BODY CORPORATE
CHAIRS' GROUP

UNIT TITLES (STRENGTHENING BODY CORPORATE GOVERNANCE AND OTHER MATTERS) AMENDMENT BILL

Submissions of the Body Corporate Chairs' Group Inc.

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SUBMISSIONS ON

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Introduction

1 The Body Corporate Chairs' Group Incorporated (BCCG) welcomes the opportunity to make submissions on the Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill (the Bill).

2 The BCCG executive was involved with the Working Group coordinated by the Honourable Nikki Kaye MP to provide papers on amendment and revision of certain key areas of the Unit Titles Act 2010 (the Act). The Working Group selected five key areas and prepared a combined paper on those key areas. This paper, entitled the Unit Title Working Group Report May 2016, was presented to the Honourable Dr Nick Smith, the then Minister of Building and Housing in May 2016. That report in its introduction stated the Working Group identified key issues of the Act; that is, where there was a need for amendment and revision. Those key issues include:

- difficulties by unit holders and buyers in obtaining information
- costly short cuts in building construction and maintenance
- sloppy administration and accounting by external managers
- lack of protection for public funds
- complex and confusing legal rules as a hindrance to self-governance
- unfair practices by some parties; and
- inability to resolve disputes practically.

3 Following the presentation of that Working Group's report, the Ministry of Business Innovation & Employment (MBIE) produced a review of the Unit Titles Act 2010 discussion document dated December 2016. That paper identified five key areas for consideration:

- improving the disclosure regime
- strengthening the body corporate governance
- ensuring professionalism in the body corporate management

- ensuring adequate Long-term Maintenance Plans; and
- ensuring accessibility of the dispute resolution regime.

4 The discussion paper sought submissions and comments on the paper and on each of the five areas.

5 Subsequently, the Honourable Nikki Kaye had this Bill drafted, which has now passed its first reading and is for consideration by the Finance and Expenditure Select Committee.

6 These submissions by BCCG cover several areas: -

6.1 general submissions

6.2 the amendments to the disclosure regime

6.3 the amendments to the Long-term Maintenance Plan and Long-term Maintenance Fund regime

6.4 the strengthening of body corporate governance for committees and chairpersons

6.5 the introduction of body corporate management into the legislation; and

6.6 general submissions on various other issues covered by the Bill.

7 The BCCG wishes to be heard in respect of these submissions.

General Submissions

8 The BCCG sees this Bill as the first stage of the revision of the Act. It is accepted other parts of the legislation require review and amendment. The number of judicial interpretations of the legislation has clearly demonstrated there are some problems with the legislation. For example, there has been a significant number of cases through the senior courts on the conflict between sections 126 and section 138 of the Act.

9 However, the BCCG sees the issues covered by this Bill are the primary areas for consideration. BCCG accepts there is a need for a more comprehensive revision of the legislation and submits the revision process is one that requires a multi-staged approach. Therefore, this Bill is the first stage in a comprehensive process of revision of the legislation to improve those parts of the Act dealing with body corporate governance, management, and other issues.

10 There may be a case for a delay in the implementation of the key areas under this Bill in the interests of a broader review. However, that is not the BCCG's position on this Bill. BCCG fears that the initiative engendered by this Bill will be lost if it is subsumed within a broader revision.

11 It is evident there is a pressing need in New Zealand to increase the housing stock for first home buyers, for the homeless, and those requiring affordable housing. The

current initiatives to increase the housing stock must find a balance between building houses (thereby, using up valuable arable land on the fringes of New Zealand's towns and cities) against the intensification of housing (within New Zealand's cities and towns). That balance must be struck. This issue was recently highlighted in the Ministry of the Environment and Stats NZ in its paper "Our Land, 2021". That paper was also referred to in the NZ Herald article by Jamie Morton on 15 April 2021 entitled "Paradise under Pressure: Report reveals toll of intensive dairying and urban sprawl". But there is a need for more intensive housing; such as apartment buildings of various sizes, walk-ups (two- or three-story multi-unit developments), and townhouses.

