BODY CORPORATE CHAIRS' GROUP INCORPORATED
RESPONSE TO THE REVIEW OF THE UNIT TITLES ACT 2010

2 March 2017

Name of submitter: Neil Cooper

Organisation: Body Corporate Chairs' Group Incorporated

Contact address: 20/80 Victoria St, Wellington 6011

Contact phone number: 021 354 019

Contact email address: national.president@bccg.org.nz

MBIE officials can contact me if they have a question about the content of this submission.

1. The Body Corporate Chairs' Group Incorporated

The Body Corporate Chairs' Group Incorporated (BCCG) was formally established in Wellington in June 2012. Its primary purpose is to provide education, training and resources for body corporate chairpersons so as to enhance the governance and management of their respective body corporate (BC). Another key role is to provide a communication and networking channel for BC chairpersons.

The BCCG has several hundred BC chair members, with separate branches in Auckland and Wellington. Other members are located in Paihia, Orewa, Hamilton, Tauranga, Mt Maunganui, Kawerau, Gisborne, Napier, Taupo, Porirua, Lower Hutt, Nelson, Christchurch, Tekapo and Queenstown.

In addition we have 20-odd body corporate management companies and other associate members (eg lawyers, accountants and others generally serving the BC community) plus a small number of individual associate members who have an on-going interest in BC matters.

2. Consultation

This consultation response document builds on a broad survey of BCCG membership almost a year ago that identified a wide range of issues related to the Unit Titles Act and its Regulations. It also identified issues with some other Acts that impacted on the governance and management of BCs. These included the Building Act, Telecommunications Act, Weathertight Homes Act and the Health and Safety at Work Act.

Since January 2017 the BCCG has invited general feedback from our membership as well as undertaking two specific surveys of aspects of the proposed changes. In addition to the MBIE consultation meetings, the BCCG held a meeting in Wellington for BCCG members to explicitly discuss a draft response to MBIE. In excess of 40 members attended and actively engaged in the discussions.

This document includes feedback from all of these sources.

3. Overarching Reform Proposals

3.1 Potential size thresholds for more rigorous legislative requirements

1	We propose that the following legislative requirements apply to complexes with 10 units and over. The body corporate for complexes between 10 and 29 units, may, however, resolve against adopting any of these requirements by special resolution. Bodies corporate must: • report on the performance of delegated powers at the annual and any other general meeting; • contract a body corporate manager to perform functions as specified in the UTA; • have LTMPs signed by the body corporate chair and a qualified person; • have a long term maintenance fund to finance the long term maintenance plan already required under the UTA; and • have body corporate accounts and LTMFs audited annually. Do you agree? If no, why?

Thresholds

The Body Corporate Chairs' Group (BCCG) is not adverse to different levels of requirements based on suitable criteria but we do not feel that the current proposal that relates just to the number of units within a body corporate (BC) is appropriate.

In particular, the discussion document refers only to the number of unit holders in the various threshold areas. This is not an appropriate way of determining the management of risk (or in fact for any sort of consideration) for a BC.

The key element here is the BC – not the number of units. As such it is necessary to determine how many BCs are in each of the threshold areas.

Separately to the discussion document, MBIE provided the following table which is said to relate to the whole of NZ and has been provided by LINZ. This identifies the number of BCs in each group:

Threshold	Number of complexes
1-9 units	11,162 (79.3%)
10-29 units	2,045 (14.5%)
30+ units	873 (6.2%)
Total	14,080 units

NB The reference to 14,080 "units" should, we assume, refer to 14,080 bodies corporate.

The stated reason for differentiating between BCs is to mitigate risk. It's not clear exactly what risks are to be mitigated in this way; how the proposed thresholds have been determined or how these are likely to mitigate the risk.

Separate questioning at the MBIE workshops indicate that the less than 10 unit category was chosen simply because that distinction is already made in the Act. No reason was able to be given for the second threshold at less than 30/30 and above units.

In particular, given that BCs in the 10-29 unit category are able to opt out of the proposed tougher regime, the LINZ data indicates that potentially 93.8% of bodies corporate could be exempt. This is not seen to have any great impact on reducing (unstated) risks within the sector.

Wider view of risk

The BCCG view is that there are multiple factors that impact on risk including:

- the nature of the building(s) ie multi-storey vs stand alone complexes
- earthquake prone, weathertight or ground issues that the BC may be facing
- the tenant/resident owner mix
- the nature of the tenants and/or residents in the building
- the nature of the BC's use eg residential vs commercial vs mixed use
- whether the BC is brand new (with sales largely off the plans) vs an established BC
- whether new developments are proposed.

To try to mitigate against all risks associated with this multitude of factors by using a "number of units" based approach is highly unlikely to address the issues.

Risks associated with small BCs

It is important to note that in some circumstances a small BC may have greater risks associated than a large one. Consider the following example that was quoted by a BCCG member:

> *There is greater scope for bullying in smaller BCs as it is easier to create a majority. The most dysfunctional entity I have been involved in was a three member company. Two owners were related and had absolute power. All meetings were held with lawyers present and there was a history of arbitration and dispute. I have more recently been involved in an entity with five members. Basically they are paralysed by lack of unity because of the domination of certain individuals. In larger entities this cannot occur.*

As such the BCCG does not support this approach, and particularly does not support the proposed thresholds.

Taking the thresholds further

There has been considerable debate as to whether very small BCs should even be included within the Unit Titles Act regime. Many small BCs, eg four units or less, are often unaware that they are covered by the Act. Environments such as 3-4 units that lie along one side of a shared driveway may theoretically be a BC, but the management of these may be minimal: repairs to the roof and perhaps to the driveway may be all that is involved.

One owner commented:

> *I bought a stand alone townhouse (1 of 4) with a shared drive. Loved it – until I found that we were a BC and now we have to have all sorts of meetings and management companies and more costs – just to look after a common driveway. I have to pay everything else myself – why have a BC?*

And as one BCMC commented:

> *Those really small BCs can be a real pain. Apart from the fact that the work around the UTA means you never recover your costs (the owners can't pay real costs) there are problems when one owner gets their grandson to say clean the gutters on her unit. I have to stop him doing it because the new Health & Safety Act is liable to create problems for the BC if he falls and injures himself. Instead I have to bring in a professional company to do the work on all three units and then charge the poor old dears. It's ridiculous!*

The BCCG would recommend reviewing the scope of BCs that currently fall into the UTA's regime and take out reference for these where there are four or less units.

See also later comments on this aspect of the proposals.

Reporting

Extent of the issue?

It is not possible to tell from the discussion paper what the extent of the issue is here. Do some BCs *not* report on their work during the year? This is not seen to be an issue in terms of comments that have been received by the BCCG.

It would seem to be difficult, if not impossible, to give a "standard" set of headings for BC committee reporting given that different BCs will delegate different levels of powers and responsibilities to their committee. However, we accept that a generic set of headings would still be useful and may assist some committees in their reporting to owners.

Reporting at every general meeting

Reporting at every general meeting is seen to be excessive and would potentially add to BC costs. For example, a general meeting may be held shortly after an AGM if it is necessary to elect a new chair, perhaps because the previous one sold their unit or died. What level of reporting would be expected if the calling of such a meeting had a very simple and defined purpose?

Given that BC management companies (BCMCs) usually charge for their time in organising and attending all general meetings, the requirement for a full report could unnecessarily extend the meeting and the costs to the BC.

BC management company contracts

Mandatory contracts

The BCCG is not adverse to BCs using a BCMC, and in many cases recommends it. However, the current lack of general proficiency and professionalism in this sector is an on-going level of concern to our group. Concerns about the actions (or non-actions) of a BCMC are the single greatest area of complaint and query to the BCCG. The 2015 and 2017 survey of member's views on meeting topics show that the highest demand area is around selecting and dealing with a BCMC, reflecting the general level of concern in this area.

The following comment from one of our members is reflective of many such comments received over the years:

> *I have an apartment in Auckland managed by a major Management Company and everything they send out has a mistake in it, can never get figures right and what they present to owners is a mess.*

And one from another member:

> *Here's a relevant question: it's not mandatory to use a lawyer or a real estate agent when buying a unit title property, and they've been around for a long time. So why make it compulsory to have a BC Manager?*

There are too many problems with the BCMC industry at this time to consider making it mandatory for any sized BC to have a management contracts with someone in this industry.

The BCCG cannot support any mandatory requirement for a BC of any size to employ a BCMC.

Occupational registration

The suggestion that MBIE does not support any form of occupational registration and require these companies to belong to a registered professional body with its own professional standards and Code of Conduct, is a great disappointment and, we believe, an adverse step.

