



Determination 2020/017

Regarding the issue of a notice to fix in respect of the use of a trailer and timber wall at 205 Papamoa Beach Road, Papamoa



Figure 1: Photograph showing placement of trailer near timber wall

Summary

This determination considers whether the authority was correct to issue a notice to fix in circumstances where the placement of a trailer near a timber wall might enable a young child to gain access to the neighbour's pool. The matter turns on the interpretation of section 116B(1)(a) of the Building Act, which provides that it is an offence to use a building for a use for which that building is not safe.

1. The matter to be determined

1.1 This is a determination under Part 3 Subpart 1 of the Building Act 2004 (“the Act”) made under due authorisation by me, Katie Gordon, Manager Determinations, Ministry of Business, Innovation and Employment (“the Ministry”), for and on behalf of the Chief Executive of the Ministry.¹

1.2 The parties to the determination are:

- the owners of the property, D and D Holland (“the owners”)
- Tauranga City Council (“the authority”), carrying out its duties as a territorial authority or building consent authority, which applied for the determination.

¹ The Building Act and Building Code are available at www.legislation.govt.nz. The Building Code is contained in Schedule 1 of the Building Regulations 1992. Information about the Building Act and Building Code is available at www.building.govt.nz, as well as past determinations, compliance documents and guidance issued by the Ministry.

- 1.3 This determination arises from the authority's decision to issue a notice to fix in relation to the owners' placement of a trailer near a timber wall just inside the boundary between the owners' and the neighbours' properties. The timber wall is adjacent to an aluminium fence which forms part of a barrier to the residential pool on the neighbouring property ("the pool barrier"). The authority considers that the placement of the trailer in close proximity to the timber wall may allow a young child to climb the pool barrier, and for this reason the owners are contravening section 116B(1)(a) of the Act. That section provides that it is an offence to "use a building, or knowingly permit another person to use a building, for a use for which the building is not safe ...".
- 1.4 The matter to be determined is the authority's exercise of its powers of decision in issuing the notice to fix.²
- 1.5 There is a separate application for a determination that considers the compliance of the neighbour's pool barrier, and I note some of the information provided for this determination also relates to that determination.
- 1.6 The authority is of the view that the owners of the adjacent property ("the neighbours") are a party to this determination as they meet the definition of an owner in respect of the pool barrier, although the neighbours do not seek to be a party. In relation to the matter to be determined, the neighbours are neither the owner of the property in respect of which the notice was issued, nor a person to whom the notice was issued, and therefore the neighbours do not meet the definition of a party for the purpose of this determination. However, as this case involves a concern about access to the neighbours' immediate pool area³ from the owners' property, I provided the neighbours with a copy of the draft of this determination and the opportunity to comment.
- 1.7 In making my decision, I have considered the submissions of the parties and the neighbours, and the other evidence in this matter.
- 1.8 All legislative references are to the Act unless otherwise stated. The relevant sections of the Act are set out in Appendix A.

2. Background

- 2.1 In 2015, when doing some building work, the owners discovered that a fibre-cement fence between the two properties ("the original fence"), which at the time also served as a barrier to the neighbour's pool, had not been constructed on the boundary and encroached onto the owners' property.
- 2.2 At some point between 2015 and 2017 the owners lined that original fence with vertical timber boards, capped by a flat top. For the rest of this determination I will refer to this fence as the "timber wall". The timber wall is 1200mm high. The owners also constructed a driveway that runs alongside the timber wall. It is on this driveway, in the southwest corner of the owners' property, that the owners park a car and trailer.
- 2.3 In mid-2017 the owners contacted the authority in relation to their concerns about the safety of the timber wall with regard to restricting access to the neighbour's pool. The owners subsequently made a formal complaint to the authority about the

² Under section 177(1)(b) and (3)(e) of the Act.