12 For apartment buildings, walk-ups, and townhouses, the only form of title available in New Zealand is a unit title. However, the Unit Titles Act 2010 has some serious deficiencies especially in the area of governance and management of the communities created by those apartments, walk-ups, and townhouses. There is an imperative on the legislature to ensure this Act is fit for purpose. The BCCG's submissions are that it is not fit for purpose at present.

13 Accordingly, there is an obligation on Parliament to commence the process of revision of the Act. The BCCG submits this Bill is the first and important step in that process. Other steps must follow swiftly thereafter once this Bill is passed into law. It is suggested the further stages of the amendment to the Act might include the following:

(a) create an amendment to section 74 to include earthquake strengthening

(b) add an offences regime to the Act

(c) provide protection for elected chairpersons and committee members thereby encouraging more to stand for election

(d) clarify the insurance regime whereby indemnity cover will be acceptable under the Act

(e) amend the Act to include occupiers and tenants, and certain owners' obligations where relevant

(f) amend the Act to provide for the paramountcy of section 126 over section 138 and amend the requirements for both section 126 and 138 to provide for Bodies Corporate to be able to levy owners for work before the work is carried out

(g) amend the Act to provide that the reference to "director" includes authorised manager or similar from various crown entities, territorial authorities, and others that own unit title property

(h) insert provisions for statutory liens to be held over owner's properties where there is no dispute about unpaid levies

(i) increase the percentage for the Long-term Maintenance Fund under section 117(3) whereby a special resolution will allow expenditure of over 25% rather than 10%

(j) require amendments to the Act and the Cadastral Survey Act whereby the plans should clearly show external dimensions of the building as common property or unit property including particularly balconies, decks, verandas, and dormer windows

(k) amend the Act to enable bodies corporate to own a unit in the development, but only in the development for the body corporate

(l) modify the rule-making powers to provide for model rules consistent with modules as explained below in paragraph 19 about the Queensland legislation

(m) establish a dedicated Ombudsman or Commissioner to resolve disputes

(n) simplify the conversion process for principal units to common property under section 65 rather than requiring a complex re-development under section 68; and

(o) move many of the administrative provisions about such matters as formation and operation of committees and other similar administrative functions into the Regulations.

14 The second part of these general submissions is the use by Parliament of secondary legislation, in this case, Regulations. The current Act contains a significant number of areas where the matters could be dealt with by Regulations. For example, the issue of the quorum required for general meetings could be better placed within the Regulations.

15 The emphasis on placing matters of detail within the legislation only causes entrenchment and causes a delay in the revision and amendment of the particular aspect. Regulations are more flexible and more fitting for such matters of detail.

16 Submissions made before the passing of the Act highlighted that there needs to be an acknowledgement of the diversity of types of developments. All come under the umbrella of unit titles. This diversity was not acknowledged at the time but needs to be addressed within the revised Act.

17 The current Act in broad measure deals with unit title governance management on a one size fits all basis. That matter is addressed in part by this Bill. However, there is a need for more sophistication in this area, because there is a large diversity of types of building developments forming unit titles within New Zealand.

18 It is not a matter of different sizes but different uses and different configurations that create diversity.

19 Looking across the Tasman to Queensland at its legislation, the Body Corporate & Community Management Act 1997 (the BCCM 1997) establishes through Regulations various "modules" for a variety of different types of developments – developments common within the Queensland property market.

20 This module system is an excellent example of how primary and secondary legislation can be used with flexibility. The BCCM Act 1997 sets out the various principles relating to different types of developments but leaves the Regulations to deal with the detail of the various modules (which, as mentioned above, differ depending on the type of development).

21 This submission requires a significant revision of various parts of the Act that is not necessarily an issue for this Bill but for a broader revision of the Act at the earliest possible time.

