Unit Titles Act 2010 Working Group * - Submission on Review of the Unit Titles Act 2010 - Discussion Document December 2016

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s 9(2)(a)

(Note: The views expressed below may not necessarily represent those of any particular individual member of the Working Group).

2. Introduction

As a group we are greatly appreciative of the steps taken by the government to make room for this issue on the legislative agenda. Ideally we would have preferred a more user friendly approach where an outcome was achieved that saw the Act become accessible on a day to day basis to owners and committee members. For example, the technical and legal provisions relating to title and ownership could have been retained as one part, and the administration provisions rewritten as a separate part in simple, plain English terms. The many and varied inconsistencies between the current Act and regulations could be resolved as part of this. However we recognise and appreciate the opportunity provided for achievable reform within the available time and resource.

Even so we feel the paper lacks clarity around policy statements over a variety of different issues. We believe that MBIE needs to go back to the first principles and look at some of the suggested changes and make policy decisions around why those changes are to be made before it then writes the material around the changes driven by the policies. See for example our submissions on the threshold and disclosure issues.

Finally we have included a new section 5 to cover technical matters which could usefully be addressed in a reform bill.

3. Overarching Reform Proposals

3.1 Thresholds

The group does not support the threshold proposals in their current form. While in principle we support the concept of a graduated application of administrative provisions, of particular concern is the legislation is being drafted around a new and untested approach which requires significant further development. For example there are views that size is not the best tool but that type and use of the development would be more suitable. There is also concern about how the various thresholds have been calculated relative to the size and number of existing Body Corporates. Specific issues relating to the threshold proposals are also covered in other areas of this submission.

The group suggest the preferred approach (as with other similar legislation) is that the law should be drafted to cover the sector as a whole and regulations used to issue exemptions which can be adjusted as necessary when policy issues have been resolved. (Until MBIE can develop sufficient expertise to issue appropriate exemptions, it is suggested, initially at least, exemptions should be developed in conjunction with an external panel.)

3.2 Government Services to the UTA sector

Although we submitted on the Ombudsman concept in our original report, we are not wedded to this particular outcome. However we remain most concerned the government develop sufficient resources and expertise to adequately service this rapidly growing sector and its various participants.

Body Corporates constitute a complex legal, administrative and social interaction. Agency support is required (at least) in the areas of regulation of managers, dispute resolution, oversight of the disclosure regime, and on going policy and regulation development.

4.1 The Disclosure Regime

Disclosure regime questions 4, 5 and 6:

As a preliminary statement the paper fails to set out a clear policy statement of what a disclosure regime is to achieve. There are four principles which should be established at the outset:

- There is a single pre contract disclosure constituting a representation by the vendor.

- Disclosure for an off the plans purchase has a greater degree of unknowns for a purchaser and additional information will need to be provided

- There is a pre settlement certificate confirming the pre contract disclosure, specifying any variations

- This is a contractual matter with contractual consequences. Responsibility for the disclosure must remain with the Vendor with the Body Corporate certifying only as to those matters directly within its control.

Having regard to the above

(a) Disclosure should take the form of a single step, single document, pre contract.

(b) For disclosure for off the plans the developer needs to address a variety of additional features about the development for purchasers. For example it needs to ensure that they are told what the developer can change and what they can't change.

(c) The pre-settlement certificate which records any alterations or changes since the original contract was entered into. If there are any changes then this is a matter that needs to be dealt with contractually rather than within the statute.

(d) This brings us to two important features that the paper alludes to but does not tackle in the questions they have answered. These are: -

i. How we are dealing with the provisions of Section 151 of the Act which we are of the view should be repealed; and

ii. How we deal with the failure of a vendor to produce pre-contract disclosure or provide pre-contract disclosure adequately. In our view we should follow the Queensland example and entitle the purchaser to terminate the contract, but that needs to be elaborated on significantly.The Tenancy Tribunal is not an adequate forum for dealing with these matters which must have a contractual rather than regulatory sanction.

(e) Question 5 asks about whether we should wrap the additional disclosure into the pre-contract disclosure and the answer to that is an emphatic yes, as will be taken from the comments above.

(f) As to question 6 we see the disclosure as being a vendor's disclosure. However, the vendor's disclosure must have some verification or certification by the body corporate, which we think is essential for items which the body corporate can in fact certify to. Therefore where the information is held by the body corporate, for example, levy amounts and levies amounts due and owing, then the body corporate should be certifying as to those items.

(g) Disclosure is not simply a matter of numbers and levy details but is a sophisticated document containing both attached information such as insurance policies, body corporate minutes and the like and information and details personal to the vendor. The body corporate should not be required to certify as to vendor specific information other than information held within the body corporate records. So a piece of information like whether the vendor has made any alterations to the inside of the unit or matters of that nature which are personal the vendor are for the vendor to deal with.

(h) That could be easily handled by having the disclosure statement segmented into vendor specific information and information relating to the unit that could be certified by the body corporate.

4.2 Strengthening Body Corporate Governance

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?

