Property Council New Zealand

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Submission on

Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill

27 April 2021

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Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill

1. Recommendations Summary

1.1. Property Council New Zealand ("Property Council") welcomes the opportunity to provide feedback on the Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill ("the Bill").

1.2. We welcome the Bill as reform in this space is long overdue. However, there are parts of it that require clarification and further refinement to ensure it is fit for purpose.

1.3. We recommend the following:

Information disclosure:

- Create a short-term working group of industry practitioners, owners and legal practitioners to ensure all potential issues are covered in the legislation;
- Expand the provisions in the Bill to ensure emphasis on disclosure to prospective purchasers (pre-contract disclosure), but also on preserving pre-settlement disclosure; and consider the same disclosure provisions as residential property agency agreements require;
- Reinstate the right to withhold disclosure (Section 147 (5) of the Bill) (Additional disclosure statement to buyer), if costs are not paid;
- Amend Section 151 (Cancellation by buyer) of the Bill to clarify the cancellation provisions, including in respect of off-the-plans sales;

Body corporate

- Amend the Bill to better provide for multiple body corporate ("BC") classes with different levels of compliance (e.g. insurance, maintenance and disclosure);
- Amend the Unit Titles Act ("Act") so that a BC can decide that BC committee members will hold office for staggered terms of one, two or three years before re-election, rather than the whole committee being re-elected each year;
- **Delete** amended Section 139 (Original owner's obligation in relation to service contracts) as the current provisions are working well;
- Amend Section 114 of the Bill to allow BC managers to act in their own interests when it is required (e.g. if there is a dispute);

Long-term maintenance plans

- Clarify whether the Long-term maintenance plans ("LTMPs") need to be peer-reviewed if completed by one of the professionals listed in Section 157D (6) of the Bill;
- Clarify whether the long-term maintenance fund ("LTMF") allows for funding by way of part funding from LTMF and remainder by special levy;
- Clarify whether there is provision to opt out from mandatory auditing of LTMF (Section 132 (8)of the Bill); if yes, state in Section 157F(3) of the Bill;

Voting

- Remove Clause 10 of the Bill which introduces limitations on the number of proxy votes;
- Add a provision to the Bill stating that a proxy has all the rights of an eligible voter in person, including the right to call a poll;
- Delete Section 88(5) of the Act which provides for Section 88(3) to expire (note: Section 88 (3) allows BC members to attend general meetings in person, by audio link or by audio-visual link;

Costs of utility interests

- Amend Clause 5 of the Bill to allow flexibility for costs of utility interests so a wider range of scenarios are considered when cost is allocated (e.g. mixed-use buildings with retail on the first floor);
- Allow BCs to reassess utility interests via ordinary resolution, not a designated resolution;

Additional comments

- Amend the Act so companies can appoint a representative to act in their stead on BC committees (even if that person is not a Director of the company); and to provide similar flexibility for other corporate types (e.g. trust, limited partnership);
- Amend the Act to capture alternative legal structures that were developed to service new forms of community living and provide for a transition process allowing these structures to be brought into the protective framework of the Act; and
- Amend the Act to reflect the recent Government's housing announcement around doubling the bright-line test and interest deductibility.

2. Introduction

2.1. Property Council's purpose is; "Together, shaping cities where communities thrive". We believe in the creation and retention of well-designed, functional and sustainable built environments which contribute to New Zealand's overall prosperity. We support policies that provide a framework to enhance economic growth, development, liveability and growing communities.

2.2. Property is currently New Zealand's largest industry with a direct contribution to GDP of $29.8 billion (13 per cent). The property sector is a foundation of New Zealand's economy and caters for growth by developing, building and owning all types of property.

2.3. Property Council is the leading not-for-profit advocate for New Zealand's largest industry – property. Connecting people from throughout the country and across all property disciplines is what makes our organisation unique. We connect over 10,000 property professionals, championing the interests of over 600 member companies who have a collective $50 billion investment in New Zealand property.

2.4. This submission provides Property Council's feedback on the Bill. Comments and recommendations are provided on those issues that are relevant to Property Council and its members.

3. Purpose of the Bill

3.1. Property Council supports an overarching purpose of the Bill to reform apartment living legislation by ensuring conflict of interests are declared and properly managed, the governance and management of unit title dwellings are professionalised, and disclosure regimes made more stringent. While we are generally supportive of the Bill, there are parts of the legislation that require further consideration. Sections below outline our recommendations to ensure the Bill is fit for purpose and delivers on its objectives.

