



**Submission to the NSW Legislative Council - Public Accountability
Committee**

INQUIRY INTO THE REGULATION OF BUILDING STANDARDS, BUILDING QUALITY AND BUILDING DISPUTES

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Introduction

The Building Products Industry Council (**BPIC**) supports the *Inquiry into the Regulation of Building Standards, Building Quality and Building Disputes* (the **Inquiry**) by the NSW Legislative Council - Public Accountability Committee (the **Committee**). In particular we ask that the Committee undertake an investigation as to why the NSW Government has ignored the recommendations of its own investigations as well as those by industry, into building conformity problems stretching back for years. Had such recommendations been instigated, we believe that the current crisis around building certification, poor building standards, inadequate consumer protections, limitations on building insurance and building defects could have been avoided or at least substantially mitigated.

From industry's perspective there have been three pivotal, but missed, occasions where the NSW Government has had the opportunity to ensure its building regulatory functions performed to the standard expected by the electorate.

The first was the extensive consultation that was done as part of the *Independent Review of the Building Professionals Act 2005* by Michel Lambert (the **Lambert Review**) in 2015.

The second was the aborted inclusion of building product chain of responsibility clauses in the Building Products (Safety) Bill (the **Safety Bill**) in 2017.

The third was the lack of take-up by Ministers Kean and Roberts in April 2018 to instigate via the Building Ministers' Forum, a National Discussion Paper and Summit to map out an agreed program of national reform for building regulations and administration.

Despite repeated attempts by many parties in the industry to get to the bottom of why these three vital instances of building regulatory reform were not actioned, no satisfactory explanation has ever been forthcoming from the NSW Government.

Unfortunately neither the public nor industry are privy to the machinations of the NSW Government, so BPIC respectfully requests that the Commission investigate these matters in order to determine the basis for the Government's failure to act and its potential culpability in the current crisis, as well to uncover a clear building regulatory reform pathway that has already largely been mapped out. In making this request, BPIC provides the following context and background related to these issues.

Lambert Review

In 2014, Andrew Wallace - Barrister-at-Law published his consultation into the Queensland Building Act and building certification, concluding that:

“There is one consistent theme which permeates the 122 recommendations contained within this report and that is the need for increased accountability, not just for building certifiers, but for all building and construction industry stakeholders.”

A year later and after extensive public and industry consultation Michael Lambert come to a similar conclusion in his review of the NSW building regulatory system. He also identified that NSW lacked:

- A NSW Building Commission to consolidate all the fragmented administrative functions related to building regulation across the state.
- Sufficient resourcing of building regulation and certification processes.
- A Building Act to consolidate building regulation that is currently spread across various parts of the EP&A Act, the HB Act and the Plumbing and Drainage Act 2011.
- Licensing of commercial builder and building work in addition to the existing registration of residential builders.

The Lambert Review was an exhaustive and detailed investigation that is directly relevant to the Commission’s Inquiry and listed no less than 12 major initiatives the government needed to undertake as a matter of urgency. His report taken as a whole was as damning of the NSW building regulatory regime as Andrew Wallace’s was of the Queensland regime. The difference is that the Queensland government took notice of Wallace’s findings and began to institute a wholesale overhaul of its building system. Whereas the NSW Government failed to implement a single recommendation of Lambert’s report.

Now four years later, we are seeing the tragic legacy of the NSW Government’s inaction and lack of accountability to the NSW public in the form of Mascot Towers, the Opal Tower and other defective buildings that have yet to come to the public’s attention.

Building Products (Safety) Bill 2017

In mid-2017 the Queensland government introduced the *Non-Conforming Building Products—Chain of Responsibility Bill* after intense public and industry consultation. While the bill wasn't perfect, it did for the first time in Australia place a legally enforceable "duty of care" on all parties in the building supply chain to ensure that building products are safe and fit for their intended use.

In October the Building Ministers' Forum (BMF) agreed the powers set out in Queensland's legislation set a model for all jurisdictions to consider.

On October 6, 2017 an exposure draft of the Building Products (Safety) Bill 2017 was discussed at confidential meeting between the NSW Department of Finance and industry (Building Products Industry Group, Housing Industry Association, Master Builders Association, Engineers Australia, Strata Community, Fire Protection Association Australia, Institute of Architects and the Property Council).

What NSW had achieved was taking the Queensland legislation and all of industry's subsequent comments and inputs and consolidating this into a robust, fair, workable and effective piece of legislation that everyone agreed at the meeting would be pivotal in tackling the incidence of Non-Conforming Building Products.

However the industry was stunned on November 16, 2017 when the Bill was given its first reading in Parliament. What Cabinet had done was introduce a heavily edited version of the Bill that was incapable of delivering on the government's commitment to the BMF, to the industry, to the NSW public and incredibly, to its own 10 point plan to tackle building non-compliance.

BPIC and other organisations wrote to Minister Kean and Minister Roberts, the opposition and the Chair of the BMF calling for the urgent reinstatement of over 80 missing clauses in the Bill (see **Attachment 1 – Reinstated Safety Bill Clauses**). However even last minute efforts by the opposition, Greens and independents could not stop the Bill from being rushed through the lower and upper houses on the same day on November 22, 2017.

Not only was this a tragedy for the voting public of NSW and proper governance of the NSW building regulatory system, but it was a pivotal national opportunity that was lost. Given that the BMF had already provided its support for the Queensland legislation to be used as a template, we believe that other jurisdictions would have rolled out similar legislation if NSW had done so.

An Action Plan for Building Regulatory Reform

From the 21st to the 22nd of February 2018, a Building Regulatory Reform Summit was held in Canberra that brought together Australia's leaders and strategists in building control to identify opportunities and weaknesses in the current building regulatory framework. Facilitated by the Building Products Industry Council (BPIC) on behalf of the wider building industry, the Summit explored the views and concerns of over 40 government, industry and community organisations involved with or affected by the building control system.

The Summit concluded that the current building regulatory framework was no longer fit for purpose to prevent a major catastrophic disaster such as the 2017 Grenfell Tower fire which broke out in Central London causing 71 deaths and over 70 injuries. Participants were able to map out the problems besetting the Australian building control system and committed to working together to find practical ways to fix the issues, with the first action being the publication of a White Paper, titled: *"Rebuilding Confidence: An Action Plan for Building Regulatory Reform"*.

In developing the White Paper, BPIC was conversing with Dame Judith Hackitt and her research team who were developing a final report for the UK parliament into the Grenfell tragedy. From that dialogue, it appeared there were many regulatory and systemic issues in common between Australia and England's building regulatory system.

Concurrently BPIC was also conversing with Bronwyn Weir as she and Peter Shergold developed their Building Confidence report.

In the lead up to the BMF April 2018 meeting, BPIC wrote to each Building Minister including Minister Kean and Minister Roberts, personally requesting that they review the White Paper and that they develop a National Discussion Paper and Summit to map out an agreed program of national reform for building regulations and administration.

Although acknowledgement of receipt of our correspondence to the NSW Ministers was received, no formal response has been forthcoming from either Minister and the opportunity for NSW to begin tackling the issue before they became a crisis was squandered.

The Role of BPIC

The Building Products Industry Council (BPIC) is a national peak body representing Australia’s leading building products industries and related services (listed in the footer of this document) in:

Steel	Gypsum Board	Concrete	
Insulation	Timber Products	Roof Tiles	Glass
Windows	Clay Bricks	Concrete Masonry	
Cement	Tiles	Insulated Sandwich Panels	

BPIC’s members and associated companies directly employ over 200,000 Australians with more than 470,000 employed indirectly. Their collective industries are worth over \$54B in annual production to the Australian economy. BPIC is a not for profit organisation governed by a Board of Directors comprised of representatives from its member organisations.

BPIC’s primary objective is to provide coordinated representation of the building products industry to interested parties including Government, the construction industry, and the general public to help improve building and construction standards. We also provide a forum for discussion, information sharing and policy formulation among major product categories in the building industry. BPIC’s mission is to:

- Promote regulatory reform to ensure that products meet minimum standards, code compliance, and are used in the manner for which they are intended.
- Promote public and regulatory confidence, growth and innovation in the building product sector.
- Promote and support improved, robust and nationally consistent building and construction product legislation, regulation, codes and standards.

BPIC works to fulfill these aims by gathering and supplying practical and current industry information on behalf of BPIC member organisations and other organisations and companies that are not members but follow BPIC through various means. This industry-wide approach to responding to regulatory issues, helps to ensure that Governments are informed of possible problems in the building industry and are provided with appropriate industry-considered responses. BPIC also encourages investment in skills formation, product development and industry research by helping to identify and remove regulatory impediments to innovation.

References

Hills, R 2018, *Rebuilding Confidence: An Action Plan for Building Regulatory Reform*. BPIC, Australia

Lambert, M 2015, *Independent Review of the Building Professionals Act 2005*

Queensland Parliament 2017, Building and Construction Legislation (Non-conforming Building Products—Chain of Responsibility and Other Matters) Amendment Bill 2017

Wallace, A 2014, *Review of the Building Act 1975 and building certification in Queensland*

Attachment 1 – Reinstated Safety Bill Clauses

NOTE – All text highlighted in RED, comprises the reinstated clauses of the Bill that were deleted by Cabinet. These amendments were proposed by the Building Products Industry Council (BPIC) and were introduced into the NSW Parliament on November 22, 2017 by Yasmin Catley the Shadow Minister for Innovation and Better Regulation. They were supported by The Greens and The Shooters Party as well as the following industry organisations:

- **Australian Industry Group**
- **Australian Institute of Architects**
- **Engineers Australia**
- **Fire Protection Association Australia**
- **Housing Industry Association**
- **Master Builders Association**
- **Owners Corporation Network**
- **Property Council Australia**
- **Strata Community Australia**

Building Products (Chain of Responsibility and Other Matters) Bill 2017

No , 2017

A Bill for

An act to regulate building products to ensure the safety of consumers and the public generally, and to ensure that persons involved in the design, manufacture, supply, specification or installation of building products are held responsible for the safety, suitability and conformity of those products and their use.

The Legislature of New South Wales enacts:

Part 1 Preliminary

1 Name of Act

This Act is the *Building Products (Chain of Responsibility and Other Matters) Act 2017*.

2 Commencement

- (1) This Act commences on a day or days to be appointed by proclamation, except as provided by subsections (2)–(5).
- (2) Schedule 2.1 commences on the commencement of Schedule 9.1 [2] to the Environmental Planning and Assessment Amendment Act 2017, or the date of assent to this Act, whichever occurs later.
- (3) Schedule 2.4 [3] commences on the commencement of section 6.25 of the Environmental Planning and Assessment Act 1979 (as inserted by the Environmental Planning and Assessment Amendment Act 2017), or the date of assent to this Act, whichever occurs later.
- (4) Schedule 2.4 [4] commences on the commencement of section 9.34 of the Environmental Planning and Assessment Act 1979 (as inserted by the Environmental Planning and Assessment Amendment Act 2017), or the date of assent to this Act, whichever occurs later.
- (5) Schedule 2.5 commences on the commencement of Schedule 9.1 [2] to the Environmental Planning and Assessment Amendment Act 2017, or the commencement of section 18 of this Act, whichever occurs later.

A Objects of Act

The object of this Act is to regulate building products:

- (a) to ensure the safety of consumers and the public generally, and
- (b) to ensure that persons involved in the manufacture, import, supply, specification or installation of building products are held responsible for the safety, suitability and conformity of those products and their use.

