



Building & Construction Issues Facing Bodies Corporate

AUTHOR // JAMES NICKLESS

DECEMBER 2015

LESSER RIGHTS FOR UNIT OWNERS?

With an ever increasing number of people living or working in Strata Developments, it is somewhat daunting that the rights which lot owners have in relation to buildings in community title schemes do not appear to be as protected as those of owners of detached dwellings. Some of the issues facing lot owners in Strata Developments include:

1. The body corporate does not come into existence until after the building is constructed and therefore has no control over the negotiation of the original construction contract or the satisfactory performance of the construction works by the builder;
2. Construction contracts for these types of developments are often very restrictive upon the body corporate's rights, particularly in relation to time periods and rights in relation to defective building works;
3. The off the plan unit sales contracts are generally of a standard form, meaning purchasers of lots in community title schemes have little bargaining power to negotiate the terms and they can contain restrictive time periods and rights in relation to defective building works;
4. Often the body corporate and the individual lot owners are not provided with all of the

documentation which they reasonably require in order to properly access their rights and responsibilities in relation to the construction and maintenance of the buildings on scheme land, such as the original construction contracts, plans, specifications and warranty documents for plant and equipment; and

5. Records of any rectification works undertaken during the defects liability period under the construction contract are often incomplete or non-existent.

CONSTRUCTION CONTRACT

The first issue that bodies corporate and lot owners will face, once they take control of the scheme from the original developer will be whether or not a construction contract exists between the developer and the builder.

If such a contract does exist, then the body corporate must obtain a copy of it and be advised on the terms of the contract, as the body corporate's rights and responsibilities in relation to defective building work will be predominately governed by the terms of the construction contract.

If such a construction contract does not exist, then this will significantly impact the body corporate and lot owners' rights, particularly in relation to any statutory warranty claims under the Statutory Insurance Scheme (if applicable). It is essential that bodies corporate identify

ClarkeKann is a commercial law firm with offices in Brisbane and Sydney. Our expertise covers commercial & corporate transactions, employment & IR, financial services, litigation, risk management and insolvency, property transactions and resources projects, across a range of industries. For a full list of our legal services, please visit our website at www.clarkekann.com.au. To update your contact details or unsubscribe to any of our publications, email us at publications@clarkekann.com.au.

This bulletin is produced as general information in summary for clients and subscribers and should not be relied upon as a substitute for detailed legal advice or as a basis for formulating business or other decisions. ClarkeKann asserts copyright over the contents of this document. This bulletin is produced by ClarkeKann. It is intended to provide general information in summary form on legal topics, current at the time of publication. The contents do not constitute legal advice and should not be relied upon as such. Formal legal advice should be sought in particular matters. Liability limited by a scheme approved under professional standards legislation. [Privacy Policy](#)

as early as possible (preferably at the first annual general meeting) whether a construction contract exists and, if so, obtain a copy of it.

OBTAINING ALL NECESSARY DOCUMENTS

Whilst there is a statutory obligation on behalf of the developer to provide to the body corporate at the first annual general meeting, all documents and material in its possession or control which are relevant to the buildings and improvements on scheme land, it is common place for issues to arise at the first annual general meeting. This can result in documents not being provided or not being adequately described so that their significance is overlooked.

If the body corporate does not obtain advice in relation to any construction contract provided, then key dates, such as the defect liability period, may pass without the body corporate being aware of them and rights in relation to rectification of defects may be extinguished.

Best practice would be to:

1. REVIEW ALL OF THE DOCUMENTS provided to the body corporate at the first annual general meeting.
2. IDENTIFY ANY MISSING DOCUMENTS.
3. TAKE STEPS TO OBTAIN ANY MISSING DOCUMENTS or confirm the lack of their existence.
4. OBTAIN LEGAL ADVICE in relation to the terms of all contractual documents obtained.
5. RECORD KEY DATES such as the date for practical completion of works and all relevant limitation dates, such as the end of the building defect liability period.
6. ARRANGE FOR AN INSPECTION AND REPORT to be undertaken by an engineer or building consultant on the existence of any defects well in advance of the expiry of the key limitation dates set out in the contract and at law.
7. STRICTLY COMPLY WITH THE TERMS of the contract and the statutory insurance policy (if applicable) when handling any defect claims.

STATUTORY DUTY TO MAINTAIN COMMON PROPERTY

Bodies corporate are under a statutory duty of strict liability to maintain the common property, water proofing membranes and certain other elements of the building which provide shelter or structural support to lots within the scheme.

Strict liability means that the body corporate is responsible for any failure in the common property, regardless of the cause or how reasonable the body corporate has been.

This places the body corporate in the difficult position of being charged with the obligation to maintain and repair the common property, potentially accruing liability in respect of losses suffered by lot owners and other parties, in circumstances where the body corporate's rights against those actually responsible for the failure are not clear cut.

Given this disparity of rights, the body corporate should plan to mitigate its damages by arranging the rectification of any defects as soon as possible, in the event that the original builder and developer do not immediately agree to rectify the defects and then follow through on that agreement.

Best practice for handling building defects involves the following things:

1. OBTAINING ADVICE including all necessary legal and engineering advice;
2. MAKING A DEMAND upon the responsible parties for rectification of the defects;
3. OBTAINING QUOTATIONS from alternative contractors for the completion of the rectification works;
4. REVIEWING THE BODY CORPORATE'S FINANCIAL SITUATION and assessing its capacity to pay for the repair works and any related legal or engineering fees;
5. CONSIDERING ALTERNATE METHODS of funding the rectification works and associated costs, including without limitation, increasing levies, striking special levies and borrowing;
6. CONSIDERING THE VIABILITY of commencing proceedings for the rectification of the works or reimbursement for the body corporate's costs of such rectification; and
7. ENSURING THAT THE WORKS WHICH ARE THE SUBJECT OF RECTIFICATION are adequately provided for in a properly drafted construction contract upon terms which suitably protect the future rights of the body corporate.

RECORD KEEPING

There are various stakeholders in Strata Schemes, including the developer, builder, body corporate, body corporate manager, resident unit manager (caretaker), lot owners and other service contractors.

An additional complication is that these stakeholders can change in membership from time to time.

Accordingly, it is essential that true and accurate records of all dealings in relation to the maintenance of common property and rectification of any building defects are kept by the body corporate in order to properly inform future stakeholders in relation to matters relevant to any future issues or claims.

FOR MORE INFORMATION, PLEASE CONTACT:



JAMES NICKLESS //
Partner

T // 61 7 3001 9237

E // j.nickless@clarkekann.com.au