

Passed by both Houses



New South Wales

Building Legislation Amendment Bill 2023

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The Legislature of New South Wales enacts—

1 Name of Act

This Act is the *Building Legislation Amendment Act 2023*.

2 Commencement

This Act commences as follows—

- (a) for Schedule 2—on a day or days to be appointed by proclamation,
- (b) otherwise—on the date of assent to this Act.

Schedule 1 Miscellaneous amendments to Home Building Act 1989 No 147

[1] Section 20 Issue of contractor licences

Omit “sections 33B and 33C” from section 20(1)(a1). Insert instead “section 33B”.

[2] Section 20(1)(a2)

Insert after section 20(1)(a1)—

- (a2) the Secretary, after considering evidence supplied by the applicant, is not satisfied as to the matters of which the Secretary is required to be satisfied by section 33C, or

[3] Section 22 Cancellation of contractor licences

Insert after section 22(2)—

- (2A) The Secretary may cancel a contractor licence of a kind referred to in subsection (1) if the holder of the contractor licence was a director or a person concerned in the management of a body corporate—
 - (a) when the body corporate became a Chapter 5 body corporate or within 6 months before that event, or
 - (b) when the body corporate, or a director of the body corporate, was convicted of an offence under the *Corporations Act 2001* of the Commonwealth or within 6 months before the conduct that was the subject of the offence occurred.

[4] Section 33A Disqualification from holding authorities

Omit section 33A(1B). Insert instead—

- (1B) The Secretary may determine that an individual, or a body corporate with which an individual is associated, is disqualified from holding an authority, other than an owner-builder permit, if satisfied the individual was a director or a person concerned in the management of a body corporate—
 - (a) when the body corporate, or a director of the body corporate, was convicted of an offence under the *Corporations Act 2001* of the Commonwealth, or
 - (b) within 6 months before the conduct that was the subject of the offence occurred, or
 - (c) when the body corporate became a Chapter 5 body corporate or within 6 months before that event.
- (1C) The Secretary may determine that an individual who is a partner in a partnership is disqualified from holding an authority, other than an owner-builder permit, if satisfied another partner in the partnership has become bankrupt, applied to take the benefit of a law for the relief of bankrupt or insolvent debtors, compounded with the partner’s creditors or made an assignment of the partner’s remuneration for the creditors’ benefit.
- (1D) The Secretary may disqualify a person from holding an authority under subsections (1A)–(1C) permanently or for a specified period of time.

[5] Section 33B General requirements for issue of certain authorities

Omit “3 years” wherever occurring section 33B(1)(a)(xvi) and (xvii). Insert instead “10 years”.

[6] Section 33B(1)(a)(xvi)

Omit “3-year period”. Insert instead “10-year period”.

[7] Section 33B(4A)

Insert after section 33B(4)—

- (4A) Subsection (1)(a)(v) and (vi) does not prevent the issuing of an authority if the Secretary is satisfied that, although the person has not complied with an order of the court or Tribunal within the period required by the court or Tribunal, the person made all reasonable attempts to comply with the order.

[8] Section 33B(5)

Omit “Subsection (1)(a)(xv), (xvi) and (xvii) do”.

Insert instead “Subsection (1)(a)(xv) does”.

[9] Section 33C Additional requirements for obtaining contractor licences

Omit “if the Secretary is of the opinion that” from section 33C(3).

Insert instead “if, after considering evidence supplied by the applicant, the Secretary is satisfied that”.

[10] Section 33C(3)(c)

Insert at the end of section 33C(3)(b)—

, and

- (c) the relevant person concerned has put in place sufficient risk mitigation measures to avoid a future bankruptcy, liquidation or the appointment of a controller or administrator.

[11] Part 3B

Insert after Part 3A—

Part 3B Investigation for defects

49 Interpretation

- (1) Subject to this part, terms and expressions used in this part have the same meanings as the terms and expressions have in Part 3A.
- (2) In this part—
contractor, in relation to residential building work, means the holder of a contractor licence to whom the work relates.
rectification order means an order under section 49B.
residential building work includes the following—
- specialist work,
 - work under this Act that impacts other land or buildings,
 - work that relates to, or leads to, other residential building work, including work referred to in paragraphs (a) and (b).

49A Investigation of residential building work

- (1) The Secretary may authorise a person (an *inspector*) to investigate residential building work.

- (2) For the purposes of making an investigation in relation to common property in a strata scheme, within the meaning of the *Strata Schemes Management Act 2015*, or association property in a scheme, within the meaning of the *Community Land Management Act 2021*, an inspector may enter and inspect the common property or the association property.
- (3) The owners corporation, a person who has exclusive use of the common property concerned and a caretaker or manager of the common property must provide reasonable assistance to enable an inspection of the common property to be carried out by an inspector under this section.
- (4) To avoid doubt, for this section, common property or association property is not a dwelling under this Act.
- (5) The relevant association that has the use of the association property concerned and, if the use of the association property has been restricted to a particular owner or owners, the particular owner or owners, and the caretaker or manager of the association property, if any, must provide reasonable assistance to enable an inspection of the association property to be carried out by an inspector under this section.
- (6) To avoid doubt, a person may be authorised under section 126 by the Secretary for the purposes of this section.

49B Secretary may make rectification order

- (1) The Secretary may, by written order given to a contractor, require the contractor to take steps specified in the order to ensure that a defect in residential building work or damage is rectified (a *rectification order*) if satisfied that—
 - (a) the residential building work done by the contractor or on the contractor's behalf is defective, or
 - (b) the residential building work done by the contractor or on the contractor's behalf was or is being carried out in a way that could result in a defect, or
 - (c) the contractor or a person acting on the contractor's behalf has, in the course of doing residential building work, caused damage to a structure or work, or
 - (d) as a consequence of defective residential building work done by the contractor or on the contractor's behalf, a structure or work has been damaged.
- (2) A rectification order—
 - (a) may specify conditions to be complied with by a specified person before the requirements of the order must be complied with, and
 - (b) may be made as a staged rectification order, being an order that specifies stages in which the requirements of the order must be complied with, and
 - (c) must specify a date by which the requirements of the order must be complied with, or a date by which the requirements of each stage of the order must be complied with for a staged rectification order, subject to another specified person's compliance with a condition referred to in paragraph (a).
- (3) Before giving a rectification order, the Secretary must give the contractor written notice of the proposed order that sets out the following—
 - (a) the Secretary's intention to give the rectification order,

- (b) details of the matters referred to in subsection (2) proposed to be included in the order,
 - (c) that written submissions may be made to the Secretary, within a period specified by the Secretary that is reasonable in the circumstances, about the giving of the rectification order and the matters referred to in subsection (2) proposed to be included in the order.
- (4) The Secretary must consider written submissions made within the specified period.
 - (5) After the specified period has expired and the Secretary has considered the written submissions made by the contractor, if any, the Secretary may—
 - (a) give the rectification order, with or without modifications, or
 - (b) decide not to give the rectification order.
 - (6) It is a condition of every contractor licence that the contractor must comply with the requirements of a rectification order.

49C Amendment, revocation and expiry of rectification orders

- (1) A rectification order may be amended by a further order of the Secretary on the application of the contractor who was given the rectification order.
- (2) The Secretary must, within 7 days of making a rectification order or an amendment to a rectification order, give a copy of the order or amendment to the following—
 - (a) the relevant local council,
 - (b) if the local council is not the certifier in relation to the residential building work—the principal certifier.
- (3) The Secretary may revoke a rectification order.
- (4) If the Secretary revokes a rectification order, the Secretary must, within 7 days of the revocation, give notice of the revocation to the persons and bodies referred to in subsection (2).
- (5) A failure to comply with subsection (2) or (4) does not invalidate a rectification order, an amendment to a rectification order or a revocation of a rectification order.
- (6) In this section—
principal certifier has the same meaning as in the *Environmental Planning and Assessment Act 1979*, Part 6.

49D Appeals to Tribunal against rectification orders

- (1) A contractor may appeal to the Tribunal against a rectification order.
- (2) The appeal must be made within 30 days after notice of the order is given, unless the Tribunal grants leave for the appeal to be made after that time.
- (3) The lodging of an appeal does not, except to the extent the Tribunal otherwise directs in relation to the appeal, operate to stay action on the order appealed against.

49E Offence—failure to comply with rectification order

A person must not, without reasonable excuse, fail to comply with a rectification order.

Maximum penalty—

- (a) for a corporation—3,000 penalty units and, for a continuing offence, a further penalty of 300 penalty units for each day the offence continues, or
- (b) otherwise—1,000 penalty units and, for a continuing offence, a further penalty of 100 penalty units for each day the offence continues.

[12] Section 51 Improper conduct: generally

Omit “a rectification order under Division 2 of Part 3A” from section 51(2)(b).

Insert instead “a rectification order under Part 3A, Division 2 or Part 3B”.

[13] Section 56 Grounds for taking disciplinary action against holder of a contractor licence

Insert after section 56(m)—

- (n) that the holder has failed to comply with a stop work order under section 129, whether or not the holder has been convicted of the offence under section 129(9),
- (o) that the holder has failed to comply with a rectification order under Part 3B.

