



A Response to

*Public Consultation - Owners Corporations
Regulations 2007 & RIS [Regulatory Impact
Statement]*

Of the: Owners Corporations Act 2006

As part of,

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.

25th July 2007

About Institute of Body Corporate Managers (Victoria) Inc. - "...the voice of the body corporate industry..."

IBCMV is the pre-eminent professional association of the body corporate industry, and was formed in 1990 to provide a forum for improved standards and education in the industry. Supporting more than 75% of all body corporate management firms it is the only organisation solely focussed upon representing this increasingly significant industry, and reaches and represents 250 body corporate professionals who manage approximately 200,000 lots. It also represents industry suppliers and bodies corporate, making it the voice of all with an interest in the management of bodies corporate. Members benefit from representation, promotion, establishment of professional practice guidelines and ethical standards, and professional development through education seminars, conferences and regularly publishing bulletins on items of professional interest. IBCMV is an affiliate member of the National Community Titles Institute, which represents practitioners throughout Australia. More information about the Institutes are available at www.bodycorp.org and www.ncti.org.au

About the bodies corporate or strata title industry in Victoria.

Changing lifestyle choices of Victorians and demographic shifts have led to rapid growth in higher density dwellings and the strata industry. With 65,000 Bodies Corporate and 500,000 lots in Victoria and about 1,000,000 Victorians or 1 in 4 people living in or affected by Bodies Corporate, it represents the management of property worth \$45 billion and they comprise residential properties ranging from 2 units in a suburban street to many hundreds of units in an urban tower block. Bodies Corporate also encompass commercial, retail, lifestyle resorts, retirement villages, car parks, storage facilities, industrial and, increasingly, mixed developments comprising more than one form of development.

Strata and Community Title Managers deal with the management of:

- People in a community living environment
- Billions of dollars of other peoples money on an on-going and not a single transaction basis
- Entire communities and their current and future assets and facilities

Introduction

Draft regulations to support the new Owners Corporations Act 2006 and replace the Subdivision (Body Corporate) Regulations 2001 have now been prepared. Amongst other things, the new regulations prescribe:

- classes of prescribed owners corporations
- insurance requirements for owners corporations
- when an existing corporation must establish an owners corporation register
- information to be included on an owners corporation certificate
- fees, costs and charges, and
- model rules for owners corporations.

Consumer Affairs Victoria is now inviting public comments regarding the proposed regulations. To assist with the consultation process CAV has produced a Regulatory Impact Statement (RIS) and is now seeking feedback in regard to both the RIS and draft regulations.

In preparation of these CAV met with IBCMV to discuss the issues arising in the regulations and sought IBCMV's views. IBCMV made a submission in March 2007 on these issues, and also made many subsequent single issue submissions upon request. Many of these have been referenced in the RIS analysis with citations.

This response should be read in conjunction with the submissions noted above.

The new regulatory regime, to commence on 31 December 2007, aims to improve transparency and financial accountability in the management of owners corporations and we welcome new dispute resolution provisions, but more onerous regulatory compliance will result in higher costs to be borne by owners.

Also, the IBCMV response to the Owners Corporations Act 2006 remains as per its submissions. While the IBCMV is pleased that the Government has accepted many of its recommendations, we believe that in practice, compliance with some of the provisions will disadvantage professional managers, members of owners corporations and committees alike. For example, the Act does not recognise the important role of professional managers in the smooth and consistent running of owners corporations. In practice, managers now perform the roles of secretary and chairperson at general meetings at the behest of owners, to ensure proper and effective conduct of meetings and proxies/ballots. The new Act prohibits this, which will result in much greater responsibility being foisted on individual committee members and a greater chance for inaccuracies and ineffective meetings and resolutions.

Though this submission is in response to the proposed regulations, another issue has arisen with the Owners Corporations Act 2006. Included in the Appendix is the issue with the restriction of Powers of Attorney for serviced apartment operators.

Summary

Where the IBCMV recommendations have not been adopted, it is acknowledged that those recommendations were not adopted after careful consideration. In most cases these will not be reiterated again here.

Maintenance plans and maintenance funds

However, **IBCMV maintains its position on a lower threshold for prescribed [ie larger] owners corporations than that proposed.** The threshold determines requirements for maintenance plans and funds, auditing of accounts, and valuations for insurance purposes.

The proposed definition of “prescribed” owners corporation is those with annual fees in excess of \$200,000, or more than 100 lots. This captures about 27% of all lots, and 1.2% of all owners corporations. The IBCMV recommendation was for annual fees in excess of \$75,000, or more than 13 lots. This would capture about 50% of all lots, and 10% of all owners corporations.

The government’s preferred light handed approach is the minimum regulation necessary to achieve policy objectives, but IBCMV believes it is unlikely that the objectives will be achieved at these threshold levels of “prescribed” owners corporations.

It is not the largest owners corporations that generally have the biggest problems. Many “prescribed” owners corporations are newer constructions and usually have professional managers well aware of the need for well-thought out maintenance plans and funds. In comparison, many of the other 99% smaller non “prescribed” owners corporations tend to be older properties and are the ones that often do not plan for such things as maintenance. It is these smaller owners corporations that often have maintenance issues, but little provision to replace major items and protect owners assets. Over time, this neglect can lead to other issues such as OH&S “slips, trips and falls” and subsequent liability claims. As noted in the RIS, owners corporations play an important role in maintaining property and sustaining residential property values in Victoria.

The situation in NSW is that maintenance [ie known as “sinking” in NSW] plans are being phased in over a 3 year period as a requirement for all owners corporations regardless of size. An important difference, although there is a requirement to prepare a 10-year maintenance plan report, it is not a requirement that owners corporations have to act on the plan and implement a maintenance [ie sinking] fund. So the situation in NSW is that all owners corporations will have to undertake a maintenance plan but none of them have to implement it with a maintenance fund. The proposed regulations of this RIS are for prescribed owners corporations to be required to do both – maintenance plans and maintenance funds. Thus NSW have a much lower threshold for maintenance plans but no requirement for maintenance funds. Note, though, that opinions vary in NSW on whether owners corporations have to implement and adopt their sinking fund plan. Some observers conclude that when the legislation is read in conjunction with the second reading speech, owners corporations are required to raise funds to meet the estimates set out in their sinking fund plan.

