



Water Act Claims and Building Defects that affect Owners Corporations in Victoria

| By Phillip Leaman

Welcome

TISHER LINER FC LAW



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WHAT WE DO:

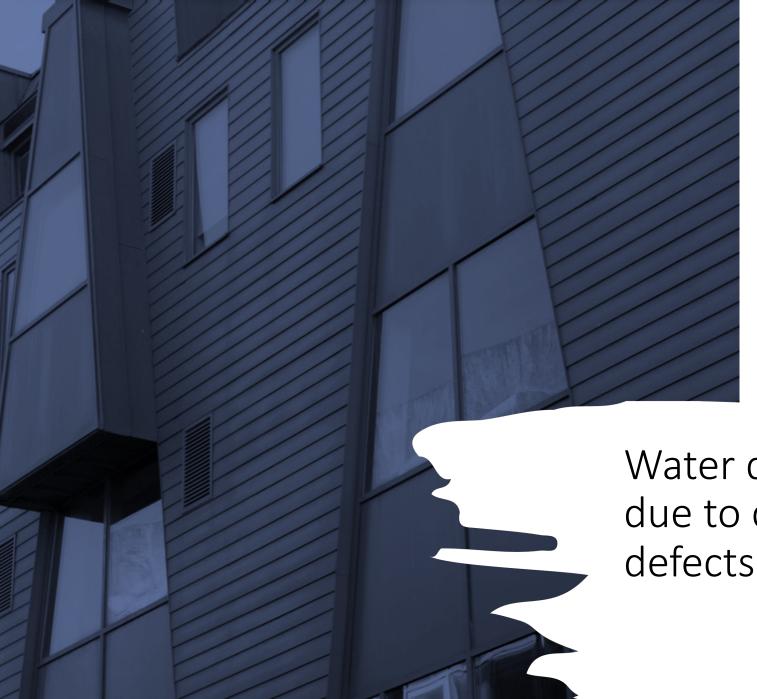
Our very experienced team can provide assistance to owners corporations, committees, lot owners and managers in a range of owners corporations legal matters including:-

- General advice and governance;
- Interpretation of plans of subdivision, common and private lot boundaries;
- Levy recovery;
- Building defect claims and water act claims;
- Adverse possession, easement and amendments to plans of subdivisions;
- Creation and enforcement of owners corporations rules;
- Preparing leases and licences over common property';
- Advice on repairs and maintenance and the application of the benefit principle; and
- Prosecuting and defending claims made at VCAT by Owners Corporations and Lot owners..



OVERVIEW

- 1. What does an Owners Corporation do when they are faced with a water ingress claim?
- 2. Who is liable for claims and can liability be passed on to others?
- 3. What happens if the building has been constructed in the last 10 years, can the builder or other parties be pursued?
- 4. How does the process of making a claim practically work?



Water damage to lot owners due to common property defects – who is liable?

Legal Framework

GENERAL OVERVIEW The current relevant legislation that governs Owners Corporations:

Subdivision Act 1988

Subdivision (Registrar's Requirements) Regulations 2011 **Owners Corporations Act 2006** Owners Corporations Regulations 2018

GENERAL OVERVIEW

Is there a water leak?

- If a lot owner is experiencing water ingress into their private lot property, or a lot owner thinks they may be leaking into another lot owner's property, here are some preliminary steps they should consider taking:
- 1. The first thing to do if there is a water leak is to call an expert and have them inspect where the leak is coming from and the extent of the damage.
- The next step is to work out whether the leak is coming from <u>private lot property</u> or the <u>common property</u>, as this will determine who is liable for the cost to repair the leak and any consequential damage.

The Plan of Subdivision determines the legal boundaries between common property and private lot property for a particular property. All Plan of Subdivisions are unique and the boundaries are different for every property.

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GENERAL	
OVERVIEW	

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Interpreting the Legal Boundaries

The Plan of Subdivision is registered with Land Victoria and creates the legal boundaries between private lot and common property.