4 Definitions

- (1) In this Act:

authorised officer means an authorised officer appointed under section 74.

building—see section 6.

building product—see section 5.

building product investigation—see section 34.

building product rectification order means an order under section 20.

building product use ban means a building product use ban under section 9 that is in force.

building work—see section 8.

chain of responsibility - see section xx.

conformity means any activity to determine, directly or indirectly, that a process, product or material meets relevant technical standards and fulfills relevant regulatory requirements.

council has the same meaning as in the Local Government Act 1993.

director has the same meaning as in the Corporations Act 2001 of the Commonwealth.

executive liability offence—see section 59.

foreign building product means a building product that is manufactured wholly or partly outside Australia.

function includes a power, authority or duty, and exercise a function includes perform a duty.

injury includes illness.

land has the same meaning as in the Environmental Planning and Assessment Act 1979.

manufacturer has the same meaning in relation to building products as it has in the ACL in relation to goods.

non-compliance risk – see section 4

non-complying building product - see section C

non-conformance risk – see section 4.

non-conforming building product - see section B.

notifiable incident means:

- (a) the death or serious injury of a person, or
- (b) an incident that exposes a person to a risk of serious injury.

owner has the same meaning as in the Local Government Act 1993 and includes, in relation to a building, the owner of the building and the owner of the land on which the building is erected.

person in the chain of responsibility, for a building product, see section Part D.

premises includes any land, building, structure, vessel, aircraft or vehicle and any place, whether built on or not.

published has the same meaning as it has in the Fair Trading Act 1987.

recall order means a recall order under section Part E that is in force.

relevant regulatory provisions means:

- (a) the Environmental Planning and Assessment Act 1979, and
- (b) the Plumbing and Drainage Act 2011.

representation means a claim, promise, publication, statement or other representation made in any way, including, for example, in advertising material or packaging or on a point-of-sale display.

~~**safety risk**—see section 4.~~

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.

statement has the same meaning as in the Fair Trading Act 1987.

strata scheme means a freehold strata scheme or a leasehold strata scheme under the Strata Schemes Development Act 2015.

supplier of a thing includes a person who supplies or re-supplies the thing by way of sale, exchange, lease, hire or hire-purchase.

temporary structure means any structure that is not attached to a permanent foundation and/or used to aid the construction of a building, and which is removed when the designated time period, activity, or use for which the temporary structure was erected has ceased (e.g. scaffolding, formwork, hoardings, etc).

the ACL means the Australian Consumer Law (NSW).

Note. See Part 3 of the Fair Trading Act 1987.

trade or commerce has the same meaning as in the Fair Trading Act 1987.

Tribunal means the Civil and Administrative Tribunal.

~~**unsafe**—see section 4.~~

use, in relation to a building product—see section 7.

Note. The Interpretation Act 1987 contains definitions and other provisions that affect the interpretation and application of this Act.

- (2) Sections 2 (2) and 11 of the ACL apply to the provisions of this Act in the same way as they apply to the provisions of the ACL.
- (3) Notes included in this Act do not form part of this Act.

Part 2 Key concepts

4 Safety risks and unsafe use of building products

- (1) For the purposes of this Act, there is a **non-conformance risk** or a **non-compliance risk** posed by the use of a building product in a building if:
 - (a) 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 (referred to in this Act as a safety risk), or
 - (b) the building product or the use of the building product will cause or is likely to cause significant detriment to consumers, or
 - (c) the building product or the use of the building product will cause or is likely to cause damage to any property or to destroy or otherwise significantly compromise any property.
 - (d) the building product for an intended use does not, or will not, comply with the relevant regulatory provisions and Standards.
- (2) 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.
- (3) The regulations may prescribe other circumstances in which a **non-conformance risk** or a **non-compliance risk** is posed by the use of a building product in a building.
- (4) For the purposes of this Act, a building product is unsuitable to be used in a building if a **non-conformance risk** or a **non-compliance risk** is posed by the use of the building product in the building.

5 Building product

- (1) A **building product** means any product, material or other thing that is, or could be, used in a building or attached to a building or used to aid the construction, modification or demolition of a building.
- (2) The following things are not building products for the purposes of this Act:
 - (a) 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),
 - (b) anything that the regulations declare is not a building product for the purposes of this Act.

6 Building

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 **this Act**), but does not include anything excluded from this definition by the regulations.

7 Use of building product

- (1) 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.
- (2) The **use** of a building product in a building has a corresponding meaning.
- (3) A **use** of a building product in a building includes a misuse of a building product in a building.
- (4) An **intended use** of a building product in a building means exactly what a product is to be used for, not what it could be used for and includes the precise situations and reasons where and why that product would be used.

8 Building work

- (1) **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.
- (2) Work that relates to a building is taken to be building work if the work is residential building work under the Home Building Act 1989 or if it would be residential building work under that Act if the building were a dwelling.
- (3) Work that relates to a dwelling is not building work if the work is not residential building work under the Home Building Act 1989, subject to subsection (4).
- (4) Work that relates to a dwelling is not excluded from being building work under this Act by virtue of clause 2 (3) (a) of Schedule 1 to the Home Building Act 1989.
- (5) The following work is not building work for the purposes of this Act:
 - (a) the supervision only of building work:
 - (i) by a person registered as an architect under the Architects Act 2003, or
 - (ii) by a person supervising owner-builder work (within the meaning of the Home Building Act 1989) for no reward or other consideration, or
 - (iii) by any other person, if all the building work is being done or supervised by the holder of a contractor licence under the Home Building Act 1989 authorising its holder to contract to do that work,
 - (b) demolition work,
 - (c) any work involved in the installation of any material that forms an upper layer or wearing surface of a floor (even if installed as a fixture) and that does not involve any structural changes to the floor, but not including work involved in the installation of floor tiles unless the regulations otherwise provide,

- (d) any work that involves the installation or maintenance of any fixed apparatus such as a lift, an escalator, an inclinor or a garage door by means of which persons or things are raised or lowered or moved in some direction that is restricted by fixed guides,
- (e) any work done by an individual in connection with a dwelling that is owned by the individual, unless the work is specialist work (within the meaning of the Home Building Act 1989) or work for which an owner-builder permit is required under that Act.
- (6) This section has effect subject to any regulations under subsection (7).
- (7) The regulations may do any of the following:
 - (a) declare any work to be building work for the purposes of this Act,
 - (b) declare any work not to be building work for the purposes of this Act.
- (8) In this section:
dwelling has the same meaning as in the Home Building Act 1989.

B Non-conforming building product

A building product is a non-conforming building product for an intended use if—

- (a) the association of the product with a building or temporary structure for the intended use—
 - (i) is not, or will not be, safe; or
 - (ii) does not, or will not, comply with relevant regulatory product conformity provisions and Australian Standards; or
 - (iii) does, or will cause, property destruction, damage or compromise.
- (b) the product does not perform, or is not capable of performing, for the use to the standard it is represented to perform by or for a consumer or a person in the chain of responsibility for the product.
- (c) its certification, authentication or test information or installation instructions are not legitimate, are inadequate or intended to deceive.

C Non-complying building product

A building product is a non-complying building product for an intended use if it is used in situations where it does not comply with the requirements of the National Construction Code (NCC), other relevant laws.

Part D Duties of persons in chain of responsibility

Division 1 General provisions about duties

D1 Relationship with safety laws

- (1) If a provision of this Part and a provision of a safety law deal with the same thing and it is possible to comply with both provisions, a person must comply with both provisions.
- (2) However, to the extent it is not possible for the person to comply with both provisions, the person must comply with the provision of the safety law.
- (3) Evidence of a contravention of this Part is admissible in any proceedings for an offence against a provision of a safety law.
- (4) If an act, omission or circumstances constitute an offence under this Part and a safety law, the offender is not liable to be punished twice in relation to the act, omission or circumstances.
- (5) In this section safety law means the Work Health and Safety Act 2011.

D2 Principles applying to duties

- (1) This section sets out the principles applying to duties persons have under Division 2.
- (2) A person may have more than 1 duty because of the functions the person performs or is required to perform.
- (3) More than 1 person can concurrently have the same duty.
- (4) Each person must comply with the duty to the standard required under Division 2 even if another person has the same duty.
- (5) If more than 1 person has a duty for the same matter, each person:
 - (a) is responsible for the person's duty in relation to the matter, and
 - (b) must discharge the person's duty to the extent to which the person:
 - (i) has the capacity to influence and control the matter, or
 - (ii) would have the capacity but for an agreement or arrangement purporting to limit or remove that capacity.

D3 Code of practice about discharging duties

- (1) The Minister may, by order published on the NSW legislation website, make a code of practice that states a way of discharging a duty a person has under this Part.
- (2) Sections 40 and 41 of the Interpretation Act 1987 apply in relation to an order under subsection (1) in the same way as they apply to a statutory rule.
- (3) A code of practice, or an order amending or repealing a code of practice, commences on the day the order is published on the NSW legislation website or a later day specified in the order.
- (4) A code of practice ceases to have effect 10 years after it commences.
- (5) A code of practice is admissible in proceedings for an offence against this Part as evidence of whether or not a duty under this Part has been complied with.
- (6) Nothing in this section prevents a person from introducing evidence of compliance with the duty in a way that is different from the code of practice.

Division 2 Duties

D4 Who is person in chain of responsibility?

A person, either natural or juridical (company, body corporate, etc), is a person in the chain of responsibility for a building product if:

- (a) the person:
 - (i) designs, manufactures, imports, supplies or specifies the building product, and
 - (ii) knows, or is reasonably expected to know, that the building product will or is likely to be used in a building, or
- (b) the person does the building work by which the building product is used in a building.

D5 Primary duty of person in chain of responsibility

Each person in the chain of responsibility for a building product must, so far as reasonably practicable, ensure that the product is not a non-conforming building product for an intended use in a building.

D6 Additional duty relating to accompanying information

- (1) A person in the chain of responsibility for a building product who designs the building product must ensure, so far as reasonably practicable, that, if the person gives the design to another person who is to give effect to the design, the design is accompanied by the required information for the product and that where relevant Australian regulatory provisions and Standards exist, the design of the product complies with these provisions and Standards.
- (2) A person in the chain of responsibility for a building product who manufactures, imports or supplies the product must ensure, so far as reasonably practicable, that when the person gives the product to another person the product is accompanied by the required information for the product, and that where relevant Australian regulatory provisions and Standards exist, the product complies with these provisions and Standards.
- (3) A person in the chain of responsibility for a building product who specifies the product must ensure, so far as reasonably practicable, that they specify products that are not non-conforming or not non-compliant for an

- intended use, and when the person gives the product specification to another person the specification includes the required information for the product.
- (4) For the purposes of subsection (1), (2) and (3), a person gives a building product to another person if the person:
 - (a) sells, supplies or otherwise transfers the building product to the other person, or
 - (b) facilitates the sale, supply or transfer of the building product to another person.
 - (5) A person who does the building work by which a building product is used in a building must ensure, so far as reasonably practicable, that the owner of the building is given the information about the product prescribed by the regulations for this subsection.
 - (6) The regulations may prescribe the following requirements in relation to the information required under this section:
 - (a) the matters that must be included or provided for in the information,
 - (b) the matters that must not be included or provided for in the information,
 - (c) the form and transmission method in which the information must be given;
 - (d) the timing or sequence in which the information must be given;
 - (e) the relevant recipients who must receive the information.
 - (7) In this section:

required information means information about the product that:

 - (a) for each intended use of the product, states or otherwise communicates the following:
 - (i) evidence it meets relevant standards and codes;
 - (ii) the suitability of the product for the intended use and, if the product is suitable for the intended use only in particular circumstances or subject to particular conditions, the particular circumstances or conditions;
 - (iii) instructions about how the product must be associated with other products in a building to ensure it is not a non-conforming building product for the intended use;
 - (iv) instructions about how the product must be used or installed in a building to ensure it is not a non-conforming building product for the intended use, and
 - (b) complies with the requirements for the information, if any, prescribed by the regulations.