[14] Section 126 Power of entry

Omit section 126(3) and (6A). Insert instead—

- (3) This section does not empower an authorised person to enter a part of premises used only for residential purposes without the permission of the occupier or the authority of a search warrant.
- (4) An authorised person may, at premises lawfully entered, do anything that, in the authorised person’s opinion is necessary to be done for a purpose specified in subsection (1).
- (5) An authorised person may do one or more of the following—
 - (a) examine and inspect a thing,
 - (b) take and remove samples of a thing,
 - (c) make examinations, inquiries, measurements or tests the authorised person considers necessary,
 - (d) take photographs or other recordings the authorised person considers necessary,
 - (e) direct a person to produce records for inspection,
 - (f) examine and inspect records,
 - (g) copy records,
 - (h) seize a thing the authorised person has reasonable grounds for believing is connected with—
 - (i) an offence against this Act or the regulations, or
 - (ii) a defect in a building,
 - (i) move a seized thing from the place where it is seized or leave it at the place where it is seized and take reasonable action to restrict access to it,
 - (j) direct the occupier of the premises where a thing is seized to keep it at those premises or at another place under the control of the occupier,

- (k) open up, cut open or demolish residential building work if the authorised person has reasonable grounds for believing that it is necessary to do so because the work is connected with—
 - (i) an offence against this Act or the regulations, or
 - (ii) a defect in a building,
- (l) anything else authorised by or under this Act.
- (6) The power to examine and inspect a thing includes a power to use reasonable force to break open or otherwise access a thing, including a floor or wall containing the thing.
- (7) 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.
- (8) The power to seize a thing connected with an offence includes a power to seize—
 - (a) a thing for or with which the offence has been committed, and
 - (b) a thing that will give evidence of the commission of the offence, and
 - (c) a thing used for the purpose of committing the offence.
- (9) The power to do a thing under this section includes a power to arrange for the thing to be done, whether at the premises or elsewhere.
- (10) 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.
- (11) When exercising a power of entry under this section, an authorised person may be accompanied by assistants the authorised person considers necessary.
- (12) In this section, a reference to an offence includes a reference to an offence that there are reasonable grounds for believing has been committed.
- (13) An investigator appointed under the *Fair Trading Act 1987*, section 18 is taken to be a person authorised under subsection (1).

[15] Sections 129–130A

Insert after section 128—

129 Stop work orders

- (1) The Secretary may, by written order given to a developer in relation to residential building work (a ***stop work order***), order the developer to ensure that the building work stops if—
 - (a) in the Secretary’s opinion the building work is, or is likely to be, carried out in a way that could result in significant harm or loss to the public or to occupiers or potential occupiers of the building to which the work relates or significant damage to property, or
 - (b) the following apply—
 - (i) there is a change in principal certifier or building practitioner for the residential building work,
 - (ii) in the Secretary’s opinion the building work is, or is likely to be, carried out in a way that could prevent the valid issue of an occupation certificate or building compliance declaration for the residential building work.
- (2) In subsection (1)(b)(ii), the valid issue of an occupation certificate or building compliance certificate means the issue of the certificate or declaration in

- accordance with the following Acts and the regulations made under the Acts, as appropriate—
- (a) the *Building and Development Certifiers Act 2018*,
 - (b) the *Design and Building Practitioners Act 2020*,
 - (c) the *Environmental Planning and Assessment Act 1979*,
 - (d) this Act.
- (3) A stop work order takes effect on the day the order is given to the developer or on a later day specified in the order.
- (4) A stop work order may be unconditional or subject to conditions.
- (5) The Secretary may, by written notice given to a developer who is subject to a stop work order, impose a condition on the order or revoke or vary a condition of the order.
- (6) A stop work order remains in force until one of the following occurs—
- (a) the order is revoked by the Secretary,
 - (b) the term, if any, of the order ends,
 - (c) the period of 12 months from the day on which the order takes effect ends.
- (7) If the Secretary makes a stop work order, the Secretary must give the following persons notice of the making of the order—
- (a) the relevant local council,
 - (b) if the local council is not the certifier in relation to the building work— the principal certifier.
- (8) The Secretary is not required to give notice to a person under subsection (7) 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.
- (9) A person must not fail to comply with an order in force under this section.
- Maximum penalty—
- (a) for a corporation—3,000 penalty units and, for a continuing offence, a further penalty of 300 penalty units for each day the offence continues, or
 - (b) otherwise—1,000 penalty units and, for a continuing offence, a further penalty of 100 penalty units for each day the offence continues.
- (10) In this section—
- building practitioner** has the same meaning as in the *Design and Building Practitioners Act 2020*.
- developer**, in relation to residential building work, means the following—
- (a) the developer of the work within the meaning of the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020* if the work is building work within the meaning of that Act,
 - (b) the holder of the contractor licence in relation to the work.
- principal certifier** has the same meaning as in the *Environmental Planning and Assessment Act 1979*, Part 6.

130 Appeals to Tribunal against stop work orders

- (1) A person given a stop work order under section 129 may appeal to the Tribunal against the order.
- (2) The appeal must be made within 30 days after notice of the order is given, unless the Tribunal grants leave for the appeal to be made after that time.
- (3) The lodging of an appeal does not, except to the extent the Tribunal otherwise directs in relation to the appeal, operate to stay action on the order appealed against.

130A Register of rectification orders and stop work orders

- (1) The Secretary must keep the following information in a register and make the information publicly available—
 - (a) copies of rectification orders under section 49B and stop work orders under section 129 that are in force,
 - (b) other information prescribed by the regulations.
- (2) In this section—
publicly available means available for inspection free of charge by the public on a website kept by the Secretary.

[16] Section 139A

Insert after section 139—

139A Continuing offences

- (1) This section applies to a provision of this Act or the regulations requiring a person to do, or stop doing, something (a *continuing requirement provision*) regardless of whether—
 - (a) the requirement is imposed by a notice or in another way, or
 - (b) the person is required to do, or stop doing, something within a specified period.
- (2) A person who is guilty of an offence because the person contravenes a continuing requirement provision—
 - (a) continues, until the requirement is complied with and despite the fact a 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.
- (3) 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.
- (4) This section does not apply to the extent a requirement imposed on a person is revoked.

Schedule 2 Amendments relating to building product safety

2.1 Building Products (Safety) Act 2017 No 69

[1] Section 3 Definitions

Omit section 3(1), definition of *Secretary*.

Insert in alphabetical order—

building design, for Part 2A—see section 8A.

building product direction—see section 46B.

building product recall means a building product recall under section 15F that is in force.

building product safety notice—see section 9.

building product supply ban means a building product supply ban under section 15B that is in force.

building product warning means a building product warning under section 15 that is in force.

chain of responsibility, for a building product—see section 8B(1).

deal with, in relation to a building product, for Part 2A—see section 8A.

Department means the Department of Customer Service.

forfeiture order, for a seized building product, for Part 7, Division 4, Subdivision 2—see section 53A(1).

grounds for not returning a seized building product to its owner, for Part 7, Division 4, Subdivision 2—see section 53A(1).

intended use, of a building product—see section 7(4).

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

non-compliance risk—see section 7A(4).

non-compliant use, of a building product—see section 7A(2).

non-conforming building product—see section 7A(1).

owner, of a building product, for Part 7, Division 4, Subdivision 2—see section 53A(1).

reasonably practicable, for Part 2A and Part 3, Division 6—see section 8A.

recalled product—see section 8I(3).

relevant regulatory provision means one or more of the following—

- (a) the *Design and Building Practitioners Act 2020*,
- (b) the *Environmental Planning and Assessment Act 1979*,
- (c) the *Gas and Electricity (Consumer Safety) Act 2017*,
- (d) the *Plumbing and Drainage Act 2011*,
- (e) the *Work Health and Safety Act 2011*,
- (f) another law, whether of New South Wales or another jurisdiction, specified by the regulations for this definition.

responsible person, for a seized building product, for Part 7, Division 4, Subdivision 2—see section 53A(1).

Secretary means the Secretary of the Department.

unlawful conduct, for Part 6, Division 3—see section 41A.

voluntary recall, for Part 2A, Division 3—see section 8J.

[2] Section 3(1), definition of “building product use ban”

Omit “section 9”. Insert instead “section 15D”.

[3] Section 4

Omit the section. Insert instead—

4 Safety risks and unsafe use of building products

- (1) For this Act, a *safety risk* exists in relation to the use of a building product in a building if the use has caused, will cause or may cause one or more of the following consequences—
 - (a) death or serious injury to a person,
 - (b) damage to, or a defect in, the building resulting in one or more of the following—
 - (i) an occupant of the building being unable to inhabit or use the building for its intended purpose,
 - (ii) the destruction of the building,
 - (iii) the threat of the building collapsing.
- (2) To avoid doubt, a safety risk exists—
 - (a) in relation to a use of the product—
 - (i) even if the use causes the consequence only in certain circumstances or as a result of another event, and
 - (ii) regardless of the probability of the use causing the consequence, and
 - (b) whether or not a non-compliance risk exists in relation to the product.
- (3) For this Act, the use of a building product in a building is *unsafe* if a safety risk exists in relation to the use.
- (4) The regulations may specify additional circumstances in which a safety risk exists in relation to the use of a building product in a building.

[4] Section 7, heading

Insert “**and intended use**” after “Use”.

