

Developer Review Panel
Building Policy
Public Works Division
Department of Energy and Public Works
GPO Box 2457

Dear Panel,

SCA (Qld) are pleased to make a submission on the Discussion Paper created by the Panel for the purposes of the review.

Introduction and Discreet Proposals

There were over 520,000 lots in more than 50,000 community title schemes across Queensland at the end of 2022. SCA (Qld) estimates 1.2 million Queenslanders live and work in strata title properties across the State. This is a significant portion of our state population and a figure which will continue to grow.

SCA (Qld) is the peak association supporting Queensland's strata sector. We understand the sector from a broad array of viewpoints owing to our diverse membership. SCA (Qld) represents body corporate managers, community titles schemes with committee members acting as nominees, lot owners as individuals, and service providers to the strata industry including specialist insurers, painting suppliers, energy suppliers, solicitors, accountants, water and plumbing providers, banks, elevator maintenance professionals, cleaning providers, surveyors, valuers, glaziers, IT providers and pool servicing and maintenance providers. The primary piece of legislation regulating our sector is the *Body Corporate and Community Management Act 1997* (Qld) (henceforth the "Act" or "BCCMA").

SCA (Qld) at the outset notes we are strongly supportive of strata and high density development. Increased high density housing is of critical importance to deliver a raft of social and economic policy goals, which we would note are bipartisan. This is clearly an important factor to be cognisant of given the ongoing housing crisis across Queensland¹. Greater volumes of high density housing will be of significant benefit to Government and Queenslanders at large, given strata's significant advantages over detached housing when it comes to affordability, requirements around infrastructure investment and sustainability. We note significantly the predominance of infill development in the South-East Queensland Regional Plan².

SCA (Qld) comes to this review from our perspective as both peak body for the strata industry and a consumer advocate. Inevitably, the issues of strata managers, lot owners and many of our service provider members are issues of consumer protection.

SCA (Qld) firmly believes that there needs to be appropriate regulation and oversight of the high density development process.

Defining "the developer".

At present, any person can theoretically be a developer. There is no regulation on this, any person or other entity that can borrow or raise sufficient capital to buy a site and lodge a development application can be a developer. For the definition of a developer, or associate of a developer, we would encourage the panel should seek to copy the well tested and effective definition used in the Electoral Act 1992³ to

¹ news. 2022. *War of words over 'crisis' hitting one state*. [online] Available at: <<https://www.news.com.au/finance/real-estate/brisbane-qld/queensland-and-federal-government-in-war-of-words-over-housing-crisis/news-story/8596911a5e3bc081f4e7a5943757a241>> [Accessed 25 July 2022].

² <https://dsdmipprd.blob.core.windows.net/general/shapingseq.pdf>

³ s273

restrict electoral donations to such persons. This submission when discussing issues related to development will use this definition. These provisions have been effective in defining and capturing developers for the policy intent of that Act and should be extended across the board with respect to any proposed controls or requirements on developers to help enhance building standards.

We would also urge policy makers to be alert to the emerging trend of multiple companies being used in a single development project.

We understand that anecdotally it is an emerging trend for individuals engaged in the long-term business of development to hold the land which is the subject of development activity with one company, and then contract a related entity to perform development work. It is important that policymakers be alert to these kinds of practices and ensure legislation is appropriately drafted to ensure it achieves its policy intent.

In the context of a body corporate, this can create an issue if the body corporate needs to sue a builder for defective building work. To counteract this in the specific context of bodies corporate, we recommend that section 36 of the BCCMA be expanded to grant bodies corporate in this situation the right to sue the building company.

Executive Summary

SCA (Qld), noting the breadth of the review, has focused on the sections and proposals we believe have the greatest impact on our members.

These are categorised as:

1. General Issues
2. Construction and Completion - Building Defects (including additional insurance)
3. Sales and Handover

We will summarise our positions on each by drawing together options promoted by the panel which we think most readily fit with our overall proposed solutions.

SCA (Qld) acknowledges that there are of course issues around the development process which affect greenfield development however our remit and knowledge is mostly confined to infill or high density (strata development).

