The purpose of this guide is to provide information about the identification and rectification of defects in your building. This is a guide for committees and unit owners alike.
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+ WHO ARE WE?

We are the leading strata and community living law firm in Queensland. Our partners have extensive experience in strata law, construction law and commercial litigation.

We are a refreshing experience compared with most traditional law firms. As examples of how we operate:

**We are accessible** - We all have direct lines. We don't hide behind automated phone systems and filter your phone calls.

**We return phone calls and emails** - it is surprising how many lawyers don't return phone calls. We make sure you have all the information you need at every stage of your matter.

**We answer in plain English** - you won't get verbose advice from us including a lot of legal jargon, and when we do need to use legalese, we explain just what it means for you. Having acted for hundreds of committees over the years we know what you need to know and present that in an easy to read manner. Even though some technical language is the norm in the world of building defects, we can break this down to make it easily understandable.

Lawyers find it very easy to blindly apply the law - what many lawyers miss is listening to what you need and giving you the right advice for your individual circumstances. If the law says you can do something, but we think you shouldn't, we will tell you.

There is no point being legally correct but strategically wrong.

**We are excellent value for money** - the proof is in how many happy clients we have. Some of these are new clients who asked around other firms, and others are clients that continue to use us and trust us to do the right thing by them – which we do.

Have a look at our website for the material we publish to both the body corporate and management rights industries. Try us - you will be surprised at how different we are to the usual law firm experience.

+ WHAT IS A BODY CORPORATE’S RESPONSIBILITY IN MANAGING A BUILDING?

Every body corporate in Queensland has a statutory responsibility to ensure that its common property is maintained in good condition. This is an inescapable obligation, regardless of the circumstances.

The *Body Corporate and Community Management Act 1997* (BCCM Act) is the foundation legislation that governs all strata schemes in Queensland. It provides that a body corporate must administer, manage and control the common property and body corporate assets for the benefit of all lot owners.

In addition, each of the five body corporate Regulation Modules (one of which will apply to your strata scheme) provides identical obligations on a body corporate to maintain in good condition the common property, as well as all structural elements of the building.

What this means is that a body corporate has a statutory (and therefore compulsory) obligation to ensure that the building is maintained, does not contain defects and is in good condition. If a defect is discovered in a building, it is the body corporate's ultimate responsibility to have that defect fixed, regardless of who caused that defect.

If someone other than the body corporate has caused a defect in a building, the body corporate may pursue the responsible party (for example, a builder) to recover the cost to fix the defect. Pursuing that party does not displace the body corporate's statutory obligation to ensure the building is in good condition. Does your body corporate procrastinate? Do people on the committee fail to follow up on matters?

We have seen many cases come across our desks involving body corporate procrastination resulting in far higher costs than if the body corporate had taken action as soon as defects were discovered. At Hynes Legal we can help raise awareness with your body corporate as it is vital that every committee knows what to do once a building defect has been discovered, and understands its overriding obligation to fix the problem prior to seeking reimbursement from the responsible party.

+ WHO IS THIS GUIDE AIMED AT?

This guide provides easily understood information about the identification and rectification of defects in your building. This is a guide for committees and unit owners alike.

This guide has been prepared as a useful practical overview of the:

- Laws in Queensland regarding building defects in the context of community title schemes;
- Types of building defects claims that can be made by bodies corporate;
- Steps that need to be taken in order to make a building defects claim; and
- Strategies that can be implemented in order to limit the risk of building defects.

This guide:

- Is not a legal document and is not intended to be a comprehensive review of all the laws regarding building defects. Readers should take legal advice (preferably from us) before applying the information contained in this document to any specific circumstances.
- Does not answer all of the legal questions you will have. It is designed so that you can understand the major issues surrounding the responsibility for and rectification of building defects, and direct you to where you can turn for legal help.
WHAT IS A BUILDING DEFECT?

The term “building defect” has no strict legal meaning under Queensland law. A building defect is actually a fairly self-explanatory term; in short, it is any defect in the building.

Building defects generally fit into two categories:

- Structural and non-structural.

The tricky part is classifying the building defect within these two categories. For example, the processes required for a body corporate to fix a broken pool fence are far different from those required to repair a leaky roof or a cracked wall.

