

So Called “Developer Bond Scheme”: Part 11 Amendments of the *Strata Schemes Management Act 2015 No 50*

21 August 2020

1. Introduction

A number of amendments have been made to the so called “Developers Bond Scheme”. These amendments come to effect from 01 July 2020. We provide in this newsletter details of the amendments and comments on the effectiveness of the amendments.

2. Preamble

- a) The Amending Act is called the *Strata Schemes Management Amendment (Building Defects Scheme) Act 2018*;
- b) The **commencement** of the amendments was **01 July 2020**;
- c) Part 11 only applies to contracts entered into on or after 01 January 2018;
- d) Part 11 only applies to ‘residential building work’¹ carried out on any part of a multi-unit dwelling strata scheme of at least four storeys; and
- e) Developers cannot contract out of these provisions.

3. Commentary

- a) First item to note is a fundamental difficulty with the legislation. That is the Developer appoints the Building Inspector.
- b) An Owners Corporation will not obtain an objective and complete report unless the secretary provide to the Building Inspector with a letter of retainer identifying matters to be included in the report. It should be clear that the retainer of the Building inspector is for the Owner Corporations(s) benefit and use.
- c) A fundamental flaw is the inclusion of section 209A(1). It states as follows:

Section 209A Determination of amount when owners corporation and developer don't agree

(1) For the purposes of enabling the Secretary to determine an amount under section 209 (1A), the Secretary may –

 - (a) Require the owners corporation or the developer (or both) to provide any information or reports that the Secretary may require, or
 - (b) Arrange for a person whom the Secretary considers to be appropriately qualified to provide a report to the Secretary in relation to the work required or the costs involved in rectifying the defective building work concerned.

On one reading it overrides the prima facie entitled to access the bond monies to meet the costs of rectifying defective work(s) and only allows for the application of the Bond monies with the Developer’s agreement.²

¹ *Strata Schemes Management Act 2015*, s 191.

² Second Reading Speech, *Strata Schemes Management Amendment (Building Defects Scheme) Bill 2018*.
<https://www.parliament.nsw.gov.au/Hansard/Pages/HansardResult.aspx#/docid/'HANSARD-1820781676-77337'>

The amending legislation require where there is no agreement that the Secretary, either:-

- i. Calls for “information” to make his or her own assessment of the costs; or
- ii. Obtain a “report” as to the “costs” involved.

This is totally unsatisfactorily given a) the absence of an express entitlement to access the fund monies taxed on the further report. b) the further time and cost involved. Given the “cost” in to be a shared cost 209A(2). Like the ‘costs’ of the initial building defects report which is a ‘cost’ to the bond (viz clause 209(a)). Likewise it’s false to say the Developer shares the cost and that ‘share’ is taken from the bond monies (viz clause 209(d)).

- d) Recommendation that any final inspection report accompanied by quantity certifier report as to reasonable cost to those works.

That advice remains despite various amendments to sections 209 (1A) and 209A which is limited to in operation to where Owners Corporation and Developer agreed that those costs following processes of the parties retaining further reports concerning cost to rectify defective building work. Noting 209 (1A) is prima facie that secretary can only claim money represented by the building bond when amount claimed and realised when read in 209 (1A).

Powers to obtain the bond to meet cost of defective work via sections 207 and 210 remain unchanged.

- e) Interestingly (and a potential advantage) 211A allows the Owners Corporation to recover as a debt due the difference between the total costs of rectification and the value of the Bond. Which again highlights the need for a precise final building report from an experienced and committed building inspector.

The difficulty as any alert reader would appreciate the section 211A amendments can have no operation if the cost of rectifying defective work need to always be agreed with the developer.

- f) Our final comment as previously expressed, we remain the view that the bond money may be used to obtain expert reports in relation to defective works.

4. Amendments

There are new requirements in relation to lodging a bond and providing information to authorities in relation to the contract. The Secretary has been given increased investigative powers in relation to the contract price, building bonds and building defects.

Section 207

- a) It is now MANDATORY, for the developer to give the 2 percent building bond to the Secretary, before an application can even be made for an occupation certificate.³
 - iii. Failure to do so will attract an increased penalty: from \$22,000 to a maximum of \$1.1 million and an additional \$22,000 for each day.

