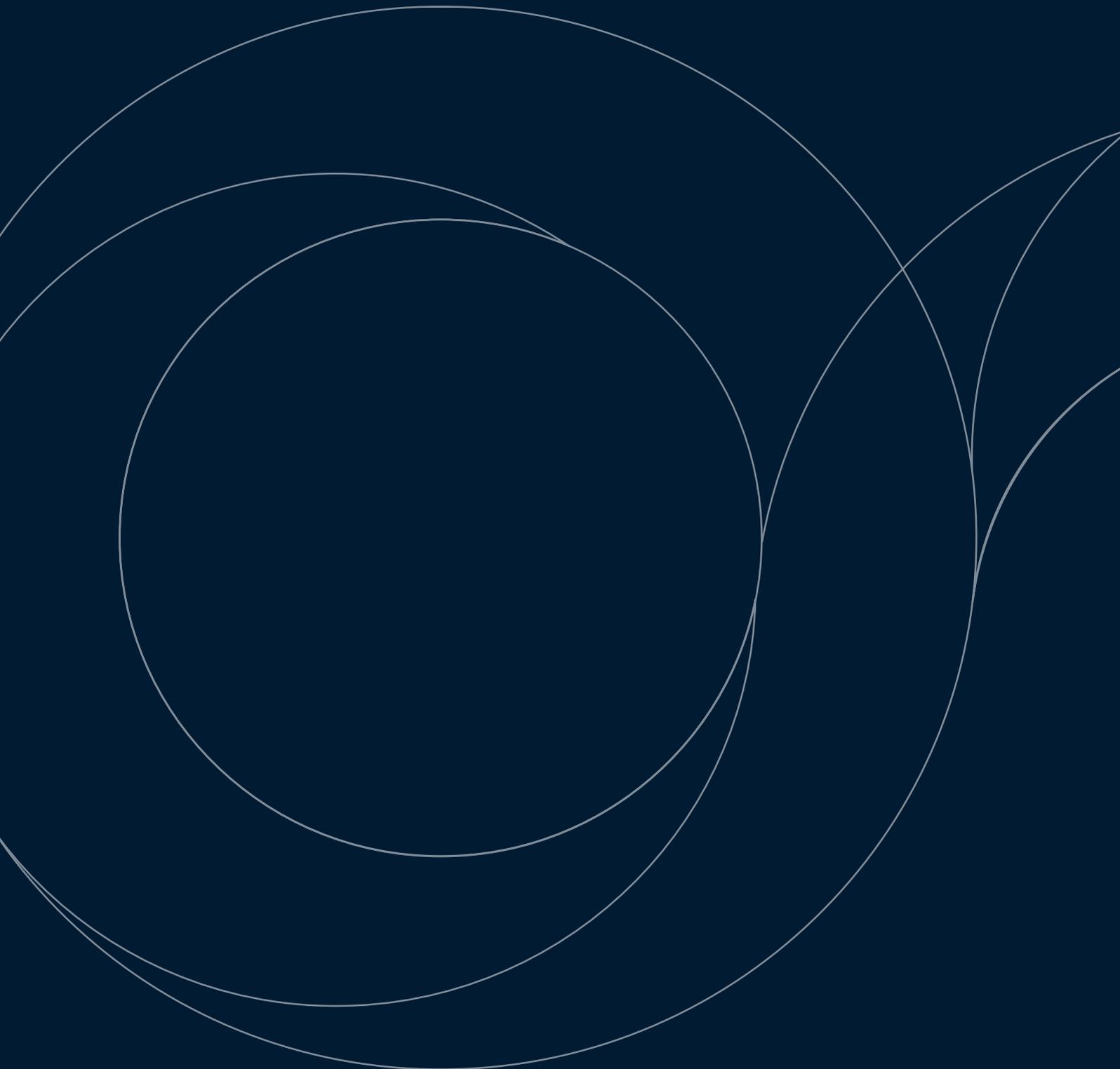


Defects in the construction of residential strata schemes in Queensland.

A Chambers Russell Lawyers White Paper
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01/

Duty of care

Section 152 of the Body Corporate and Community Management Act 1997 (Qld) (BCCMA) relevantly provides:

“(1) The body corporate for a community titles scheme must -

- a. administer, manage and control the common property and body corporate assets reasonably and for the benefit of lot owners; and
- b. comply with the obligations with regard to common property and body corporate assets imposed under the regulation module applying to the scheme.”

