

Accessing a lot: rain or shine

An overview of an owner corporation's rights and responsibilities to access a lot

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Introduction

Owners corporations and strata managing agents have been inundated with reports of water leaks in the wake of recent heavy rainfall. For the most part, owners and occupiers of lots are able to provide the owners corporation and their contractors with access to the lot to fix the water leaks.

Owners corporations may be wondering what their rights and responsibilities are in circumstances when an occupier is away on holidays or refuses to provide access, despite there being an active water leak.

Power to enter a lot

The powers of an owners corporation to enter a lot are governed by section 122 of the Strata Schemes Management Act 2015. An owners corporation may enter a lot for the purpose of carrying out work:

- required or authorised to be carried out by the owners corporation under the Act;
- required to be carried out by the owners corporation by a public authority; or
- required or authorised to be carried out by the owners corporation by an order of the Tribunal.

Additionally, an owners corporation may enter a lot for the purpose of inspecting the common property to determine whether any work is required of it.

Relevantly, an owners corporation has a statutory duty to repair and maintain the common property. In the context of a water leak, an owners corporation is under an obligation to repair the common property permitting water ingress into a lot or other parts of common property. It is also empowered to inspect the common property within a lot to determine whether there is any common property in need of repair.

Limits on that power

However, an owners corporation is not permitted to enter a lot at its discretion. The Act imposes restrictions on the exercise of that power.

Firstly, the power extends to an owners corporation entering a lot by its agents, employees or contractors. Plumbers, contractors, building managers, caretakers and strata managing agents would fall in those categories. However, strata committee members would not fall under those categories. Accordingly, the Act does not empower a strata committee member to enter a lot for the purpose of carrying out work, or inspecting the common property.

Secondly, such access to the lot is only available:

- with the consent of any occupier of the lot; or
- if the occupier does not consent, by order of the Tribunal; or
- in an emergency, regardless of the consent of the occupier.

The quickest, easiest and most cost-efficient way to access a lot to fix common property or inspect it for damage is with the consent of the lot's occupier. Notably, it is the consent of any occupier of the lot and not the consent of the owner of the lot.

But that consent may not be forthcoming for an array of reasons, most commonly if the occupier is not contactable or does not consent to such access. An owners corporation will then need to consider whether the circumstances constitute an 'emergency' as contemplated by the Act.

What constitutes an 'emergency' for the purposes of section 122 has not been the subject of judicial consideration. Albeit in the context of expenditure limits, section 102 of the Act indicates that an emergency includes:

- burst or blocked water or sewerage pipes;
- serious damage caused by a storm or other natural disaster; and
- unexpected electrical failures.

The Macquarie Dictionary defines 'emergency' as "an unforeseen occurrence; a sudden and urgent occasion for action". An owners corporation should exercise great caution before electing to enter a lot on grounds of an 'emergency' and should obtain urgent advice on that course of action to avoid improperly entering a lot.

In the absence of consent or an emergency, an owners corporation may be required to apply to the NSW Civil and Administrative Tribunal to seek an order requiring access to the lot for a specified purpose.

Taking steps to require access

Relevant to matters of water ingress, section 124 of the Act empowers the Tribunal to make an order requiring an occupier of a lot to allow access to the lot for the purposes of enabling an owners corporation to:

- carry out work to any defect in any pipe or duct that provides or through which any water, sewage or drainage passes; and
- carry out work to common property that is allowing water ingress; or
- determine whether such work needs to be carried out.

The Tribunal's power to make such an order does not limit an owners corporation's power to enter a lot in an emergency. Additionally, only an owners corporation can apply to seek an order for access to a lot. The Tribunal has no power to require an occupier to provide access to another lot owner.

The nature of such an order requires the occupier to provide the owners corporation with access to the lot, not that the owners corporation has the power to enter the lot in the face of continued refusal. The wording of section 124 does not permit the Tribunal to make an order allowing an owners corporation to forcibly enter a lot.

Hindering an owners corporation

The Act provides for circumstances where an owners corporation has an order of the Tribunal to enter a lot, but a person prevents that access. Section 122 provides that a person must not obstruct or hinder an owners corporation in the exercise of its functions relating to that access. The Tribunal has the power to impose a monetary penalty on a person who so hinders or obstructs an owners corporation up to the amount of \$550.

Damage of property during access

An owners corporation that enters a lot under section 122 is liable for damage to the lot as well as the contents within it that may arise out of the carrying out of work or exercising its functions under section 122. However, if that damage arose because the owners corporation was hindered or obstructed, the owners corporation is not liable for that damage.



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