- Adding provisions based to the UTA based on the Incorporated Societies Bill to address conflict of interest issues may be a solution that misses the nuance that is a part of body corporate decision-making. It may be more appropriate to draw on Australian legislation dealing specifically with the personal liability of strata committee members for guidance because of the analogous situation. The approach needs to be both simple and clear.

- Owning a unit in a unit title complex and holding a position of office such as Committee or Chairperson means that you have an inherent personal financial interest in decision making as you are involved in running a building that you partly own. For example, when deciding whether to recover costs from another unit owner will mean that the Committee Member will not be covering some of those costs as part of the Body Corporate. There is no such concern regarding an incorporated society. It will be difficult to set a threshold determining what exactly would attract a conflict of interest based off the Incorporated Societies Bill for this more nuanced conflict of interest. We will call this type of conflict of interest "Inherent Conflicts of Interest"). When dealing with Inherent Conflicts of Interest this can be dealt with by having a requirement to act in good faith and in the best interests of the Body Corporate.

- There are other clearer conflicts of interest which may be pecuniary or non-pecuniary when for example a building manager has a contract with the body corporate for building management, and also owns a unit and is elected to a body corporate committee and there is a decision to be made by the committee in relation to that building management contract. Alternatively, a family member might benefit from the contract leading to a claim of bias or favouritism. We will call this type of conflict of interest "Pecuniary or Non-Pecuniary Conflicts of Interest". There should be clear rules for dealing with Financial Conflicts of Interest.

- The threshold to determine whether something attracts Pecuniary or Non-Pecuniary Conflict of Interest should be when there is financial interest in a third party contract that the body corporate has entered into.

- Amendments to the UTA should include provisions covering the following in relation to Financial Conflicts of Interest:

- Conflicts of interest meeting that threshold (both at general and committee meetings) should be declared at the outset of a meeting, and a conflicts of interest register should be kept at both meeting levels.

- The disclosure requirements of the Crown Entities Act 2004 can provide an appropriate framework for the disclosure of financial conflicts of interest e.g. Section 65 of the 2004 Act: the details that must be disclosed include the nature of the interest and the monetary value of the interest (if the monetary value can be quantified) or the nature and extent of the interest (if the monetary value cannot be quantified).

- When a decision is being made where a person may have a conflict of interest, consideration should be given as to whether at some stage that person should leave the room to allow some freedom of discussion and avoid any suggestion of undue influence. While they should have an opportunity to address the discussion, they should not be chairing the meeting during the section where there is the conflict of interest. If they are an owner and have a Pecuniary or Non-Pecuniary Conflict of Interest, they should not be allowed to vote.

- Remuneration of committee members or chairperson, or any employment or other contract should be recorded and there must be a full contract in writing. At the very least, the person receiving the remuneration or being a party to the contract should not vote at the meeting and should be required to leave the room at some stage during the discussion.

- This could be further simplified to a Code along the lines of:

- Declare conflict of interest at the meeting and record in a conflicts register
- Abstain from discussion and voting
- Leave the meeting for some if not all of the discussion on the issue of conflict
- Record disclosure of conflict of interest and absence from meting in the minutes of the meeting

- **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?**

  - Generally, bodies corporate committees have an annual reporting duty on delegated powers regardless of their size – see *Reg 28* and *section 22(1)(d).*
  - It is not the frequency of reporting that is of paramount importance but instead the depth and detail of reporting. Any decisions entered into that are of a significant magnitude should be reported on, and in a

timely way to owners. For example, we are aware of committees using their delegated powers to commence arbitration and litigation without advising owners in relation to significant construction disputes. Actions such as this should be reported on to owners in a timely fashion, not waiting until the next AGM. If an owner was selling an apartment, they might inadvertently breach warranties in the sale and purchase agreement if this information is not filtered through to owners. This can be done by email and is not necessarily onerous.

- Making sure that important decisions are reported on and not just the delegation of powers is essential. That way, owners can be kept abreast of any changes brought about by the committee's decision making and can call an EGM to deal with issues imminently if they are unhappy with committee decisions and actions.
- Situations such as the termination of a body corporate manager or entering into a contract for a body corporate manager are examples of issues that should be reported on if carried out by the committee under delegated authority within say 5 working days.
- Entering into contractual obligations over a certain monetary threshold/ longer than a 1-year term should attract a reporting obligation. If a body corporate is entering into litigation or legal proceedings, then there should be a compulsory reporting obligation. Ordinary levy collection proceedings in the Tenancy Tribunal could be excluded from this requirement.
- Certain administrative changes such as a decision to change the operational rules of the body corporate should also attract a compulsory reporting obligation.
- There should also be some powers added to those that cannot be delegated, as covered in section 108. We recommend that amending a body corporate's operational rules be added to that section. Changing the body corporate manager might be another decision which should be made by the body corporate as a whole.
- There is a fundamental issue as to whether some fundamental powers should be able to be delegated to a committee e.g. changing Body Corporate rules, issuing proceedings (including arbitration) other than those concerned with straightforward debt collection, and hiring or firing a body corporate manager or a building manager (other than, perhaps, an assignment of a contract on sale of a business).
- Depending on whether these matters may still be allowed to be delegated to a committee, we submit that at all levels there should be reporting within 5 working days of a committee making a decision on important matters such as those to owners as well as otherwise set out in the discussion paper. The Body Corporate should also notify owners when proceedings are filed against the Body Corporate. Failure to require a report to owners could, for example, if an owner is selling a unit, easily lead to an owner breaching standard warranties about no litigation in a sale contract without knowing about the litigation.
- A further concern regarding the delegation of powers arises around a lack of clarity over when a committee makes a decision on an issue with delegated power what rights owners have to challenge decisions. It is unclear what rights an owner would have under minority relief to

challenge a committee decision when they themselves have not voted against it as they are not a member of that committee. Without clarification of this issue, owners lose rights to challenge matters which might treat them unfairly.

