

Regulation amendments – Strata Schemes Management Regulation 2016

This document outlines the proposed changes to Part 8 of the Strata Schemes Management Regulation 2016 (the Regulation). A copy of the draft amendment Regulation has not been provided in this package of materials.

Please note: *The information provided below is correct at the time of writing. However, minor adjustments may be required as a result of the drafting process to finalise the amendment Regulation. Once complete, further consultation will be undertaken and a copy of the draft amendment Regulation will be provided to all stakeholders and made available on the Fair Trading website.*

#	Relevant provision of the Act / Bill* and current Regulation	Proposed change to the Regulation	Comment/rationale
1	Section 189 of the Act Clause 50(1) of the Regulation	<p>The definition of ‘contract price’ is amended</p> <p>The ‘contract price’ is currently defined by reference to the total price <u>paid</u> under all applicable contracts for building work. This proposed amendment extends the definition to also capture amounts that are ‘<u>payable</u>’ under applicable building work contracts.</p> <p>The proposed amendment also removes the timing reference to the ‘date of issue of the occupation certificate’ and deletes the note that appears at the end of Clause 50(1).</p>	<p>The current definition of ‘contract price’ uses the term, “...<i>the total price paid under all the applicable contracts...as at the date of issue of the occupation certificate...</i>” This leaves open the possibility that the total of the building bond may be reduced where a portion of a contract price is not payable to the builder until after an occupation certificate is applied for.</p> <p>Given that the contract price is the basis on which the building bond is calculated, it is appropriate that the contract price is reflective of the full value of the building work and not just those amounts that have been paid at the time the bond is lodged. Accordingly, it is appropriate that the definition of contract price be amended to not only include contracts paid for, but also those which are ‘payable’ at the time the occupation certificate is applied for.</p>

2	<p>Clause 214 of the Act</p> <p>New clause in the current Regulation</p> <p><i>Clause 207A of the Bill</i></p>	<p>The Secretary will be able to require additional information or documents from developer</p> <p>The Regulation will be amended to insert a new provision to provide the Secretary with a power to issue a notice to require a developer to provide additional information or documents to substantiate the contract price used to calculate the amount of the building bond. For example, the Secretary could require the developer to lodge a quantity surveyor's report on the estimation of the contract price under this amendment.</p> <p>Failure to comply with a notice under this provision will be subject to a maximum penalty of 200 penalty units (\$22,000) for a corporation and 100 penalty units (\$11,000) in any other case.</p> <p>Note: proposed clause 207A of the Bill, which provides for an offence for providing false or misleading information in relation to the contract price or building bond, will also apply to the information provided in response to a request from the Secretary under this clause. Clause 207A carries a maximum penalty of \$110,000 for a corporation and \$22,000 in any other case.</p>	<p>Under the current legislation, the Secretary may not be able to accurately and independently determine the contract price or the building bond. This amendment provides the Secretary with an ability to require any additional documents from the developer to support either the contract price or the building bond that has been paid. This will ensure the correct amount is available for the owners corporation to rectify defective building work.</p>
3	<p>Clause 211 (3A) of the Bill</p> <p>Clause 56 of the Regulation</p>	<p>The circumstances under which a developer may apply to the NSW Civil and Administrative Tribunal for a determination of the contract price</p> <p>Currently, the owners corporation, developer and Secretary may apply to the Tribunal for a determination of the contract price on which a bond is calculated. The proposed amendment in 211(3A) of the Bill, removes the ability of a developer to apply to</p>	<p>A developer of a project, who has access to all the paperwork associated with the development, and who has usually initiated it, should in most circumstances be best placed at any time to determine the contract price. Therefore, unlike the Secretary or the owners corporation, the developer should not have ready access to the Tribunal for it to determine that contract</p>

