

NON-CONFORMING BUILDING PRODUCTS (NCBPs)

FREQUENTLY ASKED QUESTIONS



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If you have any questions as to how the NCBP laws apply to you, you should obtain appropriate independent professional advice regarding how to discharge your duties under the QBCC Act and achieve compliance with the relevant regulatory provisions for building products. This is especially important if you (or your company) intend to later rely upon that advice to demonstrate satisfaction of your duties under Part 6AA of the QBCC Act or other legislative obligations.

Reasons for the Laws

1. Why is this legislation necessary?

- QBCC had limited ability to regulate building products.
- The QBCC's powers were primarily focused on active building sites and building industry licensees.
- The NCBP legislation makes sure that there is proper responsibility taken for building products by those in the building product chain of responsibility. It also gives the QBCC the ability to investigate and ensure building products are suitable for their intended use.
- This promotes the safety of all Queenslanders in our buildings.
- The NCBP laws came into effect 1 November 2017.

I want to report a product

2. How will QBCC act on reports about non-conforming building products?

- When the QBCC is made aware of a potential NCBP, the QBCC will undertake a preliminary assessment of the risk and extent of use of the product.
- The QBCC can assess whether it is necessary to require remedial action, to take disciplinary action or to prosecute for offences.
- To report a suspected Non-conforming building product please use one of the forms available on qbcc.qld.gov.au/complaints-disputes/report-non-conforming-building-product-incident

3. How will QBCC determine who is responsible for a non-conforming building product?

- The QBCC will conduct an investigation to determine who in the chain of responsibility has contravened their duty.
- It is possible for more than one person in the chain of responsibility to have the same duty concurrently.

I want to report asbestos

4. Do the NCBP laws cover risks from asbestos containing materials?

- Yes. The NCBP laws impose obligations on the entire building product supply chain to ensure building products going forward are both compliant and safe.
- It is not intended that the QBCC will cross into the existing regimes for asbestos management and detection in Queensland.
- The laws support the regulating bodies in their current regulatory roles and maintains their established roles to ensure the relevant asbestos regulator can act swiftly to address risks from asbestos containing materials.

- Any issues and appropriate government responses to asbestos containing materials are supported through collaborative forums such as the Government's Asbestos Inter-Agency Group.
- Currently, asbestos is managed and controlled in Queensland by 10 main statutes and two codes of practice. These are administered by state government agencies and local government.
- The Office of Industrial Relations, through Workplace Health and Safety Queensland is the relevant regulator for the strategic management and coordination of asbestos detection and removal.

Can I lodge a complaint about an unsafe appliance?

5. Are electrical, gas and other appliances 'building products'?

- No. The intention is to capture products that are used, or could be reasonably used, in the construction of the building and are regulated to ensure that they comply with the requirements of the building assessment provisions of the *Building Act 1975*.
- It is not intended to capture products not forming part of the building or plumbing and drainage work for a structure.

Confidential complaints

6. Can I make a confidential complaint?

- If a person would like to make an anonymous complaint, they are able to do so. However, without the ability for the QBCC to contact the complainant and ask for further information, the ability for the QBCC to investigate may be hampered.
- If you are a person in the chain of responsibility, by law you must report a NCBP, including if you suspect a notifiable incident occurred as a result of a NCBP and if you don't it is an offence. Therefore, it is in your best interest to include your details. Refer to s.74AL and s.74AM of the QBCC Act for more information. Refer to QBCC's website here for more information about who is in the chain of responsibility qbcc.qld.gov.au/complaints-disputes/report-non-conforming-building-product-incident
- To report a suspected Non-conforming building product please use one of the forms available on qbcc.qld.gov.au/complaints-disputes/report-non-conforming-building-product-incident

Product Recall Orders

7. Can I be made to comply with a product recall order?

- The Minister has the ability to issue a recall notice for a building product to a person who designs, manufactures, imports, supplies or installs a building product. An architect or engineer who, in designing a building, specifies that a building product the subject of the order be associated with the building.
- The Minister can issue a recall order for a product that has been installed.



- Where a product has been installed, the Minister may issue the notice to the installer of the product. The installer will be responsible for compliance.
- The Minister may also issue a recall order, for the same product, to other persons in the supply chain to ensure that the product is removed from the marketplace.
- A person who designs, manufactures, imports and supplies a building product, and sometimes architects and engineers, have a responsibility to comply with the requirements of a recall order or corresponding recall order. This includes building product recalls under a law of another State.

Licence Cancellation

8. Can the QBCC suspend/cancel my licence if I buy or use an NCBP?

- There are no provisions in the Act that allow the QBCC to suspend the licence of a builder or other licensee because there are NCBPs on-site.
- If it has been established that there has been a breach of duty, such as the duty to ensure that a product is not a non-conforming building product for an intended use, disciplinary action can be taken by QBCC, which may result in the suspension or cancellation of a licence.

