NEW ZEALAND
LAW SOCIETY

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

3/05/2021

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

<u>Introduction</u>

1. The New Zealand Law Society | Te Kāhui Ture o Aotearoa (**Law Society**) welcomes the opportunity to comment on the Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill (**Bill**).

2. This submission was prepared by the Law Society's Property Law Section's unit titles working group – comprising property lawyers with extensive experience and expertise in unit titles law. The Property Law Section was established in April 2000 as a voluntary membership group, and it represents the interests of over 1,500 property lawyers.

3. The Law Society wishes to be heard.

<u>Executive summary</u>

4. Since the passing of the Unit Titles Act 2010 (**UTA**) and the Unit Titles Regulations 2011 (**Regulations**) there has been industry and body corporate criticism of the gaps and technical errors in the legislation. There is general consensus in the industry on most of the urgent changes needed to the UTA. (Many of these are covered in the Bill, and we have set out additional recommended urgent reforms in Part 2 of this submission.) In its response to the Ministry of Building and Housing's 2016 discussion document *Review of the Unit Titles Act 2010*, the Law Society called for a comprehensive review of the legislation, rather than piecemeal reform.

5. This submission is in three parts:

   - **Part 1** concerns the content of the Bill
   - **Part 2** concerns issues that are not in the Bill, but that urgently need to be addressed
   - **Part 3** concerns issues that need to be on the agenda for further, future reform.

6. The Law Society supports amendments in the Bill addressing issues that require urgent attention. There needs to be a balance in terms of protection for people investing in what will often be their largest asset, their home, but too much regulation can cause higher compliance costs which may disincentivise unit ownership and discourage lay people from becoming involved in body corporate governance. The Bill seeks to ensure that balance is maintained.

7. Given the length of time it has taken to get to a Member's Bill being drawn from the ballot to address issues needing urgent attention, there is concern that momentum must not be lost. The Bill makes essential improvements to several aspects of the UTA and we ask that the House not delay enacting the Bill.

8. As noted, there is also the need for further reform. The Law Society acknowledges that the recommendations in Part 3 will need to form part of a wider review. An immediate review should follow the Bill's enactment, where other issues that are not as urgent are considered and further legislation is introduced.

PART 1 - Submissions on the Bill

Body corporate managers

9. Body corporate managers are not referred to in the UTA, and this is a key gap in the legislation which the Bill seeks to address. The Unit Titles Act 1972 referred to body corporate secretaries, but the UTA is silent on professional body corporate management. This is a significant gap, particularly when managers may hold millions of dollars in body corporate funds, and directors may also own units within body corporates they manage, getting influence on committees. Some owners have a suspicion (whether well-founded or not) that managers may side with developers, rather than acting in the interests of the body corporate, because of the ongoing work they may receive.

10. The Law Society supports the inclusion in the Bill of provisions regarding the role of body corporate managers, as well as their functions and duties and requiring them to act in the best interests of the body corporate. Currently anyone can be a body corporate manager, with no requirement for any particular knowledge or skill, and no restrictions if someone has had fraud or dishonesty convictions.

11. The issue then becomes one of regulation. Any proposed regulatory regime should be aimed at consumer protection. New section 28B proposes a lower cost method of regulation, requiring body corporate managers to be members of an industry organisation.[1] These industry organisations should have the ability to discipline, suspend or expel members if they do not comply with the organisation's rules. We support the obligation for large body corporates to have a body corporate manager, while allowing mid-sized ones to opt out. (Some commentators might want regulation to go further than that outlined in the Bill, but that of course raises questions about adequately funding stricter regulation.)

12. The Law Society supports the improvements contained in the Bill, such as: ensuring body corporates are not bound in contracts for terms that are too long; requiring better record keeping and stronger rules around handovers of body corporate records; the ability to terminate contracts for non-performance; and extending the jurisdiction of the Tenancy Tribunal to include body corporate managers.

13. The Bill does not include offences or penalties for managers who do not comply with statutory obligations. The Law Society considers this would be appropriate and should be addressed, otherwise the only real remedies for owners will be through the District Court and High Court.

14. We also suggest the Bill should prescribe a code of conduct for all body corporate managers. If a manager joins an industry organisation that does not have a code of conduct (a possibility under proposed new section 28B(1)(b)) they will have no code of conduct obligations, which does little to improve professionalism and standards across the industry. Regardless of whether new section 28B(1)(b) is enacted, the Law Society believes a code of conduct is necessary.

15. The Bill should provide grounds to terminate a body corporate manager if they breach the code of conduct or are convicted of an offence involving fraud or dishonesty. These would override the grounds for termination in the service contract with the manager. As an

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[1] Such as SCA(NZ), the Strata Community Association (NZ).

alternative, termination clauses of this kind could be added to the terms that must be included in a body corporate management service contract in proposed new section 28C.

16. Queensland's Body Corporate and Community Management Act 1997 provides an example of a low-cost method of statutory regulation of body corporate managers, including duties, reporting, appointment and termination, and a code of conduct. Managers in Queensland do not need to be licensed and there are no formal qualifications or training requirements, but they must follow the statutory requirements.

17. Handling body corporate funds is a central part of the manager's role. A key concern for owners is the handling of body corporate funds by their manager and the Bill provides an opportunity to tighten this area significantly. The Law Society supports new section 114I(3)(c) as an essential amendment, and recommends that it should go further to clearly state that:

    (i) every body corporate must have its own separate bank account (which can have committee members as signatories and/or together with the manager), and

    (ii) body corporate managers are prohibited from using one bank account with partitioned subaccounts for each body corporate they manage.

    Auditing of body corporate monies would then be easier to reconcile with bank statements, as they should only have body corporate-specific transactions and there would be no intermingling of funds. A separate bank account should also reduce issues with obtaining body corporate funds on a handover from one manager to another.

18. The Law Society is aware of some body corporate management companies moving from the partitioned account approach to an individual bank account for every body corporate. This provides better protection for client monies. However, we understand some management companies still operate a single partitioned bank account with intermingling of funds from various body corporate clients. Operating a separate bank account for every body corporate client is common practice in Australia. Section 120 of the UTA, which sets out bank account requirements, is open to interpretation and needs to be amended to make the requirements clearer. It needs to work together with proposed new section 114I(3)(c).

