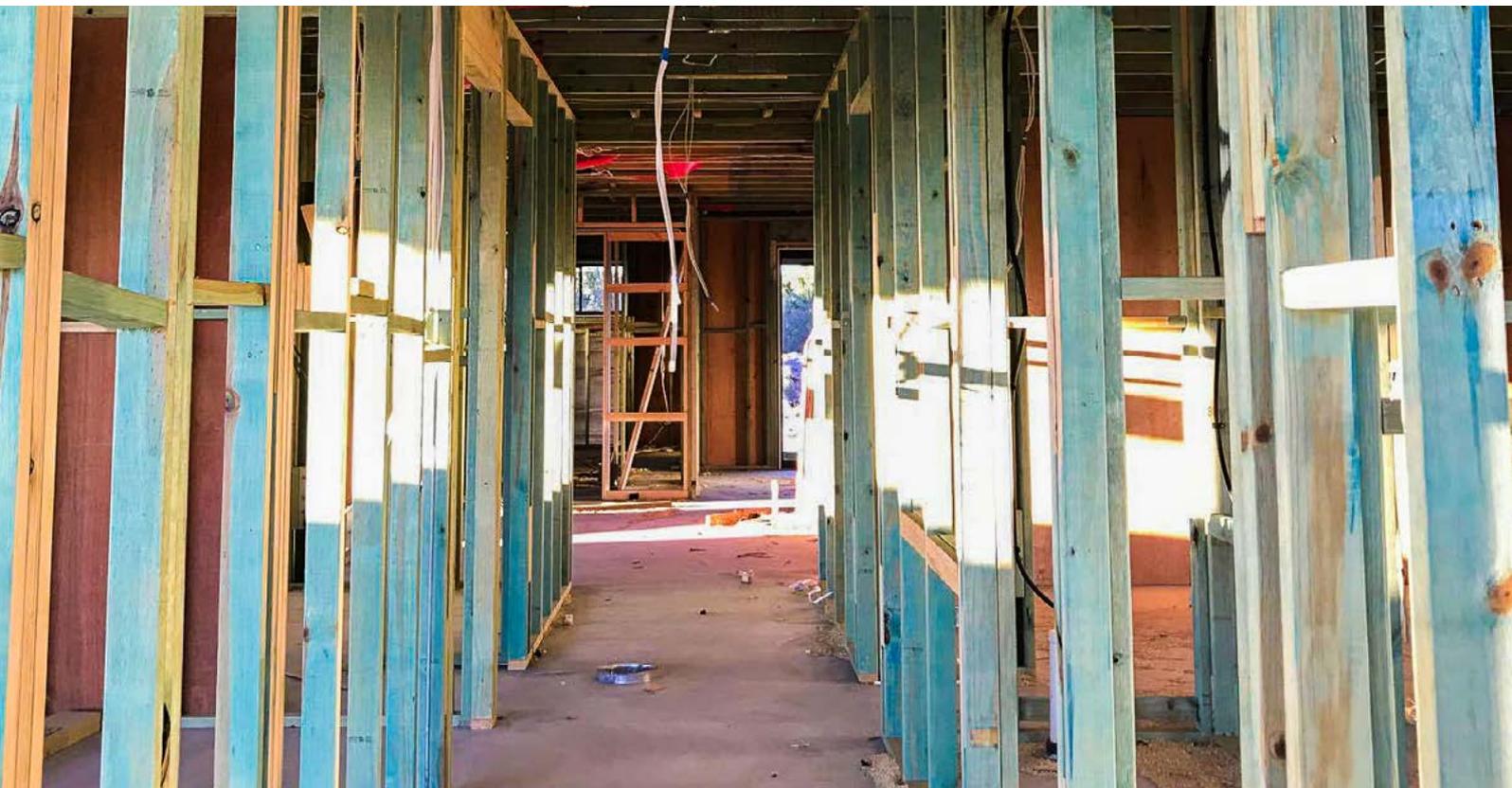


# RECTIFICATION OF BUILDING WORK

## REGULATORY GUIDE



## PURPOSE OF THE REGULATORY GUIDE

The Queensland Building and Construction Commission (QBCC) is a statutory body established under the *Queensland Building and Construction Commission Act 1991 (Qld)* (QBCC Act). Key objects of the QBCC under section 3 of the QBCC Act include:

- Regulating the building industry to ensure the maintenance of proper standards in the industry and to achieve a reasonable balance between the interests of building contractors and consumers;
- Providing remedies for defective building work; and
- Providing support, education and advice for those who undertake building work and consumers.

