

Building Product Safety FAQs

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When will these reforms commence?

If passed by Parliament, it is proposed that these changes will commence in 2024.

Why are these reforms necessary?

Non-conforming building products pose a significant risk to health and life safety, as their use threatens the integrity of a building, putting all those who enter and use the building or building site potentially at risk. The use of non-conforming building products within a building can also impose significant costs on owners to rectify damages or undertake remedial actions.

Two recent national examples have highlighted this issue: the Melbourne Lacrosse Tower fire in 2014 and the recall of Infinity and Olsent-branded cables in 2015, both of which had the potential to cause loss of life or serious injury. A contributing cause to the rapid vertical spread of fire at the Lacrosse Tower was the combustible external aluminium wall cladding on the side of the building. The Infinity and Olsent-branded cables were found to have poor quality insulation (plastic coating) which degrades at a faster rate and therefore fails to meet electrical safety standards. While fortunately there was no loss of life in the Lacrosse Tower fire, Infinity cables continue to pose risks.

Do the reforms apply to all building products?

The reforms will apply to all products, materials or other things that could be incorporated into, connected to or otherwise installed in a building by the way of building work. It does not include asbestos or asbestos products.

Building work means construction, alterations or addition to a building or the repairs, renovations, decoration or protective treatment of a building.

Examples of regulated building products include timber, windows, doors, electrical and plumbing components but would not include items such as gas or electrical appliances such as stoves (these are regulated under separate legislation).

What is a non-conforming building product?

A non-conforming building product is a building product and material that:

- does not, or will not, comply with the National Construction Code or relevant regulatory provisions or instruments, or
- the product has incorrectly been represented by a person in the chain of responsibility about its quality, features, capability, performance or compliance (see the below paragraph under Who will be responsible for ensuring building products are compliant? for information on the chain of responsibility); or
- the intended use of the product is unsuitable or does not comply with the National Construction Code or relevant regulatory provisions or instruments.

An example of this is a building product that is labelled or described as being *non-combustible* but which is actually combustible is a non-conforming building product.

A building product that *is combustible*, and described as such, but is used in a situation where a non-combustible product is required under the National Construction Code, is not suitable and is also a non-conforming building product.

How is a person in the supply chain expected to know the ‘intended use’ of a product?

If a person intends for a building product to be used for a particular purpose, they must be satisfied that the building product is not a *non-conforming building product* for that particular purpose.

This could mean that they must satisfy themselves that their product is compliant with each applicable standard called up by the National Construction Code.

The information that is made available or provided with the product should represent the uses of the product. If the product can be used for a number of purposes, information should be given for the ways that the product can be used in a compliant and conforming way, including uses that would not comply or conform.

Responsibilities and new duties

Who will be responsible for ensuring building products are compliant?

The proposed new requirements will mean that everyone in the supply chain including the designers, manufacturers, importers and suppliers of a building product, has a responsibility to ensure the building product is safe and compliant for its intended use. Company directors will also be held responsible as part of the supply, where applicable.

Non-conforming products are often costly to rectify and are often difficult to replace once they have been installed. These costs currently are falling on the builder, the installer, the building owner or the strata title community.

By imposing duties on all persons in the building product supply chain the responsibilities are shared across all participants in the supply chain.

Will a certifier be a part of the supply chain?

Building certifiers will not form part of the supply chain as they cannot be expected to detect all non-conforming building products. Although a certifier may rely on the information or representations from suppliers, manufacturers or importers about the suitability of building products to ensure they have been used for the intended purpose.

What will my new responsibilities be if I am an architect or building designer?

Persons involved in the design or writing any plans or specifications for a building must ensure that any products, materials or systems specified or approved for use in their designs are appropriately approved, fit for purpose, and meet the performance requirements relevant to their use. This may mean seeking out additional information to satisfy yourself that the product satisfied these requirements.

What will be my new responsibilities if I am a builder?

Before a product or material is used, the builder, installer or other specialist tradespeople installing or building with products and materials should be satisfied that the product is not a non-conforming product.

The builder must ensure that the product or material meets relevant standards for its intended use under the National Construction Code or other relevant standards and will be installed consistent with the limitations specified in the information provided by others in the supply chain.

There is also a requirement for the person installing a product to provide certain information to the owner on completion of the building work, including that they have used products that comply with the relevant standards and building approval and any information necessary to ensure proper maintenance of the product.

