



**Overview of *Building  
Products (Safety) Act  
2017 (NSW)***

**Presentation to Australian Construction  
Law Discussion Group  
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## Introduction

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The Lacrosse fire in Melbourne in November 2014, and the tragic Grenfell fire in London in June 2017, has led to the NSW government following the lead of Queensland and passing the *Building Products (Safety) Act 2017 (Act)*, which allows the government to declare a building product a “safety risk” and thus “unsafe” and ban it, investigate residential building work using it and require repairs, and create various offences and liability on the part of persons involved.

The Act was assented to on 30 November 2017, and commenced on 18 December 2017. The Act also made certain changes to other legislation, which while detailed in the Historical Notes for those Acts are difficult to follow as Section 30C of the *Interpretation Act 1987 (NSW)* provides that an amending Act, or amending provision of an Act, is repealed on the day after the provision takes effect. The copy of the Bill as passed still includes all those changes, at Schedule 2, can be accessed on the NSW Parliamentary Counsel’s Office web site.

While the Act sets out a number of provisions creating liability for various persons relating to unsafe building products, these are for the purposes of making persons liable for fines for offences under the Act. They do not greatly assist owners seeking to sue for the cost of repairs involved.

Owners, and stakeholders in the residential building industry, will need to be aware of this as the NSW government continues to deal with the problems arising from flammable cladding, and other unsafe building products, and starts to make use of the powers now available to it under the Act.

This paper is not intended to provide a detailed analysis of the Act, but rather an overview to understand a basic understanding of what the Act seeks out to do, which doubtless in the usual way will develop and become clearer as the government utilises it and it is the subject of litigation.

*This article is of a general, informational nature. It does not constitute legal or professional advice by the author or by Mills Oakley, and must not be relied on as such.*

## Part 1 - Preliminary

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Various definitions are set out in Section 3 of the Act. Many of them are provided for in the Act and cross referenced in Section 3.

"**Secretary**" means:

- (a) the Commissioner for Fair Trading, Department of Finance, Services and Innovation, or
- (b) if there is no person employed as Commissioner for Fair Trading--the Secretary of the Department of Finance, Services and Innovation.

such that the Office of Fair Trading is responsible for administering the Act.

## Part 2 - "Key Concepts".

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Under Section 4(1) of the Act "for the purposes of this Act, there is a "safety risk" posed by the use of a building product in a building if any occupants of the building are or will likely be at risk of death or serious injury arising from the use of the building product in the building." (emphasis added). This is the case even if the risk will only arise in certain circumstances or if some other event occurs, such as fire. The regulations may prescribe other circumstances in which a safety risk is posed by the use of a building product in a building.

As can be seen, those products that might be the subject of an order will arguably be limited, given the need for risk of death or serious injury. However, risk may also be read widely.

Under Section 5 a "**building product**" means any product, material or other thing that is, or could be, used in a building.

Asbestos or an asbestos product (including any loose-fill asbestos insulation within the meaning of Division 1A of Part 8 of the Home Building Act 1989 ), and anything that the regulations declare, is not a building product for the purposes of this Act.

Under Section 6 a "**building**" includes part of a building, and also includes any structure or part of a structure (including any temporary structure or part of a temporary structure within the meaning of the Environmental Planning and Assessment Act 1979), but does not include anything excluded from this definition by the regulations.

Under Section 7 a building product is "**used**" in a building if it is incorporated into, connected to, or otherwise installed in a building by means of building work. Use includes a misuse of a building product in a building.

Section 8 sets out what is building work, which is clearly aimed at meaning residential building work per the Home Building Act 1989 (NSW). "**Building work**" means any work involved in, or involved in co-ordinating or supervising any work involved in:

- (a) the construction of a building, or
- (b) the making of alterations or additions to a building, or
- (c) the repairing, renovation, decoration or protective treatment of a building.

The Section goes into more detail as to what may or may not be building work,

## **Part 3 - Building Product Bans.**

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Section 9 provides the Secretary with the power to ban unsafe building products.

Such a “**building product use ban**” requires written notice published on the internet, prohibit the use of a specified building product in a building if the Secretary is satisfied on reasonable grounds that the use is unsafe.

Such a building product use ban may be imposed to apply in any of the following ways:

- (a) it may apply to a specified use or uses or to all uses of a building product in a building,
- (b) it may apply to any building or only to a specified class of buildings,
- (c) it may apply to use by specified persons or classes of persons,
- (d) it may apply subject to specified exceptions (for example, an exception that permits use of the building product only by a specified class of persons),
- (e) it may be subject to conditions or unconditional,
- (f) it may apply in any other way authorised by the regulations.

A building product use ban is not invalid merely because it also prohibits another use of the building product that is not an unsafe use if the application of the ban to that other use could not reasonably be avoided and the ban operates reasonably and appropriately in prohibiting the unsafe use.

