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OPP--OPPOSITION

LEGISLATIVE COUNCIL

Building Products (Safety) Bill 2017

First print

Proposed amendments

- No. 1 **Chain of responsibility**
Page 2, clause 1, line 4. Omit "*Safety*". Insert instead "*Chain of Responsibility and Other Matters*".
- No. 2 **Scope of Act**
Page 2. Insert after line 21:
- 3 Object of Act**
- The object of this Act is to regulate building products:
- (a) to ensure the safety of consumers, building workers and the public generally, and
- (b) to ensure that persons involved in the manufacture, supply or installation of building products are held responsible for the safety of those products and their use.
- No. 3 **Chain of responsibility**
Page 2, clause 3. Insert after line 31:
- chain of responsibility*—see section 12.
- No. 4 **Scope of Act, chain of responsibility and building product recalls**
Page 2, clause 3. Insert after line 44:
- non-conforming building product*—see section 5.
- No. 5 **Chain of responsibility**
Page 2, clause 3. Insert after line 44:
- notifiable incident* means:
- (a) the death or serious injury of a person, or
- (b) an incident that exposes a person to a risk of serious injury.
- No. 6 **Building product recalls**
Page 3, clause 3. Insert after line 6:

recall order means a recall order under section 27 that is in force.

No. 7 **Chain of responsibility**

Page 3, clause 3. Insert after line 6:

relevant regulatory provisions means:

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

No. 8 **Scope of Act**

Page 3, clause 3. Insert after line 25:

unsuitable—see section 5.

No. 9 **Chain of responsibility and building product recalls**

Page 3, clause 3, line 26. Insert “and *intended use*,” after “*use*,”.

No. 10 **Scope of Act**

Page 4, clause 4, lines 3–5. Omit all words on those lines. Insert instead:

- (1) For the purposes of this Act, there is a *safety risk* posed by the use of a building product in a building if any persons who engage in building work, or any occupants of the building, are or will likely be at risk of death or serious injury arising from the use of the building product in the building.

No. 11 **Scope of Act, chain of responsibility and building product recalls**

Page 4. Insert after line 12:

5 Non-conforming building products

- (1) A building product is a *non-conforming building product* for a use in a building if:
 - (a) there is a safety risk posed by the use of the building product, or
 - (b) the building product or its use does not or will not comply with the National Construction Code (within the meaning of section 85), Australian Standards or any law of this State or the Commonwealth, or
 - (c) the building product or the use of the building product will cause or is likely to cause damage to any property or to destroy or otherwise significantly compromise any property, or
 - (d) the building product does not perform, or is not capable of performing, in relation to the use, to the standard that it is represented to perform by a person in the chain of responsibility for the building product, or
 - (e) any information or installation instructions provided in relation to the building product, or the use of the building product, by a person in the chain of responsibility for the building product is false or misleading in a material particular or inadequate.
- (2) For the purposes of this Act, a building product is *unsuitable* for use in a building if the building product is a non-conforming building product.

No. 12 **Scope of Act**

Page 4, clause 6, line 24. Insert “and any structure or part of a structure used in connection with building work on a building” after “1979”.

No. 13 **Chain of responsibility and building product recalls**

Page 4, clause 7. Insert after line 31:

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- (4) An *intended use* of a building product in a building means a use of a building product in a building that is intended or is reasonably likely.

No. 14 **Chain of responsibility**

Page 5: Insert after line 29:

Part 3 Duties of persons in chain of responsibility

Division 1 General provisions about duties

9 Relationship with safety laws

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

10 Principles applying to duties

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

11 Code of practice about discharging duties

- (1) The Minister may, by order published on the NSW legislation website, make a code of practice that states a way of discharging a duty a person has under this Part.
- (2) Sections 40 and 41 of the *Interpretation Act 1987* apply in relation to an order under subsection (1) in the same way as they apply to a statutory rule.
- (3) A code of practice, or an order amending or repealing a code of practice, commences on the day the order is published on the NSW legislation website or a later day specified in the order.
- (4) A code of practice ceases to have effect 10 years after it commences.

