



Guide for managing body corporate building defects



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Introduction

Building defects continue to be an issue, and source of dispute, for bodies corporate – highlighted by recent high profile examples like Sydney Olympic Park’s newly-built Opal Tower.

A Deakin University report revealed that 85% of apartment buildings have some form of structural defect.

The body corporate regulations that came into effect in Queensland on 1 March 2021 now place a greater obligation on the builder, developer and the body corporate to make sure building defects are identified and rectified within the legislated time frames.

In this guide we discuss:

- what is a building defect;
- the body corporate’s obligations in relation to building defects;
- the body corporate’s rights in relation to building defects;
- where the developer fits in;
- what action can be taken against a builder;
- the role of the Queensland Building and Construction Commission;
- taking action against the builder;
- the role of caretakers and body corporate managers; and
- what the body corporate should do if it has a building defect.

Because there are strict deadlines for making a claim, it is crucial that the body corporate obtains timely expert advice on how to navigate the body corporate’s rights and obligations.

Mahoneys is recognised as one of Australia’s leading body corporate and building dispute law firms, having successfully acted on a number of significant building defect disputes.

Feel free to contact us if you need any assistance with a body corporate building defect.

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What is a building defect?

Generally, a building defect is building work that is faulty or below a reasonable standard of quality. However, there are many different definitions of a building defect.

Different definitions and different defects will lead to different obligations and rights of the body corporate.

What is the body corporate's obligations in relation to building defects?

Irrespective of who caused the building defect, or if the body corporate has any rights to hold another party responsible, the body corporate has statutory obligations in the *Body Corporate and Community Management Act 1997* (Qld) (**BCCMA**) to maintain common property in good condition.

Accordingly, the body corporate is obliged to take action to ensure any common property that has a building defect is repaired. This could extend to:

- repairing the building defect at the body corporate's own cost; or
- commencing proceedings against the entity who caused the building defect.

The appropriate approach will be determined by a consideration of the cost of repairs, urgency of the repairs and progress being made with the entity who caused the building defect.

What are the body corporate's rights in relation to building defects?

The building at the scheme was constructed pursuant to a contract (**Construction Contract**) between the:

- the developer, who was the owner of the land before the body corporate was created; and
- the builder, who was engaged by the developer to carry out the building work to construct the scheme.

The Construction Contract sets out the specifications, standards and quality of work required by the builder – which would include avoiding building defects.

Accordingly, as the body corporate is not a party to the Construction Contract, it can only accrue rights under the Construction Contract in relation to the specifications, standards and quality of work if the rights of the developer are transferred to the body corporate. Section 36(3)(a) of the BCCMA achieves this in relation to common property.

Accordingly, the body corporate has rights under the Construction Contract for common property but not individual lots.

Lot owners are transferred rights pursuant to the Construction Contract in relation to their own lot pursuant to section 36(3)(b) of the BCCMA. However, the regulation module then ordinarily authorises the body corporate to take action on behalf of lot owners and transfers the lot owner's rights to the body corporate.

Where does the developer come in?

This is the first step in relation to the body corporate taking any action in relation to building defects.

So that the body corporate is in a position to take action pursuant to the Construction Contract, the regulation module obliges the developer to provide the body corporate with a number of documents (among others) at the body corporate's first annual general meeting. This includes:

- all plans, specifications, diagrams and drawings of buildings and improvements forming part of scheme land (as built) showing water pipes, electrical wiring, drainage, ventilation ducts, air conditioning systems and other utility infrastructure;

- documents in the original owner's possession or control relevant to the buildings or improvements on scheme land, other than excluded documents, including:
 - contracts for building work, or other work of a developmental nature, carried out on scheme land; and
 - certificates of classification for buildings and fire safety certificates; and
- copies of any documents relating to warranties for:
 - buildings or improvements forming part of scheme land;
 - any item of plant and equipment forming part of the common property; and
 - any other body corporate asset.

If these documents are not provided to the body corporate, the developer can be subject to proceedings that may impose a significant fine.

