OXYGEN
LIFTING PROPERTY PERFORMANCE

Consultation on the Unit Titles Amendment Bill (UTAB)

Submission
1 February 2013

1. Assessment and re-assessment of Utility interest - s41

The Act currently allows for review of the Ownership and Utility interest to be conducted following the depositing of the plan. There is a time restriction between re-assessments of 36 months. MBIE has raised the possibility that this timeframe may be too long and clarity is required around the wording used. MBIE is proposing to reduce this to six months giving the Body Corporate a shorter time frame and option to review allocations if they wish to do so.

We agree the time frame is too long at 36 months and support MBIE's recommendation to reduce it to 6 months.

We also submit the following:

The difference between Utility Interest and Ownership Interest is not as clear as it should be and requires further clarification. We have received feedback that Utility Interest is a very sensitive topic in most bodies corporate and can cause the most disagreement amongst owners.

s41(5)(b) states that any reassessment of the Utility interest may be made by the Body Corporate on a "fair and equitable" basis having regard to the relevant benefits and costs. On what basis can "fair and equitable" be decided – is that by a registered valuer? Is it by the Body Corporate? s41(5)(a) states that any reassessment of Ownership interest must be made by a registered valuer but no guidance is given about the reassessment of Utility interest. We recommend that MBIE give clarity by defining "fair and equitable" and identify utilities and methods which could be included in assessing Utility Interest formulas should a Body Corporate wish to review its Utility interest.

Clarity needs to be given why Ownership Interest is assessed by valuers on the basis of relative value of the unit in relation to each of the other units.

We suggest that the UTA 2010 is not prescriptive enough for valuers. There is no definition of what "relative value" is, and we have been advised that valuers use "market value". For mixed-use buildings, this is particularly inequitable, as commercial, office and residential values keep changing and are often at variance with one another. A valuable ground floor commercial unit, which does not use the lifts or lobby, could be contributing to some very expensive operating costs based on value.

Unlike market value, the cost of providing facilities in relation to each unit is more likely to be consistent over a long period of time; any assessment that factors them in would mean that owners would contribute to the Body Corporate funds as a user, rather than how valuable or not their unit is in relation to others. The current wording of the Act appears not to have addressed this inequality.

2. Mortgagee consent to voting - s96(5)

Requires an eligible voter whose interest in his or her unit is subject to a registered mortgage must, if required by that mortgage, obtain the consent of the mortgagee before exercising a vote.

MBIE has commented that there has been confusion around this requirement particularly whether the Body Corporate should be obtaining evidence that consent has been obtained. The proposed change will place the onus on such consent being obtained on the unit holder and not the Body Corporate. It will allow a unit owner who votes at a general meeting without obtaining the consent of their mortgagee, to have their vote counted even though this may be in breach of their mortgage terms. If there is a breach, the matter is between the unit holder and their mortgagee not with the Body Corporate.

We support the MBIE's recommendation as it is not for the Body Corporate to police mortgage agreements.

3. Decisions by bodies corporate - s101(1)

Section 101(1) of the Act states that any matters at a general meeting of a Body Corporate relating to an exercise of a duty or power that may not be delegated under section 108(2), or that have not been delegated to the Body Corporate Committee, must be decided by special resolution.

MBIE have commented that there has been some confusion around what this actually means and it appears that some bodies corporate have interpreted that many decisions need to be made by special resolution. The Act, however, is fairly clear what decisions are ordinary and those that are not.

The proposed amendment provides that a Body Corporate must make decisions by special resolution where they are required to do so under the Act and its regulations and the type of resolution required when delegated to the Body Corporate Committee does not change with that delegation.

We support MBIE's recommendation.

4. Insuring of stand-alone units – s135

Requires all bodies corporate to insure their buildings and other improvements to their full insurable value. Section 137 states that where principal and accessory units in the unit plan are stand-alone units, a Body Corporate may, by special resolution at a general meeting, require each unit owner to insure all the improvements within the boundaries of his or her unit. The Body Corporate continues to remain responsible for insuring all improvements within the common area.

MBIE states that for a unit to meet the definition of being a stand-alone unit, it must not contain buildings that are attached to buildings in other units. MBIE states that in some circumstances, unit title developments consist of separate buildings and the main structure is contained in a principal unit (for example a residential townhouse) and attached to a secondary structure (such as a garage) contained in an accessory unit. It would appear under the current wording of the Act that buildings that are freestanding do not meet the definition of a stand-alone unit because they cross the boundary between two units. A proposed amendment is that the definition of stand-alone unit be changed to include a principal unit and adjacent accessory unit that contain attached buildings but are otherwise freestanding as long as the units are in the same ownership.

MBIE is proposing an amendment that will allow unit title developments with the option of each unit owner being able to insure improvements in their own units. However, the definition will not extend to where principal units and accessory units are sold separately. In that circumstance, the Body Corporate will need to insure all units in the development.

In the current insurance market, if a Body Corporate qualifies under this provision and particularly if they are a freestanding residential low-rise block (e.g. townhouses), they may have the option of taking out their own insurance. We suggest that MBIE consider highlighting the risk of a Body Corporate passing this special resolution in an information leaflet or on the MBIE website to ensure that bodies corporate understand this section properly. The risk is that if a Body Corporate passes this special resolution, owners will be forced to rely on each other that they have adequate insurance required under the Act. With the one policy, the Body Corporate has control that its buildings, improvements and common areas are fully insured and the security that they are complying with the Act.

If owners are given the power to individually insure their buildings, we suggest that the MBIE consider an amendment to give the Body Corporate power to clean up a site where an owner has not insured and does not repair damage or clear the site. We support measures that may help reduce the cost of insurance for owners but only if it is balanced with remedies other owners can take should the enjoyment of their unit or complex be hindered through an owner who has not insured or has underinsured their unit or does not repair damage within reasonable timeframes.

5. Disclosure statements

Currently under the Act, the pre-settlement disclosure statement must be provided under section 147(2) of the Act by no later than the fifth working day before the settlement date. The timeframe for settlement has largely been dictated to by compliance with the Act in furnishing disclosure statements and doesn't take into effect shorter periods of settlement where the documentation may not be able to be received in the required timeframe. MBIE has stated that in some circumstances this may lead to postponement of settlement, or cancellation of the agreement for sale. It also limits the timeframe for an additional disclosure statement to be received.

MBIE is proposing that an amendment is required to allow parties to contract out of the requirements to provide a pre-settlement or additional disclosure statement in the circumstance of a short settlement period, providing that the preparation of disclosure statements is not practical. MBIE is also proposing an alternative; that parties may provide in the sale and purchase agreement a shorter time frame for the provision of the disclosure statements.

The latter of the two proposals giving a shorter timeframe would seem more prudent of the two options and the one that we support. We do not support the suggested opt out option.

By allowing buyers and sellers to opt out of this requirement undermines the whole reason disclosure statements are required under the Act. By electing for a shorter time frame means that the Act recognises that some sales settle faster but this is no reason to remove this consumer protection. If it was removed real estate agents may have parties to the contract agreeing on opting out without the parties understanding the protection the disclosure regime provides.

We recommend further that the Additional Disclosure statement be made compulsory or that some of the information currently contained within this optional statement be moved to the pre-contract disclosure statement. Our recommendation stems from our experience that most of the valuable information about a Body Corporate is contained within this particular but optional disclosure statement.

We do not believe valuers can properly value a unit without regard to the information in the Pre-Contract and Additional Disclosure Statements. New owners would receive operational rules, long term maintenance plan, contracts entered into by the Body Corporate etc, being some of the most important consumer protection information available for the buyer. An understanding of the complex also enhances the quality of living within a Body Corporate.

We also recommend adding a provision for the seller to provide a copy of the insurance policy with the pre-contract disclosure statement and further to provide a certificate of currency for the insurance in the pre-settlement disclosure statement. Providing a copy of the insurance policy with the pre-contract disclosure statement is an important part of the due diligence process and because some units take time to sell, the certificate of currency with the pre-settlement statement provides assurance that the insurance is still in place.

The Auckland District Law Society has decided that it is so important for the vendor to provide this to the purchaser within 5 working days before settlement, that they have made it a requirement in their Agreement for Sale and Purchase. We submit that this requirement be reflected in the UTAB.

We submit further that r33(d) should provide more clarity in terms of what is defined as the last financial statement. Is it an update to date financial statement, or is it the end of year financial statement approved at the last held AGM.

6. Cancellation by buyer – s151

Section 151 of the Act gives the buyer the option to cancel the contract if a pre-settlement or additional disclosure statement has not been provided in the required timeframe. Currently, the buyer must provide 10 days' written notice that they will be cancelling the contract.

We do not agree with the removal of this clause. We recommend that the seller be given the opportunity to remedy the breach within five or 10 days before cancellation may be effected. We do not believe that the intent of the Act was to allow the buyer to cancel without a chance of remedy by the seller. It would be unreasonable for immediate cancellation by the buyer and would create a significant detrimental effect to the seller and other parties when late delivery may be as a result of something other than the seller being at fault.

7. Poll Votes

We have received feedback that these are unfair and hardly ever used. We submit that it is almost impossible to know during any particular meeting whether a motion has passed by having to add up the ownership interest of each owner at the meeting. There could be decisions that depend on the outcome of the poll vote and without having the facilities to add up the votes at the meeting could stall a meeting. Further, a vexatious owner could request poll votes after every single motion. One vote should equal one vote and not more.

8. 10% Interest Per Annum – s128

There are too many examples of owners not paying their levies. Levies paid by other owners are effectively providing cheap loans and financing bad payers. Many bodies corporate have financial struggles because of recidivist non payers. In this regard, 10% is too little and a hangover from the UTA 1972. Overdraft rates are typically 20+%. We have received feedback that a Body Corporate should be able to set its own interest rate and/or penalties with interest being in the confines of normal lending practice as 10% does not act as a deterrent and is effectively a cheap loan.

9. Cancellation of Insurance – s136

The Act is silent on the process that an insurance company must take to cancel a policy. Currently they can cancel with 30 days written notice. The way that the Act is currently worded would allow an insurance company to add such a notice in the renewal statement/invoice. We suggest the intention is to provide a separate notice and probably after the date for renewal has passed.

10. Committee Meeting Minutes – r27(5)

The Body Corporate Committee must provide minutes to a unit owner if the owner requests them. The inference is that the Committee must keep minutes but the Act is silent on this point. We recommend that r27(5) be changed to require the Committee to keep minutes of its meetings.

11. Duties of Chairperson – r11

Regulation 11 sets out a fairly comprehensive list of the duties of a Chairperson. Often this list has been a stumbling block to elect a Chairperson each year given the lack of clarity whether the duties are personal to the Chair or whether they ultimately default to the Body Corporate. The proposed change will clarify that these are ultimately the responsibility of the Body Corporate. We support this change.

Currently there is no provision whether these duties can be contracted to a Body Corporate manager in a service agreement being both a practical and sensible option and what many well run bodies corporate have implemented anyway as a Chairperson can't possibly be expected to carry out all these tasks. However, the responsibility should fall back on the Body Corporate regarding any such contractual delegation and should there be a contractual breach by a manager/secretary that becomes a civil matter for a Body Corporate. The delegation should not mean that a manager/secretary is ultimately responsible for the duties of the Body Corporate as they are servants to the Body Corporate under a service agreement.

We do not consider that this amendment is "minor" or "technical" but nonetheless what tends to happen in reality and therefore we support it.

12. Method of Contracting

This requirement has been an interesting and at times a time consuming one for larger blocks. Regulation 17 defines obligations "as contracts or other enforceable obligations". Regulation 17 states that a Body Corporate may not enter into an obligation without the Body Corporate's approval by ordinary resolution. The obligation is to be entered into in writing by the Chairperson, or by the Committee Chairperson if this power has been delegated to a Body Corporate Committee, and must be witnessed by another member of the Committee or where there is no Committee, another member of the Body Corporate.

MBIE is proposing that the regulation be expanded to cover a wider range of documents such as notices, certificates and registrable instruments, and allow the Body Corporate to authorise other signatories other than that of the Chairperson or Committee Members to release the time consuming nature of this provision. We agree with this provision for managers and secretaries to have the mandate to effect the body corporate's requirements and therefore to take the pressure off the Chairperson and Committee having to deal with numerous requests.

We do not believe that this regulation was intended to encompass instructions to contractors for running repairs and maintenance, but as the Act is not clear, a Body Corporate must currently assume that any type of work order is an obligation. It is not practical to call for an ordinary resolution for every non-urgent job. We suggest that MBIE consider the meaning of "obligation" in r17(6) to include "service contract".

13. A seller must rectify any inaccuracies in a disclosure statement – s151

We recommend that a new form be created in the Regulations and that such form be called a "Correcting Statement" as outlined below:

Correcting Statement
s150, Unit Titles Act 2010

Date Prepared:	[insert date]
Unit Plan:	[reference number]
Body Corporate Name and Number:	[Body Corporate name and number]
Unit Number:	[number]

Further to the [Pre-Contract/Additional/Pre-Settlement] Disclosure Statement prepared on [date] we now inform you that the following information contained in that statement [was inaccurate/has since become inaccurate].

Please note that [describe the change/amendment . . . .]

Signed: _____ Date: _____
Signed by the Seller
or their authorised person

14. A Body Corporate is an entity whose position can change daily (e.g. bank balances) and we recommend that clarity be given by MBIE that the above statement is issued on the understanding that the word 'inaccurate' under section 150 UTA 2010 means 'with error' and does not mean 'changes'; nor does it expect the seller to notify the buyer of changes which occur outside of resolutions and minutes of general meetings of the Body Corporate.

15. Tenancy Tribunal Costs

We do not support the introduction of an hourly rate for Tenancy Tribunal hearings. The intent of the Act was to provide an accessible resolution service for an aggrieved party and part of that process should be mediation. The parties should know how much the process will cost. We submit that an unknown cost will act as a deterrent to the intended accessibility of the Tenancy Tribunal service. Matters heard under the Residential Tenancies Act 1986 are not based on an hourly basis. An hourly rate would become prohibitive given that Tenancy Tribunal hearings, like most court hearings, take time to be heard.

We also support a provision that would allow the Tribunal to award costs against a complainant who in the Tribunal's opinion was being vexatious and wasting the court's and Body Corporate's resources.

16. Long Term Maintenance Plan

We believe that the Act has imposed an onerous and costly requirement on simple complexes, especially owners of stand-alone units who each take responsibility for their own maintenance (and insurance). We recommend a lesser or simpler requirement for stand-alone units in order to reduce unnecessary property ownership costs.

17. Provide Owner Details to Insurer (s134(5))

We do not believe that the Act should impose this requirement on an owner. Some insurance companies do not need or want this information. It exposes the owner of a unit entitlement if they have not made updates to their insurer and should an insurance claim be submitted, it may give the insurance company an unjust opportunity to decline the claim.

We recommend that at the least, an amendment be made that does not allow an insurance company to decline a claim based on information under this section not having been provided by an owner.

18. Notice of Committee Meetings

The Act extensively covers the procedure for notices with regard to Body Corporate meetings but is silent on the procedure for Committee meetings. We recommend that the Act be amended to say how much notice should be given for a Committee meeting and the procedure for the notice. We suggest that one week notice is sufficient and there be less notice for any urgent matters.

19. Committee Quorum

The method in the Act for establishing what a quorum of the Committee should be is cumbersome and takes up unnecessary time at an AGM. We recommend a quorum be established clearly in the Act of 50% or more of the Committee members being present (and that they are financial) and that there should not be less than 2 Committee members present in any Committee meeting.

20. Apportionment of levy contributions upon sale of units

We recommend that the Act make it clear that any levies a proprietor has paid or is due to pay belongs to the Body Corporate and cannot be claimed back (unless the Body Corporate votes to make a distribution to its membership). The ADLS Agreement for Sale and Purchase 9th Edition 2012 makes important mention of this matter and sets out rules in clause 8.2(2)(b) ASP.

We recommend that due to some sales not using this Agreement, provision be made in the UTAB. We suggest that provision should state that a Body Corporate cannot allow apportionment of contributions to any Long Term Maintenance Fund, Contingency Fund or Capital Improvement Fund.

21. Body Corporate Chairperson Not Automatically a Member of the Committee

We recommend a review of this odd structure. We believe that the Act is correct in entitling a Body Corporate Chairperson to attend Committee Meetings and we recommend further that the Act should state that the Body Corporate Chairperson is automatically a Committee Member. In practice we note that it is common for the Body Corporate Chairperson to also be appointed Chairperson of the Committee and having a separate Chairperson for the Committee is rare.

22. **Regulation 33D and 35B**

r33D is repeated in r35B. Given that the Pre-Contract Disclosure Statement is compulsory it is unnecessary to duplicate this in the Additional Disclosure Statement.

23. **Reference Section 1, 22 Disclosure Statements – MBIE Consultation Document**

When disclosure statements are deemed to have been received.

We do not support the MBIE proposal to allow the buyer and seller of a unit to set out in the agreement for sale and purchase the methods by which a disclosure statement may be delivered.

This would mean risk to the buyer or seller as such detail is likely to be hidden in a small print clause.

The method should be uniform throughout NZ and the UTA is the best place to achieve this.

Whilst most sales are written on the ADLS Agreement for Sale and Purchase, not all are, and it is very common for brand new unit title sales to be made on purpose written agreements.

The consequence of having a non-standard method would unnecessarily complicate this and increase the chances of one or both parties to a contract getting the method wrong.

Thank you for your consideration of our submissions.