[5] Section 7(4)

Insert after section 7(3)—

- (4) The use of a building product in a building is an *intended use* if—
 - (a) the use is intended by a person in the chain of responsibility for the product, or
 - (b) a person in the chain of responsibility for the product makes a representation that the use is a suitable use of the product, or
 - (c) the use is otherwise reasonably foreseeable or likely.

[6] Section 7A

Insert after section 7—

7A Non-conforming building products and non-compliant uses

- (1) For this Act, a building product is a *non-conforming building product* if—

- (a) the product does not comply with an applicable requirement of one or more of the following—
 - (i) the National Construction Code,
 - (ii) a relevant regulatory provision or an instrument made under a relevant regulatory provision, or
 - (b) a person in the chain of responsibility for the product makes an incorrect representation, whether intentionally or not, about one or more of the following—
 - (i) a quality, feature or capability of the product,
 - (ii) the performance of the product in relation to a particular standard,
 - (iii) the product's compliance with the National Construction Code or another legal requirement.
- (2) For this Act, an intended use of a building product in a building is a **non-compliant use** if—
- (a) the use does not comply with an applicable requirement of one or more of the following—
 - (i) the National Construction Code,
 - (ii) a relevant regulatory provision or an instrument made under a relevant regulatory provision, or
 - (b) the use is otherwise unsuitable.
- (3) Subsections (1)(a) and (2)(a) do not apply if the building product is accredited in relation to the applicable requirement for the *Environmental Planning and Assessment Act 1979*, section 4.15(4) or 4.28(4).
- (4) For this Act, a **non-compliance risk** exists in relation to a building product if—
- (a) the product is or may be a non-conforming building product, or
 - (b) an intended use of the product in a building is or may be a non-compliant use.

[7] **Parts 2A and 3**

Omit Part 3. Insert instead—

Part 2A Chain of responsibility for building products

Division 1 General

8A Definitions

In this part—

building design includes a plan, specification or report detailing the design of a building.

deal with, in relation to a building product, means manufacture, import or supply the product.

reasonably practicable, in relation to a duty imposed on a person, means reasonably able to be done by a competent person in relation to the duty, taking into account all relevant matters.

8B Persons in chain of responsibility

- (1) For this Act, the following are in the *chain of responsibility* for a building product—
 - (a) a person who—
 - (i) designs or deals with the product, and
 - (ii) knows, or ought reasonably to know, the product will, or is likely to, be used in a building,
 - (b) a person who prepares a building design that incorporates or recommends the use of the product in the building,
Examples— building designers, engineers and architects
 - (c) a person who uses the product in a building,
Example— a person who installs, or coordinates or supervises the installation of, the product in a building during construction
Note— Section 7 defines when a building product is used in a building.
 - (d) a person specified in the regulations as a person in the chain of responsibility for the product.
- (2) The regulations may specify circumstances in which persons, including persons mentioned in subsection (1)(a)–(c), are not to be treated as persons in the chain of responsibility for a building product.

8C Multiple and concurrent duties

- (1) A person in the chain of responsibility for a building product may have more than one duty because of the functions the person performs or is required to perform.
- (2) More than 1 person may concurrently have the same duty.
- (3) A person must comply with a duty to the standard required under this part even if another person has the same duty.
- (4) If more than 1 person has a duty in relation to 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 the capacity.
- (5) A person's duty is not able to be transferred to another person.
- (6) In this section—
duty means a duty imposed by this part.

Division 2 Duties of persons in chain of responsibility

8D Standards for duties under division

- (1) A person who has a duty imposed by this division must discharge the duty—
 - (a) as far as is reasonably practicable, and
 - (b) taking into account the risk management factors in relation to the matter to which the duty relates.
- (2) In this section—
risk management factors means the following—

- (a) the likelihood of the existence of a safety risk or a non-compliance risk,
- (b) the harm that could result from the risk,
- (c) what the person knows, or ought reasonably to know, about—
 - (i) the risk, and
 - (ii) ways of removing or minimising the risk,
- (d) the availability and suitability of ways to remove or minimise the risk,
- (e) the cost associated with available ways of removing or minimising the risk, including whether the cost is grossly disproportionate to the risk.

8E Duty to ensure conforming products and compliant uses

- (1) A person in the chain of responsibility for a building product must ensure a non-compliance risk does not exist in relation to the product.
Maximum penalty—
 - (a) for a corporation—1,500 penalty units, or
 - (b) otherwise—500 penalty units.
- (2) An offence against subsection (1) is an executive liability offence.

8F Duty to provide information in relation to building products

- (1) A person who designs a building product must ensure 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.
- (2) A person who deals with a building product must ensure that the product is accompanied by the required information for the product if the person—
 - (a) sells, supplies or otherwise transfers the product to another person, or
 - (b) facilitates the sale, supply or transfer of the product to another person.
- (3) A person who prepares a building design that incorporates or recommends the use of a building product in a building must ensure 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.
- (4) A person who uses a building product in a building must ensure the owner of the building is given the information about the product specified by the regulations for this subsection.
- (5) A duty imposed by this section applies only to a person in the chain of responsibility for the relevant building product.
- (6) The regulations may provide for—
 - (a) matters that must not, or need not, be included in information given under this section, and
 - (b) the way and form in which the information must be given.
- (7) In this section—
required information, for a building product, means the following—
 - (a) for each intended use of the product—
 - (i) the suitability of the product for the intended use, and
 - (ii) if the product is suitable for the intended use only in particular circumstances or subject to particular conditions—the circumstances or conditions, and

- (iii) instructions for ensuring the intended use is not a non-compliant use, and
 - (iv) information about the maintenance required to ensure the product performs or operates correctly in relation to the intended use, and
 - (v) if the product is or includes a system or building component consisting of multiple elements—information mentioned in subparagraphs (i)–(iv) that is applicable to the system or component as a whole in relation to the intended use,
- (b) additional information specified by the regulations for this definition.

8G Duty to provide information—offences

- (1) A person who fails to comply with a duty imposed by section 8F is guilty of an offence.
Maximum penalty—
- (a) for a corporation—1,500 penalty units, or
 - (b) otherwise—500 penalty units.
- (2) A person is guilty of an offence if the person—
- (a) provides information in compliance or purported compliance with a duty imposed by section 8F, and
 - (b) knows, or ought reasonably to know, the information is false or misleading.
- Maximum penalty—
- (a) for a corporation—1,500 penalty units, or
 - (b) otherwise—500 penalty units.

8H Duty to notify Secretary of non-compliance or safety risk

- (1) If a relevant person for a building product becomes aware of one or more of the following matters, the person must give the Secretary written notice of the matter in accordance with this section—
- (a) a non-compliance risk exists in relation to the building product,
 - (b) a safety risk exists in relation to an intended use of the building product.
- Maximum penalty—
- (a) for a corporation—500 penalty units and, for a continuing offence, a further penalty of 200 penalty units for each day the offence continues, or
 - (b) otherwise—200 penalty units and, for a continuing offence, a further penalty of 100 penalty units for each day the offence continues.
- (2) The notice must be given within 7 days after the relevant person becomes aware of the matter.
- (3) The notice must be in a form approved by the Secretary and made publicly available on the internet.
- (4) In this section, a person is taken to be aware of a matter if the person reasonably suspects the matter.
- (5) In this section—
- relevant person**, for a building product, means—
- (a) a person in the chain of responsibility for the building product, or

- (b) a person prescribed by the regulations.

8I Duties in relation to building product recall

- (1) A person in the chain of responsibility for a building product subject to a building product recall—
 - (a) must not supply or use the product, and
 - (b) must comply with the recall, and
 - (c) if the person is a manufacturer, supplier or importer of the product— must do whichever of the following is most appropriate in the circumstances to remove the non-compliance risk—
 - (i) repair or modify the product,
 - (ii) replace the product with an equivalent building product,
 - (iii) refund, to the person to whom the product was supplied, the price of the product.
- (2) A refund may be reduced to less than the price of the building product if—
 - (a) more than 12 months has passed since the person supplied the product to another person, and
 - (b) the building product recall provides for a refund reduction, and
 - (c) the refund reduction is made in accordance with the building product recall.
- (3) A person who prepares a building design incorporating a building product subject to a building product recall (a *recalled product*) must—
 - (a) inform each person to whom the design was given that the product is a recalled product, and
 - (b) either—
 - (i) amend the design to remove the recalled product, or
 - (ii) give each person to whom the design was given notice specifying an alternative building product to be used instead of the recalled product.

Division 3 Voluntary recalls

8J Meaning of “voluntary recall”

In this division—

voluntary recall means action to recall a building product because—

- (a) a non-compliance risk exists in relation to the product, or
- (b) a safety risk exists in relation to an intended use of the product, or
- (c) a building product supply ban applies to the product.

8K When voluntary recall starts

For this division, a voluntary recall is taken to start when the person conducting the recall notifies one of the following of the recall—

- (a) the general public,
- (b) a person to whom the product has been supplied.