19. The Law Society recommends the following drafting amendments be made to proposed new sections 114G to 114I:

    a. 114G(1) – the phrase "(whether itself or through its body corporate committee)" should be deleted. This phrase is not used anywhere else in the UTA and seems unnecessary. The body corporate committee has delegated powers under section 108, and it can approve and sign a body corporate management service contract. The body corporate is always the contracting party. The term "*or company*" should also be added after "person".

    b. 114G(2) – should include "*assisting the body corporate chairperson, committee and body corporate in carrying out their powers and duties under the Act and Regulations, which may include carrying out the duties of the body corporate chairperson in regulation 11(1)(a) to (h) and (j) to (m).*" This is essentially the key function of the manager and it should be stated. Regulation 11(1)(i) is

intentionally excluded as it relates to the duty to sign documents on behalf of the body corporate.

c. New regulation 28C – there needs to be a savings provision added so that these terms do not apply to body corporate management agreements entered into prior to commencement. However, the Law Society recommends that all body corporates and managers should be required to comply within 2 years of the commencement of the Bill.

d. 114I(2)(d) – we do not believe the power granted to the chairperson or committee under this section is warranted. The register of body corporate manager disclosures is necessary for transparency purposes. It should not enable the chairperson or committee to alter the service contract in place between the body corporate and the body corporate manager, which appears possible under new section 114I(2)(d). Rather, section 114I(2)(d) should read "*as soon as practicable after becoming aware of any conflict of interest, disclose it to the body corporate*".

e. 114H(3) – usually it is a director of the management company or an employee that may own a unit or have an interest in or control over an entity that owns a unit. This needs to be addressed within the section. If not, it may have limited scope.

f. 114H(4) – "*principal unit owner*" needs to replace "person", and "*body corporate*" should be inserted before "manager".

g. 114I(5) – the committee should keep the register of disclosures, and where there is no committee then the body corporate chairperson.

h. 114I(6) – "*interests*" should be inserted before "register" in section 114F(2). (The term "register" is often used to describe the owners' register in regulation 4, so clearly distinguishing the interests register is important.)

Utility Interests

20. One of the biggest ongoing issues within body corporates is allocating costs fairly. Often there may be commercial units on the ground floor which do not use the lift and do not want to contribute to its maintenance. If there is a food court on the common property of the ground floor, there may be extra cleaning required relating only to those food court premises. Some body corporates can have multiple utility interest reassessments over periods of time to try to fairly apportion costs, or may register covenants to reapportion costs between owners after levying in an attempt to allocate costs more fairly.

21. New section 39(2B) in clause 5 of the Bill allows utility interests to be apportioned 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 than those on the ground floor in relation to the lift, or all of the operating costs.

22. The term ‘utility interest’ is not well understood by the public. The Law Society recommends the phrase ‘share of operating expenses’ would be a clearer and more accurate description, and should replace references to ‘utility interest’ in the UTA.

23. The Bill also needs to amend section 41 of the UTA to enable the reassessment of utility interests (or ‘shares of operating expenses’) in the future. Existing body corporates should not be disadvantaged and miss out on the option of multiple sets of utility interests.

24. It would be helpful to have the options extended further, as the current proposal does not cater for all options and scenarios. For example, if owners in a development own shares in an accessory unit which contains a carstacker, there is no provision for the body corporate to levy money on those owners to pay for an upgraded or new carstacker, as that is unit property (rather than common property). The same may apply for costs relating to building gyms (and replacing equipment) which are accessory units where some owners have a share.

25. The new section 39(2B)(b) should clarify what is meant by “a multiple set of interests, each targeted at a particular service or amenity”, otherwise those interpreting the legislation will need to make assumptions and interpretations will differ, increasing disputes. It should be possible to adopt a combination of:

    (a) uniform utility interests for a group of services and amenities in a complex, together with

    (b) a set of multiple utility interests for the balance of different specific services and amenities.

    As above, the phrase ‘utility interest’ is not well understood in the market, and changing ‘multiple utility interests’ to ‘multiple shares of operating costs’ would improve owner understanding.

26. Some have commented that reassessment of utility interests needs to be easier to implement, such as being by a majority decision (rather than the current special resolution). It is difficult to reassess utility interests by way of special resolution, especially as voting on these issues tends to be self-interested. The introduction of more options to allocate costs will likely increase the risk of disputes, particularly during the process an existing body corporate needs to follow to approve a multiple set of interests under current section 41 and sections 213 to 216 of the UTA. If the decision to reassess utility interests (or ‘shares of operating expenses’) were changed to be a majority resolution, then owners who were unhappy with the decision could still seek minority relief under section 210.

“Materially affect”

27. We support the clarification of the words “materially affect” (clauses 6 and 7, amending sections 79 and 80), a term which is often used but is not defined in the UTA, by inserting words of context to help interpretation. Sections 79 and 80 should also refer to materially affecting “utility interests” in the event the body corporate has adopted a separate set of utility interests, as alterations to a unit could impact on utility interests.

Meetings

Quorum

28. We support clause 8 (amending section 95) clarifying that an owner who owes levies and so cannot vote, cannot be part of the quorum (as the UTA is silent on this), noting that those owners may still participate in discussions. There should also be a stipulation in relation to the quorum issue for committees.

29. We propose the following edits in italics to new section 95(3): the word "general" should be added so it reads "from attending *general* meetings and taking part in any discussion *at a general meeting*". Proxies also need to be included. Using the term "those entitled to vote" could be interpreted to exclude proxies, as only "eligible voters" are able to appoint a proxy under section 102(1) of the UTA. To correct this, section 96(3) should read "those who are entitled *(including those represented by proxies)* but not eligible to vote …".

Body corporate decision-making

30. The Law Society also supports the clause 9 amendment to section 101, clarifying that the default position is that a matter is decided by way of ordinary resolution, unless the Act provides specifically for a matter to be decided by special resolution, or the body corporate has delegated the matter to its body corporate committee to decide. This is clearer wording than before and reflects case law.

31. However, we suggest that proposed section 101(2) is not needed and causes possible confusion. Instead, section 101(1) could read: "*A matter to be decided by a body corporate must be decided by ordinary resolution at a general meeting, except where the Act or regulations provide for the matter to be decided by the body corporate by special resolution, in which case a special resolution is required.*" The committee's role is addressed in current section 108 and does not need cross-referencing here. Therefore, section 101(2) in its entirety could be removed.

