



Briefing

Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill: Draft Departmental Report			
Date:	3 September 2021	Security level:	In Confidence
Priority:	Medium	Report number:	BRF20/21081068

Action sought		
	Action sought	Deadline
Hon Poto Williams Associate Minister of Housing (Public Housing)	Agree to the proposed amendments to the Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill, so they can be included in the Departmental Report. Note that the attached Departmental Report will be provided to the Finance and Expenditure Committee on 13 September.	10 September 2021
Hon Dr Megan Woods Minister of Housing	Note the contents of this briefing.	

Contact for discussion				
Name	Position	Telephone		1st contact
Claire Leadbetter	Manager, Tenures and Housing Quality	04 832 2431	s 9(2)(a)	✓
Susan O'Neill	Principal Policy Advisor, Tenures and Housing Quality	04 832 2571	-	

Other agencies consulted
Land Information New Zealand, the Ministry of Business Innovation and Employment (Housing and Tenancy; Building and Construction), Kāinga Ora-Homes and Communities, the Ministry of Justice, the Treasury and the Department of the Prime Minister and Cabinet.

Minister's office to complete

<input type="checkbox"/> Noted <input type="checkbox"/> Seen <input type="checkbox"/> Approved <input type="checkbox"/> Needs change <input type="checkbox"/> Not seen by Minister <input type="checkbox"/> Overtaken by events <input type="checkbox"/> Declined <input type="checkbox"/> Referred to (specify) <hr/>	Comments
--	---

Date returned to HUD:

Briefing

Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill: Draft Departmental Report

For: Hon Poto Williams, Associate Minister of Housing (Public Housing)
Date: 3 September 2021 **Security level:** In Confidence
Priority: Medium **Report number:** BRF20/21081068

Purpose

1. This briefing provides you with the draft Departmental Report for the Unit Titles (Strengthening Body Corporate and Other Matters) Amendment Bill (the Bill). It also provides advice on minor policy issues that have arisen in the course of developing the Departmental Report.

Recommended actions

2. It is recommended that you:
 - a) **Note** that the Unit Titles (Strengthening Body Corporate and Other Matters) Amendment Bill is being considered by the Finance and Expenditure Committee. *Noted*
 - b) **Confirm** the minor policy decisions previously agreed by you, which are set out in Annex A. *Agree / Disagree*
 - c) **Note** we have some additional minor policy decisions for your consideration by 10 September, so we can accurately reflect the Government's policy position in the Departmental Report. *Noted*
 - d) **Agree** that an off-the-plans contract requires the off-the-plans pre-contract disclosure in regulation 33(1)(b), and not the standard pre-contract disclosure in regulation 33(1)(a). *Agree / Disagree*
 - e) **Agree** that pre-contract disclosure for standard sales include a copy of the long-term maintenance plan. *Agree / Disagree*
 - f) **Agree** that any notice to delay settlement of a purchase because of late or incomplete disclosure must be provided on or before settlement day. *Agree / Disagree*
 - g) **Agree** that a proxy attending a meeting can request a poll. *Agree / Disagree*
 - h) **Agree** that a body corporate can decide matters within its functions and powers, even if those matters have been delegated to the body corporate committee. *Agree / Disagree*
 - i) **Agree** that the code of conduct for body corporate committee members provides that members must comply with the UTA, its regulations and other applicable legislation relating to matters for which the committee has responsibility. *Agree / Disagree*

- j) **Agree** that the phrase “in committee” is removed from the provision requiring the body corporate committee to provide meeting minutes to unit owners and a related provision including meeting minutes in pre-purchase disclosure. *Agree / Disagree*
- k) **Agree** that the Chief Executive can issue an improvement notice in relation to a breach, or potential breach of the Unit Titles Act 2010 or its regulations. *Agree / Disagree*
- l) **Note** we will provide the attached Departmental Report to the Finance and Expenditure Committee on 13 September. *Noted*

C. D. Leadbetter

Claire Leadbetter
Manager Tenures and Housing Quality

..... / /

Hon Poto Williams
Associate Minister of Housing (Public Housing)

..... / /

Background

3. The Bill makes a range of amendments to the Unit Titles Act 2010 (UTA). The Bill is before the Finance and Expenditure Committee (the Committee) for consideration. The Committee has requested the Departmental Report be provided to the Clerk of the Committee by 13 September.
4. You have obtained Cabinet approval for a number of major policy decisions. You have also been authorised by Cabinet to make minor policy decisions. We agreed with your office that minor policy decisions could be left out of the Cabinet paper, on the basis you could agree them. **Annex A** is a summary of the minor policy decisions you have made previously, for your confirmation.
5. In addition, we have identified a number of other minor policy issues that we propose to address in the Departmental Report. They are discussed below.