Division 3 Offences relating to duties

D7 Failure to comply with duty

- A person commits an offence if:
- (a) the person has a duty under Division 2, and
 - (b) the person fails to comply with the duty.

Maximum penalty: 1,000 penalty units.

D8 Duty about representations about building products

A person must not make a representation, or permit a representation to be made, that the use of a building product in a building complies, or will comply, with the relevant regulatory provisions if the person knows, or ought reasonably to know, that the use of the building product does not, or will not, comply with the relevant regulatory provisions.

Maximum penalty: 1,000 penalty units.

D9 Duty to notify non-conforming building product

- (1) If a person in the chain of responsibility for a building product becomes aware, or reasonably suspects, that the building product is a non-conforming building product for an intended use in a building, the person must, as soon as practicable and within 2 days after becoming aware or forming the suspicion, give the Secretary notice of the matter.

Maximum penalty: 50 penalty units.

- (2) If the person is aware of a notifiable incident that was or may have been caused by the use of the building product for the intended use, the notice under subsection (1) must also include notice of the notifiable incident.
- (3) The notice under subsection (1):
 - (a) must be given as soon as practicable but, in any case, within 2 days after the person becomes aware that, or forms the suspicion that, a building product is a non-conforming building product for an intended use, and
 - (b) must be given in a form approved by the Secretary.
- (4) In proceedings in which a person is charged with an offence under this section, it is a defence to the prosecution of the offence if the person charged proves that the person had a reasonable excuse for the act or omission concerned.

D10 Duty to comply with directions of Secretary

- (1) The Secretary may, by written notice given to a person in the chain of responsibility for a building product, direct the person to take stated action within a stated period to remove or minimise the safety risks posed by the use of the building product in a building.
- (2) Subsection (1) applies only if the Secretary is satisfied on reasonable grounds:
 - (a) that the use is an intended use, and

- (b) that the building product is or may be a non-conforming or non-compliant building product in relation to the use, and
- (c) there are safety risks arising from the product being a non-conforming building product for the intended use; or
- (d) the non-conforming or non-compliant building product does, or will cause, property destruction, damage or compromise.

(3) A person given a direction under this section must comply with the direction.

Maximum penalty: 50 penalty units.

D11 Duty to notify notifiable incident

(1) A person in the chain of responsibility for a building product who becomes aware, or reasonably suspects, that a notifiable incident was or may have been caused by the use in a building of a building product that is a non-conforming building product in relation to that use must give the Secretary notice of the notifiable incident.

Maximum penalty: 100 penalty units.

(2) The notice under subsection (1):

- (a) must be given as soon as practicable but, in any case, within 2 days after the person becomes aware that, or forms the suspicion that, a notifiable incident has occurred, and
- (b) must be given in a form approved by the Secretary.

(3) In proceedings in which a person is charged with an offence under this section, it is a defence to the prosecution of the offence if the person charged proves that the person had a reasonable excuse for the act or omission concerned.

D12 Secretary may require remedial action

(1) The Secretary may, by written notice given to a person, direct the person to do the following within the period stated in the direction:

- (a) remedy a contravention of this Part,
- (b) take stated steps to prevent the contravention from continuing or being repeated.

(2) The Secretary may give a direction under this section only if the Secretary is satisfied on reasonable grounds that the person:

- (a) has contravened a duty under this Part, or
- (b) has contravened a duty under this Part in circumstances that make it likely that the contravention will continue or be repeated.

(3) The period stated in the direction must be at least 28 days unless the Secretary is satisfied that, if the direction is not required to be complied with within a shorter period:

- (a) a substantial loss will be incurred by, or a significant hazard will be caused to the health or safety of, a person because of the contravention, or
- (b) the contravention will cause a significant hazard to public safety or the environment generally.

(4) A person given a direction under subsection (1) must comply with the direction.

Maximum penalty: 1,000 penalty units.

Part 3 Building product use bans

9 Secretary may prohibit use of building products

- (1) The Secretary must, by written notice published on the internet, prohibit the use of a particular building product in a building or buildings, if the Secretary is satisfied on reasonable grounds that the use is unsafe, if the product is non-conforming or non-compliant.
- (2) A prohibition imposed under this section is a building product use ban.
- (3) 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.
- (4) A building product use ban that prohibits an unsafe use of a building product or the use of products that are non-conforming or non-compliant, is not invalid merely because it also prohibits another use of the building product that is not an unsafe use or that is a conforming and compliant product, 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 or unsuitable use.

10 Reasons to be given

- (1) A building product use ban must specify the reasons why the Secretary has decided to impose the building product use ban.
- (2) The requirement to give reasons applies to a decision to amend a building product use ban in the same way as it applies to a decision to impose a building product use ban.

11 Duration of ban

- (1) 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).
- (2) A building product use ban remains in force until it is revoked by the Secretary.

12 Amendment or revocation of ban

- (1) The Secretary may, by written notice published on the internet:
 - (a) amend a building product use ban, or
 - (b) revoke a building product use ban.
- (2) An amendment or revocation takes effect on the date specified by the Secretary in the notice amending or revoking the ban (being a date not earlier than the date that the notice is first published on the internet).

13 Secretary may call for public submissions

- (1) The Secretary may, before or after imposing a building product use ban, by written notice published on the internet, call for public submissions on the question of whether a building product use ban is warranted and the terms or proposed terms of the ban.
- (2) If the Secretary calls for public submissions, the Secretary is to have regard to any submissions that are duly made to the Secretary by the date that is 28 days after the publication of the notice (or by a later date approved by the Secretary) in deciding whether to impose the building product use ban or, if the ban has already been imposed, to amend or revoke the ban.
- (3) The Secretary is not required to give any person an opportunity to make submissions on a building product use ban or proposed building product use ban before it is imposed (despite any requirement of the rules of procedural fairness).
- (4) This section applies to an amendment to a building product use ban in the same way as it applies to the imposition of a building product use ban.

14 Notice of imposition of building product use ban

- (1) The Secretary must, if practicable, give notice of a building product use ban to the manufacturer of the building product concerned.
- (2) If the building product is a foreign building product, notice may instead be given to an Australian importer or supplier of the building product.
- (3) If practicable, notice is to be given at least 48 hours before the building product use ban is published on the internet.
- (4) However, the Secretary is not required to give prior notice of a building product use ban 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.
- (5) The Secretary is not required to give notice to a person under this section if the Secretary is unable, after making reasonable inquiries, to ascertain the identity of, or to locate, the person to whom notice would otherwise be required to be given.
- (6) The Secretary may also comply with a requirement to give prior notice of a building product use ban under this section by publishing notice of the Secretary's intention to impose a building product use ban on the internet.

- (7) This section applies to an amendment to a building product use ban in the same way as it applies to the imposition of a building product use ban.
- 15 Offence to contravene building product use ban**
- (1) A person must not cause a building product to be used in a building in contravention of a building product use ban.
Maximum penalty:
(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.
- (2) For the purposes of subsection (1), a person causes a building product to be used in a building:
(a) if the person does the building work by which the building product is used in the building, or
(b) in any other circumstances prescribed by the regulations.
- (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.
Maximum penalty:
(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.
- (4) In proceedings in which a person is charged with an offence under this section, it is a defence to the prosecution of the offence if the person charged proves that the person had a reasonable excuse for the act or omission concerned.
- (5) An offence against subsection (1) or (3) is an executive liability offence.

Part E Building product recalls

E1 Secretary may make recall order

- (1) The Secretary may, by order in writing served on a responsible person for a building product, direct the responsible person to recall that building product from use.
- (2) An order under this section is a recall order.
- (3) A recall order may be made only if:
 - (a) the Secretary is satisfied on reasonable grounds that the building product:
 - (i) is a non-conforming building product for a risk-in-context use; or
Examples of things that under this subsection are building products that are risk-in-context i.e. in one context might be fit-for-purpose and in a different context not fit-for-purpose –
 - Australian Standards compliant plain shank flat head galvanised nails marketed, sold or supplied as being appropriate/intended for cyclonic roof fastening.
 - Watermark approved low pressure plumbing valve marketed, sold, or supplied as being appropriate/intended for high pressure plumbing application.
 - (ii) is, on a wide scale or normally, not being installed strictly in accordance with the manufacturer's or supplier's instructions, or
 - (b) the Secretary is satisfied on reasonable grounds that:
 - (i) the product has been, is proposed to be, or in the absence of specific advice to the contrary could reasonably be assumed to be, associated with a building or temporary structure for an intended use; and
 - (ii) there are safety risks arising from the product being a non-conforming building product for the intended use or the product does, or will cause, property destruction, damage or compromise.
- (4) The Secretary may make a recall order for a building product whether or not:
 - (a) the responsible person, or another responsible person, has already undertaken a recall of the building product, or
 - (b) the building product has been used in a building.
- (5) A recall order for a building product may be made in relation to 2 or more responsible persons for the building product.
- (6) In this Part:
responsible person for a building product means:
 - (a) a person who designed, manufactured, advertised, recommended, promoted, imported, supplied or specified the building product, or
 - (b) if the product has been used in a building or temporary structure—a person who did the building work by which the building product was used in the building.

E2 Notice of intention to make recall order

- (1) Before making a recall order, the Secretary must:
 - (a) give each responsible person to whom the recall order is to apply written notice of the Secretary's intention to make the order and the reasons for making the order, and
 - (b) give the responsible person a copy of the proposed recall order, and
 - (c) ask the responsible person to show cause why the Secretary should not make the proposed recall order.
- (2) If a responsible person wishes to show cause why the recall order should not be made, the person may make written submissions to the Secretary within 7 days after receiving the notice and copy of the proposed order.
- (3) The Secretary must consider any written submissions made by a responsible person within the period mentioned in subsection (2) before making the recall order.
- (4) This section does not apply to a responsible person in relation to a building product if an order, however called, directing the person to recall the building product from use is in force under the law of another State.

E3 Nature of recall order

- (1) A recall order must state:
 - (a) the reasons for the recall of the building product from use, and
 - (b) what each responsible person to whom the order applies must do to recall the building product from use including, for example, the following:
 - (i) the way in which, and the period for which, a responsible person must inform other persons about the reason for the recall order,
 - (ii) the information a responsible person must give other persons about the reasons for the recall order, including the action the other persons should take to mitigate any risk of injury,
 - (iii) the action a responsible person must take in relation to other persons to whom the building product has been sold or supplied, for example, replacing the building product or providing a refund for the building product,
 - (iv) for a building product used in a building—the action a responsible person must take to remove the building product from the building,
 - (v) the action a responsible person must take to stop the building product from being a non-conforming building product for an intended use, for example, by repair or modification,

- (vi) the action a responsible person must take to help another responsible person to whom the recall order applies to comply with the order,
 - (vii) the information a responsible person must give to the Secretary about the progress of the recall.
- (2) Each responsible person to whom the recall order applies is liable for any cost incurred in relation to complying with the order, including costs incurred by a person giving any assistance the person is required to give under this Part.
- (3) The recall order remains in force until the end of 2 years after the order is fully complied with unless sooner revoked by the Secretary.
- (4) Subsection (3) does not prevent a further recall order being made for the same building product to which the recall order applied while it was in force.