The policy documents issued by the Queensland Building and Construction Commission (QBCC) (formerly the Queensland Building Services Authority), the government watchdog for all building and construction work in Queensland, dictate that defective building work means building work that is either faulty or unsatisfactory (that is, it falls below a reasonable standard of quality).

Despite the extensive regulatory oversight of the QBCC, building defects continue to be a major cause of disputes in Queensland. The QBCC handles thousands of complaints about building defects and incomplete building work each year. A lot of these relate to normal houses and the like, but the growth in community living means more and more are strata related.

Bodies corporate for community title schemes are a natural and commonplace casualty of defective building work, particularly because of the haste with which developers need to proceed from practical completion of a building to the establishment of a community titles scheme. Time is money when it comes to developments. The sooner they are done the sooner the developer can repay what it owes. This sometimes leads to short cuts.

Building defect matters can be very complicated. This is because they:

- Can be caused by a number of factors which are often interrelated;
- Can range from very minor problems to critical defects and health risks;
- Invariably include numerous stakeholders with conflicting interests;
- Require relatively high levels of technical, engineering, legal and administrative management; and
- Are often not discovered for many years following practical completion.

HOW COMMON ARE THEY?

To put the problem into perspective, we have not yet seen a new building that has been built without a single defect. Given the complexity of the construction process and the number of stakeholders involved, it appears to be virtually impossible to construct a completely defect-free building.

The question then becomes one of severity.

However, two worthwhile observations can be made about the identification of building defects:

- Minor problems (such as a squeaky door) are not usually classified as defects; and
- Problems resulting from inadequate maintenance or fair wear and tear are not usually classified as defects.

Common defects include:

- Water leaks - including leaky roofs or decks, faulty or incorrect plumbing, swimming pools and garden water features;
- Defects in balconies and balustrades - including cracked or lifting tiles, poorly fastened or otherwise unsafe balustrades and the absence of waterproofing membranes;
- Faulty or inoperative aircon systems, elevators or hot water systems;
- Movement or cracking in the building slab;
- Electrical or wiring faults; or
- Poor standards of painting, tiling, roofing or other external finishes.
WHO IS AT FAULT FOR CAUSING DEFECTS?

It is easy to speculate from a layperson's point of view whose fault it is for the existence of a building defect. The only way to be certain about the root cause of a defect (and hence who is at fault) is to obtain a report from a suitably qualified building and construction expert (Expert Report).

We always recommend that an Expert Report is sought as soon as a defect is discovered because a well-prepared report will:

- Identify exactly what the nature of the defect is (structural, non-structural or wear and tear);
- Draw conclusions as to the most likely cause of the defect;
- Pinpoint what work is required to fix the defect;
- Provide an estimate of how much that work will cost; and
- Set the basis of any necessary legal action.

It is important to obtain an Expert Report from a suitably qualified expert because if a claim ultimately ends up in Court, the Expert Report (and potentially any correspondence with the expert) will likely have to be disclosed to the other party and the author may even have to give oral evidence. We would suggest that a body corporate looking to obtain an Expert Report first seek legal advice (preferably from Hynes Legal) as to selecting and briefing an appropriate expert, to avoid adverse consequences down the track.

Until an Expert Report is obtained, it will be virtually impossible to prove who is responsible for causing a defect. The advantage of obtaining an Expert Report as soon as a defect is discovered is that it will provide the body corporate with an immediate opinion as to who the responsible party is. This will allow the body corporate to make a commercial decision as to whether to proceed with legal action against the responsible party or parties in addition to undertaking remedial works to fix the defect. In most cases, defects are caused by poor workmanship by a builder (or the builder’s subcontractor).

In some cases, a lot owner will be responsible for causing a building defect. For example, if a lot owner knocks through a wall within their lot to make their living space larger, this might cause cracks within the building or even structural defects.

+ STRATEGY AND COMMERCIALITY

Before we get into all of the legal jargon, there are a few things that every body corporate facing a building defect issue should be aware of.

The first is the commerciality of making a claim. You need to look at the costs to fix the defect as against the cost of attempting to hold someone to account for the defect itself. This is a careful balancing act. If the claim is for millions, then it is a relatively easy answer, but if the claim is for $20,000 you may be better off just addressing it and moving on.

