



The Law Reform Commission

AN COIMISIÚN UM ATHCHÓIRIÚ AN DLÍ

CONSULTATION PAPER

MULTI-UNIT DEVELOPMENTS

(LRC CP 42-2006)

IRELAND

Law Reform Commission

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LAW REFORM COMMISSION

Background

The Law Reform Commission is an independent statutory body whose main aim is to keep the law under review and to make practical proposals for its reform. It was established on 20 October 1975, pursuant to section 3 of the *Law Reform Commission Act 1975*.

The Commission's Second Programme for Law Reform, prepared in consultation with the Attorney General, was approved by the Government and copies were laid before both Houses of the Oireachtas in December 2000. The Commission also works on matters which are referred to it on occasion by the Attorney General under the terms of the Act.

To date the Commission has published 82 Reports containing proposals for reform of the law; 11 Working Papers; 41 Consultation Papers; a number of specialised Papers for limited circulation; An Examination of the Law of Bail; and 27 Annual Reports in accordance with section 6 of the 1975 Act. A full list of its publications is contained on the Commission's website at www.lawreform.ie

Membership

The Law Reform Commission consists of a President, one full-time Commissioner and three part-time Commissioners.

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<i>President:</i>	The Hon Mrs. Catherine McGuinness, former Judge of the Supreme Court
<i>Full-time Commissioner:</i>	Patricia T. Rickard-Clarke, Solicitor
<i>Part-time Commissioner:</i>	Professor Finbarr McAuley
<i>Part-time Commissioner:</i>	Marian Shanley, Solicitor
<i>Part-time Commissioner:</i>	Donal O'Donnell, Senior Counsel
<i>Secretary/Head of Administration:</i>	John Quirke

Research Staff

<i>Director of Research:</i>	Raymond Byrne BCL, LLM, Barrister-at-Law
<i>Legal Researchers:</i>	John P. Byrne BCL, LLM (NUI), Barrister-at-Law Áine Clancy BCL, LLM (NUI) Philip Flaherty BCL, LLM (NUI) Caren Geoghegan BCL, LLM (Cantab), Barrister-at-Law Cliona Kelly BCL Joanne Lynch BCL, LLM (NUI) Margaret Maguire LLB, LLM (NUI) Jane Mulcahy BCL, LLM (NUI) Tara Murphy BCL, LLM (Essex) Richard McNamara BCL, LLM (NUI) Catherine Ellen O’Keeffe LLB, LLM (NUI) Charles O’Mahony BA, LLB, LLM (Lond), LLM (NUI) David Prendergast LLB, Barrister-at-Law Keith Spencer BCL, LLM (Dub), BCL (Oxon), Barrister-at-Law Nicola White LLB, LLM (Dub), Attorney-at-Law (NY)

Administration Staff

<i>Project Manager:</i>	Pearse Rayel
<i>Executive Officer:</i>	Denis McKenna
<i>Legal Information Manager:</i>	Conor Kennedy BA, H Dip LIS
<i>Cataloguer:</i>	Eithne Boland BA (Hons), HDip Ed, HDip LIS
<i>Information Technology Officer:</i>	Liam Dargan
<i>Private Secretary to the President :</i>	Debbie Murray
<i>Clerical Officer:</i>	Ann Browne

Principal Legal Researchers on this Consultation Paper

Professor JCW Wylie LLM (Harvard), LLD (Belfast), Professor of Law at Cardiff University
Áine Clancy BCL, LLM (NUI)

Other Legal Researchers involved with this Consultation Paper

Trevor Redmond LLB, MPhil, LLM (Cantab)

Mary Townsend BCL, LLM (NUI)

Aoife McCarthy BCL, LLM (NUI), Barrister-at-Law

Contact Details

Further information can be obtained from:

Secretary/Head of Administration

Law Reform Commission

35-39 Shelbourne Road Ballsbridge Dublin 4

T: +353 1 637 7600

F: +353 1 637 7601

E: info@lawreform.ie

W: www.lawreform.ie

THE PROJECT

In its *Second Programme 2000 – 2007*, published in December 2000, the Law Reform Commission included as an item for future consideration the law relating to “condominiums”. The expression “condominiums” is commonly used in certain parts of the world, particularly North America, the Caribbean and Continental Europe, to describe multi-unit buildings like blocks of flats or apartments. Such developments have long been the subject of extensive statutory regulation in other jurisdictions, such as the condominiums legislation in North America and Europe and the strata titles legislation in Australia. The Commission drew further attention to this subject in its *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and Other Proposals* (LRC 70 – 2003). It was described there as a “very complex subject” which would be considered at a later stage (paragraph 1.14). In September 2003, the Commission established a Group to give preliminary views of the issues involved to the Commission. It engaged the services of **Professor JCW Wylie**, who has been involved in several of the Commission’s other projects, to lead the Group. The other members of the Working Group were:-

The Hon Mrs Justice Catherine McGuinness, President of the Law Reform Commission

Commissioner Patricia T Rickard-Clarke

Commissioner Marian Shanley

Nuala McLoughlin (succeeded by Sheila McMahon), Department of the Environment, Heritage and Local Government

Sheena M Beale, Solicitor

Brian M Gallagher, Solicitor

Siobhan Kirwan, O’Dwyer Property Management Ltd

Rory O’Donnell, Solicitor

Jerry Sheehan, Solicitor

Patrick Sweetman, Solicitor

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Companies (Amendment) Act 1986	No. 25 of 1986	Irl
Companies (Amendment)(No. 2) Act 1999	No. 30 of 1999	Irl
Companies Act 1963	No. 33 of 1963	Irl
Companies Act 1990	No. 33 of 1990	IRL
Company Law Enforcement Act 2001	No. 28 of 2001	Irl
Condominiums Act 1981	Act 23 of 1981	Trin & Tob
Condominiums Act 1998	SO 1998, c. 19	Can
Conveyancing (Strata Titles) Act 1961	NSW	Aus
Environmental Protection Agency Act 1992	No. 7 of 1992	Irl
Finance Act 1988	No. 12 of 1988	Irl
Finance Act 1992	No. 9 of 1992	Irl
Finance Act 1999	No.2 of 1999	Irl
Finance Act 2004	No. 13 of 1994	Irl
Fire Services Act 1981	No. 30 of 1981	Irl
Housing (Miscellaneous Provisions) Act 1992	No. 18 of 1992	Irl
Housing Act 1966	No. 21 of 1966	Irl

Landlord and Tenant (Ground Rents) Act 1978	No. 7 of 1978	Irl
Landlord and Tenant (Ground Rents)(No.2) Act 1978	No. 16 of 1978	Irl
Planning and Development Act 2000	No. 30 of 2000	Irl
Registration of Deeds and Title Act 2006	No. 12 of 2006	Irl
Residential Tenancies (Amendment) Bill 2006	No. 15 of 2006	Irl
Residential Tenancies Act 2004	No. 27 of 2004	Irl
Roads Act 1993	No. 14 of 1993	Irl
Sectional Titles Act 1971	No. 66 of 1971	SA
Sectional Titles Act 1986	No. 95 of 1986	SA
State Property Act 1954	No. 25 of 1954	Irl
Strata Property Act 1998	SBC 1998, Chap 43	Can
Strata Schemes (Freehold Development) Act 1973	No. 68 of 1973	Aus
Strata Schemes Management Act 1996	No. 138 of 1996	Aus
Tenements (Scotland) Act 2004	2004 asp 11	Scot
Title Conditions (Scotland) Act 2003	2003 asp. 9	Scot
Uniform Common Interest Ownership Act 1982		USA
Uniform Common Interest Ownership Act 1994		USA
Uniform Condominium Act 1980		USA
Unit Titles Act	No. 17 of 1972	NZ

TABLE OF CASES

Bonomi v. Backhouse	(1858) EI BI & EI 622	Eng
Humphries v. Brogden	(1850) 12 QB 729	Eng
In re Application by the Director of Consumer Affairs	High Court, 5 December 2001	Ireland
Metropolitan Properties Ltd v. O'Brien	[1995] IR 467	Irl
Reilly v. Booth	(1890) 44 ChD 12	Eng
Shirley v. O'Gorman & Co. Ltd	High Court, 31 January 2006	Irl

INTRODUCTION

A Multi-Unit Developments

1. This Consultation Paper has been prepared under the Commission's *Second Programme of Law Reform 2000-2007*.¹ One of the most striking features of the property sector in Ireland in recent years is the huge rise in the number of residential multi-unit developments. These include blocks of flats or apartments, and mixtures of townhouses and apartments. Many multi-unit developments involve single use, whether residential or commercial, but others involve mixed use where, for example, office or other commercial units are situated on the ground floor of the development. Of the 80,000 housing units completed in 2005, over 18,000 (22.4%) were apartment complexes, with more than 9,500 in the Dublin area alone. It has recently been estimated that about 500,000 people (more than 10% of the total population) live in multi-unit developments in Ireland. This necessarily involves reviewing the law which until now was developed largely without consideration for the distinct company, property, planning and consumer issues which face multi-unit developments.

2. Apartment living on this large scale is, therefore, a recent phenomenon and it is not, perhaps, surprising that the relevant law is surrounded with some uncertainty. This is why the Commission included this area in its *Second Programme of Law Reform 2000-2007*. In preparing this Consultation Paper, the Commission was conscious that it must address a wide range of connected areas of law. These include: national regulatory issues (including planning matters and the appropriate regulatory structure for those involved in multi-unit developments), the legal structures associated with multi-unit developments (in particular the role of management companies), consumer protection issues (including the protection of consumers at purchase and protecting their long-term investment in an apartment complex) and general land ownership and conveyancing issues.

3. The Commission's study of these issues has led it to consider a wide range of related issues. The Commission is also conscious that many of these issues involve policy matters that come within the province of the

¹ *Second Programme for the Examination of Certain Branches of the Law with a View to their Reform 2000-2007*

government and other State agencies. Equally, a number of reform proposals currently under active consideration, such as the proposed National Property Services Regulatory Authority (NPRSA) must be taken into consideration. At the level of the developer and the purchaser, there has been considerable public debate on the role of management companies, and the Commission makes a number of recommendations in this area. It is not for the Commission to make recommendations directly on such matters, but, in view of their clear impact on multi-unit developments and connection with problems which the Commission's study has identified; this Paper will draw attention to them and, as appropriate, will make suggestions as to how they might be resolved.

4. This Paper makes provisional recommendations on a broad range of issues which the Commission believes impact directly on multi-unit developments. Amongst other subjects, the status in company law of management companies, the introduction of further guidance and protection for consumers and the potential regulation of the sector are all analysed and provisional conclusions are reached. The object of the Paper is also to further the debate surrounding multi-unit developments and in this context, the Commission has at this stage made no provisional recommendations but rather welcomes submissions on some of the issues addressed.

5. The Commission has also borne in mind the wider context, in particular other projects which it is currently undertaking. One is the Joint Project with the Department of Justice, Equality and Law Reform on reform and modernisation of land law and conveyancing law.² This has culminated in the Land and Conveyancing Law Reform Bill 2006³ which is currently before the Oireachtas. That Project was part of a larger reform programme the ultimate aim of which is the introduction of a simple, paperless eConveyancing system.⁴ Another project is the reform of landlord and tenant law.⁵ The discussion in this Paper of the land law implications for multi-unit developments further adds to this body of work.

6. Based on all of this, the Commission has produced this Consultation Paper, which aims to provide a comprehensive review of the

² See *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP34 – 2004) and *Report on Reform and Modernisation of Land Law and Conveyancing Law* (LRC 74 – 2005).

³ No 31 of 2006.

⁴ This was the subject of a Joint Conference held by the Commission and Department on 25 November 2004 at UCD. See also the Commission's Report *eConveyancing: Modelling of the Irish Conveyancing System* (LRC 79 – 2006) launched by the Taoiseach on 5 April 2006.

⁵ See *Consultation Paper on Business Tenancies* (LRC CP21 – 2003); *Consultation Paper on General Law of Landlord and Tenant* (LRC CP28 – 2003).

legal issues concerning multi-unit developments and to suggest reform to counter problems evident in the current system.

B Outline of this Paper

The Paper is divided into two sections, the first of which focuses on matters concerning the need for regulation and consequent proposals for reform in the sector. The second part discusses the land law implications of multi-unit developments.

7. Chapter 1 outlines the background to this Paper's discussion of the issues surrounding multi-unit developments and briefly explains the relevance of the various groups involved in them to this Paper.

Part A

8. Chapters 2 and 3 consider the role of developers and planning authorities respectively, in the proper functioning of the law surrounding multi-unit developments. It makes consequent proposals for reform with regard to these groups.

9. Chapter 4 focuses on company law as it applies to residential property management companies and proposes reforms designed to meet the unique features of such companies.

10. Chapter 5 discusses the distinction between managing agents and management companies. It outlines difficulties arising in the use of managing agents and suggests ways in which abuses through the use of managing agents can be avoided.

11. Chapter 6 deals with the consumer protection matters that are central to the controversy surrounding multi-unit developments. In particular, it looks at regulation of the calculation of service charges and sinking funds, dispute resolution for consumers and measures necessary to counter the current understanding deficit.

12. Chapter 7 identifies the reasons why the Commission believes the introduction of a regulator for the residential multi-unit development sector is necessary. It discusses potential regulators and also outlines the general purposes and functions of any proposed Regulatory Body.

Part B

13. Chapter 8 comprises a discussion some of the land law issues involved with ownership of units, focussing on conveyancing and administrative problems.

14. Chapters 9 looks at statutory schemes used in other jurisdictions. Chapter 10 examines the contemporary Irish context. In particular, it addresses the significance of the fact that ownership interests in apartment units in Ireland tend to be sold as leasehold estates.

15. Finally, Chapter 11 concerns rescue provisions for existing developments.

C Consultation

16. The Commission usually publishes in two stages: first, a Consultation Paper and then a Report. This Consultation Paper is intended to form the basis for discussion and accordingly the recommendations, conclusions and suggestions contained herein are provisional. The Commission will make its final recommendations on this topic following further consideration of the issues and consultation. Submissions on the provisional recommendations included and all issues in this paper are welcome. In order that the Commission's Report may be made available as soon as possible, those who wish to make their submissions are requested to do so in writing or by e-mail to the Commission by **30 April 2007**. In light of the significant public interest on issues surrounding multi-unit developments, the Commission will also be hosting a Conference as part of the consultation process for this Paper. This will take place on the **25 January 2007**.⁶

⁶ Organised in conjunction with the Department of Justice, Equality and Law Reform, this Conference will take place at the Law Society of Ireland, Blackhall Place, Dublin 7. To book a place, please contact registration@lawreform.ie. Please note that places are limited and advance booking is essential.

PART A

CHAPTER 1 NATURE AND STRUCTURE OF MULTI-UNIT DEVELOPMENTS IN IRELAND

A Introduction

1.01 In this chapter, the Commission presents an overview of the operation of multi-unit developments in Ireland and outlines the context in which such developments will be examined. In Part B, it outlines the size and importance of the sector and identifies the main groups concerned in the functioning of these developments. Part C examines the element of interdependence necessary for the proper functioning of multi-unit developments and discusses the issues that arise as a result. The main problems facing multi-unit developments are reviewed in Part D. Finally, Part E summarises the latest developments which have had an impact on the multi-unit development debate.

B Multi-Unit Developments

1.02 One of the most prominent features of land ownership in recent decades has been the creation of “multi-unit” constructions, such as blocks of flats or apartments¹ and office and other commercial² multi-unit buildings. Such developments often comprise one building, but they may involve more than one building.³ Often they will be confined to one type of use, such as residential or commercial, but it is becoming common to have a mixture of uses in the multi-unit building. A typical example would be a block of apartments with a row of shops and other commercial units at ground level.

¹ The Oireachtas used the expression “flat” for example, in the rent restriction legislation and ground rents legislation (see paragraphs 8.10 and 8.11 below), but in the *Planning and Development Act 2000* referred to both a “flat” and an “apartment” in the definition of “house” (section 2(1)). Such residential units are usually called “apartments” in North America and the expression “apartment” has become increasingly used in Ireland: See Laffoy’s *Irish Conveyancing Precedents* (Tolley Publishing) Division C. Flats or apartments usually comprise a suite of rooms on one floor of a multi-storey building, but sometimes they may spread over two floors, so as to form a “duplex”.

² For example, a shopping centre.

³ For example, a mixture of townhouses and a block of apartments.

1.03 In the context of residential accommodation, the typical multi-unit development is a multi-storey building comprising self-contained apartments or flats. It is not uncommon, as has just been mentioned, for the building to contain also, usually at ground level, a row of commercial units, such as a newsagents or convenience store and other shops, bank branch and facility like a dry-cleaning outlet or launderette. Larger developments may contain several such multi-storey buildings on the same site and even some purely commercial multi-storey buildings, such as a hotel or office block. They may also contain single-storey buildings, such as houses or interlinked town houses. All such developments share the high-degree of interdependence. Such interdependence may exist also in other, more traditional developments, such as the typical housing estate comprising detached or semi-detached houses or estate comprising holiday cottages. Such developments do often involve an element of sharing facilities or services, such as roads, footpaths, pipes and other means of providing services, parking facilities, play areas and other open spaces. However, the degree of interdependence is much less than that which exists in multi-storey buildings and the need for management of the development is less acute. It is not surprising, therefore, that the problems which may arise are less serious. That does not mean that those problems should be ignored and they are addressed where appropriate, at different points in the Paper.

1.04 An indication of the impact on the supply of housing in the State of apartment developments can be obtained from statistics collected by the Department of the Environment, Heritage and Local Government since 1992. **Table 1** below illustrates that, since 1992, apartment completions (over 145,000) have comprised some 20% of the total housing completions, with clear indications that this percentage is increasing. **Table 2** below illustrates that this trend is even more pronounced in Dublin. Here apartment completions (over 69,000) since 1992 have averaged some 40% of total housing completions and again there are indications that this is increasing towards 45% and over.

Table 1
National Completions

Year	Apartment completions	Apartment completions as a % of total completions	Total completions
1992	3,741	16.7%	22,464
1993	3,961	18.5%	21,391
1994	5,112	19%	26,863
1995	6,009	19.7%	30,575
1996	6,670	19.8%	33,725
1997	7,302	18.8%	38,842
1998	9,137	21.6%	42,349
1999	9,196	19.8%	46,512
2000	8,886	17.8%	49,812
2001	10,626	20.2%	52,602
2002	11,638	20.2%	57,695
2003	14,839	21.6%	68,819
2004	16,106	21%	76,954
2005	18,035	22.4%	80,557
2006 Q1-3	14,200	21.5%	66,170
	Total:		
	145,458		

Table 2
Dublin Completions⁴

Year	Apartment completions	Apartment completions as a % of total completions	Total completions
1992	1,748	25.5%	6,865
1993	2,342	33.2%	7,063
1994	2,580	32.7%	7,891
1995	3,347	37.9%	8,823
1996	3,581	37.9%	9,446
1997	3,087	33.1%	9,325
1998	3,610	40.3%	8,957
1999	4,156	41.4%	10,035
2000	3,737	39.7%	9,405
2001	5,189	54%	9,605
2002	5,540	43.9%	12,623
2003	6,266	43.5%	14,394
2004	6,995	42%	16,810
2005	9,542	53%	18,019
2006 Q1-3	8,236	57.36%	14,357
Total: 69,956			

⁴ Dublin figures are calculated by totalling apartment completions for each of the four local authorities in the Dublin area, namely Dublin City Council, Fingal County Council, Dun Laoghaire-Rathdown County Council and South Dublin County Council.

1.05 In the context of residential property, although such developments are a comparatively new phenomenon,⁵ they now make up a substantial proportion of new buildings for residential purposes. No doubt this “newness” is a source of many of the difficulties outlined below. Purely commercial multi-unit developments, like the traditional office block, have existed for a much longer period and do not appear to give rise to issues, notwithstanding that they share basic features that are inherent in such developments.⁶ Nor do the problems arise in the more recent kinds of purely commercial developments, such as shopping centres and industrial estates. No doubt this is due in large part to the fact that business organisations have become used to the nature and structure of such developments, which tend to follow the practice in other jurisdictions. The process of understanding in the commercial world has also been assisted by the influx in recent decades of commercial investors and business organisations already very familiar with operating out of multi-unit buildings. For this reason the discussion below, and, indeed, the rest of this Consultation Paper, concentrates on multi-unit developments comprising in whole or in part residential accommodation.

1.06 In order to understand the source of the various problems, it is important to identify the key elements and players in multi-unit developments, concentrating on those comprising residential accommodation.

(i) *Units and Unit Owners*

1.07 A “unit” in a multi-unit development is the individual apartment, flat, duplex unit or other self-contained accommodation, which, together with other such units, makes up the entire development. As mentioned earlier, increasingly developments will comprise a mixture of units, so that, although a particular development may comprise mostly residential units, some commercial ones may be present. Although each unit may be described as “self-contained” in the sense that it will be designed to provide within it all the accommodation and facilities needed for day-to-day living, its being part of a multi-unit development, such as a multi-storey building, means that its owner has to share many things with other unit owners. This is the element of interdependence discussed later.⁷

1.08 As regards the unit owner, it must be pointed out that he or she has two ownership interests. One is the leasehold interest in the unit which has been purchased and the other is the interest in the property vested in the management company which the unit owner has as a member of the

⁵ Apartment complexes have only become common in the past decade.

⁶ Such as the degree of “interdependence”; see paragraph 1.18 below.

⁷ See paragraphs 1.18-1.21 below.

company.⁸ The usual provision made is that membership of the management company is tied to ownership of the unit, so that it passes automatically when that ownership changes hands.⁹ Apart from having an interest in the assets of the management company as a member, membership also confers the right to participate in the company's operation, including voting rights at meetings.

(ii) Service Charges and Sinking Funds

1.09 This is a fundamental element which distinguishes most multi-unit developments from other developments. As observed earlier, residence in a multi-unit development necessarily involves a high degree of interdependence. As a result, unit-owners will normally be obliged to pay into a fund which is used to provide for the maintenance of the common areas in a development.¹⁰

1.10 Unit owners also contribute to sinking funds which are kept by property management companies to pay for capital expenses and larger, longer-term structural repairs.¹¹

(iii) Planning Authorities

1.11 Planning authorities are responsible for processing planning applications and granting planning permission. They are also responsible for 'taking-in-charge' major infrastructural services for developments when they are completed. It is this process which has generated the most controversy for planning authorities in their dealings with multi-unit developments.¹²

(iv) Developers

1.12 The developers, usually a company, own the site upon which the development is to be built and acquire the appropriate planning permission for the development in question. They then oversee the construction and sale of the units in the development and sometimes incorporate the management company and retain some control in it until all of the units are sold and the development is completed.¹³

⁸ See further paragraph 4.05 below.

⁹ Problems may arise where the unit owner is different from the actual occupier of the unit, for example, where the unit has been acquired by an investor who lets it to a sub-tenant or by a housing association for occupation by a homeless person or by a housing authority to provide social or affordable housing. See paragraphs 4.86-4.95 below.

¹⁰ For a discussion on service charges, see paragraphs 4.102-4.113 below.

¹¹ For a discussion on reserve/sinking funds, see paragraphs 4.115-4.119 below.

¹² See Chapter 2.

¹³ See Chapter 3.

(v) ***Management Companies***

1.13 Most substantial residential multi-unit developments provide for the establishment of a management company on completion of the development, if not earlier. Each management company's membership comprises the unit owners of a particular multi-unit development. The key functions of the management company are to own the freehold reversion on individual units and manage the common parts and internal and external structures of the building.¹⁴

(vi) ***Managing Agents***

1.14 It is common for a developer, especially in a larger development, to employ¹⁵ at an early stage a firm of "managing agents" or "service providers" to carry out various administrative tasks and, generally, to oversee completion of the development and to plan its subsequent operation. Such firms may also be employed subsequent to completion of the development by the management company or others with responsibility for managing the development.¹⁶ It is important to emphasise that such managing agents or service providers are simply agents of the developer, management company or other person or body with responsibility for carrying out administrative tasks. As such their role should not be confused with that of the body appointing them and which retains the legal responsibility for the due execution of the tasks in question. In particular, such managing agents should not be confused with a management company which usually has a substantial "ownership" interest in the development and major legal responsibilities which reflect that interest. The recommendations in the *Report of the Auctioneering/Estate Agency Review Group* for licensing and regulation of property management agencies relate to managing agents and not to management companies which may employ them.¹⁷

(vii) ***Small Developments***

1.15 It is important to stress that the outline of the nature and structure of residential developments given above will not apply in all cases. In particular the scheme of management companies and managing agents may not be appropriate for a small development comprising only a few units.

¹⁴ See Chapter 4.

¹⁵ Or to direct a management company already established by the developer to do so.

¹⁶ For example, in the case of a small development it may not be appropriate to have management company. Nevertheless, the unit owners, who share common parts of the building or other parts of the development and common facilities, may prefer to delegate day-to-day management tasks to a specialist firm.

¹⁷ See Chapter 5.

Such complexities may be even less suitable where, for example, a large house has been converted into two or three self-contained flats. Such multi-occupied buildings nevertheless involve the element of “interdependence” which is the fundamental feature of all multi-unit developments. They necessarily give rise to the same problems deriving from sharing parts of the building and the facilities and services associated with them. There will still be a need for “management” to some degree. The maintenance and upkeep of shared areas like the entrance, hall, stairs, landings, footpaths and gardens has to be catered for. Provision has to be made for repair and insurance of the roof and other external parts of the building.

1.16 Where the flats or other units in such a small development are let on short leases such matters will usually remain the responsibility of the landlord. In such cases the landlord retains an active interest in the building and usually will retain ownership of the “common areas”. The responsibilities as between the landlord and tenants of units will be dealt with in the usual way by the terms of the leases of the flats.

1.17 Where, however, the flats or other units in a small development or conversion of a building are “sold”, whether for a freehold interest or by way of long lease, some other provision has to be made. The most suitable method of achieving this is to use some form of co-ownership agreement entered into by the various flat owners. This subject is taken up later.¹⁸

C Interdependence

1.18 The common element of multi-unit developments is the degree of “interdependence” they necessarily involve. This has a number of aspects. One is the purely physical one, which derives from the fact that the owners or occupiers¹⁹ share the same building. Each “unit”, whether apartment, office or shop, is part of a larger building and depends on the other parts for support and shelter. It will also depend on pipes, wires, cables and other “conduits” running through the building to supply various facilities, such as electricity, gas and water, and services, such as drainage and sewerage. In order to make full use and enjoyment of a unit, the owner or occupier will need various rights over what are usually referred to as “common areas”, such as entrance halls, stairs, lifts, corridors and other passageways within the building.²⁰ It is also common for unit owners to enjoy, in common with

¹⁸ See paragraphs 10.26-10.32 below.

¹⁹ It is important to appreciate that different interests may be held in a particular unit, ranging from a freehold or leasehold estate to some minor right to use or occupy it, such as a licence to occupy.

²⁰ Usually the “common areas” also comprise other parts of the building, such as its exterior and structure, *ie* in effect all parts not included within individual units. This

other unit owners, use of facilities like car parks and gardens. Such rights are usually accompanied by obligations, such as the obligation to contribute to the cost of repair and maintenance of common areas. The result is that “interdependence” also involves an important “legal” dimension. In order to be fully effective a multi-unit development will require the creation of a wide range of mutual rights and obligations as between the different unit owners.

1.19 Such complexities give rise to another dimension which arises from the element of interdependence. This is the need for day-to-day management of the multi-unit development. How this is achieved can vary considerably. An important aspect of this is meeting management expenses, such as the costs of maintenance and repairs and insurance. This is usually achieved by requiring unit owners to pay annual “service charges”.²¹ Apart from such regular expenses, another important consideration is meeting the cost of substantial capital expenditure which will arise from time to time. It is inevitable that parts of a building will wear out, cease to function or otherwise fail to achieve their purpose,²² so that the issue of replacement arises. The need to build up a fund to meet such capital expenditure, sometimes referred to as a “sinking” or “reserve” fund, or otherwise make provision for such expenditure is of vital importance to the unit owners.²³ The management of the development and the associated costs can be a source of considerable dispute both amongst the unit owners themselves and within the management company. That body is usually a management company established initially by the developer and controlled by it while the development is being built. The first purchasers of units become members and on completion of the development all the unit owners comprise the membership of the company and control should pass to them. In practice the day-to-day management tasks are often delegated to management agents or service providers initially appointed by the developer or the management company controlled by it.

1.20 It is important to emphasise that although the complexities arising from the element of interdependence are probably at their most acute in a single block of flats or offices or of mixed-use units, they can arise in other developments which may involve a degree of interdependence. In recent times considerable variations in developments have occurred, such as those

has considerable importance for the purposes of maintenance, repair, insurance and service charges.

²¹ See paragraphs 4.102-4.113 below.

²² For example, parts of the fabric, such as the roof, drainpipes or external cladding, and internal facilities, such as the lift, central heating or air conditioning systems.

²³ See paragraphs 4.115-4.120 below.

involving interlinked “townhouses”, or a combination of blocks of flats and townhouses or of retail, leisure and residential units on the same site.²⁴

1.21 It is this high degree of interdependence which distinguishes ownership of a unit in a multi-unit development from ownership of a detached or semi-detached house in the more traditional form of housing estate. The latter may involve some degree of “common” or “shared” ownership, such as that concerning car parks, gardens and other open or landscaped areas, but, apart from such limited sharing, each house owner usually enjoys a high degree of independence. This is reflected in the fact that each individual owner takes responsibility for maintenance, repair and insurance of his or her own property. Except for the comparatively rare “private” or “gated” estate,²⁵ most services and facilities relating to roads, footpaths, lighting, drainage and sewerage will have been taken-in-charge by the local authority.²⁶ There is, therefore, usually no question of the owner of a house on such an estate being subject to service charges.

D Problems surrounding multi-unit developments

1.22 The huge surge in the amount of multi-unit developments and management companies in the past ten years coupled with the interdependent nature of ownership of multi-unit developments account in part for the recent swell of controversy around these developments.

1.23 As is discussed later,²⁷ one of the major issues to arise in recent times is that purchasers of units in multi-unit developments often do not appreciate the distinction between ownership of a unit in such a development and ownership of a more traditional housing unit. Furthermore, there is much confusion about the nature and purpose of service charges and reserve or sinking funds and the extent to which the local authority should be involved in such developments. As others have pointed out, this “understanding deficit” is a matter which requires urgent attention.²⁸ As a result of this, it seems that more information and perhaps even regulation should be introduced in order to ensure that consumers are fully aware of matters

²⁴ Note the precedents in Division C of Laffoy’s *Irish Conveyancing Precedents* (Tolley Publishing). See paragraph 8.03 below.

²⁵ As to these, see paragraph 2.13 below.

²⁶ This has, however, recently become a somewhat controversial issue: see paragraph 3.14 below.

²⁷ Chapter 5 below.

²⁸ See, for example; *Management Fees and Service Charges levied on owners of Property in Multi-Unit Dwellings*, Final Report for the National Consumer Agency by DKM Economic Consultants Ltd in association with Kevin O’Higgins Solicitors, October 2006.

concerning sinking funds, service charges, and the unit owner's rights and responsibilities in being a member of a management company.

1.24 Further to this understanding deficit, it is also rapidly becoming clear that the lack of regulation that coincides with the massive growth in the sector and the problems arising from it has become a major consumer and property stakeholder issue. Given the lack of governing legislation or a watchdog in this area, issues include the responsibilities of developers, managing agents and local authorities. Facilitation of appropriate non-court fora for dispute resolution within the sector is also an issue. There is currently no organised national mouthpiece for members of management companies when it comes to issues of policy on multi-unit developments. Similarly, there is no state agency responsible for monitoring and supervision of management companies and no body to approach for advice specific to the area. As a result, it seems that regulation may be necessary. That leads to issues such as, if a regulator of the sector is introduced, what exact functions will it have, and what public body should take on the role?²⁹

1.25 The company law surrounding management companies is also in a state of flux. It will be observed later in this Paper that the company structure as it stands seems to be more appropriate to 'business' organisations rather than 'not-for-profit' organisations such as management companies. Moreover, the law does not take into account that management company boards tend to comprise voluntary directors, many of whom have no experience in company operation. Further difficulties arise from lack of certainty with regard to what exactly the management company should have responsibility for and the rights and duties of members.

1.26 More issues arise from a land law perspective. The complexity of these developments in terms of ownership means that conveyancing is fraught with potential problems. Furthermore, where it transpires that the documentation is defective; remedying the problem will typically be far from easy. Furthermore, land law generally as it has evolved in Ireland has ensured that the practice is for purchasers to buy units as leaseholds with an interest in the freehold reversion of the development.³⁰

1.27 Having identified myriad problems in the sector, the Commission takes the view that reform of the status quo is imperative, and discusses all of the above issues in the course of the Consultation Paper. In considering these issues the Commission has taken into account several other studies which have been carried out recently and other developments with a bearing on the subject.

²⁹ See paragraphs 7.12-7.49 below.

³⁰ See paragraph 10.08 below.

E Recent Developments

1.28 The *Report of the Auctioneering/Estate Agency Review Group*³¹ contained a number of recommendations relating to property management,³² regulation of property management agents³³ and of related matters such as service charges and sinking funds.³⁴ The Review Group's recommendations were accepted by the Government, in particular the setting up of a National Property Services Regulatory Authority to implement them.³⁵ An implementation Group has been established to oversee the practical arrangements for the Authority's establishment,³⁶ pending enactment of the necessary legislation to govern its functions.

1.29 Three further reports contain material which relates to multi-unit developments.³⁷ The 2005 Report of the Housing Unit (now the Centre for Housing Research) entitled *Mixed-Tenure Housing Estates: Development, Design, Management and Outcomes*³⁸ seeks to identify best practice in relation to mixed tenure estates, including high-density ones like apartment complexes.³⁹ Dublin City Council's Housing Department recently commissioned a study⁴⁰ with a view to devising a strategy concerning the role of the local authority in private housing and mixed tenure multi-unit developments in general. The resulting Report entitled *Private and Mixed Tenure Multi Unit Developments – Management and Role of Local Authority* was submitted to the Council's Housing, Social and Community Strategic Policy Committee in May 2006. Although much of what is contained in these studies relates to issues and policy matters which are clearly outside the scope of the Commission's work, they do highlight the particular complexities of multi-unit developments and raise points which are also of concern to the Commission.

³¹ July 2005 (Department of Justice, Equality and Law Reform).

³² See *Report of the Auctioneering/Estate Agency Review Group*, Chapter 13.

³³ Including their licensing by a new Regulatory Authority: See Recommendation Nos 2, 10D and 42.

³⁴ See Recommendation Nos 7 and 26.

³⁵ Announcement by Minister for Justice, Equality and Law Reform 18 October 2005.

³⁶ Based in Navan, Co Meath, as part of the Government's decentralisation programme.

³⁷ See further, paragraph 7.05 below. Also, note the recent publication by the Office of the Director of Corporate Enforcement of their *Draft ODCE Guidance: The Governance of Apartment Owners' Management Companies*, December 2006.

³⁸ Written by the then Director of the Unit, Dr Michelle Norris.

³⁹ See especially section 4.5.

⁴⁰ Carried out by Evelyn Hanlon, chairperson of Ballymun Community Law Centre and previously Finance Director of Ballymun Regeneration Ltd.

1.30 A theme which is common to these studies, and, indeed, to the Auctioneering/Estate Agency Review Group's Report, is the problem which many owners or occupiers of units in multi-unit developments seem to have in understanding and coming to terms with all that is involved in living in such a development. Much confusion and uncertainty seems to exist over the role of management companies and managing agents (including the distinction between them) and the payment of service charges. The difficulties are exasperated by the fact that increasingly multi-unit developments contain a mixture of quite different occupiers. These can range from owner occupiers to private tenants of owner investors, tenants of housing associations and tenants of local authorities (often under the social and affordable housing provisions of the *Planning and Development Act 2000*⁴¹). These different categories may have a distinct perspective in relation to matters like operation of a management company and payment of service charges. This matter is returned to later.⁴²

1.31 The third recent study was the 2006 Report commissioned by the National Consumer Agency entitled *Management Fees and Service Charges levied on Owners of Property in Multi-Unit Dwellings*.⁴³ This also draws attention to the "understanding deficit" and contains numerous recommendations relating to management companies, management agents, service charges and sinking funds. These have been taken into consideration by the Commission in formulating its own recommendations.

1.32 The Commission has also noted developments on the political and governmental front. Much controversy arose during 2005 concerning the practice of some local authorities relating to planning conditions attached to permissions for new private housing estates. In some cases it appeared that developers were being required under such conditions to establish management companies to take responsibility for maintenance of basic services concerning water, lighting, sewage, footpaths and roads. The result was that residents of such housing estates found themselves having to pay service charges for services which traditionally would have been "taken in charge" by the local authority on completion of the development.⁴⁴ In so far as this appeared to be a method of avoiding taking in charge, it seemed to run counter to the policy of section 180 of the *Planning and Development Act 2000*. This requires planning authorities, where developments have been completed to their satisfaction, to take in charge new roads, open spaces, car

⁴¹ Part V.

⁴² See paragraphs 4.86-4.95 below.

⁴³ Carried out by DKM Economic Consultants Ltd, in association with Kevin O'Higgins, Solicitors (referred to as the "NCA Report" below).

⁴⁴ Under section 11 of the *Roads Act 1993*.

parks, sewers, water mains or drains, where requested by the developer or a majority of the qualified electors who are owners or occupiers of houses or other dwellings.⁴⁵ The Department of the Environment, Heritage and Local Government has since issued a circular⁴⁶ to local authorities reminding them of their obligations under section 180 and emphasising that the existence of a management company, such as is standard in a multi-unit development like a block of flats or apartments, should not be used as a ground for refusing to take in charge some of the basic infrastructure of developments, such as roads and footpaths. This matter is taken up later.⁴⁷

1.33 The significant increase in the building of purpose-built high-rise residential blocks of apartments led the then Minister for the Environment and Local Government to publish definitive *Planning Guidelines on Residential Density* in September 1999. These guidelines are intended to assist planning authorities, An Bord Pleanála, developers and the general public by providing guidance on the benefits of higher residential density in appropriate locations and on the safeguards required in promoting greater residential density generally. The Guidelines give effect to government policy of encouraging more sustainable urban development through the avoidance of excessive suburbanisation and the promotion of higher residential densities in appropriate locations, especially in conjunction with improved public transport systems. They set out in a detailed manner the locations appropriate for higher residential densities, the range of densities appropriate to various locations and the need to achieve a high quality of residential environment. It is through the Development Plan and the exercise of their development control functions that planning authorities can take effective action to achieve higher levels of residential density. Planning authorities have generally reviewed and/or varied their Development Plans to give full effect to the recommendations and policies contained in the Guidelines. The Guidelines are now construed as being Ministerial Guidelines under section 28 of the *Planning and Development Act 2000*. This means that planning authorities and An Bord Pleanála must have regard to the provisions of the Guidelines when exercising their planning functions.