Other minor policy issues

Minor amendments to pre-purchase disclosure

Pre-contract disclosure for off-the-plans sales

6. In our previous advice to you on pre-purchase disclosure, we gave advice about the disclosure requirements for off-the-plans sales [BRF20/21060995 refers]. We consider that the Bill is unclear about whether a seller selling off-the-plans would be required to comply with the standard disclosure requirements. We proposed that a seller should only comply with the specific pre-contract disclosure for off-the-plans, and should not be required to comply with the standard pre-contract disclosure.
7. In the briefing, we indicated that we proposed amending the Bill to clarify that off-the-plans sales would not need standard pre-contract disclosure. However, this was not included in the recommendations. For completeness, this briefing includes that recommendation.

Including the long-term maintenance plan in pre-contract disclosure for standard sales

8. During the development of the Departmental Report, we have been reviewing submissions received on the Bill. Several submitters, including Inner City Wellington and Crockers, suggested that pre-contract disclosure should include a copy of the long-term maintenance plan (LTM Plan).
9. We consider it would be useful if the disclosure included a copy of the LTM Plan. This should give prospective buyers a good overview of the maintenance requirements over the long term. It will also provide another incentive for bodies corporate to ensure their LTM Plan is current. We understand that for some real estate agents, it is already common practice to provide a copy of the LTM Plan to buyers.

Timing requirements for a notice to delay settlement

10. The UTA provides that a buyer can delay settlement of a purchase if the disclosure was late or not provided. The Bill provides that a buyer can also delay settlement if the disclosure statement is incomplete. The Bill clarifies that a buyer has five working days after the triggering event to give notice of a delay.
11. A review of submissions raised an issue which was not included in our previous advice. Submitters were concerned that as the buyer can give notice of delay within five working days of the triggering event, the buyer may be entitled to give notice after the settlement day.
12. We agree with the submissions that the notice to delay settlement must be given on or before settlement day. It would lead to confusion and potential accusations that the buyer has breached the contract, if the buyer allowed settlement day to pass without giving notice of the settlement delay.

Minor amendments to body corporate governance

Request for poll by proxy voters

13. The UTA allows any eligible voter attending a general meeting in person to request a poll on a motion that passes. A poll formally counts the votes on a motion based on ownership interest. A person who is attending as a proxy is not covered by the definition of “a person eligible to vote” which would suggest a proxy is unable to call a poll. However, a proxy is able to attend and be heard at a body corporate meeting as if the proxy were the eligible voter.
14. Six submitters commented on this issue, including the Unit Titles Working Group and the Auckland District Law Society. The submitters considered there was a lack of clarity in the UTA and recommended it be clarified that a proxy is able to request a poll.
15. While this issue is not addressed in the Bill, we consider it could be included. We recommend the Bill clarifies that proxies can request a poll. This change provides certainty and improves transparency.

Ability of body corporate to decide matters that have been delegated

16. The UTA sets out when matters at a general meeting are decided by ordinary or special resolution. The drafting is confusing. The Bill simplifies the drafting. However, it appears to provide that if a body corporate committee has delegated authority to decide a matter, then the body corporate cannot decide the matter at a general meeting.
17. Submitters, including the Auckland District Law Society, did not support the apparent inability of the body corporate to decide matters that had been delegated to the committee.
18. If an entity delegates powers or functions to a sub-entity, the entity still retains the powers or functions delegated. The UTA provides that the body corporate can revoke delegations by special resolution and written notice to the body corporate committee. We consider that this section should reflect this general principle, and the UTA. We recommend that the UTA confirm that a body corporate can decide matters within its functions and powers, even if they have been delegated to the body corporate committee.

Amendments to the code of conduct

19. The Bill provides that the body corporate committee members must comply with a new code of conduct set out in the regulations in the Bill. The code of conduct includes a requirement to take reasonable steps to comply with the UTA, including the code.
20. Some submitters made comments on the specific requirements in the code of conduct, including:
 - a) Having a commitment to acquire an understanding of the UTA and regulations is weak and vague.
 - b) It should refer to complying with other relevant legislation, for example, fire safety requirements.
21. We consider the code of conduct should require a higher level of compliance with the UTA and regulations than ‘taking reasonable steps’. The proposed code of conduct for body corporate managers requires them to comply with the UTA, its regulations and other legislation applicable to the body corporate for which the manager has responsibility. We consider that committee members should also be required by the code of conduct to comply with the UTA, the regulations and other applicable legislation.
22. We recognise that body corporate committee members are volunteers, and not professionals such as body corporate managers. However, the code of conduct sets the standards expected of body corporate committee members. The standard we want to set is compliance with the UTA regime and with other relevant legislation. It would be incongruent to have a lower standard in the code than is actually required of committee members.
23. We also consider it useful for the code of conduct to require committee members to comply with applicable legislation relating to matters for which the committee has responsibility. For

example, if the committee are responsible for maintaining fire alarms in the common property, that they do so in accordance with the requirements of the Building Code.

