

Review of the Unit Titles Act 1972
Discussion Document
November 2004
Department of Building and Housing

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I. Minister's Foreword

When the Unit Titles Act was first enacted, almost 32 years ago, unit developments were a new type of housing development. The use, scale and number of unit title developments have since changed considerably. Large scale, multi-storey unit title developments are now a relatively common feature of New Zealand's urban landscape. This trend to build up rather than out looks set to continue and accelerate, particularly in Auckland.

This discussion paper is designed to gather public comment and feedback on the act and how it might be improved to accommodate the current housing environment.

The Unit Titles Act 1972 facilitates medium and high-density housing developments by providing a system for:

- The creation and ownership of individual "unit" titles within a development, and
- The establishment of a body corporate, made up of the owners of those unit titles, to administer the common areas within the development and to carry out a range of management and administrative functions relating to the development as a whole.

In November 2003, the Government announced its decision to review the Unit Titles Act. A number of factors influenced that decision, including:

- the findings of the Law Commission in its 1999 Report "Shared Ownership of Land" (Report No. 59);

- work undertaken by the Auckland Regional Council² on the importance of the Act in the context of its policy to increase the region's housing density; and
- more general commentary from a variety of sources on perceived shortcomings with the Act.

This review also has links to other government initiatives and reviews including the review of the Residential Tenancies Act, the introduction of the Building Act 2004, the review of the New Zealand Building Code, the New Zealand Housing Strategy, the Sustainable Cities Regional Programme and the Urban Design Protocol.

The purpose of this discussion document is to identify aspects of the law relating to unit title developments that cause problems and may be in need of reform. It then seeks consumer, stakeholder and industry comment as to whether reform is required and what changes may be appropriate.

I welcome your views on the Act.

Hon Margaret Wilson
Minister for Building Issues

II. Overview of Discussion Document

What is the Unit Titles Act?

The Unit Titles Act 1972 is the legislation governing apartments, flats, townhouses, office blocks, shopping centres and other building developments where multiple owners hold a type of property ownership known as a "unit title".

A unit title is made up of individual ownership of a defined unit, such as an apartment, plus shared ownership with other unit title owners of shared areas known as "common property", such as a lobbies, lifts or driveways. Owners of unit titles are known as "unit owners".

A "body corporate" is a collective of all the owners of a unit title development. The body corporate manages and makes decisions about the building development and in particular the common property. All owners are entitled to be elected as members of a committee that manages and administers the body corporate. This committee is known as the "body corporate committee".

Broadly speaking, the Unit Titles Act covers the technical and legal aspects of creating and dealing with a unit title, and the rights and responsibilities of a body corporate.

Why Review the Unit Titles Act?

The Unit Titles Act was written in 1972, over 30 years ago. At that time unit developments, such as apartments and townhouses, were a new type of housing style. Since then the numbers of unit developments, and the variety of uses, has changed considerably. This trend is expected to continue and accelerate, particularly in the Auckland region where there is a significant increase in the number of medium- and high-density housing developments.³

The unit title form of ownership is complex, and changes to the way it is applied, or to the type of use it is applied to, can give rise to issues relating to the unit title itself and to the functioning of the body corporate.

The Act may no longer be appropriate to manage these current issues, or to create intensive development that is sustainable into the future.

Work on identifying issues with the Act has already been undertaken by the Law Commission and the Auckland Regional Council. The Auckland Regional Council, in consultation with unit title owners and representatives from across the industry, concluded that there are major deficiencies with the Act. Building on this work, the Government has decided to review the Act.

Purpose of this Discussion Document

The purpose of this discussion document is to raise key issues under three broad areas, and propose possible solutions, so that individuals, organisations and professions affected by the Unit Titles Act have the opportunity to make their views known through written comment known as a “submission”. These submissions will be considered as part of developing any recommendations about changes to the Act for Cabinet to consider.

Broad Areas for Discussion

A summary of the issues raised under the three broad areas in this discussion document are:

- i) unit titles: technical and legal aspects of creating, changing and administering a unit title
- ii) bodies corporate: the need to have one; different types; voting and decision-making; role, duties and functions; financial responsibilities; relationships with developers, members, owners and purchasers; resolving disputes

iii) other forms of shared ownership such as cross-lease and flat owning companies.

At the end of each section there are questions to which you can respond in your submission.

Have Your Say

You can make your written comment on issues raised in this discussion document by way of a submission. You will need to send your submission to the Department of Building and Housing⁴ by 28 February 2005. The process for making a submission is described on page 33.

III. Background to the Unit Titles Act 1972

Traditionally, owning a home involved owning the title (in New Zealand generally a freehold title) to a plot of land. Ownership of the plot of land in turn gave rise to ownership of the home, and other improvements, on the land. Traditional concepts of the ownership of property are, therefore, based first and foremost on the ownership of land.

Under the Unit Titles Act, the concept of a unit title focuses not so much on ownership of land, but more on ownership of part of, or a “unit” in, a building.⁵ The Act provides for the creation of titles to defined parts of a building or buildings (units), which may or may not include specific parts of the underlying plot (or plots) of land on which those buildings are erected. Unit titles are created when a plan, showing in schematic form the division of those buildings into numbered units, is registered – technically “deposited” – against the title to the land involved.⁶

With ownership of a defined part of the building, or unit, comes shared ownership of the common property.

The common property comprises any part of the land, or the buildings on the land that do not fall within the boundaries of individual units. While each owner owns the unit title to their individual unit, the common property is owned by all the owners of the individual units as “tenants in common”.⁷

As a matter of conveyancing practice and land law, unit titles can be sold, mortgaged and otherwise dealt with in much the same manner that freehold titles registered under the Land Transfer Act can.

There are, however, a number of fundamental differences between the “bundle” of rights that make up a freehold title and the “bundle” of rights that make up a unit title. These differences can be traced back to the basic definition of unit titles. Ownership

of a title to a plot of land normally gives the owner an exclusive right of occupation, and a subsequent right to exclude others. The extent of that right is defined by the surveyed boundaries of that property. In contrast, unit titles divide a property between a number of owners. The unit plan, by creating and defining the boundaries between the units, and between each unit and the common property, creates a set of relationships between the owners as “neighbours”. Those relationships are added to by the fact that the owners not only own adjoining “units”, but also own the common property as tenants in common.

The Unit Titles Act defines aspects of those relationships by providing:

- that owners of a particular unit development form a body corporate for that unit development
- for basic rules relating to the body corporate, to relationships between individual unit holders, and to relationships between unit holders and the body corporate.

Other aspects of those relationships are defined by the particular rules that may govern a unit development and its body corporate.

In many ways the issues raised by commentators on the Act and discussed in this discussion document reflect the tension between the fact that, while a unit title can be dealt with as easily as a freehold title, it brings with it a quite different set of legal relationships and obligations. These arise from the relationships that exist within a unit title development between the individual owners, the body corporate and a range of other parties.

The Unit Titles Act was passed in 1972, and was based on Victorian and New South Wales legislation of the 1960s. Although the Act has been amended since that time, principally in 1979 to provide for what are known as “staged developments”, in overall terms it remains very much the piece of legislation that was first drafted in the early 1970s. By contrast, similar Australian legislation, particularly in New South Wales and Queensland, has been extensively reformed and revised. That process continues, with a number of the Australian states currently reviewing aspects of their “strata titles” law, as unit titles are referred to in Australia. Victoria, for example, is currently undertaking a review of its laws in this area, as is New South Wales and South Australia.

