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# Irish Property & Facility Management Association (IPFMA)

## Interpretation and General Observations of the Multi-Unit Developments Bill 2009 – Submission to Government

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IPFMA

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## Executive Summary

The IPFMA consider that the new legal framework of the Bill and its provisions will when enacted, provide improved consumer protection for the owners of apartments in multi-unit developments and we welcome and endorse many of the provisions.

We believe that owners in multi-unit developments, as a collective group through the Owners Management Company (OMC), should have a contractual and legal right to:

- Have their development completed in accordance with planning permissions granted and building regulations.
- Receive at the time of transfer of the common areas all estate documentation pursuant to the development held by the developer.
- Set appropriate service charge levels to ensure adequate annual and longer-term maintenance levels are undertaken in compliance with statutory requirements.
- The peaceful enjoyment of the amenities as set out in the house rules
- Have a legal framework that supports these rights and provides appropriate sanctions and efficient and cost effective remedies in the event of default or non compliance.

In this paper, we set out under each section of the Bill what we believe to be the intention and we acknowledge the arrangements which will improve or address current problems and we also highlight additions required and some difficulties which we foresee in their overall application. We hope this paper will assist in the success of the new legislation.

Most of the difficulties noted arise from practical experiences that our members have encountered in the management of multi-unit developments in the last 20 years. We believe in order for the proposed bill to effectively address the issues raised it is essential that appropriate sanctions and efficient and cost effective remedies are provided for in the legislation.

The proposed bill acknowledges the fundamental right for the owners to a completed development and puts an obligation on the developer in this regard. However this will be of no use to the owners if as we are witnessing in the current environment the developer company goes into liquidation.

We would support the practical solution recommended in The Law Reform Commission's Report that, for new apartment developments, legislation should be enacted whereby in the event that the common areas (such as open spaces, lifts and internal stairs) have not been certified as completed under the *Building Control Acts 1990 and 2007*, the OMC would hold 5% of the purchase money for each apartment in trust for the developer until completion is certified. This would afford some financial recourse to the owners in the event that the developer subsequently encountered financial difficulties.

We highlight that irrespective of their condition at the time of transfer, once common areas and structural parts and utilities are vested in the management company, the management company (which is funded exclusively by the purchasers' and owners' service charges) immediately acquires onerous and contractual obligations to maintain and repair those common areas, structural parts and utilities, including all services. This is why owners become aggrieved to see their building being used to complete the estate.

A precise mechanism or requirement is needed on the part of the developer to complete the development, to verify the quality of construction, to address any snagging and completion issues or to furnish the owners and the management company with a final Certificate of Completion and Compliance for the overall estate itself.

The bill ensures the transfer of the common area occurs but does so without setting down clear conditions as to construction standards and completion therefore much needed essential regulations and conditions relating to the determination and standard of completion rights remain outstanding.

Our paper also highlights the importance of the delivery of estate documentation to the management company as a prerequisite to good estate management and how currently it is often not delivered, at all or as expected. Furthermore, if delivered, that there is no party assigned (such as an independent solicitor) or a prescribed method to ensure/certify the verification or adequacy of the documentation by a third-party professional acting on behalf of the owners collectively and we recommend that this be addressed.

We highlight that as recourse or remedy for defects Home Bond the Building Guarantee scheme, upon which many purchasers rely, is often found to be inadequate. The cover is far less comprehensive for apartment owners than for conventional house owners and few purchasers understand there is a distinguishment /difference until after the fact. The construction standard assurance and cover for dwellings in multi unit developments is significantly more limited and this should be addressed in the interest of consumer protection.

In relation to the new provisions in the Bill we also highlight some other practical matters that we believe warrant further consideration such as:

<p><b><i>Section 1 – Definitions – Multi-Unit Development</i></b></p>	<p>Is it intended to exclude houses, private or gated developments or mixed-use developments containing apartments and housing in the development in each case currently managed by a management company?</p>
<p><b><i>Section 2 – Transfer Prior to Sales</i></b></p>	<p>The absence of any mechanism to compel completion or satisfactory completion of the development (in particular, the common areas/structural parts).</p> <p>Therefore some primary concern remains - that is, although the common areas will be transferred to the management company in advance of the sale of any unit, it still remains unclear how completion will be determined and or completed and importantly how the standard of completion and indeed compliance with planning permission and building regulations will be confirmed.</p> <p>This new requirement may lead to developers setting up multiple management companies within an estate resulting in a block of units having a</p>

	<p>management company with a smaller common area transferred to each management company. While this practice might comply with the new requirement it is hardly what is envisaged under the Act. It would undoubtedly lead to its own completion and right of way issues for the owners in the terms of the overall estate and would lead to higher costs to owners in relation to the ongoing management of these smaller entities.</p>
<p><b><i>Section 3 – Transfer – Existing Developments</i></b></p>	<p>A defined process for the completion of the common areas before the extinguishment of the developers' beneficial interest including conditions is also required within the Bill.</p>
<p><b><i>Section 4 – Transfer - Completed Developments</i></b></p>	<p>This provision will be welcomed but it should also include the legal requirement for the delivery of defined estate documentation to the OMC at time of transfer of common areas.</p>
<p><b><i>Section 5 – Developers' Obligations to complete Development</i></b></p>	<p>This provision will be welcomed but there appears to be few safeguards and recourse to the owners where the developer may be experience financial difficulties and is unable to fulfil his obligations.</p>
<p><b><i>Section 6 – Purchasers' Automatic Membership of Management Company</i></b></p>	<p>The OMC must be provided with a contractual entitlement to obtain delivery from the developer of such company documentation.</p> <p>There should be a legal requirement of the owner to provide the OMC with their residential address (if it is not the dwelling in the development) and to be obligated to notify the OMC with any change.</p>
<p><b><i>Section 7 – Access and Shared Arrangements of Common Areas during Construction</i></b></p>	<p>In practical terms an appropriate obligation on the Developer to arrange and fund associated costs, such as insurance, cleaning, and repairing damage to the common areas caused during the work stage, is essential.</p>
<p><b><i>Section 8 – Ownership of Parts</i></b></p>	<p>We do not experience this as a frequent issue, but we welcome the flexibility it provides.</p>

<p><b><i>Section 9 – Determination of Developers’ Beneficial Interests</i></b></p>	<p>There should be a requirement that the declaration that the beneficial interest stands extinguished as respects the development is delivered to the management company.</p>
<p><b><i>Section 10 – Extinguishment of Developers’ Beneficial Interest</i></b></p>	<p>We believe an efficient mechanism to oblige developers having sold all of the units and left the common areas unfinished, to finish and transfer the common areas is essential and would be very beneficial. The failings of developers in this area have resulted in significant difficulties and exposure to the owners.</p>
<p><b><i>Section 11 – Right of Management Company to effect Essential Repairs</i></b></p>	<p>We welcome this provision, as currently the management company has no contractual right to collective remedy and redress when defects arise irrespective of their location.</p> <p>However in practice the legal costs incurred to recoup the costs incurred by the management company can be substantial and there is a risk to owners that the developer company may be in financial difficulty and consequently the owners not only end up with the cost of these necessary repairs but also the legal costs of trying to recover these costs.</p>
<p><b><i>Section 12 – Management Companies to be known as “OMC” and one vote per unit</i></b></p>	<p>We welcome the provision in Section 12 however the bill appears to be silent on the election of directors to the OMC and at what point owners would be eligible to serve as directors of the OMC. Is it envisaged that owners would be entitled to be elected to the board on the transfer of the common areas? What would be the composition of the board? Is the developer entitled to have nominees serve on the board? Given that the Board will control the OMC we believe it is important that this is clarified.</p>
<p><b><i>Section 13 – Annual Meetings and Governance (special note on fire safety management)</i></b></p>	<p>An urgent review and mandatory requirements to ensure that all works as set out in the Developer’s Approved Certification for Fire Safety Design and Installations are independently inspected, following completion, but prior to any building occupation or</p>

