



POSSIBLE REGULATION OF BODY CORPORATE MANAGERS

A DISCUSSION PAPER

issued by the Attorney-General, the Hon. Michael Atkinson, M.P.

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The views expressed in this Discussion Paper do not necessarily represent the policy of the South Australian Government, or the Attorney-General. The matters raised in this Discussion Paper are intended to encourage discussion of various policy options. They should not be seen as restricting the options available for policy-making. Nor should the inclusion of any option in this Paper be interpreted as implying Government endorsement of that option.

How to respond to this Discussion Paper

The Attorney-General, the Hon. Michael Atkinson, MP, invites responses to the matters raised in this Discussion Paper. *Questions for discussion* are highlighted chapter by chapter. The questions are intended as a guide only - you may choose to answer all, some, or none of them. Please explain the reasons for your views as fully as possible. Responses should be made in writing, by 15 November, 2003. Responses may be sent by mail, fax or email, marked *Discussion Paper on Body Corporate Managers*, to:

Address: **Attorney-General's Department**
Policy and Legislation Section
G.P.O. Box 464
Adelaide SA 5001

Fax: (08) 8204 1337

Emailed responses may be sent to: *Attorney-General@agd.sa.gov.au*
Inquiries should be directed to Shane Sody on 8207-1851.

Additional copies of the Discussion Paper may be downloaded from
<http://www.justice.sa.gov.au/> (follow the link to "News").

1. BACKGROUND

An increasing number of Australians are choosing to live or work in developments with shared facilities, or ‘common property’. These are known in South Australia as *strata title* or *community title* properties. Each owner of a lot or a unit in one of these developments is also a member of a body corporate (described in legislation as a “corporation”) which administers the property.

At 30 June 2003, in South Australia, there were 14,098 plans deposited under either the *Community Titles Act 1996* (“CTA”) or the *Strata Titles Act 1988* (“STA”). These plans (each establishing one corporation) contained a total of 70,776 lots or units. The number of lots or units has grown in recent years by more than 2,000 per year. However South Australia’s acceptance of these forms of real estate, per capita, is still well behind that of other states. This suggests that there is still room for a great deal more growth in this industry in S.A.

Corporations are often administered by a body corporate manager (“BCM”). BCM’s do not need to be licensed. Nor do they need to have any prescribed training or qualifications. A BCM is hired by the corporation, and therefore is under the control and direction of the corporation. However few unit or lot owners seem to be aware of this. Many owners mistakenly assume that the BCM, once appointed, makes all decisions about their corporation.

Some body corporate managers specialise in this area, and do nothing else (*specialist BCM’s*). Others may offer body corporate management, in addition to other services such as conveyancing, accounting, a letting agency etc. (*part-time BCM’s*). Both these types may be described as *professional BCM’s*. There are also thousands of persons who act as unpaid body corporate managers, either for their own, or a relative’s corporation (*honorary BCM’s*).

2. WHY REGULATE?

The CTA and STA were drafted on the assumption that owners of community lots or strata units (no less than owners of other forms of real estate) have sufficient knowledge and sufficient incentive to make informed decisions about who, if anyone, should be paid to assist in the management of their asset. Therefore neither of the Acts regulates who may be appointed as a BCM, or what their duties and responsibilities should be. The CTA and the STA leave those decisions to owners, through their corporations.

However since the introduction of the *Community Titles Act 1996* (under which all new developments are now made) this area of law has become relatively complex. New community title developments may have multiple layers of corporations (primary, second and tertiary). They may have multiple different uses of lots within a single scheme. The CTA also permits staged development, with “development lots” alongside “community lots” and the possible imposition of future obligations on developers or purchasers. This added complexity may have influenced some corporations in favour of obtaining professional body corporate management assistance.

On the other hand, there are also many tiny corporations comprising only two or three lots. These corporations might administer only a small amount of common property, such as a shared driveway. Many of these smaller corporations are self-managed by a committee of one or more owners. Care needs to be taken that any level of regulation appropriate for large schemes and professional BCM’s does not impose unnecessary burdens on smaller corporations, their owners and their honorary BCM’s.