The BCCM regulation modules also provide that:

“(1) The body corporate must maintain common property in good condition, including, to the extent that common property is structural in nature, in a structurally sound condition...”

The BCCM regulation modules impose further duties on bodies corporate of schemes that includes lots created under a building format plan of subdivision, such as to:

- a. maintain in good condition:
 - i. railings, parapets and balustrades on the boundary of a lot and common property;
 - ii. doors, windows and associated fittings in a boundary wall separating a lot from common property; and
 - iii. roofing membranes that are not common property but that provide protection for lots or common property;
- b. maintain the following elements of scheme land that are not common property in a structurally sound condition:
 - i. foundation structures;
 - ii. roofing structures providing protection; and
 - iii. essential supporting framework, including load-bearing walls.

The existence of a defect in the common property or a part of the building that the body corporate is responsible for amounts to a breach of duty. The body corporate is primarily responsible for remedying any breach of its statutory duties.

Being able to identify a third party to claim compensation from (i.e. a builder who has performed negligent building works) does not excuse a body corporate from compliance with its statutory duties. But the commercial reality is that a body corporate can and should seek remedies against them.



Being proactive

In a 2019 report titled 'An Examination of Building Defects in Residential Multi-owned Properties', Nicole Johnston (Deakin University) and Sasha Reid (Griffith University) reported on the analysis of 212 building audit reports across multiple states of Australia. They found that 85% of all buildings analysed had at least one defect across multiple locations.

Building defects are prevalent and bodies corporate and other pertinent stakeholders (such as insurers) should operate on the presumption that a strata-titled building is more likely than not to have defects.

Most bodies corporate react to defects as they become apparent. But the best practice is to be proactive, such as by:

- a. reviewing the body corporate's records to assess whether the original owner / developer has complied with its duty that arises under the BCCM regulation modules to hand over important documents at the first AGM, such as:
 - i. development approvals;
 - ii. plans, specifications, diagrams and drawings of buildings and improvements;
 - iii. contracts for building and development work carried out on the scheme land;
 - iv. warranties for buildings, improvements, plant, equipment and body corporate assets;
- b. engaging experts to proactively examine the building to identify defects or building conditions that are a cause of concern or warrant further investigation (i.e. invasive / destructive testing);
- c. taking legal advice on available options and remedies.

The BCCM regulation modules require a body corporate to include a defect assessment motion on the agenda of its 2nd annual general meeting. This is a motion proposing the engagement of an appropriately qualified person to prepare a defect assessment report for property the body corporate must insure.

A body corporate is not obliged to pass that motion, but it should. Moreover, similar proposals should be considered over the ensuing years as the building begins to settle into its occupation.





03/

Engaging experts

An expert report can identify the root cause of a defect, which helps to determine which party should be held responsible for it and how the defect may be remedied.

A body corporate should engage a suitably qualified expert (preferably an engineer) to:

- a. identify all existing defects on scheme land;
- b. provide an opinion as to the cause of the defects and any other consequential damage;
- c. identify any Building Codes or Australian Standards which have been breached;
- d. provide detailed advice and specifications of the necessary works required to rectify the defects and any consequential damage; and,
- e. provide an estimate of the costs of the work required to rectify the defects and consequential damage (this may need to be provided by a different expert such as a quantity surveyor).

Once the scope of the rectification works is known, the body corporate should seek legal advice on its options and the best course to follow. Some options include:

- a. taking legal action against third parties involved in the building and development work at the scheme land to compel them to rectify the defects;
- b. rectifying the defects at the body corporate's expense and then seeking compensation from a third party who may be liable;
- c. making a claim on the statutory insurance scheme; or
- d. making a complaint to the Queensland Building and Construction Commission.

Once the scope of the rectification works is known, the body corporate should seek legal advice on its options and the best course to follow.



04/

Mitigating loss

It's important for a body corporate to act quickly once a building defect is discovered. Bodies corporate have strict liability if a statutory duty to maintain is not complied with. It is immaterial whether the body corporate has been negligent, acted in bad faith or acted unreasonably. A claimant only has to prove the body corporate did not perform their statutory duty.

