

## What is common property? And what it may mean for modern building disputes.

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A strata scheme's objective is to provide separate title to individual lots and accordingly, a plan of subdivision setting out those lots is required. The plan must accurately set out the boundaries of the lots and their relationship with common property, if any.

Lot owners have registered titles to their private lots (eg a residential apartment), but they hold only equitable interests as tenants in common of the common property. If something is common property then it is the responsibility of the Owners Corporation. Private lot owners have no standing to sue in their private capacity where there are building defects in common property.

Interestingly, there is no definition of common property in the Victorian legislation. However, section 20A of the *Subdivision Act 1988* ("the Act") requires written advice from a licensed surveyor that roads and reserves are marked out and the boundaries of the land, lots and common property are also marked out and defined in the plan of subdivision. Notwithstanding this provision it is still unclear what constitutes common property in every case, because every strata plan is different.

Problems can arise in determining boundaries of private property as opposed to common property, particularly where there is a multi-storey building.

Nevertheless a plan will often define common property as all the land in the plan except the lots. What constitutes a 'lot' then becomes paramount in determining the extent of common property.

A 'lot' is defined under section 3(1) of the Act as a:

"part (consisting of one or more pieces) of any land (except a road, a reserve or common property) shown on a plan which can be disposed of separately and includes a lot or accessory lot on a registered plan of strata subdivision and a lot or accessory lot on a registered cluster plan;

"lot affected by an owners corporation" means a lot the owner for the time being of which is a member of the owners corporation".

Due to the difficulties in ascertaining the scope of common property, it follows that demarcating the boundaries between lots and common property is also plagued with ambiguities. A plan of subdivision will indicate the boundaries to be at the median, the internal face or the exterior face of the structure, where it expresses that the boundaries are

defined by buildings or structure. However, this is nowhere near sufficient in addressing the particulars required by aggrieved lot owners where building defects are alleged.

For example if the plan of subdivision defines common property as the internal face of the structure such as the flooring then does this include the membrane beneath the flooring or just the face of the tiles? A practical interpretation would argue that the membrane would be included.

Where boundaries are not defined by buildings or structures such as a wall, fence, ceiling or floor between two lots or a lot and common property, the boundary between them is the centre (or the median) of the relevant structure pursuant to schedule 2 clause 5 of the Act. That is, the boundary between the private property and common property is the middle of the wall, fence, ceiling or floor.

One can appreciate the difficulties raised in the foregoing in defining the extent of common property. More contentious issues arise where building defects affect part of private and common property simultaneously. As discussed private lot owners have no remedy against builders where there are building defects in common property as only the Owners Corporation has standing to sue (as 'the owner' of the common property).

It would be prudent for a purchaser to retain advice from a construction and/or planning lawyer prior to purchasing off the plan to consider various vital issues of liability involved in the proposed construction work.

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