- Another key governance issue relates to proposed thresholds and exemptions from compliance with the UTA. We submit that if amendments do proceed by way of threshold sizes, regardless of the size of the body corporate, there should be no ability to take advantage of any exemptions or opting out of requirements during the control period.
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- **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?**

  - The Code of Conduct in question is contained within the Body Corporate and Community Management Act 1997. We are in favour of amending the legislation to include certain duties and responsibilities in the Queensland Act in order to address some of the key governance issues that bodies corporate in New Zealand face.
    - Under the Code of Conduct (Schedule 1A of the 1997 Act), members of the body corporate committee must: act honestly, fairly and with confidentiality, act in the body corporate's best interest, and disclose conflicts of interest. Acting in good faith could also be an additional requirement.
  - Provisions regarding duties and responsibilities of the body corporate should be added in the style of Section 101A of the 1997 Queensland Act to exclude personal liability except in the case of malfeasance or gross negligence on the part of body corporate committee members.
    - Not limiting liability in this manner would likely lead to an unwillingness to serve on the part of potential and existing committee members.
    - Section 260 of the Strata Schemes Management Act 2015 of NSW addresses the personal liability of strata committee members (the Australian equivalent of body corporate committees and unit titles). Section 260 makes it clear that members of body corporates are not personally subject to any action, liability, claim or demand as long as the act or omission in question was done in good faith for the purpose of executing functions as such under the main legislation. Liability instead extends to the owners' corporation (i.e. body corporate). New Zealand legislation could draw from this good faith defence for body corporate committee members.
  - There should also be provisions included that serve as penalties for the enforcement of any potential code of conduct. Whilst financial penalties could be an appropriate means of enforcement, that might discourage people from becoming committee members. It may be more appropriate when a committee member is removed for breaching the code they cannot be reappointed (similar to existing provisions

preventing a removed chair from being reappointed).
- The Body Corporate or the Body Corporate Committee could be held accountable for ensuring that the code of conduct is met.

- **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?**

    - Proxy farming can lead to one person having a sufficient amount of votes to have a motion passed at a general body corporate meeting via acting as a proxy to others and amassing their votes. In extreme cases, they may also be able to effect a special resolution.
    - The main concern with proxy farming is the potential for an abuse of power. With all the voting power theoretically in the hands of one person in a situation like that, that may lead to the implementation of agendas to benefit that sole person whilst disenfranchising the others who did not essentially cast their own vote.
    - In cases where resolutions are passed as a result of the efforts of proxy farming, it could result in changes as crucial as the administration of the body corporate or the relevant operational rules that guide it. One may also be able to become the majority unit owner in the body corporate with enough proxies, or even the holder of 75% votes where a special resolution is required.
    - The current legislation does not expressly provide a right to attend a meeting other than by physically attending the meeting which means voting by proxy is often relied upon. While a postal vote can be sent by email, that is not electronic voting, and it does not allow an owner to listen to debate and discussions at a meeting and then make an informed decision and vote.
    - Lack of access to other owners' contact details or the owners' register will often lead to non-resident owners giving their proxies to either the body corporate manager or a building manager, being the only people they know, which can result in these parties holding several votes at once and can tip the balance of voting. Rather than prohibiting proxy farming it is better to improve access to owners' contact details, and improve the way that owners may participate in meetings through technology.
    - An owner with a Financial Conflict of Interest might be unable to use proxies in relation to a matter which directly dealt with their Financial Conflict of Interest.

<u>Recommendations</u>

- New Zealand could draw in particular from the Strata Schemes Management Act 2015 of NSW, which purports to make the number of proxies held by one person limited to 1 if the strata scheme (unit scheme) has 20 or fewer lots. Under that Act in situations where there are more than 20 lots, this number cannot be more than 5%.
    - This may be too limiting in terms of being able to reach a quorum for a meeting, as often non-resident owners only know the body corporate manager or the building manager, and may not give them their proxy unless they were happy with how they

conducted themselves. Better access to contact details in the register for owners might be a way of giving them more options as to who to appoint for their proxy, as well as being able to engage electronically in meetings is preferred.

- There should be an ability to attend body corporate meetings by telephone conference, skype, or other forms of videoconferencing/ communication technology in order to encourage awareness and participation. Scanning a proxy form (as is the measure available now) does not equal the capability to vote electronically, in real time in response to meeting discussion.
  - Voting via videoconferencing has been employed in other governance scenarios and would be a worthy avenue to explore. For example, Link Market Services Ltd has technology which allows meetings to be held where people can participate from other sites in both discussions and then voting takes place electronically. Having the ability to attend and to vote electronically would be valuable and encourage participation, which is half the problem related to proxies. There should be rules set up around how this works.