32. Current section 108 provides the ability for the body corporate to delegate all its powers and duties to the committee, except those that are set out in section 108(2). One interpretation of this is that the committee is able to decide matters that require either an ordinary resolution or a special resolution (except for those excluded in section 108(2)). Some believe that the committee should not be given power to make decisions that require a special resolution. Where the UTA or Regulations state that a special resolution is required, it is a significant decision that warrants a special resolution of the body corporate. Section 108(2) could be amended to state that all matters that require a special resolution are not able to be delegated to the committee: that is, by extending the list of matters that cannot be delegated to a committee. In practice, usually a committee would send a matter that requires a special resolution back to the body corporate to decide, but there is no legal requirement to do so. Legislating this practice provides protection for owners around special resolution decisions, leaving special resolutions with the body corporate rather than the committee.

33. The proposed amendment to section 101 (with our recommended edits above) also clears up a further interpretation issue with current regulation 17(1) and a committee's delegated powers. Current regulation 17(1) states that a body corporate can only enter into an obligation (e.g. a contract) if an ordinary resolution has first been passed at a general meeting.

Current section 108 says a body corporate can delegate all its powers to the committee. This should include the ability for the committee to pass a resolution and enter into an obligation on behalf of the body corporate. However, the reference in regulation 17(1) to needing a body corporate ordinary resolution at a general meeting leaves it open to argue that regulation 17(1) overrides the committee's delegated power and a committee cannot enter into an obligation on the body corporate's behalf. That interpretation slows down decision-making, increases costs and thwarts efficient day-to-day decision making. The above amendment to section 101(1) and (2) helps remove this issue and ensures it is clear that a committee can approve and enter into an obligation under regulation 17 on the body corporate's behalf under its delegated powers.

Proxy voting

34. A balance needs to be struck between enabling owners to appoint who they want as representative at a meeting, and enabling body corporates to obtain a quorum to ensure a meeting may proceed, with some owners being concerned about proxy farming. Often investment owners may only know the body corporate manager, or the building manager so may not know anyone else to appoint. Often owners who are happy with how things are going are not very involved, and body corporate managers at times can find it hard to assemble a quorum, particularly in a larger development and may need to chase proxies so that a quorum is achieved. Different body corporate managers deal with proxies differently. For example, unless they are a directed proxy, some would only use them to make quorum and not to vote on motions. Other body corporate managers might use the proxies to vote on resolutions as they see fit.

35. Proxy farming has been criticised, and this is often in a situation where a building manager may have proxies by virtue of a lease with a power of attorney from owners, and there is no ability for the owner to direct voting and the lessee may vote against the owner's wishes, disenfranchising owners. This is often seen in relation to expenditure on larger maintenance costs. It might be better to also prohibit an attorney from exercising voting rights on behalf of owners if the owner wants to vote, to prevent a serviced apartment tenant disenfranchising owners.

36. The proposal also does not make allowance for situations where a couple or a family trust may own several units but may want to appoint one of the group proxy to attend and vote for those owners. Perhaps there should be an exception if the proxy is one of the owners or a director or shareholder of the owner, then the numerical limit should not apply in those circumstances.

37. If it is determined that there should be a limit on proxies, this number limit is too low to enable meetings to comply with meeting thresholds and the number should be raised to enable more proxies to be held. Consideration should also be given when proxies are general and non-directed, whether they are used just to reach the quorum or whether the holder of the proxy may vote as they see fit, if they are the building manager or body corporate manager.

38. There should be clarification that proxies can call a poll (in contrast to the Tenancy Tribunal's view). Proxies should have the same rights as normal voters, which is particularly important in a Covid-19 context.

Accessing Body Corporate Meetings Remotely

39. The Covid-19 pandemic necessitated a temporary amendment to the UTA to enable remote meetings to take place. Proposed new section 104A (clause 11), enabling remote meeting access, is worded differently from the current temporary section 88(3). We recommend that the simplicity of the current temporary section 88(3) be retained. The requirements set out in proposed section 104A are too onerous and could be open to abuse if a body corporate chairperson or committee wished to influence the outcome of a meeting. With today's technology and many owners living outside the region their building is in, or overseas, the ability to attend a meeting remotely should be a right.

40. It is important the ability to meet remotely applies to both general meetings and committee meetings.

41. The section should also ensure that an owner's right to attend a general meeting "in person" (or by their proxy "in person") remains in place, and a body corporate cannot require a general meeting to be held solely by remote means. The only exception being if this is necessary due to government restrictions, such as the Covid-19 pandemic.

42. Proposed section 101(2) (clause 9) refers to regulations covering remote attendance procedures. Regulations of this kind are necessary to ensure remote attendees are verified adequately. At present there are no verification requirements prescribed in the UTA for owners attending a meeting in person. Usual practice is for a meeting attendance register to be signed by all those attending in person, which is checked against the owners register prior to the meeting commencing. The Bill presents an opportunity to consider verification for attendance both in person and remotely, to ensure consistent and robust procedures are in place. Otherwise, auditing voting results becomes difficult, and questions of reliability arise. To achieve this the regulations could include:

    a. Requiring owners attending in person to confirm they are an owner (or the named proxy) by signing a short declaration. The body corporate is then able to rely on this and is under no obligation to investigate further.

    b. Requiring pre-registration by owners attending remotely using a form prescribed in the regulations.

    c. Allowing only the phone number or email address recorded in the owners register to be used by an owner attending by audio link or audiovisual link and requiring use of a password (generated by the body corporate) where technology allows.

43. We also suggest that the use of electronic voting prior to a meeting be addressed in the Bill, and also during a meeting by remote attendees. The latter is already occurring in practice for meetings with remote attendees, using the voting/polling features within software such as MS Teams and Zoom. However, this is not expressly addressed in the current temporary section 88(3) or proposed 104A and should be, to ensure there is no doubt around the validity of owners exercising their vote in this manner.

44. To encourage owner engagement, we also believe the Bill needs to address pre-meeting electronic voting. At present owners can submit a paper postal voting form. Pre-meeting electronic voting is an alternative to this with the ease of electronic means. Australian-based Body Corporate Management software systems provide for this and Australian software is used by many New Zealand-based management companies. New Zealand managers are not however using the pre-meeting electronic voting feature as the UTA does not expressly provide for this ability. Our understanding is that pre-meeting electronic voting can be run through the owners' portal which can feed into the manager's management software. (See Part 2, sections 14 to 17, of the New South Wales Strata Schemes Management Regulations 2016 for an example of how this can be legislated.) Thought needs to be given to how a person exercising pre-meeting voting is verified as an owner. At a minimum registration could be through the email on the owners register and a password provided, together with a declaration from the person carrying out the electronic voting that they are the owner.