1. General Issues

SCA (Qld) summarises our responses to the following policy options floated in the Discussion Paper under this heading:

- Licensing
- Industry Standards
- Disclosure Arrangements
- Documentation of Amendments
- Documentation Handover

Disclosure and documentation issues are covered by our proposal below for a centralised hub.

a) Licensing and Industry Standards

SCA (Qld) does not believe the notion of specifically licensing developers is workable or desirable at this point in time. SCA (Qld) strongly supports ensuring more high density housing supply is delivered to the marketplace. Any licensing regime may discourage persons or entities, both small and large

from undertaking smaller scale projects. All sensible levers must be pulled to ensure a significant supply of housing is delivered to help house Queensland's growing population. Creating a licensing regime for developers, particularly one which is onerous, may discourage "hobby" or "mum and dad" type operations from seeking to create housing on land which they own. The previous quasi "licensing" regime proved ineffectual and difficult to administer according to feedback we have received. SCA (Qld) would support a simple register of developers administered by the QBCC or Titles Office. We will elaborate further under discussions around the idea of a ranking system and hub. SCA (Qld) believes holistic reform is needed, not merely piecemeal measures.

SCA (Qld) believes that simple registration of a person undertaking development activity (with a reasonable threshold of commerciality) would be beneficial. This ought to be linked to the substantive person (Director ID number) in control of a development and not a particular entity. We will expand on this below.

b) General Issues- Proposal for a Body Corporate/Strata Hub

SCA (Qld) believes to effectively address several of the proposed options in the paper in the context of growing community title living a "body corporate" or "strata hub" (henceforth "strata hub") commensurate to the present hub being rolled out in New South Wales should be created.

SCA (Qld) believes the strata hub should incorporate a developer ranking system and all necessary documentation and information to ensure any future body corporate can make informed decisions going forward. Using this as a repository for all relevant information and making it easily accessible for owners and managers would represent a positive, quantum leap forward reform for strata.

Given the acknowledged widespread use of special purpose entities for development projects (which SCA (Qld) makes no submission on) we believe that the importance of understanding the record, practices and dealings of the substantive control person of the project must be the focus of reform in this space. To this end, hub feedback should be tied to the Unique Director Identification Number of persons engaged in the long term business of development.

SCA (Qld) members feel that despite current obligations around document disclosure it is often the case that these legislated responsibilities simply aren't complied with. SCA (Qld) therefore suggests that the proposed "strata hub" and the deposit of all necessary documents be tied to the sealing of the plan and the ability to ultimately sell the lots to complete the project.

The ability to provide feedback into the hub should be restricted to appropriate, independent assessment bodies or professionals, including body corporate managers, lawyers and the QBCC. Other important information such as QCAT rulings, defect reports from an engineer (regardless of their rectification) may also be included. Providing feedback to the hub should be the place of appropriately qualified persons around specific issues they are able to comment on.

With respect of the documents that should be deposited into the hub, the following list should be used as a starting point:

- Building Contract
- Director ID's (of any company involved in the control of the project or ownership of the land)
- Rating of developer (attached again to Director ID)
- Structure of scheme (format plan)
- Community Management Statement
- Any other documents currently required to be handed over by law.
- Body Corporate roll (as a scheme ages managers should be able to access to update the role)
- Committee List

The above list is not exhaustive and feedback from other consumer organisations should be sought.

c) Developer Rating System

As discussed above, the proposed hub should be used to help inform in the medium term a developer rating system.

Weighting should be given to the feedback of consultants based on how critical the nature of the feedback is. For example, a high prevalence of critical building defects ought to be given very heavy weighting, whilst a failure to hand over relatively insignificant documentation may be given less.

Factors to Consider:

- Outstanding payment of contractors;
- Incidence of defects and failure to rectify defects on a previous project;
- Failure to have appropriate insurances; and
- Any other matter which goes to the concept of fit and proper status - this list is not to be exhaustive.

Summary of General Issues

SCA (Qld) acknowledges there are issues outside of the body corporate sphere which are problematic with respect of development, however we note the significant complication around issues in a body corporate setting due to the communal, democratic nature of their governance. It is therefore critical we increase transparency around the history and tendencies of individuals in the development sector. We believe our proposals above will help achieve this.

2. Defects (Construction and Completion)

Introduction

SCA (Qld) acknowledges building defects are a problem within all types of construction, however, believes it is a much more significant problem in multi-storey buildings than detached dwellings. SCA (Qld) is a member of the Ministerial Construction Council and the relevant sub-committee on reform of the Queensland Home Warranty Scheme. SCA (Qld) has made a submission to that Review on the expansion of insurance coverage above three storeys. With high density living being increasingly the norm significant scrutiny must be placed on construction of these kinds of properties.