The situation in Queensland since 1997 is that all owners corporations have been required to have maintenance plans and funds.

Alternatively, perhaps in Victoria a more palatable approach to achieve a lower prescribed threshold as recommended by IBCMV may be to phase it in over a multi-year period similarly to NSW. For example,

- by 1 July 2008 for owners corporations with plan numbers greater than 50,000
- by 1 July 2009 for owners corporation with plan numbers between 30,000-50,000
- by 1 July 2010 for owners corporation with plan numbers between 10,000-30,000
- by 1 July 2011 for owners corporation with plan numbers less than 10,000

This means that only those owners corporations above the threshold, and having plan numbers in the relevant band, have to comply by the corresponding date.

There are about 65,000 owners corporations each with their own unique chronological plan number such that the higher the number the newer the owners corporation. So that an owners corporation with a plan number of 65,000 is the newest and an owners corporation with a plan number of 1 would be the oldest.

Another issue with the Act is whether in fact a “prescribed” owners corporation actually requires a maintenance fund. There is little doubt the intention is that it does and this is clear in both the Final Report [Proposals 14 and 15] and the 2nd Reading Speech by Mr. Hulls:

“Prescribed owners corporations will be required to ... establish a maintenance plan and a maintenance fund.”

However, the reality of the Act is that a “prescribed” owners corporation:

1. Must prepare a maintenance plan
2. A maintenance plan has no effect unless it is approved by the owners corporation
3. Unless a maintenance plan is approved by the owners corporation there is no obligation to establish a maintenance fund.

Thus to comply with the legislation all a “prescribed” owners corporation has to do is to prepare a maintenance plan. The plan can then sit on the shelf forever totally ignored! It is recommended this be reviewed to ensure the Act says what it is intended to say.

The RIS erroneously says Maintenance Funds are required to be in a separate bank account. It is just required to keep separate accounts for maintenance funds. Thus the RIS is inconsistent with the Owners Corporations Act 2006. It is not a requirement to have individual bank accounts – common cheque accounts will continue to be acceptable because of this overarching responsibility that monies are held in trust and that a manager must account separately for the money held for each owners corporation.

Professional indemnity insurance

Other proposed changes include the minimum level of professional indemnity insurance for owners corporation managers to be reduced to \$1.5 million as opposed to the current \$2 million. Registration of managers will, among other things, ensure that insurance cover is in place. IBCMV supports this change.

Owners corporations certificate

An owners corporation certificate is required to be attached to the Section 32 statement, and the fee level for the owners corporation certificate is proposed to be \$150, up from the current \$50 + GST. **It is assumed the fee was to be stated as “\$150 + an amount equal to the amount of GST payable”, giving a fee of \$165 including GST. Just as the current fee for the Form 3 certificate in the Subdivision (Body Corporate) Regulations 2001 stipulates \$50 + GST. This should also be made clear in CAV’s education and information campaign published materials.**

Contingent liabilities remain a problem and will be addressed with a definition by an IBCMV Practice Guideline.

Owners corporations register

An owners corporation is required to have a register of important information, and it is proposed to allow 6 months from commencement to establish its owners corporation register. This is consistent with IBCMV’s recommendation.

Fee levels for the registration of managers

The fee levels for the registration of managers [a business registration not an occupational registration] are not yet included but indicatively it is understood these will be less than the IBCMV recommendation of \$160 per year, at about \$100 per year. This is reasonable.

Of concern is the fact that correspondence received in the mail from a legal firm made it apparent they had been provided with a non-approved and non-finalised version of the regulations, not available to the public nor provided to IBCMV to make comment on. This was different to the version on the CAV website. In particular, the changes to the proposed regulations relate to fees for the registration of professional managers, including the Registration Application Fee [\$110.20 or 10 fee units], Annual Registration Fee [\$77.14 or 7 fee units] and Late Lodgement Fee [\$11.02 or 1 fee unit]. Clearly, the Institute and its members have the right to be advised of and consulted about the fees applying to them. Until receiving the letter from this legal firm, IBCMV and its member managers were not aware of these draft fees. If accurate, the fee amounts are reasonable.

Management fees and the total owners corporation fees

The management fees and the total owners corporation fees, and hence the amount of money expended by owners corporations, is grossly underestimated.

Hourly rate for an average owners corporation manager

The calculated hourly rate for an average owners corporation manager of \$52.50 per hour is too low and needs amendment. An hourly rate of \$121.00 per hour should be used as a reasonable rate to be charged that sustains a business' profitability and enables the business to pay such things as the salaries of its owners corporation managers.

Compliance

IBCMV do not believe 80% is a sufficiently high target for compliance with the regulatory framework and the combination of education and risk based enforcement activity should endeavour to reach higher levels of compliance.

Form 2 of Schedule 2

The statement of advice and information for prospective purchasers and lot owners, Form 2 of Schedule 2, is welcome but needs information about the management of an owners corporation.

Other

This submission doesn't highlight the many grammatical and formatting errors in the RIS and the regulations, but if required we can give you a list.

Evaluation strategy

It is welcomed that the evaluation strategy on p43 notes that given the proposed regulatory framework is new, evaluations of it will be undertaken every 6 months or earlier if obvious or systemic issues arise before this.

1. Management fees and total owners corporation fees used to determine amount of money expended by owners corporations

The management fees and the total owners corporation fees, and hence the amount of money expended by owners corporations, is grossly underestimated in the cost-benefit analysis of the Executive Summary part.

The draft RIS says on p2:

“It is estimated that costs across the sector may increase by the order of approximately \$65 million over the ten year life of the Owners Corporations Regulations 2007. To put this in context, in the same ten year period, it is expected that owners corporations will expend approximately \$472 million.⁶”

And note 6 says:

⁶ The Department of Environment and Sustainability (DSE) estimate that professional owners corporation managers manage around 50% of the 65,650 existing owners corporations, which may equate to approximately 286,000 lot owners (See Department of Sustainability and Environment (2006) *Customer Information Bulletin*, October, Edition 95). If each lot paid a minimum management fee of \$1650, this would equate to \$472 million.”

The quoted minimum annual management fee of \$1,650 is the same figure as in the IBCMV “Recommended Schedule of Duties and Charges” but the IBCMV figure is **per owners corporation not per lot**. The IBCMV document says the management fee is generally based on a charge in the range of **\$154 to \$440 per lot**, depending on the size and complexity of the body corporate.

