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BUILDING DEFECTS – BONDS AND REPORTS

UNDER THE STRATA SCHEMES MANAGEMENT ACT 2015

Adrian Mueller

Partner | Senior Lawyer

B.Com LLB FACCAL

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

**BUILDING DEFECTS – BONDS AND REPORTS
UNDER THE STRATA SCHEMES MANAGEMENT ACT 2015**

What the Act Covers

- The *Strata Schemes Management Act 2015* (Act) contains new laws concerning building defects.
- These new laws are contained in Part 11 of the Act.
- The new laws commenced on 1 January 2018.
- The new laws impose obligations on developers to arrange:
 - An interim defects report;
 - A final defects report;
 - Payment of a building bond.
- The new laws will apply to:
 - Residential strata schemes;
 - Mixed use strata schemes with residential components;
 - New buildings (i.e. Building work carried out by or on behalf of a developer for the purposes of, or contemporaneously with, the registration of a strata plan).
- The new laws will not apply to:
 - Wholly commercial and industrial buildings;
 - Buildings that have or should have Home Building Compensation Fund Insurance (i.e. low rise buildings);
 - Building work for which the building contract was entered before the commencement of the new laws;
 - Building work, for which there is no contract, that was started before the commencement of the new laws.

What Defects Are Covered?

- The new laws in the Act cover defective building work.
- Defective building work is defined in the Act by reference to the *Home Building Act 1989* warranties (i.e. work that is not done with due care and skill).



When Does Time Start to Run?

- Time for events to occur under the Act starts to run from the date of completion of building work.
- Completion of building work is defined in accordance with s3C of the *Home Building Act 1989*.
- Typically, the date of completion of building work will be the date of issue of an occupation certificate authorizing occupation and use of the whole of the building.
- If the building work involves construction of two or more separate buildings there will be separate dates of completion of that building work.

Interim Report

- The developer must appoint an unconnected, qualified building inspector approved by the owners corporation not later than 12 months after completion of the building work to inspect and report to the owners corporation not earlier than 15 months and not later than 18 months after completion.
- If the developer and the owners corporation fail to agree on a building inspector or the developer fails to comply with the requirement to appoint a building inspector, the owners corporation may advise the Secretary of NSW Fair Trading who will appoint a building inspector to carry out an inspection and report.
- The report must:
 - Identify any defective building work;
 - If reasonably practicable, identify the cause of that defective building work;
 - Be in the form and contain the matters prescribed by the Regulations.
- The cost of the interim report is to be borne by the developer.
- The developer will not need to arrange an interim report if the initial period does not expire within 12 months from the date of completion of the building work.

Final Report

- The developer must, not later than 18 months after the building work is completed, arrange for the building inspector who prepared the interim report to do a final inspection and prepare a final report not earlier than 21 months and not later than 2 years after the completion of the building work.
- If the building inspector who prepared the interim report is unavailable, the developer must advise the Secretary of NSW Fair Trading who will appoint another qualified building inspector to prepare the final report.



- If the developer fails to arrange for a building inspector to prepare a final report the owners corporation may notify the Secretary who must appoint a qualified person to provide the final report.
- If the interim report identified no defective building work, the developer can apply to the Secretary for permission to dispense with the need to prepare a final report.
- The final report must:
 - Identify defective building work identified in the interim report that has not been rectified;
 - Identify any defective building work arising from rectification of defective building work identified in the interim report;
 - Specify how the defective building work identified in the report should be rectified;
 - Contain an assessment of the likely cost of rectifying defective work not rectified since the interim report or that arises from rectification of any such work;
 - 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;
 - Be in the form and contain the matters prescribed by the Regulations.

Delivery of Reports

- A building inspector must give a copy of an interim report or a final report not later than 14 days after completing the report to the developer, the owners corporation, if the initial period has ended, the Secretary, and the builder responsible for any defective building work identified in the report.
- 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 not later than 14 days after receiving the report.
- An interim and final report must be considered by a court or tribunal in any building defects claim.
- The Secretary can vary the time to provide an interim or final report.

