s 9(2)(a)

6 March 2017

Unit Titles Act Review Construction & Housing Markets, BRM
Ministry of Business, Innovation & Employment
PO Box 1473
WELLINGTON 6140

REVIEW OF THE UNIT TITLES ACT 2010: DISCUSSION DOCUMENT DECEMBER 2016

Please find **enclosed** my submission in response to the Discussion Document.

Yours faithfully

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REVIEW OF UNIT TITLES ACT 2010

Submission
by

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1. Introduction

1.1 I am responding to MBIE's invitation to present written submissions on proposals raised in its Discussion Document: Review of the Unit Titles Act 2010, December 2016.

1.2 I previously made submissions in September 2016 on matters which I believe need to be reviewed, some only of which are covered by the Discussion Document proposals. On this occasion, I limit myself to those proposals.

1.3 As I have noted previously I am a lawyer practising largely in the area of unit titles. My clients include body corporates, unit owners and property managers.

1.4 I also chair a 34 unit complex.

1.5 In addition I am a Tenancy Tribunal Adjudicator with jurisdiction to hear unit title matters. I stress that the views expressed in this submission are my own and do not necessarily reflect the views of the Tenancy Tribunal generally or any other of its members.

2. Potential Size Thresholds

2.1 I consider that the proposals are flawed.

2.2 The proposals identify small complexes, under 10 units, as a subset but size alone is not an adequate measure for differentiation. First, it is easy to identify many complexes that would qualify under this proposal, but which are:

- Multi storey;
- Contain specified systems (such as sprinkler systems or air conditioning or lifts) within the meaning of the Building Act 2004

and for reasons such as those, need to be approached with a greater degree of sophistication.

2.3 I suspect that the proposal is geared to the typical bungalow, suburban residential multi-unit developments, but these are only a proportion of small complexes.

2.4 I also note that it is proposed that the status quo apply to small complexes. By this I assume the proposals to mean that the current provisions of the UTA will apply. My experience is that in small complexes, the provisions of the UTA are honoured in the breach and applying the status quo will not improve performance or observance of the UTA.

2.5 In my experience the UTA is not well understood and the processes (such as governance procedures) are too complicated for the average owner to comprehend or carry out.

2.6 An example is a recent case which came before me.

- The complex consisted of 16 townhouse units (which is greater than the small complex size, but the problems are the same).
- Seemingly only the chairperson had bothered to read the UTA, and her understanding of it was flawed.
- The Body Corporate had decided that operational levies should be shared equally, but the procedures in s.41 had not been followed.
- Despite generally sharing expenses equally, the Body Corporate made an exception in the case of officers' liability insurance: the 4 owners who were members of the committee were exempt from contributing to premiums, apparently on the basis that they carried the risk.

- The Body Corporate allowed three bases of payment of levies, depending on whether they were paid in advance, in arrears, or by monthly instalments: if all paid in advance, or even by monthly instalments, insufficient levies would be received to meet the operational budget.

- The penalty if a monthly instalment was missed was late payment interest plus the higher level of levies became payable as if levies had been paid in arrears: my finding was that this amounted to penalty and was unenforceable.

- At the AGM, a counterproposal for payment of levies was put. There were postal votes. The chairperson properly took the view that all owners should have the opportunity to consider the counterproposal: however, rather than adjourning the meeting, she ended the meeting and called an extraordinary general meeting.

2.6 This is just one of many examples that I come across in my practise. Others include owners insuring individually, notwithstanding that units are not stand alone, failure to prepare annual accounts, and failure to hold general meetings.

2.7 This problem is not solved by the current proposals. If there is to be a category for small (suburban) complexes, then I suggest that an entirely different regime is required. At this level, there are alternatives available to owners which do not impose the requirements of the UTA. These include cross lease titles and even, in some circumstances, freehold titles.