- **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?**

  - There is already the ability to unwind harsh and unconscionable contracts under s140 of the existing UTA. However there are no clear guidelines as to what is harsh and what is unconscionable. Given the annual revenue of many of these contracts it is unlikely that they can be challenged in the Tenancy Tribunal with its $50,000 financial cap, and redress will only be able to be sought in the High Court (which can be prohibitively expensive).
  - Furthermore, s 140 does not address unfair contracts which are entered into with the use of proxies after the control period is over, and where there may be Financial Conflicts of Interest, and does not give the ability to cancel or renegotiate those contracts.

<u>Recommendations</u>

  - The issue of Financial Conflicts of Interest for owners needs to be addressed particularly with the use of proxies to ensure that unfair contracts are not entered into after the control period is over – s 140 needs to be expanded.
  - There needs to be a more cost-effective way of dealing with harsh and unconscionable contracts that does not involve going to the High Court. One way to do this would be to extend Tenancy Tribunal jurisdiction over claims involving these contracts. Further guidance should be given as to what is harsh and unconscionable.
  - Section 140 only relates to service contracts. There can be other unfair contracts which are not service contracts. An example of a situation that is not covered by s140: A developer when it controls the body corporate creates a licence to itself or a third party to install a billboard on common property on terms which are not at market rates

or terms. That party then subcontracts the billboard site to a billboard company for a super profit, however, the body corporate does not get the market revenue from the billboard.

    - You would probably be unable to get the developer to pay the body corporate compensation, but the body corporate should have the ability to take out the middle party and directly benefit from the market revenue for the billboard.

- **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**.

<u>Recommendations</u>

- The calculating of the 28-day period under sections 210 minority relief, 211 majority relief and 213 designated resolutions should be clarified e.g. it should be working days. At present it is calculated as days including weekends and public and statutory holidays, so putting a resolution immediately before the Christmas holidays can make it harder for a party to take action for relief.
- There should be a definition of the term "materially affect" in relation to the alteration of units under sections 79(e) and 80(1)(g). The relevant proposed sections should exclude alterations to common property.
    - One aspect of the threshold for this should be whether or not building works insurance is needed. An important consideration would also be whether an internal alteration that is not "structural" (like changing a partitioning) would affect the effectiveness or efficiency of the systems and the infrastructure of the complex, such as air-conditioning, water sprinklers.
- Currently, it is unclear in the legislation whether unit owners with unpaid levies (that are not able to vote) still constitute part of the quorum.
    - We suggest that in considering the case of quorum, body corporate owners that have unpaid levies or other monies (e.g. debt collection costs) should not be included in the quorum and should remain ineligible to vote. Section 95 needs to be clarified as there are inconsistent approaches to this in the industry and certainty on this point is essential.
    - We agree with the proposed change to section 101. There is a second part to this issue in that when a special resolution power is delegated is made to the committee, that special resolution threshold should also be maintained as the relevant threshold of decision-making at committee level. Under the current sections 108 and 113 the committee can make all decisions by majority even where the decision would have otherwise required a special resolution had it remained at body corporate level. The committee should also then have a duty to report on that special resolution. This would encourage consistency in decision-making and clarity.

- There is also some uncertainty surrounding the question of whether a commercial party owning more than one unit can thusly nominate up to two different directors to the complex's corresponding Body Corporate Committee. There is no case law on this point. Fundamentally, if you own a unit you are entitled to stand as a representative on a committee, and the generally accepted principle is one unit, one representative.
  - A Committee member must be the owner of a principal unit, or a director or trustee if the unit is owned by a company or trust. (Regulation 24) and 25.
  - Regulation 24(4) says if a candidate for election as a committee member is not a natural person, the candidate must nominate a director to act as a committee member on the candidate's behalf. That tends to suggest that the company can only stand once as owner, with a representative as a director.
  - We submit that in the case of companies, a company can only appoint one director to represent it in a body corporate at a time. This should be made clearer within the legislation. However, this would not necessarily be the same for trusts and husband and wife owners as the trustees themselves are each individually owners, rather than unnatural persons needing to nominate.

4.3 Professionalism in Body Corporate Management

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?

Industry bodies can assist to improve the professionalism of the body corporate management industry. However, occupational regulation of body corporate managers is required to ensure consumers are adequately protected from the broad range of complex issues affecting this industry.
Regulation is required to address, as a minimum, the consumer protection issues that arise from:

- a lack of a compulsory code of conduct for body corporate managers;
- a lack of method by which poor, dishonest or unsuitable body corporate managers can be disciplined and removed from the industry;
- a lack of minimum education requirements or the compulsion to keep training up to date; and
- the lack of direct regulation in relation to the handling of body corporate money by all body corporate managers.

