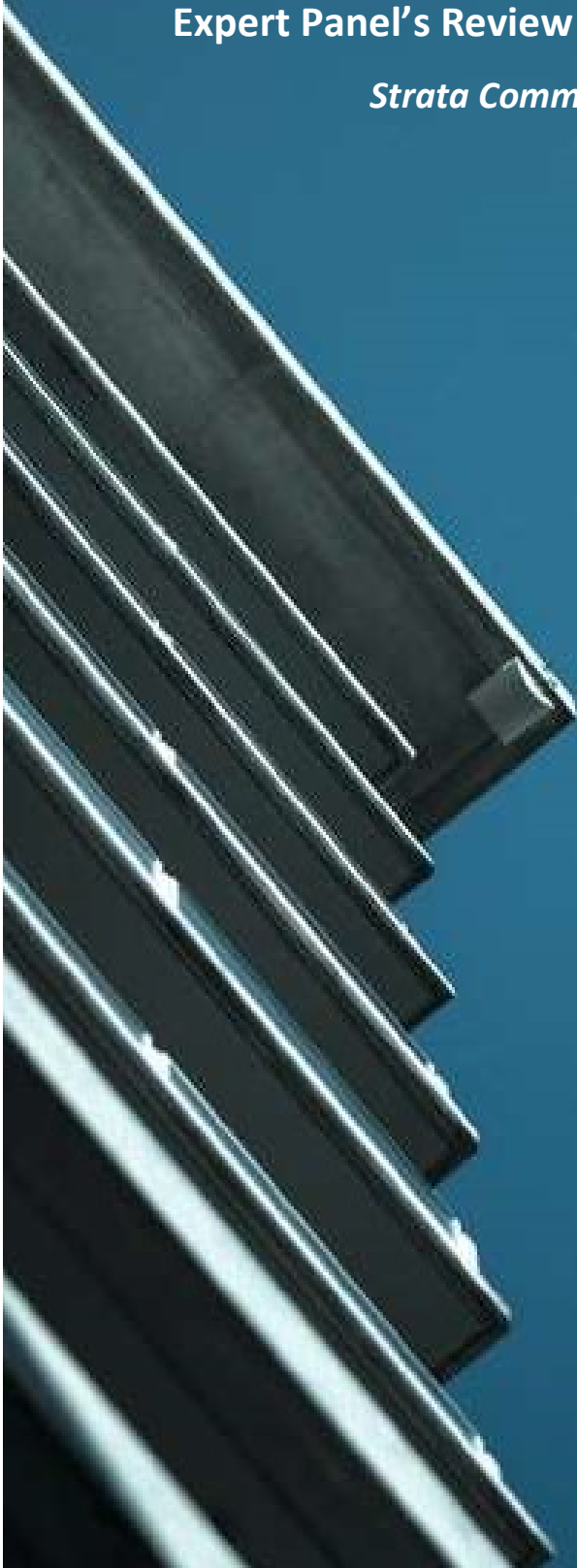


Expert Panel's Review of Victoria's Building System – Stage One

Strata Community Association (Vic) Submission

19 May 2021



Introduction

Strata Community Association (Vic) Ltd is the peak body for the Owners Corporations sector, which comprises 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 \$300 billion dollars 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. There are currently more than 85,000 active owners corporations in Victoria, covering more than 772,000 individual lots. It is estimated that around 1.5 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 more than 80 per cent of all professional owners corporation managers, with over 800 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. 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 responsibility to maintain common property and shared services is that of the owners corporation. 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.

For further information about this submission, please contact Shaun Brockman, National Policy and Advocacy Manager, SCA. Shaun.brockman@strata.community.

SCA (Vic)'s Response to the Expert Panel's Review of Victoria's Building System – Stage One

Summary

SCA (Vic) supports the establishment of this review as a means of ensuring that the rights of lot owners and their owners corporations (OCs), are protected and duly considered in future legislative and regulatory measures concerning the building and construction sector in Victoria.

Approximately 25 per cent of Victorians reside within strata-titled properties, such as apartments, townhouses, and other multi-unit dwellings. Therefore, it is crucial that future regulations concerning the areas outlined in the discussion paper are comprehensive and clearly defined in terms of addressing consumer rights, for which SCA (Vic) is a longstanding advocate.