If MBIE set standards for BCMCs to adhere to and monitored these, or required BCMCs to belong to a registered professional body that was subject to the appropriate level of oversight, we might be

more inclined to support this proposal. However, we do not believe that any voluntary body is in a position to provide the level of oversight or professionalism that is required here.

The BCCG's position is that if BCMCs had sufficient professionalism and oversight, then BCs would be inclined to voluntarily employ them to manage their affairs. To force a BC to employ a potentially under-performing BCMC when the BC may have sufficient resources internally to do this job, would impose an unnecessary level of requirement and cost on the BC.

The following comment was received from an associate member of the BCCG (a BCMC in its own right) and reflects similar comments received from a number of our associate members as well as other BCMCs that attended some of the MBIE workshops:

> *We need Body Corporate Managers to be professionals. Be licensed, have a qualification like a real estate agent and have an independent governing body that makes them accountable for negligence.*

The BCCG supports occupational registration and does not believe that any voluntary organisation such as those suggested by MBIE would be in a position to improve the current standards in the industry.

BC chair to sign off on LTMP

The BCCG's view is that this is generally unnecessary and in many cases would lead to the immediate resignation of the BC chair. Chairs have indicated that they would not be willing to sign their name to a document that in many cases they do not have the knowledge to understand or be able to ensure that the document has the appropriate coverage, let alone fully identified and correct costs.

The BCCG is of the view that an appropriate professional organisation should be used to identify all LTM elements and costs and they should sign off on the document. They should have the knowledge and professionalism to willingly put their name on such a document.

It is also our view that the BC as a whole, at the AGM, should vote on the acceptance (or otherwise) of the professionally-prepared LTMP. The minutes of the AGM would record the level of agreement.

The BCCG is aware that some professional organisations have prepared LTMPs that go into exquisite detail, recording all items down to door handles etc which are lumped together for costing and replacement in a particular year. It is highly unlikely that these items are going to all fail simultaneously. Where they may fail (randomly and in different years), the BC's annual repairs and maintenance budget would be used to cover the costs. Even stair balustrades have been quoted as a necessary replacement item yet the balustrades in the author's own BC has stood the test of 89 years of use with no visible impact on its ability to do the job it was designed to do.

In these circumstances it would be reasonable for the BC to agree to take such items off the list of replacement items, especially where the inclusion may have no material impact on any long term funding decisions. Where exclusions/removals are made from the professionally-prepared plan it must be made clear to the full BC and the BC formally agree to the removal.

Long term maintenance fund

The BCCG strongly supports the requirement that all BCs establish a LTM fund.

The BCCG does not support any implication that the fund will be sufficiently large to enable the BC to fully fund any scheduled maintenance as may be outlined in the LTMP, as is currently suggested by some companies undertaking this work. (More on this aspect later.) However, the *extent* to which a LTM fund needs to be established needs to be made clearer in the Regulations or left totally up to the owners.

It has been argued that commercial BCs are able to make more efficient use of their funds than having them tied up for many years in a LTM fund, and on this basis, need not establish such a fund. This is not a view that the BCCG would support, particularly where there may be a mixed use BC.

We are aware of BCs where one or more commercial owners are going through hard times financially and have been unable to raise their share of any major upgrade eg earthquake strengthening or waterproofing issues. This immediately impacts on other owners who may have to cover the defaulting owner's costs in the short term or take possibly draconian action against the defaulting owner so as to proceed with the necessary work.

Please refer to the later section on LTMPs and associated funds for more on this topic.

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

No, as above.

3.2 Improving Government Services to the UTA Sector

3	Please comment on : – how government agencies might achieve a more joined up approach; – how we can improve the services we provide; and – whether you think a separate dedicated entity is warranted; and if yes, what functions and responsibilities would a dedicated unit titles entity deliver? Please list.

Joined up approach

There is a critical link between the Ministry of Justice and MBIE in terms of the dispute resolution steps involving the Tenancy Tribunal and courts. While the proposal document advocates for lower fees for the Tenancy Tribunal – a major source of controversy and difficulty in the current UTA environment – the lack of any prior commitment from Justice to undertake this, shows a disappointingly low level of any sort of "joined up approach" by Government. Indeed, it is difficult to tell whether there has even been any discussions with Justice on this, let alone any commitment.

Improving services

MBIE website

The UTA information on the MBIE website is hidden deep in the site and the website's search engine usually don't bring up anything meaningful. This is a pity as the site does contain some useful information – but it can be almost impossible to find.

The BCCG believe that MBIE could enhance their site markedly by raising the Unit Titles-related information much higher in the web hierarchy (preferably with a link from the Home page) and optimise its search capability both within its own site and with other search engines such as Google.

It is disappointing that this hasn't occurred already given earlier complaints. Even trying to find the UTA discussion document on the website is difficult. It doesn't show up on the website's search engine and isn't included in *Consultations* or the *Legislative and other reviews* areas of the site. As such it would seem that it is more than just a matter of optimising the site for search engine use, but rather the underlying thought that is given to where documents should be located on the site.

Advice on BC issues

The BCCG has asked for assistance from MBIE on UTA matters on several occasions or to request them to attend a meeting to talk to BC owners, but has been turned down each time. This contrasts markedly with the support provided to BCs that have had difficulties managing the watertight homes legislation.

We acknowledge that there is an 0800 helpline but anecdotal evidence indicates that answers here are not necessarily consistent. At least part of the reason for this lies with the difficulty in interpreting some aspects of the UTA.

We believe that MBIE could markedly assist BCs in terms of advice on coping with earthquake strengthening.

Separate dedicated entity

The BCCG supports the idea of an Ombudsman or Commissioner for this sector.

It is our experience that the current Tenancy Tribunal regime does not operate at all well. While the discussion document suggests that fees may be reduced (but is incapable of ensuring this), there are other major issues with the Tenancy Tribunal regime around the speed with which a meeting can be held with the Adjudicator; the time it then takes to get a written decision; the (lack of) consistency in those decisions and the impossibility of any enforcement of those decisions (other than by separate action through the District Court).

The BCCG questions the assertion that the costs of this would have to be transferred back to the BCs. In the same way we reject the assertion that the current high costs of the Tenancy Tribunal arise from the requirement that applicants must pay for these services – other "courts" are not totally self-funded and we see no need for the Tribunal to necessarily be funded in this way.

This is particularly the case when we compare Tenancy Tribunal costs to those of the Disputes Tribunal that used to be the first step in determining Unit Title issues.

We also note that the Queensland Commissioner's fees are less than $100 per application.

A dedicated and appropriately resourced Ombudsman/Commissioner scheme should allow for speedy, consistent decision making at an appropriately low cost that does not deter especially small BCs from seeking redress. The Ombudsman/Commissioner would need to be appropriately resourced to provide educative and investigatory services and be able to impose enforcement on any decisions that may be reached.

The BCCG would not be adverse to a small fee on all BCs to assist in funding the Ombudsman's office, but this would need to be related (at least in some way) to the size of the BC – a fee per unit in the BC would be acceptable.

In the absence of an Ombudsman, the BCCG would support a system where MBIE assume the full role of having responsibility for the sector, with powers and resources appropriate to manage the issues that currently exist. (Indeed, this may well be the necessary driver to ensure that the Act is better drafted and monitored.)

Educative role of Commissioner/Ombudsman

We would stress that if a Commissioner/Ombudsman role was to be appointed in the New Zealand context then this should include an educative role. With the potential marked increase in the number of new unit titles to be provided under the Auckland Unitary Plan (let alone elsewhere in the country) there is seen to be a need to make prospective buyers much better informed on their rights and obligations in being part of this community.

There is also considerable evidence to show that many BC chairs have a very low level of understanding of their role. As this group turns over relatively quickly, there will always be a new group of owners who need this education support.

4.1 Improving the Disclosure Regime

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

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

The BCCG agrees that the current disclosure regime is inadequate and, in particular, does not adequately protect buyers. This is especially the case in terms of purchases off the plans.

The BCCG supports collapsing the current disclosure regime into two steps. The first would amalgamate the requirements of the current disclosure regimes and would provide another step approximately 7-10 days before settlement where the seller is required to disclose any (material) changes in any of the information that has already been provided.

Failure to provide this information or material changes to the original information should allow the purchaser to cancel the contract without penalty.

Purchases off plans

The BCCG believes that a related regime will apply to buyers who purchase a BC unit off the plans. We note that it can be difficult for a developer to give clear indications of future costs, especially before the building has even been built, but we are concerned at the way some developers have deliberately under-represented future costs to encourage sales, with the purchaser having no recourse later when the true costs are revealed.

