MBIE's PROPOSED AMENDMENTS TO THE UNIT TITLES ACT 2010, DECEMBER 2016

SUBMISSIONS BY [1] s 9(2)(a)

Thank you for the opportunity to make these submissions. They are in the form of a brief background to some of my involvement with Unit Titles; then my responses to the questions consolidated in Part 7 of the Discussion document[2]; followed by some closing comments.

Background

- I am a Commercial/Property Law lawyer, and have been in private practise for 35 years. I deal with the conveyancing of Unit Title properties (including the registration of Unit Title developments via *landonline*, and updating of *landonline* Unit Title records) several times each year.

- In 2016, and just in relation to residential Unit Title transactions, I was involved with: five sales of units (four in New Plymouth, one in Auckland), two purchases of units (one in New Plymouth, one in Auckland), and the registration at *landonline* of one eight-unit mixed residential/commercial Unit Title development (New Plymouth). Only one of those transactions (the Auckland purchase) was in relation to a Unit Title development of more than 10 units. All but the Auckland purchase related to Unit Title developments originally established under the 1972 Act.

- Also, only the Auckland development came anywhere near complying with the 2010 Act's requirements – four of the five sales were of units in Unit Title developments where there are not functioning Body Corporates, meaning no Body Corporate bank accounts, no LTMPs[3], no LTMFs[4], no financials, no resolutions, no meetings, and in only two instances a common building insurance policy. In the cases of the New Plymouth purchase and the remaining sale (both in the same development) there is no LTMP, no LTMF and no specific Body Corporate bank account, though there are meetings, minutes, (unaudited) statements of receipts and expenditure, a common insurance policy and levies – but paid into a bank account of one of the owners, who pays and then recovers from the various owners the two common expenses – mowing the grass and the electricity.

- In respect of the four sales where there was no semblance of a Body Corporate, rapid solutions needed to be implemented in respect of the various Unit Titles Act compliance

---

[1] Contact etc. details on page 10

[2] ***Review of the Unit Titles Act 2010 - Discussion Document, December 2016*** - Ministry of Business, Innovation & Employment

[3] Long Term Maintenance Plan

[4] Long Term Maintenance Fund

deficiencies; otherwise, given the vendor obligations under the sale agreement[5] to provide the purchaser with Unit Titles Act disclosure statements, and the statutory consequences for non- or delayed provision of those disclosure statements[6], the (unconditional) sale transactions could have been at best delayed, or at worst lost, with very serious consequences to the vendor clients.

- Those solutions came at significant cost to the clients, involved the clients expending 'good neighbour capital' in getting the other owners in the particular developments to sign-off, and added no value (since all they did was purport to legitimise, as far as practicable, the way things in fact have worked, and will continue to work).

- In my opinion, *absent* those contractual and statutory obligations, none of the matters the subject of the disclosure statements would ever have been addressed by the four vendors referred to above, nor the other owners of the relevant developments, as being wholly irrelevant to the way they actually use and occupy their properties.

- As will become apparent from my responses, I have particular concerns as to the unsuitability of the 2010 Unit Titles Act regime in relation to small (say, 2-3 unit) residential Unit Title developments. Such developments just about managed to cope with the 1972 Unit Titles Act regime, but certain of the impositions of the 2010 regime are, in my experience, not being complied with, will not be complied with, and are inappropriate to such developments.

- Also, the vast majority of the residential, commercial and industrial Unit Title developments with which I have had dealings over the years are developments with fewer than 10 principal units. I can recall only eleven transactions with which I have been involved over the last decade involving Unit Title developments with large (20+) numbers of units – four in Central Auckland (one in a residential apartment block, two 'hotel room' investments, and one s 9(2)(a)), two in Newmarket (one commercial and the other in a residential apartment block), and one each in Parnell (a 'hotel room' investment), Papakura (commercial), Henderson (commercial), Albany (residential) and Tutukaka ('hotel room' investment). These would represent perhaps 10% of the Unit Title dealings with which I have been involved over that time.

