



Institute of
Body Corporate Managers
(Victoria) Inc.

A Response to the

Future Directions Paper:

the Review of the Effectiveness and
Efficiency of the Subdivision Act 1988 and
the Subdivision (Body Corporate)
Regulations 2001 as it relates to the creation
and operation of bodies corporate

By the

Institute of Body Corporate
Managers (Victoria) Inc.

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Response to the *Future Directions Paper*: the Review of the effectiveness and efficiency of the Subdivision Act 1988 and the Subdivision (Body Corporate) Regulations 2001 as it relates to the creation and operation of bodies corporate

Introduction

The body corporate management industry and the Institute of Body Corporate Managers (Victoria) Inc., as the industry's professional association, welcomes the review of the effectiveness and efficiency of the Subdivisions Act 1988 and the Subdivision (Body Corporate) Regulations 2001 as it relates to the creation and operation of bodies corporate.

The Institute of Body Corporate Managers (Victoria) Inc. (the Institute) has fully participated in the Review to date and will seek and provide ongoing participation and advice as the process continues and legislation is drafted.

The Institute is aware of the importance of this Review given the growing number of Victorians who live and work in bodies corporate which are also growing in their diversity of use and size.

The Institute also believes that Government must recognise that the body corporate industry is not 'in crisis' – there are no significant problems to 'fix' which require substantial or inflexible codifying of the industry's performance.

The time, however, is right for fine tuning and ensuring the legal framework exists to support the efficient and effective operation of a form of property title which reflects the contemporary needs of Victorians and which protects the assets of the community.

The Institute is the pre-eminent industry body and reaches and represents -

250 body corporate professionals who manage approximately 200,000 lots

Key Issues

The Institute is aware that there are a number of overarching issues that are being addressed as part of this Review, namely:

- the need for a better informed community and members of bodies corporate

- the need for a streamlined dispute resolution process and the mechanisms to fund the process
- processes to ensure the security of body corporate funds
- mechanism to ensure the performance of professional body corporate managers

These four areas were the subject of input provided by the Institute during the Review and the following summary comments are provided to encapsulate this previous advice.

A Better Informed Community

The provision of accurate, clear and timely information to members of bodies corporate and potential purchasers of properties which are part of bodies corporate is critical.

The need is all the more critical because of the growing number of bodies corporate and their changing nature.

Professional body corporate managers are aware that many people purchasing a home or investment property for the first time that are part of bodies corporate have little understanding of the rights and responsibilities of body corporate members.

It is also undeniable that the issues that must be understood by a person considering purchasing a property that is part of a body corporate are also, in many ways, more complex than those faced by a prospective purchaser of a house on a separate title.

The Institute also believes there are unique and significant responsibilities that should be borne by property developers particularly in relation to the sale of properties in large blocks with sophisticated facilities and potentially costly medium to long term maintenance.

It is undeniable that the success of the body corporate is dependent on committed and informed members who participate in meetings, 'own' the decisions that are taken and are willing to resource and support the long term maintenance and management of the property.

It is also clear that there are distinctions to be made between the information that should be provided for existing properties and for new properties.

Access to this information should not be left to the efforts of an informed purchaser or purchaser's solicitor to identify but should be included as part of the Form 3 Body Corporate Certificate which in turn should become part of the Section 32 documentation provided as part of the purchase process.

Streamlined Dispute Resolution Processes

It is strongly believed that many concerns and disputes can be directly attributed to a lack of understanding by owners of the nature of collective decision making

by bodies corporate and their responsibilities as a member particularly in relation to the maintenance and enjoyment of the common property. The importance of individual owners adequately maintaining their own property and their responsibility to other members of the body corporate in this regard is also not fully understood with, on occasions, members seeing this as an infringement of their personal liberties partly because of the contrast with individual home ownership where the impact of their decisions has a lesser impact on their neighbours. Owners also frequently lack understanding of the role of body corporate managers and of their respective responsibilities.

The Institute is keenly aware of the complexity surrounding the resolution of disputes that occur within bodies corporate and between bodies corporate and other parties. Although it should be noted that the Institute believes the number of disputes is extremely low.

The Institute would welcome streamlined and professionally managed processes that:

- are non-legalistic in its approach – with a focus on accessibility, ease of access and containment of representational costs
- solely supports the resolution of disputes regarding breaches of the legislation, regulations and the standard and additional rules of bodies corporate
- do not duplicate existing legal processes for the handling of civil disputes that may occur between citizens, whether or not they are members of bodies corporate. For example, a property owner has access to processes to recover unpaid rent from a tenant
- are established to respond to **claims by owners but not the tenants** of properties
- apply equally to self-managed as well as professionally managed bodies corporate
- are designed to ensure vexatious or marginal claims are minimised
- are cost and time effective

It is essential that the processes that are established are proportional to the level of the problem.

It is not appropriate to establish a costly mechanism if most 'disputes' are the result of lack of knowledge and misunderstanding of the role and rules of the body corporate.

Recommendation 1

The Institute of Body Corporate Managers (Victoria) is recommending for action by the Review:

- the establishment of an independent ombudsman or commissioner to fulfil the role of adjudicator in body corporate disputes. The ombudsman or commissioner would handle the majority of cases alone and at a contained cost with complaints of a larger monetary amount, or those which the ombudsman believes would be best served through a wider hearing, being referred to an expert panel for consideration and advice to the ombudsman. For major disputes with substantial financial implications a competent Court of Jurisdiction would remain an appropriate avenue for resolution.

Recommendation 2

The funding of the dispute resolution process is, of course, a significant consideration. Although it is recognised that there are numerous mechanisms that could be put in place to secure ongoing funding of the process the Institute recommends:

- payment of a fee per lot at the time the body corporate is registered
- payment of a fee each time a lot is sold
- adoption of a 'user pays' approach when a complaint is lodged for resolution
- that these revenue sources be adopted in preference to an ongoing annual levy (or tax) on lot owners

Approximately 2,000 new bodies corporate are established each year with an average of 6.9 lots each. A \$150 fee per lot paid at the point of establishment would generate in excess of \$2 million per annum.

The additional payments of, for example, a \$50 fee at the point of sale each time a lot is sold would also generate significant and ongoing revenue.

These sources of revenue would also be supported by non-refundable lodgement fees at the point when a dispute was submitted to the dispute resolution process.

Security of Body Corporate Funds

The Institute is committed to the protection of body corporate funds held by its members and the industry more widely.

The management of these funds is, however, complex and quite different in nature from funds managed by other professionals such as real estate agents

and solicitors. The key difference with body corporate funds is that the funds are drawn on throughout the year (unlike estate agents' deposit funds) and that individual accounts often have a very small balance for the majority of the year.

Although the notion of the use of interest on funds to pay for the operation of dispute resolution services or to compensate for misappropriated funds is superficially appealing the Institute believes there is a more effective way, discussed above, to garner funds that would not disadvantage members and deplete ongoing funds that are essential to the operation of the bodies.

The industry is strongly of the belief that the interest earned on trust funds is the property of the body corporate. The interest earned also contributes to the body's capacity to pay essential costs, such as insurances, and maintenance.

The Institute is also aware of the need for, and benefits of, sinking funds to enable the medium to longer term maintenance needs of bodies corporate to be met. This is a particular concern in larger properties. Further, the advantages of requiring the mandatory collection of sinking fund fees and the preservation of these funds in interest bearing accounts for the benefit of the bodies corporate has also been canvassed elsewhere in this report.

The details relating to this matter can be found at a later point in this paper dealing with Financial Management.

Performance of Body Corporate Managers

The benefits of licensing or the self-regulation of body corporate managers has been widely discussed during this Review. The Institute reaffirms its view that an **industry managed model** based on the appropriate screening of new entrants coupled with strong educational programs to develop skills is the optimum solution to strengthen the industry and provide high levels of service to the community.

The Institute welcomes the opportunity to continue its work with government to improve the levels of service, support and information received by body corporate managers. The Institute recognises that strengthening the level of service and support to body corporate managers will result in improved levels of service to body corporate members by the industry.

Body Corporate Managers perform a difficult role requiring:

- knowledge of the Subdivision Act and its regulations,
- understanding of the elements involved in the long term management of properties including maintenance and insurance
- negotiation skills
- communication skills of a high order

- business management skills
- financial management skills

The Institute already takes seriously the need to pursue actively the development and maintenance of high standards for professional body corporate managers.

