

## **Submission**

### ***Strata Scheme Management Amendment (Building Defects Scheme) Bill 2018***

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## 1. Introduction

This Submission has been prepared by The Real Estate Institute of New South Wales Limited (**REINSW**) and is in response to the public consultation draft of the *Strata Schemes Management Amendment (Building Defects Scheme) Bill 2018 (Bill)*, released by the Department of Finance, Services and Innovation (**Department**) on 13 April 2018 and following a key stakeholder roundtable discussion held by the Department on 13 April 2018.

REINSW is the largest professional association of real estate agents and other property professionals in New South Wales. It seeks to promote the interests of its members and the property sector on property-related issues. In doing so, REINSW plays a substantial role in the formation of regulatory policy in New South Wales.

## 2. Comments on the Bill

### 2.1 Part 11, Division 3 of the *Strata Schemes Management Act 2015*

REINSW submits that Part 11 (Division 3) of the *Strata Schemes Management Act 2015 (SSMA)* relating to Building Bonds used as security for funding the rectification of defective building work, should not be included in the SSMA. One of the purposes of the SSMA is to provide guidelines on the management of strata schemes, not to deal with development issues. REINSW queries why these provisions are to be included in the SSMA, believes that they are better suited to the *Home Building Act 1989* (NSW) and should, accordingly, be relocated to that Act.

However, if this was not possible, REINSW suggests that an alternative approach would be to relocate some aspects of Part 11, Division 3 to the *Home Building Act 1989* (NSW) and retain only those aspects which relate to strata management in the SSMA.

### 2.2 Section 207 (5) – Offences Relating to Building Bond

REINSW considers that the increased maximum penalty that a developer may be liable to pay for failing to provide a building bond is unreasonable and disproportional. The proposed amendment increases the maximum penalty from \$22,000 to \$1,100,000 and imposes an additional daily penalty for continuing offences. REINSW is of the view that developers should not be penalised to the extent as proposed by the Bill. The SSMA is focused on providing housing for low income earners by way of strata schemes, however, REINSW believes that this proposed amendment will act as a deterrent for small developers who simply will not have the funds to cover such penalties.

Further to the above, REINSW recommends that the penalty should be proportionate to the dollar value of the development. As an example, whilst a \$1,100,000 fine may not be significant for a development worth over \$250,000,000, this penalty will be grossly disproportionate to smaller developments with their value often being less than \$10,000,000.

Whilst REINSW appreciates that the purpose of this amendment is to deter failures of developers in providing the Secretary with a building bond, considering the absence of a potential reduction in the prescribed penalty for circumstances arising out of honest mistakes, the significant increase in penalty is likely to have a negative impact on the number of small developers and small developments in the market. This is problematic having regard to the current shortage of housing and growing population, particularly in Sydney.

### **2.3 Section 209 – Realisation and Claims**

REINSW submits that the Bill does not address the process for when a bond is not claimed or realised within the specified timeframe. Whilst REINSW suspects that any bond that has not been realised or claimed by the Secretary will be returned to the developer, the legislation is not clear or prescriptive on this. REINSW suggests that a clear mechanism needs to be in place and documented in the SSMA dealing with the bond in the event that the timeframe is not achieved. For example, if no application is made in accordance with this section, specifically the timeframes under section 209(3), then the bond is to be returned to the developer.

REINSW notes the existence of section 210 outlining the refund obligations once a bond has been paid to the owners corporation, however, REINSW emphasises a need for further clarification regarding the process in circumstances where no claim has been made by the owners corporation.

### **2.4 Division 3A – Investigation and Enforcement Powers**

REINSW is of the opinion that the proposed investigative and enforcement powers are broad and excessive. REINSW appreciates that the purpose of Division 3A is to monitor and ensure compliance with the provisions of the SSMA, however, REINSW considers that these investigative powers and discretions should be proportionate to the bond amount and the penalty at risk. The proposed investigative powers may lend itself to the unwanted perception that the purpose of the building defects scheme is to facilitate revenue raising measures rather than targeting realistic and appropriate bonds for developments based on actual costings. REINSW assumes that this is not the intention of the Department. Accordingly, such investigative and inspection powers should be dialed back to a more measured position in line with paragraph 2.2 above and proportionate to the dollar value of the development.

In addition, the powers under this Division may seem daunting to developers, and, reiterating REINSW's concerns in paragraph 2.2 above, these discretionary and investigative powers may act as a deterrent for developers in the market. The goal of this Bill is to regulate the building defects scheme, not to drive developers out of the market.

### 3. Final Comments

As set out in this Submission, REINSW's main concern is the negative affect that the increased penalty proposed in s207(5) will have on the number of small developers, small developments and strata schemes available in the market. In addition to REINSW's recommendation that the *Home Building Act 1989* (NSW) is the more appropriate legislation to deal with Part 11 (Division 3) of the SSMA, REINSW encourages change to the proposed investigative measures and enforcement powers to ensure that such powers are proportionate to each development.

REINSW also wishes to emphasise that the process for the realisation of building bonds needs to be clearly documented in the legislation to avoid potential confusion, specifically dealing with circumstances where there is no claim made by the owners corporation.

REINSW appreciates the opportunity to provide input on this important topic and looks forward to exploring the issues further with the NSW Government.

Yours faithfully



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Chief Executive Officer  
The Real Estate Institute of New South Wales Limited