Industry bodies can assist body corporate managers to understand and comply with the above obligations but legislative intervention is required to ensure compliance.
In short, industry bodies should be an adjunct to the regulation of body corporate managers, not a substitute.
This works well in the real estate context where REINZ assists its members to comply with the duties and obligations imposed on real estate agents under Real Estate Agents Act 2008 (REA Act). Notably, the issues faced by body corporate managers are as complex, if not more so, than the issues faced by real estate

agents. It follows that the consequences for consumers of misconduct by body corporate managers may be more severe than the consequences of misconduct by real estate agents. Accordingly, body corporate managers should be subject to a legislative and regulatory regime that is, at least, equal to that which applies to real estate agents.

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?

Given the technical nature of the body corporate manager role, the duties and obligations of body corporate managers must be clearly articulated in legislation. Once this has occurred, professional groups such as Strata Community Association (NZ) and REINZ can assist body corporate managers to understand and comply with their obligations.

One method of regulation is to bring body corporate managers under the REA Act. Body corporate managers would then be subject to the Real Estate Agents Act (Professional Conduct and Client Care) Rules 2012, trust account regulations and the two-tier disciplinary regime enforced by the Real Estate Agents Authority. In doing so, issues (a)-(d) in our response to question 13 above would be addressed. In particular:

- The quality of body corporate managers entering and operating within the industry would be maintained via the licensing regime of the REA Act.
- The REA Act (Licensing) Regulations 2009 prescribe the qualifications required to obtain a real estate license. Similar qualifications could be introduced for those seeking to gain a body corporate management license. Ongoing training and education could be provided by industry bodies such as Strata Community Association (NZ) and REINZ.
- Once licensed under the REA Act, body corporate managers would be subject to Part 4 of that Act, which covers disciplinary matters. Part 4 establishes the Complaints Assessment Committee (CAC) and the Disciplinary Tribunal (DT), which would provide a robust and cost effective avenue of recourse for consumers with complaints against body corporate managers.
- Part 6 of the REA Act contains offences and penalties. For example, it is an offence under s151 of the REA Act to fail to disclose a conflict of interest. Body corporate managers would face a penalty of up to $40,000 for an individual or $100,000 for a company for breaching this provision.
- Section 37 of the REA Act would require the names of persons who are prohibited from holding a body corporate manager's license to be published.
- Funding the CAC and DT to cope with the additional workload could be achieved by levying Bodies Corporate based on the number of units within the complex. Based on the current number of unit titles in New Zealand, a $30 levy per unit amounts to approximately $4.5 million per annum.

Once an appropriate regulatory regime is implemented, professional bodies such as Strata Community Association (NZ) and REINZ can assist body corporate managers to understand their legal and ethical obligations and how best to comply.

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

We support complexes regardless of size having a contracted body corporate manager, provided an appropriate legislative regime is in place to govern the duties and obligations of managers.

If the UTA enables bodies corporate to opt out of the requirement to contract a body corporate manager, then the chairperson and committee members should be required to join a professional body as an “owner” member to ensure that they receive adequate education and resources to manage their complex in accordance with the UTA.

The proposed size thresholds need further consideration and more investigation should be done on the modules approach adopted in several Australian states. Perhaps the use of a different base as the differentiation point (such as size of income/ expenditure/ makeup of complex/ complexity of building systems) would be more appropriate, though REINZ acknowledges that it may well be too technical. Alternatively, having two differentiation points such as size of units on the basis that the income/expenditure of a complex does not exceed a proportional figure may be a way to implement this.

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

The duties and obligations of body corporate managers must be clearly articulated in legislation and supported where appropriate by regulation. Legislation must address issues such as handover, the treatment of funds, and contract length and renewal clauses. There should also be fiduciary accountability for funds held, and guidelines as to how proxies should be used by a manager.

Guidance could be taken from the REA Act regarding the wording of potential provisions. The Queensland Body Corporate and Community Management Act 1997 and its associated 2008 Regulations (QLD Act) would also be an invaluable reference in helping to establish legislative guidelines for body corporate managers.

Real Estate Agents Act 2008

As set out in our response to question 14 above, there is merit in bringing body corporate managers within the ambit of the REA Act.

Part 5 of the REA Act contains duties relating to real estate agency work including, for example, a requirement for trust account audits (the lack of which under the current UTA remains a key concern). Body corporate managers would have greater financial accountability if they were to be subject to this provision.

Part 5 of the REA Act could be amended to cover the exact duties of a body corporate manager, or a similar provision could be included in the UTA.

Section 122 of the REA Act covers the duty of a real estate agent with respect to funds received in the course of business, which, if adapted to body corporate managers, would also help mitigate the financial accountability issues flagged in this submission.

