



## ***Review of the *Domestic Building Contracts Act 1995****

***Strata Community Association (Vic) Submission***

**27 February 2024**



## Introduction

Strata Community Association (Vic) Ltd is the peak body for the Owners Corporation sector, which comprises commercial, industrial, and residential properties ranging from two units in a suburban street to many hundreds of units in inner city apartment buildings. Owners corporations represent property valued at over \$400 billion and encompass commercial, retail, lifestyle resorts, retirement villages, car parks, storage facilities, industrial and, increasingly, mixed developments. More than \$1 billion per year is collected and spent within the sector. It is estimated that around 1.6 million Victorians – a quarter of the state’s population – either live in, or own property in, an owners corporation.

## Background – Strata Community Association (Vic)

SCA Victoria was established in 1990, it succeeds Owners Corporations Victoria (OCV) and Institute of Body Corporate Managers Victoria (IBCMV). SCA (Vic) members comprise a significant percentage of all professional owners corporation managers, with several hundred members managing upwards of 450, 000 lots. SCA (Vic) Associate members are industry suppliers, including waste management providers, Essential Safety Measures managers, quantity surveyors, insurers, lawyers, accountants, facility managers, property valuers, building maintenance and tradespeople. Members benefit from representation, support, advice, and promotion. With Continuing Professional Development (CPD), Best Practice Guidelines on regulatory and legislative amendments, updates on VCAT determinations and emerging issues, SCA members are best placed to manage OCs and empower Lot Owners and occupiers.

In Victoria, the *Owners Corporations Act 2006* defines an Owners Corporation as a ‘body corporate which is incorporated by registration of a plan of subdivision or a plan of strata or cluster subdivision.’ The individual Lot Owners form a collective known as an Owners Corporation (OC). This is a legal entity which must comply with its governing legislation and enabled regulations. The responsibility to maintain common property and shared services is that of the owners corporation.

Owners corporations can choose to appoint a registered manager who will act on their direction, including engaging contractors for maintenance and repairs, on behalf of the OC. The manager assists the OC to meet these and other obligations. As part of the Annual General Meeting, Lot Owners collectively agree on a budget to fund ongoing maintenance and shared service costs. Items agreed can include the management fee, caretaking costs including gardening, utility charges, repairs to essential services, insurance premiums and waste management expenses. These are funded through fees/levies.

**The growing number of Victorians living and working in strata titled arrangements necessitates an increasing focus on regulatory responses for solutions to concerns that are faced on a daily basis, including: support for issues arising within strata communities, the cost of housing, urban renewal, sustainable living, regulatory complexity, unlimited liability risks in relation to volunteer strata committee members, building defects and skills shortages.**

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## Review of the *Domestic Building Contracts Act 1995*

### What is a Major Domestic Building Contract?

#### **1. Should there be any changes to the monetary threshold for a MDBC?**

SCA (Vic) is supportive of raising the monetary threshold for a MDBC to \$16,000 to bring this into line with the Domestic Building Insurance Ministerial Order (DBIMO) made under section 135 of the *Building Act 1993* by the Minister for Planning. Otherwise, SCA (Vic) is open to consideration of further increasing the threshold provided it is reasonable for – and fairly balanced between – the interests of builders and consumers.

#### **2. Should there be additional requirements for domestic building contracts that fall under the MDBC threshold? *For example, extending any of the MDBC requirements to apply to all domestic building contracts.***

SCA (Vic) would support extension of the MDBC requirements to apply to all domestic building contracts to include that only a registered building practitioner is permitted to enter into domestic building contracts and that the builder must provide the building owner with a contract information statement before entering into the contract.

### Limitations on deposit amounts

#### **3. Should there be any changes to the requirements around deposits, including to the monetary thresholds?**

SCA (Vic) believes the current requirements around deposits, including monetary thresholds, is satisfactory and offers no recommendation to adjust these settings.

#### **4. Should there be any changes to requirements around insurance as it relates to deposits or other payments taken prior to the commencement of domestic building work?**

SCA (Vic) is of the view that no changes to requirements around insurance are necessary as it relates to deposits or other payments taken prior to the commencement of domestic building work, though we have called for Domestic Building Insurance (DBI) to be extended to all residential buildings above three storeys in height.

## Cost escalation clauses

### **5. Should cost escalation clauses be permitted in Victoria? Please provide further information about your answer.**

SCA (Vic) is of the view that cost escalation clauses are a valuable protection for builders due to rising costs and unpredictable challenges in the building sector.

