



Developer Bonds—A Quick and Easy Fix for Defects?

On 1 January 2018, changes to the new **Strata Schemes Management Act 2015 (NSW)** (the **SSMA**) commenced which now require for developers to lodge a building bond with NSW Fair Trading on behalf of the Department of Finance, Services and Innovation (the **Building Bond Secretary**) to the value of 2 percent of the contract value (the **Bond**).

The amendments apply to residential or mixed-use strata buildings where there are four or more storeys and for contracts which are entered into on or after 1 January 2018 (or if there is no contract, where building work commences on or after 1 January 2018).

The purpose of the amendments as contained within **Second Reading Speech** is to “incentivise developers and builders to build well and to fix any problems early in the life of the building” and the amendments will operate in addition to an owner’s corporation’s rights under the **Home Building Act 1989 (NSW)**.

PROCESS UNDER THE SSMA

A summary of the Bond process under the SSMA is as follows:

1. Prior to the issue of an occupation certificate, the developer lodges the Bond with the Building Bond Secretary;
2. Within 12 months of completion of the works, the developer, must notify the Building Bond Secretary and the owners corporation of the proposed independent building inspector who is required to be selected from the “Strata inspector panel”;
3. Provided there is no objection by the owners corporation to the proposed appointment, the developer must, at its own cost, appoint that independent building inspector;
4. If there is an objection, or if the developer fails to act, the Building Bond Secretary can appoint the independent building inspector;
5. Between 15 to 18 months after completion of the works, the independent building inspector will inspect the works carried out and provide an “interim” report, which identifies defects which are present at the property and which must be rectified;
6. Between 21 to 24 months after completion of the works, the independent building inspector will then prepare a “final” report, which will indicate whether defects identified in the “interim” report have been rectified and if they have not been rectified, it will also include a scope of works for any remaining defective works;
7. If there are no defects following the “final” report, the Bond is released by the Building Bond Secretary to the developer;
8. If there are defects which are present following the “final” report, a claim is able to be made by the owners corporation against the Bond to the value of the cost to rectify defects, which is based on:

- a) the scope of works identified in the “final” report; and
 - b) an amount agreed between the developer and the owners corporation, or absent any agreement, an amount determined by a quantity surveyor appointed by the Building Bond Secretary.
9. Any claim made against the Bond must be made by the owners corporation within the latter of the following periods:
- a) 2 years following the completion of the works; or
 - b) within 60 days of the “final” report being provided to the Building Bond Secretary.

IMPACT OF THE CHANGES

The amendments will likely result in developers amending various contractual provisions such as extending the defects liability period and the amount and period for which retention is held, and subsequently passing the risk of those obligations downstream to the builder, who will likely in turn shift those obligations to its subcontractors.

If you are about to enter into a contract for a residential or mixed-use strata building which will be 4 or more storeys in height, or have recently entered into a contract, that contract should be reviewed to ascertain your rights and possible exposure noting the above legislative changes.

Kreisson are also in the process of finalising an eBook which is an in-depth summary of the changes to the SSMA referred to above. This will be available for circulation shortly.

Matthew Singh is an Associate in the Kreisson Construction team.

For more information, contact us at excellence@kreisson.com.au or on 02 8239 6500.

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