A significant risk that attaches to this strict liability is a body corporate's exposure to consequential damages suffered by owners, occupiers and third parties, such as internal damage to the lot or loss of rent. Prompt and effective action to remedy any defects can mitigate a body corporate's exposure to loss and damages.



05/

Home Warranty Scheme

The Queensland Home Warranty Scheme is a statutory insurance scheme that provides insurance cover for certain residential construction work valued at more than \$3,300. Its purpose is to provide protection for consumers in circumstances of non-completion, defective construction, subsidence or settlement.

The scheme is currently administered by the Queensland Building and Construction Commission (QBCC) and lasts for 6 years and 6 months from the earlier of when the building contract is entered into or the premium is paid.

The scheme does not apply to building work carried out in or for a structure of more than three storeys (not counting one storey if it comprises mainly a carpark).

There are strict time limits for making a claim under this scheme, so it is essential that a body corporate takes early legal advice on whether the scheme applies to any buildings on its scheme land and when a claim must be made.

The Queensland Home Warranty Scheme is a statutory insurance scheme that provides insurance cover for certain residential construction work.

06/

Statutory warranties

Under the Queensland Building and Construction Commission Act 1991 (Qld) (schedule 1B, part 3), the following warranties are implied into every contract for domestic building work or if plans and specifications form part of the contract:

- that all materials supplied will be good and suitable for the purpose for which they are used;
- that all materials supplied will be new (unless otherwise stated in the contract);
- that the work will comply with all relevant laws and legal requirements;
- that the work will be carried out in an appropriate and skilful way and with reasonable care and skill;
- that once the work is completed, the detached dwelling or home will be suitable for occupation;
- that the work will be carried out in accordance with any plans or specifications (as the case may be);
- that any provisional sum has been calculated with reasonable care and skill, having regard to all the information reasonably available when the contract is entered into; and
- that the work will be carried out with reasonable diligence, if the contract is a cost plus contract and does not have a stated completion date or period.

Warranties cannot be excluded from a contract for domestic building work. Any provision of an agreement that seeks to exclude a warranty is void. The original consumer and subsequent building owners can enforce the statutory warranties.

The statutory warranties apply for:

- a. six years and six months from the date the work is finished (eg. six years six months from practical completion of the work); or
- b. for incomplete work, the stated completion date or period specified in the contract.

These warranties only apply to a select class of buildings. They do not apply to all residential building and construction work. Legal advice should be sought on whether they apply to building work carried out on a particular strata scheme.

Australian Consumer Law may also provide additional warranties about building work that is performed.



07/

Rectification of Defective Building Work via the QBCC

The QBCC has statutory powers to require the rectification of building work and remediation of consequential damage.

It is the policy of the QBCC Board that if a consumer (i.e. a body corporate) is seeking the assistance of the QBCC to issue a direction to a building contractor to rectify defective building work, the consumer must lodge a formal complaint with the QBCC of defective building work as soon as possible but no later than within 12 months of becoming aware of the defects.

The QBCC will then consider the issuing of a direction to rectify to a building contractor:

- a. for structural defective building work, within 6 years and 3 months of the building work being completed; or
- b. the non-structural defective building work, within 12 months of the building work being completed.

The expression “structural defective building work” being defined to mean:

- defective building work (other than residential construction work causing subsidence) that is faulty or unsatisfactory because it does one or more of the following:
- adversely affects the structural performance of the building;
- adversely affects the health or safety of persons residing in or occupying a building;
- adversely affects the functional use of a building;
- allows water penetration into a building.

The QBCC’s power to issue a direction to rectify or remedy is limited to 6 years and 6 months after the building work was completed or left in an incomplete state. The QBCC can apply to the Queensland Civil and Administrative Tribunal (“QCAT”) to extend that time period, but such applications are made in the rarest of circumstance, if at all.

Accordingly, a body corporate must make a complaint to the QBCC as soon as possible and must diligently follow up the QBCC to ensure it is promptly investigating the complaint so this time period does not expire before a decision is made.

If the body corporate is not satisfied with the QBCC’s decision on whether to give a direction to rectify, it may apply for an internal review within 28 days.

