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An Examination of How Conflicts of Interest Detract from Developers Upholding Governance Responsibilities in the Transition Phase of Mult-Owned Developments: A Grounded Theory Approach

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AN EXAMINATION OF HOW CONFLICTS OF INTEREST DETRACT FROM DEVELOPERS UPHOLDING GOVERNANCE RESPONSIBILITIES IN THE TRANSITION PHASE OF MULTI-OWNED DEVELOPMENTS:

A GROUNDED THEORY APPROACH

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ABSTRACT

The multi-owned development (MOD) is a unique property type consisting of at least two individually owned lots tied to communally owned common property with a separate registered entity (the body corporate) created to govern and manage the property. While the body corporate is the ultimate governing entity and the orchestra of operations for much of a MOD's life, there is a period of time when a MOD's developer makes governing decisions. It is during this phase, the transition phase, that the developer can bind the body corporate to a myriad of arrangements and relationships. Although state based Australian legislation provides a framework for body corporate governance, concerns have been raised over the extent of power and control exerted by developers when tasked with governing.

There is a paucity of academic research concerned with the MOD transition phase. This study is therefore exploratory in nature, as it seeks to uncover the nature of governance decisions made by developers during the transition phase. This study is guided by the principles of the grounded theory method, which focuses on creating conceptual frameworks or theories through building inductive analysis from the data collected. Method triangulation was used in order to promote rigour in the research. A combination of semi-structured interviews, document (legislative) analysis and structured interviews was undertaken.

Semi-structured interviews were undertaken as the first empirical data collection phase in order to identify the challenges associated with establishing MODs from a range of stakeholder perspectives. Twelve face-to-face interviews were conducted with key industry experts including specialist lawyers, body corporate managers, a developer and government representatives. Key themes emerging from the collected data were: conflicts of interest, developer control and disclosure. Developer related conflicts of interest was the most predominant theme emerging from this initial analysis. The findings from this interview phase led to the development of the main research question underpinning this thesis: *to what extent do conflicts of interest (COIs) detract from the way that developers uphold their governance responsibilities during the transition phase of multi-owned developments (MOD)?*

As the body corporate is a statutory creation and the legislation regulating it provides a framework for governance, the legislation and associated regulations relating to MODs were analysed in the study's document analysis phase. Due to research constraints, the analysis was restricted to the States of New South Wales, Queensland and Victoria. This analysis laid the basis for identifying two distinct developer governance decision-making periods occurring during the transition phase (the planning phase and the developer control period). Distinct developer governance decisions made during these two periods have been identified and their nature examined.

Finally, structured interviews were undertaken with a sample of 19 interviewees that included lot owners, body corporate managers and developers. The questions posed during this phase of the research were informed by insights deriving from the prior empirical phases employed, a review of the pertinent literature and relevant case law.

Drawing on the literature relating to governance, governance responsibility, conflicts of interest, and this study's empirical observations, an examination of the extent to which developers are responsible for the governance decisions made while controlling the body corporate has been undertaken. In addition, an examination has been made of the extent to which developers should be required to promote good governance practices consistent with facilitating long-term functionality and viability was undertaken.

The study's findings reveal the high extent to which developers are responsible for the governance decisions made during a MOD's transition phase. The findings also show that while developers have considerable unfettered authority to make decisions during the transition phase, this phase coincides with opportunities for developers to further their commercial interests. The lure of these opportunities highlights a tension between a developer's interest in maximising commercial gain and their MOD governance responsibilities. To dispense appropriately their governance responsibilities, developers need to exhibit a capacity to exercise self-interest restraint, a factor that lies at the heart of the governance responsibility model. It appears developers are not sufficiently held accountable for their governance decisions, and this contributes to scheme dysfunctionality. This deficient

accountability provides a freedom of action license to developers that results in lot owners (generally acting in a voluntary capacity), having to manage through, and attempt to mitigate, developer-induced dysfunctionalities. Drawing on the governance responsibility model advanced in this study, a good governance model has been developed that can be used as a framework to inform the setting of developer standards that should be adhered to during the transition phase of MODs.

STATEMENT OF ORIGINALITY

This work has not previously been submitted for a degree or diploma in any university. To the best of my knowledge and belief, the thesis contains no material previously published or written by another person except where due reference is made in the thesis itself.

Nicole R Johnston

13 December 2016

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CHAPTER 1: BACKGROUND AND DISSERTATION OVERVIEW

1.1 Introduction

> ...gaps and confusions in the legal framework have provided a context which has enabled some housing professionals to usurp powers for their own benefit, a process which disadvantages the owners, who might be assumed to hold a greater share of the bundle of rights.[1]

The context in which this comment is directed is a property type which consists of multiple (at least two), individually owned lots tied to communally owned common property, with a registered entity created to govern and manage the property. In this dissertation, this property type is referred to as a multi-owned development (MOD) and the registered entity is referred to as a body corporate. [2] Lot owners buying into a MOD automatically become the members of the body corporate with a committee being derived from the membership. The committee is tasked with attending to and overseeing the day to day operations of the body corporate.

While the body corporate is the ultimate governing body, there is a period of time when individual lot owners have not yet assumed control of the body corporate but where governance and management decisions are, as a matter of necessity, made in order for the body corporate to function upon its registration. In this period, which is referred to as the *transition phase* in this dissertation, the developer, as the original owner of the land, is able to make a number of governance decisions on behalf of the body corporate. Decisions made by the developer during this transition phase can bind the body corporate to a myriad of arrangements and relationships that will subsist for many years.

This dissertation is concerned with issues relating to the transition phase in Australian MODs. Although there is legislation in each of the Australian States that provides a framework for body corporate governance, poor governance outcomes appear to be

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[1] Sarah Blandy, Jennifer Dixon and Ann Dupuis, 'Theorising Power Relationships in Multi-owned Residential Developments: Unpacking the Bundle of Rights' (2006) 43 *Urban Studies* 2365, 2366.

[2] The term body corporate will be used in this dissertation to denote the separate entity created to administer and manage the common property. It is acknowledged that each Australian jurisdiction uses a different term in relation to this entity, such as, owners corporation, association, and strata corporation.

common in this property type. To date, there has been scant academic research directed to mapping out the decision-making role of the developer when establishing a MOD, although there is some evidence suggesting that decisions made by developers can detrimentally affect the body corporate once the development is completed[3] and the developer has exited.

Owners, who are the holders of the greater share of property rights in a MOD,[4] should be confident, when buying a lot in this property type, that they can collectively determine the future governance and management direction of their MOD. Upon registration of a property scheme and settlement of the lots, it would appear reasonable for independent owners to be able to exercise their voting rights and make decisions amenable to the collective will. Although developers necessarily take a governance role when establishing a MOD, the interests of the body corporate need to be recognised and governance arrangements should be made in a manner that serves the interests of the body corporate. To be consistent with this, the transition phase should be handled in a manner that encourages owner interaction and conclude with the successful transition of a functional and viable body corporate.

1.2 Research Motivation

My motivation to undertake this study is documented in Chapter 2. As a lot owner and committee member of a body corporate in a large MOD, I have been witness to numerous developer-led practices that have caused considerable concern and conflict. I openly acknowledge my subjectivity in the early chapters of this dissertation (note the use of 'I') but I hope that an increasing degree of objectivity (taking 'me' out of the picture) is evident to readers, as they navigate through the dissertation. I have

---

[3] Blandy, above n 1; Lisa M Pardon, 'Advising Developers in Operating Community Associations' (2004) 77(3) *Wisconsin Lawyer* 1; Michael Bounds, 'Governance and Residential Satisfaction in Multi-owned Developments in Sydney' in Sarah Blandy, Ann Dupuis and Jennifer Dixon (eds) *Multi-owned Housing: Law, Power and Practice* (Ashgate Publishing, 2010) 146.

[4] Peter Butt, *Land Law* (Lawbook Co, 6th ed, 2010). In Australia, if you are the registered proprietor of an estate in fee simple (the largest estate known in law), you are conferred the most property rights. Subject to the Crown's radical title and statutory restrictions that prevent an owner doing whatever they wish in respect to the land (e.g. taken minerals from the land), ownership in an estate of fee simple is equivalent to full ownership. Although there are leasehold estates in respect to MOD, the majority of lots owned in MODs are held under an estate in fee simple. It should be noted that, upon the signing of a contract of sale, equity regards the buyer as the beneficial owner, holding an equitable interest. The interest is only to the extent of the purchase amount paid.

left it up to other stakeholders involved in the MOD environment to voice their perception, opinions and views concerning decisions made by developers in the transition phase of MODs.

1.3 The Importance of This Research

From an academic perspective, the study is important as there is a paucity of prior academic research concerned with the transition phase of MODs. No study examining the responsibility of developers during the period that they exert significant control of a body corporate has been found in the literature. This is surprising as it represents a property context that is plagued with conflict between various stakeholders (including property owners, tenants, tourists, managers, service providers, developers, financiers, rental agents, local government, and lawyers) that have divergent interests. It has been estimated that around 3.5 million Australians live in a MOD.[5] Given the quantum of people affected, it is imperative to investigate the impact that developer governance decisions, made in the early life a MOD, have on a scheme over the longer term.

From a legal policy perspective, a better understanding of this topic is required to facilitate an informed appraisal of the appropriateness of the legal mechanisms and frameworks adopted in connection with MOD transitioning. Too often, regulations appear to be developed in an ad hoc manner, without the support of in-depth empirical research. By providing guidance for law reform, this study has the potential to lessen significant emotional grief and financial losses for millions of future lot owners, and also mitigate significant dysfunctionalities encountered by elected owner representatives during the early years of administering a scheme.

1.4 Research Question and Objectives

The study seeks to uncover the nature of governance decisions made by developers during the transition phase of MODs. The main research question underpinning the study is:

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[5] Hazel Easthope and Bill Randolph, 'Governing the Compact City: The Challenges of Apartment Living in Sydney, Australia' (2009) 24 *Housing Studies* 243.

To what extent do conflicts of interest (COIs) detract from the way that developers uphold their governance responsibilities during the transition of multi-owned developments (MODs)?

The broad objectives are to advance understanding of the extent to which developers:

1. are responsible for the governance decisions made while controlling the body corporate, and
2. should be required to promote good (best) governance practices to facilitate long term scheme functionality and viability.

The sub-objectives are to:

1. identify and examine legal provisions relating to the governance framework in MODs;
2. develop a typology of COIs arising during the transition phase of MODs;
3. appraise the manner, and extent to which, developers exploit COI opportunities;
4. identify consequences arising for owners as a result of developers exploiting COI opportunities; and
5. identify possible legislative provisions and other steps that could be taken to lessen the scope for developers pursuing self-interest during the MOD transition phase.

1.5 Terminology

A number of terms relating to MODs are used throughout this dissertation. Although the rationale for using such terms and further explanation is provided throughout the dissertation, it is helpful to highlight key terms used here.

As already noted, *multi-owned development* (MOD) refers to a property development type which comprises more than one lot tied to communally held common property, with a separate legal entity created to govern and manage the development scheme. Often these types of property structures are referred to as: strata title, community title, unit title, condominiums, common-interest developments or subdivisions with owners corporations (to name just a few).

Body corporate means the distinct legal entity created upon registration of a MOD scheme to govern and manage a scheme's common property. In Australia, each

jurisdiction uses different terms to denote the body corporate. In New South Wales, 'owners corporation' or (community, precinct, or neighbourhood) association is used for strata and community schemes respectively. In Queensland, the term 'body corporate' is used and in Victoria, 'owners corporation' is used. In this dissertation, 'body corporate' or the plural 'bodies corporate' is used, and all references made in the literature, the legislation or by interviewees has been purposefully changed for convenience.

Transition phase refers to the period of time commencing when the first governance and management decisions are made in relation to a MOD and continues until control of those decisions transfers from the developer to the collective of lot owners.

1.6 Dissertation Structure

I classify myself as a socio-legal researcher and that is the orientation of this study. My intention in preparing this dissertation has been to guide an educated reader through the research.

This dissertation is organised into seven chapters.

Chapter 1 introduces the focus of this dissertation, identifies the research question and presents the study's objectives. The importance of the study and also the nature of its contribution to knowledge are also outlined.

Chapter 2 outlines the research methodology used in the dissertation. This chapter discusses my background as the researcher, the research design and the philosophical assumptions underpinning the research. A grounded theory approach has been adopted for the study and the intricacies and guidelines of the research approach are outlined. The qualitative data research methods adopted, being interviews and document analysis, are also outlined together with the coding processes utilised. Table 1.1 highlights the empirical phases (methods) employed in this research project along with each phase's purpose and the chapter location in the dissertation where the findings are outlined. An evaluation of grounded theory and the interpretation process are presented in the final section of this chapter.

Table 1.1: Empirical Phases Employed in This Research Project

Nature of the Empirical Phase	Purpose	Location in Dissertation
Informal Semi-structured Interviews	To gain an understanding of the challenges associated with establishing a MOD and inform the direction of the study	Chapter 4
Document Analysis	To identify the legislative provisions relevant to developer governance decision-making in the transition phase	Chapter 5
Formal Structured Interviews	To enable theoretical sampling, constant comparative analysis of the data and the inclusion of new insights from various stakeholders	Chapter 6

Chapter 3 examines the range and scope of existing MOD research. This chapter utilises a life cycle model as a framework to synthesize and identify research gaps. The chapter also provides a cross-sectional analysis of the disciplines that have contributed to the stock of MOD research. It is noted that there has been minimal prior research focused on the transition phase of MODs. The chapter also highlights the predominance of descriptive case studies in prior MOD research and identifies a plethora of potential avenues for future research.

Chapter 4 presents the findings arising from the informal interview phase of the study. The voices of the interviewees are used to describe their opinions, perceptions and thoughts about the challenges confronted during the transition phase of MODs. The main challenges identified are structured according to COIs and developer control. The challenges identified during this phase of the study informed the nature and direction of the subsequent inquiries undertaken.

Chapter 5 examines the legislative basis for developer governance decision-making. This chapter identifies distinct time periods occurring within the transition phase and describes the nature of decisions made by developers during these periods. The legislation in the States of New South Wales, Queensland and Victoria were reviewed. These States contain the majority of Australia's MODs.

Chapter 6 examines the extent to which developers are responsible for the governance decisions made during the transition phase and whether developers should practice good governance when establishing a MOD. The chapter draws on pertinent literature, legal decisions and the findings from empirical phase 3 (formal interviews) to assess developer governance responsibilities in the body corporate governance system. The chapter represents an exploration of the governance system, the concepts of governance, governance responsibilities, governance quality and COIs.

Chapter 7 provides a discussion and conclusion of the study. This chapter highlights the way the research question has been answered and the way the objectives and sub-objectives have been achieved. The chapter provides a theoretical discussion regarding developer governance responsibilities in the transition phase by cross-referencing each of the jurisdictions reviewed in the study.

The dissertation's final sections provide a reference list and a set of appendices. Appendix A provides the interview questions employed in empirical phase 3 and Appendix B provides the study's informed consent documents as approved by the Griffith University Human Research Ethics Committee.

1.7 Conclusion

This chapter has provided an orientation for this dissertation. The chapter has briefly provided a background to the study, the study's research questions and objectives, the importance of the research undertaken, the meaning of key terms used and also outlined the dissertation's structure. The next chapter provides a detailed overview of the methodology.

CHAPTER 2: METHODOLOGY

2.1 Introduction

The purpose of this chapter is to outline the research design adopted for this dissertation. The first section discusses and acknowledges my background as the

researcher. The research design and philosophical assumptions underpinning this research is then presented. The qualitative orientation is then explained together with the methodology and the grounded theory approach adopted. The methods applied in undertaking interviews, data collection and document analysis are then outlined. The final section of this chapter evaluates grounded theory and the interpretation process.

2.2 The Researcher

I am a Caucasian female in my late 30's. I was born in Australia in a small country town in the State of New South Wales although, my formative years were spent in a city in Queensland. I was educated at a private Lutheran school and attended several Universities, where I completed a Bachelor of Arts, majoring in Psychology and Criminology; a Bachelor of Laws with Honours; and a Master of Criminology and Criminal Justice. I have spent a number of years working as a property lawyer in middle and top tier commercial firms. Over the last 10 years, I have been a volunteer lawyer for a pro-bono project committed to freeing people who have been wrongly convicted. I would characterise myself as a social justice advocate and a socio-legal researcher.

Unbeknownst to me at the time, this research project began on the 12 June 2007, the day I signed a contract of sale for the purchase of a one bedroom unit in a large residential multi-owned development (MOD) on the Gold Coast, in the State of Queensland. The development once completed would comprise of 400 lots on 7.5 hectares and be situated in what was described as the 'knowledge precinct' of the Gold Coast. As a practising lawyer, I was aware of the pitfalls of owning and living in such developments; however the location, price and design persuaded me to make the biggest investment of my life. Although I undertook my own due diligence and engaged an independent property lawyer to undertake the steps to convey the property, I could not have foreseen the dysfunction, conflict, abuse and mismanagement that I was about to encounter.

I could not have predicted that by asking a relatively innocuous question about a car being illegally towed from the development site that I would begin to unravel a myriad

of problems that took years and an enormous amount of money and litigation to rectify.

In the first few years after the scheme was registered, the body corporate was in significant financial distress due to initial levies being underestimated and funds being unlawfully transferred to other schemes. The body corporate was highly dysfunctional, owner participation in the governance of the scheme was low and there was a high level of legal non-compliance due to the mismanagement of the scheme by external stakeholders. As I and other owners began to trace the decisions which were made on behalf of the body corporate which lead to the dysfunction, it became evident that the developer was the main contributor (both directly and indirectly) to the problems encountered by the body corporate and therefore the lot owners, in the years that followed the building phase of the project.

I tell you my background including my training and my story as a property owner for two reasons. Firstly, research topics often come from personal experiences. 'We seek through the research to better understand our own experience; we wish to authenticate and share something new we have learned; or we want to instigate change so that others can benefit from our experience.'[6] Secondly, I should acknowledge that 'I', the researcher, have predetermined beliefs and assumptions based on the discipline areas in which I have been educated and the significant insights I have gained as an owner of a lot in a MOD, which impact upon how I have undertaken the study.

According to Denzin and Lincoln, the 'biographically situated researcher'[7] stands behind each phase of the research process and therefore the researcher's social situatedness needs to be clear and acknowledged. That is, the researcher's biography seeps into every aspect of the inquiry, including the philosophical assumptions which are rooted in the researcher's training and background.[8] These philosophical

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[6] Pat Bazeley, *Qualitative Data Analysis: Practical Strategies* (Sage Publications Inc, 2013) 7.

[7] Norman K. Denzin and Yvonna S. Lincoln, *The Sage Handbook of Qualitative Research* (Sage Publications Inc, 2011) 12.

[8] John W Creswell, *Qualitative Inquiry and Research Design: Choosing Among Five Approaches* (Sage Publications, 2013).

assumptions, once acknowledged, impact the elements of the research design, including the overarching research strategy.[9]

2.3 Research Paradigm

There are four underlying philosophical assumptions that the researcher needs to consider and articulate in a research project of this nature.[10] Beliefs about ontology, epistemology, axiology and methodology, the four qualitative philosophical assumptions, shape how I (as the researcher) see the world and therefore how I interpret the world, including this research. 'All research is interpretive: guided by a set of beliefs and feelings about the world and how it should be understood and studied.'[11] Clear communication about these assumptions is important in order for the reader to understand how the research problem, questions and methods have been shaped and formulated.[12] This system of beliefs constitutes a paradigm.

This research draws on the constructivist paradigm. As a constructivist researcher, my ontological belief (which asks the question, 'what is the nature of reality?'[13]) is that there are multiple realities[14] and that these multiple realities should be reported. In this study, I have purposively selected a cross-section of MOD stakeholders (including specialised lawyers, managers, and lot owners) from different Australian jurisdictions to present their views on this phenomenon. The epistemological stance (which asks the question, 'what is the relationship between the inquirer and the known?'[15]) for a constructivist is to ensure that I, as the primary researcher, get as close to the participants being studied as possible. I use the term primary researcher, as the selected stakeholder participants represent co-researchers in this project. Knowledge is known and constructed through the subjective experiences of individual views.[16] My axiological stance (which asks the question, is the research value fee?'[17]) has

[9] Delwyn Goodrick, 'Qualitative Research: Design, Analysis and Representation' (Course Notes, ACSPRI Spring 2013).
[10] Cresswell, above n 8.
[11] Denzin and Lincoln, above n 7, 13.
[12] Cresswell, above n 8.
[13] Denzin and Lincoln, above n 7, 12.
[14] Cresswell, above n 8.
[15] Denzin and Lincoln, above n 7, 12.
[16] Goodrick, above n 9.
[17] Ibid.

already been outlined above. I believe 'values are inherent in all research.'[18] I acknowledge and assert my standpoint by providing the reader with my background. My view is through the lens of a lot owner, property lawyer and researcher. The knowledge constructed therefore must be considered and critiqued from this standpoint. The methodological stance (which asks, 'how do we know the world or gain knowledge from it?'[19]), is inductive and emergent.[20] That is, the logic followed is not guided by an existing theoretical framework but emerges from systematic comparative analysis of the data. My intent is to interpret the meaning MOD stakeholders attribute to the issues that emerge from preliminary and formal interviews within a legal context. What are their experiences of this phenomenon? Is it the same as the experiences I discovered in my own scheme? How does the law fit within these experiences?

The preliminary questions that formed the basis of this research project were based around very broad concerns:

1. are the issues that have been encountered in my scheme unique, or widespread?; and
2. what legal mechanisms are available to protect bodies corporate and lot owners from decisions made by developers that detrimentally affect a scheme?

As highlighted in the following chapter, little scholarly attention has been directed to the transition period in MODs. This is the period in the life of a scheme during which, developers control and act on behalf of the body corporate. The conclusions drawn from the initial literature review were:

1. that due to the paucity of research in this area, this research project would be exploratory in nature; and
2. that in order to understand 'the phenomena' and therefore articulate the research problem and questions, I would need to collect data early on in the research process and study that data. The views and experiences of those living and working in the MOD sector would be crucial; and

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[18] Ibid.
[19] Denzin and Lincoln, above n 7, 12.
[20] Michael Patton, *Qualitative Research & Evaluation Methods* (Sage Publications Inc, 2015).

3. that a grounded theory approach would provide methodological guidance in order to construct theories and / or conceptual frameworks.

2.4 Methodology

As an exploratory research project, it was appropriate to begin the inquiry with a qualitative positioning. 'Exploratory researchers frequently use qualitative techniques for gathering data and they are less wedded to a specific theory or research question.'[21] Typically, qualitative research, 'is enacted in naturalistic settings, draws on multiple methods that respect the humanity of the participants in the study, focuses on context, is emergent and evolving, and is fundamentally interpretive.'[22]

The use of qualitative methods for exploratory research allows researchers to be more open-minded, flexible and investigative.[23] These qualities can lead to serendipitous discoveries not considered by researchers utilising other methods of inquiry.

The exploratory nature of this research project and the paucity of prior research in this area along with my constructivist beliefs led to this project being guided by the principles of grounded theory. Grounded theory is often referred to as 'a method[24] of conducting qualitative research that focuses on creating conceptual frameworks or theories through building inductive analysis from the data'.[25] That is, conceptual frameworks or theories emerge from data (once interpreted by the researcher) and not from preconceived theories about the research area. Strauss and Corbin argue that '[t]heory derived from data is more likely to resemble the "reality" than is theory

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[21] William Lawrence Neuman, *Social Research Methods: Qualitative and Quantitative Approaches* (Pearson Education, Inc, 5th ed, 2003) 30.

[22] Catherine Marshall and Gretchen Rossman, *Designing Qualitative Research* (Sage Publications, Inc, 5th ed, 2011) 2.

[23] Neuman, above n 21.

[24] In an effort to dispel confusion over the term 'method', it is more accurate to describe grounded theory as a research design framework, allowing researchers utilising either a single or multiple methods of data collection in the process of developing a theory (ies) or conceptual framework(s). The use of the term 'method' in grounded theory method appears to indicate a broader procedure in the whole research design.

[25] Kathy Charmaz, *Constructing Grounded Theory: A Practical Guide Through Qualitative Analysis* (Sage Publications, 2006) 178.

derived from putting together a series of concepts based on experience or solely though speculation (how one thinks things ought to work).'[26]

Charmaz, a constructivist grounded theorist, notes that grounded theory methods are not prescriptive, instead they provide a systematic yet flexible guidance for the construction of theories grounded in data.[27] Due to the iterative nature of the grounded theory methodology, dissertations utilising this method do not align or accord with the more formulaic style employed by researchers using other methodologies or research designs. In most dissertations, the first step in the process is to undertake the literature review. This undertaking is based on preconceived or developed theories or conceptual frameworks. The research problem, questions, aims and objectives are ascertained early on and direct the researcher in relation to the literature and research design. Data collection and analysis is only undertaken once the review is complete. In grounded theory research, the process is not as linear[28] and requires multiple steps or processes to be undertaken simultaneously. That is, the interaction and review of the literature and the collection of data is undertaken continuously as concepts and ideas emerge from the initial interpreted data. According to Swandt, grounded theory allows tentative answers to questions to be developed and concepts constructed early in the investigation.[29] Further data collection is then used to verify these constructed concepts and theories.[30]

For clarification purposes, I have outlined in Figure 2.1 the research activities employed for this research project utilising the principles of grounded theory. The figure illustrates the primary points of focus in the course of undertaking the thesis. The identification of the activities should not be taken as an indication that some other activities were precluded from receiving attention at the same time. That is, the research activities outlined were not necessarily isolated activities undertaken sequentially.

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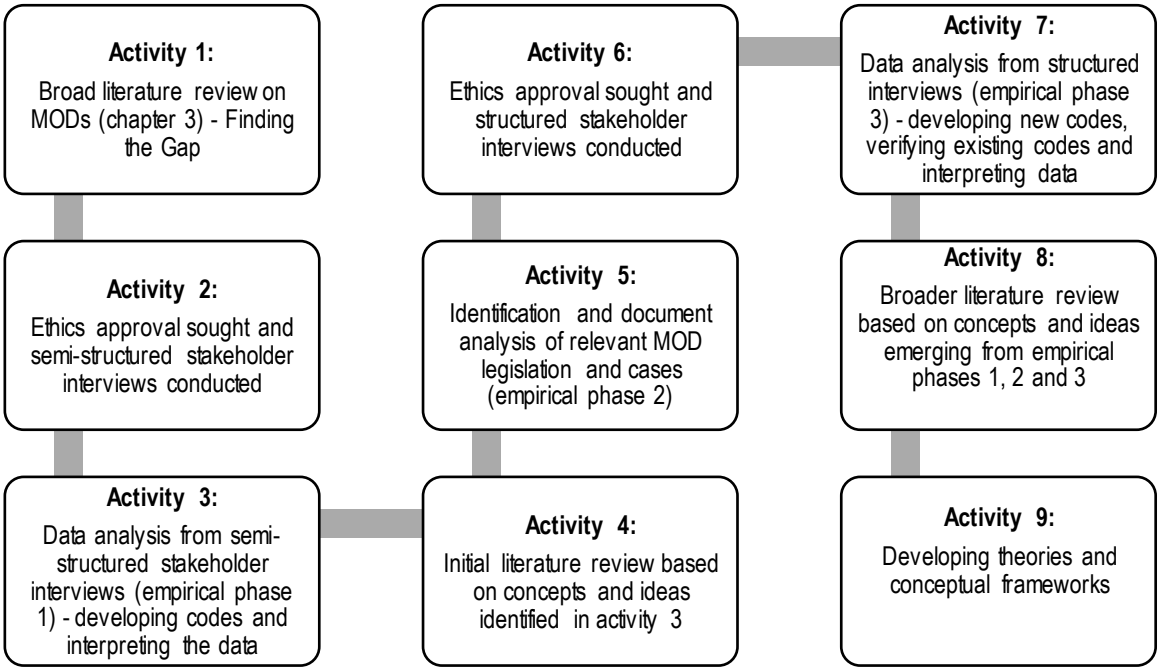
[26] Anselm Strauss and Juliet Corbin, *Basics of Qualitative Research: Techniques and Procedures for Developing Grounded Theory* (Sage Publications, 2nd ed, 1998) 12.
[27] Above n 25.
[28] Ibid.
[29] Thomas A. Schwandt (ed.), *The SAGE Dictionary of Qualitative Inquiry* (Sage Publications, 2007).
[30] Ibid.

Figure 2.1: Research Process Utilising Grounded Theory Guidelines



Activity 1: The first activity in this research project was to undertake a broad literature review on MODs. The purpose of this review was twofold. Firstly, the review was undertaken to identify studies and other works which focused on the transition phase of MODs or the developer's role in establishing a MOD and secondly, to highlight gaps in knowledge in the broader topic area of MODs. Chapter three of this dissertation, overviews the literature relating to MODs and highlights the paucity of research relating to the establishment and transition process of MODs.

Activity 2: The second activity in the research process involved the conduct of semi-structured stakeholder interviews (empirical phase 1). A total of 13 interviews were conducted. Participants included lawyers (predominant stakeholder group), managers, government representatives and a body corporate manager (BCM). The way that this empirical data collection activity was undertaken resulted from observations made in the conduct of the broad literature review. This review failed to identify any research specifically focusing on the transition phase in MODs. Prior to commencing this empirical data collection phase, ethics approval was required from Griffith University, as the research was to be conducted on human subjects.

Activity 3: The third activity involved the analysis of the semi-structured interview data using multiple coding techniques (outlined below in more details). Once coded, the data was interpreted and informed the nature and direction of the subsequent inquiry undertaken.

Activity 4: The fourth activity involved a more focused literature review that was guided by the initial concepts and themes emerging from the analysis of the unstructured interview data.

Activity 5: The most pertinent legislation, provisions and judicial decisions (empirical phase 2) were then examined based on the analysis conducted in activity 3 and the literature review conducted in activity 4.

Activity 6: The second in-depth interview phase (empirical phase 3) was then undertaken after a second ethics approval was granted by Griffith University.

Activity 7: Further coding and data analysis was undertaken concurrently throughout the structured interviews phase. New codes were developed, existing codes from phase 3 were verified and the data was interpreted.

Activity 8: A broader literature review was undertaken based on the concepts and ideas emerging from each phase.

Activity 9: Theoretical and conceptual frameworks were then developed. The next section describes these phases in more detail.

2.5 Data Collection Methods

Three data collection methods were used in this research project. Informal semi-structured interviews with key stakeholders, followed by a review of relevant state legislation and cases (document analysis), and finally, structured interviews with other stakeholders (selected from a broader set of interest groups than the informal interview phase). Use of multiple methods (triangulation) is characteristic of qualitative research and 'reflects an attempt to secure an in-depth understanding of the phenomenon in question.'[31] According to Swandt, triangulation is 'used to

[31] Denzin and Lincoln, above n 7, 5.

establish the fact that the criterion of validity has been met.'[32] Using multiple methods is one of the canons in ensuring rigour in a qualitative study.[33]

The range of methods used in this research project were determined as the project progressed. Informal semi-structured interviews were undertaken in order to facilitate an initial exploration of the research topic. The second empirical phase (document analysis of legislation and cases) was determined after the interview data was interpreted. This empirical phase was important as questions relating to legalities of developer actions became central to the research problem being uncovered. The third empirical phase (formal structured interviews) allowed for directed questions to be asked based on the data interpreted after the informal interviews were complete and also the legal documentation investigation highly advanced. The formal interview phase allowed me to pursue avenues of interest that had been highlighted by participants in the informal interview phase, while taking into account the legal framework. Questions were quite specific and directed in a way that enabled deeper probing and a more profound understanding of the research.

2.5.1 Interviewing

The voices, thoughts and opinions of these stakeholders are therefore important in understanding the phenomenon under study. Informal interviews with key industry experts were undertaken early on in developing the research project. The main purpose of this empirical data collection phase was to inform the direction of the overall study and to identify key themes and concepts worthy of deeper investigation. According to Rubin and Rubin,[34] early interviews enable the researcher to test ideas and choose concepts and themes to be explored in later interviews.

Interviewing allows a researcher to investigate what other people feel about their world, including property or commercial worlds. For Patton, '[q]ualitative interviewing begins with the assumption that the perspective of others is meaningful, knowable, and able to be made explicit.'[35] As researchers, we are gathering the stories

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[32] Schwandt, above n 29, 298.
[33] Marshall and Rossman, above n 22.
[34] Herbert Rubin and Irene Rubin, *Qualitative interviewing: The Art of Hearing Data* (Sage Publications, Thousand Oaks, California, 2005).
[35] Patton, above n 20, 341.

people hold in their minds. The quality of the information or stories to be elicited is dependent on the interviewer.

Formal structured interviews were conducted after the informal interview phase was complete and during the document analysis phase. This iterative approach to interviewing sits well within the grounded theory approach. According to Charmaz, '[g]rounded theory interviewing differs from much in-depth interviewing because we narrow the range of interview topics to gather specific data for developing our theoretical frameworks as we proceed with conducting the interviews.'[36]

2.5.1.1 Informal Semi-structured Interview Phase

Ethics approval was granted by Griffith University for 12 face-to-face interviews to be conducted. Although it is a University[37] and Australian Government[38] requirement to obtain ethics approval when involving human subjects in a study, it also highlights the ethical engagement and therefore the trustworthiness of the project being conducted.[39]

Purposive sampling was used as the main strategy to select potential interview participants. According to Patton:

> The logic and power of purposeful sampling lie in selecting information-rich cases for study in depth. Information-rich cases are those from which one can learn a great deal about issues of central importance to the purpose of the inquiry, thus the term purposeful sampling. Studying information-rich cases yields insights and in-depth understanding rather than empirical generalizations.[40]

This strategy was appropriate for this particular study, due to its exploratory nature and the need to specifically select participants from key stakeholder groups (strata title lawyers, BCMs, government representatives) and from key jurisdictions (New South Wales, Queensland and Victoria).

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[36] Charmaz, above n 25, 29.
[37] https://www.griffith.edu.au/research/research-services/research-ethics-integrity/human
[38] Australian Government, National Health and Medical Research Council: http://www.nhmrc.gov.au/guidelines-publications/r39
[39] Marshall and Rossman, above n 22.
[40] Patton, above n 20, 230.

Industry experts were identified through their association with industry bodies (Australian College of Community Association Lawyers (ACCAL), Strata Communities Australia (SCA)) or referred by committee members involved with the Griffith University Strata and Community Title in Australia for the 21st century biennial conference. The industry experts were located in the States of New South Wales, Victoria and Queensland (the States with the highest numbers of MODs). Legislative differences between States and financial constraints precluded inclusion of stakeholders drawn from all Australian States. An invitation to participate was sent via email and participation was voluntary. Once the invitation to participate was accepted, a copy of the ethics information sheet and consent form (presented in Appendix B) was sent to each participant together with an invitation for the participant to nominate a date and time to be interviewed.

The interviews took place in July and August of 2011. The majority of the participants in this interview phase were 'neutral stakeholders'. That is, aside from the two BCMs and one developer, the other participants represented other stakeholders (lawyers representing developer or body corporate clients or officers representing government departments). It was important to gain insight from the strata lawyers in particular, as their client base is diverse, due to the fact that they can act on behalf of all stakeholders.

The interviews were semi-structured. Six questions were formulated and sent to each interviewee prior to conducting the interviews. An interview guide was devised to ensure some continuity between each interview.[41] The aim of these questions was to gain an understanding of the challenges associated with establishing MODs from different stakeholder perspectives.

The interviews ranged in length from 40 minutes to one hour and 20 minutes and were electronically recorded following consent provided by each interviewee. Each interview was transcribed verbatim by a professional transcription company. Upon receipt of the transcriptions, an identification code was assigned to each transcript and the transcript was reviewed for accuracy. Each line of the transcript was numbered for ease of reference. All transcripts were uploaded into NVivo, a software

[41] Ibid.

platform for analysing unstructured data.[42] Preparation of the data in this way laid the foundation for the first step in the analysis, the coding.

2.5.1.2 Coding

According to Bazeley, 'coding is a way of fracturing data, breaking data up and disaggregating records.'[43] Coding enables the data to be sorted and ordered by indexing the information produced from the interviews. By labelling (coding) pieces of similar data, the researcher can begin to identify patterns in the data set.[44] For grounded theorists, coding links the collection of data to the emergent theory.[45] Effectively, coding data allows the researcher to describe what is happening in any given context.

There are a myriad of coding techniques that can be utilised in analysing qualitative data.[46] In grounded theory, there are two main phases: an initial phase and a focused phase. The initial phase requires either each word, line or segment of data to be labelled. This allows the analysis to take any possible theoretical direction.[47] According to Charmaz, we must ask the following questions in the initial coding phase:

- What is this data a study of?
- What does the data suggest? Pronounce?
- From whose point of view?
- What theoretical category does this specific datum indicate?'[48]

Both initial and focused coding of the interview data was undertaken. Initial coding requires the researcher to make a quick assessment about the data and assign a label. Segments of data (as opposed to words or lines) were coded and labels applied that accorded with the words of the participants. By coding segments, experiences or

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[42] QSR International, *NVivo 10 for Windows* (2015) http://www.qsrinternational.com/products_nvivo.aspx.
[43] Bazeley, above n 6, 128.
[44] Matthew B. Miles, A. Michael Huberman and Johnny Saldana, *Qualitative Data Analysis: A Methods Sourcebook* (Sage Publications Inc, 3rd ed, 2014).
[45] Charmaz, above n 25.
[46] See for example: Miles, Huberman and Saldana, above n 44.
[47] Charmaz, above n 25.
[48] Ibid, 47.

events described by the different stakeholders were captured. The experiences or events voiced by one interviewee were then compared to what was voiced by others.

The second phase, focused coding, requires the researcher to utilise the most significant codes from the initial phase to 'sift through large amounts of data'.[49] For Charmaz, '[f]ocused coding requires decisions about which initial codes make the most analytic sense to categori[s]e your data incisively and completely.'[50] Focused coding is not linear and requires the researcher to study the data in more depth and identify salient features from the initial code. It is important to continually immerse yourself in the data to ensure a full understanding of the experiences and events highlighted by participants. Table 2.1, provides examples of initial and focused coding based on some initial interview excerpts.

[49] Ibid, 57.
[50] Ibid, 58.

Table 2.1: Examples of Codes Developed From Informal Interviews

Interview Excerpt	Initial Coding Label	Focused Coding Label
Interviewee 8: 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 consultants' 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 six 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 seven thousand and at the second meeting they will say, well chop it back	• Projected levies leading to conflict • Striking levies backward • Market price point for levies • Stakeholder involvement in striking levies • Budget projection by manager • Pressure to minimise budget by developer	• Developer associated conflict • Developer priority interest • Conflict of interest
Interviewee 2: … what has tended to happen and probably more so in Queensland than the other States, but it is happening in New South Wales and Victoria, is that developers have almost taken it for granted that if it is a reasonable size 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 per cent, the arrangement is inappropriate for the building	• Jurisdictional differences • Custom for developers to appoint caretaker • Inappropriate caretaker arrangements in majority of schemes	• Inappropriate developer initiated arrangements
Interviewee 13: …because the developer, you know, because he has developed it he thinks he owns everything and also has the, tends to have very, limited about what they want to do. And they don't really quite often think about the end user too much. There they build it get out. And quite often they don't take into account the needs of the end user or they are so keen to, when they're developing it and then selling it, they don't think about a lot of the little issues that can be a big problem down the track after it's been finished	• Developer perception / arrogance about ownership • Lack of consideration about end user • Focus of building • Lack of consideration of the needs of end user • Lack of consideration about issues leading to problems later	• Disregard for end-user • Developer priority interest • Future conflict

The data from each interview transcript was coded with the aid of the NVivo software. NVivo is a tool enabling the creation of codebooks (digest of codes and categories) and providing a forum in which to house memos relating to the formulated codes. Memos are notes detailing the process the researcher undertook in analysing the data and creating the codes. Building a suite of memos is an important task in the data coding as they assist the researcher to 'increase the level of abstraction of … ideas.'[51] 'Memos catch your thoughts, capture the comparisons and connections you make, and crystallize questions and directions for you to pursue.'[52] Theoretical categories can develop from the memo-writing process as pertinent codes manifest. Memo-writing was conducted throughout the data collection and coding stages. An example of a memo is outlined in Table 2.2.

Table 2.2: Example of Memo from Interviewee 8 (excerpt from Table 2.1)

Striking Budgets
Interviewees discuss the method developers typically utilise in determining initial scheme budget. Based on pre-determined price point and not the operational costs based on the infrastructure and equipment installed – self-interest over those of future owners. What does the legislation require of developers when forecasting these budgets? Need to review requirements and jurisdictional differences. If this is commonplace, I need to investigate the impacts that these budgets have on the scheme and owners after registration. Interviewee 8 discussed a connection between underestimated levies and conflict. This is important, as underestimated budgets may have a flow on effect to a range of other issues for the scheme. At what stage do bodies corporate adjust the budget in accordance with real operational expenditure? How are these increases perceived by owners? Are there any legal ramifications for developers in striking underestimated levies? Managers engaged by developers are pressured (element of control) into preparing underestimated budget. Why? Conflict of interest? Managers will be appointed to serve the body corporate in the future. Fiduciary duties?

It is important to note that the codes were revised continually throughout the analysis phase. So the coding was not undertaken in a static manner. As new data is collected and interpreted (empirical phases 2 and 3), initial data and codes attributed to the data is revised and in some instances new labels are assigned.[53] This iterative approach, of going back to the data, is central to the grounded theory research.

[51] Ibid, 72.
[52] Ibid.
[53] Miles, Huberman and Saldana, above n 44.

2.6 Document Analysis

The second method of inquiry, document analysis, broadly relates to the examination of documents and records in a systematic way.[54] According to Altheide et al, '[a] document may be defined as any symbolic representation that can be recorded and retrieved for description and analysis.'[55] Public records such as government reports or media accounts, private documents such as medical histories or journals, or interview transcripts all can be systematically examined in research.[56] For the purpose of this study, relevant legal texts (statutes and judicial decisions) were examined and interpreted. These types of documents became the focus, as not only is the body corporate of a scheme a statutory creation and the legislation regulating it provides a framework for its governance, but also much of the structuring of MODs is regulated by the law.

Although documents or texts can be critically analysed for the purpose of constructing a literature review, they can also be considered as a method of analysis whereby the text is analysed. In the context of legal documentation, the analysis revolves around the interpretation of the text. The interpretation of legal texts, known as legal doctrine, has often been excluded as a method of empirical research.[57] Van Hoecke argues that analysing legal texts fits within the realm of empirical research, as '[l]egal scholars collect empirical data (statutes, cases, etc), word hypotheses on their meaning and scope, which they test, using the classic canons of interpretation'.[58] Although Van Hoecke uses positivist language in making his argument that legal doctrinal research is empirical in nature, I would suggest, as he asserts, that legal texts are the data source. However, the next step is not to hypothesise but to organise the data in order to facilitate interpretation (using the canons of legal interpretation).

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[54] Schwandt, above n 29; Glen A Bowen, 'Document Analysis as a Qualitative Research Method' (2009) 9(2) *Qualitative Research Journal*, 27.

[55] David Altheide et al, 'Emergent Qualitative Document Analysis' in Sharlene Nagy Hesse-Biber and Patricia Leavy (eds), *Handbook of Emergent Methods* (The Guilford Press, 2008) 127-151.

[56] Tim Rapley, *Doing Conversation, Discourse and Document Analysis* (Sage Publications, 2007).

[57] See for example, Lisa Whitehouse and Susan Bright, 'The Empirical Approach to Research in Property Law' (2014) 3 *Property Law Review* 176. The authors suggest that the doctrinal approach to research should be viewed as legal analysis, as opposed to empirical legal research.

[58] Mark Van Hoecke, 'Legal Doctrine: Which Method (s) for What Kind of Discipline?' in Mark Van Hoecke (ed), *Methodologies of Legal Research: Which Kind of Method for What Kind of Discipline?* (Hart Publishing, 2013) 1, 11.

Dobinson and Johns provide a brief but succinct narrative of the process of interpreting legal text:

> ...where an area is governed by legislation, finding the relevant source is generally straight forward. However, it is essential to check currency and judicial consideration. Checking currency is a routine technical process. Checking if there has been judicial consideration of an act or section ensures any personal assumptions about interpretation or application are not misdirected. It may also be useful to examine the context in which the legislation was created, for example the relevant parliamentary debates and, specifically, second reading speeches.[59]

The legal texts used in the context of this research represent data sources. The identification of relevant legislative Acts and provisions and judicial decisions emerged in two ways:

1. interviewees specifically identified provisions or cases when discussing issues or concerns during the interviews, or
2. the issues or concerns identified by interviewees gave rise to an examination of the relevant legislation and judicial decisions in order to determine:
    a. the rules regulating a certain behaviour or action, and
    b. decisions made which highlight the behaviour or action.

I began to construct a spreadsheet identifying pertinent legislation (and regulations) and specific provisions highlighted by interviewees. I then reviewed the entirety of the relevant Acts and regulations, noting specific provisions that aligned with the issues and concerns identified in the phase 1 interviews. I also cross-referenced these identified provisions with any relevant decisions, some of which were identified by interviewees. A review of secondary legal sources, particularly parliamentary debates and explanatory memorandums were also used as a cross referencing checklist, in order to validate the interpretation of the provisions identified. Analytic memos were created for each identified issue. Table 2.3, provides an example of the spreadsheet.

[59] Ian Dobinson and Francis Johns. 'Qualitative Legal Research' in Mike McConville and Wing Hong Chui (eds), *Research Methods for Law* (Edinburgh University Press, 2007) 27.

Table 2.3: Example of Cross-jurisdictional Spreadsheet Re: Developer-led Caretaking

Jurisdiction	Legislation	Section	Case	Secondary Source	Memo
New South Wales	*Community Land Management Act 1989* (NSW)	23	Community Association DP No 270180 v Arrow Asset Management Pty Ltd [2007] NSWSC 527	No explanatory note for Act	Section provides developer restrictions during control period specifically relating to incurring a debt Case - Initial period restrictions – developer stands in same position as promoter of company - Fiduciary duty
	Strata Schemes Management Act 1996 (NSW)	40B		SSMA – Explanatory Note- http://www.legislation.nsw.gov.au/maintop/bills - emphasis is on overcoming initial owner restrictions (alternative to Supreme Court action)	Section provides restrictions for developers entering into caretaking arrangements – places limitations on budget and contract term (expiry at first annual general meeting)
Queensland	*Body Corporate and Community Management Act 1997* (Qld)	112	Central Plaza Apartments [2012] QBCCMCmr 385	BCCM Explanatory Notes - https://www.legislation.qld.gov.au/Bills/48PDF/1997/BodyCorpComManB97E.pdf - provides max terms for contracts and contract disclosure	Section provides duties the developer must exercise in ensuring terms are reasonable and appropriate for scheme Case - Developer using POA beyond scope to vote at EGM to make changes to caretaking arrangements – double remuneration- developer failed to exercise reasonable skill, care and diligence

The Acts and regulations reviewed are set out in Table 2.4.

Table 2.4: Acts and Regulations Reviewed

State	Main Acts and Regulations	Ancillary Acts and Regulations
New South Wales	*Strata Schemes Management Act 1996* (NSW) *Strata Schemes (Freehold Development) Act 1973* (NSW) *Strata Schemes (Leasehold Development) Act 1986* (NSW) *Community Land Development Act 1989* (NSW) *Community Land Management Act 1989* (NSW) *Strata Schemes (Freehold Development) Regulation 2012* (NSW) *Strata Schemes (Leasehold Development) Regulation 2012* (NSW) *Strata Schemes Management Regulation 2010* (NSW) *Community Land Development Regulation 2007* (NSW) *Community Land Management Regulation 2007* (NSW)	*Property, Stock and Business Agents Act 2002* (NSW)
Queensland	*Body Corporate and Community Management Act 1997* (Qld) *Body Corporate and Community Management Regulation 2008* (Qld) *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld)	*Property Agents and Motor Dealers Act 2000* (Qld) *Property Agents and Motor Dealers (Property Developer Practice Code of Conduct) Regulation 2001* (Qld)
Victoria	*Owners Corporations Act 2006* (Vic) *Subdivision Act 1988* (Vic) *Sale of Land Act 1962* (Vic) *Owners Corporations Regulations 2007* (Vic)	

As grounded theory is iterative and nonlinear in nature, the document analysis commenced shortly after the data from step one (the informal interview phase) was analysed and continued throughout the second formal stakeholder interview phase.