The QBCC adheres to the above objectives when exercising the power conferred on it by section 72 of the QBCC Act, that is the power to require rectification of building work and remediation of consequential damage.

This regulatory guide has been produced for the following purposes:

- to inform building contractors and consumers about the QBCC's decision-making process in relation to requiring rectification and completion of defective or incomplete building work and remediation of consequential damage; and
- to assist consumers and contractors in understanding their responsibilities and obligations in relation to defective or incomplete building work.

Informing the QBCC's customers of the decision making process involved in issuing directions to rectify or remedy will serve to:

- increase community awareness of and satisfaction with the QBCC's decisions; and
- promote fairness, due process and transparency when making QBCC decisions.

This document contains general statements based on typical circumstances. Where exceptional circumstances exist the QBCC may depart from its usual process.

# CONTENTS

RECTIFICATION OF BUILDING WORK REGULATORY GUIDE	2
Purpose of the Regulatory Guide	2
Overview	4
Consumer’s obligations prior to lodging a complaint with the QBCC	4
Legislation & Policies	4
Decision Making Process	5
Other Matters	6
Document Control	6

## OVERVIEW

Section 72 of the QBCC Act empowers the QBCC to direct a contractor<sup>1</sup>, whether licensed or unlicensed, to rectify building work that is either defective or incomplete or to remedy consequential damage caused by or as a consequence of the carrying out of building work. Such a direction is commonly referred to as a direction to rectify (DTR). If an unlicensed contractor is issued with a DTR, they must arrange to have the work required under the DTR carried out by a licensed contractor<sup>2</sup>.

A consumer may request the QBCC to give a DTR to a contractor if they consider the work to be defective or incomplete<sup>3</sup>. Additionally, the consumer, or the owner of a residential property adjacent to a building site, may ask the QBCC to issue a direction to a contractor to remedy any consequential damage caused to their property as a result of building work. The QBCC may also act under its own initiative to issue a DTR to a contractor.

When investigating complaints and undertaking audits of building work, the QBCC's building inspectors, in assessing whether or not they should exercise their discretion to issue a DTR to a contractor, will consider the following elements:

1. was the work building work?
2. was the work defective or incomplete?
3. who was responsible for the defective building work?<sup>4</sup>
4. would a decision to direct the contractor be unfair in the circumstances?

## CONSUMER'S OBLIGATIONS PRIOR TO LODGING A COMPLAINT WITH THE QBCC

For information in relation to lodging a complaint with the QBCC for defective or incomplete work, please visit our website via the following link:

<http://www.qbcc.qld.gov.au/building-complaints/complaints-about-defective-building-work>

Lodge your complaint as soon as possible to ensure you do not miss the following statutory timeframes:

- A claim under the Queensland Home Warranty Scheme for **structural defects** must be made within **3 months** of noticing the defect
- A claim under the Queensland Home Warranty Scheme for **non-structural defects** must be made within **7 months** of the completion of the work (and the non-structural defect must have come to light within 6 months of substantial completion);

<sup>1</sup>The term "**contractor**" can also mean "**person**" and has been used in this way for the purposes of improving understanding of this regulatory guide.

<sup>2</sup>QBCC Act s 72A(3).

<sup>3</sup>QBCC Act s 71J(1).

<sup>4</sup>The wording in the legislation is 'carried out'. However, section 71I of the QBCC Act defines who "carried out" building work broadly and includes the building contractor whose licence is on the contract for the work and a person who directly or indirectly caused the building work to be carried out.

<sup>5</sup>Effective 10 October 2014 (latest version).

<sup>6</sup>While the QBCC Act s.72A(4) provides that the 6 year 6 month timeframe may be extended on application by the QBCC, the QBCC will not bring an application unless satisfied there is sufficient evidence of exceptional circumstances to take the case so far out of the realm of the primary position that it is appropriate to request the Tribunal make an exception. See QBSA v JP Constructions Pty Ltd [11 May 1993 D012-93].