Over a number of years, Government agencies have received many complaints about the activities of particular BCM’s. These complaints include:

- a BCM controlling a corporation’s meeting, rather than assisting;
- reluctance of a BCM to provide minutes of meetings and trust account records;
- difficulties obtaining information from a BCM about activities he or she has undertaken on behalf of the corporation;
- when the appointment is complete, a refusal by the BCM to deliver up the corporation’s records promptly;
- corporation members having no information about the basis on which a BCM proposes to charge the corporation for his or her services;
- a BCM not fully disclosing any commissions he or she may obtain for arranging services (such as insurance) with a particular provider;
- a BCM advising the corporation members that he or she cannot legally be replaced.

This Discussion Paper asks whether some form of regulation might be warranted to address these types of complaints, and other issues. Regulation can take the form of more stringent laws; prohibiting certain practices or imposing duties. Options for revising legislation are discussed in Sections 3 to 8 below. Failure to meet these requirements could result in prosecution. Alternatively or additionally, more interventionist forms of regulation (see Sections 11 to 13) would affect many or all of those acting as a BCM. This type of regulation cannot be implemented without funding. Possible methods of funding such regulation are discussed in Section 10 below.

3. DUTIES OF A BODY CORPORATE MANAGER

A BCM has whatever duties a corporation chooses to assign, although some functions cannot be delegated. Many disputes involving a BCM arise because the scope or extent of the corporation's delegation or instructions to the BCM has not been made clear.

3.1 Should delegation of powers and responsibilities to a BCM be made explicit, and effective only when recorded in writing?

Anecdotal evidence suggests that BCM's often preside at corporation meetings, sometimes at the request of owners who might have less knowledge of meeting procedure or the particular business to be transacted. However this practice is often contrary to law. The duty of chairing a corporation meeting is reserved for the corporation's "presiding officer" who must be one of the members; that is, an owner. Only when the presiding officer is absent can a BCM be permitted to chair the meeting, and then only in limited circumstances that are specified in the CTA or the STA.

3.2 Should a BCM be permitted to chair meetings of the corporation, or management committee?

The handling of trust moneys, i.e. the corporation's money, is strictly regulated by law. Both the CTA and the STA impose stringent accounting and auditing requirements on any "agent" who holds money on behalf of a corporation, with fines of up to \$8,000 for breaches. It would appear that trust accounting provisions in the CTA and STA are aimed at professional BCM's. However a corporation cannot operate without having a natural person as an "agent" to collect and bank its funds. Therefore it would appear that even honorary treasurers or honorary BCM's are also subject at law to the same strict trust accounting provisions and auditing requirements, although these requirements have not been enforced.

3.3 Should the same rules on delegation and trust accounting apply to all BCM's, even honorary appointments?

A person who was injured by dangerous conditions on corporation property might sue the corporation and its owners. Corporations are required to carry public liability insurance and might delegate to a BCM the task of obtaining insurance. However if the corporation is not insured, or if its insurance is insufficient to meet a claim, the corporation or its owners would have to fund some or all of a compensation payment.

3.4 If the lack of any (or sufficient) insurance was the BCM's fault, should the law protect the corporation from liability and permit the corporation to transfer liability to the BCM? Should this apply also to honorary BCM's?

If corporations are to be protected from liability in these circumstances, BCM's would presumably require their own professional indemnity insurance.

3.5 Should BCM's be required to obtain professional indemnity insurance, and pass on the cost to the corporation? Should this apply also to honorary BCM's?

4. RISKS

Risks arise even in the smallest corporations, or those that have no management at all. There is anecdotal evidence to suggest that a significant proportion (perhaps more than 20%) of all corporations have become inactive. Owners of units in these buildings have stopped (or did not ever begin) holding meetings of their corporation.

It would not be practicable for the Government to investigate all corporations to identify inactive ones. Therefore the responsibility for inactive corporations must lie with their owners.

Whether a corporation is inactive or whether it is actively managed by an honorary or professional BCM, there are many ways that its owners could lose money. The main risk is associated with funds (or lack of funds) accumulated for maintenance and repairs.