People always think about litigation being expensive, and it can be. What they fail to factor in is the time and stress that comes with it. As lawyers we can only do so much in any matter. We need instructions. Those instructions need to come from the committee and that will take time out of your day. We have helped client committees make arrangements for a committee liaison to be paid as part of the process and this tends to work better than a group of volunteers trying to find the required time.

The last point is strategy. This is all important. The detail in this guide largely talks about the legal rights you have to commence proceedings. Going to court is a last resort. Before that you should try to work through the defect issues with whoever is accountable to reach a commercially negotiated outcome. This is usually far better than a drawn out legal fight, but only comes about if you have a strategy to achieve it. There is no hard and fast rule with this and it will all depend on your particular circumstances.

“People always think about litigation being expensive, and it can be. What they fail to factor in is the time and stress that comes with it.”

Common defects include poor paint, tiling, roofing and other external features.
HOW AND WHERE DO I MAKE A CLAIM?

There are various forums available to a body corporate for making a claim and the appropriate forum depends on who the body corporate claims is at fault. However, the direction a claim takes depends on several other factors such as when the defect was discovered, how old the building is and how serious the defect. These factors are discussed later in this guide.
+ **HOW AND WHERE DO I MAKE A CLAIM?**

Generally speaking, the body corporate can make a claim against:

- **A builder** to:
  - the QBCC for defective building work; or
  - a Queensland Court seeking damages for breach of contract and or negligence (that is, reimbursement of the costs the body corporate has incurred in rectifying a defect).

- **A developer** to a Queensland Court seeking damages in negligence.

- **A lot owner** to the Office of the Commissioner for Body Corporate and Community Management.

+ **CLAIMS AGAINST BUILDERS OR SUBCONTRACTORS**

If the body corporate alleges that a builder is at fault for a building defect, the body corporate can make a claim via one of the following options:

- Lodge a complaint with the QBCC, and/or
- File a civil claim in a Queensland Court claiming damages for breach of contract and or negligence.

Which of the above options a body corporate can or should take largely depends on time (discussed below). There are strict time limitations for making complaints to QBCC for building defects.

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**+ LODGING A CLAIM WITH THE QBCC AGAINST A BUILDER**

Where a body corporate claims that building defects have been caused by defective building work by a builder, the body corporate may lodge a complaint with the QBCC. Assuming the claim has been lodged within the required time frame (discussed below), the QBCC will independently assess the complaint, including sending a qualified building inspector to assess the defects.

The QBCC divides building defects into two categories:

**Category 1 – Structural defects**

This is defective building work that is faulty or unsatisfactory because it does one or more of the following:

- adversely affects the structural integrity of the building (for example, cracked walls or foundations);
- adversely affects the health or safety of persons residing in or occupying a building;
- adversely affects the use of a building; or
- allows water penetration into a building.

If the QBCC (following a building inspection) determines that Category 1 or Category 2 defective work exists, it is empowered to direct the builder to:

- undertake remedial building work; or
- pay for remedial building work to remedy the building defect.

Being directed by QBCC to rectify defective building work is a serious matter. If a builder does not comply with such directions, the QBCC will commence disciplinary action which may result in the cancellation of the builder’s licence or a fine.

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“**DOES NOT MEET A REASONABLE STANDARD.**”
**+ HOW MUCH TIME DO I HAVE TO LODGE A CLAIM WITH THE QBCC?**

The time limits for lodgement of complaints have varied over time and they differ depending on whether the contract was entered into before or after 10 October 2014. For contracts entered into before that date, it has previously been the policy of the QBCC that:

- for category 1 defective building work, it may be unreasonable or unfair to issue a direction to rectify if the complaint is not made within 3 months of noticing a defect that appears within 6 years and 3 months from practical completion; and
- for category 2 defective building work, it may be unreasonable or unfair to issue a direction to rectify if the complaint is not made within 7 months of practical completion.

