

**EXAMINING DEVELOPER ACTIONS THAT EMBED PROTRACTED
CONFLICT AND DYSFUNCTIONALITY IN STAGED MULTI-OWNED
RESIDENTIAL SCHEMES**

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ABSTRACT

Anecdotal evidence suggests that if inappropriate decisions are made by developers in the initial establishment phase of multi-owned residential schemes, conflict and long-term dysfunctionality for the eventual owners result. This paper maps out practises commonly utilised by developers in establishing staged, multi-owned residential developments and the consequences that these practises can have on a scheme in the short and long-term. Findings stemming from twelve semi-structured interviews conducted with key strata and community title industry experts from around Australia are reported. It appears there are a number of practises, including; inappropriate budget setting, entry into inappropriate long-term contracts, and retention of majority voting power which can affect the viability and functionality of a scheme and also incite conflict for many years following cessation of the developer's formal involvement with a scheme.

Keywords: governance decisions, developer practises, residential multi-owned developments, dysfunctionality.

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1. INTRODUCTION

The purpose of this paper is to map out the governance decisions made by developers in the early life of staged residential multi-owned developments (RMODs) and identify practises commonly utilised by developers that often lead to protracted dysfunctionality for schemes. As no prior study has attempted to map out the governance decisions in a RMOD, the regulatory framework that provides the arrangements for the use of such land is the starting base for identifying governance decisions confronted by developers. Due to the word constraints of this paper, only governance decisions provided for in the Queensland legislation have been outlined.

The paper has been structured as follows. The next section provides a literature review and theoretical context. The research methodology utilised in the study will then be described. The key findings of the study will then be addressed before concluding the paper with some implications of the study.

2. LITERATURE REVIEW AND THEORETICAL CONTEXT

A staged residential multi-owned development is a property type that is either a vertical building subdivision or a horizontal land subdivision, or a combination of both and is progressively delivered over time in stages. The essential elements of this property type include shared common property and a separate legal entity created to manage the common property. In Australia, this type of property includes, *inter alia*, strata title developments, community title developments, and subdivisions with owners corporations.

During the majority of a RMOD's life, the responsible orchestrator of operations is the body corporate (Gibson & Lombard 2005). While the body corporate exercises control through management over the common property and enforcement of the by-laws, there are a number of governance decisions that are made while control is vested in the developer which, impacts on the way the body corporate manages the scheme. In staged RMODs, this control phase can last for a number of years as the development is progressively delivered.

Although there has been scant academic research directed to mapping out the elements of governance that have to be established in a RMOD, there is evidence to suggest that some arrangements implemented by the developer conflict with the interests of the body corporate and the owners. These facets of governance can detrimentally affect the scheme after the development is completed (Blandy, Dixon & Dupuis 2006; Bounds 2010; Pardon 2004) and the developer has exited.

Establishing a residential multi-owned Scheme (RMOS)

A RMOS is established when a plan subdividing an area of land into individual lots and common property is registered in the land titles registry along with a community management statement (section 24, BCCMA; section 115L(3), LTA). Upon registration of the scheme, the body corporate is created (section 30, BCCMA). Statutory powers are conferred

automatically on the body corporate upon its creation (section 94-95, BCCMA). The key governance decisions that have to be made by a developer *prior* to registration are identified predominantly in:

1. the Community Management Statement (CMS); and
2. the disclosure statement (if lots have been sold off-the-plan).

The key governance responsibilities for developers *after* registration are those:

1. bestowed on the body corporate. However, by virtue of the fact that the developer holds the titles to all lots, or is exercising proxies or, has authority under powers of attorney for the lot owners (as provided for in the off-the-plan sales contracts), the developer becomes the only voting member of the body corporate and therefore controls it; and
2. identified in the provisions relating to the agenda items for the first annual general meeting.

Governance Decisions prior to registration

A Community Management Statement (CMS) *inter alia*, requires; identification of the regulation module applying to the scheme, inclusion of a contribution schedule and interest schedule and, a statement concerning the contribution schedule principle used; and the by-laws applying to the scheme (section 66, BCCMA).

