



bcsystems
— strata managers and consultants



GUIDE TO
DEFECTS

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POTENTIAL BUILDING DEFECTS

In Queensland, consumers generally enjoy a high level of consumer protection. This extends to a regulation scheme about defective building work, administered by the Queensland Building and Construction Commission (QBCC).

Building defects can range from very minor to significant, and are not necessarily reflective of the quality of the development or building generally. Buildings are complicated and involving near-endless products, suppliers and subcontractors.

If a defect arises within a certain warranted time period, it is important to take practical and reasonable steps to resolve the issue amicably with the builder. In nearly all cases this reasonable approach resolves the issue without dispute.

In some cases a dispute between the parties (owner, builder, supplier or sub-contractor) can arise, and in those situations owners can take advice and assistance from the QBCC – the Queensland construction regulator.

It is important to take a reasonable, clear and pragmatic approach to all cases, as that will ensure that if you later need assistance from the QBCC, you will maximise your chance of obtaining a positive result.

OWNER'S RIGHTS IN A BODY CORPORATE DEVELOPMENT

In the eyes of the Queensland building regulator – an owner of a property in a body corporate development has nearly-identical rights to the owner of a normal free-standing house.

In most cases involving a defect within an owner's property (inside their apartment, townhouse or commercial lot), has nothing to do with the body corporate.

It is important to identify the body corporate's involvement (if any) as early as possible after discovering a building defect.

RESPONSIBILITY

BODY CORPORATE OR OWNER

Often building defects (suspected or known) are brought first to the attention of the body corporate committee or on-site manager by an owner or resident of an individual lot. It is important to note that not all building defects are automatically a body corporate matter, though it is often in the body corporate's best interests to be aware of the issue.

It is important to establish early who is responsible for progressing the issue to a resolution. If this is not made clear at the start, it is possible for defects to go unmanaged, which can result in the defect period expiring or the Queensland Building and Construction Commission (QBCC) assistance eligibility being lost.

The following general principle applies: The person who is responsible for managing a building defect complaint, is the same person who would ordinarily be responsible to maintain that building element under normal circumstances.

- a. Example 1 – A kitchen bench-top in a new apartment has an installation defect. As the kitchen bench-top is ordinarily the responsibility of the unit owner, the unit owner is also responsible to progress the building defect matter.

- b. Example 2 – One new townhouse is suffering a roof leak, only causing water entry to one lot. As the roof of the example townhouse is common property, the body corporate is responsible for progressing the building defect matter despite only one lot being affected. This is because the body corporate is the owner of the common property roof.

- c. Example 3 – The common property (shared) pool has a leak. As the common property pool is under the control of the body corporate, the body corporate is responsible for progressing this defect matter.

DEFECT IN COMMON PROPERTY	DEFECT INSIDE 1 LOT	DEFECT INSIDE 2 OR MORE LOTS	DEFECT IN COMMON PROPERTY AND 1 OR MORE LOTS
Body corporate is responsible	<p>Affected lot owner is responsible.</p> <p>Body corporate to be informed for record purposes.</p>	<p>Affected lot owners (each owner) are responsible.</p> <p>One complaint will be required for each affected lot.</p> <p>Body corporate to be informed for record purposes.</p>	<p>Body corporate and affected lot owner both responsible for their own part.</p> <p>One complaint for common property and one complaint for each affected lot.</p>

Under the QBCC policy, a complaint must be made by the person who is the owner of the affected property.

In a body corporate with 50 lots, there are 51 owners (each lot owner individually, plus the body corporate).

It is possible for a defect to independently affect many owners in the scheme, which means the QBCC would receive up to 51 separate complaint files. Whilst this seems to be a lot of double-handling, the QBCC is rigid in the way it deals with these types of complaints.

DEFECTS WHICH ARE COMMON TO MULTIPLE LOTS

As body corporate buildings or schemes are generally built at the same time by the same builder – defects in one lot can often occur in other lots.

If for example a toilet is a defective model, it is likely that all toilets in the building are from the same batch and may present the same issue. Defects may go unnoticed for different periods of time, depending on a wide range of factors.

In our example, just because a defect affects some or all lots does not make the body corporate responsible to manage that defect. The body corporate cannot make a QBCC complaint about a toilet in a property that the body corporate does not own (e.g. inside an apartment).

