

NAVIGATING CLAIMS INVOLVING STRATA AND BODIES CORPORATE:

TIPS, TRAPS AND PREDICTIONS

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INTRODUCTION

Residential apartment and mixed-use buildings are a common sight across Queensland and the number of these structures only continues to increase as people gravitate more and more to community living. In Queensland, these structures are referred to as community title schemes (CTS), but are also often referred to as strata schemes.

A body corporate and the CTS for which they have responsibility operate within a legislative regime that personal injury practitioners are not generally familiar with. This can present difficulties when a practitioner is faced with a matter that involves injury or illness sustained on community title scheme land.

The aim of this paper is to provide a very basic level understanding to assist in navigating claims in this area.

Strata Insights

In June 2020, the City Futures Research Centre of UNSW Sydney published *Australasian Strata Insights 2020*. Diagram 1 is a table of data extracted from the paper that 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. With regards to Queensland, it is noted that since UNSW released these statistics in 2018¹ Queensland's total number of strata schemes has increased by approximately 3.7% and the total number of lots (units) has increased by approximately 5.2%.

Diagram 1: Strata Insights Data

	Total Residents	Total Apartment Residents	% of Population in Apartment	Total Strata Schemes (plans)	Total Lots (units)
National	23,717,418	2,200,793	9%	340,601	2,869,845
NSW	7,564,945	1,124,464	15%	83,998	961,544
Vic	5,946,059	471,317	8%	115,968	907,135
Qld	4,844,547	357,947	7%	49,850	498,402
WA	2,517,851	90,795	4%	51,798	251,425
SA	1,674,787	69,063	4%	22,515	131,662
ACT	400,646	39,153	10%	4,337	60,635
Tas	504,166	16,720	3%	9,240	33,939

¹ *Australian National Strata Data 2018*, published by the City Futures Research Centre of UNSW Sydney

NT	259,112	26,063	10%	2,895	25,103
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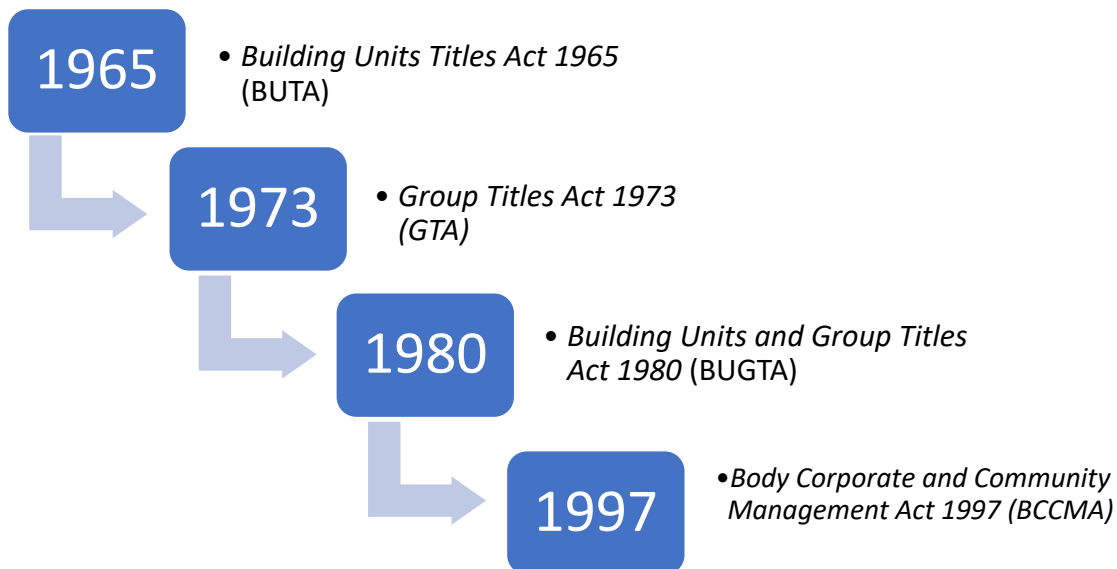
In the context of potential liability for personal injuries, it is not just the people *living* in community title schemes that need to be considered. The following cohorts add to the number of people who may potentially suffer injury or illness on community title scheme land:

1. People working on scheme land (employees and contractors);
2. Visitors;
3. Other entrants.

LEGISLATIVE HISTORY

For present purposes, a look at the legislative development in this area since the introduction of the *Building Units Titles Act 1965* (Qld) is adequate, given this was the point in time that Queensland specifically started to legislate on the topic. However, it is important to acknowledge that the 1980 legislative was replaced largely (but not entirely) by the current Act and the 1980 legislation continues to operate in respect of plans registered under “specified Acts”.²

Diagram 2: Chronology of legislative development



² Refer *Building Units and Group Titles Act 1980*, s 5A(3) for definition of “specified Acts”.