Given the time that has passed since the Act was first brought in, developments in the housing market since that time and developments in this area of law overseas and in particular in the Australian states, any review of the Act in New Zealand today inevitably raises a wide variety of issues.

To help organise those issues, and to focus responses, this discussion document has been divided into the following sections:

- creation and administration of unit titles
- the requirement for, and the rules of, bodies corporate
- the functions of bodies corporate
- relationships between bodies corporate, owners and others (including developers and property managers)
- enforcement and dispute resolution
- cross-leases and flat-owning companies
- form of legislation
- other issues.

There is inevitably a degree of overlap between these sections. Submitters should feel free, when responding to questions asked in one section, to refer to material provided in another section.

The Government acknowledges the very valuable work that has already been done in this area by the Law Commission and by the Auckland Regional Council. This discussion document reflects, and builds on, the work of both of those organisations.

IV. Issues

Creation and Administration of Unit Titles

This section focuses on a number of somewhat technical aspects of the way unit titles are initially created by the deposit of unit plans. It also focuses on the administration of unit plans, and particularly changes to the details of unit titles as defined on those plans, over time.

These, however, can be very practical issues for unit title owners. For example, the Unit Titles Act currently makes very minor changes to boundaries a costly and complicated exercise.

Physical dimensions of units

The Law Commission recommended that the Unit Titles Act should be amended to expressly provide that units should be able to be made up partly or wholly of open space. Although the definition of the term “unit” in the Act does allow for this, a variety of other provisions effectively require units to be defined by reference to the physical boundaries of buildings. The Law Commission identified a number of advantages to their recommendation, including facilitating the protection of privacy and the making of alterations and extensions to units. It reported general support for this proposal.

Questions

1. Have you ever been involved in problems relating to boundary definitions under the Unit Titles Act?
 2. Do you agree with the Law Commission's recommendation that the definition of the term "unit" should expressly allow for units to be made up of partly, or wholly, open space? What are your reasons?
 3. If this change was made, would other issues need to be addressed, for example standard rules for minor alterations such as the addition of porches or conservatories?
 4. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?
-

Boundaries

At the moment, a developer is free to determine where the boundaries of each unit will be and, subject to the statutory easement provisions of section 11 of the Unit Titles Act, which parts of the development will be common property and which parts will be individually owned. This leaves to each developer and surveyor a number of very significant decisions that can have a major impact on the future maintenance and administration of the development. The lack of consistency in such decisions is considered to be a significant cause of many disputes. For example:

- if the boundary between two units is the centre of a common wall, who is actually responsible for the maintenance of the wall
- if the outer walls of a development are not common property, but owned individually, what happens in a high-rise development when the walls of a unit on level 23 start to leak, causing problems all the way down the building, or if the building needs painting?

Questions

5. Have you ever experienced difficulties or problems relating to where the boundaries of units have been? If so, how serious a problem has it been?
6. Should the Unit Titles Act control more strictly where the boundaries should be on a unit plan and what parts of a unit development are required to be common property? If so, describe how these could be provided for, for example by way of standardised formats for plans or minimum requirements.

7. How should exclusive use areas that effect the whole property be dealt with? For example, is there a case, particularly for large developments, for the individual unit title to include only the interior surface of the unit, and for all other structural elements to be common property?
 8. Are there other ways of addressing this issue, for example giving the body corporate a right to undertake work on units, as opposed to the common property, or requiring unit owners to repair defects within their own unit title if failure to do so could cause damage to the building? Please describe your proposal and how you think it would solve the problem.
 9. Have you ever experienced difficulties or problems relating to the ownership of utilities such as water pipes and electricity lines? If so, how serious a problem has it been? How could the problem be addressed?
 10. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?
-

Staged developments

The Unit Titles Act was amended in 1979 to provide for what are known as “staged developments”. These provisions enable owners of land to deposit unit plans that do not provide for the complete development of the land into units. Rather, part of the plan sets out what is known as a future development unit. That future development unit is, in turn, developed at a later date, under a further unit plan.

The Law Commission identified certain issues with these staged development provisions such as the cost of producing a new unit title plan, and the difficulty in obtaining consent to a new plan from all parties involved, if a variation is made to the future development unit.

However, the Law Commission concluded that if units can be comprised wholly of open space:

- there was no further need for the “staged development” provisions of the Act
- “early” owners of units in a unit title development could be adequately protected from subsequent development by provisions in a contract and by the Resource Management Act. The Law Commission saw the position of owners of units of a yet-to-be completed unit title development as being essentially the same as the position of house buyers in a yet to be completed subdivision.

11. Do you agree that, if units can be comprised wholly of open space, the staged development provisions of the Unit Titles Act are no longer required?

12. Were that reform to be adopted, do you think unit owners require any special protections from the future development of “open spaces”? If you agree with the Law Commission that contractual provisions and the Resource Management Act can protect unit owners from subsequent development, do you nevertheless think it would be a good idea to provide for statutory protection as a consumer protection measure?

13. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?

Access ways, easements and covenants

The Unit Titles Act does not currently provide for jointly owned access lots to unit title properties, or for variations or surrender of easements on unit titles once the unit plan has been deposited. The Law Commission recommended amending the Act to:

- allow for jointly owned access lots to unit title properties
 - clarify that, for most purposes, heritage covenants and other similar covenants are easements under the Act
 - allow for the variation or surrender of easements on unit title plans.
-

Questions

14. Have you ever experienced problems relating to access lots, easements or covenants under the Unit Titles Act?

15. In your view, should the Law Commission’s recommendations be adopted? If not, are there any other ways these problems could be addressed?

Minor changes to common property and to boundaries of units

From time to time unit owners wish to make minor changes to their unit or the common property, perhaps to modernise the design, improve functionality or make architectural improvements. Currently any change to a unit plan, such as an addition of a conservatory, requires the deposit of a new plan. This can be a costly and complicated exercise.

The Law Commission recommended amending the Unit Titles Act so that minor changes might more easily be made to the common property and to the boundaries of units. The Law Commission also proposed giving district land registrars power to

dispense with that requirement in appropriate circumstances, after consultation with the chief surveyor.

Questions

16. In your view, is there any reason not to adopt these recommendations? Is there a better way of dealing with this issue?

17. If such an amendment is made, should the circumstances where the discretion may be applied be spelled out or should that be left to the district land registrar on a case-by-case basis?

Leasehold land

Under the Unit Titles Act, unit titles are able to be created on leasehold land.

Question

18. Have you experienced any issues in relation to unit titles on leasehold land? Are the provisions in the Unit Titles Act adequate? If not, how could they be improved? Are there issues that arise in relation to bodies corporate on leasehold land?

Requirement for Bodies Corporate, and Rules of Bodies Corporate

Every unit title development involves the creation of a body corporate. As a matter of law, the body corporate comes into existence on the deposit of the unit plan. At that point, the registered owner of the land is the body corporate. Once one unit has been sold the owners of the units in the unit plan make up the body corporate (section 12, Unit Titles Act).

As will be apparent throughout this discussion document, issues relating to bodies corporate and the role they play in unit title development are central to calls for a comprehensive review of the Unit Titles Act.

In very general terms, the successful functioning of bodies corporate is seen as fundamental to the maintenance and enhancement of unit title developments as positive living environments.

