Australian Institute of Architects

Australian Institute of Architects
Queensland Chapter
2/270 Montague Road
WEST END QLD 4101
T: +61 7 3828 4100
qld@architecture.com.au
www.architecture.com.au

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Developer Review
Building Policy
Public Works Division
Department of Energy and Public Works
GPO Box 2457
CITY EAST BRISBANE QLD 400

Dear Panel Members,

Submission to Developer Review Panel Discussion Paper

The Australian Institute of Architects (Institute) Queensland Chapter welcomes the opportunity to reply to the *Developer Review Panel Discussion Paper*.

The Institute is the peak body for the architectural profession in Australia. It is an independent, national member organisation with almost 14,000 members across Australia and overseas. The Institute actively works to maintain and improve the quality of our built environment by promoting better, responsible, and environmental design.

The Institute considers that the Discussion Paper is an extremely important document in illuminating the fundamental issues impacting development activity in Queensland in a fair and balanced way.

The Institute is supportive in principle of the recommended strategy; however, concerns have been raised by some members regarding the affordability and workability of certain recommendations and their potential impact on the cost, diversity, and timely delivery of housing.

The Institute's detailed response follows as Appendix 1. It addresses each of the proposals individually. However, member feedback has also resulted in some additional recommendations for your consideration as set out in Appendix 2. We believe these will assist in balancing the need for improved regulation while addressing concerns about the viability of certain development activity sectors.

The Institute is keen to continue to contribute to developing these proposals. It also acknowledges the contributions of one of our members, Paul Jones, in working with the Panel on the Discussion Paper.

Sincerely,

Amy Degenhart, LFRAIA
Queensland Chapter President
Australian Institute of Architects

Dr Anna Svensdotter
State Manager Queensland
Australian Institute of Architects

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APPENDIX 1

1. Licencing

The Institute has consistently supported licencing those involved in the Building Design and Construction Industry across all Australian jurisdictions. Licensing can be an effective means of improving quality outcomes, and setting agreed minimum standards in the industry.

Development Activity is broad, and developers typically come from various backgrounds and experiences (professional or otherwise) where no industry-specific education or training is required or available.

The licencing of developers will assist in identifying individuals and organisations in the industry that have met agreed standards of competency and experience and will be available for public review. With development accounting for around a third of all economic activity in Queensland, licensing will provide important data and insight into the sector's performance.

Any licensing regime should focus on the following elements:

- Registration for public and industry transparency and traceability
- Minimum education requirements
- Skills/experience requirements (either in addition to or in place of education requirements)
- Ongoing competency requirements
- Minimum Industry standards and codes of conduct

However, a one size fits all approach is unlikely to work. The requirements should focus on the specific needs and issues arising in each regulated space. Thus, different license classes are potentially required to deal with alternative development activity (financial) scale, typology (residential versus industrial) and the like. Special consideration should also be given to licensing's impact on development activities of high social and community value. Different license classes would each have their own requirements that address issues specific to each part of the development activity.

It should also be noted where there is an existing licensing regime in place, those subject to that licensing be excused from further licensing requirements under this proposal.

To avoid duplication and unnecessary additional costs, the Institute recommends that consideration should be given to exempt development activity that is covered by the Queensland Home Warranty Insurance Scheme. The rationale is that such activities are

already covered by rigorous requirements and protections and present a significantly reduced risk of the poor behaviour identified as requiring licensing.

The Institute has also identified potential gaps in the review: project management, design management, and financiers. Developers often engage project and design managers to act as their agent, while finance providers often take control over a project without adopting the commensurate social licence.

Consequently, project/design managers and finance providers influence the outcome of projects by instructing on the design, delivery, and procurement on behalf of developers. As with other elements of development activity, these entities should be captured under a licencing strategy to close any potential gaps in responsibility and accountability on project delivery.

Any licensing regime must be sufficiently robust to be effective but not so complicated for participants to become licensed that it encourages workarounds. Minimum requirements must reflect what is needed and encourage people into the system, reflecting their respective Licencing Level.