We will split our submission on these issues below into two sections. The first, and most pressing issue is the need for additional insurance. We largely restate our submission to the Review into the Queensland Home Warranty Scheme in this regard. Secondly, we will examine the various other proposals raised by the Panel's Discussion Paper and particularly how to ensure that the prevalence of defects is minimised throughout construction.

a) Additional Insurance

SCA (Qld) firmly believes there is a need for consumer protection for owners of lots in buildings above three storeys. This could be achieved through expansion of the Queensland Home Warranty Scheme (henceforth the "Scheme"). The most comprehensive study done into the topic of building defects in Australia in multi-owned (strata or body corporate) was undertaken by Griffith and Deakin Universities. Titled "An examination of building defects in residential multi-owned properties"⁴ (the Report or Deakin Defects Report) and authored by academics Dr. Nicole Johnston and Assoc Prof. Sacha Reid, the

⁴ Johnston, Nicole and Reid, Sacha 2019, An examination of building defects in residential multi-owned properties, Deakin University, [Melbourne, Vic.].

Deakin Defects Report outlines the serious problems facing building standards in this section of the built environment.

Whilst there is no uniform definition of a defect in academia or industry, recent works have tended to reference the following definition published by David Watt:

“a failing or shortcoming in the function, performance, statutory or user requirements of a building, and might manifest itself within the structure, fabric, services or other facilities of the affected building.”⁵

It is important to understand the magnitude of this problem that is building defects in strata properties. The Deakin Defects Report examined 212 building audit reports from New South Wales, Victoria and Queensland and found over 3000 line item defects.⁶ 85% of buildings analysed had at least one defect and the average number of line item defects was 14. The Deakin Defects Report cited⁷ the following core “construction systems” in a high-rise building to inform their analysis also:

- 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
- Access and Egress

The Deakin Defects Report also found that on average, almost six “construction systems” were affected by defects in each building. This data is concerning to anyone who has bought or is considering purchasing in a strata property.

The Deakin Defects Report identifies two basic reasons for defects. These are design issues and defects arising in the construction phase.

Research cited⁸ by the Deakin Defects Report into this topic noted that organisational factors were perhaps the key factor driving defects in this type of construction work. Specifically, the following quote cited in the Deakin Defects Report perhaps best summarises the issues causing defects.

“ Such factors include: instability in the client organisation (key people often change), client’s project control (day to day plans often change), late visits to site and people changing their minds, time pressure, composition of the project organisation (those who had worked together before did better), cost pressure (lowest bid wins strategy), support to the site organisation (lack of support), and motivation (lack of activities aimed at motivating)⁹. “

⁵ David Watt, Building pathology: principles and practice (Blackwell Publishing, 2nd ed, 2007) 96.

⁶ Johnston, Nicole and Reid, Sacha 2019, An examination of building defects in residential multi-owned properties, Deakin University, [Melbourne, Vic.].

⁷ Australian Building Management Accreditation (ABMA), *ABMA Building Management Code* (2018) Queensland Edition.

⁸ Monika Jingmond and Robert Agren, ‘Unravelling causes of defects in construction’ (2015)

⁹ Jonathan Drane, ‘Building Defects: How can they be avoided? – a builder’s perspective’, paper presented at the Strata and Community Title in Australia for the 21st Century 2015 Conference, Gold Coast, Australia.

None of these factors are likely to have an immediate and industry wide remedy. If anything, prevailing economic and population pressures in the state of Queensland indicate they are potentially going to be exacerbated in the construction industry in coming years. Despite these pressures causing issues within construction companies and sites, it is consumers who feel the effects.

Strata owners often have close to their entire net worth invested into their property. It is unacceptable to leave them without appropriate insurance coverage, particularly in the present environment. Several construction companies in Queensland, due to a variety of market factors have recently entered into liquidation.¹⁰ As an organisation we have received anecdotal feedback that many apartment buildings constructed recently by some of these builders are already facing issues given the QBCC will not issue a direction to rectify to a company in liquidation. Owners in these buildings now face significant financial hardship to rectify what can be serious defects through no fault of their own. This is unjust and unfair. Given the recent turmoil in the construction industry and the abovementioned statistics, this is likely going to be a growing problem.