Many unit title owners, however, do not appear to be aware of the importance of the role of the body corporate, or of the fundamental difference between freehold and unit

titles. Those differences are, in many ways, reflected in the need for the existence of the body corporate and the duties and functions of bodies corporate. At the same time, it is said that the Act does not always promote good body corporate outcomes.

This discussion document explores many of those issues. The following brief summary of the Act as it currently relates to bodies corporate provides a context for that discussion.

Bodies corporate do not own the common property. The unit owners do. A body corporate is, however, the representative body for the individual unit owners. As such, under the Act, bodies corporate are given a number of duties and functions. Those duties and functions operate as a statutory framework within which the unit owners, represented by the body corporate, are both required and empowered to act for their mutual benefit as the owners of the unit development.

In summary, that framework is intended to ensure that:

- the body corporate insures all buildings and improvements (including individual units) in the development
- the body corporate manages and maintains the common property
- the body corporate enforces the rules applying to the development, including the rules provided by the Act and any rules adopted for the development
- the body corporate can sue and be sued in respect of the development as if it were the owner of the common property, and the owners of the units are, under the Act, made liable individually for judgments against the body corporate.

The body corporate can be seen to act like a mini “local authority” or “town council” for the development, in that they often make the arrangements for, and pay for, services such as waste management, roads, parking and gardening. In reality, bodies corporate – particularly for larger developments – perform many of the functions that local government performs in areas where property is divided into freehold and leasehold titles.

Bodies corporate also perform a range of less formal functions. These are like those performed by voluntary neighbourhood groups, again designed to improve and enhance the living environment provided by unit title developments.

This discussion document will now consider a range of issues relating to bodies corporate.

Bodies corporate and small developments

The Law Commission proposed that:

- where a development comprises no more than 6 units

- the common property consists entirely of driveways or party walls

there should no longer be a compulsory requirement for a body corporate. The Law Commission in effect concluded that relevant duties and functions of bodies corporate under the Unit Titles Act could be performed by the unit holders as an unincorporated “association” of persons.

Questions

19. Do you agree with the Law Commission’s proposal? Please give your reasons.
 20. In what other situations should there no longer be a compulsory requirement for a body corporate?
 21. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?
-

Bodies corporate – recognise different types

The Unit Titles Act provides a “one size fits all” model for bodies corporate. That is, the statutory framework provided by the Act is the same for all bodies corporate, irrespective of the size or type of the development in question. There are now many different types and sizes of unit title developments, including:

- small residential developments
- terrace residential developments (which may involve large numbers of units but where each unit comprises all the levels in the development)
- large, multi-storey, residential developments
- commercial developments, for example shopping malls
- mixed use developments, often multi-storey, including residential, office and “retail” units
- “time share” developments.

Increasingly, unit owners may be investors, and not occupiers, giving rise to issues involving absentee owners and their tenants.

In Australia, a number of jurisdictions (Queensland, New South Wales and Victoria) either have, or are considering, providing different statutory models for different sizes and/or types of developments. This means that there are different requirements in relation to committees, general meetings, proxies and voting thresholds, for example.

In Queensland, different model rules are provided for “small”, “standard”, “accommodation” and “commercial” developments. These models are designed to deal respectively with:

- schemes with less than six lots, providing a relatively simple and informal environment (small)
- residential schemes with mostly owner occupiers, providing a highly regulated environment (standard)
- schemes with mostly investor owners who rent out their units (accommodation)
- non-residential business complexes, whether occupied by owners or tenants (commercial).

New South Wales has recently moved to provide a special regime for large (more than 100 unit) schemes.

It has been suggested that in New Zealand the body corporate “model” should also be customised to reflect the type of development involved.

Questions

22. Do you agree that the Unit Titles Act should be amended to provide for different models of bodies corporate depending on the size and/or type of development?
 23. If you do agree, what do you think would be a sensible range of models? How should that range best be provided, for example by regulation or by “model” rules?
 24. In what ways does the model of bodies corporate need to be tailored depending on the type of development?
 25. Are special issues raised by the complexities of high-rise buildings themselves, as opposed to the “type” of development that may occupy such a building? If so, what issues do you see?
-

Body corporate democracy

The Unit Titles Act controls how unit owners, as members of a body corporate, make decisions.

Certain decisions⁸ can only be made by a unanimous resolution. A unanimous resolution is one that all unit owners support (not just all unit owners who vote). Other decisions⁹ must also be unanimous as all unit owners must sign, or otherwise agree to, the relevant application.

These requirements have a number of practical implications. For example, in reality a “redevelopment” may involve a simple and innocuous change to a unit title, like a “boundary adjustment”. But all unit owners, not only those affected, must agree.

These requirements for unanimity reflect the view that the body corporate should not be able to take actions that could fundamentally interfere with the “property rights” each unit owner has, unless each unit owner has actually agreed to the proposal.

The question is whether these provisions strike an appropriate balance between the wishes of the majority and the interests of individual owners.

The Law Commission reported that, at least for the requirement for unanimity on changes to the compulsory rules, its view and those of submitters were that the requirement should be maintained. More recently, the Auckland Regional Council’s Case for Review suggested that changes to the unanimity requirements may be appropriate.

An alternative approach, which would respond to calls for increased flexibility and which would also perhaps more appropriately balance majority and minority interests in a way that recognised the fundamental community of interests involved in a unit title development, would be to:

- replace the requirement for unanimity with the requirement for a super majority (say 75% or 80%)
- provide for that majority to come, as is the usual case, from those who vote
- give opponents of any relevant proposal a buy-out right, like that provided by the Companies Act 1993 to shareholders who vote against key resolutions.

Recognising the different dynamics that exist in developments of various sizes and types, such change could be limited to large residential schemes, commercial schemes and mixed use schemes.

Questions

26. Do you agree that the requirement for unanimity should be relaxed? If so, for what decisions, and what majority, should replace the requirement for unanimity?

27. Should reform go as far as “normalising” the required majorities, so that the majority would only have to come from those voting, rather than those entitled to vote?

28. Would you agree to relaxing the unanimity requirement for all schemes, or do you think that the relaxation should be limited to, say large residential, commercial and “mixed” schemes? For those purposes, how would you define a “large residential scheme”?

29. Do you think individual owners who vote against a proposal requiring a “super majority” should, in certain circumstances, be given a buy-out option, like that provided by the Companies Act?

30. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?

Relief from the requirement for unanimity

The Unit Titles Act does currently provide a mechanism for the High Court to dispense with the requirement for unanimity where an 80% majority has been achieved. The High Court has taken, in the one case to be reported directly involving section 42 of the Act,¹⁰ a “hands off” approach. The Court appeared to be interested only in procedural matters, and did not look to the substance of the majority’s decision. It indicated that in the absence of procedural irregularity, the decision of a “substantial majority” should not be “thwarted” by a hold out minority.

This would appear to potentially reduce the protections provided by the requirement for unanimity to a requirement for an 80% vote.

Question

31. If the need to obtain unanimous votes is retained, do you agree with the Law Commission that criteria should be provided to protect the minority? If yes, what criteria do you suggest? What do you think would be the impact of your suggestions on unit owners, bodies corporate and on business owners?

Unit entitlements

Before a unit plan can be deposited and unit titles created, a “unit entitlement” must be assigned to every unit by a registered valuer. Valuers take a wide range of factors into account in setting unit entitlements, but are required to do so “on the basis of the relative value of the unit in relation to each of the other units in the unit plan”.