³ 'Immediate pool area' is defined in section 7 to mean "the land in or on which the pool is situated and so much of the surrounding area as is used for activities carried out in relation to or involving the pool".

compliance of the timber wall as a barrier to the neighbour's pool. An officer of the authority who inspected the pool and timber wall on 7 October 2017 noted that the owners' trailer could be used by a child to climb the timber wall.

- 2.4 Sometime between December 2017 and February 2018 the neighbours built the pool barrier on their side⁴ and adjacent to the timber wall. The pool barrier consists of solid panels 1200mm high topped with an aluminium vertical bar fence, with a total height of 2100mm from the ground level on the neighbour's property. The pool barrier was constructed without building consent after the neighbours sought and were granted an exemption under Schedule 1(2) of the Act; the decision to grant that exemption and the compliance of the pool barrier are matters considered in a separate determination.
- 2.5 In mid-2018 the owners applied for resource consent to construct a carport at the end of the driveway, within 100mm of the boundary with the neighbours. The neighbours objected on the ground that a structure built along the boundary line may assist young children to obtain access to the pool, however the authority granted the resource consent⁵.
- 2.6 The authority visited the owners' property in mid-2018 in relation to the placement of the trailer near the timber wall. In 2018 the owners proposed a solution that involved removing a section of the timber wall in the southwest corner, however the issues relating to the placement of the trailer near the timber wall remained unresolved.

2.7 The notice to fix

- 2.7.1 On 13 September 2019, the authority issued the notice to fix to the owners. The notice does not have a reference or other number to identify it. The operative parts of the notice are set out in full below:

PARTICULARS OF CONTRAVENTION OR NON-COMPLIANCE

The following use of a building has been undertaken at 205 Papamoa Beach Road (the Property) in breach of section 116B(1)(a) of the Building Act 2004:

Section 116B of the Building Act 2004

Pursuant to section 116B(1)(a) no person may use a building, or knowingly permit another person to use a building, for a use for which the building is not safe or not sanitary.

The property owner Mr [D] Holland, on a semi-permanent basis places or leaves his wheeled trailer (**the Trailer**) within a 1200mm arc from the top of a 1200mm high wall on the Property's Southern boundary (the Wall). The Wall is located immediately adjacent to the boundary with 203 Papamoa Beach Road (**your Neighbour's Property**). Immediately adjacent to the Wall, and on your Neighbour's Property, an open bar aluminium swimming pool barrier is located to restrict access to the swimming pool located on your Neighbour's Property. Should a small child under 5 years of age climb/clamber on to the Trailer, which is approximately 600mm high and which is located less than 1200mm from the Wall, that child could then access the top of the Wall. This may enable the child to scale the pool safety barrier to access the swimming pool at your Neighbours (sic) Property.

In consideration of the placement of the trailer in connection with the Wall, we are therefore satisfied that we have reasonable grounds to believe that you are

⁴ The owners have submitted that the footings of the pool barrier encroach on their property. I do not consider the matter of an encroachment, if there is one, is relevant to this determination.

⁵ I have no information regarding the size of the carport, but note that building work in connection with a carport that is at ground level and does not exceed 20m² in floor area is exempt from the requirement for building consent under section 41(1)(b) and clause 18 of Schedule 1 of the Act.

knowingly using a Building, for which is not safe [sic], in breach of section 116B(1)(a) of the Building Act 2004.

TO REMEDY THE CONTRAVENTION OR NON-COMPLIANCE YOU MUST EITHER:

- Ensure that the wheeled trailer (and all or any other such item(s) on your property) is kept or stored a minimum 1200mm away from the building (the Wall) adjacent to the Southern boundary with 203 Papamoa Beach Road, so as not to render that building unsafe.

THIS NOTICE MUST BE COMPLIED WITH BY:

In terms of the removal of the wheeled trailer/other such item, this notice must be complied with no later than 30 September 2019, and must be complied with on an ongoing basis.