Sufficient funding and resourcing are required for the regulatory body to manage the Licencing process without placing excessive cost pressures on developers and the public. This requires a delicate balance between affordability, capacity and public good.

It is also important that the regulator or enforcement body have the power to include individual, corporations, partnerships, and foreign entities. Corporate structures can potentially operate without the individual licensee responsibility or authority. We recommend that the review engage with ASIC and the ATO to develop appropriate powers to address licencing requirements of corporations and potential phoenix activity or to also include responsible individual or persons within organisations

2. Industry standards

The Institute supports best practice Industry Standards and Code of Conduct as a mandatory requirement for Licencing. Minimum industry standards will assist in ensuring all those involved in the different elements of the development activity have a base set of standards and ethical behaviour to apply.

Standards also assist in making the development process more uniform, more predictable, less time-consuming, and ensuring both industry and the public know what to expect and from whom.

However, the effectiveness of any such standards is dependent on the framework, resources, and expertise to effectively understand, monitor, and enforce compliance upon those that breach such standards.

3. Developer ranking system

The Institute does not believe that a Ranking System (High to Low or Excellent to Poor) for developers (and others regulated by this regime) will be helpful. Our preference is for

a formal system of recorded disciplinary actions or demerits that is accessible to the industry and the public.

A ranking system will likely be complex to develop, open to abuse, and potentially confusing to those who want to use it. Measuring improvement or decline in ranking would be complex to adjudicate and manage.

The Institute supports a public record of disciplinary actions as a much simpler and straightforward approach. A public record of action against developers and others covered by this regulatory regime would assist those who engage with them to understand any past contraventions. Allowing them to determine if they want to engage with a person with such a record or at least allow them to put in place actions to potentially mitigate future transgressions.

As an alternative to a ranking system, the Institute would recommend a Class of Licence related to the scale, complexity, and type of development activity. Using different licence classes will facilitate workability and can enable the industry and the public to understand the level of experience and capability of the developer. The cost and complexity of the different classes would reflect the costs and complexity of the development types and avoid unnecessary duplication where activity Is regulated elsewhere.

4. Disclosure arrangements

The Institute believes Disclosure Arrangements are an effective tool and should be extended to the work of specialist consultants and professional design teams (architects, engineers and the like) engaged to undertake work prior to the engagement of a contractor. These types of disclosures are not onerous, and the Institute may be able to offer some guidance by sharing disclosure arrangement resources developed for architects.

Financial capacity to pay for services related to development activity should be in place prior to committing to those services or activities. Often design work is expected to be undertaken speculatively, without remuneration or proposer compensation (i.e., unpaid design competitions), and contractors also devote considerable resources to tendering.

Therefore, improving disclosure arrangements will assist all parties in a development and assist in informed decision-making.

5. Expand project trust accounts

The Institute supports the principles of expanded project trust accounts that quarantine project funds to a specific project as intended but is concerned that the appropriate balance is achieved to ensure that affordability and viability are not jeopardised.

Although the definition in the Discussion Paper of Development Activity must include construction, a development commences long before the engagement of a head contractor. Specialist consultants, design teams, marketing agents, etc., will often be engaged to work with the developers to undertake concept design, schematic design, marketing and development approval documentation, and some portion of Design

Development or Contract Documentation is essential prior to engagement of the head contractor.

It is unfortunately common for payments to be delayed until a head contractor is in place and then transferred to the contractor for payment. This structure may be tied to a SPV and associated funding arrangements to limit commercial liability and risk or simply out of necessity to initiate the project.

The Institute, therefore, recommends that the Security of Payments process be calibrated to ensure it can be quickly and cost-effectively accessed by consultants who may have participated early in a project. An additional benefit of facilitating the use of Security of Payments legislation for early consultant payment disputes is that these disputes will serve a function like that of the canary in the coal mine, i.e., offering a red flag regarding a developer who might become a payment risk on a larger scale to contractors later in the development timeline.

