MINISTRY OF BUSINESS, INNOVATION & EMPLOYMENT
HĪKINA WHAKATUTUKI

Submission on MBIE's proposed amendments to the Unit Titles Act 2010

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Yes.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

Making a submission

To make a submission, please fill out the submission form below, and send to UTAreview2016@mbie.govt.nz. Both Word documents and PDFs will be accepted.

Alternately, you can download the submission form and post it to:

Unit Titles Act Review
Construction and Housing Markets, BRM
Ministry of Business, Innovation & Employment
PO Box 1473
Wellington 6140
New Zealand

Consultation on the Unit Titles Act finishes on Friday 3 March 2017 at 5pm. Thank you for your submission.

3. Overarching Reform Proposals

3.1 Potential size thresholds for more rigorous legislative requirements

1	We propose that the following legislative requirements apply to complexes with 10 units and over. The body corporate for complexes 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 long term maintenance fund 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?

Please find below my submission on the Review of the Unit Titles Act 2010 which responds to all of the questions addressed in the submission form.

Review of Unit Titles Act

Please see below my submission to the Review of the Unit Titles Act 2010 (UTA). Although I have been a Body Corporate Chair for some twelve years this submission is made as a private citizen and may not represent the opinions of any other entity.

General

Many of the problems and challenges that are being addressed in this review are part of a much broader concern about the entire property sector in New Zealand.

In terms of disclosure, those that know are not required to tell, and those who tell have no recourse to those who know. This statement broadly explains what most of the subsequent issues are about.

Residential property in NZ has moved from a social necessity in 1950 to a wealth creating system with all of the behaviour changes one would expect in a shift of this nature and magnitude. The main driver of property issues today has nothing to do with social needs – financial reward is the motivator and without appropriate regulation, the players will engage in any, or all, of the games they need to, so as to achieve the outcomes they want.

These ambitions are fed by successive government failures to create the necessary regimes to change or modify the behaviour so rather than being accidental, it is a result of deliberate policy decisions designed to increase personal wealth for those who have the wealth to do so.

Please note that these comments are not a critique of any political party, position or viewpoint but are intended to provide an overview of the broader picture and point to the need for changes in the Unit Titles Act 2010.

Applicability

My experience suggests that the overall principle of this review should be SIMPLICITY. The simplicity of New Zealand's GST tax system is the perfect example – easy to understand, easy to apply, easy to comply, easy to report on, minimal exceptions and simply language.

On that basis I believe that the UTA should apply to every multi-unit development i.e. more than one dwelling on any property, including cross lease properties. The same rules should apply to everyone, unless specifically stated otherwise i.e. the default position is yes.

Simplicity really matters and one set of rules for everyone is better than multiple exceptions.

A very small complex of (say) 4 units could still be referred to as a body corporate - whether they refer to themselves in this way is no-ones business. We know that more than half of the multi-unit housing in New Zealand is made up of less than 10 units so leaving them outside of the UTA makes no sense from a national housing perspective.

All body corporates should have a Chair and a Secretary/Treasurer, the same as larger units currently have.
All body corporate should have a Long Term Maintenance Plan (LTMP) and prepare a set of annual accounts – it is about asset management and there is no value in having a system that fails to provide adequate maintenance to prevent deterioration, so let's get it right with this review.

Support for Body Corporates

A single point of contact is a great idea and I would think that a unit within MBIE is probably the best option, provided they have staff with the necessary skills and understanding to render the services needed.
This service could sit readily within the existing website under the Information and Services button.
If required, the Ombudsman is still available if complaints are made against MBIE performance.

The main services needed is likely to be either telephone or email – many enquiries are initially simple and often people just need some information so timelines for a response should be part of the service much as they are for Official Information inquiries. Dispute resolution should be by mediation first followed by compulsory arbitration, as this produces a result and discourages endless squabbling between owners.
There is merit in developing a system that mimics Australia, given the similarity of the two countries (the existence of separate States notwithstanding).

