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Revised Legal Frameworks for Ownership and Use of Multi-dwelling Units

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BUILDING RESEARCH LEVY PROJECT

Revised Legal Frameworks for Ownership and Use of Multi-dwelling Units

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1 May 2017

AUTHORS' FOREWORD

One of the challenges of this collaboration was that two authors were based in Christchurch and one in Dunedin for the whole research period, and the fourth changed universities from one to the other during the project. Abundant use of e-mail, regular skype calls and some researcher meetings enabled us to ensure we reached agreement on critical issues.

A research project of this kind and scope requires the assistance and support of a wide range of people in different roles. We have been exceptionally lucky that that assistance and support has been so generously given by so many people and we take this opportunity to express our gratitude for their contribution to the project.

The principal funder of the research was the Building Research Association of New Zealand, and we have greatly appreciated their support. Further funding was provided by the New Zealand Law Foundation which enabled us to employ a number of research assistants to help us with this work and by the Law School of the University of Canterbury which provided funds for transcription of interviews. Their generosity was and is greatly appreciated.

We are indebted to our researchers, and especially to our principal research assistant, Lara Goddard, who worked tirelessly on this project. Lara's work was exemplary and her enthusiasm and humour were never more valuable than when things threatened to go awry. Other significant contributions were made by undergraduate research students at Canterbury and Otago - Anna Needham, Adelaide McCluskey, Rachel Kim, Joe Barclay and Laura Austin (University of Canterbury); Alice Eager, Laura MacKay, and Helen Baker (University of Otago).

The production of this report was greatly assisted by the editorial work of Rachel Souness to whom we are greatly indebted. Nor could we have carried out the whole project without the skilled help and support of our wonderful administrator Fiona Saunders.

The greatest debt of all is to the dozens of people in New Zealand, England, Australia, Canada and Hong Kong who gave up their time to be interviewed for this project or to complete our on-line survey. Their knowledge and insights provided much of our raw material; their willingness to assist was a constant reminder of the relevance of our project and also a spur to complete it to the best of our abilities.

Last but most importantly the researchers would like to thank their spouses - Michael, Anne, Rachel and Andrew - for support, understanding and encouragement while we have been engaged in our research and writing.

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May 2017

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CHAPTER 1

INTRODUCTION

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I The Genesis of the Project

On 4 September 2010 a significant earthquake measuring 7.1 on the Richter scale struck the Canterbury region of the South Island of New Zealand. It was centred in a rural location but caused widespread property damage. It triggered a sequence of aftershocks that continued over the following years. The most serious aftershock occurred on 22 February 2011. While less in magnitude, measuring 6.3 on the Richter scale, it was shallow and centred close to the city of Christchurch which meant it had a strong impact. The consequences were devastating. 185 people lost their lives. Large numbers of commercial buildings sustained severe damage including two multi-storey buildings that collapsed. Some residential suburbs, particularly in the east of the city, were so badly affected that streets of houses were eventually demolished. There was also extensive damage to the city's infrastructure. The Government has estimated the total cost to rebuild Christchurch and the surrounding areas to be \$40 billion,¹ with its contribution now expected to be \$17 billion.²

This had led to considerable legal research being conducted to explore the plethora of legal issues. This Report adds to that literature.³

II Valuable Funding

We, the research team, are based in the Faculties of Law at the University of Canterbury and the University of Otago. We were granted funding from the Building Research Levy administered by the Building Research Association of New Zealand (BRANZ) to find solutions for better housing in New Zealand by identifying the barriers that currently exist for multi-dwelling units on a single title, and for buildings which mix commercial and residential units on a single title, when those buildings are destroyed or damaged either by a natural disaster, or as a result of the leaky home syndrome. The experience with the Canterbury earthquakes and with New Zealand's widespread "leaky buildings" problem over the last two decades has shown that any such repair or replacement is a difficult,

¹ Hon Bill English, Minister of Finance "Budget Speech 2015" (21 May 2015).

² Hon Bill English, Minister of Finance "Budget Speech 2016" (26 May 2016). There was no mention of the total cost of the rebuild in the Budget Speech 2016, and therefore it is assumed the figure remains at \$40 million as was proclaimed in the Budget Speech 2015.

³The research for this Report builds, in part, on work done earlier by Jeremy Finn and Elizabeth Toomey on legal issues arising from the Canterbury earthquakes (see Jeremy Finn and Elizabeth Toomey (eds) *Legal Response to Natural Disasters* (Thomson Reuters, Wellington, 2015) as well as work by Ben France-Hudson on some land law related issues from those events and ongoing research by Jacinta Ruru into the law relating to papakāinga land.

complex and expensive process. These problems can also occur on a smaller scale with fires, floods and other triggering events.

Further funding was provided by the New Zealand Law Foundation. We are very grateful to both institutions for their support.

III Building Better Cities and Communities

The Report is based on the theme, “Building Better Cities and Communities”. The theme’s main focus addresses the potential for multi-dwelling use of urban land to support increased high density in our cities and towns. Use of land in this way can assist with resisting urban sprawl, can add to the social cohesion of an area and provide a setting for multi-cultural communities. However, where the relevant buildings are damaged or in poor condition, difficulties in facilitating repair or replacement can lead to negative effects of depopulation, lower capital values, more transient populations and a general loss of social amenity.

In this context, we aimed to identify possible modifications of existing land tenure models in New Zealand law for multi-unit dwellings on a single title (primarily unit titles, cross leases, retirement homes and papakāinga land) and for mixed-use commercial and residential developments. We also investigated the potential adoption of models used in other countries (with any necessary modifications), which would allow for more efficient, cost-effective and user-friendly use of urban land for multiple dwellings, or mixed commercial/residential uses. Enabling quicker and more economical repair and replacement of damaged or destroyed buildings not only provides greater capacity for both cities and individuals to recover from crises, but also has significant amenity benefits for local residents and communities.

IV Methodology

The first stage of the research involved the design of a range of on-line questionnaires and their administration to a range of individuals and agencies involved in administering land tenure systems. Some of these were government agencies, including Land Information New Zealand, other central government departments and local bodies. Others groups surveyed included lawyers, the insurance industry and the Earthquake Commission (EQC), associations of property owners and the construction industry.

The material from the surveys was collated by our principal research assistant, Lara Goddard. Many respondents to these surveys made themselves available for follow-up

interviews. From this group, we selected as representative a group as was possible, and semi-structured interviews were conducted in a range of New Zealand cities by Ms Goddard and/or one or more of the researchers. Those interviews were later transcribed and circulated back to the interview subjects to have the content checked.

It also became possible to conduct similar semi-structured interviews with a number of individuals who had not initially responded to the survey, but were eager to share their knowledge with the researchers. In particular, we benefited greatly from interviews with some members of the staff of the Residential Advisory Service, a team of lawyers working through Community Law Canterbury to assist homeowners who had ongoing difficulties with either EQC or private insurers or both.

That initial stage of empirical work was undertaken in parallel with a widespread review of the literature from New Zealand, Australia, Great Britain, Canada, Hong Kong, Singapore and a number of other jurisdictions. This was assisted by work done earlier by recipients of University of Canterbury Summer Scholarships into forms of land tenure in Europe and issues that have arisen there about repairs and replacement of residential or mixed use developments.

The New Zealand empirical work was then complemented by conducting a number of interviews in Calgary and Vancouver in Canada, Melbourne and Sydney in Australia, London, Manchester and other centres in England and Hong Kong. It proved impossible to arrange meetings with as broad a sample of individuals in those jurisdictions as we had done in New Zealand, but we were able to interview a significant number of lawyers, officials from a variety of government agencies, and academics who all contributed significant information and insights to our project.

Due to few lived-in residential homes currently existing on Māori freehold land, little coordinated research on legal issues concerning building on Māori freehold land has been done. The short time-frames of this research project has meant that the chapter on papakāinga and whanau housing has focused on desktop analysis including legislation, case law and policy documents. It would be useful for a future long-term project to focus on developing relationships with Māori communities in accordance with kaupapa Māori research methods with the aim of jointly designing an empirical research project to better extend these initial findings.

The drafting of this Report involved substantial interchange of draft chapters and sections of the reports between the researchers, as well as obtaining feedback from some interview participants who had agreed to read drafts.

The process of analysis and writing of the report has been greatly aided by the ability to exchange ideas with other researchers and stakeholders through presentations of seminars and conference papers in New Zealand and in Australia.

V System Failures

As our research unfolded, a number of recurring themes helped us understand the extraordinary difficulties in facilitating the necessary repair or replacement of multi-dwelling units. These difficulties resulted in constant delays which, in turn, led to a lack of owner confidence and immense frustration.

This brief discussion highlights seven particular themes, but these are not exclusive. It uses illustrative comments to emphasise the real stress that a homeowner can experience if a model of ownership, the cracks of which can be forgotten in a tranquil environment, breaks down when a disaster, either natural or man-made hits.

A Property owners do not understand what they own

In the ownership models we researched, it became clear that anything beyond the well-known model of a fee simple title - the closest any New Zealander can have in terms of unqualified ownership - was, to many people, simply a mystery.

This was particular prevalent among cross lease owners. Under a cross lease development, the owners of each of the buildings (known as a “flat”) in the complex are registered proprietors of the land (usually a fee simple estate, but occasionally a leasehold estate) as tenants in common in undivided shares, and all the tenants in common grant a lease of each flat to its owner, usually for a term of 999 years. As is explained in Chapter 3, the lease contains covenants that stipulate the rights and obligations of the lessees as between themselves. A number of those covenants are highly relevant in terms of repairing and rebuilding after a natural disaster.

Probably quite understandably, this concept is confusing to a property owner, and it was clear that some owners chose to ignore what it might mean. One lawyer we interviewed noted:⁴

...cross lease is so complex and some clients have no idea...for people wanting to cash settle I ask them if they realise that they cannot technically do this unless they have their neighbour's agreement and they have no idea. Some of the [flats] are completely separate houses, they barely have any common property – you would not be able to look at it and be able to tell.

This lack of understanding of the nature of the property title can lead to situations where owners are acting in breach of their lease. A common example is the failure of an owner to insure their property. In some cases, this has led to significant problems:⁵

...one owner (X) has cash settled [with its insurance company] but the neighbour has no insurance. X does not want to do any repairs as he would be over-capitalising on one unit next to an unrepaired unit.

Similar sentiments were expressed in relation to unit titles, with interviewees expressing a general concern that knowledge of the way the unit title regime actually operates is very limited. A unit title development allows for both individual and co-ownership of different parts of the same building or complex. Particular units (for example the inside of an apartment or shop) can be owned by individuals. The balance of the property, usually the land and common areas (such as lobbies, driveways or lifts) or shared facilities (such as a pool or gym) is then co-owned by all members of the complex. The archetypal example is an apartment building, although the model can also be used for other types of commercial or mixed developments and can be used where there are a number of stand-alone buildings on a single title to land (such as a collection of detached townhouses, or a retirement village).

One of the perceived attractions of unit title developments is that they are simply 'lock and leave'; that no maintenance is necessary and that someone else will look after things.⁶ Of course, the reality is quite different and people can be taken by surprise at both how much day-to-day involvement is required when they are a member of a body corporate, and also how expensive it can be. However, knowledge of how unit titles operate is seen

⁴ Interview with lawyer, Christchurch, September 2016.

⁵ Interview with lawyer, Christchurch, September 2016.

⁶ Interview with Chief Executive, Auckland, October 2016.

as crucial for their effective operation⁷ and this is particularly important where repairs or remediation are necessary. Moreover, ignorance appeared to be a key driver of some of the poor body corporate governance and structures identified by the people we spoke to.⁸

As noted by one interviewee, a common theme running through some of the problems with the Unit Titles Act 2010 is how the unit owners deal with issues as “property owners” living within a community.⁹ A key driver of some of the problems is that while unit owners may be vaguely aware that there is a body corporate, they do not appreciate that they are a member of it. Rather, the body corporate is seen as a foreign, and oppressive, entity. Many unit owners appear to be under the misconception that they are in some sort of landlord and tenant relationship.¹⁰ In essence:¹¹

They might vaguely be aware that they are a unit owner or there is some legislation but it is all complicated and it is interfering with my social life, and besides that, I bought an apartment to get away from the responsibilities of having to look after my house. I live in a complex with a manager you know, it’s someone else’s problem.

Further problems arise here from some of the deep seated cultural ideas New Zealanders hold about property and into which the concept of the unit title does not translate well. As noted by one interviewee “... the NZ society ... way of thinking is very much [that] a person’s home is their castle and they should be able to do what they like with their home”.¹² As a result, as another interviewee observed, people do not understand community ownership in New Zealand: “They like to think they are community but when push comes to shove it is private and it’s my castle...”.¹³ However, the fact that unit titles are a form of community living is inescapable and:¹⁴

... at the end of the day it’s a community, whether it goes up or it goes sideways, and you have the same problems pets, parking, rubbish, [and] noise but it is just about the semantics and customising and conceptualising it for New Zealand.

New Zealand property owners are not alone in not knowing or in misunderstanding the type of property ownership they have. A common misconception relates to the boundaries

⁷ Interview with lawyer, Wellington, October 2016.

⁸ Interview with lawyer, Christchurch, June 2016.

⁹ Interview with anonymous, September, 2016.

¹⁰ Interview with anonymous, September 2016.

¹¹ Interview with anonymous, September 2016.

¹² Interview with lawyer, Wellington, November 2016.

¹³ Interview with lawyer, Wellington, November 2016.

¹⁴ Interview with body corporate manager, Auckland, October 2016.

of unit title complexes. Common property is the responsibility of the body corporate; the actual unit is the responsibility of the unit owner. But how do you decide where those boundaries are?

Our overseas research provided some useful examples.

In Victoria, Australia, at the time of obtaining planning permission, developers need to state how the building is to be divided between common property and individual owners and these divisions are listed on the title so the details are public. However there are no rules as to what must be in which category.¹⁵ For example, the roof of the building may be common property in part, and in other parts be the private property of the units immediately below those roof sections. Such divisions can complicate the legal position, as the Domestic Building Contracts Act 1995 (a consumer protection statute) will apply to roof elements which are private property and part of a dwelling, but not to common property or private units used for commercial purposes.

Underlying legal rules can cause real problems in disaster response and recovery. One academic to whom we spoke in the United Kingdom described the aftermath of a flood in the town of Todmorden to the north of Manchester.¹⁶ A local stream had been covered over so that it ran in a culvert under the main street of the town, but during extreme flooding the very high water flow caused the culvert to explode. When repairs were planned, it was found that many landowners had legal rights – and responsibilities – as riparian owners whose land adjoined the covered-over stream. Most such owners were ignorant of these rights and obligations because they were unaware of the river's course or even its existence. In the upshot the local government authority and the insurance companies made a pragmatic decision to ignore the legal issues surrounding the riparian issues to avoid long and complicated litigation.

This issue is prevalent for Māori land too. The difficulty for understanding the additional Māori land law and regulations are well known. As accepted by the Court of Appeal in *Bruce v Edwards* “Maori land legislation has, as is notorious, a long and tangled history” that dates back to 1862.¹⁷ The complexity of Māori land law is pervasive, and impacts not just on owners, but also lawyers, financial lending institutions and local government planners.

¹⁵ Interview with lawyer, Melbourne, August 2016.

¹⁶ Interview with academic, Manchester, September 2016.

¹⁷ *Bruce v Edwards* [2003] 1 NZLR 515 at [61].

B Lack of governance structure

Many interviewees commented on an insufficient governance structure around multi-dwelling unit ownership.

While for unit title owners any governance structure is linked to the operation of the body corporate and the overarching Unit Titles Act 2010, cross lease owners have no discrete statute that governs this model of ownership. A common comment from interviewees was that the Memorandum of Lease was far from satisfactory in terms of defining appropriate governance.

One interviewee observed:¹⁸

There are no governance structures so it just becomes a free-for-all. When parties do try to meet to sort out issues, there are no rules around the meetings ...and in that situation property owners can really get frustrated and angry with one another. Generally what happens you have someone dominate and others who are terrified.

Although the Unit Titles Act 2010 imposes a governance structure on every unit title development, this does not remedy all problems and the lack of effective governance in many bodies corporate was seen a problem by many of the people we interviewed and surveyed.¹⁹ As noted by the Unit Title Working Group Report:²⁰

The governance provisions in the Unit Titles Act are badly drafted, complex and conflicting. Problems include unclear meeting and procedural provisions, and complicated rights and obligations. Personal liability on committee members for decision making could deter candidates from office. Proxy farming can also be an issue ... Reform is required.

For example, the interaction between what is in the Unit Titles Act and what is in the Regulations is unclear and there are a number of gaps.²¹ Various procedural rules are cemented into both the Act and Regulations and it is necessary to look at both to try and

¹⁸ Interview with lawyer, Christchurch, July 2016.

¹⁹ See responses from on-line survey.

²⁰ Auckland District Law Society Property Law Committee and others “Summary of Proposals” (Unit Title Working Group, Report, May 2016) at 4.

²¹ Interview with lawyer, Wellington, October 2016; and John Greenwood “Unit Titles Act: Lame Duck and How to Fix It” (paper presented to New Zealand Law Society Property Law Conference, June 2016) 3 at 18.

find the answer. Often it is not at all apparent because the drafting has not covered the practical issues sufficiently or do not give sufficient flexibility.²² In particular the rules around meetings are:²³

... just absolutely shocking. I don't know who drafted it up but it's like someone has taken a stab in the dark – we will have these three here because they look quite good, but they have missed out three or four other most basic things ...

Clearly, a good governance structure will be crucial in any repair or remediation context. One interviewee described their personal experience where it was necessary to try and replace an existing body corporate committee with a new one. The development suffered from weather tight and design issues and, at that time, two of the people on the committee were actually the developers who had purchased units in the development.²⁴ In the interviewee's view, they had a clear conflict of interest and nothing was being done. Even before the defects of the building became apparent it was clear there was poor governance as, among other things, there had been no adherence to the budget and bills had not been paid.²⁵ The building defects were discovered as part of the process of developing a long-term maintenance plan, but by this time the limitation period (after which litigation to recover damages would have been prohibited by legislation) was fast running out. Discovery of these issues, in light of the poor governance up until that point, was a result of this interviewee's particular skill set, but "[t]he unfortunate thing was that nothing was done because the developer was on the committee".²⁶

Conversely, another interviewee noted that good governance structures greatly facilitated the ability for insurers to do an assessment of a unit title complex and for the body corporate and the owners to make the necessary decisions. This meant that things could go surprisingly smoothly.²⁷ One example in Christchurch involved a ten unit development (where there were some shared walls, but overall separate houses). All the necessary committees were in place, and the necessary resolutions had been passed. This was positive, as at the outset some of the unit owners were advocating taking a cash settlement and making a resolution to divide it amongst the owners. Being able to advise a functioning body corporate about the complicated nature of this, and the fact that there

²² Interview with lawyer, Wellington, November 2016.

²³ Interview with lawyer, Wellington, November 2016.

²⁴ Interview with lawyer, Christchurch, June 2016.

²⁵ Interview with lawyer, Christchurch, June 2016.

²⁶ Interview with lawyer, Christchurch, June 2016.

²⁷ Interview with lawyer, Christchurch, June 2016.

were a number of retaining walls against other people's properties and public land meant that eventually everyone was on-board with the idea of a rebuild.²⁸

Governance structures are encouraged for Māori land. They are unique to Māori land: Māori land trusts and Māori incorporations. More research is required to better understand if they are well equipped to deal with natural disasters, especially when the land is lived on with extensive residential housing.

C Insurers

Insurance problems were evident across the relevant ownership models of General land.²⁹ The Unit Titles Act 2010 has detailed provisions regarding insurance, with the basic position being that it is the body corporate's responsibility to insure all buildings and improvements on the land.³⁰ Nonetheless, a range of problems are evident in this regime with problems extending from conflicts in the legislation itself, difficulties with the settlement of claims following disasters, the distribution of the proceeds following settlement, and the real problem of inadequate insurance.³¹

One particular illustration highlights the difficulties with insurance, but also the types of issues that can arise in relation to unit titles where one problem overlaps with another. In this case there was a problematic nexus between governance and insurance. The issue was whether to distribute an insurance settlement under the existing unit plan percentages or to undertake a re-valuation. For one owner, the difference between the two methods amounted to \$1 million.³² This case read "a little bit like an exam question as it hit so many of the problems in the Act".³³ There were eight owners and the affected owner owned two of the units through a company. Overall, 75 per cent of the units were in one group and 25 per cent were held by this particular owner. However, on an ownership interest or unit entitlement he was entitled to 50 per cent. The owner took every opportunity to challenge the decision making of the body corporate, including challenging the decisions of the chair person in relation to calling meetings and alleging various conflicts of interest by calling one particular type of meeting, rather than another.³⁴

²⁸ Interview with lawyer, Christchurch, June 2016.

²⁹ General land is land in the Torrens system.

³⁰ See Unit Titles Act 2010, ss 134 – 137 and the discussion in Chapter 5.V.

³¹ See Chapter 5.V.

³² Interview with lawyer, Christchurch, July 2016.

³³ Interview with lawyer, Christchurch, July 2016.

³⁴ Interview with lawyer, Christchurch, July 2016.

Cross lease owners have no obligation to have a common insurer. Moreover, even although the lease states that the lessee must take out insurance, breach of this covenant is commonplace.

One lawyer made the following prescient comment about an uninsured cross lease owner:³⁵

Then there are the uninsured ones, that is a major thing about cross leases and perhaps something that should be looked at in the future...the lease does say that they have to be insured but a lot of people who buy the less expensive units do so without mortgages so there is no watchdog making sure they are insured...that, of course, is a major because if someone is not insured they usually cannot afford to, or are not interested in, doing the repairs.

In terms of betterment, the cross lease model caused insurers considerable angst. One insurer observed:³⁶

Even if we allowed it [betterment], getting the money from the customers to allow to pay [for example] the bay window was causing problems...and was causing more trouble than it was worth. You know one person's bay window was holding up the whole site so in the end the insurers just said 'enough of this' and we forced everybody to build exactly what they had— in some we would allow them to move things internally but not the actual structure, for example, changing the position of the toilet...as for the extending the footprint, we refused. They had to stick solid to that...no movement there.

In some cases, the only practical option for a cross lease property is a cash settlement. The following scenario is illustrative:³⁷

... owners may have a history... it might have been a boyfriend and girlfriend who purchased flats side by side and then the relationship has ended...one has accepted a cash settlement and the other is trying to negotiate with their insurer but the ex is a bit sour and refuses any access to the property which means the only way the insurer can settle the claim is by cash settlements – the contractors can't go inside and...by that stage it becomes impossible to assess the building as a whole.

³⁵ Interview with lawyer, Christchurch, July 2016.

³⁶ Interview with insurer, Christchurch, July 2016.

³⁷ Interview with lawyer, Christchurch, 2016.

D Vulnerable owners and residents

In the cluster of property ownership models we studied, it became clear that problems were more prevalent, or intensified, in the lower socio-economic groups.

This was particularly significant among cross lease owners.

An insurer gave the following example:³⁸

One poor old lady actually agreed to the neighbour demolishing his side of a duplex, so he literally demolished his side of the duplex and put boarding up on the party wall and walked away from the site. Took the money and built in Timaru so left this poor old lady who had agreed to this unwittingly with the problem of what to do. She could not leave the flat looking like that: hers was a repair, his was a rebuild. Then of course someone comes up with the solution that she just takes the land ...but of course, there then needs to be a conversion into fee simple sites ...and that isn't a cheap exercise especially for the old lady who has not got two bucks to rub together.

Her other option was to try and sell her flat with a boarded up wall, chances of which were about zero.

Irrespective of any socio-economic group or type of ownership model, elderly owners and/or family relationships illustrate how vulnerable an owner can be. We were given the following examples:

There is one woman whose son has taken over the [insurance] claim – he has apparently bullied her into a Power of Attorney. He is holding all the others to ransom and is a major problem. The old lady is 89... she just wants to die really...everyone is not blaming her because they realise the son's being really, really bad.³⁹

...elderly people don't actually care. They don't want it fixed because they don't want to be out for a year or so while it is fixed because they might die –they might never get back there or they might be forced into a home.⁴⁰

³⁸ Interview with insurer, Christchurch, July 2016.

³⁹ Interview with insurer, Christchurch, July 2016.

⁴⁰ Interview with lawyer, Christchurch, 2016.

In one unit title example cited to us, a client was involved in an intractable dispute with her fellow body corporate members regarding the sharing of information about a post-earthquake insurance claim. As noted by the interviewee, this client had already been quite difficult to deal with on a number of small items (such as the colour of the fence and trees coming over) so when a big issue came along her co-owners were not interested in helping her out.⁴¹

Another unit title illustration shows that problems of vulnerability can have a marked impact on all residents, not just those who are afflicted by some infirmity. In this case the interviewee had acted for someone who had to get “out of their unit”.⁴² It involved a block of flats and one of the owners was a person who was quite mentally unwell and who “essentially just spent her time abusing all the other residents in the building”.⁴³ This became a real issue for the other owners as they would get tenants in, and then the tenants would want out again within a month because “they had this woman turning up on their doorstep swearing at them” because she “felt like she controlled the building”.⁴⁴

A related problem was illustrated by an interviewee who lived in a small unit title development comprising only two units. She had just spent nearly \$1,000 registering rules and an address for service with Land Information New Zealand as required by the unit titles regime. The other unit owner is 86 and “she just doesn’t want to know about it”.⁴⁵ In circumstances where elderly or vulnerable people are living in unit titles there is a very real risk that lack of knowledge, or apathy, may lead to poorly functioning unit title developments where formalities, such as long-term maintenance plans, the payment of insurance levies, and other requirements under the Act are either missed or not complied with.

In each of these unit title illustrations, the impact of these difficulties on coordinating a repair or remediation are obvious. If there are problems in the day to day functioning of a unit title community, these are likely to be exacerbated when something goes very wrong.

Intensification of issues for vulnerable owners was also a theme in our overseas research. One interviewee described a reported incident in Carlisle in December 2015 where about

⁴¹ Interview with lawyer, Christchurch, June 2016.

⁴² Interview with lawyer, Dunedin, October 2016.

⁴³ Interview with lawyer, Dunedin, October 2016.

⁴⁴ Interview with lawyer, Dunedin, October 2016.

⁴⁵ Interview with body corporate manager, Auckland, October 2016.

50 social homes all flooded because they had been built on unsuitable land.⁴⁶ A remedy was able to be found by pooling insurance payments and central government grants to make the whole development more resilient to future flooding.

Many New Zealand retirement villages operate through a “licence to occupy” model where residents purchase a licence to occupy a unit in the village and access common areas, such as lounges and dining rooms, under an occupation right agreement. The licence does not confer any kind of ownership of the residential unit or common facilities. At the time of the Canterbury earthquakes of 2010-2011, occupation right agreements usually provided that the right to occupy would come to an end if the future occupation of the relevant part of the retirement village became impossible as a result of an event for which neither the operator nor the occupant was to blame.⁴⁷ A number of Christchurch retirement villages were significantly damaged in the earthquakes. Four of them were located on land considered to be unsafe for future residents and red zoned so that reoccupation and rebuilding was not permitted. The owners of the retirement villages received payment from the government for their properties under the government’s buyout scheme for land which could not be built on again but were under no obligation to pass any of that money on to the residents.⁴⁸ Had the retirement village operators stuck to the letter of the occupation right agreements, the residents would have been in a very poor position. However, the operators did not do so, instead making arrangements for the 200 or so displaced occupants to find alternative accommodation in other retirement villages.

E Poor communication

Throughout our research, it became very clear that the inability of “neighbours” in any multi-dwelling unit model to communicate with one another hindered the recovery process.

We were given many examples of poor communication.

In the unit titles sphere, problems with communication can be compounded by how complex the Unit Titles Act 2010 is and how unapproachable it is for lay people. As

⁴⁶ Interview with academic, Manchester, September 2016.

⁴⁷ For a more detailed account see Alison Chamberlain “Unit Titles, Cross Leases and Retirement Villages” in Jeremy Finn and Elizabeth Toomey (eds) *Legal Response to Natural Disasters* (Thomson Reuters, Wellington, 2015) at 322.

⁴⁸ The buy-out scheme for “red-zoned” land is described in detail by Elizabeth Toomey “Canterbury Earthquake Recovery Act 2011: Land and Resource Management Issues” in Jeremy Finn and Elizabeth Toomey (eds) *Legal Response to Natural Disasters* (Thomson Reuters, Wellington, 2015) at 252.

noted by one interviewee, people really need to have their hands held (unless things have already been set up well and the structures are already working).⁴⁹ Where people are unsure of their rights and obligations, communication can become very difficult. As a result, one interviewee suggested that a well-functioning unit title development needs either someone who knows what they are doing, or a very good and competent body corporate management company involved.⁵⁰

Communication problems can often arise between people who own and live in their units and others who rent theirs out. One group may be motivated by what is good for them financially, while the other is saying: “I live here and this is very important to me”.⁵¹

This can be compounded where the investment owner is absent, so there is a lack of community engagement. This is a real problem. Sometimes owners are overseas and difficult to contact, or they may simply not engage as they do not really care about dealing with their properties.⁵² For others, their motives are simply economic. They are owners who hope for a capital gain and are collecting rent in the meantime (or using it to pay down debt). Often, they have little interest in such mundanities as long-term maintenance plans or annual reports as their investment usually has a relatively short life span.

Such a lack of communication, however, can have real consequences for all members of the development and is particularly difficult where it is necessary to repair or remediate the complex. This can be compounded even further by the fact that the Unit Titles Act 2010 is silent on electronic voting and meeting attendance.⁵³ This means that practice in relation to communication can be inconsistent. In some circumstances if someone wants to Skype or call into a committee or general meeting that will be accepted, but in others it will not. If the Act provided more guidance on these issues the lack of engagement may reduce, but it will always be an ongoing issue where people do not wish to engage.⁵⁴

Moreover, we were given examples where one owner would employ stalling tactics. A lawyer gave the following example of a cross lease complex that had two units on the ground floor, and one above:⁵⁵

⁴⁹ Interview with lawyer, Christchurch, June 2016.

⁵⁰ Interview with lawyer, Christchurch, June 2016.

⁵¹ Interview with lawyer, Christchurch, June 2016.

⁵² Interview with lawyer, Christchurch, June 2016.

⁵³ Interview with body corporate manager, Auckland, October 2016.

⁵⁴ Interview with body corporate manager, Auckland, October 2016.

⁵⁵ Interview with lawyer, Christchurch, July 2016.

The woman upstairs had bought her [flat] after the earthquakes and it was perfect. The two ground floor [flats] had real problems. The woman upstairs was in complete denial – she was not going to do anything because there was nothing wrong... that is how extreme it can get.. your [flat] is being supported by [flats] below that need remediation but you don't want to recognise it because it is going to disrupt your life.

F Privacy issues

A very vexed question in this research was the issue of privacy, a fundamental right that New Zealanders treasure. In any multi-dwelling unit complex, privacy will be compromised. At the lower end of this scale, in a unit title complex, a retirement village or a cross lease complex, one's daily comings and goings may be more public than a fee simple owner's exit from his or her garage every morning. In the heightened environment of repair and recovery after a natural or man-made disaster, ensuring one's privacy becomes much more difficult.

One insurer, commenting in the context of absentee landowners in a cross lease complex, observed:⁵⁶

At many of the sites, you've got a mismatch. You've got a landlord property owner dealing with a very elderly person and somehow you've got to get a common element – you know these two people have to disclose their own financial information and there is often mistrust by the less intelligent, if you like, party... We are still hearing at the moment people who are just unwilling to share their financial information with each other and will only do that when it comes to the contract signing. We've spent near hundreds of thousands of dollars on design, then when it comes to the signing of the contract, at the very last minute, an owner might say: 'I have not got the money; I have already spent the EQC payout'...right at the last minute, absolute devastation for the other owners.

In addition to privacy, a related problem arises from access to information. For example, one interviewee told us of a client who was a member of a small three-person unit title. That client felt as if the other members of the body corporate were behaving in a bullying manner. The client had issues with the information about her land claim post-earthquake. While one option was to go to the Tenancy Tribunal, it was likely that the Tribunal would

⁵⁶ Interview with insurer, Christchurch, July 2016.

not entertain the application because it does not consider disputes about the proceeds of insurance.⁵⁷ As a result there was no cheap or easy way for the client to resolve a small claim about information.⁵⁸

G Access to justice

Another fundamental right is access to justice. In post-earthquake Christchurch many of the complex unanticipated legal problems that arose involved the owner, an insurance company and a mortgagee, in many cases each entity having his or her own lawyers.

For many owners, the associated cost was crippling.

In Christchurch, the establishment of the Residential Advisory Service (RAS), set up by the Government, provided much-needed relief. This free and independent organisation is described as “agile and flexible and...has evolved to meet homeowners needs”.⁵⁹ RAS has a governance group which oversees the service, sets the strategy, makes key decisions and manages relationships across key agencies.⁶⁰ We conducted a number of interviews with RAS and were encouraged by their work and commitment to fragile and upset owners. Many of their files concerned cross lease owners and much effort has been given to solve their problems.

Our research has indicated that there are a range of serious problems with the ability of unit title owners, or bodies corporate to resolve disputes. Partly these are driven by the structure of the dispute resolution regime as is currently stands. For example, it is currently impossible for residents of a unit title development to resolve disputes by way of arbitration or mediation.⁶¹ Instead, where they cannot resolve problems informally, they must go to the Tenancy Tribunal. However, the costs of this are currently very high.⁶² These costs can be a real impediment to accessing justice. For example, in one

⁵⁷ Unit Titles Act 2010, s 171(4).

⁵⁸ Interview with lawyer, Christchurch, June 2016. See also the discussion of dispute resolution in Chapter 5.X.

⁵⁹ Residential Advisory Service for Property Owners “About RAS: Introducing the Residential Advisory Service” <www.advisory.org.nz>.

⁶⁰ This comprises representatives from the Ministry of Business and Employment (MBIE), the Earthquake Commission (EQC), the Christchurch City Council and major insurers via the Insurance Council of New Zealand.

⁶¹ Unit Titles Act, s 174(2).

⁶² Unit Titles (Unit Title Disputes—Fees) Regulations 2011, r 5 sets fees of \$850 for minor matters, and \$3,300 for all other disputes. There is currently a suggestion that these fees be lowered considerably: see Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 4.5.

case cited to us, a student was attempting to get his landlord to fix leaks in the bedroom of his flat. The landlord claimed that the leaks were caused by problems with the exterior of the building and were, therefore, a body corporate problem. The student had been unable to get the body corporate to do anything and while he may have had standing under s 171 of the Unit Titles Act 2010 to bring an application to the Tenancy Tribunal, he could not afford to do so.⁶³

Another access to justice issue involves questions regarding the efficacy and accuracy of decision making in the tribunals many jurisdictions set up to deal with unit title (or equivalent) disputes. While they can be cheaper than a formal court process, our interviews suggested that there was a general (although not universal) concern about the level of expert knowledge of the relevant laws and regulations by decision makers in those tribunals. For example, interviewees in Australia noted the problem of conflicting tribunal decisions, and the fact that, as litigants as often are self-represented, decision makers are often not assisted in locating and addressing the key issues.⁶⁴ Where appeals are only on an issue of law this can be a real problem. There is a perception in New Zealand that the adjudicators often do not feel that they have the authority or knowledge to make a decision.⁶⁵ However, there were contrasting views noting that Tenancy Tribunal adjudicators are given specialist training and suggesting that the negative perceptions actually reflect the view of parties who have been unsuccessful and that other levels of courts do not necessarily perform any better.⁶⁶ In a similar manner, the English First-Tier Tribunal was seen as more effective because it is not populated solely by lawyers, but includes people with other backgrounds.⁶⁷

All of these themes are highly likely to be even more acute for papakāinga and whanau housing on Māori freehold land. More extensive research is required to better understand the effects for those with occupation orders and licences to occupy Māori freehold land.

VI Our Work

Many of the failures identified above, and our ideas for reform are considered in detail in the chapters that follow.

⁶³ Submission from Alan Henwood to Minister for Building and Housing regarding the Unit Titles Act 2010 (2016) at 14.6.

⁶⁴ Interview with academic and lawyer, Melbourne, August 2016.

⁶⁵ Interview with body corporate manager, Auckland, October 2016 and interview with Chief Executive, Auckland, October 2016.

⁶⁶ Submission from Alan Henwood to Minister for Building and Housing regarding the Unit Titles Act 2010 (2016) at 14.2.

⁶⁷ Interview with Tribunal judges, London, August 2016.

On a final note, we emphasise that urgent attention on Māori freehold land is required. The national focus to date has been on enabling initial residential building to occur on this land. The startlingly obvious point is that attention has not yet moved to considering how the law ought to support papakāinga and whanau housing on single title Māori freehold land when significant repairs are required. The broader themes, findings and recommendations in this Report need to be considered specifically for Māori land. There are potentially strong learning opportunities here that need to generate a new focused approach for Māori land to better strengthen protection for all owners of Māori land, fixtures and chattels.

VII Outputs

As with any project of this size, it is important that the research findings are disseminated regularly to the public arena. The researchers have endeavoured to meet this expectation, and their combined outputs are listed below.

A Journal articles

- Elizabeth Toomey, “The Continuing Problems with the Cross Lease Model of Ownership” BRANZ BUILD publication, May 2016.
- Elizabeth Toomey “The Continuing Problems with the Cross Lease Model of Ownership” (2016) 22 Canterbury Tales 3.
- Jeremy Finn and Elizabeth Toomey “Condominium Chaos in the Wake of a Disaster” (2017) New Zealand Law Review (forthcoming).
- Jeremy Finn, Ben France-Hudson and Elizabeth Toomey “Damage, Destruction, Distress: Shared Ownership Debacles” (2016) 22 Canterbury Law Review 57.
- Toni Collins, Jeremy Finn, Henry Holderness, John Hopkins and Elizabeth Toomey “The Canterbury Earthquakes 2010-11 – Selected Issues” (2016) 31 Australian Environment Review, 324.
- Jeremy Finn, Ben France-Hudson and Elizabeth Toomey “Repairs, renovation, demolition or replacement of multi-dwelling units on a single title” (2016) 6 New Zealand Law Journal 208.

B Conference Papers

- Jeremy Finn, Ben France-Hudson and Elizabeth Toomey “Repairs, Renovation, Restoration, Demolition or Replacement of Multi-Dwelling Units on a Single Title:

BRANZ Research Project” (paper presented to Australasian Housing Research Conference, Auckland, 17-19 February 2016).

- Elizabeth Toomey “Cross Leases: Problems and the 1999 Law Commission Report” (paper presented to Cross Lease Workshop, Christchurch, 7 March 2016).
- Jeremy Finn and John Hopkins "The rule of law in emergencies in New Zealand – theory and experience" (paper presented to Constitutional and Legal Regulation of Emergencies in Democracies, University of Hamburg, 11-12 March 2016).
- Jeremy Finn, Ben France-Hudson and Elizabeth Toomey “Damage, Destruction and Distress: Shared Ownership Debacles” (paper presented to 13th Australasian Property Law Teachers Conference, Christchurch, 14-15 April 2016).
- Elizabeth Toomey “Does your Condominium need Replacement or Repair? The New Zealand Experience” (paper presented to Canadian Law and Society Conference, Calgary, Canada, 28-30 May 2016).
- Elizabeth Toomey “Strata Title Problems and Fort McMurray Issues” (seminar at University of British Columbia, Vancouver, Canada, 28-30 May 2016).
- Jeremy Finn and Elizabeth Toomey “Of fences, cliffs and ambulances: condominium governance and preparing for adverse effects” (paper presented to Corporate Social Sustainability Symposium, Barcelona, 21-22 November 2016).
- Jeremy Finn, Ben France-Hudson and Elizabeth Toomey “Towards simpler legal frameworks for condominiums: safeguarding the interests of owners and residents” (paper presented to International Research Forum on Multi-Owned Properties, Deakin University, Melbourne, 9-10 February 2017).

CHAPTER 2

OVERSEAS FINDINGS

Jeremy Finn and Elizabeth Toomey

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I Introduction

A significant part of our research was to understand the law and practice in a number of overseas jurisdictions. Information was gained from an extensive review of the literature from Australia, Great Britain, Canada, Hong Kong, Singapore and a number of other jurisdictions; and from interviews in Vancouver in Canada, Melbourne and Sydney in Australia, London, Manchester and other centres in England and in Hong Kong. This chapter gives an overview of our findings from those jurisdictions, and emphasises a number of broad issues which give a context for the more detailed information included in other chapters. The chapter divides the jurisdictions into three parts: England, Hong Kong and Australia/Canada. The latter two are dealt with together because we found many common concerns. This part of the chapter first addresses these common themes and then details a number of issues that are more jurisdiction-specific.

II England

A number of issues became clear through the course of the interviews conducted in England.

A The culture around disaster response and housing repair and replacement

We spoke to several academics who considered that England has not placed any significant priority on disaster planning so that problems are dealt with on an ad hoc basis.¹ One academic noted that Britain is much more used to dealing with property damage than risks to life because generally floods, the most common natural disaster, do not pose a risk of widespread loss of human life.² This reflects an interestingly short-term view of the issue, as England suffered a major flood disaster in 1953 with widespread flooding in the south-east in which over 300 people lost their lives.

It appears that much of the research into floods which cause significant damage has been directed either at issues of flood management and planning, or at the quality of decision-making which led to flood prevention or management decisions.³ There was agreement among all the interviewees in England that the planning process development and flood management processes are never concerned with what tenure the land is held under.

¹ Interview with academics, England, September 2016.

² Interview with academic, England, September 2016.

³ See for example discussions of what knowledge of flood risks should be given greater credence, see Graham Haughton, Greg Bankoff and Thomas Coulthard “In search of 'lost' knowledge and outsourced expertise in flood risk” (2015) 40(3) *Transactions of the Institute of British Geographers* 375.

The only issue of central coordinated policy is “coastal retreat” – that is dealing with rising sea levels by moving population away from low-lying coastal areas. This has not had a high profile because most of the land at risk is low-quality (and thus cheap) agricultural land. There is therefore no institutional experience to draw on, nor any shared expectation between consumers, landlords and government agencies that there may need to be urgent large-scale action.

The risk of future flood damage is high. The UK Government’s Environment Agency reported in 2016 that an estimated 1.85 million properties in England are at risk of flooding from rivers and the sea, out of a total of 3.5 million at risk of flooding from flooding of any kind.⁴ Despite that, the British government will engage in flood protection and resilience work only where the flood might present a risk to life and limb of humans; it does not fund or engage in mitigating property damage as such (although often work that reduces risk to humans also reduces risk to property).⁵ The government does not operate any scheme equivalent to New Zealand’s Earthquake Commission EQC for natural disaster losses.⁶ Coverage is left to the insurance market.⁷ At the moment, the tendency is:⁸

to build back rather than ‘build back better’ or build forward. Currently, due to lack of incentives, absence of procedures and time and cost elements, replacements are often made like for like, i.e. the same timber floor or the same location for electrical installations. This leads to the same level of risk should a flood occur again in the future, missing the opportunity to avoid the repetitive loss.

It is notable that a government scheme which provided a £5000 grant to property owners to improve flood resilience had a take up rate of under 25 per cent, and there was anecdotal evidence that not all those taking up the grant actually used the money for flood resilience purposes. This was seen by a government official as indicating a culture among home-owners of unwillingness protect to their assets.⁹ However, an academic attributed the low take-up to many home-owners believing that the grant on its own was

⁴ Flood Re *Transitioning to an affordable market for household flood insurance: the first Flood Re transition plan* (National Flood Forum, February 2016).

⁵ Interview with official, London, September 2016.

⁶ The New Zealand Earthquake Commission provides a limited level of insurance cover for residential dwellings against loss or damage from natural events, including earthquakes and floods. See further Chapter 6.III.

⁷ Interview with official, London, September 2016.

⁸ Zurich Insurance Group, UK *Flooding after Storm Desmond: PERC UK 2015* (Zurich Insurance Group, UK and JBA Trust) at 38.

⁹ Interview with official, London, August 2016.

too small to allow effective flood-proofing steps to be taken.¹⁰ This rather relaxed attitude to potential larger scale damage in the aftermath of a disaster seems to be mirrored in a general reluctance of owners of units in freehold multi-unit developments to provide significant funding for long-term maintenance and renovation or reinstatement of the building. As one interviewee put it, owners had a strong preference to avoid any measures which would raise charges for which they were liable.¹¹

B Recent developments

The 1953 flood event was followed by a significant number of floods in different parts of the United Kingdom. The most recent large-scale event was in December 2015 when a major flood event hit Cumbria, in the northwest of England close to the border with Scotland. Nearly 9,000 properties were flooded, including almost 2,000 businesses. The town of Kendal had 1,400 people left temporarily homeless.¹² Properties flooded included a significant number of social homes for disabled or elderly residents which had been built on unsuitable land.¹³ A remedy was able to be found by pooling insurance payments and central government grants to make the whole development more resilient to future flooding.

In 2016 the Government set up “Flood Re” in response to that flood – and others in the preceding few years.¹⁴ Flood Re is a flood re-insurance scheme created in partnership with the insurance industry, under which home-owners who would previously have been declined any insurance cover because of a high risk of flood damage, or have had extremely high premiums, may now get limited cover.¹⁵ The rates are, in effect, subsidised by a levy on other home insurance premiums. Flood Re does not insure business premises (not even home-based businesses such as small guest houses), nor does it cover rental accommodation. It also does not extend to homes built since 1 January 2009.¹⁶ It is anticipated that this scheme will eventually provide flood cover to about

¹⁰ Interview with academic, England, September 2016.

¹¹ Interview with academic, England, September 2016.

¹² Zurich Insurance Group, UK *Flooding after Storm Desmond: PERC UK 2015* (Zurich Insurance Group, UK and JBA Trust) at 20.

¹³ Interview with academic, England, September 2016.

¹⁴ Under the Water Act 2014 (UK). For discussion see Johanna Hjalmarsson (ed) *Future directions of consumer flood insurance in the UK: Reflections upon the creation of Flood Re* (University of Southampton, 2015).

¹⁵ Cover is capped at £350,000.

¹⁶ We were informed that from about that time insurance companies refused to provide cover for new buildings on flood-prone land. Interview with official, London, September 2016.

350,000 homes. That figure is only a small fraction of the at-risk properties, but will cover many who would otherwise be uninsured.¹⁷

C The influence of leasehold tenure

A key, but expected, feature of the English scene is the dominance of leasehold as a method of tenure for multi-unit buildings, both solely residential and mixed residential and commercial buildings. The roots of this are historical, with the ability in recent years of landowners to make substantial gains from leasing land on long-term leases, coupled with the willingness of purchasers, and finance providers assisting those purchasers, to invest in leasehold property.

Originally developers who built large-scale multi-unit dwellings were solely interested in renting out the premises to tenants. The landlord remained in control and was responsible for repairs and replacement et cetera. However in the 1940s and 1950s, particularly as rent control legislation limited the ability to raise rents, landlords realised there might be more profit in selling flats to persons wishing to own them.¹⁸ Although many multi-unit buildings are still held on leases, there is an increasing percentage of them which are on freehold land collectively owned by the unit-owners. Some of this reflects urban development onto freehold land, and some the right of lessees to compulsorily acquire the freehold – after paying compensation to the former owner – under the Leasehold Reform Act 1967 (UK). Disputes about the latter process, we were universally informed, will be about the appropriate level of that compensation.¹⁹ However this process of “enfranchisement” is much more common in London than in other centres, because leases in London are usually for significantly shorter periods. 99 or 125 years are common, but where property values are particularly high the lease may only be 50 years or so.²⁰ The length of the lease significantly affects how financiers regard mortgage eligibility. Generally there is a cut-off around 70 to 80 years left to run on the lease, at which point the asset is considered sound. However, below that point it is viewed as a wasting asset and financiers may be less likely to finance purchases of a leasehold property.²¹ In other areas 999 year leases are common. For example, much of central Manchester is built on

¹⁷ See A joint government and insurance industry initiative *A Broker's Guide to Flood Re* (BIBA) and Zurich Insurance Group, UK *Flooding after Storm Desmond: PERC UK 2015* (Zurich Insurance Group, UK and JBA Trust) at 42.

¹⁸ Interview with academic, England, August 2016

¹⁹ Interview with academic, England, August 2016 and interview with Tribunal Judges, London, September 2016.

²⁰ Interview with academic, England, September 2016.

²¹ Interview with academics, England, September 2016.

leasehold land – which is owned by the Manchester City Council. As many of the leases are for 999 years, tenants are not interested in acquiring the freehold.

D Leasehold land and insurance

The near-universal English custom and practice is that leases will specifically provide for the freeholder to maintain a suitable insurance policy which covers the structure of the building (and public liability issues) so as to be able to repair or reinstate the building in the case of damage or loss. Individual unit owners or lessees will generally only have insurance for their contents and any extra public liability cover they need. This will ensure that insurance is dealt with through a single company for major issues. Under some older leases, from before about 1970, individuals were left to insure for themselves, but it is now a ground to seek variation of the lease if it does not provide for a block insurance for the property.²² The lessees contribute to the costs of the insurance policy through rental service charges. If the freeholder does not comply with this obligation, a tenant may bring the matter to the First-Tier Tribunal²³ to have a manager appointed for the purpose of ensuring insurance cover is taken out - and one such case had been dealt with on that basis.²⁴

E Leaseholds and repairs

A number of interviewees pointed out that the leasehold model at least had the merit of clarity as to repair and reinstatement requirements. Several of our interviewees considered that the leasehold system was well suited to dealing with damaged or defective buildings, or ones that need replacing, because there was a single decision-maker who is ultimately able to act.²⁵ The landlord could, and usually does, include clauses governing the taking out of appropriate insurance policies as well as determining who has the responsibility for minor repairs. In that sense, the lines of financial responsibility for repairs, and the decision-making process about such repairs, will often be at least as straightforward as in the case of freehold developments. Problems will arise with landlords who are unwilling or unable to respond quickly to major events. Generally

²² Commonhold and Leasehold Reform Act 2002, (UK) s 164. For the background to this provision see Wendy Wilson and Shiro Ota *Long Leaseholders: Building Insurance Requirements* (House of Commons Library Briefing Paper Number CBP-01821, 4 March 2016). We are indebted to an interviewee in England for alerting us to this issue.

²³ The First-Tier Tribunal is a Tribunal in seven divisions, one of which is the Property Chamber which deals with a wide range of matters relating to property and land, especially leasehold land.

²⁴ Interview with Tribunal Judges, London, August 2016. As the interviewees noted, a more expensive alternative would be to seek an order for specific performance of the lease covenant from the High Court.

²⁵ Interview with Tribunal Judges, London, August 2016.

the landlord will have the obligation in relation to the external structure, which will also mean the external appearance of the building. This will go some distance to remedying issues of urban blight following a fire or other damage because the landlord should be concealing the internal damage.²⁶

A commercial lease will almost invariably have a specific provision that rent abates if the building is not usable because it is significantly damaged. Thus there is a commercial imperative to make repairs as soon as possible.²⁷ Such a rent abatement provision will not be common in residential leases.

F Freehold land, multiple owners and a company structure

One historical factor which has had great impact on English practice is that the Property Law Act 1925 restricted to a maximum of four the number of people who could be registered as owners on the title to any block of land. The logical step from that was that where a property involved more than four different owners (as was likely in many multi-unit dwellings) their collective ownership would be structured as a limited liability company.²⁸ This became standard practice and landowners and their legal advisors expected to use a company structure for multiple ownership. They still do.

Probably the most common structure for newer multi-unit multiple-occupier developments, whether residential, commercial or mixed-use, will involve the landlord (who is usually the developer) creating a multi-unit structure with a management company owned by the tenants, with that management company controlling and administering the property. This is backed by a tripartite lease which gives both the management company and the tenants a right of action against the landlord – and equally both the management company and the landlord a right of action against a delinquent tenant.²⁹

In other cases the landlord or developer will sell the individual units in the multi-unit development. In such cases, again, the title to the land will be held by a company in which the individual unit owners hold shares. Control and operation of these companies often depends on the number of units involved. Where there are only a few units, it is

²⁶ Interview with academics, England, September 2016.

²⁷ Interview with academics, England, September 2016.

²⁸ Interview with academic, England, August 2016.

²⁹ Interview with Tribunal Judge, London, September 2016 and interview with academic, England, August 2016.

likely that a committee elected by the shareholders will manage the day-to-day operations of the company, and therefore see to issues such as maintenance of the building. As may be expected, the level of success in such self-managed companies often reflects the variable standard of competence among the residents willing to serve on the committee. Where larger numbers are involved, it is very common to find affairs being put into the hands of a management company. It is not clear how far management companies have considered, let alone prepared for, the possible need to undertake major repairs following a disaster.

Normally owners of units in a multi-unit dwelling or development will pass the responsibility of ensuring adequate insurance policies are in place on to the management company. There is no legal requirement to have regular revaluations to ensure that insurance is at an appropriate level, although some companies do so as a matter of good practice.³⁰ A negligent failure to maintain adequate insurance cover might lead to actions for negligence against the directors of the management company, and some companies insure against that risk too. If major repairs or reinstatement was necessary, and insurance or other funds were insufficient, the owners could be levied for capital contributions. Alternatively, the property-owning company could raise a loan secured against the repaired building and recover capital and interest through the annual charge on unit holders. The system seems somewhat less than satisfactory to a New Zealand eye.³¹

As is common in other jurisdictions, a company which owns a multi-unit dwelling or development, and in which the unit owners hold shares, is required to have a reserve fund to pay for repairs. Where a management company administers the building, it has an obligation to notify unit owners of any planned repairs which will impact on service charges by £250 per year per tenant.³²

G Commonhold: an experiment and failure

One of the interesting features about the English system is that early in the 21st century Britain experimented with a version of strata title, similar to those found in Australia and New Zealand, which was called commonhold.³³

³⁰ Interview with academic, England, September 2016.

³¹ In New Zealand, there is a legislative structure that bears some similarity, but that is rarely used: Part 7A of the Land Transfer Act 1952 (“Flat and office owning companies”).

³² Interview with academic, England, September 2016.

³³ See Commonhold and Leasehold Reform Act 2002 (UK). There is a substantial body of literature on commonhold. See for example Chris Baker and Katharine Fenn “Commonhold - its potential for mixed-use developments” (2004) 8(6) *Landlord & Tenant Review* 121; Nicholas Roberts “Two Cheers for

Although commonhold provided a much more flexible regime for multi-unit dwellings and developments than the earlier law, it was a near total failure in practice. Very few developments took up the new tenure option. Various reasons have been given for this failure. There is a body of opinion that considers the innovation was too radical for the legal profession who preferred to stick to their traditional conveyancing practices rather than grapple with the new system. Others considered that the primary problem was that financial institutions were uncertain whether the new regime provided adequate security for loans made to purchasers of units in commonhold developments. Whatever the reason, commonhold is now little more than a footnote in legal history. Several of our interviewees indicated a general belief that the government is not interested in seeking to revive interest in, and adoption of, commonhold.

III Hong Kong

Hong Kong provides a very interesting contrast to most other jurisdictions in its regulation and organisation of multi-level and multiple-use buildings.

The normal model in Hong Kong is that of a multi-unit development, which may consist of a single building or multiple buildings, where the underlying land has been leased directly from the State, or sub-leased from an original lessee.³⁴ A body corporate will be set up to manage the overall development. In Hong Kong this body is known as the “Incorporated Owners”. The development will include both areas of the building which are demarcated as individual units which are individually owned³⁵ and areas of common property. The body corporate or “Incorporated Owners” has ultimate responsibility for issues such as the management of the building, regulation of the common areas, and maintenance.

A State involvement and supervision

Two key factors must be remembered at all times. Firstly, all land in Hong Kong is owned by the state, and so all private buildings, whether residential, commercial or mixed use, are built on land leased from the state. The second factor is that the state agencies,

Commonhold” (2002) 152 *New Law Journal* 338; Nicholas Roberts “Commonhold: A new property term - but no property in a term!” (2002) *Conveyancer and Property Lawyer* 341; P F Smith “An Initial assessment of English Commonholds” (2005) 16 *Stellenbosch Law Review* 514.

³⁴ Interviews with lawyer, academic, and officials, Hong Kong, August 2016.

³⁵ Technically these unit proprietors are sub-lessees or sub-sub-lessees etc but the term owner is more convenient.

particularly the Lands Office and the Buildings Office, are much more directly involved in the regulation of tenancy arrangements within this leasehold structure than is common in other jurisdictions.

Government monitoring of multiple-unit buildings is focused on health and safety issues. We were told that the principal concern is with unauthorised building work within existing buildings which may create hazards, such as work which breaches firewalls or which may interfere with sewage and waste disposal.³⁶ There is also a need for approval to change the use of buildings, and approval may be refused for proposals to convert former industrial buildings into residential buildings if there may be contamination or other hazards.

B Deeds of Mutual Covenant

It is interesting to compare the position in Hong Kong where all multi-unit developments are on land leased from the state. The Hong Kong system operates through a series of sub-leases (and sub-sub-leases) which define the respective rights and obligations of owners of individual units within the development and of the Incorporated Owners which owns and controls the common property within the development. The usual practice is that the various sub-leases between the developer and the first purchasers of units in the development will involve the parties entering into a Deed of Mutual Covenant (“DMC”), with this deed binding successors in title.³⁷ Given the scale of some developments in Hong Kong, there may be hundreds, even thousands, of individual parties to the deed.³⁸ However developers are not readily able to unfairly exploit their market position because all proposed DMCs are scrutinised by the Lands Office and unfair provisions may be rejected.³⁹

In other jurisdictions the matter is left to the terms of relevant leases and sub-leases. In Hong Kong the definition of common property and private property within a condominium is usually done via the assignment plans for the building (those attached to the assignment of the head lease from the government). These plans will specify what is

³⁶ Interview with officials, Hong Kong August 2016. See Buildings Ordinance (HK) cap 123, s 24B.

³⁷ Interviews with lawyer and academic, Hong Kong, August 2016; Ngai Ming Yip & Ray Forrest “Property Owning Democracies? Home Owner Corporations in Hong Kong” (2002) 17(5) *Housing Studies* 703 at 708.

³⁸ Ngai Ming Yip & Ray Forrest “Property Owning Democracies? Home Owner Corporations in Hong Kong” (2002) 17(5) *Housing Studies* 703 describe one development - City One in Shatin - which had 10,000 individual flats.

³⁹ Interview with official, Hong Kong, August 2016.

common property. If the assignment plans do not sufficiently specify the property, statutory default definitions apply.⁴⁰ The DMC executed by all unit owners as assignees of an interest under the head lease from the Government also effectively regulates the common areas of the development and provides for repair, maintenance and insurance obligations. The Lands Department will vet all proposed DMCs, with one aim being to ensure that the definitions of common property are clear.⁴¹ There have been cases where developers have wished to exaggerate the floor area of individual apartments by including parts of common amenities spaces (such as lift lobbies) within the area of the individual apartment, so as to demand a higher price. In former years litigation was necessary to determine whether, in the absence of adequate definition within the DMC, the stairs in a building were common property or were private property with an easement over them in favour of the other residents.⁴² Despite these problems the Lands Department will permit departure from the default statutory terms if there is good reason. Thus where the exterior wall of a building has commercial value as a site for advertising, or a part of the roof area has particular amenity value, individual owners whose apartments are bounded by the relevant wall or roof may wish to own that external wall surface or roof area and control its use.⁴³ However if the individual unit owner does have the benefit of controlling the area in question, that owner will also be required to undertake the full cost of maintenance.⁴⁴

C Public liability insurance cover

In most jurisdictions the body corporate must also take out public liability insurance, which will cover claims for personal injury by visitors or residents occurring in the common areas of the building, or from defects in those common areas (for example wall cladding which falls and injures pedestrians in the street below).⁴⁵ Indeed, in Hong Kong, body corporate insurance policies may be as much, or more, concerned with public liability insurance as with issues of repair and reinstatement of the building. This may well reflect the fact that in Hong Kong the owners of units within a condominium are jointly and severally liable in relation to claims against the body corporate and therefore every one of them has a direct interest in ensuring public liability cover is adequate. Public liability issues have featured in other jurisdictions. One English academic

⁴⁰ Buildings Maintenance Ordinance (HK) cap 344, s 2 and Schedule 1.

⁴¹ Interview with official, Hong Kong, August 2016.

⁴² Interview with chartered surveyor, Hong Kong, August 2016.

⁴³ We understand that the same issue can arise frequently in some parts of England.

⁴⁴ Interview with lawyer, Hong Kong, August 2016.

⁴⁵ This is not a major issue in New Zealand because there is no tort liability for personal injury. See instead, the Accident Compensation Act 2001.

suggested that a reason for the failure of commonhold in England was that potential property owners were concerned that they might incur greater liability for injuries to visitors than they would under a standard company structure (that is, their liability would not be limited to the value of the shares held).⁴⁶

IV Australia/Canada

Our interviewees in both Australia (New South Wales and Victoria) and Canada (primarily British Columbia) shared a number of mutual concerns. This Part first addresses these common themes that occur in some or all of these jurisdictions, and then details a number of issues that are more jurisdiction-specific.

A The defective building: lack of regulation and sub-standard construction

In Victoria, a generally shared belief among interviewees is that while Melbourne has experienced very rapid growth in residential and mixed use developments throughout the city, particularly in the central city and along major arterial transport routes, the quality of construction is frequently substandard, and oversight and regulation has often been inadequate. Many interviewees considered that there will be significant future problems with maintenance and repair of essentially substandard buildings. In the long term this will significantly impact on property owners and occupiers.

It is clear that local and state government agencies do not have the mandate, or the resources, to police the quality of construction and maintenance of multiple unit buildings unless there is a clear threat to the lives or health of the occupiers and visitors.⁴⁷

The common occurrence of defects in new buildings was also emphasised by our interviewees in Sydney. It seems that one of the primary reasons for this is that New South Wales privatised government inspections in the 1970s. This immediately created a disincentive for builders to adhere to the best of standards, and cutting corners to save cost is relatively common.

Interviewees had some alarming stories of badly constructed buildings. Three examples, all involving fire safety, were sobering:

- dividing walls in an apartment that did not go all the way up to the slab above thus creating a void that would be disastrous if a fire broke out;

⁴⁶ Interview with academic, England, August 2016.

⁴⁷ Interview with official, Melbourne, August 2016.

- fire escapes that did not create an impermeable “tube” to enable residents to exit the building safely but, instead, opened out on to a ground floor foyer where three sets of stairs also had their exits;
- the absence of protective fire sleeves around every pipe in the building, again creating an extreme fire hazard.

With respect to the last of these, one lawyer explained the problem.⁴⁸ When an apartment is being built, all pipe penetrations through the spine of the building - for instance, every hole bored through the wall or the floor for each kitchen, bathroom, laundry and the like of each apartment - must be sealed with a fire-retarded material. This will contain any fire-spread for 60 minutes, enough time for a resident to escape the building. Each fire “collar” costs approximately AUD \$150 – 250 and for a large apartment building, this cost is enormous. In the absence of any government certification, developers take the very risky shortcut of not buying and fitting the collars. Discovering the problem, which effectively means having to destroy a completed bathroom or kitchen, is a costly exercise.⁴⁹ The buyer risk is enormous and another interviewee observed that it was only a matter of time before there is a major fire event in a multi-dwelling complex with a huge loss of life.⁵⁰

In Canada, our research focused on British Columbia, seen as particularly relevant to our New Zealand project as that province has also suffered a disastrous “leaky home” problem (a prime example of a defective building practice). British Columbia’s leaky home problems in the 1990s arose from the adoption of a then innovative building design introduced in warmer, and less rainy, American regions that was undoubtedly unsuitable for Vancouver’s very wet climate. This major crisis resulted in a totally depressed strata property market that eventually led to a public enquiry, the result of which was the Barrett Report.⁵¹ The recommendations in this Report included the enactment of a Homeowner Protection Act, which was passed shortly afterwards.

B Warranties and deductibles

(a) Warranties

⁴⁸ Interview with lawyer, Sydney, August 2016.

⁴⁹ Interview with lawyer, Sydney, August, 2016.

⁵⁰ Interview with lawyer, Sydney, August 2016.

⁵¹ Dave Barrett *The Renewal of Trust in Residential Construction* (Commission of Inquiry into the Quality of Condominium Construction in British Columbia, June 1998).

Some areas of Victorian law fit uneasily with mixed-use strata title developments. For example, under the Domestic Building Contracts Act 1995 (Vic) residential owners have the benefit of statutory warranties as to the quality of work done.⁵² Those warranties do not apply to units used for commercial purposes, nor to the common property of the body corporate. The position may be further complicated by other statutes. Legislation imposes strict liability on the owner of premises from which water leaks into other premises, irrespective of the original source of the water.⁵³ Thus if water leaks through the roof of a condominium and into a residential unit, the unit owner has a right of action against the designer or builder of the roof at common law. If water then proceeded through the residential unit into lower floors of the building, doing damage, the owner of the unit at the top of the building, through which the water travelled, would each become liable to owners at lower levels. Similarly, as the water leaked through various levels of units in the building, unit owners would become liable to owners of properties beneath them as the water leaked through. The issue of water leakage has arisen frequently where balconies – which were common property – had been modified by unit-owners who laid tiles over a supposedly waterproof membrane – with the tiles and membrane sometimes being classed as individual property. If water flowed from the balcony into the building, attribution of liability was complex in the extreme.⁵⁴ To make things worse, under Victorian law – as in most Australian jurisdictions – tort liability is proportionate, not joint and several.⁵⁵ Therefore a person who was liable for 60 per cent of the damage would not be required to pay for losses attributable to other defaulters, such as plumbers or engineers. Another feature is that an owner of property from which water escapes remains liable even though the cause of the escape is conduct by a prior owner, unless the current owner has taken all reasonable steps to remedy the problem.⁵⁶ The resulting complex position renders agreement on repairs – and on funding them – problematic. All in all, this is not a model to be recommended.

Several of our interviewees in Sydney perceived the warranty time frames, prescribed under the Home Building Act 1989 (NSW) as being too tight. There is a two year warranty period for any defects, other than major defects for which there is a six year

⁵² Domestic Building Contracts Act 1995 (Vic), s 8.

