Are Termites Eating Away At You?

Managing termites and the damage they can cause is a tricky issue in strata schemes. This is partly because of the wide range of potential scenarios and partly because there are many different views on how far the owners corporation's obligations go.

Key Issues

- Termites can cause an enormous amount of damage, often in a short space of time and often undetected until well advanced. The nature and extent of the problem can be unclear. Identified damage may be active (ongoing) or unrepaired past damage. The offending nest can be hard to locate, as termites can attack a property from a nest situated well outside the property and can also relocate their nest quickly, especially if disturbed.

- Compulsory termite protection measures under the Building Code of Australia only apply to new buildings. There is no requirement for existing buildings. However, there is a standard (AS3660.2) and it provides guidance as to good practice for existing buildings, including regular inspections and possibly additional preventative measures.

- An owners corporation has a statutory duty under Section 106 of the Strata Schemes Management Act 2015 ("Act") to maintain and repair common property and potentially to compensate lot owners for losses arising from failure to discharge that duty. However, there are limits to that duty and it does not follow that an owners corporation is always liable for termite damage to lot property. A recent case in the NSW Civil and Administrative Tribunal *Mullen v Owners Corporation SP15342 [2017] NSWCATCD 97* suggests that, in the absence of knowledge of a particular threat, an owners corporation will not generally be liable for damage to lot property which might have been prevented by conducting regular termite inspections. In that case, the Tribunal also found that the damage to lot property was in any event not caused by the failure to inspect.

- An owners corporation also has liability under the law of negligence, at least in scenarios where a duty of care is owed. Then most common scenario would involve occupiers' liability, e.g. where termite damage has made a staircase dangerous and failure to take proper care has led to an injury. It is unlikely that this would extend liability for damage to lot property beyond what would derive from Section 106.

- An owners corporation may also have obligations under work health and safety legislation and some take the view that this may impose obligations on owners corporations regarding termite damage. While that could in theory be right in some cases, it would be unlikely as, at

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least in a residential scheme, an owners corporation will not generally be a “person with management or control of a workplace” or a “person conducting a business or undertaking”.

Management

- It is good practice for an owners corporation to undertake ongoing pest control measures and this probably includes annual termite inspections and possibly more frequent inspections and additional measures if a threat is identified. Given the specialist knowledge required, this should obviously be undertaken by an appropriately skilled and licensed contractor. Initially, this probably should involve a report as to the recommended inspection frequency and whether any additional measures are warranted.

- If common property damage is identified, the owners corporation is obliged to repair it, unless Section 106(3) of the Act applies and the owners corporation determines by special resolution that it is inappropriate to effect the repair and that its decision will not affect the safety or appearance of the property.

- If lot property damage is identified, the owners corporation will only be liable for the damage if the owners corporation failed to discharge its statutory duty and if the damage was caused by that failure. That may be the case where the owners corporation was aware of some particular threat, e.g. based on knowledge of past damage or some inherent vulnerability of the property, warranting inspections and/or other preventative measures. In the absence of such factors, the owners corporation will probably not be liable.

- If lot property damage is identified and is found to have been caused by the owners corporation’s failure to discharge its statutory duty, contributory negligence by the lot owner, e.g. failure to obtain a pre purchase pest inspection report, would not be a defence available to the owners corporation.

We have considerable experience with these issues and can assist if you are having difficulties with them.

Key takeaways

- Termites can cause significant damage in strata schemes, often going undetected until it is severe.
- Owners corporations have a statutory duty to maintain common property but may not always be liable for termite damage.
- Regular inspections and pest control measures are recommended to prevent termite infestations.
- Liability for termite damage may depend on the owners corporation's knowledge of existing threats.
- Best practices include engaging licensed contractors for pest control and maintaining clear communication with lot owners.

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