Consistent with this, the 2006 National Strata Management Benchmarking Project results show that the average **base management fee per lot is about \$154**, with the average **total income per lot to the management firm per lot of about \$257**.

Further, management fees are only one component of owners corporations expenses. Generally it can be expected that the **management fee would comprise about 10% of the total expense budget of the owners corporation**. The other 90% is made up of items larger the management fee such as insurance premiums, maintenance, legal advice and any maintenance fund.

Thus, income of \$257 per lot equates to 10% of **\$2,570 per lot, per annum**.

The calculated total erroneously did not multiply by the 10 year lifespan.

Hence, \$2,570 per lot x 286,000 lots x 10 years = **\$7.35 billion**.

\$7.35 billion is, by an order of magnitude, much greater than the calculated \$472 million.

ALTERNATIVE CALCULATION

Quantifying the extent of the problem, the draft RIS says on p10:

"The IBCM recommends that the minimum fee for professionally managed owners corporations is \$1,650 per annum.²⁷"

And note 27 says:

"²⁷ Annual owners corporation fees can currently range from \$1,000 per lot in a traditional subdivision (such as a block of flats), to \$6,000 per lot for up-market inner-suburban subdivisions (such as townhouses) to \$20,000 per lot for city subdivisions (such as high-rise apartment towers)."

Accordingly, applying the \$6,000 middle range, then the \$5,000 column from the stated table on p10 is a reasonable average of total fees paid by owners corporations.

CONSEQUENTIAL AMENDMENTS

There are a number of other areas that consequentially are also erroneous.

Page 17 - it says:

"In those [prescribed owners corporations] cases the increased cost per lot may be approximately \$50 per annum. This represents approximately 3 per cent of their estimated annual owners corporation fees."

The **3%** is calculated based on the \$1,650 noted above which is **incorrect** and should be \$2,750 – giving **1.8%**. IBCM is not sure of where the \$50 per annum comes from or its validity.

Page 20 - Analysing the benefits of auditing it says:

*"If the IBCM's minimum management fee (**\$1650**) is taken as the maximum potential loss per lot owner, ..."*

Replace "\$1650" with "\$2570".

Page 26 - Analysing the benefits of professional indemnity insurance it says:

*"If the IBCM's minimum management fee of **\$1650** is taken as the potential loss per lot owner..."*

Replace "\$1650" with "\$2570".

2. Hourly rate for an average owners corporation manager

Note 39 on p22 says:

³⁹ At \$52.5 per hour for an average owners corporation manager, which includes on-costing and overheads. This is based on yearly income of \$50,000, the middle-income level provided in the Macquarie Bank National Survey of Strata Management Professionals (http://www.macquarie.com.au/au/business/strata/benchmarking_survey.htm) and includes on-costing and overheads. VCEC has set the default on-cost and overhead multiplier at 1.75.

The web site source cited for this data does not have this information; it is rather from the not publicly available full report of the 2006 project.

The citation of the project is incorrect and requires proper recognition. It should be:

“National Strata Management Benchmarking Project 2006 commissioned by Macquarie Bank and endorsed by the National Community Titles Institute (NCTI)”.

IBCMV disputes the hourly rate calculated.

IBCMV publishes a recommended schedule of duties and charges but there is no obligation to comply with the recommendation. If an hourly rate is adopted the time charge should be a reasonable rate. This will vary depending upon the type of services to be performed. The rate should be fixed prior to carrying out any duties. IBCMV recommends an hourly rate in the range of \$99.00 to \$220.00 per hour. IBCMV recognises that for complex matters a higher hourly rate may apply.

The hourly rate of \$52.50 per hour for an average owners corporation manager is too low and needs amendment.

An hourly rate of \$121.00 per hour should be used as a reasonable rate to be charged that sustains a business' profitability and enables the business to pay such things as the salaries of its owners corporation managers.

CONSEQUENTIAL AMENDMENTS

Page 26 - The \$52.50/hr is also used to calculate the costs of Model Rule 6, the internal grievance procedure:

“For professionally managed owners corporations, a basic dispute requiring a one-page statement and perhaps 30 minutes (at \$52.5/hour) may cost \$26.50.”

This and subsequent calculations using this also needs amending.

Page 28 - It is also used to calculate costs of the information and advice statement:

“It is therefore assumed that the statement may cost approximately \$9 to produce (10 minutes labour at 52.5/hour). This would account for the printing of the document and time taken.”

This and subsequent calculations using this also needs amending.

Page 30 - It is also used to calculate costs of the fees for owners corporation certificate:

“(at \$55.5/hour including on costing, overheads and paper)”

This includes the \$52.50/hr plus allowances for paper and copies of accompanying documents. The subsequent calculations' using this also needs amending.

Page 40 - It is also used in alternative option 1 for the fees for owners corporation certificate at Note 46:

⁴⁶ If it costs \$52.50/ hour for labour (including overheads and on-costing), then anything over 2 hours would be greater than the set fee.”

This would also need amending.

3. Fee for owners corporation certificate

The costs of the owners corporation certificate are calculated to be \$148 - thus a set fee of \$150.

It is assumed the fee was to be stated as “\$150 + an amount equal to the amount of GST payable”, giving a fee of \$165 including GST. Just as the current fee for the Form 3 certificate in the Subdivision (Body Corporate) Regulations 2001 stipulates \$50 + GST. This should also be made clear in CAV’s education and information campaign published materials.

The \$150 fee is in effect a price of \$136.36 + GST, which is less than the cost to produce a certificate based on the RIS calculations. If the fee is too low such that only part of the manager’s cost for the work involved can be recovered, then the management agreement would be changed so that the remaining portion [after the applicant’s fee has been paid] would be charged back to the owners corporation.

Costs of owners corporation certificate

Analysing the costs of the owners corporation certificate on p28 it says:

“With the exception of information relating to the funds held by the owners corporation and notices and orders served on the owners corporation, the prescribed information is already a requirement of the current regulatory regime.”

However, the new owners corporation certificate is more onerous than the current Form 3 Body Corporate Certificate and other information is required under the new Act and proposed regulations that is not currently a requirement. This is to include details of **contracts** affecting the common property; and also to attach required **accompanying documents** [copies of - rules, resolutions, information & advice statement, and a statement advising that further information on prescribed matters can be obtained by inspection of the owners corporation register].