Furthermore, the QBCC has a broad power to take disciplinary action against a licenced builder (and others) for, amongst other things, negligence or defective building work. This action can include:

- a. directing a person to pay for rectification work and consequential damage, or to pay compensation for loss or damage;
- b. imposing a penalty on the person; or
- c. suspending or cancelling the licence.



08/

QCAT proceedings

QCAT has jurisdiction to:

- a. resolve building disputes;
- b. review certain QBCC decisions, such as in relation to:
 - disciplinary action;
 - directions to rectify defective building work;
 - whether rectification work is or is not to a satisfactory standard; and
 - claims under the statutory insurance scheme.

Applications made to QCAT amount to commencing proceedings, which a body corporate must authorise by special resolution.

09/

Court proceedings

The QBCC and QCAT do not have exclusive jurisdiction to resolve disputes about defective building work. In some circumstances, a body corporate may be better served by commencing proceedings in a court of competent jurisdiction. Considerations of this kind include:

- a. the complexity and value of the defects and remediation work;
- b. the loss of control over the process of resolving the dispute if it is handed over to the QBCC;
- c. the effectiveness of directions to rectify and whether the penalties for noncompliance are a meaningful deterrent in proportion to the value of the rectification work; and
- d. the history, experience and standing of the builder.

Legal advice should be sought on the circumstances each body corporate faces and which action is the most appropriate for it.

A body corporate must authorise the commencement of court proceedings by special resolution.

10/

The financial standing of the builder

Recent years has seen many media reports of builders going into administration or liquidation. This does not necessarily mean that a body corporate no longer has any meaningful rights or remedies to pursue compensation for building defects.

QCAT can still take disciplinary action against a licence. This can include requiring compensation to be paid. This may assist where a person's company goes into liquidation. The QBCC can still pursue the natural person who was the licensee-in-charge.

The home warranty scheme, if it applies to the building/s on scheme land, can also be claimed on.

Having regard to the nature and specifics of the defects, other contractors or participants in the supply chain for the building work could also be pursued.

There are other options and remedies beyond the few described above. Suffice it to say, a body corporate should seek legal advice on its rights and remedies.



11/

Considerations

There are a significant number of stakeholders in a body corporate faced with building defects, such as owners, occupiers, committee members, strata managers, insurers, service contractors, letting agents, neighbours, the local government, etc. All these stakeholders, in one way or another, have interests that can be affected by building defects.

The process for satisfactorily addressing building defects is multi-faceted, complex and can be drawn out. A misstep in this process can cause time, resources, rights, remedies, and community goodwill to be thrown away.

If you are a stakeholder directly involved in a body corporate's management of building defects or assessing that management from a distance, we provide these metrics:

1. Has an audit been carried out on the documentation handed over by the original owner / developer at the first AGM?
2. Has the body corporate clearly identified when the building work was completed?
3. Has the body corporate complied with its duty to include a defect assessment motion on the agenda of its 2nd AGM, and did it pass?
4. If the defect assessment motion passed, when was the report delivered and what has the body corporate done about any findings in the report?
5. If defects have been identified, has the body corporate received expert reports on:
 - a. the estimated costs of rectifying those defects; and
 - b. consequential damage that may be caused by the defects?
6. Has the body corporate obtained legal advice on whether the home warranty scheme applies and, if so, when a claim must be made?
7. If a complaint is made to the QBCC for a direction to rectify, has the end date for such a direction to be given (6 years and 6 months) been identified, and is the body corporate proactively following up the QBCC to ensure that deadline does not expire?
8. If legal proceedings are going to be commenced in QCAT or a court of competent jurisdiction, has the body corporate:
 - a. received advice on the time limits for bringing such proceedings, the causes of action available to it, the prospects of success and estimate costs of the proceedings; and
 - b. authorised commencing those proceedings by special resolution?

References

¹ For example *Shearman v Owners Corporation No 1 417405Y* [2016] VSC 551 (21 September 2016); *Verve 501 Pty Ltd v Owners Corporation 1 Plan No 512424P & Ors (Real Property)* [2009] VCAT 2400; *Owners Corporation 1 PS 539693J v Taleb & Ors (Owners Corporation)* [2011] VCAT 24 2 *Kanter v Milroy Investments Australia Pty Ltd* [2015] VCAT 90, the company was fined \$10,000 for contempt because it breached orders previously made by the Tribunal

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