

BUILDING LEGISLATION AMENDMENT ACT 2023

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The Building Legislation Amendment Act amends the following statutes:

1

Home Building Act 1989 (NSW)

2

Building Products (Safety) Act 2017 (NSW)

3

*Design and Building Practitioners Act 2020 (NSW) (“**DBP Act**”)*

4

Strata Schemes Management Act 2015 (NSW)

4

*Residential Apartment Buildings (Compliance and Enforcement Powers) Act 2020 (NSW) (“**RAB Act**”)*

Today's Focus

- Expanded regulatory powers under the *Home Building Act 1989* (NSW)
- Introduction of a “chain of product safety” – amendments to the *Building Products (Safety) Act 2017* (NSW)



Key Concept – Classification of Buildings

Building classifications under the *National Construction Code*

Class 1

- Houses which are typically standalone single dwellings of a domestic and residential nature. These building can also be horizontally attached to other class 1 buildings (for example, town houses)

Class 2

- Apartment buildings which are typically multi-unit residential building where people live above and below each other. They might also include single storey attached dwellings with a common space below. For example, 2 dwellings above a common basement or carpark.

Legislation to extend existing powers

- The Amendment Act expands powers of the Building Commission
- Builds on the success of existing regulation of class 2 buildings and expands compliance, oversight and enforcement powers for class 1 buildings

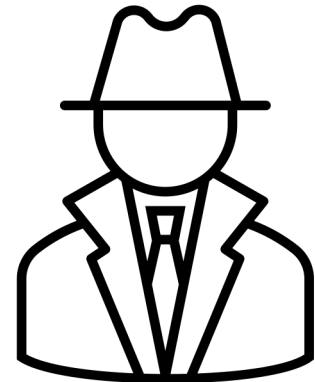


Summary of Key Amendments

Amendments to the Home Building Act 1989 (NSW):

1. expanded powers to investigate “residential building work” – extends to residential homes (section 49A of the *Home Building Act 1989* (NSW);
2. power conferred on the Building Commission to issue a rectification order to a contractor in respect of residential building work (s 49B of the *HBA*);
3. power conferred on the Building Commission to issue a stop work order on a contractor in respect of residential building work (s 129 of the *HBA*).

These provisions mirror those found in the RAB Act and DBP Act



Case Note

- Legislative Intention = early intervention and a reduction of defect litigation
- Case study demonstrates how that intention may be undermined
- *Strata Plan 99576 v Central Construct Pty Ltd* [2023] NSWSC 212:
 - concerned an application by the builder to stay proceedings where the building works in question were the subject of investigation by the regulator
 - after proceedings were commenced, the owner's corporation (plaintiff) lodged a complaint to the regulatory in respect of the defects.
 - Regulator was in the course of investigating the defects, but no building works rectification order had yet been issued.

Case Note Continued

Outcome: the Court rejected the application and refused to grant a stay

- The Court was somewhat critical of the regulatory process
- At [14], *“It seems to me that the outcome of the process under the Act is attended with great uncertainty. Moreover, even if orders were ultimately made and complied with, there is no facility under that process for any damages to be awarded by way of compensation to the plaintiff. **Not only is the overall outcome of the process quite uncertain, the time for completion of the process is itself most uncertain...**”*

Building Products Safety Act – Chain of Responsibility

1. All persons in the supply chain of building products have a duty to ensure that the building products they design, manufacture, sell or install are suitable for their intended use.
2. It creates a layered, legally enforceable regime of responsibility of compliance.



Who is part of the chain of responsibility?

Section 8B of the act sets out those people who are part of the “**chain of responsibility**”:

- A person who designs a product;
- A person who deals with the product (e.g., a supplier or manufacturer);
- A person who prepares a building design that incorporates or recommends the use of the product in a building (e.g., designers, engineers and architects);
- A person who uses the product in a building (e.g., builders, trades, and contractors);
- A person specified in the regulations as a person in the chain of responsibility.



To what standard must the duty be discharged?

Section 8D(1) provides that the duties must be discharged:

1. As far as is “reasonably practicable”; and
2. Taking into account the “risk management factors” in relation to the matter.

Section 8D(2) sets out the “risk management factors”:

1. the likelihood of the existence of a safety risk;
2. the harm that could result from the risk;
3. what the person knows, or ought reasonably to know, about the risk, and ways of removing or minimising the risk;
4. the availability of ways to remove or minimise the risk; and
5. the cost associated with available ways of removing or minimising the risk



What duties are contained in the amendments?

There are a range of duties imposed, the key ones of which include:

1. To ensure that a “non-compliance risk” does not exist in relation to a product (s 8E);
2. To provide information in relation to building products (s 8F) which can be broken down into a range of sub-duties:
3. To notify of non-compliances or safety risks (s 8H); and
4. Various duties in relation to a product recall (s 8I).

Duty 1 - To ensure that a non-compliance risk does not exist

Section 8E(1) provides that

“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.”

A “non-compliance risk” will exist if the building product:

1. The product is or may be a non-conforming building product – including if the product does not comply with the National Construction Code (**NCC**); or
2. An intended use of the product in a building is or may be a non-compliant use – including if the “use” of the building product does not comply with the NCC.

Duty 2 – To provide information in relation to building products

Section 8F broadly provides that parties in the chain of responsibility are required to provide the “**required information**” to the next person in the chain of responsibility in respect of a building product.

“**Required Information**” for each intended use of the building product means:

1. The suitability of the product for the intended use;
2. Whether the product is only suitable for the intended use in some circumstances;
3. Instructions for ensuring the intended use is not a non-compliant use;
4. Information about the maintenance required to ensure it operates correctly; and
5. If the product includes a system or building component containing multiple elements, the required information must be provided for that system as a whole⁴

Supreme Court Practice Note SC Gen 23 – use of AI

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10 December 2024

Supreme Court Practice Note SC Gen 23

Use of Generative Artificial Intelligence (Gen AI)

- Commences 3 February 2025
- Generative AI must not be used to prepare the content of an expert report without obtaining leave of the Court (p 20)
- Application for leave must identify:
 - the proposed use of Gen Ai;
 - the program proposed to be used;
 - the benefit derived from its use; and
 - any documents proposed to be submitted to the program
- If leave is obtained, the expert report must identify what part of the report was prepared using Gen Ai, and how it was used (in an annexure to the report)
- Link: [PN_Generative_AI_21112024.pdf](#)

Supreme Court Practice Note SC Gen 23

Use of Generative Artificial Intelligence (Gen AI)

- Expert reports prepared between the date of issue of the Practice Note and the date of its commencement must identify which, if any, part or parts of the report has or have relied upon Gen AI in the preparation of its content.
- If leave is obtained, the expert report must identify what part of the report was prepared using Gen Ai, and how it was used (in an annexure to the report)
- Generative AI is a form of artificial intelligence that is capable of creating new content, including text, images or sounds, based on patterns and data acquired from a body of training material.

Questions?