45. Enabling owners to attend meetings remotely may also help with decreasing the use of proxies and the potential for issues arising from proxy farming.

46. The matters set out above need to be addressed given the practical challenges with running meetings with remote attendees. We recommend that regulations should be promulgated to deal with protocols and rules around meetings, and to ensure attendees are validated and have participation rights. Proposed section 104A(2) refers to regulations covering remote attendance procedures. Regulations of this kind are necessary to ensure remote attendees are verified adequately, and voting can be audited.

Committees

47. We support clause 12 introducing new section 112(2), but suggest the drafting causes some confusion around its application to subsections (1) and (2). We recommend it be amended to read "*Where a body corporate committee is formed under subsection (1) or (2), that committee must conduct its business in accordance with this Act and the regulations.*"

48. We support clause 13 which inserts new section 112A into the UTA. The section provides for the chairperson of a body corporate to also be the chairperson of the body corporate committee, if any, for the body corporate. This is a default position and applies unless the body corporate decides that the chairperson should be another person elected by the committee.

49. We support clause 14 which replaces section 113 of the UTA, which relates to decision-making of body corporate committees. The UTA authorises a body corporate to set up a body corporate committee to perform its functions and exercise its duties by way of delegated authority (subject to certain limitations and restrictions). The *r*eplacement section 113 expands on the meeting procedure requirements for these body corporate committees requiring minutes. This is important as committees often make most key body corporate decisions.

50. We support the new sections which introduce accountability requirements to body corporate committees and their members, new sections 114A to 114I. With respect to these sections, we submit that:

a. “, *the regulations*” be inserted after “under this Act” in section 114C(4)(c);

b. “*and regulations*” be inserted after “with this Act” in section 4 of the Schedule 1A Code of Conduct; and

c. “*interests*” be inserted before “register” in section 114F(2). (The term “register” is often used to describe the owners register in regulation 4, so clearly distinguishing the interests register is important.)

51. We support the automatic election of the chairperson to the committee, and that to be elected the proposed committee member needs to have all levies paid up, and also the ability to self-nominate.

52. We support the amendments to regulation 24 regarding committee elections (clause 31). However, we submit that a nominee for election to the committee must consent to their nomination if nominated by another owner. See current regulation 24(3)(b) for this requirement. Regulation 24(3)(b) is being removed, but the need for such consent should be reinstated in new regulation 24(5)(a), and it should be clarified when this consent must be provided. (For example, prior to the commencement of the relevant general meeting.)

53. We support the introduction of a code of conduct for committee members.

54. The conflicts provisions need to be very clear whether they are addressing ‘third party conflicts’ (where a committee member is interested in a contract or transaction involving a related party: an obvious example being a manager who also sits on the committee) or ‘voting conflicts’ (where a committee member votes in favour of a particular remediation project because that committee member benefits from the project). The two are quite different, as almost any vote involves some voting conflict, and the intention behind regulating conflicts of interest needs to be clear.

55. A defence of good faith provision should also be provided for chairpersons and committee members who are acting in good faith, to ensure that people are not discouraged from volunteering for these roles. Australian state legislation contains this provision. See section 101A of Queensland’s Body Corporate and Community Management Act 1997 (on which the Committee Code is modelled), which states a committee member will not be personally liable if they acted in good faith and without negligence. See also section 101B of that Act which states a committee member breaching the Code can be removed from the committee. This may be suitable here also.

56. At present the UTA and regulations are silent on whether a committee member can appoint a proxy to attend a committee meeting and vote on their behalf. General accepted practice is they cannot, unless the UTA or regulations expressly allow for it. The Law Society believes proxies are not appropriate for committees, as a committee member is a representative of the body corporate elected by owners and the powers and duties delegated to committees should fall on those elected committee members only. The Law Society recommends that current regulation 24 should be amended to clarify that committee proxies are not permitted. It should also be made clear that each committee member has (and can have) only one vote.

57. At present the UTA and regulations are silent on the use of email by committees for decision-making. This practice is used regularly by committees in between meetings. Helpfully, the High

Court has held that committee decisions can be made by email. When using email, it is essential that a quorum is reached, the resolution is clearly set out, the responses of the committee members voting are unequivocal (i.e. the response is not conditional), and the committee resolution is subsequently prepared as a committee minute recording the voting result.[2] We recommend proposed section 113 be amended to allow for committee voting by email in this manner. Alternatively, procedures for committee voting by email could be set out in the regulations. New regulation 27(5) (clause 33 – requiring committee minutes to be circulated to all owners within 1 month of a meeting) would also need amending to address committee decision-making by email which is not a traditional "meeting".

58. We believe it should also be clarified that only one owner/director of each unit may be elected to the committee. We are aware of situations in some small body corporates where committees are 'stacked' by multiple owners from one or two units. This situation should be avoided.

Minority Relief

59. There needs to be clarification as to whether minority relief is available in relation to committee decisions, or how owners can view/challenge decisions committees make. If an owner is not a committee member, they cannot vote against a decision which may negatively impact them, and they may not find out about the resolution until after the 28 days has passed. This is a legislative gap that needs addressing, ideally by clarifying that committee decisions are subject to minority relief within 28 days after the decision is notified to all unit owners.

Long-Term Maintenance Plan

60. We support clause 16 which amends section 116 of the Act, which relates to the long-term maintenance plan for a body corporate, requiring the plan to also identify any defects in or repairs required to the unit title development and an estimate of the costs involved in rectifying the situation. This is because currently known repairs are often not disclosed in long-term maintenance plans as they are repairs which are required now, rather than over the longer term. It can be difficult for purchasing or selling owners to try to work out what the likely costs will be and the requirement to disclose them is important. We note this applies to all long-term maintenance plans and all body corporates regardless of size, which we support.