E4 Compliance with recall order

- (1) A responsible person must comply with the requirements of a recall order that applies to the person.
- (2) A person must not supply, or cause to be used in a building, a building product that the person knows, or ought reasonably to know, is the subject of a recall order.
- Maximum penalty: 1,000 penalty units.

E5 Other persons must help responsible person

- (1) person who supplies a building product, or does the building work by which a building product is used in a building, must give a responsible person who is the subject of a recall order in relation to the building product any reasonable assistance that the person requests to enable the person to comply with the recall order.
- Examples of reasonable assistance –
- ceasing the supply of the recalled building product;
 - putting up easily read signs (in English and Italian, Greek, Cantonese, Arabic, Vietnamese or other language as may be required) about the recall in a prominent place at the supplier’s place of business and announcing the recall prominently on the homepage (in English and Italian, Greek, Cantonese, Arabic, Vietnamese or other language as may be required) of the supplier’s website, social media sites, relevant trade publications and all technical/promotional literature;
 - providing a convenient, no-cost, collection points for recalled building products close to places where the products were installed or used;
 - identifying and or contacting persons supplied with the recalled building product;
 - responsibly recycling recalled products, or safely disposing of them if recycling is not possible.
- Maximum penalty: 50 penalty units.
- (2) This section applies only if the responsible person who is the subject of the recall order produces a copy of the recall order to the person the subject of the request.

E6 Public notice

The Secretary must ensure information sufficient to alert the public about the reason for the recall order is published:

- (a) in a newspaper circulating generally in the State, and
- (b) on the internet.

E7 Voluntary recalls to be notified

A responsible person may voluntarily recall a product, but must notify the Secretary within 2 days of doing so.

E8 Voluntary recall

- (1) A voluntary recall order must state:
- (a) the reasons for the recall of the building product from use, and
 - (b) what each responsible person to whom the order applies must do to recall the building product from use.
- (2) Each responsible person to whom the recall order applies is liable for any cost incurred in relation to complying with the order, including costs incurred by a person giving any assistance the person is required to give under this Part.
- (3) A responsible person must comply with the requirements of a recall order that applies to the person.
- (4) A person must not supply, or cause to be used in a building, a building product that the person knows, or ought reasonably to know, is the subject of a voluntary recall order.
- Maximum penalty: 1,000 penalty units.
- (5) A person who supplies a building product, or does the building work by which a building product is used in a building, must give a responsible person who is the subject of a recall order in relation to the building product any reasonable assistance that the person requests to enable the person to comply with the recall order.

Part 4 Identification and rectification of affected buildings

16 Definitions

In this Part:

affected building—see section 17.

affected building notice means a notice under section 18.

general building safety notice means a notice under section 19.

made safe—see section 26.

relevant enforcement authority in relation to a building means:

- (a) a person or body that may give orders under section 121B of the Environmental Planning and Assessment Act 1979 in relation to 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.

17 Affected building

(1) For the purposes of this Part, a building is an affected building if a building product the subject of a building product use ban, product recall or other ban, has been used in the building for a use that is prohibited by the building product use ban, product recall or other ban.

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

18 Identification and notification of particular affected buildings

(1) If the Secretary is satisfied, on reasonable grounds, that a particular building is or may be an affected building, the Secretary may issue a notice under this section (an affected building notice).

(2) An affected building notice is to include the following information:

- (a) the location of the building that is or may be an affected building,
- (b) particulars of the relevant building product use ban,
- (c) particulars of the ~~safety~~-risk posed by the use of the building product to which the building product use ban applies.

(3) The Secretary is to give a copy of an affected building notice to the following:

- (a) the owner or owners of the building,
- (aa) the occupier or occupiers of the building,
- (b) the council for the area in which the building is located,
- (c) a relevant enforcement authority for the building (if the council is not a relevant enforcement authority for the building),
- (d) the Commissioner of Fire and Rescue NSW, if the safety risk posed by the use of the building product relates to a risk of fire.

(4) If the building is the subject of a strata scheme under the Strata Schemes Management Act 2015, a requirement to give notice to the owner or owners of the building is a requirement:

- (a) to give notice to the owners corporation constituted under that Act for the building, and
- (b) to give notice to each person who is an owner (within the meaning of that Act) of a lot in the strata scheme.

(5) The Secretary may publish an affected building notice on the internet, but only if the Secretary considers that it is in the public interest to do so.

19 General warning about class of buildings that may be affected buildings

(1) The Secretary may issue a notice under this section (a *general building ~~safety~~-notice*) if the Secretary is satisfied, on reasonable grounds, that a class of buildings may be affected buildings.

(2) A general building ~~safety~~ notice is a notice that identifies the risk posed by the use of a building product that is the subject of a building product use ban in the class of buildings concerned.

(3) A general building ~~safety~~-notice is to include the following information:

- (a) particulars of the class of buildings that may be affected buildings, to the extent known to the Secretary,
- (b) particulars of the relevant building product use ban,
- (c) particulars of the safety risk posed by the use of the building product to which the building product use ban applies.

(4) A general building ~~safety~~-notice may be given:

- (a) to all councils or to any councils that the Secretary considers appropriate, and
- (b) to the Commissioner of Fire and Rescue NSW, if the safety risk posed by the use of the building product relates to a risk of fire.

(5) The Secretary may publish a general building ~~safety~~-notice on the internet, but only if the Secretary considers that it is in the public interest to do so.

20 Power of relevant enforcement authority to order rectification

(1) A relevant enforcement authority may make an order under this section (a building product rectification order) in respect of a building.

(2) A building product rectification order is an order that requires the owner of a building to do such things as are necessary for either or both of the following purposes:

- (a) 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,
 - (b) to remediate or restore the building following the elimination or minimisation of the safety risk.
 - (3) A building product rectification order may be made only if the relevant enforcement authority is satisfied, on reasonable grounds, that the building is an affected building.
 - (4) For the purposes of any proceedings relating to a building product rectification order or proposed building product rectification order, an affected building notice or a general building safety notice is evidence that the use in a building of the building product specified in the notice poses a safety risk of a kind specified by the Secretary in that notice.
 - (5) However, a relevant enforcement authority may make a building product rectification order in respect of a building whether or not the relevant enforcement authority has received an affected building notice or general building safety notice in respect of the building.
- Note. For example, a council may make a building product rectification order if, as a result of its own investigations, it identifies an affected building.

21 Statutory provisions applicable to building product rectification order

- (1) The Environmental Planning and Assessment Act 1979, and any regulations under that Act, apply to a building product rectification order in respect of a building as if the order were an order made under section 121B of that Act, except as provided by subsection (3).
- (2) A reference in section 121ZP of the Environmental Planning and Assessment Act 1979 to orders in force under Division 2A of Part 6 of that Act is taken to include a reference to building product rectification orders and affected building notices that are in force.
- (3) If a building is not a building within the meaning of the Environmental Planning and Assessment Act 1979, the Local Government Act 1993, and any regulations under that Act, apply to a building product rectification order in respect of the building as if the order were an order made under section 124 of the Local Government Act 1993.
- (4) The regulations may modify the application of any of the statutory provisions referred to in subsection (1), (2) or (3) to or in respect of a building product rectification order.
- (5) The Minister is not to recommend the making of a regulation that modifies the operation of any of those statutory provisions in respect of a building product rectification order except with the concurrence of the Minister administering the relevant statutory provisions concerned.

22 Appeals concerning orders

- (1) A council must give notice to the Secretary of an appeal against a building product rectification order made by the council.
- (2) The Secretary is entitled to appear and be heard on an appeal against a building product rectification order.
- (3) The Land and Environment Court may, on hearing an appeal against a building product rectification order, order the Secretary to amend or revoke an affected building notice or a general building safety notice (without limiting any other powers the Court has on an appeal).

23 Council to report to Secretary on response

- (1) The Secretary may, by notice in writing served on a council that has been given an affected building notice, require the council to provide a report to the Secretary about the steps it has taken in relation to the affected building notice.
- (2) The report is to indicate or include the following:
 - (a) whether the council has made a building product rectification order in respect of the building the subject of the affected building notice,
 - (b) whether the order has been complied with or the progress that has been made towards compliance with the order,
 - (c) any other steps that are being taken by the council to ensure that the building the subject of the affected building notice is made safe,
 - (d) such other matters as may be prescribed by the regulations.
- (3) If the council has not made a building product rectification order in respect of the building the subject of the affected building notice, the report is to set out the council's reasons for not making the order.
- (4) The report is to be provided to the Secretary within the period specified by the Secretary in the notice (being a period of not less than 30 days after the notice is served).
- (5) The Secretary may require more than one report to be provided under this section in respect of a building.
- (6) The Secretary may publish a report provided by the council under this section on the internet.
- (7) The Secretary may withhold from publication any information in the report that identifies the particular building that is the subject of the affected building notice.

24 Amendment or revocation of notices

- (1) The Secretary may amend or revoke an affected building notice or a general building safety notice by issuing a further notice.
- (2) The Secretary is to give notice of the amendment or revocation of an affected building notice to each of the following:
 - (a) the owner or owners of the building,

- (aa) the occupier or occupiers of the building,
 - (b) the council for the area in which the building is located,
 - (c) any relevant enforcement authority for the building to whom the affected building notice was given,
 - (d) the Commissioner of Fire and Rescue NSW, if the affected building notice was given to the Commissioner.
- (3) The Secretary is to give notice of the amendment or revocation of a general building safety notice to each of the following:
- (a) any council that was given the general building safety notice,
 - (b) the Commissioner of Fire and Rescue NSW, if the general building safety notice was given to the Commissioner.
- (4) An affected building notice or general building safety notice ceases to be in force if it is revoked.
- 25 Revocation of affected building notice**
- (1) The Secretary must revoke an affected building notice if the Secretary is satisfied that:
- (a) the building concerned has been made safe, or
 - (b) the building is not an affected building.
- (2) The Secretary may revoke an affected building notice on the application of an owner of the building or on the Secretary's own initiative.
- 26 When a building is "made safe"**
- For the purposes of this 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 risk, is minimised as far as practicable.

Part 5 Building product undertakings

27 Secretary may accept undertakings

- (1) 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 this Act.
- (2) The giving of an undertaking does not constitute an admission of guilt by the person giving it in relation to the contravention, suspected contravention or likely contravention to which the undertaking relates.

28 When building product undertaking takes effect

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.

29 Contravention of building product undertaking

- (1) A person must not contravene a building product undertaking given by the person that is in effect.
Maximum penalty:
 - (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 and, in the case of a continuing offence, a further penalty of 400 penalty units for each day the offence continues.
- (2) An offence against subsection (1) is an executive liability offence.

30 Order requiring compliance with building product undertaking

- (1) The Secretary may apply to the Supreme Court for an order if a person contravenes a building product undertaking.
- (2) If the Court is satisfied that the person who gave the building product undertaking has contravened the undertaking, the Court may make one or both of the following orders:
 - (a) an order directing the person to comply with the undertaking,
 - (b) an order discharging or varying the undertaking.
- (3) In addition to the orders referred to in subsection (2), the Court may make any other order that the Court considers appropriate in the circumstances, including orders directing the person to pay to the State:
 - (a) the costs of the proceedings, and
 - (b) the reasonable costs of the Secretary in monitoring compliance with the building product undertaking in the future.
- (4) Nothing in this section affects the liability for an offence of a person who contravenes a building product undertaking.