Section 207A

- b) NEW PENALTY where if the developer provides the Secretary with false or misleading information about the contract price or amount required to be secured by the bond (maximum penalty: \$1.1 million for corporations, \$22, 000 for any other case);

³ *Strata Schemes Management Act 2015*, s 207.

Sections 209 (1A) and 209A

- c) A requirement that the developer and owners corporation agree on the amount required to rectify any building defects identified by the inspector. If both parties cannot agree, the Secretary may appoint a quantity surveyor to determine this amount;
 - a. Section 209A Determination of amount when owners corporation and developer don't agree
 - (1) For the purposes of enabling the Secretary to determine an amount under section 209(1A), the secretary may –
 - (a) Require the owners corporation or the developer (or both) to provide any information or reports that the Secretary may require, or
 - (b) Arrange for person whom the Secretary considers to be appropriately qualified to provide a report to the Secretary in relation to the work required or the costs involved in rectifying the defective building work concerned.
 - (2) The costs of obtaining any report arranged by the Secretary are to be borne by the owner's corporation and developer in equal shares, except in the circumstances (if any) specified in the regulations for the purposes of this section.
 - (3) The Secretary may give to a person whom the Secretary has arranged to provide the report any documents relating to the building work that the Secretary considers would assist the person to prepare the report.

Section 209(3)(b) When amount secured by building bond payable

- d) The deadline for an owners corporation to claim the secured amount to rectify defects has been EXTENDED, from 60 days after the building inspector's final report is issued to 90 days;

Section 210 Use of amounts secured by building bond

- e) Under s210(2) an owners corporation must now repay the developer any amount secured by a building bond that has been paid to the owners corporation and is not required for a purpose specified in subsection (1); and must give the developer written notice of the completion of the rectification of the defective building work. A failure to do so may incur a maximum penalty of 10 penalty Units
 - a. Subsection (3) has been omitted; and
 - b. Subsection (5) omit "any part of a building bond" and inserts "any amount secured by a building bond that has been paid to the owners corporation".

Section 210A Cancellation of building bond

- f) The Secretary may release the developer from the bond, if the interim report does not identify any defects, or if some of the amount has been claimed and both the owners corporation and developers agree to cancel the remaining amount;

Section 211A Debt recovery if building bond not provided or insufficient

- g) If the building bond given by the developer is insufficient to cover the amount required to be secured, the Secretary may recover the required amount in court as a debt from a developer. The owners corporation may then claim from the Secretary;
 - a. "...Section 211A Debt recovery if building bond not provided or insufficient
 - (1) The Secretary may recover from a developer, as a debt in a court of competent jurisdiction any amount required to be secured by a building bond given by the developer to the Secretary under this Part if –
 - (a) The building bond has not been given to the Secretary, or
 - (b) The building bond has been given to the Secretary but the amount secured by the building bond is less than the amount required under this Part.

- (2) An owners corporation may claim from the Secretary the whole or part of an amount recovered under this section for payment to the owners corporation..."

Please refer to clauses (3)-(6) for modifications of claims, Secretary Refusals and actions an owners corporation must comply with to succeed in a section 211A debt recovery claim.

Part 11, Division 3A: Sections 211B to 211M

- h) The Amending Act grants new powers of investigation and enforcement under Part 11 of the Act, an authorised officer may:⁴
1. by notice in writing to a person require them to provide information or records;
 2. require a person or the director of a corporation to answer their questions, if they suspect this person has knowledge about Part 11 matters;
 3. enter premises at any reasonable time, with or without a search warrant, and do certain activities: make examinations and inquiries, direct a person to produce records, examine and inspect records, copy records, and seize anything suspected of being connected with an offence. Where the premises are predominantly residential, a warrant or the consent of the occupier is required for entry;
 4. obtain a warrant to enter and search premises for evidence of contravention of Part 11; and
 5. penalties for refusing to comply give rise to penalties up to \$4,400 for a corporation, or \$2,200 for other cases. This is unless a reasonable excuse can be shown i.e. client legal privilege or privilege against self-incrimination.
- i) Building inspectors are protected from action, liability or claim where they act in good faith and for the purposes of their Part 11 functions. However, professional associations will have power to impose conditions on the functions of building inspectors.

