



New South Wales

Residential Apartment Buildings (Compliance and Enforcement Powers) Bill 2020

Explanatory note

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

Overview of Bill

The object of this Bill is to prevent developers from carrying out building work that may result in serious defects to building work or result in significant harm or loss to the public or current or future occupiers of the building. In particular, the Bill makes provision for the following—

- (a) to enable the Secretary of the Department of Customer Service (the *Secretary*) to—
 - (i) issue a stop work order if building work is being carried out, or likely to be carried out, in a manner that could result in a significant harm or loss to the public or current or future occupiers of the building, or
 - (ii) issue a building work rectification order to require developers to rectify defective building works, or
 - (iii) prohibit the issuing of an occupation certificate in relation to building works in certain circumstances,
- (b) to impose an obligation on developers to notify the Secretary at least 6 months, but not more than 12 months, before an application for an occupation certificate is intended to be made in relation to building works,
- (c) to provide investigative and enforcement powers for authorised officers to ensure compliance with the requirements of the proposed Act,
- (d) to establish penalties for the contravention of the requirements of the proposed Act,
- (e) to make provision for the recovery of costs associated with compliance with the requirements of the proposed Act by a developer where there is more than 1 developer for the building work, or by the Secretary where the developer fails to comply,

- (f) to enact other minor and consequential provisions and provisions of a savings and transitional nature,
- (g) to make consequential amendments to other legislation.

Outline of provisions

Part 1 Preliminary

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 1 September 2020.

Clause 3 defines certain words and expressions used in the proposed Act.

Clause 4 defines, for the purposes of the proposed Act, the term *developer*, in relation to building work, to include the following—

- (a) the person who contracted or arranged for, or facilitated or otherwise caused (whether directly or indirectly) the building work to be carried out,
- (b) if the building work is the erection or construction of a building or part of a building—the owner of the land on which the building work is carried out at the time the building work is carried out,
- (c) the principal contractor for the building work within the meaning of the *Environmental Planning and Assessment Act 1979*,
- (d) in relation to building work for a strata scheme—the developer of the strata scheme within the meaning of the *Strata Schemes Management Act 2015*,
- (e) any other person prescribed by the regulations for the purposes of this definition.

Clause 5 defines *building work* to mean physical activity involved in the erection of a building. This includes work involved in, or coordinating or supervising work involved in, the construction, alteration, repair, renovation or protective treatment of a building. Additional work may be prescribed as building work, and work may be excluded from being building work, by the regulations.

Clause 6 limits the application of the proposed Act to residential flat buildings where the building work is authorised to commence under certain certificates issued under the *Environmental Planning and Assessment Act 1979* and has not been completed or has been completed within the previous 6 years.

Part 2 Completion of residential apartment building work

Clause 7 requires a developer to give notice to the Secretary of a proposed application for an occupation certificate for any part of the building for which building work is being carried out, at least 6 months, but not more than 12 months, before the application is to be made. If there is more than 1 developer, any of those developers may give the required notice (an *expected completion notice*).

Clause 8 requires the developer to notify the Secretary if the date given in an expected completion notice is expected to change. If there is more than 1 developer, any of those developers may give the required notice (an *expected completion amendment notice*).

Clause 9 enables the Secretary to make an order prohibiting an issue of an occupation certificate in certain circumstances, including—

- (a) if insufficient notice is given under proposed sections 7 or 8, or
- (b) if the Secretary is satisfied that a serious defect in the building exists, or
- (c) if any building bond required under section 207 of the *Strata Schemes Management Act 2015* in relation to the building has not been given to the Secretary, or

- (d) any other circumstances prescribed by the regulations for the purposes of the proposed section.

Clause 10 provides that a developer in relation to a residential apartment building to which a prohibition order applies may appeal against the order to the Land and Environment Court.

Part 3 Investigations

Division 1 Preliminary

Clause 11 defines certain words and expressions used in the proposed Part, including defining *authorised officer* to mean a person appointed under proposed Division 2.

Clause 12 provides that the functions (which include powers) conferred by the proposed Part may be used for investigating, monitoring and enforcing compliance with the proposed Act and the regulations, the performance requirements of the Building Code of Australia and relevant Australian Standards and approved plans, investigating whether buildings have serious defects and enforcing, administering (including obtaining information) or executing the proposed Act.

Division 2 Authorised officers

Clause 13 enables the Secretary to appoint authorised officers.

Clause 14 provides that an authorisation as an authorised officer may be general or subject to conditions, limitations or restrictions or only be for limited purposes.

Clause 15 requires the Secretary to provide each authorised officer with an identification card but enables the Secretary not to provide cards to officers who are also investigators under the *Fair Trading Act 1987*.

Division 3 Information gathering powers

Clause 16 makes it clear that powers conferred by the proposed Division may be exercised even if a power of entry under proposed Division 4 is not being exercised.

Clause 17 confers power on authorised officers to issue notices directing persons to give information or records or both for an authorised purpose.