2.8 My proposal is that only a minimal certification process should apply to these complexes. Annually, the owners should be required to certify:

- that a chairperson or statutory contact person had been appointed, including relevant details;

- that the complex was insured (collectively or individually);

- that all identified maintenance of common property, building elements and infrastructure had been carried out;

- if any future maintenance requirements had been identified, details of those requirements;

- whether the members of the Body Corporate had held a meeting during that year, and the matters discussed at that meeting.

2.9 The statement should be required to be filed with LINZ in the same way that a company is required to file an annual return with the Companies Office, and it should also be a requirement that it be included in/attached to any pre-contract disclosure document.

2.10 I consider that the number of units that qualify as a small complex is too high and should be set at no more than 8, on the basis that is closer to the maximum size of typical suburban residential developments: some further research on this is probably necessary. The definition of small complex should also exclude:

- any industrial or commercial development or which contains industrial or commercial units;

- any complex which comprises more than two levels;

- any complex which includes more than eight units (the typical suburban development);

- any complex which includes specified systems.

The reason for this is the complexity which these factors introduce.

Questions 1 and 2 – Medium and large complexes

2.11 For complexes which fall outside the small complex definition, I see no justification to differentiate by reason of size. The reasons are the same as I have given above: size is not necessarily a determinant of complexity.

3. Improving Government Services to the UTA sector

Question 3 – Government Agencies

3.1 I agree that a separate unit within a government agency which provides information, advice and education would assist. Currently I have the impression that unit titles are treated as an "add-on" to the services provided by MBIE in relation to tenancies, and suffer for that reason. A parallel regime would be useful.

3.2 I see no need for such a unit to provide dispute resolution mechanisms/services. Effectively it would amount to a duplication of existing services

4. Improving the Disclosure Regime

Question 4- Disclosure Statements

4.1 I am on record as supporting a proposal for amalgamating the current requirements of the pre-contract, pre-settlement and additional disclosure statements into one step.

4.2 In addition I would suggest a requirement for certification prior to settlement that none of the information in that statement has changed.

Question 5 – Disclosure Statements

4.3 There is also a need to carefully review the matters that are covered by the disclosure statement. For example, I note that the proposals pick up on the issue whether or not a building has weather tightness issues: the current question regarding claims to the Weathertight Homes Tribunal is too narrow in its application.

4.4 In addition there is a need for disclosure regarding seismic strength and, because body corporates qualify as PCBUs, disclosure of health and safety policies and hazard identification.

Disclosure Warranty

4.5 I do not support a statutory warranty. Most Body Corporate owners (and managers) have neither the experience nor qualifications to assess whether information is correct. Potential exposure to liability is already an issue for many Body Corporate owners, and discourages them from putting

their name forward for Body Corporate offices, and any such requirement would only exacerbate the problem.

5. Strengthening Body Corporate Governance

5.1 The Discussion Document states that the UTA was designed to give Body Corporates a flexibility and autonomy to govern their own units and unit complex, based on a minimal regulatory framework. I could not disagree more with that statement. One of the basic problems with the UTA is that it lacks flexibility in the governance area.

Question 7 – Conflicts of Interest

5.2 In general terms, I agree with the proposals to address conflicts of interest.

Question 8 – Committee Reporting

5.3 I do not agree with the proposal that committees should report on performance of their delegated powers at all general Body Corporate meetings. These may be few and far between.

5.4 There should be a requirement that Body Corporate committees keep minutes, and those minutes are circulated to all members following meetings.

Question 9 - Committee Duties

5.5 As far as Body Corporate committees are concerned, I consider that further statutory guidance about role and responsibilities is not needed, but training should be available.

5.6 In addition I suggest that minimum procedural requirements should be laid down. That could usefully be in the form of a template meeting agenda/minutes that a committee could complete.

5.7 I do not support penalties for non-compliance. I agree with the statement that these could have a negative effect and deter unit owners from participation on committees, a point similar to that which I have made previously in relation to certification of disclosure statements.

Question 10 - Proxies

5.8 In my experience, the use of proxy votes is an issue, but contrary to the statement in the Discussion Document, nomination of proxies is not limited to other members of the Body Corporate and that is a bigger problem than proxy farming.