Section 10 requires that a building product use ban, or an amendment to one, must specify the reasons why the Secretary has decided to impose the building product use ban.

Section 11 provides that a building product use ban comes into force on the day specified by the Secretary in the notice imposing the ban (being a date not earlier than the date that the notice is first published on the internet), and it remains in force until it is revoked by the Secretary. A ban can be amended or revoked by written notice on the internet by the Secretary in the same way, under Section 12.

Under Section 13 the Secretary may, before or after imposing a building product use ban, by written notice published on the internet, call for public submissions but is not required to provide any person with such a chance.

Under Section 14 the Secretary must, if practicable, give notice of a building product use ban to the manufacturer of the building product concerned or if a foreign building product, to an Australian importer or supplier. If practicable, at least 48 hours notice is to be given before the building product use ban is published on the internet.

However, prior notice is not required if the Secretary believes on reasonable grounds that the nature of the safety risk posed by the use of the building product is so serious that, in the public interest, the publication of the building product use ban should not be delayed.

Notice is not required if the Secretary is unable, after making reasonable inquiries, to ascertain the identity of, or to locate, the person to be notified. Notice can be provided by publishing notice of the Secretary's intention to impose a building product use ban on the internet.

Under Section 15(1) a person must not cause a building product to be used in a building in contravention of a building product use ban.

Under Section 15(3) a person must not, in trade or commerce, represent that a building product is suitable for a use in a building if that use would contravene a building product use ban.

A breach of either is punishable by up to:

(a) in the case of a corporation--10,000 penalty units and, in the case of a continuing offence, a further penalty of 1,000 penalty units for each day the offence continues, or

(b) in any other case--2,000 penalty units or imprisonment for 2 years, or both, and, in the case of a continuing offence, a further penalty of 400 penalty units for each day the offence continues.

A Penalty Unit under s 17 of the *Crimes (Sentencing and Procedure) Act 1999* (NSW). Is \$110

It is a defence to the prosecution of an offence if the person charged proves that the person had a reasonable excuse for the act or omission concerned.

Either offence is an executive liability offence under the Act.

## **Part 4 - Identification and Rectification of Affected Buildings.**

Under the Part:

**"relevant enforcement authority"** in relation to a building means:

(a) a relevant enforcement authority for an order under Part 1 of Schedule 5 to the *Environmental Planning and Assessment Act 1979* in respect of the building, or

(b) in the case of a building that is not a building within the meaning of the *Environmental Planning and Assessment Act 1979*, the council for the area in which the building is located.

**"affected building"** if a building product the subject of a building product use ban has been used in the building for a use that is prohibited by the building product use ban.

It does not matter that the building product was used in the building before the building product use ban was in force.

The Secretary may issue an **"affected building notice"** where satisfied, on reasonable grounds, that a particular building is or may be an affected building. It is to be issued on the owner(s) (or owners corporation only, if a strata scheme) and occupier(s) of the building, relevant council, a relevant enforcement authority (if not the council) and the Commissioner of Fire and Rescue NSW (if a risk of fire). The notice can be published on the internet if said to be in the public interest.

The Secretary may issue a **"general building safety notice"** for a safety risk posed by the use of a building product the subject of a building product use ban in a class of buildings concerned, to be issued to all appropriate councils and Commissioner of Fire and Rescue NSW (if a risk of fire), and published on the internet if in the public interest.

A relevant enforcement authority may make a “**building product rectification order**” in respect of a building.

The *Environmental Planning and Assessment Act 1979*, and any regulations under that Act, apply to a building product rectification order as if the order were a development control order, except if a building is not a building within the meaning of the *Environmental Planning and Assessment Act 1979*. Then the *Local Government Act 1993*, and any regulations under that Act, apply to a building product rectification order in respect of the building as an order under section 124 of the *Local Government Act 1993*.

Orders can be appealed by councils, as well as amended and revoked. The Secretary may require a council to provide a report about the steps it has taken in relation a notice. Sadly, it seems that the NSW Government seems intent on delegating responsibility for part of the process to the level of government least resourced and funded to do so.

A building is “**made safe**” if the notified safety risk is eliminated or, if it is not reasonably practicable to eliminate the safety risk, minimised as far as practicable.

## **Part 5 - Building Product Undertakings.**

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A person who has contravened, or the Secretary suspects has contravened or is likely to contravene, a requirement of the Act may provide a “**building product undertaking**”. Such an undertaking does not constitute an admission of guilt.

Contravention of an undertaking carries a maximum penalty in the same terms as breaches of Section 15 above. Further, such an is an executive liability offence.

The Secretary may apply to the Supreme Court for an order if a person contravenes a building product undertaking, and the Court can make inter alia an order directing the person to comply with the undertaking, for costs of the application, and reasonable costs of the Secretary in monitoring compliance with the undertaking in the future

Undertakings can be withdrawn or varied by the person providing them, of acceptance withdraw or varied (by agreement) by the Secretary.

No proceedings for a contravention or alleged contravention of the Act may be brought against a person if a building product undertaking is in effect in relation to that contravention.

The Secretary is to maintain a register of undertakings, available for public inspection (in electronic form) during ordinary business hours free of charge but information relating to undertakings that have been withdrawn is to be removed.

## **Part 6 - Investigation and Assessment Powers of the Secretary.**

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The Secretary may authorise a "**building product investigation**" to ascertain:

- (a) whether a use of a building product in a building is unsafe,
- (b) the location of any building in which a building product has been used in a way that is or may be unsafe.

The Secretary must, if practicable, give the manufacturer of the building product notice of the investigation and an opportunity to make. If a foreign building product, notice may be given to an Australian importer or supplier.

The Secretary may impose or amend a building product use ban to reflect the results of an investigation.

The Secretary may require a person to conduct a "**product assessment**" in relation to a building product, and provide a "**product assessment report**". A person who, without reasonable excuse, fails to comply or includes false and misleading information in an assessment, can be fined up to 100 penalty units. Failure to conduct an assessment allows the Secretary to the conduct it and recover the costs incurred as a debt.

## **Part 7 provides Investigation and Assessment Powers of Authorised Officers.**

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The Secretary may appoint "**authorised officers**" who have the power to:

- require information and documents;
- require answers;
- enter premises;
- investigate and test on premises;
- require occupiers to provide assistance;
- issue search warrants.

However, they must do as little damage as possible, and compensate all interested parties for damage caused (unless the occupier obstructed or hindered the authorised officer in the exercise of the power concerned).

Failing to comply with requirement made by an authorised officer is punishable by a fine of up to 100 penalty units, as is furnishing false or misleading information. Having a reasonable excuse for the failure concerned is a defence, and a warning that the office is punishable is required first.

## Part 8 deals with Offences and Other Proceedings.

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Importantly the Act creates an “**executive liability offence**” (designated as such under the Act) whereby if:

- “(a) a corporation commits an executive liability offence, and
- (b) the person is:
  - (i) a director of the corporation, or
  - (ii) an individual who is involved in the management of the corporation and who is in a position to influence the conduct of the corporation in relation to the commission of the executive liability offence, and
- (c) the person:
  - (i) knows or ought reasonably to know that the executive liability offence (or an offence of the same type) would be or is being committed, and
  - (ii) fails to take all reasonable steps to prevent or stop the commission of that offence.”

(emphasis added)

The maximum fine for such is 200 penalty units.

“**reasonable steps**” includes various steps outlined in Section 59.

The Act also creates a “**corporate offence**” being an offence against this Act or the regulations that is capable of being committed by a corporation, whether or not it is an executive liability offence.

“A person commits an offence against this section if:

- (a) a corporation commits a corporate offence, and
- (b) the person is:
  - (i) a director of the corporation, or
  - (ii) an individual who is involved in the management of the corporation and who is in a position to influence the conduct of the corporation in relation to the commission of the corporate offence, and
- (c) the person:
  - (i) aids, abets, counsels or procures the commission of the corporate offence, or
  - (ii) induces, whether by threats or promises or otherwise, the commission of the corporate offence, or
  - (iii) conspires with others to effect the commission of the corporate offence, or
  - (iv) is in any other way, whether by act or omission, knowingly concerned in, or party to, the commission of the `.”

The maximum penalty is the same as the original offence for the corporation.



Under Section 61 “If a corporation contravenes any provision of this Act or the regulations, each person who is a director of the corporation or who is concerned in its management is to be taken to have contravened the same provision if the person knowingly authorised or permitted the contravention.”

Section 62 allows for fines for continuing offences, whereby the fine applies for each day such continues.

The Act confirms per Section 64 that the onus of proof of reasonable excuse in any proceedings for an offence against this Act or the regulations lies on the person charged with the offence.

Proceedings for an offence against the Act or regulations may be taken and prosecuted only by the Secretary, and may be dealt with:

- (a) summarily before the Local Court, or
- (b) summarily before the District Court in its summary jurisdiction.

Proceedings in the Local Court may only impose fines up to 100 penalty units.

Proceedings for an offence may be commenced within but not later than 2 years after the date on which the offence is alleged to have been committed. They can be commenced later with leave of the court, if they are commenced within but not later than 2 years after the date on which evidence of the alleged offence first came to the attention of an authorised officer.

Section 68 sets out various provisions of the Australian Consumer Law (**ACL**) that apply to an offence against Part 3 of the Act in the same way as they apply to a contravention of, or an offence against, a provision of Chapter 4 of the ACL.

Section 69 provides as follows:

- “(1) If a person is convicted by a court of an offence against this Act or the regulations and the court is satisfied that another person has suffered loss or damage as a result of the conduct of the convicted person, the court may, in addition to any penalty it may impose in respect of the offence, order the convicted person to compensate the other person for the loss or damage.”

The Local Court cannot order more than its jurisdictional limit (being \$100,000).

The limited effect of such is clear, in only dealing with the case before the Court (being brought by the Secretary as a prosecution of an offence) and on the evidence before it.

Under Section 70 the Supreme Court can provide various injunctive relief on the application of the Secretary for contraventions (or attempted contraventions) of the Act.

## **Part 9 deals with Authorised Officers.**

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Employees of the following are eligible to be appointed as an authorised officer for the purposes of the Act:

- (a) the Department of Finance, Services and Innovation,
- (b) the Environment Protection Authority,
- (c) the Department of Planning and Environment,

- (d) Fire and Rescue NSW,
- (e) a member of a permanent fire brigade within the meaning of the Fire Brigades Act 1989,
- (f) a council who is an authorised person under the Local Government Act 1993 ,
- (g) a person of a class prescribed by the regulations.

A police officer is taken to be an authorised officer under this Act and may exercise all of the functions of an authorised officer under this Act.

It is an offence to:

- (1) resist or obstruct an authorised officer in the exercise of the officer's functions under the Act (up to 20 penalty units).
- (2) assault, abuse or threaten an authorised officer, or who encourages another person to do so (up to 100 penalty units, or imprisonment for 6 months, or both).
- (3) impersonate an authorised officer (up to 100 penalty units, or imprisonment for 6 months, or both).

## **Part 10 - Miscellaneous**

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Section 81 provides for administrative review of decisions.

A person who is aggrieved by any of the following decisions by the Secretary may apply to the Tribunal for an administrative review under the *Administrative Decisions Review Act 1997* of that decision:

- (a) to impose or amend a building product use ban,
- (b) to issue an affected building notice,
- (c) to issue a general building safety notice,
- (d) to refuse to revoke an affected building notice on application made by the person under this Act,
- (e) to require a product assessment to be conducted.

The application is to be made within 28 days of the day on which notice of the decision is published on the internet, or served on the person, whichever occurs first.

Division 3 (Internal reviews) of Part 2 of Chapter 3 of the *Administrative Decisions Review Act 1997* does not apply to a decision to impose or amend a building product use ban under the Act.

Section 84 provides for fines of up to 100 penalty units for fraudulent allegations about building products or their use to the Secretary.

Section 85 provides that the Act prevails over the National Construction Code (inter alia compliance with the NCC is not a reasonable excuse for a contravention).

Section 87 allows the issue of permits under the Act allowing for contraventions.

Section 88 allows the regulations to provide for exemptions under the Act for any:

- (a) any person or class of persons, or
- (b) any thing or class of things.

## **Schedule 1 - Savings, Transitional & Other Provisions**

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Schedule 1, Part 2 of the BPSA provides:

*“The power to make a building product rectification order under this Act in respect of a building product used in a building extends to building products used in a building before the commencement of Part 4 of this Act.”*

In addition, Schedule 2.6[1] of the BPSA added to the definition of a “major defect” provided in Section 18E(4) of the *Home Building Act 1989* (NSW) to include:

*“the use of a building product (within the meaning of the Building Products (Safety) Act 2017) in contravention of that Act”*

As such, once the Government issues an order under the BPSA, the use of that product will apparently be a major defect for work but only for work to be undertaken after that date. That is, builders would need to use products the subject of a ban to be a major defect.

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## Victoria bans flammable cladding

12 March 2018

The Victorian Government will ban the most dangerous types of combustibile cladding from being used on high-rise buildings.

Planning Minister Richard Wynne has released new guidelines to building surveyors, following recommendations from the Victorian Cladding Taskforce.

Aluminium cladding panels with a polyethylene core of more than 30% will be banned on all multi-storey buildings. Expanded polystyrene will also be banned.

The new guidelines spell out what can't be used on Victorian building sites for suppliers and practitioners in the building chain.

Last year, the government established the cladding taskforce to investigate the extent of non-compliant cladding on Victorian buildings.

It originally identified 1369 buildings as most likely having aluminium cladding with a polyethylene core or expanded polystyrene, but of those buildings 579 have not begun construction and a further 129 are half-built.

If buildings are found to be non-compliant, the Victorian Building Authority and Municipal Building Surveyors will issue emergency orders, ensuring additional measures are put in place to meet safety standards.

The government has directed the VBA to inspect more of Victoria's buildings each year, from less than 2% annually to 10%.

"We're putting a stop to dangerous combustibile cladding being used on Victorian buildings," Mr Wynne said.

"This has been allowed to go on for too long and we're ending it.

"The rules are clear: if builders use these dangerous flammable products, they'll face disciplinary action from the VBA."