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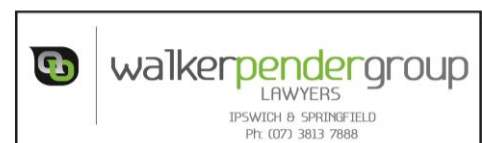
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Liability for personal injuries on community titles scheme land

Katherine Caldwell, Solicitor
Email kcaldow@walkerpendergroup.com.au



Lawyers



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Australian Lawyers Alliance
GPO Box 7052
Sydney NSW 2001
DX 10126 Sydney Stock Exchange
Ph: 02 9258 7700
Fax: 02 9258 7777
Email: enquiries@lawyersalliance.com.au
Web: www.lawyersalliance.com.au

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Introduction

Understanding body corporate law as a personal injury lawyer

A body corporate and the community titles scheme (CTS) for which they have responsibility operate within a legislative regime that is not widely understood by lawyers who do not practice in body corporate law. Whilst this is understandable, the lack of understanding can create difficulties for a personal injury lawyer who is representing a client who was injured on CTS land.

Some of the key knowledge areas within body corporate law that are relevant to personal injury lawyers include the following:

1. What is a CTS?
2. Understanding the difference between “lot property” and “common property” in a CTS and who bears the responsibility for those different areas.
3. Who is the body corporate and what do they do? Getting to know your respondent.
4. The various statutory duties and obligations relevant to a body corporate.
5. Identifying stakeholders in a CTS that are potential claim respondents.
6. The various documents of a CTS that may be relevant to determining liability.
7. The statutory right of access to, and copies of, the books and records of a body corporate that exists outside of the *Personal Injuries Proceedings Act 2002* (**the PIPA**).

It is prudent for personal injury lawyers to ensure they have, at least, a general understanding of the above to ensure effective investigation and pursuit of common law claims. The aim of this paper is to provide that general understanding, with a focus on the body corporate as a potential respondent and a view to guiding personal injury lawyers on how to approach liability for personal injuries on CTS land.

Australian National Strata Data

Strata Community Association (**SCA**), the national peak body for the strata industry, identified a need for comprehensive national data on Australia’s strata sector. As a result, the SCA approached the City Futures Research Centre at UNSW to assist with data collection and analysis. In May 2018, Australian National Strata Data 2018 (**ANSD**) was published by the City Futures Research Centre and is the first report of its kind providing comprehensive national, State and Territory specific data on the strata sector in Australia.

The ANSD sets out a variety of statistics and data analysis, including the number of schemes (i.e. plans) and lots (i.e. units) in Australia, the number of people employed in the industry, the estimated value of strata property and the number of people residing in a strata scheme of CTS.

The data relevant to Queensland shows that 7% of Queensland’s population lives in a CTS¹ and approximately 15% of Australia’s total number of residential scheme buildings (316,000+ schemes²) are in Queensland.

¹ Australian National Strata Data 2018, authored by Hazel Easthope, Caitlin Buckle and Vandana Mann, City Futures Research Centre, Faculty of Built Environment, UNSW, published by City Futures Research Centre UNSW Australia, May 2018, p 11.

²² Australian National Strata Data 2018, authored by Hazel Easthope, Caitlin Buckle and Vandana Mann, City Futures Research Centre, Faculty of Built Environment, UNSW, published by City Futures Research Centre UNSW Australia, May 2018, p 5.

Table 1 “Strata Data Analysis” has been compiled from the data presented in the ANSD and helps show where Queensland is positioned in terms of its number of schemes (residential and non-residential), lots and residents who have taken up apartment living. It is also interesting to note that, of the States that provided sufficient data for analysis,³ legal services were in the top three most common professional services engaged by strata and body corporate management firms for each State.

Table 1: Strata Data Analysis

	Total Residents	Total Apartment Residents	% of Population in Apartments	Total Strata Schemes (plans)	Total Lots (units)
National	23,717,418	2,200,793	9%	316,227	2,587,397
NSW	7,564,945	1,129,464	15%	80,664	889,630
Vic	5,946,959	471,317	8%	101,298	771,939
Qld	4,844,547	357,947	7%	48,083	473,838
WA	2,517,851	90,795	4%	48,637	224,522
SA	1,674,787	69,063	4%	21,619	115,305
ACT	400,646	39,153	10%	3,865	53,630
Tas	504,166	16,720	3%	9,208	33,793
NT	259,112	26,063	10%	2,853	24,740

As Queensland’s population continues to increase and more people gravitate to apartment living, it stands to reason that the number of public liability claims, including hybrid work injury claims, arising from injuries that occur within a CTS may also increase. It is therefore a good time for personal injury lawyers to familiarise themselves with this area of the law and “get to know” the potential respondents commonly associated with these claims.

Brief history of governing legislation

Developments and key legislation

It is outside the scope of this paper to provide a comprehensive history of land ownership, titling and property development laws in Queensland since the establishment of the State in 1859. However, it can be said that the changing landscape of the laws over the years appears to have been heavily influenced by factors such as population growth, tensions between early constraints on urban expansion and increased costs of utility infrastructure,⁴ inflexible structures of communal property ownership prior to the mid-1960s and the lag between increased development and legislated certification requirements intended to improve quality of build and consumer protections. Whilst the State is not the same place it was 160 years ago, these underlying, driving forces still exist today to a large extent.

For present purposes, a look at the legislative development since the introduction of the *Building Units Titles Act 1965* (Qld) is adequate, given this was the point in time that Queensland specifically started

³ New South Wales, Queensland, Western Australia and South Australia.

⁴ Marc J Mercier, *Body Corporate Law in Qld: Practice and Procedure*, (CCH Australia Limited, 1st ed, 2018), pp 7-8, citing Queensland, *Parliamentary Debates*, Legislative Assembly, 21 October 1885.

to legislate on the topic. Diagram 1 below sets out the chronology of those legislative developments along with the key factors associated with each statute.⁵

Diagram 1 – Chronology of legislative development since 1965

1965	1973	1980	1997
<ul style="list-style-type: none"> • Building Units Titles Act 1965 (BUTA) • provided for vertical subdivision of multi-story buildings under a 'building units plan' (BUP). • 'body corporate' created upon registration of BUP with responsibilities for communal property 	<ul style="list-style-type: none"> • Group Titles Act 1973 (GTA) • introduced the 'group titles plan', (GTP) which allowed for horizontal subdivision • resolved issues of horizontal community property ownership by company titling 	<ul style="list-style-type: none"> • Building Units and Group Titles Act 1980 (BUGTA) • repealed BUTA and GTA • new requirement for building certification a likely in response to concerns of **second-class home unit** • dispute resolution - referee orders • no staged development 	<ul style="list-style-type: none"> • Body Corporate and Community Management Act 1997 (BCCMA) • basic concept of "community titles scheme" • replaced BUPs and GTPs • CTS compatible with any plan of subdivision

second class home units⁶

It is important to know that, whilst the BCCMA replaced (to a great extent) the BUGTA, the BUGTA still operates in respect of plans registered under a "specified Act". The transitional provisions of the BCCMA provided that the plans that had been registered under the BUGTA, except those registered under a "specific Act", were deemed to be CTSs under the BCCMA.⁷

What constitutes a "specified Act" is defined by section 5A(3) of the BUGTA as follows:

specified Act means –

- the Integrated Resort Development Act 1987; or*
- the Mixed Use Development Act 1993; or*
- the Registration of Plans (H.S.P. (Nominees) Pty. Limited) Enabling Act 1980; or*
- the Registration of Plans (Stage 2) (H.S.P. (Nominees) Pty. Limited) Enabling Act 1984; or*
- the Sanctuary Cove Resort Act 1985.*

The topic of this paper is specifically focused on CTSs and so consideration of the BUGTA and any properties created by a "specified Act" is outside of its scope. However, be alert to the BUGTA's existence and the possibility that an injured party may have been injured on a property registered under one of the "specified Acts". In such a case, the property will be governed by the provisions of

⁵ The 'key factors' set out are not intended to be an exhaustive list, but identify, at a high level, the progression in this area necessary to a basic understanding of the legislative development for the purposes of this paper.

⁶ Queensland, *Parliamentary Debates*, Legislative Assembly, 17 April 1980, 3358-9 (Robert Gibbs).

⁷ *Body Corporate and Community Management Act 1997* (Qld) s 325(1)(a).

the respective “specified Act” and the BUGTA (as opposed to a CTS, which is governed by the BCCMA and regulation modules). Table 2 sets out details of some of the actual developments under the “specified Acts” for reader convenience:

Table 2 – developments registered under a specified Act.⁸

<p><i>Registration of Plans (H.S.P. (Nominees) Pty. Limited) Enabling Act 1980</i></p>	<ul style="list-style-type: none"> •The Paradise Centre at Surfers Paradise, Gold Coast • It comprises two residential towers, a hotel and several levels of commercial premises
<p><i>Registration of Plans (Stage 2) (H.S.P. (Nominees) Pty. Limited) Enabling Act 1984</i></p>	<ul style="list-style-type: none"> •Stage 2 of The Paradise Centre •Specifically allowed the construction of the hotel
<p><i>Sanctuary Cove Resort Act 1985</i></p>	<ul style="list-style-type: none"> •Sanctuary Cove Resort at Hope Island, Gold Coast •world-class resort comprising a golf course, international hotel, a marina, a harbour and up to 900 residences
<p><i>Integrated Resort Development Act 1987</i></p>	<ul style="list-style-type: none"> •facilitates the development of complete destination resorts •A number of developments across the State, including on the Gold Coast, Fraser Island, the Whitsundays and Port Douglas.
<p><i>Mixed Use Development Act 1993</i></p>	<ul style="list-style-type: none"> •facilitates development of buildings for residential, commercial and office spaces •mixed commercial, residential or industrial use developments (not resorts)

The consistency (or lack thereof) between the BCCMA and the BUGTA was recently the subject of an Issues Paper prepared by Queensland University of Technology’s Commercial and Property Law Research Centre in 2017. The paper is aptly titled “*Property Law Review Issues Paper – Consistency between the Body Corporate and Community Management Act 1997 and the Building Units and Group Titles Act 1980*” and is available online for anyone inclined to better understand the current state of this area of the law.⁹ The Issues Paper was just one part of a larger “independent and broad-ranging review of Queensland’s property laws”,¹⁰ which has been ongoing for a number of years.