Queensland Body Corporate and Community Management Act 1997

Section 58(1) of the QLD Act sets out when a body corporate manager may be engaged on behalf of a body corporate to carry out the functions of a committee and its executive members. It would be helpful to include similar clauses in the REA Act (if it were to apply to body corporate managers) or the UTA, to better protect the interests of the bodies corporate and the unit title owners they represent, with the following caveats:

- That the original owner control period has ended before the engagement;
- That the material given to members of the body corporate pertaining to engaging a body corporate manager include the terms of the engagement (proposed contract between the manager and the body corporate), an explanation of those terms, and clarification about the engagement itself;
- On the topic of the length of a body corporate manager's contract, s118 of the QLD Act specifies that the engagement of a person as a body corporate manager must not be longer than 3 years at a time. REINZ submits that a similar limitation on the amount of time that one person can serve as body corporate manager is appropriate, though the exact length of their tenure is up for discussion.
- Section 59 of the QLD Act has strict guidelines that must be complied with to render the engagement of a body corporate manager valid. With reference to the format of the QLD Act, REINZ submits that any engagement of the services of a body corporate manager should be enshrined in legislation as including:
- The duties and powers that the body corporate manager may exercise in the course of carrying out the functions of the committee and its executive members; and
- The authority to carry out these duties and powers.
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What functions, if any, do you think should be prohibited from being contracted to a body corporate manager?

Where Regulation 17 of the UTA applies, and except in the case of pre-settlement disclosure statements, a body corporate manager should be prohibited from signing on behalf of a body corporate.
Body corporate managers can assemble information for meetings (and they should be able to do so) but they should not be allowed to call a general meeting. This power should be left to the Body Corporate and its chairperson and committee.
A body corporate manager should only ever be allowed to use proxies as a means of obtaining a quorum and never for voting purposes. This must be made explicit.
Body Corporate managers should be prohibited from being allowed to retain interest earned on clients' money.
Regulation 11 of the UTA, being the list of chairperson's duties, could be a starting point for the proposed functions of a body corporate manager (subject to the above comments).

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

In the interests of consumer protection and given the complexities involved in managing a body corporate, the powers, duties and obligations of body corporate managers must be clearly articulated in legislation and supported by regulation.
In particular, the reporting requirements, financial accounting and audit obligations, licensing and termination of body corporate managers must be clearly articulated.
<u>Reporting obligations of body corporate managers</u>

The reporting obligations set out in the QLD Act (discussed in our response to question 16 above) are a useful model. Section 62 of the QLD Act advises on the frequency of reports that a manager must submit to his/her relevant body corporate regarding expenses, repairs and maintenance, anything known to the manager about the assets of the body corporate, and a summary of each fund belonging to the body corporate.

It is submitted that the reporting requirements of body corporate managers be mandatory in New Zealand.

Termination of body corporate managers

The QLD Act allows bodies corporate to terminate their body corporate manager in certain circumstances. Section 130 allows termination for conviction of a particular offence, and s 131 provides for termination for failure to comply with a "remedial action notice". A remedial action notice can be issued by a body corporate to a manager when that manager has been noncompliant (either by being grossly negligent, by failing to perform their contracted duties, or by failing to comply with the code of conduct). If the noncompliance continues, then the body corporate can terminate its agreement with the manager.

It is submitted that clauses for termination be included in legislation, together with a list of offences. The list of offences set out in s130 of the QLD Act are a helpful model and include fraud, transferring an interest in the engagement without the body corporate's approval and assault. Specific monetary offences should also be included in the list of offences.

All proposed termination provisions should include guidelines for the actions that bodies corporate will be required to take to dismiss body corporate managers. The framework of this is set out in ss129, 131 of the QLD Act.

As noted elsewhere in this submission, the REA Act provides a mechanism for complaints in the event of misconduct by a body corporate manager.

4.4 Ensuring adequate Long Term Maintenance Plans

- The overarching importance of the accuracy and scope of the Long Term Maintenance Plans has been comprehensively set down in our previous submission on point (prepared by HOBANZ). Furthermore, we assert that any reforms to the maintenance regime for bodies corporate must be informed by the very significant number of legacy complexes that have been found to have suffered serious damage as a result of inadequate maintenance.

- The majority of these complexes have also been found to have life-risk defects as a result of sub-standard construction, and in some cases the wilful negligence on the part of contractors and developers in choosing not to complete construction in accordance with the consented design.

Any move to reduce the maintenance requirements for bodies corporate, no matter how many units are in the complex, is not acceptable in our view, as it will increase the exposure of current and future owners to increased financial and life-safety risks.

The condition of New Zealand homes is, on average, known to be poor as a result of inadequate or no maintenance. The Building Research Association of New Zealand conducts regular surveys of the condition of New Zealand homes. Their reporting over the last two surveys (2005 & 2010) has pointed to a decline in the condition of New Zealand homes. The 2010 survey shows that 25% of the homes surveyed were classified in the 'poor – very poor condition' category with approximately 38% being in 'average condition', and approximately 52% being in 'good – excellent condition'. The survey results speak for themselves and the poor condition of a significant proportion of New Zealand's housing stock will undoubtedly have far reaching effects on those that own and reside in such homes. There are also several research studies that point to significant social, financial, health and welfare issues that are related to homes that are in poor condition.

To ignore such research and to make changes that reflect a political agenda to keep compliance costs down would be a flawed approach and would fail to meet the social and economic needs of the communities living in multi-unit complexes governed under the UTA. The consequences of failing to respond more fully to the issue surrounding the maintenance and repair of the buildings in a body corporate would, in our view, be unacceptable. It is paramount that the proposed reforms result in a comprehensive maintenance planning regime and a mandatory maintenance and repair frame work for all bodies corporate.

