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2 March 2017

Unit Titles Act Review
Construction and Housing Markets, BRM
Ministry of Business, Innovation & Employment
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Review of the Unit Titles Act 2010

The New Zealand Law Society welcomes the review of the Unit Titles Act 2010 (Act). Problems with the unit titles regime have been apparent for some years, and the Law Society's Property Law Section has been active, along with other stakeholders, in calling for a fundamental review of the legislation.

The Property Law Section's unit titles working group – comprising property lawyers with extensive experience and expertise in unit titles law – has considered the *Review of the Unit Titles Act 2010 discussion document, December 2016* (discussion document), and responses to the consultation questions are set out below.

The regulatory and legislative proposals outlined in the discussion document, if adopted, are intended to facilitate a robust and fit-for-purpose regulatory regime. The Law Society supports many of the proposals. However, only a targeted review has been undertaken and the discussion document addresses only a limited number of the issues highlighted in the recent stakeholder report provided to the Minister.[1]

The Law Society considers there are further issues in the Act and Unit Titles Regulations that need to be addressed. An indicative list of issues that are not addressed in the current review is set out in **Appendix A**. A more comprehensive review, rather than piecemeal reform, is needed.

The Law Society also notes that section 2.3 mentions the usefulness of recent reforms in Queensland. It is important however to recognise that the Queensland unit titles environment is more sophisticated than New Zealand's. Research into reform efforts in other states and jurisdictions would also be useful.

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1 *Unit Title Working Group Report May 2016, Presentation to Hon Dr Nick Smith, Minister of Building and Housing*. Available at http://www.documentcloud.org/documents/2848147-Unit-Title-Working-Group-May-2016.html.

Consultation questions

Potential size thresholds for more rigorous legislative requirements – Section 3.1

Q1: We propose that the following legislative requirements apply to complexes with 10 units and over. The body corporate for complexes between 10 and 29 units, may, however, resolve against adopting any of these requirements by special resolution. Bodies corporate must:

- report on the performance of delegated powers at the annual and any other general meeting;
- contract a body corporate manager to perform functions as specified in the UTA;
- have LTMPs signed by the body corporate chair and a qualified person;
- have a LTMF to finance the long term maintenance plan already required under the UTA; and
- have body corporate accounts and LTMFs audited annually.

Do you agree? If no, why?

The Law Society notes that the Queensland model sets thresholds based on both development size and development type (for example, mixed use developments, developments with standalone units etc). A criterion of development size alone fails to take account of the complexities of many unit title developments. Other determining factors may include the configuration of the development, the amount of common property, the existence (or not) of lift and ventilation units, etc. There is therefore a variety of different factors that impact upon a body corporate's duties and obligations, of which the size of the development is only one.

A criterion of development size alone is overly simplistic and insufficient to appropriately trigger varying degrees of compliance. Size of development has an influence on governance only where the level of interaction between owners is limited and a high level of management is necessary for the efficient and effective running of the development. The Law Society therefore recommends that 'development type' is also incorporated as a criterion.

Q2: Do you consider that it is appropriate for complexes between 10 and 29 units to be able to opt out of the above proposed legislative requirements by special resolution? If no, why?

As stated in response to Q1, the Law Society considers there is a fundamental problem with the current sole criterion of size of unit complex. If this is addressed in the way suggested above, then it may be appropriate for certain body corporates to opt out.

It is essential that first principles are reviewed, as the type (not just size) of unit complex will likely inform many of the current proposed amendments to the Act.

Consideration of a separate UTA Entity – Section 3.2

Q3: Please comment on:

- how government agencies might achieve a more joined up approach;
- how we can improve the services we provide; and

- whether you think a separate dedicated entity is warranted; and if yes, what functions and responsibilities would a dedicated unit titles entity deliver? Please list.

There has been a significant increase in body corporate developments, particularly in the three main centres: Auckland, Wellington and Christchurch. At present there is no centralised agency to support this. The Law Society considers that the Tenancy Tribunal lacks the necessary experience and expertise to deal with the specialised nature of unit title disputes. In addition, the process for bringing a dispute before the Tribunal is viewed as expensive, cumbersome and rigid.

Furthermore, the number of disputes brought before the Tenancy Tribunal is not indicative of the actual number of unit title disputes. There is anecdotal evidence that many unit title disputes are settled outside of the Tribunal, or are not settled and significant dysfunction continues to affect the body corporate.