1.34 In April 2006 a private member's Bill (the Residential Tenancies (Amendment) Bill 2006) was introduced⁴⁸ in the Dáil. This was designed to extend the remit of the Private Residential Tenancies Board (PTRB) established under the *Residential Tenancies Act 2004* to include regulation

⁴⁵ The section refers to developments including construction of "2 or more houses", but the definition of "house" in section 2(1) makes it clear that it applies also to blocks of flats and apartments.

⁴⁶ PD 1/06.

⁴⁷ See paragraphs 3.14-3.39 below.

⁴⁸ Sponsored by Fine Gael Deputy Fergus O'Dowd.

of management companies, and managing agents employed by them, relating to multi-unit developments. The Minister for the Environment, Heritage and Local Government made it clear during the debate on the second stage⁴⁹ that, while the Government had much sympathy for the objectives behind the Bill, it did not think that its specific provisions were appropriate. In particular, the view of Government was that the PTRB was not a suitable body to undertake the task sought to be imposed on it. Attention was drawn to the study being undertaken by the Commission and the Minister succeeded in persuading the Dáil to postpone further debate on the Bill for a period of 9 months. The Commission has paid particular attention to the various issues raised in the debate.

F Conclusion

1.35 The Commission is concerned that the law has not kept pace with the sudden ubiquity of residential multi-unit developments and that as a result, there is scope for mismanagement and abuse. Given the discrete nature of Irish land law;⁵⁰ it seems that from a regulatory perspective, it may not be appropriate to follow the schemes of other countries. Moreover, the legislative response to this recent phenomenon in Irish property law seems at best piecemeal. As a result, uncertainty and frustration with regard to the lack of sector-specific regulation and legislation abound. All of this convinces the Commission that a more proactive Government approach is imperative to counter the current problems. Given the numbers of people dependant on multi-unit developments as a source of housing in this country, the current situation requires a planned and structured approach to the issues involved.

⁴⁹ 4 April 2006.

⁵⁰ See Chapters 8 and 10.

CHAPTER 2 PLANNING AUTHORITIES

2.01 The key role of planning authorities in multi-unit developments has already been mentioned.¹ That role, as prescribed by the *Planning and Development Act 2000* and related legislation and informed by guidelines issued by the Department of the Environment, Heritage and Local Government, is not something upon which it would be appropriate for the Commission to comment. However, in the course of its study of multi-unit developments, issues have come to light to which the Commission considers it ought to draw attention. Many of these have also been identified by other recent studies.²

2.02 This chapter will examine three areas which the Commission believes require assessment. First, the general planning policy adopted by planning authorities will be reviewed. Secondly, the Commission looks at the inadequacies inherent in the current operation of s.180 of the *Planning and Development Act 2000* and makes consequent proposals for reform. Finally, the efficacy of the use of development bonds as a means of guaranteeing satisfactory completion of developments is discussed.

A General Policy for Multi-Unit Developments

2.03 It seems clear that planning authorities need to develop urgently a more focussed and specific policy towards apartment complexes and similar multi-unit developments. Recent studies³ have identified a wide range of issues which need addressing when planning authorities are considering applications for planning permission for such developments and, if minded to grant permission, what conditions should be attached.

2.04 Some issues relate to the physical nature of such developments, such as their size, configuration, facilities and location. In particular, there is the view that far too many in the past have not been built to suit families and lack the facilities families need. A broad current trend in apartment building is to construct relatively small units with one or two bedrooms. As a result of

¹ Paragraph 1.11 above.

² Such as the Norris, Hanlon and NCA Reports: see paragraphs 1.28-1.31 above.

³ In particular the Norris and Hanlon Reports.

this, multi-unit development apartments are often an attractive short-term option for young people without families who rent property before upgrading to a more permanent home. In terms of sustainability of communities, this is undesirable as it leads to an area becoming characterised by a highly transient population. This makes it difficult to establish and develop a sense of community leading in turn to social deprivation for some residents and so-called ‘ghettoisation’ in an area over time.

2.05 Other issues relate to the ownership and occupation of units in such developments. Increasingly, a mixture of occupiers will be found, ranging from absentee owner/investors who have sublet to short-term tenants to long-term owner-occupiers to tenants of local authorities occupying under the social and affordable housing provisions of the *Planning and Development Act 2000*⁴ and lower-income tenants of housing associations. This multiplicity of occupiers of units gives rise to the question as to who are the appropriate members of the management company in these different contexts.⁵

2.06 The Commission takes the view that planning authorities in carrying out their functions under the planning legislation in relation to multi-unit developments need to develop policies which take into account more specifically such issues. Given the increasing importance of such developments in delivering the government housing strategy, there is clearly a role for further national guidelines issued by the Department of the Environment, Heritage and Local Government which focus directly on these issues, particularly where local authorities have a direct ownership involvement.

2.07 The Commission further considers that given the quite piecemeal development of the law surrounding what is still a relatively new but huge sector, government reappraisal of all issues involved and consequent implementation of new policy is necessary. To this end, the Commission recommends that a detailed study should be commissioned with a view to developing a clear and focussed strategy for the multi-unit development sector as a whole, with the aim of informing government policy on the sector.

2.08 *The Commission provisionally recommends a review by Planning Authorities and the Department of the Environment, Heritage and Local Government of planning and housing policy relating to multi-unit developments.*

⁴ Part V.

⁵ See further, paragraphs 4.85-4.95 below.

2.09 *The Commission provisionally recommends that a detailed study should be commissioned with a view to developing a clear and focused strategy for the multi-unit development sector as a whole, with the aim of informing government policy on the sector.*

B Taking in Charge – Section 180

2.10 There has been much recent controversy concerning certain local authorities' policies on taking in charge of services, the operation of section 180 of the *Planning and Development Act 2000*, and requiring developers to establish management companies to provide services which would otherwise be taken in charge. Notwithstanding the prompt Departmental action to issue new guidelines on the matter,⁶ the Commission has concluded that problems remain and further action may be appropriate.

2.11 The first essential is that the precise operation and scope of section 180 needs to be clarified and fully understood. The recent controversy concerned its operation in relation to traditional housing estates, but the Commission's research suggests that there is even more uncertainty as to how far it should operate in respect of apartment complexes and similar multi-unit residential developments. As was pointed out earlier,⁷ the wording of the section, when read with the definition of "houses" in section 2(1) of the Act,⁸ makes it clear that the section applies equally to multi-unit structures like apartment blocks. It follows that the obligations imposed by the section on planning authorities apply equally to such structures.⁹

2.12 These obligations fall into two categories. Where a development is completed to the satisfaction of the planning authority in accordance with the permission granted and any conditions attached to it, the authority is obliged¹⁰ to take in charge the new roads, open spaces, car parks, sewers, water mains or drainage systems provided as part of the development, where requested by either the developer or a majority of the qualified electors¹¹ who own the houses or apartments involved. Where a development is not so

⁶ Circular PD 1/06.

⁷ Paragraph 1.32 above.

⁸ Which provides that "house" means a building "or part of a building" occupied as or provided for use as a dwelling and includes "a building which was designed for use as 2 or more dwellings or a flat, an apartment or other dwelling within such building".

⁹ See Gore-Grimes *Key Issues in Planning and Environmental Law* (Butterworths 2002) page 471.

¹⁰ Subsection (1) uses the imperative "shall" without qualification.

¹¹ Subsection (3) makes provision for the planning authority holding a plebiscite to ascertain the electors' wishes.

completed and no enforcement action has been taken within seven years of expiration of the permission authorising the development,¹² the obligation to take in charge arises when again requested by a majority of the house or apartment owners.¹³ Notwithstanding the apparent clarity and wide scope of these provisions, the Commission accepts that there must be some doubt about the appropriateness of their literal application to multi-unit developments like apartment blocks where the intention is that they will remain in private ownership.

2.13 The Commission entirely agrees with the position taken by the Department of the Environment, Heritage and Local Government that developers and owners of houses in traditional housing estates should not be excluded from the long-established taking-in-charge system by planning conditions requiring the putting in place of alternative private arrangements. On the other hand, there is some merit in the view that public funding should not be applied to service developments which are clearly private and to which no general public access is available. This applies to so-called “gated” developments, to which access is limited generally to owners within the development and to others only if given the code or other security means of access. It has been pointed out that such developments do cause problems, where, for example, emergency services need immediate access or other public bodies need access to carry out inspections or other statutory duties. The Commission understands that for such reasons some local authorities have adopted the policy of not granting permission in future for construction of ‘public’ gated developments. Meanwhile the Commission acknowledges that there is force in the argument that the taking-in-charge system should not apply to private gated developments and that, notwithstanding its apparently wide scope, nor should section 180 of the 2000 Act. The question remains as to where one should draw the line.

2.14 Apartment complexes are the obvious illustration of how difficult it may be to decide where to draw the line in this context. Arguably the internal infrastructure of such buildings should be regarded as largely private to the owners of the apartments and so should remain outside the scope of the taking-in-charge system and section 180. They should remain the permanent responsibility of the owners’ management company.

¹² Since planning permission usually lasts 5 years (see sections 40 – 42 of the 2000 Act), this means that the obligation to take in charge under this provision will operate only after 12 years from the grant of permission for the development.

¹³ Subsection (2)(a). Subsection 2(b) authorises the planning authority to apply a development bond or other security required as a condition of the planning permission under section 34 (4)(g) of the Act in carrying out completion of the development, see paragraph 2.28 below.

2.15 However, the same argument is not so convincing with regard to the external infrastructure, such as the roads and footpaths leading to the apartment building, to which the general public will actually have access. The same applies to the lighting of these areas and the drains, sewers and watermains serving the building. Gardens and other open spaces are more problematic, particularly if the general public is clearly denied access and such areas are solely for the enjoyment of private residents. The Commission recognises that these are essentially policy matters to be determined by others, but takes the view that urgent consideration needs to be given to a number of issues.

2.16 First, the scope of section 180 needs to be reviewed. Its apparent full application to apartment and other multi-unit residential developments may not be appropriate, as outlined above. It must be borne in mind that a consequence of section 180 being invoked is that the planning authority may find itself required to expend very substantial public funds. There must be a concern about the future, potential liabilities of planning authorities if section 180, as it currently stands, is applied literally, i.e. applied to every new development, gated or otherwise, which complies satisfactorily with the planning permission and any attached conditions. The reference in the section to applying security provided by the developer as a condition of getting planning permission¹⁴ may prove to be of little comfort. Even if a development bond or other security was provided, in the case of uncompleted developments, by the time section 180 can be invoked, the bond or other security is likely to have lapsed, become unenforceable by expiry of time or even been released.¹⁵ At the very least arguably section 180 should not apply in its totality to either purely private gated developments or to multi-unit developments where it is appropriate that the permanent responsibility for gardens, outdoor lighting etc for open spaces within these developments should remain in the ownership of an owners' management company, funded by the owners' service charges and contributions to a reserve or sinking fund.

2.17 Secondly, the recent controversy which led the Department of the Environment, Heritage and Local Government to issue its Circular on developers of housing estates being required to establish management companies¹⁶ highlights the need for more specific guidelines. The Commission has concluded that the issue of when it is appropriate to require a management company to be established, with a view to relieving local authorities of their need to take charge various services and to exclude any

¹⁴ Section 180 (2) (b)

¹⁵ See further paragraphs 2.24-2.34 below.

¹⁶ PD 1/06: see paragraph 1.32 above.

obligation under section 180 of the 2000 Act, needs a thorough review. This should be carried out by the Department of the Environment, Heritage and Local Government and involve interested bodies such as the Construction Industry Federation, the Irish Home Builders Association, the National Property Services Regulatory Authority and other bodies representing the architectural, surveying and legal professions.

2.18 The Commission's proposed new Regulatory Body for multi-unit developments could play a central role.¹⁷ This should lead to the issuing of more precise and specific guidelines and standards to be applied by developers and planning authorities. The Commission further recommends that following a thorough review of section 180, guidelines should also be issued explicitly enumerating the circumstances where local authorities should take in charge and of what exactly they are expected to take in charge.

2.19 Thirdly, planning authorities should keep the implications of section 180 of the 2000 Act in mind when considering the initial application for planning permission for any development potentially coming within its scope. Since that section may result in the authority being obliged at a much later stage to take the development in charge and to complete any works necessary to facilitate this, the authority should anticipate this possibility. Two important points arise. One is that a failure from the outset to require the developer to carry out works to the standard necessary to enable the authority to take services in charge, is likely to prove very costly if the authority has to carry them out later when costs will have increased substantially. The other is that careful consideration should be given to what development bond or other security to cover completion works should be required of developers.¹⁸

2.20 The Commission recommends that these issues should also be reviewed urgently and new specific guidelines issued to planning authorities. The Commission of course acknowledges that for some developments, the developers and/or purchasers of units may opt against having the development's infrastructural requirements taken in charge by local authorities. In such circumstances, the Commission believes that it is imperative from the outset that potential buyers of units are made fully aware of the intention of the developers or of the majority of prospective owners that the development will not come under s.180 and will remain perpetually in private ownership.

2.21 Fourthly, the Commission is aware that the Irish Home Builders Association has drafted recently a Policy for the Taking in Charge of

¹⁷ See Chapter 7 below.

¹⁸ See further paragraphs 2.24-2.34 below.

Housing Developments designed to promote the “efficient and timely” taking in charge of housing developments, including under section 180 of the 2000 Act. It sets out conditions to be met, a timeframe and makes provision for dispute resolution or arbitration of disputes between developers and local authorities.

2.22 The Commission has also noted that the Construction Industry Federation has been agreeing Taking in Charge Protocols with some local authorities,¹⁹ setting out the application procedures for developers, documentation to accompany applications, various certificates to be supplied and other requirements. The Commission takes the view that these are welcome developments, but considers that such initiatives should be reviewed with the objective to developing a national scheme while taking into account local circumstances. That review may conclude that they should be given statutory force, by being incorporated in regulations made by statutory instrument, or, if that is not appropriate, by being promoted nationally by guidelines issued under section 28 of the *Planning and Development Act 2000*.²⁰

2.23 *The Commission provisionally recommends that the scope of section 180 of the Planning and Development Act 2000 be clarified, and that guidelines should be issued based on that clarification. It further recommends that planning authorities should closely consider the implications of s.180 when processing planning applications and that a national policy should be produced on local authorities taking multi-unit developments in charge.*

C Development Bonds

2.24 As already observed, one of the key areas of controversy surrounding multi-unit developments is the failure of developers to properly complete developments leading to a subsequent delay in local authorities taking in charge the maintenance of the public infrastructure in and around the development. A further problem is the delay in some local authorities taking in charge the development upon completion of the development. Either scenario is highly unsatisfactory for the residents of multi-unit developments. Local authorities use the mechanism of bonds to ensure that developers complete developments satisfactorily and within a reasonable timeframe.

2.25 Section 180 of the *Planning and Development Act 2000* provides that once a housing estate is completed to a satisfactory standard, the local

¹⁹ For example, the Protocol agreed with Kilkenny County Council dated 8 June 2005.

²⁰ Planning authorities are required to have regard to such guidelines in the performance of their functions: see section 28 (1).

authority is obliged to take in charge the public services where requested to do so by a majority of residents or by the developer.

2.26 In respect of developments that have not been completed satisfactorily, where 7 years have elapsed since the planning permission expired and where it is requested by the majority of residents, the local authority shall take in the estate in charge.²¹

2.27 A bond will indemnify the planning authority up to a specified amount if the developer fails to fulfil his obligations under a planning permission. If a developer fails to fulfil his legal obligation under the terms of the permission, the local authority can take him to court and, if necessary, the developer will forfeit the bond. Thus the bond provides security to the planning authority to ensure proper completion of watermains, sewers, roadways, public lighting and open spaces etc.

2.28 The Departmental Circular PD1/06²² drew planning authorities' attention to the need to insist on developers providing an acceptable level of security to cover completion of developments. The provision of such security may be made a condition of the grant of planning permission.²³ Traditionally such security has been provided by way of a development bond, but other forms of security may be provided, including cash deposits. The Circular also emphasised to planning authorities the need for vigorous and promptly pursued enforcement action in cases where developers failed to complete satisfactorily a development on time and under the terms of the planning permission.

2.29 The experience of local authorities as to the efficacy of the development bond system appears to be mixed. As local authorities expand in size and efficiency, administration of bonds is becoming easier. Some local authorities say that they maintain strict control of the bonds by carrying out regular monitoring of works and regular inspections of sites, and thus rarely need to pursue enforcement action. In any case, some local authorities believe that the mere threat of a claim on a bond is a sufficient deterrent to builders renegeing on their responsibilities to complete a development properly. However, the Commission's study suggests that, while the development bond system generally works reasonably well when put in place by local authorities, a number of problems exist. Amongst these are:

- i) bonds sought from developer being pitched at such a level that their value is not really a threat to the developer and/or lower than what would be required to complete the development;

²¹ *Planning and Development Act 2000*, section 180 (2)(b).

²² See paragraphs 1.32 and 2.17 above.

²³ *Planning and Development Act 2000*, section 34 (4)(g).

- ii) bond amounts diminishing in value over time and being inadequate to cover the cost of works when they are being carried out;
- iii) some developers relying on insurance bonds which may only have a premium of €6,000 or €7,000 and which may not provide the same level of deterrence as cash;
- iv) some local authorities being reluctant to impose bonds high enough to cover potential problems as they feel it may discourage developers from building in parts of the region covered by the local authority where development is most needed;
- v) local authorities struggling with the administration of bonds, resulting in claims not being made on time and bonds being allowed to lapse;
- vi) local authorities failing to carry out sufficiently rigorous follow-up inspections of completion works and so missing opportunities to call in the bond;
- vii) local authorities delaying release of bonds after developers have completed works;
- viii) local authorities refusing to release bonds until the taking-in-charge process is complete.

2.30 Some local authorities feel that bonds are not the most effective way of ensuring satisfactory completion at all and that negotiation is often the solution.

2.31 Notwithstanding all of these problems, however, it is important to emphasise that in relation to bonds, the situation has gone from a situation of absolutely no compliance to gradual enforcement; local authorities have become more active and started issuing commencement notices leading to wider implementation of the use of bonds. Thus, on the whole, bonds have actually improved the accountability of developers but local authorities could still be more rigorous in enforcement. The bonds are still not very well geared but are infinitely better than they were. However, there are still some leading Irish developments that are not in compliance with their permissions by not having a bond or a cash security in place.

2.32 Again the Commission takes the view that the various problems in this area be thoroughly reviewed, with the objective of issuing new national guidelines²⁴ designed to ensure that bonds or other security are obtained and released when appropriate and that, as a consequence, developments are

²⁴ These can build on recent initiatives such as the IHBA one mentioned earlier: paragraph 2.21 above.

completed and taken in charge, as appropriate, in a timely fashion. On a regional level, it appears that protocols have already been developed by some local authorities in conjunction with the construction industry in approaching the problem of unfinished housing schemes, and the Commission welcomes this progress.²⁵ On a national level, the new guidelines should set out a clear procedure and time frame for completion of works, release of the bond or other security and taking in charge. They should cover matters such as the following:

- i) completion of developments according to specified standards, which ensure compliance with the planning permission and the requirements for taking in charge;
- ii) practical guidance on gearing of bonds to such a level that is reasonably likely to act as a deterrent to the developer against failure to complete and reasonably likely to cover the cost of unfinished works in the event of this happening;
- iii) procedure and requirements for applications to take in charge, including documentation to be submitted and professional certification;
- iv) a clear time frame for dealing with such applications, including local authority inspections and notification to developers of completion works;
- v) a time frame for carrying out such works and notification of completion, with appropriate professional certification;
- vi) a time frame for local authority checking of such completion and release of the bond or other security;
- vii) a time frame for completion of the taking in charge process;
- viii) a dispute resolution or arbitration mechanism.

2.33 The suggested review should include an examination of local authority administrative procedures and resources for dealing with development bonds and other security, building control and inspection and the taking-in-charge process. It would appear that some local authorities are struggling with these matters and that there is a considerable backlog in taking developments in charge. Improvement is also needed in matters such as the timely release of bonds by local authorities and their monitoring of the progress of developments and the provision of services to residents there before they are taken in charge. The Commission would reiterate that any delay in taking in charge is bound to have a harmful impact on the owners of apartments and other units in the developments.

²⁵ Eg. the Protocol agreed with Kilkenny County Council dated 8 June 2005

2.34 *The Commission provisionally recommends that the bonds system should be reviewed and that national guidelines should be produced to facilitate efficient and efficacious use of bonds for both local authorities and developers. Such guidelines should be periodically reviewed to ensure that the deterrent effect remains persuasive to developers and to meet new challenges faced by developers and local authorities over time.*

CHAPTER 3 DEVELOPERS

3.01 Having proposed recommendations for the regulation of planning authorities, the Commission now turns to developers. First, this chapter sets out the responsibilities of developers and suggests reform of the law to enforce proper completion of developments. Secondly it outlines the duties of developers in relation to the establishment, control and operation of management companies.

A Imposing Statutory Obligations on Developers

3.02 The developer is required under planning law to carry out the development in accordance with the permission granted. This includes compliance with any conditions attached to the permission. In order to maximise revenue it is common practice for developers to sell “off plan”, *ie*, before any building has taken place, by entering into a contract for sale and building agreement for a particular unit with individual purchasers.¹ A deposit will be paid by each purchaser at this stage, but it is not uncommon for prospective purchasers to pay a preliminary “booking deposit” on a particular unit before any contract is entered into. The Auctioneering/Estate Agency Review Group recommended that some regulation of sales off plan should be introduced,² including a requirement that all client monies such as deposits should be held in separate client accounts.³ Again, for revenue purposes, the developer will usually wish to complete the sale of units as quickly as possible, so that it is common for some purchasers to move into their units while others are still being built or other parts of the development are being completed.

3.03 During the period between the start of the building of the development and its final completion, the developer usually remains in control and has legal responsibility for the entire development. It is usually contemplated that in due course a management company, whose members

¹ The developer may not carry out the building itself, but may engage another company to do it, in which case the purchasers will enter into building agreements with that company.

² July 2005 Report, Recommendation No. 26.

³ *Op cit*, Recommendation No. 7.

will comprise the various unit owners, will assume responsibility, especially when the development is fully completed. However, it is common for such a company to be established at an earlier stage, especially once the point of completing the sale of individual units is reached. In such cases, the developer will usually be the controlling member of that company and will remain so until the sale of the majority of units is completed and each purchaser becomes a member. Even where a management company is established earlier, it may not be in a position to assume any major responsibility because no interest in the development⁴ is vested in it – this will not be done by the developer until after completion of the development. Whether or not a management company is established prior to completion of the development, it is common, especially in larger developments, for the developer (or the management company at the developer's direction) to employ a specialist firm of managing agents to organise and supervise many of the administrative tasks connected with completion of the development and its subsequent day-to-day management.⁵

3.04 Regardless of how the developer organises such administrative matters during the interim period between commencement and completion of the development, nothing should disguise its legal responsibilities under planning law and the contractual arrangements made with the individual first purchasers of units in the development.

3.05 Various concerns have been raised about the practices which have evolved due to the lack of any regulation in relation to the developers' role in multi-unit developments. Some of these involve a failure to comply strictly with legal responsibilities and others involve practices which give rise to various problems. Much reference has already been made, for example, to the taking in charge problems arising with local authorities resulting from developers' failure to complete developments properly or punctually, and from some developers' reluctance to cede control of management companies to apartment owners.

3.06 The Commission believes that the most appropriate means of avoiding these and other problems in the future is to make legislative provision for the regulation of certain aspects of the development of multi-unit developments and to make developers accountable to the proposed Regulatory Body.

3.07 What the Commission has in mind in this context is statutory provisions which lay down certain obligations which developers would have to meet in future. These would be designed essentially to prevent many of the administrative problems outlined in a later chapter from arising in the

⁴ Such as ownership of the common parts. See paragraph 4.04 below.

⁵ See Chapter 5 below.

first place.⁶ To some extent these statutory obligations would supplement the control exercised over developments by planning authorities under the *Planning and Development Act 2000*, in accordance with Ministerial guidelines and directives issued under Part IV of that Act.⁷ They would also supplement the general regulations and supervision of multi-unit developments which the Commission proposes should come within the remit of the proposed Regulatory Body.

3.08 It is envisaged that the statutory obligations would relate primarily to ensuring that developers do not engage in unfair, obstructive or restrictive practices in relation to multi-unit developments. These provisions would be aimed particularly at problems concerning the role of developers in the period between commencement and completion of the building as a multi-unit development. In seeking to address such problems, the provisions would provide a clear framework in which developers must operate in the context of multi-unit developments.

3.09 The Commission's preliminary view is that these problems should be dealt with in a variety of ways, as set out below.

B Completion of Development

3.10 The developer clearly has a legal responsibility under planning law to complete the development in accordance with the planning permission granted by the planning authority, including any conditions attached to the permission. A failure by the developer to complete the building and finishing work will cause much inconvenience to occupiers of a multi-unit structure in particular. The same applies to any undue delay in dealing with "snag" problems. Further problems arise where completion of such work is a pre-condition to the local authority taking in charge elements of the development.⁸

3.11 Extensive powers for enforcement of compliance with planning matters are contained in the *Planning and Development Act 2000*.⁹ What concerns the Commission is that, notwithstanding their apparent extensiveness, these powers do not always prove to be an effective way of ensuring compliance by developers. One reason is that it would appear that some local authorities are reluctant to invoke their powers speedily, so that

⁶ See Chapter 6 below.

⁷ Such as the 1999 Guidelines for Planning Authorities on Residential Density, which are construed as being made under section 28 (3) of the 2000 Act: see paragraph 1.33 above.

⁸ See further paragraph 3.14 below.

⁹ Part VIII.

the developer is left free to delay or procrastinate. When eventually the enforcement powers are invoked, it has been suggested sometimes the courts tend to give developers more time for compliance. Meanwhile, the occupiers of the development are left in a most unsatisfactory state of “limbo”. Another reason perhaps is that the sanctions for non-compliance are not strong enough to have a deterrence effect. An alternative albeit extreme sanction could be that failure to complete a development would constitute a breach of planning permission.

3.12 The Commission takes the view that the proposed Regulatory Body should monitor the use by planning authorities of their enforcement powers in relation to multi-unit developments and advise the Department of Environment, Heritage and Local Government as to what action might be appropriate.

3.13 *The Commission provisionally recommends that the proposed Regulatory Body should monitor the use by planning authorities of their enforcement powers in relation to multi-unit developments and advise the Department of Environment, Heritage and Local Government as to what action might be appropriate.*

C Taking in Charge: Management Companies

3.14 As mentioned above, often an important aspect of “completion” of the development is ensuring that all work is done to the required standard to enable the local authority to take in charge elements such as roads, footpaths, lighting, water services, drainage and sewerage systems and open spaces. As is discussed elsewhere,¹⁰ the extent to which the taking-in-charge system should apply may vary from development to development. Also discussed is the operation of section 180 of the *Planning and Development Act 2000*. Various recommendations are made in respect of both these matters.¹¹ The point the Commission wishes to reiterate in this context is that it is essential that there is no undue delay in the operation of the taking-in-charge system. The enforcement powers under the 2000 Act are not an effective method of achieving this and that is why the Commission recommends rigorous use of development bonds or other security provided by developers.¹²

3.15 Where the multi-unit development envisages the establishment of a management company to own the “common areas” of the development and the reversionary interests in unit owners’ leases, and generally to manage the development throughout its existence, provision for its establishment and

¹⁰ Paragraphs 2.10-2.23 above.

¹¹ Paragraphs 2.10-2.23 above.

¹² See paragraphs 2.24-2.34 above.

operation is usually made in the legal documentation prepared by the developer's solicitor. Several concerns arise.

(a) Legal Documentation

3.16 One is that the legal documentation may be defective in the provision it makes for establishment and operation of the management company. The Commission reiterates the recommendations it makes elsewhere for statutory requirements as to the nature and structure of such companies in relation to residential developments.¹³ It also makes recommendations to facilitate modifications to the legal documentation where it is defective or has failed to meet statutory requirements.¹⁴

(b) Advance Payment of Service Charges

3.17 Another worrying trend which the Commission has been made aware of is developers, while still in control of the management company before completion of the development, asking unit owners to pay service charges for coming multiple years in advance. Developers do this as a way of raising a large lump sum of cash immediately. The developer is then, in effect, a debtor to the management company for the next few years. The money is used for the developer's immediate expenses or development costs. From a consumer perspective, this practice is unsatisfactory and clearly should not be allowed. It places a demand for a sum of money on unit owners for services which have not been yet contracted for. Furthermore, it is undesirable from the management company's point of view for the developer, who should cede any interest in the management company as early as possible once the development is completed, to have control over what is effectively the management company's money over a long term period.

3.18 Based on this, the Commission recommends that there should be a statutory prohibition on developers seeking payment of more than a year's advance on service charges. This should be subject to review on a case-by-case basis by the Regulator where the developer claims that he or she has a legitimate purpose for demanding such advance payments.

3.19 *The Commission provisionally recommends that demand by a developer of more than a year's advance on service charges should be strictly prohibited by legislation. This should be subject to review on a case-by-case basis by the Regulator where the developer claims that he or she has a legitimate purpose for demanding such advance payment.*

¹³ Paragraph 4.98 below.

¹⁴ Paragraphs 10.24-10.25 and 11.01-11.09 below.

(c) *Establishment of a Management Company*

3.20 Another concern is that there are reports that some developers may delay in establishing the management company, misuse it while it is under the developer's control, fail to ensure that it meets legal obligations or delay in transferring assets to it when the development is essentially complete. Each of these concerns is considered below. To some extent they would be dealt with by recommendations made elsewhere but some specific recommendations are also made below.

3.21 As regards a delay in establishing the management company, in view of the lack of awareness of their legal rights of many occupiers of multi-unit developments¹⁵ and likely reluctance of them to incur the expense of going to court to enforce contractual provisions,¹⁶ the Commission has reached the preliminary conclusion that this is an area where statutory provision is needed. There should be a statutory obligation put on developers to set up the management company by a specified date. The Commission takes the view that the latest date should be completion of the sale of the first unit, because, as is discussed elsewhere, the purchaser should become a member of the company automatically on that date.¹⁷

(d) *Misuse of the Management Company*

3.22 As regards misuse of the management company, several concerns have been expressed to the Commission. One is that for much of the company's early operation, i.e., while the building of the multi-unit development is taking place, it is under the control of the developer. This is because, while most of the units remain unsold, the developer will hold the majority shares or membership rights allocated to units. The Commission is not convinced that this is necessarily improper. If, as the Commission recommends elsewhere,¹⁸ the most appropriate allocation of shares or membership voting rights in the management company is one share or vote per unit, the developer will necessarily hold the majority so long as the majority of units remain unsold. What should not happen is that the developer disregards the one share or vote per unit rule and fixes the allocation so that the developer retains majority control after the majority of units have been sold. The Commission recommends that the developer should not be permitted to have weighted votes and that a fundamental principle one vote per unit should apply.¹⁹ A further source of the problem of

¹⁵ See Chapter 6 below.

¹⁶ See ODCE *Draft Guidance* at paragraph 6.15.

¹⁷ Paragraphs 4.80-4.83 below.

¹⁸ Paragraphs 4.85-4.95 below.

¹⁹ *Ibid.* and paragraph 4.31 below.

developers retaining control of the company is their failure to reduce the number of directors nominated by developers as the units are sold off. The Commission has concluded that membership, directorship and voting rights of members should be the subject of statutory regulation, with which developers would be obliged to comply.²⁰

3.23 Even where the developer properly holds the majority interest in the management company, as in the early stages of the development before the majority of units are sold, it is important that its interest is not used improperly. In particular it is essential that the role of the developer and that of the management company do not become confused. It is the developer's responsibility to complete the development in accordance with the planning permission, to ensure that works to the required standard are done to facilitate the taking in charge of any services by the local authority and to attend to any snagging problems. The management company should not be involved in such matters and, in particular, any service charges levied on owners of units already sold off should not be expended on these matters.

3.24 This is a fundamental point which the Commission has concluded should be enshrined in legislation. Developers should be under a statutory obligation not only to establish the management company in due time, but also to ensure that its operation is strictly confined to its prescribed remit. This should be limited to "management" of a completed development and not extend to works needed to complete the development. Where a development is not completed, it should be emphasised that the management company must only hold responsibility for the operational day-to-day issues normally invested in such companies, for example: cleaning, lift and garden maintenance etc, and longer term operational issues normally funded by the reserve/sinking fund; and have absolutely no involvement with ongoing construction works or development works for which the developer is being compensated by way of the capital purchase monies for each unit.

3.25 The Commission firmly believes that developers should be subject to heavy sanction where any of the abuses outlined in relation to management companies are evident. Under company law, there is a long-established principle that the director must act in the best interests of the company.²¹ The developer or the developer's agent, where acting as a director of the company, are under a fiduciary obligation to act in the best interests of the company and its members. The abuses outlined above suggest that the developers in such instances may very well be in breach of their duties as directors.

²⁰ Paragraph 4.98 below

²¹ See Keane, paragraphs 27.77-27.120.

3.26 *The Commission provisionally recommends that it should be further provided that service charges should never be used to pay for ‘snagging problems’ or any other expenses incurred by the developer in completing the development.*

3.27 *The Commission provisionally recommends that developers should be under a statutory obligation to establish the management company in due time..*

(e) Contracting with Managing Agents

3.28 The Commission also recommends that developers should be prohibited by statute from using their control of the management company in the early stages of the development to commit it to long-term contracts with managing agents. In particular, the decision whether to employ such agents, and which agents once the development is complete, should be that of the management company and the owners of the units who by then comprise the membership.²² For the same reason, it should also be prescribed by statutory regulations relating to the constitution of management companies that any directors appointed by the developer must resign when the development is complete and the management company assumes full responsibility for the development.²³

3.29 *The Commission provisionally recommends that developers should be statutorily prohibited, while in control of the management company, to commit the company to long-term contracts with managing agents.*

3.30 *The Commission provisionally recommends that statutory regulations relating to the constitution of management companies should prescribe that any directors appointed by the developer must resign on completion of the development.*

(f) Transfer of Assets

3.31 The Commission is especially concerned about reports of developers unduly delaying the transfer of assets to the management company, i.e., the vesting in it of ownership of the common areas and the reversionary interests of the unit owners’ leases.²⁴ Such delay can cause many problems. The most serious one is that the management company cannot carry out its intended management functions until this transfer takes place.

²² See paragraph 5.10 below.

²³ See further on this, paragraph 4.98.

²⁴ See the Commission’s recommendations on this matter at paragraphs 4.80-4.83.

3.32 The Commission recommends that this practice should be prohibited. The developer should be under a clear statutory obligation to transfer the relevant interests to the management company as soon as the sale of the last unit intended to be sold is completed. If, as is common, the developer wishes to retain one or more units for their own purposes, this should not be allowed to delay the transfer. That transfer should still take place. Moreover, in such a case, the developer, like all unit owners, is entitled to membership of the management company, but strictly only in the capacity of unit owner once the freehold interest has been vested in the management company. The Commission notes that the Law Society's Conveyancing Committee has recently promoted a scheme which facilitates such a transfer which has Revenue Commissioners' approval from the stamp duty point of view.²⁵ In order that the statutory obligation to transfer it is not evaded, the legislation should require developers to specify in the planning application whether such retention is proposed, and its extent. Any change in the proposed retention should need the approval of the planning authority and the statutory obligation should apply accordingly.

3.33 Moreover, in the case where a development comprises a number of separate apartment blocks, the Commission believes that on completion of each individual block, the freehold of that part of the development should be immediately vested in the management company.

3.34 *The Commission provisionally recommends that developers should be under a statutory obligation to transfer all relevant interests to the management company as soon as the sale of the last unit intended to be sold is completed, and that they should be required to specify from the outset whether they intend on retaining units for themselves.*

3.35 To counter any potential ambiguity in this area, the Commission recommends a statutory definition of 'completion' of a multi-unit development. Completion should be held to mean the point at which all units are sold off. Should the developer want to keep some of the units, this must be detailed in the planning application. If more units are wanted, the developer must reapply to the planning authority. In either case, the transfer of assets to the management company must still take place.

3.36 *The Commission provisionally recommends that developers must specify in the planning permission where they intend on keeping a unit or units.*

3.37 *The Commission provisionally recommends that there be a statutory definition of the term 'completion' of a development.*

²⁵ See "Retention of Units in Apartment Development by Developer: Stamp Duty Treatment and Precedent Documentation" Law Society Gazette June 2006 page 48.

3.38 The Commission further recommends that every development should be registered with the Regulatory Body. Details of units to be kept over by the developer must be included in registration. Where the developer keeps units over, the Regulator must also be notified of this. The Commission recommends that this should also be provided for in any regulatory legislation.

3.39 *The Commission provisionally recommends that every development should be registered with the proposed Regulatory Body, and further provisionally recommends that developers must inform the Regulatory Body where they intend to retain units in the development.*

D Enforcement of Obligations

3.40 As regards enforcement of such statutory obligations, the Commission has concluded that a breach should constitute a criminal offence.²⁶ Consideration was given to imposing other types of sanction, such as rendering sales of units void where a developer breached obligations. No doubt in one sense such a sanction would severely penalise developers, and, therefore, appear to be very effective, but the trouble is that it would also penalise equally severely innocent parties, in particular purchasers of units. For this reason, such a sanction is not recommended. It is considered appropriate that proceedings in relation to such offences should be brought and prosecuted by the Regulatory Body, given the extended remit in respect of multi-unit development which the Commission is recommending. This would supplement the power of planning authorities to take enforcement action in respect of breaches of planning law under Part VIII of the *Planning and Development Act 2004*. In addition it should be open to any unit owner, or other person or body interested in a development (such as a management company or mortgagee of a unit), to seek an order for enforcement of a developer's statutory duties from the Circuit Court and an award of damages to cover any loss suffered as a consequence of a breach of the statutory obligations.