The BCCMA and Regulation Modules

The BCCMA provides for the establishment of a CTS and the operation and management of the CTS as a means of achieving its primary object,¹¹ which is:¹²

*...to provide for flexible and contemporary communally based arrangements for the use of freehold land, having regard to the secondary objects.*¹³

⁸ Queensland University of Technology, *Consistency between the Body Corporate and Community Management Act 1997 and the Building Units and Group Titles Act 1980*, Issues Paper (2017), pp 9 – 13.

⁹ https://www.justice.qld.gov.au/_data/assets/pdf_file/0010/534970/qut-issues-paper-consistency-between-bugta-bccma.pdf

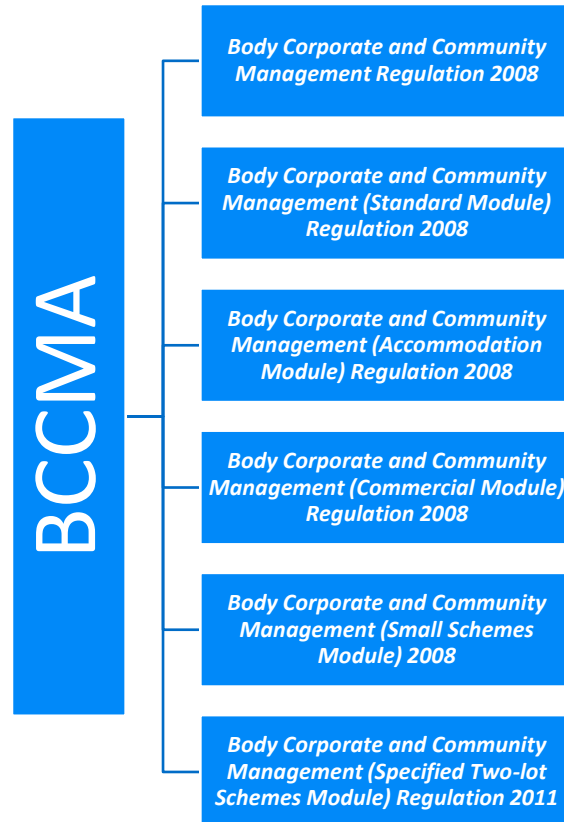
¹⁰ *Ibid* 8, p 7.

¹¹ Body Corporate and Community Management Act 1997 (Qld), s 3.

¹² *Body Corporate and Community Management Act 1997* (Qld), s 2.

The BCCMA also creates and regulates the body corporate of the CTS. It sits above, and is accompanied by, six different regulation modules, with the intention of providing greater flexibility in the regulation of various types of community styled developments.¹⁴

Diagram 2: BCCMA regulatory modules framework



The *Standard Module (SM)* is by far the most utilised module as it contains all of the governance rules that a typical scheme requires to best function in the ways contemplated by the BCCMA. The *Accommodation Module (AM)* also closely mirrors the SM requirements. For these reasons, most decisions made by Adjudicators in the Body Corporate and Community Management Commission largely reflect disputes occurring in a scheme registered under either the SM or the AM.

What is a Community Titles Scheme?

The Basics

A CTS is the basic concept of the BCCMA.¹⁵ It is defined in section 10 of the BCCMA as follows:

(1) a community title scheme is:

¹³ The “secondary objects” are set out in sections 4(a) – (i) inclusive.

¹⁴ For example, commercial offices, residential units, hotels and resorts.

¹⁵ *Body Corporate and Community Management Act 1997* (Qld), s 9(1).

- a. a single community management statement recorded by the registrar identifying land (the scheme land); and
- b. the scheme land.

(2) Land may only be identified as scheme land only if it exists of –

- a. 2 or more lots; and
- b. Other land (the common property for the community titles scheme) that is not included in a lot mentioned in paragraph (a)

(3) Land can not be common property for more than 1 community titles scheme.

(4) For each community titles scheme, there must be—

- (a) at least 2 lots; and
- (b) common property; and
- (c) a single body corporate; and
- (d) a single community management statement.

A CTS is established by:¹⁶

1. the registration, under section 115B of the *Land Title Act 1994* (**LTA**), of a plan of subdivision¹⁷ for identifying the scheme land for the scheme; and
2. the recording by the registrar of the first Community Management Statement (**CMS**) for the scheme.

It is the point in time at which the first CMS is recorded that the CTS comes into existence.¹⁸

Each CTS is allocated a name in accordance with legislative naming requirements under section 22 of the BCCMA and section 115E(2) of the LTA, as set out below.

22 Names of community title schemes

The name of a community titles scheme is made up of –

- (a) an identifying name shown in the community management statement; and
- (b) the words ‘community titles scheme’; and
- (c) the unique identifying number allocated under the *Land Title Act*, section 115E(2).

Example of name of community titles scheme –

Seaview community titles scheme 1234

115E Names of community title schemes

- (1) *The registrar must allocate a unique identifying number for a scheme when the first community management statement is recorded.*

¹⁶ *Body Corporation and Community Management Act 1997* (Qld), s 24(1).

¹⁷ The plan of subdivision is registered as a survey plan and will show the boundaries of the lots and the common property in that particular CTS. The plan of subdivision could be a *standard format*, *building format* or *volumetric format* plan; see *Land Title Act 1994* (Qld), s 48A.

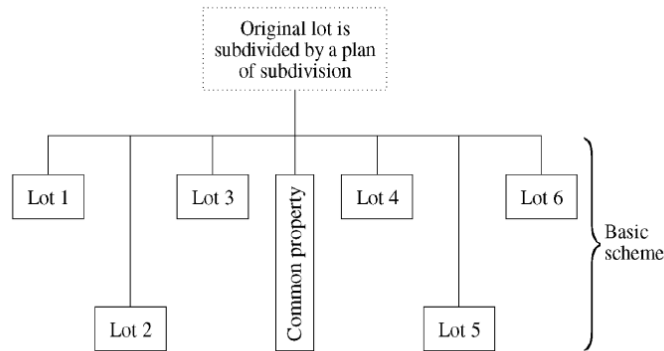
¹⁸ *Body Corporate and Community Management Act 1997* (Qld), s 24(2).

“Basic” and “Layered” Schemes

A CTS can take the form of a “basic” or “layered” scheme.¹⁹ It is important to know whether the injury you are dealing with took place on a layered scheme in order to identify the correct body corporate, whether the scheme may be subsidiary other schemes and any relevant aspects of the relationship between the various schemes that may affect liability.

The following illustrations are taken from Schedule 1 to the BCCMA and depict a “basic” and “layered” scheme. The visual representations are particularly helpful. There can be more complex versions of the “basic” and “layered” scheme and further examples are provided in Schedule 1.

Part 1 Example of basic scheme



Notes—pt 1

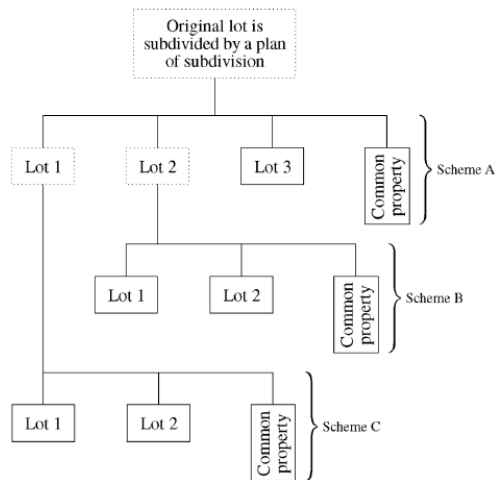
The original lot is subdivided into lots and common property.

The plan of subdivision could be a standard format, building format or volumetric format plan.

The scheme land consists of lots 1 to 6 and the common property.

A community management statement must accompany the plan of subdivision when the plan is lodged for registration.

Part 2 Example of simple layered arrangement of schemes



Notes—pt 2

Lots 1 and 2 in scheme A are subdivided by further plans of subdivision to create basic schemes B and C.

Accordingly, lots 1 and 2 in scheme A are themselves community titles schemes.

¹⁹ Refer to examples of possible structures of CTSs set out in diagrammatic form in Schedule 1 to the *Body Corporate and Community Management Act 1997* (Qld).

Community Management Statement

Community Management Statement (**CMS**) is defined in section 12 of the BCCMA as follows:

12 Meaning of community management statement

- (1) A community management statement is basic to the identification of a community titles scheme.
- (2) A community management statement is a document that—
 - (a) identifies land; and
 - (b) otherwise complies with the requirements of this Act for a community management statement

The registration of the first CMS for a CTS is required for the CTS to exist and for the CMS to take effect.²⁰ As such, every CTS will have a CMS.