Without appropriate consumer protections, the only option for an affected strata community is expensive, time consuming and stressful litigation. Funding litigation can be an issue for schemes, particularly those with a small number of residences. At present, a body corporate attempting to “sue” a builder or developer has the legal issue of proportionate liability, a lack of sophistication when compared with the builder or developer in terms of resourcing and of course the potential winding up of a given defendant. All these factors mean the current framework is manifestly inadequate in protecting the rights of consumers.

Consumers have protection from defective goods and services through most sectors of the economy. Most professions mandate professional indemnity insurance and the Australian Consumer Law¹¹ protects everyday people from defective goods. There is no such recourse for what a person’s biggest purchase is often - a property in a new development which is over three storeys. Apartments are increasingly the only option for many members of the Queensland community and to leave what often amounts to a huge portion of their net worth and substantial time, effort and emotional energy without coverage is unacceptable. This needs to change. It needs to be understood that homes are an important source of stability and community for people, one that cannot necessarily be quantified. This should warrant appropriate consideration by policy makers.

Building defects cause emotional and personal strain which cannot be quantified but is no doubt real. This is not simply speculation, the New South Wales Legislative Council Regulation of Building Standards, Building Quality and Buildings Disputes Report¹² (henceforth “NSW Report”) received submissions from owners regarding the emotional, personal and of course financial toll of building defects.

Submissions to the NSW report included the following excerpts relating to personal hardship faced by owners in affected strata schemes- these are just some of a plethora of examples:

“I am now out of pocket over \$550,000 (paid for by way of a mortgage) and I am still not living in my home due to major building defects, gross negligence and unreasonable delay on the builders’ part... This whole situation has left me with medically-diagnosed severe depression.”¹³

¹⁰ <https://www.9news.com.au/national/condev-probuild-privium-more-major-australian-construction-companies-will-fail-2022-insolvency-expert-predicts/907d2e0b-4e56-4040-93e0-14295e8c5383>

¹¹ Competition and Consumer Act 2010

¹² <https://www.parliament.nsw.gov.au/lcdocs/inquiries/2540/PAC%20-%20Regulation%20of%20building%20standards%20quality%20disputes%20-%20Final%20report%20-%20Report%20no%206.pdf>

¹³ Submission 60, Name suppressed, p 1. (NSW Report)

"I will start by stating that words and numbers on a page cannot adequately convey the human pain and suffering caused, firstly by the handful of individuals responsible for this sorry affair but also the environment within which they were allowed to operate.¹⁴"

"Besides the financial cost, there is also a real hard to measure negative impact on time, health, relationships and ultimately quality of life in the past 8 years for all concerned.¹⁵"

Given the above, the socially responsible policy is to increase consumer protection, so that experiences like this don't become widespread in Queensland. Information from the Deakin Defects Report indicates that there is little variation between the rates of building defects in Queensland and New South Wales in the context of multi-owned dwellings.¹⁶ Without added consumer protection, this is a real possibility.

It is important to note the economic consequences of a lack of building defect insurance at a macro level. Consumer confidence in the New South Wales high rise apartment sector was significantly dampened by high profile instances of building defects. Valuers estimated the Opal Towers incident to have diminished values across the New South Wales high rise apartment sector by 16 per cent.¹⁷ Markets rely heavily on sentiment for consumers. There is little to suggest a similar high profile incident of high rise building defects in Queensland wouldn't diminish confidence in a similar fashion. By guaranteeing insurance coverage, Queensland will protect itself from such a market crash.

It is virtually impossible to argue that the costs of premiums will approach 16 per cent of asset value even if the introduction of insurance cover is the only reform made. This means purchasers will likely be better off by having guarantees as to the construction of their building. Confidence in the Queensland Building sector should take priority. On a "net" basis owners will potentially be better off for paying a premium and having confidence in their asset and its resale value. A 16% or similar loss in asset value would leave consumers broadly in a significantly worse position with reference to their "balance sheet" than if they simply paid an insurance premium. It only took two buildings across the enormous New South Wales market to cause what is a very large loss in values across the entire market.

All the above factors indicate the serious need for expanded consumer protection. SCA (Qld) will support all mechanisms which enhance confidence in the high-rise building sector. We are open to any policy levers which can enhance confidence in the sector.

