

BUILDING DEFECTS: health & safety risks, responsibility and recoverability.

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INTRODUCTION

*Building defects are common phenomena in the construction industry worldwide and have become an accepted part of the building process. The concern is not that defects occur, they are inevitable. The concern is the extent, severity and impact these defects have on buildings and their occupants.*¹

The above passage is from the latest Australian research into apartment building defects released in June 2019 and it seemed a fitting introduction to this paper on Building Defects in the context of personal injuries litigation. The *concern* referred to is one currently held by many stakeholders in the strata and building industries from architects to developers, certifiers, lawyers and building/apartment owners. However, given the hazards that some defects present to the health and safety of building occupants, the concern also crosses into the domain of personal injuries litigation.

Although there has been concern regarding building defects in Australia for many years, the issue did not attract the significant level of media attention and government action that we have seen in the last five years until the likes of fire events involving *combustible cladding* such as Melbourne's Lacrosse building in 2014 and (tragically) Grenfell Tower in West London in 2017. Certainly, the more recent evacuations of Opal Tower² on Christmas Eve and Mascot Tower³ just six months later due to structural concerns have ensured that building defects remain highly topical.

This paper's aim is to provide an introduction into the issue of building defects in Australia (specifically Queensland where possible)⁴, two of the common defects and the hazards and risks created by them, legal responsibility for injury/illness/death caused by the materialisation of those risks (with a focus on body corporates) and matters relating to recoverability.

Defining Building Defect

There is no single accepted definition of "building defect". Generally, in State based building legislation, defects are categorised as minor, major, structural etc. and this often interplays with the identification of time limits for lodging complaints and/or commencing claims and litigation against those responsible for the design and construction of a building.

One of the broader definitions that appears to be adopted in the more recent published papers in this area is as follows:⁵

a failing or shortcoming in the function, performance, statutory or user requirements of a

¹ Johnston & Reid, 'An Examination of Building Defects in Residential Multi-owned Properties' (Research Paper, Deakin University & Griffith University, June 2019) p 6

² Apartment building in Sydney Olympic Park. The building is comprised of 392 apartments with 34 above ground levels and three levels underground. The construction was only completed in August 2018

³ The building is comprised of 132 apartments and is 10 storeys in rise

⁴ It is outside the scope and intention of this paper to provide a comprehensive analysis of this complex issue.

⁵ Johnston & Reid, 'An Examination of Building Defects in Residential Multi-owned Properties' (Research Paper, Deakin University & Griffith University, June 2019) p 8 citing David Watt, *Building pathology: principles and practice* (Blackwell Publishing, 2nd ed, 2007) p 96

building, and might manifest itself within the structure, fabric, services or other facilities of the affected building

Further, a “building defect” can be caused by:

- issues in the design and/or construction of the building (whether original works or subsequent repairs or refurbishment); and/or
- a lack of maintenance and repair in circumstances where there was no defect in the construction. This could be a complete lack of maintenance or simply maintenance that does not conform to the manufacturer’s guidelines and specifications.

The cause of the defect can be of particular relevance to a personal injuries practitioner when identifying Defendants, assessing liability and formulating allegations of negligence. For example, actual or constructive knowledge of a hazard caused by lack of maintenance may be easier to establish than a hazard created by a latent construction defect that may present suddenly (assuming any injury causing incident occurs within a short period of time from when the defect manifests). Using that same example, the burden of expense to rectify hazards caused by lack of maintenance would likely have been reduced had preventative maintenance been undertaken over time, whereas rectification costs of a latent defect may be more prohibitive and completely outside the control of a body corporate acting reasonably.

Research – building defects in apartment buildings

There have been at least three separate studies undertaken in Australia indicating the most common building defects in multi-owned properties:

- 2009:⁶ water ingress, internal and external wall cracking, roofing and guttering problems and tiling faults
- 2012:⁷ water leaks (42%), internal and external wall cracking (42%), exterior water penetration (40%), guttering problems (25%), defective roof coverings (23%), plumbing faults (22%) and tiling related defects (20%)
- 2019:⁸ building fabric and cladding (40.19%), fire protection (13.26%), water proofing (11.46%), roof and rainwater disposal (8.58%) and structural (7.25%)

Whilst the manner of categorisation and naming of the defect type is not consistent between these studies, there is a clear presence of water leaks/ingress issues and (more recently) fire protection deficiencies.

The most recent report was released in June 2019 and was authored by Nicole Johnson of Deakin University and Sacha Reid of Griffith University. It is titled *An Examination of Building Defects in Residential Multi-owned Properties* (“**Johnson Paper**”). It is considered a “pilot project” by the authors to help guide further research and understanding; nevertheless, it has provided valuable input and been the subject of many presentations and educational seminars since.

⁶Hazel Easthope, Bill Randolph and Sarah Judd, ‘Managing Major Repairs in Residential Strata Developments in New South Wales’ (2009) City Futures Research Centre, UNSW 1, p 10

⁷ Hazel Easthope, Bill Randolph and Sarah Judd, ‘Governing the Compact City: The role and effectiveness of strata management (Final Report)’ (2012), City Futures Research Centre, UNSW 1, p 65

⁸ Johnston & Reid, ‘An Examination of Building Defects in Residential Multi-owned Properties’ (Research Paper, Deakin University & Griffith University, June 2019)

The Johnson Paper examines building defects in the specific property context of *multi-owned property*,⁹ focusing on medium and higher density living environments,¹⁰ i.e. apartment buildings.

The Johnson Paper is focused on the following areas:¹¹

1. identifying the types of defects impacting residential buildings;
2. understanding the impacts defects have on buildings and occupants;
3. assessing the regulatory environment relating to building construction;
4. understanding how defects are managed and rectified within the multi-owned property environment.

The Johnson Paper research methods included detailed interviews with (and surveys of) various stakeholders as well as analysing 212 building defect audit reports (undertaken in New South Wales, Queensland and Victoria), with 66 of those reports coming from Queensland buildings constructed between 2008 – 2017.¹²

A building defects matrix was created to categorise and analyse the data, which identified the following key construction systems relevant to multi-owned properties:¹³

Table 2: Core Construction Systems⁷⁸

<ul style="list-style-type: none">• Access and Egress• Building Fabric and Cladding• Electrical, Lighting and Data• Fire Protection• Hydraulics• In Motion Equipment• Mechanical and Ventilation• Roof and Rainwater Disposal• Safety• Structural• Utility Supply• Waterproofing• Non-essential Services
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Research results – most common defects reported and observed

The analysis of the defect audit reports showed 3227 line items of defects¹⁴ across the 212

⁹ Multi-owned properties are property schemes that consist of at least two lots tied to common property with a private entity incorporated via registration to govern and manage the scheme. In Queensland, these property schemes are referred to as *community title schemes* and are governed and managed by the *body corporate* created upon registration of the scheme.