There is no express process for dealing with the wide variety of tenant and owner issues and identifying with precision whether the Residential Tenancies Act or the Unit Titles Act should prevail. Reference to tenants in the Unit Titles Act is important, as a large percentage of units are occupied by tenants.

A single UTA agency

The Law Society supports a single agency (a new unit to be established within MBIE) offering streamlined dispute resolution services for unit title disputes. (Alternatively, an external panel could assist with disputes, many of which can and should be referred to mediation.)

The single agency could utilise expertise and knowledge from across MBIE, MOJ and LINZ. A coordinated group of specialists could provide a variety of relevant knowledge and skills to assist the various needs of a wide variety of unit title stakeholders.

The agency's tasks and services could include:

- ongoing review of the Act and Regulations;
- guidance to all stakeholders;
- education and training for owners, committees, managers and the like;
- unit titles dispute resolution, mediation and adjudication;
- providing technical rulings (similar to determinations under the Building Act); and
- supporting bodies corporate on financial management and governance matters.

Any dispute resolution regime requires enforcement and penalty provisions to enforce orders made. Without this, there is little or no incentive to resolve disputes.

The Law Society suggests that a UTA-specific website should be established (and maintained jointly by MBIE, MOJ and LINZ). The website could include relevant statutory and other information and education for unit title developers, bodies corporate, owners and tenants, plus links to relevant external organisations, such as the Strata Community Association.

Improving the Disclosure Regime – Section 4.1

Proposal 1: Amalgamate the current requirements of the pre-contract, pre-settlement and additional disclosure statements into one step

Q4: Do you agree that the current pre-contract, pre-settlement and additional disclosure steps should be consolidated into one step? If no, why?

The Law Society does not support the amalgamation of all disclosure into one step. Just as an agreement for sale and purchase of real estate requires warranties under the agreement at different points in the continuum of the transaction, the purchase of a unit title property should also be seen as a transaction on a continuum.

The Law Society supports partial consolidation of the disclosure regime. Accordingly, there would be two disclosures, namely the pre-contract disclosure statement (which would include items from the additional disclosure – see Q5), and a pre-settlement disclosure statement. This retains a mechanism to require disclosure of any material changes (for example changes to levies or operational rules) between the time of signing the contract, and settlement.

The contractual consequences of incorrect or misleading disclosure information remain unclear, particularly since disclosure is often provided (in a legal sense) by vendors, who are not subject to the Fair Trading Act. Disclosure information however is provided in a practical sense by professional managers who are likely to be subject to the Fair Trading Act.

The discussion document also fails to identify that different information needs apply to off-the-plan, new and existing properties. This needs to be addressed more fully. With new properties, the content of the pre-contract disclosure should be far broader and cover a whole range of different issues than for an existing property. For example, budgets for levies can only be assessed with off-the-plan and new properties but still need to be as accurate as possible. With existing properties, these budgets are already known.

The disclosure regime is also silent with regard to rights to information for existing owners, such as body corporate committee meeting minutes or expert reports commissioned by committees. There is a need to clarify information rights in the Act, in respect of principal unit owners.

Proposal 2: Add further requirements in disclosure statements

Q5: Do you agree that additional requirements should be included in disclosure statements? Do you consider any other requirements should be included?

The Law Society agrees that the additional disclosure requirements noted in the discussion document should be included. However, the requirement that 7 years of financial information be provided is considered excessive. The Law Society considers that the last 3 years of financial reports and minutes would be adequate.

The Law Society notes that the following information needs to be included in the proposed additional disclosure:

- reference to a Long Term Maintenance Plan;
- fire evacuation plan;
- health and safety management plan (if one exists);
- copy of the building's current warrant of fitness;

- unpaid levies; and
- changes to body corporate levies over the development period of a new unit title development.

Whether a body corporate or committee can conduct business '*in committee*' needs to be clarified. If so, redacted *in committee* minutes should be included as part of pre-contract disclosure.

Proposal 3: Require a statutory warranty on all disclosure statements

Q6: Do you agree that bodies corporate should certify that all disclosed information is complete and correct? If no, why?

Disclosure under the Act is described as being provided from the vendor to the purchaser, with certification of information required for a pre-settlement disclosure statement. In practice however, a disclosure statement is usually prepared by a professional manager who is contracted to the body corporate. This is signed by the Chair of the body corporate. (Who should sign in the absence of a body corporate Chair needs to be considered.)