Apart from two-lot corporations (which may exempt themselves) all corporations formed under the CTA must establish a “sinking fund” for irregular maintenance or capital works. They must also prepare annual estimates of future spending for which funds should be raised now and held in reserve. Despite this requirement, contributions for the “sinking fund” might be set at negligible levels, or discontinued. Under the STA, there is no requirement even to have a “sinking fund”.

Many corporations rely on their BCM to advise them how much to set aside in sinking funds. Recent problems highlighted in Melbourne and Sydney involved apartment blocks where new unit owners were charged extraordinarily large amounts to address maintenance or structural problems that had been ignored for years by previous unit owners.

Strata units and strata lots are defined by reference to the building. If and when a strata building has to be demolished, those who own the building at the time of the demolition will end up owning only a proportional share of the vacant land. A recent review of legislation in NSW recommended that all corporations be required to prepare regular 10-year sinking fund plans. In Queensland, it is compulsory for corporations to prepare, each year, both an administrative fund budget, and a sinking fund budget.

4.1 Should the amounts set aside for maintenance and sinking funds be regulated? If so, on what basis? Should smaller corporations be exempt?

There are other risks associated with sinking funds. If a fund is maintained, it might be:

- subjected to poor accounting practices, becoming pooled with other funds to the point where it became unidentifiable;
- dissipated with poor investment choices, or spent unwisely without getting several quotes;
- subjected to deliberate theft or fraud;
- spent by a BCM with a conflict of interest, commissioning work or supplies from a relative or associate from whom the BCM expected to get some benefit in return.

There are also risks to the corporation if its assets are not properly protected. This might occur if a BCM (or an inactive corporation):

- failed to adequately insure the property;
- failed to pursue legal rights the corporation might have against builders, tradespersons or other suppliers;
- failed to maintain records or provide them to potential purchasers as required, thereby exposing the corporation to prosecution and penalties; or
- failed to advise owners of the amounts needed to be set aside in a “sinking fund” to replace or repair major items of corporation common property.

4.2 *Are existing requirements on the handling of corporation funds (See Section 3 above) sufficient to protect corporations from these risks? If not, what additional requirements should be inserted in legislation?*

Any owner or prospective owner is entitled to view a corporation’s accounts and the contributions expected from each lot in the coming year. These records are usually held by a corporation’s BCM. Although a corporation is obliged to provide this information on request, there is nothing to prevent an owner selling their lot or unit without having this information to pass on to the buyer. Provided that a request has been made to the corporation, a vendor can complete a “Section 7 statement” by specifying the date on which the request was made to the corporation. Therefore buyers cannot rely on receiving the corporation’s accounts in time to exercise their cooling-off rights, if any. If the accounts arrive later, before settlement, a vendor is unlikely to permit the buyer to re-negotiate or rescind the contract because of any information contained in the accounts.

4.3 *Should a vendor’s Section 7 statement be required to include a copy of the corporation’s accounts?*

5. USE OF PROXY VOTES

In some large developments under the CTA the original owner, being the developer, might appoint a BCM before many of the lots are sold. Persons buying lots after that time might be advised, or sometimes required by the developer's proposed sale contract, to assign their proxy votes in the corporation to either the BCM or another nominee of the developer. Owners might then find themselves outvoted at corporation meetings by the BCM or another person exercising proxy votes.

Alternatively, or additionally, the assignment of proxy voting rights is sometimes expressed in a contract of sale to be "irrevocable" so that a lot purchaser purportedly signs away all future rights to vote on matters affecting the corporation. In Queensland, this practice has been explicitly prohibited. In Queensland, an owner cannot be prevented by contract from exercising a vote at a meeting, except on a limited range of issues, (including to appoint a BCM) and only for a maximum of 12 months after the purchase.

5.1 Should legislation explicitly provide that a contract cannot oust the right to revoke a proxy?

Owners who appoint a proxy are under no obligation to direct the proxy how to vote at corporation meetings. The use of proxy votes can be questionable if the person holding the proxy stands to benefit financially from a corporation decision. For example it would be inappropriate for a BCM holding a proxy, to vote on a motion to extend the BCM's own appointment, or the terms of his or her own contract. Neither the CTA nor STA addresses these issues.