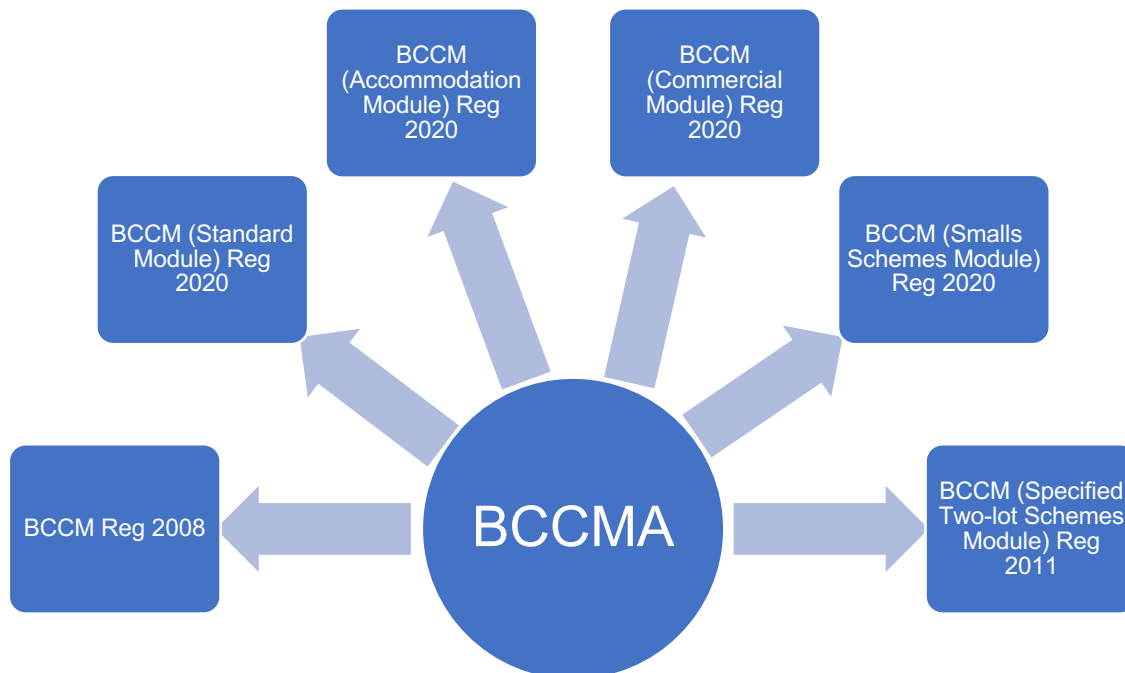
Understanding the BCCM legislative framework

The primary object of the BCCMA is “[t]o provide for flexible and contemporary communally based arrangements for the use of freehold land, having regard to the secondary objects”. It is supported by six pieces of subordinate legislation commonly referred to as the regulation modules.

As you will see from the title of the regulation modules set out in Diagram 3 below, each module is intended to cater for a different type of CTS. The *Standard Module (SM)* contains all the governance rules that a typical scheme requires to best function in the ways contemplated by the BCCMA. It is not surprising then that most CTSs are governed by the SM. The *Accommodation Module (AM)* closely mirrors the SM requirements.

This helps to explain why most decisions made by Adjudicators in the Body Corporate and Community Management Commission relate to schemes registered under either the SM or the AM.

Diagram 3: Legislative framework:



Recent legislative amendments

The Commercial and Property Law Research Centre of the Queensland University of Technology (QUT) recently completed a review of Queensland's property laws, which commenced approximately 6 years ago. "[T]he review examined issues arising under legislation governing ownership, use and dealings in real property in Queensland including the *Property Law Act 1974* and the *Body Corporate and Community Management Act 1997* and other body corporate legislation".³

As a result of the review outcomes and recommendations new regulations were made, which came into effect on 1 March 2021. It is anticipated (although yet to be seen) what further changes may be made to the current state of the law. It is outside the scope of this paper to delve into the nature and extent of the amendments. For the purposes of this paper it is relevant to note that a body corporate is now required to expressly consider obtaining a building defects assessment and reference is made to this elsewhere.