3.41 The Commission reiterates its view that the statutory obligations relating to developers should be confined to multi-unit developments which comprise at least some residential units. Different considerations apply to purely commercial developments, like office blocks, shopping centres and industrial estates. The lessees of such developments are much better

²⁶ There is a precedent for use of criminal sanctions in this area, *eg*, it is an offence for a landlord to breach the standards for rented houses laid down by regulations made under the *Housing (Miscellaneous Provisions) Act 1992*: see section 34 of that Act. Note also section 126 of the *Residential Tenancies Act 2004* (offence to fail to comply with determination order made under that Act); and see sections 143 and 144 (4) of the 2004 Act (offences relating to registration of tenancies).

equipped to deal with issues concerning completion of the building and other aspects of the development. Frequently they will undertake themselves to carry out substantial “fit-out” and other works. Furthermore, the leases of units are usually for much shorter terms (35 years used to be the norm, but shorter leases are common nowadays) and the landlord retains an active interest in the building throughout the term. The rent is usually a substantial “rack” rent, protected against inflation by rent review provisions. The landlord retains substantial repairing and other obligations, the cost of which is met through the service charges. There may be a management company, but usually under the control of the landlord rather than the tenants. For these reasons the sort of problems which arise in respect of management companies in residential developments rarely occur and, where any problems do arise, commercial tenants are usually well-equipped to deal with them. Nevertheless, the issue of extension of the new statutory regulations to purely commercial developments should be kept under review and the enabling legislation should provide for such future extension.

3.42 *The Commission provisionally recommends that breach of the statutory regulations should be a criminal offence prosecuted by the Regulatory Body.*

CHAPTER 4 MANAGEMENT COMPANIES

A Introduction

4.01 The Commission's study of multi-unit developments has identified that there are two primary areas of difficulty with the law as it relates to management companies.¹ The first area is the role and legal status of management companies in company law. The second area is the administration and regulation of such companies. This chapter will deal with both areas.

4.02 A management company is a company the membership of which comprises the unit owners in the development. The function of the management company is to “‘manage’ all of the common parts and services within a complex, not belonging to or the responsibility of a single person.”² In effect, the management company, a collective of the unit owners, owns the common areas of the development.

4.03 Most residential multi-unit developments already have an established management company by the time the units are completed. It is usually the developer who incorporates the management company in anticipation of selling the units in the property. Each new unit owner in the development then becomes a member of the management company. Theoretically at least, when the development is completed and the last unit is sold, the developer cedes all control in the company to the purchasers of the units.

B Functions of the Management Company

4.04 There are four key features of such a management company. One is that it is usual to vest in it a substantial “ownership” interest. That interest comprises two elements. One is ownership (usually the freehold³) of the

¹ For a discussion on the source of these difficulties, see Office of the Director of Corporate Enforcement, *Draft ODCE Guidance: The Governance of Apartment Owners' Management Companies*, December 2006, paragraph 2.1.

² *Management Fees and Service Charges levied on owners of Property in Multi-Unit Dwellings*, Final Report for the National Consumer Agency by DKM Economic Consultants Ltd in association with Kevin O'Higgins Solicitors, October 2006, p.ii.

³ See further paragraph 8.08 below.

“common areas” or “common parts” of the development. In essence, these comprise all the parts of the development which are not included in the individual units (such as apartments) “bought”⁴ by the initial purchasers. They include such areas as entrance halls, lifts, corridors, underground car parks in buildings and external communal areas like gardens, leisure open spaces, pathways and open air car parks. Since it is usual to confine a unit to its interior space stretching to the decorative finish level only of ceilings, floors and walls, the management company will also own the exterior of the building and its interior structural parts. In addition the management company also has vested in it the (again usually freehold) reversionary interest in the lease acquired by each unit owner of an individual unit.

4.05 Secondly, the management company’s membership ultimately comprises all the owners for the time being of the units in the development. This means that unit owners have two ownership interests- each owns the lease of his or her apartment or other unit plus, as a member of the management company which owns the freehold of the common areas and the freehold reversion on each unit, a share in those freehold interests commensurate with his or her membership rights.⁵ As is pointed out later, this is a particularly significant feature of Irish developments which avoids some of the problems which have been a particular concern in other jurisdictions.⁶

4.06 The third key feature of the management company is the fact that it is a corporate body and, therefore, subject to company law. How that law applies depends upon the type of company structure used, but whatever the structure, there are problems exacerbated by the nature of the legislation relating to companies. Existing company legislation is primarily directed towards profit-making trading companies rather than a non-profit-making body, with strictly limited functions, which is the nature of a management company. This matter is discussed further later.⁷

4.07 Lastly, the primary function of the management company is the management of the development on a permanent basis. As owner of the common parts it will usually have extensive responsibilities for their maintenance and repair and the provision of a variety of other services, such as employment of a caretaker, concierge or janitor for the building and other persons, like cleaners, decorators and gardeners. As mentioned earlier, the management company may discharge some of its responsibilities by

⁴ What is bought is invariably a long lease of the unit in question. See again paragraph 8.08.

⁵ See paragraph 10.04 below.

⁶ See paragraph 10.09 below.

⁷ See paragraphs 4.14-4.16 and paragraph 4.48 below.

employing a firm of managing agents to see to their day-to-day execution and generally to provide expert advice. A number of reasons contribute to this including the size of development, the voluntary nature of directorship in a management company, and the fact that, often, the unit owners who are the members of the management company from whom any directors or other executive officers will be drawn may have little or no experience of operating a company or carrying out the sort of administrative tasks which are its primary function.

4.08 Furthermore, as owner of the reversionary interest on each unit, the management company will have the landlord's responsibility to enforce various covenants which may have been entered into by each unit owner, such as to comply with various "house rules" as to use of the unit. In order to meet the expense of carrying out its functions the management company, as part of its responsibility to manage the multi-unit development is empowered to levy an annual service charge on each unit owner.⁸ This, in real terms means that the unit owners, as 'co-owners'⁹ are contributing to a fund that will cover the expenses of the common areas and services. This charge is payable in addition to mortgage repayments to be made in respect of any loan taken out by the unit owner to pay for the unit when it was first purchased.

C Company Law

4.09 As it stands, administration and management of multi-unit developments take two major forms. For smaller developments, the precise division of responsibility between the unit owners for things like insurance, maintenance and repairs will usually be the subject of extensive provisions in the co-ownership agreements accompanying the purchase of the units.¹⁰ For larger developments, it is impracticable to include all of the features which come under common ownership within an agreement; particularly since in larger developments, conditions of such agreements would be more likely to change over time, and as there are more unit owners, it is also likely that there is more diversity of opinion. As a result, larger developments do not have co-ownership agreements and instead use management companies as a means of managing the development.

4.10 Also, in smaller developments, unit owners tend to own the freehold of their individual units¹¹ whereas in larger developments, unit

⁸ See further paragraphs 4.102 -5.104 below.

⁹ That is; as shareholders in the management company.

¹⁰ See paragraph 10.28 below.

¹¹ Although it is not uncommon for smaller developments to follow a large development model, allowing the unit owner only to purchase a long-term leasehold estate.

owners tend only to purchase a leasehold estate on their units and the freehold reversion is vested in association of all of the unit owners, with responsibility for common areas and the building structure as a whole. For convenience, this group is normally registered as a company (i.e. it is incorporated).

4.11 There are many advantages to incorporating all of the unit owners as a management company. First, a company can be incorporated with limited liability which means that should the company accrue high debts, liability of the unit owners will be limited.¹² Secondly, a company and its members, in law are separate personalities. In the case of management companies, this enables the corporate entity, but no natural individual to hold ownership of the freehold reversion of the company. Thirdly, companies' members can be organised into shareholders, and this enables clarity and democracy of ownership of the common and structural areas of a development in the case of management companies. Fourthly, because of the way companies are governed, i.e. major decisions can be taken by resolutions at EGMs, members are presented with a full set of accounts and reports every year at the AGM; the company provides a useful model to facilitate the management of multi-unit developments.¹³

4.12 Under the existing law, there are three models of limited company under which management companies have been incorporated. The public company limited by guarantee is the type of company which management companies generally incorporate as is explained below. The private company limited by shares is a company where the liability of the shareholders is limited to the amount unpaid in shares owned in the company. As the law currently stands, the maximum membership of a private company is 50 people,¹⁴ which in practical terms means that it is unsuitable as a legal structure for large management companies. The public company limited by shares (PLC) is a company with the same type of limited liability for its members but can have an unlimited membership.

(I) Types of Management Company

4.13 There are currently an estimated 4,600 property management companies in the Republic of Ireland.¹⁵ The current practice is typically for a management company to be set up as a public company limited by

¹² The amount to which it is limited is determined by the type of limited liability company established. This is explained later in the chapter.

¹³ See further, Office of the Director of Corporate Enforcement, *Draft ODCE Guidance: The Governance of Apartment Owners' Management Companies*, December 2006, paragraphs 2(3)k - 2(3)m.

¹⁴ *Companies Act 1963*, s.33(2)

¹⁵ NCA Report, p.ii.

guarantee. A private company so limited is usually not suitable because, as the law stands, it must have a share capital and be limited to 50 members.¹⁶ Many multi-unit developments will comprise more than 50 apartments or other units, all the owners of which should become members of the management company.¹⁷ On the other hand, a public limited company by guarantee can no longer have a share capital¹⁸ and has no limit on the number of members, although there is a minimum requirement of seven.¹⁹ The Commission is aware, however, that a number of management companies are incorporated as private companies.

4.14 A company limited by guarantee is a company where each member's potential liability is limited to the amount of their guarantee to contribute to the company's assets when the time comes for winding up of the company. Members are not required to provide money to the company during its formation or lifetime. Keane points out "it is accordingly a suitable vehicle for associations which wish to secure the benefits of a separate legal personality and of limited liability but do not wish to raise funds from its members".²⁰ Furthermore, in recognising that this type of company is normally limited to organisations which are not trading for profit, he states:

"The management of such companies is normally entrusted by the articles of association to a council or a committee elected by the members rather than a board of directors."²¹

(2) *Company Law Issues Facing Management Companies*

4.15 Management companies play a crucial role in most residential multi-unit developments, but it is clear from the Commission's study, and other studies,²² that several issues concerning their legal structure and operation require examination.

4.16 It has been observed that legal entities under company law as they currently exist are unsuitable for meeting the needs of not for profit

¹⁶ *Companies Act 1963* section 33. See Courtney *The Law of Private Companies* (2nd ed Lexis Nexis Butterworths 2002) paragraphs 2.000 – 2.018.

¹⁷ See paragraphs 4.29-4.31 below.

¹⁸ *Companies (Amendment) Act 1983* section 7. See Courtney *op cit* paragraph 28.005 – 28.009.

¹⁹ *Companies Act 1963* section 36. See Courtney *op cit* paragraphs 5.075 – 5.077.

²⁰ Keane *Company Law* (3rd ed Butterworths 2002) paragraph 4.32

²¹ *Ibid.*

²² E.g. the Hanlon and NCA Reports: paragraphs 1.28-1.31 above.

organisations such as management companies.²³ Problems arising from company law manifest themselves for management companies in a number of ways:

- Companies limited by guarantee (the most common vehicle for management companies) where there is no separation of powers are unwieldy for people who hold the dual role of company directors and members as they make some decisions in one capacity and other decisions in the other capacity.
- Should any proposed new Regulatory Body require management companies to register with it and file annual reports, companies may face a burden of dual registration and reporting to both the Companies Registration Office (CRO) and the Regulatory Body.
- The company corporate governance regime is not tailored to fit the management company (not for profit) structure.²⁴
- From a legal and administrative viewpoint, private companies hold many advantages over public companies. Advantages include the fact that a private company does not need to obtain a trading certificate before commencing business and that small and medium sized companies are not required to file full accounts with the Company Registrar's Office (CRO).²⁵ Accordingly, larger management companies are not able to benefit from the concessions to the private company because with a membership exceeding fifty people, they are obliged to incorporate as a public company.
- Despite the fact that management companies have limited purposes which fall short of those of a trading company, the law as it currently stands does not generally recognise this distinction.
- Courtney notes that "it can not be overstated that under the law as it stands careful attention must be given to the maintenance of proper books of account, to the correct preparation and

²³ For further discussion of this see: Dublin City Council Guide to Successful Apartment Living, June 2006; see especially Chapter 2: Management of Apartment Developments pp. 14-21.

²⁴ Dublin City Council Guide to Successful Apartment Living, June 2006; see especially Chapter 2: Management of Apartment Developments.

²⁵ For a more extensive list of advantages, see Courtney at paragraph 1.113. It would probably not be difficult for the vast majority of management companies to qualify as medium companies if they weren't public companies. The quantification of a 'medium' company is in fact quite large. Companies with balance sheet totals for the previous year not exceeding €7,618,438 and turnovers for the previous year not exceeding €15,236,857 with less than 251 employees are medium-sized companies- *Companies (Amendment) Act 1986*, s. 8.

circulation of annual accounts and to the diligent filing of proper annual returns.’²⁶ In the case of directorship of management companies, the work done is commonly undertaken on a voluntary part-time basis by people who have little or no experience or expertise in company law. It is questionable thus whether it is appropriate for management companies to use traditional forms of companies with the commensurate directorial responsibilities as a legal vehicle.

- The officers of a management company hold an onerous responsibility to comply with company law regulations. For example, failure of a company to make an annual return to the Registrar of Companies can lead to a company being struck off the register of companies,²⁷ and the officers and the company may face legal proceedings.²⁸ Once a company has been struck off it has no legal existence and its property (with the exception with property held on trust for another) becomes the property of the Minister for Finance on behalf of the State.²⁹ These types of sanctions may not be suitable for management companies.³⁰

D Reform of the Legal Structure of Management Companies

4.17 In 2002, the Commission set out a number of proposals following identification of issues arising for management companies in the context of company law. On foot of the resulting submission to the Company Law review group, more recent oral submissions from the Commission, and the raising of the issue by the Minister for the Environment, Heritage and Local Government, the CLRG has formulated recommendations which are intended to be included in the General Scheme for the New Companies Bill.

4.18 The CLRG has kindly allowed the Commission to reproduce these recommendations.³¹

4.19 Developments in other sectors have provided some food for thought. The Commission suggested in a recent report the introduction of a

²⁶ *Op cit*, paragraph 13.002.

²⁷ *Companies (Amendment) Act 1982*, s. 12(1).

²⁸ *Companies Act 1963* s. 127 as amended s.15 of the *Companies (Amendment) Act 1982*.

²⁹ *State Property Act 1954*, s.28.

³⁰ See paragraphs 4.51-4.69 below.

³¹ Appendix A.

new form of legal vehicle specifically for charities.³² That report provisionally recommended the creation of a new company model called the Charitable Incorporated Organisation (CIO), which was designed to cater for the specific incorporation needs of charities. The CIO as proposed in the Commission's report is a radically different legal entity compared to a typical company. Features include the option to operate under a single tier and to use a model constitution designed in consultation with the charity sector. Such a corporate model, which in the context of other jurisdictions has been well received,³³ is interesting when consideration is applied to the arguable incompatibility of the management company with company law in its current form. One of the main distinctions however in relation to Charitable Organisations as incorporated as companies is that such companies are established for public benefit and not for the benefit of individual members or shareholders. Accordingly, the Commission does not consider that CIO-type structure would be suitable for the incorporation of residential management companies.

4.20 Also thought provoking is the fact that in a recent report, Dublin City Council questioned whether it was necessary at all to incorporate multi-unit development organisations and argued that the cost and work involved running an organisation as a corporate body outweighs its usefulness as a device for management.³⁴ That report ultimately acknowledged that these problems could potentially be avoided with the introduction of a more appropriate legal and operational framework for management companies.³⁵

4.21 The new Companies Bill outlines a new companies regime, and heads for a new classification of companies have been published.³⁶ With regard to management companies it is stated that "the CLRG is making provision to permit a management company to be formed as either: (1) a private company limited by shares, with the same capacity and powers of a natural person (a "CLS"); (2) a "DAC" (designated activity company), which would be a private company limited by shares or by guarantee with an objects clause; (3) a "guarantee company", which would be a public company without a share capital (a "CLG")."³⁷ In its original submission to

³² Charitable Incorporated Organisations known as CIOs. See Law Reform Commission *Report on Charitable Trusts and Legal Structures for Charities* (LRC 80-2006).

³³ Law Reform Commission *Report on Charitable Trusts and Legal Structures for Charities* (LRC 80-2006), Chapter 2.

³⁴ Dublin City Council *Guide to Successful Apartment Living*, June 2006; see especially Chapter 2: Management of Apartment Developments.

³⁵ *Ibid*, Recommendation 5.1.

³⁶ See www.clrg.org

³⁷ From a paper entitled "*CLRG's Views on Issues Affecting Property Management Companies insofar as they Relate to Company Law*", p. 1.

the CLRG,³⁸ the Commission proposed that the management company should be a private company limited by guarantee without a share capital. However, the Commission believes the changes to company law and range of company types proposed by the CLRG go some way towards responding to submissions made; especially with the inclusion of the provision which removes the maximum number of shareholders a private company can have for management companies.³⁹

4.22 The Commission welcomes these proposed changes to company law and believes that such changes will facilitate management companies; particularly given the proposed degree of choice between company structures.

4.23 Furthermore, the CLRG has made its position clear on the extent to which company law should impact on the activities of companies-

“It is important in the first instance to define what company law does and distinguish this from the regulation of activities engaged in by companies. Company law provides structures for forms of incorporation. It is inappropriate that company law should seek to regulate the activities companies engage in. The Minister for Enterprise, Trade and Employment does not have competence in law for the regulation of property transactions, just as he does not have competence for the regulation of charities, banks, etc. Using these latter two regulatory activities as an example, a clear model emerges. If a company wishes to have charitable status from the Revenue Commissioners, then it must comply with their requirements in forming the company and include appropriate provisions in its memorandum and articles of association. Similarly for a company that wishes to be a bank, it must comply with the obligations imposed by the Financial Regulator. There are other examples, too. The role of company law vis à vis companies operating as management companies is to facilitate their operation as companies. Accordingly, CLRG envisages that an appropriate regulatory body be charged with regulating management companies and setting out requirements, the compliance with which can be facilitated in company law.”⁴⁰

³⁸ Law Reform Commission, *Management Entities for Multi-Unit Developments*, 16 December 2002, (Submission to the CLRG) see: <http://www.clrg.org/submissions/submissions.asp?CID=28>

³⁹ See paragraph 4.29 below.

⁴⁰ *CLRG's Views on Issues Affecting Property Management Companies insofar as they Relate to Company Law*, Company Law Review Group, June 2006, p.1.

4.24 The Commission would like to emphasise that it is not suggesting that company law have a function in the actual regulation of the activities of companies. It does, however, wish to make the point that company law has a role in ensuring that the rules relating to the conduct of companies are suitable to the form of activity that the company is engaged in. It follows that company law needs to act dynamically in response to development and evolution in law and society. Indeed, company law itself recognises and has developed different schemes to take account of the different needs of companies and their members, e.g. the creation of the public limited company, companies limited by shares, companies limited by guarantee, and the proposed new designated activity company. It could be argued that these are simply different types of incorporation but their development arose out of the need to reflect the different type of activities that companies engage in. There will be a further recognition in the implementation of the proposal to provide a statutory definition within the Companies Acts of a 'management company.'⁴¹

(I) *Company Limited by Shares (CLS)*

4.25 A company limited by shares is a form of private company whereby potential liability of the members is limited to the amount which they have agreed to pay for the shares that they own in the company. As already observed, there are many legal and administrative advantages to incorporating as a private rather than public company.⁴² A private company by definition is a company which has a share capital and which has satisfied the provisions of s. 33(1) of the *Companies Act 1963*.⁴³ A primary reason currently for management companies not being incorporated as CLS is that the membership of these companies is limited to fifty people.⁴⁴ However, the CLRG has proposed that the law should be changed to remove this limitation on membership where the members are all members of a management company.⁴⁵ This proposal, if implemented, will widen the incorporation

⁴¹ Paragraph 4.32 below.

⁴² See paragraph 4.16 above.

⁴³ i.e. is a company which, "by its articles—
(a) restricts the right to transfer its shares, and
(b) limits the number of its members to fifty, not including persons who are in the employment of the company and persons who, having been formerly in the employment of the company, were, while in that employment, and have continued after the determination of that employment to be, members of the company, and
(c) prohibits any invitation to the public to subscribe for any shares or debentures of the company."

⁴⁴ *Companies Act 1963*, s. 33(1).

⁴⁵ *CLRG's Views on Issues affecting Property Management Companies insofar as they Relate to Company Law*, Company Law Review Group, June 2006, at p. 2

options open to management companies and enable them to avail of the advantages of forming a private company.⁴⁶ The Commission welcomes this proposal as an option for incorporation of management companies.

(2) Designated Activity Companies (DACs)

4.26 The concept of a “designated activity company” originally came from the recognition that there would be a need to provide for a type of company similar to the private company limited by shares i.e. a private company with an objects clause.⁴⁷ They can be limited by shares or by guarantee. Thus, they are a suitable legal vehicle for companies who wish to maintain clearly identified objects e.g. management companies.

4.27 As in the case of the CLS, the CLRG has recommended that although there would normally be a limitation on the membership of a DAC, the law should be changed to allow unlimited membership in the case of a management company “where those persons are the owners of a freehold or leasehold estate or interest in the land that is managed by that company.”⁴⁸

(3) Guarantee Companies

4.28 Public guarantee companies without a share capital have been examined above and represent the most common incorporation model used for management companies.⁴⁹

(4) Membership

4.29 While the current limit of 50 members for a private company would be increased to 99, it is proposed that there would be no limit for private management companies comprising members owning units in a multi-unit development.⁵⁰

4.30 The Commission welcomes these recommendations and endorses the choice and flexibility which they would introduce. However, the Commission is firmly of the view that there is a need to consider which of the forms proposed is most suitable for different types of developments. This is a matter which the Commission considers should be reviewed by any

⁴⁶ See paragraph 4.16 above.

⁴⁷ An objects clause is a clause in a company’s Memorandum of Association setting out what business actions the company intends on undertaking.

⁴⁸ *CLRG’s Views on Issues Affecting Property Management Companies Insofar as They Relate to Company Law*, Company Law Review Group, June 2006, at p. 4: see Appendix A.

⁴⁹ See paragraph 4.12 above

⁵⁰ *CLRG’s Views on Issues Affecting Property Management Companies Insofar as They Relate to Company Law*, Company Law Review Group, June 2006, at p. 4: see Appendix A

proposed new Regulatory Body,⁵¹ with a view to recommending the issue of guidelines. It should not be assumed that a particular form is necessarily suitable for every type of development.⁵² Subject to such guidelines, there should be a choice as to the form most suitable for each particular development.

4.31 The Commission is also concerned about the unwillingness of developers in some management companies failing to cede membership of the companies after completion of the development. This is an undesirable practice because it means that individuals with no remaining ownership interest in the development continue to impact on how the company is run. The Commission recommends elsewhere in this Paper that membership should be confined to one vote per unit.⁵³ This provision should operate to ensure that the developer will not have voting rights once the purchase of all units has been finalised. The Commission believes that a requirement for developers and/or any agents placed by developers in the management company to resign their membership of the company on completion of the development should be placed on a statutory footing.⁵⁴

(5) Definition

4.32 The CLRG proposes a new definition of a management company as follows:

‘ “management company” means a company that is wholly and exclusively formed and operated to own and/or manage the common areas of a property development and whose members are the owners of a freehold or leasehold estate or interest in land being a part of such development.’⁵⁵

4.33 The Commission notes this as a working definition. At this stage it would simply draw attention to one point which should be considered. Usually a management company does not just own the common areas; it also owns the reversionary interests of the leases held by unit owners.⁵⁶ The result is that its “management” function does not relate just to the common areas, but also involves enforcement of obligations entered into by each unit owner under the terms of their leases. In this respect it is performing a “landlord” function as part of its overall management role. Perhaps this

⁵¹ See Chapter 6.

⁵² Paragraph 1.02 above.

⁵³ See paragraphs 3.22 above and 4.85-4.95 below.

⁵⁴ See paragraph 3.34 above.

⁵⁵ *Op cit*, p.2.

⁵⁶ Paragraph 10.27 above.

should be reflected in the definition; as it underlines the fact that the company is a separate legal entity from the unit owners. However, arguably, making this an explicit part of the definition may prove pointless because as the membership of the management company comprises the unit owners, the unit owners, when working as a majority and exercising their voting rights in the company are effectively their own landlords. This issue becomes complicated though, in the case where a majority of company members seek to compel an unwilling minority member to fulfil his or her obligations as a 'tenant.' This may be a persuasive reason to explicitly include the landlord function as part of the definition.

4.34 The Commission provisionally takes the view, however, that the definition as proposed by the CLRG is satisfactory; as it is a clear and accurate summation of the concept of a management company, but the Commission invites submissions on the point.

(6) *Name and Objects*

4.35 The CLRG has taken the view that any company incorporated under the new proposed company law scheme should be required to adhere to the appropriate designated ending according to its type – “limited” (a private company limited by shares with the contractual capacity of a natural person), “clg” (a public company limited by guarantee, without a share capital) or “dac” (a private company limited by shares or by guarantee which has an objects clause indicating its designated activity). It is not, in its view, appropriate for company law to require certain companies to have specified activities in its name, but the CLRG accepts that an appropriate government department with responsibility for activities engaged in by certain companies could make regulations requiring use of particular titles.

4.36 The Commission has concluded that there is, indeed, a need for such specific provision. For example, a major problem which has emerged is that many owners of apartments and other residential units in multi-unit developments are confused about the role of such companies. In particular, part of the “understanding deficit”⁵⁷ is that they fail to appreciate that it is “their” company, that they comprise its membership and own it. They are, therefore, in a position to control its operation and should do so in their own interests. One way of correcting the understanding deficit would be to insist that all such management companies refer to this “ownership” aspect in their titles, e.g., the “X Owners’ Management Company” clg/limited/dac. The CLRG have stated in response to a submission from the Commission that it

“does not believe it appropriate that the Companies Acts should legislate to require certain companies to have specific activities mentioned in their names.... If there is a public policy end [to

⁵⁷ Chapter 6 below.

having management companies identified as such in their names]... the Department of the Environment, Heritage and Local Government may wish to consider making regulations...⁵⁸

4.37 However, given the fact the Companies Acts already prescribe company endings, albeit in a broader context, the Commission believes that in consumer interest, this should be taken a step further for management companies. This is especially the case since the CLRG have already acknowledged that there is need for a statutory definition of management companies. In any event, this is very much a public policy issue and the Commission feels that this is another area where bodies with various regulatory responsibilities for management companies such as the Department of Environment, Heritage and Local Government, the proposed Regulatory Body and the CRO should act in consultation to determine this issue. This again highlights the necessity for cooperation and working co-operative governance in the public sector with regard to management companies.

4.38 The Commission also believes that there is scope for such regulations to cover other matters, such as specifying a standard set of objects within the Memorandum of Association, confined to non-profit-making activities, to which all such companies would be required to adhere. The Commission is undecided, however, as to whether or not it should be mandatory to subscribe to such standard objects or whether composition of the objects clause should be open to the discretion of the membership of the management company. The Commission invites submissions on this matter.⁵⁹

4.39 *The Commission provisionally recommends that the Companies Acts be amended allowing for specific provision requiring a company's name to adhere to the appropriate ending according to its type and with the management company's specific activity in its name.*

(7) Reports, Accounts and Auditing

4.40 The Commission recognises the importance of the annual return and the documents annexed to the return as an essential means of enforcing transparency and accountability in the running of a company. Notwithstanding this, the Commission believes that for management companies, some changes are needed to the statutory requirements for the annual return.

⁵⁸ CLRG's Views on Issues Affecting Property Management Companies Insofar as They Relate to Company Law, Company Law Review Group, June 2006, at p. 4: see Appendix A.

⁵⁹ See further: paragraphs 4.98-4.101 below.

4.41 As indicated earlier,⁶⁰ the Commission is concerned that the level of expertise required for management company directors in compiling complex annual financial reports is inappropriate given the onerous responsibility to comply with accounting best practise and also given the fact that management companies do not trade for profit. Based on these concerns, the Commission, in a submission to the CLRG in 2002 recommended that management companies should be exempt from the requirement to prepare annual audited accounts for submission to the members and the Registrar of Companies. The Commission further submitted that management companies should be exempt from the requirement to make an annual return to the Registrar of Companies but believed that they should be required to submit an income and expenditure account, balance sheet and directors' report to the Registrar of Companies.

4.42 The CLRG has made it clear that, while it is not appropriate to exempt any of the new forms of company from the requirement to make annual reports to the Registrar of Companies, some, such as private companies and DACs, will be able to avail of an exemption from having to prepare annual audited accounts for submission and inclusion in annual reports.

4.43 The CLRG has expressed doubts as to whether it would be appropriate to exempt management companies from preparing annual accounts fully audited by an independent accountant. The Commission agrees with the CLRG insofar as it believes that management companies should make an annual financial report to the CRO.⁶¹ To grant a full exemption would run counter to the overriding need for owners of apartments and other units in multi-unit developments to understand fully the operation of the management company and to understand that it is their company, which is supposed to be acting entirely in their interests. It would also militate against the need for transparency about what the company does, including the fixing of annual service charges and contributions to a reserve or sinking fund. Notwithstanding this, however, the Commission suggests that rather than requiring a traditional 'Profit and Loss' type annual statement to be presented to the members and the CRO, a less complex, more comprehensible Income and Expenditure account should be prepared.

4.44 This will tackle a number of existing problems. Management company reports using the Profit and Loss system will sometimes show a surplus of income over expenditure as an accrual or a future expense leading members to believe that the company has finished the year at a loss. This does not reflect the reality that the surplus may be used, in fact, to reduce

⁶⁰ Paragraphs 4.07 and 4.16 above.

⁶¹ For further discussion of this see ODCE's *Draft Guidance* at paragraph 11.2.

next year's service charge or may be used to contribute to the sinking fund. The reason directors do this is because they believe an end of year 'profit' in the form of an income surplus will be subject to tax. Profit and Loss accounts may also be misleading to members in other ways. Their balance sheets are often modelled on those of going concerns and thus include details such as the depreciation of capital expenditure and breakdowns of the worth of the company's capital assets, the result of which is that the final balance is distorted and thus, the financial state of the company is grossly misrepresented.

4.45 This, coupled with the complexity of language often used in such reports, contributes to the aforementioned consumer understanding deficit. Moreover, the Commission observes that company law already makes allowances for some types of company structure in their obligations to file a complete annual return. Small companies, for example, are exempt from the requirement to annex a copy of the profit and loss account and the directors' report to the return.⁶²

4.46 Based on all of this, the Commission reiterates the CLRG's view that management companies should not be exempt from submitting an annual return, particularly in view of the administrative burden such companies have to deal with.⁶³ The Commission believes that it may be more appropriate for such companies to do this in the form of an Income and Expenditure balance sheet. The Commission invites further submissions on this matter. The Commission recommends that any annual accounts should also be readily available to future purchasers of apartments or other units or their professional advisers.

4.47 The Commission further believes that there is scope for the development of an annual return more relevant to the interests of management company members. Accordingly, it could be argued that details such as, for example, a formal list of the assets owned by the company, a statement confirming whether the development is fully compliant with fire and safety regulations; the development's insurance details, etc, should be included in the directors' reports. Rules laying down such provisions could either be laid down by regulation, or by standardised provisions in the Articles of Association of every company, developed in conjunction with the proposed Regulatory Body.⁶⁴ The Commission invites submissions on this matter.

4.48 Finally, the Commission is concerned at the practice of many accountants formatting the accounts of management companies as prescribed

⁶² *Companies Act 1986*, s10 (1).

⁶³ See paragraphs 4.78-4.82 below.

⁶⁴ See paragraphs 4.98-4.101 below.

by the *Companies (Amendment) Act 1986*. This is in spite of s. 2 (1) (a) of the Act which clearly states that the Act does not apply to not-for-profit companies. This trend suggests that even accountants experience the much-cited ‘understanding deficit’ as it relates to multi-unit developments, as management companies are non-trading companies.

4.49 *The Commission provisionally recommends that directors’ reports should include a list of the management company’s assets, its insurance details, and whether the development is fully compliant with fire and safety regulations.*

4.50 *The Commission provisionally recommends that any annual accounts should be readily available to potential unit owners or their professional advisors.*

(8) *Striking Off*

4.51 In order to maintain the integrity of and compliance with company law in Ireland, there are statutory provisions in place designed to deter companies from abusing or failing to fulfil their corporate obligations. For a company, the most serious sanction arising from non-compliance is being ‘struck off’ the Companies Register. Under s.125 of the *Companies Act 1963*,⁶⁵ all companies are required to file an annual return, and failure of a company to file this can result in the company being struck off. This means that the organisation then loses its status as a corporate body, and all of its assets are vested in the State and held by the Minister for Finance.⁶⁶ This fate befalls thousands of companies annually; in 2004,⁶⁷ 1,401 companies and in 2005, 9,514 companies were struck off for failure to file annual returns to the CRO.⁶⁸ This suggests that the Companies Registration Office is now rigorously enforcing the rules on failure to file annual returns. Courtney describes the purpose and nature of the annual return as follows:

“The purpose of the annual return is to provide information in relation to the affairs of the company which may be of relevance to the public, such as the address of the registered office, the location of the register of members, the total indebtedness of the company, etc. Certain other documents are required to be filed

⁶⁵ As amended by *Company Law Enforcement Act 2001*, s.59.

⁶⁶ *State Property Act 1954*, s.28.

⁶⁷ Department of Enterprise, Trade and Employment, *Companies Report 2004*, p. 11.

⁶⁸ Department of Enterprise, Trade and Employment, *Companies Report 2005*, p. 25.

along with the annual return, notably, specified particulars of the annual accounts and reports annexed hereto.”⁶⁹

4.52 Thus, there are two main elements in the returns, the particulars of the current directors of the company and details about its location, indebtedness etc, and the audited accounts of the company.⁷⁰ The accounts to be filed with the return are copies of the profit and loss account and balance sheet,⁷¹ and a comprehensive summary of the status of all shares issued. The returns must also include the directors’ names, addresses and personal details including date of birth, nationality, business occupation etc.⁷² A list of members and their addresses must also be included.⁷³

4.53 Interestingly, however, there is no requirement for a company to state the type of activity in which the company is engaged in the annual return. This lack of collation of knowledge on company activity works in part to explain the lack of definitive statistical information on management companies in Ireland which, in turn, has arguably contributed in part to the understanding deficit.⁷⁴ Notwithstanding this, it is clear that a considerable amount of work is often necessary to file returns which are fully compliant with the Companies Acts.⁷⁵

4.54 Companies are required to complete the annual return within 60 days after the company’s AGM and then forward it to the Companies Registration Office without delay complete with the signatures of the company secretary and a director. Failure to comply with this results in the imposition of a fine.⁷⁶ Far more serious than this, however, is the fact that where the annual return has not been filed for a year or more, the Registrar of Companies can write to the company advising it that the company has one month to deliver all outstanding returns to the CRO; otherwise, that company’s name will be published in the *Iris Oifigiúil* with a notice stating

⁶⁹ T.B. Courtney, *The Law of Private Companies* (2nd ed LexisNexis Butterworths 2002), para 13.154. See also, Keane, Chapter 29; and the ODCE’s *Draft Guidance*, Chapter 15.

⁷⁰ See paragraphs 4.40-4.48 above.

⁷¹ *Companies (Amendment) Act 1986*, s.7.

⁷² The required details are set out in full in the *Companies Act 1963*, s.195(4).

⁷³ *Companies Act 1963*, Fifth Schedule.

⁷⁴ This will be considered further in Chapter 6.

⁷⁵ Returns may be rejected for filing under the *Companies Act 1990*, ss. 248 and 249 where the CRO believes that the returns do not take the required form under those sections.

⁷⁶ *Companies Act 1963*, s. 127 as amended by the *Companies (Amendment) Act 1982*, s.12.

that it will be struck off the Companies Register.⁷⁷ Where the company fails to deliver the requested returns within one month, the Registrar may publish a notice in the *Iris Oifigiúil* giving the company a further one month's notice to deliver returns to the Companies Registration Office. Where a month has elapsed, the Registrar will then have power to strike the company's name off the register.

(a) *Effects of the State Property Act 1954*

4.55 As already observed, the effects of strike off on a corporate body are extremely serious. The company no longer has any legal existence. Its assets become subject to s.28 of the *State Property Act 1954* which provides that where a company is dissolved, its real and personal property becomes vested in the State and is held on the State's behalf by the Minister for Finance.⁷⁸ Courtney notes the serious practical problems that may arise when company is struck off, particularly in the context of sale of property.⁷⁹ It is often not until a company's solicitor attempts to dispose of property on its behalf that it is discovered that the property is not, in fact, any longer the property of the company as the company has been struck off the register. In such circumstances, the only way for the company to retrieve ownership of its property is to get itself restored to the register.

4.56 The effect of restoration to the register is to re-vest the property back in the company. However, where for some reason the company is not yet restored and the issue of ownership becomes urgent, a waiver of the right of the State to the property may be sought from the Minister for Finance.⁸⁰

(b) *Restoration to the Companies Register*

4.57 Where a company has been struck off the Companies Register as a result of failure to file annual returns,⁸¹ the restoration process is relatively simple provided that the application for restoration is made within 12 months of being struck off. In such a circumstance, a representative of the company may apply to the Registrar of Companies to have the company restored to the register.⁸² Application for restoration proves relatively expensive as there is a €300 fee involved and the company will also have to pay the maximum fine of €1,200 for each year of late returns. This restoration via

⁷⁷ Section 12 of the *Companies (Amendment) Act 1982* as replaced by the *Companies (Amendment)(No. 2) Act 1999* s.46.

⁷⁸ *State Property Act 1954*, s. 28(2).

⁷⁹ *Op cit* at paragraph 12.147.