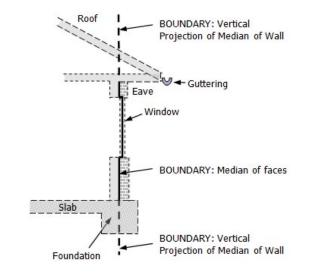
There are different types of legal boundaries in plans of subdivisions, including:

- Interior Face;
- Median (floor and ceiling);
- Median (wall, window, door, balustrade);
- Exterior Face.

Subdivision (Registrar's Requirements) Regulations 2011 (SR NO 111 of 2011) - REG 10

Regulation 10 has some great examples of the differences between interior, median and exterior face boundaries.

Example: Median (wall, window, door, balustrade)



Balconies

Balconies are a common source of water leak issues within Owners Corporations.

If a balcony (or the balcony above the lot is leaking) is affected by an **interior face boundary**, it means that the boundary lies along the interior face of any wall, floor (upper surface of elevated floor if any), ceiling (underside of suspended ceiling if any), window, door or balustrade of the relevant part of the building.

Any internal coverings, waterproof membranes and fixtures attached to walls, floors, and ceilings are included within the relevant parcel. It has also been confirmed by VCAT that balconies with interior face boundaries, include any internal coverings (meaning internal to the lot) including tiles and waterproof membrane are within the lot and not part of common property.

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GENERAL OVERVIEW

Owners Corporation PS508732B v Fisher (Owners Corporations) [2014] VCAT 1358

At paragraph [25]:

GENERAL

OVERVIEW

"The 2011 registrar's requirements make it clear that any internal coverings (meaning internal to the lot) including tiles and waterproof membrane are within the lot and not part of common property. The regulation makes for good sense and practicality. **It would be unduly onerous to require an Owners Corporation to repair and maintain the tiles, floor coverings, paint and light fittings within individual lots**."

At paragraph [27]:

"The membrane and tiles are within the respondent owners' lot. It is for the respondent lot owners to repair and maintain the waterproof membrane."



Private lot leaking?

If a private lot is leaking, there is a statutory duty under section 129 of the *Owners Corporations Act* 2006 (Vic), that requires a lot owner to properly maintain in a state of good and serviceable repair any part of the lot that affects the outward appearance of the lot or the use or enjoyment of other lots or the common property.

This also includes any service that serves that lot exclusively.

Lot owners should take steps to repair any issues to avoid potential legal claims being made against them.

Source of the section of the section

What powers does an Owners Corporation have?

Under section 48 of the *Owners Corporations Act* 2006, if a lot owner has refused or failed to carry out repairs, maintenance or other works to the lot owner's lot that are required because:

(a) the outward appearance or outward state of repair of the lot is adversely affected; or

(b) the use and enjoyment of the lots or common property by other lot owners is adversely affected

the Owners Corporation may serve a notice on the lot owner requiring the lot owner to carry out the necessary repairs, maintenance or other works.



Continued..

Under section 50(1) of the *Owners Corporations Act* 2006, an Owners Corporation may authorise a person to enter a lot or a building on a lot on its behalf to carry out repairs, maintenance or other works in accordance with section 47(1), 47(2) or 48(3).

Further, under section 50(2), an Owners Corporation may authorise a person to enter a lot or a building on a lot where necessary to carry out repairs, maintenance or other works on its behalf on the common property.

What notice of entry must be given?

Under section 51 of the *Owners Corporations Act 2006,* the Owners Corporation <u>must</u> give at least 7 days' notice in writing to the occupier of a lot of its intention to enter the lot unless—

- (a) the occupier agrees to a lesser time; or
- (b) there is an emergency.

"emergency" includes:

- ✓ an interruption to gas, water, electricity, telephone, drainage, sewerage or a similar service; and
- \checkmark a leak or a similar problem requiring prompt attention; and
- cracking or a similar structural problem likely to affect the immediate safety of a building or any person.