If the Government is to maintain or strengthen its overarching planning policy favouring strata development, it is important reforms reflect this with respect to construction. Carving out an increasing share of Queenslanders from protection for their largest asset is contrary to the overarching goals of the Scheme.

Defining the Scope of Additional Insurance

SCA (Qld) believes that consumer protection cover should be extended primarily to cover structural issues for new buildings. Subsequent renovations would be the responsibility of either the body corporate or the relevant owner/owners. SCA (Qld) believes that the vast majority of problems are in new builds and often can be apparent upon appropriate expert inspection within the first 12 or 24 months following completion.

SCA (Qld) believes that the actions of the original owner often are the substantive cause of the most major issues. SCA (Qld) therefore believes expansion of consumer protection should in the first

¹⁴ Submission 141, Name suppressed, p 1. (NSW Report)

¹⁵ Submission 51, Name suppressed, p 4 (NSW Report)

¹⁶ Deakin Defects Report, p 21

¹⁷ <https://www.abc.net.au/news/2019-01-21/opal-tower-effect-to-hit-sydney-apartment-prices/10727268>

instance be focused on original construction and specifically structural issues created during the time of the control of the original owner. Any expansion to include subsequent renovation work should be a step following on from enhancing protections for structural defects in new builds.

We note that subsequent renovation work can be negotiated to have appropriate insurance with respect to building contracts. We believe, as a priority, that ensuring new builds are covered should be the focus and a “first step.”

SCA (Qld) believes any and all methods of expanding consumer protection in this space need to be considered. SCA (Qld) believes the Scheme has significant positives to help consumers, most particularly its “first resort” nature. In other states, pursuit of the building contractor through civil litigation or otherwise adds expense, often borne by the claimant owner which significantly reduces the amount of money available for rectification.

The Scheme as it stands is an effective option to ensure coverage. Given it is both mandatory and run on a not for profit basis, risk can be effectively spread through expansion of the Scheme.

Financial Implications

SCA (Qld) acknowledges that for a variety of reasons premiums on a high rise building will likely be substantially higher per dollar value of work than a detached house, duplex or other “low rise” building. At present, based on the data available from Government, the Scheme is sustainable. SCA (Qld) understands that the risk will be greater for taller buildings and present premium rates may need to be increased. The net benefits of this outweigh the costs in the opinion of SCA (Qld).

We acknowledge that there will likely be an overall increase in costs; however, we would view the resultant restoration in confidence in the sector as being worth the cost. The financial implications for Mascot Towers, where the builder has gone into liquidation, have been severe. Owners face a loss of 70-80% of the purchase price, ongoing legal and strata fees and in many instances bankruptcy.¹⁸ Whilst it may not always make sense for an individual to take out an insurance for a particular event, on a macro scale, large rates of non-insurance can be catastrophic.

We believe the need to pay for insurance will over time encourage standards to be higher. This, coupled with other reforms we will refer to later in this submission mean that over the long-term premiums are likely to be able to be controlled. The mandatory nature of the Scheme means any premium increases can be equitably distributed.

It is also important to note last financial year, roughly 19% of Queensland State Government revenue was from transfer duty.¹⁹ The bulk of this was from property transactions and amounts to billions of dollars. Strata owners also paid almost \$40 million in taxes last financial year on their insurance premiums.²⁰ It would be fair and reasonable to reinvest a portion of these revenues in ensuring confidence in building for strata owners.

Queensland had significant financial windfall from interstate migration and an increased value of property transactions over the course of the COVID-19 pandemic. This trend is set to continue.²¹ We note the abovementioned costs to values in Sydney. Similar falls in the Queensland market to those brought about by Mascot and Opal Towers in New South Wales would have a disastrous effect on state revenues. We therefore urge the State Government to view any investment from them as an investment in securing revenue from property taxation and would suggest this approach is protective of their interest.

¹⁸<https://www.sbs.com.au/language/english/owners-in-last-ditch-attempt-to-recoup-losses-two-years-after-mascot-towers-evacuation>

¹⁹ https://budget.qld.gov.au/files/BP2_4_Revenue.pdf

²⁰ Johnston, N., Lee, A., Mishra, S., Powell, K., Bowler- Smith, M and Zutshi, A. (2021) A data-driven holistic understanding of strata insurance in Australia and New Zealand. Deakin University

²¹ https://population.gov.au/sites/population.gov.au/files/2021-12/population_statement_2021.pdf

Given new build strata will likely make up a huge portion of development in Queensland in coming decades, this is a no brainer and any cost to Government in underwriting the expansion of the Scheme will likely pay for itself in the long run.