¹⁰ Johnston & Reid, 'An Examination of Building Defects in Residential Multi-owned Properties' (Research Paper, Deakin University & Griffith University, June 2019), p 7

¹¹ Ibid 10, p 6

¹² Ibid 11, p 18

¹³ Ibid 12, pp 17-18

¹⁴ By way of explanation, a standard defect report will contain a schedule of the identified defects comprised of consecutively numbered lines each describing a defect, its location in the property, the cause, further necessary investigations and (sometimes) a proposed scope of works for rectification. However, a schedule of defects showing

buildings. However, the actual number of defects was said to be much higher than this figure because 85% of the building reports (71% in Queensland) had grouped like defects together in a single line item.¹⁵ The Queensland reports audited showed an average of 12 line item defects per building.¹⁶

The following defects were the most commonly reported:¹⁷

- 40.19% - building fabric and cladding¹⁸ (33% of these defects related to water ingress and moisture);¹⁹
- 13.26% - fire protection;
- 11.46% - water proofing;
- 8.58% - roof and rainwater disposal;
- 7.25% - structural.

As for the stakeholder interviews and surveys, this included body corporate managers, engineers, apartment owners and lawyers. In response to the question “what are the most common building defects being observed” there were two standouts for the major issues observed over the last five years:²⁰

1. combustible cladding; and
2. glass balustrades.

The Johnson Paper results show that defects relating to building fabric and cladding are the most commonly reported and observed issues currently affecting apartment buildings. Water ingress/moisture and *combustible cladding* are of major concern. Both types of defect can create risks to the health and safety of building occupants and this is where the issue of building defects becomes most relevant to personal injuries practitioners. Given the results of the research, this paper will look closely at the hazards and risks created by damp buildings and *combustible cladding*.

Research results – most concerning impacts of building defects

The Johnson Paper identified the following impacts of building defects as the most concerning:²¹

- the number of defects – they are significant and there is a problem;
- the prevalence of fire safety defects - fire is a direct threat to life;

85 numbered lines may not be truly representative of the number of *individual* defects as some experts group like defects together. This is, if the same defect was found across multiple locations within the building it is reported as one line item in the schedule and the language used is pluralised, e.g. missing fire collars, and the “location” identified as each of the levels on which the defect was identified.

¹⁵ Johnston & Reid, ‘An Examination of Building Defects in Residential Multi-owned Properties’ (Research Paper, Deakin University & Griffith University, June 2019), p 21

¹⁶ Ibid 15, p 21

¹⁷ Ibid 16, p 21

¹⁸ Building fabric and cladding refers to any product or material that is applied over another product or material to provide a skin or layer. These products or materials often provide thermal and sound insulation, weather and vermin resistance and improve building aesthetics

¹⁹ Johnston & Reid, ‘An Examination of Building Defects in Residential Multi-owned Properties’ (Research Paper, Deakin University & Griffith University, June 2019) p 36.

²⁰ Ibid 19, p 45

²¹ Ibid 20, p 59

- mould that has arisen due to water ingress defects and that has the potential to lead to serious health implications for residents, which is also contributed to by the lack of care by trades in properly managing mould, which often leads to spores embedding or remaining in lots;
- the type of defects most commonly observed require invasive and often costly remedial works to rectify (particularly waterproofing and fire separation failures);
- the commercial impact on owners can lead to a number of psychological health impacts (particularly stress related) and for some, financial ruin.

Concerningly, the Johnson Paper stated that for owners who took part in the interviews and whose schemes had been built since 2000, 75% said that there were still some defects in their schemes that had not been fixed.²²

For the purpose of this paper, the above impacts reinforce the relevance of this issue to personal injuries litigation. This is because the impacts relate either to the prevalence or nature of defect hazards and their risks to personal health and safety, or impacts on the financial ability of a body corporate to take steps to adequately mitigate the risk (relevant to considerations of breach of duty).

HAZARDS AND RISKS OF COMMON BUILDING DEFECTS

Water ingress – Mould in damp buildings

A water damaged building is a breeding ground for substances that contribute to its biotoxin load.²³ According to the Royal Australasian College of Physicians (“**RACP**”), *biotoxins* is an umbrella term for substances of biological origin, some of which can produce toxic effects in humans.²⁴ It includes toxic chemicals found on airborne spores, fine or ultrafine fragments of mould or fungus.²⁵

Mould is a very real issue in water damaged buildings, but additional substances breeding in these environments can include bacteria, volatile organic compounds, parasites, and dust-mites.²⁶ Buildings with poor ventilation also create a breeding ground for mould particularly buildings located in areas that commonly experience high levels of humidity. Buildings in Northern Queensland are particularly susceptible to mould build-up in circumstances of poor ventilation as this area of the State has been classified by the Bureau of Meteorology as a “hot humid summer” climate zone.²⁷

²² H Easthope, B Randolph and S Judd, City Futures Research Centre, Faculty of the Built Environment, University of NSW, May 2012, “Governing the Compact City: The role and effectiveness of strata management Final Report”, p 3

²³ House of Representatives Standing Committee on Health, Aged Care and Sport, *Report on the Inquiry into Biotoxin-related illness in Australia* (October 2018), p 14 citing Dr Tim Law, Submission 75, p. 5.

²⁴ Ibid 23, citing Royal Australasian College of Physicians, Submission 142, p. 2.

²⁵ Ibid 24 citing MouldLab, Submission 26, p. 19.

²⁶ Ibid 25 citing Dr Sandeep Gupta, Board Member, Australian Chronic Infectious and Inflammatory Disease Society (ACIIDS) and Australasian College of Nutritional and Environmental Medicine (ACNEM), Official Committee Hansard, Canberra, 9 August 2018, p. 17.

²⁷ *Hot humid summer* is one of six key zones across Australia, based on a set of definitions relating to summer and winter conditions and classified according to temperate and humidity properties; see *Climate classification maps* published by the Bureau of Meteorology online http://www.bom.gov.au/jsp/ncc/climate_averages/climate-classifications/index.jsp

The Johnson Paper highlights not only the prevalence of water ingress and damage issues in apartment buildings, but also the fact that there has been limited focus and research on assessing the consequent risks to the health of building occupants.²⁸

The Australasian Society of Building Biologist (“**ASBB**”) has stated that the:²⁹

true prevalence and geographic distribution of dampness in Australian buildings is yet to be quantified and we definitely need to quantify the prevalence of dampness—it’s been done in many countries, not in Australia—to see if there are at least correlations to things like asthma allergies, which is well documented in literature, and, potentially, to chronic fatiguing illness.

Whilst biotoxins are believed to be a cause of illness they are not captured within the National Notifiable Diseases Surveillance system and so the Department of Health does not retain data on their frequency or distribution.³⁰ Such data would provide a helpful base upon which much needed research could be undertaken in relation to the causal connection between biotoxin exposure in water damaged buildings and illness.

Inquiry into biotoxin-related illnesses in Australia

In the flurry of investigation and media attention on the issue of building defects in Australia over the last few years there has been some movement in the area of biotoxin-related illnesses. Specifically, in June 2018, the Standing Committee on Health, Aged Care and Sport (“**Committee**”) conducted an inquiry into (and reported on) biotoxin-related illnesses in Australia.

In October 2018 (following receipt of submissions from various experts, professionals and individuals suffering health issues) the Committee published its *Report on the Inquiry into Biotoxin-related Illness in Australia*.³¹

One of the issues evident from the materials received by the Committee was the lack of consensus on the causal connection between health impacts and water damaged buildings. This included some uncertainty on the level at which mould exposure may be harmful.³²

Mould

The ASBB have stated that “[m]ould is frequently found in pre-purchase house assessments particularly in...new apartments that lacked adequate ventilation in wet areas.”³³

²⁸ Johnston & Reid, ‘An Examination of Building Defects in Residential Multi-owned Properties’ (Research Paper, Deakin University & Griffith University, June 2019), pp 13-14.

