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NEW BUILDING BOND AND DEFECT LAWS COMMENCE TODAY

Adrian Mueller

Partner | Senior Lawyer

B.Com LLB FACCAL

[Email](#) | [LinkedIn](#)

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Introduction

Amendments to the *Strata Schemes Management Act 2015* that were passed by the NSW Parliament in September 2018 commenced today. Those amendments are contained in the *Strata Schemes Management Amendment (Building Defects Scheme) Act 2018*. That Act introduces new laws with respect to the rectification of building defects in new strata buildings. In this article we take a look at those new laws.

Overview of new laws

The new laws will supplement the building defect laws that are contained in Part 11 of the *Strata Schemes Management Act 2015*. The laws in Part 11 deal with the requirement for a developer to pay a building bond and appoint a building inspector to inspect a building and prepare an interim report and a final report about building defects.

Application of new laws

The laws in Part 11 (and the new laws that commence on 1 July 2020) only apply to building work done under a contract that was entered into on or after 1 January 2018 or which was commenced without a contract before that date. Those laws also only apply to residential buildings or mixed use buildings with residential components, where the building work was carried out for the purposes of the registration of a strata plan and where there is no need for the work to be covered by home building compensation fund insurance (as is the case with most high rise buildings).

Changing the due date for payment of the building bond

Up until now, a developer has only been required to pay a building bond before an occupation certificate for a building is issued. Now, a developer will need to pay the building bond before an application is made for the occupation certificate.

Increased penalties for failing to provide a building bond

The new laws that commence on 1 July 2020 will increase the maximum penalty that a developer may be liable to pay for failing to provide a building bond to secure payment for defective building work. The maximum penalty will increase from \$22,000.00 to \$1.1 million and there will now be scope for an additional daily penalty of up to \$22,000.00 to be imposed on a developer who fails to pay a building bond.



Making it an offence for a developer to give false or misleading information to the Commissioner

The amount of the building bond that is payable by the developer is generally 2% of the contract price for the building work. The new laws will make it an offence for a developer to knowingly give false or misleading information to the Commissioner for Fair Trading about the contract price of building work for the purpose of calculating the amount of the bond that is payable by the developer.

Determining disputes about use of the building bond

The new laws will give the Commissioner for Fair Trading power to determine the amount of the building bond that may be claimed by an owners corporation to cover the cost of rectifying building defects identified in the final report of a building inspector where the owners corporation and developer cannot agree on how much of the bond should be used for that purpose. The Commissioner will now be able to arrange for an appropriately qualified person to provide a report in relation to the work required to rectify defects or the costs involved in rectifying those defects to assist in determining the amount of the bond that should be released to the owners corporation. Any such report will need to be paid for by the owners corporation and developer. The Commissioner will now also be able to require the owners corporation or developer to provide information or a report for that purpose.

Allowing the building bond to be used to pay other costs

Up until now, the building bond has only been able to be claimed for payment to an owners corporation. The new laws will now enable the bond to be used to pay the unpaid costs of a building inspector who has prepared an initial or final report or a person who has prepared a report for the Commissioner where the developer has not paid those costs and has died, ceased to exist, cannot be found or is insolvent.

Extending the time to claim the building bond

Up until now, the building bond could only be claimed by an owners corporation within 2 years after completion of the building work or 60 days after the building inspector gives the Commissioner a final report concerning the building defects (whichever is later). The new laws will alter that timeframe to enable the building bond to be claimed within 90 days (rather than 60 days) after the final report is given to the Commissioner.

Cancelling the building bond

The new laws will allow the Commissioner to cancel the building bond paid by a developer if an interim report by a building inspector does not identify any defects or if part of the amount secured by the building bond has been claimed or realised by the Commissioner.



Limiting applications by a developer to NCAT

From now on, a developer will only be able to apply to NCAT for an order specifying the amount of the contract price for building work in order to determine the amount of the building bond that is required to be paid by the developer in the limited circumstances prescribed by the strata regulations.

Recovering the building bond from the developer

The Commissioner will now be entitled to recover from a developer, as a debt in a court of competent jurisdiction, any amount required to be secured by a building bond if the building bond has not been given to the Commissioner or the amount of the bond that has been given to the Commissioner is less than the required amount. An owners corporation will be entitled to claim from the Commissioner any amount recovered by the Commissioner from the developer for payment to the owners corporation.

Creating investigative and enforcement powers

Officers appointed by the Commissioner will now be able to investigate, monitor and enforce compliance with the requirements relating to the building defects scheme that is set out in Part 11 of the *Strata Schemes Management Act 2015*. This Part sets out the requirements for the initial and final inspections and reports prepared by building inspectors and the payment of building bonds by developers.

Protecting building inspectors from personal liability

The new laws will protect 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 exercising their functions under Part 11 including carrying out inspections and preparing initial and final defect reports. The same protections will be extended to professional associations, and individuals acting under the direction of those associations, and the Commissioner.

Extending the regulation making power

The new laws will give the NSW Government greater power to make strata regulations dealing with conditions which may be imposed on building inspectors and the functions of professional associations with respect to determining whether persons are qualified to carry out functions as building inspectors. The Government will also now have the ability to create strata regulations that create a register of qualified building inspectors that will be available for inspection by the public.

Forcing developers to provide information to building inspectors

The new laws will require developers to provide building inspectors that have been appointed to prepare initial and final reports with documents identifying building defects of which the developers are aware



including any building defects that are considered at the first annual general meeting of an owners corporation.

Conclusion

The new laws are part of the NSW Government's promise to "get tough" on building defects and form part of a suite of new laws that have recently been introduced to combat the spate of poorly built strata buildings. All of these new laws will strengthen the rights of owners corporations to make claims against builders, developers and other to have defects repaired or obtain compensation to cover the cost of repairing defects.

Adrian Mueller

Partner | B.Com LLB FACCAL
adrianmueller@muellers.com.au

About JS Mueller & Co Lawyers

JS Mueller & Co Lawyers has been servicing the strata industry across metropolitan and regional NSW for over 40 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law, building defects and levy collection.

02 9562 1266
enquiries@muellers.com.au
www.muellers.com.au



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