The CMS is an important document for a personal injury lawyer to consider during early liability investigations as it contains a lot of information about the body corporate and management of the scheme that may be relevant. Helpfully, section 155L of the LTA requires the registrar to give the CMS a unique identifying number²¹ and record a reference to the CMS (including its identifying number) on the indefeasible title for each lot and the common property. This means that, when investigating an injury that has occurred on CTS land, a personal injury lawyer can easily identify and obtain a copy of the current CMS via standard fee-based property searches.

If your client is a lot owner or tenant, they should have been issued with a copy of the current CMS by the body corporate and you should check that first before incurring expenses on property searches. Of course, a search for the registered version is the quickest and easiest way to ensure you have the most current CMS.

Some of the information contained in a CMS that may be relevant to liability investigations includes, without limitation:²²

1. **the full legal name of the CTS, including the name of the body corporate:**²³ The legal name of the body corporate is simply the full CTS name with the words “body corporate for” in front.²⁴ The full legal name of the CTS is to be used when identifying the body corporate in legal documents (e.g. Notices of Claim under the PIPA and court documents).
2. **the applicable regulation module:**²⁵ In the event the CMS does not specify a regulation module, the SM will apply.
3. **description of scheme land:**²⁶ this will assist in identifying boundaries (if necessary).
4. **lot details and applicable plans:** the plans can include important notations regarding aspects of lots that may in fact be considered common property. Whilst it would be a very fact specific case that may require such a level of scrutiny, it is nevertheless important to know.
5. **architectural and landscape code:** the regulation modules provide for the adoption and regulation of an architectural and landscape code for a CTS, including allowing such matters

²⁰ *Land Title Act 1994* (Qld), s 115L(3).

²¹ *Land Title Act 1994* (Qld), s 115L(1)(a).

²² Marc Mercier, *Body Corporate Law in Qld: Practice and Procedure*, (CCH Australia Limited, 1st ed, 2018), 43.

²³ *Body Corporate and Community Management Act 1997* (Qld), s 66(1)(a)(i) and (ii).

²⁴ *Body Corporate and Community Management Act 1997* (Qld), s 33.

²⁵ *Body Corporate and Community Management Act 1997* (Qld), s 66(1)(b).

²⁶ *Body Corporate and Community Management Act 1997* (Qld), s 66(1).

to be included in the CMS²⁷ and establishing an architectural review committee with operational responsibilities.²⁸

6. **the scheme's by-laws:** “[b]y-laws constitute a public document which provides the necessary rules through which the body corporate may control and manage matters relevant to the operation (and governance) of the particular scheme”.²⁹ Whilst the body corporate can adopt its own by-laws,³⁰ it may be the case that there are no by-laws appearing in the CMS. Where that happens, the by-laws set out in Schedule 4 of the BCCMA apply.³¹ Also note that a by-law cannot be inconsistent with the BCCMA³² and so, for example, if a by-law purported to alter the duty of the body corporate to keep its common property in good condition, the by-law would be invalid.
7. **exclusive use allocations:**³³ refer below to discussion on the body corporate’s statutory duty to keep common property in a “good condition”.

The CMS is binding upon the body corporate, each member of the body corporate, each person who is an occupier of a lot in the scheme and each person who is an occupier of the common property.³⁴ It is a living document that is amended from time-to-time (most commonly for amendment to by-laws).

Whilst the fact of registration does not itself guarantee that a CMS is valid,³⁵ it would likely be a rare case, in the context of a personal injury damages claim, that a respondent who is bound by the provisions of the CMS would argue its invalidity and perhaps even a rarer case where such an argument has any real impact on an injured person’s claim of breach of duty of care.

Personal injury lawyers also need to be mindful of the existence of “layered” schemes, where multiple CMSs will exist. A layered scheme will have a principal scheme and one or more subsidiary schemes and a CMS for each scheme. Unfortunately, given the nature of a layered scheme and multiple body corporates trying to regulate for their specific scheme, inconsistencies can arise between CMSs.

The existence of inconsistencies is dealt with in section 58 of the BCCMA, which provides that a subsidiary scheme’s CMS has effect subject to the CMS for each CTS for which it is a subsidiary scheme.

The BCCMA provides the following example of the application of section 58:

Example: The community management statement for the principal scheme in a layered arrangement of community titles schemes prevails over the provisions (other than the lot entitlement schedules and the provisions prescribed under s 58(2)(b)) of the community management statement for each other community titles scheme forming part of the layered arrangement.

²⁷ *Body Corporate and Community Management (Standard Module) Regulation 2008*, s 6(b); *Body Corporate and Community Management (Accommodation Module) Regulation 2008*, s 7(b); *Body Corporate and Community Management (Commercial Module) Regulation 2008*, s 7(b);

²⁸ See for example *Body Corporate and Community Management (Accommodation Module) Regulation 2008*, s 7(b).

²⁹ Marc J Mercier, *Body Corporate Law in Qld: Practice and Procedure*, (CCH Australia Limited, 1st ed, 2018), 470-71.

³⁰ Note the by-laws can only provide for the matters set out in section 169 of the *Body Corporate and Community Management Act 1997* (Qld).

³¹ *Body Corporate and Community Management Act 1997* (Qld), ss 66(1)(e) and 168(2).

³² *Body Corporate and Community Management Act 1997* (Qld), s 180(1).

³³ for already authorised and agreed allocations see *Body Corporate and Community Management Act 1997*, s 175; for future allocations in progressive developments see *Body Corporate and Community Management Act 1997* (Qld), s 66(1)(f)(ii).

³⁴ *Body Corporate and Community Management Act 1997* (Qld), s 59(2).

³⁵ The registrar is not obliged to examine the CMS for its validity (or otherwise), *Land Title Act 1994* (Qld), s 115L(2).

Lot Property vs Common Property

Knowing the difference between lot property and common property is essential to determining whether a lot owner or the body corporate (or both) are responsible for the repair and maintenance of that part of the scheme where a person has suffered personal injury.

A lot owner is responsible to maintain their lot,³⁶ including any area of the common property over which the lot owner has exclusive use rights (refer below discussion on exclusive use rights). These lot owner responsibilities are subject to the body corporate's responsibilities for utility infrastructure³⁷ and any exceptions expressly provided for in the regulation module.

Defining Lots and Common Property

“Common property” is defined in s 10(2) of the BCCMA as meaning effectively freehold land forming part of the scheme land but not forming part of a lot included in the scheme. “Lot” is defined in Schedule 6 of the BCCMA to mean a lot under the LTA.³⁸ The Schedule 2 Dictionary of the LTA defines lot as follows:

Lot means a separate, distinct parcel of land created on –

- (a) the registration of a plan of subdivision; or*
- (b) the recording of particulars of an instrument;*
- (c) and includes a lot under the Building Units and Groups Titles Act 1980*

In order to properly determine the boundary of a lot you need to know whether the CTS was created by a standard format, building format or volumetric format plan. The two most common plans are the standard format and building format plans. Below is a brief description of those plans and how each defines the areas of land within a CTS.

Building Format Plans

A building format plan usually applies to multi-story unit complexes (i.e. vertical subdivisions). It is a survey plan that defines land using the structural elements of a building, including, for example, floors, walls and ceilings.³⁹

The structural elements of a building includes “*projections of, and reference to*”⁴⁰ structural elements. An example of “projections” as structural elements of a building is provided in section 48C of the LTA as follows:

Projections might be used to define a lot that includes a balcony, courtyard, roof garden or other area not bounded, or completely bounded, by floors, walls and a ceiling.

Diagram 3 below represents a typical 2-storey building format plan and provides a good example of how lots and common property are drawn/depicted on a plan.⁴¹ Note that the boundary of each lot is represented by a **thick black line**.

³⁶ *Body Corporate and Community Management (Standard Module) Regulation 2008*, s 170.

³⁷ For details of what constitutes “utility infrastructure” refer *Body Corporate and Community Management Act 1997* (Qld), s 20.

³⁸ Unless the lot is included in a CTS other than a “basic” scheme, in which case the lot could be a subsidiary scheme.

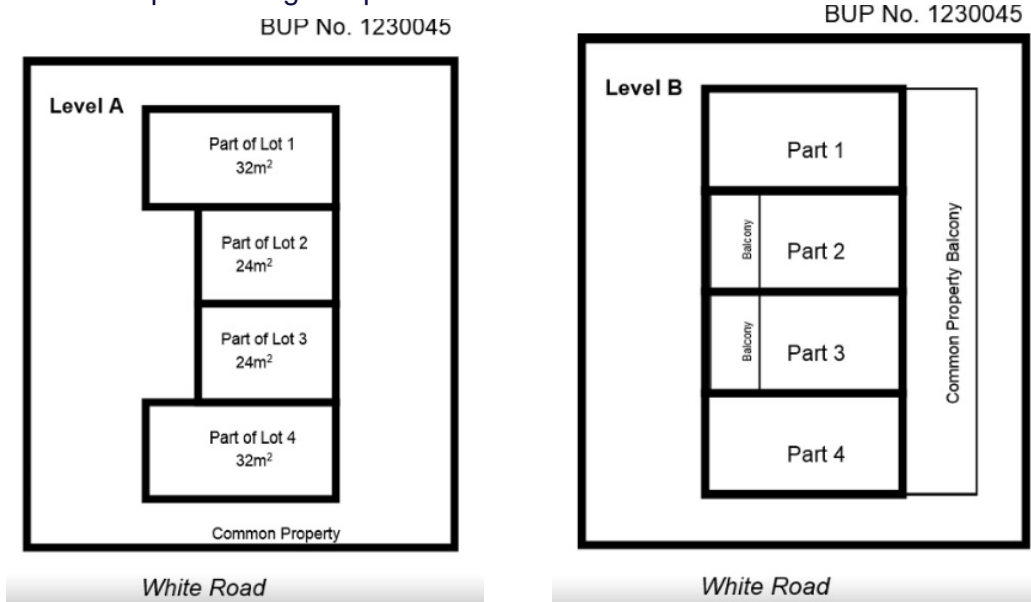
³⁹ *Land Title Act 1994* (Qld), s 48C(1).