SCA (Vic) have proposed a series of recommendations in this submission as a means of achieving these goals in the broader context of updated legislation concerning the Victorian building and construction sector due at the conclusion of the review.

SCA (Vic) Recommendations

Theme 1 – Practitioner Registration:

- SCA (Vic) recommend registration of applicable practitioners (Appendix 1) via membership of relevant industry bodies to ensure high standards and prevent defects within a building at handover to the greatest extent possible, and as a statutory requirement.
- SCA (Vic) proposes the establishment of a form of statutory warranty that protects the work of subcontractors, which should be legally enforceable.
- SCA (Vic) specifically recommends provision of enforcement powers for Domestic Building Dispute Resolution Victoria (DBDRV), to legally enforce warranties against sub-trades of concern to strata.
- SCA (Vic) advocate for the establishment of a lower-cost, direct course for consumers to seek effective legal redress in the event of building defects should be established, in the form of a relevant commission, or ability to litigate through VCAT against subcontractors where defects are found.
- SCA (Vic) strongly recommends that there is a strict duty to hand over warranties in the form of the Australian Building Manual Guideline.
- SCA (Vic) recommend that registration of other practitioners involved in modern fast track build and construction projects, such as project managers, should be categorised to best avoid ambiguities regarding proficiency and meeting of standards.
- SCA (Vic) recommends the use of an expanded BAMS platform to act as a portal for base building data and documentation, with appropriate resourcing.
- SCA (Vic) also recommend a review of occupancy certificate requirements, to ensure satisfactory compliance with requirements.

Theme 2 – Building Approvals:

- SCA (Vic) recommend the inclusion of ESD consultants within any mandatory registration structure.
- SCA (Vic) recommend reinstatement of a public insurance guarantee for multi-level, high-rise residential buildings as a means of enhancing the current consumer rights environment in Victoria for issues stemming from approvals processes.
- SCA (Vic) recommend reform to the scope and implementation of occupancy certificates as a means of incentivising builders to ensure best practice in addressing issues such as defects in a pre-emptive capacity.

Theme 3 – Regulatory Oversight:

- SCA (Vic) recommend the establishment of a building manual and register of all strata buildings to address issues of accessibility to information by regulators and other government agencies, as well as consumers, are properly addressed.
- SCA (Vic) recommend that a future building commission or amalgamated regulatory structure should ideally include an Owners Corporation portal to ensure that strata-specific matters are dealt with in a distinguished capacity.

Theme 4 – Consumer Protection:

- SCA (Vic) advocate for the creation of a building manual and information portal for consumers.
- SCA (Vic) support simplification of schedule documents, so that consumers can access information concerning occupancy and loadings of lots within a multi-unit dwelling, inclusive of balcony structures.

Theme 1 - Practitioner Registration

Q1. How can accountability across all construction work be improved?

Builders are currently held accountable under Section 8 of the *Domestic Building Contracts Act (1995)*, specifically by the presence of a statutory warranty for works undertaken. This remains at present, the primary and only cause of litigation available to an owners corporation.

Sub-contractors are not currently liable to an owners corporation, unlike a builder, with no duty of care owed to end users for works carried out.

An exception exists for plumbers, under the Plumbers' Warranty Insurance Scheme; however, the process of pursuing action under the scheme at present has been identified as cumbersome, slow in progress and lacking in enforcement. Accessibility to this process is unclear, given the lack of immediate availability for a claim form on the Victorian Building Authority (VBA)'s front facing website and resources. VBA's capability to investigate and enforce under the Plumbers' Warranty Insurance scheme is also questionable, given the lack of a prosecutor function.

Q2. Which currently unregistered practitioners should be considered for registration?

Currently, builders, relevant building surveyors (RBS), architects and engineers are required to be registered in Victoria, with some of these parties being subject to a requirement for professional indemnity insurance. Sub-contractors are not entirely subject to this requirement.

Trades of particular relevance to the strata sector that should be included in future registration requirements include waterproofing, window and cladding installation, and carpentry.

Q4. Could accreditation by industry bodies or RTOs become part of the practitioner registration and/or licensing process? If so, how can we guarantee the improvement of practitioner standards through such a process?

Improvement of standards among practitioners is typically encompassed through continual professional development (CPD) as a requirement of membership within a specific industry body.

In other Australian states and territories, regulators have mandated a minimum amount of CPD with a set quota for delivery, with peak industry bodies comprising the remainder of CPD to be administered for certain educational subjects.