2.8 On 18 September 2019 the Ministry received the authority's application for a determination.

3. Submissions

3.1 The authority

3.1.1 The authority provided a submission dated 18 September 2019 with its application for a determination. The authority also provided the following supporting documents (as noted above, some of the information in these documents relate to the other determination application):

- a summary of the background
- an internal memorandum of the authority dated 15 May 2018 regarding the pool barriers at the neighbouring property
- the authority's inspection notes dated 17 February 2018 relating to the as-built pool barrier
- the notice to fix
- the warrant of appointment of the authority's compliance officer who issued the notice to fix.

3.1.2 The authority states in its submission:

The Opinion received by [the authority] ... concluded that by placing the trailer next to the fence, in these circumstances it appears that the [owners are] knowingly permitting the use of the fence as a means for a young child to obtain access to the [neighbours' pool]. If so, the owner is therefore permitting that structure to be used for a use which is not safe in contravention of [section] 116B(1)(a) of the Act.

3.1.3 The authority considers it had reasonable grounds to conclude that there had been a breach of section 116B(1)(a), and the notice to fix was issued to the owners to cease breaching this section.

3.1.4 The authority states that it is "aware that a Notice to Fix for this purpose is unusual, particularly given it regards access to a neighbour's property, and therefore [the authority] considers it necessary to test the application of section 116B of the Act" through the determination process.

3.1.5 A further submission was received from the authority on 1 November 2019, together with the authority's internal memoranda and correspondence between the parties and the neighbours from September 2015 to October 2019. The authority also provided two videos that it received from the owners (as referred to below at paragraph 3.2.2),

and subsequently provided the opinion referred to above at paragraph 3.1.2, which had been commissioned by the authority and is dated 18 July 2019.

3.1.6 The authority accepts that the trailer is not a building for the purposes of the Act, but states that in the circumstances of the case the use of the trailer is relevant to determining a contravention of section 116B. The authority submits that:

- “the conscious placement of the trailer in connection with the [timber] wall, and providing a means for a young child to access a residential pool, is not a safe use, for the purposes of section 116B(1)(a)”
- the inclusion of the words “knowingly permitting” in section 116B import a *mens rea*⁶ element to the offence; the authority points to various communications from the owners that it says establish that the owners are fully aware of the potential risk to young children posed by their placement of the trailer, and that therefore the owners are knowingly permitting the use of the timber wall for which it is not safe
- as the authority had reasonable grounds to consider there had been a contravention of section 116B, it was required to issue the notice to fix
- section 116B “is appropriately used in the circumstances given the issues presented by pool fences located on or near the common boundary where a neighbour knowingly causes the [pool barrier] to become non-compliant”.

3.2 The owners

3.2.1 The owners provided submissions to the Ministry on 19 September 2019 and 2 October 2019, together with the following:

- email correspondence with the authority, in which the owners state that the notice to fix should have been served on the neighbours, and that the authority “has no authority in law to issue the notice and that it is accordingly of no legal effect”
- an undated photograph of the trailer and the timber wall and pool barrier.

3.2.2 In support of the owners’ view that the pool barrier is not compliant (which is a matter considered in a separate determination), the owner provided the following:

- a cross section sketch of the timber wall and pool barrier
- a sketch showing the location of the pool, timber wall and pool barrier in plan
- a video of a child walking along the timber wall and crossing to the neighbours’ property at the junction of the property boundary at the southwest corner (I note that this video does not show how the child accessed the timber wall, however the authority provided a second video that it received from the owners showing a child climbing onto the timber wall via the trailer)
- a 1999 permit plan for the neighbours’ pool and the original fence between the two properties
- the notice to fix.

⁶ *Mens rea* is a legal term that refers to the knowledge or intention element of an offence.