THE BODY CORPORATE

The body corporate is a legal entity capable of suing and being sued in relation to the CTS common property and assets;⁴ it exists immediately upon the establishment of the CTS.⁵ The owners of all lots in the CTS⁶ from time-to-time comprise its membership. The *Corporations Act 2001* does not apply to it.⁷

The body corporate "[m]ust act reasonably" in discharging its general functions.⁸ 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".⁹

³ Queensland Government, Department of Justice and Attorney-General, *Review of property law in Queensland* <<https://www.justice.qld.gov.au/community-engagement/community-consultation/community-consultation-activities/past-activities/review-of-property-law-in-queensland>>

⁴ *Body Corporate and Community Management Act 1997*, s 36(1)

⁵ *Body Corporate and Community Management Act 1997*, s 30; note that when dealing with a property under one of the "specified Acts" that there are multiple bodies corporate 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 proceeding

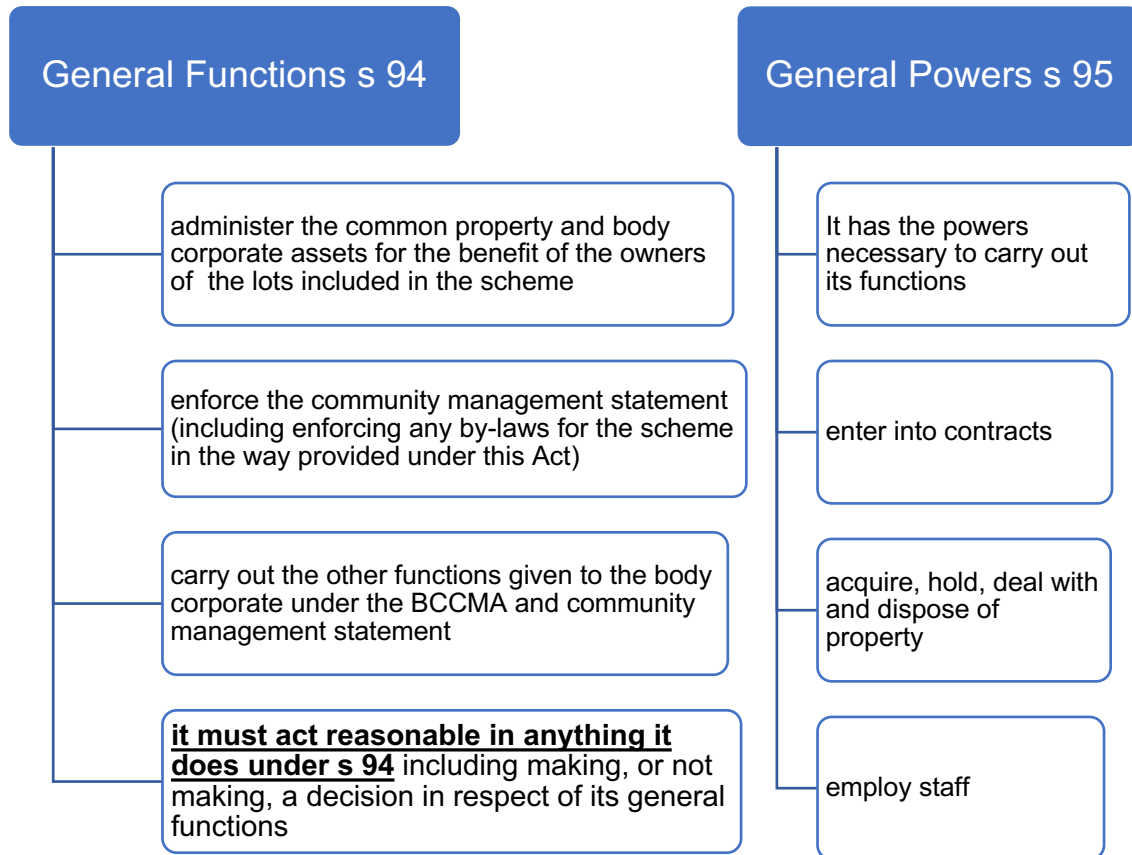
⁶ *Body Corporate and Community Management Act 1997*, s 31

⁷ *Body Corporate and Community Management Act 1997*, s 32

⁸ *Body Corporate and Community Management Act 1997*, s 94(2).

⁹ Marc J Mercier, *Body Corporate Law in Qld: Practice and Procedure*, (CCH Australia Limited, 1st ed, 2018), 165

Diagram 4: General powers and functions



To discharge its functions and exercise its powers the body corporate makes a series of decisions. These decisions are made by the passing of resolutions at duly convened meetings or by the passing of resolutions by its appointed committee at duly convened committee meetings.¹⁰ 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).