Recent high-profile examples of building defects such as those present in the Mascot and Opal Tower complexes in New South Wales, respectively, have led agencies such as Consumer Affairs Victoria to recognise the shortfalls of the status quo.

Registration of practitioners should also be inclusive of strata managers, given they are often responsible for interpreting designs.

Professional standing committee powers should therefore be delegated to SCA (Vic) to register strata managers, as the capacity for demonstrating members have met relevant criteria or professional standards already exists in the form of CPD.

Q5. Should the NSW approach (see case study 1) to design practitioners be considered for Victoria?

Yes. A reactive track record of Victorian government and regulatory action on issues such as defects, as opposed to a proactive approach, has highlighted the need for industry expertise. This industry expertise can be used to form an effective regime of self-regulation in tandem with a clearer regulatory landscape, such as that seen in the New South Wales (NSW) context.

This approach would allow government and regulatory authorities to appreciate the scale of defects and other issues, outside of the current administrative focus and approach to regulations that exists.

Registration of practitioners via industry bodies has also proven useful in NSW with respect to fire safety and design regulations, wherein standards of servicing for Essential Safety Measures (ESMs) have improved.

However, unless membership of the relevant industry body is a statutory requirement, enforcement will only be applicable to members of the industry bodies and be unevenly applied across industry, with non-industry body members able to act irresponsibly.

Q7. Are there other key issues and possible improvements the panel should consider?

Yes. A lack of professional indemnity insurance and/or protection leads to increased costs for practitioners to resolve defects, which are then passed on to the consumer. Any such information concerning insurance coverage of builders and developers should ideally be included in a building manual. Specific focus should also be placed upon the number of practitioners involved in the process of compiling information into a building manual.

In doing so, a portal would best be suited to accommodating the increased practice by developers in providing new build information via digital means (such as via USB), over physical copies of documents.

At present, the VBA Building Activity Management System (BAMS) infrastructure, if properly expanded, may have the requisite capacity to act as a dedicated public platform for retaining documentation such as building manuals.

Base Building data should be held or overseen by the Victorian Government to ensure that access to the data is available to Government during disasters, pandemics, and other catastrophes.

It is also critical that accountability is upheld for design in addition to building, given that architects do not currently owe a duty of care or statutory obligation to an owners corporation.

In previously identified instances where a builder has been the subject of litigation by an owners corporation for a breach of warranty, defects have been designated as 'design issues' in many cases, highlighting ambiguity regarding the responsibility of design practitioners in the event a build has deviated from plan.

Measures should be implemented to facilitate a better relationship between architects and builders on a level playing field in terms of accountability.

The current scope of occupancy certificate requirements should be reviewed, given the unique status of statutory liability that exists between surveyors and consumers, despite the former lacking training to identify workmanship issues or defects.

Recommendations:

- SCA (Vic) recommend registration of applicable practitioners (Appendix 1) via membership of relevant industry bodies to ensure high standards and prevent defects within a building at handover to the greatest extent possible, and as a statutory requirement.
- SCA (Vic) proposes the establishment of a form of statutory warranty against subcontractors, which should be legally enforceable.
- SCA (Vic) specifically recommend provision of enforcement powers for Domestic Building Dispute Resolution Victoria (DBDRV), to legally enforce warranties against sub-trades of concern to strata, in a coercive capacity.
- SCA (Vic) advocate for the establishment of a lower-cost, direct course for consumers to seek effective legal redress in the event of building defects should be established, in the form of a relevant commission, or ability to litigate through VCAT against subcontractors where defects are found.
- SCA (Vic) strongly recommend establishment and enforcement of a strict duty to hand over warranties in the form of the Australian Building Manual Guideline.
- SCA (Vic) recommend that registration of other practitioners involved in modern fast track build & construction projects, such as project managers, should be categorised to best avoid ambiguities regarding proficiency and meeting of standards.
- SCA (Vic) recommends the use of an expanded BAMS platform to act as a portal for base building data and documentation, with appropriate resourcing.
- SCA (Vic) also recommend a review of occupancy certificate requirements, to ensure satisfactory compliance with requirements.

Theme 2 - Building Approvals

Q1. What do you see as the benefits and potential risks of the models described above? In particular, what are the implementation issues which the Panel needs to consider?