31 Withdrawal or variation of building product undertaking

- (1) A person who gives a building product undertaking may, at any time, with the written agreement of the Secretary:
 - (a) withdraw the undertaking, or
 - (b) vary the undertaking.
- (2) The Secretary may, at any time:
 - (a) withdraw the Secretary's acceptance of a building product undertaking, by notice in writing served on the person who gave the undertaking, or
 - (b) vary a building product undertaking (but only with the written agreement of the person who gave the undertaking).
- (3) The provisions of a building product undertaking cannot be varied to provide for a different alleged contravention.
- (4) A building product undertaking ceases to have effect if:
 - (a) it is withdrawn by the person who made it (in accordance with this section), or
 - (b) acceptance of the undertaking is withdrawn by the Secretary.

32 Proceedings for alleged contravention

- (1) Subject to this section, no proceedings for a contravention or alleged contravention of this Act may be brought against a person if a building product undertaking is in effect in relation to that contravention.
- (2) No proceedings may be brought for a contravention or alleged contravention of this Act against a person who has made a building product undertaking in relation to that contravention and has completely discharged the building product undertaking.
- (3) The Secretary may accept a building product undertaking in relation to a contravention or alleged contravention before proceedings in relation to that contravention have been finalised.
- (4) If the Secretary accepts a building product undertaking before the proceedings are finalised, the Secretary must take all reasonable steps to have the proceedings discontinued as soon as possible.

33 Register of undertakings

- (1) The Secretary is to maintain a register that includes the following in relation to each building product undertaking accepted under this Part:
 - (a) a copy of the undertaking.

- (b) a copy of each variation of the undertaking,
 - (c) the name and address of the person who gave the undertaking,
 - (d) the date of the undertaking.
- (2) The register is to be amended to remove information relating to undertakings that have been withdrawn.
 - (3) The register is to be kept in the head office of the Department of Finance, Services and Innovation and is to be made available for public inspection during ordinary business hours free of charge.
 - (4) The register may be made available in electronic form.

Part F Civil actions for unsuitable building products

F1 Proceedings for offences

- (1) Proceedings (offence proceedings) for an offence against this Act—
 - (a) are to be taken in a summary way; and
 - (b) must start—
 - (i) within 6 years after the offence is committed; or
 - (ii) within 1 year after the offence comes to the complainant's knowledge.
- (2) However, only the enforcement authority may bring a proceeding for an offence under this Act; or
- (3) In a complaint starting offence proceedings, a statement that the matter of the complaint came to the complainant's knowledge on a stated day is evidence of the matter.

F2 Proceedings brought in a representative capacity

- (1) A person may bring offence proceedings in a representative capacity, if the person has the consent of—
 - (a) for proceedings brought on behalf of a body of persons or a corporation—the members of its controlling or governing body; or
 - (b) for proceedings brought on behalf of an individual—the individual.
- (2) The person on whose behalf the offence proceedings are brought may contribute to, or pay, the legal costs and expenses incurred by the person bringing the proceedings.

F3 Enforcement orders

- (1) After hearing offence proceedings, a Magistrates Court may make an order (an enforcement order) for the defendant to take stated action within a stated period.
Examples of action that an order may require—
 - cease manufacture, sale, promotion or supply of a building product or material
 - order destructive and/or other testing of a building product or material
 - to stop the installation of a building product or material in a development
 - to demolish or remove part of a development incorporating a building product or material
 - to restore, as far as practicable, premises to the condition the premises were in immediately before a building product or material was used
 - to do, or not to do, another act to ensure a building product or material complies with all regulatory requirements and Standards
 - if the court reasonably believes building products or materials are dangerous, to repair or rectify the property, to secure the property, or to fence the property off to protect people
 - to stop a stated use of a building product or material
 - to require refund of purchase and delivery costs of sub-standard building products
 - to require compensation of costs associated with removal and rectification associated with sub-standard building products
- (2) The enforcement order may be in terms the court considers appropriate to secure compliance with this Act.
Example—
The order may require the defendant to provide security for the reasonable cost of taking the stated action, or a restraint on the defendant from removing any assets located in or outside Australia or from disposing of, dealing with, or diminishing the value of, those assets, which might reasonably pay for the costs of taking the stated action.
- (3) An enforcement order must state the period within which the defendant must comply with the order.
- (4) An enforcement order may be made under this section in addition to the imposition of a penalty or any other order under this Act.
- (5) A person must not contravene an enforcement order.
Maximum penalty—4500 penalty units or 2 years imprisonment.
- (6) Unless a court orders otherwise, an enforcement order—
 - (a) attaches to the building product, material or premises; and

- (b) binds the manufacturer, importer, supplier, property owner, their successors in title and any other associated party.
Maximum penalty—200 penalty units.
- (7) A person may apply to the court for an order (a compliance order) that states the enforcement order has been complied with.
- (8) If a person gives a notice that a compliance order has been made, and a copy of the compliance order, to the registrar of titles, the registrar must remove the record of the making of the enforcement order from the appropriate register.
- (9) If the enforcement order is not complied with within the period stated in the order, the enforcement authority may—
 - (a) take the action required under the order; and
 - (b) recover the reasonable cost of taking the action as a debt owing to the authority from the defendant.

F4 Order for compensation

- (1) This section applies if a Magistrates Court—
 - (a) finds a defendant guilty of an offence under this Act;
 - (b) finds that, because of the offence, another person has—
 - (i) suffered loss of income; or
 - (ii) suffered a reduction in the value of, or damage to, property; or
 - (iii) incurred expenses to replace or repair property or prevent or minimise, or attempt to prevent or minimise, the loss, reduction or damage.
- (2) The court may order the defendant to pay the other person compensation for the loss, reduction or damage suffered or the expenses incurred.
- (3) An order may be made under this section in addition to the imposition of a penalty and any other order under this Act.

F5 Order for investigation expenses

- (1) This section applies if—
 - (a) a Magistrates Court finds—
 - (i) a defendant guilty of a building offence; and
 - (ii) an enforcement authority has reasonably incurred expenses in taking a sample or conducting an inspection, test, measurement or analysis to investigate the offence; and
 - (b) the enforcement authority applies for an order for the payment of the expenses.
- (2) The court may order the defendant to pay a reasonable amount for the expenses to the enforcement authority if the court considers it would be just to do so in the circumstances.

Part 6 Investigation and assessment powers of Secretary

Division 1 Building product investigations

34 Building product investigations

- (1) The Secretary may authorise an investigation for any or all of the following purposes:
 - (a) to ascertain whether a use of a building product in a building is unsafe, unsuitable, non-conforming or non-compliant;
 - (b) to ascertain the location of any building in which a building product has been used in a way that is or may be unsafe, unsuitable, non-conforming or non-compliant.
- (2) An investigation authorised under this section is a building product investigation.
Note. Authorised officers may exercise their information gathering powers under Part 7 for the purposes of a building product investigation.

35 Consultation

- (1) The Secretary must, if practicable, give the manufacturer of the building product that is the subject of the building product investigation notice of the building product investigation and an opportunity to make submissions in relation to the building product investigation.
- (2) If the building product is a foreign building product, notice may be given to an Australian importer or supplier of the building product instead of the manufacturer.
- (3) The Secretary is taken to comply with the requirement to give notice under this section if the Secretary publishes on the internet a notice that:
 - (a) advises of the Secretary's intention to conduct the building product investigation, and
 - (b) invites interested persons to make submissions in relation to the investigation.

36 Publication and use of results of building product investigation

- (1) The Secretary may impose or amend a building product use ban, as the Secretary considers appropriate, to reflect the results of a building product investigation.
- (2) The Secretary may publish notice of the results of a building product investigation.
- (3) The Secretary must publish on the internet notice of the results of a building product investigation if the Secretary has published notice of the Secretary's intention to conduct the building product investigation.
- (4) If the Secretary publishes the results of a building product investigation, the Secretary may, if the Secretary considers it appropriate:
 - (a) identify any building or class of buildings in which the building product has been used, and
 - (b) identify how the building product has been used in a building or class of buildings.

37 Other powers of investigation not limited

This Division does not limit the functions of an authorised officer under Part 7.

Division 2 Product assessments

38 Definitions

In this Division:

product assessment means an assessment that is conducted for the purpose of assessing whether any reasonably foreseeable use of a building product in a building is unsafe, unsuitable, non-conforming or non-compliant.

product assessment report means a report about a product assessment.

39 Secretary may require product assessment

- (1) The Secretary may, by order in writing served on a person, require the person:
 - (a) to conduct a product assessment in relation to a building product, and
 - (b) to provide to the Secretary a product assessment report about that product assessment.
- (2) The Secretary may require a person to conduct a product assessment in relation to a building product only if:
 - (a) the Secretary has reasonable grounds to suspect that a foreseeable use of the building product is unsafe, unsuitable, non-conforming or non-compliant.
 - (b) the person required to conduct the product assessment is the manufacturer or a supplier of the building product, and
 - (c) the Secretary is satisfied that it is reasonable in the circumstances to require the manufacturer or supplier concerned to conduct the product assessment.
- (3) The order is to specify the requirements of the product assessment and product assessment report, including the time frame in which the product assessment is to be conducted and the product assessment report provided.
- (4) The time frame must be reasonable having regard to the requirements of the product assessment.
- (5) Without limiting subsection (3), the requirements of the product assessment may specify the following:
 - (a) the tests or inspections that must be conducted for the purposes of the product assessment,
 - (b) the qualifications or experience required in relation to the persons who conduct those tests or inspections.
- (6) A product assessment may be required whether or not a building product investigation into the building product is being conducted.
- (7) A person who, without reasonable excuse, fails to comply with a requirement made of the person under this section is guilty of an offence.
Maximum penalty: 100 penalty units.

- (8) A person who includes in any product assessment report provided to the Secretary any information that the person knows is false or misleading in a material particular is guilty of an offence.
Maximum penalty: 100 penalty units.

40 Taking of required actions and recovery of costs

- (1) If a person required to conduct a product assessment (the liable person) fails to conduct that product assessment, or to provide a product assessment report, to the satisfaction of the Secretary, the Secretary may take any action that is reasonably necessary to conduct or complete that product assessment.
- (2) The Secretary may, by notice in writing served on the liable person, require the person to pay a fee for action taken under this section.
- (3) The fee is to be no more than is reasonable to cover the costs and expenses incurred in connection with the action.
- (4) Costs and expenses incurred include costs and expenses incurred by or on behalf of any government agency.
- (5) The fee is recoverable by the Secretary as a debt payable by the liable person in any court of competent jurisdiction.
- (6) This section does not prevent the taking of proceedings for an offence of contravening a requirement to conduct, or report on, a product assessment.

41 Publication and use of product assessment report

- (1) The Secretary may, having regard to a product assessment report provided under this Division, impose or amend a building product use ban as the Secretary considers appropriate.
- (2) The Secretary may publish a product assessment report provided under this Division.
- (3) A product assessment report is admissible in any legal proceedings under this Act and in any legal proceedings in connection with a building product rectification order.

Part 7 Investigation powers of authorised officers

Division 1 Preliminary

42 Purposes for which functions under Part may be exercised

- (1) An authorised officer may exercise the functions conferred by this Part for any of the following purposes:
 - (a) to assess whether a reasonably foreseeable use of a building product in a building is unsafe, unsuitable, non-conforming or non-compliant;
 - (b) 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,
 - (c) for the purposes of a building product investigation or a product assessment,
 - (d) for the purpose of investigating and monitoring compliance with the requirements imposed by or under this Act,
 - (e) for the purpose of obtaining information or records for purposes connected with the administration of this Act,
 - (f) for the purpose of administering or executing this Act (including any instrument made under this Act).
- (2) In this Part, a reference to an authorised purpose is a reference to any purpose referred to in subsection (1).