The body corporate should consider:

- a. If a defect appears to be common to multiple lots – to communicate to all owners to point out the potential issue, and prompt owners to check their own property to see if the defect is present. The goal of this is to assist owners to make their own reports if they do have the defect, and to assist them to identify the defect within the relevant time period.
- b. When the builder is notified, the body corporate should consider engaging with the builder, in addition to the separate process undertaken by each affected owner. That might include assisting the builder by recording a list of affected lots, and facilitating access to the building through the on-site manager. The body corporate should however make it clear to owners that the body corporate cannot take over the issue, and that the owners are ultimately responsible for progressing their own individual issue with the builder.
- c. If the defect issue is very significant, then it may be in the body corporate's best interests to consider legal or other professional advice which can be provided to individual lot owners to assist them.

DISCLOSURE AND REPUTATION

Following some very high-profile strata building defects in New South Wales, purchasers are generally more conscious of potential building defects when inspecting property and carrying out due diligence.

Some committees are concerned that open discussion of building defects (e.g. in committee meeting minutes) may put at risk the reputation of the building, however this is not the primary consideration for a body corporate committee, and in fact this thinking may be detrimental to the scheme.

In our experience, many strata search agents and solicitors will prefer to see a diligent cataloguing of any defects or maintenance issues, with an established process to action each issue. This demonstrates that the committee has been making itself aware of the condition of the common property, and will be more likely to achieve good outcomes by noticing issues and acting on them.

As a general principle – strata committees are required to be fully transparent to the body corporate owners who elected the committee, and whom the committee represents. To avoid the discussion or disclosure of building defects or other issues to the lot owners may constitute a breach of the committee's duty, which may then make the enforcement of the body corporate's rights more difficult.

Further to this point, some of the steps in the defect management process require a general meeting resolution (a vote of all owners at an AGM or EGM). If owners are not made aware of the matter until immediately prior to voting, that can cause owners to vote "no" to the committee's motions based on insufficient detail or understanding of the cause of the problem and the steps required to resolve it.

STEPS TO RESOLVE DEFECTS

STEP 1: ESTABLISH WHETHER IT IS A MAINTENANCE ISSUE OR DEFECT

Not all building issues are defects. The body corporate and owners have obligations to maintain their property, and there may be external factors which influence the building beyond the control of the builder. For example if a new building develops a roof leak as a result of a damaging storm, that may be an insurance issue and not a building defect.

The building must be completed within certain standards and tolerances. If there is a very minor paint imperfection for example, that would generally not constitute a defect for the purpose of the QBCC process. However if the paint had been applied poorly in many areas and was suffering a significant failure (e.g. peeling away), that may be considered to reach the level of a non-structural defect.

STEP 2: CONSIDER LIABILITY TIME PERIOD

Different elements of the building are required to be warranted by the builder for different periods of time.

Generally, defects are separated into two classifications:

1. Structural – e.g. water leaks, leaking roof, leaking shower, structural cracking, health and safety issues (including fire safety systems).

Structural defects can be actioned within 6.5 years after the completion of the building work.

2. Non-structural – e.g. sticking drawer, cosmetic plasterboard cracking, paint defects, fitted cabinetry defects, tiling defects.

Non-structural defects generally must be actioned within 12 months of completion of the building work.

If the relevant time period has elapsed, the owner cannot be supported by the QBCC or applicable QBCC insurance.

STEP 3: CONTACT BUILDER AS SOON AS POSSIBLE

If you have established defective building work within the relevant time period, the first action is to notify the original builder who was responsible for completing the work or contract. The builder has a legal right to return to complete repairs/rectification, and denying the builder this opportunity may cause the loss of the body corporate's resolution rights.

- a. Notify the builder of the issue in writing and provide relevant documents, photos or other evidence. If you do not have the details of the builder, the body corporate can generally provide those details to you.
- b. Allow the builder reasonable time to address the defect, having regard to time necessary to order materials and parts, arrange sub-contractors etc. Generally the period should be no less than 30 days unless the situation presents an emergency or danger.
- c. Facilitate access by the builder and their subcontractors during the period. Often many visits are required for inspection, measuring, ordering, and then carrying out the work.

