

Property managers in Scotland

A market study

February 2009

OFT1046

© **Crown copyright 2009**

This publication (excluding the OFT logo) may be reproduced free of charge in any format or medium provided that it is reproduced accurately and not used in a misleading context. The material must be acknowledged as crown copyright and the title of the publication specified.

CONTENTS

<i>Chapter/Annexe</i>	<i>Page</i>
1 Executive summary	4
2. Introduction	11
3. Overview of the property management sector in Scotland	16
4. Competition	27
5. Consumer information and satisfaction	50
6. Land maintenance	64
7. Recommendations	93
<i>Annexe</i>	
A. List of consultees and contributors	
B. Consumer survey	
C. Survey of property managers	
D. Market definition	
E. Choice and competition	
F. Regulatory and legislative review	
G. International comparisons	
H. Scottish House Conditions Survey	
I. Local Authority use of planning agreements	
J. Local Authority use of planning conditions	
K. Glossary	

1 EXECUTIVE SUMMARY

- 1.1 The management of the common parts of homes in multiple ownership is of importance to many Scottish consumers - some 36 per cent of the population in Scotland live in a tenement flat, maisonette or apartment which amounts to about 780,000 households.
- 1.2 Property management firms, used by owners in shared properties, typically provide such services as: instructing contractors to carry out repairs, organising common property insurance cover and the cleaning and maintenance of common areas - stairways, hallways, lifts and common gardens. Property managers bill and collect money from individual owners.
- 1.3 In Scotland, about 50 per cent of people living in privately owned flats and apartments have a property manager – 30 per cent have a private sector manager and about 20 per cent have a registered social landlord as a manager. The rest either do not use a property manager and arrange the services themselves or have no arrangements in place.
- 1.4 The OFT launched this short market study partly in response to a submission from the Scottish Consumer Council, one of the predecessor organisations of Consumer Focus Scotland and partly in response to other representations and the obvious interest of the issue to Scottish people. Key issues identified by Consumer Focus Scotland included the degree to which consumers are locked into a supplier, the information available to property owners and the ability of owners to obtain satisfactory resolution of complaints or disputes.
- 1.5 The supply of land maintenance services – in particular the maintenance of open areas and play parks on new housing developments – has many similarities to the supply of property management services although the supply is not limited to flat owners. Many property managers also provide land maintenance services. We received a number of representations on the subject of land maintenance in Scotland, these concerns were very similar in nature to those raised by people

concerned with property managers – and so we decided to include land maintenance services in Scotland in this study too.

Key findings

- 1.6 We found that most people – about 70 per cent – are happy with their property manager. The majority of respondents to our consumer survey said they found it easy to get repairs carried out, felt the services offered by property managers represented value for money and were of good quality. On the other hand, a substantial minority were less happy about the services provided. One illustration of this can be found among consumers that had made a complaint about their management firm: as many as two thirds were dissatisfied with the way their complaint was handled.
- 1.7 The relationship between the property manager and the owners in a shared property is defined by complex legislation, property deeds and agreements – many consumers do not understand their rights and obligations and are unsure about what they should expect from their property manager, or the standards of service that should apply. When consumers cannot easily and confidently identify the terms and conditions which apply to their relationship with a supplier, then the possibility of a breakdown of that relationship increases.
- 1.8 We found a very low level of switching in this market, even compared to some other markets such as banking, communications or energy where switching is either currently, or has historically been, low. In part this is due the difficulties of coordinating the individual owners in a tenement block or property development to facilitate a switch, but it is also due to the problems these consumers have in understanding the processes involved in switching to another property manager.
- 1.9 There is very little evidence of active competition between property managers to encourage consumers to switch. We also found that some perceptions about the Code of Practice of the main trade association, the Property Managers Association of Scotland (PMAS), may have further dampened competition between property managers. We found

evidence to suggest that some PMAS members believed that the PMAS Code of Practice prohibited members from approaching other members' customers with a view to encouraging them to switch from their current supplier of services. We are pleased to report that PMAS has confirmed to us that its code of practice should not be misinterpreted as discouraging competition and have written to their members to make it clear that the code of practice does not prohibit members from approaching other members' customers and that PMAS encourages healthy competition among its members for the benefit of consumers.

- 1.10 Owners in shared properties who have a complaint or are dissatisfied with their property manager have limited scope for redress. Even after using what complaint procedures do exist, typically the property managers' own complaints system, many are left with the issue either unresolved or with an unsatisfactory response and the only - unrealistic for many - recourse may be to the courts. There is no independent complaint or redress mechanism available to the owners of shared property in Scotland.
- 1.11 We also found that where consumers are organised and have a strategy for engaging with their property manager there are clear benefits. Consumers organised in an association or similar are better able to represent their collective interests effectively and assertively; property managers, acting with a clear mandate and instructions are more likely to be able to meet consumers' expectations.

Key recommendations

- 1.12 The lack of effective competition in this market, difficulties with switching, and the complexity of the legal situation means that there is a need for an effective independent complaints and redress mechanism which is easily accessible to the owners of shared property. In order for this to work effectively, this scheme needs to operate within a framework which lays down minimum requirements for best practice so that complaints are assessed against clear standards. We recommend that these standards should provide for property managers to:

- set out in writing the details of the services they will provide¹ and the relevant delivery standards
- encourage property owners to form an organised body (either a formal residents' association or limited company)
- the provision, as a matter of course, of a detailed financial breakdown and description of the services provided by the property manager and such supporting documentation as is appropriate (for example, invoices were appropriate)
- proactive explanations of how and why particular contractors have been appointed, demonstrating that the services being procured are charged at a competitive market rate
- automatically return floats to owners at the point of settlement of final bill, without consumers needing to request the return of the float
- have and operate a complaints procedure and to proactively make details of it available to consumers
- at a minimum follow Financial Services Authority (FSA) guidelines on disclosure of commission on insurance, whether FSA authorised or not
- in addition, there should be a mechanism to allow the audit of payments to contractors, either on a random basis or reactively in response to complaints, to reassure consumers that no improper payments are involved

¹ Often, there is no written 'contract' for services between the property manager and the owners of the shared property. Rather maintenance obligations are traditionally enforced by real burdens set out in the title deeds.

- 1.13 To be effective in changing the nature of the market the standards and redress scheme needs to cover a large majority of Scottish property managers. The Scottish Government has put forward a proposal for a self-regulatory scheme that would bring together representatives of Consumer Focus Scotland, SFHA and PMAS but would be open to all engaged in property management. If such a voluntary scheme receives widespread backing, and includes the provision for an independent and robust complaint and redress mechanism, in the terms set out in the 'Recommendations' chapter of this report, this would be a big step toward solving the most serious problems.
- 1.14 Given that there are benefits to a voluntary scheme, and there are indications such a scheme may be successful, this route should be attempted before considering statutory regulation. Nevertheless, given the low level of competition in the market, if self regulation fails, there is a case for the introduction of statutory regulation.
- 1.15 However, proposals for an accreditation scheme have been considered for several years, without any significant impetus from industry participants. It is important that, if a scheme is to be set up quickly, for Scottish Government to take a lead in setting out the proposals and ensuring that a scheme is effective. Given it is not certain industry support will be forthcoming, we recommend that if an effective scheme is not in place and operating successfully within two years, proposals for a statutory scheme should be brought forward and implemented.
- 1.16 Our study has also shown that there is a need for clear advice and assistance to consumers on what is a complex area of law. In addition, the relationships between the owners of the shared property and between the owners of the shared property and the property manager can also be problematic, for a wide range of reasons not least because of communication, information or coordination difficulties. We therefore also recommend that the Scottish Government should work with local authorities to develop a centralised information, advice and mediation service for private sector property owners and all types of property managers providing services to private sector owners.

- 1.17 We recommend that the advice service should be distinct from any self regulatory scheme and more formal redress mechanism since its purpose would not be to resolve complaints or award redress, but to be a source of advice and guidance for all parties.

Land maintenance

- 1.18 Land maintenance services are typically provided on new housing developments where open space requirements may be included as part of the obligations associated with planning permission. These open spaces may also include play areas, grass verges, drainage systems or woodland. The property developer will choose the arrangements for land maintenance, including the appointment of a maintenance company. Obligations on property owners to pay for the land maintenance services are often incorporated into the deeds of conditions.
- 1.19 We found very similar issues around land maintenance to those found in property management. There are some differences, however, particularly where ownership of the land is transferred to the land maintenance company but property owners are tied by the deeds to pay for that maintenance. In these cases it is even harder to change supplier and there is very limited protection for the property owners against price increases or the failure of a company to deliver services.
- 1.20 Given the similarity between activities and indeed the fact that many property management companies organise land maintenance and vice versa, we recommend that any voluntary scheme for property managers, or statutory scheme if the voluntary arrangements are unsuccessful, includes and applies to land maintenance companies in Scotland.
- 1.21 In designing arrangements for management of the open spaces both property developers and local authorities need to be aware of the risks of certain models which transfer ownership to private companies and

involve payments in the form of a commuted sum.² Developers and local authorities should take steps to mitigate the risk that these arrangements may be unsatisfactory or indeed may fail altogether.

- 1.22 Our final recommendation around land maintenance relates to the Title Conditions (Scotland) Act 2003. This Act allows property owners to amend real burdens (namely obligations) affecting the community potentially allows for property owners to switch land maintenance supplier. We are not aware of any group of consumers that have used this option to change their land maintenance supplier, possibly due to the cost or complexity involved.
- 1.23 Consumer Focus Scotland has agreed in principle to provide support to a group of owners seeking to test the provisions of the Act in order to assess the feasibility of residents taking this action in practice. If the process proves manageable, this may provide an example for others. If the costs and complexity mean the process is out of practical reach, we recommend that the Scottish Government should reconsider the provisions of the Title Conditions (Scotland) Act 2003.

Thank you

- 1.24 As part of this study, we consulted directly with consumer groups, residents' associations, trade associations, Government and academics. We also received many representations direct from individual consumers and other interested parties. We are very grateful to everyone who helped us in our work. A list of the consultees and contributors to this report is attached at annexe A.

² A sum of money paid upfront to the private company to cover the future maintenance costs of the land.

2 INTRODUCTION

Background to the report

- 2.1 The OFT launched this market study into property managers in Scotland in June 2008. We started the work after receiving a submission from the Scottish Consumer Council (SCC), one of the predecessor organisations of Consumer Focus Scotland. A range of stakeholders in Scotland including Members of the Scottish Parliament (MSPs), newspapers and the Housing Improvement Task Force have also raised concerns about the property management sector in Scotland.
- 2.2 There were two main concerns identified in the SCC submission and by others. First, that because it is difficult for consumers to exercise collectively choice and switch means that competition between suppliers is not effective in ensuring that consumers get a good deal. Second, in the absence of competition and switching as an effective constraint on suppliers, consumers need to be able to enforce good standards and value for money.
- 2.3 In addition, we received submissions from a number of parties about land maintenance companies in Scotland. Land maintenance companies offer a very similar service to property managers for the maintenance of open spaces, such as play parks on a new housing development. There is often a common responsibility on the home owners to maintain, or pay for maintenance, of such open spaces.
- 2.4 Two questions summarise the main points raised by the submissions to us. These are:
- is competition effective in ensuring that consumers get a good deal from their property manager or land maintenance company?
 - can consumers enforce their rights and otherwise assure themselves of good service and value for money?

- 2.5 The nature of the issues for consumers when dealing with land maintenance companies is very similar to those when they are dealing with property managers. A number of property managers also undertake both property management and land maintenance for new developments on very similar terms. So we decided to bring into the scope the activities of land management companies.

Scope of the study

- 2.6 This study considers the supply of residential property management services to owners in multi-owned dwellings and dwellings with communally owned space including self-management arrangements, in Scotland. The provision of property management services by local authorities and housing associations to individual property owners is included. The study does not look at property management services for non-residential properties.
- 2.7 The study also looks at the supply of land maintenance services for open spaces where there is a communal maintenance obligation.

Why limit the scope of the study to Scotland?

- 2.8 Scotland has a specific form of ownership for flats, maisonettes and apartments distinct from the leasehold arrangement that predominates in England and Wales. Scotland also has specific legislation for the arrangements for property management services. Furthermore, the suppliers of property management services in Scotland typically, although not exclusively, tend to limit their activities to Scotland. There is a separate trade body, the Property Managers Association of Scotland (PMAS) that is distinct from the main trade body in England and Wales (Association of Residential Managing Agents).

Methodology

- 2.9 Market studies involve detailed examinations of markets, practices and regulation to explore whether the needs of consumers in particular

markets are being well served.³ They are exploratory studies to gain the best possible understanding of how markets are working. Possible outcomes of a market study include:

- giving the market a clean bill of health
- publishing information to help consumers
- encouraging an industry code of practice
- making recommendations to the Government or sector regulators
- investigation and enforcement action against companies suspected of breaching consumer competition law
- a market investigation reference to the Competition Commission.

2.10 If a study reveals the need for further investigation or action under any of the OFT's enforcement powers, the OFT will act accordingly, subject to its administrative priorities.⁴

2.11 When we launched the study, we invited written submissions from interested parties. We received nearly 200 responses between June and December 2008 from consumers via email and letters which were helpful in highlighting the key issues that the study should consider. We have also consulted directly with property managers, representatives of residents' associations, consumer organisations, independent regulators, Scottish Government, the PMAS, academics and other stakeholders

³ www.offt.gov.uk/shared_offt_business_leaflets/enterprise_act/oft519.pdf,
www.offt.gov/advice_and_resources/small_businesses/competing/studies.

⁴ The OFT's prioritisation principles can be found on the OFT website at www.offt.gov.uk/advice_and_resources/publications/corporate/general/oft953.

with an interest in this sector. A full list of consultees and contributors can be found at annexe A.

- 2.12 The principal surveys and information requests we sent out or commissioned are outlined below.

Consumer survey

- 2.13 This was a telephone survey carried out on behalf of the OFT by Ipsos MORI consisting of 998 completed telephone interviews with flat owners seeking information about their relationship with their property manager (if they used one) and their experiences in relation to the repair and maintenance of the communal areas of their property. Annexe B sets out in detail the results of the survey.

Information from Scottish Household Condition Survey

- 2.14 During our information gathering, we discovered that a number of questions contained within the existing Scottish House Condition Survey (SHCS) had relevance to our study. We requested some tabular outputs from the SHCS team – in part to use the information but also to support consistency checks with other parts of our research. These results are presented and summarised in annexe H.

Property managers' survey

- 2.15 The OFT wrote to 365 businesses potentially acting as property managers covering all geographic regions of Scotland inviting them to complete an online survey. The survey was designed to find out more about the market and the supply of property management services as well as to seek information on the key issues being looked at by the study. A summary of the final results can be found in annexe C.

Additional information from consumers

- 2.16 We asked a number of consumers who had written to the OFT to provide additional documentary evidence. In particular, we asked for

copies of title deeds, deeds of condition, marketing materials and examples of a typical monthly bill.

International comparisons

- 2.17 We looked at the supply of property management services in other jurisdictions, specifically Australia (New South Wales), France, Ireland, and England and Wales. The findings are summarised in annexe G.

Consultation with stakeholders

- 2.18 We sought information from, and consulted with, as many of the key stakeholders as was practicable in the time available to us. We also carried out a limited consultation on our provisional findings with some stakeholders, such as the PMAS, Scottish Government and Consumer Focus Scotland.

3 Overview of the property management sector in Scotland

- 3.1 The owner of a flat in a block will typically have some responsibility for the upkeep of the block as a whole or at least the communal parts of the block such as the roof, stairwell, hall, and so on. Across the world there are various forms of ownership of flats and various arrangements set out for the repair and maintenance of the block. In Scotland individual flats are owned outright but come with responsibilities for communal areas. These responsibilities are set out either in the property's title deeds or deeds of conditions.
- 3.2 These deeds, which are frequently specific to the block, set out in greater or lesser detail how the management responsibilities should be fulfilled. In general, an individual flat owner in a shared property, acting together with the other owners in the same block, may appoint a property manager to organise property maintenance on their behalf. Alternatively, consumers⁵ can organise this themselves which is known as 'self- management' or 'self-factoring'.

Title deeds and burdens and other legislation

- 3.3 The title deeds of a property are legal documents which state who has title or ownership of a property and set out the 'burdens' – these are the conditions that will have to be obeyed by the owner. This could include an obligation to pay a proportion of common repairs, or a restriction on the uses of the property.
- 3.4 The title deeds may also contain some information about the management and maintenance of the property but sometimes this information can be found in a separate deed of conditions. The deed of conditions may have rules about an owner's responsibilities for the management and maintenance of the common parts, rules about how decisions should be made about the common parts, rules about how costs should be shared between the individual owners of the shared

⁵ We use 'consumers' as short hand in some places for 'owners of shared property'.

property and arrangements for paying for maintenance works and services.

- 3.5 The title deeds will have been drawn up for a particular property and will reflect local and regional variations and also vary according to whether or not they are modern title deeds – which seems generally to be taken to mean the title for a property built in the last 10-20 years or so.
- 3.6 It appears that title deeds vary markedly from property to property. In general, older title deeds make almost no provision for common decision making processes. This is in contrast with the title deeds for newer, and often much larger, developments in multiple ownership where the individual properties are sold on the basis that comprehensive management services will be provided.
- 3.7 Where there is no provision for a property manager in the deeds⁶ of a property, maintenance and repair can be organised and contracted for directly by the owners of the shared tenement property or development. Our consumer survey found that this was a common type of arrangement. However, half of properties in multiple ownership in Scotland do not engage a property manager but instead they look after communal maintenance and repairs themselves, either collectively or individually.
- 3.8 The Tenements (Scotland) Act 2003 provides for a default management scheme where Title Deeds are either silent or defective. The Tenements (Scotland) Act 2003 applies to all buildings that are divided into two or

⁶ By deeds we mean either the 'title deeds' or in the 'deed of conditions'.

more separate properties on different floors.⁷ For newer larger properties, the property developer may, in future, be able to put in place a Developmental Management Scheme (DMS).⁸ The DMS provides for the creation of an owners' association to run the development in accordance with the terms of the scheme.