The developer is therefore responsible for making the following governance decisions:

Determining the regulation module applying to the scheme: In order to provide a flexible regulatory framework, four regulation modules have been enacted to accommodate the different needs of the various development types (Qld Parliamentary Debates 1997). Although the standard module is the default module (section 3, BCCM(SM)R), the accommodation module is often applied as it is less regulated and allows for longer term service contracts (including caretaking) letting business authorisations and leases to be entered into. Although the original intention of the accommodation module was for schemes requiring accommodation management, such as holiday letting and serviced apartments (Qld Parliamentary Debates 1997), lots included in residential schemes that are either predominantly for long-term letting or were originally intended for long-term letting (but are no longer) fall within the ambit of the definition of an accommodation lot, and therefore the accommodation module can apply (section 3, BCCM(AM)R).

The developer therefore needs to consider whether the lots in the scheme will be purchased predominantly by investors or occupiers and, whether long-term service contracts, letting business authorisation and leases are warranted for a scheme under development. In Queensland, in particular, there is a financial incentive for a developer to enter into a long-term management rights agreement with the body corporate.

The contribution schedule and interest schedule: These schedules, identify each lot's contribution schedule lot entitlement (i.e., the owner's share of levies and voting power) and interest contribution schedule lot entitlement (being, *inter alia*, the owner's share in the common property) (section 47, BCCMA). In 2011, amendments were made to the *Body Corporate and Community Management Act 1997* (Qld) in relation to the method for calculating lot entitlements. The developer must now apply the market value principle (lot entitlements must reflect the market value) when determining each lot's *interest schedule* lot entitlement (sections 46(8), 46B, BCCMA). Either the equality or relativity

principle must be applied when determining each lot's *contribution schedule* entitlement (46A, BCCMA). If the equality principle is applied, all lot entitlements are equal and therefore all lots are levied at the same amount. If the relativity principle is applied, the lot entitlements are unequal and each lot may be levied differently. If a determination is made to use the relativity principle, the unequalness must be accounted for by demonstrating the relationship between the lots taking into account five factors (*inter alia*, the impact that a lot has on common property maintenance costs and, the purposes of the lot).

Although the process of deciding lot entitlements has become more prescribed following these amendments, there appears to be some discretion left to developers. This determination of lot entitlements is highly significant, as it affects not only each lot owner's levy contribution, but also their proportional ownership in the common property.

The by-laws: Although a scheme's by-laws (rules) must be included in the CMS, the developer has the discretion to either rely on model rules contained in the legislation (Schedule 4, BCCMA), or to draft rules that are tailored to a specific development. The content of the rules must be limited to matters relating to the administration, management and control of the common property and body corporate assets and, the regulation of lots in the scheme, common property, body corporate assets, and services and amenities supplied by the body corporate (section 169, BCCMA). There are also, exclusive use by-laws that can be drafted to give identified lot owners special rights to exclusively use parts of the common property and/ or body corporate assets (section 170, BCCMA).

This facet of governance decision making regulates, *inter alia*, owner behaviour (Sherry 2011) and can deprive owners of their interest in their collectively held land (via exclusive use by-laws) (Sherry 2009). When drafting by-laws, a developer should consider potential negative behaviours and problems that may be encountered once a development is complete and residents move in.

A disclosure statement is required to be given to buyers wishing to purchase a lot off-the-plan, prior to entry into a sales contract (section 213(1), BCCMA). The disclosure statement must state, *inter alia*: the expected annual contributions payable by lot owners to the body corporate; the terms, estimated costs, and proportion of cost borne by the proposed lot owner in relation to any engagement of a body corporate manager or service contractor to be entered into after the establishment of a scheme; and the terms of authorisation for a letting agent (section 213(2), BCCMA).

The developer is therefore responsible for making the following further governance decisions:

Determining Expected Annual Contributions Payable: Although the legislation requires an expected per lot contribution amount to be stated in the disclosure statement, there is no requirement to justify how the contribution is calculated in respect to the costs of administering the scheme. Therefore, the developer is only responsible for advising buyers of their expected contributions, not the manner in which the contributions payable were calculated.