Will I need to have insurance to protect me against building products that may be non-conforming in the future?

Under the *Design and Building Practitioners Act 2020*, any person who carries out construction work already has a duty to exercise reasonable care to avoid defects. The duty of care also applies to manufacturers or suppliers of building products used for building work.

Builders, developers, tradespeople and owner-builders undertaking residential building work, also have obligations under the statutory warranty scheme for the work they conduct and materials they supply during the course of a construction arrangement.

Although persons in the chain may not be legally required to hold insurance, they all have ongoing obligations and duties in relation to building products they design, use or supply.

How will the new laws affect me as a homeowner?

The new laws aim to eliminate the use of unsafe building products by imposing responsibilities on those involved at the earliest stages of a typical building supply chain. This will help provide greater safety and certainty for homeowners and save money by preventing costly rectification works.

Homeowners can assist by taking the following steps to reduce the likelihood of non-conforming building products being installed in your home.

- If your project requires designs, including work covered by the *Design and Building Practitioners Act 2020*, ensure that your designer is insured and provides you and your builder clear information on what products must be used to ensure their designs comply with the National Construction Code.
- Choose a tradesperson that is licensed and insured and understands they are legally required to use building products that comply with the standards under the National Construction Code.
- Choose the right building products for the job. If you are purchasing building products make sure you check the information with a licensed tradesperson. If your builder is

supplying the product, check with them that the product meets the required standards. Check that plumbing products have the relevant WaterMark certification.

Does the chain of responsibility capture developers, homeowners and/or testing authorities?

These classes of persons are not captured in the supply chain and therefore do not have any prescribed responsibilities. Although these classes may have influences on the products selected, it will be the responsibility of the designer and builder to ensure the products are compliant and suitable for the use.

If you are an owner-builder undertaking residential building work, then you will be captured as part of the supply chain.

This is still an open discussion and may be changed based on feedback received through public consultation process.

Information requirements

What information should be supplied or made available about a product?

All building products need to have information accompanying them or made easily available to help the next person in the supply chain decide whether the product is suitable for its intended use. This could be information (depending on the product) that demonstrates or outlines:

- the suitability of the product for its intended use.
- how the product legitimately meets the relevant Australian Standards for that use
- the conditions and circumstances in which the product can be safely used, for example, in internal areas or not above certain heights
- how the product should be installed, for example, the type of fastener, adhesive or mounting system to ensure National Construction Code compliance
- how the product must be used to remain compliant with the National Construction Code
- how the product should be maintained to ensure it performs and operates correctly and as intended.

It will be illegal to supply a building product with labelling, packaging or promotional material which makes untrue or misleading claims about the building product and how its intended use meets the relevant building standards. If you do this, you may be liable for misleading or false advertising and any defective work that is caused because of the misleading information you have provided.

Can a person rely on the information given by another in the supply chain?

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 non-conforming building product.

Reasonably practicable means reasonably able to be done by the person in relation to the duty at a particular time, taking into account all relevant matters.

For example, the person would need to consider and weigh up all information made available about the product. The manufacturer's instructions or a product statement describing its use and a statement that the product conforms to the National Construction Code (as the product has a CodeMark or WaterMark Certificate of Conformity) would satisfy this requirement.

What happens if a manufacturer does not provide the information for a building product?

It is a duty of all persons in the supply chain to provide information about the building product to other persons in the chain. Failure to do so may incur a penalty of up to \$165,000 for a corporation and \$55,000 for an individual. If you have not been given information by a person that supplies you with a product you must immediately seek out that information before supplying the product onto another person.

As a builder what information do I need to provide to the owner of the building?

The builder will be required to provide certain information to the owner in relation to the building products they have used. For example, information related to the maintenance required to ensure the product continues to perform or operates as intended.

The information that is required to be given or made available to the owner will be prescribed in the Regulation. Further work and consultation will be required in developing the supporting Regulation which will occur after the Bill passes through Parliament.

This consultation will ensure that building owners and occupiers have sufficient information to properly maintain the building without imposing an undue burden on builders with respect to the information they must pass on.

There are a lot of fraudulent certificates provided for building products especially from overseas. How is the builder meant to know what is real?

There may be circumstances where fraudulent documentation is provided with a product that makes a false claim that a product's performance meets specific standards or codes or has been tested and meets specific requirements when it doesn't. This may include fraudulent certification or test results.