Other forms of Insurance for Multi-Unit Dwellings

a. Government bond Scheme:

SCA (Qld) believes that the idea of a Government bond Scheme is one worth exploring. It must be rigorous and backed by independent assessment of building defects. There should be sufficient safeguards in any regime to ensure the inspections are thorough and independent of the developer.

SCA (Qld) believes a bond Scheme would need to be accompanied by a mandatory inspection regime at specific intervals, ideally 12 and 24 months after practical completion by a structural engineer. SCA (Qld) believes most structural defects will be found by an appropriately qualified engineer carrying out a thorough onsite inspection at these landmarks post construction. The Bond should be a percentage of construction cost sufficient to cover significant remediation works and released in stages as approvals around structural fit for purpose are given through these mandatory inspections. We believe that any bond Scheme must operate with a view of 'consumer first,' and if necessary, be punitive upon developers.

b. Decennial Liability Insurance

SCA (Qld) believes a mandatory decennial liability for developers and accompanying insurance has the potential to be an effective remedy for the current building crisis in high rises. Decennial liability insurance is a product which has many benefits and would restore long term confidence in the sector also. SCA (Qld) believes for the avoidance of doubt that the strict liability in the French system, where there is no obligation to prove fault should be applied to original owners if this type of insurance is introduced to Queensland.

The French Civil Code introduced the concept of decennial liability at its inception for construction work.²² This means that if significant structural defects in a building manifest themselves in the first ten years of a building life cycle, the builder is obliged by law to rectify.

Obviously, buildings built in the 1800's lacked the complexity and technicality of those built today. Decennial liability insurance came about as buildings became more complex in the 20th century- as the issue of bankruptcies or other inability by builders to rectify became an issue regarding more complex buildings. Decennial liability insurance in France is designed with the overarching goal of confidence in the building sector.

Under the French system, the ten year period for major defects, damage or partial or total collapse begins on the date of construction works and protection by this liability period is transferred to any subsequent owner.²³ This means any defects which manifest in the first ten years of a building life cycle must be rectified. If there is no capacity for the contractor to rectify, the insurance is used to fund works. Government strictly regulates premiums and there is no allowable limit on cover by law.

This type of system has operated very successfully around the world including in many former French colonies.²³ In France, premiums are generally 0.8% to 2% of construction cost.²⁰ In France, it is a criminal offence not to take out this type of insurance for a construction contractor. Government strictly regulates premiums and there is no allowable limit on cover by law. If a defect is identified and the construction contractor is still available, they are obligated to rectify.

²² <https://ferrer.law/blog/construction/decennial-liability-and-decennial-liability-insurance-the-only-road-to-the-promised-land-for-the-new-south-wales-building-crisis>

²³ https://constructionlegal.com.au/wp-content/uploads/2020/03/jrippon_bcl_v35_pt5.pdf

The decennial liability product as it applies in France would work in the Queensland context quite well. Given Queensland has a government monopoly on construction insurance, issues which have been barriers to this type of product in other jurisdictions such as underwriting, and reinsurance should not be as much of a factor.

SCA (Qld) feels, a first resort, mandatory decennial liability scheme, if implemented, will ensure significantly improved building standards, confidence in the property market and will be affordable. It is important to note that in the United Kingdom, decennial insurance premiums have come down over time after their introduction²¹. This indicates that over time, the prospect of liability improves building quality, culture, and overarching confidence. There is nothing to suggest this would not be the experience in Queensland.

SCA (Qld) further notes we will refer to and recommendations regarding the liability or potential liability of head contractors. Ultimately, given the level of influence developers have on projects it is supported by SCA(Qld) to give them higher levels of liability for outcomes.

We also finally note the successful roll-out of decennial liability insurance in New South Wales²⁴ in recent months and hope this demonstrates that such a product can be successful in Australia to the panel.

b) Construction Processes and Consultants

Extend the Chain of Responsibility to Developers

SCA (Qld) do not believe creating a cause of action against original owners with respect of non-conforming building products is going to be a valuable consumer protection in the context of multi-unit dwellings. SCA (Qld) believes that liability and an obligation to rectify ought to be something considered in the context of multi-unit developments. Whilst we acknowledge this may at present be difficult, particularly in the context of project or special purpose vehicles, we believe that integrating responsibility with a strata hub, which includes a register of developers and their Director ID's, individuals may more easily be made to rectify if obliged to do so by law. This may also work well in concert with the abovementioned decennial liability product.

