



Guidance Note For
Certifiers On The
Legislative And NCC/
BCA Application Of
CodeMark.

Note: Dintel sought legal advice on the legislative and NCC/BCA application of CodeMark. The below guidance provides the applicable legislation, Certifiers should check the information provided with their trusted legal advisors for their own satisfaction. This guidance is consistent with conclusion paragraph 12.6 of the Fire Compliance Report by Grove and Wynn-Jones.

A1. Background

The CodeMark Certification Scheme (CodeMark) is a voluntary third-party building product certification scheme, that provides one method for verifying that a building product or system meets requirements of the NCC as nominated in the CodeMark Certificate of Conformity (CodeMark Certificate). This guidance note uses the term “Certifiers” to collectively refer to certifiers (in NSW and ACT), building surveyors (in Victoria), and assessment managers (in Queensland).

This guidance note explains:

- the extent to which Certifiers must have regard to CodeMark Certificates;
- when certifiers must give reasons for refusals to grant approvals;
- when the existence of relevant CodeMark Certificates oblige Certifiers to issue approvals;
- what legislative protections are available to Certifiers who rely upon CodeMark Certificates.

B1. Use of Certificates

A CodeMark Certificate may be used (on its own or among other evidence) as evidence to support that the use of a material, product, form of construction or design meets a Performance Requirement or a Deemed-To-Satisfy (DTS) provision.

NSW, Vic, QLD, ACT: National Construction Code 2022 (NCC/BCA) A5G3 provides:

[NCC A5G3 Evidence of suitability ¶ Volumes One and Two \(BCA\)](#)
(1) Subject to A5G5, A5G6, A5G7 and A5G9, evidence to support that the use of a material, product, form of construction or design meets a Performance Requirement or a Deemed-to-Satisfy Provision may be in the form of any one, or any combination of the following: a. A current CodeMark Australia or CodeMark Certificate of Conformity...

B2. Certifier Reasons

There are clear requirements for Certifiers to [give reasons for refusals](#). The legislation provides that:

- **NSW:** a certifier must give reasons for refusing to issue a construction certificate;
- **Vic:** a building surveyor must give reasons for refusing to issue a permit;
- **Qld:** an assessment manager must give a reasons for refusing to issue a development application;
- **ACT:** a certifier must give reasons for refusing to issue a building approval.

NSW: Section 13(1)(c)(i) of the Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021 (NSW) (Certification Regulation) provides:

[13 Determination of application for construction certificate](#)
(1) A certifier must ensure the certifier's determination of an application for a construction certificate contains the following information—... (c) if the application is refused- (i) the reasons for the refusal...

VIC: Section 25 of the Building Act 1993 (VIC) provides:

[25 Reasons for refusal to be given](#)

The relevant building surveyor must notify an applicant for a permit in writing without delay of the refusal of the permit and the reasons for the refusal.

Qld: Section 63(1)(a) of the Planning Act 2016 (Qld) provides:

[63 Notice of decision](#)

(1) The assessment manager must give a decision notice about the assessment manager's decision [in respect of a development application] to: (a) the applicant...

(2) The notice must be in the approved form and state—(i) if the application is refused... (ii) for a refusal for a reason other than because of a referral agency's direction—the reasons for the refusal; and...

ACT: Section 27A(2) of the Building Act 2004 (ACT) provides:

[27A Notice if building approval not issued](#)

(2) The certifier must give the applicant written notice stating that building approval is not issued for the building work mentioned in subsection (1) (b) and the reason why the approval is not issued.

B3. Certifier Refusals

There are circumstances in which a Certifier may not refuse to issue an approval where a CodeMark Certificate is in force and valid for the relevant building product or system. The legislation provides that:

- **NSW:** A certifier may not refuse to issue a construction certificate (or a complying development certificate) on the ground that a building product or system does not comply with a requirement of the BCA - where a CodeMark Certificate is in force and valid for that building product or system, and use of the building product or system is not prohibited under the Building Products (Safety) Act 2017 (BP Act).
- **Vic:** A building surveyor must not refuse to approve building work on the ground that any building product, construction method, design, component or system connected with the building work is unsatisfactory to the extent that a CodeMark Certificate confirms it complies with the BCA;
- **Qld:** If a CodeMark Certificate applies to a building element, the element is, to the extent stated in the certificate, taken to comply with the BCA; and
- **ACT:** a building product, construction method, design, component or system connected with a building is taken to comply with the building code to the extent that a CodeMark Certificate confirms it complies with the BCA.