⁴⁰ *Land Title Act 1994* (Qld), s 48C(2).

⁴¹ <https://www.qld.gov.au/law/housing-and-neighbours/body-corporate/maintenance/format-plan/building>

On level B, there is a Common Property Balcony. The thin black line around the balcony illustrates that the balcony is outside the lot boundaries (thus forming common property). Compare this Common Property Balcony to the two smaller balconies illustrated within the **thick black line** boundary of lots 2 and 3 on level B. As these balconies appear within the lot boundary they form part of that respective lot and are therefore lot property. In circumstances such as these, the face of the balcony becomes the boundary of the lot.

Diagram 3: Example building unit plan⁴²



Standard format plans

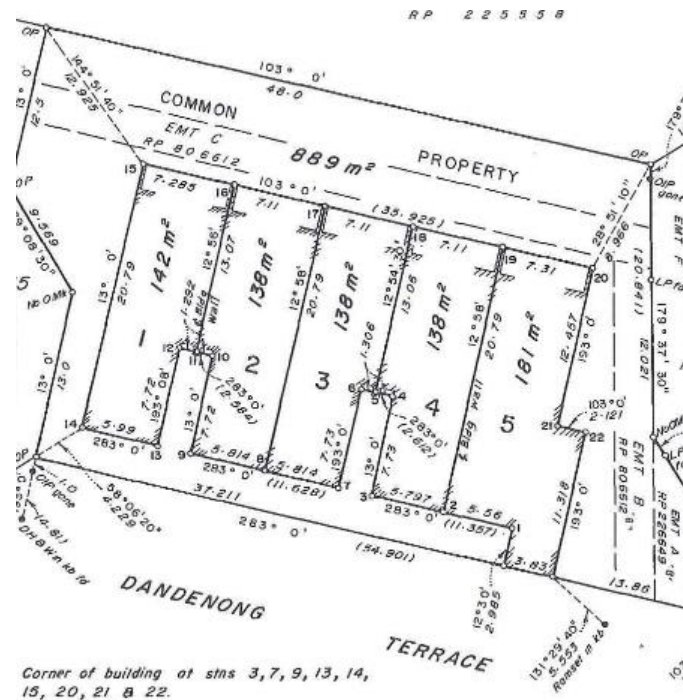
The standard format plan usually applies to horizontal subdivisions such as townhouse complexes that incorporate a building and yard within a single lot. “[t]he boundaries of lots in the scheme are defined by the measurements shown on the survey plan and any marks put on the ground when the survey was done”.⁴³

Diagram 4 represents a five lot CTS and its common property.

⁴² <https://www.qld.gov.au/law/housing-and-neighbours/body-corporate/maintenance/format-plan/building>

⁴³ <https://www.qld.gov.au/law/housing-and-neighbours/body-corporate/maintenance/format-plan/standard>.

Diagram 4 – Example standard format plan⁴⁴



Rules governing lot owner and body corporate responsibilities for lot and common property

As stated earlier, the SM is by far the most utilised regulation module for schemes. Sections 159, 170 and 173 of the SM are the primary provisions of that module dealing with the rules that govern lot owner and body corporate responsibilities. Accordingly, those sections of the SM reflect the typical set of rules and are the focus of this paper. Sections 159 and 170 are set out in full below; section 173 is dealt with in the discussion on exclusive use by-laws.

159 Duties of body corporate about common property

- (1) *The body corporate must maintain common property in good condition, including, to the extent that common property is structural in nature, in a structurally sound condition.*

Note— For utility infrastructure included in the common property, see section 20 of the Act (Utility infrastructure as common property).

- (2) *To the extent that lots included in the community titles scheme are created under a building format plan of subdivision, the body corporate must—*
- a. *maintain in good condition—*
 - *railings, parapets and balustrades on (whether precisely, or for all practical purposes) the boundary of a lot and common property; an*
 - *doors, windows and associated fittings situated in a boundary wall separating a lot from common property; and*
 - *roofing membranes that are not common property but that provide protection for lots or common property; and*

⁴⁴ <https://www.qld.gov.au/law/housing-and-neighbours/body-corporate/maintenance/format-plan/standard>

- b. maintain the following elements of scheme land that are not common property in a structurally sound condition—
- foundation structures;
 - roofing structures providing protection;
 - essential supporting framework, including load-bearing walls.

(3) Despite anything in subsections (1) and (2)—

- a. the body corporate is not responsible for maintaining fixtures or fittings installed by the occupier of a lot if they were installed for the occupier's own benefit; and
- b. the owner of the lot is responsible for maintaining utility infrastructure, including utility infrastructure situated on common property, in good order and condition, to the extent that the utility infrastructure—
- relates only to supplying utility services to the owner's lot; and
 - is 1 of the following types—
 - hot-water systems
 - washing machines
 - clothes dryers
 - another device providing a utility service to a lot; and

Examples for paragraph (b)—

1 An air conditioning plant is installed on the common property, but relates only to supplying utility services to a particular lot. The owner of the lot would be responsible for maintaining the air conditioning equipment.

2A hot-water system is installed on the common property, but supplies water only to a particular lot. The owner of the lot would be responsible for maintaining the hot-water system and the associated pipes and wiring.

- (4) the owner of the lot is responsible for maintaining the tray of a shower that services the lot, whether or not the tray forms part of the lot.
- (5) To avoid any doubt, it is declared that, despite an obligation the body corporate may have under subsection (2) to maintain a part of a lot in good condition or in a structurally sound condition, the body corporate may recover the prescribed costs, as a debt, from a person (whether or not the owner of the lot) whose actions cause or contribute to damage or deterioration of the part of the lot.

170 Obligations of lot owners and occupiers

- (1) An occupier of a lot included in a community titles scheme must keep the parts of the lot readily observable from another lot or common property in a clean and tidy condition.
- (2) The owner of a lot in a scheme must maintain the lot in a good condition.
- (3) The owner's obligations under subsection (2) to maintain the lot in good condition does not apply to a part of the lot the body corporate is required under this regulation to maintain in good condition.
- (4) The owner of a lot included in a scheme must maintain the utility infrastructure within the boundaries of the lot, and not part of the common property, in good condition and, if the utility infrastructure is in need of replacement, must replace it.
- (5) This section applies only to a lot that is not a community titles scheme.

Exclusive use rights under by-laws

Exclusive use by-law is defined in section 170 of the BCCMA as follows:

170 Meaning of exclusive use by-law

(1) An exclusive use by-law, for a community titles scheme, is a by-law that attaches to a lot included in the scheme, and gives the occupier of the lot for the time being exclusive use to the rights and enjoyment of, or other special rights about—

- (a) common property; or
- (b) a body corporate asset.

The regulation module applying to a CTS may make provision in respect of the regulation of exclusive-use by-laws, including obligations imposed on the owner with the benefit of the by-law.

Some examples of common property areas that are commonly the subject of exclusive use by-laws include:

- an elevator providing access to a penthouse apartment;
- car park(s);
- storage cage(s);
- layered schemes where a subsidiary scheme has exclusive use rights to a part(s) of the principal scheme's common property or the common property of another subsidiary scheme.

When acquired, the boundaries of the exclusive use area are helpfully identified in an exclusive use plan annexed to the CMS and thereby gain a complexion of a permanent attachment in relation to the lot.⁴⁵

The reason it is important for a personal injury lawyer to know about exclusive-use by-laws is because they can alter the maintenance responsibilities and operating cost obligations attaching to a part(s) of the common property. The most common obligations attaching to the lot owner with the benefit of the exclusive-use by-law appears in section 173 of the SM (set out in full below). Take particular note of the *example* provided for section 173(2), which would be relevant if a cause or contributing factor to a client's incident was a lack of lighting in an area of the common property subject to an exclusive-use by-law:

173 Conditions and obligations under exclusive use by-law

- (1) *If the owner of a lot included in the community titles scheme to whom rights are in the first instance given under an exclusive use by-law agrees in writing, the by-law may impose conditions (that may include conditions requiring the owner to make a payment or periodic payments to the scheme's body corporate or the owners of lots included in the scheme, or both).*
- (2) *An exclusive use by-law is taken, in the absence of other specific provision in the by-law for maintenance and operating costs, to make the owner of the lot to whom exclusive use or other rights are given responsibility for the maintenance of and operating costs for the part of the common property to which the exclusive use by-law applies.*

*Example of operating cost for part of common property –
cost of providing lighting to the part of common property*

- (3) *However, if the law was created under a building format plan of subdivision, in the absence of other specific provision in the by-law, the owner of the lot is not responsible for –*
 - a. *Maintaining in good condition roofing membranes that –*
 - i. *are on the part of the common property to which the by-law applies; and*
 - ii. *provide protection for lots or common property; or*
 - b. *maintaining in a structurally sound condition any of the following elements of scheme land that are part of a structure that is on the part of the common property to which the by-law applies and is not constructed by or for the owner –*
 - i. *foundation structures;*
 - ii. *roofing structures providing protection;*
 - iii. *essential supporting framework, including load-bearing walls.*

⁴⁵ Marc J Mercier, *Body Corporate Law in Qld: Practice and Procedure*, (CCH Australia Limited, 1st ed, 2018), 254.