⁸⁰ *State Property Act 1954*, s. 31.

⁸¹ Pursuant to *Companies (Amendment) Act 1982*, s.12(3).

⁸² Section 311A of the *Companies Act 1963*, as amended by s.246 of the *Companies Act 1990*.

administrative action will prove effective provided all outstanding returns are provided to the Registrar.

4.58 From company members' perspective, the issue of restoration of the company's name to the register becomes thornier, however, where more than one year has elapsed since the company was struck off. In those circumstances, the company must apply under s.12B (3) of the *Companies (Amendment) Act 1982* for a High Court order for reinstatement to the register. The conditions that the company must meet are numerous and are likely to be highly time-consuming and inconvenient. Meeting the conditions may very well also prove expensive; the CRO recommends that legal advice be obtained in relation to any proposed application to court for restoration.⁸³ The use of the mechanism of restoration via a court order is widespread: over 200 companies petitioned the High Court in 2004 while 182 companies petitioned in 2005.⁸⁴

4.59 In order to restore the company's name to the register, the solicitor, member or director acting on behalf of the company must firstly submit a letter to the Enforcement Section of the CRO requesting confirmation that the Registrar has no objection to the restoration of the company. The Registrar will provide this confirmation on condition that all outstanding returns including accounts are submitted to the CRO. Alternatively, where the company provides all outstanding returns and accounts in draft format coupled with an undertaking to provide the completed versions within three months of issue of the court order, the Registrar will also provide a letter of no objection. The company's representatives must also obtain letters of no objection to the company being restored from the Chief State Solicitor's Office on behalf of the Minister for Finance, and from the Revenue Commissioners. They must then petition the High Court for a restoration order. Following this, the company's representatives must deliver an attested copy of the order together with the filing fee within three months of the date of the pronouncement of the order. The company will also have to pay all outstanding fines on the late returns. Hence, it is highly inadvisable to get struck off the Companies Register and to allow more than 12 months pass. Moreover, given the State's time and resources used up in hearing hundreds of petitions in the courts and processing thousands of strike-offs annually, failure of companies to file annual returns on time also proves expensive for the taxpayer.

⁸³ See CRO *Restoration of a Company to the Register*, Information Leaflet No.11/ Oct 2005, p.4

⁸⁴ Courts Service *Annual Report 2005*, p.99

Year	2004	2005
Companies struck off*	6,595	13,624**
Struck off for failing to file returns	1,401	9,514
Restored	729	673
Via administrative action	528	491
Via court order	201	182

*This includes voluntary strike-offs. ‘Companies’ in this context includes all companies, not management companies only.

**The numbers of companies struck off in 2005 is extraordinarily high due to the introduction of the ‘Integrated Enforcement Environment’ system in late 2004.

(c) *Striking Off and Management Companies*

4.60 As observed earlier, management companies are almost unique in company law insofar as its directors often run the company on a purely voluntary, non-professional basis.⁸⁵ It is common for management company directors to have no experience in company law requirements. Property management companies are thus, effectively merely an incorporated version of residents associations within a multi-unit development. On this basis, the appropriateness of the use of strike-off, the complexity of the company law used to govern management companies and the high administrative burden on company directors necessarily involved in complying with company law are all issues which must be addressed. The arguably unnecessarily detailed nature of the annual return required from management companies has been already discussed.⁸⁶

4.61 The Commission accepts the concept of the onus of directors as fiduciaries to take their role in the management company very seriously.⁸⁷ Accordingly, it is proper to expect at least, a basic level of skill and care from a director of a management company. However, the Commission is of the view that the standard of expertise currently required from what are mainly voluntary and often inexperienced directors of management companies is currently unrealistic. In the case of management companies still under the control of the developer, notice will be served on the developer or its agent. The individual unit owners may not be aware of this pending strike-off which has grave consequences. The Commission also

⁸⁵ See paragraphs 4.07 and 4.16 above.

⁸⁶ See paragraphs 4.40-4.48 above.

⁸⁷ See paragraphs 3.25 above and 5.03 below

referred earlier to the high fees to which the management company is subject for filing late returns.⁸⁸ These charges are visited on the unit owners and not on the developer who may have been solely responsible for allowing this serious situation to arise.

4.62 While recognising the importance of deterrence for failure to file returns, the Commission believes that the current system of striking off is mutually disadvantageous for the Government and management company members, and perhaps even facilitates bad practice. In some cases, it is also true to state that the strike-off provisions facilitate some developers who wish to renege on their responsibility to complete the development. If the company is no longer in existence, then there is no entity to which ownership of the common areas can be transferred. In this way, the strike-off provision can be used to reward bad practice. Another situation where the propriety of the provision must be questioned is where company members, for whatever reason, become unhappy with the management company as it exists and decide to allow the company to be struck off, which results in serious implications for the ownership of the development. Under the Companies Acts, being struck off for failure to file returns, as stated earlier, may result in a company's assets being vested in the State and held by the Minister for Finance.⁸⁹ In practical terms, it is impracticable and unrealistic to expect the Department of Finance to dispose of the communal areas and interior and exterior structures or the freehold reversion of an apartment development. Moreover, given the number of management companies being struck off,⁹⁰ the processing of such companies is proving to be draining on resources, yet seems inadequate as a deterrence measure. From the management company member's perspective, being restored to the register often involves legal action and is expensive and time consuming.⁹¹

4.63 As an aside to this issue, it is worth noting that the Commission was unable to obtain any exact figures for the number of management companies struck off the companies register. The primary reason for this is that the coded classification system used by the CRO as it stands does not take into account the idea of a company with residential property management as its primary purpose.⁹² The Commission suggests that

⁸⁸ See paragraph 4.57 above.

⁸⁹ *State Property Act 1954*, s.28

⁹⁰ An RTE Prime Time report *Buyer Beware* on 11 Dec 2006 stated that 75 management companies on that date were 'currently on the strike-off list.'

⁹¹ See paragraphs 4.57-4.59 above.

⁹² This classification system is known as the NACE classification. It is used to define companies according to their chief classification system. See further, *Management Fees and Service Charges levied on owners of Property in Multi-Unit Dwellings*,

implementation of simple steps like including more specific codes would work to counter the understanding deficit from which the sector as a whole suffers; quantifying the exact size of the sector would place various public bodies in a better position to determine policy applying to management companies.⁹³ Indeed, on a broader level, one of the key points of the functions undertaken by public regulatory and supervisory bodies and government departments is to facilitate good governance of various sectors which impact on the public at large. The Commission acknowledges the importance of filing an annual return as a means of monitoring the smooth running of, and lending transparency and accountability to companies in Ireland. A second important function of the return is the information it provides to the Oireachtas which can then tailor company law and policy to the contemporary needs of the corporate community. Based on this, the Commission believes that the annual return filed in the Companies Registration Office should include information on the type of activity in which the company is engaged.

4.64 Returning to the issue of sanctions for non-compliance; the CLRG has accepted that there may be a case for a “less onerous” striking-off provision for management companies and the Department of Enterprise, Trade and Employment has undertaken to discuss the feasibility of this with the Registrar of Companies.⁹⁴ The Commission welcomes this and recommends that consideration be given to excluding management companies from the effects striking-off provision, at least as an initial sanction. The Commission’s view is that a major purpose of the law should be the protection of all stakeholders involved in the management company whenever signs of financial mismanagement appear. The Commission also believes that any enforcement/regulatory body, be it the CRO or the proposed Regulatory Body, should be wary about enforcing statutory obligations before reviewing the usefulness of the legislation in terms of successful regulation and good corporate governance. In the case of the current strike-off provisions, the *Companies Act 1963* was framed primarily to deal with ‘business-based’ companies and did not really take not-for-profit companies and their particular objectives into consideration. It seems that for such companies, the manner in which the strike-off provision is currently used is quite inappropriate and ineffective the purpose of achieving

Final Report for the National Consumer Agency by DKM Economic Consultants Ltd in association with Kevin O’Higgins Solicitors, October 2006, paragraph 2.4 .

⁹³ In fact, this policy would be also welcome in other sectors. The Commission encountered similar difficulties in obtaining statistical information on companies engaging in charitable activities when authoring its *Report on Charitable Trusts and Legal Structures for Charities* (LRC 80-2006).

⁹⁴ *CLRG’s Views on Issues Affecting Property Management Companies insofar as they Relate to Company Law*, Company Law Review Group, June 2006, p.6

good governance for management companies.⁹⁵ Given the lack of regulatory process specific to the management company sector, the problem was not highlighted earlier. As a result, there is currently no mechanism to collect information on the area enabling the Government to monitor trends.

4.65 In terms of sanctions, the Commission suggests that what should be put in place is an investigative system which triggers a warning system at the first sign of such mismanagement. Such signs could range from a failure to submit audited accounts to members or annual returns to the Registrar of Companies to complaints by members about service charges, sinking fund contributions or other alleged irregularities. The Commission believes that rather than imposing the sanction of striking off on management companies who fail to file returns, a less draconian solution could potentially be for the CRO to inform the proposed Regulatory Body of failure to comply with company law. The Regulatory Body would then be in a position to advise and assist the management company in complying with the Companies Acts. If, following this advice, and a reasonable timeframe to allow for compliance, the management company still fails in complying with company law, it could then be reasonable for the CRO to consider striking off. Also pertinent to this is the role of the CRO and other public bodies dealing with the sector in their collection of information for mutual cooperation and data exchange to further enable good governance. In relation to multi-unit developments, the key purposes in having management companies file annual returns is the protection of members from financial mismanagement and to promote good governance of companies. For management companies, good governance is especially important as protection of the value of the development depends on it. Clearly, by potentially vesting ownership of the common and structural parts of their development in the State, the striking-off provision does not achieve a desirable result either way for the unit owner.

4.66 As an interim measure, while structuring and procedure within the proposed Regulatory Body is being resolved, the Commission considers that a moratorium should be placed on the striking-off of residential management companies. This move would operate to protect management companies from such an unsuitable sanction. Notwithstanding this, the Commission believes if such a measure were introduced, the company would still be liable for the usual fees incurred in the event of late submission of the annual return, until the Regulatory Body, in consultation with the Companies Registration Office, concludes on the best course of action to take in these situations.

⁹⁵ See paragraph 4.60 above.

4.67 Mismanagement could also be detected by any proposed Regulatory Body⁹⁶ which would have a supervisory function over management companies. The first step should be for the Registrar, complaining member, or supervisory department of the Regulatory Body to refer the matter to the Body and for it to investigate the matter. That Body would have powers, then, to decide the most appropriate next steps if the complaints are substantiated. These might range from requiring reorganisation of the existing management company's operation (e.g., replacing the existing directors or managing agents) to replacing the company with a new company structure. The CLRG's new company regime makes provision for conversion of an existing company to any other type of company. As a last resort the Regulatory Body might support interested parties in an application to the court under the Commission's proposed "rescue" provisions.⁹⁷

4.68 The Commission is, however, of the view that the proposed Regulatory Body should have a role in assisting management companies in complying with the provisions of the Companies Acts and should have a supervisory function with regard to such companies. This would necessarily involve the Regulatory Body playing a part where a management company defaults in complying with statutory requirements. Based on this, strong cooperation, wide channels of information and a good system of joined up government between the CRO and the proposed Regulator will play a large role in the future of management companies and company law compliance.

4.69 The Commission considered making a provisional recommendation to the effect that striking off should, for management companies, be deferred until specified action was taken by the Regulator. Notwithstanding this, in formulating an ultimate recommendation, the Commission is keen to retain an annual reporting system for the corporate governance reasons mentioned above. As a result, it is still imperative that there is a sanction for non-compliance; albeit perhaps not as serious as the striking off sanction. The Commission therefore suggests that this could be a policy decision to be determined by the CRO in consultation with the proposed Regulator. Given the consultative nature of this paper, the Commission puts forward the possibilities discussed above and invites submissions on the issue.

4.70 *The Commission provisionally recommends that the sanction of striking off should be reviewed in the case of management companies.*

4.71 *The Commission provisionally recommends that a moratorium against striking off should be introduced as an interim measure until a more*

⁹⁶ See Chapter 7.

⁹⁷ Paragraphs 11.06-11.09 below.

appropriate sanction is decided upon for management companies who fail to file returns.

4.72 *The Commission provisionally recommends that the annual return should include information on the type of activity in which the company is engaging.*

4.73 *The Commission provisionally recommends that the proposed Regulatory Body should play a role in assisting management companies to comply with the provisions of the Companies Acts.*

(9) *Joined-up Government*

4.74 One aspect of the regulation of management companies which the Commission wishes to emphasise is the importance of cross reporting and co-operation amongst the various state agencies involved. Ownership of multi-unit developments involve a number of different legal areas e.g. consumer law, property law, company law and contract law. Different state bodies deal with different elements of the law relating to management companies. Multi-unit developments aside, given the growing trend of vesting regulation of various sectors in a growing number of state agencies, it seems that now is the ideal time for the Government actively to promote a strong policy of co-ordination and so-called cross-cutting between public agencies.⁹⁸

4.75 In the context of companies, however, it is particularly important given the opportunities for corporate mismanagement and the ensuing difficulties caused for the public and for the company members. A good example of legislation providing for cross-cutting is s.12A of the *Companies (Amendment) Act 1982*.⁹⁹ This section enables the Revenue Commissioners, where a company has defaulted on any returns or statements, to give a notice to the registrar of companies empowering the CRO to strike the company off in the event of non-compliance. This provision was introduced as a mechanism to combat fraud and corporate mismanagement by non-resident Irish companies.¹⁰⁰

4.76 Another good example of the necessity of joined-up government arose from the increasing prevalence of “Phoenix Syndrome.” This occurred where certain companies were being wound up at the CRO, which was unaware that these companies were leaving behind large unpaid revenue debts. These companies would then continue unscathed and incorporate under a different company name. This resulted in massive tax losses to the

⁹⁸ See for example the approach taken in the United Kingdom: *Wiring it up: Whitehall's Management of Cross-cutting Policies and Services*, Cabinet Office, January 2000.

⁹⁹ As inserted by s.46 of the *Companies Act (No. 2), 1999*.

¹⁰⁰ See Courtney, paragraph 2.035.

State. The issue has since been tackled with the enactment of the *Company Law Enforcement Act 2001*. However, it is clear that if there were wider channels of information flowing between the two state agencies involved in that case, the situation may not have arisen in the first place.

4.77 The policy of cross-cutting is being employed in recent legislation; for example, s.10 of the *Registration of Deeds and Title Act 2006* which provides that one of the functions of the new Property Registration Authority is to:

“undertake or commission, or collaborate or assist in, research projects and activities relating to the registration and ownership of land, including the compilation of statistical data, needed for the proper planning, development and provision of services related to such registration”

4.78 Under the existing law, unit owners are obliged to register the transfer of property with the Property Registration Authority, register and file returns with the Companies Registration Office, and the Commission is proposing further reporting requirements with a further regulator. The Commission is keen to avoid the problem of administrative burden for the directors of management companies. As a result, the Commission envisages a very active role for joined-up government for state agencies involved in management companies. How exactly the minimising of administrative burden is to be achieved, the Commission believes is an issue for the bodies concerned to establish in consultation with each other.

4.79 One means by which the Commission proposes to cut down on administrative burden would be to introduce a requirement for unit purchasers, when registering under the PRA (either with the Land Registry or with the Registry of Deeds), to include the name of the management company they will be automatically be joining. The PRA can then send this information (electronically, to minimise effort) to the Regulatory Body’s database and to the management company. In this way, the Regulatory Body can keep track of changes in membership in management companies without requiring individual notification to the management company. This will also ensure that the register of members for the company is up to date and there will be no individual obligations for filing or notification, which in default could lead problems not only for the individual members but for the company itself.

(10) *Automatic Transfer of Shares / Membership*

4.80 The CLRG states that it perceives that one of the problems currently facing management companies under existing company law provisions is the fact that membership in such companies is held independent to the ownership of land. In practice, this is not a major problem as solicitors

ensure that transfer of the property is not taken without a simultaneous transfer of shares or membership. Nevertheless, the Commission fully endorses the CLRG's proposed new regime which will include statutory provision for the automatic transfer of shares in or membership of a management company whenever ownership of the apartment or other unit to which the share or membership relates is transferred. There will be no need to execute any transfer of shares or to make an application for membership, but the company will have to be notified of the change of ownership of the apartment or other unit for the automatic transfer to be effective.

4.81 The Commission is concerned however about the usefulness of one aspect of the Company Law Review Group's proposal on transfer of shares in a management company. Where a share/membership of the company is automatically transferred to a new unit owner the CLRG believes that the new member should:

“within 21 days notify the company in writing of this fact and until such time as the transferee notifies the company, no right or interest of any kind whatsoever in respect of his membership shall be enforceable by him, whether directly or indirectly, by action or legal proceeding.”¹⁰¹

4.82 While good governance requires that the company must be notified where there is a transfer of shares or new membership, this particular provision adds even greater weight to the administrative burden carried by management company members.¹⁰² Moreover, inserting such a provision as a statutory obligation may result, in case of default, on the unit owner being debarred from holding an interest in the company and the company could then in turn find it difficult to enforce company membership obligations such as payment of service charges or contributions to the reserve fund. The Commission suggests that there may be constitutional implications in debarring the individual's right to legal redress in this way; particularly given the property ownership issues involved. The Commission believes that the state agencies and authorities who may play a cross-cutting role in reducing the administrative burden for the individual should work in consultation with each other to resolve this problem.¹⁰³

4.83 *The Commission provisionally recommends the CLRG's proposal that membership of a management company and ownership of an apartment should be statutorily bound together.*

¹⁰¹ CLRG paper, p.3

¹⁰² See paragraphs 4.78 and 4.57 above.

¹⁰³ See paragraph 4.78 above.

E Regulation of Management Companies

4.84 The following section deals with a number of areas within management companies for which the Commission believes there should be specific regulation.

(I) Allocation of Shares/Membership

4.85 The Commission strongly believes that developers should be prohibited by regulating legislation from fixing or loading the share or membership allocation with a view to retaining control of the management company. Arguably the best system would be the simple one share/member per apartment or other unit, with voting rights at meetings accordingly.¹⁰⁴

4.86 There are, however, other matters which require consideration. One is the question of who should be entitled to exercise the voting rights in cases where the owner of the apartment or other unit does not occupy it. Different categories of other occupiers may exist, even in the same multi-unit complex. For example, there may be owner-occupiers, tenants of owner-investors, tenants of the local authority occupying under the social and affordable housing provisions of the *Planning and Development Act 2000*¹⁰⁵ and tenants of housing associations. One view is that voting rights should remain exercisable by the person or body which owns the long-term interest in the apartment or the unit, at least in respect of any matter which could have a substantial impact on the value of the unit or have a long-term effect. On that basis, it is arguable that if an owner has defaulted on a charge over a unit and the mortgagee has invoked its security, by, e.g., taking possession of the unit,¹⁰⁶ it should be entitled to exercise the voting rights.¹⁰⁷ Whether short-term tenants or other occupiers should have voting rights in respect of matters which do not involve long-term consequences or have little or no impact on the value of apartments or other units is arguably less clear. For example, it could be argued that such occupiers should have a say in the appointment of the directors or other officers of the management company serving for a short period of office and in relation to day-to-day matters which impact directly on such occupiers, e.g., lift maintenance, security measures, etc. However, given that short-term tenants are not

¹⁰⁴ See paragraphs 3.22 and 4.31 above.

¹⁰⁵ Part V.

¹⁰⁶ Exercise of a mortgagee's security rights would become subject to new provisions in Part 9 of the Land and Conveyancing Law Reform Bill 2006 currently before the Oireachtas.

¹⁰⁷ Under Part 9 of the 2006 Bill a mortgagee will no longer be the "owner" (as a result of a conveyance or assignment of the mortgagee's interest) of an apartment or other unit which is unregistered land but will hold a charge only on it. This has long been the position with respect to mortgages of registered land.

required to pay service charges, and given the fact that decisions on these day-to-day matters may have long-term effect on the value of the development as a whole; their right to control over such matters and voting rights is open to question, despite their status as residents of multi-unit developments under the control of a management company.

4.87 Furthermore, there are further distinctions to be made between categories of tenant. For example, should the short-term tenant of a private investor have different voting rights to long-term tenants where the local authority owns the unit? In that case, the long-term interests of the tenants are at stake and it is unlikely that the local authority will necessarily avail of its management company vote in such a circumstance. The Commission believes that the proposed Regulatory Body will have to consider many different permutations in relation to these complexities before reaching its conclusions.

4.88 The Commission's preliminary view is that it is not appropriate that voting rights should apply to any categories other than unit owners and has concluded that the above matters need further consideration and that the proposed new Regulatory Body should review them in consultation with interested parties, particularly local authorities, who have a role in social and affordable housing. Following that, regulations should again be issued specifying the appropriate allocation of voting rights attached to shares or membership of management companies.

4.89 Where voting rights, and other rights relating to membership of the management company and participation in its activities, remain vested in owners not in occupation of units, there is a danger that the company may not function as well as it should because those owners, not living in the development, take no interest in it. The Commission has concluded that this problem could be addressed in a number of ways.

4.90 One would be for guidelines or information¹⁰⁸ to be issued which advises such owners of the need to remain consistently interested in the management company and to exercise their membership rights in their own long-term interests. It should be emphasised that the value of units and of the development as a whole depends to a major extent on the efficient and proper functioning of the management company. Local authorities and housing associations have a duty to ensure that good estate management is maintained for their tenants and so also have a major interest in seeing that the management company is working properly. This, in turn has an effect on preserving the value of an important asset for such groups. Local authorities, in particular, should be aware that if things go badly wrong they may find themselves faced with demands to participate in a rescue scheme. The risks

¹⁰⁸ See further, Chapter 6.

of a section 180 application, which were discussed earlier,¹⁰⁹ should also be borne in mind.

4.91 It may be that some obligations in these matters should be included in primary or subsidiary legislation for management companies. For example, it is essential that “absentee” owners are kept fully informed of the operation of the management company. They should be required to register an address with the company to which all documentation issued to members can be sent and to notify the company of any changes in this. The Commission acknowledges that in the case of properly administrated management companies, this practice represents the status quo.

4.92 It should also be borne in mind that many multi-unit developments contain a commercial element.¹¹⁰ Where the commercial units are confined to a separate building on the development there may be fewer problems. In such cases it is usual to have separate management companies, one to manage the commercial building and another to manage the residential building. This will facilitate having different structures and arrangements governing matters like services charges for the different buildings. The different buildings may, of course, share common areas or services, such as the paths, roads and drainage, lighting and sewerage systems. This may be dealt with by having a separate management company to deal with these such as a holding or overarching one of which the buildings companies are subsidiaries.¹¹¹

4.93 Where there are commercial units within a primarily residential building,¹¹² the position is more complicated. It will rarely be appropriate to have separate management companies owning and responsible for managing different parts of the same building. It will usually make much more sense to have the one company owning and responsible for the entire building. That however gives rise to the complication that the perspective of the different categories of unit owners on such matters as service charges and reserve or sinking fund contributions may be quite different. For example, commercial unit owners confined to the ground floor¹¹³ may object to paying

¹⁰⁹ Paragraphs 2.10-2.23 above.

¹¹⁰ Paragraph 1.03 above.

¹¹¹ See the precedents in Division C of Laffoy’s *Irish Conveyancing Precedents* (Tottel Publishing).

¹¹² The converse situation is, of course, possible, such as “penthouse” residential suites on the top of commercial buildings, but the management structure in such cases is more likely to be driven by a commercial arrangement. In such cases the management function is likely to be vested in the landlord or a management company owned or controlled by the landlord or investors.

¹¹³ As in the common example of a row of shops and other commercial units on the ground floor below several upper floors of apartments.

service charges relating to items of no concern to them, such as maintenance and repair of lifts and stairs. If, as is often the case, commercial units are held on relatively short-term leases, their tenants may balk at having to contribute to a reserve or sinking fund designed to cover long-term capital expenditure. On the other hand, residential unit owners may object to having to contribute to the more expensive insurance cover which is likely to be required in respect of the commercial operations in the ground floor units.

4.94 Again the Commission has concluded that these are matters which need further consideration by the proposed new Regulatory Body and, in the light of this, it may be appropriate to issue appropriate guidelines or regulations to deal with the disparate interests of the different owners in such mixed multi-unit developments.

4.95 *The Commission provisionally recommends that the proposed Regulatory Body should place under review and set regulations for the voting rights and powers of both apartment owners and short-term tenants in management companies.*

(2) Memorandums and Articles of Association

4.96 The memorandum of association and articles of association are two documents that every organisation must have if they want to incorporate as a company. The memorandum of association sets out amongst other things the name and objects (the business purposes of the company and the “parameters of permitted corporate activity”,¹¹⁴) of the company while the articles of association set out the rules of the company. In the context of management companies, a couple of issues arise in relation to memorandums and articles of association. First, the business purposes of residential management companies are uniform in nature. However, there is no standard memorandum of association which companies can adopt. For legal practitioners and other stakeholders in multi-unit developments, this means that each company’s memorandum and articles of association must be examined closely before engaging in legal dealings with the management company. Seeking to generate greater consistency would lead to less confusion towards how management companies are run.

4.97 Secondly, the Commission’s research suggests that the problem of the current ‘understanding deficit’ may be exacerbated by the fact that members of many companies may not be aware of the rights, responsibilities and running of the management company until the annual report at the Annual General Meeting, if at all. This is often contributed to by the fact that for many members, access to the business and legal documents of the company is limited or non-existent.

¹¹⁴ Courtney *The Law of Private Companies* (2nd ed Lexis Nexis Butterworths 2002) paragraph 3.012.

4.98 The Commission has concluded that there is a need to prescribe a standard set of provisions which should be included in all management companies' constitutions. Precisely what these provisions should be is a matter for further consideration in which the proposed new Regulatory Body and other interested parties, such as planning authorities, relevant government departments and professional bodies, should be involved. In due course regulations should be issued dealing with the appropriate matters that might be included in a standard statutory form of Memorandum and Articles of Association for management companies to be provided, which would apply unless modified in a particular case to the extent permitted by the regulations.

4.99 Apart from the usual provisions relating to the appointment of directors and other officers, the holding and conduct of meetings, passing of resolutions, voting and financial accounting, the Commission envisages that such regulations would require all management companies' constitutions to have provisions which would also require them to deal with a number of other important matters. One is the keeping and making available to appropriate parties of information and documentation relating to operation of the company and management of the building. This would include information and documentation relating to insurance, service and other contracts entered into, fire and safety certificates and files, service charge payments and the reserve or sinking fund. Such information and documentation should be readily available not only to members but also to prospective purchasers and their mortgagees.¹¹⁵ If, as is sometimes the case, such information and documentation is kept by managing agents, part of their duties should be to ensure that the management company's obligations to make it available or open to inspection are complied with.

4.100 In proscribing a standard set of provisions, these should be confined to ensure that the company complies with its legal obligations and is clear in the manner in which members engage in the company. It is not to suggest that individual developments might not require other contractual arrangements between members given the particular circumstances of the development.

4.101 *The Commission provisionally recommends that the proposed Regulatory Body should, in consultation with other stakeholders, prescribe a standard set of provisions to be included in all management companies' constitutions.*

¹¹⁵ The NCA Report contains a "consumer check list" of matters which should be checked by prospective purchasers: see section 5 and Appendix 3.

(3) *Service Charges*

4.102 Service charges are an essential feature of multi-unit developments since they provide the funding for the management of the common areas and structures.¹¹⁶ In essence they are annual charges levied on the owners of units (the company's members) to meet the various expenses incurred by the company in carrying out its various functions. These range from the cost of insurance and maintenance and repair of the building to the expense of employing managing agents, caretakers, janitors, gardeners and professional advisers. Notwithstanding their vital function, they remain one of the most controversial aspects of multi-unit developments.¹¹⁷

4.103 The source of much of the controversy is again the "understanding deficit" which seems to affect many owners of units in residential multi-unit developments. Having in effect "bought" their units, they find it difficult to comprehend why they should be paying additional annual charges, when owners of houses on conventional residential estates do not do so. Sometimes, this attitude is caught up with the taking in charge issue, because the impression is formed that the unit owners are paying for services which the local authority provides at public expense to residents of housing estates.

4.104 As this Paper recommends,¹¹⁸ this understanding deficit must be addressed as a matter of urgency. Purchasers of apartments and other residential units in multi-unit developments must be educated as to the precise function of service charges. This is obviously linked to understanding the nature and function of the shared ownership. The Commission would reiterate its later recommendations relating to provision of information to prospective purchasers of units and subsequent owners and tenants at different stages in the life of a development.¹¹⁹ The Commission welcomes recent work done thus far in this area by the National Consumer Agency and the Office of the Director of Corporate Enforcement.¹²⁰

¹¹⁶ This also includes all conduits to services, all interior and exterior structures of the building and all interior and exterior common areas as well as services provided on a communal basis. See further, paragraph 1.18.

¹¹⁷ Some of the controversy is highlighted in the recent Hanlon and NCA Reports: paragraph 1.28 above.

¹¹⁸ Chapter 6 below.

¹¹⁹ Paragraphs 6.21-6.24 below.

¹²⁰ The NCA published an information leaflet for owners and prospective purchasers of multi-unit development apartments titled *Property Management Companies and You* in October 2006. The Office of the Director of Corporate Enforcement has recently published a *Draft ODCE Guidance: The Governance of Apartment Owners' Management Companies* which provides a useful guide to the members of management companies.

4.105 Apart from the provision of information, there are other important aspects of service charges which need addressing. One is that there is currently no regulation of the fixing of such charges and often a total lack of transparency.¹²¹ There are constant reports of developers fixing levels of charges which are inappropriate. Frequently the charges in the first year or initial years are set at a deliberately low level which bears little relation to the actual costs and expenses being incurred by the management company. This may be often done as an inducement to prospective purchasers, to encourage a speedy sale of units in the early stages of the development. However, it can also be argued that new developments require lower service charges because maintenance costs in initial years are minimal as there has been little wear-and-tear. Also, in the case of uncompleted developments, the service charges may be low because the full array of services may not yet be in place.¹²²

4.106 The consequence of higher service charges after the first few years is that these purchasers may be lulled into a false sense of security which is, then, shattered by the shock of substantially increased charges levied in later years. The giving of inadequate or inappropriate information on service charges should be prohibited by legislation. Where, due to lack of completed services in the initial stages of the management company, the service charges are low, developers should be obliged to explain explicitly the reason for this to unit buyers and offer a realistic projection of what the service charges are likely to be on completion of the development. In this, developers should be obliged to estimate an appropriate service charge from the outset, which bears a close relation to realistic anticipated¹²³ costs and expenses likely to be incurred by the management company.¹²⁴

4.107 In addition there should be total transparency as to how the charges are calculated and what the anticipated costs and expenses are which they are intended to cover. The Commission recommended earlier that developers should be prohibited from fixing or loading shareholdings or

¹²¹ Similar conclusions are to be found in other studies, such as the Hanlon and NCA Reports.

¹²² For example, the grass may not have grown or gardens may not be planted yet so grass-cutting and gardening costs are still non-existent.

¹²³ Apart from the first year, charges are usually levied on the basis of what is calculated to be the likely costs and expenses in the coming year, together with an adjustment to cover any balance or deficit accruing on the previous year's actual, as opposed to its original anticipated, expenditure. Most years' charges will involve some such balancing element relating to the previous year's charges.

¹²⁴ Note also the Commission's earlier recommendation that the charges must be restricted to such matters and should not include any element relating to the developer's costs of completing the development: paragraph 3.26 above.

membership rights in the management company¹²⁵ and this should extend to the method of calculating service charges. The Commission is inclined to the view that again some statutory regulation may be appropriate as has been introduced in other jurisdictions.¹²⁶ Arguably there should be a statutory obligation on developers, while they retain a controlling interest in the management company,¹²⁷ and later on the company itself to set charges which are “reasonable” or “appropriate” in the light of the anticipated costs and expenses specified. In order that unit owners can, then, judge their reasonableness or appropriateness for themselves, if necessary after seeking expert advice, management companies should be obliged to furnish a detailed breakdown of the calculations, duly certified independently and specifying how the individual charge for a particular owner has been arrived at. Alternatively, the proposed Regulatory Body could randomly audit management company service charges and their calculation. This monitoring mechanism would act as deterrence against setting unreasonable or inappropriate service charges.

4.108 Apart from that, the Commission sees it as one of the important roles of the proposed new Regulatory Body to keep the whole system of service charges under review. It should gather information for comparative purposes and make this readily available to intended parties, such as unit owners in a particular development who are convinced that their charges are excessive. Again, owners in such circumstances could lodge a complaint for investigation by the Regulatory Body. However, this should not be an issue where unit owners are taking responsibility for the proper management of their own development.

4.109 While the provision of information about service charges and the need for transparency and reasonableness is of direct concern to existing owners of units, it must also be recognised that it is also important information for subsequent prospective purchasers of units. Management companies should be obliged to furnish information to such persons about existing charges and to indicate on a realistic basis anticipated future charges for the next, say, 3 or 5 years.¹²⁸ A standard form for doing so might be prescribed by statutory instrument, following advice from the new Regulatory Body.

¹²⁵ Paragraphs 4.85-4.95 above.

¹²⁶ Paragraphs 9.14-9.17 below.

¹²⁷ *ie*, before the development is completed and the last unit has not been sold. Note however, in some cases, the developer has nothing to do with the management company at any stage as the company is established after completion and sale of all of the units in the development.

¹²⁸ Note the similar recommendations in the NCA Report.

4.110 Finally, the Commission is aware of the major problems caused for a development when unit owners fail to pay their service charges. Whether this is due to a failure to understand the nature and purpose of the charges or frustration arising from what is perceived as a failure by the board of the management company or its managing agents to carry out their duties, unit owners must be made to understand the seriousness of such action. The fundamental point is that if the charges are not paid, the management will not be able to carry out essential tasks, such as insuring the building and attending to its maintenance and repair, and essential services cannot be undertaken. That can only harm the unit owners themselves and if, as may happen, the situation spirals out of control, the effect on the value of the development as a whole and of individual units in the long term will be disastrous. In very serious cases it could lead to a situation where units in a development become difficult or impossible to sell.

4.111 Many of the recommendations made by the Commission would bear on this problem and should reduce considerably its future occurrence. In particular, the recommendations to deal with the “understanding deficit” experienced by unit owners¹²⁹ and to ensure that developers management companies and managing agents perform their tasks efficiently¹³⁰ should help to stop the problem arising. As regards existing developments where the problem may already have arisen, the new Regulation Body may be able to intervene and help sort out a solution.¹³¹ As the last resort, the proposed “rescue” provisions may be invoked.¹³²

4.112 As regards the sanction for non-payment of such charges, the management company, as owner of the reversionary interest of the unit, can invoke a landlord’s remedies for breach of covenant by a tenant.¹³³ However, in practice, these are not very effective in the case of residential units. Although technically the right to forfeit the lease is fully available in such cases,¹³⁴ it is highly unlikely that a court will give effect to such forfeiture in respect of a property “owned” by the lessee. Suing to recover the charges is likely to prove time-consuming, but a management company

¹²⁹ Chapter 6.

¹³⁰ Paragraphs 7.12 and 7.25.

¹³¹ Paragraph 7.15.

¹³² Paragraphs 11.06-11.09.

¹³³ See Wylie *Irish Landlord and Tenant Law* (2nd ed Butterworths 1998).

¹³⁴ The unenforceability of re-entry and exclusion of an action of ejection for non-payment of rent by section 27 of the *Landlord and Tenant (Ground Rents) Act 1967* applies only to tenants of dwelling house entitled to acquire the fee simple under the ground rents legislation. Flats in multi-unit developments are generally excluded from this entitlement: paragraph 8.09 below.

may eventually be forced to do so. Imposition of a high interest charge for overdue payments may have some deterrent effect, but only if the unit owner understands that this will increase the debt and that it will be pursued effectively.

4.113 If, in the light of experience of implementation of the various other recommendations made by the Commission in this Paper there continues to be a problem concerning unpaid service charges, the Regulatory Body should consider whether other sanctions should be introduced. In some other jurisdictions such unpaid charges automatically become by statute a charge on the unit which would have to be discharged on any sale of the unit. In practice, this is the case in this jurisdiction, as a solicitor, when acting for the purchaser will ensure that all previous charges on the unit have been discharged.

4.114 *The Commission provisionally recommends the creation of statutory regulations for the regulation of service charges in consultation with any Regulatory Body and believes that the system of service charges should be kept under review including the types of charges that should be included in the service charge and information that should be provided about the service charge.*

(4) Reserve or Sinking Fund

4.115 The importance of the management company building up a reserve fund, or “sinking fund”, to meet future major capital expenditure has already been referred to.¹³⁵ Every multi-unit development must face the inevitability that parts of buildings have a natural life and will inevitably wear out or cease to function. The unit owners must anticipate having to replace part of the external fabric, like the roof and windows, and internal systems, like the lifts, central heating and air conditioning systems and the mechanisms operating them. There is really no choice in this matter and the company and the unit owners must face up to it from the outset. As all unit owners effectively co-own the common areas and the building structure, they will all be obliged to contribute to capital expenses incurred. They must also recognise that the costs will be very substantial if no provision has been made to contribute to the fund since the management company was created.

4.116 If no reserve fund has been built up to meet these costs, they will have to be loaded onto the annual service charges. That will increase those to a prohibitive level for many owners.¹³⁶ Borrowing the capital is unlikely to be a satisfactory alternative because the debt will have to be serviced out of the annual service charges. Nor, of course, is postponing the capital

¹³⁵ Paragraph 1.10 above.

¹³⁶ Even more so for low income social and affordable owners or tenants.

works because such postponement is likely to result in ever greater costs when the work is eventually done, with the attendant inconvenience and likely consequential damage to other parts of the building in the meantime. Failing to carry them out ever will, of course, have even more disastrous consequences for all concerned, and could ultimately lead to the development falling into such disrepair that owners may find it difficult to sell on their units.

4.117 All of this convinces the Commission that there should be a clear statutory obligation on management companies to establish a reserve or sinking fund. The annual service charges should contain an element comprising a contribution to this fund. The company may consider obtaining expert advice on the necessary contribution each year, taking into account anticipated future capital expenditure. This would necessarily involve an expert assessment of the life of parts of the building likely to give rise to such expenditure and, of course, of the likely costs of replacement or other works at the anticipated time of carrying them out.

