

## New Strata Building Bond and Inspection Scheme

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# New Strata Building Bond and Inspection Scheme

## Relevant Legislation

***Strata Schemes Management Act 2015 (NSW)***  
***Strata Schemes Management Regulation 2016 (NSW)***

## Critical Event

**From 1 January 2018, developers will be required to deposit a sum equating to 2% of the construction contract price as a bond to the Secretary which is held for and on behalf of the Owners Corporation in circumstances where the Owners Corporation is required to pay for the rectification works or completion of incomplete works.**

## Partners

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## Disclaimer

This paper constitutes a summary of the information of the subject matter covered. This information is of a general nature and is not intended to be nor should it be relied upon as legal or any type of professional advice.

## New Strata Building Bond and Inspection Scheme

### Overview of Legislative Reforms

- 1 The Strata Building Bond and Inspection Scheme was introduced in order to provide Owners Corporations with protection from unscrupulous builders and/or developers.
- 2 The scheme requires the developer or builder to deposit a sum equating to 2% of the construction contract price as a bond to the Secretary which is held in an account controlled by the Secretary. The bond money is then accessed by the Secretary on behalf of the Owners Corporation in circumstances where the Owners Corporation is required to pay for the rectification works or completion of incomplete works (**Scheme**).
- 3 The Scheme is encapsulated in Division 3 of the *Strata Schemes Management Act 2015* (NSW) (**Act**) and Part 8 of the *Strata Schemes Management Regulation 2016* (NSW) (**Regulation**). For ease of reference, the relevant provisions of the Act and Regulation are extracted in the Schedule at the end of this note.
- 4 The Scheme applies where a builder and developer enter into a construction contract from **1 January 2018**.

### Operation of Scheme

- 5 The Scheme applies to building works on residential or partly residential strata properties that are four or more storeys. The Home Building Compensation Fund covers residential or partly residential strata properties that are under four storeys.
- 6 The Scheme also includes a building bond and mandatory defect inspection report component. It proposes to provide a structured and proactive process that resolves building disputes quickly and cost effectively.
- 7 The purpose of the Scheme is to increase consumer protections available to Owners Corporations by securing a Bond which is applied to cover the costs of rectifying incomplete and defective building work within the two year statutory warranty period.
- 8 A number of parties will be affected by the Scheme, including:
  - (a) Developers;
  - (b) Builders (contracted by the developer);
  - (c) Owners Corporations;
  - (d) Strata Inspector Panel which is made up of nominated bodies [as specified in the Regulations] through which a building inspector can be selected; and
  - (e) Building Inspectors, being members of the Strata Inspector Panel.

### Stages in the Process

- 9 The Scheme can be broken down into key stages, including:
  - (a) Preparing to lodge the building bond;
  - (b) Bond lodgment;
  - (c) Appointing a building inspector;
  - (d) Interim inspection and report;
  - (e) Final inspection and report;

- (f) Payment of bond; and
- (g) Completing the process.

### **Preparing to Lodge the Building Bond**

- 10 Once a builder and developer enter into a contract to construct a strata scheme of four or more storeys, the developer should prepare to lodge the building bond equal to 2% of the contract value of the work.

### **Bond Lodgment**

- 11 The developer must upload the following to the Scheme's online portal when giving a building bond to the Secretary:
- (a) the lodgment form;
  - (b) building bond (i.e. a bank guarantee or a 'bond');
  - (c) supporting documents and information; and
  - (d) the administration fee of \$1,500.
- 12 The Secretary then receives, verifies and accepts the original building bond (i.e. a bank guarantee or a 'bond'), which is required before an occupation certificate can be issued.

### **Appointing a Building Inspector**

- 13 The developer sources a building inspector through the Strata Inspector Panel. The building inspector must be independent of the developer. The developer can be penalised up to 200 penalty units [being, \$22,000]<sup>1</sup> for failing to disclose any connection with the building inspector to the Secretary. Likewise, the building inspector can be penalized up to 100 penalty units [being, \$11,000<sup>2</sup>] for failing to disclose any connection with the developer.
- 14 The developer must notify the Secretary and the Owners Corporation of the proposed appointment of the building inspector. The Owners Corporation then approves or rejects the building inspector appointment.
- 15 The Secretary will appoint an independent building inspector, if:
- (a) the developer fails to organise for one to be appointed; or
  - (b) the Owners Corporation rejects the building inspector that the developer seeks to appoint.
- 16 The building inspector then arranges a date with the Owners Corporation to inspect the strata property. At all stages where a building inspector is used in the process, the developer pays for their work.