3.2.3 The owners submit (in summary):

- The wording of the notice to fix is confusing and it is not clear what the building is that the notice refers to – the trailer or the timber wall. Neither are buildings per se. The building referred to in the notice should be the neighbours' pool barrier.
- It is also not clear what the authority means by “and all or any other such item(s) on your property kept or stored a minimum 1200mm away from the building (the Wall)”. The area where the trailer is kept is the only suitable area on the property to store materials (e.g. wheelbarrows, portable scaffolding etc). Resource consent was obtained for the carport, which can hold any vehicle (including a car or trailer etc). A small child could easily climb onto the timber wall via such a vehicle.
- With reference to the definition of ‘building’ in section 8, the trailer (and all other equipment, vehicles etc) are clearly not buildings as they are not fixed to the ground, they are movable and not permanent, and not used for habitation. Nor is the trailer a ‘structure’ as defined in the authority’s city plan, as it is not fixed to the land.
- The notice to fix should be directed to the neighbours. It is the neighbours (as owners of the pool) who have failed to comply with the requirements relating to pool barriers.

3.2.4 The owners provided a further submission, via their agent, on 22 November 2019, together with a timeline of events. The submission reiterates a number of the owners’ earlier points, and also states (in summary):

- the consideration of a breach of section 116B is for a court to determine, not the Ministry⁷
- the timber wall is “safe as a structure per se”, and common sense and usage suggest it cannot be used as a building
- many fences and retaining walls would be dangerous if climbed on
- the notice to fix specifies a remedy which is unrelated to the timber wall; the authority accepts that the trailer is not a building so the remedy that refers to the trailer cannot apply
- the proposed staging of a child climbing onto the timber wall while under full adult supervision is not a “use”; use as a concept is something that happens or occurs regularly or all the time, whereas the staging is a one-off example of what might occur if unsupervised young children wander from any of the houses on the right-of-way that the property is on.

3.3 The neighbours

3.3.1 The neighbours provided an email on 9 October 2019, in which they advised they did not seek to be a party to this determination, and made the following points:

- The timber wall only ceased to be compliant as a pool barrier when the trailer was parked there semi-permanently; the neighbours had to construct the new pool barrier because of this and also the owners’ refusal to extend the height of the timber wall.

⁷ As set out in paragraph 1.4 of this determination, the matter for determination as provided for under section 177 of the Act is the authority’s exercise of its power of decision to issue a notice to fix for what the authority considered to be a contravention or failure to comply with section 116B of the Act.

- The neighbours had requested the owners move the trailer temporarily while the neighbours constructed the new pool barrier, but the owners declined.

3.4 The draft determination

- 3.4.1 On 11 March 2020 a draft of this determination was issued to the parties for comment. The neighbours were also provided with a copy of the draft determination to comment on if they wished.
- 3.4.2 On 24 March 2020 the owners advised, via their agent, that the draft determination was accepted subject to amendments the owners considered were non-contentious.
- 3.4.3 On 27 March 2020 the authority accepted the draft determination without further comment.

4. Discussion

4.1 General – notices to fix and the offence in section 116B

- 4.1.1 Under section 164(1)(a) an authority has the power to issue a notice to fix where the authority considers, on reasonable grounds, that a ‘specified person’ is contravening or failing to comply with the Act. ‘Specified person’ is defined in section 163 and includes “the owner of a building”.⁸
- 4.1.2 A notice to fix is an enforcement notice that:
- requires a specified person to remedy the contravention of, or to comply with the Act (section 164(2)(a))
 - specifies a reasonable timeframe for compliance (section 165(1)(b))
 - may be enforced by a prosecution for failing to comply with the notice (section 168).
- 4.1.3 In this case, the particular contravention of the Act alleged by the authority is of section 116B(1)(a). That section provides:
- (1) No person may–
- (a) use a building, or knowingly permit another person to use a building, for a use for which the building is not safe or not sanitary; or
 - (b) use a building, or knowingly permit another person to use a building, that has inadequate means of escape from fire.