6. Education

The Institute believes that industry-specific education is of high value. Education should be both initial and ongoing by way of Continuing Professional Development (CPD). The architecture profession, like others, has required minimum education requirements and CPD requisites for many years. These protocols ensure that there are minimum agreed learning outcomes completed before someone can undertake an activity. They also ensure that knowledge is maintained up to date with regulatory and other changes.

However, any initial and ongoing CPD requirements need to be not only relevant but also not so onerous as to exclude a developer with appropriate experience and a proven social license from continuing to participate in undertaking development activity.

The Board of Architects of Queensland ensures architects continue learning to maintain registration, and the Institute would welcome any further available content on development topics that could be shared with its members as part of their annual CPD programme.

7. Tendering standards

The issue of Tendering Standards was one that was unanimously recommended by Institute members, and the establishment of a minimum level of documentation for tendering and evaluation would be welcomed.

Further, the Institute would suggest expanding the requirement to a suite of interrelated approval documents such as for Development Approvals, Building Approval and Tender Documentation. Currently, there can often be varying standards applied subject to the level of services engagement (and fees), specialist consultant teams' engagement, project brief changes and the like.

The Architectural profession (and industry in general) has significantly evolved into digital and Building Information Modelling (BIM) documentation over the past decades. Most

projects of scale already adopt BIM protocols. Digital technologies should form the basis of any future documentation standards, and enable integration with industry for shop drawings, designs, manufacture, maintenance, alterations, and the like.

The Institute already has available to its members' documentation standards, protocols, and deliverables, including BIM standards. As the lead design consultant responsible for the progress and co-ordination of design activity, architects (through the Institute) would be best placed and willing to work with the panel or department to develop documentation minimum standards.

8. Promote alternatives to hard tendering

There are already many forms of procurement available to industry (including Early Contractor Involvement). Contractor and design team engagement can be used to suit different project types, scenarios, market conditions (trade and material availability, fluctuating money markets etc.), time, and cost scenarios. Tendering needs to accommodate many other project-specific factors.

The structure and tone of a project is set at the outset. The Institute's recommendation would be to work towards a more carefully considered and well-rounded suite of acceptable procurement models with terms and conditions to address the issues noted throughout the panels' review. Issues raised under this review could be mitigated at contract, with appropriately considered and drafted clauses.

The Institute recommends the development of contracting principles and a code of conduct or practice that can be adopted into many forms of contract and procurement options. These constructs should suit both the head contract, as well as sub-contracts services agreements under the head agreement, be balanced and are insurable, fair, and reasonable. Industry realignment may be required for all parties, including legal and financial to act with reasonable terms.

9. Cooling-off periods

The Institute agrees with the principle of cooling off periods on the basis that the project does not stop the development activity. Protocol around cooling off period under tender conditions should be carefully mandated so that abuse of process does not become a tender tactic. i.e., the cooling off prerogative could be abused by parties who might exploit the vulnerability of the other. Possible Commercial and feasibility fluctuations would require consideration where affordability, rent levels, and mortgage arrangements of the purchasing public are affected.

10. Improving documentation

The Institute agrees with improving documentation and further recommends that minimum standards and levels of information are established for consistency and clarity. The Institute already has available to its members' documentation standards, protocols, and deliverables, including BIM standards. As the lead design consultant responsible for the progress and coordination of design activity, architects (through the Institute) would

again be best placed and willing to work with the panel or department to develop documentation minimum standards.

11. Expand ‘fairness in contracting’ laws

The Institute believes that Fairness in Contracting should extend beyond head/principal contract arrangements to sub-consultant and sub-contract agreements to ensure fair and balanced arrangements with reasonable terms for secondary contracts.

Architects and their insurers often see unfair and uninsurable clauses in professional services contracts, and the Institute would be willing to work with the panel or department to use their practical experience to develop suitable contract terms that align with insurable provisions.