5.2 What, if any, controls should be placed on the method of appointing a proxy, the use of proxy votes or the period of a proxy appointment?

6. DEVELOPER RETAINING CONTROL

By permitting multi-tiered schemes, the CTA clearly envisages developments in which, even from the beginning, a minority of lot owners can control a primary community corporation, and through it, the overall scheme. For example, a scheme with 50 lots in total might have only three primary lots. Two primary lots would constitute two-thirds of the voting rights in the primary scheme, while the other 48 lots would be secondary lots, comprising a secondary corporation as a third primary lot. If the developer or two nominees retained control of the two primary lots, they could control the overall scheme, by outvoting the 48 secondary lot owners, two to one.

This could be an attractive structure if, for example, a trustee controlled two primary lots and was bound by a trust deed to maintain certain standards, over time, for the benefit of the entire scheme.

On the other hand, such a structure could be used to prevent changes that were desired by the majority of owners. In this situation a BCM might hold proxies for the primary lot owners, and could therefore use the two proxy votes to outvote all other lot owners. This structure could also prevent the majority from giving directions to, or changing the appointment of a BCM.

- 6.1 *What, if any, benefits accrue to lot owners by having a single entity controlling all decisions of the community corporation?*
- 6.2 *Is any legislative amendment warranted to prohibit or restrict this practice?*

7. FORMAL DISPUTE-SETTLING

There are many different types of disputes involving community titled or strata titled properties. When a dispute arises, it is sometimes difficult to distinguish, at first, between the roles of the corporation, its management committee (if any), and the BCM. For example, a single dispute might concern the terms of the BCM's appointment, the corporation's powers over one or more lots or units, the validity of resolutions taken at corporation meetings, whether the BCM's actions are consistent with the corporation's instructions, and so on.

When a dispute about the administration of a corporation cannot be settled informally, an application may be made to the Magistrates Court. The Court hears the dispute as if it were a "minor civil action." Minor civil actions are small claims, limited to no more than \$6,000, or "neighbourhood disputes". They are heard with minimal formality, and without lawyers present. The advantage of using the Magistrates Court is that the Court can also hear, at the same time, (and also as a "minor civil action") any dispute involving the BCM's contract.

The Residential Tenancies Tribunal is also available as a relatively low-cost option for settling disputes, usually between landlords and tenants. However disputes under the CTA and STA do not always involve residential premises. Nor do they necessarily involve tenancies. That is why jurisdiction to settle disputes under the CTA and STA has been conferred on the Magistrates Court.

In a recent six-and-a-half-year period, the Magistrates Court heard 219 of these cases under the CTA and STA.

	Strata Titles Act	Community Titles Act
1997	21	
1998	25	
1999	30	
2000	40	
2001	35	2
2002	30	3
2003 (to 30 Jun)	33	
Total 1997-2003	214	5

Disputes that have been heard in the Magistrates Court under the CTA or STA do not necessarily involve BCM's. In some cases it can be assumed the parties would be confined to the corporation and one or more of its members. However both Acts do permit action to be taken directly against any person (including a BCM) for a "breach of this Act."

- 7.1 *Is the Magistrates Court the appropriate body to settle disputes involving CTA or STA corporations, their members and their BCM's? If not, why not? What alternative dispute-settling mechanism should be preferred, and why?*

8. ENFORCEMENT OF BY-LAWS OR ARTICLES

A corporation's internal rules are known as its by-laws (under the CTA) or its articles (under the STA). One of the functions of a corporation is to enforce its by-laws or articles. Often this function is delegated to a BCM. The corporation might issue standing instructions to a BCM to deal promptly with any breach, and report later to a corporation meeting.

Under the CTA or the STA an application can be made to the Magistrate's Court, alleging a breach of the by-laws or articles. Any person bound by the by-laws or articles (including a tenant) can make such an application or can be the defendant in such an action. The Court has wide powers to settle the dispute. However an application to the Court is not always necessary.

