Building Bonds: A New Regime of Pro-Active Building Defect Management

Divisions 3 (sections 207-211) of the Strata Schemes Management Act 2015 (NSW) (**SSM Act 2015**) introduces a building bond scheme for new multi-storey buildings (defined as three or more storeys) from 1 January 2018. The defect bond scheme applies to:

- Contracts for building works in the construction of new residential or partially-residential strata buildings entered into after 1 January 2018; or
- Where there is no contract, building works in the construction of new strata buildings commenced on or after 1 January 2018.

From 1 January 2018:

- Developers must arrange and pay for an independent building inspector to:
    - Inspect the premises and prepare an interim report no earlier than 15 months and no later than 18 months after the completion of the building works; and
    - Inspect the premises and prepare a final report no earlier than 21 months and no later than 2 years after the completion of the completion of the building work.
- The interim and final reports must be given to the Department of Fair Trading, the developer, the owners corporation and any builder responsible for the works within 14 days of the completion of the report.
- The developer and builders responsible for the defective work are given a reasonable opportunity to enter premises to rectify the defective work by giving 14 days written notice.
- Developers of a new strata scheme must lodge security in the form of a building bond with the Department of Fair Trading. The purpose of the bond is to secure payment for the costs of rectification work identified in the inspector's final report.
- The building bond must be provided prior to the issue of an occupation certificate. The amount of the building bond is to be 2% of the contract price of the building work. This sum is adjusted accordingly if the developer only performed part of the building work.
- Where the contract price for a building work is unclear, the Owners Corporation can apply to the Tribunal under section 211(3) of the SSM Act 2015 for an order specifying the amount of the contract price of the building work, for the sole purpose of determining the amount of the building bond.

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- Developers are subject to strict notification requirements for the appointment of inspectors and payment of the bond. The builder must give at least 14 days written notice to the Owners Corporation, the owner and the occupant of any affected lot of their intention to enter the premises for inspection or rectification.

- The Owners Corporation is able to claim the costs of rectification from the bond if the final report identifies building defects, or if the Owners Corporation makes an application to the Department of Fair Trading with the consent of the developer.

- Developers may face strict fines for failing to comply with the requirements of the bond scheme.

- Residual funds in the bond are paid back to the developer upon the maturation of the bond.

Consequences for Owners Corporations

There is a limited time for the Owners Corporation to make a claim to the Building Bond Secretary for sums in the building bond for rectification costs.

If the Owners Corporation and the developer are in agreement over the rectification sums, a claim must be lodged with the Building Bond Secretary appointed by the Department of Fair Trading no later than 14 days from the last day the building bond must be claimed or realised.

The last day to claim or realise a building bond is:

- 2 years after the date the building work covered by the bond is completed; or

- Within 60 days after the final report on the building work is submitted to the Building Bond Secretary by the building inspector through the online portal.

If the Owners Corporation and the developer are not in agreement over the rectification sums to be paid from the bond, the Building Bond Secretary will typically nominate a quantity surveyor to determine the sum. The costs of the quantity surveyor is usually split between the Owners Corporation and the developer.

The Building Bond Secretary may vary the sums to be paid from the bond if it was found the owners corporation had unreasonably refused access to the developer or builder to perform rectification works.

Accordingly, Owners Corporations must be aware the imposition of the building bond scheme will carry commercial consequences beyond the stated requirements in the legislation, and should implement sensible measures to rectify issues in newly completed strata buildings with developers and builders.

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A protracted dispute with the developer or a failure to claim within the timeframes may jeopardise the prospects of recovery under the bond.

If you require any further assistance, please contact us for assistance.

Key takeaways

- Developers must arrange independent inspections and lodge a building bond for new strata buildings.
- The building bond is set at 2% of the contract price and must be provided before an occupation certificate is issued.
- Owners Corporations have a limited timeframe to claim rectification costs from the building bond.
- If there is a disagreement over rectification costs, a quantity surveyor may be appointed to determine the amount.
- Strict penalties apply to developers who fail to comply with the building bond requirements.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

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