Vendors often have little understanding of their disclosure obligations, or of the details of the required information. The legal responsibilities of the body corporate manager to both the vendor and purchaser (both of whom generally have no direct contract with the manager) are often unclear. Whether body corporate managers should be required to certify information as complete may need to be considered. The likely implications of imposing additional obligations may also need to be considered.

Some information may need to be signed by the Chair with the qualifier of "to the best of our knowledge and belief" where there is no realistic expectation that the Chair will be able to certify the information to a higher standard.

The Law Society recommends that certified disclosure should be qualified as disclosure that the body corporate has *actual* knowledge of. Disclosure, whether it is pre-contract or pre-settlement, consists of vendor-specific matters relating to the property, e.g. matters that the vendor has done within their own unit for which they have obtained the consent of the body corporate, and matters the body corporate has determined relating to the vendor's unit or the development complex as a whole.

The discussion document fails to address issues concerning section 151.[2] The consequences of a failure on a vendor's part to provide disclosure in a timely fashion is not satisfactorily answered by the current provision. The Law Society recommends a review of this section, in line with the recent Queensland unit title Act reforms.

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[2] *Unit Title Working Group Report May 2016, Presentation to Hon Dr Nick Smith, Minister of Building and Housing*, p19 at [19] - [20]; see also New Zealand Law Society submission dated 1.2.13 on the Unit Titles Amendment Bill at page 8 http://www.lawsociety.org.nz/__data/assets/pdf_file/0016/61108/Unit-Titles-Amendment-Bill-consultation-doc-010213.pdf.

Strengthening Body Corporate Governance – Section 4.2

Proposal 1: Address conflicts of interest

Q7: We propose to add provisions to the UTA that address conflicts of interest that achieve similar aims to the provisions included in the Incorporated Societies Bill. Do you agree? If no, why?

The Law Society supports mandatory disclosure of conflict of interest, either through body corporate rules or through Regulations.

It should be noted that the conflict provisions of the Incorporated Societies Bill appear to address only direct or indirect financial interests. Unit title arrangements differ from incorporated societies in that committee members are owners, and often in occupation. Decisions made in a unit title context can be non-financial in nature. The Law Society therefore recommends any other non-financial interest that could materially influence a decision should also be required to be disclosed.

The Law Society suggests guidance and assistance with the development of protocols would be required to accompany these heightened disclosure requirements.

Proposal 2: Increase reporting of delegated powers

Q8: We propose that bodies corporate of large sized complexes (30 and over) should report on the performance of their delegated powers at every general body corporate meeting? Do you agree? If no, why?

The Law Society supports increased transparency of reporting from bodies corporate to owners. We support the broadening of the reporting obligation on large complexes (30+ units) to all general meetings, and suggest that the reporting obligation should also apply to medium-sized complexes (10 – 29 units). However, the discussion around Q1 (the criteria for assessing thresholds of compliance) is also relevant to this question.

Proposal 3: Duties and responsibilities of body corporate committees

Q9: We propose including additional provisions on the duties and responsibilities of a body corporate committee similar to those included in the Queensland's Code of Conduct for committee members. Do you agree? If no, why?

The Law Society supports this proposal. The principles of flexibility and autonomy that underpin the Act assume committee members' familiarity with duties and scope of decision-making powers under the Act. Anecdotal evidence however, shows that body corporate committees are typically comprised of laypersons unfamiliar with their legal duties and responsibilities, associated statutory procedures and the doctrine of ultra vires. Many rely on body corporate managers to guide them. Body corporate managers have varying degrees of experience and legal knowledge, which can pose a risk especially given their current lack of regulatory oversight.

The Law Society has noted previously in this submission that the Tenancy Tribunal statistics on disputes brought before it are not indicative of the actual number of disputes. Governance issues are often present in body corporates but many are not brought before the Tribunal. Additional provisions to clarify duties and responsibilities would serve to mitigate many of these issues and disputes.

An appropriate balance needs to be struck when prescribing these duties and responsibilities. It is important to recognise the volunteer nature of many committee members, and to avoid overly

prescriptive or onerous provisions that may create a disincentive to service. It is suggested that provisions should be drafted with guidance for committee members in mind.