Different types of property manager in Scotland

3.9 As well as private sector property managers, Registered Social Landlords (RSLs), more commonly known as 'housing associations', and local authorities also supply property management services to private residential properties. This is, in part, a result of the sale of public housing through the Right-to-Buy scheme. Many privately owned houses and flats are within a development that also contains social housing owned by either a RSL or local authority which have become property managers for privately owned property.⁹ In practice, RSLs and local authorities supply services, either direct or through a subsidiary

⁷ A tenement is defined in section 26 of the Tenements (Scotland) Act 2003 as:

'... a building or a part of a building which comprises two related flats which, or more than two such flats at least two of which -

(a) are, or are designed to be, in separate ownership; and

(b) are divided from each other horizontally,

and, except where the context otherwise requires, includes the solum and any other land pertaining to that building or, as the case may be, part of the building'.

This definition is broader than what would traditionally be described as a tenement i.e. a residential sandstone or granite building of three or four stories.

⁸ The DMS is defined as a scheme of rules for the management of the development – although the detailed provision of the rules is yet to be made (by way of an order, in this case secondary legislation). At the time of writing, section 71 of the Title Conditions (Scotland) Act 2003, allowing the owner of land to apply the DMS to that land is not yet in force.

⁹ Typically, the RSL or local authority reserve to themselves the power to manage or appoint a property manager, by way of a title condition called a 'manager burden'.

company, and charge individual property owners in the same way as private sector property managers.

- 3.10 In the former social rented sector the responsibility for managing or appointing a property manager to maintain and repair the shared communal areas of a property remains with the local authority or housing association for a period of 30 years. However, a majority of two-thirds of the owners of those properties can dismiss and then appoint a property manager within that 30 year period.¹⁰ There are 117 RSLs in Scotland who supply property management services.
- 3.11 Of all the types of property in Scotland that have common parts, we estimate that roughly 415,000 properties are privately owned. A proportion of these self manage, leaving 225,000 that buy services from a property manager. Of these we estimate 135,000 were served by property managers and 90,000 by a registered social landlord.
- 3.12 There is no comprehensive register or list of companies that act as property managers in Scotland. The Property Managers Association of Scotland (PMAS) covers a large part of the private sector property management market and includes within its membership most of the large and long established firms – it has about 40 member firms. However, there appears to be a potentially large number of suppliers whose main business is not property management, for example, their main business may be estate agency or property letting agency, but

¹⁰ This is by virtue of the Title Conditions (Scotland) Act 2003 section 63(8)(b) and section 63(6) and is in contrast to sheltered or retirement housing where the maximum duration of a manager burden is three years from the date the deed creating the burden was registered. In all other cases the maximum length of the manager burden is five years. In cases where the maximum duration is three or five years, section 28 of the Title Conditions (Scotland) Act 2003 provides that, once this period expires, the manager may be dismissed and a new manager appointed either following the procedure set out in the title deeds or, where these are silent, on a simple majority. If the deeds require a higher majority to take such a decision, under section 64, the owners of two-thirds of the properties will always be able to dismiss and appoint managers, whatever the title deeds say.

they may in addition to their main business also take on the role property manager for a limited number of properties.

- 3.13 The largest property managers are typically based in either Glasgow or Edinburgh, though they may have branches elsewhere. Our survey of property managers also found that some property managers also manage commercial properties. Some property managers also offer land management as a distinct stand-alone service as well as part of more general property management services.
- 3.14 Based on the figures provided by consumers about the annual payments for maintenance charges we estimate the market size to be approximately £66 million. This figure includes management fees and routine maintenance but excludes major repairs. As a result the true total may be significantly higher.

Differences in services across Scotland

- 3.15 Property management arrangements tend to differ between the East and West of Scotland. Arrangements where a property manager is used are typically more prevalent in the West of Scotland but have become more common in the East with the development of new, larger scale, purpose built accommodation. As noted earlier, there is a high prevalence of self-factoring or no factoring, particularly outside Glasgow, and in smaller properties - for example, in relation to 'four in a block' tenement properties.
- 3.16 Historically, in Glasgow, property managers tended to work for many small property investors. With the move from landlord ownership of the property to the individual ownership of flats within the block, deeds of condition were drawn up setting out the obligations in relation to the shared areas of the property and were passed on to the owners of each flat.
- 3.17 In Edinburgh individual landlord owners tended to have larger holdings and consequently often carried out the property management activity themselves. Property owners - both landlord and individual owners - relied on the title deeds of the property, which tended to either limit or

not make detailed provision for the management of shared areas, and the default legal position is set by statute or, historically, common law.

Paying for repairs

- 3.18 As well as setting out the obligations of the owners of the shared property in respect of the appropriate levels of maintenance, the title deeds or deed of conditions may also, in some cases, set out how the cost of repairs should be apportioned. The level of apportionment may vary between the individual owners depending on the type of work is required. For example, in some cases the title deeds may vary in the apportionment that ground floor residents pay for roof repairs.
- 3.19 Larger scale repairs typically have to be agreed in advance and may be funded through the existence of a sinking fund, though our research suggested such funds were uncommon.¹¹ The property manager will typically engage a contractor to provide repair services. Most have an approved list of contractors from which they seek quotations for major work. Having secured quotations for the proposed work, the property manager should then seek the agreement of the owners of the shared property for the work to go ahead.
- 3.20 In most modern residential developments each owner is required to contribute to a 'float' on purchasing the property. The float provides the property manager with money to pay contractors for recurring maintenance services or urgent repairs. The majority of private sector property managers insist, as a condition of supply, that the owners of the shared property contribute to the float.
- 3.21 A property manager will undertake small scale repairs up to an agreed maximum level, and in some cases where a repair is an emergency, without seeking agreement in advance. Property managers told us that

¹¹ A sinking fund in this context is a fund into which consumers set aside money over time, in order to fund a large scale (or expensive) repair. Typically, the funds are ring fenced and cannot be drawn on until there is sufficient money in the sinking fund to meet the costs of the repair.

such maximum agreed spending levels were generally modest, on average around £125 per dwelling.

The relationships

3.22 The interaction between the owners of the shared property, between the owners of the shared property and the property manager and between the property manager and the contractor make for a complicated picture of relationships.

Owners of the shared property

3.23 The owners of the shared property may not be a homogenous group. They may well have different expectations and requirements of the maintenance and repair of communal areas - and different perceptions of value for money. It may be difficult, therefore, for them to agree what services they want and a price they are all willing to pay. These issues can be difficult to resolve, particularly if there is no formal or informal representative body in place where they can discuss and agree such issues.

The owners of the shared property and the property manager

3.24 Our consumer survey found that where consumers are better organised they are generally more satisfied with the services of their property manager. This is partly because they can communicate their requirements more effectively to the property manager. In the absence of such organisation, the property manager has to confirm its instructions with each individual property owner. This can be time consuming and may not result in a clear consensus. In such circumstances and without a clear mandate for action, the property manager may not be able to carry out its functions effectively.

3.25 In such circumstances, problems between the property manager and owners of the shared property may arise. Some consumers may consider that the property manager is not adequately fulfilling its responsibilities even though this could be a consequence of some of the property owners' inaction, failure to agree, or that not enough of them

have provided funds to be able to guarantee payment to the contractor on completion of the repair work.

- 3.26 Problems can also arise where the communication between the property manager and the owners of the shared property is not sufficient or where the contractual terms of conditions of the relationship are either uncertain or unclear. These issues are considered in more detail in Chapter 5.

Regulation

- 3.27 There are currently no specific legal requirements in Scotland when setting up in business as a property manager.¹² Anyone can offer their services as a property manager.
- 3.28 There are currently proposals to introduce either a statutory scheme of licensing and regulation or a non statutory self regulatory accreditation scheme that would cover a large part of the market. The proposal for a statutory licensing scheme is contained in a draft private members bill proposed by Patricia Ferguson MSP. In June 2008 the Scottish Government announced its proposals to develop a property managers' accreditation scheme led by a coalition of industry and consumer representatives.
- 3.29 While providing property management services is not regulated as such, a number of activities carried out by property managers are regulated. For example, many private sector property managers will arrange block insurance for the owners of the shared property. Many property managers are registered with the FSA for the purposes of insurance intermediation. Furthermore some property managers possess a consumer credit licence which they need because of the way in which they collect funds from their clients.

¹² This situation is also the case in the rest of the United Kingdom.

- 3.30 Both registration with the FSA and application for a consumer credit licence involve the application of a fitness test. As a result while it is possible to practice as a property manager without being subject to a fitness test a majority, and in particular the largest property managers, are subject to such a test.¹³
- 3.31 Revocation of a consumer credit licence or removal of FSA authorisation would not in principle bar someone from continuing to operate as a property manager but it may prevent the property manager from engaging in certain activities, such as insurance intermediation, that may be seen as key activities for many property managers. In practice such revocation may, therefore, place a significant limit on the practicality of acting as a property manager.
- 3.32 Firms that hold a consumer credit licence and/or are FSA regulated are also subject to the Financial Ombudsman Service – but only for their regulated activities. Property management activities do not fall within the jurisdiction of the Financial Ombudsman Service.
- 3.33 Registered social landlords (RSLs) and Local authorities¹⁴ do not need a consumer credit licence to carry on a business and will also not typically be FSA registered. Housing associations in Scotland are regulated by the Scottish Housing Regulator. The Scottish Housing Regulator regulates RSLs and local authorities to protect the interests of current and future tenants, ensure the provision of good quality social housing and maintain the confidence of funders. Its purpose is not designed to encompass the handling of complaints about property management services.
- 3.34 The Scottish Public Services Ombudsman (SPSO) may hear complaints about the property management activities of both housing associations

¹³ From the respondents to the survey of property managers, 32 out of 52 private sector property managers either held a consumer credit license or were FSA authorised, or both.

¹⁴ By virtue of the Consumer Credit Act 1974, as amended by section 21(2).

and local authorities but only where those relate to tenants and not where the property management services are provided on a commercial basis to individual property owners.¹⁵

- 3.35 The PMAS membership accounts for a significant proportion (up to 70 per cent) of the properties that are managed by private sector property managers and includes most of the large property managers. As a trade association, the PMAS promotes professional development and standards amongst its members but is not a consumer facing organisation. Consumers may complain to PMAS if they have a complaint about a member, and up to a hundred complaints per year are received by PMAS. However, the primary concern of PMAS is to use the complaints to assess whether their members are acting professionally rather than to award redress or otherwise satisfy the consumer's grievance. The PMAS has a code of practice but it does not set out detailed performance standards for its Members.

Regulatory proposals

- 3.36 In October 2007 Patricia Ferguson MSP put forward a consultation paper 'Property Factors (Scotland) Bill'.¹⁶ The Bill proposed the implementation of a Property Factor's Register whereby any 'relevant person'¹⁷ who acted as a property manager would be required to be listed on a property managers' register.
- 3.37 In addition the Bill proposed that an accessible dispute resolution service be provided to home owners. The Bill suggested this be achieved by extending the jurisdiction of the Private Rented Housing Committee (PRHC).¹⁸ It was envisaged that the PHRC would sit as an independent

¹⁵ The SPSO was established by virtue of the Scottish Public Services Ombudsman Act 2002.

¹⁶ www.scottish.parliament.uk/business/bills/pdfs/mb-consultations/propertyfactors.pdf.

¹⁷ A 'relevant person' is any individual, partnership or corporate body, but excludes Local Authorities.

¹⁸ www.scotland.gov.uk.

and impartial tribunal and hear disputes between property owners and property managers providing a low cost alternative to bringing a case at the Sheriff Court.

- 3.38 In June 2008, The Scottish Government announced that it intends to put in place an accreditation scheme designed to raise standards of service, improve complaint redress and to 'weed out the cowboys'.¹⁹ The proposal for a National Accreditation scheme for property managers was first put forward by the Scottish Governments' Housing Improvement Task Force (HITF) in 2003.²⁰ The HITF concluded that there was a lack of regulation in the industry which meant that there was no quality assurance or regulation of the services being provided and recommended the implementation of an accreditation scheme for all property managers in Scotland. The governing body for the accreditation scheme would include representatives of the industry, local authorities and a body with consumer interest.

¹⁹ 'Combating rogue property managers' – press release dated 2 July 2008, The Scottish Government – see www.scotland.gov.uk/News/Releases/2008/07/02102754.

²⁰ 'Stewardship and responsibility: a policy framework for private housing in Scotland' published 13 March 2003 www.scotland.gov.uk/Publications/2003/03/16686/19494.

4 COMPETITION

4.1 Competitive markets bring benefits to consumers. When competition is working well, consumers can expect to benefit from choice and value for money. If competition worked well in this market we would expect to see property managers seeking to identify consumers dissatisfied with their current property manager, and persuading them to switch to a better offer. This process would give rise to a good deal for consumers - not only directly through consumers switching to a better service - but through the more general competitive constraints which would mean property managers tried hard to deliver good services and value to their existing customers because otherwise, they would lose them to another property manager.

4.2 A further gain from effective competition in this market would be through property managers competing to be better purchasers of contracted services. A property manager that is effective in securing good value from their contractors is more likely to be able to deliver better value for money to its customers.

4.3 In this chapter, we look at indicators which informs us about how competitive the sector may be, including:

- does the market deliver a good outcome for consumers?
- the level of switching
- indicators of competition: concentration, barriers to entry and expansion and competition for different types of customer.

Market definition

4.4 Any analysis of competition usually begins with a market definition – this is normally a process which allows us to state, both in terms of products and geographically, what is included in the 'market' under consideration. The purpose of market definition is to identify the most

important competitive constraints that act on suppliers of the product that we are interested in, in this case property management services for common areas in multi-occupied residential buildings.

- 4.5 In annexe D we explain why we believe an appropriate definition for the purposes of this report is property management services for common areas in multi-occupied residential buildings provided by private companies, local authorities and RSLs with, for some consumers, self-management an alternative. Competition, and so the relevant geographic scope of the markets, appears to be local. However, we have not found it necessary to reach a definitive conclusion on these points.

Quality and value for money

- 4.6 The money collected from owners in shared properties by the property manager to pay for contracted services is significantly greater than the management fee itself. Money is also often collected separately for one-off major items of repair usually undertaken by contractors. So the performance of property managers in managing contractors is an extremely important function.
- 4.7 The property manager should, because of the number of customers it has, be able to exercise some degree of buyer power and should be able to negotiate more competitive terms than an individual property owner acting on their own or even a tenement block or development could acting independently of a property manager. The property manager also has an important role in checking the repair or maintenance work is completed to an appropriate standard.
- 4.8 In the next sections we present results from our consumer survey which tell us what consumers think about the value for money and levels of service they receive from property managers.

Overall value for money

Just under half of consumers surveyed (48 per cent) rated the service provided by their property manager as being good value for money. Around a third (33 per cent) saying they felt they received poor value for money.

- 4.9 Consumers who dealt with their property manager in an organised way – that is, via a formal residents' associations or similar – were much more likely than average to rate the services provided by their property manager as good value for money (64 per cent compared to 47 per cent overall). The results are shown in table 4.1 broken down by whether the relevant property manager was a private sector property manager or a RSL/ local authority, and by whether consumers were organised into an association or similar.