The Institute of Body Corporate Managers (Victoria) **currently**:

- advertises new applicants' names to all existing members for them to respond with any relevant matters before considering membership applications
- requires police checks for all new applicants
- requires proof of current Professional Indemnity Insurance
- has a Code of Professional Conduct, setting a standard over and above the requirements of legislation, which must be agreed to as part of the application process. Further, members are also bound by any other guidelines or standards formally adopted by the Institute.
- requires members to reapply each year, again showing requirements similar to new applicants

It must also be recognised that these requirements are rigorously applied by the Institute with hearings against members being held. The Institute has the disciplinary power to censure, fine, suspend or expel the member from the Institute when warranted.

The Institute also believes that it is the initial and ongoing education of practitioners which will deliver long term benefits for the community. The Institute is committed to expanding its education and training role underpinned by the deployment of the national competency standards and qualifications. This will deliver a common and nationally driven approach to the education, training and assessment of body corporate managers for the first time.

The Institute has also recently introduced a requirement to only accept Corporate Membership applications where 80% of body corporate managers are either existing practising members or are applying for practising membership.

The Institute of Body Corporate Managers (Victoria) Inc. has introduced a Continuing Professional Development (CPD) Program. The Program is designed:

- to ensure all members maintain a high standard of professionalism and
- to assure the public of the high ethical and professional standards maintained by Institute members

It is also designed to ensure membership of the Institute is a status to be valued both by members and the users of body corporate management services.

This is achieved through continuing skill development and the maintenance of a current knowledge base on issues and subjects relevant to the industry.

To ensure equity for all members the Institute has developed a point system for a biannual continuing professional development program.

Members who choose not to be involved in the continuing professional development program will have their membership status reviewed.

Refer attached CPD Program.

Industry Certification

The Institute is aware of its key and integral role in the continual development and improvement of a growing industry and one which provides an important service to large and increasing numbers of Victorians.

The Institute has adopted, through its strategic plan, a process based on educational attainment, experience and adherence to the Institute's code of practice that will deliver a range of post nominal qualifications that certify the practitioners' standing and experience within the profession. The process of adopting and promoting the use of industry accreditation, which is being introduced during 2004-05, will provide comfort to owners about the competence and probity of their body corporate manager. *Refer attached current membership application form.*

The establishment of a rigorously managed industry accreditation process will, over time, build community confidence in the same manner as that achieved by CPAs.

The current "Membership Renewal & Application 2004-5" form, describes the post nominal certifications as being:

MIBCMV	Practising Member (entry level)
CPIBCMV	Certified Practising Member (intermediate level)
FIBCMV	Fellow (elite level)

The adoption of the Institute's post-nominal qualifications as an *industry certification process* would not be used as a barrier to entry to the industry and would be available to non-members of the Institute. This accreditation model reflects that established by the accounting profession with the recognition of Certified Practising Accountants (CPAs) or Chartered Accountants (CAs).

Additional regulation is not a substitute for ongoing education, training and the support of professionals by their industry Institute. Regulation also should not be a barrier to entry to the industry or anti-competitive.

It must also be recognised that body corporate managers currently operate in a regulated environment and this review process will improve and refine the Subdivisions Act and its regulations.

The Institute believes that there is no evidence for the need to license body corporate managers through an additional government process.

A contemporary and forward looking model is for government to support the Institute to strengthen the professionalism of practitioners through the introduction during 2004-05 of the proposed industry accreditation process. This coupled with the use of existing and standard business processes such as company reporting will provide the environment in which the industry can provide the best service to the community. It should be noted that, as described in earlier submissions to this review, the accreditation or certification process will be managed by a board that includes independent experts and will be available to non-members of the Institute.

A licensing or other regulatory regime that does not apply equally to the secretaries and other office bearers of self-managed bodies corporate would be highly discriminatory, and would simply lead to “opting out” and self management which is likely to result in reduced levels of service and security for members.

With members calling for Best Practice recommendations the Institute is committed to providing guidelines across a range of issues such as Records Transfer, OH&S, Common Property Defects and is also currently updating its endorsed *Form 4 Management Agreement* for members.

The Institute’s Membership Application Forms including the Code of Professional Conduct, and forms used for a Police Check are attached in an appendix together with the application form for lodgement of a complaint against a member.

Recommendation 3

It is recommended that an ‘industry managed model’ be utilised to ensure high standards of professional conduct by body corporate managers in Victoria and that the model put in place by the Institute of Body Corporate Managers (Victoria) Inc for the maintenance of professional standards, industry certification and professional development is to be adopted and promoted within the State.

Responding to 'Future Directions'

The Institute of Body Corporate Managers (Victoria) Inc. has, in the previous section of this paper, outlined its major concerns and the key themes which it believes should be reflected within the new legislative framework.

The Institute also recognises that a great deal of work has already been undertaken and that the Government has widely canvassed the opinions of the community and other stakeholders.

The *Future Directions* discussion paper reflects the breadth of this work and the views which were expressed in the initial rounds of consultations. The following comments and recommendations have been made in response to the specific areas raised in the Future Directions paper. The Institute would welcome the opportunity to discuss this response with the Review team and to provide any clarification that may be necessary.

Purpose and Objectives

The IBCM wishes to reaffirm the overarching advice that it has previously provided in its initial submissions to the Review and seeks assurance that this earlier input is reconsidered when final decisions are being made during this phase of the Review process.

The Institute continues to believe, for example, that the Act must deal with owners and their rights and responsibilities. Although the Institute supports the Act enabling owners to require their tenants to adhere to body corporate rules, it is believed that there are considerable dangers in blurring the focus of the legislation to address the relationships between tenants and other parties.

Any changes to the Act that required the engagement of body corporate managers with tenants or that enabled tenants to bring complaints and be party to dispute resolution processes would increase the cost of the management process for owners and engender confusion with other dispute resolution processes that related specifically to tenants.

Creation of the Body Corporate

The Institute is strongly in support of the need for the Act to facilitate and require:

- the establishment of equitable allocation of lot entitlement and liability

- the limitation of arrangements entered into by developers on behalf of, and binding, bodies corporate
- a framework to reflect and support the increasingly complex forms of bodies corporate

This position reaffirms and restates the advice provided by the Institute in its earlier submissions to the legislative review.

The equitable allocation of lot entitlement and liability

The allocation of a proportion of 'units' of liability and entitlement to each lot of a body corporate is performed by the surveyor as part of the process of establishing the subdivision.

The range of potential options for the allocation of lots of liability and entitlement by the surveyor is almost as diverse as the number of developments. This diversity is only set to increase with the trend towards larger and multi-use bodies corporate increasing. The diversity of structure in bodies corporate makes the possibility of legislating a formula for the allocation of lot entitlements and liabilities almost impossible.

The IBCM reaffirms its advice that the optimal solution is to ensure that all purchasers have access, **prior to purchase**, to the rationale used to establish the allocation of lot entitlements and liabilities. Transparency of information and a mandate for the lodgement of the rationale with the plan of subdivision and the distribution of this rationale with each S32 is seen to provide the best form of protection for purchasers. The rationale, except in extremely complex cases, need not be lengthy and would typically refer to the allocation based on, for example:

- relative sizes of the lots
- availability of various amenities (such as balconies, car spaces, court yards etc) enjoyed by the various lots

Reliance on the professional integrity of surveyors and transparency in the provision of information would not only lead to better informed purchasers but would result in developers realising the commercial benefits to be gained from the reasonable and rational allocation of lot entitlements and liabilities.

Limiting of contractual arrangement entered into by developers

Once again the Institute is pleased to reaffirm the advice it has previously provided regarding this matter.

The IBCM, in its initial submission to the Review, recommended that:

The Act be changed to require surveyors and developers to state the rationale and basis for the determination of the units of liability and entitlement allocated to each lot within a development and that information should be clearly articulated to prospective purchasers

The Institute adopts a firm position regarding the right of a body corporate to determine how the property should be managed and who should be appointed to undertake its management. The Institute's sample Management Agreement (*refer attachment*) allows for the appointment or reappointment of a body corporate manager of an established property each year. It must, however, be recognised that the matter is more complex in the establishment phase of a body corporate with the first year often being a time when complex issues must be addressed.

Recommendation 4

It is, therefore, recommended that body corporate management contracts established by developers not extend beyond two years at which point the owners who comprise the body corporate may elect a manager of their choice.