Clause 18 confers power on authorised officers to require persons to answer questions with respect to matters about which information is reasonably required for an authorised purpose. A person may be required to attend at a specified time and place for that purpose. The specified time and place must be reasonable in the circumstances.

Clause 19 enables questions and answers to questions under the proposed Division to be recorded if the person being questioned has been informed about the recording. A copy of the record must be provided to the person being questioned as soon as practicable after it is made.

Division 4 Entry to premises

Clause 20 confers power on authorised officers to enter premises at a reasonable hour in the daytime, or when business is in progress or is usually carried on, and enables an authorised officer to be accompanied by assistants that the authorised officer considers necessary. Entry may be effected with or without the authority of a search warrant.

Clause 21 prohibits an authorised officer from entering a part of premises used only for residential purposes unless the occupier has given permission or the officer is authorised to enter by a search warrant. The prohibition will not apply to common property under a strata scheme or association property under a scheme under the *Community Land Management Act 1989*.

Clause 22 enables search warrants to be granted to authorised officers for the purpose of searching premises if there are reasonable grounds to believe that there has been a contravention of the proposed Act on the premises or there is on the premises a matter or thing connected with an offence under the proposed Act or the regulations under the proposed Act.

Clause 23 enables an authorised officer to direct the owner or occupier of premises, or a person in or on premises (other than a public place), to provide reasonable assistance for the purposes of exercising the authorised officer's functions with respect to the premises.

Clause 24 sets out the investigative actions an authorised officer may take after entering premises.

Division 5 Miscellaneous

Clause 25 provides for records taken by an authorised officer for evidentiary purposes to be retained by the Secretary until completion of the proceedings in which they may be evidence.

Clause 26 makes it an offence to obstruct, hinder or interfere with an authorised officer in the exercise of the officer's functions under the proposed Part.

Clause 27 makes it an offence, without reasonable excuse, to fail to comply with a direction made by an authorised officer in accordance with the proposed Part.

Part 4 Remedial actions

Clause 28 provides for the Secretary to accept written undertakings from developers regarding the carrying out of building work.

Clause 29 confers a power on the Secretary to issue a stop work order for building work if the Secretary is of the opinion that the building work is, or is likely to be, carried out in a manner that could result in significant harm or loss to the public or occupiers or potential occupiers of the building to which the work relates or significant damage to property. A stop work order may be conditional and can be in force for up to 12 months. It is an offence to fail to comply with a stop work order.

Clause 30 enables an appeal to be made to the Land and Environment Court against a stop work order.

Clause 31 enables the Land and Environment Court, on application by the Secretary, to make an order to remedy or restrain a breach of the proposed Act or the regulations under the proposed Act. An interim order may also be made.

Clause 32 confers power on the Secretary (with or without a complaint having been made) to investigate developers and former developers, buildings, the carrying out of building work and other matters that may constitute a breach of the proposed Act or the regulations under the proposed Act.

Part 5 Rectification of serious defects

Division 1 Building work rectification orders

Clause 33 enables the Secretary to make an order under the proposed Part (a *building work rectification order*) if the Secretary is of the opinion that the building work was or is being carried out in a manner that could result in a serious defect. The building work rectification order is to require the developer (in relation to the building work) to carry out, or refrain from carrying out, building work, to eliminate or minimise the serious defect. A building work rectification order may be conditional. It is an offence to fail to comply with a building work rectification order.

Clause 34 provides that a building work rectification order may, instead of requiring the developer to carry out or refrain from carrying out building work, specify the standard the building work is required to meet or indicate the nature of building work that would meet that standard.

Clause 35 makes provision for when a building work rectification order is taken to have been given and takes effect.

Clause 36 requires the Secretary to give a developer to whom a building work rectification order is given the reasons for making the order.

Clause 37 sets out who, other than the developer, notice must be given to when a building work rectification order is made.

Clause 38 enables the Secretary to make modifications to a building work rectification order.

Clause 39 provides that a building work rectification order must specify the period within which the terms of the order are to be complied with, and may require immediate compliance.

Clause 40 provides that a building work rectification order that specifies a period within which the terms of the order are to be complied with continues to have effect until the order is complied with (even if that period has expired), unless the requirement under the order has been revoked.

Clause 41 enables the Secretary to order the occupier of land relating to a building work rectification order to permit the developer to carry out the work specified in the order on the land if the Secretary is of the opinion that it is necessary to do so in order to enable the requirements of the proposed Act (or the regulations under the proposed Act) or the order to be complied with.

Clause 42 enables the Secretary to do anything necessary or convenient to give effect to the terms of a building work rectification order if the developer to whom the order was given fails to comply with the order. Provision is made for the Secretary to demolish a building, for distribution of proceeds made from the sale of materials recovered from the demolition and for the recovery of expenses incurred by the Secretary.