Proposal 4: Limit the number of proxy votes an individual can hold

Q10: Do you consider that the risk of proxy farming is sufficiently high to warrant amendment of the UTA to limit the number of proxy votes one person can hold at a time? If yes, why?

The Law Society understands from anecdotal information supplied that proxy farming is a growing issue, and it supports the principle of discouraging this activity.

Where there is evidence of abuse of proxy votes, the Law Society supports penalty provisions. There is more likely to be evidence of abuse where general authority (rather than specific authority) is given. However, the issue of evidence can be more problematic when powers of attorney are used. It is important to note that while proxies are regulated, other arrangements such as powers of attorney are not.

A practical solution to the issue of proxy farming would be to allow absent owners to attend meetings remotely or to use electronic voting mechanisms.

Proposal 5: Limit the impact of unfair service contracts

Q11: We propose to amend the UTA to:

- limit service contract timeframes; and
- specify a renewal period for service contracts after the control period.

Do you agree? If no, why?

The Law Society agrees it would be useful for the Act to provide for long-term contracts to be revisited, as well as the ability for the body corporate to revisit the nature of the "control period", and the arrangements entered into before and during this period. The Law Society suggests that the definition of "service contracts" be extended to capture other like contracts that are sometimes enshrined by registering an encumbrance or in a long term lease, entered into or initiated by a developer.

It may also be necessary to provide guidance to bodies corporate around appropriate limitations on certain types of contracts.

Proposal 6: Clarification of governance terms

Q12: Do you agree with the proposals made above as they relate to:

- Minority relief – no change warranted

The Law Society is concerned that recent case law has limited the scope of minority relief.[3] It suggests that provisions in the Act could be strengthened to ensure that no person is precluded from seeking minority relief. A provision could be drafted to ensure that a person may seek minority

[3] *Body Corporate 401803 v Vermillion Wagener Ltd & ors*, CIV-2014-404-1343 [2015] NZHC 285 (*Tremont Holdings*).

relief, where the effect of a body corporate resolution results in injustice or inequity for any part of the minority.

- Alteration to units – sections 79 and 80 (i) to be amended if necessary to align with section 65

The Law Society agrees and supports amendment of these sections to create consistency across the Act.

There is a lack of definition or guidance contained in the Act pertaining to a threshold of what changes would "materially affect" a unit, and this would be a useful addition.

- Quorum – section 95 to be clarified;

The Law Society agrees that there is some inconsistency in the terminology in the Act in relation to entitlement to vote at a general meeting of the body corporate.

Section 79(c) specifies that an owner of a principal unit "is entitled as a body corporate member to exercise a vote in respect of his or her unit, subject to section 96 …". Section 96 is entitled Voting eligibility: section 96(1) sets out the qualifications required in order for a person to be "eligible to vote", and section 96(3) stipulates that "an eligible voter may not vote unless all body corporate levies … have been paid". A quorum is constituted under section 95(1) by at least 25% of the persons "entitled to exercise the voting power".

It appears that the intention of the sections in combination is that an eligible voter (s 96(1)) is only entitled to exercise their voting power in terms of forming the quorum (s 95(1)) and to exercise a vote (s 79(c)) if their levies have been paid (s 96(3)). However, the use of more consistent terminology would be helpful.

The Law Society agrees with the statement in the discussion document at page 19 that it is fair and equitable for unit owners to pay levies if they wish to participate (i.e. vote) in body corporate decision-making.

- Resolutions – section 101 to be amended.

The Law Society agrees with this proposal.

Professionalism in Body Corporate Management – Section 4.3

Proposal 1: Status quo and self-regulation

Q13: Do you agree that industry bodies such as those mentioned have the ability to increase professionalism and help address body corporate management issues? If no, why?

The Law Society believes a self-governing and regulated professional group is the way to provide appropriate professional management of bodies corporate. Membership of a unit titles-specific professional group should be mandatory for body corporate managers, thereby making the manager subject to that group's code of conduct/practice.

The body corporate manager's contractual tenure should ideally be limited to ensure no adverse consequences result from a long-term appointment of any manager.

The nature of the duty owed by a body corporate manager to a body corporate may need to be reviewed. The basis of this duty may in fact be contractual rather than fiduciary.

Q14: Do you support requiring body corporate managers to be members of a professional group and being subject to the codes of practice of the group? If no, why?

As noted at Q13, the Law Society strongly supports both statutory regulation and professional membership of body corporate managers. This would provide an appropriate code of practice and conduct, plus enforcement for any breaches.