The extension of the limitation of the rights of developers to enter into contracts on behalf of future owners of lots is more complex when other forms of contracts, such as maintenance of essential infrastructure, is taken into consideration. It may, for example, prove to be in the best financial interests of owners for longer term 5 to 10 year contracts to be entered into for the management of, for example, lifts within the building. A simple prohibition of all contracts of more than two years by developers, therefore, may not be in the best interest of owners.

Recommendation 5

It is recommended that the Act contain requirements for developers to:

- **only enter into contracts, on behalf of the future owners of lots, of more than two years when clear benefit can be demonstrated to the future owners and that this benefit is documented and made available to purchasers of lots within the development**

and

- **not enter into contracts of more than two years with businesses with which the developer or his or her companies are a beneficiary or part owner or owner**

Support for increasingly complex forms of bodies corporate

The Institute is keenly aware of the need for the legislative review to develop a framework which supports new and emerging forms of bodies corporate.

This is particularly relevant in relation to the burgeoning mixed-use form of development that encompasses, for example, residential and commercial lots. The diverse size, value of investment and purposes for which the lots will be used create a series of interlinked issues which can create inequities and confusion amongst property owners. For example, the allocation of contributions to sinking funds or the payment of insurances may be complex to determine fairly in many of these developments.

Recommendation 6

The Institute recommends that:

- **in developments with mixed-uses that at least one separate body corporate is established for each type of lot (eg residential and commercial). This would enable the equitable and simplified determination of costs and rights.**

It should also be recognised that it is already quite common for more than one body corporate to be established for ease of administration within the one physical development and this would not represent a major departure from emerging practice.

Legal Status of the Body Corporate

The Institute is clearly supportive of the right of bodies corporate to be recognised as legal entities with the capacity to take legal action as established in the regulatory framework of 1988. It is also recognised, however, that there have been recent court decisions which have cast doubt on this right. Clarification and strengthening of the Act is required to enable the body corporate to take action in its own right and for a properly constituted meeting of the body corporate to empower its committee to act on its behalf.

Role of committees

The Institute is well aware of the need for effective representation of owners and the efficient management of properties through the establishment of committees and the active engagement of members. The Institute is, however, also aware that the encoding of the roles, functions and responsibilities of committees within the Act may make this honorary function too onerous and increase the difficulty of attracting people willing to serve on committees.

There is a need, however, for more active engagement of members on committees and for the provision of increased assistance and information to bodies corporate about how their committees can be effectively operated. It is believed that an educative, rather than legislated, approach is needed to

ensure that the diverse needs of bodies corporate are met and reflected in the legislation without unduly limiting or, conversely, over prescribing how committees may operate. (Note: this issue is also canvassed in the later section entitled *Acting on behalf of the body corporate*)

Caution in the drafting of this section of the Act is, therefore, recommended.

Recommendation 7

The Institute recommends that:

- **The Act be amended to require the establishment of a committee when there are eight or more lots in a body corporate (contrasted to the current Act, where a committee is only required where there are 13 or more lots)**
- **The Act contain a clear statement about the purpose of committees**
- **Consumer Affairs Victoria (CAV) be responsible for the promulgation of information including fact sheets and 'model' statements of powers and functions that can be adopted by bodies corporate of various sizes and types to meet their specific needs**
- **The Act affirms the right of the body corporate to delegate those powers and functions to the committee that it sees fit**

Winding up and Alterations to the Plan

The IBCM has, throughout this and earlier advice, supported the establishment of provisions which will make the management of bodies corporate more efficient. The difficulty of obtaining attendance at meetings is also recognised together with the difficulty of obtaining unanimous votes where the interests of one party may be overturned.

The Institute also recognises that considerable care must be exercised to ensure that the rights and the integrity of the property of owners are protected. Given that the Act must be constructed to balance the need to protect owners' rights and property while also ensuring a workable voting system, the Institute believes that it is essential that the Act differentiates between various aspects of the winding up and alteration to plans rather than adopting a single strategy.

Recommendation 8

It is recommended that the following decision-making thresholds are reflected in the Act:

Issue	Rationale	Voting Required
Alteration to lot entitlements and liabilities	Currently it is necessary to obtain a unanimous vote or to incur significant cost and seek a decision through the Magistrates' Court. A unanimous decision is extremely difficult, if not impossible, to achieve when an initial determination of lot liability and entitlement has unfairly favoured one owner who is unlikely to vote against his or her personal interests.	Special resolution
Alteration to the boundaries	A significant decision that could have major impact on the value of the owners' asset. A decision of this magnitude requires a unanimous decision or, if this cannot be obtained, referral to a new dispute resolution ombudsman for mediation and resolution.	Unanimous resolution
Sale of common property	A significant decision that could have major impact on the value of the owners' asset. A decision of this magnitude requires a unanimous decision or, if this cannot be obtained, referral to a new dispute resolution ombudsman for mediation and resolution.	Unanimous resolution
Winding up	A significant decision that could have major impact on the value of the owners' asset. A decision of this magnitude requires a unanimous decision or, if this cannot be obtained, referral to a new dispute resolution ombudsman for mediation and resolution.	Unanimous resolution

Definitions:

special resolution: to be passed requires assent by 75% of all members obtained at the meeting or, as with non quorum meetings, the minutes of the meeting are distributed and the resolution stands unless 26% or more members disagree in writing within 28 days.

unanimous resolution: requires 100% votes of members achieved either through attendance at a meeting or through written, electronic or telephone conference.

Financial Management

Securing and using funds

The Institute of Body Corporate Managers strongly supports the appropriate management and clear reporting of finances for bodies corporate.

The Institute also reaffirms its earlier advice that there are a range of issues which are fundamental to the management of body corporate finances and that must be reflected in any legislative change:

- the variety of bodies corporate, and their diverse financial situations, makes it impossible to institute a single mechanism for the management and reporting of their finances – one size does not fit all
- it is the right and responsibility of body corporate members to determine the processes that are used for the cost effective management of the funds of the body corporate
- the interest earned from the funds of bodies corporate is the property of the bodies corporate and must be made available to them to support their on going costs
- transparent, appropriate and regular financial reporting is essential

Therefore, while all Victorian's have a right to be confident that their body corporate funds are secure, a single mandatory arrangement for the management of funds would not be suitable, given the diversity in size of the funds under management. For example, it must be considered that:

- smaller bodies corporate cannot afford the mandatory auditing of individual accounts but that this should be an option if elected and paid for by bodies corporate

- larger bodies corporate with a significant annual income of, for example, \$50,000 can be appropriately managed through a separate bank account
- the mandatory establishment of separate bank accounts for small funds would be a severe disadvantage given the high cost of fees
- where a separate bank account is operated there are already alternative controls available to the body corporate. Typically, for example, a nominated member may be a counter signatory of the bank account to ensure each payment is approved prior to the cheque being forwarded to the payee.

Currently, it is common practice for professional body corporate managers to operate a **common account** which contains the funds of a number of bodies corporate. This process enables the cost of bank and management fees to be contained. It must also be recognised that standard account keeping practices supported by contemporary accounting software still enables detailed and individual reporting to be readily provided to each body corporate.

Although there is no significant evidence of misappropriation of members' funds by members of the professional body corporate management industry in Victoria the Institute is aware of a perception that controls need to be put in place to ensure this does not become a problem in the future.

The Institute is also concerned about the more significant and hidden problem of misappropriation of funds from self-managed bodies corporate.

Recommendation 9

The Institute, therefore, recommends that:

- where a body corporate manager operates a common account (ie single bank account) for the management of the funds of a number of bodies corporate that these funds must be audited annually and a statement of the auditor's findings and the audit certificate must be tabled with the financial report at the AGMs of bodies corporate and paid for by the body corporate
- where a body corporate, either professionally or self managed, seeks to have a separate audit conducted of its funds this can be required by the passing of a special resolution which must also authorise the payment of all costs associated with the audit by the body corporate
- where a future independent Ombudsman or Commissioner is appointed to oversee dispute resolution processes and cases are raised concerning the management of funds that he or she can require an independent audit with all costs associated with the audit being borne by the body corporate

It should also be noted that bodies corporate can already hold Fidelity Guarantee insurance of up to \$40,000. For example, the insurer CHU offers a widely used policy that provides cover of up to \$40,000 against an appointed body corporate secretary or treasurer absconding with body corporate funds. Appointed body corporate managers, acting as managing agents, currently have to hold Professional Indemnity insurance of \$2,000,000 which also covers misappropriation of funds and provides a high degree of security to members.