The key take away for personal injury lawyers in relation to exclusive use rights is to be aware of their possible existence and ensure you are specifically looking for any exclusive use by-laws in the CMS. A personal injury lawyer should have, at the very least, a basic understanding of how to identify exclusive use rights and determine their effect (if any) on liability on potential respondents.

Who is the “body corporate” and what does it do?

The body corporate

The body corporate is a creature of statute, created upon the establishment of the CTS pursuant to section 30 of the BCCMA.⁴⁶ Its membership is comprised of the owners of all lots in the CTS⁴⁷ from time-to-time. The body corporate is a legal entity capable of suing and being sued in relation to the common property and assets of a CTS,⁴⁸ but note that the Corporations Act does not apply to it.⁴⁹

The general functions and powers of the body corporate are set out under sections 94 and 95 of the BCCMA respectively and state:

94 Body corporate’s general functions

(1)The body corporate for a community titles scheme must—

- (a)administer the common property and body corporate assets for the benefit of the owners of the lots included in the scheme; and*
- (b)enforce the community management statement (including enforcing any by-laws for the scheme in the way provided under this Act); and*
- (c)carry out the other functions given to the body corporate under this Act and the community management statement.*

(2)The body corporate must act reasonably in anything it does under subsection (1) including making, or not making, a decision for the subsection.

95 Body corporate’s general powers

(1)The body corporate for a community titles scheme has all the powers necessary for carrying out its functions and may, for example—

- (a)enter into contracts; and*
- (b)acquire, hold, deal with, and dispose of property; and*
- (c)employ staff.*

⁴⁶ Also be aware that when dealing with a property under one of the “specified acts” that there are multiple body corporates with different areas of responsibility, for example, Primary Thoroughfare Body Corporate, Secondary Thoroughfare Body Corporate, Principal Body Corporate etc. This will be particularly relevant when naming the correct entity in a Notice of Claim or legal proceedings.

⁴⁷ *Body Corporation and Community Management Act 1997* (Qld), s 31.

⁴⁸ *Body Corporation and Community Management Act 1997* (Qld), s 36(1).

⁴⁹ *Body Corporation and Community Management Act 1997* (Qld), s 32.

Note section 94(2), which mandates that the body corporate “[m]ust act reasonably”. This concept of reasonableness is “[o]ne of the pervasive elements underpinning the interpretation of the BCCMA provisions and the making of decisions in the jurisdiction of body corporate law”.⁵⁰

The body corporate makes its decisions by the passing of resolutions at duly convened meetings or by the passing of resolutions by its appointed committee at duly convened committee meetings.⁵¹ There may be times where decisions are made outside strict compliance with meeting and voting rules, but leaving aside any issues of validity of such decisions (which is outside the scope of this paper), all decisions are generally evidenced by the recording of minutes or otherwise captured in writing (e.g. email exchange). This may be particularly helpful to a personal injury lawyer investigating liability for the reasons discussed in this paper under the heading *Statutory right of access to documents outside of the PIPA*.

As previously stated, the legal name of the body corporate is mandated by section 33(1) of the BCCMA. It is referred to as its “corporate name”. It is this corporate name that is to be used when the body corporate sues, or is being sued. Accordingly, the corporate name should appear on the relevant Notice of Claim (Part 1) under the PIPA and any subsequent Court documents.

In terms of effecting service on the body corporate, the “address for service” will be the address registered and appearing on the title to the common property⁵² (which is available to lawyers via standard fee based property searches).

The Committee

The committee (voting members) is a group made up primarily of lot owners, elected at each annual general meeting. Other stakeholders can be on the committee in a non-voting capacity, such as the body corporate manager and caretaking service contractor.⁵³ The committee is charged with the administrative and day-to-day running of the body corporate and section 100(1) of the BCCMA provides that a decision of the committee is taken to be a decision of the body corporate.

The committee, like the body corporate, “[m]ust act reasonably in making a decision”.⁵⁴ Committee members do have the benefit of section 101A of the BCCMA which provides protection from civil liability, provided the relevant act or omission was done in good faith and without negligence.

The composition of the committee includes a Chairperson, Secretary and Treasurer, with small schemes being accommodated with a smaller committee. Each voting member is governed by a Code of Conduct, which is set out in Schedule 1A of the BCCMA.

Not every body corporate will have a committee and it may be necessary to look to the provisions of the governing regulation module to determine whether a committee exists (where it is not otherwise known or obvious based on initial client instructions). For example, there is no committee provided for

⁵⁰ Marc J Mercier, *Body Corporate Law in Qld: Practice and Procedure*, (CCH Australia Limited, 1st ed, 2018), 165.

⁵¹ Note decision can also take place outside of a duly convened committee meeting, known as VOCs (voting outside of committee meeting), but “Flying Minutes” should be kept of any VOCs.

⁵² The address for service is usually the address of the body corporate management agency. Unfortunately, it is not uncommon for a body corporate to forget to update the address for service when it changes managers. For that reason, there can be initial delays with the body corporate receiving a Notice of Claim.

⁵³ For example, see *Body Corporate and Community Management (Standard Module) Regulation 2008*, s 12(1) and *Body Corporate and Community Management (Accommodation Module) Regulation 2008*, s 13(1);

⁵⁴ *Body Corporation and Community Management Act 1997* (Qld), s 100(5).

under the Specified two-lot schemes module and no committee under the Small schemes module where a body corporate manager has been engaged.⁵⁵

Where a committee is required, or otherwise exists, Chapter 3, Division 2 of the BCCMA applies along with the relevant provisions of the governing regulation module. In the event the election process does not bring about a valid committee, the body corporate manager can be appointed under Chapter 3, Part 5 of the SM.⁵⁶

The body corporate manager

The meaning of body corporate manager is set out in section 14 of the BCCMA, as follows:

14 Meaning of body corporate manager

A person is a body corporate manager for a community titles scheme if the person is engaged by the body corporate (other than as an employee of the body corporate) to supply administrative services to the body corporate, whether or not the person is also engaged to carry out the functions of a committee, and the executive members of a committee, for a body corporate.

There is no legal obligation on a body corporate to engage a body corporate manager; however, it is quite common that they do. If engaged, the body corporate manager must act in accordance with the Code of Conduct set out in schedule 2 of the BCCMA and the terms of the governing management agreement. The agreement will be void if it is not in writing or does not otherwise comply with the relevant regulation module provisions.⁵⁷

Section 120 of the BCCMA provides that, in schemes for which there is no committee, a body corporate has the power to authorise, in writing, the body corporate manager to exercise the powers of a committee and an executive member of a committee. Decisions made by the body corporate manager under that authorisation are taken to be decisions of the body corporate pursuant to section 121(1).

There are some limits placed on the body corporate manager under the BCCMA, specifically, section 100(3) provides that any decision of a body corporate manager that is inconsistent with a decision of the committee is void.

A body corporate may elect to engage a body corporate manager when:⁵⁸

- there is a committee – to perform some or all of the powers of the executive members of the committee to assist the committee;
- there is no committee – to carry out functions in place of the committee.

Presently, there are no licensing requirements in Queensland for body corporate managers.

⁵⁵ *Body Corporation and Community Management (Small schemes module) Regulation 2008, s 8(2).*

⁵⁶ See ss 58 - 62.

⁵⁷ *Body Corporation and Community Management (Standard module) Regulation 2008, s 116; Body Corporation and Community Management (Accommodation module) Regulation 2008, 114.)*

⁵⁸ <https://www.qld.gov.au/law/housing-and-neighbours/body-corporate/roles/manager>

Common law duty of care

Section 36(2) of the BCCMA expressly provides that, in respect of the body corporate suing or being sued, it is to be taken as being the “occupier” of the common property (this does not include a claim in respect of common property for which another entity is the actual occupier). Accordingly, the starting point for the liability of a body corporate respondent is the law of occupier’s liability. It will then be necessary to consider the facts specific to each case to further identify the nature and scope of the duty of care owed, before being able to properly identify whether a breach of that duty has occurred.

The following extract at paragraph 125 of McColl JA’s judgment in *Ridis v Strata Plan 10308* [2005] NSWCA 246 (**Ridis**) provides a useful reminder of the law of occupier’s liability in Australia (however, it is not the intention of this paper to provide a comprehensive discussion or analysis of the law of occupier’s liability):

In Australian Safeway Stores Pty Limited v Zaluzna the High Court concluded that the law of occupier’s liability in Australia should accord with Deane J’s statement in *Hackshaw v Shaw* [1984] HCA 84; (1984) 155 CLR 614 at 662 – 663 that “[a]ll that is necessary is to determine whether, in all the relevant circumstances, including the fact of the defendant’s occupation of premises and the manner of the plaintiff’s entry upon them, the defendant owed a duty of care under the ordinary principles of negligence to the plaintiff”. Accordingly the High Court held that the duty of care owed by an occupier of premises to entrants to those premises is to take such care as is reasonable in the circumstances and that what is reasonable will vary with the circumstances of the plaintiff’s entry upon the premises: *Australian Safeway Stores Pty Limited v Zaluzna* at 487 – 488 per Mason, Wilson, Deane and Dawson JJ; see also *Phillis v Daly* (1988) 15 NSWLR 65. The duty is not to make the premises as safe as “reasonable care and skill on the part of anyone can make them”: *Jones v Bartlett* (at [92] per Gaudron J); *Wilkinson v Law Courts Ltd* [2001] NSWCA 196 at [21] per Heydon JA (with whom Meagher JA and Rolfe AJA concurred).