However, for contracts entered into after 10 October 2014, a consumer must lodge a formal complaint with the QBCC as soon as possible but not later than within 12 months of becoming aware of the defects. The QBCC will then consider issuing a direction to rectify to a builder:

- for category 1 defective building work – within 6 years and 6 months of the building work being completed;
- for category 2 defective building work – within 12 months of the building work being completed.

Bearing in mind the body corporate’s overriding obligation to maintain the common property, it will be appropriate in some circumstances for the body corporate to utilise the QBCC’s defect process before undertaking any remedial work itself (provided that the Body Corporate is still in time). This further demonstrates why it is important for a body corporate to act as soon as defects are discovered; the longer the body corporate knows about a defect and does not rectify it, the more likely it will be that the body corporate will be forced to rectify the defect itself and at its own cost. We can provide you with tailored advice recommending the most appropriate course of action in your circumstances.

If you make a complaint to the QBCC outside of this timeframe, the QBCC will likely not accept the complaint and you may be left without any options in this forum.

However, in some circumstances (the body corporate has no control of this) QBCC may decide to apply to the Queensland Civil and Administrative Tribunal for permission to issue a direction to a builder outside of time. They usually only do this where the work is of such a poor quality that it is in the public’s interest for action to be taken against the builder outside of time.

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**+ COURT PROCEEDINGS AGAINST A BUILDER FOR BREACH OF CONTRACT OR NEGLIGENCE**

When constructing a community titles scheme, the developer (who originally owned the land) and a builder (who will build the scheme for the developer), will enter into a construction contract. A usual construction contract will contain various warranties as to the standard of workmanship expected.

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**+ CONTRACT CLAIM**

To succeed in a civil claim against a builder for breach of contract, you will need to prove that the builder has breached one or more of the warranties in the construction contract.

However, a key principle of contract law is that only those parties who signed the contract will be able to sue under it. This is problematic for bodies corporate because they will never be a party to the construction contract. A body corporate is only established after the building work has been completed.

Thankfully, there is a provision in the BCCM Act which provides that a body corporate may be substituted into the construction contract (as if it were the developer of the scheme). This means that the body corporate:

- steps into the shoes of the developer;
- can rely on any warranties given by the builder under the construction contract; and
- has the right to sue under the construction contract.

Assuming appropriate warranties were given in the construction contract, to be successful in any contractual claim against the builder you need to be able to prove that the builder has breached one or more of the warranties in the construction contract. To do this, you really do need an Expert Report.
A limitation period prevents a party from commencing civil proceedings against another upon the expiry of a certain time frame. If the limitation period passes, you will generally lose the right to bring an action irrespective of its prospects.

The limitation period for a contractual claim for breach of warranty:
- generally commences on practical completion; and
- expires six (6) years later.

A civil claim of negligence against a builder is a completely separate claim from a contractual claim. In order to succeed in a claim of negligence, the body corporate must prove that:
- a relationship existed between the builder and the developer (remember the body corporate is placed in the shoes of the developer pursuant to the BCCM Act) such that one party owed the other a duty to take reasonable care in doing something (such as constructing a building);
- the builder has breached that duty by not using the appropriate standard of care;
- damage has occurred as a result of the builder not taking reasonable care; and
- the damage incurred was reasonably foreseeable (for example, it is reasonably foreseeable that if the builder used incorrectly sized downpipes throughout a building, flooding may occur).

Like an action for breach of contract, the limitation period for an action in negligence is six (6) years. However, unlike a contractual claim, in a negligence claim the limitation period only starts when the defect first becomes known or manifests itself. This can be several years after practical completion.

We always recommend that bodies corporate seek specific advice on any limitation period before commencing legal action. If a defending party successfully argues that a limitation period applies, the whole claim may be defeated.

Recent case law suggests that the circumstances in which a duty of care will be owed by a builder to a body corporate is limited. As a result, a claim of negligence can be complicated. The individual circumstances of each particular case (including the terms of the contracts of sale between unit owners and the developer) will determine whether the body corporate has a claim in negligence.
I BELIEVE I HAVE A CLAIM. WHERE DO I GO NEXT?

One of the goals of the BCCM Act is to ensure that bodies corporate are governed with a minimum of fuss. The key mechanism to achieve this was to ensure that the majority of decisions that a body corporate is required to make are able to be made by the committee alone.