We note too that it is not unusual for the fine print in sales documents for purchases off the plans to include statements to the effect that the developer can reduce the size of the apartment by up to 10% and for the quality of fittings to be changed from the purchase agreement – all without further discussion with the purchaser. Some safeguards must be provided for owners in these areas.

Landonline

The suggestion that information be lodged and maintained on *landonline* is not seen as appropriate unless this is freely accessible by everyone, which isn't the case currently.

Proposal 2: Add further requirements in disclosure statements

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

The BCCG accept all of the suggested inclusions for the disclosure regime with the following exceptions:

- financial information and audit reports going back seven years is excessive. Three years of financial information and audit reports should be sufficient, especially when BC annual reports or minutes of the AGM are also included
- we strongly believe that a LTMP should be included with the initial disclosure and that details of any funds set aside for to pay for the planned expenditure are clearly identified
- we question what would be considered able to be redacted. Unless clear criteria is provided about this, and this is subject to consultation, we are concerned that some would see this as an opportunity to inappropriately exclude information that would be important for any prospective owner to see.

Agenda

Most BCCG members indicated that there was no need for agenda to be included with the disclosure documents and that meeting minutes should be sufficient. However, one member argued a contrary view:

> *The ability to compare agenda to minutes will illustrate whether the AGM is being run correctly i.e. new resolutions or substantive changes to resolutions being made on the night with the Chair's held proxy votes being used to carry these (this was a common occurrence at our rental property AGM until we made a fuss).*

Another member commented:

> *One aside on agendas – I simply never keep them, they have no status. End of.*

This may come down to what the agenda is defined to be. For many people "agenda" may be just a list of topics to be discussed. For others it may include a full list of arguments and motions for a particular view. The inclusion of the latter would certainly expose any issues such as have been identified by the BCCG member above. A simple list of topics would be of no use at all.

Additional information

The BCCG is also of the view that the following additional information should be included:

- any material changes to the status of the BC since the last AGM
- details on insurance cover held by the BC
- a copy of the BC Rules
- a full BC unit plan should be made available rather than just the unit plan of the unit being purchased on the grounds that it is important for any prospective owner to understand what common property elements they will be (partially) responsible for
- the extent to which ownership within the BC may be controlled by a single owner/entity as a result of ownership of the units or other legally controlling ability, needs to be disclosed. ("Controlled" may be defined as having more than 30% of the voting power of the BC.) This would be an indication to a prospective buyer as to the extent to which they may be able, in future, to implement change within the BC.

The BCCG is particularly concerned about the current turn-over disclosure requirements when someone is buying a unit off the plans as we consider the current requirements very deficient.

Proposal 3: Require a statutory warranty on all disclosure statements

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

Sign-off responsibility

BCCG believe that there should be some form of mandatory warranty on any information supplied as part of the disclosure regime. It is important to distinguish though between information that needs to be supplied by the seller versus the BC.

It is our view that the disclosure statement should clearly delineate between the information that is to be supplied by the seller versus that which the BCMC or BC chair should have to supply.

The BCCG would see that the seller has a responsibility to advise on any conditions related to the actual unit and should be prepared to sign their name to disclosure in this area.

We believe that where a BCMC is contracted to manage the legal and financial affairs of the BC then accountability for reporting in those areas should belong to the BCMC rather than the BC chair. For instance, it is possible that an owner, through lack of engagement with BC issues, may be unaware of work that is proposed around, for instance, non-mandatory earthquake strengthening or dealing with other issues within the building eg expensive replacement of a fire system. The BCMC would be involved and aware of such matters and should be required to identify these in the disclosure statements. In this case a responsible person within the BCMC would be expected to sign disclosure related to these areas.

Where a BCMC is not employed to do this work, we believe that the BC chair should sign off on the information provided to the prospective purchaser. There is a difficult balancing act here. On one hand the BC Chair is probably the person who best knows what is happening within the BC, so should clearly provide this information to the prospective buyer. However, we are also aware that many chairs believe that the level of accountability is already too high and any increase may cause additional chairs to opt out of that role.

A BC chair raised an additional point:

> *I also have a concern that the owner may change the material (e.g. by omitting to pass all of it on) after the BC sign off, so it would need to go straight to the purchaser from the BCMC/BC Chair, not via the owner, or be in a non-tamperable form.*

One of our members commented on the need for consequences:

> *The first principle has to be that that whatever disclosure information is provided has to be backed up by some warranty or system of consequences. The common practice of BCMCs to provide details with disclaimers renders the whole exercise futile. Information on current levies' position has to be correct for preparation of settlement statements. I'm fine with your proposal that the financial manager completes and certifies as long as the buck stops with him or her and there's no wriggling out with a disclaimer. There also has to be a cost effective way of redressing any errors.*

Impact on sale

The BCCG supports the idea that the potential purchaser should be able to cancel the sale without penalty where information is shown to be inadequate or incorrect, and that that cancellation shall not impose penalty on the purchaser.

Further comment from a BC chair adds to this issue:

> *My BCMC is very wary on providing info to prospective purchasers: we are aware of instances of legal action by sellers for causing the sale to be lost when BCMC/Chairs have revealed perfectly legitimate/ correct info to purchasers. In one case, someone he knows was not subject to legal action but was fired from the BCMC. There needs to be protection for the other side too – if the BCMC/Chair releases valid BC information which results in the loss of the sale, the Chair/BCMC should not be deemed at fault in any way.*

Enforcement

The BCCG does not agree that the Tenancy Tribunal is an appropriate recourse for any enforcement provisions under this section of the Act. The Tribunal has been seen to be slow, expensive and inconsistent in its dealing with BCs and there is nothing in the proposal that would convince the BCCG that these problems are likely to be resolved.

4.2 Strengthening Body Corporate Governance

Proposal 1: Address conflicts of interest

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

The BCCG support the provision of Conflict of Interest provisions in the UTA. However, while we would accept that the Conflict of Interest provisions as is proposed for the Incorporated Societies Bill is an excellent start, we are concerned at the inherent conflict of interest that exists within any BC and which does not necessarily apply to other forms of incorporated societies.

Owners have an inherent conflict of interest in almost all decision making because those decisions are almost all associated with costs involving their BC. New maintenance or replacement work in one area is likely to impose costs on all owners (where generally no-one wants to pay more) or is to be on-charged to one or other owners (using s 126) who usually fight strenuously against such costs. Others demand that costs are passed on because they don't want to pay them. Everyone has a conflict of interest.

A Code of Conduct for BC owners that includes the requirement to act in good faith and with the best interests of the full BC to the fore, may assist in resolving these issues.

The BCCG is aware of instances where a BCMC employs a live-in manager or other contractors using a contract that provides financial benefit to the BCMC. The BCCG view is that this form of contracting is both inappropriate and represents a direct financial conflict of interest.

All contracts for services should be with the BC so that the BC has the ability to directly influence the quality of the work. The day to day management of these contracts may be separately contracted to the BCMC but where there may be any conflict of interest in such contracting this conflict of interest must be clearly identified to the BC.

Similarly we are aware of a BCMC that has a separate legal arm to its business. The BCMC is well known for its aggressive stance with any owner that may be in arrears with levies or at odds with the BC on other issues. These instances very often end up in the Tenancy Tribunal and where these fail, instances have been reported where the BCMC strongly encourages the BC to take the matter to the District Court on appeal. We are aware of at least once recent instance where the accumulated costs of those legal services far outweighed the outstanding levies and where the court sharply criticised the BCMC for their stance.

The BCCG view is that at all general meetings and committee meetings there should be a requirement to state any individual conflict of interest and to identify this in a Register.

Need for education

The BCCG believe that the concept of Conflict of Interest is not well understood in general and if this is introduced then additional guidance on this would be necessary. It is suggested that this could be done through the MBIE website and should be tailored to the Unit Titles Act.

Proposal 2: Increase reporting of delegated powers

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

We are unclear on the extent of the problem in this area as we have received no complaints re reporting back to all owners.

The BCCG believe that the chairperson of *all* BCs should provide a report at the AGM to inform all owners of the state of the BC and the activities over the previous financial year, together with any specific requirements as included in the delegations.

If there is an issue with inadequate reporting to owners, the BCCG would welcome guidance on the range of topics that could be included under this requirement (perhaps on the MBIE website). Given that different BCs may differ markedly on the level of delegation to their committee, it may be difficult to be explicit on what the minimum level of reporting should be.

The BCCG recommends that BC chairs report to their owners more frequently than once a year, particularly where there are major projects or areas of concern. We would also support specific requirements to report to all owners where, for example, the committee proposes to take an owner or other party to the Tenancy Tribunal or court for anything other than recovery of standard levies.