	<p>handover to the management company, and certified as built in compliance.</p> <p>Furthermore, we recommend a means to compel delivery by the developer to the management company of all fire-safety documentation, so as to ensure effective fire-safety operation and management.</p>
<p><b>Section 14 - Service Charges, Arrangements, Recoveries and Costs</b></p>	<p>One of the practical concerns is that there is generally a very low turnout of members at Annual General Meetings and consequently far reaching decisions could be made at Annual General Meetings under this section by what is in fact a very small representative number of the entire membership.</p> <p>Firstly in terms of <b>arrangements</b> for the services to be provided, the management scheme and the apportionment methods are generally set down in the formal legal title documentation. To propose that such matters be addressed at an AGM is unsuitable and is likely to be open to legal challenge from owners whose apportionment is set out in title documents and this subsequently has been varied at Annual General Meeting.</p> <p>Secondly, in terms of <b>service charge levels and transparency</b>:</p> <p>Normally 85-90% of the service charge budget relates to non-discretionary spend and covers annual, recurring consumption and maintenance costs. For example generally electricity, insurance and lift maintenance account for 30% of costs; A further 25% for refuse, grounds and cleaning; 10% on electrical and building repair and maintenance costs and; a further 15% on security/janitors services where applicable.</p> <p>A professional estimate of costs known as a budget must be prepared annually in advance and as carefully as possible, using the best information available. A professional agent will prepare a budget including options review and approval by the Directors of the management company.</p> <p>The Board of Directors (made up of owners) can then make informed decisions.</p> <p>Thirdly in terms of the <b>recovery of the</b></p>



	<p><b>Service Charge:</b></p> <p>Frequently, the problem is that the management company cannot identify the legal owner of the apartment. This prevents the management company taking legal proceedings against the owner to recover arrears of service charge.</p> <p>A mandatory requirement and timeframe to register and return the counterpart lease to the management company, provisions for a realistic level of interest and that all necessary legal costs and outlay incurred by the management company be fully recoverable.</p> <p>Finally in terms of <b>recovery of the Service Charge for unsold units:</b></p> <p>We welcome what we believe is the intention under Section 14.9 that the developer or building contractor is obligated to pay for all service charges levied under this section. The OMC currently pursues legal recovery of service charges on foot of covenants signed by the owner in the title documents at the time of purchase of the unit. However as there is no such title documents in respect of unsold units held by the developer or building contractor clarity is required on what legal basis the OMC would look to legally pursue the developer or building contractor if they were in default of paying service charges for unsold units.</p>
<p><i>Section 15 - Sinking Fund</i></p>	<p>We welcome these provisions however; we would be concerned that the Bill does not require the establishment of the sinking fund immediately upon or prior to the transfer of the common areas.</p> <p>We would recommend this section be amended to require sinking fund monies collected relating to prior years service charges be held in a separate designated bank account and only expended on expenditure outlined in Section 15.1. This would allow the OMC some flexibility in using funds collected to discharge day-to-day liabilities until such time as all service charges were collected for that year.</p>

<p><b><i>Section 16 - An Aggregate Request for Payment</i></b></p>	<p>We are not aware of the purpose or benefit of the amalgamation of the two charges, which contravenes current best practise, which is to provide separate figures and a copy of the budget and a detailed analysis of the service charge so that owners may be fully aware of what services are being provided for and the cost of each such service.</p>
<p><b><i>Section 17 - House Rules</i></b></p>	<p>Although house rules may have statutory recognition still there will be no means to enforce them. That is the real issue. Without appropriate legal sanctions, abuse will continue and as owners are not aware of the absence of sanctions an unreasonable expectation of how such matters may be resolved will continue.</p>
<p><b><i>Section 18 - Dispute Resolution and Rehabilitation of Multi-Unit Developments</i></b></p>	<p>We welcome Section 18, which introduces a dispute resolution mechanism.</p> <p>The right to seek orders to amend legal documentation relating to the management company and the formal documentation transfer of control of the management company; apportioning funds between service charges and the sinking fund are all welcomed also.</p>
<p><b><i>Section 19 – Persons who may apply under Section 18</i></b></p>	<p>We welcome subsection (1) (a), which includes the management company as a party entitled to apply to the court for an order to enforce any rights conferred or obligation imposed under the Act.</p> <p>However the bill appears to be silent on the election of directors to the OMC and its composition, which will dictate who actually controls the OMC.</p>
<p><b><i>Section 20 – Jurisdictions and Venue of Circuit Court</i></b></p>	<p>Noted</p>
<p><b><i>Section 21 - Mediation Conferences</i></b></p>	<p>We welcome Sections 21 and 22, which indicate that mediation should be used, wherever possible, to resolve disputes.</p>
<p><b><i>Section 22 – Report of Chairperson</i></b></p>	<p>We welcome Sections 21 and 22 that indicate that mediation should be used,</p>

<i>or Mediation Conference</i>	wherever possible, to resolve disputes.
<i>Section 23 - Saver for Existing Jurisdictions</i>	Noted
<i>Section 24 – Restoration of certain companies to Register</i>	We welcome this section, which extends to six years the period within which a management company may be restored to the register without recourse to the courts. This helps address the problem caused by management companies being struck off the register of companies and the onerous and very costly consequences for apartment owners who inter alia may be unable to sell until the management company is restored to the register.
<i>Section 25 – Transfer of Benefit of Guarantee and Warranties</i>	This is welcomed but we believe the section should also obligate the developer to deliver this documentation to the OMC at the same time as the transfer of the common areas.
<i>Section 26 – Restrictions on entering into certain contracts</i>	Noted
<i>Section 27 – Exercise of power to make Regulations</i>	Noted
<i>Section 28 – Short Title and Commencement</i>	We are unclear why sections 12 and 26 are excluded under this section.

We hope that our paper assists and contributes to the success of the Bill and in all ongoing regulations. The IPFMA are available and disposed to be of assistance in any practical manner that may assist to the development of these most welcome improvements.

## *The Multi-Unit Developments Bill 2009*

A Bill to amend the law relating to the ownership, control and management of the common areas of multi-unit developments and to facilitate the fair, efficient and effective management of bodies responsible for the management of such common areas, and to provide for related matters.

The Bill forms the centrepiece of the Government's strategy to deal with multi-unit developments and management companies. It is intended that the Bill will operate alongside and compliment the Property Services Regulatory Authority's comprehensive licensing system for all property service providers, including property management agents.