Division 2 Information gathering powers

43 Exercise in conjunction with other powers

A power conferred by this Division may be exercised whether or not a power of entry under Division 3 is being exercised.

44 Powers of authorised officers to require information and documents

- (1) An authorised officer may, by notice in writing given to a person, require the person to furnish to the officer such information or documents (or both) as the officer may require for an authorised purpose.
- (2) A notice under this Division must specify the manner in which information or documents are required to be furnished and a reasonable time by which the information or documents are required to be furnished.
- (3) A notice under this Division may only require a person to furnish existing documents that are in the person's possession or that are within the person's power to obtain lawfully.
- (4) The person to whom any document is furnished under this Division may take copies of it.
- (5) If any document required to be furnished under this Division is in electronic, mechanical or other form, the notice requires the record to be furnished in written form, unless the notice otherwise provides.

45 Power of authorised officers to require answers

- (1) An authorised officer may require a person whom the authorised officer suspects on reasonable grounds to have knowledge of matters in respect of which information is reasonably required for an authorised purpose to answer questions in relation to those matters.
- (2) An authorised officer may, by notice in writing, require a corporation to nominate, in writing within the time specified in the notice, a director or officer of the corporation to be the corporation's representative for the purpose of answering questions under this section.
- (3) Answers given by a person nominated under subsection (2) bind the corporation.
- (4) An authorised officer may, by notice in writing, require a person to attend at a specified place and time to answer questions under this section if attendance at that place is reasonably required in order that the questions can be properly put and answered.
- (5) The place and time at which a person may be required to attend under subsection (4) is to be:
 - (a) a place and time nominated by the person, or
 - (b) if the place and time nominated is not reasonable in the circumstances or a place and time is not nominated by the person, a place and time nominated by the authorised officer that is reasonable in the circumstances.

46 Recording of evidence

- (1) An authorised officer may cause any questions and answers to questions given under this Division to be recorded if the officer has informed the person who is to be questioned that the recording is to be made.
- (2) A recording may be made using sound recording apparatus or audio visual apparatus, or any other method determined by the authorised officer.
- (3) A copy of any such recording must be provided by the authorised officer to the person who is questioned as soon as practicable after it is made.
- (4) A recording may be made under this section despite the provisions of any other law.

Division 3 Power to enter premises

47 Powers of authorised officers to enter premises

- (1) An authorised officer may enter any premises:
 - (a) at any reasonable time, or
 - (b) at any time, if the authorised officer reasonably believes it is necessary to do so as a matter of urgency.
- (2) A power to enter premises conferred by this Act authorises entry by foot or vehicle or by any other means.
- (3) Entry to any premises may be effected with or without the authority of a search warrant, subject to subsection (4).

- (4) This section does not empower an authorised officer to enter any part of premises used only for residential purposes except with the permission of the occupier or with the authority of a search warrant.

48 Power to require occupier to provide assistance

An authorised officer proposing to exercise a power of entry under this Division may, by notice in writing given to the owner or occupier of the premises, require the owner or occupier to provide such reasonable assistance and facilities as are specified in the notice within a specified time and in a specified manner.

Division 4 Functions that can be exercised on premises

49 Powers that can be exercised on premises

- (1) An authorised officer may, at any premises lawfully entered, do anything that in the opinion of the authorised officer is necessary to be done for an authorised purpose, including (but not limited to) the things specified in subsection (2)
- (2) An authorised officer may do any or all of the following
- (a) examine and inspect any thing,
 - (b) take and remove samples of a thing,
 - (c) make any examinations, inquiries or tests that the authorised officer considers necessary,
 - (d) take any photographs, films or other recordings that the authorised officer considers necessary,
 - (e) require documents to be produced for inspection,
 - (f) examine and inspect any documents,
 - (g) copy any documents,
 - (h) do anything else authorised by or under this Act.
- (3) The power to examine and inspect any thing includes a power to use reasonable force to break open or otherwise access a container or other thing being used, or suspected of being used, to hold or contain another thing.
- (4) The power to test a thing includes a power to destructively test a thing or a sample of a thing, if that is a reasonable test in the circumstances.
- (5) The power to do a thing under this section includes a power to arrange for that thing to be done (whether at the premises or elsewhere).
- (6) A power to do something under this section in relation to a thing may be exercised without the consent of the owner of the thing.

50 Search warrants

- (1) An authorised officer may apply to an eligible issuing officer for the issue of a search warrant if the authorised officer believes on reasonable grounds that:
- (a) a requirement imposed by or under this Act is being or has been contravened at any premises, or
 - (b) entry to the premises is necessary to enable the authorised officer to exercise functions for an authorised purpose.
- (2) An eligible issuing officer to whom such an application is made may, if satisfied that there are reasonable grounds for doing so, issue a search warrant authorising an authorised officer named in the warrant to do any of the following:
- (a) to enter the premises specified in the warrant,
 - (b) to exercise any function of an authorised officer under this Act.
- (3) Division 4 of Part 5 of the Law Enforcement (Powers and Responsibilities) Act 2002 applies to a search warrant issued under this section.
- (4) In this section:
eligible issuing officer has the same meaning as it has in Part 5 of the Law Enforcement (Powers and Responsibilities) Act 2002.

51 Requiring assistance

- (1) An authorised officer may require the owner or occupier of premises, or any person in or on premises (other than a public place), to provide any reasonable assistance that the authorised officer specifies for the purposes of exercising the authorised officer's functions under this Division in relation to those premises.
- (2) The requirement may be made in the form of a direction that is given orally to the person or by notice in writing served on the person.

52 Care to be taken

- (1) In the exercise of a power of entering or searching premises under this Division, or doing anything else on premises under this Act, an authorised officer must do as little damage as possible.
- (2) In particular, an authorised officer must exercise the functions conferred by this Division in a way that, as far as is reasonably practicable, avoids compromising the integrity of any building or building work in relation to which the functions are exercised.
- (3) In subsection (2), compromising the integrity of a building or building work includes damaging the building or building work or exposing the building or building work to damage or deterioration.

53 Compensation

- (1) The Secretary must 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.

- (2) Subsection (1) does not apply if the occupier obstructed or hindered the authorised officer in the exercise of the power concerned.

Division 5 General

54 Offence of failing to comply with requirement made by authorised officer

A person who fails to comply with a requirement made of the person by an authorised officer exercising a power conferred by this Part is guilty of an offence.

Maximum penalty: 100 penalty units.

55 Offence of furnishing false or misleading information

A person who furnishes any information, or does any other thing in purported compliance with a requirement under this Part, knowing that it is false or misleading in a material particular is guilty of an offence.

Maximum penalty: 100 penalty units.

56 Defence to contravention

In proceedings in which a person is charged with an offence of failing to comply with a requirement made of the person by an authorised officer exercising a function conferred by this Part, it is a defence to the prosecution of the offence if the person charged proves that the person had a reasonable excuse for the failure concerned.

57 Warning to be given

A person is not guilty of an offence of failing to comply with a requirement under this Part to furnish information or documents or to answer a question unless the person was warned on that occasion that a failure to comply is an offence.

58 Revocation or variation of notices

- (1) A notice given under this Part may be revoked or varied by a subsequent notice or notices.
- (2) Without limiting subsection (1), a notice may be varied by extending the time for complying with the notice.
- (3) A notice may be revoked or varied by the Secretary or by any authorised officer.

Part 8 Offences and other proceedings

Division 1 Liability for offences

59 Liability of directors etc for corporate offences—executive liability

- (1) A person commits an offence against this section 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.
- Maximum penalty: 200 penalty units.
- (2) For the purposes of this section, an executive liability offence is an offence against a provision of this Act that is designated by a provision of this Act to be an executive liability offence.
- (3) The prosecution bears the legal burden of proving the elements of the offence against this section.
- (4) The offence against this section can only be prosecuted by a person who can bring a prosecution for the executive liability offence.
- (5) This section does not affect the liability of the corporation for the executive liability offence, and applies whether or not the corporation is prosecuted for, or convicted of, the executive liability offence.
- (6) This section does not affect the application of any other law relating to the criminal liability of any persons (whether or not directors or other managers of the corporation) who are accessories to the commission of the executive liability offence or are otherwise concerned in, or party to, the commission of the executive liability offence.
- (7) In this section:
reasonable steps, in relation to the commission of an executive liability offence, includes, but is not limited to, such action (if any) of the following kinds as is reasonable in all the circumstances:
- (a) action towards:
 - (i) assessing the corporation's compliance with the provision creating the executive liability offence, and
 - (ii) ensuring that the corporation arranged regular professional assessments of its compliance with the provision,
 - (b) action towards ensuring that the corporation's employees, agents and contractors are provided with information, training, instruction and supervision appropriate to them to enable them to comply with the provision creating the executive liability offence so far as the provision is relevant to them,
 - (c) action towards ensuring that:
 - (i) the plant, equipment and other resources, and
 - (ii) the structures, work systems and other processes, relevant to compliance with the provision creating the executive liability offence are appropriate in all the circumstances,
 - (d) action towards creating and maintaining a corporate culture that does not direct, encourage, tolerate or lead to non-compliance with the provision creating the executive liability offence.

60 Liability of directors etc for offences by corporation as an accessory

- (1) For the purposes of this section, a corporate offence is 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.
- (2) 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 corporate offence.
- Maximum penalty: The maximum penalty for the corporate offence if committed by an individual.
- (3) The prosecution bears the legal burden of proving the elements of the offence against this section.

- (4) The offence against this section can only be prosecuted by a person who can bring a prosecution for the corporate offence.
 - (5) This section does not affect the liability of the corporation for the corporate offence, and applies whether or not the corporation is prosecuted for, or convicted of, the corporate offence.
 - (6) This section does not affect the application of any other law relating to the criminal liability of any persons (whether or not directors or other managers of the corporation) who are concerned in, or party to, the commission of the corporate offence.
- 61 Offence by corporation—general liability of directors**
- (1) 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.
 - (2) A person may be proceeded against and convicted under a provision pursuant to subsection (1) whether or not the corporation has been proceeded against or convicted under that provision.
- 62 Continuing offences**
- (1) A person who is guilty of an offence because the person contravenes a requirement made by or under this Act or the regulations (whether the requirement is imposed by a notice or otherwise) to do or cease to do something (whether or not within a specified period or before a particular time):
 - (a) continues, until the requirement is complied with and despite the fact that any specified period has expired or time has passed, to be liable to comply with the requirement, and
 - (b) is guilty of a continuing offence for each day the contravention continues.
 - (2) This section does not apply to an offence if the relevant provision of this Act or the regulations does not provide for a penalty for a continuing offence.
 - (3) This section does not apply to the extent that a requirement of a notice is revoked.
- 63 Continuing effect of requirements**
- (1) A requirement imposed by or under this Act that specifies a time by which, or a period within which, the requirement must be complied with continues to have effect until the requirement is complied with even though the time has passed or the period has expired.
 - (2) A requirement that does not specify a time by which, or period within which, the requirement must be complied with continues to have effect until the requirement is complied with.
 - (3) This section does not apply to the extent that any requirement imposed by or under this Act is revoked.
 - (4) Nothing in this section affects the powers of the Secretary with respect to the enforcement of any requirement imposed by or under this Act.
- 64 Proof of reasonable excuse**
- 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.
- 65 Penalty notices**
- (1) An authorised officer may issue a penalty notice to a person if it appears to the officer that the person has committed a penalty notice offence.
 - (2) A penalty notice offence is an offence against this Act or the regulations that is prescribed by the regulations as a penalty notice offence.
 - (3) The Fines Act 1996 applies to a penalty notice issued under this section.
Note. The Fines Act 1996 provides that, if a person issued with a penalty notice does not wish to have the matter determined by a court, the person may pay the amount specified in the notice and is not liable to any further proceedings for the alleged offence.
 - (4) The amount payable under a penalty notice issued under this section is the amount prescribed for the alleged offence by the regulations (not exceeding the maximum amount of penalty that could be imposed for the offence by a court).
 - (5) This section does not limit the operation of any other provision of, or made under, this or any other Act relating to proceedings that may be taken in respect of offences.

