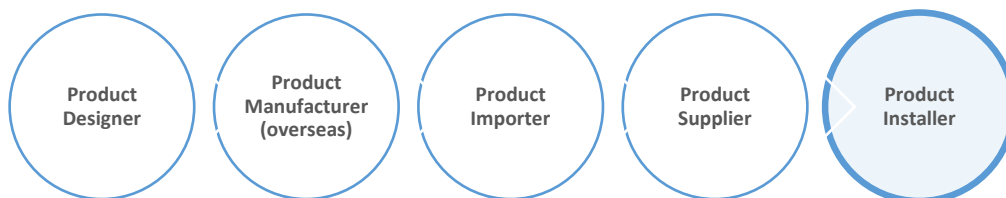
The chain of responsibility is the supply chain for any building product and is described in s74AE of the QBCC Act.

The persons included in the chain of responsibility are building product designers, manufacturers, importers, suppliers and installers of a product who know, or are reasonably expected to know, that the building product will or is likely to be associated with a building.

A chain of responsibility is legislated to make sure that everyone involved in the supply chain can be held accountable where a building product is found to be non-conforming. This is particularly important when health and safety risks arise from a product's use.

The concept of a chain of responsibility was first used in workplace health and safety laws, including electrical safety, and also has precedent in laws governing the heavy transport sector in Queensland.

Below is an example of the supply chain, and therefore a chain of responsibility, for a building product.



A person may fulfil several roles in the chain of responsibility e.g. they may be the product designer and importer for a building product. In these circumstances, the person must meet the duties related to each of those roles as described below.

Where a building owner directly supplies building products for use, they assume the responsibilities of a supplier under the QBCC Act.

### 3. Duties in relation to building products

The QBCC Act specifies an overarching, primary duty for all people in the chain of responsibility, as well as individual responsibilities for each class of person e.g. building product suppliers.

The Act requires that each person takes actions to meet their duties 'so far as is reasonably practicable'.

#### 3.1 What does 'reasonably practicable' mean in relation to duties under the QBCC Act?

The term so far as 'reasonably practicable' has longstanding use in law. This term is designed to take into account the circumstances in which the duty occurs.

The QBCC Act (s74AA) defines 'reasonably practicable' as meaning that which is, or was at the particular time, reasonably able to be done in relation to the duty, taking into account and weighing up all matters including:

- the likelihood of a safety risk or non-compliance risk happening; and
- the harm that could result from the safety risk or non-compliance risk; and

- what the person concerned knows, or ought reasonably to know about the safety or non-compliance risk and the ways of removing the risks; and
- the availability and suitability of ways to remove or minimise the safety risk or non-compliance risk; and
- the costs 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.

### 3.2 Primary Duty

The primary duty of each person in the chain of responsibility is described in s74AF of the QBCC Act as being:

Each person in the chain of responsibility for a building product must, so far as responsibly practicable, ensure that the product is not a non-conforming building product for an intended use.

Under s74AB(2) a product will be a non-conforming building product for an intended use if:

(a) the association of the product with a building for the use—

(i) is not, or will not be, safe; or

(ii) does not, or will not, comply with the relevant regulatory provisions; or

(b) the product does not perform, or is not capable of performing, for the use to the standard it is represented to perform by or for a person in the chain of responsibility for the product.

In order to comply with s74AF of the Act concerning compliance with relevant regulatory provisions, you need to consider if the product meets the relevant regulatory provisions that relate to its intended use. These regulatory provisions may include links to the standards referenced in the National Construction Code (NCC). <http://www.abcb.gov.au/Resources/NCC>

A product may be considered non-conforming if it does not meet the standards referenced in the NCC for the intended use.

### 3.3 How to identify conforming building products for an intended use

To satisfy the primary duty under s74AF, you must ensure 'so far as reasonably practicable' that a building product is not a non-conforming building product.

When identifying whether a building product is conforming or not, you may wish to consider the following process.

#### Step 1

When identifying building products for an intended use, first consider all aspects of the intended use, including:

- any relevant design features that may impact how the building product might need to be associated with the building or other building products;
- the consequences of the product failing;
- health and safety laws;
- environmental considerations (e.g. will the building product be exposed to weather in a coastal location);
- conformity with relevant legislative requirements.