Other minor amendments & insertions:

Amended:

- j) Section 194 – Obligations of developer to appoint building inspector or notify Secretary;
- k) Section 196 – when building inspector for interim inspection arranged by Secretary;
- l) Section 208 – Form of building bond;
- m) Section 211 – Tribunal may make orders as to access and contract price;
- n) Section 213 – Review of decisions; and
- o) Section 214 – Regulations.

Insertions:

- p) Section 198A – Documents to be provided to building inspector;
- q) Section 213A – Liability of inspectors and persons acting under direction of inspectors; and
- r) Section 213B – Liability of professional associations in respect of accreditation functions.

5. Regulations – Part 8 Building Defects

The aim of the amendment to the *Strata Schemes Management Regulation 2016* (the Regulation) is to ensure that it aligns with the objectives of the Act. Namely, making the strata laws simpler and more certain for all parties involved, while improving the governance of the scheme and developing better ways to manage buildings, money and disputes.

The amendments to the Regulation seek to:

- a) ensure sufficient consumer protection;

⁴ *Strata Schemes Management Act 2015*, Part 11 Division 3A.

- b) increase the level of transparency and accountability between the parties, especially transparency of Developers;
- c) provide fair, accessible and practical democratic processes;
- d) encourage self-governance; and
- e) realising the purpose of the different types of schemes available and ensuring that the Regulations and Act are clear on its objectives.

Key Amendments:

- i) **Sections 45 Persons qualified to be appointed as building inspectors & 45A Register of members of strata inspector panel**
For defect inspections, a building inspector must be from a strata inspector panel from a list of approved organisations listed in the regulations.
- ii) **Section 46A Documents to be provided to building inspector by developer**
In light of section 198A(10)(b) of the Act, the list of documents that must be handed over to building inspector by the developer has been inserted to ensure all relevant documents are provided in order for the building inspector to adequately inspect for any building defects.
- iii) **Section 50 Contract price for determining building bond**
Pursuant to section 189 of the Act, the contract price for building work is to be the price set out in a cost report if there are no written contract or the parties to the building are connected persons. The cost report is to be prepared by a qualified quantity surveyor.
- iv) **Sections 53 Application to pay amount secured by the building bond to owners corporation & 55 Payment of building bond**
For the purposes of section 209 of the Act, the developer must provide a building bond of 2 per cent of the contract price for the building works on a new apartment. The bond must be used towards defect rectification and both parties are given 14 days notice before any money is released.

Project Name:	
Name of Party:	
Date of Questionnaire:	

NOTE: Party means the relevant Subcontractor or Contractor who has completed the Questionnaire

LOW RISK ENVIRONMENT

1.	<p>Is the work deemed to be rectification of work (under a Contract) of an existing building or structure which involves the removal of an aluminum composite panel ('ACP') or banned product/system or other non-compliance with Australian Standards or the Building Code?</p> <p><input type="checkbox"/> YES</p> <p><input type="checkbox"/> NO</p>
2.	<p>Are the rectification works to be based on a third party consultant design and/or development consent?</p> <p><input type="checkbox"/> YES</p> <p><input type="checkbox"/> NO</p>
3.	<p>Was the cladding product or system found to be non-compliant with either:</p> <p>(a) Legislative requirement;</p> <p>(b) Audit of an Occupation Certificate; or</p> <p>(c) Product Safety Legislation?</p> <p><input type="checkbox"/> YES</p> <p><input type="checkbox"/> NO</p>
<p><i>Deemed to be Low Risk</i> <input type="checkbox"/></p>	

MEDIUM TO HIGH RISK

4.	<p>Is the counterparty to the Contract a Primary (Major Works) Contractor, Building Owner/Principal Client or Facilities/Project Manager?</p> <p><input type="checkbox"/> YES</p> <p><input type="checkbox"/> NO</p>
5.	<p>Does the Contract require the Party to provide design services?</p> <p><input type="checkbox"/> YES</p> <p><input type="checkbox"/> NO</p>