²⁹ House of Representatives Standing Committee on Health, Aged Care and Sport, *Report on the Inquiry into Biotoxin-related illness in Australia* (October 2018) p 16 citing Mrs Nicole Bijlsma, ASBB, Official Committee Hansard, Canberra, 9 August 2018, p. 10.

³⁰ Ibid 29 citing Department of Health, Submission 56, p. 2.

³¹ https://www.aph.gov.au/Parliamentary_Business/Committees/House/Health_Aged_Care_and_Sport/BiotoxinIllnesses/Report

³² House of Representatives Standing Committee on Health, Aged Care and Sport, *Report on the Inquiry into Biotoxin-related illness in Australia* (October 2018), p 30

³³ Ibid 32, p 16 citing Australasian Society of Building Biologists (ASBB), Submission 45, p 5

Mould is a type of fungi that produces tiny particles called spores which are carried in the air, and help it to grow and spread.³⁴ They are naturally present outdoors, but can also be found inside. Generally, if a building has dampness, water damage and/or poor ventilation there will be more mould and therefore more mould spores.³⁵ Whilst the World Health Organisation and the Department of Health have ‘concluded that there is an association between exposure to dampness or mould and conditions such as asthma, allergic alveolitis and mould infections in susceptible individuals,’³⁶ there remains uncertainty regarding the causal connection between mould spores and an increasingly prevalent condition referred to as Chronic Inflammatory Response Syndrome.

Chronic Inflammatory Response Syndrome (“CIRS”)

CIRS has been defined as a syndrome,³⁷ which is different from a disease. In particular, the Committee heard that a syndrome may not be supported by a consensus medical view regarding cause, testing and/or treatment and that there are no clinical guidelines pertaining to CIRS or CIRS-like symptoms.³⁸

Reported symptoms of CIRS can include a combination of:³⁹

fatigue, weakness, aches, muscle cramps, sharp pain, headache, light sensitivity, red eyes, blurred vision, tearing, sinus problems, cough, shortness of breath, joint pain, morning stiffness, memory issues, difficulty with focus/concentration, word finding difficulties, decreased assimilation of new knowledge, confusion, disorientation, light sensitivity, mood swings, sweats (especially night sweats), temperature regulation or dysregulation problems, excessive thirst despite frequent water intake, static shocks, numbness, tingling, vertigo/dizziness, metallic taste, abdominal pain, diarrhoea, tremors, unusual pain, migraine/facial pain, appetite swings, increased urination/nocturia

According to the Department of Health, at this stage, ‘the scientific evidence is not sufficient ... to accept the assertion that exposure to environmental biotoxins is causing [CIRS].’⁴⁰ That said, there did appear to be consensus that there are people who suffer from a range of complex symptoms that are debilitating and difficult to both diagnose and treat and which are often ascribed to CIRS.⁴¹

³⁴ Ibid 33 p 8 citing New South Wales (NSW) Health, Mould, www.health.nsw.gov.au/environment/factsheets/Pages/mould.aspx, Accessed 23 August 2018

³⁵ Ibid 34, p 8 citing Victorian State Government, Mould and your health, www.betterhealth.vic.gov.au/health/conditionsandtreatments/mould-and-your-health, Accessed 23 July 2018

³⁶ Ibid 35, p 9 citing Department of Health, Submission 56, p. 2

³⁷ Submission of Dr Mark Donohoe, Private Capacity, Official Committee Hansard, Canberra, 9 August 2018, p. 19: “[A] syndrome is an observational gathering of symptoms that are in common between different patients. [For example] in Chronic Fatigue Syndrome we have a particular group of people with six months fatigue and five of the eight criteria in addition to it. Do we know cause? No. Do we know treatment? No. There’s no one common thing ... You don’t have a disease until the consensus of medicine is that you have a disease, and it moves from syndrome to disease at that point, but that’s because you have testing or treatment that is widely accepted to work.”

³⁸ House of Representatives Standing Committee on Health, Aged Care and Sport, *Report on the Inquiry into Biotoxin-related illness in Australia* (October 2018), p 60

³⁹ Ibid, pp 40-42

⁴⁰ Ibid, p 2 citing Professor Brendan Murphy, Chief Medical Officer, Department of Health, Official Committee Hansard, Canberra, 12 September 2018, p. 1

⁴¹ House of Representatives Standing Committee on Health, Aged Care and Sport, *Report on the Inquiry into Biotoxin-related illness in Australia* (October 2018), pp iii – iv

Further, there are a number of proponents in the medical profession for the causal link between CIRS and exposure to biotoxins (including mould). In the context of building defects:

in some instances, CIRS and biotoxin-related illnesses have been reported to be associated with exposure to biotoxins such as mould in buildings arising from excessive moisture build-up from water damage.⁴²

Dr Sandeep Gupta, Board Member, Australian Chronic Infectious and Inflammatory Disease Society and Australasian College of Nutritional and Environmental Medicine, outlined for the Committee four factors⁴³ that have been used to define and identify CIRS:

- it is a multisystem and multi-symptom illness;
- the patient has had 'documented exposure to biotoxins, usually in the form of a water damaged building';
- testing indicates the patient has a number of 'abnormal biomarkers'; and
- the illness responds to therapy, 'the main one being cholestyramine.'

Unfortunately, consistent with the general lack of data on this issue, Toxic Mould Support Australia stated that the prevalence of CIRS among Australians is "unknown at present".⁴⁴

Committee Recommendations

The Committee made a number of recommendations for the Department of Health and Australian Government as a result of its inquiry, which are set out below. Whilst the recommendations are certainly a good first step in better understanding this issue, it is still early days since the release of the report and it is unclear which (if any) of the recommendations are being acted on.

Recommendations that the Department of Health:

- a) produce and publish fact sheets and undertake further research on the potential health effects of exposure to damp and mould, the prevalence of dampness and mould in the built environment and advice on the prevention and removal of mould;⁴⁵
- b) conduct a review into the treatment of patients presenting with complex illnesses that are difficult to diagnose such as those with CIRS-like symptoms;⁴⁶
- c) develop clinical guidelines for general practitioners for the diagnosis, treatment and management of CIRS-like conditions.⁴⁷

Recommendations that the Australia Government work with the States and Territories to:

⁴² Ibid, p 1

⁴³ Ibid, p 32

⁴⁴ Ibid, p 1

⁴⁵ Ibid, pp 30-31

⁴⁶ Ibid, p 62

⁴⁷ Ibid, p 62

- a) research into, and develop standards and/or accreditation requirements for the mould testing and remediation industries;⁴⁸
- b) ensure that tenants in rental properties, aged care facilities, and community, social and public housing are provided with timely information about disclosure and rectification of any previous or existing mould and/or water damage issues in a property before entering into a residential leasing agreement;⁴⁹
- c) research the adequacy of current building codes and standards related to the prevention and remediation of dampness and mould in buildings.⁵⁰

The Committee also recommended that the Australian Government commission the National Health and Medical Research Council to conduct research into CIRS-like syndromes including examining any causal connection between mould, biotoxins and complex symptoms most commonly reported as typifying CIRS.⁵¹

Expert medical opinion in cases of CIRS

CIRS medicine is a specialized and highly complex area and practitioners will need to give careful consideration to the selection and briefing of an appropriate expert(s) to bolster a claimant's evidence on medical causation.

