

**SAMPLE ADVICE LETTER**

*The advice set out in this document is a sample only and is not relevant to your specific circumstances. It should not be relied upon as legal advice.*

Dear [first name],

I have been instructed to answer a number of questions relating to the boundaries between lots and common property at the above strata plan.

To assist with my advice, I have been provided with copies of:

1. the registered strata plan
2. the consolidated by-laws

I answer each of your questions under the headings below. The question is summarised in the heading:

**1. What is classified as common property and lot property**

Your strata plan was registered on ### [pre 1 July 1974]

The relevant legislation in force at that time was the *Strata Titles Act 1961* ("1961 Act").

Section 4(2) of the 1961 Act provided:

*Unless otherwise stipulated in the strata plan, the common boundary of any lot with another lot or with common property shall be the centre of the floor, wall or ceiling, as the case may be*

We refer to this as the "centre line rule".

The centre line rule only applied if:

- (a) the registered strata plan did not stipulate some other boundary position; and
- (b) the relevant floor, wall or ceiling separated one lot from another lot, or a lot from the common property.

The centre line rule therefore did not apply in the case of a floor, wall or ceiling separating *part of a lot* from *another part* of the same lot.

Walls, floors and ceilings separating part of a lot from another part of the same lot were considered, under the 1961 Act, lot property.

The *Strata Schemes (Freehold Development) Act 1973* ("1973 Act") came into effect on 1 July 1974. It contained what we call 'transitional provisions' which set out how boundaries previously determined under the 1961 Act should be determined under the 1973 Act.

In respect of floors, walls or ceilings separating a lot from another lot, or a lot from the common property, the transitional provisions removed the centre line rule and instead applied what I call the 'surface rule': lots which had boundaries under the 1961 Act that were described as the centre of a wall, floor or ceiling, now have boundaries that are *the inner surface of the wall, the upper surface of the floor or the under surface of the ceiling*.

However, the surface rule applies only in respect of floors, walls or ceilings separating a lot from another lot, or a lot from the common property. In all other respects, the transitional provisions in the 1973 Act left the 1961 Act boundary lines unchanged.

This means that, for strata plans registered before 1 July 1974:

(a) if the registered strata plan stipulates a boundary position, that boundary position applies; and

(b) if the floor, wall or ceiling separates part a lot from another part of the same lot, it is not a boundary and the wall, floor or ceiling in question is lot property.

These rules have been carried through to our current legislation, which is now the *Strata Schemes Development Act 2015*.

#### Your strata plan

Your strata plan contains the following notes:

- Sheet 2: "*The height of lots 1, 2, 4, 6 & 7 as Parking Spaces are restricted to a height of 8 feet above the respective concrete floors.*"

- Sheets 3, 4 and 5: "*Balcony areas to be extended upwards 8 feet from the floor of the balcony.*"

These notations confirm the upper horizontal boundary of the lot 1, 2, 4, 6 and 7 parking spaces and all balconies. In my view, they also confirm the lower horizontal boundary of the balconies. In respect of those areas, lot property comprises the airspace that is between the floor and 8 feet above the floor. In my view, this means that the balcony slabs are common property (assuming the slab of the balcony immediately overhead is more than 8 feet above, which I assume it would be).

#### Parking spaces and structure above

I have not visited the property, so do not know for sure but I assume that the parking spaces for lots 1, 2, 4, 6 and 7 are uncovered, hence the need for the surveyor who drew the strata plan to limit their upper horizontal boundary by inclusion of the notation on the plan.

In respect of remaining lots 4, 5, 8, 9, 10, 11, 12, 13, 14, 15, if these lots are covered, the boundary is limited by the structure that is above them.

Subject to what I say below about balconies, if the structure that is above these parking spaces is *part of the same lot*, then – in accordance with the 1961 Act provisions outlined above, the structure is lot property.

If this structure is *common property or part of another lot*, then the structure is a boundary and the ‘surface rule’ applies. The structure itself is common property.