All people in the chain of responsibility must satisfy themselves as far as *reasonably practicable* that the product is not a non-conforming building product. If you are concerned that you have received a fraudulent certificate you need to take steps to verify the accuracy of the certificate. If in doubt, find a more reputable supplier as you may be liable for the product's non-compliance if you have not taken reasonably practicable steps to ensure the product is not a non-conforming product.

A person or corporation providing false or misleading information will be guilty of an offence and can incur a penalty of up to \$165,000 for a corporation and \$55,000 for an individual.

The NSW Government is developing a Building Trustworthiness Indicator (a blockchain based product that provides a ledger of inputs of a building) that will bring together the products and design certificates of compliance for each building. This tool will show what

products were used, who made them, what testing certifications are held and, who installed and certified building work. So, the quality for the certification process can be assessed at the point that that information is uploaded into the tool. It is expected that this will provide more confidence in the accreditation and certification process to that point. Further information on the Building Assurance Solution is available on [NSW Building Commissioner website](#).

How will the substitution of products be managed?

Product substitution occurs when a product is submitted for third party certification testing and after the certification is granted, the manufacturer or supplier alters it and does not retest or recertify the product. Product substitution is also when a seemingly identical (and potentially non-conforming) replacement building product is offered or provided.

Substituting products that have not been tested or comply to codes or standards may be risky and lead to product failure and reduced performance of the building. It may also lead to high rectification costs, penalties or legal action.

It is the responsibility of a person that sells, supplies or otherwise transfers the product to another person, or facilitates the sale, supply or transfer of the product to another person to ensure the products are safe and comply with the National Construction Code or any laws or instruments that apply to the product.

There are also counterfeit building products in the market which are an unauthorised copy of a building product, often created with the intention to deceive. They are sold to suppliers, builders and even consumers as if the product was genuine.

Persons are not to make incorrect statements, whether intentionally or not, about a products quality, feature, capability, compliance or performance. Providing non-conforming products or false or misleading information will be an offence and can incur a penalty of up to \$165,000 for a corporation and \$55,000 for an individual.

For those undertaking building work under the *Design and Building Practitioners Act 2020*, where a regulated design prescribes the use of a certain product it cannot be substituted by the builder without a variation to the regulated design that has been prepared and declared by a registered design practitioner.

How do you prove that a product is certified or complies with the National Construction Code?

There are six different types of substantiation or evidence to verify that a product conforms and/or complies with the National Construction Code:

- CodeMark or WaterMark Certificate of Conformity
- Certificate of Accreditation from a State and Territory Accreditation authority
- certificate from an appropriately qualified person such as a professional engineer
- certificate from a product certification body accredited by the Joint Accreditation System of Australia and New Zealand (JAS-ANZ)
- report issued by a registered testing authority or
- other documentary evidence such as a certificate through an industry scheme.

What happens if there is no existing standard that a particular building product needs to meet?

Given the rate of building product innovation, it is difficult to maintain a suite of standards against which all products can be tested and/or certified. Where products that have no appropriate standard to be tested against, the product may need to be reviewed by appropriately accredited product certification bodies to determine if the product has met the requirement of regulatory performance through other means.

Conformity assessment schemes establish an independent process for the assessment of products to enable the issuing of a certificate of conformity. Conformity assessment schemes that are based on internationally recognised standards such as ISO/IEC 17065 and 17025 and such certificates can be relied on by designers and builders provided that the use of the product meets any conditions or limitations set out in the certificate.

What happens when a product is compliant at the time of installation but later becomes non-compliant?

There may be instances where a product was compliant at the time of installation but becomes a non-conforming building product. This may be due to a product that is recalled or banned due to safety risks or changes made to Australian Standards over time.

If a building product met relevant requirements at the time it was installed (for example, complied with the Australian Standard that was published at that time) it would not breach the building product safety framework. This does not mean that the builder does not have other obligations under other legislation.

If a product is recalled or banned, manufacturers and suppliers should consider if any of their products are affected and provide appropriate information and actions to be taken to purchasers and potential purchasers. Builders who may be using or installing the banned or recalled product should contact the supplier or manufacturer to confirm if the product is banned or recalled. If it is, the builder should stop using the product and discuss options with the principal contractor, developer or other relevant party.