This reporting may also be required where the BC is to enter into a new contract of say more than three years or for more than a specified value. Examples may include replacing the roof, repainting the building or employing a new BCMC. We would not see this reporting necessary if the general conditions of such a contract had been discussed and agreed at a general meeting prior to the actual contract being agreed. There needs to be some balance between the need for informed decision making on costs by the full BC balanced with the need for efficiency in the committee's decision making.

All owners should also be informed if anyone files proceedings against the BC.

This reporting could be done by email, quarterly or 6 monthly newsletters etc.

Proposal 3: Duties and responsibilities of body corporate committees

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

The BCCG supports the establishment of a Code of Conduct for BC committee members. We accept that the Queensland Code of Conduct as established under their Act would be a good starting point for this. However, aspects of this Code could be enhanced. For example, while there seem to be requirements to not create a nuisance, that requirement does not seem to be explicitly linked to their performance or behaviour in an actual committee meeting.

The Code does not provide for any decision of the committee to be debated and once agreed, for the committee member to support it unless otherwise agreed within the committee ie collective responsibility principle.

The BCCG support having the ability to remove someone as a committee member if they fail to abide by the Code or for other reasons as outlined in the Queensland Code.

The BCCG would also support the view that committee members should be excluded from personal liability in undertaking their duties if those duties were performed in good faith.

Committee minutes

Views differ within the BCCG as to whether or not committee minutes should be available to all owners. Some argue for full disclosure while others argue that if the committee minutes are to be fully disclosed then the minutes may become minimal to the point of not including key information, particularly were contentious issues may be being debated.

It has been suggested that large sections may be declared "in camera" to ensure that full information is recorded on an issue but also that personal details around that issue are kept appropriately private. Examples of the latter may include financial or health details of an owner which may impact on their behaviour or their ability to pay levies etc.

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

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

The BCCG acknowledge that in some BCs there have been examples of proxy farming, but we are unclear on the extent to which this is a real problem. We are aware that some supposed examples of "proxy farming" have occurred when a large block of units is controlled by a separate entity and this has made it difficult for other owners to make changes within the BC. The latter is not seen as proxy farming.

For the purposes of this response, the BCCG views proxy farming as the deliberate attempt by one or more owners or the BCMC to seek proxies for a general meeting so as to influence decision making, usually in their favour.

However, we do not see how attempts to remove this ability can be adequately introduced without potentially restricting the ability of some owners to exercise their vote.

While the notice of AGM may include statements such that the proxy can be awarded to any other owner or the BCMC or any other person, our experience is that the greatest proportion of proxies are given to the person that sends out the notice.

Often these proxy notices are returned at the last minute.

If there was to be a limit of proxies that could be held by any one person, and if an owner sent in their proxy near the date of the AGM, then that may exceed the maximum number of proxies that that person is able to hold. It may not be possible for the receiver to contact the owner to request them to reassign their proxy, particularly if that owner may not be a resident or may be overseas.

Even if the owner is a resident they may not trust anyone else to hold their proxy so it would be unfair on the owner to force them to give that proxy to another person that they may not know or trust.

The BCCG would not support any limit on the number of proxies that may be held.

However, the BCCG would support the view that only owners should hold proxies for other owners. We have had several members comment that BCMCs in particular should not hold proxies.

"Postal" voting

The BCCG believes that there should be stronger guidance for a "postal" voting form to be included with the proxy to ensure that the owner exercises their true intentions. However, we do not believe that this should be a mandatory requirement.

We can think of many situations where the owner may not understand the information provided on a vote or may be ill and unable to provide clear guidance to the proxy holder. However, they may

trust the person sufficiently to give their proxy, and this ability should not be removed. As such, ***the BCCG would not support a mandatory voting form to be included with a proxy vote***.

The BCCG would strongly support clarification that "postal voting" can include voting by electronic means.

We are aware of some BCs where one owner may control the vote through a lease agreement. The lease agreement tied to voting ability may be a contractual matter between the owner and the leasing company, but is not a situation that the BCCG would support. Where there is the existence of such a lease agreement we believe that this should be adequately disclosed as part of the initial disclosure statement.

Number of unit owners per unit on the committee

The BCCG believe that there should be greater clarity as to the number of owners that may represent a unit and whether they can all be part of a committee. For instance, if two names are listed on the title of a single unit, can both people be elected to a BC committee? The BCCG would suggest not but this is not always clear for some BCs.

Knowledge of and contact details for other BC owners

It has been suggested that all owners should be provided with contact details of all other owners within the BC. The BCCG does not support a mandatory stance on this.

Feedback from our members indicates clearly that there are major issues of privacy associated with the disclosure of this information as well as a desire to retain the "quiet enjoyment" of their unit without harassment by other owners.

Several BC chairpersons reported instances where an owner demanded access to all BC owner contact details so as to distribute material, usually prior to a general meeting. The material was variously described as biased, incorrect and even unhinged. The BCCG supports the view that owners not be given these contact details but that the BC generally release such information on the owner's behalf. Where necessary the chair can provide a cover note to explain the committee's view of the content.

The BCCG has been told that many owners would not be prepared to disclose their personal contact information to everyone else in the BC. Indeed, a number of BCs choose to have a generic BC chair email address rather than provide a personal email address to other owners.

Proposal 5: Limit the impact of unfair service contracts

11	We propose to amend the UTA so that bodies corporate can vary the terms of or seek to release themselves from longer term contracts in certain circumstances. Do you agree? If no, why?

The BCCG would strongly support extending the ability for a BC to seek redress for onerous contracts. This would apply particularly where contracts were set up for very long periods or where "sweetheart" deals may have been signed between the initial developer and third parties.

For example, one BC chair reported that their 107 unit BC originally had most of the units sold off the plans without any management contract being disclosed at the time. It was subsequently found that an encumbrance had been registered against all titles that required owners to use the assigned management company to handle all rental agreements as well as providing the management company with a 25 year contract to manage the extensive buildings and grounds. The management company hired a couple to do this work and provided them with on-site accommodation with the BC

required to pay to the management company the costs of the unit that were used for this purpose. As the contract for the live in manager was with the management company, the BC had no ability to influence the quality of the work that was done. None of this is seen to be appropriate.

The BCCG is aware of cleaning and management contracts that fall into this category as well as the "sale" of billboard rights to a third party where there is no financial benefit back to the BC.

Agreement on contracts

The BCCG would not support a mandatory requirement that all contracts had to be approved by the full BC. To do so would severely restrict the ability of a BC committee to function efficiently. We may, however, support the view that all contracts over a particular period eg greater than five years, would have to be reported to the full BC (preferably before signing).

At the same time we would strongly support the idea that BC chairs should regularly report to all owners more frequently than just at a general meeting where there are major decisions or actions taking place.

Need for guidance on service and other contracts

The BCCG would support further guidance on appropriate contracts to be used for BCMCs and may support restrictions on the time period for these contracts, depending on what other requirements may be made within such contracts. For example, the BCCG sees no difficulty in allowing a 2+2 year contract with BCMCs or other contractors.

While some may argue that any extension of such a contract past this point should be subject to full BC approval, it is our belief that this too may impose additional costs on the BC in organising a meeting that may be solely for this purpose, and would decrease any efficiency in having a BC committee in the first place.

The BCCG view is that the BC and any contracted parties should keep regular open communication on the quality of services or passage of information. Where these are seen to be deficient, these should be addressed as soon as possible and may be signalled at the AGM prior to any extension of the service contract.

The BCCG is aware of 25+ year contracts for management services or the provision of other services such as electricity. The BCCG view is that this length of period is inappropriate unless it contains clear "exit" clauses for cause, including where the market rate for those services is shown to be considerably less than the contract rate. While s139 does give potential relief for service contracts it does not assist in resolving problems with other sorts of contracts.

Proposal 6: Clarification of governance terms

12	Do you agree with the proposals made above as they relate to: • Minority relief – no change warranted; • Alteration to units – sections 79 and 80 (i) to be amended if necessary to align with section 65; • Quorum – section 95 to be clarified; and • Resolutions – section 101 to be amended. If no, why?

Minority relief

The BCCG agrees that there is sufficient clarity in terms of who the *appropriate decision-maker* is.

We don't agree that the Tenancy Tribunal in its present state and costs is an appropriate decision-maker.

The BCCG would support greater guidance being made available on the MBIE website so that owners better understand the Act.

Alteration to units

The BCCG would support greater clarity as to when an owner can undertake alterations within their unit. This should include greater ability for the BC to review those changes where other owners complain about noise or impact on their property or the common property.