Prescribed information for owners corporation certificate on p40 also needs amendment.

Content – Contingent Liabilities

IBCMV recommended the removal of contingent liabilities but these remain at Regulations 11(e) and 11(i). If liabilities have to be inserted, they should be limited only to items that have been resolved to be done. Thus at the very least a better definition of contingent liabilities is required.

Depending on the reference, the definition of “contingent” may be something which is uncertain, dependent on or conditional on an uncertain event or circumstance that may or may not occur. ‘Contingent’ can also mean ‘a possible but not very likely future event or condition’ and the word ‘liabilities’ as a ‘likelihood or probability’. The definition of “liabilities” may also include a financial obligation [not yet discharged], a debt, or responsibility.

Provision in regard to future works is required. Whilst the intent may be to alert prospective purchasers of the intention of the owners corporation to consider attending to some form of works, it is not workable in its current form.

The listing of contingent liabilities in the owners corporation certificate is not appropriate or not practical for listing in the owners corporation certificate because:

- contingent liabilities cannot be measured and depend on some future event
- the owners corporation certificate is required in 10 business days
- the owners corporation certificate included in the section 32 may impact on the sale of a lot and the owners corporation (or voluntary secretary) may get the information wrong and the vendor may suffer a loss
- the owners corporation register is available for inspection
- not needed as the following are already required:
 - details of legal proceedings
 - notices and orders served on the owners corporation
 - details of resolutions made at the last AGM

The IBCMV recommendation has not been adopted and the IBCMV solution will be to develop an IBCMV Practice Guideline for members on the Owners Corporation Certificate. It will be noted that all managers should add in a definition of “contingent liabilities” for the purposes of all certificates they issue, and note the only items listed at this question are those items that fit the definition below which is based on the advice of specialist strata lawyers.

Contingent Liabilities

Butterworth’s Definitions

“Contingency” is defined as “an event or circumstance which may or may not happen, which is conditional on something uncertain... If the event is highly improbable, then a contingency still exists as there is a small probability that it will in fact occur: *Inland Revenue Commissioners v Trustees of Sir John Aird’s Settlement* [1982] 2 All ER 929.”

“Liability” is defined as “being answerable, chargeable, or responsible; under legal obligation... In an accounting sense, the future sacrifices of service potential or future economic benefits that an entity is presently obliged to make to other entities as a result of past transactions or other past events.”

“Contingent Debt” is defined as “a debt, based on an existing obligation, that will or might arise at a future time or if a future event occurs: *Federal Commissioner of Taxation v Gosstray* [1986] VR 876.

Financial Definitions

1. “Contingent Liability” is defined in an online financial dictionary titled *The Language of Money* (accessible via the ANZ website) as “a potential expense, one that may or may not eventuate, depending how events turn out, but which should be provided for in properly kept accounts or budgets. Examples of a company’s contingent liabilities might include damages from a pending lawsuit against the company; guarantees given to secure another company’s borrowings; or having the company’s name as endorser on a bill of exchange that is yet to mature.”

2. The *Framework for the Preparation and Presentation of Financial Statements* (AASB publication) defines a “contingent liability” as “a present obligation of the entity arising from past events, the settlement of which is expected to result in an outflow from the entity of resources embodying economic benefits”.
3. AASB Accounting Standard 137: *Provisions, Contingent Liabilities and Contingent* defines a “contingent liability” as either:
 - (a) a possible obligation that arises from past events and whose existence will be confirmed only by the occurrence or non-occurrence of one or more uncertain future events not wholly within the control of the entity; or
 - (b) a present obligation that arises from past events but fails the criteria for recognition as a liability or provision because:
 - (i) it is not probable that an outflow of economic resources will be required to settle the obligation; or
 - (ii) the amount of the obligation cannot be measured reliably;

Note also that the accounting term is set by International Accounting Standards [IAS], and in 2005 the IAS queried whether contingent liability should be eliminated. See the separate attachment.

Case Law

In *Redundancy Case – PR032004* [2004] AIRC 287 the court accepted evidence regarding the definition of contingent liabilities. At paragraph 203 it is stated that contingent liabilities are:

- (a) liabilities of an entity that have not been recognised because there is significant uncertainty as to whether a sacrifice of future economic benefits will be required, or because the amount of the liability cannot be easily measured
- (b) items that are not recognised as liabilities because of significant uncertainty as to whether an obligation presently exists.

Conclusion

The term “contingent liability” is confusing because a liability is generally accepted to be a legal obligation which is not conditional or contingent. An obligation that is contingent in the sense that it may or may not arise does not by itself give rise to a legal liability. Therefore, for something to be a “contingent liability” there must be an existing legal obligation to settle the liability and the contingent element must relate to uncertain future events that may affect the amount required to settle the liability.

It will be correct to list only existing obligations on the owners corporation certificate. Whilst it is noted that definition 1 above extends the meaning of “contingent liabilities” to potential expenses that may or may not eventuate, this seems too broad and if this approach was followed one would have to include an infinite number of possible expenses.

Definition

In an owners corporation context the appropriate definition of “contingent liabilities” that IBCMV proposes CAV acknowledges and accepts is:

A liability that has been resolved to be incurred by the owners corporation at a future date, but which cannot be quantified as at the date of this owners corporation certificate.

Other content

Regulation 11, prescribed information for owners corporation certificate, requires two other changes.

11(a) says “the current fees for the lot for each quarter or annually”. After “annually” insert “or other period”. As with the current regulations, this needs flexibility as the current practice can be monthly or 6 monthly.

11(h) says “the total funds held by the owners corporation”. This provision has no value and should be deleted. Notwithstanding this, it is also ill defined. What does this mean? Is it a check of the last financial statement and stating the members’ funds held by the owners corporation, and the date at which it held those funds?

Number of owners corporation certificates

On p28 & p29 the RIS says:

“Considering the new requirement to have the information statement accompany the owners corporation certificate and the certificate to accompany a section 32 statement, the total number of statements produced will generally depend on the frequency of owners corporation lots purchased. Therefore, looking at the frequency of newly constructed lots and lots turned over would give an indication of information and advice statements produced under the new legislative framework.