The concepts and ideas emerging from the informal interviews along with the insights emerging from the document analysis, allowed for more insightful questions to be asked in the second interview phase.

2.7 Formal Stakeholder Interviews

The third phase of data collection involved structured interviews with a sample of 19 interviewees that included lot owners. The codes and categories that emerged from the analysis of the informal interviews informed the interview questions for this data collection phase. This more deeply probing, and structured interview phase enabled theoretical sampling. Theoretical sampling 'means seeking and collecting pertinent data to elaborate and refine categories in your emerging theory.'[60] It is a process of saturating the categories identified (from phase 1) to ensure that the properties of each category is well developed with a range of variation. It is not concerned with ensuring repetitive accounts, events of stories, as commonly thought.[61] Theoretical sampling ensures that the categories identified contain rich, thick and well-balanced properties. The iterative approach of grounded theory requires immersion into the chosen field of study over time. This enables theoretical sampling and adds to the credibility of the research. The data collected and analysed from both the informal and formal interviews (collectively 32 interviews) promoted category saturation. It is important to note that in qualitative research, the sample size is irrelevant. 'The validity, meaningfulness, and insights generated from qualitative inquiry have more to do with the information richness of the cases selected and the observational / analytical capabilities of the researcher than with sample size.'[62]

A total of 19 face-to-face interviews were conducted during 2012. A purposive sampling technique was again used in order to select information-rich cases. Interviewees were selected from the same jurisdictions as phase 1 (New South Wales,

[60] Charmaz, above n 25, 96.
[61] Ibid.
[62] Patton, above n 20, 245.

Queensland and Victoria); however, the stakeholder groups identified were different and included developers, lot owners (committee members) and BCMs. These specific stakeholder groups were identified as the most relevant stakeholders by the interviewees in phase 1.

Developers from a range of companies (different tiers - large international, large multi-national, medium) specialising in MODs were identified in each of the identified jurisdictions. An email invitation to participate in an interview was sent to the company director of each of these development companies. Some requests were internally referred to relevant project managers. BCMs specialising in large residential MODs were again identified through SCA or referred by committee members involved with the Griffith University Strata and Community Title in Australia for the 21st century series of conferences. Lot owners were identified through organisations representing lot owners or bodies corporate or by individuals working in body corporate management companies. Only owners who met specific criteria (owner, committee member, large residential scheme) were invited to participate.

Table 2.5, highlights the stakeholder groups contacted, the method and number of contact attempts and the number of individuals who agreed to be interviewed.

Griffith University granted ethics approval for this stage of the research project (see Appendix B). An invitation to participate was sent via email and participation was voluntary. Once the invitation to participate was accepted, a copy of the 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.

Table 2.5: Cold Calling Communications with Potential Participants

Stakeholder Group	Made Contact	Agreed to Interview
Developers	9- telephone call and email follow up	2 - developers from top-tier company 1- developer from mid-tier company
Body corporate managers	13 – telephone call and email follow up	7
Committee members	11 – telephone call and email follow up	9

Each interview had a duration of approximately one hour and was electronically recorded with the consent of each interview subject. The interview questions were derived from the informal interview phase findings and the document analysis. Questions were modified, depending upon the stakeholder group (owner, manager, developer) represented in an interview. Therefore three different sets of questions were developed. It should be noted that the questions evolved slightly over the course of the interviewing program. This accords with the guidelines used in grounded theory, as the researcher gains additional insights over the course of conducting interviews.

Each interview was transcribed verbatim shortly after the interview had taken place. Each transcribed interview was imported into NVivo 9 (analysis software) in order to assist with the thematic analysis of the data collected.

The same coding method and memo-writing was applied to the formal interview phase as the informal interview phase. That is, in relation to coding, the data was initially coded and then a secondary, focused coding was undertaken. The focused coding labels from the phase 1 interviews were beneficial in directing the coding labels for the phase 2 interviews. By applying the same coding method, a verification check was undertaken to ensure that the original coding labels (phase 1 interview data) were accurate and well developed and also it provided a clearer direction for the phase 2 labels.

2.8 Evaluating Grounded Theory

It is important to demonstrate that the research is credible, that there is a sound basis for the inferences made about the phenomenon being studied.[63] Traditionally, researchers used validity and reliability checks to ensure that the research was of sound quality. In the qualitative sphere, alternative standards have been proposed, although there are no all-encompassing standards.[64] As a constructionist grounded theorist, Charmaz highlights criteria for grounded theory studies, albeit with the caveat that the criteria is to guide.[65] Credibility, originality, resonance and usefulness

[63] Bazeley, above n 6.
[64] Ibid.
[65] Charmaz, above n 25.

are criteria used to 'address the implicit actions and meanings in the studied phenomenon and help [the researcher] analyse how it is constructed'.[66] To ensure rigour, I was guided by Charmaz's criteria. In terms of credibility, the multiple methods used and the iterative nature of the interviewing process over time enhanced not only the coverage of the data collected but also allowed for constant comparisons. In terms of originality, as an exploratory research project, the categories and insights developed are new and contribute significantly to property theory and to the MOD industry. In terms of resonance, again, the iterative nature of the data collection process saturated theoretical categories providing certainty in terms of the 'fullness of the studied experience'.[67] In terms of usefulness, this study not only contributes to knowledge but also, offers insights to the MOD community, including stakeholders and policymakers. The outcomes of this research can be the foundation of future research in the MOD area.

2.9 Interpretation

The outcomes of this study are the result of an analytical process, transforming the data into findings.[68] Making sense of the voluminous data collected 'involves reducing the volume of raw information, sifting the trivial from the significant, identifying significant patterns, and constructing a framework for communicating the essence of what the data reveal.'[69] Although there are numerous guidelines concerned with analysing qualitative data in existence, there is no exact recipe to follow. Generally, the process of reducing the data in order to make sense of it and identifying consistencies and meaning is referred to as content analysis.[70] This analysis allows patterns (descriptive findings) and themes (categorical or topical findings) to be revealed. Description comes first in the analysis stage. Chapter 4 of this dissertation therefore presents descriptive findings from the informal interview phase. The challenges and concerns voiced by the participants in the informal interviews are important as they too are co-researchers in this study and present the foundations, the starting point for the study. Chapter 6 presents the emergent themes from the

[66] Ibid, 183.
[67] Ibid, 182.
[68] Patton, above n 20.
[69] Ibid, 521.
[70] Ibid.

data. It is less descriptive and more analytical. The interpretation process culminates in constructing grounded theory. 'Theorising is a practice. It entails the practical activity of engaging in the world and constructing abstract understanding about and within it.'[71] Theorising is not, according to Charmaz, 'a blueprint for theoretical product.'[72] The resultant theory is an interpretation, my interpretation of the world subject to the study.

2.10 Conclusion

This chapter has outlined the research design and philosophical underpinnings of this research. As an exploratory study, the appropriateness of using qualitative methods was outlined. The grounded theory approach was also justified throughout the chapter. Examples were provided of the coding and memo writing processes. The methodological soundness was commented upon.

[71] Charmaz, above n 25, 128.
[72] Ibid, 129.

CHAPTER 3: LITERATURE REVIEW: EXPLORING THE KNOWLEDGE GAP[73]

3.1 Introduction

Internationally, there is a growing trend towards people living or working in multi-owned developments (MODs).[74] This legal structure of tying individual lots to communally owned property is being employed in a range of development contexts, including; commercial, residential, industrial, tourism properties, and even cruise ships.

Growth of the MOD approach has occurred despite shortcomings that appear endemic to the model.[75] For example, the legal obligations and responsibilities placed on owners to manage and govern these, often large, privatised communities appear to be a major contributor to the complexity of MODs in most jurisdictions. Further, the sheer scale and tiered structuring of some schemes, together with the existence of complex infrastructure that is communally owned, such as decentralised water management systems, can detract from the functionality and viability of these developments. These factors, combined with the large number of stakeholders that can be involved in a MOD[76] provide researchers with a plethora of research issues to examine. Despite this, there has been negligible effort directed to synthesizing this growing body of academic literature.

The purpose of chapter is to examine the range and scope of existing MOD research utilising a MOD life cycle model as a framework to synthesize and identify research gaps. The aim is to outline the life cycle of a MOD, the focus of prior research and the lack of research directed toward the establishment and transition phase of residential

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[73] A version of this chapter was further developed and published. Nicole R Johnston and Sacha Reid, 'Multi-owned Developments: A Life Cycle Review of a Developing Research Area' (2013) 31(5) *Property Management* 366.

[74] Simon Y Chen, 'Common Interest Development and the Changing Roles of Government and Market in Planning' (2011) 48(16) *Urban Studies* 3599; Easthope and Randolph, above n 25, 243; Douglas Harris, 'Condominium and the City: The Rise of Property in Vancouver' (2011) 36(3) *Law & Social Inquiry* 694; Evan McKenzie, 'Emerging Trends in State Regulation of Private Communities in the U.S' (2006) 66 *GeoJournal* 89; Ivan Townshend, 'From Public Neighbourhoods to Multi-Tier Private Neighbourhoods: the Evolving Ecology of Neighbourhood Privatization in Calgary' (2006) 66 (1) *GeoJournal* 103.

[75] Sarah Blandy, Ann Dupuis and Jennifer Dixon, *Multi-Owned Housing: Law, Power and Practice* (Ashgate, Surrey, 2010).

[76] Kelly Cassidy and Chris Guilding, 'Defining an Emerging Tourism Industry Sub-sector: Who are the Strata Titled Tourism Accommodation Stakeholders?' (2010) 29(3) *International Journal of Hospitality Management* 421.

MODs. It is important to provide such an in-depth, sequential, analysis, as the challenges faced by lot owners in MODs are often a consequence of problems arising at different stages in a development's life. Understanding how a development is planned, constructed, sold, operated and terminated and the key junctures when problems can arise, is critical to understanding the breadth of challenges faced in MODs.

Population growth and urban consolidation, in many nations, has led to increasing densities and forms of real properties that mirror a compact city approach to urban development.[77] Within this context, MODs are an important form of real property to study, as they impact on many individuals and communities socially, economically, and environmentally. Residential MODs are an established tradition in European countries, as a consequence of urban development. Whilst difficult to accurately determine, evidence suggests that approximately 21.1 per cent of the United States of America (USA) population reside in MODs.[78] In Australia, forecasts suggest the proportion of the population housed in MODs will mirror those of the USA in the not too distant future.[79] However, the impact of MOD moves beyond residential properties as many people work in factories, bars, restaurants, retail shops and offices that are also MODs.

Proliferation of this property type has resulted in many industry innovations, particularly with respect to design and structure. In terms of design, MODs have been categorised by; 'gatedness' (gated or non-gated)[80], density (high, medium or low)[81],

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[77] Easthope and Randolph, above n 5, 243; Bill Randolph, 'Delivering the Compact City in Australia: Current Trends and Future Implications' (2006) 24(4) *Urban Policy and Research* 473.

[78] Community Association Institute, Industry Data. Available at: https://www.caionline.org/AboutCommunityAssociations/Pages/StatisticalInformation.aspx (accessed 10 March 2017).

[79] Easthope and Randolph, above n 5, 243.

[80] Edward J Blakely and Mary G Snyder, 'Divided We Fall: Gated and Walled Communities in the United States', in: Nan Ellin (Ed) *Architecture of Fear* (Princeton Architectural Press, 1997); Jill Grant, 'The Function of the Gates: The Social Construction of Security in Gated Developments' (2005) 76(3) *The Town Planning Review* 291; Renaud Le Goix, 'Gated Communities: Sprawl and Social Segregation in Southern California' (2005) 20(2) *Housing Studies* 323.

[81] Valerie Kupke, Peter Rossini and Stanley McGreal, 'Measuring the Impact of Higher Density Housing Development' (2012) 30(3) *Property Management* 274; Bill Randolph, 'Delivering the Compact City in Australia: Current Trends and Future Implications' (2006) 24(4) *Urban Policy and Research* 473.

size (generally measured by number of lots)[82], scalability (horizontal or vertical)[83] or their use (residential, commercial, tourism, mixed-use, etc.).[84] In terms of structure, decisions in relation to tenure (e.g. freehold, leasehold), title (e.g. tenants in common, company title, strata title), and scheme arrangements (e.g. basic, layered) add to the range of forms this property type can assume.

The challenges that arise in MODs are as diverse as their design and structure. Some of the challenges faced by MOD stakeholders include: the curtailment of tobacco smoke exposure[85], owner apathy[86], management of building defects[87], decaying properties[88], competing stakeholder interests[89], and ensuring sound fiscal management.[90] Such challenges conspire to generate a dynamic context that poses research opportunities for academics representing a broad cross-section of disciplines.

Property research draws primarily on related disciplines such as economics, geography, planning, sociology and politics.[91] However, issues arising in MODs broaden the pertinent fields of enquiry, enabling theories and approaches from areas

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[82] Encon YY Hui, 'Key Success Factors of Building Management in Large and Dense Residential Estates' (2005) 23 *Facilities* 47; Kevin McHugh, Patricia Gober and Daniel Borough, 'The Sun City Wars: Chapter 3', (2002) 23(7) *Urban Geography* 627.

[83] Nicole Johnston, Chris Guilding and Sacha Reid, 'Examining Developer Actions that Embed Protracted Conflict and Dysfunctionality in Staged Multi-owned Residential Schemes'. Paper presented at the 18th Annual Pacific-Rim Real Estate Society Conference, Adelaide, Australia, 15-18 January 2012.

[84] Jill Grant and Katherine Perrott, 'Where Is the Café? The Challenge of Making Retail Uses Viable in Mixed-use Suburban Developments', (2011) 48(1) *Urban Studies* 177; Chris Guilding et al, 'An Agency Theory Perspective on the Owner/Manager Relationship in Tourism-based Condominiums, (2005) 26(3) *Tourism Management*, 409; Michael Pacione, 'Proprietary Residential Communities in the United States' (2006) 96(4) *Geographical Review* 543.

[85] Karen Wilson et al, 'Tobacco-Smoke Exposure in Children Who Live in Multiunit Housing' (2011) 127(1) *Pediatrics* 85.

[86] Chris Guilding et al, 'An Agency Theory Perspective on the Owner/Manager Relationship in Tourism-based Condominiums, (2005) 26(3) *Tourism Management*, 409.

[87] Alice Christudason, 'Defects in Common Property of Strata Developments in Singapore: Representative Actions Against Developers' (2007) 25(3/4) *Structural Survey* 306; Hazel Easthope, Bill Randolph and Sarah Judd, 'Managing Major Repairs in Residential Strata Developments in New South Wales' (2009). Available at http://149.171.158.96/sites/default/files/upload/pdf/cf/research/cityfuturesprojects/managingmajorrepairs/ManagingMajorRepairs_FinalReport.pdf (accessed 30 October 2012).

[88] Jan Warnken, Roslyn Russell and Bill Faulkner, 'Condominium Developments in Maturing Destinations: Potentials and Problems of Long-Term Sustainability' (2003) 24(2) *Tourism Management* 155.

[89] Guilding et al, above n 86, 409.

[90] Martti Lujanen, 'Legal Challenges in Ensuring Regular Maintenance and Repairs of Owner-Occupied Apartment Blocks' (2010) 2(2) *International Journal of Law in the Built Environment* 178.

[91] Simon Guy and John Hanneberry, (Eds) *Frontmatter, in Development and Developers: Perspectives on Property* (Blackwell Science Ltd, 2008).

as diverse as business,[92] accounting,[93] management,[94] criminology,[95] health,[96] psychology,[97] tourism[98] and law,[99] to name just a few. The incorporation of the separate entity to manage a MOD invites a number of new perspectives into property management discourse. For example, psychological theories can be drawn upon to advance understanding of the challenges faced by volunteer members in managing a MOD. Similarly, corporate governance theories can inform research concerned with identifying an optimal MOD governance model.

Although researchers from disciplines such as planning, geography, sociology and urban studies have provided significant contributions to the MOD literature in recent years, particularly with respect to the emergence, functioning and form of gated communities,[100] little attention has been directed to the life cycle of a MOD, or the links between the various life cycle stages and particular challenges arising within each stage. This may be due to the interdisciplinary research perspective that is required to undertake such analysis.

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[92] Kelly Cassidy and Chris Guilding, 'Tourist Accommodation Price Setting in Australian Strata Titled Properties' (2007) 26 *International Journal of Hospitality Management* 277.

[93] Kaylene Arkcoll et al, 'Funding Common Property Expenditure in Multi-owned Housing Schemes' (2013) 31(4) *Property Management* 282.

[94] Ngai-ming Yip, Chin-oh Chang and Tzu-ying Hung, 'Modes of Condominium Management: A Principal-Agent Perspective' (2007) 25(5/6) *Facilities* 215.

[95] Michael Townsley et al, 'Crime in High-Rise Buildings: Planning for Vertical Community Safety' (Report to the Criminology Research Advisory Council CRG29/11-12, Criminology Research Grants, June 2013).

[96] Brandon Perry, 'Falls Among the Elderly Living in High-Rise Apartments' (1982) 14(6) *Journal of family practice* 1069.

[97] Chris Guilding, Bradley Graham and Jessica Guilding, 'Examining Psychosocial Challenges Arising in Strata Titled Housing' (2014) 32(5) *Property Management* 386; Daniel Cappon, 'Mental Health in the High-Rise' (1971) *Canadian Journal of Public Health/Revue Canadienne de Sante'e Publique* 426.

[98] Jan Warnken and Chris Guilding, 'Quo vadis Gold Coast? A Case Study Investigation of Strata Titled Tourism Accommodation Densification and Issues Arising' (2014) 53(2) *Journal of Travel Research* 167.

[99] Kimberly Everton-Moore et al, 'The Law of Strata Title in Australia: A Jurisdictional Stocktake' (2006) 13(1) *Australian Property Law Journal* 1; Alice Christudason, 'Legislation Affecting Common Property Management in Singapore: Confusion or Solution through Fragmentation?' (2008) 26(3) *Property Management* 207.

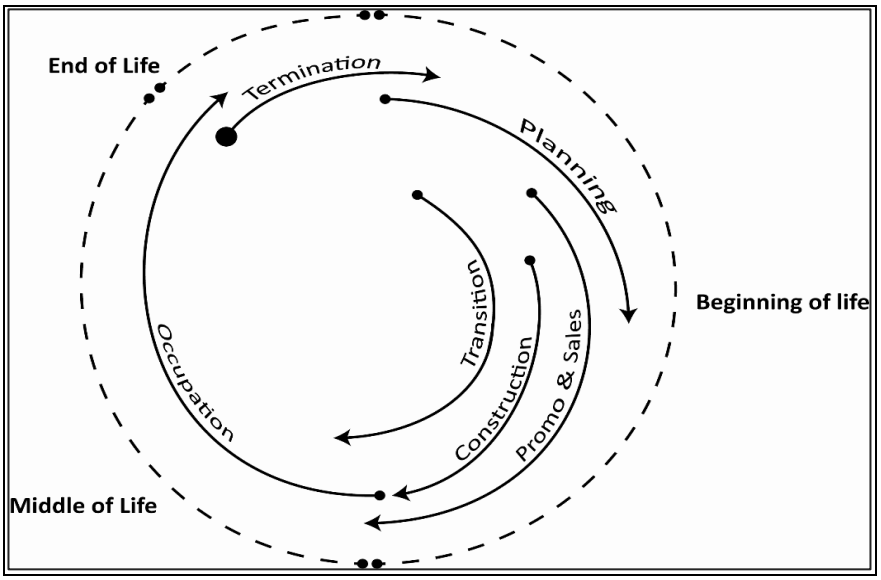
[100] Sarah Blandy and Diane Lister, 'Gated Communities: (Ne)Gating Community Development?' (2005) 20(2) *Housing Studies* 287; Jill Grant, 'Two Sides of a Coin? New Urbanism and Gated Communities' (2007) 18(3) *Housing Policy Debate*) 481; Evan McKenzie, 'Constructing The Pomerium in Las Vegas: A Case Study of Emerging Trends in American Gated Communities' (2005) 20(2) *Housing Studies* 187; Choon-Piew Pow, 'Constructing a New Private Order: Gated Communities and the Privatization of Urban Life in Post-Reform Shanghai' (2007) 8(6) *Social & Cultural Geography* 813.

3.2 Multi-owned Development Life Cycle

The MOD life cycle conceptualised here is not a developer-centric model, therefore it does not conclude with the completion of construction. Although the main development processes finish upon the conclusion of construction, there are a number of other staged processes that continue until the development is no longer sustainable or has reached the end of its viable life. There are a range of stakeholders, aside from the developer, who engage to varying degrees during the different phases subsequent to construction completion. The following six stages comprising the MOD life cycle are proposed and will be drawn upon to structure the ensuing discussion: planning, construction, promotion and sales, transition, occupation, and termination. Although identified as discrete stages, in reality, these phases are not mutually exclusive and they are over-lapping. For example, a basic MOD which is developed over a relatively short period of time (e.g. single high-rise building), begins with planning which will frequently overlap with the sales and promotion phase, the transition phase, and to a lesser extent the construction phase. The transition and sales and promotion phases will also often overlap with the occupation phase. In more complex schemes, delivered over time (e.g. greenfield sites), in addition to overlaps in the basic model, construction and occupation would overlap and the planning phase will be extended and may overlap with construction.

These six phases can be distilled down to three broad sequential stages: beginning of life, middle of life and end of life. During the 'beginning of life' stage, the development is created and sold (subsuming the planning, construction, promotion and sales and transition phases). During the 'middle of life' stage, the MOD is occupied. The 'end of life' stage sees the MOD demolished, renovated or redeveloped. These phases and stages for the basic MOD life cycle are diagrammatically depicted in Figure 1 and discussed in more detail below.

Figure 3.1: Basic Multi-owned Development Life Cycle Model



3.2.1 Beginning of Life Stage

3.2.1.1 Planning

Integral to all property development, planning 'is the process of informed decisions associated with plan-making and implementation, with regard to social, economic and environmental aspects of particular spatial arrangements'.[101] Developers and planners are in a powerful position to shape cities, towns and communities in the pursuit of creating sustainable, vibrant and functional communities.[102] The planning phase of the MOD life cycle incorporates a range of events that include: site identification and investigations, market research and feasibility analysis, financing and acquisition, design, and adhering to government approval processes.[103] Unlike other forms of development, the planning phase of most MODs overlaps with other life cycle phases, mainly due to financing constraints and the need to secure off-the-plan sales prior to construction. The planning phase also overlaps extensively with the occupation phase, especially in staged schemes.

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[101] Alan March, 'Practising Theory: When Theory Affects Urban Planning' (2010) 9(2) *Planning Theory* 108, 109.

[102] Jeffrey Kenworthy, 'The Eco-city: Ten Key Transport and Planning Dimensions for Sustainable City Development' (2006) 18(1) *Development, Environment and Urbanization* 67.

[103] Geoff Birrell and S Gao, 'The Property Development Process of Phases and Their Degrees of Importance', Paper presented at the RICS Cutting Edge Conference, Dublin, September 1997; Patsy Healey, 'An Institutional Model of the Development Process, (2007) 9(1) *Journal of Property Research* 33.

3.2.1.2 Promotion and Sales

Post global financial crisis, financiers, in most jurisdictions, require pre-sales of lots prior to providing financial approval that will enable construction commencement. The promotion and sales phases involve the original owner (developer) marketing, negotiating and executing sales contracts with potential buyers. In most jurisdictions, there is a requirement that disclosure statements be submitted to buyers at the time of contract of sale negotiation. The legal disclosure requirements that are imposed on developers vary significantly across jurisdictions. Requirements vary from disclosing only a scheme's by-laws, to disclosing budgets, maintenance forecasts, service and other agreements, and management statements.

3.2.1.3 Construction

The first phase of construction in a typical greenfield low density MOD may involve the clearing and installation of civil infrastructure and essential services, such as roadways, water and electricity. This is followed by a second construction phase during which individual lot owners engage independent builders to construct their dwellings. In other types of MOD, construction may be staged, signifying building construction is undertaken over an extended period of time, often on a precinct by precinct basis. In these developments, residents will often commence occupation in a building located in one of the initially completed precincts well in advance of construction commencing on other precincts comprising the scheme.

3.2.1.4 Transition

In the context of MODs, the term 'transition' refers to the period of time commencing when governance and management decisions are made in relation to a MOD and continues until control of those decisions transfers from the developer to the lot owners, collectively.[104] Transition processes begin in the MODs planning phase, at the point when the developer starts to make decisions that will affect the future operational structure of the development. Such decisions might relate to the establishment of service utility and facility contracts, management contracts, initial development budgets, and by-laws. During this phase, the developer is responsible

[104] Foundation for Community Association Research, 'Best Practices: Transition' (2003), Available at http://www.cairf.org/research/bptransition.pdf (accessed 12 November 2012).

for governance and management decisions by virtue of the role that is performed. That is, the role of the original owner, the legal entity (e.g. body corporate) or lot owner or lot owners' representative (by proxy or powers of attorney). In most jurisdictions, the end point of this phase is statutorily determined by a provision that stipulates when the developer can no longer control decisions.

3.2.2 Middle of Life Stage

3.2.2.1 Occupation

The occupation phase begins when sales of individual lots are legally settled and residents move into the MOD. The occupation phase is the middle of life stage of the MOD life cycle, as it is the period in which the development is used for the purpose that it was designed for. Dredge and Coiacetto note that much of the strata title (i.e. MOD) literature has a sociological, economic, governance and management approach which falls within this phase.[105] As places of residence or business activities, MODs constitute social spaces. The self-governance obligation, in addition to community issues arising during this phase, triggers a multitude of sociological issues.

3.2.3 End of Life Stage

3.2.3.1 Termination

The termination phase occurs when an MOD either reaches a point where the infrastructure (the buildings and common facilities) have decayed and there is a need to either rejuvenate (renovate), or to demolish in order to facilitate site redevelopment. Prior to any redevelopment or demolition of a site, the ownership of a scheme must be terminated and the legal entity dissolved. Legal processes involved in actioning a termination can be difficult and slow, as most jurisdictions (e.g. Australia[106], USA) require unanimous resolution of the owners to terminate a scheme. Legislative innovation in Singapore, Hong Kong, New Zealand and some States in the USA has facilitated a reduction in the proportion of owners that are required to

[105] Dianne Dredge and Eddo Coiacetto, 'Strata Title: Towards a Research Agenda for Informed Planning Practice', (2011) 26(4) *Planning Practice and Research* 417.

[106] Except in New South Wales which amended the termination provisions in 2015. The *Strata Schemes Development Act* 2015 requires the support of at least 75 per cent of the owners for a proposed strata renewal plan to be implemented. See part 9 of the Act.

terminate a scheme.[107] However, a significant proportion of MODs are entering their end of life stage and research that can better facilitate termination is becoming increasingly important to the sustainability of future urban form.

3.3 Methodology Applied in the Literature Search

An exploratory qualitative research methodology utilising a three stage search process was adopted to collate the MOD literature. Firstly, a lexicon of terms was developed to identify the range of terms used when referring to MODs due to the range of terms used internationally (as evidenced in Table 3.1).

Table 3.1: Overview of Multi-owned Development Terms by Jurisdiction

Jurisdiction	Development Type	Legal Entity
Australia		
New South Wales	Strata title Community title	Owners Corporation Association
Queensland	Community title	Body corporate
Victoria	Subdivision with owners corporation	Owners corporation
International		
USA / Canada	Common interest developments / communities Condominiums Gated communities	Homeowners Associations HOA)
United Kingdom	Commonhold Gated communities	Commonhold association
New Zealand	Unit title	Body corporate
Singapore	Strata title	Management corporation
South America	Condominios exclusivos / fechado	

Secondly, these terms, together with more generic terms such as; high-rise, apartments, mixed use, flats, serviced apartments, apartments, and mixed ownership, were used in a search of databases (Proquest, Informit, Science Direct and Google Scholar). The database searches ensured broad capture of works concerned with MODs. Key academics known to be active in the field were also searched, such as;

[107] Easthope and Randolph, above n 5, 243.

Blandy, Christudason, Easthope, Glasze, Grant, Guilding, McKenzie, Randolph, Sherry, and Webster. Additionally, a specific search was made of the following journals: Housing Studies, Property Management, Urban Policy and Research, and Urban Studies. These journals were selected on the basis that they are internationally focused, represent a broad range of disciplines and their aims cohere with issues relevant to the field of MODs. Over 403 journal articles were identified in the initial search.

Thirdly, all of the papers obtained during the second phase were entered into Endnote. A search for duplicate papers was then undertaken. An Ulrich search was then utilised to identify only peer-reviewed journal articles and then further refined to include only empirical research articles. A total of 96 peer-reviewed empirical research articles were identified.

An iterative two stage content analysis process was then adopted to analyse the corpus of published works. Firstly, a literature matrix by primary author discipline, MOD term, main themes, authors, methodology and jurisdiction was undertaken. Papers specific to MODs were then further categorised according to MOD life cycle category, research theme, MOD terminology, authors, jurisdiction and methodology.

3.4 Findings and Discussion

A significant number of authors, both professional and academic, contribute to the MOD literature (approximately 230). However, less than a quarter (96 or 23.8 per cent) of the papers identified were peer-reviewed, empirical research articles, with most published in the last decade (approximately 90 per cent). These findings are unsurprising, given that the study of 'property' is not a traditional academic discipline, with relatively few property and MOD specific programs and courses offered (aside from property law courses) in many Universities. As Getz[108] acknowledges, new academic fields emerge when both professional practice warrants the implementation of courses or degrees at a university level and '[w]hen a critical mass of students, programs, and teachers is reached'. Currently in the USA and Australia, a limited number of tertiary education courses are directed to or even incorporate the

[108] Donald Getz, 'Event Tourism: Definitions, Evolution, and Research' (2008) 29 *Tourism Management* 403, 405.

study of MODs. University educated professionals at the centre of the sector are primarily drawn from either business, law or planning disciplines. The largest professional stakeholder group, managers of MODs, either have a business based disciplinary education or participate in educational courses for accreditation via industry institutes or vocational training. In Australia there is no formal industry specific educational qualification required of someone seeking a career as a MOD manager.[109] However, there are a number of conferences that focus specifically on MODs. These tend to be practitioner (e.g. lawyers and managers) focused as opposed to academically focused.

Like other emergent fields of inquiry, knowledge creation in this arena has been eclectic and ad hoc.[110] It appears that the proliferation of this property development type, the diversity of challenges that arise, the multitude of stakeholders involved and the lack of academic investigation in the development of educational programs, dedicated journals and academic conferences, has contributed to a siloed and fractionised approach to research. This fractionalised characteristic is evident from the literature review undertaken for this study.

Whilst the range of disciplinary perspectives evident in the MOD research literature is wide, it is dominated by key areas. The geography, planning and urban studies disciplines are dominant with a third (34) of the journal articles authored by researchers from these fields. The dominance of these disciplines is unsurprising, given the extensive impact of these developments (due to size, scale and proliferation) on the local and regional communities' landscape. MOD proliferation has also impacted upon local government infrastructure responsibility and resource management, which in turn affects the way in which planners make decisions concerning the development and growth of towns and cities.

The diversity of disciplinary perspectives combined with the breadth of jurisdictions represented has resulted in a wide range of terms used to describe MODs. The MOD form most frequently referred to in the papers was 'gated communities' (38 or 39.6 per cent), followed by 'high-rise' or 'high(er) density' (17). 'Gated communities' is a

[109] However, there are courses available if managers wish to obtain professional qualifications.
[110] Getz, above n 108, 403.

term used in studies conducted in a broad range of jurisdictions including; the United States of America, United Kingdom, Argentina, Australia, Brazil, Bulgaria, Canada, Chile, China, Indonesia, Israel, Poland, Portugal, Saudi Arabia, Singapore, South Africa, and Turkey. The terms 'high-rise', 'high density', or 'strata' were used almost exclusively in the Australasian region (e.g. Australia, Hong Kong, and Singapore). Although it is acknowledged that the term 'MOD' may be somewhat broad and all-encompassing when conducting research concerning a specific MOD type (e.g. high-rise building), the lexicon of terms used across the world creates barriers for researchers when attempting to uncover or identify pertinent research in this area. As more research is published in this field, it will become more onerous to ascertain, with any certainty, the breadth of research on MODs and also the knowledge gaps.

According to Getz, it is difficult to ascertain in new fields of inquiry 'what is being argued, theorized, concluded, or questioned'[111] without first mapping out the literature and assessing the methodologies, concepts, themes, and topics. In light of this concern, Table 3.2 has been developed. This table provides a listing of academic papers, structured according to the particular phase of the MOD life cycle with which they most closely align.

[111] Donald Getz, 'Event Studies: Discourse and Future Directions' (2012) 16 *Event Management* 171, 182.

Table 3.2: Research Papers That Align with a Stage of the Multi-owned Development Life Cycle

Life Cycle Phase	Articles	MOD Description	Article Themes / Authors	1st Author Discipline Area	Research Methods
Planning	3	High density, high-rise, planned unit developments, gated communities	• Compliance with planning conditions (Lai et al., 2005) • Privatising roads (Grant & Curran, 2007) • Strategic planning (Pouder & Clark, 2009)	Real estate and construction, planning, management	Survey, document analysis, interviews, field observations, case studies
Construction	0				
Sales and Promotion	7	Gated communities, high density, serviced strata, common interest	• Property valuations (Bible & Hsieh, 2004; Pompe, 2008; Chau et al., 2004; LaCour-Little & Malpezzi, 2009; • Marketing strategies (Fernandez et al., 2002) • Disclosure requirements (Riley & Li, 2009; Hetrick, 2008)	Economics and finance, real estate, law	Hedonic pricing, interviews, case studies, sales data, legislative analysis, document analysis
Transition	3	Residential MODs, private housing estates, high density	• Transfer of control and power (Blandy et al., 2006) • Governance planning (Mahon & OCinneide, 2009; Li, 2005)	Law, geography, real estate and construction	Interviews, case studies
Occupation	26	Condominiums, gated communities, high density, tourist accommodation, strata, community title, apartments, multi-storey, homeowners associations	• Resident satisfaction (Carvalho et al., 1997; Chapman & Lombard, 2006) • Experiences of living (Appold & Yuen, 2007; Whitzman & Mizrachi, 2012; Blandy & Lister, 2005; Yee, 2002) • Nuisance issues (Noise (Alam et al., 2010; Tobacco exposure (Wilson et al., 2011)) • Room rates (Cassidy & Guilding, 2007) • Stakeholder relationships (Cassidy & Guilding, 2011; Guilding et al., 2005; Chase, 2008) • Disputes & conflict (Christensen & Wallace, 2006) • Property managers / management (Christudason, 2004; Christudason, 2008; Han & Lim, 2001; Ho et al., 2005; Lai, 2006; Hsieh, 2009; Hastings & Wong, 2005; Guilding & Whiteoak, 2008, Gibson & Lombard, 2005) • Building Defects (Christudason, 2007) • Owner participation (Yau, 2011) • Service providers (McCabe & Tao, 2006) • By-laws (Sherry, 2009)	Architecture, urban studies, business, paediatrics, tourism, real estate, law, public administration, geography	Survey, secondary data, diaries, simulations, interviews, panel discussions, legal cases analysis, case studies, mapping
Termination	4	Condominiums, strata, buildings	• Impacts preventing rejuvenation (Warnken et al., 2003; ; Hui et al., 2008) • Factors impacting on collective sales (Christudason, 2005; Low, 1999)	Environmental science, real estate	Field enquiries, secondary data, mapping, case studies, legislative and case analysis

Approximately 45 per cent (43 of 96) of analysed articles aligned with a MOD life cycle phase. The occupation stage dominated, corroborating Dredge and Coiacetto's findings that MOD research has been concerned primarily with sociological, economic, governance and management orientation of occupation.[112] Popular themes examined during the occupation phase include resident satisfaction, MOD living experience, nuisance issues (noise, tobacco exposure), stakeholder relationships, disputes and conflicts, management issues, building defects and by-laws. For example, Appold and Yuen[113] and Whitzman and Mizrachi[114] have contributed to MOD occupation phase research by examining the experiences of families and children living in high-rise environments. Furthermore, Christensen and Wallace[115] undertook research focused on the causes of disputes in a MOD context. Studies of this nature have the potential to promote understanding that can lead to better planning, design and construction of MODs.

Whilst the MOD occupation phase has generated the most research interest, extensive further research opportunities relating to this phase are still evident. As the occupation phase signifies the occupation of MOD space by individuals, this phase is associated with the multiplicity of challenges surrounding living issues, with the added complexities that arise from close quarter living. Future research focusing upon stakeholder relationships, owner participation and body corporate committee responsibilities, conflict resolution and disputes, legal compliance and community governance models is needed. The sociological aspects of community living, such as developing a 'sense of community' and facilitating culturally and demographically diverse communities also require future research attention. Some examples of possible research questions that could be pursued include: what are the main causes of non-participation by owners in a scheme?; how would compulsory education of committee members impact upon committee participation and dispute resolution?;

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[112] Dredge and Coiacetto, above n 105, 417.
[113] Stephen Appold and Belinda Yuen, 'Families in Flats, Revisited' (2007) 44(3) *Urban Studies* 569.
[114] Carolyn Whitzman and Dana Mizrachi, 'Creating Child-Friendly High-Rise Environments: Beyond Wastelands and Glasshouses' (2012) 30(3) *Urban Policy and Research* 233.
[115] Sharon Christensen and Ann Wallace, 'Links Between Physical and Legal Structures of Community Title Schemes and Disputes' (2006) 14(1) *Australian Property Law Journal* 90.

what measures can be introduced to minimise neighbour intolerance?; to what extent do committees comply with the law?

Research into sustainability measures that would enhance MOD liveability is also required. One possible focus concerns the potential implications of decentralised water management systems and other sustainability measures. In undertaking research of this nature, an understanding of the legal framework and how governance and management decisions are made would be fundamental.

The promotion and sales phase is the next most commonly researched MOD life cycle phase. Interestingly, extensive commercial research directed to the significance of this MOD phase has not been matched by a similar quantum of academic research. Academic research has been limited to property valuations, marketing strategies deployed and disclosure requirements. The literary interest on property valuations has focused primarily on the added value of, 'gating'.[116] Research that can better inform the conduct of this life cycle phase is to be welcomed, as it is during this stage that potential purchasers commit themselves to becoming a key stakeholder (owner) in a MOD. This is a challenging purchase decision, as purchases are frequently made off the plan, with no opportunity to inspect or view the actual built form. Potential avenues of promotion and sales research that could be beneficial for the sector include: consumer behaviour and buyer targeting (investors versus prospective owner occupiers), marketing strategies employed, buyer inducements (including rental guarantees and levy ceilings for initial ownership periods), and agent representations.

Disclosure statements, which are frequently debated in the MOD industry, have also been the subject of research within the promotion and sales MOD life cycle phase. Hetrick examined the bombardment of disclosure documents in many jurisdictions and the ineffectiveness of disclosures in protecting consumers.[117] In a study focused on serviced schemes, Riley and Li examined the need for Commonwealth and state

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[116] Douglas Bible and Chengho Hsieh, 'Gated Communities and Residential Property Values' (2001) 69 (2) *The Appraisal Journal* 140; Jeffrey Pompe, 'The Effect of a Gated Community on Property and Beach Amenity Valuation' (2008) 84 *Land Economics* 423; Michael LaCour-Little and Stephen Malpezzi, 'Gated Streets and House Prices' (2009) 18 *Journal of Housing Research* 19.

[117] Patrick Hetrick, 'Drafting Common Interest Community Documents: Minimalism in an Era of Micromanagement' (2008) 30(3) *Campbell Law Review* 409.

regulatory requirements for disclosure to be more synergistic and consistent.[118] Valuable insights can be derived from research that examines the issuance, adequacy and effectiveness of disclosure statements. In addition, the legal advisory process invoked in connection with MOD sales also appears to be worthy of academic scrutiny.

Whilst, engineering and construction disciplines have well-established bodies of literature, especially in relation to high rise developments, a limitation of this research is the dearth of MOD journal articles aligned to the construction phase. MOD research that focuses on construction issues is much needed. In particular, research concerned with the following issues could greatly advance our understanding of challenging, yet important, aspects of MOD development: uncovering and rectification of building defects, certification of works, issues confronting residents living in MODs while construction is on-going, issues relating to the non-completion or revised design of staged MODs, and construction issues arising from the rejuvenation of existing buildings. Interdisciplinary informed research that is directed to the MOD construction phase would likely provide considerable insights into how some highly undesirable scenarios can be mitigated or avoided. For example, ensuring residents are well-informed about construction progress, anticipated disturbances and also using materials that minimise noise or smells could greatly lessen the propensity for tensions arising between residents and a MOD developer.

This study identified limited research aligned to the planning, transition and termination MOD life cycle phases. Themes evident in the planning phase included planning conditions (specifically non-compliance of conditions and development control), privatising roads (i.e. the planning implications of privatising roads) and strategic planning (i.e. planning targeted towards sustainable growth and preservation). These findings support Dredge and Coiacetto's claim that 'research directly relating to strata title and its impact and relevance to planning is quite limited'.[119] This is concerning, as the quality of planning decisions carries implications for all ensuing MOD life cycle stages. Decisions made in connection with legal titling,

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[118] Sophie Riley and Grace Li, 'Disclosure Requirements and Investor Protection: The Compatibility of Commonwealth, State and Territory Laws in Serviced Strata Schemes' (2009) 16(3) *Australian Property Law Journal* 262.

[119] Dredge and Coiacetto, above n 105, 425.

governance and management structure, the implementation and ownership of equipment and infrastructure, are vital to the success of a MOD. Well informed planning represents a key investment that has the potential to mitigate negative implications for a MOD structure and the range of stakeholders that own lots, live in, or work in the structure. Therefore, research aimed at addressing planning concerns within the MOD life cycle has the potential to be highly significant for the industry.

The transition phase, which concerns the transference of developer control and ownership to lot owners, is an under-researched area.[120] Themes evident in connection with this phase are concerned with the transfer of control and power (specifically noting issues stemming from control retained by developers) and governance planning (legislative deficiencies that impact on property management). A tenet of Blandy, Dixon and Dupuis[121] concerns the way that power embedded in the developer can have long-term consequences for lot owners, despite ownership transfer. New owners can be reliant on other stakeholders to understand the legal requirements bestowed on them to manage their development, how the development operates and is to be managed and maintained, contractual arrangements that need to be established, development of financial procedures, etc. Issues relating to a scheme's establishment, the turnover of control and power and, establishing governance and management frameworks, all constitute potential avenues for future research. It is often during the transition stage that issues relating to building defects can become apparent. If building defects are not appropriately handled by the various stakeholders, considerable tension and conflict can manifest for an extended period.

Impediments to rejuvenation and collective sales represent emergent themes in the literature relating to the termination phase. Ageing MOD stock, approaching the end of life stage, constitutes a challenge that confronts many owners and bodies corporate. Decaying and ageing high-rise buildings and impediments to renewal were explored by Hui, Wong and Wan[122] in relation to Hong Kong and Warnken, Russell and

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[120] See for example: Blandy, Dixon and Dupuis, above n 1, 2365.
[121] Ibid, 2365.
[122] Eddie Hui, Joe TY Wong and Janice KM Wan, 'A Review of the Effectiveness of Urban Renewal in Hong Kong' (2008) 26(1) *Property Management* 25.

Faulkner[123] in relation to tourism properties in Australia. As building standards and requirements change (e.g. fire safety, health and safety, environmental sustainability measures) it can become prohibitively expensive to accommodate or retrofit a building. Challenges also often arise in these ageing developments when one or several owners refuse to sell, stifling building demolition and subsequent site redevelopment. Balancing owners' proprietary rights against the need for site rejuvenation is an area worthy of specific academic enquiry.

Table 3.3 overviews the 53 papers that do not align with the MOD life cycle model. Strong themes apparent in this sub-set of the literature include: the emergence of MODs (gated communities in particular), issues relating to community segregation, social inclusion and integration, market characteristics and issues relating to crime and fear of violence as a rationale to gate. A number of papers also examined legal frameworks, structures, and policies. In analysing the collected data, many researchers drew comparisons with non MOD properties.

[123] Warnken, Russell and Faulkner, above n 88, 155.

Table 3.3: Broad Context Multi-owned Development Papers

1st Author Discipline	Articles	MOD Description	Article Themes / Authors	Research Methods and Methodologies
Planning / Urban Studies	16	Condominiums, gated communities, common interest, medium density, higher density	• Market characteristics (Skaburskis, 1988; Sanchez et al., 2005; Easthope & Tice, 2011; Danielson, 2007) • Segregation (Atkinson & Flint, 2004; Roitman, 2005) & Integration (Salcedo & Torres, 2004; • Emergence and development (Ben-Joseph, 2004; Buxton & Tieman, 2005; Grant & Rosen, 2009) • Sense of community, crime and fear of crime (Wilson-Doenges, 2000) • Comparisons to other communities (Grant, 2007) • Regulations and policies (Cruz & Pinho, 2009; Gooblar, 2002; Grant et al., 2004; Grant, 2005)	Survey, observations, interviews, case studies, secondary data, document analysis
Geography	13	Gated communities, condominiums and cooperatives, high-rise, common interest	• Spatial change and seclusion (Glasze & Alkhayyal, 2002; Wu & Webber; 2004; Townshend, 2006) • Development and emergence (Stoyanov & Frantz, 2006; Leisch, 2006; Pow, 2009; Costello, 2005) • Private provision of infrastructure and segregation (Le Goix, 2005) • Comparisons to other communities (Lemanski & Oldfield, 2009) • Electoral behaviour (Walks, 2012) • Resident characteristics (Preston, 1991; Fincher, 2007) • Regulations and policies (Thuillier, 2005) & Governance (Kenna, 2010)	Case studies, interviews, surveys, mapping, secondary data, narratives, document analysis
Social science	8	Gated communities	• Violence and fear of crime (Low, 2001) • Segregation (Durington, 2006; Vesselinov et al. 2007; Vesselinov 2008; Raposo, 2006) • Emergence of gated cities (Genis, 2007; Polanska, 2010) • Gentrification (Bounds & Morris, 2005)	Interviews, observations, document analysis, ethnographic fieldwork, case studies, secondary survey data, questionnaire
Architecture / Built Environment / Property Development	8	Enclaves, Higher density, gated communities, serviced apartments, high density	• Prevalence and rationale (Luymes, 1997) • Market characteristics and implications for planning (Randolph, 2006) • Social cohesion and segregation (Manzi & Smith-Bowers, 2005) • Design approaches (Landman, 2008; Rofe, 2006) • Factors impacting supply (Foxley, 2001) • Impacts on neighbourhood social structure (Kupke et al., 2012) • Changing ownership system (Walters & Kent, 2000)	Thematic analysis of advertisements, secondary data, case studies, Interviews
Law & Public Policy	4	Strata title, community title, common interest, high rise	• Legal framework or structure (Everton-Moore et al., 2006; Sherry, 2009) • Electoral behaviour (Gordon, 2003) • Sense of community (Forrest et al., 2002)	Legislative review, case study, Secondary data, mapping, interviews
Economics	2	Planned developments and condominiums, HOAs	• Private government effects on public finance (Cheung, 2008) • HOA membership and local politics participation (Groves, 2006)	Survey, secondary data

Environment	2	Condominiums	• Gentrification and spatial segregation (Lehrer & Wieditz, 2009) • Emergence (Huong & Sajor, 2010)	Document analysis, interviews, case study

3.5 Conclusion

The findings of the literature search undertaken reveal a predominance of descriptive case studies. Exploratory research is common in nascent fields of enquiry.[124] As Edmondson and McManus note '[b]ecause little is known, rich, detailed, and evocative data are needed to shed light on the phenomenon'.[125] Therefore, descriptive case studies and qualitative research techniques such as interviews and observations allow researchers to describe and understand the phenomena. Much of the existing research is also aimed at justifying the proliferation and rationale for MODs (particularly gated communities). Sociological (e.g. segregation) and psychological (e.g. fear of crime) considerations have also emerged as primary topics explaining the rise in MODs. Interestingly, consumer demand or other business management factors were generally not researched, despite the economic importance for development feasibility and business sustainability.