4. Information disclosure

4.1. We recognise there are currently issues with what information purchasers are receiving and when they are receiving. Therefore, we support the intention to improve information disclosure. It is critical that unit title purchasers are provided with as much relevant information as possible to enable the purchaser to make a full and informed decision when purchasing a property subject to a unit title. However, further refinement of the Bill is required to improve the process (as outlined below).

<u>Other building issues need to be covered</u>

4.2. Disclosure requirements are tied specifically to buildings with issues, such as leaky buildings. We are concerned that this provision is insufficient, as there are other areas that should also be covered. Therefore, we suggest a short-term working group of industry practitioners, owners and legal practitioners be created by Ministry of Business, Innovation and Employment to ensure all potential issues are covered in the legislation. This will help ensure that prospective purchasers are fully armed with all the relevant information. Property Council would be pleased to assist with any such group.

4.3. We agree that the emphasis should be on disclosure to prospective purchasers (pre-contract disclosure), **not** on disclosure just before settlement (pre-settlement disclosure). Increased disclosure up-front will better assist with informed decisions. In addition, various research overseas on disclosure and its limitations show that the problem is not disclosure per se, but a failure to focus on relevance, specificity and, more importantly, purchaser's understanding, including consequences and implications of all the matters disclosed.[1] Any disclosure is only helpful if it is read and understood by purchasers.

4.4. However, we do not believe pre-settlement disclosure should be abandoned entirely – just that it is better if information is made available before the contract is signed.

[1] Ben-Shahar, O., & Schneider, C. (2014). *More than you wanted to know: The failure of mandated disclosure*. Princeton University Press.

4.5. We recommend considering the same disclosure provision as residential property agency agreements require. This will help ensure that nothing is left out by the vendor, and inform purchaser decision-making.

Right to withhold the disclosure

4.6. Section 147(5) removes the right to withhold the disclosure if costs are not paid. We do **not** support the amendment as it means that the service provider has no remedy or resource if they are not paid. We are concerned that this will drive instances of payment up front or require solicitor's undertakings before accepting an order for the document. Given the above, we recommend reinstating the right to withhold the disclosure if costs are not paid to avoid unintended consequences.

Cancellation clause

4.7. Under Section 151, a buyer may cancel an agreement for sale and purchase if disclosure is late, incomplete, or not made at all. From our experience, a right to cancel an agreement is an extreme legal remedy with uncertain legal consequences, as it has been exercisable when disclosure is late, not because the disclosure information raises concerns with the purchaser about the unit. For example, our members have acted for vendors or purchasers who have utilised the cancellation right where they have simply changed their mind, or where the law would not otherwise provide remedy. This problematic issue under the existing legislation has been retained in section 151(4).

4.8. Any cancellation right, if it is to exist, should be based on legal rights (e.g. breach of warranty, misinterpretation) rather than a process-based right. This is how buyers are protected in the most effective way. Further to this, developers do not want banks and other financiers to have a reason to discount pre-sales cover because of perceived cancellation risk.[2]

4.9. Given the above, we **do not** support the proposal for cancellation rights based simply on timeframes not being met (and without regard to the content of disclosure) as it will create significant problems for contracts generally, particularly sales off-the-plans. Current pre-contract disclosure for off-the-plans is unable to provide a lot of the information as it is still being developed as part of the development process. The protections for this area often in the sale and purchase agreement and that is where they should be.

4.10. Further to this, sales off-the-plans are often necessary for financing large construction projects, but inherently involve some uncertainty for both vendors and purchasers. This generally gets factored into price, with a lower price being paid for an off-the-plans purchase. From a developer's perspective, ensuring compliance with all the disclosure requirements is sometimes simply not possible, and this reality should be reflected in the legislation.

4.11. Therefore, we recommend amending Section 151 so a buyer can delay an agreement for sale and purchase and charge interest (not cancel an agreement) if disclosure is late, incomplete, or not made at all.

4.12. We agree with having different disclosure provisions for off-the-plans sales.

[2] Note: the developer's solicitor and the financier's solicitors are obligated to identify any cancellation risk (on the part of the buyer) that might make the ultimate settlement vulnerable

5. Body corporate

Governance arrangements

5.1. New sections 114A to 114F introduce accountability requirements to BC committees and their members (e.g. compliance with code of conduct, dealing with conflict of interest). While we understand the rationale for the proposal, we are concerned with the amount of compliance involved. It is important to note that most BC committees are volunteers, often with little experience in governance and administration. The new requirements will be overwhelming for most committee members. There is already strong industry evidence that many BCs find it hard to attract residents as committee members because of concerns about the time, risk, and compliance involved. Further to this, there is a risk that too much regulation will be counterproductive, as more regulations usually mean more cost. Particularly, these provisions are likely to increase fees for BC managers as the amount of work required will significantly increase. This will reduce the affordability and desirability of unit title ownership.