Given that 66,000 lots have been created in the last 5 years⁴¹, it can be assumed that lots may continue to rise at a rate of 13,200 per annum. It can also be assumed that if the average turnover of lots bought and sold is once every 7 years (from a total of 483,590 lots), then there are also 69,094 lots turned over per annum. Therefore, it can be assumed that there is an approximate 82,294⁴² lots sold per annum (69,094 turned over lots + 13,200 new lots), the owners corporations of which will have to produce at least one information and advice statement (to accompany the certificate). It is important to note that this figure may increase as the frequency of purchased owners corporation lots increase.”

And the notes say:

⁴¹ *Data taken from Consumer Affairs Victoria (2006) Final Report of the Owners corporations Review, p 12.*

⁴² *The IBCM estimate that around 20,000 owners corporation certificates are issued annually, although the IBCM only represent 75% of the sector. Therefore, it could be assumed that approximately 25,000 certificates are issued annually, with the remaining 25% of the sector issuing 5000 certificates, under the existing regulatory framework.”*

Supporting the IBCM estimate referenced at Note 42, the Department of Sustainability & Environment Land Registry’s informal estimate is that:

In the current market, when there has been full adoption of the new certificate requirements and full compliance, ultimately there will be 30,000 per year.

This is based on the number of residential unit sales in 2005 and 2006. Perhaps marginally higher based on the share of certificate activity attributable to units.

4. Industry statistics

The industry statistics in the background of the executive summary on p1 says:

“Available data suggests that bodies corporate now provide services to between 10% and 25% of all residential housing in Victoria.¹ In 2002, it was estimated that the minimum total value of residential housing affected by bodies corporate was \$40 billion, which represents approximately 7% of the total of all property in Victoria.²”

And the notes say:

¹ Consumer Affairs Victoria (2006) *Final Report of the Owners corporations Review*, p 18.

² Ibid.”

These figures, from the Final Report, use data from 2002 that is now 5 years old and needs updating. Department of Sustainability & Environment updates this data every 2 years and the information is easily accessible by CAV. For example, in 2002 the figure was \$40 billion, but it is understood that as of 2006 DSE figures would show it is more like \$58 billion.

5. Costs across the sector

Regarding the costs across the sector, in the cost-benefit analysis of the Executive Summary part, it says on p2:

“It is estimated that costs across the sector may increase by the order of approximately \$65 million over the ten year life of the Owners Corporations Regulations 2007.”

This figure is made up of the costs detailed in the various sections of the RIS as follows:

1. Auditing	\$19.6m
2. Maintenance plans and funds [report, admin & fund costs - \$8.24m + \$33.27m]	\$41.5m
3. Valuations	\$2.19m
4. PI insurance	\$5.19m
5. Model rules [grievance procedure]	\$0.22m
6. Owners corporation register	\$0
7. Owners corporation certificate preparation [cost neutral & in Act]	\$0
8. Information & advice statement [\$6.16m but included in 9]	\$0
9. Fee for owners corporation certificate [\$12.2m but not considered because cost is transferred]	\$0
10. Fees associated with registration of managers [not included yet]	\$0
TOTAL	\$68.7m

This summary figure of \$65 million thus needs to be reconciled against the \$68.7 million.

6. Reducing the Regulatory Burden

The Victorian Government’s plan to reduce red tape, “Reducing the Regulatory Burden”, notes:

“Ensuring the administrative burden of any new regulation is met by an ‘offsetting simplification’ in the same or related area”

This has not been demonstrated in this RIS analysis. Thus VCEC [Victorian Competition and Efficiency Commission] in its review of the rigour of the RIS may not be satisfied.

7. Groups affected and their levels of compliance

The RIS notes on p17 that overall compliance is expected to be 80% with professional managers and larger owners corporations totally complying, whilst it is expected large percentages of the self-managed and smaller owners corporations not complying because they are regulated less and do not have the resources.

IBCMV understands the level of compliance is seldom 100%.

However, **IBCMV does not believe 80% is a sufficiently high target for compliance, and the combination of education and enforcement activity should endeavour to reach higher levels of compliance.**

As was noted in the Productivity Commission 2007, "*Performance Benchmarking of Australian Business Regulation*", Research Report, Melbourne, released on 19 February 2007.

"The enforcement of regulation

Regulatory enforcement refers to measures undertaken by government to achieve observance of, and adherence to, regulation by intended affected parties.

While excessively stringent enforcement can lead to unnecessary burdens, a lack of enforcement can undermine the regulation itself. The Institute of Body Corporate Managers (Victoria) noted:

Without active enforcement, not only are some of the benefits from regulation foregone, but those businesses that do devote effort to comply are put at a competitive disadvantage to those that do not. (sub. 1, p. 9)"

Pursue risk based enforcement based on professional association membership.

The benefits of regulation can come only from businesses and individuals complying with the regulation.

Enforcement activity, including inspections and audits, can be time consuming and thus costly, even for businesses which comply with regulatory requirements. Consequently, targeting enforcement on potential poor performers can reduce the adverse impacts on those which do comply, and strengthen incentives for better performance.

Risk based enforcement strategies would better focus enforcement activity through assessments of the likelihood and impacts of non-compliance across the owners corporation management sector.

CAV's regulatory enforcement is already risk based. It is recommended the same approach be taken here to reduce the possibility of unnecessary inspections of low risk businesses, but also that necessary inspections be carried out on higher risk businesses.

The recommended approach is to target managers first if they are not members of a professional association, and to target managers last if they are a member of the peak Victorian professional association. The IBCMV already sets standards for its members which are higher than statutory obligations.

Further, consistent with CAV's approach in other regulated activities, the enforcement policy needs to be well publicised to encourage compliance.

8. Benefits of auditing

Analysing the benefits of auditing on p20, the draft RIS says:

“The qualitative benefits of mandatory auditing are it would ensure that the management had not exposed the owner corporation to any regulatory obligation such as compliance with the Building Act 1993. ... Identification of this oversight during an audit can enable corrective action to be taken to ensure these insurance policies are effective if the need arises.”

A financial audit of the probity of accounts has nothing to do with detecting compliance with the *Building Act 1993*.

9. Benefits of maintenance plan and funds for prescribed owners corporations

In analysing the benefits of maintenance plans and funds for prescribed owners corporations, on p23 it says:

“This will ensure that separate bank accounts are used...”