## Step 2

Consider which building products meet the relevant regulatory provisions. These may be specified in the National Construction Code (NCC).

To do this, you will need to seek evidence that a building product meets the 'deemed to satisfy' provisions or performance solutions specified in the NCC.

This evidence could consist of, but is not limited to:

- 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.

## 3.4 Plumbing Products

Plumbing products installed in buildings in Queensland have been required to have Watermark certification since 2003 under the *Plumbing and Drainage Act 2002* and the Standard Plumbing and Drainage Regulation 2003.

The Watermark Certification scheme is administered at a national level by the Australian Building Codes Board (ABCB). The requirements for Watermark certification is specified in the *Plumbing and Drainage Act 2002*.

Under the primary duty of the new laws, it is an offence under the Act to supply plumbing products in Queensland that don't have Watermark certification as these products do not meet the relevant regulatory provisions.

This change is designed to reduce the likelihood of non-conforming plumbing products being installed in buildings in Queensland.

More information on the Watermark certification system, including a list of certified products and information on the certification process, can be obtained from the ABCB website here: <http://abcb.gov.au/Product-Certification/WaterMark-Certification-Scheme>

## 3.5 Duties relating to required information accompanying a building product

The QBCC Act (s74AG) requires that a person in the chain of responsibility has a duty to provide 'required information' to accompany a building product as it passes from them to the next person in the building product supply chain. Each person in the chain of responsibility also needs to conduct due diligence investigation on the 'required information' they receive to ensure that the QBCC Act is being complied with.

Role in the chain of responsibility	Additional Duty
Designer of a building product	The designer must ensure, so far as reasonably practicable, that if they give the design to another person who is to give effect to the design (e.g. manufacture the product according to the design) the design is accompanied by the required information for the product.
Manufacturer, importer or supplier of a building product	<p>The manufacturer, importer or supplier must ensure, so far as reasonably practicable, that when they give the product to another person that the product is accompanied by the required information for the product.</p> <p>Giving the product to another person means to sell, supply or otherwise transfer the building product to another person or facilitates the sale, supply or transfer to another person.</p>

### 3.6 What is the required information to accompany a building product?

The Additional Duty described in s74AG is to ensure a design or product provided to the next person in the chain of responsibility is accompanied by the ‘required information’.

The required information is specified in s74AG(6) of the QBCC Act as being information about the product that for each intended use of the product, states or otherwise communicates the following information:

- the suitability of the product for the intended use and, if the product is suitable for the intended use only in particular circumstances, or subject to particular conditions then describe those circumstances or conditions;
- instructions about how the product must be associated with a building to ensure that it is not a non-conforming building product for the intended use;
- instructions about how the product must be used to ensure it is not a non-conforming building product for the intended use.

The table below demonstrates some examples of how compliance may be achieved in relation to the required information to accompany building products.

The required information can be provided in several ways including by way of packaging, promotional material or instructions accompanying the building product.

Required Information	Example of compliance
The suitability of the product for its intended use	Provide evidence that the product legitimately meets the relevant standards in the NCC or other relevant regulatory provision, including the Australian Standard where applicable.

If it is only to be used in particular circumstances or conditions, what are they?	If a product is only to be used in internal dry areas or not above certain heights prescribed in the NCC.
Instructions about how the product must be associated with the building for its intended use	The type of fastener, adhesive or other mounting system to be used with the product to ensure compliance with the NCC or other relevant standards.
Instructions on how the product must be used in order to ensure that is not a non-compliant building product.	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).

### 3.7 How can the required information accompany a building product?

In order to meet the requirements of the Act, the required information, 'as far as reasonably practicable' must accompany the building product to be received by the next person in the chain of responsibility.

This can be done in a number of ways, including, but not limited to, the examples below:

- 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.

If it is not 'reasonably practicable' for the required information to accompany the building product (e.g. premixed concrete), you should ensure that the information is otherwise made available to the next person in the chain of responsibility.