8L Duty to notify voluntary recall

- (1) A person in the chain of responsibility for a building product who conducts a voluntary recall of the product must give the Secretary written notice of the recall in accordance with this section.
- (2) The notice must be given to the Secretary as soon as possible but in any case within 2 days of the start of the recall.
- (3) The notice must—
 - (a) be in a form approved by the Secretary, and
 - (b) include the following information—
 - (i) relevant details of the recalled product,
 - (ii) the reason for the recall of the product,
 - (iii) other details of the recall reasonably required by the Secretary.
- (4) The Secretary may publish details of the voluntary recall on the internet.

8M Report on voluntary recall

- (1) A person in the chain of responsibility for a building product who conducts a voluntary recall of the product must give the Secretary a written report about the recall in accordance with this section.
Maximum penalty—100 penalty units.
- (2) The report must be given to the Secretary as soon as possible after the decision to conduct the recall has been made but in any case within 2 days after the start of the recall, unless the Secretary approves a further period.
- (3) The report must include the following information—
 - (a) details about the building product being recalled,
 - (b) the reasons why the building product is being recalled,
 - (c) details of how the recall will be or is being publicised,
 - (d) other details of the recall reasonably required by the Secretary.
- (4) The Secretary may publish a copy of the report on the internet.

Part 3 Building product safety notices

Division 1 General

9 Building product safety notices

For this Act, *building product safety notice* means—

- (a) a building product warning, or
- (b) a building product supply ban, or
- (c) a building product use ban, or
- (d) a building product recall.

10 Public submissions

- (1) The Secretary may, before or after issuing a building product safety notice under this part, call for public submissions about—
 - (a) whether the notice is justified, and
 - (b) the terms or proposed terms of the notice.

- (2) The Secretary must issue the call by written notice published on the internet (a *call notice*).
- (3) The Secretary must consider submissions duly made to the Secretary by the date that is 28 days after the publication of the call notice, or by a later date approved by the Secretary, in deciding whether to—
 - (a) publish the notice, or
 - (b) if the notice has already been published—amend or revoke the notice.
- (4) The Secretary is not required to give a person an opportunity to make submissions on a building product safety notice or proposed building product safety notice.
- (5) Subsection (4) prevails over a principle of procedural fairness.
- (6) This section applies to an amendment of a building product safety notice in the same way as it applies to the original publication of a building product safety notice.

11 Notice of issue of building product safety notice

- (1) The Secretary must, if practicable, give notice of the issue of a building product safety notice under this part to the manufacturer of the relevant building product.
- (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 must be given at least 2 days before the building product safety notice is published on the internet.
- (4) However, the Secretary is not required to give prior notice if the Secretary believes on reasonable grounds that a safety risk existing in relation to a use of the building product is or may be so serious that, in the public interest, the publication of the notice 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 determine 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 safety notice under this section by publishing written notice on the internet of the Secretary's intention to publish the notice.
- (7) This section applies to an amendment of a building product safety notice in the same way as it applies to the original publication of a building product safety notice.
- (8) The regulations may specify other persons to whom notice must be given under this section.

12 Application of building product safety notice

- (1) A building product safety notice may be expressed to apply in one or more of the following ways—
 - (a) to some or all uses of a building product in a building,
 - (b) to the use of a building product in some or all buildings,
 - (c) to the use of a building product by some or all persons,

- (d) subject to exceptions, including exceptions permitting the use or supply of a building product by only some persons,
 - (e) subject to conditions,
 - (f) as otherwise authorised by the regulations for this section.
- (2) A building product safety notice may be issued whether or not the building product to which the notice applies has been used in a building when the notice is published.

13 Period for which building product safety notice in force

- (1) A building product safety notice issued under this part comes into force on the day specified by the Secretary in the notice.
- (2) The specified day must not be earlier than the day on which the notice is first published.
- (3) A building product safety notice remains in force until the day that is 2 years after the day on which the notice comes into force, unless sooner revoked by the Secretary.

14 Amendment or revocation of building product safety notice

- (1) The Secretary may, by written notice published on the internet—
 - (a) amend a building product safety notice, or
 - (b) revoke a building product safety notice.
- (2) An amendment or revocation comes into force on the day specified by the Secretary in the notice of amendment or revocation.
- (3) The specified day must not be earlier than the day on which the notice of amendment or revocation is first published.

Division 2 Building product warnings

15 Secretary may issue building product warning

- (1) The Secretary may issue a notice warning about a building product (a ***building product warning***) if the Secretary is satisfied on reasonable grounds that—
 - (a) a non-compliance risk exists or may exist in relation to the product, or
 - (b) a safety risk exists or may exist in relation to an intended use of the product.
- (2) The Secretary must issue the warning by written notice published on the internet.
- (3) A building product warning may be issued whether or not another building product safety notice or a voluntary recall is in force in relation to the product.

15A Content of building product warning

- (1) A building product warning must specify the reasons the Secretary has decided—
 - (a) to publish the warning, or
 - (b) if the warning is amended—to amend the warning.
- (2) A building product warning notice may also include the following—

- (a) information, advice or recommendations the Secretary considers would be in the public interest to include in relation to the product or the warning,
- (b) information the Secretary considers relevant relating to—
 - (i) the buildings or types of buildings, if any, in which the product has been used, and
 - (ii) the way the product has been used in the buildings.

Division 3 Building product supply bans

15B Secretary may issue building product supply ban

- (1) The Secretary may issue a notice prohibiting the supply of a building product (a *building product supply ban*) if the Secretary is satisfied on reasonable grounds that—
 - (a) a non-compliance risk exists in relation to the product, or
 - (b) a safety risk exists in relation to an intended use of the product.
- (2) The Secretary must issue the ban by written notice published on the internet.
- (3) A building product supply ban may be issued whether or not a building product warning is in force in relation to the product.

15C Content of building product supply ban

- (1) A building product supply ban must specify the reasons the Secretary has decided—
 - (a) to publish the ban, or
 - (b) if the ban is amended—to amend the ban.
- (2) A building product supply ban may require a person in the chain of responsibility for the building product with possession or control of the product to—
 - (a) notify the Secretary of the possession or control, or
 - (b) ensure the product is disposed of in the way and within the period specified in the ban.

Division 4 Building product use bans

15D Secretary may issue building product use ban

- (1) The Secretary may issue a notice prohibiting a use of a building product in a building (a *building product use ban*) if the Secretary is satisfied on reasonable grounds that—
 - (a) the prohibited use is an intended use that causes a non-compliance risk to exist in relation to the product, or
 - (b) a safety risk exists in relation to the prohibited use.
- (2) The Secretary must issue the ban by written notice published on the internet.
- (3) A building product use ban may be issued whether or not a building product warning is in force in relation to the product.

15E Content of building product use ban

- (1) A building product use ban must specify the reasons the Secretary has decided—

- (a) to publish the ban, or
 - (b) if the ban is amended—to amend the ban.
- (2) A ban that prohibits an unsafe use of a building product may also prohibit another use of the building product that is not an unsafe use if—
- (a) the application of the ban to the other use is not reasonably avoidable, and
 - (b) the ban operates reasonably and appropriately in prohibiting the unsafe use.

Division 5 Building product recalls

15F Secretary may issue building product recall

- (1) The Secretary may issue a notice for the recall of a building product (a ***building product recall***) if the Secretary is satisfied on reasonable grounds that—
- (a) a non-compliance risk exists in relation to the product, or
 - (b) a safety risk exists in relation to an intended use of the product.
- (2) The Secretary must issue the recall by written notice published on the internet.
- (3) A building product recall may be issued whether or not the Secretary knows the identity of some or all suppliers of the product.
- (4) A building product recall may be issued whether or not a building product warning, a building product supply ban or a building product use ban is in force in relation to the product.

15G Content of building product recall

- (1) A building product recall must specify the reasons the Secretary has decided—
- (a) to publish the recall, or
 - (b) if the recall is amended—to amend the recall.
- (2) A building product recall must specify what persons in the chain of responsibility for the building product must do to recall the product from use.
Example— An architect or engineer may be required to amend a design to specify an alternative building product instead of the recalled product.
- (3) The regulations may make further provision about—
- (a) matters that may, must or must not be included in a building product recall, and
 - (b) the obligations of persons in the chain of responsibility for a recalled product in relation to the recall.

Division 6 Provision of information relating to notices

15H Definition

In this division—

reasonably practicable has the same meaning as in Part 2A.

15I Requirement to provide information—persons in chain of responsibility

- (1) This section applies to a building product that is the subject of a building product safety notice other than a building product warning.

- (2) The Secretary may, by written notice, require a person in the chain of responsibility for the product to give specified information about the building product safety notice to other specified persons in the chain of responsibility, including—
 - (a) the existence of the building product safety notice, and
 - (b) particular information contained in the building product safety notice.
- (3) The person must comply with the notice as far as is reasonably practicable.
Maximum penalty—
 - (a) for a corporation—500 penalty units, or
 - (b) otherwise—200 penalty units.

15J Requirement to provide information—general

- (1) This section applies to a person who, in trade or commerce, designs, manufactures, imports or supplies a building product that is the subject of a building product safety notice other than a building product warning.
- (2) The Secretary may, by written notice, require the person to give specified information about the building product safety notice to other specified persons to whom the building product safety notice applies or may apply.
- (3) The notice given to the person may—
 - (a) specify the way in which the notice must be complied with, and
 - (b) specify the period for compliance, and
 - (c) require the person to give the Secretary evidence of the person's compliance.
- (4) The person must comply with the notice as far as is reasonably practicable.