The decisions that a body corporate makes (or fails to make) may be relevant to considerations of liability for personal injuries. It is therefore important for practitioners to understand *how* a body corporate makes decisions and where those decisions are evidenced.

The legal name of the body corporate (referred to as its “corporate name”) is the words “Body corporate for” followed by the name of the scheme itself,¹¹ for example, *Body*

¹⁰ Note decisions can also take place outside of duly convened meetings, known as VOCs (voting outside committee meeting), but flying minutes should be kept of any VOCs.

¹¹ *Body Corporate and Community Management Act 1997*, s 33(1)

Corporate for CTS 12345. It is to be used when the body corporate sues, or is being sued.¹² It is therefore the name that a Notice of Claim (Part 1) is to be addressed to if the body corporate is a proper respondent to a claim.

To properly effect service on the body corporate, the “address for service” is the address registered and appearing on the title to the common property¹³ (which is available to lawyers via standard fee based property searches).

THE COMMITTEE

The committee is a smaller group of the body corporate members headed by a Chairperson and is responsible for the administrative and day-to-day running of the body corporate.¹⁴ It can be comprised of both voting members and non-voting members, such as the body corporate manager and caretaking service contractor.

Importantly, a decision of the committee is taken to be a decision of the body corporate¹⁵ and the committee “[m]ust act reasonably in making a decision”.¹⁶ The conduct of voting members is governed also by a Code of Conduct.¹⁷

Committee members shielded from civil liability in respect of their acts and omissions provided they act in good faith and without negligence.¹⁸

Statutory duties and obligations

A body corporate is burdened by various statutory duties and obligations. Understanding these duties and obligations can help to inform the nature and scope of the duty of care owed in any given case. Further, whilst a breach of any one (or more) of such duties is not determinative of the body corporate also having breached its common law duty of care to an injured entrant / occupant, it may nevertheless be a relevant consideration in some cases.¹⁹

¹² *Body Corporate and Community Management Act 1997*, s 33(2)

¹³ 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 the Notice of Claim.

¹⁴ Not every body corporate has a committee. For example, there is no committee provided for under the Specified Two-Lot Scheme Module.

¹⁵ *Body Corporate and Community Management Act 1997*, s 100(1)

¹⁶ *Body Corporate and Community Management Act 1997*, s 100(5).

¹⁷ *Body Corporate and Community Management Act 1997*, Schedule 1A

¹⁸ *Body Corporate and Community Management Act 1997*, 101A

¹⁹ *Ridis v Strata Plan 10308* [2005] NSWCA 246, [90]: “[t]he 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

Understanding the main statutory duties and obligations of a body corporate can also help practitioners to better understand the motivations behind body corporate decision making and the various purposes for which a body corporate may obtain certain documents and/or information.²⁰

The following table sets out some of the statutory duties and obligations relevant to bodies corporate:

Duty / Obligation	Source
Administer, manage and control the common property and body corporate assets	152(1)(a) BCCMA
Comply with all obligations arising under the applicable regulation module	152(1)(b) BCCMA
To keep common property in good condition, including to the extent that common property is structural in nature, in a structurally sound condition	180(1) Standard Module; 170(1) Accommodation Module; 127(1) Commercial Module; 99(1) Small Schemes Module; 31(1) Specified Two-lot Schemes Module
Including, but not limited to: <ul style="list-style-type: none"> • 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 • to ensure, so far as reasonably practicable, that the premises are maintained so as not to expose workers to risks to health and safety 	If the body corporate can be characterised as a “person conducting a business or undertaking” as contemplated by s 5 <i>Work Health and Safety Act 2011</i> it will be burdened by work health and safety duties and obligations. Otherwise, a CTS is generally excluded from the definition provided it does not engage employees and its common property areas are for residential purposes only; 7(1) and (2) <i>Work Health and Safety Regulation 2011</i>

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.”

²⁰ This may be relevant to any claim of professional privilege raised by the body corporate in the event of a request for a copy of body corporate records.

	19(1) and (2) <i>Work Health and Safety Act 2011</i>
<p>Financial management.</p> <p>Setting budgets for both the administrative and sinking funds, which is integral to ensuring the body corporate can adequately discharge its duties and obligations when required. For example, the administrative budget is required to contain estimates for maintaining common property and the body corporate needs to have a good understanding of the current, short and long term state of the common property to ensure adequate provision for works in each financial year's budget and 9 years capital works projection for the sinking fund.</p> <p>Practitioners should take particular note of injuries caused by a failure to maintain or repair common property, which may have been due to a lack of adequate budgeting for such maintenance or repairs.</p>	<p>150 BCCMA</p> <p>See for example 160 Standard Module.</p> <p>Caretaker / building management agreement: 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 ensconced as a duty in the caretaker agreement".²¹</p>

POTENTIAL RESPONDENTS

The body corporate is not the only entity with responsibilities and potential liabilities in respect of the operation and management of a CTS. It is important for a personal injury practitioner to understand the various stakeholders and their role within the CTS when considering potential respondents to a personal injuries claim.