For the protection of funds the Duties of Manager in section 122 [2] provides that a manager must account separately for the money held for each owners corporation.

Thus the RIS is inconsistent with the Owners Corporations Act 2006. **It is not a requirement to have individual bank accounts – common cheque accounts will continue to be acceptable** because of this overarching responsibility that monies are held in trust.

Amendments to the previous Bill, including the deletion of:

- the third sub-clause of Clause 27, Bank account, which required a separate bank account for maintenance funds, and
- the second sub-clause of Clause 40, Establishment of maintenance fund, which required that maintenance funds to be separate from all other funds,

means that **Maintenance Funds are not required to be in a separate bank account**. It is just required to keep separate accounts for maintenance funds.

Finally, the new section 33 [2], Financial Records, states an owners corporation that has an approved maintenance plan must keep separate accounts for its maintenance funds.

Error

In the same section on p23 it says:

“over the twenty-five year life cycle”

This should be “ten year”.

10. Costs of model rule 2.1(1) – metering of services and apportionment of costs of services

In analysing the costs of the model rules, relating to Rule 2.1(1), on p26 it says:

“This rule would mean that owners corporations would be unable to be reimbursed for the potential administrative costs they may suffer for the administration of services to lot owners or occupiers (organising accounts etc). However, it is envisaged that this cost would be minimal and one that many owners corporations would already be enduring and passing on to lot owners as part of their fees.”

Upon reading this rule it appears to IBCMV that this is like a maximum retail price applicable, and that economies of scale would see substantial benefits to individual lot owners such that the price they pay, even with administrative costs added on, would still be less than the price the individual lot owners would pay if they were supplied directly. The RIS as quoted is saying no administrative costs may be reimbursed at all.

If this was the case this would undo many existing arrangements owners corporations have with suppliers of bulk services for electricity, gas, water, provision of electronic keys, debt recovery, etc.

For example, many owners corporations have existing embedded energy network contracts for electricity and the transitional provisions will not apply where it is inconsistent with the new regulatory framework. Model Rule 2.1(1) may well impact upon any owners corporations ability to on sell. There are also many examples where suppliers will not read the individual meters. In these cases, how will the cost be known?

Notwithstanding this proposed rule, it is arguable there is nothing stopping an owners corporation from passing a special resolution to amend the rules and thus allow for administrative costs in any event.

Box 1 – What is the situation with water in owners corporations?

Is there one meter for all or individual meters? If it's one for all, how does this work and is it fair? Does this situation cause controversy?

Yes there are some blocks that have individual meters and others that do not. Those that do not can in most cases have individual cold water meters fitted, however, in some buildings it is difficult to do so without extensive works.

The case *Mulholland v Chen* is the 'test' case. Both sides had legal representation and the matter was fully argued over two days. Tribunal Member Mr Vassie handed down his decision on 15 Dec 2005. It runs to 30 pages but in summary he ruled:

- The owners corporation can invoice owners whatever the owners corporation decides.
- Pursuant to s 52 of the Residential Tenancies Act, a tenant is only liable for the cost of water at the same price the water utility company charges the owners corporation. This is water that flows through the hot and cold meters.
- The tenant is not liable to pay for any heating of the water. It requires gas and electricity to heat the water, but the meters measure only water. He ruled that gas or electricity were therefore not 'separately metered' as required.
- Also under the Act, tenants are not liable to pay any administrative, meter reading, account charges or the like.

Origin Energy, TRU and others have, for many years, charged 'gas' based on litres of hot water. The conversion of litres of water to kilojoules of gas has been gazetted by the Essential Services Commission. It was argued that owners corporations should be able to do the same, but Mr Vassie did not accept this argument as owners corporations are not licensed gas retailers.

Current position:

There a number of owners corporations that are now introducing charging water without any 'heating' component. The supply of water is much more expensive than the gas being used. It is felt this is due to the efficiency of the bulk boilers in new buildings. Inner Melbourne examples include owners corporations such as The Arkley, Conder and Flinders Wharf.

Most owners corporations with bulk hot water systems and the Carter Research separate meters are not charging water. The Mirvac Docklands owners corporations and the MAB New Quay owners corporations Boyd, Palladio, St Elia and Nolan properties do not charge.

Some buildings do not have individual hot water meters, separate to the individual cold water meter and supply. There may be, for example, a gas service provider meter that measures hot water volumes into a lot though that statutory information is retained by the provider to drive off individual energy bills. In that situation, the water utility measures and bills cold supply individually and provides a bulk hot water bill to the owners corporation.

The alternative solutions are:

- The Residential Tenancies Act requires amendment to make tenants pay for heating of water (Most unlikely); or
- Essential Services Commission [ESC] grants exemptions to owners corporations to enable them to sell gas, as they do now with (embedded) electricity exceptions. It is understood that Pentridge owners corporation has such an exemption. Applications to ESC have been denied although we understand they may review gas licensing within the next few years. If they do so then an owners corporation could make application for gazetted rates for converting water measurement to gas. For example, Flinders Wharf pays around \$125,000 water, but only \$35,000 for gas.

This is an important issue as tenants in many owners corporations are getting free water and, in particular, free hot water.

11. Costs & benefits of Model Rules

Internal grievance procedures

As stated on p26 of the RIS the proposed Rule 6 as set out in the Model Rules makes no allowance for the costs of professional managers in facilitating the internal grievance procedures. Such costs may include correspondence and communications with the parties which can be time consuming. These costs should be included and allowed for.

The rule only allows for the cost of the manager preparing the written statement. It is also reasonable to assume that many owners corporations committees will not want to volunteer their time to attend these meetings and thus managers may be engaged to do this on their behalf. Hence the total costs would be considerably more than the \$220, \$115 discounted over the ten year life of the proposed regulations.

Evacuation procedures

On page 27 in relation to the benefits of Model Rules, the RIS says:

“These model rules will also improve the capacity of owners corporations to meet a range of government requirements, such as fulfilling safety requirements (for example evacuation procedures in buildings)”

There are, however, no specific legislative requirements for owners corporations to have evacuation procedures. A joint publication of the MFB [Metropolitan Fire Brigade] and IBCMV, “Fire Alarm Systems & False Alarms”, is about to be published. There are two versions, one for owners corporation managers and another for owners & occupiers. In the managers brochure, relating to evacuation procedures, it says:

“The fire services recommend that all premises with internal common areas have evacuation procedures. A floor plan showing exits, fire extinguishers, assembly points and advice not to use lifts should be displayed in common areas including lift lobbies on each floor level.