The unit entitlement fixed for a unit determines, for the first and each subsequent owner of that unit, a range of matters including:

- their share in the common property
- their responsibility to contribute to the cost incurred by the body corporate in insuring, managing and maintaining the common property
- their voting rights, where a poll of owners is required

- the relative size of their residual interest in the property if the unit plan is cancelled.

Once set, the unit entitlement may only be varied in very limited circumstances.

Two main issues arise. Firstly, is “relative value” the right way to determine all these matters? For example, should relative value always determine common property maintenance obligations? A large relatively high value ground floor unit could end up paying more for lift services it does not use than a less valuable smaller top floor unit, even though the value of that top floor unit would be further reduced if the lift did not work.

Secondly, relative values change over time for a variety of reasons. There is no way (short of a redevelopment) to recognise such changes at the present time.

Questions

32. Do you think relative value is the right concept to be used to fix unit entitlements, given the range of matters determined by unit entitlements? If yes, why do you support it?

33. Should there be a more flexible approach to these issues? For example, could scheme rules be used to set entitlements in a way that better matches the benefits and costs of different aspects of unit developments? Would a better approach be to provide for some concept of a “fair and reasonable charge” set by the body corporate for the allocation of common costs, with individual owners having rights to object? Should there be provision for owners to enter into voluntary agreements to pay for certain expenses on the basis of who benefits, rather than unit entitlement?

34. Whatever approach is adopted, should there be an obligation for bodies corporate to review the apportionment of rights and obligations over time?

35. How should owners be protected from unreasonable changes, if the approach to these issues is made more flexible? The Unit Titles Act does currently provide some flexibility. In limited circumstances (work benefiting one or more units only, or work benefiting one or more units substantially more than other units) “other” unit holders may be excused from an obligation to contribute.¹¹ It is not clear, however, how useful those provisions are in addressing this issue. Should the body corporate itself be given more discretion, subject to appropriate rights of objection?

Duties and Functions of Bodies Corporate

The Unit Titles Act currently provides a range of functions and duties of bodies corporate. This part of the discussion document addresses the issue of whether those duties and functions are still appropriate and adequate.

Clarify role of bodies corporate?

The comment is often made, both in New Zealand and overseas, that neither the concept of a “body corporate”, nor its role, are well understood. This lack of understanding both reflects, and contributes to, a lack of understanding of:

- the differences between freehold titles and unit titles
- the basic legal features of unit titles and unit developments
- living in unit developments.¹²

The term “body corporate” is itself not a well known one. Furthermore, the fact that one body corporate is distinguished from all other bodies corporate only by a number may not help matters. Although the Unit Titles Act sets out a list of duties (section 15), and other provisions of the Act itself and the statutory rules describe a number of the functions of bodies corporate, there is no clear statement of the overall role of bodies corporate to provide a framework within which those duties and functions can be understood.

Some ways to help address these issues would be to:

- find a better term than “body corporate” to call the legal body that is made up of and represents owners. Perhaps “community corporation”, together with a reference to the chosen name of the development, for example, “The Elysian Fields Community Corporation” could be a better approach
- include a statement of the overall function of bodies corporate in the Act.

Questions

36. Do you agree that the concept “body corporate” and the overall functions of a body corporate are not well understood? Please give reasons for your response.

37. Would some other name be better? Do you like the approach “The ABC Community Corporation”, or do you have other suggestions?

38. Is there a place in the Unit Titles Act for a general statement of the function of bodies corporate? If so, what matters might be included in that statement?

Financial planning and reporting

As the size and complexity of developments increases, so does the task of the body corporate. The Auckland Regional Council's Case for Review (para 4.5.1) commented on this phenomenon in the following way:

One feature common to many medium- and higher-density-housing schemes throughout the world is the importance placed upon the collection and use of funds from owners. The present Act is unable to deal adequately with current issues, which are created by the increased diversity and size of developments. Often the payment and use of financial contributions for the development are an area of significant disharmony between unit holders; individual owners and the body corporate; and the body corporate and the body corporate management.

The Unit Titles Act only deals in general terms with this very important aspect of a body corporate's functions. In other jurisdictions, considerably more attention is paid to these issues.¹³

The suggestion here is that bodies corporate should be explicitly required to plan in advance, on at least an annual basis, for regular recurring maintenance and for more significant and "lumpy" expenditure. At the same time, the way in which bodies corporate deal with and are accountable for the moneys they levy should be clarified, particularly by requiring trust accounts for common funds and improved standards of financial reporting to owners.

Any such requirements would, however, need to be proportionate to the size and complexity of a development, and hence to the task of the body corporate.

Questions

39. Do you think there should be a specific requirement for bodies corporate to prepare financial plans and budgets? If so, what matters should be covered by such financial plans and budgets?
 40. Should there be a requirement for common funds to be held in trust accounts? Please provide reasons.
 41. Are the financial reporting provisions of the Unit Titles Act adequate? If not, how can they be improved?
 42. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?
-

Sinking funds

In addition to requiring a fairly steady level of expenditure on regular maintenance items, bodies corporate will also, from time to time, be called upon to spend significant sums of money to meet one-off capital or maintenance items, for example replacement of lifts in a high-rise development, or major unexpected expenses such as a burst sewer main.

If a body corporate needs to raise all the money required to meet such expenditure at once from the owners at the time those owners:

- can be met with unexpected costs that they may have difficulty paying
- could, in effect, be meeting a disproportionate share of the cost of maintaining the development over time because they happened to be the owners when this large item of capital expenditure needs to be made.

A way of addressing these issues is to establish what are known as “sinking funds”. Sinking funds are funds raised by regular levies over time that are held to meet significant items of capital expenditure.

Some jurisdictions require bodies corporate to maintain sinking funds. There is no such requirement in New Zealand. Furthermore, even where a body corporate wanted to establish a sinking fund, it could be difficult to do so under the Unit Titles Act as it is currently drafted.

It has been suggested that if sinking funds were mandatory, developments affected by the “leaky buildings” problem would have been in a far better position to cope with the difficult issues raised by the need to effect substantial repairs to address those problems.

Questions

43. Do you think the Unit Titles Act adequately empowers a body corporate to establish a sinking fund?
44. Do you think that the Unit Titles Act could be improved by providing a regime for instituting and maintaining sinking funds for capital works, whether or not it is compulsory to do so? If so, what features should be included in such a regime?
45. Do you think that the Unit Titles Act should require sinking funds to be established by all or some (for example large, complex unit developments) bodies corporate?
46. Do you think the Unit Titles Act should go further and prescribe maintenance obligations, along with the requirement to establish a sinking fund for long-term planned maintenance?

47. Should claims against third parties for the repair or maintenance of common property be made only by the body corporate, or should individual owners also be entitled to make an individual claim against third parties for damage to, or diminution in the value of, their interest in the common property?

Insurance

The Unit Titles Act makes it compulsory for a body corporate to insure all buildings and other significant improvements for full replacement value.

Questions

48. How should the current requirement for compulsory insurance be changed? Are there other issues relating to insurance that you think a review of the Unit Titles Act should take into account such as insurance during staged developments, or who is responsible for an insurance excess?

Body Corporate Relationships

A unit title development involves a series of relationships between owners, individually and as represented by the body corporate, and a range of other parties such as prospective purchasers, tenants, the body corporate secretary, building manager and maintenance, gardening and other contractors. Often these relationships are reflected by formal legal contracts. The human side of these relationships, particularly within the community of the unit development, are also of significance.

This part of the discussion document considers a number of these relationships, and issues relating to them.

