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BUILDING BONDS AND INSPECTION REPORTS – THE NEW REGIME

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BUILDING BONDS AND INSPECTION REPORTS – THE NEW REGIME

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 using materials that are good and suitable).

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 authorising 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.
- The building inspector must report to the owners corporation not earlier than 15 months and not later than 18 months after completion.
- To approve the appointment of a building inspector, the owners corporation must pass a resolution at a general meeting. The owners corporation is entitled to refuse to approve the appointment of a building inspector on any grounds.
- The owners corporation must advise both the Secretary and the developer not later than 14 days of the decision to either approve or refuse the appointment.
- 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 provide an interim report.
- A lot owner is entitled to object to the approval of appointment of a building inspector and the Secretary may appoint an alternative building inspector to prepare an interim 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.
- The building inspector must 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, in which case the interim report is taken to be the final report.
- The final report must:
 - Be in the form approved by the Secretary and contain the matters specified in the form.
 - 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;
 - 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;

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 the Tribunal in determining any building defects claim and by any Court in proceedings relating to the building work, but the reports do not bind the Tribunal or Court.
- 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 for Rectification Work

- 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 responsible for rectification of defective building work may:
 - enter the strata scheme at any time after completion of the building work for or in connection with rectifying defective building work;
 - 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; and
 - enter a lot only at a time that is reasonable in the circumstances or as agreed with the owner or occupier.
- 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.
- The requirement to give reasonable access to the builder does not extend to a time while the building inspector is carrying out a final inspection.
- The builder is not bound by any provision of a report prepared by a building inspector in connection with rectifying defective building work.

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 Home Industry Association,
 - the Master Builders Association of NSW
 - the Australian Institute of Architects
 - and others (see Reg. 45)
- A building inspector must disclose if the building inspector has been “connected” with the developer at any time within the period of 2 years before appointment as a building inspector. This includes:
 - involvement in any design, construction or certification of the building work to be reported on;
 - a connection with anyone so involved;
 - a financial interest in the building work.
- The meaning of “connected” does not include having prepared previous reports for a developer.
- A building inspector cannot and does not represent the interests of the developer of a strata scheme.
- The Act imposes penalties on the building inspector or any other person (which would include the developer and owners corporation) that seeks or accepts or offers or agrees to accept a benefit of any kind, whether for the building inspector’s behalf or for any other person.

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 Tribunal or Supreme Court may determine the contract amount if there is a dispute.
- 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.

- The building bond may also be used to pay the costs of the building inspector if the developer is dead, cannot be found or is insolvent.
- The building bond can be a bank guarantee, bond or other form of security.

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.
- The Secretary may refuse to claim or realise the building bond if satisfied that the developer and builder were not given reasonable access to rectify the defective building work.

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 (unless retained with the consent of the developer); and
 - give to the developer written notice of the completion of the rectification work.
- A lot owner has no entitlement to the building bond in respect of defects affecting the owner's lot.



Review of Decisions

- Many decisions of the Secretary are reviewable by an “interested person”. 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;
 - allow a claim or realise a building bond for payment to an owners corporation, developer or other person.
- An interested person is:
 - The developer;
 - The owners corporation;
 - A lot owner (if the decision relates to the lot);
 - The builder responsible to rectify defects.
- A decision by the Secretary to claim or realise a building bond for payment is not reviewable if the amount has already 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.



- On review, a decision may be:
 - Affirmed;
 - Varied; or
 - Set aside and a decision made in substitution.
- An applicant for a review must be notified of the reasons for the review decision, which must include:
 - Findings of facts by referring to the material on which the review decision is made;
 - The understanding of the law by the reviewer;
 - The reasoning process for the decisions made by the reviewer.

Are Other Rights Affected?

- The provisions in the Act will not affect other rights of an owners corporation in relation to defective work, however there are some changes to the Home Building Act as a result of the strata defects scheme.
- The right to claim for defective building work under the Home Building Act for two years for non-major defects is extended for 90 days after the expiry of the time for providing a final report [s. 18E(1A) HBA].
- A building dispute cannot be made under the Home Building Act to the Department of Fair Trading if any of the steps under Part 11 of the Act have not been completed.

Other Matters

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

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Helen is a lawyer of 20 years practicing in the areas of strata law, property law, litigation and construction. She has extensive experience acting for owners corporations, particularly in relation to construction related matters. Her experience includes building contract negotiations, preparing payment schedules and adjudication responses in security of payment claims by contractors against owners corporations, and acting in building contract and defects disputes. Helen also advises on insurance claims, easements, compulsory acquisitions, strata disputes and by-laws.

About JS Mueller & Co

JS Mueller & Co has been servicing the strata industry across metropolitan and regional NSW for almost 40 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.

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