In relation to balconies which may be above the parking space for the same lot, my view is that, regardless their location, all balcony slabs are common property. That is because of the notation on the strata plan that the “*Balcony area [is] to be extended upwards 8 feet from the floor of the balcony.*” This notation indicates, if only by inference, the intention that the lower horizontal boundary of the balcony is the floor of the balcony.

To illustrate with some examples:

- (a) if the lot 3 parking space is immediately below the lot 3 living space, the slab (or part thereof) that separates the parking space from the living space is lot property
- (b) if the lot 5 parking space is immediately below the lot 5 living space, the slab (or part thereof) that separates the parking space from the living space is lot property.

I would be in better position to consider the situation of specific lots more accurately if I were to attend and view the building. It is difficult to ascertain, looking at the strata plan only, precisely whether lot parking spaces are indeed immediately below lot living and balcony spaces.

**2. Who is responsible to fix a leaking shower that has caused water damage/rising damp to an internal wall shared with the shower and a section of the unit flooring?**

I am instructed that the shower in question is in lot 15.

It appears from the strata plan that the internal part of lot 15 overlays the internal part of lot 10. I assume but do not know that the bathroom slab therefore separates lot 15’s bathroom from lot 10’s bathroom.

As this is a “floor” that separates one part of a lot from another lot, the “surface rule” applies and, assuming the leak is due to a problem below the surface of the tiled shower, it is the Owners Corporation’s responsibility to repair and maintain this item of common property.

Pursuant to section 106(5) of the 2015 Act, it is open to an owner who has suffered loss and damage in this circumstance to claim that loss and damage from the Owners Corporation.

**3. Should the shared water pipes running through our bathrooms be inspected and upgraded by the Owners Corporation?**

In my view, these pipes are common property. If there is a reason to believe they are in need of repair or replacement, then yes, they should be inspected and repaired or maintained as necessary by the Owners Corporation.

**4. Who is responsible for repair and maintenance of the balconies, balustrades and parking?**

I have provided my opinion in respect of the balcony slabs above: in my view these are all common property, regardless their location. They are the responsibility of the Owners Corporation.

In relation to 'parking' I am not sure how the parking spaces are contained: are there garages with floor slabs and walls? If so, the floor slab and any wall that separates one lot from a different lot, or one lot from the common property, is the Owners Corporation's responsibility to repair and maintain.

In relation to any parking space 'ceilings' (if these exist), the responsibility for those ceilings will depend on whether the ceiling is separating one lot from a different lot, or part of one lot from part of the same lot. I refer to my explanation above.

In my view, the balustrade separates a lot from the common property. It is the responsibility of the Owners Corporation.

**5. Does this responsibility change if concrete cancer has been detected on a number of lot balcony floors and ceilings**

Responsibility does not change in the event a defect such as concrete cancer is located. In some cases, lot owners may be responsible for rectifying the defect. In others, the Owners Corporation may be responsible.

**6. Who is responsible for the repair and maintenance of the glass panelling in the front balconies?**

Please see my comments above in respect of balcony balustrades. In my view, the Owners Corporation is responsible for the glass panelling.

**7. What rights do lot owners have if the Owners Corporation wants to repair and/or maintain a mixture of lot and common property and how do we proceed with this?**

The Owners Corporation only has a duty to repair and maintain the common property, not lot property.

If the Owners Corporation is proposing to repair and maintain lot property, lot owners should give their express permission to the Owners Corporation for that to happen. It would appear an unusual circumstance that the Owners Corporation would take on a responsibility it does not legally have. Perhaps even more unusual if lot owners objected to this!

If the Owners Corporation is refusing to repair and maintain the common property, you have the right to seek an order of the NSW Civil and Administrative Tribunal requiring the Owners Corporation to attend to its duty. Subject to the urgency of the situation, this process is commenced by lodging an application for mediation with Fair Trading NSW. I can assist further with this process at the relevant time should it become necessary.

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