Have you considered that the scheme may have the effect of seeing a decline in the number of new products entering the market?

The obligation to use building products that comply with the National Construction Code is not a new obligation – design and building practitioners should already be ensuring that the products they are using are compliant and conforming.

It will be up to the manufacturers or suppliers of new products to ensure that the products are conforming to the National Construction Code or applicable standards or laws. If manufacturers provide the relevant information and assurance that the products are conforming and suitable for a use then there should be no additional work than what would normally have been required in ensuring the product is suitable for the intended purpose.

What happens if I become aware of a non-conforming building product?

All suspected non-conforming building products or products that cause a safety risk should be reported to Fair Trading within seven days by completing an online form that will be available on the Fair Trading website (if the proposed changes are passed by Parliament, it is expected the form will be available in 2024).

How will the new laws be enforced?

When Fair Trading is made aware of a potential non-conforming building product, they will undertake a preliminary assessment of the risk and extent of use of the product.

Authorised officers may consider obtaining samples, seizing products, conduct testing or request the manufacturer carry out a product assessment.

A building product direction may be issued by the Secretary requiring a person to cease using or supplying the product generally or in a specific way or to make the product incapable of being used or operated.

Fair Trading may conduct an investigation to determine who in the supply chain has contravened their duty. It is possible for more than one person in the supply chain to have the same duty concurrently.

Fair Trading will assess whether it is necessary to require remedial action, to take disciplinary action or to prosecute for offences.

Where there is a high degree of seriousness, the Secretary may take further action by issuing a warning statement, building product supply ban or a recall notice.

New Secretary powers

How will I know if a warning has been issued for a building product?

The powers to publish a building product warning is designed to raise public awareness of a non-conforming building product. If the Secretary believes that a building product is a non-conforming building product or the building product has been used in a building which may pose a safety risk, the Secretary may issue a Building Product Warning.

The warning notice will be published on the internet to make the public aware of the risks associated with using a particular building product. Persons in the chain of responsibility will need to be aware of published warnings and be cautious or refrain from using or supplying these products.

A notification system that persons can subscribe to, to alert them of a product warning notice, bans or recalls, will be developed in the future.

What will I need to do if a building product is subject to a supply ban?

A building product supply ban may be issued by the Secretary to prohibit the supply of a non-conforming building product where there is no safe use for the product or where there is a misrepresentation about its suitable use.

The Secretary will be required to give notice to the manufacturer (or Australian importer or supplier), if practicable, two days before the supply ban is published on the internet.

To ensure fairness, the Secretary may also call for public submissions before or after imposing the supply ban to determine if the ban is warranted and the terms (or proposed terms) of the ban.

A building product supply ban may require a person in the chain of responsibility that has possession or control of the product to dispose of the product and within a period specified in the ban and notify the Secretary. A ban will be in place for two years from the date it comes into force unless it is revoked by the Secretary earlier.

Heavy penalties can be imposed on persons that use or supply a building product that is subject of a supply ban. It will be essential for persons in the chain of responsibility to be aware of any building products that are subject to a building supply ban and refrain from using or supplying these products.

What happens when a building product is recalled?

A building product recall notice may be issued to remove a non-conforming building product from the market. These powers are intended to protect industry, workers, consumers, building residents and the community.

It is expected that the Secretary's powers to issue a recall will not be used routinely or often and will be limited to certain instances for non-conforming building products or where there is a safety risk arising from the use of a non-conforming building product in a building.

The Secretary will be required to give notice to the manufacturer (or Australian importer or supplier), if practicable, two days before the supply ban is published on the internet.

The Secretary may also call for public submissions before or after imposing the recall to determine if the recall is warranted and the terms (or proposed) terms of the recall.

A recall will be in place for two years from the date it comes into force unless it is revoked by the Secretary earlier.

Where a recall is issued, the manufacturer will be required to notify other persons in the chain of responsibility and provide evidence to the Secretary that this action has been carried out.

The recall notice may also impose obligations on other persons in the chain of responsibility. For example, builders may be required to notify owners if the product has been used in the construction of their building or an architect or engineer may be required to amend a design or specify an alternative building product instead of the product that has been recalled.

Heavy penalties can be imposed on persons that use or supply a building product that is the subject of a recall notice. It will be essential for persons in the chain of responsibility to be aware of any building products that are subject to a recall notice and refrain from using or supplying these products.