WHERE DO I GO NEXT?

The BCCM Act does place several limitations on the power of committees by requiring certain matters to be decided by the body corporate, as a whole, with all lot owners having the opportunity to vote in a general meeting. Accordingly, before a committee or body corporate attempts to make a building defects claim, we strongly recommend that you contact Hynes Legal and seek advice as to the legalities, process and prospects of such a claim. There are issues surrounding spending limits, quotations and also the authority to commence proceedings to be worked through.

APPOINTING LAWYERS AND BUILDING EXPERTS

Committees are not allowed to spend more than their statutory spending limit. This is different for every scheme. The applicable spending limit for your scheme (unless a general meeting has decided otherwise) is $200 multiplied by the number of units in the scheme. If a committee wishes to appoint a building expert, lawyer, tradesperson or for that matter any other service provider, it must make sure that it is entitled to spend that amount of money.

Your body corporate manager will be able to tell you what your committee spending limit is. If not, we always provide a free appraisal of each committee spending limit if you are considering engaging us.

STARTING A CLAIM - PROCEDURAL ISSUES

Making a claim against the party responsible for a building defect is what is called a “restricted issue” under the BCCM Act. This means that, a committee cannot resolve to commence a building defects claim by itself (this does not include a complaint to the QBCC); instead the commencement of a claim must be authorised by a Special Resolution passed in a general meeting of all lot owners.

This is a very high threshold and is aimed at ensuring that bodies corporate properly scrutinise whether a claim should be made. A sound way for bodies corporate to scrutinise whether a claim should be started or not is to seek a legal opinion. Engaging a solicitor to provide an opinion on the merits of a potential claim does not require a special resolution; this is a matter that can be actioned at a committee level (provided that the committee’s spending limit is not exceeded).

It is imperative that a motion to commence proceedings is drafted correctly; for example, if the motion does not expressly allow the committee to have day-to-day management of the claim, then every decision will likely need to be made by the body corporate in a general meeting which would severely delay the progress of the claim. Hynes Legal has drafted countless motions to conduct court proceedings in the past and we are more than able to tailor a motion to meet every circumstance.

REACHING A SETTLEMENT

Once court proceedings have been commenced, in some circumstances a defendant (whether that is a builder or developer) will accept defeat and propose a compromise (a settlement) to address the defect. However, it is not as simple as shaking hands and accepting whatever settlement terms have been suggested.

Similar to commencing court proceedings, any matter that will change the rights, privileges or obligations of lot owners in a scheme is a restricted issue and cannot be decided solely by the committee.

Accepting an offer to settle a claim is a restricted issue and must be approved by the body corporate in a general meeting.

If the body corporate resolves in general meeting to accept an offer of settlement we always recommend that it be recorded in a signed agreement; this ensures there is no ambiguity over the terms of the settlement. Hynes Legal has extensive experience in negotiating and documenting settlement terms and you can rest assured that your rights will always be protected whenever we are involved.

“Before a committee or body corporate attempts to make a building defects claim, we strongly recommend that you contact Hynes Legal and seek advice as to the legalities, process and prospects of such a claim.”
WHY SHOULD YOU CHOOSE HYNES LEGAL?

Hynes Legal is the leading strata law firm in Queensland, with a dedicated team of lawyers advising hundreds of bodies corporates and their committees and associated industry parties across a broad range of strata issues.

Hynes Legal has extensive experience in prosecuting building defects claims, ranging from advising bodies corporate on their prospects of a claim all the way through to trial and the enforcement of judgments. Our extensive knowledge of the day-to-day operations of a body corporate, and the management rights and strata industries as a whole, ensures that our clients can rely on us to get your building defect issue resolved as quickly and economically as possible.

At Hynes Legal we act for hundreds of bodies corporate and are familiar with all of the issues that arise in the management of community title schemes. We know where the risks are in the community management process and we work closely with committee members, body corporate managers and bodies corporate to manage and minimise these risks.

We genuinely enjoy working in the body corporate industry and we are not afraid of leading change where it is needed and, as such, we have been involved in a number of ground-breaking decisions in the field of body corporate law.

