



UNSW
SYDNEY



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CITY FUTURES RESEARCH CENTRE

GETTING THE LEGAL ADVICE YOU NEED

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Given the complex nature of the legislation in relation to building defects and the strict time limits, it is important for owners corporations to consider getting legal advice early in the process. At this point, a specialist strata lawyer can engage building consultants to conduct inspections, provide expert reports on the defects and remedial scopes of work, advise the owners corporation on their options for having the defects rectified, the relevant timeframes under the *Home Building Act 1989 (NSW)*, and options for resolving any disputes that may arise. Involving a lawyer early on in the process means that communications with your experts can be privileged which can be important if legal action is required. Note that engaging a lawyer early on in the process does not necessarily mean immediately commencing legal action, but can involve negotiation or mediation with the builder and developer while protecting the owners corporation's rights.

If you need help finding a suitably qualified lawyer, you can consult the list of members of the [Australian College of Strata Lawyers](#), contact [Fair Trading](#), contact the [SCA \(NSW\)](#), or speak to your strata managing agent.

In many cases where building defects are identified, the builder or developer will opt to rectify the defects directly. Where this occurs, your lawyer can provide advice on relevant timeframes and what you can require the builder/developer to do in terms of work and quality, and how to protect your rights if the rectification work is inadequate.

In some cases, it may not be possible or desirable to have the original builder/developer undertake or complete the rectification work. This may be because:

- The builder or developer is no longer operating (e.g. has become insolvent, or has otherwise disappeared);
- The builder or developer refuses to undertake the work, or to complete the work to an acceptable standard; or
- The timeframes for making a claim against the builder or developer under the *Home Building Act 1989 (NSW)* have expired.

In some of these circumstances, your lawyer may advise that one option is to pursue legal action, either against the builder and/

or developer, or another party (such as the architect or certifier). If this option is being considered, it is important for the owners corporation to carefully weigh up the pros and cons - not only the likelihood of the legal claim succeeding, but also the cost, stress and time involved in taking legal action.

STRENGTH OF LEGAL CASE

Making a successful case with regards to defective work can be challenging. There may be a number of potential avenues for taking legal action, each of which will offer a different likelihood of success. Make sure you clearly understand the advice being offered by your lawyer, and how strong your case is likely to be. It may also be worth considering seeking a second opinion as to the likely costs and risks involved. For tips on how to talk to your lawyer and ensure you understand the advice you've been given, see [Communicating with Stakeholders](#).

COST

It is important for owners corporations and strata committees to ensure they understand their legal rights and responsibilities, and getting good legal advice to help with this is often a very worthwhile but a complicated investment. Given the complexity of dealing with defects, getting legal advice early in the process is recommended, and some lawyers will offer a fixed fee arrangement for preliminary advice on how to manage building defects.

If the option of pursuing legal action is being considered, however, it is important for owners to recognise that the costs can be significant, and are sometimes far greater than originally anticipated. Pursuing defects claims can cost hundreds of thousands of dollars, with no guarantee of a positive outcome. Even where a legal action is successful, owners may find they are out of pocket overall, as the damages and costs awarded by the court may not cover the full cost of rectification, as well as all of the required [legal and other expert advice](#).

It is also important to think through how the necessary funds will be gathered. While some schemes will have sufficient finances for legal action in their existing funds, others will require special levies or loans that will require approval at a general meeting of the owners corporation.

TIME

You should also consider the time that you and other members of the owners corporation have to dedicate to manage legal administration. You should also have a conversation with your strata manager about their capacity to assist in the legal process, and any additional cost for their assistance. Court cases require preparation and evidence gathering, in addition to the other tasks involved in managing a strata scheme. It is not unusual for legal cases to take years to be resolved.

If the decision is taken to pursue legal action, [setting up a sub-committee](#) to manage and gather evidence and to assist your strata committee in managing the legal process can be helpful.

EMOTIONAL IMPACT

[Case studies](#) have shown that the legal process can be draining on the mental and physical health of apartment owners. As one strata committee member said of their defects case:

"If I had my time over again, I would have done what the others did and sell - it's had a drastic impact on my health."

When deciding to take legal action, consider the state of mind, co-operation and personal circumstances of the owners corporation and strata committee. These considerations are important to ensure the best outcome, and that pursuing legal action is a positive step for all involved.

ADDITIONAL RESOURCES:

- [Dealing with Defects – City Futures Research Centre, UNSW](#)
- [Home Building Act 1989 – NSW Legislation](#)
- [Strata Schemes Management Act 2015 – NSW Legislation](#)

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Strata Community Association (NSW) is the peak industry body for Strata and Community Title Management in New South Wales. Membership includes strata managers, support staff, committee members and suppliers of products and services to the industry. SCA (NSW) has in excess of 3,000 members who represent over 75% of strata lots in NSW by way of helping to oversee, advise or manage a combined property portfolio with an estimated replacement value of over \$400 Billion. SCA (NSW) proudly fulfils the dual roles of a professional institute and consumer advocate. Contact: (02) 9492 8200 | enquiries.nsw@strata.community | <https://nsw.strata.community/>