

Act Amendments – Strata Schemes Management Amendment (Building Defects Scheme) Bill 2018

#	Clause #	Proposed change	Comment/rationale
1	198A	<p>The developer must provide prescribed documents to the building inspector</p> <p>The developer must provide the building inspector with:</p> <ul style="list-style-type: none"> • a document that identifies any building defects that the developer is aware of (including any information about defects considered at the first annual general meeting of the owners corporation), • any other documents prescribed by the Regulations. <p>If any of the above documents are in the possession or control of the Commissioner for Fair Trading (the Secretary), then the Secretary may provide the documents to the appointed building inspector.</p>	<p>While the Act requires developers to provide prescribed documents to the owners corporation before the first annual general meeting, there is currently no requirement for the developer to provide documents to the building inspector. Provision of these documents will assist the building inspector in conducting an effective inspection.</p> <p>See proposal #4 in the Regulation amendments table for further details on the additional documents proposed to be prescribed in the Regulation.</p>
2	207(1)	<p>The building bond must be lodged before the occupation certificate is applied for</p> <p>The building bond must be lodged with the Secretary <u>before</u> the developer applies for the issue of an occupation certificate, rather than at any time before an occupation certificate is issued (as is currently required).</p>	<p>This amendment ensures that the certifying authority will not inadvertently issue the occupation certificate before the building bond has been lodged.</p>
3	207(1A)	<p>Applications for an interim occupation certificate for certain building work will not require a building bond to be lodged</p> <p>This amendment clarifies that an application for an interim occupation certificate for certain parts of a building will not trigger the requirement to lodge a building bond. This applies to specific parts of a building</p>	<p>Certain parts of new building developments are often finished first to assist with the building process (e.g. driveways and parking areas to provide access and parking of builders' motor vehicles and</p>

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		only (e.g. driveways and parking areas under the Building Code of Australia), as prescribed by the Regulations.	equipment. This amendment will allow applications for an interim occupation certificate to be made in order to use such areas, without triggering the need for the developer to lodge the building bond.
4	207(5)	<p>Increase in the maximum penalty for failing to lodge the bond Currently, the maximum penalty for a developer failing to lodge the bond with the Secretary is 200 penalty units (\$22,000). This amendment increases the maximum penalty to 10,000 penalty units (\$1.1 million), with a further 200 penalty units (\$22,000) for each day the offence continues.</p>	<p>Up until the issue of an occupation certificate, prospective purchasers have only paid the deposit. The issue of the occupation certificate to the developer allows the completion of ‘off the plan’ sales, requiring purchasers to pay the remaining purchase price of their lot and allowing them to move into their lots. It is therefore imperative that Fair Trading obtain the building bond before the occupation certificate is issued and the developer moves on to other projects.</p> <p>The substantial increase in the penalty reflects the serious nature of failing to lodge the bond and will encourage compliance with the scheme.</p>
5	207A	<p>Developers must not provide false or misleading information This amendment inserts an offence provision for developers providing false or misleading information to the Secretary in relation to the contract price or the building bond. The maximum penalty for the offence will be 1,000 penalty units (\$110,000) for corporations, and up to 200 penalty units (\$22,000) in any other case.</p>	<p>This provision supports the Secretary’s requirement to be able to more correctly identify the contract price, and consequently the amount of the building bond to be lodged by the developer. The provision supports the need for the building bond amount to be maximised for the benefit of</p>

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			the owners corporation. The offence provision will apply to the whole of Part 11.
6	208 (a) and 208 (b)	<p>Bond must only be issued by authorised/approved providers Currently, a building bond may be either a bank guarantee or bond, but the Act does not specify who can issue these securities. This amendment clarifies that a bank guarantee must be issued by an authorised deposit-taking institution and a bond must be issued by an ‘approved insurer’ as defined in Section 4 of the Act:</p> <p>approved insurer means: (a) a general insurer within the meaning of the <i>Insurance Act 1973</i> of the Commonwealth, or (b) any other person prescribed by the regulations.</p>	Authorised deposit-taking institutions and general insurers under the <i>Insurance Act 1973</i> (Cth) are regulated by the Australian Prudential Regulation Authority (APRA). Requiring a building bond to be issued by an APRA approved provider gives greater certainty and helps to ensure Fair Trading can verify all building bonds as well as use its debt recovery power to recover unpaid or underpaid bonds.
7	209(1) (c) and (d), 209(2A)	<p>Additional circumstances when the bond may be payable Two additional circumstances have been added to the existing requirements in Section 209(1) as to when the whole (or part) of the bond may be claimed or realised by the Secretary for payment:</p> <ol style="list-style-type: none"> 1. to a building inspector for the costs of an inspection or report; or 2. to a person who has prepared a report to the Secretary per 209A, to meet the developer’s share of the costs of the person for the report. 	In normal circumstances, the costs of a building inspection and any reports are paid by the developer. However, where the costs have not been paid and the developer has died, ceased to exist, is bankrupt or insolvent or cannot be found, the costs of the building inspector and any reports must still be met. It is not appropriate that these costs be met directly by the owners corporation – accordingly, they must be paid for out of the building bond.