We meet our clients’ objectives by providing the highest quality of work, with the right people, at the right time and at the right price. For us this means having a dynamic and flexible team led by industry leading lawyers and providing our clients with flexible and realistic pricing options.

We understand the importance of fostering long-term relationships with our clients and where possible we will always strive to add value through our vast network of contacts and industry leadership.
**GLOSSARY OF TERMS**

**BCCM Act**
This is the *Body Corporate and Community Management Act 1997*. This legislation covers almost all community titles schemes in Queensland.

**By-laws**
These are a body corporate’s rules relating to the use of common property. By-laws detail the responsibilities of the body corporate and apply to everyone entering the complex including owners, tenants and guests.

**Body corporate**
The body corporate is a separate legal entity - similar to a company - that is created to control common property. All lot owners are members of the body corporate. An elected group (like a board of directors) forms the committee.

**Body corporate manager**
The person who administers the financial and secretarial side of the body corporate. This person issues levy notices, chases levy arrears, records minutes of meetings and undertakes other administrative duties.

**Commissioner’s Office**
Office of the Commissioner for Body Corporate and Community Management. This is the official office that decides the vast majority of body corporate disputes between bodies corporate and lot owners.

**Committee**
Effectively the board of directors of the body corporate, who are elected by lot owners every year.

**Committee meeting**
These are meetings of the committee held at different times throughout the year to discuss various body corporate issues. These can occur monthly, or not at all. It all depends on how active the committee is.

**Common property**
This is property jointly owned by all lot owners and managed by the body corporate. This may include foyers, hallways, swimming pools, gardens, tennis courts, gymnasiums, toilets, lifts and entertainment areas. It is everything other than the lots in the scheme. The day-to-day maintenance of common property is generally outsourced by the body corporate to a caretaker.

**Community Management Statement**
Commonly referred to as a ‘CMS’, this is the document that contains the by-laws, a description of the real property in the scheme as well as the lot entitlements for all lots in the scheme.

**Community Title Scheme**
This refers to a strata development as a whole; it is the original plot of land on which the building or complex was built, which has since been subdivided into separate titles or lots (units or townhouses) and common property.

**General meeting**
This is one of two types of meetings where all owners can vote on issues. The first type (held once a year) is the annual general meeting (or AGM). This is where, amongst other things, the committee is elected. Any other general meeting held during the year is called an extraordinary general meeting (or EGM). Annual general meetings are held to address financial and other aspects of the body corporate as well as elect the committee. Extraordinary general meetings may be called at any time to address specific issues. Owners attend meetings in a similar context to company shareholders.

**Lot**
The pieces of property in a community titles scheme that belong to the individual owners.

**QBCC**
This stands for the Queensland Building and Construction Commission, which oversees all building work in Queensland.

**QCAT**
This stands for the Queensland Civil and Administrative Tribunal, which is responsible for determining disputes in relation to decisions of the QBCC.

**Practical completion**
This is defined differently in every construction contract, but is the legal term given for when construction is complete.

**Proceeding**
This is what lawyers call an ongoing legal matter which is to be decided by an appointed decision maker (for example a Judge, Magistrate, Tribunal Member or Adjudicator), depending on the Court or tribunal in which the claim is lodged.

**Regulation modules**
There are more detailed rules for different community titles schemes under the BCCM Act. The five modules, being the Standard, Accommodation, Commercial, Small Schemes and Specified Two-Lot Schemes cover various types of body corporate structures. In our experience, most buildings are administered pursuant to the Standard or Accommodation modules.

**Restricted issue**
These are issues which are not allowed to be decided by the committee alone and must instead be put to all lot owners at a general meeting to decide.

**Special resolution**
This is a resolution which requires more than just a majority vote. A motion is only passed by special resolution if:

1. at least two-thirds of the votes cast are in favour of the motion
2. the number of votes against the motion is not more than 25% of the total number of lots
3. the total contribution schedule lot entitlements of the votes against the motion is not more than 25% of the total contribution schedule lot entitlements for all lots in the scheme.

**Warranties**
These are specific promises made by a party to a contract and are enforceable. The most common warranties given by the builder in construction contracts are that the builder will use reasonable skill, will provide good quality workmanship and will use appropriate and correct construction materials.