For the past 12 months, [input prices to house construction rose 4.4%](#).

According to the Australian Bureau of Statistics (ABS), while input prices to the house construction industry recorded [no change in the September quarter 2023, this was preceded by sixteen consecutive quarterly price rises since December quarter 2019](#).

In light of the above, SCA (Vic) believes it is prudent to allow for cost escalation clauses to assist builders in a difficult economic climate.

### **6. Is the current \$500,000 contract price threshold for cost escalation clauses appropriate? Please provide further information about your answer.**

SCA (Vic) believes the current \$500,000 contract price threshold for cost escalation clauses is not appropriate on the basis that it no longer reflects the reality of building costs and is restrictive to those seeking to enter the property market.

SCA (Vic) notes that, according to the latest PropTrack New Homes report, during the past 12 months [the number of 1-bed apartments on the market has decreased by 16% while the number of apartments under \\$500,000 has decreased by 40%](#). Consequently, PropTrack has theorised that [‘as the cost of construction is so high, it is hard to make a profit on smaller, cheaper properties and therefore, fewer are being built, and more expensive properties that provide a better yield are replacing them.’](#)

As this can relate to cost-of-living pressures as well as housing affordability, there is a clear interest in rectifying this situation to help ensure a stable supply of residential properties at the lower price point of the market.

Accordingly, SCA (Vic) is supportive of the contract threshold for cost escalation clauses being reduced to a level which would encourage more builders to engage at the lower price point of the property market as well as providing the potential to offer a higher degree of certainty to builders and consumers that projects can be completed.

### **7. Should any changes be made to the operation of cost escalation clauses? Please provide further information about your answer.**

SCA (Vic) is broadly satisfied with the operation of cost escalation clauses but is supportive of cost escalation clauses which are specific enough to provide detail as to potential areas of cost increase (such as particular items or labour costs).

## Fixed price contracts

### **8. Should there be any changes to the restrictions on cost-plus contracts, prime cost items or provisional sums? Please provide further information about your answer.**

#### *Cost-plus contracts*

Cost-plus contracts provide more protection and flexibility to builders, which is important within an economic climate that provides increasing uncertainty and inflation on residential project delivery. Indeed, a reliance on fixed-price contracts is widely seen as [a contributing factor to building companies \(such as Porter Davis\) going into liquidation](#).

Numerous factors attribute for why building costs have risen in Victoria. These include [infrastructure cuts, a residential ramp up and an equipment cost crunch](#). More broadly, [construction costs have risen by at least 32% in Melbourne over the past three years](#).

Accordingly, SCA (Vic) is broadly supportive of cost-plus contracts.

There are, however, areas in which cost-plus contracts could be reformed. For example, the increase in 2017 of the previous threshold price from \$500,000 to \$1 million could be reviewed with consideration given to lowering the threshold again. The threshold could be reduced to its previous figure of \$500,000 or an alternative figure below \$1 million (which is reached through appropriate consultation with stakeholders). Reducing the threshold would restore greater flexibility to the formation of agreements between builders and consumers.

Additionally, SCA (Vic) believes there should be greater scope for variance in how contracts are structured to reflect the type of building being undertaken (eg: home projects or apartment projects) and additional consumer protections to allow for more transparency on flexible pricing in the event of delays or further cost escalation.

#### *Prime cost items*

A prime cost item is an item that either 'has not been selected, or whose price is not known, at the time a domestic building contract is entered into and for the cost of supply and delivery of which the builder must make a reasonable allowance in the contract.'<sup>1</sup>

Typically, these items are fixtures and fittings which a builder will make an allowance for without knowing the specific cost.

SCA (Vic) is of the view that the restrictions on prime cost items are mostly acceptable in current form.

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<sup>1</sup> *Domestic Building Contracts Act 1995* s3

## Fixed price contracts (continued)

### *Provisional sums*

A provisional sum is 'an estimate of the cost of carrying out particular work...under a domestic building contract for which a builder, after making all reasonable inquiries, cannot give a definite amount at the time the contract is entered into.'<sup>2</sup>

The reasonableness element of the aforementioned section requires that the builder provides a provisional sum which has been calculated 'with reasonable care and skill taking account of all the information reasonably available at the date the contract is made, including the nature and location of the building site.'<sup>3</sup>

In light of the above, SCA (Vic) is satisfied that current restrictions on provisional sums are satisfactory.

