Defending a Water Ingress Claim: What are the Owners Corporation's Defences?

- Over the past few months NSW has experienced widespread and heavy rainfall. This has resulted in increased and prevalent claims against owners corporations, however the recent weather events and delays in construction is no defence to a breach of s106 of the Strata Schemes Management Act 2015 *(*NSW*)* (**SSMA**) or a nuisance claim.

- This in turn has increased the volume of insurance claims being made. Owners corporations should rectify defects promptly as there is a risk insurers may not cover any resultant damage repairs until the issues have been rectified.

- Owners corporations for a strata scheme have a duty to repair and maintain common property, especially when it comes to water ingress and consequential damages, such as mould.

- If an owners corporation has taken action against an owner or other person in respect of damage caused to the common property, an owners corporation can defer compliance. However, there would not be a defence as a result of a nuisance claim. An owners corporation would need a different claim or additional right. One example includes mould. There may be an action in nuisance if there is toxic mould in a lot which may spread to other lots. Mould is a contributing factor to these losses and the commencement of claims.

- If claims for damages relating to a financial or economic loss are brought outside of 2 years after first becoming aware of the loss, then damages cannot be claimed. However, nuisance can be claimed in the NSW Civil and Administrative Tribunal. An owners corporation must be aware of the time limits when defending claims brought against them.

- An owners corporation may not be obliged to repair if it is resolved by special resolution that:

    a) It is inappropriate to maintain, renew, replace or repair the property

    b) Its decision **will not affect** the safety of any building, structure or common property in the strata scheme or detract from the appearance of any property in the strata scheme

- A defence to these types of claims may be that the obligation has been transferred by the owners corporation to an individual owner by way of common property memorandum or by the scheme's by-laws.

- A claim for contribution may be made under easements, covenants or management statements.

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Key takeaways

- Owners corporations have a duty to repair and maintain common property, especially regarding water ingress.
- Claims for damages related to financial loss must be made within two years of awareness.
- Nuisance claims can be pursued in the NSW Civil and Administrative Tribunal.
- Special resolutions can exempt owners corporations from certain repair obligations.
- Obligations may be transferred to individual owners through common property memorandums or by-laws.

****The information contained in this article is general information only and not legal advice. The currency, accuracy and completeness of this article (and its contents) should be checked by obtaining independent legal advice before you take any action or otherwise rely upon its contents in any way.*

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Related Articles:

- Growth in Mould Claims
- Claims by Owners for Damages caused by Water Ingress Under s106(5) of the SSMA

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