### *Section 1 – Definitions*

Section 1 contains standard / essential definitions and a number of concerns come to mind regarding definitions generally

A “**multi-unit development**” is defined as “land on which there stands erected a building which, or a part of which, subject to subsection (3) is divided into units of which not less than five are designed and intended for residential use”. Under subsection (3) those sections of the bill set out in the schedule apply to multi-unit development (i.e. a single building) comprising 2 to 5 units. Is it intended to exclude houses, private or gated developments or mixed-use developments containing apartments and housing in the development in each case currently managed by a management company?

To provide clarity to owners, the Law Reform Commission recommended a statutory definition of the term “**completion**” and that “completion” of the development be defined as certification by a professional person. This appears now omitted. A clear definition of “completion” would be beneficial if not essential as many current disputes / problems revolve around that term.

Similarly, a definition of “**satisfactory completion**” would be helpful. It would be beneficial if this definition were to include testing and commissioning of all relevant mechanical and electrical items. Test and Commissioning Certificates for lifts, pumps, fire systems, access, vehicle gates, intercoms etc are often not provided to the Management Company.

A definition and or prescription for the “**verification of completion**” would also be beneficial. The absence of any means to verify the standard of construction or determine satisfactory completion of the common areas is omitted. As no defined process currently exists for the owners to verify the estate documentation thus no level of assurance is provided nor do they have access to such documentation when the occasion necessitates this.

The definition of “**unit**” in section 1 (1) includes a unit designed for non- residential use. However section 1 (2) appears to apply only if that unit has self contained facilities, (bathroom and cooking facilities). Often a building in a multi-unit development will contain a mix of unit types. Is it intended that all unit types, irrespective of use, will be treated in a similar manner?

**Responsibilities of the Developer in terms of construction and completion** –The original draft Bill prepared by the LRC more clearly defined the responsibilities of the developer. In the bill these responsibilities are not directly referred to the developer but rather to “a person to whom this section applies”

**Responsibilities of The Developer and the Management Company in terms of the management of arrangements** - It would assist greatly in the delivery of a reasonably robust model of good practise if the Bill were to identify and set out in broad terms the different parties and their responsibilities at various stages. Whilst the detail of these responsibilities and their performance might be more appropriate to the formal legal documentation, (i.e. of the unit itself) significant difficulties occur, particularly in phased developments, where it is unclear whether it is the Developer or the management company which has responsibility for the management of arrangements.

## *Section 2 – Transfer Prior to Sales*

We welcome the intention of Section 2, which provides that ownership of the common areas of a development will be transferred to the management company before any apartments are sold.

The bill corrects the present common but unsuitable arrangement whereby the management company operates without any formal right to do so from the sale of the first unit rather than following the assurance of the common areas. The new arrangement will eliminate the current legally invalid practise and it will enable the management company to regulate the common areas and collect the service charges from the sale of the first unit.

This new arrangement may now avoid a developer retaining control of the common areas and the management company long after they should have been transferred or passed into the owner’s control. Consequently current issues in relation to the transfer, such as lack of enforceability, entitlement to notice and collective representation of the owners ought be no more.

Importantly it also provides each owner with membership of and the entitlement to an immediate involvement in the management company thereby better protecting purchaser’s interests and it eliminates the need now for power to compel the assurance of common areas.

It is unclear if this new requirement will lead to developers setting up multiple management companies within a development. It may result in each block of units having a management company with a smaller common area transferred to each management company. While this practice might comply with the new requirement it is hardly what is envisaged under the Act. It would undoubtedly lead to its own completion and right of way issues for the owners in the terms of the overall estate and would lead to higher costs to owners in relation to the ongoing management of these smaller entities.

However related problems still remain unresolved: The absence of any mechanism to compel completion or satisfactory completion of the development (in particular, the common areas/structural parts).

It is also still unclear how the Bill will address the absence of any means to verify the standard of construction or determine satisfactory completion of the common areas.

These issues currently are at the core of the vast majority of the problems and disputes in multi-unit developments.

Multi Unit developments are unique and require special consumer protection in that they involve purchasers contracting and paying over 100% of the purchase price although their apartments may be situated within only partially completed developments.

Indeed, the formal legal documentation invariably reserves the right of the developer to alter the estate (even going as far as to eliminate certain amenities) and imposes no obligation to finish out as per marketing/sales brochures or models of the estate. Few purchasers appreciate the possible consequences of this reservation.

The reason is that completion of sales occur frequently in phases within an ongoing development before site works and the common areas have been finished, and the standard RIAI Certificate of Compliance to the effect that the individual apartment complies with planning permission and building regulations contains a 'qualification', such as 'Insofar as it is applicable the estate has been finished at that point in time in accordance with planning'. Therein lies the problem.

Purchasers seldom appreciate that any item referred to as a 'qualification' is excluded from the Certificate of Compliance and highlighted as being not compliant. In reality, therefore the qualification could refer to all of the common areas and not only those immediately outside the owner's apartment door.

A practical solution was suggested in The Law Reform Commission's Report in which it recommended that, for new apartment developments, legislation should be enacted whereby in the event that the common areas (such as open spaces, lifts and internal stairs) have not been certified as completed under the Building Control Acts 1990 and 2007, the OMC would hold 5% of the purchase money for each apartment in trust for the developer until completion is certified.

This recommendation has been excluded. However, it is clear that the Law Reform Commission's intention was to both accelerate and set standards for completion, which would have resolved many current problems.

Notwithstanding the Law Reform Commission's recommendation, section 2 of the Bill generally does not include any alternative or a precise mechanism or requirement on the part of the developer to complete the development, to verify the quality of construction, to address any snagging and completion issues or to furnish the owners and the management company with a final Certificate of Completion and Compliance for the overall estate itself.

Currently the management company has no enforceable contractual right to oblige the developer to satisfactorily complete the development of the overall estate and the common areas, as an integral part of the transfer of the common areas. This causes frequent problems.

Therefore some primary concern remains - that is, although the common areas will be transferred to the management company in advance of the sale of any unit, it still remains unclear how completion will be determined and or completed and importantly how the standard of completion and indeed compliance with planning permission and building regulations will be confirmed

Seldom is it appreciated that irrespective of their condition at the time of transfer, once common areas and structural parts and utilities are vested in the management company, the management company (which is funded exclusively by the purchasers' and owners' service charges) immediately acquires onerous and contractual obligations to maintain and repair those common areas, structural parts and utilities, including all services. This is the reason why owners often end up seeing their service

charge being used for developer and completion work. A practice, which must not be allowed.

Therefore much needed essential regulations and conditions relating to the determination and standard of completion rights remain required and outstanding.

### **Section 3 – Transfer – Existing Developments**

Section 3 provides that in cases of existing developments, the developer must transfer ownership of the relevant parts of the common areas to the owners' management company within six months subject to the retention by the developer of the beneficial interest, pending completion of the relevant common areas.

This arrangement may operate well, in theory, to effect a transfer of the common areas but in practice for it to be beneficial and effective firstly an appropriate and defined process to ensure satisfactory completion will be essential as part of the conditions to transfer and before the extinguishment of the developers beneficial interest.