Developed emergency procedures may form part of a building’s certificate of occupancy (usually for larger apartment buildings). Please ensure these are implemented according to AS3745-2002 and 4083-1997.

Further information (including a standard form for Emergency Procedures with Evacuation Instructions) is available on: www.mfb.vic.gov.au. Follow the links ‘safety’ □ ‘workplace safety’ □ ‘workplace’.”

Use of equipment, services and amenities

The RIS also says:

“Clear rules for health, safety and security and for the use of equipment, services and amenities, should enhance better use and enjoyment of common property and lots.”

Although there is the power to make a rule relating to the use of equipment, services and amenities from the new Act, there is no model rule relating to this provision in the model rules. This statement needs to be amended accordingly.

12. Competition impact of proposals

This section, on p35, says:

“The proposed Owners Corporations Regulations 2007 do not impose restrictions on competition.”

This is not correct. The required professional indemnity insurance cover and registration of managers are examples of restriction on competition because these are legislative entry barriers to the owners corporation management market. Refer to CAV Research Paper No. 9 November 2006: “Using licensing to protect consumers’ interests”.

There is no doubt that professional indemnity insurance cover can be comparatively costly for smaller and/or part-time operators to obtain the required insurance compared to larger businesses, creating a potential barrier to competition. The result can be higher prices and/or fewer body corporate managers, particularly in rural areas. This can have the perverse outcome of reducing the access to services for some consumers.

The RIS should be reworded to say it does not impose “significant” restrictions on competition.

13. Alternatives to proposals – prescribed owners corporations

Maintenance plans and maintenance funds

Considering the alternatives for prescribed owners corporations on p37, it says:

“Regulation 5 of the proposed regulations proposes that a prescribed owners corporation is one that consists of more than 100 lots, which is similar to NSW, or within a financial year levies annual fees of more than \$200,000.”

The situation in NSW is that maintenance [ie “sinking” in NSW] plans are being phased in over a 3 year period as a requirement for all owners corporations regardless of size. An important difference though is that this is a requirement to prepare a 10-year maintenance plan report. It is not a requirement that owners corporations have to act on the plan and implement a maintenance [ie sinking] fund.

In NSW all owners corporations will have to undertake a maintenance plan but none of them have to implement it with a maintenance fund. The proposed regulations of this RIS are for prescribed owners corporations to be required to do both – maintenance plans and maintenance funds.

Thus NSW have a much lower threshold for maintenance plans but no requirement for maintenance funds. A note should explain these important differences.

Note, though, that opinions vary in NSW on whether owners corporations have to implement and adopt their sinking fund plan. Some observers conclude that when the legislation is read in conjunction with the second reading speech, owners corporations are required to raise funds to meet the estimates set out in their sinking fund plan.

Alternative option 1 - higher threshold

When discussing the alternative option 1 [higher threshold – 150 lots or \$250,000] it says on this p37:

“Less than 25% (compared to around 1/3 of lot owners with the proposed threshold) of lot owners...”

This is incorrect. From Note 34 and Note 36, 1/3 is not correct and should be 27% of lots [ie 130,000/483,590]

Alternative option 2 - lower threshold

When discussing the alternative option 2 [lower threshold – 20 lots or \$50,000] it says on this p37:

“...(approximately 65% of the sector would be a prescribed owners corporation)”

This is incorrect. From the table in the Appendix, more than 20 lots would be 45% of lots [possibly marginally more if an allowance is made for some owners corporations with fewer than 20 lots that would have fees greater than \$50,000].

14. Alternatives to proposals – fees associated with registration

Considering alternatives to the fees associated with registration on p42, in Option 2 with increase fees associated with a stricter licensing regime, it says that the licensing schemes for Estate Agents and motorcar traders are not based on full cost recovery for the administration of these systems. In the example of Estate Agents, it says that based on full cost recovery an Estate Agent's license would cost \$3572 for a corporation or \$2369 for non-corporations.

Given the reasons outlined earlier in the RIS for fees associated with registration of managers to be on a full cost recovery basis, why are other licensing schemes, such as the examples of Estate Agents and motorcar traders, not based on full cost recovery?

Why then should not the fees for registration of managers also be subsidised?

15. Extent of regulations and forms

At only 17 regulations and 10 pages total in length, it is remarkably short. The only forms prescribed are a Proxy Form [Form 1] and a Statement of Advice and Information for Prospective Purchasers and Lot Owners [Form 2]. It does not include, for example, forms for making/amending/revoking rules, change of address, etc.

At p17, Enforcement, the RIS notes:

“An important emphasis of the proposed regulatory structure is that it has been designed to limit the role of government in intervening in the decision making of owners corporations. It does this by focusing on ensuring that the public has the information and tools to effectively manage their responsibilities and relationships. Accordingly, not all matters that can be prescribed under the Owners Corporations Act 2006 have been prescribed.”

Whilst not over-prescribing is laudable in isolation, questions remain whether enough has been prescribed namely appropriate forms to give guidance to owners corporations. Are many of these matters intended to be part of the information and education campaign by CAV in the form of guidance materials such as fact sheets and the like?

Proxy Form - Form 1

Also, is the prescribed Proxy Form, Form 1, a minimum that may be added to without changing its intent? Or is it unable to be changed at all? It needs to be the former.

16. Model Rules – Schedule 1

The Model Rules at Schedule 1 on p54 says it is pursuant to Regulation 16. This is incorrect, it is actually Regulation 8.

1.4 Waste Disposal, says “...of the occupiers of other lots” but should say “...of the owners, occupiers or users of other lots”.

2.1(3) says: “Subrule (4)...” But should be “Subrule (2)...”

Also note throughout the regulations the inconsistent spelling – subrule, sub-rule, etc.

3.2(c) says “...specified for purpose...” but should say “...specified for such purpose...”

5.1 & 5.2 address the issue of noise and not interfering with others use of the common property, but shouldn't they also refer to noise not having an affect on lots?

6(5) says “...within 10 working days...” but should say “...within 10 business days...” consistent with definition of “business day” in the new Act.