### **9. Should there be any changes to the requirement for building contracts to be a fixed price? Please provide further information about your answer.**

SCA (Vic) acknowledges that research has indicated [82.5% of Australian builders use fixed-price contracts, based on the ability to deliver higher gross margins even with material price increases, in preference to the perceived security of a cost-plus contract](#). This is in contrast to other jurisdictions such as [New Zealand, Canada and the United States in which the majority of contracts allow for rising costs](#).

However, SCA (Vic) is of the view that fixed price contracts have the potential to cause considerable strain on the construction industry. It has been estimated that [almost a quarter of contracts in the residential building sector are on fixed price terms](#) which may have significantly contributed to the collapse of building companies.

SCA (Vic) would, therefore, generally support measures which allow builders to adjust fixed-price contracts in the case of demonstrable cost blowouts. Such measures would need to be carefully calibrated to balance the challenges faced in the residential construction industry with safeguards for consumers to protect against unreasonable cost escalations.

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<sup>2</sup> Ibid

<sup>3</sup> *Domestic Building Contracts Act 1995* (Vic) s20(2)



### Progress payment stages

**10. Are the progress payment provisions in the DBC Act fit for purpose for all types of construction methods? Please provide further information about your answer.**

SCA (Vic) believes a potential area of reform for the progress payment provisions of the DBC Act could be [adjusting the regular payment stages in the construction timeline](#) so that payments could be made more frequently by the consumer. Allowing for this would be more reflective of the contemporary costs and challenges of residential construction. It would also offer scope to reduce the risks of cost fluctuations faced by builders while increasing the likelihood of construction completion.

In addition, SCA (Vic) believes adjustments could be made to the DBC Act to reflect the [significant increase in recent and projected apartment construction](#). The DBC Act is mostly reflective of the construction process for a house rather than for the stages of apartment construction or multi-storey developments. As a result, SCA (Vic) would support adjustments to progress payment provisions which reflect the contemporary construction climate and incorporate the different timeline and stages which apartment and multi-story development projects have in comparison to house construction.

**11. Should any changes be made to the limitations on progress payments including the % paid for each stage? Please provide further information about your answer.**

SCA (Vic) is supportive of measured changes to the limitations on progress payments, including the % paid for each stage, in line with our response to the previous question.

In this respect, it may be beneficial to reduce the % payable while introducing more stages to the staged payment approach. Doing so may improve the cashflow available to builders to continue construction while also providing more confidence to consumers that construction will be satisfactorily completed.

**12. Should any changes be made to the building stages, including to their definitions? Please provide further information about your answer.**

SCA (Vic) is supportive of changes being made to the building stages, including their definitions, in accordance with our responses to the previous two questions.

Additional stages, again reflective of the contemporary residential construction process, would open the possibility to consumers to pay at shorter and more regular intervals during construction.

At this stage, SCA (Vic) does not offer specific detail on alteration to existing definitions and/or introduction of new definitions but reserves the right to do so in future should this area be open for further consultation by government.

#### Other matters covered in the DBC Act

### **13. Should single trades work (or certain types of single trades work) be considered domestic building work, to be made subject to DBC Act restrictions and to fall within Domestic Building Dispute Resolution Victoria (DBDRV)'s jurisdiction?**

SCA (Vic) is of the view that existing single trades work, provided under Regulation 7 of the DBC Regulations, should continue to not be considered domestic building work.

While SCA (Vic) is appreciative of the work which Domestic Building Dispute Resolution Victoria (DBDRV) undertakes, there is a risk expanding the scope of the DBDRV's jurisdiction further – particularly into single trades work – would generate additional workload and delays.

Already, there is evidence DBDRV is experiencing difficulty handling the disputes before it [with a 20% increase in demand for DBDRV services last financial year and an average wait time of three months](#).

### **14. Should there be any changes to what is considered domestic building work under the DBC Act?**

SCA (Vic) is of the view that attaching external fixtures (in particular, balcony balustrades) should be considered domestic building work. The basis for this consideration is [recent evidence presented by Cladding Safety Victoria \(CSV\) of issues and risks associated with balcony defects such as leaking balconies, balustrades and terraces causing structural damage](#).

Of significant concern in terms of defects in this space include water ingress, inadequate or no waterproofing, and design flaws, with [almost a quarter of buildings which received cladding rectification funding in Victoria found to have defective balconies](#).

As a result, SCA (Vic) believes it would be prudent to include the attaching of external fixtures into what is considered to be domestic building work.

