

Body corporate building defects
**your complete guide to managing
building defects in Queensland**



Introduction

Building defects continue to be an issue — and a source of dispute — for bodies corporate. A 2019 Deakin University study revealed that 85% of apartment buildings had some form of structural defect.¹

Recent high-profile examples (i.e., Johnson Apartment Tower in Brisbane, Opal Tower, Mascot Towers and Sugar Cube Apartments in Sydney) reinforce this issue and highlight the potential consequence for owners.

To help protect bodies corporate from defective building works, a number of significant changes were made to the Body Corporate and Community Management Regulations in 2021.

Importantly, the changes require bodies corporate (and body corporate managers) to take a more proactive role in protecting the legal rights of owners by identifying and rectifying building defects early.

To help with this important responsibility, Mahoneys and Sedgwick have prepared a detailed guide to managing body corporate building defects.

In this guide we discuss:

- What is a building defect
- The body corporate's obligations for defects
- Why it is important to identify defects early
- The importance of a building defect report
- What bodies corporate should do to protect their rights
- How Mahoneys and Sedgwick can help

Feel free to contact us for more information on how Mahoneys and Sedgwick can help your body corporate identify and manage any body corporate building defects.



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1. Deakin University, "Report analyses growing number of apartment building defects," June 2019

What is a building defect?

Building defects are generally defined as building work that is non-compliant, faulty or below a reasonable standard of quality. Defects can include, but are not limited to, issues with the following:



Aesthetics

(e.g. bubbling or peeling paint)



Compliance

(e.g. combustible cladding)



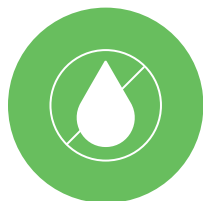
Safety

(e.g. non-compliant fire systems, balustrades)



Structural integrity

(e.g. cracking, sinking)



Water proofing

(e.g. water intrusion, pooling or staining)

To an untrained eye, a lot of building defects can initially seem inconsequential, or even go unnoticed. Some can take time to develop – water proofing issues and structural defects, for example, generally don't appear until well after a complex has been built.

Body corporate's obligations

No matter who is responsible for the building defect, the body corporate has an obligation under the Body Corporate and Community Management Act ("the Act") to maintain common property in good condition.

This extends to identifying and rectifying building defects on a timely basis, including pursuing the builder for any defective work it is responsible for.

Under recent changes, the body corporate also has:

- A right to make sure it has received copies of all the relevant construction documents for the scheme from the builder
- An obligation to consider engaging an independent expert to inspect the scheme and report on any building defects

Importantly, a body corporate that fails to act on a timely basis can lose the right to claim against the builder. When this happens, the burden to rectify any defects would fall directly on to the body corporate, which is then usually passed on to owners in the form of special levies.

Importance of identifying defects early

Early identification is critically important because there are strict timeframes for acting on building defects. A body corporate can lose some — or all — of its rights against the builder if they do not act within the legislated timeframes.

Construction contract

Generally a body corporate has 12 months from practical completion to lodge a warranty claim directly against the builder. After that time the body corporate would need to pursue the builder for breach of contract or lodge a claim with the Queensland Building and Construction Commission.

Queensland Building and Construction Commission (QBCC)

The body corporate can lodge a claim for defective building work with the QBCC. To be considered, a claim must be made:

- Within 12 months of the body corporate becoming aware of the building defect and either:
 - within 12 months of the building work being completed for work that does not meet the reasonable standard of a competent QBCC license holder; or
 - within approximately six years of the building work being completed, with the defect relating to water ingress, structural integrity, health and safety, or the use of the building

A claim against the builder may be limited, or even dismissed, if defects are not raised as soon as they are identified, because the builder can argue that the defects were due to, or made worse by, the body corporate's delay.

And finally, with an increasing number of builders being wound up — either voluntarily at the end of the project, or forced to by creditors — early escalation can help preserve the body corporate's right against the builder before they cease to exist.



Importance of construction documents

The body corporate regulations require the developer to hand over all body corporate records, registers and related documentation at the first annual general meeting, including all development and construction-related documents. The list of construction documents required to be handed over include:

- Development approvals
- As-built construction drawings
- The first CMS
- Construction contract
- Contractor warranties
- Certificates of classification

It is critically important that the body corporate obtains all construction documents as soon as practicable after the scheme is registered, because:

- It is required under the BCCMA
- They are essential records belonging to the body corporate
- They can be extremely difficult to obtain and verify
- They help determine the scheme's ongoing management and maintenance requirements
- It is difficult to assess defects and pursue the builder without them

It is not uncommon for the body corporate (and body managers) to have problems obtaining and verifying the documents. A lawyer with experience in body corporate building defects can help obtain and verify the construction documents which belong to the body corporate.