Cost of Reports

- The developer must pay the costs of obtaining an inspection and report by a building inspector.

Access

- An appointed building inspector may enter and inspect any part of the strata scheme upon giving at least 14 days written notice of intention to enter for the purpose of preparing a report. The owners corporation, the strata manager, the building manager, owners, occupiers and exclusive users must provide reasonable assistance to enable the inspection to take place.



- The builder may enter the strata scheme at any time before completion of a final inspection on the giving of at least 14 days written notice to the owners corporation, the developer, and the owner and occupier of any lot, to rectify any defective building work.
- The Tribunal may make orders requiring any occupier of a lot to grant access for inspection or rectification of defective building work on the application of an owners corporation, developer, building inspector or builder.

Qualifications of Building Inspector

- To be eligible for appointment as a building inspector, a person must be a member of a strata inspector panel established by one of various building industry bodies such as the Master Builders Association of NSW.
- A building inspector must disclose previous employment with, or contractor work for, the developer that occurred at any time within the period of 2 years before appointment as a building inspector.

Building Bonds

- The developer must give the Secretary of NSW Fair Trading a building bond in the sum of 2% of the contract price for the building work before an occupation certificate is issued for the building work.
- The contract price for the building work is the price paid under the contract for that work, or if the work has not been completed, the reasonable estimate of the price payable under the contract for that work.
- The purpose of the building bond is to secure funding for the payment of the cost of rectifying defective work identified in a final report.

Payment Out of Building Bonds

- The whole or part of the building bond is payable as follows:
 - To the owners corporation to meet the cost of rectifying defects identified in the final report.
 - To the developer if there is no defective building work or no further costs for rectification identified in the final report.
 - To the owners corporation, with the consent of the developer, on joint application to the Secretary made within 14 days after the expiry of a period of 2 years from the date of completion of the building work or 60 days after the Secretary is given the final report by the building inspector (whichever occurs later).

- The building bond must be paid out within either 2 years after the date of completion of building work or 60 days after the final report is given to the Secretary by the building inspector, whichever is later.
- The Secretary must not pay a building bond unless the Secretary has given at least 14 days written notice to the owners corporation and the developer of the strata scheme of the proposed payment or any application to review the Secretary's decision to pay the bond has been determined or withdrawn.

Use of Building Bonds

- An owners corporation that has been paid a building bond must:
 - within a reasonable time use the amount paid for or in connection with rectifying the defective building work for which it was received or costs related to the rectification;
 - repay to the developer any amount of a building bond that is not required for such a purpose; and
 - give to the developer written notice of the completion of the rectification work.

Review of Decisions

- Many decisions of the Secretary are reviewable. These include decisions to:
 - appoint a building inspector to carry out a final report;
 - exempt a developer from the need to arrange a final report;
 - vary the period within which an interim report or final report is to be provided, or other action is to be done;
 - release a building bond for payment to an owners corporation, developer or other person.
- 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.
- An application for a review of a decision of the Secretary must be made not later than 14 days after notice of the decision is given by the Secretary to the interested person.
- The application to review a decision of the Secretary must:
 - be in writing and signed by the applicant, and
 - specify the decision for which a review is sought and the grounds on which the review is sought, and

- 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
 - provide an address for giving notice to the applicant of the decision by the Secretary on the review.
- The review is conducted by a member of staff of the Department of Finance, Services and Innovation who was not involved in making the decision under review.

Are Other Rights Affected?

- The provisions in the Act will not affect other rights of an owners corporation in relation to defective work.

Other Matters

- The developer cannot cast a vote in person or by proxy on a motion on a matter concerning building defects.

Adrian Mueller

Partner | BCOM LLB FACCAL
adrianmueller@muellers.com.au

About JS Mueller & Co

JS Mueller & Co has been servicing the strata industry across metropolitan and regional NSW for over 30 years. We are a specialist firm of strata lawyers with in depth and unmatched experience in, and comprehensive knowledge of strata law and levy collection.

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



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