The Victorian *Building Act* (1993), and inspection mandates are currently based upon conventional practices, such as domestic and basic construction, while the building and construction sector is more complex than these areas. For instance, inspection requirements for Ecologically Sustainable Design (ESD) initiatives, such as air tightness, do not presently exist.

Issues concerning the status of ESD consultants and their obligations under the code remain unresolved, in the context of increased reliance on such consultants by builders, as well as upward pressure being placed on minimum standards by ESD initiatives.

This creates the potential for a 'domino effect', whereby ESD consultants begin consultations with planners in the absence of meaningful enforcement mechanisms for this segment of the sector.

The consumer inherits the ESD obligations agreed to by the developer and the municipal council and none of the parties have a duty to act in the interests of the future owners, nor are they accountable for any poor design recommendations. Therefore, ESD consultants should be included in registration requirements.

Q2. Do you agree that a stronger regulatory framework for building approvals for complex or high-risk building work is needed?

Yes, an approvals system is needed that better reflects the entirety of the built environment, with a more coordinated inspection regime.

Q4. What other suggestions are there that would remove the potential for conflicts of interest between PBSs and builders, developers, or design practitioners?

Building surveyors have already incorporated requisite capability to effectively self-regulate and act in the best interest of owners. Furthermore, the establishment of a third party or independent certifier may risk increasing overall building costs.

This being said, there should be a means of facilitating greater engagement with owners by building surveyors, with clear definitions of appointment by the owner, and a mandate for surveyors not to become involved in design-specific work for the specific project.

The onus to avoid conflicts of interest should be made more comprehensive for developers. The VBA states that registered professionals should be able to designate designs as meeting prescriptive requirements or deviated from these.

Greater consistency in the application of standards for professional indemnity insurance coverage is also needed, given the issues for consumer rights that conflicts of interest between parties have caused.

Q5. Is there merit in introducing a ‘clerk of works’ or similar oversight function into the approvals process?

No, previous issues identified with the presence of a Clerk of Works as a mechanism of local councils overseeing the approvals process ostensibly led to privatisation of this function in Victoria.

Reinstatement of a Clerk of Works function should only be considered where a clear definition of skills required for this oversight function exists, as well as mandatory registration under the same designation as project managers.

Q7. Are there any other key issues and possible improvements that the panel should consider?

The then-Metropolitan Fire Brigade (MFB) identified issues concerning a lack of whole of building function test for separately installed parts of fire safety systems as part of ESMs. This could potentially form part of a framework for ESMs in future.

The current design of occupancy certificates do not necessitate meeting specific regulations, including ESMs (these are currently a condition but not a requirement of an occupancy certificate), but instead are based upon the assessment of a surveyor wherein the expertise in this field for identifying issues such as defects, does not exist.

Off-the-plan contracts of sale between builders may currently be settled on a registration of planned subdivision, without an occupancy certificate being issued; this has led to lot owners and owner-occupiers purchasing properties without an occupancy certificate present.

Recommendations:

- SCA (Vic) recommend the inclusion of ESD consultants within any mandatory registration structure.
- SCA (Vic) recommend reinstatement of a public insurance guarantee for multi-level, high-rise residential buildings as a means of enhancing the current consumer rights environment in Victoria for issues stemming from approvals processes.
- SCA (Vic) recommend reform to the scope and implementation of occupancy certificates as a means of incentivising builders to ensure best practice in addressing issues such as defects in a pre-emptive capacity.

Theme 3 - Regulatory Oversight

Q1. What changes to the functions and/or structure of the regulator(s) would improve regulatory outcomes?

Centralisation and greater symbiosis, with due regard given to the built environment, should comprise the basis of any functional or structural change to the regulatory landscape. Currently, gaps in responsibility and oversight exist between respective regulatory bodies, resulting in consumer questions not receiving requisite answers.

Q3. What are the benefits and risks of establishing an independent Office of the State Building Surveyor?

If such a proposal is implemented and the office operates within the frame of ensuring consumer rights, this may prove broadly beneficial in addressing issues affecting the strata sector.

Q5. Should there be separate regulators for practitioners and for building works?

No; the regulatory landscape is fragmented to the extent that design and build issues are unable to be sufficiently addressed on a systemic level, or regulations enforced.

Q6. Should regulation of all design practitioners be brought together under one regulator?

