

## Friday LIVE: 7 June 2024

In today's "Ask Amanda Now" session, Amanda answered Peter's question: **if an owner fails to lodge a claim for a minor defect to common property within the defect period and later requests repairs, can the owners corporation be held responsible?**



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Hello and welcome to ask Amanda now. I'm your host, strata lawyer, Amanda Farmer. We are going out live to the facebook page, we're going out to LinkedIn, we're going out to YouTube. It's great to be here with you on this Friday afternoon. It's a little bit wet and dreary where I am. Bit of a cosy start to the long weekend. How's your week in strata? Been another busy one for me.

I was in Sydney, travelled for 24 hours or so to cheque in on a couple of clients over the last few days. So after darting back and forth, it's good to be here and settled and doing some desk work today, gearing up for a relaxing weekend. And I'm sure many of you are doing the same. With Monday off, we've actually had what kind of feels like a four day weekend here because my son had people free day from school today.

So I think possibly this time, 04:00 he's still in his pyjamas. So we are settled in and ready to relax. Let me know what you are up to. Shawn is here saying hi. Hey, Sean, how are you doing? I can see some other eyes coming in live as well. Feel free to give me a hello here in the comments. I am kicking back here on the lounge in my home office and just kicked the ugg boots off and settled in.

Ready to chat. Strata, with you today is an ask Amanda now session. If you're not familiar with the way we roll, that is an opportunity for me to answer one strata question. We've already chosen the question. I know sometimes you turn up and throw your questions into the comments here. We have chosen a question from those that have rolled in to my inbox, those that have appeared here on the page.

We sent the call out for questions a few hours ago and as always, we got lots and lots. So I will be answering that one strata question here today. If you catch us on the alternative or alternate is the correct word, Friday, we do a longer Friday live session, more of a deep dive discussion. What's going on in strata? Kristen is here. Happy Friday to you, Kristen. My pleasure to be here.

Carol is here saying thank you for this. My pleasure, Carol. Thank you for joining us. Hey, David, it is good to see you. And Sharna is here. Happy long weekend from coffs. She's working on NCAT. Yeah, it's tempting, isn't it, to use your extra time? Don't worry, I've got that long list as well. Use your day off, your public holiday, to catch up on things including writing tribunal submissions.

I am very sympathetic to that, Sharna. I know how you feel. Michelle is telling me this weekend we're getting a visit from daughter and her chaotic dog. Good to hear. Michelle, look after yourself. Don't let the dog push you around. I'm going to say that. Hey, Sean, how you doing? I hope you are well also. Okay, let's jump into our strata questions. I'm thrilled to see so many of you here live, even though you are getting ready for that long weekend.

The question we have chosen today, drum roll. Let's bring it up here on the banner. Thank you very much. Today, team. Oh, that's actually not this week's question. That's a question from a few weeks ago. So we will pull up the correct question for this week, which is Peter's question. **If an owner fails to lodge a claim for a minor defect to common property within the defect period and later requests repairs, can the owners corporation be held responsible?**

Great question. Now, a few things to point out. First up, Peter has been listening when I have been here for our ask Amanda now sessions, and I've given you some hints about the types of questions that I choose from the long list that we get. I choose a question that is short, sharp to the point. I choose a question where I think the answer is going to help quite a few people.

It's not too specific to your personal situation. There are some questions in my inbox at the moment that the team has pulled across to our spreadsheet that are five paragraphs, eight paragraphs long. Given me all the history, they are not the kinds of questions that I'm going to be able to answer in one of these short sessions. If you are a member in our online community, and we very often get members putting their hands up to have their question asked in an ask Amanda now session where that gets chosen.

Great. If you're a member and your question hasn't been chosen, please remember that you can always head over to the members Q and a forum. You can type your paragraphs into the Q and a forum. I don't really mind how long they are there, as long as you're very clear about the question you have for me. And I will absolutely answer all of our members questions over there in our Q and a

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forum. So if you're a member and your question hasn't been chosen, please do. Maybe this weekend you want to pop over to the Q and a forum, busy place that it is, and add your question in there. Hey, Ruth, thanks for being here. To you too. And we're going to continue on with Peter's question and today's answer now. So it's a great question because it's short. It's to the point.

Thank you very much, Peter. If you're tuning in and you wanted to add anything else in the comments here, please do go ahead. The defect period that Peter is referring to here, I'm going to assume. I think it's a pretty safe assumption that Peter is talking about a brand new building or a relatively new building that has been subject to a warranty period under the Home Building act.

That's the defect period that he's talking about. And that warranty period has expired. That can be anywhere between two years and six years at the moment, depending on what kind of defect we're talking about. So more than six years after the building has been finished, then you're going to run out of your home building act warranties. They will expire. And the little bit more detail that we didn't fit into the banner here is that Peter has told me that it has been many years since the warranty period, the defect period, Peter calls it, has expired.