Owners Corporation No. 1 - PS434030V v Carroll (Owners Corporations) [2016] VCAT 1863 (16 November 2016)

Senior Member Vassie at [40]:

"Section 51 requires an owners corporation to give to an occupier under a residential tenancy agreement the same notice of intention to enter the lot as a landlord is required to give under the Residential Tenancies Act 1997. Again, the section prescribes the kind of notice which must be given **but does not in its terms compel the occupier to permit entry.**

So the sections relied upon might **provide a basis for an owners corporation to apply to the Tribunal for an order compelling a lot owner or occupier to permit access** and entry but do not themselves confer any right of access or entry."



Are the leaks coming from the common property?

Water from the Common Property

If an expert has determined that the water leak is coming from the common property into private lot property, depending on the age of the building, the Owners Corporation should consider whether there is another party who may be liable for the water ingress.

Things to consider:

Is the water coming from a private lot onto the common property? Is the property old and does it require repair/maintenance ?

Is the property new and the water is from a building defect?

What can an owners corporation do when faced by an emergency e.g. burst pipe etc?

An owners corporation may carry out urgent repairs if resolved to do so by ordinary resolution by the committee or by the manager if there is an appropriate delegation of power.

If access to a private lot is required an owners corporation may authorise a person to enter a lot where necessary to carry out repairs and not provide notice under section 51 in the case of an emergency.

Obviously, if the access is without consent, the owners corporation will be liable for damage occurred due to the access. Ocs need to be careful and seek advice if they propose to enter a lot without consent of the lot owner.

What is an emergency for the purpose of entry?

For the purpose of Section 51:

"emergency" includes—

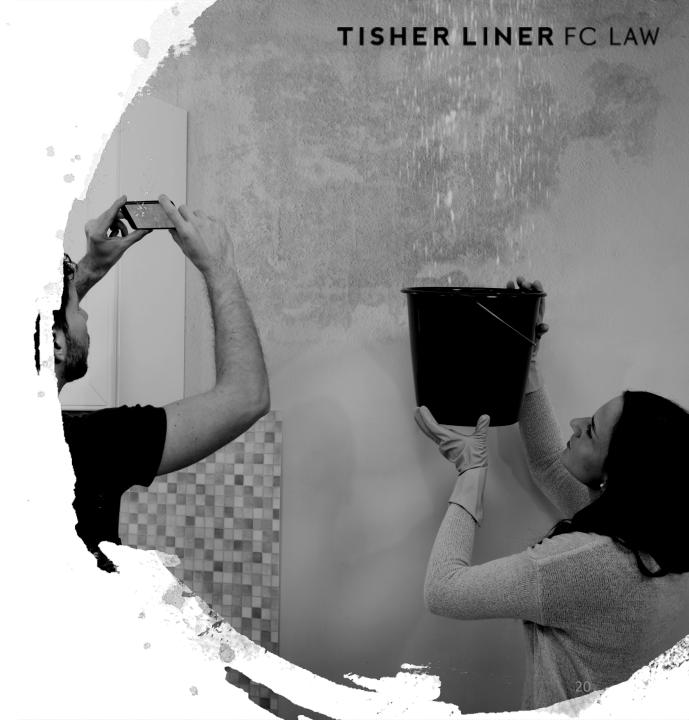
(a) an interruption to gas, water, electricity, telephone, drainage, sewerage or a similar service; and

(b) a leak or a similar problem requiring prompt attention; and

(c) cracking or a similar structural problem likely to affect the immediate safety of a building or any person.

REPAIR & MAINTENANCE

✓ COMMON PROPERTY
 ✓ SERVICES
 ✓ FIXTURES



SECTION 46

Section 46 of the Act requires Owners Corporations to repair and maintain common property and any services or fixtures.

But what happens when the Owners Corporation fails to carry out the repairs or maintenance?

Lot owners can become frustrated with inaction and may choose to carry out the works themselves. However, lot owners should not be tempted in carrying out works to common property <u>without express authorisation</u> from the Owners Corporation.

SECTION 47– Owners Corporations Act 2006

S 47: Owners corporation must repair and maintain services

An owners corporation must repair and maintain a service in or relating to a lot that is for the benefit of more than one lot and the common property.



New Provision: Section 47A of the *Owners Corporations Act 2006*

The new legislative changes to the *Owners Corporations Act 2006* (which occurred in 1 December 2021) have added a new provision.