Table 4.1: Perception of value for money by property managing arrangement and strategy for dealing with property manager

	<i>All</i>	<i>Property Manager</i>			<i>Council/HA</i>	
		<i>Formal owners or residents association or semi-formal</i>	<i>No fixed arrangements</i>	<i>One owner tend to deal on behalf of others</i>	<i>Formal owners or residents association or semi-formal</i>	<i>No fixed arrangement</i>
<i>Base:</i>	<i>511</i>	<i>118</i>	<i>154</i>	<i>30</i>	<i>69</i>	<i>133</i>
<i>Very good value for money</i>	<i>10</i>	<i>17</i>	<i>5</i>	<i>10</i>	<i>18</i>	<i>11</i>
<i>Fairly good value for money</i>	<i>33</i>	<i>46</i>	<i>32</i>	<i>33</i>	<i>42</i>	<i>30</i>
<i>Neither good nor poor value for money</i>	<i>20</i>	<i>18</i>	<i>24</i>	<i>20</i>	<i>12</i>	<i>19</i>
<i>Fairly poor value for money</i>	<i>13</i>	<i>13</i>	<i>21</i>	<i>13</i>	<i>12</i>	<i>19</i>
<i>Very poor value for money</i>	<i>23</i>	<i>6</i>	<i>18</i>	<i>23</i>	<i>15</i>	<i>20</i>

Results derived from table 6.2 taken from annexe B: Re-analysed to exclude don't know answers

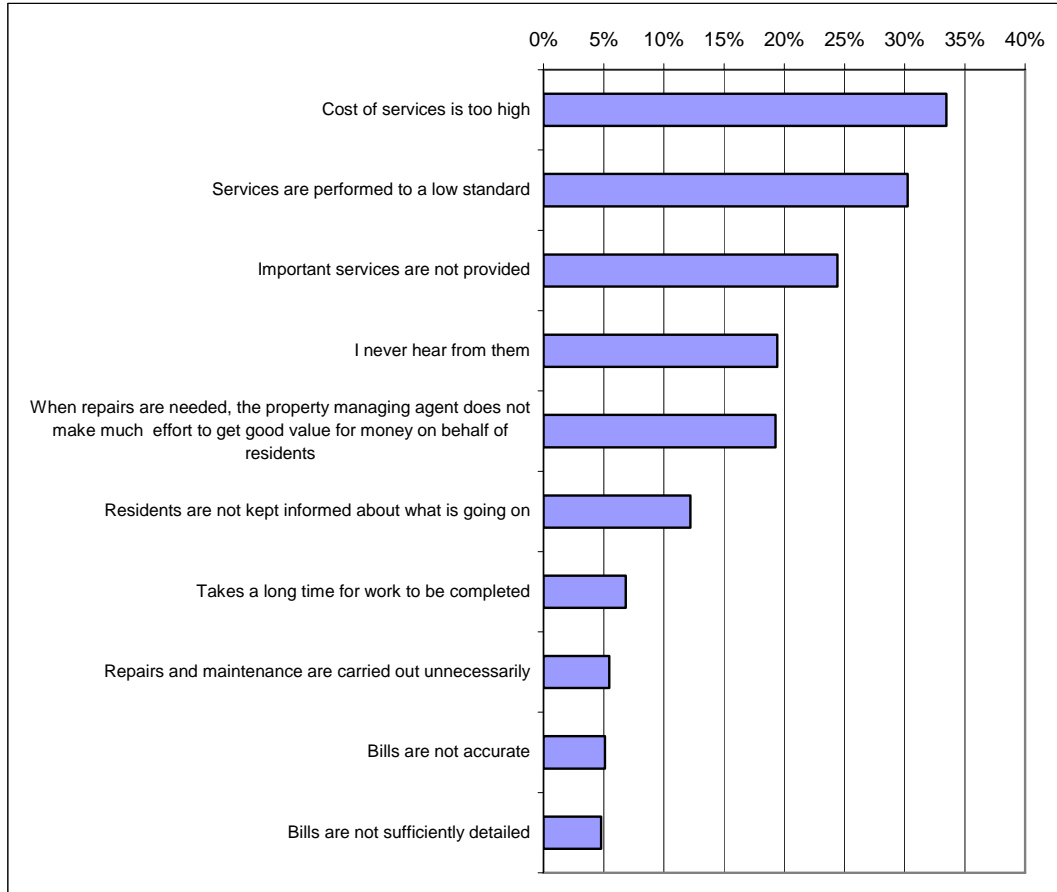
Source: Survey of consumer experiences of property management – a report of findings

4.10 As might be expected, consumers see poor value for money mainly in terms of the property managers' not securing good value and service from contracted services. The main reasons consumers gave for describing the service provided by their property manager as 'poor value for money' were the cost of services being too high (33 per cent) and the service being performed to a low standard (30 per cent).

4.11 Respondents also mentioned the lack of important service provision (24 per cent), poor communication (19 per cent) and the lack of effort made by their property manager (19 per cent) as reasons why they were not getting good value for money.

Table 4.2: Top ten reasons for describing the service as poor value for money

Q: Why do you say it is poor value for money?



Base: All who say service is poor or very poor value for money (162)

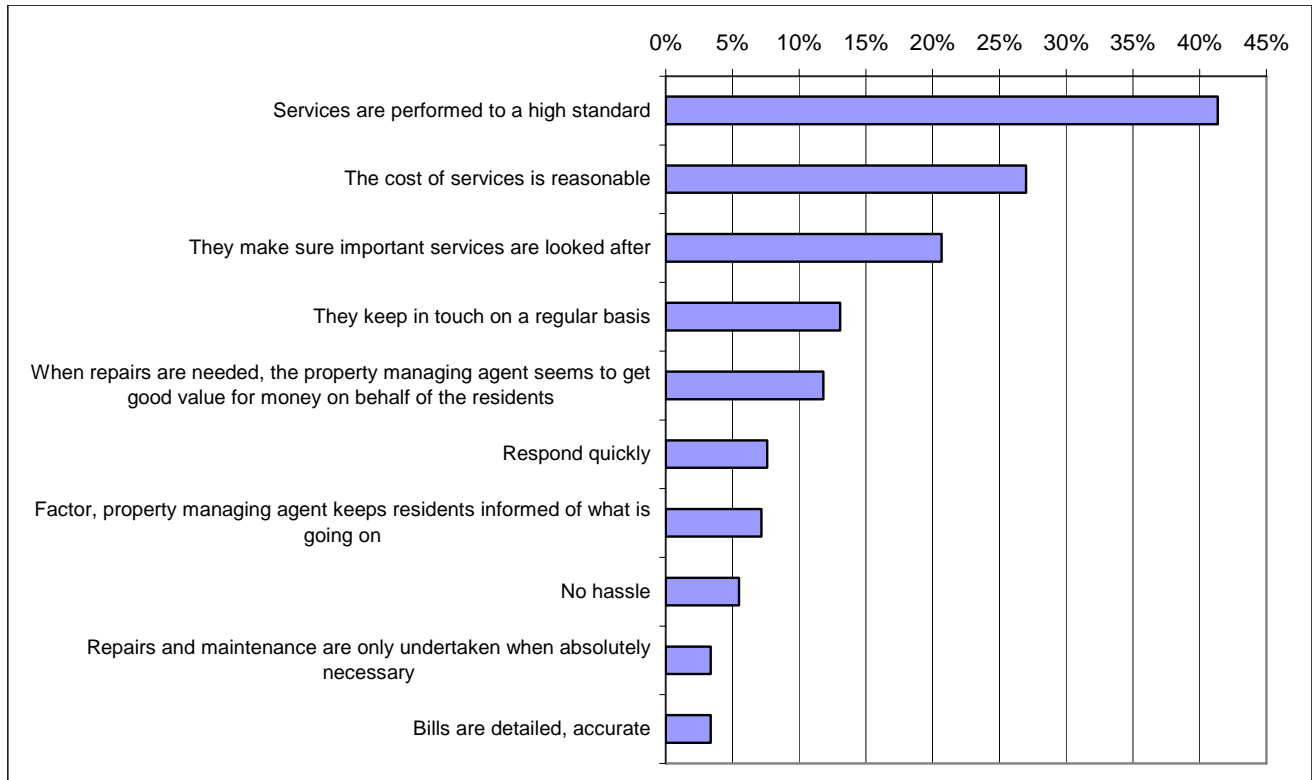
Source: Survey of consumer experiences of property management – a report of findings

4.12 The aspects of service that were cited by consumers who rated the service provided by their property managers as 'good value for money' were strongly related to cost and service quality, albeit positively skewed. Two-fifths of consumers said that services were performed to a high standard (41 per cent), while just over a quarter said that the cost of services was reasonable (27 per cent). Again, a fifth said their

property manager ensured the important services were looked after and 13 per cent said their property manager keeps them informed of what is going on.

Table 4.3: Top ten reasons for describing the service as good value for money

Q: Why do you say it is good value for money?



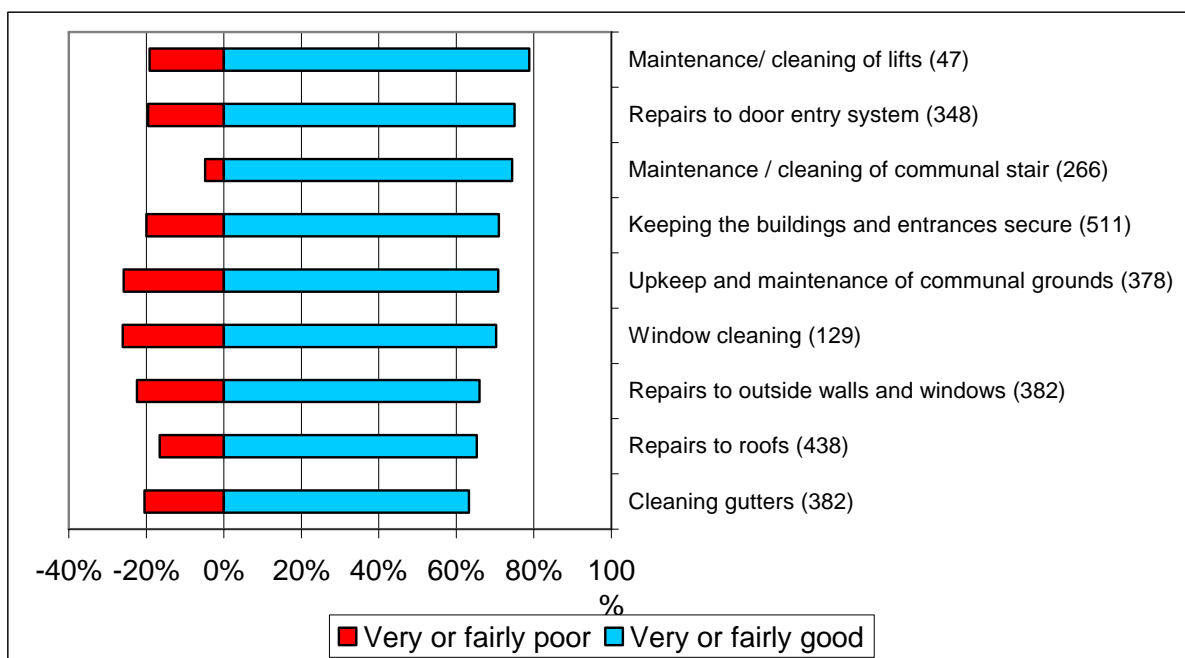
Base: All who say service is good or very good value for money (240)

Source: Survey of consumer experiences of property management – a report of findings

Consumers' satisfaction with specific services

4.13 We also asked respondents to rate the individual services supervised by their property manager. With repairs and maintenance, the majority of consumers surveyed who used each service rated them as 'good'.

Table 4.4: Perceptions of repair and maintenance services



Base: All who use a property manager or who have services provided by Council, Housing Association, or Housing Association appointed factor. Results include only participants in receipt of the relevant service and exclude don't know answers.

Source: Survey of consumer experiences of property management – a report of findings

- 4.14 Consumers were most satisfied with the maintenance and cleaning of lifts (79 per cent), repairs to door entry systems (75 per cent), the maintenance and cleaning of communal stairs (74 per cent), the upkeep of communal grounds (71 per cent) and window cleaning (70 per cent).
- 4.15 This positive finding notwithstanding, as was the case with perceptions of value for money, a significant minority of service users were dissatisfied with the services provided by their property manager. Indeed, around a fifth of service users rated each of the services listed in the previous paragraph as 'poor'.

- 4.16 Overall, services being provided by private property managers were more likely to be rated 'good' than services being provided by RSLs.
- 4.17 Consumers receiving services from RSLs appeared less likely to choose a neutral 'neither good nor poor' rating and tended therefore to have slightly increased percentages in their 'poor' ratings. These varied from service to service, but typically resulted in the level of 'poor' assessments being two percentage points higher than private property managers. For full details see annexe B.

Switching property managers

- 4.18 The decision to dismiss a property manager and to appoint another is a communal decision of the owners of the shared tenement or development. The deeds of the shared property may set out the arrangements necessary to switch. These may be quite detailed in modern deeds: for example, they may specify procedures for notifying owners, the quorum required for a meeting of owners, and the majority required for the property manager to be replaced.
- 4.19 The law provides that where the deeds are silent property managers may be dismissed and appointed on a simple majority vote of the owners of the shared property.²¹ Once consumers have taken a decision to dismiss the property manager, a written notice of dismissal is served, sometimes specifying a notice period and the signature of the required number of owners of the shared property.

²¹ Or where the title deeds provide for a higher majority or unanimity section 64 of the Title Conditions (Scotland) Act 2003 states that the owners of two-thirds of the properties can in any event dismiss or appoint a property manager once the manager burden has been extinguished. The manager burden is a condition typically placed by a developer which gives power to appoint a manager to a particular party, such as the developer or a property management company. See also further discussion of the 'manager burden' at paragraphs 2.7-2.14 of the legal annexe.

- 4.20 Once the owners of the shared property have agreed to appoint a new property manager there may be some issues around the 'float'.²² The owners of the shared property will, in most cases, have already paid a 'float' to the incumbent property manager and this may be used against any final invoices or unpaid fees. This means that the individual flat owners in the block or development may find themselves having to fund another 'float' with the new property manager at least until the accounting has been finalised with the previous property manager.
- 4.21 Figure 1 in annexe E provides an illustration of the generic rules governing the switching process.

Level of switching

- 4.22 In our survey of property managers we asked the participants to supply information on the proportion of tenements/developments and customers lost each year, gained each year in total and of those gains how many gains were new developments.²³

²² See annexe K- Glossary for definition of 'float'.

²³ In our study respondents found it more difficult to provide factual evidence about blocks and tenements than individual dwellings. We have chosen to measure changes in terms of dwellings as we are able to call on more reliable and larger volumes of data. Although switching will operate at the level of blocks of property, we think this measure is strongly related to switching at a block level and a suitably robust measure.

Table 4.5: Changes in client numbers: most recent full year, among responding private sector property managers and housing associations

<u>Base sample information</u>	<u>Property managers</u>	<u>Housing associations</u>
Total number of participating businesses supplying data	20	12
Total number of dwellings being managed	76,000	37,000
Gains / losses per 100 existing dwellings being managed		
<u>Type of business gains and losses</u>	<u>Property managers</u>	<u>Housing associations</u>
Number dwellings lost	1.0	0.1
Number dwellings gained in total	4.7	1.8
<i>Of which</i>		
Number gained as new developments	3.4	0.6
Number gained exclusive of new developments	1.3	1.2 ¹
Net gains exclusive of new developments	0.3	1.2

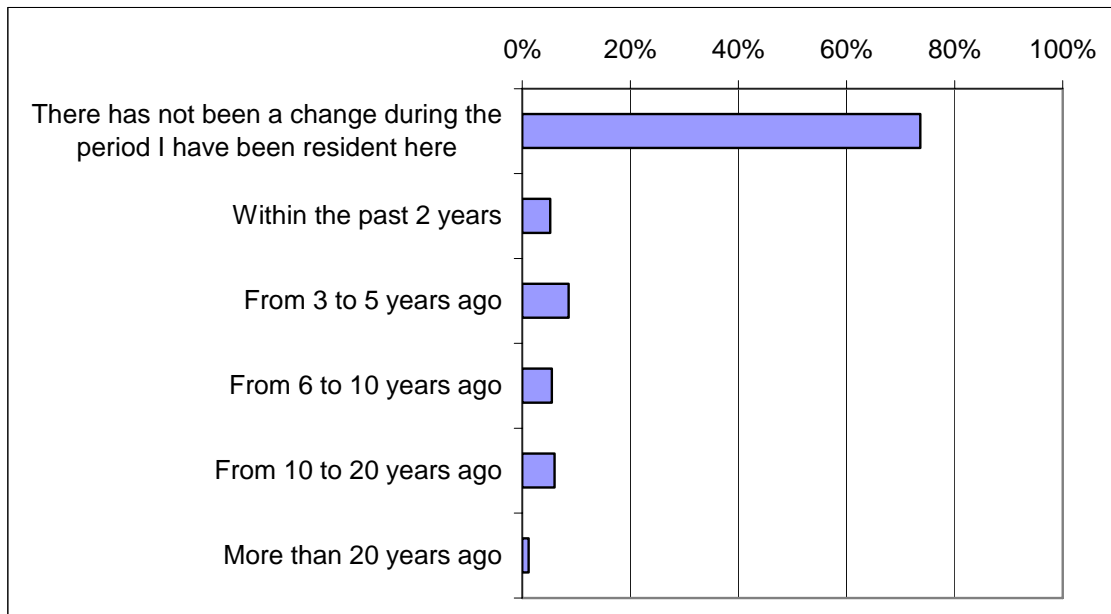
¹: Housing associations may gain extra clients for their services as property managers when occupiers of rented accommodation exercise their preserved 'right to buy' entitlement.

Source: OFT survey of property managers

- 4.23 From Table 4.5 above it can be seen that average gains and losses were very low – of the order of one per cent of existing business or even lower. Allowing that the data will include various types of transfers (to self-management for example) the results suggest that switching from one property manager to another is unlikely to exceed around one per cent of existing business each year and may even be lower.
- 4.24 Our consumer survey gives slightly different figures but provides a consistent picture of very low levels of switching. Table 4.6 shows a summary of the responses when asked when there was last a change in property manager.

Table 4.6: Experience of a change in property manager

Q: In the time you have been resident in your current property, when was the last time there was a change in factor/ property manager



Base: All who have a factor / property manager (294), Results exclude don't know answers
 Source: OFT survey of property managers

Around one percent of consumers switching each year is an exceptionally low rate.

4.25 By comparison, the recent OFT study Personal current accounts in the UK found that six percent of UK consumers switched current accounts in the 12 months to July 2008. A survey of consumers in 2007 found that 20 per cent of electricity customers and 18 per cent of gas customers had switched supplier in the previous year.²⁴ Mintel research in 2008 found that over the past 5 years 22 per cent of consumers had **not** switched their home insurance provider.²⁵ By contrast our consumer

²⁴ Key Note report *Utilities* June 2007

²⁵ Mintel *Home Insurance* November 2008

survey indicated that 83 of consumers had not switched their property manager in the past five years.

- 4.26 As we discussed earlier in this report, 15 per cent of all consumers rated their property manager as providing 'very poor value for money' and 16 per cent rated it as 'fairly poor value for money'.

Such levels of dissatisfaction with such low levels of switching suggest that there may be significant barriers to switching present.

- 4.27 In our survey of property managers, we asked how easy they thought it was for consumers to change property manager:

Table 4.7: Property managers' survey – how easy it is to switch property managers?