Before the body corporate can be in a position to understand its rights in relation to building defects, it needs to review all of the documents the developer is obliged to provide.

What action can be taken against the builder?

Once the documents from the developer are reviewed, the next step is to assess the body corporate's rights against the builder.

The body corporate will have two options to take action against the builder for any building defects the builder is responsible for, being:

- a claim to the Queensland Building and Construction Commission (**QBCC**); and
- commencing proceedings pursuant to the Construction Contract.

QBCC

A claim to the QBCC will involve the QBCC assessing the complaint and investigating the building defects.

If the QBCC determines a building defect exists it can issue the builder with a direction to carry out, or pay for, the required repairs. If the direction is not complied with it can lead to fines and cancellation of the builder's licence.

A claim to the QBCC must be made within:

- 12 months of the body corporate becoming aware of the building defect; and
- either:
 - 6 years and 6 months of the building work being completed for a building defect which relates to water ingress or one that adversely affects the structural integrity, health or safety of occupiers or the use of a building; or
 - 12 months of the building work being completed for a building defect that is faulty or unsatisfactory because it does not meet a reasonable standard of construction or finish expected of a competent QBCC licence holder.

Accordingly, it is important to assess the type of defect and date the building work was completed so the body corporate does not lose any rights it may have through the QBCC.

In some limited cases, the body corporate may be able to make a claim on the home warranty insurance scheme. However this will usually only extend to buildings that are no more than 3 storeys high.

A claim to the QBCC is not a proceeding and does not amount to a restricted issue such that the committee can authorise the action.

Commencing proceedings

Commencing proceedings against the builder is based upon the body corporate's rights it has pursuant to the Construction Contract.

This action is based upon the following position:

- the builder had obligations in the *Construction Contract* to construct the building without building defects;
- the builder *breached* that obligation in the Construction Contract;
- as a result of the builder's breach, the body corporate has suffered *damage*; and
- the body corporate's *remedy* for the damage is to have the works repaired, or paid for, by the builder.

Accordingly, the prospects of the body corporate obtaining a successful remedy by commencing proceedings against the builder is contingent on:

- the specific terms of the *Construction Contract*; and
- evidencing a *breach* – which is why expert reports are required (**Expert Report**). The use of an expert third party building inspector is crucial. It is often the Expert Report and evidence produced by this inspector that determines the success or failure of any action taken by the body corporate.

Proceedings against the builder pursuant to the Construction Contract generally must be commenced within 6 years from practical completion.

Commencing proceedings is a restricted issue for the committee, requiring a special resolution at a general meeting.

The time taken to obtain the necessary evidence, seek to negotiate remedial works with the builder, explore any options with the QBCC and obtain general meeting approval can take months or years.

Accordingly, it is important to assess the rights under the Construction Contract and obtain an Expert Report so the body corporate does not lose any rights it may have pursuant to the Construction Contract. This is why legislation requiring the body corporate to obtain an Expert Report at the second annual general meeting has been introduced.

Commercial outcome

Commencing proceedings against a builder can be a long and expensive process, and requires a special resolution. Accordingly, it can sometimes be a more favourable outcome for the body corporate to reach an agreed settlement with the builder.

This could take place at any time during the process, including before, or during, any claims or proceedings that are commenced.

It is not a restricted issue for the committee to negotiate a commercial outcome, but any final agreement may be a restricted issue, requiring an ordinary resolution at a general meeting.

What is the body corporate manager's role?

The body corporate manager is not responsible for building defects in the scheme. However, the body corporate manager has obligations to assist the body corporate in meeting its statutory obligations. By helping guide a body corporate through the building defects process, not only are they assisting their client, but they are also mitigating the risks of a body corporate complaining that they were let down by their body corporate manager.