Any consolidation of regulatory authority concerning the building and construction sector should be comprehensive, with clarity of purposes and obligations established for all practitioners, and independent of the legislature.

Moreover, enforcement as a function of a centralised regulatory body should be properly resourced.

Q7. Are there other key issues and possible improvements the Panel should consider?

Owners Corporations continue to face issues in sourcing documents and detailed information about buildings. In specific instances, building surveyors do not provide documentation on account of their private status, unless subpoenaed or otherwise compelled to do so. The issue of building information accessibility should also be considered throughout this review.

At present, lot owners within strata-titled properties such as apartments and townhouses aren't entitled to regulatory benefits available to the remainder of the property sector under the auspices of relevant support funds.

Recommendations:

- SCA (Vic) recommend the establishment of a building manual and register of all strata buildings to address issues of accessibility to information by regulators and other government agencies, as well as consumers.
- SCA (Vic) recommend that a future building commission or amalgamated regulatory structure should ideally include an Owners Corporation portal to ensure that strata-specific matters are dealt with in a distinguished capacity.

Theme 4 - Consumer Protection

Q2. Are there innovative ways to identify systemic issues faced by consumers in building and construction activities?

Materials may be published by regulators and industry associations, that could readily be interpreted and acted upon to maintain high standards, using industry expertise available in the process of creating these.

Addressing accessibility issues in relation to documentation and information concerning new builds would likely prove effective in addressing consumer issues within the context of building and construction activities.

Investigation into the application of the NSW Home Building Compensation Fund (HBCF) model may also be considered as a means of providing a safety net for Victorian lot owners, to cover costs arising from defective or incomplete building works.

Q3. How can consumers be better represented in the building system?

Government has a role to play in ensuring the means of regulation exist within a defined context for contracts and surveyors, while regulatory practice should be left to a centralised, independent entity, and through industry/market maintenance of high professional standards.

Centralisation of the array of regulatory bodies within Victoria, and/or establishment of a new body aimed at regulating building contracts and surveyors, is needed.

Addressing discrepancies in the Victorian Government's perception of the strata sector, in particular, owners corporations, must also be addressed as a matter of priority. Consumers, being individual lot owners, comprise the membership of owners corporations.

SCA (Vic) have noted that Victorian Government advice, particularly in recent times in relation to COVIDSafe protocols, among other regulations, has inconsistently recognised the role that Owners Corporations play, in imposing some obligations largely applicable to business in this context.

Consumer rights in the strata sector should be clearly defined so that support can reach owners corporations where it is needed; the crux of this issue is that defects and other building issues don't discriminate between private and common property areas, and neither does the current regulatory landscape.

Q4. What kinds of direct consumer feedback mechanism would work best in the building context?

Creation of a centralised public portal for all base building data, building documentation, and other dedicated resources related to the building and construction industries would best allow consumers to share their experiences, concerns, and questions regarding their rights, seek information and receive advice specific to their circumstances.

Q5. Are there other key issues and possible improvements the Panel should consider?

Multi-unit or high-rise dwellings cannot always have exterior areas inspected for defects, particularly with regard to ESMs and cladding.

Owners Corporation certificates as they currently exist, are insufficient in identifying build issues, given defects are not included in these documents. Consumers should be made aware of lot-specific issues in addition to building information where possible.

Strata managers have raised questions regarding the basis and evidence that claims may be made for defects, citing lack of clarity on the liability of vendors.

Recommendations:

- SCA (Vic) advocate for the creation of a building manual and information portal for consumers.
- SCA (Vic) support simplification of schedule documents, so that consumers can access information concerning occupancy and loadings of lots within a multi-unit dwelling, inclusive of balcony structures.

For further information about this submission, please contact Shaun Brockman, National Policy and Advocacy Manager, SCA. Shaun.brockman@strata.community.

Appendix 1: Defects by Construction System across all Jurisdictions

In June 2019 Dr Nicole Johnston, lead researcher on the June 2019 report: [An Examination of Building Defects in Multi-Owned Properties](#), identified the types of building defects impacting residential buildings, the effects that building defects have on buildings and residents, the impact of the regulatory environment and how defects are managed by owners corporations.

The study identified the prevalence of building defects based on construction systems. Defects were most prevalent in following systems (in order): building fabric and cladding, fire protection, roof, and rainwater disposal, waterproofing and structural.

Figure 2: Percentage of Defects by Construction System across all Jurisdictions