⁵³ Water Act 1989 (Vic), s 16.

⁵⁴ Interview with lawyer, Melbourne, August 2016.

⁵⁵ Wrongs Act 1958 (Vic) Part IVAA; Civil Liability Act 2002 (NSW), Part 4; Civil Liability Act 2003 (Qld), Part 2; Law Reform (Contributory Negligence and Apportionment of Liability) Act 2001 (SA), Part 3; Civil Liability Act 2002 (Tas), Part s9A; Civil Liability Act 2002 (WA), Part 1F; Civil Law (Wrongs) Act 2002 (ACT), Ch 7A; Proportionate Liability Act 2005 (NT).

⁵⁶ Water Act 1989 (Vic), s 16(5).

period.⁵⁷ The main difficulty is that defects in new buildings do not immediately manifest themselves. When they do appear, there may only be a small window of opportunity to lodge a claim. As one lawyer noted, the lawyers often have to move very quickly - “you are herding 300 people or 300 apartments and you have only got two years and they only meet once a year, suddenly you are very restricted in time”, and failure to lodge the claim in time is fatal – “you are out, you are done. ..That’s one of our challenges”.⁵⁸

In British Columbia, Canada, the Homeowner Protection Act provides warranty coverage to new buildings.⁵⁹ One interviewee noted a case where this had worked very effectively. A three storey underground concrete parking area had been built with no waterproofing. The repair involved digging up the entire footing and installing proper drainage and waterproofing, at the cost to the warranty provider of approximately \$3 million for a relatively small building. Arguments can also ensue as to whether such an event is leakage or condensation and the warranty providers insist that egress must be proved, the standard of which is high.

This home warranty regime is colloquially described as a 2-5-10 warranty programme:⁶⁰ a two year coverage for defects in materials and labour; a five year coverage for defects in the building envelope, including defects resulting in water penetration; and a 10 year coverage on structural defects. The scheme is backed by insurers. Our interviewees in Vancouver spoke of the difficulty in bringing any claim under the regime, with any disputes generally ending up in the courtroom with multiple parties. One interviewee

⁵⁷ Home Building Act 1989 (NSW), s 18E.

A major defect is defined in s 18E(4) as:

(a) a defect in a **major element** of a building that is attributable to defective design, defective or faulty workmanship, defective materials, or a failure to comply with the structural performance requirements of the National Construction Code (or any combination of these), and that causes, or is likely to cause:

- (i) the inability to inhabit or use the building (or part of the building) for its intended purpose, or
- (ii) the destruction of the building or any part of the building, or
- (iii) a threat of collapse of the building or any part of the building, or

(b) a defect of a kind that is prescribed by the regulations as a **major defect**.

A major element is defined as:

- (a) an internal or external load-bearing component of a building that is essential to the stability of the building, or any part of it (including but not limited to foundations and footings, floors, walls, roofs, columns and beams), or
- (b) a fire safety system, or
- (c) waterproofing, or
- (d) any other element that is prescribed by the regulations as a **major element** of a building.

The path of the limitation period for this warranty is telling. It started at ten years and, over time has gradually decreased: 7 years, 5 years, and in the current regime, 2 years.

⁵⁸ Interview with lawyer, Sydney, August 2016.

⁵⁹ Homeowner Protection Act SBC 1998 c 31, s 22.

⁶⁰ Homeowner Protection Act SBC 1998 c 31, s 22.

noted that warranty companies often bring in several parties in an attempt to make the matter so complex that the affected owners “will just walk away”.⁶¹

(b) Individual unit owner insurance and the threat of deductibles

Despite not being a mandatory requirement, owners are expected to hold and keep current adequate insurance to cover the costs of repair and reinstatement of their particular unit (that is, what is not deemed common property).

The following description of what is expected in Ontario, Canada, is useful. Individual unit insurance would be taken out:⁶²

...to cover appliances, improvements made to the unit such as wallpaper, upgraded carpets and cabinetry, light fixtures, window coverings etc as well as personal property, liability for injuries to third parties and any deductible which may be charged back to the unit from damages caused by an act or omission of the owner or those for whom the owner is responsible.

A failure to meet this expectation means that owners are either not insured, or are inadequately insured, and thus are unable to meet the necessary cost of repairs if the building is damaged short of requiring demolition and rebuilding. This will generally force the body corporate into finding the necessary funds to complete repairs and then seek to recover from the individual unit holder.

This then leads to the issue of deductibles. If, in the event of damage, the strata corporation can identify an individual owner as being the one responsible for the damage, that owner is responsible for paying the deductible (that is, the excess). In Vancouver, in some cases, this can be \$100,000 – an impossible task for some owners “who can barely afford the mortgage”.⁶³ Another interviewee noted that the prevalence of water claims in Vancouver has resulted in more expensive insurance premiums, especially the deductible.

Likewise, in New South Wales deductibles have risen exponentially over the last three years. An interviewee estimated that in today’s environment, a building’s deductible would be at least \$25,000 and in some cases, several hundred thousand if the building’s claim history is poor.⁶⁴ As an interviewee in Sydney noted, when the strata corporation

⁶¹ Interview with lawyer, Vancouver, July 2016.

⁶² Audrey Loeb “The Condominium Regime in Ontario” (2016) 22 *Canterbury Law Review* 1.

⁶³ Interview with lawyer, Vancouver, July 2016.

⁶⁴ Interview with lawyer, Sydney, August 2016.

can pinpoint the source of an accident (an overflowing washing machine or a toilet leak) to a particular unit, that owner, whether or not he or she was negligent, is targeted as the person responsible and the entire deductible can be charged back to that owner – a financial disaster if the owner is not insured.⁶⁵

In British Columbia and Ontario, unlike Australasian jurisdictions, liens can be filed for repair (see below at Part IV.G), but no such lien can be filed for the insurance deductible – the strata corporation is forced to use the court system. Moreover, if mortgagees foreclose on a particular owner, this lack of priority means that recovering that deductible is highly unlikely.⁶⁶

C The disappearing developer

In New South Wales, some interviewees noted the importance of a potential purchaser finding out about the likely structure behind the vendor developer. Phoenix companies are common. Several interviewees spoke of vendor companies that either put their company into receivership, or find some way of making sure it has no assets as soon as the certifier hands over the occupation certificate – the “\$2 company” concept. When defects occur, there is simply no one to sue. The building company that built your building has disappeared.

The issue of a disappearing developer was also a consistent theme in our Vancouver interviews. A new purchaser has no method of performing due diligence on a building company before entering into a contract with it. One interviewee used the useful analogy of buying a car:⁶⁷

With cars, if a car company builds a bad car, it is in the news everywhere. Everybody knows about it. It is a mass manufacturing product and everybody stops buying their cars. However, in this area [condominium development] a developer is with ABC Development. When the project becomes a mess, ABC Development becomes DEF Development, an entirely different entity, and ABC Development simply ceases to exist.

⁶⁵ Interview with lawyer, Sydney, August 2016.

⁶⁶ Interview with lawyer, Vancouver, July 2016.

⁶⁷ Interview with lawyer, Vancouver, June 2016.

Moreover, as one interviewee noted, once the owner has purchased, he or she is unlikely to set about cutting holes in walls to see whether there is a problem.⁶⁸ Understandably, the owner assumes that because it is a new building, nothing is likely to have gone wrong.

D Economic damage: the AirBNB problem

It is clear that world-wide the advent of Air BNB - short term letting - has had a major impact on condominium living. It is generally accepted that a bylaw banning short term leasing would be ultra vires as it interferes with an individual's right to deal with his or property as he or she desires. This problem was emphasised by interviewees in Sydney, Melbourne and Vancouver and since those interviews there are indications that the problem is now becoming apparent in New Zealand.

A Sydney interviewee gave an illustration of the problem.⁶⁹ He knew of a complex that is an old warehouse building with wooden floors. There was one apartment doing Air BNB and the girl downstairs described her situation as "awful". While she accepted that condominium living meant an element of noise, she said that the worst part for her was that every three days there were people above her getting up at 4 o'clock in the morning to catch a plane "banging around their luggage and that is not normal living".⁷⁰

Interviewees provided other examples of the effect of Air BNB rentals on other residents in a building complex:

- Safety. One interviewee noted that many apartment owners no longer feel that the large front door of the building is their safety net from the world. Rather, they are often terrified of whom they might encounter in the corridors or the lifts and only feel safe when they turn the lock of their own apartment. The following comment was made in the context of short-term letting, but given the inability to discriminate who buys a condominium, it can also apply to modern condominium life generally:⁷¹

...actually shaking as they get their keys out and once they can just slam the door and actually get into their tiny little apartment then and only then do they feel they can shut out the world...it's doing nothing for the sense of community...This will

⁶⁸ Interview with lawyer, Vancouver, June 2016.

⁶⁹ Interview with lawyer, Sydney, August 2016.

⁷⁰ Interview with lawyer, Sydney, August 2016.

⁷¹ Interview with lawyer, Sydney, August 2016.

translate down not people not wanting to live in apartments because of the security and safety concern. The [...] Building has to engage roving security patrols on Friday and Saturday nights and that costs the building an extra \$50,000 a year. They have had to upgrade their security system and install 100 new CCTV cameras which has cost the building well over \$100,000 as well...[all] because people are saying: “We don’t feel safe”. But there is no political will to change that.

- Transient tourists who have no idea what to do with the garbage;
- Weekend renters who party every Saturday night that goes on until 4 am (something that you might expect once every six months in a normal residential property);
- Owners who construct new dividing walls within the apartment to turn a three bedroom apartment into a six bedroom apartment with bunks for maximum occupancy (one interviewee noted that there are advertisements in Hong Kong encouraging this as a money-making venture in Australia);
- Families coming for a short weekend stay, armed with all their electronic devices and enjoying the building’s internet services for free: “.... because it is PABX, we actually have no power to flick them off”.⁷²

E Lack of maintenance/reserve funds

Failure to maintain a building complex and/or failure to set aside sufficient funds for maintenance or unexpected damage is, unfortunately, commonplace.

Interviewees in Vancouver noted that this was evident in strata complexes and was largely driven by a strata corporation’s desire to keep the strata fees low – referred to as a “short term fix for a long term problem”.⁷³ This is a market-driven issue. We were regularly told that owners are not living in multi-dwelling units through choice, but rather because it was the only affordable option in a very expensive city and simply seen as a stepping stone. Those owners shy away from large strata fees and are not interested in paying for future repairs as they are not planning a long-term stay. Moreover if an owner’s contributions into a well-planned reserve fund is not going to be reflected in the sale price, there is little incentive to buy into that strata complex.⁷⁴

⁷² Interview with lawyer, Sydney, August 2016.

⁷³ Interview with lawyer, Vancouver, July 2016.

⁷⁴ Interview with lawyer, Vancouver, July 2016.

In British Columbia, an operating fund (for common expenses that usually occur either once a year or more often than once a year, or are necessary to obtain a depreciation report) and a contingency reserve fund (for common expenses that usually occur less often than once a year or that do not usually occur) are mandatory.⁷⁵

Likewise, in Ontario, a reserve fund is mandatory. The following description is helpful:⁷⁶

It is a trust account, from the condominium's operating account, which all condominium corporations are required to establish. A portion of the common expenses paid by the owners is transferred monthly into this separate account. Both accounts must be in the name of the condominium. The reserve fund is the unit owners' savings account for the major repair and replacement costs of common element and assets, as the building gets older. The contributions made to the reserve fund must be based on a reserve fund study which will establish the amount the Board of Directors must ensure is contributed...if the reserve fund is inadequate, the Board is required to develop and implement a plan to "top it up".

In Victoria bodies corporate with 100 or more units or a substantial operating expenditure must have a maintenance fund,⁷⁷ but there is no requirement to ensure that the fund is at an adequate level to meet long term maintenance obligations. Smaller bodies corporate do not have this obligation.⁷⁸ In New South Wales the legislation requires bodies corporate to have an administrative fund, a capital works fund and a 10-year capital works fund plan.⁷⁹ The body corporate must levy charges as a contribution to the administrative fund and the capital works fund.⁸⁰

Under a body corporate structure, where the body corporate itself is fixing the level of levies, reserve funds and the like, individual members of the body corporate can clearly have a direct voice in meetings. They may urge either greater levels of preparedness to meet possible hazards and costs or, that levies should be kept down, while running a

⁷⁵ Strata Property Act SBC 1998 c 43, s 92.

⁷⁶ Audrey Loeb "The Condominium Regime in Ontario" (2016) 22 Canterbury Law Review 1 (referring to Condominium Act 1988 (Ontario) s 93 as amended by the Protecting Condominium Owners Act 2015: s 93(2) repealed and substituted by s 84(1) of the 2015 Act; ss 93 (3),(4),(5) and (6) repealed and substituted by s 84(3) of the 2015 Act). See also Jeremy Finn and Elizabeth Toomey "Condominium Chaos in the Wake of a Disaster" (2017) New Zealand Law Review (forthcoming).

⁷⁷ This is so because of the combined effect of ss 36 and 40 of the Owners Corporations Act 2006 (Vic) and Reg 5 of the Owners Corporations Regulations 2007 (Vic) which define a "prescribed corporation" and impose on that corporation an obligation to have a maintenance plan.

⁷⁸ Owners' Corporations of less than 100 units have no obligation to operate a maintenance fund: s 36(2) of the Owners Corporations Act 2006 (Vic).

⁷⁹ Strata Schemes Management Act 2015 (NSW), ss 73, 74 and 80.

⁸⁰ Strata Schemes Management Act 2015 (NSW), s 81.

greater risk of levies being needed to cover the cost of repair should there be a significant damaging event. Some Australian jurisdictions have experienced occasions where even in the face of an urgent need for repairs to be carried out, members of bodies corporate have been reluctant to impose on themselves levies which will adequately fund repairs. For example, in Queensland in the aftermath of Cyclone Yasi in 2011, a number of bodies corporate experienced significant disputes over imposing levies to fund repairs prior to receipt of insurance monies.⁸¹

We note that there appears to be a widespread assumption that individual members of bodies corporate who did not have the cash resources to meet a levy, either to provide sufficient funds for repair or to fund works which were needed for betterment, would be able to borrow on the commercial market. This is only partially true. In some cases unit owners may already have borrowed money to purchase the unit in question and have insufficient equity to provide security for further borrowings at any affordable rate of interest. In other cases there may be adequate security for future borrowing, but the unit owner may not have an adequate income stream to fund repayment of any loan.⁸² In such a case there is a very real risk that the process of repairs will create an opportunity for a financially secure majority of owners to force out other owners who are not so advantaged, thus depriving them of security of accommodation and exposing them to potentially significant financial loss.

While a body corporate may not directly address a repair plan for a major risk event, a careful body corporate entity will usually have a robust long-term maintenance plan that deals with repairs on a logical basis and which ought to ensure that funds put aside for this purpose could be used in any such emergency situation.

For instance, as already noted, in New South Wales the Owners' Corporation (ie the body corporate) must have a 10-year capital works fund plan.⁸³ The plan must be reviewed at least once every five years;⁸⁴ must contain, amongst other things, details of the proposed work or maintenance,⁸⁵ the timing and anticipated costs of any proposed work,⁸⁶ and the

⁸¹ Interview with academic, Melbourne, August 2016.

⁸² This point was made most strongly in the English context, interview with academic, England, September 2016.

⁸³ Strata Schemes Management Act 2015 (NSW), s 80.

⁸⁴ Strata Schemes Management Act 2015 (NSW), s 80(3).

⁸⁵ Strata Schemes Management Act 2015 (NSW), s 80(4)(a).

⁸⁶ Strata Schemes Management Act 2015 (NSW), s 80(4)(b).

source of funding for any such work.⁸⁷ The Owners' Corporation may engage expert assistance in the preparation of such a plan.⁸⁸

As one interviewee noted:⁸⁹

You generally don't get much push back from owners once you go out there and meet with them and explain to them that they need a defect report... no-one likes paying money but generally there are no major objections.

On the reverse side of the coin, if a special levy has to be raised to meet such repairs, owner resistance is common:⁹⁰

One of the biggest problems is cost when you go to the owners and say we have to raise two or three million dollars. Depending on the demographic of the owners, that becomes a big problem for some, but not for others...Lately, I am finding people who simply cannot come up with the money. They cannot get the financing and then we have to look into the possibility of loan arrangements but that can be difficult. Those owners do not want the Strata Corporation to borrow because they are going to have to pay their proportionate share of the interest...it becomes a deadlock....

F Victoria: large scale fires

It was very clear from the Melbourne interviews that issues of natural disaster damage and resilience are very largely seen as being linked to large-scale fires. This is not surprising given the frequency of bushfires in Victoria and several recent disastrous fire events. Most such large fire events have been in rural areas and small provincial towns and their scope has focused attention on State agency intervention.

We were also told by several interviewees that many of the property owners and occupiers affected by bushfires had been uninsured or significantly underinsured. This naturally had significant influence on the capacity to repair or reinstate damaged or destroyed buildings. While any essentially undamaged buildings did not need to be upgraded, property owners undertaking any repairs, extensions or new building which required building permits were required to meet more demanding standards of construction and fireproofing.

⁸⁷ Strata Schemes Management Act 2015 (NSW), s 80(4)(c).

⁸⁸ Strata Schemes Management Act 2015 (NSW), s 80(6).

⁸⁹ Interview with lawyer, Sydney, September 2016.

⁹⁰ Interview with lawyer, Sydney, September 2016.

The nature of fire damage, and the possibilities that the occurrence of fires and the level of damage they inflicted could, in some cases, be attributed to the negligence of identifiable individuals or corporations appears also to have created a perception of litigation as a method of mitigating individual loss. This view did not seem to be so prevalent in other states, where flood damage created an alternative focus through which to view disaster damage and recovery.

G Canada: lien for repair

In British Columbia, if a strata corporation cannot raise money for a necessary repair – some owners simply do not have the money; others simply don't want to pay – the corporation is able to place a lien against that property⁹¹ and sell it.⁹² Again market forces are evident. As one interviewee noted, if there are 10 such units up for sale, the value of all the units in the complex will drop.⁹³

The lien ranks in priority to every other lien or registered charge except in very limited circumstances.⁹⁴

Similarly, in Ontario, if an owner does not pay his or her monthly common expenses, the condominium corporation can place a lien against the property for the amount owing, together with interest and legal costs incurred.⁹⁵ The lien has priority over all encumbrances affecting the unit except real property taxes. And, as in British Columbia, if neither the owner nor the mortgage lender pays the arrears, the unit can be sold to collect the amount owing.⁹⁶

⁹¹ Strata Property Act SBC 1998 c 43, s 116.

⁹² Strata Property Act SBC 1998 c 43, s 117.

⁹³ Interview with lawyer, Vancouver, 2016.

⁹⁴ See Strata Property Act SBC 1998 c 43, s 116(5). The only exceptions to priority arise when the strata corporation's lien is for the strata lot's share of a judgment against the strata corporation; if the other lien or charge is in favour of the Crown and is not a mortgage of land; or if the other lien or charge is made under the Builders Liens Act.

⁹⁵ Condominium Act 1988 (Ontario), s 85.

⁹⁶ For a more detailed description, see Audrey Loeb "The Condominium Regime in Ontario" (2016) 22 *Canterbury Law Review* 1.

H Canada: licensing regime for strata managers

In British Columbia (the only province in Canada that has this requirement) the management of strata corporations is now a licenced activity.⁹⁷ The licensing regime requires all new licensees to work for a broker to gain the necessary experience. The University of British Columbia runs a university accredited course which educates prospective strata managers about dispute resolution, how to guide strata corporations and strata councils on governance issues, and the mandatory requirement of strata corporations to do a contingency reserve fund/depreciation study every three years. While the condominium home owners' associations welcome this initiative as it raises the expectations of the unit owners as to the management of their building, professionalism comes at a cost that has to be absorbed by the individual unit owners.

I Canada: airspace subdivisions

Several interviewees in Vancouver spoke of the increasing complexity concerning the growth of sophisticated and obscure common law airspace parcel subdivisions. An airspace parcel, described as “the modern equivalent of party wall units”⁹⁸ is inherently difficult to work with because, according to one interviewee, only the developers and the developers' lawyers understand them:⁹⁹

Typically they have completely impenetrable cost sharing agreements and it is possible to bury them in all kinds of cross subsidies that are not apparent to anybody until five to ten years in and they have legal arbitration clauses that prevent you from going to court.

There is considerable concern that real difficulties will arise when buildings that are in airspace subdivisions begin to age. In an airspace subdivided building, the building envelope in each airspace parcel is owned by the owners of that airspace (it is not common property) and there is no statutory safeguard as to who is liable for the airspace's repair or maintenance. As one interviewee noted:¹⁰⁰

⁹⁷ The Real Estate Council of British Columbia (RECBC) is responsible for the licensing, education and discipline of real estate service providers, including strata managers and strata management companies (brokerages), under the authority of the Real Estate Services Act SBC 2004 c 42 and the associated Rules. For further discussion, see Jeremy Finn and Elizabeth Toomey “Condominium Chaos in the Wake of a Disaster” (2017) *New Zealand Law Review* (forthcoming).

⁹⁸ Interview with lawyer, Vancouver, June 2016.

⁹⁹ Interview with lawyer, Vancouver, June 2016.

¹⁰⁰ Interview with lawyer, Vancouver, June 2016.

What is going to happen when a high-rise building starts having envelope issues in the upper airspace parcel – what rights do they have. The rights are all at common law. While they have easement rights, it would be a very risky endeavour to devise a contract to replace a bunch of building components at the bottom level based on an easement.

J A New South Wales Reform

Our interviewees in Sydney all spoke of the new Strata Schemes Management Act 2015 that came into operation on 30 November 2016 (two months after our interviews). While there were mixed responses as to its likely effectiveness in various areas, it was generally seen as positive reform. We discuss briefly some relevant initiatives.

The Strata Schemes Management Act 2015 (NSW) has set in place a prescribed inspection regime which requires owners to discuss and formulate an inspection plan at their first and second AGM and reports of this have to be completed.¹⁰¹ This is seen as a very positive move:¹⁰²

[I]t brings people to the table, brings it in the front of people’s minds so it is thought about prior even to there being a problem – there is a framework for assessing defects.

An interviewee spoke of the apathy this is designed to cure.¹⁰³ Owners are reluctant to go and look for defects and are even more reluctant to spend thousands of dollars on experts’ reports. They simply prefer not to think about what might be wrong with the building.

The 2015 Act imposes a “building bond” on the developer of a strata scheme for building work that has been completed.¹⁰⁴ This must be lodged before an occupation certificate is issued under the Environmental Planning and Assessment Act 1979. The amount secured is two per cent of the contract price for the building work. Its purpose is to secure funding for the payment (up to the amount of the bond) of the costs of rectifying defective building work identified in the final report of the building work. This is a mandatory duty for the developer.¹⁰⁵ The building bond must be claimed or realised two years after the

¹⁰¹ Strata Schemes Management Act 2015 (NSW), s 15 (“Agenda for first AGM”); s 80 (“Owners’ Corporation to prepare 10-year capital works fund plan”).

¹⁰² Interview with lawyer, Sydney, August 2016.

¹⁰³ Interview with lawyer, Sydney, August 2016.

¹⁰⁴ Strata Schemes Management Act 2015 (NSW), s 207.

¹⁰⁵ Strata Schemes Management Act 2015 (NSW), s 207(5).

date of completion of building work for which it is given, or within 60 days after the final report on the building work.¹⁰⁶

Several interviewees were mildly optimistic about this initiative – at least it is something to hold the developer to account. However, interviewees pointed out two obvious problems. First, if the building has major structural defects, the two per cent bond will be totally insufficient; second, that structural defect may not manifest itself within two years after the building has been completed.¹⁰⁷

Under the 2015 Act, the Owners' Corporation (ie the body corporate) must have an administrative fund, a capital works fund and a 10-year capital works fund plan.¹⁰⁸ The body corporate must levy charges as a contribution to the administrative fund and the capital works fund.¹⁰⁹

As one interviewee noted, if a special levy is to be raised to meet necessary repairs, owner resistance is common.¹¹⁰ Depending on the demographic of the owners, it is a big problem for some but not for others. In the former group, often the owners simply cannot find the money, and the Owners' Corporation will consider some type of loan arrangement that, in reality, exacerbates the problem. Those owners do not want the Owners' Corporation to borrow the money as they are going to have to pay their proportionate share of the interest.

V Some Comparative Findings

A Challenging body corporate decisions

Our research shows an interesting range of pathways for legal challenge to decisions of the body corporate.

In most jurisdictions a specialist tribunal is empowered to resolve disputes involving bodies corporate. For instance, in New South Wales disputes are heard by a specialist tribunal¹¹¹ (dubbed a “super tribunal”)¹¹² that deals with a wide range of disputes. There

¹⁰⁶ Strata Schemes Management Act 2015(NSW), s 209(3).

¹⁰⁷ Interview with lawyers, Sydney, August 2016.

¹⁰⁸ Strata Schemes Management Act 2015 (NSW), ss 73, 74 and 80. For further discussion, see Jeremy Finn and Elizabeth Toomey “Condominium Chaos in the Wake of a Disaster” (2017) *New Zealand Law Review* (forthcoming).

¹⁰⁹ Strata Schemes Management Act 2015 (NSW), s 81.

¹¹⁰ Interview with lawyer, Sydney, September 2016.

¹¹¹ See Strata Schemes Management Act 2015 (NSW), s 226.

were very varied opinions as to the efficacy and accuracy of decision-making in these tribunals. While litigation is less expensive than in the normal courts, the use of tribunal decision-makers who may not be well-informed about the relevant law has drawn criticism in Australia, not least for the occurrence of conflicting tribunal decisions.¹¹³ A Melbourne lawyer noted that as the parties are usually self-represented, tribunal members are not assisted to address the key issues, something which can cause further problems as appeal is only possible on issues of law. A Sydney lawyer advocated the need for a dedicated tribunal for strata title disputes, and noted that the lack of any monetary limit was “actually quite scary... it can be a million-dollar job at the end of the day”.¹¹⁴ By comparison the English First-Tier Tribunal was seen as more effective. Various jurisdictions also employ dispute resolution and mediation procedures.¹¹⁵

In Australia, Hong Kong and England the parties have a right to bring cases to Tribunals, rather than to the regular courts, but these appear to have more power than the Residential Tenancies Tribunal in New Zealand.

In British Columbia, legislation enables strata corporations, owners and tenants to make a request under s 4 of the Civil Resolution Tribunal Act¹¹⁶ asking the civil resolution tribunal to resolve a dispute concerning any strata property matter over which that tribunal has jurisdiction.¹¹⁷ However, as became very clear from our interviews in Vancouver, interviewees were extremely frustrated that, as yet, the Tribunal has not been established.¹¹⁸ There is a Small Claims Court which has a jurisdictional limit of \$25,000 but, as one interviewee observed, that Court is overwhelmed with work and, in any case, the monetary limit is too low.¹¹⁹

B Insuring the building

A key issue in any form of multi-dwelling building is ensuring the building itself is insured against damage or destruction. The coverage required in the policy will vary according to the legal structure involved. If the building is owned by a company with

¹¹² Interview with lawyer, Sydney, September 2016.

¹¹³ Interview with academic, Melbourne, August 2016 and interview with lawyer, Melbourne, August 2016.

¹¹⁴ Interview with lawyer, Sydney, September 2016.

¹¹⁵ See also Jeremy Finn and Elizabeth Toomey “Condominium Chaos in the Wake of a Disaster” (2017) *New Zealand Law Review* (forthcoming).

¹¹⁶ Civil Resolution Tribunal Act SBC 2012 c 25.

¹¹⁷ Strata Property Act SBC 1998 c 43, s 189.1.

¹¹⁸ Interview with lawyers, Vancouver, June 2016.

¹¹⁹ Interview with lawyer, Vancouver, June 2016.

unit-owners holding shares in the company, the company as owner will be need to insure every part of the fabric of the building.

(a) Insurance: strata corporations and multiple unit developments

In both Australian and Canadian jurisdictions, generally legislation requires the strata corporation or condominium to take out compulsory insurance, but this is not mandatory for individual owners.

In Victoria, one interviewee considered that generally the strata titles regimes in Australia did not place enough emphasis on ensuring that strata title premises were adequately insured.¹²⁰ While in some cases under-insurance is a deliberate tactic, in others it will arise because policies have not been reviewed to take account of rising property values and repair costs. Although revaluations of property were, in theory, necessary at intervals, in several states the revaluations could be at intervals of as much as five years. By contrast in England there is no obligation on companies owning multi-dwelling buildings to obtain regular revaluations to ensure that insurance is at an appropriate level, although some do so as a matter of good practice.¹²¹ There is no indication that the revaluation obligation resting on bodies corporate is actually being complied with and that bodies corporate are then amending insurance policies as a result.¹²² There was also a problem in Victoria that management companies often had responsibility for insurance but received significant income from the insurance companies and thus could be inclined to insure with the companies which gave them greater returns rather than those which were optimum in coverage.

A similar responsibility to adequately insure the building may fall on the owner of a building in which the tenants lease, rather than own, their units. In England insurance requirements will vary significantly depending on the nature of the multi-unit building and the age of any governing leases. The standard modern practice is that the owners of a block of flats will have a flat-owner's policy, which covers the structure of the building and public liability issues, and will recover a part of the costs from the tenants. This will ensure that insurance for major issues is dealt with through a single company. Some older leases contained no standard provisions about insurance, leaving it to individual tenants to arrange their own insurance. Where freehold land is leased out to multiple lessees, the leases will require the owner of the freehold to maintain a suitable insurance

¹²⁰ Interview with academic, Melbourne, August 2016.

¹²¹ Interview with academic, England, September 2016. Where insurance was inadequate, there is the possibility the managing body might be sued in negligence by the unit owners.

¹²² Interview with academic, Melbourne, August 2016.

policy so as to be able to repair or reinstate the building in the case of damage or loss. If this obligation is not complied with, the lessees may seek an order for specific performance in the courts or may take the matter to the First-Tier Tribunal. In one case lessees successfully sought to have a manager appointed for the purpose of ensuring insurance cover was taken out.¹²³ Under the English regime individual owners will generally only have insurance for their contents and any extra public liability cover they need.

A quite different practice applies in Hong Kong. Although the underlying legal structure is leasehold, the standard deeds of mutual covenant will require the individual unit owners to insure the fabric of their units, while the Incorporated Owners insure the common parts of the building. This therefore parallels the standard practice in condominiums using the body corporate structure.

C The problem with end-of-life buildings and/or buy-out for redevelopment

Buildings do not last forever and eventually they simply have to be demolished. From our interviews, there is a major issue as to how this is to be achieved in a multi-unit development.

(a) Selling the development

Generally, a developer would have targeted the building and perhaps surrounding buildings as ripe for development. This leads to, often very contracted, negotiations either with the body corporate or each individual owner.

In New South Wales, prior to the passing of the Strata Title Management Act 2015 (NSW) the general “give and take” of a normal sale and purchase discussion had been thwarted, by the fact that the owner-vote had to be unanimous. This led to enormous frustration for developers. One interviewee remembered a developer who simply went bankrupt: he bought six of eight apartments in a strata scheme looking straight over the Bondi icebergs, but failed to buy the last two simply because the owners refused to sell.¹²⁴

On the other side of the coin, there was considerable unease about the developer’s true intentions. One might assume that demolition of perhaps six apartments to make way for

¹²³ Interview with First Tier Tribunal judges, London, September 2016.

¹²⁴ Interview with academic, Sydney, August 2016.

a 48-apartment block would align with a city's higher density programme. However, research completed in Sydney has demonstrated that in many instances, developers cannot do that because of the size of the land, in which case plans for higher density will fail.

Terminating a building for the sake of redevelopment can occur even if the building is perfectly sound and still only in its mid-life stage.

The Strata Schemes Management Act 2015 (NSW)¹²⁵ now allows developers to have to buy only 75 per cent of a complex to start redeveloping and this plays into a developer's hands: "he or she will simply be voting the other people off the island, so to speak".¹²⁶

As one interviewee noted, the plight of the owners who, under the former unanimous rule, would have held out and refused to sell, is condominium-specific:¹²⁷

You know if they tried to make a similar argument in relation to a developer buying six houses in a block of eight freestanding houses, and forcing the other two to sell, people would be outraged.

And the essence of strata title ownership is reflected in the following comment:¹²⁸

When you buy into an apartment block, you do not buy on the understanding that you can force your neighbours to sell because you would make money if they did. You buy on the understanding that you have a shared building...but somehow later [you realise] that your rights as a strata owner extend to your right to selling the whole building...this was never part of strata law.

(b) Cancelling the plan/ winding up the body corporate

In the Australian jurisdictions, the strata title legislation provides for decisions on winding up the body corporate following demolition of the existing building.¹²⁹

¹²⁵ Strata Title Management Act 2015 (NSW), s 5 ("Resolutions of owners corporation").

¹²⁶ Interview with academic, Sydney, August 2016.

¹²⁷ Interview with academic, Sydney, August 2016.

¹²⁸ Interview with academic, Sydney, August 2016.

¹²⁹ See, for example, Body Corporate and Community Management Act 1997 (Qld), s 74; Strata Titles Act 1998 (Tas), s 32(2)(a). In New South Wales a possible termination of a scheme does not follow from damage or destruction, but the scheme may be terminated by order of the Court or, where all owners agree, by the Registrar-General: see Strata Schemes Development Act 2015 (NSW), ss 135 and 143 respectively. In Western Australia and the Northern Territory there is no provision relating to termination after damage but the members may at any time by unanimous resolution resolve to wind up the body corporate: Strata Titles Act 1985 (WA), ss 30 and 31; Termination of Unit Plans and Unit Title Schemes Act 2014 (NT), s 7.

In British Columbia, Canada, should a body corporate wish to cancel a strata plan, a resolution must be passed by an 80 per cent vote at an annual or special general meeting.¹³⁰ In order to dispose of any land held in the strata corporation's name, a resolution must be passed by a 75 per cent vote (termed a $\frac{3}{4}$ vote)¹³¹ at an annual or special general meeting.¹³² The same vote percentage applies for the disposal of common property.¹³³

Even higher majorities are required in other places. In Hong Kong a decision to compulsorily acquire minority interests so that the building can be redeveloped or its use changed requires 90 per cent of the owners voting for the proposition, although the chief executive of the Hong Kong government may approve DMC provisions which lower that to something not less than 80 per cent. Somewhat similar rules apply in England to leasehold multi-dwelling units. The normal rule will be that a variation of the lease under which the various apartment owners operate will require 80 per cent of all owners to agree. There is now a process for "round robin" documentation which allows lessees to sign up to the proposed change without attending a meeting.

In determining how effective these voting provisions may be, it is critical to consider whether the votes are of all members, or of all members voting. In every jurisdiction there has been comment on the problem of effective administration of a condominium or multiple dwelling-unit building where a number of the stakeholders are absentee owners who take no significant part at all in the operation of the entity. Requiring decisions to reach absolute percentages of stakeholders is therefore to set a very high barrier. In other cases, the issue may be whether votes are taken in a traditional style at a meeting, or can be recorded electronically or by some form of round robin documentation.

These details may prove critical where relationships between stakeholders break down, or where there is a major decision to be made. It is too late to wait until then to understand the nature of the decision-making machinery.

In Victoria owners corporations can only be wound up by the Victorian Civil and Administrative Tribunal; Subdivision Act 1998 (Vic) s 34G. In the Australian Capital Territory, there is nothing to allow a vote after damage, but anyone can seek an order from the Supreme Court for dissolution of the body corporate: see Unit Titles Act 2001 (ACT), s 165.

¹³⁰ Strata Property Act SBC 1998 c 43, s 272.

¹³¹ Strata Property Act SBC 1998 c 43, s 1.

¹³² Strata Property Act SBC 1998 c 43, s 79.

¹³³ Strata Property Act SBC 1998 c 43, s 80.

VI What Lessons Can Be Learnt

Our wide-ranging overseas research left us in little doubt that New Zealand’s Unit Titles Act 2010, although very much in need of reform, provides a robust legislative structure for multi-dwelling complexes on a single title. Nonetheless, from that research, we have identified a number of areas that warrant some consideration to improve the regime. These conclusions interrelate with our Chapter 5 recommendations and are cross referenced where appropriate.

A A priority lien

There is perhaps some merit in considering the imposition of a priority lien on a unit title to preserve a body corporate’s expenses for repair.

As we recommend in Chapter 5, we recommend that consideration is given to the introduction of a lien for limited purposes. Such a lien would allow a body corporate to recover debts accrued by a unit owner in the context of necessary repairs to a development, or work done to increase the resilience of a development to natural disasters. It should give the body corporate priority over a secured lender. Consideration should be given to whether this priority should be up to a maximum level.¹³⁴

B Maintenance and reserve funds

In New Zealand, suggestions for improving the regime are underway. In December 2016, the Ministry of Business Innovation and Employment (MBIE) released a Discussion Document that reviewed the Unit Titles Act 2010 and proposed some reforms.¹³⁵ One of the principal suggestions concerned long-term maintenance plans and long-term maintenance funds.

The Discussion Document notes that the Act must promote best accounting practices to prepare current and future owners for the costs associated with owning a unit title. To ensure this, long-term maintenance plans “need to be credible, active documents that accurately detail expected repair and maintenance expenses for the near to medium future”.¹³⁶

¹³⁴ See Chapter 5.VI.

¹³⁵ Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016).

¹³⁶ Ministry of Business, Innovation & Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at [4.4].

These reforms are explained in detail in Chapter 5.¹³⁷

C Accessibility of the dispute resolution regime

In the Discussion Document released by MBIE, another principal proposal concerned the dispute resolution process. The Discussion Document proposes lowering fee settings and introducing a reduced fee for mediation. It also suggests changing the name of the Tenancy Tribunal (which deals with unit title disputes to the upper limit of \$50,000) to the Tenancy and Unit Titles Tribunal in order to reflect the Tribunal’s jurisdiction over unit title disputes.¹³⁸

D A warning about potential AirBNB problems in New Zealand

It was clear from our overseas research that short term letting – especially the rise of AirBNB – is a worldwide problem that overseas legislators are grappling with. The problem is also beginning to emerge in New Zealand. We suggest that this is perhaps a “wait and see” period to ascertain how the overseas jurisdictions deal with the problem. Stringent zoning laws appear unlikely to work in this era of intense inner city living, especially where there are mixed-use multi-dwellings. In a later chapter we suggest that short-term accommodation providers be excluded from EQC coverage and required to insure at full commercial rates.¹³⁹ That, and perhaps closer scrutiny by the Inland Revenue Department may limit the number of unit owners who run commercial-scale Air BnB operations in residential developments. More effective processes for dispute resolution within bodies corporate may also assist.

¹³⁷ See Chapter 5.VII.

¹³⁸ See Chapter 5.I. See also Jeremy Finn and Elizabeth Toomey “Condominium Chaos in the Wake of a Disaster” (2017) *New Zealand Law Review* (forthcoming).

¹³⁹ See Chapter 6.III.

CHAPTER 3

CROSS LEASES

Elizabeth Toomey

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I Introduction

I would get rid of the cross lease title...you know it is never going to work and heaven help Wellington if they ever have an earthquake as the city is full of cross leases.¹

This chapter explores the shared ownership model of cross leases,² opinions on which range from extolling its virtues to declaring them a “ticking time bomb”.³

While, in a tranquil environment, the perceived advantages – for the co-owner, having a measure of control over his or her neighbour; for the developer, generally a cheaper version option than a fee simple subdivision – help disguise inherent deficiencies in the scheme, in the advent of a natural disaster, those sometimes hidden flaws morph into major defects.

As recently as 2011, a joint working group comprising Land Information New Zealand (LINZ), the New Zealand Law Society, the Auckland District Law Society and the New Zealand Bankers Association noted the complexities of the cross lease system and reiterated, yet again, the need for action:⁴

Accordingly, conveyancing to meet the future needs of cross-lease title owners will require an examination of cross leases with a view to their possible replacement or facilitating a simple transition to another form of title.

At almost the same time, Canterbury suffered a series of devastating earthquakes. The complexities of repairing or rebuilding the many damaged cross lease properties in the region must go down in history as a lesson well learnt – the model simply does not work.

Our interviews with the professionals involved left us in no doubt that the many rebuild/repair problems would never have occurred if suggestions made by the Law

¹ Interview with lawyer, Christchurch, July 2016.

² For a full explanation of this model of ownership, see Part IV below. The term “cross lease” can also be hyphenated to “cross-lease”. This chapter adopts the unhyphenated version, unless it is in stated legislation or a quotation.

³ Joanna Pigeon “The Deficiencies of Cross Leases” *Law News* (26 April 2013).

⁴ Land Information New Zealand and others *Conveyancing 2020: The Future Conveyancing/Land Development Environment – Strategic Priorities and Initiatives* (Joint Working Group Report, December 2011) at 4.3 (comment from Auckland District Law Society).

Commission to abolish the model and phase out the existing cross leases in favour of other forms of ownership had been implemented rather than forgotten.⁵

Instead, lawyers, engineers, insurers and mortgagees were forced into uncharted territory:⁶

...you cannot just say I am going to paint my unit and fix up those cracks in the ceiling when the two ends of the common slab are not holding the building up properly anyway.

This chapter outlines the complexities of the system, especially the lease covenants that every purchaser of a cross lease property enters into:⁷

...many customers ...absolutely denied that there was such a thing as a cross lease

and then reviews in depth the themes that emerged from our extensive interviews before offering suggestions for reform.

II History

The cross lease scheme was developed in the 1960s as a means of exploiting a loophole in the rules restricting subdivision of land. It provided separate titles to two or more flats⁸ in one building on one section without there being a subdivision of the land within the meaning of the Municipal Corporations Act 1954 (MCA 1954) or the Land Subdivision in Counties Act 1946. Thus homeowners were able to “own” their own flats. In 1971, as a result of further amendments being made to the MCA 1954 and the Counties Amendment Act 1961 (CAA 1961), it became possible for separate buildings on the same section to be cross leased, for example a conventional flat (being part of a building), a semi-detached town house, a free-standing town house or a conventional house. Nonetheless, the word “flat” continued to be used to describe any kind of cross leased dwelling, until recently when both buildings were named “Areas” with a number, and restricted use areas were named “Areas” with an alphabetical letter. While the introduction of the Local Government Act 1964 (which replaced both the MCA 1954 and the CAA 1961) made little difference to cross leases (they still did not constitute a subdivision of land), a

⁵ Law Commission *Shared Ownership of Land* (NZLC R59, 1999).

⁶ Interview with lawyer, Christchurch, July 2016.

⁷ Interview with insurer, Christchurch, July 2016.

⁸ The correct term for ownership is a “flat” even although this could comprise a four storey stand-alone house. In interviewees’ comments, where they have referred to a “unit”, the word “unit” has been replaced with “[flat]”.

dramatic shift occurred when the Resource Management Act 1991 (RMA 1991) was passed. The grant of a cross lease is now a “subdivision of land”⁹ and a subdivision consent must be obtained for a cross lease development in accordance with the provisions of that Act.¹⁰ Nonetheless:¹¹

[c]ross lease titles ... continue to be used for some smaller urban housing projects because they remain cheaper and more convenient for the property developer. Following the coming into force of the UTA 2010, they may continue to be used, again for smaller developments, to avoid the costs and complexities, even for the developer, inherent in that Act. However, the cross-lease scheme becomes unwieldy as larger numbers of flats are involved; unit titles are normally used for larger developments.

In Auckland with the greater intensification allowed under the Unitary Plan, it is anticipated that there will be an increase in cross leases to create separate titles, particularly as houses which currently have a major and minor dwelling on one title could now be cross leased into separate titles.¹²

III Cross Leases in Australia

In South Australia, cross leases are also known as “less than entirety titles” or “moiety titles”.¹³

In a moiety title, sometimes referred to as a cross lease, the ownership of a unit comes from being the registered owner of a share of the land the group of units sits on. The owner is leasing the right to occupy their unit, along with the right to use common areas, from the other unit owners.

Consent of all owners is required to convert a cross lease into the South Australian model of a community title. Cross leases ceased to be used once the strata title system (Australia’s term for our unit title scheme) was developed.

In Western Australia, our cross lease equivalent is referred to as a “purple title”. A purple title reference occurs where there is ownership of an undivided share of the title of a

⁹ Resource Management Act 1991, s 218(1)(a)(iv).

¹⁰ Resource Management Act 1991, Part 10 (Subdivision and reclamations).

¹¹ DW McMorland and Thomas Gibbons *McMorland and Gibbons on Unit Titles and Cross Leases* (Lexis Nexis Ltd, Wellington, 2013) at 4.1.

¹² Conversation with lawyer, Wellington, February 2017.

¹³ Department of Planning, Transport and Infrastructure “Certificates of title: Company titles and moiety titles” (5 October 2016) Government of South Australia <www.sa.gov.au>.

whole parcel of land. The reference to the colour purple refers to the colour of the sketch on the title, which used to be shaded as such. Each owner has a share in the contract that defines what area he or she owns.

Purple titles were used for issuing share titles for high rise buildings prior to the strata title legislation in Western Australia. To convert purple titles to strata titles, all the tenants in common must agree to the conversion.

Purple titles are still used occasionally for tenancy titles, particularly in rural areas.¹⁴

IV The Characteristics of a Cross Lease

The mechanics of the cross lease scheme were devised by using a combination of two provisions in the Land Transfer Act 1952:¹⁵

- s 66 which enables the issue of a title in respect of leasehold interests; and
- s 72 under which tenants in common are entitled to a separate title.

Thus, under a cross lease development, the owners¹⁶ of each of the flats are registered proprietors of the land (usually a fee simple estate, but occasionally a leasehold estate) as tenants in common in undivided shares, and all the tenants in common grant a lease of each flat to its owner, usually for a term of 999 years. Thus, each owner is both a lessor and a lessee. Originally, the purchaser of a cross lease property received two titles (as per ss 66 and 72 of the Land Transfer Act 1952), but subsequently there evolved the practice of issuing one title for both estates, commonly known as a composite title.

The individual lessees acquire the right to the exclusive possession of their particular flats. The part of the land that is not cross leased (that is, does not have a flat built on the land) remains in the joint possession of the owners as tenants in common, either as common areas, or as restricted user areas attaching to a particular flat.¹⁷

Cross lease flats may be stand-alone buildings or they may have common elements (that is, they may be attached to each other). In terms of this project, the latter type caused

¹⁴ Landgate *Strata Titles Practice Manual* (Government of Western Australia, April 2016) at [13.7].

¹⁵ At the time of lodging this Final Report, the Land Transfer Bill (118-2) had passed its Second Reading and it is anticipated that the Land Transfer Bill will be enacted in 2017. This chapter refers to the current Land Transfer Act 1952 but, where appropriate, includes comment about its successor.

¹⁶ The noun “owner” is used loosely in this chapter. As explained, a cross lease owner is both a lessor and a lessee.

¹⁷ For a comprehensive discussion on the characteristics of a cross lease and inherent problems, see J O’Regan and R Thomas “Cross Leases and Unit Titles – Problems and Solutions” (New Zealand Law Society Seminar, October/November 1994).

more problems in the post-earthquake repair or rebuild environment than stand-alone buildings.

Some cross lease developments are staged developments. The initial cross lease plan registered in the Land Transfer Office will only involve the flat being developed and a discrete computer register will be issued for that flat. The head computer register is cancelled for that portion, and once the first flat has been sold, the fee simple is owned by the developer and the new purchaser. As is noted, “[s]ubject to the terms of the cross lease, this gives the purchaser a degree of control over future development of the property”.¹⁸

V The Lease

The rights and obligations of the lessees as between themselves are defined by the covenants in the cross lease. While the form of a cross lease is not prescribed either by statute or regulation, the most recent and commonly used form is the Auckland District Law Society (ADLS) cross lease memorandum: ADLS 2011/4291. This version reformatted the Auckland District Law Society standard form lease (1989 ed) in order to comply with registration regulations. The changes are not significant. One would not operate better than the other in a disaster environment.

A number of covenants in the lease document are highly relevant in terms of repairing and rebuilding after a natural disaster. Any breach of a covenant attracts the normal range of remedies that might include an injunction (an order to stop or refrain from undertaking repairs or other building work) or specific performance (an order to complete repairs or other building work).

In some cases, as indicated below, the lessor can step in and remedy the breach and then the defaulting lessee is responsible for refunding the cost to the other lessors.

Clause 18 of ADLS 2011/4291 stipulates that if the lessee commits any breach or defaults in the performance of any of the covenants, Subpart 6 of Part 4 of the Property Law Act 2007 applies – in other words, the lease can be cancelled.

Clause 24 then states if the lease is determined (that is, if the lease comes to an end) in any manner, the lessee can be directed by the lessors to sell his or her share in the land

¹⁸ DW McMorland and Thomas Gibbons *McMorland and Gibbons on Unit Titles and Cross Leases* (Lexis Nexis Ltd, Wellington, 2013) at 4.5.

“to such person and at such consideration as may be nominated by the Lessors and shall execute all documents required to complete any sale”.¹⁹

Moreover, as noted below, if there is a disagreement between cross lease owners, an application may be made to the Court under ss 339 -343 of the Property Law Act 2007 for the sale or physical division of the land among the co-owners or for an order requiring one or more co-owners to purchase a share in the property of one or more other co-owners.²⁰

Given that one of our common findings from our interviews was that many purchasers of a cross lease property show no interest in what sort of ownership model they are buying and hence have no idea of their lessee obligations, these are potentially serious consequences for uninformed (albeit by their own default) owners.

A Clause 9 - Unauthorised alterations and additions

One of the most common arguments between cross lease owners concerns unauthorised alterations and additions to a cross lease building. Two different problems arise: a cross lease owner can demand the demolition of improvements erected by one of the owners if no consent has been given by the other co-owners; and if the improvement has extended beyond the footprint of the building, as shown on the plan registered with the title in the Land Registry Office, this can result in a defect in title which can only be rectified by lodging a new plan.

Any repairs undertaken on a cross lease property must be referenced against the rights and obligations of the lessee. As noted below, further complications arise when insurers become an interested party.²¹

The lessee’s covenant with respect to alterations and additions is found in clause 9 of ADLS 2011/4291. It states:

9(a): Not to erect on any part of the land²² any building, structure or fence, nor to alter, add to or extend any existing buildings without the prior written consent of the Lessors. Such consent shall not be reasonably withheld.

¹⁹ ADLS 2011/4291, clause 24(a)(i).

²⁰ See Part VII below.

²¹ See Part X below.

²² The term “land” is not defined in the ADLS 2011/4291 but is considered to be “the whole of the land owned by the lessors as tenants in common and includes not only the fee simple estate underlying the lease

9(b) : If any addition or alteration proposed by the Lessee shall have the effect of altering the external dimensions of the flat, the Lessee shall upon receiving the Lessors' consent prepare and have deposited at Land Information New Zealand at the Lessee's own cost a new plan of the alterations or additions to the flat and, upon deposit of the plan, do such acts and things as shall be necessary or desirable to effect registration of a surrender of this lease and a new lease in substitution thereof.

...

There is considerable case law as to the extent of such a clause.²³ The fundamental issues have been usefully summarised:²⁴

- (a) What alterations and additions are "structural"?
- (b) What is the effect of an unqualified covenant?
- (c) In what circumstances is consent unreasonably withheld?
- (d) What is the nature of the consent?
- (e) What are the consequences of making unauthorised alterations or additions?
- (f) Are alterations or additions a defect in the lessee's title, and thus a major problem when the lessee comes to sell the property?

While a detailed examination of the extent of the clause is beyond the scope of this chapter, three of the issues deserve brief comment:

- (a) What are "structural" alterations or additions?

The term "structural alteration" appears quite frequently in some cross lease forms, and while the term is not stated as such in clause 9(a) ADLS 2011/4291, the wording used there achieves the same purpose.

Detailed consideration of what comprises a "structural alteration" was given by Potter J in *Ferguson (Estate of) v Walsh*.²⁵ In brief, alterations that are cosmetic, decorative or superficial; or are non-load-bearing and of little consequence to the other lessees are not likely to be regarded as "structural". On the other hand, alterations that affect load-

but also the restricted use area attached to the lease": DW McMorland and Thomas Gibbons *McMorland and Gibbons on Unit Titles and Cross Leases* (Lexis Nexis Ltd, Wellington, 2013) at 4.11, n 40.

²³ See, for example, *Smallfield v Brown* (1992) 2 NZ ConvC 191,110; *Ferguson (Estate of) v Walsh* (1999) 4 NZ ConvC 193,032; *French v Bickerton* HC Auckland A1646/85, 14 April 1986; *Walsh v Studd* (2003) 5 NZCPR 1; *Song v Chi*, HC Auckland CIV-2011-404-422, 30 June 2011; *Collins v Ko* (2007) 9 NZCPR 83; *Duncan v Taylor* (2010) 12 NZCPR 235; *Duncan v Taylor* (2011) 12 NZCPR 808.

²⁴ DW McMorland and Thomas Gibbons *McMorland and Gibbons on Unit Titles and Cross Leases* (Lexis Nexis Ltd, Wellington, 2013) at 4.11

²⁵ *Ferguson (Estate of) v Walsh* (1999) 4 NZ ConvC 193,032.

bearing and impact on the strength and support of the building; alterations to the exterior of the building which alter its shape or structure; and, more generally, alterations that affect the use or enjoyment of other lessees' flat will be considered "structural" alterations and therefore co-owners' consent must be sought.

(b) What are the consequences of making unauthorised alterations or additions?

If the covenant is binding on the lessee making the alteration or additions, and co-owners' consent is not obtained, he or she may be ordered to restore the building and/or land to its original condition, if damages do not constitute a sufficient remedy. If the work has not yet started or has not been completed, a court may order a permanent injunction preventing any work proceeding.

(c) Post earthquake repair and rebuild

In terms of repairing and rebuilding, an expert lawyer in this field issued the following warning about obtaining neighbours' consents:²⁶

Before any work is carried out, the co-Lessors must agree to that work, noting that consent must not be unreasonably withheld. It is preferable for this to be recorded in an agreement between the Lessors and the Lessees covering the scope of the works, agreement to sign replacement cross leases, and to deposit the new cross lease plan, and what is required if a property is sold prior to the rebuild being completed, how costs will be shared, particularly if the insurance is insufficient, among other things.

(d) When does a defect in title occur and what does that mean?

In order to assess whether a defect in title has occurred, knowledge of the actual footprint of the flat as it appears on the diagram shown in the plan is fundamental.²⁷ Any alterations or additions that are made, with or without co-owner consent, that alter the dimensions of that footprint either horizontally or vertically outside the leasehold boundary (generally the exterior walls and roof of the building) will constitute a defect unless, or until, the title is amended by depositing a new cross lease plan and executing and registering a new cross lease.

²⁶ J Pidgeon "Issues arising in the repair or rebuild of multi-unit residential buildings" (2015) (3) *The Property Lawyer* 14.

²⁷ Improvements within the flat itself, or on the appurtenant restricted use area around the flat if those improvements are independent are not considered defects in title.

In the context of this chapter, the following comment is apt:²⁸

Before any rebuilding or repair is carried out on site, a check should be made with both a surveyor and a lawyer on the status of any cross lease and the implications of any repair or rebuild...If a flat is being reclad, with the insertion of a cavity even if the building is essentially the same, the new building will protrude slightly from the flats plan. Again, technically the cross lease should be surrendered and a new cross lease registered reflecting the new flats plan.

A defect in title will also occur if the alterations extend onto the common property or onto another co-owner's restricted user area.

Failure to amend the title and execute a new lease has far reaching consequences. When the owner of an altered flat decides to sell, he or she cannot give the potential purchaser any interest in the additions and there is a defect in that title. In this instance, the potential purchaser may simply walk away or negotiate a reduced purchase price.

It may also have insurance consequences:²⁹

Often extensions or accessory buildings may have been added over time which have not been incorporated in the flats plan, even if they have been consented to by neighbouring lessors. These additions may or may not be covered by insurance, and are usually dealt with on a case by case basis. The cost of a new flats plan may or may not be covered by an insurer in the case of a claimable event, as the insurer may not pay to update the flats plan if titles were already defective due to other extensions not incorporated in the flats plan.

B Clause 12 and 19 – Insurance

Clause 12 of ADLS 2011/4291 is a lessee covenant – it binds the lessee to certain insurance obligations. As we note later in this chapter,³⁰ breaches of this covenant can occur as a cost-saving measure and, in a post-earthquake environment, an uninsured co-owner is not likely to be interested in undertaking any repairs.

Clause 12 states:

²⁸ J Pidgeon “Issues arising in the repair or rebuild of multi-unit residential buildings” (2015) (3) *The Property Lawyer* 14.

²⁹ J Pidgeon “Issues arising in the repair or rebuild of multi-unit residential buildings” (2015) (3) *The Property Lawyer* 14.

³⁰ See Part X below.

12 (a): Separate Insurance effected by Lessee

To effect and at all times keep current, in the joint names of the Lessors and Lessee for their respective rights and interests, a separate replacement insurance policy (including fire, earthquake and flood risks) for the flat and its appurtenant amenities.

or

12(b): Payment of premium on replacement policy effected by lessors

To pay the Lessors or a person nominated by them or by a majority of them a land share of the premium and other moneys payable in respect of the policy of insurance to be effected by the Lessors under clause 19. In any case where by arrangement between the Lessors and the insurance company the premium in respect of each flat on the land is assessed and payable separately, to pay the separate premium whenever it is due direct to the insurance company and if and whenever required by the Lessors to produce to the Lessors the receipt of that premium.

Clause 19 is a mutual covenant – it binds both the lessor and the lessee. It is fundamental in the context of repair and, with reference back to clauses 12(a) and 12(b), stipulates who is able to make good the destruction or damage and who bears the cost.

Clause 19 states:

19 (a): Reinstatement by Lessee (where clause 12(a) applies)

If the flat is destroyed by any cause whatsoever during the term of the lease the Lessee shall with all reasonable despatch repair and make good that destruction or damage to the reasonable satisfaction of the Lessors, or a majority of them. The cost of doing so shall be borne by the Lessee. If any part of any building on the land not held by a lessee pursuant to any lease is damaged or destroyed then the Lessors shall with all reasonable despatch repair and make good such damage and destruction. The Lessee shall bear a land share of the cost thereof.

19 (b): Reinstatement by the Lessors (where clause 12(b) applies)

The Lessors shall in the name of the Lessors and the Lessee for their respective rights and interests insure and keep insured all buildings on the land against fire, flood and earthquake and such other risks as are normally covered by a prudent owner for the full amount available under a replacement policy and (subject to reimbursement by the Lessee as set forth in clause 12(b)) shall pay the premiums on that policy as they become due. If any of the buildings are damaged or destroyed

from any cause whatever the Lessors shall with all reasonable despatch repair and make good any damage or destruction. If the moneys received under any policy of insurance are insufficient to repair and reinstate the buildings, then the Lessee shall bear a land share of the insufficiency unless the damage or destruction was caused by the negligence of one or more of the Lessors in which case the insufficiency shall be borne by that party or parties.

It is apt to refer to an extremely useful, and clearly still highly relevant, discussion on the importance of insurance for cross lease developments that was given at an Auckland District Law Society seminar in 1991.³¹ While this discussion looked at both cross leases and unit titles, due to changes in the Unit Titles Act 2010, these problems are now cross lease specific. Complications and risks with respect to insurance arise from two problem areas. The first arises from the owners' interdependence:³²

The cross lease [flats], because of their close relationship, construction and use of common facilities have particular problems which are not associated with or are not as serious for owners of individual dwellings. Examples of such problems are:

- (a) Structural damage being caused to one unit because of fire in an adjoining unit
- (b) The value of one unit being lowered because one or more of the other units in the building are burnt out and not reinstated.
- (c) Your clients' lack of control over events in other units in the block which may cause damage to their unit, i.e. taps left on causing floods and unattended heaters causing fires.
- (d) Multiplicity of parties in the case of reinstatement after damage – other owners and their mortgagees and insurers all can become involved.
- (e) In a sense your client's title depends on four walls, a roof and a floor. All of these can be destroyed so that your client's title becomes practically useless: lines on a piece of paper but little else.

As that commentator notes:³³

In practice many [flat] owners have completely disregarded the provisions of their cross leases. They have different types of policies with different insurance companies. This situation...is likely to lead to conflict between the insurance

³¹ P Merfield "Insurance on Cross-leases and Unit Titles" in *Conveyancing Pot Pourri (No2)* (Auckland District Law Society Seminar, 1991).

³² P Merfield "Insurance on Cross-leases and Unit Titles" in *Conveyancing Pot Pourri (No2)* (Auckland District Law Society Seminar, 1991) at 1.1.3.

³³ P Merfield "Insurance on Cross-leases and Unit Titles" in *Conveyancing Pot Pourri (No2)* (Auckland District Law Society Seminar, 1991) at 2.4.

companies possibly leading to delays in having claims actioned while protracted negotiations and court proceedings are resolved between insurers.

We also note a comment about cross lease insurance given by a specialist lawyer amid the post-earthquake repair and rebuild frenzy:³⁴

If all owners do not have the same insurer or insurance policy this may complicate any repair or rebuild process because even if the buildings are separate and not joined, services will always be shared and so neighbours' insurers will need to be involved.

If an owner does not have insurance, they may not be able to pay for their share of the repair or rebuild, even though they have contracted to repair or rebuild. Failure to do so can lead to the sale of the lessee's interest by their co-lessors.

C Clause 6 - Maintenance

Clause 6 of ADLS 2011/4291 is a lessee covenant – it binds the lessee to certain maintenance obligations. Again, this becomes particularly important in a post-disaster environment.

As our findings below show, breaches of this covenant are commonplace in the post-earthquake era in which Cantabrians find themselves.³⁵ For instance, such a breach will occur if a co-owner accepts a cash settlement from his or her insurer for a damaged flat and simply walks away.

Clause 6 states:

(a) Maintenance of exterior and interior by Lessee

At the Lessee's own cost and expense to keep and maintain in good order, condition and repair both the interior and exterior of the flat including any electrical and plumbing equipment, drains, roof, spouting, downpipes and other amenities exclusively serving the flat. Where any part of the flat or the electrical and plumbing equipment, drains or other amenities serving the flat also relate to or serve any other flat erected on the land then they shall be maintained in good order condition and repair by the Lessee together with the lessees of the other flats to which they relate

³⁴ J Pidgeon "Issues arising in the repair or rebuild of multi-unit residential buildings" (2015) (3) The Property Lawyer 14. See also clause 24, at Part V above.

³⁵ See Part X below.

or which are served by them and the cost of so doing shall be borne by the Lessee and the lessees of such other flats in such shares as may be fair and reasonable having regard to the use and benefit derived from that equipment, drain or amenity.

OR

(b) Maintenance of interior only by Lessee

At the Lessee's own cost and expense to keep and maintain in good order, condition and repair the interior of the flat (including the doors, windows and fittings of any kind but not any part of the structure, framework or foundations) together with any electrical and plumbing, equipment and any drains exclusively relating to or serving the flat.

VI Mortgages

Mortgages on cross-leased land may take one of two forms: flats may be built on mortgaged land; or a lessee may mortgage his or her flat. For the purposes of this Report, the latter is likely to be more relevant. When a lessee mortgages his or her flat, the consent of the mortgagee should be obtained to each cross lease in the same development. The following warning is given:³⁶

If these precautions are not taken and the mortgagee exercises the power of sale in the mortgage, it is arguable that ...where a cross-lessee has mortgaged his or her own flat, certain of the covenants in the mortgaged cross-lease may not be enforceable against the purchaser, and any subsequently granted cross-leases would not be enforceable against the purchaser. In effect, the legal structure of the whole cross-lease development would be seriously damaged if not destroyed.

Post-earthquake repairs added an extra complexity:³⁷

If your client owns an individual dwelling the problem of insurance concerns only the mortgagor and the mortgagee. In the case of a mortgage over a [flat] the *other* [flat] owners, their mortgagees and insurers become involved. They will want to ensure that if a unit is damaged then it is reinstated as soon as possible.

³⁶ DW McMorland and Thomas Gibbons *McMorland and Gibbons on Unit Titles and Cross Leases* (Lexis Nexis Ltd, Wellington, 2013) at 4.7(b).

³⁷ P Merfield "Insurance on Cross-leases and Unit Titles" in *Conveyancing Pot Pourri (No2)* (Auckland District Law Society Seminar, 1991) at 1.3.2.

Reference also needs to be made to a provision in Schedule 2 of the Property Law Act 2007. If any buildings or improvements on mortgaged land are destroyed or damaged, the mortgagee, at its option, can apply the proceeds either in or towards:³⁸

- (a) rebuilding or repairing the buildings and improvements; or
- (b) payment of the principal amount, interest and other amounts secured by the mortgage even though such monies are not due to be repaid.

Therein arises a potential conflict between the interests of the mortgagor, mortgagee and the other owners in the development.

The following comment from a mortgagee in our survey is instructive.³⁹

The major issue was the insurer cash settling directly with some customers despite having the bank noted as an interested party. This left us with a seriously devalued security.

VII How to determine a cross lease development?

Without any legislative action to phase out this model of multi-dwelling units on a single title, there are only three ways to determine such a development:

A Unanimous agreements from cross lease parties or initiative by a developer

If there is unanimous agreement by all parties in a cross lease development to determine it, then the parties can surrender the cross leases and create a new title structure.⁴⁰ If the transition is to a fee simple structure the requirements of the Resource Management Act 1991 or the relevant territorial authority, such as the local council, may create difficulties and expense.⁴¹

However, the growing trend for developers to undertake fee simple subdivision around individual units (some of which may share party walls) due to individual titles being more attractive to prospective purchasers attracted the following comment from a planner:⁴²

³⁸ Property Law Act 2007, Schedule 2, Part 1 “Covenants, conditions, and powers implied in mortgages over land” at clause 3 “Application of insurance money”.

³⁹ Response from on-line survey.

⁴⁰ See *Kevdu Properties Ltd v Ko* (2007) 8 NZCPR 23 in which the Court enforced such an agreement.