The proposed reforms provide an opportunity for Government to make a significant difference to the quality of the lived-in environment for residents in unit title developments , and to ensure that there is much greater protection for current and future owners of properties in this growing housing sector.

Question 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 have LTMPs signed by the body corporate chair and a qualified person;

Question 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?

Question 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?

The questions above pertaining to the proposal to have LTMP's signed by the body corporate chairperson and a qualified person. We support a requirement for the LTMP to be fit for purpose and prepared and certified as such by a professional building surveyor from either the Royal Institute of Chartered Surveyors (RICS) or the New Zealand Institute of Building Surveyors (NZIBS). In most cases where a LTMP plan has been prepared by a professional building surveyor they are not only signed off by the surveyor that inspected the complex and prepared the plan, but they are also signed off by another surveyor from within their organisation who has peer reviewed the plan. We therefore see no reason why an approach could not be adopted, where the plan is certified by the firm producing it and is subject to an internal peer review for quality assurance purposes.

With reference to the proposed concept of having the Body Corporate Chairperson sign the LTMP “guaranteeing” its accuracy; we believe that this presents an unacceptable and unnecessary assumption of liability by the Chairperson when the Body Corporate has relied upon the advice of the professional building surveyor that prepared the plan. This risk of liability would off course be mitigated by the proposed indemnity for office bearers as has been raised elsewhere in this submission. However, we do recommend the following procedure for the sign off by the Chairperson:

- The Body Corporate decides by ordinary resolution what (if any) additional items will be included in the plan and approving the engagement of a professional building surveyor to undertake a survey of an existing “legacy” building or to review the maintenance schedules for a new building for the purposes of preparing the LTMP.

- The LTMP is prepared by a professional building surveyor in accordance with a standard set down in the regulations and is signed off as covering all the necessary maintenance items prescribed under the UTA.

- The plan is then presented to the Body Corporate for approval and adoption by way of an ordinary resolution. At the same time the sum that will be levied annually to fully fund the LTMP will also be decided by ordinary resolution.

- The Chairperson would then execute a form that provides a summary of the relevant resolutions that approved and adopted the plan and the sum that will be levied annually to fully fund the plan. The execution of the form by the Chairperson should be witnessed by a Committee member if the body corporate has elected to have a Committee. This form is then attached to the LTMP and distributed to all owners.

- This process would then be repeated for each update of the plan every 3 years.

The above process is not dissimilar to the approval of any changes to the operational rules.

There is perhaps one additional step that should be considered and that is a declaration to be provided to the professional building surveyor that the Body Corporate has disclosed all relevant information to the building surveyor. This may include disclosing the existence of any issues that are relevant to the performance and durability of the buildings (i.e. has there been any leaks) and details of insurance claims history. This will assist the surveyor to get an understanding of the scope of the site survey that will need to be undertaken in order to prepare a comprehensive maintenance plan.

Question 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?

By their very size, usual lack of complexity and relative ease of access, there is a natural scaling of the maintenance requirements for smaller complexes. This, we think, negates the need for an “opt-out” provision.

Having a robust maintenance regime is one of the benefits and protections of owning a unit title property. Without this owners will be expose to all of the problems that arise with cross-leased terraced properties and those on freehold titles with shared party walls, when it comes to maintenance of the exterior envelope and external finishing’s.

It is also important to note that size is only one indicator of the complexity of a development. Other factors such as the design of the development (for instance separate buildings or a unified block) and use (the presence of commercial units or holiday rental accommodation) also need to be consider. The ownership type can also influence the desire for proper maintenance – owner occupiers often have a very different view of the need for proper maintenance to those who rent their units out.

The proposal to allow bodies corporate with less than ten units to proceed without a LTMP as a default provision, and for those with 10 – 29 units to be allowed opt out, would remove important protections with far reaching consequences and is therefore considered to be entirely inappropriate.

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

The list of mandatory fields we consider essential to be included in a revised template is too long to put in this submission, but HOBANZ will provide MBIE with a full schedule under a separate cover in due course.

Question 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?

We reiterate our position that all complexes must be required to have a LTMP irrespective of their size. A 30 year time frame for the establishment of a LTMP is appropriate and indeed crucial in order to have absolute transparency around the long term ownership costs when taking into account the cost of maintenance, repair and replacement of building elements and infrastructure. This supports the building of the LTMF to ensure that there are no major financial shocks in the future given that levies are being struck every year to enable the LTMF to be built up over time to cover the big-ticket items that will have to be attended to within the expected lifespan of the building. This is also the most equitable approach given that today’s owners will be contributing to the fund right from the very beginning, and that if any of them choose to sell their units in the future they are not leaving new owners to contend with the significant financial burden in relation to an underfunded and/or short span LTMP.

We believe that the benefits from creating a mandatory LTMP and LTMF regime for all bodies corporate should not only see the value and amenity of the complexes being sustained, but any depreciation in the values of the complex related to its maintenance status will be offset by a commensurate sum being held in the LTMF. This should shore up the value of the unit upon sale as it becomes an attractive investment when such funds are held in reserve.