61. The term "defects" is undefined and could be misinterpreted to mean every body corporate needs to seek a defects report from a building surveyor to feed into its long-term maintenance plan. This is a significant cost and we question whether this is the intention. The Law Society suggests, for clarity, that "defects" be amended to "known defects not yet remediated". Regulation 30 setting out the content of long-term maintenance plans, will also require amending if section 116 is amended as proposed to include reference to "defects".

62. With respect to the additional requirements introduced for medium and large residential developments (new section 157D: clause 20), we suggest there should be a requirement to have suitability qualified people drafting the plan. The cost of being obliged to peer review the long-term maintenance plan is prohibitive. Anyone can get a peer review if they think it is

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[2] *Wheeldon v Body Corporate 342525* [2017] NZHC 87 [7 February 2017].

needed. While the Chief Executive of MBIE has the power to monitor the financial and management regimes of body corporates under section 133 of the UTA, to our knowledge this role has not been exercised. It would appear this role has not been adequately funded either.

63. In terms of time frames, 10 years is too short, as many systems have a longer life span. A 30-year time frame is recommended for buildings, and we support the introduction of a 30-year time frame for medium and large residential developments. There should be an obligation to fund these, but there should be some discretion since it may be too difficult financially to be contributing to a long-term maintenance fund in some circumstances, such as, for example, if a building is struggling financially after a remediation or earthquake-strengthening project. There should be an option added to new section 157E to opt out in that situation. To keep costs down, there should be the ability to opt out of the long-term maintenance fund audit requirement in new section 157F by special resolution. Currently plans have to be reviewed every 3 years – we support the requirement to review if the body corporate becomes aware of facts that may change the plan.

64. We support the extension of time that plans are to cover, that they be prepared by suitably qualified people, and that plans be funded, subject to the comments above.

65. Currently section 117(3) requires a special resolution to approve expenditure of any amount on any 1 maintenance item if the amount exceeds the amount specified for that item in the long-term maintenance plan by more than 10%. We would seek an amendment for this to be an ordinary resolution if up to 25% of expenditure, with a special resolution required for expenditure of 25% or more, as the 10% figure is unworkable.

Original Owner restrictions on service contracts

66. We support the extra safeguards imposed by clause 17 amending section 139 of the UTA, which relates to service contracts entered into by an owner before the date the control period ends so that the original owner may not enter contracts which unfairly burden or disadvantage the body corporate members once control (and benefit or responsibility, or both) passes from the original owner. If the contract is longer than 24 months the body corporate can negotiate a variation or terminate if agreement cannot be reached and the body corporate must decide to renew. We note the protections introduced in section 139 will also apply to service between body corporates and body corporate managers as they will likely be for 1 year and fall into the "service contract" definition, which we support.

67. Section 140 grants body corporates the ability to upset service arrangements entered into by developers when they are harsh and unconscionable. This needs to be expanded to cover encumbrance arrangements, covenants, signage licences, and other situations where developers enter into long-term arrangements to benefit the developer which leaves the body corporate or the owners paying inflated utilities, for example, or not receiving the true market benefit of advertising or signage on the building.

Disclosure

68. Currently not enough information is disclosed and what information is disclosed is disclosed at the wrong time during a purchase contract process. Clause 18 replaces sections 146 to 149 of the Act with a simpler regime. The provisions relate to information required to be disclosed by

a seller of a unit to a prospective buyer. While we generally support the proposal in terms of timing of information being disclosed upfront, there need to be some changes.

69. We support, in principle, the new section 146 requiring the information to be disclosed to a buyer to be endorsed by the body corporate as being correct. However, we have concerns about the nature and extent of the 'endorsement' sought. The Law Society considers that the proposed endorsement requirement will inhibit the vendor and purchaser from contracting efficiently, and will increase costs. At present, no such endorsement is required for pre-contract disclosure. If endorsement from the body corporate or manager at the pre-contract disclosure phase is deemed necessary, it should be limited to levies, details of any proceedings, and insurance information. Endorsement is appropriate from the vendor as the contractual relationship on a sale is between the vendor and purchaser and disclosure is an obligation on the vendor. Proposed sections 146(2)(b) and 148(2) should be removed or amended accordingly.

70. In addition, the term 'endorsed' is legally vague and should be replaced with a requirement to be 'certified correct', consistent with the current wording in section 147(3)(b).

71. Proposed new sections 146(3)(a) and (b) (clause 18) seem problematic. Often the seller's real estate agent provides the pre-contract statement to the purchaser on the seller's behalf. This section could prohibit that practice, which would be an unintended consequence. Introducing an obligation on the seller to "discuss issues arising from the statement" with the purchaser seems vague and unwarranted and will likely attract disputes around its interpretation. The term 'discuss' does not belong in statute law.

72. The need to include 7 years of financial statements and audits is excessive in the new pre-contract disclosure statement. This should be amended to 3 years in line with current practice and to be consistent with the requirement for 3 years' body corporate and committee minutes.

73. We support the proposed regulations relating to the contents of the pre-contract disclosure statement (clause 37: new regulation 33) but as well as weathertightness issues and earthquake-strengthening issues there should be the addition of fire engineering and structural issues.

74. The proposed revised pre-contract disclosure statement is also missing some important information that is supplied with the current pre-contract disclosure statement (see current regulation 33). For example, any planned maintenance work that sits outside the long-term maintenance plan (current regulation 33(c)), the balance of every body corporate fund or bank account at the date of the last financial statement (current regulation 33(d)), and explanation of terms and documents (current regulation 33(f)). These should be added back to the new pre-contract disclosure statement.

75. In terms of additional disclosure under section 147 (clause 18), it should be the vendor's obligation to pay for disclosure, as they are the party with access to the information that a purchaser would want to see. Current regulation 35 setting out the content of the disclosure statement needs to be added back. Its removal seems to be an oversight. The reference to insurance details in regulation 35 needs to be removed as this has now been inserted into the new pre-contract disclosure statement. As noted above, we do not see the need for the

additional disclosure statement to be endorsed by the body corporate or body corporate manager. No such endorsement is required under the current additional disclosure statement.

76. We support the right of a buyer to delay settlement if a seller provides disclosure information later than permitted; if the information is incomplete and not substituted within the permitted timeframe; or if the information is simply not provided at all under the new section 149.

77. We support the clarification that clause 19 gives, amending and clarifying the right of a purchaser under section 151 to cancel an agreement for defects in disclosure, to clarify rights in this area. There might also be additional clarification that if matters relating to body corporate non-compliance with the UTA have been disclosed in the pre-contract disclosure, the purchaser may not cancel for disclosure being non-compliant if the non-compliance was already disclosed, and that cancellation may not take place for non-material matters.