Whistleblower Protections

SCA (Qld) do not believe whistleblower provisions or protections on their own will have significant impact. SCA (Qld) believes stronger proactive oversight, greater responsibility being legislated upon original owners and greater oversight of consultants and other professionals working on projects is needed.

Certifiers and Other Consultants

Certifiers generally need more robust and significant oversight according to a substantial volume of feedback from SCA (Qld) members. Feedback from members of SCA (Qld) involved in these issues is that the Government should take stronger action to ensure that commercial interests and other pressures do not prevent building certifiers from acting in the public interest.

Building certifiers face practical and commercial pressures to provide client advice that may conflict with their compliance and enforcement roles as independent checking professionals – the concerns are:

- conflicts of interest;
- disengagement of building certifiers;
- confusion over the building certifier role;
- the standard of building certifier work; and

²⁴ <https://www.nsw.gov.au/housing-and-construction/strata/ten-year-defect-insurance-for-apartment-buildings>

- enforcement action.

SCA (Qld) believes appropriate oversight of these factors, particularly relationships with developers, need to be addressed. In the industry, there is a view that certifiers can often have conflicted priorities owing to commercial relationships with developers. SCA (Qld) believes this needs to be addressed through a comprehensive auditing system with respect to the activities of building certifiers.

Such a regime could consist at the outset of the QBCC examining the practices of certifiers who have signed off on projects where the QBCC has been forced to issue a direction to rectify for significant defects. If it is found by the QBCC upon investigation that the defects ought to have been picked up, then the regulator should be empowered to issue fines or other punishment in a similar fashion to how it operates with licensees.

SCA (Qld) also sees scope for the regulation of how certifiers interact with developers like how auditing practices are regulated by the *Corporations Act* (2001) (Cth). Specifically, section 324DA which reads:

(1) If an individual plays a significant role in the audit of a listed company or listed registered scheme for 5 successive financial years (the extended audit involvement period), the individual is not eligible to play a significant role in the audit of the company or the scheme for a later financial year (the subsequent financial year) unless:

(a) the individual has not played a significant role in the audit of the company or the scheme for at least 2 successive financial years (the intervening financial years); and

(b) the intervening financial years:

(i) commence after the end of the extended audit involvement period; and

(ii) end before the beginning of the subsequent financial year.

Similarly drafted legislation around time periods or even the number of projects certified without interruption by a specific certifier may have the effect of removing any real or perceived conflicts from their role.

SCA (Qld) also believes on-site inspections must be made mandatory for certifiers to undertake via legislation, and that photographic proof of this inspection must be mandatory. This should be accompanied by a mandatory statutory declaration indicating the attending certifier attended on site, inspected and took the photos. This should also be part of the documentation input into the proposed strata hub.

Overall, SCA (Qld) would like to see more robust regulation of certifiers, appropriate assurance of on-site physical inspection and a continuation of the otherwise robust licensing regime Queensland has in place for tradesmen. These reforms would work in concert with new construction insurance and executive responsibility for head contractors. This comprehensive suite of reforms should work in concert to minimise defects at the source, whilst also covering innocent owners when things do go wrong.

3. Sales and Handover

a) Voting Restrictions

SCA (Qld) believes the option suggested by the Discussion Paper of banning developers (and their associates) from voting for six months is insufficient. SCA (Qld) would support a total ban on Developers and their associates being able to vote on any body corporate decision at all once sales of the lots begin to occur. The ability of developers to influence decisions is often an irreconcilable conflict of interest between lot owners writ large and the developer themselves and their associates. Language for drafting

such a provision could come from New South Wales²⁵ strata legislation. The relevant provision below could be used as a starting point to ensure the integrity of body corporate governance.

32 Persons who are not eligible to be appointed or elected to strata committee.

(1) The following persons are not eligible for appointment or election to a strata committee or to act as members of a strata committee unless they are also the owners of lots in the strata scheme—

(a) the building manager for the strata scheme,

(b) a person who acts as an agent for the leasing of a lot or lots in the strata scheme to tenants,

(c) a person who is connected with the original owner of the strata scheme or the building manager for the scheme, unless the person discloses that connection at the meeting at which the election is held and before the election is held or before the person is appointed to act as a member,

(d) any other person prescribed by the regulations for the purposes of this section.