The Inquiry report provides a helpful summary of the current position regarding the identification of CIRS in patients and the barriers faced by practitioners in being able to test and diagnose CIRS. Refer specifically to chapter 3 of the report.

A starting point for expert selection could be to contact medical practitioners such as Dr Sandeep Gupta who contributed to the Committee's inquiry through written submissions.⁵² At the time of preparing his submissions Dr Gupta was based in Maroochydore at Lotus Holistic Medicine. Dr Gupta submitted that he has "[s]een many hundreds of patients who appeared to meet the diagnostic criteria for either provisionally diagnosed or confirmed cases of CIRS".⁵³

In terms of expertise, Dr Gupta:

was able to assist in 2014 and 2015 in having some of the diagnostic and monitoring tests for CIRS established in Australia, including the Quest Diagnostics testing, NeuroQuant and the availability of nasal swabs for lengthened cultures to look for the coagulase negative staph known as MARCoNS. [He] assisted with some of the initial training in Australia for medical practitioners in 2015, and [has] established an online course to help the public and practitioners to understand this illness

⁴⁸ Ibid, p 31

⁴⁹ Ibid, p 31

⁵⁰ Ibid, p 31

⁵¹ Ibid, p 62

⁵² Dr Gupta's submissions can be accessed here:

https://www.aph.gov.au/Parliamentary_Business/Committees/House/Health_Aged_Care_and_Sport/BiotoxinIllnesses/Submissions

⁵³ Ibid citing Dr Sandeep Gupta, Submission 124, p 1

Dr Gupta described the diagnosis process he uses for CIRS as “[i]nvolving history and examination, bedside tests and formal investigations”.⁵⁴ Legal practitioners should therefore ensure thorough instructions are taken from claimants regarding their history and exposure and supporting evidence obtained to establish key facts upon which medical causation may be established. This will likely assist in briefing experts and the quality of evidence obtained.

Unfortunately, according to the Australian Chronic Infectious and Inflammatory Disease Society, not all CIRS tests are available in Australia, necessitating bloods to be sent to America for testing. Dr Gupta confirmed this issue, noting there is only one lab in Australia (located in Queensland) that ‘is willing to forward the blood to America.’ A lack of Medicare rebate for tests presents further barriers to potential CIRS sufferers.

In terms of briefing of experts, consideration should also be given to what (if any) research materials can be provided to the expert in the brief for their consideration. As a starting point for research and better understanding the state of scientific and medical knowledge in this area, it appears Dr Ritchie Shoemaker is a recognised leader in research and education in the field of biotoxin related illness with a particular focus on illness caused by exposure to the interior environment of water-damaged buildings.⁵⁵ Dr Shoemaker is based in the USA and Dr Gupta’s submissions indicate Dr Gupta himself has undertaken training in this area developed by Dr Shoemaker.

Based on the above, obtaining expert evidence is likely going to be an expensive exercise and case selection will therefore be important to ensure the quantum of the case justifies the expense.

Combustible Cladding

In the event of a fire, a building and its fire safety system must allow for the safe evacuation of occupants whilst also maintaining the integrity of the building’s essential fire safety elements. The fire safety system for a building is the product of various components. Chiefly, these are “[f]ire prevention, fire detection (including warnings) and escape, fire containment and control (restricting the spread of fire), and fire extinguishment”.⁵⁶

The Johnson Paper results showed that 13.26% of the reported defects related to fire protection systems. Further, *combustible cladding* was said to be one of the major concerns observed by building stakeholders in the last five year. This is concerning because the presence of *combustible cladding* on a building significantly increases the risk (and rate) of fire spread, which can significantly increase risks to occupant safety,⁵⁷ particularly if the balance of the fire safety system does not adequately compensate for that additional risk.

⁵⁴ Ibid citing Dr Sandeep Gupta, ACIIDS and ACNEM, Official Committee Hansard, Canberra, 9 August 2018, p16

⁵⁵ Refer to Dr Shoemaker’s website “Surviving Mold” <https://www.survivingmold.com/about/ritchie-shoemaker-m-d>

⁵⁶ Johnston & Reid, ‘An Examination of Building Defects in Residential Multi-owned Properties’ (Research Paper, Deakin University & Griffith University, June 2019) p 28 *citing* H Leslie Simmons, *Construction: Principles, Materials, and Methods* (John Wiley & Sons, 7th ed, 2001); National Construction Code, Volume 1 - Definition section (schedule 3)

⁵⁷ “Combustible cladding: what building owners and owner corporate managers need to know”, published online blog 20 February 2019, written by Bruce McKenzie, National Manager, Commercial Services & Major Projects, Australia, Building Consultancy Division, Sedgwick <https://www.sedgwick.com/blog/2019/02/20/combustible-cladding-what-building-owners-and-owner-corporate-managers-need-to-know>

The continued presence of *combustible cladding* on many buildings “[r]emains one of the largest safety risk issues in the [building] industry today”.⁵⁸ Accordingly, the issues surrounding cladding are relevant to personal injuries practitioners should they be presented with a case of injury or death from an apartment building fire where *combustible cladding* was involved.

Whilst this paper looks only at *combustible cladding*, there are other types of cladding that may not comply with relevant Codes, Standards and legislation. Discussion of other “non-compliant” cladding is outside the scope of this paper,⁵⁹ but be alert to the fact they can exist.

What is “combustible cladding”

Combustible cladding is a term used to describe what is actually *aluminium composite panelling* (“ACP”). ACP is a “[c]ladding material, comprising external panels of aluminium sheet metal surfaces, sandwiching an inner core material.”⁶⁰ The core can be made from polyethylene in a high density form (“HDPE”), mineral fibre or both.⁶¹ Polyethylene is the world’s most common plastic and its presence in the core of ACP can contribute (significantly) to the rate of fire spread. A key reason for the rapid fire spread in ACP cladding is the combustibility ratio of HDPE. According to Dr Kate Nguyen, Senior Lecturer and leader of the Innovative Fire and Facade Engineering Group at RMIT University, the combustibility ratio of HDPE is 25. At a very basic level of understanding, that means HDPE produces 25 times more heat than it takes for it to combust.

With a combustibility ratio of 25, “[a] burning chunk of HDPE provides more than enough heat to ignite any HDPE sitting close enough to it, which can ignite the patch next to it, and so on”.⁶² However, there are various other means by which fire is able to rapidly spread across ACP, including:

- the “drip effect” – when exposed to enough heat the hydrogen and carbon atoms in HDPE break down. That is, the once solid plastic ACP core melts and begins to drip. As cladding is generally installed vertically on a building the hot liquid “drips” and adds more fuel to the system;
- aluminium contribution – aluminium is an outstanding conductor of heat. If hot enough, there will be a heat transference to the underlying HDPE. This will shorten the time taken for that HDPE to combust if it were otherwise only exposed to the heat from nearby HDPE that has already ignited;

⁵⁸ Ibid

⁵⁹ See for example the recent decision in *The Owners Strata Plan No 92888 v Taylor Constructions Group Pty Ltd and Frasers Putney Pty Ltd* [2019] NSWCAT [15 November 2019, Senior Member Boyce] where Biowood cladding was held to constitute an “undue risk of fire spread” in breach of the provisions of the Building Code of Australia in force at the time of construction of the building.

