

In Confidence

Office of the Associate Minister of Housing (Public Housing)

Chair, Cabinet Economic Development Committee

## **Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill: Further Policy Proposals**

### **Proposal**

1. I am seeking Cabinet approval for three further proposed policy changes to the Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill (the Bill), which I intend to introduce via Supplementary Order Paper. These policy changes build on my earlier proposals to ensure the regulatory framework for the unit titles sector is fit for purpose in a growing market.

### **Relation to government priorities**

2. This Government is committed to improving the wellbeing of people. Housing plays a fundamental role in wellbeing and the Government has prioritised improving housing outcomes.
3. This Government made a pre-election commitment in 2020 to review and reform the Unit Titles Act 2010 (UTA). The Government recognises that more New Zealanders are choosing to live in apartments and townhouses. The Government wants to ensure the UTA is fit for purpose and modern.

### **Executive Summary**

4. The UTA provides a regulatory framework for the ownership and management of building developments where multiple owners hold both private and common property. The Bill is a Member's bill which introduces a range of changes to the UTA in relation to pre-purchase disclosure, body corporate managers, body corporate governance, long-term maintenance planning, and dispute resolution.
5. During the select committee process, various submitters raised issues in relation to the Bill and other matters in the UTA. Many of these issues were addressed in my previous paper proposing a range of amendments to the Bill [DEV-21-MIN-0172 refers].
6. This paper sets out my recommendations for further amendments to the Bill in response to some further issues. I propose to:
  - 6.1. introduce a scale costs regime for unit title disputes at the Tenancy Tribunal (Tribunal), similar to those already used by the District Court and the High Court

- 6.2. provide that matters which require a decision by special resolution of the body corporate may not be delegated to a body corporate committee
- 6.3. to extend provisions which allow unit owners to apply to receive compensation for, or to terminate, service contracts in certain circumstances, to signage licenses
7. If Cabinet agrees to my proposals, Parliamentary Counsel will draft a Supplementary Order Paper (SOP) implementing these changes. I intend to bring the SOP to the Cabinet Legislation Committee (LEG) in early 2022 to meet the likely timeframe for the Committee of the Whole House stage for the Bill.

## **Background**

8. The UTA provides a regulatory framework for the ownership and management of building developments where multiple owners hold both private and common property. The unit titles sector has been seeking reform for some time to address a range of practical challenges with the UTA. This resulted in a previous Government review of the UTA in 2016-17.
9. This Government made a pre-election commitment in 2020 to review and reform the UTA. The Bill introduces a range of changes to the UTA in relation to pre-purchase disclosure, body corporate managers, body corporate governance, long-term maintenance planning, and dispute resolution. Although the Bill is a Member's Bill, the Government has agreed to support it. The Bill is currently before the Finance and Expenditure Committee (the Committee), and is due to report back by 3 December.
10. During the select committee process, various submitters raised issues in relation to the Bill and other matters in the UTA. Many of these issues were addressed in my previous paper proposing a range of amendments to the Bill [DEV-21-MIN-0172 refers]. This paper sets out my recommendations for further amendments to the Bill in response to some further issues, which were not included in the Departmental Report.
11. My objectives for reform to the UTA are to:
  - 11.1. provide greater protection for current and prospective unit title owners;
  - 11.2. encourage prospective homeowners to consider apartment and other high-density living as a viable and attractive alternative to free-standing houses;
  - 11.3. ensure it is enabling for the growth in high-density living.

## **Further proposed changes**

12. If Cabinet agrees to my proposals, Parliamentary Counsel will draft an SOP implementing these changes. I intend to bring the SOP to LEG in early 2022 to meet the likely timeframe for the Committee of the Whole House stage for the Bill.