QCAT

9. Why is QCAT prevented from 'staying' some decisions?

- QCAT is prevented from staying:
 - » a decision to direct a person in the chain of responsibility to take action to remove or minimise safety risks
 - » a decision to direct a person contravening a duty to remedy or prevent the contravention
 - » a decision to issue a stop work notice
 - » a decision to seize a dangerous place or thing
 - » a decision of an investigator to give a direction about use of a product or about action at a place.
- This is due to the emergent and safety issues associated with these decisions.

- In order to balance the interests of safety with natural justice, QCAT can hear such a review of these decisions by way of an expedited hearing.

Role of the Office Of Fair Trading

10. What is the role of the Office of Fair Trading in regulating non-conforming building products?

- The ACCC is responsible for enforcing the *Competition and Consumer Act 2010*, which includes the Australian Consumer Law.
- The ACCC is considered a generalist regulator and building regulators are considered to be specialist regulators in their area.
- Where possible, the NCBP laws will regulate building products with the support of the relevant jurisdictional regulator, including the Office of Fair Trading.

Queensland Home Warranty Scheme

11. Will the Queensland Home Warranty Scheme assist?

- The Scheme provides consumers with cover for residential building work where a licensee fails to complete residential building work or performs, and fails to rectify, defective residential building work.
- A consumer is not currently entitled to assistance under the Scheme for loss caused by or contributed to by a defective product.
- However, for incomplete and defective work claims, a consumer will not necessarily be excluded from receiving assistance because of the presence of an NCBP.
- A consumer claiming under the Scheme may also be able to pursue their builder, or another party at-fault, civilly if a payout under the Scheme cannot assist. It is recommended that advice be sought from a legal practitioner with experience in building disputes.
- Such actions may be assisted by schedule 1B of the QBCC Act. It provides an implied warranty in all domestic building contracts that building materials are good and suitable for purpose. Breach of the warranty (which applies for six years for structural defects and for one year for non-structural defects) may ground a civil action.

Powers of QBCC Investigators

12. Why have the powers of QBCC investigators been increased?

- Expanding the powers of QBCC investigators generally will not only ensure that they have the appropriate powers to investigate instances of NCBPs, it will also improve ability to detect NCBPs in the first place.
- Previously, the QBCC had limited ability to investigate complaints not involving an active building site, now these powers have been broadened to enable the detection and rectification of NCBPs.
- Currently, the QBCC has limited ability to investigate complaints not involving an active building site.
- To assist the QBCC in addressing issues related to NCBPs, QBCC investigators have been provided with a range of powers to complement their expanded functions.
- These powers align with the powers of other safety investigators (e.g. Work Health Safety and Electrical Safety) and include powers to:
 - » enter places
 - » take action after entry (make enquiries etc.)
 - » require the name and address of persons
 - » require documents
 - » require attendance and to answer questions
 - » seize things including evidence, NCBPs and dangerous places
 - » have building products examined
 - » give directions in relation to an installed NCBP and/or dangerous situations
 - » take direct action to make a place safe.
- Each of these powers may only be exercised in specific circumstances and incorporate a legislative threshold, such as presence of a risk of injury or illness.

13. What safeguards are there on the powers of entry?

- The QBCC requires additional powers of entry to ensure it is able to enter all places where a NCBP might be present.
- A QBCC investigator is only able to enter a residence with consent, or under a warrant, and only for compliance reasons.
- If there is consent, the investigator may only enter under any conditions of the consent and must cease if consent is withdrawn.
- The investigator must tell the occupier and obtain consent acknowledgement. Often the investigator will ask the occupier to sign a document which acknowledges that the following has been explained to the occupier:
 - » the purpose of the entry and the powers to be exercised
 - » that the occupier is not required to consent
 - » that the consent may be given subject to conditions and withdrawn at any time.
- If consent is not given, the QBCC may apply to a Magistrate to obtain a warrant.
- The Magistrate must be satisfied that there are reasonable grounds for entry. This judicial overview makes sure that a person's privacy is protected.

Stop work orders

14. Why are stop work powers needed?

- The ability of the QBCC Commissioner to issue stop work orders will mean that the QBCC can take swift action against contraventions or repeated contraventions of the QBCC Act.
- This will minimise the risk to consumers and licensees.
- For example, if a person is about to use, supply or sell a NCBP, the QBCC is able to take action.
- The person will be given five days to respond to the proposed stop work order to ensure that the process is quick.
- QCAT is empowered to hear expedited hearings about the issue of a stop work order.