	Per cent	
Service providers assessment of the ease with which residents may change their property manager	Property managers	Housing associations
Very easy	21	13
Quite easy	58	33
Quite difficult	8	27
Very difficult	13	27
All	100	100
Base size: Participants providing answers	24	15

Source: OFT survey of property managers

- 4.28 Those property managers who responded that it was either 'quite difficult' or 'difficult' were supplied with a number of reasons why this might be the case, and asked to identify the most important reasons.
- 4.29 In so far as the providers of property management services feel that switching is difficult, it appears that they hold the opinion that a wide range of issues are working together in varying degrees to make the process difficult, rather than the problems resulting from any single

cause. Some of those reasons related to the attitude of individual owners and the lack of understanding on the part of consumers of the necessary process and also difficulty getting together to decide. Notice periods, the arrears of some of the owners in the same shared property, and restrictions in the deeds were also identified as very important in creating difficulties with switching. Other reasons suggested included that it was hard to switch 'problem' properties and that there was no marketing by property managers.²⁶

- 4.30 In our survey of consumers we also asked about perceptions of switching property managers. Only a minority of respondents had a direct experience of changing, with just 29 per cent reporting that there had been a change during the time they had lived there. Of these, over half agreed that the change was necessary, with 50 per cent agreeing strongly. Meanwhile just over one quarter (27 per cent) were ambivalent on the matter and 14 per cent disagreed that change was necessary.
- 4.31 Asked whether they had experienced any difficulties when attempting to switch, a majority – almost 80 per cent – said they had not, while 15 per cent said they had (and a further seven per cent could not remember one way or the other).
- 4.32 Among the small minority (11 respondents) who had encountered difficulties, the main problems related to: reconciling final bills and floats; obtaining the co-operation of all the owners of the shared property; and, to a lesser extent, obstructive behaviour by the incumbent property manager.
- 4.33 We also looked at the attitude to switching of all respondents with a property manager – not just the minority who had experienced switching. On whether there was information available to help switching, we found that a majority disagreed that there is plenty of information available about property managers, and two in five

²⁶ Full details of the reasons are given in Chart 4.15 of annexe C.

disagreed that property managers make information available on their fees and services.

Only about 50 per cent agreed that they understood the steps needed to appoint a new property manager.

- 4.34 When asked if they agreed or disagreed with the statement 'The contract with factors/property manager is for a fixed term and cannot be easily terminated' some 41 per cent were unable to give a definite answer and replied 'don't know'.²⁷
- 4.35 While a majority of consumers with a property manager would be willing to get involved in trying to change their property manager, most feel that the process would be fairly onerous. Seven in 10 agreed that it would be difficult to get the necessary agreement among the owners of the shared property to organise a change, and a similar proportion agreed that appointing a new property manager would be 'a lot of hassle'.²⁸
- 4.36 There was some variation in attitudes. Owners of shared properties who had a formal strategy for dealing with their property manager were more likely than average to agree that there was plenty of information available, understand the necessary steps to appoint a new property manager and showed less appetite for arranging repairs and maintenance themselves.
- 4.37 Those who had been through the process of switching were more likely than average to:
- disagree that appointing a new property manager is a lot of hassle
 - disagree that it is difficult to get the necessary agreement among individual owners to organise appointing a new property manager

²⁷ See figure 8.4 in annexe B.

²⁸ See figure 8.5 in annexe B.

- more likely to agree that they understood the steps that are needed to go about appointing a new property manager.

4.38 Nevertheless, just under half (49 per cent) still said that appointing a new property manager is a lot of hassle.

4.39 There are three situations where it may be particularly difficult for consumers to switch. These are where:

- owner occupiers in ex-local authority properties within a predominantly social housing development are required to use the social housing landlord's property manager
- a property manager is appointed by a developer on the completion of a new development to manage that site for a number of years
- more generally title deeds – and deeds of conditions – may make it difficult to dismiss the incumbent property managers.

4.40 Annexe E discusses these three particular situations in more detail.

Indicators of competition

Barriers to entry and expansion

4.41 A source of potential competitive constraint may be provided by the threat of businesses which may enter the market – that is, it is possible that the threat of entry disciplines firms to keep prices down and quality and service levels high. In terms of the capital and skill required, property management may be a relatively straightforward market to enter.

4.42 There are also a number of 'candidate' businesses which might be considered well placed to enter the market. Estate agents and letting agents may have detailed knowledge of the residential property market. There are also businesses that supply management services to

commercial property (for example, to shopping centres) and they might switch to providing services for residential property. There may also be more specialised management companies – for instance, that manage sheltered accommodation – which may consider providing property management services.

- 4.43 The skills an individual learns from managing their own block can be used to carry out the management of other property. It is quite feasible, therefore, for an individual having carried out property management for their own property to expand their operations to provide property management services to other properties as well.
- 4.44 The main issue with market entry appears to be the difficulty in obtaining properties to manage. As discussed below, the fact that there is little switching for properties already with a property manager not only inhibits competition, but must also deter entry as possible entrants may perceive it as difficult to persuade the owners of a shared property who already have a property manager to consider switching, particularly to a new entrant. A new entrant may also be at a disadvantage in bidding to manage new developments as developers are likely to have established relationships with some existing property managers and/or require a track record of management.
- 4.45 In principle there are a large number of properties, approximately 190,000, that are self managed and an entrant could seek to expand by taking on these properties rather than by encouraging those already with a property manager to switch. However, three quarters of flat owners that currently self manage or have no arrangements have indicated that they would not be interested in switching to a property manager.²⁹ Furthermore those properties that approach a property manager may

²⁹ See Table 4.2 of annexe H Scottish House Conditions Survey.

also be properties that are more difficult to manage.³⁰ These aspects may also be behind the observation from the survey of property managers that established property managers do not appear to spend significant resources marketing themselves to self managed properties.

4.46 While this suggests that there may be businesses that are well placed to enter the market, it appears that the threat of entry as a constraint is in practice low, as the acquisition of business on a viable scale appears to be difficult.

We have seen only limited evidence of entry into this market over the past 15 years.

Local concentration

4.47 Taking Scotland as a whole it appears that there are a number of property managers of a significant scale with turnovers of several million pounds,³¹ a number of medium-sized ones and many small property management companies. There are also a significant number of RSLs and local authorities that provide property management services. In almost all local areas property owners looking for a new property manager would have a range of choices and we did not come across any evidence to suggest that there were significant concentrations in the market – such as local monopolies – which might affect competition.

³⁰ It was suggested to us that the trigger for a property currently without a property manager approaching a property manager to take on the responsibility could be an urgent need for a repair which may signal that a lot of work is required and/or that the current owners have not been successful in agreeing maintenance and repairs between them. In either case the property manager may find such a property more difficult to manage because of these pre-existing issues.

³¹ Revenues derived from fees for providing property management services (not including monies collected from owners to pay for contracted out services).

Different competitive conditions in different parts of the market

4.48 Any competition among property managers takes place at the level of obtaining the business of tenements or developments. For a property manager, new business opportunities arise from three sources:

- new developments – the development of new multiple ownership property with common and shared parts will generally result in the appointment of a property manager
- existing properties without a property manager – tenements and developments may not currently have a property manager either because the owners of the shared property carry out the functions themselves or because there are no formal arrangements
- changing property managers – property managers may also approach owners in the same shared property already using a property manager to see if they wish to switch.

New developments

4.49 A developer will typically appoint a property manager before completion of a major development. The deeds of modern developments often reserve to the developer the power to appoint a property manager for the development.

As it is the developer that makes the appointment decision, the purchasers and the individual flat owners will have little or no say in this decision.

4.50 Developers told us that in some cases the contract will be put out to tender, but in other cases a more informal arrangement will be used to determine the property manager. Submissions from a number of property managers complained that some developers did not put a contract out to tender but instead simply appointed an established property manager.

4.51 In competing for such business, property managers may not be competing directly to satisfy consumers but to satisfy the property developer. The developer's incentives are discussed in more detail in Chapter 6.

Existing properties without property managers

4.52 Property managers may approach tenements or developments without property managers with a view to providing such services – or alternatively a group of individual owners may approach a property manager. Such properties may already have the individual owners organised to a greater or lesser degree performing property manager functions, or may have no formal arrangements in place.

In general, we found little evidence of active marketing by property managers to properties either with or without a current property manager.

4.53 We did find isolated instances where property managers had sought to move into previously unmanaged property. One housing association which provided evidence to our study, for example, sought to market its services to private blocks near its existing housing stock.

4.54 The stated reluctance of the majority of consumers in self managed property to hire a property manager may be one explanation for this. Another explanation may be that those properties that would respond to such marketing may be properties that are on average harder to manage (see paragraph 4.45 above).

Competition for properties already with a property manager

4.55 The third area for competition occurs where a tenement or development already has a property manager, but another property manager also offers its services to the owners of the shared property.

4.56 This type of competition should in theory not only provide consumers the opportunity to secure a better deal on property management, but the threat of such competition should incentivise property managers to perform well in order not to lose the business.

We found little evidence of active competition to acquire business from properties with or without property managers.

4.57 It appears that the main way property managers are changed is through the owners of the shared property getting together and approaching property managers to see what they can offer. Change therefore appears to be driven almost solely through consumers' initiative and dissatisfaction, rather than through property managers proactively approaching the owners of the shared property with a better deal.

4.58 One of the main findings of the consumer survey that we commissioned is that where consumers were better organised or had some system in place for dealing with their property manager they were more likely to be happy with the services being provided.

4.59 In contrast, where there are no such arrangements in place (or the arrangements are more ad hoc) owners of the shared property were less satisfied as a group with the services being provided by their property manager. However, of itself, this 'dissatisfaction' does not appear to be sufficient to galvanise the owners of the shared property into organising themselves to switch to another property manager.

4.60 The study also found that there was a common perception among many consumers that even if they did switch to another property manager they might not be any better off. As such, we might hypothesise that not only do the owners of the shared property have to be unhappy before they will actively contemplate a change of property manager, but they also need to be convinced that the property manager they switch to will be better than the incumbent property manager. In this regard, there may well be an element of 'better the devil you know' contributing to consumer inertia and the low level of switching.

4.61 Property managers also cite consumer inertia and poor motivation as a major reason for the low level of switching in the industry. Clearly consumer inertia and lack of competition can feed off each other – property managers do not compete as they believe consumers are insufficiently motivated to switch, and consumers' motivation is damped by the lack of competition. In our view, consumers' willingness to switch could be increased by more proactive competition for their custom.

4.62 A number of the submissions made to the OFT by property managers in response to the OFT's survey of property managers expressed reservations about, or disapproval of, the practice of making unsolicited approaches to customers of another property manager. The OFT found some evidence during the course of its study which suggested that there was a perception among some PMAS members that they should not solicit business from customers of other property managers. In some cases the submissions appeared to imply that such conduct would be unethical and/or contrary to the code of practice of PMAS. One property manager commented:

'Writing unsolicited letters to customers of another manager is unethical and contrary to the PMAS code of conduct for members'.

We consider attitudes which mean competitors may be reluctant to compete to be unacceptable and approached PMAS for clarification of its code of practice and property managers soliciting business from other members' customers.

4.63 PMAS have assured the OFT that such statements are based on a misunderstanding of the PMAS code of practice. PMAS has since written to all of its members explaining that its code of practice does not prohibit soliciting business from other member's customers and it does not see that there is an ethical constraint on soliciting for such business or indeed responding to requests from customers.

Marketing

- 4.64 Property managers do not appear to spend much on advertising. Typically, advertising spend is less than one per cent of their turnover.³² Among housing associations, advertising spend relative to turnover is at even lower levels than for private sector property management businesses. Such advertising that is undertaken typically involved paying for an entry in Yellow Pages rather than a more proactive form of publicity, such as promotional leaflet drops. While many of the main private sector property managers do produce leaflets explaining the services they provide, these are typically only provided to consumers on request or passively from their website.

The publicity material we saw did not appear to be the kind of material that might make a dissatisfied consumer consider switching their property managers.

- 4.65 The material we collected mainly consisted of simple outlines of the services the relevant property manager typically provides. The one exception that we saw was a leaflet produced by a private sector property management company for prospective customers that both encouraged and explained how consumers might change their property manager.
- 4.66 Consistent with this picture is, apparently, a lack of price competition or competition on quality of service. We saw very little publicity material which suggested that switching might improve value for money or lead to a better service. In some other market sectors where there may historically have been some similar problems with consumer inertia in relation to switching, such as in the energy and credit card sectors, businesses have adopted aggressive marketing strategies to try to overcome consumer apathy and encourage them to switch. We have not found any evidence of similar behaviour in this sector. These issues are considered further in Chapter 5.

³² See annexe C paragraph 2.28

Conclusion on competition and lack of switching

4.67 Formal barriers to entry in to the market appear low but we see only a low level of entry. We have also seen very few signs of active competition on the part of property managers, such as advertising or approaching rival's customers. For many consumers switching may be a fairly straightforward procedure, but we found a very low level of switching.

Our overall impression is that competition between property managers for the business of customers is weak.

4.68 The lack of obvious barriers to competition yet the low level of observed competition requires some explanation. In part this may be found in consumer information and attitudes to switching. The majority of consumers consider that there is insufficient information available, that they do not have sufficient knowledge of the switching process and that it may be hard work and difficult to get the owners of the shared property to agree to change property manager. Where these problems have been overcome, for example, where there is a group of sufficiently organised, motivated and informed consumers, switching property managers does not seem to be too problematic.

4.69 The lack of evidence of active competition is surprising. When switching costs are high this either can lead to more intensive or less intensive competition. Switching costs can make it more difficult for a property manager to induce customers to switch from a rival but potentially makes them more valuable to a property manager once they have switched. In markets with switching costs such as telecoms, energy and banking we frequently observe significant levels of advertising aimed at inducing switching. We have not observed that in this market.

5 CONSUMER INFORMATION AND REDRESS

5.1 As identified in the last chapter, there is – at best – only muted competition in this market characterised by very low levels of switching, some consumer dissatisfaction and a lack of suppliers promoting and marketing services to consumers. Against this background, we look at the information available to consumers, the role and benefits of this information, and the means of redress available to consumers when things go wrong.

Consumer detriment

5.2 Property managers are responsible for securing value from the money paid to them by the owners of the shared property for services provided by contractors such as builders and cleaners, as well as the fees paid to the property managers themselves. While fees charged by Scottish property managers amount to some £66 million per year (see Chapter 3), they are responsible for further sums for major repairs which increases the scope for harm above this level.

5.3 Further, much of the expenditure may be viewed as investment rather than consumption expenditure. Most improvements and repairs are concerned with preserving or increasing the value of housing, and therefore represent an investment in maintaining the value of an asset. The harm to consumers when the relationship with a property manager does not work satisfactorily impacts on the value of their asset and their habitable environment, the value of which may significantly outweigh the sums paid to the property manager.

5.4 During the course of the study, we were told about examples where arrangements with property managers in recently built developments had become problematic and had resulted in the property manager withdrawing its services. In such cases the property manager had problems collecting money, particularly from absentee owners or even the developer (in respect of unsold units on a new property development), which meant that the property manager could not finance

the activities needed to discharge its obligations to maintain the properties.

- 5.5 These matters may escalate into significant problems such as the buildings not being secure, or even not habitable, as a consequence of the property manager ultimately having to withdraw its services. The consequent consumer detriment in such cases can be significant.

The failure of the relationships around, or the arrangements for, property management services has the potential to cause significant consumer detriment.

Assuring good performance - incentives

- 5.6 The property manager is typically paid on the basis of a fixed rate administration charge per year per flat. In addition to the administration charge repairs, maintenance and insurance will be expected to be charged to the individual flat owners at cost.³³ Arguably, in the absence of competitive pressures on the property manager, this arrangement does not provide a direct financial incentive for the property manager to secure the lowest cost, or best value for money, contractor since the costs are passed on directly to the individual flat owners in the block or development and do not affect the property manager's remuneration.
- 5.7 So there is a need for the owners of the shared property to monitor the activities of the property manager to ensure that the manager is engaging in sufficient effort to secure low cost, or high value for money, from contractors. If consumers do not monitor the property manager,

³³ In practice many property managers take a commission on insurance payments so in those cases the flat owner will not strictly be charged at cost. Furthermore we have received unsubstantiated claims that some property managers may receive extra payments from contractors, or may not pay the full invoice price. The possibility of such an arrangement, which may mean that the property manager's incentives are divorced from those of the flat owner, reinforce the need for monitoring of the property manager.

and in the absence of effective competition, there is no direct incentive on the property manager to ensure value for money.³⁴

- 5.8 In order for such monitoring to take place there is a need for adequate information to be made available to flat owners by the property manager such that they can assure themselves that the property manager is indeed acting in their interests.
- 5.9 A further issue in this context is that each individual flat owner has relatively little incentive, in isolation, to monitor the activities of the property manager – the benefits of a single owner taking steps to hold the property manager to account for its actions will be shared amongst all of the owners of the shared property, yet the costs will be borne by the individual flat owner. As a result we would, firstly, expect that flat owners would take less time to monitor the actions of the property manager than is efficient, and secondly, that consumers who share the monitoring, for example through an owners or residents association, would receive better value for money than other who do not.

The provision of better information is likely to benefit consumers by enabling them to monitor the performance of their property manager.

Communication and information

- 5.10 Good communication can provide a framework for consumers to know what the property manager is doing, what to expect, evaluate their performance and so on. In addition, transparency can allow consumers to scrutinise individual transactions (for instance, tenders) undertaken by the property manager, and should allow consumers an up-to-date picture

³⁴ Ordinarily we would expect competition and the associated possibility of consumers switching supplier to provide a reasonably strong incentive on property managers to provide value for money. As discussed in Chapter 4 this mechanism appears to exercise relatively little constraint in this sector.

of their financial position.

- 5.11 Without adequate information and communication, consumers are ill-equipped to evaluate the service the property manager provides, and to assess whether they are getting good value for money. In assessing whether the degree of communication by property managers was adequate, we considered the types of information and documentation typically provided by property managers.
- 5.12 We considered not only the results of the consumer and property manager surveys, but also looked at some of the actual documents that property managers supply to consumers. We considered the information provided at the stage of the initial purchase (as well as what information might be expected to be available at that stage), the on-going information provided to the consumer once the relationship is established and what information is provided about complaints and redress.