The Law Society cautions against allowing body corporate managers to pick from multiple professional bodies. This may lead to a range of differing standards of practice and conduct. As mentioned at Q13, a single UTA-specific professional group would provide appropriate guidance and standard-setting for body corporate managers.

Proposal 2: Make contracting a body corporate manager a requirement for medium and large complexes

Q15: Do you support body corporate managers being mandatory for medium and large complexes? If no, why?

The Law Society supports this proposal. The various compliance requirements, issues and need for professional independence in the unit title governance regime highlights a need for professional management, especially considering body corporate committees are primarily comprised of layperson volunteers. Where the size and type of body corporate is such that professional management is shown to be unnecessary, an 'opt out' option could be given (refer Q1).

Proposal 3: Define body corporate managers in the UTA and introduce operational requirements in regulations

Q16: Do you support the functions of body corporate managers being set out in the UTA? If no, why?

The Law Society recommends that the functions and minimum obligations of body corporate managers should be set out, either in the Act or the Regulations. Specifying duties in the Regulations would allow ease and flexibility for duties to be updated over time, in response to what is likely to be a dynamic period in the body corporate management industry.

Q17: What functions, if any, do you think should be prohibited from being contracted to a body corporate manager?

The body corporate manager should have limited decision-making power over the body corporate's assets. Expenditure under a certain amount should be allowed and only out of the operating account, not out of any of the other accounts that a body corporate can hold. For example, expenditure out of the long term maintenance fund should be determined by the committee or the body corporate itself. The body corporate manager should also be prohibited from investing body corporate funds.

Any provisions should ensure there is no risk that a body corporate manager could take control of a body corporate through any default on the part of owners.

Q18: Do you support the setting of additional requirements in regulation for body corporate managers? If no, why?

Yes. Please refer to Q16 above.

Ensuring Adequate Long Term Maintenance Plans – Section 4.4

Proposal 1: Guarantee the credibility of the LTMP through the body corporate chairperson and appropriately qualified signatories

Q19: Do you agree that a member of a recognised surveying institution or professional group should be required to guarantee the accuracy and completeness of the LTMPs? If no, why?

The Law Society agrees in part. It does agree that members of a recognised surveying institution or professional group are the most appropriate professionals to certify LTMPs but cautions against imposing a requirement for a guarantee of the accuracy and completeness of the LTMP. The concern is that this may be perceived as too onerous for the professional concerned, possibly creating a chilling effect, or attempts may be made by the professional to negate the required guarantees by the use of waivers.

Q20: Do you agree that the body corporate chairperson, on behalf of the body corporate, should be required to sign LTMPs to guarantee accuracy (to the best of their knowledge)? If no, why?

The Law Society believes this proposal puts too much of a burden and potential liability onto the body corporate chairperson. This may result in a disincentive for any volunteer to accept a chairperson position. Furthermore, the chairperson generally does not possess the requisite expertise to make the required certification. It is considered adequate for certification to be provided from a relevant expert (as discussed at Q19).

Proposal 2: Develop a new online template for LTMPs

Q21: Are there mandatory fields/information you consider should be included in the revised template? If so, please list.

The Law Society recommends that a template should be devised by specialist building surveyors. It is noted that a working group of members from the RICS/NZIBS were involved in the drafting of the 2011 Regulations and it is suggested that a similar group could revise and approve the LTMP template.

Proposal 3: Extend the timeframe of LTMPs to 30 years

Q22: Do you agree that 30 years is an appropriate timeframe for LTMPs for medium (unless they resolve not to) and large complexes? If no, what threshold or timeframe do you consider appropriate?

The Law Society considers that 30 years is appropriate for capital expenditure items such as roofs, lifts and HVAC systems, and supports the compulsion for the LTMP and a LTMF to be associated to this expenditure.

Proposal 4: Require body corporates to review their LTMPs every three years

Q23: Do you agree that LTMPs for medium and large complexes should be reviewed every three years? If no, what threshold or timeframe do you consider appropriate?

The Law Society agrees a review of the LTMP every three years is appropriate.

Proposal 5: Require large bodies corporate to have a LTMF

Q24: We propose that medium sized bodies corporate comprising 10 – 29 units are required to establish and maintain a LTMF (unless they resolve not to by special resolution). Large complexes comprising 30 units and over units would be required to have and maintain a LTMF. Do you agree? If no, why?