4.2 Using a building for a use for which the building is not safe

- 4.2.1 In deciding whether the authority was correct to issue the notice to fix, I must first consider whether the owners have contravened section 116B(1)(a). That is, whether the owners have used a building, or knowingly permitted another person to use a building, for a use for which the building was not safe.
- 4.2.2 The following questions arise in considering the requirements of section 116B(1)(a):
- What is the building?
 - Have the owners used the building or knowingly permitted another person to use the building?
 - Has the building been used for a use for which it is not safe?

⁸ The definition of ‘specified person’ in section 163 also includes other persons if the notice to fix relates to building work or a residential pool.

4.2.3 I will consider each of these questions in turn; however given the interrelationship between the second and third questions I will consider them together.

What is the building?

4.2.4 The ‘particulars of contravention or non-compliance’ section of the notice to fix does not clearly specify the building. It refers to “the placement of the trailer in connection with the [timber] Wall”. However the remedy stated in the notice to fix refers to keeping the trailer “away from the building (the Wall) so as not to render that building unsafe.”

4.2.5 Section 8 sets out what a ‘building’ means, and section 9 set outs what is excluded from that definition. The timber wall, which is on the owners’ property, is clearly a ‘building’ within the general definition of that term in section 8(1)(a) as it is “a temporary or permanent movable or immovable structure”.

4.2.6 The trailer, however, is not a building, and in this I agree with the owners. For a vehicle to be a building, it must be immovable and occupied on a permanent or long term basis.⁹ Because the trailer is not a building, the authority has no power under the Act to regulate the use or placement of the trailer.

4.2.7 Accordingly, for the purpose of considering whether the owners have breached section 116(1)(a), the building is the timber wall.

Have the owners used the timber wall or knowingly permitted another person to use the timber wall for a use for which it is not safe?

4.2.8 In its submissions, the authority contends that the placement of the trailer in connection with the timber wall, which provides a means for a young child to access the neighbour’s immediate pool area, is not a safe use of the building. The authority also contends that the owners are fully aware of the potential risk to young children posed by the placement of the trailer, and that therefore the owners are knowingly permitting the use of the timber wall for a use for which the timber wall is not safe.

4.2.9 I acknowledge the authority’s concerns that the trailer (and other various items on the owners’ property) could potentially assist a young child in climbing the timber wall and from there gain access to the neighbours’ immediate pool area. However whether a young child is able to access the neighbour’s immediate pool area in such a manner is a matter of compliance of the pool barrier rather than a question of the use of the timber wall. The question of the compliance of the pool barrier is being addressed in a separate determination.

4.2.10 It is my view that neither the placement of the trailer near the timber wall, nor the ability of a child to access the timber wall (regardless of how it is accessed) in the circumstances in this case, is the type of use of a building that section 116B is intended to apply to.

4.2.11 The Act and Building Code regulate building work and set performance standards for buildings to ensure that people who use buildings can do so safely and without endangering their health¹⁰. The Building Code seeks to attain these objectives through the performance requirements for various aspects of a building, such as building elements and materials, spaces and amenities, and building systems.

4.2.12 The words “use a building ... for a use for which the building is not safe” must be interpreted in light of this context and the purposes of the Act. I consider that section

⁹ Section 8(1)(b)(iii).

¹⁰ See the purpose of the Act in section 3(a)(i).

116B requires the unsafe situation to arise from the use of the building, i.e. the features of the building itself (such as its spaces and systems) that are not safe for that use, not the features of the surrounding landscape or other nearby objects that are not buildings.