⁴¹ DW McMorland and Thomas Gibbons *McMorland and Gibbons on Unit Titles and Cross Leases* (Lexis Nexis Ltd, Wellington, 2013) at 4.17.

⁴² Response from on-line survey.

It is bound to create long term issues for rights of access to maintain/repair elements of the building. It foolishly eradicates the need for any formal maintenance plan that would keep the buildings looking tidy in years to come, and creates an issue for ongoing maintenance of shared services in the long term, such as onsite stormwater detention tanks etc, which have a limited life span.

While some of these fee simple developments may use encumbrances, covenants and incorporated societies to effect some community control or oversight, it remains to be seen how effective these structures are in terms of maintenance and repair.⁴³

B Court order

If there is disagreement between cross lease parties, those parties wishing to convert the development into a fee simple title structure can apply to the Court under s 339(1) of the Property Law Act 2007 for an order for the “division of the property in kind among the co-owners”. The Court may, if appropriate, order that, subject to resource consent, the land be subdivided into separate fee simple titles.⁴⁴

C Unit Titles Act 2010

A cross lease development may be converted into a unit title development under ss 191 – 200 of the Unit Titles Act 2010 but this method has attracted the following comment:⁴⁵

However, the Act’s “one size fits all” approach and heavy emphasis on governance and increased administration and associated costs makes it continually unlikely that owners in cross lease schemes, which are generally smaller, sometimes only two properties in an in-fill situation, will convert to unit titles.

In addition, this method can only be used if the flat plan is accurate in its depiction of flats and other building outlines. If the flat plan is not up-to-date, the Unit Titles Act method of conversion cannot be used.

⁴³ See comments at Part XI below.

⁴⁴ See, for instance, *MacKenzie v Smythe* [2012] NZHC 1113, (2012) 13 NZCPR 321.

⁴⁵ DW McMorland and Thomas Gibbons *McMorland and Gibbons on Unit Titles and Cross Leases* (Lexis Nexis Ltd, Wellington, 2013) at 4.18.

VIII Inherent Problems

The problems that exist under this model of ownership for a multi-dwelling unit on a single title were quick to surface and remain today despite a somewhat determined effort by the Law Commission in 1999 to instigate a managed system to phase them out. The following comment, made in 1994, is apposite:⁴⁶

The great disservice which local authorities have done to the general public for a large number of years by refusing to allow fee simple subdivisions ... and forcing the use of the cross lease mechanism is only now beginning to surface in litigation. However, the flow has begun, the problems are constantly arising, and they will continue to do so for a long time in the future.

Local authorities contribute to the problem with cross lease titles by allowing a lessee to obtain a building consent without requiring the execution of consent by the co-lessors, which has led to the proliferation of extensions and alterations to cross lease flats without them being recorded on the flat plan. Owners often mistakenly think because they have Council consent, they have “consent” without understanding that they also need to get their cross lease neighbours’ consent.

IX The Law Commission Report

In its 1999 Report, the Law Commission identified the basic problem with the cross lease system as “public lack of awareness that there are problems”.⁴⁷ It noted aptly:⁴⁸

Most cross-lease owners, it may be suspected, think of themselves as owning their flats plus so much of the surrounding land as they may occupy to the exclusion of other cross-lease owners (whether such exclusion rests on courtesy or custom or the rather sounder basis of a restrictive covenant). They may have been told by the kindly real estate agent ... that they would be “as good as” owners. But of course they are in fact neither owners nor as good as owners ... Common sense suggests, however, that with the passing of time and as buildings age or uses permitted in particular neighbourhoods change, the essentially unsatisfactory nature of this form of tenure will become more and more apparent.

Indeed, while there are advantages of this model⁴⁹ there are many disadvantages for the flat owners. Those disadvantages include:⁵⁰ lack of ownership of the flats (the lessees’

⁴⁶ D McMorland (1994) 6 Butterworths Conveyancing Bulletin 253 at 254.

⁴⁷ Law Commission *Shared Ownership of Land* (NZLC R59, 1999) at [8].

⁴⁸ Law Commission *Shared Ownership of Land* (NZLC R59, 1999) at [8].

⁴⁹ See Part I above.

rights depend upon the terms of the cross lease); the lessee's share in the estate in fee simple can be defeated; the rights of the lessee are different from those of an owner; the lessee's rights of user of the restricted area might be controlled and limited by the terms of the lease; disputes are much more likely to arise because the lessees live in close proximity to one another and because of the complex nature of their rights inter se; the developer often prepares and registers the cross leases so a purchaser buying in often does so on a "take it or leave it" basis; lack of restricted use areas in older cross leases; and insurance.⁵¹

The Law Commission expressed considerable concern about the physical or economic life of a flat which undoubtedly would be far shorter than 999 years.⁵²

Different buildings on the same lot may have different life expectancies. This will usually be so where a new "infill" housing is built on the same lot as an existing older dwelling. There is no machinery for resolving differences as to whether or not a cross lease scheme should be terminated, this being often the only sensible solution if one flat has reached the end of its economic life. A single cross lease owner would be able to prevent this.

The Commission offered suggestions for reform - these are discussed below.⁵³

X Our Findings

A Introduction

It is estimated that there are approximately 20,000 cross leases in the Canterbury region,⁵⁴ approximately 12,000 of which have a shared element.⁵⁵ The remainder are stand-alone buildings. After the earthquakes, many cross leases, especially those with a shared element, had problems with repair, or demolition and rebuild.

We extensively surveyed professionals in the field, particularly lawyers, insurers, mortgagees and engineers. Our findings confirmed that while there have long been concerns about the difficulties of the cross lease form of ownership, it takes a crisis, such

⁵⁰ This list is taken from D W McMorland and Thomas Gibbons *McMorland and Gibbons on Unit Titles and Cross Leases* (Lexis Nexis Ltd, Wellington, 2013) at 4.18 where a more detailed description of the problems can be found.

⁵¹ Insurance issues are discussed below at Part X.

⁵² Law Commission *Shared Ownership of Land* (NZLC R59, 1999) at [12].

⁵³ See Part XI.

⁵⁴ Interview with insurer, Christchurch, July 2016.

⁵⁵ Interview with insurer, Christchurch, July 2016.

as a natural disaster, to highlight the extreme difficulties that cross-lease owners can face. Interviewees have variously described cross leases as “an absolute nightmare”,⁵⁶ or “a massive problem”.⁵⁷

The problems can be categorised as follows:

- (i) Lack of governance structure, the lease and its breach;
- (ii) Vulnerable owners;
- (iii) Poor communication;
- (iv) Insurers;
- (v) The Shared Property Project;
- (vi) Privacy issues;
- (vii) Access to justice.

B Lack of governance structure

A frequent issue that arose from the interviews was the lack of a governance structure in the cross lease model. As noted above, cross leases developed from an inventive use of two statutory provisions in the Land Transfer Act 1952. As opposed to unit titles, there is no discrete statute that governs this model of ownership. A common comment was that the ADLS lease is far from satisfactory in terms of defining appropriate governance. Thus, as one lawyer commented, the problems are no surprise:⁵⁸

It [the model] wasn't ever developed with anything in mind other than saving money and getting around regulations at the time...anything that is put together on that basis is not going to be a perfect vehicle.

Another lawyer noted:⁵⁹

Cross leases are a massive problem. All cross leases need to be converted into something more sensible or there needs to be some sort of free service in place which allows owners to set up appropriate governance relationships so they know how to communicate with each other, and they know how to raise and address issues.

1 Absentee owners

A number of interviewees commented about the added complexity of an absentee owner. One lawyer observed:⁶⁰

⁵⁶ Interview with lawyer, Christchurch, July 2016.

⁵⁷ Interview with lawyer, Christchurch, July 2016.

⁵⁸ Interview with lawyer, Christchurch, July 2016.

⁵⁹ Interview with lawyer, Christchurch, July 2016.

[As regards] absentee owners – there is no structure if someone is living overseas and renting the unit out – no agreement or anything. If you are going to have a meeting, these people don't have to be there, nor do they have to send a representative.

There is no requirement to appoint a New Zealand based representative when the owner is offshore, as under the Unit Titles Act 2010.⁶¹

The lack of such governance encouraged an outpouring of personal grievances in our interviews. In many cases these grievances, which may have been completely unrelated to the actual repair or reinstatement repair of the building, resulted in delay or, in some cases, complete deadlock in that process of repair. Issues surrounding process, communication and relationships were but a few of those that arose. As an example, one issue recounted to us was:⁶²

A tenant leaving a smelly rubbish bin on the path which is the only route to the washing line; no-one shares the gardening equally so it is all left to one resident.

Often, the lack of any structure led to disruptive meetings and at times dominance by one owner thus preventing any possibility of a sensible resolution.

One interviewee observed:⁶³

There are no governance structures so it just becomes a free-for-all. When parties do try to meet to sort out issues, there are no rules around the meetings ...and in that situation property owners can really get frustrated and angry with one another. Generally what happens you have someone dominate and others who are terrified.

In a cross lease situation, often decisions require a 100 per cent agreement, as opposed to the majority percentages for particular resolutions under the Unit Title Act 2010 regime. This led to numerous problems.⁶⁴ A few cross leases do provide for majority decisions,⁶⁵ but this still falls short in terms of process.

⁶⁰ Interview with lawyer, Christchurch, July 2016.

⁶¹ See Chapter 5.

⁶² Interview with lawyer, Christchurch, July 2016.

⁶³ Interview with lawyer, Christchurch, July 2016.

⁶⁴ Interview with insurer, Christchurch, July 2016.

⁶⁵ Avon Publishing Cross Lease Form.

Poor communication was frequently cited as a problem, which is elaborated on below.⁶⁶

2 *The lease*

A number of interviewees identified the fact that many cross lease owners simply do not know what sort of land ownership they have or, indeed, do not have. People “don’t actually understand what a cross lease is”⁶⁷ and, many refuse to believe they have any sort of lease. As one insurance professional stated:⁶⁸

...many customers ...absolutely denied that there was such a thing as a cross lease.

A lawyer noted:⁶⁹

I do conveyancing for people – you explain it, give them all the documents, go through the whole thing but they don’t take it on board [or] if they do, it is in a very superficial way...it is quite an imperfect way to own land.

This lack of understanding makes effective governance difficult:⁷⁰

...the starting point always is the lease...they are reliant on this lease which they are not even aware of...they need to be reliant on it to collectively make a decision and there does not seem to be any understanding out there that their neighbours are important, just as important...and what they want to do is just as important to the owner as to what the owner, himself or herself, wants to do.

An inability to comprehend the nature of the property title can lead to situations where owners act in breach of their lease.

The “as is, where is” sale often resulted in a breach of the lease. “As is, where is” sales were a new phenomenon after the Canterbury earthquakes. Despite the best efforts of insurance companies to ensure that their cash settlements⁷¹ resulted in repair, many cash-settled owners did not repair but simply put their house on the market for sale. Obviously, any such action is a breach of the lease obligation to repair or reinstate.⁷²

⁶⁶ See Part X below.

⁶⁷ Interview with lawyer, Christchurch, July 2016.

⁶⁸ Interview with insurer, Christchurch, July 2016.

⁶⁹ Interview with lawyer, Christchurch, July 2016.

⁷⁰ Interview with lawyer, Christchurch, July 2016.

⁷¹ A cash settlement occurs when the insurer and the insured agree on a price to repair or rebuild the building, the money is paid over, and the insurer has no further earthquake-related interaction or liability with the homeowner.

⁷² Further discussion of the interface between insurers and cross lease owners is detailed below.

C Vulnerable owners

An important aspect of cross lease ownership that was highlighted in the aftermath of the Canterbury earthquakes was the type of owner. A significant number of cross lease owners fall into what might be regarded a vulnerable category. As has been noted with respect to strata titles in other jurisdictions,⁷³ and indeed here in New Zealand, the decision to purchase a cross lease is often not based on choice, but rather affordability:⁷⁴

...you will always have a high percentage of vulnerable people in these types of properties because of the shared walls and floors - they are cheaper to build and therefore they are cheaper for those people.

Different insurers, including EQC, took different approaches as to identifying this less-advantaged group.

As to why the insurers were interested, a lawyer made the following comment:⁷⁵

...[they] knew that certain owners of cross-leased properties were vulnerable, less able to look after their own interests and they [the owners] were meant to be prioritised and meant to be dealt with first but instead the opposite happened so that houses that were repaired first were the stand-alone, fee simple houses that had cosmetic damage.

The following example illustrates the problem:⁷⁶

One owner (our client) has a brain injury and his unit is attached to [the unit of] an elderly male owner. Our client thinks his neighbour has had someone break into his house and because he doesn't have any money, he cannot do anything resolving it...no-one wants to buy his unit because his neighbour has not maintained his. Hence he has suffered a loss of value and there is no real ability for him to leave...enforcing the cross lease costs money, it is a difficult process and is quite overwhelming for people especially as it is more the lower socio economic people that are in these unitsand it is very difficult for one person to try and figure it out

⁷³ See Chapter 2.

⁷⁴ Interview with insurer, Christchurch, July 2016. Note: this obviously refers to joined cross lease properties, not singular units, but is generally accepted that a cross lease property, whether amalgamated or single units will be more affordable than fee simple titles.

⁷⁵ Interview with lawyer, Christchurch, July 2016.

⁷⁶ Interview with lawyer, Christchurch, July 2016.

When trying to carry out assessments or nail down contracts for repair or demolition, insurers faced difficulties dealing with this group of owners. Hoarders often denied access to their property. Some owners lacked the mental capacity to enter into repair contracts, to make the necessary decisions to keep the process going or, following a cash settlement, to be able to project manage the repair of their property.⁷⁷ Others were simply too old:⁷⁸

...when you have got someone very elderly in a flat in a group, often that person just does not want to do anything at all...they just want to stay there in their place, they can live in it at the moment ... but obviously there are a lot of repairs that need to be done...really worrying.

Another interviewee gave the following example of a cross lease owner with a mental health problem who lived in one unit of four: two lower units and two upper units:⁷⁹

Three of the four people agreed that the property needed to be bowled and rebuilt. The fourth refused to agree because one of the people who lived at the top was a designer of golf courses and she thought that once the building was demolished, that owner would build a golf course on the site...so she did not give any permission to demolish and was not even prepared to move out.

An insurer also commented:⁸⁰

We are dealing with very serious issues, I mean really serious ... people who are alcoholics or have ivy growing through their house ...they are living in these flats and incapable of actually making decisions and of course these people although they are fully insured are holding up the demolition of their place.

Added to this mix are complex family relationships which can also cause problems. As noted by an insurance professional, “In the early days it was not quite appreciated how big this problem was going to be”.⁸¹

⁷⁷ As an insurance expert noted: “This raises the question of incapacity. While it is probable that any person or entity could seek an order for control of the property under the relevant legislation, as soon as the living conditions of the owner are affected, there will also need to be a welfare guardian under the legislation”. Interview with insurer, Christchurch, July 2016.

⁷⁸ Interview with lawyer, Christchurch, July 2016.

⁷⁹ Interview with insurer, Christchurch, July 2016.

⁸⁰ Interview with insurer, Christchurch, July 2016.

⁸¹ Interview with insurer, Christchurch, July 2016.

While it needs to be remembered that similar problems occurred with vulnerable people across all types of home ownership, the issue was exacerbated for cross lease owners. For instance, there was a greater risk of owners being bullied by neighbours to make decisions that may not have been in their best interests. Moreover, ironically, such owners could be further disadvantaged by being denied access to free legal advice through the Residential Advisory Service (RAS)⁸² due to conflict of interest. If one other owner of the complex had already approached the service, RAS was prohibited from advising the owners as a collective.⁸³

D Poor communication/behavioural problems

Poor communication between all parties was a frequently raised issue with multi-dwelling units. It was not confined solely to vulnerable owners. While conflict is likely to occur in any situation where people share living space, the problem is exacerbated in the cross lease model of ownership, primarily because of the lack of any governance structure.

The difficulty of obtaining agreement and co-operation amongst multiple owners, whether in a cross lease or unit title situation was widely recognised by multiple professions. As an engineer stated:⁸⁴

Dealing with multiple owners is a huge problem – it is very difficult trying to get buy-in from everybody and consistency.

That viewpoint was reiterated by an insurance professional:⁸⁵

...what we have found is that a lot of delays right through Christchurch and especially in multi-unit areas have come about by human behaviour problems.

And, as one lawyer noted, the more units, the greater the difficulty:⁸⁶

It is virtually impossible to get 26 people who have equal ownership of the land to come to an agreement.

⁸² This organisation is described at Part X below.

⁸³ Interview with lawyers, Christchurch, July 2016.

⁸⁴ Interview with engineer, Christchurch, July 2016.

⁸⁵ Interview with insurer, Christchurch, July 2016.

⁸⁶ Interview with lawyer, Christchurch, July 2016.

Poor communication among owners is exacerbated when there is a staged cross lease development.⁸⁷ For instance, some owners will not be aware of their legal responsibilities such as a driveway they do not use.⁸⁸

Poor communication was not limited to owners. Several professionals identified communication with EQC as an issue. While this problem was felt in many insurance claims (not just cross lease claims), in the general context, one interviewee commented that the EQC complaints process made it “virtually impossible” to progress a complaint and, of the thousands of formal complaints, only a fraction went to mediation.⁸⁹

It was clear that some cross lease owners considered that it was the insurer’s responsibility to co-ordinate the owners.⁹⁰

Poor communication resulted in a lack of trust among the parties. This led to situations where engineers, builders, assessors and the like were walking into tense and angry situations and having to explain themselves. One engineer felt that some advocates and insurers had the ultimate aim of simply getting the dispute into the court.⁹¹

they tell you that straight off to your face – we are going to court and that’s it, so no matter what you try to do it is quite a mess.

Several interviewees commented on the stalling tactics of one flat holder which can lead to a deadlock situation.

Poor communication was exacerbated by the fact that often there are multiple insurers. This is described in detail below.

However, as one lawyer pointed out, successful communication can often depend on well-informed neighbours:⁹²

Sometimes if people understand their obligations under a cross lease, for example, they have an obligation to apply the insurance settlement towards the repairs, then they will get the repairs done and co-ordinate with their neighbour...so where people

⁸⁷ See description of a staged cross lease development at Part IV above.

⁸⁸ Interview with lawyer, Christchurch, July 2016.

⁸⁹ Interview with lawyer, Christchurch, July 2016.

⁹⁰ Interview with lawyer, Christchurch, July 2016.

⁹¹ Interview with engineer, Christchurch, July 2016.

⁹² Interview with lawyer, Christchurch, July 2016.

are co-operative and talk to their neighbours, the cross lease system can work quite well.

E Insurers

When addressing the repair, reinstatement or demolition of cross lease properties, a very real problem was that there were often multiple insurers involved.

As noted above, clauses 12 and 19 of the ADLS 2011/4291 stipulate the obligations of the parties and who is responsible for reinstatement.⁹³

Where there were multiple insurers, the repair issues that related to the proposed methodology and the determination of who was liable for what repairs became very complex. One lawyer noted that problems will arise where there are discrepancies between the ways two insurers treat a shared driveway, or where one neighbour was covered for driveway repairs and the other was not.⁹⁴

It seems clear that insurers of multi-dwelling units initially underestimated the complexities involved in the post-earthquake repair. As one insurance expert noted:⁹⁵

The whole issue of multi [flats] didn't really raise itself as a problem until well into two to two and a half years down the track. All of a sudden the insurers, who had done the initial assessments and EQC had done its initial assessments, suddenly realised that they had assessed their customer's [flat] in isolation and knew that was not the way to go... EQC had recognised the problem fairly early on and they had taken almost all of the multi-[flats] and put them to one side.

The development of the Shared Property Project⁹⁶ generally siphoned off unit-titled properties⁹⁷ as these did not raise as many problems as other forms of multi-unit/flat dwellings.

The following example is a useful illustration of the problems that could occur:⁹⁸

⁹³ See Part V above.

⁹⁴ Interview with lawyer, Christchurch, July 2016.

⁹⁵ Interview with insurer, Christchurch, July 2016.

⁹⁶ See Part X below.

⁹⁷ One lawyer commenting at the peer review stage (Christchurch, February 2017) noted that there were, in fact, some unit title properties in the project which was considered rather strange as they were, presumably, covered by body corporate insurance.

⁹⁸ Interview with insurer, Christchurch, July 2016.

...the insurers realise that if you go and fix one [cross lease] [flat] and it has got a cracked slab needs replacing, that slab goes under all four or all eight or all twelve [flats] so if you have to take the [flat's] slab out that means the whole lot has had to come down and they have found situations where blocks of the [flats] are damaged at one end, but only very slightly damaged at the other end but the whole lot has to come down.... In a normal situation an insurer with a [flat] that has to be demolished could cause damage or consequential damage to another [flat] and that insurer would have to compensate the other insurer. They quickly worked out that in the swings and roundabout situation with the numbers that they were talking, there was no point in going in on an individual basis and trying to establish liability for consequential or collateral damage and to recover that.

As one lawyer noted in respect of initial repair work carried out:⁹⁹

The main problem is that they have looked at it on an individual basis, which they are entitled to do, but it would have been far better if from the start they had really looked at the structure as a whole.

1 Problems identifying cross lease properties

A fundamental problem for insurers was the inability to identify which of its insured properties were among the many cross lease properties in Canterbury.

The general practice of insurers is not to ask the nature of the title of their potential customer. From our interviews, it seems very probable that insurers will now have adjusted their practices to ensure that this information is high on their checklist. Trying to identify a cross lease by an address such as 28B or 1/22 proved to be “totally inadequate”;¹⁰⁰ it could just as easily have been a fee simple subdivision, or simply a renumbering by neighbours.

One insurer described their method of identification:¹⁰¹ they accessed available information from Land Information Memorandums (a LIM) (information available at council offices on a particular property); overlaid the targeted property onto Google Maps; and then isolated the cross leases that had common elements: “an enormous exercise”.¹⁰²

⁹⁹ Interview with lawyer, Christchurch, July 2016.

¹⁰⁰ Interview with insurer, Christchurch, July 2016.

¹⁰¹ Interview with insurer, Christchurch, July 2016.

¹⁰² Interview with insurer, Christchurch, July 2016.

There may have been a more direct method to obtaining this information. The registered title of a cross lease property that comprises two registered estates (a share of the fee simple of the land as a tenant in common; and the owner's leasehold interest in the flat) is accompanied with the flat plan which shows the footprint of the lease boundaries. There may be a simple way of requesting Land Information New Zealand (LINZ) to release the statistics of all cross lease titles in a region, in this instance, Canterbury. There is then a different emphasis on the importance of searching the LIM of that property.

2 *The uninsured*

A cross lease owner may be uninsured. In many cases, this is seen as a cost-saving decision. In a post-earthquake environment, this exacerbates an already fraught scenario. If an owner is uninsured he or she is not likely to be interested in doing any repairs.

F The Shared Property Project

The Shared Property Project was an initiative developed after the Canterbury earthquakes to resolve issues with shared property, primarily cross leases and freehold properties that have shared walls, slabs, ceilings and the like.

Its ultimate aim was to “unblock the road blocks of which there have been plenty”.¹⁰³

In this chapter, we suggest a number of reforms which, if instigated, should result in a much improved response for repairing and rebuilding cross lease properties.¹⁰⁴ If, sadly, these ideas are not acted upon, insurers will be in exactly the same position as they were after the Canterbury earthquakes and something akin to this model will be an important tool. Consequently, the unique enterprise of the Shared Property Project deserves some detailed analysis in this chapter.

A number of insurers who were involved generally in the repair and rebuild of residential earthquake-damaged properties located in the Canterbury region, entered into a Memorandum of Understanding with each other and with EQC. The MOU covered earthquake-damaged dwellings that were adjoining dwellings which shared a structural element (“Shared Properties”) where the insurance cover for the Shared Properties was provided by different insurers. It was clear the ownership arrangements for the Shared

¹⁰³ Interview with insurer, Christchurch, July 2016.

¹⁰⁴ See Part XI below.

Properties made it difficult for the insurers to act independently in arranging the repair or rebuild of these properties.

The insurers agreed to a collaborative and good faith approach to resolve the unique issues arising to such rebuilds or repairs.¹⁰⁵ As an insurance expert noted, “there [was] a massive element of trust” in the documents that were prepared and signed.¹⁰⁶

One insurer commented that one of the positives that emerged from the Project was the waiver of the collateral damage rule when dealing with the targeted multi-unit dwellings.¹⁰⁷ The interviewee questioned whether such a waiver would ever be possible again given that insurance companies have ceased writing open-ended replacement policies, replacing them with policies that nominate a replacement cost figure.

He gave an “extreme situation” of what can happen if no such waiver is in place:¹⁰⁸

The cross lease complex was two-storied: three flats on top, three below. The flat that was the total loss was the bottom middle one. The other five had suffered significant damage but not total loss. To actually demolish and rebuild would mean that under the laws of collateral damage the insurer of that offending property should have to pay for tipping all the others into a total loss.

Given that the waiver under the Project was not applicable to instances where a flat had no insurance or was under-insured, he observed that everything would “fall down like a house of cards”.¹⁰⁹

1 Which properties were to be included in the Shared Property Project

Properties were divided into two categories:

(i) Insured Managed Property

Indicators:

- usually two or three flats
- usually two insurers involved

¹⁰⁵ Some of those insurers had been involved in an earlier Memorandum of Understanding in which they had agreed to adopt this approach for a limited number of Shared Properties as a type of trial run.

¹⁰⁶ Interview with insurer, Christchurch, July 2016.

¹⁰⁷ Interview with insurer, Christchurch, July 2016. The waiver was not applicable to instances where a unit had no insurance or was under-insured.

¹⁰⁸ Interview with insurer, Christchurch, July 2016.

¹⁰⁹ Interview with insurer, Christchurch, July 2016.

- no apparent significant legal issues
- no apparent potential of heightened client anxiety
- same foundation throughout the whole footprint
- same construction and design

(ii) Complex Shared Property

Indicators:

- usually three or more flats
- more than three insurers involved
- potential complex legal issues – or legal issues already in progress
- client vulnerability – identified by insurer
- mixed foundation across the footprint
- mixed design and construction

If the insurer decided that the claim was an “Insured Managed” claim, then it would be dealt with amongst the insurers involved and not advised to the Project Leader of the Shared Property Project. The Shared Property Project would have no involvement with these claims unless specifically instructed to by the insurers through the Project Leader.

2 Complex Shared property: Over cap/under cap¹¹⁰

If it was clear that flats identified as “complex shared property” exceeded the EQC cap, and insurers were in agreement, then the site proceeded to the “full Shared Property Project”.

Once insurers identified flats that they considered should be part of the Shared Property Project, they advised the Project Leader of their desire to include that property and indicated who they thought should be the lead insurer for that particular site.

¹¹⁰ EQC is the primary insurer for earthquake damage to residential buildings and the land on which they stand. It is a statutory body set up under the Earthquake Commission Act 1993 (ECA) which is funded by a levy on insurance premiums paid by owners of residential property. It insures the owners of residential buildings against loss from damage caused by earthquakes and other natural disasters to the buildings, provided there is an insurance policy in place against loss by fire. EQC also covers damage to land under the dwelling or any outbuildings, as well as land within eight metres of such buildings and land used for the main access to the property (but not surface damage to such access). Any such damaged land is covered for its value at the time of the disaster or the repair cost, whichever is the lower amount. Compensation for damage to buildings and land is capped at \$100,000 plus GST per event per dwelling. If there is a series of damaging events, each generates a separate claim. There is no cover for residential buildings which are not insured, or for land zoned residential on which there are no dwellings. There is no cover for commercial, industrial or agricultural buildings or land.

Where one or more of the flats was under cap or had not yet been classified by EQC, or where other complications were evident (for example one insurer had already settled their flat claim at the site) then the insurers could agree that the claim be handled as an “Evaluation”. A “lead insurer” would be nominated by the insurers.

3 Sharing information

Once agreement had been reached with all insurers that a site should be included in the Shared Property Project or Evaluation Process, the Project Leader created a file in a specially designed data repository and provided access to this file to involved insurers. The file was also available to an independent adjuster who was appointed to handle all complex claims (whether Shared Property Project or Evaluation Process) and who was responsible for ensuring that the correct processes and reporting formats were adhered to.

4 Legal advice

Where the independent adjuster considered that there were unusual circumstances that warranted further advice or involvement from a legal expert, he or she would discuss this with the Project Leader who would then seek authority from the lead insurer’s claim handler to obtain this. Once that authority had been obtained, the Project Leader would brief the designated law firm.

5 Engineering advice

In many cases, there was existing engineering advice – both structural and geotechnical – but this usually only related to a specific site, not the total site.

Where there was a conflict in the engineering advice, the adjuster utilised the services of a designated engineering firm, the people of which were the nominated engineers to the Shared Property Project.

6 Memorandum of Understanding for Insurers

The Memorandum of Understanding outlined the intentions of the parties:

- (i) Each insurer was to make available to the other insurers all assessment details (including any third party reports commissioned, that could include, but was not limited to, engineering reports) of the damage to that part of each Shared Property as was insured by that insurer, after obtaining the necessary consent from the relevant owner or owners.
- (ii) The project would be facilitated by one independent insurance industry professional as agreed by the parties and this would include the development

and documentation of improvements to the project and participation in governance issues.

- (iii) The insurers would appoint governance representatives who would meet from time to time to make decisions with respect to issues of strategy and/or principles that might arise within the project; and likewise operations representatives who would make decisions regarding operational matters arising from the project.

The cost sharing arrangement set out the following criteria:

- (i) A Shared Property was to be treated as one structure. This meant that the assessment of whether it was economic to repair an individual flat that was adjoined to another flat or flats would not be determined in isolation of damage suffered to other flats in the structure, but rather determined based on the assessment of the extent of structural damage to the entire structure.
- (ii) If it were determined that the structure was economic to repair, the allocation of costs for such repair were to be apportioned as follows:
 - (i) equally for all damaged “common property” as defined by the cross lease document (this was often the driveway area);
 - (ii) equally for the damage to the structural and external elements of the flats that comprise the one structure, unless, in instances where there are noticeable differences in the floor size of the flats, the insurers agree that costs are to be apportioned according to the relative size of such flats; and
 - (iii) as agreed between each individual insurer and its affected customer for the damage suffered to the internal fit-out of each flat.
- (iii) If it were determined that the structure was beyond economic repair and had to be rebuilt the allocation costs were to be apportioned as follows:
 - (i) equally for all “common property”, as defined by the relevant cross lease document;
 - (ii) equally for the construction of the structural and external elements of the flats that comprise the one structure, unless again, in instances where there are noticeable differences in the floor size of the flats, the insurers agree that costs be apportioned according to the relative size of such flats; and
 - (iii) as agreed between each individual insurer and its affected customer for the agreed value of the internal fit out of each flat.
- (iv) Costs incurred by an insurer in relation to a Shared Property prior to the property being referred to the Shared Property Project, other than costs that could be used for the proposed reinstatement of the Shared Property (such as drilling and geotechnical analysis) were to be borne solely by the insurer.

- (v) All costs arising from the set-up of the Project (including the creation of a common database) and the engagement of the Project leader, loss adjusters, consulting engineers and legal advisers, were to be borne between the parties equitably to the extent that such costs were not directly attributable to a particular flat.

7 Various conditions

The Memorandum of Understanding set out a number of conditions for the interested insurers. These included the following:

- (i) No insurer was to attempt to isolate a flat from the “one structure” approach and argue that its flat was repairable if it were considered in isolation of the damage suffered to the rest of the structure. However, there was one qualification to this. If, after a joint assessment of the structure by all interested insurers, it was agreed that each flat could be repaired in isolation and each individual repair would not impact the structural integrity of all other flats, then each interested insurer could carry out repairs to that part of the Shared Property for which it provided cover individually and in isolation and at its own cost.
- (ii) If uninsured or underinsured units formed part of the Shared Property, the agreed reinstatement plan was to be communicated to the affected owners as soon as was practicable, together with the amount of their expected contribution to the reinstatement.

A lawyer noted:¹¹¹

I’ve had one case where it has worked perfectly – one where there were two different Insurers. One insurer took the lead...so their PMO [Project Management Organiser] ...carried out the assessments and developed the scope...[T]hey project managed the repairs and the repairs happened to overall to be a pretty high standard...[The] owners were able to move on ...it worked perfectly and, as well as that, the lease was complied with.

An insurer praised EQC’s commitment to the scheme:¹¹²

They came on board as well realising that they needed to...they accepted that it was for the greater good.

¹¹¹ Interview with lawyer, Christchurch, July 2016.

¹¹² Interview with insurer, Christchurch, July 2016.

8 *The “no betterment” policy of the Shared Property Project*

An insurance expert in the Shared Property Project explained that while initially the insurer group tried to accommodate requests for betterment, it eventually became clear that accommodating one owner’s wishes for shifting the layout of areas such as showers, laundries and the like led to inordinate delays, as did requests for an extension beyond the original footprint (see comments below). The insurer noted that delay was caused as “they have to stop working on the plan, go back, redraw, go back to the architect – two or three more weeks - then change their mind”.¹¹³ Consequently, the project’s governance arm resolved on a “no betterment” policy – the Project would repair or replace but not improve.

A lawyer provided a useful example that demonstrates why the Project eventually adopted its “no betterment” stance:¹¹⁴

Our clients entered into a shared property scheme for rebuild of the five dwellings on a cross lease title. Three different insurers were involved. Four owners and their insurers very quickly agreed on matters but one owner created difficulties by requesting over \$200,000.00 of betterment to which her insurer would not agree. This owner then engaged an “insurance advocate” to negotiate a cash settlement. The insurers told our clients that they would not go ahead with the rebuild of the remaining four properties because it was not practical. It was an “all or nothing” situation where either all owners were rebuilt under the scheme or they all cash settled. If they had all cash settled the practicalities of the site would have required them to arrange a joint rebuild anyway, so our clients were understandably keen to remain in the scheme. The problem dragged on for over a year until the insurers put a deadline on the situation. The only option at that point was for the hold out owner to opt back into the scheme and agree to its terms. Following a meeting between representatives from the insurance companies, their lawyer and each of the owners and their representatives, the fifth owner did opt back in and the rebuild is due to start in April [2016].

9 *Delays in the Project*

An insurance interviewee explained some of the reasons for delays in the Project and estimated that 40 per cent of the delays were owner delays. The following example of various owners’ stalling, described as a “nightmare”, was given:¹¹⁵

¹¹³ Interview with insurer, Christchurch, July 2016.

¹¹⁴ Response from on-line survey.

¹¹⁵ Interview with insurer, Christchurch, July 2016.

One claiming from EQC; the second asking for the claim to be put on hold while he gets a deed of assignment and seeks legal advice; the third not wanting the building company involved due to previous unfortunate dealings with it; the fourth disputing the repair methodology; the fifth with a property that had potential water tightness issues.

10 Building outside the footprint

Despite the “no betterment” policy that was eventually put in place, it is possible that repairs to a cross lease complex have resulted in buildings being built or repaired outside the initial footprint. This will generally occur where new building codes mandate changes to the original construction, for example, a thicker fire wall. To comply with the building code, if five fire walls have been thickened, the building extends beyond its original slab footprint. As explained above, extension beyond the original footprint results in a defect of title and requires a new plan to be struck. As an insurance interviewee commented – there are two options: “go outside the slab or decrease the internal space...and no homeowner is going to say, yes please increase the wall on the inside”.¹¹⁶

This creates its own set of problems which the insurers appear reluctant to cover: the owners will require a survey to define the new plan and, as one insurance expert noted, that is the owners’ problem.¹¹⁷ For the insurer the rebuilding beyond the footprint is not a “sudden loss” and is thus not covered under a normal insurance policy.¹¹⁸

11 Evaluation

At the time of writing, the Project is still running. It remains to be seen whether insurers and owners alike consider it was successful. Early indications are positive.

One lawyer observed:¹¹⁹

It can [work well]... Sometimes the insurers or property owners will come up with some innovative ways of resolving whatever obstacles there are preventing them all from settling in the same way. For example, if one party is underinsured they might come up with a way of resolving it or may decide to top up the repair or rebuild themselves...so they can all have a managed repair or rebuild.

¹¹⁶ Interview with insurer, Christchurch, July 2016.

¹¹⁷ Interview with insurer, Christchurch, July 2016.

¹¹⁸ However, that interviewee suggested that some insurance companies had agreed to cover that cost. One law firm noted that it had been involved in the legal work for at least three blocks of flats to update the cross lease flat plan, with that work being paid for by the SPP. (Lawyer, Christchurch, July 2016.).

¹¹⁹ Interview with lawyer, Christchurch, July 2016.

One of our main recommendations in this Report is that the cross lease model of ownership should be abandoned and existing cross leases be converted either to subdivision or a type of unit title. If that recommendation is not initiated, and assuming the Project's ultimate success, we feel confident in recommending that a scheme such as this be embedded as a disaster recovery instrument created ahead of time in preparation for any future disaster where widespread repairs or reinstatement of cross lease buildings will again be required.

G Cash Settlements

The cash settlement process becomes complex when a multi-dwelling unit is involved. With reference to cross leases, one lawyer commented:¹²⁰

[A cash settlement] leaves the property owners to co-ordinate their own repair or rebuild rather than having the insurer oversee it. So although the claim is settled and the clients have the money the house isn't fixed and they will need to go through the process of collaborating with the neighbours to get it fixed and ..the costs can escalate as time goes on...so when it comes to repair or rebuild there might not be enough funds to cover it.

Another lawyer noted the instances where one unit owner had left with the insurance money and had managed to find a purchaser who was prepared to take on whatever obligation there was to repair... "that is very risky and there is not a lot of legal protection around that".¹²¹

In other instances, a cash settlement is the only practical solution.

H Privacy Issues

A number of interviewees noted that privacy issues among the owners of a flat in a cross lease complex could be a major road block in terms of negotiating a repair or a rebuild. This highlights the unusual nature of cross lease ownership. As explained above, each flat holder is a co-owner of the fee simple title, a lessor of the leasehold estates, and a lessee of his or her unit. Hence, each flat holder has an intricate legal relationship with his or her neighbours in the complex and yet, in practice, each flat holder generally acts as a sole fee simple owner, and, at least until difficulties arise, has little, if anything, to do with

¹²⁰ Interview with lawyer, Christchurch, July 2016.

¹²¹ Interview with lawyer, Christchurch, July 2016.

those neighbours. It is therefore no surprise that in the post-earthquake era, those owners considered their privacy sacrosanct. This led to problems.

One insurer commented on the “massive waste of resource” when an insurer finally receives an “over-cap” claim from EQC and has to repeat an engineering and/or geotechnical assessment from scratch despite the fact that that investigation has already been done by EQC, sometimes by the same experts, because of the reluctance of one insurer to share that information with another.¹²² The insurer made the following comment about the cross lease neighbours:¹²³

Yes, and in fact we went to the Privacy Commissioner and laid out the problem. We said we are going to have to run right across this...and inevitably each neighbour is going to have to see almost the full financial plans and the full financials of everybody else [in the complex] and so [full] sharing of the information... Effectively in some ways the cross lease almost binds them into that sort of arrangement because unwillingly or unknowingly they had almost committed to a communal arrangement anyway.

I Access to Justice

1 Residential Advisory Service

As our findings show, in post-earthquake Christchurch many unanticipated complex legal problems concerning repairs and rebuilds arose. For a single property, these often involved the owner, an insurance company and a mortgagee - and lawyers singularly representing the three groups. Problems over cross lease properties featured prominently. The complicated discussions and inevitable disputes were clearly going to come at a huge expense.

The Government, recognising the fundamental right of access to justice, set up the Residential Advisory Service (RAS) for residential property owners facing the challenges of repairing or rebuilding. It was established on 16 May 2013 and operated under the aegis of Community Law Canterbury. This free and independent organisation is described as “agile and flexible and...has evolved to meet homeowners’ needs”.¹²⁴

¹²² Interview with insurer, Christchurch, July 2016.

¹²³ Interview with insurer, Christchurch, July 2016.

¹²⁴ Residential Advisory Service for Property Owners “About RAS: Introducing the Residential Advisory Service” <www.advisory.org.nz>.

RAS is funded by MBIE, EQC, Christchurch City Council and the major insurers via the Insurance Council of New Zealand.¹²⁵ Representatives from these organisations and the Community Forum (a branch of the Canterbury Earthquake Recovery Authority (CERA)) make up the RAS governance group which oversees the service, sets the strategy, makes key decisions and manages relationships across key agencies.

At first, RAS lawyers ran the cases and this meant that access to this free advice became unavailable if a conflict of interest occurred. If one other owner of the complex had already approached the service, RAS was prohibited from advising the owners as a collective.¹²⁶

Subsequently RAS devised a system whereby the homeowner meets with a broker who has experience working with homeowners, insurers and EQC. If the homeowner's situation has technical problems, the situation may be referred to the RAS technical panel which can provide independent comment on the insurer's and homeowner's reports. This can result in an assurance to the homeowner that the suggested repair solution is appropriate. If that assurance cannot be given, concerns will be highlighted and if the situation has a legal aspect to it the broker has access to qualified lawyers from Community Law Canterbury to offer advice.¹²⁷

All RAS brokers have considerable experience operating in the earthquake environment assisting people in various capacities.

Insurers have agreed to participate in the service in good faith. However, if the homeowner has filed legal proceedings against his or her insurer, or engaged with the Insurance and Financial Services Ombudsman (IFSO) RAS's services are not available to that homeowner.

The organisation's website cites its statistics as they stood on 31 August 2015, just over two years into its operation. Given that our interviews with some of the RAS team demonstrated the high scale of cross lease queries they dealt with, the statistics deserve mention here.

¹²⁵ At the time of releasing this Report, funding has essentially been wound back prior to termination.

¹²⁶ It should be noted that, under the unit titles regime, the Body Corporate collective can make a decision whether or not an individual is engaged with the process, and if the individual disagrees, there is a time limit on them lodging an application to object to the collective decision so that the Body Corporate can progress matters and not be held to ransom by a single owner.

¹²⁷ See Residential Advisory Service for Property Owners "About RAS: Introducing the Residential Advisory Service" <www.advisory.org.nz>.

The organisation:¹²⁸

- (i) had received 10,084 contacts from homeowners;
- (ii) had, through the service’s Independent Advisors, held face-to-face meetings with 2,471 homeowners;
- (iii) had successfully progressed or resolved the claims of more than 1,900 homeowners; and
- (iv) had referred nearly 250 cases to the technical panel to seek a second opinion.

2 Arbitration

Clause 26 ADLS 2011/4291 provides that where there is any dispute or difference that arises between the parties (or their respective representatives or assigns) with respect to the lease; or any duties, liabilities of any party in connection with the land, flat or any other buildings on the land; or the use or occupation of the land, flat or other buildings on the land, that the matter be referred to arbitration.¹²⁹

However, given the financial restraints on many cross lease owners, one lawyer noted that “arbitration is a bit expensive and out of reach for some people.”¹³⁰

A number of our interviewees had some very pragmatic ideas for more financially accessible methods of dispute resolution and these are described below.¹³¹

XI Reform

From our interviews, across all professions, we were left in no doubt there was uniform agreement that the cross lease system of ownership should be completely eliminated.

Failing that, major reform is required with some form of internal governance structure established and legislation to mandate a single insurer. As one insurance professional stated:¹³²

¹²⁸ Residential Advisory Service for Property Owners “The Residential Advisory Service – two years on” <www.advisory.org.nz>. There has been a substantial increase in all categories since 31 August 2015.

¹²⁹ Clause 27 of the ADLS 2011/4291 stipulates the procedure for decisions lessors or lessees might wish to make and, if the proposed action is not agreed to unanimously, the matter will be deemed to be a question to be arbitrated under clause 26.

¹³⁰ Interview with lawyer, Christchurch, July 2016.

¹³¹ See Part XI below.

¹³² Interview with insurer, Christchurch, July 2016.

I think there absolutely needs to be just one insurer - the insurers have come to this themselves and I've raised this, saying we need to address it. I feel as though there is legislation on the way.

There are many ways to start a discussion on any such reform but we feel that the most useful starting point is to reconsider some of the recommendations (including draft statutory provisions) made by the Law Commission in its 1999 Report.¹³³ Unfortunately, while some of the Law Commission's suggestions for unit titles were considered in the modelling of the Unit Titles Act 2010, none of its suggestions for dealing with the fraught cross lease housing model was adopted. Eighteen years later, problems with the model continue and have been exacerbated by the added complexities of repair and reinstatement, not to mention insurance woes, after the Canterbury earthquakes. As will become clear from the commentary below, dealing with the problem in 1999 (a relatively tranquil environment) would have eliminated many of the current cries for action.¹³⁴

No legislative action has yet been taken though thousands of such situations exist throughout New Zealand affecting in many cases the most valuable asset of the lessee, his or her home.

The Law Commission did not anticipate that major deficiencies in the model would manifest themselves though a natural disaster. They did however consider the "end of life" scenario of a cross lease complex and its comments on that matter are prescient in the current Canterbury circumstances.¹³⁵

It is important to be clear about the consequences of not grasping the nettle of reform. Quite apart from the problems that may arise during the life of the buildings, a time will arrive when the economic life of one or more of the dwellings forming part of a particular scheme is at an end...One may guess that few, if any, of the cross lease dwellings built since 1972 will have a life in excess of 100 years, and at the more jerry-built end of the market their life can be expected to be substantially less.

What will be the position (given a lease of only the existing dwelling) of the owner of a cross-leased home that is beyond economic repair? If all buildings in a particular complex are in the same plight the owner may be able to persuade all the other lessees to either join in a subdivision ...or to surrender their leases and sell the whole

¹³³ Law Commission *Shared Ownership of Land* (NZLC R59, 1999).

¹³⁴ DW McMorland and Thomas Gibbons *McMorland and Gibbons on Unit Titles and Cross Leases* (Lexis Nexis Ltd, Wellington, 2013) at 4.18.

¹³⁵ Law Commission *Shared Ownership of Land* (NZLC R59, 1999) at [27].

property en bloc. If there is no agreement to this, the owner could conceivably erect a new dwelling occupying the same footprint as the old if his lease included the land on which the building was erected and had provision for this (but it will almost certainly not). A partition application might be a possibility but this is likely to be very much more expensive than the proposal we advance in this report. If these solutions are unavailable, he will be left owning a lease of a dwelling which is unusable without uneconomic expenditure, which is unsaleable and which by his lease he has probably covenanted to maintain and repair. Because such an outcome will be readily foreseeable by any potential purchaser, the property will be likely to have been unmarketable for some little time before reaching the repair stage. It is surely better to try and sort out such potential problems now, than to shut one's eyes to them.

While, in some ways, in the Canterbury post-earthquake era, the entrance of insurers (not even contemplated in the above comment) into this conundrum deals with some of the financial aspects of an uneconomic repair (but the above comment reminds the reader that any rebuild on an existing platform must have the consent of all the other co-owners in the complex), the ever-increasing pressure from insurers to cash settle a claim, creates a situation that falls squarely into the problems identified above. The reader is referred to our Chapter One: Introduction where the illustration was given of an elderly resident who was left with a boarded-up party wall when her co-owner made a hasty repair, took his cash settlement and moved to Timaru.¹³⁶

A The Law Commission's suggestions

The Law Commission made three suggestions, each of which are dealt with in detail below.

(i) *Phasing Out.*

The Law Commission suggested the immediate prohibition of new cross lease schemes. There was widespread support for this initiative.¹³⁷

(ii) *Voluntary conversion of cross-lease schemes to subdivisions.*

Not surprisingly, there were no objections to this proposal.

¹³⁶ See Chapter 1.V.

¹³⁷ See, for instance, the Real Estate Institute of New Zealand, the Auckland City Council, the Property & Land Economy Institute of New Zealand Incorporated, the New Zealand Institute of Surveyors and Local Government New Zealand. Housing New Zealand supported a ten year "phasing out" period.

- (iii) *Mandatory conversion of cross lease schemes to unit title schemes or subdivisions.*

This third suggestion attracted considerable criticism.

One argument advanced by those who opposed this suggestion was that there was indeed an advantage for those holding under cross lease schemes – the ability to regulate the behaviour of neighbours living in close proximity.¹³⁸ The Law Commission responded:
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This contention seems over-sophisticated. We very much doubt whether the overwhelming majority of those acquiring cross-leases look at the matter this way. If this is wrong and it is genuinely important to a cross-lease owner that the leases comprising a particular scheme forbid (say) more than one budgerigar per flat, it is always possible to provide for that prohibition by means of a restrictive covenant...

The Law Commission noted that a much more common argument against the suggestion of mandatory conversion was the cost, particularly as it may affect older people with modest means.

The Commission proposed a softer alternative – that mandatory conversion be achieved indirectly by a prohibition after the mandatory conversion date of the registration of any dealing affecting a cross lease other than a transmission or vesting order. Therefore, on the registration of any dealing other than a transmission or vesting order, cross lease owners would be required to convert their cross lease scheme to a subdivision or a unit title scheme.

1 Prohibition and Phasing Out

In its Summary of Recommendation, the Law Commission's second bullet point was clear:¹⁴⁰

- A2 No further cross-lease schemes should be permitted

¹³⁸ One insurer, (Christchurch, July 2016) noted that often shared freehold titles were more troublesome than cross leases. In the former, the only agreement between owners was a “very lightweight” party wall easement.

¹³⁹ Law Commission *Shared Ownership of Land* (NZLC R59, 1999) at [16].

¹⁴⁰ Law Commission *Shared Ownership of Land* (NZLC R59, 1999) at Appendix A: Summary of Recommendations.

In order to achieve this, the Law Commission, in its proposed Shared Ownership of Land Bill (in this chapter, proposed SOL Bill) suggested the following statutory provisions.

Part 1 [of the proposed SOL Bill] is intitled “Amendments to the Land Transfer Act 1952”.

Clause 3 inserts a new Part, after Part VIIA (Flat and office owning companies”): “Part VIIB: Prohibition and Conversion of Cross-Leases”.

Clauses 121Q and 121R state:¹⁴¹

121Q Meaning of cross-lease

For the purposes of this Act, a cross-lease means a lease of a building or part of a building on, or to be erected on, any land

- (a) that is granted by the registered proprietor of the land; and
- (b) that is held by a person who is a registered proprietor of an estate or interest in an undivided share in the land.

121R Prohibition on dealing with cross leases

- (1) No Registrar may register an instrument purporting to transfer or otherwise deal with any estate or interest in land if that land is subject to a cross-lease, or a cross-lease itself.
- (2) Subsection (1) does not apply to
 - a. a transmission; or
 - b. a vesting order of an estate or interest under s 99; or
 - c. the vesting of an estate or interest under s 99A; or
 - d. an application under s 121S.
- (3) This section comes into force on a date to be appointed by the Governor-General by Order in Council but that date is not to be earlier than 10 years after the commencement of the Act.

It is clear from the Report (and the explanatory note in the proposed Bill) that the effect of clause 121R is to forbid the registration after a mandatory conversion date of any dealing affecting the title of a cross lease owner, other than the exceptions stated. The mandatory conversion date would be fixed by Order in Council and must not be sooner than 10 years after the commencement of the Act, thus:¹⁴²

¹⁴¹ In clause 121R(2) s 99 refers to s 99 of the Land Transfer Act 1952: “Memorandum of vesting order to be entered on register”; s 99A refers to s 99A of the Land Transfer Act 1952: “Vesting by statute” and clause 121S refers to s 121S of the proposed Shared Ownership of Land Bill: “Voluntary conversion of cross-leases”.

¹⁴² Law Commission *Shared Ownership of Land* (NZLC R59, 1999) at [26].

...leaving it for the government of a decade hence to make the final decision as to when provision of mandatory conversion should be brought into force in the light of such matters as the then economic climate and the number of voluntary conversions.

(a) Comment about prohibition

The Law Commission prefaced the comment above by stating “[t]he urgent matter is stopping any more cross leases”.¹⁴³ The drafting in clause 121R does not achieve this – it is designed to deal with a phasing out of cross leases. There appears to be nothing in the proposed Bill, despite the intituling, that would have the effect of an immediate prohibition on creating any more cross leases.

Recommendation 3.1: We recommend that a new Part of the current Land Transfer Act 1952 be enacted after Part VIIA (Flat and office owning companies’): “Part VIIB: Prohibition of and Conversion of Cross-Leases”.¹⁴⁴

Recommendation 3.2: We recommend the clauses 121Q and 121R of the proposed Sale of Land Bill be enacted as part of Part VIIB of the Land Transfer Act 1952.

Recommendation 3.3: We recommend that a further section be inserted in the proposed SOL Bill, and then enacted as part of Part VIIB of the Land Transfer Act 1952, after s 121Q and before s 121R, simply stating:

121 QA: “No Registrar shall register any new cross lease instrument”.

This would have immediate effect.¹⁴⁵

There may, however, have to be a limited grace period to accommodate any developments already under construction that are intending to use the cross lease system. A warning should be issued to any “budding” developments not yet under construction that the cross lease model will not be acceptable. Rumours that the Auckland Unitary Plan anticipates many cross lease properties for its increased density precincts suggest that immediate action on this front is imperative.¹⁴⁶

¹⁴³ Law Commission *Shared Ownership of Land* (NZLC R59, 1999) at [26].

¹⁴⁴ Should the current Land Transfer Bill be passed (see Land Transfer Bill (2016) No 118-2) this new Part should be placed after Part 3, subpart 6 (Flat and Office Owning Companies).

¹⁴⁵ In Part 1, clause 2 of the proposed Shared Ownership of Land Bill states at clause 2(2): “Except for section 121R, this part comes into force on the day after the date on which this Act receives the Royal assent”.

¹⁴⁶ Conversation with lawyer, Wellington, February 2017.

Recommendation 3.4: We recommend that s 66 (“Certificates of title in respect of leasehold interests”) and s 72 (“Tenants in common entitled to separate certificates of title”) of the Land Transfer Act 1952 be amended to make the prohibition on any further cross leases clear. The new amendments (s 66(6) and s 72(2)) (with the current wording in s 72 becoming s 72(1)) would state:

“For the avoidance of any doubt, this section must not be used as a mechanism to create a cross lease title.”

This may necessitate elevating the definition of a cross lease (as it appears in clause 121Q) to the main Interpretation provision of the current Land Transfer Act 1952 (s 2).

2 *Voluntary conversion to subdivision*

Clause 121S of the proposed SOL Bill deals with voluntary conversions to subdivision. It provides that the procedure for conversion from cross lease to subdivision is by application to the Registrar (subclause (1)). Subclauses (2) and (3) are concerned with the bringing down of encumbrances on to the new titles. Subclauses (4) and (5) make it clear that no consents (whether from territorial authorities, encumbrancers (for example a mortgagee) or head lessees) are required, other than those of the registered proprietors of the converted land.

Clause 121T of the proposed SOL Bill particularises the contents of a clause 121S application, and makes it clear that the consent of the territorial authority is not required to any right of way and that any requirement under the Resource Management Act 1991 for a survey plan does not apply.¹⁴⁷

In its Preliminary Paper, the Law Commission noted:¹⁴⁸

The legislation must make it clear that territorial local authorities are not to have the right to thwart either voluntary or mandatory conversion by the subdivisional requirements of the Resource Management Act 1991. This would include any requirement for the upgrading of affected buildings of the sort contemplated by the Resource Management Act 1991 section 224(f). It seems inappropriate for a physical upgrading of a building to be required where no change in use or effective ownership is contemplated but merely a tidying up of the method of tenure.

¹⁴⁷ Clause 121U of the proposed Shared Ownership of Land Bill (“Incidental rights”) is intended to avoid, if desired, the need to particularise rights such as easements and the like; and clause 121V provides the machinery for the extinguishing or varying of clause 121U rights. Clause 121W provides for the notification of the change of ownership to the territorial authority.

¹⁴⁸ Law Commission *Shared Ownership of Land* (NZLC PP35, 1999) at [15].

While this view was supported by the view of the New Zealand Institute of Surveyors and the Real Estate Institute of New Zealand, unsurprisingly Local Government New Zealand expressed grave concerns about the proposal that cross leases become subdivisions without local authority approval.

This view attracted a strident comment from the Law Commission:¹⁴⁹

But the present mess is essentially the territorial authorities making it easier for developers to cross-lease than subdivide. If, in permitting cross-leases, the local authorities have failed to make proper provision for the matters listed by Local Government New Zealand that is unfortunate, but the tidying up of the legal position that we propose should not be seized upon as an occasion to remedy such past blunders or levy fresh revenues or incur costs.

Thus, the proposed SOL Bill unwinds the dramatic shift that occurred when the Resource Management Act 1991 (RMA 1991) was passed. It repeals s 218(1)(a)(iv) of the Resource Management Act 1991 – the provision that made the grant of a cross lease a “subdivision of land” and thus required a subdivision consent to be obtained for a cross lease development in accordance with the provisions of that Act.

It also inserts a new provision after s 218 of the Resource Management Act 1991 that provides a prohibition on subdivision by way of cross lease.

The Law Commission also made it very clear that it would be inappropriate to charge registry fees in respect of conversions:¹⁵⁰

...The Land Transfer Act 1952 section 170 provides that the cost of corrective surveys should be borne by the consolidated fund. There is a real sense in which the reform we are proposing can be described as corrective. Successive statutes enabled de facto subdividing by cross-leasing. In enacting the [now repealed] Unit Titles Act 1972, the legislature failed to harken to proposals that the creation of further cross-leases be outlawed.

...

¹⁴⁹ Law Commission *Shared Ownership of Land* (NZLC R59, 1999) at [20].

¹⁵⁰ Law Commission *Shared Ownership of Land* (NZLC R59, 1999) at [23].

In all those circumstances it seems reasonable that the taxpayer, who will have to make up the registration fees not charged under our proposal, should make that modest contribution to the costs of conversion.

The Law Commission thus noted the various cost-saving measures it proposed, noting that the list “leaves an irreducible minimum of legal and surveying costs”:¹⁵¹

- (i) dispensing with mortgagee and other consents;
- (ii) dispensing with territorial local authority consents;
- (iii) eliminating or reducing the cost of easements and restrictive covenants; and
- (iv) dispensing with registration fees.

Seventeen years and a major earthquake later, not one of these proposals has been introduced.

The comments from our interviewees echo exactly what the Law Commission hoped to avoid.

One lawyer commented that fee simple conversion was complicated and expensive because of Council requirements and suggested that there should be more Council flexibility.¹⁵²

We also have had some owners who are moving to fee simple but that has been harder than it should be because of the Council requiring some upgrading because of the change in the legal structure. We have some on the hill where there is a long driveway...Council requirements about that will kill the conversion and we will probably be doing just a new cross lease. Some cross lease properties have a single water meter for say two flats and the Council insists on a new connection – there is nothing different on the ground, there is the same demand, there is the same pipe facility serving the two houses.

The Council’s unwillingness to let go of the lever that requires upgrading or modernising is a problem. If we could drop that so that the conversion to fee simple is simpler people who are now facing earthquake issues would be able to come to a better solution.

Another lawyer suggested that there should be a window of two to three years where there was a waiver of the subdivision fees to convert the title to fee simple ownership.¹⁵³

¹⁵¹ Law Commission *Shared Ownership of Land* (NZLC R59, 1999) at [24].

¹⁵² Interview with lawyer, Christchurch, July 2016.

¹⁵³ Interview with lawyer, Christchurch, July 2016.

Recommendation 3.5: We recommend clauses 121S and 121T of the proposed Sale of Land Bill be enacted as part of Part VIIB of the Land Transfer Act 1952.

Recommendation 3.6: We recommend that the Resource Management Act 1991 be amended by inserting after s 218 a new provision to prohibit subdivision by way of cross lease.

The proposed SOL Bill, as well as advocating a complete prohibition on any new cross lease developments, recognises that regulatory measures should be taken for the many existing cross lease properties problems.

The following commentary expands on the suggestions made under the proposed SOL Bill, and, if all else fails, considers ways of improving the current model.

3 Conversion to a unit title

The Law Commission did not explore in depth conversion of cross leases to unit titles. This is discussed below.

B Conversion to a Unit Title

Unit titles have been described in the following terms:¹⁵⁴

Unit [t]itles are the best method of ongoing communal ownership in terms of a legislated process for decision making and resolving disputes.

The UTA provides for a method of property ownership which allows owners to privately own their part of the building and is suitable when there are common areas which need to be maintained and provided for. It provides for a mandated system of property management and maintenance governed by owners, who together comprise the body corporate.

Thus, the following comments from our interviewees were not surprising:

Generally it is probably easier not to have cross leases so people don't need to cooperate with their neighbours ...perhaps having some kind of governance structure for a cross lease such as the unit title structure might be a possibility.¹⁵⁵

¹⁵⁴ J Pidgeon "Property – converting cross leases to freehold and unit title (New Zealand Law Society webinar, March 2014) at 17. For a full discussion on unit titles, see Chapter 5.

¹⁵⁵ Interview with lawyer, Christchurch, July 2016.

I think unit titles for some of them – the ones that have a lot of party walls and are larger. Where there are just two, three or four [physically] separate units, you should be able to sort out fee simple titles and easements. That would be ideal.¹⁵⁶

Either all cross leases need to be converted into something more sensible or there needs to be some kind of free service in place which allows owners to set up appropriate governance relationships so they know how to communicate with each other, they know how to raise issues, they know how to address issues.¹⁵⁷

1 The road blocks

This chapter borrows, and summarises, a succinct commentary of some of the complications of such a conversion:¹⁵⁸

- the co-owners would need to have one insurance policy covering all units (unless they are stand-alone buildings);¹⁵⁹
- the co-owners would have to have a long-term maintenance plan that outlines the requirements for maintenance over the next ten years;
- there will be a body corporate comprising the co-owners, and that body corporate is responsible for ensuring that the properties are maintained properly;
- a valuer must be engaged to value the respective values of each flat, and each owner would be given a number of ownership interests being their proportion of 10,000 depending on the respective value of their unit:

This could mean that if one flat was worth more than the other, they might have over 50 per cent of the ownership interests and if there was ever a vote, and it wasn't a special resolution, and the two owners disagreed, the owner with the higher ownership could always demand a poll and override the other owner.

- The provisions in the Unit Titles Act 2010 allowing for conversion are only available if the flat plan completely mirrors the buildings on the

¹⁵⁶ Interview with lawyer, Christchurch, July 2016.

¹⁵⁷ Interview with lawyer, Christchurch, July 2016.

¹⁵⁸ J Pidgeon "Property – converting cross leases to freehold and unit title" (New Zealand Law Society webinar, March 2014) at 17. See Chapter 5 for a full discussion of the complexities of repairing and rebuilding under the unit title scheme following a natural disaster.

¹⁵⁹ As discussed below, irrespective of conversion or not, many interviewees considered that this was an essential requirement for all cross lease properties. One insurer (Christchurch, July 2016) observed that simplicity should be the driving factor: a simple administrative process and a simple insurance process able to be provided by all insurers in the market, thus creating an even playing field for all. That insurer also urged that New Zealand consider adopting proposals in some Australian states whereby insurance quotes are sought from at least three insurers at each renewal stage.

property.¹⁶⁰ If there have been alterations going beyond the flat outline, the co-owners would either need to lodge a new flat plan incorporating these changes before proceeding to conversion; or would need to obtain a full subdivision consent to convert to a unit title, just as one would for obtaining a fee simple subdivision consent;

- If conversion proceeds under the Unit Titles Act 2010 there are ongoing requirements including annual general meetings of the body corporate and insurance and maintenance responsibilities, and, on a sale, additional costs involving disclosure statements and insurances.

A lawyer with expertise in the area has suggested that any conversion to a freehold strata title should be done with an overlay of covenants, encumbrances and consent notices.¹⁶¹ A registered encumbrance could refer to an overarching management agreement to govern decision-making and to cover off rights of support, cabling, interlinking piping and the like, binding future owners and mortgagees, and thus avoiding the complications of registering numerous complicated easements which would need to be amended from time to time.

Nonetheless, as this Report attests, while the Unit Titles Act 2010 requires some major reform, the model itself is considered a robust form of multi-dwelling ownership. Hence our recommendation below for existing cross leases.

Recommendation 3.7: We consider that where existing cross leases are converted to a small number of unit titles, the regulatory and management provisions should be less onerous than those that currently exist under the Unit Titles Act 2010.

3.7.1. We recommend that the body corporate be regulated under a modified and simpler version of the current 2010 Act. While guidance in relation to medium sized and large sized unit title entities can be found in the size threshold limits proposed by the Ministry of Business, Innovation and Employment Discussion Document, “Review of the Unit Titles Act 2010”;¹⁶²

¹⁶⁰ Unit Titles Act 2010, ss 191-200. However, “ given the emphasis on administration and the associated costs of unit titles, it is not likely that smaller cross lease developments will seek to convert to unit titles” (J Pidgeon “Property – converting cross leases to freehold and unit title” (New Zealand Law Society webinar, March 2014) at 17).

¹⁶¹ Lawyer commenting at peer review stage, Christchurch, February 2017.

¹⁶² Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 3.1.

3.7.2. We recommend that in the case of converted cross lease entities with six or fewer units, these entities should operate under an even less strict regime than that Discussion Document proposes for entities of up to 10 units.

C If no conversion to subdivision or unit title

1 Lease

It has been suggested that if a lease is required, it only needs to be a bare ground lease.¹⁶³ The use of land covenants and, importantly, consent notices from councils governing building structures and aesthetics offers a better and more transparent legal structure than the current cross lease templates that are not well drafted in terms of dealing with alterations and additions and the dispute process. This suggestion requires more detailed investigation.

2 Insurance

If the above options are not instigated, either voluntarily or mandated by legislation, and cross leases continue to exist, our interviewees were adamant that co-owners must have the same insurer. It seems that this solution would have to come from insurance brokers, banks and other agency holders (for instance, other financial agents, institutions and, more recently, department stores), or be a government directive.¹⁶⁴ Given our findings above, leaving the initiative to co-owners may simply result in inaction. An insurance expert gave the following example of a buyer who had just acquired a unit in a cross lease complex:¹⁶⁵

...he realised the issues and thought he had better go and get everyone to insure with the same insurer. There were five in the block: four, including him, agreed to involve the same insurer; the fifth refused saying, 'I've been with [my insurance company] all my life and I'm going to stay with them and not change'.