### **Interim Inspection and Report**

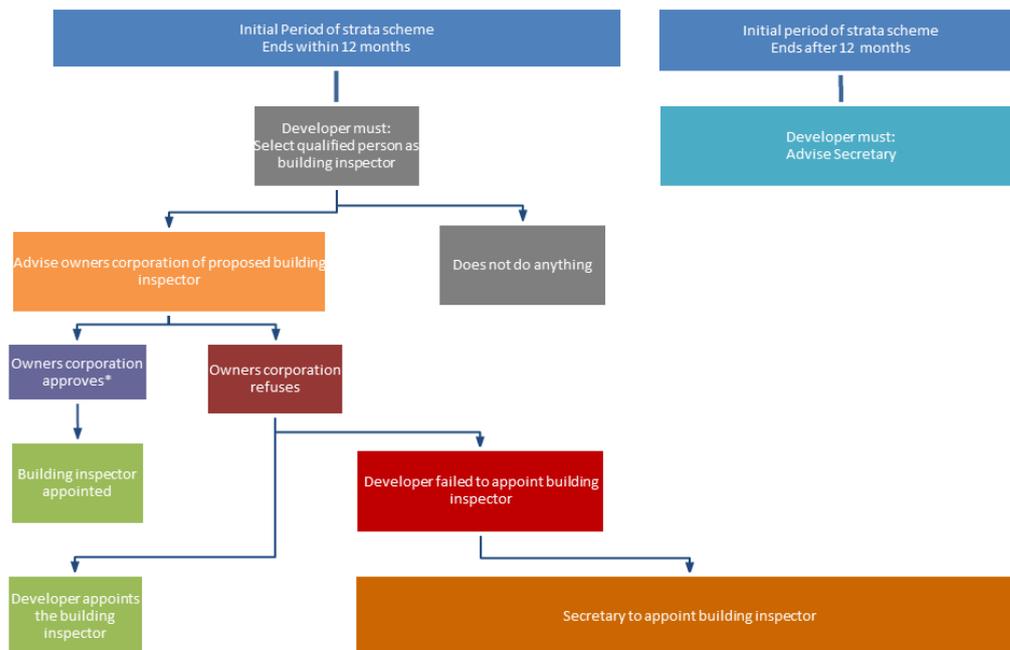
- 17 The building inspector conducts their first inspection of the strata property and completes a report identifying any defective building work. This happens between 15 and 18 months after the building work has been completed.
- 18 The Owners Corporation, developer, builder responsible for any defective work and the Secretary receive access to the report.

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<sup>1</sup> Section 17 of the *Crimes (Sentencing Procedure) Act 1999* (NSW) relevantly provides that "Unless the contrary intention appears, a reference in any Act or statutory rule to a number of penalty units (whether fractional or whole) is taken to be a reference to an amount of money equal to the amount obtained by multiplying \$110 by that number of penalty units."

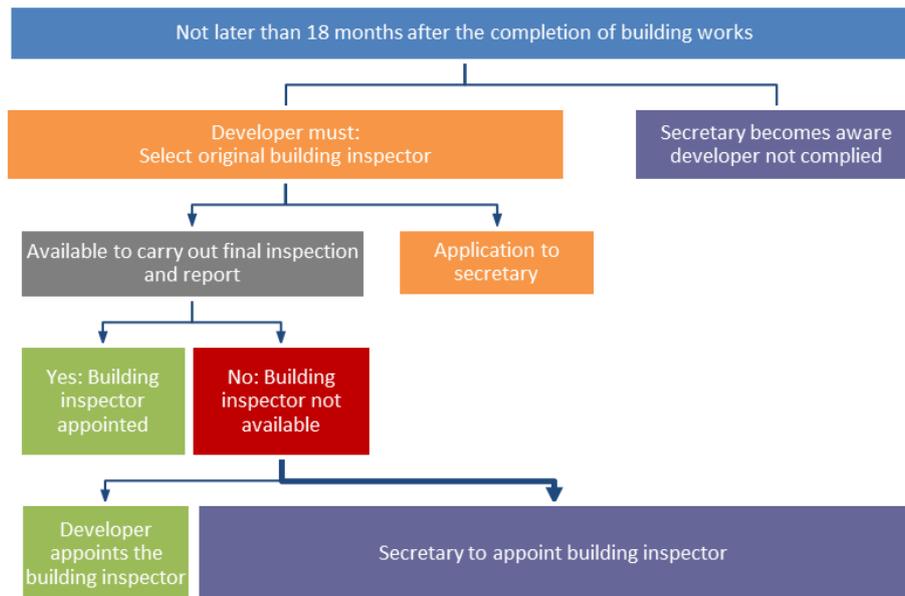
<sup>2</sup> *Ibid.*

- 19 If no defects are identified, the bond may be released to the developer - **two years after the date of completion** (not at 18 months when the interim report is provided by the building inspector).
- 20 If there are defects, the builder responsible for the defective work must rectify them. The developer must also organise the building inspector to conduct a final inspection.
- 21 The developer must advise the Secretary if the original building inspector is unavailable, or make an application to the Secretary to appoint a building inspector. The Secretary appoints the new building inspector and notifies the owners corporation and developer of the appointment.
- 22 We set out below a diagram setting out the Interim Inspection Process



**Final Inspection and Report**

- 23 The building inspector arranges with the Owners Corporation to conduct a final inspection of the property. This happens between 21 and 24 months after the building work has been completed.
- 24 The building inspector provides a final report to the developer, the Owners Corporation, builder responsible for any defective work and the Secretary. This report will assess whether the defects identified in the interim report have been fixed.
- 25 We set out below a diagram setting out the Final Inspection Process.



### Payment of Bond

- 26 If there are no defects, the bond is released in full to the developer.
- 27 If there are defects:
- 28 Step 1:
- (a) the cost to rectify the defects must be agreed to by both parties. The Secretary will then claim that amount from the issuer of the building bond for payment to the Owners Corporation, or
  - (b) the developer can agree to release part or all of the bond money to the Owners Corporation.
- 29 Step 2:
- (a) in the event that an agreement is not reached between the developer and Owners Corporation, the Secretary will appoint a quantity surveyor to determine the cost to rectify based on the identified defective building work in the final report.

### Completing the Process

- 30 The Secretary facilitates the release of the bond money. The Owners Corporation must use any money they receive to fix the defects identified. After the defects are fixed, any money left over must be returned to the developer.
- 31 There is an alternative review process if the Owners Corporation or developer disagrees with how much Bond money, if any, is returned to the developer or paid to the Owners Corporation.

### Observations concerning the operation of the Scheme

- 32 Whilst the Scheme has only recently commenced, we set out our initial observations as to the potential operation of the Scheme. We intend to supplement this paper in due course.