- 4.2.13 The court cases considering section 116B(1)(a) (and its predecessor, section 80(1)(b) of the Building Act 1991) support this interpretation. For example, *Waitakare City Council v Graham*¹¹ involved a prosecution under section 116B in relation to farm stock sheds that had been converted to rental accommodation and let out when the accommodation was not safe or sanitary for that use. Similarly, *Queenstown Lakes District Council v The Wanaka Gym Limited & Graham*¹² was a prosecution where a gymnasium was used for group sleeping accommodation, a use for which the building was not safe.
- 4.2.14 In my opinion there is a distinction between the unsafe use of a building within the meaning of section 116B(1)(a), and using a building in an unsafe manner – irresponsible behaviour of an individual does not make the use of the building itself unsafe. For example, while placing a climbable object against or next to a building may be an unsafe thing to do, it does not follow that the use of the building itself is unsafe in terms of section 116B.
- 4.2.15 In taking this approach I have considered a recent District Court decision¹³ in which Judge Rowe considered human factors and the role of human agency in the Building Code:
- [57] The scheme of the Building Act, Building Code and Clause C4.2 itself, are concerned with how a building is designed and constructed to achieve its functional requirements.
- [58] It is therefore incorrect to measure the functional and performance requirements of a building against the likelihood of human error. The [Building] code is not concerned with whether persons using a building will act or respond in a particular way, but **whether the building facilitates the functional requirement**; ... [my emphasis]
- 4.2.16 The Act and Building Code do not manage the actions of building users. The Building Code prescribes functional requirements for buildings and the performance criteria with which buildings must comply. Clause F9 Means of restricting access to residential pools¹⁴ is concerned with how pool barriers are designed and constructed to achieve the functional requirement of restricting access by unsupervised children under five years of age. The performance criteria in Clause F9 apply to the neighbours' pool barrier, not to the owners' timber wall, and are the responsibility of the neighbours as the owners of the pool.
- 4.2.17 In this case, a child who has climbed onto the timber wall is at risk of falling and suffering injury, or being able to access the neighbour's immediate pool area or indeed other properties. However, I consider that neither the act of climbing up and/or walking along the wall, nor the placement of a trailer or other object next to the wall providing access to it, is using a building for a use that is not safe within the meaning of section 116B(1)(a).
- 4.2.18 The intended use of the timber wall when constructed was as a boundary fence, delineating the owners' and neighbours' properties. While it formed part of the pool

¹¹ DC Auckland CRI-2007-004-5596, 3 July 2007.

¹² DC Queenstown CRN-08059500156, 17 December 2010.

¹³ *Palmerston North City Council v Brian Green Properties (1971) Ltd* [2020] NZDC 1828.

¹⁴ Unless otherwise stated, references to clauses in this determination are to clauses of the Building Code

barrier at the time of construction, it is no longer a part of the pool barrier. As a fence that is not a pool barrier it is an ancillary structure and its compliance obligations are limited to its structural performance and durability. It provides no amenity and is not a space for occupation or human habitation.

- 4.2.19 As outlined in the discussion above, risks to people using buildings lawfully are managed through the Building Code in accordance with the intended use of the particular building. It is difficult to see how the timber wall could be used for a use that is not safe when it is fulfilling its function as a fence.

Access to the neighbour's immediate pool area

- 4.2.20 In reaching this view I have also taken into account how the construction of pool barriers on property boundaries is addressed in Acceptable Solution F9/AS1¹⁵, in particular the comment to paragraph 2.2.1:

Should a child gain access to the top of the barrier from the outside, this construction method will prevent them from climbing down into the pool area.

- 4.2.21 The purpose of the criteria in paragraph 2.2.1 of the Acceptable Solution is to deal with the fact that owners of residential pools cannot control what occurs on neighbouring property that may assist a young child to reach the top of a pool barrier on a property boundary. For this reason the Acceptable Solution sets criteria that will inhibit a young child's ability to climb down the barrier on the pool side, thus restricting access of the child to the immediate pool area regardless of whether they can access the top of the barrier from the neighbouring property.
- 4.2.22 My view that the issue of whether a child is able to access the immediate pool area in the manner specified by the authority is a matter of compliance of the pool barrier is supported by the definition of 'specified person' in section 163. If the authority had grounds to issue a notice to fix in relation to the pool barrier, it would only be able to issue such a notice to the neighbours, being the owners of the pool. There would be no ability for the authority to issue a notice to fix to the owners of 205 Papamoa Beach Road in relation to non-compliance of the pool barrier.¹⁶

4.3 Conclusion

- 4.3.1 I do not consider that the owners in this case have used a building, or knowingly permitted another person to use a building, for a use for which the building was not safe, in contravention of section 116B(1)(a).
- 4.3.2 As the owners did not contravene the Act, the authority was incorrect to issue a notice to fix.