12. Contemporary standard contract

The Institute agrees with the proposal to upgrade standard form contracts to Contemporary Standard Contracts. Further, the Institute recommends that all forms of contracting (including professional services contracts and sub-contracts) are based on available standard form contracts (AIA, Australian Standard or similar). Terms and Conditions should be insurable, fair, and balanced.

13. Improved transparency in amendments

The Institute agrees with the proposal to improve transparency in amendments to contracts to ensure greater clarity. Further, the Institute recommends that the essence of the original standard form contract is maintained, and not materially changed.

14. Streamlined responses

The Institute agrees that the contractor should have the ability to cease work due to a clear issue of non-payment. Further, this should extend to secondary services and sub-contract agreements to enable professional services and sub-contractors to have the right to cease work for non-payment or not commence work on approved variations until there is agreement of the variation.

15. Property protections

The Institute agrees with the proposal to enable access to the site for the head contractor but also secondary and subcontractors to collect/recover material and equipment in the event of the default of the contractor or developer, subject to it being safe for all concerned to do so.

The tools, equipment and materials of these professionals and workers are their own and they should be free to extract such. These items can be very expensive pieces of equipment that may be difficult to replace, particularly in times where there are supply chain issues or in remote areas.

The right to enter the worksite should be supported both in the law and be required terms in development activity contracts.

16. Enhanced reporting obligations

The Institute believes that enhanced reporting obligations under the head contract and associated secondary and subcontracts will improve behaviour and ensure parties are better informed of potential issues and breaches.

Late and/or non-payments are indicative of potentially grave financial problems that may impact the ongoing viability of a project and should be acted on promptly. Enhanced reporting will assist other parties to become aware of potential concerns.

17. Extend the chain of responsibility to developers

The Institute agrees with the proposed inclusion of developers in the chain of responsibility for non-compliant/non-conforming building processes (NCBP's), as it is often the case that it is the developer who initiates and/or approves the change in a product specification, design, or the like.

18. 'Whistleblower' protections

The Institute agrees with the proposed 'whistleblower' protections. The building and construction industry, while representing a third of the Queensland economy, is also a very tightly integrated industry. Each relies on the other for continued work. This status can cause a hesitancy to report for fear of retribution, in particular the loss of future work. Enhancing whistler-blower protections will allow greater freedom for reporting in a way that reduces any blow-back to the whistleblower. Too often unscrupulous elements rely on this fear to get away with behaviour that would not be supported in other industries.

19. Extend the chain of responsibility to certifiers

The Institute agrees with the proposed inclusion of certifiers in the chain of responsibility for non-conforming/non-compliant building processes through legislation or a code of conduct for certifiers. The impact of extending the chain of responsibility to certifiers on their ability to obtain insurance must be monitored, as the industry cannot operate if certifiers are priced out of insurance.

20. Superintendents

The Institute supports the proposal for superintendents to be fair, impartial, and licenced. This requirement already applies to architects registered by the Board of Architects of Queensland (BOAQ). As a point of clarity, registration as an architect is an ideal prerequisite for a superintendent, and architectural registration should be deemed to be a licence to be a superintendent.

Licencing and impartiality should be specifically expanded to other professions, such as project managers and design managers that are often engaged as superintendents, contract administrators, and services agreement administrators to act on behalf of the developer.

The Institute also recommends that fairness and impartiality in administration of contracts should extend to secondary and tertiary contracts where sub-agreements do not align with head agreements.

21. Documentation of amendments

The Institute believes that documentation of amendments is a fundamental requirement of good industry practice and Quality Assurance (QA).

Further, the Institute would recommend expanding the requirement of documentation amendments to a suite of interrelated documents, such as Development Approvals (DA's), Building Approvals (BA's), Tender Documentation (TD's), and as-constructed documentation. Documentation of amendments must also be reflected in services and subcontract agreements.

22. Third-party quality assurance

The Institute would support third party Quality Assurance (QA) review of work on the basis that exemplars (positive or negative) remain anonymous so that identification and reputations are not related or linked to the learning outcomes. Identification of parties at fault should be attended to separately.