For the bodies involved, the requirement for all co-owners to have the same insurer would simply involve a more detailed enquiry as to the model of property ownership a potential insuree has – a full title and LIM search. Once the property has been identified as a cross lease, this would be followed by a simple refusal to insure until the co-owner

¹⁶³ Lawyer commenting at peer review stage, Christchurch, February 2017.

¹⁶⁴ An insurer noted that currently unit title policies are almost exclusively administered by insurance brokers.

¹⁶⁵ Interview with insurer, Christchurch, July 2016.

involved has persuaded his or her neighbours to comply. An insurer noted that the commission rates of brokers, banks and the like were very high and asking these organisations to voluntarily give up many millions of dollars of commission would be a significant challenge. The same would potentially apply to niche insurers.¹⁶⁶

Given the possible push-back from brokers and banks, we strongly recommend that this requirement becomes a statutory mandate.

Recommendation 3.8: We recommend that if existing cross leases are not converted to a subdivision or a unit title, all parties to the lease must be insured by a single insurer. A legislative provision to this effect is essential.

3 Compulsory acquisition

An insurance expert thinking “outside the square”, suggested that the cross lease problems that arose following the Canterbury earthquakes signalled the need for the government to have the ability to compulsorily acquire “difficult” cross lease complexes. This would be especially useful in situations where one owner is holding other owners to ransom - prepared, and financially able to sit tight until the other owners are forced to sell to him or her at a hugely discounted price. The expert advocated a system whereby the government would step in, buy the site, work with the insurers, restate it and put the owners back into their units, and presumably return the titles to them.¹⁶⁷

While we applaud this pragmatic thinking, compulsorily acquiring land goes against the New Zealand psyche. Acquiring the land in these circumstances would not equate to a public work, so the Public Works Act 1981 could not be used. Any such action would require a discrete piece of legislation. We note that the provisions for compulsory acquisition in the Canterbury Earthquake Recovery Act 2011 (primarily for land in the CBD that had been targeted in the blueprint) were viewed by the public with great suspicion. Ultimately, the Crown went to enormous lengths to negotiate a price with the affected CBD owners and it was very obvious that the Crown would use its acquisition powers as a last resort. Negotiations to settle a price have gone on for years.

4 The Council’s role

Should cross leases remain, it has been suggested that many of the issues relating to unconsented works and deficient titles would be resolved if all Councils required cross

¹⁶⁶ Interview with insurer, Christchurch, July 2016.

¹⁶⁷ Interview with insurer, Christchurch, July 2016.

lease owners to get written consent of other co-lessors before granting a building consent for any building changing the outline of a flat, as well as giving them a pamphlet on cross lease alterations alerting owners to the necessity to alter their cross lease plan.¹⁶⁸ The Councils should apply the same logic they use when they require tenants of commercial leases to get landlord consent for building consent. This could be enforced by a mandatory statutory requirement.

Recommendation 3.9: We recommend that if existing cross leases are not converted to a subdivision or a unit title, there be a mandatory statutory requirement in an appropriate statute whereby Councils require consent from all parties to a cross lease complex before the Council grants a building consent for any work which will change the footprint of any building on the land covered by the cross lease. Some procedure would be necessary to address the issue of an owner unreasonably withholding his or her consent.

D Dispute resolution

The reader is reminded that clause 26 of the ADLS 2011/4291 provides that where there is any dispute or difference that arises between the parties (or their respective representatives or assigns) with respect to the lease; or any duties, liabilities of any party in connection with the land, flat or any other buildings on the land; or the use or occupation of the land, flat or other buildings on the land, that the matter be referred to arbitration.¹⁶⁹

Arbitration is seen as an expensive option that some cross lease owners simply cannot afford.

For complex questions of law, litigation is perhaps the best course of action. Again, expense is an issue:¹⁷⁰

It must be remembered that litigation is always expensive, sometimes protracted and, because of its adversarial nature, unlikely to restore good neighbourly relations between the parties.

¹⁶⁸ Lawyer commenting at peer review stage, Christchurch, February 2017.

¹⁶⁹ Clause 27 of the ADLS 2011/4291 stipulates the procedure for decisions lessors or lessees might wish to make and, if the proposed action is not agreed to unanimously, the matter will be deemed to be a question to be arbitrated under clause 26.

¹⁷⁰ DW McMorland and Thomas Gibbons *McMorland and Gibbons on Unit Titles and Cross Leases* (Lexis Nexis Ltd, Wellington, 2013) at 4.16(a).

The third possibility is alternative dispute resolution, either mediation or “in some cases simply constructively assisted negotiation”.¹⁷¹

Interviewees suggested some other alternatives. One lawyer observed:¹⁷²

The Tenancy Tribunal has already got mediators to try and resolve things at an early stage and Tribunal adjudicators could be helpful for helping cross lease property owners to enforce the terms of their cross lease rather than arbitration.

Now that Tenancy Tribunal adjudicators have upskilled to deal with unit title issues, they have experience which could be applied to cross lease issues.

Other interviewees suggested that the Disputes Tribunal was a more appropriate body or that an impartial insurance tribunal should be set up.

The Law Commission, when considering conversion possibilities, recommended that any dispute as to the terms of the conversion should be resolved by the District Court and, if the conversion were to a unit title, the Unit Titles Act should be amended to give the District Court appropriate jurisdiction in the case of cross lease to unit title conversions.

In its proposed SOL Bill the Commission dealt with the situation where the owners were in disagreement over a conversion.¹⁷³ The statutory provision allows the District Court to provide the necessary consent, and the Court may impose conditions. If the application was to be made before the mandatory conversion date, the Court would be required to take into account the financial circumstances of a dissident.

It should be noted that under the Unit Titles Act 2010 all “title” disputes go to the High Court rather than the District Court. We strongly advocate that any dispute as to title should always be dealt with by the High Court.

If there is a conversion to a unit title structure, obviously resolution of any dispute will follow the procedure set out in the Unit Titles Act 2010.

¹⁷¹ DW McMorland and Thomas Gibbons *McMorland and Gibbons on Unit Titles and Cross Leases* (Lexis Nexis Ltd, Wellington, 2013) at 4.16(c).

¹⁷² Interview with lawyer, Christchurch, July 2016.

¹⁷³ Clause 121X of the proposed Shared Ownership of Land Bill.

For situations where there is no conversion to a subdivision or a unit title, we make the following recommendation.

Recommendation 3.10: We recommend that if cross leases are not converted to a subdivision or a unit title, the Tenancy Tribunal (perhaps renamed appropriately) be given jurisdiction to hear disputes involving cross lease land, other than those going to title, up to a maximum claim not exceeding \$50,000.00.

XII Conclusion

In our investigations in the Christchurch area (both on-line and individual interviews) we were struck by the constant emphasis on cross lease problems. Criticism came from all sectors: lawyers, insurers, mortgagees, engineers, surveyors, planners, MBIE and local authorities. When we moved outside the Christchurch area, while there was still strident criticism of the system from legal experts, other entities were much less concerned.

In a tranquil environment, the cracks in a flawed system of land ownership are not obvious. When that environment becomes hostile, those cracks are exposed and, as this chapter makes clear, the result is disastrous.

This chapter emphasises an urgent need for reform and we hope our suggestions - abolish the form of ownership; and, for existing cross lease properties, explore the possibilities of conversion to fee simple subdivision or unit title - are acted upon. In 1999, the Law Commission went to the extent of drafting a proposed Shared Ownership of Land Bill. Had that Bill been passed, many of the frustrated and often angry comments we heard from Cantabrians would not have ensued.

We make the following recommendations:

Recommendation 3.1: We recommend that a new Part of the current Land Transfer Act 1952 be enacted after Part VIIA (Flat and office owning companies’): “Part VIIB: Prohibition of and Conversion of Cross-Leases”.¹⁷⁴

Recommendation 3.2: We recommend the clauses 121Q and 121R of the proposed Sale of Land Bill be enacted as part of Part VIIB of the Land Transfer Act 1952.

¹⁷⁴ Should the current Land Transfer Bill be passed (see Land Transfer Bill (2016) No 118-2) this new Part should be placed after Part 3, subpart 6 (Flat and Office Owning Companies).

Recommendation 3.3: We recommend that a further section be inserted in the proposed SOL Bill, and then enacted as part of Part VIIB of the Land Transfer Act 1952, after s 121Q and before s 121R, simply stating:

121 QA: “No Registrar shall register any new cross lease instrument”.

Recommendation 3.4: We recommend that s 66 (“Certificates of title in respect of leasehold interests”) and s 72 (“Tenants in common entitled to separate certificates of title”) of the Land Transfer Act 1952 be amended to make the prohibition on any further cross leases clear. The new amendments (s 66(6) and s 72(2)) (with the current wording in s 72 becoming s 72(1)) would state:

“For the avoidance of any doubt, this section must not be used as a mechanism to create a cross lease title.”

Recommendation 3.5: We recommend clauses 121S and 121T of the proposed Sale of Land Bill be enacted as part of Part VIIB of the Land Transfer Act 1952.

Recommendation 3.6: We recommend that the Resource Management Act 1991 be amended by inserting after s 218 a new provision to prohibit subdivision by way of cross lease.

Recommendation 3.7: We consider that where existing cross leases are converted to a small number of unit titles, the regulatory and management provisions should be less onerous than those that currently exist under the Unit Titles Act 2010.

3.7.1. We recommend that the body corporate be regulated under a modified and simpler version of the current 2010 Act. While guidance in relation to medium sized and large sized unit title entities can be found in the size threshold limits proposed by the Ministry of Business, Innovation and Employment Discussion Document, “Review of the Unit Titles Act 2010”;¹⁷⁵

3.7.2. We recommend that in the case of converted cross lease entities with six or fewer units, these entities should operate under an even less strict regime than that Discussion Document proposes for entities of up to 10 units.

¹⁷⁵ Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 3.1.

Recommendation 3.8: We recommend that if existing cross leases are not converted to a subdivision or a unit title, all parties to the lease must be insured by a single insurer. A legislative provision to this effect is essential.

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CHAPTER 4

PAPAKĀINGA AND WHANAU HOUSING ON MĀORI FREEHOLD LAND

Jacinta Ruru

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I Introduction

This chapter provides an introduction to the current law and policy that seeks to enable multiple housing on Māori freehold land. This type of housing is often referred to as papakāinga or whanau housing. Papakāinga as a noun means original home, home base, village, communal Māori land. Whanau as a noun means extended family, family group, the primary economic group unit in traditional Māori society and in a modern context can sometimes be used to include friends who may not have kinship ties to other members.¹ Māori freehold land is a globally unique land tenure system accounting for about 5.5 per cent of all land in this country (1.4 million hectares). Its origins are further explored in this chapter.

While Māori were the first peoples to make their homes in Aotearoa New Zealand according to their own tenure system of law and building codes, the arrival of Europeans and the consequent colonisation, including of Māori lands, lead to significant displacement of Māori from their homes. Loss of land titles and disproportionately low incomes has aided consistently low Māori home ownership ever since.² Moreover, Māori have been disproportionately affected by poor housing conditions and are more likely to be in state provided housing.

With contemporary law and policy seeking reconciliation with Māori, new emphasis is emerging on recognising the need to better enable more widespread building of residential homes on Māori land.³ New demand from Māori organisations and individuals to use their land for housing is evident, as this chapter will discuss. While the current statute governing Māori land - Te Ture Whenua Māori Act / Māori Land Act 1999 (TTWMA) – aspires for the utilisation of Māori land, hindering this has been law, policy and professional practice. Māori and Government are working to address the issues.

Thus this chapter has a different focus from other chapters in this Report. This is simply because few residential lived-in homes currently exist on Māori freehold land compared

¹ See Māori Dictionary online: Te Aka Māori-English, English-Māori Dictionary and Index.

² Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at 23.

³ See Bidy Livesay “Housing development on Māori land – Two case studies in developing and retaining Māori land” (November 2012) Māori Law Review and Victoria Kingi “Comment; Papakainga housing at Mangatawa” (November 2012) Māori Law Review.

to General land.⁴ The value of this chapter lies in bringing together current law and policy aspirations for Māori housing to lay the groundwork for further necessary research, including the need for qualitative data. More research is certainly required because issues of future repair and replacement of damaged dwellings on Māori freehold land following a natural disaster will raise specific tikanga, law and policy concerns. Nonetheless, the themes explored throughout this Report and specifically outlined in Chapter One: Introduction are also likely to apply to multi-unit developments on Māori freehold land, and in many cases will be exacerbated because of the complexities concerning Māori land. It would be useful for future research to convey learnings from the experiences of the Māori communities whose lands and homes were affected by the worst recorded flooding of the Whanganui River in 2015 (and subsequent flooding in 2017). Moreover, with much Māori freehold land lying along the coasts and thus highly susceptible to rising sea levels,⁵ issues raised throughout this Report will be of value to many Māori land owners, policy makers and professionals.

This chapter is structured accordingly. First, it provides a general overview of Māori land law focusing on the broad questions: what is Māori freehold land; why does it exist; why are there additional laws for Māori freehold land; what are these additional laws; and how different is the reform proposed in Te Ture Whenua Māori Bill 2016, which is currently before Parliament. Second, this chapter discusses the legislation and case law relevant for building on Māori freehold land. The law primarily considered is TTWMA, the Resource Management Act 1991, the Building Act 2004, and Te Ture Whenua Māori Bill 2016. Third, it considers some of the central government policies, available grants, and commissioned research to better enable building on Māori land. Fourth, it reviews some of the relevant local government policies and plans. Lastly, this chapter concludes with some brief comments highlighting some of the pertinent issues in law for multiple housing on single title Māori freehold land.

II General Overview of Māori Land Law

Described here is a background overview of Māori land law to better understand the complexities of building residential homes on Māori freehold land. This part of this chapter focuses on answering some preliminary questions about Māori land.

⁴ Māori freehold land is defined as land that “the beneficial ownership of which has been determined by the Māori Land Court by freehold order”. General land is land that is owned in fee simple estate (and does not include Māori freehold land or Crown land). See TTWMA, s 129.

⁵ See Parliamentary Commissioner for the Environment *Preparing New Zealand for Rising Seas: Certainty and Uncertainty* (Wellington, November 2015).

A *What is Māori Freehold Land?*

In Aotearoa New Zealand six categories of land have been created: Māori customary land; Māori freehold land; General land owned by Māori; General land; Crown land; and Crown land reserved for Māori.⁶ Māori customary land is land that is held by Māori accordance with tikanga Māori. Māori freehold land is land where the beneficial ownership has been determined by the Māori Land Court by freehold order.⁷

Māori freehold land has both economic and cultural value and is typically characterised as lying in rural areas but with little arable value, not inhabited and, until recently, not actively managed.⁸ History, law and multiple ownership of the titles explain the predicament of Māori land. Today, the average Māori land block has a size of 52ha and 98 owners. The total number of ownership records recorded in all Māori freehold blocks of land is 2,693,523.⁹ The law specifically creates a presumption of ownership of tenants in common¹⁰ (and not as joint tenants) where there are more than two owners of Māori freehold land.¹¹ The sheer average number of owners for this category of single title land obviously creates complex issues for residential building.

B *Why Does the Māori Freehold Land Title Exist?*

The colonial beginning point in New Zealand at 1840 was that Māori owned the land. Following the signing of the Treaty of Waitangi, the British Crown set about acquiring land from Māori (Māori customary land) and by the early 1860s had become the owner of most of the land in the South Island and the lower part of the North Island (constituting about 60 per cent of New Zealand's land mass and where about 10 per cent of Māori lived).¹² The Crown then on sold this Crown land as general freehold land to the new European settlers. In the 1860s, legislation enabled the Crown acquisition of most of the

⁶ TTWMA, s 129.

⁷ Māori freehold land also often includes land that was set aside for Māori under the South Island Landless Natives Act 1906, Māori reservations created under TTWMA, and Māori reserved land created under the Māori Reserved Land Act 1955. Section 6 of the Māori Purposes Act 1983 deems Titi Islands to be Māori freehold land.

⁸ Note though that there are some remarkable financial success stories, mostly concerning forestry on Māori freehold land where the Māori trusts or Māori incorporations are returning million dollar plus profits.

⁹ See *Māori Land Update – Ngā Ahuatanga o te whenua*, (Office of the Chief Registrar, Māori Land Court, Annual Update, June 2016).

¹⁰ This type of tenure allows people to share the ownership of a property in equal or unequal shares.

¹¹ TTWMA, s 345(1).

¹² Note that many of these early 'sales' included clauses that promised to set aside some land for reserves but it was rarely done and even where it was done, Māori were not forced to reside on the reserved lands. See Waitangi Tribunal, *Te Whanganui A Tara Me Ona Takiwa. Report on the Wellington District*, Wai 145 (Wellington: Legislation Direct, 2003). See also Richard Boast *The Native Land Court 1862-1887: A Historical Study, Cases and Commentary* (Thomson Reuters, Wellington, 2013).

remaining Māori customary lands in the North Island through out-right confiscation¹³ and the more subtle but equally successful waiver of the British Crown's right of pre-emption in favour of the creation of, what were initially called, Native freehold land titles.¹⁴ The Native Land Court was established with the primary purpose to encourage Māori land owners to transfer their customary holdings into these new freehold titles to encourage them to then onsell their lands to the increasing number of European immigrants.¹⁵ While individualising customary lands was not globally unique, the means of doing so in New Zealand, for example with the creation of the Native Land Court, was unique.¹⁶ The system sought to transform land communally held by Māori (Māori customary land) into individualised titles derived from the Crown (Māori freehold land). The initial enabling legislation, the Native Land Act 1862, sought to advance and civilise Māori by assimilating their land ownership "as nearly as possible to the ownership of land according to British law".¹⁷ As expected by the Crown authorities, many owners of the newly titled Native freehold land were forced to sell their lands to pay for financial debt incurred in the transfer process (for example mandatory court fees and survey costs). The Native Land Court was extraordinarily effective in making available Māori land for European Pakeha purchase. By the 1930s very little tribal land remained in Māori ownership. Of the scattered land that stayed in Māori ownership, few blocks were permanently inhabited because that which remained in Māori hands mostly represented remote, landlocked and non-arable land.¹⁸

C Why are there Additional Laws for Māori Freehold Land?

The Māori freehold land tenure system originated with its own set of additional rules because of its very nature: a title coming from Māori customary land. The Land Court had to determine who owned the land, and once ownership was established, who would then succeed to that land title. The legislation commenced with a desire to determine succession "as nearly as it can be reconciled with Native custom".¹⁹ The Land Court held in 1867 that this meant that if an owner passed away without a will the land interest

¹³ See New Zealand Settlements Act 1863, Suppression of Rebellion Act 1863.

¹⁴ Native Lands Act 1865.

¹⁵ See David V Williams 'Te Kooti Tango Whenua': *The Native Land Court 1864-1909* (Huia Publishers, Wellington, 1999).

¹⁶ See Richard Boast "Individualization – an idea whose time came, and went: The New Zealand experience" in Lee Godden and Maureen Tehan (eds) *Comparative Perspectives on Communal Lands and Individual Ownership: Sustainable Futures* (Routledge, Oxon, 2010) at 145.

¹⁷ Native Land Court Act 1862, preamble.

¹⁸ See Richard Boast *Buying the Land, Selling the Land: Governments and Māori Land on the North Island 1865-1921* (Victoria University Press, Wellington, 2008).

¹⁹ Native Land Act 1865, s 30.

would not go to the eldest son as it would if the land was General Land, but it would go to the owner's children equally. This is one example of a different rule for Māori freehold land and helps explain one of its characteristics: multiple ownership. The complexities of multiple ownership and a land tenure system that has been largely administratively underfunded so that it cannot ensure up-to-date title records contribute to why additional property legislation exists for Māori land.²⁰

D What are these Additional Laws?

The laws are complex, building on a long history of regulating Māori freehold land. The current principal statute setting out the rules for Māori land is TTWMA. Its enactment in 1993 signified a new intention to create a complete restatement of the law relating to Māori freehold land. At its heart is the aspiration for the retention and utilisation of Māori land. General law is still applicable including, for example, the Land Transfer Act 1952, the Resource Management Act 1991 and the Property Law Act 2007.²¹ TTWMA is currently under reform with a Bill foreshadowing a significantly new approach having passed its second reading at the time of writing this chapter.²² This new Bill is also discussed in this chapter.

The Preamble of the TTWMA notes that the Treaty of Waitangi established a special relationship between the Māori people and the Crown, and reaffirms the principles of kawanatanga and the protection of rangatiratanga. It recognises that land is of special significance to Māori, and thus it should be retained in the hands of its owners, whanau, and hapu. It also aims to facilitate the occupation, development and utilisation of that land for the benefit of its owners, whanau and hapu. Sections 2(2) and 17(1) further confirm the principles of retention and utilisation of Māori land.

The Māori Land Court is responsible for administering Māori freehold land. It is a court of record and its primary objective is to promote and assist in the retention and effective use, management, and development of Māori land.²³ The bulk of the Court's work concerns succession orders and orders relating to establishing and administering Māori

²⁰ New Zealand Royal Commission on the Māori Courts *The Māori Land Courts* (Government Printer, Wellington, 1980).

²¹ There has been long tension between Māori land law and land transfer law. See: *Jensen v Registrar General of Land* [2013] NZHC 3525.

²² To track Te Ture Whenua Māori Bill's progress see New Zealand Parliament "Bills and Laws" website <www.parliament.nz>. This Bill was a read a second time on 13 December 2016.

²³ See TTWMA, preamble and ss 2 and 17.

land trusts.²⁴ Below is a brief discussion of some of the law relating to owning and managing Māori land which provides important background for understanding some of the complexities of building residential homes on Māori land.

1 Owning Māori freehold land

(a) Limited testamentary freedom

Restricted categories of people are permitted to inherit (succeed) to a Māori freehold land interest by will.²⁵ In summary this includes:

- Children and grandchildren of the owner;
- Any persons who would be entitled under the TTWMA rules of intestacy;
- Any persons who are related by blood to the owner *and* are members of the hapū associated with the land;
- Other owners of the land who are members of the hapū associated with the land;
- Whangai (children adopted in accordance with Māori customary values and practices) of the owner;
- Trustees of above persons.

A spouse, civil union partner or de facto partner can only receive a life interest in Māori freehold land. Having a life interest means you hold the land as a kaitiaki (a guardian) in accordance with tikanga Māori and cannot alienate (for example sell or mortgage) the land without the consent of all the people entitled to an interest in the land when the life interest ends.

(b) Specific intestacy rules

Intestacy rules apply if an owner of Māori freehold land interests dies without a will, or has executed a will incorrectly (for example, has devised his or her remainder interest to someone outside the permitted categories, such as a spouse or friend). Section 109(1) sets out the three-pronged rule for intestacy:

- Children have first right to succeed equally;
- If there are no children, then the interest will go to the deceased's brothers and sisters; and

²⁴ Māori Land Court decisions can be viewed on the Māori Land Court Decisions' website at <www.maorilandcourt.govt.nz>. See also the *Māori Law Review*.

²⁵ TTWMA, s 108(2).

- If there are no siblings, the interest will go to the children nearest in the chain of title to the deceased.

A surviving spouse or civil union partner is entitled as of right to a life interest in the Māori land, unless at the date of death there was a separation order in existence. A de facto partner is not entitled to a life interest.²⁶

(c) Property relationship division rules not applicable

It is important to appreciate that the rules contained in the Property (Relationships) Act 1976 do not apply to Māori land. Section 6 of this 1976 Act makes this explicitly clear:

Nothing in this Act shall apply in respect of any Māori land within the meaning of TTWMA.

(d) Difficult to change to General Land

Land can only acquire or lose the status of Māori customary and Māori freehold land in accordance with TTWMA or as expressly provided in any other Act.²⁷ Today, the Māori Land Court is reluctant to change the status of Māori freehold land to General land because to do so attacks one of the fundamental purposes of the Court: to promote and assist in the retention of Māori land in the hands of its owners.

(e) Strict alienation rules

Māori customary land cannot be alienated.²⁸ Māori freehold land can be alienated but only in accordance with TTWMA.²⁹ Section 4 clarifies what constitutes an alienation. The definition is broad and includes for example, sale, gift, lease, easement, mortgage and granting, or otherwise dealing with, a forestry right over the land. It does not include some things, for example a disposition by will, or a lease or licence that is for less than three years.³⁰ There are different rules depending on whether the entire block of land is intended to be alienated or just one owner's interest in the land.

If it is the block of land, then the general alienation rules are that a sale requires 75 per cent support, and a long-term lease (defined as a lease for more than 52 years) requires 50 per cent support. If the land is owned in common and the owners propose to alienate the

²⁶ See J Ruru and M Stevens "Māori land and non-owners' rights" (2007) *New Zealand Law Journal* 325.

²⁷ TTWMA, s 130.

²⁸ TTWMA, s 145.

²⁹ TTWMA, s 146.

³⁰ TTWMA, s 4.

land (but not by way of sale or long-term lease), then 100 per cent agreement is required or a resolution carried at a meeting of assembled owners. If a meeting of assembled owners is required, then the Meeting of Assembled Owners Regulations 1995 must be followed. These Regulations stipulate the rules for quorums and voting.

It is important to note that if Māori freehold land is being contemplated for sale or gift, then the owners must give the right of first refusal to prospective purchasers or donees who belong to one or more of the preferred classes of alienees.³¹ Section 4 defines the preferred classes of alienees as essentially persons who have a blood connection to the land (relations).

If the proposed alienation is in relation to an interest in land, then an owner can alienate this interest only to any person who belongs to one or more of the preferred classes of alienee.

(f) Title reconstruction rules

TTWMA provides rules for changing Māori freehold titles to allow for better access (such as easements or ordering access to landlocked land) and to divide the titles (such as partition). The Court will make title reconstruction orders having regard to the best overall use and development of the land and must be satisfied: (a) that the owners of the land to which the application relates have had sufficient notice of the application and sufficient opportunity to discuss and consider it; and (b) that there is a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter.³² In regard to partition orders specifically, the Court cannot make a partition order unless it is satisfied that it is necessary to facilitate the effective operation, development, and utilisation of the land.³³ These are tough tests for owners of Māori freehold land to prove.³⁴ Moreover, since 2002 the Māori Land Court has had, like the High Court, jurisdiction to make orders that give reasonable access to landlocked Māori freehold land.³⁵

(g) Rates

³¹ TTWMA, s 147A.

³² TTWMA, s 288(2).

³³ TTWMA, s 288(4)(a).

³⁴ *Hammond – Whangawehi 1B3H1* (2007) 34 Gisborne Appellate MB 185 (34 APGS 185).

³⁵ See TTWMA, s 326B(4). See *Houpapa v Woods - Taharoa A Sec 6D No 2 Block* (2012) 44 Waikato Maniapoto MB 167 (44 WMN 167). For discussion see McCaw Lewis “Landlocked Māori land” (April 2015) McCaw Lewis online publication <www.mccawlewis.co.nz>.

Māori freehold land is rated in the same way as general land. But under ss 102 and 108 of the Local Government Act 2002, local authorities must have a policy of remission and postponement of rates on Māori freehold land.

2 *Managing Māori freehold land*

Specific management structures have been created as options for Māori land owners to employ as a way to manage their multiple-owned land.³⁶

(a) Māori land trusts

The Māori Land Court has exclusive jurisdiction to constitute the five types of trusts capable of managing predominantly Māori freehold land (although, general land and general land owned by Māori can also be managed under some Māori land trusts). The five trusts are: putea trusts; whanau trusts; ahu whenua trusts; whenua topu trusts; and kai tiaki trusts.³⁷ These trusts are subject to the specific rules contained in TTWMA and the general law of trusts, namely the Trustee Act 1956 and equitable principles.

Whanau and Ahu Whenua trusts are the most common trusts used for Māori land. The whanau trust is a type of share management trust. The land interests of a living or deceased owner are vested in the trustees, usually family members, and no further succession and fragmentation occurs. The ahu whenua trust is a land management type trust, the ahu whenua trust operates to promote and facilitate the use and administration of the land in the interests of the persons beneficially entitled to the land.³⁸ The constitution of an ahu whenua trust does not affect any persons entitled to succeed to any beneficial interest in any land vested in the trustees.³⁹

The land, money and other assets of a Māori land trust must be held for, and applied to, purposes or persons that align with the rationale for creating the distinct trust. For example, the land, money and other assets of a whanau trust must be held and applied for the purposes of promoting the health, social, cultural and economic welfare, education and vocational training, and general advancement in life of the descendants of any tipuna (whether living or dead) named in the order constituting a whanau trust.⁴⁰ Trustees can also be empowered to apply trust income for “Māori community purposes” which includes promotion of health by installing water supplies in Māori settlements, or by

³⁶ For up to date figures on Māori land structures see Ministry of Justice and Te Kooti Whenua Māori *Māori Land Update – Nga Ahuatanga o te whenua* (June 2016) <www.maorilandcourt.govt.nz>.

³⁷ TTWMA, s 211(1).

³⁸ TTWMA, s 215(2).

³⁹ TTWMA, s 215(8).

⁴⁰ TTWMA, s 214(3).

carrying out or subsidising housing schemes, or by making grants or loans for any such schemes.⁴¹ In comparison, the land, money and other assets of an ahu whenua trust are simply to be held in trust for the persons beneficially entitled to the land in proportion to their several interests in the land.⁴²

In one case, the Court has held that the trustees can proceed with a Waste Water Treatment Plant proposal because it will not use the entirety of the land and there will still be areas available for papakāinga housing if the trustees choose to develop such a scheme.⁴³ In this situation, the trustees did not have to provide “for each and every trust objective” including ensuring habitation for the owners, as the objectives were separated by “or”. In any event, the proposal for the Waste Water Treatment Plant provided for both the management of the land and the better habitation by beneficial owners.

(b) Māori Incorporations

A Māori incorporation is a body corporate recognised by, or created under, TTWMA for the purpose of holding and managing Māori freehold land on behalf of the incorporated owners of the land.⁴⁴ Part 13 of TTWMA sets out the rules for Māori incorporations. The Māori Incorporations Constitution Regulations 1994 set out the rules for the constitution and meetings.

(c) Māori Reservations

Māori freehold land or general land can be set apart as a Māori reservation for a variety of purposes such as a marae or burial grounds or as a place for meeting, recreation, sports or fishing.⁴⁵ Māori reservations are held for the common use or benefit of the owners.⁴⁶

E How Different is the Proposed Reform

Te Ture Whenua Māori Bill 2016 is intended to be a deliberate overhaul of the existing law. It is designed to “completely refresh and modernise” the current law providing a:⁴⁷

⁴¹ TTWMA, s 218(2).

⁴² TTWMA, s 215(5).

⁴³ See *Falwasser v Olsen – Matata Parish 6A* (2014) 107 Wairiki MB 74 (107 WAR 74). See also *Corrigan - Ngatihine H2B* (2014) 71 Taitokerau MB 72 (71 TTK 72).

⁴⁴ TTWMA, s 4.

⁴⁵ TTWMA, s 338(1).

⁴⁶ TTWMA, s 338(3).

⁴⁷ Te Ture Whenua Māori Bill 2016 (126-2) (select committee report) at 1.

new approach that aims to increase the ability of Māori land owners to use their land by empowering them to make decisions by and for themselves, supported by an owner-focussed Māori land service. At the same time, it aims to maintain, and even to strengthen, the protections that currently exist for the retention of Māori land for the benefit of future generations (a taonga tuku iho) by virtue of whakapapa.

The Bill is controversial and not supported by all Māori land owners.⁴⁸

The Māori Affairs Select Committee agrees with many of the submitters who commented that the Bill is large and complex. Te Ture Whenua Māori Bill was introduced into Parliament on 14 April 2016 and had its first reading on 11 May 2016 and its second reading on 13 December 2016. It is expected that the Bill will be enacted mid 2017. The Bill will be divided into three separate pieces of legislation before enactment:

- Te Ture Whenua Māori Act providing the overall legal framework for Māori land;
- Te Kooti Whenua Māori Act providing the institutional arrangements for the Māori Land Court and the Māori Appellate Court;
- Te Ture Whenua Māori (Repeals and Amendments) Act providing for the consequential and other changes to existing legislation.

III Building on Māori Land – The Legislation and Case Law

If Māori freehold land is owned by more than one owner (which is the norm), then the very nature of multiple ownership can make it difficult for owners to build residential homes on their land. Will other owners agree to one owner building a house on the land for his/her exclusive benefit? Where on the land should the home be built? Will other owners also be able to build houses on this land in the future? Who will be able to own the house in the future? What security will be able to be offered if a mortgage is required to raise the capital to build the home? These are all issues that plague the development of Māori freehold land. Legislation and case law have created some pathways for understanding these issues and setting precedents to enable more widespread residential living on Māori freehold land.

This part of this chapter proceeds to consider more specifically how the law regulates and enables new residential building on Māori freehold land. This part considers the most relevant legislation and decisions from the Courts under the following subheadings:

- Te Ture Whenua Māori Act 1993

⁴⁸ See Waitangi Tribunal *He Kura Whenua Ka Rokohanga: Report on Claims about the Reform of Te Ture Whenua Māori Act 1993* (Wai 2478, 2016).

- Resource Management Act 1991
- Building Act 2004
- New Process? Te Ture Whenua Māori Bill 2016
- Other relevant legislation

A Te Ture Whenua Māori Act 1993

Prior to the enactment of TTWMA, the norm for enabling housing on multiple-owned Māori freehold land was to seek the title reconstruction tool of partitioning the land. This drawing of a new survey line on the land to create new separate titles then enabled the respective owners of their new (albeit smaller) land blocks to proceed with developing the land in consensus. The Māori Land Court has become much more resistant to partitioning land as a solution to owner disagreement about its utilisation. This is because retention of the land is generally favoured. Occupation orders have become the key tool to empower an owner who wishes to build a home on part of the land.

1 Occupation Orders

The main intention of occupation orders is to give persons with interests in communally held Māori land the opportunity, with the agreement of the owners, to live on it in a house. Having a legal instrument to do this is important both to secure some enforceable rights to the occupier, and to enable the occupier to raise finance. Occupation orders have their genesis in political comments from the early 1980s.⁴⁹ They are a simpler proposition than partition, since they do not effect a severance from the community of ownership. The problems with the erection of dwellings on Māori land without permission, and the solution that occupation orders provide, are significant.⁵⁰

Occupation orders provide a solution to better enable owners of Māori freehold land to build homes on their land. The Māori Land Court is empowered by s 328(1) to vest in one specific owner the “exclusive use and occupation of the whole or any part of that land as a site for a house (including a house that has already been built and is located on that land when the order is made)”. These occupation orders can be made for a specified time.⁵¹ Moreover, the Court may permit another beneficial owner in the land to inherit an

⁴⁹ In New Zealand Māori Council *Kaupapa: te wahanga tuatahi* (Wellington, 1983) at 25.

⁵⁰ In *Re Wainui 2C2B4A and Paul* (1991) 3 Taitokerau ACMB 29. This case also notes that s 30(1)(a) Māori Affairs Act 1953 (now TTWMA, s 18(1)(a)), which allows the Court to determine any claim in equity to possession in Māori land, cannot validate the construction of unauthorised dwellings after the event. In this regard, see also *Re Matauri 2F2B and Williams* (1991) 3 Taitokerau ACMB 20 and *McClutchie v Trustees of Rahui A8* (2009) 191 Gisborne MB 203 (191 GIS 2013).

⁵¹ TTWMA, s 328(4)(a).

occupation order if gifted by will to him or her by the original holder.⁵² However, the Court does not have jurisdiction to grant an occupation order in favour of a spouse or partner. If the land is managed by a Māori land trust or a Māori incorporation, then the Court can only make an occupation order with the consent of the trustees or the management committee.

Section 329 sets out the relevant issues for the Court in deciding whether or not to make an occupation order:

- (1) In deciding whether or not to exercise its jurisdiction to make any occupation order, the Māori Land Court shall have regard to—
 - (a) the opinions of the owners as a whole; and
 - (b) the effect of the proposal on the interests of the owners of the land; and
 - (c) the best overall use and development of the land.
- (2) Notwithstanding subsection (1), the Māori Land Court shall not make any order, unless it is satisfied—
 - (a) that the owners of the land to which the application relates have had sufficient notice of the application and sufficient opportunity to discuss and consider it; and
 - (aa) that the owners of the land to which the application relates understand that an occupation order—
 - (i) may pass by succession; and
 - (ii) may be for a specified term or until the occurrence of a defined event:
 - (b) that there is a sufficient degree of support for the application among the owners, having regard to the nature and importance of the matter:
 - (c) that, in the circumstances, the extent of the beneficial interest in the land held by the person in whose favour the occupation order is to be made, or to which that person is entitled to succeed, justifies the occupation order.

Therefore, an owner who wishes to develop papakāinga housing on multiple-owned Māori freehold land should engage early with the other owners to seek their advice and support if possible. This is not easy, as for many owners there are no current contact details.⁵³ Many issues have arisen for owners in seeking and having occupation orders as the below discussion illustrates.

⁵² TTWMA, s 108(2)(b).

⁵³ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at 55. Also Ministry of Justice “Your Māori Land: Occupy or build on your land” (17 January 2017) Māori Land Court <www.maorilandcourt.govt.nz>.

Section 329(2) requires a sufficient degree of support for an occupation order. This means that not all owners must consent to the occupation order. There is some flexibility here with the threshold being “a sufficient degree”. The Māori Land Court has recently stated in regard to this provision:⁵⁴

The question of what amounts to a “sufficient degree of support” for an application for an occupation order (and other applications under the Act) has been addressed in several decisions. In short, the Court must assess the sufficiency of support having regard to the nature and importance of the application before the Court, which includes the circumstances of the owners and the land. That assessment is not dictated by any specific percentage threshold. If there is opposition, the Court can take into account the reasons for that opposition. In making the assessment the Court is to have regard to the kaupapa of the Act as contained in the Preamble and ss 2 and 17.

The Court has agreed that tikanga Māori is important in resolving title reconstruction issues although a claim such as “‘my tipuna put me here and I will not move’ will not carry weight if that owner’s shares are too small to justify an occupation order for that site”.⁵⁵

The *Davis – Ahipara A8B* case illustrates the long term significance of an occupation order. In this case, there was consensus from the owners to support one owner, Catherine Davis, to seek an occupation order for a 6000m² site (1.5 acre section) within the larger block. Catherine would be the “first owner to live on the land in recent generations”.⁵⁶ She and Her financee sought exclusive use of part of the block for building a home and an extensive garden or orchard. The Court held it could not issue an occupation order beyond land required for a house. Section 328 specifically states that the purpose for an occupation order is to award “exclusive use and occupation of the whole or any part of that land as a site for a house”. To allow for anything further would:⁵⁷

... set a precedent and have potentially adverse implications for her fellow owners.
An occupation order is of indefinite duration when it is not limited to a lifetime or a

⁵⁴ *Leckie – Matauri 2K Block* (2016) 137 Taitokerau MB 23 at [10], a case involving seven applications for occupation orders over Matauri 2K by beneficiaries of the Kira-Hiria Williams Whanau Trust which is a significant owner of the land. Occupation orders were granted.

⁵⁵ *Gough – Pataua 4B* Māori Land Court (2011) 19 Taitokerau MB 1 (19 TTK 1) at [34].

⁵⁶ *Davis – Ahipara A8B* Māori Land Court (2014) 88 Taitokerau MB 186 (2014 TTK 186) at [2].

⁵⁷ *Davis – Ahipara A8B* Māori Land Court (2014) 88 Taitokerau MB 186 (2014 TTK 186) at [16].

specific term. Therefore Catherine’s descendants will be able to succeed to the occupation order in the future. Because an occupation order is semi-permanent in nature, the Court must exercise careful judgment in determining the size of the occupation order as it will impact on the ability of other owners to use the land in the future.

The Court explained that if Catherine was awarded an occupation order for 6000m², then other owners in this block would have a similar expectation to seek their own occupation orders for similarly sized sites within the block. The Court stated “[t]his will further reduce the total number of house sites available to the owners. Such an approach will result in inefficient and short-sighted allocation of areas of the land”.⁵⁸ The Court held that there were no exceptional circumstances to award Catherine a site area for her house beyond the minimum site area that the local Council requires for a building site in this zoned area of land: 3000m². The Court issued Catherine an occupation order for 3000m² as her exclusive area to use and occupy for the purposes of her home and noted too that “there is nothing to prevent her from using other parts of [the block] for garden and orchard purposes as long as it does not interfere with the rights of her fellow owners”.⁵⁹

A few situations have arisen where an applicant has sought to cancel an occupation order. The Court has recently said this:⁶⁰

... the level of owner support for or opposition to the cancellation of an existing occupation order is not paramount. That is because ... the Court is being asked to decide whether it should extinguish an existing property right in the land. The continuation of property rights, such as occupation orders, should not be subject to the shifting views of the owners, as that would remove any certainty for holders of occupation orders.

2 *Partition orders*

The Court certainly prefers to order occupation orders rather than orders to partition land, including when the applicant is seeking the partition to build a family home on the land. Two recent cases are worthwhile mentioning here. Incidentally, they concern adjacent blocks of land.

The *Heta – Taiharuru 4C3B* case is interesting because it has created a new ‘hybrid partition’ template as a way to enable blocks of Māori freehold land in multiple

⁵⁸ *Davis – Ahipara A8B* Māori Land Court (2014) 88 Taitokerau MB 186 (2014 TTK 186) at [17].

⁵⁹ *Davis – Ahipara A8B* Māori Land Court (2014) 88 Taitokerau MB 186 (2014 TTK 186) at [19].

⁶⁰ *Leef v Leef – Panguru A47B* (2015) 113 Taitokerau MB 11 (113 TTK 11) at [53].

ownership to be better developed.⁶¹ Here, Eric Heta, as one of 11 owners of a 1.3940 hectare block of prime beach front land, sought a separate title so he could obtain mortgage finance to build his family home. The other owners supported the request for the partition but required a clause to be inserted that would prevent the land being sold out of the wider whanau. The Court explained to the owners that if partition was awarded, then Mr Heta would be free to sell the land even if it remained as Māori freehold land. If the land were ever sold the whanau would merely be entitled to a right of first refusal to purchase as preferred classes of alienee. The Court was reluctant to pursue a partition order because partition:⁶²

... represents the final severance of collective ownership of the land. It is a terminal step. While partitioning Māori land into individual ownership may have become commonplance in the past, it had little in common with Māori custom and merely reflected the legislation and the policies of the time. I do not accept that in the twenty first century we should be hamstrung by historical approaches to ownership of land, particularly when the 1993 Act offers innovative tools to achieve owners' aspirations.

Instead the Court invited the owners to consider a new solution, a 'hybrid partition': that is "a title reorganisation that is effected by title, trust and occupation orders".⁶³ The owners have now agreed to the Court's hybrid partition. This means: partitioning the land into five residential sections (with a sixth section for the purpose of a roadway and walkway); most of the owners vesting their shares into separate whanau trusts; managing the sections with separate ahu whenua trusts; and granting occupation orders over the sections to the relevant whanau trust. The agreement includes a Deed of Covenant to protect the interests in the land. Essentially, "each of the whānau trusts is permitted to mortgage the land and thereby place the land at risk, but if the worst happens and the land is sold, that whānau trust must relinquish its interests in the balance sections".⁶⁴

However, a case concerning an adjacent block of Māori freehold land, with similar characteristics and of similar size, demonstrates that the *Heta* hybrid partition solution will not work when "there is insufficient unity of purpose or support for establishment of a trust amongst the owners".⁶⁵ In this case, *Neal - Taiharuru 4C3C*, the Court took the rare contemporary path of ordering the partition of the land so the owner could build a

⁶¹ *Heta – Taiharuru 4C3B* (2010) 13 Taitokerau MB 203 (13 TTK 203).

⁶² *Heta – Taiharuru 4C3B* (2010) 13 Taitokerau MB 203 (13 TTK 203) at [29].

⁶³ *Heta – Taiharuru 4C3B* (2010) 13 Taitokerau MB 203 (13 TTK 203) at [62].

⁶⁴ *Heta – Taiharuru 4C3B* Māori Land Court (2015) 99 Taitokerau MB 164 (99 TTK 164) at [4(f)].

⁶⁵ *Neal - Taiharuru 4C3C* Māori Land Court (2016) 132 Taitokerau MB 97 (132 TTK 97) at [38].

permanent residence there. With this land not being large in area, its “primary utility ... for holiday or residential accommodation”, a history of disagreement amongst the owners and the applicant not seeking the best part of the block, the Court was satisfied that the strict tests for partition were satisfied.⁶⁶ The Court agreed that the alternative occupation order “raises impediments to what the applicant is trying to achieve”.⁶⁷ Mr Neal submitted a letter of evidence from the Westpac Bank dated 28 September 2015 that it “would not lend in circumstances where an applicant holds only an occupation order in respect of a housing site on multiply owned [sic] Māori land”.⁶⁸ It was submitted:⁶⁹

While an occupation order vests exclusive use and occupation of the site in the grantee, it does not vest the underlying fee simple title. The right of a grantee under an occupation order is overlaid on the fee simple interest, and rights under an occupation order remain limited and personal to the grantee. From a legal perspective, an occupation order would not provide security for a bank in the form of a first registered mortgage over a fee simple interest in Māori freehold land capable of being separately and freely realised by that bank in the event of default.

As a rare event, the Court ordered the partition order.

3 *Licences to Occupy*

Licences to occupy are another means to permit living on Māori land. If the licence to occupy the land is for more than three years, then the owners of the land must comply with the alienation provisions of TTWMA. If the land is managed by a Māori Trust or Māori Incorporation, then the relevant terms of the Trust or constitution of the Incorporation will determine if, and the conditions for, issuing a licence to occupy. If the licence is for more than 21 years, then the Māori Land Court Registrar must note this on the title.⁷⁰ If the land is not managed by a Trust or Incorporation, then the rules of section 150C of TTWMA apply. Essentially s 150C requires agreement from all the owners or a resolution to be carried at a meeting of assembled owners in accordance with the Meeting of Assembled Owners Regulations. A granted licence to occupy will generally include the:⁷¹

⁶⁶ *Neal - Taiharuru 4C3C* Māori Land Court (2016) 132 Taitokerau MB 97 (132 TTK 97) at [33].

⁶⁷ *Neal - Taiharuru 4C3C* Māori Land Court (2016) 132 Taitokerau MB 97 (132 TTK 97) at [41].

⁶⁸ *Neal - Taiharuru 4C3C* Māori Land Court (2016) 132 Taitokerau MB 97 (132 TTK 97) at [39].

⁶⁹ *Neal - Taiharuru 4C3C* Māori Land Court (2016) 132 Taitokerau MB 97 (132 TTK 97) at [40].

⁷⁰ See TTWMA, ss 150A(3)(b) and 150B(3)(b).

⁷¹ Ministry of Justice “Your Māori Land: Leases and Licenses” (7 April 2017) Māori Land Court <www.maorilandcourt.govt.nz>.

- granting of occupation to a defined area or site on the land;
- set fixed term dates for the licence;
- rights of assignment and compensation for improvement to the land if done; and
- provide for the payment of rates and rent.

In a recent case, the Māori Land Court had to consider if action, or inaction, of the trustees of an Ahu Whenua Trust had resulted in an informal right for some of the owners to occupy the land. The whanau had been occupying the land for almost 30 years without paying rent or rates and consider the land to be their home. The Court issued an injunction to the whanau to vacate the lands because their occupation was against the authority of the trustees and to the exclusion of the other owners. The Court noted “[g]ranteeing an order for the removal of such a large family from land they have occupied for such a long time is one of the most challenging decisions that a judge of this Court will face”.⁷²

The Māori Land Court has called for legislative change concerning succession to licences to occupy. Licences to occupy are personal only and end upon the licensee’s death, distinguishing them from occupation orders. As stated by Amber J of the Māori Land Court, “succession to a ‘lease’ requires formal administration through the High Court” but in his “respectful view, requiring succession to a licence to occupy on Māori land to be addressed outside of this Court’s processes is inconsistent with the Act’s broad aim of addressing Māori land succession issues in the one Court”.⁷³

4 *Change of status*

Sometimes, particularly when there are few owners and consensus among them, owners apply to the Court to change the status of their land from Māori freehold land to General land on the assumption that it would be easier to develop residential housing on land with a General title. The Courts have not been sympathetic to this argument, reinforcing that nowadays it is probably even rarer to successfully seek a change of status order than a partition order.⁷⁴

5 *Determining ownership of house*

Many instances arise where a house has been built on Māori freehold land but it is unclear who owns it. Applications are made to the Māori Land Court under s 18(1)(a) to:

⁷² *Tau v Tahere – Rangihamama X3A* (2016) 137 Taitokerau MB 68 (137 TTK 68) at [170].

⁷³ *Anderson – Te Rauipo* (2015) 99 Taitokerau MB 206 (99 TTK 206) at [25].

⁷⁴ See *Davies – Orokawa 3B Lot 14* (2005) 6 Taitokerau Appellate MB 240 (6 APWH 240) [2005] NZMAC 3.

to hear and determine any claim, whether at law or in equity, to the ownership or possession of Māori freehold land, or to any right, title, estate, or interest in any such land or in the proceeds of the alienation of any such right, title, estate, or interest.

The court first determines if the house is fixed to the land. If it is not, then it is a chattel and the Māori Land Court has no jurisdiction to determine the ownership of chattels, even chattels on Māori land. For example, in one case the Māori Land Court determined that a bach and a shed could be removed without destruction and therefore they were chattels.⁷⁵

There is an important associated issue for owners of Māori freehold land to be attentive to when considering building a family home on Māori freehold land. If the house is fixed to the Māori land, then it is dealt with in law as being Māori freehold land. If a relationship ends (upon separation or death), then the family home is not subject to the usual property relationship division rules. This is because s 6 of the Property (Relationships) Act excludes Māori freehold land from its ambit. It is only if the house is declared to be a chattel that it can fall into the relationship property pool.⁷⁶

In conclusion to this discussion on TTTMW, TTWMA seeks to support owners of Māori freehold to utilise their land for residential building by providing some options, notably occupation orders, licences to occupy and of least preference, partition. There are obviously significant issues for owners of Māori freehold land wishing to build a single dwelling on their multiple-owned land. These issues will be even greater where multi-unit dwellings, for example in the form of papakāinga or whanau housing, are sought to be built. Even if the Māori Land Court has agreed that owner/s can use a part of a block of their multiple-owned Māori freehold land, the owner/s will still need to comply with the general law, namely seeking a building consent, and if required, a resource consent. This chapter now proceeds to briefly look at these other relevant statutes.

⁷⁵ *Connor – Pataua 4B* (2016) 130 Taitokerau MB 17 (130 TTK 17). See *Stock v Morris – Wainui 2D2B* (2012) 41 Taitokerau MB 121 (41 TTK 121) for the degree of annexation test for Māori freehold land. See also *Anderson – Te Raupo* (2015) 99 Taitokerau MB 206 (99 TTK 206) concerning a Housing Corporation of New Zealand mortgage agreement where the Court held the house is a fixture for the purposes of TTWMA, s 18(1)(a) but can become a chattel if clause 21 of the mortgage deed is ever triggered.

⁷⁶ See *Epiha William Hills* (2005) MB 110 SI 85 and *Yates v Nathan* (2016) Chief Judges' MB 223 (2016 CJ 223).

B Resource Management Act 1991 (RMA)

A resource consent may be required to build on Māori freehold land. A resource consent is required when building is a controlled, discretionary, restricted discretionary or non-complying activity (which is decided by the local authority). For example, in the Western Bay of Plenty District Council, a resource consent is not required to build one main dwelling (house) and one minor dwelling (no more than 50m² gross floor area) on Māori freehold land as this has been deemed a ‘permitted activity’ for this region.⁷⁷ Overall, one of the biggest challenges facing papakāinga development can be an arduous consenting process, as most planning documents focus on a single house per plot paradigm.⁷⁸

A resource consent may be granted on any condition that the consent authority considers appropriate. Pursuant to s 108 of the RMA, a resource consent condition may require a financial contribution, which can be money and/or land but never Māori land.⁷⁹

All RMA empowered decision-makers must have some level of regard to Māori interests. Specifically, s 6(e) states that in achieving the purposes of the RMA, all persons who exercise functions and powers under the Act, in relation to managing the use, development and protection of natural and physical resources, shall recognise and provide for the relationship of Māori and their culture and traditions with their ancestral lands, waters, sites, wahi tapu and other taonga. Section 7(a) states that all persons who exercise functions and powers under the Act, in relation to managing the use, development and protection of natural and physical resources shall have particular regard to kaitiakitanga. Section 8 states that all persons who exercise functions and powers under the Act, in relation to managing the use, development and protection of natural and physical resources shall take into account the principles of the Treaty of Waitangi. Schedule 1, Clause 3 of the RMA requires local authorities to consult with the tangata whenua of the area through iwi authorities when preparing proposed policy statements and plans. Local authorities must also take into account any relevant planning documents recognised by an iwi authority when preparing a policy statement or plan.⁸⁰ Clause 3B of

⁷⁷ See Western Bay of Plenty District Council “Building a House on Māori Land” (15 December 2015) <www.westernbay.govt.nz>.

⁷⁸ Lara Burkhardt and Nick Swallow “Papakāinga development – turning aspiration into reality” November (2014) Resource Management Journal 11 at 14.

⁷⁹ RMA, s 108(9)(b). A condition requiring a financial contribution can only be imposed in accordance with the purposes specified in the plan or proposed plan (including the purpose of ensuring positive effects on the environment to offset any adverse effect). See RMA, s 108(10)(a).

⁸⁰ RMA, ss 61(2A)(a), 66(2A)(a), 74(2A).

Schedule 1 to the RMA lists specific requirements for consultation with iwi authorities.⁸¹ The RMA additionally provides for local authorities to transfer their functions, duties or powers to public bodies, which includes iwi authorities, although local authorities have proved reluctant to take this step.⁸²

It is interesting to note *Sustainable Matata v Bay of Plenty Regional Council* where the Environment Court considered the impact of potential odour on any future Papakāinga housing and community facilities.⁸³ Papakāinga developments had been a long-held objective of the neighbouring land owners but as they did not yet exist, they could not be considered a part of the existing environment. However, the Environment Court held that:⁸⁴

Nevertheless, we acknowledge that the impact of such odour upon the clear objective of the owners to develop Papakāinga and community facilities on this site is a cultural effect which can and must be taken into account under the Act. It would clearly impact on the relationship of those persons with this residue land holding, particularly for its stated purpose as Papakāinga and community facilities.

C Building Act 2004

Regardless of whether a resource consent is needed for building on Māori land, a building consent is always needed.⁸⁵ Under s 36 of the Building Act, the local authority may issue development contribution notices if it considers a development contribution is payable by the owner. Development contribution fees are charged by the Council to pay for additional public infrastructure such as water supply, stormwater drains and roads that are made necessary by new building developments.⁸⁶ The costs and processes for obtaining a building consent have been described as barriers to using Māori land for housing. The strict restrictions on Māori land means landowners incur extra costs to get the necessary

⁸¹ These include considering ways in which the local authority may foster increased capacity of iwi authorities to respond to an invitation to consult, the establishment and maintenance of processes to provide opportunities for iwi authorities to consult, enabling iwi authorities to identify resource management issues of concern to them and indicating how those issues have been or are to be addressed.

⁸² RMA, s 33.

⁸³ *Sustainable Matata v Bay of Plenty Regional Council* [2015] NZEnvC 90.

⁸⁴ *Sustainable Matata v Bay of Plenty Regional Council* [2015] NZEnvC 90 at [275].

⁸⁵ See *Gibbs v New Plymouth District Council* [2009] NZAR 344 (HC) and *Thames-Coromandel District Council v Henare* [2011] DCR 460.

⁸⁶ Community Law “Community Law Manual Online: Building on and occupying Māori land” <www.communitylaw.org.nz>.

consent or permission to build. For historical reasons, Māori land is more likely to be zoned for purposes other than housing which means it can be difficult to gain consent.⁸⁷

D New Process? Te Ture Whenua Māori Bill 2016

There are two changes to the current TTWMA regime proposed by the Bill which will have a major effect on building on Māori land. First, under cl 29, occupation orders will become leases for residential housing. Leases for residential housing will be governed under clauses 129 and 130 which state that a lease may be granted over all or part of a parcel of Māori freehold land for the purpose of residential housing, subject to certain conditions. Clause 129 governs a lease when rent is payable, which can only be the case if there is a governance body. Here, the lease must be 99 years or less, or must be a periodic tenancy. Clause 130 governs a lease when the residential housing is rent free. Again, the term of the lease must be 99 years or less, or for the life of the person to whom it is granted. In this case, the lease can be agreed to by the governance body or by the owners who together hold 75 per cent or more of the participating owners total shareholding in the land. This would remove the need to go to the Māori Land Court in the case where there is no governance body.

The second change is that a local authority may write off all, or part, of the rates on a section of Māori land.⁸⁸ The local authority must have adopted a rates write-off policy under the Local Government Act 2002 and be satisfied that the conditions and criteria under Schedule 11 of the Local Government Act have been met.

E Other relevant legislation

1 Housing Accords and Special Housing Areas Act 2013

The purpose of this Act is to “enhance housing affordability by facilitating an increase in land and housing supply in certain regions or districts, listed in Schedule 1, identified as having housing supply and affordability issues”.⁸⁹ A Housing Accord is an agreement between the Minister for Building and Housing and a territorial authority whose district is within a scheduled region or district to work together to address housing supply and

⁸⁷ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at 66.

⁸⁸ TTWM Bill, cl 489; s 117AA inserted.

⁸⁹ Housing Accords and Special Housing Areas Act 2013, s 4.

affordability issues in the district of the territorial authority.⁹⁰ Qualifying developments in Special Housing Areas (discrete geographical areas) can seek more permissive resource consent processes to fast-track residential development. Special Housing Areas can be used for papakāinga developments. For example, in Auckland, consent has been granted to Ngāti Whatua Orakei to develop the next stage of papakāinga housing within the Orakei Special Housing Area.⁹¹ As stated by the Auckland Council:⁹²

The consent paves the way for the construction of papakāinga housing comprising an additional 30 dwellings, private and communal open space, landscaping, car parking, access and infrastructure. The 30 secure, warm dwellings will be sold or leased to hapū of Ngāti Whātua Ōrākei. They are also designed with the intention to foster community values, and to embrace the concepts of whanaungatanga, manaakitanga, kitiakitanga and kotahitanga.

A Special Housing Area was also announced in Otara. A papakāinga development is planned there by the Kokiri Trust.⁹³

However, there is no reference in the Housing Accords and Special Housing Area Act to the importance of, or need to support, the development of papakāinga or housing Māori communities with reference to recommending a Special Housing Area. Papakāinga have special attributes that should be specifically provided for in the Act.⁹⁴ For example, papakāinga may be smaller than what is anticipated for a Special Housing Zone. Additionally, a problem arises in that papakāinga are geographically constrained to land within the ancestral rohe of the iwi or hapu, and may be associated with an existing marae or area of cultural importance. Therefore, they may not occur within areas normally contemplated for Special Housing Areas, or may be lacking access to conventional infrastructure.

2 Treaty of Waitangi Settlement Statutes

There are currently a range of Treaty of Waitangi claims which have either been settled, or will be settled in the near future. The transfer of Crown lands and financial resources

⁹⁰ See Housing Accords and Special Housing Areas Act 2013, s 6, definition of “housing accord”

⁹¹ Auckland Council *Auckland Housing Accord: What’s been achieved in the first year* (First Year Report, 2014) at 3.

⁹² Auckland Council *Auckland Housing Accord: What’s been achieved in the first year* (First Year Report, 2014) at 3-4.

⁹³ Chris Harrowell “Otara Special Housing Area vacant three years after being announced” *Manukau Courier* (online ed, Auckland, 23 May 2016).

⁹⁴ Independent Māori Statutory Board “Submission to the Social Services Select Committee on the Housing Accords and Special Housing Areas Bill” (4 June 2013) at 5.

can provide opportunities for the development of affordable housing, sometimes as papakāinga.⁹⁵ Papakāinga can be established on general land owned by Māori, and certain government loans (Kainga Whenua loans) can be made for general land returned under settlement claims.

Sitting alongside this law is extensive central and local planning and policy including financial support grants to help enable more residential building on Māori freehold land. This chapter now turns to discuss these matters.

IV Building on Māori Land – Government Grants and Policy, and Commissioned Research

The Government is committed to enabling more widespread residential building on lands owned by Māori (both Māori freehold land and General land). This part of this chapter considers more generally current government grants and policy, and commissioned research that seeks to permit more papakāinga and whanau housing. This chapter is structured according to relevant central government departments and independent agencies: Te Puni Kokiri; Ministry of Business, Innovation and Employment (MBIE), Housing NZ Corporation, Office of the Auditor-General, Treasury, Ministry of Social Development, Inland Revenue, Department of Conservation, New Zealand Productivity Commission, Independent Māori Statutory Board, and Landcare Research.

It is useful to note upfront that the Auditor-General has produced two significant reports on the effectiveness of government support for Māori wishing to build housing on their land in 2011,⁹⁶ and a later progress report in 2014.⁹⁷ The 2011 published Report audited some of the central government initiatives and found them lacking, specifically in effective process. It was a ‘game changer’ report.

A Te Puni Kokiri (TPK) Ministry of Māori Development

Te Puni Kokiri has many initiatives and funds to support building housing for Māori families. Most significantly, in 2015 the Government established the Māori Housing

⁹⁵ Historical papakāinga sites have been returned to iwi as cultural redress, such as in the Ngāti Apa (North Island) Claims Settlement Act 2010.

⁹⁶ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011).

⁹⁷ Controller and Auditor-General *Government planning and support for housing on Māori land: Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014).

Network in Te Puni Kōkiri to lead the Government’s work to improve housing outcomes for whanau. The Māori Housing Network is to “support the energy, enthusiasm and entrepreneurship in the Māori housing sector with information, advice and practical support to build capability”.⁹⁸ The Māori Housing Network contributes to the Government’s broader housing strategies, including the Māori Housing Network Investment Strategy 2015-18.⁹⁹ In 2016, a \$12.6 million boost was announced for the Māori Housing Network.¹⁰⁰

The budget for the 2015/2016 financial year was allocated to five different areas in an effort to increase the capability and capacity in the Māori housing sector and to increase the supply of affordable housing:

(a) \$1.9 million to Special Housing Action Zones. These Zones, established in 2000 and led by TPK, “[s]upports [sic] Māori organisations and communities to build ability to deliver affordable housing solutions” with a focus “on community initiatives rather than individual households”.¹⁰¹

(b) \$4 million to the Māori Housing Fund. This Fund, established in MBIE, “[a]ssists Māori organisations and communities increase new housing, especially on land with multiple owners”.¹⁰²

(c) \$2.8 million to Kāinga Whenua Infrastructure Grants. These grants are administered through MBIE and are available to “assist individual households and land trusts developing papakāinga, social and affordable housing on Māori land”.¹⁰³

(d) \$3.3 million to the Whānau Housing Response Fund. This fund provides for emergency housing.¹⁰⁴

⁹⁸ Te Puni Kōkiri “Māori Housing Network” <www.tpk.govt.nz>.

⁹⁹ Te Ururoa Flavell, Minister for Māori Development “Māori Housing Network” (Community Housing Aotearoa Conference, Wellington, 22 October 2015).

¹⁰⁰ Te Puni Kōkiri “\$12.6 million boost for Māori Housing Network” (12 May 2016) <www.tpk.govt.nz>.

¹⁰¹ Te Puni Kōkiri *Māori Housing Network: Our process, our funds* (December 2015).

¹⁰² Te Puni Kōkiri *Māori Housing Network: Our process, our funds* (December 2015).

¹⁰³ Te Puni Kōkiri *Māori Housing Network: Our process, our funds* (December 2015).

¹⁰⁴ Te Puni Kōkiri *Māori Housing Network: Our process, our funds* (December 2015).

(e) \$2.4 million to the Whānau Housing Support Fund. This fund allows for the “[p]urchase of specialist practical and technical advice to advance whānau and Māori organisations’ housing aspirations”.¹⁰⁵

The Māori Housing Network is providing funding to multiple papakāinga of varying scale nation-wide. One recent example is the Te Aro Pā whānau papakāinga. The Māori Housing Network, in collaboration with the Wellington City Council, Homestead Homes and Dwell Houses, have constructed 14 homes in an urban papakāinga in Wellington to provide accommodation for elderly Te Aro Pā descendants. This papakāinga was completed in 2016.¹⁰⁶

Further, in the Hawkes Bay, the Māori Housing Network is providing 70 per cent of the \$2.25 million needed to construct a papakāinga consisting of eight homes intended for beneficiaries of the reclaimed ancestral land. These eight homes are the first of 32 to be constructed, with the intention of providing housing to the whānau at below market rates.¹⁰⁷

Another example is a five-house papakāinga in Ngāruawāhia for the Ranga-Bidois whānau. This project again demonstrates the collaboration between different agencies and sectors; it was developed with the support of Whanau Ora, while the Māori Housing Network helped to plan the project. The bulk of funding assistance came from MBIE through the Social Housing Fund.¹⁰⁸

B Ministry of Business, Innovation and Employment (MBIE)

1 He Whare Āhuru He Oranga Tāngata – The Māori Housing Strategy

Similar to TPK, MBIE has several initiatives to support better housing for Māori, including more papakāinga and whanau housing. Most significant is *He Whare Āhuru He Oranga Tāngata – The Māori Housing Strategy* that was launched on 1 July 2014. The Preamble notes that Māori are disproportionately affected by overcrowding or live in substandard housing as compared to other New Zealanders. Māori are also less likely to

¹⁰⁵ Te Puni Kōkiri *Māori Housing Network: Our process, our funds* (December 2015).

¹⁰⁶ Te Ururoa Flavell, Minister for Māori Development “Māori providing their own housing solutions” (press release, 19 March 2016).

¹⁰⁷ Aroha Treacher “Homes for whanau are now ready in Hastings” *Hawke’s Bay Today* (online ed, Hawke’s Bay, 24 November 2015).