Recommendation

1 That this Bill is passed with whatever revision and amendments are accepted as the first stage of a broader revision of the Act.

2 That Parliament considers the more flexible use of primary and secondary legislation to improve the flexibility and embrace the diversity of different types of unit title developments.

3 That Parliament considers the further stages of amendment to the Act following the list set out in paragraph 13 above.

Chairperson of Body Corporate Committee and Committee Membership

22 Clause 13 of the Bill inserts a new section 112A. Section 112A(1) deals with the chairperson of the body corporate committee. This new section assists to unravel the previous confusion in the role of the chairperson and establishes the chairperson as both a member of the committee and the chairperson of the body corporate committee. The BCCG supports this new section.

23 Section 112A(2) provides for an alternative where the annual general meeting may decide by ordinary resolution that the chairperson of the committee should be a person elected by the committee.

24 BCCG submits that section 112A(2) reverts to the current confused situation where there can be both an elected chairperson of the body corporate and an elected chairperson of the committee. It is not desirable for a body corporate to have two chairpersons.

25 The submission is that section 112A(2) should be deleted.

26 Clauses 14 and 15 of the Bill inserts a new section replacing section 113, which deals with the decision making of the body corporate committee and inserts new sections 114A to 114F, which concern codes of conduct of the committee, conflicts of interest, and matters of that nature. The BCCG fully supports these amendments.

27 However, as a consequence of the amendments regarding the election of the chairperson and as a consequence of BCCG's position that the elected chairperson should always be a committee member and the chairperson of the body corporate committee, the BCCG submits that the amendment to Regulation 26 inserted by

clause 32 should be deleted. Clause 32 inserts a new Regulation 26(1AA), which will be redundant if the submissions in regards to deleting section 112A(2) as set out above are approved.

28 However, in line with the earlier general submission, the BCCG considers various aspects concerning the disclosure of interest could be better placed within the Regulations rather than within section 114C in the same manner as the code of conduct for committees is placed within the Regulations. The BCCG submits that Parliament should look at the Queensland legislation (the BCCM 1997) in this regard. In the BCCM 1997, the seven sections on the committees for the body corporate set out key principles. However, the detail on how committees' function, their codes of conduct, and the like are contained within the Regulations to the Act. These Regulations differ depending on the type, size, and configuration of the development between various models. Therefore, the Queensland legislation acknowledges that Regulations for small residential only unit title developments are different from the Regulations required for large multi-use developments.

29 The BCCG notes that clauses 30 and 31 deal with the election of the chairperson and the election of the body corporate committee. These clauses amend Regulation 10, which concerns the election of the chairperson and amend Regulation 24, which concerns the election of the body corporate committee.

30 BCCG accepts Clause 30 amending Regulation 10 as a worthwhile amendment.

31 However, there needs to be an amendment to Regulation 10(1) which reads:

"A body corporate must elect a chairperson by ordinary resolution at every annual general meeting of the body corporate".

32 The BCCG submits that elections should occur by way of a ballot on a first past the post basis. It is not possible to determine the election of a chairperson by ordinary resolution (51%) where there are multiple candidates for the chairperson. Accordingly, Regulation 10(1) needs to be amended by providing that the election process should occur by way of a ballot based on first past the post.

33 Similarly, clause 31 of the Bill amending Regulation 24 as to the election of body corporate committee members should be amended.

34 Clauses 33 and 34 deals with Regulation 27 and 28 concerning body corporate committee business and body corporate committee reports. These amendments are appropriate to improve body corporate committee processes and procedures.

35 BCCG submits that this reporting process should be enhanced by the amendment to Regulation 6 *"Notice of annual general meeting"*. Regulation 6(4) establishes what should be in the notice. BCCG recommends that new Regulation 6(4)(g) should be inserted requiring a body corporate committee report as a standard item in the notice of every general meeting. Many bodies corporate fail to have a report from the committee at annual general meetings either because it is overlooked or because it is ignored by those preparing the notices and the agenda for the meeting.