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		but only where these costs have not been paid and the developer has died or ceases to exist, or is bankrupt, insolvent or cannot be found.	
8	209(1A)	<p>The owners corporation and the developer to agree the amount to be released from the bond to meet the costs of rectification</p> <p>A building bond may be paid to the owners corporation to meet the costs of rectifying defective building work identified in the final report but there is currently no provision determining how this amount is calculated. This amendment provides that the amount to be paid to the owners corporation from the bond must be agreed between the owners corporation and the developer. In cases where no agreement can be reached, the Secretary can determine the amount to be paid from the bond (see clause 209A below).</p>	<p>Part 11 does not currently provide a mechanism to determine the amount of the building bond (if any) to be paid to the owners corporation to rectify any identified defects. It is appropriate that the two parties jointly determine this amount, sharing any costs required for this process. The owners corporation, together with the developer can use any means at their disposal, provided they both agree, to determine the amount to be paid from the bond by the Secretary. These amendments will provide certainty and ensure its finality to all the parties.</p> <p>It will still be open to the developer, if they wish to do so, to allow the Secretary to pay the entire amount of the building bond to the owners corporation without using this process.</p>
9	209A	<p>Where the parties are unable to agree the amount to be paid from the building bond, the Secretary will determine this amount</p> <p>To enable the Secretary to determine the amount to be released for the purposes of clause 209(1A), the Secretary may require the owners corporation, the developer (or both) to provide any information or reports that the Secretary may require, or, arrange for the appointment of an appropriately qualified person (such as a quantity</p>	<p>This amendment provides some finality to the payment process. When the parties are unable to jointly decide, the Secretary can use a number of means to determine the amount (if any) to be paid from the building bond to the owners corporation.</p>

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		<p>surveyor or similar) to provide a report on the work required or costs involved in rectification. The Secretary may also give any person engaged to provide such a report any relevant documents relating to the building work.</p> <p>The cost of obtaining any report arranged by the Secretary is to be borne by the owners corporation and developer in equal shares. A regulation making power has been included in this clause to enable circumstances to be prescribed where it is not appropriate for these costs to be shared equally. However, no such circumstances are proposed as part of these amendments.</p> <p>To provide some certainty and finality to this process, the Secretary's decision will not be appealable except by Judicial review (see proposed changes to clauses 56(1)(d) and 56(2) of the Regulation).</p>	
10	211 (3A)	<p>A developer may only apply to the Tribunal for a determination of the contract price in the circumstances prescribed by the Regulation</p> <p>This amendment limits the circumstances under which a developer may apply to the Tribunal to determine the contract price to those circumstances (if any) prescribed by the Regulation only.</p>	<p>Section 211 of the Act presently provides that the Secretary, the owners corporation and the developer can apply to the Tribunal for a determination of the contract price on which the 2 per cent bond is based. While it is appropriate for the Secretary and the owners corporation to have this right, given that the developer was involved in the construction of the property and is in possession of all relevant information, it is best-placed to determine the contract price and should not be afforded the opportunity to apply to the Tribunal for a determination.</p>

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			However, there may be circumstances (such as intervention by a third party, such as a quantity surveyor), when this right should be available. This will be further explored during consultation on the draft amendment Regulation.
11	211A	<p>The Secretary will have a debt recovery process to recover unpaid or underpaid building bonds from the developer</p> <p>This amendment creates a debt recovery process for the Secretary where a building bond has not been provided by a developer, or the amount provided is less than the amount required under Part 11.</p> <p>Amounts recovered under this section may be claimed (in whole or in part) by the owners corporation, and sections 209 and 210 (except for s210(3)) applies (with any necessary modifications) to any claim or amount paid.</p>	The debt recovery power for the Secretary is a necessary addition, given that following the Secretary's investigations (under the new provisions), it may be determined that a developer has failed to provide a building bond, or has provided an incorrect building bond amount. The Secretary requires a means to be able to recover the correctly determined amount of the building bond from the developer.
12	Division 3A 211B – 211L	<p>Investigation and enforcement powers</p> <p>The Bill establishes standard investigation and enforcement powers for authorised officers to ensure NSW Fair Trading is able to monitor compliance with the requirements under Part 11 of the Act and Part 8 of the Regulation. These powers may be exercised by authorised officers to obtain evidence, information or records relating to matters that constitute (or may constitute) a contravention of Part 11 of the Act or Part 8 of the Regulation. The powers include:</p> <ul style="list-style-type: none"> • a power of entry to a developer's business premises; 	<p>Fair Trading must be able to verify the contract price and the amount of the building bond that has been lodged by the developer. Part 11 does not currently provide investigative powers for authorised officers to be able to do this effectively and efficiently. These amendments seek to address this issue.</p> <p>The investigation and enforcement powers are standard enforcement provisions included in much of the legislation</p>