⁶⁰ “Reducing the hysteria around combustible cladding”, online article by Lynda Kypriadakis published 10 April 2018 <https://accomproperties.com.au/news-info/article-display/reducing-the-hysteria-around-combustible-cladding,181>

⁶¹ NSW Government Fair Trading website “Aluminium Composite Panel Ban” <https://www.fairtrading.nsw.gov.au/trades-and-businesses/construction-and-trade-essentials/building-products/aluminium-composite-panel-ban>

⁶² Why aluminium composite cladding is flammable and how buildings can be made safe, by science reporter Belinda Smith, first posted 12 March 2019, <https://www.abc.net.au/news/science/2019-03-12/aluminium-composite-cladding-polyethene-flammable-grenfell/10882316>

- acceleration by oxygen – eventually, the aluminium will itself melt. When it does, the underlying HDPE (which is already heated) is exposed to oxygen. The addition of oxygen accelerates the combustion process;
- cavity funnels – cavity barriers behind cladding that are designed to prevent the spread of fire become funnels through which smoke, flames and heat can travel up the building's façade. Generally, there will be a layer of insulation within the cavity that may also be flammable and this adds to the fuel load.

When considering the above, it is not difficult to understand why the presence of *combustible cladding* on apartment buildings is such a cause for concern. Given the Johnson Paper findings on the prevalence of other types of defects in a building's fire safety system, the safety risk presented by some buildings may be significant.

Australian Fire Safety Engineer, Mr Tony Enright, stated in an ABC Four Corners program examining PE cladding that:⁶³

A kilogram of polyethylene will release the same amount of energy as a kilogram of petrol, and it gets worse than that because polyethylene is denser than petrol too, so that's about, a kilogram of polyethylene is like about one and a bit, one and a half litres of petrol. If you look at a one metre by one metre square section [of PE core ACP cladding] that will have about three kilograms, the equivalent of about five litres of petrol

Responses to the combustible cladding issue

The Minister for Housing and Public Works established Queensland's Non-Conforming Building Products Audit Taskforce in June 2017.⁶⁴ The Taskforce was established to:⁶⁵

identify and make recommendations with regard to non-conforming building products and to prioritise the identification and subsequent investigation of buildings using a risk-based approach. To meet this requirement, the Taskforce initially investigated buildings identified by industry as having non-conforming cladding and high-risk buildings such as hospitals, education and public buildings

Following is a list (as of 3 December 2019) of Queensland Government owned buildings that have been identified by the Taskforce as requiring rectification works following the Taskforce's cladding investigations:⁶⁶ Cairns Hospital, Logan Hospital, Mackay Hospital Nambour Hospital, Princess Alexandra Hospital, Robina Hospital, Moreton Bay Integrated Care Centre, Royal Brisbane and Women's Hospital, Southport Courthouse, Mooloolaba TAFE, John Tonge Forensic Centre, Ascot State School, Redcliffe Hospital, Gold Coast University Hospital, Brisbane Port Authority, Carseldine Government Precinct, Mount Gravatt TAFE, Queensland Academy for Creative Industries, Ecosciences Precinct Building, Brisbane Convention and Entertainment Centre, Gallery of Modern Art, Queensland Multi Cultural Centre, Brisbane Entertainment Centre and Metricon Stadium.

⁶³ Debbie Whitmont, Patricia Drum, Anne Davies, 'Combustible', *ABC Four Corners*, 4 September 2017, <http://www.abc.net.au/4corners/stories/2017/08/31/4726881.htm> (accessed 5 September 2017)

⁶⁴ Queensland Non-Conforming Building Products Audit Taskforce, Queensland Government Department of Housing and Public Works, *Status Report* (2018) p 1

⁶⁵ *Ibid*, p 2

⁶⁶ Queensland Government Department of Housing and Public Works <https://www.hpw.qld.gov.au/about/initiatives/ncbp-audit-taskforce>

For a summary of the statutory obligations on private building owners for investigation and risk assessment of buildings with cladding refer to my paper from the 2019 ALA Queensland Conference - "Liability for Personal Injuries on Community Titles Scheme Land", specifically body corporate *Statutory duties and obligations*.

As a direct result of the cladding issue, the National Construction Code was also amended. This took place in 2018 and introduced more "[s]tringent testing and verification methods to prevent the use of combustible cladding on buildings". Keep in mind that those amendments will apply to buildings constructed from the time the amendments came into effect and buildings already constructed at that time will have been subject to one of the earlier versions of the Code.

Queensland specifically has a Code titled the Queensland Development Code ("QDC"). It "[c]onsolidates Queensland-specific building standards into a single document...[and] covers Queensland matters that are outside the scope of, and in addition to, the National Construction Code".⁶⁷ To the extent of any inconsistency between the QDC and the NCC, section 35 of the *Building Act 1975 (Qld)* states the QDC prevails. Following the NCC amendments referred to above, the Queensland Government passed the *Building (Approval of Amendment of QDC) Amendment Regulation 2019* which introduced new "Part 2.5 – Use of external cladding" into the QDC. The effect of Part 2.5 is a ban on the use of ACP with a core comprising polyethylene greater than 30% by mass on any building in any external cladding, external insulation or façade.⁶⁸ The ban came into effect on 18 October 2019 (some 14 months after the New South Wales Government instituted the same ban⁶⁹) and was intended to ensure that the aim of the NCC amendments with respect to ridding new builds of *combustible cladding* was actually achieved here in Queensland.

Case examples – fire events

The Lacrosse Building is a 23-story mixed-use commercial-residential property. The 2014 fire event was started by a burning cigarette on an eighth-floor balcony. Within 11 minutes the fire had spread to the 21st floor due to the cladding materials used. Fortunately, despite the required evacuation of over 400 occupants, there were no reported serious injuries or fatalities.