### Issues for Developers

- 33 There is the risk that developers may endeavour to “price” the cost of the Bond when setting the price for apartments in an attempt to pass the cost of the Bond onto purchasers [vis-à-vis the ultimate members of the Owners Corporation].
- 34 With reference to s. 207(1) of the Act and reg. 52 of the Regulations, it may be in the developer’s best interest to provide the building bond and accompanying building and contract documents as

early in time as possible to avoid having to pay a larger bond because of any potential increase in the contract price caused by variations.

- 35 Section 195 of the Act requires that the building inspector's appointment be approved by the Owners Corporation. This provision provides the Owners Corporation with extremely broad powers to refuse the appointment<sup>3</sup> and suggest that an Owners Corporation could "shop" for a building inspector that may overvalue the cost of rectification works, thus depleting the 2% Bond in full.

#### Issues for Builder

- 36 The builder must only enter the lot at a time that is reasonable in the circumstances or at a time agreed with the owner or occupier and that person(s) must not, without reasonable excuse, refuse access to a builder to the strata scheme<sup>4</sup>. The Act, however, does not specify what remedy, if any, is available to the builder in circumstances where access is restricted or refused.

#### Issues for Owners Corporations

- 37 In the event that an interim report does not identify any defective building work, the Secretary is not required to arrange for a final inspection and report<sup>5</sup>.
- 38 As discussed below, the Scheme operates exclusively of any building claim under the HBA and any other court proceedings relating to the building work. In these circumstances:
- (a) the Tribunal or Court will be required to take the building inspector's reports into consideration but any decision made is not required to be made solely on these reports;
  - (b) in light of this, the developer and Owners Corporation may each obtain further expert evidence; and
  - (c) the Tribunal or Court take into consideration three potentially competing reports and, subject to the issues identified in those reports, make further monetary orders or work orders.

#### Issues for Building Inspectors

- 39 In the event that the Owners Corporation refuses the developer's proposed building inspector within the 12-month timeframe, the developer will be given the right to appoint a building inspector. There may potentially be, in this situation, a conflict of interest between the developer and/or builder and the building inspector, particularly in circumstances where there is a pre-existing relationship between the parties which they have not disclosed adequately or at all to the Secretary.

#### Operation of the Scheme with the provisions of the *Home Building Act 1989* (NSW)

- 40 The operation of the Scheme does not prevent an Owners Corporation from commencing proceedings in the Tribunal or Court against the developer and/or builder for breach of statutory warranties under the HBA.
- 41 The Scheme may have the unintended effect of watering down s. 48MA of the HBA being, that the preferred outcome is for the developer and/or builder to return to the property to rectify the defects because it may leave little or no incentive for a developer or builder to rectify defects in circumstances where the Owners Corporation has accessed and applied the Bond. This is contrary to the intended effect of s. 48MA of the HBA.

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<sup>3</sup> Section 195(3) of the Act relevantly provides that "An owners corporation may refuse to approve the appointment of a building inspector on any grounds."

<sup>4</sup> See s. 206(3) and (5) of the Act.

<sup>5</sup> See s. 200(4) of the Act.

## Contact Us

If you require any further information or advice in relation to the effect of the matters referred to in this paper, please do not hesitate to contact us.

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## Schedule of Relevant Legislation

### *Strata Schemes Management Act 2015 (NSW)*

#### Part 11 – Building Defects

##### Division 1 – Preliminary

##### 189 Definitions

(1) In this Part:

"building bond" --see section 207 (1).

"building inspector" --see section 193 (1).

"contract price" means the price determined as the contract price in accordance with the regulations.

"developer" means the developer of the strata scheme by whom or on whose behalf building work to which this Part applies was carried out.

"final report" means a report prepared under section 201.

"interim report" means a report prepared under section 199.

"residential building work" has the same meaning as it has in the Home Building Act 1989.

##### 190 Interpretation Provisions – Building Work

(1) In this Part:

"builder responsible for defective building work" means:

- (a) the person (the "principal contractor") who contracted to do the building work and who contracted with another person (a "subcontractor") to do the work for the principal contractor, or
- (b) the principal contractor, if the principal contractor did not contract with a subcontractor to do the work.

"building work" means any work involved in, or involved in coordinating or supervising any work involved in:

- (a) the construction of a building, or
- (b) the making of alterations or additions to a building, or
- (c) the repairing, renovation, decoration or protective treatment of a building.

"defective building work" means building work that:

- (a) is residential building work done in such a way that it constitutes a breach of a statutory warranty applicable to the work under Part 2C of the Home Building Act 1989, or
- (b) is building work done in such a way that it would constitute such a breach if the building work were residential building work.

(2) For the purposes of this Part, the "completion of building work" to which this Part applies occurs on the date specified for the completion of residential building work for the construction of a new building for a strata scheme in the Home Building Act 1989 (whether or not the work is

residential building work) or on the occurrence of some other event that is prescribed by the regulations as constituting completion of the work.

### **191 Building Work to which Part Applies**

- (1) This Part applies to building work carried out on a building, or a part of a building, that is part of the parcel of a strata scheme, being work that is:
  - (a) residential building work, or
  - (b) carried out on a building, or a part of a building, used or proposed to be used for mixed use purposes that include residential purposes.

The parcel of a strata scheme includes common property and lots in a strata scheme.

- (2) This Part applies to building work only if the building work was carried out for the purposes of, or contemporaneously with, the registration of a strata plan or a strata plan of subdivision of a development lot.
- (3) This Part does not apply to building work if the work is subject to the requirement to obtain insurance under Part 6 of the *Home Building Act 1989* in relation to the work or is not subject to that requirement only because the contract price does not exceed the amount referred to in section 92 (3) of the *Home Building Act 1989*.
- (4) The regulations may prescribe additional building work to which this Part does not apply.
- (5) (Repealed)

### **192 Owners Corporation Decisions**

- (1) The approval or consent of an owners corporation under this Part is to be given by a resolution of the owners corporation at a general meeting.