Responses to the Summary of Questions

Potential size thresholds for more rigorous legislative requirements – Section 3.1	
1. We propose that the following legislative requirements apply to complexes with 10 units and over. The body corporate for complexes	The responses in this section just relate to developments of 10+ units:

[5] See eg REINZ/ADLS Agreement for Sale and Purchase of Real Estate Ninth Edition 2012(5), clauses 9.1-9.3 (inclusive)

[6] Sections 149, 150 and 151 of the Unit Tiles Act 2010 – postponement of settlement, and/or cancellation of the sale contract by the buyer

between 10 and 29 units, may, however, resolve against adopting any of these requirements by special resolution. Bodies corporate must: *- report on the performance of delegated powers at the annual and any other general meeting;* *- contract a body corporate manager to perform functions as specified in the UTA;* *- have LTMPs signed by the body corporate chair and a qualified person;* *- have a LTMF to finance the long term maintenance plan already required under the UTA; and* *- have body corporate accounts and LTMFs audited annually.* *Do you agree? If no, why?*	What do you anticipate as being the sanctions for failure to achieve adequate performance? What would be the effect of a regime of sanctions on the willingness of potential delegatees to accept appointment? The issue is achieving satisfactory performance of the pertinent functions. Who does the job, and what their title, is irrelevant, so long as there is adequate performance. The issue is the actual adequacy of the LTMP. Just because someone with a particular title signs it is irrelevant. Do you anticipate some form of sanction, if the LTMP turns out – many years in the future – to have been inadequate? What do you foresee the consequences of a sanctions regime would be would be on the willingness of potential candidates to be appointed as Body Corporate Chair? Agreed, but I recommend that the LTMF be held securely in a trust account, and be available only for the agreed maintenance. For Body Corporate-held funds, yes, unless all owners agree to the contrary. For third party-held funds (eg. a contracted Body Corporate management firm), annual audits should be mandatory. Sanctions for inadequacies would be required.
2. Do you consider that it is appropriate for complexes between 10 and 29 units to be able to opt out of the above proposed legislative requirements by special resolution? If no, why?	Only if unanimously so resolved, and that it be so resolved every year[7]
Consideration of a separate UTA Entity – Section 3.2	
3. Please comment on : *- how government agencies might achieve a more joined up approach;* *- how we can improve the services we provide; and*	My only comment is that I find the Unit Titles Act information/draft forms presently available on the MBIE website to be very useful (as are the residential tenancy materials, just in passing). By all means add to them – but please do not take

[7] cf. the Companies Act s.207I

- whether you think a separate dedicated entity is warranted; and if yes, what functions and responsibilities would a dedicated unit titles entity deliver? Please list.	any of them away.
Improving the Disclosure Regime– Section 4.1	
4. Do you agree that the current pre-contract, pre-settlement and additional disclosure steps should be consolidated into one step? If no, why?	No. The information required to be provided eg. Body Corporate insurance details, 'leaky homes' issues, is unnecessary and unwarrantably intrusive on the privacy of the other unit owners and the Body Corporate unless and until the purchaser is committed to the purchase ie. the agreement for sale and purchase has become unconditional, meaning the purchaser is (other things being equal) obliged to become one of the unit holders and thus part of the Body Corporate. (A purchaser is free to make their purchase offer for a Unit Title property conditional on their obtaining and being satisfied with the results of a due diligence on the Body Corporate and its affairs and on the unit; and the purchaser can then cancel the purchase contract if the information is not forthcoming or discloses an unsatisfactory state of affairs. A vendor who does not wish to accept the risks associated with such a conditional offer can decline to accept it.)
5. Do you agree that these additional requirements should be included in disclosure statements? Do you consider any other requirements should be included?	No, but with the possible exception in relation to alterations to a unit – see response to Question 12 point 2.
6. Do you agree that bodies corporate should certify that all disclosed information is complete and correct? If no, why?	Only if there is a functioning Body Corporate – in my experience, more often than not the 2 or 3-unit residential Unit Title developments do not operate as a Body Corporate, as such, since those dwellings are mostly single level, detached or semi-detached, unlikely to have any common property except possibly a driveway, and will for all intents and purposes (including building insurance and maintenance) operate as if each dwelling is a fee simple or a cross-lease, each owner just 'going their own way'. It is unworkable to attempt to impose a regime intended for multi-level, multi-unit developments on such small-scale unit developments, and this reality should be