Cost to Industry

15. Will there be increased cost to industry?

- The legislative duty on those in the chain of responsibility for building products simply ensures that they are doing what they ought to already be doing which essentially is making reasonably sure that their building products are safe and fit for intended purposes.
- This means, for example, that if a person supplies a building product only to be used in or on a low-rise building, that person has a duty to reasonably ensure that the product is not going to be used on a high-rise building.

Compliance

16. How will I know if I am complying with the laws?

- The Department of Energy and Public Works has produced a Code of Practice which can be located at epw.qld.gov.au/__data/assets/pdf_file/0019/4654/nonconformingbuildingproductscodeofpractice.pdf which will assist industry in complying with NCBP laws.

17. Are persons who deliver products captured by the legislation?

- No. The intent of the laws is to capture product designers, manufacturers, importers and in some cases architects, engineers and installers of building products.
- A person is not intended to be captured simply because, for example, they deliver a building product to a site.

18. What information can a person in the chain of responsibility rely on from others higher up?

- Each person in the chain of responsibility must ensure that so far as reasonably practicable, a product is not a NCBP for an intended use.
- When provided a document or information from another person in the chain of responsibility, a person must satisfy themselves as far as reasonably practicable that the product is not a NCBP.
- 'Reasonably practicable' is defined in the QBCC Act. The Department of Energy and Public Works has produced a Code of Practice which can be located at epw.qld.gov.au/__data/assets/pdf_file/0019/4654/nonconformingbuildingproductscodeofpractice.pdf, which will assist industry in complying with NCBP laws.

In October 2017, the Department of Housing and Public Works issued a Non-conforming Building Products Code of Practice which can be found [here](#).

19. How is a person in the chain of responsibility expected to know the intended use of a product?

- Intended use, for a building product, means a use for which the building product is intended to be, or is reasonable likely to be, associated with a building.
- The product designer, manufacturer, importer, installer, and supplier of the product must ensure that, so far as is reasonably practicable, that when they give the product to another person, that it is accompanied by the required information (section 74AG).
- Therefore, if a person intends a product to be used for a particular purpose, they must be satisfied that the building product is not non-conforming for that particular purpose. This could mean that they must satisfy themselves that their product is safe for this use and compliant with each applicable standard called up by the National Construction Code.
- Ideally, this would mean that the information would be supplied either on or with the product, so that other parties in the chain of responsibility can attest to the suitability of the product for the intended use.

20. Do persons outside Queensland have to comply with the NCBP laws?

- Anyone who is undertaking business in Queensland is required to comply with the NCBP laws.

Required Product Information

21. What product information does the installer need to provide for a completed building? Will it relate to the building certification?

- This relates to section 74AG.
- The requirements for product information are additional to the current building regulatory system whereby the building certifier, builder and subcontractor work together to collect and assess documentation to ensure that a building complies with the *Building Act 1975*.
- The laws impose an obligation on installers to provide 'accompanying information' (section 74AG(4)) to the owner of the building. The accompanying information may be prescribed by regulation.
- The intent of this section is to ensure that manufacturing instructions or any other information relevant to the product are provided to each person in the chain of responsibility so that they may ascertain the product designer or manufacturer's intended use and installation method to avoid the product from being non-conforming.

Role of Certifiers

22. Do building certifiers check for NCBPs as part of their role?

- Yes, but building certifiers cannot be expected to detect all non-conforming building products, such as products that contain or have been treated with harmful or banned substances.

Incident Reporting Obligations

23. Do the reporting obligations to QBCC replace my obligations to notify other agencies of an incident?

- No. You still need to meet your normal reporting obligations, such as those to Workplace Health and Safety, Electrical Safety Office, Queensland Health and other regulators.
- It is important to ensure the relevant regulators are all notified because:
 - » the issue may be associated with an entity that is licensed by a number of the different regulators involved; and
 - » each of the respective regulators has different regulatory obligations in relation to such hazardous risks/situations.
- The NCBP laws ensure QBCC is directly notified of safety matters allowing it to take immediate action as well.
- These laws require licensees to notify the QBCC about the death or serious injury of a person on a work site, or any incident on a site that presents a serious work health and safety risk, such as a partial building collapse or electrocution. Licensees are required to report non-compliance with a notice or injunction issued by Workplace Health and Safety or the Electrical Safety Office.
- This will enable a coordinated, multi-agency response.

24. Should I report a NCBP?

If a person in the 'chain of responsibility' for a building product becomes aware, or reasonably suspects, that the building product is a non-conforming building product (NCBP) for an 'intended use', the person must report the matter to the QBCC as soon as practicable but within 2 days after becoming aware or reasonably suspecting the NCBP. If the person is aware a 'notifiable incident' was or may have been caused by the use of the building product, this must also be reported to the QBCC.