Division 2 Proceedings for offences

- 66 Proceedings for offences**
- (1) Proceedings for an offence against this Act or the regulations may be taken and prosecuted only by the Secretary or, in the name of the Secretary, by a person acting with the authority of the Secretary.
 - (2) Proceedings for an offence against this Act or the regulations may be dealt with:
 - (a) summarily before the Local Court, or
 - (b) summarily before the District Court in its summary jurisdiction.
 - (3) If proceedings are brought in the Local Court, the maximum monetary penalty that the Local Court may impose for the offence is 100 penalty units, despite any higher maximum monetary penalty provided in respect of the offence.
 - (4) In proceedings for an offence against this Act or the regulations, an authority to prosecute purporting to have been signed by the Secretary is evidence of that authority without proof of the signature of the Secretary.
- 67 Time within which offence proceedings may be commenced**

- (1) Proceedings for an offence against this Act or the regulations may be commenced within but not later than 2 years after the date on which the offence is alleged to have been committed.
- (2) Proceedings for an offence against this Act or the regulations may, with leave of the court, be commenced after the end of the period referred to in subsection (1) 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.
- (3) If subsection (2) is relied on for the purpose of commencing proceedings for an offence, the court attendance notice or application must contain particulars of the date on which evidence of the alleged offence first came to the attention of an authorised officer and need not contain particulars of the date on which the offence was committed. The date on which evidence first came to the attention of an authorised officer is the date specified in the court attendance notice or application, unless the contrary is established.
- (4) This section applies despite anything in the Criminal Procedure Act 1986 or any other Act.
- (5) In this section:
evidence of an offence means evidence of any act or omission constituting the offence.

68 Enforcement provisions of ACL that extend to building product offences

- (1) The following provisions of the ACL apply to an offence against Part 3 of this Act in the same way as they apply to a contravention of, or an offence against, a provision of Chapter 4 of the ACL:
 - (a) section 207 (Reasonable mistake of fact),
 - (b) section 208 (Act or default of another person etc),
 - (c) section 209 (Publication of advertisements in the ordinary course of business).
- (2) The following provisions of the ACL apply to an offence against Part 3 of this Act in the same way as they apply to a contravention of, or an offence against, a provision of Chapter 4 of the ACL:
 - (a) section 214 (Penalties for contraventions of the same nature etc),
 - (b) section 215 (Penalties for previous contraventions of the same nature etc).
- (3) This section is subject to the regulations.

Division 3 Other court orders

69 Compensation orders by court on conviction of person

- (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.
- (2) The compensation that the Local Court may order to be paid under this section is not to exceed the jurisdictional limit of the Local Court when sitting in its General Division within the meaning of the Local Court Act 2007.
- (3) The regulations may make further provision for the awarding of compensation under this section, including by limiting the types of loss or damage in respect of which compensation may be awarded.
- (4) In this section, a reference to the conviction of a person includes a reference to the making of an order in respect of a person under section 10 of the Crimes (Sentencing Procedure) Act 1999.

70 Supreme Court injunctions

- (1) The Supreme Court may grant an injunction in such terms as the Court determines to be appropriate if satisfied that a person has engaged, or is proposing to engage, in conduct that constitutes, or would constitute:
 - (a) a contravention of a provision of this Act, or
 - (b) attempting to contravene such a provision, or
 - (c) aiding, abetting, counselling or procuring a person to contravene such a provision, or
 - (d) inducing, or attempting to induce, whether by threats or promises or otherwise, a person to contravene such a provision, or
 - (e) being in any way, directly or indirectly, knowingly concerned in, or party to, the contravention by a person of such a provision, or
 - (f) conspiring with others to contravene such a provision.
- (2) The Supreme Court may grant an injunction under this section only on the application of the Secretary made with the consent of the Minister.
- (3) The power of the Supreme Court to grant an injunction restraining a person from engaging in conduct may be exercised:
 - (a) whether or not it appears to the Court that the person intends to engage again, or to continue to engage, in conduct of that kind, and
 - (b) whether or not the person has previously engaged in conduct of that kind, and
 - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person engages in conduct of that kind.
- (4) The power of the Supreme Court to grant an injunction requiring a person to do an act or thing may be exercised:
 - (a) whether or not it appears to the Court that the person intends to fail again, or to continue to fail, to do that act or thing, and
 - (b) whether or not the person has previously failed to do that act or thing, and
 - (c) whether or not there is an imminent danger of substantial damage to any person if the first-mentioned person fails to do that act or thing.

- (5) An injunction may be granted under this section as an interim injunction without an undertaking being required as to damages or costs or may be granted as a permanent injunction.

Division 4 Evidence

71 Evidence

Sections 80–83 of the Fair Trading Act 1987 apply to proceedings under this Act in the same way as they apply to proceedings under that Act.

72 Evidentiary certificates

- (1) A certificate that is issued by the Secretary that states any of the following matters is admissible in any legal proceedings (whether or not proceedings under this Act) and is evidence of the matters so stated:
- (a) that an instrument was made, issued or given under this Act on a specified day by a specified person,
 - (b) the terms of any instrument made, issued or given, or purported to be made, issued or given, under this Act, as in force on a specified day or during a specified period,
 - (c) the manner in which the instrument was made, issued or given,
 - (d) that an instrument made, issued or given under this Act was amended or revoked, the day on which it was amended or revoked, and the terms of any amendment,
 - (e) that a function was delegated under this Act, including the following:
 - (i) the person or persons to whom the function was delegated,
 - (ii) the date of the delegation,
 - (iii) the period during which the delegation had effect,
 - (iv) the terms of the delegation, including any restrictions or limitations on the delegation,
 - (f) that a person who made, issued or gave or purported to make, issue or give, an instrument under this Act was the holder of a specified office on a specified day or during a specified period,
 - (g) that a person was, on a specified day or during a specified period, an authorised officer under this Act,
 - (h) the terms of, and any conditions of or limitations on, a person's appointment as an authorised officer under this Act.
- (2) For the purposes of this section, a document purporting to be a certificate under this section is, unless the contrary is proved, taken to be such a certificate.
- (3) In this section:
given includes served.
instrument includes a notice or direction.
Secretary includes a delegate of the Secretary.

73 Opinion of Secretary

In any legal proceedings, it is to be presumed, unless the contrary is proved, that the opinion of the Secretary necessary for any of the purposes of this Act was duly formed.

Part 9 Authorised officers

74 Appointment of authorised officers

- (1) The Secretary may, by instrument in writing, appoint any person (including a class of persons) as an authorised officer for the purposes of this Act.
- (2) An appointment may apply to a specified person or to persons of a specified class.
- (3) An appointment may be unconditional, or subject to conditions or limitations.
- (4) An appointment has effect for the period specified in the instrument of appointment or, if no period is specified, until revoked by the Secretary.
- (5) The Secretary may, by instrument in writing, revoke or amend an appointment under this section at any time.
- (6) If an appointment of an authorised officer is made by reference to a particular office, the person appointed ceases to be an authorised officer if the person ceases to hold that office.

75 Persons eligible for appointment as authorised officers

- (1) Each of the following persons is eligible to be appointed as an authorised officer for the purposes of this Act:
 - (a) an employee of the Department of Finance, Services and Innovation,
 - (b) an employee of the Environment Protection Authority,
 - (c) an employee of the Department of Planning and Environment,
 - (d) an employee of Fire and Rescue NSW,
 - (e) a member of a permanent fire brigade within the meaning of the Fire Brigades Act 1989,
 - (f) an employee of a council who is an authorised person under the Local Government Act 1993,
 - (g) a person of a class prescribed by the regulations.
- (2) 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.
- (3) Nothing in this Act limits the functions of a person who is an authorised officer under any other Act or law.

76 Powers subject to instrument of appointment

- (1) An authorised officer may exercise the functions of an authorised officer under this Act, subject to any conditions or limitations specified in the officer's instrument of appointment.
- (2) Nothing in this Act authorises or requires an authorised officer to act in contravention of the conditions or limitations specified in the officer's instrument of appointment.

77 Issue of identification

- (1) Every authorised officer is to be provided with evidence of his or her authority as an authorised officer.
- (2) This section does not apply to a police officer.

78 Identification to be produced

- (1) In the course of exercising the functions of an authorised officer under this Act, the officer must, if requested to do so by any person affected by the exercise of any such function, produce to the person the officer's evidence of authority.
- (2) This section does not apply to a police officer who is in uniform.

79 Use of assistants

- (1) An authorised officer exercising a function conferred by or under this Act may exercise the function with the assistance of any other person the authorised officer considers necessary.
- (2) The person may accompany an authorised officer and take all reasonable steps to assist the authorised officer in the exercise of the authorised officer's functions under this Act.

80 Offences

- (1) A person who resists or obstructs an authorised officer in the exercise of the officer's functions under this Act is guilty of an offence.
Maximum penalty: 20 penalty units.
- (2) A person who assaults, abuses or threatens an authorised officer, or who encourages another person to do so, is guilty of an offence.
Maximum penalty: 100 penalty units or imprisonment for 6 months, or both.
- (3) A person who impersonates an authorised officer is guilty of an offence.
Maximum penalty: 100 penalty units or imprisonment for 6 months, or both.

Part 10 Miscellaneous

81 Administrative review of decisions

- (1) A person who is aggrieved by any of the following decisions may apply to the Tribunal for an administrative review under the Administrative Decisions Review Act 1997 of that decision:
 - (a) a decision of the Secretary to impose or amend a building product use ban,
 - (b) a decision of the Secretary to issue an affected building notice,
 - (c) a decision of the Secretary to issue a general building safety notice,
 - (d) a decision of the Secretary to refuse to revoke an affected building notice on application made by the person under this Act,
 - (e) a decision of the Secretary to require a product assessment to be conducted.
 - (f) a decision of the Secretary to make a recall order,
- (2) An application may not be made more than 28 days after the day on which notice of the decision is published on the internet, or served on the person, whichever occurs
- (3) 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 this Act.

82 Modification of requirement to give reasons

- (1) Section 49 of the Administrative Decisions Review Act 1997 does not apply to a decision to impose or amend a building product use ban.

Note. Section 49 of the Administrative Decisions Review Act 1997 requires an administrator to provide, on request by an interested person, a statement of reasons for a reviewable decision. The Secretary is already required by this Act to provide the Secretary's reasons for imposing or amending a building product use ban when notice of the ban or amendment is published.
- (2) If the Tribunal considers that the statement of reasons for imposing or amending a building product use ban, as set out in the notice of the ban or amendment, is not an adequate statement of reasons, the Tribunal may (on the application of an interested person) order the Secretary to provide an adequate statement of reasons or further particulars of the reasons for the decision within such time as may be specified in the order.
- (3) For the purposes of this section, a statement of reasons for imposing or amending a building product use ban is adequate only if it sets out the following:
 - (a) the findings of the Secretary that led the Secretary to impose or amend the building product use ban,
 - (b) the evidence or other material on which those findings were based,
 - (c) the reasoning process that led the Secretary to those findings.
- (4) In this section:

interested person means a person who is entitled to apply for an administrative review of a decision to impose or amend a building product use ban.