Improving the Disclosure Regime

This needs substantial rewriting.

The major problem is that many Body Corporate Committee's/Chairs DO NOT advise owners of issues/reports/defects and Body Corporate Secretaries/Managers are either left out of the discussion, or collude to withhold information from owners. This becomes a major subsequent problem for owners to then seek legal remedies against their own BC for failing to disclose.

The first step is to solve the lack of disclosure to owners.
A possible simple solution is to require developers to prepare a Statutory Declaration as part of the Unit Title lodgement (a new schedule to the UTA) confirming that the development meets the Resource and Building consent conditions, that all materials and system have bene installed as per manufacturer's instructions (Producer Statements) and that they are not aware of any defects of building issues that prospective property owners should be aware of.

The same disclosure regime should apply to Body Corporate Chairs with the declaration supported by a formal condition report (as briefly described in the section below: "*Ensuring Adequate Long Term Maintenance Plans"*). Both of these Statutory Declarations should be signed by a natural person with all of the legal implications that go with that description as this provides the simplest route to future legal claims if time proves this necessary.

On this basis, the preferred option is therefore to have just one disclosure for all purposes – insurance, buying, selling, LTMP etc.

Strengthening Body Corporate Governance

While it is easy to blame inadequate or poor governance for some of the current woes in the building sector, the truth is likely to be far more prosaic i.e. money!

Body Corporates frequently inherit major problems from the property developer and it is at this point that the first intervention needs to take place if governance is to be improved.

Getting the disclosure regime right between the developer and the body corporate is the single most important start to better governance. Many body corporates find themselves in impossible situations where they are trying to deal with leaking buildings, liquidated companies, totally inadequate disclosure, angry owners, causal and circular responses to those involved in the what has become the "leaky building industry" along with insufficient funds and access to professional advice/support. There is almost no form of governance that is capable of dealing with these situations, which are now embarrassingly frequent in New Zealand.

There is no point in revisiting how New Zealand arrived at this unsatisfactory position other than to comment that a collision of multiple factors always results in a major outcome – some negative some positive – with the leaky buildings being one of the more negative ones.

Assuming appropriate disclosure regimes the governance of body corporates is not a difficult or especially demanding role but there do need to be some agreed rules.

Conflicts of interest should be incorporated into the UTA on much the way proposed and similar to the provisions of the Incorporated Societies Act.

Given that internet access is readily available in New Zealand it is suggested that there is no reason why body corporates should not be able to provide copies of all agendas and minutes to owners within a set timeframe before and after meetings – either via email or through a web portal. This is

simple, quick and easy to manage and incurs minimal costs. Similarly, there are good reasons, why owners should be able to request an item for an agenda and be able to attend that meeting to talk to the item as an owner.

All body corporates, of whatever size, should report to owners irrespective of whether duties or powers have been delegated – this is fundamental to good governance and is required in all businesses in New Zealand (and many body corporates are very big businesses in their own right).

A Code of Conduct based on the Queensland model would be a useful addition and is supported.

Proxy votes are part of the democratic system in New Zealand and are supported. Changing this to accommodate malfeasance by property developers is pointing the finger at the wrong offence. ALL contracts entered into by a developer should be capable of being voided and renegotiated/rescinded by the body corporate once the Unit Plan is lodged. Longer term contracts of more than (say) five years entered into by the body corporate should be required to include a variation clause allowing renegotiation or release. This requirement needs to have a retrospective element to it as there are already in existence a considerable number of such embedded commercial arrangements that are not in the interests of the relevant body corporate.

The proposed changes relating to minority relief, alteration to units, quorum and resolutions is supported.

Professionalism in Body Corporate Management

I do not support the concept that body corporates need "managing" from the outside. They don't! Body Corporates are responsible for managing themselves, but need access to impartial professional advice, very good secretarial support, quality financial services and good property managers.

Each body corporate has different needs and these needs change depending on what is happening with a particular building. In a small complex of (say) thirty units with nothing more exciting on an agenda than annual maintenance it is likely that the only services the body corporate needs is financial (LTMP, insurance and budgets) and possibly secretarial services (agendas and minutes).