A common trap for practitioners in this area is to misconstrue the nature and scope of the role of various stakeholders, which can lead to a scattergun approach to respondent selection and unnecessarily increased costs for claimants. Such an approach is contrary to the objects of the various pre-litigation legislation.

²¹ Marc J Mercier, *Body Corporate Law in Qld: Practice and Procedure*, (CCH Australia Limited, 1st ed, 2018)

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

STAKEHOLDER	ROLE
Letting agents and other service providers	<p>Where such stakeholders are engaged by the body corporate there will exist a written agreement, i.e. a letting agreement and/or caretaking agreement. The contractual obligations 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.</p> <p>Tip: review the CMS for any exclusive-use rights by-laws in favour of a scheme service provider (e.g. storeroom) – if the accident location falls within the exclusive-use area this will be relevant to respondent selection.</p>
Lot owner / tenants	<p>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.</p>
Body corporate manager	<p>Defined in s 14 BCCMA as: <i>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</i></p>

	<p>Currently, there are no licensing requirements for body corporate managers in Queensland.</p> <p>Given the relationship between the manager and the body corporate is one borne primarily from contract, understanding the scope of the management agreement between the parties is imperative to proper consideration of the manager as a potential respondent. It is not uncommon for a body corporate manager to be engaged to undertake tasks of a purely administrative nature that would not give rise to liability for injuries. For example, the fact that a body corporate manager communicates decisions of the body corporate in an administrative context can be mistaken for the body corporate manager having involvement in the decision making itself, resulting in management companies being joined to claims unnecessarily.</p> <p>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.²² Decisions made by the body corporate manager under that authorisation are taken to be decisions of the body corporate.²³</p>
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TIP:

Where a dispute arises within a body corporate it is often the case that the dispute can be lodged with the Body Corporate and Community Management Commissioners Office seeking relevant Adjudicator orders.²⁴ It may be helpful to search Adjudicator orders or QCAT decisions involving the subject CTS as there may be prior disputes and decisions of relevance. For example, if a building caretaker was not adequately discharging their obligations there may be a dispute relating to an attempt to terminate

²² *Body Corporate and Community Management Act 1997*, s 120

²³ *Body Corporate and Community Management Act 1997*, s 121(1)

²⁴ Refer generally Chapter 6 of the *Body Corporate and Community Management Act 1997*

the management rights. Other dispute decisions generally may indicate scheme management issues.

EVIDENCE GATHERING – IDENTIFYING and ACCESSING DOCUMENTS

There are many documents that exist in relation to a CTS at any given time. Some of those documents may be relevant to understanding and / or establishing liability in respect of an injury suffered on CTS land and which stakeholders should be pursued as a respondent.

Accordingly, it is beneficial for a practitioner to understand what documents exist, including how to access those documents outside the restricted disclosure provisions under the PIPA. This section of the paper introduces practitioners to the Community Management Statement (CMS), Building Management Statement (BMS), common property defects report and meeting minutes.

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.²⁵ As such, every CTS will have a CMS.

The CMS contains a lot of information about the body corporate and management of the scheme that may be relevant to a damages claim. The document should be easy to identify and locate because it is recorded on the indefeasible title for each lot and for the common property.²⁶ The identifying number of the CMS will also be recorded

²⁵ *Land Title Act 1994*, s 115L(3)

²⁶ *Land Title Act 1994*, s 155L

meaning practitioners can easily identify and obtain a copy of the current CMS via standard fee-based property searches.

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.²⁷ It is a living document that is amended from time-to-time (most commonly for amendment to by-laws).

TIP: layered schemes will have multiple CMSs (one for the principal scheme and each subsidiary scheme). To the extent there are any inconsistencies between the respective CMSs the principal scheme's CMS will prevail pursuant to s 58 BCCMA.