Timely payment of fees

The members of the IBCM encounter daily the problems of collecting body corporate fees and levies. While this is an understood aspect of business, the Institute believes the changes to the regulations in 2001 which overturned the capacity of bodies corporate to institute and levy penalty interest rates has significantly added to the difficulty of collecting fees in a timely manner. The late payment of fees places significant burdens on the majority of owners who are prepared to meet their responsibilities and threatens the capacity of bodies corporate to respond to unforeseen costs that may arise from time to time.

Recommendation 10

It is recommended that:

- **The Act include the capacity of bodies corporate to levy penalty interest for late payment of fees and levies at a rate of 2% above the penalty interest rate struck by government**
- **Penalty interest can be applied after 14 days from the properly notified due date for payment**
- **Bodies corporate can provide standing authority to body corporate managers to collect the late payment fees together with the costs of collection**

The Institute has also given consideration to the benefits of discounts for early or on-time payment of fees as a strategy to reduce the strain on body corporate finances resulting from the late payment of fees by members. The Institute believes that this strategy is, typically, ineffective and more importantly results in a penalty being borne by those members who do pay in a timely manner given that the value of any discounts offered must be built into the fees to be levied. It must be recognised that the budgets of bodies corporate are constructed to meet the real costs associated with their operations and do not have sufficient surplus to carry the cost of a discount.

Property maintenance and budgeting

The need for the appropriate maintenance of the common property assets of bodies corporate is a major and ongoing concern for the IBCM and all professional body corporate managers.

Recommendation 11

The Institute wishes to reaffirm its previous advice and strong recommendation for:

- the establishment of *maintenance or sinking funds* underpinned by a professionally and independently developed maintenance plan to ensure the long term protection of body corporate assets
- the allocation of adequate *contingency funds* to meet the unexpected and short term maintenance needs of bodies corporate

These two issues, while requiring differing responses, have significant impact on the operation of bodies corporate and the maintenance of asset value and the lifestyle of owners.

Maintenance funds

Maintenance or sinking funds are designed to ensure body corporate property is maintained to a standard which reflects its original condition. The purpose of sinking funds should not be confused with special levies that may be made to improve the condition or extend the amenities of a body corporate property but rather they have the sole purpose of protecting the members' investment in their properties by ensuring the maintenance and, therefore, value of the property.

The underpinning of the sinking fund with a planned approach to maintenance and the mandatory and systematic collection of sinking fund fees would also enable members to plan financially for what may be significant expenditure by spreading payments over time.

The IBCM is committed to working with Government and Victoria's bodies corporate to advance the protection of properties through the introduction and sound management of sinking funds which must be accompanied by an education and information campaign geared towards explaining the principles and benefits of the scheme.

A range of strategies to protect and inform body corporate members are recommended for action by the Review.

Recommendation 12

It is recommended that:

- the Act be changed to require developers to provide a defensible and best-estimate of the first full and typical year's body corporate expenditure. The first full year estimate should *not* include the savings afforded to new properties where warranties on significant items such as air conditioning will result in, for example, lower maintenance costs than will be experienced in subsequent years. It is further recommended that this information be included as part of the Form 3 Body Corporate Certificate and that this form should become part of the Section 32 documentation provided as part of the purchase process
- the Act be changed to require the establishment of sinking funds and that these be supported by a professionally constructed maintenance plan and the mandatory collection of sinking fund fees which are to be held in an interest bearing account by and for the benefit of the bodies corporate
- the Act be changed to require that for existing properties the vendors are to provide the annual budget for body corporate expenditure and a report of the financial standing of the body corporate including the status of the sinking fund described in the body corporate balance sheet. This information is to be included as part of the Form 3 Body Corporate Certificate together with a copy of the previous year's AGM minutes. Further, this form should become part of the Section 32 documentation provided as part of the purchase process.
- the Act be changed to allow for a commensurate increase in the fee chargeable by Body Corporate Managers for the preparation of Form 3 Body Corporate certificates to \$110 including GST. This fee would recognise the increased work and costs associated with preparing an important and legal document together with the fact that the existing fee of \$55 has stood since 1989 and does not reflect inevitable increases in operating costs experienced by Body Corporate Management firms during the previous fourteen years.

Contingency funds

The Institute believes that a similar focus should be given to the recognition of the role of **contingency funds** within the budgets of bodies corporate. While sinking funds provide a mechanism to support the long term maintenance of a body corporate a contingency fund provides the capacity to meet the equally important shorter term and unplanned expenses.

Professional body corporate managers always advise bodies corporate to include a 'contingency fund' line within the annual budget. The fund is designed to enable , for example, critical maintenance to be undertaken in a timely

manner when there is insufficient time to raise a special levy. For example, in cases such as water pipe failure, fire service failure or trees that have fallen and require immediate removal. In such cases, the body corporate manager is obliged to pay a tradesperson within the standard business terms of 30 days. In many instances there would be insufficient balance within a body corporate account to cover costs if the body corporate has not elected to set aside funds for this purpose.

The need for contingency funds is most keenly felt:

- in smaller and newer bodies corporate which have not established a workable and realistic account balance
- where there are ongoing problems with owners being in arrears with their fee payments which results in accounts with zero or extremely low balances
- in bodies corporate where some or all owners place extreme pressure on body corporate managers and other owners to slash budgets to an unrealistically low level

Recommendation 13

It is recommended that:

- **the Act be changed to require bodies corporate to establish and pay a contingency fund fee as a mandatory component within the annual budget**
- **the body corporate manager, or body corporate secretary in self-managed bodies corporate, establish and document the rationale for the formula used to establish the level of the contingency fund and that this rationale be considered at the Annual General Meeting. Notwithstanding this process, the contingency fund established should not be less than 15% of the value of the other components of the annual budget, but may exceed this amount if required. A body corporate could vote to vary the levy downwards once the accumulated balance in the contingency account had reached 150% of the total annual turnover of the body corporate.**

Use, Repair and Maintenance

The role of sinking and contingency funds, discussed above, are inextricably linked with general discussion about the use, repair and maintenance of bodies' corporate common property.

The issue of bodies corporate upgrading or renovating their properties, which falls outside the definition of maintenance, is however more complex. While it is understood that there will always be a range of owners views about the value and benefit of upgrading a common property, the Institute also believes that it is

essential that the current barriers to owners improving the quality of their lifestyle and the value of their asset should be removed.

The Institute also advises that the Act and its regulations would benefit from direct references that provide greater clarity about what, and how, alterations are able to be made to the external appearance of dwellings for example the installation of air conditioners, painting and signage.

Recommendation 14

It is strongly recommended that bodies corporate have the capacity to resolve to upgrade or renovate common property by:

- **developing a plan outlining the proposed enhancement that is submitted in writing at least 14 days before a properly constituted meeting of the body corporate**
- **presenting two to three quotations for the work to be undertaken and identifying the levy to be raised and the timeframe for the work to be completed**
- **passing a motion by special resolution**

Insurance

The Institute in its earlier input to this Review, raised the considerable concern about the need to ensure that property's are appropriately insured. This advice stands and is strongly reaffirmed.

A minority of bodies corporate are unwilling to commit funds to provide appropriate insurance cover and often seek the cheapest rather than the most appropriate cover. Foremost, in the advice previously provided by the Institute and reaffirmed here, is the need for bodies corporate to undertake a mandatory valuation as the basis for determining the level of insurance required. The Institute believes that it is critical, but also practical, for site valuations to be conducted at least at five yearly interval with annual desk audits occurring in the intervening years. It would then be required that insurance was taken out at a level that would ensure full replacement of the property. Similarly, bodies corporate should carry a minimum of \$20 million of public liability insurance.

It must also be mandatory for the insurance of common property to be held by the body corporate rather than as part of individual lot owners' insurance which, should a claim occur, can result in disputes between the insuring companies of the lot owners which delays a speedy and effective resolution to the claim.

The importance of insurance is highlighted in the growing number of mixed use bodies corporate where, for example, retail and hospitality lots are included in

bodies corporate with residential lots. Elsewhere in this paper the Institute recommends that separate bodies corporate be established to manage the different types of uses. This proposal was made in part because it provides a simple and straightforward mechanism to ensure the clear allocation of costs attributable to particular lots where, for example, the higher risk and therefore insurance premiums of restaurants are separately identified from those of lower risk residential lots. Irrespective of the mechanism used to manage mixed use bodies corporate, there is a clear need for the allocation of costs to lots which are equitable and reflect the true nature of risks and responsibilities of lots as well as their rights.