Under the CTA or the STA the corporation can enforce its by-laws or articles directly, by issuing a notice to the owner requiring the owner to carry out specified work. This is a task that the corporation might have delegated to a BCM. If the owner fails to comply, the corporation may, if necessary, enter the property, carry out work, and recover the cost from the owner as a debt. The owner must be given reasonable notice of the proposed entry, but if the premises are rented, the corporation is not required to notify the tenant.

8.1 Should the CTA and STA oblige a corporation (and its BCM) to give written notice to a tenant before entering property to enforce by-laws or articles?

Tenants who contravene corporation by-laws or articles risk repercussions from their landlord, the corporation, or their neighbours. Leases usually require tenants to observe the by-laws or articles of the corporation, so a contravention might result in the termination of a lease and an order to vacate. If the premises involved were residential, then the corporation (or any one of its members, not necessarily the landlord) could make an application to the Residential Tenancies Tribunal, as a "person adversely affected" claiming that the tenant had either "caused or permitted a nuisance" or "caused or permitted an interference with the reasonable peace, comfort or privacy of another person who resides in the immediate vicinity of the premises." The Tribunal could then make an order "terminating the tenancy."

Under the CTA, (but not under the STA) a by-law may impose a penalty, not exceeding \$500, for contravention of a by-law. The penalty is to be paid to the corporation. However to enforce the fine, the corporation might need to make an application to the Magistrates Court, and this could be done for the corporation by its BCM.

9. REGULATION IN OTHER JURISDICTIONS

In **New South Wales** and the **Northern Territory**, persons operating a business of providing BCM services must be licensed. A licensee may employ persons to provide BCM services to client corporations. Any such employees need not be licensed, but must be registered. These provisions are similar to those applying to be land agents. A person who provides BCM services, for a fee, without being registered or licensed commits an offence. The legislation does not affect honorary BCM's. The New South Wales Government also provides a mediation service to help settle strata disputes. A party unhappy with the outcome of mediation can take a case to an adjudicator and from there to the Strata Schemes Board. A fee of \$54 is payable for each application.

Victoria and Queensland have schemes that do not require BCM's to be licensed. Instead, these two states impose obligations on corporations that hire a BCM. In **Victoria**, any appointment must be made by a general meeting, and documented using a prescribed form. The BCM's fees must be included on the form, and the BCM must carry a minimum of two million dollars professional indemnity insurance cover. The BCM must provide a report of his or her activities at the corporation's annual general meeting. Victoria, like South Australia, utilises the jurisdiction of the Magistrates Court to resolve strata disputes when informal measures have not been successful.

In **Queensland**, the procedures that must be followed by a corporation to appoint a BCM are more rigorous, as all members must be given a statement outlining the proposed appointment before a vote is taken. Queensland regulations also specify the circumstances in which a BCM may be dismissed, and explicitly provide that a management committee may direct the BCM, and render his or her decisions void. Queensland has a Commissioner for Body Corporate and Community Management who has a dual role of providing general information, and managing dispute-resolution procedures. Aggrieved persons make application for adjudication. The Commissioner, through a process of case management, may refer the dispute to mediation, rather than adjudication.

Western Australia does not regulate BCM's. However a Parliamentary Committee recommended, on 26 June 2003, that a three-tier licensing scheme should be introduced. Under the proposal, BCM's engaged by mid-size or large corporations would have to be licensed, meet specified levels of competence, and statutory minimum reporting standards. Small corporations (with up to five ground-level units) would still be able to use unlicensed, honorary BCM's. Western Australia has a Strata Titles Referee, a statutory officer (who must be either a magistrate or a legal practitioner) who hears and determines disputes. The Referee lacks enforcement powers, although the same Committee has recommended strengthening the Referee's role in this regard.

Legislation in **Tasmania** and the **Australian Capital Territory** merely permits a corporation to appoint any person as a manager and delegate functions to that person, subject to the control and direction of the corporation or its management committee.

10. FUNDING ANY REGULATORY SCHEME

A scheme of regulation might be confined to addressing the matters raised in sections 3 to 8 above, to create new offences and impose new duties on corporations and their BCM's, like the Victorian or Queensland models. This would require minimal, if any funding commitment.

However any further type of regulation, such as the options discussed in the next three sections, would require the introduction of one or more funding schemes. The South Australian Government does not support the introduction of any form of tax or levy on corporations or their members. Therefore, there are only two possible methods for such funding.