Division 7 Offences

15K Contravening building product safety notice

- (1) A person must not—
 - (a) supply a building product in contravention of a building product supply ban, or
 - (b) cause a building product to be used in a building in contravention of a building product use ban, or
 - (c) contravene, or fail to carry out a requirement of, a building product recall or section 8L.Maximum penalty—
 - (a) for a corporation—10,000 penalty units and, for a continuing offence, a further penalty of 1,000 penalty units for each day the offence continues, or
 - (b) otherwise—2,000 penalty units or imprisonment for 2 years, or both, and, for a continuing offence, a further penalty of 400 penalty units for each day the offence continues.
- (2) For subsection (1)(b), 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 other circumstances specified by the regulations.

- (3) In proceedings for an offence against this section, it is a defence if the accused proves the accused had a reasonable excuse for the act or omission concerned.
- (4) An offence against subsection (1) is an executive liability offence.

15L Representation contravening building product safety notice

- (1) A person must not, in trade or commerce, represent that a building product is suitable for a use in a building if the use would contravene—
 - (a) a building product use ban, or
 - (b) a building product supply ban, or
 - (c) a building product recall.Maximum penalty—
 - (a) for a corporation—10,000 penalty units and, for a continuing offence, a further penalty of 1,000 penalty units for each day the offence continues, or
 - (b) otherwise—2,000 penalty units or imprisonment for 2 years, or both, and, for a continuing offence, a further penalty of 400 penalty units for each day the offence continues.
- (2) In proceedings for an offence against this section, it is a defence if the accused proves the accused had a reasonable excuse for the act or omission concerned.
- (3) An offence against subsection (1) is an executive liability offence.

[8] Section 17 Affected building

Omit section 17(1). Insert instead—

- (1) For this part, a building is an *affected building* if—
 - (a) a building product the subject of a building product use ban has been used in the building for a use that is prohibited by the building product use ban, or
 - (b) a building product the subject of a building product supply ban has been used in the building for a use that is referred to in the building product supply ban, or
 - (c) a building product the subject of a building product recall has been used in the building for a use that is referred to in the building product recall.

[9] Sections 17(2) and 19(3)(c)

Omit “building product use ban”. Insert instead “relevant ban or notice”.

[10] Sections 18(2)(b), 19(2), 19(3)(b) and 20(2)(a)

Insert “, building product supply ban or building product recall” after “building product use ban”.

[11] Section 18(2)(c)

Omit the paragraph. Insert instead—

- (c) particulars of the safety risk or non-compliance risk posed by the use of the building product to which the relevant ban or notice applies.

[12] Section 18(3)(e)

Insert “or non-compliance risk” after “safety risk”.

[13] Section 26 When a building is “made safe”

Omit “applies, as identified by the Secretary in an affected building notice,”.

Insert instead “, building product supply ban or building product recall applies”.

[14] Part 6, heading

Omit the heading. Insert instead—

Part 6 Powers of Secretary

[15] Section 34 Building product investigations

Insert after section 34(1)(b)—

- (c) to decide whether a non-compliance risk exists in relation to a building product.

[16] Sections 36(1) and 41(1)

Omit “use ban”. Insert instead “safety notice”.

[17] Section 38 Definitions

Omit the definition of *product assessment*. Insert instead—

product assessment means an assessment conducted for the purpose of assessing whether—

- (a) a non-compliance risk exists in relation to a building product, or
- (b) an intended use of a building product in a building would be unsafe.

[18] Section 39 Secretary may require product assessment

Omit section 39(2)(a). Insert instead—

- (a) the Secretary has reasonable grounds to suspect that—
 - (i) a non-compliance risk exists in relation to a building product, or
 - (ii) an intended use of a building product in a building would be unsafe, and

[19] Part 6, Division 3

Insert after Part 6, Division 2—

Division 3 Trading prohibitions

41A Meaning of “unlawful conduct”

In this division—

unlawful conduct means conduct that constitutes a contravention of a provision of this Act, whether or not proceedings have been brought in relation to the contravention.

41B Show cause notices

- (1) This section applies if the Secretary is satisfied that a person has, in trade or commerce, engaged in unlawful conduct relating to the use or supply of a building product on more than 1 occasion, whether in New South Wales or in another place.

- (2) The Secretary may, by written notice given to the person, require the person to show cause why the person should not, for the reason specified in the notice, be prevented from carrying on a business of supplying building products.
- (3) The notice must specify a period of at least 14 days after the notice is given in which the person may show cause.
- (4) The person may, within the specified period, make written submissions in relation to the matters to which the notice relates.
- (5) The Secretary—
 - (a) must consider submissions made, and
 - (b) may conduct inquiries, or make investigations, the Secretary thinks appropriate in relation to the matters to which the notice relates.
- (6) This section does not limit the operation of the *Fair Trading Act 1987* or the ACL.

41C Trading prohibition orders

- (1) The Secretary may apply to the Supreme Court for an order prohibiting a person from carrying on a business of supplying building products (a **trading prohibition order**) if the Secretary—
 - (a) has given the person written notice under section 41B, and
 - (b) has considered submissions made in relation to the matter, and
 - (c) considers the person is likely to engage again, or to continue to engage, in unlawful conduct relating to the use or supply of a building product.
- (2) The Supreme Court may make a trading prohibition order if satisfied the person is likely to engage again, or to continue to engage, in unlawful conduct relating to the use or supply of a building product.
- (3) A trading prohibition order may be expressed to operate in one or more of the following ways—
 - (a) to prohibit the person from carrying on a business of supplying building products generally or in relation to a specified business,
 - (b) to prohibit the person from carrying on a business of supplying building products as part of, or incidentally to, the carrying on of another business.
- (4) A trading prohibition order may have effect—
 - (a) indefinitely, or
 - (b) for a period specified in the order.
- (5) In making a trading prohibition order, the Supreme Court may, if satisfied another person has sustained loss or damage as a result of the unlawful conduct of the person who is the subject of the order (the **prohibited person**), order the prohibited person to compensate the other person for the loss or damage.
- (6) A reference in subsection (5) to loss or damage does not, if the loss or damage arises from a contravention of the ACL, Part 2-1, 3-1 or 4-1, include a reference to—
 - (a) the death of a person, or
 - (b) personal injury to a person, including prenatal injury, impairment of the person's physical or mental condition and disease.

- (7) This section does not limit the operation of the *Fair Trading Act 1987* or the ACL.

[20] Part 7, heading

Omit “Investigation powers”. Insert instead “Powers”.

[21] Section 42 Purposes for which functions under Part may be exercised

Omit section 42(1)(a) and (b). Insert instead—

- (a) to assess whether—
 - (i) a non-compliance risk exists in relation to a building product, or
 - (ii) an intended use of a building product in a building would be unsafe,
- (b) to determine the location of a building in which a building product has been used for a use that is—
 - (i) prohibited by a building product use ban, or
 - (ii) referred to in a building product supply ban, or
 - (iii) referred to in a building product recall,
- (b1) for a function under Division 2A—for a purpose for which a building product direction may be given,

[22] Part 7, Division 2A

Insert after Part 7, Division 2—

Division 2A Powers relating to building product directions

46A 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.

46B Building product directions

- (1) An authorised officer may give an appropriate person a direction (a ***building product direction***) for one or more of the following purposes—
 - (a) to prevent the use of a building product in a building, by a person in the chain of responsibility for the product, in a way that poses a safety risk,
 - (b) to eliminate or minimise a safety risk posed by an intended use of a building product in a building,
 - (c) to prevent, eliminate or minimise a non-compliance risk in relation to a building product,
 - (d) to administer or execute this Act or an instrument made under this Act.
- (2) A building product direction may require the person to do, or refrain from doing, anything the authorised officer reasonably believes is necessary to give effect to the relevant purpose, including one or more of the following—
 - (a) ceasing to use or supply a building product generally,
 - (b) ceasing to use a building product in a specified way,
 - (c) making a building product incapable of being used or operated.
- (3) A building product direction may be given orally or in writing.
- (4) A building product direction remains in force until the day that is 90 days after the day on which the direction comes into force, unless sooner revoked.

- (5) An authorised officer is not required to notify a person who may be affected by a building product direction before the authorised officer gives the direction.
- (6) Unless the direction has already been complied with, written confirmation of an oral direction must be given to the person within 7 days after the oral direction.
- (7) In this section—
appropriate person means one of the following—
 - (a) a person in the chain of responsibility for the relevant building product,
 - (b) a person with possession of the relevant building product,
 - (c) a person who is the occupier of, or employed at, a place where the relevant building product is manufactured, supplied or stored,
 - (d) a person who is employed at, or engaged in building work at, a building or a building site where the relevant building product is stored or used.

46C Limitations on building product direction

- (1) A building product direction must not require something to be done in relation to a building product that has been used in a building if the building is occupied or fit for occupation.
- (2) Without limiting subsection (1), a building is taken to be fit for occupation if an occupation certificate under the *Environmental Planning and Assessment Act 1979* that is required in relation to the occupation of the building has been issued.

46D Failure to comply with building product direction

- (1) A person who fails to comply with a building product direction without a reasonable excuse is guilty of an offence.
Maximum penalty—500 penalty units.
- (2) If a person has failed to comply with a building product direction, an authorised officer may do anything the authorised officer reasonably believes is necessary to remedy the failure to comply.