If the body corporate has breached any statutory or regulatory requirements, this will help “[i]nform the scope and nature of the duty of care...but it is not decisive”.⁵⁹ This paper does go on to identify the various statutory duties of a body corporate that should be considered when drafting allegations of negligence against a body corporate respondent.

In addition to potential breaches of statutory duties, consideration must also be had of the nature of the CTS itself. For example, consider whether the scheme is purely a private residential scheme, serviced apartments, a mix of residential and commercial, purely commercial etc. This will also inform the nature and scope of the duty of care and the following extract from paragraph 15 of the Queensland Court of Appeal decision in *Smith v Body Corporate for Professional Suites Community Titles Scheme 14487* [2013] QCA 80 (**Smith’s case**) is indicative of that relevance:

Ms Smith has placed reliance on Jones v Bartlett, Ahluwalia and Ridis. All three cases concerned incidents arising in domestic premises whereas the respondent’s premises was a commercial building with the glass wall forming part of the façade to a busy area in downtown Brisbane. And nor did those three cases concern a breach of the equivalent of s 30(1)(c) of the Act or the Advisory Standard. I note that since Jones v Bartlett was decided, Higgins J in Cardone v Trustees of the Christian Brothers [1994] ACTSC 85, [57], found that, in a non-domestic (school) situation, failure to replace non-safety glass with safety glass after the introduction of revised standards was a breach of duty to the plaintiff student injured by falling into and breaking the glass.

⁵⁹ *Ridis v Strata Plan 10308* [2005] NSWCA 246, [21] (McColl JA).

As for breach of duty of duty, personal injury lawyers are encouraged to look outside the usual factors (such as known or obvious works or renovations) to determine the actual, or expected, knowledge of the body corporate regarding the state of its common property. For example, the body corporate needs to have a thorough understanding of the current and likely future state of the common property over a 10 year period in order to comply with its annual budgeting obligations (refer discussion below on statutory budgeting obligations). It is therefore not uncommon for body corporates to obtain common property reports to help comply with those obligations. Such reports may include, without limitation, fire safety report, asbestos report, balustrade report, work health and safety report, general building report, other engineer reports.

Further, where repair and maintenance works are needed and outstanding, it is not uncommon for caretakers or facilities managers to undertake a “triage” of the issues and report to the body corporate (or committee) on the priority of works to be undertaken to rectify those known issues. Your client may have direct knowledge of such matters and/or a statutory right to inspect, and obtain copies of, the books and records of the body corporate (refer discussion below on *Statutory right of access to documents outside of the PIPA*).

Consideration of liability must also take place within the context of Chapter 2 of the *Civil Liability Act 2003 (Qld)*, which is not discussed in this paper.

Based on the above, the key take aways for investigating and determining liability of a body corporate respondent are:

- in relation to identifying the nature and scope of the duty of care owed by a body corporate, “[w]hat is reasonably required to be done in one set of circumstances may not be reasonably required in another”.⁶⁰ To understand the circumstances you need to understand the nature of the scheme, how it has been managed and who is responsible for what.
- the state of knowledge of a body corporate (whether what it actually knows or what it ought to know) is informed by many and varied sources of information and documents.

Some brief case examples in this area:

Jones v Bartlett [2000] 205 CLR 166 - there was no obligation on a home owner or occupier to update the safety standards of a building when the Australian Standards pertaining to same were upgraded, “[u]nless, for some reason, the glass had to be replaced”.

Ridis v Strata Plan 10308 [2005] NSWCA 246 – the owners corporation was not required to inspect the common property for the purpose of identifying unknown and unsuspected defects. As a result, the owners corporation was not found liable for failing to identify a safety risk posed by ordinary glass installed circa 1939, despite the current standards requiring installation of safety glass.

Smith v Body Corporate for Professional Suites Community Titles Scheme 14487 [2013] QCA 80 (Smith’s Case)- there was no obligation on an owner or occupier of a commercial premises to improve safety standards relating to a building’s construction as the Australian Standards were upgraded. Where no defect with the construction of a building, or part of a building, is obvious to a layman the occupier will not be held liable for non-compliance with relevant

⁶⁰ *Smith v Body Corporate for Professional Suites Community Title Scheme 14487* [2013] QCA 80, [18] (??), citing *Jones v Bartlett* (2000) 205 CLR 166, 185, [58], 216, [174] and *Tweed Shire Council v Hancomatic Music Pty Ltd* [2007] NSWCA 350, [223].

building standards. Note, however, paragraph [71] wherein it was found that the “[e]vidence did not establish that the defendant had any reason to suspect that the glass panels were not safe or less safe in their situation than they were at the time when they were installed”.

Cardone v Trustees of the Christian Brothers [1994] ACTSC 85 - whilst the court found the school to have been negligent for failure to replace non-safety glass following changes to the standard, there were “[t]wo physical features combined to cause the plaintiff to trip”,⁶¹ a boot-scraper on which the plaintiff tripped and the glass panel in the subject door against which he fell. The tripping hazard near the glass was relevant to the finding of negligence.

Statutory duties and obligations

In terms of information relevant to a personal injury lawyer, there are two main reasons why an understanding of body corporate duties and obligations is important:

1. you will gain a greater understanding of the driving forces behind a body corporate’s decision making and the various purposes for which they may obtain certain information and documents (this is relevant to claims of legal professional privilege over records); and
2. the statutory duties of the body corporate help to inform the nature and scope of the duty of care owed in any given case and breach of those duties can be relied upon as evidence of negligence.

The following extract from paragraph 90 of the McColl JA’s decision in *Ridis* deals with the relevance of statutory duties:

It is open to the appellant to rely upon what he contends is the respondent’s breach of s 62 as evidence of negligence on its part, rather than as conferring a cause of action: see O’Connor v SP Bray Ltd [1937] HCA 18; (1937) 56 CLR 464 at 477 per Dixon J. However a breach of s 62, if established, is not conclusive as to whether the respondent acted negligently. The common law duty to act reasonably in all the circumstances is paramount. Whether a failure to act in accordance with a statutory obligation constitutes a breach of that duty is a question of fact to be judged in the circumstances of the case: Sibley v Kais [1967] HCA 43; (1967) 118 CLR 424 at 427; see also Abela v Giew (1965) 65 SR (NSW) 485 at 489; Tucker v McCann [1948] VLR 222 at 225 per Herring CJ.

The above passage was more recently cited by the Queensland Court of Appeal in *Smith’s Case* at paragraph 16 when considering whether the body corporate in that case had breached its statutory duty under section 30(1)(c) of the then *Work Health and Safety Act 1995*:

Caution must be exercised, however, in translating statutory and regulatory obligations like those under the Act and the Advisory Standard into a common law duty of care which requires only the exercise of reasonable care: Leighton Contractors Pty Ltd v Fox (2009) 240 CLR 1, 22, [49].

Duty to keep common property in good condition

The body corporate is burdened by section 152(1)(a) of the BCCMA to “administer, manage and control the common property and body corporate assets”. Further, it must comply with any obligation arising under the regulation module applicable to the scheme: section 152(1)(b).

⁶¹ at [47].

The regulation modules place a duty on the body corporate to maintain the common property in a “good condition”, including, to the extent that common property is structural in nature, in a structurally sound condition.⁶²

In *Ridis*, the New South Wales Court of Appeal held that an owners corporation (analogous to the body corporate and with a similar statutory duty to maintain and repair common property) should have in place a system for monitoring the maintenance and state of repair of the common property in order to discharge its statutory duty. It was further determined that the obligations to have a system of monitoring do not extend to requiring the owners corporation to inspect premises for the purpose of discovering unknown and unsuspected defects. These concepts can be applied to a body corporate’s statutory duty in Queensland. In circumstances where a person is injured due to common property that is not in *good condition*, consider what (if any) system for monitoring was in place at the time.

As previously stated, the body corporate must act reasonably when carrying out its functions.⁶³ Unlike New South Wales, where the statutory duty of maintenance and repair is a strict liability,⁶⁴ breach of the statutory duty in Queensland is determined based on this concept of reasonableness. The following extract from the Adjudicator’s orders in *Atlantis West* [2010] QBCCMCmr 58 sets out when a body corporate will be in breach of its duty keep the common property in good condition:

...it appears that the obligation in section 159 Standard Module should not be interpreted as imposing strict liability that is contravened as soon as something stops operating properly. Rather, it appears that a body corporate, acting reasonably, should have a system in place for monitoring the maintenance and state of repair of the common property. The body corporate would only be in breach of its duty to maintain if it fails to remedy deterioration or defects within a reasonable time of when it became aware of the problem or should reasonably have become aware of the problem.

It was also held in *Magog (No 15) Pty Ltd v The Body Corporate for The Moroccan* [2010] QDC 70 at [85] that a body corporate will be liable if it fails to rectify a maintenance issue that it has become aware of within a “reasonable time”.