Information at point of purchase

- 5.13 A purchaser may buy a flat from a previous owner, or they may be buying direct from the developer.
- 5.14 When buying from the developer, a prospective purchaser may receive from the developer's sales team a guide to property management, among other sales literature. If they then purchase the property, the property manager may send them an introductory letter explaining what the property manager does, how they manage customer account, how the buildings insurance arranged and what it covers, and so on. A property manager may also proactively approach a new owner who has purchased a flat from the previous owner. In addition, the solicitor acting for the prospective buyer has a duty to inform the buyer of the provisions in the deeds of the property, including any arrangements in relation to the management of the maintenance and repairs to the property and its communal areas.

- 5.15 From 1 December 2008, houses for sale in Scotland have to be marketed with a Home Report. The Home Report is made available on request to prospective buyers of the home. The pack is made up of three documents:
- the Single Survey which is an assessment by a surveyor of the condition of the home, a valuation and an accessibility audit for people with particular needs
 - an Energy Report, which contains an assessment by a surveyor of the energy efficiency of the home and its environmental impact and
 - a Property Questionnaire which is completed by the seller of the home, which contains additional information, including property management arrangements and costs.
- 5.16 We found very little in the way of documents summarising the terms and conditions of supply by private sector property managers. The purchase of the flat signifies that the consumer has taken on the burdens as set out in the deeds of the property. In this sense the deeds of the property set out the extent of the commercial arrangement between the property manager and the individual property owner. Where the deeds are silent, the default law, either the Title Conditions (Scotland) Act 2003 or the Tenements (Scotland) Act 2004 applies.
- 5.17 Typically, neither the deeds nor the Title Conditions (Scotland) Act 2003 sets out in any detail what the standards of service should be. It can be difficult in such circumstances to establish whether the property manager has fulfilled its duties.
- 5.18 So a particular concern is the absence of any statement of the service standards that a consumer can expect. Given the nature of the role and responsibilities of the property manager, we acknowledge that it may be difficult to specify service standards precisely. Nevertheless, there is significant room for improvement - we have seen some clear examples where minimum service standards are set out. However, often property

managers, particularly private sector property managers, do not appear to be routinely providing such information to consumers.

The details of the commercial arrangement between consumer and property manager are often contained in deeds and legislation rather than set out in plain language easily understood by consumers.

Routine information

- 5.19 Our survey of property managers considered: the degree of communication between the property manager and the consumer; how property managers informed consumers about the way their money is spent; and the documentation provided.
- 5.20 We were told that statements and individual bills were provided as a matter of routine while practice varied in relation to the provision of other financial information.³⁵
- 5.21 In almost all cases, property managers said that they would provide information on request or, in some cases, according to the merits of the request and the costs involved in providing the information. For instance, 86 per cent indicated that they would provide copies of invoices for specific items of work on request, with the remaining 14 per cent saying they would do so according to the merit of the request.³⁶
- 5.22 The majority of property managers who responded to our survey said that they provide information such as statements, bills and accounts in a fully itemised format. For example, 86 per cent said they provided individual bills in a fully itemised form (10 per cent partially itemised and five per cent summary only). Only in the case of decisions about choice of particular contractor was there any marked tendency to show

³⁵ See Table 4.9 in annexe C.

³⁶ See Table 4.10 in annexe C.

information only in summary form.³⁷ See annexe G for a comparison with the information provided in England and Wales.

- 5.23 In our survey, we found that most consumers were most likely to rate as 'good' their property managers' performance relating to presenting detailed and accurate bills (69 per cent), collecting payments from the owners of the shared property (68 per cent), and organising work efficiently and in a reasonable time (62 per cent).
- 5.24 Although a majority rated these services as good, 28 per cent of consumers rated their property manager's performance in relation to being kept informed of what was going on as 'poor'. In addition, 23 per cent of consumers rated their property manager's ability to identify reliable contractors as 'poor'. Moreover, the findings indicate that property managers could do more to perform preventative services, with users more likely to rate their property manager's performance of making routine checks as 'poor' than 'good' (38 per cent compared to 27 per cent) with a further 22 per cent rating this service as 'very poor'.³⁸
- 5.25 For a number of services, private sector property managers performed better than RSLs. In particular, consumers with a private sector property manager were more likely than those who had services provided by a local authority or RSL to rate their property manager's performance in identifying reliable contractors (and presenting detailed and accurate bills to owners) as 'good'.

There is room for improvement in the type, detail and transparency of routine information supplied to consumers

³⁷ See Table 4.11 in annexe C.

³⁸ See Table 6.5 in annexe C.

Conclusions on information and communications

- 5.26 A good understanding of the property management relationship involves knowledge of complex legal provisions in deeds and legislation. It is not straightforward to provide this to consumers. However, it is important that consumers have access to readily understandable information. Without such information consumers will have difficulty monitoring the work of the property manager and enforcing high quality standards.
- 5.27 We have seen that many property managers do routinely provide many sources of information, but the quality and extent of such provision varies between managers. We rarely saw a clear set of service and quality standards that a consumer could use to enforce high quality provision. There is therefore room for improvement in the type, detail and transparency of information supplied to consumers.

When things go wrong

- 5.28 We have reviewed the legal framework relevant to property management in Scotland. Full details of our review are set out in annex F.
- 5.29 In summary, this is an area where the rights and responsibilities of the owners of the shared property and the property manager can be difficult to ascertain. These are principally set out in the deeds of the property. However these deeds vary substantially across properties and in many cases may be silent on the relevant issues. There have been legislative changes such as the TCA and Tenements (Scotland) Act 2004 that have helped to provide a foundation where deeds may be silent or defective. However, the legal framework is comprised of various statutes and regulations, all of which have to be analysed to understand the full extent of the framework.
- 5.30 In our view, the average flat owner would find it difficult to ascertain accurately their rights and responsibilities with respect to their property manager without recourse to professional advice. In addition, we note that access to justice through the court system is still an expensive and

time consuming undertaking. We have also explained in Chapter 3 that there is currently no body that is capable of giving redress to consumers in this sector outside of the courts.

We consider that the flat owner's current access to redress via the court system is unlikely to provide many with effective protection.

5.31 The handling of complaints is dealt with in paragraphs 5.35 – 5.43 below.

Independent information

5.32 There appear to be a number of discussion websites, and blogs, about property management in Scotland run by consumers. Consumers in Scotland can typically go to their local authority for advice on housing matters. Not all local authorities will be in a position to provide specialist advice on the specific legislation relating to property managers. There are also generic leaflets available such as *Common Repair, Common Sense*³⁹ produced by the Scottish Consumer Council for Communities Scotland.

5.33 As discussed in annexe G in England and Wales the Leasehold Advisory Service (LEASE) is funded by the government and provides free legal advice to leaseholders, landlords, professional advisers, managers and others on the law affecting residential leasehold and commonhold. It also provides a website with resources for consumers.

5.34 LEASE, also offer a mediation services that provides a way of settling a dispute without the need to go to court or the Leasehold Valuation Tribunal (LVT). The mediator will help the parties draw up an agreement which sets out the parties objectives in resolving the matter and the way in which they will do this. They will also produce the necessary

39

www.communitiesscotland.gov.uk/stellent/groups/public/documents/webpages/hmcs_006465.pdf.

papers for signature. Where agreement is not possible, either or both parties are free to take their dispute to the LVT.

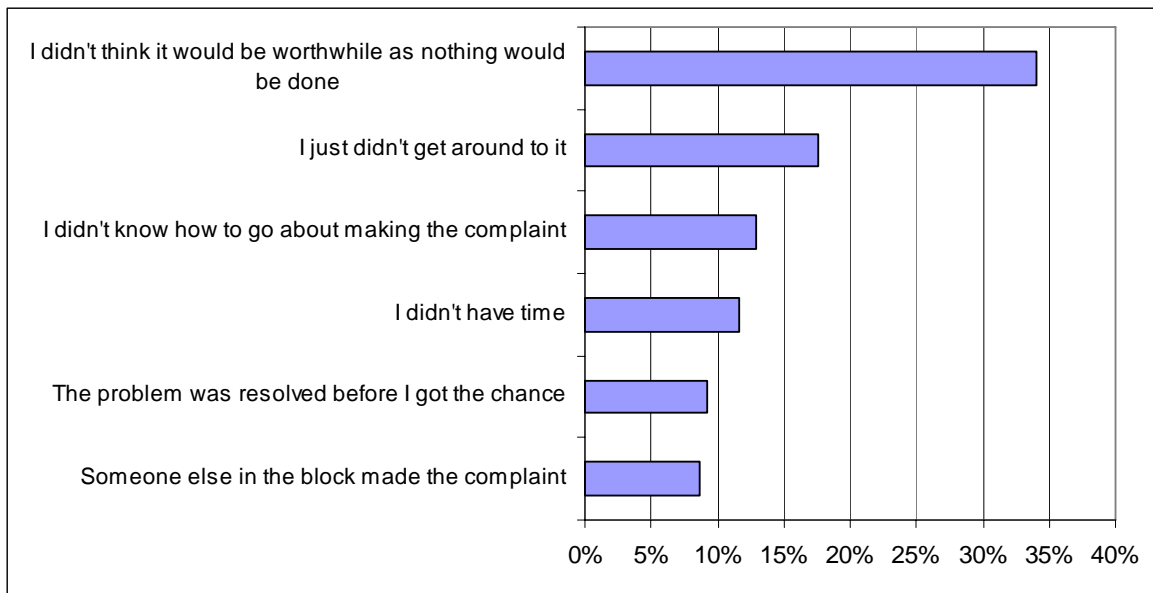
There is no centralised advice service currently available to consumers of property management services in Scotland.

Complaints

- 5.35 According to our survey of consumers, at some time or other, just over half (53 per cent) of all owners with a property manager wanted to make a complaint. Two-thirds (67 per cent) of consumers who wanted to make a complaint actually did so. This is equivalent to 35 per cent of all flat owners who had a private sector property manager, services provided by a local authority or an RSL.
- 5.36 The survey asked those respondents who wanted to complain, but who did not actually make a complaint, why they did not do so. A number of reasons for not complaining were identified. The most common reason was scepticism about the likelihood of the complaint making any difference. Indeed, a third (34 per cent) of consumers who wanted to make a complaint did not do so because they felt it would not be worthwhile as nothing would be done.

Table 5.1: Reasons for not complaining

Q: What prevented you making the complaint?



Base: All who wanted to complain but did not make a complaint (181): Excludes don't know answers

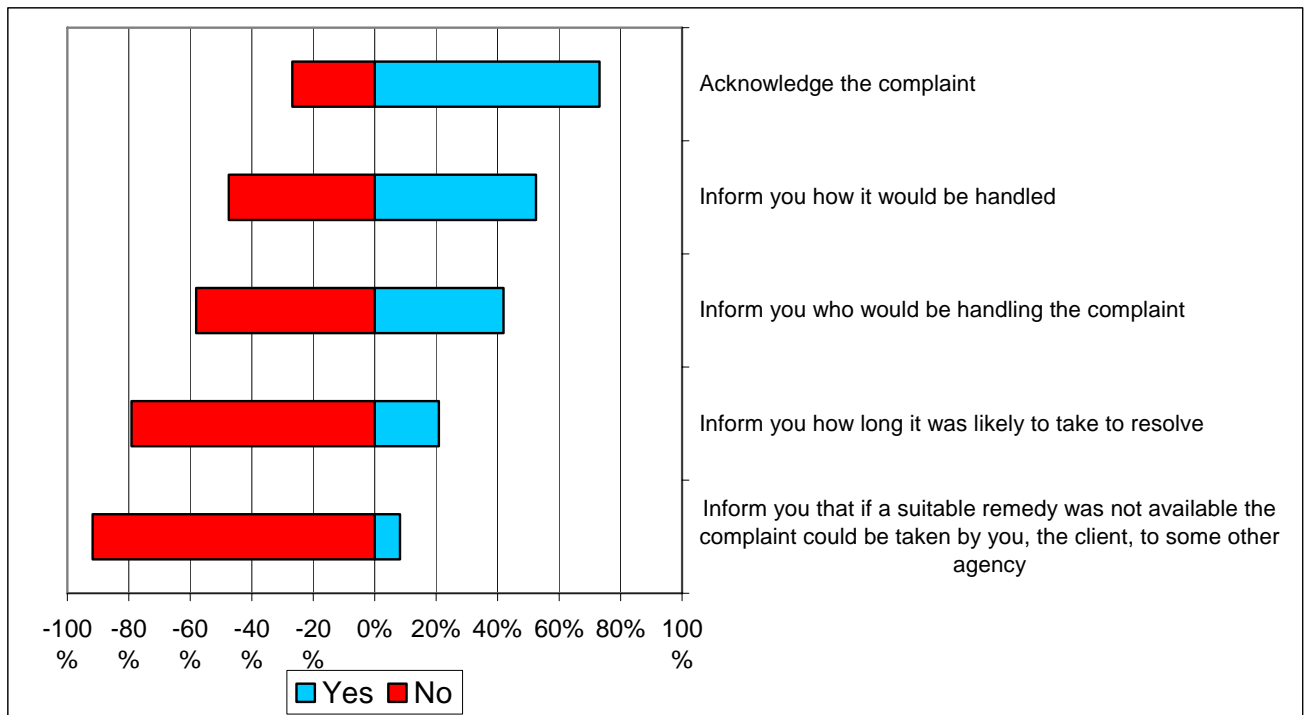
Source: Survey of consumer experiences of property management – a report of findings

Experience of complainants

5.37 Those with experience of making a complaint were asked about the way the complaint was handled by their property manager. The answers are shown in Table 5.2 below.

Table 5.2: Management of complaints

Q: Regardless of your satisfaction or dissatisfaction with the outcome, we would like to know how the complaint was handled by your factor / property manager/ Council / Housing Association. Did they . . .



Base: all who made a complaint (181): Excludes don't know answers

Source: Survey of consumer experiences of property management – a report of findings

5.38 Two-thirds (67 per cent) of consumers who made a complaint said they were dissatisfied with the way their complaint was handled, of which 18 per cent were fairly dissatisfied and 49 per cent were very dissatisfied (see figure below). Only a quarter (28 per cent) of those who made a complaint said they were satisfied with the way their complaint was handled.

5.39 Respondents who had services provided by an RSL or local authority were more likely than those with a private sector property manager to be dissatisfied with the way their complaint was handled (78 per cent compared to 60 per cent).

- 5.40 Asked what specific aspects of complaint handling they were dissatisfied with, the overriding reason was that the complaint was not addressed (71 per cent).⁴⁰ Other aspects mentioned included the property manager took too long to react to the complaint (14 per cent), failed to communicate what they were going to do in response to the complaint (14 per cent) and staff were rude and unhelpful (12 per cent).
- 5.41 Only a quarter of those who were dissatisfied with the way their complaint was handled took the complaint further. The most common place where they sought advice was from another party such as the Citizen's Advice Bureau or legal advice. Others included the local authority (three per cent) and fellow residents to try and enlist support (three per cent). Three per cent had a complaint ongoing at the time the survey was conducted.
- 5.42 Nearly two-fifths (38 per cent) who took their complaint further said that the action did not help. 23 per cent though said their issue was resolved and a further 17 per cent said that their complaint was partly resolved.
- 5.43 Around three quarters (73 per cent) did not take their complaint any further. Given this and the fact that 71 per cent said that they were dissatisfied because their complaint was not addressed, the findings suggest that a significant proportion of complaints ended up without a satisfactory conclusion for the consumer.

When things go wrong - conclusions

- 5.44 We have seen that many consumers feel they have cause for complaint about their property managers and many of those who do complain to their property manager are left without a satisfactory resolution. Barring the costly and complex possibility of court action, there are currently

⁴⁰ A property manager is likely to only be able to address those complaints that are valid and justified.

very limited avenues for a consumer to obtain redress when they do not get a satisfactory response from their property manager.

Competition places a very limited constraints on the property manager, and therefore consumers are reliant on enforcing their rights. The absence of advice and information, and an effective system of redress means there is inadequate protection for consumers.

Organisation of consumers

- 5.45 As discussed earlier in Chapter 4, owners in properties with common areas have some responsibilities in common and are dependent on each other. Where there is no property manager, the owners of the shared property may, to varying extents, organise themselves to manage the common areas and organise the carrying out of maintenance and repair to the property. The degree of organisation and management varies from very ad hoc to a formal management company with directors.
- 5.46 Where a property manager is used, there is still the same issue as to the extent consumers organise themselves. In some modern developments, the individual property owners are required both to organise themselves (for instance, a residents' committee) and use a property manager.
- 5.47 One of the consistent findings of the study – and in particular the consumer survey – was that where consumers are better organised and have a strategy for engaging with their property manager, there are clear benefits to both consumers and property managers. Property owners in the tenement block or development were able to represent their collective interests more effectively and assertively; and the property manager, acting on a clear mandate and instructions from its clients, was more likely to be able to meet the expectations of consumers. Problems of non-payment of fees or float charges were also less likely to arise.

Consumers who adopt a formal, or at least organised, strategy for engaging with property managers bring benefits to themselves and property managers.