78. In our view pre-settlement disclosure should be maintained, as often there can be a period of time in between pre-contract disclosure being issued and pre-settlement disclosure and the purchaser needs to know the current levy and payment situation and whether any events may have changed. Current regulation 34 should be added back in, which sets out its content, subject to the general principle that there should be no 'new' information in the pre-settlement disclosure statement: this should already have been disclosed in the pre-contract disclosure statement.

79. Current section 147 requiring a pre-settlement disclosure statement should be added back in, to facilitate this statement. There needs to be a certification by the body corporate, particularly confirming the amounts owed. Another important part of this section is the body corporate's ability to withhold the pre-settlement disclosure statement if money remains owing to the body corporate. Currently the vendor's lawyer will undertake to pay outstanding amounts from the sale proceeds. The body corporate needs this mechanism to force payment of overdue debt on a sale settlement.

80. A provision needs to be inserted for owners in body corporates without a chairperson, committee or body corporate manager, as to how they may obtain certification by the body corporate, as failure to obtain it may entitle a purchaser to cancel. If it is disclosed in pre-contract disclosure that the body corporate is dysfunctional, a purchaser is knowingly buying into that situation and the owner should be able to certify in that instance, as sometimes it is impractical to be able to get all owners to confirm and certify.

Small, Medium, and Large Residential Developments

81. We support the provisions setting out different categories of unit title developments, characterised by the number of residential units that are contained within the entire complex (new section 157A(3): clause 20). While recognising that this is an attempt to reduce compliance costs for smaller body corporates, in most cases, medium residential developments may opt out of complying with the obligations if the body corporate so decides (by special resolution).

82. The obligations conferred by proposed new Part 2A include the following:

- employing or engaging one or more body corporate managers *(*new section 157B*)*,

- complying with additional reporting requirements by the body corporate committee *(*new section 157C*),*
- complying with additional reporting and planning requirements in relation to the long-term maintenance plan for the development *(*see new section 157D*)*,
- mandatory establishment and auditing of a long-term maintenance fund *(*see new sections 157E and 157F*)*.

83. There are, however, buildings which may be smaller but may have more complicated systems such as lifts and air-conditioning which are expensive to maintain and replace. It might be more appropriate if the building requires a warrant of fitness that some elements are not able to be contracted out of, such as having a professional body corporate manager, having additional LTMP requirements, and having a fund.

84. New section 157C sets up extensive reporting obligations for medium and large complexes on the delegations to committees. These delegations are currently rarely reported on well. The Law Society considers it would be simplest and most transparent to reduce reporting requirements, and simply to require all committee minutes to be circulated to owners, as committee minutes are now required to be taken with the introduction of proposed new section 113 (clause 14).

85. The proposed change to regulation 27(5) (clause 33) will mean all committee minutes must be provided to all owners within 1 month of a committee meeting. This means owners will receive committee updates more regularly, and applies to all complexes regardless of type and size. Current section 114 and regulation 28 already require the committee to report on the exercise of its delegated powers and duties so it seems proposed section 157C (clause 20) is duplication. The Law Society considers that committee reporting obligations should be the same across all complexes, as the committee is the 'hub' of a body corporate and makes important decisions, regardless of the type and size of the complex. However, we support committee minutes being provided to owners within 2 weeks of the meeting date, not 1 month, to better tie into minority relief rights in section 210 of the UTA.

Reduction of Tribunal fees

86. Currently fees to the Tenancy Tribunal are very high, being $850 for category 2 proceedings and $3,300 for category 1 proceedings. These are seen as prohibitive and we support the proposed reduction in fees to fees more in line with those required in the Disputes Tribunal or for residential tenancies, as provided for in the Bill. In the interests of access to justice, we would support the fees becoming lower, as the altered fees in the Bill (including mediation) would be $1,000 and $1,700 – still prohibitively expensive for a forum that can only consider disputes up to $50,000 in value.

87. The Law Society suggests that body corporate applications regarding outstanding levies should be directed straight to adjudication (not mediation). These constitute the bulk of all UTA applications to the Tribunal and are usually straightforward and undefended.

PART 2 – Urgent matters to be included in the Bill

88. The UTA has court-endorsed section 74 schemes, which allow for body corporates that have suffered destruction or damage to have a court-endorsed scheme of repair. These schemes have been used for leaky building or earthquake damage to facilitate repair. Many body corporates struggle to get full agreement of all owners to do earthquake strengthening, particularly in Wellington and Christchurch but in other centres too. However they cannot use this section as there is no actual damage to the building. A simple amendment is needed to bring earthquake strengthening under the ambit of this section. The Law Society recommends amending section 74(1) of the UTA as follows:

> *"This section applies if any building or other improvement comprised in any unit or on the base land is damaged****, destroyed or where demolition and/or structural upgrade work is required to preserve and enhance if required the structural integrity of building elements and/or infrastructure within a unit title development****, but the unit plan is not cancelled."*

89. The absence of offence and penalty provisions in the UTA serves to encourage bad behaviour. There need to be offence provisions. Without a body corporate having the power to impose an infringement notice, and then a penalty or fine for ongoing breaches of rules or the UTA, there is not much that can be done other than (slowly) going to the Tribunal and hoping for an order. The Bill should set out a procedure for a notice and penalty regime, and regulations could set limits of penalties which body corporates could impose, with the ability for the Tribunal to determine whether an offence has been committed if the infringement is challenged. This would cut down on enforcement costs and the need for body corporates to make applications to the Tribunal, thereby cutting legal costs, which is a benefit to both the body corporate and to defaulting owners. If owners thought the penalties had been imposed unfairly, they could challenge them in the Tribunal. Penalty and offence regimes in the Residential Tenancies Act 1986 or the Retirement Villages Act 2003 could be modified to suit the UTA regime.

90. MBIE needs to be adequately resourced and focused on body corporates, or a dedicated Ombudsman/Commissioner office needs to be established with enforcement agents and/or with dispute resolution officers, following the Queensland model in their Body Corporate and Community Managed Act 1997. At present, many issues go unresolved because of legal complexity, cost, expense, and an absence of overall oversight in the sector.