The Institute is also aware that the changes that occurred in the previous legislative review that resulted in the need for a special resolution to take out additional insurance cover (e.g. catastrophe, contents, loss of rent) has had a negative impact and that a more realistic and workable threshold is required.

It is also essential that owners in self managed as well as professionally managed bodies corporate benefit from these changes.

Recommendation 15

It is strongly recommended that the legislative Review requires all bodies corporate to:

- **undertake a site valuation each 5 years with an annual 'desk' audit to determine the level of insurance cover that is required**
- **ensure the common property is insured for the full replacement value identified in the valuation**
- **carry a minimum of \$20 million of public liability insurance**
- **be the entity which holds the insurance of the common property and not individual lot owners**
- **ensure that the lot owner(s) in a mixed-use body corporate with a greater risk associated with their lots pay the additional risk premium associated with their lots**

Further, it is also recommended that the legislation enable bodies corporate to take out additional insurance cover with a simple majority vote rather than the current requirement for a special resolution.

Services and Agreements for Members and Occupiers

The Institute supports the proposal that no amendments are required in relation to this matter.

Rules Applying to Bodies Corporate, Members and Occupiers

The members of the Institute, through their daily work, are keenly aware of the importance of standard rules as a means of ensuring a satisfactory 'base level' of operation of bodies corporate.

Recommendation 16

It is recommended that:

- **attention is given to the improvement and clarification of standard rules with, in particular, the provision of definitions of "pets" and "nuisance".**

Further, the Institute strongly supports the need for the application and maintenance of standard rules.

Recommendation 17

The Institute recommends:

- **the development of model rules for *both* self managed *and* professionally managed bodies corporate**
- **and, these should be promulgated through communication with, and education of, members of bodies corporate rather than being embedded in the Act.**

It is also recognised that there is a need for additional rules which are supplementary to the standard rules that would apply to a range of more complex bodies corporate including:

- high rise environments
- multi-use environments

For example, additional rules in a high rise building may require that new residents cannot move into the building, or existing residents leave the building, during Saturday and Sunday in order to minimise disruption to other residents through the closing of lifts to provide easy access for removalists or noise.

Similarly, additional rules in a mixed-used development may limit access to a swimming pool or gymnasium to lot residents and not the customers of a restaurant within the complex.

Recommendation 18

It is recommended that:

- **additional rules should be drawn up by a legal practitioner, agreed by special resolution and then submitted to Land Registry (Land Victoria) for ratification.**

Records and Information

Accessing Member Contact Information

The Institute recognises that the decision-making processes and active engagement of all owners in the work of the body corporate can be hampered by an inability to contact members.

This situation is of growing concern given the steady increase in the number of non-resident owner-investors, particularly in high rise urban developments.

Recommendation 19

It is recommended that:

- **Current owners be required to advise the body corporate of any changes to their contact details on a prescribed form for this purpose]**

The Institute also believes that the current legislative review should provide for enforceable penalties for non-compliance with critical body corporate rules and the regulations. The operation of a body corporate, and the rights of the majority of members, can be impaired by members who refuses to supply his or her address for the servicing of notices and the provision of meeting agenda and minutes. In these cases it is almost impossible to gain payment of fees which have been properly struck.

Further, the body corporate manager should be informed of the change of ownership of a lot to enable the proper communications to be undertaken. It is unrealistic to place this requirement on the vendor, who has left the property, and should be a requirement of the purchaser.

Recommendation 20

It is, therefore, recommended that:

- **notification of the new owners contact details are to be provided to the body corporate manager (or secretary for self managed bodies corporate) within 25 days of the transfer of title.**

This practice would reflect the current requirements of other agencies such as the council and utilities which also must know of the new owner and person responsible for the lot.

The Institute also believes that it should be made clearer that members of a body corporate are able to access the names and addresses of other owners for the purposes of calling meetings. There are, however, concerns with the maintenance of owners' privacy. The review must, therefore, make clear that privacy legislation is subordinate to this Act. The Institute also recommends that telephone contact details not be provided for any purpose.

Accessing Records by Prescribed Persons

The Institute believes that the definition of prescribed persons able to inspect records currently contained within the Act is appropriate and does not require change.

It is important, however, for clarification to be provided regarding the definition of 'records' and who should be able to access the data.

The Institute also recognises that the cost charged by managers to access records must be 'reasonable' while also being commercially viable. The costs of providing access recommended below also recognises the difference between the provision of reports that are standardised and generated from a computer system and those that require special and individualised responses.

Type of Records	Right to Access	Characteristics of Records	Cost range for provision of records
Membership lists	Persons prescribed by the Act	<ul style="list-style-type: none"> • Held electronically • No telephone numbers provided 	<ul style="list-style-type: none"> • Viewed/inspected at body corporate manager's office (\$25-\$50) • Printed and despatched to applicant's address (\$20-\$50)
Financial records – most recent financial report tabled at a Body Corporate meeting	Persons prescribed by the Act	<ul style="list-style-type: none"> • Held electronically • Provided in standard format from previously prepared report 	Printed and despatched to applicant's address (\$25-\$50)

Type of Records	Right to Access	Characteristics of Records	Cost range for provision of records
Financial records – previous financial report tabled at a Body Corporate meeting	Persons prescribed by the Act	<ul style="list-style-type: none"> • Held electronically • Provided in standard format from previously prepared report 	Printed and despatched to applicant's address (\$25-\$75)
Financial records – special purpose report produced in response to a particular request	Persons prescribed by the Act	Subject to separate negotiation	Subject to separate negotiation
Financial records – access to quotations received or invoices paid for work performed	Members of the relevant Body Corporate only	Held in Body Corporate Manager's files	Viewed/inspected at body corporate manager's office only (\$25-\$100 dependent on length of time spent with applicant)
Agenda and Minutes of most recent Body Corporate meeting	Persons prescribed by the Act	<ul style="list-style-type: none"> • Held electronically • Provided in standard format from previously prepared report 	Printed and despatched to applicant's address (\$25-\$50)
Agenda and Minutes of a prior Body Corporate meeting	Persons prescribed by the Act	<ul style="list-style-type: none"> • Held electronically • Provided in standard format from previously prepared report 	Printed and despatched to applicant's address (\$25-\$75)
Agenda and Minutes of most recent Body Corporate Annual General Meeting	Persons prescribed by the Act	<ul style="list-style-type: none"> • Held electronically • Provided in standard format from previously prepared report 	Printed and despatched to applicant's address (\$25-\$75)
Agenda and Minutes of a prior Body Corporate Annual General Meeting	Persons prescribed by the Act	<ul style="list-style-type: none"> • Held electronically • Provided in standard format from previously prepared report 	Printed and despatched to applicant's address (\$25-\$85)
Additional copies of maintenance plans prepared to support sinking funds	Persons prescribed by the Act	<ul style="list-style-type: none"> • Held electronically • Provided in standard format from previously prepared report 	Printed and despatched to applicant's address (\$25-\$85)
Other records	By negotiation	By negotiation	By negotiation

Protection of Purchasers Through Adequate Disclosures

The Institute wishes to reaffirm its previous advice about the need for prospective purchasers of properties that form part of bodies corporate to be adequately informed of their rights and responsibilities. Other discussion about much of the content provided in this section can be found elsewhere in this submission including prior discussion of the protection of members finances.

Awareness of rules

Purchasers of properties within bodies corporate must be made aware of the rules of the body corporate as a formal and mandatory part of the purchase process.

Leases & Licences

New plans of subdivision must provide details of any leases or licences, and should be noted as an annexure to the title plan of subdivision.

Awareness of maintenance cost estimates

The Institute also believes there are unique and significant responsibilities that should be borne by property developers particularly in relation to the sale of properties in large blocks with sophisticated facilities and potentially costly medium to long term maintenance.

While the ongoing distribution of high quality information about the roles and processes of bodies corporate is vital – it is prospective owners at the point of purchase who must be fully informed and understand their responsibilities and rights.

It is also clear that there are distinctions to be made between the information that should be provided for existing properties and for new properties.

It is essential that developers of new properties provide a defensible and best-estimate of the first full and typical year's body corporate expenditure. The first full year estimate should *not* include the savings afforded to new properties where warranties on significant items such as air conditioning will result in, for example, lower maintenance costs than will be experienced in subsequent years.

Existing properties which are being sold have budgets and decisions taken in properly constituted body corporate meetings that can be made available to purchasers to inform them of the costs and responsibilities that they will assume on purchase.

