



New South Wales

Strata Schemes Management Amendment (Building Defects Scheme) Bill 2018

Explanatory note

This explanatory note relates to this Bill as introduced into Parliament.

Overview of Bill

The object of this Bill is to amend the *Strata Schemes Management Act 2015* (the **SSM Act**), in relation to the scheme for rectifying building defects in new strata schemes, as follows:

- (a) to increase the maximum penalty that a developer of a strata scheme may be liable to pay for the offence of failing to provide the security (**building bond**) that is required by the SSM Act to secure payment for defective building work,
- (b) to make it an offence for a developer to knowingly give false or misleading information to the Commissioner for Fair Trading (the **Secretary**) in relation to the amount required to be secured by a building bond,
- (c) to provide that, in cases where the developer and owners corporation fail to agree on the amount secured by a building bond that may be claimed for payment to meet the costs of rectifying defective building work, the Secretary is to determine the amount to be claimed,
- (d) to enable the Secretary, for the purposes of determining the amount to be claimed in those cases, to arrange for an appropriately qualified person to provide the Secretary with a report (paid for by the owners corporation and developer) on the work required or costs involved in rectifying the defective building work,
- (e) to enable an amount secured by a building bond to be claimed to meet certain unpaid costs that would otherwise be payable under the building defects scheme by a developer, but only if the developer has died or ceased to exist, is bankrupt or insolvent or (after due search and inquiry) cannot be found in Australia,
- (f) to extend the period within which a building bond may be claimed,

- (g) to enable the cancellation of a building bond in certain circumstances, including if an interim report on the building work concerned does not identify any defective building work,
- (h) to limit the circumstances in which a developer may apply to the Civil and Administrative Tribunal for an order specifying the amount of the contract price of building work (for the purposes of determining the amount required to be secured by a building bond) to the circumstances specified in the regulations,
- (i) to enable the Secretary to recover from a developer any amount required to be secured by a building bond if the developer fails to give the Secretary a building bond or gives a building bond that secures a lesser amount than is required,
- (j) to confer investigative and enforcement powers on authorised officers who are appointed by the Secretary,
- (k) to protect building inspectors, professional associations and others from liability for acts or omissions done in good faith,
- (l) to protect the Secretary and others from personal liability for acts or omissions done in good faith,
- (m) to extend the regulation-making power, including by enabling regulations to be made dealing with conditions that may be imposed on building inspectors, and with the functions of professional associations with respect to determining whether persons are qualified to carry out functions as building inspectors,
- (n) to make amendments in the nature of statute law revision, and other minor and consequential amendments.

The Bill also provides for a consequential amendment to the *Law Enforcement (Powers and Responsibilities) Act 2002*.

Outline of provisions

Clause 1 sets out the name (also called the short title) of the proposed Act.

Clause 2 provides for the commencement of the proposed Act on a day or days to be appointed by proclamation.

Schedule 1 Amendment of Strata Schemes Management Act 2015 No 50

Offences relating to building bond

Schedule 1 [11] increases the maximum penalty that a developer may be liable to pay for the offence of failing to give the Secretary a building bond that secures the amount required by the SSM Act (generally, 2% of the contract price for the building work concerned). The proposed amendment increases the maximum penalty from 200 penalty units (currently \$22,000) to 10,000 penalty units (currently \$1.1 million) and also imposes an additional daily penalty of up to 200 penalty units for a continuing offence. **Schedule 1 [34]** makes a consequential amendment.

Schedule 1 [12] makes it an offence for a developer to knowingly give false or misleading information to the Secretary about the contract price of building work or the amount required to be secured by a building bond. The maximum penalty, if the developer is a corporation, is 1,000 penalty units (currently \$110,000) or 200 penalty units (currently \$22,000) in any other case.

Claiming and payment of amount secured by building bond

An amount secured by a building bond may be claimed for payment to an owners corporation either with the consent of the developer or to meet the costs of rectifying building work that a final report of a building inspector has identified as defective. **Schedule 1 [16]** ensures that the amount

that may be claimed to meet the costs of rectifying that building work is either the amount agreed to by the owners corporation and developer or the amount determined by the Secretary.

Schedule 1 [21] enables the Secretary, for the purpose of making a determination about the amount, to arrange for an appropriately qualified person to provide the Secretary with a report on the work required or costs involved in rectifying the defective building work. The report must be paid for by the owners corporation and developer. The Secretary may also require the owners corporation or developer to provide information or reports.

Currently, an amount secured by a building bond may only be claimed for payment to an owners corporation. **Schedule 1 [15]** enables an amount to be claimed for payment to the following persons for unpaid costs that would otherwise be payable by the developer concerned:

- (a) a building inspector for the costs of an inspection or report,
- (b) a person who has prepared a report for provision to the Secretary (whether arranged by the Secretary or required by the Secretary to be provided by the developer) under the amendment made by **Schedule 1 [21]**.

Schedule 1 [17] provides that the amount may be claimed for payment to those persons only if the developer has died or ceased to exist, is bankrupt or insolvent or (after due search and inquiry) cannot be found in Australia.

An amount secured by a building bond can only be claimed within 2 years after completion of the building work concerned or 60 days after the final report of the building inspector for the building work is given to the Secretary, whichever is the later. **Schedule 1 [19]** alters that time frame by enabling an amount secured by a building bond to be claimed within 90 days (rather than 60 days) after the final report is given to the Secretary.