Section 47A states that lot owners must not repair, alter or maintain—

(a) the common property of the owners corporation; or

(b) a service in or relating to a lot that is for the benefit of more than one lot or the common property.

<u>Unless authorised expressly</u> by the Owners Corporation as an agent of the Owners Corporation.



Lot owners need to be careful that they only undertake works to common property that are <u>approved in writing by the</u> <u>Owners Corporation</u> and that the issue of who is paying for the works <u>is specified.</u>

It should be noted that an Owners Corporation <u>must obtain a special resolution</u> if the Owners Corporation (or someone as agent for the Owners Corporation) is undertaking a *significant alternation* to the common property under Section 52 of the Act.

Claims under the *Water* . Act 1989

In addition to having obligations to comply with sections 46, 47 and 129 of the *Act*, lot owners and the Owners Corporation also have obligations under section 16 of the *Water Act 1989*. Section 16 of the *Water Act* says as follows:-

(1) If—

- (a) there is a flow of water from the land of a person onto any other land; and
- (b) that flow is not reasonable; and
- (c) the water causes;
 - 1. injury to any other person; or
 - 2. damage to the property (whether real or personal) of any other person; or
 - 3. any other person to suffer economic loss-

the person who caused the flow is liable to pay damages to that other person in respect of that injury, damage or loss.

SECTION 16 – WATER ACT

(2) If—

- (a) a person interferes with a reasonable flow of water onto any land or by negligent conduct interferes with a flow of water onto any land which is not reasonable; and
- (b) as a result of that interference water causes—
 - (i) injury to any other person; or
 - (ii) damage to the property (whether real or personal) of any other person; or
 - (iii) any other person to suffer economic loss:

the person who interfered with the flow is liable to pay damages to that other person in respect of that injury, damage or loss.

Section 3 of the *Water Act 1989* defines a "flow" in relation to water as a discharge, release, escape, percolation, seepage and passage, and includes both surface and underground flow.

SECTION 16 – WATER ACT

- (3) If the <u>person</u> who caused, or interfered with, the <u>flow</u> (as the case requires)—
 - (a) is the servant of another <u>person</u> and acted in the course of the servant's employment; or
 - (b) is the agent of another <u>person</u> and acted within the scope of the agent's <u>authority</u>—

that other <u>person</u> is liable to pay damages in respect of the injury, damage or loss.

(4) The existence of a liability under subsection (3) does not extinguish the liability of the servant or agent under subsection (1) or (2), as the case requires.

SECTION 16 – WATER ACT

(5) If the causing of, or the interference with, the <u>flow</u> (as the case requires) was given rise to by <u>works</u> constructed or any other act done or omitted to be done on any land at a time before the current <u>occupier</u> became the <u>occupier</u> of the land, the current <u>occupier</u> is liable to pay damages in respect of the injury, damage or loss if the current <u>occupier</u> has failed to take any steps reasonably available to prevent the causing of, or the interference with, the <u>flow</u> (as the case requires) being so given rise to.

(6) The existence of a liability under subsection (5) extinguishes the liability under subsection (1) of the <u>person</u> who caused the <u>flow</u> or the liability under subsection (2) of the <u>person</u> who interfered with the <u>flow</u> (as the case requires).

SECTION 16 – WATER ACT

The effect of section 16 of the Water Act 1989 is that:-

the Owners Corporation will be liable to compensate a lot owner for damage to the lot or for economic loss, or for both, that results from an unreasonable flow of water from the common property into the lot:

i. if the owners corporation has caused the flow; or

ii. (where the cause of the flow occurred before the owners corporation became the occupier of what has become common property) if the owners corporation has failed to take any steps reasonably available to prevent the causing of the flow.

the owner of a lot will be liable to the owner of the damaged lot for that damage, or for economic loss, or for both, where the unreasonable flow of water into the lot has originated from another lot, not from common property:

i.if that owner, or that occupier, of the other lot has caused the flow; or

ii. (where the cause of the flow occurred before the current owner or occupier became the occupier of that other lot) if the occupier has failed to take any steps reasonably available to prevent the flow.