A resolution at a meeting is to be determined by a simple majority (see clause 14 (1) of Schedule 1). A developer, or lessor of a leasehold strata scheme, is not entitled to vote, or exercise a proxy vote, on a matter concerning building defects (see clause 15 of Schedule 1).

## **Division 2 – Inspection Reports**

### **193 Building Inspectors**

- (1) In this Part, "building inspector" means a person appointed for the purposes of this Part as a building inspector for building work.
- (2) A person is qualified to be appointed as a building inspector only if the person is a member of a class of persons prescribed by the regulations for the purposes of this section.

### **194 Obligations of Developer**

- (1) If the initial period of a strata scheme ends not later than 12 months after the completion of building work, the developer of the strata scheme must within that period of 12 months:
  - (a) appoint a qualified person as a building inspector to carry out an inspection of, and to report on, the building work and give the Secretary written notice of the appointment not later than 14 days after making the appointment, or
  - (b) if the developer fails for any reason to appoint a building inspector within that period of 12 months, give the Secretary written notice of the fact not later than 21 days after the end of that period.

Maximum penalty: 200 penalty units.

- (2) If the initial period for a strata scheme does not end within 12 months after the completion of building work, the developer of the strata scheme must give the Secretary written notice of that fact not later than 21 days after the end of that period.

Maximum penalty: 200 penalty units.

### **195 Approval of building inspector appointment by owners corporation**

- (1) The developer of a strata scheme must not appoint a building inspector under section 194 to carry out an inspection and to report on building work unless the appointment is approved by the owners corporation by a resolution at a general meeting of the owners corporation.

Maximum penalty: 200 penalty units.

- (2) If a building inspector proposed to be appointed by a developer to carry out any such inspection has been employed by, or by a contractor of, the developer at any time within the prescribed period preceding the proposed appointment, the developer and the proposed building inspector must disclose that fact to the owners corporation before the owners corporation determines whether or not to approve the appointment.

Maximum penalty: 200 penalty units. Notice of other connections is also required to be given to the owners corporation under section 197 (4).

- (3) An owners corporation may refuse to approve the appointment of a building inspector on any grounds.
- (4) The owners corporation must, not later than 14 days after deciding to approve or refuse to approve the appointment of a building inspector by a developer, give the developer and the Secretary written notice of the decision.

Maximum penalty: 5 penalty units.

### **196 When Building Inspector for Interim Inspection Arranged by Secretary**

- (1) On notification by a developer that the developer has not appointed a building inspector in accordance with section 194 or if the Secretary otherwise becomes aware that a developer has not done so:
- (a) the Secretary is to arrange for the appointment of a qualified person as a building inspector to carry out an inspection of, and to report on, the building work in accordance with this Part, and
  - (b) must give written notice of the appointment to the developer and the owners corporation as soon as practicable after the appointment is made.

The regulations may provide for a fee for an appointment by the Secretary, see section 204.

- (2) An owner of a lot in a strata scheme who objects to an approval of the appointment of a building inspector by the owners corporation may, not later than 14 days after the approval, give the Secretary written notice of the objection and the grounds for the objection.
- (3) On receiving the objection, the Secretary may, if the Secretary thinks it appropriate in the circumstances and the building inspector has not carried out an interim inspection:
- (a) arrange for the appointment of another qualified person as the building inspector to carry out an inspection of, and to report on, the building work in accordance with this Part, and
  - (b) give written notice of the appointment to the developer and the owners corporation as soon as practicable after the appointment is made.
- (4) The Secretary must give written notice of a decision not to arrange the appointment of a building inspector to the person who made the objection, the developer, the owners corporation and the building inspector approved by the owners corporation.
- (5) The appointment of a building inspector arranged by the Secretary under this Part is not required to be approved by the owners corporation.

**197 Building Inspector must not be Connected with Developer**

- (1) The developer of a strata scheme must not appoint a building inspector to inspect building work for the scheme if the building inspector is, or was at any time in the 2 years immediately before the appointment, connected with the developer. Maximum penalty: 200 penalty units.
- (2) In addition to the circumstances set out in section 7, a building inspector is "connected" with a developer if the inspector:
  - (a) has been involved in the design or any aspect of the construction or certification of the building work or any part of the building work to be reported on, or
  - (b) is connected with any person who has been so involved, or
  - (c) has a pecuniary interest in any aspect of the building work.
- (3) A building inspector is not connected with a developer merely because the inspector has been or is appointed by the developer to carry out a report under this Part on other building work.
- (4) A person who is connected with a developer of a strata scheme and who is proposed for appointment as a building inspector under this Part in connection with that scheme must give written notice of the connection to the person making or arranging the appointment, and to the owners corporation before the appointment.

Maximum penalty: 100 penalty units.

**198 Obligations of Building Inspector**

- (1) A building inspector carrying out functions under this Part cannot and does not represent the interests of the developer of a strata scheme and has a duty to act impartially in carrying out the functions of a building inspector under this Part. This subsection has effect despite any condition of the appointment of the building inspector and whether or not the inspector was appointed by the developer.
- (2) A building inspector must not, on an understanding that the building inspector will act otherwise than impartially in the course of the building inspector's functions as a building inspector under this Act, seek or accept, or offer or agree to accept, any benefit of any kind, whether on the building inspector's own behalf or on behalf of any other person.

Maximum penalty: 200 penalty units.

- (3) A person must not, on an understanding that a building inspector will act otherwise than impartially in the exercise of the building inspector's functions as a building inspector under this Act, give, or offer to give, any benefit of any kind, whether to the building inspector or any other person.

Maximum penalty: 200 penalty units.