Removal of a reference in the requirement to provide meeting minutes

24. The Regulations require a body corporate committee to provide meeting minutes to unit owners upon request. The Bill amends the Regulations to require committees to provide minutes to all unit owners promptly, but no later than one month after the meeting.
25. Consideration of this clause for the Departmental Report has raised a minor issue. It refers to decisions being made “in committee”, which suggests that some parts of the meetings are open to unit owners (and other parts closed to them). The UTA and the Regulations do not provide any basis for body corporate committee meetings to be open to unit owners. We recommend that this phrase is removed from this provision, and a related provision including committee minutes in pre-purchase disclosure.

Minor amendment to enforcement measures

Matters for which the regulator can issue an improvement notice

26. Cabinet agreed that the regulator can issue an improvement notice when they reasonably believe a breach of the UTA has or will occur. The improvement notice is a formal instruction to remedy or avoid the breach. Cabinet has also agreed that the regulator can seek a civil penalty from the Tenancy Tribunal if a party does not comply with an improvement notice.
27. We have compared the proposed improvement notice provision to the similar provision recently included in the amendment to the Residential Tenancies Act 1986 (RTA). A review of that provision has confirmed an improvement notice can be issued for a breach of the RTA, its regulations or the tenancy agreement. We recommend that the proposed provision for the UTA refer to a breach of the UTA or its regulations. We consider this is appropriate because it will capture behaviour for which the regulator may wish to serve an improvement notice. For example, the Unit Titles Regulations 2011 contain provisions around the election and removal of chairpersons and body corporate committee members, and the documents that must be provided in disclosure statements. Breaches of these provisions could have serious consequences for unit owners and prospective owners. It is also consistent with the RTA to include the regulations and body corporate operational rules as matters for which an improvement notice can be issued.

Consultation

28. We have consulted with Land Information New Zealand, the Ministry of Business Innovation and Employment (Housing and Tenancy; Building and Construction), Kāinga Ora-Homes and Communities, the Ministry of Justice, the Treasury and the Department of the Prime Minister and Cabinet on the Departmental Report.

Next steps

29. We will provide the Departmental Report to the Clerk of the Committee by 12pm on 13 September. We are meeting with the Committee to discuss the Departmental Report on 15 September.

Annexes

30. Annex A: List of minor policy decisions
31. Annex B: Pre-contract disclosure documents for standards sales
32. Annex C: Pre-contract disclosure documents for off-the-plans sales
33. Annex D: Draft Departmental Report

Annex A: List of minor policy decisions previously agreed

Disclosure

1. Agree that the information to be disclosed in the pre-contract disclosure statement for standard sales are those set out in **Annex B**.
2. Agree that the information to be disclosed in the pre-settlement disclosure statement is the same information currently provided for in the Unit Titles Regulations 2011 (the Regulations).
3. Agree that the pre-settlement disclosure statement also include information about whether there any proceedings pending that will be instituted by the body corporate.
4. Agree that the documents to be disclosed in the pre-contract disclosure statement for off-the-plans sales are those set out in **Annex C**.
5. Agree that the standard pre-settlement disclosure should be required for off-the-plan contracts, but only to the extent that the information applies to the unit title development.
6. Agree that the pre-settlement disclosure for off-the-plan contracts also include:
 - a. The name and contact details of the body corporate manager, if any.
 - b. The insurance information required for the pre-contract disclosure for standard purchases.
7. Agree to remove the requirement that the body corporate endorse disclosure statements.
8. Agree to remove the prohibition against delegating responsibility for providing a disclosure statement.
9. Agree the Bill includes a general obligation on bodies corporate to keep records in order to meet its obligations of disclosure.

Body corporate governance

10. Agree that the new eligibility requirement for quorum also applies to general meetings of timeshare resorts in the Unit Titles Act, but does not affect the quorum threshold for timeshare resorts.
11. Agree the Regulations are amended to provide that the interests register is attached to the notice of each annual general meeting of the body corporate.
12. Agree that the Bill clarifies that a person can apply for judicial review of a decision where a conflict of interest has not been declared.
13. Agree that the Regulations should require that body corporate committees produce an agenda for each body corporate committee meeting.
14. Agree that the body corporate committee meeting minutes may be provided electronically, including on an online portal, as long as any unit owner has the ability to request a physical copy of the minutes.
15. Agree that the Regulations be amended to require that a candidate for election as chairperson must not have outstanding body corporate levies at the time of the nomination.