It's been about five years since that period has expired and the owner has notified the strata manager that there is a defect in the common property, minor defect, and is requesting repairs. So is the owner's corporation responsible for that repair? Do they have to pay for it? Sean's saying, okay, I have a thought about this one. I'm so glad that you do, Sean, because something I was going to put out here to, to this community, which is always so good at helping me with your on the ground experience, is how do you handle this as a strata manager, as a committee that is helping, working with a new building in the middle of claims against the builder developer, Home Building act claims in that warranty period within the first two years?

Within the first six years. How are you dealing with this in practise? Because the short answer to Peter's question is that the owner's corporation is going to remain responsible for any defects in the common property. The need to repair and maintain the common property, even outside of this defect liability period or this homeowners warranty period, the owners corporation stays responsible for the common property. But I know when buildings are within that warranty period, they are very keen, understandably, to make sure that list of defects is complete.

Because while you still got the builder or the developer around and willing, or at least able, certainly legally required, to fix those defects, you want to make sure that they're fixing all of them, that you're not left with many, if any, at the end of the day, that are going to fall in the lap of the owners corporation. So when you are communicating as a committee or a strata manager, even lawyers who are acting for these buildings, when you're communicating to these people and saying to these owners, saying, look, we need to know what the defects are that perhaps only you can see within your lot, we need to know what they are so that we can inform the builder about them and they can come in and fix them.

And if you don't tell us what they are, or you don't let us or our contractors in to your apartment to inspect and to add these defects to our list, then maybe your defect is not going to be included in the claim against the builder. I'm not sure. Well, here's the thing. I think you can go one step further there and say, if you don't let us in, if you don't add your defect to our list, then we, the owners corporation, will not take responsibility for it into the future.

I think you can do that. But in order to make that legally binding, to make it enforceable down the track, you need to enter into a deed or some other legally binding agreement between the owner's corporation and the lot owner, and for the lot owner to essentially release the owner's corporation from any future liability for this defect. Because the lot owner says, I don't want you in here, I don't want you.

I don't want to be part of this claim. In order for the owners corporation to wash its hands of that responsibility, I think there would need to be a contract in place, an agreement, a deed to allow the owners corporation to walk away from that. And even if you have that in place, it's a contract between that lot owner and the owner's corporation. It's that lot owner at that point in time.

So if that owner then sells, someone else buys in. They are not a party to that agreement. They did not agree to release the owners corporation from its obligation to repair and maintain the common property. So the owners corporation is going to be back on the hook to fix that defect. So I don't know if these deeds, I don't do a lot of work. I don't do any work anymore in this defect space.

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So that's why I'm putting it out to the brains trust here to let me know, how are you dealing with this in practise? Because I think unless an owner has released the owner's corporation from this obligation and done so expressly, by contract, by deed, by an agreement, the owners corporation is still going to be on the hook. The other way that an owners corporation may be released from this responsibility to fix defects that weren't disclosed, that weren't attended to in the liability period.

You could have a bylaw, put a bylaw in place, which is created by a special resolution at a general meeting where the owners corporation says, we are no longer going to be responsible for these areas of the common property and the lot owners are going to take responsibility for them. You need that bylaw to be put in place and you would need the written consent of lot owners agreeing to take on that responsibility.

If you did that, then the owners corporation is freed of that responsibility forevermore. The bylaw is registered on title. The bylaw runs with the land. It doesn't matter if owners come and go. You don't have that contractual, personal relationship with lot owners that you would have if you had a deed. The bylaw gets around that, but I can't see any properly advised lot owner agreeing to that kind of a bylaw where they, they are actually taking on responsibility for the repair and maintenance of common property that they wouldn't otherwise be responsible for.

So those are my thoughts. Peter, I can see the sean's posting a bit over here in the chat, so I'm going to head over and see. Oh, I've just lost my light. I'll sit here in the dark with you and just head over and see what the comments are in the chat here. Sean says, I thought of the answer to this one. Yes. Hey, Josephine, I see you there.

Jan is saying hi. Hey, Wendy. Okay. Sean is saying. Sean M is saying practically during the defects period, I would recommend reports and lawyers. Yep, absolutely. After I would defer to the Strata Schemes Management act statement on owners, corporations and owner responsibilities. Yes. So you're essentially saying we're outside the defects period. So the law applies and the owners corporation is responsible for common property for sure. Sean says, I wouldn't trust owners alone to correctly identify defects.

I wouldn't trust myself to identify defects. Yes. So it's about those owners making sure that they are allowing experts to access their property. Shaun says, what happens if an owner won't sign the deed? Yeah, indeed. So it can't happen then that agreement can't happen. The owners corporation remains on the hook. And this concept of getting access to lots, experts getting access to lots so that they can inspect these defects.