83 Enforcement of Act by council officers

- (1) A power conferred by the Environmental Planning and Assessment Act 1979 on a council investigation officer (within the meaning of section 119A of that Act) that may be exercised for the purpose of enabling a council to exercise its functions under that Act may also be exercised for the purpose of enabling a council to investigate, monitor or enforce compliance with this Act or a building product rectification order.
- (2) For that purpose, a reference in Part 6 of the Environmental Planning and Assessment Act 1979 to an offence against that Act includes a reference to an offence against this Act.

84 Fraudulent allegations

- (1) A person who, with the intention of obtaining a financial advantage or causing a financial disadvantage to another person:
 - (a) provides any false or misleading information about a building product or the use of a building product to the Secretary, or
 - (b) makes an unsubstantiated allegation about a building product or the use of a building product to the Secretary, is guilty of an offence.

Maximum penalty: 100 penalty units.
- (2) In this section:

obtain a financial advantage and cause a financial disadvantage have the same meanings as they have in Part 4AA of the Crimes Act 1900.

Secretary includes an authorised officer or any other person exercising functions under this Act.

unsubstantiated allegation means an allegation or complaint made without reasonable grounds.

85 Act prevails over National Construction Code

- (1) 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.
- (2) The fact that a building product or the use of a building product complies with a requirement of the National Construction Code does not constitute a reasonable excuse for a contravention of a building product use ban.
- (3) In this section:

National Construction Code means the National Construction Code produced and maintained by the Australian Building Codes Board, as in force from time to time.

86 Exchange of information

- (1) The Secretary may enter into, or approve of, an arrangement (an *information sharing arrangement*) with a relevant agency for the purposes of sharing or exchanging information held by the Secretary or the agency.
- (2) The information to which an information sharing arrangement may relate is limited to the following:
 - (a) information concerning investigations into and assessments of the safety of building products,
 - (b) any other information about building products and the use of building products in buildings relevant to the administration of this Act,
 - (c) any other information of a type prescribed by the regulations.
- (3) Under an information sharing arrangement, the Secretary and the relevant agency are, despite any other Act or law of the State, authorised:
 - (a) to request and receive information held by the other party to the arrangement, to the extent that the information is reasonably necessary to the exercise of the Secretary's functions under this Act, the administration or execution of this Act or to protect the safety of a person or property, and
 - (b) to disclose information to the other party, to the extent that the information is reasonably necessary to the exercise of the other party's functions or to prevent or eliminate a safety risk that may arise from the use of a building product in a building.
- (4) The Secretary may also (whether as part of an information sharing arrangement or otherwise):
 - (a) refer any matter with respect to building products or the use of building products to a relevant agency, and
 - (b) receive any such matter from a relevant agency, and
 - (c) conduct a joint investigation into any such matter with a relevant agency.
- (5) Any such relevant agency is, despite any other Act or law of the State, authorised to refer such a matter to the Secretary or to conduct an investigation into the matter jointly with the Secretary.
- (6) This section does not:
 - (a) limit the functions that may be exercised by the Secretary under other provisions of this Act, or
 - (b) require the Secretary to provide information to a relevant agency only in accordance with an information sharing arrangement where that information can otherwise be lawfully provided, or
 - (c) limit the operation of any other Act or law under which a relevant agency is authorised or required to disclose information to another person or body.
- (7) In this section:

information includes reports, recommendations, opinions, assessments and operational plans.

law enforcement agency means:

 - (a) the NSW Police Force or the police force of another State or Territory or of an overseas jurisdiction, or
 - (b) the Australian Federal Police, or
 - (c) the New South Wales Crime Commission, or
 - (d) the Australian Crime Commission, or
 - (e) any other authority or person responsible for the investigation or prosecution of offences against the laws of the State or of the Commonwealth, another State or Territory or an overseas jurisdiction.

relevant agency means:

 - (a) an agency of the State, or of the Commonwealth, another State or Territory or an overseas jurisdiction, that exercises functions under an enactment with respect to fair trading or consumer protection, or
 - (b) an agency of the State, or of the Commonwealth, another State or Territory or an overseas jurisdiction, that exercises functions under an enactment with respect to residential building work (within the meaning of the Home Building Act 1989) or plumbing and drainage work (within the meaning of the Plumbing and Drainage Act 2011), or
 - (c) a council, or
 - (d) a law enforcement agency, or
 - (e) any other agency of the State or of the Commonwealth, another State or Territory or an overseas jurisdiction, or
 - (f) any other person or body that exercises functions, in the public interest, that involve protecting the interests of consumers, or
 - (g) any other person or body prescribed by the regulations.

87 Permits

- (1) The Secretary may, by instrument in writing, issue a permit to a person that authorises the person to engage in any specified conduct.
- (2) A person is not guilty of an offence against this Act or the regulations if the person was authorised to engage in the conduct alleged to constitute the offence by a permit in force under this Act. A permit does not authorise a contravention of any other Act.
- (3) A permit is subject to any conditions imposed by the Secretary.
- (4) Conditions may be imposed:
 - (a) at the time of granting the permit, or
 - (b) at any other time by variation to the permit.
- (5) The Secretary may, at any time, vary a permit by notice in writing to the permit holder.

- (6) A variation includes the imposition of new conditions on a permit, the substitution of a condition, or the omission or amendment of a condition.
- (7) A person who contravenes a condition of a permit is guilty of an offence.
Maximum penalty: 100 penalty units.
- (8) A permit remains in force for the period specified in the permit, unless sooner revoked by the Secretary.
- (9) If no period in which the permit remains in force is specified in the permit, the permit remains in force until it is revoked by the Secretary.
- (10) The Secretary may, by notice in writing to a permit holder, revoke a permit:
 - (a) if the Secretary is of the opinion that the permit holder has contravened a provision of this Act or the regulations, or
 - (b) if the Secretary is of the opinion that the permit holder is not a suitable person to engage in the conduct authorised by the permit, or
 - (c) on any other grounds prescribed by the regulations.
- (11) The regulations may make further provision for permits including by providing for any of the following:
 - (a) applications for permits or for variations to permits,
 - (b) eligibility criteria for permits,
 - (c) fees for permits.

88 Exemptions

- (1) The regulations may exempt from all or any specified provisions of this Act or any notice or other instrument under this Act:
 - (a) any person or class of persons, or
 - (b) any thing or class of things.
- (2) An exemption may be conditional or unconditional.
- (3) An exemption has no effect during any period in which a condition to which it is subject is not complied with.

89 Delegation by Secretary

- (1) The Secretary may delegate to any person the exercise of any of the functions conferred or imposed on the Secretary by or under this Act (other than this power of delegation or a function conferred by Part 3).
- (2) The Secretary may delegate a function conferred by Part 3 to any person employed in the Public Service.
- (3) A delegate of the Secretary may sub-delegate a function if authorised in writing to do so by the Secretary.
- (4) If the Secretary delegates functions subject to conditions or limitations, any sub-delegation by the delegate is taken to be subject to the same conditions and limitations, and any further conditions or limitations imposed by the delegate.

90 Service of notices etc

- (1) A notice or direction in writing that is required or permitted to be given under this Act may be given:
 - (a) to a person other than a corporation:
 - (i) by giving it to the person, or
 - (ii) by leaving it at the person's place of residence with someone who apparently resides there and has apparently reached the age of 16 years, or
 - (iii) by leaving it at the person's place of employment or business with someone who is apparently employed there and has apparently reached the age of 16 years, or
 - (iv) by posting it in a letter addressed to the person at the address last known to the Secretary of the person's place of residence, employment or business, or
 - (v) by email to an email address specified by the person for the giving of notices or directions of that kind, or
 - (vi) by any other method authorised by this Act or the regulations for the giving of notices or directions of that kind, or
 - (b) to a corporation:
 - (i) by giving it to the secretary of the corporation, or any other person concerned in the management of the corporation, personally, or
 - (ii) by leaving it at the corporation's only or principal place of business with someone who is apparently employed there and has apparently reached the age of 16 years, or
 - (iii) by posting it in a letter addressed to the corporation at the address last known to the Secretary of its only or principal place of business, or
 - (iv) by email to an email address specified by the corporation for the giving of notices or directions of that kind, or
 - (v) by any other method authorised by this Act or the regulations for the giving of notices or directions of that kind.
- (2) Subsection (1) (b) does not limit anything in the Corporations Act 2001 of the Commonwealth.
- (3) In this section:
give includes serve.

91 Publication on internet

If this Act requires or permits the Secretary to publish a notice or other instrument on the internet, the notice or instrument is to be published on a website that the Secretary considers is appropriate to cause the notice or instrument to come to the attention of the public.

92 Description of building products

A notice or other instrument under this Act may specify a 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.

93 Protection from liability

- (1) A matter or thing done or omitted to be done by the Crown or a protected person 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 any provision of this Act, the regulations or any instrument made under this Act.
- (2) No liability is incurred by a person for publishing in good faith:
 - (a) a statement issued in the execution of functions under this Act, as referred to in subsection (1), or
 - (b) a fair report or summary of such a statement.
- (3) This section does not affect the application of section 121ZL of the Environmental Planning and Assessment Act 1979 to building product rectification orders.
- (4) In this section:

Crown means the Crown within the meaning of the Crown Proceedings Act 1988 or an officer, employee or agency of the Crown.

liability includes liability for defamation.

protected person means:

 - (a) the Minister, or
 - (b) the Secretary, or
 - (c) an authorised officer, or
 - (d) an officer, employee or agent of the Crown or a government agency, or
 - (e) any other person of a class prescribed by the regulations.

94 Act to bind Crown

This Act binds the Crown in right of New South Wales and, in so far as the legislative power of the Parliament of New South Wales permits, the Crown in all its other capacities.

95 Application of ACL

If a provision of this Act applies the ACL to or in respect of a matter arising under this Act, the ACL provision is to be applied with the following modifications:

- (a) a reference in the ACL to goods is to be read as a reference to building products,
- (b) any further modifications provided for by this Act or the regulations.

96 Regulations

- (1) The Governor may make regulations, not inconsistent with this Act, for or with respect to any matter that by this Act is required or permitted to be prescribed or that is necessary or convenient to be prescribed for carrying out or giving effect to this Act.
- (2) A regulation may create an offence with a maximum penalty not exceeding 100 penalty units.

Schedule 1 Savings, transitional and other provisions

Part 1 General

1 Regulations

- (1) The regulations may contain provisions of a savings or transitional nature consequent on the enactment of this Act or any Act that amends this Act.
- (2) Any such provision may, if the regulations so provide, take effect from the date of assent to the Act concerned or a later date.
- (3) To the extent to which any such provision takes effect from a date that is earlier than the date of its publication on the NSW legislation website, the provision does not operate so as:
 - (a) to affect, in a manner prejudicial to any person (other than the State or an authority of the State), the rights of that person existing before the date of its publication, or
 - (b) to impose liabilities on any person (other than the State or an authority of the State) in respect of anything done or omitted to be done before the date of its publication.

Part 2 Provisions consequent on enactment of this Act

2 Building product rectification orders

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.