In the IPFMA's Position Paper Part One 1.2 – it was recommended that multi-unit conveyancing documentation, including the Certificate of Compliance, be materially amended so as to remove the limitation of the rights and remedies available to purchasers consequent on the usual qualifications in the Certificate of Compliance, which effectively exclude defects or completion issues that might arise outside the four walls of the apartment but within the development.

This remains an important requirement, as presently, once the purchaser completes, the degree of protection and his or her legal recourse in relation to the quality and completion of the common areas is limited. Although we can see the intention of the Bill is to ensure the transfer of the common areas, which may be outstanding, it is not clear if the Bill fully addresses the fundamental issues of construction standards and completion of the common areas themselves.

It may not be fully appreciated that frequently the sole purpose of the owners' desire for the transfer of the common areas and control of the management company is not to perfect title but actually to address outstanding problems usually to do with the quality/standards and timelines of the completion of the overall development. For this purpose they consider that they must gain control of the management company as the vehicle to seek resolution of the issues with the developer.

Owners often see transfer and control of the management company as their only means and mechanism to enforce their contractual right to a satisfactory and completed development.

Clearly a defined process for the completion of the common areas before the extinguishment of the developers' beneficial interest including conditions is also required within the Bill.

### **Section 4 – Transfer - Completed Developments**

In section 4, it is provided that in the case of completed developments the developer must transfer ownership of the common areas to the relevant owners' management company within six months of enactment of the Bill.

Whilst this provision will be welcomed it should also include the legal requirement for the delivery of estate documentation including at a minimum the documents mentioned below. This documentation is a prerequisite to good estate management.

Invariably, such documentation is not delivered, as expected. Furthermore, if delivered, there is no prescribed method to ensure/certify the verification or adequacy of the documentation by a third-party professional acting on behalf of the owners collectively.

Such documentation, at a minimum, ought to include the following:

- i. Agreed snag list and Practical Completion Certificate.
- ii. Certificate of Completion and Compliance with planning permission and building regulations for the overall development and estate.
- iii. Set of 'as-built' drawings, operational and maintenance manuals and health and safety manuals (three copies).
- iv. Warranties and other guarantees, including test records for drainage, water and heating pipe work.
- v. Certifications for fire safety, health and safety, including the project safety file.
- vi. Schedule of plant, equipment and infrastructure defining its expected useful life, recommended maintenance and details of the relevant suppliers and installation sub-contractors.
- vii. Title documents to the estate including original stamped and registered transfer of the common areas.
- viii. Stamped and registered counterpart leases for all the units within the development.
- ix. Documentation relating to the management company, including the statutory documents such as the Register of Members, the Minute Book and the company seal.

Therefore conditions of transfer should include a legal requirement for the delivery of estate documentation and a means to verify the adequacy of the documents.

## ***Section 5 – Developers' Obligations to Complete Development***

Section 5 provides that the transfer of ownership of common areas does not relieve a developer of responsibility for completing the development in compliance with the Planning and Development Acts and the Building Control Acts.

We would have concern as to how such compliance will be assured.

The current legal framework already provides similarly in law but not in practise. Presently this is a core problem. The IPFMA believe that for any existing or new legislation to operate effectively, a regulatory system must operate to ensure the application of the law.

In accordance with planning legislation, all developments must be completed in compliance with the Planning and Development Acts. However the problem is that the legal framework operates more in theory than in practise, particularly in relation to multi-unit developments.

Therefore in the absence of specific and practical provisions the Bill when enacted may similarly fail to deliver in practice any real improvement. While there may be a legal obligation on the developer to ensure completion of the development there appears

to be little safeguards to the owners where the developer may experience financial difficulties. We are experiencing this in the current environment where the developer is unable to complete the development and the specific developer company pertaining to that development is going into liquidation. This is likely to result in significant difficulties and exposure to the owners. Meanwhile there appears to be no obstacles to the developer carrying on further developments under new entities.

Part 2 of the IPFMA's Position Paper identifies issues within the planning system and the absence of a proper system of building control. It draws attention to the limitations of 'self-certification', without a local authority building control inspection programme, which results in both a lack of quality control in construction and compliance with building regulation standards, which in particular affect the multi-unit building sector.

In parallel, it identified the limited provisions for planning enforcement by local authorities and the related difficulties with development completions, defect remedies and redress procedures.

Part 2's recommendations include a process which entails the use of planning conditions as contractual obligations for multi-unit developments, similar to that commonly used to provide protection for satisfactory completion of developments, which are taken in charge by local authorities. It also recommends a review of the local authorities' role in monitoring building control and compliance with building regulations in private residential developments, to ensure such protection, which is apparently intended but not provided, in fact.

We believe that within the planning process as it stands, there is a missed opportunity to address some of the issues commonly arising in relation to construction and estate completion.

The opportune time for the planning authority (or An Bord Pleanála on appeal) to set down conditions to protect long-term residential amenities is at the 'grant of permission' stage.

In estates, which will be taken in charge or part in charge, planning authorities usually require a cash lodgement or performance bond with a financial institution, as security for the completion of the common areas. However, where local authorities are not taking private estates and roads in charge they do not routinely insist on security bonds in their planning conditions for such schemes.

The IPFMA's Position Paper also recommended legislative reform to ensure that a comprehensive and consistent system of inspection of building standards be provided by each local authority in order to police and ensure the completion of multi-unit development in compliance with building regulations.

This is still considered necessary. In multi-unit developments there is currently limited and inadequate assurance of completion and compliance with building regulations/building control. The current process of 'self-certification' operates poorly without milestone monitoring/ inspections by the relevant local authority. Reform is essential in order to protect apartment owners' investment and long-term housing welfare and amenity through the management company.

We recommended further legislative reform to provide that local authority enforcement powers be extended and that they be sufficiently resourced to ensure a prompt and efficient means of monitoring and enforcing construction standards and remedying defects and completion issues in multi-unit developments.

The IPFMA Position Paper also highlighted the limitations and deficiencies in HomeBond as a Defect Guarantee Scheme also recommend that further legislation be enacted so that HomeBond, the building guarantee scheme, be developed to a

standard for multi-unit developments similar to that provided for conventional housing units and also that Home Bond be extended to cover building services including plumbing, mechanical and electrical services within the common areas.

## ***Section 6 – Purchasers’ Automatic Membership of Management Company***

In Section 6 the Bill provides that on the sale of an apartment, the vendor’s membership of the management company will transfer automatically to the purchaser, that the management company will be obliged to give to the purchaser the share or membership certificate as soon as practicable following notification of the change of ownership; and that the management company must ensure that the register of members is updated and complies with other relevant requirements under the Companies Acts.

To enable compliance – we believe it is important that if the Management Company is so obliged then in the first instance it must be provided with a contractual entitlement to obtain delivery from the developer of such company documentation.

Currently the management company documentation including the register of members is often not handed over by the developer to the management company and as a result its affairs cannot be administered as statutorily required.

Accordingly we recommend the delivery of such documentation by the developer to the management company must be a prerequisite.

We believe there should also be a legal requirement of the owner to provide the management company with their residential address (if not the dwelling in the development and to be obligated to notify the management company with any change. Unfortunately it is a common problem that owners who are not living in the dwelling in the development do not provide their residential addresses either by design or fault. This makes the legal collection of services charges where there is default by the owner expensive and onerous.