5.2. More flexibility should be provided for governance arrangements of BCs. The layered framework proposed under Queensland's **Body Corporate and Community Management Act 1997** could also be applicable to New Zealand context. Particularly, the Queensland framework has three types of BCs, each one of them having significantly different areas of responsibility:

- a building format plan (a multi-storey style building like a block of units);
- a standard format plan of low-rise houses or townhouses (where the buildings may not be connected but there is common property such as a shared driveway; or, if they are connected, they share only some building elements such as a wall); and
- a volumetric format plan of subdivision.

5.3. Given the above, we support amending the Act to include multiple BC classes with different levels of compliance in areas, such as insurance, maintenance and disclosure, but would like this extended to governance requirements and to different types of development (e.g. mixed use, commercial/industrial, etc). Further to this, BC should all have access to a standard set of rules, standard coverage for quorums, and the Tenancy Tribunal for disputes. The default BC operational rules in the Regulations have been described by the Courts as 'skeletal'. This situation needs to improve. The Act should also allow for further classes to be added if needed.

5.4. We support the Tenancy Tribunal becoming cheaper (and so more accessible). However, if a 'simple' (category one) matter goes to mediation, the total cost is now $1,000, which is more than at present, and a category 2 matter that goes to mediation will still cost $1,700. These costs remain prohibitive for many parties with low-level disputes.

5.5. We question whether amendments to Section 139 (Original owner's obligation in relation to service contracts) are necessary. For developers the proposed amendments remove the ability to contract with any certainty with service providers. This takes some "value" off the table. It is important to note that this value can also be about sharing the cost rather than needing to pass it on to an owner up front.

5.6. From our perspective, the current provisions are working well to discourage the "bad behaviour" seen historically (e.g. developers entrenching unfair contracts for their own benefit). Developers

currently are much more inclined to disclose these arrangements up front too and contracting may be for positive and non-nefarious reasons (e.g. provisions of solar panels for a long term period that buyers can opt in and use, long-term contract with CityHop to provide an electric car). These efforts to provide for development amenities should be able to be done with certainty.

5.7. Therefore, we recommend deleting amended Section 139 as the current provisions are working well.

5.8. Section 114 requires a BC manager to always act on the best interest of the BC. We question whether Section 114G inadvertently captures accountants, lawyers and others providing services to BCs that fall within the description at 114G(2). We are concerned about liability as there are situations when a BC manager may need to act in its own interests (e.g. if there is a dispute). Therefore, we recommend amending Section 114 to allow BC managers to act in their own interests when it is required.

5.9. We favour more flexibility with committees. At present, committee members must be re-elected every year. In large developments with complex maintenance and infrastructure requirements, this can mean a loss of knowledge and experience if the entire committee changes. We favour committee members being able to be elected for terms of one, two or three years, on a rotational model (as is the case with many incorporated societies, companies and charitable trusts). This would mean only ½ or 1/3 of the committee would change at each election, ensuring greater continuity and better governance.

5.10. Therefore, we recommend amending the Act so that a BC can decide that BC committee members will hold office for staggered terms of one, two or three years before re-election, rather than the whole committee being re-elected each year. This will help ensure greater continuity and better governance.

Regulations of BC managers

5.11. We support the proposal to return the definition of BC managers to the Act (new Section 114G) and provide regulations around functions and duties of BC managers (new Sections 114H to 114I). However, legislation as it is currently drafted does not provide enough clarity around what industry organisation BC managers need to be part of and what organisation fosters the professional development of BC managers.

6. Long-term maintenance plans

6.1. The Bill is seeking to ensure that planning and funding of long-term maintenance projects is adequate and proportionate to the size of the complex concerned. We support the proposal. However, further refinement is required.

6.2. Section 157D provides additional requirements regarding LTMPs (e.g. peer-review process every three years). Clarification is required around whether LTMPs need to be peer reviewed if completed by one of the professionals listed in Section 157D(6). We are concerned that the new provision may result in increased costs if documents were already prepared by a competent professional.

6.3. The BC of a large residential development or a medium residential development must establish and maintain a long-term maintenance fund (Section 157E). We support the provision. However, it is unclear whether this allows for funding by way of part funding from the long term maintenance fund

and remainder by special levy (i.e. items not fully funded from the long-term maintenance fund). We believe this should be allowed if it is made clear in the LTMP if a certain percentage can be funded by special levy as this allows some flexibility in funding for a BC.

6.4. We also have concerns around annual mandatory auditing of the fund as it will be expensive, time consuming and resource intensive. Adding more costs to BC's unnecessarily will only make apartments less attractive to people, especially at the more affordable end.