**199 Interim Report**

- (1) A building inspector appointed under this Division is to carry out an inspection of the building work, and provide an interim report, not earlier than 15 months and not later than 18 months after the completion of the building work.
- (2) The interim report must:
  - (a) be in the form and contain the matters prescribed by the regulations for the purposes of this section, and
  - (b) without limiting paragraph (a), identify any defective building work of a kind required by the regulations to be reported on, and
  - (c) if reasonably practicable, identify the cause of that defective building work.

**200 Obligation to Arrange Final Inspection and Report**

- (1) The developer of a strata scheme must, not later than 18 months after completion of the building work:
- (a) arrange for the building inspector who prepared the interim report on the building work to carry out a final inspection of, and provide a final report on, the building work and give written notice to the Secretary of the arrangement not later than 14 days after making the arrangement, or
  - (b) if the original building inspector is not available, give the Secretary written notice of that fact not later than 14 days after becoming aware that the building inspector is not available, or
  - (c) make an application to the Secretary under this section.

Maximum penalty: 200 penalty units.

- (2) On notification under this section that the original building inspector is not available or if the Secretary otherwise becomes aware that a developer has not complied with subsection (1), the Secretary:
- (a) is to arrange for the appointment of a qualified person as a building inspector to carry out the final inspection of, and provide the final report on, the building work, and
  - (b) must give written notice to the developer and the owners corporation of the appointment as soon as practicable after it is made.
- (3) The Secretary is not required to arrange for a final inspection and report under this section if the interim report was prepared by a building inspector arranged by the Secretary and the report did not identify any defective building work.
- (4) The Secretary may, on application by a developer, determine that the developer is not required to arrange for a final report under this section if the interim report did not identify any defective building work and the Secretary thinks it appropriate in the circumstances of the case to make the determination.
- (5) The Secretary must give written notice of any decision that a final inspection and report is not required to the owners corporation and the developer not later than 28 days after the decision is made.
- (6) In any case in which a final report is not required, the interim report is taken to be the final report for the purposes of this Part.

**201 Final Report**

- (1) A building inspector appointed to carry out a final inspection is to carry out a final inspection of the building work, and provide a final report, not earlier than 21 months and not later than 2 years after the completion of the building work.
- (2) The final report must:
- (a) be in the form and contain the matters prescribed by the regulations for the purposes of this section, and
  - (b) without limiting paragraph (a), identify defective building work identified in the interim report that has not been rectified, and
  - (c) identify any defective building work arising from rectification of defective building work previously identified in the interim report, and
  - (d) specify how the defective building work identified in the report should be rectified.
- (3) The final report must not contain matters that relate to defective building work not identified in the interim report, other than work arising from rectification of defective building work identified in the interim report.

**202 Persons Who are to be Provided with Copies or Notice of Reports**

- (1) A building inspector must give a copy of an interim report or a final report to the following persons not later than 14 days after completing the report:
  - (a) the developer,
  - (b) the owners corporation, if the initial period has ended,
  - (c) the Secretary,
  - (d) the builder responsible for any defective building work identified in the report.
- (2) An owners corporation must give written notice to the owners of lots in the strata scheme of the receipt of an interim report or a final report on building work in connection with the scheme not later than 14 days after receiving the report.
- (3) The notice must contain the particulars, if any, prescribed by the regulations for the purposes of this section.

Maximum penalty: 5 penalty units.

**203 Powers of Building Inspector**

- (1) A building inspector appointed to prepare a report under this Division may enter and inspect any part of the parcel of the strata scheme.
- (2) The building inspector must give at least 14 days written notice to the owners corporation and the owner and any occupier of any affected lot of an intention to enter any part of the parcel of the strata scheme.
- (3) The owners corporation, any person who has exclusive use of common property, a strata managing agent, any building manager or manager of the common property and any owner or occupier of a lot must provide any assistance that is reasonable to enable an inspection to be carried out in accordance with this Division.
- (4) A person must not, without reasonable excuse, refuse a building inspector access to any part of the parcel of a strata scheme or a lot in the strata scheme, or obstruct or hinder a building inspector, in the exercise of the inspector's functions under this Act.

Maximum penalty: 10 penalty units.

**204 Costs of Reports and Appointment**

- (1) The costs of obtaining an inspection and report by a building inspector under this Division are to be borne by the developer, whether or not the building inspector was appointed by the developer.
- (2) The regulations may provide for the fees that may be charged for an inspection or a report under this Division.
- (3) The regulations may provide for a fee for the arrangement by the Secretary of the appointment of a building inspector under this Division.

**205 Effect of Inspection Report**

- (1) A report prepared under this Division must be considered by the 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 report, if the report is brought to the attention of the Tribunal or the court in the proceedings.
- (2) The report does not bind the Tribunal or court.

**206 Rectification of Defects**

- (1) The builder who is responsible for defective building work, or an employee, agent or contractor of any such person, (the "builder") may, at any time after the completion of the building work, enter any part of the parcel of the strata scheme that the person may reasonably require for the purpose of or in connection with rectifying the building work.

See sections 122 and 123 for other powers to enter the parcel of a strata scheme.

- (2) The builder must give at least 14 days written notice to the owners corporation, the developer and the owner and any occupier of any affected lot of an intention to enter any part of the strata parcel for the purpose of or in connection with rectifying defective building work.
- (3) A builder who enters a lot after giving notice in accordance with this section may enter the lot only at a time that is reasonable in the circumstances or at a time agreed with the owner or, if the owner is not the occupier of the lot, the occupier.
- (4) The builder is not bound by any provision of a report under this Division for the purpose of or in connection with rectifying defective building work.
- (5) A person must not, without reasonable excuse, refuse access to a builder to any part of the parcel of the strata scheme or a lot in a strata scheme if that access is permitted by this section.

Maximum penalty: 10 penalty units.