Negotiate a Body Corporate Management Agreement: A body corporate manager (BCM) is defined in section 14 of the *Body Corporate and Community Management Act 1997* (Qld) as a person:

...engaged by the body corporate (other than as an employee of the body corporate) to supply administrative services to the body corporate, whether or not the person is also engaged to carry out the functions of a committee, and the executive members of a committee, for a body corporate.

Although under the regulations there is no requirement that a BCM must be engaged (s112, BCCM(AM)R), it is common practice for schemes to outsource the conduct of these administrative services. In preparing for a scheme's

establishment, the developer usually negotiates the terms and conditions of an administration agreement with a BCM on behalf of the yet to be created body corporate. Although the terms and conditions are generally negotiable, the regulations limit the term of the engagement to a maximum of three years (section 116, BCCM(AM)R).

The engagement of a BCM is therefore a discretionary governance decision, however, if engaging a BCM, the developer must negotiate in accordance with the regulations.

Negotiate Service Contract Agreements: A service contractor is defined in section 15 of the *Body Corporate and Community Management Act 1997* (Qld) as a person:

... engaged by the body corporate (other than as an employee of the body corporate) for a term of at least 1 year to supply services (other than administrative services) to the body corporate for the benefit of the common property or lots included in the scheme.

A service contractor usually includes those persons engaged to undertake caretaking or other maintenance duties. Similar to the engagement of a BCM, the developer negotiates the terms and conditions of the agreement with the contractor on behalf of the yet to be created body corporate. Although the regulations limit the term of the contract, as noted above, the term is dependent upon the regulation module applying to the specific scheme. If the scheme is registered under the accommodation module, the term can be as long as 25 years (section 117). Therefore, the module that is applied will have significant implications for bodies corporate and lot owners.

It is common practice in Queensland for developers to establish a management rights business (caretaking and letting agency) and, then sell these rights to a third party. The decision to incorporate a management rights business into a RMOD is an important governance decision as these agreements effectively bind the body corporate to a contracted arrangement for many years.

Letting Agent Authorisation: A person is a letting agent under section 16 of the *Body Corporate and Community Management Act 1997* (Qld), 'if the person is authorised by the body corporate to conduct a letting agent business for the scheme.' The term of the authorisation is limited (and mirrors the terms for a service contract) and dependent upon the applicable module. As noted above, it is usual for a developer to incorporate the letting agent business with the caretaking duties to establish a management rights business.

In summary, the key developer governance responsibilities in the phase prior to registration are those identified predominantly: in the CMS and the disclosure statement requirements.

Governance Decisions after registration

There is a period immediately following a scheme's registration when the developer owns all the lots in the scheme. This period begins upon registration of the scheme and ends no earlier than 14 days thereafter. It is only after the 14 days has expired that a developer can transfer the lots in the scheme to new owners (section 212, BCCMA). During this period, the developer is the only member of the body corporate and, subject to certain limitations, is divested with all the powers, functions and duties of the body corporate. The developer also has the ability, again subject to certain limitations, to control the body corporate for a maximum of one year after this period, even if the majority of the lots have been sold. The developer, as the seller of the lots, can, as a condition of the sales contract, require buyers to

relinquish their right to vote by appointing the developer as their proxy (section 108(3), BCCM(AM)R) and also, give authorisation to the developer to act on their behalf under a power of attorney (s211, BCCMA). The matters which a developer can control under a power of attorney arrangement are broader than the proxy power, but must be disclosed to the owner before the power is given. Proxy power is limited to specific matters, as disclosed to the buyer prior to entry into the contract, and include; the engagement of a BCM or service contractor, the authorisation of a letting agent business, the authorisation to occupy part of the common property by the letting agent or service contractor and, the registering of a new CMS (section 108(3)(b), BCCM(AM)R).

The end of the developer control phase is therefore dependent upon:

1. the retention of lots by the developer (feasibly the developer could control the body corporate indefinitely, if more than 50 percent of the lots are retained);
2. the time period between registration of the scheme and settlement (a minimum of 14 days);
3. the use of proxies and powers of attorney as a condition of the contract of sale.