Awareness of lot entitlement and liability implications

The Institute's initial submission to the Review included clear advice about the need for surveyors to disclose the rationale used to determine units of lot liability and entitlement in order to foster a culture of transparent and fair processes for all owners within a body corporate.

A complex issue that confronts prospective purchasers and new owners is the allocation of liabilities and entitlements associated with the lots that comprise a body corporate. The allocation of a proportion of 'units' of liability and entitlement to each lot of a body corporate is performed by the surveyor as part of the process of establishing the subdivision. In a small and simple subdivision with, for example, four townhouses being of the same size and enjoying the same amenities, typically, all would have the same number of units of liability and entitlement.

In more complex developments or those with mixed or diverse lots the distribution of units of liability and entitlement may vary considerably and have a major impact on the equitable distribution of costs incurred over the life of the development. To illustrate: what is the appropriate share of liabilities and entitlements of a penthouse with a large balcony compared with a smaller unit without a balcony *or* a restaurant on the ground floor of a complex which also contains residential apartments?

It is essential that:

- Information be provided to prospective purchasers about the basis for determining the lot's allocation of liabilities and entitlements and the impact of this on their immediate and future costs
- The distribution of lot liability and entitlement be conducted equitably and transparently.

The Institute also believes that the Review should ensure that owners, and prospective purchasers, have access to clear information about the boundaries that comprise the body corporate and their lots.

Providing the information

Access to this information should not be left to the efforts of an informed purchaser or purchaser's solicitor to identify but should be included as part of the Form 3 Body Corporate Certificate which in turn should become part of the Section 32 documentation provided as part of the purchase process.

While it is understood that it is difficult to communicate complex technical information to lay people there is a need to ensure that all owners understand not only the formula on which their entitlements and liabilities will be determined but also the precise extent of their responsibility. Such clarity would lessen the ongoing queries and potential complaints when, depending on how the boundaries of the body corporate have been drawn, owners believe that the body corporate should pay for maintenance that may in fact not form part of the common property.

It is believed that the information could be provided in plain English using a template form that listed a range of aspects of the property with advice about whether the item was common or individual property. For example:

	Common Property responsibility of the body corporate	Individual Owner responsibility
External faces	Yes	
Roof	Yes	
Window Frames	Yes	
Garage Doors		Yes
Fences – external boundary	Yes	
Etc.		

Recommendation 21

It is recommended that:

- CAV fund the development of print and web-based material aimed at the broad cross section of prospective lot purchasers that delineates in ‘lay-terms’ the roles and responsibilities of body corporate members, the operation of the Subdivision Act and its regulations and provides questions that can, and should, be asked of vendors prior to purchase
- CAV fund the development of print and web-based material specifically geared to the needs of prospective purchasers of off-the-plan and large scale developments that indicates the issues that will affect body corporate members and provides questions that can and should be asked of vendors prior to purchase
- the Act be changed to require surveyors and developers to state the rationale and basis for the determination of the units of liability and entitlement allocated to each lot within a development and that this information be clearly articulated to prospective purchasers
- the Act be changed to require all new plans of subdivision to include details of any leases or licences, and that these should be noted as an annexure to the title plan of subdivision
- the Act be changed to require developers to provide a defensible and best-estimate of the first full and typical year’s body corporate expenditure. The first full year estimate should *not* include the savings afforded to new properties where warranties on significant items such as air conditioning will result in, for example, lower maintenance costs than will be experienced in subsequent years. It is further recommended that this information be included as part of the Form 3 Body Corporate Certificate and that this form

should become part of the Section 32 documentation provided as part of the purchase process

- the Act be changed to require the establishment of maintenance or sinking funds and that these be supported by a professionally constructed maintenance plan and the mandatory collection of sinking fund fees which are to be held in an interest bearing account by and for the benefit of the bodies corporate
- the Act be changed to require that for existing properties the vendors are to provide the annual budget for body corporate expenditure and a report of the financial standing of the body corporate including the status of the sinking fund described in the body corporate balance sheet. This information is to be included as part of the Form 3 Body Corporate Certificate together with a copy of the previous year's AGM minutes. Further, this form should become part of the Section 32 documentation provided as part of the purchase process.
- plain English advice provided in tabular form (see sample) describing the boundaries of the body corporate be attached to the Form 3 Body Corporate Certificate and become part of the Section 32 documentation provided as part of the purchase process.
- the Act be changed to allow for a commensurate increase in the fee chargeable by Body Corporate Managers for the preparation of Form 3 Body Corporate certificates to \$110 including GST. Further, this fee, expressed in 2004 dollars should be indexed annually to reflect CPI increases.

This fee would recognise the increased work and costs associated with preparing an important and legal document together with the fact that the existing fee of \$55 has stood since 1989 and does not reflect inevitable increases in operating costs experienced by Body Corporate Management firms during the previous fourteen years.

Acting on Behalf of the Body Corporate

The Institute is keenly aware that the effective operation of a body corporate is largely determined by the willingness of members to engage with, and assume responsibility for, the operations of the body corporate.

Although it is not always palatable to accept the reality of how a proportion of bodies corporate operate the facts must be faced that it is not uncommon to find bodies corporate where:

- it is extremely difficult or impossible to find members who are willing to serve as the chairperson or on a committee of management

- members simply do not attend meetings which stalls decision-making and the development of a collegial approach to management of the owners' shared asset
- the majority of owners are 'captive' to the aggressive or idiosyncratic approach of one owner who sees it as his or her responsibility to 'drive' the body corporate leading to either poor decision-making, friction amongst owners or abdication of responsibility by many of the owners who withdraw from the work of the body corporate in an attempt to secure a 'quiet life'

The process and effective operation of bodies corporate is facilitated and enhanced when a professional manager is appointed and it is vital that the powers and relationships of managers and bodies corporate are strengthened. This is not to say that the relationships between managers and bodies corporate are always positive but there is no evidence that bodies corporate operate more effectively without the involvement of a professional manager. Indeed, the reverse is true with all professional managers having experienced being appointed to solve intractable problems and relationship breakdowns in previously self-managed properties.

Professional body corporate managers play a vital role in an increasingly complex environment by ensuring bodies corporate are compliant with their legal responsibilities, efficiently and effectively protect and maintain the owners' assets and plan for the future.

Appointing a Manager

The Institute is in general supportive of the maintenance of existing legislative processes for the appointment of body corporate managers and also believes that the future rights of bodies corporate to appoint a manager of their choice must be protected.

The Institute has however, in its previous submission to this Review, recommended that the West Australian model be introduced in Victoria that would require all bodies corporate of five lots or more to be professionally managed and subject to appropriate reporting processes. It is recognised that this proposal may not be palatable to some interest groups however the fact remains that two key trends are evident and growing, namely:

- the level of investment in properties subject to bodies corporate is significant and increasing
- the significant number of properties with a large number of lots and complex services, such as can be found in high rise or mixed use developments

Both trends make the self management of properties extremely problematic and pose significant risks for owners who may not be informed of the complexities associated with the management of their common properties. While it is understood that the number of lots may not be seen as a sophisticated indicator of complexity or risk it is readily understood and easy to assess.

The Institute, however, wishes to raise alternative models for consideration that would provide indicators of those situations when professional management is required to protect highly valuable assets and facilitate the management of complex or large bodies corporate.

Recommendation 22

It is recommended that bodies corporate are professionally managed when they have *any one* of the following characteristics:

- **at the time of initial development and sale, the median value of the lots is 150% of the median Victorian house price**
- **there is more than one body corporate established within an integrated property development**
- **the body corporate has multi-use lots**
- **the body corporate property is more than four floors in height**
- **the body corporate has 8 lots or more (*note: this threshold reflects the Institute's advice, contained in the following section, that committees should be formed and required in bodies corporate with 8 lots of more – in contrast to the current requirement for bodies corporate with 13 lots*)**

The Institute is also concerned that bodies corporate have the right to select a manager that meets its needs. This recognises the strengths and benefits that can be found in a competitive and open market.

It is recognised that there is a limited but real situation which sees valuable contracts for the long term management of large properties let by the developer – sometimes to a related company. The Institute's standard and recommended processes are for the annual appointment of body corporate managers. It is, however, also recognised that the first year of a body corporate can see many complex matters arising and that it is not until the second year that a manager can establish a more routine and sustainable working relationship.

