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
No I do not wish to remain anonymous in any reporting or submission analysis

Executive Summary

This submission does not support many of the proposals listed in the discussion document. However, it does support an overhaul of the disclosure regime and proposes alternative, more cost effective solutions to some of the problems being experienced within the sector.

However, this submission also argues that many of the problems we are supposedly experiencing may be overstated and that the UTA is not "broken" as has been claimed. It is proposed that much of the noise we have recently experienced has come from weathertightness issues and some owners refusing to accept the principle of majority rule.

Solutions are offered to resolve the first of these causes, while the second is not resolvable and neither have much to do with the UTA.

The arguments in this submission are supported with examples and the fact that based on analysis of the number of applications to the Tenancy Tribunal, we can assume that 99.99% of owners don't have any problems.

This submission also strongly suggests that the best way to generally improve the performance of individual bodies corporate and to ensure they are compliant, is to establish an owner funded agency to monitor and control the sector.

s 9(2)(a)

1 March 2017

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Personal Statement

and a drone view of the sector

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A drone view

As an introduction, I believe it would be helpful to present my drone view of the segment so that before I present my proposals, we might have a better understanding of why I believe so many people appear to be unhappy. I have found that taking this stand back, overview approach has also helped me remain sane, while continuing to operate businesses in this seemingly inconsistent and random sector.

Following on, I admit to have empathy for the officials who have put the discussion document together because trying to get a consensus of opinion of the issues supposedly plaguing the sector must feel like herding cats. I feel the same way and I am working on the coal face in the sector.

They are just small businesses

For a start, we should think of each body corporate a small business, the majority of which have annual expenditure of less than about $60,000, making them smaller than the average New Zealand household. Yes, larger developments can have expenses of up to $1 million, but that's still a small business in New Zealand and in financial terms would make them about the size of a decent cafe.

So even the big ones are small and we should try to avoid overloading them with compliance, especially when it increases costs.

They only look after one property

Then typically a body corporate has to look after only one property. Which again is what the average householder does. Sometimes the property can be more technically complex and take additional knowledge to understand and manage because has a lift and needs a Building Warrant of Fitness

(BWOF) etc. But the building owners get experts to look after those things just like a home owner gets a plumber in to fix a blocked drain. It's the same, just on a larger scale.

Technical infrastructure is not a problem

But lifts and BWOFs are not the cause of the problems. There are few complaints about the difficulty associated with managing them. So what is the noise all about?

Why are there so many people saying that the Unit Titles Act (UTA) is broken?

Looking behind the complaints

There seems to be two significant reasons why there is a lot of noise coming from unit owners.

1. Shared living and shared decision making

Unit owners have to manage their property collectively. By consensus. The body corporate is a mini democracy and we know that democracies are messy and people with different opinions often clash with each other. Then sometimes if people can't get their own way, usually because of the principle of majority rule, they make a fuss. We might hear that as a complaint. Even as a broken UTA. But often it's just an adult throwing a tantrum.

2. Shoddy, leaky buildings

During the last couple of decades, as a nation we managed to build some terrible buildings. Individual home owners who have found themselves stuck with one, have had to work through the problem on their own. But those who own a unit in a leaking unit title development are required to work through the process collectively. Considering the money and emotions involved, this can quickly become a headline or an email to an MP, particularly when a decision goes against an individual.

The primary causes of disagreements in a body corporate

Overall the most common disagreements that occur within a body corporate tend to be about who should pay - the individual or the community. The second is about pets. Having to regularly deal with these kind of highly emotive issues, would suggest that bodies corporate are a democracy that behaves more like a local body than a national government.

The comparison with local bodies is also consistent with voter turnout where only about 30% of owners participate. Because the rest aren't interested. However, those that are interested are not so interested that they will bother to read and understand the Unit Titles Act. That is an expectation that will never be fulfilled, regardless of how often we come back here to review the legislation.

So while we all accept that the principle of a body corporate being a democracy is not negotiable. we also need to accept that there will always be an unhappy minority. No matter how often we review the legislation and how many changes are made.

Leaky buildings is just an intensifier

The second reason above, that of leaky buildings is just an intensifier. The distress and chaos that comes from leaky buildings can create what appear to be symptoms of inadequate Unit Titles legislation.

But weathertightness issues are not exclusively a Unit Titles problem and there are processes and laws in place to deal with them across all building types - outside the UTA.

However, weathertightness issues do impact on disclosure, long-term maintenance plans, funding, decision making and communication.

We will look closely at those and other symptoms later in this submission.

Communication

One area that does appear to be a genuine problem is that committees often make decisions and not keep the owners informed. The outcome is that some owners complain that they don't know what is going on and people can fill vacuums of information with misinformation.

The simplest way to tidy that up is to require committees to distribute the minutes of committee meetings to all owners within a certain timeframe.

This would have more effect than tinkering with the reporting provisions relating to the delegation clauses.

Part 1

The sky is falling

We have to ask "why are here reviewing the legislation?".

We can also ask why some people think the UTA broken. Because I suggest that when the officials get past that emotive sound bite and finally sit down and look at all of the submissions, it is likely there will not be a consistent thread. The summary of all submissions is most likely to be inconclusive.

Then without being able to clearly define the problem, it becomes very difficult to find a solution and by making a series of legislative changes without a clear understanding of what broken parts we are trying to fix, we might just create more problems while adding unnecessary costs to owners.

If we don't have a lot of similar complaints but there are complaints never-the-less, we might look behind the loudest or perhaps the ones presented by those who appear to be the most qualified.

When we do that I suggest we will find that most of them are really not caused by weaknesses in the legislation but something else.

Some recent history

In late 2015 and early 2016 there were quite a few "bad body corporate" type headlines in the Herald. It's worth noting that few of those stories were repeated in the other national dailies and we can take what we like from that.

More recently, since about mid 2016, things seem to have quietened down. We can also take what we like from that but one notion we might consider, is that things may not be as bad as some people will claim.

Looking at the data

But to get some real quality information we can analyse the data in the discussion document.

Apparently there are 144,488 units in New Zealand and a total of 699 applications have been made to the Tenancy Tribunal. Let's assume that those applications represent a complaint or problem.

However, most of those applications were in regard to recovery of body corporate fees. i.e. The Tribunal was used by the body corporate to try and get their owners in arrears to pay their levies. That's just using the Tribunal as the first stage of debt recovery and nothing to do with a broken UTA.

If we remove those levy recovery applications we are left with 115 applications that were effectively complaints and most were owner versus body corporate.

But we need to take another step, because those 115 applications were over a five year period from 2011 to 2016, meaning that there have been an average of only 23 complaints per year. Or one a fortnight.

Now comes the interesting part. If we apply those 23 complaints as a percentage of the total number of units, we find that the average of owners who make applications to the Tenancy Tribunal each year is 0.01%.

So why do we think the UTA is broken, when we can conclude that 99.99% of owners don't have a problem?

More significant problems for buyers of units

What is apparent is that there are weaknesses in the disclosure regime whereby prospective buyers are currently not given enough information to make a fully informed decision. This notion is reinforced by the representations made in the initial reports back in mid 2016 where a number of recommendations for changes to the Disclosure Regime and to LTMPs were made.

Perhaps that's why the applications to the Tenancy Tribunal were so low. Maybe the most noise comes from people who have just purchased and at this time there is nowhere for them to go if they feel they have been shafted. Because nobody has mislead and nobody has broken the law.

But while changes to the disclosure regime are clearly necessary to help buyers, the same can't be said for changes to LTMPs or Funds.

Because all buyers really need, is to actually see a copy of an LTMP, as prepared under the existing rules and that's covered in the next section.

Part 2

Disclosures and LTMPS

Disclosure and LTMPs are discussed together because one of the principle reasons for having a LTMP, is so that prospective buyers know what they are getting into.

But more importantly a prospective buyer of a unit should know whether or not the building has weathertightness issues or any other significant defects.

To make improvements in this area, the discussion paper proposes changes to the disclosure regime, LTMPs and funding.

Some of these proposals have merit, others will just increase costs.

1. The proposed changes to the disclosure regime

The current Additional Disclosure Statement includes the provision of elements of the LTMP but this document is underused because it is too expensive to produce and the buyer has to pay for it.

Any of the changes mooted in the discussion document will work, providing it includes a provision that a full copy of the LTMP is given to a prospective purchaser, before the confirmation date and it is paid for by the vendor. But it shouldn't cost much because it's already there. Or should be.

That's the easy bit.

2. The LTMP does not include weathertightness or other known defects

The biggest omission from LTMPs relates to those items that are known to the body corporate but are not required to be disclosed in any of the current Disclosure Statements. Therefore they are not disclosed.

It is my experience that this is common. More common than we would prefer.

For example, if a body corporate has been presented with a report from a registered building surveyor that suggests that the weathertightness of the building may be compromised, there is no requirement to disclose it - to anybody. For the buyer this is caveat emptor.

There will even be occasions where a known significant defect is deliberately kept undisclosed. This should be no surprise. There is a lot of money involved.

Before they buy a unit, the buyer may obtain a pre-purchase building inspection report but this will not include the common area or any other units. It will only relate to the unit.

This is a significant omission but it could be fixed easily by requiring the body corporate warrants in one of the disclosure statements, that there are no known issues. This method of providing warranties is now common practice for any home owner who is selling through a licensed real estate agent as a result of as changes made in the REA Act 2008 because the same problem used to occur in real estate transactions.

Also if we follow the principle that ignorance is not an excuse, even if the body corporate is not aware there is a problem, this should not be a defence. But we can strengthen this by making a requirement that the body corporate understands its weathertightness standards and be aware of any other reasonably obvious building related issues. This can be achieved by making additions to UTA S138 and is discussed in more detail below.

3. Taking care of weathertightness issues

If we take the position that it is unacceptable for a body corporate to be unaware of weathertightness or other significant defects in their building, a simple solution might be to add a provisions in UTA S138 something like this. (sorry I don't profess to be a section writer but you'll get the idea).

The body corporate must ensure that the weathertightness status of all building elements is fully understood by the body corporate at all times and plans to remedy any deficiencies are included in the LTMP.

If the body corporate is aware of any possible significant defects of the building elements, infrastructure or common property, investigations must be carried out to ensure that the body corporate has a complete understanding of the defect and repairs to remedy are included in the LTMP.

4. Now the body corporate can use anybody they like to prepare the LTMP

The discussion document proposes that some (using an arbitrary measure of unit numbers) bodies corporate are required to use a person with specific qualifications to prepare their LTMP. This would not be necessary if the body corporate had to warrant that there were no known defects

This is because the body corporate can now decide what level of professional and qualified support it requires to ensure they can honour their warranty.

5. Using a qualified person is no guarantee

The discussion document suggests that using a qualified person will give greater assurance that the LTMP is complete and accurate. While this might appear to be so, everyone would be basking in the warmth of a false assurance.

The only way any person, regardless of qualifications, could give a reasonably accurate assessment of weathertightness is by conducting invasive testing throughout the building, including in all units. This is obviously beyond the scope of any LTMP because it would make the cost prohibitive. It makes more sense to treat weathertightness assessments as a separate matter.

In addition, even if an expert was to conduct a full investigation, including using invasive testing, he or she would still include a disclaimer because nothing is certain when it comes to weathertightness - except that every building leaks, at least a little bit.

So while having qualified people prepare LTMPs might feel like it is closing a loop hole, all it will do is increase costs for those unit owners who prefer to find a cheaper but acceptable option.

And finally we should remember that experts can be wrong, often don't agree with each other and that every shoddy building in the country was designed, built and consented by qualified people.

But coming back to the principle of separating weathertightness out of LTMPs, if we do this, we don't need a registered building surveyor to prepare the plan because the high risk elements are now taken care of separately.

6. Old Government House

Old Government House, or more correctly The Government Building Historic Reserve in Lambton Quay, was completed in 1876, meaning that it is now around 140 years old. It is built from timber. Kauri in fact and most probably heart Kauri.

After a search of the internet, I found that the accepted convention is that Kauri weatherboard typically has a life of around 100 years. So as far as our collective accepted understanding is concerned, the weatherboards on Old Government House have now exceeded their useful life.

If this building was owned by a body corporate, they would have to have a long-term maintenance plan and that plan would consider what to do with the weatherboard cladding.

If the body corporate had 30 or more principle units and it was mandatory for their plan to be prepared by a qualified person, that person might feel compelled - for fear of the liability that comes with incorrect recommendations - to recommend that the cladding be replaced. Of course this would be nonsense and the owners would know that.

But what do they do about their long-term maintenance plan? After all, now they have been given a recommendation by an expert and if they do not follow it, the liability moves from the qualified person to the body corporate. Or more specifically those elected officers who are standing before the AGM recommending they ignore professional's advice.

It is my experience that this scenario happens often. More often than we would like. Particularly relating to roofs, claddings, lifts and particularly when the plan building contractor has a heightened adversity to risk.

The problem is that the plan builder, regardless of whether they are a qualified person or not, has no skin in the game. There is no benefit for them to take a risk that could be used against them. However there is a lot of downside. So naturally they will err on the side of caution and make recommendations based on manufacturers minimum recommendations and warranties. Of course manufacturers also err on the side of caution.

The outcome is that we have lots of LTMPs out there that are recommending replacing items that would easily last a lot longer.

The expert plan builder doesn't care. He's been paid. It's now the owner's problem.

For this reason the only people who can "prepare" a LTMP are the owners of the building. That's the body corporate. And if they feel they would like help to prepare the plan they should be entitled to appoint anyone they like.

After all, they are the only ones who ultimately have to stand by it and pay for any work that will be carried out.

7. Signing off the LTMP

Having the Chairperson sign off the LTMP has merit but of course that would not happen until after it has been approved by the body corporate at a General Meeting. But it should be made clear that the Chairperson is not taking personal responsibility for it, they are only signing on behalf of the body corporate.

Otherwise there would never have anyone willing to stand for Chairperson.

8. LTMPs that owners understand and embrace

One of the issues that has not been addressed in this review, is that the value of LTMPs to unit owners is consistent with their ability to understand them.

Many LTMPs that I have seen, that I presume are among the more expensive, over indulge in financial and planning jargon that the majority of owners will not understand. Of course in order to not look like an idiot, most will just pretend they understand and raise their hand to approve the plan.

The point is that no matter how awesome a plan might look and how much it cost, if owners don't understand it, it's worthless.

The proposal to only use qualified people to prepare plans will only increase the number of supposedly technically and academically correct but unintelligible plans, to the detriment of owners and the profit of the plan building industry.

We don't need our LTMPs pass a level four masters paper. We need LTMPs that owners understand and get behind. They need to know what maintenance should be done, how much each job is expected cost and how much money needs to be put in the kitty to pay for it. That's it.

In this regard, the much maligned MBIE template is a better tool than most of the supposed top end plans I have reviewed.

We need to remember the goal. Better maintained and well funded buildings. It doesn't need to be complicated..

9. Putting in a word for the owners

We should not forget that they are the owners. It's their building. They have property rights and in New Zealand that means they are entitled to neglect or even destroy their property if they like. Should they wish to do that, all we need to ensure is that any decision is made using the correct processes and the decision is communicated to those who need to know. Owners and prospective buyers.

Of course they aren't going to neglect or destroy their property but the point is that it is their right to make the decisions. It is wrong and maybe even offensive to suggest that people who are part of a body corporate are not smart enough or responsible enough to make the right decisions relating to their own property to the degree that we insist they appoint professionals to help them plan their maintenance and manage their affairs.

If they think they are up to it, they should be entitled and even encouraged to do it.

10. The separation of planning and recommendations

As a professional plan builder I feel the need to distinguish between what is part of the plan and what are my recommendations. Because they really are two different things.

The LTMP should be what the owners intend to do, while the recommendations are what someone else thinks they should do. Plan builders should take care not to mix the two but typically that's what they dot. If the plan builder includes their recommendations, the LTMP is not really the body corporate's. It's the plan builders and is often not followed because the body corporate doesn't agree with some of it.

Because of this, many LTMPs are produced, not to be used as a useful planning tool but just to satisfy the requirements of the UTA. Once it's prepared, it sits in a bottom drawer somewhere while the body corporate just get on with the job they way they always have, making decisions on the fly.

We need to think about how to change that attitude and allow for LTMPs that are actually useful tools, but the proposed changes will likely only make matters worse.

An example

The first rule I use is that it is the body corporate's plan and as a contractor, my role is to help them create it. So the LTMP is built with language such as "The body corporate will..." etc,

Then in a separate letter I provide recommendations that they might like to consider and the reasons for them. Accordingly any element that I am not sure of, or are unable to access, I recommend that they get a report from a suitably qualified person. This may be part of the weather skin but could equally be the lift, fire protections systems, HVAC etc.

They might even want to get second opinions on any recommendations I have made.

I have included this information in this submission, not to suggest any changes that might be made to the legislation but to provide some clues how to best build LTMPs. After all a new industry has been created and most people still don't fully understand it.

The points being made are that

- No one person is qualified to provide recommendations for every element in the development.
- In that regard a "planner" or "manager" could be better qualified than any specific building related professional. Someone who is skilled in gathering and summarising opinions from a range of experts.
- If a LTMP is prepared with recommendations included, the body corporate will find it difficult to separate them and it will be equally difficult to get a second opinion on any specific item and have the plan updated.
- The body corporate may not actually need recommendations, just a LTMP that includes the information they already have and decisions they have already made.
- On that basis, it is a benefit for the body corporate to use a reusable and responsive template and obtain recommendations from as many people as it likes.

These points all mean that the MBIE template could be a valuable tool for any sized development if it was more complete and all bodies corporate were able to use any person to prepare LTMPs.

11. Defining the word "cover" in Regulation 30

This is a recommendation for legislative change outside those items proposed.

Regulation 30 of the Unit Titles Regulations 2011 could be improved significantly by replacing the word "cover" in SS(1)(a) with "include a description and condition assessment of".

Currently the word "cover" is not defined and is open to interpretation. A risk averse person would assume it means "include a description and condition assessment" but not everyone is risk averse, so plans are created with many items not even mentioned.

Part 3

Long-term maintenance funds

1. Extending plans to 30 years

It has been claimed that by extending LTMP's to 30 years it would improve cash planning in bodies corporate. This could appear logical unless we think about it.

In 30 years it will be 2047 and by then we would have had 10 more general elections and perhaps even more significantly, another seven POTUS elections.

We have no idea what will happen during the next 10 years in regard to price of materials, the cost of labour, the new technology relating to building components and design etc. let alone 30 years. For example the 2016 change in OSH laws came out of left field for bodies corporate but added significant costs to maintenance and immediately changed pricing and attitudes in regard to maintenance.

It also might appear logical that we can predict the life of building elements and therefore factor in the cost of replacement. But building elements and items of infrastructure don't have an expiry date. They don't even have a best before date. While manufacturers will limit their warranties to a number of years this shouldn't be used as a replacement date. Nobody knows when a lift or roof will need to be replaced and nobody should have to replace an item that is perfectly fine for the job because some other qualified person says so.

Following on, why would anyone start saving to pay for a replacement in 20 or 30 years time when they aren't sure that it will actually need replacing.

The best we will get, is body corporate's including a 30 year table and pay lip service to the requirement. The worst we will get will be when unit owners are forced to take cash out of their bank accounts, so that it can sit in the body corporate's bank account never to be used.

Examples

a. It was declared from the floor at one of the Wellington workshops that a lift might require replacing in say 20 or 25 years and they cost a lot of money.

Not true. I am currently (Mar 2017) assisting an s 9(2)(b)(ii) with their LTMP. Apart from any repairs that would inevitably have been carried out at some time in the past, their lift which services five floors, is the original 1930's model including a wooden carriage and steel mesh concertina lobby doors. This lift is some 80 years old and had not yet required replacement. It's actually very cool.

However, the body corporate is including a modernisation programme in their LTMP. This programme is intended to upgrade the motor and drive unit but retain the character elements. The total cost is expected be about $120,000. Spread over the 17 units this equates to an average of about $7,000 per owner. Or $1,000 per year for seven years.

The points are

- It's already 80 years old and could last another 20 if they wanted it to. It would be highly unlikely that it would die. Particularly since it is routinely serviced - as they all are. But if it does suddenly die? Guess what, you use the stairs.
- It is not such a prohibitive amount that they needed to plan for 30 years to save up for it.

So while the statement made at the Wellington workshop was likely have sounded credible to anyone who was not informed, it was in fact wrong.

b. It was also declared by the same person at the same workshop that replacing the HVAC in a building could cost up to $350,000

This might also sound plausible but is even more wrong than the lift example.

My s 9(2)(a) was a joiner all of his life and after he had retired he showed me his hammer and said "this is the same hammer I started with when I was an apprentice. It's just had five new handles and two new heads."

The same principle can be applied to many items of infrastructure.

The HVAC systems in an apartment building will typically be dominated by basement ventilation. In some buildings there may be some common area ventilation, including stairwells and on rare occasions a universal central heating. However while central heating is common in multi tenant commercial buildings, in apartment buildings, each unit will inevitably have their own HVAC systems maintained by the owner. The typical body corporate normally doesn't actually have such a large system to maintain.

Then, while a large ventilation system might cost a lot to initially install, it is inconceivable that it would ever be fully replaced. That's because the initial setup includes the ducting which could be expected to last the full life of the building.

That leaves the moving parts and control systems that do fail from time to time. Electric motors that drive fans might have a predicted life of anywhere between five and 10 years. Usually they are a complete unit and a whole fan, including the motor will be replaced. But nobody knows when and it doesn't make economic sense to replace them until they do fail. The best you can do is put a line in your LTMP as a contingency so that the cash if available when and if one of the units fail.

Other elements include CO sensors that are designed to ensure that basement fans run when CO levels get unacceptably high. They need recalibrating every couple of years and will also likely fail after four or five years. Then there might be filters that need replacing, probably out the operating account and nobody can predict with any electronic element associated with the controllers might fail.

HVAC systems are like my s 9(2)(a) hammer. The individual items get replaced when they fail, meaning that with ongoing repairs and replacement of parts, the total system works just fine for the life of the building. You just have to have some cash in the bank to pay for the immediate replacement of any parts that fail. That's the role of the LTMP.

The point of all this is that the statement made at the Wellington workshop was convincing but wrong. Nobody needs to set aside $350,000 to provide for a replacement HVAC system and it's not a reason to have every large body corporate extend their plan to 30 years.

As already mentioned it will simply make over-zealous chairpersons and committees take more money off owners than they need, so they can put it in the body corporate's bank account and count it.

2. Just because a body corporate has opted out of having a long-term maintenance fund (Fund) it doesn't mean they are irresponsible and not planning to pay for long term maintenance.

There is a popular notion that not having a Fund is bad and bodies corporate who opt out are irresponsible.

This theory is not so much written in the discussion document as implied. But is seems to have been influenced by a couple of reports in the first round of submissions. However, it's a completely false and counter-productive theory.

Just because a body corporate has opted out of having a Fund as defined in the current legislation, it does not mean that they are not intending to save up to pay for long-term maintenance. It usually just means they have a different name for their fund or reserves.

Poor governance to not opt out

In fact, under the current rules that must be applied to a Fund, it can easily be argued that would be poor governance not to opt out. That's because the body corporate is likely to require more of owners money be held in the body corporate's bank account, than is actually required.

If a body corporate has a Fund, it's like having different jars on your mantelpiece to hold the money for electricity and groceries. If you run out of money in the food jar, you can't use the money in the electricity jar and have to go hungry. That would be dumb.

What they should do, is plan for all of their cash requirements and manage their spending accordingly. That's what every business does because it would be a poor use of cash reserves setting aside funds for building maintenance that won't be due for some time.

A body corporate's cashflow is easy to manage

It's actually easier for a body corporate to manage their cashflow than it is for a business because they aren't reliant on sales for revenue. A body corporate has infinite control over its income from levies. They know exactly how much cash they are getting in and can adjust it precisely each year.

The Government doesn't do it

The Government is the country's biggest property owner but it doesn't maintain something like a long-term maintenance fund for each of its buildings - or its stock collectively. They would have to have billions of borrowed money sitting in a fund somewhere. If they did we would be complaining. Because it would be stupid. But some people want to have us insist that bodies corporate do it. Why is that?

Let owners make their own decisions

We know the owners of units are adults because they have to be at least 18 to own property and many of elected officers of large body corporate's are smart people. We especially know that they are smart enough to own at least one property which puts them in the top half for staters.

We should let them decide how much money they should hold in reserve, what they call the fund and how they use their own cash.

Changes to UTA S117

But there is one change we could make to the legislation that would help. All we need to do is change UTA S117 to say something like this.

The body corporate will ensure that it has adequate funding to pay for all of its planned maintenance when it comes due.

a. It doesn't need to say that it can only be used on what is recorded in the plan. Because things can come up that couldn't be predicted and therefore aren't in the plan.

b. Sometimes you can only make guesses. Like HVAC fans failing. It makes sense to just say that we will need $2,000 a couple of times in the next 10 years because the fans are predicted to fail. So let's make sure there is always about $4,000 ear marked for that. At the moment if you use a Fund you would supposedly have to also create a contingency fund. That's a lot of additional bookkeeping that serves no useful purpose.
c. The 10% rule in UTA S117(3) is especially to be avoided. At the moment if a body corporate had a job scheduled for the current year - say a full building repaint - that was estimated a year ago and quotes were now being called for, if it turns out that the quote the body corporate wants to accept is more than 10% above the estimate in the LTMP, they would have to call an EGM to have it approved. What a waste of everybody's time.

An example of good cash management

There is a 32 unit residential building in s 9(2)(b)(ii) that has about $100,000 cash in the bank. It doesn't have a Fund. But it is saving up to complete a full building repaint in a few years time. They don't know exactly when and they don't know exactly how much (maybe $150,000) but their reserves are growing at about $20,000 a year and they will have the money in the bank when they will be ready to let the job.

In mid-term each year, the insurance premium of about $35,000 is due. They pay the premium in cash out of the reserves and by the end of the financial year the reserves are back to where they were at the beginning of the year but increased by the annual budgeted increase.

If they had a Fund they would have to have an additional $35,000 in the operating account. This building is well run by thoughtful people but if the proposals were to come into effect, they would have to have a Fund. That would be rather silly.

Incidentally these people won't be making submissions because they are all busy people with day jobs and trust that the rest of us are working in their interests.

3. Compulsory audits would be an unnecessary cost

If we take our 32 uni s 9(2)(b)(ii) development above, under the proposed changes they would be required to have a Fund and to have their financial statements audited. All for annual revenues of about $100,000, an average of about seven supplier payments a month and $100,000 cash in the bank.

This body corporate has a committee that meets quarterly and approves quarterly financial reports. It operates its own bank accounts and one of the owners on the committee is an accountant. That owner has direct access to the body corporate's cloud based accounting system. The chairperson approves all payments.

Requiring this body corporate to have their accounts audited or reviewed each year would be an unnecessary cost and we have to wonder where the pressure to have accounts audited has come from. I doubt that it's based on evidence of a problem because I can't recall any case where someone has run off with the money.

It is my experience that owners and committees are paranoid about the body corporate's bank account and each year at the AGM, when the motion to opt out of the audit comes up, there is always a full discussion.

The current opt out provision works really well and by removing that we will be asking unit owners to pay to solve a problem that doesn't exist.

4. Maybe we can have rules based on the amount of cash held in reserve

Acknowledging that a few developments hold significant reserves to pay for remedial work, perhaps we can target these, rather than making blanket rules adding an unnecessary cost for everyone else.

Maybe we can include something in UTA S132 that says something like this

if a body corporate holds more than $1 million of owners funds or the equivalent of $30,000 per owner, it may not opt out of the audit

Part 4

Governance and management

Debunking some of the theories

In this section we will first debunk some theories that are included in the discussion document.

1. **"Poor governance presents a greater risk to owners in large developments than it does with small." (Section 3.1)**

This is a poor generalisation. The truth is that the financial risk to each owner is only relative to the market value of their unit and the amount they are required to pay in levies.

Analysing these two factors, there is no correlation between the market value of the unit and the size of the development and there is equally no correlation between the amount paid in levies by each owner and the size of the development. Typically an owner will pay somewhere between $2,000 and $4,000 a year regardless of the how many units there are in a development and of course a unit could have a market value of just about anything.

It's true that some big developments are likely to hold larger cash reserves. But large developments also typically have a larger pool of better qualified people who are prepared to stand for elected office. On that basis, larger developments already have an advantage in regard to being able to provide good governance.

It is acknowledged that large high rise developments will have more technically complex infrastructure, but typically also, they appoint qualified professionals to manage these systems. Experts such as lift, HVAC and fire system engineers. These professionals will be engaged regardless of whether or not a body corporate manager has been appointed.

Governance does become difficult in those developments that have weathertightness problems, are earthquake prone, are heritage buildings, are high rise as opposed to villages or townhouses, have decks above living areas, or have a high percentage of elderly people on fixed incomes and with no experience in governance or management.

However, none of the factors above are related to size.

2. **"The costs of an agency or Ombudsman would be prohibitive" (Section 3.2)**

It is my view that the establishment of an agency of some sort to administer the industry would be the most valuable change that could be made.

However, it is argued in Section 3.2 of the discussion document that it "would require significant changes to UTA policy intent". Whatever that means. But if it means what it appears to mean, the "UTA policy intent" is flawed.

It is also claimed that the cost would be prohibitive but we have to ask whether or not it has been costed. For example.

a. A body corporate manager will charge a minimum of $300 per unit (owner) per year plus GST.
b. A registered building surveyor will charge a minimum of $240 per hour to prepare a long-term maintenance plan. For a 30 unit building you can expect the LTMP prepared by a registered building surveyor to cost somewhere between $3,500 and $5,000 or over $100 per unit owner. Once every three years.

c. An audit could cost $3,000.

And the proposal to make each of these requirements mandatory is unlikely to bring any benefits.

Fund a new agency with $30 per unit per year

On the other hand, if each unit owner had to pay say $30 per year to fund an agency, on the basis that there are 145,000 units in NZ, this would bring in about $4.5 million. Additional revenue from sanctions and deposits for dispute hearings would easily bring the total to $5 million.

Surely we could run an agency on that.

So claim that the cost of an agency or Ombudsman would be prohibitive is false. It would cost each owner considerably less than the proposed changes.

3. **"Body corporate managers have a fiduciary duty to the body corporate chair.." Section 4.3**

This statement cannot be correct because each body corporate manager's duty is relative to the terms of the contract of service the parties have entered into.

There is no standard agreement and bodies corporate are generally given a menu of services to choose from and it is quite common and acceptable for a body corporate to opt out of many of the services offered in order to save some fees. This might include bookkeeping, financial reporting, guidance relating to the provisions of the legislation, facilities management etc, etc.

But the most common element of service that bodies corporate opt out of, is having their manager attend committee meetings. That means decisions are made and recorded without the body corporate manager being present.

On that basis it would be hard to argue that the body corporate manager has any responsibility in regard to decisions made by the committee and that the relationship is one of utmost good faith.

4. **A body corporate manager's duties "include any or all of the chairperson's". Section 4.3**

In reality the chairperson, or committee, never delegates their duties to the body corporate manager. The relationship the body corporate manager has with the body corporate is one of a contract of service. The manager is a servant of the body corporate.

That appears to be how most bodies corporate like it.

For example, the chairperson has the duty to ensure the body corporate is insured. The body corporate manager's duty is to follow the chairperson's instructions relating to seeking proposals, presenting them to the body corporate, then once the body corporate has made its decision, to place the insurance and pay the premium.

The contract of service will inevitably include a provision that the body corporate manager will assist with insurance and advise the body corporate in insurance related matters. But managers will not commit a body corporate to an insurance policy or any other financial obligation unless the body corporate itself has approved it. They can't. It's not their money.

The body corporate manager has a duty of care based on the agreed level of service in the contract of service. There is nothing in the UTA which places a duty on the body corporate manager and there shouldn't be.

5. Two owners from the same unit on a committee

There is one small matter that should be tidied up while we are changing the legislation. This is not something that is included in the discussion document.

There is a hole in the rules relating to committees whereby two owners from the same unit can be elected to the committee and I am aware of a bizarre situation where there is one owner on the committee who has four units while another unit has two owners on the same committee. The outcome is that the owner with four units can be outvoted by the owners of a single unit.

This is not the first time it has come to my attention and in each case, it was apparent that the motive to have two people from the same unit on the committee was for power and personal gain.

But it is a loophole that should be easy to fix.