This chapter has sought to outline the range and scope of the existing MOD literature. The literary overview provided has been structured according to the phases in the life of a MOD structure. Exploring and investigating MODs from a life cycle perspective has assisted in exposing numerous avenues for future research that can be conducted from a range of discipline areas. A significant contribution of the chapter concerns the new insights into gaps in the literature provided. Identification of these gaps has resulted from the novel structure adopted in undertaking the literature review.

As more individuals are living and working in MODs, significant social, economic and environmental consequences arise. Therefore, it is timely that the prior research is reviewed and research gaps identified, in order to assist in the field's advancement. The interrelationships that exist within and between the MOD life cycle stages have significant implications for those living and working within MODs. Creating vibrant and functional MODs can only be achieved by considering all aspects of the MOD life cycle.

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[124] Friedrich Steinle, 'Entering New Fields: Exploratory Uses of Experimentation' (1997) 64 *Philosophy of Science* S65.

[125] Amy Edmondson and Stacy E McManus, 'Methodological Fit in Management Field Research' (2007) 32(4) *Academy of Management Review*, 1246, 1262.

The literature review findings also highlight that discipline specific research has dominated MOD research. It appears that adopting an interdisciplinary perspective will strengthen future theoretical and industry development. MODs are not simply a static built form, they are akin to a living organism that evolves over time. Focusing on how MODs are governed and managed, understanding the laws regulating these communities, how people live in the communities, the challenges that arise for each stakeholder group, the barriers to MOD termination and so forth, can inform planning research and property professionals. However, consistent with all nascent fields of study, this research has identified a plethora of possible future research directions.

In conclusion, societal expectations of functioning and sustainable communities highlights the importance of academic attention contributing to these debates. There is a need for informed research about the challenges that arise within each life cycle stage, in order to plan for sustainable MODs. Sustained population growth and constrained physical space will continue to drive many governments towards a compact city planning approach.[126] In a world that is constrained by physical space, it is inevitable that more individuals and businesses will be operating and living in MODs.[127]

This chapter has provided a timely snapshot of current research, to provide the development sector and the housing literature with an understanding of the range and scope of research focusing upon MODs. It is important as it showcases the research focus in the MOD area and more importantly, for the purpose of this dissertation, the paucity of scholarly works relating to MOD establishment and transition. The lack of knowledge in this area provides a very strong motivation for the application of grounded theory in pursuit of this thesis' broad objective of advancing our appreciation of issues and challenges associated with the transition phase in the life of MODs. It is hoped that the findings of this dissertation will contribute towards closing this research gap.

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[126] Haiyan Chen, Beisis Jia and S S Y Lau, 'Sustainable Urban Form for Chinese Compact Cities: Challenges of a Rapid Urbanized Economy' (2008) 32(1) *Habitat international* 28; Louise Thomas and Will Cousins 'The Compact City: A Successful, Desirable and Achievable Urban Form?' in Mike Jenks, Elizabeth Burton and Katie Williams (eds) *The Compact City: A Sustainable Urban Form?* (Spon Press, 2005), 44.
[127] Mike Jenks and Rod Burgess (eds) *Compact Cities: Sustainable Urban Forms for Developing Countries* (Spon Press, 2000).

The next chapter will highlight and discuss findings from the informal interview phase of the research.

CHAPTER 4: DESCRIPTIVE FINDINGS – THE CHALLENGES IN TRANSITIONING MULTI-OWNED DEVELOPMENTS

4.1 Introduction

As highlighted in Chapter 3, the transition phase of a multi-owned development (MOD) is an under-researched area that is in need of scholarly attention. It is the phase in the life cycle of a MOD that can shape the long term future functionality and viability of a scheme. The purpose of this chapter is to seek to lessen this research void by highlighting the challenges arising from the transition phase of MODs, as described by stakeholders interviewed for this study.

In light of the paucity of prior research, it was deemed important at the outset of the study's empirical phase to invite key stakeholders to express their thoughts, perceptions and opinions about the challenges faced by stakeholders involved in transitioning MODs. As outlined in Chapter 2, informal stakeholder interviews were undertaken in order to inform the direction of the study and to identify key themes and concepts worthy of further investigation. The findings highlighted in this chapter relate to these interviews and are descriptive in nature. The voices of the interviewees dominate and are used to describe the challenges and concerns they have identified through their experiences. These challenges and concerns are collated under themes that were identified in the course of the data coding process.

Table 4.1 provides an overview of the interviewee sample. It identifies a unique identifying code for each interviewee, the nature of their professional background and an indication of their main client base. The identification numbers are used to reference the voices of the interviewees throughout the chapter. The majority of the interviewees (eight) were MOD specialist lawyers. Specialist litigation lawyers were targeted as the main informal interviewee group as they represent a range of different stakeholder perspectives and have a particular awareness of the conflicts and challenges arising in MODs. The five other interviewees were body corporate managers (BCMs), government representatives and a developer.

Table 4.1: Informal Interviewees

Interviewees' Identification Number	Background / Expertise	Client Base	State
1	Body corporate manager	Developers and bodies corporate	Queensland
2	Lawyer	Developers and bodies corporate	Queensland
3	Government representative	Bodies corporate and owners	Queensland
4	Lawyer	Bodies corporate predominately	Victoria
5	Developer	Owners	Victoria
6	Body corporate manager	Developers and bodies corporate	Victoria
7	Lawyer	Developers	New South Wales
8	Lawyer	Bodies corporate and owners	New South Wales
9	Government representative	Bodies corporate and owners	New South Wales
10	Lawyer	Bodies corporate and owners	New South Wales
11	Lawyer	All stakeholders	New South Wales
12	Lawyer	All stakeholders	Queensland
13	Lawyer	Bodies corporate and owners	Queensland

Although a general interview guide was prepared prior to conducting the interviews, all interviewees were encouraged at the beginning of the interviews to speak openly and candidly about the transition phase of MODs, the challenges they had encountered and the concerns that they held. The following questions were used as a general interview guide only.

1. What are the key challenges associated with transitioning a strata and community title scheme from a developer to lot owners?

2. What are the challenges for developers (as the original owner) in creating strata and community title schemes?

3. What are the challenges for the body corporate in managing strata and community title schemes both during the developer control period and after the developer has left?

4. What are the challenges for owners who have purchased a lot in a strata or community title scheme?

5. Are there different challenges in larger - layered / staged schemes?

> 6. What role do you think the law plays in contributing to or alleviating the challenges faced by the various stakeholders?

In interpreting the interview data, the main purpose was to look for descriptive patterns. That is, the identification of different challenges and concerns raised by the interviewees. Qualitative data requires '[a] solid, descriptive foundation' in order to obtain a 'higher level of analysis and interpretation.'[128] Similarly, Patton suggests that in qualitative research, description must come first.[129]

> A basic tenant of research is careful separation of description from interpretation…It is tempting to rush into the creative work of interpreting the data before doing the detailed, hard work of putting together coherent answers to major descriptive questions.[130]

Three overarching themes emerged from this interview phase – conflicts of interest, developer control and disclosure.

The voices of the interviewees are used to illustrate their opinions, perceptions and thoughts about the topic or the concerns that they raised. Quotations are used not only to highlight their concerns but also to capture their emotion. The interviews triggered passionate responses from many of the interviewees. As a result, it has been deemed important to keep responses whole and in a narrative style.[131] Words, phrases and thoughts that were repeatedly used have been highlighted in bold to showcase connections. The quotations cited have been edited to remove speech disfluencies and fillers and to ensure consistent terminology usage. For example, 'body corporate' was replaced when interviewees were referring to 'owners corporations'.

Each theme and associated sub-themes and concepts are detailed below:

4.2 Conflicts of Interest

Developer related conflicts of interest (COIs) were overwhelmingly the main topic area discussed in the interviews. The COI concerns have been organised under two

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[128] Miles, Huberman and Saldana, above n 44.
[129] Patton, above n 20.
[130] Ibid, 534.
[131] Ibid.

headings – direct COIs and indirect COIs. Direct COIs relate to the multiple roles held by developers and the frequently conflicting nature of these roles. That is, the developer can hold such roles as the initial owner (developer), builder, lot owner(s), body corporate, manager, caretaker (building manager), seller, and real estate agent, to name a few. The multiplicity of these roles can place the developer in a position where some roles conflict with one another. The indirect COIs relate to third party conflicts where the developer, in its capacity as the body corporate, promotes the interests of service providers such as BCMs, utility or other service contractors. The interviewees highlighted instances and provided examples of particular COI situations arising from these direct and indirect relationships in the transition phase of MODs as well as the consequences of these conflicts for schemes.

4.2.1 Direct Conflicts of Interest

The majority of the lawyer interviewees saw COIs as one of, if not the, biggest issue in the transition phase of MOD.

> ...one of the greatest problems in that period is the **conflicts of interest** that exist; that the **stakeholders have interests, which are often at odds with each other**. (10)

The conflicting interests commented on by the lawyer interviewees stem from the diversity of stakeholder interests apparent in development projects.

> So, whenever the **developer has a financial interest, you are going to have this potential conflict**. (2)

Both the lawyer interviewees and the developer interviewee highlighted the competing nature of the roles that a developer can and must assume. The developers juggling of these multiple roles can compound the COI issue.

> There's certainly apparent **conflicts of interest**, and a lot of developers don't know how to handle it. (7)

The developer interviewee discussed the competing roles and the difficulties associated with juggling these roles and responsibilities:

> **…** But, the reality is **I sort of wear multiple hats, because I'm the manager, I'm the developer and I'm also a member** ... **and I sit on all the committee meetings**,... but at the

> end of the day, it is an issue of ethics I guess, and depending on who I am, that might be used or abused. **I am juggling my roles**, like how am I thinking at this point in time and occasionally when I am talking to my OC Manager she will say, **just reminding you, you've got to put your members' hat on, or the committee's hat on or your manager's hat on. So I guess it is always hang on, am I making that decision because I am a developer now, or am I thinking about the greater good of the existing residents**. (5)

The lawyer interviewees focused strongly on the purpose of the body corporate (as a creation of statute), the developer as a constructing entity and the developer in its capacity to act as the body corporate. As a recurring theme in these interviews (and as highlighted in this chapter), the lawyer interviewees flagged how the body corporate can be used as a mechanism to benefit the developer in the early stages of the development. The following comment highlights the juxtaposition of the competing roles of the developer and the intention of the legislature in creating bodies corporate.

> I would say that the **legislature did not create bodies corporate for developers to make a profit. They created them for people to run the communities they ultimately live in**. And developers are just taking advantage of a legal quirk… Developers can make a profit, knock yourself out, make as much money as you can, **but just not in your capacity in acting on the body corporate**. (11)

This interviewee drew on an analogy to explain why a developer cannot, in its capacity as the body corporate, make a profit from its position or use information acquired from this position to make a personal profit.

> I have never been able to get anyone to explain to me how those obligations are any different to a company director of a company. It is just the fact that in a body corporate they can't act on their own, they only can act to the extent that a human being acts for them. And in exactly the same way that a director of a company very clearly **cannot make a personal profit at the expense of a company or cannot make a profit from stuff they have found out about as a result of being a director of a company, to me in your capacity of sitting on a body corporate is exactly the same.** (11)

4.2.2 Indirect Conflicts of Interest

The interviewees also outlined a number of indirect COIs relating to the developer. These are COIs arising from arrangements entered into by the developer on behalf of the body corporate. Often these arrangements are determined prior to the creation of the body corporate but formalised in the early stages of the life of a body corporate during the period when the developer controls the body corporate.

The lawyer interviewees, in particular, expressed significant concerns over the relationship between BCMs and developers during the start up phase of MODs and the potential consequences resulting from these relationships. In order to ensure that bodies corporate function from inception, developers often engage a BCM to assist in the administration of the body corporate. It has become customary for managers to provide these services, at little or no charge, in exchange for the developer causing the body corporate to enter into a management agreement. The lawyer interviewees expressed the clear view that this practice should not only be prohibited but that it represents a potential breach of both the developer's fiduciary obligation to the body corporate and the manager's fiduciary obligation to the body corporate.

> It happens in every jurisdiction that I know. So we get this problem. Now **why do the strata managers prostitute themselves in this way, and the answer to that is because they get their work from developers**. So the developer says to a strata manager, "I want you to do a budget and write some by-laws and tell me what should be in the common property and what shouldn't be, but I am not going to pay you for that. What I am going to do, I am going to give you a three year contract when this thing is built". (8)

> Most of them [BCMs] 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 should be prohibited. That is also, I think, **a breach of the fiduciary duties, anyway**. So that should be stopped. And it can be stopped in one of two ways, either by saying that developers cannot offer these incentives, if they are going to take those sorts of advice that they can pay for it or get them on some other basis. (7)

> ...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… (10)

> But [the developer] will go to a strata managing agent whilst they are putting their development together, and they will say, right here is what it looks like, I want you to do a draft budget for me so I can tell the purchasers what the likely levies are, you know, setting the question after the price for the practiced punters, here's how much the levy is going to be, so they do that. **They're not being paid for this**, most of them aren't being paid for this. (7)

The developer interviewee advised that in structuring a particular development, a decision was made to establish its own management company and provide services to the body corporate.

> So, one of the first mechanisms is that **we own the [body corporate] management company**. And so, before we actually bought the site we went back to this group of people and said, do you accept this company as the body corporate manager and put it to a vote and as you know there is a **lot of complacency in these communities, so we ultimately did get their approval to manage them**. So, in this situation we had to get their approval to be manager, in every other situation it's a **condition of their contract of sale**. (5)

COI situations also arise in relation to utility suppliers. From interviewee comments made, it is evident that developers often enter into agreements with utility suppliers on the basis that the equipment or infrastructure is supplied at no charge to the developer in exchange for committing to agreements that may not serve the best interests of the body corporate.

> …those gas heaters they 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)

> We see now with developers they are entering into **agreements with utility companies** in relation to electricity, hot water, you know 10 year agreements where the utility

company owns the equipment, so if you try and get out of it, then you have got to then buy back the equipment, and sometimes that is hundreds of thousands of dollars. And a lot of those sorts of agreements really are not disclosed in the off the plan contracts. (13)

4.2.3 Challenges arising from Conflicts of Interest

Interviewees were asked to discuss the challenges and situations that arise as a result of these COIs. Challenges identified included underestimated budgets and levies, inappropriate use of proxies and service agreements, problems rectifying building defects and non-deliverance of development documents.

4.2.3.1 Budgets and Levy Contributions

A significant transition phase problem that interviewees highlighted relates to the preparation of the initial budget of the body corporate and therefore in turn, the contributions to be paid by each lot owner. A number of interviewees indicated that it is common practice for developers to formulate a body corporate's budget based on a marketable price point instead of based on the real costs of running (operating) the body corporate. It was widely claimed that the developer creates an underfunded budget in order to make the project more saleable to potential buyers.

> …so you just got an issue with **underfunding** because they [developers] want to keep the levies looking as low as possible. (13)

> ...budgeting becomes an issue because **the developer's budgeting usually turns out to be totally inadequate**... (2)

The following comments highlight one interviewee's observation relating to how budgets are determined. This observation typifies the views expressed by several interviewees:

> 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 $6 000 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 $7 000 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)

The exclusion of some cost items in a scheme's initial budget was identified as a result of product guarantees. That is, some maintenance costs could be excluded from the initial annual cost estimates due to warranties connected to some products. However, most interviewees were of the opinion that the true cost levels that will be incurred following the warranty expiration period should be highlighted to purchasers. The concern being that purchasers are under the belief that the initial levies are indicative of on-going levy levels.

> The administrative fund is slightly different, because the **admin fund at the very outset is never going to be genuine because most of them work on developer guarantees**. But it will always be a **false figure** [administration figure], because it won't reflect what they will have to pay when they get in. If they **mislead people I don't think that is fair**, the way to get over it, may just be to make it mandatory for a budget to be pushed out. (10)

A budgetary item that has a large impact on the total cost of running a body corporate relates to insurance. Interviewees commented that developers often underinsure developments in order to keep the levies low.

> They [developers] will **insure the property for what is really half the value**. And there is the first problem. You will see a three unit development insured for $300 000, which is ridiculous. They keep the costs down as low as possible to get them off the ground and then the people have to pick up the pieces and there is double insurance etc. [6]

The developer interviewee was quite candid about this process of determining a levy based on market saleability:

> … so we went out and looked at comparable buildings and what are these buildings paying for levies, and we were conscious that we don't have much in way of amenity here, there are no pool, no gym, so is it reasonable to be expecting people to paying $3 000 a year here... probably not, and so when we compared it with other buildings and found that $2 000 is probably the right figure … (5)

Aside from the infrastructure warranties, interviewees also commented on developers subsidising a scheme's budget in order to enhance a scheme's

marketability. The developer interviewee elaborated on the rationale for such a subsidisation:

> … at the moment, although I am only legally entitled to contribute 25 per cent of that overall budget, I am actually paying 75 per cent, so I am subsidising an additional 50 per cent…Also, as a developer you have to think, well hang on, I am trying to sell apartments here. If people know that their body corporate levies are $3 000 a year, I might not make a sale, and so it's to **my own marketing advantage** to be able to subsidise this at the same time…So, it's in my interest to subsidise and to maintain a seamless transition at this stage, to be able to market the stage. (5)

4.2.3.2 Unpaid Developer Levies

Another problem given significant prominence by the lawyer interviewees related to unpaid developer levies. The issue of unpaid developer levies has a couple of dimensions. Firstly, through vote retention, the developer controls the body corporate and therefore can inhibit debt recovery efforts. Secondly, BCMs engaged by developers are often reluctant to advise the independent members of the body corporate that the developer owes a debt. Interviewees commented on the financial burden that arises due to these unpaid levies.

> …unpaid development levies, **unpaid development levies being a fantastic problem**. And particularly **where the developer connives the situation to thwarting attempt at recovery**. You know there is quite a few of those around the traps …developers just don't have the money. And so they don't pay their levies, and of course leaves your body corporate buggered. (12)

> **Some of them [developers] don't pay the levies as well**. (13)

> I think another issue that we are seeing a lot of is **developers retaining ownership** of unsold stock, and / or balance development land, and staged developments, **who won't pay their levies**. So often, you have got [bodies corporate] in distress if you have got a developer that's got 40 per cent control, that means you have 60 per cent of the people paying 100 per cent 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. So that, that is real pressure and then of course their mentality as well. We will pay the levy for that unit when that unit's sold, well that is not the responsibility. The

> responsibility is to pay the levies like all unit owners, when they are due. So that is a massive problem. And it always comes at the bottom of the market… (8)

4.2.3.3 Building Defects

Another major challenge identified by interviewees that stems from COI situations relates to building defects. Several of the lawyer interviewees commented that developers attempt to abrogate responsibility in relation to remedying building defects. The rationale opined was that rectifying defects impacts negatively on developer profits and therefore developers skirt around their responsibilities in order to ensure profit maintenance. As highlighted by a government representative and lawyer interviewees, bodies corporate are under statutory obligations to maintain the building(s) and common property. If the body corporate inherits a building with defects, it must remedy the defects itself and either; shoulder the costs of the rectification works or take legal action against the developer to recoup the costs associated with defect rectification. In any event, it must comply with the statutory requirements.

> You know the **body corporate inherits a building or a complex and inherits warts and all**, and then has obligations itself under the Act in terms of maintaining the building… I mean, those obligations are quite onerous. You know the body corporate is obliged to maintain the building in good condition, and if it finds it's inherited a building which is in its view **defective,** then it has to look to potential remedies for that whilst complying with its obligations to maintain it and potentially looking at trying to apportion some liability for the defect on the developer. (3)

> … a developer who may or may not be the builder will have to confront a **defective building** audit, which is probably the **single largest issue in terms of both dollars for cost** to the [body corporate] on legal's that are spent. Obviously the developer **has a vested interest in not doing any defects, because it will come out of his bottom line**. Whereas the [body corporate] has a vested interest, and indeed has an obligation to the statute to see that it is done. (10)

COI situations can arise in relation to building defects in several ways. The most common scenario highlighted by lawyer interviewees related to the pre-existing relationship between the developer and the BCM. Interviewees commented that managers are reluctant to inform bodies corporate about avenues to address building

defects and even go so far as thwarting or suppressing defect claims. Lawyer interviewees commented that BCMs have fiduciary obligations to the body corporate and by thwarting or suppressing defect claims, they are breaching their obligations.

> … in the middle, you've got **agents who in many circumstances are beholden to the developer for work, but at the same time have fiduciary obligation to the owners' corporation as their agent.** (10)

> I've heard people say that the agents are all a pack of crooks, and I've had other people say, oh we rely on their agent to give us advice...The legal reality is they should be able to rely on that agent because they are a **fiduciary**, and they should give them fearless and fair advice. The reality is that a lot of agents don't, **because they rely on the developer for the work and therefore they suppress the defect claims.** (10)

> …they [BCMs] are engaged originally by the developer and they want to get the developer's next project and the next one and the next one so, and you do see it in some cases, where there is an issue with the developer, whether he is gone or still there, particularly **building defects** and things like that, the **manager just won't do anything**. If there are defects and you want to get the developer back or the body corporate wants to sue the developer, they are not encouraging or assisting the process and quite often the committees are being left out on their own, they are not getting any support from the manager and they say, well he was engaged by the developer and now he is going to get the next project and he doesn't want to upset the developer. That's a bit systematic as well. (13)

The developer interviewee highlighted a connection between unpaid developer levies and the inability of the body corporate to rectify defects. The developer's comment appears to indicate that the rectification was a body corporate responsibility and the issue related to their non-payment of levies, not the developer's responsibility to rectify the defects.

> **...**there was frustration on that issue, **defects being repaired** and that was a result at the time, GFC had struck, **[development company] was quite slow in paying subsidised levies and so there weren't funds in the kitty to address those issues**, and so people were frustrated more by the fact that things weren't being repaired when they needed to be and because our funds were slowing down. We were slow at paying our funds ....so there was a built up anger by the time we got to the AGM. (5)

Another issue relating to COIs that was noted by several interviewees concerns service and leasing agreements. Leasing arrangements can arise whereby the developer creates a lot which is retained in ownership by the developer and facilities are created for resident use or utilities are provided to individual lots. The developer (or its associated entity) then causes the body corporate to enter into a leasing arrangement whereby the body corporate becomes the lessee and pays the developer or its associated company for the use of the property and facilities. In such a situation, the developer is the only provider of the particular service and has effectively shut out external providers. This monopolistic situation does not allow an independent, non-conflicted body corporate to negotiate fair terms and remuneration.

> So I've got another one whereby [the developer is] **building a full gymnasium, pool, recreation centre, but it's a private lot owned by the developer and going to be leased** back at $250 000 to the body corporate. (6)

> Embedded networks where [the developer] retains it. Video, broadband, some kind of communication embedded network… Where they retain lots and then lease them back to the body corporate. Ok, now I have one where this is happening in a building. So they are owned by the developer, he charges rent on it and it is for the purpose of bringing up power, common power, water, communications etc through the building. **So it's an outgoing, a payment going back to the developer** … They can **retain it for as long as they like for an ongoing investment**. But this developer on this particular site did say, look if we leave the site we will give it back. So, I don't think he has a long term plan but it depends on the market. You can never say never. (6)

4.2.3.4 Management Rights and Caretaking Arrangements

Concerns relating to management rights, particularly in Queensland, were discussed by many interviewees at length. Many questioned the appropriateness and feasibility of these types of management arrangements. The concern for many interviewees was that these arrangements are entered into on behalf of the body corporate by the developer and there may be no real benefit for the body corporate.

> ...what has tended to happen and probably more so in Queensland than the other States but it is happening in New South Wales and Victoria, is that developers have almost taken it for granted that if it is a reasonable size 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 per cent, the arrangement is inappropriate for the building**. (2)
>
> ...Yet, developer put a management rights structure in place. It had horrific security contracts involved in it and it's just a classic example of a building where management rights were put in place simply to have product to sell in addition to the units to make the feasibility of the project approved and from an owner's point of view **it offered no real benefit at all**... So, **the problem is the developers have I guess abused the management rights packages** by using them when they are not appropriate. (2)

A further concern related to the contracted time period being excessive. That is, the developer can cause an agreement to be entered into with a body corporate for an excessive period of time, burdening the body corporate for years. Lawyer Interviewees noted that bodies corporate should be able to negotiate the terms and conditions appropriate to their scheme when independent owners are established in the scheme.

> The **Queensland management rights system is just a law unto its own**. I don't for a moment pretend to understand how it can be justified from a policy perspective, because why would I contract with my gardener for 25 years? It just makes no sense, because there is no value proposition in that at all for unit owners. Unit owners are best served by having people that do work for them on the basis, that if they don't do the work well, they can get sacked. It's as simple as that. (8)
>
> I think ultimately people absolutely reasonably expect that they will have the power to choose **who manages their property and that is a completely legitimate expectation of property ownership**. You own the common property. It is the people who live there that own it, not the renters, and I think on one level management rights are like buying the property and discovering that you are compelled to employ your vendor's cleaner for the next 20 years. If you bought a house and discovered that you were contractually bound to keep employing the same cleaner that your vendor had for the next 20 years, you would be pissed off and rightly so. And on one level that is how management rights operate. **The people who should be deciding who manages that common property are the people who own the common property and that is no longer the developer.** There is also the **straight out corruption element of giving those rights to mates.** (11)

There was some debate amongst the interviewees concerning whether the inclusion of management rights is necessary to make a scheme's development financially viable. One interviewee commented that although management rights signify a COI situation, some developments require the ability to sell and profit from management rights in order to make the development feasible.

> There is clearly a **pretty powerful argument that developers shouldn't be allowed to profit from management agreements** in place, but it's like everything, there are implications of any decision that you make and the reality is, and I have seen it, by personal experience, where a project with management rights has been feasible and if you took the management rights out of the feasibility, out of the revenue lines, the project all of sudden fails... So, if you were to go down that path, and I think there is a fairly powerful argument to do it, then you will make it quite difficult for projects to be feasible. And you've got to be prepared to accept that, but **there is no doubt there is a conflict, there is no doubt it has been abused in the past.** (2)

Other interviewees disagreed strongly with that proposition:

> And this argument that is consistently put up by developers that we need **management rights in Queensland to sustain the feasibility of our developments**. It's just nonsense. Because if that were true, there would be no high rises in Melbourne. There would be no high rise in London. There would be no high rise in New York. Its absolute nonsense; it's just a **Queensland furphy**. (8)

Many interviewees discussed the rationale for retaining these types of rights. Some developers, through associated entities, retain the management rights or facility management agreements to the scheme in order to retain some control and continue earning income from the development product. Many lawyer interviewees commented that these types of arrangements create further conflict in a scheme.

> They are controlling the management rights so they think they can do whatever they like. (13)

> There are a number of developers in this area who saw the opportunity to start up asset management companies and to get in at that level. (7)

> The primary reason it happens is the **developer's income is lumpy, even in good times**. So they see management rights and strata management and property management as

being a **panacea** for that, because it is **smooth income**. However, it's just fundamentally a different mindset. A developer's mindset is about build and leave, whereas a manager's mindset is about nurturing and ongoing, and indeed attention to detail and so it never works. But I have seen it, I've seen it you know right back from the 80s and **it never ever works**. So they will trade again and you know, they just don't care. **Culturally it's like oil and water and they never get it right** so yes they will hold onto those things. (8)

4.2.3.5 Document Handover

Another situation that stems from the conflicted interests of developers relates to document handover. Interviewees commented on the failure of most developers (except some tier one developers) to hand over relevant and necessary documentation relating to the scheme and also the inability of BCMs to ensure that the relevant documents are turned over at a body corporate's first annual general meeting (AGM). Many interviewees commented that it is a legislative requirement to hand over specific documentation at the first AGM. The lack of document hand over results in difficulties for the body corporate in not only running and operating the scheme and maintaining its equipment and infrastructure but also monitoring the dates of guarantee and warranty expiries, as these can carry implications for the timing of building defect claims.

...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, are they just drawings or just design drawings etc. 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)

...you **hardly ever see a hand over of drawings and plans and specifications and warranties** that the developer has entered into which govern the body corporate in its

initial years. Despite the fact that every jurisdiction has, almost has laws about that, it just doesn't happen in practice. With the exception of the tier one developers who are quite particular about governance and handing over manuals and things like that. (8)

4.3 Consequences of Conflicts of Interest

Interviewees discussed the consequences of the COI situations identified, including potential legal consequences. Interviewees discussed the long term impacts for schemes, many expressing the view that schemes suffering from some, or all, of these identified challenges are unable to resolve the problems within the lifetime of the scheme. Other related comments were that these types of schemes become dysfunctional and legally non-compliant because of the difficulties associated with overcoming these initial establishment challenges. Internally, conflict between owners can be high. The decision and resolution required to commence litigation to rectify defects can be complicated and stakeholders can be in danger of breaching their legal duties.

4.3.1 Internal Owner Conflict

Interviewees discussed how internal owner conflict can manifest due to problems that have arisen in the initial phase of the scheme set up. Unrectified building defects can lead to internal conflict, especially if the defects impact upon a minority of lots. Owners can be reluctant to pay for rectification works if the defects do not directly affect their lot.

> So the **conflict of interest** also extends to the lot owners themselves and how they **control** the body corporate, because if you have a minority of lot owners who have building defects concerning them, they can try to get the board to have the other owners do what the courts say they should do, which is to have the body corporate fix things, even if it is only to the benefit of one lot owner. I had one for example… where all the defect work was in the lot, and we are talking a significant amount of defect work. It was a penthouse and it was certainly six figures worth, but the common property and the other six lots were OK. And so those people wouldn't pass any motions to allow the people in seven to do anything because they didn't want to pay for an engineer to come in and say what was wrong with it. They didn't want to pay for lawyers to pursue the builder; they just didn't want to pay for anything, so they voted the whole thing down. (10)

4.3.2 Stakeholder Conflict

Conflict can also arise between the owners or the body corporate and the appointed managing agent. Interviewees commented that often the owners will have concerns about the management appointment and the manager's relationship with the developer, which leads to distrust and eventually the appointment of new 'untainted' managers.

> So at the first meeting, when the owners start realising what they are responsible for, they turn to the strata manager and say who are you, what are you doing here, who signed us up to you, you are in the developer's pocket. And so there is a pretty **toxic relationship** there. If not initially, because initially everyone is dazed and confused. But it gets toxic at about the two year mark, when they really realise that they have been done over. So then there will be some sort of coup, and the manager will be tossed out and they will put their own people in, and away they go. (8)

4.3.3 Legal Action

Many of the lawyer interviewees commented about legal actions relating to challenges that arise in the transition phase and concern COI situations. The comments related to actions commenced by bodies corporate, actions by developers to thwart the commencement of legal proceedings against it and legal threats made to committee members or owners.

Interviewees commented on the types of litigation matters most often commenced by bodies corporate, including building defects and long term contracts.

> But one of the most common things that I get to do, in a large scale litigation, is eradicate people who've got **long term contracts, are in fact probably, next to building defect litigation, that's the single largest category at the moment in terms of dollars and of resources spent**…like caretakers, letting managers, maintenance people, that type of thing… (10)

Many of the lawyer interviewees commented that developers can and do use its voting power to thwart the commencement of legal action against it. If the developer has substantial voting power through control of at least 25 per cent of entitlements (either via the use of proxies or through retained lot ownership), a motion to

commence legal proceedings can easily be thwarted by the developer. Using a building defect claim as an example, the following interviewee, highlights this common practice.

> So 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 in respect of those defects, which is useful but it contains once again, a shortcoming and that is this. In our Act, and we are not dissimilar to other Australian States, we have a requirement for a special resolution to be passed before issuing legal proceedings**… the body corporate must resolve by 75 per cent to issue legal proceedings… You've got on the one hand the notion that before the body corporate can take proceedings, for example, for building defects, you need a 75 per cent resolution… **If the developer owns anywhere between 26 and 49 per cent, 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 per cent of lot entitlement to be able to knock on the head and circumvent any building to issue proceedings against them**. (4)

Another interviewee commented that developers, particularly in relation to building defect claims, will delay rectifications as long as possible in an attempt to defeat statutory time limitations.

> You were talking about building defect claims being out of time. The answer to the question if I recall is yes, it does happen, and it is a worry where the developer is using that in order to, using, not just the controls, what they use quite frankly most of the time is **just obfuscation and bullshit to delay the process** to the point where you are out of time. (10)

A manager interviewee commented that developers will skirt around its obligations in relation to building defects by not approving budgets that contain a building defect report as an item of expenditure. Its motivation in doing this is that the developers' representatives know that the body corporate would then not have sufficient funds to engage an engineer to report on the defects.

> The body corporate can and often does have in its first year's budget to go and get a building defects report done, but the problem of course in a staged development is that

> the developer is in control. Now whilst he has to act in good faith and you know on scouts honour, **there is obviously some developers who are going to say I don't want that defects report to be on there** and even though they don't point at that, they will say '**I don't approve that budget'**. **They will say 'let's make it $80 000 not $90 000' and there goes the building defects report. There are ways and means to block it**. (6)

As discussed by one interviewee, committee members can be threatened with legal action, particularly defamation, for raising concerns or making enquiries about stakeholders and the actions of stakeholders.

> It's ridiculous, ridiculous, it's just abhorrent, it's obscene. And there's you know a small click of lawyers and agents who are principally based on the Gold Coast who behave disgracefully in relation to management rights. They **abuse people's rights** all the time and if you act on behalf of a body corporate in Queensland and you assert some right or to make an inquiry, committees are slammed with letters that are delivered at home at night time, are **threatened with defamation proceedings**, it is just scurrilous... (8)

4.3.4 Scheme (Dys)functionality

Many interviewees discussed the long-term impacts and conflicts that developer decision-making has on a scheme including the on-going functionality of the scheme. Some commented that it can take years for the problems to truly manifest.

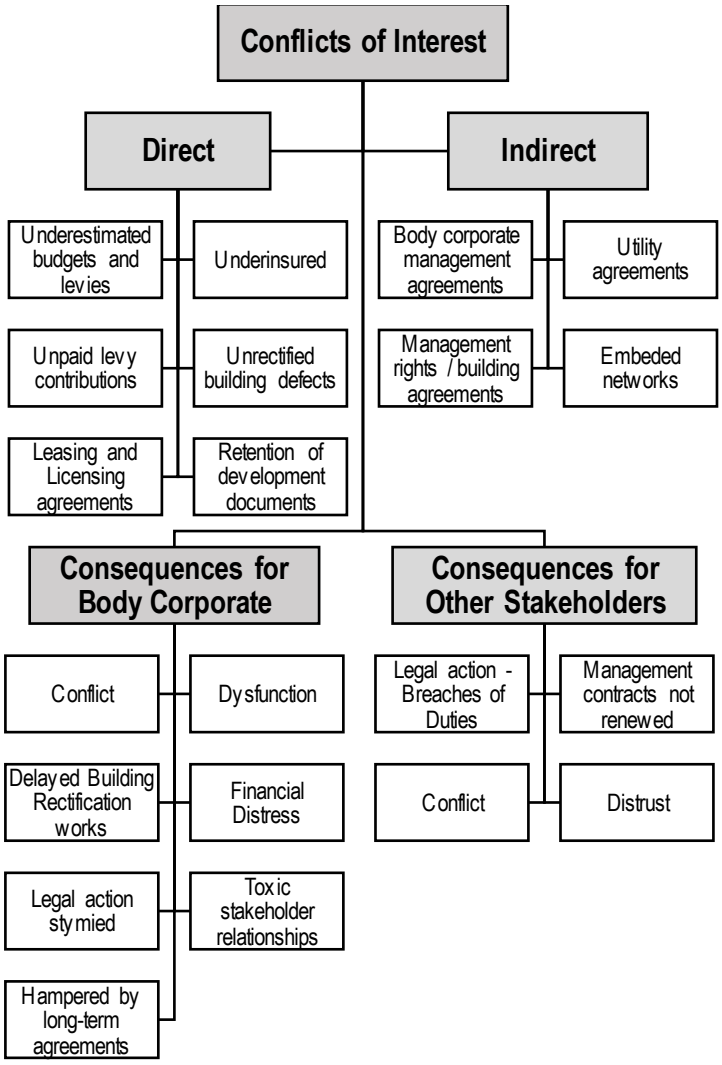
> We do see [adjudication] applications directed at body corporate decision-making which is forced upon them by **issues going way back to the commencement** of the scheme. The dispute that might arise from that is when it's recognised that the **budget is inadequate** and the levies need to be adjusted or a special levy needs to be struck for example. (3)

> ...it could be fair to say that 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)

> ... 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**, until you get someone in there who just does the wrong thing as far as lot owners are concerned. Or you get different lot owners in there who are starting to get concerned about something different, and **sow the seeds, or 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)

Many lawyer interviewees were of the opinion that the greatest concern in the transition phase in MODs related to COIs. The corrosive impacts for schemes were highlighted by many interviewees. Figure 4.1, represents the COIs arising in the transition phase of MODs and the consequences for owners and stakeholders as highlighted by the initial interviewees of this study.

Figure 4.1: Conflicts of Interest Arising in the Transition Phase of Multi-owned Developments



4.4 Developer Control

The second overarching theme identified during the initial interview phase was developer control. The challenges and concerns identified under this theme are, in many respects, connected to the COIs considered above. Developer control, in many instances, allows COI situations to manifest. Interviewees discussed the mechanisms that enable developers to control the governance and management of bodies corporate and the tensions that arise between owners and developers due to that control.

Some interviewees discussed the different phases within the transition phase whereby a developer controls the body corporate (whether the body corporate has been created or the developer is acting as the promoter of the scheme prior to the

creation of the body corporate). The connection between developer control and the developers' self-interests was highlighted by a lawyer interviewee:

> ...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 that tends 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)

4.4.1 Voting Power

The developer interviewee commented on how voting power is used, particularly when there is an issue that affects the developer's interest. This interviewee also commented on how the use of this power creates tension between the developer and lot owners.

> I generally don't get involved in the day-to-day issues, **I let people make their own decisions, but if there is something critical to our objectives, then I will use my vote, completely and entirely and that's when people start to understand.** We had a very heated AGM last year and that's when people started to realise, well hang on, there's no point in me voting here because you control...and people get upset with that... **People don't realise it initially, but as they start getting involved they realise they have no control**. (5)

4.4.2 Realising the Development Vision

The BCM and developer interviewees commented that developer control was essential to ensuring that a development's vision is realised. Pursuit of the development vision is important to lot owners, as they can be seen to have bought into the vision.

> **To keep control**. It is important. Then again, [owners] buy into the vision… If the developer doesn't think very cleverly about keeping control, they would lose control. And despite having the planning permit that allows them to do whatever it is they are doing, the owners there could make it very difficult for them to realise the vision. (6)

> **Control is, from a developer point of view** for such a long term multiple staged project, **is important** because the reality is when most people buy into these large estates, they don't appreciate that this is going to be a construction site for the ten years. There is going to be noise, there is going to be dust, and they are not going to like the fact that construction starts at 7 o'clock in the morning. And so, people get upset and the reality is well, we are **trying to create the vision** that you purchased into, and we can't do that if you are getting upset with the activities that going on around you. So, control is very important ... (5)

4.4.3 Staged Schemes

The developer's ability and level of control appears heightened and most problematic in staged developments (schemes developed over multiple years). During the early phase of a multiple year staged project, the developer owns lots that are yet to be developed (sometimes vast tracks of land) and if the lots are part of the scheme, then the developer financially contributes via levies and is therefore granted voting rights. If the developer retains a large number of lots, then the majority of the voting power is vested in the developer. As noted by interviewees, while the developer retains control, it will act in a self-interested manner, which may signify actions taken that are contrary to the owners' collective interests.

> ...Because they hold the balanced development lot, they will be the **biggest vote in the body corporate** and so they will be tight and they will be on the committee and they will exercise control and absorb costs which, when they are gone, actually have to be paid. So you still have a period of shock and trauma that probably just delays exactly what has happened in the unit scheme until the development is complete and they exit. (8)

> ... we [developer] instructed the body corporate manager to … negotiate with council to come in and fine people for parking [original developer did not provide enough car parking space]. So then there were arguments amongst those people, you know, why should I be fined? Again, I sort of stayed out of it. It is their issue. They should deal with it. (5)

4.4.4 Control Mechanisms

Interviewees discussed the mechanisms used by developers to ensure the retention of voting power and therefore control. Mechanisms discussed included powers of attorney and proxies, unequal entitlement distribution and the creation of airspace lots (which are vested with voting rights).

> There are still a lot stitched up in contracts that might not say it's a power of attorney, but the **contract will say you can't vote against me**. What you usually find, especially in staged development where the developer must have control, is that it will be set up so [owners] don't have any control … whatever it takes. (6)

> ...And also, the previous developer had created some **air space lots** in here **for the purpose of retaining some degree of control**, so the previous developer controlled 30 per cent, which is not enough but gets you part way through the process. (5)

4.4.5 Lack of Owner Knowledge

The developer interviewee commented that developer control is important due to the lack of understanding by lot owners.

> People need to be protected from their own stupidity… At the end of the day, people just fundamentally don't have enough understanding in body corps, subdivision, property generally. They can't make decisions that they don't understand and it's like you going to your doctor and telling them what your diagnosis is. You don't know and so **developers do need to have a degree of control to manage things which are beyond the knowledge and expertise of, I guess, their members**. (5)

Many of the lawyer interviewees saw a link between developer control and the concerns raised in connection with the COIs theme. For the developer and BCM interviewees, the prevailing view was that control is essential in order for developers to realise the vision as marketed and sold to property owners. It is a necessity, due to the lack of owner knowledge about the workings of MODs and the need to realise the vision.

4.4.6 Disclosure

Another area of concern identified by interviewees can be most appropriately captured under the heading 'disclosure'. Concerns were raised about the level of

disclosure and the effectiveness of disclosure. Challenges arise due to either a deficiency in disclosure or an apparent buyer unwillingness to read and seek understanding of the information disclosed by the developer. Interviewees discussed the lack of experience of buyers and conveyancers and how this detracted from their capacity to read and understand matters relating to the body corporate and how it is governed and managed. They also discussed the lack of disclosure, in some jurisdictions, particularly in relation to off-the-plan sales.

Buyer attraction to a development that is in high demand appears to further undermine the effectiveness of disclosure.

> The average purchaser just gets the contract and looks at it and doesn't have that experience to be able to make the judgement on whether this was an issue or not. Lawyers might be partly to blame for not pushing the issue, but let me say this, in relation to that project [named project], it was so much in demand that I don't think any amount of **disclosure** would have solved the problem, because people were just mad to get their hands on one of those properties. It was very much in demand and if a thing is in demand, people take less time to scrutinise what they are actually buying. (2)

The manager and developer interviewees noted that purchasers are obligated to accept things that are disclosed, in order for the developer to realise the vision, regardless of whether a buyer reads the disclosure.

> ...the problem is that developers are required to do all this **disclosure which limits how they can manage, how they can roll out the development over a period**. And then purchasers come in and go 'I don't want the management agreements'. Well, the question is: 'Why didn't you read them at the time because they are given to you as part the **disclosure** statement which you signed'. **People have an obligation when they sign on to accept that that's how things are going to be run**. (1)

> When most people buy into a body corporate, they don't really understand what they are buying into, so **most just accept it and most people use conveyancers who aren't really adept at reading these contracts that are this thick and really understanding what it is or advising their client properly**. **But that's not a bad thing, because at the end of the day, our interest is to create the vision, that they put into and you know. We need to be able to deliver on that. We need to control it as well.** (5)

Some interviewees raised the issue of an inadequate disclosure regime in some jurisdictions, particularly in relation to off-the-plan sales. This signifies some buyers are entering into contracts of sale without understanding the potential structure and arrangements being put in place by developers. The Victorian situation is described:

> If you are buying off the plan and the plan is not yet registered, which would almost always be the case, then you can't give a certificate. **There is simply no such disclosure made**. The [body corporate] gives the certificate, there is nothing to be given until such time as the [body corporate] is in existence. So if you buy off-the-plan, and the plan is registered two years later, then presumably before you settle, you would apply for a certificate, but not at the time you sign the contract, there is nothing to disclose, according to our [Victoria] legislation. (4)

It is evident from these commentaries that both the level and effectiveness of disclosure as well as buyer awareness were issues of concern for the interviewees.

4.5 Conclusion

This chapter has served to highlight the thoughts, perceptions and opinions of interviewees who were interviewed as part of an exploratory empirical data collection phase. The interviewees' voices have been used as a narrative to provide insights into the nature of challenges associated with the MOD transition phase. COIs emerged as a primary theme and has been found to be related to developer control. The level and effectiveness of disclosure has also been identified as a challenge for buyers in understanding the property arrangement that they are committing to through their purchase.

Chapter 5 will provide an analysis of the legislative framework governing MODs in the States of New South Wales, Queensland and Victoria. The legislative analysis will focus specifically on the decision-making abilities of the developer and the roles that a developer can assume.

CHAPTER 5: LEGISLATIVE ANALYSIS OF DEVELOPER GOVERNANCE DECISIONS IN THE TRANSITION PHASE[132]

5.1 Introduction

The interview observations outlined in Chapter 4, raise a number of concerns relating to the transition phase of multi-owned developments (MODs). These concerns relate, in particular, to the governance and management of bodies corporate and the role developers play in structuring governance and management arrangements.

Governance and management arrangements relating to a particular MOD are determined, to a large extent, by those parties in control of the body corporate at whatever juncture that a scheme is at in the transition phase. Such arrangements will be developed and negotiated prior to the creation of the body corporate by those controlling the body corporate (usually the developer) at its inception. In some jurisdictions, these arrangements require disclosure at the time that buyers enter into a contract of sale, or prior to the settlement of the lots. As detailed in Chapter 4, challenges can arise due to: the control held by developers, conflicted interests and the ineffectiveness and level of disclosure provided to buyers of this property type.

Taking into consideration the concerns raised by interviewees in Chapter 4, it is important to identify those time periods during which developers can control the body corporate, the capacity of the developer to determine the governance and management structure of a particular scheme, and the legal events that impact upon a developer's control and its capacity to determine governance and management arrangements.

Research conducted in England and New Zealand by Blandy, Dixon and Dupuis, identified and analysed four 'critical legal events in the process of development of a multi-owned site'.[133] The authors aligned these events with changes in the

[132] This review was undertaken prior to any legislative amendments made in the respective states after July 2014. Where relevant, a footnote has been inserted to address any significant reforms, especially relating to New South Wales: *Strata Schemes Development Act 2015* (NSW); *Strata Schemes Management Act 2015* (NSW).

[133] Blandy, Dixon and Dupuis, above n 1, 2365, 2372. The four critical legal events are numbered 1,2i, 2ii and 3.

distribution of property rights from the developer to the owners as a development approaches completion.[134] The critical legal events identified are:

1. Contract for management of the site;
2(i). Body corporate is created;
2(ii). Purchase of individual lots; and
3. Freehold of site is transferred as developer's share diminishes.[135]

Blandy, Dixon and Dupuis consider some of the governance decisions that are made by the developer at each critical event. For example, they note that the management agreement between the body corporate and the manager is negotiated and drawn up by the developer and manager at the first 'critical legal event', prior to the creation of the body corporate.[136] This agreement then becomes legally binding at the second (2(i)) 'critical legal event', i.e., when the body corporate is created.

The purpose of this chapter is to identify the time periods in the transition phase, the decisions that are made during these periods, the capacity of the developer (that is, the role held) to make these decisions, and to identify other legal events that may be relevant in the Australian MOD context, modifying the critical legal events outlined by Blandy, Dixon and Dupuis.