## ***Section 7 – Access and Shared Arrangements of Common Areas during Construction***

Following early transfer of the common areas to the management company, section 7 provides that the developer automatically retains the right to pass and re-pass over these areas to complete the development with minimum inconvenience to residents, and to ensure that access is available to them at all reasonable times. A reciprocal duty is imposed on the Management Company not to obstruct the developer in exercising its rights over the development itself or adjoining land.

In practical terms an appropriate obligation on the Developer to arrange and fund associated costs, such as insurance, cleaning, and repairing damage to the common areas caused during the work stage, is essential. Whilst there is an obligation to arrange indemnity insurance, the Bill is silent as to whether the cost of this should be born by the developer or the management company.

If the common areas are to be shared by residents and construction workers, even though temporarily, then to avoid unreasonable costs being charged to the management company, careful operational mechanisms ought to be defined and provided for.

The Bill requires that the developer must indemnify the management company against any claims made in respect of acts or omissions by the developer in the course of the completion works. Whilst the indemnity is appropriate, it would appear that the management company (to be funded by the owners) is to be burdened with the cost and necessity of insurance due to the developer's building works.

Surely the insurance necessitated by the developer should be paid for by the developer and this should be clarified in the bill. Arranging such insurance and its cost requires a practical arrangement that is appropriate and equitable.

## ***Section 8 – Ownership of Parts***

Section 8 provides where the ownership of certain parts of the common areas has been allocated to individual unit owners that in such cases, the unit owners concerned and the management company may agree that ownership and responsibility for any such part may be transferred to the management company. The section also provides that if consent is unreasonably withheld to such transfer, an application to the court may be made under the dispute resolution mechanism in section 18.

We do not experience this as a frequent issue, but we welcome the flexibility it provides.

## ***Section 9 – Determination of Developers' Beneficial Interests***

Section 9 provides the mechanism for the extinguishment of the developer's beneficial interest in the common areas upon completion of the development. It requires that the developer must, as soon as is practicable, make a declaration that such interest stands extinguished and that the declaration must be made with the consent of any mortgagee of the property, which consent may not be unreasonably withheld.

Firstly we would be concerned with the time frame of "as soon as is practicable". This is imprecise and provides limited compellability and therefore we suspect that it will result in delays and problems similar to those, which occur currently in relation to the transfer of the common areas. We would be concerned that the Bill will not ensure, in practise, the result intended.

Furthermore if the declaration can be made without the consent of the management company or the owners of the relevant units then, as often happens currently, the declaration may be made without the knowledge of anyone, whether management company, relevant owner or otherwise. There should be a requirement that the declaration that the beneficial interest stands extinguished as respects the development is delivered to the management company.

A prescribed process with set down conditions is required for the extinguishment of the developers' beneficial interest.

## ***Section 10 – Extinguishment of Developers' Beneficial Interest***

Section 10 provides for the extinguishment of the developers beneficial interest in the common areas and in the reversion of the units themselves. Where a development has not been completed 60% of the unit owners can request the developer to make a declaration that such beneficial interest is extinguished, the owner/director must make

that declaration unless “good and sufficient cause is shown”. In the event of a dispute, an application to court under section 18 may be made.

We welcome this provision in situations where the development is completed and the only outstanding matter is the transfer of the common areas. However, we suggest that it would be better if the Bill provided that the beneficial interest ceased upon 60% of the owners so requesting unless within a specific period the developer showed good and sufficient cause. (i.e. an automatic extinguishment would be more beneficial).

We would highlight that far more frequently the development has not been completed and the owners are obliged to seek the transfer of the common areas primarily and exclusively to provide them with a vehicle through which they may collectively act and procure completion of the development by the developer.

Unfortunately, the owners then discover invariably to their dismay that the management company has no enforceable contractual right to oblige the developer to finish the common areas or the structural parts.

The qualifications contained in the Certificate of Compliance (see above, Part 1.2) provided to the purchaser, coupled with the management company’s lack of contractual rights to compel satisfactory construction and completion of common areas, have left ample room for abuse by some developers.

Furthermore, the opportunity for abuse is compounded due to the absence of any requirement to provide an overall Certificate of Completion and Compliance for the estate as a whole or any defined statutory procedure or process for the handover of the common areas.

Consumers rarely understand or know about this. It becomes apparent only when problems or completion issues have arisen either in the form of defects or poor finishes.

These are material flaws in the current legislation and in the usual conveyancing documentation, which militate against a reasonable standard of consumer protection.

We believe an efficient mechanism to oblige developers having sold all of the units and left the common areas unfinished, to finish and transfer the common areas is essential and would be very beneficial. The failings of developers in this area have resulted in significant difficulties and exposure to the owners.

## ***Section 11 – Right of Management Company to effect Essential Repairs***

Section 11 provides that the management company shall have a right to carry out reasonably necessary repairs or maintenance to common areas parts not within its ownership and may recover the cost from any person, including the developer, responsible.

We welcome this provision, as currently the management company has no contractual right to collective remedy and redress when defects arise irrespective of their location.

However in practice the legal costs incurred to recoup the costs incurred by the management company can be substantial and there is a risk to owners that the developer company may be in financial difficulty and consequently the owners not only end up with the cost of these necessary repairs but also the legal costs of trying to recover these costs.

We would strongly agree with the LRC recommendation that the OMC would hold 5% of the purchase money for each apartment in trust for the developer until completion

is certified. The owners should be entitled to recoup monies expended from these funds for necessary repairs described in this section.

## ***Section 12 – Management Companies to be known as “OMC” and one vote per unit***

We welcome the provision in Section 12 whereby management companies in new developments must in future be known as “owners’ management company” and the provision that one vote shall attach to each unit in a development, each vote being of equal value. This provision will now outlaw weighted voting.

The bill appears to be silent on the election of directors to the OMC and at what point owners would be eligible to serve as directors of the OMC. Is it envisaged that owners would be entitled to be elected to the board on the transfer of the common areas? What would be the composition of the board? Is the developer entitled to have nominees serve on the board? Given that the Board will control the OMC we believe it is important that this is clarified.

## ***Section 13 – Annual Meetings and Governance (special note on fire safety management)***

The new obligations of the OMC’s set out in section 13 in relation to holding annual meetings and the content of annual reports, accord with current good practise and such meetings are generally convened and reports provided by professional agents.

However, that said, we are concerned in particular with one requirement that is the requirement of a fire statement contained in section 13.(2)(h) is imposed on the OMC without regard for the problems highlighted in the IPFMA’s Position Paper Part 2.5, which need to be addressed urgently to facilitate good fire safety management in multi unit developments.

The IPFMA’s position paper highlighted concerns with the management of fire safety in multi unit development. Under the current system, developers of new multi-unit development buildings are legally required to apply for and obtain a fire safety certificate before commencing construction. The certificate sets out the safety requirements to be observed in the design and construction of the building. The Certificate is issued when the local authority is satisfied that the proposed development meets the requirements of the regulations and is adequate from a fire-safety point of view.

The certification process is carried out prior to construction. It is then up to the developer to build in accordance with the application submitted and the fire safety certificate granted. Once built, self-certification applies.

In practice, the process does not ensure that what has been built is as was designed and approved by the Fire Safety Certificate.