		<p>the Tribunal to make an order specifying the contract price, except in the circumstances prescribed in the Regulation.</p> <p>It is proposed that the Regulation be amended to prescribe that a developer may apply to the Tribunal for a determination of the contract price where the determination of the contract price has been taken out of the hands of the developer, for example, by the subsequent use of a quantity surveyor's report. Note that the right of the Secretary and the owners corporation to apply to the Tribunal for a determination is not affected by the proposed amendment to section 211 of the Act.</p> <p>See proposal #10 in the Act amendments table.</p>	<p>price, and thus the amount of the building bond to be lodged with the Secretary.</p> <p>However, in circumstances where the determination of the contract price has been taken out of the hands of the developer, it is appropriate that the developer should have this access to the Tribunal, and the Regulation will be amended to reflect this position. This will be further explored during consultation on the draft amendment Regulation.</p>
4	<p>Clause 198A of the Bill</p> <p>Clause 44 of the Regulation</p>	<p>The developer must provide prescribed documents to the building inspector</p> <p>Currently, there is no requirement for the developer to provide documents to the building inspector to assist them in conducting an inspection. The amendment proposed by clause 198A of the Bill requires the developer to provide documents to the appointed inspector as soon as practicable after their appointment. In addition to the documents listed in clause 198A(1)(a), the developer must also provide any documents which are prescribed by the Regulation (see proposal #1 in the Act amendments table).</p> <p>For the purposes of clause 198A, it is proposed that the following documents be prescribed in the Regulation:</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.</p> <p>The documents listed in proposed clause 198A and prescribed in the Regulations will provide the building inspector with the building history of the strata scheme, and sufficient information to assist the building inspector in conducting an effective inspection.</p> <p>The proposed amendment requires that the documents be provided '<u>as soon as practicable</u>' after the appointment of the building inspector. The ICT</p>

		<p>(a) The designated documents relating to the building work,</p> <p>(b) A copy of the initial maintenance schedule relating to the strata scheme.</p> <p>The list of 'designated documents' will be included in clause 44 of the Regulation which contains 'interpretation provisions' for Part 8. The designated documents are:</p> <p>(a) A copy of the contract or contracts for the building work between the developer and the builder;</p> <p>(b) A copy of specifications for the building work, and any variations;</p> <p>(c) A copy of any schedule of non-conforming works relating to the building work;</p> <p>(d) A copy of all "issued for construction" and "as-built drawings and specifications relating to the building work;</p> <p>(e) A copy of any schedule of approved samples relating to the building work;</p> <p>(f) A copy of any development consent, approvals or certificates granted or issued under the <i>Environmental Planning and Assessment Act 1979</i> and relating to the building work;</p> <p>(g) In the case of building work involving an alternative solution in respect of a fire safety requirement under the Building Code of Australia – a copy of any documents prepared by or on behalf of a fire safety practitioner in relation to the alternative solution that were required in connection with an application for a</p>	<p>systems being developed by Fair Trading will assist developers in this requirement.</p>
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5	<p>Clause 214(a1) of the Bill</p> <p>Clause 45 of the Regulation</p>	<p>Professional associations will be able to impose conditions on members of a strata inspector panel</p> <p>While the current legislation includes strict probity requirements for building inspectors, it does not include any qualification requirements for them, other than that they are members of one of the prescribed professional associations.</p> <p>It is proposed that the Regulation be amended to allow professional associations to impose conditions on building inspectors. Under this change, an authorised professional association may, having regard to the competency of a member to carry out functions as a building inspector, impose conditions on the member limiting the circumstances in which they may carry out functions as a building inspector under Part 11. This amendment is made under the new Regulation making power proposed by clause 214(a1) of the Bill (see proposal #14 in the Act amendments table).</p>	<p>Developers will select building inspectors from strata inspector panels established by the authorised professional associations which are listed in the Regulations. It is important that the associations be able to impose conditions on the persons they appoint to the panel, to ensure their qualifications are appropriate for the work to be undertaken. For example, conditions may be imposed on the inspector relating to the kind of building work that the inspector may inspect and report on without having to engage a specialist to assist them.</p>