- (6) The duty under section 18BA of the *Home Building Act 1989* to allow reasonable access does not require a builder to be given reasonable access to the parcel of a strata scheme at any time while a building inspector is carrying out a final inspection under this Part on any part of the parcel.
- (7) If the builder who is responsible for defective building work is unavailable because the builder has died, is insolvent, has ceased to exist or is unavailable for any other reason prescribed by the regulations for the purposes of this section, the developer may appoint another person to rectify building work under this section. Any such person is taken to be the builder for the purposes of this section.

**Division 3 – Building Bonds****207 Bond to be Given**

- (1) The developer of a strata scheme must give the Secretary a security (a "building bond") for building work to which this Part applies before an occupation certificate is issued under the *Environmental Planning and Assessment Act 1979* for any part of a building for which the building work was done.
- (2) The amount secured by a building bond is to be 2% of the contract price for the building work.
- (3) The purpose of the building bond is to secure funding for the payment (up to the amount of the bond) of the costs of rectifying defective building work identified in a final report under this Part.
- (4) If the building work to which this Part applies comprises only part of the building work to which a contract price applies, the amount secured is to be 2% of the part of the contract price applicable to the building work to which this Part applies.
- (5) A developer must not fail to comply with this section.

Maximum penalty: 200 penalty units.

**208 Form of Building Bond**

- (1) A building bond may be in one or more of the following forms:
  - (a) a bank guarantee,
  - (b) a bond,

- (c) another form of security that is prescribed by the regulations for the purposes of this section.

## **209 When Amount Secured by Building Bond Payable**

- (1) The whole or part of the amount secured by a building bond may be claimed or realised by the Secretary for payment as follows:
  - (a) to the owners corporation to meet the costs of rectifying defective building work identified in the final report on the work, if the report identifies the defective building work,
  - (b) to the owners corporation, with the consent of the developer, on application to the Secretary by the owners corporation and the developer.
- (2) An application under subsection (1) (b) must be made within the period prescribed by the regulations for the purposes of this section.
- (3) A building bond must be claimed or realised under this section:
  - (a) 2 years after the date of completion of building work for which it is given, or
  - (b) within 60 days after the final report on the building work is given to the Secretary by the building inspector,whichever is the later.
- (4) The developer must take any necessary steps to enable the Secretary to claim or realise an amount of building bond given by the developer and required for payment in accordance with this Division.

Maximum penalty: 10 penalty units.
- (5) The Secretary may refuse to claim or realise an amount, or reduce the amount otherwise payable, under this section if the Secretary is satisfied that the developer or the builder responsible for defective building work was unreasonably refused access to the strata parcel for the purposes of rectifying that work.
- (6) The Secretary must give the owners corporation and the developer of a strata scheme written notice of any proposed payment under this section in relation to the strata scheme.

## **210 Use of Amounts Secured by Building Bond**

- (1) Purposes for which bond amount may be used an owners corporation for a strata scheme that is paid the whole or part of an amount secured by a building bond must, within a reasonable time, use the amount paid:
  - (a) for or in connection with rectifying the defective building work identified in the final report (whether or not the work affects the common property or any other part of the parcel), or
  - (b) for costs related to the rectification.
- (2) An amount secured by a building bond cannot be used to meet the costs of an inspection or a report under Division 2, including any fee for the appointment of a building inspector by the Secretary, except in the circumstances (if any) specified by the regulations for the purposes of this section.
- (3) Repayment of excess amounts to developer An owners corporation must repay to the developer any amount of a building bond that 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.

Maximum penalty: 10 penalty units.
- (4) Owner not entitled to building bond This Act does not confer on the owner of a lot any entitlement to be paid any part of an amount secured by a building bond that is paid in respect of defective building work affecting the owner's lot.

- (5) Payments with consent not affected This section does not prevent the owners corporation from retaining any part of a building bond, and using it for any purposes, with the consent of the developer.

#### **211 Tribunal May Make Orders as to Access and Contract Price**

- (1) The Tribunal may, on application, make an order requiring the occupier of a lot or part of a lot in a strata scheme or any other person to allow access to the lot or any other part of the parcel for the purpose of or in connection with an inspection under this Part or rectifying defective building work.
- (2) An application under subsection (1) may be made by an owners corporation, the developer, a building inspector or a person entitled to enter any part of a parcel of a strata scheme under section 203 or 206.
- (3) The Tribunal may, on application by an owners corporation, the developer or the Secretary, make an order specifying the amount of the contract price of building work for the purpose only of determining the amount of a building bond.
- (4) An application under this section is to be made to, and determined by, the Supreme Court (and not the Tribunal) if the matter is incidental to other proceedings being dealt with by the Court.
- (5) A determination under this section of the amount of the contract price of building work does not bind a court or tribunal in any other proceedings.

### **Division 4 – Miscellaneous**

#### **212 Variation of Times for Reports and Other Matters**

- (1) The Secretary may, on the Secretary's own motion or on application by the developer, owners corporation or a building inspector, vary the period within which an interim report or a final report is to be provided, or any other action is to be done, under this Part, if the Secretary considers it appropriate to do so in the circumstances of the case.
- (2) The Secretary must give written notice to the developer, owners corporation or building inspector of the following:
- (a) any application under this section,
  - (b) a decision by the Secretary under this section.
- (3) The Secretary is not required to give notice of an application to any person who made the application.

#### **213 Review of Decisions**

- (1) Right to apply for review An interested person may apply to the Secretary for a review of a reviewable decision.
- (2) The following persons are interested persons in relation to a reviewable decision:
- (a) the developer of a strata scheme to which the decision is related,
  - (b) the owners corporation of a strata scheme to which the decision is related,
  - (c) the owner of a lot in a strata scheme to which the decision is related,
  - (d) any other person prescribed by the regulations for the purposes of this section.
- (3) Reviewable decisions The regulations may prescribe decisions under this Part that are to be the reviewable decisions for the purposes of this section.
- (4) Applications An application for a review is to be made in accordance with the regulations.