23. Certifier disengagement

The Institute agrees there should be statutory mechanisms in the legislation to limit the 'disengagement' of' certifiers, such that it only applies to required circumstances. Otherwise, there should be continuity of service from the same certifier for the duration of the project.

Changing certifier increases project risks such as loss of oversight, knowledge gaps, increased risk to public safety, and increased costs. The basis for disengaging the certifier should, therefore, be limited to non-performance, or unprofessional/unethical behaviour.

In some other states, there is currently an emerging trend for engaging two certifiers: one that acts as the consultant to advise the design team as part of the design process and a second that acts as an independent approving certifier. This practice is not unreasonable, as it allows for the specialisation of expertise or to benefit from the cost-effectiveness of proximity to the site for inspections.

24. Further mandatory Inspections

The Institute believes that further mandatory inspections for all building classes will enhance public safety by being engaged to visit site and visually inspect the work being approved. This strategy would have the effect of supporting timely review of compliance, quality, and affordability, as the cost of delaying the correction of defective work that forms the foundation for the work of other trades can be exponential.

25. Quantity surveyors and building certifiers

It is important to have a high-level of consistency and competency among quantity surveyors and building certifiers, particularly in the ever-changing regulatory environment.

26. Additional Insurance

Additional insurance must be weighed against unintended consequences and cost burdens. Recommendations set out in our Appendix 2 may mitigate the need for additional insurance in certain circumstances.

27. Audits

The Institute believes that random audits to verify 'Certificates of Occupancy' will encourage best behaviour and ensure an earlier identification of potential issues so that rectifications can be put in place.

A 'Certificate of Occupancy', however, does not apply to a detached house (class 1a), carport or garage (class 10). Consideration should be made as to whether such classes may be appropriately excluded from the need to be undertaken by a licensed developer.

28. Review current services

The Institute believes that the review and improvement of current dispute resolution services to ensure that they are effective for sub-consultant and services agreements, particularly for modest amounts of non-payment, would be valuable. Formerly, it was possible to have amounts of less than $1,000 collected quickly and efficiently through the services provided, but now 'administration costs' actively discourage those claims being made, thereby depriving the industry of the early warning of the future potential poor behaviour of developers.

29. Investigate alternative services

The Institute agrees that the investigation into alternative dispute resolution services for interim and/or work under a certain value.

30. Promote mediation

The Institute supports mediation as a method to resolve disputes in a timely and cost-effective manner. The Institute believes that due to their professional and ethical requirements, experience and Industry standing, architects would make effective QCAT members.

31. Additional protections

The provision of additional protections against retaliation after the use of adjudication to resolve a dispute is desirable, but difficult to achieve through legal constructs. A suite of enticements and disincentives for retributive behaviour could provide additional protection from threats of retaliation. The sector should be consulted on what additional measures may be effective,

32. Promote security of payment in domestic contracts

As a point of clarity, we understand that domestic contracts for principal places of residence have been excluded from the definition of development activity by this panel, and so are excluded from the core purpose of this Discussion Paper. However, fairness of payment is the larger issue of concern, but so too is the protection of the consumer in terms of the predictability of cost. Currently, contractors have the legal protection of the case law of 'undue enrichment' to accompany the provisions of their building contracts, and any further interventions in this arena will impede affordability at a critical time in the industry.

33. Line of sight to contractors

Providing owners with a line of sight to developers and head contractors under principal agreements can only be of benefit to all. However, providing owners access to sub-consultants and service providers under a head contractor is not desirable, as contractual protocols and mechanisms exist to enable management of contract related issues via the head contracted party. Exposure to broader indirect third-party claims may result in insurance and extended liability uncertainty that may affect project cost and un-necessarily heighten vexatious and frivolous claims.