6 LAND MAINTENANCE

Introduction

- 6.1 Open spaces on housing developments have traditionally been owned and maintained by local authorities (LAs) but in recent years various arrangements for maintenance of open spaces on new housing developments by the private sector have developed.
- 6.2 The nature of these open spaces vary but may include:
- play areas (with equipment) and sports pitches
 - conservation areas
 - woodland
 - electrical/mechanical items such as public lighting systems and controlled entry gates, and
 - sustainable urban drainage systems (SUDS)⁴¹ including various elements such as retention ponds.
- 6.3 Alternatives to adoption by LAs are: communal ownership by home owners who may appoint a company to maintain the land on a fixed term contract; and ownership and maintenance of the land by a land maintenance company (LMC).
- 6.4 The communal ownership model is similar to property management. A property manager will tender for the contract with the home owners and will subcontract the necessary maintenance work. It will bill home owners for this and charge a management fee. A number of property

⁴¹ SUDS are special forms of landscaping designed to assist storm water drainage and therefore reduce the risk of flooding of the surrounding properties.

managers undertake open space management only where a property management service is being provided.⁴²

- 6.5 One reason why LAs have traditionally taken on the maintenance responsibilities is that open space areas often have characteristics of a 'public good'. That is, the provision and maintenance of a play park (or other open space facility) may be seen to benefit more people than the property owners. So property owners on a development may place a lower value on the provision than the community as a whole. Leaving provision to just one group of home owners could in principle lead to under provision. This may be exacerbated where some home owners do not use the facility so may not be inclined to pay for provision of it. Such arguments usually imply that there are advantages to LA provision of parkland and playgrounds since the LA is in a better position to gauge overall demand and is also able to charge all members of the community for its maintenance.
- 6.6 This issue can be more acute with land maintenance than property management since the advantage of a well maintained property typically accrues to the owners of the property and relatively little to the community at large.

The three models of land maintenance

- 6.7 Typically the homebuilder determines the development of open spaces in conjunction with the planning requirements of the local authority. Once agreement is reached as part of the planning process it is the homebuilder who is responsible for the arrangements for maintenance of the open space on that development.
- 6.8 The three models open to a developer for maintenance of these sites are:⁴³

⁴² A housing development may include flats with common areas for which a property manager is appointed and often the same property manager will undertake the maintenance of the common open spaces. However some property managers also undertake open space management even where there are no flatted properties, only houses, on a development.

- local authority ownership
- communal ownership
- land maintenance company ownership.

Local authority ownership

6.9 The developer transfers ownership of the open space to the LA, which takes on responsibility for maintenance. The LA may require the developer to pay it a capitalised maintenance charge (also known as a commuted sum), usually calculated as a multiple of the first year's estimated maintenance charge. The multiples that were suggested to us were typically between 10 and fifteen years but others were also mentioned. The model, of course, depends on the LA being willing to take on the land.

Communal ownership

6.10 The developer transfers ownership of the open space to all house owners in the development jointly. The developer may also appoint a company to maintain the land for an initial fixed term, typically of two to three years duration. A maintenance specification is agreed between this company and the developer. The obligation to pay for maintenance is set out in the deed of conditions.

6.11 One property management company which undertakes such work told us that the home owners were empowered upon sale of the last property on a site to make their own decisions about arrangements for land maintenance. They could choose to retain the services of the property manager appointed by the developer, change to an alternative manager or undertake the work themselves. This company told us that the process of changing the manager was very simple and required just a majority decision. Under this arrangement there are no ongoing or lump

⁴³ In principle there may be other options but we are not aware of other prevalent arrangements.

sum payments to or from the developer. This arrangement is closest to the property management model.

- 6.12 We were told that there were some problems with this model. Some property managers that undertook this work said these arose where solicitors did not advise home buyers of their future liabilities. One also said that home owners were often reluctant to pay for areas which were not adjacent to their property or for play areas if they did not have any family using these facilities. Another said that many home owners were reluctant to pay because they considered that this work should be undertaken by the LA and funded by the Council Tax. If non-payment is too great the appointed company might cease its involvement with a site. Some of the property management companies we heard from had done this at some point.
- 6.13 Whether in this case the LA would itself ultimately take over responsibility for maintenance appears to vary from area to area. One LA told us that management by residents often broke down eventually, which 'invariably' resulted in it taking over maintenance. Another said that if an area of open space was poorly maintained an option available to it was to maintain the site itself, thereafter recharging costs to the developer. However, it also said that in most cases where responsibility was split between house owners it would consider such areas 'privately owned' and would not take over responsibility for maintenance.

Land maintenance company ownership

- 6.14 The developer transfers ownership of the open space to a LMC. A service agreement is agreed with the LMC. Ongoing maintenance may be funded in one of two ways or a combination of both. The developer may pay a lump sum to the LMC which is similar to the commuted sum

payable to the LA.⁴⁴ Alternatively a requirement for property owners to pay the LMC a service charge for maintenance in perpetuity is written into the title deeds of the properties. The level of service charges payable is agreed between the developer and the LMC and is typically indexed to some measure of inflation (see paragraph 6.83 below).

- 6.15 The developer may separately pay the LMC for initial work to develop the open space (for instance, installation of landscaping). Developers will see the attraction of not having to pay a commuted sum where LMCs levy service charges to pay for maintenance.
- 6.16 Under this arrangement, unlike in the communal ownership arrangement, there is no simple mechanism for home owners to switch supplier at some point in the future since the LMC, and not the home owners, owns the open space land.

Description of the market

- 6.17 The first LMC, Greenbelt, was set up by Strathclyde Regional Council, Scottish Natural Heritage and Scottish Enterprise in 1992. It has expanded beyond its Scottish base to England and Northern Ireland. In 1999 there was a management buy out and there has been no public sector involvement or funding of Greenbelt since then.
- 6.18 Other companies have followed Greenbelt in operating the land maintenance company ownership model in Scotland. Scottish Woodlands commenced land maintenance in October 2006. Ethical Maintenance was started in July 2007.
- 6.19 Other companies operating this model include Meadfleet which operates principally in England and Wales with just three sites in Scotland. Other organisations including wildlife trusts may undertake specific adoptions.

⁴⁴ We were told that while local authorities refer to the fee paid by the developer for transfer of the land and ownership responsibilities as a commuted sum, developers referred to a capitalised maintenance charge and the LMC referred to a Development Fee. These terms generally related to the same issue and were interchangeable (although the underlying formula/calculation might differ).

- 6.20 Greenbelt manages open space on behalf of nearly 24,000 home owners. The other two dedicated LMCs in Scotland are much smaller – a total of approximately 1,000 houses contracted to date. Ethical Maintenance said it maintained six sites with 430 houses. Scottish Woodlands said it was currently billing 400 residents across five sites. It told us that it both operated the LMC ownership model, on about half its sites, and was engaged by the owners of open space on some sites to maintain it for a fixed period - as per the communal ownership model.
- 6.21 Annual maintenance charges ranged between £100 and £200 according to information provided to us by LMCs. Based on the figures supplied we estimate that this accounts for approximately £7 million per year. We have not been able to accurately determine the number of developments under the communal ownership model. However, based on discussions with developers and property managers we believe that this model could account for as much business as the LMC model.
- 6.22 A submission from a developer indicated that previous performance was the main factor in selecting an LMC because the companies' fees did not differ much. Greenbelt also told us that to win business from developers a LMC needed to demonstrate a proven track record. However, Ethical Maintenance said it was relatively easy for start-up companies as long as they won the confidence of developers although there was some inertia on the part of developers when it came to using new companies. Scottish Woodlands said developers' choice of LMC was generally determined by reputation and price. It also said that things that might impede it winning business from developers it did not already work with included pre-existing relationships.
- 6.23 Land maintenance may also be undertaken in combination with property management at the same development (for example, where a block of flats has communal gardens). Some property management companies also undertake land maintenance (as per the communal ownership model) separately from property management. Scottish Woodlands maintains sites according to the communal ownership model as well as the land maintenance company ownership model.

- 6.24 A property manager described sites which had been developed by several companies which meant there were several companies maintaining the land and also sites where home owners pay both a land owning maintenance company and a property management company to maintain different parts of the open space.

Complaints

- 6.25 The OFT survey of consumers did not specifically include owners who pay for land maintenance. However, approximately 40 per cent of the consumers' submissions to us during this study concerned the LMC ownership model. A substantial number of articles about land maintenance and have also featured in the press, mainly in Scotland, and the issue has a high public profile.
- 6.26 The OFT had received 100 submissions from consumers about LMCs by the end of 2008. We have analysed these submissions to assess the specific issues raised, while recognising that people who are motivated to write to the OFT as part of a market study may not be representative of the generality of consumers. Not all submissions specified a cause for complaint and not all related to Scotland. The issues complained about in the 75 submissions that raised particular issues of complaint (a number of which raised more than one issue) were:

Table 6.1: Summary of land maintenance complaints (by issue)

Complaint	No. of complaints	Percentage of no. of submissions
Work quality	59	79%
Charges (including transparency) ¹	21	28%
Debt management (late payment charges)	20	27%
Complaints system ²	12	16%
Poor communication ³	11	15%
Monopoly position	8	11%
Inability to switch away from LMC	4	5%
Inadequate information at purchase ⁴	3	4%
Public access to LMC maintained land ⁵	3	4%
Contract tendering ⁶	2	3%
LMC denial of responsibility for tasks	1	1%
Inadequate redress system	1	1%
Harassment of residents	1	1%
Contravening deeds ⁷	1	1%
Direct debit payment taken early	1	1%
TOTAL	148	

Notes:

¹ Including charges alleged to have increased above amounts quoted or stated in title deeds and where detailed invoices supplied to customers were set out in a manner that made it difficult to follow the charging methodology.

² Lack of response from LMC or time it took to respond.

³ Complaints here ranged from LMC refusing to supply its terms to not consulting owners about whether maintenance work should be contracted out.

⁴ Two consumers claimed the annual charge was not specified and another claimed he was not made aware of LMC in relation to the property purchased.

⁵ Members of the public allowed to use land that they had not paid to maintain.

⁶ LMC not paying the contractors it employed and not obtaining more than one quote when tendering for services.

⁷ LMC alleged it owned land despite title deeds stating the contrary.

Source: OFT - complaints received during the period June – December 2008.

6.27 All of these complaints related to LMCs primarily operating under the LMC ownership model rather than the communal ownership model. Nearly a third (31 per cent) of the 72 complaints included in the analysis that identified the consumer's location were from West Lothian. The next most responsive areas were Aberdeenshire and Clackmannanshire which each accounted for 10 per cent.

6.28 10 submissions were excluded from the analysis as they did not relate to Scotland – nine from England and one from Northern Ireland.

The developers' perspective

6.29 The developer normally decides which model to choose. The requirement to pay the LA a commuted sum to adopt the land appears to make transfer to a LMC, without the need for such a lump sum payment, an attractive option for developers. One developer told us LAs were generally unwilling to adopt the land and, on the few occasions when it was an option, the size of the commuted sum required meant it was not viable. A LMC told us that developers approached it 'where the position is either that the local authority has stopped adopting or that their price is too high for the developer' or the common ownership model was 'regarded as not providing the security required by the Planning Consents'.

6.30 One developer told us that the choice of arrangements for land maintenance had no effect on the price which is achieved on the sale of houses. Similarly, this developer also said house buyers did not attempt to negotiate annual charges or the standard of maintenance at all. In fact one would not expect a home buyer to be able to negotiate maintenance charges since these will be standard for all properties in the development, but if maintenance charges were thought to be high this might be the basis for seeking a reduction in the purchase price. Home buyers are unlikely to take maintenance arrangements into account in their decision to purchase if either land maintenance charges are not very visible to home buyers or they are not an important factor in the purchase decision, as the later section on consumer choice suggests (see paragraphs 6.48 – 6.54).

6.31 Developers might, however, take into account the effect on their reputation if inadequate arrangements were put in place. One LMC said that developers were responsive to bad publicity surrounding the LMC ownership model and it had witnessed a slight change towards communal ownership in order to protect their brand image. However, another LMC said it had not witnessed any such change.

- 6.32 The developer will retain an interest in a site during the period for which a LMC has been appointed to undertake work to install the features of an open space (landscaping and so forth) but will have no involvement once a site has been handed over to a LMC. One LMC said that after the developer had left the site there was minimal liaison 'unless there were significant on-site problems with residents'.
- 6.33 Planning conditions are imposed on the developer but if the land is transferred to a LMC then enforcement action in the event of breaches of the conditions will be against the new landowner. One developer told us that it retained an interest in so far as, if there was a customer complaint, it would mediate with the LMC and take this into account for future appointments.

Developers may have little incentive to take account of home buyers' preferences in their choice of land maintenance model.

Determination of maintenance charges and commuted sums

- 6.34 One developer told us the LMCs provided details before appointment which indicated the anticipated level of annual charges and the standard of maintenance. It said the main factors determining the level of any payment to a LMC were the amount of open space, any particular play area facilities and the nature of the open space, for example, whether shrubbery or grass, which determined the number of visits required in a particular season.
- 6.35 One LMC told us the level of the developers' commuted sum payments and house owners' maintenance charges were dependent on sub-contractors' charges for different components of work required on each site (with a percentage uplift for management functions). Another LMC also told us that the annual service charge was based on the cost it expected to incur in maintaining the site plus a percentage mark-up to cover its overheads. Rather differently, the other LMC told us the annual charge was usually decided on as being a 'reasonable amount' depending on the likely value of the houses (which would itself affect the amount of provision of play areas and so on). It said charges could

not be set 'objectively' because there were so many parameters that could impact on the charge.

- 6.36 A developer may also make one off lump sum payments related to the start-up of a site. These payments may be designed to cover one-off installation and development costs but also may cover legal and administrative costs associated with the handover of the land and the start up of the maintenance arrangement.
- 6.37 Greenbelt told us there were a number of 'historic' open spaces where the developer had not put in place an arrangement for management and maintenance and had not provided in the title deeds for existing home owners to contribute to maintenance costs. It took over ownership responsibilities on these sites including maintenance in return for a fee from the developer. These tended to be sites that were several years old or woodlands. It told us that this arose, for example, on some occasions where at the outset of the development process the LA might have agreed to adopt the areas but by the end of the development process had reviewed its decision.
- 6.38 Greenbelt said this applied to approximately 326 sites and it did not receive annual maintenance charges from residents on these sites. Residents pay service charges to Greenbelt on 180 sites in Scotland (16,000 residents) and 124 sites in England and Northern Ireland (7,000 residents). Greenbelt received funding from the developer on six of these sites. This means that there are a large number of sites for which Greenbelt is responsible but in respect of which it receives no funds on an ongoing basis.

Role of Local Authority in developer choice

- 6.39 The LA can influence the developer's choice by varying the level of the commuted sum in return for which for which they would take on the land. LA planning departments may also be able to promote measures that lower the costs of maintaining the land (thereby making it more attractive for LAs to take on). For example, one LMC told us the planning authority could influence the amount of infrastructure on a site.

However it cannot dictate what the arrangements the developer makes for maintenance shall be.

- 6.40 While the developer has to make the arrangements for land maintenance, LAs are empowered to conclude planning agreements with developers to obtain payment towards the cost of maintenance of open space or transfer of the land itself. Current Scottish Government guidance on the use of planning agreements⁴⁵ is that developers may, for example, reasonably be expected to pay for or contribute to the cost of facilities or infrastructure which would not have been necessary but for the development.⁴⁶ Moreover, it makes specific provision for the use of agreements to fund land maintenance. It says that in some cases 'the obligations of a landowner or developer can be implemented, for example, by a one-off payment towards the cost of infrastructure provision or the maintenance of open space'.⁴⁷
- 6.41 In practice there are reasons why a LA may not wish to take on maintenance and may choose not to institute a planning agreement. For example, it may be concerned at the developer's ability to make a lump sum payment for maintenance and the effect on the viability of the overall development. One LA said that in practice developers would not sign an agreement which required them to use the Council to maintain land, mainly because they felt that the capitalised maintenance sums were too high.
- 6.42 In response to questions to LAs in Scotland the OFT received a mixed response about the use of planning agreements to secure the transfer of land and lump sum payments for land maintenance. Some LAs use such agreements, others it appears do not and some are considering doing so. This difference is also observed in a recent research report funded by the Scottish Government which noted that some LAs secured significantly more funds by this means than others. It found that LAs

⁴⁵ Set out in Circular 12/1996 (Town and Country Planning (Scotland) Act 1972: Planning Agreements).

⁴⁶ Circular 12/96 paragraphs 10-11.

⁴⁷ Circular 12/96 paragraph 18.

with staff dedicated to planning contributions and those operating formula based policies secured the most contributions.⁴⁸

- 6.43 The same report indicated that number of environmental/open space contributions secured by planning agreements (the vast majority of which related to major housing developments) rose from 15 in 2004/05 to 30 in 2006/07. The average value of these increased significantly with the result that the total value of contributions rose sharply from £146,000 in 2004/05 to £3.7 million in 2006/07.
- 6.44 The regulations and Scottish Government guidance on planning agreements and research into how they are currently used are described in more detail in annexe I.
- 6.45 The LAs attitude to the developer's choice of model can also be influenced by the likely reliability of the maintenance arrangements. Under both the communal ownership model and the LMC ownership model it might ultimately fall to the LA to ensure that adequate maintenance is carried out.
- 6.46 Problems in delivery of well maintained open space became more complex when responsibilities are transferred to residents rather than a LMC, according to one LA. It cited an area that had reverted to wasteland due to a failure among residents to agree a way forward for maintenance. It said input by the LA to progress matters would involve negotiations with individual owners and use up significant staff resource. A LMC also told us that LAs preferred to have a single point of contact rather than large numbers of residents. A LA agreed that it was simpler to serve planning condition enforcement notices where the land is owned by one company (as under the LMC ownership model) than if the land is owned in common by individual householders. Another LA said that 'the sensitivities and the difficulties' in enforcing planning conditions against residents where they are responsible for the breach of

⁴⁸ McMaster, R. and U'ren, G. – Dundas and Wilson CS LLP; Carnie, J. Strand, G. and Cooper, S. – Bidwells (2008) *An Assessment of the Value of Planning Agreements in Scotland* Scottish Government Social Research p.65.

a planning condition to enforce maintenance meant it was unlikely the Council would enforce planning conditions.