<sup>7</sup>The RBW Policy is expected to be updated and approved by Regulation. It is noted that the RBW Policy refers to a period of 6 years and 3 months whereas the legislation has been amended since the RBW Policy was made and the relevant period is 6 years and 6 months.

- A request for a DTR should be made within **12 months** of becoming aware of the defective/incomplete work or consequential damage.

## SAFETY CONCERNS

Health and safety at the site is your responsibility. The QBCC does not provide a 'make safe' service. If you have any immediate safety concerns, we recommend you take steps to mitigate any risk to occupants and visitors (e.g. restrict access to any unsafe areas).

## LEGISLATION & POLICIES

Part 6 of the QBCC Act contains the relevant provisions for DTRs.

The QBCC will also have regard to the Rectification of Building Work Policy<sup>5</sup> (**RBW Policy**) when responding to complaints about defective building work, incomplete building work or consequential damage. The RBW Policy is approved under the *Queensland Building and Construction Commission Regulation 2018* (QBCC Regulation).

The QBCC Act provides that a direction may be issued within 6 years and 6 months after the building work was completed (or left incomplete)<sup>6</sup>. For non-structural defects, the RBW Policy provides that the QBCC will consider issuing a direction to rectify within 12 months of the building work being completed. The time that has passed since completion of non-structural building work is a relevant consideration towards determining whether to issue a DTR.

### The following are examples of non-structural defects:

- chipped internal paintwork;
- sticking drawers;
- minor cracking of plasterboard.

### The following are examples of structural defects:

- leaking roof;
- leaking shower to internal walls;
- major cracking of walls.

A copy of the RBW Policy can be found on the QBCC's website via the following link<sup>7</sup>:

<https://www.qbcc.qld.gov.au/sites/default/files/Rectification%20Of%20Building%20Work%20Policy.pdf>

For further readings of the relevant Legislation, please visit our website via the following link:  
<http://www.qbcc.qld.gov.au/about-us/legislation>.

## DECISION MAKING PROCESS

### Was the Work Building Work?

A direction to rectify defective or incomplete work must relate to 'building work' as defined in the QBCC Act.

A direction to remedy consequential damage can only be for damage caused by or as a consequence of carrying out building work.

#### **"Consequential damage" is damage –**

*(a) caused by, or as a consequence of, carrying out building work at a building site (the relevant site), regardless of any intention, negligence or recklessness of the person carrying out the work; and*

*(b) to a residential property at the relevant site, containing the relevant site or adjacent to the relevant site.<sup>8</sup>*

The following are examples of consequential damage:

- the impairment of drainage at the property;
- the undermining of a fence, retaining wall or other structure along the boundary of the property;
- the compromising of the structural integrity of a building, swimming pool or wall on the property;
- the cracking, lifting or cratering of a driveway or pathway on the property;
- water penetration of the property;
- Infestation of the property by termites.

### Was the Work Defective?

The QBCC Act describes defective building work to include work that is faulty or unsatisfactory. The words 'faulty' and 'unsatisfactory' are to be given their ordinary and natural meaning. Further, the RBW Policy provides the following assistance for interpreting the term 'defective building work':

*"building work that is faulty or unsatisfactory, and includes, for example, work that:*

*a. does not comply with the Building Act 1975, Building Code of Australia or an applicable Australian Standard*

*b. involves the use of a manufactured product, and that product has been used, constructed or installed in a way that does not comply with the product manufacturer's instructions."*

The QBCC is not required to identify a non-compliance with the *Building Act 1975*, National Construction Code or manufacturer's instruction, in establishing that the building work is defective.

<sup>8</sup> QBCC Act s. 71H

<sup>9</sup> See for example *Gemini Homes (Qld) Pty Ltd v QBCC* [2014] QCAT 481.

<sup>10</sup> QBCC Act s 71I.

<sup>11</sup> See for example *Goldfield Projects Pty Ltd v QBCC* [2016] QCAT 362.

Where defects are evident, yet the cause is unclear, the building work may be determined to be defective and may be the subject of a DTR.<sup>9</sup>

The QBCC may, in some circumstances, find that work which is contrary to contractual requirements is not defective. For example, the wrong colour paint may be a breach of the contract, but may not be considered defective building work under the QBCC Act.

For a DTR, the QBCC needs to establish it is reasonably satisfied on the balance of probabilities as to whether work is defective or unsatisfactory. The QBCC will endeavour to, but does not need to, identify the exact cause of the defect to issue a DTR.