Fire crews had to access every level of the Lacrosse building to alert occupants of the fire and direct them to evacuate as the building's electrical systems were compromised by the fire. A report prepared by the Metropolitan Fire and Emergency Services Board observed that 'it was fortunate that the installed fire sprinkler system operated well above its designed capability preventing further internal spread'.⁷⁰ Further, MFESB noted there would have been "a greater

⁶⁷ Queensland Government Business Queensland "Background of the Queensland Development Code" <https://www.business.qld.gov.au/industries/building-property-development/building-construction/laws-codes-standards/queensland-development-code/background>

⁶⁸ Explanatory Notes, Building (Approval of Amendment of QDC) Amendment Regulation 2019 (Qld) <https://www.legislation.qld.gov.au/view/html/published/exp/sl-2019-0208>

⁶⁹ The NSW ban came into effect on 15 August 2018 - see NSW Government Fair Trading <https://www.fairtrading.nsw.gov.au/trades-and-businesses/construction-and-trade-essentials/building-products/aluminium-composite-panel-ban>

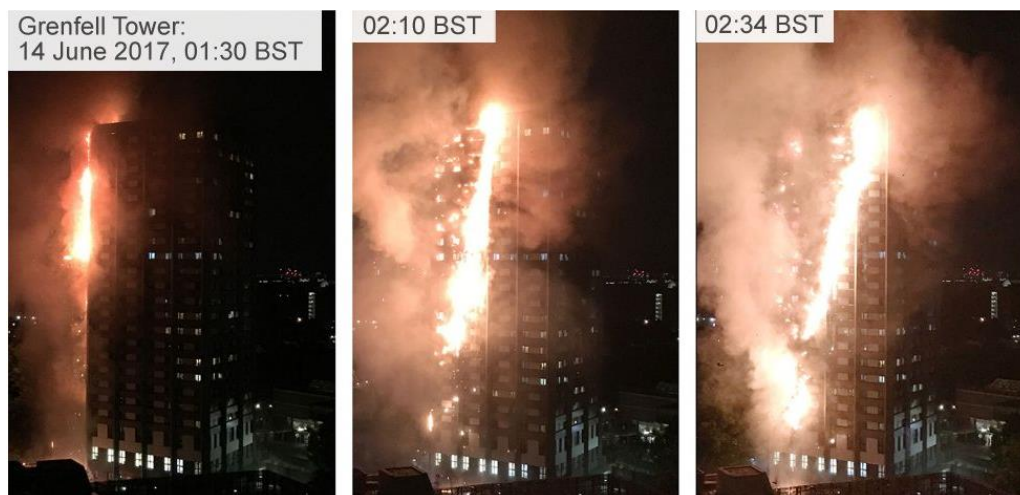
⁷⁰ The Senate Economics References Committee, *Non-confirming building products Interim report: aluminium composite cladding* (September 2017) – accessed online https://www.aph.gov.au/Parliamentary_Business/Committees/Senate/Economics/Non-

likelihood of serious injury or even loss of life” had the sprinkler system and MFB fire-fighters not performed as well as they did.⁷¹

The Grenfell Tower tragedy in 2017 is an example of an ACP clad building whose fire safety systems did not perform adequately. Grenfell Tower was a 24-story apartment building. In the early hours of 14 June 2017 a fire started in the kitchen of a fourth floor apartment when a fridge-freezer malfunctioned. The fire rapidly spread across the building and to the upper floors because of the combustible cladding. 72 people lost their lives.⁷² It is noted that Grenfell Tower had other fire safety system deficiencies that also contributed to the tragic loss of life; however, the presence of *combustible cladding* was a significant feature.

It is also of note that Grenfell Tower was constructed in the 1970s and the combustible cladding was not affixed to the building until decades later when combustible cladding was retrofitted to the building’s original masonry facade. The presence of the cladding both increased the building’s fire load and changed the fire dynamics of the building holistically. Unfortunately, the fire systems of the building were not adjusted to compensate for these changes and therefore not able to perform to the level required to allow safe evacuation.⁷³

Photographs of the Grenfell Tower fire spread:⁷⁴



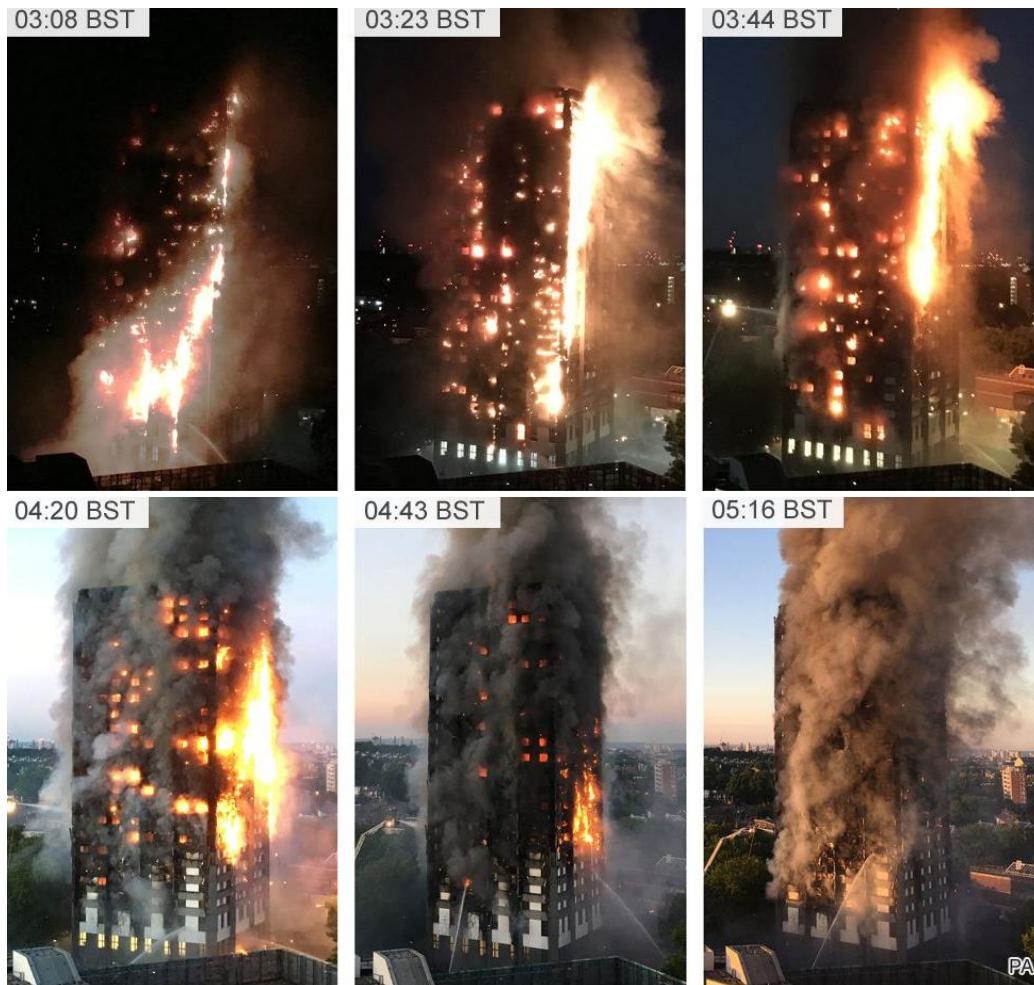
[conforming45th/Interim_report_cladding](#) citing Metropolitan Fire and Emergency Services Board, *Post Incident Analysis Report, Lacrosse Docklands, 673-675 La Trobe Street, Docklands 25 November 2014*, 27 April 2015, pp. 5–6. See Metropolitan Fire and Emergency Services Board, *Submission 22, Attachment 1*.