1. *Licensing fees.* If a form of licensing or registration is imposed, the fees collected could be set at a level to recover the cost of administering and enforcing the scheme. Introduction of licensing might discourage some part-time BCM's from continuing in the occupation. It is not clear how many persons work in this occupation, but licensing fees are not likely to raise much more than \$100,000 p.a.¹
2. *Collecting interest earned on trust accounts.* This is the model already used for legal practitioners and residential tenancies. If honorary BCM's are excluded from the obligation to keep statutory trust accounts (and such an obligation has not been enforced to date) then this model would impose a cost on corporations that use professional BCM's, but no cost at all on those using honorary BCM's. Hence it could be seen as a disincentive to the use of professional BCM's. It could be coupled with a scheme to ensure that larger corporations are professionally managed. It is uncertain how much would be raised by this scheme. However rough calculations suggest that gross revenue in excess of \$150,000 per year would be generated.²

10.1 *Should either or both of these models of funding be adopted?*

11. REGULATORY OPTIONS

South Australia has an obligation under National Competition Policy to ensure that regulatory restrictions on competition are introduced only if there is a net public benefit and the objectives of the legislation can be met only by restricting competition. The following regulatory options have been identified:

1. **Licensing or registration** would involve restricting entry to the occupation of BCM solely to those who hold a licence. Persons wishing to be licensed or registered would need to demonstrate that they meet certain criteria, and may be subjected to disciplinary action under the licensing legislation. This is the type of regulatory approach that has been adopted for land agents and conveyancers. In some schemes of licensing, it is only a principal operator or proprietor who must be registered or licensed, while the proprietor's employees are subject to lesser forms of regulation. For example a real estate agent must be registered i.e. approved by the Commissioner for Consumer Affairs, but an agent's sales representatives are subject only to negative licensing.
2. **Negative licensing** imposes a requirement that a person hold prescribed qualifications before practising a particular occupation. It is generally accompanied by a means of removing unfit persons from the industry – usually by means of disciplinary action. Examples of industries using this form of regulation include hairdressers and land valuers. Before introducing a scheme of negative licensing, the Government would need to ensure that appropriate courses for obtaining a licence could be offered by suitable institutions or bodies.
3. **Co-regulation** involves the Government delegating a specified role in the administration and enforcement of a particular Act to a particular industry group. Although the National Community Titles Institute aims to represent all specialist BCM's, it does not represent part-time BCM's who are a significant sector of the industry. Therefore the absence of an industry group overseeing or representing all professional BCM's means that this option is unlikely to be workable.
4. **Certification** involves providing a certificate, specifying that a person has achieved a certain level of expertise once he or she has completed a course of instruction. It would not be an offence to practise without a certificate but it would be an offence to advertise as being qualified or certified without possessing such a certificate. This system would permit consumer choice, but it would be difficult to monitor those who were not certified and certification may be misleading to consumers where it is based on a one-off award of a certificate of competence some years earlier. Additionally, there are generally no disciplinary proceedings to expel a person from being part of the 'certified' class. Therefore certification might provide no more than a false sense of assurance.

5. **Restriction of title** is similar to certification. Under this option, any person would be allowed to be involved in body corporate management, but only a person holding prescribed qualifications and fulfilling other criteria could call himself or herself a body corporate manager. This option would permit competition, but allow consumers to choose whether to obtain a body corporate manager, or a person with another title, or no qualification. However, again there would be difficulty in monitoring those who call themselves BCM's and ensuring that persons who act in this role were properly trained.
6. **A code of conduct** might be imposed on people holding themselves out as, and performing the duties of, a professional BCM. Failure to meet these specified standards could result in the corporation or the Government pursuing disciplinary action against the BCM. This option would not restrict competition in the industry because any person would still be permitted to act as a BCM. However, it is an approach that would require action once something had gone wrong rather than being proactive to ensure that wrongs were not likely to occur in the first place. A code of conduct could be adopted in combination with a scheme of licensing or negative licensing.