Clause 43 provides that a building work rectification order must be considered by the Civil and Administrative Tribunal for the purposes of determining a building claim under Part 3A of the *Home Building Act 1989* and by any other court in proceedings relating to the building work the subject of the order, if the order is brought to the attention of the Tribunal or the court in the proceedings. Nothing in the proposed section binds the Tribunal or court.

Division 2 Natural justice requirements

Clause 44 provides that before giving a building work rectification order, the Secretary must give notice to the person to whom the proposed order is directed of the following—

- (a) the intention to give the order,
- (b) the terms of the proposed order,
- (c) the period proposed to be specified as the period within which the order is to be complied with,
- (d) that the person to whom the order is proposed to be given may make written representations to the Secretary as to why the order should not be given or as to the terms of or period for compliance with the order.

Clause 45 provides that the Secretary must give notice of the Secretary's intention to make a building work rectification order to certain other bodies and persons.

Clause 46 enables a person who is given notice under this Division of the intention to give a building work rectification order to make written representations concerning the proposed order in accordance with the notice.

Clause 47 requires the Secretary to consider any written representations made under the proposed Division.

Clause 48 provides that, after considering any written representations made concerning the proposed building work rectification order, the Secretary may determine—

- (a) to give an order in accordance with the proposed order, or
- (b) to give an order in accordance with modifications made to the proposed order, or
- (c) not to give an order.

Division 3 Appeals

Clause 49 enables a developer to make an appeal to the Land and Environment Court against a building work rectification order.

Clause 50 makes it clear that any appeal against a building work rectification order does not effect a stay of the order.

Division 4 Compliance cost notices

Clause 51 enables the Secretary to serve on a developer to whom a building work rectification order has been given notice in writing (a *compliance cost notice*) requiring the developer to pay all or any reasonable costs and expenses incurred by the Secretary in connection with that order. Where there is more than 1 developer, if the developer to whom the compliance cost notice is served complies with the notice but is not the developer responsible for the situation giving rise to the issue of the notice, the developer who complied may recover costs from the developer who was responsible.

Clause 52 enables a developer to make an appeal to the Land and Environment Court against a compliance cost notice.

Division 5 Miscellaneous

Clause 53 allows the Secretary to include 2 or more building work rectification orders in the same instrument.

Clause 54 makes provision for a building work rectification order to direct 2 or more people to do the thing specified in the order jointly.

Clause 55 makes it clear that where there is more than 1 developer in relation to building work, a building work rectification order in respect of that building work is still valid if it was only given to some but not all of those developers, and a developer's compliance with the order does not affect the liability of the other developers to pay or contribute towards the costs of complying with the order.

Part 6 Offences

Clause 56 provides for proceedings under the proposed Act to be summary proceedings in the Local Court or the Land and Environment Court and limits the penalty that the Local Court may impose to a maximum of 1,000 penalty units. The period within which proceedings for an offence must be taken is not later than 3 years after the offence was allegedly committed or, with the leave of the court, 2 years after evidence of the offence first came to the attention of an authorised officer.

Clause 57 enables offences prescribed by the regulations as penalty notice offences to be dealt with by the issue of a penalty notice rather than through court proceedings.

Clause 58 makes a director or person concerned in the management of a body corporate liable for an offence committed by the corporation if the director or person knowingly authorised or permitted the contravention constituting the offence.

Clause 59 provides for the operation of continuing offences.

Clause 60 makes it clear that the onus of proving that a person had a reasonable excuse for the purposes of an offence which provides for that exception lies on the defendant.

Part 7 Miscellaneous

Clause 61 requires the Secretary to keep a register containing copies of all prohibition orders, building work rectification orders and stop work orders in force, and to make it publicly available on the Department of Customer Service's website.

Clause 62 enables the Secretary to delegate functions conferred on the Secretary by the proposed Act to persons employed in the Department of Customer Service and certain other persons.

Clause 63 makes it an offence to disclose information obtained in connection with the administration or execution of the proposed Act, except in specified circumstances including in connection with the administration or execution of the proposed Act and with other lawful excuse.

Clause 64 enables the Secretary to provide information to a government sector agency or other persons or bodies prescribed by the regulations for the purposes of enabling or assisting the Secretary to exercise the Secretary's functions. An information sharing arrangement may also be

entered into with one of those agencies, persons or bodies for sharing information that is reasonably necessary to assist the exercise of functions by the Secretary or another party to the arrangement.

Clause 65 excludes the Secretary, an authorised officer or a person acting under the direction of the Secretary or an authorised officer from personal liability for a matter or thing done or omitted to be done in good faith for the purposes of the proposed Act.

Clause 66 sets out the manner in which documents may be given to persons for the purposes of the proposed Act.

Clause 67 enables the Governor to make regulations for the purposes of the proposed Act.

Clause 68 makes provision for the review of the proposed Act.

Schedule 1 Savings, transitional and other provisions

Schedule 1 contains savings, transitional and other provisions consequent on the enactment of the proposed Act.

Schedule 2 Amendment of other legislation

Schedule 2 makes consequential amendments to the legislation specified in the Schedule.