46E Revocation or amendment of building product direction

- (1) A building product direction may be revoked or amended by a subsequent direction or directions.
- (2) Without limiting subsection (1), a direction may be amended by extending the time for complying with the direction.
- (3) A direction may be revoked or amended by the Secretary or an authorised officer.

[23] Part 7, Division 4, Subdivision 1, heading

Insert before section 49—

Subdivision 1 General

[24] Section 49 Powers that can be exercised on premises

Insert after section 49(2)(g)—

- (g1) an act authorised by Subdivision 2 in relation to the seizure or forfeiture of a building product,

[25] Section 50 Search warrants

Insert at the end of section 50(1)(b)—

, or

- (c) the following conditions apply—
 - (i) a building product is being supplied in trade or commerce in or from the premises,
 - (ii) a safety risk exists in relation to an intended use of the product in a building.

[26] Part 7, Division 4, Subdivision 2

Insert after section 53—

Subdivision 2 Seizure and forfeiture of building products

53A Interpretation

- (1) In this subdivision—
 - forfeiture order*—see section 53G.
 - grounds* for not returning a seized building product to its owner—see section 53D.
 - owner*, of a building product, includes a person entitled to possession of the product.
 - responsible person*, for a seized building product, means the apparent owner of the product or the apparent occupier of premises at which the product is seized.
- (2) For this subdivision, a reference to returning or delivering a seized building product to its owner includes a reference to returning or delivering the product to a person nominated by the owner for the purpose of the return or delivery.

53B Seizure of building product

- (1) An authorised officer may seize a building product if the authorised officer believes on reasonable grounds that—
 - (a) a non-compliance risk exists in relation to the product, or
 - (b) a safety risk exists in relation to an intended use of the product, or
 - (c) the seizure is necessary to determine whether the non-compliance risk or safety risk exists, or
 - (d) an offence against this Act or the regulations has been committed in relation to the product.
- (2) On seizing the product, the authorised officer may do any of the following—
 - (a) move the product from the place where it is seized,
 - (b) leave the product at the place where it is seized and take reasonable action to restrict access to the product,
 - (c) direct the occupier of the premises where the product is seized to keep the product at the premises or at another place under the control of the occupier,
 - (d) direct the occupier of the premises where the product is seized to deliver the product to a place specified by the authorised officer.

53C Receipt for seized product

- (1) As soon as practicable after an authorised officer seizes a building product, the authorised officer must give a written receipt for the product to a responsible person.
- (2) If the authorised officer cannot practicably give the receipt to a responsible person, the officer may instead leave the receipt at the place where the product is seized in a conspicuous position and in a reasonably secure way.
- (3) The receipt must describe generally the seized product and its condition.
- (4) This section does not apply if—
 - (a) the building product is seized in a public place and the authorised officer cannot, after reasonable inquiries, identify or locate the apparent owner of the product, or
 - (b) considering the nature, condition or value of the seized building product, it would be impracticable or unreasonable to give a receipt for the product.

53D Grounds for not returning seized building product to owner

- (1) The *grounds* for not returning a seized building product to its owner are as follows—
 - (a) it is not lawful for the owner to have possession of the product,
 - (b) the regulations specify that the product must not be returned to its owner in the circumstances,
 - (c) an authorised officer has certified in writing that it is not reasonably practicable to return the product to its owner,
 - (d) continuing to keep the product in custody is reasonably necessary—
 - (i) to prevent a safety risk in relation to the use of the product in a building, or
 - (ii) as evidence of an offence.
- (2) An authorised officer may certify that it is not reasonably practicable to return a seized building product to its owner if—
 - (a) the authorised officer cannot find the owner after making reasonable inquiries, or
 - (b) the product has been destroyed in the process of testing or examining the product, or
 - (c) the authorised officer cannot, for another reason, return the product to its owner after making reasonable efforts.
- (3) A seized building product ceases to be necessary to be kept in custody as evidence of an offence—
 - (a) on the completion of proceedings, including proceedings on appeal, in which the product may be evidence, or
 - (b) if the court in which the proceedings are commenced makes an order that it is no longer necessary that the product be kept in custody as evidence.
- (4) In deciding what inquiries or efforts are reasonable under subsection (2)(a) or (c), the authorised officer must—
 - (a) consider the condition, nature and value of the seized building product, and

- (b) take account of any relevant guidelines issued by the Secretary for the purposes of this section.

53E Return of seized product

- (1) An authorised officer must return a seized building product to its owner unless there are grounds for not returning the product.
- (2) A requirement to return a seized product to its owner under subsection (1) includes a requirement to remove or lift restrictions, if any, on an owner's access to or control of the product.
- (3) The authorised officer may comply with the requirement to return a seized product to its owner under subsection (1) by ensuring the seized product is made available for collection in accordance with an arrangement made with its owner.

53F Court order requiring delivery of seized product

- (1) The owner of a seized building product may apply for an order directing that the product be delivered to the owner.
- (2) The application may be made to—
 - (a) if the estimated value of the product exceeds \$100,000—the Supreme Court, or
 - (b) otherwise—the Local Court.
- (3) The court must not make the order if—
 - (a) it is satisfied that there are grounds for not returning the seized building product to the owner, or
 - (b) the seized building product has been forfeited to the Secretary.
- (4) In deciding the application, the court may do one or more of the following—
 - (a) make a finding or order about the ownership of the product,
 - (b) make a finding or order about the liability for, or payment of, costs and expenses incurred in keeping the product in custody,
 - (c) make an incidental or ancillary finding or order the court considers necessary.
- (5) A requirement to deliver a seized building product to its owner includes a requirement to remove or lift restrictions, if any, on an owner's access to the product.

53G Forfeiture of seized building product

- (1) The Secretary may, by written order (a *forfeiture order*), declare a seized building product to be forfeited to the Secretary if the Secretary is satisfied that—
 - (a) there are grounds for not returning the product to its owner, and
 - (b) continuing to keep the product in custody is not justified.
- (2) The Secretary must not make the order if—
 - (a) notice of the Secretary's intention to make the order has not been given in accordance with section 53H, or
 - (b) the Secretary is aware the owner of the seized building product has applied to a court under section 53F for the return of the product and the application has not been finally determined.

- (3) On the making of a forfeiture order for a seized building product, the product—
 - (a) is forfeited to the Secretary, and
 - (b) becomes the property of the Secretary, and
 - (c) may be dealt with by the Secretary in a way the Secretary considers appropriate.

53H Notice of intention to make forfeiture order

- (1) At least 21 days before making a forfeiture order for a seized building product, the Secretary must give written notice specifying that—
 - (a) the Secretary intends to make the forfeiture order for the product on the date set out in the notice, and
 - (b) before the forfeiture order is made, the owner of the product may apply to a court under section 53F for the return of the product.
- (2) The notice must be given by—
 - (a) publishing the notice on the internet, and
 - (b) unless an authorised officer has certified under section 53D that it is not reasonably practicable to return the product to the owner—giving the notice to the owner of the seized building product.

[27] Section 59 Liability of directors etc for corporate offences—executive liability

Insert in alphabetical order in section 59(7)—

product safety steps means the following—

- (a) action to obtain and maintain an up-to-date understanding of the building products for which the corporation is a person in the chain of responsibility, including—
 - (i) the nature of the corporation’s business activities in relation to the products, and
 - (ii) the safe use of the products, and
 - (iii) potential safety risks and non-compliance risks associated with the products,
- (b) action to ensure the corporation is appropriately resourced and has appropriate processes in relation to potential safety risks and non-compliance risks associated with the products, including processes—
 - (i) to remove or minimise the risks, and
 - (ii) to receive and respond to new information about the risks or incidents that may be relevant to the risks,
- (c) action to ensure the resources and processes mentioned in paragraph (b) are being appropriately implemented.

[28] Section 59(7), definition of “reasonable steps”, paragraph (e)

Insert after paragraph (d)—

- (e) for an executive liability offence against section 8E(1)—the product safety steps.

[29] Sections 81 and 82

Omit “building product use ban” wherever occurring.

Insert instead “building product safety notice”.

[30] Section 81 Administrative review of decisions

Insert after section 81(1)(e)—

- (f) a decision by the Secretary under section 40 to require the payment of a fee for action taken to conduct or complete a product assessment,
- (g) a decision by an authorised officer to give a building product direction.

[31] Section 82 Modification of requirement to give reasons

Omit “notice of the ban” from section 82(1), note. Insert instead “the notice”.

[32] Section 82(2)

Omit “of the ban”.

[33] Section 85

Omit the section. Insert instead—

85 Relationship with National Construction Code

- (1) A building product safety notice or building product direction may be issued even if the relevant building product or use complies with the requirements of the National Construction Code.
- (2) The fact that a building product or use complies with the requirements of the National Construction Code does not constitute a reasonable excuse for contravening a building product safety notice or building product direction.
- (3) However, a building product safety notice or building product direction must not purport to authorise, and is void to the extent it otherwise purports to authorise, a contravention of the National Construction Code.

[34] Section 87 Permits

Omit the section.

[35] Section 90 Service of notices etc

Omit “email to an email” wherever occurring in section 90(1)(a)(v) and (b)(iv).