We would support reasonable access to individual units by the BC to confirm that work is being done as stated as we are aware of instances where an owner made statements that were incorrect and left the BC exposed in terms of inappropriate changes to fire walls etc.

Quorum

The BCCG supports the view that only those owners who are not in arrears for either levies or other charges that may have been imposed by the BC, are entitled to vote at a general meeting. This would include recovery of charges (such as recovery for Fire Service call-outs) or on-charging of repairs (s 126) that the BC may have had to undertake which are of primary benefit to the particular owner.

The BCCG also requests that greater clarity be given to whether a person who has not paid their levies but who attends the meeting may be counted as part of the quorum that would allow the meeting to proceed. Our view would be that they are to be counted for quorum purposes but not in terms of their ability to vote.

Resolutions

The BCCG supports the view that all duties or powers not delegated to the committee should be decided by ordinary resolution.

It has been suggested that where powers that would require a special resolution at BC level have been delegated to a committee, then those committee decisions should also have a 75% threshold. We do not support this, largely due to the nature of committee sizes and the difficulty of always being able to resolve this if more than 75% had to vote in favour. However, we would see this as a good example of an action undertaken by the committee that should be reported to the full BC – and that that reporting could be by email rather than formally at a general meeting.

4.3 Professionalism in Body Corporate Management

Proposal 1: Status Quo and Self-Regulation

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

BCMCs = major area of concern

Complaints about and concerns with the lack of professionalism of BCMCs is the single greatest area of concern expressed by BC chairs. In the 2015 and 2017 BCCG surveys re requested meeting topics, selecting a good BCMC and addressing concerns with BCMCs were in the top three requests in both years. (The other item related to the responsibilities of a chairperson.)

The BCCG believe that the current level of professionalism amongst BCMCs is woefully low, with inadequate restrictions on entry and on-going operation. The BCCG has received numerous complaints about inconsistent standards; inadequate knowledge of those who manage individual BCs; a lack of financial and governance knowledge; conflicts of interest; unnecessary Tenancy Tribunal and litigation claims; poor relationship skills and the inability to manage difficult situations amongst owners, committee members or even some contractors.

While in most cases these complaints arise from ignorance by the BCMC representative, there are a disturbing number of complaints from owners about BCMCs acting in a way that borders on, if not actually crossing, a legal boundary.

The deliberate refusal or long delays in passing over BC documentation and even funds creates huge problems for the on-going effective and efficient operation of the BC. The BCCG has had several complaints of this nature.

The BCCG is particularly concerned at the way some BCMCs lump all funds from multiple BCs into one bank account which they control. We would wish to see greater clarity around the way in which BCMCs are to handle banking arrangements between BCs.

We strongly urge that as a minimum, all monies held on behalf of a BC are held in bank account(s) in the BC's name and with access and control remaining with the BC – even if they wish in some circumstances to delegate some responsibility for the payment of accounts to the BCMC.

One of our members sent through the following comment:

> *XXX owns several hundred unit title properties in bodies corporate ranging in size from 3 units (total value over $100M) to 200+ units (value $150M +). I therefore have more experience with BC management companies than most owners.*
>
> *I am STRONGLY opposed to mandatory BC management by a so called "professional" management company. The BC management industry does have good managers but it also has more Cowboys than a Louis L'Amour novel.*

Another commented:

> *Our small body corporate is better managed, more compliant and financially better off self-managed that with the previous management companies. In our transition into self-management we have lost some of our records as the companies have been unwilling to provide detailed records. They were also lax in ensuring the BC was managed in a compliant manner and challenging us for the decisions we were making (we had no chair for a lengthy period, operational budgets were insufficient to meet basic costs, the LTMP was poor at best, maintenance work was not being completed and LTMF was being used for operational purposes).*

Occupational regulation

The BCCG believe that occupational regulation is the appropriate way to manage the BCMC sector.

While BCMCs may be a subset of the broader property management group, the level of control that BCMC managers have over the affairs and financial matters of owners is considerably greater. For example, while real estate agents may hold large sums of money on their client's behalf, BCMCs often have considerably larger sums (often tens of millions of dollars worth of funds, if not more in some circumstances) in their control for years on end.

The current level of risk and level of complaints that the BCCG receive about bad BCMC financial management alone would indicate that the Cabinet threshold for stronger management of this sector has been passed.

The BCCG does not believe that the BCMC sector is sufficiently professional or unified to effectively self-regulate.

The BCCG strongly supports the formation and educative aims of the fledgling SCA(NZ) and recognise that a number of BCMCs have joined that organisation. However, the voluntary nature of SCA(NZ) and its inability to control, punish or even monitor the behaviour of its members is such that there is insufficient power available to manage this large and extremely influential sector.

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

The BCCG supports requiring BCMCs to be members of a professional group and being subject to the codes of practice/conduct for that group, but does not believe that a totally voluntary organisation is able to main the necessary standards.

The BCCG would support a requirement that BCMCs are required to belong to a body such as REINZ that has the current structures and powers to ensure that a higher level of professionalism is maintained.

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

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

The BCCG does not support the mandatory requirement for BCs of any size to contract a BCMC.

While we would encourage many BCs to contract a BCMC to assist with the management of their affairs, we believe that the current low general standard of BCMCs is such that it would be inappropriate to force a BC to take on such a contractor, especially where the BC may have the ability to do this work within their own owners.

The BCCG may support requirements of this nature in the future, if the industry's professional standards are seen to markedly improve.

The BCCG supports the idea that smaller BCs (ie 9 or fewer units) do not have mandatory requirements forced on them. An analysis of BCCG membership indicates that a very high proportion of BCs in this small size group are currently self-managing. Comment from many of our members in this sector have indicated that mandatory requirements for, say, a BCMC to have oversight of their business, would impose totally unnecessary costs on those owners.

It is possible that if there was a more effective and professional BCMC sector, some of the small to medium BCs may elect to appoint a BCMC to look after their affairs. At the moment though, the generally low regard for the current level of professionalism and the costs imposed by some BCMCs, is beyond the reach of many small BCs.

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

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

The BCCG supports the view that minimum functions for defined BCMCs is set out in the UTA with more detailed requirements established in the Regulations.

Defining the BCMC

It must be noted that the range of duties undertaken by BCMCs at present can be very broad, including relatively full services such as financial, legal, governance assistance, secretarial and facilities management. Some also include a (contractual) requirement to manage all rentals in the BC.

A large number of BCMCs do not undertake any facilities management services. Where a BC selects such a company the BC may be required to contract the facilities management services from a separate entity – and many of these services are also not particularly professionally run.

The BCCG believe that there needs to be appropriate definition of what constitutes a BCMC under the Act and/or Regulations and that there be clarity around the role of a facilities management company where this is separately contracted.

Add-on charges

The way in which some BCMCs and facilities managers charge is open to question, with "add on" charges from the BCMC or facilities managers as a percentage add-on to any services that they may contract in.

It is the BCCG's view that charges of this nature are inappropriate and provide no incentive for the BC to get the most cost-effective service. In some cases it merely guarantees the most expensive level of service.

Kickbacks and contractual requirements

The BCCG is aware of an existing practice where a BCMC contracts a facilities management company (FMC) on behalf of the BC – and collects a "kickback" on those services. One of our associate BCMC members reported:

> *We recently tendered for a facilities management contract with an Auckland BC developer. Our fee was approximately $32,000 – but the BCMC that was putting together the contract suggested that the fee be $44,000 with $9,500 to be paid back to the BCMC every year.*
>
> *When we withdrew from the process, given what they felt were inappropriate professional standards, the BCMC rang back to explain that they were merely trying to build a buffer fund as they had promised the owners that their levies would not rise within the first four years. We withdrew from the tender as we didn't see this as appropriate as the owners could have benefited from lower fees from the start if the BCMC had operated more professionally.*

The BCCG is strongly of the view that any contract with a BCMC should include a requirement that the BCMC identify any commissions or similar payments that they receive in working for the BC.

We are aware that some BCMCs "hide" these commissions under other names. For instance, we are aware of one BCMC that receives sizeable rebates from an insurer if the BC joins an insurance scheme that is supposedly tailored to BCs. In this particular situation, the BCMC stated, in line with the contractual requirements, that they received no commissions from insurance or other work. When it was later identified that the BCMC did in fact receive such payments the General Manager of the BCMC stated that they weren't a commission but rather a payment towards the administrative work that the BCMC did on behalf of the insurer and so saved the insurer additional costs. The BCCG does not see this as a valid argument.

