

Building Products Safety Laws

BUILDING PRODUCTS SAFETY LAWS

The Building Products (Safety) Act 2017 (“Act”) has been passed by the New South Wales government and is to commence on a date to be proclaimed. When it commences, it will give NSW Fair Trading substantial powers to identify and stop the use of potentially unsafe building products. The current focus is on cladding products, but the Act has much broader application.

Key issues include:

- NSW Fair Trading having enhanced investigative powers, including power to require builders, suppliers, manufacturers and importers to produce records to facilitate identification of dangerous products.
- The Fair Trading Commissioner having power to ban use of unsafe building products when satisfied on reasonable grounds that the particular use is unsafe, i.e. where “occupants of the building are or will likely be a risk of death or serious injury arising from use of the building product in the building”. The ban could involve specific uses, use by specified persons or classes of persons or use in specific buildings or classes of buildings.
- The Fair Trading Commissioner having power to issue affected building notices in relation to specific buildings or classes of building. This can occur even if the product was used before the relevant ban came into force.
- Increased council powers to require rectification in case of use of dangerous products.
- Substantial penalties for non-compliance, up to \$1.1 million for corporations or \$220,000 or two years imprisonment or both for individuals. Further, an additional penalty may be imposed for each day an offence continues, being \$110,000 for corporations and \$44,000 for individuals.

Implications for strata schemes include:

- Details of any outstanding building product rectification order will need to be disclosed in certificates issued under Section 184 of the *Strata Schemes Management Act 2015*.
- Lot owners selling lots the subject of an outstanding building product rectification order will need to disclose that to the purchaser, because it constitute an adverse affectation for the purpose of the implied warranties under the Conveyancing (Sale of Land) Regulation 2017.
- The use of a building product in contravention of the Act will be listed as a “major defect” for the purpose of proceedings for a breach of statutory warranties under the Home Building Act 1989 (“HBA”), i.e. therefore, it may be a six-year limitation period, from completion of the works, for commencing proceedings if the item was to cause or likely to cause the

building or part of it to be destroyed, incapable of use or to collapse. However, this amendment is not retrospective.

- Owners corporations should, as a priority, engaging suitable experts as required, investigate whether dangerous building products may have been used in their buildings and if so, determine the appropriate course of action. In particular, they should ensure that any appropriate proceedings are commenced within the permitted timeframe.

We have considerable experience with these issues and could help you pre-empt difficulties in this area.

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