17. Schedule 2, Form 2 – Statement of advice and information for prospective purchasers and lot owners

This is welcome but leaves out any information about owners corporation managers. As detailed in the Executive Summary of the RIS, problems to be addressed, on p2 it says:

“Some of the major causes of disputes related to a lack of information about the...role of...manager...”

A lack of understanding of the role of the manager is a key source of disputes and an extra section should be included to educate prospective purchasers.

Before “Further information”, insert:

Management of an owners corporation

An owners corporation may be self-managed by the owners or professionally managed by an owners corporation manager. Owners corporations that do not have a professional manager and are self-managed (ie, run by a ‘volunteer manager’) are still subject to and need to comply with their obligations in the Act and Regulations. If an owners corporation decides to appoint and pay a professional manager, it must be a registered manager. The role of a professional manager typically includes assisting owners with the administration, management, finances, meetings, maintenance and insurance of common property.

Error:

In the section “How are decisions made by an owners corporation?” it finishes with the statement that decisions “will be made by a majority vote”. This is not correct. Replace “will” with “may”.

Error:

In the section “Lot entitlement and lot liability”, a full stop is missing after the word “pay”.

18. Letterbox/Sign

Regulation 17 says that self-managed owners corporations require a letterbox/sign, and professionally managed owners corporations require a sign.

In both cases, these require the following details to be displayed:

- a. Name
- b. Address
- c. Telephone number

Regarding [b], the address, it does not clarify that a correspondence [ie postal] address is sufficient rather than a street address. So, at the very least, it should be made clear that a postal address is adequate because currently it is a huge cost impost to owners corporations when a manager moves and the signs for all the owners corporations they manage have to be changed and the expense is passed on to the owners corporation.

IBCMV understands that Land Registry is currently working on a project to change the current Form 5, Change of Address, so that it will not just be “one to one” but rather allows for “one to many”. i.e. changing one manager’s details and all their owners corporations managed. This would be welcomed.

Regarding [c], telephone number, this is a new provision not currently required. There are extensive privacy concerns with this new provision, particularly with self-managed owners corporations. The telephone number would have to be the person’s home phone number unless a mobile number is listed.

19. Other errors requiring amendment

Owners corporation register

Analysing the establishment of owners corporation register on p27, the RIS refers to s144(2) but this is wrong and should be s147(2).

Information and advice statement

Analysing the information and advice statement on p28, the RIS refers to Section 151(b)(ii) but this is wrong and should be Section 151(4)(b)(ii).

In the same section/page, analysing its costs, it says "Forms 2 of Schedule 3" but this is wrong and should be "Forms 2 of Schedule 2".

Also in the same section on p29 it says: "(9 ? 82,294)" but should be "(9 x 82,294)".

Fee for owners corporation certificate

Some other minor errors requiring amendment to this section on p 30–

- Replace "the existing fee (\$55 + GST)" with "the existing fee (\$50 + GST)"
- Replace "information and advice statement (Schedule 3, Form 2)" with "information and advice statement (Schedule 2, Form 2)"
- At note 44 on this page, replace "Form 2 of Schedule 3" with "Form 2 of Schedule 2"

Alternatives to proposals – fee for owners corporation certificate

The option 2 on p40 says:

"the existing regulations prescribe a set fee of \$55 plus GST."

This is not correct – it should say \$50 plus GST.

Schedule 2, Form 1 – Proxy Form

It says on p57:

"Under regulation 8 of the..."

This is wrong and should say *"Under regulation 6 of the..."*

Appendix – Powers of Attorney

Though this submission is in response to the proposed regulations, another issue has arisen with the Owners Corporations Act 2006. It is an issue with the restriction of Powers of Attorney raised by major serviced apartment operators.

In the new Act developers [and anyone else] are prohibited from requiring owners to provide proxies or powers of attorney as a condition of purchase. The rationale is to impose specific performance standards on property developers to prevent cases where developers award themselves irrevocable proxies, or enter into long-term service contracts with subsidiary or related companies that are not cost competitive. The principle applying here is that a power of attorney or proxy must be freely given. The penalty for this offence is 60 penalty units. IBCMV supports that these practices cannot be allowed to continue.

However, the concern is that an unforeseen consequence of these provisions is that serviced apartment operators will find it extremely difficult.

For the purposes of the Owners Corporations Act 2006 in respect of the power of attorney provisions, a "typical" serviced apartment scenario is as follows;

- The Serviced Apartment Entity ("the Tenant") will either occupy the entire building or be the major tenant of the building.
- The Tenant will typically assume the responsibility for the maintenance and cleaning and general day to day management of the building.
- The Tenant will charge the owners corporation a fee for the building related work which it conducts - i.e. cleaning, maintenance etc.
- Pursuant to the standard form of a serviced apartment lease, the Tenant will be responsible for the payment of non capital related owners corporation fees. As such any day to day fees which are incurred by the owners corporation are borne by the Tenant.
- The standard serviced apartment lease includes a provision whereby the Landlord grants to the Tenant a power of attorney - this is typical in the accommodation industry. The power of attorney is needed so as to ensure that the Tenant can have access to, and the utilisation of, a building which will enable it to operate its business - in particular the use of the power of attorney will avoid the need to consult all of the landlords (often in excess of 60) to obtain their consent to certain items (the cost of which is, in any event, often borne by the Tenant). As such, as a result of the power of attorney, the Tenants ability to operate its business is not in any way compromised.
- The 'serviced apartment' power of attorney also allows the Tenant to have limited rights to raise Maintenance Fund levies (which are paid for by the Landlord) and to appoint/remove the owners corporation manager.
- It should also be noted that the owners corporation manager will, at all times, oversee any rights exercised by the Tenant pursuant to the power of attorney provisions. As such there is an additional "check and balance" which can provide landlords with comfort that their interests are, at all times, protected.

If the new Act remains unchanged, the efficiencies which the current power of attorney provisions created for the Tenant may be lost - which may in turn have an adverse effect on the Tenants ability to operate its business. As the power of attorney provisions do not in any way have a detrimental impact on the landlords (particularly as it is the Tenant which bears the non capital related owners corporation costs) an inability to utilise them would be of concern to serviced apartment operators.

The Act needs to be amended in a way that enables serviced apartment operators to continue to utilise a power of attorney in the manner currently being used.