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- (5) A code of practice is admissible in proceedings for an offence against this Part as evidence of whether or not a duty under this Part has been complied with.
 - (6) Nothing in this section prevents a person from introducing evidence of compliance with the duty in a way that is different from the code of practice.

Division 2 Duties

12 Who is person in chain of responsibility

A person is a person in the *chain of responsibility* for a building product if:

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

13 Primary duty of person in chain of responsibility

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

14 Additional duty relating to accompanying information

- (1) A person in the chain of responsibility for a building product who designs the building product must ensure, so far as reasonably practicable, that, if the person gives the design to another person who is to give effect to the design, the design is accompanied by the required information for the product.
- (2) A person in the chain of responsibility for a building product who manufactures, imports or supplies the product must ensure, so far as reasonably practicable, that when the person gives the product to another person the product is accompanied by the required information for the product.
- (3) For the purposes of subsection (2), a person gives a building product to another person if the person:
 - (a) sells, supplies or otherwise transfers the building product to the other person, or
 - (b) facilitates the sale, supply or transfer of the building product to another person.
- (4) A person who does the building work by which a building product is used in a building must ensure, so far as reasonably practicable, that the owner of the building is given the information about the product prescribed by the regulations for this subsection.
- (5) The regulations may prescribe the following requirements in relation to the information required under this section:
 - (a) the matters that must be included or provided for in the information,
 - (b) the matters that must not be included or provided for in the information,
 - (c) the form in which the information must be given.
- (6) In this section:

required information means information about the product that:

 - (a) for each intended use of the product, states or otherwise communicates the following:

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- (i) the suitability of the product for the intended use and, if the product is suitable for the intended use only in particular circumstances or subject to particular conditions, the particular circumstances or conditions,
 - (ii) instructions about how the product must be used in a building to ensure it is not a non-conforming building product for the intended use, and
- (b) complies with the requirements for the information, if any, prescribed by the regulations.

Division 3 Offences relating to duties

15 Failure to comply with duty

A person commits an offence if:

- (a) the person has a duty under Division 2, and
- (b) the person fails to comply with the duty.

Maximum penalty: 1,000 penalty units.

16 Duty about representations about building products

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

Maximum penalty: 1,000 penalty units.

17 Duty to notify non-conforming building product

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

Maximum penalty: 50 penalty units.

- (2) If the person is aware of a notifiable incident that was or may have been caused by the use of the building product for the intended use, the notice under subsection (1) must also include notice of the notifiable incident.

- (3) The notice under subsection (1):

- (a) must be given as soon as practicable but, in any case, within 2 days after the person becomes aware that, or forms the suspicion that, a building product is a non-conforming building product for an intended use, and
- (b) must be given in a form approved by the Secretary.

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

18 Duty to comply with directions of Secretary

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

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- (b) that the building product is or may be a non-conforming building product in relation to the use, and
 - (c) that the use poses a safety risk.
- (3) A person given a direction under this section must comply with the direction.
Maximum penalty: 50 penalty units.

19 Duty to notify notifiable incident

- (1) A person in the chain of responsibility for a building product who becomes aware, or reasonably suspects, that a notifiable incident was or may have been caused by the use in a building of a building product that is a non-conforming building product in relation to that use must give the Secretary notice of the notifiable incident.
Maximum penalty: 100 penalty units.
- (2) The notice under subsection (1):
- (a) must be given as soon as practicable but, in any case, within 2 days after the person becomes aware that, or forms the suspicion that, a notifiable incident has occurred, and
 - (b) must be given in a form approved by the Secretary.
- (3) In proceedings in which a person is charged with an offence under this section, it is a defence to the prosecution of the offence if the person charged proves that the person had a reasonable excuse for the act or omission concerned.