The chapter will firstly define the transition phase and also identify distinct periods occurring within the transition phase. The remainder of the chapter details the governance decisions made during each of these periods with reference to (and comparison of) the legislation in the States of New South Wales,[137] Queensland,[138] and Victoria.[139]

5.2 The Transition Phase

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[134] Ibid.
[135] Ibid.
[136] Ibid.
[137] *Strata Schemes Management Act 1996* (NSW); *Strata Schemes (Freehold Development) Act 1973 (*NSW*); Strata Schemes (Leasehold Development) Act 1986 (*NSW*); Community Land Management Act 1989 (*NSW*); Community Land Development Act 1989 (*NSW*).*
[138] *Body Corporate and Community Management Act 1997 (*Qld*)*; *Body Corporate and Community Management (Standard Module) Regulation 2008 (*Qld*)*; *Body Corporate and Community Management (Accommodation Module) Regulation 2008 (*Qld*).*
[139] *Owners Corporations Act 2006 (*Vic*); Subdivision Act 1988 (*Vic*).*

As highlighted in Chapter 3, the transition phase refers to the period of time commencing when governance and management decisions are made in relation to a MOD and continues until control of those decisions transfers from the developer to the lot owners, collectively. The transition phase begins in the planning period for a MOD.[140] The transition phase continues through the developer control period, which commences at the date of scheme registration and ends when the developer's control or ownership has diminished to a level prescribed in the relevant State legislation.

In New South Wales, for example, this period is described as:

> [T]he period commencing on the day on which the [body corporate] is constituted and ending on the day on which there are owners of lots the subject of the strata scheme concerned (other than the original owner) the sum of whose unit entitlements is at least one-third of the aggregate unit entitlement.[141]

In Queensland, the *Body Corporate and Community Management Act 1997* (Qld) sch 6 defines this period as the period in which:

> (a) the body corporate is constituted solely by the original owner; or
>
> (b) the original owner owns, or has an interest in, the majority of lots in the scheme or, in any other way, controls the voting of the body corporate.

In Victoria, the period is defined by the period in which the original owner is:

> the owner of the majority of the lots affected by the owners corporation and only until the end of the period of five years following the registration of the plan of subdivision.[142]

Table 5.1 provides an overview of the differences in each state marking the end of the developer control period.

Table 5.1: Comparing Developer Control Periods by State

State	End of Control Period	

[140] Depending on the type of scheme proposed, the planning period may include a time period pre-construction or during construction.
[141] *Strata Schemes Management Act 1996 (*NSW*)* (Definitions); *Strata Schemes (Freehold Development) Act 1973 (*NSW*)* s 5 (Definitions); *Community Land Management Act 1989 (*NSW*)* s 3 (Definitions); *Community Land Development Act 1989 (*NSW*)* s 3 (Definitions).
[142] *Owners Corporations Act 2006* (Vic) s 68(3).

		Limitations on End of Control Period
New South Wales	≥1/3rd of unit entitlements vested in new owners	None
Queensland	Majority of lots vested in new owners and developer granted proxies and powers of attorney have expired	None
Victoria	Majority of lots vested in new owners	5 years post registration

5.3 Decision-making Roles

During the life of a MOD, the responsible orchestrator of operations is the body corporate.[143] The body corporate is controlled by the members (or lots owners) collectively, or via the elected committee. During the developer control period, the developer has complete or majority control and can therefore make the decisions on behalf of the body corporate. Prior to the creation of the body corporate, the developer (as initial owner) is the promoter of the scheme. As the owner of the scheme land, the developer can negotiate and structure arrangements in anticipation of the scheme being registered and the body corporate being created. In order for the body corporate to function from its inception, the developer has the ability to implement measures that can impact upon how the body corporate is ultimately governed and managed by the lot owners collectively.[144] Subject to legal restrictions, the developer can create binding contractual relationships knowing that upon registration, it controls the body corporate and therefore can ratify or pass any resolutions relating to these promoted arrangements. In some jurisdictions, these arrangements must be disclosed to potential buyers (in disclosure statements), in others jurisdictions, there are no disclosure requirements. The law itself is then left to provide safety measures to ensure that developers act in the interests of the body corporate when negotiating and creating these arrangements. Chapter 6 of this dissertation details these statutory and common law duties in detail.

[143] Pamela A Gibson and John R Lombard, 'Common Interest Communities in Virginia: Legal Dilemmas and Legislative Responses to Self-Governance' (2005) 33 *Politics and Policy* 554.
[144] Lisa M Pardon, 'Advising Developers in Operating Community Associations' (2004) 77(3) *Wisconsin Lawyer* 1.

5.4 Governance Decision-making in the Transition Phase

The starting point for identifying the key decisions is the legislation regulating this property type. Although there is an emphasis on management in the various State regulations,[145] it is implicit that a governance regime exists.[146] That is, the legislation provides a governance framework for the operation of bodies corporate. The legislation not only provides mandatory governance arrangements (that is, requirements that *must* be adhered to) but also regulates arrangements that developers have discretion in implementing (that is, arrangements that *may* be implemented). Often, the discretionary arrangements may incorporate mandatory elements. That is, the developer may exercise choice whether to implement an arrangement, but if implemented, the arrangement is subject to mandatory requirements.

The following review provides a summary of the key developer decisions as identified in the relevant New South Wales, Queensland and Victorian legislation and associated regulations. It should be acknowledged that the structuring of this review is bound to be somewhat arbitrary, as no prior review of this type has been reported in the literature.

5.5 The Purpose of Multi-owned Development Legislation

Chapter 2 of this dissertation identifies the Acts and regulations reviewed in this analysis. When analysing or interpreting a provision in legislation, regard must be given to the purpose of the legislation. According to Sanson, 'the purpose of legislation is to give effect to a government policy…'.[147] It is imperative therefore, to keep the purpose of each Act in mind when undertaking an analysis of this type.

In New South Wales, there are five Acts and five associated regulations relating to multi-owned developments (strata and community schemes). The terms 'strata' and

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[145] For example, one of the secondary objectives of the *Body Corporate and Community Management Act 1997 (*Qld*)* refers to the responsibility to self-manage a community title scheme.

[146] Gary Bugden, 'In Search of Better Ways to Govern and Manage Owners Associations' (Paper presented at the Strata and Community Title in Australia for the 21st Century III conference, Surfers Paradise, Queensland, September 2009). The author suggests that governance involves the setting of policies and strategic objectives and that management is the implementation of those policies and objectives.

[147] Michelle Sanson, *Statutory Interpretation* (Oxford University Press, 2012) 58.

'community schemes' are used in New South Wales to denote, building subdivisions (strata schemes) and land subdivisions (community schemes). The community schemes allow for the development of subsidiary schemes within a development. In Queensland, there is one overarching Act for all MODs (community title schemes), with no specific distinction between building or land subdivisions. Five associated regulations which distinguish between particular scheme uses and also one general regulation accompanies the Act. In Victoria, a one-size-fits all model is applied to schemes. There are two specific Acts, one for the subdivision requirements and one for the management of the governing body. There are associated regulations accompanying these Acts.

In New South Wales, the purpose of the *Strata Schemes (Freehold Development) Act* 1973 (NSW) is to facilitate the subdivision of land into cubic spaces. The purpose of the *Strata Schemes Management Act 1996* (NSW) s 3 is to provide for the management of strata schemes and provide for the resolution of disputes arising in connection with the management of schemes.[148] The *Community Land Development Act 1989* (NSW) s 4 facilitates staged subdivisions whereby separate parcels are developed but where common property is shared. Its' accompanying management Act, the *Community Land Management Act 1989* (NSW) provides for the management of community schemes, precinct schemes and neighbourhood schemes established by the subdivision of land.

The purpose of Queensland's[149] *Body Corporate and Community Management Act 1997* (Qld) is to provide flexible and contemporary communally based arrangements for the use of freehold land having regard to secondary objectives.

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[148] The *Strata Schemes (Leasehold Development) Act 1986 (*NSW*)* and its purpose to allow for the subdivision of land where an owner retains freehold title to the land and provides a leasehold interest to separate parties is acknowledged. This Act has not been reviewed in this analysis because no other comparable jurisdiction provides for leasehold developments within the MOD context and the governance and management of leasehold developments sit within the same legislative as the *Strata Schemes (Freehold Development) Act 1973 (*NSW*).*

[149] Queensland has three additional module regulations that have not been incorporated in this review. These additional regulations have been designed to regulate small schemes, two-lot schemes and commercial schemes. These regulations are the: *Body Corporate and Community Management (Small Schemes Module) Regulation 2008* (Qld*); Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011* (Qld*); Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld). These regulations model, to a large extent, the

In Victoria, the *Subdivision Act 1988* (Vic) s 1 sets out the procedure for the subdivision and consolidation of land including buildings, and regulates the management of and dealings with common property and the constitution and operation of bodies corporate. The *Owners Corporations Act 2006* (Vic) s 1 provides for the management, powers and functions of the body corporate and also dispute resolution mechanisms.

5.6 Establishing a Multi-owned Development Scheme

The point in the transition phase when the planning period ends and the developer control period begins is marked by the establishment of the scheme and therefore the creation of the body corporate. A MOD scheme is established when a plan subdividing an area of land into individual lots and common property is registered in the respective State land titles office[150] along with accompanying documentation. Upon registration of a scheme, the body corporate is created.[151] Upon its creation, statutory powers are conferred automatically on the body corporate.[152] The key governance decisions that have to be made by the developer prior to registration (during the planning period) are identified in:

requirements outlined in the accommodation and standard scheme module regulations. This study is focused primarily on larger schemes.

[150] In New South Wales, Land and Property Information (LPI) (Department of Finance and Services);in Queensland, the Titles Registry (Department of Environment and Resource Management); in Victoria, Land Victoria (Department of Sustainability and Environment).

[151] *Strata Schemes Management Act 1996* (NSW) s 8; *Community Land Development Act 1989 (*NSW*)* s 25; *Body Corporate and Community Management Act 1997 (*Qld*)* s 30, *Subdivision Act 1988* (Vic*)* s 28.

[152] *Strata Schemes Management Act 1996* (NSW) s 12; *Community Land Management Act 1989* (NSW*)* ss 5, 6, 7; *Body Corporate and Community Management Act 1997* (Qld) ss 94-95; *Owners Corporations Act 2006* (Vic) s 6.

New South Wales, in

1. the management statement;[153] and
2. the relevant legislation applying to MODs.[154]

Queensland, in

1. the community management statement;
2. the disclosure statement (if lots have been sold off-the-plan);[155] and
3. the relevant legislation applying to MODs.[156]

Victoria, in

1. owners corporation information form[157] and
2. the relevant legislation applying to MODs.[158]

The key governance decisions for developers after registration (in the developer control period) are those:

1. bestowed on the body corporate. Initially, the developer, as holder of the titles to all lots, becomes the only voting member of the body corporate and therefore controls it.[159] The developer can continue to control the body corporate through the use of powers of attorney and proxies, if allowable and the retention of lots; and
2. relating to prescribed agenda items placed on the meeting notification for consideration at the first annual general meeting (AGM).

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[153] Including a community management statement, strata management statement, neighbourhood management statement and precinct management statement.

[154] *Strata Schemes Management Act 1996* (NSW); *Strata Schemes (Freehold Development) Act 1973* (NSW); *Community Land Management Act 1989* (NSW); *Community Land Development Act 1989* (NSW).

[155] Only in Queensland.

[156] *Body Corporate and Community Management Act 1997* (Qld); *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld); *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) (and other relevant modules).

[157] There is no prescribed form mandated under the legislation, however, the Department of Sustainability and Environment have forms for use which have been approved by the Register of Titles. There are approved forms for Limited and Unlimited Owners Corporations.

[158] *Owners Corporations Act 2006* (Vic); *Subdivision Act 1988* (Vic).

[159] In Queensland, control of voting also includes the exercise of proxies or, authority granted under powers of attorney for the lot owners (as provided for in the off-the-plan sales contracts). This practice has been prohibited in New South Wales and Victoria.

5.7 Governance Decisions in the Planning Period

In this section, the specific matters to be addressed in the management statements (for New South Wales and Queensland schemes), the owners corporation information form (for Victorian schemes), the off-the-plan disclosure statement (in Queensland) will be outlined along with detail relating to the legal requirements as outlined in the relevant legislation. The purpose of this section is to showcase the specific decisions that a developer must make in the planning phase and the legislative scope given in making those decisions.

5.7.1 Management Statements

In New South Wales and Queensland, a management statement must be lodged for registration with a plan of subdivision.[160] In New South Wales, the management statement must include, inter alia; scheme by-laws, plans and other particulars relating to; the control, management, use and maintenance of the common property; the storage and collection of garbage; the maintenance of utility services, insurance of the common property, the executive committee and its function, meetings of the committee, voting on motions, and keeping of records. Further provision is made for discretionary matters which can be included in the management statement such as; by-laws and other particulars relating to; the hanging of washing, safety and security measures, details of any restricted property, keeping of pets, noise levels, details of any business or trading activity to be carried on by the body corporate, the control or preservation of the essence or theme of the development, architectural and landscaping guidelines, and any agreements entered into for the provision of services or recreational facilities.[161] In Queensland, the community management statement requires, inter alia; the identification of the regulation module applying to the scheme,[162] the inclusion of a contribution schedule and interest schedule, a statement

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[160] *Strata Schemes (Freehold Development) Act 1973 (*NSW*)* s 28R*; Strata Schemes (Leasehold Development) Act 1986 (*NSW*)* s 57A; *Community Land Development Act 1989 (*NSW*)* ss 5(4), 9(4), 13(4); *Body Corporate and Community Management Act 1997 (*Qld*)* s 52.

[161] *Strata Schemes (Freehold Development) Act 1973 (*NSW*)* sch 1C*; Strata Schemes (Leasehold Development) Act 1986 (*NSW*)* sch 2A; *Community Land Development Act 1989 (*NSW*)* sch 3, 4.

[162] In Queensland, there are a number of modules that have been enacted to regulate different MOD schemes. For example, there is a two-lot scheme module, a small scheme module, a standard scheme module, an accommodation scheme module and a commercial scheme module. Although there are applicability conditions in relation to the adoption of the modules, there is enough flexibility (in relation

concerning the contribution schedule principle used; and the inclusion of by-laws applying to the scheme.[163] There are also permitted inclusions outlined in the relevant module regulations applying to a scheme. Future utility arrangements, architectural and landscape codes, shared facility agreements (relevant to layered schemes),[164] and leases or licences to be granted over part or the whole of the common property[165] may also be included in a community management statement.

5.7.2 Disclosure Statements (Queensland)

In Queensland, a disclosure statement is required to be given to buyers wishing to purchase a lot off-the-plan[166] and prior to entry into a contract of sale.[167] The disclosure statement must state, inter alia: the expected annual contributions payable from the proposed lot owner to the body corporate; the terms, estimated costs, and proportion of costs borne by the proposed lot owner in relation to any engagement of a BCM or service contractor to be entered into after the establishment of a scheme; the terms of authorisation for a letting agent; details of body corporate assets proposed to be acquired, and any other matter prescribed in the regulation applying to the scheme.[168]

5.7.3 Owners Corporation Information (Victoria)

Although neither management nor disclosure statements are required to be lodged in Victoria, a number of accompanying documents must be lodged with the plan of subdivision creating a scheme. A plan of subdivision which creates a body corporate

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to some modules) to allow a choice to be made. This is specifically evident in relation to the standard and accommodation modules.

[163] *Body Corporate and Community Management Act 1997* (Qld) s 66.

[164] *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 7; *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 6.

[165] *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 159(4); *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 161(4).

[166] A lot purchased off-the-plan is a lot intended to come into existence. A disclosure statement is also required to be given to buyers of existing lots. The governance decisions extracted from the information to be given in that disclosure statement will be dealt with in the section on governance decisions in the developer control period. It should be noted that there is a requirement that the community management statement be included in the disclosure statement. It is therefore evident that in respect to a time line for implementing governance decisions, those decisions outlined in relation to the community management statement must be made first.

[167] *Body Corporate and Community Management Act 1997 (*Qld*)* s 213(1).

[168] *Body Corporate and Community Management Act 1997 (*Qld*)* s 213(2).

must specify whether the body corporate is an unlimited or limited body corporate.[169] A document specifying the purpose of the limited or unlimited body corporate must accompany the plan of subdivision.[170] A further document specifying details of each lot's entitlement and liability and the basis for the allocation must also be included.[171] Rules (by-laws) for the body corporate appear to be a discretionary inclusion when lodging the plan.[172]

Considering the content of the management statements, disclosure statements and information documents, the developer is therefore required to make the following governance decisions:

5.7.4 Entitlements and Liabilities

Each jurisdiction has a process for determining: a lot's share in the common property, contribution to financial management and voting power at general meetings. Some jurisdictions create separate allocations for liabilities and entitlements (for example, Queensland and Victoria), others create a singular allocation incorporating both (New South Wales).

In New South Wales, a schedule of lot entitlements for the proposed lots must also accompany the plan of subdivision.[173] That is, each lot's share in the common property, proportion of levies to be paid, and voting power. Lot entitlements are based on the comparative market value of each lot at the time the plan is registered. A certificate issued by a registered valuer must accompany the interest schedule of lot entitlements that is lodged with the plan. [174]

In Queensland, schedules identify each lot and its respective contribution schedule lot entitlement (the owner's share of the levies and value of voting power on an ordinary

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[169] *Subdivision Act 1988 (*Vic*)* s 27(3). Unlimited bodies corporate own the common property and limited bodies corporate apply to only some lots within the scheme. There can be multiple limited bodies corporate in the one scheme.

[170] *Subdivision Act 1988 (*Vic*)* ss 27B(2), 27C(2). A document which specifies the functions and obligations of the limited body corporate may also accompany the plan of subdivision creating a limited body corporate.

[171] *Subdivision Act 1988 (*Vic*)* s 27F.

[172] *Subdivision Act 1988 (*Vic*)* s 27E(1).

[173] *Strata Schemes (Freehold Development) Act 1973* (NSW) s 10; *Strata Schemes (Leasehold Development) Act 1986* (NSW) s 13; *Community Land Development Act 1989* (NSW) ss 7-13, sch 11.

[174] *Strata Schemes (Freehold Development) Act 1973 (*NSW*)* s 8; *Strata Schemes (Leasehold Development) Act 1986* (NSW) s 7; *Community Land Development Act 1989* (NSW) sch 11.

resolution if a poll is conducted) and interest contribution schedule lot entitlement (the owner's share in the common property, interest upon termination of the scheme, and the value of the lot if charges are imposed by a state authority).[175] In 2011, amendments were made to the *Body Corporate and Community Management Act 1997* (Qld) in relation to the method for calculating lot entitlements.[176] The developer must now apply the market value principle[177] (lot entitlements must reflect the market value) when determining each lot's *interest schedule* lot entitlement. Either the equality or relativity principles must be applied when determining each lot's *contribution schedule* entitlement. [178] 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 (including, inter alia, the impact the lots have on common property maintenance costs and the purposes of the lot). Although the process of deciding lot entitlements has become more definitive following these amendments, there appears to be some discretion left to developers.

In Victoria, details of lot entitlement and lot liability must accompany the plan of subdivision, including the basis for the allocation.[179] However, there is no statutory requirement as to the method of calculating the entitlement or liability.

This governance decision with respect to determining lot entitlements and liabilities is highly significant as it affects not only each lot owner's levy contribution, but also their proportional ownership share in the common property. The method of calculating entitlements is most prescriptive in New South Wales, followed by Queensland.

5.7.5 The By-laws / Rules

[175] *Body Corporate and Community Management Act 1997* (Qld) s 47.
[176] *Body Corporate and Community Management and Other Legislation Amendment Act 2011* (Qld).
[177] *Body Corporate and Community Management Act 1997* (Qld) ss 46(8), 46B.
[178] Ibid s 46A.
[179] *Subdivision Act 1988* (Vic) s 27F.

The by-laws (or rules) of a scheme govern behaviour, the use of common property and in some instances, the individual lots. By-laws are another governance structure within the MOD framework. Although the power to make and amend by-laws is embedded in the respective legislation and there are some restrictions on the type of by-law which can be created, the developer has some freedom to create tailored by-laws for each scheme.

In the States of Queensland and Victoria, developers have discretion in proposing by-laws for the scheme prior to its inception.[180] If rules are not provided upon lodgement of the plan of subdivision, then the model by-laws, as provided for in the regulations, will apply.[181]

In New South Wales, the same discretion applies for schemes regulated by the *Strata Schemes (Freehold Development) Act 1973* (NSW) and the *Strata Schemes Management Act 1996* (NSW) except that there must be an indication at the time of lodging the plan whether the model rules prescribed under the regulations will apply or other by-laws proposed and lodged with the plan be adopted.[182] However, schemes regulated by the *Community Land Development Act 1989* (NSW) and *Community Land Management Act 1989* (NSW) require the developer to propose by-laws for the scheme.[183]

In Queensland, the content of the by-laws 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.[184] There are also, exclusive use by-laws that can be drafted to give special rights to identified lots (and therefore certain owners) to exclusively use parts of the common property or body corporate asset.[185]

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[180] *Body Corporate and Community Management Act 1997* (Qld) ss 66(1)(e), 168(2); *Subdivision Act 1988* (Vic) s 27E(1).
[181] *Body Corporate and Community Management Act 1997* (Qld) ss 66(1)(e), 168(2); *Owners Corporations Act 2006* (Vic) s 139(2).
[182] *Strata Schemes (Freehold Development) Act* (NSW) 1973 s 8 (4B).
[183] *Community Land Development Act 1989* (NSW) schs 3, 4.
[184] *Body Corporate and Community Management Act 1997 (*Qld) s 169.
[185] Ibid s 170.

In Victoria, the content or subject matter of the by-laws is limited and must be for the purpose of the control, management, administration, use or enjoyment of the common property or of a lot.[186] However, when reviewing the applicable provisions in the legislation, it appears unclear whether the content limitation is only applicable to rules created by the body corporate via a special resolution[187] and not those lodged by the developer in the planning period. Upon a strict interpretation of the provisions, developers can create rules outside the content limitation outlined.

The creation of by-laws regulates, inter alia, owner behaviour[188] and can deprive owners of their interest in their collectively held land (via exclusive use by-laws).[189] The developer when drafting by-laws must take into account and to some extent forecast, the potential negative behaviours and problems that may be encountered once the development is complete and residents move in.

5.7.6 Insurance

Prior to a scheme being registered, the developer must insure the building under construction. In New South Wales, a developer must not enter into a contract of sale unless a certificate of insurance is attached to the contract.[190] Similarly, in Victoria, the developer cannot sell a lot unless there is insurance in place in accordance with the insurance requirements set out in the *Owners Corporations Act 2006* (Vic).[191] In Queensland, the developer is required to ensure that insurance policies are in place at the time a scheme is registered.[192] The developer must obtain from a quantity surveyor or registered valuer an independent valuation stating the replacement value of the building and must insure the building to that value.[193] There are penalty provisions that apply for non-compliance.

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[186] *Owners Corporations Act 2006 (*Vic*)* s 138(3).
[187] Ibid s 138.
[188] Cathy Sherry, 'A Bigger Strata Footprint: Are We Aware of the Implications?' (Paper presented at the Strata and Community Title in Australia for the 21st Century III Conference, Surfers Paradise, Queensland, September 2011).
[189] Cathy Sherry, 'How Indefeasible is Your Strata Title: Unresolved Problems in Strata and Community Title' (2009) 21 (2) *Bond Law Review* 159.
[190] *Home Building Act 1989* (NSW) s 96A.
[191] *Sale of Land Act 1962* (Vic) s 11. A contravention of this section gives the purchaser the right to rescind the contract of sale.
[192] *Body Corporate and Community Management Act 1997* (Qld) s 191.
[193] Ibid s 191(3).

5.7.6 Body Corporate Management Agreement

According to Strata Community Australia,[194] managers provide services relating to the administrative management of bodies corporate including financial and clerical support.

Under the New South Wales regulations, a body corporate may appoint a person who is the holder of a strata managing agent's licence under the *Property, Stock and Business Agents Act* (PSBAA) *2002* (NSW) to be the BCM. Under the PSBAA, a [BCM] is a person:

> …who, for reward (whether monetary or otherwise), exercises or performs any function of [a body corporate] under this Act, not being:
>
> (a) a person who:
>
> (i) is the owner of a lot to which the strata scheme for which the [body corporate] is constituted relates, and
>
> (ii) is the secretary or treasurer of the executive committee of the [body corporate], and
>
> (iii) exercises only functions of the [body corporate] required, by the by-laws in force in respect of the strata scheme for which the [body corporate] is constituted, to be exercised by the secretary or treasurer of that executive committee or by the [body corporate], or
>
> (b) a person who maintains or repairs any property for the maintenance and repair of which the [body corporate] is responsible.[195]

A BCM in Queensland is defined in the *Body Corporate and Community Management Act 1997* (Qld) s 14 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

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[194] *Questions about Strata Managers* (19 July 2016) http://www.stratacommunity.org.au/understandingstrata/faqs.

[195] *Property, Stock and Business Agents Act 2002* (NSW) s 3 (definition of Community Management Agent and Strata Managing Agent); *Strata Schemes Management Act 1996* (NSW) s 26; *Community Land Management Act 1989* (NSW) s 3.

engaged to carry out the functions of a committee, and the executive members of a committee, for a body corporate.

In Victoria, there is no definition of a manager per se; however, a distinction is made between paid and non-paid managers. Managers paid a fee for service must be registered.[196] A manager's functions are those conferred by the Act or regulation, the rules of the body corporate, resolutions by the body corporate and delegated functions.

Although under the legislation there is no requirement that a BCM *must* be engaged,[197] it is common practice for schemes to outsource the conduct of these administration 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 in the States of New South Wales and Queensland, limit the term of the engagement. In New South Wales, an appointment of a manager made in the initial period must not extend beyond the first AGM.[198] In Queensland, the term of appointment must not exceed three years.[199] Although there are no prescribed limitations on the term of a manager's appointment in Victoria, the legislation allows for the body corporate to revoke an appointment.[200]

The power to engage is therefore discretionary, as there is no requirement to engage a BCM. However, there are mandatory provisions imposed as to the exercise of the power, once the decision to engage is made. For example, in Queensland, the developer must act in the best interests of the body corporate in ensuring that the terms are appropriate for the scheme.[201]

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[196] *Owners Corporations Act 2006* (Vic) s 119(2). An Owners Corporation Manager must be registered with the Business Licensing Authority of Victoria - http://www.consumer.vic.gov.au/registered-businesses/owners-corporation-managers/registration

[197] *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld), s 114; *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld), s 112.

[198] *Strata Schemes Management Act 1996 (*NSW*)* s 113(1)(c); *Community Land Management Act 1989* (NSW) ss 50(4), 50(6).

[199] *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 118; *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 116.

[200] *Owners Corporations Act 2006 (*Vic*)* s 119(6). See also comments in *Farrugia v Walshe & Whitlock Pty Ltd (Civil Claims)* [2009] VCAT 762.

[201] *Body Corporate and Community Management Act 1997* (Qld) s 112 (2).

5.7.7 Service Contract Agreements (including Caretaking Agreements)

In the States of New South Wales and Queensland, it is common practice (particularly in larger schemes) for developers to engage service contractors, particularly caretakers, on behalf of the body corporate prior to registration of the scheme for the effective management and maintenance of the common property.

In New South Wales, there is an emphasis on caretakers as opposed to other general contractors for service. A caretaker is defined under the New South Wales legislation as a person:

> … who is entitled to exclusive possession (whether or not jointly with another person or other persons) of a lot or common property and assists in exercising any one or more of the following functions of the owners corporation for the strata scheme concerned:
> (a) managing common property,
> (b) controlling the use of common property by persons other than the owners and occupiers of lots,
> (c) maintaining and repairing common property.[202]

The broader term of service contractor is used in Queensland, which includes a caretaker. A service contractor is defined in the *Body Corporate and Community Management Act 1997* (Qld) s 15 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 a person or entity 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. In New South Wales there are restrictive limitations in the legislation in relation to the term of the engagement. That is, the developer cannot cause the body corporate to enter into a caretaking or other service agreement (that being an agreement for the repair, maintenance,

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[202] *Strata Schemes Management Act 1996* (NSW) s 40A.

management or control of use of the common property) that extends beyond the first AGM.[203]

In Queensland, the term limitations are significantly less restrictive and are dependent upon the regulation module applying to the specific scheme. If the scheme is registered under the standard module, the contract term is limited to 10 years.[204] However, if the scheme is registered under the accommodation module, the term is limited to 25 years.[205] Therefore, the module that is applied will have significant implications for bodies corporate and lot owners.

It is common practice, in Queensland in particular, for developers to establish a management rights business (caretaking and letting agency) and then sell those rights to a third party. The decision to incorporate a management rights business into a MOD is an important governance decision as these agreements effectively bind the body corporate to a contracted arrangement for at least 10 years.

In Victoria it appears less common for developers to negotiate caretaking type arrangements on behalf of the yet to be created body corporate. Although the body corporate can engage contractors to assist in carrying out its functions,[206] it appears to be common practice for the BCM to assist the body corporate in engaging maintenance contractors once it is established.

5.7.8 Letting Agent Authorisation

Letting agencies are often included in schemes that have a high proportion of investor lots, whereby the lots are rented. The convenience of pooling lots along with scheme knowledge appears to be an appealing proposition for both investors and developers.

A person is a letting agent under the *Body Corporate and Community Management Act 1997* (Qld) s 16, '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.

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[203] Ibid s 113(1)(c).
[204] *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 119.
[205] *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 117.
[206] *Owners Corporations Act 2006* (Vic) ss 9, 10.

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 Queensland. In New South Wales and Victoria, there are no specific provisions addressing or regulating letting agents.

5.7.9 Applying the Regulation Module

In Queensland, developers have to decide which regulation module to apply to the scheme being developed. In order to provide a flexible regulatory framework, five regulation modules[207] have been enacted in Queensland to accommodate for the differing needs of different types of development.[208] Four of the modules apply to residential MODs.[209] Although the standard module is the default module,[210] the accommodation module is often applied, as it allows for longer term service contracts (including caretaking / letting business authorisations and leases) to be entered into for a longer period.[211] Although the original intention of the accommodation module was for schemes requiring accommodation management, such as holiday letting and serviced apartments,[212] lots included in residential schemes that are either predominately 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.[213] Therefore, it is feasible that a scheme with no holiday letting will be registered under the accommodation module.

A developer therefore needs to consider whether lots in a scheme that it is developing will be purchased predominately by investors or occupiers and, whether a long-term

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[207] *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld); *Body Corporate and Community Management (Specified Two-lot Schemes Module) Regulation 2011* (Qld); *Body Corporate and Community Management (Small Schemes Module) Regulation 2008* (Qld); *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld); *Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld).

[208] Queensland, *Parliamentary Debates,* Legislative Assembly, 30 April 1997, 1136 (H.W.T Hobbs).

[209] The *Body Corporate and Community Management (Commercial Module) Regulation 2008* (Qld) does not apply to residential schemes and therefore will be excluded from this discussion. For the purpose of this thesis, the *Body Corporate and Community Management (Small Scheme Module) Regulation 2008* (Qld) will also be excluded as it relates to basic schemes of less than 6 lots and there is no letting agent for the scheme.

[210] *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 3.

[211] Office of the Commissioner of Body Corporate and Community Management, *Regulation Modules* (18 August 2011) http://www.justice.qld.gov.au/justice-services/body-corporate-and-community-management/regulation-modules.

[212] Queensland, *Parliamentary Debates,* Legislative Assembly, 30 April 1997, 1136 (H.W.T Hobbs).

[213] *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 3.

service contract and letting business authorisation is warranted. 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. That is, developers can sell the management rights business to a third party for profit. It is important to note, however, that a body corporate is prohibited from selling such rights itself.[214]

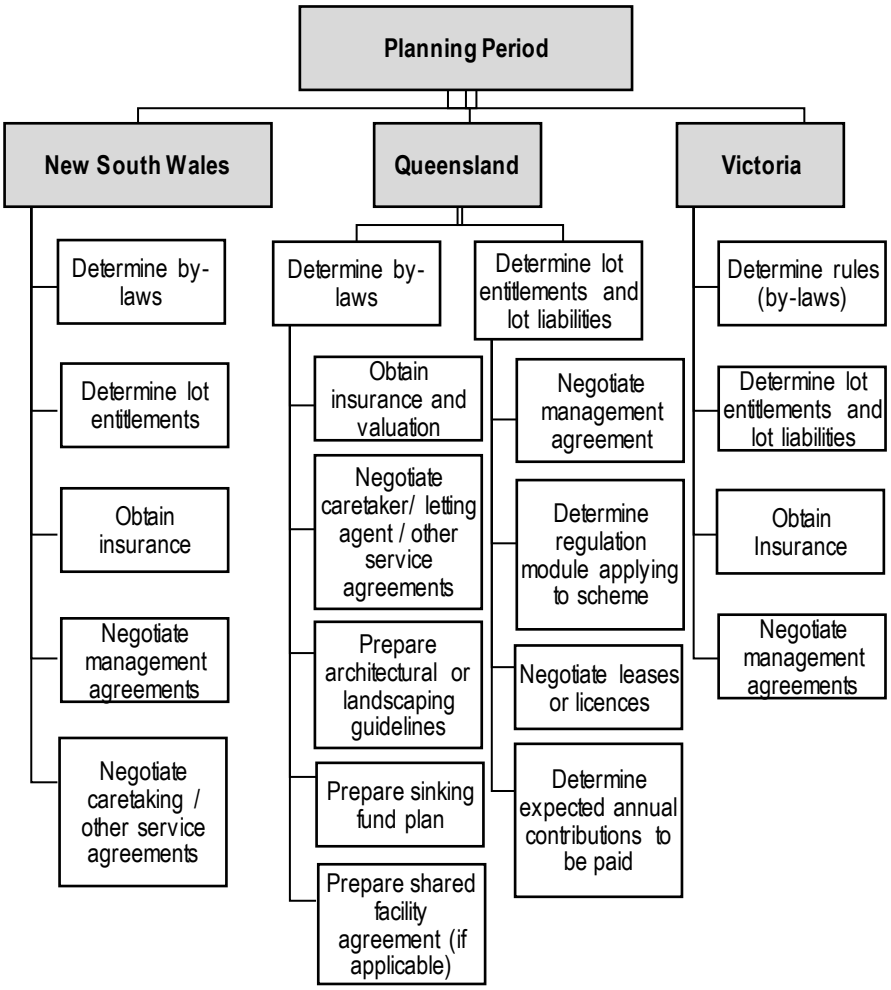
5.7.10 Expected Annual Contributions Payable

Although the Queensland legislation requires an expected per lot contribution amount to be stated in the disclosure statement,[215] there is no requirement to justify how the contribution amount has been determined. Therefore, developers are only responsible for advising buyers of their expected contributions, not the manner in which the contributions payable were calculated. The other States do not require disclosure in relation to anticipated contributions.

In summary, the key developer governance decisions in the planning period, across the three jurisdictions reviewed, relate to: lot entitlements and liabilities, scheme by-laws or rules, insurance, body corporate management agreements, caretaking or other service based agreements, letting agent authorisations, regulation module applicability and expected annual contributions payable. Figure 5.1 depicts the key discretionary and mandatory governance decisions made prior to scheme registration, i.e. during the planning period.

[214] *Body Corporate and Community Management Act 1997* (Qld) s 113. A body corporate is prohibited from seeking or accepting a payment for the engagement of a service contractor or authorisation for letting rights or to extend a term.
[215] *Body Corporate and Community Management Act 1997* (Qld) s 213(2).

Figure 5.1: Key Developer Governance Decisions in the Planning Period of Multi-owned Developments



5.8 Governance Decisions in the Developer Control Period

In this section, the matters addressed relate to decisions made by the developer post registration, when:

1. the developer is the only member of the body corporate, i.e., the only owner of all the lots in the scheme;
2. the developer retains the majority voting control (by way of lot retention or through the use of proxies and powers of attorney); and
3. the developer is required by law to:
    a. make certain decisions in anticipation of the first AGM, and
    b. hand over documentation specific to the scheme.

The purpose of this section is to showcase the specific decisions that a developer makes in the developer control period and the legislative provisions and scope given in making these decisions.

Firstly, there is an initial period in the developer control period when all lots included in a scheme are owned by the developer. This period begins upon registration of the scheme and ends, usually, no earlier than 14 days thereafter. It is only after expiry of the 14 days that a developer transfers (or settles) the lots in the scheme and transfers ownership to the new lot owners.[216] 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.

Secondly, the developer can effectively retain control of the body corporate and therefore its decisions by retaining lots in the scheme (subject to the developer control period provisions outlined in the respective legislation). Other than for staged developments, it is unlikely that a developer would consider this option as a long term strategy.[217] There may be benefits associated with a developer retaining majority ownership in an environment where fulfilling the development vision is dependent upon certain body corporate decisions being made.

Thirdly, in Queensland, the developer can include a condition in a contract of sale requiring the buyer to appoint the developer as their proxy and / or power of attorney. That is, the developer is appointed as the representative of the lot owner to vote on his or her behalf at body corporate meetings. The power of attorney can only be exercised in the way prescribed in the disclosure statement provided to buyers.[218] That is, a developer using this power, can only vote on matters previously disclosed to the buyer. Restrictions are also placed on the use of proxies. The developer can

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[216] *Body Corporate and Community Management Act 1997* (Qld) s 212. In Victoria, the *Estate Agents (Contracts) Regulations 2008* (Vic) prescribes standard forms of contracts (including off-the-plan) to give effect to agreements negotiated by agents. The regulations are made under s 99(ge) of the *Estate Agents Act 1980* (Vic). Other forms approved by the Legal Services Board or contracts prepared by Legal Practitioners or licensed conveyancers may be used in residential sales. Form 1 of the standard form contract under the above regulation makes it a general condition that settlement is due on the date specified in the contract, or 14 days after the seller gives notice in writing that the plan of subdivision has registered. It appears that these types of settlement clause are common practice.

[217] A scheme that is progressively developed over time. It should be noted that the retention of lots may be a result of market forces and the inability to sell off the stock.

[218] *Body Corporate and Community Management Act 1997* (Qld) s 211.

only exercise a proxy on issues stated in the contract of sale and limited to matters relating to: the engagement of a BCM, service contractor or letting agent; the occupancy of part of the common property by an authorised service contractor or letting agent; and the recording of a new community management statement.[219] The legislation restricts the use of this power and proxies to one year.[220] In Victoria and New South Wales, this practice has been prohibited. In Victoria, there is a penalty provision that applies for persons requiring or demanding that lot owners give proxies and / or powers of attorney.[221] In New South Wales, similar restrictions are placed on proxies and powers of attorney required to be given pursuant to a term of a contract of sale.[222]

Developer control, post registration, is therefore dependent upon:

1. the time period between registration of the scheme and settlement (being at least 14 days);
2. developer retention of lots in a scheme; and
3. (in Queensland) the use of proxies and powers of attorney as a condition in a contract of sale.

The key developer governance decisions in this period are:

5.8.1 The First Meeting of the Body Corporate

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[219] *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 108(3); *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 110(3).

[220] *Body Corporate and Community Management Act 1997* (Qld) s 211(3); *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 108(3); *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 110(3).

[221] *Owners Corporations Act 2006* (Vic) s 89. This provision states that a person must not require or demand that a lot owner give a proxy or power of attorney for the purpose of voting. Although this restriction does not refer explicitly to a developer request or demand as a condition of a contract of sale, it is arguable that this is implied. The explanatory memorandum accompanying the *Owners Corporations Bill 2006 (*Vic*)* states that the principle behind this restriction is that powers of attorney and proxies should be given freely. Further, in the second reading speech, it is noted that developers will be prohibited from requiring owners to provide proxies and powers of attorney as a condition in a sales contract (see, Victoria, *Parliamentary Debates,* Legislative Council, 12 September 2006, 3290-3293 (J.M. Madden). Moreover, the right to vote (and therefore the right to grant a proxy or power of attorney) only arises once the owners corporation is created via registration and the contracted party becomes a lot owner. I would argue that a provision in a contract of sale requiring a buyer to grant a proxy or power of attorney in the future will not defend the intention of the provision.

[222] *Strata Schemes Management Act 1996* (NSW) sch 2 11(7AA).

In Queensland and New South Wales, an extraordinary (or requested extraordinary) general meeting can be called and held by the developer in the first days or weeks following registration of the plan.[223] Often, inter alia, service based agreements, licences and leases are finalised, ratified and executed at this first meeting of the body corporate.[224] The developer, on behalf of the body corporate, executes the BCM agreement, service contracts, letting authorisation, and any other agreements, leases and licences. In Victoria, the first AGM is the first meeting of the body corporate[225] and therefore, it is common practice in Victoria for the first AGM to be held shortly after scheme registration.

5.8.2 The First Annual General Meeting of the Body Corporate

In each of the jurisdictions, the developer is required to call and hold the first AGM and provide a notification including a meeting agenda.[226] Depending on the type of scheme and whether proxies and powers of attorney are being utilised, the developer may hold the balance of power when voting on the issues outlined in the AGM agenda. In Queensland, the first AGM must be called and held by the developer within two months after 50 per cent or more of the lots are no longer owned by the developer, or it has been six months since the registration of the scheme, whichever event happens sooner.[227] In Victoria, the developer must hold the first meeting (being the first AGM[228]) of the body corporate within six months of the scheme being

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[223] *Strata Schemes Management Act 1996* (NSW) sch 2, s 37; *Community Land Management Act 1989* (NSW) sch 5, s 3; *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 67; *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 65.

[224] As highlighted in this chapter, in New South Wales, there are limitations placed on developers when executing agreements in the developer control period. These restrictions are outlined under the heading *Service Agreements*.

[225] *Owners Corporations Act 2006* (Vic) ss 66, 67.

[226] *Strata Schemes Management Act 1996* (NSW) sch 2, s 2; *Community Land Management Act 1989* (NSW) s 9; *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 77(1); *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 75(1); *Owners Corporations Act 2006 (*Vic*)* s 66.

[227] *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 77(1) - 77(2); *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 75 (1) -75(2).

[228] *Owners Corporations Act 2006* (Vic) s 70.

registered.[229] In New South Wales, the first AGM must be held within two months of the expiration of the developer control period.[230]

At the first AGM, the developer must include prescribed agenda items and hand over prescribed documents relating to the scheme. Table 5.3 highlights the items that must be included on the agenda in the respective jurisdictions and the documents that must be handed over.

[229] *Owners Corporations Act 2006* (Vic) s 66.
[230] *Strata Schemes Management Act 1996* (NSW) sch 2, s 2; *Community Land Management Act 1989* (NSW) s 9.

Table 5.3: Agenda Items and Documentation Required to be Provided by the Developer at the First AGM – New South Wales, Queensland and Victoria

New South Wales [231]	Queensland [232]	Victoria [233]
Strata roll	Register of assets, owners roll	Owners Corporation Register, includes: • owners roll • management information • total of lot liabilities and entitlements • details of notices • details of contracts • leases and licences • details of insurances
Decide whether to appoint an auditor	Decide whether to appoint an auditor	
• Decide on strata management appointment (if applicable) and delegations to manager • Decide on caretaker appointment and functions (if applicable) • Development consents • Development certificates • Endorsements • Fire safety certificates and warranties • Certificate of title for common property • Any accounts • Records	All documents in developer's possession or control relevant to the scheme including: • accounts • meeting minutes • registers • engagements • tender documentation • building contracts • certificates of classification • fire safety certificates	• Any contracts • Leases and licences • Information relating to suppliers providing warranties and guarantees • The appointment of a manager (if applicable) • Any accounts or records made • Any delegations made
Sinking fund plan (preparation)	Sinking fund plan	Maintenance plan (if any)
Plans, specification and certificates, diagrams and documents	Plans, specifications, diagrams and drawings of buildings and improvements	Plans and related building and planning documents
Insurance policies (confirmed, varied or extended)	Insurance policies and an independent valuation	Insurance policies

[231] *Strata Schemes Management Act 1996* (NSW) sch 2 ss 3 - 4; *Community Land Management Act 1989* (NSW) s 9, sch 5 s 3. Note: The new *Strata Schemes Management Act 2015* (NSW) s 15, extends the items to be included in the first AGM agenda. Upon commencement of this Act, a first AGM agenda must include consideration of a motion detailing strata management commissions, to decide whether a building manager should be appointed, to consider initial maintenance schedule, to consider building defects and rectification. Further documents must also be provided by the developer including; the initial maintenance schedule, and any interim or final reports from a building inspector (s 16).

[232] *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 77(3), 79; *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 75(3), 77.

[233] *Owners Corporations Act 2006* (Vic) ss 67 - 71.

New South Wales [234]	Queensland [235]	Victoria [236]
Determine number of committee members and election of committee	The election of the committee	The election of a committee
Administrative and sinking funds (confirmed or varied), accounting records and financial statements	Administrative and sinking fund budgets	Consideration of proposed annual budget, financial statements and details of fees
Decide if any matter or class of matter be determined at a general meeting	Decide issues reserved for decision by ordinary resolution	Copy of *Owners Corporations Act 2006 (Vic), Subdivision Act 1988 (Vic*) and accompanying regulations
Decide on by-law amendments	Decide on by-law amendments	Books to enable record keeping – minutes, accounts and other records

[234] *Strata Schemes Management Act 1996* (NSW) sch 2 ss 3 - 4; *Community Land Management Act 1989* (NSW) s 9, sch 5 s 3. Note: The new *Strata Schemes Management Act 2015* (NSW) s 15, extends the items to be included in the first AGM agenda. Upon commencement of this Act, a first AGM agenda must include consideration of a motion detailing strata management commissions, to decide whether a building manager should be appointed, to consider initial maintenance schedule, to consider building defects and rectification. Further documents must also be provided by the developer including; the initial maintenance schedule, and any interim or final reports from a building inspector (s 16).

[235] *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 77(3), 79; *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 75(3), 77.

[236] *Owners Corporations Act 2006* (Vic) ss 67 - 71.

Extracted from these items and documents and detailed below are the governance and management decisions that a developer can make in this period including:

5.8.3 Registers

In Victoria, the developer must provide a body corporate register[237] which contains the plan number and address of the scheme, the name and address of each lot owner, details relating to the manager (if appointed), details relating to the lot liabilities and entitlements for the scheme, details of any rule amendments, details of notices or orders, details of contracts, leases and licences, and details of insurance policies taken out.[238]

In Queensland, the developer must provide an inventory of all assets of the body corporate to be placed on the assets register.[239] The register must include a description of the assets, whether the assets were purchased or gifted, when the assets became body corporate assets, and the cost or value of the assets.[240] As highlighted in this chapter, the developer must include all body corporate assets proposed to be acquired by the body corporate after registration in the sales disclosure document. The developer must therefore decide what assets to acquire on behalf of the body corporate. The developer will purchase the assets prior to the inception of the scheme and then transfer by way of gift to the body corporate, or purchase the assets post registration, in the name of the body corporate.

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[237] *Owners Corporations Act 2006* (Vic) s 67(a).

[238] Ibid s 148.

[239] *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 77(1)(a); *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 79(1)(a).

[240] *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 195(2); *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 197(2).

5.8.4 Appointment of Auditor

In Queensland and New South Wales, a motion to appoint (or not to appoint) an auditor is placed on the agenda for the first AGM.[241] It is common place for the BCM to refer an auditor for consideration at the AGM.

5.8.5 Service Agreements

Although, as stated in section 5.7.1 (Management Statements), developers in New South Wales and Queensland often hold a general meeting prior to the AGM in order to enter into or ratify service agreements contemplated prior to the registration of the scheme. Service agreements can also be voted on at the first AGM, subject to some statutory limitations.

In New South Wales, restrictions have been provided for, in relation to agreements entered into by the developer (on behalf of the body corporate) with managing agents, caretakers and other providers dealing with the management, control or maintenance of the common property.[242] Appointments entered into must not extend beyond the first AGM.[243] More specifically, if a developer executes a caretaking agreement prior to the inception of the scheme (that is, in its capacity as a promoter), then the caretaking agreement automatically expires at the conclusion of the first AGM.[244] However, subject to some term limitations (10 years for caretaking agreements),[245] a developer who holds the balance of voting power at the first AGM could, on behalf of the body corporate, enter into agreements for an extended time period.