The key developer governance decisions after registration therefore are:

Control of the body corporate: The developer can effectively retain control of the body corporate and therefore its decisions by retaining the majority of lots in the scheme. It is unlikely that a developer would consider this option in a RMOD that is not a staged development. There may be benefits to the developer retaining majority ownership in a scheme development context where the capacity to complete the vision of a development can be affected by body corporate decisions made.

The inclusion of proxies and powers of attorney as a sales condition: A developer must also consider whether to include a condition in a sales contract that would require the buyer to appoint the developer as their proxy and attorney. A decision to include a power of attorney also requires consideration of the decisions to be made on behalf of the buyer, as these decisions must be disclosed (section 211, BCCMA).

The execution of agreements: The developer, on behalf of the body corporate, executes the BCM agreement, service contracts and letting authorisation, as disclosed to the buyers. The developer has a responsibility at this stage to ensure that the agreements executed accurately reflect the agreements disclosed.

The first annual general meeting (AGM) of the body corporate: The first AGM must be called and held by the developer within 2 months of 50% or more of the lots no longer being owned by the developer, or six months since the registration of the scheme, whichever happens sooner (section 75, BCCM(AM)R). It is therefore likely that the first AGM will be held around eight months following registration of a scheme. At the first annual general meeting, the developer must include on the agenda the following issues (section 75(3), BCCM(AM)R):

1) Adoption of the budgets and finalising contributions to be levied for the first financial year. The developer must prepare an administrative and sinking fund budget for adoption by the body corporate (section 137(5), BCCM(AM)R). The budget for the administrative fund must include an estimate of costs for maintaining the common property and body corporate assets, insurance and other recurrent expenditure (section 137(2), BCCM(AM)R). The sinking fund budget must include costs for expected capital expenditure for the forthcoming financial year and a proportional amount for future capital expenditure (section 137(3), BCCM(AM)R). The initial financial management arrangements are therefore the responsibility of the developer for the first year of a scheme's life.

2) *Reviewing the by-laws*: The developer must determine at the AGM whether the registered by-laws should be amended (section 75(3), BCCM(AM)R). This again highlights how the developer has a responsibility to implement rules that regulate resident behaviour.

In summary, the key developer governance decisions after registration of a scheme are: those inherited as the only voting member of the body corporate (until settlement of the lots begin or through use of proxies or powers of attorney); those inherited if the developer retains the majority of lots, and, those in connection with the first AGM.

3. METHODOLOGY

Twelve exploratory face-to-face semi-structured interviews have been conducted as part of a pilot phase of a PhD study. Industry experts from the strata and community title sector were selected as potential participants through their association with industry bodies (Australian College of Community Association Lawyers (ACCAL), Strata Community Association (SCA)) or referred by committee members involved with the Griffith University *Strata and Community Title in Australia for the 21st Century* conference. The industry experts were located in the states of New South Wales, Victoria and Queensland (the states with the most RMODs). An invitation to participate was sent via email and participation was voluntary. Once the invitation to participate was accepted, an ethics information sheet and consent form was sent to each participant and the participant was asked to nominate a date and time for the interview. The interviews took place in July and August of 2011. Table 1 provides an overview of the sample of interviewees. The first column of the table records an identifying code number for each interviewee, the second column highlights the nature of their work experience and the third column identifies their predominant client base.

Table 1: Interviewee Details

Interviewee	Background/ Expertise	Client Base
1	Body Corporate Manager	Developers / Body Corporate
2	Lawyer	Government
3	Government Representative	Body Corporate and owners
4	Lawyer	Body Corporate predominately
5	Developer	Owners
6	Body Corporate Manager	Developers / Body Corporate
7	Lawyer	Developer
8	Lawyer	Body Corporate and owners
9	Government Representative	Body Corporate and owners
10	Lawyer	Body Corporate and owners
11	Lawyer	All stakeholders
12	Lawyer	All stakeholders

The interviews were electronically recorded following consent provided by each interviewee. The interviews lasted from 40 minutes to 1 hour and 20 minutes. The interviews sought to identify the challenges associated with establishing and transitioning ownership of residential multi-owned developments from the developer to the end-users, ie, the body corporate and lot owners.

