



Office of the Director  
of Corporate Enforcement

*Oifig an Stiúirthóra um  
Fhorfheidhmiú Corparáideach*

## EXTENT AND OUTCOME OF THE ODCE'S CONSULTATION PROCESS C/2006/2

1. The purpose of this document is—
  - to state briefly the nature and extent of the ODCE's Consultation Process C/2006/2;
  - to give a broad outline of how we dealt with the submissions made by those who responded to our request for observations.
2. In December 2006 the ODCE published a Consultation Paper concerning the Governance of Apartment Owners' Management Companies.
3. The background to that paper was that, almost since our establishment in 2001, the ODCE had been receiving a steady stream of complaints about the governance of companies ("*property management companies*") associated with the management of multi-unit developments.
4. From all of those complaints, as well as from commentary made by other persons and agencies,<sup>1</sup> it had become apparent to the ODCE that, although company law is clearly relevant to the governance of property management companies, many people connected with such companies had fairly little understanding of that law, and of their duties and responsibilities under it.
5. One of the ODCE's statutory functions is "to encourage compliance with the Companies Acts".<sup>2</sup> In discharge of that function it therefore seemed appropriate that we should seek to publish some appropriate material to assist people connected with property management companies in better understanding how company law was relevant to them.
6. As a first step towards that process we decided to concentrate on the types of property management companies with which we were then most familiar: those involved solely with the management of apartment complexes. We therefore prepared Draft Guidance on the Governance of Apartment Owners' Management Companies which attempted to describe the key legal structures and company law provisions dealing with how property management companies should be governed, and what were the main privileges and responsibilities of relevant company law stakeholders (such as management company directors and members).
7. We invited all interested parties to comment on the format and content of the Draft Guidance and, in particular, to deal with the following questions—
  - (a) whether, having regard to its primary purpose, the Draft Guidance was clear and useful;
  - (b) whether there were any omissions or issues which should have been discussed in the ODCE Guidance, or better explained;
  - (c) whether the ODCE Final Guidance should be in a similar form to the draft Guidance, although supplemented by a list of key governance requirements;
  - (d) whether, and to what extent it was helpful and appropriate for the ODCE to have proposed certain changes to certain regulations often contained in management companies' articles of association, or whether such changes might give rise to problems;

<sup>1</sup> For example, the documents referred to at paragraphs (a) and (b) in paragraph 11 below.

<sup>2</sup> Section 12(1)(b) of the Company Law Enforcement Act 2001.

- (e) recognising that the Draft Guidance had been developed with apartment owners' management companies particularly in mind, whether there were distinct features of the management companies for housing estates or mixed use developments which required specific attention in the development of the ODCE's Final Guidance.
8. We circulated the Consultation Paper to a large number of agencies, bodies and persons whom we thought would have useful perspectives to share in relation to these issues. In addition we placed advertisements widely in the media concerning the topic. We also publicised the Consultation Paper by way of a mass-marketing campaign.
  9. The outcome of this process was that we received almost 70 submissions in response to our Consultation Paper. These came from across the full spectrum of persons interested in the area: private individuals who resided in multi-unit developments or owned investment properties located there, public representatives, property managing agents, Government Departments, statutory agencies, professional bodies whose members have ongoing dealings with management companies, etc. The Appendix below lists all those who responded to the Consultation Paper.
  10. To all of those who responded to the Consultation Paper the ODCE owes a sincere debt of gratitude for the helpful and insightful comments which respondents offered. Those observations have significantly enhanced our understanding of this topic. In addition many respondents were kind enough to commend the ODCE for having taken an initiative in this area and this is something for which we are also very grateful.
  11. The ODCE's publication of its Consultation Paper occurred at a time when wider issues concerning management companies (and the multi-unit developments with which they are associated) have been attracting significant public attention in several other ways. At the official or industry level these included the following events or matters—
    - (a) The publication in June 2006 by Dublin City Council of *Successful Apartment Living - A Role for Local Authorities in Private Residential Management Companies*.
    - (b) The publication in October 2006 by the National Consumer Agency of *Management Fees and Service Charges Levied on Owners of Property in Multi-Unit Dwellings*.
    - (c) The publication in December 2006 by the Law Reform Commission of its Consultation Paper on *Multi-Unit Developments*.
    - (d) A Government Decision in December 2006 to establish a high-level interdepartmental committee, comprising representatives of relevant Departments / Offices, to assist in the development of a coherent and comprehensive legislative response to issues arising in relation to property management companies. The ODCE was invited to participate in the work of this committee.
    - (e) A Public Conference in January 2007 entitled *Law Reform Options for Multi-Unit Developments* organised jointly by the Law Reform Commission and the Department of Justice, Equality and Law Reform.
    - (f) The establishment in March 2007 by the National Consumer Agency of a Multi-Unit Development Stakeholder Forum comprising key stakeholders in the relevant sector.
    - (g) The publication in June 2007 by Dublin City Council of *Successful Apartment Living - Survey of Service Charges, Design, Management and Owners' Attitudes in 193 Private Apartment Schemes in Dublin City*.
    - (h) The publication in March 2008 by the Irish Home Builders Association of its *Code of Practice for Management Companies in respect of Multi-Unit Developments*.
    - (i) The publication in June 2008 by the Law Reform Commission of its Report on *Multi-Unit Developments*.
    - (j) The publication in September 2008 by the National Consumer Agency of—
      - the Conclusions & Outputs of its Multi-Unit Development Stakeholder Forum; and,
      - *Buying and Living in a Multi-Unit Development Property in Ireland*.