### Who was Responsible for the Defective Work?

In determining responsibility for the defective building work, the QBCC may investigate the following:<sup>10</sup>

- any contract for the work;
- any insurance notification for the work
- the person profiting from the work (e.g. the person receiving payment for the work);
- the contractor who managed the work; and/or
- the contractor who directly or indirectly causes the work to be carried out.

Where the QBCC is not satisfied on balance that the contractor is the party responsible, for example where other contractors, or the homeowner, have subsequently performed relevant works, the QBCC may find the contractor is not the party responsible for the defective work, or may find it unfair in the circumstances to issue a DTR.

The QBCC may have regard to:

- the cause of the defective work; and
- the evidence of work performed by all contractors and the homeowner.

Where it remains unclear as to which contractor was responsible for the defective building work, a DTR may not be issued<sup>11</sup> or a DTR may be issued to multiple parties, depending on the circumstances and fairness considerations.

Where a DTR is issued to more than one party, all are responsible for the rectification. If the work the subject of the DTR is not rectified satisfactorily, it may be noted as 'failure to rectify' and an infringement notice with a penalty may be issued to all parties who were issued the DTR.

## Site inspection

The QBCC will determine whether to conduct a site inspection. If a site inspection is carried out by the QBCC, the QBCC officer present will record the inspection by audio recording device.

Both parties will be informed of the proposed inspection. It is preferable for both parties to attend.

The QBCC has no power to require a person to allow anyone onto their private property. However, homeowners will be requested to provide permission for the contractor to attend the site inspection. As stated below, if defective work is identified and the homeowner informs the QBCC of their refusal to allow the contractor onto the site to rectify the defects, the QBCC will consider it is unfair to issue a DTR to the contractor in such circumstances.

## Taking into account relevant considerations

The QBCC will consider those aspects of the information and material before it that it considers are reasonably relevant to the decision whether to give a DTR. This may include the contractual terms for carrying out the building work, and matters such as actions of a consumer after the building work was completed.

## Would it be unfair to give the direction?

The QBCC must consider whether it would be unfair to the contractor to give a DTR.

The QBCC Act has provided an example that it would be unfair to issue a DTR in circumstances where the owner of a property has refused to allow the contractor to return to the property to attend to the defective work. This includes a refusal to allow the relevant subcontractor or consultant to attend the property.

Other examples of factors that may be considered in determining whether it is unfair to issue a DTR to a contractor include:

- where the defective work has been exacerbated due to the homeowner's failure to properly maintain the property;
- where the consumer has not paid the contractor for work performed;
- the extent of rectification work required when compared to the nature of the defective work.

## OTHER MATTERS

If a direction is issued, the QBCC can make a decision that the building work undertaken as a result of the direction was not of a satisfactory standard. This is a 'reviewable decision'.

The Queensland Home Warranty Scheme terms of cover also provide that the consumer is not entitled to assistance for defective work if the consumer unreasonably refused the licensed contractor access to carry out rectification work.

## Health and Safety

QBCC will not tolerate threatening or abusive conduct towards staff. If a homeowner engages in such conduct, the QBCC may withdraw its staff from the matter and close the complaint. If a contractor engages in threatening or abusive conduct they may be stopped from attending the site. A DTR may still be issued in this instance and disciplinary action may be taken.

## Penalties & Offences

Under the QBCC's legislation it is an offence for a person to fail to comply with a DTR issued by the QBCC, or to delay or obstruct compliance with a DTR. The maximum penalty for each offence is 250 penalty units.<sup>13</sup>

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## DOCUMENT CONTROL

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<b>Date</b>	17 September 2020
<b>Document history</b>	v6.0
<b>Citation of relevant legislation</b>	<i>Queensland Building and Construction Commission Act 1991 (Qld); Queensland Civil and Administrative Tribunal Act 2009 (Qld); Queensland Building and Construction Commission Regulation 2018 (Qld)</i>
<b>Disclaimer</b>	This regulatory guide is of an informative nature only and does not constitute the provision of legal advice.

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<sup>12</sup> QBCC Act ss72C and 73.

**Need more information?**

Visit [qbcc.qld.gov.au](http://qbcc.qld.gov.au) or call us on 139 333.