In Victoria, any contracts binding or benefiting the body corporate must be provided at the first AGM.[246] There appears to be no specific provision requiring a resolution to

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[241] *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 75(3)(g); *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s77(3)(g); *Strata Schemes Management Act 1996* (NSW), sch 2, s 3(h).

[242] *Strata Schemes Management Act 1996* (NSW) s 113(1)(c).

[243] Ibid s 113(1)(c).

[244] Ibid s 40B.

[245] Ibid s 40B. Under the *Strata Schemes Management Act 2015* (NSW), limitations have been introduced in relation to the term of appointments for managing agents. Section 50(1) provides that, if an agent is appointed at the first AGM then the appointment ends 12 months after the appointment. For any additional appointments, the term limitation is three years.

[246] *Owners Corporations Act 2006* (Vic) s 67(f).

be passed at the first AGM for entry into service contracts or for such contracts to be ratified. The requirement relates only to the deliverance of such contracts. It is assumed that as a matter of course, the body corporate would resolve to enter into these agreements.

5.8.6 Leases and Licences

Leases and licences over the common property are often entered into early on in the life of a scheme. In New South Wales, a special resolution passed by the body corporate is required to execute a lease.[247] There are restrictions under the *Community Land Development Act* 1989 (NSW) s 23(2)(a), prohibiting the granting of a lease of neighbourhood property during the developer control period. In Queensland, the body corporate can pass a resolution to enter into a lease or licence agreement at the first AGM,[248] if the developer has not negotiated these types of agreements and included them in the community management statement. In Victoria, a special resolution is required to lease or licence the whole or part of the common property.[249]

5.8.7 Sinking (or Maintenance) Fund Plan

A sinking or maintenance plan anticipates the major capital expenditure required for a scheme. The plans forecast capital or non-recurrent expenditure over a 10 year period. The body corporate can then utilise the plan in determining the budget for this type of expenditure. In most jurisdictions, the developer would engage a quantity surveyor to assist or prepare the plan for the scheme.

In New South Wales, a 10 year sinking fund plan must be prepared with a commencement date being the date of the first AGM.[250] In the *Community Land*

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[247] *Strata Schemes (Freehold Development) Act 1973* (NSW) s 25; *Community Land Development Act 1989* (NSW) s 17.

[248] A resolution without dissent is required for leases or licences over part of the common property for a term of 10 years or more. A special resolution is required for terms less than 10 years. Special provisions apply for the whole of the common property. See *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 159(3); *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 161(3).

[249] *Owners Corporations Act 2006* (Vic) s 14.

[250] *Strata Schemes Management Act 1996* (NSW) s 75A(2); *Community Land Management Act 1989 (*NSW*)* s 80. Two- lot schemes are not required to establish a sinking fund (see: *Strata Schemes Management Act 1996* (NSW) s 69(2). The new *Strata Schemes Management Act 2015* (NSW) s 115, now requires the developer to cause an initial maintenance plan to be prepared. Furthermore, the

Management Act 1989 (NSW) s 80(4), specific factors are required to be included in the plan including, inter alia; details of proposed work, the timing and anticipated costs of any proposed work, the source of funding. In Queensland, the developer must at the first AGM deliver a sinking fund forecast for the first 10 years of a scheme's life.[251] As the developer is obligated under the disclosure statement requirements to specify the amount of annual contributions reasonably expected to be payable (including the sinking fund contributions), it is likely that a sinking fund forecast is requested by the developer prior to the scheme being registered. In Victoria, a maintenance plan must be prepared by the developer and delivered at the first AGM only for schemes (prescribed) with annual fees in excess of $200 000 a year or for schemes that consist of more than 100 lots.[252] However, the funding of the plan is contingent upon the body corporate approving the plan.[253] There is no mandatory requirement to activate the plan or fund it.

In New South Wales and Queensland, at least, the developer will need to provide information (often to a quantity surveyor) as to the capital infrastructure and equipment for the scheme in order to prepare the plan.

5.8.8 Adopting Budgets and Fixing Contributions

In order to fund the operational aspects of a scheme, financial contributions must be made within the first few months post registration. Contributions are determined based on the lot entitlements (in Queensland and New South Wales) or lot liabilities (Victoria) for a scheme. In New South Wales, the body corporate must provide a budget for its administrative and sinking fund expenses within 14 days of its registration.[254] In Queensland, the developer must prepare an administrative and sinking fund budget for adoption by the body corporate.[255] The budget for the

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accompanying regulations provide specific requirements in relation to the initial maintenance schedule.

[251] *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 77(1)(i); *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 79(1)(i).

[252] The definition of a prescribed owners corporation – see *Owners Corporations Regulations 2007* r 5.

[253] *Owners Corporations Act 2006* (Vic) s 40.

[254] *Strata Schemes Management Act 1996* (NSW), s 75(1); *Community Land Management Act 1989* (NSW) 79(1).

[255] *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 139(5); *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 137(5).

administrative fund must include an estimate of costs for maintaining the common property and body corporate assets, insurance and other recurrent expenditure.[256] The sinking fund budget must include costs for expected capital expenditure for the forthcoming financial year and a proportional amount (e.g. 1/9th) for future capital expenditure.[257] It is then the decision of the body corporate to, inter alia, fix the contributions to be levied on each owner.[258] In Victoria, there is no mandatory provision requiring the setting of annual levies.[259] It is again assumed, that in schemes larger than two lots, the body corporate would levy contributions at the first AGM.

The setting of the initial financial management arrangements is therefore the responsibility of the developer for the first year of a scheme's life.

5.8.9 Insurance Review

In each jurisdiction, there are regulations requiring bodies corporate to take out insurance in relation to the building(s) (reinstatement and replacement insurance) and public liability for the scheme.[260] In New South Wales, the developer must ensure that the body corporate takes out insurance as required by the legislation as soon as the scheme is registered. In Queensland, as the developer is required to take action in relation to insurance prior to the scheme registering, all required insurances should be in place at the time of registration. The body corporate can then, at the first AGM, review the insurance policies put in place by the developer.[261] In Victoria, the developer must take out insurance as if it were the body corporate up until either, the

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[256] *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 139(2); *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 137(2).

[257] *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 139(3); *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 137(3).

[258] *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 141; *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 139.

[259] See *Owners Corporations Act 2006* (Vic) s 23.

[260] *Strata Schemes Management Act 1996* (NSW) ss 83, 87; *Community Land Management Act 1989* (NSW) ss 39, 40; *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) ss 178 - 179, 187; *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) ss 176- 177, 185; *Owners Corporations Act 2006* (Vic) ss 59 - 60.

[261] *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 77(3); *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 75(3).

end of six months post registration or if the body corporate holds its first AGM within six months, one month after that meeting.[262]

5.8.9 By-laws / Rules

As explained in the planning period section, the initial scheme by-laws or rules must be determined by the developer prior to a scheme's registration. However, at the first meeting or AGM, the developer may be able to amend or repeal the by-laws or rules initially set. In New South Wales, restrictions have been imposed which prohibit the making, amending, or repealing of a by-law in the developer control period if, the change confers a right or obligation on one or more, but not all lots in the scheme.[263] In Queensland, the body corporate can decide at the AGM, by special resolution, whether the registered by-laws should be amended.[264] In the event that the resolution is passed, a new community management statement must be lodged.[265] In Victoria, a special resolution is required for the amendment or revocation of a rule.[266]

5.8.10 Documents Handover

At the first AGM, the developer must hand over a suite of documents relating to the development. In New South Wales, all plans, specifications, certificates, diagrams and other related documents must be handed over by the developer.[267] Similarly in Queensland, the developer must give the body corporate all plans, specifications, diagrams and drawings relating to the infrastructure and utilities for the scheme and any contracts for building works.[268] In Victoria, a copy of the plan of subdivision and all related building documents must be provided at the AGM.[269]

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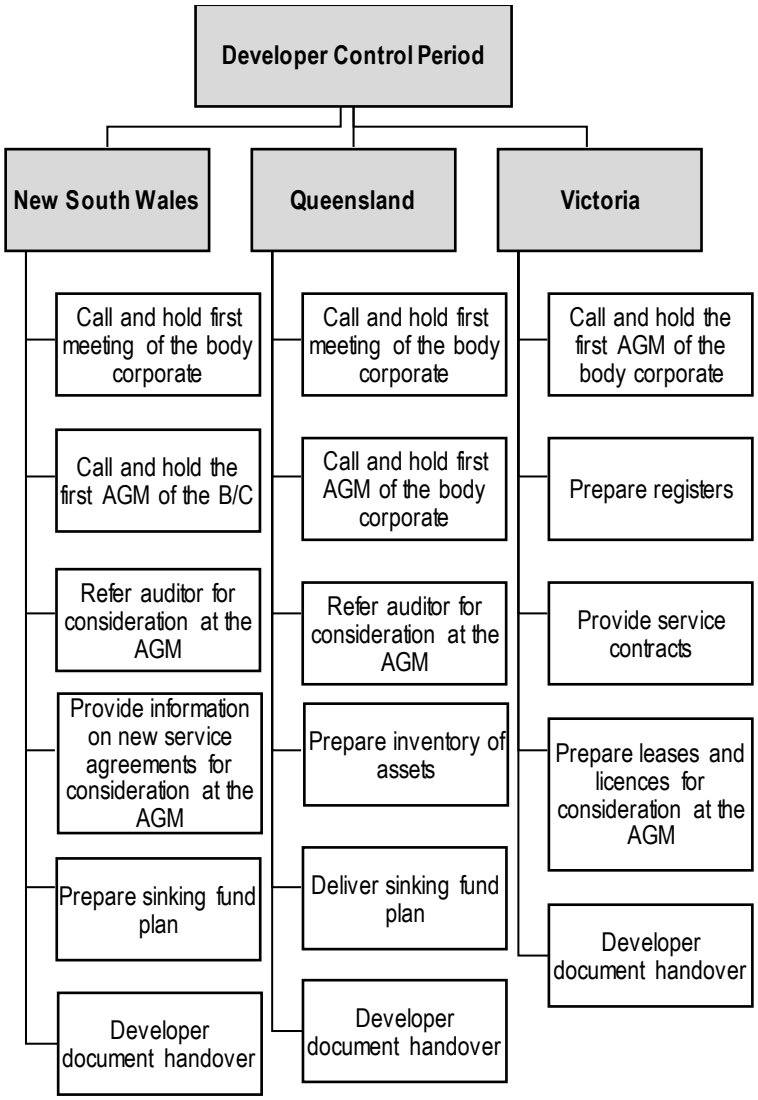
[262] *Sale of Land Act 1962* (Vic) s 9AAA.
[263] *Strata Schemes Management Act 1996* (NSW) s 50. A similar provision has been retained in the *Strata Schemes Management Act 2015* (see s 140).
[264] *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 77(3); *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 75(3).
[265] *Body Corporate and Community Management Act 1997* (Qld) s 62(3).
[266] *Owners Corporations Act 2006* (Vic) s 138 (2).
[267] *Strata Schemes Management Act 1996* (NSW) sch 2, s 4 (1); *Community Land Management Act 1989* (NSW) s 9(3).
[268] *Body Corporate and Community Management (Standard Module) Regulation 2008* (Qld) s 79(1)(b),(g); *Body Corporate and Community Management (Accommodation Module) Regulation 2008* (Qld) s 77 (1)(b),(g).
[269] *Owners Corporations Act 2006* (Vic) s 67.

In summary, the key developer governance decisions made during the developer control period are: those inherited as the only voting member of the body corporate (until settlement of the lots begin or using proxies or powers of attorney); those inherited if the developer retained the majority of lots, and, those in connection to the first AGM.

For ease of reference, the key developer governance decisions in the developer control period are outlined in Figure 5.2.

Figure 5.2: Key Developer Governance Decisions in the Developer Control Period of Multi-owned Developments



5.9 Conclusion

This chapter highlights, from a legislative perspective, what decisions a developer can (discretionary) or must (mandatory) make in relation to the governance of a body corporate both prior to and after the registration of a plan creating a scheme, i.e., during the transition phase.

As outlined in this chapter, developers decide in the planning period, inter alia; the lot entitlements and liabilities for each lot in a scheme, the by-laws or rules regulating behaviour and the use of common property and lots, the insurer and the type of insurance policies (to some extent), service contract agreements including caretaking

and letting agency arrangements, the regulation module to apply to Queensland schemes, and the expected annual contributions payable. These decisions can carry significant implications for a scheme and the people living within a scheme. Voting power, common property share ownership, levy contribution levels, liability, financial management, lot and common property usage are issues that are determined by developers during the planning period.

This analysis has identified three ways in which the developer can control the body corporate and therefore its decisions post registration, in the developer control period. The developer has complete voting control initially and until such time that independent owners settle their respective lots. The developer can maintain its control while it retains lots until such time that the statutory prescribed developer control period expires. In Queensland, the developer can exercise control under contract demanded proxies and powers of attorney up until one year post registration. The developer decisions made during this period include, inter alia; calling and holding the first meeting and AGM, preparing registers, referring auditors for consideration at the AGM, delivering sinking fund plans, and handing over developer documents.

Additionally, this analysis has contributed to the modification of Blandy, Dixon and Dupuis critical legal events model. In the Australian context, I suggest that the critical legal events can be marked by:

1. negotiating governance and management arrangements (includes the management arrangements identified by Blandy, Dixon and Dupuis's (critical legal event 1));
2. off-the-plan contracts entered into by purchasers;
3. plan of subdivision registered and body corporate created (includes Blandy, Dixon and Dupuis's critical legal event 2(i);
4. initial body corporate meeting called and held (negotiated arrangements ratified);

5. settlement of individual lots (Blandy, Dixon and Dupuis's critical legal event 2(ii); and

6. developer's control period ends (Blandy, Dixon and Dupuis's critical legal event 3).

The decisions made during these critical events are important to highlight, as the property rights that attach to the land change (or at least redistribute) at each critical event.

It is important to note that the analysis undertaken in this chapter highlights the decisions that are contemplated in the legislation. The Victorian legislation, in particular, does not, to any great extent, anticipate that developers would or could make decisions prior to the creation of the body corporate. However, this does not mean that developers are not negotiating and making decisions on behalf of the body corporate, like they are in the other states. There are limited disclosure requirements in Victoria and therefore buyers purchasing lots off-the-plan may be unaware of the governance decisions that a developer is making in the planning period and will be actioned at the first AGM when the developer holds all the voting power. The Queensland legislation is much more transparent, requiring detailed disclosure documents to be provided to buyers. New South Wales sits in the middle, providing less disclosure documents, but imposing more limitations on the decisions developers can make.

However, these developer governance decision making powers are not unfettered. There are legal duties that apply to developers in the various roles that they assume. Chapter 6 of this dissertation, details the duties relating to developer governance decision-making and argues that developers are responsible and in turn accountable for the decisions they make in respect of the body corporate. Chapter 6 also provides the findings for the secondary interview phase and ties these findings to the literature relating to conflict of interests and governance theories.

CHAPTER 6:MODELLING DEVELOPER GOVERNANCE RESPONSIBILITIES - INSIGHTS FROM THE LITERATURE AND STRUCTURED INTERVIEW PHASE

6.1 Introduction

> Perhaps the most notable abuse by developers today is pre-election self-dealing, where the developer, while acting as an agent for the [body corporate], executes sweet-heart contracts which are binding on the owners.[270]
>
> The long-term duration of these so-called "sweetheart" contracts constitutes an infringement upon rights of the [body corporate] and the unit owners to contract on their own behalf. Moreover, because these contracts may be self-serving for the developer-manager, he may include terms which are commercially unreasonable.[271]

The exploitation of the body corporate governance system by developers in new multi-owned developments (MODs) is not new. Concerns relating to actions taken by developers which place their interest above that of the body corporate have been highlighted by lawyers and academics in many jurisdictions and for many years. It is disconcerting that little has changed since these issues were raised more than 40 years ago. Although the quotes highlighted above relate to 'abuses' in the United States of America (USA), they mirror the concerns and outcomes observed by stakeholders in Australia. It appears surprising that Australian legislatures have ignored the lessons learned in the USA and have allowed similar practices to manifest without implementing effective mechanisms to safeguard the interests of lot owners.

Although these practices appear common across jurisdictions, little attempt has been made to examine: the extent to which developers are responsible for the governance decisions made while controlling the body corporate; and whether developers should be required to promote good (best) governance practices to facilitate long term scheme functionality and viability.

Chapter 5 outlined the governance decisions that developers can make and whether those decisions are mandatory or discretionary in nature. However, identifying these

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[270] Joseph T Kirkland Jr, 'Developer Abuses Relating to Condominiums – A Need for Change in Tennessee' (1974) 5 *Memphis State University Law Review* 572.

[271] Thomas G Krrebs, 'Legislative Response to Sweetheart Management Contracts: Protecting the Condominium Purchaser' (1979) 55 *The Chicago-Kent Law Review* 319.

powers and determining whether their implementation is discretionary or mandatory does not assist in determining whether or not developers should be responsible for the decisions they make and further, whether they should be practising good governance. It appears essential to not only identify developers' decision-making powers but also whether developers are responsible for such decision-making outcomes.

The broad objective of this chapter is to explore the body corporate governance system and in particular, how decisions made by developers in the transition phase impact the system. The sub-objectives are to:

1. conceptualise and examine the nature and extent of developer governance responsibilities;
2. evaluate the duties owed by developers that give rise to governance responsibilities;
3. appraise the manner and extent to which developers exploit conflict of interest (COI) situations;
4. evaluate the effectiveness of legal mechanisms designed to overcome COI; and
5. examine the quality of governance in the MOD environment and the practices and challenges that threaten good governance outcomes.

This chapter builds on the findings from Chapters 4 and 5 and incorporates the findings from the formal stakeholder interview phase as well as pertinent literature relating to governance, governance responsibilities, COIs and governance quality.

As outlined in Chapter 2, the formal stakeholder interview phase was undertaken in order to examine more profoundly the challenges identified in the informal interview phase. This phase of the research was more structured and the questions asked were formulated based on the findings from empirical phase 1 (informal interviews), empirical phase 2 (document analysis) and a review of the pertinent literature. Deep, probing questions were asked as part of a strategy directed to identifying and evaluating the core challenges perceived by the various stakeholders.

Although an interview guide was prepared and the interview process was much more structured than phase 1, the questions posed continued to be developed as the

interview data was analysed and further challenges and ideas emerged. This process ascribes to the iterative nature of the grounded theory method and allows information-rich cases to be identified.[272] Appendix A provides examples of the questions posed to interviewees in each of the stakeholder groups.

Table 6.1 provides an overview of the interviewee sample for empirical phase 3. It assigns a unique identifying code for each interviewee, records the nature of their professional background and the state in which they live or work. The identification numbers are used to reference the voices of the interviewees throughout this chapter. Seven BCMs, nine owners and three developers were interviewed in the States of New South Wales, Queensland and Victoria.

Table 6.1: Formal Interview Interviewees

Respondents' Identification Number	Stakeholder Identification Group	State
14	Body corporate manager	New South Wales
15	Body corporate manager	Queensland
16	Owner	New South Wales
17	Developer	Queensland
18	Owner	Queensland
19	Body corporate manager	Queensland
20	Owner	New South Wales
21	Owner	New South Wales
22	Developer	Queensland
23	Owner	New South Wales
24	Owner	Queensland
25	Body corporate manager	Victoria
26	Body corporate manager	Victoria
27	Developer	Victoria
28	Body corporate manager	Victoria
29	Owner	Queensland
30	Owner	Queensland
31	Body corporate manager	Queensland
32	Owner	Queensland

[272] Charmaz, above n 25.

Quotes provided by the interviewees are used throughout this chapter to illustrate their opinions, perceptions and thoughts about the issues raised.[273] In grounded theory, the voices and stories of participants serve in the analysis.[274] Quotations are provided to not only highlight their concerns and tell their stories but also to capture their emotion. The quotations cited have been edited to remove speech disfluencies and fillers and to ensure consistent terminology usage.

Relative to the findings interpretation provided in Chapter 4, this chapter is more analytical and less descriptive. This chapter presents the emergent themes constructed from the interpreted data.[275] The chapter also represents my interpretation of the phenomenon under study.[276]

The chapter will firstly provide an overview of the body corporate governance system. Secondly, a brief review of the concept of governance will be provided. The third part of the chapter provides a detailed overview of governance responsibility (including conceptualisation and an evaluation of legal duties owed by developers). The fourth part examines COIs (including conceptualisation, literature review, case law review and interview findings). The chapter's fifth part discusses mechanisms that can be used to combat COIs and comments on the effectiveness of these mechanisms. A review of the importance of good governance practices is then evaluated prior to the chapter's conclusion.

6.2 The Body Corporate Governance System

In 1961, the New South Wales parliament was the first Australian jurisdiction to introduce legislation that not only enabled separate titling of individual lots within a building subdivision but also, enabled the creation of a new type of legal governing entity (the body corporate).[277] This new type of legal entity was adopted in all

[273] Bazeley, above n 6 380; Patton, above n 20, 605.
[274] Charmaz, above n 25, 174.
[275] Ibid.
[276] Ibid.
[277] *Conveyancing (Strata Titles) Act 1961* (NSW). It is acknowledged that the Victorian parliament introduced the *Transfer of Land (Stratum Estates) Act* 1960 (Vic) prior to the commencement of the New South Wales Act and that the *Transfer of Land (Stratum Estates) Act 1960* (Vic) allowed for the separate ownership of lots in a building subdivision. However, this legislation did not provide for the

Australian jurisdictions, albeit often using different terms to describe the entity. Since the introduction of this new entity, there has been debate about how best to classify the body corporate (that is, what is it?). Does its structure, including its governance structure, resemble that of a company or a (mini) government?

Although not determinative, the shift in classification from a company like structure to a government like structure was discussed in the parliament whilst debating the original New South Wales bill:

> …the shareholder in a company has no title to a home unit and, therefore, no security to offer to any lending institution from which he wishes to borrow money. In addition, he has become involved in what might be called a little dictatorship, for the owners of a unit under the company system is subject to the dictates of the company, with some of which he might violently disagree. Under the bill, a home-unit building could be likened to a municipality. All the owners of units in a building combine in a controlling authority, in the same way as the responsibilities of a town are placed in the hands of a controlling authority, the local council. The citizens of a town combine in a council to control all the common property…[278].

Similar debate has occurred in the United States of America. Hyatt and Stubblefield, writing in the American context, analysed the different types of models often used to explain the law relating to community associations (bodies corporate).[279] They undertook a detailed analysis, assessing the viability of the corporate, trust and municipal models in order for lawyers, academics, and stakeholders to classify the body corporate. They concluded that: '[p]aradoxically, all of the options work, and none of the options work.'[280] Although there are similarities, particularly with the corporate and municipal models, there is a uniqueness to the body corporate structure.[281] To date, there has been little attempt to examine the intricacies of the body corporate, its governance system and developers' roles in that system.

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creation of a new separate entity but relied upon a company law and the structuring the companies to govern and manage the areas situated outside the individual fee simple lots.

[278] New South Wales, *Parliamentary Debates*, Legislative Assembly, 7 March 1961, 2984 (Charles Cutler).

[279] Wayne Hyatt and Jo Anne Stubblefield, 'The Identity Crisis of Community Associations: in Search of the Appropriate Analogy' (1993) 27 *Real Property, Probate and Trust Journal* 589.

[280] Ibid 691.

[281] Charmaz, above n 25.

Although it is not the purpose of this chapter to conclusively classify the body corporate system, the chapter draws on the conceptual and theoretical ideas of the corporate and municipal governance models in seeking a better understanding of the body corporate governance system. Due to the paucity of literature relating to body corporate governance, it is helpful to examine 'comparable' governance systems. However, drawing upon analogous governance systems to understand and perhaps explain the body corporate governance system is challenging. It is erroneous to simply adopt the characteristics and dimensions of other governance systems when discussing the body corporate system as it is difficult to determine what systems most align, and the degree to which they align, with the body corporate system. Instead, evaluating 'comparable' governance systems may be persuasive and contribute to a better understanding. Therefore, much of the literature reviewed in this chapter incorporates aspects of both corporate and municipal (or political) governance concepts and theories.

6.2.1 Defining Governance

Corporate, democratic, good, global, private, environmental and urban are just a few descriptive words often preceding the term 'governance'.[282] It is a concept that is primarily used in relation to organisational structures, with much of the literature concentrated on corporate and political governance.[283]

Although the term 'governance' is used frequently in the public and private sectors, the terms meaning is somewhat elusive.[284] Rosenau, in his efforts to conceptualise 'governance', referred to the original Greek meaning, to steer or pilot.[285] He then conceptualised that '[t]he process of governance is the process whereby an organization or society steers itself, and the dynamics of communication and control

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[282] Bob Tricker, *Corporate Governance: Principles, Policies and Practices* (Oxford University Press, 2012); Amnon Lehavi (ed), *Private Communities and Urban Governance* (Springer, 2016); Luigi Pellizzoni, 'Responsibility and Environmental Governance' (2012) 13(3) *Environmental Politics* 541; James N Rosenau, 'Governance in the Twenty-First Century' (1995) 1 *Global Governance* 13.

[283] Lisa Ruhanen et al, 'Governance: A Review and Synthesis of the Literature' (2010) 65(4) *Tourism Review* 4.

[284] R A W Rhodes, 'The New Governance: Governing without Government' (1996) XLIV *Political Studies* 652; Laurence E Lynn Jr, Carolyn Heinrich and Carolyn Hill, 'Studying Governance and Public Management: Challenges and Prospects' (2000) 2 *Journal of Public Administration Research and Theory* 235.

[285] James N Rosenau, 'Governance in the Twenty-First Century' (1995) 1 *Global Governance* 13.

are central to that process.'[286] Similarly, Lynn Jr, Heinrich and Hill, referred to governance as 'the means for achieving direction, control and coordination' in organisations.[287]

In reference to corporate governance, the often cited Cadbury report refers to governance as 'the system by which companies are directed and controlled'.[288] In response to this definition, Kaler broadens the concept of governance stating that generally it 'is about systems for directing and controlling more or less formally structured groupings of people, be they states, communities, companies, universities, social clubs, or whatever'.[289] He further suggests that the use of the word systems 'concerns the established structures for decision-making: structures for determining who has what sort of decision-making powers in relation to what sort of issues.'[290]

Writing in the MOD context, Easthope and Randolph suggest that structures include both formal structures like the legislation which regulates this property type and process based structures that are more customary in nature.[291] In order to understand governance in the MOD context therefore, it is essential to:

1. determine who has decision-making power in respect to the ways in which bodies corporate operate;
2. understand the extent to which the exercise of these powers are discretionary or mandatory,[292] and;
3. understand the customary nature or common practices implemented in a body corporate environment.

Given the focus of this dissertation, only developers' decision-making powers which affect a body corporate and the nature of the exercise of these powers is pertinent.

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[286] Ibid 14.

[287] Laurence E Lynn Jr, Carolyn Heinrich and Carolyn Hill, 'Studying Governance and Public Management: Challenges and Prospects' (2000) 2 *Journal of Public Administration Research and Theory* 233, 235.

[288] Cadbury, Adrian, *Report of the Committee on the Financial Aspects of Corporate Governance* (Gee, 1992).

[289] John Kaler, 'Responsibility, Accountability and Governance' (2002) 11(4) *Business Ethics: a European Review* 331, 334.

[290] Ibid.

[291] Easthope and Randolph, above n 5.

[292] See chapter 5 of this dissertation.

6.2.2 Developers' Governance Responsibilities

Like governance, the concept of 'responsibility' has not been definitively articulated in academic literature.[293] The Oxford dictionary defines the term as 'the state or fact of having a duty to deal with something or of having control over someone'.[294] Allen and Mintrom state that '[a]s a concept, responsibility is related to the concepts of control and accountability.'[295]

Efforts have been made in the literature to formulate a typology or model of responsibility.[296] Pellizzoni[297] and Schlenker et al[298] suggest that there are two essential facets of responsibility – imputability (or imputation) and answerability (accountability). Imputability assigns the action, event or consequence 'to an agent as its causal factor'.[299] That is, the agent caused the specific outcome. Answerability, on the other hand, concerns the reason or explanation for the choice made.[300]

It is apparent from these articulations that those owing duties or the ability to control or cause an outcome are not only held to be the responsible party but must account for and justify their decisions, once an action is invoked. The concept of responsibility imposes not only legal duties but also ethical obligations on the agent to make appropriate choices.[301] Responsibility is therefore apparent when an agent 'face choices, understands the broader consequences of those choices, and chooses options that are likely to produce good and fair outcomes.'[302]

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[293] Ann Allen and Michael Mintrom, 'Responsibility and School Governance' (2010) 24(3) *Educational Policy* 439; Barry Schlenker et al, 'The Triangle Model of Responsibility' (1994) 101(4) *Psychological Review* 632; Luigi Pellizzoni, 'Responsibility and Environmental Governance' (2004) 13(3) *Environmental Politics* 541.

[294] Oxford Dictionaries.com. 2012. http://oxforddictionaries.com/definition/english/responsibility?q=responsibility (16 October 2012).

[295] Ann Allen and Michael Mintrom, 'Responsibility and School Governance' (2010) 24(3) *Educational Policy* 439, 445.

[296] Above n 290.

[297] Luigi Pellizzoni, 'Responsibility and Environmental Governance' (2004) 13(3) *Environmental Politics* 541.

[298] Barry Schlenker et al, 'The Triangle Model of Responsibility' (1994) 101(4) *Psychological Review* 632.

[299] Ibid, 546.

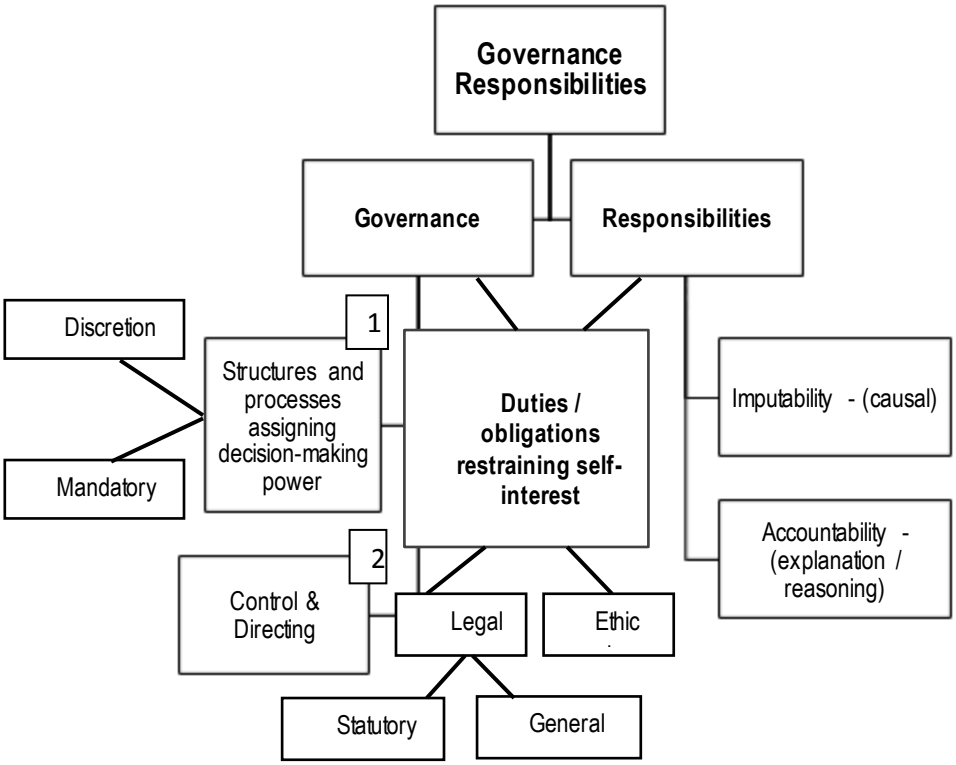
[300] Pellizzoni, above n 294; Schlenker et al, above n 295.

[301] Thomas Bivins, 'Responsibility and Accountability' (2006) *Ethics in public relations: Responsible advocacy* 19.

[302] Allen and Mintrom, above n 292, 439.

Although governance and responsibility are not intrinsically linked, responsibility becomes involved in governance when, according to Kaler, 'the directing and controlling is required to have a purpose other than serving the interests of those doing the directing and controlling.'[303] That is, when those directing and controlling owe duties or are obligated to others, then they are responsible and in turn accountable for the actions.[304] Figure 6.1, diagrammatically represents the key elements of the governance responsibilities concept.

Figure 6.1: Key Elements of Governance Responsibilities



In light of the literature on governance and responsibility and this dissertation's focus, the term 'governance responsibilities' will be used in this chapter to refer to decision-making powers (governance 1) assigned to developers (imputability) in order to give functional (accountability) direction (governance 2) to the body corporate (the duty owed entity).

[303] Ibid 331.
[304] Ibid.

In order to appraise the presence of developer governance responsibilities in the transition phase of a MOD, it is necessary to: determine the legal duties imposed on developers that should restrain developers from acting in a self-interested manner; and the ethical determinants that should act as a deterrent to overcome self-interested decision-making. The duties and obligations imposed on the developer, however, becomes a more complicated issue, as developers hold a number of positions aside from 'the developer' and therefore different legal and ethical duties or obligations may be owed, depending on the role being fulfilled at a particular time.

In the planning phase, the developer as the original owner owns the undeveloped or partially developed land but can take on (either personally, as representative, or through associated entities) a number of other roles including builder, real estate agent, financier, and project manager. The developer is also the promoter of the scheme. In the developer control phase, the developer will be a lot owner and the body corporate and may take on the role of committee member, service provider (including caretaker and letting agent) or BCM. Understanding the duties and obligations that attach to the developer therefore, must be considered with regard to the multiple roles that are held. For the purpose of this section, the roles reviewed are limited to those that confer decision-making powers in respect to MODs governance and those that are commonly held. Therefore the roles of developer, body corporate, and committee member are examined to determine the duties and obligations imposed to restrain the developer from acting in a self-interested manner.

6.3 Developers' Legal Duties in Governing Multi-owned Developments

6.3.1 Developer Duties in the Planning Phase

In the states reviewed for this dissertation, there are limited statutory duties imposed on developers in connection with their body corporate governance decision making. In Queensland there is legislation that imposes legal duties on the developer in the planning period. The *Property Agents and Motor Dealers (Property Developer Practice Code of Conduct) Regulation 2001* (Qld) ss 2, 6, 17 regulates the conduct of property developers when carrying on the business of a property developer,[305] by requiring

[305] Since undertaking this research and writing this chapter, both the *Property Agents and Motor Dealers Act 2000* (Qld) and the *Property Agents and Motor Dealers (Property Developer Practice Code*

them to, inter alia: comply with any fiduciary obligations incurred as a developer and if referring a service provider to a buyer, the developer must not falsely represent that the service provider is independent of the developer.[306] The *Body Corporate and Community Management Act 1997* (Qld) s 112 requires the developer, when intending to engage a BCM or service contractor or, authorising a person to conduct a letting agent business, to exercise reasonable care, skill and diligence and act in the best interests of the body corporate in ensuring that the terms are fair and reasonable and appropriate for the scheme. In the States of New South Wales and Victoria, there are no statutory duties imposed on developers restraining them from acting in a self-interested manner prior to the registration of a scheme. Aside from duties imposed in Queensland relating to the intended engagement of service providers, it is evident that there has been limited statutory intervention directed to preventing developers acting in a self-interested manner when establishing a MOD. It is therefore the domain of the general law[307] to impose a self-restraining duty in the planning period.

Analogies are often drawn between a developer of a MOD and a company promoter, when attempting to determine the general law duties owed by a developer prior to the registration of a MOD.[308] The corporate realm fails to provide a conclusive definition for the term 'promoter', however, in *Tracy v Mandalay Pty Ltd* the court suggested that '…the term 'promoter' involves the idea of exertion for the purpose of getting up and starting a company (of what is called 'floating' it)....'.[309] Company promoters are responsible for such matters as registering the company and if warranted, preparing the company's constitution. In terms of duties directed towards ensuring that those directing and controlling abstain from acting in their own

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of Conduct) Regulation 2001 (Qld) have been repealed. The *Property Occupations Act 2014* (Qld) and associated regulation (*Property Occupations Regulation 2014* (Qld)) has replaced the previous legislation. The overarching fiduciary obligation is not present in the new legislation, instead the Act requires the developer to disclose to prospective buyers any relationship, including a fiduciary relationship, when referring a buyer for professional services associated with the property sale (s 158).

[306] A service provider is independent of a developer if no rebates, commissions, discounts or referral benefits are received.

[307] The term 'general law' is used in this chapter to denote both the Common Law and Equity.

[308] Robert Natelson, 'Keeping Faith: Fiduciary Obligations in Property Owners Associations' (1986) 11 *Vermont Law Review* 421; David Bugden, 'Management Rights – Are Developers Promoters?' (1996) *Queensland Law Society Journal* 281; Alisa Levin, 'Condo Developers and Fiduciary Duties: an Unlikely Pairing?' (2011) 24(2) *Loyola Consumer Law Review* 197.

[309] [1953] HCA 9; (1953) 88 CLR 215 (12 March 1953), 19.

interests, the general law (equitable) duty of fiduciary has been imposed upon company promoters.[310]

For MODs, it is the developer, as the original owner, who is responsible for registering the scheme and getting it up and started.[311] The developer is necessarily placed in a position to provide a framework, subject to legislative restraints, for how the development will be ultimately governed and managed during transition.

The general law has imposed fiduciary obligations on developers (in their role as promoter) due to the nature of their relationship with the body corporate[312] and in *Community Association DP No 270180 v Arrow Asset Management Pty Ltd* (the Arrow Asset case), the court held that:

> …it is appropriate to regard the developer of a [MOD] as being, vis-à-vis the [body corporate], in a position analogous to that of a promoter of a company. It follows that the relationship between the developer and the [body corporate] is a fiduciary relationship.[313]

The law recognises that relationships exist in which there is the potential for one person to exercise power or discretion to the detriment of another more vulnerable party.[314] Frankel suggests that fiduciary relationships often arise in circumstances where one party provides socially desirable services to another and in order to ensure efficiency, the service provider must be entrusted with power or property.[315] In the MOD context, the developer provides new properties (which are socially desirable) to buyers and are entrusted to not only deliver on the product but also make decisions (entrusted power) on their behalf. However, there is risk associated with the entrustment that may not be combated by the entrustors or markets own protective mechanisms,[316] and therefore the law steps in to regulate such relationships.

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[310] *Erlanger v New Sombrero Phosphate Co* (1878) 3 App Cas 1218.
[311] *Tracy v Mandalay Pty Ltd* [1953] HCA 9; (1953) 88 CLR 215 (12 March 1953), 19.
[312] *Re Steel and Others and the Conveyancing (Strata Titles) Act*, 1961 (1968) 88 W.N. (Part 1) NSW 467.
[313] [2007] NSWSC 22.
[314] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.
[315] Tamar Frankel, *Fiduciary Law* (Oxford University Press, 2011).
[316] Ibid.

At the heart of a fiduciary duty is loyalty.[317] The duty is designed to ensure that those acting on behalf of another treat the other's interests as paramount.[318] As articulated by Dawson and Toohey JJ in *Breen v Williams,* '[i]t has been observed that what the law exacts in a fiduciary relationship is loyalty, often of an uncompromising kind, but no more than that.' [319]

Although the fiduciary duty principle has been applied in numerous jurisdictions throughout the world, the Australian Courts have been more restrained in their interpretation of fiduciary duties, opting for a proscriptive approach. That is, those owing fiduciary duties are prohibited from engaging in certain activities (that is, negative obligations) as opposed to owing duties that demand 'the duty-ower produce a defined beneficial outcome for another person'[320] (that is, positive obligations).

The principle therefore as applied in Australia is that fiduciaries:

> '(a) cannot use [their] position, or knowledge or opportunity obtained in or by reason of it, to [their] own or to a third party's possible advantage or to the beneficiary's disadvantage; or (b) cannot, in any matter within the scope of [their] service, have a personal interest or an inconsistent engagement with a third party.' [321]

Although it is clear that as fiduciaries, developers cannot use their position to act in a self-interested manner, the duty is not absolute in regard to all aspects of their relationship with the duty owed person(s). As suggested by Kleinschmidt, '[a] relationship may be fiduciary but not all of the dealings in the relationship will be the subject of fiduciary duties.'[322]

For example, in Queensland, as noted above, developers are statutorily obligated to exercise reasonable care, skill and diligence and act in the best interests of the body

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[317] Gillian Dempsey and Andrew Greinke, 'Proscriptive Fiduciary Duties in Australia' (2004) 25 *Australian Bar Review* 1.
[318] Ibid.
[319] *Breen v Williams* [1996] HCA 57; (1996) 186 CLR 7.
[320] Darryn Jensen, 'Prescription and Proscription in Fiduciary Obligations' (2010) 21 *King's Law Journal* 333.
[321] Paul Finn, 'Contract and the Fiduciary Principle' (1989) 12 *UNSW Law Journal 76*, 84.
[322] Michael Kleinschmidt, 'Falling Short of the Target: Some Implications for Fiduciary Duties for Developer Practice in Queensland and New South Wales' (2011) 19 *Australian Property Law Journal* 262, 271.

corporate in ensuring that the terms of a BCM agreement, a caretaking agreement and letting agent authority are fair and reasonable when binding the body corporate prior to registration. There are also requirements to disclose such agreements to prospective buyers.[323] By disclosing such agreements in the contracting stage, the buyers are effectively granting consent to the yet to be created body corporate to enter into these agreements, once it has been created. This allowance has enabled developers to tie caretaking agreements and letting agent authorisations together in order to establish management rights businesses to sell to third parties. Without such allowances, developers would be unable to profit from what would otherwise be a self-interested transaction and arguably a breach of its fiduciary duty.

However, a concern arises in connection with obtaining consent in this way, as buyers often do not have a choice in respect to the arrangements made and often do not understand or seek legal advice in relation to disclosures made.[324] According to Winokur, consent in this way is 'reduced to a purely theoretical premise… [and] constructively inferred.'[325]

In the planning period of transition, the law therefore has imposed on developers some self-interested restraints when making decisions for and on behalf of the yet to be created body corporate. The general law duty of fiduciary provides an overarching mechanism to thwart self-interested dealings. Queensland has enshrined some restraints in statute, particularly in relation to negotiated service agreements however, allowances are made that effectively negate the restraint to act in a self-interested manner. That is, through the use of disclosure statements, developers can act in a self-interested manner and profit from the sale of agreements that are not ultimately binding on it.

As highlighted in Chapter 4, a number of lawyer interviewee's highlighted common practices that they believe may give rise to a breach of fiduciary duty when the developer is promoting a scheme. In particular, agreements made between BCMs and

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[323] *Body Corporate and Community Management Act 1997* (Qld) s 213(b).
[324] Hetrick, above n 117; James Winokur, 'The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity' 1989 1 *Wisconsin Law Review* 1.
[325] James Winokur, 'The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity' 1989 1 *Wisconsin Law Review* 1, 62.

developers, whereby managers provide initially structuring advice for free in exchange for entry into a management contract with the body corporate. Similarly, agreements can be made with utility providers whereby equipment or infrastructure is provided for free in exchange for entering the body corporate into a contract for utility supply. These types of arrangements can provide a benefit to the developer (often financial) and in turn a burden to the body corporate.

6.3.1 Developer Statutory Duties in the Developer Control Period

Upon registration of a MOD and creation of a body corporate, the roles conferred on the developer include, but are not limited to, the body corporate, the committee, and lot(s) owner or lot owner representative (via proxies or powers of attorney). There are time limitations enshrined in statute regarding the periods in which a developer can hold some of these positions.[326]

Each of these positions could allow the developer to exercise decision-making power that may be advantageous to the developing entity (the developer) and / or disadvantageous to the body corporate and therefore the lot owners, if the developer does not exercise restraint.

A description of the roles typically held by developers in the control period and the legal mechanisms that can aid in restraining self-interested developer decision making are now provided.

6.3.2 Developer as the Body Corporate

In the jurisdictions of New South Wales and Victoria, statutory duties or restrictions have been imposed on bodies corporate in the developer control period that limit the developer's ability to act in a self-interested manner. In New South Wales, restrictions have been placed on the body corporate that prevent: alterations to the common property, incurrence of debts exceeding the available amounts in established funds, the appointment of BCMs or other service providers beyond the first annual general meeting (AGM), the borrowing of monies or the giving of securities,[327] and the

[326] These time limitations were outlined in chapter 5.
[327] *Strata Schemes Management Act 1996* (NSW), s 113

making, amending or repealing of by-laws that confer a right or obligation on one or more lot owners.[328]

In Victoria, there is a statutory duty that in carrying out its powers, a body corporate must act honestly and in good faith and exercise due care and diligence.[329] Developers in this period must act in the interest of the body corporate in exercising any rights under the *Owners Corporations Act* 2006 (Vic).[330]

In Queensland, there appears to be no apparent statutory provision restraining a body corporate constituted solely by the developer from acting in a self-interested manner. However, if the developer controls the body corporate by virtue of proxies and / or powers of attorney granted to the developer under a condition of the contract of sale,[331] the developer is limited to voting on matters that have been disclosed, even if the matters voted on benefit the developer.

It is interesting to note the different mechanisms used across these states to restrain the developer when acting on behalf of the body corporate. New South Wales applies specific prohibitions in the legislation, Victoria imposes an overarching duty based on equitable principles of good faith and care and diligence. Queensland is more disclosure oriented, allowing developers to act on behalf of owners on issues agreed to in the contractual process stage of a purchase. These jurisdictional variations and approaches will be explored further in Chapter 7.

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[328] *Strata Schemes Management Act 1996* (NSW), s 50; *Community Development Management Act 1989* (NSW), s 23. Under the new legislation, additional restrictions have been provided particularly in relation to voting on building defect matters. A developer is not entitled to vote or exercise a proxy on matters concerning building defects (*Strata Schemes Management Act 2015* (NSW), s 192).

[329] *Owners Corporations Act 2006* (Vic) s 5.

[330] Ibid 68.

[331] This is usual practice in Queensland but prohibited in other jurisdictions.

6.3.3 Developer as Committee Member

A developer, acting as either owner or lot owner representative can hold a committee position, subject to legislative restraints.[332]

In MODs, the committee as representative of the body corporate owes duties obligating members to act in a manner that is not self-serving. In Queensland, the *Body Corporate and Community Management Act 1997* (Qld) sch 1A (3), (6) incorporates a Code of Conduct for committees of the body corporate which includes, inter alia, a duty to act in the best interests of the body corporate, and a duty to disclose any COIs.[333] The Code of Conduct acts as a statutory contract between each voting committee member and the body corporate.[334] In Victoria, there is a statutory duty, that a committee member must not make improper use of their position to gain an advantage for themselves or someone else.[335]

In New South Wales there are currently no specific statutory provisions imposing duties on committee members to act either in the best interests of the body corporate or in a manner that is not self-serving. In *Nulama Village P/L v Owners Strata Plan 61788* however, the Consumer, Trader & Tenancy Tribunal stated that '*[t]he executive committee members as office bearers should at all times act in a transparent way, be accountable, and act in the best interests of the [body corporate].'* [336]

6.3.4 Fiduciary Duties in the Developer Control Period

At the commencement of the developer control period, new roles are effectively created by virtue of the creation of the body corporate. However, the role of developer / promoter continues. This role continues in two ways. Firstly, if the scheme is layered, where multiple individual bodies corporate are created within the MOD, the developer continues in the role of promoter in order to establish the new schemes. The fiduciary duty therefore continues to be imposed in relation to that

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[332] For example, in Queensland, if the developer is associated with the caretaker or letting agent, they are precluded from holding a committee position.
[333] *Body Corporate and Community Management (Accommodation Module) 2008* (Qld) R 53; *Body Corporate and Community Management (Standard Module) 2008* (Qld) R 53.
[334] *Body Corporate and Community Management Act 1997* (Qld) s 101B.
[335] *Owners Corporations Act 2006* (Vic) s 117.
[336] *Nulama Village Pty Ltd v Owners Strata Plan 61788* (Strata & Community Schemes) [2006] NSWCTTT 550.

role. Secondly, the promoter role continues as the property stock, or capital of the MOD has not yet transferred to new owners. Until transfer is affected, the lots are vested in the developer and therefore the developer is effectively the body corporate. It is therefore arguable that until such time that the majority of the lots are settled, the developer continues to hold the position of promoter, even though the body corporate is a separate legal entity. The developer, acting as the promoter, therefore continues to owe fiduciary duties to the body corporate until the property stock is transferred to the new owners. Referring to the position of company promoters post-incorporation, the Court in *Tracy v Mandalay Pty Ltd* stated that:

> …it is in our opinion an entire mistake to suppose that after a company is registered its directors are the only persons who are in such a position towards it as to be under fiduciary relations to it. A person not a director may be a promoter of a company which is already incorporated, but the capital of which has not been taken up, and which is not yet in a position to perform the obligations imposed upon it by its creators.[337]

The role of the promoter and the duties that attach to that position end once the property stock is taken up and the body corporate is constituted by new independent owners. This is an important point because if decisions are made by the developer, post registration, as the promoter, then fiduciary duties apply when making decisions on behalf of the body corporate. The fiduciary duties apply directly to the role of promoter.