5.9 Where proxies do become an issue is when they are sought or given to the Body Corporate manager, who/ which I consider has potentially a conflict of interest in this situation. It confuses owner and employee roles. Very often it is the performance of the manager that determines the adequacy of the body corporate's performance, and allowing manager to hold proxies gives it the opportunity to control a meeting. There have been cases where this has been an issue, and it is a common complaint that I hear from owners.

5.10 I have not seen an example where proxy farming has been used to manipulate or disenfranchise other voters. I have difficulty in conceiving how that would occur: the probability is that any motion to that effect would be regarded as invalid and unenforceable. There is also the ability to seek minority relief.

5.11 For these reasons, I do not see a need to limit the number of proxy votes an individual can hold, but I do suggest that the persons who can hold proxy votes are limited to other members of the Body Corporate.

Question 11 - Long Term Contracts

5.12 In previous submissions I have commented on the impact of unfair service contracts. I agree with the need to limit the maximum term and to require that contract renewals can only be approved by Body Corporate resolution.

5.13 In my previous submissions, I have also commented on the use of encumbrances to entrench such contracts or rights. I suggest that practice should be outlawed, as should the use of registered covenants that have the same effect.

Question 12 – Governance Terms

5.14 An issue which the proposals do not address is the complexity of Body Corporate governance procedures. As I noted in previous submissions, these are spread over the UTA and the Regulations. In 2011, I created a compendium of matters which are covered by both the Act and the Regulations. Including forms, this runs to over 60 pages (in 8 pitch).

5.15 For example, the general provisions relating to quorums are found in s.95 of the UTA but an important exception relating to postal voters appears as Regulation 13 (1).

5.16 In some cases, provisions do not reflect accepted meeting procedures. In that regard, I refer specifically to the provisions relating to calling for polls.

5.17 Under the 1972 Act, meeting procedures were set out in a schedule and could be amended. The same approach is adopted in the Companies Act and in the Incorporated Societies Bill. My understanding of the reason for inclusion of governance procedures in the Act was to prevent potential abuse through amendment of procedures, but, so far as I am aware, there is no evidence that that has occurred in the case of companies or incorporated societies, or that it occurred under the 1972 Act.

5.18 The other reason for suggesting change is that the current rules are inflexible. For example, there is no provision in the Act for attendance or voting by electronic means, something which is typically included in most well drafted meeting procedures. The potential to alter the entrenched procedures is limited by the fact that rules cannot contain provisions that are inconsistent with the Act: by implication, anything which departs from provisions in the Act is inconsistent.

5.19 I do not support changes to current provisions to include in a quorum persons whose Body Corporate levies have not been paid. However, as I have noted, the Regulations allow persons who have cast postal votes to be included in the quorum, but not persons who have given proxies. I see no logical reason for that differentiation.

5.20 The changes to s.101(1) are welcome.

5.21 In addition, a problem recently brought to my attention is a discrepancy in s.132, Financial Statements. Under s.132(2), the Body Corporate has the option to submit its financial statements to an independent auditor for auditing or to submit its financial statements to an accountant for review. However, s.132(7) then goes on to state that any person appointed to undertake any of the functions described in subsection (2) must be a person who is qualified to act as an auditor for a company in accordance with s.199 of the Companies Act 1993. An accountant as such does not meet that definition and therefore cannot, in terms of subsection (2), carry out a review or verification procedures. I suspect that the application of subsection (7) should be limited to a person appointed to undertake an audit under subsection (2)(a).

6. Body Corporate Management

6.1 I support proposals to regularise Body Corporate management.

Questions 13 and 14 – Regulation of Managers

6.2 I do not see the formation of voluntary organisations such as SCANZ as addressing this issue. This is because such organisations have limited ability to enforce standards or to discipline members. I support compulsory membership of a professional body such as REINZ.

Question 15 – Mandatory Managers

6.3 I do not see that there is anything to be gained by requiring Body Corporates over ten members to have independent management. There are a number of reasons for this.

6.4 The first is that the competence of many of the property managers that I come across is questionable and the employment of Body Corporate managers as such will not address the professionalism of Body Corporate management.