The following table sets out some of the information that you will find in a CMS and which may be relevant to liability investigations. It is not intended to be an exhaustive list of all information:

INFORMATION	COMMENTS
Description of scheme land ²⁸	It may be necessary for you to identify boundaries within the scheme. If so, the description of the scheme land may be of assistance.
The legal name of the CTS, including the name of the body corporate ²⁹	The legal name of the body corporate is simply the full CTS name with the words "body corporate for" in front. ³⁰ 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).
The regulation module applying to the scheme ³¹	In the event the CMS does not specify a regulation module, the SM will apply.

²⁷ *Body Corporate and Community Management Act 1997*, s 59(2)

²⁸ *Body Corporate and Community Management Act 1997*, s 66(1)

²⁹ *Body Corporate and Community Management Act 1997*, s 66(1)(a)(i) and (ii)

³⁰ *Body Corporate and Community Management Act 1997*, s 33

³¹ *Body Corporate and Community Management Act 1997*, s 66(1)(b)

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.
By-laws	<p>“[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”.³²</p> <p>It is possible for there to be no by-laws appearing in a CMS. If that occurs refer to the by-laws detailed in the BCCMA Schedule 4 which will apply.³³</p> <p>TIP: keep an eye out for by-laws that are inconsistent with the BCCMA because this is not allowed.³⁴ For example, if a by-law purported to alter the duty of the body corporate to keep its common property in good condition, that by-law would be invalid.</p>
exclusive use allocations ³⁵	An area(s) of the common property may actually be the subject of exclusive use rights held by one or more lot owners. A common example of this is a car park, which may actually be common property.

³² Mark J Mercier, *Body Corporate Law in Qld: Practice and Procedure*, (CCH Australia Limited, 1st ed, 2018), 470-1

³³ *Body Corporate and Community Management Act 1997*, ss 66(1)(e) and 168(2)

³⁴ *Body Corporate and Community Management Act 1997*, s 180(1)

³⁵ 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*, s 66(1)(f)(ii)

	Practitioners should double check the CMS exclusive use allocations to ensure the location of an accident that appears to be on common property is not actually a location for which there are exclusive use rights (and corresponding responsibilities – such as maintenance).
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Building Management Statement

A BMS is an instrument under the LTA³⁶ that is binding on a CTS. A BMS:

- 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
- d) *must* include provisions regarding the supply of services to lots, rights of access to lots, rights of support and shelter and insurance arrangements³⁷
- e) *may* include provisions regarding property maintenance, architectural and landscaping standards and rules for common services and facilities.³⁸
- f) *may* establish a building management group whose decisions are binding on a CTS³⁹ 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.

TIP: if a BMS exists there will be a reference to the BMS on the title to a lot⁴⁰ and the document should be available through standard fee based property searches.

Common property defects reports

Prior to the recent amendments to the management regulations, there were several reasons why bodies corporate (particularly in new buildings) were likely to obtain a common property condition report, despite there being no legislated mandate to do so. Following are just a few of those reasons:

³⁶ *Land Title Act 1994*, s 54A(2)

³⁷ *Land Title Act 1994*, s 54C(1)

³⁸ *Land Title Act 1994*, s 54C(2)

³⁹ *Land Title Act 1994*, ss 54(2) and (3)

⁴⁰ *Land Title Act 1994*, s 54D(1)

1. early identification of issues 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 for annual and 9 yearly budgets;
3. insurance – to ensure adequate disclosure obligation compliance regarding to the state of the common property;
4. the cost is usually not prohibitive when shared amongst all lot owners in the building through the levying of contributions.

The recent amendments to the Standard Module,⁴¹ Accommodation Module,⁴² Commercial Module⁴³ and Small Schemes Module⁴⁴ now require a body corporate to include a defects assessment motion at the annual general meeting after the first annual general meeting. These amendments came into effect on 1 March 2021.

Meeting minutes

A body corporate and its committee must each keep full and accurate minutes of meetings,⁴⁵ which evidences decisions made (referred to as *resolutions*) during meetings. The minutes must include the words of the motions voted upon also and this can assist in understanding the nature of the decision made.

Decisions made by a body corporate and / or its committee may be very relevant to liability in a damages claim. This is particular so where the act or omission complained of is evidenced in prior meeting minutes.

STATUTORY RIGHT OF ACCESS TO DOCUMENTS OUTSIDE OF THE PIPA

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 restrictions of s 27 of the PIPA.

⁴¹ See ss 181 - 182

⁴² See ss 168-169

⁴³ See s 124 - 125

⁴⁴ See ss 100 - 101

⁴⁵ For example see *Body Corporate and Community Management (Standard Module) Regulation 2020*, ss 71 and 117

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

The body corporate must keep rolls, records and other documents⁴⁶ as part of its governance. The records of a body corporate are not usually limited to only those items it is required by statute to keep and this was acknowledged 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 (extracted below). If your client is an “interested person” it is recommended that a request be lodged to obtain access to relevant documents (either by way of inspection and copying or by way of request for specific documents⁴⁷).