34. Documentation at handover

The proposition to provide documentation at handover in a more complete form and make it available to end-users/owners will be beneficial. The project team will generally have the information available and preparing it for handover is generally subject to the willingness of the developer and contractor to share an appropriate level of information and to appropriately commission and compensate sub-contractors and consultants to include the provision of such documentation. The information can be provided in a digital form preferably and subject to copyright. This information should form part of a suite of required documents outlined earlier for the project.

35. Digital tools

The use of digital tools is a valuable form of record keeping for projects for all stakeholders.

The architectural profession (and industry in general) has significantly evolved into digital and BIM documentation over the past decades. Most architectural offices and projects already adopt BIM standards and protocols. Digital technologies will form the basis of future industry documentation standards and enable integration with industry providers in the procurement of projects (for shop drawing, design for manufacture and the like).

The Institute already has available to its members documentation standards, protocols, and deliverables, including BIM standards. As the lead consultant, the Institute would be willing to work with the panel or department to develop BIM documentation minimum standard.

36. Voting restrictions

This issue is outside of Institute's area of expertise, though we are aware that it is a complex one that would benefit from thoroughly considered impact research

37. Address conflicts of interest

As a highly regulated profession governed by strict codes of practice and protected by professional indemnity insurance, architects are one of the only participants in the development industry whose very livelihood depends on the provision of independent advice, and the greater the involvement of architects in the defect rectification process the less opportunity there would be for conflicts of interest to become a problem.

38. Enhanced disclosure of budget projections

An enhanced level of documentation would allow for more accurate budget projections, which in turn might provide developers more confidence to disclose their projections to the body corporates.

APPENDIX 2

39. Staggered start to licencing

With the adoption of different classes of licence, it may assist the industry to transition if there was consideration for a staggered approach, whereby those sectors of most concern, large developments, are licensed first, with smaller developers licensed later, considering lessons learned from the first round of licensing.

40. Exclude activities covered by the Queensland Home Warrantee Scheme

To provide a measured response in proportion to the scale of the issues, start the licencing of developers at the top end of the industry by excluding any projects covered by the Queensland Home Warrantee Scheme, which already provides a key level of protection at a reasonable cost.

41. Expand the Queensland Home Warrantee Scheme to include Rooming Accommodation

Consideration should be given to extending the protection of the Queensland Home Warrantee Scheme to encompass Rooming Accommodation projects.

42. Make available a public register of Security of Payment claims that have been resolved in favour of the claimant

A publicly searchable register should be developed that provides information in relation to successful Security of Payment claims. This data will also assist in better understanding potential problems within the development industry.

43. Expand Security of Payments to include a free service that addresses both claims of a modest amount and those made by professional services providers

Security of payment issues often start small and increase over time, so encouraging dispute resolution of small claims, particularly if successful claims become a matter of public record as proposed above, would give an excellent indication of the likelihood of other inappropriate developer behaviour that may arise in the future.

44. Developer licencing to include all marketing names and be easily searchable

The Institute believe an appropriate test for the practicality of developer licencing is whether it would be as easy for a subcontractor, service provider, potential purchaser, or simply any member of the public to search for a developer's licence as it currently is for the public to access the Search Register for the Board of Architects Of Queensland, which provides a search process that instantly confirms the registration status of any individual or company in Queensland.

45. Marketing material to include developer's license

It's important to be able to link a development activity to the licensed developer, and legislation must include a requirement to disclose the relevant license in all marketing material for any developer activity that requires a licenced developer.

46. Introduce a code of practice for financiers

The Discussion Paper was surprised to discover how much control financiers have on issues confronted in the paper, improving the behaviour of non-bank financiers would be helpful, including greater clarity on the following:

1. Declaring any conflicts of interest
2. Clarifying what information will be relied upon in making the decision to provide finance
3. With multiple-phase finance, identify clearly what milestones must be achieved in to obtain finance for subsequent stages
4. Mandate the inclusion of soft costs such as professional services in the overall finance package
5. Ensure that financiers cannot establish unreasonable timeframes for performance