12. All these publications, and the discussions within and leading up to them, have furthermore significantly enhanced the ODCE's overall understanding of this topic. Likewise since December 2006 the ODCE has continued to deal with many queries and complaints from members of the public relating to management companies and these too have given us additional insights into other ways in which our *Draft Guidance* of December 2006 needed to be modified. The ODCE has benefited also from discussion with members of the Company Law Review Group concerning property management companies.
13. Having reflected carefully on all of the submissions referred to at paragraph 9, and the issues raised as described at paragraph 12, the ODCE has now prepared a detailed *Company Law Handbook on Residential Owners' Management Companies* and a shorter booklet entitled *Management Companies – A Property Owner's Guide to Company Law*.
14. Major themes which were outlined, explored or brought into focus by respondents to the ODCE's Consultation Process included the following—
  - a. Agreement with the ODCE's view that its eventual publications should deal with property management companies generally, and not solely those concerned with the management of apartment complexes.
  - b. A need for the ODCE Guidance to deal not only with property management companies which were incorporated as companies limited by guarantee not having a share capital, but also with such companies as are incorporated as private companies limited by shares.
  - c. Commentary on the extent to which, in practice, the *de facto* role of the management company during the Developer-and-Owners Phase may differ from its *de jure* role apparently assigned to the company in the conveyancing documents from which the company's operational role is determined.
  - d. A need for the ODCE Guidance to include reference to ad hoc committees that are often formed in property management companies during the Developer-and-Owners Phase.
  - e. A concern that in the Draft Guidance the ODCE had under-emphasised the extent to which the predominant power to manage a company is vested in its directors, not in its members.
  - f. The desirability of the ODCE Guidance including a section dealing specifically with the duties and liabilities of management company directors, the extent to which they can face personal liability, and of how they can seek to minimise those risks.
  - g. A need to deal with the situation where no-one is willing to become a director of a property management company.
  - h. The appropriateness of a managing agent acting as company secretary of a property management company.
  - i. Whether there is an obligation in company law for management company directors to attend general meetings of company members.
  - j. The desirability of explaining better the rules regarding when AGMs and Annual Returns are needed, and of how the rules differ.
  - k. A need to explain more precisely the role of a management company's statutory auditors and the extent to which it is mistaken to expect that they can/should have a role in ascertaining and certifying service charges.
  - l. A questioning of the correctness of the ODCE's view in the Draft Guidance that property management companies were generally "companies not trading for the acquisition of gain by the members" and were therefore subject to different accounting obligations than apply to most other companies.
  - m. The circumstances in which a property management company is / should be able to avail of audit exemption.
  - n. Outlining better the general advisory role of a management company's solicitors.

- o. Instances in which it was apprehended that the ODCE's Draft Guidance was excessively prescriptive, and where it would be more appropriate for us to merely outline relevant matters in relation to which management companies should – as necessary – seek their own advice.
  - p. The desirability of highlighting more conspicuously the remedies available in cases where there is a breach of company law obligations.
  - q. Misgivings in relation to some of the changes to commonly adopted articles of association which had been canvassed in the Draft Guidance.
15. In addition many respondents to the ODCE's Consultation Process made observations to us in relation to issues concerning multi-unit developments which, in our view, were more relevant to the wider law reform agenda which was simultaneously being worked upon by the Law Reform Commission. (Some respondents in fact copied the ODCE with their submissions to the Law Reform Commission sent in the context of the Commission's Consultation Process.) Because the focus of the ODCE's work is confined to company law matters we did not seek to deal specifically with any of those issues in our Handbook, but they were useful in the context of the valuable dialogue which existed between the Law Reform Commission and the ODCE. They also assisted the ODCE's representative on the inter-departmental committee referred to at paragraph 11(d) above in contributing fully to the work of that group.
16. Many respondents to the ODCE's consultation process were complimentary as regards the ODCE's efforts in preparing the Draft Guidance. Terms and phrases used by respondents included the following—
- “most informative”,
  - “very clear and straightforward”,
  - “a well thought out consultation document which covers most of the problems encountered when dealing with [a property management company]”,
  - “very easy to read and understand”,
  - “an exceptionally well conceived guidance document”,
  - “informative and well-researched”
  - “this publication will play an important role in helping to reduce the ‘information deficit’ that exists in relation to property management companies and in promoting better governance.”