In other words, the requirements proposed by the developer and approved by the fire safety certificate are not necessarily always as built.

Consequently, we believe occupiers of multi-unit developments presently may be at risk in the event of a fire, as they have limited means of ensuring that all fire-safety installations and programmes as certified are fully operational within the building.

We recommend urgently legislating for a mandatory requirement that the design and installation approved by the fire safety certificate be independently inspected and certified as built by the local authority.

We recommend, prior to any building occupation or handover to the management company that the developer be compelled to deliver the following:

- i. A copy of the approved Fire Safety Certificate application documentation.
- ii. The final approved fire-safety technical report which accompanied the application (also known as the 'Compliance Report').
- iii. Any supplementary reports or clarifications submitted as part of the application.
- iv. Drawings including: site location map, site plan, floor plans, sections, elevations.
- v. The fire safety certificate as issued, including any conditions etc.
- vi. Details of any relevant correspondence and in relation to the application its assessment, and or appeal/decisions.

In summary, an urgent review and mandatory requirements to ensure that all works as set out in the Developer's Approved Certification for Fire Safety Design and Installations are independently inspected, following completion, but prior to any building occupation or handover to the management company, and certified as built in compliance.

Furthermore, we recommend a means to compel delivery by the developer to the management company of all fire-safety documentation, so as to ensure effective fire-safety operation and management.

We also recommended a review of all existing apartment buildings through a nationwide risk assessment programme to ensure their safe operations and that a national programme of education and awareness be implemented, to ensure that owners and directors of management companies and all occupiers are aware of the responsibilities and vigilance required.

## ***Section 14 - Service Charges, Arrangements, Recoveries and Costs***

Section 14 requires that that the OMC must establish a scheme for annual service charges; the annual service charge must be calculated and apportioned on a transparent and fair basis and; that the annual charge must be approved by a general meeting of the members of the management company. These requirements accord with current best practice adopted by some developers and professional organisations with the exception that service charge budgets are approved by owner committees or owner directors (if control has been handed over by the developer) rather than at Annual General Meeting. One of the practical concerns is that there is generally a very low turnout of members at Annual General Meetings particularly in large developments where the turnout is generally lower than 20% and in some cases only a handful of owners may turn up. Our concern is that if there is a low turnout at Annual General Meetings then far reaching decisions could be made at Annual General Meetings under this section by what is in fact a very small representative number of the entire membership.

We appreciate that the intention is to address dissatisfaction with the level of service itself, the lack of transparency in calculating the annual service charge and the fact that often owners are unsure what particular services are covered by the service charge.

However, in practice we do not believe that section 14 will achieve all its intended objectives.

Firstly in terms of arrangements for the services to be provided, the management scheme and the apportionment methods. These are all considered in advance and set down in the formal legal documentation (i.e. the leases and management agreement) well before the sale of the first unit and are not really open to alteration by the owners at a general meeting.

To propose that such matters be addressed at an AGM is unsuitable and is likely to be open to legal challenge from owners whose apportionment is set out in title documents and this subsequently has been varied at AGM.

The Bill should ensure that the formal legal documentation for the estate is appropriate and adequate for all end users. The Bill should also ensure that the owners have a right to directorships of the Management Company so they can offer and be involved in all decision-making.

The drafting of the legal documentation is critical to the operational success of a development and its management. However, disputes and problems arise as it often falls short in addressing the complexities of phased schemes, high density and mixed usage fails to set out sufficiently a coherent and comprehensive system of management suited to the type, diversity and design of the particular development.

Furthermore conflicting priorities or interests may influence the formal documentation, for example, in phased or diverse developments that consist of commercial, retail and residential apartments, different interests can be weighted inappropriately.

The developer has virtually exclusive control over the formal documentation, which shapes critically all legal aspects of the development, and its management once the consumer completes the purchase his degree of control of the estate operation is limited.

Accordingly a mandatory requirement for the overall documentation and description would serve more benefit

Many purchasers wish their involvement in the management company to be limited to participation at an AGM, unless they agree otherwise for example to become a director of the management company. They do not wish to be involved in large meetings at which costs, services and other matters are determined. They expect that the formal documentation prescribes a model, which is robust and sufficient to maintain and protect their interests and that the management company will operate consistently with those principles and report comprehensively at the AGM as a matter of confirming rather than deciding arrangements. We believe consumer interests would be far better served in this manner.

Secondly, in terms of **service charge levels and transparency:**

We understand that the Bill's objective is to ensure that service charges are reasonable. To determine reasonableness and to understand the amount or level of the service charge and what it covers it is necessary to understand how it was calculated. A professional estimate of costs known as a budget must be prepared annually in advance and as carefully as possible, using the best information available. A professional agent will prepare a budget including options review and approval by the Directors of the management company.

The Board of Directors (made up of owners) can then make informed decisions.

Normally 85-90% of the service charge budget relates to non-discretionary spend and covers annual, recurring consumption and maintenance costs. For example generally electricity, insurance and lift maintenance account for 30% of costs; A further 25% for refuse, grounds and cleaning; 10% on electrical and building repair and maintenance costs and; a further 15% on security/janitors services where applicable.

The most frequent problem with service charges relates to inadequate or overstated levels.

Once the board have decided on the service charge budget it should be mandatory that a copy of the approved budget should be issued with the service charge demand with explanations sufficient to explain the purpose and justification for each service cost, specification and frequency and any significant departures. This arrangement would be far more beneficial than seeking a special general meeting of the owners to discuss and approve the budget.

Finally, contrary to the suggestion in the Bill we would like to point out that it is misleading in a new development, where warranties cover service contracts costs in the first year to not highlight and account for a full years cost.

**Service charges** the IPFMA recommended that a standard code of practice be adopted and made compulsory for the calculation of the apportionment method of the service charges within an estate. We further recommend that legislation require that the initial budget be a professional estimate of all administration and maintenance costs, including a sinking-fund provision for the cost of replacing plant machinery and fittings given their expected useful life. This is necessary in order to eliminate the current unfair and inequitable methods and/or the giving of inadequate rates or inappropriate information on service charges.

Furthermore, we recommended

That it be required also under regulation that the auditors to the management company certify the annual budget and any special levies otherwise approved of by the directors.

3.7 That there be a mandatory requirement for a Chartered Quantity Surveyor's Certificate of Opinion as to the adequacy of the sinking fund as provided in respect of each management company every three years and that a copy of the certificate form part of the audit process.

Thirdly in terms of the **recovery of the Service Charge:**

Section 14 also places an obligation on apartment owners to pay the annual service charge. But we regret that the bill includes no provisions to address the current problems with non-payment and legal action for recoveries of arrears, which are an unexpected costly burden to the compliant owners and significantly hinder good estate management.

In Part 3.6 of the IPFMA's position paper we set out a number of obstacles to the collection of the service charge, which prejudice the financial stability of the management company.

Frequently, the problem is that the management company cannot identify the legal owner of the apartment. This prevents the management company taking legal proceedings against the owner to recover arrears of service charge.

This situation occurs because in the case of new apartments, it is a matter for the purchaser's solicitor to register the purchaser's title in the land registry or the registry

of deeds. Sometimes this is not done and the purchaser's lease not returned to the developer's solicitor notwithstanding undertaking to do so.