¹⁰⁸ Te Ururoa Flavell, Minister for Māori Development “Ranga-Bidois Whānau Papakāinga ‘an outstanding example of a whānau-led housing initiative’” (press release, 3 October 2015).

own a home and are more likely to have limited housing choices or need government assistance.¹⁰⁹ The Māori Housing Strategy sets out six directions to improve the way that Māori whanau are housed, including: ensuring the most vulnerable Māori have secure tenure and access to safe, quality housing with integrated support services; improving the quality of housing for Māori communities; supporting Māori and their whanau to transition to preferred housing choices; increasing the amount of social housing provided by Māori organisations; increasing the amount of housing on Māori owned land; and, increasing large scale housing developments involving Māori organisations.

The fifth objective, increasing the amount of housing on Māori owned land, considers papakāinga housing developments in depth. It notes that in principle, papakāinga housing would decrease the cost of constructing affordable housing for Māori, as the cost of the land does not need to be factored in. However, in practice, the array of restrictions that apply to Māori land, and lack of infrastructure already present make the construction of papakāinga much more difficult than it initially appears.¹¹⁰

The Māori Housing Strategy notes that a further barrier to increasing the amount of housing on Māori-owned land arises from lack of financial and funding support as well as the need for increased business capacity, capability and resourcing.¹¹¹ It examines the Kainga Whenua loan system which provides funding for Māori collectives wishing to build on Māori land.

Although officials are reviewing government funding programmes to ensure they provide a solid basis for delivering housing schemes for Māori, the Māori Housing Strategy accepts that other pressures on government funding, combined with the high costs of housing, mean that sustainable growth in Māori housing will ultimately depend on Māori organisations obtaining access to private sector capital and housing schemes which are financially sustainable in the long term. Therefore, an increase in the potential for private lending on papakāinga will be necessary.¹¹²

¹⁰⁹ Ministry of Business, Innovation and Employment *He Whare Āhuru He Oranga Tāngata – The Māori Housing Strategy* (July 2014) at 5.

¹¹⁰ Ministry of Business, Innovation and Employment *He Whare Āhuru He Oranga Tāngata – The Māori Housing Strategy* (July 2014) at 29.

¹¹¹ Ministry of Business, Innovation and Employment *He Whare Āhuru He Oranga Tāngata – The Māori Housing Strategy* (July 2014) at 29.

¹¹² Ministry of Business, Innovation and Employment *He Whare Āhuru He Oranga Tāngata – The Māori Housing Strategy* (July 2014) at 30.

Further, the Māori Housing Strategy anticipates the development of different forms of home ownership on Māori land in response to the small capital gain that can be made on properties, given the limited pool of potential owners. For example, as part of the papakāinga at Orakei, mortgages will be underwritten by the iwi and there is a guarantee of purchase of the properties for up to 10 years for home owners who wish to realise their equity.¹¹³

The Māori Housing Strategy lists its Action Areas for 2015-2025 as:

- (a) developing tools and models to support Māori organisations to set up sustainable housing projects on their land;
- (b) ensuring government funding assistance is effectively used to support sustainable housing schemes on Māori land;
- (c) increasing access to private sector funding for building on Māori land, including through Kāinga Whenua schemes.¹¹⁴

It also states its priorities for 2014-2017 as completing and implementing the review of government funding assistance for housing development on Māori land and increasing the uptake of Kāinga Whenua loans.¹¹⁵

The Māori Housing Strategy considers the Auditor-General's Report into building on Māori land, and its focus on coordination between agencies involved in the process of constructing papakāinga. It notes that the best example of such coordination to date is in the Western Bay of Plenty where local land trusts, councils and government agencies have prioritised working collaboratively.¹¹⁶

2 Putea Māori Fund

The Putea Māori Fund is a capital grant for social affordable and assisted home ownership housing, principally on Māori land. It was established as a targeted fund for Māori in 2012, and grants in 2011 and 2012 were made from the Māori and Rural Funds. It received \$4.2 million in 2011/2012, and a further \$13.8 million from 2012-2015. This

¹¹³ Ministry of Business, Innovation and Employment *He Whare Āhuru He Oranga Tāngata – The Māori Housing Strategy* (July 2014) at 30.

¹¹⁴ Ministry of Business, Innovation and Employment *He Whare Āhuru He Oranga Tāngata – The Māori Housing Strategy* (July 2014) at 30.

¹¹⁵ Ministry of Business, Innovation and Employment *He Whare Āhuru He Oranga Tāngata – The Māori Housing Strategy* (July 2014) at 30.

¹¹⁶ Ministry of Business, Innovation and Employment *He Whare Āhuru He Oranga Tāngata – The Māori Housing Strategy* (July 2014) at 29.

funding is now being included in the Māori Housing Fund.¹¹⁷ The Auditor General's Progress Report stated that between 2011 and 2015, 18 grants totalling \$18.26 million were approved from this fund. This funding will deliver 103 units of housing, and all but four of the projects are on Māori land. The four projects that are not based on Māori land are still run by Māori organisations or collectives, however they had purchased or otherwise acquired general land.¹¹⁸

3 *Kāinga Whenua Project Capability*

This was originally part of the Proposal Development fund, set up to assist with project development costs under the Putea Māori Fund. However, it was separated from the Putea Māori Fund and re-aligned with Kāinga Whenua loans. The criteria were also extended to include building capability to manage future housing projects and portfolios. It had funding of \$500,000 from 2012 - 2015, however this funding is now being included in the Māori Housing Fund.¹¹⁹ Between 2011 and 2014, the Auditor General's Progress Report states that \$1.44 million was distributed to support 12 Māori organisations or collectives in preparing their plans.¹²⁰

4 *Kāinga Whenua Infrastructure Grant*

This grant covers the cost of infrastructure needed to connect developments on Māori land to existing infrastructure. From 2013-2015 it had \$3 million a year in funding.¹²¹ At the time the Auditor General's Progress Report was published it had given 19 grants, totalling \$3.45 million which supported the development of 83 houses (78 of which were newly built dwellings). Ten infrastructure grants were for trusts or other Māori collectives, ranging from \$18,196 to \$990,363 (an average grant of \$40,108 per house).¹²²

¹¹⁷ Controller and Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014) at [1.44], Figure 2.

¹¹⁸ Controller and Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014) at [1.43].

¹¹⁹ Controller and Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014) at [1.44], Figure 2..

¹²⁰ Controller and Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014) at [1.43].

¹²¹ Controller and Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014) at [1.44], Figure 2.

¹²² Controller and Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014) at [1.43].

5 *The Māori Housing Fund*

This fund aims to support the repair and rebuild of rural housing, the improvement of housing on the Chatham Islands and the development of Māori social housing providers. Over four years from 2014, it has had \$16 million in funding.¹²³

C Housing NZ Corporation

Housing New Zealand (HNZ) manages the two main sources of finance for building on Māori land: Kāinga Whenua loans and the Māori Demonstration Partnership fund.

1 Kāinga Whenua Loan Scheme

The Kāinga Whenua Scheme is a joint initiative between Housing New Zealand and Kiwibank. This Scheme aims to provide mortgage loans to households that have shares in Māori land. The scheme is intended to remove the financial barrier that often exist to building on Māori land, as many private banks refuse to lend to Māori homeowners due to the difficulty of selling the land in event of a default. Kāinga Whenua loans are an extension of the Welcome Home Loan adapted for houses built or moved onto Māori land.¹²⁴

HNZ provides Kiwibank with the lender's mortgage insurance for the loan, which enables the loan to be secured only against the home, rather than the home and the land. Kiwibank assesses applicants according to eligibility criteria set by HNZ and its own credit policies.¹²⁵ HNZ underwrites the loan made by Kiwibank so in the event of a default HNZ will pay the value of the Kāinga Whenua loan to Kiwibank. This minimises the risk for Kiwibank and HNZ in turn can repossess the home in the event of a default.¹²⁶

Problems have arisen with the Kāinga Whenua loan. Under the lending criteria for Kāinga Whenua, a household with an income of \$45,000 would be eligible for a loan of \$170,000, as long as the applicants maintain a good credit rating and meet other criteria

¹²³ Controller and Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014) at [1.44], Figure 2.

¹²⁴ See Welcome Home Loans <www.welcomehomeloan.co.nz>.

¹²⁵ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [4.28].

¹²⁶ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [6.32].

such as living within a ‘commutable distance’ to their place of work. Yet, many low-income Māori families are unable to service a loan of this size because their income is too low, they have existing debts or would be unable to meet other financial commitments in addition to loan repayments.¹²⁷ When recalculated by the Auditor General, the same hypothetical household would, in reality, need a \$70,000 household income (rather than \$45,000) for Kāinga Whenua to be affordable.¹²⁸

Further, there are substantial financial risks that Māori landowners face when they take on a mortgage to build on Māori land. As the right to occupy Māori land is restricted by TTWMA, it is more difficult to sell a house on Māori land than on general land. Due to this limited market, the house is likely to lose rather than gain value. If a homeowner does default on the loan, in general HNZ will have to remove the house. This has a negative effect on both parties: it leaves the homeowner without a house and usually causes HNZ to incur a debt. In addition, if the sale of the house does not pay off the debt in full, HNZ will require the borrower to pay off the remaining debt.¹²⁹

The Auditor-General’s Report also notes the difficulty landowners face when getting advice, information and support. The Report estimates there are up to 30 steps involved in getting a Kāinga Whenua loan, and applicants must go through multiple agencies and authorities. The Report then recommends that there be better and clearer communication between HNZ, the Māori Land Court, Kiwibank and local authorities to make the process easier.¹³⁰ Communicating the level of risk through appropriate advice and guidance is key.

The Auditor General concluded that, to date, Kāinga Whenua loans have been ineffective in overcoming the difficulties faced by Māori wishing to build on their land. Conceiving of Kāinga Whenua loans as an extension of the Welcome Home loan scheme significantly limited both the design and implementation of Kāinga Whenua, as it did not

¹²⁷ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [6.9].

¹²⁸ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [6.12].

¹²⁹ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [6.33].

¹³⁰ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [6.28].

properly take into account Māori household incomes and what they can afford. However, the Report also notes that “the Government underwriting loans to gain access to private finance for building houses on Māori land is an innovation”.¹³¹ In this sense, the scheme should be improved rather than removed.

However, HNZ has responded to some criticisms of the Kāinga Whenua scheme. Originally its eligibility criteria stated that the applicants must be first home buyers or in the same position as a first home buyer, and an income cap was placed on the scheme. This meant that a household of two incomes that earned over \$85,000 was unable to access the loan. This income cap excluded many people who wished to build on Māori land, and who were often still unable to get finance elsewhere.¹³² However, the Auditor-General’s 2014 Progress Report noted that the income cap had been altered. The current income cap is now \$120,000 for one borrower and \$160,000 for two or more borrowers. Furthermore, those who have previously owned a home may apply.¹³³ More changes were also made to the criteria that has made accessing a loan easier, such as:¹³⁴

(a) Only one borrower needs to live full time in the house, rather than all borrowers who contribute to the loan repayments having to live full-time in the dwelling. Therefore, other whanau members who are not living in the house are able to contribute to the loan repayments.

(b) The loan can also be used for repairs and maintenance on existing homes on Māori land, rather than only building, buying or re-locating homes onto Māori land. Furthermore, grants and loans are now also available for land that hapu and iwi receive from their treaty settlements.

¹³¹ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [6.36].

¹³² Pahia Turia, “Draft Report Submission to the New Zealand Productivity Commission on the Kāinga Whenua Scheme” (2011) <<http://www.productivity.govt.nz/sites/default/files/DR078%20-%20Pahia%20Turia%20-%20Draft%20Report%20Submission.pdf>>.

¹³³ Controller and Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014) at [1.45], Figure 3.

¹³⁴ Controller and Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014) at [1.45], Figure 3.

(c) Previously, houses built on ancestral land must be relocatable, to provide for the event of a loan default. However, this requirement may be waived so long as there is alternative security for the loan.

Not having a land trust over a block of Māori land significantly increases the difficulty of obtaining a Kāinga Whenua loan. This is because an applicant needs the consent of the other landowners to get a Licence to Occupy and a tripartite agreement with HNZ. The tripartite agreement designates that the house remain a chattel of the borrower, rather than a fixture to the land, which would mean all the shareholders in the Māori land would own it. Designating a house as a chattel allows it to be used as security for a loan, as it can be removed from the land and sold if the borrower defaults.¹³⁵ Every shareholder needs to sign both of these contracts if there is no trust over the land. In cases where there are many, up to hundreds, of owners, this can be practically impossible.¹³⁶ However, in the situation where a trust exists, the trustees can sign these contracts on behalf of all of the owners. HNZ also changed this part of the criteria which now allows trusts to apply.¹³⁷

To illustrate how effective these changes have been, the Progress Report stated that between July 2011 and August 2014:

- 10 Kāinga Whenua individual loans adding up to \$1.85 million were agreed;
- One Kāinga Whenua loan for a collective was approved and further 10 trusts have registered an interest with HNZ to access to these loans.¹³⁸

2 *Community Housing providers*

In some regions of New Zealand, HNZ is working with local iwi to provide community housing. Iwi generally provide the social housing by utilising multiple-owned land, such as in Tauranga, where kaumātua housing is being built by the Nga Potiki Tamaphore Trust on multiple-owned land to help resolve a housing shortage for elderly members of

¹³⁵ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [6.18].

¹³⁶ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [6.19].

¹³⁷ Controller and Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014) at [1.45], Figure 3.

¹³⁸ Controller and Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014) at [1.43].

the iwi.¹³⁹ HNZ contributed \$1.17 million in Māori Demonstration Partnership Funding towards this project.¹⁴⁰

As at February 2016, eight iwi are registered as Community Housing Providers:¹⁴¹ Aorangi Māori Trust Board; Te Tumu Kāinga; He Korowai Trust; Maniapoto Māori Trust Board; Nga Rau Tātangi; Papakāinga Solutions Ltd; and, Tāmaki Redevelopment Company Ltd. Many of them have already begun, or completed, developments through their roles as Community Housing Providers. For example, He Korowai Trust had state homes due for demolition shipped to Northland and re-purposed as affordable housing. HNZ provided \$720,000 towards this project.¹⁴²

3 Ki Te Hau Kāinga: New Perspectives on Māori Housing Solutions (2002)

This Report, written on behalf of HNZ, considers communal housing to be a forward-thinking approach that should be adopted, and then continues to consider the design elements required to successfully develop papakāinga communities that are rooted in Māori values.¹⁴³ The Report states that papakāinga must be developed with a focus on the requirements of whanau, hapu and iwi. As such, Māori housing should be developed as a part of a holistic approach to Māori economic, cultural, educational, social and environmental development.¹⁴⁴

4 The Māori Demonstration Partnership Fund

The Māori Demonstration Partnership Fund (MDP) is a contestable fund that is part of the Housing Innovation Fund. Housing projects that receive funds from MDP are expected to be 50 per cent funded by Māori organisations. This equity can be in the form of land, funds or labour. The MDP funding is typically a loan, generally with an extended interest free period of up to 10 years. It can be used for building houses or for some infrastructure. Capacity funding was available which could be used to pay for

¹³⁹ Housing New Zealand *Annual Report 2010/11* (2011) at 25.

¹⁴⁰ Housing New Zealand *Annual Report 2010/11* (2011) at 25.

¹⁴¹ Hinerangi Barr “Supporting Māori Housing Providers” (18 February 2016) Māori Party <www.maoriparty.org>. This excludes iwi based groups.

¹⁴² Dean Nathan “Kaitaia homeowners to move into Papakinga [sic] homes” *Māori Television* (online ed., Northland, 16 June 2016).

¹⁴³ Rau Hoskins and others *Ki te Hau Kainga: New Perspectives on Māori Housing Solutions* (A Design Guide Prepared for Housing New Zealand Corporation, August 2002).

¹⁴⁴ Rau Hoskins and others *Ki te Hau Kainga: New Perspectives on Māori Housing Solutions* (A Design Guide Prepared for Housing New Zealand Corporation, August 2002) at 5.

professional services needed as part of planning the development, however, this is no longer available.¹⁴⁵

This fund provides finance to Māori organisations, ranging from small land trusts to large iwi governance organisations. Funding schemes targeting trusts, rather than individuals can lead to more sustainable housing solutions, as it has been found that developing Māori land on a house-by-house basis is expensive and does not end with well-planned developments that increase employment and services. The Rural Housing Programme review concluded that a focus on individual houses should be “replaced by a community redevelopment approach”.¹⁴⁶

There are benefits to financing a trust rather than individual owners. Trusts who build on Māori land face less risk than individual owners, because Māori trusts are inherently linked to the land. Therefore, the possibility of a change in circumstances leading to a default for an individual is not a risk for a trust. Further, working with an established group shifts the focus to a ‘community redevelopment’ approach rather than a more individualist perspective. Trusts are able to deliver ‘wraparound’ services such as healthcare, as well as services focused on homeownership, which improves wellbeing and assists in avoiding defaulting on the agreement for living in the house.¹⁴⁷

The Auditor-General’s Report found that although the fund has enabled some Māori housing developments, it is out of reach for many smaller Māori organisations that have land, but not the capacity or finances needed to prepare eligible project plans.¹⁴⁸ This is mainly because there are high upfront costs before Māori trusts receive any funding and the MDP fund is administered less as a partnership and more like a standard contestable

¹⁴⁵ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at 6.42.

¹⁴⁶ As quoted in Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [6.38].

¹⁴⁷ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [6.40].

¹⁴⁸ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [6.4].

fund.¹⁴⁹ The Auditor General noted that many trusts were unclear about what criteria they needed to satisfy in order to receive funding.¹⁵⁰

D Office of the Auditor-General

The Office of the Auditor-General is the auditor of every public entity, providing independent reporting on how the government spends our taxes and rates.¹⁵¹ It has now produced two significant reports on Māori land.

1 Report of the Auditor-General 2011

In 2011, the Auditor-General published its “Government planning and support for housing on Māori land” report.¹⁵² This Report examined the effectiveness of government support for Māori wishing to build housing on their land. It specifically audited three policies: Kāinga Whenua loans, the Māori Demonstration Partnership fund and Special Housing Action Zones. Its conclusion was that “despite good intentions, the process to build a house on Māori land is fraught”.¹⁵³

The Report examined the potential for Māori land to provide for affordable housing. As the land is already in the ownership of the Māori individual or organisation, the costs of developing a house are reduced. The Report estimated this can reduce the cost of building by up to 40 per cent.¹⁵⁴ The focus of building homes on Māori land would be most in areas where the population growth of Māori is expected to be high, for example the Bay of Plenty.

The Report analysed the barriers to building on Māori land, as despite the potential for affordable housing, many of the plans held by whanau, Māori trusts, hapu and iwi are yet

¹⁴⁹ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [6.47].

¹⁵⁰ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [6.46].

¹⁵¹ See Public Audit Act 2001.

¹⁵² Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011).

¹⁵³ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at 9.

¹⁵⁴ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [2.9].

to be realised. They listed the barriers and the governmental responses to these barriers as following:¹⁵⁵

(a) Difficulty in raising finance

Banks have been reluctant to lend money for mortgages on Māori land, as it is difficult to sell the land if the borrower defaults on the loan. . Compared to General land, it will be easier for owners of Māori land to obtain a mortgage if they intend to build a house not fixed to the land (a chattel). The government's Kāinga Whenua loan scheme and Māori Demonstration Partnership fund were recognised as attempts to address this.

(b) Planning restrictions

Much of Māori land is rural, or on the outskirts of towns or cities. Generally, it has been used agriculturally, or not utilised at all. The zoning of Māori land as rural restricts the number of houses that can be built and also affects the designs and plans of housing developments. As district planning has traditionally not considered Māori land for housing developments, resource consent applications can often prove costly. The Report noted that some local authorities were revising their district plans, and were using these revisions to alter their approach to development on Māori land.

(c) Rates arrears

Due to the underutilisation of Māori land, rates arrears have accumulated over time. This can discourage owners of Māori land from building as they believe they will have to pay for the arrears. However, local authorities have rates remission policies that can remove this barrier. Land around a newly built house can be 'apportioned' so that the household is only responsible for the rates due on the land surrounding the house and not the entire land block.¹⁵⁶ The Report recommended that local authorities do more to communicate to owners of Māori land how these rates remissions work.¹⁵⁷

(d) Infrastructure

¹⁵⁵ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [2.12], Figure 3.

¹⁵⁶ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [2.12], Figure 3.

¹⁵⁷ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [5.22].

Due to the rural zoning of land, and its frequently isolated location, Māori land is often poorly connected to vital infrastructure and services such as water, stormwater, electricity and waste-water. The costs to connect and develop these services is a significant barrier to housing developments on Māori land. Kāinga Whenua loans and Māori Development Partnership funding can be used to fund some infrastructure.

(e) Gaining consent to build on multiple-owned land

Ownership in Māori land can be shared, sometimes by hundreds of owners. In 2011, there were, on average, 86 owners for each land title. As well as the difficulty of contacting these shareholders, once contacted, shareholders may not all agree about what should be done with the land. This can delay, or even end, plans to develop housing. A possible solution to this problem lies with the Māori Land Information system, which was introduced in 2000. It provides information on title holders of Māori land. This was followed in 2011 with a Māori Land Geographic Information System, which provides information about all Māori Land. In 2004, the Auditor-General recommended that the Māori Land Court compile a database of addresses of shareholders of Māori Land.¹⁵⁸ A problem remains in that the Māori Land Court relies on the shareholders to update the information, meaning some of the information is incomplete or outdated.

(f) Lack of coordination between government entities and authorities in providing advice and guiding Māori through the process of building a home on Māori land.

Often owners of Māori land lack experience in managing the development of housing, and the added restrictions on building on Māori land complicate this process further.¹⁵⁹ The Report stated that no single agency provides owners of Māori land with the information and advice needed. Usually owners have to speak with at least three, but generally more, agencies to get the necessary information. The different agencies do not adequately understand each other's processes, policies and requirements, and there is a lack of coordination between central and local government. However, the Report recognised that local authorities in regions it audited were seeking to improve the way they approached their planning for Māori land by becoming more flexible in how they

¹⁵⁸ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [2.12], Figure 3.

¹⁵⁹ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [4.2].

charge development fees, providing rates remissions and free advice to landowners.¹⁶⁰ The Report also analysed the problems specific to separate regions. Common themes included low income, lack of infrastructure and access, and lack of funding.

Overall, the Auditor-General concluded that:¹⁶¹

- (a) although some individuals in government entities provide high quality advice, agency staff generally lack the knowledge and depth of understanding to guide people through the maze of agencies and processes;
- (b) the process for obtaining approval and funding for putting houses on Māori land is complicated and disconnected. Exacerbating this is a lack of coordination between central and local government;
- (c) getting consent to build on Māori land can require approval from multiple shareholders who can be hard to locate;
- (d) without adequate financial support, the up-front costs of the local government consent process can become a significant barrier for Māori landowners;
- (e) banks are reluctant to accept Māori land as a security for a loan, and houses on Māori land generally do not gain value because there is a limited market for them;
- (f) state lending programmes should be more targeted to the financial circumstances of Māori households and organisations. The Report states that although the Kāinga Whenua loan is an encouraging development, as it is currently designed “most people who can afford the loan cannot get it and most people who can get the loan cannot afford it”.¹⁶² The Māori Partnership Development Fund is also in need of improvement; and

¹⁶⁰ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [5.35].

¹⁶¹ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at 10.

¹⁶² Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at 10.

(g) government funding is more likely to be successful when:¹⁶³

- (i) it is tailored to the particular circumstances of Māori landowners, for example if the income cap on Kāinga Whenua was raised and other solutions were given for low income households;
- (ii) different ways of funding allowed for a mixture of tenures so that people from all sides of the socio-economic spectrum can be housed;
- (iii) funding is available when upfront costs are incurred;
- (iv) funding is realistic about long term costs; and
- (v) the capacity of Māori is built so that housing can make a larger contribution to long-term social outcomes.

The Report also recommended changes to the current system:¹⁶⁴

(a) Involved agencies coordinate locally by:

- (i) having one organisation to act as a single point of contact for Māori who wish to build housing on their land;
- (ii) agreeing to a shared process that designates who will work with Māori who wish to build on their land and when; and
- (iii) having staff with the relevant expertise and knowledge available to provide high quality information and advice;

(b) More flexibility is allowed in local authority district plans to allow housing to be built on Māori land;

¹⁶³ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [6.79].

¹⁶⁴ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at 16.

(c) Local authorities identify and work alongside landowners who have particularly suitable land and wish to build housing on it;

(d) Recommend that the Department of Building and Housing (now MBIE) better target financial support programmes by:

(i) better matching the support available to the financial circumstances of Māori so that it is affordable for more Māori organisations and households;

(ii) making financial support available when costs are incurred;

(iii) structuring financial support to make housing developments sustainable; and

(e) Department of Building and Housing (now MBIE) work with other agencies to build the capacity of Māori organisations that wish to build on their land. This would include the organisation's ability to manage the legal and practical processes of a housing development.

2 Auditor-General Progress Report (2014)

In 2014 the Auditor-General published its Progress Report on Māori land.¹⁶⁵ This Report analysed any changes since the 2011 Report was released. It noted that changes to the criteria for loans to Māori and Māori organisations had been effective, with 11 Kāinga Whenua loans for building new houses agreed since 2011, as well as the development of the Kāinga Whenua infrastructure grant. 19 of these have been granted, with the funding going towards the costs needed to connect housing to infrastructure such as water and power.¹⁶⁶

It also considered that local authorities were working more collaboratively with Māori to improve their housing options. However, this varied regionally and some local authorities

¹⁶⁵ Controller and Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014).

¹⁶⁶ Controller and Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014) at [1.7].

were still more proactive than others, with specific consultation processes and planning regulations that are designed to ease the way for Māori to build on their land.¹⁶⁷

E Other Relevant Activity and Reports

1 Treasury

In 2015 the Treasury released a report commissioned from Community Housing Aotearoa involving a Community Housing Sector Survey. This Survey gave no identifiable special consideration to the role of papakāinga or Māori housing, but its numbers do show the important role of Māori organisations in providing community housing. Of the three organisations in the community housing sector that have revenue of over \$100 million a year, one is a post-settlement iwi entity.¹⁶⁸ Further, of the five organisations that have over \$100 million in equity, two are iwi.¹⁶⁹

2 Ministry of Social Development

The Ministry of Social Development lists emergency housing providers, a significant number of which are Māori organisations.¹⁷⁰ These include:

- Koraunui Marae Charitable Trust;
- Ngati Awa Social and Health Services Trust;
- Te Manawanui Trust;
- Te Roopu O Te Whānau Rangimarie O Tamaki Makaurau ;
- Te Runanganui O Ngati Porou Trustee Limited;
- Te Kauhanga Nui Aa Iwi Trust Board;
- Waitomo Papākaianga Development Society Incorporated;
- Whakaatu Whanaunga Trust; and
- Whānau Resource Centre O Pukekohe Charitable Trust.

3 Inland Revenue Department

The rules regarding Kiwisaver withdrawals were changed in 2015 to clarify that a First Home withdrawal could be used to buy a house on Māori land. This clarification was

¹⁶⁷ Controller and Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014) at [1.28].

¹⁶⁸ Community Housing Aotearoa *Community Housing: A Sector Survey - a report by Community Housing Aotearoa* (The Treasury, Treasury Report No: T2015/80, February 2015) at 1.

¹⁶⁹ Community Housing Aotearoa *Community Housing: A Sector Survey - a report by Community Housing Aotearoa* (The Treasury, Treasury Report No: T2015/80, February 2015) at 1.

¹⁷⁰ Ministry of Social Development “Emergency Housing” <www.msd.govt.nz>.

necessary as previously the rules stated that the withdrawal had to be used towards “an estate in land,” which excluded a home on collectively owned Māori land.¹⁷¹

4 *Department of Conservation*

The New Zealand Coastal Policy Statement is intended to ensure the sustainable development of the coast.¹⁷² Papakāinga is recognised briefly in the most recent statement, released in 2010. Policy 6 addresses ‘Activities in the Coastal Environment’. Policy 6(1)(d) states, “in relation to the coastal environment”:

recognise tanagta whenua needs for papakāinga, marae and associated developments and make appropriate provision for them

Papakāinga is defined in the glossary as “[d]evelopment of a communal nature on ancestral land owned by Māori.” Although papakāinga is mentioned in this policy statement, it is not considered in the general conservation policy.

5 *New Zealand Productivity Commission*

The New Zealand Productivity Commission is an independent Crown entity that provides advice to the Government on improving productivity. Its 2015 report *Using Land for Housing* explored the regulatory practices in terms of land use of local and regional authorities.¹⁷³ The Commission sought to understand how the approach to land use planning and regulation has affected increasing house prices. However, this report does not consider the situation of Māori building on Māori land. The New Zealand Centre for Sustainable Cities provided a submission to the Commission, in response to the Report including a short note about Māori housing developments. It stated that:¹⁷⁴

... it would be constructive to investigate ways in which the ownership of the land and the development of housing can be separated. For example, the development of papakāinga on multiply-owned Māori land uses a ‘licence to occupy’ system which allows an owner to reside on land owned by a trust. This model is not unlike a Community Land Trust, a mechanism used to provide affordable housing in perpetuity in the United States, United Kingdom and Australia.

¹⁷¹ Inland Revenue “First home withdrawal available for homes on Māori land” (14 August 2015) <www.ird.govt.nz>.

¹⁷² Department of Conservation *New Zealand Coastal Policy Statement 2010* (November 2010).

¹⁷³ New Zealand Productivity Commission *Using land for housing: summary version* (September 2015).

¹⁷⁴ New Zealand Centre for Sustainable Cities “Submission to the New Zealand Productivity Commission’s Draft Report *Using Land for Housing*” <www.productivity.govt.nz>.

6 *Independent Māori Statutory Board*

In 2009, legislation was enacted to establish a board to assist the Auckland Council to make decisions, perform functions and exercise powers by promoting issues of significance to mana whenua groups and mataawaka of Tamaki Makaurau (Auckland).¹⁷⁵ This board, named the Independent Māori Statutory Board, is noted here because of its statutory authority and significant reach that recognises papakāinga development in the Auckland region as a priority. This work is discussed in the next part of this chapter, within the local government context.

7 *Landcare Research NZ*

In 2008, Landcare Research published a report entitled “Tu Whare Ora – Building Capacity for Māori Driven Design in Sustainable Settlement Development”.¹⁷⁶ This is a substantial report capturing important research enabled by Nga Pae o te Maramatanga New Zealand’s Māori Centre of Research Excellence to address the growing desire among Māori to be more active in developing living environments for their people and the overall settlement patterns of their respective traditional areas. It also includes a bibliography of resources on papakāinga that is supported by an online bibliography. The resources span Māori housing from “pre-European times, through the state sponsored housing schemes of the 1950s, up to the current climate of iwi/hapū advocating for kaupapa Māori based solutions for housing”.¹⁷⁷

This part of this chapter has provided a summary of the current work led by central government and agencies to better address the unique issues of building residential homes on Māori freehold land. The next part of this chapter considers in brief some of the local government initiatives.

V *Building on Māori Land – Local Government Policy and Plans*

Some local authorities have specific planning regulations for Māori land that are intended to help make it easier for Māori to build housing on their land. A 2009 review by Te Puni Kokiri found that about 60 per cent of local authorities have provisions in their district

¹⁷⁵ Local Government (Auckland Council) Act 2009, s 81.

¹⁷⁶ Shaun Awatere and others *He Whare Ora – Building Capacity for Māori Driven Design in Sustainable Settlement Development* (Landcare Research Report: LC0809/039, October 2008).

¹⁷⁷ Shaun Awatere and others *He Whare Ora – Building Capacity for Māori Driven Design in Sustainable Settlement Development* (Landcare Research Report: LC0809/039, October 2008) at 1. The online bibliography can be found at Landcare Research “He Rārangi Pukapuka Papakāinga - A Papakāinga Bibliography” <www.papakāinga.landcareresearch.co.nz>.

plans to support housing development on Māori land.¹⁷⁸ The Auditor-General's Report (2011) identified three different approaches that local authorities were taking or intending to take to planning of Māori land. These are:¹⁷⁹

(a) no zoning or separate recognition for housing on Māori land: this makes housing on Māori land an average \$10,000 more expensive for each house than zoning for it;

(b) zoning particular areas of Māori land for housing on Māori land: this makes housing on Māori land an average \$10,000 cheaper for each house. This provides certainty to those who wish to develop houses that fall within the permitted numbers and other standards. However, developments of greater intensity than intended by the zone would still have to go through the resource consent process. All Māori land would have to be included in the zones. This is uncommon and not very flexible where land is returned to Māori after zoning has been decided.

(c) no zoning for papakāinga housing, but general provisions included in current zones and/ or approval on the basis of land management plans. This creates greater flexibility in designing the development (especially its intensity), and possibly, better resource management outcomes from the development plans. Regardless there is some increased cost because of compulsory land management plans. Whether this is a disadvantage depends on who bears the cost and what assistance is available. The plan may or may not have been required for the development anyway.

This part of this chapter considers current activity in just two local governments to provide a snapshot of some of the best practices occurring in the country. We consider the Auckland region, as the most populated region in New Zealand, and the Bay of Plenty region as being renowned for being a leader recognising the unique issues facing Māori.

¹⁷⁸ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [5.10].

¹⁷⁹ Controller and Auditor-General *Government planning and support for housing on Māori land Ngā whakatakotoranga kaupapa me te tautoko a te Kāwanatanga ki te hanga whare i runga i te whenua Māori* (Office of the Auditor-General, Performance audit report, August 2011) at [5.11]-[5.12].

A Auckland Council

The Auckland Plan was adopted by the Auckland Council in 2012. It presents the Auckland Council’s vision for Auckland for the next 30 years. It covers a large variety of areas affecting the city’s growth and its inhabitants, including: transport, employment, housing, environment and youth. Three parts of the Auckland Plan in particular are relevant to papakāinga housing and building on Māori land. These are the Unitary Plan, the Housing Action Plan and the Māori Plan.

1 The Auckland Unitary Plan

The Auckland Council has, for some years, been working on an intense Unitary Plan intended to be the “rulebook that shapes the way Auckland grows”.¹⁸⁰ It regulates what can be built, and where. The Unitary Plan replaces the regional policy statement as well as all 13 district and regional plans that used to be within the bounds of the now singular Auckland Council. The Unitary Plan became operative in part from 15 November 2016 (and at the time of writing this chapter was last updated 11 April 2017).¹⁸¹

By way of background, the Auditor-General’s Progress Report in 2014 provided an analysis of how the Auckland Council was working with Māori to implement its Unitary Plan, and how well this plan accounted for Māori interests. In general, the Unitary Plan was expected to provide greater flexibility for housing and a wider range of development options for Māori land.¹⁸²

The Auditor-General recognised that the Auckland Council worked closely with iwi authorities on the proposed Unitary Plan to ensure it understood the values and the needs of Māori wishing to build on Māori land (and general land returned as a result of Treaty settlements). The Council considered Māori interests at the outset, by involving iwi in the process before the Unitary Plan began, as well as giving feedback to iwi about issues they had identified would be addressed.¹⁸³

¹⁸⁰ Auckland Council *Auckland Unitary Plan* (Operative in part, updated 11 April 2017) <www.aucklandcouncil.govt.nz>.

¹⁸¹ Auckland Council *Auckland Unitary Plan* (Operative in part, updated 11 April 2017) <www.aucklandcouncil.govt.nz>.

¹⁸² Controller and Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014) at [1.32]; Auckland Council, *Section 32 Report for the Proposed Auckland Unitary Plan* (Part 2.17: Māori land)(30 September 2013) at [1.2].

¹⁸³ Controller and Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014) at [1.33]; Auckland Council, *Section 32 Report for the Proposed Auckland Unitary Plan* (Part 2.17: Māori land)(30 September 2013).

The Unitary Plan recognises the development of Māori land and Treaty Settlement land is an issue of importance to local Māori. In order to address this, the proposed regional statement has two objectives relevant to Māori land: (1) development supports the economic, cultural and social aspirations of Māori; (2) mana whenua occupy, develop and use their land within their ancestral area. Two policies are then proposed to support these objectives: (1) enable the occupation, development and use of Māori land for the benefit of its owners, their whanau and their hapu; (2) enable mana whenua to occupy, develop and use Māori land within areas scheduled for natural heritage or historical heritage values in ways that recognise and provide for those values.¹⁸⁴

A document prepared under s 32 of the Resource Management Act characterises the approach taken in the Unitary Plan as a significant shift from legacy plans because:¹⁸⁵

- (a) the provisions for Māori land are not limited to rural areas;
- (b) the Unitary Plan recognises the need for economic development to support occupation;
- (c) it includes provision for a discretionary integrated Māori Land Development activity;
- (d) it includes an objective and policies to address potential conflict between natural heritage overlays and the desire of landowners to occupy their ancestral land; and
- (e) it includes an objective and policy to encourage infrastructure providers to avoid development on Māori land, where possible.

In terms of land specifically, the Unitary Plan provides for Integrated Māori Development Plans. These Plans have a discretionary activity status under the Unitary Plan which allows applicants to apply for consent to develop land beyond the specific controls of that

¹⁸⁴ Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014) at [1.35]-[1.36]; Auckland Council, *Section 32 Report for the Proposed Auckland Unitary Plan* (Part 2.17: Māori land)(30 September 2013).

¹⁸⁵ See Auckland Council, *Section 32 Report for the Proposed Auckland Unitary Plan* (Part 2.17:Māori land)(30 September 2013) at [1.3].

land. One of the major benefits of an Integrated Māori Development Plan is that it is processed on a non-notified basis which significantly reduces both the risk and cost of developing.¹⁸⁶

An example of papakāinga development in Auckland is at Orakei. The Papakāinga Development Report, provided to Auckland Council staff involved in writing the Auckland Unitary Plan, considered this particular development as part of a profile of four papakāinga developments profiled in order to make recommendations to the Auckland Council.¹⁸⁷

In 1992 and 2004, 28 papakāinga houses were built in total at Orakei, taking the total of papakāinga houses situated there to 62. However, the environment of the papakāinga did not address communal living or higher density papakāinga approaches. Presently, the Trust Board of the land at Orakei wishes as many of their beneficiaries to be housed on the land as possible, which will require higher density housing.¹⁸⁸

The District Plan currently in force¹⁸⁹ has special provisions for papakāinga land returned to the iwi, however these provisions would not apply to housing subsequently purchased in the area by the iwi. This led the Trust to embark on a Spatial Planning exercise, which was originally intended to inform a private plan change. However, given the new proposed Unitary Plan, this thinking can be directly incorporated into the Draft Spatial Plan for the Council. This Spatial Plan addresses the types of housing densities required to house up to 3000 members of the iwi.¹⁹⁰ The Trust Board will financially support hapu members into this housing. It is likely that this support will be trialled on a section of the land, which can inform future development in the area.

The Papakāinga Development Report also considered the proposed papakāinga development in Mangere. It was conceived in 2009, and in 2010 a funding agreement with TPK was granted which enabled the Trust which controls the land to develop its

¹⁸⁶ Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014) at [1.38].

¹⁸⁷ Design TRIBE *Papakāinga Technical Report for Auckland Council* (30 April 2012) <www.aucklandcouncil.govt.nz>.

¹⁸⁸ Design TRIBE *Papakāinga Technical Report for Auckland Council* (30 April 2012) <www.aucklandcouncil.govt.nz> at 9.

¹⁸⁹ City of Auckland “Auckland Council District Plan Operative Auckland City - Isthmus Section 1999” (Part 10- Special Purpose Activity) ” (23 May 2012) Auckland Council <www.aucklandcity.govt.nz>.

¹⁹⁰ Design TRIBE *Papakāinga Technical Report for Auckland Council* (30 April 2012) <www.aucklandcouncil.govt.nz> at 10.

papakāinga housing proposal. The design of the papakāinga has been influenced by key elements of Mautauranga Māori including: Kaitiakitanga (ability of the tribe to assume kaitiaki relationships of their whenua tupuna and takutaimoana); Kotaitanga (working together as part of a combined whanau working group to place, advance, build and manage the papakāinga); and Whanaungatanga (considerable goodwill developed to reach agreement on who will occupy the allocated sites).¹⁹¹

The Papakāinga Development Report identifies some key contributors to the success of the project. These include whanau cohesiveness, effective project management, a skilled cross-disciplinary team and multi governmental agency support. However, the project has also had to overcome significant barriers, such as funding. The affordability of the loans required for the larger papakāinga dwellings was a problem, as it was essential the homes were designed around whanau dynamics (as opposed to income). This barrier was eventually overcome with the assistance of the NZ Housing Foundation, supported by HNZ and the ASB Trust.¹⁹²

After also considering Tauranga Moana and Whangaruru papakāinga developments, the Papakāinga Development Report made the following recommendations:¹⁹³

- (a) Engage directly with all mana whenua groupings to discuss provisions for Māori freehold land and papakāinga. This would be best achieved with a series of hui.
- (b) Consider the role of the Council as an active facilitator of papakāinga developments as opposed to passive receivers of applications. This role is a service to mana whenua recognising the Treaty of Waitangi responsibilities and historical breaches, as well as the holistic benefits of quality housing for Māori as a solution for iwi and wider Auckland.
- (c) Consider papakāinga in its widest sense as able to be developed by both mana whenua and taura on both Māori and general land, in urban, suburban, periurban, rural and coastal locations.

¹⁹¹ Design TRIBE *Papakāinga Technical Report for Auckland Council* (30 April 2012) <www.aucklandcouncil.govt.nz> at 15.

¹⁹² Design TRIBE *Papakāinga Technical Report for Auckland Council* (30 April 2012) <www.aucklandcouncil.govt.nz> at 16.

¹⁹³ Design TRIBE *Papakāinga Technical Report for Auckland Council* (30 April 2012) <www.aucklandcouncil.govt.nz> at 28.

- (d) Consider communal buildings proposed as part of papakāinga on a permitted or discretionary basis.
- (e) Consider relief of development levies to assist and encourage papakāinga developments.
- (f) Consider the Western Bay of Plenty Smart Growth Approach to providing and/or funding specialist advice to assist in papakāinga developments.

2 *Housing Action Plan: Stage 1*

As part of the Unitary Plan, Auckland Council developed a Housing Action plan with 32 objectives and 12 priority areas.

Priority area 9 is “Papakāinga and housing for Māori”.¹⁹⁴ Priority Area 9 states that a Māori Land Programme is currently being developed by the Council which identifies papakāinga as a priority. The main initiatives to achieve this goal are likely to include changes to rates, pilots to improve the quality of existing housing, and development contributions.

The Housing Action Plan also notes that all the general actions being considered to support community housing providers would benefit Māori housing providers as part of this group. It considers that Māori housing providers must have equal access to a range of funding and development partnership opportunities, not just sources of funding specifically allocated for Māori or partnerships only for Māori-owned land.

The Plan states that work is required in the Stage 2 Plan to identify specific, feasible opportunities for papakāinga and other types of housing and social infrastructure for Māori, along with measures to build the capacity of Māori housing providers.

3 *The Māori Plan*

The Māori Plan was developed by the Independent Māori Statutory Board and summarises key Mana Whenua and Mataawaka aspirations. It provides greater clarity to Auckland Council about what Mana Whenua and Mataawaka want, and reflects their vision for the future.¹⁹⁵ Papakāinga housing is one of 49 key issues discussed in the Māori Plan. This plan proposes three undertakings for Auckland Council in order to

¹⁹⁴ Auckland Council *Housing Action Plan: Stage 1* (December 2012) at 32.

¹⁹⁵ Independent Māori Statutory Board *The Māori Plan for Tāmaki Makaurau* at 9.

achieve the Plan's goals of sustainable futures and an improvement in the quality of life for Māori.

The Independent Māori Statutory Board also created a Schedule of Issues of Significance to Māori in Tāmaki Makaurau. This schedule identifies papakāinga housing as an issue of significance due to the lack of prioritisation of papakāinga development in Auckland council plans.¹⁹⁶ The schedule considers papakāinga housing is a key component to enabling sustainable futures and intergenerational reciprocity.¹⁹⁷

Under the section on 'Auckland's Māori' the Auckland Council website states that 'Priority 1' is establishing papakāinga in Auckland.¹⁹⁸

Papakāinga have the potential to become a model for community/village development. Like marae, papakāinga are an important extension of who iwi are, where they came from and their aspirations for future development. Enhancing opportunities for existing papakāinga and establishing new papakāinga continue to be important matters for iwi. Papakāinga present an opportunity for an integrated approach to community or village development. This requires coordinated support mechanisms to integrate funding, health and education initiatives, and economic development.

The Council will work with iwi, the government, and financial institutions to find ways to access funds for papakāinga development. Additionally, inappropriate regulatory constraints that hinder papakāinga development will be reviewed and amended.

The papakāinga concept is not limited to the cultural configurations attached to mana whenua. It can also be applied to Mataawaka interests as part of affordable housing: supporting physical and social infrastructure are found in papakāinga. As 90% of Auckland Māori have difficulty in accessing satisfactory, affordable housing, papakāinga housing could benefit some of these people. The Auckland Plan recognises that papakāinga applies to the development of Māori ancestral land or where appropriate, to land held in general title by mana whenua.

¹⁹⁶ Independent Māori Statutory Board *Schedule of Issues of Significance to Māori in Tāmaki Makaurau* (2014) at 23.

¹⁹⁷ Independent Māori Statutory Board *Schedule of Issues of Significance to Māori in Tāmaki Makaurau* (2014) at 45.

¹⁹⁸ Auckland Council *The Auckland Plan: Chapter 2 – Auckland's Māori* <www.theplan.theaucklandplan.govt.nz>.

B Bay of Plenty

81 per cent of new homes being built in the Western sub-region are above the median house price of \$340,000. This is problematic especially for Māori, as 55 per cent of Māori households have an annual income less than \$50,000 and 32 per cent have less than \$30,000 annually. Furthermore, the Māori population in the Western Bay sub-region is expected to treble by 2051 to 60,000 persons. However, within Tauranga and the Western Bay of Plenty, there are approximately 22,035 hectares of multiple-owned Māori land which is under-developed or undeveloped. 646 hectares of this is zoned residential, which provides an opportunity for affordable housing.¹⁹⁹

The Bay of Plenty has instigated a successful Joint Agency Group for Māori Housing. The function of this group is to take the lead in coordinating the work of entities helping to build housing on Māori land in the Bay of Plenty. These entities include the Western Bay of Plenty District Council, the Tauranga City Council, the Bay of Plenty Regional Council, TPK, and Waikato Maniapoto and Waiariki District Māori Land Courts.²⁰⁰ This group currently only applies to the Western Bay of Plenty.²⁰¹

1 Smartgrowth

In 2004, the Western Bay of Plenty District Council, Tauranga District Council, Environment Bay of Plenty and Tangata Whenua adopted an action plan for the long term growth of Western Bay of Plenty that was to be known as SmartGrowth. The plan identified the growth, in particular, of Māori populations and the need to address this through strategies such as the facilitation of housing on multiple-owned Māori land.²⁰²

Toolkit

The Toolkit is a step-by-step guide developed by the Bay of Plenty Joint Agency Group with practical contributions from Ngati Tuheke, Makahae Marae Papakāinga Forum, Tapika Iwiw Authority Trust, Western BOP Māori Housing Forum and the SmartGrowth Combined Tangata Whenua Forum members. It is designed to help Māori prepare

¹⁹⁹ Taupo District Council and others *Building a Better Bay: Creating value and better business through collaboration* (Bay of Plenty District and Regional Councils, Joint Report, May 2016) at 67.

²⁰⁰ Controller and Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014) at [1.21].

²⁰¹ Tauranga City Council "Papakāinga" (28 July 2016) <www.tauranga.govt.nz>.

²⁰² *Development of Housing on Multiple-Owned Māori Land in the Western Bay of Plenty* (Western Bay of Plenty District Council Māori Forum, April 2005) at 6.

proposals and development plans for building on Māori land. A workshop accompanies the toolkit to apply the theory to real life situations.²⁰³

The toolkit stemmed from a 2004 Report entitled ‘A Project to facilitate the development of Affordable Housing on Multiple-owned Māori Land.’ This Report identified the following issues:²⁰⁴

- The need to reduce bureaucracy;
- The need to reduce the length of time it took to undertake housing developments;
- The need to improve access to agencies and agency information;
- The need to work with landowners in the early stages to increase capacity by providing information, training and support;
- Land zoning being too restrictive;
- Financial burdens adding a significant cost;
- Restrictions associated with borrowing against Māori land;
- The inability to pay mortgages based on low incomes and affordability; and
- The costs of building a house were in excess of what could be loans, based on the ability to pay.

The Western Bay of Plenty Council initially took ownership of this project, however it was brought under the umbrella of SmartGrowth in 2005.

The second stage of the project was a pilot papakāinga project to ‘test’ and refine the development process. A potential pilot project was identified at Tapuika Iwi near Te Puke. Project stakeholders included: Te Puni Kokiri, Housing NZ, Māori Land Court, SmartGrowth, Tauranga Moana Trust Board, Western Bay of Plenty District Council, and a project consultant.²⁰⁵ The toolkit continued to develop alongside of this pilot.

The ‘More for Less’ Report by the Tauranga District Council states that the toolkit, along with the pilot is a successful example of overcoming the barriers to papakāinga housing

²⁰³ Controller and Auditor-General *Government planning and support for housing on Māori land. Progress in responding to the Auditor-General's recommendations* (Office of the Auditor-General, Progress Report, December 2014) at [1.53].

²⁰⁴ See Taupo District Council and others *Building a Better Bay: Creating value and better business through collaboration* (Bay of Plenty District and Regional Councils, Joint Report, May 2016) at 67; and *Development of Housing on Multiple-Owned Māori Land in the Western Bay of Plenty* (Western Bay of Plenty District Council Māori Forum, April 2005) at 7.

²⁰⁵ Taupo District Council and others *Building a Better Bay: Creating value and better business through collaboration* (Bay of Plenty District and Regional Councils, Joint Report, May 2016) at 68.

through effective relationships between Māori and non-government and government organisations. By May 2013 there were applications for 10 papakāinga projects, totaling \$12.5 million over the next five to seven years. The economic outcomes of these 10 developments is estimated to be:²⁰⁶

- Funding the infrastructure to support the construction of 252 new homes which will provide immediate and direct benefits to 252 families and potentially 1222 individual residents by providing quality affordable housing;
- Productive use of Māori land;
- Improved whanau wellbeing: reduce health problems, improve education and employment opportunities;
- An estimated capital housing construction spend of \$63.8 million which generates \$53.1 million in additional GDP;
- Supports 1128 full time equivalents (FTE) i.e. jobs;
- Potentially from 25 new families (10 per cent) coming to Tauranga. They will spend \$1.13 million per annum, generating \$1.08 million additional GDP and support an additional 19 FTE's;
- Increase the weekly discretionary income for the 252 households;
- Increase in capital land value of equal to at least the value of the 252 new homes built, an estimated \$30 to \$42 million; and
- Potential annual rates income of \$71,082.88.

2 *Horaparaike papakāinga*

The difficulties faced by Horaparaike papakāinga were very much a driver for changes to both the Tauranga City Plan and the Western Bay of Plenty District Plan.²⁰⁷ Horaparaike papakāinga was initially conceived of in 2004, to be located in land outside of Welcome Bay. The intention was to cluster houses around a central communal house and an Ahu Whenua Trust was established to oversee the development. This activity required full discretionary resource consent because it exceeded the two lot limit for permitted dwellings in the Rural Zone under the Tauranga District Council Plan. To gain consent, a costly application process had to be undertaken. The financing for this came from a combination of fundraising, a Tauranga Moana Trust Board loan and a

²⁰⁶ Taupo District Council and others *Building a Better Bay: Creating value and better business through collaboration* (Bay of Plenty District and Regional Councils, Joint Report, May 2016) at 69.

²⁰⁷ Lara Burkhardt and Nick Swallow "Papakāinga development – turning aspiration into reality" November (2014) *Resource Management Journal* 11 at 11-14.

variety of grants. A further challenge also arose in fulfilling servicing requirements specific to the rural area, such as fire-fighting water supply and upgraded power supply.

Following the challenges faced by this development, awareness grew of the difficulties facing papakāinga development and lobbying of the central and local government began for change. The response from local government has seen new provisions included in both the Tauranga City Plan and the Western Bay of Plenty District Plan.

For Tauranga City Council in particular, a new general papakāinga rule in the rural zone allows three to 10 dwellings on multiple owned Māori land as a controlled activity, and a maximum of 30 dwellings as a restricted discretionary activity. Secondly, rural marae are now recognised through spot zoning, with a set number of houses allowed for each marae. For example, 50 independent dwellings can be built at the Waikari Rural Marae Community zone as a permitted activity.

The Western Bay of Plenty District Plan, also responded to the issues raised by the Horaparaikete papakāinga. Papakāinga development is now provided for in the rural zone as a controlled activity. The number of dwellings able to be constructed on Māori land is set at five if accessible by an unsealed road, and 10 if the road is sealed. Further, on sealed roads, 11-30 dwellings can be constructed as a restricted discretionary activity. Both cases require either a site plan (for a controlled activity) or a structure plan (for a discretionary activity).

These new provisions were developed in close consultation with Māori communities, and have eased the resource consent process for later papakāinga. For example, if these rules were in place the whanau would have only had to submit an Outline Development Plan with general housing layouts, and thus no resource consent would have been required as long as there were no more than 10 units, each having a minimum of 2000m² per site. This would have saved the whanau over \$22,000, 12 months of time, and a lot of frustration.²⁰⁸

3 Tauranga District Council

The Tauranga City Council has also put in place some of its own, individual resources for Māori planning to build on Māori land, including a brochure for building on Māori land,

²⁰⁸ Design TRIBE *Papakāinga Technical Report for Auckland Council* (30 April 2012) <www.aucklandcouncil.govt.nz> at 7.

designed to assist Māori owners with the Tauranga City Council resource and building consent procedures.²⁰⁹

VI Conclusion

This chapter demonstrates that there is now significant attention on the need to better enable building of residential homes on Māori land. The focus to date is properly on enabling this initial building to occur. The contribution of this chapter within this Report is important for highlighting the unique issues associated with Māori land. The startlingly obvious point is that attention has not yet moved to considering how the law ought to support papakāinga and whanau housing on single title Māori freehold land when significant repairs are required. The broader findings and recommendations in this Report need to be considered specifically for Māori land. There are potentially strong learning opportunities that experiences with multiple-owned housing on general land could provide to better strengthen protection for owners of Māori land.

For example, many of the themes identified in this Report and summarized in Chapter One: Introduction, need to be closely considered within the context of multiple housing on multiple-owned Māori freehold land. The issues are likely to be exacerbated for Māori freehold land. Particular attention ought to focus on the problems identified within the broader themes of:

- Lack of governance structures;
- Problems with insurance;
- Vulnerable owners;
- Poor communication/behavioural problems; and
- Access to Justice.

Many of the challenges recognised for cross-leases, unit titles, and residential tenancies are likely to be acute in relation to papakāinga and whanau housing on Māori freehold land. For example, the problems of finance in relation to development on Māori freehold land are clear – however, if the rule is that a mortgagee should receive any insurance payouts first (before it is used for repair or remediation), then problems of finance may be compounded for this type of development. If it was difficult to convince a lending institution to finance residential building on Māori freehold land in the first place, it may be even more difficult to convince such an institution to allow the taking of the insurance payout to be used to fix the dwellings.

²⁰⁹ Tauranga City *Building on Māori Land: Guidance on resource and building consent processes* (August 2013) <www.tauranga.govt.nz>.

Likewise, access to justice following a disaster might be a real problem. Dispute resolution services specific to Māori and Māori land are not common. The Māori Land Court will be able to provide some relief, but it is unlikely to be within a short timeframe. The proposed new Māori Land Service and the proposed new enhanced mediation services within Te Ture Whenua Māori Bill 2016 will need to be developed with natural disaster specialist components.

The proposed change to a 99-year lease under Te Ture Whenua Māori Bill (from the rather more amorphous, but potentially more permanent occupation agreement) may also have an acute impact in the context of repairs and remediation. If it is a lease of the land, but there is a fixture on it, who actually has responsibility for repairs, and what do the finances look like if there is only, for example, 30 years on the lease left to run? What covenants ought to be part of the lease, and if instead the common law needs to be relied on, what would be the position at common law?

What will happen when there has been a natural disaster so extensive that it prohibits a rebuild on the land in the near future? Who will have responsibility for the insurance (the owners of the land or the owners of the occupation orders)? If the law changes from occupation orders to leases for residential housing, who will be responsible for the insurance? Will these leases be subject to the usual provisions of the Property Law Act?

The problems identified throughout this Report for General land will be exacerbated for Māori land. Serious issues arise for General land even when there is usually just one owner of the land. For Māori land, it is much more likely that the land will be owned by many. With the policy and legislative intent now emphasising a need to better utilise Māori land, substantially more residential housing is likely to be built on Māori land in the near future. The findings in this Report must be seriously considered within the context of Māori land. However, the answers for General land may well not be applicable for Māori land.

This Report has emphasised that no current working model for multiple housing on single title land is effective. Moreover, the proposed new legislation for Māori land has not addressed the potentially ‘ticking time bomb’ problems for Māori land following a natural disaster and may in fact have aggravated the problem with the intent to move to residential leases.

We recommend an urgent rethink for the law governing Māori freehold land that creates a unique solution recognising the imperative for Māori land that it is a taonga tuku iho and should remain in the hands of those who have a generational connection to the land through whakapapa.

With significant law reform on the near horizon and the associated new development of the Māori Land Services, along with the fast growing attention by central and local government to better encourage building on Māori freehold land, urgent attention must address specific issues for what will happen to residential homes on Māori land following a natural disaster.

We recommend:

Recommendation 4.1: We recommend that the Government convene an urgent inquiry to propose specifically tailored legislative and policy solutions for residential homes on Māori land following a natural disaster that start from the premise that Māori land is a taonga tuku iho.

Recommendation 4.2. We recommend that Government agencies encourage further research including with an empirical focus to better understand the issues unique for Māori land.

Recommendation 4.3. We recommend that Government agencies consider legislative reform of the Building Act 2004 to better recognise the need to support the development of papakāinga and whanau housing.

Recommendation 4.4: We recommend that Government agencies consider policy reform to ensure policies are most effective for supporting the building of future-proofed robust homes on Māori land across the country.

Recommendation 4.5. We recommend that Government agencies consider how to better support Māori land to more permanent and well functioning vital infrastructure that is likely to withstand and/or alleviate some of the effects of natural disasters for the residential homes.

An Overview Table of Law and Policy relating to Māori Housing

1991	<p>Resource Management Act</p> <p>Resource consents may be required to build on Māori land depending on the local authority plans.</p>
1993	<p>Te Ture Whenua Māori Act / Māori Land Act (TTWMA)</p> <p>The principal statute that sets out the rules for Māori land</p>
2000	<p>Special Housing Action Zone</p> <p>This fund is managed by Te Puni Kokiri (TPK) and is used to build the capacity of Māori groups to address housing issues</p>
2002	<p>Local Government Act</p> <p>Provides the framework for local authorities to regulate land use in their area through district plans</p>
2002	<p>Ki te Hau Kainga Report</p> <p>Report written on behalf of Housing New Zealand (HNZ) that provides a guide on how Māori housing can reflect Māori values</p>
2004	<p>Building Act</p> <p>A building consent is required to build on Māori land (unless a local authority plan expressly states otherwise)</p>
2004	<p>Western Bay of Plenty District Council report <i>A Project to Facilitate the Development of Affordable Housing on Multiple-owned Māori Land</i></p> <p>Identified a series of issues and made commitment to develop a papakāinga toolkit</p>
2005	<p>Development of Housing on Multiple-Owned Māori Land in the Western Bay of Plenty (Smart Growth Action Plan)</p> <p>An action plan for the long term growth of the Western Bay of Plenty is launched including the need to facilitate housing on multiple-owned Māori land</p>
2008	<p>Māori Demonstration Partnership Fund</p> <p>This fund is part of the Housing Innovation Fund and provides funding to Māori organisations</p>
2008	<p><i>Tu Whare Ora – Building Capacity for Māori Driven Design in Sustainable Settlement Development</i></p> <p>Authored by Shaun Awatere and others for Nga Pae o te Maramatanga, this report provides detailed analysis and guidance relating to the development of papakāinga.</p>

2009	<p>Local Government (Auckland Council) Act</p> <p>Established the Independent Māori Statutory Board (IMSB), an independent body that assists the Auckland Council in making decisions</p>
2010	<p>Kāinga Whenua Loans</p> <p>A loan scheme, offered jointly by HNZ and Kiwibank, that aims to provide mortgage loans to households that have shares in Māori land</p>
2010	<p>NZ Coastal Policy Statement</p> <p>Papakāinga are recognised briefly in policy 6(1)(d)</p>
2011	<p>Auditor General report <i>Government planning and support for housing on Māori land</i></p> <p>Examined the effectiveness of government support for Māori wishing to build housing on Māori land</p>
2012	<p>Ngāri Toa Rangatira and Toa Rangatira Trust and the Crown Deed of Settlement of Historical Claims</p> <p>The Crown paid \$1,000,000 towards papakāinga housing</p>
2012	<p>Papakāinga Technical Report for Auckland Council</p> <p>Provided assistance to the Auckland Council in developing the Unitary Plan and includes four case studies about papakāinga developments</p>
2012	<p>Putea Māori Fund</p> <p>A capital grant for socially affordable and assisted home ownership housing, principally on Māori land (note now included in the Māori Housing Fund)</p>
2012	<p>Auckland Plan</p> <p>The first single plan to deliver the vision for all of Auckland and its peoples for the next 30 years, and includes documents of particular relevance to building on Māori land including the Housing Action Plan particularly Priority Area 9: “Papakāinga and Housing for Māori”, and the Māori Plan produced by the IMSB that identifies papakāinga housing as a key issue</p>
2013	<p>Housing Accords and Special Housing Areas Act</p> <p>Special Housing Areas can be used for papakāinga developments</p>
2014	<p>Auditor General report <i>Government planning and support for housing on Māori land</i></p> <p>A Progress Report responding to the Auditor General’s recommendations made in its 2011 report</p>
2014	<p>Māori Housing Fund</p>

	A Ministry of Business, Innovation and Employment (MBIE) fund that assists Māori organisations and communities to increase new housing
2014	He Whare Āhuru, Māori Housing Strategy MBIE led, this strategy aims to improve housing for Māori and increase housing choices by growing the Māori housing sector, it also sets out Action Areas for 2015-2025
2014	Schedule of Issues of Significance Report Published by IMSB, this Schedule identifies papakāinga housing as an issue of significance
2014?	<i>Building a Better Bay, Creating value and better business through collaboration Bay of Plenty District and Regional Councils, Joint Report</i> Discusses the Māori Housing toolkit and how collaboration is essential to the papakāinga housing project
2015	Māori Housing Network Established by TPK, the Māori Housing Network provides information and assistance to the Māori housing sector
2015	Ngāi Takoto Claims Settlement Act Waipapakauri Papakāinga property ceased to be a conservation area and is listed as a cultural redress property
2015	NZ Productivity Commission report <i>Using Land for Housing Report</i> Explores regulatory practices of local and regional authorities in terms of land use but does not consider Māori land
2015	<i>Community Housing: A Sector Survey - a report by Community Housing Aotearoa, Treasury Report</i> Gives no special consideration to the role of Māori housing but its numbers demonstrate the important role of Māori organisations in providing community housing
2016	Te Ture Whenua Māori Bill Proposes a radical reform of TTWMA and if enacted will change the processes for building on Māori land
2016	Māori Report for Tāmaki Makaurau The first progress report on the IMSB's original Māori Plan
2016	Auckland Unitary Plan (part of Auckland Plan) Intended to be the 'rulebook that shapes the way Auckland grows' and will replace the Regional Policy Statement

CHAPTER 5

UNIT TITLES

Ben France-Hudson

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In a perfect world it would be incredibly simple and ... one thing that I think would be of benefit, and it is impossible, would be uniformity ... the fact that each complex has its own little differences I think makes it more and more complicated to the average person to understand it, and access to knowledge of one's property rights should not be limited to lawyers, it should just be available to everyone. ... I think my goal would be to try and grind out some of the differences and to make it that if one person has lived in a unit development then 99 per cent of that would transfer to any other unit development because we are heading towards the average New Zealander living in a unit development. We are not at that yet there ... but it will come, it will come in my lifetime I believe.¹

I Introduction

This chapter considers New Zealand's Unit Titles Act 2010, which governs the creation, ownership and operation of "unit title" developments, a common method of owning residential, commercial, and mixed commercial and residential property in New Zealand.² It considers the problems our research has uncovered that may prevent the successful, simple and efficient repair, and reinstatement of buildings (or elements of buildings) within unit title complexes. It argues that the lack of clarity in the current law is likely to significantly hamper attempts to carry through repair or reinstatement unless there is complete agreement between the owners. It makes a number of recommendations which, if adopted, would address these problems.

While we are extremely appreciative of the time given by many people to discuss the problems with unit title developments, unfortunately, a number of the difficult problems raised in our interviews were beyond the narrow scope of issues we can consider here.³ As a result, the focus in this chapter is on New Zealand and the problems with repair or remediation. Perhaps unsurprisingly, a number of the issues we have discovered in New Zealand are reflected overseas.⁴ However, international aspects are not considered in detail in this chapter, although reference is made to our discussion of these issues in the

¹ Interview with lawyer, Wellington, November 2016.

² See Chapter 6 for specific concerns facing developments which contain both commercial and residential premises.

³ These included concerns regarding: the governance of bodies corporate, the timing and extent of disclosure requirements, and the use of (and duties that pertain to) body corporate managers. We hope to address a number of these concerns in further writing in this area (see, for example, Jeremy Finn, Ben France-Hudson, and Elizabeth Toomey "Toward Simpler Legal Frameworks for Condominiums: safeguarding the interests of owners and residents" (paper presented to International Research Forum on Multi-owned Properties, Melbourne, February 2017).