⁷¹ Ibid

⁷² “Combustible cladding: what building owners and owner corporate managers need to know”, published online blog 20 February 2019, written by Bruce McKenzie, National Manager, Commercial Services & Major Projects, Australia, Building Consultancy Division, Sedgwick <https://www.sedgwick.com/blog/2019/02/20/combustible-cladding-what-building-owners-and-owner-corporate-managers-need-to-know>

⁷³ Lyndia Kyriadakis, Reducing the hysteria around combustible cladding, published online 10 April 2018, Accom Properties website - <https://accomproperties.com.au/news-info/article-display/reducing-the-hysteria-around-combustible-cladding,181>

⁷⁴ ‘Grenfell Tower: What Happened’ *BBC News* (online) 2017 and last updated 29 October 2019, <https://www.bbc.com/news/uk-40301289>



LIABILITY IN THE CONTEXT OF INJURY ARISING FROM DEFECT RISKS

Put simply, the common property in an apartment building is the legal responsibility of the body corporate who is deemed to be the occupier of the common property under section 36(2) of the *Body Corporate and Community Management Act 1997* (“**BCCMA**”) for the purpose of it suing or being sued.⁷⁵ The owner(s) and occupiers of each lot are responsible for their respective lot property and injury caused by lot property issues. Unfortunately, it is not always a simple task for owners to distinguish between lot property and common property⁷⁶ and this was one of the primary issues faced by owners identified in the Johnson Paper.⁷⁷

For a summary and discussion of the common law and statutory duties of a body corporate and identification of other possible respondents in cases of injury occurring in a scheme, refer to my paper from the 2019 ALA Queensland Conference - “*Liability for Personal Injuries on Community Titles Scheme Land*”. What follows here is intended to build upon that summary and discussion in the specific context of injuries arising from the hazards and risks created by building defects in apartment buildings.

⁷⁵ Except for areas otherwise occupied or subject to an exclusive use by-law.

⁷⁶ H Easthope, B Randolph and S Judd, City Futures Research Centre, Faculty of the Built Environment, University of NSW, May 2012, “Governing the Compact City: The role and effectiveness of strata management Final Report”, p 3

⁷⁷ Ibid, p 68 p 68

A body corporate is burdened with a statutory duty 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. Remedying a defect in the original construction of the common property falls within that statutory duty and this was confirmed by Needham J in *Proprietors of Strata Plan No 6522 v Furney*⁷⁸ (“**Furney’s case**”).

Furney’s Case since been followed by the NSW Court of Appeal in *Ridis v Strata Plan 10308*⁷⁹ and by the NSW Supreme Court in *Seiwa Pty Ltd v The Owners - Strata Plan 35042*.⁸⁰ This has also been applied in Queensland, see for example the decision in *Klinger & Anor v Body Corporate for Costa D’Ora Apartments*⁸¹ at [67].

The body corporate must act reasonably when carrying out its functions.⁸² Unlike New South Wales, where the statutory duty of maintenance and repair is a strict liability,⁸³ breach of the statutory duty in Queensland is determined based on the concept of reasonableness (much like the determination of a breach of the common law duty of care in a negligence case). For this reason, a breach of the statutory duty in respect of a building defect that is later found to have been the underlying cause of an incident resulting in injury may have more weight and be more instructive in a negligence case in Queensland than in New South Wales. A good starting point for a personal injury practitioner would be to search the published decisions of the Office of the Body Corporate and Community Management Commissioner⁸⁴ to see whether the underlying defect or any consequential damage that was responsible for the incident has previously been the subject of dispute before an Adjudicator.

What constitutes the keeping of the common property in a good condition “[i]s a question of fact to be determined reasonably by the body corporate in light of the circumstances of the case”.⁸⁵

Often in cases involving injury at a property the issue of expert inspection and reporting is raised. In previous cases that have considered whether or not retaining an expert to inspect a property for defects was reasonable Courts have taken into consideration the prohibitive cost of that step for an owner, whether there was any actual or constructive knowledge of an issue in the property necessitating investigation and the fact that, without knowledge of a problem, it is not common practice for a property owner to take that step: see for example *Sheehy v Hobbs* [2012] QSC 333 at [94] – [99].

However, these were cases where expert reports were not obtained. It must be remembered that it is much more common for a body corporate to engage an expert to inspect the condition of its common property and so there is a greater likelihood of a common property defect report existing. This is perhaps more likely now than ever given the seriousness of the building defects issues discussed in this paper.

⁷⁸ [\[1976\] 1 NSWLR 412](#), [416]

⁷⁹ [\[2005\] NSWCA 246](#), [164] – [165]

⁸⁰ [\[2006\] NSWSC 1157](#)

⁸¹ [2007] QDC 300

⁸² *Body Corporate and Community Management Act 1997*, s 94(2)

⁸³ See *Seiwa Pty Ltd v Owners Strata Plan 35042* [2006] NSWSC 1157, [3] – [5]

⁸⁴ <https://www.qld.gov.au/law/housing-and-neighbours/body-corporate/disputes/adjudication/decisions> and <http://www6.austlii.edu.au/cgi-bin/viewdb/au/cases/qld/QBCCMCmr/>

⁸⁵ Marc J Mercier, *Body Corporate Law in Qld: Practice and Procedure*, (CCH Australia Limited, 1st ed, 2018), 383

There are several reasons why body corporates (particularly in new buildings) are likely to obtain a common property condition report, following are just a few:

1. for new buildings the early identification of issues is important to ensure defects can be resolved by the builder during the contractual defects liability period and/or commencing litigation in respect of defects to protect relevant time limits associated with those claims. Given the prevalence of defects a body corporate is often advised by facilities managers, body corporate managers and/or lawyers to get these reports;
2. budgeting – annual and 9 yearly budgets must be set by the body corporate and knowing the state of common property can assist greatly in accurately calculating future costs and ensuring adequate levies are raised;
3. insurance – refer to below discussion on strata insurance and the interplay of common property defects with disclosure obligations and coverage;
4. the cost is not as prohibitive as for individual owners as the body corporate costs are shared amongst all lot owners in the building through the levying of contributions.

RECOVERABILITY

When representing a claimant injured on community title scheme land, any damages settlement or award will either be indemnified by the scheme's insurer or (in the event of a lack of coverage) by the body corporate itself. Whilst the body corporate is generally a viable recovery target there can be a number of complicating factors relating to the logistics of getting in settlement funds.

Whilst it is outside the scope of this paper to provide a detailed discussion on recovering damages from a body corporate directly, below are some relevant starting points for consideration. If you become aware during the claim process that the body corporate (not the insurer) will be liable for payment any settlement or award, consideration should be given to involving counsel with knowledge of body corporate laws at an early stage to work through appropriate terms for inclusion in any settlement deed. A well-crafted deed addressing the technicalities in this area could save time, money and frustrations in the event of a recalcitrant body corporate or member lot owners.

Strata insurance

A body corporate is required to maintain public risk insurance of the common property and relevant assets⁸⁶ for amounts the body corporate becomes liable to pay for compensation for death, illness and bodily injury and damage to property.⁸⁷ Coverage must be for at least \$10M for a single event and in a single period of insurance.⁸⁸

While the minimum coverage for public risk (liability) insurance is \$10m, “[i]t is an industry standard to cover the body corporate for such risk in the amount of \$20m...to mitigate against

⁸⁶ *Body Corporate and Community Management (Standard Module) Regulation 2008*, s187(1). “Relevant assets” means body corporate assets for which it is practicable to maintain public risk insurance.

⁸⁷ *Ibid*, s 187(3)

⁸⁸ *Ibid*, s 187(3)

the possibility that the public risk insurance is insufficient to meet an insurable event”.⁸⁹ Where there is a shortfall in cover the body corporate will be liable.