- (5) Individuals who may carry out reviews An application for a review of a decision is to be dealt with by an individual other than the person who made the decision who is (if the reviewer is not the Secretary) approved by the Secretary.
- (6) The reviewer must be, as far as practicable, an individual:
- (a) who was not substantially involved in the process of making the decision under review, and
  - (b) who is a member of staff of the Department of Finance, Services and Innovation, and
  - (c) who is suitably qualified to deal with the issues raised by the application.
- (7) Powers on review In reviewing a decision, the reviewer is to consider any relevant material submitted by the applicant.
- (8) Following the review of the decision, the reviewer may:
- (a) affirm the decision, or
  - (b) vary the decision, or
  - (c) set aside the decision and make a decision in substitution for the decision that is set aside.
- (9) In exercising a function under subsection (8), a reviewer is taken for all purposes to have the right to exercise the same functions in law that the person who made the decision had in making the decision being reviewed.
- (10) Reviewer to notify relevant decision maker of decision A reviewer must notify the Secretary of the result of, and the reasons for, his or her decision under subsection (8) as soon as is practicable after making the decision.
- (11) Statement of reasons for the purposes of this section, an applicant is notified of the reasons for a decision in a review only if the applicant is given a statement of reasons setting out the following:
- (a) the findings on material questions of fact, referring to the evidence or other material on which those findings were based,
  - (b) the understanding of the reviewer of the applicable law,
  - (c) the reasoning processes that led the reviewer to the conclusions the reviewer made.
- (12) Status of decisions made on review For the purposes of this Act, a reviewable decision that is affirmed, varied or set aside and substituted under this section is:
- (a) taken to have been made by the person who made the original decision (as affirmed, varied or substituted by the reviewer), and
  - (b) taken to have been made on the date under which the applicant is given a notice of the decision under this section.
- (13) No reviews of decisions previously reviewed under this section A person is not entitled to a review under this section of any decision previously reviewed under this section or a decision made under subsection (8).

## **214 Regulations**

- (1) Regulations may be made for or with respect to the following:
- (a) building bonds,
  - (b) the appointment of a building inspector by the Secretary if a building inspector is no longer available or is not qualified or is otherwise not suitable,

- (c) additional circumstances in which the Secretary, rather than the developer, is to appoint a building inspector,
  - (d) information required to be provided to the Secretary by the developer or the owners corporation in relation to building inspectors and other matters arising from this Part,
  - (e) nomination of building inspectors for approval by owners corporations,
  - (f) matters to be disclosed to the owners corporation by a developer seeking approval of a building inspector and the period within which disclosure is to be made,
  - (g) meetings of owners corporations to consider the approval of the appointment of a building inspector,
  - (h) the provision of information to a building inspector for the purposes of an inspection or report,
  - (i) applications to the Secretary for a determination that a final inspection and report are not required,
  - (j) requirements to be observed in relation to the conduct of a review under section 213.
- (2) Without limiting subsection (1) (a), the regulations may provide for the following:
- (a) requirements for the provision and maintenance of a building bond,
  - (b) requirements for additional information or documents to be provided relating to the amount of a building bond,
  - (c) how the contract price is to be determined for the purposes of the amount of a building bond,
  - (d) when a building bond lapses or need not be maintained,
  - (e) procedures relating to applications for, and the payment of, amounts secured by a building bond,
  - (f) the period of notice to be given of a proposed payment of an amount secured by a building bond,
  - (g) fees relating to the provision of building bonds under this Part.

## **215 Relationship of Part to Other Remedies**

- (1) A building bond is payable in respect of defective building work under this Part whether or not:
- (a) Part 2C of the *Home Building Act 1989* applies to the work, or
  - (b) the developer is liable to the owners corporation or the owner of a lot in respect of the work.
- (2) A developer may recover the amount of any building bond paid to an owners corporation in respect of defective building work for which the developer is not otherwise liable from any person against whom the developer has a cause of action in respect of the defective building work.
- (3) Anything done or omitted to be done under this Part does not affect any action that may be taken, or remedy that may be sought, by or in respect of building work under any other law.
- (4) However, any court, tribunal or other body may take into account any payment made, rectification work done or any other action taken in relation to building work under this Part when it is determining a matter relating to the work.

## Relevant Sections of *Strata Schemes Management Regulation 2016 (NSW)*

### 44 Interpretation

- (1) Words and expressions used in this Part have the same meaning as they have in Part 11 of the Act.

### 45 Building Inspectors

- (1) For the purposes of section 193 (2) of the Act, a person who is a member of a strata inspector panel established by any of the following bodies is qualified to be appointed as a building inspector:
- (a) the Housing Industry Association,
  - (b) the Master Builders Association of New South Wales,
  - (c) the Australian Institute of Building,
  - (d) the Australian Institute of Building Surveyors,
  - (e) the Australian Institute of Building Consultants,
  - (f) the Institute of Building Consultants Inc,
  - (g) Engineers Australia,
  - (h) the Australian Institute of Architects,
  - (i) the Association of Accredited Certifiers.

### 46 Disclosure of Previous Employment by Developer

- (1) For the purposes of section 195 (2) of the Act, a building inspector must disclose previous employment by the developer or a contractor of the developer that occurred at any time within the period of 2 years before appointment as a building inspector.

### 47 Interim Reports – Section 199(2) of the Act

- (1) An interim report by a building inspector must be in the form approved by the Secretary and contain the matters specified in the form.

### 48 Final Report – Section 201(2) of the Act

- (1) A final report by a building inspector must be in the form approved by the Secretary and contain the matters specified in the form.