However if it is discovered that the complex leaks, or floods, or is impacted by an earthquake as examples, then their need for professional support increases exponentially – but they still don't need managing!

As alluded to earlier in this submission, there is a lot of casual and circular behaviour in the property sector and the concept of a legal entity (a body corporate) needing to be 'managed' is one of those examples. The problem frequently is that they are actually being 'farmed' by groups of professionals and this is a consequence of very poor legislation and even poorer building practices so getting the UTA right is really important for owners.

Rather than having body corporate managers, the entire property sector needs to have the same conflict of interest and disclosure regimes that are being proposed for body corporates. Many body corporate 'managers' comprise real estate, property management, rental management, valuations, appraisals and body corporate secretarial services under the same roof and there is inherent conflict with the impartiality of these functions.

In our current body corporate (49 units), we have always separated the property manager role from the secretarial services provider. Long Term Maintenance Plans are carried out independently of

both and any work required beyond $10,000 has to go to an open tender. For us this provides a safe level of independence and prevents conflicts of interests as best we can.

The point of these comments is simply to illustrate that it is not difficult for a body corporate to manage themselves – what they need is better access to independent professional support and legislation that reflects the reality of what they do.

Based on these comments, I think the most important service that MBIE can offer is a short course on body corporate governance that all BCC members should have to attend (Governance NZ perhaps?). Raising the level of professionalism within the body corporate committee will make a very big difference to both the governance and management of body corporates.

There is also a need for all parts of the property sector to have similar registration and licensing requirements in much the same way as Real Estate Agents do now. For property managers I can see no reason why they should not need to be registered members of the Real Estate Institute New Zealand and those providing Secretarial services should be members of a similar institution – again Governance New Zealand might be appropriate. Each of those entities are already set up for this purpose so the UTA only needs to include the requirement to be members.

Membership of entities like SCANZ, HOBANZ and BCCG should remain voluntary.

I could not support a mandatory requirement that body corporates engage a body corporate manager for the reasons outlined above. However, I do support them having to engage professional qualified member of the CAANZ. Many smaller body corporates are perfectly able to prepare their own agendas and minutes but they do need professional accounting support to prepare the LTMP, insurance aspects and financial accounts.

Ensuring Adequate Long Term Maintenance Plans.

These should remain mandatory for all multi-unit developments but supported by a far more robust process than currently exists. Many body corporates are creating serious future problems by not facing up to a level of maintenance with levies to match, to ensure that their building is maintained in perpetuity.

A solution is to require 20 year LTMP's, supported by a Condition Report containing a schedule of year by year maintenance recommendations with both reviewable every five years. I would strongly support the need for CPEng structural, civil, mechanical, cladding and building services engineers being the minimum qualification required for this work. Whether they are IPENZ members is not so critical – it is the CPEng qualification that matters.

The use of building surveyors for this function is not supported as their required qualifications are not sufficient to provide the level of professional confidence body corporates need. There is already a robust and well tested system around the CPEng qualifications, along with the appropriate level of Professional Indemnity insurance. It is more efficient to use a proven existing system than it is to reinvent the wheel!

With this information, all the Body Corporate Chair should be signing is that a Condition Report has been prepared in accordance with the requirements of the UTA, that the LTMP gives effect to the Condition Report and that the appropriate level of levies have been set to meet the costs of maintenance outlined in the LTMP. This information is all owners and prospective owners need for

them to make informed decisions about property transactions and the associated financial commitments.

I would think that the above regime would not require auditing as it this safeguard is inherently built into the process.

Accessibility of Dispute Resolution Regime.

My experience as a Body Corporate Chair suggests that most disputes within body corporates require some level of facilitation to resolve. Conflict is a normal part of life and if this leads to a dispute, it needs to be resolved quickly and professionally.

