

13 October 2017

Email: bip@hpw.qld.gov.au

Subject: Non-Conforming Building Products Code of Practice

Dear Sir/Madam,

Thank you for the opportunity to provide feedback on this important document.

We note from the non-conforming products legislation that the Code of Practice is intended to be a document that “states a way of discharging a duty a person has under this division.” The division being “Division 2 duties relating to building products”.

As a starting point therefore, the Code needs to address each of duties under the legislation and only the duties. It needs to be a clear, concise and practical guide to fulfilling obligations arising from the duties. The draft Code currently contains detail around how the Queensland building and Construction Commission will exercise their new powers. This is not the appropriate and should be removed.

To note, in providing our comments we have assumed that it is the government’s intent to include all the necessary detail in the Code of Practice and not the regulations that were included in the legislation.

DUTY		ISSUE FOR THE CODE OF PRACTICE
74AF	Ensure a product is not a non-conforming product	<p>Whether a product is a non-conforming product for an intended use must be determined by the requirements of the National Construction Code (NCC).</p> <p>Part A2 of the NCC covers the suitability of materials and A2.2 specifically details ‘evidence of suitability’ which is to be used to establish product conformance. This must be the starting point for the Code of Practice.</p> <p>The Code of Practice would therefore draw from the existing resources used to establish ‘evidence of suitability’. The Australasian Procurement and Construction Council’s “Procurement of Construction Products: A guide to achieving compliance” is a useful</p>

		<p>resource that clearly details an appropriate process to determine 'evidence of suitability'.</p> <p>In addition, there is a suite of third party certification schemes that can be used to establish conformance. Again, these are detailed in the Australasian Procurement and Construction Council guide. Schemes which have JAS/ANZ or NATA accreditation can be relied upon and should be referenced in the Code.</p>
74AG	Required information	<p>The current draft does not provide enough detail or practical guidance on the 'required information' that is to be passed through the chain.</p> <p>Specifically, industry needs to be clear on the information that the installer can require of the supplier / manufacturer and the information that is required to be passed onto the owner.</p> <p>Specific questions that we have of the Code include:</p> <ul style="list-style-type: none"> • Will suppliers have a responsibility to ensure that the 'required information' is clearly visible at the point of purchase (that is labelling on a shelf, details on a delivery note) or will it be enough to have the information to hand if requested (under the counter or on a website)? • Can the information be very simple at one level, a certification logo on the product packaging? What products will require more detailed information? • Will there be a requirement for all information to be in plain English? <p>We expect that there will be different ways of providing the information and suggest the Code detail the criteria that must be met and then include specific examples or scenarios that illustrate how the criteria can be met.</p> <p>When it comes to the end of the chain of responsibility and the information that needs to be passed to the owner this needs to directly link to the existing certification process.</p> <p>In the Code as currently drafted, the 'required information' on every building product will need to pass all the way through to the owner. For a new building this can run into the thousands of products and is unworkable.</p> <p>The Code needs to provide guidance on how long to maintain records and needs to be bounded.</p>

74AH	Recalls	<p>The Code needs to provide guidance on how a person “ought reasonable to know” that a building product is the subject of a recall, especially in circumstances where it is under the law of another state.</p> <p>Government needs to ensure that it is easy to know that a product has been recalled. We therefore ask for single Australia-wide register of all recalled building products.</p>
74AI	Executive officer / due diligence	<p>The Code needs to be clear when an installer can rely on representations from higher up the chain. If, as a responsible person, you have been passed the ‘required information’ from someone higher in the chain it should serve as due diligence. That is, you should be able to rely on that information and not be required to source the information again from first principles; undertake your own testing.</p> <p>A common industry practice is for suppliers to include clauses in the fine print that remove or limit their liability in the event that their product is found defective. The Code is an opportunity to make clear that this practice is no longer acceptable.</p>
74AK	Representations	<p>It needs to be made clear that it will be what a reasonable person would expect the “intended use” to be. For example, for products such as a tie down rod or a tap which are nearly always used in building work, there can be no loophole for a manufacturer/supplier to claim that the intended use is not for a building and therefore avoid their duties under the legislation.</p>
74AL	Notify NCP	<p>The Code needs to provide guidance on what “becoming aware or reasonably suspecting” means in practice. Does notification need to be provided where there is a first suspicion, does there need to be certain grounds for the suspicion or will there be an evidence test?</p>
74AM	Notify notifiable incident	<p>We would expect the Code to include details of the “approved form”.</p>

Given the legislative intent of the Code, further consideration also needs to be given to the scope of the document. Specifically,

- The Code cannot be silent on the role that product specifiers play in the chain of responsibility. Architects, building designers and engineers are integral to the building chain and therefore need to form part of the chain of responsibility. It needs to be clearly articulated in the Code that installers can rely on the product specification information provided by these building professionals.

- Similarly, the role of builder certifiers (building surveyors) and plumbing inspectors with respect to the chain of responsibility needs to be clearly set out in the Code. In the majority of cases it will be the certifier or inspector who identifies a non-conforming product.
- Electrical products need to be explicitly included in the Code. While they can now be a non-conforming product under the definition of the legislation they have always been regulated outside the NCC and therefore not historically regarded as “building products”. The Code needs to be explicit that this is no longer the case.
- The Code should also be explicit on circumstances where the owner becomes the supplier, taking on the duties in the chain of responsibility.

IMPLEMENTATION

While important, the ‘information requirements’ are also likely to become an onerous responsibility. Government has an important facilitating role here. In considering the implementation of the Code, we ask that the government consider a central store of information to improve the efficiency of the system. This can build on the initial non-conforming product website provided by the Australian Building Codes Board. It could take the form of a central register where manufacturers are responsible for uploading the ‘required information’ for their products.

We also ask that the government consider consistent labelling, similar to the European “CE system”.

Local authorities should also be required to keep the documents provided by the certifier for each building in their jurisdiction.

Please do not hesitate to contact me if I can provide further assistance.

Regards,



Dyan Johnson
Manager – Policy & Economics