Minimum services

The BCCG would support the idea that a defined BCMC would undertake certain minimum services, as outlined in the proposal, including reporting to the BC and to the committee (where established) and, especially, separate bank accounts for each BC and short time limits on returning records and funds to the BC where there is a change of BCMC.

The BCCG would strongly recommend that any BCMC be run by someone with defined minimum professional qualifications and that all "managers" that deal with individual BCs are required to meet minimum professional standards and pre-entry training from the start. They should also have to undergo compulsory annual professional development requirements in a similar way to those in other professional organisations.

The BCCG agree that BCs should be able to seek redress from BCMCs that fail to meet the minimum legislative requirements.

As before, the BCCG does not support the Tenancy Tribunal as the appropriate vehicle for this because of cost, lack of timeliness and inconsistent decision making.

Given that the BCCG believe that BCMCs should come under a broader occupational regulation, it is our view that that professional body should, in the first instance, take appropriate action against its members.

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

The BCMC should be legislatively prohibited from the following acts:

- acting as BC chair
- signing contracts on behalf of the BC (other than as part of the BC section of the disclosure documents)
- calling a general meeting
- voting on the basis of proxies received – such proxies should be handed to the chair to vote (Note that we would accept that where an owner had submitted a postal voting form then the BCMC representative could announce the call made by the owner on individual motions)
- holding BC funds in the BCMC's name
- retaining interest received from BC funds
- initiating Tenancy Tribunal or court action unless specifically approved by the BC or BC chair.

However, we do believe that there should be some minimum requirements that a BCMC is required to undertake and that any organisation that has professional oversight of BCMCs be required to monitor these requirements and take appropriate action where they are not being met. That action should also be included in terms of regular public reporting so as to make BCMCs publically accountable and to provide transparency for BCs that may be looking for a new BCMC.

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

The BCCG support the idea that minimum requirements are established under the UTA and that additional requirements may be added under the Regulations.

The reason for the latter lies with the greater ease with which Regulations can be amended vs making changes to an Act.

4.4 Ensuring Adequate Long Term Maintenance Plans

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

19	Do you agree that an appropriately qualified person should be required to guarantee the accuracy and completeness of the LTMPs? If no, why not?

The BCCG is strongly of the view that all BCs, regardless of size, should have a LTMP and that an appropriate professional should sign off on these plans.

It is possible that a BC may have an owner that has such expertise and it should be possible for the BC to engage that person to draw up a LTMP. However, even in this circumstance we believe that the owner/professional should be required to certify the quality of the document.

We are also of the view that if the BC committee believe that some aspects of the plan should not be included in any funding model (see comments in 3.1 above), then those exclusions should be clearly identified to all owners prior to the plan being approved.

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

The BCCG does not agree that the BC chairperson should be required to sign off on the plan if that sign-off indicates a level of responsibility for the accuracy and completeness of that plan. This view would apply regardless of the size of the BC.

The simple reason for this is that by far the majority of BC chairs are not sufficiently knowledgeable about what needs to be replaced, let alone knowing residual life or replacement cost values. If BC chairs are required to sign in this way there is likely to be an exodus of chairs.

It is the BCCG view that if the person preparing the plan comes from an appropriate professional organisation, then they sign off on the plan. If there is recourse under the Act if the plan is seen to be deficient, then there should be no need for the BC chair to also sign.

However, we have concerns as to how responsibility may be applied here given the very long term nature of such a plan. It is suggested that this responsibility be limited to a maximum of 10 years and should not cover unanticipated increases in costs that could not have been foreseen at the time that the plan was developed.

As before, the BCCG does not see the Tenancy Tribunal in its current form as an appropriate vehicle for redress.

Proposal 2: Develop a new online template for LTMPs

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

The BCCG is strongly of the view that MBIE update their guidance on LTMPs on their website. The guidance for small BCs in particular is woefully lacking in any detail that would assist in the development of such a plan.

It is suggested that MBIE seek guidance from appropriate professionals and then consult with the BC sector in terms of their understanding and requirements for such plans. The BCCG would welcome the opportunity to engage with MBIE on the requirements for such a plan as we remain concerned about the current guidance and the materiality associated with what should be covered in a LTMP versus routine maintenance plans.

Improving the ease of accessing this information is an equally important requirement. (At the moment, putting "LTMP" into the MBIE search engine returns "0 items matching your search terms". Putting "long term maintenance plan" into the same search engine returns two items, neither of which give a BC any information as to how to set up a LTMP.)

Proposal 3: Extend the timeframe of LTMPs to 30 years

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

All BCs to have a LTMP

The BCCG believe that every BC, regardless of size, should have a LTMP.

While there is an argument that the development of a LTMP for a small BC may be an additional cost spread amongst a very small number of owners, it is likely that the cost of developing such a plan will also be somewhat smaller than for a large BC. More importantly, if a small BC does not have a LTMP and then is faced with a major high cost replacement item such as a new roof, if no money has been set aside then it is unlikely that all owners will be prepared for the cost. In these circumstances the necessary repair costs become much greater for the remaining small number of owners.

Note These comments are made in recognition of our earlier assertion that only those BCs of more than 5 units should be included within the Unit Titles Act.

LTMP timeframes

The BCCG does not support a mandatory 30 year timeframe for a LTMP but does support the view that the LTMP should indicate major items requiring replacement over at least the next 20 years.

Our reasoning on the timeframe is that a LTMP should identify all major items that need replacement within the agreed timeframe and we would not be adverse to seeing this aspect identified for the next 30 years. Good LTMPs identify the key elements that will need to be replaced and will show their normal expected life together with the residual life the professional is assigning to the item at that time.

However, accurately estimating *costs* of major replacement items for the next 30 years is an impossibility, especially as most LTMPs merely index existing known costs out to the necessary timeframe according to an assumption on the rate of inflation. Improved technology and a multitude of other factors, including varying inflation and interest rates, all compound to make identifying costs even 10 years out a major guesstimate.

The BCCG would support a requirement for BCs to have a fully costed LTMP that extends for at least 10 years on a rolling basis ie the plan is continually "reviewed" to ensure that costs for identified elements are known for at least 10 years into the future at all times.

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

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

It is the BCCG's view that the concept of "review" needs greater clarity.

Ideally, all LTMPs should be "reviewed" annually at the AGM to ensure that sufficient funds are in fact going to be available for planned LTMP expenditure for the new financial year. Ideally these costs would have been "reviewed" in the previous year through obtaining quotes to check that the costs originally identified in the LTMP for the next year are in fact still valid or are updated in time for the AGM.

The question becomes whether a specialist from an appropriate professional body undertakes any further "review" of the plan at the three year point or whether a different timeframe is required. The BCCG does not support the proposal that a LTMP be formally "reviewed" by a specialist company every three years.

The BCCG recommend that a formal review of the LTMP by a qualified professional be undertaken every 8-10 years and that the BC "review" the plan each year in the context of reviewing their annual budget.

Proposal 5: Require large bodies corporate to have a LTMF

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

The BCCG believe that all BCs should have a LTMP, regardless of their size, for the reasons stated above. (*Note*, again that we are excluding "BCs" of four or less units from the UTA and hence these recommendations.)

The BCCG is also of the view that all BCs should have a LTM fund. The issue is the extent to which that fund should have money in it to meet projected expenditure.

A comment from one of our members identifies some of our concerns:

> *Not maintaining a fund is a significant risk for any BC. …*
>
> *Where there is no or insufficient funding there is a risk that owners will be called upon to make ad-hoc levy contributions and in some cases this may be with some urgency. Not maintaining a fund assumes that all owners will be able to make this payment on demand.*

Another comment broadens the scope of concerns:

> *Don't think that just because an owner is a commercial or retail entity within the BC that they are going to be able to conjure up funds when needed! I know that some commercial owners believe that they have better money management skills than the average residential owner but this isn't necessarily the case. We had a large commercial owner in our building that was refusing to pay contributions to the LTMF – but then the Seddon earthquake struck. His tenant left because they weren't satisfied with the %NBS and the owner couldn't come up with the funds needed for strengthening. This created great antagonism within the BC as well as major financial issues for other owners who had to front up with additional funds to get the strengthening work started. I really don't want anyone to go down that path again!*

Funding – to what extent?

Professional companies preparing LTMPs seem to have different views as to the extent to which a fund should be able to meet costs as they arise. It can be unrealistic to expect that a BC move to from having no LTMF to have a "fully funded" fund in a short period as this may require unrealistic increases in levies over that period.

This issue becomes even more difficult when a BC may be preparing for major remedial work to resolve watertightness or earthquake issues. In these circumstances it is often realistic for the owners to put their money into urgent remediation work rather than prepare for (say) a new roof or lift that may not be needed for many years.