36 BCCG submits that Regulation 6(4) should be amended as set out above.

Recommendation

1. That the provisions of new section 112A(2) providing an alternative that the AGM may resolve the chairperson as elected by the committee should be deleted.

2. That the deletion of the proposed insertion of new Regulation 26 as set out in clause 32 of the Bill be repealed or deleted.

3. That various aspects of the administration of committees are placed in Regulations rather than in the Act.

4. That the role of the chairperson contained in Regulation 11 be moved to the role of the body corporate manager as set out in new section 114G(2) and as set out in paragraph 38 below.

5. That Regulation 10(1) should be amended to provide the election of the chairperson should be by way of the ballot.

6. That, similarly, clause 31 of the Bill as to the election of the body corporate committee should be amended to provide those elected to the committee should be by ballot.

7. That clauses 33 and 34 dealing with Regulation 27 and 28 concerning body corporate committee operations are accepted but, following earlier submissions, these should be expanded. The procedure set out in the Queensland legislation, the BCCM 1997, should be a model.

8. That Regulation 6(4) as to the notices of the annual general meeting should be amended to include a mandatory report from the committee of their actions over the preceding twelve months. This will enable the owners in the body corporate to have a fully written report from the committee as to its actions under its delegated authority over the proceeding twelve months.

Body Corporate Managers

37 Clause 15 of the Bill inserts a new section, 114G, H, and I relating to body corporate managers. The body corporate management industry has developed over the last 15 years. It has, therefore, been a significant omission in the Act that there is no recognition of the body corporate management industry and body corporate managers. But, the omission has now been corrected by the insertion of these new sections. BCCG supports the proposals.

38 New section 114G(2) sets out the services that a manager is to provide. BCCG suggests it would be more appropriate and more complete for the services to be those set out in Regulation 11, which are currently the duties of the chairperson. These are largely administrative in nature. This is acknowledged in terms of Regulation 11(1)(m), which reads:

"Any other duties relating to the administration of the body corporate that the body corporate has decided by ordinary resolution to confer on the chairperson".

39 Since the passing of the Act, the practice has arisen whereby the chairperson's duties that are set out in Regulation 11(1)(a) to (m) are delegated to the body corporate committee. That delegation occurs pursuant to Regulation 11(2).

40 In turn, the committees typically enter into a service contract with a body corporate manager to carry out the functions set out in Regulation 11(1) (a) to (m) inclusive.

41 The submission of BCCG is that the new section 114G (2) should adopt the duties set out in Regulation 11(1) (a) to (m) instead.

42 BCCG considers it appropriate the conflict of interest provisions set out in new sections 114C(3) and (2)-(5) should apply to the role of a body corporate manager. Essentially section 114I(2)(c) should specifically refer to the conflict of interest provisions in section 114C. Moreover, section 114I (2) should have an additional subparagraph (e) requiring a manager to comply with a code of conduct. That code of conduct should be set out in a schedule to the Regulations. An example of a code of conduct for body corporate managers is contained in the Queensland BCCM 1997.

43 Section 114H deals with the retention of a body corporate manager either employed or engaged by a contract for services. There needs to be clarity in the legislation between an employment contract and a contract for services. This clarification needs to be inserted in clause 35 of the Bill wherein new Regulation 38(C) sets out the terms to be included in engaging a body corporate manager. This Regulation should cover both the manager being engaged under a contract for services or being an employee. The Regulation needs to be amended accordingly.

44 Clause 35 also inserts a new Regulation 28B headed "Body Corporate Manager Must be a Member of Industry Organisation".

45 The BCCG does not support this Regulation. It does not consider there is any organisation or professional body that is currently able to comply with this Regulation. Accordingly, the BCCG seeks the removal of this Regulation in its entirety.

Recommendation

1. That the inclusion of body corporate managers in the Act is an important and welcome amendment to the Act.

2. That, as indicated above, the duties should be expanded under section 114G(2) to include all those, or a selection of those, under existing Regulation 11(1) (a) to (m).