The failure to register and return the purchaser's lease is a significant problem, which adversely affects the recovery of service charges and the financial welfare of the management company.

Furthermore, the standard formal documentation does not require the payment of service charges by direct debit, such as is provided in commercial leases and usually only provides for a low interest penalty on arrears of service charge.

In addition, legal costs incurred by the management company are not always fully recoverable against the defaulting owner and consequently such costs must be borne by the other owners through higher service charges.

Such matters hamper the efficient collection of arrears of service charges and have an adverse impact on the compliant owners who must fund the shortfall together with the unrecovered outlays and legal fees if services are to be maintained.

Our recommendations included a mandatory requirement and timeframe to register and return the counterpart lease to the management company, provisions for a realistic level of interest and that all necessary legal costs and outlay incurred by the management company be fully recoverable. The reality is that where a number of owners do not pay their service charges then in order to ensure day to day services are provided to the development these services have had to be funded through the sinking fund reserves collected until such time as the OMC has been successful in legally collecting these arrears. This can be a lengthy process and can put extreme financial pressure on the OMC. Where legal costs incurred in pursuing these arrears cannot be re-charged to the offending owner then these costs unfairly fall to rest of the owners to pay.

The final matter with Section 14 is that it provides that the service charge must not be used to cover **costs, which are the responsibility of the developer or builder**, unless more than 90% of the members vote in favour of such use. In any such cases, the management company may recover such cost from any person, including the developer.

We note the wording of Section 14.6 and assume it excludes expenditure necessarily incurred under Section 11.1 and believe this should be clarified in Section 14.6.

It would be useful for avoidance of doubt and dispute to list /define the type of costs that would generally be considered the responsibility of the developer.

In this regard the facility and payment for "snagging" of the common areas has arisen as a problem for many developments.

We suggest the purpose of a professional snag report be clarified. Often owners will collectively engage an independent chartered building surveyor to prepare a professional snag report on the common areas, structural parts and services, to ensure the attendance to and completion of the snags by the developer. There should be no prohibition for such an arrangement.

Unfortunately, the completion of these snagging works is completely dependent upon the willingness and integrity of the developer involved. Consequently the snag work can end up being done at the owners expense and then the report ends up being used as evidence in proceedings for breach of contract and or negligence against the developer.

We understand the intention of section 14 is to prohibit snag work being undertaken at the cost of the owners. However the real problem that must first be addressed is the lack of contractual arrangements for the completion of the development.

Where problems with completion of the common areas occur, the owners often turn to the management company and the managing agent for collective remedy. However, in terms of recourse, the management company, in the invariable absence of any contractual compellable agreement with the developer for the completion of the estate, is in a weaker position than any one single apartment owner.

In the event of unattended snagging or an incomplete development the management company has no standing in or any legal interest in the common area prior to their transfer and therefore no right to take legal action – still less the ability to do so. Prior to such transfer, the management company remains within the control of the developer, who is unlikely to consent to the management company being used as a vehicle to sue the developer.

Until then, the management company seldom has any contractual rights on which to rely, on behalf of all the owners as a collective body. Thus, on many occasions the owners may issue proceedings against the developer only in negligence (as opposed to in negligence and in breach of contract) and such proceedings can be lengthy, uncertain and costly.

If the common areas have not been transferred to the management company and there are known defects, the owners must then agree that one or more of them take legal action individually (with the attendant personal exposure to legal costs) on behalf of the owners collectively. This is clearly unacceptable and requires reform and we would suggest that the legal framework and conveyancing documentation be amended to include the management company be provided with a compellable contract from the developer for the completion and delivery of the common areas.

We welcome what we believe is the intention under Section 14.9 that the developer or building contractor is obligated to pay for all service charges levied under this section. The OMC currently pursues legal recovery of service charges on foot of covenants signed by the owner in the title documents at the time of purchase of the unit. However as there is no such title documents in respect of unsold units held by the developer or building contractor clarity is required on what legal basis the OMC would look to legally pursue the developer or building contractor if they were in default of paying service charges for unsold units.

## ***Section 15 - Sinking Fund***

Section 15 provides a statutory basis for sinking funds in response to widespread concerns that many developments have no sinking fund at all or at best an inadequate one. The Bill provides that the management company must establish a sinking fund and that it be contributed to by each owner on the same basis as the annual service charge subject to a minimum contribution of €200 per unit per year.

We welcome these provisions and that the minister in future may make regulations prescribing for classes of expenditure, procedures and arrangements, all of which is as recommended in Part 3 section 3.7 of the IPFMA's position paper.

We also welcome that the Bill acknowledges that the responsibility for the establishment and resourcing of the sinking fund rests with the management company and that the assessment of a sinking fund may require professional expertise which may be paid for out of funds collected.

However, we would be concerned that the Bill does not require the establishment of the sinking fund upon or prior to the transfer of the common areas but instead within three years of such transfer and that the relevant contribution to the sinking fund is not included in the initial service charge. Such a delay and lack of financial resources contravene best practice, which includes the immediate and adequate provision of

funding from year one. Wear and tear occurs from year one and there is no basis as to why provision for its remedying would be deferred to the fourth year when the contribution required would then be higher because of the lapsed time.

A realistic analysis of the financial requirements of the sinking fund can most easily be undertaken at the development stage by the developer's professional team. Thereafter that analysis or the report can be updated annually by the management company, thus avoiding the cost of engaging a Chartered Building/Quantity Surveyor to provide annual guidelines, later.

The usual method of calculating how much money is needed annually is simply to ascertain the expected costs of future works and divide that amount by the number of years which may be expected to pass before it is incurred. This exercise requires knowledge of the building design, fabric, materials and plant to ensure that all items are identified and adequately accounted and provided for. The expected life of materials and plant will be influenced by the quality of the original installation, the type and level of maintenance required to be carried out and technological advances (which may make an item obsolete or difficult to maintain and Legislation, particularly Health & Safety).

Accordingly we recommend that regulation mandate that the initial analysis and estimate for the sinking fund be required of the developer and provided in the initial service charge payable.

We have a practical concern under Section 15.7 where it requires that contributions made to sinking funds are held in a separate designated bank account and only expended on expenditure outlined in Section 15.1. The difficulties encountered by OMCs in collecting services charges from owners who have defaulted and the length of time it can take to process legal proceedings through the courts (6-9 months) means that even in cases where there is a default of only 5-10% of owners this would place an intolerable financial strain on the management company. The reality is that where a number of owners do not pay their service charges then in order to ensure day to day services are provided to the development these services have had to be funded through the sinking fund monies collected until such time as the OMC has been successful in legally collecting these arrears.

If the flexibility to use the Sinking Fund monies collected in this manner was not allowed to the OMC then we would fear that many OMC would not be in a position to discharge the day to day running costs as they fall due. This would result in a withdrawal of services by the contractors engaged and would result in a most undesirable situation for the majority of owners who had paid their service charges. We would recommend that this section be amended to require sinking fund monies collected relating to prior years service charges be held in a separate designated bank account and only expended on expenditure outlined in Section 15.1. This would allow the OMC some flexibility in using funds collected to discharge day-to-day liabilities until such time as all service charges were collected for that year.