NSW: section 19(3) of the Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021 (NSW) provides:

[19. Compliance with development consent and Building Code of Australia](#)

(3) A certifier must not refuse to issue a construction certificate because a building product or system relating to the development does not comply with a requirement of the Building Code of Australia if—
(a) a certificate of conformity issued in accordance with the CodeMark scheme is in force in relation to the building product or system, and
(b) use of the building product or system is not prohibited under the Building Products (Safety) Act 2017

NSW: section 4.28(4) of the Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021 (NSW) provides:

4.28 Process for obtaining complying development certificates

(4) A council or registered certifier must not refuse to issue a complying development certificate on the ground that any building product or system relating to the development does not comply with a requirement of the Building Code of Australia if the building product or system is accredited in respect of that requirement in accordance with the regulations.

NSW: section 120 of the Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021 (NSW) provides:

120 Building products and systems certified under CodeMark scheme
For the purposes of the Act, sections 4.15(4) and 4.28(4), a building product or system is accredited if—

(a) a certificate of conformity issued in accordance with the CodeMark scheme is in force in relation to the building product or system, and
(b) use of the building product or system is not prohibited under the Building Products (Safety) Act 2017.

VIC: Section 14(1) and 15(a) of the Building Act 1993 (VIC) provide:

14 Accreditation of Building Products

(1) A building product, construction method, design, component or system connected with building work (a building product) and accredited by the Building Regulations Advisory Committee or any other person or body prescribed for the purposes of this section (a prescribed person or body) is accredited for the purposes of this Act and the building regulations.

15 Building surveyor must not refuse to approve building work on certain grounds

The relevant building surveyor must not refuse to approve building work on the ground that any building product, construction method, design, component or system connected with the building work is unsatisfactory if the building product, construction method, design, component or system complies with—

(a) an accreditation given by the Building Regulations Advisory Committee or a person or body referred to in section 14(1), which is in force; or

(b) a certification or an approval given under any other accreditation system or process prescribed by the regulations, which is in force.

Section 239 of the Building Regulations 2018 (VIC) provides:

239 Prescribed persons and bodies to accredit building products

For the purposes of section 14(1) of the Act, the following persons and bodies are prescribed as a prescribed person or body— (a) the Australian Building Codes Board; (b) a person or body authorised by the Australian Building Codes Board.

Qld: Section 78 of the Building Regulation 2021 (Qld) provides:

78 Certificate of conformity

(1) If a certificate of conformity applies to a building element, the element is, to the extent stated in the certificate, taken to comply with the BCA.

(2) In this section—

building element means the properties and performance of a material, system, method of building or other thing relating to building work.

certificate of conformity means a current CodeMark certificate of conformity issued by the Australian Building Codes Board under the scheme known as the CodeMark Certification Scheme.

ACT: Section 139A of the Building Act 2004 (ACT) and the Building (Recognised Standard) Declaration 2006 (ACT) provides:

29(3)(b) Approval Requirements

(3) For subsection (1)(b) a building product, construction method, design, component or system connected with a building is taken to comply with the building code if the product, method, design, component or system complies with a recognised standard.

139A Recognised standards

(1) The Minister may declare a document to be a recognised standard for this Act."

"Building (Recognised Standard) Declaration 2006

1. I declare that a product, construction method, design, component, or system connected with a building, as referred to in section 29(3)

(b) of the Act complies with the recognised standard if it is certified in accordance with the 'CodeMark Scheme Rules' as published by the Australian Building Codes Board from time to time.

B4. Certifier Protections

In NSW, a certifier will not incur liability as a consequence of issuing a construction certificate (or complying development certificate) for a building product or system relating to a development that does not comply with a requirement of the BCA - if a CodeMark Certificate is in force and valid for that building product or system, and use of the building product or system is not prohibited under the Building Products (Safety) Act 2017 (BP Act).

NSW: section 19(4) of the Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021 (NSW) provides:

19. Compliance with development consent and Building Code of Australia

(3) A certifier must not refuse to issue a construction certificate because a building product or system relating to the development does not comply with a requirement of the Building Code of Australia if—

(a) a certificate of conformity issued in accordance with the CodeMark scheme is in force in relation to the building product or system, and

(b) use of the building product or system is not prohibited under the Building Products (Safety) Act 2017

(4) The following persons do not incur liability as a consequence of acting in accordance with subsection (3)—

(a) a certifier,

(b) an employee of a certifier, if the certifier is a consent authority.

NSW: section 120 of the Environmental Planning and Assessment (Development Certification and Fire Safety) Regulation 2021 (NSW) provides:

4.28 Process for obtaining complying development certificates

(4) A council or registered certifier must not refuse to issue a complying development certificate on the ground that any building product or system relating to the development does not comply with a requirement of the Building Code of Australia if the building product or system is accredited in respect of that requirement in accordance with the regulations.

(5) A council, an employee of a council and a registered certifier do not incur any liability as a consequence of acting in accordance with subsection (4).



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