3. That the conflict of interest provisions under section 114C should be specifically referred to under the terms of section 114I relating to the managers acting in the interest of the body corporate.

4. That section 114I should be expanded to include a requirement for a code of conduct for body corporate managers.

5. That the legislation should be expanded to set out more clearly the terms of engagement of a body corporate manager. This will require an amendment to regulation 28C.

6. That the requirement under regulation 28B that a body corporate manager must be a member of an industry organisation should be deleted.

Disclosure Regime

46 Clause 18 of the Bill replaces sections 146 to 149 relating to various aspects of the disclosure regime set out in the Act.

47 Disclosure is an essential element of consumer protection. This concept is particularly important for unit title developments. Where a buyer is purchasing a stand-alone house, they can carry out their own due diligence (or not). They can control the flow of information and the future expenditure on that property. This is all because they are not answerable to anyone else other than possibly a mortgagee.

48 By contrast: in-unit title developments, unit owners are also (in part) owners of the common property. As a member of the body corporate community, they must meet payment of levies for a multitude of different aspects around the development; such as annual expenses for the operating account or levies for the long-term maintenance fund. Decisions on levies and special levies fall to the body corporate to decide, and the individual unit owner has to abide by the decision of the majority. Furthermore, there are rules and guidelines established by each body corporate about the standard of behaviour and actions within the common property. None of these decisions are made by individual owners but by the community as a whole. Therefore, it is imperative for any buyer buying into a unit title development to have disclosure from the vendor and the body corporate about factors that are community factors. All those factors are outside the control of individual unit owners.

49 It is for the above reason that consumer protection in the form of a disclosure regime is imperative for unit titles. The current regime is borrowed from the Queensland legislation. However, the current regime is seriously flawed.

50 The principal flaws are:

(a) not enough information is available clearly enough for prospective purchaser's pre-purchase to enable that buyer to decide whether or not this development is appropriate to buy into; and

(b) the regime is overly complicated with too much standard proforma information confusing purchasers with inadequate specific information relating to the particular unit and the development.

51 In this regard, the Additional Disclosure Statement (ADS) set out in section 148 of the Act has become redundant. From anecdotal evidence, few purchasers obtain an ADS

once the contract has been signed. Remember, the ADS does not enable a purchaser to cancel or modify the contract based on the information obtained. Accordingly, few purchasers bother to obtain an ADS. The submission is that ADS should be abandoned. In return, the information in the ADS in Regulation 35 should be inserted into the Pre-Contract Disclosure Statement (PCDS) to buyers.

52 In that regard, clause 37 of the Bill replaces Regulations 33 to 35. Those Regulations are headed up "Regulation 33 – Pre-Contract Disclosure Statement", "Regulation 34 – Pre-Settlement Disclosure Statement", and "Regulation 35 – Additional Disclosure Statement". However, the Bill only replaces Regulation 33 with new requirements for PCDS and is silent on ADS and Pre-Settlement Disclosure Statement (PSDS) requirements.

53 BCCG submits that it is appropriate ADS in section 147 is abandoned because additional disclosure is both redundant and confusing for buyers.

54 Clause 18 repeals section 14 on the PSDS. But, it does not provide an alternative section to provide for PSDS.

55 BCCG submits that a PSDS should be provided. However, this statement provided by the seller, and endorsed by the body corporate, should merely specify any changes to the financial information provided under the PCDS together with changes relating to the issues of those set out in Regulation 33(1) for existing buildings, which include:

1. (a) as to weathertightness claims, remedial works, and earthquake-prone issues
2. (b) as to whether the body corporate is involved in any proceedings in a court or tribunal
3. (f) as to body corporate levies for the unit
4. (g) as to outstanding amounts of body corporate levies due by the unit; and
5. (i) as to proposed work under the long-term maintenance plan.