If there is a requirement for BCs to have a LTMF, this can be easily identified in a pre-contract disclosure statement and cited by real estate agents when preparing documentation for a unit for sale. Currently many real estate agents seem to have a very poor knowledge of the value that this fund constitutes when a prospective buyer is comparing BCs.

Proposal 6: Require bodies corporate LTMFs to be annually audited

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

The BCCG does not support mandatory annual audit of BC funds, although we do recommend that this happen from time to time.

We note that many of our members are unclear on what an audit (let alone a review) actually involves, particularly in terms of the level of confidence that they may have in the reporting of their funds as a result. Additional guidance from MBIE on audits and reviews would be of benefit.

It's all about assurance

We are aware of some BCs (and BCMCs) that allow owners to access detailed transaction level accounts for their BC so that owners can see for themselves what went into the summary figures that are provided in the annual financial statements. The BCCG support this.

The BCCG strongly recommends that at a minimum, if an audit is not undertaken, owners should be able to see bank statements, in the BC's name, that show the balances at the end of the financial year for all funds held for the BC and that these balances can be directly compared to the annual financial statements.

We are aware that there are some BCMCs that cite the "advantages" of the BC not undertaking an audit given that the BCMC is already audited and this would suffice. This is often accompanied by statements about the "trust" nature of the funds that the BCMC holds, which supposedly provides greater assurance to a BC without the need for an audit. In general BCMCs do not operate a trust account in the way that lawyers or accountants are required to operate such an account.

However, where a BC does have a financial audit then we are strongly of the view that the LTMF should be included within that audit. This is done on the basis that there is little point in auditing just, say, the operating account, when the LTMF may hold considerably greater sums.

The cost of audits

We are aware of the considerable range of costs being charged for audits. The author's BC – a mixed use, 42 unit building built in 1928 and valued at approximately $80 million – has an annual operating budget of about $400,000 and a LTMF of approximately $500,000. We have our accounts audited

annually at a cost of approximately $3,000+GST. Considerably higher costs have been suggested to the BCCG and this can be off-putting for many BCs.

Inflexibility in the Act

Section 117(3) provides that a special resolution is required where a body corporate needs to expend more than 10% of any item specified in the LTMP. That provision is far too inflexible.

Even where a BC gets quotes before implementing major works, it is possible that new issues are identified in undertaking the project that mean that other work has to be included at additional cost. The process of setting up the mechanism for a special resolution (likely extraordinary general meeting) is time consuming and may well add extra costs in itself (eg work done and attendance by the BCMC) as well as slowing down the continued work on the project.

Greater flexibility such as the total LTMP costs (as compared to individual items in the plan) not exceeding 10% (or a greater figure) would allow for more efficient progress on agreed projects.

At the very least an ordinary resolution should be acceptable rather than a special resolution given that the BC will already have agreed on the actual project.

4.5 Accessibility of the Disputes Resolution Regime

Proposal 1: Fee settings

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

A critical element is whether or not the Tenancy Tribunal process should be seen as a full cost recovery model or not. The reality of the current model is that the costs are extremely high (especially as compared to other Tribunals such as the Disputes Tribunal) and provide a major barrier for BCs to use this as a resolution process, especially when coupled with long delays in being heard and similarly delays in getting a decision.

For example, the BCCG is aware of one four-owner BC that used the Tenancy Tribunal process to force one of their owners to pay their levies. It took 14 months for a decision to be handed down and the BCCG was told that the decision was effective up to the time of the application. The small BC then had to go back to the Tenancy Tribunal to seek further levies for the intervening 14 months. It seems that both the timeframe and decision was far from satisfactory.

The BCCG does not believe that the current delays in being heard provide "a relatively quick dispute resolution service". In fact the quoted times for resolution in some other jurisdictions, while longer than for Tenancy Tribunal hearings, should be considered to be a disgrace rather than a reasonable comparator.

While it is possible to take disputes to the District Court to enforce a Tribunal decision, the additional costs and time associated with this means that most BCs are not able to take this step. This applies particularly with small BCs.

The BCCG believe that a reduction in fees for the Tenancy Tribunal is seen as a critically important step in resolving UTA-related issues but, by itself, is not sufficient in resolving these issues.

While it is acknowledged that the suggested fees are an improvement on the current fees, we note that there is still a very large gap between the approximate $100 fee to the Disputes Tribunal (where UTA issues used to be taken prior to the UTA2010) compared to the $600-$1,000 now being suggested. We note too that the suggested fees here are markedly in excess of those charged under the Queensland Commissioner scheme.

We see no point in a separate "administration fee" but would welcome further explanation as to why this is necessary rather than having just a single fee.

The BCCG would support the mediation fee as a cost associated with the first step in resolving issues.

We note that the suggested fees are not indicative of any likely future fee and express concern and dismay that MBIE and Justice are not able to work together more closely to provide a package from the start.

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

The BCCG strongly support mediation as a first step in resolving disputes and reduced fees for that service.

We would also support the use of arbitration given that the fixed attitudes of many owners when it comes to resolving costs makes it difficult to achieve success through mediation.

Proposal 2: Revise the name of the Tenancy Tribunal (preferred proposal)

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

The BCCG is strongly of the view that the current level of resourcing and way of operating for the Tenancy Tribunal makes this an inappropriate method in resolving disputes.

If the Tenancy Tribunal is retained, then the BCCG would support a change of name to better indicate where BCs can take their issues to be resolved.

In a related and surely no cost move, the BCCG would strongly recommend that anything to do with the Unit Titles Act be removed from the Tenancy Services section of the MBIE website and, given the highly likely large increase in Unit Title ownership in future, that access to that area of the website be raised to the Home page level.

The need for a simpler, faster way of resolving the most common Tenancy Tribunal issues

Data supplied in the discussion document indicates that over 80% of cases heard by the Tribunal relate to the recovery of BC fees.

Based on anecdotal evidence, the number of BCs that would have used this service would be even greater were it not for the high fees and wide-spread comment about the difficulties associated with accessing the service.

It is the BCCG view that the large number of cases related to recovery of fees could be quickly resolved "on the papers" through a checklist approach as to what documents or other evidence is to be provided to the Tribunal.

In addition, enforcement of this could be made through the ability of a BC to lodge a statutory lien against an owner's title where debts are not disputed or where they exceed a stated amount eg $5,000. Legal advice indicates that the lien would have the same impact as a charging order, allowing a BC to pursue a sale of a unit if absolutely necessary.

Allowing a mechanism such as a statutory lien charge should provide an incentive for recalcitrant owners to deal with their debts to their body corporate, reduce anxiety levels for BCs that are under financial pressure and remove the burden of BCs having to pursue court proceedings which are inherently time delayed and costly.

5 Other issues

The BCCG believes that there are other areas of the Act that have not been considered as part of the review but which need to be addressed to ensure that the Act is useable. Key elements are:

5.1 Boundary issues between private ownership and common property and the related on-charging of repair and maintenance costs

The Act is unclear as to where the boundary exists between private ownership and common property in many areas. For example, the 1976 Act explicitly mentioned "windows" and while the assigned responsibility for these matters was unclear or difficult to address (suggested boundary lying down the middle of a window pane), the 2010 Act completely removed any explicit comment on the role of windows.

However, the s 5 (Interpretation) definition of "building elements" includes *"…external and internal components of any part of a building or land on a unit plan that are necessary to the structural integrity of the building…*". Does this mean windows are deemed to be part of the building elements?

Separate legal opinion arising from a dispute over repairs to windows indicates that there is a beneficial interest to the owner of unit in which the window appears. As such, it would be reasonable (under s 126) to on-charge any costs of repair to those owners.

In practice, this is an area of dispute that is fraught with difficulty and controversy.

A similar argument seems to apply in relation to "balconies". While the Act explicitly (s 5) mentions balconies as being part of the building elements, and hence a responsibility of the BC to repair, does this restrict the BC on-charging balcony repair costs to the owner that is deemed to hold a beneficial interest in being able to use the balcony?

Similarly, is there any difference in a balcony that protrudes from a building and that is used only by the owner(s) that have direct access versus the balcony that is also the roof of a unit below? In the latter case, can repair costs for that balcony be assigned to either or both of the owners that either enjoy the view that the balcony provides or rely on it to stop water coming into their unit?

