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# Building Products (Safety) Bill 2017

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On 16 November, the NSW Government introduced the Building Products (Safety) Bill 2017 into Parliament, addressing safety risks associated with non-conforming building products.

The purpose of the Building Products (Safety) Bill 2017 (Bill) is to address safety risks associated with the use of non-conforming building products. The Bill is in response to the tragedies of the Lacrosse fire in Victoria and the Grenfell Tower fire in London.

This Bill is one in a series of steps proposed to be implemented. The primary driver of the proposed legislative reform is the use and risks associated with aluminium composite façade panels.

## When the Bill takes effect

On 23 November 2017, the Bill was passed. The Bill is awaiting Royal Assent which is likely to occur soon.

Importantly, the power to make a building rectification order extends to banned building products used in buildings before the commencement of the Bill. This means that all buildings in NSW will be susceptible to building rectification orders, regardless of when they were constructed.

## What you need to know

In summary, the Bill:

1. enables the Fair Trading Commissioner to ban the use of unsafe building products and to issue notices to affected buildings;
2. permits enforcement authorities to make building product rectification orders;

3. confers a number of investigatory powers on authorities to support the identification and elimination of unsafe building products.

## What is an “unsafe building product”

The definition of “unsafe building product” is general, wide reaching and gives Fair Trading a high degree of discretion. The Bill states:

“the use of a building product in a building is unsafe if there is a safety risk posed by the use of the building product in the building”

“there is a safety risk posed by the use of a building product in a building if any occupants of the building are or will likely be at risk of death or serious injury arising from the use of the building product in the building.”

The Bill sets out a process that Fair Trading must follow to include a

building product on the “banned” list. This includes consultation with manufacturers and a public submission process. Presently, there are no building products on the “banned” list.

## Fair Trading powers

Under the Bill, Fair Trading will have power to:

1. ban the way a building product is used;
2. ban the use of a particular building product;
3. issue rectification notices to owners which may trigger relevant authorities (likely to be Local Council) to issue rectification orders;
4. impose penalties on those who breach bans or otherwise breach the Bill (up to \$220,000)





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per offence for individuals and \$1.1 million for companies [with directors and senior managers also being specifically exposed to personal liability for offences] – as well as daily fines and the possibility of imprisonment).

### Exceptions – product undertakings

A person may submit a written undertaking where they have contravened or are likely to contravene a building product use ban. If Fair Trading accept the undertaking it will prevent Fair Trading from commencing proceedings for the contravention of the Bill identified in the undertaking.

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

### Amendments to other legislation

There have been a series of other legislative reform in NSW which flow from the Bill. Some of those include:

- Environmental Planning and Assessment Regulation 2000 – A building's planning certificate will need to include:

> a statement addressing whether there is any affected building notice in force;

> a statement addressing whether there is any building product rectification order in force that has not been fully complied with;

> whether any notice of intention to make a building product rectification order has been served.

- Strata Schemes Management Act 2015 – Particulars of any outstanding building product rectification order will need to be disclosed on a certificate under s 184.
- Home Building Act 1989 – The Bill makes the use of a banned building product a major defect for the purpose of proceedings for a breach of statutory warranties under the Home Building Act. This means that proceedings for a breach of a statutory warranty under the Act can be commenced up to six (6) years after the completion of the building work.
- Conveyancing (Sale of Land) Regulation 2017 – A building product rectification order that has not been fully complied with will be an adverse affectation for the purpose of implied warranties. A vendor's failure to disclose such an order in a contract for sale of land will therefore breach the warranty implied in the contract by s 52A of the Conveyancing Act 1919.

If you have any questions relating to this article or would like to speak to a lawyer in relation to the Bill or another aspect of this area of law, please contact Mark Yum, Partner – Construction & Infrastructure or Nelson Arias-Alvarez, Partner – Construction & Infrastructure.

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