⁴ See Chapter 2.

overseas findings chapter, and that work also underpins the recommendations made here.
5

The structure of this chapter is simple. It begins by briefly outlining the Unit Titles Act 2010, before turning to the problems disclosed by our research that occur when a unit title development must be repaired or reinstated. Issues are addressed in turn, with recommendations for improvement made. A full list of recommendations can be found in the conclusion.

II Background

A The Unit Titles Act 2010

The Unit Titles Act 2010 allows for both individual and co-ownership of different parts of the same building or complex.⁶ Particular units (for example the inside of an apartment or shop) can be owned by individuals. The balance of the property, usually the land and common areas (such as lobbies, stairwells, driveways) or shared facilities (such as a pool or gym) is then co-owned by all members of the complex.⁷ The archetypal example is an apartment building,⁸ although the model can also be used for commercial developments (such as industrial or retail buildings), mixed commercial and residential developments,⁹ car parks and can even be applied where there are a number of stand-alone buildings on a single title to land (such as a collection of detached townhouses). It can be used in any situation where there is more than one ‘unit’ on a piece of land and, as a result, can be used for a two-unit development or a 500-unit development. The purpose of the legislation is to “provide a regulatory framework for the ownership and management of land, associated buildings and facilities by communities of individual owners”.¹⁰

⁵ See Chapter 2.

⁶ This Act replaced the Unit Titles Act 1972 and came into force in 2011.

⁷ Hazel Easthope and Bill Randolph “Principal-agent Problems in Multi-unit Developments: The impact of developer actions on the on-going management of strata titled properties” (2016) 48 *Environment and Planning* 1829 at 1830.

⁸ See Part III below.

⁹ See Chapter 6.

¹⁰ Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 2.1. This is reflected in the purpose section of the Act which notes:

3 Purpose

The purpose of this Act is to provide a legal framework for the ownership and management of land and associated buildings and facilities on a socially and economically sustainable basis by communities of individual owners and, in particular, —

- (a) to allow for the subdivision of land and buildings into unit title developments comprising units that are owned in stratum estate in freehold or stratum estate in leasehold or licence by unit owners, and common property that is owned by the body corporate on behalf of the unit owners; and

Crucially, while individuals may own their individual units, every unit title development has a “body corporate” (which is comprised of all owners in the development) that is responsible for operating and managing the development.¹¹ The body corporate owns the common property, which the Act defines as being all the land that is part of the development but is not contained in a principal unit.¹² The body corporate has a range of duties and decision making powers outlined in the Act.¹³ Importantly, the body corporate must elect a chairperson who has the responsibilities and duties outlined in the accompanying regulations.¹⁴ Bodies corporate for developments with ten or more units must have a body corporate committee, unless the body corporate decides not to.¹⁵ A body corporate committee is a subset of the body corporate and its members are elected by the full body corporate. The body corporate is able to delegate some of its duties (particularly those related to administration and management) to the body corporate committee.¹⁶ Bodies corporate are sometimes assisted by professional body corporate managers, although these are not currently regulated by the Act.¹⁷

The philosophy underpinning the Act is to:¹⁸

... give bodies corporate the flexibility and autonomy to govern their own units and unit complexes, based on a minimal regulatory framework. This is based on the recognition that owners know their immediate areas best and government does not necessarily have sufficient knowledge, or a role other than to provide a framework and a dispute resolution process.

-
- (b) to create bodies corporate, which comprise all unit owners in a development, to operate and manage unit title developments; and
 - (c) to establish a flexible and responsive regime for the governance of unit title developments; and
 - (d) to protect the integrity of the development as a whole.

¹¹ Unit Titles Act 2010, s 3.

¹² Unit Titles Act 2010, s 5.

¹³ Unit Titles Act 2010, s 84, 88 – 114. These are discussed below where necessary.

¹⁴ Unit Titles Act 2010, s 89 and Unit Titles Regulations 2011, reg 11.

¹⁵ Unit Titles Act 2010, s 112 and Unit Titles Regulations 2011, reg 22.

¹⁶ Ministry of Business, Innovation and Employment “Body corporate committee” Tenancy Services <www.tenancy.govt.nz>.

¹⁷ Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 4.3.

¹⁸ Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 4.2. Interestingly, other jurisdictions have not taken this approach. For example, the equivalent regime in Queensland is much more prescriptive than the New Zealand approach. Of course, this has both advantages and disadvantages.

B General Points

There are a range of difficulties that arise when a unit title development needs to be repaired or replaced. However, the general sense received from our interviews was that unit titles are “streets ahead” of the cross lease model, largely because there is a specified structure to the model, which has been created by legislation.¹⁹

A preliminary point is that some of the practical problems discussed in the balance of this chapter, are influenced by the philosophical position underpinning the Unit Titles Act 2010, which might be difficult to reconcile with the changes advocated by a number of the people we spoke to. As noted by one interviewee, the Unit Titles Act 2010 is a deliberately minimalist piece of legislation, which is designed to provide property rights for unit title properties and to give body corporate unit owners the ability to manage and govern their own affairs; it is “... light touch regulation, a market-based legislation”.²⁰ It follows that the legislation consciously avoids telling unit owners exactly what they must do in every situation, which can be contrasted with other unit or strata title regimes (such as that found in Queensland) which are significantly more prescriptive.²¹

However, some interviewees took the view that this approach is actually a contributing factor to some of the problems which are evident in the Act. As noted by one interviewee “... the UTA is a lightweight piece of legislation which is unmonitored in terms of compliance and there are no consequences of not following the law. I mean that’s basically the issue”.²² And as noted by another interviewee, while the system may well be aiming to be democratic:²³

... it may be a democratic system but that only works if you have got a group of people who are going to be fair and responsible in how they act ... and often it’s the little guy who doesn’t have much money that actually is right and gets steamrolled by the investor owners who couldn’t care less about the condition of the property and they just want to get their rent for it.

However, rather than the solution being driven by government, another interviewee was of the opinion that personal responsibility is crucial and responding to this lack of understanding should be through the increased provision of information, rather than

¹⁹ Interview with lawyer, Christchurch, June 2016. See Chapter 3 for the problems and concerns with that model.

²⁰ Interview with anonymous, September 2016.

²¹ Interview with anonymous, September 2016.

²² Interview with Chief Executive, Auckland, October 2016.

²³ Interview with Chief Executive, Auckland, October 2016.

increased education.²⁴ However, as with many aspects of life, it is actually necessary to take the time to understand your rights and obligations “and it is not someone else’s problem, it’s your responsibility as a property owner; and you are a property owner”.²⁵ If people understand their rights and obligations, and if the owners choose a committee that reflects a broad range of skills (for example, people who have a legal background, a financial background, a public service background) then it is likely to function well.²⁶ In this interviewee’s opinion, even perfect legislation will only operate correctly if the community relying on it understands its nature and operation.

These are not arguments that we can resolve in the context of this report. However, we stress that many of our recommendations run counter to the light-touch philosophy that currently informs the Act. While a minimalist piece of legislation *may* be appropriate when everything is functioning as it should, in the aftermath of a disaster a significantly more prescriptive approach is likely to be necessary.

C Ministry of Business, Innovation and Employment: December 2016 Review of the Unit Titles Act

Evidence of the topical nature of the issues we are considering can be seen in the fact that the Ministry of Business, Innovation and Employment released a discussion document *Review of the Unit Titles Act 2010* in December 2016.²⁷ This discussion document was prompted by a report prepared by a group of property professionals raising concerns about the current unit title regime.²⁸ The discussion document accepts that at least some of these concerns, may have an impact on the sector’s long term ability to support increases in high density housing. The discussion document is somewhat limited in its scope considering only: the disclosure regime, body corporate governance, body corporate management, long-term maintenance plans and the dispute resolution regime. Some of this impacts on the focus of our work (in particular long-term maintenance plans and dispute resolution) and are touched on later in the chapter. Although the other aspects are important, they are of limited relevance to our project and we do not consider them further here. We do, however, note that submissions on the discussion document were due by early March 2017 and it is anticipated that submissions and proposal for reform

²⁴ Interview with anonymous, September 2016.

²⁵ Interview with anonymous, September 2016.

²⁶ Interview with anonymous, September 2016.

²⁷ Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016).

²⁸ Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 2.2

are to be referred to the Minister in April 2017 with any resulting legislation being introduced to Parliament in August 2017.

III The Repair and Maintenance Regime

One of the fundamental issues in managing repairs and reinstatement, and in planning for them in the unit title context, is determining who owns what, and the subsequent issue of who is responsible for what. The importance of this, and the difficulties that accompany it, is illustrated when the repair and maintenance regime under the 2010 Act is considered.²⁹

Under the Unit Titles Act 2010, responsibility for repairs and maintenance are governed by a combined reading of ss 80(1)(g), 126 and 138.³⁰ Section 80(1)(g) provides that an owner of a principal unit³¹ must repair and maintain the unit and keep it in good order to ensure that no damage or harm³², is, or has the potential to be, caused to the common property,³³ any building element, any infrastructure, or any other unit in the building. Section 138, however, imposes an obligation on the body corporate to repair and maintain.³⁴

- (a) the common property; and
- (b) any assets designed for use in connection with the common property; and
- (c) any other assets owned by the body corporate; and

²⁹ It is important to recognise at the outset that a different regime applies under the Act where the unit title complex has been damaged or destroyed, but the unit title plan (creating the development) is not cancelled. In such a case, the body corporate, in addition to others (including an individual unit owner), can apply to the High Court to settle a special scheme for the remediation of the development (See Unit Titles Act 2010, s 74). See Part IV below.

³⁰ This can be contrasted with the former position under the 1972 Act. Generally speaking, the body corporate was responsible for the ‘common property’ and unit owners were responsible for their own ‘unit property’. The obligations were set out in body corporate rules, which could be amended by resolution. The current scheme was adopted in part as a response to the leaky building crisis and the practical problems faced when it was more appropriate for a body corporate to undertake the work. See Liza Fry-Irvine “The Repair and Maintenance Regime” (paper presented to NZLS CLE Ltd Challenges for Bodies Corporate, Webinar, October 2015).

³¹ Defined in s 7 of the Unit Titles Act 2010 as a unit that is designed for use as a place of residence or business or for any other use of any nature, and that is shown on a unit plan as a principal unit; and either contains a building (or part of a building) or is contained in a building; or, is a car park.

³² Which includes: physical, economic or otherwise (see Unit Titles Act 2010, 80(1)(g)).

³³ Defined in s 5 of the Unit Titles Act 2010 as:

common property means—

- (a) all the land and associated fixtures that are part of the unit title development but are not contained in a principal unit, accessory unit, or future development unit; and
- (b) in the case of a subsidiary unit title development, means that part of the principal unit subdivided to create the subsidiary unit title development that is not contained in a principal unit, accessory unit, or future development unit

³⁴ Unit Titles Act 2010, s 138.

(d) any building elements and infrastructure that relate to or serve more than 1 unit.

‘Building elements’ and ‘infrastructure’ are defined in the interpretation section.³⁵ Building elements include, among other things: “... the external and internal components of any part of a building ... that are necessary to the structural integrity of the building, the exterior aesthetics of the building, or the health and safety of persons who occupy or use the building ...”. Specifically mentioned are: the roof, balconies, decks, cladding systems, foundations systems, retaining walls, and any other walls or other features for the support of the building.

Infrastructure is defined as:³⁶

... pipes, wires, ducts, conduits, gutters, watercourses, cables, channels, flues, conducting, or transmission equipment necessary for the provision of water, sewerage, drainage, stormwater removal, gas, electricity, oil, shelter, protection from fire, security, rubbish collection, air, telephone connection, Internet access, radio reception, television reception, or any other services or utilities to or from a unit or to or from the common property ...

Also important is s 138(5)(c) which notes: “... the duty to repair and maintain includes (without limitation) a duty to manage (for the purpose of repair and maintenance), to keep in a good state of repair, and to renew where necessary”.

Thus, in essence s 138 requires the body corporate to repair and maintain common property and imposes an obligation to repair and maintain building elements and infrastructure where they relate to, or serve, more than one unit.

For completeness, s 138(4) provides that costs incurred by a body corporate in repairing or maintaining building elements and infrastructure contained within a unit are recoverable from a unit owner. Moreover, s 126 indicates that where the body corporate does any repair, work or act, which it is required or authorised to do under the Act (or any other), and that work is substantially for the benefit of one unit, or substantially for the benefit of some of the units only, those costs can be recovered from those units owners.³⁷

³⁵ Unit Titles Act 2010, s 5.

³⁶ Unit Titles Act 2010, s 5.

³⁷ Unit Titles Act 2010, s 126(1). This provision is discussed further at Part VIII below.

It should also be noted that under this provision the body corporate must first incur the costs before deciding whether to seek recovery of them.³⁸

These provisions relate to each other in a range of complicated and unclear ways and our research has found that a number of problems stem from this. Despite relatively detailed definitions in the Act, difficulties arise in particular where damage affects both the common property (including building elements or infrastructure), and an individual unit (or units). Determining initial responsibility is only the first step and it then becomes necessary to work out who is responsible for undertaking the work, followed by the question of who should pay. This leads to further issues including how levies should be apportioned, when they should be raised and how those funds should be safeguarded.³⁹ Of course, there will also be circumstances where the damage or destruction is of such an extent that the provisions in the Act cannot usefully address the problems, in which case it may be necessary for a court to settle a scheme for remediation.⁴⁰

Our research suggests that the current repair and maintenance provisions of the Act are not suitable to resolve many of the problem that arise where there is damage (or total destruction) of a unit title complex and we make a number of recommendations to address these issues. Particularly difficult questions relate to how the common property and private property within the development is defined and the impact this has on who is ultimately responsible for repairs and maintenance, and the associated costs.⁴¹

A Determining Ownership within a Unit Title: Defining Common Property and Private Property in a Unit Title

A problem for unit title developments (or equivalent) throughout the world is working out where the ownership of a particular unit ends and the “common property” begins. In the context of repairs and remediation difficulties can arise when working out who is responsible for what. It can be unclear who actually has the responsibility to do the work

³⁸ Unit Titles Act 2010, s 126(2).

³⁹ The Unit Titles Act 2010 allows the body corporate to establish and maintain a range of funds, in addition to an operating account. These other funds include a long-term maintenance fund (s 116), one or more contingency funds (s 118), and a capital works fund (s 119). Contributions to these funds are by way of “levies” which the body corporate has the power to raise under s 121. The body corporate also has the power to recover money expended for repairs and other work under s 126. See the discussion at Part VIII below.

⁴⁰ See Part IV below.

⁴¹ Liza Fry-Irvine “The Repair and Maintenance Regime” (paper presented to NZLS CLE Ltd Challenges for Bodies Corporate, Webinar, October 2015).

and what happens if that work is not done. Moreover, it can be very difficult to work out who has rights of access to actually do the work and who should pay for it.

A central problem is that decisions about whether particular aspects of a unit title development are common or private property are decisions made at the development stage, usually with very little thought to the practical consequences of those decisions.⁴² Some of our interviewees noted that developers generally want to build the development and then leave,⁴³ with decisions about how a unit title scheme is to be structured almost always focused on the “here and now”.⁴⁴ While it is theoretically in a developer’s interest to structure the development well so that people are attracted to buy into it,⁴⁵ conscientious developers tend to be fewer in number than those who are focused on the “profit side of profit”.⁴⁶ As a consequence, the long-term impact of defining a particular wall as common or private property may not get a lot of thought.⁴⁷

In New Zealand, and many other jurisdictions,⁴⁸ developers who establish a unit title scheme have an unfettered discretion to define what is common property and what is not. The Cadastral Survey Rules are a starting point.⁴⁹ They indicate that where one is utilising a permanent structure boundary, the midpoint of that permanent structure is usually the point at which common property starts and private property ends; unless otherwise shown on the plans.⁵⁰ It is a soft, rather than a hard rule, with the result that it is perfectly possible to have the boundary of the private property at some point outside the external cladding of the building, with the result that it may be private, or private in some parts and not in others.⁵¹ Unfortunately, there is no requirement under these rules for 3D

⁴² Interview with lawyer, Wellington, November 2016.

⁴³ Interview with policy advisors, October 2016.

⁴⁴ Interview with lawyer, Wellington, November 2016.

⁴⁵ Interview with policy advisors, October 2016.

⁴⁶ Interview with lawyer, Wellington, November 2016 and interview with lawyers, Auckland, October 2016.

⁴⁷ For a general discussion see Hazel Easthope and Bill Randolph “Principal-agent Problems in Multi-unit Developments: The impact of developer actions on the on-going management of strata titled properties” (2016) 48 *Environment and Planning* 1829.

⁴⁸ See Chapter 2. While New Zealand’s definitions are relatively clear, they can be much less so in other jurisdictions. In some parts of the world developers have an unfettered discretion to define what is common property and what is not. Conversely, other jurisdictions prescribe the position of boundaries very tightly (see Jeremy Finn and Elizabeth Toomey “Condominium Chaos in the Wake of a Disaster” (2017) *New Zealand Universities Law Review* (forthcoming)).

⁴⁹ Rules for Cadastral Survey 2010 – LINZS65003 (amended 1 November 2012).

⁵⁰ Interview with lawyer, Wellington, November 2016.

⁵¹ Interview with lawyer, Wellington, November 2016 and Rules for Cadastral Survey 2010 – LINZS65003 (amended 1 November 2012) at 6.9.

plans showing the demarcation of boundaries.⁵² Moreover, because the 2010 Act does not expressly provide responsibility for protrusions that do not form part of a unit, building aspects, such as balconies, can add further layers of complication.⁵³ As noted above, the lack of clarity about who is responsible for what that follows from these provisions can make any attempts to repair or remediate a damaged unit title complex exceedingly difficult.

On a practical level, the usual advice is that before any repairs or maintenance are undertaken an analysis of the unit plan should be done to work out whether a particular aspect of the building is unit or common property.⁵⁴ The unit plan should state clearly what areas are unit or common property, although where the boundary sits inside an aspect of the building (such as a wall), it is not always clear. As one interviewee noted, while many experienced surveyors take advantage of Land Information New Zealand (LINZ) rules allowing for notations on plans, in many cases (particularly older plans) the boundary definitions between what is unit and what is common property are unclear.⁵⁵ While notations can be successful, they are often lacking in specificity and often the plan has gone much too far before a lawyer is consulted. This interviewee recounted a recent example of a development where the surveyors were specifically advised that the roof should be common property and not within the unit at the top of the building: “and they ended up with lines and notations and things and half the roof was common property and half was within the unit, [and] it is just through very poor draftsmanship”.⁵⁶ Setting boundaries in this way obviously leads to uncertainty and an increased probability of disputes arising between bodies corporate and unit owners.⁵⁷ Conversely, further anecdotal evidence suggests that some of the very recent supplementary record sheets, although still 2-D, are very specific. Nonetheless, 3-D mapping may help to eliminate any ambiguities and a rule requiring 3-D mapping may minimise some of the disputes that

⁵² John Greenwood “Unit Titles Act: Lame Duck and How to Fix It” (paper presented to New Zealand Law Society Property Law Conference, June 2016) 3 at 8.

⁵³ Interview with lawyer, Wellington, November 2016 and John Greenwood “Unit Titles Act: Lame Duck and How to Fix It” (paper presented to New Zealand Law Society Property Law Conference, June 2016) 3 at 8. See also a line of cases involving a verandah attached to the Endeans building in central Auckland, including *Body Corporate 95035 v Chang* [2012] NZHC 2467, (2012) 13 NZCPR 697; *CBD Investments (NZ) Ltd v Body Corporate 95035* [2014] NZHC 72. See also *Body Corporate 198900 v Bhana Investments Ltd v Others* [2015] NZHC 1620 which considered awnings, affixed under a verandah, and whether the body corporate had the power to remove them.

⁵⁴ Liza Fry-Irvine “The Repair and Maintenance Regime” (paper presented to NZLS CLE Ltd Challenges for Bodies Corporate, Webinar, October 2015).

⁵⁵ Interview with lawyer, Wellington, November 2016.

⁵⁶ Interview with lawyer, Wellington, November 2016.

⁵⁷ Liza Fry-Irvine “Introduction to the Unit Titles Bill and Practical Tips on Unit Title Conveyancing” in *Conveyancing Pot Pourri* (Auckland District Law Society Inc CLE, 2011).

arise, particularly where there is a question regarding whether a necessary repair is to a building element or aspect of infrastructure that “serves more than one unit”.⁵⁸

Recommendation 5.1: We consider the clear delineation of boundaries within unit title developments is crucial. We recommend that consideration is given to compulsory delineation by way of 3-D mapping for any new large scale unit title complexes. We suggest that existing large scale developments become subject to this requirement if any major changes are made.

B Obligations to Repair and Maintain

Where there is difficulty in determining where the boundary between common and unit property lies, this can lead to a dispute about who has the obligation to undertake and pay for any repairs or maintenance. The difficulty here arises because there is a potential conflict between s 80(1)(g), which says that a unit title owner must look after their own unit, and s 138, that says the body corporate will look after common property and building elements and infrastructure that relate to or serve more than one unit. In particular, as noted, exterior surfaces such as decks and windows can be difficult to assess as unit or common property.

Moreover, the fact that s 138 allows for the cost to be recoverable from a unit holder within whose unit the infrastructure or building elements are situated raises the question of where the boundaries of units are.⁵⁹ On this the Act and Regulations are silent; and the cadastral rules are “useless”.⁶⁰ As noted by one lawyer, this is an “absolute disgrace of drafting”.⁶¹

The classic illustration of the problem arises where a deck for a particular unit also happens to form the roof of a lower unit in the development. If water runs through the deck and affects the lower unit, the liability for repair depends on where the boundary of the unit is. If the unit plan follows the survey rules, this will probably be the mid-point of the deck/roof. In this case it follows that it should be the responsibility of the owner of the deck to plug the holes as they will be in his or her unit; unless the deck is classed as common property.⁶² However, he or she may object to repairing a deck which causes no

⁵⁸ See discussion at Part VIII below.

⁵⁹ See the discussion at Part VIII below.

⁶⁰ Interview with lawyer, Wellington, November 2016.

⁶¹ Interview with lawyer, Wellington, November 2016.

⁶² Interview with lawyer, Wellington, November 2016.

practical problems from his or her perspective. The owner of the lower unit, however, will of course not want to expend money on a problem that does not actually occur in his or her unit. Solving this perennial problem has been left to the courts, with recent guidance from the decisions in *Wheeldon v Body Corporate 342525*.⁶³

This case involved a 22 unit complex near Paihia which followed a ‘wedding cake’ design where the level three and four apartments were stepped back with their decks comprising the roofs (or part roofs) of the apartments below. The complex suffered from weather tightness problems and, in response to a report prepared by an expert, 17 of the 22 unit owners wished to proceed with a comprehensive repair. However, the remaining five unit owners thought that only targeted repairs were required to some units as the complex did not suffer from any systemic problems.⁶⁴ In particular, these owners were of the view that the relevant decks were unit property and that, therefore, the responsibility to repair them fell to the unit owners, with those unit owners bearing all the costs.

At the heart of the plaintiffs’ case was an argument that the duties imposed on a body corporate under s 138(1)(d) are subordinate to those imposed on a unit owner under s 80(1)(g). Only where a unit owner has defaulted on his or her repair and maintenance obligations, does the body corporate have the duty (and corresponding power) to effect a repair.⁶⁵ In short, the suggestion was that s 80(1)(g) should “be interpreted as prevailing over s 138”.⁶⁶ However, this argument was rejected by both the High Court⁶⁷ and the Court of Appeal⁶⁸ with both concluding that s 138 had primacy over s 80(1)(g). Consequently, the body corporate had both the authority and the responsibility to undertake the repairs to the building, including repairs to the decks.

⁶³ *Wheeldon v Body Corporate 342525* [2015] NZHC 884, (2015) 16 NZCPR 829; *Wheeldon v Body Corporate 342525* [2016] NZCA 247 and *Wheeldon v Body Corporate 342525* [2016] NZSC 125.

⁶⁴ *Wheeldon v Body Corporate 342525* [2015] NZHC 884, (2015) 16 NZCPR 829 at [1] – [3].

⁶⁵ *Wheeldon v Body Corporate 342525* [2015] NZHC 884, (2015) 16 NZCPR 829 at [28].

⁶⁶ *Wheeldon v Body Corporate 342525* [2016] NZCA 247 at [27].

⁶⁷ *Wheeldon v Body Corporate 342525* [2015] NZHC 884, (2015) 16 NZCPR 829 at [43]. As noted in the High Court judgment this position is reinforced by the Parliamentary debates on the 2010 Act which indicated that a body corporate needs to be able to act quickly and decisively on behalf of all unit owners and for the good of the development as a whole when repair and maintenance need to be done. Where an apartment block has a leaky roof it will be the body corporate’s responsibility to fix it rather than the responsibility of the owner of the top floor apartment. See *Wheeldon* at [38] and (5 March 2009) 652 NZPD 1713.

⁶⁸ The Court of Appeal was of the opinion that the provision of s 138(1) gave the body corporate the necessary authority to undertake the work, as it is work necessary to maintain the “common property”. See *Wheeldon v Body Corporate 342525* [2016] NZCA 247 at [47].

However, while *Wheeldon* is no doubt useful and clarifies the responsibilities of bodies corporate in relation to the maintenance and repair of building elements and infrastructure, there are still a number of problematic gaps in the legislation that it does not assist with. For example, a particular problem noted by one interviewee was where a unit owner has issues that are peculiar to his or her unit, but which affect the rest of the development and yet he or she refuses to do any repairs or maintenance.⁶⁹ A common example is a leaky shower. Section 138 does not appear to give the body corporate the authority or power to enter the unit and fix that shower.⁷⁰ The leaky shower is not a building element or infrastructure that “serves more than one unit” even though the effect of a slow leak in a shower may have consequences beyond the particular unit. A practical solution, though cumbersome and not necessarily guaranteed, is to apply to the local authority seeking a notice to fix under subpart 8 of the Building Act 2004. Once a notice has been issued, if the unit owner does not comply, the notice can be served on the body corporate, which then has an obligation to comply.⁷¹ However, this is a very convoluted way to try and get problems within units remedied and it relies on the local authority taking some steps. The solution would be to statutorily empower bodies corporate to carry out repairs and maintenance to units where a unit owner has failed to do so (subject to the necessary procedural steps and safeguards).⁷² Interestingly, New Zealand appears to be a surprising exception to the international approach in this regard. The usual approach in overseas jurisdictions is that the body corporate is given the power to enter a unit to carry out repairs where a unit owner has failed to comply with a notice in writing to do the work. Usually the body corporate has the right to recover the costs later. For example, in South Australia the body corporate has this power and need only wait two days before entering to carry out the work.⁷³

Recommendation 5.2: We recommend that bodies corporate should be given the power to enter a unit to carry out a repair to a defect which is likely to affect other units or common property, where a unit owner has failed to comply with a formal notice in writing to do the work.

⁶⁹ Interview with lawyer, Wellington, October 2016.

⁷⁰ Interview with lawyer, Wellington, October 2016 and Submission from Alan Henwood to Minister for Building and Housing regarding the Unit Titles Act 2010 (2016) at 10.3.

⁷¹ Interview with lawyer, Wellington, October 2016 and Submission from Alan Henwood to Minister for Building and Housing regarding the Unit Titles Act 2010 (2016) at 10.4.

⁷² Submission from Alan Henwood to Minister for Building and Housing regarding the Unit Titles Act 2010 (2016) at 10.5.

⁷³ Community Titles Act 1996 (SA), s 101(3). In Victoria the period is 28 days (Owners Corporations Act 2006 (Vic), s 48).

Another problematic aspect of the legislation noted by an interviewee is that there is a distinction between ‘upgrades’ and ‘repairs and maintenance’.⁷⁴ Section 138 does not use the word upgrade and court decisions tend to take a conservative view, suggesting that upgrading is not maintenance. However, the interviewee suggested that surely repair and maintenance of any household unit must include upgrading because that is what you have to do to look after your capital investment.⁷⁵ In his view, “... taking a technical view that maintenance does not include upgrading is just ridiculous”.⁷⁶ He suggested that an easy solution would be to simply add the word upgrade to s 138. Although the Act was amended in 2013 so that for the purposes of s 138 the “duty to repair and maintain” includes a duty to “renew where necessary”⁷⁷ this has not solved all interpretive difficulties.⁷⁸ It does not, on its face, allow a body corporate to undertake any upgrades.

We are unconvinced that it is either desirable or necessary to enable bodies corporate to upgrade unit title developments. Providing the body corporate with the power to repair, maintain and renew where necessary reflects the goal of enabling unit title developments to retain their original quality (insofar as this is possible over time). An upgrade is entirely different and, providing the democratic processes inherent in unit title ownership are functioning correctly, any betterment to the development should be achievable using the mechanisms that already exist within the Act. Nonetheless, we acknowledge that sometimes issues may arise where decisions made by the body corporate may be considered a renewal by some and an upgrade by others. Ideally, body corporate members will be able to resolve such disputes between themselves, or through formal means if necessary, but in our view it is not appropriate for the body corporate to have the absolute right to upgrade the development outside the usual democratic processes.

Recommendation 5.3: We recommend that bodies corporate should not be given the power to upgrade the development under s 138.

However, we note that unit title developments do need to be given the power to undertake work on the complex to either avoid, or mitigate, the anticipated effects of known hazards, such as flood or earthquake. This is discussed at Part IV below.

⁷⁴ Interview with lawyer, Wellington, November 2016.

⁷⁵ Interview with lawyer, Wellington, November 2016.

⁷⁶ Interview with lawyer, Wellington, November 2016.

⁷⁷ Unit Titles Act 2010, s 138(5)(c).

⁷⁸ Interview with lawyer, Wellington, November 2016.

IV Damage and Destruction: Schemes of Repair under s 74

Some want to demo and rebuild, others want a quick and cheap re-clad, while others want to alter the building if they need to go through the effort and/or cost of remedial works anyway.⁷⁹

Where a unit title complex has been extensively damaged or destroyed it is likely that the basic repair and maintenance powers in the Act under s 138 and s 80 will be insufficient. As the above comments suggest, in such a case the problems of coordination and of differing desires and interests can be manifold and intractable. In recognition of this, s 74 of the Unit Titles Act 2010 provides for the High Court to settle a scheme for reinstatement where a building (or other improvement comprised in any unit or on the base land) is “damaged” or “destroyed”, but the unit plan is not cancelled.⁸⁰ In other words, the High Court can confirm a plan for rebuilding, including who is to pay for what. This is a crucial power as damage, and in particular damage caused by water or earthquakes, does not respect legal concepts such as common property or the private property of a particular unit. Often it makes more economic sense to repair several parts of a building at the same time, but it is also necessary for those carrying out repairs to have access to both common and private property.

The leading case on s 74 is *Tisch v Body Corporate 318596*, which involved two three-level apartment buildings which were ‘leaky’ and that were going to cost about \$2 million to fix.⁸¹ The scheme had been submitted to the High Court by the body corporate and eight of the 10 unit owners. Among other things, the proposed scheme required the body corporate to take responsibility for the cost of repairs to balconies, which were the private property of the unit owners and not common property. There was disagreement about whether a scheme was necessary and the key task for the Court of Appeal was to determine the scope and proper use of s 74.⁸²

In response the Court of Appeal outlined a relatively straight-forward, three step process for determining whether a scheme should be settled.⁸³ Firstly, the court must be satisfied that the building has been damaged or destroyed. Secondly, if so satisfied, the court must decide whether a scheme is appropriate in the circumstances. Finally, if a scheme is

⁷⁹ Responses from on-line survey.

⁸⁰ Unit Titles Act 2010, s 74.

⁸¹ *Tisch v Body Corporate 318596* [2011] NZCA 420, [2011] 3 NZLR 679.

⁸² Note that this case was decided under s 48 of the Unit Titles Act 1972. However, there is no material difference between that section and the current s 74.

⁸³ *Tisch v Body Corporate 318596* [2011] NZCA 420, [2011] 3 NZLR 679 at [35].

considered appropriate, the court must decide what the terms of the scheme should be. There are a further five factors which must be considered in relation to this final step.⁸⁴ This approach has now become the accepted method for determining whether a scheme should be settled.

Although a scheme under s 74⁸⁵ has been referred to as a “remedy of last resort”,⁸⁶ since 2007 it has become a popular avenue for those involved with unit title developments to facilitate repairs where unit title owners have reached an impasse.⁸⁷ The scheme will dictate all of the terms of the remediation, including how the costs are to be shared. As a result, it avoids the complicated post-repair arguments that arise under ss 80, 128 and 126 discussed above. While these provisions can be interpreted as empowering a body corporate to undertake a large remediation project without the requirement for a scheme, schemes remain quite popular.⁸⁸

A potential reason for this was noted by one interviewee, who suggested that a scheme is sometimes the easiest option in the case of large scale damage, as it is a way of guaranteeing a result, providing a blueprint for going forward, and it is unlikely to take as long as trying to get everyone to agree.⁸⁹ Indeed, as responses to the survey indicated, without the legal ability to force owners to work together via a scheme (or similar), many developments would simply be unable to gain consensus to repair as “it is not possible to repair some apartments and not others in one block with any degree of reliability”.⁹⁰ A general consensus was that, while the Unit Titles Act contains many flaws, the ability to seek High Court orders on a scheme for repair is constructive.⁹¹

Nonetheless, applying for a scheme under s 74 is not entirely without problems. Acquiring a consensus on design changes and the extent of work can take a long time in a body corporate situation, particularly if a unanimous vote is required for these

⁸⁴ These include considering: what support there is for the scheme (a scheme with broad support is to be preferred); whether the scheme is appropriately detailed; the fact that the work should normally be done to the same standard and at the same time; and, whether the terms of the scheme depart from the scheme of the Act or from the body corporate rules. If so, these departures should be no more than is reasonably necessary to achieve what is fair between unit owners in the circumstances.

⁸⁵ Formerly s 48 of the Unit Titles Act 1972.

⁸⁶ *Fraser v Body Corporate S63621* (2009) 10 NZCPR 674 at [97].

⁸⁷ DW McMorland and Thomas Gibbons *McMorland and Gibbons on Unit Titles and Cross-Leases* (LexisNexis Ltd, Wellington, 2013) at 3.33.

⁸⁸ Interview with lawyer, Wellington, October 2016.

⁸⁹ Interview with lawyer, Wellington, November 2016.

⁹⁰ Responses from on-line survey.

⁹¹ Responses from on-line survey.

decisions.⁹² Moreover, there can be real problems where the body corporate does not take a clear lead in how repairs should be done.⁹³ In light of this, it is unsurprising that the largest concern regarding schemes under s 74 is that they can be slow and expensive.⁹⁴ As noted by one interviewee “You can’t do it for less than ten grand and probably more close [sic] to twenty by the time you submit your application and supporting affidavits [and] if it is opposed the sky’s the limit”.⁹⁵ However, time is as important as cost in some cases because while the scheme is being developed it is necessary to get all of the owners on board, and tease out all of the issues and potential problems as much as possible.⁹⁶ Two interviewees noted that, in an ideal world, you would reach a position where there are no disaffected parties. However, this takes time and people have to wait to get repairs started.⁹⁷ Once you do have a hearing in front of a judge, “often it will happen in five minutes”.⁹⁸ Another interviewee reinforced the fact that, given the amount of money involved in a remediation requiring a scheme, the process itself is a highly valuable exercise.⁹⁹ He echoed other interviewee’s comments in describing the huge amount of time getting owners to a point of consensus before an application is filed, because it is opposition to a scheme that causes all the problems.¹⁰⁰ Where a body corporate presents an unopposed scheme it is reflective of all of the work done prior to hearing. At this point a scheme under s 74 can be seen as just another tool for the remediation of a complex suffering from damage or destruction. In this interviewee’s opinion it need not be seen as a litigious or adversarial process, but this will not occur where the work has not been put in before the application to the court.¹⁰¹

However, not all cases are smooth sailing and, as noted by another interviewee, you can get both majority and minority interests within the body corporate that can abuse their positions: “it is an unusual thing to say but unfortunately that’s the reality of these communities”.¹⁰² For example, in one ‘classic’ case, a development had two exterior walls at the end of a complex. One exterior wall was common property because it adjoined a driveway. The other end, which adjoined a garden, was the unit property of one unit owner. If the costs were split on the basis of unit entitlement that owner would

⁹² See responses from on-line survey.

⁹³ Responses from on-line survey.

⁹⁴ Interview with lawyers, Auckland, October 2016.

⁹⁵ Interview with lawyer, Wellington, October 2016.

⁹⁶ Interview with lawyers, Auckland, October 2016.

⁹⁷ Interview with lawyers, Auckland, October 2016.

⁹⁸ Interview with lawyers, Auckland, October 2016.

⁹⁹ Interview with Chief Executive, Auckland, October 2016.

¹⁰⁰ Interview with Chief Executive, Auckland, October 2016.

¹⁰¹ Interview with Chief Executive, Auckland, October 2016.

¹⁰² Interview with lawyer, Wellington, November 2016.

have had to pay vastly more than anyone else. The body corporate was not prepared to get a scheme itself and so the unit owner attempted to file a s 74 application on his own, with a little bit of background legal assistance, rather than the body corporate taking charge of it. As the preliminary work had not been done the application was not as strong as it could have been.¹⁰³ While judges can get irritated where a minority interest pursues an objection to a scheme, the courts are always alive to suggestions of abuse by the majority.¹⁰⁴

A recent academic review of the case law since 2011 confirms the interviewees' comments and suggests that any proposals aimed at speeding up the process under s 74 would be beneficial.¹⁰⁵ Since the decision in *Tisch* there have been approximately 40 cases dealing with s 74 (or its predecessor). Of these cases, 28 of them appear to have been utterly non-controversial. Indeed, of these 28 cases, only one case recorded an appearance for a respondent (and one case involved 108 respondents). That sole appearance was to advise that the particular respondent no longer objected to the scheme. In another case, an initial written objection was later withdrawn. Moreover, the bulk of these cases are relatively short (often just three or four pages of judgment), there is often no recorded opposition to the settlement of the scheme, and they simply involve the judge noting that he or she is satisfied that the requirements laid down in *Tisch* have been met. The general impression provided by these cases is that s 74 works well, is often non-controversial and requires no detailed consideration by the High Court.

In a number of cases, the application to settle a scheme was driven by the failure of some (or even, only one) unit title owner to engage with the process. There was essentially no argument or formal opposition and there was no particular 'dispute'. Thus, while it is possible for all unit owners to reach a consensus on a remediation approach (which obviates the need to apply under s 74) this requires the active consent of every unit title holder. Where even one unit owner does not participate or provide consent, settlement of a scheme will be necessary. For example, in one recent case Katz J noted "[t]he Body Corporate has used its best endeavours, over several years, to try and get agreement as to an agreed plan of remediation. It has been unable to do so, however, due to a lack of engagement on the part of some of the unit owners."¹⁰⁶ In another case, it was noted that

¹⁰³ Interview with lawyers, Auckland, October 2016.

¹⁰⁴ Interview with lawyer, Wellington, November 2016.

¹⁰⁵ For a more detailed discussion of the issues raised here, see: Jeremy Finn, Ben France-Hudson and Elizabeth Toomey "Damage, Destruction, Distress: Shared Ownership Debacles" (2016) 22 Canterbury Law Review 57.

¹⁰⁶ *Body Corporate S89766 v Brocorp Properties Ltd* [2015] NZHC 2891 at [30].

the application was necessary because not all unit owners had formally co-operated with the formation of the scheme, even though a unanimous resolution had been passed at an extraordinary general meeting.¹⁰⁷

Moreover, other cases demonstrate that disputes can be of a very minor nature. For example, in *Body Corporate 361945 v Westpac New Zealand Ltd* (although there was no appearance for the respondent) there was a division between unit owners as to the mode of cost apportionment under the scheme.¹⁰⁸ However, the difference between the two positions was modest in the context of a \$4.5 million remediation, as the difference was generally less than \$2,000 and for 54 unit owners, less than \$1,000. In another case, *Body Corporate 331094 v McMillan-Rourke* only one owner opposed the application for approval of a scheme.¹⁰⁹ Although it filed a notice of opposition, it did not file any evidence, did not appear at the hearing and did not seek an adjournment.¹¹⁰

What these cases suggest is that there is a need to change the way the uncontroversial majority of applications under s 74 are dealt with. Currently, an application under s 74 must be made to the High Court by way of originating application,¹¹¹ which is designed to provide a relatively speedy and inexpensive mechanism for a miscellany of applications which need to be made to the Court under specific statutory provisions.¹¹² Although a hearing date must be allocated at the time of filing the application¹¹³ there does not appear to be any power for the High Court to determine the matter on the papers.¹¹⁴ Moreover, as it stands, the matter must be dealt with by a High Court Judge, rather than by an Associate Judge of the High Court. This seems unnecessary where the application to settle a scheme under s 74 has no opposition and has been driven by either

¹⁰⁷ *Body Corporate 312431 v Auckland Council* [2015] NZHC 961.

¹⁰⁸ *Body Corporate 361945 v Westpac New Zealand Ltd* [2014] NZHC 1336.

¹⁰⁹ *Body Corporate 331094 v McMillan-Rourke* [2015] NZHC 3050.

¹¹⁰ *Body Corporate 331094 v McMillan-Rourke* [2015] NZHC 3050 at [4].

¹¹¹ High Court Rules, r 19.2(za).

¹¹² *Manchester Securities Ltd v Body Corporate 172108* [2015] NZCA 29 at [15].

¹¹³ High Court Rules, r 19.10.

¹¹⁴ Although *Dominion Finance Group Ltd (in Rec and Liq) v Body Corporate 382902* [2012] NZHC 3325, (2012) 7 NZ ConvC 96-003, (2012) 14 NZCPR 252; *Body Corporate 073471 v Dynasty Hotel Investments Ltd* [2013] NZHC 1127; and *Body Corporate 211974 v Kimba Holding Ltd* [2016] NZHC 1916 suggest that a decision may be made “on the papers” it is unclear on what jurisdictional basis this is based. The source of this suggestion is *Body Corporate 382902* where, in obiter comments, Fogarty J observed that where an application to cancel a unit plan had been made with unanimous support it “would likely have been approved on the papers, without the need for a hearing” (at [141]). However, the judge cites no authority for this proposition. Although an ‘on the papers’ approach may well be useful in the context of a s 74 application, as it would potentially speed up the process and reduce expenditure (slightly), it is not clear that the High Court does have the power to take this approach. Moreover, it does not appear to have been followed in the majority of s 74 applications where there is no specific opposition.

a very minor dispute, or by a more general failure of unit owners to engage in the process.¹¹⁵

However, the High Court has a number of Associate High Court Judges who have powers that are somewhat limited in comparison with High Court Judges, but who could be well placed to consider applications under s 74 (at least in the first instance). Associate High Court Judges have a specialist civil (as opposed to criminal) jurisdiction and they undertake a range of companies and insolvency work.¹¹⁶ They also have an extensive jurisdiction regarding matters that arise during the conduct of civil trials. Such interim matters include the jurisdiction to award summary judgment. The summary judgment procedure is intended for situations where there is no defence to a claim brought by a plaintiff.¹¹⁷ Basically, this allows the plaintiff to ask the court to find in its favour without the necessity of having a full trial.

Sometimes applications for summary judgment require similar decision making processes to s 74 applications.¹¹⁸ In light of this we consider that there may be a role for Associate Judges of the High Court in relation to applications under s 74. Although consultation with the judiciary and other interested parties would be necessary, there are at least three possibilities for streamlining the current s 74 process. Firstly, it may be appropriate for an Associate Judge of the High Court to be empowered to give approval to a scheme under s 74 “on the papers” (in other words without a hearing in open court). Secondly, an Associate Judge of the High Court could hear an application for a scheme in open court (this would necessitate the body corporate and other interested parties attending a hearing at court). We note that the first and second options would only be appropriate where there was no (or very minor) opposition to the scheme (and we include here an apparent lack of opposition as a result of silence through lack of engagement). The final possibility is for the current rules to be changed so that a High Court Judge (rather than an Associate

¹¹⁵ Interestingly, the cost of bringing the application in this way is \$540 (High Court Fees Regulations 2013, Schedule Fees Payable in Respect of Proceedings in Court, Item 3) (bearing in mind that if there is no respondent there is no scheduling or hearing fee) (High Court Fees Regulations 2013, reg 5). This can be contrasted with the dispute resolution provision of the Unit Titles Act 2010 itself, which indicates that in many instances disputes should go to the Tenancy Tribunal. The cost of this procedure is a fee of \$850 for minor matters, but \$3,300 for all other disputes. This suggests that the dispute resolution provisions of the Act need reassessment more generally. See: Elizabeth Toomey, Jeremy Finn and Ben France-Hudson “Repairs, Renovation, Restoration, Demolition or Replacement of Multi-Dwelling Units on a Single Title: BRANZ Research Project” [2016] New Zealand Law Journal 208-212.

¹¹⁶ Courts of New Zealand “History and role” <www.courtsofnz.govt.nz>.

¹¹⁷ See the High Court Rules, rule 12.2 and *Pemberton v Chappell* [1987] 1 NZLR 1.

¹¹⁸ Similar decision making processes are found in some of the other matters that Associate Judges have jurisdiction over. See, for example, the assessment of damages, or the entry of a judgment by consent. See the Senior Courts Act 2016, s 20(1).

Judge) is able to consider a scheme on the papers. We note that in any case where an Associate Judge was not prepared to approve the scheme, provision should be made for the matter to proceed to a full hearing before a High Court Judge.

This is not to say that all s 74 schemes could be dealt with in this way. Several of the cases reviewed raised substantive issues that were appropriately within the remit of a defended hearing in the High Court.¹¹⁹ For example, in *St Johns College Trust Board v Body Corporate No 197230*¹²⁰ the complex had been damaged by water ingress and was made up of what was once four multi-storey buildings on separate properties, each having its own freehold title. It now comprised 110 units plus common property. The units had a mix of uses. Some were part of the original structures, others were new additions. The effect of the complex's structure was that under the Unit Title Act 1972 (which was the legislation governing the dispute) some people responsible for contributing to body corporate levies would have to contribute toward the repair costs of exterior cladding of units and other common areas located in a different building from the one they owned and from which they would receive little or no benefit. The cost of repairs was approximately \$4 million. The High Court, faced with a choice between four different schemes, refused to approve those schemes which had been proposed to change the respective burdens from the position under the Act. Duffy J did not consider it would be in the best interest of the unit owners as a whole to do so. Rather she approved a scheme that was consistent with and followed the purpose of the 1972 Act most closely.¹²¹ The Court of Appeal agreed. Clearly, this was not a straight forward case. It demonstrates that there are still situations where the substantive issues and the quantum involved (often millions of dollars of repair work) mean that it is an appropriate matter for the High Court to consider.

Recommendation 5.4: We recommend that thought is given to streamlining the current s 74 procedure so that a hearing before a High Court Judge is not necessary in every case.

¹¹⁹ See, for example, *St Johns College Trust Board v Body Corporate No 197230* [2013] NZCA 35, (2013) 14 NZCPR 56; *Body Corporate 183930 v Chua* [2015] NZHC 2122; *Gao v Body Corporate 183930* [2016] NZCA 458; *LV Trust Holdings Ltd v Body Corporate 114424* [2012] NZHC 3578, (2012) 14 NZCPR 344 and *Body Corporate 198245 v Wong* [2012] NZHC 2676, (2012) 14 NZCPR 203.

¹²⁰ *St Johns College Trust Board v Body Corporate No 197230* [2013] NZCA 35, (2013) 14 NZCPR 56. For a similar example see *Body Corporate 183930 v Chua* [2015] NZHC 2122 (and the unsuccessful attempt to appeal in *Gao v Body Corporate 183930* [2016] NZCA 458). This litigation concerned the way in which costs should be distributed under the scheme (in light of the fact that some remediation work had already been undertaken, what powers of delegation the body corporate should have, and how GST should be accounted for).

¹²¹ *St Johns College Trust Board v Body Corporate No 197230* [2012] NZHC 827.

While consultation with the judiciary and interested parties will be necessary we suggest the following alternatives (subject to any appropriate rights of appeal or review):

- That Associate Judges of the High Court be empowered to give approval to a scheme under s 74 “on the papers” where there is no (or very minor) opposition to the scheme (including where some unit owners are silent through lack of engagement); or
- That Associate Judges of the High Court be empowered to hear applications for a scheme in open court where there is no (or very minor) opposition to the scheme (including where some unit owners are silent through lack of engagement); or
- High Court Judges (rather than Associate Judges) be empowered to consider applications under s 74 on the papers.

A A Significant Oversight: There is no provision for work required even though there is no damage or destruction.

A significant problem brought to our attention by several interviewees is the fact that s 74 only applies “if any building or other improvement comprised in any unit or on the base land is *damaged or destroyed*”.¹²² It is, therefore, not possible to apply under s 74 where there is no damage or destruction. This is a particular problem where a body corporate is required to undertake a seismic upgrade of the complex.¹²³ It can also be a particular problem for heritage buildings or old buildings which have been converted into unit titles. It means that the body corporate is left with few options but to convince every unit owner of the necessity of repairs and the appropriate approach to them.¹²⁴

Grafton Road Ltd v Stalker provides an interesting example of the courts trying to get around the wording of s 74.¹²⁵ It involved a complex where the internal walls of two units were erected so that the whole length of those walls encroached onto an access corridor. As a result, the access corridor was substantially narrower than intended, but also the units owned by the plaintiff (Grafton Road Ltd) were smaller in floor area than intended. The plaintiff applied to the High Court under the Property Law Act 2007 for an order that the encroaching walls be removed,¹²⁶ and also for a direction that a scheme under s 74 of

¹²² Unit Titles Act 2010, s 74.

¹²³ Seismic strengthening is only required where a building is considered dangerous or earthquake prone. This may encompass some existing unit title developments, particularly if they are comprised on an historic building. See the information on Seismic Resilience “Building Upgrades” <www.seismicresilience.org.nz>.

¹²⁴ Interview with lawyer, Wellington, November 201 and John Greenwood “Unit Titles Act: Lame Duck and How to Fix It” (paper presented to New Zealand Law Society Property Law Conference, June 2016) 3 at 7.

¹²⁵ *Grafton Road Ltd v Stalker* [2015] NZHC 880, (2015) 16 NZCPR 44.

¹²⁶ See the Property Law Act 2007, s 325(e).

the Unit Titles Act 2010 be put in place to reinstate the walls in their correct position. After considering the evidence and competing suggestions the High Court made the orders requested:

[31] ...

- (a) The respondents are to remove the encroaching walls ... pursuant to s 325(e) of the Property Law Act 2007
- (b) A scheme under s 74 of the Unit Titles Act 2010 is to be put in place to reinstate the walls in the correct position ...

As noted by one interviewee, the judge appears to have ordered the demolition and then ordered the reconstruction under s 74 and in so doing *anticipated* the destruction.¹²⁷ However, there is no discussion in the case of the court's ability to do so and it should be seen as slender authority for a general approach under s 74. Indeed, arguably the court could have reached the same result by using the provisions of the Property Law Act 2007. Nonetheless, it highlights the fact that the Unit Titles Act 2010 does not have a general power to make such an order, particularly in cases where the Property Law Act would not apply and earthquake strengthening requires demolition work.¹²⁸ The interviewee was of the opinion that a door has been opened and he is actively trying to get this issue taken up by the Minister as part of the current review of the Act.¹²⁹ Suggested amendments to s 74 have been made by other interested parties.¹³⁰

Although this issue is somewhat outside our focus, which is on repairs and remediation following damage, we think it is sufficiently important to comment on. We consider that providing unit title developments with the tools to effectively increase resilience to potential hazards (such as earthquakes or floods) is crucial; as the adage goes - an ounce of prevention can be worth a pound of cure. Allowing unit title developments to efficiently prepare for disaster is likely to reduce both the extent and significance of any damage suffered as a result of disaster. This is likely to have positive flow on effects in terms of the ease and efficiency of repairs and remediation. In particular, where there is legislation requiring particular types of building comprising unit titles to prepare for disaster (for example through seismic strengthening) we believe that there ought to be an easy way for a body corporate to respond, both to raise the required funds from unit

¹²⁷ Interview with lawyer, Wellington, November 2016.

¹²⁸ Interview with lawyer, Wellington, November 2016.

¹²⁹ Interview with lawyer, Wellington, November 2016.

¹³⁰ John Greenwood "Unit Titles Act: Lame Duck and How to Fix It" (paper presented to New Zealand Law Society Property Law Conference, June 2016) 3 at 7. This suggestion is echoed in the Submission from Alan Henwood to Minister for Building and Housing regarding the Unit Titles Act 2010 (2016) at 3.4.

owners, but also to coordinate the necessary works. We anticipate that sometimes this might go so far as needing to make a decision to demolish the building and either rebuild or cancel the unit title development.

We consider that the best way to manage this sort of process would be through a power similar to that currently contained within s 74, which would allow a body corporate to settle a scheme to undertake works, to a reasonable level, that would make the unit title development more resilient to potential hazards such as earthquakes, fires or floods. As noted above, we do not consider that such a power should extend to changing the aesthetic nature of the building through upgrades,¹³¹ but the position is different when it comes to hazard management.

We think that a process similar to that under s 74 would be appropriate, as we envisage that there may be a range of disputes and potentials for conflict. These may be avoided by a requirement for judicial oversight. Two types of dispute immediately spring to mind. Firstly, there could be disputes about whether or not the work actually needs to be done. Secondly, there may be disputes about what methods should be used to achieve the necessary results (for example, should one method, which is cheaper than another, be used; or would a more expensive option furnish a better result). We think that judicial oversight of this type of process would be critical and aligning such process with that under s 74 would be an appropriate way to approach the matter.¹³²

Recommendation 5.5: We recommend that consideration is given to empowering a body corporate to apply to the High Court to settle a scheme to enable the body corporate to undertake works, to a reasonable level, that would make the unit title development more resilient to potential hazards such as earthquakes, fires or floods. We consider that s 74 may provide an appropriate starting point or template for such a provision.

¹³¹ See the discussion at Part III above.

¹³² We certainly consider that this approach would be better than the “remediation agreement” approach which is currently adopted in practice. A remediation agreement is signed by the body corporate and all unit owners and its terms will purport to allow for the required works. Often the agreement will reflect the shape and terms usually found in s 74 schemes approved by the High Court. However, a number of interviewees noted that there are some real problems with these agreements including the fact that they need 100 per cent agreement of all unit owners, and will often require interference with the existing scheme of the unit title development in ways that are problematic from a legal perspective. See Interview with lawyer, Wellington, October 2016, Submission from Alan Henwood to Minister for Building and Housing regarding the Unit Titles Act 2010 (2016) at 3.6 and Liza Fry-Irvine “The Repair and Maintenance Regime” (paper presented to NZLS CLE Ltd Challenges for Bodies Corporate, Webinar, October 2015) at 10.

V Insurance

Whenever damage to a unit title complex is caused by natural disaster, fire or some other type of accident, insurance is likely to be very important. Our research has uncovered a number of problems that arise under the unit titles regime as it currently stands.

The Unit Titles Act 2010 has a number of insurance provisions,¹³³ which are aimed at both assisting remediation and safeguarding the interests of mortgagees.¹³⁴ It is not possible to contract out of these rules and it is not possible for a body corporate to pass a resolution that is contrary to them.¹³⁵ Under s 135(1) the body corporate must “insure and keep insured all buildings and other improvements on the base land to their full insurable value”. Section 135(2) also provides that the body corporate must take out any other insurance it is required by law to do so. Section 136 deals with what is called the “principal insurance policy” which, in relation to the units or common property shown on a unit plan, means the insurance policy effected by the relevant body corporate in accordance with s 135.¹³⁶ Importantly, money paid by the insurer under the principal insurance policy must be applied in or towards the reinstatement of the unit title development, unless the body corporate decides otherwise by a special resolution.¹³⁷ Moreover, if money is applied in or towards reinstatement, then a mortgagee is not entitled to demand that any part of that money be applied in or towards repayment of the mortgage debt.¹³⁸ Section 137 states that unit owners can take out insurance to cover damage or destruction to their own unit.

Our interviews and other commentary indicate that there are a number of problems with these provisions. It is useful to deal with these under a number of discrete headings.

A Problems with the Legislative Provisions

Although s 135 requires the body corporate to “keep insured all buildings and other improvements on the base land to their full insurable value”, it is unclear what “full insurable value” means in any given context. Following the Canterbury Earthquakes it was reportedly very difficult to obtain replacement insurance and, if it was available, it

¹³³ Unit Titles Act 2010, ss 134 – 137.

¹³⁴ DW McMorland and Thomas Gibbons *McMorland and Gibbons on Unit Titles and Cross Leases* (LexisNexis NZ Ltd, Wellington, 2013) at 3.59.

¹³⁵ Unit Titles Act 2010, s 134(2).

¹³⁶ Unit Titles Act 2010, s 134.

¹³⁷ Unit Titles Act 2010, s 136(4).

¹³⁸ Unit Titles Act 2010, s 136(6).

was prohibitively expensive.¹³⁹ It is unclear how the requirement to insure for full insurable value ought to be interpreted in this context. Section 137(2)(b) provides that “indemnity cover is permitted if full replacement cover is not available in the market”. However, it is not clear whether “available” means ‘available at all’, or ‘available at a reasonable cost’.¹⁴⁰ In one example at the peak of the post-earthquake insurance price fluctuations, a unit title complex faced an increase in its premium from \$45,000 to \$500,000.¹⁴¹ The move by insurers to ‘sum insured’ policies complicates matters further, as these policies will not necessarily provide for full replacement.¹⁴² While the fact that s 137(2)(b) refers to “full replacement cover” may indicate that the words “full insurable value” in s 135(1) should actually be read as “full replacement cover” it is unclear why different words were used and what effect that might have.¹⁴³

A further problem with the legislative drafting relates to s 137(2)(a) which allows bodies corporate to, by special resolution, allow unit owners of “stand-alone” units to insure all the improvements within the boundaries of his or her unit. A stand-alone unit is defined in s 5 as being one in which no part of any building in the unit is attached in any way to any building in any other unit or to any building in the common property. Nonetheless, it is suggested that this is obscure¹⁴⁴ and anecdotal evidence suggests that even where units are semi-detached the practice is that each owner will insure his or her own unit.¹⁴⁵ Of course, the risk is that this will give rise to some of the problems that afflict cross-leases when different insurance companies are involved in a repair situation.¹⁴⁶

¹³⁹ Submission from Alan Henwood to Minister for Building and Housing regarding the Unit Titles Act 2010 (2016) at 9.3.

¹⁴⁰ Submission from Alan Henwood to Minister for Building and Housing regarding the Unit Titles Act 2010 (2016) at 9.4 and John Greenwood “Unit Titles Act: Lame Duck and How to Fix It” (paper presented to New Zealand Law Society Property Law Conference, June 2016) 3 at 16.

¹⁴¹ John Greenwood “Unit Titles Act: Lame Duck and How to Fix It” (paper presented to New Zealand Law Society Property Law Conference, June 2016) 3 at 16.

¹⁴² Submission from Alan Henwood to Minister for Building and Housing regarding the Unit Titles Act 2010 (2016) at 9.5.

¹⁴³ Submission from Alan Henwood to Minister for Building and Housing regarding the Unit Titles Act 2010 (2016) at 9.5.

¹⁴⁴ John Greenwood “Unit Titles Act: Lame Duck and How to Fix It” (paper presented to New Zealand Law Society Property Law Conference, June 2016) 3 at 16.

¹⁴⁵ Submission from Alan Henwood to Minister for Building and Housing regarding the Unit Titles Act 2010 (2016) at 9.8.

¹⁴⁶ See Chapter 3.X.

B Insurance Experiences following the Canterbury Earthquakes

On a general level the post-earthquake problems for unit titles were largely the same as for other earthquake claims.¹⁴⁷ Issues arose regarding: delays in having claims processed; assessments that were based on incorrect information; assessments which did not incorporate a sufficient depth of investigations; and instances where the repair methodology was to the wrong standard, or where the repair methodology tried to isolate various components of the building and did not treat the building as a whole. As with other types of building, problems arose in relation to cash settlements which were done on a “unfair basis”.¹⁴⁸

In comparison to some of the problems that afflict cross leases, issues relating to unit titles and insurance are far fewer, essentially because s 135 of the Act states that the body corporate must insure and keep insured all buildings and other improvements on the base land to their full insurable value. Thus, as one interviewee observed, insurance was not too much of a problem in relation to unit titles after the Canterbury earthquakes.¹⁴⁹ Despite this general state of affairs, where a body corporate was not functioning there could be problems, an issue compounded by the fact that the 2010 Act did not come into force until 20 June 2011 (four months after the February 2011 earthquakes).¹⁵⁰ However, once the governance of the unit title was sorted out and working properly it was “just a matter of the committee making the necessary decisions”.¹⁵¹ Although there was a degree of complexity as a result of the number of people involved in a unit title complex, because there was only one insurer many post-earthquake unit title developments had received their money and were “moving on”.¹⁵² There was also a view that unit titles were taken more seriously by insurers who knew what their responsibilities were and were not “given an out”.¹⁵³ Another lawyer noted that the process was relatively simple as s 136(4) mandates that any money paid by an insurer under the policy must be applied towards reinstatement of the unit title development unless the body corporate decides otherwise.¹⁵⁴ Thus, the money should go to the body corporate rather than to individual owners and the body corporate will (if a decision is made to disburse it) apportion it on

¹⁴⁷ Interview with lawyer, Christchurch, June 2016.

¹⁴⁸ Interview with lawyer, Christchurch, June 2016.

¹⁴⁹ Interview with insurer, Christchurch, July 2016. This point was echoed in interviews with lawyers, Christchurch, June 2016.

¹⁵⁰ Interview with lawyer, Christchurch, June 2016.

¹⁵¹ Interview with lawyer, Christchurch, June 2016. This point was echoed in another interview with lawyer, Christchurch, June 2016.

¹⁵² Interview with lawyer, Christchurch, July 2016.

¹⁵³ Interview with lawyer, Christchurch, June 2016.

¹⁵⁴ Importantly, s 136(6) states that if the money is applied towards a reinstatement, mortgagees are not entitled to demand that any part of the money is applied towards repayment of the mortgage debt.

the basis of shares in the unit title development. Moreover, the unit title regime generally resulted in there being a spokesperson who would, hopefully, be representing a collective decision. If things became difficult, a professional manager could be appointed.¹⁵⁵

C Problems with Settlement

However, it was not all plain sailing for unit titles in Canterbury post-earthquake. For example, one interviewee noted that the body corporate must reach a settlement with the insurer before there can be an insurance distribution amongst owners, or a decision to rebuild the property.¹⁵⁶ While in theory this is a decision for the body corporate in line with the requirements of the Act, in Canterbury the practice became for the insurer to ask all the owners to countersign the settlement document (and sometimes mortgagees were also asked to sign). This meant that one disaffected person could confound the whole process by not signing; a result that is not in keeping with the ostensible operation of the Act.¹⁵⁷

Settlement itself could also be problematic. While early settlement of disputes is often seen as desirable, it is not without its pitfalls. The decision of the Court of Appeal in *Prattley Enterprises Ltd v Vero Insurance NZ* ventilated two issues of interest.¹⁵⁸ The first concerned an unsuccessful application for relief under the Contractual Mistakes Act 1977 following a settlement between the appellant building owner and Vero Insurance. The appellants contended that both parties had been mistaken as to the proper method of assessing the quantum of loss, which failed for a number of reasons, including an inability to prove any actual mistake or any significant disparity in value, as well as an allocation of the risk of mistake to the building owner. Given the emphasis placed by the court on the high threshold needed to upset a settlement agreement on any grounds, it is clear that a rush to early settlement may, at times, be unwise.

The case also reveals some of the problems with “advisers” and “experts” who may be expected to flock to the scene of any significant disaster in the hopes of securing a share of the insurance or settlement monies available. One of the reasons that the building owner in the *Prattley* case sought to set aside the settlement agreement was the involvement of an overseas “expert” who advocated a novel method of calculating

¹⁵⁵ Interview with lawyer, Christchurch, June 2016.

¹⁵⁶ Interview with lawyer, Christchurch, July 2016.

¹⁵⁷ Interview with lawyer, Christchurch, July 2016.

¹⁵⁸ *Prattley Enterprises Ltd v Vero Insurance NZ* [2016] NZCA 67, [2016] 2 NZLR 750. This case was unsuccessfully appealed to the Supreme Court which did not comment on these issues in detail. See *Prattley Enterprises Ltd v Vero Insurance New Zealand Ltd* [2016] NZSC 158, [2017] NZCCLR 1.

depreciation on the building under which the owners would have been entitled to more than 10 times the sum for which they had actually settled. What is inexplicable is that this “expert” first acted as an advocate for the building owners, then entered into a litigation-funding arrangement with them for the action to set aside the settlement agreement, before finally appearing in the witness box as an alleged independent expert witness. The Court of Appeal was singularly unimpressed by this multiplicity of roles.¹⁵⁹

D Distribution of Insurance Proceeds

A further problem regarding unit titles and insurance involves the question of how to distribute insurance proceeds once they have been received. As noted in Chapter One, in one case cited to us a dispute regarding the distribution of insurance, would have resulted in a difference of \$1 million for a single unit owner depending on how it was approached.¹⁶⁰

OM Hardware Ltd v Body Corporate 303662 provides a further example.¹⁶¹ A unit title development in the centre of Christchurch contained a mix of ground-floor commercial units and upper-level residential units. The building was badly damaged by earthquakes, and demolition became necessary. The body corporate claimed on its insurance policy. There was a major disagreement between the residential unit owners and the commercial unit owners because, when the initial allocation of ownership interests was carried out, it reflected the floor areas of the units, not their actual values. This was contrary to the Unit Titles Act, and was soon recognised as incorrect. However, no alternative allocation had been agreed. The residential unit owners successfully sought to have the insurance proceeds distributed on a retrospective assessment drawing on expert valuers’ advice, rather than on the incorrect initial scheme. It was critical that expert valuation based on sound data was available and, although there had been some change in relative values between the commercial and residential units over the years, the different valuations were remarkably similar.