4.118 The importance of the fund is such that there should be a further obligation to hold it in a special protected account separate from the management company's day-to-day working account or accounts. This should be an appropriate interest-bearing account, but regulations could provide for other suitable forms of investment. Such interest or other returns on the investment should accumulate to the benefit of the fund.

4.119 The existence of such a reserve fund is important from other points of view. Not only existing unit owners but any prospective purchasers of units have an obvious interest. Thus the obligations to provide information about service charges referred to later¹³⁷ should extend, as appropriate, to the reserve fund.¹³⁸ Unit owners, in particular, must be made to understand that the value of their units, as well as that of the development as a whole, will be substantially affected by the existence and value of the fund. This applies whether such owners are long-term or short-term owners. For this reason, annual contributions are never refundable when unit owners sell their units. The sale price will reflect the value of the fund at the time of sale and its impact on the value of the development.

4.120 The Commission is concerned that there are several existing multi-unit developments where either no provision or inadequate provision has been made for a reserve or sinking fund. This is a matter which should be addressed urgently. The Commission recommends that the new Regulatory Body should carry out an investigation of the current situation as one of its first tasks. Following that investigation, it should recommend

¹³⁷ Paragraphs 6.21- 6.24 below.

¹³⁸ Note the recommendations in the NCA Report on this subject.

appropriate remedial action according to the position of particular developments. This could range from advising management companies to establish a fund or augment an existing one to supporting an application under the “rescue” provisions proposed later.¹³⁹

4.121 *The Commission provisionally recommends that there should be a clear statutory obligation on management companies to establish reserve or sinking funds.*

4.122 *The Commission provisionally recommends that reserve or sinking funds should be held in a special protected account separate from the companies’ working accounts. The Commission further provisionally recommends that any new Regulatory Body should investigate the current situation of reserve funds as a matter of priority.*

¹³⁹ Paragraphs 11.06-11.09 below.

CHAPTER 5 MANAGING AGENTS

A Introduction

5.01 While the previous chapter focused on management companies, this chapter looks at the altogether different role of managing agents. It will first explain the functions of a managing agent, then outline the problems arising through the use of managing agents and finally propose reform of the law surrounding managing agents in the multi-unit development sector.

5.02 As outlined earlier, consumers within the multi-unit development sector are experiencing an ‘understanding deficit’. Nowhere is this more evident than in the confusion between the responsibilities of managing agents and management companies. Management companies are incorporated organisations of the unit owners in multi-unit developments. Such companies manage and own the freehold of the common areas and structure of the development and the reversions of the unit leases. Managing agents, on the other hand, have no ownership interest in the development. Firms of managing agents are engaged by management companies to oversee the day-to-day running and maintenance of the multi-unit development. They may also be employed by developers to oversee completion of the development.

5.03 The scope of the management undertaken by managing agents differs from arrangement to arrangement. Experienced developers tend to employ at a very early stage, and certainly before any unit in the new development is sold to a purchaser,¹ professional management agents to advise them on the management of the development. Such agents will often attend to initial administrative matters and they will usually act as agents for the management company (which usually takes over from the developer) for the first few years of the development. It must be pointed out, however, that where a managing agent is engaged to deal with the administrative work of the management company; it does not relieve any directors of the management company of their duty to fulfil their legal obligations as fiduciaries to the company.² Thus, it could be said that where managing

¹ As explained earlier this invariably means the granting of a leasehold interest only: see paragraph 1.08 above.

² See Courtney *The Law of Private Companies* (2nd ed LexisNexis Butterworths 2002) paragraph 10.005.

agents' responsibilities are to include the 'running' of the company, they should be obliged to fulfil facilitative and operational duties; not to make decisions competence for which would normally be vested in the board of directors. In other words, managing agents should ensure that they do not inadvertently become shadow directors of management companies.³

5.04 A typical list of the services which a good firm of management agents would provide initially to the developer and subsequently to the management company is as follows:-

- Preparation of service charge and sinking fund budgets
- Apportionment and collection of service charges
- Checking, approval and payment of creditors' invoices
- Arranging the services and payment of employees (eg the janitor or caretaker) and dealing with PAYE, PRSI etc
- Dealing with the Revenue Commissioners on matters relating to employees
- Advising on insurance matters and handling claims
- Bookkeeping, accounting, maintaining bank accounts and reconciling statements
- Preparation of financial reports for management meetings
- Liaising with auditors and issue of Auditor's Report and Financial Statements
- Issuing information and advice to prospective purchasers of units
- Carrying out routine site inspections
- Arranging routine common area repairs and maintenance
- Dealing with telephone enquiries and correspondence from unit owners
- Attending management company meetings
- Advising the management company's board of directors generally.⁴

5.05 It is important to emphasise that this list is by no means exhaustive and the more experienced management agents will often provide a wide range of other services, such as dealing with breaches by unit owners

³ See paragraph 5.08 below.

⁴ See further, *Auctioneering/Estate Agency Review Group Report*, July 2005, Chapter 13.

of 'house' or car park regulations, compliance with health and safety requirements, management of new works or major refurbishment and provision of full secretarial and emergency services.

B Potential Abuse

5.06 Where such agents are employed and operate to an appropriate standard, few, if any, serious administrative problems arise. This is particularly the case for managing agents who have received specific terms of reference from the management companies or developers who employ them. Notwithstanding this, however, there are a number of instances where the use of managing agents enables developers or management companies to shirk their respective legal responsibilities.

5.07 It is perfectly proper, and, indeed, in most cases highly desirable, that developers should employ experienced managing agents in the early stages of the development, to oversee its completion and to organise operation of the management company.⁵ The danger is that the role of the company and the agents can become confused, particularly from the unit owners' perspective.

5.08 The Commission is concerned, for example, with the tendency of some management companies vesting such control in managing agents that the agents become a shadow board of directors.⁶ In such circumstances, the management company board of directors will leave basic operational responsibilities, such as informing members of the dates of company meetings and helping to compile for the CRO, with the managing agents. The Commission is aware of circumstances, however, where the line between the management company and the managing agent running a development has become blurred to the extent that the accounts of the two groups mingle; or where the managing agents set the date for the management company's AGM. The Commission accepts that managing agents may have a role in facilitating such tasks. For example, management companies sometimes use the address of the agent's office as the company's registered address and store files such as accounts and the Memorandum and Articles of Association there. However, this ought not to confuse the company members to the extent that it detracts from the principle that directors owe a basic level of skill, care and diligence to the company.⁷

⁵ See paragraph 1.14 above.

⁶ In the case of a strike-off the official directors of the company face the possibility of becoming restricted under the Companies Acts, which would prevent them from ever acting as a director again.

⁷ See Keane *Company Law* (3rd ed Butterworths 2002), paragraphs 27.77-27.120.

5.09 The Commission finds the practice of directors effectively allowing managing agents to run their company particularly regrettable as it believes it is desirable that unit owners should take a more proactive approach in controlling how their management company is run. The relatively hands-off approach taken by some company directors here is in stark contrast to the activities of Residents' Associations in other jurisdictions. It is often the case overseas that unit owners in such associations become actively involved in the running of the development in order to ensure that the value of the development is maintained or increased as much as possible.

5.10 Another problem arises where the developer, while still in control of the management company, engages managing agents for a long-term contract in a deal which will suit the developer's own needs. In other words, the developer commits the management company to a long term arrangement before unit owners are able to have any say in the matter. The danger of such long-term contracts being entered into by the developer is that once the developer has ceded control of the management company to the owners, the company will then be precluded from being able to decide which managing agent to employ, or if it even wants a managing agent to run the development, for a number of years.

5.11 A further problem stems from a failure by the developer to carry out its responsibilities in the period between commencement and completion of the development. The primary responsibilities are

- i) to complete the development in accordance with the planning permission granted and any conditions attached to that permission
- ii) to ensure that those parts of the development which are intended to be taken in charge by the local authority (roads, footpaths, sewers and the like) are made ready in a timely fashion to ensure a smooth transfer of responsibility
- iii) to ensure that a management company is established and ready to take over responsibility for management of the rest of the development as soon as it is complete
- iv) to ensure that any "snag" list of problems with the building is dealt with before it becomes the responsibility of the management company and, therefore, the subject of service charges levied on unit owners.

5.12 It is clear that much confusion exists over these matters which tends to be exacerbated in some cases when these are put in the hands of managing agents or service providers. In that situation such agents or providers will be acting for the developer, either directly or through a management company which the developer still controls. This should not be

allowed to disguise the fact that the developer should retain legal responsibility for those matters.

5.13 Nevertheless, because managing agents are funded by the management company service charge, where developers vest responsibility for completion of the development in the agents, the service charge is wrongly used to pay for the completion. The Commission has elsewhere in the Paper recommends that this practice should be strictly prohibited.⁸

5.14 A final problem is the trend of smaller developments finding it difficult to engage managing agents. The experienced firms of agents based in Dublin have confirmed that they do not consider it commercially viable becoming involved in “smaller” developments, *ie*, those with less than 30 units (and some would put the minimum threshold higher than that figure). This is particularly problematic in the initial stages as developers of smaller developments tend to have less experience in incorporating and running management companies. However, where such a company runs into problems, whether company law issues or more general completion or taking-in-charge troubles, they are unable to refer to managing agents who have experience in the area for advice or help. These situations again underline the lack of availability of a regulatory or advisory body overseeing the sector when such problems arise, and the necessity of establishing such an body with an educative role.

C Regulation of Managing Agents

5.15 The Auctioneering/Estate Agency Review Group pointed out in its July 2005 Report that managing agencies are currently unregulated and so there is no guarantee that a particular firm will deliver an appropriate standard of service. The Commission is encouraged to see that the Government has accepted the need to impose regulation and bring such agencies within the purview of the proposed new National Property Services Regulatory Authority. The Group’s case for management companies coming under the ambit of the NPRSA is compelling:

“...property management frequently involves large sums of clients’ money. The Group believes, therefore, that it is appropriate and proper to require persons to operate as property management agents to demonstrate that they have the necessary financial safeguards in place to protect their clients. Thus the Group recommends that property management agents be required to hold a licence under the Regulatory Authority... Property management agencies will thereby be made subject to oversight

⁸ See paragraph 3.26 above.

by the Regulatory Authority and to its vetting and complaints procedures.”⁹

5.16 The Commission echoes this recommendation, but goes further. A key source of the problems arising with managing agents is the uncertainty arising within management companies about what the exact duties of the managing agent are expected to be. This is because very often, there is no formalised arrangement made between the two groups with regard to exactly what responsibility and for which tasks the managing agent is engaged. As a result, the Commission believes that it is imperative that the National Property Services Regulatory Authority constructs some kind of normative list of obligations for management agencies. This would take the form of a standard form contract which all managing agents would be required to sign on engagement by the management company.

5.17 There is successful precedent for the use of standard form contracts in the regulation of other sectors. Notably, a standard Building Agreement was negotiated by representatives of the Law Society of Ireland and the Construction Industry Federation (CIF), which both bodies recommended to their respective members as the basis for individual contracts between builders and purchasers. When both bodies became aware in the late 1990s that a number of building agreements were departing from the standard Building Agreement – to the disadvantage of purchasers – they approached the Director of Consumer Affairs with a view to initiating declaratory proceedings seeking to have a sample of 15 specific examples of these departures declared in breach of the 1995 Regulations. In *In re Application by the Director of Consumer Affairs*,¹⁰ Kearns J in the High Court declared the 15 samples in breach of the 1995 Regulations.¹¹

5.18 This example provides a good illustration of the powers that the proposed Regulatory Authority will have in respect to standard form contracts for management companies. The Commission has already taken the view elsewhere in this Paper that any practice constituting the potential abuse of the consumer rights of unit owners should be monitored by a proposed Regulatory Body. Moreover, apart from the Body’s powers to take direct action against licensed persons or bodies,¹² it should be given power to direct a complaint to the Director of Consumer Affairs for action under the

⁹ Report of the Auctioneering/Estate Agency Review Group, July 2005, paragraph 13.1.

¹⁰ High Court, 5 December 2001.

¹¹ See Dorgan “Safe as Houses?” (2002) *Law Society Gazette of Ireland* January 2002, 12. The details of the case are also available on the website of the Director of Consumer Affairs, www.odca.ie

¹² See paragraph 7.15 above.

*European Communities (Unfair Terms in Consumer Contracts) Regulations 1995.*¹³

5.19 *The Commission provisionally recommends that the National Property Services Regulatory Authority should develop a standard form contract for use by management companies in engagement of managing agents.*

5.20 The Commission also recommends that developers should be prohibited by statute from using their control of the management company in the early stages of the development to commit it to long-term contracts with managing agents. In particular, the decision whether to employ managing agents, and if so, which agents, once the development is complete, should be that of the management company and the owners of the units who by then comprise the membership. For the same reason, it should also be prescribed by statutory regulations relating to the constitution of management companies that any directors appointed by the developer must resign when the development is complete and the management company assumes full responsibility for the development.¹⁴

5.21 *The Commission provisionally recommends that developers should be statutorily prohibited from committing management companies to long-term contracts with managing agents.*

D Conclusion

5.22 In examining the problems arising for multi-unit developments generally, it is increasingly obvious that many of the issues experienced in the sector stem from the under-informed status of unit owners. This is especially clear in the context of managing agents. Unfortunately, the result of such lack of knowledge is that the consumer rights of unit owners can be easily taken advantage of by various groups.

5.23 For management companies dealing with managing agents, the Commission believes that the best way to counter such abuse is to inject clarification into the system for unit owners. Through the use of licensing and regulation of managing agents, standard form contracts, and mechanisms for investigation and dispute resolution, the Commission is convinced that consumers will be in a better position to assert their rights against such abuse in the future.

¹³ See Chapter 6.

¹⁴ See further on this, paragraphs 4.80-4.83 above.

CHAPTER 6 CONSUMER PROTECTION

6.01 In some respects multi-unit developments are the subject of considerable consumer protection. In particular, they are subject to extensive regulation imposed by planning legislation¹ and related legislation, such as that concerning building control² and fire and safety.³ Housing authorities have extensive powers⁴ to institute enforcement action where private dwellings, including apartments, are unfit for human habitation or overcrowded.⁵ Furthermore, consumers involved in multi-unit developments already have recourse to the law for a number of problems they may have. For example, the Office of the Director of Consumer Affairs is currently in charge of enforcement and compliance with a wide range of consumer law.⁶ Notwithstanding such provision however, this Paper has exposed a series of problems faced by unit owners chiefly emanating from lack of supervision and regulation of the sector, and from lack of understanding of the proper functions of various stakeholders involved in multi-unit developments.

6.02 Throughout this Paper, the reform of the law which the Commission has recommended has necessarily involved a consumer protection element. Accordingly, this chapter aims to identify the key problems arising for consumers in the areas discussed earlier, and outlines the significance of the Commission's recommendations from a consumer perspective.

(i) *Scope of Understanding Deficit*

6.03 A primary area of concern for the Commission is the lack of knowledge on the part of many unit owners or potential unit owners as to

¹ In particular the *Planning and Development Act 2000*.

² *Building Control Act 1990*.

³ *Fire Services Act 1981*.

⁴ Under the *Housing Act 1966*.

⁵ It should be noted that the *Residential Tenancies Act 2004* is not intended to apply generally to "owner occupied" apartments, though there are a few special provisions relating to management of apartment complexes which apply to "tenants" (in effect, subtenants of the owner-lessees) of apartments: see sections 187 (forwarding complaints to management company) and 188 (information about service charges).

⁶ This function will soon be fulfilled by the National Consumer Agency.

what precisely is involved in living in a multi-unit development. The phenomenon is repeatedly referred to in this Paper as an ‘understanding deficit’. This deficit is largely derived from the fact that there is often a lack of appreciation on the part of the unit buyer of the degree of interdependence involved in such developments.⁷ There is a corresponding lack of understanding as to the extent to which the activity of an individual unit owner or failure to abide by obligations will impinge upon other units and their owners. This understanding deficit can be attributed, at least in part, to the relative ‘newness’ of residential multi-unit developments in housing in Ireland.⁸ Most unit owners will be more familiar with ‘traditional’ housing, that is, housing without the ‘common interest’ element necessary in residential multi-unit developments.

6.04 Another reason why this lack of understanding is so widespread is the lack of standardisation in the operation of multi-unit developments. For example, there is presently no standard form contract for the engagement of managing agents, no standardised constitution for management companies, and no well-established protocol for taking-in-charge. The variety of mechanisms used in the day-to-day running of multi-unit developments results in further confusion across the sector as a whole.

6.05 The National Consumer Agency (NCA) commissioned a report which was published earlier this year.⁹ This report provides valuable insight into the problems faced by consumers. What is remarkable about the report’s findings is the wide scope of the understanding deficit experienced by unit owners.¹⁰ Primary areas of confusion and consumer dissatisfaction include the:

- purpose of service charges and sinking funds
- function and operation of management companies
- function of managing agents
- provision of information for unit owners.

6.06 Based on these findings, the Report makes a number of recommendations. These include the recommendation that the NCA should undertake two major surveys; a representative survey to ascertain consumer views on a range of issues affecting multi-unit developments, and a national

⁷ See paragraphs 1.18-1.21 above.

⁸ See paragraph 1.05 above.

⁹ *Management Fees and Service Charges levied on owners of Property in Multi-Unit Dwellings*, Final Report for the National Consumer Agency by DKM Economic Consultants Ltd in association with Kevin O’Higgins Solicitors, July 2006.

¹⁰ *Ibid*, Section 5.

survey of service charges and management fees.¹¹ The Commission welcomes these recommendations and believes that the information yielded from these surveys will prove very important when any proposed Regulatory Body considers policy relating to regulation of such developments.

(ii) *Service Charges and Sinking Funds*

6.07 While most are familiar with the concept of paying rent under a lease, many find it difficult to grasp the concept of paying a service charge. Many unit owners, once they have ‘bought’ their unit, believe that they will not have any further contributions to make to the ownership of their property. The service charge, as explained earlier,¹² is a charge that unit owners pay periodically to fund the maintenance of the common areas of the development. These service charges levied on owners are a serious potential source of dispute.

6.08 The legal documentation in most developments tends to give landlords or the management company a very wide discretion in fixing service charges. In the case of residential developments, many unit owners may have little or no idea as to how these charges are worked out and how they are apportioned as between the different unit owners. Once again, this can be attributed to the ‘understanding deficit’. Unfortunately, this understanding deficit is sometimes taken advantage of, enabling developers, while still in control of the management companies, to compel unit owners to use the service charges as a means of paying for ‘snagging’ problems before completion of the development.

6.09 Furthermore, there is the danger that the system may be manipulated unfairly. For example, initially the charges may be set at a low level by developers while still in control of the management companies so as to attract purchasers, who then find that the charges subsequently rise substantially and unexpectedly to a more realistic level, so as to meet the true management costs incurred and services provided.

6.10 Major problems also arise where unit owners default on service charge payments. This often happens because unit owners are frustrated with the level of service they receive in return for the amount they contribute. This results in a cycle whereby the management company is then unable to properly maintain the development, thus harming the value of the property.

6.11 The Commission has made a number of recommendations in this Paper which have a bearing on the service charge problems faced by unit

¹¹ *Management Fees and Service Charges levied on owners of Property in Multi-Unit Dwellings*, Final Report for the National Consumer Agency by DKM Economic Consultants Ltd in association with Kevin O’Higgins Solicitors, July 2006.

¹² See paragraph 1.09 above.

owners.¹³ First, regulation of calculation of service charges is recommended.¹⁴ In order to ensure greater transparency, management companies or developers should be obliged to provide a break-down of the calculation of service charges and provide a forecast of service charges for coming years.¹⁵ The Commission has also recommended that the proposed Regulatory Body should keep the issue of service charges under review. All of these measures will go towards alleviating the understanding deficit, and will work to counter the frustration felt by many unit owners. It will also effectively prevent the misrepresentation of the calculation of the service charges that owners should expect to pay in coming years.

6.12 The NCA Report also makes some suggestions with regard to the calculation of service charges. It provides a list of what services should be included in the calculation of a service charge,¹⁶ and a consumer checklist to be used upon receipt of the bill for the service charge.¹⁷ Another of its recommendations has already been implemented: the publication of a guide for unit owners of multi-unit developments.¹⁸ The Commission welcomes these developments.

(iii) Management Companies

6.13 The notion of becoming a member of a management company is alien to many unit owners, and the idea of actually becoming involved in running such a company even more so. Many people do not realise that purchase of a unit in a multi-unit developments means automatic membership in a management company. The Commission identified earlier some of the problems arising between unit owners and their management companies.¹⁹ In terms of directorship, the current company law scheme means that voluntary and often inexperienced members of management companies face onerous responsibilities as directors.²⁰ This in turn leads to apathy towards taking an active role in the company. As a result, management companies commonly have a high turnover of directors frustrated with what is often in reality a thankless job. Moreover, the understanding deficit surrounding the exact rights and obligations of a

¹³ See paragraphs 4.103-4.113 above.

¹⁴ See paragraph 4.105 above.

¹⁵ See paragraph 4.109.

¹⁶ NCA Report, Appendix 1.

¹⁷ NCA Report, section 5.10.3.

¹⁸ National Consumer Agency *Property Management Companies and You*, October 2006.

¹⁹ See Chapter 4 above.

²⁰ See paragraphs 4.16 and 4.60 above.

management company adds to the difficulty in acting as a director. The problem is further exacerbated by the fact that there is currently no body responsible for training directors of management companies how to fulfil their duties properly. The trend also detracts from unit owners positively engaging in the improvement and upkeep of their development.

6.14 In some cases, the management company is used as a mechanism for keeping control of the common areas of the development out of the hands of the unit owners. This Paper has already discussed developers loading the allocation of shares in management companies in order to retain control.²¹ Also of concern to the Commission is the apparent tendency of developers to delay for as long as possible in completing the development and vesting the freehold interest in the management company.²² This creates serious problems for unit owners as such a delay can prevent taking in charge from happening for a considerable amount of time.

6.15 A range of measures have been proposed to counter the problems arising with management companies. In the context of directorship, the Commission has forwarded recommendations aimed at lightening the administrative burden faced by directors.²³ The NCA Report suggests the idea of training for officers of management companies.²⁴ Moreover, the Office of the Director of Corporate Enforcement has recently published a *Draft Guidance* for the members of residential management companies.²⁵ Ultimately, the Commission believes that a highly effective way of countering the apathy and confusion surrounding company directorship is for a Regulatory Body to produce a full scheme of directors' rights and obligations as a guide for management company members. This should work to demystify the role of the company director and further standardise the operation of management companies generally.

6.16 *The Commission provisionally recommends that a guide for management company directors including a full scheme of their rights and responsibilities should be compiled.*

6.17 Earlier in this Paper, the Commission also provisionally recommends that developers should be obliged to cede any control in the management company on completion of the development.²⁶ The

²¹ See paragraph 4.85 above.

²² See paragraph 3.20 above.

²³ See for example, paragraphs 4.50 and 4.62-4.69 above.

²⁴ *Op cit*, Recommendation 16.

²⁵ Office of the Director of Corporate Enforcement, *Draft ODCE Guidance: The Governance of Apartment Owners' Management Companies*, December 2006.

²⁶ See paragraph 3.17 above.

Commission also recommends that developers should be obliged to establish a management company within a reasonable timeframe and that it should only operate within its prescribed remit.²⁷ The Commission further suggests that votes should be distributed to management company members in a one vote per unit allocation.²⁸ The Commission believes that these recommendations will prevent the abuse by developers of consumers through the use of management companies.

(iv) *Managing Agents*

6.18 The distinction between a management company and a firm of managing agents employed by the developer or by the management company is not well understood. It would appear that all too often not enough is done by developers and their agents to fully explain to prospective purchasers of units in such developments exactly what is involved. The understanding deficit aspect of this is covered later.²⁹

6.19 There are a number of other issues involving managing agents about which the Commission is concerned. First, there is the problem of management companies relying on managing agents effectively to act as a shadow board of directors.³⁰ Secondly, the Commission is aware of developers, while still in control of the management company committing the company into long-term contracts with firms of managing agents. Thirdly, managing agents are sometimes engaged by the developer to take over completion of snagging problems within the development with the result that unit owners' service charge contributions are sometimes wrongly used to fund the completion.³¹

6.20 The Commission is confident that the regulation of managing agents recommended in Chapter 5³² will operate to prevent their misuse in the future. For example, the Commission endorses the recommendation of the Auctioneering/Estate Agency Review Group³³ that managing agents should be subject to licensing by the NPRSA and should be obliged to sign standard form contracts.³⁴ Such contracts would operate to clarify to

²⁷ See paragraph 3.27 above.

²⁸ See paragraph 3.22 above.

²⁹ See paragraph 6.22 below.

³⁰ See paragraph 5.08 above.

³¹ See paragraph 5.13 above.

³² See paragraphs 5.15-5.21 above.

³³ Auctioneering/Estate Agency Review Group's July 2005 Report, Recommendation No. 10.

³⁴ See paragraph 5.19 above.

managing agents, developers and management companies the parameters of what should be expected of managing agents. The Commission also recommends prohibiting developers from signing long term contracts with managing agents on behalf of management companies.³⁵ Central to the proper use of managing agents however, is a fully-informed consumer base which realises the proper functions of each stakeholder in the multi-unit development sector.

(v) ***Provision of Information***

6.21 As observed, all those who have studied the subject of residential multi-unit developments³⁶ have concluded that there is a major “understanding deficit” which must be addressed urgently. There is far too much confusion over what is involved in owning and living in or renting an apartment or other unit in such a development. This lack of understanding relates to a wide range of matters, such as:

- i) the nature, purpose and operation of the management company;³⁷
- ii) the distinction between the management company and managing agents;³⁸
- iii) the role and rights of unit owners as members of the management company;³⁹
- iv) the extent to which local authorities are likely to take in charge the infrastructure of the development;⁴⁰
- v) the nature and purpose of service charges and how they are calculated;⁴¹
- vi) the nature and purpose of a reserve or sinking fund and the need for one.⁴²

6.22 The Commission is firmly of the view that developers or any other professionals (*eg* estate agents, auctioneers, solicitors, etc) involved in the sale of a unit ought to be required to furnish all prospective owners of apartments or other units in such developments with information clarifying

³⁵ See paragraph 5.21 above.

³⁶ See the Hanlon and NCA Reports: paragraph 1.28 above.

³⁷ See paragraphs 4.04-4.07 above.

³⁸ See paragraphs 1.13-1.14 above.

³⁹ See paragraphs 1.07-1.08.

⁴⁰ Paragraph 1.11 above.

⁴¹ Paragraph 1.09 above.

⁴² Paragraph 1.10 above.

such matters before a binding contract to purchase is entered into.⁴³ That information ought to be reinforced once the purchase is completed and similar information should be provided to the new purchasers when an apartment or other unit is sold on. Information should also be supplied to others who may live in or occupy such units, such as tenants of the owner. Working out precisely what information should be provided at different stages and to different persons, what form and content it should have and who should provide it are matters which the Commission recommends should be investigated by the proposed new Regulatory Body. Appropriate consultation should take place with bodies like the National Consumer Agency,⁴⁴ planning authorities, interested government departments, representatives of the housing and building industry and professional bodies.

6.23 The Commission further recommends that primary legislation should specify the obligations to provide such information on developers and other persons and bodies (for example, auctioneers, estate agents, management companies, managing agents and solicitors), as appropriate. The nature and content of the information should be prescribed by statutory instrument.

6.24 *The Commission provisionally recommends that primary legislation should be enacted specifying the obligations of various groups in the multi-unit development industry in the provision of information to tenants, owners and potential owners.*

(vi) Conclusion

6.25 The Commission has reached the preliminary conclusion that additional protection measures should be introduced for owners of units in residential multi-unit developments. As explained earlier, a number of matters would be covered⁴⁵ One would be a statutory requirement to provide prospective purchasers of units with clear information as to what is involved

⁴³ Where units are being purchased through estate agents, the estate agents should be similarly obliged to furnish all prospective purchasers with such information.

⁴⁴ Note the similar recommendations in its recently published report: *Management Fees and Service Charges levied on owners of Property in Multi-Unit Dwellings*, Final Report for the National Consumer Agency by DKM Economic Consultants Ltd in association with Kevin O'Higgins Solicitors, October 2006, p.i.

⁴⁵ Note should also be taken of the power of the Director of Consumer Affairs to seek an order of the High Court prohibiting unfair terms under regulation 8 (1) of the *European Communities (Unfair Terms in Consumer Contracts) Regulations 1995*. This power was invoked recently in respect of various terms in building agreements which the Law Society regarded as onerous: see *Re An Application Pursuant to Regulation 8 (1) of the European Communities (Unfair Terms in Consumer Contracts) Regulations 1995*, High Court, 5 December 2001. See Dorgan "Safe as Houses" *Law Society Gazette*, Jan/Feb 2002, p12; Igoe "Unfair conditions: has the penny dropped yet?" *Law Society Gazette*, December 2002, p 6.

in owning a unit in a multi-let development and to ensure that the initial scheme for service charge payments set up by the developer is appropriate to the development in question.⁴⁶ Initial purchasers of units should be assured that service charge payments are not only fair and reasonable, but also adequate for the purpose of meeting both annual expenditure and also capital costs which may have to be met from time to time. There would be a requirement to explain such charges in a totally transparent way and also to explain how major future capital expenditure will be met.⁴⁷ The Commission takes the view that these matters are so fundamental and important that they should be given statutory force, at least by regulation, if not by primary legislation. The new Regulatory Body would have the role of monitoring and enforcing such provisions.

6.26 Once the management company has been established and is fully functioning, the unit owners, as its members, should be in a position to control its operation, including the fixing of service charges. As members of the company they are responsible to ensure the company is run efficiently and are also entitled to demand information and explanations as to what the company is doing and how it is doing it. For this reason the Commission takes the view that there is no need to impose further statutory obligations relating to operation of management companies once they are fully operational, *ie*, after the developer has ceased to play a role and has vested the common areas and other property in the company. However, the Commission takes the view that the Regulatory Body should have as part of its remit the monitoring and supervision of the operation of management companies.⁴⁸

6.27 In view of the fact that many unit owners are unfamiliar with the operation of such companies, and even less inclined to become involved in their activities, the Commission also takes the view that part of the Regulatory Body's remit should be to investigate complaints about the operation of management companies, and the activities of other persons or bodies involved, such as managing agents. It is not envisaged that the Body should engage in dispute resolution or arbitration. This is the reason why the Commission does not see the need to introduce special statutory provisions for dispute resolution, such as exist in other jurisdictions.⁴⁹ Disputes should be resolved through the company structure, as between the company and its members. In extreme cases where the company structure does not work in this regard, and investigation of a complaint by the Regulatory Body and

⁴⁶ See paragraphs 6.21-6.24 above.

⁴⁷ See paragraph 4.107 above.

⁴⁸ See paragraph 7.13 below.

⁴⁹ See paragraph 9.20 below.

further action it takes in the light of this does not produce a satisfactory solution, there would be the fall back provision under the “rescue” provisions discussed later.⁵⁰

6.28 The Commission also reiterates its recommendations with regard to placing an onus on groups involved in the sale of a unit to provide all relevant information concerning the unit, the development, the management company and the managing agents and recommends that this should be enshrined in legislation.

6.29 There is also an onus on individual unit owners to take responsibility for the active management of the management company of which they are members.

⁵⁰ See paragraphs 10.24-10.25 and Chapter 11 below.

CHAPTER 7 REGULATION OF MULTI-UNIT DEVELOPMENTS

A Introduction

7.01 This chapter aims to identify the problems surrounding multi-unit developments and outlines the necessity for regulation of the sector. It goes on to discuss potential regulators and sets out the role and functions of any new Regulatory Body established to facilitate the control of residential multi-unit developments.

7.02 With apartment completions comprising over 50% of total completions in Dublin and over 20% nationally last year,¹ it is clear that multi-unit developments now play an important role for housing in Ireland. However, it is also clear that the lack of regulation that coincides with the massive growth in the sector and the issues arising from it has become a major consumer and property stakeholder issue. Given the lack of governing legislation or a watchdog in this specific area, issues including the running of management companies, the responsibilities of developers, managing agents and local authorities, and the facilitation of appropriate non-court fora for dispute resolution within the sector are open to question. The absence of a standardised procedure for calculating service charges and sinking fund charges and legislative clarity on issues including, inter alia, who should have voting rights within management companies² should be addressed as a matter of urgency.

7.03 Currently, management company shareholders are experiencing what this Paper refers to as an understanding deficit. They are unsure about many fundamental issues including which organisation is responsible for taking in charge of basic infrastructural responsibilities, how long developers are entitled to retain controlling interests in the management company after sale of all the units in the development, and myriad other questions. Lack of consumer knowledge invariably leads to abuse of the consumer on occasion. The Commission welcomes the publication by the National Consumer Agency of the information leaflet *Property Management Companies and*

¹ See paragraph 1.04 above.

² See Chapter 4.

You,³ and believes that further measures such as consumer-orientated regulation in the sector is imperative.

7.04 Further to this, for some players in multi-unit developments, there are no groups established to act a national representative body. In the case of groups potentially open to abuse such as management companies, there is currently no body which plays an educative and advisory role in the context of multi-unit developments.

7.05 As discussed in the first chapter, four major reports have recently been published on this matter by stakeholders in the area of multi-unit developments.⁴ The *Report of the Auctioneering/Estate Agency Review Group*⁵ acknowledged the numerous problems in the sector and recommended the establishment of a National Property Services Regulatory Authority (NPRSA) to deal with the issues encountered by the property industry in Ireland. The 2005 Report of the Housing Unit (now the Centre for Housing Research) entitled *Mixed-Tenure Housing Estates: Development, Design, Management and Outcomes*⁶ underlined the confusion many multi-unit development residents felt about the functions and regulation of their management companies. Dublin City Council's Housing Department recently commissioned a study⁷ with a view to devising a strategy concerning the role of the local authority in private housing and mixed tenure multi-unit developments in general. This study lead to the production of a guide titled *Successful Apartment Living*,⁸ which strongly advocated -

“new legal and operational framework for management companies in apartment developments to increase the sustainability and chances of success of the apartment development sector.”⁹

7.06 Lastly, the National Consumer Agency commissioned a report¹⁰ which identified the need for a regulator of multi-unit developments,

³ National Consumer Agency, October 2006.

⁴ See also paragraphs 1.28-1.31 above.

⁵ July 2005 (Department of Justice, Equality and Law Reform).

⁶ Written by the then Director of the Unit, Dr Michelle Norris.

⁷ Carried out by Evelyn Hanlon, chairperson of Ballymun Community Law Centre and previously Finance Director of Ballymun Regeneration Ltd.

⁸ Dublin City Council, June 2006.

⁹ *Ibid*, recommendation 5.1.

¹⁰ *Management Fees and Service Charges levied on owners of Property in Multi-Unit Dwellings*, Final Report for the National Consumer Agency by DKM Economic Consultants Ltd in association with Kevin O'Higgins Solicitors, July 2006.

particularly management companies and the position of such companies in law as among the most important issues within the sector.¹¹ It also recommended that the National Property Services Regulatory Authority (NPSRA) should be given competence for regulation of the sector and that the Government should treat the establishment of the Authority as a matter of priority.

7.07 The aforementioned papers held the consensus that proper organisation of the multi-unit development industry is necessary to protect consumer members of the public by advising all of the various stakeholders of their rights and obligations. It is also clear that this method of communal living has become a feature of Irish society. The proper planning and appropriate structural framework for multi-unit developments is therefore important for the good governance and order of society.

7.08 It is also worth noting that the Office of the Director of Corporate Enforcement has recently published a *Draft ODCE Guidance: The Governance of Apartment Owners' Management Companies*.¹² This guidance adds to the body of literature discussing the issue of management companies in recent years and provides a useful guide to members of such companies.¹³

7.09 One of the striking features of the development in particular of multi-unit developments in Ireland is the extent to which they have flourished without much regulatory intervention. This has led to confusion and concern with regard to the legal rights, duties and responsibilities of management companies. Moreover, as observed in Chapter 4, the membership of such organisations commonly comprises people completely inexperienced in the directorship of corporate bodies. Ultimately, at present, no party or body seems to be responsible for looking at the functioning of such developments as a whole and so, many of the issues are not being addressed in any effective way or even not addressed at all. Most fundamentally, there is no body currently responsible for laying down best practice guidelines for the sector in this jurisdiction.

7.10 Given all of these problems, the Commission believes that regulation in the multi-unit development sector is long overdue. In view of the numerous difficulties relating to residential multi-unit developments

¹¹ *Management Fees and Service Charges levied on owners of Property in Multi-Unit Dwellings*, Final Report for the National Consumer Agency by DKM Economic Consultants Ltd in association with Kevin O'Higgins Solicitors, July 2006, Executive Summary.

¹² December 2006.

¹³ This Guidance is the subject of a consultation exercise which will remain open until 30 March 2007.

which have been identified in this Paper, and other Reports,¹⁴ the Commission has also concluded that there is a need for some sort of Regulatory Body to oversee the operation of such developments. As the Paper indicates, there is a huge range of parties interested in such developments: government departments, local authorities, developers, management companies, managing agents, unit owners and various professional bodies advising or representing such parties.

7.11 *The Commission provisionally recommends the establishment of a Regulatory Body to oversee regulation of the multi-unit development sector in Ireland.*

B Role of the Regulatory Body

7.12 The Commission has reached the preliminary conclusion that a Regulatory Body of some kind should be given responsibility for the regulation of multi-unit developments. Given the importance of such developments for the expansion of housing in Ireland and the number of people whose homes are contained in them, there is a strong case for including developers who build and sell such properties within the sort of new licensing scheme proposed for auctioneers, estate agents and managing agents. If formal licensing is not thought appropriate, the Commission certainly agrees with the Auctioneering/Estate Agency Review Group that builders and developers engaging in sales on their own behalf should be required to provide a similar level of consumer protection as that required of auctioneers in the Group's Report.¹⁵ At the very least the Commission is of the firm view that developers and builders of multi-unit developments involving residential units should be subject to similar monitoring and supervision as is proposed for managing agents.¹⁶ This would include compliance with the statutory obligations specified earlier and enforcement of those obligations.¹⁷

7.13 The Commission provisionally recommends that the proposed Regulatory Body's remit should include a general monitoring and supervision responsibility for management companies involved in residential multi-unit developments. This should apply to such companies both during the interim period between commencement of building and completion of the development, and the company coming within the entire control of the

¹⁴ Especially the Hanlon and NCA Reports: paragraph 1.28-1.31 above.