STEP 4: WHAT IF THE DEFECT IS CAUSED BY SUBCONTRACTORS?

Depending on how the builder organises their work and their project management, some of the construction work may be done by the builder's own subcontractors.

Example – ABC Builders is engaged to build a house for a fee of \$500,000 and is a licensed builder. ABC Builders then engages a subcontractor XYZ Waterproofing to carry out the waterproofing of the bathrooms, ABC Builders pays XYZ Waterproofing for their work.

If the waterproofing of the bathroom fails and is a building defect, it is ABC Builders that are responsible for rectifying the defect. ABC Builders may direct XYZ Waterproofing to come back and fix their job, however it is ABC Builders who must arrange that work directly, and not simply provide XYZ Waterproofing details to the owner to contact.

STEP 5: ARRANGE A QUOTATION TO MAKE REPAIRS

Consider arranging your own independent contractor to assess the issue and give a quotation to repair the issue. This may become helpful later if you are required to substantiate the issue and demonstrate that it is in fact a defect, or to consider the estimated cost or complexity of repair.

THE CARETAKER OR BUILDING MANAGER

Your body corporate may have a contract for caretaking or building management duties, either with an on-site manager or an off-site management company. This role is generally responsible for maintaining common property, gardens and grounds, arranging service contracts etc.

The caretaking contractor is not responsible for building defects. That said, the caretaking contractor's role to assist the body corporate should extend to:

- Being aware of any building defects on-site
- Recording a log of defects reported to the body corporate or observed by the caretaker
- Notifying the builder initially and requesting rectification under warranty
- Being aware of any action the body corporate is taking
- Liaising with building inspectors, the QBCC, the builder and any other contractors to conduct works and/or inspections on-site
- Keeping the committee informed of any change to the condition of the defects and any work being carried out

BCSYSTEMS' INVOLVEMENT

The body corporate manager (BCsystems) assists the committee to resolve defect issues by:

- Providing general advice/guidance to the committee (e.g. by preparing this defect guide)
- Arranging for relevant industry expert consultants as required (building inspectors, lawyers etc)
- Informing owners of the issue at the committee's direction
- Recording the committee's decisions at meetings

BCsystems is not a building company and our team are not experts in construction management, project management or law. If a defect process requires the involvement of these specialists we will make a recommendation to the committee.

WHEN TO CONSIDER QBCC CLAIM

If the communication between owner and builder breaks down, it may be necessary to call on the regulator QBCC for support.

The QBCC provides its own advice to property owners about its processes and forms. Most complaints can be made online.

The QBCC complaint must be made by the owner of the affected property.

WHAT CAN THE QBCC DO TO HELP?

The QBCC is the statutory body which licenses most types of construction individuals and businesses, including builders.

Depending on the type of complaint, the QBCC has a power to:

- Inspect your affected property
- Issue a direction to rectify defective building work to the builder
- Take enforcement steps against the builder which may include revoking their licence
- Assist you with an insurance claim if you and your building are eligible.

The QBCC will generally not:

- Direct the builder to reimburse you for cleaning, removal or other costs
- Reimburse you if you fix the issue first before allowing the builder to fix it
- Assist you in any personal civil court action against the builder.

BEYOND THE QBCC: COMMENCING LEGAL PROCEEDINGS

CONTRIBUTED BY TODD GARSDEN - PARTNER



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.

BEYOND THE QBCC: COMMENCING LEGAL PROCEEDINGS

CONTRIBUTED BY TODD GARSDEN - PARTNER



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.

BUILDING DEFECT CHECKLIST

BUILDER	
COMPANY NAME	
ABN	
ADDRESS	
EMAIL	
PHONE	

Date of completion of building work:

Date defect identified:

<p>Establish whether external damage or failure to maintain has caused or contributed to the issue</p> <p>Is the defect structural or non-structural</p> <p>Contact builder in writing including:</p> <ul style="list-style-type: none"> • Detailed description • Photos • Independent contractor's report (if applicable) <p>Include reasonable period in which the builder must:</p> <ol style="list-style-type: none"> a. Respond acknowledging issue b. Commence rectification work c. Complete rectification work 	

Date for builder to complete rectification:

<p>If unresolved, contact QBCC for advice.</p> <p>Arrange independent review/quotation to assist with QBCC evidence</p>	



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