	recognised and accommodated as part of this review of the Unit Titles Act. Just as examples of areas where the Unit Titles regime does not fit: - pre-settlement disclosure statements – who signs for the 'Body Corporate' in such circumstances? (only the pre-contract disclosure statement can be signed by the vendor, alone) - is there seriously a need for a formal LTMP when the only 'common property' is a short length of concrete driveway, and each owner maintains their own dwelling, inside and out? - what is the worth of getting a formal resolution to allow each owner to effect their own building insurance, when separate insurance has been in place for years? - and what possible need is there for any sort of Body Corporate bank account or financial statements or even meetings in such circumstances?
Strengthening Body Corporate Governance – Section 4.2	
7. We propose to add provisions to the UTA that address conflicts of interest that achieve similar aims to the provisions included in the Incorporated Societies Bill. Do you agree? If no, why?	Yes.
8. We propose that bodies corporate of large sized complexes (30 and over) should report on the performance of their delegated powers at every general body corporate meeting? Do you agree? If no, why?	This would only be worthwhile if accompanied by a sanctions regime for failure to achieve adequate performance. A sanctions regime would have a consequence on the willingness of potential delegatees to accept appointment.
9. We propose including additional provisions on the duties and responsibilities of a body corporate committee similar to those included in the Queensland's Code of Conduct for committee members. Do you agree? If no, why?	Duties to act honestly, to make disclosure to the owners, and act in the best interests of the Body Corporate[8], are unexceptionable. So, yes.
10. Do you consider that the risk of proxy farming is sufficiently high to warrant amendment of the	I do not know how prevalent this is, nor what the effect.

[8] See Schedule 1A "Code of conduct for committee voting members", Body Corporate and Community Management Act 1997 (Queensland)

UTA to limit the number of proxy votes one person can hold at a time? If yes, why?	
11. We propose to amend the UTA to: *- limit service contract timeframes; and* *- specify a renewal period for service contracts after the control period.* *Do you agree? If no, why?*	Yes to both.
12. Do you agree with the proposals made above as they relate to: *- Minority relief – no change warranted;* *- Alteration to units – sections 79 and 80 (i) to be amended if necessary to align with section 65;* *Quorum – section 95 to be clarified;* *- Resolutions – section 101 to be amended.* *If no, why?*	 Agreed. Given the liabilities of a unit owner to the Body Corporate under the Act in relation to alterations ultimately causing the Body Corporate to undertake repair work[9], I suggest an express statement be required in both a pre-contract disclosure statement (vendor-signed) and a pre-settlement disclosure statement (Body Corporate-certified), as to whether the particular unit has ever had any alterations made to it. Following on from the latter (Body Corporate-certified statement), if the pre-settlement disclosure statement does not disclose alterations as having been made to the relevant unit, then liability should not attach to the then owner of the unit, in my view, if it is later discovered that in fact alterations were made to the unit prior to that statement being certified. Paying levies to be entitled to vote is all very well – provided the levies are fair and reasonable, and have been validly approved. And there should be some votes in respect of which payment of levies or otherwise should be irrelevant – for instance, anything requiring a unanimous resolution. Yes.
Professionalism in Body Corporate Management – Section 4.3	
13. Do you agree that industry bodies such as those mentioned have the ability to increase professionalism and help address body corporate management issues? If no, why?	No. The entire property management sector (of which Body Corporate management is a subset) carries significant potential for very serious risk to consumers, in terms of the monies involved