Part 5

Discussing some of the proposals

1. Making it compulsory for a large development to appoint a body corporate manager

This suggestion raises many difficult questions

a. What is a body corporate manager? Is an accountant who does the books for a body corporate defined as a manager? That's all some bodies corporate need and use.
b. What are to be a body corporate manager's qualifications? Currently there isn't a specific one. What about cross credits? Are qualifications such as an MBA, BCom or BBS considered to have any value when it comes to managing a body corporate? If not, why not?
c. What should a body corporate manager do? Should it be mandatory for a body corporate to delegate every function to the body corporate manager or is the body corporate entitled to use its own volunteer officials to carry out functions they are ably qualified for. It is quite common for a body corporate committee to consist of electrical engineers, architects, accountants, lawyers and just about every profession possible. It is quite common for a committee member to be much more qualified and experienced than their body corporate manager in one field or another.
d. If it is mandatory that a body corporate manager - as would defined in the new legislation - is appointed and there is a disagreement between the manager and a more qualified body corporate elected official, how will the new legislation propose this is dealt with. After all both would have defined statutory roles.

Unfortunately this proposal is likely to cause as many problems as it might solve and at an increased cost to owners.

There is no evidence that appointing body corporate managers will improve the governance of bodies corporate. We don't even have a decent understanding of the current standard of governance of bodies corporate with or without professional manager. All we have is anecdotal evidence and the opinions of a handful of people.

Finally on this subject, we equally have anecdotal evidence that the average standard of body corporate management is not generally acceptable to bodies corporate.

2. Making it compulsory for body corporate managers to belong to a professional organisation

We must hope body corporate management companies believe, that it is in their own interests that they belong to a strong and well governed professional organisation and that they become involved in that organisation, contributing to its growth and reputation.

However, making it compulsory is a bit like compulsory unionism and the principle certainly didn't benefit consumers when it was compulsory for real estate agents to belong to the REINZ.

While the motive to encourage a better trained and accredited industry is commendable, this should be driven by the industry itself, along with its desire to become more professional, more knowledgeable and provide a superior service to the segment.

While I am a passionate member of the newly founded SCANZ and it would be given a boost with a larger pool of members, I consider it to be wrong to insist that all body corporate management companies join it, or any other similar organisation.

Body corporate managers should be engaged on their merit and their professional groups should also be encouraged to attract new members based on the value of being a member. Making either of those options mandatory will simply slow down the improvement that is now being made across the sector.

3. Just sack them and get another

There is a simple solution for bodies corporate who are unhappy with their manager. Sack them and try out another. Ultimately the market will sort it out.

I'm not sure why we're even talking about this.

4. There appears to be little enthusiasm or support for an industry agency at official level

It is clear in the discussion document and from feedback at the workshops, that there is little support for an industry authority at official level. That's disappointing because it's probably the only thing that would make a real difference.

Consider this. The word "must" is written 284 times in the UTA. Yet there are no follow ups or checks by any authority to determine whether or not bodies corporate are compliant. This is even when there is hard evidence that a body corporate is not compliant.

There are no investigations, audits or sanctions. Ever. There is no supervision. It would be hard to find a body corporate that is fully compliant. Most don't even know they aren't compliant because no member has ever read the UTA. They don't have to because it appears that nobody in officialdom cares whether they do or not.

So now we all sit around and waste an enormous amount of collective time to add a few more "musts" to the UTA which will change nothing. Because bodies corporate know that they can ignore the legislation with impunity.

The message is simple. If the rules aren't enforced, nobody follows the rules. Especially if the rules are deemed to be stupid.

I have said to many people, you can just about do what you like because there are no unit titles police.

But if we really want to effect change, that's exactly what is needed.

Part 6

Summary of the recommendations in this submission

1. Appoint an industry authority similar to the REAA to oversee the segment. It's primary role would be to ensure that every body corporate is compliant with the legislation. It would be funded by levying owners.
2. Make changes to the disclosure regime so that a copy of the LTMP is supplied to prospective buyers before confirmation.
3. Require that all known significant defects and building related issues including weathertightness are disclosed or that the body corporate warrants there is none.
4. Require that the body corporate is to be aware of the weathertightness standard of its buildings and investigate any matters that indicate a significant defect exists.
5. Change UTA S117 so that use of a Fund is not restricted, providing the body corporate can demonstrate that it can pay for any planned maintenance when it will become due.
6. The committee should distribute minutes of its meetings to all owners within a certain timeframe.
7. Replace the word "cover" in S30 of the Regulations so that a LTMP includes a description and condition assessment of every building element, item of infrastructure and all common property.
8. Require mandatory audits of financial statements when a body corporate holds a significant amount of owner's money.
9. Change the rules relating to committees so that only one owner from each unit can be a committee member.

This submission does not support any of the other proposed changes and in particular,

1. The proposal to create arbitrary sizes of developments based on the number of units and generally increasing the compliance for the larger ones.
2. Making it mandatory for any body corporate to appoint a body corporate manager, use a qualified person to create their LTMP, not be able opt out of having a long-term maintenance fund and not being able to opt out of an audit.
3. Making it mandatory for body corporate managers to belong to a professional organisaiton.
4. Extending LTMPs to 30 years.