20 Secretary may require remedial action

- (1) The Secretary may, by written notice given to a person, direct the person to do the following within the period stated in the direction:
- (a) remedy a contravention of this Part,
 - (b) take stated steps to prevent the contravention from continuing or being repeated.
- (2) The Secretary may give a direction under this section only if the Secretary is satisfied on reasonable grounds that the person:
- (a) has contravened a duty under this Part, or
 - (b) has contravened a duty under this Part in circumstances that make it likely that the contravention will continue or be repeated.
- (3) The period stated in the direction must be at least 28 days unless the Secretary is satisfied that, if the direction is not required to be complied with within a shorter period:
- (a) a substantial loss will be incurred by, or a significant hazard will be caused to the health or safety of, a person because of the contravention, or
 - (b) the contravention will cause a significant hazard to public safety or the environment generally.
- (4) A person given a direction under subsection (1) must comply with the direction.
Maximum penalty: 1,000 penalty units.

No. 15 Powers of Secretary

Page 6, clause 9, line 3. Omit "may". Insert instead "must".

No. 16 Scope of Act

Page 6, clause 9, line 5. Omit "the use is unsafe". Insert instead "the building product is unsuitable to be used in a building".

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- No. 17 **Scope of Act**
Page 6, clause 9, lines 16, 18 and 19. Omit “unsafe” wherever occurring. Insert instead “unsuitable”.
- No. 18 **Scope of Act**
Pages 7, 9, 10, 11, 12, 32 and 34, clauses 14, 18, 19 (2), (3), (4) and (5), 20, 22, 24, 26, 81 and 86 (3) (b). Omit “safety” wherever occurring.
- No. 19 **Scope of Act**
Pages 9 and 10, clauses 16 and 19 (1). Omit “*safety*” wherever occurring.
- No. 20 **Building product recalls**
Page 9, clause 16. Insert after line 7:

regulatory instrument means a building product use ban or recall order.
- No. 21 **Building product recalls**
Page 9, clause 17, line 18. Insert “or that a building product the subject of a recall order has been used in the building” after “ban”.
- No. 22 **Building product recalls**
Page 9, clause 17, line 20. Omit “building product use ban”. Insert instead “relevant regulatory instrument”.
- No. 23 **Building product recalls**
Pages 9, 10 and 12, clauses 18, 19, 20 and 26. Omit “building product use ban” wherever occurring. Insert instead “regulatory instrument”.
- No. 24 **Powers of Secretary**
Page 9, clause 18, line 23. Omit “may” where secondly occurring. Insert instead “must”.
- No. 25 **Notification of affected buildings**
Page 9, clause 18. Insert after line 31:

(b) the occupier or occupiers of the building,
- No. 26 **Notification of affected buildings**
Page 9, clause 18, lines 37–40. Omit all words on those lines. Insert instead:

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

(a) to give notice to the owners corporation constituted under that Act for the building, and
(b) to give notice to each person who is an owner (within the meaning of that Act) of a lot in the strata scheme.
- No. 27 **Notification of affected buildings**
Page 9, clause 18, lines 41 and 42. Omit all words on those lines. Insert instead:

(5) The Secretary must publish an affected building notice on the internet and in the Gazette.
- No. 28 **Powers of Secretary**
Page 10, clause 19, line 2. Omit “may”. Insert instead “must”.
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- No. 29 **Scope of Act**
Pages 11 and 12, clauses 23 and 25. Omit “safe” wherever occurring. Insert instead “suitable”.
- No. 30 **Notification of affected buildings**
Page 12, clause 24. Insert after line 8:
 (b) the occupier or occupiers of the building,
- No. 31 **Scope of Act**
Page 12, clause 26, line 29. Omit “safe”. Insert instead “suitable”.
- No. 32 **Building product recalls**
Page 12. Insert after line 32:

Part 5 Building product recalls

27 Secretary may make recall order

- (1) The Secretary may, by order in writing served on a responsible person for a building product, direct the responsible person to recall that building product from use.
- (2) An order under this section is a *recall order*.
- (3) A recall order may be made only if the Secretary is satisfied on reasonable grounds that:
 - (a) the use of the building product in a building is unsafe, or
 - (b) the building product is a non-conforming building product for an intended use, or
 - (c) the building product is being used, on a wide scale or normally, otherwise than in accordance with the instructions of the manufacturer or supplier.
- (4) The Secretary may make a recall order for a building product whether or not:
 - (a) the responsible person, or another responsible person, has already undertaken a recall of the building product, or
 - (b) the building product has been used in a building.
- (5) A recall order for a building product may be made in relation to 2 or more responsible persons for the building product.
- (6) In this Part:

responsible person for a building product means:

 - (a) a person who designed, manufactured, imported or supplied the building product, or
 - (b) if the product has been used in a building—a person who did the building work by which the building product was used in the building.

28 Notice of intention to make recall order

- (1) Before making a recall order, the Secretary must:
 - (a) give each responsible person to whom the recall order is to apply written notice of the Secretary’s intention to make the order and the reasons for making the order, and
 - (b) give the responsible person a copy of the proposed recall order, and
 - (c) ask the responsible person to show cause why the Secretary should not make the proposed recall order.

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

29 Nature of recall order

- (1) A recall order must state:
 - (a) the reasons for the recall of the building product from use, and
 - (b) what each responsible person to whom the order applies must do to recall the building product from use including, for example, the following:
 - (i) the way in which, and the period for which, a responsible person must inform other persons about the reason for the recall order,
 - (ii) the information a responsible person must give other persons about the reasons for the recall order, including the action the other persons should take to mitigate any risk of injury,
 - (iii) the action a responsible person must take in relation to other persons to whom the building product has been sold or supplied, for example, replacing the building product or providing a refund for the building product,
 - (iv) for a building product used in a building—the action a responsible person must take to remove the building product from the building,
 - (v) the action a responsible person must take to stop the building product from being a non-conforming building product for an intended use, for example, by repair or modification,
 - (vi) the action a responsible person must take to help another responsible person to whom the recall order applies to comply with the order,
 - (vii) the information a responsible person must give to the Secretary about the progress of the recall.
- (2) Each responsible person to whom the recall order applies is liable for any cost incurred in relation to complying with the order, including costs incurred by a person giving any assistance the person is required to give under this Part.
- (3) The recall order remains in force until the end of 2 years after the order is made unless sooner revoked by the Secretary.
- (4) Subsection (3) does not prevent a further recall order being made for the same building product to which the recall order applied while it was in force.

30 Compliance with recall order

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

Maximum penalty: 1,000 penalty units.

31 Other persons must help responsible person

- (1) A person who supplies a building product, or does the building work by which a building product is used in a building, must give a responsible person who is the subject of a recall order in relation to the building product any reasonable assistance that the person requests to enable the person to comply with the recall order.
Maximum penalty: 50 penalty units.
- (2) This section applies only if the responsible person who is the subject of the recall order produces a copy of the recall order to the person the subject of the request.

32 Public notice

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

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

No. 33 **Scope of Act**

Pages 15, 16 and 18, clauses 34, 38, 39 and 42. Omit “unsafe” wherever occurring. Insert instead “unsuitable”.

No. 34 **Building product recalls**

Page 15, clause 36, line 24. Omit “impose or amend a building product use ban”. Insert instead “impose, make or amend a building product use ban or recall order”.

No. 35 **Building product recalls**

Page 17, clause 41, line 15. Omit “impose or amend a building product use ban”. Insert instead “impose, make or amend a building product use ban or recall order”.