Developers and initial purchasers of units

As noted above, it thought that some purchasers of unit titles may not fully appreciate the particular features of their investment. This lack of clarity may exist at a general level (for example, what is a body corporate) or a more specific level (the obligation to pay for the maintenance of common property).

The initial legal relationship is between the developer and the purchaser of a unit. It is sometimes suggested that developers of unit title developments should be required, as a consumer protection measure, to provide more information to purchasers of units.

Information to be included in a disclosure statement could include:

- a basic description of key features of owning and living in a unit title property, including the role of the body corporate and the significance of the rules

- an estimate of likely annual maintenance costs and of the cost and frequency of major items of capital expenditure
 - a description of any property management or other similar contracts awarded by the developer
 - a statement of any interest the developer will have, and for how long, in the body corporate as the owner of unsold units.
-

Questions

49. Do you think developers should be required to provide more information to purchasers of units? Please give reasons to support your comments.

50. If you think developers should be required to provide more information, what topics should be covered, for example general information about unit titles and living in a unit title development, or specific information, such as estimates of future maintenance costs?

51. Should the information be different depending on the size and type of the development?

Developers and bodies corporate

In order to properly discharge their functions, bodies corporate need access to a range of information about their development. Arguably they need to know as much about the development as the developer knows or what the developer, through the various contractors, can be deemed to know. There is, however, no formal relationship between the developer and the body corporate, nor any requirement for a developer to provide such information.

To address this issue, a developer could be required to provide to the body corporate, say before its first annual general meeting, copies of various documents. These could include:

- the plans and specifications for the development, including wiring, sewerage and drainage plans
- any insurance policies taken out by the developer, and the date of warranty expiry on structural and non-structural defects
- copies of all warranties from manufacturers of equipment and goods installed comprising common property.

In this way a body corporate would have access to the information it required.

Questions

52. Do you think there are good reasons to require a developer to provide certain information to the body corporate? Please state your reasons.

53. If so, is the list of information set out above a sensible one? Do you think any other types of documentation or information should be provided?

Contracts made by the developer

A developer may enter into contracts for the unit development that lock unit owners and bodies corporate into unsatisfactory relationships. For example, a developer may, in effect, grant a property management company the contract with the body corporate to manage the property, and the body corporate itself. Subsequently, the owners may have little or no ability to terminate or renegotiate that contract. Developers are, in effect, “selling” the property management rights.

One way to address this issue would be to give bodies corporate a statutory right to review, within say two years of the sale of a specific proportion of units, all contracts entered into by the developer. Alternatively developers could be prevented from entering into such contracts for longer than, say, three years.

Questions

54. What, if any, problems have you experienced or know of in relation to long-term contracts entered into by the developer? How serious have these problems been?

55. Should such contracts be controlled, and if so, how?

56. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?

Disclosure to subsequent purchasers

It has been suggested that, as a consumer protection measure, developers should be required to disclose to initial purchasers a range of information, and that a statement functionally equivalent to the disclosure statement now provided under the Retirement Villages Act should be required by the Unit Titles Act.

This raises the question of the information provided to subsequent purchasers of units, who would not benefit directly from any obligation imposed on developers. The Act currently gives purchasers the right to obtain certain information from a body corporate (section 30, Unit Titles Act). There is no obligation, however, for that information to be provided unless it is asked for and the information to be provided is

fairly limited. The Auckland Regional Council's Case for Review suggested that, again for consumer protection reasons, it would be appropriate for purchasers of units to have access to a broader range of information. The Queensland "Community Management Statement" was referred to as a possible model. This comprises:

- a full community management statement, containing financial reports and budgets, sinking fund details, and any required annual contribution to body corporate levies of various sorts e.g. maintenance funds or sinking funds
- details of the regulation model (body corporate rules) used for the development
- details of any amendments to the unit title development where the unit is a brand new unit in the development under construction
- details of body corporate financial and property management and support service contracts, such as caretaker contracts.

Questions

57. Do you think information disclosure to purchasers should be a requirement under the Unit Titles Act? Should the range of information provided to purchasers of unit titles be broadened?

58. If so, do you think the Queensland Community Management Statement provides a good model for New Zealand to follow? Please give reasons.

59. Do you have other suggestions to improve the information available to purchasers of unit titles?

60. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?

Relationships with body corporate managers and secretaries

In discussing issues relating to the administration of bodies corporate, the Auckland Regional Council's Case for Review (pg 21) commented that:

The [Unit Titles Act] does not have a transparent regime or provisions for body corporate management, and there is significant confusion about the appropriate roles of body corporate secretaries, on-site managers, and the body corporate itself, or its committee, in administration and management.

Without the benefit of a legislative framework the area of professional body corporate management has become a matter of significant disharmony between body corporate owners. There is no standard of licensing for body corporate managers or a code of

conduct by which they operate. As a result, owners of unit title developments have become increasingly disenchanted with the performance of some body corporate secretaries and the burden that has fallen back upon the executive committees to manage these developments.

A recent case¹⁴ has highlighted the difficulties that can arise between a body corporate and a property manager.

Questions

61. Should the Unit Titles Act provide a clearer statement of the relative roles of the body corporate, the body corporate committee and contracted property managers?
 62. Should the relationship between bodies corporate and body corporate managers be regulated, and if so, how?
 63. Should occupational regulation of body corporate managers be introduced?
 64. Should the process whereby a body corporate contracts with a body corporate manager be regulated?
 65. Should the content of contracts between bodies corporate and body corporate managers be regulated, and if so, how?
-

Body corporate governance

The management and governance of bodies corporate is dealt with in fairly rudimentary fashion in the Unit Titles Act. This is an important part of the regulatory framework, and arguably bodies corporate for larger and more complex developments, at least, may require more sophisticated rules.

This is an area that other jurisdictions pay considerable attention to, including in relation to:

- the composition and role of committees
- the role, if any, a body corporate manager should be allowed to play in governance, for example as a committee member, meeting chair or the holder of proxies
- the use and control of proxy votes generally.

As noted in a recent Victorian review of bodies corporate:

The management and governance of bodies corporate requires a sensibly structured regulatory framework that promotes self-governance and enables bodies corporate to make decisions by democratic processes at the lowest cost to consumers. But [this]

review also recognises that the regulatory scheme must provide sufficient tools to enable effective and efficient operations of bodies corporate.

Questions

66. Have you experienced or do you know of any significant problems with body corporate governance structures in New Zealand? Please describe them and their magnitude.
67. Are the issues focused on by other jurisdictions (committees, body corporate managers, proxy voting) relevant in New Zealand?
68. Are there other issues relating to body corporate governance that should be reviewed?
69. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?
-

Legal protection of body corporate committee members

The body corporate committee can, in many cases, exercise all the powers and duties of the body corporate. Members of the body corporate committee are volunteers and have no legal protection under the act.

Question

70. Should body corporate committee members be provided legal protection when carrying out the duties of the body corporate? Should there be provision to allow body corporate committee members to be paid?
-

Unit owners, bodies corporate and tenants

When the owner of a unit leases the unit to tenants, the tenants (knowingly or otherwise) enter into two sets of legal relationships. The first is with the unit owner, pursuant to the terms of the relevant lease. The second is with the body corporate, and the owners and occupiers of the other units in the development, pursuant to the body corporate rules.