56 For PSDS for off-the-plan unit sales, the statement from the vendor should be required to provide all the financial information that may have differed since the PCDS was provided as set out above. As well, the vendor should provide information about changes that have occurred in regards to any of the items set down in Regulation 33(2), which include:

1. (a) a summary of the financial budget
2. (b) the proposed utility interests for the owner; and
3. (d) the body corporate operational rules that may have changed since the PCDS was provided.

57 In analysing the PCDS set out in clause 37 of the Bill, new Regulation 33 sets out a list of requirements for the statement. It is recommended that the following changes should be made to Regulation 33, as set out in the Bill, as follows:

1. Regulation 33(1)(c) should be changed to three years
2. the provisions of Regulation 33(1) (d) regarding notices of general meetings should be deleted because they are irrelevant to a prospective purchaser
3. the provisions of Regulation 33(1)(j) should be deleted because there is no importance to a purchaser when the next review of the Long-term Management Plan will occur; and
4. Regulation 33(1)(k) should be deleted and replaced with a requirement that the certificate of insurance for the body corporate be provided together with the insurer or brokers contact name and details.

58 Therefore, BCCG submits the disclosure regime as currently drafted in the Bill needs to be completely re-drafted and simplified. Simplification would provide the following:

(a) only two disclosure statements required being the PCDS and the simplified PSDS

(b) abandon and delete any reference to ADS in the Act and Regulations; and

(c) ensure the purchaser is given meaningful and detailed information before entering into the contract and before the buyer is required to settle the purchase.

59 Turning to the consequences of late, incomplete, or not made at all disclosure statements, clause 18 replaces section 149 of the Act with a new replacement section. BCCG submits this should not only include late, incomplete, or not made at all disclosure statements but also "incorrect" or "misleading" disclosure statements.

60 Clause 19 of the Bill replaces section 151 of the Act. This section deals with the buyers' cancellation rights if the disclosure is late, incomplete, or not made at all. Again, BCCG submits this should include "incorrect" and "misleading" disclosure statements if the new section is to be retained.

61 BCCG is of the view that section 151 in both the Act and the Bill should be repealed. BCCG does not accept there should be any right of cancellation of the contract by a buyer where they have received a defective disclosure statement. The right of unilateral cancellation is a draconian provision. Instead, BCCG submits that the right of delay of settlement under section 149 will suffice to ensure the buyer has all the correct information before settlement; otherwise, they can rely upon their contractual rights.

62 The BCCG submits that any statute on unit title development requires a fit for purpose disclosure regime. The current amendments to the Act are an improvement on the current Act. But, the amendments require further redrafting to provide any

prospective purchaser with accurate, relevant, and timely information they require. Such an amendment will enable purchasers of all walks of life to be able to make an informed decision about the purchase they are making. Apartment living is becoming a significant element of homeownership; therefore, it is imperative buyers have the opportunity to determine the quality of the unit and unit title development community they are buying into. A fit for purpose regime will ensure that all buyers can have a heightened level of due diligence on the unit and the development they intend to buy into. This is especially important for those first home buyers or those buying affordable housing who do not have the resources to pay for costly specialist reports.

Recommendation

1. That additional disclosure statement set out in section 148 is repealed.

2. That the new Regulation 33 for the Pre-Contract Disclosure Statement be enhanced by anything contained in Regulation 35 not already included in the new Regulation 33.

3. That a new section is inserted with a Pre-Contract Disclosure statement because this has been omitted from the Act with the repeal of section 147.

4. That a new Regulation 34 is inserted providing a PSDS for both existing units and off-the-plan units. However, it covers a limited discreet group of items that are already disclosed under the PCDS as set out in the submissions.

5. That the terms of new Regulation 33 dealing with the PCDS is amended as set out in the list above in paragraph 57.

6. That the right of a buyer to delay settlement under section 149 be expanded to include incorrect or misleading disclosure statements.

7. That clause 19 as to cancellation rights under section 151 be expanded to include incorrect or misleading disclosure statements. Or, in the alternative, that section 151 is repealed in its entirety.