¹⁵ Auctioneering/Estate Agency Review Group's July 2005 Report, Recommendation No 9.

¹⁶ *Ibid*, Recommendation No. 2. See Chapter 6 above.

¹⁷ See Chapter 3.

members, and the subsequent operation of the company. It would not be appropriate for the Regulatory Body to become involved in matters which, under company law, come within the jurisdiction of the registrar of companies or the courts, but it could have an important role to play in alerting the registrar or other appropriate body to irregularities. Nor would it be appropriate to dictate the type of contractual arrangements between unit owners; but it could provide advice as to the appropriate corporate structure for the development in question and to members who wish to change the structure or make other modifications. Through its role of issuing Codes of Ethics and Practice¹⁸ the Regulator could provide much useful advice to unit owners about the operation of a management company.

7.14 *The Commission provisionally recommends that the Regulatory Body's remit should cover management companies.*

7.15 An important part of the proposed Regulator's supervisory role would be the investigation of complaints made by any person interested in a residential multi-unit development. Such persons would include developers, managing agents, management companies, unit owners and other stakeholders. It is not envisaged that the Regulatory Body would have a direct role in dispute resolution,¹⁹ but it would be in a position to take appropriate action in the light of its investigation which could produce a resolution. Such action would range from imposing sanctions,²⁰ instituting prosecution for breach of statutory obligations,²¹ or assisting in a court application for modifications under proposed "rescue" provisions²² to giving advice to the complainant as to how to seek a solution.²³

7.16 The Commission is aware that a perceived conflict of interest may arise where the same Regulatory Body operates in both licensing and investigation and enforcement capacities. It could be argued that the Regulator could be prejudiced against allowing future licensing applications where, for example, a managing agent has come under suspicion in the past, or where the Regulatory Body has pursued legal proceedings against it. Furthermore, should a Regulatory Body hold responsibility for both managing agents and management companies, more potential conflict arises where the interests of one of the groups may run contrary to the interests of

¹⁸ See paragraph 7.43 below.

¹⁹ See paragraph 7.17 below.

²⁰ Such as revoking a managing agent's licence in cooperation with the NPSRA.

²¹ See, for example, paragraph 4.64.

²² See Chapter 11.

²³ For example, advising an aggrieved unit owner how to use his or her rights as a member of the management company.

the other. The question then arises as to which side the Regulatory Body should favour at the risk of disillusioning the other group with regard to the impartiality of the Body.

7.17 The Commission believes however that, in reality, these fears are largely unfounded. First, the Regulatory Body will not in itself be responsible for dispute resolution between the groups. As stated earlier, it will merely facilitate resolution through referral to arbitration or mediation services. Secondly, while a perception of conflict of interest is understandable with regard to licensing, it is within the regulator's own interest to maintain its integrity as a Regulatory Body by conducting all internal monitoring and investigation in an objective and professional manner. Given the fact that it is envisaged that any proposed Regulatory Body will cater to a wide range of stakeholders, its efficacy as a public body would be undermined and public confidence in its professionalism would be compromised if it engaged in bias for one group over another.

7.18 Thirdly, there is already precedent in this jurisdiction for licensing and regulation being overseen by a single body. The Commission for Communications Regulation (ComReg), for example, has both areas within its remit. The Broadcasting Commission of Ireland and the Commission for Energy Regulation are two other bodies which similarly are in charge of both areas within their respective sectors. Finally, vesting responsibility for both regulation and licensing within the one Regulatory Body means that as a public service, it is streamlined, and maximises expertise within the one organisation.

7.19 Notwithstanding the above arguments, however, it must be noted that there is still a possibility that a conflict of interest would arise in such a situation. This is especially the case in the context of a regulator for the multi-unit development sector. Given the variety of stakeholders, there would invariably be a number of competing interests at work where a regulator tries to formulate policy and establish best practice principles within the sector.

7.20 *The Commission provisionally recommends that the Regulatory Body should have a wide remit to investigate complaints made by any body or person interested in a residential multi-unit development and to take appropriate action to assist in remedying the complaint.*

7.21 As part of its role in producing Codes of Practice, the Regulator should play a central role in ensuring that appropriate information and other appropriate consumer advice is given to purchasers of units in multi-unit developments.²⁴ It is envisaged that provision for such matters will be made

²⁴ See further: Chapter 6 above.

by statutory regulation under enabling legislation²⁵ and the Regulatory Body would be expected to contribute expert advice on the initial drafting and content of the regulations and subsequently to monitor their operation. It would also be expected to suggest appropriate amendments in light of that monitoring experience.

7.22 *The Commission provisionally recommends that the Regulatory Body should advise on the drafting and content of statutory regulations designed to provide purchasers of units in multi-unit developments with consumer advice and other protection and to monitor the operation of such regulations.*

7.23 As indicated earlier,²⁶ the recommendations in this Consultation Paper are directed primarily at multi-unit developments involving residential units and particularly at those which involve a high degree of interdependence, such as multi-storey apartment complexes. Most of the questions which the Paper discusses do not arise in relation to purely commercial developments, such as office blocks, shopping centres and industrial estates. For this reason the Commission makes no recommendation for application of its proposals to such developments, but invites submissions on the matter. As regards other residential developments, such as a typical housing estate or estate of holiday cottages, the Commission's view is that the proposed responsibilities of the Regulatory Body and recommended legislation should apply to the extent which is appropriate. Thus, some of the proposed statutory obligations for developers of multi-unit developments could apply equally to developers of housing estates.²⁷ In so far as any such development involves employment of management agents or establishment of a management company, again the proposals relating to these could apply to developments similar to multi-unit developments. This is a matter which should be considered carefully in drafting the legislation governing the Regulatory Body and other legislation proposed later in this Paper.

7.24 *The Commission provisionally recommends that legislation should be introduced to regulate multi-unit developments and this legislation should apply primarily to multi-unit developments involving residential units and a high degree of interdependence. Application to other residential developments involving a lesser degree of interdependence or features such*

²⁵ The appropriate legislation could be that being prepared for the new National Property Services Regulatory Authority.

²⁶ See paragraph 1.03 above.

²⁷ For example, in relation to completion and ensuring timely taking in charge by the local authority; see paragraph 3.14 above.

as employment of managing agents or establishment of a managing company should be provided for where appropriate.

7.25 This Consultation Paper contains numerous recommendations as to the role of the proposed Regulatory Body. Amongst the more important functions which the Commission envisages it should have are the following:

- (i) general oversight of residential multi-unit developments, including their functioning and that of key players like developers, management companies and managing agents;
- (ii) issuing advice to such players and, as appropriate, making recommendations to the appropriate government department as to the issue of guidelines and statutory regulations;
- (iii) investigation of ways to address the “understanding deficit” which purchasers of units in multi-unit developments suffer from;
- (iv) advising on guidelines or regulations concerning the constitution of management companies, including membership and voting rights;
- (v) investigation of signs of mismanagement, financial or otherwise, by management companies; and advising companies about what course of action to take as a result;²⁸
- (vi) monitoring service charge regimes and reserve or sinking fund provisions and initiating appropriate action to remedy problems concerning such matters;²⁹
- (vii) an urgent investigation of the provision in existing residential developments of reserve funds or other provisions to meet long-term capital expenditure and again initiation of action to remedy problems coming to light.

7.26 It would be essential for the Body to have wide investigative powers, including the power to inspect documentation and records of parties like developers and management companies. As regards initiating action or solutions to problems, it should be obliged to report findings to other bodies with powers to take action, such as planning authorities, the Financial Regulator, the Office of the Director of Corporate Enforcement and government departments. In so far as the primary legislation imposes statutory obligations on parties such as developers, with a criminal sanction, the Regulatory Body should have the power of prosecution.³⁰ The Commission believes that this position is justified given the potential for far-reaching abuse by the various stakeholders and the hugely adverse effects of such abuse suffered, particularly by ‘smaller’ stakeholders such as individual unit owners. Furthermore, the Commission points to other sectors where

²⁸ Paragraph 4.64 above.

²⁹ Paragraphs 4.102-4.122.

³⁰ See paragraph 3.40 above.

such measures have operated successfully to bring about a deterrent effect against non-compliance. For example, s.11 of the *Environmental Protection Agency Act 1992* allows for prosecution by the EPA for flouting of environmental law, while the *Company Law Enforcement Act 2001*, s.12 grants powers to the Director of Corporate Enforcement to similarly prosecute for non-compliance with company law. The Commission also recently recommended conferring similar powers on a proposed Charities Regulator to deal with mismanagement and/or misconduct in the administration of charities.³¹ The Regulatory Body should also have power to advise on, support and be heard in applications under the “rescue” provisions.³²

C Potential Regulatory Bodies

7.27 The decision as to what form the Regulatory Body should take is obviously a matter for government. The wide remit recommended by the Commission, and the co-ordinating role that any such body must necessarily involve itself with, suggests that it is probable that it is outside the remit of existing regulatory bodies. On the other hand, existing bodies may be more qualified than anyone in terms of expertise and experience in dealing with the area and the question is raised as to whether their existing remit should be widened. It is necessary to briefly useful the advantages and disadvantages of vesting regulation of multi-unit developments in specified organisations.

(1) *Department of the Environment, Heritage and Local Government*

7.28 The Department of the Environment, Heritage and Local Government is the government department responsible for, amongst other areas, planning and development, and housing. Thus, as a state department, it has responsibility for many of the policies and issues surrounding multi-unit developments. It has a role in directing planning authorities to collect information about enforcement, planning issues for multi-unit developments, and to inform the Minister so that policy can be formulated. Thus, in some respects, it already plays an important role within the sector; it is partly responsible for general planning policy for multi-unit developments and also deals in more specific policy such as that relating to the taking-in-charge of services. The Department also has a Minister of State with particular responsibility for housing and urban renewal.³³

³¹ Law Reform Commission *Report on Charitable Trusts and Legal Structures for Charities* (LRC 20-2006), Chapter 1.

³² See recommendations at paragraph 11.14 below.

³³ This is currently Noel Ahern T.D.

7.29 The current practice in Ireland is to assign such regulatory, executive or advisory roles to independent special purpose organisations. Furthermore, the Department does not have any current experience or involvement in relation to operational matters involved in property management. While it has primary competence in the State for setting policy on matters of housing, practical implementation of this is typically delegated to local authorities. As a result of this, and, given the Department's overall role in formulating policy, the Commission does not believe that the Department to be the Regulatory Body in respect of multi-unit developments.

7.30 Nevertheless, the Commission believes that the Department will continue to play an important role in the sector. As discussed earlier, it is envisaged that any proposed Regulatory Body will work closely in consultation with the Department in dealing with policy and strategy issues and will also be a central source of information for the Body which will enable it to operate.

(2) *Local Authorities*

7.31 Local authorities are responsible for the governance of housing, planning and development on a regional basis, and have a very direct decision-making role in relation to these issues. As a result of this, they are well placed to have a unique insight into the issues and opinions on the ground in the property sector. Notwithstanding this, however, there are a number of issues which render local authorities inappropriate bodies to deal with the regulatory side of multi-unit developments. First, if regulation of the sector is assigned to the various local authorities around the country, it will negate the potential for standardisation of regulation. Secondly, should the proposed Regulatory Body have facilitation of dispute resolution within the area in its remit, a local authority could have a potential conflict of interest, as it may be a party to a given dispute. This point is particularly pertinent given the recent controversy surrounding local authorities' responsibilities for taking-in-charge. The sector needs an independent and objective regulator. Thirdly, practicably, many local government councils probably do not have the resources, the manpower or the expertise to facilitate a dedicated team dealing with multi-unit developments in every local authority in the country. Hence, the Commission believes that it is altogether more sensible to confer the substantial responsibility for regulation of multi-unit developments on a more independent, specialised organisation.

(3) *Private Residential Tenancies Board (PRTB)*

7.32 The recommendations of the Commission on the Private Rented Residential Sector published in July 2000 led to the establishment of the

Private Residential Tenancies Board.³⁴ The PRTB has thus developed some experience in dealing with problems arising in the context of private residency. Moreover, it is arguably more desirable to keep all regulation of residential property within one organisation.

7.33 However, on appraisal of the Explanatory Memorandum accompanying the *Residential Tenancies Act 2004*, it appears that the PRTB's ambit extends only as far as the 'mainstream' private rented sector and it is not within the spirit or intendment of the Act that it be applicable to shareholders in multi-unit developments. The Government has already rejected the proposal in the Private Members' Residential Tenancies (Amendment) Bill 2006 to extend the remit of the Private Residential Tenancies Board to cover many of the matters relating to multi-unit developments about which the Commission is concerned.³⁵ That Board is concerned primarily with landlord and tenant issues and, in so far as its present remit extends to multi-unit developments, it is confined to the interests of tenants of the owners of the units. It is not concerned with owner-occupiers of the units or owner-investors who have sub-let on short-term leases.

7.34 In any event, it can be argued that engaging the PRTB as the management company sector regulator could foreseeably dilute the Board's efficacy in catering for the needs of 'traditional' tenants as membership of management companies often comprises landlords. Thus, the PRTB could find its usefulness compromised in cases of where it would be necessary to represent and advise both tenants and shareholder landlords.

(4) National Consumer Agency

7.35 As already observed, multi-unit developments currently constitute a major consumer issue. The National Consumer Agency (NCA) recently commissioned and published an extremely comprehensive report on the sector³⁶ and recommended the establishment of a Regulatory Body to oversee regulation of multi-unit developments. It is clear that as a group, they have a clear understanding of the difficulties facing stakeholders within the area; particularly in relation to problems surrounding management companies.³⁷

³⁴ *Report of the Commission on the Private Rented Residential Sector*, 27 July 2000.

³⁵ See paragraph 1.34 above.

³⁶ *Management Fees and Service Charges levied on owners of Property in Multi-Unit Dwellings*, Final Report for the National Consumer Agency by DKM Economic Consultants Ltd in association with Kevin O'Higgins Solicitors, October 2006.

³⁷ In October 2006 for example, they released a consumer advice leaflet entitled *Management Companies and You*.

7.36 Moreover, the NCA are especially vocal about the need to counter the ‘understanding deficit’ which is currently evident in the area; an issue about which the Commission are equally concerned. As a body, they also have experience of enforcement of issues concerning consumer affairs and carry out a supervisory/watchdog role for consumers. It is envisaged the proposed Regulatory Body will provide a similar service for stakeholders of multi-unit developments.

7.37 Despite this, the Commission is not convinced that the National Consumer Agency would be the most appropriate body to regulate multi-unit developments. The NCA’s mandate is chiefly to provide a voice for consumers in Ireland. This means that it would potentially be in a conflicted position if it were called on to advise, represent or regulate any other stakeholder group. In any case, such activity would fall clearly outside the Agency’s remit.

(5) *Companies Registration Office*

7.38 The Companies Registration Office (CRO) is familiar with regulation and enforcement of compliance with the law as it relates to private and public companies. Given the central role played by management companies in the multi-unit development sector, the CRO is worth considering as a potential regulator by the sector as a whole, particularly as other main players such as managing agents and developers are also often incorporated bodies.

7.39 Notwithstanding this, however, it is clear that the CRO’s remit is limited only to implementation and enforcement of the Companies Acts. Thus, it would not be an appropriate body to manage regulation of the sector on a more general level, and would not be in a position, for example, to monitor service charge regimes or to facilitate dispute resolution between stakeholders. For the same reasons, any such regulatory role suggested for the Office of Director of Corporate Enforcement would be outside its statutory remit.

7.40 However, the Commission envisages that the CRO will play a key role in regulation in so far as it will have to work closely with any proposed Regulator in the collection and distribution of information on management companies, particularly in light of the issues raised in this Paper.

(6) *Property Registration Authority*

7.41 The Property Registration Authority, as the body now responsible for recording transactions in relation to property in Ireland, will in the future play an important role in the multi-unit development business. However, as with the PRTB and the CRO, it has a closely defined remit; in this case the control and management of the Land Registry and the Registry of Deeds in this jurisdiction. Again, thus, the diversity of functions envisaged for the

proposed Regulatory Body would probably prove inappropriate given the closely defined duties of the PRA.

(7) ***National Property Services Regulatory Authority (NPSRA)***

7.42 The concept of a national regulator for all property trading entities and property management services was mooted by the *Report of the Auctioneering/Estate Agency Review Group*³⁸ and was enthusiastically accepted by the Government in October 2005. Since then, an implementation group has been established to oversee the practical arrangements for the National Property Services Regulatory Authority's establishment,³⁹ pending enactment of the necessary legislation to govern its functions.

7.43 Although the proposed new National Property Services Regulatory Authority⁴⁰ is expected to have a remit which will have a bearing on multi-unit developments, in that it will be responsible for the regulation of property managing agents and promotion of consumer awareness,⁴¹ its primary role is the regulation of auctioneers, estate agents and letting agents. The National Property Services Regulatory Authority apparently will have within its proposed remit or be responsible for enforcing⁴² a number of matters which bear directly on regulation of multi-unit developments. These include –

- Licensing and regulation (such as setting standards for qualification, monitoring performance, investigation and inspection of records) not only of auctioneers and estate agents, but also of builders and developers engaging in direct property sales and property management agents;⁴³

³⁸ July 2005 (Department of Justice, Equality and Law Reform), Recommendation No. 2.

³⁹ Based in Navan, Co Meath, as part of the Government's decentralisation programme.

⁴⁰ Paragraph 1.28 above.

⁴¹ Recommendation Nos 2, 10, 19 and 40 in the *Report of the Auctioneering/Estate Agency Review Group* (July 2005) and statement of Minister for Justice, Equality and Law Reform accepting the Report on behalf of the Government made on 18 October 2005.

⁴² Recommendation Nos 2, 10, 19 and 40 in the *Report of the Auctioneering/Estate Agency Review Group* (July 2005) and statement of Minister for Justice, Equality and Law Reform accepting the Report on behalf of the Government made on 18 October 2005.

⁴³ Report Recommendation Nos. 2, 10 and 42. See also Chapters 4 (pages 21-22) and 13 of the Report.

- Ensuring that all client monies, including service charges and sinking funds, are held by licensed agents in client accounts;⁴⁴
- Requiring all licence holders to contribute to a Fidelity Fund out of which clients can be compensated for losses caused by licence holders' actions;⁴⁵
- Promotion, with the auctioneering and other professions, of consumer awareness of the process involved in property transactions and the nature and levels of service provided by auctioneers and other professional persons;⁴⁶
- Sanctioning⁴⁷ licence holders who exhibit a pattern of providing inaccurate information;⁴⁸
- Giving accurate information where properties are sold "off plan" and justifiable estimates of service charges;⁴⁹
- Promotion of the operation of Codes of Ethics and Practice to be adopted by all licence holders.

7.44 The Commission welcomes these proposals and takes the view that their implementation will help to solve some of the problems, particularly those to do with administration and consumer awareness, which it has identified in relation to multi-unit developments. It is clear that the Review Group also identified some of the problems, but it was to some extent constrained by its terms of reference.⁵⁰

7.45 The NPRSA is arguably preferable to other bodies as a regulatory authority in many respects. First, it is completely independent from all other stakeholders in the multi-unit development industry. This factor is particularly pertinent given its proposed advisory, investigatory and watchdog functions. Secondly, its sole purpose is to oversee the property sector which means that it will hold a high degree of specialisation within the area. A corollary advantage to this is that it would be in an excellent position to work in consultation with the Department of Environment, Heritage and Local Government on matters of general multi-unit

⁴⁴ Recommendation No 7. This requirement would be enshrined in the new legislation.

⁴⁵ Recommendation Nos 6 and 16. The Fund will be operated by or with the approval of the Regulatory Authority: see Report pages 20-21.

⁴⁶ Recommendation Nos 19 and 40.

⁴⁷ Such as withdrawal of the licence to practice.

⁴⁸ Recommendation No 25.

⁴⁹ Recommendation No 26.

⁵⁰ See Chapter 13, *Report of the Auctioneering/Estate Agency Review Group*.

development policy. Thirdly the wide remit of the NPSRA if adopted as an overall multi-unit development sector regulator would enable it to achieve uniformity of standard and transparency in licensing, regulation and information provision across the whole sector.

7.46 There are quite a few compelling reasons, however, why regulation of multi-unit developments should not be vested in the control of the proposed National Property Services Regulatory Authority. First, to add all the matters which the Commission is recommending would involve a very substantial extension of the proposed remit of the Authority, in both qualitative and quantitative terms. The Commission has considerable doubts as to whether such an extension would be appropriate for a body which has yet to come into existence and find its feet. This is particularly the case given the current breadth of the remit proposed for the new National Property Services Regulatory Authority,⁵¹ which includes regulation of builders, developers and managing agents. Based on this, the Commission questions whether the Authority should be given an additional remit to deal with various aspects of multi-unit developments.

7.47 Secondly, the Commission earlier expressed doubts as to the appropriateness of single body undertaking the dual role of licensing and imposing sanctions within a sector.⁵² While it is clear that such a system has worked successfully in other sectors, the Commission believes that the multi-unit development sector may constitute a special case given the multiplicity of stakeholders involved.⁵³

7.48 Thirdly, it is clear that any body conferred with responsibility for regulating the multi-unit developments sector will have an onerous task in co-ordinating the regulation already carried out in distinct parts of the sector and interaction with the various bodies involved in this regulation, for example, the CRO, the Dept of the Environment, Heritage and Local Government, the NCA and the NPRSA in relation to auctioneers, estate agents and property service agents. Such a task necessarily would involve huge reliance on coordination of activities between the relevant public bodies and government departments.⁵⁴ The Commission considers that such a task may necessarily require an existing body more internally adept at utilising such policies over a period of time, rather than a new body.

⁵¹ See paragraph 1.28 above.

⁵² See paragraphs 7.15-7.19 above.

⁵³ See paragraph 7.19 above.

⁵⁴ See paragraphs 4.74-4.79 above.

(8) *Specialised Regulator*

7.49 The Commission acknowledges that many of the advantages inherent in opting for any of the above organisations could be distilled into an entirely new Regulatory Body. The idea of having a single specialised regulator for the sector is particularly compelling. Notwithstanding this however, the Commission questions the wisdom of having yet another body with some kind of regulatory function in the multi-unit development sector. In the interests of better governance, it may be better to confer responsibility for regulation on an existing body. The Commission invites submissions as to whether the Regulatory Body should be a specialised regulator for multi-unit developments only.

(9) *Conclusion*

7.50 The Commission outlined earlier the functions it expects any regulator of multi-unit developments to perform.⁵⁵ The Commission firmly believes that the sector needs to be regulated. To this end, the Commission recommends that power to perform the functions envisaged by the Commission⁵⁶ must be vested in an organisation which will act as a Regulatory Body. The Commission does not propose at this stage to make any recommendation as to which of the above bodies should regulate multi-unit developments, but invites submissions on the most suitable Regulatory Body to fulfil the proposed functions. For the sake of convenience, the resulting regulator, whichever that may be, will be referred to in this paper as the Regulatory Body.

7.51 *The Commission invites submissions on the most suitable Regulatory Body to regulate multi-unit developments.*

D Overview of the Functions Proposed for the Regulatory Body

7.52 Given that the recommendations with regard to the function of the proposed Regulatory Body are dispersed throughout this Paper, the Commission considers that it is appropriate to summarise these recommendations, which it now does. The functions outlined in this Paper for the proposed Regulatory Body as provisionally recommended by the Commission broadly fall into two main categories; policy and regulation for the multi unit development sector.

(1) *Regulatory Body- Policy*

7.53 The Commission's proposals with regard to vesting of responsibility for regulation of the sector in a Regulatory Body envisage that

⁵⁵ See paragraphs 4.74-4.79 above.

⁵⁶ See paragraphs 7.12-7.26 above.

the Body will be at least partially responsible for the development and implementation of policy in for multi-unit developments. Here is a summary of the Body's proposed 'policy' function:

- the Regulatory Body will have input into creation of guidelines for developers outlining the suitable time to establish a management company for a development and the duties to be fulfilled by a developer while in control of such a company;⁵⁷
- the Body will be involved in developing protocols to be followed by both planning authorities and developers during the taking-in-charge process;⁵⁸
- the Regulatory Body will have to undertake an urgent study into the status of sinking/reserve funds in the sector at the moment and address the issues arising where developments have not yet established such funds;⁵⁹
- it will have responsibility for setting standards for the 'reasonable' and 'appropriate' calculation of service charges,⁶⁰ and will also have to keep under review the sanctions to be imposed on those who fail to pay their service charges;⁶¹
- with regard to management companies, the Body will play a major role in deciding the proper name to be used by management companies,⁶² determining who should be given voting rights,⁶³ development of an alternative sanction to the strike-off provision,⁶⁴ and development of standard provisions for management companies' memorandums and articles of association.⁶⁵ Such issues arising in relation to the development of policy which has an impact on company law for management companies will be considered in conjunction with the Companies Registration Office.
- the Regulatory Body will review, in consultation with other state agencies, a full scheme of management company directors' rights and obligations;⁶⁶

⁵⁷ See paragraph 3.06 above.

⁵⁸ See paragraph 2.18 above.

⁵⁹ See paragraph 4.122 above.

⁶⁰ See paragraph 4.107 above.

⁶¹ See paragraph 4.108 above.

⁶² See paragraph 4.37 above.

⁶³ See paragraph 4.87 above.

⁶⁴ See paragraph 4.66 above.

⁶⁵ See paragraph 4.98 above.

⁶⁶ See paragraph 4.87 above.

- the Regulatory Body will advise on and monitor the drafting and implementation of all regulations introduced to regulate the multi-unit development sector.⁶⁷

7.54 Once a number of these policy functions are initially achieved, the regulatory role will then be simply to act in a monitoring capacity to ensure that policies do not become outdated, and to review and strategically reform the applicable regulations should this occur.

(2) ***Regulation - General***

7.55 The proposals of the Commission with regard to regulation of multi-unit developments can be summarised as follows:

- every multi-unit development should be registered with the Regulatory Body. Where developers decide to retain units in the developments which they have constructed, the Regulatory Body must also be informed of this;⁶⁸
- the Regulatory Body will be responsible for the monitoring and supervision of management companies;⁶⁹
- to facilitate this, all management companies will be required to file annual reports to the Body;⁷⁰
- the Body will keep a database of the membership of all management companies;⁷¹
- the Regulatory Body will advise companies about which is the most appropriate company type for them to adopt;⁷²
- the Body will advise management companies on the proper steps to take when they are made aware that such companies face strike-off;⁷³
- the body will advise and assist management companies on compliance with the Companies Acts generally;⁷⁴
- all of the regulatory and supervisory powers outlined above will also apply to smaller developments.⁷⁵

⁶⁷ See paragraph 7.22 above.

⁶⁸ See paragraph 3.38 above.

⁶⁹ See paragraph 7.13 above.

⁷⁰ See paragraph 4.16 above.

⁷¹ See paragraph 4.79 above.

⁷² See paragraph 7.13 above.

⁷³ See paragraph 4.65 above.

⁷⁴ See paragraph 4.68 above.

⁷⁵ See paragraph 10.31 below.

7.56 In so far as possible, the Commission believes that any proposals for regulation should not inadvertently lead to some groups of stakeholders being unnecessarily subject to regulation from a number of different state bodies. Furthermore, in some instances, the role of the proposed Body will be confined to simply ensuring that the role of an existing regulator within a given part of the sector (for example, local authorities) is consistent with the wider demands that are required in the sector as a whole.

(3) *Regulation - Accountability of the Sector*

- The Regulatory Body will monitor use of enforcement powers of local authorities in ensuring that developers properly complete developments;⁷⁶
- developers will be accountable to the Regulatory Body where they are in breach of their statutory obligations. Sanctions for such breaches may include the Body instituting criminal proceedings against such developers;⁷⁷
- the Regulatory Body will be able to investigate and, if necessary, take appropriate action where it receives a complaint or discovers that service charges or reserve/sinking fund contributions are excessive;⁷⁸
- it will undertake random audits on the accounts of management companies to ensure that good practice is followed in the calculation of such charges⁷⁹
- the Body will investigate mismanagement of management companies following complaint from any interested party or as part of its monitoring and supervision mandate. It will be empowered to take appropriate steps where the complaints are substantiated;⁸⁰
- the Regulatory Body will have power to investigate complaints against any part of the multi-unit development sector and will be able to take appropriate steps where necessary to resolve any disputes;⁸¹
- the Regulatory Body will be able to apply to the Circuit Court for a remedial order where problems arise with multi-unit developments.⁸²

⁷⁶ See paragraph 3.12 above.

⁷⁷ See paragraph 3.06 above.

⁷⁸ See paragraph 4.108 above.

⁷⁹ See paragraph 4.107 above.

⁸⁰ See paragraph 4.67 above.

⁸¹ See paragraph 7.15 above.

⁸² See paragraph 11.10 below.

7.57 The Commission emphasises that these recommendations are provisional and it suggests a very wide remit for the proposed Regulatory Body. However, all the areas identified do require some form of oversight and the Commission very much welcomes debate and submissions on these important issues.

PART B

CHAPTER 8 LEGAL PROBLEMS ARISING WITH MULTI-UNIT DEVELOPMENTS

8.01 The Commission’s study of multi-unit developments has revealed that there are various legal problems, or potential problems, which can arise. The source of these problems also varies and so does their seriousness, depending upon the nature of the development. What the Commission has in mind in referring to “legal” problems are problems which relate to the technical side of multi-unit developments¹ such as the conveyancing documentation which is drawn up. The complexities of such developments, which were mentioned earlier,² require that great care is taken in drawing up the legal documentation relating to the particular development. Other problems stem from difficulties in the current state of the law. Such problems are to be distinguished from the administrative or regulatory problems discussed in Part A of this Consultation Paper.

8.02 This chapter highlights legal problems facing multi-unit developments; first underlining the complexity of the legal documentation involved in conveyancing; then discussing how land law, as it has evolved, is unsuitable for dealing with multi-unit developments and finally examining the unique position of small developments in the sector.

A Legal Documentation

8.03 An examination of the precedents contained in Division C³ which was recently added to Laffoy’s *Irish Conveyancing Precedents* reveals just how complex the legal documentation relating to multi-unit developments tends to be. If those who acquire a unit in such a development are going to enjoy the full benefits of ownership, the documentation must, at the very minimum, deal clearly and effectively with the following matters: -

¹ Some of these problems were adverted to during argument before the Supreme Court in *Metropolitan Properties Ltd v. O'Brien* [1995] IR 467 at 481-482. See also Wylie *Irish Conveyancing Law* (3rd ed Tottel Publishing 2005) paragraphs 19.11-19.22; Laffoy’s *Irish Conveyancing Precedents* (Tolley Publishing) pages C3-C6.

² See paragraphs 1.18-1.20 above.

³ Headed “Building Schemes”.

- i) Identification of the different parts of the development, in particular individual units and other parts such as common areas;
- ii) Creation of a wide-ranging scheme of mutual rights and obligations as between the units owners themselves and as between unit owners and any body responsible for management of the development (in particular the common areas);
- iii) Establishment of a scheme for day-to-day management, to cover provision of vital services and facilities, repairs and maintenance of common areas and insurance;
- iv) Definition of the relationship between individual unit owners and any body responsible for management;
- v) Provision for meeting the costs and expenses of management, including regular annual charges and occasional capital expenditure.

8.04 This is the barest outline of the main requirements for effective legal documentation. It is sufficient to make the point that if the legal documentation is defective on any of the above matters the likelihood is that those involved in the multi-unit development are going to face considerable difficulties.

8.05 One major difficulty may be that if the documentation is defective, it may not be easy for unit owners and the body responsible for management⁴ to remedy the problem. In that event the only solution may be recourse to lengthy and costly litigation, but even that may not provide an effective resolution of the difficulties. If the source of the problem is defective legal documentation there may be little or nothing which the courts can do – in such circumstances the courts have no general jurisdiction to amend legal documentation which the parties have created nor to create rights or obligations which they have failed to create.⁵ Such amendment or variation of the legal documentation could, of course, be agreed by all the parties concerned, but the inevitable danger with large multi-unit developments is that some of the parties may not be prepared to join with the others in such an agreement. It only takes a minority of one to thwart the wishes of the vast majority.

8.06 Another important consideration is that it may be important to draw a distinction between different types of multi-unit development. The outline of main requirements given above may be particularly relevant to the typical, large-scale, modern block of apartments or office block. It may not

⁴ Assuming this has been created or, if it was established, is still functioning. As was explained earlier, this may not be the case: see paragraphs 4.51-4.69 above.

⁵ See further paragraphs 11.07 and 11.10 below.

be so relevant to small developments, whether new buildings or, as commonly occurs, a conversion of an older house into a small number of flats or apartments. The imposition of the paraphernalia of a management company may be inappropriate for such a development, and some other, simpler, way of managing the necessary sharing of parts of the building and its services and facilities should be considered, such as co-ownership by the unit owners.

B Defective State of the Law

8.07 Whatever care is taken in drafting the legal documentation relating to a particular multi-unit development, there are some problems which cannot be overcome easily because of the current state of the law. The classic illustration of this, which is most commonly cited in the context of multi-unit developments, is the law relating to freehold covenants. In essence, as the law currently stands, in general⁶ any positive obligation created by such a covenant will not bind successors in title. This has major implications for multi-unit developments, which invariably involve numerous positive obligations relating to payment of service charges and covering repairs, maintenance and insurance. It has long been recognised that this is a major flaw in the development of our land law and conveyancing system. The Commission has recently recommended that the law should be changed radically, so that freehold covenants should become as fully enforceable by and against successors in title as leasehold covenants have been for centuries.⁷

8.08 This defect in the law relating to freehold covenants has had the consequence that lawyers dealing with the legal aspects of multi-unit developments in Ireland have long taken the view that the difficulties in creating freehold ownership of individual units in multi-storey buildings in particular are insurmountable.⁸ This is notwithstanding the fact that it is well recognised by the common law that it is possible to divide up freehold

⁶ The various suggested mechanisms for getting round this problem suffer themselves from drawbacks: See Lyall *Land Law in Ireland* (2nd ed Roundhall Sweet & Maxwell 2000) Chapter 21; Wylie *Irish Land Law* (3rd ed Butterworths 1997) Chapter 19.

⁷ See *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and Other Proposals* (LRC 70-2003) Chapter 1; *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP34-2004) paragraphs 7.29-7.32. This matter was covered by provisions in the draft Land and Conveyancing Bill 2005 in Appendix B to the *Report on Modernisation of Land Law and Conveyancing Law* (LRC 74-2005). They are now to be found in Part 7, Chapter 4 of the Land and Conveyancing Law Reform Bill 2006 introduced by the Government to the Séanad on 9 June 2006.

⁸ This point was made before the Supreme Court in *Metropolitan Properties Ltd v O'Brien* [1995] IR 467 of 481-482.

ownership of horizontal layers of the airspace above the land, so as to create separate ownership of so-called “flying freeholds”.⁹ Instead, the standard practice adopted up to now has been to confine ownership of a unit in such multi-unit developments to a leasehold interest, with the freehold of the entire building (including both units and common areas) being vested in a landlord.¹⁰ This achieves the security of full enforceability of all obligations by and against successors in title in accordance with leasehold law.

8.09 The Oireachtas has also had to recognise the difficulties created by this defect in the law relating to freehold covenants. Thus the prohibition on the creation of leases of dwellings imposed by the *Landlord and Tenant (Ground Rents) Act 1978*¹¹ does not apply where the dwelling is a “separate and self-contained flat in premises divided into two or more such flats.”¹² This ensured that the practice of creating leasehold flat or apartment developments could continue. Furthermore, the right of lessees to purchase the fee simple originally conferred by the *Landlord and Tenant (Ground Rent) Act 1967*, and extended by the *Landlord and Tenant (Ground Rents)(No.2) Act 1978*, does not apply where the lease “includes a building divided into not less than four separate and self-contained flats”.¹³ Thus the lessee of such a flat or apartment has no right to purchase the freehold, unlike the lessee of a single house.

8.10 The matters referred to in the previous paragraphs have also created considerable uncertainty amongst practitioners. Notwithstanding the common law’s apparent willingness to recognise in theory the horizontal division of airspace above ground level, doubts persist amongst some as to the legal practicalities of this process. In particular, it has been queried whether a freehold or, indeed, a leasehold interest can be created in what is at the time in question a block of airspace not filled in by a part of a building or some other structure ultimately attached to the ground. This may be of particular significance where a multi-unit building is badly damaged or

⁹ See *Humphries v. Brogden* (1850) 12 QB 729 at 747 and 755-757 (per Lord Campbell CJ); *Bonomi v. Backhouse* (1858) EI BI & EI 622 at 645-655 (per Willes J); *Reilly v. Booth* (1890) 44 ChD 12 at 23 (per Cotton LJ) and 26-27 (per Lopes LJ). See also Gray “Property in Thin Air” (1991) CLJ 252. Note also the wide definition of “land” in section 3 of the Land and Conveyancing Law Reform Bill 2006.

¹⁰ Originally usually the developer, but subsequently often transferred to a management body: see Chapter 5 above and paragraphs 10.08 and 10.09 below.

¹¹ Section 2, *Landlord and Tenant (Ground Rents) Act 1978*.

¹² See definition of “dwelling” in section 1 of the 1978 Act.

¹³ See section 16 (2)(a) of the 1978 (No. 2) Act. Somewhat oddly this restriction applies only where the lease of the flat contains a rent review provision, which is common in a lease of business premises and much less common in leases of residential property. See Wylie *Irish Landlord and Tenant Law* (2nd ed Butterworths 1998) Chapter 11.

virtually destroyed by some catastrophic event. It would be desirable if it were made clear what the rights of the owners of the destroyed units were in such a situation.

8.11 It also has to be said that practitioners have had considerable difficulties in interpreting the provisions of the ground rents legislation. Much doubt exists as to what constitutes a “flat”; for example, does it include a “duplex” unit spread over two floors of a building? Such doubts should be considered in any review of the ground rents legislation.