The starting point for a strata insurer when offering a policy is to assume the building was properly built.⁹⁰ It is therefore vital that a body corporate disclose known defects to the insurer to allow the risk to be adequately considered and the premium set accordingly.

There is usually an exclusion for defects that are known or that ought to have been known; however, a “defective building” can still be insured for damage caused by defects. Whilst defects will not themselves be covered for rectification, providing the issue was disclosed so as to allow the insurer to properly consider the level of risk (and set the premium accordingly) the insurer will usually indemnify in respect of resultant damage. This is where the provision of a common property condition report (discussed earlier) can assist in ensuring the greatest scope of insurance coverage possible through full disclosure.

The best way to mitigate against the risk of a body corporate being exposed to liability for loss and damage caused by building defects (including claims for injury or death) is for the body corporate to ensure defects and maintenance issues are dealt with proactively.⁹¹ Given the findings of the Johnson Paper and various media reports of significant (and longstanding) defect issues in buildings, the concern is that defects are simply not being rectified in a timely manner. This could be exposing body corporates to liability for damage (including in relation to injury claims) for lack of insurance coverage.

Body corporate as a viable recovery target

In the event of an injury or death arising from hazards caused by a building defect that is not covered by a body corporate’s policy of insurance the body corporate will become liable for the extent of any damages payable under a settlement or Court order.

Authority to settle legal claim / proceeding

Although the BCCMA deals expressly with the type of authority required to commence a legal proceeding⁹² the Act is silent on the type of authority required to settle (or otherwise bring to an end) a proceeding. It is generally accepted that a resolution to discontinue or settle legal proceedings requires the same type of resolution as was required to commence legal proceedings.⁹³ This means that a special resolution would need to be passed at a general meeting before a proceeding could be settled, unless the special resolution approving the legal proceedings already covers how, and under what conditions, this may take place. A well prepared body corporate may have gone to the extent of identifying who has the authority to

⁸⁹ M Mercier, *Body Corporate Law in Qld: Practice and Procedure*, (CCH Australia Limited, 1st ed, 2018), p 633.

⁹⁰ Andy Kollmorgen, ‘Broken Buildings: Strata insurance may not pay off if your building is defective’ *Choice* (online), last updated 1 June 2017 <https://www.choice.com.au/money/insurance/home-and-contents/articles/strata-insurance-claims>

⁹¹ *Ibid*

⁹² By way of special resolution: see *Body Corporate and Community Management Act 1997*, s 312(1).

⁹³ Property Law Review Issues Paper - Procedural issues under the Body Corporate and Community Management Act 1997 (2015), p 59 <https://www.publications.qld.gov.au/dataset/procedural-issues-under-the-body-corporate-and-community-management-act-1997/resourcel/72d4b93b-8e94-490d-a544-5ff7bf2620c0>

make specific decisions in respect of a particular legal claim without having to return to the body corporate for further approvals (e.g. members of the executive committee by a majority vote).

The message here is to ensure that whoever accepts a settlement and executes the Deed for a body corporate is authorized to do so. If not, the validity of the settlement may be open to challenge by disgruntled lot owners. See for example the decision in *Beachfront Towers* [2018] QBCCMCmr 531. Consider requesting a copy of the meeting minutes reflecting the approvals that are in place.

Damages liability – obligation to raise special levy

As previously indicated, the body corporate has statutory obligations to set budgets on an annual and 9 yearly basis. Unless the body corporate has previously raised funds for settling anticipated legal claims (unlikely) there will be inadequate funds available at the time of any settlement or Court judgment for payment of damages. However, section 141(2) of the *Body Corporate and Community Management Act 1997* (“**BCCMA**”) states that a body corporate must raise a “special contribution” when a liability arises for which they have not adequately provisioned for. This mandatory obligation provides some comfort in the event of a settlement or order against a body corporate respondent.

Protecting an injured lot owner from paying their own damages

The power of the body corporate to raise a special contribution should not be confused with a wider power to dictate which lot owners do (or do not) have to contribute. If a claimant is also a lot owner in the scheme the claimant will require an order of the court to protect the claimant from being levied. Section 314 of the BCCMA provides a claimant lot owner with the mechanism to obtain such orders.

314 Liability of owners for monetary obligations of body corporate

- (1) In a proceeding by or against the body corporate for a community titles scheme, a court may order that an amount payable under a judgment or order against the body corporate be paid by the owners of particular lots included in the scheme in proportions fixed by the court.
- (2) If an order is sought under subsection (1) against the owner of a lot who is not a party to the proceeding, the owner must be joined as a party.

There is limited case law on section 314(1) and the sections construction. Practitioners are referred to the decisions in *Body Corporate of Balmattum v Biddle & Anor* [2016] QSC 144 (where it was held s314 orders could not be made as the application was brought in the primary proceeding and should have been the subject of a separate application), *Body Corporate for Donnelly House CTS37465 v Judith Elizabeth Shaw* [2016] QDC 132 (orders granted) and *Body Corporate for Hilton Park CTS 27490 v Robertson* (No 2) [2019] QCATA 59 (Tribunal held it did not have jurisdiction to make s314 orders, which can only be made by a court).

Given the limited judicial consideration of this section and the express reference in section 314(1) that the orders being sought are in relation to a “proceeding” it is unclear whether the Court would have jurisdiction to make these orders in respect of a pre-litigation settlement at compulsory conference. The writer is unaware of any judgments on this discrete issue and suggests this is another matter on which appropriate advice should be sought.

Timeframes to consider for payment of damages

It is important to keep in mind the legislated timeframes for matters such as the calling of the extraordinary general meeting required to pass the special contribution (21 clear days' notice to owners⁹⁴) and the fixing of a date for payment of the special contribution once passed (at least 30 days after a notice of contribution is issued on lot owners⁹⁵). These will impact upon the advice to be given to a claimant regarding timeframes for receipt of funds and also calculation of a due date for payment of funds under the terms of settlement. The latter plays into the timing of a right to bring proceedings for failure to pay the debt owed, which would be necessary for a claimant who has settled informally to obtain a money order which can later be enforced through the court.

Recovery of unpaid special levies

The body corporate can recover unpaid special contributions from lot owners as a debt pursuant to section 145 BCCMA. However, you may find yourself in a situation where a body corporate is not proactive in seeking recovery of unpaid special contributions. This could have the effect of causing significant delay in payment of the balance of funds owed under a settlement or damages award. Assuming your client has an enforceable money they will be considered an *enforceable creditor* for the purpose of section 300 BCCMA and entitled to apply to the Court for appointment of an administrator who (if appointed) will be assigned the functions of the body corporate for the purpose of performing the functions stated in the money order.⁹⁶

CONCLUDING REMARKS

The information in this paper is merely an introduction to the issue of building defects and how it interplays with personal injuries litigation. In the context of claims against a body corporate, the issue presents a number of potential complexities for personal injury practitioners to navigate in the event of a claim, particularly in the event of a settlement or award against a body corporate without insurance coverage.

⁹⁴ *Body Corporate and Community Management (Standard Module) Regulation 2008*, s 74

⁹⁵ *Ibid*, s 142(1)

⁹⁶ M Mercier, *Body Corporate Law in Qld: Practice and Procedure*, (CCH Australia Limited, 1st ed, 2018), p 788.