One of our members reported the following situation:

> *In the same apartment block, a bay window feature running the full height of the building and serving three apartments is in poor condition and allowing water ingress. Professional advice indicates the bay window at all three levels need complete replacement. Each bay window sits within the unit title of that apartment.*
>
> *While private property, each bay window relates to or serves more than one unit from an aesthetic and possibly structural perspective, therefore the body corporate has to take responsibility for undertaking the work. However, only one owner accepts the need for full replacement, one accepts the need for some work, one doesn't accept the need for any work. We believe that the body corporate has the right to override private property rights and to determine the scope and timing and cost of works in this situation, but I cannot see how it could actually do such work on private property without the owner's agreement, not to mention the difficulty of on-charging the owner for such work once completed.*
>
> *Since the three owners above cannot agree how to share the costs between them, the body corporate will have to levy every owner (the whole body corporate) to contribute towards private repairs to these three private apartments and hope that it can claim back some or all of the costs at some later stage. Given that only three owners are ultimately responsible for the cost, the Act should allow the body corporate to levy those three owners ahead of time rather than the whole body corporate paying for the work by special levy on all owners until such future time when attempts can be made to claim it back.*

Clarity is needed on this as this is a relatively frequently reported situation.

5.2 Lack of any offence provisions

The Act provides no penalty regime when owners or others are in breach of the Act.

As a result there is no incentive for owners, the BC chair or BCMCs to follow the legislation. This encourages “bad” behaviour.

The BCCG support the view that normal offense provisions be included in the Act.

The BCCG also supports the view that the BC chair and committees should be granted a defence of good faith as applies in overseas jurisdictions.

5.3 Schemes

Section 74 of the Act allows for the High Court to impose a scheme for remedial action – but only where there has been prior destruction or damage. While this is useful in progressing work on say weathertight issues, it allows no relief in progressing any pro-active earthquake strengthening.

The BCCG view is that the wording of this section should be changed to include the ability to cover remedial work where there is no prior damage.

5.4 BC unit ownership

There is no express right in the Act for a BC to own a unit and in fact s 130(2) would seem to explicitly prohibit this. Yet there are a number of BCs that have a live-in manager that occupy a unit belonging to the BC. We are aware of instances where the BC has established a separate company to own and manage such a unit but it seems rather nonsensical to have to go to this extreme to provide the manager’s accommodation that would benefit all owners and tenants.

Other BCs have leasing arrangements for car parks or storage units that are able to provide an additional income to the BC – but theoretically the BC cannot own such items.

Ownership of such units implies voting rights but these could be assigned to the BC chair.

5.5 BC subcommittees

The Act is silent on the ability of a committee to establish subcommittees yet these can be a very efficient way of managing BC business. The fact is that many BCs establish such committees anyway.

The BCCG view is that the Act should allow for the establishment of subcommittees without reference back to the full BC and that those subcommittees may be delegated such powers as the BC committee has already been delegated by the full BC.

5.6 BC funds

Section 120 of the Act identifies the requirement for separate bank accounts for each fund or a single bank account in which separate funds are separately accounted for. However, there is nothing to distinguish whether any of these bank accounts are in the name of the BC or the BCMC.

The BCCG is aware of several BCMCs that operate a single fund where monies from multiple BCs are kept under the name of the BCMC. Various “examples” are quoted of the supposed benefits this brings to the BCs in operating in this way.

The BCCG view is that each BC should have its funds in a bank account or accounts in the name of the BC and that, as a minimum, bank statements should be available on demand to owners.

The BCCG does not support in any way the view that a BCCG should amalgamate funds into one account in the BCMC's name. Nor do we believe that interest on BC funds should be applied to offset costs associated with the operation of the BCMC.

5.7 Guidance on financial reporting

While the Regulations state the minimum financial statements that are to be presented at an AGM, additional guidance is needed on what these should include. We note that the level of financial understanding of many of our members is very low and that comments by some BCMCs prey on this.

5.8 Responsibility of tenants

Several of our members have indicated concern at the lack of responsibility within the Act for tenants in terms of abiding by the Act or the BC Rules. While the behaviour of tenants can be targeted back at the owners, the actual ability to do much is seen to be very limited, particularly where owners may live overseas.

5.9 The role of the body corporate chairperson versus the role of the body corporate committee chairperson

A BCCG survey on this topic shows the following:

- 75% of BC chairs indicated that their BC has a separate BC committee
- 17% of BC chairs have small BCs that operate a "committee of the whole" where all owners are consulted on all decisions
- 2% leave all decision making to the BCMC.

After this survey went out to our members a chairperson of a BC of more than 100 units wrote to ask what the distinction was between the two positions. She said she was the committee chair and didn't realise that there was another role as well. Yet this BC was managed by one of the larger BCMCs in that city – yet another example of where a BC is not getting clear and proper assistance from their BCMC.

One role or two?

The Unit Title Regulations (s 11) define the role of the body corporate chairperson but is silent on the role of the body corporate committee chairperson. If the two roles are to be retained this needs to be addressed.

The majority of BCCG respondents (48%) combine the role of BC chairperson and BC committee chairperson. An additional 33% operate just as BC chairperson with someone else taking on the committee chairperson role. A small proportion (2%) indicated that the BCMC acts as BC chairperson.

There are mixed views within the BCCG whether both the BC chair and committee chair positions are necessary. The majority (61%) have indicated that the roles should be combined. 33% indicated that they were happy with the status quo.

Owner or other person as chairperson?

A clear majority (78%) of BC chairs indicated that it was very important or extremely important that the BC chairperson should be an owner within the BC.

49% of respondents felt that an independent person (a non-owner) should not be allowed to chair the BC (24%) or would not be keen on this happening (25%).

A clear majority of BC chairs (almost 60%) were opposed to the suggestion that a contracted BCMC representative chair the BC. 32% indicated that it may be useful – largely when there was difficulty in dealing with some owners or where contentious issues were being discussed.

The BCCG agrees with the view of one of the submissions passed to us:

> *It [the BC chairperson role] is not a role that is suitable for novices.*

In fact the current Regulations tend to frighten off many owners who would potentially stand as chairperson. Better education for BC chairpersons and limited liability for acts undertaken in good faith are important in retaining owners as BC chairpersons.

5.10 Impact of the Health and Safety at Work Act 2015

Several of our members have expressed concern at the impact of the Health and Safety at Work Act 2015 (HSWA) on BC operations. That Act has already imposed additional costs on the BC as contractors have generally increased their prices as a result of their need for greater compliance under the Act.

However, the lack of clarity in the HSWA as to where a BC fits in this structure is also of concern. The Worksafe NZ website no longer explicitly states that a BC is a PCBU and in fact their latest text ("Volunteer groups that only employ contractors, instead of having employees, are not classed as PCBUs.") seems to indicate that a BC doesn't fall into this definition.

BC chairs have indicated their concern that if a BC is to be considered as a PCBU then this directly makes them and potentially their committee members responsible as "officers" under the Act. Some BC chairs have indicated that this is the final straw for them and they will resign as chair if they are to be liable as an officer.

5.11 Searching the Tenancy Tribunal decisions

While not directly related to the Unit Titles Act, several of our members have commented on the difficulty of searching the Tenancy Tribunal decisions in any meaningful way. The general comment has been that if the decisions were searchable, this may allow some BCs to identify the chances of being successful (or not) in their particular issue.

While every case is seen to have its own particular characteristics that may impact on the final decision, the BCCG feel that better access to these decisions would be an advantage.

Another benefit we see from this would be the ability to check to see how a particular BCMC may be faring in terms of their appearances in the Tribunal.

EXPOSURE DRAFT OF THE UTA

Given that a number of the views presented above are at odds with the views proposed in the discussion document, the BCCG would be particularly keen to please see and have a chance to comment on any Exposure Draft of the Act before it goes to the House.

ACKNOWLEDGEMENTS

This response to MBIE has been drafted with input from BCCG members by Neil Cooper, Co-National President of the BCCG.

The BCCG acknowledge the following members who provided substantial input into the preparation of this paper:

- Penelope Austin
- Kelly Butel
- Mike Champion
- Deborah Cox
- Sue Glyde
- Mike Francis
- Garth Freeman
- Grahame Fong
- John Greenwood (NZLS conference paper)
- Geoff Henley
- Garrie Hoddinott
- Lannes Johnson
- Craig Leishman (Boutique Body Corporate Ltd)
- Justin Leonard
- James Lowe
- Maggie Miller
- Olly and John Pitcaithly (Pitcaithly Body Corporate Services Ltd)
- Brian Plimmer
- Alistair Ward
- David Watt

We would also like to acknowledge the input from in excess of 140 other BCCG members who responded to specific questions or surveys run as part of the BCCG consultation exercise plus the more than 40 members that attended a BCCG meeting in Wellington to give feedback on the proposed BCCG response to the consultation document.

While not all ideas put forward have been portrayed in this paper, every effort has been made to ensure that the majority view is accurately stated.