### 49 Notice to Owners of Reports: Section 202(3) of Act

- (1) A notice to owners of the receipt of an interim or final report by a building inspector must contain the following particulars:
- (a) whether the report is an interim or final report,
  - (b) how to obtain an electronic copy of the report.

### 50 Contract Price for Determining Building Bond

- (1) For the purposes of the definition of "contract price" in section 189 of the Act, the contract price for building work is the total price paid under all the applicable contracts for the building work as at the date of issue of the occupation certificate.
- (a) Note: Under section 211 (3) of the Act, the Tribunal may make an order determining the contract price of building work for the purposes of determining the amount of a building

bond.

- (2) However, the contract price for building work is to be the price set out in a cost report prepared by a quantity surveyor who is a member of the Australian Institute of Quantity Surveyors or the Royal Institute of Chartered Surveyors, and is not connected to the developer or the builder, if:
  - (a) there is no written contract for the building work, or
  - (b) the parties to the building contract are connected persons.
- (3) A cost report prepared by a quantity surveyor for the purposes of this clause must include the costs of the following and be accompanied by a certificate by the quantity surveyor that he or she has inspected the as-built drawings and specifications for the strata plan to which the report relates:
  - (a) construction and fit out costs, not including appliance and PC items,
  - (b) demolition and site preparation,
  - (c) excavation,
  - (d) car parking,
  - (e) costs for the common property that is included in the property plan, including landscaping, pools, fencing and gates,
  - (f) professional fees,
  - (g) taxes applied in the calculation of the as-built construction.

## **51 Maturity Dates for Building Bonds**

- (1) A building bond must be able to be claimed or realised for a period of not less than 2 years and not more than 3 years after the date of the occupation certificate for the building work to which it applies.

## **52 Additional Documents to be Lodged with Building Bond**

- (1) A developer must, when giving a building bond to the Secretary, also give the Secretary the following documents and information, in the manner approved by the Secretary:
  - (a) a lodgment form in the form approved by the Secretary,
  - (b) the strata plan number of the strata scheme concerned,
  - (c) the street address of any building to which the bond relates,
  - (d) the name and address of the principal certifying authority for any building work to which the bond relates,
  - (e) an address for service for the developer,
  - (f) an address for service for the owners corporation for the strata scheme,
  - (g) a copy of any documents relevant to the determination of the contract price used to calculate the amount of the building bond,
  - (h) a copy of the contract or contracts for the building work between the developer and the builder,
  - (i) a copy of specifications for the building work, and any variations,
  - (j) a copy of any written warranties relating to the building work,

- (k) a copy of any schedule of non-conforming works relating to the building work,
- (l) a copy of all "issued for construction" and "as-built" drawings and specifications relating to the building work,
- (m) a copy of any schedule of approved samples relating to the building work,
- (n) a copy of any development consent or other consents, approvals or certificates issued under the Environmental Planning and Assessment Act 1979 and relating to the building work,
- (o) a copy of any alternative solutions and fire engineering reports, and the applicable assessment and approval by the principal certifying authority, relating to the building work,
- (p) a copy of any design certificates relating to the building work,
- (q) a copy of Building Code of Australia compliance certificates by each subcontractor for any part of the building work carried out by the subcontractor,
- (r) a copy of any inspection report obtained by the developer or builder relating to the building work.

### **53 Application to Pay Building Bond to Owners Corporation**

- (1) For the purposes of section 209 (2) of the Act, an application to pay a building bond to the owners corporation must be made not later than 14 days before the last day on which the building bond must be claimed or realised under that section.

### **54 Use of Building Bond to Meet Costs of Inspection or Report**

- (1) For the purposes of section 210 of the Act, an amount secured by a building bond may be used to meet the costs of an inspection or a report under Division 2 of Part 11 of the Act, including any fee for the appointment of a building inspector by the Secretary, if:
  - (a) the developer of the strata scheme is bankrupt or insolvent and the costs or any fees have not been paid, or
  - (b) the developer of the strata scheme is dead or cannot be found or failed to comply with any requirement to appoint a building inspector.

### **55 Payment of Building Bond**

- (1) The Secretary must not pay the whole or part of an amount secured by a building bond unless the Secretary has given at least 14 days written notice to the owners corporation, the developer of the strata scheme and the builder of the proposed payment.
- (2) If an application to review a decision to pay the whole or part of an amount secured by a building bond is made in accordance with clause 56, the amount is not to be paid until the application for the review is determined or withdrawn.

### **56 Review of Decisions**

- (1) For the purposes of section 213 of the Act, the following decisions of the Secretary are reviewable decisions:
  - (a) a decision to appoint a building inspector to carry out a final report under section 200 of the Act,
  - (b) a determination under section 200 of the Act that a developer is not required to arrange for a final report,
  - (c) a decision under section 212 of the Act to vary the period within which an interim report or final report is to be provided, or other action is to be done, under Part 11 of the Act,

- (d) a decision that the whole or part of a building bond may be claimed or realised for payment to an owners corporation, developer or other person.
- (2) Despite subclause (1), a decision by the Secretary to claim or realise a building bond for payment is not reviewable if the amount has been paid in accordance with the decision.
- (3) An application for a review of a reviewable decision must be made not later than 14 days after notice of the decision is given by the Secretary to the interested person or, if the interested person is the owner of a lot, to the owners corporation and must:
  - (a) be in writing and signed by the applicant, and
  - (b) specify the decision for which a review is sought and the grounds on which the review is sought, and
  - (c) specify any additional information that is provided by the applicant for the purposes of the review and indicate why the information was not previously provided, and
  - (d) provide an address for giving notice to the applicant of the decision by the Secretary on the review.
- (4) For the purposes of section 213 (2) (d) of the Act, a builder who carried out building work to which a reviewable decision relates, or a builder who is responsible for defective building work to which a reviewable decision relates, is an interested person in relation to the reviewable decision.