Schedule 1 [22] omits a provision consequent on the amendment made by **Schedule 1 [15]** and also makes an amendment in the nature of statute law revision.

Cancellation of building bond

Schedule 1 [24] enables the Secretary to facilitate the cancellation of a building bond, by providing the developer concerned with a release:

- (a) if an interim report on the building work concerned does not identify defective building work, or
- (b) on application by the developer (with the agreement of the owners corporation) if part of the amount secured by the bond has been claimed.

Order of Tribunal in relation to contract price of building work

Schedule 1 [27] provides that a developer may apply to the Civil and Administrative Tribunal for an order specifying the amount of the contract price of building work (for the purposes of determining the amount required to be secured by a building bond) only in the circumstances prescribed by the regulations.

Debt recovery where building bond not provided or insufficient

Schedule 1 [28] enables the Secretary to recover from a developer any amount required to be secured by a building bond if the developer fails to give the Secretary a building bond or gives a building bond that secures a lesser amount than is required. The owners corporation concerned may claim a recovered amount from the Secretary to meet the costs of rectifying defective building work.

Other amendments relating to building bonds

Schedule 1 [9] requires a developer to give a building bond before an application is made for an occupation certificate under the *Environmental Planning and Assessment Act 1979*, rather than (as is currently the case) before the application is determined. The bond must be in terms acceptable to the Secretary.

Schedule 1 [13] and [14] ensure that a building bond may be in the form of a bank guarantee or bond only if issued by an authorised deposit-taking institution or an approved insurer, respectively.

Investigative and enforcement powers

Schedule 1 [29] inserts a new Division 3A in Part 11 of the SSM Act, which confers investigative and enforcement powers on authorised officers.

Authorised officers are appointed by the Secretary (proposed section 211B).

Authorised officers may exercise functions conferred by the proposed Division 3A for an *authorised purpose*, which includes investigating, monitoring and enforcing compliance with the requirements relating to the building defects scheme that are set out in Part 11 of the SSM Act (proposed section 211C).

The powers conferred on an authorised officer include the following:

- (a) to require a person to provide information and records that are in the person's possession or that are within the person's power to obtain lawfully (proposed section 211D),
- (b) to require a person to answer questions in relation to matters for which information is reasonably required for an authorised purpose (proposed section 211E),
- (c) to enter premises to carry out certain inspections and seize certain things (proposed sections 211G and 211J),
- (d) to apply for a search warrant if the authorised officer believes on reasonable grounds that Part 11 of the SSM Act has been or is being contravened (proposed section 211H),
- (e) to require an owner or occupier of premises, or an owners corporation, to provide reasonable assistance and facilities for the purposes of exercising the other powers conferred on the authorised officer in connection with the premises (proposed section 211I).

Proposed section 211K specifies how things that have been seized are to be dealt with.

Proposed section 211L makes it an offence for a person, without reasonable excuse, to refuse or fail to comply with a requirement made of the person under proposed Division 3A.

Proposed section 211M makes it an offence for a person, without reasonable excuse, to delay, hinder or obstruct an authorised officer in the exercise of the officer's powers under proposed Division 3A.

Protection from liability

Schedule 1 [31] (proposed section 213A) protects building inspectors, and persons acting under the direction of building inspectors, from personal liability for acts or omissions done in good faith for the purpose of executing functions under Part 11 of the SSM Act.

Schedule 1 [31] (proposed section 213B) protects professional associations, and individuals acting under the direction of professional associations, from liability for acts or omissions done in good faith for the purpose of executing functions under Part 11 of the SSM Act.

Schedule 1 [37] excludes the Secretary, and persons acting under the direction of the Secretary, from personal liability for acts or omissions done in good faith for the purpose of executing functions under the SSM Act. **Schedule 1 [38]** makes a consequential amendment.

Regulation-making powers

Schedule 1 [32] enables regulations to be made dealing with conditions that may be imposed on building inspectors, and with the functions of professional associations with respect to determining whether persons are qualified to carry out functions as building inspectors.

Schedule 1 [33] enables regulations to be made dealing with the procedures to be followed by the Secretary in determining, under the provision inserted by **Schedule 1 [16]**, the amount secured by a building bond that may be claimed to meet the costs of rectifying defective building work.

Schedule 1 [39] enables the regulations to create offences that have a maximum penalty of 200 penalty units (currently \$22,000).

Proceedings for offences

Schedule 1 [35] enables the Supreme Court to deal with offences under the SSM Act or regulations in its summary jurisdiction. **Schedule 1 [36]** limits the maximum monetary penalty that the Local Court may impose in proceedings for an offence under the SSM Act or the regulations to 1,000 penalty units (currently \$110,000).

Other amendments

Schedule 1 [8] requires the developer of a strata scheme to provide a building inspector appointed to inspect building work for the scheme with documents identifying building defects of which the developer is aware.

Schedule 1 [1]–[7], [10], [18], [20], [23], [25] and [30] make amendments in the nature of statute law revision.

Schedule 1 [26] inserts a note.

Schedule 2 Amendment of Law Enforcement (Powers and Responsibilities) Act 2002 No 103

Schedule 2 makes an amendment to the *Law Enforcement (Powers and Responsibilities) Act 2002* that is consequent on the insertion of proposed section 211H (relating to search warrants) of the SSM Act by **Schedule 1 [29]**.