#### Statutory warranties

### **15. Do the implied warranties need to be updated, including through the removal or addition of any warranties, or expanding their application to all developers? Please provide further information about your answer.**

SCA (Vic) supports updates to the implied warranties listed in Section 8 of the DBC Act via a clearer definition of what constitutes a 'defect' in order to provide greater protection for consumers.

This could be achieved by including language which encourages builders to choose a material or product which has an extended warranty period to provide cover and support in the event of any defect arising down the track.

In addition, consideration could be given to providing further specificity regarding the meaning of terms such as 'proper and workmanlike manner' to ensure an appropriate minimum standard of work. This language could be tailored to the specific work being undertaken, or more closely defined as a general category, to help reduce the amount of defects being seen across residential construction in Victoria by creating a higher standard of finish for the consumer.



## Consumer information products

### **16. Are the consumer information products effective? If not, how can they be improved?**

SCA (Vic) believes the consumer information products provided by Consumer Affairs Victoria (CAV) are mostly effective in conveying relevant considerations and courses of action for builders and consumers.

However, SCA (Vic) is supportive of the inclusion of fact sheets as well as anonymised relevant case studies for categories such as warranty issues, defects, and building disputes. Inclusion of such case studies could help builders and consumers to understand causes of action, rights and responsibilities, as well as pathways to resolve various issues in a more immediate and less abstract manner.

SCA (Vic) recommends that any relevant case studies be anonymised to protect the identities of parties involved or otherwise to create fictional examples based on real cases to help illustrate and relate complex matters.

### **17. Should there be a requirement for a standard form contract to be used for some or all domestic building contracts? For example, see the prescribed residential rental agreements made under the Residential Tenancies Act 1997.**

SCA (Vic) is supportive of the use of a standard form contract, publicly available on the CAV website, to be used for some or all domestic building contracts.

A standard form contract created by the Victorian Government would provide greater consistency in relations between contracting parties as well as providing benefits in terms of time saved in having to draft new contracts for individual transactions.

There would, however, need to be an appropriate balance struck in such a standard form contract to ensure that builders and consumers are not at risk of exposure to unfair contract terms.

### **18. Are there other changes or requirements that would help consumers and builders understand their legal obligations and rights? Please provide further information about your answer.**

SCA (Vic), in line with previous responses, believes that fact sheets, case studies and standard forms would be beneficial to helping consumers and builders understand their legal obligations and rights.

Further to this, SCA (Vic) is supportive of short informational videos – similar in content to materials produced by Fair Trading NSW – which can convey content succinctly and in audio/visual fashion across multiple languages to help consumers and builders understand their legal obligations and rights.

## Contents of a MDBC

### **19. Should there be any changes to what must be included in a MDBC? If yes, please provide further information about your answer.**

SCA (Vic) is open to consideration of an amendment to the standard MDBC to incorporate terms to require parties in dispute to undertake a process of mediation as the initial stage of any dispute resolution process.

This step may offer the prospect of successfully resolving matters before progressing to further stages of dispute resolution while also offering the potential to avoid additional workload for DBDRV. In addition, it would be another indicator that parties have taken reasonable steps to try and resolve their dispute before applying to DBDRV.

Any such amendment in this regard should be carefully calibrated to balance the rights and obligations of builders and consumers while also providing scope on what can and cannot be considered mediation.

### **20. What else can be provided to a consumer to help them to understand a contract including the rights and obligations of the parties to the contract?**

SCA (Vic) believes appropriate resources such as webpages, fact sheets, guides and videos should be made by the Victorian Government which adequately provide information on the rights and obligations of parties to a contract.

The content, where practicable, should be produced in plain language in order to increase its capacity to be broadly understood. While some aspects of rights and obligations will necessarily need to remain written at a technical/legal level, beyond those specific terms and concepts the text should be accessible for the consumer.

### **21. Should any changes be made to the allowances a builder must make for delays in time estimates?**

SCA (Vic) is mostly satisfied with the current allowances a builder must make for delays in time estimates.

However, SCA (Vic) proposes the addition of a clearly and specifically articulated allowance for delays in regard to supply-chain matters and the acquisition of products and materials necessary for construction. By adding this, the DBC Act can more accurately reflect the difficulties faced by builders in the contemporary economic climate and provide a more accurate understanding to consumers of expectations for delays.

### Cooling-off period

#### **22. Should the number of days allowed for a cooling-off period be amended? Please provide further information about your answer.**

SCA (Vic) is satisfied with the existing number of days allowed for a cooling-off period.

This period is broadly consistent with legislation currently in place in the states of [New South Wales](#), [Queensland](#), [South Australia](#), and [Tasmania](#).