The role of a prudent body corporate manager should extend to:

- ensuring that the body corporate considers a motion to engage a suitably qualified and experienced expert to provide an Expert Report;

- suggesting in writing that the body corporate consider obtaining independent legal advice on its rights and obligations with respect to building defects in the scheme;
- helping and assisting the committee by providing recommendations on experts that can assist the body corporate (including building inspectors, lawyers and contractors); and
- if the body corporate does decide to take action with respect to building defects, ensuring that all decisions and correspondence are properly documented and recorded.

Importantly this role does not extend to project managing the repairs. Such a task is not something that a committee should expect a body corporate manager to perform as it is not within a body corporate manager's expertise or duties in the administration agreement.

What is the caretaking service contractor's role?

The caretaking service contractor is not responsible for building defects in the scheme. However, they play an important role in assisting the body corporate managing the defect process as the point of contact at the scheme.

A prudent caretaking service contractor's role should extend to:

- being aware of any building defects on site and the action the body corporate is taking;
- liaising with building inspectors, the QBCC and other contractors to conduct site inspections; and
- keeping the committee informed of any change to the condition of the defects and any works being carried out.

Importantly this role does not extend to project managing the repairs. Such a task is not something that a committee should expect a caretaking service contractor to perform as it is not within a caretaking service contractor's expertise or duties in the caretaking agreement.

Depending on the level of involvement the committee expects from the caretaking service contractor and the terms of the caretaking agreement the caretaker can be engaged to carry out a more involved process for an additional fee. However, this will not always be the case.

Where to from here?

It is crucial that the body corporate obtains a quality Expert Report, and the correct legal advice on how to navigate the body corporate's rights and obligations, in a timely manner.

In summary, the body corporate has:

- an obligation to repair the building defects to the common property;
- rights against:
 - the developer, to provide various documents related to the construction of the scheme; and
 - the builder, for any building defects that the builder has caused in the scheme, including:
 - a claim to the QBCC; and
 - commencing proceedings pursuant to the Construction Contract; and
- the ability at any time to explore a commercial outcome against the builder.

It is important for the committee, caretaking service contractor and body corporate manager's expectations of each other, and their role, to be clear from the outset. This will assist the body corporate in properly managing the defect process.

About the firm

Mahoneys is an independent law firm offering a range of commercial advice, transaction support, and dispute resolution services. With offices in Brisbane and the Gold Coast, we have a dedicated team of lawyers who specialise in body corporate and strata law.

We have a long history of acting for bodies corporate - our work includes acting for lot owners and bodies corporate on all matters relating to the Body Corporate and Community Management Act and associated legislation – including in the following areas:

- management rights assignments & variations
- common property amalgamation subdivision & sale
- general BCCM Act advice
- community management statements
- procedural & governance issues
- by law review & enforcement
- noise & other community living issues
- terminate & sell schemes to developers
- debt & levy recovery
- lot entitlement issues
- building defects
- building management statements
- planning & environment matters
- legal & regulatory compliance
- disputes & other disagreements

We are active members of the Strata Community Association of Queensland (SCA) and regularly present at SCA, Australian Building Management Accreditation (ABMA) and other industry events.

About the Team

A key to our success has been the quality of our team and our unwavering commitment to providing market leading legal services. Our dedicated body corporate team is made up of leading industry lawyers, led by 2 experienced partners:



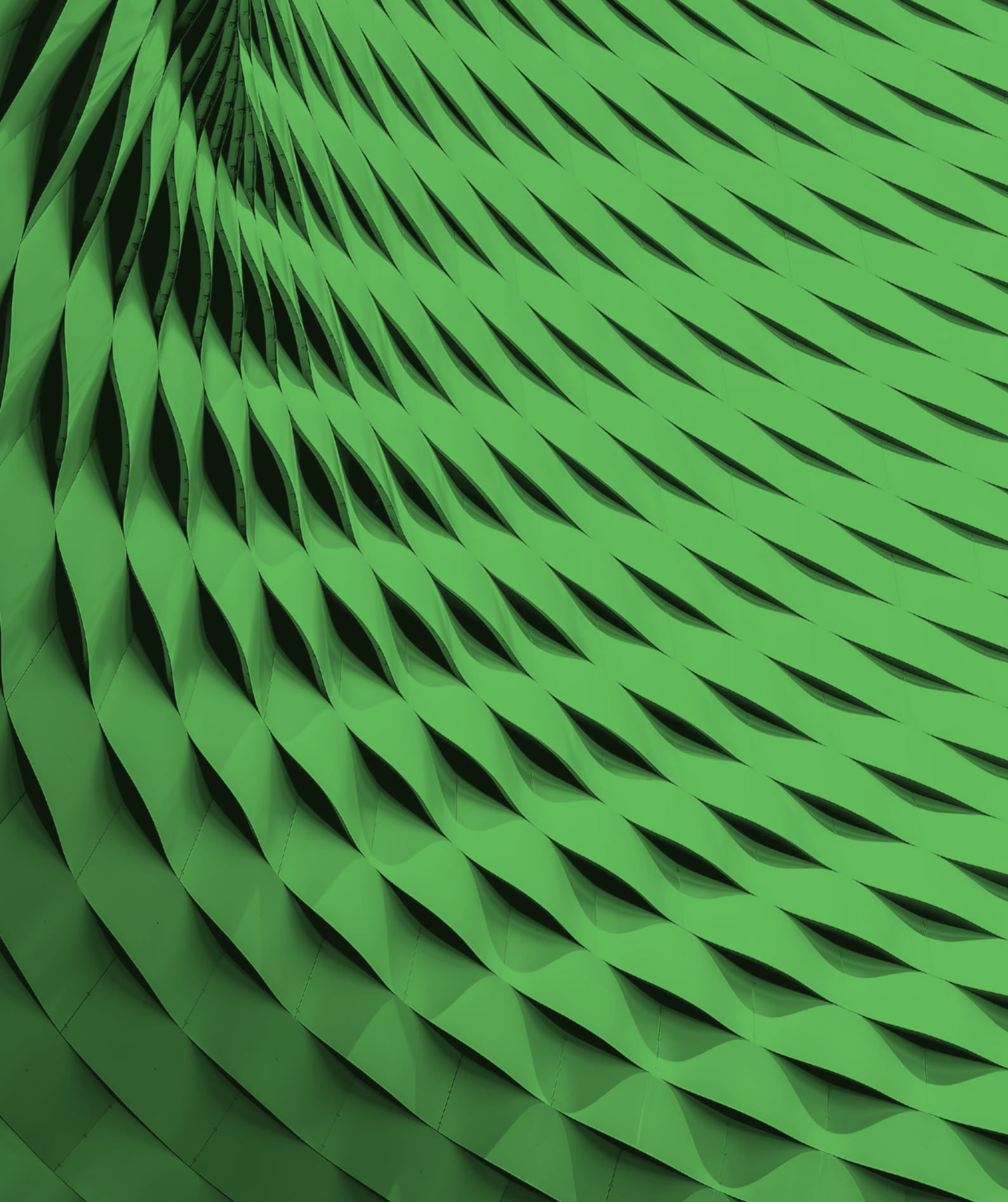
Ben Seccombe who heads up the Mahoneys Dispute Resolution team, is a nationally recognised litigator with significant experience advising bodies corporate including on contract issues between resident manager and body corporate, by-laws, building and construction (including defect management), statutory compliance and insurance. Ben also has significant experience helping bodies corporates terminate and sell body corporate schemes to developers.



Todd Garsden is a leading Body Corporate lawyer who specialises in body corporate law. Todd is an active member of the Strata Community Association of Queensland (SCA), including a member of their Legislation and Membership Committees, and acts extensively for Bodies Corporates, Body Corporate Managers and lot owners.

Want to know more?

To receive updates on body corporate matters, you can visit our dedicated body corporate page www.mahoneys.com.au/industries/bodies-corporate-strata, follow us on LinkedIn www.linkedin.com/company/mahoneys or sign up to our body corporate focused newsletter www.mahoneys.com.au/subscribe.



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