Insert instead “electronic means to a location or”.

[36] Schedule 1 Savings, transitional and other provisions

Insert after Part 2—

Part 3 Provision consequent on enactment of Building Legislation Amendment Act 2023

3 Building product use bans

A building product use ban in force immediately before the commencement of the *Building Legislation Amendment Act 2023* is taken to continue in force, on and from the commencement of that Act, Schedule 2.1, as a building product use ban under this Act as amended by that Act, Schedule 2.1.

2.2 Design and Building Practitioners Act 2020 No 7

Section 64 Grounds for taking disciplinary action

Insert after section 64(g)—

- (g1) the practitioner has—
 - (i) used or supplied a building product in contravention of a building product use ban, building product supply ban or building product recall within the meaning of the *Building Products (Safety) Act 2017*, or
 - (ii) contravened another requirement of the *Building Products (Safety) Act 2017*, whether or not the practitioner is prosecuted or convicted for the contravention,

2.3 Home Building Act 1989 No 147

[1] Section 56 Grounds for taking disciplinary action against holder of a contractor licence

Insert at the end of the section—

- (p) that the holder has—
 - (i) used or supplied a building product in contravention of a building product use ban, building product supply ban or building product recall within the meaning of the *Building Products (Safety) Act 2017*, or
 - (ii) contravened another requirement of the *Building Products (Safety) Act 2017*, whether or not the holder is prosecuted or convicted for the contravention.

[2] Section 57 Grounds for taking disciplinary action against holder of a supervisor or tradesperson certificate

Insert after section 57(h)—

- (i) that the holder has—
 - (i) used or supplied a building product in contravention of a building product use ban, building product supply ban or building product recall within the meaning of the *Building Products (Safety) Act 2017*, or
 - (ii) contravened another requirement of the *Building Products (Safety) Act 2017*, whether or not the holder is prosecuted or convicted for the contravention.

Schedule 3 Amendments relating to strata schemes

3.1 Strata Schemes Management Act 2015 No 50

[1] **Section 207 Bond to be given**

Omit “2%” from section 207(2). Insert instead “the prescribed percentage”.

[2] **Section 207(4)**

Omit “2%”. Insert instead “the prescribed percentage”.

[3] **Section 209 When amount secured by building bond payable**

Omit section 209(3). Insert instead—

- (3) An amount secured by a building bond must be claimed or realised under this section within the period prescribed by the regulations.

[4] **Part 11, Division 3AA**

Omit the division. Insert instead—

Division 3AA Decennial insurance

211AA Definitions

- (1) In this division—

building element has the same meaning as in the *Design and Building Practitioners Act 2020*.

decennial insurance means insurance of the kind described in subsection (2) that—

- (a) is taken out by the developer of a strata scheme in favour of the owners corporation for the scheme, and
- (b) insures against serious defects in the building elements of the common property for one or more buildings in the scheme—
- (i) for 10 years, and
- (ii) on a strict liability basis.

DLI policy means a policy of decennial insurance.

serious defect has the same meaning as in the *Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020*.

- (2) For subsection (1), definition of *decennial insurance*, the insurance must—
- (a) comply with criteria prescribed by the regulations, and
- (b) be in a form acceptable to the Secretary.

211AB Exemption from certain inspection and building bond provisions if developer obtains decennial insurance

The following provisions do not apply to a developer of a strata scheme who satisfies the Secretary that the developer has, for building work to which this part applies, obtained decennial insurance—

- (a) Division 2, other than section 206,
- (b) Division 3.

211AC Exemption from other statutory insurance requirement

- (1) A regulation may exempt a person from complying with the *Home Building Act 1989*, section 92 or 96, or both, in relation to building work if a developer has notified the Secretary of the developer's intention to obtain decennial insurance for the building work.
- (2) The regulation may—
 - (a) provide that the exemption is subject to specified conditions, and
 - (b) require the developer to give information to specified persons, including specifying the way and time within which the information must be given, and
 - (c) provide that the Secretary may require information be given by the developer to specified persons, including that the Secretary may—
 - (i) require information be included in contracts for purchase or in disclosure to potential purchasers before exchange of contracts, and
 - (ii) specify the way and time within which the information must be given, and
 - (d) if a regulation is made under subsection (1)—extend the application of a provision of this division that applies to the Secretary under this Act to the Secretary under the *Home Building Act 1989*, and
 - (e) make other provision about the exemption and the provision of information.

211AD Directions to decennial insurers to provide information

- (1) The Secretary may, by written order, direct a person who has issued a DLI policy to give the Secretary the following information, as specified in the direction—
 - (a) the number, terms and premiums payable of DLI policies issued by the person,
 - (b) the names of developers to whom DLI policies have been issued,
 - (c) the buildings covered by DLI policies,
 - (d) the number and value of claims made under DLI policies,
 - (e) circumstances where a developer has failed to meet a term or condition of a DLI policy, including specific details about the developer and the term or condition not met,
 - (f) other information prescribed by the regulations.
- (2) To avoid doubt, a direction under this section may—
 - (a) apply generally or specifically, and
 - (b) require information to be given on the occurrence of a specified event or at regular specified times, and
 - (c) specify the way and time within which the information must be given.
- (3) A person must comply with a direction under this section.
Maximum penalty—
 - (a) 500 penalty units, and
 - (b) for a continuing offence—200 penalty units for each day the offence continues.

211AE Directions to developers to provide information about decennial insurance

- (1) The Secretary may, by written order, direct a developer who has obtained a DLI policy to give the Secretary or another specified person information about the insurance, as specified in the direction.
- (2) To avoid doubt, a direction under this section may—
 - (a) apply generally or specifically, and
 - (b) require information to be given on the occurrence of a specified event or at regular specified times, and
 - (c) specify the way and time within which the information must be given.
- (3) A person must comply with a direction under this section.
Maximum penalty—
 - (a) 500 penalty units, and
 - (b) for a continuing offence—200 penalty units for each day the offence continues.

211AF False or misleading information in relation to decennial insurance

A person must not knowingly give the Secretary information in relation to decennial insurance that is false or misleading in a material particular.

Maximum penalty—

- (a) for a corporation—1,000 penalty units, or
- (b) otherwise—200 penalty units.

211AG Tribunal may make orders as to access and in relation to decennial insurance

- (1) The Tribunal may, on application, make an order requiring the occupier of a lot or part of a lot in a strata scheme or another person to allow access to the lot or another part of the parcel for the purpose of or in connection with—
 - (a) an inspection authorised under a DLI policy given to the strata scheme's owners corporation at the time of first occupation of a lot in the strata scheme, or
 - (b) determining whether building work is defective building work, or
 - (c) rectifying defective building work.
- (2) An application under subsection (1) may be made by the following—
 - (a) an owners corporation,
 - (b) the developer,
 - (c) the builder responsible for the defective building work or an employee, agent or contractor of the builder,
 - (d) a person who has issued a DLI policy referred to in section 211AA that covers the defective building work.
- (3) The developer may make an application for an order under subsection (2) only in the circumstances prescribed by the regulations.
- (4) An application under this section must be made to, and determined by, the Supreme Court, and not the Tribunal, if the matter is incidental to other proceedings being dealt with by the Court.

211AH Requirements for evidence of decennial insurance before issue of certain building certificates

- (1) The regulations may prohibit the issue of one or more of the following unless evidence of the issue of decennial insurance, or the giving of a building bond under Division 3, has been given to the Secretary—
 - (a) a complying development certificate under the *Environmental Planning and Assessment Act 1979*, or a certificate under that Act, Part 6,
 - (b) a strata certificate within the meaning of the *Strata Schemes Development Act 2015*.
- (2) The regulations may specify the following—
 - (a) the type of evidence that must be given,
 - (b) the way in which the evidence must be given to the Secretary.
- (3) A certificate issued in contravention of a prohibition under this section is invalid.
- (4) To avoid doubt, evidence of the issue of decennial insurance includes evidence of the issue of a certificate of currency for decennial insurance that comes into force on the occupation of a building.

211AI Regulations about decennial insurance

Regulations may be made about the following—

- (a) requiring developers to give notice to the Secretary of an intention to obtain decennial insurance,
- (b) requiring developers to give copies of certificates of currency for decennial insurance to the Secretary before specified events or actions,
- (c) fees payable to the Secretary for assessing whether a DLI policy—
 - (i) meets, in the Secretary's opinion, the criteria prescribed by the regulations under section 211AA(2)(a), and
 - (ii) is in a form acceptable to the Secretary under section 211AA(2)(b),
- (d) matters of a savings or transitional nature consequent on a change in regulations under this part or a decision of the Secretary under this part.

Example of changes— a change in a prescribed percentage or a change in the type of decennial insurance form acceptable to the Secretary

211AJ Publication of information about decennial insurance

The Secretary may publish information obtained under sections 211AD and 211AE.

211AK Extraterritorial application

A direction may be given under this division to a person in relation to a matter even though the person is outside the State or the matter occurs outside the State, so long as the matter affects or relates to building work carried out in the State or to related goods and services supplied in the State.