The effect of Section 16...

O'Connor v OC PS3320703 (Owners Corporations) [2015] VCAT 1912 (1 December 2015)

Facts:

- The Applicant (Mr O'Connor) and his wife are the tenants of a first floor apartment in an eight storey residential complex in Drewery Lane, Melbourne (the property).
- On 12 September 2014, sewerage was observed dripping from the ceiling of the laundry of Mr O'Connor's apartment. Later that evening sewerage was dripping from the ceiling in both bedrooms.
- A plumber called by the Respondent's Building Manager established that there was a blockage in one of the three sewerage stacks located in the Ground Floor car park.
- The cause of the blockage was a build-up of a quantity of material being baby wipes, tampons and kitty litter which had apparently been flushed down toilets by residents.

Issues:

•Was the sewerage stack in the common property of the Owners Corporation (the OC)?

•If so, has the OC failed to maintain the sewerage stack so as to prevent blockages as required by s47 of the Owners Corporation Act 2006 (the OCA)?

•Is the Applicant's claim in fact made under the Water Act 1989 (the Water Act)?

O'Connor v OC PS3320703 (Owners Corporations) [2015] VCAT 1912 (1 December 2015)...

Outcome:

- Tribunal accepted the OC's submission that the issue is not whether the OC failed to maintain the sewer stack, but what was the cause of the blockage.
- The evidence was that the cause of the blockage(s) was an unknown person(s) flushing inappropriate material down a toilet.
- *Ridus v Strata Plan 10308* [2005] NWSCA 246 is authority for the proposition that an owners corporation is <u>not required</u> to monitor the maintenance and state of repair of the common property. Therefore, it cannot be said that the OC was aware, or should have been aware, of the possibility of blockages to the sewerage resulting from residents flushing inappropriate materials down the toilet.
- The OC hadn't breached its duty under s 47 to repair and maintain the sewer stacks.
- The OC did not cause the flow of sewerage from the sewer stack into the apartment of Mr O'Connor under s16 of the *Water* Act 1989.

Barter v Bushett (Building and Property) [2019] VCAT 774 (27 *May 2019*) ("**the Barter Case**").

Outcome:

In the Barter Case, a defective stormwater and agricultural pipe located directly underneath the soil of the courtyard of a private lot caused water damage to a lot and common property.

VCAT rejected the Owners Corporation's submission that the private lot owner was responsible for repairing and maintaining the pipes, as the drains preserved the integrity of the private lot property structure. VCAT held that a lot owner is not required to repair and maintain part of a service that benefits other parts of the land affected by the Owners Corporation.

VCAT found that even though the defective stormwater pipes were located underneath the private lot, they were designed to receive water from the agricultural drains and remove groundwater from the common property. The removal of groundwater was a service that benefited other private lots at the Property as well as the common property and it is the Owners Corporation's responsibility to repair and maintain them.

Hersusianto v Owners Corporation No. PS300560N (Owners Corporations) [2018] VCAT 1845 (5 December 2018) ("the Hersusianto Case").

In the Hersusianto Case, a central air-conditioning service servicing 15 lots in the building was made up of a chiller, boiler and pumps on the rooftop that then circulated heated and cooled water through pipes that ran through cavities in the building to a fan coil air conditioning unit in each of the 15 lots. One of the fan coil air conditioning units in one of the lots failed and the owner requested the Owners Corporation repair the defective fan, but the Owners Corporation refused.

VCAT rejected the Owners Corporation's argument that the defective fan coil unit only 'served' one lot and should be the individual lot owner's responsibility to repair and maintain. Instead, VCAT determined that the defective fan coil unit and ducts to the lot were "*inextricably connected, linked to, and form part of*" the central air conditioning system for the building and the Owners Corporation was liable to repair and maintain them.

The Hersusianto Case confirms that VCAT will likely reject artificial legal submissions that different 'parts' of a central system at the Property should be considered as 'separate' when it comes to determining which unit owner is responsible for fixing that part of the central system.