In addition to the above, in the context of common property issues arising from defects in the original construction of the building, the following extract from the judgment in *Klinger & Anor v Body Corporate for Costa D’Ora Apartments* [2007] QDC 300 clarifies that the body corporate is not excused of its ongoing statutory duty in such circumstances:

*[67] The statutory duty imposed on the Body Corporate in relation to the above matter is one which obliges it to remedy any defect as soon as any of the building parts covered by the duty fall into disrepair or were not operating properly. Failure to do so, once aware, gave rise to a breach of its duty. See *Seiwa Pty Ltd v Owners, Strata Plan 35042 (2006) NSWSC 1157* at paras 4-6. The statement of the Body Corporate to the Appellants’ solicitors of 9 December 2004[38] that it was never requested to become involved in the rectification works as it was always considered to be an issue between the Appellants and the original builder evidences a misconception by the Body Corporate of its statutory duty. The fact that the Appellants did at one point investigate through the QBSA the possible*

⁶² See for example *Body Corporate and Community Management (Standard Module) Regulation 2008*, s 159.

⁶³ *Body Corporate and Community Management Act 1997*, s 94(2).

⁶⁴ See *Seiwa Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157, paragraphs 3-5.

responsibility of the building builder, did not, and cannot, relieve the Body Corporate of its ongoing statutory obligations..

In regards to what constitutes the keeping of the common property in a good condition, “[i]t is a question of fact to be determined reasonably by the body corporate in light of the circumstances of the case”.⁶⁵

Work Health and Safety Act 2011

A body corporate will only be burdened by duties under the *Work Health and Safety Act 2011* if it meets the definition of a “person conducting a business or undertaking” (PCBU).⁶⁶ A strata title (i.e. CTS) body corporate is expressly excluded from that definition provided that common areas are used only for residential purposes,⁶⁷ and doesn’t engage any employees.⁶⁸ An “employee” would not include a person engaged for discrete repairs or tasks (e.g. plumber, electrician etc).

The body corporate of commercial premises (for example retail) would be considered a PCBU.

In circumstances where the body corporate meets the definition of PCBU, it will have duties such as, but not limited to:

- to ensure, so far as it reasonably practicable, the health and safety of its workers and other persons who may be put at risk by the work being undertake;⁶⁹
- to ensure, so far as reasonably practicable, that the premises are maintained so as not to expose workers to risks to health and safety.⁷⁰

Cladding – Building Regulation 2006 – Part 4A Combustible Cladding

The *Building and Other Legislation Cladding Amendment Regulation 2018* introduced Part 4A into the *Building Regulation 2006*. It sets out how Queensland is responding to the industry wide issues regarding the use of non-compliant cladding on building facades in the aftermath of the Lacrosse Tower and Grenfell Tower incidents. The amendments commenced on 1 October 2018.

Under Part 4A, owners of buildings which fulfil the following criteria must follow a regulated process aimed at identification, assessment and (where necessary, based on the level of risk arising from the non-compliant cladding) rectification by the dates set out in the below chronology):

- a class 2 - 9;
- of type A or B construction; and
- built or have had the cladding altered after 1 January 1994 but before 1 October 2018

⁶⁵ Marc J Mercier, *Body Corporate Law in Qld: Practice and Procedure*, (CCH Australia Limited, 1st ed, 2018), 383.

⁶⁶ *Work Health and Safety Act 2011*, s 5.

⁶⁷ *Work Health and Safety Regulation 2011*, s 7(1).

⁶⁸ *Work Health and Safety Regulation 2011*, s 7(2).

⁶⁹ *Work Health and Safety Act 2011*, s 19(1).

⁷⁰ *Work Health and Safety Act 2011*, s 19(2).

1 Oct 2018	<ul style="list-style-type: none"> • Regulation provisions came into effect
29 March 2019	<ul style="list-style-type: none"> • buildings must register and complete the checklist Part 1 on the “Safer Buildings” website • online system will indicate if the building is an <i>affected building</i> requiring further investigation; s 16S(1)(a).
29 May 2019	<ul style="list-style-type: none"> • complete <i>building industry professional statement</i> • complete the checklist Part 2 • online system will indicate is building is an <i>affected building</i>: s 16V(a)
27 August 2019	<ul style="list-style-type: none"> • engage fire engineer and register their details on the checklist Part 3
3 May 2021	<ul style="list-style-type: none"> • complete the <i>building fire safety risk assessment, fire engineer statement</i> and the checklist Part 3

Given the introduction of this regulated approach to identifying and, where necessary, rectifying non-compliant cladding, is it the case that a body corporate who complies with these timeframes will be deemed to have acted “reasonably” in the discharge of its statutory duty to keep its common property in good condition? What impact, if any, might this have on a finding of negligence in a common law claim where a person(s) suffers injury or illness from smoke or fire where the rapid spread of the fire (caused by the non-compliant cladding’s impact on the overall fire safety) prevented early egress? These are interesting questions to keep in mind if you are presented with such a case.

Budgets

A body corporate has strict statutory obligations regarding the setting of budgets for its administrative and sinking funds. A budget must be set for each fund, each financial year.⁷¹ The body corporate will enlist the assistance of various persons for the preparation of the budgets such as the treasurer of the Committee and the caretaker manager. Adequate budgeting is essential for the body corporate to be able to discharge its duties and obligations in a timely manner.

The caretaker manager will often undertake an “[a]dvisory role in informing of any capital expenses or maintenance matters that require expense provisioning. The duty to assist in the formulation of the budgets will also often be enconced as a duty in the caretaker agreement”.⁷²

General maintenance and repairs are included in the budget for the administrative fund,⁷³ whereas capital expenditure for larger, one-off works and renovations fall within the sinking fund budget. Major expenditure under the sinking fund is required to be budgeted for the current year and a period 9 years into the future.⁷⁴ As raised earlier, the body corporate needs to have a good understanding of

⁷¹ *Body Corporate and Community Management (Standard Module) Regulation 2008*, s 139(1) Note also s 146 which describes the Administrative and Sinking Funds.

⁷² Marc J Mercier, *Body Corporate Law in Qld: Practice and Procedure*, (CCH Australia Limited, 1st ed, 2018), 529.

⁷³ *Body Corporate and Community Management (Standard Module) Regulation 2008*, 139(2).

⁷⁴ *Body Corporate and Community Management (Standard Module) Regulation 2008*, 139(3).

the current, short term and long term state of the common property in order to ensure adequate provision for works in each financial year's budget and 9 years capital works projection for the sinking fund.

If evidence comes to light that a personal injury was caused by a failure to maintain or repair common property, it may be due to a lack of adequate provisioning for the works in the budget. In such a case, this may provide an additional allegation of negligence. This is particularly so if it can be established that the body corporate knew, or ought to have known, that their budgeting was in fact inadequate.

A review of the General Meeting Minutes, Committee Meeting Minutes and Flying Minutes⁷⁵ will also reveal any expenditure/budget issues. Those issues may include a decision or failure to adequately budget, failure to raise a special levy⁷⁶ or failure to bring an application for the approval of emergency expenditure. The latter two may have been the subject of a vote that was defeated (for e.g. because lot owners did not want to pay further levies).

Identifying potentially liable parties

There are various stakeholders involved in a CTS with their own obligations and involvement with the body corporate. To a great extent, those stakeholders are governed by the BCCMA and relevant regulation module and, in most cases, there will exist a services contract further regulating the nature of the relationship. It is important for a personal injury lawyer to have, at least, knowledge of the existence of these various stakeholders and their role within the CTS when determining potential respondents to a personal injuries claim.

Following is a summary of the key stakeholders and a brief description of their relationship to the running of a CTS:

1. **Body corporate:** refer above discussion on Who is the body corporate and what do they do?
2. **Lot owners or their tenants:** a potential respondent in circumstances where the incident occurred within the person's lot and due to an issue arising from lot property (or common property over which the lot owner holds exclusive use rights) or otherwise arising from the occupiers use of the lot. Whether the duty of care owed is one of landlord (i.e. owner) or occupier (i.e. tenant) will depend on the circumstances of the case.
3. **Body corporate managers:** refer above discussion on *The body corporate manager*. Whether or not the body corporate manager is a possible respondent to a claim will depend a number of factors, including the scope of any authority given to the manager by the body corporate to carry out functions and exercise powers,⁷⁷ and whether the manager has acted within the

⁷⁵ Commonly referred to as VOCs – *voting outside of committee meeting*.

⁷⁶ A levy raised for an unbudgeted expense, for example unexpected capital works or works that are more costly than budgeted for.

⁷⁷ Compare the wide scope to carry out the functions of the committee under *Body Corporate and Community Management (Standard Module) Regulation 2008*, s 58(1) and the limited scope of authority to exercise powers as a committee member under *Body Corporate and Community Management Act 1997*, s 119(2).

scope of that authority. The exercise of powers may include circumstances where the body corporate manager has been appointed to act as a committee under Chapter 3, Part 5 of the SM (as referred to in *The Committee* discussion above). The terms of the management agreement between the parties will also be instructive;

4. **Letting agents or other service provider (such as caretakers and facilities managers):** where a body corporate engaged a letting agent and/or caretaker, there will be a letting agreement and/or caretaking agreement in place and the scope of the obligations of the caretaker will be particularly relevant to whether they may be a potential respondent to a claim. For example, some caretaker agreements will include an obligation to undertake all the maintenance and repair of the common property (e.g. cleaning, gardening, general repairs etc). However, other agreements provide authorisation for the caretaker to engage third party contractors to undertake such work. Service providers such as these can also be granted exclusive occupation of certain parts of the common property, for example a foyer or storeroom,⁷⁸ for which they will be responsible. There will usually be a by-law within the CMS setting out the scope and use of any such occupied area and who has the benefit of it. This will obviously be relevant when an injury occurs on that part of the scheme property where the letting agent or other service provider has actual occupation. Also keep in mind that the management rights held by a caretaker can be in place for up to 25 years and it is not uncommon for there to be disputes between a body corporate and its caretaker where there is disagreement regarding the scope or quality of work being undertaken. It would be prudent for a personal injury lawyer to search for any Adjudicator's orders or QCAT decisions/orders relating to the CTS and disputes with current or prior caretakers. A previous caretaker may be a good source for information regarding the operation and management of the scheme. Any orders or decisions located may alert you to possible management issues within the scheme.

