

# New South Wales Government to Massively Increase Penalties for Developers That Fail to Comply With Defect Bond Scheme

## The New South Wales government is set to vastly enhance its powers of enforcement against developers that do not comply with the recently introduced strata defects bond scheme.

The Strata Schemes Management Amendment (Building Defects Scheme) Bill 2018 (NSW) was introduced into Parliament on Wednesday 15 August 2018.

The bill, if it is passed, would see developers facing a maximum penalty of AU\$1.1 million for an initial failure to comply with the recently introduced developers' bond scheme, plus an ongoing penalty of AU\$22,000 per day for each day that the offence continues. This would be a massive increase from the previous maximum penalty of AU\$22,000 for the entire offence.

The bill also proposes to provide the Secretary (the Commissioner for Fair Trading, Department of Finance, Services and Innovation) with vast powers to appoint officers to investigate, monitor and enforce compliance with the requirements of the scheme. Those powers include the powers to enter and inspect premises, demand information and compel answers to questions.

Under Part 11 of the Strata Schemes Management Act 2015 (NSW), developers are required to provide security (a bank guarantee or insurance bond) to the Secretary equal to 2% of the contract price for all contracts entered into on or after 1 January 2018. The security is to secure funding for the payment of the costs of rectifying defective building work.

The defect bond scheme presently requires, for contracts entered into on or after 1 January 2018, the developer to lodge the security with the Secretary before an occupation certificate is issued. The amendments propose to change the timing so that the security must be lodged before the application for an occupation certificate is made. As noted above, a failure to comply with these provisions would, if the bill passes, place the developer at risk of an AU\$1.1 million fine and an ongoing risk of AU\$22,000 per day.

The amendments also propose to give the Secretary increased powers to determine the terms upon which security will be accepted and to provide that bank guarantees and bonds must be issued by authorised deposit-taking institutions or approved insurers respectively.

The amendments are clearly designed to bolster the powers of the Secretary and ensure compliance. If the bill passes, the Secretary would be able to:

- Sue a developer if the security lodged by the developer is less than the required amount
- Appoint officers with vast powers to investigate and enforce the Part 11 provisions

It is this latter aspect of the bill that should cause developers to take particular notice of the developer bond scheme and ensure compliance. Under the proposals, the "authorised officers" to be appointed by the Secretary would have the powers to:

- Require a person (read developer or its employees) to furnish that officer with any information or records (or both) that the authorised officer may require for an "authorised purpose" (officers would be authorised to investigate, monitor and enforce compliance with Part 11)
- Demand any person whom that officer suspects on reasonable grounds to have knowledge of matters in respect of which information is reasonably required for an "authorised purpose" to answer questions in relation to those matters (so no right to remain silent)
- Enter any premises at any reasonable time with or without the authority of a search warrant
- Search the premises (with a search warrant and potentially with a police officer) for evidence of a contravention of Part 11 or its regulations
- Require the owner, occupier or owners' corporation to provide reasonable assistance and facilities to the officer, including to produce any records for the officer to examine, inspect, copy or seize

## Contacts

### Avendra Singh

Partner

T +61 2 8248 7810

E [avendra.singh@squirepb.com](mailto:avendra.singh@squirepb.com)

### Jeremy Munce

Senior Associate

T +61 2 8248 7831

E [jeremy.munce@squirepb.com](mailto:jeremy.munce@squirepb.com)