Question 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.

As we have previously stated in the white paper we submitted to the Hon Nikki Kaye; not only do we believe that <u>all</u> complexes should have a LTMP, but that they should also be required to have their plan fully funded by way of a mandatory LTMF.

If this approach is not adopted, then we believe the government must make it mandatory to record on the balance sheet of the body corporate, the contingent liability created as a result of not having a fully funded LTMP. This follows standard commercial practice and will allow current and future owners to fully understand the financial exposure this approach creates.

Question 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 – notwithstanding our previously stated exception to any concept of a scaled approach to long-term maintenance regime, we believe that a 3 yearly review of an established plan is imperative. This is not only to ensure that any new maintenance, repair or replacement issues are identified and built into the revised plan, but that the costings for the entire plan are updated in accordance with the current building costs. The latter is important considering the significant inflation in building costs year on year that will compound if not updated and reflected in the LTMF levies that are required to be raised to ensure that the LTMP is fully funded.

Question 25. We propose that the LTMFs of medium and large bodies corporate are audited annually.

We do not agree – once again we must reiterate our position that all complexes must be required to have a LTMP irrespective of their size. The establishment of a LTMF and contributions and expenditure in relation to items on the LTMP for all complexes should always fall under the standard set of financial records and statements that are prepared annually by the Body Corporate. To suggest that they should be treated separately is inappropriate. Accordingly, the standard audit provisions of the UTA should prevail. The control over these funds is firstly dependent upon them being under the control and management of the Body Corporate Chairperson and Committee and secondly that investment of these funds is not left in the hands of Body Corporate Managers. Bodies Corporate should be required to obtain independent professional investment advice and should have an investment strategy that is conservative and secured.

4.5 Accessibility of the Dispute Resolution Regime

While it is pleasing to see the proposal to reduce application fees to the Tenancy Tribunal and to see encouraged the role of mediations, there are still difficulties with taking a half glass full approach when dealing with dispute resolution involving owners. Primary concerns as we see them:

There exists continued confusion between the Ministry of Justice role and that of MBIE with there being a need to establish a centralised agency or division within MBIE to at least address the following possible issues:

Providing Government agency support assistance for referral to external expert providers and assisting with identifying the actual nature of a body corporate dispute and to direct disputing parties to an appropriate mediator in the first instance

Subject to the Government establishing a centralised mediation service, maybe in the first instance refer to a selected Resolution institute panel member and see streamlined the pro forma application forms produced in submitting to the Tenancy Tribunal which are currently too formulated and prescriptive and off-putting for many owners.

The practical difficulty of referring matters still to the Tenancy Tribunal is that in substance such Tribunal deals with tenant problems not owner problems. A far better outcome would be to see established a separate Land Tribunal, which was overlooked in the Law Commission report on the Court restructuring, but which has considerable merit when considering the vast number of owner/neighbour disputes existing in New Zealand

We reject the suggestion in the discussion document that because there has been a few number of applications made to the Tenancy Tribunal there is no need to establish a separate tribunal or have an agency such as an ombudsman or commissioner established when anecdotal evidence is overwhelming, in our view, that many dozens of disputes are simply left smouldering or not dealt to leading to more disfunctionality among a number of bodies corporate particularly in Auckland and Wellington. Moreover, the fact as acknowledged that any enforcement of a Tenancy Tribunal order must be made through the District Court and/or High Court, only serves to undermine the frustration of going through the legal process. Also, we note from the Body Corporate's Chairs Group that dissatisfaction with inconsistent Tribunal decisions and delays in getting decisions from the Tribunal are not uncommon which is not surprising where experience and specialist expertise is lacking. This is not helped by dealing with poorly drafted and inadequate legislation.

We do not believe that simply changing the name of the Tenancy Tribunal to Tenancy and Unit Titles Tribunal deals with the practical problems involved with dispute resolution. We also observe that the non-publication of Tribunal and to some extent District Court judgments involved with bodies corporate and unit title developments is unhelpful in providing assistance to owners and their advisers in formulating advice or giving appropriate discussion on problems arising.

5. Technical issues

No offence or penalty provisions
No reference to earthquake strengthening and section 74 schemes
Alignment of sections 126 and 138(4) and 80(1)
No statutory lien for recalcitrant owners
No ability to use a redevelopment plan where a principal unit or FDU unit is being converted to common property
No express provision allowing a Body Corporate to own a manager’s unit or car park units to derive income and defray operating expenses
No model rules akin to Queensland
No alignment with Residential Tenancies Act or reference to tenants having a voice within the unit titles regime
No indemnity for acting in good faith for Administrator’s appointed by the High Court or body corporate committee members and chairpersons
No default provision where there is no body corporate chair or body corporate committee
Need to change conversion provisions regarding acquisition of ground leases so not compulsory to have an existing option to purchase or right of first refusal in a ground lease before triggering a conversion and on purchase of a ground lease by a body corporate only a certificate from the chairperson should suffice not have all owners sign a declaration or application to merge.
Need to include authorised managers say of Housing New Zealand and any Council entities that own units as deemed directors to attend and vote at meetings.