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

⁴⁶ *Body Corporate and Community Management Act 1997*, s 204.

⁴⁷ 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] QBCCMmr 470

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).

The author has previously had success obtaining access to body corporate records under s 205 in the context of a damages claim under the PIPA. Had the request been made under s 27 of the PIPA the documents requested would have been outside the scope of entitlement. The access provisions for “interested persons” under the BCCMA is not as restrictive as s 27 of the PIPA. There is no legislative limit on the scope and content of records that may be accessed under section 205, except for material reasonably believed to be defamatory⁸⁶ or that is subject to legal professional privilege.

Further (and importantly) there is no restriction on the purpose for which an owner or buyer of a lot may use records obtained under section 205. This has been confirmed *The Grange* at [31] and most recently in *Clermont Apartments* [2018] QBCCMCmr 587 at [24]. The author is not aware of any express restriction in either the BCCMA or the PIPA that would prevent use of a record obtained under the s 205 BCCMA in a PIPA damages claim.

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

- 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.

Claim of legal professional privilege

The only grounds upon which a body corporate can refuse an “interested persons” request for access to body corporate records is where the material may contain defamatory statements or there is a valid claim of privilege.

TRAP: Do not be fooled by a claim of privilege. In the author’s experience such claims are often misconceived and advanced by a person(s) without an adequate legal knowledge of when privilege attaches to a communication. If a claim of privilege is advanced be sure to test the claim and ensure it is properly made.

Practitioners will be better equipped at identifying bogus claims of privilege if they have an adequate understanding of the purposes for which certain documents or records may have been brought into existence. This was recognised in 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.**⁴⁸

RECOVERABILITY

When representing a claimant injured on CTS 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.

⁴⁸ *The Owners – Strata Plan No. 74602 v Eastmark Holdings Pty Limited* [2013] NSWCA 221, [39].

Strata insurance

A body corporate is required to maintain public risk insurance of the common property and relevant assets⁴⁹ for amounts the body corporate becomes liable to pay for compensation for death, illness and bodily injury and damage to property.⁵⁰ Coverage must be for at least \$10M for a single event and in a single period of insurance.⁵¹

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 the possibility that the public risk insurance is insufficient to meet an insurable event”.⁵²

Recoverability against body corporate directly

If there is any shortfall in a body corporate’s insurance coverage the body corporate will be directly responsible for that shortfall. In the event of no coverage the body corporate will bear the entirety of liability for any damages settlement or award.

One particular area where the risk of lack of coverage is more prevalent is where an injury or illness has arisen from issues related to building defects.

The starting point for a strata insurer when offering a policy is to assume the building was properly built.⁵³ 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. As stated earlier in this paper, the requirement to make disclosure of defects to an insurer is often one of the motivating factors behind a body corporate obtaining a common property defects report.

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:

⁴⁹*Body Corporate and Community Management (Standard Module) Regulation 2020*, s 206(1). “Relevant assets” means body corporate assets for which it is practicable to maintain public risk insurance

⁵⁰*Body Corporate and Community Management (Standard Module) Regulation 2020*, s 206(3)(a)(i)

⁵¹ *Body Corporate and Community Management (Standard Module) Regulation 2008*, s 206(3)(b)

⁵² Marc J Mercier, *Body Corporate Law in Qld: Practice and Procedure*, (CCH Australia Limited, 1st ed, 2018), 633

⁵³ 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>

Relevant Factor	Comments / Recommendations
A practitioner becomes aware that a body corporate's insurer has denied coverage	Seek discrete issue advice from a specialist body corporate lawyer or barrister with experience in the area regarding relevant provisions to be included in a settlement Deed addressing the various technicalities and challenges relating to recovering funds
Requirement of authority to settle legal claim / proceeding	<p>It is generally accepted that a special resolution of the body corporate is required to authorise a settlement. However, it may be the case that when the body corporate passed the necessary resolution to commence the action that it also dictated how settlement could be approved (e.g. by majority vote of the members of the committee from time to time).</p> <p>In the event of an informal settlement of the proceeding it may be prudent to request evidence of the necessary approvals, for e.g. a copy of the minutes reflecting the approvals.</p>
Special levy	<p>If the body corporate is required to pay the damages amount from a settlement or award and it has not already budgeted for that expense it is required to raise a <i>special contribution</i> to cover the liability.⁵⁴</p> <p>If your client is a lot owner, you may need to approach the Court for relevant orders relieving your client of the burden of being levied to contribute to their own settlement funds. There is a mechanism for this under s 314 BCCMA. Note the section refers only to circumstances where a <i>judgment or award</i> is made in a <i>proceeding</i>. It is unclear whether s 314 can be utilised in respect of an informal settlement in the pre-litigation stage.</p>
Getting in settlement funds being	Unpaid contributions are recoverable against a lot owner