Some body corporate chairs will manage this well and others not so well, so having access to a quick dispute resolution service would be really helpful. However, who the provider is might be something that the body corporate determines as each AGM, so that it is clear to all, that they have another independent option if one is needed. It also makes an explicit statement that owners recognise the issues and concerns that may come with close living situations, such as apartment buildings, and understand that they have recourse to independent resolution process.

The Tenancy Tribunal offering this service is a good choice as a fall-back position, but the UTA should provide for other options as suggested above. It might be helpful if the UTA requires agreeing a dispute resolution process to be a deliberate AGM item in much the same way as occurs for other contracted services.

I support the suggested change of name from the Tenancy Tribunal to include the Unit Titles Act.

I would appreciate the opportunity to speak to this submission if that is available.

Regards,

s 9(2)(a)

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?

3.2 Improving Government Services to the UTA Sector

3	Please comment on : – how government agencies might achieve a more joined up approach; – how we can improve the services we provide; and – 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.

4.1 Improving the Disclosure Regime

Proposal 1: Amalgamate the current requirements of the pre-contract, pre-settlement and additional disclosure statements into one step

4	Do you agree that the pre-contract, pre-settlement and additional disclosure step should be consolidated into one step? If no, why?

Proposal 2: Add further requirements in disclosure statements

5	Do you agree that these additional requirements should be included in disclosure statements? Do you consider any other requirements should be included?

Proposal 3: Require a statutory warranty on all disclosure statements

6	Do you agree that bodies corporate should certify all disclosed information is complete and correct? If no, why?

4.2 Strengthening Body Corporate Governance

Proposal 1: Address conflicts of interest

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?

Proposal 2: Increase reporting of delegated powers

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?

Proposal 3: Duties and responsibilities of body corporate committees

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?

Proposal 4: Limit the number of proxy votes an individual can hold

10	Do you consider that the risk of proxy farming is sufficiently high to warrant amendment of the UTA to limit the number of proxy votes one person can hold at a time? If yes, why?

Proposal 5: Limit the impact of unfair service contracts

11	We propose to amend the UTA so that bodies corporate can vary the terms of or seek to release themselves from longer term contracts in certain circumstances. Do you agree? If no, why?

Proposal 6: Clarification of governance terms

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; and • Resolutions – section 101 to be amended. If no, why?

4.3 Professionalism in Body Corporate Management

Proposal 1: Status Quo and Self-Regulation

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?

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?

Proposal 2: Make contracting a body corporate manager a requirement for medium and large complexes

15	Do you support body corporate managers being mandatory for medium and large complexes? If no, why?

Proposal 3: Define body corporate managers in the UTA and introduce operational requirements in regulations

16	Do you support the functions of body corporate managers being set out in the UTA? If no, why?

17	What functions, if any, do you think should be prohibited from being contracted to a body corporate manager?

18	Do you support the setting of additional requirements in regulation for body corporate managers? If no, why?

4.4 Ensuring Adequate Long Term Maintenance Plans

Proposal 1: Guarantee the credibility of the LTMP through body corporate committee and appropriately qualified signatories

19	Do you agree that an appropriately qualified person should be required to guarantee the accuracy and completeness of the LTMPs? If no, why not?

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?

Proposal 2: Develop a new online template for LTMPs

21	Are there mandatory fields/information you consider should be included in the revised template? If so, please list.

Proposal 3: Extend the timeframe of LTMPs to 30 years

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?

Proposal 4: Require body corporates to review their LTMPs every three years

23	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?

Proposal 5: Require large bodies corporate to have a LTMF

24	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?

Proposal 6: Require bodies corporate LTMFs to be annually audited

25	We propose that the LTMFs of medium and large bodies corporate are audited annually. Do you agree?

4.5 Accessibility of the Disputes Resolution Regime

Proposal 1: Fee settings

26 Do you support the proposed fee level for the dispute resolution service? If no, why?

27 Would you consider using mediation if the above option was adopted? If no, why?

Proposal 2: Revise the name of the Tenancy Tribunal (preferred proposal)

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?