Long-term Maintenance Planning and Medium and Large Developments

63 Clause 20 of the Bill inserts a new Part 2A. This part 2A is headed "Special Provisions for Certain Medium or Large Unit Title Developments". Medium and large developments are defined in the new section 157A(4). The BCCG questions whether the various aspects of this new part of the Act are appropriate in terms of size; however, there is a multitude of other factors that influence the functioning, governance, and management of the development. BCCG submits that size is not the only factor. To fashion statutes around size only is a mistake.

64 In that regard, the BCCG's view is that the additional requirements for the Long-term Maintenance Plan for large and medium residential developments set out in new section 157D are not appropriate. The view is that long-term maintenance planning is an essential core requirement of any unit title development large or small. Poor

maintenance will affect the unit owners of a small seven-unit development just as significantly as of a 120-unit development.

65 In addition and terms of section 157D (6), this section requires peer review and BCCG considers this unnecessary. A peer review will add additional costs for little return or little benefit to the body corporate or unit owners.

66 Under new section 157D (9), the chairperson is placed in a position of significant risk in being required to sign the Long-term Maintenance Plan stating that *"the plan records as accurately and completely as possible all defects in or repairs required to the unit title development"*.

67 BCCG submits that this places too great an onus on the chairperson. The alternative is to ensure the body corporate retains the services of a professional to create the plan to submit to the body corporate. This alternative approach will be adequate protection for owners and prospective purchasers to ensure the plan is fulsome as possible. There is an alternative point of view: small bodies corporate under nine in size should be entitled to create their Long-term Maintenance plan but that this plan is peer-reviewed by a qualified professional.

68 In keeping with the comments earlier concerning the carve-out of large and medium residential developments requiring a Long-term Management Plan under section 157E, BCCG submits that all bodies corporate under the Act should require a Long-term Maintenance Fund. Size is immaterial concerning maintenance and upkeep of the development. Accordingly, the BCCG does not support this amendment.

69 Neither does the BCCG support the new section 157F; that is, as to not supporting mandatory auditing of Long-term Maintenance Funds. The BCCG considers the cost of an audit as excessive. There is the alternative under section 132(2) of the Act; whereby, either a financial review or a special verification procedure can be carried out. Therefore, there are less costly alternatives, which the BCCG supports. It is opposed to auditing.

70 Clause 16 of the Bill inserts new section 116 (3) (aaa), which refers to the identification of any *"defects in"* or *"repairs required"* to the unit title development.

71 The BCCG submits that the concept of *"defects in"* and *"repairs required"* is a departure from the general concepts of maintenance. Often, defects are such that need to be repaired immediately. However, maintenance is more a matter that needs to be addressed over a period of time. These are different concepts. BCCG submits that this new subsection adds a completely different tenor to Long-term Maintenance Planning. BCCG notes the reference to *"defects in"* or *"repairs required"* is carried through into the provisions in section 157 A through to F in various parts. BCCG submits that this change in terminology is significant and should be entirely removed from the Bill.

72 Finally, clause 20 of the Bill inserts new clause 157E (2). This subsection reads:

"To avoid doubt, section 117 applies to the fund, other than the ability of the body corporate to opt-out of establishing a fund".

This drafting is obscure. Rather than avoiding doubt, it appears to create further doubt and uncertainty about what is intended by this clause relating to a Long-term Maintenance Fund. BCCG submits that what this subsection intends is the ability to opt-out of a Long-term Maintenance Fund by special resolution should apply to small residential developments only. However and in keeping with earlier submissions, the BCCG generally holds a view that Long-term Maintenance Funds should be mandatory for all sizes of unit title developments.

Recommendation

1. That the carve-out for medium and large developments contained in new section 157 should be reconsidered. It is submitted that size is only one of several criteria for carve-out provisions.