No. 36 **Enforcement orders**

Page 27. Insert after line 18:

70 Enforcement orders by court on conviction of person

- (1) If a person is convicted by a court of an offence against this Act or the regulations, the court may, if satisfied that it is appropriate in the circumstances to do so, make an order (an *enforcement order*) that imposes any or all of the following requirements on the convicted person in relation to the building product to which the conviction relates:
 - (a) a requirement that the convicted person cease manufacturing, supplying or using the building product,
 - (b) a requirement that the convicted person do anything, or cease to do anything, reasonably necessary to ensure that the building product is not a non-conforming building product and is not unsuitable for use in a building,
 - (c) a requirement that the convicted person do anything reasonably necessary to ensure that the building product is not used in a building,
 - (d) if the building product has been used in a building, a requirement that the convicted person do, or cause to be done, any work reasonably necessary to remove the building product from the building, or to eliminate or minimise the risk posed by the use of the building product and remediate or restore the building following that work,
 - (e) a requirement that the convicted person do anything reasonably necessary to ensure that third parties do not suffer loss or injury as a result of the convicted person’s actions or as a result of the convicted

person being required to comply with any of the other requirements of an order under this section.

- (2) An enforcement order must state the period within which the convicted person must comply with the order.
- (3) A person must not fail to comply with any requirement imposed on the person by an enforcement order.
Maximum penalty: 4,500 penalty units.
- (4) If an enforcement order is not complied with within the period stated in the order, the Secretary may:
 - (a) take any action that is required to be taken under the order, and
 - (b) recover from the convicted person, as a debt in any court of competent jurisdiction, the reasonable costs of taking those actions.
- (5) An enforcement order operates in addition to any other penalty the court imposes in respect of the offence.
- (6) In this section, a reference to the conviction of a person includes a reference to the making of an order in respect of a person under section 10 of the *Crimes (Sentencing Procedure) Act 1999*.

No. 37 **Recovery of investigation costs**

Page 27. Insert after line 18:

70 Payment of investigation costs on conviction of person

- (1) If a person is convicted by a court of an offence against this Act or the regulations, the court may, if satisfied that it is appropriate in the circumstances to do so, make an order (an *investigation costs order*) that requires the convicted person to pay a specified amount of investigation costs to the Secretary.
- (2) Investigation costs are any costs reasonably incurred by or on behalf of the Secretary in investigating, assessing or testing a building product, or the use of a building product, in connection with the conduct the subject of the offence.
- (3) The amount payable under an investigation costs order is not to exceed the jurisdictional limit of the Local Court when sitting in its General Division within the meaning of the *Local Court Act 2007*.
- (4) The amount payable under an investigation costs order is recoverable by the Secretary from the convicted person as a debt in any court of competent jurisdiction.
- (5) An investigation costs order operates in addition to any other penalty the court imposes in respect of the offence.
- (6) In this section, a reference to the conviction of a person includes a reference to the making of an order in respect of a person under section 10 of the *Crimes (Sentencing Procedure) Act 1999*.

No. 38 **Building product recalls**

Page 32, clause 81. Insert after line 10:

- (e) a decision of the Secretary to make a recall order,

No. 39 **Chain of responsibility**

Page 40, line 2, Schedule 2.1. Omit "Safety". Insert instead "Chain of Responsibility and Other Matters".

No. 40 **Chain of responsibility**

Pages 40, 41 and 42, Schedule 2.2, 2.3, 2.4, 2.5, 2.6, 2.7, 2.8 and 2.9. Omit “*Safety*” wherever occurring. Insert instead “*Chain of Responsibility and Other Matters*”.

No. 41 **Chain of responsibility**

Page 40, line 27, Schedule 2.2 [2]. Omit “**Safety**”. Insert instead “**Chain of Responsibility and Other Matters**”.

No. 42 **Chain of responsibility**

Omit “to prevent the unsafe use of building products in buildings” from the long title. Insert instead “to regulate building products, to impose duties on persons who design, manufacture, supply and install building products”.