A small number of respondents were more sceptical, however, about the value of the ODCE's work—

- “while the document is welcomed, the reality is that the majority of issues encountered on a daily basis in relation to [property management companies] are of a consumer nature and not covered by this document.”
  - “I am disappointed that something more is not being done, not detracting from your office's efforts, but lets face it, there needs to be some law enforcement and regulation around [property management companies'] modus operandi rather than just heightening consumer awareness. Effectively all you are doing is pointing out all the wrongs to look out for, which is great; the disappointment then comes afterwards when [people] realise the management company holds all the cards and there isn't a lot that can be done thereafter.”
  - “While the guidance booklet drafted by the ODCE is excellent, in reality I cannot see too many apartment purchasers actually taking the time to read it as it is quite large ...”.
17. Aside from the changes flowing from the observations and suggestions of respondents to the Consultation Process, the ODCE concluded that other ways in which the Handbook could be improved were—
- a. By dealing with specific company law issues in short chapters which would improve accessibility for readers.
  - b. By dealing more clearly with the record and registers which all companies are required to keep.

- c. By explaining the concept of weighted voting, how votes are taken at meetings, and of how members can seek to exercise their voting power through proxies or representatives.
- d. By dealing with how management company directors are appointed, how many directors there can be, and how they cease to hold office. We also decided to give practical example of how a set of typical "Rotation of Directors" rules would operate in practice.
- e. By emphasising the requirement for a board of directors to act collectively and of the unacceptability of any directors being ignored or "frozen out" by the other directors.
- f. By including sections (including practical precedents) concerning how directors' meetings, AGMs and EGMs should be organised, how notice should be given of them, and of how those seeking to transact business at meetings should go about doing so.
- g. By including a section dealing with the chairing of a property management company's general meetings.
- h. By emphasising the importance of the company's registered office being a location at which all appropriate statutory obligations could be performed, and from which the company is in a position to meaningfully receive all formal communications sent to the company.

**OFFICE OF THE DIRECTOR OF CORPORATE ENFORCEMENT  
DECEMBER 2008**

## APPENDIX

### *Respondents to the ODCE's Consultation Process C/2006/2*

1. John Atkinson – Wexford Project Management Services Ltd
2. Eoghan Breathnach
3. Buyers Broker Ltd
4. Deputy Joan Burton T.D.
5. Deputy Joan Burton T.D. (on behalf of a named constituent)
6. James Byrne
7. Maura Cagney
8. Tom Canavan
9. Paula Carey & Fergal McNamara
10. Fergal Cassidy
11. Michael Clarke
12. Ian Cloran
13. Carl Cody
14. Tony Collins – J.C. Collins & Co Ltd, Insurance Brokers
15. Malachi Conlon
16. The Consultative Committee of Accountancy Bodies - Ireland
17. Fintan Coughlan
18. Nicola Coughlan
19. Patrick C Coughlan
20. Albert Dawson – Albanne Property Management Limited
21. Fergus Desmond
22. Brian Devlin
23. Colin Doyle
24. Dún Laoghaire – Rathdown County Council
25. eircom Ltd.
26. The Department of the Environment, Heritage and Local Government
27. Fingal County Council
28. John Finnegan
29. Aidan Fitzsimons
30. Marian Fitzpatrick
31. Deirdre Fox
32. Brian Glen
33. Robert Gogan BL
34. Patrick Grealay
35. Anton Hunt
36. Institute of Directors in Ireland
37. Irish Home Builders Association
38. Irish Property and Facilities Managers Association
39. James Jennings – James Jennings & Co, Chartered Accountants, Registered Auditors and Taxation Consultations
40. Kildare County Council
41. W Terence Liston – Liston & Company, Solicitors
42. Jim Loughnane
43. The Law Society of Ireland
44. Cian MacLochlainn
45. Mairead McElligott
46. Ita Mannion
47. Richard Michaelides
48. Monkstown Square Management Company Ltd
49. Ruth Mooney
50. Claire Murphy
51. Colin Murphy
52. Rosemary Murphy
53. Sinead Murphy
54. The National Consumer Agency
55. National Standards Authority of Ireland, Fire Safety Standards Committee
56. Margaret Oakes
57. Joseph O'Broin
58. Jim O'Donohoe
59. John O'Loughlin
60. Rory O'Meara
61. Patrick Pegman
62. Mary Rafferty
63. Rockabill Owners' Steering Group
64. Willie Ryan
65. Derek Synnott
66. Tramyard Residents' Committee
67. Julia Vaughan
68. Andrew Whelan