To consider whether it is 'reasonably practicable' to comply with the required information provisions, you should refer to section 3.1 of this Code.

### 3.8 Duty on representations about building products

Complementing the 'required information' about building products, s74AK of the QBCC Act applies where a person in the chain of responsibility for a building product knows, or ought reasonably to know, that the association of the product with a building for an intended use, does not or will not comply with the relevant regulatory provision. The person must not make a representation, or permit a representation to be made, that the association of the product with a building for the use complies or will comply with a regulatory provision.

In other words, do not make false or misleading claims about the use of a building product that would lead to the product being a non-conforming building product if it was used in accordance with the claims being made. Representations could include information on packaging, technical data sheets, expert opinions, marketing materials, point of sale signage or verbal advice given by sales staff.



### 3.9 Duty to report non-conforming building products

Any 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.

This duty applies if the person becomes aware, or reasonably suspects, that the building product is non-conforming for an intended use.

The person is required to notify the QBCC 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.

This notification to the QBCC must be made in the approved form, which can be accessed from the QBCC's website through this link: <https://my.qbcc.qld.gov.au/s/contactsupport> or by contacting the QBCC on 139 333.

### 3.10 Duty to report safety related incidents or concerns

If a person in the chain of responsibility becomes aware, or reasonably suspects, that a non-conforming building product has caused a death or serious injury or illness for any person, or an incident that exposes a person to a risk of serious injury or illness, this is regarded as a *notifiable incident* under the QBCC Act.

Under s74AM of the Act, a person in the chain of responsibility is required to report a notifiable incident to the QBCC within two days, unless there is a reasonable excuse.

This notification to the QBCC must be made in the approved form, which can be accessed from the QBCC's website through this link: <https://my.qbcc.qld.gov.au/s/contactsupport> or by contacting the QBCC on 139 333.

### 3.11 Principles applying to duties

There are some key principles that apply to the duties of a person in chain of responsibility under the QBCC Act that can assist you in understanding your obligations in relation to non-conforming building products.

These are described in s74AD of the Act:

- a person may have more than one duty because of the functions that they perform or are required to perform;
- more than one person can have the same duty at the same time;
- each person must discharge their duties even if another person has the same duty;
- if more than one person has a duty for the same matter each person is responsible for their duty and must discharge it to the extent they have the capacity to influence and control the matter;
- the duty still applies to the extent the person would have capacity but for an agreement or arrangement purporting to limit or remove that capacity;
- a person's duty cannot be transferred to another person.

### 3.12 Due Diligence

If a company has a duty under the QBCC Act in relation to non-conforming building products, then an executive officer of the company must exercise due diligence to ensure compliance.

Due diligence is defined in the Act as taking reasonable steps to:

- acquire and keep up to date knowledge of matters about the safe use of building products;
- gain an understanding of the nature of the company's business activities relating to building products and safety risks and non-compliance risks associated with them;
- ensure the company has and uses appropriate resources and processes to manage risks and to comply with the company's duties;
- 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;
- verify the resources and processes mentioned above are being provided, used and implemented.

#### **Examples:**

A company is both the supplier and installer for a building product under an exclusive agreement with the manufacturer of the product. The executive officer of that company must fulfil the duties of both the supplier and installer of the building product.

A company is installing a building product on two construction sites at the same time. Due to their experience with the product, the installers on each site notice that the batch of the product they are using is faulty and not fit for its intended use. Due to the possible safety risks associated with the product, both installers are required to report the product as a non-conforming building product to the QBCC.

## **4 More information on Non-conforming Building Products**

For more information about non-conforming building products, please contact the QBCC's Non-conforming Building Product team at [ncbp@qbcc.qld.gov.au](mailto:ncbp@qbcc.qld.gov.au), call the QBCC on 139 333, or visit the website [www.qbcc.qld.gov.au/non-conforming-building-products](http://www.qbcc.qld.gov.au/non-conforming-building-products).

Department of Housing and Public Works:

<http://www.hpw.qld.gov.au/construction/BuildingPlumbing/Building/Pages/NonConformingBuildingProducts.aspx>