8.12 In passing it may be noted that it was to get round the practical conveyancing difficulties of creating freehold units in multi-unit developments that many other jurisdictions enacted special legislation. A long standing example is the strata titles legislation enacted in Australia,¹⁴ and a more recent one is the commonhold legislation enacted for England and Wales.¹⁵ An important issue which is considered later is whether a similar step should be taken in this jurisdiction.¹⁶

8.13 Other difficulties which stem from the current state of the law relate to company law. As explained in Part A of this Consultation Paper, it is now fairly standard practice to have the management of a multi-unit development put in the hands of a company of which the individual unit owners automatically become members. Such a company has limited purposes which fall far short of those of a trading company. However, the law as it currently stands does not generally recognise this distinction in terms of statutory requirements, such as those relating to filing annual returns and auditing of annual accounts and the penalties which may be imposed for failure to comply.¹⁷ Furthermore, practical difficulties may arise in connection with the type of company which is created for such management purposes. This issue was dealt with in Chapter 4.

¹⁴ And adopted in many other parts of the common law world: see *eg* the British Columbia *Strata Property Act 1998* [SBC 1998] Chapter 43. See also the *Final Report* of the National Competition Policy Review of the NSW *Strata Schemes Management Act 1996* (Department of Fair Trading 2001) and the Discussion Document *Review of the Unit Titles Act 1972* (NZ Department of Building and Housing, November 2004).

¹⁵ See the *Commonhold and Leasehold Reform Act 2002*, Part 1 of which deals with commonhold and came into force on 27 September 2004.

¹⁶ See paragraph 10.14 below.

¹⁷ See generally Courtney *The Law of Private Companies* (2nd ed LexisNexis Butterworths 2002); Keane *Company Law* (4th ed Tolley Publishing 2006).

C Small Developments

8.14 It is important to stress that the nature and structure of multi-unit developments which was the subject-matter of much of the discussion in Part A of this Consultation Paper will not apply in all cases. In particular, the scheme of management companies and managing agents may not be appropriate for a small development comprising only a few units.¹⁸ Such complexities may be even less suitable where, for example, a large house has been converted into two or three self-contained flats. Such multi-occupied buildings nevertheless involve the element of “interdependence” which is the fundamental feature of all multi-unit developments. They necessarily give rise to the same problems deriving from sharing parts of the building and the facilities and services associated with them. There will still be a need for “management” to some degree. The maintenance and upkeep of shared areas like the entrance, hall, stairs, landings, footpaths and gardens has to be catered for. Provision has to be made for repair and insurance of the roof and other external parts of the building.

8.15 Where the flats or other units in such a small development are let on short leases such matters will usually remain the responsibility of the landlord. In such cases the landlord retains an active interest in the building and usually will retain ownership of the “common areas”. The responsibilities as between the landlord and tenants of units will be dealt with in the usual way by the terms of the leases of the flats or other units.

8.16 Where, however, the flats or other units in a small development or conversion of a building are “sold”, whether for a freehold interest or by way of long lease, some other provision has to be made. The most suitable method of achieving this is to use some form of co-ownership agreement entered into by the various flat owners. This subject is taken up later.¹⁹

¹⁸ See paragraphs 1.15-1.17 above.

¹⁹ See paragraph 10.28 below.

CHAPTER 9 STATUTORY SCHEMES IN OTHER JURISDICTIONS

9.01 As part of its study of the operation of multi-unit developments in Ireland, the Commission has examined the position in other jurisdictions. This chapter considers the position in other common law jurisdictions with regard to how the various statutory schemes operate, regulation of such schemes, and how such “common interest” structures are managed. The chapter then goes on to briefly examine consumer protection, dispute resolution and registration of title in other countries.

9.02 Statutory schemes to govern multi-unit developments have been a feature of the law of most other common law jurisdictions and indeed, of civil law jurisdictions, such as those on continental Europe.¹ An early, and influential, example of this was the “strata title” legislation enacted in Australia.² Many of the features of this have been adopted in other parts of the common law world.³ In the United States of America similar legislation relating to what are called “condominiums”⁴ has been enacted. There many

¹ For interesting comparative studies see van der Merwe “Apartment Ownership”, Volume VI, Chapter 5 of Drobnig and Zweiger (eds) *International Encyclopaedia of Comparative Law* (Mohr 1994); Hurndall (ed) *Property in Europe: Law and Practice* (Butterworths 1998), *passim*; Robertson and Rosenberry *Home Ownership with Responsibility: Practical Governance Remedies for Britain’s Flat Owners* (Joseph Rowntree Foundation 2001); van der Merwe and Smith “Commonhold Development Rights – A Comparative Assessment” [2005] 69 Conv 59.

² Initially the NSW *Conveyancing (Strata Titles Act) 1961* *Conveyancing (Strata Titles) Act 1961* [later renamed the *Strata Schemes (Freehold Development) Act 1973*] and *Strata Schemes Management Act 1996*. See the *Final Report* of the National Competition Policy Review of the 1996 Act (Department of Fair Trading 2001). See also Bugden and Allen *New South Wales Strata and Community Titles Law* (CCH Australia Ltd 1999).

³ But not always using the expression strata titles: eg New Zealand (*Unit Titles Act*: See Hinde McMorland & Sim *Land Law in New Zealand* (Butterworths 1997) Chapter 2); Singapore (*Land Titles (Strata) Acts 1967 and 1976*); South Africa (*Sectional Titles Act 1971* and *Sectional Titles Act 1986*); Canada (eg the British Columbia *Strata Property Act* [SBC 1998] Chapter 43) and Ontario *Condominiums Act 1998* [SO 1998].

⁴ This concept has also been adopted in, eg, the Caribbean: see the Trinidad and Tobago *Condominiums Act 1981*; Wylie *The Land Laws of Trinidad and Tobago* (Government of Trinidad and Tobago 1986) Chapter 8.

states adopted the *Uniform Condominium Act 1980*⁵ drafted by the National Conference of Commissioners on Uniform State Laws and approved by the American Bar Association. That Act was replaced by the *Uniform Common Interest Ownership Acts 1982*⁶ and 1994.⁷

9.03 The need for statutory regulation of multi-unit developments was recognised on Continental Europe much earlier. Indeed, some provisions were contained in early codes.⁸ Later “condominiums” legislation of varying kinds has been enacted in many European countries.⁹ On the other hand, until comparatively recently the United Kingdom and this State have failed to follow this strong trend.

9.04 In England and Wales the need for such legislation was flagged as long ago as 1965 by the Committee on Positive Covenants Affecting Land.¹⁰ It drew particular attention to the Australian strata titles legislation.¹¹ Then in 1984 the Law Commission issued a report proposing legislation to recast the law relating to “land obligations”¹² which provoked the response from many that the 1965 Report should be reconsidered. This prompted the Lord Chancellor in 1986 to request the Law Commission to set up a Working Group to examine the legislation of other jurisdictions and to “put forward a scheme to regulate relations between the owners of separate properties which lie in close proximity to each other and are interdependent.” This Group¹³ issued a report in 1987¹⁴ in which it was recommended that a new land ownership scheme, which it called “commonhold”, should be established by legislation. Commonhold was described as “a new form for a

⁵ Or a version of this: see *eg* the Florida *Condominiums Act* Chapter 718 (1999).

⁶ The 1982 Act combined in a single comprehensive law prior uniform laws in the area, *ie* the *Uniform Condominium Act 1980*, the *Uniform Planned Community Act 1980* and the *Model Real Estate Cooperative Act 1981*.

⁷ The 1994 Act was approved and recommended for enactment in all States at the National Commissioners’ Annual Conference held in Chicago in July-August 1994 and was approved by the American Bar Association in February 1995.

⁸ For example, the French *Code Civil 1804* Article 664.

⁹ For example, Austria, Belgium, Denmark, Finland, France, Germany, Greece, Italy, Luxembourg, The Netherlands, Norway, Portugal, Spain, Sweden and Switzerland. See generally Hurdall *op cit* fn 1.

¹⁰ Usually known as the “Wilberforce” Committee (after the law lord who chaired it) : see its Report (Cmnd 2719).

¹¹ For example, the NSW *Conveyancing (Strata Titles) Act 1961*.

¹² *Transfer of Land – the Law of Positive and Restrictive Covenants* (Law Com No 127).

¹³ Chaired by one of the then Law Commissioners, Mr Trevor Aldridge.

¹⁴ *Commonhold: Freehold Flats and Freehold Ownership of Other Interdependent Buildings* (Cm 179).

system of land ownership where the emphasis is on cooperation between owners living within a defined area.”¹⁵ In essence it was designed to facilitate freehold ownership of flats and units in other types of multi-unit developments, including non-residential ones. Otherwise it reflected closely the schemes already in existence elsewhere in the world and was, in due course, adopted by the British Government.¹⁶ The scheme was enacted in Part 1 of the *Commonhold and Leasehold Reform Act 2002* and came into force on 27 September 2004.¹⁷ It has not been greeted with universal enthusiasm.¹⁸

9.05 At the time the English Law Commission’s Working Group was deliberating on the subject the Land Law Working Group¹⁹ established by the British Government in 1980 to review the general land law of Northern Ireland was still engaged in its exercise. That Group decided to adopt the English proposals and the recommendations were set out in its Final Report published in 1990.²⁰ The main difference between those recommendations and the scheme set out in the English *Commonhold and Leasehold Reform Act 2002* is that the former recommended an element of compulsory use of a Commonhold scheme. In essence, in accordance with proposals to restrict the granting of long leases of residential property, it was recommended by the NI Working Group that any multi-unit development involving residential

¹⁵ *Commonhold: Freehold Flats and freehold ownership of other interdependent buildings* (Cm 179), paragraph 1.10.

¹⁶ See the Lord Chancellor’s Department’s publications *Commonhold: A Consultation Paper* (CM 1345 1990); *Commonhold and Leasehold reform* (CM 4843 2000).

¹⁷ *Commonhold and Leasehold Reform Act 2002 (Commencement No.4) Order 2004* (SI/1832). See also *Commonhold Regulations 2004* (SI/1829) and the *Commonhold (Land Registration) Rules 2004* (SI/1830). For comprehensive treatment of the subject see Clarke *Commonhold: Law, Practice and Precedents* (Jordans 2002).

¹⁸ See Clarke “The Enactment of Commonhold – Problems, Principles and Perspectives” [2002] Conv 349; Driscoll “Ownership Will Never be the Same Again” [2004] 39 EG 124; Fetherstonhaugh “Slow on the Uptake” [2005] 35 EG 104; Frost “Commonhold – not so much flawed, but different” (2004) NLJ 330; Jack “Commonhold: the fatal flaw” (2003) NLJ 1907; PHK “Commonhold – can’t sing can’t play the mouth organ but nevertheless a star?” [2002] Conv 206; Larcombe “Commonhold – a quiet revolution?” (2006) NLJ 226; Roberts “Two cheers for Commonhold?” (2002) NLJ 338 and “Commonhold: A New Property Term – But No Property in a Term!” [2002] Conv 341; Smith “The Purity of Commonholds” [2004] Conv 194; van der Merwe and Smith “Commonhold Development Rights – A Comparative Assessment” [2005] 69 Conv 53; Wong “Potential Pitfalls in the Commonhold Community Statement and the Corporate Mechanisms of the Commonhold Association” [2006] 70 Conv 4. For an Irish perspective see Woods “Commonhold: An Option for Ireland?” (2003) Ir Jur (NS) 284.

¹⁹ Led by Professor JCW Wylie.

²⁰ HMSO (Belfast) Volume 1 Part 3. Note the draft *Commonhold Order* set out in Volume 3 of the Report.

property should be required to adopt the statutory scheme for Commonhold (ie freehold ownership of individual flats or other units). This aspect of the Final Report has yet to be acted upon.²¹

9.06 In Scotland the conveyancing difficulties experienced in most common law jurisdictions in devising schemes for freehold ownership of units in multi-unit developments²² did not arise. Under the law of “the tenement” as it developed in Scotland there is no difficulty in positive obligations (“real burdens”) being made to bind successors in title.²³ When the subject was reviewed by the Scottish Law Commission in the late 1980s it concluded that there was no need for a Commonhold scheme such as had been proposed for England and Wales.²⁴ Instead the Commission ultimately recommended legislation to clarify the existing law of the tenement and to operate as a “default” scheme, ie to regulate multi-unit developments where the legal documentation fails to do so.²⁵ This was implemented to a large extent with enactment by the Scottish Parliament of the *Tenements (Scotland) Act 2004*.²⁶

9.07 In view of the existence of such a wide range of statutory schemes operating in different parts of the world, it may be useful to summarise their essential features. Although there is considerable commonality in many of these features, there are also many variations in approach, as has already been indicated. It is also instructive to consider what appear to have been the motivating factors behind enactment of the legislation, for this usually has determined the form it has taken. The next chapter will give the Irish perspective.

A Common Interest Structures

9.08 A recent study²⁷ of multi-unit developments in common law jurisdictions like the United States of America and Australia revealed that a

²¹ It is understood that the NI Advisory Committee on Law Reform is currently reviewing the matter.

²² See paragraph 8.08 above and 10.11 above.

²³ See Gordon *Scottish Land Law* (Green 1989) chapter 15; Halliday *Conveyancing Law and Practice in Scotland* (Green 1986) Vol II paragraphs 18.20 – 18.22; Reid *The Law of Property in Scotland* (Butterworths 1996) paragraphs 227 – 251.

²⁴ See Discussion Paper No. 91 *Law of the Tenement* (December 1990).

²⁵ *Report on the Law of the Tenement* (Scot Law Com No. 162 1998).

²⁶ See also the *Title Conditions (Scotland) Act 2003*. And see Lovell “Building Changes” [2003] 42 EG 118.

²⁷ Robertson and Rosenberry *Home ownership with responsibility; practical governance remedies for Britain’s flatowners* (Joseph Rowntree Foundation 2001).

number of different structures had been developed to deal with “common interest” communities. Most legislation in other jurisdictions adopts one of the structures or an amalgam of some of their features.

(1) *Housing Co-operatives*

9.09 This structure, which has been used in parts of the United States and Australia, usually involves a corporate body owning the entire building and unit owners holding a lease of their units only, plus a shareholding interest in the corporate body. However, the structure is rarely used nowadays and has largely been replaced by condominium/strata titles schemes.

(2) *Condominium/Strata Titles Schemes*

9.10 Under this sort of structure the unit owner usually owns the freehold of the unit, plus a co-owned interest in the common areas of the building, *ie*, the unit owners are tenants in common of the common areas. Sometimes a unit owner may own individually a “limited” common area, *eg*, a balcony, patio or parking space, or share it with some, but not all, of the other unit owners.

(3) *Planned Community Schemes*

9.11 This structure is similar to a condominium/strata title structure, in that the unit owner again owns the freehold of the unit, but is unlike such structures because the common areas are not co-owned by the unit owners (unless, perhaps, limited common areas). Rather the common areas are owned by a community association, which is usually a corporate body. Each unit owner has, however, a shareholder interest in this body.

(4) *Master Planned Community*

9.12 This structure usually exists where two or more buildings are part of the same scheme or a single building involves a combination of uses, *eg*, residential and commercial. The structure otherwise follows structure (3), but with modifications to reflect the complexity of the scheme. Thus it is usually provided that residential unit owners cannot vote on matters relating to commercial units.

B Freehold Ownership

9.13 It is clear that a major factor behind the statutory schemes introduced in the common law world, such as the strata titles and condominiums legislation mentioned earlier,²⁸ was the desire to facilitate freehold ownership of individual units in multi-unit developments. To some

²⁸ Paragraph 9.01 above.

extent this may have been due to doubts as to whether such ownership could exist, although as also indicated earlier, such doubts were probably groundless.²⁹ Rather more serious were the difficulties in carrying out the necessary conveyancing, especially in view of the defects in the common law relating to enforcement of freehold positive covenants against successors in title.³⁰ The resolution of such conveyancing difficulties was also a major consideration in enactment of the Commonhold legislation in England and Wales.³¹

C Statutory Regulation

9.14 A common feature of the legislation in most parts of the world is the imposition of a high degree of statutory regulation. A primary object of the legislation is to ensure that individual unit owners have all the rights necessary for reasonable enjoyment. Thus most legislative models incorporate a scheme of mutual rights and obligations designed to regulate the relationship of the unit owners as between themselves.

9.15 What tends to vary from jurisdiction to jurisdiction is the extent to which adoption of the statutory “model” is required. Many of the legislative schemes are aimed primarily at residential multi-unit developments, but many are also equally applicable to commercial developments. However, where they are so applicable, it would appear that the take up in the commercial field has not been as great, where, as is usually the case, there is a choice in the matter. It is, however, important to avoid confusion in this context over the element of “compulsion”.

9.16 Very few jurisdictions have gone as far as was proposed in Northern Ireland, which was that residential multi-unit developments could be created only by adopting the statutory (Commonhold) model.³² Often the statutory model is designed simply to facilitate conveyancing and there is only an element of “compulsion” in a very limited sense. This is that if it is desired to obtain the benefits of the statutory model, then it must be “adopted” in whatever manner is prescribed. Otherwise developers are free to create developments of any other kind which may not enjoy the benefits of the statutory model. This is the approach adopted in the Commonhold scheme for England and Wales,³³ where developers remain free to create leasehold multi-unit developments outside the Commonhold scheme. A

²⁹ Paragraph 8.08 above.

³⁰ See paragraph 8.07 above.

³¹ See paragraph 9.04 above.

³² See paragraph 9.05 above.

³³ See paragraph 9.04 above.

similar position exists in many of the jurisdictions which have enacted strata titles and condominiums legislation.

9.17 An alternative approach to “compulsion” is that adopted in Scotland.³⁴ In one sense there is no compulsion at all because for the most part developers there remain free, subject to the general law,³⁵ to create tenements as they choose. An element of compulsion exists only in the sense that if they do not make provision for various matters which are deemed by the legislature to be important, then the statutory “default” or “fall back” provisions will come into play.³⁶

D Management

9.18 A major objective of most statutory schemes is to ensure that multi-unit developments are properly managed. The complexity of such developments, in particular the degree of interdependence they necessarily involve,³⁷ makes this an essential requirement. Most statutory schemes envisage the establishment of a management company of which all the unit owners are members, although in continental Europe the alternative approach is often adopted of having the common parts co-owned by the unit owners and regulation through residents’ associations. This direct participation in management of their own property is a potential source of both strengths and weaknesses. Its strengths lie in giving the unit owners a say in their own destiny, an opportunity to have the operation run to their satisfaction. If it works well it can help to engender a spirit of mutual co-operation and respect which is important when large numbers of owners have to share a building and management of a complex property. Unless professional expertise is obtained, and this will involve a cost which the unit owners will ultimately have to bear,³⁸ there is a danger that the whole operation will run off the rails. This leads to another, related objective of most statutory schemes.

E Consumer Protection

9.19 Much of the legislation enacted in other jurisdictions has a “consumer protection” aspect. In many jurisdictions the “educative”

³⁴ See paragraph 9.06 above

³⁵ Including legislation amending and clarifying it, like the *Titles Conditions (Scotland) Act 2003*.

³⁶ *Tenements (Scotland) Act 2004*.

³⁷ See paragraph 1.18 above.

³⁸ Including legislation amending and clarifying it, like the *Titles Conditions (Scotland) Act 2003*.

function of this regulation is furthered by the fact that the statutory scheme imposes a strong element of “standardisation” in the legal structure of multi-unit developments. The result is that over time unit owners and their professional advisers know exactly what to expect.

F Dispute Resolution

9.20 By their very nature multi-unit developments are a fertile breeding ground for disputes. The high degree of interdependence and sharing which they involve makes this inevitable. So too does the need for management and the tensions which are likely to arise not only as between the unit owners themselves, but also as between the unit owners and the management company. Effective enforcement of obligations, such as observance of restrictions on user and payment of service charges,³⁹ is crucial in the interests of unit owners as a whole. Many of the statutory schemes in other jurisdictions make provision for arbitration, mediation, alternative dispute resolution and even reference to an ombudsman.⁴⁰

G Registration of Title

9.21 It is a common feature of many schemes that creation of a multi-unit development is linked to the particular jurisdiction’s registration of title system. This was a particular feature of the strata title schemes originally developed in Australia and adopted in various other common law jurisdictions.⁴¹ In essence the creation of a strata title involves initial registration of the scheme and subsequent dealings by unit owners only through the registry system.⁴² This has not been a requirement in jurisdictions where a registration of title system is not prevalent. The obvious example of this is the United States of America. However, the *Uniform Common Interest Ownership Act 1994*, which is now recommended for condominium-type statutory schemes,⁴³ provides that a “common interest community” can be created “only by recording a declaration executed in the

³⁹ See paragraphs 4.102-4.114 above.

⁴⁰ See section 42 of the English *Commonhold and Leasehold Reform Act 2002* (an “approved Ombudsman Scheme”).

⁴¹ See paragraph 9.01 above.

⁴² This is also a feature of the English Commonhold scheme: see *Commonhold and Leasehold Reform Act 2002*, sections 2-10 and *Commonhold (Land Registration) Rules 2004* (SI/1830).

⁴³ See paragraph 9.01 above.

same manner as a deed” and indexed accordingly.⁴⁴ The American recording system is very similar to the Irish registration of deeds system.⁴⁵

⁴⁴ Section 2-101.

⁴⁵ See also the Commission’s recommendation for multi-unit developments to be registered with the Regulatory Body in addition to the requirement to register the transfer of the ‘property’ interest from one unit owner to the next.

CHAPTER 10 THE IRISH CONTEXT

10.01 The problems arising in multi-unit developments outlined in this Paper have convinced the Commission that there is an urgent need for some form of legislation. What form that legislation should take is discussed in this chapter, which sets out the objectives to be achieved and outlines the recommended means of achieving them. Several of these objectives relate to regulatory issues which are discussed in Part A of this Consultation Paper. The Commission recommends a two-pronged approach. One is introduction of legislation to apply to future developments.¹ The other is introduction of a statutory mechanism for dealing with problems which have arisen, or may arise, in respect of existing developments.²

10.02 In formulating its recommendations for legislation the Commission has been mindful of the problems outlined throughout the Paper. It has also taken into account the existence of legislation in other parts of the world, as outlined in Chapter 9. This, however, has caused the Commission to give some thought to the implications of these issues for the current position in the State. The conclusion which the Commission has reached, particularly as regards future multi-unit developments, is that it is not appropriate to impose the sort of extensive statutory scheme which has been introduced in other jurisdictions. Nor does the Commission consider that some scheme is necessary in order to facilitate such developments. These conclusions are best explained by reference to the Irish context.

A The Irish Context

10.03 It may be useful to begin this discussion of the Irish context by considering some of the motivating factors and objectives behind the specific legislation in other jurisdictions.³ Because of the way the law has developed, or not developed in some respects, in Ireland the relevance of

¹ Precisely what developments would come within the scheme is discussed later: see paragraphs 11.03 below.

² It is envisaged that this mechanism will also be available to deal with problems which may arise in respect of future developments, despite the new legislation. Hopefully these will be a rare occurrence. See paragraph 11.01 below.

³ See Chapter 9 above.

some of these may not be as great. The fact that developers and their professional advisers have had to operate in Ireland without statutory regulation for many years has created a particular context.⁴

(I) Freehold Ownership

10.04 As explained in an earlier chapter,⁵ the perceived theoretical difficulties and practical conveyancing problems in creating freehold ownership of parts of buildings above ground level has led to the practice in Ireland of confining multi-unit developments to leasehold ownership. What the purchaser of a unit, be it an apartment or office or retail unit, acquires is a leasehold interest, usually for a very substantial term. The freehold of each unit and of the other (common) parts of the building, remains vested in a landlord, often a management company to which the freehold is transferred.⁶

10.05 The leasehold system has become an established one in recent decades to which developers, consumers and professional advisers have become accustomed. In the context of commercial multi-unit developments, like office blocks and large retail outlets like shopping centres, there has been no apparent demand for freehold ownership. Indeed, quite the reverse is the case, because such property developments are seen mostly as an important type of investment. A key element in this is the income-stream derived from the leasehold rents. Over the past few decades the legal and other professions concerned with property development and investment have spent much time and effort tailoring the structure and content of commercial leases to the object of maximising this investment aspect.⁷ In recent times, not only financial institutions but also Irish private individual investors have invested substantial sums in multi-unit leasehold developments in Ireland, elsewhere in Europe and other parts of the world.⁸ No doubt this has been partly a response to the erratic performance of stock markets throughout the

⁴ In this respect the position is similar, but only in some respects, to that in the United Kingdom before recent legislation was enacted there: see paragraphs 9.04-9.06 above.

⁵ Paragraphs 8.07-8.12 above.

⁶ See paragraphs 1.13 and 4.04 above.

⁷ See generally Wylie *Irish Landlord and Tenant Law* (2nd ed Butterworths 1998) Chapters 5-20. See also the Commission's *Consultation Paper on Business Tenancies* (LRC CP21-2003).

⁸ It was reported in the 18 December 2004 issue of the *Estates Gazette* (page 13) that Irish investors were the biggest group investing in London's West End district in 2004 – some 1.2 million sterling. The 9 April 2005 issue (page 43) reported that Irish investors invested some €3.9 billion in European commercial property in 2004, making them the third largest group of cross-border investors. The *Irish Times* Commercial Property issue of 29 November 2006 reported that Irish investors had invested over €3 billion in property markets overseas in 2006.

world of late, but investment in property was popular even when returns on other forms of investment were much higher.

10.06 The position with respect to residential multi-unit developments, like blocks of apartments, is somewhat different. It is true that in the past couple of decades, a substantial proportion of purchasers of such units, especially in the new developments built in Dublin and other major urban areas in the past couple of decades, have been investors.⁹ This was largely stimulated by the tax relief provided for investors who purchased new apartments or houses of a specified size and standard and then rented them out for at least 10 years.¹⁰ Apart from the desire to take advantage of such tax relief, the other major objective of such investors has been to obtain the substantial capital gain resulting from the substantial rise in property values in Ireland in recent times, rather than the rental income. From the long-term investment point of view, it might be argued that this would be even more attractive if the freehold could be acquired rather than a leasehold interest, which may appear to be a “wasting” asset.¹¹ However, this argument does not have much force in Ireland because the practice has been adopted in respect of residential developments of granting the unit purchaser a very long lease. Leases for a term of 500 years or 999 years with a nominal rent are common. Such a long leasehold term is likely to have a value equivalent to the freehold’s value.

10.07 Of course many purchasers of residential units are not investors but rather are acquiring them as their homes. The huge rise in the value of residential properties experienced in Ireland in recent times has put the traditional detached or semi-detached house, with garden, beyond the reach of many. This is true even of relatively modest terraced houses. Many, particularly younger professional people, have been attracted by the modern, well-equipped, conveniently located apartments built in prime inner city areas. Since most of these developments will have been created in the past couple of decades the leasehold terms will still have a long period to run and so most lessees are unlikely to have in contemplation what will happen when the lease runs out. Many will regard their apartment as a relatively

⁹ *Report of the Commission on the Private Rented Residential Sector* (Department of the Environment and Local Government, July 2000) paragraph 1.5.4 and Chapters 6 and 7.

¹⁰ Originally under section 23 of the *Finance Act 1981* and subsequently under sections 27-29 of the *Finance Act 1988*. Section 50 of the *Finance Act 1999* extended such tax relief to purchase of accommodation for letting to students. Under the *Finance Act 1992* section 23-27 type relief was restricted to rental property in designated renewal areas. Under the *Finance Act 2004* most such relief expired on 31 July 2006.

¹¹ It is bound to determine at the end of the term granted in the lease. This is, of course, subject to statutory rights of renewal which may be available: See Wylie *op cit* Chapters 29-31.

temporary home, to be changed when something better can be afforded or circumstances, such as a change in family size, necessitate a move to larger accommodation.¹²

10.08 Even those who regard occupation of an apartment as a long-term venture are unlikely in the foreseeable future to concern themselves with the issue of what happens when the lease expires, given the usual length of the lease. Arguably it should never be a concern because, as has already been mentioned, Irish conveyancers have managed to adapt the leasehold system to achieve a situation for residential unit owners which comes very close to having the freehold. The point here is that in most modern multi-unit developments the freehold reversion on the unit owners' leases is vested in the management company, in addition to the freehold of the common parts. Since the unit owners are the members of this company they are in a position to control what happens to the freehold, including when the leasehold term expires. As members of the company owning the freehold of the entire development they could vote to sell the entire property for redevelopment or to have new leases granted in respect of their units.

10.09 This position of Irish owners of residential apartments is in marked contrast to that in many other jurisdictions. In some countries, the lease of each unit is often for a relatively short term; and the freehold reversions on the leases remain vested in the developer as landlord and disposable to successor landlords who maintain an active interest in the potential future redevelopment of the property. They may also retain ownership of the common areas and management responsibilities which are discharged with varying degrees of competence. It is not surprising, therefore, that in other jurisdictions¹³ there has been a demand for freehold ownership by tenants wishing to acquire control over the building they occupy. Irish tenants already have that control because of the way residential multi-unit developments are structured from the legal point of view. Each owns directly a very long lease of the apartment and, as members of the management company in which the freehold reversions on the apartment leases and the freehold of the common parts are vested, "own" indirectly or at least, are in a position to control that freehold. The Commission has detected no demand for direct ownership of the freehold of apartments and has concluded that the need for legislation relates to other concerns referred to later in this chapter.

10.10 *The Commission has concluded that there is no need in Ireland at this stage for a statutory scheme to facilitate freehold ownership of*

¹² See paragraph 2.04 above.

¹³ England and Wales: see paragraph 9.04 above.

apartments and other units in multi-unit developments and makes no recommendation in respect of a statutory scheme.

10.11 In coming to this conclusion the Commission is mindful of the fact that one of the major reasons why Irish lawyers have confined multi-unit developments to leasehold units are conveyancing difficulties, particularly those relating to enforceability of freehold positive covenants.¹⁴ The Commission has addressed this problem in previous reports and provisions to deal with it are contained in the Land and Conveyancing Law Reform Bill introduced to the Seanad by the Government on 9 June 2006.¹⁵ If those provisions are enacted, it may be that lawyers will explore the possibility of creating direct ownership of the freehold of apartments and other units in multi-unit developments. Some demand for this may arise in mixed developments where other residential units, such as townhouses, have to be freehold because of the statutory prohibition on leases of dwellings contained in the *Landlord and Tenant (Ground Rents) Act 1978*.¹⁶ The Commission is also mindful of the scheme being developed by local authorities to enable tenants of local authority flats to “purchase” their flats. It may be that, in due course, a demand will arise for such a purchase to include the freehold interest. This is, however, for the future and concerns primarily the practice of conveyancers and the wishes of their clients. The Commission sees no need for additional legislation at this stage.

10.12 The enactment of legislation to facilitate enforcement of freehold covenants, and other provisions in the 2006 Bill designed to simplify conveyancing, may call into question the continuance of the restriction, now in the *Landlord and Tenant (Ground Rents)(No. 2) Act 1978*,¹⁷ on the right of a lessee of a separate and self-contained flat, in a building divided into not less than 4 such flats, to acquire the freehold. However, again the Commission takes the view that this is for the future. One of the issues which will be part of any reconsideration of landlord and tenant issues will be the question as to the constitutionality of certain aspects of the ground rents legislation.¹⁸

¹⁴ See paragraph 8.07 above.

¹⁵ See *Report on Land Law and Conveyancing Law: (7) Positive Covenants over Freehold Land and Other Proposals* (LRC 70-2003) Chapter 1; *Consultation Paper on Reform and Modernisation of Land Law and Conveyancing Law* (LRC CP34-2004) paragraphs 7.29-7.32. .

¹⁶ See paragraph 8.09 above.

¹⁷ Section 16 (2) (a) of the 1978 (No.2) Act.

¹⁸ A challenge to certain aspects failed in the recent High Court case *Shirley v. O’Gorman & Co. Ltd*, 31 January 2006.

10.13 *The Commission recommends that, if legislation on enforceability of freehold covenants is enacted, the restriction on lessees of flats to acquire the freehold should be reviewed.*

(2) Statutory Regulation

10.14 In view of the various problems relating to multi-unit developments outlined earlier,¹⁹ the Commission has concluded that there is a clear need for legislation of some form in Ireland. It reiterates, however, that it is not convinced that this should take the form of a statutory model along the lines of the condominium and strata title schemes introduced in other parts of the world.

10.15 As explained earlier,²⁰ Irish conveyancers have managed to facilitate creation of multi-unit developments by using the well-established leasehold system. There appears to be no particular demand for a freehold system, particularly one which developers would in the future be compelled to use. There is also the danger that a compulsory statutory model will impose an undesirable rigidity. The Commission takes the view that developers and their professional advisers should retain a large element of flexibility in the sort of schemes which they devise to meet changes in market demand.

10.16 It is clear, on the other hand, that something must be done to deal with the various problems outlined earlier.²¹ The Commission is convinced that since many of the problems seem to stem from the activities of key players in multi-unit developments, such as developers, management agents and management companies, and their interaction as between themselves and with their “consumers”, primarily the owners of units in the development, there is a need for some form of statutory regulation. Apart from the remit of any proposed Regulatory Body as recommended in Chapter 7, the Commission takes the view that there is a need for some legislation which would seek to achieve a number of objectives. In some respects these objectives would accord with some of the objectives pursued in the statutory schemes of other jurisdictions. The objectives for the legislation proposed by the Commission are

- i) Changes to the law necessary to facilitate multi-unit developments;
- ii) Imposition of certain statutory obligations on developers;
- iii) Introduction of some further consumer protection measures.

¹⁹ Chapters 1 and 8 above.

²⁰ Paragraph 10.04 above.

²¹ Chapters 2 and 3 above.

Each of these objectives has been explained in Part A of this Consultation Paper.

10.17 What was recommended in Part A was directed at the future, but, as indicated earlier,²² many problems already exist with respect to existing multi-unit developments. There is a real fear amongst lawyers and other professions which deal with such developments that more and more of these problems are likely to emerge in future years. This is particularly so with respect to the older developments which were created before developers and their advisors had much experience of such developments. It is also likely with respect to smaller developments which will often have been created in this way without the benefit of a full range of professional advice. The Commission has concluded that the legislation being recommended must adopt a “two-pronged” approach and also must contain provisions designed, so far as is practicable, to solve problems which arise with respect to existing developments. What the Commission has in mind is explained further in Chapter 11.

10.18 *The Commission provisionally recommends that the legislation should contain provisions designed, so far as is practicable, to solve problems which arise with respect to existing multi-unit developments*

B Changing the Law

10.19 What the Commission has in mind in this context is changes to the law which would remove difficulties presently encountered by developers and their advisors in relation to multi-unit developments. Two obvious ones have already been mentioned.

10.20 One change related to the defect in the law which prevents freehold covenants being fully enforceable against successors in title.²³ As explained earlier in this chapter, this change would be convenient in this context, not so much because the expectation would be that freehold multi-unit developments would suddenly become the norm, but rather because it would introduce further flexibility for developers and their professional advisors. Freehold developments may come into consideration in certain situations, such as where a development is a small one not justifying establishment of a management company (*eg* conversion of a freehold house into flats) or a mixture of apartments and freehold townhouses. This change will be implemented as part of the general reform and modernisation of land law and conveyancing law which was the subject of a joint project between

²² Chapter 1 above.

²³ See paragraphs 8.14 above.

the Commission and the Department of Justice, Equality and Law Reform.²⁴ That general reform will also have other impacts on multi-unit developments, such as the law of easements, like rights of way or of support.²⁵

10.21 The general reforms contemplated by the joint project are to some extent designed to prepare the way for introduction of an eConveyancing system for land transfers. Such a system is likely to be linked closely to the registration of title system which the Land Registry has been computerising increasingly in recent years.²⁶ This will raise the issue of extension of compulsory registration of title to major urban areas where it has still to make a substantial impact. Since most multi-unit developments take place in such areas, they have hitherto largely involved unregistered land. A developer will usually only engage in voluntary registration where this is considered necessary in order to clarify the title to the site for the development. In view of the policy discussions currently taking place with respect to the future strategy of the Land Registry, and the decisions which are likely to have to be made about future extensions of compulsory registration, it is not appropriate at this stage for the Commission to express a view on whether future multi-unit developments should become subject to compulsory registration, as is the case in many other jurisdictions.²⁷

10.22 The other change in the law which should be considered related to company law as it applies to management companies in multi-unit developments. This subject was discussed in an earlier chapter.²⁸

10.23 This chapter now turns to address a couple of other issues. In terms of imposing statutory obligations on developers, the Commission's thoughts were explained in earlier chapters.²⁹ Similarly, consumer protection

²⁴ See Part 7, Chapter 4 of the Land and Conveyancing Law Reform Bill introduced by the Government to the Séanad on 9 June 2006.

²⁵ Land and Conveyancing Law Reform Bill Part 7, Chapter 1. Note also that the definition of "land" in section 3 of the Bill includes: "(d) buildings or structures of any kind on the land and any part of them, whether the division is made horizontally, vertically or in any other way; (e) the airspace above the surface of land or above any building or structure on land which is capable of being or was previously occupied by a building or structure and any part of such airspace, whether the division is made horizontally, vertically or in any other way."

²⁶ Note the provisions designed to facilitate this further contained in the *Registration of Deeds and Title Act 2006*. See also the Commission's Report *eConveyancing: Modelling of the Irish Conveyancing System* (LRC 79-2006).

²⁷ See paragraph 9.21 above.

²⁸ Chapter 4 above.

²⁹ See especially Chapters 2, 3 and 6 above.

was already addressed.³⁰ The Commission now examines the question of rescue provisions.

C Rescue Provisions

10.24 As indicated earlier,³¹ the Commission is concerned about the number of problems which have emerged with respect to existing developments. Whether these arise from defective conveyancing or various administrative faults or mismanagement, it is imperative that unit owners should have available to them a mechanism for solving the problems so far as is practicable. The expectation is that some of the problems may be resolved by intervention by the Regulatory Body, if it is given a sufficiently wide remit, but there is a fear that some of the problems will prove to be so serious that their resolution, if one is possible, will be beyond the scope of the Body's powers. Examples would be where it comes to light that the legal documentation is defective and needs substantial amendment to enable the development to function properly or that no provision was made for a sinking fund and major capital expenditure is needed on a multi-storey building. As is explained in the next chapter, it is doubtful for a variety of reasons whether in respect of such matters there is any alternative to obtaining a court order.³² What will be important is to ensure that the jurisdiction conferred on the courts gives the widest discretionary powers to tailor the most appropriate solution to the circumstances of the particular case.