That second set of relationships has been seen as giving rise to a number of issues. In particular:

- body corporate rules may impose additional obligations on tenants, not provided for by the lease agreement, and that could be inconsistent with, or reduce their rights under, the provisions of the Residential Tenancies Act
- bodies corporate may act as de facto landlords, although a tenant's legal relationship is with the unit owner
- bodies corporate make decisions affecting tenants, yet tenants may have no representation in that decision-making process.

Questions

71. Do you think that the difficulties sometimes associated involving tenants in unit title developments are serious? What do you think might be done to address these issues?
72. Would you agree, for example, that a unit owner leasing their unit should be obliged to provide tenants with a copy of the body corporate rules? Should body corporate rules – as a matter of law – be incorporated into the lease and bind tenants directly?
73. Is it appropriate that tenants in bodies corporate may have fewer rights than in other tenancies, if they are fully informed before agreeing to the tenancy?
74. If body corporate rules are to become binding on tenants by being incorporated in the lease, should body corporate rules be required to recognise the interests a tenant has in the operation of the body corporate and provide a mechanism for the body corporate to consult with, and take account of the interests of, tenants?
75. Are there other ways relationships between tenants, unit owners and bodies corporate could be improved?
76. Do you think these issues should be addressed through the Unit Titles Act, or the Residential Tenancies Act?
-

Dispute Resolution

Disputes involving bodies corporate and owners range from the apparently straightforward (recovery of unpaid levies), through intensely contested “neighbour” issues¹⁵ to complex matters relating to fundamental differences between owners over the future of developments themselves.¹⁶

The Law Commission focused on the issue of the difficulties bodies corporate can have in recovering levies from unit holders who do not pay what is due from them. It suggested ways of addressing this, involving section 36 certificates and imposing

liability on first mortgagees. It stopped short of recommending that bodies corporate have a power of sale of the unit in question to recover unpaid levies.

The Auckland Regional Council's Case for Review, noting that the current provision in the Unit Titles Act is generally for unit owners to seek redress through the High Court, took a broader approach. It proposed that a framework for dispute resolution should be set up at a much lower level than the High Court. It noted that one approach could be to provide an adjudication or resolution process within the legislation, and that another was to set up a "Land Tribunal" to hear and determine disputes relating to unit title matters and a wide range of other land issues. It pointed to the Construction Contracts Act 2002 as an example of the former approach.

Other jurisdictions, for example New South Wales, provide an intensive dispute resolution process for body corporate disputes. Victoria is currently considering a new, four-tier dispute resolution process, reflecting elements of the relevant provisions of the Strata Property Act 1998 of British Columbia.¹⁷

Questions

77. Do you agree that a new framework is required for resolving disputes involving bodies corporate, unit owners and other parties?
 78. If so, what do you think the main elements of such a framework should be?
 79. Do you agree with the "self help" remedies proposed for bodies corporate by the Law Commission for recovery of levies? Would you extend these to include a power of sale?
 80. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?
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Flat-owning Companies and Cross-lease Schemes

This discussion document has referred in various places to the Law Commission's 1999 Report Shared Ownership of Land, and its discussion of and recommendations on various aspects of the Unit Titles Act. The Report also discussed, and made recommendations on, issues relating to flat- and office-owning companies, and cross-lease schemes.

Issues relating to flat- and office-owning companies and cross-lease subdivisions were of particular concern to the Law Commission. In a flat- or office-owning company the development is owned by the company. Each occupier owns a parcel of shares in the company. Each parcel of shares carries with it the benefit of an exclusive

lease or licence to a part of the building owned by the company. Specific amendments to the Land Transfer Act provided for registration of such licences.

The concept of cross-leasing originated with 1958 legislative initiatives that provided that leases of parts of buildings were not subdivisions of land. This basic concept was elaborated on in subsequent legislative changes and by various practices adopted by District Land Registrars. These developments enabled multiple units to be developed on sections that might not themselves have been subdivisible into separate titles.

The Law Commission described flat- and office-owning companies and cross-leasing schemes as “ingenious schemes” devised by conveyancers, prior to the passage of the Unit Titles Act, to enable medium- and high-density housing development.

While the Law Commission did not identify significant issues with flat-owning companies, it concluded that with the advent of the Act the reason for the existence of flat- and office-owning companies had effectively ceased.

The Commission also saw, following the Act, cross-lease schemes as no longer being required. More fundamentally, the Commission concluded for a variety of reasons that such schemes were “irremediably flawed”. In the Commission’s view, they provide an essentially unsatisfactory form of tenure. The Commission thought that those problems were already significant, but would become especially severe as such developments neared the ends of their useful lives.

On the basis of those considerations, the Law Commission recommended that no further flat- and office-owning companies or cross-lease developments should be permitted. Voluntary conversion of cross-lease arrangements to unit titles was to be facilitated by a range of measures. More controversially, as proposed by the Law Commission, conversion of cross-lease arrangements would become mandatory after ten years.

Questions

81. Do you agree with the Law Commission that no further flat-owning company schemes should be created? If not, why not?

82. Do you agree with the Law Commission that cross-lease schemes are irredeemably flawed and that no further such schemes should be created? If not, why not?

83. If you do agree with the Law Commission on cross-lease schemes, do you agree with the Law Commission’s proposals:

- to facilitate their conversion to unit titles
- to make such conversion mandatory?

If not, why not? What other solutions do you suggest?

Form of Legislation

In considering the future of the Unit Titles Act, one issue that is raised is the form the legislation should take. New Zealand has one act dealing with all matters relating to unit titles. Other jurisdictions commonly divide the legislation into two separate enactments. One deals with the technical rules relating to the creation of unit titles and their administration from a land law point of view. The other deals with bodies corporate, their constitutions, and the management and administration of the body corporate and the unit development.

Question

84. Do you think having two separate acts is a sensible approach to adopt in New Zealand? What are your reasons?

Other Issues

This discussion document has raised a wide range of issues relating to the Unit Titles Act and bodies corporate. However, there may be other issues that concern you. We welcome your comments on any such other issues.

V. How to make a Submission

The closing date for submissions is 28 February 2005.

Please, where possible, use the same headings and numbering for your answers and comments as those used for the questions in this discussion document. A list of all the questions in the document is set out on the following pages to help you.

Your submission will become publicly available information. For this reason, please indicate clearly if your comments are commercially sensitive or if, for some other reason, you consider that all or parts of your submission should not be disclosed. Any request for non-disclosure will be considered in terms of the Official Information Act 1982 and the Privacy Act 1993.

Submissions can be sent by post or hand delivered to:

Unit Titles Act Review
Department of Building and Housing
39 The Terrace
PO Box 11846
Wellington

or by email to:

utareview@dbh.govt.nz

or by fax to:

04-471 0798

In order to facilitate the consideration of responses, we request that an electronic copy in Microsoft Word also be supplied, either on disk or by email. For additional copies of this document, call freephone 0800 83 62 62 or email utareview@dbh.govt.nz.

List of Questions

Creation and Administration of Unit Titles

Physical dimensions of units

Questions (page 8)

1. Have you ever been involved in problems relating to boundary definitions under the Unit Titles Act?
2. Do you agree with the Law Commission's recommendation that the definition of the term "unit" should expressly allow for units to be made up of partly, or wholly, open space? What are your reasons?
3. If this change was made, would other issues need to be addressed, for example standard rules for minor alterations such as the addition of porches or conservatories?
4. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?