		A person appointed for the purposes of the Act as a building inspector must comply with any conditions imposed on the person, and a maximum penalty will apply for any breach of this provision.	
6	<p>Clause 214(a1) of the Bill</p> <p>Clause 45 of the Regulation</p>	<p>Professional associations will be required to maintain a register of details of members of a strata inspector panel</p> <p>There is currently no requirement that an authorised association keep a register of inspectors appointed to an inspection panel.</p> <p>The Regulation will be amended to require authorised professional associations to keep a register of members of a strata inspector panel that contains the name and other relevant information of each member, including any conditions imposed on a member. This amendment is made under the new Regulation making power proposed by clause 214(a1) of the Bill (see proposal #14 in the Act amendments table).</p>	It is important that in the event of a dispute the identity of an inspector and any conditions imposed on them are able to be readily ascertained. Registers will not be public registers but will be able to be accessed by Fair Trading.
7	<p>Clause 214(a1) of the Bill</p> <p>Clause 45 of the Regulation</p>	<p>The Secretary may issue guidelines to professional associations</p> <p>As noted above, there are currently no qualification requirements imposed on building inspectors, other than that they are members of one of the prescribed professional associations.</p> <p>Accordingly, the Regulation will be amended to require authorised professional associations to have regard to any guidelines approved by the Secretary regarding the appointment and conduct of building inspectors.</p>	This amendment will allow the Secretary to address the qualifications and experience of building inspectors and ensure consistency in the appointment and conduct of building inspectors. These guidelines will outline minimum requirements for all strata inspector panels, including standards and requirements for building inspectors selected and appointed to a panel and how building inspectors are to perform their appointed duties (see proposal #14 in the Act amendments table).

		This amendment is made under the new Regulation making power proposed by clause 214(a1) of the Bill (see proposal #14 in the Act amendments table).	Fair Trading published the Strata Inspector Panel Guidelines on its website for comment in November 2017. The Guidelines are being reviewed prior to their finalisation and all comments received will be considered as part of this process.
8	Section 204(2) of the Act Schedule 4 of the Regulation	A fee of \$1,500 will be payable where the Secretary arranges the appointment of a building inspector Where a developer fails to comply with their obligations under section 196 (<i>When building inspector for interim inspection arranged by Secretary</i>) and/or section 200 (<i>Obligation to arrange final inspection and report</i>) of the Act, the Secretary is able to arrange for the appointment of a building inspector. Currently, the Secretary is required to bear the costs involved in this process and there is no ability to charge a fee to the developer. The Regulation will be amended to require payment of a fee (currently proposed at \$1,500) where the Secretary is required to arrange the appointment of a building inspector. Section 204(2) provides a Regulation making power to be able to impose this fee.	The Scheme places a number of responsibilities on the developer, including appointing a building inspector, and ensuring the required inspections are conducted. If these responsibilities are ignored, delays then occur. To address this issue, the Secretary can then appoint a building inspector and ensure the inspections are conducted as required. It is appropriate that the Secretary be able to charge a developer for having to attend to these requirements.
9	Section 250 of the Act Schedule 5 of the Regulation	New penalty notice offences and penalty amounts The Regulation does not presently contain any penalty notice offences relating to Part 11 of the Act. It is proposed to amend Schedule 5 of the Regulation to prescribe the following penalty notice offences for Part 11: <ul style="list-style-type: none"> • section 195(4) - Owners corporation not give required 14 days' notice to developer and Secretary of decision to approve or refuse 	Penalty notice offences and amounts were not prescribed for Part 11 or Part 8 when the Act commenced, or when the Scheme commenced on 1 January 2018. Penalty notices allow Fair Trading to deal with certain breaches of Part 11 quickly and efficiently. The four offences listed were carefully chosen to ensure that the rights of owners corporations and lot owners were

		<p>appointment of inspector – Proposed penalty: \$220se</p> <ul style="list-style-type: none"> • section 202(1) – Building inspector not give copy of interim report or final report to required persons within 14 days of completing report – Proposed penalty: \$220 • section 202(2) – Owners corporation not give 14 days’ written notice to owners of lots on receipt of an interim or final report – Proposed penalty: \$220 • section 203(2) – Building inspector not give 14 days’ written notice to owners corporation, owner and any occupier of any affected lot of an intention to enter any part of the parcel of the strata scheme – Proposed penalty: \$220 	<p>able to be protected by reinforcing required conduct under the provisions of Part 11.</p> <p>Penalty notices allow a person to pay a prescribed amount for a range of offences that are prescribed in the Regulations. If a person chooses to pay the penalty notice, they do not admit their guilt for the offence, and no criminal history is recorded. A person who feels they did not commit the offence can instead choose to have the matter heard at the Local Court.</p>
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* Act refers to the *Strata Schemes Management Act 2015* and Bill is the *Strata Schemes Management Amendment (Building Defects Scheme) Bill 2018*

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