- 6.47 Whether the LA is likely to step in if maintenance is poor appears to depend partly on the resources available to the LA. One LA told us that it required a permanent bond to be lodged with it that could be called upon to allow maintenance responsibility to pass to the Council in the case of the default of maintenance obligations. However, this option was not usually taken up as neither developers or LMCs wanted to be tied to it. Another authority (which does not use planning conditions relating to maintenance) said that the demise of a LMC responsible for sites in its area without a bond lodged with the Council 'could pose a resource problem for the Council'.

Local authorities can influence the developer's choice of land maintenance model through charges and through the planning process.

Consumer choice

- 6.48 In considering whether to purchase a home, prospective buyers are likely to take into account a large number of factors and arrangements for future maintenance of open spaces are unlikely to be among the main ones. For example, the market study 'Homebuilding in the UK' published by us in September 2008 concluded that purchasers were primarily concerned with price and location.⁴⁹ Indeed, we were told (by a property manager, albeit in relation to the communal ownership model) that house purchasers paid very little attention to prospective common open space areas at time of purchase generally as there was far more to concern them in relation to the house they were buying than communal landscaped areas.
- 6.49 For purchasers to take maintenance arrangements into account in their decision to purchase or attempt to negotiate a reduction in the purchase price on the basis of the maintenance arrangements would appear to

⁴⁹ *Homebuilding in the UK* OFT (2008) p.137.

require that they were aware of the arrangements and that the amounts at stake were significant.

6.50 Our market study into Homebuilding found that information provided to home purchasers about maintenance charges was incomplete. As part of that study, we employed mystery shoppers to visit new-build developments and pose as potential home buyers, recording what information they were given about various things including maintenance fees (not specifically land maintenance but also including upkeep of communal areas generally). It found that in Scotland:

- 12 per cent of sales people did not discuss whether maintenance fees were payable even after prompting, 60 per cent of shoppers were told only after prompting and 28 per cent were told spontaneously⁵⁰
- where maintenance fees were payable and this information was provided, nine per cent of shoppers were not given the level of fees. 50 per cent were given it only after prompting and 41 per cent were provided with it spontaneously⁵¹
- of those shoppers provided with the level of maintenance fees, only 16 per cent were told these were subject to review⁵²
- just 16 per cent of all shoppers were provided with written material on maintenance fee coverage.⁵³

6.51 One LMC acknowledged that lack of clarity with regard to information provided by developers at the time of purchase was a 'major source of

⁵⁰ *Homebuilding in the UK* OFT (2008) p.145 and chart 6.1 page 144 presents data for the UK but results cited here are for Scotland only.

⁵¹ *Homebuilding in the UK* OFT (2008) annexe C page 17 presents data for the UK but results cited here are for Scotland only.

⁵² *Homebuilding in the UK* OFT (2008) annexe C page18 presents data for the UK but results cited here are for Scotland only.

⁵³ *Homebuilding in the UK* OFT (2008) chart 6.1 page144 presents data for the UK but results cited here are for Scotland only.

consumer dissatisfaction'. It described the steps taken to inform house purchasers as follows:

- it provided a welcome letter, with a brief summary of its role and responsibilities, a plan of the areas to be managed and the annual charge noted, to developers' marketing suites. It said it regularly visited sales advisers in these marketing suites to ensure provision of its sales literature was 'up to date' and that this allowed sales staff an opportunity to ask questions
- 'many' developers required new house purchasers to acknowledge that they had been informed of the arrangement with the LMC by signing 'the appropriate clause in their handover pack at time of entry'
- solicitors acting for the house purchasers were responsible for informing them of the LMC's involvement and the nature of the arrangement during the conveyancing process
- after purchase, the LMC Community manager liaised with residents and arranged public welcome meetings with residents for each development
- prior to sending out its first bill, the LMC sent a Homeowners pack to every house purchaser which indicated the type and range of services that they could expect it to provide.

6.52 The other LMCs' provision of information prior to purchase is very similar. One provides an introductory pack and the other provides tailored information sheets available in the sales cabin or for the developer's sales staff at each site.

6.53 Information is not provided direct to home owners until they get their first bill. One LMC accompanies this with a welcome pack detailing its appointment, the maintenance specification and areas for which it would be responsible. The other confirms its service charge upon the first request for payment.

- 6.54 A developer simply said prospective purchasers were informed of arrangements for land maintenance and annual charges at the stage of enquiry because all the information was with sales staff on site.
- 6.55 The OFT wishes to ensure that house purchasers are well informed about the land maintenance obligations in their deeds at the point of purchase. In response to our report on Homebuilding, the industry set up a code body to address the concerns that we raised. We have asked that the code of practice for homebuilders that is being developed includes requirements for specification of ongoing commitments and obligations relating to land maintenance as well as property maintenance and that these are properly communicated to prospective purchasers. If the Homebuilders code is not established, the OFT has recommended that statutory regulation of homebuilders should be considered.

Consumers effectively have no choice over the land ownership model on a particular development since it is decided by the developer. Moreover purchasers of new houses and flats may not be fully aware of the arrangements and charges for maintenance.

Scope for switching

- 6.56 In the LMC ownership model the LMC owns the land so it is very difficult to replace it as supplier. As a result home owners are effectively locked in to a particular LMC and a key competitive constraint on the LMC is, therefore, absent.
- 6.57 In the communal ownership model the owners may switch company after an initial period provided they can secure agreement of a majority. As is detailed in chapter 4, in practice the need to secure the agreement of home owners can lead to very low levels of switching between property managers. However, with the LMC ownership model there is the added obstacle that the LMC owns the land.
- 6.58 There are provisions in the Title Conditions Act (Scotland) 2003 (TCA) that potentially enable property owners, acting together, to transfer responsibility from the incumbent LMC. The TCA, in part 2 of the Act,

provides for majority decision making in respect of varying community burdens (also known as 'obligations') where the title deeds are silent on this matter.⁵⁴

6.59 The TCA provides two routes for property owners who wish to amend their title deeds.

Section 33 of the TCA sets out the rules whereby the majority of property owners can vary or discharge burdens applying to the community by:

- preparing a deed to vary the title conditions
- signing the deed
- notifying those owners who did not sign (by written notice with a copy of the executed deed)
- allowing eight weeks for those owners who did not sign to raise their objections in the Lands Tribunal for Scotland (LTS)
- registering the deed in the property registers.⁵⁵

The deed is then effective against the whole community.

6.60 Alternatively, an application may be made⁵⁶ to the LTS by the owners of at least a quarter of the properties in a community for the variation or discharge of a community burden as it affects all or part of that

⁵⁴ The TCA provides (at section 25(1)(a) that a community is a group of two or more properties which are subject to the same or similar burdens and which are mutually enforceable – meaning that the owner of each property will be able to enforce some or all of those burdens against other owners. Communities can include modern housing estates, tenements and sheltered housing.

⁵⁵ This summary of the procedure is taken from 'Management and Maintenance of Common Property Guidance on the Tenements (Scotland) Act 2004 and the Title Conditions (Scotland) Act 2003 for Housing Professionals' page 8, paragraph 30.

⁵⁶ By virtue of section 91.

community.⁵⁷ The LTS may compensate the owner of the benefitted property, for example, the property owner entitled to enforce the burden. Compensation can be awarded only if the person who is to pay agrees, but if that person does not agree the LTS may decide not to grant the discharge⁵⁸. Compensation cannot be awarded if the application for discharge is unopposed⁵⁹.

6.61 As far as we are aware, neither of these statutory procedures have yet been relied on by property owners as a means of amending their title deeds to vary or discharge burdens relating to a LMC maintaining open space.

6.62 The costs of the LTS itself are low but home owners wishing to amend the deeds face the possible difficulty of organising large numbers of home owners, the need to obtain legal representation to take on a case where the law is untested, the prospect of further expense and uncertainty over the outcome.

6.63 LMCs told us that they will not oppose such applications. Greenbelt told us it had developed options enabling home owners to maintain the open spaces in its place or appoint another property manager to do so. It would retain land ownership under these options. It said these were:

- where the developer includes this management option in the Deed of Conditions for the estate, home owners can make their own arrangements for maintenance where two thirds of home owners are in favour of doing so and all outstanding debts to Greenbelt are cleared.⁶⁰ This would not involve changing the title deeds (unlike the statutory scheme laid down in the TCA).

⁵⁷ Section 91(1).

⁵⁸ Section 90(9).

⁵⁹ Section 97(1).

⁶⁰ This is referred to in a statement entitled *Greenbelt on consumer choice* posted on the Greenbeltgroup.co.uk website (April 2008).

- where this option is not included within the Deed of Conditions for the estate, a simple majority of home owners can enter into a lease arrangement with Greenbelt for five years at a time to provide for the transfer to them of maintenance and insurance responsibilities. Greenbelt's literature points out that it would be more equitable for the home owners if a larger majority were in favour as the obligations to pay for maintenance and insurance would be enforceable only against those who entered into the lease.

- 6.64 Greenbelt would also consider on a case by case basis transferring ownership of the open spaces to home owners where all home owners expressed an interest in doing so.
- 6.65 Scottish Woodlands did not make any specific commitment to transfer ownership of sites or responsibility for maintenance to home owners. It said commuted sums received from the developer for the site would complicate matters. It also told us of legal agreements with developers whereby if it wanted to sell the land it would require the developer's prior written consent.
- 6.66 Ethical Maintenance told us it committed to transfer the common areas back to the residents if more than 50 per cent of all site residents voted for this through a meeting of the Residents' Association. It said the Residents' association would pay the legal fees for this transfer. It had not yet been asked to transfer land back to home owners.
- 6.67 It has also been suggested to us that the LMC ownership model may involve deeds that conflict with section 3(7) of the TCA which states:
- 'Except in so far as expressly permitted by this Act, a real burden must not have the effect of creating a monopoly (as for example, by providing for a particular person to be or to appoint (a) the manager of property; or (b) the supplier of any services in relation to property).'
- 6.68 The use of the term monopoly is not defined in the TCA. As far as we are aware, there have been no challenges to deeds on the basis that the LMC model creates a monopoly.

6.69 We have considered whether Unfair Terms in Consumer Contract Regulations 1999 (UTCCRs) apply to a developer's Deed of Conditions. It is likely that the UTCCRs do apply to contracts relating to land in Scotland.⁶¹ However, section 61 of the TCA prevents a burden when it is created operating as both a contract and a real burden. The current position, therefore, is that an obligation (a burden) can be either a burden or a contract, but not both. When a deed creating a burden is registered - creating the burden - contractual liability ceases to the extent that it is duplicated by the real burden. Our assessment is that to the extent that a developer's deed of conditions specifies real burdens, for example, obligations which run with the land, the UTCCRs do not apply.

The legal provisions which would enable consumers to switch land maintenance companies, under the ownership model, are complex and untested.

Standard of maintenance

6.70 The developer and LMC draw up the agreement specifying the maintenance to be carried out on a site along with any payments from the developer and the level of the annual charge home owners will pay. The developer constitutes the deeds of condition for each property which includes a maintenance specification and establishes obligations between the LMC and the home owners. According to an LMC this means that the LMC is legally obliged to carry out work and the home owners have a legal right to enforce performance by the LMC to the standard set out in the specification. However, an LMC agreed that it might have a fair degree of flexibility in the amount of work it could do in order to meet the maintenance specification.

6.71 One LMC told us that if a majority of the home owners wished to amend the Management and Maintenance Specification, the Deed of Conditions

⁶¹ That the UTCCRs apply to contracts relating to land seems to have been settled following the Court of Appeal judgment in *The London Borough of Newham v Khatun, Zeb, Iqbal* and the Office of Fair Trading [2004] EWCA Civ 55. This judgment is likely to be of persuasive authority, in that the Court of Session may be likely to follow the decision.

provided a mechanism enabling them to do so 'with [the LMC's] agreement' and if agreement could not be reached within a set timescale, there was provision for the matter to be referred to independent arbitration.

Local Authority enforcement of standards

- 6.72 Planning conditions are the Scottish Government's preferred method of ensuring land is maintained to a certain standard where this is to be achieved through planning legislation. However, Scottish Government guidance states that a condition requiring land to be maintained should be imposed only when the requirement is sufficiently precise in its terms to be readily enforceable. It may be difficult to specify the standard to which land is to be maintained so precisely that it would be clear what must be done to comply with such a planning condition and when it was in breach. One LA that responded to our questions on planning conditions said 'the required level and standard of maintenance would not be easy to specify in a planning condition and therefore would be difficult to enforce'.
- 6.73 The possibility of appeal with its attendant demand on LA resources may deter imposition of planning conditions or lower the standard of maintenance they prescribe. A small number of LAs confirmed that the possibility of appeal against planning conditions could act as a deterrent to their use. Scottish Government guidance on planning agreements acknowledges that 'many authorities' feel that these are a 'more effective means of enforcement without the risk of having a condition overturned or modified at appeal'.^{62 63}
- 6.78 Whether planning conditions are an effective mechanism for ensuring land maintenance is carried out depends also on whether LAs enforce them. For enforcement to be effective the breach of planning conditions must be clear notwithstanding any difficulty of specifying maintenance

⁶² Circular 12/1996 paragraph 3.

⁶³ This may change with the implementation of the provisions of the Planning etc (Scotland) Act 2006 which will allow appeals against the terms of planning agreements.

standards precisely. One LA told us that using conditions to secure maintenance was unenforceable and impractical to manage, citing lack of precision and practical difficulties in establishing when a scheme of landscaping was being maintained satisfactorily. Another said that 'if the planning condition required maintenance, it would be likely to be viewed as unenforceable and any enforcement notice would be likely to be quashed at appeal'.

- 6.74 Another LA that does employ conditions said that it was 'extremely rare in practice' that it took steps to enforce conditions relating to maintenance of open space. This was largely due to a lack of resource, which meant that the monitoring of conditions was a relatively low priority. The resources required would be 'disproportionate to any likely penalty to the developer'. It said that given the number of sites where maintenance had failed (for example, a widespread failure to carry out routine weed spraying) the need for enforcement action could arise on scores of sites across the LA area. When poor maintenance was brought to the LA's attention by residents, enforcement officers would be likely to take informal action through letters and negotiation with the developers but this was usually resource intensive and progress was often slow.
- 6.75 One LA said it preferred to achieve a solution by negotiation, typically with an appointed property manager or an LMC, and found this to be effective. Another LA said that matters were first pursued with developers through either a letter or a Planning Contravention Notice and these cases were generally satisfactorily resolved without having to take formal enforcement action. This would be problematic under the communal ownership model as notices would have to be served on every individual property owner and one LA said it was unlikely to enforce planning conditions against residents.

It seems doubtful that the enforcement of planning conditions is an effective practical means of ensuring high standards of maintenance are provided to consumers.

- 6.76 Further detail on the regulations and guidance governing the imposition and enforcement of planning conditions is provided in annexe J.

Maintenance charges

- 6.77 As with the standard of maintenance, in so far as home owners are locked in to a particular LMC under the LMC ownership model, that LMC may have little direct incentive to minimise maintenance charges to home owners. The setting of the initial maintenance charge paid by a home owner to a LMC will be determined by the developer, in response to any submissions or tenders it invites from land maintenance companies and/or property managers. As we have seen earlier (paragraph 6.35) LMCs have told us that maintenance charges are set simply according to either costs likely to be incurred (with the addition of a percentage mark-up) or what the purchasers of houses on a particular development are thought likely to bear.
- 6.78 Given the very long term nature of the relationship between home owner and LMC there is a need for some provision to vary the annual maintenance charge paid by the home owner. LMCs have informed us that there is normally a provision within the deeds that the annual maintenance charge rises in line with inflation.⁶⁴ Since over time the costs of the LMC may rise faster or slower than general inflation, there is also a need for a mechanism to allow for such adjustments in costs. In some deeds there are provisions for a review after a set period, for example every five years, at which point adjustments other than in line with inflation may occur.
- 6.79 If such reviews were capable of leading to substantial increases in charges above costs this would be a cause for concern, given the difficulty consumers would have in switching in response to such an increase. Since consumers will typically have a lot less information about the costs of the LMC than the LMC there would appear to be a need for a safeguard to prevent increases in management charges above the level of cost increase as part of such a review. From the information

⁶⁴ The annual maintenance charge is typically indexed to the Retail Price Index (RPI).

provided by LMCs we have not been able to ascertain whether such safeguards are in place that would adequately enable a home owner to verify whether an above inflation increase was justified by a cost increase.

- 6.80 LMCs have told us that they do not currently produce separate accounts for each development that they adopt. They pointed to difficulties in producing such accounts and question their usefulness. However, such accounts, particularly if audited, might help improve transparency about how home owners' maintenance charges were spent and the costs incurred on a particular site. By setting out clearly any changes in costs related to a site this may help to offer some protection against increases in charges that were not related to cost.

It appears that there is room for improvement in terms of LMCs providing financial information for each site managed – this might help owners assess whether or not charges are fair.

Overall assessment

- 6.81 The OFT has a number of concerns about the operation of land maintenance arrangements on new developments. These are divided into three areas, each addressed in turn.
- the incentives for developers and LAs to put in place effective and efficient land maintenance arrangements
 - the degree of lock-in faced in the LMC ownership model
 - the effectiveness of consumers to assure themselves of value for money services and have complaints adequately addressed.

Incentives for efficient effective arrangements

- 6.82 The developer, when it puts in place a land management company under the communal ownership model, is creating a long term contract on behalf of the residents. When it transfers the land to a LMC it creates a perpetual relationship between owner and LMC. Such long term supply

relationships can create difficulties for specifying the terms of supply, the possibilities for varying the price and enforcement of quality of supply, and the risks if the relationship breaks down.