Aside from the fiduciary duties imposed on the developer as a promoter of a scheme, a number of cases, particularly in Queensland, have suggested that committee members of a body corporate also owe fiduciary duties to the body corporate.[338] In *Grand Pacific Resort [2010]* for example, the court stated:

> Put simply, a committee member is required to disclose and refrain from voting upon a matter where there is scope for their personal financial or material interests to conflict with their fiduciary obligations to the body corporate - for example where a committee

[337] *Tracy v Mandalay Pty Ltd* [1953] HCA 9; (1953) 88 CLR 215.

[338] *Body Corporate for Palm Springs Residences CTS 29467 v J Patterson Holdings Pty Ltd [2008] QDC 300; Shafston University Mansions [2010] QBCCMCmr 212 (17 May 2010); Isle of Palms Resort [2012] QBCCMCmr 35 (24 January 2012); Oscar on Main [2012] QBCCMCmr 213*.

> is a party to a contract with the body corporate or has a beneficial interest in a business that supplies goods or services to the scheme. [339]

In the New South Wales case of *Re: Steel,* the Court suggested that a higher fiduciary duty may be owed by committee members that are also developers acting in the position of promoter:

> Such persons are at least in a position analogous to company directors; they may even have a higher fiduciary duty, and when they are promoters as well this duty has a dual basis. It is plain that the respondents have failed to recogni[s]e that it is their duty to manage the affairs of the body corporate for the benefit of all the lot holders, and that the exercise of any of their powers in circumstances which might suggest a conflict of interest and duty requires them to justify their conduct, and that the onus lies on them to prove affirmatively that they have not acted in their own interests or for their own benefit.[340]

From a legal perspective, it is evident that there are duties and restrictions imposed on developers attempting to restrain self-interested decision-making. Although in some jurisdictions allowances are made for a developer to benefit, they are limited to matters disclosed to future buyers. For ease of reference, Table 6.2 highlights the roles and phases in which statutory and fiduciary duties are owed by the developer.

Table 6.2: Developers' Roles and Transition Phases in Which Statutory and Fiduciary Duties are Owed to Bodies Corporate

Role Held by Developer	Statutory Duties Imposed Restraining Self-interest	Fiduciary Duty Imposed Restraining Self-interest
Planning Phase		
Developer / promoter	Queensland only	Yes
Developer Control Phase		
Body corporate	Yes – in NSW and Victoria	Yes – developer in the capacity of promoter
Committee	Yes – in Queensland and Victoria	Yes

[339] *QBCCMCmr 255 (9 June 2010).*

[340] *Re Steel v The Conveyancing Strata Titles Act 1961* (1968) 88 WN Part 1 NSW 467

Although there is no all-encompassing duty to thwart self-interested decision making, it is clear that duties are imposed on the developer in its numerous capacities when directing and controlling the body corporate. The fiduciary duty in particular should aid in restraining self-interest. From a purely legal perspective, the developer is responsible and accountable for the governance decisions made in the transition phase. The imposition of duties from a legal standpoint is not the only mechanism impinging on a developer's capacity to act in its own interests when governing. Ethics also plays a role in governance and governance responsibility.

6.4 Developers' Ethical Obligations in Governing Multi-owned Developments

The fiduciary duty, like many other legal duties, has historically an ethical and moral underpinning. Clerics originally presided over the courts of England and fiduciary law developed in order to resolve moral issues.[341] 'These courts frequently relied upon biblical sources when discussing fiduciary obligations, setting a tone for the fiduciary standard by establishing a rhetorical tradition of fervent moral and ethical language.'[342]

Fiduciary duties have been applied to various relationships.[343] In the corporate context, and in relation to the management of property, prominent authors Berle and Means discussed the ethical nature of the fiduciary duty:

> Tracing this doctrine back into the womb of equity, whence it sprang, the foundation becomes plain. Wherever one man or a group of men entrusted another man or group with the management of property, the second group became fiduciaries. As such they were obligated to act conscionably, which meant in fidelity to the interests of the person whose wealth they had undertaken to handle. In this respect, the corporate stands on precisely the same footing as the common-law trust.[344]

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[341] Marleen O'Connor, 'How Should We Talk About Fiduciary Duty? Directors' Conflict-of-Interest Transactions and the ALI's Principles of Corporate Governance' (1993) 61(4) *George Washington Law Review* 954.
[342] Ibid 338, 965
[343] Such relationships are detailed in: *Hospital Products Ltd v United States Surgical Corporation and Others* (1984) 156 CLR 41.
[344] Adolf Berle and Gardiner Means, *The Modern Corporation and Private Property* (Harcourt, Brace & World Inc, 1967) 295.

In fact, fiduciary is derived from the Latin term 'fiducia' which means trust.[345] Fiduciaries are those entrusted by others. However, trust as a concept can be applied in different ways. In everyday speech, we use 'trust' to denote a belief in the reliability or ability of someone or something[346] or:

> *Trust* is the expectation by one person, group, or firm of ethically justifiable behavio[u]r – that is, morally correct decisions and actions based upon ethical principles of analysis – on the part of the other person, group, or firm in a joint endeavour or economic exchange.[347]

In the legal environment, 'trust' is often used in the context of a legal device used to hold property. However, its conception is based on the notion that a party trusts in or has the confidence of another:[348]

> The word 'trust' refers to the duty or aggregate accumulation of obligations that rest upon a person described as trustee. The responsibilities are in relation to property held by him, or under his control.'[349]

Hyatt suggests that the position and control developers exercise in the transition phase of a MOD is tantamount to a trustee. Although he makes the point that the trust doctrine does not fit a MOD under the control of independent lot owners. He points out that:

> [a]n argument can be made that when the developer is in control of the [body corporate] and its members, it acts in a trustee-like capacity on behalf of the [body corporate] and its members, thus establishing some nexus to the trust model.[350]

The developer has dominion and control over the [body corporate] (the trust property) to carry out the general plan of development (the settlor's instructions) for the benefit of the [body corporate's] present and future members (the beneficiaries).[351]

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[345] O'Connor, above n 338.
[346] Oxford Dictionaries.com. 2016. https://en.oxforddictionaries.com/definition/trust
[347] Larue Tone Hosmer, 'The Connecting Link between Organizational Theory and Philosophical Ethics' (1995) 20(2) *The Academy of Management Review* 379, 399.
[348] Graham Moffat, *Trust Law: Text and Materials* (Cambridge University Press, 4th ed, 2005).
[349] Ibid, 3.
[350] Hyatt and Stubblefield, above n 276, 666.
[351] Ibid 633.

In relation to governance responsibilities, 'trust' is an ethical obligation that should guarantee that developers and other duty bound parties restrain from acting in their own interests. Although these ethical obligations cannot take the place of legal frameworks, they are essential to the success of MODs. According to Franzese and Siegel, trust plays a significant role in MODs making 'communities healthier, more prosperous and ultimately wiser'.[352] When trust is eroded, the consequences are widespread and costly.[353]

Trust and other ethically based concepts, such as loyalty, were discussed by the interviewees in this study. In interviews with lot owners, discussions primarily revolved around their clear distrust of developers and BCMs. In relation to developers however, the distrust for developers by lot owners appeared to be a fait accompli. There was an underlying assumption that developers are only profit-seeking and therefore the expectation was that developers shouldn't and couldn't be trusted.

In relation to BCMs, the expectation was different. Lot owners acknowledged the role of the BCM was to inform the body corporate and also to assist in the administration of a scheme. Owners acknowledged the necessary reliance on BCMs. One owner commented:

> **Trust is very important** because, first of all, you have to rely on them, I mean, you can't be a developer, engineer, book keeper, lawyer, council specialist, you are buying into an apartment to live there, and you can't be all these, which we have to be, in order to understand and to make sure we're not being ripped off in any way. So I think you have to have this trust. (24)

Although both developers and BCMs are fiduciaries to the body corporate and developers have more control over the governance system, the lot owners interviewed dedicated more discussion and raised more concerns about distrusting the BCM than the developer.

Much of the distrust from lot owners related to the pre-existing relationship between the developer and the BCM:

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[352] Paula Franzese and Steven Siegel, 'Trust and Community: The Common Interest Community as Metaphor and Paradox' (2007) 72 *Missouri Law Review* 1111, 1155.
[353] Ibid.

> Coming back to the body corporate management, the reasons why we would dismiss them at the earliest possible moment, or whenever we can, is because **there is not trust there**. (18)

This distrust, stemming from the pre-existing relationship, was acknowledged by managers and one manager commented on how the distrust can arise by providing an example relating to building defect rectifications:

> …defects didn't get fixed in the building, so the owners got impatient and said 'well, we're going to take action'. I said 'righto, I'm your servant, I'm the servant of the lot owners here, so you tell me what you want me to do and I'll do it'. But I've got to give you my professional advice about what you are going to be successful with and what you aren't. And of course, as part of that, there was a **distrust** there. 'Oh you're with the developer, you know, came in with the developer and you're going to be with them, so we're going to keep our cards close to our chest and we're going to get our own advice and all that. (25)

BCMs acknowledged that they were in a position of trust but also that (dis)trust was an issue in their relationship with the body corporate:

> …we see ourselves as being in a **position of trust** to provide professional advice to the body corporate. Not to any individual, to a body corporate, and that's run by committee. (15)

> **I don't think they trust**. I mean I manage a very large body corporate and at their AGM, one gentleman just said 'we don't trust ya'. (26)

Many spoke of the need to build the trust in the early years of a scheme due to the relationship with the developer in setting up the body corporate. The position for many managers was that owners needed to be educated and once educated about their role, trust could be restored:

> Sometimes we are seen to be in cahoots with the developer. And we have actually lost buildings because of issues that the developer had and we were seen to be on their side. And maybe the view was we weren't passing on all the information. But this is something I had to really educate the owners, as to our role. So once they are educated, that we are working for the body corporate, ok – we did do the set up, but that is

> separate, our relationship is with you, and once you **build the trust**, with the owners and the body corporate, it's usually not a problem. (31)

A number of managers discussed trust in terms of all parties trusting one another. Very few acknowledged or understood the fiduciary nature of their relationship with the body corporate and several discussed their role as one of mediator when disputes arose between the developer and the body corporate:

> **Trust is a priority**. Because if members don't trust that you're supporting their views, you know, if you're engaging with the developer outside of the committee members if you like, when your contract is up, and they've got control, you're out the door. And you know, it's our credibility as well, same as the developers' reputations. We want to be known that we support the ownership. Whether that fluctuates between the developer and the majority of residents, we want to be seen as delivering the same transparent service to everyone. **To be trusted by everyone, trust is the key.** *(28)*

Managers' disregard, misunderstanding or ignorance of their duties and obligations to the body corporate may be part of the distrust experienced. Similar disregard, misunderstanding or ignorance by developers may impact upon owners' ability to trust.

There are both legal duties (statutory and fiduciary) and ethical obligations (trust) that should restrain a developer from acting in its own interests when making decisions about the governance of a body corporate. However, as highlighted in Chapter 4, COI situations, whereby a developer acts in a manner that serves its own interest, often arise in the transition phase of MODs.

The next section of the chapter explores this issue in greater detail by identifying the COIs confronted by developers in MODs (extending the work outlined in Chapter 4), the negative impacts COIs have on a MOD, and the effectiveness of legal mechanisms designed to minimise COIs.

6.5 Understanding Conflicts of Interest

As already noted, there are a number of roles that allow the developer to act on behalf of either: the yet to be created body corporate, the body corporate (upon creation) and the initial owners (through proxies and powers of attorney). However, fulfilment of these roles has the potential to lead to situations were one role (for example, acting as developer) competes with another (for example, acting as the body corporate). Reconciling these competing roles can be problematic and may lead to a COI scenario.

There is a general understanding that COIs arise when someone's self-interest conflicts with a duty owed to another person.[354] In his analysis on the concept of COI, Carson proposed the following specific and broad definition:

> A conflict of interest exists in any situation which an individual (*I*) has difficulty discharging the official (conventional / fiduciary) duties attaching to a position or office she holds because either: (i) there is (or *I* believes that there is) an actual or potential conflict between her own personal interests and the interests of the party (*P*) to whom she owes those duties, or (ii) *I* has a desire to promote (or thwart) the interests of (*X*) (where *X* is an entity which has an interest) and there is (or I believes there is) an actual or potential conflict between promoting (or thwarting) X's interests and the interests of *P*.[355]

Deconstructing this definition, it is evident that the threshold for what constitutes a COI is low. This definition captures most, if not all, commercial transactions where a duty bound party is confronted simultaneously with their professional responsibility and their personal interest.[356] Although Carson refers to conventional and fiduciary duties, there are other legal duties (statutory and contractual) that a person owes that may give rise to a COI.[357] Once confronted, the duty bound person should make an unbiased judgement in the interests of the duty owed party.[358]

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[354] Alison G Anderson, 'Conflicts of Interest: Efficiency, Fairness and Corporate Structure' (1978) 25 *UCLA Law Review* 738.
[355] Thomas L Carson, 'Conflicts of Interest' (1994) 13 *Journal of Business Ethics* 387, 388.
[356] Don A Moore and George Loewenstein, 'Self-Interest, Automaticity, and the Psychology of Conflict of Interest' (2004) 17(2) *Social Justice Research* 189.
[357] Anderson, above n 351.
[358] Don A Moore, Lloyd Tanlu and Max Bazweman, 'Conflict of Interest and the Intrusion of Bias' (2010) 5(1) *Judgment and Decision Making* 37.

Anderson suggests that special legal regulations are imposed on specific occupational groups that 'have the greatest opportunities to cheat without detection and whose cheating imposes the most serious cost on others.'[359] In the MOD context, many stakeholders (including developers, BCMs, body corporate committees, caretakers, and letting agents) are subject to regulations in an effort to, inter alia, negate COIs.

COIs are more prevalent and insidious in environments where specialised exchange is necessary due to the complexity of service or product being offered.[360] The more complicated the service or product, the more opportunity there is for the duty bound person to ignore their obligations and cheat or lie about their COI without being detected.[361] Grover and Hui suggest that in order to resolve or reduce a COI, the duty bound person will fulfil one role while lying about the fulfilment of the other role.[362]

In the MOD environment, specialised exchange is inherent, particularly in larger schemes with complex infrastructure, plant and equipment. The complexity of the legal framework and the prescriptive nature of the various MOD legislative provisions combined create an environment where the body corporate and owners rely heavily on professionals. The ultimate environment for cheating, according to Anderson, is one where the specialist has discretion and is in a position of trust.[363]

Although this chapter section explores developers' COIs, it is important to identify other stakeholders' COIs, especially where the developer has been instrumental in establishing the relationship between the duty bound party (alternative stakeholder) and the duty owed party. With respect to Carson's definition of COIs, third party involvement can give rise to a COI between the original duty bound party (in this instance, the developer) and the duty owed party.

Some authors have noted instances of developer COIs within the MOD environment and have raised concerns about their impact.[364] However, to date, no concerted and

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[359] Anderson, above n 351, 740.
[360] Ibid.
[361] Ibid; Steven L Grover and Chun Hui, 'The Influence of Role Conflict and Self-Interest on Lying in Organizations' (1994) 13(4) *Journal of Business Ethics* 295.
[362] Steven Grover and Chun Hui, 'The Influence of Role Conflict and Self-Interest on Lying in Organizations' (1994) 13(4) *Journal of Business Ethics* 295.
[363] Anderson, above n 351.
[364] Blandy, Dixon and Dupuis, above n 1; Cathy Sherry, 'Long-Term Management Contracts and Developer Abuse in New South Wales' in Sarah Blandy, Ann Dupuis and Jennifer Dixon (eds) *Multi-*

comprehensive exploration of COIs within this environment has been attempted. The next section of this chapter focuses on findings from the formal stakeholder interview phase relating to COIs and incorporates a review of court and tribunal decisions that highlight COI concerns.

6.5.1 Developer Conflicts of Interest in Multi-owned Developments

When developers are responsible for governance in the MOD context, COIs must be avoided. Developers not only owe legal duties restraining them from acting in a self-interested manner, they are also ethically obligated to use restraint in situations where its interests compete with the interests of the duty owed entity. In any environment where a single person controls the governance decision-making and can act in a manner where their interests are served, difficulties in discharging their duties will result.

The self-interest does not need to be realised to be a COI. Reflecting on Carson's definition above, a COI can exist in an environment where there is a potential conflict between the duty owed and duty bound parties' interests. As highlighted in Chapter 4 and further detailed in this section, examples of COIs in the transition phase of MODs are rife. This section categorises COIs in terms of developer as scheme promoter and developer as body corporate using Carson's definition, by detailing the actual or potential conflict: (1) between developers own interests and the interests of party who is owed duties; or (2) that arise when developers' promote both its interests and the interests of third parties.

6.5.2 Developer as Promoter: Category 1 Conflicts of Interest

This section highlights situations where the developer as scheme promoter is unable to discharge its duties (fiduciary and statutory) because there is an actual or potential conflict between the developer's interests and the interests of the body corporate. Three specific situations have been identified as a result of analysing the interview data collected in this study. These situations include: the establishment of building management arrangements (including caretaking, facility management and

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Owned Housing: Law, Power and Practice (Ashgate Publishing, 2010) 159; John Whiteoak and Chris Guilding, 'Managing the Developments of Multi-Titled Golf Complexes' (2009) 15(1) *Pacific Rim Property Research Journal* 68; Kleinschmidt, above n 319.

management rights businesses); leasing and licensing arrangements; and the determination of the initial budgets (and levies).

6.5.2.1 Building Management

Chapter 4 described concerns raised by lawyer interviewees about developer initiated building management agreements, specifically management rights businesses. Concerns related to the length of the contracted term, the profitability aspect of the arrangement, and the haphazard implementation of these types of arrangements across various schemes. Although there is evidence that long-term, inappropriate caretaking arrangements have been implemented in all jurisdictions, the main focus of concern has been on arrangements developed in Queensland. There has been a proliferation of management rights businesses in Queensland due to the application of the accommodation module regulation and provisions in the legislation which allow for these types of arrangements.

Developers in Queensland have the governance responsibility to determine the most applicable module regulation for a scheme.[365] The most controversial determination relates to the accommodation module regulation. The application of this module is contentious because, unlike other residential based modules, the accommodation module regulation allows service contractors to be engaged for a maximum term of 25 years. This provides developers with the opportunity to create a management rights business (packaging long-term caretaker agreements with long-term letting agency agreements) to sell to third parties for profit. As a result, the body corporate is burdened with long-term agreements that the individual future members have neither negotiated nor received a financial benefit deriving from the selling of the rights. Although the legislation imposes statutory duties on developers when creating these arrangements by requiring them to, inter alia, act in the best interests of the body corporate in ensuring that the terms are balanced and appropriate,[366] it is only the developer's interests that are best served under these arrangements. It is paradoxical to impose such best interest duties on one party and also allow that party to be the only beneficiary of the arrangement.

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[365] Chapter 5 of this dissertation outlines the definitions and requirements for each module.
[366] *Body Corporate and Community Management Act 1997* (Qld) s 112(2).

The election of the accommodation module regulation becomes a COI issue as there is a direct correlation between the term of a contract and the value of a management rights arrangement. The developer, as the scheme promoter, is placed in a COI situation. Efforts have been made in Queensland by a number of bodies corporate to change the module in order to ensure that no further long term agreements can be imposed.

In *Palm Springs Residences*[367] the applicant, a lot owner in a scheme comprising of 48 lots, sought an order to change the community management statement from the existing accommodation module to the standard module. The applicant submitted that the original owner (being the developer) incorrectly applied the accommodation module to a scheme that was not predominantly for short term letting, in order to maximise his return from selling a 25 year management rights agreement. The applicant stated that, '...[n]aturally, the developer will choose the module most advantageous to his purpose.'[368] Even though evidence was submitted that 12 out of the 28 units originally sold were to be used as a principal place of residence (and therefore not for letting), the tribunal determined that there was no evidence to support the claim that the original owner was wrong in applying the accommodation module. The decision in this case is not surprising given that the parameters of what constitutes an accommodation lot in the legislation are extremely broad.

Many of the Queensland lot owners interviewed expressed negative views about the application of the accommodation module in their respective schemes. They saw the accommodation module as the vehicle allowing for long term caretaking arrangements to be implemented, or the inclusion of short stay tenancies.

> One of the owner interviewees indicated that the module to be applied to the scheme was not disclosed and that a decision was made later to apply the accommodation module. 'We had disclosure statements that we looked at and the module application was blank. But when our contract was finally done, he slipped in that it was accom…'. (24)

[367] *Palm Springs Residences* [2007] QBCCMCmr 155.
[368] Ibid, 3.

> Other owners interviewed raised concerns that the application of the accommodation module had led to an increase in holiday letting, which they were against. 'So ultimately, everybody who is an owner occupier in this building, do not want holiday lets. And if we believed that we had a reasonable chance at fighting it, we probably would'. (29)
>
> The reasoning for the application of the accommodation module appears to be a commercial decision by the developer. A developer Interviewee commented, '[w]hatever the 25 year one is. By the way, anything that is less than 15 years you can't sell, there is no value'. (17)
>
> A body corporate manager similarly reasoned, '…it's a commercial decision that they're making'. (15)

From a governance responsibility perspective, the implementation of the accommodation module for schemes that are not predominantly or explicitly established for tourism accommodation purposes only serves the interests of the stakeholders involved in the selling of management rights, specifically developers. The commercial rationale for applying the accommodation module in order to institute long term contractual arrangements is at odds with the interests of those who ultimately govern, i.e., the lot owners.

In Queensland, it is common practice for developers to cause the body corporate to enter into a management rights arrangement which usually consists of a caretaking contract, an authorisation to establish a letting agent business from the scheme and, a lot. However, the sale of the management rights takes place between the developer and the management rights buyer, wherein the developer seeks to profit from the arrangements made on behalf of the body corporate. Concerns have been raised for many years about the appropriateness of management rights.[369] In debating the introduction of the *Body Corporate and Community Management Bill 1997* (Qld) in 1997, management rights were referred to by one parliamentary member as a

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[369] Kelly Cassidy, Chris Guilding and Jan Warnken, 'Multi-Titled Tourism Accommodation Operations in Australia: The Queensland Context' in Sarah Blandy, Ann Dupuis and Jennifer Dixon (eds) *Multi-Owned Housing: Law, Power and Practice* (Ashgate Publishing, 2010)177; Ardill et al, 'Community Title Reforms in Queensland: a Regulatory Panacea for Commercial, Residential, and Tourism Stakeholders' (2004) 25(1) *The Queensland Lawyer* 13; Guilding et al, above n 86.

'political blob'.[370] Another member commented that '[t]his legislation maintains the management rights gravy train that should be stopped.'[371] The Hon. Merri Rose stated that, '[s]ervice contractors have a conflict of interest when they have a letting business in conjunction with the caretaking agreement, for which a salary is paid by a body corporate.'[372]

Although the developer can sell the management rights, the body corporate itself is prohibited from profiting from such a sale.[373] The lot owners involved in this study were unanimous in their distaste for these types of arrangements and the methods used to implement them. A number of lot owners raised concerns about the duties to be performed by the caretaker:

> The agreement put in by the developer. When we signed the contracts, in the contract they said there was going to be a full-time caretaker that lived on the premises. At the first meeting, the way they manipulated it was that they only allowed a certain amount of people in to the meeting, so they hold the proxies on the majority. And they rolled us ... the managers come in for half a day and not living on the premises. (23)

> Each scheme has been seeking legal advice with regards to the caretaking agreement. The caretaking agreement is a pretty cryptic document. You could nearly read into it what you want. It doesn't define specific duties, it isn't a very clear document at all. You could have ten people read it and each have a different opinion of what it means by the way it's worded. (18)

Owners in staged schemes also raised concerns about the distribution of duties and the costs associated with those duties when multiple bodies corporate are involved in a development. One lot owner discussed how the subsidiary bodies corporate pay a substantial amount of money for caretaking duties that should be directed to the principal body corporate:

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[370] Queensland, *Parliamentary Debates*, Legislative Assembly, 9 May 1997, 1787-1790 (The Hon. Henry Palaszczuk MLA).
[371] Queensland, *Parliamentary Debates*, Legislative Assembly, 9 May 1997, 1803 - 1806 (The Hon. Clem Campbell).
[372] Queensland, *Parliamentary Debates*, Legislative Assembly, 9 May 1997, 1799-1803 (The Hon. Merri Rose).
[373] *Body Corporate and Community Management Act 1997* (Qld) s 113.

> … well you think maybe, it's just bad practice, or actually is it fraud because the common property of each scheme is actually quite small, it's all covered by principal body corporate, but we're all paying for a caretaker who is actually already being paid by the PBC [prescribed bodies corporate]…. the [named subsidiary scheme] has got two square metres, the [second named subsidiary scheme] I think have got three square metres and [third named subsidiary scheme] over four square metres. We pay $16 000 a year for that two square metres, the others pay 18 and 20. Our principal body caretaking is about $300 000 ... there's still some of us still bitter about the contracts, the caretaking contract in particular, because the developer controlled the PBC. At one stage we had a contract in place and then they voted in that they would increase it, without an explanation and that they would also then increase it to include plus consumables. So previously we had all these included in the costs, now we're having to pay extra. (30)

Many developer interviewees appreciated that management rights arrangements are a source of contention in bodies corporate. One developer who was unable to structure the management rights arrangements before settlement of the lots acknowledged that owners dislike these types of arrangements and noted that in order to get these arrangements in place developers needed to be somewhat surreptitious:

> If I had of sold the management rights agreement, it would have caused a great deal of angst in the community, for no other reason than, it boiled down to they didn't want to see a developer making money on their asset, they were very anti that. And if I had have pushed harder earlier in the scheme, when there was less lots, I think I would have been able to get that agreement signed. I would have had to, I wouldn't use the word unethical, but I would've had to do it in a very direct manner, probably without disclosing the full nature of the reason why I was doing it, which again would cause angst in the long term. (22)

This developer was acutely aware of this COI situation and that the implementation of such arrangements would impact upon any trust relationship built between it and the body corporate.

Binding the body corporate to a long-term agreement upon a scheme's establishment inhibits the body corporate's ability to negotiate appropriate terms and conditions on its own. However, there are contract review provisions under *the Body Corporate and*

Community Management Act 1997 (Qld) s 130 which, effectively allow the body corporate and service contractor to re-negotiate the terms of the agreement (if unfair and unreasonable) after the control period has ended. A lack of knowledge about these provisions and the time limitations imposed on commencing the review can result in no action being taken by the body corporate.

Challenging issues associated with management rights arrangements are exacerbated when a developer retains the management rights. An extra layer is added to this already conflicted interest when a developer takes on the role of caretaker / letting agent. BCM interviewees commented on this practice and acknowledged that the retention is for cash flow purposes and control.

> If it's a large developer, they usually have some sort of association with one of the management rights companies, so they will essentially retain through that company. In terms of selling it on, it's usually smaller ones that do that. The smaller developers, or the smaller schemes, perhaps, they're looking at that business, it's not only the income that it generates, it's the worth of the business which is usually derived from the income that it generates. (15)

Alarmingly, one BCM also exposed their conflicted interest by advising developers of concerns raised by the body corporate and lot owners:

> Developers retain the management rights for cash-flow reasons, because you see, management rights done properly, is a good cash-flow business. They don't buy it, they just transfer it from one balance sheet to another balance sheet. The problem that we have seen is predominantly, they don't run it like a proper management rights operation. They'll use their marketing person as the letting agent and they'll just find someone in the building area that's available to do maintenance. So they reduce the standard quite considerably. Rarely is the developer actually going to go and get someone who is a management rights operator and put them in under salary that can run it properly. We often see a developer go down this track, we whisper in their ear, and say 'listen, the Indians aren't happy, they're starting to sharpen their tools. So really the problem is this, this and this, and you're not complying with the agreement, but you're holding your main hand out for all of these things, and in fact you've probably getting things done that's a defect as opposed to a body corporate cost. (19)

The most noted dispute in relation to the sale of management rights was heard in the New South Wales Supreme Court in 2007. Although one of the key findings in *Community Association DP No 270180 v Arrow Asset Management Pty Ltd* [374] was affirming that the developer stands in a fiduciary relationship with the body corporate, the court also examined the terms of the management agreement entered into by the developer. After hearing expert evidence on the method of calculating the remuneration, the court held that the ten year agreement with two further five year options was unusual for the industry[375] and that the minimum remuneration payable was excessive and would in the future exceed the real value of the services provided.[376]

In Victoria, most of the caretaking arrangements for MODs are managed by the BCM. The BCM typically has an affiliated company providing caretaking and other services. BCMs in Victoria advised that caretaking arrangements are dealt with simultaneously when negotiating the administrative agreement with the developer.

> Yeah, the joint tender process is to provide both. So it had to be for both of those things. So we do the administrative [body corporate] management, we are also doing the facility management… So, we're providing that service, via long term contracts and those things. (28)

> Well I've got my own facility management company and I introduced that company to some of the developers and they're happy for, based on the price, that we become the facility manager or the building manager for five years… (26)

Both the governance responsibility to apply the module regulation to schemes in Queensland and the governance responsibility to implement arrangements for building management have produced an environment where COIs thrive. In Queensland, developers exploit the loose nature of the regulatory provisions relating to the application of the accommodation module regulation. The legislature in Queensland has created the ultimate juxtaposition by providing a regime that allows developers to act in a self-interested manner and profit through the creation of

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[374] *Community Association DP No 270180 v Arrow Asset Management Pty Ltd* [2007] NSWSC 527.
[375] Although 25 year agreements are usual in Queensland, it appears uncommon in other States.
[376] *Community Association DP No 270180 v Arrow Asset Management Pty Ltd* [2007] NSWSC 527.

management rights arrangements while also mandating a statutory duty to act in the best interests of the body corporate when negotiating the terms and conditions of the arrangement. Although these arrangements in Queensland are overt, there has been considerable disquiet amongst lot owners and bodies corporate in the other reviewed jurisdictions where developers have been able to enter the body corporate into longer term contractual arrangements with building managers.

6.5.2.2 Leasing and Licensing Arrangements

A number of interviewees in the informal interview phase (Chapter 4) also raised concerns about leasing and licensing arrangements entered into by the developer on behalf of the body corporate. A COI is apparent when the developer, as promoter, causes the body corporate to enter into a lease or licensing arrangement where the developer or its associated entities benefit from the arrangement. For example, a developer can exploit the body corporate by entering into agreements whereby the developer leases a lot it owns to the body corporate for recreation purposes (for example, a gym). Another option maybe to cause the body corporate to lease an area to the developer, at a negligible cost, in order to facilitate utility services (for example, communication services) where the developer is able to receive a financial benefit.

In *Scarborough Beach Resort*[377] the representative of the development company held two extraordinary general meetings prior to the first AGM for the scheme. At one of those meetings, the representative for the development company (being the only member of the body corporate by virtue of the granting of powers of attorney under the sales contracts) passed a motion which effectively caused the body corporate to enter into a lease with the development company for a term of ten years. The lease area was a conference room and one of the lease clauses required the body corporate to convert the lease premises into a separate lot at its expense. This would require the body corporate to consent to a new community management statement, or survey plan and the transfer of the lot to the development company without further

[377] *Scarborough Beach Resort* [2006] QBCCMCmr 457.

consideration. The applicants, being owners of a lot in the scheme, applied for orders, inter alia, to void the lease.

In the concluding remarks, the adjudicator stated:

> I am of the view that the use of the power in the circumstances of this community title scheme as existing on 2 December 2005, was an unjust and inequitable use, and contrary to the spirit of the Act in respect of the powers of attorney given to [the development company]. The proponents of the lease, and the parties to it, were in effect all [the developer] wearing different hats, and he was granting to his company an advantage and use of common property to the detriment of current and future lot owners.[378]

Similar arrangements were discussed by lot owner interviewees where associated companies were a party to a lease or licence.

> …the developer puts in a community gym, pool, tennis courts… It then turns out that the development company owns them, the community doesn't own them, but for $1 we can, as long as we pay $700 000 a year to maintain it. And then what they do is they divide it up between all the lots, and the theory was of course, that the owners would be paying it out of their levies, but as people came to use it, user pays. Now that agreement was backdated to 1 September 2007, but the vote wasn't taken til May 2008. So, I'm not quite sure how that can be backdated, but they have. (21)

The governance responsibility to enter into appropriate leasing and licensing arrangements on behalf of the body corporate becomes tainted when the developer or its associated entities becomes a party to the agreement.

6.5.2.2 Determination of Initial Budget (and Levies)

Developers, often with the assistance of BCMs, prepare initial scheme budgets and allocate contributions to each lot. Although a budget should itemise annual expected operational and capital costs associated with a scheme, as outlined in Chapter 4, the general practice for estimating initial budgets is based on perceived marketable price points. That is, the developer determines the contribution amount for each lot based on market perceptions and then fits the budget within these constraints. Pardon

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[378] *Scarborough Beach Resort* [2006] QBCCMCmr 457, 11.

suggests that, '[d]evelopers often are accused of "low-balling" maintenance fees, undercharging owners, and subsidizing operations to keep assessments at an artificially low level to attract sales.'[379] Developers subsidising maintenance costs, particularly in relation to aesthetic works, such as garden maintenance, can add substantial costs to the body corporate budget once the developer is no longer involved in the development:

> The owners have the perception that it's all paid for, then when you explain to them, 'well no, the developer was doing that, you need to make a decision as to whether that is to continue or stop that service'. (15)

By understating the budget and contributions, the developer is placed in a COI situations whereby self-interest (ensuring the sale of lots) is prioritised over the interests of the body corporate (to ensure contributions are sufficient to meet scheme expenditure).

The careless attitude of some developers was commented on by a manager:

> There are the developers that say no, no, no, bare bones, we know the fees are going to have to double in the second and third year, but we'll be out of there by then…. (25)

There were mixed comments from BCMs about this practice. Some managers attempt to reach a compromise with the developer in order to provide a realistic budget:

> Of course, the instructions are generally, for this to sell it would need a certain levy. So we need to keep it at a certain minimum, can you do that? And of course, what we come back with is, well, we'll certainly try. But then we go through and get as much information out of them to get the right budget costs, to get the future costs for maintenance and electricity and those sorts of thing and they'll pass that information back to us. But they're not proactive about it, they'll generally know what they want, and tell us to achieve it. Most times you can't achieve what they want. Then there is compromising, they may look at changing certain things along the way to set it up, to get it to that level. They do their own studies to see if it's marketable. So yeah, and then there's usually some compromise, and reduced in some way. (15)

[379] Pardon, above n 144.

Other managers would not acquiesce to the pressure from developers to keep levies unrealistic low:

> Some developers are very inclined to pressure you to keep it within a price point. I have had to state that, in some cases, we can't go that low to be realistic and in that case I sort of sign off and say this is what [our body corporate firm] recommended, if you want to change it, I won't put our name to it. (31)

However, most BCMs along with developer interviewees justified the initial budget by explaining that:

1. the developer subsidises some expenditure items initially and therefore those expenses must be absorbed by the body corporate once the developer exists the scheme;
2. product warranties may offset 'normal' maintenance expenditure;
3. the building is not operational and therefore budgets can only be based on projections using comparable scheme budgets;
4. owners expectations vary from minimum service to luxury and therefore, budgets are catering to conservative expectations, and
5. initial budgets are often determined prior to or during construction when detail is lacking regarding equipment inclusion.

Although many of the developer and BCM interviewees provided a justification for the changes in the budget and levy contributions from the initial (off-the-plan budget) to subsequent budgets, the outcomes for the independent body corporate and owners is substantial and financially distressing:

> Having a realistic budget, because if it is not realistic, it definitely puts the body corporate in a difficult position 12 months down the track of having to increase levies which, puts the owners off side. (31)

> The first 18 months, we had no money, we were definitely in the red and we couldn't pay our onsite manager. So our onsite manager bore the brunt of that. If they had of pushed it more, they could've gone legal on us, definitely. And they would've had us. (29)

The types of increases were discussed by many lot owner interviewees:

> …it put us in the awkward situation at the second AGM having to increase the levies by 71 per cent. (20)

> …they severely under-estimated what [the budget] was, so the next year we had to go and jam it up. They told us that we would be paying about $750, so now we pay about $2 200 a quarter. (23)

> We paid $500 and it's now currently at $1 500. So there's been that increase and a lot of that, again, comes to the development decisions. (30)

> …40 per cent in three years. (21)

> I was told the levy would be $60 or $65 a week, which is one of the reasons I bought into it. Now the $65 a week, it stayed that for about 18 months. Our second AGM it went up to about $85 and then in that year, we also ended up something like around, I think it was $3 000 in special levies. (18)

In order to survive financially, lot owners and BCMs discussed the practice of using moneys allocated to sinking or maintenance funds to prop up the administrative funds until realistic budgets could be passed.

> What would normally happen in those circumstances, is that you would actually use part of the sinking fund for part of those costs until the next AGM. Because the sinking fund would be available. So that's what happens in reality. You go into deficit, it's not legal, but you then need to make a transfer back to the sinking fund in a period of time, but what would happen is, you're usually talking where the meeting is going to occur in the future, so where you've actually got a date, so you would actually put your admin fund into deficit short term. (14)

> We had to use our sinking fund money to cover admin expenses….we are gradually recovering from that. (18)

One of the developer interviewees who acted as the body corporate at a first AGM discussed how voting power was used to increase the levies.

> The way I did it was at the first AGM before the committee was formed, as a developer who has not sold all the units, I had most of the rights. So I got it passed before a committee was formed. Then you get the backlash from the owners saying its $200 more than you told me. But what owners don't realise is that if you didn't do it, all of the gardens would fall apart (17).

In a study conducted by Goodman, Douglas and Babacan, interview subjects raised concerns that bodies corporate might be placed in a position where they find it difficult to pay for repairs and maintenance of body corporate assets if not sufficiently funded from the outset.[380]

In order to finance the expenditure of the body corporate from its inception, developers must determine a budget for the scheme and determine the contributions for each lot. This determination is a governance responsibility and therefore developers should ensure that the initial budgets adequately cover the anticipated costs of running the body corporate. The practice of constructing a budget based on a marketable price point serves the interests of the developer to the detriment of the body corporate and is therefore a COI.

6.5.3 Developer as Promoter: Category 2 Conflicts of Interest

This section highlights COI situations where the developer as scheme promoter has difficulty discharging its duties (fiduciary and statutory) because of its own conflict (category 1) and there is a desire to promote the interests of third parties. Three specific situations have been identified as a result of analysing the interview data collected. These situations include: the engagement of BCMs, the engagement of supply companies and, the preparation of by-laws.

6.5.3.1 Engaging the Body Corporate Manager

As already noted, it is common practice for the developer to cause the body corporate to enter into a management agreement with a nominated BCM upon a scheme's registration.[381] Until such time that the body corporate is created and the agreement is executed, it is usual practice for the BCM to provide consultancy services to the developer.[382] These services may include assisting the developer with the allocation

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[380] Robin Goodman, Kathy Douglas and Alperhan Babacan, 'Master Planned Estates and Collective Private Assets in Australia: Research into the Attitudes of Planners and Developers' (2010) 15(2) *International Planning Studies* 99.

[381] Michael Bounds, 'Governance and Residential Satisfaction in Multi-Owned Developments in Sydney' in Sarah Blandy, Ann Dupuis and Jennifer Dixon (eds) *Multi-Owned Housing: Law, Power and Practice* (Ashgate Publishing, 2010) 146.

[382] John Whiteoak and Chris Guilding, 'Managing the Developments of Multi-Titled Golf Complexes' (2009) 15(1) *Pacific Rim Property Research Journal* 68.

of lot entitlements, the scheme's estimated budgets, insurances, by-laws and other common administrative practices.

It has been suggested that in order to secure a body corporate management contract and future work, BCMs discount establishment consultancy service fees (usually borne by the developer)[383] in return for premium administrative fees (borne by the body corporate).[384] As described in Chapter 4, many lawyer interviewees condemned this practice, arguing that it gives rise to a breach of both the developer's and the BCM's fiduciary duty to the body corporate. Developers place themselves in a COI situation by: receiving a benefit (offsetting costs for services relating to the structuring of the body corporate) in exchange for causing the body corporate to enter into a management contract; and promoting the interests of a third party (BCM) without due consideration of the interests of the body corporate. This dual COI situation becomes even more problematic and insidious when BCMs are unable to discharge their duties to the body corporate because they continue to promote the interests of the developer over the interests of the body corporate.

A further COI can arise when the developer acts as the BCM or is related to a BCM.

> Developers are becoming body corporate managers. And I think that's the other critical key, there's a number of developers out there who have their own owners corporation managers. (26)

In *Body Corporate Fresh Apartments v Vecchio Property Group,* [385] the body corporate alleged that the developer, when acting as the BCM and chairperson of the body corporate, failed in his duties to advise the body corporate committee that a building defect should have been referred to the Queensland Building Services Authority and that time limits were applicable. The delay resulted in the application being out of time. These types of arrangements are the most problematic, as the developer places

[383] Kleinschmidt, above n 319. See also comments made by lawyer interviewees in chapter 4 of this dissertation.
[384] Bounds, above n 378.
[385] *Body Corporate Fresh Apartments v Vecchio Property Group* [2010] QCAT 363

itself in multiple COI situations, where it would be impossible to discharge the various competing duties.

This section provides examples of how these COIs manifest and affect the body corporate. The BCM interviewees were very frank about their relationship with the developer and the services provided in the planning period of MODs. It is evident that the goal, generally, is to secure not only the body corporate management contract but also associated benefits such as: facility management contracts, insurance commissions and fees generated from the production of body corporate certificates (often referred to as section 109 (NSW) or section 151 (Vic) certificates).

> Without giving away all my trade secrets, I will offer two things to the developer. I will offer a consultancy rate to do their set up, an hourly rate, and I'll usually calculate that about 20 hours which, is about what it takes to set up a building just from a review perspective. Or, I will have a commitment from them that we will retain all the 109 fees, we place the insurance on their behalf and we give them the opportunity to present our proposals at the first AGM. So no further commitment than that, and if we do that then I'll give them 20 hours of consultancy to do the set up. (14)

> We'll provide consultant services to them in the development stage, at what is a pretty reasonable price.… we'll go in with that deal, with the prospect of getting appointment, and in fact we'll say to them, 'look, where do you want to go with this, because we'd love to be with it the whole way through and that's good for everyone, because if you put a lot of thought into helping with the planning, then you're the one with all the knowledge of about how to roll it out when it's actually there. And, it's continuity, because if the developer is going to be there a long time, with a staged development, it might be 15 or 20 years … (25)

In some jurisdictions, it is a requirement that the body corporate management agreement is disclosed to the potential purchasers in the contract signing phase, in other jurisdictions, there are no formal disclosure requirements. Some manager interviewees also discussed the need to trust that the developer will cause the body corporate to enter into its BCM agreement at the first meeting. Some managers commented that the set up fees are only offset if the BCM contract is executed by the body corporate at the first meeting.

> Normally we have an hourly rate for it, we also offer different packages if you like, so we can set up the design and the committee and the structure … We can review the rules and make changes and get them reviewed by a specialist lawyer and that's a package. Often that works well, because they can see the dollar value… You then just get a letter of intention from them. 'Congratulations, we engage you to do the management and consult through the initial phase'. So you don't have to sign a contract at that point. I think it's a contract of trust. Well I think you could scare them off, because you need trust and confidence in each other, but they want to see that we're worth our weight. (28)

> We basically say, listen, if we do all this work for you, and you're not paying for it, and we've arranged the deal that we get the thing, if you change your mind through it, then we're taking our documents back and you lose all your sales. Because our objective, like everyone else's objective is to get body corporate management contracts… And we thought of approaching developers on the basis of, you give us a three year appointment without negotiating our fees, then we will offset, or subdue our consultancy fees. Now it means that if they sell a project, or we don't get our contract, we will charge them a consultancy fee. (19)

Interviewees also commented on practices that assisted in keeping BCMs involved in schemes for longer periods. The use of by-laws or management statements were drafted in a way that facilitated contract renewals. These by-laws and management statements are prepared in conjunction with the developer and the BCM.

> So it's written into the management statement for the community and actually says, manager 'a' must be manager 'b'. Now whilst the developer still controls the community, obviously there is a strong likelihood, if not a guarantee that you will be appointed … Now, the fact that we already do provide the strata and facilities management on these other buildings actually acts as a bit of incentive for people to use us. One, because it reduces cost and two, we obviously display that we've continually managed these properties, not just from inception but through a number of renewals, so the community is obviously happy with our services. (14)

Although some of the BCMs interviewed acknowledge the potential COI that this association with the developer creates, many believed that they can either curtail these COIs segregating the roles that they undertake (being developer consultant and BCM) or acting as a mediator to assist in resolving disputes between the parties.

> So we've got two hats essentially, you're a body corporate manager, but then you're a body corporate consultant, setting up the scheme in their interest. So switching over once you've done your set up, you've done your consulting, that can be difficult at times, because developers want you to continue on… (15)

> …you've got one from one side and one from the other. You're engaged by the developer, so you owe them, I guess, not act solely in their interest, but also they're the lot owner effectively, so they are making decisions. But you can just make them mindful of the impact their decisions will make, and say, 'look, maybe that's a bit unreasonable to do that, let's do it another way, let's get an individual eye to review that contract before it's signed'. Just little things you know, to check boxes and make it fair and reasonable down the track, if a new committee's coming in… (28)

> In fact one of the important roles, I reckon that a manager fulfils in the developments, is the liaison between the developer and the body corporate (25)

> …so you're really playing that fine line between making sure the developer doesn't think you're doing too much for the owners, make sure the owners don't think you're doing too much for the developer. And it can get very blurred, particularly if there is some action from either party. (14)

Another avenue discussed by BCMs was the creation of information barriers (that is, a Chinese wall) in their management business to overcome any potential conflicts by implementing a developer division and a body corporate management division.

> Almost every project that we're involved with, where the developer is still involved, there's conflict. Between what the end users expect and what power they think they have over the developer. So, what we do is we have a system, and it's basically we have our consultancy department, and they only deal with the developer and our body corporate department that only deals with the body corporate. And each one is separate. So we don't have a consultant that's involved in the body corporate management, that's the body corp management department. (19)

As noted by Whiteoak and Guilding, '...the body corporate service provider is placed in the position of providing advice to the developer and body corporate committee, and the advice sought by owners may well relate to a concern with some aspect of

the developer's service provision.'[386] Many of the stakeholders interviewed in this study concurred with this point and provided examples of instances where the BCM either did not advise the body corporate of situations which may have been disadvantageous to the developer, or took steps that would be disadvantageous to the body corporate. The main concerns raised related to unpaid developer levies and building defects.