A different result occurred in *Dominion Finance Group Ltd (in rec and liq) v Body Corporate 382902* (“*Gallery Apartments*”) where an apartment building was badly damaged in the Canterbury earthquakes and later had to be demolished.¹⁶² Again, there

¹⁵⁹ *Prattley Enterprises Ltd v Vero Insurance NZ* [2016] NZCA 67, [2016] 2 NZLR 750 at [104] – [109].

¹⁶⁰ See Chapter 1.V.

¹⁶¹ *OM Hardware Ltd v Body Corporate 303662* [2015] NZHC 190.

¹⁶² *Dominion Finance Group Ltd (in Rec and Liq) v Body Corporate 382902* (“*Gallery apartments*”) [2012] NZHC 3325, (2012) 14 NZCPR 252.

was a dispute as to the accuracy of the allocation of ownership interests, and disgruntled unit owners sought a retrospective revaluation. However, in this case the Court refused to order such an exercise because there were no good comparators to allow a reliable figure to be reached. Therefore, the challenged allocation stood.

E Inadequate Insurance

A further significant insurance problem was a lack of sufficient insurance to cover the necessary repairs.¹⁶³ This left unit owners to make up the difference.¹⁶⁴ This interviewee considered that this was probably the biggest cause of all the problems in Christchurch post-earthquake: "... if there had been enough money to put things back perfectly it would still have been complicated and a scheme [under s 74] would have been necessary, but it would have been possible to achieve".¹⁶⁵ The cause of under insurance is often simple; the higher the sum insured, the higher the cost. Interestingly, however, the experiences in Canterbury post-earthquake suggest that the reason for the lack of sufficient insurance is not always a result of undervaluing. There was a huge increase in the cost of construction post-earthquake¹⁶⁶ and the cost of demolition also took many in the industry by surprise.¹⁶⁷ Both of these things contributed to some cases of under insurance following the earthquakes.¹⁶⁸

As a result of insufficient insurance proceeds, many unit owners in Christchurch have attempted to take the money available and sell their damaged units.¹⁶⁹ However, there are some significant issues for them in doing so. Central problems include consensus between owners and the division of the overall proceeds between unit owners. The disposal of the underlying land is not a body corporate matter¹⁷⁰ so everyone has to cooperate in order to make a collectivised sale work.¹⁷¹ As one interviewee noted, as soon as you get over about 10 unit owners things can start to get very complicated:¹⁷²

¹⁶³ Interview with insurer, Christchurch, July 2016.

¹⁶⁴ Interview with lawyer, Christchurch, July 2016.

¹⁶⁵ Interview with lawyer, Christchurch, July 2016.

¹⁶⁶ Interview with lawyer, Christchurch, July 2016.

¹⁶⁷ Interview with insurer, Christchurch, July 2016.

¹⁶⁸ Some cases of under insurance resulted in litigation. See *Body Corporate 78462 v IAG New Zealand Ltd* [2016] NZHC 320 and Nick Truebridge "Multimillion-dollar dispute in Christchurch over Sumner apartments ongoing" *Stuff* (online ed, 8 August 2016).

¹⁶⁹ Interview with lawyer, Christchurch, July 2016.

¹⁷⁰ Unit Titles Act 2010, ss 181 and 185.

¹⁷¹ Interview with lawyer, Christchurch, July 2016.

¹⁷² Interview with lawyer, Christchurch, July 2016.

... the chances of a hundred owners agreeing a scheme and co-operating together and rebuilding the development is impossible ...

While the likelihood for a developer to make an offer to those owners is probably no worse than where there are a smaller number of owners, it increases the probability of one unit owner taking a different view, “being a holdout and stymieing it”.¹⁷³

However, the benefit of a developer buying a whole development is that it is up to that person to make all the decisions regarding remediation or rebuilding.¹⁷⁴ Developers may find it easier to cancel a unit plan as they are the only person who has to sign any resolution and they do not need to obtain a valuation as normally required by the Unit Titles Act s 177(7) as Land Information New Zealand has said it is unnecessary in these circumstances.¹⁷⁵ As noted by one interviewee:¹⁷⁶

I thought it was going to be an absolute nightmare given people have died, people have been bankrupted, people had financial issues but the banks and everything were really cooperative in terms of actually making it happen.

Overall, although it is possible to coordinate all unit owners and sell to a single purchaser, this is not common. The impression gained from our interviews is that the Unit Titles Act does not deal well with a scenario where the body corporate elects not to repair or rebuild following damage or destruction.¹⁷⁷ It can get extremely complicated where the individual unit owners then elect to sell their units to third parties. The usual practice is to combine the resolution not to rebuild, with a decision to do something else with the insurance money (generally to give it to the owners), which appears possible under s 136(4). However, this results in a damaged unit title complex and a body corporate that has responsibilities in terms of maintenance and repairs (for example under s 138), but with insurance money distributed to individual owners. As noted by an interviewee:¹⁷⁸

Arguably, it is implicit that if you give the money away to the owners that maybe you are not intending those statutory obligations to still apply, but it is arguable that they still do apply.

¹⁷³ Interview with lawyer, Christchurch, July 2016.

¹⁷⁴ Interview with lawyer, Christchurch, July 2016.

¹⁷⁵ Interview with lawyer, Christchurch, July 2016.

¹⁷⁶ Interview with lawyers, Auckland, October 2016.

¹⁷⁷ Interview with lawyer, Christchurch, July 2016.

¹⁷⁸ Interview with lawyer, Christchurch, July 2016.

Certainly, the Act does not appear to allow a body corporate to avoid its obligations to repair and maintain by way of a resolution that it will not do so; s 138 is drafted in mandatory terms. The problems that might arise from this discrepancy can become even worse if the unit owners sell their unit to someone else and the unit plan has not been cancelled. In these circumstances, the new owner could potentially be asked to repair their principal unit (or contribute to it) and an owner could turn to the body corporate and say "... 'fulfil your duty to repair the common property and the infrastructure' – and there is no money to do it".¹⁷⁹

F EQC

Many of the interviews we conducted, especially in Christchurch, were done with the spectre of the earthquakes and the Earthquake Commission in the background. Interestingly, there were very few particular complaints about the operation of EQC and the unit titles regime.¹⁸⁰ Although there are some complications with how the EQC regime works in with the unit title regime, especially when mixed-use developments are involved, these are discussed elsewhere.¹⁸¹ Nonetheless, there were some problematic cases. One example links to the problem of under insurance noted above. In some cases, disputes arose between EQC and the private insurers as to liability. In *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand Ltd* the unit title complex involved comprised two buildings containing a total of 68 apartments.¹⁸² The issue in this case was whether the insurance, which covered the replacement value of the complex to a limit of \$12.95 million, was inclusive or exclusive of the insurance provided under EQC. The apartment was badly damaged in the 22 February 2011 earthquake. The dispute arose because the complex was insured well below the replacement cost that was estimated at \$25 million. The insurer, Zurich Australian Insurance Ltd, argued unsuccessfully in the High Court¹⁸³ but successfully in the Court of Appeal¹⁸⁴ that the sum for which it may be responsible¹⁸⁵ was limited to \$6.1 million, being the difference between the cover limit of \$12.95 million and the \$6.8 million paid to the body corporate by EQC.

¹⁷⁹ Interview with lawyer, Christchurch, July 2016.

¹⁸⁰ For a review of the general complaints see Jeremy Finn and Elizabeth Toomey *Legal Response to Natural Disasters* (Thomson Reuters, Wellington, 2015).

¹⁸¹ See Chapter 6.V.

¹⁸² *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand Ltd* [2014] NZSC 147, [2015] 1 NZLR 432.

¹⁸³ *Body Corporate 398983 v Zurich Australian Insurance Ltd* [2013] NZHC 1109, (2013) 17 ANZ Insurance Cases 61-972.

¹⁸⁴ *Zurich Australian Insurance Ltd v Body Corporate 398983* [2013] NZCA 560, [2014] 3 NZLR 289.

¹⁸⁵ This was assuming that the alternative claim of the body corporate that the replacement value cover limit be raised to \$100 million failed at trial.

In the Supreme Court, the firm of brokers which arranged the insurance on behalf of the body corporate argued that Zurich was liable to a limit of \$12.5 million, not the \$6.1 million decided by the Court of Appeal. In a split 3:2 decision, the Supreme Court agreed with the insurer and Court of Appeal. The majority considered that clause MD15, a pivotal clause in the insurance contract, when read in the context of the whole contract, limited Zurich's liability to the difference between the amount paid by EQC and the sum insured under the policy.¹⁸⁶ Moreover, the Supreme Court stressed that the outcome of the case resulted from the fact of underinsurance rather from the statutory EQC provisions themselves.¹⁸⁷

Overall, we consider that accurate levels of insurance are crucial to the successful repair of a unit title complex. We also consider that accurate insurance is important to the reduction of disputes if an election is made not to repair a unit title complex. We believe that the best way to ensure accurate levels of insurance is for there to be regular revaluations. We suggest that the three year review for long-term maintenance plans suggested in the recent discussion document prepared by the Ministry of Business, Innovation and Employment may apply by analogy.¹⁸⁸ We also strongly believe that this requirement should not be able to be avoided by a body corporate and ought to apply to all unit title developments regardless of their size.¹⁸⁹

Recommendation 5.6: We recommend that the insurance for all unit title developments (regardless of size) be revalued every three years. Bodies corporate should not be able to opt out of this requirement.

VI Levies and the Recovery of Costs

A problem that permeates the issues of repair, maintenance and remediation is what to do when unit owners do not, or cannot, pay. This is particularly relevant in light of some of the problems with insurance identified above. If there is not enough money from insurance to undertake the work, the question of how the unit title development can fund

¹⁸⁶ Jeremy Finn has noted that “[t]he majority view appears to be much more in accordance with both common sense and the natural meaning of the wording of the policy”: see Jeremy Finn “Insurance Issues” in Jeremy Finn and Elizabeth Toomey (eds) *Legal Response to Natural Disasters* (Thomson Reuters, Wellington, 2015) at 203.

¹⁸⁷ *Firm PI 1 Ltd v Zurich Australian Insurance Ltd t/a Zurich New Zealand Ltd* [2014] NZSC 147, [2015] 1 NZLR 432 at [98].

¹⁸⁸ Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 4.4.

¹⁸⁹ See the discussion of small unit title developments at Part IX below.

the work becomes acute. Moreover, if work is already done and an individual unit owner cannot pay, there will be a potentially significant impact on all other unit owners. Conversely, where it is known there may be difficulties with payment from some, or all, unit owners, this can act as a disincentive to do necessary repairs (or ongoing maintenance) which can result in longer term problems.

The Act has a number of provisions in relation to the raising of money to do work and to recover costs after work has been undertaken. Section 121 allows a body corporate to impose levies on unit owners. Section 124(2) states that the amount of any unpaid levy (including the reasonable costs of its collection) is recoverable as a debt due to the body corporate. As noted above, s 126 allows for the recovery of money where repairs or other work is substantially for the benefit of one (or more) units.¹⁹⁰ Section 127 states that where a body corporate does any repair or work that was rendered necessary “by reason of any wilful or negligent act or omission on the part of, or any breach of the Act, the body corporate operational rules, or any regulations by, any unit owner or his or her tenant, lessee, licensee, or invitee”, any expense is recoverable as a debt due to the body corporate from the unit owner.¹⁹¹ Although the recovery of costs is not directly addressed by s 74 (schemes following destruction or damage), s 74(7)(b) does note that the High Court is empowered to make any orders it considers expedient or necessary including directing payment of money by, or to, the body corporate or by, or to, any person.

Regardless of the initial source of the obligation, many interviewees suggested that a recurring problem was how to enforce levies and debts to the body corporate where a unit owner was unwilling, or unable, to contribute. A particular problem arises in a situation where a unit owner refuses to sell, but cannot actually afford to keep their unit. The body corporate is in a difficult position as they have no power to sell the unit.¹⁹²

While it is technically possible to apply to the courts for a charging order, one interviewee notes that this is not a common occurrence.¹⁹³ The problem was well articulated by another interviewee who noted that because there is almost always a bank in the background with a registered mortgage, it is necessary to have that bank’s consent before it would be possible to exercise any power of sale flowing from the charging order.¹⁹⁴ A bank would not do this if it puts their security at risk.¹⁹⁵ While it is possible to

¹⁹⁰ At Part III above.

¹⁹¹ Unit titles Act 2010, s 127(1).

¹⁹² Interview with lawyer, Christchurch, June 2016.

¹⁹³ Interview with lawyer, Wellington, November 2016.

¹⁹⁴ Interview with lawyer, Wellington, October 2016.

negotiate directly with a bank so that the bank pays the arrears and adds the sum to the sum owing under the relevant mortgage (as you can with rates), banks will not do this where the levies owed are likely to increase the mortgage beyond what the property is actually worth.¹⁹⁶ This can become particularly complicated when unpaid levies result in a lack of maintenance and the unit, or the complex, has become devalued as a consequence.¹⁹⁷ This also links to the problems that arise where unit owners simply will not do the necessary maintenance on their units under s 80(g) (either because they will not, or they are overcommitted). In this circumstance there is no way to force these owners to maintain their property and this leaves all other members of the body corporate to pay themselves (if they can).¹⁹⁸

We sought the views of a number of interviewees as to whether the approach taken in Ontario¹⁹⁹ (where it is possible for the condominium corporation (i.e. the body corporate) to register a lien against an owner's unit for any default on the obligation to contribute to the common expenses) might work in New Zealand.²⁰⁰ However, a number of interviewees noted that a similar rule in New Zealand would probably discourage banks from lending on apartments in circumstances where they already require much larger deposits than for other forms of property ownership.²⁰¹ These interviewees suggested that the reality is that if a body corporate levies and some people do not pay, then the only option is to apply an additional levy to everyone else.²⁰²

One interviewee suggested the establishment of a mechanism similar to the “old lien charge” as a solution to this issue.²⁰³ Essentially, this would allow a body corporate to lodge a statutory lien against a debtor owner's title.²⁰⁴ It would be available where there was an undisputed debt and where the debt was more than a certain amount, which would mean that the body corporate would not have to go through the cumbersome process of

¹⁹⁵ Interview with lawyer, Wellington, October 2016.

¹⁹⁶ Interview with lawyer, Wellington, October 2016 and interview with lawyer, Wellington, November 2016.

¹⁹⁷ Interview with lawyer, Christchurch, June 2016.

¹⁹⁸ Interview with lawyer, Wellington, October 2016.

¹⁹⁹ See Chapter 2.IV.

²⁰⁰ Condominium Act 1998 (Ont), s 85. This lien has “priority over every registered and unregistered encumbrance even though the encumbrance existed before the lien arose” (Condominium Act 1998 (Ont), s 86(1)) and can be enforced in the same manner as a mortgage (Condominium Act 1998 (Ont), s 85(6) and the Mortgages Act 1990 (Ont)).

²⁰¹ Interview with lawyers, Auckland, October 2016.

²⁰² Interview with lawyers, Auckland, October 2016.

²⁰³ Interview with lawyer, Wellington, November 2016. This suggestion was echoed in the interview with lawyer, Christchurch, June 2016.

²⁰⁴ John Greenwood “Unit Titles Act: Lame Duck and How to Fix It” (paper presented to New Zealand Law Society Property Law Conference, June 2016) 3 at 4.

obtaining a charging order.²⁰⁵ The mortgagees would rank ahead of the lien, but it would allow a body corporate to pursue a sale of the unit in the worst cases.²⁰⁶ Such a mechanism would provide an incentive for debtor owners to address their debt, but would also remove the requirement for an affected body corporate to have to go through costly and time consuming court procedures to get the same outcome.²⁰⁷

Alternatively, another interviewee suggested that the current position be reversed so that the body corporate take statutory priority for “at least operational levies”.²⁰⁸ A cap on the total amount, or the number of years for which levies can be claimed, may be appropriate.²⁰⁹

We are not in a position to be able to authoritatively discuss whether there should be a lien in New Zealand for general debts owed to the body corporate. However, we do consider that there may be a place in New Zealand for a lien for limited purposes. If the debt owed by the unit owner reflects the costs of repairing damage to a development, we can see no reason why a body corporate should not have priority over a mortgagee (that is, the lender). After all, but for the repairs, the mortgagee would have a very devalued security. Likewise, if the body corporate has had to borrow to undertake the repairs, and has had to pay mortgage premiums on behalf of a unit owner, we consider that a body corporate should have priority over others in recovering these costs. Similar reasoning applies to debts that have arisen as a result of work done on a development to increase its resilience to disasters such as floods or earthquake. We note that given the difficult balancing of interests involved, an upper limit on the level of funds that can be recovered may need to be considered.

Recommendation 5.7: We recommend that consideration is given to the introduction of a lien for limited purposes. Such a lien would allow a body corporate to recover debts accrued by a unit owner in the context of necessary repairs to a development, or work done to increase the resilience of a development to natural disasters. It should give the body corporate priority over a secured lender. Consideration should be given to whether this priority should be up to a maximum level.

²⁰⁵ Interview with lawyer, Wellington, November 2016.

²⁰⁶ Interview with lawyer, Wellington, November 2016.

²⁰⁷ John Greenwood “Unit Titles Act: Lame Duck and How to Fix It” (paper presented to New Zealand Law Society Property Law Conference, June 2016) 3 at 4.

²⁰⁸ Submission from Alan Henwood to Minister for Building and Housing regarding the Unit Titles Act 2010 (2016) at 10.9.

²⁰⁹ Submission from Alan Henwood to Minister for Building and Housing regarding the Unit Titles Act 2010 (2016) at 10.9.

A Sources of Funding

Where repairs are necessary for a complex involving people with different incomes and different levels of asset worth, difficult problems can arise.²¹⁰ In cases where there is hardship and a unit owner is unable to pay, solutions generally focus on friendly bank funding.²¹¹ Price rises (particularly in central Auckland) have helped give the banks sufficient comfort to keep lending,²¹² although those on the periphery of Auckland have not necessarily seen price rises in the same league, or anywhere enough to cover the level of costs required to fix their properties.²¹³ Moreover, while many remediation projects that have already taken place have had some degree of litigation or settlement proceeds, limitation periods mean that this source of funding is likely to become less available.²¹⁴ It is also likely that some repairs will be uneconomic and, as noted by one interviewee, banks are likely to start questioning whether it is responsible to lend to customers in this situation.²¹⁵

In one interviewee's experience it is sometimes necessary to indulge in quite creative thinking in order to help those who cannot afford the work to finance it in some manner.²¹⁶ Given the body corporate has no power to mortgage common property,²¹⁷ (and the banks would not lend without security in any event),²¹⁸ banks often have to rely on personal guarantees. Alternatively, sometimes other unit owners pay the balance and take a second mortgage over the unit of the person who cannot afford it (and thereby recoup the money (and presumably interest) on sale).²¹⁹ As a result, even if a unit has to be sold, at least it has been remediated, which also raises the possibility of refinancing.²²⁰ However, we note that issues of fairness, and possibly undue influence, can easily arise in these circumstances.

²¹⁰ Interview with lawyer, Wellington, November 2016.

²¹¹ Interview with lawyer, Wellington, November 2016.

²¹² Interview with lawyers, Auckland, October 2016.

²¹³ Interview with Chief Executive, Auckland, October 2016.

²¹⁴ Interview with Chief Executive, Auckland, October 2016.

²¹⁵ Interview with Chief Executive, Auckland, October 2016.

²¹⁶ Interview with lawyer, Wellington, October 2016.

²¹⁷ Unit Titles Act 2010, s 130(2).

²¹⁸ Submission from Alan Henwood to Minister for Building and Housing regarding the Unit Titles Act 2010 (2016) at 8.1.

²¹⁹ Interview with lawyer, Wellington, November 2016.

²²⁰ Interview with lawyers, Auckland, October 2016.

VII Long-term Maintenance Plans

Related to questions of repair and the recovery of costs, either after a disaster or as a result of aspects of a building wearing out over time, a widely recognised problem is the degree of planning for long-term maintenance of the building. Our research has indicated that how to plan, and fund, long-term maintenance is something that most jurisdictions struggle with.²²¹ The central issue here, is when, and upon whom, should the costs fall. One possibility is that there is temporal equity with costs saved over time. Another is that costs fall solely on the owners at the time the work is needed. Most jurisdictions make provision for long-term maintenance planning, although fewer couple this with a requirement for those plans to be funded.²²²

The Home Owners and Buyers Association Inc (HOBANZ) has illustrated the problem here by noting that there are now many buildings that suffer from weather tightness which are older than ten years. This means the owners are time-barred from bringing a claim under the Weathertight Homes Resolution Services Act 2006 or via litigation in the courts.²²³ Owners in this position have no option but to attempt to fund the necessary repairs themselves. The impact on existing and future owners may be profound. They are likely to be exposed to a “mountain of debt in terms of the contingent liability that is accruing in relation to the cost of future repairs and maintenance”.²²⁴ These significant problems arise as a direct result of a maintenance and funding regime that has prevented the identification of existing construction defects, the failure to remedy such defects or the failure to schedule the necessary series of repairs.²²⁵ To this could be added the failure to make sufficient provision to actually fund the maintenance or repairs.²²⁶

As it currently stands, s 116 of the Unit Titles Act 2010 states that a body corporate must establish and regularly maintain a long-term maintenance plan. It must cover a period of at least ten years and its purpose is to:²²⁷

²²¹ See Chapter 2.

²²² See Chapter 2.

²²³ This also means that they are not eligible to obtain funding under the government’s financial assistance package for leaky building related repairs: see John Gray “The Long-term Maintenance Regime” (Unit Title Working Group, Report, May 2016) at 5.

²²⁴ John Gray “The Long-term Maintenance Regime” (Unit Title Working Group, Report, May 2016) at 6.

²²⁵ This also means that they are not eligible to obtain funding under the government’s financial assistance package for leaky building related repairs: see John Gray “The Long-term Maintenance Regime” (Unit Title Working Group, Report, May 2016) at 5. HOBANZ also makes the point that some complexes now under remediation are not only leaky but also compromised structurally, fail to conform with the building code standards for the prevention of fire and acoustic performance and “have put the lives of residents, visitors and rescue personnel at risk”.

²²⁶ Interview with lawyer, Wellington, November 2016.

²²⁷ Unit Titles Act 2010, s 116.

- (a) identify future maintenance requirements and estimate the costs involved; and
- (b) support the establishment and management of the funds; and
- (c) provide a basis for the levying of owners of principal units; and
- (d) provide ongoing guidance to the body corporate to assist it in making its annual maintenance decisions.

Section 117 is also relevant. It states that a body corporate must establish and maintain a long-term maintenance fund *unless* the body corporate, by special resolution, decides not to.²²⁸

Crucially, this fund may only be applied to spending relating to the long-term maintenance plan.²²⁹ So, in any case that requires unexpected repairs, or maintenance that has not been planned for, the money set aside in the long-term maintenance fund cannot be accessed by the body corporate to undertake that work. This is likely to be an issue whenever there is damage following a natural disaster as, by its nature, it is not something that can be planned for. Any other unexpected damage would also pose problems. As noted below, in such a case the body corporate would be required under s 138 to undertake the repairs it is responsible for (that is, to building elements and infrastructure) before seeking to recover the costs of any work that was solely within the boundary of a particular unit (under s 138(4)), or that substantially benefited one unit (or units) more than any other (s 126). As a result, long-term maintenance plans and funds are somewhat inflexible. Moreover, any spending on one item that exceeds the amount specified in the long-term maintenance plan by more than ten per cent requires a special resolution.²³⁰

We note that long-term maintenance plans are one of the focuses of the review of the Unit Titles Act 2010, which is currently being undertaken by the Ministry of Business, Innovation and Employment.²³¹ The discussion document released by the Ministry in December 2016 notes a number of concerns with the current regime, including: that there are no penalties for a body corporate that fails to comply with the requirement to produce a long-term maintenance plan; that the plans are often prepared by people with no

²²⁸ This is a somewhat similar structure to that found in Victoria, where some large developments are required to have a long-term maintenance plan, and smaller developments can develop plans if they wish. Those developments that have a plan must also have a fund, although there does not appear to be a requirement to contribute to it. See the Owners Corporation Act 2006 (Vic), ss 36 – 45. This can be contrasted to New South Wales, where there is a requirement to have a capital works fund. See the Strata Schemes Management Act 2015 (NSW), s 74. For further discussion, see Chapter 2.IV.

²²⁹ Unit Titles Act 2010, s 117(2).

²³⁰ Unit Titles Act 2010, s 117(3).

²³¹ Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 4.4.

appropriate qualifications; that the current ten year timeframe is insufficient and that sometimes bodies corporate will exclude “long-life” building elements (such as exterior cladding) from their maintenance plans.²³² They also note the concern that the current requirements may be unduly burdensome for small unit title developments. In responding to these concerns the Ministry suggests, among other things that:²³³

- Long-term maintenance plans be signed by a member of a recognised surveying group or professional group;
- The plan is also signed by the body corporate chairperson at an Annual General Meeting certifying that the building defects have been recorded as accurately as possible to the body corporate’s knowledge;
- A template for long-term maintenance plans is developed to assist bodies corporate in meeting the requirements of the Act;
- The timeframe for long-term maintenance plans is extended to 30 years;
- The long-term maintenance plans for medium and large bodies corporate must be reviewed every three years;²³⁴
- Large bodies corporate *must* have long-term maintenance funds and that medium bodies corporate should have a fund unless they opt not to; and
- Long-term maintenance funds are audited annually for medium and large bodies corporate.

In our view, many of these suggestions, if adopted, would go a long way towards remedying the concerns expressed by the people that we interviewed. These interviews gave the general sense that many of the long-term maintenance plans currently created by bodies corporate are inadequate.²³⁵ As well as practical ramifications in terms of necessary maintenance, this is a major issue because many potential purchasers rely on long-term maintenance plans in making decisions about whether or not to buy, particularly given any pre-contractual inspection they have done will usually be limited to the unit itself. A purchaser in this position can only assume that the long-term

²³² Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 4.4.

²³³ Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 4.4.

²³⁴ Other aspects of the discussion document suggest differentiated requirements for different size bodies corporate (under ten units: small; ten to 29 units: medium; 30 units and over: large). See Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 3.1.

²³⁵ John Gray “The Long-term Maintenance Regime” (Unit Title Working Group, Report, May 2016) at 5.

maintenance plan has been prepared in accordance with the Act, and has identified any problems and appropriately adopted a plan to fix them.²³⁶

In order to assess the Ministry's proposals, it is useful to briefly consider them in light of comments on the long-term maintenance regime we heard during our interviews.

The suggestion that long-term maintenance plans be signed by a member of a recognised surveying group or professional group is a good one, as is the proposal that a template for long-term maintenance plans is developed to assist bodies corporate in meeting the requirements of the Act. As noted in the Ministry's discussion document, long-term maintenance plans are often prepared by people that do not have the appropriate qualifications or competencies and this can result in 'hidden' defects not being captured or disclosed.²³⁷ This view was certainly reinforced by our interviews, which suggested that a development's long-term maintenance plan (if indeed there is one) will often be prepared with no regard to the practical realities of maintaining the complex over time.²³⁸ We understand that many bodies corporate or body corporate managers often write their own, without proper input or expertise. For example, one interviewee recounted an example where the long-term maintenance plan simply covered a roof repair and repainting the exterior of a block of flats. The body corporate put down a nominal figure for painting in eight years. However, they had no idea whether that figure would cover the cost of painting in eight years, or would only cover half of the cost. They had not sought advice and really had no idea.²³⁹ Comments such as this suggest that even bodies corporate which have attempted to prepare long-term maintenance plans often do not conform to the requirements of the Act and those plans are characterised by serious omissions.²⁴⁰

This is not to say, however, that maintaining a professionally prepared long-term maintenance plan would solve all difficulties. A professionally developed plan is no guarantee of an accurate assessment of costs in the future. For example, one interviewee noted that while some companies will produce, at great expense, extremely complete plans, these may also be ridiculous. In one instance a company suggested that some

²³⁶ John Gray "The Long-term Maintenance Regime" (Unit Title Working Group, Report, May 2016) at 5.

²³⁷ Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 4.4.

²³⁸ Interview with lawyer, Wellington, November 2016.

²³⁹ Interview with lawyer, Wellington, November 2016.

²⁴⁰ John Gray "The Long-term Maintenance Regime" (Unit Title Working Group, Report, May 2016) at 6. Gray notes the situation is not helped by the fact that the templates provided on the MBIE website do not meet the requirements of the Act either.

concrete steps in the building would need to be replaced at a huge cost. However, the general consensus is that those steps will never need to be replaced.²⁴¹ It follows that mandating a professionally prepared long-term maintenance plan may not be a panacea: “Like anything else, it goes to the quality of the professional. There are varied qualities in all professions”.²⁴² Nonetheless, the likelihood of a plan being an accurate reflection of the long-term needs of a complex is higher where the plan must be signed off by an accredited individual.

We also consider that the suggestion that the timeframe for long-term maintenance plans be extended to 30 years is an excellent one. As noted by one commentator, the fact that s 116(2) currently states that a long-term maintenance plan must cover a period of “at least ten years from the date of the plan” (and that many only consider this period) can operate to hide a range of contingent liabilities. In particular, it does not adequately represent the costs involved in maintaining or replacing items such as roofs, exterior cladding or joinery which can have an approximate life cycle of 25 to 30 years.²⁴³ Thus, the standard current set by the Act itself is “inadequate”.²⁴⁴ We believe that the extension to 30 years is likely to solve this problem.

We also agree with the proposal that long-term maintenance plans for medium and large bodies corporate be mandatorily reviewed every three years. As it stands, there is no guarantee (or requirement in the Act) that a body corporate will set levies at a level that will ensure the long-term maintenance plan is fully funded. While a requirement for the plan to be signed off by a suitably qualified person may lead to more accurate estimates regarding costs, there is currently no suggestion in the discussion document that the level of funding be linked to the work anticipated under the plan. This may be because it is so obvious that it goes without saying, however, this is probably something that needs to be explicitly addressed. Moreover, there is a further problem in that costs can rise substantially in a very short period.²⁴⁵ Thus, while it may appear that the body corporate is planning for the future, there may still be a significant shortfall when the expenditure falls due. This would have to be met by a substantial increase in levies at that point. Revisiting the long-term plan at least every three years is likely to address this problem

²⁴¹ Interview with lawyer, Wellington, November 2016.

²⁴² Interview with lawyer, Wellington, November 2016.

²⁴³ John Gray “The Long-term Maintenance Regime” (Unit Title Working Group, Report, May 2016) at 12.

²⁴⁴ John Greenwood “Unit Titles Act: Lame Duck and How to Fix It” (paper presented to New Zealand Law Society Property Law Conference, June 2016) 3 at 5.

²⁴⁵ See the discussion of under insurance at Part V above.

and strikes a reasonable balance between the necessity for review, and the onerous nature of having to do so yearly.

We also consider that the suggestion that large bodies corporate *must* have long-term maintenance funds is excellent.²⁴⁶ However, we query whether the suggestion that medium sized bodies corporate be able to opt out of this requirement by special resolution is wise.²⁴⁷ One of the general concerns our interviewees had about the current regime is that while it is a requirement to have a long-term maintenance plan, it is *not* a requirement to have a long-term maintenance fund, and many unit title developments do not; a feature which was described as “odd”.²⁴⁸ The current structure appears to be driven by a desire to enable the body corporate to have a say in the fixing of levies and the level of reserve funds, if any. As a result, individual unit owners can have a direct voice and may urge greater or lesser levels of preparedness to meet long-term maintenance costs. This is in keeping with the philosophy underpinning the 2010 Act and the ideas of personal responsibilities and democracy that are inherent in it.²⁴⁹ However, a consequence of the current structure is that if a body corporate has not put aside any money for long-term maintenance (even though that maintenance is anticipated in the plan), future owners will face significant debt when the maintenance needs to be undertaken.²⁵⁰ As noted by one lawyer we spoke to, many owners are simply not in a position to be able “to meet a large levy that is thrown on them ... because the roof ... needs replacing at \$125,000 and there is nothing in the kitty”.²⁵¹ The Ministry’s suggestion that the long-term maintenance plan be coupled with a long-term maintenance fund is likely to eliminate this problem. However, given that a medium sized body corporate may be comprised of ten to 29 units (suggesting a relatively large building and associated maintenance costs) we consider that they should also be subject to the requirement to have a long-term maintenance fund.

We note, however, that there is a further problem with long-term maintenance funds. There may be circumstances where the body corporate wishes to use money which has been set aside for a particular purpose identified in the long-term maintenance plan for a

²⁴⁶ For discussion of small unit title developments, see Part IX below.

²⁴⁷ For discussion of small unit title developments, see Part IX below.

²⁴⁸ Interview with lawyer, Wellington, November 2016 and John Greenwood “Unit Titles Act: Lame Duck and How to Fix It” (paper presented to New Zealand Law Society Property Law Conference, June 2016) 3 at 4.

²⁴⁹ See the discussion at Part II above.

²⁵⁰ John Greenwood “Unit Titles Act: Lame Duck and How to Fix It” (paper presented to New Zealand Law Society Property Law Conference, June 2016) 3 at 4.

²⁵¹ Interview with lawyer, Wellington, November 2016.

different purpose. This could arise either because a major problem has arisen that was not identified in the long-term maintenance plan or because of unexpected damage, such as that following disaster. It may also arise in circumstances where preparatory measures such as seismic strengthening or flood mitigation measures are required. We think that providing there is unanimity, a body corporate should be able to alter the purpose for which long-term maintenance funds are put. Where there is no unanimity we consider that a power to apply to the High Court for directions (similar to the power under s 74) might be very useful.

Moreover, while many of the proposals are positive, we note a reservation in relation to the suggestion that the plan be signed by the body corporate chairperson at an Annual General Meeting certifying that the building defects have been recorded as accurately as possible to the body corporate's knowledge.²⁵² The rationale for this suggestion is to support the idea of voluntary quality controls and self-regulation where possible.²⁵³ However, we consider that this idea is somewhat problematic. It is not at all clear what additional benefit it would have beyond a simple certification that the requirements of the Act have been complied with. More worryingly, such a step would likely have a chilling effect on body corporate governance as body corporate members may not wish to participate as either the chairperson, or as a member of a committee, if the implication is that the person signing is giving the long-term maintenance plan a seal of approval. Clearly, this could give the impression of validating its contents, which could lead to some degree of personal responsibility for it, particularly as there is no right of indemnity, or defence of good faith or due diligence, for those serving on body corporate committees or as chair.²⁵⁴

Moreover, the Ministry also notes that any recourse for non-compliance with these requirements would be through the Tenancy Tribunal. We note, however, that in the absence of any penalty provisions it is unclear what orders, if any, the Tribunal could actually make beyond ordering the body corporate to comply with the Act. Presumably, there may also be common law causes of action (for example the torts of negligence,

²⁵² Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 4.4

²⁵³ This is in line with the philosophy of the Act which was designed to “give bodies corporate the flexibility and autonomy to govern their own units and unit complexes”, which in turn is based on the “recognition that owners know their immediate areas best and government does not necessarily have sufficient knowledge, or a role other than to provide a framework and a dispute resolution process”. Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 4.2.

²⁵⁴ See John Greenwood “Unit Titles Act: Lame Duck and How to Fix It” (paper presented to New Zealand Law Society Property Law Conference, June 2016) 3 at 6.

deceit or malfeasance) that would mean the body corporate could be sued for any loss,²⁵⁵ but it is not clear what the basis would be for such a claim and it would be difficult to quantify the level of loss. It would also probably require action in the District or High Courts and not the Tenancy Tribunal.

We also note, however, that some of these measures could go further. For example, we consider that members of the body corporate should be informed in each annual report of the degree to which the maintenance plan for the relevant year has been carried out.

We also note that if the Ministry's current suggestion of requiring a long-term maintenance fund for medium and large bodies corporate is seen as unduly onerous, a possible solution is to require at least a minimum proportion of the budgeted repair costs to be levied every year and placed in the long-term maintenance fund. The balance could be levied, where necessary, on owners at the time the work is performed.

Overall, we acknowledge that there is a clear tension between the interests of current owners, who will usually wish to keep body corporate charges as low as possible, and the interests of future owners. However, the current New Zealand model where current owners can simply refuse to fund future expenditure is highly undesirable.

Recommendation 5.8: We recommend that the following changes be made to current law or proposed reforms in relation to long-term maintenance plans and long-term maintenance funds:

5.8.1 We recommend that, as suggested by the Ministry, long-term maintenance plans be signed by a member of a recognised surveying group or professional group;

5.8.2 We recommend that, as suggested by the Ministry, the timeframe for long-term maintenance plans be extended to 30 years;

5.8.3 We recommend that, as suggested by the Ministry, that *large* bodies corporate must have long-term maintenance funds;

5.8.4 We further recommend that *medium* sized bodies corporate not be permitted to opt out of the requirement to have a long-term maintenance fund;

²⁵⁵ See the Unit Titles Act 2010, ss 142 and 143.

5.8.5 We recommend that, as suggested by the Ministry, that long-term maintenance plans for medium and large bodies corporate must be reviewed every three years;

5.8.6 We recommend that the proposal that the plan is also signed by the body corporate chairperson at an Annual General Meeting is given further thought. At the very least, a defence of due diligence should be available to a chairperson signing a document in these circumstances;

5.8.7 We recommend that members of the body corporate should be informed in each annual report of the degree to which the maintenance plan for the relevant year has been carried out; and

5.8.8 We recommend that, as suggested by the Ministry, that a template for long-term maintenance plans is developed to assist bodies corporate in meeting the requirements of the Act.

Recommendation 5.9: We recommend that bodies corporate be empowered to alter the purpose for which long-term maintenance funds have been put aside to enable to the repair of unforeseen or unexpected damage, or to use funds to increase the resilience of the development to potential natural disasters. A body corporate should be able to exercise this power if there is unanimous agreement to the proposal. If there is not unanimous support, a body corporate should be able to apply to the High Court for directions in a manner similar to that under s 74.

VIII Obligations to Pay and Timing

In any case where a repair or remediation is necessary, how to pay for it will be of critical importance. In some cases insurance may well cover the costs, but as noted above, this is not always the case. In this section we outline the provisions of the Unit Titles Act that allocate responsibility for meeting the costs of repairs and note some of the problems with them.

If the responsibility to undertake repairs or maintenance falls to a unit owner under s 80(1)(g), then they are also responsible for funding those repairs. However, where the responsibility falls to the body corporate under s 138(1) the position is significantly more

complicated.²⁵⁶ Where the responsibility to maintain or repair under s 138(1) falls on the body corporate it must raise the funds, via levy, to complete the work.²⁵⁷ However, once the cost has been incurred, the body corporate may recover those costs if they “relate to repairs to or maintenance of building elements and infrastructure contained in a principal unit”.²⁵⁸ In other words, the body corporate must first pay for the work and then recover it from unit owners. Moreover, under s 126 where a body corporate does any repair, work or act that is required or authorised by the Act, but the work is substantially for the benefit of one unit only, substantially for the benefit of some units only, or benefits one or more of the units substantially more than it benefits the others, it may recover those expenses as well.

Where there is a long-term maintenance plan, the plan should identify how to levy owners of principal units for work done on their units.²⁵⁹ If this has occurred, there should be no problem regarding the allocation of costs as it will already be established and, if there is a long-term maintenance fund, already paid for. However, this will not apply where the work is unexpected (for example damage following disaster) or simply not addressed in the long-term maintenance plan. As a result, MBIE’s current suggestion of making long-term maintenance funds compulsory for large unit title developments will not alleviate the problems identified here.²⁶⁰ However, the ability to create a contingency fund under s 117 may provide a way for a body corporate to make provision for both unexpected repairs and maintenance, although an exercise to appropriately allocate the costs to the relevant unit owners would still need to be undertaken after the work was done.

²⁵⁶ For a discussion of where responsibility for repairs or maintenance lies, see Part III above.

²⁵⁷ The courts have been clear that the body corporate must first expend the money under s 138 before it can recover under s 138(4) or s 126. See *Tisch v Body Corporate No 318596* [2011] NZCA 420, [2011] 3 NZLR 679 at footnote 10; *Wheeldon v Body Corporate 342525* [2015] NZHC 884, (2015) 16 NZCPR 829; and Liza Fry-Irvine “Introduction to the Unit Titles Bill and Practical Tips on Unit Title Conveyancing” in *Conveyancing Pot Pourri* (Auckland District Law Society Inc CLE, 2011) at 9.

In some circumstances it may be that the body corporate has already levied the funds to undertake the work. For example, under s 115 the body corporate must maintain an operations account into which it may place funds to meet a range of expenses including “those incurred at least once a year relating to the maintenance of the unit title development”: (see Unit Titles Act 2010, s 115(2)(e)). The body corporate may also have set aside funds in an optional contingency fund to meet unexpected expenditure, or in a long-term maintenance fund that it may apply towards any costs associated with a long-term maintenance plan (see the discussion at Part VII). It would appear that, in some cases, work required to be done by the body corporate under s 138 may be funded out of those specific accounts. In all other cases the body corporate must, presumably, raise a specific levy, after the work has been completed, under s 121 (see s 138(4)).

²⁵⁸ Unit Titles Act 2010, s 138(4).

²⁵⁹ Unit Titles Act 2010, s 116(3)(c).

²⁶⁰ See Part VII above.

As a result, in any case where work is not covered by the long-term maintenance plan but is work that the body corporate must undertake, the body corporate must undertake the work and then attempt to recover the costs.

In this context, the discussion above regarding whether something is common or private property becomes crucial,²⁶¹ as does the question of whether a particular unit ‘benefits’ substantially from the work. As noted by one interviewee, it can be very difficult to work out whether particular units substantially benefit from repair work.²⁶² This complication is compounded by the fact that there is no hint in the Act about whether s 138 trumps s 126 or vice versa. Both speak of expenditure being recoverable, so the common complaint is that it is necessary for the body corporate to go out, raise the money from its members in the usual way, and then, after the work has been done, seek to recover it, as opposed to receiving it from the appropriate units before the work starts.²⁶³ Moreover, the Act uses the word “recoverable” which suggests that the body corporate has a discretion as to whether the funds are recovered or not.²⁶⁴ Indeed, this has been recognised by the courts with the decision in *Wheeldon* going so far as to note:²⁶⁵

... the plaintiffs should not be heard to complain that it is unfair that they have to pay for the costs of repairs and maintenance to building elements and infrastructure (within the terms of s 138(1)(a)) by ownership interests in the first instance, with the Body Corporate later deciding what recovery steps it will take. I accept that was Parliament’s expressed intention and that people who want to be able to choose how and when they might repair building elements should carefully reflect on whether unit title ownership is appropriate for them.

The central problem then, is how to fairly apportion costs in terms of ‘benefit’ under s 126. The Act provides no guidelines and there are a number of different routes that the body corporate can go down. This is likely to lead to disputes when repairs are required.²⁶⁶ As noted by the court in the recent case *Body Corporate S73368 v Otway*:²⁶⁷

²⁶¹ See Part III above.

²⁶² Interview with lawyer, Wellington, November 2016.

²⁶³ Interview with lawyer, Wellington, November 2016.

²⁶⁴ Interview with lawyer, Wellington, November 2016.

²⁶⁵ *Wheeldon v Body Corporate 342525* [2015] NZHC 884, (2015) 16 NZCPR 829 at [52], and see the discussion at Part III above.

²⁶⁶ Interview with lawyers, Auckland, October 2016.

²⁶⁷ *Body Corporate S73368 v Otway* [2016] NZHC 1070 at [8].

... So far as I am aware, this is the first contested case under s 126 of the 2010 Act. It is to a large extent unexplored territory. The way the section is to work in practice has still to be fully worked out.

In this case, the body corporate was seeking to recover some of the expenses it incurred in carrying out repairs to the complex, which it claimed benefited the defendant's units substantially more than other units. While the court made a number of observations about s 126, because of the nature of the case, it was clear that "they should be regarded as tentative only".²⁶⁸ In essence, the court notes that whether a particular unit (or units) 'benefited' must be assessed objectively, for the benefit of the 'benefiting owners', as it cannot be fair to require them to pay for benefits that cannot be objectively proved.²⁶⁹ Conversely, an objective standard protects against the fact that owners of benefiting units will downplay any advantages they are alleged to have received, just as the body corporate may tend to downplay any benefits to the complex generally.²⁷⁰

Notwithstanding this recent authority, this is clearly an area in which improvements could be made, and doing so may help in any situation where a body corporate has to undertake unplanned repairs to a unit title complex. Two interviewees noted they would provide guidance for people making decisions in relation to s 138 and 126 if they could:²⁷¹

Particularly around who substantially benefits under 126 ... And what does "substantially benefit" mean ... I wouldn't want to be the one to draft it because it would be very difficult, but some sort of definition of what substantial benefit means.

They also suggested that guidance from a government department, such as MBIE, that is not legally binding could also be useful. However, it may also be helpful if this guidance was binding and incorporated under the legislation or regulations.²⁷²

Certainly, as noted by another interviewee, the current provisions can result in the majority of unit owners not accepting that property, ostensibly within the confines of a particular unit, does provide a benefit to the whole complex.²⁷³ Often in these circumstances the dispute ends up being between the body corporate on behalf of the

²⁶⁸ *Body Corporate S73368 v Otway* [2016] NZHC 1070 at [9].

²⁶⁹ See also the discussion of upgrades at Part III above.

²⁷⁰ *Body Corporate S73368 v Otway* [2016] NZHC 1070 at [26] – [27].

²⁷¹ Interview with lawyers, Auckland, October 2016.

²⁷² Interview with lawyers, Auckland, October 2016.

²⁷³ Interview with lawyers, Auckland, October 2016.

majority of unit owners and the particular unit owner in question, which can leave that owner in a very difficult position.²⁷⁴

However, as some interviewees noted, if legal advice is sought, disputes can often resolve themselves. Often this is dependent on whether there is a body corporate manager, and if so, who that person is. Sometimes there is a body corporate manager who “thinks they know it all” and will give a situation a “very directed steer”.²⁷⁵ While presumably this may be helpful if the body corporate manager has sufficient knowledge and skills, it is not necessarily a good thing. In one example recounted to us, the owner of a unit had purchased it prior to the 2010 Act coming into force. At that stage, the rules adopted by the body corporate said that an upper deck area formed the roof of the building and the body corporate would be responsible for any costs associated with its maintenance and repair. However, the position is different under the 2010 Act. When the owner’s deck required repair, instead of taking into account the former position and expectations of the owner regarding repairs, the body corporate manager simply came up with an apportioning of costs that was completely outside the Act. As a result, the owner had to go to the Tenancy Tribunal at a cost (simply to file) of \$3,300 for a significant dispute.²⁷⁶ At this point the body corporate manager rescinded the original levy. The likelihood was that a new levy would be raised on the same erroneous basis as that which gave rise to the expensive, and now redundant, application to the Tenancy Tribunal.²⁷⁷ Had the body corporate taken good advice at the outset, then in the interviewee’s opinion it ought to have become clear, and accepted, that the roof deck formed the roof of other units and provided a benefit to them and that there needed to be some degree of cost sharing (especially in light of the expectations engendered by past behaviour).²⁷⁸

One suggestion we received is that bodies corporate ought to have the option to raise the funds necessary to conduct repairs from those who are likely to be liable before those repairs are undertaken.²⁷⁹ Of course, if adopted, such an approach may delay the instigation of the repairs where there are disputes about liability. Conversely, the current structure means that the costs can be accrued before any decisions are made about who is

²⁷⁴ Interview with lawyers, Auckland, October 2016.

²⁷⁵ Interview with lawyers, Auckland, October 2016.

²⁷⁶ Interview with lawyers, Auckland, October 2016. Tenancy Tribunal costs are discussed at Part XI below.

²⁷⁷ Interview with lawyers, Auckland, October 2016.

²⁷⁸ Interview with lawyers, Auckland, October 2016.

²⁷⁹ Interview with lawyer, Wellington, November 2016 and John Greenwood “Unit Titles Act: Lame Duck and How to Fix It” (paper presented to New Zealand Law Society Property Law Conference, June 2016) 3 at 13.

ultimately to pay for it. Where the body corporate decides that only a few units benefit from the work this can result in expensive arguments which may impact in an extremely negative way on those unit owners. Nonetheless, a policy decision may have been made to enable repairs to be made as soon as possible, with arguments about responsibility for paying for it reserved for a later date. However, on the level of ethics, if particular unit owners are likely to be liable for work in greater proportion than other unit owners, they should be aware of this, and able to comment, before the work is undertaken.

Recommendation 5.10: We recommend that there should be an ability for bodies corporate to raise levies from particular unit owners ahead of repairs or maintenance being undertaken. However, any body corporate that wishes to do so should have to seek a court order in order to do so. Such an order could be similar to the process currently allowed for under s 74.

IX Small Unit Title Developments

A general problem with the current scheme of the Act, which was noted by a number of interviewees, is that it draws no distinction between small unit title developments and large ones.²⁸⁰ There is a sense that the law is currently inadequate in differentiating between larger scale unit title structures and smaller (often standalone) buildings on the same title.²⁸¹

Positively, the current review of the Unit Title Act being undertaken by the Ministry of Business, Innovation and Employment proposes that size thresholds should be introduced into the New Zealand unit titles regime, with the idea being that smaller complexes would have minimal requirements and larger ones more rigorous requirements.²⁸² This suggestion is driven by a desire to respond to the “risk of poor governance faced by unit owners in medium and large complexes compared with small complexes” and it aims to “address the risks to unit owners related to the size and budget of their development, without putting onerous compliance requirements on small complexes”.²⁸³

²⁸⁰ Interview with lawyer, Wellington, October 2016 and submission from Alan Henwood to Minister for Building and Housing regarding the Unit Titles Act 2010 (2016) at 2.1.

²⁸¹ Responses from on-line survey.

²⁸² The proposed thresholds are: under 10 units: small; 10 to 29 units: medium; 30 units and over: large. For an outline of the proposed requirements by threshold see Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at Annex Two.

²⁸³ Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016 at 3.1.

We consider size thresholds to be a good idea that are likely to address some of the concerns raised during the course of our research. In particular, size thresholds are likely to alleviate the problem that some small unit title developments do not comply with all of the requirements of the Act because they are so onerous. As noted by one interviewee, based on her personal and professional experiences, it is ridiculous for a small body corporate to try and conform to all of the Act's requirements in the way that is important for a big body corporate to do.²⁸⁴ Another interviewee had been struck, particularly in the South Island and Queenstown, by the fact that some developers were developing two unit developments under the unit title regime with a party wall and when selling them advising the purchaser to take their own insurance.²⁸⁵ Moreover, no functioning body corporate had been established. No appropriate rules had been put in place and the default rules under the Act "are negligible".²⁸⁶ This can have real consequences, particularly where something goes wrong or there is a later sale. One interviewee described a situation involving a two unit development. The owner of unit A paid the insurance and the only formal unit title related interaction between the owner of unit A and the retired owner of unit B was to visit once a year to get a contribution towards insurance. When the owner of unit B decided to sell, it was necessary for her solicitor to prepare all the required statements and contact the owner of unit A to have them signed off and get confirmation of insurance and other matters.²⁸⁷ There were difficulties in tracking down the owner of unit A, which led to a delay in preparing the pre-settlement statement. While it did not delay settlement in this case, it added to the costs of the transaction.²⁸⁸

Overall, we agree that differentiated regulatory requirements depending on the size of the development is sensible. However, we would be concerned if the result of this was to retain all of the current standards for small developments, as seems to be indicated by the Discussion Document's suggestion that small unit developments retain the status quo.²⁸⁹ Further thought needs to be given to simplifying the range and extent of reporting requirements for small developments.

Recommendation 5.11: We recommend that the proposal in the Ministry of Business, Innovation and Employment Discussion Document regarding size thresholds be adopted,

²⁸⁴ Interview with anonymous, October 2016.

²⁸⁵ See the discussion at Part V above.

²⁸⁶ Interview with lawyer, Wellington, October 2016.

²⁸⁷ Interview with lawyer, Dunedin, October 2016.

²⁸⁸ Interview with lawyer, Dunedin, October 2016.

²⁸⁹ Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 3.1.

subject to further thought being given to simplifying the range and extent of reporting requirements for small developments.

We note that there is no detail in the discussion document as to how the differentiated requirements might be implemented. In this context, the logic of the model on which the Queensland legislation is structured appears to be the most flexible and probably provides the best template.²⁹⁰ In Queensland the overarching statute, the Body Corporate and Community Management Act 1997, is supplemented by not one set of statutory rules, but by five different modules of regulations, each applicable to, and designed specifically for, a different kind of strata development; such as for small schemes (with no more than six lots), for mixed residential and commercial schemes or standard schemes. We note, however, that there is anecdotal evidence suggesting that these regulations are extremely developer friendly. While the model may be useful, the content would need careful crafting for New Zealand circumstances.

Recommendation 5.12: We recommend that careful attention is paid to ensuring that it is clear which requirements apply to each size of complex, and that new regulations in line with the Queensland model be considered.

X Dispute Resolution

A further problematic area of the unit title regime relates to dispute resolution which has been described as “adversarial and expensive” and as polarising “positions between owners, rather than serving to bring warring parties together”.²⁹¹ Problems with dispute resolution appear to be universal and many of the concerns held by New Zealand based interviewees are shared by those in other jurisdictions.²⁹² This is unsurprising given the tensions that can arise where repairs are necessary and the sums of money involved are large.

²⁹⁰ Interview with body corporate manager, Auckland, October 2016. Although we note that on our own reading of these regulations it can be very difficult to see the differences between the different sets of regulations.

²⁹¹ John Greenwood “Unit Titles Act: Lame Duck and How to Fix It” (paper presented to New Zealand Law Society Property Law Conference, June 2016) 3 at 8 and see: John Greenwood and Charles Levin “Proposal for a Body Corporate Ombudsman” (Unit Title Working Group, Report, May 2016).

²⁹² See the discussion in Chapter 2.V. For example, in Australia, Hong Kong and England, there is a right to bring disputes to a tribunal rather than to the regular courts. While perceptions regarding the efficacy and accuracy of these tribunals varied, there was a general (although not universal) dissatisfaction regarding the knowledge and experience of those tasked with making decisions (Interview with academic, Melbourne, August 2016 and interview with lawyer, Melbourne, August 2016).

Disputes within unit title developments are governed by ss 171 – 176 of the Act. There are three potential forums in which a dispute may be heard: the Tenancy Tribunal (which has jurisdiction to deal with disputes up to \$50,000 but cannot deal with disputes relating to the title to the land or the application of insurance monies);²⁹³ the District Court (for disputes exceeding \$50,000 but less than \$350,000);²⁹⁴ and the High Court (for disputes exceeding \$350,000 or regarding the title to the land).²⁹⁵ These various jurisdictional cut-offs have been described as arbitrary and “just plain wrong”,²⁹⁶ with one interviewee observing that it ought to be the nature of the dispute which dictates the forum of its resolution, not its quantum.²⁹⁷ Moreover, each of these forums is adversarial in its format and none have specialist knowledge or expertise.²⁹⁸

Interestingly, s 174 forbids the exclusion or limitation of the Tenancy Tribunal’s jurisdiction and this includes agreements which provide for disputes to be referred to arbitration in the first instance.²⁹⁹ Thus, it is not possible for members of a unit title development to refer the matter to arbitration (or mediation) in the first instance; they must first go to the Tenancy Tribunal. It should be noted that it is currently necessary to pay a fee to the Tenancy Tribunal of \$850 for minor matters, and \$3,300 for all other disputes.³⁰⁰ This can be contrasted with the cost for residential tenancy disputes which is \$20.44.³⁰¹

This is another area which is engaged by the current review of the Unit Title Act being undertaken by the Ministry of Business, Innovation and Employment.³⁰² In its discussion document the Ministry notes a number of the concerns we encountered in our interviews, including the level of fees, the slow nature of the Tenancy Tribunal, the fact that the “Tenancy Tribunal” name is inapt and there are no enforcement measures the Tribunal can take (such matters being the responsibility of the District Court). There are two proposals put forward by the Ministry in the discussion document. A minor suggestion is

²⁹³ Unit Titles Act 2010, s 171

²⁹⁴ Unit Titles Act 2010, s 172.

²⁹⁵ Unit Titles Act, s 173. This section was amended by the District Courts Act 2016 on 1 March 2017 and raised the jurisdiction of the High Court from \$200,000.

²⁹⁶ John Greenwood “Unit Titles Act: Lame Duck and How to Fix It” (paper presented to New Zealand Law Society Property Law Conference, June 2016) 3 at 9.

²⁹⁷ Interview with lawyer, Wellington, November 2016.

²⁹⁸ John Greenwood and Charles Levin “Proposal for a Body Corporate Ombudsman” (Unit Title Working Group, Report, May 2016).

²⁹⁹ Unit Titles Act, s 174(2).

³⁰⁰ Unit Titles (Unit Title Disputes—Fees) Regulations 2011, reg 5.

³⁰¹ Residential Tenancies (Fees) Regulations 1998, reg (2)(1).

³⁰² Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 4.5.

that the name of the Tenancy Tribunal be changed to the ‘‘Tenancy and Unit Titles Tribunal’’ to more accurately reflect the Tribunal’s jurisdiction and responsibilities for hearing unit title disputes.³⁰³

The more major suggestion is that there be a reduction in the level of fees. If adopted, the proposal would reduce the application for adjudication to \$600 for non-complex and \$1,000 for complex disputes.³⁰⁴ It would also introduce reduced fees for mediation (\$300 for non-complex and \$600 for complex applications) in order to encourage claimants to choose mediation as an alternative to adjudication. However, two points should be noted. The proposal also indicates that a non-refundable application fee of \$100 (on top of the other costs) would be charged whenever the Tribunal is accessed, regardless of whether the case is progressed. This would mean that for a non-complex case going to adjudication, a total cost of \$700 would result, only \$150 less than the current fee. Moreover, if mediation was unsuccessful and the case needed to go to adjudication, a new fee for adjudication would be requested.³⁰⁵ While the proposal would result in costs going down, they will still be comparatively high when compared to the cost of accessing the Tenancy Tribunal for a residential dispute.

Certainly, the proposal goes some way towards addressing the almost universal concern raised in our interviews regarding the current cost of taking a unit title dispute to the Tenancy Tribunal and the fact that, as it stands, it really results in an absence of affordable dispute resolution for unit title owners.³⁰⁶ As was well summarised by one interviewee:³⁰⁷

... someone came up with the idea that it is going to be cost recovery [but] that’s not justice. Justice is not about cost recovery so whoever got that paper through the cabinet and through Parliament I just find that outrageous.

As another interviewee noted, it recently cost significantly less to file an application to the Supreme Court.³⁰⁸ The current level of fees is a problem because, for example, a fee of \$850 to recoup unpaid levies of \$2,000 is disproportionate. Although the body

³⁰³ Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 4.5.

³⁰⁴ Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 4.5.

³⁰⁵ Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 4.5.

³⁰⁶ Interview with lawyer, Christchurch, June 2016.

³⁰⁷ Interview with lawyer, Wellington, November 2016.

³⁰⁸ Interview with lawyer, Wellington, November 2016.

corporate may be able to recover the fee, it adds significantly to the total amount that must be recovered. Where a unit owner is already failing to pay, it may simply compound an existing problem.³⁰⁹ Whether a \$700 fee would change this position is a matter of conjecture, but in our view it seems unlikely.

Although the proposal for mediation as an alternative is positive, one interviewee noted that it is difficult to understand why the current scheme requires parties to use the Tenancy Tribunal and does not allow for the parties to attempt to resolve problems through private mediation.³¹⁰ In their view, this is a significant problem, which is not addressed in the current proposals for reform.³¹¹

More generally, our interviewees suggested that there was a general, although not universal, perception that the Tenancy Tribunal does not work particularly well as a forum for resolving unit title disputes.³¹² In one interviewee's view, this is in part because the filing fees are currently prohibitive, but also because the adjudicators often do not feel that they have got the authority or sufficient knowledge to make a decision. As a result things tend to be left on the back burner and not get dealt with.³¹³ A similar view was expressed by another interviewee who suggested that the Tenancy Tribunal does not have the knowledge or experience of the issues in the body corporate environment.³¹⁴ While it can deal with small scale issues such as levies being unpaid, it can really struggle in other contexts. In one case it made an order that, in the interviewee's opinion:³¹⁵

... should never have been made ... to enforce a levy on somebody that was totally illegal. It wasn't a levy struck as is required under the Act but the person wasn't well represented and the lay Tribunal member that was hearing it didn't really understand the Act and didn't know where to go looking and so made an order that just was crazy.

The consequences of this were significant as the body corporate was in the midst of a very difficult dispute around levies. It would have been useful for the Tenancy Tribunal to give some direction to the body corporate. This is in contrast to another dispute that that interviewee was involved in at the District Court level, where the judge issued a set

³⁰⁹ Submission from Alan Henwood to Minister for Building and Housing regarding the Unit Titles Act 2010 (2016) at 14.3.

³¹⁰ Unit Titles Act, s 174(2)

³¹¹ Interview with lawyer, Wellington, November 2016.

³¹² See, for example, interview with body corporate manager, Auckland, October 2016.

³¹³ Interview with body corporate manager, Auckland, October 2016.

³¹⁴ Interview with Chief Executive, Auckland, October 2016.

³¹⁵ Interview with Chief Executive, Auckland, October 2016.

of orders that addressed many of the substantive issues lying at the heart of the dispute, only part of which underpinned the court action.³¹⁶

However, a contrasting view was reflected in recent submissions made to the Minister.³¹⁷

As an adjudicator, I do not believe that the lack of confidence is justified and, more often than not, simply reflect dissatisfaction that a party has been unsuccessful. As someone who works closely with the legislation I can point to District Court and High Court decisions that I regard as reflecting poor knowledge and understanding of the legislation.

An interviewee we spoke to also noted that the statistics suggest that the expected number of unit title cases before the Tribunal had not eventuated, with the estimate about five times higher than what has actually happened.³¹⁸ However, in his view, this is likely driven by the level of fees that are set, and not any lack of proficiency on the part of the Tribunal.³¹⁹

In addressing the current problems with the dispute resolution processes under the Act, John Greenwood has suggested that a flexible, quick and cost effective method should be adopted.³²⁰ He has suggested the creation of a body corporate ombudsman or commissioner along the lines of that in Queensland, who would be empowered to assess cases and suggest alternative dispute resolution mechanisms, in particular mediation or specialist adjudication.³²¹ Such a service could be funded by a levy on body corporate trust accounts or a fee per unit.³²² However, other interviewees suggested that this sort of approach was unlikely to work, although potentially the expertise of the Weather Tight Homes Resolution Service could be harnessed to deal with smaller issues dealt with quickly.³²³ It should be noted that, while the Ministry's discussion document touches on the idea of establishing an ombudsman it rejects it as being disproportionate to the size of

³¹⁶ Interview with Chief Executive, Auckland, October 2016.

³¹⁷ Submission from Alan Henwood to Minister for Building and Housing regarding the Unit Titles Act 2010 (2016) at 14.2.

³¹⁸ Interview with lawyer, Wellington, October 2016.

³¹⁹ Interview with lawyer, Wellington, October 2016.

³²⁰ John Greenwood "Unit Titles Act: Lame Duck and How to Fix It" (paper presented to New Zealand Law Society Property Law Conference, June 2016) 3 at 8.

³²¹ John Greenwood "Unit Titles Act: Lame Duck and How to Fix It" (paper presented to New Zealand Law Society Property Law Conference, June 2016) 3 at 9 and John Greenwood and Charles Levin "Proposal for a Body Corporate Ombudsman" (Unit Title Working Group, Report, May 2016).

³²² John Greenwood and Charles Levin "Proposal for a Body Corporate Ombudsman" (Unit Title Working Group, Report, May 2016).

³²³ Interview with Chief Executive, Auckland, October 2016.

the industry, and stresses that it would require significant changes to the policy intent of the current Act and have significant cost implications.³²⁴

As dispute resolution strays somewhat beyond our focus on repair and remediation we have not formulated specific recommendations in relation to dispute resolution under the Unit Titles Act 2010. However, we do make some general observations. Overall, we consider tribunals are a useful tool for resolving many disputes or for clarifying rights in the first instance. For example, a Tribunal may be well placed to decide if a particular building element or aspect of infrastructure serves more than one unit or whether a unit has substantially benefited more than another.³²⁵ However, although it may be quicker and cheaper to use a tribunal there will be circumstances (for example an application under s 74) where a tribunal is not the appropriate forum.

Clearly, there is a problem of access to justice under the current fees structure and the proposed reduction in fees is clearly a good one. However, the suggested fees remain comparatively high when compared with other New Zealand tribunals (for example the Disputes Tribunal which charges a maximum of \$180). We also note that to initiate something in the District Court the fee is \$200, although there are additional charges should the matter actually be heard in court.

We see no justification for continuing to limit parties to use of a tribunal in the first instance. Providing both parties agree, private mediation should be available as an option. It is disappointing that this has not been addressed in the current review. Moreover, jurisdictional forums based on quantum seem arbitrary and unnecessarily expensive. We also suggest that parties have an option to elect to take the matter to a different forum, even if such an election is predicated on an application for leave.

An ombudsman may well be a useful alternative or addition to the current regime. However, it is unlikely that an ombudsman would be involved in any disputes regarding repair, remediation or rebuilding where there has been significant damage so we have not considered the suggestion in detail.

³²⁴ Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 3.2 and see Part II above.

³²⁵ See discussion at Parts III and VIII above.

XI Conclusion

It is clear that unit titles are an increasingly important part of New Zealand's home ownership landscape. Overall, we consider that the unit titles model is a relatively robust one and we do not believe that a fundamental rethink is required. However, in terms of repair and remediation our research suggests that changes are necessary. We believe that our suggestions, if adopted, would significantly improve the resilience of unit title developments and their ability to respond to both anticipated repairs and maintenance and unanticipated damage. We acknowledge that some of our suggested changes challenge some of the current approaches to the Unit Titles Act 2010 and the philosophy underpinning it. Nonetheless, within the last two decades New Zealand has suffered from the leaky building crisis and the Canterbury earthquakes, both of which demonstrate the difficulties that can be faced by those having to repair unit title complexes. We consider that changes should be made now and that, if made, the unit titles model will be well placed with regard to repairs and remediation to allow for the continued drive towards high density well-functioning cities.