(2) An owner of a lot in a strata scheme who was an unfinancial owner at the date notice was given of the meeting at which the election of a strata committee is to be held and who did not pay the amounts owing by the owner before the meeting is not eligible for appointment or election to the strata committee.

(3) A person who becomes ineligible for appointment or election to a strata committee after being appointed or elected to the strata committee must disclose that fact to the secretary or chairperson of the owners corporation as soon as possible after becoming aware of that fact.

(4) A disclosure by a person under this section, other than a disclosure that is made at a meeting of an owners corporation or strata committee, is to be made by written notice given to the secretary or chairperson.

b) Address Conflicts of Interest (Service Contracts)

SCA (Qld) has a firm view that developers should not be able to bind bodies corporate to extensive service contracts during their period of control. Whilst this is often brought up in the context of management rights, there are instances where we receive member feedback regarding other types of service contracts being entered into and binding the body corporate on unfavorable terms. These include waste management, cleaning and storm water drainage maintenance contracts. We do not believe this list is exhaustive.

The overarching SCA (Qld) position on this issue is as follows:

1. Original owners / developers should not be permitted to put in place long-term contractual arrangements (3 + years) that would bind the future body corporate. It should be left for a body corporate to decide for itself the contractual arrangements for the maintenance of its common property that are in the best interests of the owners of lots in its scheme. Other consumer protections are also needed including:

²⁵ Strata Schemes Management Act 2015 (NSW) S 32

- a. section 3 of the *Body Corporate and Community Management (Accommodation Module) Regulation 2020* (Qld) (the “Accommodation Module”) should be amended to better define what is meant by lots in the scheme being, or intended to be, “*predominantly accommodation lots*”, by clarifying that “predominantly” means 75%;
 - b. the definition of “accommodation lot” in section 3(3) of the Accommodation Module should be amended so it no longer extends to the lease or letting of a lot for accommodation for long term residential purposes;
 - c. in the absence of a removal of the powers of an original owner to bind a body corporate to a long term contract; a body corporate’s right to undertake a statutory review (“review provisions”) of a service contract entered into during the original owner control period should be improved, by including provisions:
 - i. allowing a committee of a body corporate to make the decision to request a review;
 - ii. extending the review to include provisions concerning whether the total term of the service contract is appropriate for the scheme, having regard to whether the intention that the scheme would consist of “*predominantly accommodation lots*” has come to pass;
 - iii. allowing the review to extend to all terms of the contract, not just the functions, powers and remuneration of the service contractor;
 - iv. making the body corporate’s final decision binding on all contracted parties unless overturned under the dispute resolution process;
 - v. to extend the review period from three years to five years from when the contract was entered into; and
 - vi. allowing the right of a body corporate to request a review of a service contract to survive a transfer of the service contract, even if the transfer occurs outside the original owner control period.
2. The type of resolution needed to enter into a service contract for a term of more than three years, or to add a right or option to extend or renew a service contract for more than three years, should be by a special resolution.

SCA (Qld) believes these reforms are absolutely critical to ensure appropriate consumer protections for lot owners purchasing off the plan.

c) **Budget Projections**

SCA(Qld) believes enhanced disclosure provisions were required for those who prepare initial budgets. Whether the individuals are surveyors, the developers themselves or body corporate managers. Initial budgets must be signed off on by an independent person. Whoever drafts the initial budget should be strictly liable with respect of the budget. SCA (Qld) believes a cause of action should be inserted into s125 of the BCCMA with respect of deficient or inaccurate budget forecasting. This cause of action should be simple, and adjudicators empowered to make the developer pay the shortfall back to the body corporate. The process needs to be simple to favour lot owners to keep original owners and their consultants culpable.

Conclusion

SCA (Qld) supports holistic reform with respect of the development sector and believes these reforms need to be implemented together to ensure they work best to protect consumers. SCA (Qld) believes that reforms in this space need to be comprehensive and holistic, to ensure the best possible outcomes for consumers. We thank the panel for the opportunity to participate in this review.

Kind regards,



Laura Bos (General Manager (SCA (Qld)))