The Institute reaffirms its previous advice and recommendations namely that body corporate management contracts established by developers are not to extend beyond two years at which point the owners who comprise the body corporate may elect a manager of their choice

Election and Powers of the Committee

One of the major problems that affects the effective operation of bodies corporate is the difficulty in securing members who are willing and able to act as office bearers on the committees of management. The Institute is also concerned that the current powers of delegation are not working effectively and require a renewed focus and new definitions.

The current legislation requires that bodies corporate with 13 or more lots must have a committee. The Institute believes that this requirement needs to be tightened to reflect the value and complexity of many smaller bodies corporate while not encompassing small suburban properties of two or three units.

Recommendation 23

The Institute recommends that:

- **every body corporate with 8 or more lots be required to have a committee.**

Many owners, however, are concerned about taking the responsibility of being an office bearer. Although it is desirable to have skilled and committed office bearers to facilitate the effective working of a body corporate the reality must be faced that this is sometimes difficult to achieve although every effort should be made by CAV to provide information and support to members to reduce their concerns and develop their skills.

Recommendation 24

It is, therefore, recommended that:

- **committees do not have to have elected, standing, office bearers**
- **however, each meeting must have a chairperson and minute secretary and these tasks can be delegated to the body corporate manager**
- **CAV produce and distribute information about roles and responsibilities of office bearers, meeting procedures, negotiation techniques, problem solving techniques and legislative overviews etc**

Delegation of Powers

The Institute is aware that the Act must allow sufficient delegation of powers to facilitate the efficient operation of the body corporate.

However, the Institute also believes there are inherent problems with including within the Act a list of those functions which can be delegated given that, inevitably, such a list cannot be exhaustive or cater for the need of each individual body corporate.

The Act should allow for each body corporate to define those functions and responsibilities that are delegated to either a committee or a body corporate manager given that there is reporting of the acts performed on behalf of the body corporate and the outcomes of those acts.

The Institute further advises that the use of the body corporate common seal should be able to be delegated to the Committee.

Meetings and Decisions

A recurring concern expressed by body corporate managers relates to the difficulty in securing the attendance of members at meetings and of achieving a quorum. This problem is exacerbated in, but not limited to, larger bodies corporate and those with a significant proportion of non-resident owners. The use of technology to enable participation from anywhere in the world coupled with the efficient use of proxies should lift meeting participation and complement the existing legislative arrangements that allow for postal ballots.

A framework which recognises the practical difficulties of securing attendance at meetings must, however, still require the establishment of an appropriate quorum so that the meeting can be seen to be representative. The Institute recommends that a quorum which requires the attendance of a minimum of three members is appropriate.

Recommendation 25

It is therefore recommended that:

- **the use of electronic technology to facilitate attendance at meetings is to be encouraged and, reflecting current company law, a clause should be included in the act which allows meetings to be held online or by teleconference¹**

¹ See section 249S of the Corporations Act 2001 which states that: *The Company may hold a meeting of members at 2 or more venues using any technology that gives the members as a whole a reasonable opportunity to participate.*

- Proxies may be sent (rather than 'handed') to the secretary, and may also be sent to the chairperson or body corporate manager to be presented at the meeting. There is no conflict of interest by the body corporate manager as the body corporate manager does not have voting rights
- the quorum for a meeting should be attendance by three members

Please also note that further advice about the definitions of special and unanimous resolutions can be found in the section addressing: *Winding up and alterations to the Plan*.

APPENDICES

APPENDIX 1

Summary of recommendations contained in this Response to the Future Directions paper.

The Institute also reaffirms its previous advice and requests that the Review team review and reconsider its earlier advice and recommendations.

Summary of the Institute's Recommendations

Recommendation 1

The Institute of Body Corporate Managers (Victoria) is recommending for action by the Review:

- the establishment of an independent ombudsman or commissioner to fulfil the role of adjudicator in body corporate disputes. The ombudsman or commissioner would handle the majority of cases alone and at a contained cost with complaints of a larger monetary amount, or those which the ombudsman believes would be best served through a wider hearing, being referred to an expert panel for consideration and advice to the ombudsman. For major disputes with substantial financial implications a competent Court of Jurisdiction would remain an appropriate avenue for resolution.

Recommendation 2

The funding of the dispute resolution process is, of course, a significant consideration. Although it is recognised that there are numerous mechanisms that could be put in place to secure ongoing funding of the process the Institute recommends:

- payment of a fee per lot at the time the body corporate is registered
- payment of a fee each time a lot is sold
- adoption of a 'user pays' approach when a complaint is lodged for resolution
- that these revenue sources be adopted in preference to an ongoing annual levy (or tax) on lot owners

Recommendation 3

It is recommended that an 'industry managed model' be utilised to ensure high standards of professional conduct by body corporate managers in Victoria and that the model put in place by the Institute of Body Corporate Managers (Victoria) Inc for the maintenance of professional standards, industry certification and professional development is to be adopted and promoted within the State.

Recommendation 4

It is recommended that:

It is, therefore, recommended that body corporate management contracts established by developers not extend beyond two years at which point the owners who comprise the body corporate may elect a manager of their choice.

Recommendation 5

It is recommended that the Act contain requirements for developers to:

- only enter into contracts, on behalf of the future owners of lots, of more than two years when clear benefit can be demonstrated to the future owners and that this benefit is documented and made available to purchasers of lots within the development

and

- not enter into contracts of more than two years with businesses with which the developer or his or her companies are a beneficiary or part owner or owner

Recommendation 6

The Institute recommends that:

- in developments with mixed-uses that at least one separate body corporate is established for each type of lot (eg residential and commercial). This would enable the equitable and simplified determination of costs and rights.

Recommendation 7

The Institute recommends that:

- The Act be amended to require the establishment of a committee when there are eight or more lots in a body corporate (contrasted to the current Act, where a committee is only required where there are 13 or more lots)
- The Act contain a clear statement about the purpose of committees
- Consumer Affairs Victoria (CAV) be responsible for the promulgation of information including fact sheets and 'model' statements of powers and functions that can be adopted by bodies corporate of various sizes and types to meet their specific needs

- The Act affirms the right of the body corporate to delegate those powers and functions to the committee that it sees fit

Recommendation 8

It is recommended that the following decision-making thresholds are reflected in the Act:

Issue	Rationale	Voting Required
Alteration to lot entitlements and liabilities	Currently it is necessary to obtain a unanimous vote or to incur significant cost and seek a decision through the Magistrates' Court. A unanimous decision is extremely difficult, if not impossible, to achieve when an initial determination of lot liability and entitlement has unfairly favoured one owner who is unlikely to vote against his or her personal interests.	Special resolution
Alteration to the boundaries	A significant decision that could have major impact on the value of the owners' asset. A decision of this magnitude requires a unanimous decision or, if this cannot be obtained, referral to a new dispute resolution ombudsman for mediation and resolution.	Unanimous resolution
Sale of common property	A significant decision that could have major impact on the value of the owners' asset. A decision of this magnitude requires a unanimous decision or, if this cannot be obtained, referral to a new dispute resolution ombudsman for mediation and resolution.	Unanimous resolution
Winding up	A significant decision that could have major impact on the value of the owners' asset. A decision of this magnitude requires a unanimous decision or, if this cannot be obtained, referral to a new dispute resolution ombudsman for mediation and resolution.	Unanimous resolution

Definitions:

special resolution: to be passed requires assent by 75% of all members obtained at the meeting or, as with non quorum meetings, the minutes of the meeting are distributed and the resolution stands unless 26% or more members disagree in writing within 28 days.

unanimous resolution: requires 100% votes of members achieved either through attendance at a meeting or through written, electronic or telephone conference.