6.5. It also raises capability concerns. In particular, the BC of a large residential development or a medium residential development must annually submit its records, statements, and other relevant information in relation to its long-term maintenance fund for audit to an independent auditor (Section 157F). It seems to be burdensome to complete if, for example, the fund has not been used. However, if there is an option to opt out under Section132 (8), it has to be clearly stated in Section 157F(3).

7. Voting

7.1. Clause 10 amends Section 102 and inserts limitations of the number of proxy votes any one proxy may hold. From our members' experience, proxy votes are significantly important as people do not always show up at meetings. We believe that provision under Clause 10 will cause more harm than solve the issue. What it does is it deprive people of their legitimate property rights (e.g. if a company that owns 1/3 of the building appoints a Director or property manager as proxy). Given the above, we recommend removing Clause 10 to ensure provision of legitimate property rights.

7.2. Clause 11 inserts new Section 104A which authorises members of a BC to attend meetings and vote at those meetings using some form of remote access facility (e.g. a telephone or audio-visual link). We support the provision as all meetings in today's environment should provide for virtual access). However, further refinement is required. Particularly, the insertion of Section 88 (3) in the Act was done as part of the COVID-19 response, which means it was a temporary measure. We believe it has to be a permanent measure. Therefore, we recommend deletion of Section 88 (5) which provides for Section 88 (3) to expire.

7.3. The Covid-19 events have shown that it is important that those who cannot attend a meeting in person are not disenfranchised from involvement in BC matters. We recommend that it is clarified that a proxy can call for a poll on a vote in the same way as any other in-person voter.

8. Costs of utility interests

8.1. Clause 5 amends Section 39 which relates to the assigning of utility interests to each principal unit. The amendment allows for apportioning of utility interests so that costs of particular utilities can be more fairly divided, based on use. For example, if there is a lift installed in a unit development, the interests amongst all the units could be apportioned in a way that results in those on the upper floors being responsible for a larger share of the operating costs than those on the ground floor.

8.2. We believe this approach to dividing the cost is too narrow and prescriptive. Some flexibility should be provided to account for different scenarios (e.g. mixed-used buildings with retail on the bottom).

8.3. We are also concerned that this provision is incredibly difficult to achieve in practice. It needs to be easier to reassess utility interests. Therefore, it should be an ordinary resolution, not a designated resolution.

9. Additional comments

Appointment to BC committee

9.1. Only natural persons may be appointed to a BC committee. When a unit titled property is owned by a limited liability company, the only natural person who may be appointed to the BC committee to represent that unit must be a Director of the company owning the unit. This prevents large companies such as a listed entity from being involved in the management of properties in which they own, discourages the use of this form of ownership, and lacks clarity where non-company entities (such as local authorities or incorporated societies) own units. We support companies being able to appoint a representative to act in their stead on BC Committees, even if that person is not a Director of the company. We also support committee members being able to be elected for terms of more than one year, as noted above (see para 5.8 above). Similar flexibility should also be provided for other corporate types, such as trust and limited partnership.

Alternative legal structures

9.2. The Act last saw substantial amendment 10 years ago, with various 'tinkering' amendments since then. As a result, it has not kept pace with the development of community living in New Zealand and alternative legal structures that have being developed to service them. However, these legal structures are unwieldy and leave consumers with no recourse when issues occur. The Act needs to be amended accordingly to capture these alternative legal structures and then provide for a transition process allowing some of those historic structures to be brought into the protective framework of the Act.

Government's announcement on tax deductibility and bright-line changes

9.3. The Government has recently announced the housing package which includes proposals around doubling the bright-line test and interest deductions. If these recent proposals shift new build development, it has to be reflected in the Act, so it is fit-for-purpose.

10. Conclusion

10.1. We support an overall intention of the Bill to modernise the Unit Titles Act to ensure it is fit for purpose. Reform in this space is long overdue.

10.2. While we support the Bill, there is a need to work through the detail of legislation to ensure it delivers on the objectives that have been set for it. This includes refinement of the proposals to improve information disclosure rules, BC governance arrangements, planning and funding of LTMPs, regulations around voting and cost distribution. We also provided recommendations around what is currently not in the Act but needs to be included (e.g. appointment to BC committee; alternative legal structures).

10.3. Property Council would like to thank the Finance and Expenditure Committee for the opportunity to provide feedback on the Bill. **We also wish to be heard in support of our submission.**

10.4. For any further queries contact Natalia Tropotova, Senior Advocacy Advisor, via email: natalia@propertynz.co.nz or cell: 021863015.

Yours sincerely,

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