¹⁵ Acceptable Solutions are produced by the Ministry and, if followed, must be accepted by a building consent authority as establishing compliance with the Building Code. Acceptable Solution F9/AS1 is entitled 'Residential Pool Barriers'.

¹⁶ Paragraph (c) of the definition of 'specified person' in section 163 provides that if a notice to fix relates to a residential pool, a specified person can be a person referred to in section 162C(4). That section sets out the persons who must ensure compliance with the requirement in section 162C(1) for pools to have physical barriers restricting access by children under five years; the persons include the owner of the pool and the owner of the land on which the pool is situated.

5. The decision

- 5.1 In accordance with section 188 of the Building Act 2004, I hereby determine that the authority was incorrect to issue the notice to fix and I reverse the authority's decision.

Signed for and on behalf of the Chief Executive of the Ministry of Business, Innovation and Employment on 29 July 2020.

Katie Gordon
Manager Determinations

Appendix A – relevant sections of the Act

8 Building: what it means and includes

- (1) In this Act, unless the context otherwise requires, building—
- (a) means a temporary or permanent movable or immovable structure (including a structure intended for occupation by people, animals, machinery, or chattels); and
 - (b) includes—
- ...
- (iii) a vehicle or motor vehicle (including a vehicle or motor vehicle as defined in [section 2\(1\)](#) of the Land Transport Act 1998) that is immovable and is occupied by people on a permanent or long-term basis;
- ...

116B Offence to use building for use for which it is not safe or not sanitary, or if it has inadequate means of escape from fire

- (1) No person may—
- (a) use a building, or knowingly permit another person to use a building, for a use for which the building is not safe or not sanitary; or
 - (b) use a building, or knowingly permit another person to use a building, that has inadequate means of escape from fire.
- (2) A person who fails to comply with subsection (1) commits an offence.
- (3) A person who commits an offence under this section is liable on conviction to a fine not exceeding \$100,000 and, in the case of a continuing offence, to a further fine not exceeding \$10,000 for every day or part of a day during which the offence has continued.

163 Definitions for this subpart

In this subpart, unless the context otherwise requires,—

...

specified person means—

- (a) the owner of a building;
- (b) if a notice to fix relates to building work being carried out,—
 - (i) the person carrying out the building work; or
 - (ii) if applicable, any other person supervising the building work;
- (c) if a notice to fix relates to a residential pool, a person referred to in section 162C(4).

164 Issue of notice to fix

- (1) This section applies if a responsible authority considers on reasonable grounds that—
- (a) a specified person is contravening or failing to comply with this Act or the regulations (for example, the requirement to obtain a building consent); or
 - (b) a building warrant of fitness or dam warrant of fitness is not correct; or
 - (c) the inspection, maintenance, or reporting procedures stated in a compliance schedule are not being, or have not been, properly complied with.
- (2) A responsible authority must issue to the specified person concerned a notice (a notice to fix) requiring the person—
- (a) to remedy the contravention of, or to comply with, this Act or the regulations; or
 - (b) to correct the warrant of fitness; or
 - (c) to properly comply with the inspection, maintenance, or reporting procedures stated in the compliance schedule.

- (3) However, if a responsible authority considers that it is more appropriate for another responsible authority to issue the notice to fix, it must—
 - (a) notify the other authority that it holds that view; and
 - (b) give the other authority the reasons for that view.
- (4) The other responsible authority referred to in subsection (3) must issue the notice to fix if it considers that this section applies.