Boundaries

Questions (page 9)

5. Have you ever experienced difficulties or problems relating to where the boundaries of units have been? If so, how serious a problem has it been?
6. Should the Unit Titles Act control more strictly where the boundaries should be on a unit plan and what parts of a unit development are required to be common property? If so, describe how these could be provided for, for example by way of standardised formats for plans or minimum requirements.
7. How should exclusive use areas that effect the whole property be dealt with? For example, is there a case, particularly for large developments, for the individual unit title to include only the interior surface of the unit, and for all other structural elements to be common property?
8. Are there other ways of addressing this issue, for example giving the body corporate a right to undertake work on units, as opposed to the common property, or requiring unit owners to repair defects within their own unit title if failure to do so

could cause damage to the building? Please describe your proposal and how you think it would solve the problem.

9. Have you ever experienced difficulties or problems relating to the ownership of utilities such as water pipes and electricity lines? If so, how serious a problem has it been? How could the problem be addressed?

10. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?

Staged developments

Questions (page 10)

11. Do you agree that, if units can be comprised wholly of open space, the staged development provisions of the Unit Titles Act are no longer required?

12. Were that reform to be adopted, do you think unit owners require any special protections from the future development of “open spaces”? If you agree with the Law Commission that contractual provisions and the Resource Management Act can protect unit owners from subsequent development, do you nevertheless think it would be a good idea to provide for statutory protection as a consumer protection measure?

13. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?

Access ways, easements and covenants

Questions (page 11)

14. Have you ever experienced problems relating to access lots, easements or covenants under the Unit Titles Act?

15. In your view, should the Law Commission’s recommendations be adopted? If not, are there any other ways these problems could be addressed?

Minor changes to common property and to boundaries of units

Questions (page 11)

16. In your view, is there any reason not to adopt these recommendations? Is there a better way of dealing with this issue?

17. If such an amendment is made, should the circumstances where the discretion may be applied be spelled out or should that be left to the district land registrar on a case-by-case basis?

Leasehold land

Questions (page 12)

18. Have you experienced any issues relation to unit titles on leasehold land? Are the provisions in the Unit Titles Act adequate? If not, how could they be improved? Are there issues that arise in relation to bodies corporate on leasehold land?

Requirement for Bodies Corporate, and Rules of Bodies Corporate

Bodies corporate and small developments

Questions (page 13)

19. Do you agree with the Law Commission's proposal? Please give your reasons.

20. In what other situations should there no longer be a compulsory requirement for a body corporate?

21. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?

Bodies corporate – recognise different types

Questions (page 15)

22. Do you agree that the Unit Titles Act should be amended to provide for different models of bodies corporate depending on the size and/or type of development?

23. If you do agree, what do you think would be a sensible range of models? How should that range best be provided, for example by regulation or by "model" rules?

24. In what ways does the model of bodies corporate need to be tailored depending on the type of development?

25. Are special issues raised by the complexities of high-rise buildings themselves, as opposed to the "type" of development that may occupy such a building? If so, what issues do you see?

Body corporate democracy

Questions (page 16)

26. Do you agree that the requirement for unanimity should be relaxed? If so, for what decisions, and what majority, should replace the requirement for unanimity?

27. Should reform go as far as "normalising" the required majorities, so that the majority would only have to come from those voting, rather than those entitled to vote?

28. Would you agree to relaxing the unanimity requirement for all schemes, or do you think that the relaxation should be limited to, say large residential, commercial

and “mixed” schemes? For those purposes, how would you define a “large residential scheme”?

29. Do you think individual owners who vote against a proposal requiring a “super majority” should, in certain circumstances, be given a buy-out option, like that provided by the Companies Act?

30. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?

Relief from the requirement for unanimity

Questions (page 17)

31. If the need to obtain unanimous votes is retained, do you agree with the Law Commission that criteria should be provided to protect the minority? If yes, what criteria do you suggest? What do you think would be the impact of your suggestions on unit owners, bodies corporate and on business owners?

Unit entitlements

Questions (page 18)

32. Do you think relative value is the right concept to be used to fix unit entitlements, given the range of matters determined by unit entitlements? If yes, why do you support it?

33. Should there be a more flexible approach to these issues? For example, could scheme rules be used to set entitlements in a way that better matches the benefits and costs of different aspects of unit developments? Would a better approach be to provide for some concept of a “fair and reasonable charge” set by the body corporate for the allocation of common costs, with individual owners having rights to object? Should there be provision for owners to enter into voluntary agreements to pay for certain expenses on the basis of who benefits, rather than unit entitlement?

34. Whatever approach is adopted, should there be an obligation for bodies corporate to review the apportionment of rights and obligations over time?

35. How should owners be protected from unreasonable changes, if the approach to these issues is made more flexible? The Unit Titles Act does currently provide some flexibility. In limited circumstances (work benefiting one or more units only, or work benefiting one or more units substantially more than other units) “other” unit holders may be excused from an obligation to contribute.¹⁹ It is not clear, however, how useful those provisions are in addressing this issue. Should the body corporate itself be given more discretion, subject to appropriate rights of objection?

Duties and Functions of Bodies Corporate

Clarify role of bodies corporate

Questions (page 19)

36. Do you agree that the concept “body corporate” and the overall functions of a body corporate are not well understood? Please give reasons for your response.
37. Would some other name be better? Do you like the approach “The ABC Community Corporation”, or do you have other suggestions?
38. Is there a place in the Unit Titles Act for a general statement of the function of bodies corporate? If so, what matters might be included in that statement?

Financial planning and reporting

Questions (page 20)

39. Do you think there should be a specific requirement for bodies corporate to prepare financial plans and budgets? If so, what matters should be covered by such financial plans and budgets?
40. Should there be a requirement for common funds to be held in trust accounts? Please provide reasons.
41. Are the financial reporting provisions of the Unit Titles Act adequate? If not, how can they be improved?
42. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?

Sinking funds

Questions (page 21)

43. Do you think the Unit Titles Act adequately empowers a body corporate to establish a sinking fund?
44. Do you think that the Unit Titles Act could be improved by providing a regime for instituting and maintaining sinking funds for capital works, whether or not it is compulsory to do so? If so, what features should be included in such a regime?
45. Do you think that the Unit Titles Act should require sinking funds to be established by all or some (for example large, complex unit developments) bodies corporate?
46. Do you think the Unit Titles Act should go further and prescribe maintenance obligations, along with the requirement to establish a sinking fund for long-term planned maintenance?

47. Should claims against third parties for the repair or maintenance of common property be made only by the body corporate, or should individual owners also be entitled to make an individual claim against third parties for damage to, or diminution in the value of, their interest in the common property?

Insurance

Questions (page 22)

48. How should the current requirement for compulsory insurance be changed? Are there other issues relating to insurance that you think a review of the Unit Titles Act should take into account such as insurance during staged developments, or who is responsible for an insurance excess?

Body Corporate Relationships

Developers and initial purchasers of units

Questions (page 23)

49. Do you think developers should be required to provide more information to purchasers of units? Please give reasons to support your comments.

50. If you think developers should be required to provide more information, what topics should be covered, for example general information about unit titles and living in a unit title development, or specific information, such as estimates of future maintenance costs?

51. Should the information be different depending on the size and type of the development?

Developers and bodies corporate

Questions (page 24)

52. Do you think there are good reasons to require a developer to provide certain information to the body corporate? Please describe your reasons.

53. If so, is the list of information set out above a sensible one? Do you think any other types of documentation or information should be provided?