If a building product is a non-conforming building product (NCBP) for an intended use AND a person in the chain of responsibility for the building product becomes aware, or reasonably suspects, that a 'notifiable incident' was or may have been caused by the use of the building product for the 'intended use', the person must report the matter to the QBCC as soon as practicable but within 2 days after becoming aware or reasonably suspecting the notifiable incident was or may have been caused by the NCBP.

The above notifications must be given in the approved forms and penalties apply for not notifying the QBCC if required.

Refer to s.74AL and s.74AM of the QBCC Act for more information.

'Intended use' is a defined term in the QBCC Act and means for a building product, a use for which the building product is intended to be, or is reasonably likely to be, associated with a building.

A 'notifiable incident' is a defined term in the QBCC Act and means:

- (a) the death or serious injury or illness of a person; or
- (b) an incident that exposes a person to a risk of serious injury or illness.

Legislation also requires that if a licensee becomes aware that a 'notifiable incident' has occurred on a building site under the licensee's control or on which the licensee is carrying out building work, then the licensee must give the QBCC notice of the safety matter.

The notice must be given in the fastest way possible in the circumstances by telephone or in writing. Penalties apply for not notifying the QBCC.

Refer to section 54A of the QBCC Act for more information.

Confidentiality

25. How is my information protected?

- The confidentiality requirements apply to persons exercising a power or performing a function under the QBCC Act. This could include QBCC or departmental officers, Board members or the Minister.
- Exceptions to the confidentiality requirements are only provided where the disclosure is made with a person's consent, to a Minister or to a court, tribunal or authority, or to the extent necessary for:
 - » the exercise a power or performance of a function under the QBCC Act;
 - » administering, or monitoring or enforcing compliance with the QBCC Act, *Building Act 1975* or another Act prescribed by regulation; or
 - » administering or enforcing another Act to lessen or prevent serious risk to public safety.
- Instances of when information may be disclosed could include where:
 - » the Minister must make a public statement or warning about an NCBP
 - » the QBCC is required to make submissions to the Queensland Civil and Administrative Tribunal
 - » the QBCC provides information to the Department to inform policy and legislation development
 - » the Minister may brief his or her colleagues on an emergent issue in the building and construction industry that requires a wider Government response.

Legislative Interpretation

26. What does 'reasonably practicable' mean?

- 'Reasonably practicable' is defined in section 74AA of the QBCC Act to mean taking account of:
 - » 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 concerned knows, or ought reasonably to know, about:
 - the safety risk or non-compliance risk
 - and ways of removing or minimising the risk
 - » the availability and suitability of ways to remove or minimise the safety risk or non-compliance risk;
 - » 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.
- The Department of Energy and Public Works has produced a code of practice which can be located at www.epw.qld.gov.au/_data/assets/pdf_file/0019/4654/nonconformingbuildingproductscodeofpractice.pdf, which will assist industry in complying with NCBP laws.

27. What does 'safe' mean?

- 'Safe' and 'reasonably practicable' are defined terms in the QBCC Act. Visit qbcc.qld.gov.au/worksite-building-practice/non-conforming-building-products/what-are-non-conforming-building for more information.
- 'Safe' is defined in section 74AA of the QBCC Act to mean:
 - » removing, as far as reasonably practicable, all risks of injury or illness to a person; or
 - » if not reasonably practicable to remove a risk of injury or illness, the risk has been minimised so far as practicable.

28. If a product complies with the National Construction Code, how could it not be safe?

- It is possible for a product to comply with the building assessment provisions of the *Building Act 1975* and specifically an Australian Standard called up by the National Construction Code (NCC), but still not satisfy the meaning of 'safe'.
- For example, windows that comply with all glazing standards called up by the NCC may be unexpectedly shattering causing broken glass to fall on passers-by. That would mean the windows are not safe and therefore a non-conforming building product under the laws.

Vexatious Complaints

29. How will vexatious complaints be managed?

- The QBCC has robust internal policies relating to complaints management.
- The QBCC currently receives complaints about licensees including the performance of building work and can receive vexatious complaints.
- The QBCC will manage complaints relating to NCBPs, including how to appropriately deal with vexatious complainants.

Information Sharing

30. Can my information be shared with other regulators?

- Yes. The laws allow QBCC to enter into information-sharing arrangements with other agencies, including Queensland and other state Government departments, health and safety regulators, local governments and agencies with Commonwealth jurisdiction.

Legislation

The NCBP legislation can be found at www.legislation.qld.gov.au/view/html/inforce/current/act-1991-098#pt.6AA, by accessing Part 6AA - Building Products in the QBCC Act. The QBCC Act defines key terms including:

- building product
- non-conforming building product
- person in the chain of responsibility
- safe
- intended use
- reasonably practicable
- required information
- notifiable incident.

For more information

Visit qbcc.qld.gov.au or call us on **139 333**.