[9] s.127 of the Unit Titles Act

	and the consequences of poor property management performance. Just on general principles, those holding themselves out as professional property managers (ie. not managing their 'own' property, but rather the property of others) should be regulated, with minimum sector-specific educational qualifications, exclusion of those with certain criminal convictions (especially for dishonesty offences), registration, annual licensing, mandatory continuing education, audited trust accounts for client funds, fiduciary obligations to Body Corporate clients and individual unit owners, and an external complaints/disciplinary regime. (An appointee by the unit owners from within the pool of owners, to fulfil Body Corporate management-type duties, is not in the same category as a Body Corporate management firm holding itself out as a professional. If an owner-appointee acts honestly and reasonably, then such should be sufficient to exempt them from any sanctions regime (otherwise, who would ever take on such a Body Corporate management responsibility, from within the owners?) If the other unit owners don't like that limitation on redress, it is open for them to appoint - and pay for - a professional Body Corporate manager, who should be subject to stronger sanctions for poor performance.)
14. Do you support requiring body corporate managers to be members of a professional group and being subject to the codes of practice of the group? If no, why?	In respect of those holding themselves out as professional Body Corporate managers, yes – see previous comment.
15. Do you support body corporate managers being mandatory for medium and large complexes? If no, why?	No. See my comment on Question 1 point 2 – the issue is competent performance. An appointee from within the owners could well be perfectly competent to fulfil all required duties.
16. Do you support the functions of body corporate managers being set out in the UTA? If no, why?	Yes.
17. What functions, if any, do you think should be prohibited from being contracted to a body corporate manager?	Anything where there is a potential or actual conflict of interest.
18. Do you support the setting of additional requirements in regulation for body corporate	Yes, but a 'two-speed' regime – a strict one for those holding themselves out as professional

managers? If no, why?	property managers, and a less-strict regime for appointees from within the ownership.
Ensuring Adequate Long Term Maintenance Plans – Section 4.4	
19. Do you agree that a member of a recognised surveying institution or professional group should be required to guarantee the accuracy and completeness of the LTMPs? If no, why?	This raises various issues, as regards the expense of obtaining such certification; the effect of the Limitations Act on claims against such professionals if their certification is given wrongly; the availability or otherwise of professional indemnity insurance for those professionals; and whether there are other mechanisms whereby a Body Corporate could obtain redress if a LTMP is inadequate.
20. Do you agree that the body corporate chairperson, on behalf of the body corporate, should be required to sign LTMPs to guarantee accuracy (to the best of their knowledge)? If no, why?	Please see my comment on Question 1 point 3 – this is pointless unless there is a sanctions regime – and who would be a Body Corporate Chair under such a threat?
21. Are there mandatory fields/information you consider should be included in the revised template? If so, please list.	The current model is adequate, in my view.
22. Do you agree that 30 years is an appropriate timeframe for LTMPs for medium (unless they resolve not to) and large complexes? If no, what threshold or timeframe do you consider appropriate?	In an ideal world, yes. But what is the incentive to look 30 years ahead? How many of the owners setting or reviewing the LTMP will actually be owners in 30 years' time, or even believe they will still be owners in 30 years' time? Setting and reviewing the LTMP has a financial consequence (other things being equal), and I question whether setting a LTMP for 30 years' worth of maintenance and its associated funding will be dealt with appropriately by those whose intention is to dispose of their unit in the space of a few years, and wish to minimise the property costs to themselves in the meantime.
23. We propose that medium sized bodies corporate comprising 10-29 units are required to establish and maintain a LTMF (unless they resolve not to by special resolution). Large complexes comprising 30 units and over units would be required to have and maintain a LTMF. Do you agree? If no, why?	Yes - as long as the money is held securely in a trust account.
24. Do you agree that LTMPs for medium and large complexes should be reviewed every three years? If no, what threshold or timeframe do you consider appropriate?	Yes.