Insurance

91. Earthquakes have caused issues around the availability and cost of insurance cover leading to body corporates facing difficult insurance decisions. There needs to be clarity around what "indemnity cover" means under section 137(2)(b), where details of what actual cover is required is absent (compare section 15(1)(b) Unit Titles Act 1972).

92. In particular, there is uncertainty about the phrase "not available in the market" – may body corporates just obtain fire cover and not earthquake cover for example? The pricing of earthquake insurance in areas of the country such as Wellington can be prohibitively expensive. The intention of this phrase should be clarified.

93. The meaning of “stand-alone units” for insurance purposes needs clarification. This would be better provided for by allowing owners within different building blocks to take out their own insurance cover, as a body corporate could comprise a series of duplexes or different townhouse blocks, which do not necessarily need to be insured together. In practice, many small body corporates without a body corporate manager arrange independent insurance whether they are standalone or not.

94. There is confusion between section 135(1) where the term “full insurable value” is used compared to the term used in section 137(2)(b) referencing “full replacement cover”. This should be clarified.

95. It should be made clear that large body corporates are obliged to have officers’ liability cover for the chairperson and committee members, as they may be held liable for their actions or inactions, particularly given the Bill introduces a committee code of conduct and codifies statutory duties of committee members.

Governance

96. Various body corporates do not have a body corporate chairperson or a committee to administer the operational requirements. There needs to be a ‘catch-all’ provision for those body corporates that do not have an elected chairperson, particularly for certification of disclosure.

97. The Law Society suggests a default provision along the following lines:

> *“In situations where a body corporate does not carry out the normal duties of a body corporate or body corporate committee in terms of the Act and the Regulations (for example, where a body corporate does not hold an annual general meeting or elect a chairperson), a majority of owners may in writing or otherwise by consensus:*
>
> *(a) appoint a person with authority to arrange insurance and to sign documents on behalf of the body corporate; or*
>
> *(b) arrange each year the holding of an annual general meeting with one of their members being appointed chairperson of the annual general meeting, to see the approved arranging of body corporate insurance cover, adoption of a long term maintenance plan and ensure that there is compliance, particularly with sections 80 and 138 of the Act and authority given to the chair to sign any section 147(3) certificates.”*

Consideration should also be given to whether any of these matters may be contracted to or delegated to the body corporate manager.

98. The chairperson of the body corporate should automatically become the chairperson of the committee if there is a committee. There is no need for a further election.

99. The definition of ‘owner’ needs to be extended to include occupiers and tenants, particularly in relation to gaining access under section 80(1)(a) and compliance with sections 80(1)(d) “must comply with all laws and legal requirements relating to the use, occupation, or enjoyment of the unit” and (1)(k) “must not do anything that breaches or in any way undermines any policy of insurance in the name of the body corporate”. While some body corporates try to address this with their rules, it needs to be addressed in the UTA.

Alignment with the Residential Tenancies Act 1986

100. There needs to be an alignment of the UTA and the Residential Tenancies Act 1986. Where tenants are breaching body corporate operational rules (and tenants are required to comply with the rules under section 105(4)(c) UTA), it is unclear whether the body corporate can apply for an order to stop the tenant and owner from breaching the rules. If the breaches amount to acts of anti-social behaviour such that the tenancy might be terminated by order of the Tenancy Tribunal, it should be clarified whether a body corporate can compel an owner to make such an application to the Tenancy Tribunal, and/or compel an owner to issue an anti-social breach notice to the tenant under the Residential Tenancies Act. A body corporate should be able to act to protect the interests of other residents where a landlord fails to do so.

101. We recommend considering a provision for tenants to attend body corporate meetings and to have a voice on building issues, to address tenants' building concerns. Sometimes buildings are predominantly owned by investor owners with tenancies, and owners may not be aware of (or provide input into) ongoing building issues.

102. Current regulation 5 asks owners to submit matters for discussion at the AGM. Often owners will submit a proposed resolution. The regulations need to state what obligations the chairperson has (or the committee with delegated powers) to include owners' proposed motions in an AGM agenda. There are mixed approaches taken in the industry, with some adding all proposed motions (unless they are unlawful) and others exercising discretion and not adding them at all, or adding them to the general business section at the end of the AGM where no resolutions are passed but matters are discussed. There needs to be a consistent approach and the regulations should state what practice applies. Current section 89A and regulation 8A (allowing an owner group to call an EGM) should also remove the obligation to include any unlawful resolutions, for clarity.

Repairs and Maintenance

103. Repairs and maintenance lack direction over which sections prevail between sections 80(1)(g), 126 and 138. *BC S73368 v Otway* [2018] NZCA, 216 decided that section 126 prevails, but for anyone reading the UTA without experience it is unclear and confusing. In particular, the nature of a 'substantial benefit' is unclear.

104. Also, section 126 needs to permit raising of funds/levies ahead of any work programme, rather than paying on utility interest and then reallocating costs on completion. People should know and understand their liability for works before the works are carried out. Currently, if remedial works relate to only one or some units, then all owners need to be levied up front, with the body corporate only considering recovery once the works are complete. This creates an inflexible regime that is unfair to many owners, who must pay up front for works that they derive no benefit from, with the hope (but not any certainty) that the body corporate will seek recovery later. More flexibility about levying only those owners who substantively benefit from the works up front would resolve this.

105. The reference in section 138(1)(d) to "relates to or serves" needs clarification, adopting the High Court's observation in *Wheeldon v Body Corporate 342525* [2015] NZHC 884 that such wording is not confined to adjoining units or units being linked together by physical contact

but extends to cover units linked together economically and also that aesthetics forms part of the analysis.

Committees

106. Only directors of companies can be committee members of body corporates.[3] This is impractical for Crown entities, territorial authorities and listed companies etc. The definition of "director" needs to be expanded so that their authorised managers are deemed directors, by adding a further paragraph (d):

> *"(d) In relationship to any Crown entities, territorial authorities or companies listed on the New Zealand stock exchange who own units within a unit title development, authorised managers shall be deemed directors for the purposes of these regulations."*

107. Committees are where the real work of the body corporate is carried out. With the entire committee up for election every year, this can cause issues because the committee can lose its institutional knowledge. It would be useful to have the ability to elect committee members for longer terms with a rotation system where say 1/3 of the committee retires at an AGM but can stand for re-election. This is common for many other bodies (incorporated societies and trusts), and means there is some governance continuity, which is particularly important for larger body corporates.