In relation to unpaid developer levies, BCMs appear reluctant to commence any action that would promulgate the independent body corporate to take action against developers. One BCM commented that:

> …we normally have a debt collection process but with developers we stop that because it is extra fees for them and we know they are trying to sell the units. (31)

> Lot owners also described the surreptitious nature of avoiding both advising bodies corporate about the amount of debt and the debt recovery action against developers.

> And at that meeting, I queried actually, the body corporate management, who was attending the meeting, and said, "are all the levies paid up?" and he could not come up with a straight answer and said "I'll have to look and get it out of the office", and it took nearly three months. When we finally found out just how much money was outstanding, and the body corporate was really in a bad way with over $50 000 outstanding, $40 000 was from the developer. (24)

> Well, that's the contention that we've had with the body corporate manager, to say 'you know, you should have notified us about this debt and how did you let it become so huge over this time'. And their argument, their defence on the paperwork states, that all times they followed appropriate procedure and informed the treasurer or the secretary, which was the developer. We don't quite know how it got to be so big apart from the fact that they were quite controlling at that level and still are. (30)

The suppression of defect claims by BCMs was highlighted in the initial interviews with lawyers. The reluctance to advise or aid in the process of rectifying defects was also highlighted by BCMs.

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[386] Whiteoak and Guilding, above n 379, 81.

> Invariably we have clients who say, we are going to move a motion at the next AGM that we're going to take the developer to court and I say, 'development issue, you can fight it if you want, but not through the body corporate. You've got to get your band together, fly the flag, hold your meetings, do what you need to do, but, it's not a body corporate matter and it's not on our agenda. We're not discussing it at official committee meetings. (25)

> … the developer says, 'ok, I've been very generous with you', which normally they are, they fix things they don't normally have to fix, but they just seem to be asked for more and more, and unfortunately that irritates the developer to the point where they just say, 'well stuff you, I'm not doing anything more, and in fact you want me to do what I'm supposed to do, I'm going to make it harder for you, because you just went too far', and, normally it's just a few people in the building, you know, they're just crazed about something, for whatever reason, they just want everything to be perfect, but, I've never seen a perfect building, so they don't understand that you can't have a perfect building, so they just keep harping on. (19)

The relationship between the developer and BCM which commences in the planning period, when the developer is the promoter, is one of, if not the most, insidious COIs in the body corporate environment. It is most problematic because the developer and BCM owe fiduciary duties to the body corporate, are in positions of trust (particularly the BCM) and constantly place themselves in positions where their interests are served to the detriment of the body corporate and in turn the lot owners or, they are promoting the interests of each other at the expense of the body corporate. It is a relationship that has the potential to cause a great deal of harm to the body corporate, particularly in relation to its financial health.

6.5.3.2 Engagement of Supply Contractors

There are a number of service contractors engaged in MODs. This is particularly apparent in larger more complex schemes. Common service providers include lift maintenance contractors, pool maintenance contractors, and utility providers (for water, electricity, gas). As highlighted in Chapter 4, it is common practice for developers to profit directly from service providers by causing the body corporate to enter into long-term utility service contracts with either the development company

itself, an associated entity[387] or a third party. Although installed on the common property, sometimes, infrastructure ownership may not be transferred to the body corporate but retained by the developer or its associated entity. Concerns have been raised that in some instances, the supply costs incurred by the body corporate are not competitive.[388] A lot owner provided the following example relating to pool heaters:

> This is all came to light when the committee wanted to stop heating the swimming pools for 365 days a year…. Now, the developer / management rights operator objected to this and said that you can't do it, there's a gas agreement in place and you have to use a certain amount of gas a year to fulfil that contract. Now, there's never been a contract come forward, and I believe the reason they said it is, they advertise on their website and with all rental properties, that the swimming pools are heated to the same temperature 365 days a year. (18)

These types of arrangements give rise to COI situations. The developer can receive a benefit either by, retaining utility supply infrastructure and monopolising the services that can be used in a MOD or, where infrastructure is provided by a utility company at no cost in exchange for causing the body corporate to enter into a non-negotiated supply agreement.

6.4.3.3 Preparing the By-Laws

When establishing a MOD, developers can adopt model by-laws or tailor by-laws to meet the needs of a particular scheme. Interviewee comments suggest it is rare to see the implementation of model by-laws in larger schemes. Interviewees discussed types of by-laws that developers implement that are beneficial to the developer or exclusive to the developer or its associates. The types of by-laws discussed by interviewees related to either: (1) the developer retaining some form of control of the development; (2) the developer ensuring that the manager obtains a benefit or; (3) dedicating a part of the common property for the benefit or exclusivity of specific lots.

BCMs and developers, in particular, commented that by-laws are used as a vehicle to ensure that a developer's vision is achieved. BCMs commented:

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[387] Kleinschmidt, above n 319.
[388] Ibid.

> We write in the by-laws that the developer has the right to do x, y and z. Until such stage as they sell the last lot. I believe that's the right of the developer, because they've promoted this development, they've put their heart and soul into it, obviously they've got to make money. So I don't personally have a problem with that. If people read the rules, there's caveat emptor, 95 per cent of people have rose-coloured glass and never have seen these. (26)

> There is a good chunk of them [by-laws) about the developer of course, you know, about having signage where others don't have signage but that's a short term thing. (6)

In a case involving Queensland's Chevron Renaissance, the adjudicator invalidated a by-law drafted by the developer that stated: '[a]ny lot nominated by the original owner from time to time may be used for commercial purposes.'[389] The adjudicator concluded that:

> It is one thing for the original owner to be able to nominate which lots can be used for commercial purposes when the scheme is established, or even when the original owner first sells any particular lot. However, it is quite another thing for an original owner to be able to change the use allowed of any lot at any time. A by-law providing for a grant of such a power to any person is obviously unreasonable and oppressive.[390]

An owner discussed how the by-laws required all bodies corporate within the one development to engage the same BCM: 'The initial by-laws requires us all to have the same strata manager.' (20) These types of by-laws, if not challenged and defeated in a tribunal or court, may stifle a body corporate's ability to engage a BCM of its choosing.

A developer explained how a by-law was used to enable the appointed building managers to receive a benefit from lot owners for services the managers organised.

> In relation to the rec centre, I had a few choices and decided unfortunately to give it to the body corporate. But I wrote the by-laws in a way that the managers have exclusive use and the managers can employ the services of a masseur. The one thing that I did do was allow the manager to earn a clip whenever they organised something. A resident

[389] *Chevron Renaissance* [2010] QBCCMCmr 330, 1.
[390] Ibid, 4.

> could ring up the manager and make an appointment for a masseur for Saturday etc, the masseur might charge $50 but the manager would charge $60. (17)

It appears that the most contentious issue relating to by-laws arises when a developer grants exclusive use of part of the common property to a specific lot(s). Sherry points out that in some instances, exclusive use by-laws may be practical, especially in circumstances where accessibility to part of the common property may only be available to a specific lot, due to the property's design.[391] However, all common property vests in the owners as tenants in common in proportion to their interest entitlement. The passing of an exclusive use by-law effectively disposes owners of their collective right to use all the common property.[392]

In the matter of *Radford v The Owners of Miami Apartments,* [393] a number of exclusive use by-laws that favoured lots retained by directors of the development company were passed at the scheme's first AGM. At the meeting, the project manager for the development held all proxies for the then owners, being the directors and the development company. However, at that time an off-the-plan sales contract had been entered into by the plaintiffs and settlement was pending. The buyers were not aware of the resolutions passed at the AGM in respect to the exclusive use by-laws until after settlement. In deciding whether leave to appeal should be granted, the court stated:

> It might be argued in this case that the developers have placed themselves in a position of conflict. The conflict that might be argued to have existed here was one between their self-interest and their duty to advise the defendant [being the body corporate] as to the appropriate management of the common property.[394]

COIs arise in relation to by-laws when developers use their position as promoter of the scheme to continue to control the development or when a benefit is passed on a preferred lot (owner), including lots retained by the developer or its associates. Developers can effectively bequeath parts of the common property to specific lots and receive a favourable benefit.

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[391] Sherry, above n 189.
[392] Ibid.
[393] Kings Park Strata Plan 45236 [2007] WASC 250.
[394] Ibid 159.

6.5.4 Developer as Body Corporate: Category 1 Conflicts of Interest

This section highlights COI situations where the developer as the body corporate has difficulty discharging its duties (fiduciary and statutory) because there is an actual or potential conflict between the developer's interests and the interests of the body corporate. The issue most frequently cited in the interviews relates to the calling and holding of first meetings and also the motions passed or ratified at these meetings.

6.5.4.1 First Body Corporate Meeting

The first AGM of the body corporate is an important point in the transition phase of a MOD. In many schemes, it signals the transfer of developer control to lot owner control. It is an event which sees the election of a committee and should mark the diminishment of the developer's control. In some jurisdictions, like Victoria, the AGM is the first meeting and occurs in the first few weeks after scheme registration. In other jurisdictions, a general meeting (not being an AGM) is the first meeting called in the initial weeks post registration. Whether it is an AGM, or general meeting, the first meeting allows the developer to ratify all contractual arrangements negotiated in the planning period of a MOD, prior to independent lot owner involvement in the body corporate. As the developer is the sole owner of all the lots in the scheme at this time, all resolutions are unanimously passed. The following case summary typifies the resolutions passed. In *Newton Management Pty Ltd v Owners of Strata Plan 67219*[395] the inaugural general meeting of the body corporate was held one day after the strata plan was registered. At that meeting, the executive committee, comprising of the developer's representative only, resolved to appoint a building manager for the scheme for a term of three months with a holding over provision until terminated by either party. One of the critical clauses in the agreement provided that, '[u]pon expiry of the term of this agreement and provided the manager has otherwise complied and is not in default, the manager and the body corporate must enter into a new agreement for a further term of five years which will be identical to this agreement...'.[396] The applicant's complaint was that this provision effectively forced the body corporate into a perpetual agreement with the manager.

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[395] *Newton Management Pty Ltd v Owners of Strata Plan 67219 [2009] NSWSC 150*.
[396] Ibid, 19.

It is this control of the voting power that enables developers to confidently enter into arrangements during an MOD's planning period. Although for many developers, the governance aspect of their role nears completion at this stage, for others, particularly those involved in staged schemes, retaining control becomes vital and some developers take active steps to ensure that majority or sole control is retained.

Although the legislation in each state provides clear and prescriptive rules relating to the calling and holding of the first AGM (and subsequent AGMs), a number of owners interviewed commented about delays in calling and holding the first AGM:

> The very first AGM was held on the 13th July 2011. The complex was formed in February 2008 and went all that time without having meetings. So it appears as though the developer and the body corporate manager at the time, just made decisions on what to do and what levies to charge, there was never general meetings, EGMs or AGMs to set levies or budgets. It just appeared that when money was required, the developer said, 'look, bill them this'. (18)

> I almost had a seizure because I'd been pushing to have our first AGM because of a few things going on in the community that are now turning around and biting us, because the developer voted on. I was actually there in the community when they were doing all this and I wanted, I was hounding them, but they kept saying, until they sold 30 per cent of the apartments, there isn't a first AGM. (21)

Lot owners are somewhat hamstrung when it comes to the calling and holding of the first AGM, as it is the developer's responsibility to call and hold the meeting. In the event that the developer does not hold the first AGM in the prescribed time period, lot owners would be forced to make an application to the relevant commission or tribunal to seek an order to hold the meeting.

Control post registration becomes more difficult for developers to retain when lot owners become involved in the body corporate and its committee. Developers often use different means to thwart any action (including legal) commencing against it. In the matter of *The Ecovillage at Currumbin*,[397] the developer applied for an adjudication order to invalidate resolutions passed at a committee meeting which related to the engagement of a legal firm to recover outstanding levies. At the time,

[397] The Ecovillage at Currumbin [2010] QBCCMCmr 554

the developer owned three lots in a staged scheme and was the contracted caretaker. The principal body corporate committee submitted that the BCM had advised them that the scheme was "approaching insolvency" and, that the developer owed levies in excess of $330 000, of which over $147 000 was unsecured. The committee also submitted that by preventing the recovery of the debt owed, the developer was seeking to oppress the PBC. Ultimately, the application was dismissed, as the adjudicator determined that the committee had properly engaged lawyers.

In *Teneriffe Hill Apartments*[398] the applicant was the developer of a scheme in which it had retained a number of lots. The applicant had applied to adjust (effectively reduce) the lot entitlements for commercial lots which it owned. The body corporate made a submission that although the applicant was seeking to reduce its entitlements, it had at the same time used its entitlements to influence votes in its favour. The adjudicator determined that the body corporate could not deprive the applicant of its voting power but cautioned the applicant not to use its power to unreasonably favour the commercial lots. One of the body corporate's submissions related to the applicant's threat to vote against the engagement of legal representatives for the body corporate in defending the application. The adjudicator stated that:

> I consider it unreasonable for the applicant to bring an application against the body corporate and then use its disproportionately greater lot entitlements to impede the body corporate's ability to defend the application. The applicant has created a conflict of interest situation and it would be unreasonable of the applicant to vote in its own interests and prevent the body corporate obtaining proper legal representation. [399]

In *Body Corporate Fresh Apartments v Vecchio Property Group*,[400] the body corporate sought an order to have work rectified by the developer. The complaint related to stipple coating which had been applied to external walls and ceilings and which was flaking off. The developer claimed that as the body corporate had not complied with the requirements of the *Body Corporate and Community Management Act 1997* (Qld), which requires a special resolution of the members to commence legal proceedings, the application must be dismissed. Although the body corporate acknowledged that

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[398] Teneriffe Hill Apartments [2005] QBCCMCmr 322.
[399] Ibid, 4.
[400] *Body Corporate Fresh Apartments v Vecchio Property Group* [2010] QCAT 363.

the consent was by way of committee resolution only, and therefore not compliant with the legal requirements to obtain consent, it submitted that it was numerically impossible to obtain consent by way of special resolution, as the developer (through a related entity) owned a number of apartments within the scheme. The tribunal dismissed the body corporate's application and observed that, '[i]t is possible that one owner, having purchased a majority of the lots in any particular apartment block, could conceivably control the voting process. There is nothing unlawful or improper about this...'.[401] The tribunal noted that the legislative intent in relation to obtaining a special resolution before commencing legal proceedings was to ensure that owners gave informed consent prior to incurring litigation costs.

Developers using their voting power or securing proxy votes from apathetic lot owners in order to thwart legal action was highlighted by a number of lawyer interviewees, as described in Chapter 4.

Although not retaining majority ownership, the developer in *Owners Corporation 1 Plan No. PS440878V v Dual Homes Victoria Pty Ltd*,[402] effected control of the body corporate by securing proxies. The developer in this matter was the owner of two lots in an eight lot scheme. At an AGM, a motion was put to the owners to commence legal proceedings against the developer for common property building defects. The motion, which required a special resolution, was defeated as the developer voted against the motion and secured proxies from the owners of two other lots. The substance of the applicant's submission was that the body corporate had become effectively dysfunctional due to its inability to rectify the defects and recover the costs. The tribunal found that the body corporate was dysfunctional as a result of the COI of the developer.

When a developer retains majority control of lots in a MOD, it can veto any decision that is not favourable to it. As highlighted in this dissertation, the developer retains control either by retaining ownership of the majority of lots or through the use of proxies or powers of attorney granted by lot owners. Sales contracts that require the transfer of voting rights to the developer via proxies and powers of attorney

[401] Ibid, 12.

[402] *Owners Corporation 1 Plan No. PS440878V v Dual Homes Victoria Pty Ltd* [2011] VCAT 211.

effectively allow control of a scheme to remain in the developer's hands after settlement. Although in these circumstances, when the developer makes self-interested decisions that are not beneficial to the body corporate, there are no specific duties that attach. A developer acting as a lot owner can effectively prevent the body corporate from taking action against it.

6.6 Effectiveness of Legal Mechanisms Designed to Limit Conflicts of Interest

To combat the corrosive nature of COIs, policymakers employ a number of legal mechanisms including sanctions and penalties and, disclosures. This section briefly outlines the effectiveness of these mechanisms.

6.6.1 Sanctions and Penalties

A duty bound person will be legally sanctioned or penalised in a COI situation only if the law regulating the duty has provided a sanction or penalty in the event of a breach of the duty. As noted above, the source of developers' legal duties are those prescribed in statute and at common law (specifically fiduciary). If the COI situation arising has been contemplated in these sources and is prohibited or regulated (via disclosures), then a breach will enable the duty owed person to pursue an action that may result in the duty bound person being legally sanctioned or penalised.

Although strict legal penalties are often seen by policymakers as a panacea for minimising the destructive effects of COIs by ensuring compliance, according to Moore, Moore, Tanlu and Bazweman, they are ineffective.[403] The ineffectiveness stems from the fact that the duty bound person is often unaware that they have been biased in their judgment.

The problem with this approach is that it assumes people are aware of the degree to which selective mental accessibility of thoughts, evidence and arguments can influence their professional judgements; however, if they are not aware, then

[403] Moore, Tanlu and Bazweman, above n 355.

conscious attempts to increase objectivity would fail to correct for biases in judgment.[404]

There has been a substantial amount of research on the psychology of COIs. The literature suggests that even though professionals may be asked to make a neutral judgment, they are unable to remove themselves from a partisan role.[405] The research also suggests that self-interested motivations are automatically processed (effortless and unconscious) whereas professional responsibility motivations are invoked through controlling processes (effortful and analytical).[406] There is evidence to suggest that duty bound persons faced with a COI situation may simply be unable to act in a manner that does not serve their own self-interest. Legal sanctions and penalties therefore represent limited deterrents.

6.6.2 Disclosure

Disclosure is seen as the least intrusive legal mechanism from a policymaker's point of view.[407] Disclosure requires that the duty bound person reveals the nature of the COI and how the duty bound person will be enriched or benefited. Cain, Loewenstein and Moore suggest that disclosure promises to the duty bound person 'minimal disruption from the status quo; it does not require professionals to sever financial relationships or change how they get paid.'[408] For the duty owed person, disclosure supposedly arms them with the knowledge that the duty bound person may receive a benefit and therefore they need to look after their own interests.[409]

In the Arrow Asset case, the court discussed disclosure in the context of fiduciary duties. Justice McDougall commented that: '[I]n some cases what is *prima facie* a breach of the fiduciary duty not to make a profit may be cured by adequate

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[404] Ibid.
[405] Ibid.
[406] Moore and Loewenstein, above n 353.
[407] Daylian Cain, George Loewenstein and Don A Moore, 'Coming Clean but Playing Dirtier: The Shortcomings of Disclosure as a Solution to Conflicts of Interest' in Don Moore, George Loewenstein, Daylian Cain and Max Bazerman (eds) *Conflicts of Interest* (Cambridge University Press, 2005) 104.
[408] Ibid, 108.
[409] Moore and Loewenstein, above n 353.

disclosure.'[410] The Court further questioned the meaning of 'adequate disclosure' and outlined the criteria for determining it.

> The first step is to identify those to whom the "proper disclosure" is required to be made. The second is to consider, by reference to the specific duty and the particular facts of the case, what it is that should be disclosed. That exercise is to be undertaken bearing in mind that the question is not whether there is a duty to disclose but, rather, whether such disclosure as has been made negates an existing breach of duty.[411]

However, Cain, Loewenstein and Moore, in researching the effects of disclosure in COI situations, found that: 'advisors give more biased advice after disclosing that they have a conflict of interest.'[412] Cain, Loewenstein and Moore suggest that strategic exaggeration and moral licensing are two reasons why disclosure may actually compound the problem.[413]

The Queensland Government, in an effort to protect MOD lot buyers from unscrupulous developer practises, requires developers (as sellers) to disclose (via a statement) certain prescribed matters to potential buyers.[414] A developer must, for example, disclose the terms and conditions of all service contracts to be entered into by the body corporate upon a scheme's registration. The disclosure regime is rigorous in Queensland and appears to be based on the ideology that disclosure equates to informed consent. The problems noted with these types of disclosure statements are that:

1. often the statements are not read or understood by the buyer;
2. often the statements are not properly reviewed by the buyer's lawyer (due to either cost issues or lack of understanding by the lawyer, or more often the conveyancer);
3. the consequences of the arrangements being put in place are not appreciated at the contract signing stage.

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[410] *Community Association DP No 270180 v Arrow Asset Management Pty Ltd [2007] NSWSC 527,* 235.
[411] Ibid, 236.
[412] Daylian Cain, George Loewenstein and Don A Moore, 'Coming Clean but Playing Dirtier: The Shortcomings of Disclosure as a Solution to Conflicts of Interest' in Don Moore, George Loewenstein, Daylian Cain and Max Bazerman (eds) *Conflicts of Interest* (Cambridge University Press, 2005) 104, 116.
[413] Ibid.
[414] Chapter 5 of this dissertation, outlines the disclosure requirements.

If owners are not properly informed about the potential consequences that might arise from arrangements established by the developer during a MODs transition phase and also the potential for a COI, the effectiveness of this legal mechanism has to be questioned.

The harm caused to bodies corporate and lot owners due to these types of COI can be significant and long lasting. For the body corporate governance system to operate effectively, developers need to govern responsibly and avoid all COIs. The COIs that have been highlighted in this study are insidious and cause problems for the body corporate. Responsible governance in this context requires mechanisms that are more efficient and effective than penalties and disclosures. A review of the legal parameters and strategies implemented in other jurisdictions may provide some insight into ways in which COIs could be combated in the Australian context.

6.7 Governance Quality

Although the body corporate operates within a governance system, effective outcomes for schemes are not automatically guaranteed.[415] While legislation provides a governance framework for schemes, it does not necessarily follow that the legislation aids in the betterment or production of well governed schemes. The governance quality achieved by any organisation is highly dependent on the standards imposed by those controlling (governing) the organisation or, the standards imposed by a regulatory authority. The purpose of this section of the chapter is to examine whether developers should be required to promote good (best) governance practices when controlling the body corporate and, if so, what common practices undermine good governance.

Although good governance standards and codes have been developed across jurisdictions and industries and the merits of good governance have been discussed, the literature is somewhat lacking in research examining governance quality as a concept and its impact on governance systems. Although not explicit in many definitions of 'governance', it appears implicit that good governance is embedded in the governance construct. The 'directing and controlling' that is apparent in nearly all

[415] Nicole Johnston and Eric Too, 'Multi-owned properties in Australia: a governance typology of issues and outcomes' (2015) 8(4) *International Journal of Housing Markets and Analysis* 451.

definitions proposed for this concept seems to indicate that the direction is positive and aligns with functional outcomes for the organisation. Even if an argument is raised that contradicts this assumption, it is clear that when a controller of a governance system is responsible (due to the powers (duties) assigned), the direction has to be positive in order to provide functional outcomes. It is therefore arguable that developers in the MOD context, when either promoting a scheme or acting on behalf of the body corporate, should promote good governance.

In order to achieve effective scheme outcomes: developers need to be aware of their governance responsibility; developers need to avoid COI situations; and good governance standards not only need to be imposed, they also need to be met.[416]

As yet, no governance metric, such as a ratings system or index, designed to gauge MOD body corporate governance quality, has been developed. Although many rating schemes have been developed and used in the evaluation of corporate entities (for example, Corporate Governance Quotient (CGQ) and Governance Metric International (GMI)) there has been much criticism about the reliability of these schemes and whether they accurately measure quality.[417] It is therefore difficult to apply or modify these measures to a body corporate setting.

However, consideration could be given to common governance dimensions and principles that encourage the implementation of good governance practices. These dimensions and principles have been advocated in the literature, practice guides and codes. Shared dimensions of these 'good governance principles' can provide a lens in which to assess the quality of governance in MODs.

In a study by Ruhanen et al, 53 articles relating to political and corporate governance were analysed in order to identify dimensions of governance. The top ten dimensions identified are: accountability, transparency, involvement, structure, effectiveness, power, (de)centralisation, shareholder rights, knowledge management and legitimacy.[418] Similar dimensions were highlighted by Grindle who considered good

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[416] Ruhanen et al, above n 280.

[417] Gerhard Schnyder, 'Measuring Corporate Governance: Lessons from the 'Bundles Approach' (2012) Centre for Business Research, University of Cambridge, Working Paper No. 438.

[418] Ruhanen et al, above n 280, 9.

governance in political settings.[419] Many of these dimensions have been incorporated into the development of governance standards for publicly listed companies in Australia, and other jurisdictions, in order to encourage and promote good governance outcomes.[420]

In Australia, eight central principles and 29 recommendations have been developed to promote good governance in companies. These include: laying solid foundations for management and oversight (ensuring management is monitored and evaluated); structuring the board to add value (ensuring board composition, skill and commitment to discharge duties); acting ethically and responsibly; safeguarding integrity in reporting (ensuring processes are in place that independently verify and safeguard the integrity of reporting); respecting the rights of security holders (distributing information and facilitating their right to vote); recognising and managing risk (establishing a risk management framework and reviewing the framework); and remunerating fairly and responsibly (sufficient pay to attract high quality executives).[421]

It is acknowledged by the Australian Stock Exchange (ASX) that these principles and recommendations are not exhaustive but are reflective of good corporate governance standard and can be modified to meet the needs of non-listed entities.[422] Although the body corporate is not a company, the rationale behind most of these principles and recommendations can be taken into consideration, in conjunction with other identified principles, when evaluating the quality of governance in a MOD setting.

The Foundation for Community Association Research in the United States has developed best practice governance guides for bodies corporate (known as homeowner associations). Although a simple adoption of these guides would not be feasible, due to regulatory differences in the structuring of MODs across jurisdictions, the principles underlying these guides represent a valuable reference point. Six

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[419] Merilee Grindle, 'Good Enough Governance Revisited' (2007) 25(5) *Development Policy Review* 553, 556-557.
[420] ASX Corporate Governance Council – Corporate Governance Principles and Recommendations, 3rd edition, retrieved 10 October 2016 http://www.asx.com.au/documents/asx-compliance/cgc-principles-and-recommendations-3rd-edn.pdf
[421] Ibid.
[422] Ibid.

general principles have been identified to enhance governance in the transition phase. Table 6.3 presents these principles and a general translation of these principles into the Australian context. A clarifying statement has also been presented for each guideline, highlighting the underlying concept.

Table 6.3: Adapting the USA's 'Best Practice' Guide for Bodies Corporate in the Transition Phase

Underlying Guideline Rationale	Foundation for Community Association Research - Best Practice Guidelines[423]	Translation into the Australian context
• In the USA, the developer prepares: articles of association; the declaration of covenants, conditions, and restrictions; by-laws; and initial scheme budgets (collectively the governing documents) • In new schemes, developers need to ensure that the vision (from a design and development perspective) is realised • Sufficient control needs to be granted to the developer in order to fulfil the vision as represented to lot owners and in accordance with governmental requirements and approvals	• Draft governing documents that focus on the control of development and sales and not control of the board	• Establish a framework (implemented by the developer or as a legal requirement) that allows the developers to control design guidelines and approval processes until project completion • Implement restriction on body corporate control • The developer in Australia is not dissimilar to the developer in the USA in relation to the level of control exercised in structuring scheme governance
• Decisions made by developers must ensure that the scheme, post transition, is operational and functional	• Create governing documents that enable rather than impede the business and financial management of the association	• Establish a framework that enables rather than impedes the future operations of the body corporate
• Procedures should be implemented to allow owners to have a say in decisions that impact the governance of their scheme • Leadership and a sense of community can be enhanced by early owner involvement	• Create a governance structure that encourages involvement by owners and other residents	• Create a governance structure that encourages involvement by owners and other residents
• A transition committee (nominated or interested buyer / owners) involved in early governance decision making may assist in enhancing leadership, scheme knowledge, transparency and accountability from the outset	• Create a transition team in the governance documents	• Establishment of a transition team (implemented by the developer or as a legal requirement) that includes a future owners' representative committee
• Disputes arise in the transition phase between developers and lot owners (or other stakeholders) • An internal procedure may assist in the early resolution of disputes	• Include alternative dispute resolution approaches in the governing documents	• Include procedures for internal alternative dispute resolution approaches (aside from existing mechanisms in the legislation
• A schedule is required in order for the lot owners to prepare for transition. Lot owners need to know when developer control has ended, when the transition is complete and when they assume independent control	• Establish reasonable schedules for developer turnover (of control) or comply with regulatory requirements	• Provide a schedule for developer transition (exit from scheme)

[423] Foundation for Community Association Research, 'Transition' No 7, 2003 1, 16-17.

Although these principles may be a good starting point in the development of a model of Australian MOD good governance, they are not sufficiently comprehensive, nor do they have sufficient flexibility to dovetail with the legislative frameworks. Any attempt to produce a comprehensive set of strong governance standards needs to recognise both sources of law (legislative and general law), jurisdictional variability and the governance dimensions outlined above. Although it is not the purpose of this dissertation to develop a comprehensive set of criteria that can be used to evaluate MOD governance quality, a good governance model for MODs in transition has been developed and is outlined in Chapter 7. It is beneficial in this section however, to recognise some key practices that have been identified by interviewees as undermining good MOD governance. These practices have been incorporated into the good governance model outlined in Chapter 7.

Drawing on the challenges for schemes highlighted by interviewees, the following is a list of common practices that appear to undermine good MOD governance:

- The application of the accommodation module regulation for schemes in Queensland that are predominately residential;
- Long-term contractual arrangements (with service providers including managers) negotiated by developers;
- Contractual arrangements entered into by the developer during the transition phase that fail to ensure the terms and conditions are fair and reasonable;
- Underestimated initial budgets and levies;
- A developer and BCM negotiating negligible scheme initiation consultancy fees in exchange for agreeing a long term engagement of the BCM with the body corporate;
- By-laws that unfairly provide exclusive use of lots or provide continued developer control;
- AGMs held out of time;
- Proxies and POAs used during the transition phase;
- Delays or no document handover (from developer to unit owners) of building specifications and plans;

- Developer related entity arrangements (developer as BCM, leasing and licensing);
- Developer participation in an independent committee;
- Unpaid developer levies;
- Delay in rectifying building defects;
- The use of voting power to thwart legal action; and
- Underinsured schemes.

A substantial amount of power has been assigned to developers and through the duties imposed, they are responsible not only for the decisions made in governing a scheme in the transition phase, but also for governance quality. Unfortunately, common practices that undermine good governance outcomes and COI are endemic in MODs.

6.7.1 Governance Failures in Multi-owned Developments

The contribution of weak corporate governance to the failure of companies has received extensive attention in the media and academic literature 'because of its apparent importance for the economic health of corporations and society in general.'[424] Given that the property market and MODs also represent a significant economic contributor, it appears surprising that little attention has been directed to MOD governance failures. This might be partially attributable to the fact that bodies corporate, unlike companies, cannot become insolvent.[425] In any event, compromised governance practices in the body corporate system can have long lasting and devastating impacts on bodies corporate, lot owners and, by implication, the property market.

The concern is that there are systemic failures in the body corporate governance system due to:

1. the regulatory environment providing developers, in some circumstances, unbridled decision-making power during the transition phase;

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[424] Surendra Arjoon, 'Corporate Governance: An Ethical Perspective' (2005) *Journal of Business Ethics* 61, 343, 343.

[425] Companies are afforded a protective mechanism, limited liability whereas, bodies corporate have unlimited liability and lot owners are financially liable for expenses.

2. the way that many developers approach business decision making in a self-interested manner that fails to attach sufficient importance to their duties, obligations and responsibilities;
3. the prevalence of COIs in the transition phase; and
4. widely adopted practices that undermine good governance and effective outcomes for schemes.

These failures appear more problematic in the MOD context due to lot owner apathy. As one of the lawyer interviewees commented:

> I mean it's interesting you know, you can see this phase play out in every single building, where there is certain surprises and revelations and part of that is to do with the developer not telling owners, and part of that is general peoples' apathy and you know human nature, someone else is looking after it, so we don't have to worry about it. (8)

BCMs also reflected on the end result for lot owners:

> In general the only person left holding the can at the end of the day is the poor lot owner, who inherits the building that they know nothing about, have no control over, and legislation doesn't support their rights really as an owner. But that's the cold harsh reality. You're moving into a brand new strata scheme, you either do your homework on the developer or the entity that started it, there is no guarantees that you're going to get either, a) the product you bought, that's going to be in a working condition that you're happy to pay the money for, or you're going to suffer some sort of a loss or an issue with the way it's been structured. So the measures, the protection in place for the body corporate, are slim to non-existent. (14)

Lot owners also discussed the realities of living in a dysfunctional scheme and the efforts that need to be made to rectify the problems created during the transition phase.

> Because of the financial problems and you can see it's a long road, it's not going to be sorted out overnight. And a lot of it too, is the personal attacks, people have had substantial bullying, and there's been that ostracising from groups, depending on who you supported. It has been behaviour at its absolute worst. It is quite distressing, and even for myself. I mean I know it's an area I don't know about, and I've been lucky in my life-span that I actually don't mix with level of manipulation and lies and corruption, so

> I would never have realised that people could behave like this and could tell bare face lies …. I'm quite horrified about it all. But the major reason I moved to [development] is the community, and my partner and I don't have children, don't have school every day, so I don't care. Hate me. (30)

> So the community at the moment is quite divided, there's big struggles going on now… We're quite dysfunctional. I think we will, we're starting to get on top of it, I think we've identified what we need to do. By us taking ownership, by digging and poking, and standing up has made a difference. (21)

6.8 Conclusion

This chapter has drawn on the literature relating to governance, governance responsibility and COIs, findings from the formal interview phase of the study, and case law in order to examine: the extent to which developers are responsible for the governance decisions made while controlling the body corporate and; whether developers should be required to promote good (best) governance practices to enable scheme functionality and viability long-term.

The chapter provided a definition of governance responsibility in order to enable an assessment of the appropriateness of developer decision-making in the transition phase of MODs. The definition requires developers to govern in a manner consistent with promoting strong body corporate governance. The interview findings revealed the endemic nature of COI situations in MODs and how this undermines strong governance in bodies corporate due to developers frequently failing to attend adequately to their duties and obligations. Although developers are responsible for the governance of schemes, the financial benefits and associated opportunities that can be derived from the establishment of MODs appears too great, leading to an avoidance of their responsibilities. In turn, the quality of governance suffers, often leading to body corporate dysfunctionality.

The next chapter reflects upon the study's findings and considers the extent to which the research question posed has been answered. In addition, the study's contributions and limitations will be discussed, together with some suggestions for future research initiatives that can usefully build on the study reported herein.

CHAPTER 7: DISCUSSION AND CONCLUSION

7.1 Introduction

> *The law – including the law of property – recognizes that our fate is tied to the fate of others. Moreover, the law does not exist only to protect our interests; it exists also to promote liberty and justice. These goals cannot be realized unless we act in ways that respect the interests of others, as well as ourselves. For this reason, the core precepts of property law require owners to use their property in a manner that is consistent with the legitimate interests of others. These other-regarding obligations suggest that our moral obligations and our legal institutions are more closely related than one might think. The law is highly protective of the prerogatives of owners, but it also recognizes that ownership may impose vulnerabilities on others and limit the rights of owners when their actions impinge on the legitimate interests of others.*[426]

This quote by Joseph Singer resonates with this thesis. Although Singer is not writing specifically on property ownership in the multi-owned development (MOD) context, he is cognizant of the social relationships that exist in the property law system and how competing interests affect others interests. Striking an appropriate balance between the interests of the developer, as initial land owner and development visionary, and the interests of future lot owners remains a challenge in the MOD context. During a MOD's transition phase, lot owners constitute a highly vulnerable stakeholder group. It is during this phase that lot owners are beholden to the legislature, the courts and the degree to which the developer acts ethically in safeguarding the interests of the body corporate. My thesis is that laxity in the body corporate governance system has enabled developers of MODs to exert an inordinate amount of control and that this has, in turn, created an environment where, in the midst of widespread conflicts of interest (COIs), many developers have failed to adequately uphold their responsibility to owners. It is an unfortunate reality that a profoundly important factor contributing to the fate of a body corporate is the quality of the steps taken by the scheme's developer.

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[426] Joseph William Singer, '*The Edges of the Field: Lessons on the Obligations of Ownership*' (Beacon Press, 2000) 20.

This chapter concludes the thesis by providing a critical appraisal of its achievements. In the context of re-visiting the study's objectives and sub-objectives that were provided in Chapter 1, the first section outlines the study's contributions to both the literature and to the understanding of the MOD environment more broadly. The limitations of the study are then presented, followed by an overview of future research opportunities. Finally, a concluding commentary to the thesis is presented.

Many of the contributions described in this chapter take the form of conceptual models that succinctly capture some of the study's more significant findings. The advancement of these models is reflective of the grounded theory approach employed in the study. The iterative nature of the data collection process and analyses undertaken led to a review of literature pertinent to the findings. The coalescence of the literature and empirical findings has laid the basis for the promulgation of these conceptual models. While several key contributions are detailed below, it is believed that deployment of the grounded theory approach in the property, and more specifically, the MOD research context represents an important distinguishing facet of the study that has elucidated broad insights to other researchers working in this area.

7.2 Contributions to the Literature and Multi-owned Development Sector

Two broad objectives and five sub-objectives were initially developed and subsequently refined through the data analysis stages of the study. The extent to which these objectives and sub-objectives have been met is discussed in this section of the chapter.

7.2.1 Objective 1

To advance understanding of the extent to which developers are responsible for the governance decisions made while controlling the body corporate.

This research has contributed to the advancement of a conceptual model of 'governance responsibility', which can be used both in the MOD context and more broadly in other governance contexts. The theoretical and conceptual frameworks identified in the literature relating to the constructs of *governance* and *responsibility* underpin this model which, was depicted as Figure 6.1 in Chapter 6. This model's

development has enabled a working definition of *governance responsibility* to be employed in the thesis. In order to appraise developers' responsibility for governance decision-making in the transition phase, it was necessary to evaluate: (1) the legal duties imposed that inhibit the pursuit of self-interest and, (2) the ethical determinants that should aid in mitigating self-interested decision-making. These duties and ethical factors were evaluated against each of the roles that a developer can take on (e.g. manager, committee member) or will naturally assume (e.g. promoter, body corporate) during the transition phase.

In relation to the duties that inhibit the exercise of self-interest, the findings emanating from the document (legislative) analysis point to a deficiency of statutory duties imposed on developers when promoting a scheme. Queensland provides a 'reasonable care, skill and diligence in the best interests of the body corporate' duty in relation to the intention to engage service providers, only to the extent that the terms must be fair and reasonable. Although no other specific duties restraining self-interest are prescribed in the Queensland legislation, restrictions have been placed on the type of decisions that can be made when exercising a vote via proxies or powers of attorney. New South Wales legislation has limited statutory specific duties that attempt to restrain self-interest, but it does impose restrictions on some of the governance decisions that a developer can make throughout the transition phase (both as promoter and the body corporate). Victoria imposes an 'honesty and good faith' statutory duty on developers (as the body corporate) when exercising any rights under its Act. In the event that a developer takes on a committee position, each state imposes a 'best interest' type duty for committee members. This is a common law duty in New South Wales. In Queensland and Victoria, however, it is a duty prescribed by statute.

Although these duties assist in satisfying the core self-restraint criteria that lie at the heart of the governance responsibility model, it is the imposition of the equitable fiduciary duty and arguably the ethical underpinning of that duty that ultimately satisfies the criteria.

These observations provide support for the positing of the following propositions:

1. in a MOD's planning period, the developer, as promoter is responsible for the governance decisions made on behalf of the yet to be created body corporate; and
2. during the developer control period, the developer, acting as the promoter (up until the first meeting), body corporate and committee member (if applicable), is responsible for governance decisions made on behalf of the body corporate.

In the transition phase, developers are duty bound and ethically obligated to, not only use restraint when making governance decisions that serve its own interests but also, are answerable to the body corporate for decisions made.

From the above discussion, it is apparent that the study has provided a particular contribution to the understanding of developer governance responsibilities and therefore objective one has been fulfilled. It is also noteworthy that the model advanced can be used in the evaluation of any governance system, including corporate, municipal and non-profit. In any evaluation invoking this governance responsibility model, the duty-bound person (or agent) must be identified and the legal duties and ethical determinants need to be considered. These duties and ethical determinants must relate to the restraint of self-interest decision-making.

7.2.2 Objective 2

To advance understanding of the extent to which developers should be required to promote good (best) governance practices to facilitate long term scheme functionality and viability.

Governance is concerned with direction and control. Responsibility (for governance) is concerned with accountability. It is implicit that the focus in on favourable outcomes for the organisation being governed i.e., a MOD should be guided toward scheme functionality and viability. In a MOD's transition phase, the developer is both the controller of governance decision-making and the responsible party. In order to promote scheme functionality and viability, developers will need to make decisions that align with good governance practices. The 'accountability' element of the governance responsibility model dictates that the controlling party should provide the rationale for the choices made while governing. The inclusion of good governance

principles aligns with this component, requiring transparency and accountability. These core dimensions of governance were detailed in Chapter 6.

The governance responsibility conceptual model developed in the study and the literature relating governance dimensions and good governance principles have laid the foundation for the development of a good governance model. Aside from transparency and accountability, the governance dimensions of involvement, power (dilution) and knowledge management underpin the development of these good governance principles.

The study has contributed to advancing a model of good governance during a MOD's transition phase. The framework underlying the model, which is depicted in tabular form as Table 7.1 (pertaining to the planning period) and Table 7.2 (pertaining to the developer control period), has been structured whereby:

1. column 1 identifies the distinct developer governance responsibilities during the MOD planning phase (Table 7.1) and during the MOD developer control phase (Table 7.2);
2. column 2 provides examples of developer governance decisions that relate to the different governance responsibilities identified in column 1;
3. column 3 provides good governance principles that, in combination, represent a framework of good governance practice. These principles are designed to counter the potential for the type of problematical developer actions that can contribute to the type of scheme dysfunctionality that was commented upon by the study's interviewees.

As it is believed that no prior attempt has been made to provide a model of good governance principles in the MOD context, the model represented as Tables 7.1 and 7.2 should be viewed as a working model. It is believed that a potentially rich research opportunity lies in further advancing a more comprehensive good practice governance model, not only for the transition phase, but by also encompassing the post transition period.

Table 7.1: Good Governance in the Planning Period of Multi-owned Developments

Column 1 **Developer Governance Responsibilities**	*Column 2* **Examples of Developer Governance Decisions**	*Column 3* **Good Governance Principles for Developers Establishing a Multi-owned Development**
Establish sustainable financial structure	Open appropriate body corporate bank accounts Formulation of initial budgets	• Open an administration account to fund annually recurring expenditures • Open a sinking fund (to fund common property capital expenditures), even if not prescribed in the legislation • Formulate year 1 budgets • Formulate year 2 budgets (excluding warranties) • Both years 1 and 2 budgets should include notations regarding the methods used and assumptions made during budget formulation • For administrative budgets – the budget should be based on the reasonable operating costs associated with the scheme. A schedule of services (or maintenance plan) should be developed as a reference for the administrative budget • For sinking fund (capital expenditure) budgets – the budget should be based on a forecast report prepared by a professional quantity surveyor or other suitably qualified professional
Establish sustainable financial and maintenance structure	Preparation of sinking plan (capital expenditure budget)	• Sinking fund expenditure plans should be prepared by suitably qualified professionals in the planning phase • An amended report should be prepared upon completion of the scheme if the original report is prepared prior to the confirmation of all asset, equipment and infrastructure purchases • Sinking fund should be funded in accordance with the sinking fund expenditure plan
Establish fairness and equity in the by-laws	Preparation of bylaws	• Model rules should be used where possible • For schemes requiring tailored bylaws, the tailoring should only be made following due consideration given to the interests of all lots and residents • Exclusive use bylaws should clearly state the rationale behind the exclusivity (e.g. the design of the building creates a common property space where only one lot can access the common property) and should be used sparingly
Establish fairness and equity in lot liabilities and entitlements	Determination of lot entitlements and liabilities	• Lot liabilities and entitlements should be determined by a suitably qualified professional and implemented in accordance with these determinations • Notations regarding the calculation methodology and rationale should be provided to lot owners and the body corporate
Establish supportive stakeholder relationships	Engagement of body corporate manager (BCM)	• A suitably qualified professional should be engaged to assist with the initial structuring of the operational aspects of the body corporate (in the planning phase) • If appropriate for the scheme size, a BCM should be appointed from the date of scheme registration (developer control period) • The professional engaged to assist with the initial structuring should be unrelated and not affiliated with the appointed BCM • Any engagement of a BCM should be restricted to three years (or less if prescribed in the legislation) • Any engagement of a BCM should be carefully considered to ensure that the BCM is suitably qualified and appropriate for the specific scheme • At least 2 management proposals should be requested prior to any BCM appointment • Detailed information should be provided relating to the engagement of the BCM • The BCM should not be related or affiliated with the developer or any of its related entities

Column 1 **Developer Governance Responsibilities**	*Column 2* **Examples of Developer Governance Decisions**	*Column 3* **Good Governance Principles for Developers Establishing a Multi-owned Development**
Establish sustainable building management structure	Engagement of building / resident manager (including management rights businesses)	• For non-tourism (or other special purpose) based schemes, the management rights model should be avoided • Caretaking / letting agency arrangements should be capped to three years (or less if prescribed in the legislation) • A detailed schedule of duties and costs should be determined by a suitably qualified professional, in accordance with industry standards • Arrangements in staged / layered schemes, whereby one body corporate's caretaking costs offsets the costs of another body corporate, should be avoided • Caretaker, letting agent or resident managers should not be related or affiliated with the developer or its related entities
Establish infrastructure maintenance procedure	Engagement of supply contractors	• Arrangements whereby supply contractors agree to provide infrastructure or equipment to the developer for free, in exchange for non-negotiated contractual arrangement with the body corporate, should be avoided • Supply agreements should be limited to a term of less than three years (or less if prescribed in the legislation)
Establish a competitive supply structure	Negotiate leasing and licensing arrangements	• Leasing and licensing arrangements, where the developer causes the body corporate to enter into arrangements with associated or related developer entities, should be avoided • Arrangements whereby the developer retains a lot and leases the property to third parties, whereby the third party provides utility services to the exclusion of other providers, should be avoided
Establish protections from liability	Arrange insurances	• A valuation report should be prepared for insurance purposes • Insurance policies should align with the valuations report
Establish appropriate regulatory framework	Application of regulatory module (Queensland)	• The use of the accommodation module should be avoided for all non-tourism based MODs
Establish user-friendly and flexible guidelines	Prepare architectural / design guidelines	• Provide clear and unambiguous guidelines • Ensure sufficient suppliers in the market for maintenance or supply of innovative products which are required to be implemented
Establish user-friendly procedures	Shared facility agreements	• Ensure agreements are prepared by competent and skilled lawyers

Table 7.2: Good Governance in the Developer Control Period of Multi-owned Developments

Column 1 **Developer Governance Responsibilities**	*Column 2* **Examples of Developer Governance Decisions**	*Column 3* **Good Governance Principles for Developers Establishing a Multi-owned Development**
Establish transparent procedures	Transparency of procedures to be documented for the first meeting	• Invite contracted buyers to attend the first meeting • Ensure decisions made are beneficial and are in the best interests of the body corporate • In the states that do not require negotiated arrangements to be disclosed, ensure sufficient information is provided to the contracted buyers
Establish owner involvement and transparent procedures	Promotion of owner attendance at the first annual general meeting (AGM)	• Use of proxies and powers of attorney should be avoided • All owners should be invited and encouraged to attend the first AGM and participate in the decision-making process
Establish record keeping protocols	Preparation of rolls and registers (for first AGM)	• Ensure rolls and register accord with the legislative requirements • Ensure accuracy of information • All records to be submitted to the body corporate at the first AGM, or in a timely manner
Establish transparent procedures	Appointment of auditor – at first AGM	• Request at least two auditor quotes from separate companies that are not affiliated with the BCM
Establish sustainable maintenance structure	Submission of development documents	• Ensure all development documents relating to the scheme are delivered to the body corporate at the first AGM • Ensure documents are comprehensive and contain all relevant information for the ongoing maintenance of the scheme • Ensure documents are well organised
Establish sustainable financial structure	Budget performance review	• Budgets should accurately reflect the true costs of running the body corporate • Recalibrate budgets if needed expenditure differs from budgeted expenditure
Facilitate transition and independence	Passing of resolution decisions (New South Wales and Queensland) (for first AGM)	• Decisions that change the legislatively prescribed resolution should be avoided

The good governance framework captured in the final columns of Tables 7.1 and 7.2 comprises a set of principles that align to both governance decisions commonly made in the transition phase of a MOD and also the governance responsibilities relating to these decisions. If attempting to extend this model further, consideration could be given to owner involvement in the decision-making process. Formation of an owner representative committee during the planning phase would appear consistent with promoting more transparent decision-making and also lessening the likelihood of developers acting in a self-interested manner when confronting COIs.