11.1 What, if any, model or models of regulation should be adopted for professional BCM's?

Although some type of regulation might be appropriate for professional BCM's, regulating honorary BCM's raises entirely different questions. An estimated 40% of South Australia's strata title and community title corporations are managed either on an honorary basis or are inactive. Many are small corporations, with fewer than five members. Presumably few, if any of these corporations would welcome any significant regulatory burden on honorary BCM's. However regulatory schemes such as certification or restriction of title need not impose any unwanted burden on honorary BCM's.

11.2 If professional BCM's are to be subject to regulation such as licensing, what scheme, if any, should protect owners from unsatisfactory honorary BCM's?

12. QUALIFICATIONS AND TRAINING

At present, no formal qualifications are required to act as a BCM. However if one or more of the regulatory models discussed in Section 11 is adopted, it will be necessary to decide how much training is sufficient to qualify as a BCM.

At one end of the scale, some training in handling trust account funds and contract negotiation might be advisable even for honorary BCM's managing the smallest corporations. Such training need not be compulsory, but might be left as a matter of discretion for each small corporation to decide for itself whether to have its BCM trained.

At the other end of the scale, those who are professionally managing corporations with dozens or hundreds of lots or units have greater responsibility, with much more money in their trust. The duties of managing a larger scheme are more complex, especially under the CTA when a single scheme may have primary, secondary and tertiary corporations, and/or multiple different land uses. There is a strong argument, therefore, that the management of larger schemes ought to be reserved to those who have certain qualifications. However a distinction can be drawn between necessary minimum qualifications, and higher standards that might be voluntarily pursued by others to achieve industry best practice.

- 12.1 *Should there be different levels of regulation, for BCM's managing corporations of different size?*
- 12.2 *What should be the maximum size corporation (how many units or lots), if any, that a person without qualifications should be permitted to manage?*
- 12.3 *If professional BCM's ought to have prescribed qualifications, what subjects or training should be passed as a minimum standard to qualify as a professional manager of a small corporation? Up to what size corporation should such a person be permitted to manage?*
- 12.4 *What additional subjects or training should be required to qualify as an unrestricted professional manager of even the largest corporations?*
- 12.5 *What, if anything, should exclude a person from qualification as a professional BCM, or constitute grounds for removal? (e.g. bankruptcy, conviction for certain offences, mental or physical incapacity etc.)*

13. INDEMNITY OR FIDELITY FUND

The interest earned on money held on trust by real estate agents finances a professional indemnity fund to cover fiduciary defaults and the cost of investigating complaints against real estate agents and their sales representatives. The fund includes interest from rent moneys, held on trust by property managers, and protects property owners from defalcation of rent money. Likewise, the Residential Tenancies Tribunal is funded by the interest received from rental bonds, held by the Commissioner for Consumer Affairs. Significantly, this requirement protects not only tenants, but also landlords and property managers, whether they are professional or honorary, because all bonds must be lodged. A similar scheme operates to protect the clients of legal practitioners.

Honorary BCM's usually manage the funds from only their own corporation, although these funds can be significant. Professional BCM's may have considerable sums of money from many corporations under their control. No money or interest from these funds is set aside to cover defaults. An intentional defrauding of a BCM's accounts could have severe repercussions for many owners.

- 13.1 Should regulation include creation of an indemnity or fidelity fund to cover defaults? If so, should it be funded by interest from trust accounts, as occurs for other occupations?*
- 13.2 Should an indemnity fund for BCM's be a separate scheme, or should it be combined with the existing real estate agents indemnity fund?*
- 13.3 Should anyone holding money on behalf of a corporation, (including honorary BCM's) have their accounts subjected to the same regime? If not, what corporations (or which BCM's) should be exempt?*

14. ADVICE, INFORMATION AND CONCILIATION

Although option 1 (in Section 10 above) would provide sufficient revenue to administer a scheme of licensing, and option 2 would provide revenue for an indemnity or fidelity fund, neither of these options would raise sufficient revenue to also fund an office to provide information, advice, conciliation or mediation.