BUILDING DEFECTS

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BUILDING DEFECTS

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Owners Corporations & Building Defects

When considering action against a builder for defective building works, an Owners Corporations should consider and deal with the following matters and take the following steps:

- Identify the issues at the property;
- Obtain legal advice on the legal boundaries as outlined in the Plan of Subdivision to identify whether the defects are <u>common</u> **property**, **private lot property** or a mixture of the two.

The Builder's Statutory Warranties for Domestic Building Work

Builders in Victoria must give the following warranties for domestic building work carried out under a domestic building contract:-

- That the work will be carried out in a proper and workmanlike manned and in accordance with the plans and specifications set out in the contract;
- That all materials to be supplied by the builder for use in the work will be good and suitable for the purpose for which they are used and that, unless otherwise stated in the contract, those materials will be new;

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BUILDING DEFECTS CONT..

The Builder's Statutory Warranties for Domestic Building Work

BUILDING

DEFECTS

CONT..

- That the work will be carried out in accordance with, and will comply with, all laws and legal requirements including, without limiting the generality of this warranty, the *Building Act 1993* and the regulations made under that Act;
- That the work will be carried out with reasonable care and skill and will be completed by the date (or within the period) specified in the contract;
- That if the work consists of the erection or construction of a home, or is work intended to renovate, alter, extend, improve or repair a home to a stage suitable for occupation, the home will be suitable for occupation at the time the work is completed;

BUILDING DEFECTS CONT..

Who is the Builder?

Identify the relevant parties/entities.

- Who is the builder?
- If the builder is a company, is that company still registered?
- If still registered proceed. If no longer registered, consider insurance options.

BUILDING DEFECTS CONT..

When will domestic building work be regarded as "defective"?

"Defective" domestic building work has a legal definition. It includes domestic building work that has been carried out:-

- a. In breach of a **Builder's Statutory Warranty** under section 8 of the *Domestic Building Contracts Act 1995*; or
- b. Which fails to maintain a standard of quality of building work specified in the domestic building contract between you and the Rectifying Builder.

Limitation Periods

Consider the applicable limitation periods – have they expired?

Pursuant to section 134 of the *Building Act 1993,* a building action cannot be brought more than 10 years after the date of the <u>relevant</u> Occupancy Permit (regardless of whether the Occupancy Permit was subsequently cancelled or varied) or a Certificate of Final Inspection (if an Occupancy Permit was not issued). Proceedings must be issued - it is not enough to lodge a dispute with the Domestic Building Dispute Victoria Resolution Victoria conciliation process.1

In some developments, building works are completed in stages under different building permits. Where multiple occupancy permits are issued in relation to a building permit, which permit is the operative permit for the purpose of determining the limitation date?

1. Owners Corporation 1 Plan No. PS543073S v Eastrise Constructions Proprietary Limited (Building and Property) [2019] VCAT 1639.

BUILDING DEFECTS CONT..

Lendlease Engineering Pty Ltd v Owners Corporation No 1 [2022] VSCA 105

The Supreme Court of Appeal considered this issue in *Lendlease Engineering Pty Ltd v Owners Corporation No 1* [2022] VSCA 105 (Lendlease).

It was decided that...

"time must commence to run from the date of issue of the permit that relates to the building work the subject of complaint in the building action."

This means where there are multiple occupancy permits, legal advice is required to work out what is the correct starting point for the 10 years.



Expert Evidence

Too often we see Owners Corporations not obtaining the appropriate expert evidence to work out exactly what are the defects and more importantly what are the recommended actions to remedy the defects.

Some builders are fantastic and return to the site and carry out the proper remediation. Other builders who are not so reliable may simply slap on some silicon and call it a day or ignore the matter and hope that it goes away.

Owners Corporations should ensure that they take action early and do not wait until the last minute for the 10-year period to elapse.

Obtain a VCAT-Compliant Expert Report which:-

- a. Identifies the defects, why they are defects, and the location of each;
- b. Specifies whether a defect is originating or resultant;
- c. Provides a scope of rectification works;
- d. Outlines the approximate costings to carry out works as per the recommended scope of rectification works.

BUILDING DEFECTS CONT..

Domestic Building Dispute Resolution Victoria ("DBDRV")

BUILDING

DEFECTS

CONT..