Contracts made by the developer

Questions (page 24)

54. What, if any, problems have you experienced or know of in relation to long-term contracts entered into by the developer? How serious have these problems been?

55. Should such contracts be controlled, and if so, how?

56. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?

Disclosure to subsequent purchasers

Questions (page 25)

57. Do you think information disclosure to purchasers should be a requirement under the Unit Titles Act? Should the range of information provided to purchasers of unit titles be broadened?
58. If so, do you think the Queensland Community Management Statement provides a good model for New Zealand to follow? Please give reasons.
59. Do you have other suggestions to improve the information available to purchasers of unit titles?
60. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?

Relationships with body corporate managers and secretaries

Questions (page 26)

61. Should the Unit Titles Act provide a clearer statement of the relative roles of the body corporate, the body corporate committee and contracted property managers?
62. Should the relationship between bodies corporate and body corporate managers be regulated, and if so, how?
63. Should occupational regulation of body corporate managers be introduced?
64. Should the process whereby a body corporate contracts with a body corporate manager be regulated?
65. Should the content of contracts between bodies corporate and body corporate managers be regulated, and if so, how?

Body corporate governance

Questions (page 27)

66. Have you experienced, or do you know of, any significant problems with body corporate governance structures in New Zealand? Please describe them and their magnitude.
67. Are the issues focused on by other jurisdictions (committees, body corporate managers, proxy voting) relevant in New Zealand?
68. Are there other issues relating to body corporate governance that should be reviewed?
69. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?

Legal protection of body corporate committee members

Questions (page 28)

70. Should body corporate committee members be provided legal protection when carrying out the duties of the body corporate? Should there be provision to allow the payment of body corporate committee members?

Unit owners, bodies corporate and tenants

Questions (page 29)

71. Do you think that the difficulties sometimes associated with involving tenants in unit title developments are serious? What do you think might be done to address these issues?

72. Would you agree, for example, that a unit owner leasing their unit should be obliged to provide tenants with a copy of the body corporate rules? Should body corporate rules – as a matter of law – be incorporated into the lease and bind tenants directly?

73. If body corporate rules are to become binding on tenants by being incorporated in the lease, should body corporate rules be required to recognise the interests a tenant has in the operation of the body corporate and provide a mechanism for the body corporate to consult with, and take account of the interests of, tenants?

74. Are there other ways relationships between tenants, unit owners and bodies corporate could be improved?

75. Do you think these issues should be addressed through the Unit Titles Act, or the Residential Tenancies Act?

Dispute Resolution

Questions (page 30)

76. Do you agree that a new framework is required for resolving disputes involving bodies corporate, unit owners and other parties?

77. If so, what do you think the main elements of such a framework should be?

78. Do you agree with the “self help” remedies proposed for bodies corporate by the Law Commission for recovery of levies? Would you extend these to include a power of sale?

79. What do you think would be the impact of your answers on unit owners, bodies corporate and on business owners?

Flat-owning Companies and Cross-lease Schemes

Questions (page 32)

80. Do you agree with the Law Commission that no further flat owning company schemes should be created? If not, why not?

81. Do you agree with the Law Commission that cross-lease schemes are irredeemably flawed and that no further such schemes should be created? If not, why not?

82. If you do agree with the Law Commission on cross-lease schemes, do you agree with the Law Commission's proposals:

- to facilitate their conversion to unit titles
- to make such conversion mandatory?

If not, why not? What other solutions do you suggest?

Form of Legislation

Questions (page 32)

83. Do you think having two separate acts is a sensible approach to adopt in New Zealand? What are your reasons?

Other Issues

This discussion document has raised a wide range of issues relating to the Unit Titles Act and bodies corporate. However, there may be other issues that concern you. We welcome your comments on any such other issues.

Footnotes

1 Note: responsibility for building related policy transferred from the Ministry of Economic Development to the Department of Building and Housing on 1 November 2004. Any queries about this discussion document should be directed to the Department on 0800 83 62 62.

2 Bodies Corporate and Intensive Housing in Auckland: A Preliminary Assessment January 2003 and Unit Titles Act 1972: The Case for Review, Discussion Document, August 2003.

3 In the Auckland region alone it is estimated that at least 45,000 people are living in unit title property today, and that by 2050, this number could rise to around 500,000 people. (Auckland Regional Council, Unit Titles Act 1972: The Case for Review, p5.)

4 Responsibility for building-related policy transferred from the Ministry of Economic Development to the Department of Building and Housing on 1 November 2004. Any queries about this discussion document should be directed to the Department on 0800 83 62 62.

5 Under section 4 of the Unit Titles Act, units must be defined by reference to a building or buildings “already erected” on the land. This, and other similar requirements, form one of the aspects of the Act for which reform has been proposed.

6 The Unit Titles Act also provides for the division of a plot of land into a number of unit titles, on each of which a single “unit” may be erected. The issues which have given rise to the review of the Act tend to relate to more complex developments where one or more buildings, often multi-storeyed, are divided into units.

7 In technical terms, tenants in common hold undivided shares in a property. Their share is undivided, in the sense that the boundaries of that share have not been established, but the right to that share already exists. By contrast, joint tenants together own the whole property, and have no right to a distinct share.

8 For example, dealings with and additions to the common property, changes to Second Schedule (compulsory) Rules, decisions not to apply insurance moneys to reinstatement, and decisions on redevelopment.

9 For example, an application to cancel a unit plan (in effect the mechanism for winding up a body corporate).

10 *In re Bell*, High Court, Wellington, M 243/92, Jane J, 22 October 1992.

11 Unit Titles Act, section 33.

12 In response to these concerns, the Auckland Regional Council published *The Mysteries of Bodies Corporate; A guide to the rights and responsibilities of apartment owners*, in August 2003, which is available for free from the Regional Council.

13 See, for example, Part 3 “Finances of Strata Scheme” of the New South Wales Strata Schemes Management Act 1996.

14 *Chambers and others v Strata Title Administration Limited* (High Court Auckland, CIV-2003-404-490, Paterson J, 22 December 2003).

15 *Godoy v Body Corporate No. 164980* (High Court Auckland, M1906/98, Fisher J, 14 June 1999).

16 *The World Vision of New Zealand Trust Board v Seal and others* (Body Corporate No. 91113) (High Court Auckland, M1299-SD02, Heath J, 12 November 2003).

17 The main elements of the possible Victoria approach are:

- the first tier would be an internal process requiring members to talk about the issue and resolve the issue themselves
- the second tier would be to have an expert body corporate trained conciliator to assist the parties to resolve the dispute themselves (similar to the Building Advice and Conciliation Victoria Service)
- the third tier would have an expert body corporate person or body able to determine day-to-day issues that need to be resolved quickly, for example, matters relating to rules and meeting procedures
- the fourth tier would have an expert court or tribunal, which could resolve more complex technical and legal issues.

The aim of the proposed model is to provide a flexible, low-cost model that empowers members and builds relationships within bodies corporate. The proposal for consideration recognises that some issues may be more appropriately and cost-effectively handled by the body corporate members themselves. Access to the government dispute resolution services will only be available if an attempt to resolve the dispute through the body corporate internal process has been formally recorded in minutes.

Future Directions Paper, Bodies Corporate, Victorian Government, 2004.

18 Responsibility for building-related policy transferred from the Ministry of Economic Development to the Department of Building and Housing on 1 November 2004. Any queries about this discussion document should be directed to the Department on 0800 83 62 62.

19 Unit Titles Act, section 33.