⁵⁴ See for example *Body Corporate and Community Management (Standard Module) Regulation 2020*, s 162(2)

<p>raised by special levy</p>	<p>as a debt;⁵⁵ however, the debt recovery process can take time and relies upon the body corporate to act in a timely manner. Consideration should be given to the mechanism that could be provided for in a settlement Deed that may assist the claimant to ensure debt recovery processes are undertaken swiftly.</p>
<p>Timeframe for payment of damages</p>	<p>If a body corporate is required to call a general meeting to vote on settlement of a claim it will not happen immediately. Practitioners should factor in the additional time required relating to meeting notice periods etc.</p> <p>If a <i>special contribution</i> must be raised take note lot owners will have at least 30 days after issuance of the contribution notice to make payment.⁵⁶</p>

PREDICTIONS – INJURY OR ILLNESS FROM BUILDING DEFECTS

There is a significant issue in Australia (and many other areas of the world) relating to defects in strata buildings. It would be surprising if readers had not heard of at least one of the following:

- Opal Tower in Sydney Olympic Park
- Combustible cladding
- Mascot Towers in Sydney
- London’s Grenfell Tower fire tragedy

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

- 2009:⁵⁷ water ingress, internal and external wall cracking, roofing and guttering problems and tiling faults

⁵⁵ See for example *Body Corporate and Community Management (Standard Module) Regulation 2020*, s 166(1)

⁵⁶ *Body Corporate and Community Management (Standard Module) Regulation 2020*, s 163(1)

⁵⁷ Hazel Easthope, Bill Randolph and Sarah Judd, ‘Managing Major Repairs in Residential Strata Developments in New South Wales’ (2009) City Futures Research Centre, UNSW 1, 10

- 2012:⁵⁸ 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: building fabric and cladding (40.19%), fire protection (13.26%), water⁵⁹proofing (11.46%), roof and rainwater disposal (8.58%) and structural (7.25%)

The most recent report was released in June 2019 and was authored by Nicole Johnston of Deakin University and Sacha Reid of Griffith University. It is titled *An Examination of Building Defects in Residential Multi-owned Properties* (“**Johnston Paper**”)

The Johnson Paper results show that defects relating to building fabric and cladding are the most prevalent 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.

The topic of building defects is a vast and complex topic and well outside the scope of this paper. Suffice to say, building defects can (and do) create health and safety hazards on CTS land. Water ingress and moisture issues are of particular significance.

Whilst it can be difficult to establish medical causation in respect of mould exposure health effects, the author predicts that there will be a growing number of claims in the future relating to the health impacts from mould exposure in wet and damp buildings.

The Australasian Society of Building Biologists (“**ASBB**”) has stated that the:⁶⁰

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.

⁵⁸ 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, 65

⁵⁹ Johnston & Reid, ‘An Examination of Building Defects in Residential Multi-owned Properties’ (Research Paper, Deakin University & Griffith University, June 2019)

⁶⁰ House of Representatives Standing Committee on Health, Aged Care and Sport, *Report on the Inquiry into Biotxin-related illness in Australia* (October 2018) p 16 citing Mrs Nicole Bijlsma, ASBB, Official Committee Hansard, Canberra, 9 August 2018, p. 10

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 Biotoin-related Illness in Australia*.⁶¹

The Committee made a number of recommendations relating to (but not limited to) the need for further investigation of the extent of the issue, development of medical guidelines and further research regarding health impacts. It is unclear what (if any) advancement has been made on the recommendations since the release of the report.

Given the above, the author predicts that there will be a rise of claims relating to mould exposure illnesses in the future. This is particularly so if recommendations made by the Committee are taken up and the general and medical communities become better educated on the issue and medical practitioners improve their skills and knowledge around testing for and diagnosis of mould exposure conditions.

⁶¹[https://www.aph.gov.au/Parliamentary Business/Committees/House/Health Aged Care and Sport/BiotoinIllnesses/Report](https://www.aph.gov.au/Parliamentary_Business/Committees/House/Health_Aged_Care_and_Sport/BiotoinIllnesses/Report)