2. That the requirement in section 157D(6) for peer review of the Long-term Maintenance Plan should be deleted.

3. That the requirement under new section 157D(9) for a chairperson to sign off the Long-term Maintenance Plan as being accurate and complete as possible should be deleted as it places too great an onus on the chairperson.

4. That small developments of nine units or less should be entitled to create their Long-term Maintenance Plan and have it peer-reviewed; thereby saving costs.

5. That all bodies corporate should have a Long-term Maintenance Fund.

6. That section 157F as to auditing of Long-term Maintenance Funds should be removed.

7. That the new insertion in the Bill of section 116(3)(aaa) regarding defects or repairs required as an additional feature of a Long-term Maintenance Plan is out of place and should be deleted from the Bill.

8. That new section 157E(2) should be redrafted so it makes sense.

Other Issues

73 The Bill also contains a plethora of other issues that need to be addressed. The BCCG submits and supports the following additional amendments to the Act.

74 Clause 5 of the Bill amends section 39 as to utility interest, which is supported. The explanatory notes to the Bill about the intent of clause 5 are supported because this has been a major issue for bodies corporate since the 1972 Act. However, the new section 39(2B) is not clear. It needs to be redrafted. The reference to "a utility interest apportionment" should be tied to payment to the Operating Account under section 115. Further, section 39(2B)(b) should be clearer as to what is meant by "a multiple sets of interest" and "particular services or amenities".

75 Clause 8 of the Bill amends section 95 as to quorum, which is also supported.

76 Similarly, clause 9 amends section 101 as to how a matter at a general meeting of the body corporate is decided. This correction is necessary.

77 Clause 10 amends section 102 dealing with voting by proxy. This section effectively deals with "proxy farming" and is supported. However, the section should be amended to allow for exclusion from the regime for the chairperson who may be appointed randomly by the various owners in the building as their proxy. In other words, the proxy farming provision should apply to unit owners who gather proxies from other owners.

78 Clause 11 provides new section 104 A dealing with attending a meeting and voting by remote access. This is a replacement for the amendment to section 88 that was passed during the COVID-19 period and is due to expire later in 2021.

79 However, whilst BCCG supports the inclusion of section 104A, there is a need for more sophistication in this section. In addition to remote access, there needs to be inserted additional provisions concerning voting by remote access through various software platforms. Therefore, BCCG submits that Regulations are required to establish guidelines for how meetings how can be conducted where either all members attending by remote access or members attending partly by remote access and partly in person. This will require significant amendments to sections 97 to 100 as well as sections 102 and 103, which all deal with voting at general meetings.

80 Consistent with the inclusion of remote access provisions for general meetings, clause 33 deals with Regulation 27 concerning body corporate committee business and deals with the ability for members to attend a committee meeting by telephone, audiovisual, or other remote access facilities. Whilst BCCG supports that provision, BCCG also notes the ability for committee members to vote remotely should be addressed. And, Regulation 27 should be enhanced accordingly to allow voting to occur by electronic means.

81 Clause 20 amends Regulation 5 relating to fees. This Regulation modifies the fees for both mediation and adjudication at the Tenancy Tribunal for category 1 and 2 proceedings. The BCCG supports the amendments to the fees.

Recommendation

1. That new section 39(2B) about utility interest determination should be reconsidered and redrafted with a clearer and more accurate statement of what is intended.

2. That new section 102 as it relates to "proxy farming" should be amended to apply only to unit owners who "farm" proxy votes and not to the chairperson.

3. That section 104A dealing with meetings held by alternative methods, audio-visual, and the like, should be expanded to ensure it deals not only with attendance by remote access but also with voting by remote access. This will require further amendment to section 97 to 100 as well as to sections 102 and 103.

4. That the new Regulation 27 concerning committee meeting business would also need to be amended to provide for remote access and remote voting for committees.

5. That other provisions (shown as supported and set out above) are supported.

Body Corporate Chairs Group

Per:

Lyn Gillingham, President and Timothy Jones Vice-President

25 April 2021