CTS documents that may be relevant to establishing liability

Whilst this paper does set out below a discussion on possible ways to obtain access to records of the body corporate outside of the PIPA, in circumstances where multiple parties are determined to be possible respondents to a claim and served with a Notice of Claim (Part 1), any "finger blaming" amongst the respondents may provide a good opportunity to obtain documents such as service agreements from parties trying to escape liability.

Community Management Statement

Refer above to *What is a Community Titles Scheme? Community Management Statement (CMS)*.

⁷⁸ Marc J Mercier, *Body Corporate Law in Qld: Practice and Procedure*, (CCH Australia Limited, 1st ed, 2018), 255; *Body Corporate and Community Management (Standard Regulation) 2008*, s 136.

Building management statement (BMS)

A BMS is an instrument under the LTA that:⁷⁹

- (a) identifies the lots to which it applies;
- (b) contains provisions benefiting and burdening the lots to which it applies; and
- (c) otherwise complies with Part 4 Division 4 of the LTA.

A BMS must include provisions regarding the supply of services to lots, rights of access to lots, rights of support and shelter and insurance arrangements.⁸⁰

Relevantly, for the purposes of this paper, a BMS may also include provisions regarding property maintenance, architectural and landscaping standards and rules for common services and facilities.⁸¹

If a BMS applies to scheme land for a CTS, it is binding on the CTS.⁸² Further, if the BMS establishes a building management group, section 54I(2) of the LTA provides that any decision made by the building management group is binding on the CTS.⁸³ Whilst the binding nature of the BMS and management group decisions appears contrary to section 97 of the BCCMA (i.e. that a body corporate cannot delegate its powers), the LTA expressly provides in section 54L(4) that the LTA provisions have effect despite section 97.

The obtaining of the BMS (if one exists) will only be relevant if the risk that eventuated falls within the scope of matters covered by the BMS. If a lot is burdened by a BMS there will be a reference to the BMS on the title to the lot⁸⁴ and the document should be available through standard fee based property searches.

Landscape and Architectural Guide

A CMS can adopt and regulate the operation of a LAG, if one exists, including the establishment and operation of an architectural review committee. Just know that a LAG is a document that can exist. It is only likely to be relevant if a respondent lot owner alleges that the risk that eventuated causing injury was created by an aspect of the LAG that they were obligated to comply with.

Statutory right of access to documents outside of the PIPA

Throughout this paper there has been reference to many different types of documents and records that the body corporate may create, or otherwise come into possession of, and which may be relevant to liability investigations. For example, common property reports, “triage” reporting on outstanding maintenance and repair works, budgets and budget forecasting, meeting minutes, service provider contracts etc. This section of the paper looks at how a personal injury lawyer might be able to obtain access to (and copies of) those records and documents outside of the PIPA.

⁷⁹ *Land Title Act 1994* (Qld), s54A(2).

⁸⁰ *Land Title Act 1994* (Qld), s 54C(1).

⁸¹ *Land Title Act 1994* (Qld), s 54C(2).

⁸² *Land Title Act 1994* (Qld), s 54I(2).

⁸³ *Land Title Act 1994* (Qld), s 54I(3).

⁸⁴ *Land Title Act 1994* (Qld), s 54D(1).

Body corporate's obligation to keep, and provide access to, records and documents

The body corporate is obligated to keep rolls, records and other documents⁸⁵ as part of its governance. However, as stated in *The Grange* [2018] QBCCMCmr 44 (*The Grange*) at [26]:

there is nothing in the legislation to suggest that the documents and information listed in this section as records that a body corporate must keep are the only documents and information that a body corporate can choose to keep. Rather, it sets out the documentation that must be retained for specified periods. Any other documents that a body corporate chooses to retain will form part of the records of the body corporate unless and until it is disposed of.

In addition to keeping records and documents, section 204 of the BCCMA states the body corporate “must give access to them”. This includes providing access to “interested persons”, which is dealt with under section 205 as follows:

205 Information to be given to interested persons

(1) This section provides for the giving of information by the body corporate for a community titles scheme from the body corporate's records.

(2) Within 7 days after receiving a written request from an interested person accompanied by the fee prescribed under the regulation module applying to the scheme, the body corporate must do either or both of the following as requested by the interested person—

- (a) permit the person to inspect the body corporate's records;*
- (b) give the person a copy of a record kept by the body corporate.*

Maximum penalty—20 penalty units.

(3) However, the body corporate is not required to allow a person to inspect or obtain a copy of a part of a record under subsection (2) if the body corporate reasonably believes the part contains defamatory material.

...

(6) In this section—

interested person means—

- (a) the owner, or a mortgagee, of a lot included in the scheme; or*
- (b) the buyer of a lot included in the scheme; or*
- (c) another person who satisfies the body corporate of a proper interest in the information sought; or*
- (d) the agent of a person mentioned in paragraph (a), (b) or (c).*

There is no legislative limit on the scope and content of records⁸⁶ that may be accessed under section 205, except for material reasonably believed to be defamatory⁸⁶ or that is subject to legal professional privilege. There is no restriction on the purpose for which an owner or buyer of a lot may use records obtained under section 205. Therefore, the reason why a person wants records or the use to which they will use those records is not relevant to the body corporate's obligation to provide records. This has been confirmed in *The Grange* at [31] and most recently in *Clermont Apartments* [2018] QBCCMCmr 587 at [24].

Accordingly, the only considerations for a body corporate in responding to a request to access records are as follows, which was confirmed by Adjudicator Rosemann in *Merrimac Heights* [2018] QBCCMCmr 278 at [19]:

⁸⁵ *Body Corporate and Community Management Act 1997*, s 204.

⁸⁶ *Body Corporate and Community Management Act 1997*, s 205(3).

- a. whether the person has made a written request
- b. whether the person has paid the required fee
- c. whether the person falls within the definition of an ‘interested person’
- d. whether the information sought is a body corporate record
- e. whether the record is reasonably believed to contain defamatory material
- f. whether the record is protected by legal professional privilege.

If the injured claimant is a lot owner, a request to inspect the records should be promptly made. If the injured claimant is not a lot owner, they may know a lot owner who is willing to exercise their own rights to assist. Otherwise, the injured claimant would have to sign a conditional contract to purchase any lot for sale in the CTS to fall within the definition of “interested person”, giving rise to a right to inspect and copy (but that seems a little extreme).

If your client does have a right to inspect, or otherwise knows an “interested person” who is willing to exercise their own rights, there is also the option of simply requested a copy of certain documents. A useful discussion of the level of specificity required when identifying documents to be produced from the body corporate records can be found in *Ocean Plaza Apartments* [2012] QBCCMr 470.

...A person requesting copies of records does not need to identify the exact date, author or details of the document. However, they should provide a reasonable degree of specification so the record can be readily identified by the body corporate. For example, they could request a particular class or type of document – such as minutes within a specific date range or letters from a particular person. In fulfilling a request under section 205 of the Act, a body corporate will need to search through its records, but is not necessarily required to read through each document to identify whether it contains particular information sought by the requester.

Claim of legal professional privilege

A body corporate may be entitled under common law to withhold records that are subject to legal professional privilege. However, legal professional privilege only applies to communications created for the dominant purpose of obtaining or providing legal advice or conducting actual or contemplated litigation.

Lawyers should not readily accept that a claim of privilege by a body corporate over certain of its records is properly made. The CTS and body corporate basics provided in this paper should give personal injury lawyers a greater understanding of the various motivations and regulatory burdens that inform the many “purposes” for which a body corporate may bring a document or record into existence. Understanding those different purposes will assist in challenging claims of privilege over body corporate records, remembering that it is the person who claims the privilege that must establish it.

The link between knowing/understanding the body corporate and identifying the purpose for which documents may be created was identified by the New South Wales Court of Appeal in *The Owners – Strata Plan No. 74602 v Eastmark Holdings Pty Limited*, a case involving a claim of privilege by an owners corporation over certain of its documents and records that lot owner, Eastmark, was trying to obtain (emphasis added):

In many cases the reports would result from established corporate or bureaucratic procedures, and the individual who made the report would simply be following instructions. **It may be necessary to understand the internal procedures, or the**

objectives of some person of higher authority, in order to identify the purpose or purposes for which reports were prepared.⁸⁷

Concluding Thoughts

At this point, readers who were not otherwise familiar with body corporate law should have a greater understanding of the basics of CTSs in the context of liability for personal injuries suffered on CTS land. The volume of law in this area is immense, but the challenge of its complexities can be rewarding. If you are a personal injury lawyer looking for a specific area within your practice to concentrate your knowledge, then body corporate law presents a great opportunity for that practice focus.

⁸⁷ *The Owners — Strata Plan No. 74602 v Eastmark Holdings Pty Limited* [2013] NSWCA 221, [39].