Recommendation 9

The Institute, therefore, recommends that:

- where a body corporate manager operates a common account (ie single bank account) for the management of the funds of a number of bodies corporate that these funds must be audited annually and a statement of the auditor's findings and the audit certificate must be tabled with the financial report at the AGMs of bodies corporate and paid for by the body corporate
- where a body corporate, either professionally or self managed, seeks to have a separate audit conducted of its funds this can be required by the passing of a special resolution which must also authorise the payment of all costs associated with the audit by the body corporate
- where a future independent Ombudsman or Commissioner is appointed to oversee dispute resolution processes and cases are raised concerning the management of funds that he or she can require an independent audit with all costs associated with the audit being borne by the body corporate

Recommendation 10

It is recommended that:

- The Act include the capacity of bodies corporate to levy penalty interest for late payment of fees and levies at a rate of 2% above the penalty interest rate struck by government
- Penalty interest can be applied after 14 days from the properly notified due date for payment
- Bodies corporate can provide standing authority to body corporate managers to collect the late payment fees together with the costs of collection

Recommendation 11

The Institute wishes to reaffirm its previous advice and strong recommendation for:

- the establishment of *maintenance or sinking funds* underpinned by a professionally and independently developed maintenance plan to ensure the long term protection of body corporate assets
- the allocation of adequate *contingency funds* to meet the unexpected and short term maintenance needs of bodies corporate

Recommendation 12

It is recommended that:

- the Act be changed to require developers to provide a defensible and best-estimate of the first full and typical year's body corporate expenditure. The first full year estimate should *not* include the savings afforded to new properties where warranties on significant items such as air conditioning will result in, for example, lower maintenance costs than will be experienced in subsequent years. It is further recommended that this information be included as part of the Form 3 Body Corporate Certificate and that this form should become part of the Section 32 documentation provided as part of the purchase process
- the Act be changed to require the establishment of sinking funds and that these be supported by a professionally constructed maintenance plan and the mandatory collection of sinking fund fees which are to be held in an interest bearing account by and for the benefit of the bodies corporate
- the Act be changed to require that for existing properties the vendors are to provide the annual budget for body corporate expenditure and a report of the financial standing of the body corporate including the status of the sinking fund described in the body corporate balance sheet. This information is to be included as part of the Form 3 Body Corporate Certificate together with a copy of the previous year's AGM minutes. Further, this form should become part of the Section 32 documentation provided as part of the purchase process.
- the Act be changed to allow for a commensurate increase in the fee chargeable by Body Corporate Managers for the preparation of Form 3 Body Corporate certificates to \$110 including GST. This fee would recognise the increased work and costs associated with preparing an important and legal document together with the fact that the existing fee of \$55 has stood since 1989 and does not reflect inevitable increases in operating costs experienced by Body Corporate Management firms during the previous fourteen years.

Recommendation 13

It is recommended that:

- the Act be changed to require bodies corporate to establish and pay a contingency fund fee as a mandatory component within the annual budget
- the body corporate manager, or body corporate secretary in self-managed bodies corporate, establish and document the rationale for the formula used to establish the level of the contingency fund and that this rationale be considered at the Annual General Meeting. Notwithstanding this process, the contingency fund established should not be less than 15% of the value of the other components of the annual budget, but may exceed this amount if required. A body corporate could vote to vary the levy downwards once the accumulated balance in the contingency account had reached 150% of the total annual turnover of the body corporate.

Recommendation 14

It is strongly recommended that bodies corporate have the capacity to resolve to upgrade or renovate common property by:

- developing a plan outlining the proposed enhancement that is submitted in writing at least 14 days before a properly constituted meeting of the body corporate
- presenting two to three quotations for the work to be undertaken and identifying the levy to be raised and the timeframe for the work to be completed
- passing a motion by special resolution

Recommendation 15

It is strongly recommended that the legislative Review requires all bodies corporate to:

- undertake a site valuation each 5 years with an annual 'desk' audit to determine the level of insurance cover that is required
- ensure the common property is insured for the full replacement value identified in the valuation
- carry a minimum of \$20 million of public liability insurance
- be the entity which holds the insurance of the common property and not individual lot owners

- ensure that the lot owner(s) in a mixed-use body corporate with a greater risk associated with their lots pay the additional risk premium associated with their lots

Further, it is also recommended that the legislation enable bodies corporate to take out additional insurance cover with a simple majority vote rather than the current requirement for a special resolution.

Recommendation 16

It is recommended that:

- attention is given to the improvement and clarification of standard rules with, in particular, the provision of definitions of “pets” and “nuisance”.

Recommendation 17

The Institute recommends:

- the development of model rules for *both* self managed *and* professionally managed bodies corporate
- and, these should be promulgated through communication with, and education of, members of bodies corporate rather than being embedded in the Act.

Recommendation 18

It is recommended that:

- additional rules should be drawn up by a legal practitioner, agreed by special resolution and then submitted to Land Registry (Land Victoria) for ratification.

Recommendation 19

It is recommended that:

- Current owners be required to advise the body corporate of any changes to their contact details on a prescribed form for this purpose

Recommendation 20

It is, therefore, recommended that:

- notification of the new owners contact details are to be provided to the body corporate manager (or secretary for self managed bodies corporate) within 25 days of the transfer of title.

Recommendation 21

It is recommended that:

- CAV fund the development of print and web-based material aimed at the broad cross section of prospective lot purchasers that delineates in 'lay-terms' the roles and responsibilities of body corporate members, the operation of the Subdivision Act and its regulations and provides questions that can, and should, be asked of vendors prior to purchase
- CAV fund the development of print and web-based material specifically geared to the needs of prospective purchasers of off-the-plan and large scale developments that indicates the issues that will affect body corporate members and provides questions that can and should be asked of vendors prior to purchase
- the Act be changed to require surveyors and developers to state the rationale and basis for the determination of the units of liability and entitlement allocated to each lot within a development and that this information be clearly articulated to prospective purchasers
- the Act be changed to require all new plans of subdivision to include details of any leases or licences, and that these should be noted as an annexure to the title plan of subdivision
- the Act be changed to require developers to provide a defensible and best-estimate of the first full and typical year's body corporate expenditure. The first full year estimate should *not* include the savings afforded to new properties where warranties on significant items such as air conditioning will result in, for example, lower maintenance costs than will be experienced in subsequent years. It is further recommended that this information be included as part of the Form 3 Body Corporate Certificate and that this form should become part of the Section 32 documentation provided as part of the purchase process
- the Act be changed to require the establishment of maintenance or sinking funds and that these be supported by a professionally constructed

maintenance plan and the mandatory collection of sinking fund fees which are to be held in an interest bearing account by and for the benefit of the bodies corporate

- the Act be changed to require that for existing properties the vendors are to provide the annual budget for body corporate expenditure and a report of the financial standing of the body corporate including the status of the sinking fund described in the body corporate balance sheet. This information is to be included as part of the Form 3 Body Corporate Certificate together with a copy of the previous year's AGM minutes. Further, this form should become part of the Section 32 documentation provided as part of the purchase process.
- plain English advice provided in tabular form (see sample) describing the boundaries of the body corporate be attached to the Form 3 Body Corporate Certificate and become part of the Section 32 documentation provided as part of the purchase process.
- the Act be changed to allow for a commensurate increase in the fee chargeable by Body Corporate Managers for the preparation of Form 3 Body Corporate certificates to \$110 including GST. Further, this fee, expressed in 2004 dollars should be indexed annually to reflect CPI increases.

Recommendation 22

It is recommended that bodies corporate are professionally managed when they have *any one* of the following characteristics:

- at the time of initial development and sale, the median value of the lots is 150% of the median Victorian house price
- there is more than one body corporate established within an integrated property development
- the body corporate has multi-use lots
- the body corporate property is more than four floors in height
- the body corporate has 8 lots or more (*note: this threshold reflects the Institute's advice, contained in the following section, that committees should be formed and required in bodies corporate with 8 lots or more – in contrast to the current requirement for bodies corporate with 13 lots*)

Recommendation 23

The Institute recommends that:

- every body corporate with 8 or more lots be required to have a committee.

Recommendation 24

It is, therefore, recommended that:

- committees do not have to have elected, standing, office bearers
- however, each meeting must have a chairperson and minute secretary and these tasks can be delegated to the body corporate manager
- CAV produce and distribute information about roles and responsibilities of office bearers, meeting procedures, negotiation techniques, problem solving techniques and legislative overviews etc

Recommendation 25

It is therefore recommended that:

- the use of electronic technology to facilitate attendance at meetings is to be encouraged and, reflecting current company law, a clause should be included in the act which allows meetings to be held online or by teleconference²
- Proxies may be sent (rather than 'handed') to the secretary, and may also be sent to the chairperson or body corporate manager to be presented at the meeting. There is no conflict of interest by the body corporate manager as the body corporate manager does not have voting rights
- the quorum for a meeting should be attendance by three members

² See section 249S of the Corporations Act 2001 which states that: *The Company may hold a meeting of members at 2 or more venues using any technology that gives the members as a whole a reasonable opportunity to participate.*

Appendix 2

Institute of Body Corporate Managers (Victoria):

- Membership application forms (including Code of Professional Conduct) 2004-5
- Police Check form
- Form for the lodgement of complaint against a member
- Management Agreement
- Continuing Professional Development requirements