[5] Section 227 Certain applications cannot be accepted without prior mediation

Insert after section 227(4)(e)—

- (e1) an order under section 211AG(1) in relation to access to a lot,

[6] Section 271 Regulations

Insert after section 271(3)—

- (4) A regulation may also provide that an offence created by regulation is a continuing offence punishable by a penalty for the continuing offence, in addition to the penalty for the primary offence, not exceeding 50 penalty units per day.

3.2 Strata Schemes Management Regulation 2016

[1] Clauses 54 and 54A

Insert after clause 53—

54 Amount of building bond

For the Act, section 207(2) and (4), the prescribed percentage is as follows—

- (a) for a building bond given before 1 February 2024—2%,
(b) for a building bond given on or after 1 February 2024—3%.

54A Time within which building bond is payable

For the Act, section 209(3), an amount secured by a building bond must be claimed or realised under section 209 before the later of the following—

- (a) 2 years after the date of completion of the building work for which the bond is given,
(b) 90 days after the final report on the building work is given to the Secretary by the building inspector.

[2] Part 8, Division 3A

Insert after Part 8, Division 3—

Division 3A Decennial insurance

55A Decennial insurance criteria

- (1) For the Act, section 211AA(2)(a), decennial insurance for a building must—
(a) not permit cancellation, whether by the developer or another party to the policy,
(b) be issued before an application is made for an occupation certificate under the *Environmental Planning and Assessment Act 1979* for any part of the building.
- (2) To avoid doubt, insurance complies with subclause (1)(b) if the insurance is issued before the application for the occupation certificate subject to a condition that the insurance does not take effect until the occupation certificate is issued.

55B Notice of intention to take out decennial insurance to be given to Secretary

- (1) For the Act, section 211AI(a), the developer of a strata scheme must, before an application is made for a construction certificate under the *Environmental Planning and Assessment Act 1979* for building work to which the Act, Part 11 applies, give written notice to the Secretary, in the way specified by the Secretary, as to whether or not the developer intends to obtain decennial insurance for the building work.

- (2) If the developer intends to obtain decennial insurance for the building work, the written notice to the Secretary must include a copy of a certificate of currency for the decennial insurance showing the following—
 - (a) the name of the issuer,
 - (b) the name of the insured,
 - (c) the amount covered by the policy,
 - (d) the terms and conditions of the insurance policy, including the building work covered by the policy and the commencement date of the policy,
 - (e) the amount of the premium deposit,
 - (f) confirmation that the premium deposit has been paid.
- (3) A developer must not fail to comply with this clause.
Maximum penalty—
 - (a) 200 penalty units, and
 - (b) for a continuing offence—50 penalty units for each day the offence continues.

55C Certificate of currency for decennial insurance to be given to Secretary before application for occupation certificate is made

- (1) For the Act, section 211AI(b), the developer of a strata scheme must, before an application is made for an occupation certificate under the *Environmental Planning and Assessment Act 1979* for building work to which the Act, Part 11 applies, give the Secretary, in the way specified by the Secretary, a copy of a certificate of currency for the decennial insurance for the building work.
- (2) Subclause (1) does not apply if the developer has given the Secretary a building bond under the Act, section 207.
- (3) The copy of a certificate of currency for the decennial insurance must show the following—
 - (a) the name of the issuer,
 - (b) the name of the insured,
 - (c) the amount covered by the policy,
 - (d) the terms and conditions of the insurance policy, including the building work covered by the policy and the commencement date of the policy,
 - (e) the amount of the premium deposit,
 - (f) confirmation that the premium deposit has been paid.
- (4) A developer must not fail to comply with this clause.
Maximum penalty—
 - (a) 200 penalty units, and
 - (b) for a continuing offence—50 penalty units for each day the offence continues.

3.3 Residential Apartment Buildings (Compliance and Enforcement Powers) Regulation 2020

Clause 15A

Insert after clause 15—

15A Secretary may issue prohibition order for failure in relation to strata scheme decennial insurance

For the Act, section 9(1)(f), a failure of a developer of a strata scheme to comply with the *Strata Schemes Management Regulation 2016*, clause 55C is prescribed.

Schedule 4 Amendments relating to immediate suspension of authorisations

4.1 Building and Development Certifiers Act 2018 No 63

[1] Section 47A

Insert after section 47—

47A Power to suspend registration when notice to show cause served

- (1) The Secretary may, by written notice to a registered certifier, suspend the registration of the registered certifier in accordance with Part 2 pending a determination by the Secretary of whether to take disciplinary action under this Act against the holder if—
 - (a) a notice to show cause has been served on the registered certifier under section 47, and
 - (b) in the Secretary's opinion, there are reasonable grounds to believe that—
 - (i) the registered certifier has engaged in conduct that constitutes grounds for suspension of the registration, and
 - (ii) it is likely the registered certifier will continue to engage in the conduct, and
 - (iii) there is a danger a person or persons may suffer significant harm, or significant loss or damage, as a result of the conduct unless action is taken urgently.
- (2) The Secretary may suspend a registration under this section only if satisfied that the grounds for disciplinary action specified in the notice to show cause would, if established, justify the suspension or cancellation of the registration.
- (3) A suspension must not be imposed for a period of more than 60 days after the notice to show cause is served, but may, if the Secretary remains of the opinion referred to in subsection (1)(b), be extended, by written notice, for further periods of 60 days.
- (4) The period of initial suspension must be specified in the notice imposing the suspension.
- (5) The Secretary is not required to give a person an opportunity to be heard before taking action against the person under this section.
- (6) The Secretary may revoke a suspension under this section at any time by written notice to the suspended person.
- (7) This section does not limit or otherwise affect another power to suspend a registration or licence under the *Fair Trading Act 1987*, section 79A.

[2] Section 49

Omit the section. Insert instead—

49 Review by Civil and Administrative Tribunal

A person aggrieved by the following decisions of the Secretary may apply to the Tribunal for an administrative review under the *Administrative Decisions Review Act 1997*—

- (a) a decision under section 47A to suspend the registration of a registered certifier pending a determination of whether to take disciplinary action,

- (b) a decision to take disciplinary action under this part.

4.2 Design and Building Practitioners Act 2020 No 7

[1] Section 65A

Insert after section 65—

65A Power to suspend registration when notice to show cause served

- (1) The Secretary may, by written notice to a registered practitioner, suspend the registration of the registered practitioner in accordance with Part 5 pending a determination by the Secretary of whether to take disciplinary action under this Act against the holder if—
 - (a) a notice to show cause has been served on the registered practitioner under section 65, and
 - (b) in the Secretary's opinion, there are reasonable grounds to believe that—
 - (i) the registered practitioner has engaged in conduct that constitutes grounds for suspension of the registration, and
 - (ii) it is likely the registered practitioner will continue to engage in the conduct, and
 - (iii) there is a danger a person or persons may suffer significant harm, or significant loss or damage, as a result of the conduct unless action is taken urgently.
- (2) The Secretary may suspend a registration under this section only if satisfied that the grounds for disciplinary action specified in the notice to show cause would, if established, justify the suspension or cancellation of the registration.
- (3) A suspension must not be imposed for a period of more than 60 days after the notice to show cause is served, but may, if the Secretary remains of the opinion referred to in subsection (1)(b) be extended, by written notice, for further periods of 60 days.
- (4) The period of the suspension must be specified in the notice imposing the suspension.
- (5) The Secretary is not required to give a person an opportunity to be heard before taking action against the person under this section.
- (6) The Secretary may revoke a suspension under this section at any time by written notice to the suspended person.
- (7) This section does not limit or otherwise affect another power to suspend a registration or licence under the *Fair Trading Act 1987*, section 79A.

[2] Section 68

Omit the section. Insert instead—

68 Review by Civil and Administrative Tribunal

A person aggrieved by the following decisions of the Secretary may apply to the Tribunal for an administrative review under the *Administrative Decisions Review Act 1997*—

- (a) a decision under section 65A to suspend the registration of a registered certifier pending a determination of whether to take disciplinary action,
- (b) a decision to take disciplinary action under this part.

Schedule 5 Amendments relating to sharing of information

5.1 Building and Development Certifiers Act 2018 No 63

[1] Section 108 Exchange of information

Insert in alphabetical order in section 108(6)—

government sector agency means—

- (a) a Public Service agency or other government sector agency within the meaning of the *Government Sector Employment Act 2013*, or
- (b) a NSW Government agency, or
Note— See the *Interpretation Act 1987*, section 13A.
- (c) an entity constituted by or under an Act or exercising public functions, such as a State owned corporation, being an entity prescribed by the regulations for this definition.

[2] Section 108(6), definition of “relevant agency”

Insert after paragraph (c)—

- (c1) a government sector agency, or

5.2 Home Building Act 1989 No 147

[1] Section 121B Information sharing

Omit section 121B(1)(c). Insert instead—

- (c) a government sector agency or a member of staff of a government sector agency,
- (d) a person or body prescribed by the regulations for this section.

[2] Section 121B(5)

Insert after section 121B(4)—

- (5) In this section—

government sector agency means—

- (a) a Public Service agency or other government sector agency within the meaning of the *Government Sector Employment Act 2013*, or
- (b) a NSW Government agency, or
Note— See the *Interpretation Act 1987*, section 13A.
- (c) an entity constituted by or under an Act or exercising public functions, such as a State owned corporation, being an entity prescribed by the regulations for this definition.