Importance of a building defect assessment

At the second annual general meeting, the body corporate regulations require the body corporate to consider engaging an independent building expert, who would conduct an initial building defect assessment. This assessment will help the body corporate proactively identify actual and potential building defects, including those that need to be raised with the builder.

A properly prepared defect assessment report should help the body corporate (and body corporate manager):

- Identify any defective building work, within the meaning of schedule 2 of the QBCC Act
- Determine the cause of the defective work, including:
 - how significant it is (or can be if left unchecked)
 - the work required to rectify the defect
 - who is responsible for rectifying it
- Take steps to rectify the defect including, where necessary, taking action against the builder

A properly prepared defect report will also help the body corporate's lawyers take up any issues with the builder.

The Act does not mandate a building defect assessment report be done, only that one be considered, however, not doing one can affect the body corporate's rights to claim against the builder. As defects can develop over time, the body corporate should consider having a regular defect assessment done to make sure defects are identified and rectified early.

Exercising the body corporate's rights

Under the Act, the body corporate assumes the right of the developer and unit holders (in some circumstances) for any work done by the builder. This includes taking steps to rectify any defective building work.

The course of action will depend on the defect, who is responsible, if a claim can be made, and whether the person responsible for the defect (e.g. the builder) is available and prepared to respond.

There are a number of rights available to bodies corporate for defective building work, including:

- Having the builder rectify the defect to the satisfaction of the body corporate/unit holder
- Having the builder compensate the body corporate/unit holder, who in turn pays someone else to rectify the defect
- Lodging a complaint/claim with the QBCC, which can instruct the builder to rectify the defect or compensate the body corporate/unit holder
- Taking legal action against the builder, including seeking orders to rectify or compensate the body corporate/unit holder
- Taking legal action against the administrator/liquidator in the event the builder ceases to exist, including seeking orders to rectify or compensate the body corporate/unit holder
- Undertaking the work at the body corporate/unit holder's own cost

It is important to seek legal advice before taking any steps to rectify a defect, in order to ensure the body corporate's rights are protected, the proper processes are followed (including getting any body corporate approvals) and the supporting evidence is obtained.



How Mahoneys and Sedgwick can help

Mahoneys and Sedgwick are experienced at helping bodies corporate identify and rectify building defects.

Mahoneys can help with the following:

- Advising the body corporate on its legal rights and obligations, including:
 - right to receive the construction documents from the builder/developer at the first annual general meeting
 - obligation to consider appointing an expert to undertake the defect assessment at the second annual general meeting
- Obtaining the construction documents from the developer/builder
- Reviewing and verifying the construction documents received by the body corporate
- Working with the expert appointed to conduct the building defect assessment
- Reviewing the building defect assessment report and advising on appropriate next steps, including:
 - confirming who is responsible for the defect
 - what action, if any, can be taken (and against whom)
 - any strategies for achieving the desired outcome

- Pursuing the builder for any defects they are responsible for
- Advising on and preparing any relevant body corporate motions
- Attending body corporate meetings to discuss any issues and outline the body corporate's rights and options

Sedgwick can help with the following:

- Conducting the preliminary building defect assessment
- Working with the body corporate's lawyers to:
 - review/assess any defects identified
 - determine and support any next steps
- Providing additional reports/evidence/opinions required to support any action to be taken
- In the event that the body corporate is required to undertake the work, helping to:
 - scope out and cost any rectification works
 - contract out and manage any work to be undertaken

- Overseeing and reporting on any remediation work undertaken by the builder or appointed third party
- Attending body corporate meetings to discuss any issues and outline the body corporate's rights and options