 Under the DBC Act a building owner cannot commence a domestic Building Dispute in VCAT unless you have first obtained a "Certificate of Conciliation" from a relatively newly created body called the "Domestic Building Dispute Resolution Victoria" ("DBDRV").

 Participating in the DBDRV process does <u>not</u> extend the Limitation Date and based on experience can take longer that six (6) months to complete.

✓ If you fail to include a particular category of originating defects in the DBDRV application, then you may not be authorised to bring a building action in VCAT for that defect.

✓ If the DBDRV conciliation is not successful and a 'Certificate of Conciliation – dispute not suitable' is obtained, then decide whether to commence a building action in VCAT against the builder (and any other potentially liable parties)

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Victorian Civil and Administrative Tribunal

 \checkmark Issue an application and points of claim

- ✓ Directions Hearing listed for many months later
- ✓ Builder files points of defence and expert reports
- ✓ Compulsory conference or mediation fixed
- ✓ Directions Hearing
- ✓ Hearing- 1-3 years away

Options: Negotiate or go to County Court of Victoria

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BUILDING DEFECTS CONT..

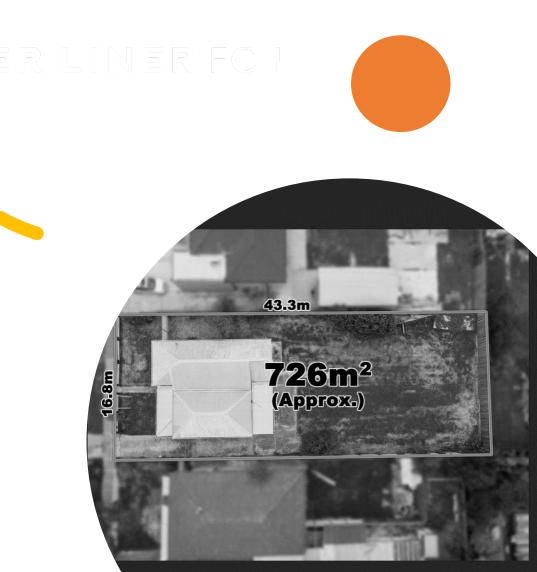
DEFECTS & PRIVATE LOT PROPERTIES

To the extent that any part of the claim relates to **private lot property** (in respect to resulting defects), if the Owners Corporation is to pursue any of those claims, it will need to either join the relevant lot owner as an applicant/party or obtain an assignment of rights from them.

Generally, we recommend that private lot owners prosecute their own applications for originating defects that affect private lot property.

Private lot owners should:

- ✓ obtain their own legal advice as to any defects that relate to their private lot property.
- ✓ review their own certificate of occupancy (in case the relevant limitation date is not the same as the Owners Corporations).



RESOLUTIONS TO COMMENCE PROCEEDINGS

Power to commence legal proceeding

Special Resolutions In accordance with section 18 of the *Owners Corporations Act 2006*, a special resolution of the Owners Corporation must be passed before legal proceedings are commenced for defective building works.

What is a Special Resolution?

Under section 96:

A special resolution of an owners corporation is a resolution passed by —

(a) if a ballot or poll is taken, 75% of the total lot entitlements of all the lots affected by the owners corporation; or

(b) in any other case, 75% of the total votes for all the lots affected by the owners corporation.



INSURANCE

Domestic Building Insurance (previously known as "home warranty insurance")

In Victoria, builders who perform domestic building work to <u>residential</u> <u>buildings of three or less storeys</u> and under a Construction Contract which is more than \$16,000.00 (for contracts after 1 July 2014) are required to obtain a domestic building insurance policy that protects the homeowner(s) from loss or damage caused by the builder's defective building work.

Domestic Building Insurance policies are only activated in the event that the builder:

- ✓ Dies
- ✓ Disappears; or
- ✓ Becomes insolvent

(or where the builder failed to comply with a Tribunal or Court Order where Domestic Building Insurance was issued by VMIA on of after 1 July 2015).

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Changes

NEXT EXIT 🖊



QUESTIONS?