### *Scale for costs awarded in the Tenancy Tribunal*

13. The Tribunal has jurisdiction to hear and determine all disputes under the UTA, except those that:
  - 13.1. would ask the Tribunal to make an order requiring any person or body to pay any sum, or to do any work to a value, or otherwise incur expenditure, in excess of \$50,000 (the Bill would increase this to \$100,000); or
  - 13.2. relate to the application of insurance money under section 136(4); or
  - 13.3. relate to the title of land.
14. Tribunals are intended to be an efficient and low-cost means of dispute resolution. This is partly because parties usually do not need to (and in many cases cannot) be represented by legal counsel, meaning lower costs to be either borne by the applicants or passed on to the unsuccessful party.
15. Despite this, sometimes parties at the Tribunal can be represented by legal counsel; and consequently, under section 102 of the Residential Tenancies Act 1986 (RTA) – which, along with most of the RTA provisions establishing the Tribunal, applies to unit title disputes at the Tribunal by virtue of section 171 of the UTA – the Tribunal does have the power to award costs as part of their ruling in a number of circumstances. My officials understand that, as a general rule, when awarding legal costs as part of a decision, the Tribunal will scale these costs, typically awarding between 40 and 70 percent of actual costs incurred.
16. This approach is similar to that used in the District and High Courts, where a set scale (set out in the District Court Rules and the High Court Rules) is applied, and sees costs awarded at a typically lower rate than the costs actually incurred. This provides a check and balance on the reasonableness of legal costs, and moderates the level of legal fees a party is willing to incur.
17. An exception to this approach has arisen in the context of unpaid levy recovery. The UTA states that the amount of any unpaid levy, together with any reasonable costs incurred in collecting the levy, is recoverable as a debt due to the body corporate. A body corporate is entitled to recover its reasonable legal costs (as part of the reasonable cost incurred in collecting the levy) if it is successful in a claim.<sup>1</sup>
18. The UTA allows parties to be represented before the Tribunal by an agent. It appears that some lawyers are arguing they are appearing as agent, not as legal representation. This means that lawyers may in practice appear in the Tribunal (and consequently have their costs passed on) where the dispute doesn't otherwise meet the criteria for legal representation.

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<sup>1</sup> *Body Corporate 162791 v Gilbert* [2015] NZCA 185.

19. This has created a disparity between the Tribunal's approach to levy recovery disputes (where any reasonable legal costs incurred as part of the recovery must be passed on) and their approach to other matters (where any legal costs are passed on at a lower rate). It also creates a disparity between the approach applied in the Tribunal and that applied in the higher courts, where scale costs do apply.
20. To address this disparity, I propose to amend the UTA to allow a costs scale to be set in regulations, similar to those used in the District and High Courts. The development of the scale itself will be done in consultation with the sector.

#### *Voting on special resolutions*

21. All the unit owners in a unit title development are members of the body corporate. Some bodies corporate choose to establish a body corporate committee, to undertake some of their functions. Section 108 of the UTA allows the body corporate to delegate most of its duties or powers to the body corporate committee, with a few exceptions.
22. Most decisions made by the body corporate can be made by a simple 50 percent majority. Some matters require a special resolution, or a 75 percent majority. These decisions are potentially significant, for example, agreeing to a subdivision, or agreeing to vary covenants.
23. In contrast, all decisions by the body corporate committee can be made by a simple majority. Submitters on the Bill noted their concern that a matter that would require 75 percent support at a general meeting would only require 50 percent support in a much smaller committee meeting. Some submitters also noted that in practice, a body corporate committee would typically send a matter that requires special resolution back to the body corporate to decide, but there is no legal requirement to do so.
24. I propose amending the UTA to provide that matters which require a special resolution under the UTA cannot be delegated to a body corporate committee. I consider that this approach would ensure that those special resolution decisions are consulted and agreed upon using the 75 percent threshold, as was intended by Parliament in introducing this threshold.
25. This amendment would also ensure that special resolution decisions are considered by the larger decision-making group – the body corporate, rather than the body corporate committee. This allows for the best opportunity to engage with unit owners on decisions that can be permanent or long-lasting, and which may affect the rights and obligations of unit owners. This amendment also provides clear direction for what matters may be delegated to the body corporate committee, and what must remain the responsibility of the body corporate as a whole.

#### *Extending service contract protections to signage licenses*

26. Developers of unit title developments can choose to enter into service contracts on behalf of the body corporate before units are sold to unit owners, for

example, services relating to building management, lifts or grounds. These service contracts remain in place between the body corporate and the service provider when the units are sold to unit owners.

27. Section 139 of the UTA requires a developer to ensure that the service contract balances the interests of the service contractor and the body corporate, and to ensure the contract terms, powers and functions are appropriate for the unit title development. This is intended to prevent the developer from binding future unit owners to contractual terms that are inappropriate or unfair. Section 140 of the UTA provides that service contracts can be terminated, or compensation can be ordered, where the developer has not complied with section 139.
28. Submitters to the Bill recommended extending section 140 to include signage agreements providing advertising. Some submitters noted that some developers enter long-term signage arrangements that benefit the developer. These arrangements sometimes prevent unit owners from receiving the true market value of advertising or signage on the building.
29. I propose extending these service contract protections to include signage agreements. I consider that allowing unit owners to apply to terminate or receive compensation for inappropriate or unfair signage agreements will ensure that the original owner or developer does not unfairly disadvantage future unit owners.