25. We propose that the LTMFs of medium and large bodies corporate are audited annually. Do you agree?	If the money is held by the Body Corporate itself, then unless there is unanimous agreement to the contrary, yes. If the money is held by a professional Body Corporate manager, audit of the LTMF at least annually should be mandatory.
Accessibility of the Dispute Resolution Regime – Section 4.5	
26. Do you support the proposed fee level for the dispute resolution service? If no, why?	I consider the proposed fee regime better than the present fee regime, the latter being too expensive, in my view.
27. Would you consider using mediation if the above option was adopted? If no, why?	If I was confident in the skills and experience of the mediator, yes. Otherwise, no.
28. Do you agree that the name of the Tenancy Tribunal should be changed to the 'Tenancy and Unit Titles Tribunal' to reflect its jurisdiction over unit title disputes? If no, why?	"A rose by any other name..."

Closing Comments

- The Unit Titles Act 2010 and its 1972 predecessor are a valiant attempt to cater for strata ownership in New Zealand, but in my view have been used by developers principally to circumvent the fee simple subdivision restrictions imposed by local authorities.

- Other models to cater for multi-unit buildings exist (cross-lease; company share - again, both being responses to local authority fee simple subdivision restrictions, in my view), and there are many more such dwelling units (well over 216,000, I understand[10]) than there are Unit Title dwelling units. The same issues as affect Unit Title developments affect such non-Unit Title developments, and it is curious that similar maintenance, disclosure etc. regimes are not being made to apply to those alternative ownership structures. Also, it is perfectly possible to implement a 'homeowners' association/communal rules' regime through the use of land covenants, easements and encumbrances registered against [fee simple] titles – I can think of four such instances I have come across in the last few years (two in the Auckland CBD, and one each in Whitianga and New Plymouth).

- In my view, it was unfortunate that the 2010 Act did not include model operational rules akin to those in the 1972 Act. Those 1972 model Rules were very useful as a consolidation of Body Corporate powers and duties, as a base from which to add or from which to vary, and as a minimum position as regards standards of owner behaviour.

[10] ***The Deficiencies of Cross Leases,*** ADLSI 26 Apr 2013 — Joanna Pidgeon

- It was also unnecessary to have pre-2010 Act Body Corporate Rules lapse mandatorily per s.221 of the 2010 Act, in my view. A deemed addition of the First Schedule Unit Titles Regulations 2011 to existing Body Corporate Rules would have sufficed, along with a provision specifying that any references in existing Rules to the 1972 Act's sections would be deemed references to the equivalent 2010 Act sections.

- I take no issue with the current regime as regards small commercial/industrial Unit Title developments – in my experience, the owners and occupiers of such units have the money and resources to cope with the 2010 regime.

- Small residential Unit Title developments (which I believe are the vast majority), where in fact the, say, 2 or 3 dwellings are separate or semi-detached, and treated by the owners as their own separate property, should not be subject to the full Unit Titles Act regime. I suggest a specific carve-out of such developments from all but the 'title'-related provisions[11] of the Unit Titles legislation, but with provision for the owners to opt-in to some or all of the full regime by unanimous agreement at any time, such opting-in having to be renewed by unanimous agreement each year. (Of course, this issue would not exist for such small unit title developments if local authorities were compelled to relax their fee simple subdivision restrictions, so that resort to expedients such as the Unit Titles Act and cross-leases as a means of obtaining title to flats and apartments became unnecessary).

Thank you for the opportunity to make these submissions.

s 9(2)(a)

☑ MBIE officials can contact me if they have a question about the content of my submission
☑ I wish to remain anonymous in any reporting or submission analysis

[11] Eg. Sections 18, 38(3)(a), (b) and (d), 43, 50, 60-63 (inclusive), 79, 80(1)(a)(ii) and (iii), (e), (f), (g), (i) and (k) – though with any references to the Body Corporate replaced with reference to 'the [relevant] other owner/s'