There is no single Government office that has responsibility for administering strata and community corporations, or with a duty to disseminate information, explain the operation of the two Acts, or assist corporations and their office-bearers to carry out their functions and duties. Nevertheless, corporation members have been able to get information from organisations in both the public and private sectors. These include:

- Attorney-General's Department
- Lands Titles Office
- Legal Services Commission
- Office of Consumer and Business Affairs
- Community and Strata Corporations Institute of South Australia
- Individual "strata managers"
- Real Estate Institute of S.A

14.1 Is the current level of information about strata title and community title matters adequate? If not, which agency or organisation should provide information? How should it be funded?

When disputes arise it is often helpful to have a neutral person offer to assist the parties in coming to a resolution. The State Government does not normally offer this service, but, if funding was available, it might be possible, in future, to introduce a conciliation or mediation service, perhaps in conjunction with an information and advice service.

14.2 Should the government provide an informal conciliation or mediation service? If so, how should it be funded?

15. PROPERTY MANAGERS OR LETTING AGENTS

This Paper was to have been confined to the problems that arise in managing corporations under the CTA and STA. However during the preparation of this Paper, suggestions were made that it should have a broader focus, because there may be similar problems associated with property managers.

Property managers, also known as “letting agents” are in a similar position to BCM’s. Many individuals perform both these roles in connection with the same real property, for the same clients. Until 2002 the Real Estate Institute of South Australia (REISA) dealt with complaints against member land agents pursuant to an agreement with the Office of Consumer and Business Affairs. The REISA has reported that there were 26 formal complaints against property managers lodged in the year 1 July 2001 to 30 June 2002. Complaints included:

- failure to collect rent or allowing rent to fall into arrears;
- failure to conduct property inspections or to report accurately on the results of inspections;
- incurring unauthorised expenses, e.g. for advertising and repairs;
- delays in passing on rent collected;
- failure to deduct appropriate amounts from security bonds before authorising release of the bond;
- failure to conclude negotiations with a prospective tenant leaving property untenanted for a period; and
- failure to account.

A person who carries on the business of providing services connected with the leasing of properties is a land agent for the purposes of the *Land Agents Act 1994*, and therefore must be registered as a land agent. This means that the principal of the business (and a nominated supervisor or manager if the agent is a company) must hold mandatory qualifications as a land agent. Any rent money collected by the property management business is trust money for the purposes of the *Land Agents Act* and must be deposited in the agency trust account. The trust account, in turn, is subject to controls and audit requirements designed to protect that money from misapplication or misappropriation.

However unlike real estate sales representatives, who are subject to disciplinary action under the *Land Agents Act*, property managers cannot be removed from the industry by disciplinary action. Even if a property manager has misappropriated trust money or acted negligently, there is nothing to prevent that property manager continuing to be employed by an agent and continuing to carry out the functions of a property manager.

Regulation such as compulsory licensing or registration would restrict competition. It could also have the effect of increasing the costs to owners of engaging property management services. Alternatively, introduction of a mandatory Code of Conduct might make required standards clear and help to prevent loss to property owners as a result of substandard services. This might achieve higher standards while avoiding the increased costs associated with licensing and mandatory training requirements.

- 15.1 *Should property managers be subject to a regulatory regime equivalent to that required for BCM's?*
- 15.2 *If not, should property managers be required to meet competency and propriety requirements?*
- 15.3 *Should property managers be subject to disciplinary proceedings?*
- 15.4 *Should property managers be required to comply with a mandatory Code of Conduct?*
- 15.5 *Do owners of commercial and retail premises require protection from incompetent and/or dishonest property managers or should protection be limited to residential property owners?*

¹ A figure of \$75,000 p.a. is obtained by making the following assumptions:

- * 350 BCM's
- * \$215 annual licence fee. This is comparable to the fees charged for land agents and conveyancers. It excludes revenue from the once-off application fee.

² A figure of \$168,000 p.a. is obtained by making the following assumptions:

- * 70,000 lots or units under the CTA or STA.
- * 60% of them professionally managed, and subject to trust accounting.
- * Estimated average body corporate contributions, currently paid by unit or lot owners, of \$500 p.a.
- * 80% of contributions disbursed on collection, so only 20% of funds earning interest at any one time.
- * Interest rate on these funds assumed to be 4%.