6.5 The second reason is that, very often, the real issue in a Body Corporate is one or more unit owners that refuse, or are unwilling, to conform with the

direction or wishes of the majority. There is an industry saying that "Every Body Corporate has one".

6.6 Body Corporate managers will tell you that they are no more successful in dealing with these persons than are other owners/members of the Body Corporate. The real need is to address this dysfunction.

6.7 The solution, in my submission, is to expand on the powers under the Act to appoint an administrator under s.141. That power should be extended to the Tenancy Tribunal: at present it is vested in the High Court, which most Body Corporates find too expensive and time consuming to apply to. It should include power to appoint an administrator whether or not there is a manager in place. The suggestion is similar to the suggestion that there be the ability to appoint an independent chairperson: the reason I do not favour that alternative is that the powers of a chairperson are relatively limited. They can be augmented by resolution but lack the statutory backing and enforcement powers that can be associated with the role of administrator.

6.8 I also suggest establishment of a panel from whom administrators could be drawn. The appointment of administrators should be available as an alternative to ordering mediation or the Tribunal making orders. The administrator should have the ability, however, to seek orders from the Tribunal.

6.9 Fees of the administrator would be met by the body corporate.

6.10 In addition I suggest the powers of the Tribunal should be extended to include the ability to suspend or remove officers of a body corporate. Traditionally that is a course available to the body corporate in general meeting but in many cases the offender is a dominant personality and other owners feel intimidated: property managers have told me of cases where the person in question is the chairperson and refuses to call a meeting or has sufficient support to defeat a vote: there is a need for an alternative process.

Question 16, 17 and 18

6.11 I do not support the concept of functions of body corporate managers being set out in the UTA. The needs of each body corporate differ.

6.12 The suggestion for minimum contract provisions to be included in contracts between Body Corporates and Body Corporate managers are nebulous, and probably do not add anything to the law as it currently stands. Rather, I see the functions of Body Corporate managers (which should, in any event, be set out in a contract between the Body Corporate and the manager) as being defined by exception. For example, Body Corporate managers should not have the ability to:

- hold proxies
- chair Body Corporate meetings
- own units in the complex (or, if that is permitted, voting rights should be negated)
- provide other services to the Body Corporate such as provision of utilities or maintenance services.

6.13 In addition, lawyers, accountants, or other professionals who act for or have an association with the manager should not be able to act for the Body Corporate, because of the potential for conflicts of interest. This has been recognised by the courts.

6.14 Anecdotally there is also concern in the industry about managers and consultants "hunting in packs", particularly where there are issues of weathertightness. While it is reasonable for managers to have preferences for consultants based on their experience of them, the appointment of consultants in those circumstances should be an identifiably arms' length process – such as tender.

6.15 As far as accounts and accounting is concerned, I do not support the concept of holding separate accounts for each Body Corporate if that means that trust accounts – similar to those which lawyers, accountants and real estate agents operate - cannot be used, but I see a need for those

to be regulated and subject to audit in the same way as lawyers and real estate agents trust accounts are regulated.

7. Long term maintenance plans

Question 19 – Independent Certification

7.1 I agree that there is a need for a long term maintenance plan to be signed off by a member of a recognised surveying institution or professional group. The real issue is that there are a minimal number of organisations prepared to undertake this kind of work because it is not regarded as profitable and, based on inquiries my Body Corporate has made, the cost is not likely to be less than $4,000 which, on top of other operational levies, is a significant cost.

Question 20 - BC Certification

7.2 I do not agree that the Body Corporate chairperson should be required to sign LTMPs to guarantee accuracy. The reality is that few Body Corporate chairpersons have the competence or experience to certify that an LTMP is accurate. In addition, potential chairpersons will see this as another potential source of liability, and will be discouraged from taking on the role.

Question 21 – Mandatory Fields

7.3 I agree that there is a need to amend the MBIE LTMP template to require more in depth descriptions of the current state of property. But not all fields should be mandatory: it would depend on the nature of the complex.

