

Owners Corporation & Water Flow – Part 3

Water leaking out of a lot on to another lot and/or common property is common.

What is the owners corporation required to do about it?

OC can undertake works itself - section 48 Owners Corporations Act 2006

Section 48 of the Owners Corporations Act 2006 provides that if a lot owner has not carried out repairs, maintenance or other works to the lot that are required because:

- the outward appearance or state of repair of the lot; or
- the use or enjoyment of lots or the common property by other lot owners;

is adversely affected, the OC may serve a notice requiring the lot owner to carry out the necessary repairs, maintenance or other works.

Most water flowing on to lots or common property will adversely affect their use. If the leak is as a result of the owner's failure to repair or maintain, the OC may serve a notice.

Note that section 48 (as well as sections 49, 50 and 51) are not available to OCs which are "limited to common property". Limitations on the OC are noted on the plan of subdivision.

There are plenty of obvious examples of water flow resulting from failure to repair or maintain – for instance, water leaking from dishwashers or washing machines or air-conditioning units, or from a bathroom where sealant has deteriorated.

Of course, some water flow is natural and is not caused by any lack of repair or maintenance (for instance the normal dripping of rainwater from the underside of a balcony on to the balcony below).

Before serving the section 48 notice, *the OC needs to be satisfied that the reason for the water flow is the lot owner's failure to repair, maintain or carry out other works to its own lot.* This will often require a report from a plumber.

If, after the OC serves the notice, the owner does not carry out the repairs within 28 days, the OC may carry out the repairs itself and recover the cost from the owner.

The OC may authorise the appropriate tradesperson to enter a lot for these purposes (section 50). The OC must give 7 days notice of entry to the occupier (or with tenanted residential property, as agreed with the tenant at least 7 days before entry) unless the occupier agrees to a lesser time, or it is an emergency (section 51). Section 50 says that an emergency includes "a leak or similar problem requiring prompt attention".

However, the right to enter in an emergency arises only after the lot owner has not made the repairs within the 28 days. *The OC can only enter under these provisions after 28 days from service of the notice.*

What about emergencies?

There could be a situation where water is flowing from a lot due to a faulty appliance or broken pipe, causing significant damage to another lot and/or the common property, and the lot owner will not take steps to stop the flow (perhaps because they cannot be contacted quickly), and an emergency situation is developing.

What can the OC do in these circumstances?

Options include:

- turning off water mains from common property;
- seeking the owner's permission to enter to address the problem (at the owner's expense);
- if the owner is not contactable but the lot is occupied, seeking the occupant's permission to enter (recovering the cost of the works from the owner later);
- if the flow is causing real (rather than trivial) damage to common property or other lots, and if the flow cannot be stopped from outside the lot, and if neither owner nor occupant can be contacted to allow entry, it may be appropriate for the OC to authorise a tradesperson to enter the lot to stop the flow, recovering the cost from the owner later (while such action may technically be a trespass, necessary entry on to property to prevent nuisance can be a defence to an action in trespass);
- if the owner or occupant refuses entry, proceeding urgently to VCAT for the appropriate declarations and orders to allow access.

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Cost Recovery

The OC may recover as a debt the cost of repairs, maintenance or other works undertaken wholly or substantially for the benefit of one or some, but not all, of the lots affected by the owners corporation from the lot owners: section 49(1). The amount payable by the lot owners is to be calculated on the basis that the lot owner of the lot that benefits more pays more: section 49(2).

So, where water is flowing from a lot because of a failure to repair (for instance), the OC can serve notice under section 48, and if the owner still refuses, the OC can, after 28 days, authorise a tradesperson to enter the lot to perform the works, and the OC may recover the costs from that lot owner. For the purposes of s 49(2) of the OC Act, the recalcitrant lot owner benefits more from the repair, because it is a repair to that owner's lot only and the work avoids or mitigates that owner's liability for the water flow¹.

If the common property is damaged by the water flow, the OC's common property insurance may respond. The cost of the emergency action taken by the OC to prevent or mitigate loss should form part of the insurance claim.

Situations where the owner will not address water flowing out of that owner's lot should be unusual. It may arise where the owner denies that it has caused the flow. Where it happens, the above may be a useful guide as to what should be done.

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¹ See *Penniall Enterprises Pty Ltd v Owners Corporation RN4160667X* [2012] VCAT 943 at paragraph 87.

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