Through the developer good governance framework advanced in this section and the high degree of novelty apparent in the documented structure used to formulate the framework, it is apparent that the study has substantively fulfilled objective 2.

7.2.3 Sub-objective 1

Identify and examine the legal provisions supporting the governance framework in MODs.

As widely-noted throughout this thesis, the Australian state based legislation can be seen as constituting a governance framework for bodies corporate. A detailed cross-jurisdictional (New South Wales, Queensland and Victoria) analysis of the legislative provisions regulating developer governance decision-making in the transition phase was provided in Chapter 5. This analysis represents a contribution to the literature, as no similar analysis with a focus on the MOD transition phased has been identified.

The cross-jurisdictional analysis has also facilitated a comparative examination. As highlighted in Chapter 5, the identification of the relevant legislative provisions that underpin the developers' decision-making power also identified the mandatory and discretionary nature of each associated provision. Table 7.3 summarises and structures the developer governance decisions (based on the provisions outlined in Chapter 5), classifying each decision according to whether its implementation is mandated (must be adhered to) or discretionary (may be adhered to) in the legislation. This classification is important as it identifies the decisions that the developer must make. That is, what 'necessary' decisions must be made in order for the scheme to function from inception. However, it should be noted that for some of the discretionary undertakings, if a decision to implement is made

by the developer, prescriptive mandated provisions come into effect. For example, the decision to appoint a BCM is a discretionary decision in each of the jurisdictions. However, if a developer appoints a BCM, there are specific requirements that must be followed.

Table 7.3: Mandatory (M) and Discretionary (D) Developer Governance Decisions in the Transition Phase[427]

Transition Phase	Developer Governance Decisions	New South Wales	Queensland	Victoria
Planning	Preparation of scheme specific (tailored) bylaws[428]	D	D	D
	Determination of lot entitlements and lot liabilities	M	M	M
	Obtaining insurance	M	M	M
	Negotiating BCM agreements	D	D	D
	Negotiating caretaker and / or letting agency agreements	D	D	D
	Negotiating other service provider agreements	D	D	D
	Negotiating leases and licences	D	D	D
	Preparation of sinking fund plan	N/R	N/R	N/R
	Determining expected annual contribution to be paid (initial budgets)	N/R	M	N/R
	Determining applicable regulation module	N/A	M	N/A
	Preparing architectural and / or landscaping guidelines	D	D	N/R
	Preparing shared facility agreement (if applicable)	N/R	D	N/R

[427] N/A denotes no applicable legislative provision (the requirement may be specific to a jurisdiction). N/R denotes that in the relevant State, there is no specific provisions regulating this governance decision. These options were distinguished, as there are decisions made by developers that do not have a corresponding provision in the regulation.

[428] Developers in each jurisdiction have the discretion to include tailored bylaws. In the event that a developer does not make a determination about the use of the bylaws for the scheme, the model bylaws will apply.

Transition Phase	Developer Governance Decisions	New South Wales	Queensland	Victoria
Developer Control	Calling and holding first meeting of the body corporate	D	D	N/R
	Calling and holding the first AGM of the body corporate	M	M	M
	Preparing registers	N/A	N/A	M
	Referring auditor for consideration at the AGM	M	M	N/R
	Preparing inventory of assets	N/R	M	N/R
	Providing service contracts	D	D	M
	Preparing leases and licences for consideration at AGM	D	D	D
	Preparing / delivering sinking fund plan	M	M	M/D[429]
	Developer document handover	M	M	M

[429] It is mandatory to prepare a sinking (maintenance) fund plan for prescribed schemes only.

As identified in Table 7.3, in order to comply with the legislation, developers establishing a scheme in New South Wales, Queensland and Victoria *must* make six, nine and six or seven (out of 21 identified provisions) governance decisions respectively. The majority of the governance decisions made are either discretionary in nature or are not specifically regulated. The types of decisions that are mandatory relate to:

1. the planning period - the determination of lot entitlements and lot liabilities and obtaining insurance for a scheme. The determination of lot entitlements and lot liabilities is a 'necessary' decision, as this determination provides, inter alia, each lot's share in the common property and therefore the property rights that attach. It is important for purchasers to know what share of the common property attaches to their respective lots, as this contributes to the determination of their lot value. Obtaining insurance for the scheme benefits the developers as much as the new incoming lot owners. The insurance requirement minimises the risks for all parties involved.
2. the developer control period - the calling and holding of the first AGM. Most of the mandatory decisions in this period relate to the AGM. The preparation of, and delivery of, a sinking fund plan, preparing specific registers, referring an auditor for consideration and the handing over of development documents are all items for consideration at the first AGM. These matters become developer decisions, as the developer is the only entity in control at this stage and therefore must propose motions or deliver items for consideration at the AGM. The most crucial mandated decisions in this period are: (1) the calling and holding of the first AGM, as it signals the transfer of control from the developer to the collective of owners and, (2) the delivery of development documents. These documents are vital to a scheme from an ongoing maintenance perspective.

From a legislative perspective, there are limited provisions requiring developers to make decisions regarding a scheme's governance. However, it is the discretionary

based decisions that developers make that appear most problematical from a COI perspective.

The cross-jurisdictional analysis also examined the regulatory approaches relating to developer governance decision-making in the transition phase. Although no singular approach regulated all aspects of developer governance decision-making, three distinct approaches were evident. The New South Wales framework tends to support a more prohibitive or controlled approach. The legislation is used as a mechanism to curb undesirable practices that can be endemic in the transition phase. The Queensland approach is more disclosure oriented, particularly in the planning phase and is more facilitative due to its highlighting of governance decisions that are customarily made. In Victoria, the regulatory approach is grounded in an overarching duty. This statutory duty places the onus on the developer to act ethically when making decisions in the transition phase. The duty is, arguably, limited to decisions made during the developer control period. Developers in Victoria have the most unfettered discretion when making governance decisions during the transition phase.

Table 7.4 summarises the legislative approaches regulating developer governance decision-making in each of the reviewed jurisdictions. The key legislative provisions relating to the identified regulatory approaches are outlined and the strengths and weaknesses of each approach are also outlined. As no such prior cross-jurisdictional integration and commentary on the regulatory approaches impacting developer governance decision making has been attempted in the literature, the information encapsulated in Table 7.4 can be viewed as constituting a set of key contributions achieved by this study.

Table 7.4: Cross-jurisdictional Regulations Impacting on Developer Governance Decision-making

Jurisdiction	Predominant Regulatory Approach	Key Legislative Provisions	Strengths	Weaknesses
New South Wales	• Regulated through imposition of *prohibitions*	• Service agreements (including BCM, caretaker and other service providers) entered into by the developer in the control period expire at first AGM • Proxies and powers of attorney granted pursuant to a term of the sales contract is prohibited	• Sets clear boundaries for developers entering into agreements • Has a high 'consumer protection' orientation • Creates an environment in which service providers (including BCMs and caretakers) have limited time to showcase the standard of services – may act as an incentive to produce higher quality services	• The prohibitions are not all encompassing (geared toward prohibiting long term service agreements and the use of proxies and powers of attorney) • Developers can present longer term contracts for consideration at the first AGM and can influence the vote • Does not provide purchasers an opportunity to seek advice regarding initial arrangements before entering into the contract of sale
Queensland	• Regulated through pre-contractual *disclosure* statements	Pre-contractual disclosure statement must include information relating to: • Expected annual contribution per lot • Terms and estimated costs associated with the engagement of service providers • Terms of letting agency authorisation • Details of assets to be acquired • Identification of the applicable regulation module • Lot entitlements and lot liabilities and principle used • By-laws	• Purchasers have an opportunity to acquire information relating to the governance structure • Purchasers can make an informed decision about the entry into the contract of sale • Provides evidence of the promises / representations made by the developer	• Does not prevent implementation of inappropriate arrangements • Burden is placed on purchasers to determine the impacts of the disclosed information • Buyers and conveyancers often lack experience and knowledge about the consequences of problematical MOD practices • Disclosures are not all encompassing (not everything is being disclosed) • Underlying rationale is that purchasers are consenting to the arrangements disclosed • Inaccuracies in the disclosure statement may not provide a right to terminate • Issues relating to the disclosure may only arise post settlement and therefore termination rights are ineffective • No requirement to disclose conflicts of interest

Victoria	• Regulated through the imposition of *legal duties*	The duty requires that the developer acts honestly and in good faith and with due care and diligence in the interests of the body corporate when exercising rights under the Act	• Codifies general law duties • Provides overarching ethical base for developer decision-making • Directs attention to the body corporate as the central stakeholder	• Does not set specific boundaries or standards in relation to decision-making • Does not provide an opportunity for purchasers to acquire any information about arrangements to be implemented (purchasers buying blind) • The duty is open to interpretation

The Prohibition - Controlled Approach (New South Wales): The prohibitions in New South Wales are not all encompassing. The legislation prohibits the granting of proxies and powers of attorney, by buyers to developers, as a condition of the sales contract. This prohibition serves to thwart continued voting control by the developer beyond the end of the statutory prescribed developer control period. This is an important prohibition in the New South Wales legislation, because the developer control period (effectively) ends earlier than the other reviewed states and therefore any restrictions placed on the developer in this period may end shortly after the registration of the scheme. That is, when the threshold of one-third of the aggregated entitlements is attributed to lots not owned by the developer, the developer control period ends. However, the developer may hold the majority of lots and continue to be influential until ownership diminishes to a level where voting power is less than the required resolution (for example, 50 per cent). The prohibition in relation to proxies and powers of attorney aids in minimising developer control beyond the end of the developer control period.

The legislature has enabled arrangements to be implemented in order for the body corporate to function effectively upon its creation. The developer therefore has been provided with scope to implement management and service contract arrangements up until the first AGM. Any arrangement where the developer has executed an agreement with a third party prior to or after the inception of the scheme is restricted to a term not beyond the first AGM.

The rationale for such prohibitions is commendable, in so far as the parliament has recognised the problems that can manifest in schemes where developers cause the body corporate to enter into long-term contractual arrangements, or use proxies and powers of attorney to control governance. However, there are some flaws in this approach. The developer could place longer-term contracts on the agenda for consideration at the first AGM. The lack of knowledge and apathy of most new owners provides the ultimate environment to effectively roll over agreements. New owners are generally reluctant to seek alternative service providers and fee proposals for consideration at the first AGM. The developer could also hold substantial voting power at this meeting and therefore influence the vote to engage contractors for longer periods.

Although the rationale for this approach is to prevent developers making long-term agreements that may be inappropriate for a scheme, the reality is that developers can use alternative means to fulfil promises made to third party service providers. It would be potentially insightful if research could be undertaken to determine at what point lot owners become more proactive in body corporate decision-making. Such research could assist in determining an appropriate time frame for the restriction of developer-led agreements.

The Disclosure Approach (Queensland): The pre-contractual disclosure statement that is required to be included in off-the-plan sales contracts in Queensland provides consumers with information about the governance arrangements *to be* implemented. Of the states reviewed, Queensland is the only one that requires the developer to provide comprehensive governance arrangements disclosure to potential buyers. This disclosure forms part of the contract and therefore, upon the signing of the contract, it is implicit that the buyer consents to the arrangements disclosed. According to Krrebs, 'barring fraud or misleading statements, the purchaser who has been informed and thereafter signs a purchaser agreement is presumed to have determined that the contract is commercially fair and reasonable.'[430]

A particular issue warranting discussion relates to consent. From a legal perspective, and prima facie, the signing of a contract constitutes consent to the terms and the conditions of the contract, including any disclosures that form part of the contract. However, the effectiveness of disclosures is diminished if the consent is not informed consent. Concerns were raised by both interviewees and other scholars in the literature suggesting that buyers may not read or obtain advice relating to disclosures. Further, concerns were raised about the aptitude of conveyancers in providing appropriate advice to buyers in relation to disclosures. Legal advisers, including conveyancers, need to not only understand the disclosed arrangements and advise on those arrangements; they also need to understand the consequences of the arrangements in order to appropriately advise a client. The cost of obtaining this advice however, is more costly than the legal costs associated with the transfer of title. Buyers may be reluctant to pay for advice relating to the disclosed information.

[430] Krrebs above n 268, 329.

Interviewees in this study suggested that this problem is compounded when there is high demand for properties in the market, as in this circumstance, some buyers will take the risk of not obtaining advice in order to secure a property.

Unlike jurisdictions that adopt a prohibition – controlled approach, States like Queensland place a greater caveat emptor burden on the buyer. Furthermore, it is nigh on impossible for an inexperienced buyer to verify whether the terms and conditions of service contracts are fair and reasonable when the MOD is yet to be constructed. I suggest that only an experienced consultant could evaluate the appropriateness of the terms and conditions of service contracts prior to the construction of a scheme.

A further issue relating to consent concerns the party to which consent is being provided. Consent in relation to the governance arrangements disclosed, is consent as a member of the yet to be created body corporate. The consent is therefore, collective consent. One buyer cannot negotiate in relation to the arrangement disclosed if other buyers have consented to the arrangements. It is a disclosure regime based on a 'take it or leave it' philosophy. A buyer is effectively acting as a future member of the body corporate in relation to the disclosure, not as an individual lot owner.

As already alluded to, disclosures are not all encompassing. Disclosures are based on fulfilling the stated requirements provided for in the legislation. The legislation is prescriptive requiring developers to identify, state or include prescribed information. The COI situations identified in this dissertation are rarely disclosed because the associations underpinning the COIs are not required to be disclosed.

Another facet of a disclosure regime is that disclosures are often viewed as a panacea for COIs. The rationale is that if a developer discloses a COI then, the other party is aware of the conflicted interest and can then take appropriate steps based on that awareness. I strongly contend that disclosure is not a panacea for abating COIs. As highlighted in Chapter 6, disclosure does not require the developer to sever (inappropriate) relationships or to stop the flow of any benefits. I further disagree with comments made in the Arrow Asset Management case and by others who have asserted that disclosure is a cure for what would otherwise be a breach of a fiduciary

duty. The fiduciary duty imposes a high ethically based standard on those who owe duties to more vulnerable parties. The fiduciary duty is applied to relationships in order to prevent self-interest being inappropriately exercised. There should be no exemption to this rule.

Although Queensland's regulatory approach to disclose affords buyers with the opportunity to be more informed about the governance arrangements being implemented, the disclosures are not all encompassing. Undesirable practices that negatively impact a scheme are not prohibited and therefore this regulatory approach is not the most effective safeguard to protect MOD consumers.

The Duty Approach (Victoria): The regulatory approach in Victoria is based on the imposition of a statutory duty. The duty requires the developer to act honestly and in good faith with due care and diligence in the interests of the [body corporate] when exercising rights under the Act.[431] Although the duty provides an ethical base for decision-making and directs attention to the best interests of the body corporate, the duty is not prescriptive and therefore is subject to interpretation. A duty approach to regulation does not provide specific standards that developers must adhere to when acting on behalf of the body corporate. Further, this approach does not require the disclosure of information to buyers. Consumers buying lots off-the-plan in Victoria, are buying blind and are exposing themselves to potential risk (particularly financial risk).

The findings of this study support the proposition that the New South Wales and Victoria legislatures have not appreciated the enormous control that developers, as promoters, wield in relation to governance and the consequences that can arise for bodies corporate and lot owners during the life of an MOD. Unfortunately, the Queensland legislature has not appreciated the ineffectiveness of the disclosure regime in thwarting unsavoury practices.

The discussion in this section has highlighted the extensive degree to which this study has identified and critically examined the legal provisions supporting the MOD governance framework. In light of this, it appears that the study's sub-objective 1 has

[431] *Owners Corporations Act 2006* (Vic) s 68(1).

been substantively fulfilled. The essence of the study's contribution in this regard is captured in Table 7.4.

7.2.4 Sub-objective 2

Develop a typology of COIs arising during the transition phase of MODs.

It has been found that even in a system where developers have governance responsibilities, and at the heart of these responsibilities is the need to act in a manner that restrains self-interest pursuit, COIs can be endemic. The study's findings have contributed to the literature by not only identifying COI situations arising during the transition phase but also through the advancement of a COI typology. Figure 7.1 presents in diagrammatical form a hierarchical typology of developer COIs arising during the MOD transition phase.

As highlighted in Chapter 6, there are various roles that a developer takes on and assumes over the course of the transition phase: promoter, body corporate, manager, and committee member. These roles are not necessarily held independently of each other and a developer may, at any one time, act in multiple capacities. The role of the promoter, for example, commences when the first governance decision is made in the planning period and continues into the developer control period, until the first AGM is concluded. Upon the registration of a scheme and creation of its body corporate, the developer, as the owner of all the lots in the scheme, acts as the body corporate but also continues in the role of promoter. Developers can also be manager(s) (both or either BCM or resident manager) from the date of registration until the expiry of the appointment and similarly, may act as a committee member from the end of the first AGM.[432] In all jurisdictions, however, the developer is prohibited from being the sole committee member and therefore control and decision-making power is limited.

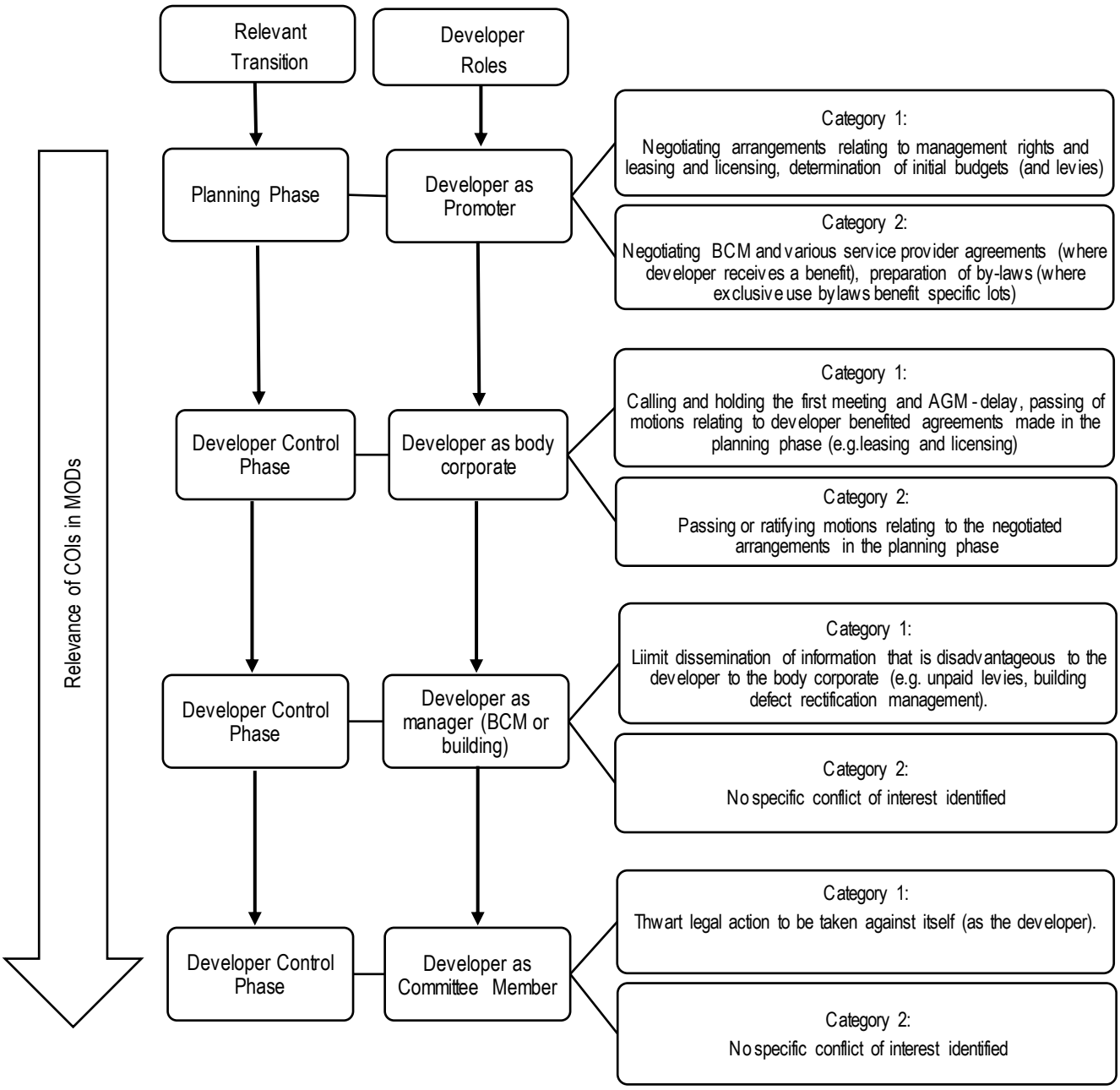
Chapter 6 categorised COIs as: (1) situations where the developer has difficulty discharging its duty and, (2) situations where both the developer has difficulty discharging its duty and whereby the interests of third parties are promoted over those of the duty-owed entity. This categorisation aligns with Carson's definition of

[432] Queensland restrictions prevent a person being both a manager and a voting committee member. Managers are automatically non-voting committee members, however.

COIs. The hierarchical typology outlined in Figure 7.1 highlights these categories based on each of the developer roles during the transition phase. The model is hierarchically presented to highlight the manner in which each COI can be traced back to one or more developer roles. It has been found that the promoter role provides the most fertile arena for developers exploiting COIs. The second most fertile arena is apparent when the developer is acting as the body corporate, followed by acting as manager and, finally, acting as committee member.

As no prior attempt has been made to develop such a typology, this aspect of the study has a high degree of novelty. This signifies that sub-objective 2 has been met.

Figure 7.1: Hierarchical Typology of Developer Conflicts of Interest Arising During Multi-owned Development Transition Phase



Reflecting on the critical legal events concept originally advanced by Blandy, Dixon and Dupuis, and now modified by this dissertation, it appears the majority of the critical legal events occur in the planning period of a MOD, when the developer is the promoter of the scheme. The negotiation of governance and management arrangements, entry into off-the-plan contracts by buyers, the registration of the plan of subdivision and creation of the body corporate and the initial meeting of the body corporate are all critical legal events that take place when the developer is the promoter. It is also the period in which the future lot owners (as buyers) possess only equitable rights, despite the fact that they have legitimate interests in the property and are the most vulnerable party. It is this vulnerability that the courts have determined needs a level of protection and have identified the relationship between the developer and the, yet to be created, body corporate as fiduciary.

7.2.5 Sub-objective 3

Appraise the manner, and extent to which, developers exploit COI opportunities.

It appears to be in larger MODs that have more complex infrastructure and commercially based activities that there is a greater susceptibility for developers to exploit COIs. This study has identified the types of COIs commonly seen in MODs and their connectedness to distinct roles of the developer. Many of the COI situations identified relate to the developer maximising profitability from the sale of lots (e.g. underestimated budgets, exclusive use bylaws) or deriving some other forms of financial benefit (e.g. no or low BCM consultation fees, sale of management rights, related entity leasing). There are multiple ways that developers can profit or receive some other form of benefit. Reflecting on Anderson's comments, outlined in Chapter 6, the legal environment has provided developers with discretionary power to implement a range of governance decisions that are not necessary for the initial operation of a scheme. This discretion, along with the trust position that developers hold, has created the ultimate environment for COI exploitation. The complexity of this property type, the apathy of lot owners and the lack of awareness with respect to the problematic nature of COIs by professionals involved in the conveyance of MOD lots, has further contributed to the prevalence and insidious nature of COI exploitation.

The findings of the study provide insights into the manner in which several COI exploitations have become common practice during the transition phase of MOD. Practices such as the BCM providing establishment consultancy services for no fee or a low fee in exchange for a contract with the body corporate appear to have become widespread. BCMs allowing developers to defer the payment of levies until settlement of each lot (irrespective of whether they are overdue) also appears to be a common practice. The supply of utility services whereby infrastructure is provided at no cost in exchange for a contract with the body corporate also appears to have become commonplace. It is difficult to determine whether stakeholders, and developers in particular, are aware and think through the adverse impacts of their decisions. Although many BCMs interviewed commented on the after effects of developer decisions made during the transition phase, they appeared to feel that the focus for change revolves more around lot owners and their ability to be informed, not on the behaviour of developers. Furthermore, the legislation regulating MODs appears to be used as a benchmark for what can and cannot be done in a scheme. Although some developer and BCM interviewees commented and acknowledged that they owe fiduciary duties, there appeared to be little understanding regarding the nature of this duty.

The dependency on the fiduciary duty to combat COIs in this environment is problematic. It is not the fiduciary duty itself that is problematic, it is that the duty is enshrined in the general law, but not codified in the legislation. In environments where professionals do not have a legal background, the legislation represents a key consolidated locale for parties to develop their understanding of boundaries and regulations relating to a specific subject matter. Stakeholders are not deterred by the imposition of the fiduciary duty. This may be because so few cases relating to breaches of fiduciary duty have been successfully pursued against developers.

Although this dissertation has appraised the manner in which developers exploit COI opportunities, it should be acknowledged that the qualitative data research methods used can only provide insights into the prevalence of COI exploitation. To provide more definitive insights into the extent to which developers are exploiting COIs, a sample large enough to allow confident extrapolation to the population of interest would need to be developed. Perhaps in further research an attempt could be made

to undertake a survey of BCMs who specialise in MOD scheme set ups. The problem with such a data collection approach would be the difficulty of getting BCMs to provide candid responses to questions concerned with appraising the extent to which specific COI exploitations are occurring. This problem may well signify that future attempts designed to further our understanding of the extent to which COI exploitation is occurring may have to follow the lead of this study and employ qualitative data collection methods. Notwithstanding this caveat, it appears that this study has achieved much in terms of pursuing sub-objective 3.

7.2.6 Sub-objective 4

Identify consequences arising for owners as a result of developers exploiting COI opportunities.

Bodies corporate are unlimited liability entities and therefore the lot owners are personally liable for any debts of the body corporate that are outstanding. Lot owners in a MOD have a vested interest in ensuring that the development is viable and risks are minimal. Any exposure to risk may leave the body corporate and its lot owner members vulnerable to a range of consequences that can greatly damage their financial interests.

Findings made in this study reveal that most often it is the lot owners who must deal with the consequences of developer decisions that are motivated by self-interest considerations rather than the interests of the body corporate. Such decisions can have a highly corrosive effect and can damage a MOD over a short, or an extended, period of time. These types of decision may also have 'knock on' effects on other decisions and result in a quagmire of problems for a scheme and its lot owners.

For example, it has been noted that the issue of setting the initial budget and levy contributions constitutes a COI situation. This is because the developer's self-interest to advertise the sale of lots that have low fees comes at the expense of the body corporate's financial health in the early years post registration. The consequences of this particular COI can create a knock on effect. The body corporate is immediately placed in financial distress if the contributions paid do not cover body corporate expenditures. Lot owners will eventually have to fund the body corporate's financial

deficit, a factor that can be expected to place an unexpected additional financial burden on many lot owners. Furthermore, if the developer does not pay its levies in a timely manner, still greater pressure is placed on the individual lot owners to cover the shortfall until such time as full financial recovery is achieved. If the body corporate is unable to secure further funding from the lot owners in a timely manner, the body corporate is at risk of legal action for any debts outstanding. A deficiency of funds can also limit the body corporate's ability to seek legal advice and take action in respect of disputes (including debt recovery) and may inhibit the body corporate's ability to properly maintain the scheme's physical assets in a timely manner. Maintenance works that are delayed can further adversely impact the lot owners both directly (if there are maintenance issues impacting their respective lots) and indirectly (as the body corporate may be exposed to risk). As a consequence of this financial distress, lot owners can develop a distrust of stakeholders involved in the initial structuring (for example, BCMs), a factor that may give rise to still further conflict. As a further consequence, the reputational capital of a dysfunctional MOD in distress may be jeopardised and potentially lead to value depletion. This situation can manifest as a consequence of a developer exploiting just one COI. A similar tangled web can result from other COI exploitations detailed in this dissertation. The consequences can trigger internal lot owner conflict as well as the health and wellbeing of owners being adversely affected.

These consequences can be exacerbated in schemes built during an economic downturn that can result in slowing sales and magnified levy deficits. From data collected, it appears that some schemes that are subject to multiple developer COI exploitations and poor decisions, may never recover. At the beginning of this dissertation, I detailed my experience of buying a lot off-the-plan in a large MOD in 2007. As I conclude this research project, my scheme is still wrestling with the highly adverse consequences of decisions made by the developer a decade ago. It appears that the thesis has achieved much in terms of sub-objective 4, as it has identified extensive consequences arising for owners as a result of developers exploiting conflict of interest opportunities.

7.2.7 Sub-objective 5

Identify possible legislative provisions and other steps that could be taken to lessen the scope for developers pursuing self-interest when confronting COIs during the MOD transition phase.

As discussed in connection with sub-objective 1, each jurisdiction reviewed has taken a different approach to regulating developers' pursuit of self-interest in the MOD context. It is evident that no singular approach has been taken to combat the exploitation of COIs or the pursuit of self-interest when tasked with governing a scheme. Even when different approaches are implemented across jurisdictions, the practices and the consequences for schemes when developers find ways to exploit COIs are comparable. Furthermore, the fiduciary duty, which is the most unifying and predominant legal mechanism existing to address COIs, is ineffective in thwarting inappropriate self-interest governance decision-making.

As discussed, the manner in which the fiduciary duty has been enshrined in general law detracts from its general effectiveness, because stakeholders are more familiar with legislation and the manner in which provisions within the legislation are framed. For this reason, I believe that any key duty or obligation should be incorporated in the legislation.

At the beginning of this chapter, using the words of Joseph Singer, I made the comment that a balance needs to be struck between the interests of the developer, as the initial land owner, and those who will become the eventual property owners, as lot owners. In light of this, it is difficult to argue for sweeping prohibitions as the sole mechanism to combat COI exploitation. A concern with the implementation of sweeping prohibitions is that generally, policymakers will apply sanctions or penalties when drafting prohibitions in order to deter the problematical practice. A general prohibition aimed at thwarting COIs may not have the desired outcome. As highlighted in Chapter 6, penalties and sanctions aimed at minimising the potential for COI exploitation are ineffective because often duty bound people are unaware that they have been biased in their judgement. Cognitively, a self-interested motivation is easier to process than a professional responsibility motivation.

Furthermore, there are no regulatory overseers in Australia who have the power and capacity to investigate breaches of the Act. So the burden would fall on the body corporate and lot owners to pursue any breaches through the tribunals or courts.

Disclosure requirement sits at the opposite end of prohibition in terms of intrusiveness. Disclosure does not thwart COI exploitation; it only alerts the duty-owed when a potential or actual COI exists. In an environment where COIs are extensive, the sole reliance on disclosures appears to be ineffective.

A balanced approach incorporating the disclosure of information, statutory prohibitions and statutory duties (including the codification of the fiduciary duty) may serve to better combat COI exploitation. Careful consideration needs to be taken to determine which practices / decisions should be prohibited, the form and depth of information to be disclosed and the best way in which to incorporate the fiduciary duty into the legislation.

The law should not stand alone in attempting to combat COI exploitation. Good governance principles can guide developers and other stakeholders in making decisions that lead to better governance outcomes for schemes. Good governance principles set standards that developers can aspire to meet. The MOD sector should engage in the promotion of good governance principles and in turn identify practices that align with these principles. In Australia, *Strata Communities Australia* (SCA) is an association of professionals concerned with MOD issues. Its membership is primarily made up of BCMs. It would be a most welcome development if the SCA were to develop codes of practice designed to lessen some of the problems outlined herein. For instance, a professional standard indicating that BCMs should not provide free work for a developer in return for a long-term contract managing the new scheme in question, could be developed. Similar provisions that focus more on developers could be developed by the *Property Council of Australia* and the *Urban Development Institute of Australia*.

In recognition of sub-objective 5, this discussion has highlighted possible legislative provisions and other steps that could be taken to lessen the scope of developers pursuing self-interest.

7.3 Limitations of the Study

This study is not without limitations and I acknowledge them here. The findings of this study, like all qualitative research findings, are not generalisable. The findings are based on the data collected from interviewees who were purposefully selected.

The study has not sought to assess how many MODs (in each jurisdiction) are compromised by developer exploitation of COIs. Accordingly, the true extent of the problem is not known. Furthermore, the study was unable to determine whether a certain type of developer is more prone to exploiting COIs. It should be noted that part of the problem of determining the extent of developer COI exploitation in a particular state or country relates to the matter of degree. In some schemes there may be a small degree of COI exploitation in evidence while in others a large degree of exploitation might be apparent. This raises the question of "What degree of COI exploitation constitutes serious exploitation?", as some might argue that a small degree of COI exploitation that minimally damages the interests of low owners is acceptable. This thesis has not attempted to appraise this issue.

As this study was exploratory, the models advanced from the enquiries undertaken should be viewed as working models. They have been derived from the findings of this first study into developer exploitation of COIs in the MOD setting. Therefore they will need to be critically evaluated in the context of findings made in future studies. In particular, the good governance model would benefit from further development. In light of this, further research that examines good governance practices would be most welcome.

7.4 Future Research Opportunities

As highlighted in Chapter 3, there are considerable opportunities for further research relating to MODs. In terms of advancing some of the issues addressed in the study reported on herein, there are multiple avenues to explore. Further research could:

1. compare and examine regulatory approaches taken for MODs across all Australian jurisdictions or more globally;

2. examine the proactivity of owners in body corporate decision-making in order to determine appropriate service contract terms;
3. appraise the applicability of the models developed in this study in other jurisdictions;
4. utilise other methodologies to determine, more precisely, the extent of the COI exploitation problem in schemes;
5. investigate perceptions in the property marketplace of schemes impacted by COI exploitation or those that are dysfunctional;
6. investigate the extent to which developers understand governance responsibilities and the fiduciary duty.

7.5 Conclusion

This chapter has served to draw the strands of this thesis together by revisiting the objectives and sub-objectives stated in Chapter 1 and examining the extent to which these have been achieved. A number of models have been advanced based on the empirical findings made and also in light of the literature.

The study has shown that while developers have considerable unfettered authority to make decisions during the MOD transition phase, the extent of commercial opportunities presented to developers at this time can threaten and undermine their duty to restrain self-interest, which lies at the heart of governance responsibility. It appears that developers are not sufficiently held to account and therefore, lot owners are often left with dysfunctional schemes.

Lot owners are not only the most vulnerable party during the transition phase, they are the party that holds the greatest share of the property rights. The MOD environment is based on a model that requires lot owners to trust in stakeholders who are engaged to support the body corporate. Because of this vulnerability and the need to trust in others, developers and other stakeholders, like BCMs, need to be held to a higher (legal and ethical) standard. The job for government and the MOD sector more generally is therefore to identify and disseminate the best approach(es) to combat COI exploitation in order to promote healthy, well governed MODs.

Sometimes we have to remind the developer that, you know, you have to do the right thing, rather than you know, rape and pillage. (19)

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APPENDICES

APPENDIX A

FORMAL INTERVIEW QUESTION GUIDE – BY STAKEHOLDER GROUP

Developer Interviewees:

1. What are the key decisions that you have to make in relation to how the scheme will be managed or how it will operate once the body corporate is established?

2. Generally, what are the main challenges faced by you in establishing a multi-owned development (MOD)?

3. Is it your practice to establish business operations for future sale or as an additional income stream? If so, what types?

4. How often, do the body corporate managers (BCMs) that you engage to consult (set up budgets etc) become the BCM for the scheme?

5. Do you see any problems arising for owners when the BCM during the set up phase becomes the BCM during the scheme's early operational life?'

6. Do you believe that developers are placed in a difficult position when the law requires them to act on behalf of future owners / the body corporate and as an owner? If you do, please explain.

7. Do you believe that the law burdens the developer by placing them in a conflict of interest situation?

8. How do you handle situations where you must act in the interests of another party eg the body corporate? What measures do you put in place?

9. How much do you see marketing considerations impacting on how you draw up a scheme's first budget?

10. How important is it that you maintain control over the development until its completion?

11. Do you implement any measures to ensure that the vision for a development is realised? If so, what are they?

12. To what extent do you consider the long term effects on owners (or the body corporate) of the decisions that you make at the inception of the scheme?

13. Are you aware of the Arrow Asset Management Case? How mindful are you that developers have certain duties (fiduciary and statutory) that they owe to the body corporate? What steps do you put in place to ensure that these duties are not breached?

Lot Owner Interviewees:

1. Are there any adverse issues you are dealing with that have arisen as a consequence of decisions made by the developer while your scheme was being set up?

2. Are you aware of any significant developer initiated arrangements that are in place that you weren't aware of when you purchased the property?

3. How long after you purchased your property did the developer (or an associated entity) continue to be involved with the scheme? If so, in what capacity?

4. Has the developer had control over the votes at any meeting that you have attended? If so, for how long into the life of the scheme did this control subsist? Were any key decisions made during this period?

5. Do you know of any decision made by the body corporate (where the developer voted) that was beneficial to the developer and disadvantaged the body corporate and / or owners?

6. Did the body corporate ever seek legal advice or information in respect to any action taken by the developer? If so, what was the nature of the enquiry?

Body Corporate Manager (BCM) Interviewees:

1. What are the key decisions made by developers that affect the long term 'workability' of a scheme? Probe further – what issues/ considerations do developers factor in when making these decisions?

2. How often do you provide consultancy services to developers prior to a scheme being established?

3. Can you comment on particular challenges arising for BCMs engaged as consultants during scheme set up, staying on to be the BCM during the early years of a scheme's life?

4. How difficult is it for you to advise the body corporate about a situation that may disadvantage the developer? For example, building defects. Can you give examples when such a situation has arisen? Is this problem exacerbated if you acted as advisor to the developer during a scheme's set up phase?

5. How do you handle conflicts that arise between the body corporate and the developer in situations where you were initially engaged by the developer?

6. What are the main challenges for you when owners have moved into a scheme and the developer is still involved in the development?

7. Do you often see conflict arising when the developer is still involved or controls aspects of the body corporate?

8. Do you see problems in schemes that can be traced back to the decisions made by developers in establishing the scheme? If so, examples.

9. Do you advise the body corporate to engage a consultant to provide a building defects report? If so, at what stage?

10. Do you believe that BCM's owe fiduciary duties to the body corporate? Probe – what duties do you owe?

APPENDIX B

ETHICS INFORMATION SHEETS

Information and Consent form for empirical phase 1 (informal interviews)

The Challenges of Transitioning Property in Strata and Community Title Schemes

INFORMATION SHEET

Who is conducting the research?

Ms Nicole Johnston
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Why is the research being conducted?

This research aims to explore the challenges faced by the relevant stakeholders (developers, bodies corporate, owners, body corporate managers, resident managers) when property is transferred from the original owner (developer) to lot owners in strata and community title schemes.

This research is being undertaken as part of a PhD project. There are a number of phases to the research project. This particular phase, which you are being asked to participate in is phase 1. The purpose of this phase is to explore the topic in order to identify the main challenges faced by the various stakeholders. The results from this phase of the research will inform the direction of the overall study.

What you will be asked to do?

Your participation will be in the form a face-to-face interview with the researcher. This discussion will be approximately 1 hour in duration at a time of convenience for you. The interview will be electronically recorded. During this interview you will be asked to discuss the challenges faced by various stakeholders involved in creating and managing strata and community title schemes and the role that the law plays in relation to these challenges.

The basis by which participants will be selected or screened

Participants have been selected because of their affiliation with specific industry associations, or they were referred by committee members involved with the Griffith University Strata and Community Title in Australia for the 21st Century conference as industry experts.

You have been selected as a potential participant because of the key expertise that you have in the field. Your expertise can greatly assist the researcher in understanding the challenges faced by various stakeholders involved in strata and community title developments.

The expected benefits of the research

This research is expected to:

- inform further phases of the overall research project;
- contribute to the body of knowledge about this topic;
- inform stakeholders about the challenges faced by other stakeholders in this area.

Risks to you

The researcher has taken all steps necessary to avoid any participants encountering personal or professional risks as a result of participating in this research.

Your confidentiality

All interviews will be electronically recorded and transcribed by the researcher. Directly after the recording has been transcribed, the recording will be erased. Data collected will be de-identified prior to storage in a locked filing cabinet in the researcher's locked office. Therefore, the data and handling of this data is limited to the research team and is not available to any other person, restricting the possibility of a breach of confidentiality.

All publications resulting from the research will report the findings in aggregate and any quotations will be provided in a de-identified form, so as not to reveal the identity of actual participants.

Your participation is voluntary

Your participation is voluntary. Please be assured that should you wish, you are free to withdraw from this study at any time.

Questions / further information

Potential interview questions you will be asked include:

In answering these questions, I would like you to think about the transition of strata and community title property from the developer to the lot owner or body corporate:

1. What are the key challenges associated with transitioning a strata and community title scheme from the developer to the lot owner?
2. What are the challenges for developers (as the original owner) in creating strata and community title schemes?
3. What are the challenges for the body corporate in managing strata and community schemes both during the developer control period and after the developer has left?
4. What are the challenges for owners who have purchased a lot in a strata or community title scheme?
5. Are there different challenges in larger - layered / staged schemes?
6. What role do you think the law plays in contributing or alleviating the challenges faced by the various stakeholders?
7. To what extent (if any), do you think owners' property rights are diminished in strata and community title schemes?

If you have any questions or require further information on this research project please call Nicole Johnston on (07) 5552 9190 or alternatively email on n.johnston@griffith.edu.au

The ethical conduct of this research

Griffith University conducts research in accordance with the *National Statement on Ethical Conduct in Human Research*. If potential participants have any concerns or complaints about the ethical conduct of the research project they should contact the Manager, Research Ethics on 3735 5585 or **research-ethics@griffith.edu.au**.

Feedback to you

The findings of this research will form part of a PhD expected to be concluded in 2013. These findings may also be presented at industry conferences or published in academic journals.

Legal Privacy Statement

The conduct of this research involves the collection, access and / or use of your identified personal information. The information collected is confidential and will not be disclosed to third parties without your consent, except to meet government, legal or other regulatory authority requirements. A de-identified copy of this data may be used for other research purposes. However, your anonymity will at all times be safeguarded. For further information consult the University's Privacy Plan at **http://www.griffith.edu.au/about-griffith/plans-publications/griffith-university-privacy-plan** or telephone (07) 3735 5585.

Informed Consent

By agreeing to participate, you will be confirming that:

- You understand what participation in this research entails;
- You have had any questions answered to your satisfaction;
- You understand that if you have any additional questions you can contact the researcher;
- You understand that your participation is voluntary and that you are free to withdraw at any time, without comment or penalty; and
- You understand that you can contact the Manager, Research Ethics, at Griffith University Human Research Ethics Committee on 3735 5585 (or **research-ethics@griffith.edu.au**) if you have any concerns about the ethical conduct of the project.

Name: Date:

Signature:

Information and Consent form for empirical phase 3 (Formal interviews with key stakeholders)

The Challenges of Transitioning Property in Residential Multi-Owned Developments

INFORMATION SHEET

Who is conducting the research?

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Why is the research being conducted?

This research aims to explore the challenges faced by the relevant stakeholders (developers, bodies corporate, owners, body corporate managers) when property is transferred from the original owner (developer) to lot owners in a residential multi-owned development. Anecdotal evidence suggests that there are a number of challenges faced by the various stakeholder groups in the early life of a residential multi-owned development.

The purpose of this interview phase of the research is to identify the main challenges faced by the various stakeholders and evaluate their affects on a scheme's life. This research is being undertaken as part of a PhD project.

What will you be asked to do?

Your participation will be in the form a face-to-face interview with the researcher. This discussion will be approximately 1 hour in duration at a time of convenience for you. The interview will be electronically recorded. During this interview you will be asked to discuss the challenges faced by you as a stakeholder involved in creating and / or managing a residential multi-owned scheme.

The basis by which participants will be selected or screened

Participants have been selected because of their affiliation with specific industry associations, or they were referred by committee members involved with the Griffith University Strata and Community Title in Australia for the 21st Century conference.

You have been selected as a potential participant because you fit a specific profile for the study. That is, you are either: a developer involved in the creation of large residential multi-owned schemes, a committee member of a body corporate (or owners corporation) who purchased a lot in a large scheme off-the-plan or a body corporate manager with experience managing large staged and non-staged schemes.

The expected benefits of the research

This research is expected to:

- inform the overall research project;
- contribute to the body of knowledge about this topic;
- inform stakeholders about the challenges faced by other stakeholders in this area.

Risks to you

The researcher has taken all steps necessary to avoid any participants encountering personal or professional risks as a result of participating in this research.

Your confidentiality

All interviews will be electronically recorded and transcribed by the researcher. Directly after the recording has been transcribed, the recording will be erased. Data collected will be de-identified prior to storage in a locked filing cabinet in the researcher's locked office. Therefore, the data and handling of this data is limited to the research team and is not available to any other person, restricting the possibility of a breach of confidentiality.

All publications resulting from the research will report the findings in aggregate and any quotations will be provided in a de-identified form, so as not to reveal the identity of actual participants.

Your participation is voluntary

Your participation is voluntary. Please be assured that should you wish, you are free to withdraw from this study at any time.

Questions / further information

List below are examples of potential interview questions you will be asked including:

Developer Interviewees:

1. What are the challenges faced by you in establishing a RMOD?
2. To what extent do you seek guidance from other industry professionals in establishing a RMOD?

Owner Interviewees:

1. Are there any issues you are dealing with that have arisen as a consequence of decisions made by the developer while your scheme was being set up?
2. How long after you purchased your property did the developer (or an associated entity) continue to be involved with the scheme? If so, in what capacity?

Body Corporate Manager Interviewees:

1. How often do you provide consultancy services to developers prior to a scheme being established?
2. Is it usual that you will be the contracted BCM for schemes where you have provided consultancy services to the developer during a scheme's set-up period?
3. If you were originally engaged by a developer, do you find it difficult to balance your duties to the body corporate if the developer still has some involvement in the scheme?

If you have any questions or require further information on this research project please call Nicole Johnston on (07) 5552 9190 or alternatively email on **n.johnston@griffith.edu.au**

The ethical conduct of this research

Griffith University conducts research in accordance with the *National Statement on Ethical Conduct in Human Research*. If potential participants have any concerns or complaints about the ethical conduct of the research project they should contact the Manager, Research Ethics on 3735 5585 or **research-ethics@griffith.edu.au**.

Feedback to you

The findings of this research will form part of a PhD expected to be concluded in 2013. These findings may also be presented at industry conferences or published in academic journals. An executive summary of findings will also be emailed to each participant upon completion of the PhD.

Legal Privacy Statement

The conduct of this research involves the collection, access and / or use of your identified personal information. The information collected is confidential and will not be disclosed to third parties without your consent, except to meet government, legal or other regulatory authority requirements. A de-identified copy of this data may be used for other research purposes. However, your anonymity will at all times be safeguarded. For further

information consult the University's Privacy Plan at **http://www.griffith.edu.au/about-griffith/plans-publications/griffith-university-privacy-plan** or telephone (07) 3735 5585.

Informed Consent

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- You understand what participation in this research entails;
- You have had any questions answered to your satisfaction;
- You understand that if you have any additional questions you can contact the researcher;
- You understand that your participation is voluntary and that you are free to withdraw at any time, without comment or penalty; and
- You understand that you can contact the Manager, Research Ethics, at Griffith University Human Research Ethics Committee on 3735 5585 (or **research-ethics@griffith.edu.au**) if you have any concerns about the ethical conduct of the project.

Interviewee name: Date:

Interviewee signature: