



New South Wales

Building Products (Safety) Bill 2017

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The objects of this Bill are as follows:

- (a) to prevent the unsafe use of building products in buildings, by giving the Commissioner for Fair Trading (the *Secretary*) power to prohibit the use of a building product in a building if the Secretary is satisfied on reasonable grounds that the use is unsafe,
- (b) to enable the Secretary to identify buildings in which building products have been used in a way that is prohibited (including buildings in which building products were used before the prohibition was imposed),
- (c) to enable councils or other relevant enforcement authorities to require the use of the relevant building product in the building to be rectified, by giving the council or other relevant enforcement authority power to order that the safety risk posed by the use of the building product in the building be eliminated or minimised,
- (d) to confer other powers in connection with the investigation and assessment of building products so that unsafe uses of building products can be identified and prevented.

The Bill is proposed in response to the Grenfell Tower fire in London, where it is thought that external cladding attached to the building may have accelerated the spread of fire in the building. This Bill will enable the Secretary to impose a ban on the use of a specified building product in a building, such as external cladding, if the Secretary is satisfied that there is a safety risk posed by the use of the building product, including a safety risk that arises in the event of fire.

Outline of provisions

Part 1 Preliminary

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act.

Clause 3 defines terms used in the proposed Act.

Part 2 Key concepts

Clause 4 provides that for the purpose of the proposed 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. A risk can be considered to arise from the use of a building product in a building even if the risk will only arise in certain circumstances or if some other event occurs, such as fire. The use of a building product in a building is *unsafe* if there is a safety risk posed by the use of the building product in the building.

Clause 5 defines *building product* as any product, material or other thing that is, or could be, used in a building, except asbestos or asbestos product or anything that the regulations declare is not a building product.

Clause 6 defines *building* to include a part of a building and to include temporary structures.

Clause 7 provides that 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. The clause also provides that a *use* of a building product includes its misuse.

Clause 8 defines *building work* to mean any work involved in, or involved in co-ordinating or supervising any work involved in the construction of a building, the making of alterations or additions to a building or the repairing, renovation, decoration or protective treatment of a building. The definition is similar to the definition of *residential building work* under the *Home Building Act 1989* but it is not limited to work involving a dwelling.

Part 3 Building product use bans

Clause 9 enables the Secretary to impose a *building product use ban* that prohibits the use of a specified building product in a building if satisfied on reasonable grounds that the use is unsafe. The ban may apply to all uses, or to specified uses, of a building product, to all buildings or to any specified class of buildings, and subject to other conditions and exceptions.

Clause 10 requires the Secretary to specify the reasons for imposing a building product use ban.

Clause 11 provides that a building product use ban remains in force until it is revoked by the Secretary.

Clause 12 provides that the Secretary may amend or revoke a building product use ban.

Clause 13 enables the Secretary to invite, and have regard to, public submissions before or after imposing a building product use ban. However, there is no requirement to give prior notice of a building product use ban.

Clause 14 requires the Secretary to give notice of a building product use ban to the manufacturer of the building product, before the ban is published, if practicable.

Clause 15 makes it an offence for a person to cause a building product to be used in a building in contravention of a building product use ban, or for a person, in trade or commerce, to represent that a building product is suitable for a use in a building if the use would contravene a building product use ban. The maximum penalty in the case of a corporation will be 10,000 penalty units (currently \$1,100,000) and a further penalty of 1,000 penalty units (currently \$110,000) for each day the offence continues. In any other case, the maximum penalty will be 2,000 penalty units

(currently \$220,000) or imprisonment for 2 years, or both, and a further penalty of 400 penalty units (currently \$44,000) for each day the offence continues.

Part 4 Identification and rectification of affected buildings

Clause 16 inserts definitions of terms used in the proposed Part.

Clause 17 provides that, for the purposes of the proposed Part, a building is an *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 ban had effect.

Clause 18 enables the Secretary to issue a notice (an *affected building notice*) if satisfied that a building is or may be an affected building (that is, 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). The notice must identify the safety risk posed by the use of the building product and must be provided to the owner of the building and to the council for the area in which the building is located.

Clause 19 enables the Secretary to issue a notice (a *general building safety notice*) if satisfied that a class of buildings may be affected buildings.

Clause 20 provides that a relevant enforcement authority may make an order (a *building product rectification order*), which requires the owner of the building to do such things to eliminate or minimise a safety risk posed by the use in the building of a building product to which a building product use ban applies, or to remediate or restore the building following the elimination or minimisation of the safety risk, or to do both those things. The relevant enforcement authorities are a person or body who may give orders under section 121B of the *Environmental Planning and Assessment Act 1979* (which is generally a council) in relation to the building, or, in the case of a building that is not a building within the meaning of that Act, the council for the area in which the building is located.

Clause 21 specifies the statutory requirements in planning law and local government law that apply to a building product rectification order.

Clause 22 requires a council to give the Secretary notice of an appeal against a building product rectification order made by the council. The Secretary is entitled to be heard at the appeal.

Clause 23 requires a council to report to the Secretary on the steps it has taken in response to an affected building notice.

Clause 24 provides that the Secretary may amend or revoke an affected building notice or a general building safety notice.

Clause 25 requires the Secretary to revoke an affected building notice if the Secretary is satisfied that the building concerned has been made safe or is not an affected building.

Clause 26 specifies that, for the purposes of the proposed Part, a building is *made safe* if the safety risk that is posed by the use of a building product to which a building product use ban applies, as identified by the Secretary in an affected building notice, is eliminated or, if it is not reasonably practicable to eliminate the safety risk, is minimised as far as practicable.

Part 5 Building product undertakings

Clause 27 provides that the Secretary may accept a written undertaking (a *building product undertaking*) given by a person if the person has contravened, or the Secretary suspects that the person has contravened or is likely to contravene, a requirement imposed by or under the proposed Act.

Clause 28 provides that a building product undertaking takes effect and becomes enforceable when notice of the Secretary's decision to accept the undertaking is given to the person who made the undertaking or on a later date specified by the Secretary.

Clause 29 makes it an offence for a person to contravene a building product undertaking given by the person.

Clause 30 enables the Secretary to apply to the Supreme Court for an order requiring compliance with a building product undertaking by a person.

Clause 31 provides for the withdrawal or variation of a building product undertaking by the person who gave it.

Clause 32 provides that proceedings for contravention may not be brought against a person if a building product undertaking is in force in relation to the contravention, or if it has been discharged.

Clause 33 requires the Secretary to maintain a register of building product undertakings and to make it available for inspection.

Part 6 Investigation and assessment powers of Secretary

Division 1 Building product investigations

Clause 34 gives the Secretary the power to authorise an investigation to ascertain whether a use of a building product in a building is unsafe or to ascertain the location of any building in which a building product has been used in a way that is or may be unsafe.

Clause 35 enables a manufacturer or supplier of the building product that is the subject of an investigation to make submissions about the investigation.

Clause 36 provides that the Secretary may make or amend a building product use ban to reflect the results of a building product investigation.

Clause 37 makes it clear that the proposed Division does not limit the functions of an authorised officer under proposed Part 7.

Division 2 Product assessments

Clause 38 defines words used in the proposed Division.

Clause 39 provides that the Secretary may require a person to conduct a product assessment in relation to a building product and provide the Secretary with a report of that assessment. The Secretary may impose such a requirement only if the Secretary has reasonable grounds to suspect that a foreseeable use of the building product is unsafe, and the person required to conduct the product assessment is the manufacturer or a supplier of the building product.

Clause 40 provides that the Secretary may take action reasonably necessary to conduct or complete a product assessment if a person who is required to conduct the assessment fails to conduct it or to provide a report.

Clause 41 provides that the Secretary may publish a product assessment report provided under the proposed Division and may make or amend a building product use ban having regard to a product assessment report.

Part 7 Investigation powers of authorised officers

Division 1 Preliminary

Clause 42 lists the only purposes for which an authorised officer may exercise investigation and assessment powers. Those purposes include to assess whether a reasonably foreseeable use of a building product in a building is unsafe, to ascertain the location of any buildings in which a building product that is the subject of a building product use ban has been used for a use that is prohibited by the building product use ban and for the purpose of investigating and monitoring compliance with the requirements imposed by or under the proposed Act.

Division 2 Information gathering powers

Clause 43 makes it clear that an information gathering power under the proposed Division may be exercised whether or not a power of entry under proposed Division 3 is being exercised.

Clause 44 provides authorised officers with the power to require information and documents.

Clause 45 provides authorised officers with the power to require answers to questions.

Clause 46 empowers authorised officers to record evidence of any questions asked, and answers given, under the proposed Division. An authorised officer is required to inform the person questioned about the recording.

Division 3 Power to enter premises

Clause 47 sets out the powers of authorised officers to enter premises, and provides that authorised officers can enter residential premises only with permission or a search warrant.

Clause 48 provides that an authorised officer who proposes to exercise a power of entry may give the owner or occupier of the premises a notice requiring the owner or occupier to provide reasonable assistance and facilities.

Division 4 Functions that can be exercised on premises

Clause 49 lists the powers that can be exercised on premises by an authorised officer at any premises that the officer has entered lawfully. Those powers include examining and inspecting any thing or any document, taking and removing samples and making examinations or inquiries and conducting tests.

Clause 50 provides for authorised officers to apply for the issue of search warrants and that Division 4 of Part 5 of the *Law Enforcement (Powers and Responsibilities) Act 2002* applies to the issue of such warrants.

Clause 51 provides that an authorised officer may require the owner or occupier of premises, or any person in or on premises, to provide reasonable assistance.

Clause 52 requires authorised officers to take care in the exercise of powers of entering and searching premises.

Clause 53 requires the Secretary to compensate all interested parties for damage caused by an authorised officer in exercising a power to enter premises, or a power to break open or otherwise access a thing for the purposes of examination or inspection, but not any damage caused by the exercise of any other power.

Division 5 General

Clause 54 makes it an offence to fail to comply with a requirement made by an authorised officer under the proposed Part.

Clause 55 makes it an offence to knowingly furnish false or misleading information in purported compliance with the proposed Part.

Clause 56 provides a defence of reasonable excuse in proceedings for an offence of failing to comply with a requirement made by an authorised officer.

Clause 57 requires a person to be warned that failure to comply with a requirement to furnish documents or information, or to answer questions is an offence.

Clause 58 provides that a notice given under the proposed Part may be revoked or varied by a subsequent notice, including by extending the time for complying with the notice.

Part 8 Offences and other proceedings

Division 1 Liability for offences

Clause 59 provides that a director of a corporation or a person concerned in the management of a corporation can, in certain circumstances, be found guilty of an offence if the corporation commits an executive liability offence. Executive liability offences include the proposed offences of contravening a building product use ban or a building product undertaking.

Clause 60 makes a person who is a director of a corporation or involved in the management of a corporation liable for an offence in certain circumstances if the corporation commits an offence against the proposed Act or the regulations and the person aids, abets, counsels, procures or induces the offence, conspires to have the offence committed or is in any other way knowingly concerned in or party to the offence.

Clause 61 provides that each director of a corporation or person concerned in the management of a corporation is taken to be guilty of an offence if the corporation commits an offence and the director or person knowingly authorised or permitted the contravention.

Clause 62 provides for the liability of persons committing continuing offences.

Clause 63 provides for the continuing effect of requirements imposed by or under the proposed Act, where those requirements specify a time by which, or a period within which, the requirement must be complied with. Such a requirement continues to have effect until the requirement is complied with even though the time has passed or the period has expired.

Clause 64 provides that the onus of proof of reasonable excuse in offence proceedings lies on the person charged with the offence.

Clause 65 enables penalty notices to be issued for offences that are prescribed by the regulations.

Division 2 Proceedings for offences

Clause 66 provides for proceedings for offences under the proposed Act or regulations to be dealt with summarily before the Local Court or the District Court and limits the maximum penalty that may be imposed by the Local Court for an offence to 100 penalty units (currently \$11,000).

Clause 67 requires any proceedings for an offence under the proposed Act or the regulations to be commenced within 2 years after the date on which the offence is alleged to have been committed, and provides for the court to grant leave to extend that period in certain circumstances.

Clause 68 extends certain enforcement provisions of the Australian Consumer Law to offences under the proposed Act.

Division 3 Other court orders

Clause 69 provides for the making of compensation orders by a court on conviction of a person for an offence against the proposed Act or the regulations if the court is satisfied that another person has suffered loss or damage as a result of the conduct of the convicted person.

Clause 70 provides that the Supreme Court may grant an injunction to prevent or terminate a contravention of the proposed Act. Such an injunction may be granted only on the application of the Secretary made with the consent of the Minister.

Division 4 Evidence

Clause 71 applies certain evidential provisions of the *Fair Trading Act 1987* to proceedings under the proposed Act.

Clause 72 provides for the use of evidentiary certificates as evidence of certain instruments or other matters under the proposed Act in court proceedings and before other persons and bodies that receive evidence.

Clause 73 provides that in legal proceedings it is to be assumed that the opinion of the Secretary was duly formed, unless the contrary is proven.

Part 9 Authorised officers

Clause 74 provides for the Secretary to appoint persons to exercise the functions of authorised officers under the proposed Act.

Clause 75 specifies the employees of Departments, statutory bodies, councils and police officers, and other persons, who are eligible for appointment as authorised officers.

Clause 76 specifies that the relevant instrument of appointment of an authorised officer may limit the authority of the officer.

Clause 77 requires authorised officers to be issued with an identity card or other identification.

Clause 78 requires identification to be produced by an authorised officer when exercising functions under the proposed Act.

Clause 79 provides for the use of assistants by authorised officers exercising functions under the proposed Act.

Clause 80 provides for offences of resisting or obstructing authorised officers, assaulting authorised officers and impersonating authorised officers.

Part 10 Miscellaneous

Clause 81 provides for a person to apply to the Civil and Administrative Tribunal for administrative review of decisions of the Secretary under the proposed Act.

Clause 82 modifies the requirement for the giving of notice of decisions of the Secretary to impose or amend a building product use ban.

Clause 83 provides for the enforcement of the proposed Act by council officers.

Clause 84 makes it an offence to provide false or misleading information about a building product or the use of a building product, or to make an unsubstantiated allegation about a building product or its use, to the Secretary, with the intention of obtaining a financial advantage or causing a financial disadvantage to another person.

Clause 85 provides that the proposed Act prevails over the National Construction Code produced by the Australian Building Codes Board. This will mean that a building product use ban may be imposed even if the building product or the use of the building product concerned complies with the requirements of the National Construction Code.

Clause 86 provides that the Secretary may enter into, or approve of, an arrangement with a relevant agency for the purposes of sharing or exchanging information held by the Secretary or the agency. Those relevant agencies include agencies of the State or of the Commonwealth or another State or Territory or an overseas jurisdiction that exercises functions with respect to fair trading or consumer protection, residential building work or plumbing and drainage work, and also includes councils and law enforcement agencies.

Clause 87 enables the Secretary to issue a permit to authorise a person to engage in specified conduct and provides that a person to whom a permit is issued is not guilty of an offence against the proposed Act or the regulations in respect of conduct authorised by the permit.

Clause 88 provides that the regulations may exempt a person or thing, or class of persons or things, from any or all provisions of the Act.

Clause 89 enables the Secretary to delegate functions under the proposed Act and provides for sub-delegation.

Clause 90 provides for the manner in which documents are to be served under the proposed Act.

Clause 91 provides that the Secretary complies with any requirement under the proposed Act to publish a notice or instrument on the internet if the Secretary publishes it on a website that the Secretary considers appropriate to cause it to come to the attention of the public.

Clause 92 provides that a notice or other instrument under the proposed Act may specify the building product to which it applies by reference to a description of the building product, the batch

or brand of the building product, the manufacturer or supplier of the building product, the period in which the building product was manufactured or supplied or in any other way.

Clause 93 provides that a matter or thing done or omitted to be done by the Crown or a protected person (including an authorised officer) does not subject the Crown or the protected person to any action, liability, claim or demand if the matter or thing was done or omitted to be done in good faith for the purpose of executing the proposed Act or regulations or instruments under the proposed Act.

Clause 94 provides that the proposed Act binds the Crown.

Clause 95 explains how the Australian Consumer Law is to be construed if a provision of the proposed Act applies the Australian Consumer Law to a matter.

Clause 96 enables the Governor to make regulations for the purposes of the proposed Act.

Schedule 1 Savings, transitional and other provisions

Schedule 1 contains savings, transitional and other provisions consequent on the enactment of the proposed Act, including:

- (a) a power to make savings and transitional regulations, and
- (b) a provision that extends the power to make building product rectification orders under the proposed Act in respect of a building product used in a building before the commencement of the proposed Act.

Schedule 2 Amendment of Acts and regulations

Schedule 2.1 amends the proposed Act (the *Building Products (Safety) Act 2017*) to update a reference to the persons or bodies authorised to make orders in respect of buildings requiring work to be carried out. (The power to issue those orders is subject to amendment by uncommenced provisions of the proposed *Environmental Planning and Assessment Amendment Act 2017*.)

Schedule 2.2 amends the *Civil and Administrative Tribunal Act 2013* to:

- (a) add the proposed Act to the list of legislation in relation to which the Civil and Administrative Tribunal has functions allocated to the Administrative and Equal Opportunity Division, and
- (b) make it clear that the functions of that Tribunal in relation to the proposed Act are subject to certain specific provisions in the proposed Act.

Schedule 2.3 amends the *Conveyancing (Sale of Land) Regulation 2017* to add to the list of prescribed warranties (which are deemed to be included in a contract for the sale of land and an option for purchase of residential property), so that an adverse affectation includes:

- (a) a building product rectification order under the proposed Act that has not been fully complied with, and
- (b) an affected building notice under the proposed Act.

This is similar to the existing warranty in relation to orders under section 121B of the *Environmental Planning and Assessment Act 1979*.

Schedule 2.4 amends the *Environmental Planning and Assessment Act 1979* to:

- (a) provide that the issue of a building certificate does not operate to prevent a council from making a building product rectification order under the proposed Act, and
- (b) note the operation of the proposed Act in relevant provisions.

Schedule 2.5 adds to the list of matters that must be included in a planning certificate (prescribed under the *Environmental Planning and Assessment Regulation 2000*) a requirement to include a statement of whether there is any affected building notice of which the council is aware that is in force in respect of the land, whether there is any building product rectification order of which the

council is aware that is in force in respect of the land and has not been fully complied with and whether any notice of intention to make a building product rectification order of which the council is aware has been given in respect of the land and is outstanding.

Schedule 2.6 amends the *Home Building Act 1989* to provide that the use of a building product in contravention of the proposed Act is a major defect in residential building work. The statutory warranty period is 6 years for a warranty breach that results in a major defect in residential building work.

The amendments also provide that a holder of a contractor licence who is authorised by the contractor licence to contract to do residential building work or specialist work, or a holder of a supervisor or tradesperson certificate, is guilty of improper conduct if the holder contravenes a requirement imposed by or under the proposed Act, whether or not the holder is convicted of an offence in respect of that contravention.

Schedule 2.7 adds a provision of the proposed Act about search warrants to the list of Acts to which the search warrant provisions of the *Law Enforcement (Powers and Responsibilities) Act 2002* apply.

Schedule 2.8 inserts a note about the provisions of the proposed Act that relate to the identification and rectification of affected buildings in a provision of the *Local Government Act 1993* about other orders that may be given by a consent authority, the Minister or certain other persons.

Schedule 2.9 includes a requirement to specify particulars of outstanding building product rectification orders in the form of a certificate prescribed by the *Strata Schemes Management Regulation 2016* to be given by an owners corporation to an owner, mortgagee or covenant chargee of a lot in a strata scheme.