### **Financial implications**

30. There are no financial implications from these proposals. The financial implications of the earlier amendments to the Bill have been considered previously by Cabinet [DEV-21-MIN-0172].

### **Legislative Implications**

31. Should these proposals proceed, amendments will be required to the UTA. Parliamentary Counsel will draft an SOP, which I intend to bring to LEG in early 2022.
32. The UTA will include a regulation-making power in relation to the scale costs proposal. Regulations will need to be made to give effect to a cost scale.

### **Regulatory Impact Statement**

33. Treasury's Regulatory Impact Analysis team has determined that the proposals in relation to extension of section 140 of the Unit Titles Act to signage licenses, and clarifying that matters requiring special resolution cannot be delegated to the body corporate committee, are exempt from the requirement to provide a Regulatory Impact Statement on the grounds that they have no or only minor impacts on businesses, individuals and not-for-profit entities.
34. A regulatory impact assessment (RIA) has been prepared by the Ministry for Housing and Urban Development in accordance with Treasury requirements and is attached to this paper as **Annex A**.

35. A Quality Assurance Panel from the Ministry for Housing and Urban Development reviewed the RIA. The Panel considers that the RIA partially meets the quality assurance criteria. It has concluded that the assessment is complete, clear, concise and convincing. The assessment acknowledges that all affected parties have not been consulted on the proposed options as the issue they address was raised in a submission to the Select Committee considering the wider Unit Titles Amendment Bill.
36. The RIA and Quality Assurance Panel both note, however, that in the event that the preferred option is adopted, consultation with key stakeholders would take place during the development of enabling regulations.

### **Climate Implications of Policy Assessment**

37. The Climate Implications of Policy Assessment (CIPA) team has been consulted and confirms that the CIPA requirements do not apply to this proposal as the threshold for significance is not met.

### **Population Implications**

38. There are no population implications associated with the proposals in this paper.

### **Human Rights**

39. The proposals in this paper are consistent with New Zealand Bill of Rights Act 1990 and the Human Rights Act 1993.

### **Consultation**

40. The following agencies have been consulted on this Cabinet paper: Land Information New Zealand, the Ministry of Business, Innovation and Employment (Housing and Tenancy; Building and Construction), Kāinga Ora-Homes and Communities, the Ministry of Justice, the Treasury and the Department of the Prime Minister and Cabinet. Parliamentary Counsel Office has also been consulted.
41. The public has had an opportunity to submit on the proposals in the Bill. Their submissions have informed the development of the proposals recommended in this paper.

### **Communications**

42. As the Bill is currently before the Committee, I do not propose any publicity at this time.

### **Proactive Release**

43. I intend to proactively release this Cabinet paper once the SOP has been tabled in Parliament. This means the release of the Cabinet paper is likely to be delayed beyond 30 business days.

## Recommendations

The Associate Minister of Housing (Public Housing) recommends that the Committee:

1. **note** that the Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill, a Member's Bill, is being considered by the Finance and Expenditure Committee, and is due to be reported back by 3 December;
2. **note** that Cabinet previously agreed to a range of proposals to amend the Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill [DEV-21-MIN-0172 refers], which were addressed in the Departmental Report;
3. **note** there is a further opportunity to amend the Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill through a Supplementary Order Paper;
4. **agree** to amend the Unit Titles Act 2010 to allow the making of regulations to introduce a cost scale for legal costs incurred for unit titles disputes in the Tenancy Tribunal;
5. **agree** to amend the Unit Titles Act 2010 to provide that decisions requiring a special resolution of the body corporate cannot be delegated to a body corporate committee;
6. **agree** to extend the service contract protections contained in the Unit Titles Act 2010 to signage licenses;
7. **authorise** the Ministry of Housing and Urban Development to issue drafting instructions to the Parliamentary Counsel Office to draft a supplementary order paper giving effect to Cabinet's agreement to the recommendations above;
8. **authorise** the Associate Minister of Housing (Public Housing) to make decisions on any minor or technical issues which arise throughout the drafting process, consistent with policy decisions;
9. **note** that I intend to table the supplementary order paper in Parliament in early 2022, in time for the Committee of the Whole House stage.

Authorised for lodgement

Hon Poto Williams

Associate Minister of Housing (Public Housing)

## **Annex A: Regulatory impact assessment**