While [Western Australia has no statutory cooling-off period for building contracts](#), this is not a position which SCA (Vic) is recommending.

#### **23. Are the outcomes when a building owner withdraws from a MDBC during the cooling-off period fair? If not, why and what changes could be made?**

SCA (Vic) considers the outcomes fair for when a building owner withdraws from a MDBC during the cooling-off period. This is on the basis that existing Victorian legislation is not entirely out of step with similar legislation found in other Australian jurisdictions (with examples in this response limited to Queensland and New South Wales).

In Queensland, for example, the retainable amount in the event of withdrawing from a building contract during the cooling-off period is 'an amount equal to any out-of-pocket expenses reasonably incurred by the building contractor before the building owner withdrew from the contract; and if the building owner withdraws from the contract under schedule section 35(1) - \$100.<sup>4</sup> These terms are consistent with those currently in place in Victoria.

With regard to New South Wales, the cooling-off period for withdrawal from a building contract allows that 'the holder of the contractor licence may retain out of any money already paid to the holder the amount of any reasonable out-of-pocket expenses the holder incurred before the rescission.<sup>5</sup> In addition, in New South Wales 'the party who rescinded the contract is not liable to the holder of the contractor licence in any way for rescinding the contract.'<sup>6</sup>

### Variations to plans and specifications

#### **24. Should any changes be made to the requirements for variations to a MDBC? Please provide further information about your answer.**

SCA (Vic) is satisfied with the existing requirements for variations to a MDBC and at this stage offers no recommendations to change these requirements.

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<sup>4</sup> *Queensland Building and Construction Commission Act 1991* (Qld) s38(8)(a)-(b)

<sup>5</sup> *Home Building Act 1989 No 147* (NSW) s7BA(3)(b)

<sup>6</sup> *Ibid* s3(d)

### Ending the contract

#### **25. Should any changes be made to when or how a building owner can end a MDBC?**

SCA (Vic) currently offers no changes to be made to when or how a building owner can end a MDBC.

#### **26. Should any changes be made to when or how a builder can end a MDBC?**

SCA (Vic) currently offers no proposals for changes to be made to when or how a builder can end a MDBC at this stage.

### Dispute resolution framework

#### **27. Is the current dispute resolution framework in the Act fit for purpose? Please provide further information about your answer and any specific examples.**

SCA (Vic) believes the current dispute resolution framework in the Act is mostly fit for purpose and commends the work DBDRV has done, and is doing, to help resolve disputes between parties regarding building matters in Victoria.

The most recent annual report from VCAT indicated, for the Building and Property List, a 'small increase in initiated cases, up 6% from 2021/22.'<sup>7</sup>

While there was evidence to suggest that DBDRV's work initially reduced applications to VCAT, as intended, subsequent evidence beyond those initial stages indicates VCAT has since seen an increase in building applications.<sup>8</sup>

#### **28. What improvements, if any, could be made to strengthen domestic building dispute resolution?**

In line with our response to question 19, SCA (Vic) believes consideration should be given to incorporate terms to require parties in dispute to undertake a process of mediation as the initial stage of any dispute resolution process and before proceeding to DBDRV.

This would provide an additional opportunity to resolve issues before engaging with the dispute resolution process more formally as well as potentially reduce the workload DBDRV experiences (which may also result in a reduction of wait times).

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<sup>7</sup> Victorian Civil and Administrative Tribunal, Annual Report 2022-2023, (pg. 18)

<sup>8</sup> Victorian Civil and Administrative Tribunal, Annual Report 2018-2019, (pg. 9)

Any other feedback

**29. Do you have any other comments on Parts 1, 2, 3, 4, or 6 of the DBC Act? Is the Act achieving its purposes and is it flexible enough to apply to protect consumers in the context of modern construction practices?**

SCA (Vic) believes the act is mostly achieving its purposes and is mostly flexible enough to apply to protect consumers in the context of modern construction practices. However, there is scope to modernise the Act based on a contemporary understanding of the stages and challenges associated with building projects in Victoria (specifically, apartments and multi-storey developments).

In addition, SCA (Vic) would caution that any changes to the DBC Act should be appropriately balanced between the rights and obligations of consumers and builders as much as is practicable. While consumer protection is paramount, this should not come at the expense of builders who provide a vital service to the Victorian community.

**For further information about this submission, please contact Josh Karpin, Policy and Advocacy Officer, [josh.karpin@strata.community](mailto:josh.karpin@strata.community)**