## ***Section 16 - An Aggregate Request for Payment***

Section 16 provides that the OMC may issue an aggregate request for payment under sections 14 and 15 and that such request must set out the basis of the calculation of each charge.

We are not aware of the purpose or benefit of the amalgamation of the two charges, which contravenes current best practise, which is to provide separate figures and a copy of the budget and a detailed analysis of the service charge so that owners may be fully aware of what services are being provided for and the cost of each such service.

## ***Section 17 - House Rules***

Section 17 permits the management company to make house rules; that such rules must be consistent with the formal documentation and be agreed at a meeting of members of the management company and; that reasonable cost incurred by the management company in remedying such breaches are recoverable.

The statutory right to make house rules as contained in the new bill is not the only solution needed, as the primary difficulty and core problem is there are no legal sanctions available to the management company or its agent to enforce existing house rules.

Therefore, although house rules may have statutory recognition still there will be no means to enforce them. That is the real issue.

Currently compliance with house rules largely depends on the development's location, the quality of occupiers and the community's own initiatives to resolve issues that have arisen. A general increase in anti social behaviour and petty crime, together with a disregard of standard house rules (such as noise, wooden floors, satellite dishes) can be quite distressing for the owners. The effort required to achieve reasonable compliance can be considerable with little or no guarantee of success or future compliance.

Although the Bill provides for recovery of the reasonable cost of remedying such breaches, this measure will not, in its self, reduce the level or degree of abuse of house rules or reasonable standards of behaviour or good neighbourliness.

In the meantime, without sanctions, abuse will continue and as owners are not aware of the absence of sanctions an unreasonable expectation of how such matters may be resolved will continue.

The managing company has responsibility for the administration, circulation and display of the house rules; but to a large degree without sanctions, resolving breaches is difficult and at best done through a community and garda neighbourhood watch programme, such as operate in other countries.

The managing company is limited to having clear policies and procedures for handling breaches of house rules; complaints of nuisance from neighbours and disputes between occupiers but limited capacity to resolve such issues will remain unless sanctions are introduced.

## ***Section 18 - Dispute Resolution and Rehabilitation of Multi-Unit Developments***

We welcome Section 18, which introduces a dispute resolution mechanism.

An application may be made by the management company or any member, and others. If the court is satisfied that a right has been infringed or an obligation has not been discharged, it will make the appropriate order. We welcome the examples of situations under which an order may be made which provide significant new opportunities for owners to resolve disputes.

In particular owners in multi unit developments will benefit from Section 18 (4) (h) under which the court may direct the developer to complete the development in accordance with the relevant planning permission. However a crucial question as to the benefit is whether this provision is intended to be retrospective as we believe that

once planning has been obtained under the Act referred to (i.e. 2000 to 2007), the section does not apply?

The right to seek orders to amend legal documentation relating to the management company and the formal documentation transfer of control of the management company; apportioning funds between service charges and the sinking fund are all welcomed also.

### ***Section 19 – Persons who may apply under Section 18***

We welcome subsection (1) (a), which includes the management company as a party entitled to apply to the court for an order to enforce any rights conferred or obligation imposed under the Act.

However the bill appears to be silent on the election of directors to the OMC and at what point owners would be eligible to serve as directors of the OMC. Is it envisaged that owners would be entitled to be elected to the board on the transfer of the common areas? What would be the composition of the board? Is the developer entitled to have nominees serve on the board? Given that the Board will control the OMC we believe it is important that this is clarified.

### ***Section 20 – Jurisdictions and Venue of Circuit Court***

Section 20 provides that the Circuit Court, concurrently with the High Court, will have jurisdiction to hear and determine an application under section 18.

### ***Section 21 - Mediation Conferences***

We welcome Sections 21 and 22 that indicate that mediation should be used, wherever possible, to resolve disputes. The court may, at any stage during proceedings, oblige all parties to meet in a mediation conference.

### ***Section 22 – Report of Chairperson or Mediation Conference***

Section 22 provides that the chairperson (Barrister or solicitor or a person nominated by a prescribed body) of a mediation conference must submit a report to the court on the outcome of the conference. A copy of the report must also be given to the parties to the application. Where the court is satisfied that a party to the application did not comply with a direction to engage in the mediation process, it may make an order as to costs.

### ***Section 23 - Saver for Existing Jurisdictions***

Section 23 provides that nothing in the Act shall derogate from any power vested in any person or court, by statute or otherwise, and that the powers conferred in the Act shall be in addition to and not in substitution for any such powers. Is this needed?

## ***Section 24 – Restoration of Certain Companies to Register***

We welcome Section 24, which extends to six years the period within which a management company may be restored to the register without recourse to the courts. This helps address the problem caused by management companies being struck off the register of companies and the onerous and very costly consequences for apartment owners who inter alia may be unable to sell until the management company is restored to the register.

IPFMA's position paper Part 3 Section 3.8 recommended that management companies be awarded a special designation status under Company Law to provide for a less stringent process than company strike-off in the event of a failure to file statutory returns in the Company Registration Office.

We suggested that a specific CRO form be introduced for a management company to distinguish it as a company with the sole purpose of managing a multi-unit development for the benefit of its members on a not-for-profit basis. On that basis it was suggested that the management company could be subject to certain exemptions

The specific status would also facilitate the adoption of standard Memorandum & Articles of Association and standard accounting reports. Such uniformity would provide many benefits.

This special status could also involve other special provisions such as the requirement for disclosure of additional information at AGM, such as reports on the management activities, a survey or details of the sinking fund and insurance information.

This additional information is regularly called for by owners at AGM but not statutorily required to be given under current company law requirements.

## ***Section 25 – Transfer of Benefit of Guarantee and Warranties***

Section 25 provides that the benefit of any guarantees or warranties relating to any materials used in the construction, repair or improvement of a multi-unit development shall stand transferred to the management company on the transfer of the common areas. This is welcomed but we believe the section should also obligate the developer to deliver this documentation to the OMC at the same time as the transfer of the common areas.

Currently there is no process to compel the delivery of estate documents including such guarantees and warranties by the developer to the management company.

In the event that recourse to guarantees and warranties is necessary at present the voluntary cooperation and goodwill of the developer/builder must be relied upon.

## ***Section 26 – Restrictions on Entering into Certain Contracts***

Section 26 places restrictions on the management company entering into any contract for a term in excess of three years with providers of goods or services and prohibits any penalty if any such contract is terminated after a three-year period.

## ***Section 27 – Exercise of Power to make Regulations***

Section 27 provides that the regulation-making powers conferred on the Minister for Justice, Equality and Law Reform in sections 14, 15 and 17 shall be exercised in consultation with the Minister for Enterprise, Trade and Employment and the Minister for the Environment, Heritage and Local Government. The Schedule to the Bill specifies provisions, which apply to multi-unit developments comprising more than two units but fewer than five units. The relevant sections are sections 13, 14, 15, 17, 18, 19, 20, 21 and 22.

## ***Section 28 – Short Title and Commencement***

Section 28 provides that the Act other than sections 12 and 26 shall come into operation on such day or days as the Minister may appoint by order or orders.

We are unclear why sections 12 and 26 are excluded under this section.

**-END-**