10.25 The Commission envisages that this "rescue" jurisdiction will be used primarily to solve problems arising from multi-unit developments which already exist. However, it considers that the jurisdiction need not be so confined. Notwithstanding the legislative provisions which the Commission is recommending for future developments and the suggested role of the proposed Regulatory Body, it will remain possible that problems will still arise which cannot otherwise be resolved. For example, they may be the result of developers ignoring the new statutory obligations, with the result that, notwithstanding sanctions which a developer may incur,³³ unit owners will still find themselves in trouble. Mistakes may still occur in the legal documentation relating to developments, which again cause problems

³⁰ Chapter 6 above.

³¹ Paragraphs 10.01 and 10.17 above.

³² See paragraph 11.10 below.

³³ See paragraphs 3.02-3.09 above.

for the unit owners or the management company.³⁴ The rescue provisions should apply to these cases as well.

D Small Developments

10.26 It was mentioned earlier³⁵ that there are situations where it is not appropriate to establish a management company, with all that this entails.³⁶ Where the number of units is relatively small, say less than 10, some other way of dealing with the problems of “interdependence” may be more appropriate. Those problems, which derive largely from the sharing of parts of the building and its facilities and services,³⁷ will still exist whether the “small” development comprises a purpose-built block of apartments or other units or a large house or other building which has been converted into self-contained apartments, flats or other units.

10.27 What the Commission is concerned with in this context is a development which involves the “sale” of such units,³⁸ with the expectation that the ownership and management of the building will be the responsibility of the purchasers rather than the developer/vendor. It is not concerned with the situation where the units are let on short-term leases and the landlord retains the freehold or leasehold reversionary interest. In that situation the landlord has a continuing ownership interest and, as landlord will have responsibility for various management matters. The precise division of responsibility between the landlord and the tenants for things like insurance, maintenance and repairs will usually be the subject of extensive provisions in the leases of the units.³⁹

10.28 A satisfactory scheme for sale of apartments of other units in small developments, without a management company, requires considerable drafting skills on the part of the solicitor drawing up the scheme. The structure is likely to take a form along the following lines:

³⁴ See paragraphs 1.15-1.17 and 8.05 above.

³⁵ Paragraphs 8.13-8.15 above.

³⁶ Paragraph 1.15 above.

³⁷ Chapter 1 above.

³⁸ Often the interest acquired by the purchasers will be a long lease of their units, rather than the freehold, as is the practice with large developments: see paragraph 10.04 above. It remains to be seen whether the changes in the law contained in the Land and Conveyancing Law Reform Bill 2006, such as those relating to freehold covenants in Part 7, will encourage the development of unit owners owning the freehold of their units: see paragraph 10.11 above.

³⁹ See Wylie *Irish Landlord and Tenant Law* (2nd ed Butterworths 1998)

- i) Each unit owner will be granted a long lease of the unit. The “unit” will usually be described in terms which confine it to the interior airspace, to the decorative level of walls and ceilings. Excluded will be all structural and exterior parts, and, or course, shared areas (such as entrances, hall, stairs, passageways, roof and gardens) and facilities not confined to particular units (such as a water tank in the roof space or hot water or central heating boiler serving the entire building). In this respect the leases will be similar to leases of units in large developments involving a management company.⁴⁰
- ii) The developer/vendor will transfer its interest in the entire building, the freehold or a superior leasehold interest comprising both the ownership of the parts of the building excluded from units and the reversionary interests of the units’ leases,⁴¹ to the unit owners collectively. This creates a form of co-ownership of those interests, which in this instance will take the form of a tenancy in common.⁴² The unit owners will, therefore, own together, in addition to the leases of their individual units, the freehold or superior leasehold interest in the rest of the building and its surrounding property.⁴³
- iii) As co-owners of the rest of the building and its shared facilities and services, the unit owners will enter into a co-ownership agreement setting out their various rights and responsibilities. This would cover a wide range of matters, including mutual enjoyment and use of the shared areas and shared responsibility for insurance, maintenance and repairs.

⁴⁰ In effect the excluded parts will be the “common areas” usually excluded in such leases: see paragraph 1.19 above.

⁴¹ This is the “dual” interest transferred to the management company in larger developments: see paragraph 10.09 above.

⁴² The other main form of co-ownership recognised by our land law system, a joint tenancy, is not suitable for what is essentially a commercial arrangement. This is because of the “right of survivorship” which attaches to a joint tenancy. Under this the interest of a deceased joint tenant passes automatically to the surviving joint tenants. Under a tenancy in common, each owner is regarded as having a distinct share in the property which can be disposed of by a deceased owner’s will or succeeded to by the owner’s intestate successors if no valid will has been made.

⁴³ As regards the reversionary interest of each unit’s lease, this will merge in each lease since, unlike in the case where there is a management company which is a separate legal entity, the two interests (the reversion and the lease) will vest in the same person. Even if there is an express declaration of non-merger, it is questionable whether covenants in the lease of any unit would be enforceable because of the fundamental rule that one cannot enforce a contract against oneself.

10.29 At this stage the Commission is not convinced of the need to provide, still less to prescribe the use of, statutory legal documentation for such cases. It recommends that this matter should be considered urgently by the Law Society's Conveyancing Committee with a view of issuing recommended precedents for use by solicitors in such cases. Alternatively, legal publishers could include such precedents, drafted by conveyancing experts, in a suitable publication.

10.30 *The Commission provisionally recommends that the Law Society's Conveyancing Committee should consider urgently the issue of precedents for the legal documentation suitable for small multi-unit developments or arrangements for publication of such precedents by legal publishers.*

10.31 The Commission does recommend, however, that "small" developments without a management company should come within the jurisdiction of the proposed new Regulatory Body. This will enable that Body to keep their operation under review and owners of units in such developments to seek advice and guidance. In due course, in the light of experience, it may recommend some statutory provisions to deal with problems which come to light. The Commission also recommends that such developments should come within the proposed "rescue" provisions.⁴⁴

10.32 *The Commission provisionally recommends that small multi-unit developments should come within (a) the jurisdiction of the proposed new Regulatory Body and (b) the proposed "rescue" provisions for existing developments.*

⁴⁴

Chapter 11 below.

CHAPTER 11 RESCUE PROVISIONS FOR EXISTING DEVELOPMENTS

11.01 This chapter reviews the mechanisms available for solving problems which arise in the context of existing multi-unit developments and recommends reforms to facilitate pursuit of a remedy where such problems exist.

11.02 It is clear from the evidence which the Commission has received that many of the problems referred to earlier¹ are now coming to light in relation to existing multi-unit developments. The view has also been put that more are likely to come to light in the near future. The result is that the Commission has concluded that a two-pronged approach is necessary.² It is to be hoped that as developers and their advisers become more experienced in dealing with the legal structure of multi-unit developments, especially those involving residential units, and operating the proposed new statutory regulations many of the problems will not arise in the future. However, no doubt some problems will arise in respect of future developments and so provision should be made to deal with these as well as those arising or likely to arise in respect of existing developments.

11.03 Most of the problems identified seem to arise in respect of residential developments, so that the rescue provisions are needed mostly for these. However, the Commission takes the view that there is reason not to make them available for all types of development.

11.04 The Commission recommends that the proposed legislation should contain “rescue” provisions to enable problems arising in respect of existing or future developments, of whatever kind and whenever created, to be resolved.

11.05 *The Commission provisionally recommends that the proposed legislation should contain “rescue” provisions to enable problems arising in respect of existing or future developments, of whatever kind and whenever created, to be resolved.*

¹ See especially Chapters 1 and 8 above.

² See paragraph 10.01 above.

A Rescue Provisions

11.06 It is clear from earlier discussion³ that the problems which are arising, and may arise in the future, with respect to, in particular, multi-unit developments which already exist are likely to be many and various. It is also clear that they derive from several sources, including defects in legal documentation and faults or breakdowns in administration. The Commission is convinced that an attempt to give a list of the problems would be fruitless and that any rescue provisions must be sufficiently broad and flexible to cover any eventuality.

11.07 It is clear that many of these problems will be the source of substantial disputes amongst those involved in the developments, including developers, unit owners, management companies and other interested parties like mortgagees and creditors. Often there will be competing interests at play which are difficult to reconcile. It is to be hoped that intervention by the new Regulatory Body will in many, if not most, cases result in a solution being arrived at which every party involved can accept. However, it must be recognised that on occasion this may not occur. A particular problem which can arise is that, while a majority of those interested is committed to a particular solution, a minority, often very small, refuses to co-operate, even though overall, there is real harm to the interests everyone. The Commission has concluded that the only way out of this dilemma is to give the Court⁴ jurisdiction to deal with such matters.

11.08 The jurisdiction being proposed here would supplement the provisions in existing legislation which may be availed of by apartment owners. For example, section 180 of the *Planning and Development Act 2000* entitles a majority of residents⁵ in an apartment block, or block of flats,⁶ to request the planning authority take in charge open spaces, car parks, sewers, water mains or drains within the attendant grounds of the development.⁷ This applies not only where the development has been completed to the satisfaction of the planning authority in accordance with the planning permission and any conditions attached to that permission.⁸ Where a development has not been so completed, such a request can be made after

³ See again Chapters 1 and 8 above.

⁴ The Circuit Court, which, it may be noted, has jurisdiction under the *Residential Tenancies Act 2004* to enforce determination orders made by the Private Residential Tenancies Board: see section 122.

⁵ The planning authority may hold a plebiscite to ascertain the wishes of the “qualified electors”: section 180 (3) (a).

⁶ See the definition of “house” in section 2 (1).

⁷ Using the procedure laid down in section 11 of the *Roads Act 1993*.

⁸ Section 180 (1).

expiration of the period during which enforcement action could be taken by the planning authority.⁹ This subject was discussed in an earlier chapter.¹⁰

11.09 It would also supplement the jurisdiction of the Registrar of Companies,¹¹ or the Court,¹² to restore to the Register a management company which has been struck off, for, eg failing to file returns. An application for this can be made by any member of the company (such as an apartment owner) or creditor within 20 years of the date of dissolution of the company. However, the Commission reiterates its view expressed earlier that the striking-off sanctions should be reviewed by the relevant authorities.¹³

B Application to Circuit Court

11.10 The Commission takes the view that it should be open to any person or body interested in a multi-unit development to apply to the Court for an appropriate “remedial” order designed to rectify any problem which cannot otherwise be rectified. By “cannot otherwise be rectified” the example can be given of a situation where, by reason of defective legal documentation or a change of circumstances outside the control of those interested in the development, particularly the management company and the unit owners, the development is facing a potentially disastrous situation. It may be that the only solution involves a complete restructuring of the development from the legal (eg, revision of unit owners’ rights and obligations) or administrative (eg, changing the management structure) point of view. An applicant for a remedial order could include the developer (if it still retains an interest in the development¹⁴), the management company, any unit owner or person deriving an interest from a unit owner, such a lessee or sublessee or mortgagee, and the proposed new Regulatory Body. The Commission is not convinced, however, that it should include unsecured creditors, who should be left to their ordinary remedies under the general law.

⁹ *Planning and Development Act 2000*, Section 180 (2) (a). Since permission has a life of 5 years, and enforcement action can be taken within 7 years, this could amount to a period of 12 years: see Gore-Grimes *Key Issues in Planning and Environmental Law* (Butterworths 2002) page 470.

¹⁰ See Chapter 2 above.

¹¹ *Companies Act 1963*, section 311A (inserted by section 246 of the *Companies Act 1990*); *Companies (Amendment) Act 1982* sections 12A and 12C.

¹² *Companies Act 1963*, section 311; *Companies (Amendment) Act 1982*, sections 12B. See Courtney *The Law of Private Companies* (2nd ed LexisNexis Butterworths 2002) paragraphs 12.152-12.174.

¹³ Paragraph 4.69 above.

¹⁴ For example, where the development is not yet complete.

11.11 The basis upon which such an application should be made under the legislation governing remedial orders, in effect the definition of the problems to which a solution is being sought, should be couched in very wide terms for the reason given earlier.¹⁵ Clearly reference may be made to the sort of legal and administrative problems discussed earlier,¹⁶ but the statutory provisions should include a form of words designed to catch any other, unspecified problem which results in the development not functioning effectively or denying those interested in it legitimate expectations, *eg*, in relation to how the development would function.

11.12 In view of the proposal that any interested person or body should be able to make an application, it should be a requirement before the application is heard that notice of the application is given to other interested parties. Such parties should have the right to make representations at the hearing of the application.

11.13 Although, as is discussed below,¹⁷ the Circuit Court should be given a wide jurisdiction in terms of the remedial orders which it can make, it is envisaged that applicants would be required, by appropriate rules of court, to furnish the Court with a proposed solution. For example, if the problem derived from a defect in the legal documentation relating to the particular development, the expectation would be that amended documentation would be tendered for approval by the Court. If a restructuring of the management is being proposed, a new management structure should be tendered.

11.14 The Commission recommends that –

- i) an application to the Circuit Court for a “remedial” order should be capable of being made by any person or body interested in a multi-unit development, including the Regulatory Body, but not unsecured creditors;
- ii) the basis of such an application should be to solve a problem which prevents the development from functioning effectively or denies to those interested legitimate expectations and which cannot be solved otherwise;
- iii) notice of the application should be served on any other interested person or body;
- iv) such other person or body should have the right to make representations at the hearing of the application;

¹⁵ Paragraph 11.06 above.

¹⁶ Chapter 8 above.

¹⁷ Paragraph 11.16 below.

v) rules of court should require, as appropriate, applicants to furnish the Court with a proposed solution for approval.

11.15 *The Commission provisionally recommends that-*

i) *an application to the Circuit Court for a “remedial” order should be capable of being made by any person or body interested in a multi-unit development, including the Regulatory Body, but not unsecured creditors;*

ii) *the basis of such an application should be to solve a problem which prevents the development from functioning effectively or denies to those interested legitimate expectations and which cannot be solved otherwise;*

iii) *notice of the application should be served on any other interested person or body;*

iv) *such other person or body should have the right to make representations at the hearing of the application;*

v) *rules of court should require, as appropriate, applicants to furnish the Court with a proposed solution for approval.*

C Remedial Orders

11.16 The Commission is convinced that the rescue provisions will only be effective if the Court is given a very wide discretion as to the orders it can make. However, there should be some guidelines relating to this.

11.17 One is that the Court should be required, in exercising its discretion, to take account not only of the various representations made, but also the interests of all concerned as a whole. This is an important point as often the need to apply to the Court will arise because, eg, a minority of unit owners is opposing the solution. Even if that minority is motivated by malice or other negative factors, such as stubbornness or disinterest, it may not be guilty of any breach of obligation and, to an extent, is entitled to stand on strict legal rights. If the only solution is to amend those rights in some way, constitutional requirements dictate two things. The first is that the solution would have to be based on the interests of all those involved, taken as a whole. The other is that, to the extent that the vested rights of any person are affected adversely without consent, appropriate compensation would have to be made. The legislation should, therefore, make the provision of such compensation a requirement to cover, eg, cases where a remedial order results in a loss of value to a unit or reduction in its enjoyment by a unit owner.

11.18 Although it would be important to use wording which made it clear that the Court had an unfettered discretion to order whatever is required

to make the particular development work effectively or to ensure that the legitimate expectations of the unit owners as a whole are met, it would be appropriate to specify in the legislation examples of remedial orders which might be made. The Commission envisages that these would include –

- i) requiring the legal documentation relating to the scheme to be amended so as to confer rights or to impose obligations which are necessary to make it work effectively or as intended;
- ii) establishment of a management system or modification of the existing one, including replacement of the existing management company or one that has ceased to function and cannot be restored;
- iii) appointment of a professional administrator to take over management pending establishment of a new system;
- iv) amendment of the constitution of the management company, including its powers and duties;
- v) ordering a minority of unit owners to co-operate in such matters, subject to provision of compensation, where appropriate.

11.19 In view of the complexities of multi-unit developments it is important that the Court is not left in a vacuum in considering how to exercise its discretion. This is why the Commission takes the view that the legislation should require the applicant for a remedial order to put forward a draft order or scheme of the approval of the Court, by way of analogy with the *cy-près* jurisdiction relating to charities.¹⁸ The Commission recommends that –

- i) the Court should have very wide discretion as to the remedial orders it can make;
- ii) the applicant for a remedial order should be required to put forward in the application a draft order or scheme for the approval of the Court;
- iii) in exercising its discretion the Court should be required to take into account –
 - representations made to it by any interested person or body;
 - the interests of all interested persons or bodies, taken as a whole;

¹⁸ See *Charities Act 1961* section 47; *Re Royal Kilmainham Hospital* [1966] IR 451; *Re Worth Library* [1995] 2 IR 301. Delany *Equity and the Law of Trusts in Ireland* (3rd ed Thomson Round Hall 2003) pages 355-370.

- the need to compensate any person who establishes that a vested interest will be adversely affected by the order.

11.20 *The Commission provisionally recommends that –*

- i) *the Court should have very wide discretion as to the remedial orders it can make;*
- ii) *the applicant for a remedial order should be required to put forward in the application a draft order or scheme for the approval of the Court;*
- iii) *in exercising its discretion the Court should be required to take into account –*
 - *representations made to it by any interested person or body;*
 - *the interests of all interested persons or bodies, taken as a whole;*
 - *the need to compensate any person who establishes that a vested interest will be adversely affected by the order.*

CHAPTER 12 SUMMARY OF PROVISIONAL RECOMMENDATIONS

12.01 The provisional recommendations of this Consultation Paper may be summarised as follows:

A Part A

(i) Chapter 2: *Planning Authorities*

12.02 The Commission recommends a review by Planning Authorities and the Department of the Environment, Heritage and Local Government of planning and housing policy relating to multi-unit developments. [Paragraph 2.08]

12.03 The Commission provisionally recommends that a detailed study should be commissioned with a view to developing a clear and focused strategy for the multi-unit development sector as a whole, with the aim of informing government policy on the sector. [Paragraph 2.09]

12.04 The Commission provisionally recommends that the scope of section 180 of the *Planning and Development Act 2000* be clarified, and that guidelines should be issued based on that clarification. It further recommends that planning authorities should closely consider the implications of s.180 when processing planning applications and that a national policy should be produced on local authorities taking multi-unit developments in charge. [2.23]

12.05 The Commission provisionally recommends that the bonds system should be reassessed and that national guidelines should be produced to facilitate efficient and efficacious use of bonds for both local authorities and developers. Such guidelines should be periodically reviewed by the relevant authorities to ensure that the deterrent effect remains persuasive to developers and to meet new challenges faced by developers and local authorities over time. [Paragraph 2.34]

(ii) Chapter 3: *Developers*

12.06 The Commission provisionally recommends that the proposed Regulatory Body should monitor the use by planning authorities of their enforcement powers in relation to multi-unit developments and advise the

Department of Environment and Local Government as to what action might be appropriate. [Paragraph 3.13]

12.07 The Commission provisionally recommends that demand by a developer of more than a year's advance on service charges should be strictly prohibited by legislation. This should be subject to review on a case-by-case basis by the Regulator where the developer claims that he or she has a legitimate purpose for demanding such advance payments. [Paragraph 3.19]

12.08 The Commission provisionally recommends that it should be legislated for that service charges should never be used to pay for 'snagging problems' or any other expenses incurred by the developer in completing the development. [Paragraph 3.26]

12.09 The Commission provisionally recommends that developers should be under a statutory obligation not only to establish the management company in due time. [Paragraph 3.27]

12.10 The Commission provisionally recommends that developers should be statutorily prohibited, while in control of the management company, to commit the company to long-term contracts with managing agents. [Paragraph 3.29]

12.11 The Commission provisionally recommends that statutory regulations relating to the constitutions of management companies should prescribe that any directors appointed by the developer must resign on completion of the development. [Paragraph 3.30]

12.12 The Commission provisionally recommends that developers should be under a statutory obligation to transfer all relevant interests to the management company as soon as the sale of the last unit intended to be sold is completed. [Paragraph 3.34]

12.13 The Commission provisionally recommends that there be a statutory definition of the term 'completion' of a development. [Paragraph 3.37]

12.14 The Commission provisionally recommends that developers must specify in the planning permission where they intend on keeping a unit or units. [Paragraph 3.36]

12.15 The Commission provisionally recommends that every development should be registered with the proposed Regulatory Body. [Paragraph 3.39]

12.16 The Commission recommends that breach of the statutory regulations should be a criminal offence prosecuted by the Regulatory Body. [Paragraph 3.42]

(iii) Chapter 4: Management Companies

12.17 The Commission provisionally recommends that the Companies Acts be amended allowing for specific provision requiring a company's name to adhere to the appropriate ending according to its type and with the management company's specific activity in its name. [Paragraph 4.39]

12.18 The Commission provisionally recommends that directors' reports should include a list of the management company's assets, its insurance details, and whether the development is fully compliant with fire and safety regulations. [Paragraph 4.49]

12.19 The Commission provisionally recommends that any annual accounts should be readily available to potential unit owners or their professional advisors. [Paragraph 4.50]

12.20 The Commission provisionally recommends that the sanction of striking off should be reviewed in the case of management companies who fail to file returns. [Paragraph 4.70]

12.21 The Commission provisionally recommends that a moratorium against striking off should be introduced as an interim measure until a more appropriate sanction is decided upon for management companies who fail to file returns. [Paragraph 4.71]

12.22 The Commission provisionally recommends that the annual return should include information on the type of activity in which the company is engaging. [Paragraph 4.72]

12.23 The Commission provisionally recommends that the proposed Regulatory Body should play a role in assisting management companies to comply with the provisions of the Companies Acts. [Paragraph 4.73]

12.24 The Commission provisionally recommends the Company Law Review Group's proposal that membership of a management company and ownership of an apartment should be statutorily bound together. [Paragraph 4.83]

12.25 The Commission provisionally recommends that the proposed Regulatory Body should place under review and set regulations for the voting rights and powers of both apartment owners and short-term tenants in management companies. [Paragraph 4.95]

12.26 The Commission provisionally recommends that the proposed Regulatory Body should, in consultation with other stakeholders, prescribe a standard set of provisions to be included in all management companies' constitutions. [Paragraph 4.101]

12.27 The Commission provisionally recommends the creation of statutory regulations for the regulation of service charges in consultation

with any Regulatory Body and believes that the system of service charges should be kept under review including issues such as the types of charges that should be included in the service charge and information that should be provided about service charges. [Paragraph 4.114]

12.28 The Commission provisionally recommends that there should be a clear statutory obligation on management companies to establish reserve or sinking funds. [Paragraph 4.121]

12.29 The Commission provisionally recommends that reserve/sinking funds should be held in a special protected account separate from the companies' working accounts. The Commission further provisionally recommends that any new Regulatory Body should investigate the current situation of reserve funds as a matter of priority. [Paragraph 4.122]

(iv) Chapter 5: Managing Agents

12.30 The Commission provisionally recommends that the National Property Services Regulatory Authority should develop a standard form contract for use by management companies in the engagement of managing agents. [Paragraph 5.19]

12.31 The Commission provisionally recommends that developers should be statutorily prohibited from committing management companies to long-term contracts with managing agents. [Paragraph 5.21]

(v) Chapter 6: Consumer Protection

12.32 The Commission provisionally recommends that a guide for management company directors including a full scheme of their rights and responsibilities should be compiled. [Paragraph 6.16]

12.33 The Commission provisionally recommends that primary legislation should be enacted specifying the obligations of various groups in the multi-unit development industry in the provision of information to tenants, owners and potential owners. [Paragraph 6.24]

(vi) Chapter 7: Regulation of Multi-Unit Developments

12.34 The Commission provisionally recommends the establishment of a Regulatory Body to oversee regulation of the multi-unit development sector in Ireland. [Paragraph 7.11]

12.35 The Commission provisionally recommends that the proposed Regulatory Body's remit should cover management companies. [Paragraph 7.14]

12.36 The Commission provisionally recommends that the Regulatory Body should advise on the drafting and content of statutory regulations designed to provide purchasers of units in multi-unit developments with

consumer advice and other protection and also designed to monitor the operation of such regulations. [Paragraph 7.22]

12.37 The Commission provisionally recommends that legislation should be introduced to regulate multi-unit developments and this legislation should apply primarily to multi-unit developments involving residential units and a high degree of interdependence. Application to other residential developments involving a lesser degree of interdependence or features such as employment of managing agents or establishment of a managing company should be provided for where appropriate. [Paragraph 7.24]

12.38 The Commission invites submissions on the most suitable Regulatory Body to regulate multi-unit developments. [Paragraph 7.51]

B Part B

(i) Chapter 10: The Irish Context

12.39 The Commission has concluded that there is no need in Ireland at this stage for a statutory scheme to facilitate freehold ownership of apartments and other units in multi-unit developments and makes no recommendation in respect of a statutory scheme. [Paragraph 10.10]

12.40 The Commission recommends that, if legislation on enforceability of freehold covenants is enacted, the restriction on lessees of flats to acquire the freehold should be reviewed. [Paragraph 10.13]

12.41 The Commission provisionally recommends that the proposed legislation should contain provisions designed, so far as is practicable, to solve problems which arise with respect to existing multi-unit developments [Paragraph 10.18]

12.42 The Commission provisionally recommends that the Law Society's Conveyancing Committee should consider urgently the issue of precedents for the legal documentation suitable for small multi-unit developments or arrangements for publication of such precedents by legal publishers. [Paragraph 10.30]

12.43 The Commission recommends that small multi-unit developments should come within (a) the jurisdiction of the proposed new Regulatory Body and (b) the proposed "rescue" provisions for existing developments. [Paragraph 10.32]

(ii) Chapter 11: Rescue Provisions for Existing Developments

12.44 The Commission provisionally recommends that the proposed legislation should contain "rescue" provisions to enable problems arising in respect of existing or future developments, of whatever kind and whenever created, to be resolved. [Paragraph 11.05]

- 12.45 The Commission provisionally recommends that-
- i) an application to the Circuit Court for a “remedial” order should be capable of being made by any person or body interested in a multi-unit development, including the proposed Regulatory Body, but not unsecured creditors;
 - ii) the basis of such an application should be to solve a problem which prevents the development from functioning effectively or denies to those interested legitimate expectations and which cannot be solved otherwise;
 - iii) notice of the application should be served on any other interested person or body;
 - iv) such other person or body should have the right to make representations at the hearing of the application;
 - v) rules of court should require, as appropriate, applicants to furnish the Court with a proposed solution for approval. [Paragraph 11.15]

12.46 The Commission provisionally recommends that –

- i) the Court should have very wide discretion as to the remedial orders it can make;
- ii) the applicant for a remedial order should be required to put forward in the application a draft order or scheme for the approval of the Court;
- iii) in exercising its discretion the Court should be required to take into account –
 - o representations made to it by any interested person or body;
 - o the interests of all interested persons or bodies, taken as a whole;
 - o the need to compensate any person who establishes that a vested interest will be adversely affected by the order. [Paragraph 11.20]

Proposed position paper/recommendation to Minister for Enterprise, Trade and Employment setting out views on issues affecting property management companies insofar as they relate to company law

This paper addresses issues related to the company law aspects of property management companies. It sets out how and to what extent it is proposed to address issues affecting management companies in the Company Law Reform and Consolidation Bill. Specifically, it deals with the position of management companies in law and the rights of unit-owner company-members.

The paper sets out how the changes proposed for company law will be facilitative as regards management companies. Notably, in the new company law regime, there will be a degree of choice for persons incorporating as property management companies as to the company type which best suits their individual circumstances. No recommendation is put forward as to which company type is most suitable for the activity of acting as a management company, although a PLC is clearly an unsuitable vehicle. Accordingly, CLRG is making provision to permit a management company be formed as either:

- a private company limited by shares, with the same capacity and powers as a natural person;
- a "DAC" i.e. a designated activity company, being a private company limited by shares or by guarantee that has an objects clause; or
- a "Guarantee Company" i.e. a (public) guarantee company without a share capital.

The response also clarifies those issues which are germane to company law and hence within the policy responsibility of the Minister for Enterprise, Trade and Employment as opposed to policy issues appropriate to other Ministers and their Departments. The paper also takes account of an informative exchange of views with the Law Reform Commission. Points (a) - (h) below were raised in an LRC submission to the CLRG of 16 December 2001. The two additional points at the end of this note were raised at a meeting of CLRG secretariat and the LRC on 17 May 2006.

While that discussion with the LRC focused on the CLG (the company limited by guarantee) as the vehicle of incorporation of choice, the CLRG response as set out in this paper takes account, broadly speaking, of the views of the LRC.

It is important in the first instance to define what company law does and to distinguish this from the regulation of activities engaged in by companies. Company law provides structures for forms of incorporation. It is inappropriate that company law should seek to regulate the activities companies engage in. The Minister for Enterprise, Trade and Employment does not have competence in law for the regulation of property transactions, just as he does not have competence for the regulation of charities, banks, etc. Using these latter two regulatory activities as an example, a clear model emerges. If a company wishes to have charitable status from the Revenue Commissioners, then it must comply with their requirements in forming the company and including appropriate provisions in its memorandum and articles of association. Similarly for a company that wishes to be a bank – it must comply with the obligations imposed by the Financial Regulator. There are other examples, too. The role of company law vis a vis companies operating as management companies is to facilitate their operation as companies. Accordingly, CLRG envisages that an appropriate Department of State or regulatory body be charged with regulating management companies and setting out requirements, the compliance with which will not be prevented by company law.

With regard to issues affecting management companies which arise from land, contract, local government or environmental law, etc it is a matter for the competence of the relevant Minister/Department (or competent authority, where powers have been devolved to such) to provide for the conditions to be applied to such companies.

The CLRG believes that it can recommend changes to company law that will further facilitate the good governance and ownership of management companies and their members, particularly in the area of numbers of members and transfer of membership/shares. To that end, the CLRG is proposing that the following specific changes should be made to company law.

1. To Allow "Management Companies" form as Private Companies Limited by Shares

It is proposed to provide a statutory definition within the Companies Acts of a "management company". The purpose of providing such a definition is to permit a management company form as the new model company, the private company limited by shares. One of the most common reasons for forming management companies as public guarantee companies is because of the limitation on the number of members that a private company may have

(currently 50). Whilst this will be increased generally to 99 for private companies, it is proposed that there would be no limitation where the members are all members of a management company.

Subject to the views of the LRC, the proposed definition of management company is as follows:

"management company" means a company that is wholly and exclusively formed and operated to own and or to manage the common areas of a property development and whose members are the owners of a freehold or leasehold estate or interest in land being a part of such development".

2. To link the ownership of shares/membership of management companies to ownership of the property and provide for automatic transfer of shares/membership upon transfer of the property.

CLRG perceives that one of the problems currently facing management companies which is a result of existing company law provisions is that membership of or shares in management companies are held independent to the ownership of land. In the case of a "management company" as defined, CLRG proposes three specific changes to companies legislation, for each of the identified three types of company: The CLRG feels that these two Heads will be of significant practical benefit in clarifying the entitlement to transfer membership.

Private Company Limited by Shares and Designated Activity Company

Head X Transfer of shares in a Management company

(1) This Head applies to a company that is a management company as defined in [Part A1, Head 1]

(2) The shares in the company follow the estate or interest in the property, automatically, without the need to execute a transfer or have it approved by the directors (transfer occurs upon acquisition of property)

(3) Where pursuant to *subsection (2)*, shares are automatically transferred, the transferee of those shares must, within 21 days, notify the company in writing of this fact and until such time as the transferee notifies the company no right or interest of any kind whatsoever in respect of the shares concerned shall be enforceable by him, whether directly or indirectly, by action or legal proceeding.

(4) This Head overrides any provision to the contrary [in Part A4].

Guarantee Companies (Public Companies without Share Capital)

Head Y Transfer of membership of a guarantee company that is a management company

(1) This Head applies to a guarantee company that is a management company as defined in [Part A1, Head 1]

(2) A member of a guarantee company that is a management company shall cease to be a member upon disposal of his/her estate or interest in property and the person who acquires the property automatically becomes a member of the CLG (cessation and acquisition of membership happens upon acquisition or disposal of property)

(3) Where pursuant to *subsection (2)*, membership in a management company is or are automatically transferred, the new member must, within 21 days, notify the company in writing of this fact and until such time as the transferee notifies the company no right or interest of any kind whatsoever in respect of his membership shall be enforceable by him, whether directly or indirectly, by action or legal proceeding

(4) This Head overrides any provision to the contrary [in Part A4]

(5) Head X shall not apply to a guarantee company

The question of there being any transfer of interests from the developer to the persons who own units is a matter for regulation by the appropriate Regulatory body.

Anything else which may be considered appropriate for a Management Company can be catered for in its Constitution (or memorandum and articles of association) if a regulator or competent authority considers such appropriate.

Points (a) to (h) below are those points raised in the LRC submission to the CLRG, December 2002.

(a) That a management company should be a private company limited by guarantee without a share capital;

The CLRG feels that the choice of company type appropriate to a management company is not something upon which it should opine. CLRG is proposing changes that will facilitate the incorporation of a management company as either of the three types set out at the start of this paper. A management company will be able, therefore, to incorporate as a private company limited by shares in which case it will not have objects but may have supplementary regulations. If an incorporating property management company wishes to have objects it has the choice of incorporating as a company limited by guarantee (clg) or a designated activity company (dac).

(b) That a management company be required to include in its name the phrase 'management company'

The consistent policy throughout the Bill is to provide for designated endings according to the company type, for example "limited" (i.e. a private

company limited by shares with the contractual capacity of a natural person), "clg" (i.e. a public company limited by guarantee, without a share capital), "dac" (i.e. a private company limited by shares or by guarantee which has an objects clause, viz., a designated activity), etc. The CLRG does not believe it appropriate that the Companies Acts should legislate to require certain companies to have specific activities mentioned in their names and so under company law a property management company will therefore be required only to adhere to the generic requirements of its chosen company type in this regard. If there is a public policy end to having management companies identified as such in their names then the Department of the Environment, Heritage and Local Government may wish to consider making regulations to require management companies to state that fact in their title along with their designated ending, along the lines of "XXXX Company (Property Management Company) c1g/limited/dac etc."

(c) That the minimum number of shareholders be two, with no maximum number of shareholders;

Under the proposed Heads of Bill, all company types will be permitted to have only one member. The maximum number of members depends on company type:

A private company is limited to a maximum of 99 members;

A DAC is limited to a maximum of 99 members;

A CLG has no maximum number of members

However, as noted above, under the proposed Heads a private company or a DAC which is also a management company, will be allowed to have more than 99 members, where those persons are the owners of a freehold or leasehold estate or interest in the land that is managed by that company.

In the event, any of the options above will ameliorate the current complications applying to membership of a residential property company.

(d) That a management company be restricted to trading 'not for profit';

It is inappropriate that company law would restrict the activities for which a particular company can be used. This is not to say that management companies could not be so restricted. However, it is a matter for the Department which regulates the *activities* of such companies to impose any such restrictions ancillary to whatever conditions it wishes to apply to the activities of such companies. Any such restrictions deemed to be appropriate can be contained in the companies' constitutions or memoranda or articles of association. Just as the Revenue Commissioners require charitable companies to restrict their trading to 'not for profit' it is the function of the authority who will regulate the *activities* of management

companies to impose restrictions on those activities. In the absence of such obligations an individual property management company will be free to adopt as one of its supplementary regulations or objects a requirement that the company does not trade for profit, according to the wishes of the members. It is not immediately apparent why a property management company would wish to trade for a profit, and even if it chose to do so, it would seem that any such profits would fall for distribution among the members in any event.

(e) That stated objects of a management company be owning, managing and maintaining the common areas of the multi-unit development (and other ancillary activities);

A property management company will, under the Bill, be able to adopt supplementary regulations (in the case of a private company) or an objects clause (in the case of a CLG or a DAC) containing these objects. The doctrine of *ultra vires*, however, will have no application to a private company.

(f) That as a result of these stated objects a management company only be required to prepare an income and expenditure account, a balance sheet and a directors' report for presentation to the members at the annual general meeting (should one be held).

Under the Bill, a property management company will follow the requirements for its chosen company type in relation to the preparation of accounts. The requirements applicable to the several company types available should be considered by any new management company regulator in formulating its requirements for such companies.

(g) That a management company be exempt from the requirement to make an annual return to the Registrar of Companies, but that it be required to submit the above mentioned income and expenditure account, balance sheet and directors' report to the Registrar of Companies; and

The CLRG is of the view that it is not appropriate to exempt any company type from the basic requirement of having to make a return to the CRO. In any event, it appears that the documents listed in the LRC recommendation as an alternative to the annual return are in substance very similar to the components of the annual return, apart from the auditors' report, which itself will be determined by whether the company falls above or below the audit exemption threshold.

(h) That a management company be exempt from the requirement to prepare annual audited accounts for submission to the members and the Registrar of Companies.

The CLRG is not aware of a compelling argument as to why a property management company should be subject to less onerous requirements than any other company in relation to the preparation of annual audited accounts. Indeed, there is an argument that members of the company, who by definition are owners of property in the development concerned, have a very strong interest in seeing the company's accounts audited so they can be satisfied of the probity of the conduct of the company's affairs during the year. As a general principle whether or not the audit exemption applies will be determined by the company type, i.e.

- a private company can avail of the audit exemption;
- a DAC can avail of the audit exemption; and
- a CLG cannot avail of an audit exemption.

If there is a public policy desire not to allow management companies to avail of audit exemption this is a matter best addressed by Department of the Environment, Heritage and Local Government regulations, for instance by requiring a management company to include a prohibition in its Articles of Association from availing of the audit exemption that would otherwise be available to that company type.

Other matters (as raised in discussion with LRC)

- A somewhat 'less onerous' strike-off provision should apply to management companies.

The Department of Enterprise, Trade and Employment will discuss the feasibility of addressing this issue with the Registrar of Companies.

- There should be a provision for conversion of an existing company which would fit the proposed definition of management company to convert to the latter.

Part B6 of the proposed General Scheme provides a mechanism for the conversion of an existing company to any other type of company. This provision allows an existing public guarantee company to re-register as a private company.