7.4 The design of the template requires guidance from an organisation such as the Surveyors Institute or IPENZ

7.5 Glaring omissions from the template are:

(a) Utilities such as water, electricity, gas, stormwater and sewage;

(b) The landscaping component: it omits reference to items such as trees, lawns, and fencing other than paling fences;

(c) The roof, which refers to only one type of roof.

Question 22 - Timeframe

7.6 I agree with the proposal to extend the timeframe of LTMPs to 30 years.

7.7 Again I consider, for the reasons already noted, that division into small, medium and large size Body Corporates is too simplistic. As I have noted, quite small Body Corporates can have specified systems such as lifts, air conditioning and fire evacuation systems. The criteria need to be re-thought. I consider that any Body Corporate other than a small Body Corporate, as I have suggested it be defined, should be required to have a LTMP.

Question 23 - Review

7.8 I consider three years too frequent for review of LTMPs, particularly if the term is to be extended to 30 years. In addition there is the question of cost.

7.9 I suggest five yearly reviews. In addition, the reviews should be "rolling" reviews: i.e on each review the plan should be extended by the review period.

Question 24 – Requirement for a LTMF

7.10 As in the case of LTMPs, the size criteria is too simplistic, and for the same reasons.

Question 25 - Audit of LTMFs

7.11 I cannot see that any purpose is served by auditing LTMFs. LTMFs should be identified in financial statements, will be audited if the financial statements are audited, and I see no need for a separate audit.

7.12 The real issue is when LTMFs can be used. In my experience, there is confusion as to the inter-relationship between LTMF levies and operational levies for maintenance and the process to be followed when LTMP items fall due for maintenance/repair. A recent example is *Newland v. Body Corporate 81340* [2016] NZHC 1190.

7.13 There is also confusion with sinking funds – often established under the 1972 Act, and with the capital improvement fund. At times, as tax and

utilities law illustrates, there can be confusion between what is repair/maintenance, and what is capital (replacement/renewal) expenditure. Clarification in this area would be helpful.

8. The Disputes Resolution Regime

Question 26 – Reduction of Fees

8.1 I support a reduction in the proposed fee level for dispute resolution services. The current level for even simple claims makes it uneconomic for Body Corporates to attempt to recover relatively small amounts of levies, which is what the bulk of claims are.

8.2 It is not explained why unit title fees were "intended to be funded by full cost recovery", when that is not the norm in any other Court. Anecdotally, I understand that the then Minister of Finance (now Prime Minister) indicated that he was not prepared to fund claims relating to "parties, pets and parking", but that in fact is a very small part of the range of claims that are brought to the Tribunal, as the statistics at Annex 5 illustrate.

Question 28 - Name of Tribunal

8.3 Rather than changing the name of the Tenancy Tribunal, the acronym for which would probably become "TUTT", to which there are negative connotations, I suggest constituting a separate division of the Tenancy Tribunal, called the Unit Titles Tribunal. This also recognises that – at present anyway – there are insufficient cases to justify establishment of a separate Tribunal and, because of their experience to date, a number of Tenancy Tribunal Adjudicators would be logical appointments to an independent Tribunal.

8.4 This would also recognise the current reality which is that there are a limited number of Tenancy Tribunal adjudicators who are trained and designated to hear unit titles cases. Currently that is an informal process. I suggest it would lend more credibility if those adjudicators were warranted to hear unit titles cases in addition to hearing tenancy cases, in the same way as some District Court Judges hold Family Court or Children's Court or jury trial warrants.

9. Closing Comments

9.1 I welcome the opportunity to comment on MBIEs proposals. They are a step in the right direction. However as I have submitted previously, there are many more issues to be addressed before the UTA is fit for purpose.

9.2 There is also a need to fundamentally review the approach to multi-unit dwellings. For example, the suggestion that there be different approaches to small, medium and large complexes is an implicit recognition that Act is not a comfortable fit for all developments. There were fundamental errors made in 2010, and these proposals are only a rearrangement of the deckchairs.

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March 2017