108. The current regulations setting out committee elections make no reference to how a body corporate in a layered development puts up a nominee for election onto the committee of the head body corporate. This needs to be addressed in regulation 24, with provision made for the subsidiary body corporate representative to be put up for nomination.

Redevelopments

109. Current section 68 enables a unit plan to be amended if common property is being changed, or units are being added or removed etc. Section 68(3)(a) requires the body corporate to obtain written consent to the redevelopment plan from every owner "materially affected by the redevelopment." Guidance is needed on what this phrase means. For example, where the ownership interests of all units will change as a result of the redevelopment, this can be said to be a "material effect" on all owners, triggering the need for written consent from all owners, including those whose legal title will not be affected. This phrase needs to be given context so that its application can be narrowed down. It is questionable whether this is needed at all, given such an owner can vote on the special resolution required for the redevelopment, and can also make an objection under the process in sections 212 – 216 of the UTA.

<u>PART 3 – Further, less pressing reform needed</u>

110. Section 110 states that no delegation affects the body corporate's exercise of powers or performance of duties, while section 111 states that the revocation of a delegation requires a special resolution. It is unclear whether this means a body corporate can decide matters by

[3] Unit Titles Regulations 2011, see regulatons 10, 19, 24, and the definition of 'director' in regulaton 3.

ordinary resolution when a delegation is in place, and this resolution might override the committee. The relationship between these provisions should be clarified.

111. There needs to be a cost-effective method for body corporates to enforce unpaid levies against recalcitrant owners who have not paid levies and where there is no dispute over unpaid levies. This could be done by allowing a statutory lien if debt is, for example, over $10,000, with an annual CPI adjustment. This would cut enforcement costs which simply get added to the debts owed by owners. Currently a body corporate needs to get judgment for a levy and then apply for a charging order through the District Court or High Court, which incurs cost and delay. A lien would have the same impact as a charging order. Mortgagees need not fear such a regime as they can pay off any unpaid debt and add to the indebtedness under their mortgage, similar to that of any unpaid rates. In any case, their mortgage would rank ahead of any lien.

Cancellation of Plans

112. Some have the view that the ability to cancel a unit plan and body corporate with a threshold of 75% is too low a threshold, and that there should be a threshold of 85%. There is also no linkage with the considerations in section 339 of the Property Law Act 2007, which often interlink with plan cancellation, as after cancellation the next step for owners is usually sale. There is also no direct reference in the UTA about provisions allowing the owners to sell the complex as a whole without cancelling the unit plan. This is often done when there are remediation issues, and the owners don’t want to or can’t afford to repair. This is currently usually done by getting every owner to agree but this can take time and be complicated. It would be more straightforward to have a mechanism covering this in the UTA.

Survey plans

113. The Act should address survey plans and external extensions beyond unit title boundaries, such as balconies, decks, verandahs, and dormer windows.

114. It should be compulsory to have 3-dimensional survey plans. Land Information New Zealand is developing the capacity to have 3-dimensional plans with its project to modernise Landonline.

Ownership of units

115. Body corporates should be granted an express right to own units (they can where they acquire following a forced sale under a court charging order) and also allow body corporates to lease or take a mortgage over units plus own shares in a company-owned unit. This is often necessary when trying to remedy structures set up by developers where resident building managers’ units need to be purchased, to unwind punitive rental regimes where the body corporate is paying well above market rent (for example, for the manager’s unit, and many of the building’s operational systems are installed in those units). The ability for a body corporate to own carpark units for leasing or licensing out could help body corporates defray expenses particularly when carrying out remedial or capital works projects.

Lending to body corporates

116. To our knowledge, no registered banks have developed any lending packages for body corporates to enable borrowing to enable remedial or capital works to be carried out, such as

earthquake-strengthening. The government should encourage the banking industry to provide lending in this area.

Operational Rules

117. The default Operational Rules in Schedule 1 of the Regulations are deficient. While Auckland District Law Society Inc. has published model operational rules to attempt to fill the vacuum, these should be set out in the Regulations with model rules in the following areas:

- residential
- mixed use commercial office and residential
- industrial
- mixed use shopping centres and residential/commercial.

Legislation in Australia provides more extensive model rules. (See New South Wales, Strata Schemes Management Regulations 2016, Schedule 4; Victoria, Owners Corporations Regulations 2018, Schedule 2; Queensland, Body Corporate and Community Management Act 1997, Schedule 4.)

118. An ongoing issue for many body corporates is whether operational rules may restrict short-term accommodation. This could be clarified by legislation as to whether buildings are allowed to decide to prohibit this, or limit it in some way, within their operational rules. See clarification regarding short term accommodation rules introduced in New South Wales, Strata Schemes Management Regulations 2016, section 137A, allowing some prohibition. Victoria and Queensland have not introduced restrictions, but have instead focused on managing the effects of the use.

119. It should also be clarified whether a body corporate may pass a rule requiring the building and its residents to be smoke-free.

Conversion to common property

120. A mechanism could be included to allow the conversion of principal units to common property via section 65, to convert principal units to common property based on a redevelopment plan rather than having to collapse the entire unit plan under section 68, similar to section 69(3). Examples include signage right principal units and FDU roof units to convert to common property.

121. There are also many unit title developments that involve two (or more) buildings of different ages and risks: a common example is an old building (with earthquake-prone issues) and a new apartment building (with potential leaky issues) being within one body corporate. There should be a clear mechanism to separate these out into separate body corporates without requiring cancellation of the unit plan, and enabling provisions would help achieve this.

Health and Safety

122. Under Health and Safety Legislation there is a need to adopt the Australian approach exempting body corporates from compliance if they do not engage any workers as employees and where common property is used for residential purposes only.

Conclusion

123. As already noted, there is general consensus in the industry on most of the urgent changes needed to the UTA. Many of these are covered in the Bill, along with the additional urgent reforms suggested in Part 2 of this submission.

124. The Law Society recommends that the Bill, subject to amendments, be enacted as soon as possible, so that momentum is not lost. We do not want to see the enactment of this Bill deferred, while the outstanding issues are considered.

125. An immediate review should follow the Bill's enactment, where other issues that are not as urgent are considered and further legislation is introduced.

Arti Chand
NZLS Vice President

3 May 2021