If you can't get access, if a lot owner is saying, no, don't want you in here, then it is for the owners corporation to apply to the tribunal and seek an order for access. And that's what the tribunal will say. You can't turn around later and say, well, lot owner never told us about the defect. Lot owner never let us in to inspect the defect, so we're not responsible for it.

Tribunal's going to say, uh uh uh. If you couldn't get in, then the onus was on you owners corporation to make an application for an order to access the property. Hey, Maureen. Uh, Sean saying, agreed, if an owner is refusing, they should be willing to sign a deed, maybe a bylaw for later owners, but that would be a hard line to hold. Yeah, I don't. I've never seen this happen.

I've got to say, I've seen plenty of letters that will be circulated by strata managers, by experts who are inspecting by committee members that say, we are coming on this date. Our experts are coming on this date. If you don't let us in, then whatever the problems are at, your lot will not be included in the claim and you'll lose your opportunity to have these fixed. The letters get written.

I understand why. It's an encouragement for the owner to be there and open up on the day. But legally, unless you have a deed, unless you have a bylaw, I don't think the owners corporation would have a leg to stand on saying, five years ago we were happy to fix this. When we were in the warranty period, owner wouldn't let us in. So we're not going to fix it now.

Doesn't work that way. Sean's already picking that up. Yep. NCAT has to be the way, surely. Hey, Keery. Kerry saying, particularly if the defect has the potential to cause future damage to the rest of the common property, for example, a water membrane. Yeah, absolutely. So that's where if you had a bylaw that shifted responsibility from the owner's corporation over to the lot owner, that bylaw has to have the agreement of the lot owner and that bylaw would have all sorts of conditions in it.

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About the lot owner is now responsible for the repair and maintenance of their bathroom. Waterproof membrane. If it needs repair, the lot owner is responsible for attending to that repair. The repair has to be done in accordance with all building code, Australian standards, quality requirements. If the lot owner doesn't do it, the owners corporation can come in and do it. So the bylaw has all of those protections built in to make sure that even if it is the lot owner's responsibility, it has to be done properly and it has to be done.

And if it's not done, the owners corporation can come in and do it. Hey Margaret, wishing you a great weekend. Also Shauna saying I got all the owners impacted to sign consent for a bylaw that they were responsible for vents installed by the light rail authority. Interesting. About half the owners in a 15 lot scheme. Other owners must be happy with that. Yep, interesting situation there, Sean. David saying maybe phrase the letter to make it clear that if they don't claim under warranty, the owners corporation will have to pay and they will have to pay part of that.

Exactly right, David. I like that. I like that. Isn't that interesting that we kind of have this concept that it's the owner's corporation paying at the end of the day? And as I recently posted on LinkedIn in response to a very wise Kathy Sherry comment, we have, we often forget that the owners corporation is not this nameless, faceless entity. The owners corporation is the owners. So if you don't get your warranty claim in time and the builder developer isn't around to fix the problem at their cost, then ultimately it's going to be the owners corporation's responsibility and you as an owner contribute to that.

Beautiful. I love that David. Really, really clever Kristen saying great question. Thanks for the answer. Happy weekend to you, Kristen. Sean's saying they'll probably think someone else will be owning by then and it's only a part payment anyway. Yeah, possibly there, Sean, excellent. Great discussion. Love having these chats with you. Love the contributions that you make. Thank you very much Peter for asking the question. Thank you to all of you here live who have pitched in with your views.

I hope that's helpful to you. Peter, if you come around and have a listen, let us know what you think. Remember, if you are a member inside our online community and you'd like your strata question answered, head over to the Q and a forum, log on in and post your question there. Rochelle and Mina, our support team, are always around to help you. If you have any questions about how to log in and how to post your question and I will be there answering them for you.

If you are not yet a member, then it's super easy to join. You want to head over to [stratamembership.com](http://stratamembership.com)? now is the perfect time to be joining us inside the membership. We will be having a price increase on the 1 July. Everybody who gets in before then, that's the 30 June. Get in by midnight on the 30 June and you will only ever pay \$67 a month. For your membership, you will not be subject to the 20% price increase that is happening on the 1 July.

So if you've been thinking about it, if you want to get your question answered in our Q and a forum and have access to all of the member resources and benefits, including your opportunity to have a one on one online chat with me, then head on over to [strata membership.com](http://stratamembership.com). I would love to welcome you in to our fantastic community. Happy weekend to everybody who's wishing me a happy weekend there in the comments.

If you're catching the replay, give me a hello. Be safe, be good, enjoy, relax, and I'll see you all next week. Bye for now.