The interviews were transcribed verbatim. As part of the analysis, the data was then categorised according to specific identified themes under the main categories of developer practises and consequences.

4. FINDINGS

Observations made in the interviews indicate that there are a number of systemic practises employed by developers in transitioning the ownership of residential multi-owned developments that negatively impact upon schemes, bodies corporate and ultimately the lot owners. Inappropriate initial budget setting, inappropriate long term contractual arrangements, inappropriate stakeholder relationships, inappropriate exercise of voting power, and insufficient legislative compliance are common practises identified by the interview sample. These practises can, according to respondents, lead to issues relating to scheme dysfunctionality and protracted conflict.

Developer Practises

This section highlights comments made by the various industry experts in respect to developer practises and considers the impact that these practises have on a scheme, the body corporate and the lot owners.

Inappropriate budget setting

As outlined in the literature review section of this paper, a developer is required to disclose to potential purchasers an expected annual per lot contribution amount and also adopt an administrative and sinking fund budget at the first annual general meeting for the scheme. A number of respondents interviewed indicated that it is common practise for developers to formulate a scheme's budget based on a marketable price point instead of the real costs of running the scheme. As one respondent commented:

So the biggest conflict is the projections in relation to levies. Now a developer will typically strike a budget working backwards, so you go to a consultant's meeting and the first thing the developer says to the real estate agent who will be at the meeting, is what's the market for levies on this unit, because they know there is a price point at which they can't go past. So the agent might say it is 6 thousand dollars a year, so the developer will then turn to the strata manager, and say I want a budget and they will come up with a budget that says the levies are 7 thousand and at the second meeting they will say, well chop it back. And so things work backwards from what the developer perceives what the market will bear, as opposed to going from bottom up saying what is it really going to cost to run this building. That's the number one problem. (8)

This type of practise is problematic for purchasers' buying a lot off-the-plan, as their property cost calculations would be based on a false and misrepresented lot contribution amount. If the real costs of running the building exceed the costs identified in the initial budget, the body corporate would either need to raise a special levy to cover the deficit funding or prepare a new budget and reset the per lot contribution levies. Either way, new owners would be forced to pay an amount greater than that initially stipulated to cover the costs of running the scheme. This issue may be exacerbated in staged schemes, especially where the developer controls the body corporate for the first year of the scheme's life (through proxies and powers of attorney) and where there is an incentive to continue to keep the levies low as future stages are rolled out and sold. If the budget is significantly understated and one or two years pass until the owners' effect control, the body corporate's financial situation may be seriously jeopardised. If owners are unable or unwilling to pay the increased amounts, the body corporate quickly becomes dysfunctional and conflict is likely to result.

Inappropriate long-term contracts

Enabling the developer to negotiate and execute contracts on behalf of the body corporate has been a contentious issue in the industry for many years. A common practise noted by the interviewees related to developers causing the body corporate to enter into inappropriate contractual arrangements. Management rights arrangements were a particular focus in relation to Queensland schemes, where the overwhelming majority of management rights businesses exist. Interviewee 2 commented that:

What has tended to happen, and probably more so in Queensland than the other states, but it is happening in NSW and Victoria, is that developers have almost taken it for granted that if it is a reasonable sized complex, they will put in an onsite caretaker and grant management rights to that caretaker. In the vast majority of cases. It could be as high as 90% (that) the arrangement is inappropriate for the building. (2)

These types of arrangements allow the developer to directly profit from the sale of a management rights business without being a party to the long term contract. Other service contracts are also being entered into on behalf of the body corporate by the developer, whereby the developer receives a benefit for causing the body corporate to enter into the contract with a third party service provider. Often the benefit relates to cost savings on infrastructure or equipment. One interviewee commented that a conflict of interest situation arises in these instances:

...those gas heaters they [developers] put in for the water, and then sign up with the supply authority for let's say a slightly larger than over the market rate. Things like that then create conflict, and then you are bringing more stakeholders in. You've now got a supply authority who is tainted with conflict of interest, arising from what the developers state. So you have a monumental propensity to have these conflicts of interest in that opening stanza stretching from the development stage, through to the stage where the people take over. (10)

The body corporate therefore is bound by long term agreements reducing its ability to negotiate in an open market. The following comment highlights the issue:

There are slightly different tensions and conflicts that exist before the plan is registered and the corporate body comes into existence, as opposed to after it. Even though in all jurisdictions there's a weighting of votes towards the developer which permits him to retain an inordinate amount of control... you've got these two aspects of him lining his own pocket on the one side and then trying to keep money from going out of his pocket on the other side. The lining the pocket tends to occur in the early phases when he's putting out contracts and trying to milk as much as he can out of the ongoing services to the scheme, over the next 10 years usually; and then they tend to be before the scheme is even in place, which means that by the time the body corporate exists, and the owners are in there and don't know any of this is done, contracts are signed, sealed, delivered and in place. (10)

Body Corporate Management Incentives

Another common practise noted by interviewees concerns the relationship between the developer and the body corporate manager. Respondents commented that body corporate managers are often engaged by developers on the basis that initial consultancy work be undertaken by them without fee to assist the developer with the establishment of the body corporate. This no fee agreement is on the proviso that the developer causes the body corporate to engage the manager for administrative services for a fixed term once created. The following comment outlines this practise:

What happens is that the developer will go to a managing agent and he will say to the managing agent, "Well you do all the budgets and everything for me, and you do them for nothing. And then I will then support you to be appointed at the first Annual General Meeting". So you can immediately see the conflict of interests here, our two fiduciaries basically looking to screw down the organisation to whom they're hired to do the fiduciary duty, and so what you get then is a back scratching situation where you get these levies which are just preposterously low. (10)

One respondent commented that this practise should be prohibited:

Most of them [BCM] are on some sort of promise or a wink and a nod that they are going to get appointed as the managing agent. Fair enough, it might only be for that small period but they all understand that if they are there, lack of inertia will probably get them to stay there, at least for another year. And if they are good talkers, maybe two or three. My view is that, that should be prohibited. That is also, I think, a breach of the fiduciary duties anyway. (7)

Concerns were raised by a number of respondents that this practise creates a conflict of interest situation and a breach of fiduciary duty. Both the developer and the body corporate manager are effectively acting in an unconstrained self-interested manner that abuses their fiduciary position to the body corporate. For owners purchasing into a scheme with limited knowledge of the workings of a body corporate, much reliance is placed on the body corporate manager to provide advice and assistance. Potential conflict and inappropriate decision-making may arise if the body corporate manager is unable to act in the best interests of the body corporate, as is legally required. For example, the body corporate manager may refrain from advising the body corporate about time restrictions in relation to building defects (which, if identified, may disadvantage the developer), contract review provisions and other matters that may favour the body corporate but disadvantage the developer. This situation may be more evident in staged schemes where the body corporate manager is promised a contract for each new scheme as it is developed.

Retention of majority voting power

According to many of the respondents, issues arise particularly in relation to staged schemes when the developer retains unsold stock or there is balanced land with lot contributions that allows the developer to vote on body corporate matters. A developer may have voting power that vetos body corporate decisions that may be detrimental to the developer. This is particularly evident, as noted by one respondent when the developer can thwart the commencement of legal action in relation to building defect claims:

So in other words, upon handover when all sorts of off-the-plan purchasers settle their purchases and take possession and the buildings are with defects, well, if the developer has a majority ownership then it has a statutory obligation to enforce the contract against the builder for, in respect of those defects, which is useful but it contains once again, a shortcoming and that is this,...the Owners Corporation must resolve by 75 percent to issue legal proceedings ...You've got on the one hand the notion that before the Owners Corporation can take proceedings, for example, for building defects, you need a 75 percent resolution... If the developer owns anywhere between 26 and 49 percent, the thing can be stultified. I have seen that happen. Developers are aware of their duties, they are aware of those obligations and they are aware of their ability provided they hold 26 percent of lot entitlements to be able to knock on the head and circumvent any building to issue proceedings against them.(4)

Another common practise relates to developers not paying their contribution levies. In staged schemes in particular, developers will own balanced lots (for future development) and those lots will have a contribution entitlement. The

developer therefore has an obligation to pay the contribution to the body corporate in the same timeframe and manner as the other lot owners. Depending on the lot entitlement contribution, non-payment can detrimentally impact on the scheme's ability to pay and places pressure on the other contributors, the lot owners, to pay more. As one respondent commented:

I think another issue that we are seeing a lot of is developers retaining ownership of unsold stock, and/or balance development land, who won't pay their levies. So often, you have got owners corporations in distress, so if you have got a builder that's got 40 percent control that means you have 60 percent of the people paying 100 percent of the bills and we were instructed the other day to sue a developer for \$220,000 worth of unpaid levies in a 90 block building, it was an extraordinary amount of money. (8)

The retention of the majority of lots by the developer has the potential to cause conflict and lead to scheme dysfunctionality, especially if the body corporate is unable to commence legal proceedings against a developer to recover unpaid levies or in relation to a building defects claim. Both instances can put enormous financial pressure on the body corporate and the owners.

Legislative non-compliance

Similarly, issues arise when developers do not comply with their obligations at law to hand over documents pertinent to the running and maintenance of a scheme. As commented by one respondent:

...the issues that tend to crop up are the handing over of sufficient documents and information so that the body corporate has got everything it needs to be able to manage the building. And as far as that is concerned, most of the legislation in Australia requires the developer to hand over certain packages of documents. Quite often there are issues about whether they are all there, particularly when it comes to technical building plans like engineering, electrical, plumbing, all those sorts of things, but by and large the type of issues are you know, do we have our hands on everything we need to run the building.. There also tends, during that period, to be building defects because a lot of the purchasers have a period in which to notify the developer of building defects The body corporate has to notify the developer of any building defects on common areas so, there the sorts of issues that tend to be involved in the development handover. (2)

Deferred Consequences

Respondents discussed problems arising during the life of a scheme that can be traced back to the period in which the developer controlled the scheme. Comments provided by Interviewees 2 and 10 are insightful in this regard:

There are problems which can have their source at a time when the developer is involved, which might not in fact surface as a problem for 20 or 30 years... You get different lot owners in there who are starting to get concerned about something different and sow the seeds, all this badness are laid down in that period, and yet don't germinate until many years later, they don't always fossilise during that initial period. (10)

It could be fair to say that the function, the functionality of the body corporate can be affected by the issues that go back to the commencement of the scheme. And issues about the development and handover from the developer to the body corporate, you know, if those sorts of things are set up well, the schemes get off on a good foot, on a good footing and has greater potential to be a well functioning scheme. (2)

Inappropriate developer decision-making in the early life of a scheme can manifest in scheme conflict and dysfunctionality many years after the developer has relinquished control over the development. A number of respondents made the point that some schemes are never able to overcome the issues created at the beginning and continue to suffer from dysfunctionality.

5. CONCLUSION

This paper has identified the governance decisions made by developers in the early life of a RMOD. These decisions must be made either prior to or immediately following the registration of a scheme. Prior to scheme registration, a developer must decide on the appropriate regulation module to be adopted, the contribution and interest schedules, the by-laws for the scheme, the expected annual contribution payable by each lot and the service contractors to be engaged. After registration, the developer must control and therefore make decisions on behalf of the body corporate until the first annual general meeting is held and a new committee is appointed. The developer can also decide to include proxies and powers of attorney in the sales contracts in order to lengthen this control period.

Interview findings highlight that there are common practises utilised by developers that have the potential to negatively impact on schemes, leading to conflict and dysfunctionality for many years after the developer has exited the development. These practises include inappropriate budget setting, inappropriate contractual arrangements, inappropriate stakeholder relationships, retention of majority voting power, and legislative non-compliance. It is apparent that these decisions and practises aid in returning profit to the developer at the expense of the future lot owners.

These practises often place the body corporate and therefore the owners in financial distress for many years after the completion of the development. As this type of property development is on the rise in Australia and internationally it appears important that greater attention be directed to this issue. Such attention can highlight the importance of the problem and also point towards solutions that can be adopted by legislative policymakers. It is in this spirit that more research directed to the issues outlined in this paper is to be welcomed, especially as the issues have attracted scant interest from academics to date.

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- Land Titles Act 1994* (Qld) ('LTA')

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