Next steps

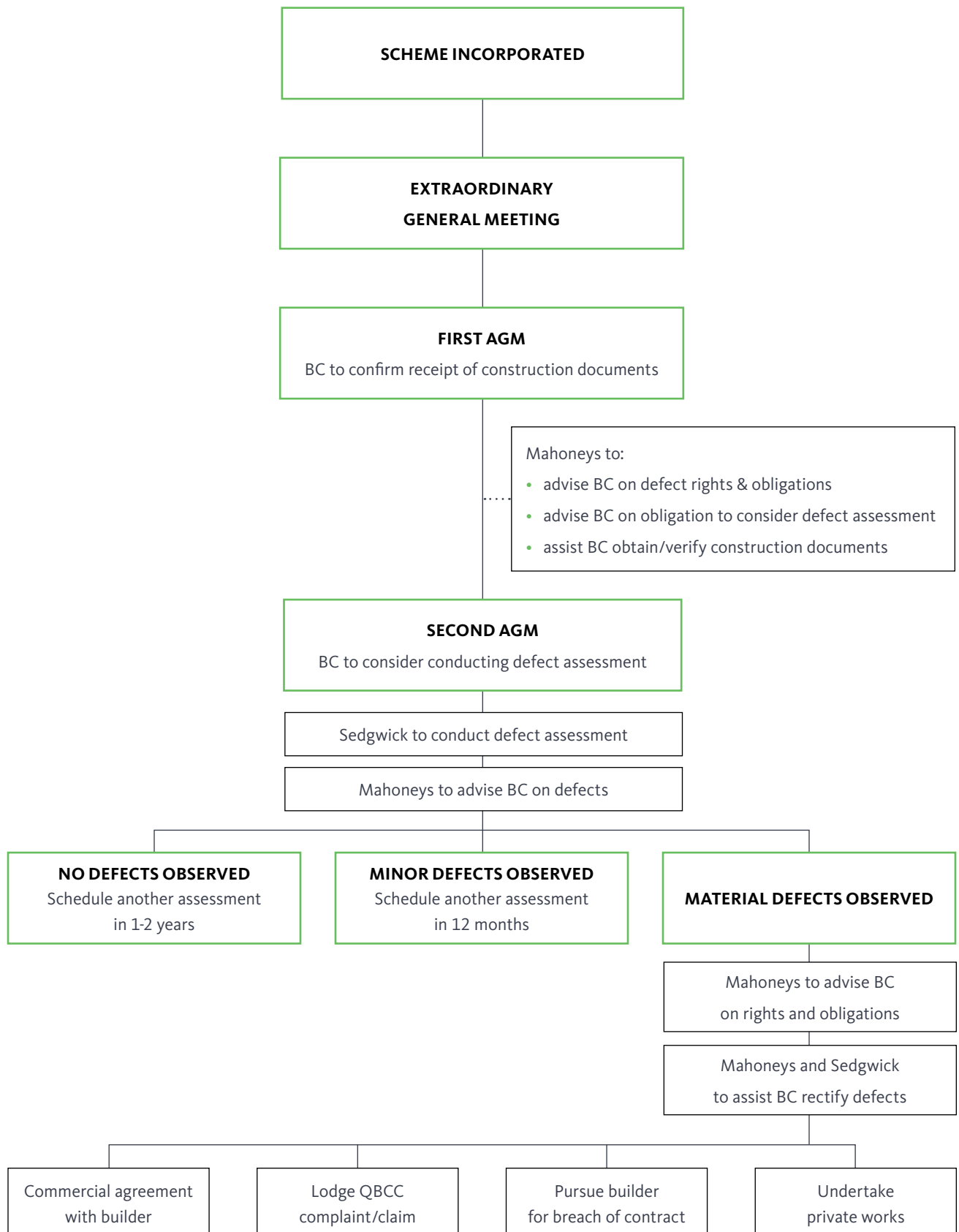
Irrespective of when the complex was constructed, bodies corporate should adopt the practice of having it assessed regularly for defects.

Any complex completed in the last six years should have a building assessment done as soon as possible if they haven't already, or risk losing the right to make a claim against the builder.

Any material defects should be discussed with the body corporate's lawyers immediately, to make sure the body corporate's rights are assessed and protected — especially where there is the possibility of holding another party responsible for the defect(s).

Mahoneys and Sedgwick can guide you through the importance of, and the process for, having a complex assessed for building defects.

DEFECT INSPECTION PROCESS



About us



About Mahoneys

Mahoneys is an independent law firm offering a range of commercial advice, transaction support, litigation and dispute resolution services.

Mahoneys' vision is to be a leading full-service commercial law firm through the delivery of quality work, excellent service and the best possible outcomes for our clients.

Our dedicated body corporate team is made up of industry leading lawyers who have developed a detailed understanding and expertise in strata, community and company titles schemes.

Specifically, our team includes experienced town planning and construction lawyers. This gives us the capability to advise bodies corporate on all their building defect needs, including:

- The body corporate's obligation to identify and rectify defects
- What documents the developer is legally required to hand over
- Obtaining and verifying the construction documents required by the body corporate
- Coordinating building defect reviews
- Taking action against the builder
- Town planning issues



About Sedgwick

As a leading global provider of technology-enabled risk, benefits and integrated business solutions, Sedgwick is continually evolving to meet the needs of our diverse client base. And while the depth and richness of our service offerings are always expanding, we remain — first and foremost — focused on our clients and their customers. We do this by helping people, restoring property, preserving brands and empowering performance for our clients around the world.

We take a people-first, tech-forward and data-driven approach to providing support in the moments that matter most. By combining an unwavering commitment to caring for people with our proprietary technologies and unparalleled industry data, we're able to deliver exceptional experiences and outcomes that make a world of difference.

After all, taking care of people and organizations is at the heart of everything we do.