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		<ul style="list-style-type: none"> • the right to examine, inspect, record, seize and make copies of records and require records to be produced for inspection; • a search warrant power, (made under application) to enter premises and to search for evidence relating to a contravention of Part 8 or Part 11 of the Act. Where a search warrant is issued, Division 4 of Part 5 of the <i>Law Enforcement (Powers and Responsibilities) Act 2002</i> applies; • the power to require a person to furnish information and/or records that the Secretary requires by notice; and • the power for authorised officers to ask questions and demand answers to questions from a developer and other persons by notice. <p>Clause 211K creates an offence provision for persons who, without reasonable excuse, refuse or fail to comply with a requirement made under the investigation and enforcement powers, or who delay or obstruct an authorised officer in their duties. The maximum penalty for a breach is 40 penalty units (\$4,400) for a corporation and 20 penalty units (\$2,200) in any other case. However, a warning must be given that a failure to comply with a direction to provide records, information or answer questions is an offence for that person to be guilty of an offence under this Division.</p>	<p>administered by Fair Trading (for example, similar provisions are contained in the <i>Home Building Act 1989</i>, which regulates builders, and the <i>Property, Stock and Business Agents Act 2002</i>, which regulates property agents). Fair Trading has well-established practices and procedures in the use of such investigation and enforcement powers.</p> <p>It is important to note that the investigation and enforcement powers will only be able to be used in relation to Part 11 of the Act (as per section 211B), to assist with determining compliance with Part 11 or the Regulations, or for obtaining evidence, information or records in relation to a matter that constitutes or may constitute a contravention of Part 11 or the Regulations made under the Part. They cannot therefore be used in relation to other parts of the Act.</p>
13	213A, 213B	<p>‘Good faith’ liability protection for inspectors, persons acting under their direction and professional associations</p> <p>There are currently no protections afforded to building inspectors, persons acting under their direction and/or professional associations</p>	<p>While inspectors and those engaged by them to assist the inspection process would have their own professional indemnity insurance, it is appropriate that they, and the professional associations that appoint</p>

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		<p>in respect of claims that may arise relating to inspections conducted under Part 11 of the Act.</p> <p>This amendment provides that an appointed inspector (or any person following their direction) cannot be subject to any action, liability, claim or demand for anything done (or omitted to be done) 'in good faith' in the conduct of an inspection conducted under Part 11 of the Act.</p> <p>Furthermore, no liability can be incurred by a professional association (or person acting under their direction) in respect of anything arising from that professional association identifying a person as being qualified for the purposes of appointment as an inspector, but only in respect of anything done (or omitted to be done) 'in good faith' by the professional association or person.</p>	<p>them to inspection panels be afforded adequate protection under the Act. Note that the 'good faith' protection is a similar protection to that given to officers of an owners corporation and members of strata committees under the Act (s.260). and that proposed to be given to the Secretary and any person acting under the Secretary's direction (see in relation to s257A below).</p>
14	214	<p>Additional regulation making powers for Part 11 Section 214 is amended to include two additional regulation powers:</p> <ul style="list-style-type: none"> • regulations may be made about the identification by professional associations, or other bodies, of qualified persons who can be appointed as building inspectors • the regulations may create an offence punishable by no more than 200 penalty units (currently \$22,000). 	<p>These amendments will allow the Secretary to address the qualifications and experience of building inspectors and allow professional associations impose conditions on members of strata inspector panels. See proposals #5, #6 and #7 in the Regulation amendments table for matters proposed to be prescribed under this new provision.</p>
15	257A	<p>A 'good faith' liability protection for the Secretary or a person acting under the Secretary's direction This amendment excludes the Secretary (or any person acting under the direction of the Secretary) from liability for any matter or thing done (or omitted to be done) by the Secretary (or any person acting</p>	<p>It is usual in legislation that the Secretary be afforded some protection. This was not previously included as the role of the Secretary under the Act, was limited. However, as Part 11 of the Act, and the</p>

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		<p>under their direction) if the matter or thing was done (or omitted to be done) in good faith for the purposes of executing functions under the Act. Instead, any such liability attaches to the Crown.</p>	<p>proposed amendments place a range of responsibilities on the Secretary and any person acting under the Secretary's direction, it is appropriate that this protection now be included. The exclusion of liability applies to the whole Act, rather than just Part 11.</p>
16	<p>Sections:</p> <ul style="list-style-type: none"> - 207(3) - 209(3) - 209(4) - 210(3) - 210(5) - 214(2)(b) and (c) - 211(3) - 213(6) - 250(6) - 250A - 257(a) - 260 	<p>Minor drafting errors, and minor amendments of a machinery nature</p> <p>Minor amendments have been made throughout the Act reviewing general definitions, interpretation provisions, penalties and times for general compliance with provisions in Part 11.</p> <p>These minor amendments assist with a better interpretation of Part 11 of the Act.</p>	<p>These amendments address minor drafting issues and are of a machinery nature only.</p>