The Law Society agrees in principle. Long term maintenance funds are an important aspect of protecting owners, especially in large bodies corporate. However, the discussion around Q1 (the criteria for assessing thresholds of compliance) is also relevant to this question.

Proposal 6: Require bodies corporate LTMFs to be annually audited

Q25: We propose that the LTMFs of medium and large bodies corporate are audited annually. Do you agree?

The Law Society considers that formal auditing by an external professional is not strictly necessary and may create an unnecessary cost and burden for bodies corporate. It should be adequate that the bank statements are reviewed and ratified by the body corporate committee.

Accessibility of the Dispute Resolution Scheme – Section 4.5

Proposal 1: Lowering fee settings and introducing a reduced fee for mediation

Q26: Do you support the proposed fee level for the dispute resolution service? If no, why?

The Law Society agrees with the new fee proposals.

Q27: Would you consider using mediation if the above option was adopted? If no, why?

Mediation is a valuable tool to resolve multi-party disputes and relationship-oriented disputes, both of which are common in the unit title environment. Care needs to be taken however, to ensure the time between lodging a dispute and adjudication will not be unduly drawn out by the insertion of another step in the alternative dispute resolution process, such as mediation.

Proposal 2: Revise the name of the Tenancy Tribunal

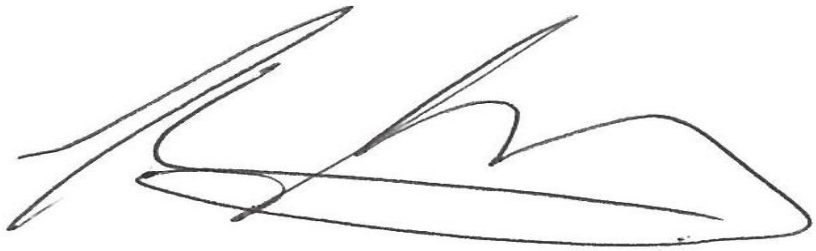
Q28: Do you agree that the name of the Tenancy Tribunal should be changed to the 'Tenancy and Unit Titles Tribunal' to reflect its jurisdiction over unit title disputes? If no, why?

The Law Society has no objection to the proposed name change. It is noted that the name 'Tenancy Tribunal' creates a strong perception that the Tribunal only has jurisdiction over tenants and landlords, not owners.

Conclusion

The Law Society hopes the above comments are helpful to the Ministry, and if further information or discussion would assist please contact the Property Law Section Manager, Katrina Thomas (katrina.thomas@lawsociety.org.nz, DDI: 04 463 2963). The Property Law Section would like to make a constructive contribution to the unit titles reform process, and is available to assist the Ministry on the technical details of the proposed reforms.

Yours faithfully



Kathryn Beck
President

Appendix A: Unit Titles regime problems that remain unaddressed

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1. The conflict that exists between the terms of sections 126 and 128 of the Unit Titles Act.
2. The conflicting role of the chairperson of body corporate, as elected, and the chairperson of the body corporate committee, as appointed. The role of the chairperson of the body corporate is identified by Regulation 11 but is frequently vacant in various bodies corporate because no one will stand for election.
3. The technical problem that exists in regards to layered developments where the developer is looking to create layered developments simultaneously with creating of the parent unit title. Currently the layered development provisions under Part 1, Subpart 2, sections 19–21 do not allow simultaneous deposit of plans to occur, requiring a work-around by the Registrar General of Lands. This needs to be resolved.
4. The election of the chairperson of the body corporate under Regulation 10(1) which requires a majority but where there are multiple candidates, it is unworkable.
5. Regulation 17(1) provides for an ordinary resolution for the body corporate to enter into an obligation but the Act and the Regulation do not make clear whether this applies to entering into a delegation or whether delegation requires a special resolution.
6. Whether the body corporate and/or the committee can go “into-committee”.
7. Whether under section 111 a body corporate can override an earlier delegation set by special resolution on the committee to do certain acts.
8. Whether election of either a chairperson or committee members can take place by a written resolution in lieu of a meeting.
9. Clarification in regard to section 73 as to easement terms in relation to incidental and ancillary rights contained within that section.
10. Inconsistencies in the sections relating to insurance – sections 134–137 – in particular the reference to full insurable value in section 135(1) which is not available in the insurance market.