Body corporate managers

16. Agree to include an empowering provision in the Bill which requires body corporate managers to comply with a code of conduct to be set out in the Regulations.

17. Agree that the requirement to comply with the code of conduct should be a term that must be included in the agreement engaging the body corporate manager, set out in new regulation 28C.

Long term maintenance, planning and funding

18. Agree to remove the requirement for the long term maintenance plan to be signed off by a body corporate chairperson at each annual general meeting.
19. Agree that regulation 30(1)(g) should be amended so that on an annual basis, the body corporate must both state *and apply* the amount it has determined to maintain the long term maintenance fund (LTM Fund).
20. Agree that if a body corporate has previously decided against having a LTM Fund, it must review its decision annually and can reverse its decision by special resolution.
21. Agree to remove the requirement for the LTM Funds of medium and large developments to be audited by an independent auditor.

Utility interests

22. Agree to introduce a provision allowing existing bodies corporate to reapportion utility interests as a set of multiple interests.

Annex B: Pre-contract disclosure documents for standard sales

Bill	Our proposals
<p>a) whether any part of the unit development has:</p> <ul style="list-style-type: none"> i) weathertightness issues for which a claim has been made under the Weathertight Homes Resolution Services Act ii) or weathertightness issues that have been remediated without a claim or iii) earthquake prone issues 	<p>Clarify that the disclosure must only include known issues (i.e. the body corporate does not need to obtain a report for disclosure).</p> <p>Require disclosure to include weathertightness issues that have not been remediated.</p> <p>Require disclosure to include other known significant defects that may require mediation.</p>
<p>b) whether the body corporate is involved in any proceedings in any court or tribunal</p>	<p>No change.</p>
<p>c) financial statements and audit reports for the previous 7 years</p>	<p>Require disclosure of 3 years of financial statements and audit reports (if any).</p>
<p>d) notices and minutes of general meetings of body corporate and committee meetings for previous 3 years and supporting documents. Excluding any in committee items if privacy or other issues require the items be redacted</p>	<p>Include notices of general meetings.</p>
<p>e) name and contact details of the body corporate manager</p>	<p>No change.</p>
<p>f) Body corporate levies payable for unit for current financial year and amounts paid or owing</p>	<p>Remove the reference to amounts paid or owing.</p> <p>Clarify that the levies required to be disclosed are all levies for the unit.</p> <p>Include information about the period covered by the levy.</p>
<p>g) outstanding amounts of body corporate levies for the unit from previous financial years</p>	<p>Remove this requirement.</p>
<p>h) any amounts held in credit by body corporate for the unit for the purposes of any long-term maintenance fund, contingency fund, or capital improvement fund</p>	<p>Clarify that this requirement relates to the amount in each of the separate funds.</p>
<p>i) Any proposed works under the long-term maintenance plan to be carried out or begun within the next 3 years and estimated costs</p>	<p>No change.</p>
<p>j) next review date for the long-term maintenance plan</p>	<p>No change.</p>
<p>k) summary of insurance cover including the insurer's name and contacts, type and amount of</p>	<p>No change. We do not consider requiring a certificate of insurance is necessary, and would</p>

Bill	Our proposals
cover, premium, excess, exclusions, where and how policy can be viewed	require the body corporate to contact their insurer or broker to arrange this.
-	Include current regulation 33(c) – details of maintenance the body corporate proposes to carry out in the year following the date of the disclosure statement, and how the body corporate proposes to meet the cost of that maintenance.
-	Include current regulation 33(d) – the balance of every fund or bank account held or operated by the body corporate.
-	Include current regulation 33(f) – an explanation of unit title terms and documents.

Annex C: Pre-contract disclosure documents for off-the-plan sales

Bill	Our proposals
a) Summary of the financial budget for the unit title development	Clarify it is a draft financial budget. Include the estimated cost of operating the body corporate in an average 12 months.
b) the proposed ownership interest for the unit	Amend so that it is an estimated ownership interest based on the sales value.
c) the proposed utility interest for the unit	Amend so that it is an estimated utility interest.
d) The body corporate operational rules that will first apply	Amend so that it refers to draft operational rules, if any are available.
e) What, if any, service contracts proposed to be entered into that will continue in force after the unit purchase is settled	<p>Amend to include whether the developer has appointed or intends to appoint a body corporate manager.</p> <p>We will work with the PCO drafter to ensure that service contracts include contracts for utilities.</p>
<p>f) Whether the original owner has been involved in any capacity in any previous unit title development or other building-related work that has resulted in weathertightness issues:</p> <ul style="list-style-type: none"> i. For which a claim has been made under the Weathertight Homes Resolution Act 2006; or ii. That have been remediated without a claim under that Act or other proceedings before a court or tribunal 	We propose deleting this requirement.