- 6.83 The communal ownership model provides home owners with the opportunity to change supplier, usually after a fixed initial period. At this point changes to the level of maintenance and the service charge can also be agreed. Therefore, this model offers some protection to consumers if the LMC organising maintenance performs poorly. The main risk associated with this model is that if there is a significant rate of non payment by home owners the relationship may break down. The LMC may stop performing maintenance, may be unwilling to continue with the contract, since it is not able to obtain payment. In such situations there may be no arrangements made for maintenance at all.
- 6.84 With the LMC ownership model the problems of the long term relationship are more extreme. Changing the service standards or varying the price are not conducted in the context of contract negotiations so the bargaining power of home owners is likely to be much weaker. There is little evidence to suggest that developers take such factors into account in their decision except to the extent that putting in place inadequate or poor land maintenance services may lead to bad publicity for the developer.
- 6.85 The LA may seek to force residents to undertake maintenance if there are planning conditions to enforce, but enforcement against a large number of home owners may be an expensive and bureaucratic exercise. For this reason some LAs have reported a preference for the LMC ownership model, where enforcement of conditions would be against the single entity, the LMC, over the communal ownership model.

The LMC ownership model is not free of risk. For example, if a LMC was to cease trading, so that it was unable to carry out maintenance, it is unclear what arrangements would exist for continued maintenance of its sites.

- 6.86 If an LMC stopped trading, funds already provided by the developer to pay for maintenance in perpetuity might be lost. Moreover, if a LMC

was to go out of business where there was no, or insufficient, ongoing revenue stream to provide for maintenance (such as from maintenance charges) it is not clear how such maintenance would be funded or whose responsibility this would be.

- 6.87 In particular we note that there are a large number of sites for which Greenbelt is responsible but for which it receives no funds on an ongoing basis. It appears unlikely that taking over ownership of land with associated maintenance responsibilities but without any income to fund that maintenance would be an attractive proposition. Similarly on those sites where maintenance is partly funded by commuted sum and partly by annual charges home owners might see their annual charges rise if they have to provide for the full costs of maintenance.
- 6.88 The LA ownership model affords house owners some element of redress over the level of maintenance through their elected councillors. One LA does not allow residents to be charged for the maintenance of any public open space. It told us this was because the long term provision of public open space is a legitimate infrastructure cost to be borne by the new development. In addition it is inequitable for new house owners to have to pay to maintain a facility accessible to others who do not have to pay for it; paying compromises the principle of freely accessible open space, which is important neutral ground where people of all ages can go for recreation, exercise and socialising; and residents paying for maintenance may seek to exclude others from using the open space.
- 6.89 Both the LMC and the communal ownership model involve incurring administrative costs for billing and administration of property owner accounts. These costs may be significant relative to the costs of the maintenance of the land overall.⁶⁵ To pay for ongoing maintenance either via a lump sum payment by the developer intended to cover at least the first few years maintenance or through council tax may involve significant resource savings as neither of these approaches incurs these administrative expenses.

⁶⁵ Some consumers have identified that proportion of the annual charge that is accounted for by administration costs may be up to 50%.

- 6.90 Developers may still prefer the communal ownership or LMC ownership model because it enables them to avoid incurring the lump sum payments. Shifting the costs on to home owners apparently has little effect on the price they charge for a home (see paragraph 6.30 above) and therefore can yield significant savings for the developer.
- 6.91 Similarly to the extent that lump sums are insufficient to cover the perpetual commitment to maintenance of the LA and therefore some costs are added to LA. The LA can avoid these costs when home owners take responsibility. Therefore, developers and LAs do not appear to have incentives to choose the most efficient means of delivering services. This is largely due to the fact that home buyers do not appear to fully take into account the ongoing costs of maintenance in their purchase decision.

Prospects for consumer switching

- 6.92 The second area of concerns relates to the protection afforded to consumers once they own a property and have a relationship with a LMC. As discussed earlier, switching is very difficult. There appears to be a potential mechanism available to change the supplier, using the TCA. However this is untested and even if it is tested and proves a feasible route for changing supplier it may well be a very costly mechanism. It may be desirable if the application of the TCA were to be tested so that the uncertainty about the ability to switch supplier using the TCA and likely costs of switching using this method is resolved.
- 6.93 We have been in discussion with Consumer Focus Scotland about whether a test case of the application of the TCA to switching LMC could be promoted in order to obtain such clarity.

Consumer Focus Scotland have indicated their willingness in principle to support a group of residents wishing to take a case to the Lands Tribunal for Scotland in order to see whether the provisions of the TCA provide a means of changing the provider of land maintenance services.

6.94 If Consumer Focus Scotland are successful in supporting home owners to use the existing legislation to test the TCA to see whether it is a reasonably effective way of changing supplier of land maintenance services this may lead the way for other home owners to change supplier. If it is found, however, that the TCA does not provide an effective mechanism the Scottish Government should consider legislation to enable consumers to switch.

Consumer redress and assurance

6.95 In addition to the difficulties switching, consumers face many of the same issues in dealing with the company that manages open space as with their property manager. There can be difficulty assuring the quality of provision and getting complaints resolved.

Any regulatory controls that are introduced for property managers, including a complaints redress mechanism should also be made available to consumers of land maintenance services.

7 RECOMMENDATIONS

7.1 Competition in this market is not working well for consumers. The level of switching is very low. Consumers often do not understand their rights and obligations, and do not have a clear understanding of the standards they can expect from a property manager. When things go wrong, there is no effective redress mechanism. Similar problems arise in land maintenance, in particular, the barriers to switching supplier when the ownership of land is transferred to a private company are substantial. The case for measures which bring about change is strong.

Should property management in Scotland be regulated?

7.2 Regulation has both costs and benefits. Self regulation, when it works successfully and is well designed by industry professionals, has some benefits over statutory regulation, in particular, it may cost less to set up and administer. The question of the cost of any proposed regulation is an important one – there are benefits to consumers and, in terms of maintaining Scotland's housing assets, benefits to Scotland, when property managers provide an effective service. But the main reason why half of flat owners in Scotland do not use a manager is cost.

7.3 The Scottish Government has put forward a proposal for a self-regulatory scheme that would bring together representatives of Consumer Focus Scotland, SFHA and PMAS but would be open to all engaged in property management. Most respondents to our property managers survey were receptive to the idea of some form of accreditation scheme and therefore there are some grounds for believing that a self regulatory scheme would receive sufficient backing to be successful, and that there may be wide coverage of the scheme and property owners seeking to switch to a member of the scheme would find one available in the local area.

7.4 The current low level of switching may indicate that a private sector property manager may have little to gain from joining a scheme. However, we would expect that property developers, who provide the key source of new business for most property managers, would seek to

ensure that the property managers that they appoint subscribe to the scheme. This would provide a badge of quality to signal to home buyers that the property they buy will have a properly manager that is subject to appropriate quality assurance standards. Furthermore, the fact that consumers find it difficult to find sufficient information that would permit them to distinguish a good quality property manager may contribute to the current low level of switching. Therefore, the ability for some property managers to signal their quality to consumers may still mean that those who do sign up would obtain a competitive advantage over rival firms that do not sign up to the voluntary scheme.

- 7.5 Given that there are benefits to a voluntary scheme, and there are indications such a scheme may be successful, this route should be attempted before considering statutory regulation. Nevertheless, given the low level of competition in the market, if self regulation fails, there is a case for the introduction of statutory regulation.

The OFT recommends that the Scottish Government takes the lead in ensuring early implementation of a self regulatory scheme. The OFT recommends that the progress of the scheme be reviewed by the Scottish Government. If a voluntary scheme has not come into place within 18 months, or has not proved effective within two years then the Scottish Government should take steps to introduce a scheme on a statutory basis.

Options for consumers when things go wrong

- 7.6 The majority of consumers are happy with the service from their existing property manager. However, many also have reason for complaint and do not have satisfactory avenues for resolving such complaints.
- 7.7 A regulatory scheme – either voluntary or statutory – that allows consumers a robust independent framework within which to complain if they are not receiving a good service represents only a light burden to those property managers that are provide a good service and have an effective mechanism for dealing with complaints internally – since they will receive few referrals to any complaints body.

7.8 An effective, independent redress mechanism can be a powerful force for change in a sector. When consumers have an easily accessible means of obliging suppliers to put things right, those suppliers find they have increased incentives to provide good service in the first place. This is particularly likely to be the case when the results of the redress scheme, in terms of the complaints upheld in favour of the customer, are known to prospective customers. The exact form of the redress scheme should be the subject of appropriate consultation, but our view on desirable characteristics are set out below.

- it must be credible to both consumers and suppliers, and so should be independent of both
- since one purpose is to provide an alternative to complex legal resolution, it should be set up on a basis which allows it to operate with clear and straightforward principles, easy for both property managers and consumers to understand, supporting cost effective and efficient resolution of cases
- it should allow property managers the chance to put things right before stepping in, so consumers should be obliged to first raise their complaint with the property manager
- cost should not be a barrier to access, or deter access, so the scheme should be free to consumers – there should be benefits to property managers allowing consumers to seek the view of an independent third party even when the resolution is in their favour
- it should be able to award meaningful redress to consumers and have a credible mechanism for enforcing payment of its awards
- it should be able to use its experience and expertise, which it will build up over time, in publishing generic advice and comment to the public, property managers, the owners of the shared property and legislators

- it should publish the outcome of complaints against property managers – in terms of percentage upheld and/or the actual resolution of cases – so consumers shopping round for a property manager can take this information into account and so the scheme contributes to additional competitive pressure in the sector.

The OFT recommends that there should be an independent redress scheme, which should be set up in such a way that not only does it provide a mechanism for consumers to obtain redress, but it is a force for positive change in the sector.

7.9 It is difficult for consumers to assure themselves that the property manager is performing to a high quality. Indeed there is often a lack of clarity about the basic services and standards that owners in shared property can expect from the property manager. There is a clear role for a self regulatory body to set down standards of information provision and basic requirements for a property manager to adhere to. The full details should be for determination by the self regulatory body after appropriate consultation. However, the OFT recommends that the self regulatory scheme should include amongst the provisions the following elements:

- a requirement that property managers set out, in writing, to each property owner what services they are obligated to provide⁶⁶ and the associated delivery service standards. This document should also set out, in relation to the communal areas of the property, the obligations of the individual owner in the shared block or development
- property managers should encourage the owners in a shared property to form an organised body (either a formal residents

⁶⁶ Often, there is no written 'contract' for services between the PM and the property owner. Rather maintenance obligations are traditionally enforced by real burdens set out in the title deeds.

associations or limited company) so that there is a central coordinating body that they can deal with

- property managers should provide to consumers, as a matter of course, a detailed financial breakdown and description of the services provided and such supporting documentation as is appropriate (for example, invoices where appropriate) on a regular basis – an appropriate frequency will depend on the services offered but a default of quarterly may be suitable
- in addition, property managers should be able to explain how and why it has appointed contractors and demonstrate that the services being procured on the behalf of the owners are secured at a competitive market rate. Such information should be supplied proactively rather than managers waiting for requests from consumers
- the self regulatory body should be able to audit a property managers payment to contractors either on a random basis or reactively in response to complaints in order to ensure that contractors are paid to invoice and consumers that no improper payments are involved
- 'floats' should be automatically returned to consumers at the point of settlement of final bill, without the need to request the return of the float
- property managers (whether regulated by the FSA or not) should follow FSA requirements/guidelines on disclosure of commission on insurance.

The OFT recommends that the self regulatory scheme contains at a minimum the requirements for information provision and financial accountability set out above.

Professional qualifications

- 7.10 We have not received evidence which indicates fraudulent activity in this sector. However, since we have no formal information gathering powers in a study such as this, we have not been able to make a full assessment about whether there are problems with fraud or similar criminal activities. Nevertheless, based on what we could observe, the problems do not appear to be the result of a few 'rogue' property managers. Instead the level of discontent and complaint appear to relate to generic features of the market and be spread widely across all property managers and locations.
- 7.11 We do not believe that property managers should be required to possess minimum professional qualifications in order to offer their services – we are mindful that such regulation carries the danger of creating unnecessary barriers to entry into the market. This may be particularly important in this sector since there appears to be little evidence of substantial entry in this market in the recent past. Half of the flats in Scotland are self-managed or have no fixed arrangements for managing repairs and maintenance. While self management is not free of problems, it appears that there are many properties for which self management works effectively as a means for organising repairs and maintenance, despite those property owners having no formal training or qualification.

The case for imposing a requirement that property managers hold professional qualifications does not seem strong.

Consumer information

- 7.12 The deeds that set out the obligations of the owners in relation to the maintenance and repair of their property and the upkeep of the communal areas are often voluminous, complicated, legal documents.
- 7.13 It is difficult for consumers to find out exactly what the services the property manager should be supplying. There is a general lack of awareness of how to switch. Many consumers do not understand their

rights and obligations. This all points to a greater need for information and advice services.

- 7.14 Provision of advice to consumers on housing matters is currently a matter for local authorities in Scotland. We believe that there would be great benefit to the creation of a single website through which owners in shared properties (and consumers more generally) can access generic information on property management and related legal structures. There is also a need for a dedicated telephone or email advice service where such consumers can receive advice. This advice service would need to be staffed by those who have some expertise in the area of property law and would therefore be competent to provide such advice. Since the objective is the improvement of property management in general, this advice service should be open to consumers who use a property manager, consumers who self manage and property managers alike.
- 7.15 We do not wish to be prescriptive about the precise form of this advice service. Provision of advice is a matter for Scottish Government and local authorities. We have already noted that LEASE in England and Wales currently provides a similar service. Therefore, some lessons may be learned from the LEASE experience while of course taking account of the institutional and legislative differences between Scotland, and England and Wales.
- 7.16 In addition, where disputes arise between the owners of shared property, either with the property manager or amongst the owners, a mediation service can prove valuable as a low cost means of resolving disputes and forestalling the need for court action. Access to such a mediation service should be considered as part of the advice service.

The OFT recommends that Scottish Government takes steps to ensure that such a website and advice service, which may also offer mediation, is available to all property owners regardless of the local authority in which they reside.

Low level of competition

- 7.17 This study has found very low levels of switching, low levels of market entry and a general low level of competitive pressure.
- 7.18 Some of the causes are intrinsic to the market. The need for a majority of owners in the same shared property to coordinate and agree on a switch is an obstacle in itself which, under the current legal framework, cannot be eliminated. However, the measures we recommend may stimulate competition.
- 7.19 Consumers may have some difficulty identifying and distinguishing a good property manager from a poor property manager hence may see little incentive to switch. A voluntary self regulatory scheme may allow a good property manager to signal its quality, and distinguish itself from other property managers, by joining the scheme, and thus encouraging switching. Even if all property managers were to join the scheme, the requirements of the scheme to provide greater information on service standards would allow consumers to make a more effective decision on property manager and, therefore, could encourage switching.
- 7.20 Developers have told us that home buyers do not pay significant attention to the identity of the property manager when purchasing a new home. However, we found in our homebuilding market study that consumers have limited information available at the point at which they make their decision. The development of the Homebuilding code and the proposed provisions for disclosure of information on service and management fees may assist with provision of information at point of sale for new properties.
- 7.21 One possible reason for low switching that is the lack of information on the switching process. Since the scope for switching depends largely on the situation as set out in the deeds, generic advice in leaflets may not be helpful to the consumer. Improving advice services available to consumers may assist consumers, who are not experienced at reading deeds, or contracts, to understand their specific circumstances and how they can go about switching their property manager.

7.22 A contributory factor to the lack of active competition on the part of property managers may have been the apparent misinterpretation by some property managers of the PMAS code of practice.

We are pleased that the PMAS has taken steps to clear up this apparent misunderstanding by writing to its members to explain that its members are entirely free to solicit the business of customers.

To the extent that this has affected property managers' conduct in the past we would expect to see a greater degree of active competition on the part of property managers in future.

Land maintenance

7.23 There are many similarities between land maintenance under the communal ownership model and property management.

The OFT recommends that the self regulatory scheme currently being promoted by the Scottish Government for property management should also cover the land maintenance activities of property managers and be open to companies that are primarily land maintenance companies.

7.24 We have identified some concerns specifically with the LMC ownership model. These relate primarily to the nature of the relationship between the owner and the LMC. There appears to be very little scope for homeowners to switching supplier.

7.25 There are as yet unused sections of the Title Conditions Act 2003 (TCA) that in principle offer the opportunity to homeowners to switch supplier. It is desirable that the application of the TCA to these arrangements and the prospect for switching supplier are tested. Uncertainty regarding the application of the law may prevent switching.

7.26 The OFT cannot test the law, this needs to be done by a group of homeowners. But of course the costs, uncertainty and difficulty obtaining legal advice may be a deterrent to those seeking to take such

a case so we are pleased to say that Consumer Focus Scotland has agreed to take on a role to help facilitate a test of the legislation.

Consumer Focus Scotland has agreed to provide organisational support to a group of consumers who wish to bring a case that would test the provisions of the TCA. Consumer Focus Scotland would also assist such a group in obtaining legal advice.

7.27 If such an exercise establishes that the TCA is not effective in allowing property owners to switch provider the Scottish Government should reconsider the relevant provisions to ensure adequate protection for home owners from being locked-in to a particular company.

7.28 We have outlined in this study the potential risks and downsides to consumers from the LMC ownership model. Local authorities, which have some influence over the developer's choice of model, should be aware of the downsides and risks, and future costs of enforcing planning conditions, and take these into account when deciding whether to take on the maintenance responsibilities for new developments.

Developers and Local Authorities need to take into account the long term costs and effectiveness of maintenance arrangements for open spaces. Local authorities should in particular be aware of the risks to consumers, and potentially the local authority itself, of the LMC ownership model.