We, therefore, make the following recommendations:

Recommendation 5.1: We consider the clear delineation of boundaries within unit title developments is crucial. We recommend that consideration is given to compulsory delineation by way of 3-D mapping for any new large scale unit title complexes. We suggest that existing large scale developments become subject to this requirement if any major changes are made.

Recommendation 5.2: We recommend that bodies corporate should be given the power to enter a unit to carry out a repair to a defect which is likely to affect other units or common property, where a unit owner has failed to comply with a formal notice in writing to do the work.

Recommendation 5.3: We recommend that bodies corporate should not be given the power to upgrade the development under s 138.

Recommendation 5.4: We recommend that thought is given to streamlining the current s 74 procedure so that a hearing before a High Court Judge is not necessary in every case. While consultation with the judiciary and interested parties will be necessary we suggest the following alternatives (subject to any appropriate rights of appeal or review):

- That Associate Judges of the High Court be empowered to give approval to a scheme under s 74 “on the papers” where there is no (or very minor) opposition to the scheme (including where some unit owners are silent through lack of engagement); or
- That Associate Judges of the High Court be empowered to hear applications for a scheme in open court where there is no (or very minor) opposition to the scheme (including where some unit owners are silent through lack of engagement); or
- High Court Judges (rather than Associate Judges) be empowered to consider applications under s 74 on the papers.

Recommendation 5.5: We recommend that consideration is given to empowering a body corporate to apply to the High Court to settle a scheme to enable the body corporate to undertake works, to a reasonable level, that would make the unit title development more resilient to potential hazards such as earthquakes, fires or floods. We consider that s 74 may provide an appropriate starting point or template for such a provision.

Recommendation 5.6: We recommend that the insurance for all unit title developments (regardless of size) be revalued every three years. Bodies corporate should not be able to opt out of this requirement.

Recommendation 5.7: We recommend that consideration is given to the introduction of a lien for limited purposes. Such a lien would allow a body corporate to recover debts accrued by a unit owner in the context of necessary repairs to a development, or work done to increase the resilience of a development to natural disasters. It should give the body corporate priority over a secured lender. Consideration should be given to whether this priority should be up to a maximum level.

Recommendation 5.8: We recommend that the following changes be made to current law or proposed reforms in relation to long-term maintenance plans and long-term maintenance funds:

5.8.1 We recommend that, as suggested by the Ministry, long-term maintenance plans be signed by a member of a recognised surveying group or professional group;

5.8.2 We recommend that, as suggested by the Ministry, the timeframe for long-term maintenance plans be extended to 30 years;

5.8.3 We recommend that, as suggested by the Ministry, that *large* bodies corporate must have long-term maintenance funds;

5.8.4 We further recommend that *medium* sized bodies corporate not be permitted to opt out of the requirement to have a long-term maintenance fund;

5.8.5 We recommend that, as suggested by the Ministry, that long-term maintenance plans for medium and large bodies corporate must be reviewed every three years;

5.8.6 We recommend that the proposal that the plan is also signed by the body corporate chairperson at an Annual General Meeting is given further thought. At the very least, a defence of due diligence should be available to a chairperson signing a document in these circumstances;

5.8.7 We recommend that members of the body corporate should be informed in each annual report of the degree to which the maintenance plan for the relevant year has been carried out; and

5.8.8 We recommend that, as suggested by the Ministry, that a template for long-term maintenance plans is developed to assist bodies corporate in meeting the requirements of the Act.

Recommendation 5.9: We recommend that bodies corporate be empowered to alter the purpose for which long-term maintenance funds have been put aside to enable to the repair of unforeseen or unexpected damage, or to use funds to increase the resilience of the development to potential natural disasters. A body corporate should be able to exercise this power if there is unanimous agreement to the proposal. If there is not unanimous support, a body corporate should be able to apply to the High Court for directions in a manner similar to that under s 74.

Recommendation 5.10: We recommend that there should be an ability for bodies corporate to raise levies from particular unit owners ahead of repairs or maintenance being undertaken. However, any body corporate that wishes to do so should have to seek a court order in order to do so. Such an order could be similar to the process currently allowed for under s 74.

Recommendation 5.11: We recommend that the proposal in the Ministry of Business, Innovation and Employment Discussion Document regarding size thresholds be adopted, subject to further thought being given to simplifying the range and extent of reporting requirements for small developments.

Recommendation 5.12: We recommend that careful attention is paid to ensuring that it is clear which requirements apply to each size of complex, and that new regulations in line with the Queensland model be considered.

CHAPTER 6

MIXED USE

Jeremy Finn

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I Introduction - What are “Mixed-use” Buildings or Developments?

Multi-unit mixed-use buildings are now common, particularly in central city areas or in suburban hub areas. In such locations, a single plot of land may be developed into multiple premises - some of which are used for commercial use and some for residential use. Such premises can conveniently be referred to as mixed-use developments. The paradigm for such mixed-use developments is a multi-storey block containing retail space on the ground floor with business offices on a further floor or floors, with one or more floors of residential apartments completing the building.

However there are many variations from this paradigm model. For example the building may be relatively small with only a ground floor retail development and a single storey of accommodation above; equally buildings may contain other commercial uses such as car parking or entertainment complexes. In some cases the commercial elements of a mixed use development may be quite limited. For example there may be a block of apartments, primarily occupied by owner occupiers, with a cafe for the use of both residents and the general public.

An unusual variant is to provide for the planned commercial operations in the building to be conducted from part of the common property by operators who lease their commercial space from the body corporate. Such a scheme involves higher start-up costs per unit, but provides an income stream which lowers the level of service and maintenance costs over time.¹

This chapter looks at a number of the problems that arise with mixed use buildings, focussing particularly on issues which have not generally been identified and discussed in the literature and research into unit title structures, such as EQC coverage and, very importantly, the proper classification of rental accommodation, whether short or long term. While mixed use buildings, will generally, but not always, be structured on a unit title basis, not all unit title buildings will involve mixed use. Some unit title schemes are solely residential, while others contain entirely commercial or industrial premises. This chapter deals with the particular issues that arise in a mixed use development because both commercial and residential uses must be catered for. Where the building is organised under a unit title scheme, the issues arising in that chapter such as the

¹ See for example the planned use of common property in this way in the proposed Nightingale development in Melbourne: <www.habitusliving.com/projects/nightingale>. Unfortunately the development ran into problems: Clay Lucas “Green building with no car parking thrown out by VCAT for having no car parking” The Age (online ed, Victoria, 23 October 2015). We are indebted to an Australian interviewee for information about this project.

definition of common and separate property, the management of common property, planning for maintenance of the building and body corporate management are likely to apply in addition to those discussed here.

II Legislative Context

While almost every jurisdiction we investigated has legislation for strata titles, the statutes are normally drafted in terms which reflect residential use. New Zealand, in common with most others, has no specific provisions for mixed-use developments. The only jurisdiction to have passed such a statute is Queensland, with the Mixed Use Development Act 1993, which is discussed below at part X.

As this lack of specific legislation would suggest, very little attention has been paid by Parliament or by Government departments to mixed-use developments generally, and even less to the particular legal problems that might arise. One New Zealand government website does point out the competing interests of different stakeholders in a mixed-use development, and suggests a number of issues that should be considered when creating a suitable body of rules for the body corporate in a mixed-use development.² It must be remembered that body corporate rules must operate in addition to, and be consistent with, a large number of other legal rules – statutes, regulations and local body by-laws – which regulate possible uses of the units whose owners make up the body corporate. In the mixed-use context these will include health and safety regulations (including food hygiene requirements for cafes etc), employment legislation, local body zoning of land for different uses and even local parking by-laws.

However, the website of the Ministry of Business, Innovation and Employment (MBIE) which is directly responsible for oversight of unit title developments largely ignores mixed-use matters. The website states:³

The Unit Titles Act 2010 is the law governing building developments where multiple owners hold a type of property ownership known as a unit title.

Residential unit title developments are typically apartment blocks, townhouses and suburban flats. Commercial and industrial types include office blocks, industrial or retail complexes and shopping malls.

² Ministry of Business, Innovation and Employment “Operational rules for mixed use developments” <www.tenancy.govt.nz>. The list of issues does not include any reference to repair or reinstatement of damaged units.

³ Ministry of Business, Innovation and Employment “Unit Titles Act 2010” <www.tenancy.govt.nz>.

Perhaps unsurprisingly, proposals for changes to the Unit Titles Act 2010 emanating from MBIE have also not addressed – or even identified – any specific mixed-use development issues.⁴ This is unfortunate and consideration of those issues is necessary.

Recommendation 6.1: We recommend that in the process of finalizing the reform proposals for Unit Titles (as presented in the December 2016 MBIE Discussion Document) particular account be taken of the difficulties for mixed-use buildings of the current and the proposed regimes, and that these issues be addressed before any relevant legislative changes are formulated.⁵

III Unpacking the “Mixed-use” Concept

It is common in the literature, and in government discussion papers and similar documents, for there to be a contrast drawn between occupants of a building who use their units for commercial purposes and those who use them for residential purposes.⁶ While this is a convenient distinction, and it has been used in this Report for that convenience, it must be recognised that the distinction cannot be maintained under closer scrutiny. Some of the lack of clarity about mixed-use developments may be because the terminology is imprecise – or may be used imprecisely – and because there has been a lack of analysis of the concepts involved. It will be helpful to examine these issues more closely.

A “Residential” or “Commercial” – A False Dichotomy

A clear distinction can be made between one unit in a mixed-use development which is solely used for commercial purposes – for example as a business office or for commercial retail operations – and another unit which is used solely for residential purposes and only by the owner of the unit. Yet between those ends of the spectrum lie a great variety of

⁴ Neither the Unit Title Working Group Report (Unit Title Working Group Report (May 2016) nor the follow-up Discussion Document (Ministry of Business, Innovation and Employment Review of the Unit Titles Act 2010: Discussion Document (December 2016)) refer at any time to mixed-use developments. For discussion of that document see Chapter 5.II.

⁵ Ministry of Business, Innovation and Employment Review of the Unit Titles Act 2010: Discussion Document (December 2016). For our discussion of the reform proposals for unit titles more generally, see Chapter 5.

⁶ To take but two examples, neither SSY Lau, R Giridharan and S Ganesan “Multiple and intensive land use: case studies in Hong Kong” (2005) 29(3) *Habitat International* 527 nor K Everton-Moore and others “The law of strata title in Australia: A jurisdictional stocktake” (2006) 13 *Australian Property Law Journal* 1 discuss mixed-use developments.

potential mixed uses of a single unit. Two in particular, may be identified as potentially problematic for the development's rulemaking body and for government regulators alike.

B Mixed Residential and Income-earning Uses of a Single Unit in a Multi-unit Building or Development

It is common, and may become even more common, for an owner or occupier of a unit in a multi-unit building or development to both reside in that unit and carry out his or her income-deriving activities from it. These may be uses as varied as freelance journalism, writing computer software, the manufacture of designer jewellery or clothing or the provision of personal services such as hairdressing or therapeutic massage. In each case the activities from which income is derived are unlikely to impinge unduly on neighbouring unit owners. However the use of the premises for such activities may have significance both in terms of any local planning or other regulations, and in the calculation of insurance premiums - and indeed may raise issues as to EQC coverage of the unit and, by spill-over effects, the EQC coverage of that floor within the development. That issue is discussed below, in Part V of this chapter.

It is also likely that unit owners who use their units for both income generating activity and as residential space will have different imperatives when it comes to repair or reinstatement of the building than other residents who do not need to be able to carry on their business. A simple example, and a commonplace one after the Canterbury earthquakes, is that ability to access high-speed internet connections at will may be much more important for income-generating owner-residents, than repairs to common areas.

C Income-producing "Residential" Use vs Non-commercial Use

Units in a multi-unit building - whether ostensibly a solely residential building or a mixed-use development - are frequently used for the commercial supply of accommodation, on a short-term or a long-term basis. There are a number of multiple unit developments in which "residential" units are in fact used as hotel or motel accommodation on a permanent basis with a fixed management structure; in others owners let to long-term tenants; in still others owners may rent out some or all of the unit for transient accommodation. In particular, the issue of "residential" units in multi-unit dwellings being used for Airbnb customers was raised with our researchers in a number of cities.⁷

⁷For discussion of this widespread issue see Chapter 2.IV.

Clearly any such regular usage of a unit for commercial gain is a business use. It would therefore be expected that bodies corporate would be able to make rules against such uses if they chose; again issues may arise as to insurance and EQC cover.⁸ Indeed, some do so, but enforcement is often difficult. In other cases the whole development may be geared to some degree of commercial use of units for short-term accommodation. This is particularly likely to occur in resort and holiday centres.⁹ Creating any effective regulation of such activity is likely to be difficult given the number of stakeholders and their competing interests. One study of short-term tourist accommodation in strata title developments in Queensland identified a multiplicity of stakeholders involved:¹⁰

unit owners, unit owners' associations, tourists, resident managers, body corporate committees, real estate agents, management rights' brokers, body corporate service providers, competitors, financiers, state government tourist organisations, and developers.

Given this strong commercial element in the provision of short-term rental accommodation, it was surprising to find that events after the Canterbury earthquakes and experience with “leaky buildings” both indicate that units used for commercial accommodation were, and are, generally treated as still having their residential character.¹¹ This has significant implications for insurance, for EQC cover and for tax issues.¹²

D Mixed Industrial and Residential Use

Neither respondents to our survey, nor any interviewees, identified cases of mixed industrial and residential use within a single building. This may be because certain forms of light industry have been essentially subsumed into the more general commercial category. It is, for example, likely that a small-scale printing and copying business will be seen as commercial rather than industrial; and we are aware of city redevelopments in

⁸ See Part VB for a discussion of the EQC issues.

⁹ For an early study of the need for legislation to address use of this kind see A Ardill and others “Community Titles Reforms in Queensland: a regulatory panacea for commercial, residential, and tourism stakeholders” (2004) 25 *The Queensland Lawyer* 13.

¹⁰ Kelly Cassidy and Chris Guilding “Defining an emerging tourism industry sub-sector: Who are the strata titled tourism accommodation stakeholders?” *International Journal of Hospitality Management*, Volume 29, Issue 3, September 2010, 421 at 424-425.

¹¹ For a fuller discussion see Jeremy Finn, Ben France-Hudson and Elizabeth Toomey “Damage, Destruction, Distress: Shared Ownership Debacles” (2016) 22 *Canterbury Law Review* 57 at 76-79.

¹² There may also be significant issues as to the appropriate level of local body rates, but that question falls outside our scope of enquiry.

New Zealand where artists and artisan food producers operate on the ground floor of buildings with residential accommodation on other levels. The mixing of such small-scale manufacturing or light industrial uses with residential accommodation is likely to be limited both by local body zoning regulations and by obligations on owners/occupiers of properties not to create a nuisance. Mixing of heavy industrial activity and residential use in a single building will be very rare. Local government may see significant health risks to residential occupiers and thus refuse consent, while such mixed-use developments are unlikely to appeal to residential occupiers. It is not likely that any rent-paying residential occupiers of a mixed industrial/residential building will seek to purchase their units, and thus control of the entire building will rest with the owner of the land, as regulated by leases with the occupiers.

IV The Auckland Unitary Plan and Its Lack of Clarity about Mixed Uses

The lack of precision in analysis often evident in Government publications is, unfortunately, reflected in the recently published Auckland Unitary Plan (AUP) which provides the framework for future development of that city.¹³ There are elements of that plan which clearly contemplate greater numbers of mixed-use developments and buildings, but without clear articulation of how this is to happen or the constraints that may be needed on developers.

The AUP sets out general objectives for increasing mixed uses of land and then lists a number of general policies to achieve those goals.¹⁴ Of these, only policies (2) and (10) set a clear framework for future decisions regarding mixed-use buildings or developments:¹⁵

- (2) Enable an increase in the density, diversity and quality of housing in the centre zones and Business – Mixed Use Zone while managing any reverse sensitivity effects including from the higher levels of ambient noise and reduced privacy that may result from non-residential activities.

¹³ Auckland Council Auckland Unitary Plan (Operative in part, updated 11 April 2017) <www.aucklandcouncil.govt.nz>. The authors have been greatly assisted here by a March 2017 University of Canterbury Summer Scholarship report by Joseph Barclay, to which Mr Barclay kindly allowed us access.

¹⁴ Auckland Unitary Plan, H8.3; H9.3; H10.3; H11.3; H12.3; H13.3; H14.3; H15.3 Policies: General policies for all centres, Business – Mixed Use Zone, Business – General Business Zone and Business – Business Park Zone.

¹⁵ The AUP does also have another possibly relevant general policy H8.3; H9.3; H10.3; H11.3; H12.3; H13.3; H14.3; H15.3: (6) Encourage buildings at the ground floor to be adaptable to a range of uses to allow activities to change over time.

(10) Discourage dwellings at ground floor in centre zones and enable dwellings above ground floor in centre zones.

Policy (2) impliedly recognises the competing interests of stakeholders and owners/occupiers of premises in a mixed-use dwelling (whether under a unit title or some other form of tenure). However, neither it nor other parts of the AUP give any clarity about other issues to do with intensified mixed-use developments – as opposed to either fully residential or fully commercial developments in the city centre area, particularly as to possible conversion of existing buildings such as older commercial buildings and offices into dwellings, as has been common in Australian cities. Any such conversions will be restricted discretionary activities under the Plan, and so specific approval will be needed in each case.¹⁶

Policy (10) indicates a policy decision to encourage a particular mode of mixed commercial-residential style of development, with ground floor areas always being non-residential and upper stories being either commercial or residential. However this type of development is planned only for quite limited parts of the city and does not apply to developments along major roads.¹⁷ Such areas instead fall into a Business – Mixed Use Zone, where the AUP provides for residential activity as well as predominantly smaller scale commercial activity that does not cumulatively affect the function, role and amenity of centres. The zone does not specifically require (nor prohibit) a mix of uses on individual sites or within areas.

The lack of clarity in the AUP about mixed-use developments suggests there has been little analysis of the potential problems which may arise (for example different useful life-spans for elements of the same building or development which may cause problems with repairs and renovations).

V EQC Issues for Mixed-use Buildings

Our research indicates that the current regime for EQC coverage of multi-unit mixed-use buildings needs to be reconsidered. A significant part of the problem is that the legislative framework is insufficiently nuanced - experience in Canterbury shows that the application of the Act in practice may be different from what was apparently intended.

¹⁶ AUP Part 3 Regional and District Rules, Chapter I: Zone Rules.

¹⁷ While other zones contemplate a mix of uses, for example the Mixed Housing Urban and the Terrace Housing and Apartment Buildings Zones, they do not directly address mixed use buildings.

The Earthquake Commission Act 1993 extends cover to all residential buildings which are the subject of a fire insurance policy.¹⁸ Residential buildings are defined, in part, in s 2 of the Act:

Residential building means—

(a) Any building, or part of a building, or other structure (whether or not fixed to land or to another building, part, or structure) in New Zealand which comprises or includes one or more dwellings, if the area of the dwelling or dwellings constitutes 50 percent or more of the total area of the building, part, or structure:

In turn, a “dwelling” is defined:

Dwelling means, subject to any regulations made under this Act, any self-contained premises which are the home or holiday home, or are capable of being and are intended by the owner of the premises to be the home or holiday home, of one or more persons.

This rather crude “50 per cent or more” criterion contrasts sharply with other parts of the definition section, which give very precise figures as to the distance from the house for which damaged land or drains or pipes attract EQC cover. The definitions do not, of themselves, provide a clear direction about whether a unit substantially or solely used for the provision of commercial accommodation should be seen as part of a residential use or a commercial one. The latter is excluded from the EQC coverage. We interviewed an experienced member of the insurance industry who told us that some insurers were surprised to find that EQC cover extended to parts of buildings which they had not expected to be covered.¹⁹ This may sometimes have been due to EQC having undertaken more careful evaluation of mixed-use buildings to ensure that levies due from commercial occupants were collected, and as a result, having more precise records than did insurers, but equally it may reflect EQC paying out on premises which may not have been entitled to cover and for which EQC levies are cheaper than commercial insurance premiums. This would all suggest an imperfectly functioning insurance market. While many unit owners might be pleased to obtain the benefit of EQC cover, EQC will pay out more than it should if repairs are needed following a significant natural event. Further there is the risk that in the aftermath of an event EQC may decide a unit is not covered, leaving the unit owner at risk of being under-insured.

¹⁸ Earthquake Commission Act 1993, s 18.

¹⁹ Interview with insurance expert, Christchurch, August 2016.

Our understanding is that after the Canterbury earthquakes, EQC generally took the view that buildings which have a mix of short-stay apartments and owner occupied apartments were to be classed as residential buildings. This may have been a flow-on from the decision in *Morley v EQC*, which held that boarding-houses came within the statutory definition of residential buildings because each boarding house was “an entire self-contained building and as such was self-contained premises being shared as a home by a number of individuals”, even though the individual residents shared communal kitchens and bathrooms.²⁰ The Judge noted that it was common ground between the parties that rented accommodation was a “residential building” as opposed to a commercial property, even though the landlord had a commercial purpose in letting out the premises.²¹ Thus the key point about the extent to which properties remained residential buildings despite an element of commercial use was not decided by the judge, but rather bypassed because the parties did not contest it. However the case appears to have prompted a general view, repeated in later cases, that no differentiation should be made between apartments or flats rented on long-term tenancies, and those let on very short terms of a week or two, or even a few days. That view needs to be re-visited. The definitions quoted above would appear to reflect a parliamentary intention to distinguish between buildings used as long-term residences and those which are given over to other uses. However, the present position appears to privilege one form of commercial accommodation provision over others in terms of EQC cover. This does not seem valid. Amendment to the legislation would appear highly desirable.

Recommendation 6.2: We recommend that the definitions of “residential building” and “dwelling” in the Earthquake Commission Act 1993 should be clarified to exclude premises predominantly used for commercial short-stay accommodation from coverage. Eligibility for EQC cover should depend on actual use to which individual units are put. In consequence, consideration should be given to a more nuanced criterion than the current “50 percent or more” of particular floors of the building so that actual usage is better reflected in EQC cover and levies.

A further reason for reviewing the current law is that the distinctions drawn by the EQC legislation are not maintained in other contexts. In particular, the Weathertight Homes Resolution Services Act 2006 takes a different approach to issues of residential use. Similarly, tax law regards the commercial use of a property as attracting GST.

²⁰ *Morley v EQC* [2013] NZHC 230 at [50].

²¹ *Morley v EQC* [2013] NZHC 230 at [49].

Consistency of approach would simplify the legal position and facilitate decision-making as to repairs or reinstatement.

A Weathertight Homes

Similar definitional issues arise under the Weathertight Homes Resolution Services Act 2006.²² That statute allows owners of “dwellinghouses” affected by “leaky home syndrome” or “weathertightness issues” arising from faulty design and/or construction to have their cases dealt relatively speedily through the Weathertightness Tribunal. Although owners must abandon their tort claims against the relevant local body, they do get the benefit of a government contribution to the remedial payments.

The critical parts of the definition of “dwellinghouse” in s 8 of the Weathertight Homes Resolution Services Act are:

dwellinghouse—

- (a) means a building, or an apartment, flat, or unit within a building, that is intended to have as its principal use occupation as a private residence; and
- ...
- (d) does not include a hospital, hostel, hotel, motel, rest home, or other institution

That definition has been discussed in both the courts and the Weathertightness Tribunal in the context of eligibility to access the scheme. One case in the Tribunal concerned a building which comprised a number of apartments, each of which had been designed as private residences but had never been used as such.²³ Instead, they were rented out. The Tribunal gave primacy to the intended purpose of the owners to use the flats as a permanent or holiday home at some later time, rather than the actual use to which the units had been put.²⁴ In *Body Corporate 85978 v Wellington City Council* the Court was dealing with a building in which there were 100 residential units and a café.²⁵ Twenty-one of the units were leased to the Quest hotel chain and used as hotel rooms. The Tribunal considered these units fell outside the statutory scheme, but in the High Court a “bright line” test of the purpose at the time of construction was applied. The clear change of intended use over time apparently did not matter.

²² A most useful introduction to the “weathertightness” or “leaky homes” problem in New Zealand is Ken Palmer. “Local authority liability in New Zealand for defective homes” (2012) 4(3) *International Journal of Law in the Built Environment* 203.

²³ *Re The Anchorage* [2012] NZWHT Auckland 33.

²⁴ *Re The Anchorage* [2012] NZWHT Auckland 33 at [12] and [19].

²⁵ *Body Corporate 85978 v Wellington City Council* [2013] NZHC 2852.

B GST Issues and Use of Units for Short Term Accommodation

Tax law does not focus on intention or notional use, but rather on reality. Provision of commercial accommodation attracts GST – although there may be some evaders who do not declare income to the authorities.²⁶ Such evaders might, in the aftermath of a natural disaster, find they can not reclaim GST from the costs of repairs. The clear theoretical demarcation is usually matched in practice, and may cause problems where events force a change of use. . A Christchurch lawyer described problems encountered when dealing with a property which contained units used for short stay visitor accommodation.²⁷ In the aftermath of the Canterbury earthquakes, with the significant decline in visitor numbers, the owners of units wanted to convert their usage from short stay visitor accommodation - which was classed as a commercial activity and attracted GST - to long-term residential occupancy, which did not. The position was complicated because it was not clear whether the owners were entitled to make this change under their contracts with the manager of the short stay accommodation. However, the owners insisted.

VI The Christchurch and New Zealand Experience: Difficulties with Repairs or Replacement of Mixed-use Multi-unit Buildings

In our New Zealand research a significant number of interviewees commented on the difficulties involved with repair or reinstatement of mixed-use developments. A civil engineer involved in the Christchurch rebuild noted that mixed-use developments were more difficult to deal with than solely residential buildings, because it was more difficult to get approval for particular repairs from the range of persons involved.²⁸ There were also more likely to be issues with planning applications and approvals needing to be revisited during the process. By contrast, a lawyer involved in rebuild issues who had principally dealt with mixed-use developments involving commercial retail space and residential space considered that while such premises were more complicated to deal with, this was largely compensated for by the relative ease of dealing with a body corporate officer rather than individual unit owners.²⁹

Another difficulty identified by a Christchurch lawyer was that repair and reinstatement issues were made very difficult where there were not accurate valuations of the respective

²⁶ The issues of non-disclosure to authorities – and of providers avoiding paying appropriate levels of local body rates – fall outside the scope of this study.

²⁷ Interview with lawyer, Christchurch, August 2016.

²⁸ Interview with engineer, Christchurch, June 2016.

²⁹ Interview with lawyer, Christchurch, June 2016.

units in the overall property.³⁰ However unit title developments were much more readily dealt with than some other forms of land-holding because the owners were dealing with only a single insurance company (plus EQC where relevant).

A Christchurch lawyer noted that mixed-use developments posed particular problems as there was a need to apportion floor space to determine eligibility for EQC funding, but a different assessment was required to determine actual entitlements of the various owners.³¹ Problems were compounded because commercial tenants were primarily concerned with business interruption insurance and claims for material damage to stock or fittings, while residential owners and owners of commercial space were more concerned with reinstatement. Insurance was essential for commercial activities as EQC did not cover consequential losses such as loss of rental income or trade revenue.

Another lawyer based in Wellington noted that in mixed-use developments there was a constant tension between ownership interests, which were clear on the legislation, and other interests which were not so defined.³² In that lawyer's view there were commonly issues about one use of a part of the building generating noise or odours, which other unit owners considered unreasonably impacted upon them. Dealing with such concerns was more difficult because the developer or initial commercial owners can, and do, arrange the structure of the body corporate, and the apportionment of service charges, to benefit themselves, at the expense of residential owners. The lawyer considered there should be more guidance in the legislation about what is permissible and the body corporate rules should be created on a more holistic basis. A guiding principle for body corporate rules should be that unit owners who did not use, or benefit from, particular aspects of the overall development should not be expected to contribute to the costs of maintaining or servicing them. The relevant Government department has proposed changes to the disclosure regime which might indirectly discourage such unfair apportionments, but has not, as yet, suggested formal rules prohibiting them.³³

VII Legal Structures for Mixed-use Developments

In this section we briefly outline the common legal structures that may be used to create mixed-use developments. In the next section, we undertake an assessment of which

³⁰ Interview with lawyer, Christchurch, July 2016.

³¹ Interview with lawyer, Christchurch, June 2016.

³² Interview with lawyer, Hamilton, October 2016.

³³ Ministry of Business, Innovation and Employment Review of the Unit Titles Act 2010: Discussion Document (December 2016) at [4.1].

tenure options are best suited to repair and reinstatement of mixed-use developments after a natural disaster.

A Unit title and its variants

Strata title law generally has been discussed in chapter 5 of this Report and the basic principles need not be repeated here. It is sufficient to note that changes made by the Unit Titles Act 2010 were designed to allow greater flexibility to create and operate mixed-use developments. Under the earlier 1972 legislation, all the units within a unit title development were controlled through a single body corporate organisation. This meant that the management process for the body corporate dealt with a wide range of different issues concerning both residential owners and those using their units for commercial activities. In small developments this could work reasonably effectively despite the sometimes differing interests and perspectives, but in larger developments effective management became more difficult. The 1972 Act did very little to prevent the developer of the multi-unit development from retaining effective control of the development or passing it to a structure in which commercial interests dominated.

While the problem of developer control is still very significant under the 2010 Act, it does permit a very much more flexible management structure.³⁴ The 2010 Act, drawing heavily on Australian models, created two forms of subsidiary structures within a single body corporate. These are a “subsidiary unit title development” formed by subdividing the existing principal unit³⁵ and “layered developments”³⁶ formed out of a principal unit and a subsidiary unit title development. This structure allows a body corporate to create separate subordinate bodies corporate, which manage particular areas of the original development and may be composed of those unit-owners whose units are used for a particular activity. The overall body corporate rules determine the relationship between the different layers of the development and their respective bodies corporate. To take the example cited by one interviewee, a proposed unit title development might be intended to have four different classes of use within a single building - commercial retail, commercial offices, car parking and residential accommodation.³⁷ The developer could create a single body corporate to control the entire building, but divide the units making up that original body corporate into four different subordinate bodies corporate. Each subordinate body corporate would comprise of, and be concerned with, the administration of the units being used for a particular purpose.

³⁴ For the unit titles regime see Chapter 5.II.

³⁵ Unit Titles Act 2010, s 20.

³⁶ Unit Titles Act 2010, s 19.

³⁷ Interview with anonymous interviewee, July 2016.

While having layered developments allows flexibility and the ability of owners of a particular nature to engage together and draft suitable rules for their activities, there is highly likely to be conflicting interests over matters such as noise, operating hours of commercial enterprises and - it appears from the case law - use of parking facilities. There has, however, so far been remarkably little litigation in New Zealand about such layered developments. A rare example of litigation over a mixed-use development is *Myers Park Apartments Ltd v Sea Horse Investments Ltd*, a case decided under the Unit Titles Act 1972, which considered the enforceability of a redevelopment covenant created by vendors of a mixed-use development in central Auckland.³⁸

Advocates of this layered model argue that it allows more effective and participatory governance because the body corporate for the particular level or levels is concerned with owners who have similar issues, interests and concerns. Therefore, owners are not forced to spend long periods at meetings where issues not relevant to them are discussed.

On the other side of the ledger, dividing the entity means that bodies corporate for different parts of the overall building or development may effectively be special interest groups concerned with promoting their own interests at the expense of persons in other parts of the building. At best, they may not act in the best interests of all concerned, because of a lack of awareness of how their decisions might impact on other occupiers of other parts of the building.

In theory the community body corporate or other overarching governing body will be able to balance the competing interests of the different bodies corporate and achieve an outcome which maintains a fair balance between the different groups and interests concerned. This, of course, depends on the community body corporate having sufficient legal capacity to override special interest groups and on the community body corporate not being unreasonably dominated by a particular interest group.

B Leases

The other major form of tenure for mixed-use buildings or developments is leasehold tenure, as found in England and Hong Kong and, to a much lesser extent, in Australasia. Here the normal structure is that the owner of land leases out entire buildings, or parts thereof, to different tenants who may make use of the land in different ways. For

³⁸ *Myers Park Apartments Ltd v Sea Horse Investments Ltd* (2006) 7 NZCPR 454.

example, in England it is not uncommon to have a multi-storey building with a commercial tenant on the ground floor, and a number of residential flats on the upper floors, each with its own lease.

While leasehold arrangements are usually contrasted with strata title or unit title developments, this is not strictly accurate as most strata title legislation allows for a multi-unit development to be created on leasehold land.³⁹ However in our research into New Zealand and Australia practice, we were not informed of any cases of mixed-use developments on leasehold titles.

As noted elsewhere, people we spoke to in England and Hong Kong took the view that leasehold tenure had significant advantages over multi-owner tenures in terms of reinstatement or repair following a disaster event because a single agent - the owner of the freehold - controls all decisions about repair and rebuilding, in so far as they have not already been provided for in the leases.⁴⁰ Indeed in those jurisdictions it appears that all stakeholders in multiple unit buildings assume that any such matter will be adequately provided for in the lease.

In our view, New Zealand should be slow to accept this viewpoint.

Firstly, experience in this country suggests that it is not wise to assume that leases will provide appropriately for matters consequent on a natural disaster. We note that extensive research into the potential application of the doctrine of frustration of contract as it might affect commercial leases in Christchurch after the Canterbury earthquakes found that the standard form lease contracts in use did not adequately provide for the foreseeable position that undamaged or slightly damaged buildings might be inaccessible because of limitations on access imposed by governmental authorities.⁴¹ While that matter has now been addressed, other problems may be expected to arise following a major disaster event.

Further, as many leases provide for rights of renewal at the lessee's option, the landlord may find that the possibility of major changes to a building are significantly limited for a long, but uncertain period. While it would be possible for owners to insist on terms which terminated a lease on the occurrence of a natural disaster which significantly damaged the

³⁹ For example, see s 158 of the Unit Titles Act 2010 (NZ).

⁴⁰ See Chapter 2.II and 2.III.

⁴¹ See generally Toni Collins "The Doctrine of Frustration, Commercial Leases and the Canterbury Earthquakes" (PhD thesis, University of Canterbury, 2016). For further discussion of frustration of contract see Chapter 7.II.

building, there is a risk that the owner might find it difficult to attract lessees willing to agree to such a term at the outset, let alone to find tenants later after any event damaged the building and triggered the termination clause. Anecdotal evidence in Christchurch suggests that some retailers would be very unwilling to accede to planned repairs to, or replacement of, a mixed-use building which would not provide comparable retail space in terms of both quality of fit-out and customer access.

Secondly the position becomes much more complex where leases have been registered under the Land Transfer Act 1952. Although it is not common for commercial leases to be registered, a number of them are. This may pose significant problems because once a lease has been registered, the lessee has an indefeasible interest in the land for the term of the lease. Additionally, the owner of the land cannot undertake any repair or reinstatement work inconsistent with the registered lease for so long as the lease remains in force.

VIII Best Tenure Options to Allow for Repair or Reinstatement

Given that the focus of this project has been to determine the most advantageous tenure structures from the point of view of repair or restoration after a natural disaster, it is inherently necessary to ask whether a particular model will be able to operate any process of repair or reinstatement speedily, effectively and economically. There is an inherent tension in all mixed-use developments between those who will want to see a building restored to its earlier standard and those who will wish to set a higher, or a lower, quality standard for such repairs or reinstatement.

The availability of adequate finance is clearly a key feature here. If the mixed-use development is adequately insured, then repair to the quality provided for under the insurance policy is likely to be relatively straightforward, whether under a leasehold tenure or a unit title structure. Difficulties arise where the insurance is inadequate to return the building to its original state, or to reinstate it if necessary. In such a case lessees will clearly be disadvantaged if the lessor cannot afford to repair the building, as it will remain unrepaired and the lessees will be effectively forced to move. (If the lessor has adequate other resources this may not be an issue but that may not generally be the case).

If the building is in a unit title scheme, insurance shortfalls ought not to occur because of the duty to maintain adequate insurance, although experience suggests the requirement is not always complied with. Further, any shortfall falls on the owners as a group, and

therefore there may be more likelihood other resources can be found to complete repairs. However, there will be some unit owners who are in a position to provide further finance to allow for a better result than the insurance policy alone would provide, while others may not be in that position. This is perhaps particularly likely where the development includes a significant number of residential units occupied by either recent purchasers with little equity in their units and a very limited capacity to borrow further, or by residents with little capital outside the value of the residential unit and very little capacity to service any borrowings against the security of that capital asset. There may be a real risk that in such cases unit owners with long purses successfully advance a proposal for a standard of repair which will require substantial fresh financial contributions from all unit holders, with a view to driving out a number of the other occupiers less fortunately placed. Behaviour of this nature has been identified in relation to substantial repair and renovation of condominium buildings in Ontario.⁴²

On balance therefore it seems the unit titles regime is more likely to ensure resources are available for reinstatement or repairs. However, against that it must be acknowledged that the leasehold model does provide for quicker decision-making and may allow more flexible and speedy responses to a major event. Further, in unit title developments there may well be quite conflicting objectives which are difficult or impossible to reconcile.

One interviewee who spoke only on condition of anonymity, considered that the current law was very suitable for mixed-use developments because of its ability to have separate governance arrangements for the different kinds of occupancy.⁴³ The interviewee gave the example of Lambton Quay in Wellington where there may be “shops over two floors, then a carpark, then offices and then residential apartments on the top” with each use having its own body corporate, and maintenance being dealt with by an overarching common body corporate. The interviewee took the view that it is necessarily in the interest of all unit owners that the property is maintained. It may be doubted that this is invariably so in cases where there has been major damage to a building. Some unit owners will be in a position to make alternative arrangements during a period of repairs, but for others demolition of the building and sale of the underlying land may be more attractive. Others will wish to sell the damaged building and divide the proceeds of insurance and sale. It is, for example, likely that owners of units in which they conduct their own retail operations will place a priority on solutions which allow them to re-establish the trading operation in a suitable location as quickly as possible; operators of

⁴² Personal communication with Audrey Loeb.

⁴³ Interview with anonymous interviewee, July 2016.

infrastructure businesses such as parking may be in a position to take a much longer view.

IX Reform Proposals in New Zealand

The Ministry for Business, Innovation and Employment (MBIE) has been considering possible changes to the Unit Titles Act 2010.⁴⁴ While the reform proposals do not include any thing specifically targeting mixed-use developments, it is possible that one of the key recommendations may have significant impact on such developments. At present the Act differentiates for various regulatory purposes between small developments of fewer than 10 units and larger developments of 10 or more units. MBIE proposes the creation of an intermediate category of medium sized developments of 10 to 29 units.⁴⁵ Certainly there will be many mixed-use buildings and developments - particularly in provincial centres and along arterial routes within the larger cities - which will fall into this medium-size category. In such medium-sized developments the “rigorous” reporting requirements on large body corporate would apply unless the body corporate resolved by special resolution against adopting those requirements.⁴⁶ Unfortunately there is little reason to believe that this change will actually resolve a major problem with current unit titles; that of developer capture.

A Developer Capture

Under the current law it is common for developers to arrange matters so that the developer, or some related party, continues to have effective control over the development, or to privilege one class of unit owners (usually commercial operators) over other classes of owners (such as owners of residential units). It seems likely that reform along the proposed lines will simply lead to even greater use by developers of their initial powers of control to see that special resolutions are passed which reject the rigorous regulatory requirements.

In part the problem of owners of commercial units having greater influence in the overall governance of a mixed-use development can be put down to the common position where the commercial occupants of a new building, or of a building repurposed from another

⁴⁴ Ministry of Business, Innovation and Employment Review of the Unit Titles Act 2010: Discussion Document (December 2016).

⁴⁵ Ministry of Business, Innovation and Employment Review of the Unit Titles Act 2010: Discussion Document (December 2016) at 9.

⁴⁶ Ministry of Business, Innovation and Employment Review of the Unit Titles Act 2010: Discussion Document (December 2016) at 10.

use, acquire their interests and become an organised group earlier than residential owners. This may be because the lower levels of such a building are completed first, and are therefore acquired earlier by future retail users or persons intending to let the premises for commercial purposes, and/or the developers deliberately create structures which facilitate the creation of bylaws for the body corporate which advantage commercial tenants.

Submitters to a New South Wales on-line survey identified problems with developers and commercial interests setting up unfair divisions of maintenance and operational costs at the expense of residential unit owners.⁴⁷ These submitters suggested legislative intervention to reduce such unfair practices. Two particular suggestions may be relevant to New Zealand:⁴⁸.

- Legislation should address the requirements of motels and serviced apartments which increasingly operate as strata schemes.
- Encourage separate strata plans for residential, retail and commercial parts of the same development.

The first of these would assist significantly in clarifying the law and enabling more effective management of such premises, and therefore allow for more appropriate structures for deciding on repair or reinstatement decisions should the building be damaged. The second is more debatable. New Zealand law allows bodies corporate, each with their own sets of rules within a single unit title development. However, these must be integrated into an overarching body corporate structure. This appears more effective than complete separation, which might lead to conflicting decisions on repair or reinstatement of common property – as well as conflicts in day-to-day management.

The findings of that on-line survey clearly influenced the proposals for law reform made in 2013 by the NSW Government.⁴⁹ Much of the position paper dealt with staged multi-unit developments, but it also considered mixed-use schemes. However the suggestions quoted above were not carried through into the Strata Schemes Management Act 2015.

⁴⁷ Global Access Partners Pty Ltd *Strata Laws Online Consultation: Final Report* (Sydney, April 2012) at 43-44.

⁴⁸ Global Access Partners Pty Ltd *Strata Laws Online Consultation: Final Report* (Sydney, April 2012) at 44.

⁴⁹ New South Wales Government *Strata Title Law Reform: Strata & Community Title Law Reform Position Paper* (NSW Fair Trading, Government Position Paper, November 2013).

X Lessons From Overseas

A Australian experience

We conducted a number of interviews in both Melbourne and New South Wales, and have examined the available case law and literature on other Australian jurisdictions. Unfortunately very little has been written about legal issues specific to mixed-use developments. Indeed most articles simply do not refer to the existence of mixed-use developments, preferring to focus solely on the relationships between owners and bodies corporate.⁵⁰

1 Victoria

An academic in Melbourne described a relatively recent phenomenon of major redevelopment in the centre of Melbourne with conversion of older buildings into residential use on upper floors, and some purpose-built developments with retail or commercial use on one or two of the lowest levels.⁵¹ As a result, the city neighbourhoods now mix high-rise residential developments with purely commercial uses, in a way contrary to traditional planning practice of separating land use into different zones. Other parts of Melbourne have seen significant growth in mixed-use developments. Planning regulations have been amended to encourage mixed use development as a method of intensification of occupation.⁵² In particular, areas close to suburban railway stations have seen redevelopment with buildings containing several storeys of residential units and commercial operations on the lower floors. There has been little litigation arising from these developments.

A key feature of the layered development model in Victoria, which is mirrored in New Zealand,⁵³ is that the subsidiary bodies corporate or owners' corporations can, and do, set their own level of service charges payable by the members of the subsidiary corporation, in addition to the service charges levied by the overarching body corporate. This allows those subsidiary bodies corporate to carry out their own functions with a significant degree of independence. A Melbourne lawyer noted that having a multiplicity of bodies corporate could be administratively difficult if too many bodies existed.⁵⁴ There were also

⁵⁰ See, for example, K Everton-Moore and others "The law of strata title in Australia: A jurisdictional stocktake" (2006) 13 Australian Property Law Journal 1 and Dianne Dredge and Eddo Coiacetto "Strata Title: Towards a Research Agenda for Informed Planning Practice" (2011) 26(4) Planning Practice & Research 417.

⁵¹ Interview with academic, Melbourne, August 2016.

⁵² Interview with lawyer, Melbourne, August 2016.

⁵³ Unit Titles Act 2010, s 121.

⁵⁴ Interview with lawyer, Melbourne, August 2016.

potential difficulties if one of the subsidiary bodies corporate was in conflict with the overarching body corporate, although the overarching body corporate has the power to override subsidiary bodies corporate decisions. In such cases the dispute could go to the Victorian Civil and Administrative Tribunal.

2 *Western Australia*

In 2014 Western Australia proposed the creation of new legislation to provide a better framework for community titles and for mixed-use developments.⁵⁵ As yet, no draft legislation has resulted. It is therefore not clear exactly what is proposed, but one focus is on community titles schemes similar to those in operation in Queensland and New South Wales.

3 *Queensland: The Mixed Use Development Act and other options*

Mixed-use development in Queensland is governed by a range of statutes, principally the Mixed Use Development Act 1993, but also including the *Land Title Act 1994 and the Body Corporate and Community Management Act 1997* (BCCMA). The latter is supplemented by five different regulatory modules, two modules which could apply to mixed-use developments, although neither is designed to do so.⁵⁶

The Mixed Use Development Act 1993 appears to have been intended to limit the extent to which one class of owners (such as commercial or residential) could set up arrangements which unreasonably benefitted that class at the expense of other owners. Two interlocking mechanisms appear in the Act. Firstly, there must be an overarching community body corporate which controls, through its bylaws, the activities that can take place within the community development, although different parts of the development may be administered by separate bodies corporate. Secondly, bylaws made by that community body corporate require ministerial consent if their effect will be to limit the uses to which land may be put by the individual bodies corporate. Once such a bylaw has ministerial consent, it can only be repealed or altered by a unanimous resolution of all members. In theory, this allows a single owner to block any attempt by other owners to put in place any unfair or exploitative bylaws. However, the only case we found which considered these provisions gives very good grounds to doubt that aim will be achieved in practice. In 2013 the Queensland Court of Appeal had to consider whether the

⁵⁵ Landgate Strata Titles Act Reform: Consultation Summary (Government of Western Australia)

⁵⁶ The Body Corporate and Community Management (Commercial Module) Regulations 2008 (Qld) apply to developments where the predominant use of units is commercial while the Body Corporate and Community Management (Accommodation Module) Regulation 2008 (Qld) applies to developments which include owner-occupied and rental accommodation, including hotels.

overarching body corporate could repeal bylaws which had significantly benefitted businesses in the development at the expense of residential owners.⁵⁷ Those bylaws had been passed when all relevant bodies corporate were controlled by the developer at a “meeting” involving only a single person. That person was the authorised agent of the developer, and also of all bodies corporate existing at that time. The bylaws then received ministerial approval.⁵⁸ The repeal motion was found to be effective by the Courts, but only because at the initial “meeting” there had been a failure to ensure that the resolution creating the unfair bylaws had been passed as a special resolution which would then have required unanimity for the repeal.

As the case demonstrates, if the requisite procedures are followed, the developer can bind the later unit owners in the mixed-use development to one-sided and unfair arrangements. Nor does the requirement of ministerial sign-off seem to be likely to prevent such behaviour. It is, however, notable as one of the few attempts at any form of regulatory supervision of the content and effect of by-laws.⁵⁹

Queensland law does afford considerable flexibility to developers as they may use the legal structure described above or one or more community title schemes – the equivalent of unit title structures in New Zealand – or indeed combine the two. A further possibility, though outside this research’s focus on multiple ownership of single lots of land, is the Building Management Statement regime. Such schemes essentially involve a contractual structure under which owners of different lots agree to grant each other reciprocal rights – and undertake reciprocal duties - to facilitate the use of adjoining areas of land.⁶⁰ An area controlled under a Building Management Statement may be part of a community title development.

B England

The dominant position in England for mixed-use buildings is one of control through the terms of leases.⁶¹ Although the commonhold system created by the Commonhold and Leasehold Reform Act 2002 (UK) allows for mixed-use developments to be structured as commonhold, very few, if any, have been constructed in this manner.

⁵⁷ *The Proprietors Cathedral Village Building Units Plan No 106957 v Cathedral Place Community Body Corporate* [2013] QCA 264.

⁵⁸ As required under Mixed Use Developments Act 1993 (Qld), s 206.

⁵⁹ Contrast this limited intervention with the high degree of governmental supervision found in Hong Kong, see Chapter 2.III.

⁶⁰ Land Title Act 1994 (Qld), ss 54A(2)(b).

⁶¹ Interview with academic, England, September 2016.

Instead, the English model is for a freehold owner to rent out individual parts of a building or development, with each individual lease being determined by bargaining between tenant and freeholder, subject to any overriding statutory provisions in the Landlord and Tenant Act 1985 (UK) as regards residential units.⁶² Leases of units for commercial purposes are less regulated by statute and more determined by individual bargaining.

In other cases, the freeholder may lease the underlying land to a single tenant who then subleases units within the building to individual businesses or residential occupants. The same general constraints and market approach apply.

More complex models are possible with a freehold owner maintaining control of some parts of a building or development and using it for its own purposes, and/or leasing out parts of the building to individual tenants, while giving a longer lease of another part of the development to a tenant who has the right to sublease parts of the leasehold to residential or commercial occupants. It is also possible for the tenants of a multi-unit leasehold building to agree to compulsorily acquire the freehold of the building, but only if not more than 25 per cent of the units are used for commercial purposes.⁶³

As noted elsewhere, the British experience with major natural disaster events has almost entirely been with flood damage, and our research indicates other perils are rarely considered. Flooding - riverine or coastal - is therefore both the lens through which disaster response is seen in Britain, and the focus of governmental and private planning for the consequences of natural events. A government official we spoke to in England considered that commercial landlords and tenants would generally provide in the lease for rent not to be payable during any period where the building was not usable as a result of floods.⁶⁴ Such break clauses were not common in residential leases. The official was unaware of any case where there had been issues of mixed-use with some leases providing for a break in rent and others not doing so. The British government has introduced a scheme ("Flood Re") to assist residential owners to get effective flood insurance at a capped or preferential price.⁶⁵ The scheme does not extend to commercial

⁶² Interview with First Tier Tribunal judges, London, September 2016.

⁶³ Enfranchisement, as this compulsory acquisition is called, is made possible by the Leasehold Reform Act 1967 (UK). See the discussion in Chapter 2.II.

⁶⁴ Interview with official, London, September 2016.

⁶⁵ The statutory framework is under Part 4 of the Water Act 2014 (UK). For further discussion see Chapter 2.II.

enterprises such as social housing or retirement villages, nor to mixed-use buildings, even those where commercial use is very much in the minority.⁶⁶

The British government is aware of problems with the availability of insurance for commercial and mixed-use properties in a small number of high-risk areas⁶⁷ but is, for the moment, constrained from intervening in the market by EU rules about financial assistance to businesses. The British insurance industry has taken steps to make insurance cover even more readily available and to lower premiums.⁶⁸ This may encourage landlords who only own a small number of properties used for commercial purposes and are currently reluctant to engage with the structures needed for business insurance to take out suitable insurance.⁶⁹

C Hong Kong

Hong Kong provides a very interesting contrast to most other jurisdictions in its regulation and organisation of multi-level and multiple-use buildings.

The normal model in Hong Kong is that of a multi-unit development, which may consist of a single building or multiple buildings, where the underlying land has been leased directly from the State or sub-leased from an original lessee.⁷⁰ A body corporate will be set up to manage the overall development. This body is known as the “Incorporated Owners” (“IO”). The development will include both areas of the building which are demarcated as individual units which are individually owned⁷¹ and areas of common property. The IO has ultimate responsibility for management of the building, regulation of the common areas, maintenance and the like.

Mixed-use developments are very common. As in New Zealand, some of them will be residential accommodation with a level or two of commercial activities, but very many are much larger and more complex. It is common, for example, for a building to have a

⁶⁶ Timothy Evans Household Flood Insurance (House of Commons Briefing Paper Number 06613, 1 March 2017) at 23.

⁶⁷ Timothy Evans Household Flood Insurance (House of Commons Briefing Paper Number 06613, 1 March 2017) at 32 indicates government reliance on industry estimates that 94 per cent of small to medium sized enterprises had affordable flood insurance cover.

⁶⁸ British Insurance Brokers’ Association “New insurance scheme from British Insurance Brokers’ Association offers hope to businesses at risk from flood” (press release, 5 December 2016).

⁶⁹ We were told in an interview with an official in London, September 2016, of this frequent reluctance to engage with insurance issues.

⁷⁰ Interviews with lawyer, academic, and officials, Hong Kong, August 2016.

⁷¹ Technically these unit proprietors are sub-lessees or sub-sub-lessees etc but the term owner is more convenient.

podium in which there are several levels of retail businesses and more of office space with residential units on multiple floors higher in the building. In a significant number of cases, buildings will incorporate one or more of a range of other uses, such as transport links (for example bus stations or railway stations), entertainment venues and parking areas. In such cases the lease structure becomes necessarily complex. The rights and obligations of owners of units in the development are set out in Deeds of Mutual Covenant (DMCs) by which each unit owner acquires legal rights against the other unit owners, as well as correlative obligations.

In mixed-use developments it is very common for there to be two levels of DMC. One set of covenants is entered into by all those owners in a particular part of the building, and/or undertaking a particular kind of activity. The other set of covenants are entered into by all owners within the development.

Under the Buildings Maintenance Ordinance c 344 Hong Kong has a default list of what will be considered common property⁷² However, the members of the IO can choose to structure the property differently. Owners of individual units are responsible for the maintenance of their own units⁷³ while the IO has responsibility for the common areas. The DMCs will carefully define common property. For example, in Hong Kong the roofs of multi-storey buildings have significant amenity value and so there will be issues as to whether it should be common property available for all to use, or whether use is limited by the DMC to a subset of owners.

A common feature of lease conditions will be restrictions on the use and alienation of particular parts of the development used for a particular purpose (for example a large retail shop or a cinema) so that the area must always be dealt with as a single unit and cannot be divided and passed into different ownership.⁷⁴

D Canada

Canada has essentially two different models of tenure which can be relevant to mixed-use multi-unit buildings. The first is the condominium structure, a form of strata title.⁷⁵ The other, which has no counterpart in New Zealand, is an air space title.

⁷² The list appears in Schedule 1 to the Buildings Maintenance Ordinance (Hong Kong) Cap 344.

⁷³ Buildings Maintenance Ordinance (Hong Kong) Cap 344, s 34H.

⁷⁴ Interview with official, Hong Kong, August 2016.

⁷⁵ For a useful conspectus on condominium law in Ontario see A Loeb “The Condominium Regime in Ontario” (2016) 22 *Canterbury Law Review* 1.

1 Condominium model

The condominium structure differs significantly in some ways from Australasian unit titles models. In each case, there are individual units which are separately owned. However in Canada the common parts of the building are not owned by a separate body corporate but rather are jointly owned by all the unit holders. There is however a condominium, a body corporate, which administers the development and controls the joint property of the unit owners. The condominium structure can be used for a very broad range of uses. A Vancouver lawyer told us:⁷⁶

Of course we have now got about 30,000 Strata Corporations in all of British Columbia, now that literally can mean a duplex or a terrace as they would say in England those kind of things would be considered as Stratas and malls can be Stratas, marinas can be Stratas, all sorts of things get lumped in there.

That said, it seems many mixed-use condominiums will be of relatively low-rise buildings with commercial units on the ground floor and then two or three storeys of residential units.⁷⁷ It is the responsibility of the condominium to ensure that the common property is in good repair, and as a consequence to ensure that there is suitable insurance in place. The condominium also insures the individual units with the unit owners repaying the costs through service charges.

None of our informants could give us an example of condominiums needing replacement or repair after a major disaster event. However it would appear that undertaking any major works would generally require at least a two thirds majority of the unit owners.

There does not appear to be anything in this Canadian model which would be an improvement on current New Zealand law.

2 Airspace models

North American jurisdictions have developed legal structures, for example the Air Space Titles Act 1971 in British Columbia, which allow for airspace parcels above developed land to be separated from ownership of that land so that they become separately tradeable items of property.⁷⁸ In consequence, high-rise buildings might incorporate different air-space parcels. The model is apparently most used for mixed-use commercial and

⁷⁶ Interview with lawyer, Vancouver, July 2016.

⁷⁷ Interview with lawyer, Vancouver, July 2016.

⁷⁸ The origins of this practice, and some of the legal difficulties with it, have been described by Douglas C Harris "Condominium and the City: The Rise Of Property in Vancouver" (2011) 36 *Law & Social Inquiry* 694.

residential developments. New Zealand has no equivalent legislation, although there is a somewhat similar practice where the Registrar may issue a computer register under the Land Transfer Act 1952 for different strata of the subsoil beneath the surface of the land, or for different layers of the airspace above the surface. These layers are referred to as strata titles.⁷⁹ There are a number of such titles in use in Wellington.⁸⁰

As far as we are aware, no major issues have yet arisen with repair or reinstatement of such buildings in Canada, but the theoretical problems were referred to by one Vancouver lawyer we interviewed:⁸¹

I have been thinking of the airspace buildings as challenges for late in life rehab but if an airspace building is up for demolition and there are some that might be getting close, how do you do that? You can dissolve the Strata Corporation in the tower, you've got another airspace parcel and then you've got two airspace parcels one which is essentially a rental residential building and one which is a commercial rental complex and there is no Strata Property Act to govern those affairs. It's not even a partition question because it's two titles. You are stuck with them forever.

The airspace model does not seem suitable for adoption in New Zealand. Certainly it would appear to pose severe problems in the aftermath of a major natural disaster event as it would significantly hamper the process of repairing and rebuilding larger city buildings. Any benefits would be significantly outweighed by the negatives.

XI List of Recommended Reforms

Recommendation 6.1: We recommend that in the process of finalizing the reform proposals for Unit Titles (as presented in the December 2016 MBIE Discussion Document) particular account be taken of the difficulties for mixed-use buildings of the current and the proposed regimes, and that these issues be addressed before any relevant legislative changes are formulated.

Recommendation 6.2: We recommend that the definitions of “residential building” and “dwelling” in the Earthquake Commission Act 1993 should be clarified to exclude premises predominantly used for commercial short-stay accommodation from coverage. Eligibility for EQC cover should depend on actual use to which individual units are put.

⁷⁹ DW McMorland and Thomas Gibbons *McMorland and Gibbons on Unit Titles and Cross Leases* (Lexis Nexis Ltd, Wellington, 2013) at ch 2.

⁸⁰ Interview with lawyer, Wellington, July 2016.

⁸¹ Interview with lawyer, Vancouver, June 2016.

In consequence, consideration should be given to a more nuanced criterion than the current “50 percent or more” of particular floors of the building so that actual usage is better reflected in EQC cover and levies.

CHAPTER 7

RETIREMENT VILLAGES

Jeremy Finn

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I Introduction

This chapter is principally concerned with retirement villages, but also briefly considers some other land uses which do not fit within the mainstream of multiple interests in a single block of land. We thought it desirable to consider these land uses, both for completeness, and because the law regarding them does not seem satisfactory.

Retirement villages in New Zealand may employ a range of different tenure models. Some of these involve units within the village having individual owners – usually through a variant of the unit titles regime. We discuss this model, below, at III. In some cases, retirement village units are leased from the retirement village operator, although this does not seem to be common. The other very common form of retirement village tenure is that a resident purchases a right to occupy a building without acquiring any interest in the underlying land. This method of tenure, and the problems associated with it after the Canterbury earthquakes, is discussed below, at II.

This diversity of tenures is reflected in the definition of a “retirement village” in the governing statute, the Retirement Villages Act 2003 which applies the term to any building or property which contains two or more residential units intended to provide residential accommodation together with services and facilities intended predominantly for retired persons, and their spouses or partners, and for which the residents have paid a capital sum.¹ Under the statute the retirement village may provide for a resident’s right of occupation “by way of freehold or leasehold title, cross-lease title, unit title, lease, licence to occupy, residential tenancy, or other form of assurance, for life or any other term”.² The retirement village will include any common areas and facilities to which residents have access under their occupation right agreements with the retirement village, or through ownership of a unit.³ However, if the development includes a rest home or hospital care institution, the retirement village will not include the premises of rest home or hospital care institution except for any common areas or facilities to which the unit owners have access solely under their occupation right agreement with the retirement village operator.⁴

¹ Retirement Villages Act 2003, s 6. The Supreme Court has noted that s 6 of the Act must be read in conjunction with s 103 (which allows Orders in Council to state whether or not a particular property is a retirement village), see s 6(7): *Cashmere Capital Ltd v Carroll* [2009] NZSC 123; [2010] 1 NZLR 577 at n 24.

² Retirement Villages Act 2003, s 6(1)(a).

³ Retirement Villages Act 2003, s 6(2).

⁴ Retirement Villages Act 2003, s 6(3).

Our aim in this Report is to determine the best options for any potential law reform to facilitate repair or reinstatement of retirement villages, or units within them, after a disaster event. However, this task is made more difficult by the lack of clarity about a number of issues in the current law. Although there have been a reasonable number of court cases about retirement villages, the focus has been very much on alleged failures to comply with disclosure requirements for prospective purchasers, planning decisions about proposed retirement villages and disputes about the quality of service provided to residents. There has only been a trickle of cases involving land tenure.

The most substantial discussion has been in *Cashmere Capital Ltd v Carroll*, which concerned the priority of the competing interests of the mortgagee and the occupants of an unregistered retirement village.⁵ The case does not provide guidance for cases where the retirement village has been registered, as is required by law.⁶ More guidance can be found from a 2013 case where the Weathertight Homes Tribunal had to determine, as an issue going to its capacity to hear the case, whether units within a retirement village development which included a rest home were dwelling-houses as defined in the Weathertight Homes Resolution Services Act 2006, given that the Act excluded rest homes. The Tribunal held that the different elements of the retirement village development could be considered separately, and the residential units were covered by the scheme.⁷

The Retirement Villages Act 2003 does not contain any specific provisions relating to repair or reinstatement after a natural disaster event. However, it does provide for the promulgation of a code of practice governing retirement homes.⁸ The Code of Practice is binding on all operators of retirement villages (and on any liquidator or receiver of the operator). It also provides that residents may enforce provisions of the Code of Practice as if they were terms of their contract and if the Code provisions are more favourable than the terms of the agreement or arrangement giving a right of residence, the Code provisions prevail. As is discussed below, there is a specific, if not entirely satisfactory, provision for repairs and reinstatement in the Retirement Villages Code of Practice.

⁵ *Cashmere Capital Ltd v Carroll* [2009] NZSC 123, [2010] 1 NZLR 577.

⁶ Failure to register prevents the retirement village from advertising for clients or from concluding occupation rights agreements with potential residents: Retirement Villages Act 2003, s 25.

⁷ *Re Body Corporate 337872 Grace Joel Retirement Village Ltd* [2013] NZWHT Auckland 16.

⁸ Retirement Villages Act 2003, s 92.

A Closing Down the Retirement Village

Some provisions of the Retirement Villages Act 2003 may be of considerable importance should an external event mean that large-scale repair or reinstatement of village units is needed. Section 22 restricts the rights of the retirement village operator, and of any holder of a security interest (whether or not registered on the title)⁹ or any receiver or liquidator of the retirement village to dispose of the retirement village other than as a going concern, or to disclaim occupation rights agreements as owner's property, or to evict or exclude any resident from his or her normal use of the facilities or parts of the retirement village. Those powers of eviction or exclusion, which are clearly likely to be highly relevant if the retirement village suffered significant damage in a disaster event, cannot be used unless all the residents of the retirement village have received independent legal advice and at least 90 per cent of the residents have consented in writing to the proposed action.¹⁰ However the party seeking to alter the position may seek High Court approval for an exemption from those requirements.

There would appear to be a viable, but less straight forward, alternative to an application to the court under s 22. The operator of a retirement village may apply to have the registration of the village cancelled under s 19. That section requires the Registrar of Retirement Villages to cancel the registration of a village if satisfied that the village has ceased to operate as a retirement village, or will do so after cancellation, and that all residents of the village have received independent legal advice about the effects of such a cancellation and at least 90 per cent of the residents have agreed in writing to the proposed cancellation. Rights under ss 21 and 22 are lost if registration is cancelled under s 19. It should be noted that the required 90 per cent majorities under ss 19 and 22 cannot be overridden by the terms of an occupation rights agreement creating a licence to occupy a unit.¹¹

As can be seen, both cancellation of registration and cessation of operation require residents to be given independent legal advice and the written consent of 90 per cent of residents for the proposal to, in effect, wind up the retirement village.

⁹ *Cashmere Capital Ltd v Carroll* [2009] NZSC 123, [2010] 1 NZLR 577 at [30]. The provision is aimed at protecting mortgage lenders.

¹⁰ Retirement Villages Act 2003, s 22. It is not clear who will have to pay for the independent advice but it would appear to be implicit in the section that the costs fall on the party seeking to change the status or mode of operation.

¹¹ Retirement Villages Act 2003, s 27(2). Occupation rights agreements are discussed further below, part II.

It is not clear how well these provisions will operate in practice. It is highly probable that some retirement village residents who own (rather than rent or occupy under a licence) their units will be regarded as wholly or partly lacking capacity to properly manage their affairs under the Protection of Persons and Property Rights Act 1988. Under that Act the property of a person who lacks capacity can be put under the care of a manager appointed by the Court.¹² That manager can give substituted consent for the winding up process. However the Act also envisages the possible appointment of a welfare guardian to look after the best interests of the person under a disability,¹³ and it may well be that the views of the guardian and the manager as to the best choices to make do not correspond. In such a case the welfare guardian's view prevails.¹⁴

Other difficulties may be anticipated. If a retirement village development is significantly damaged, residents who are unit owners (or lessees whose leases continue) may find it very difficult to find acceptable housing during a period of repairs, particularly if the unit owner (or lessee) has been reliant on facilities provided by the retirement village operator, such as medical care or provision of meals. Residents who have a right of occupancy only will receive some benefit from the Code of Practice provisions, discussed below, but these are unlikely to be sufficient.

B Statutory Supervisor

A feature of the Retirement Villages Act regime is that the operator of a retirement village must appoint a statutory supervisor who holds a licence under the Financial Markets Supervisors Act 2011.¹⁵ Under normal circumstances the duties of the statutory supervisor are relatively limited, but include the provision of a stakeholder facility for intending residents who have paid deposits in respect of future occupation right agreements or uncompleted residential units,¹⁶ the monitoring of the financial position of the retirement village and annual reporting to the registrar.¹⁷ The statute allows, but does not require, the statutory supervisor to receive any insurance moneys paid out as stakeholder for the residents if the premises are damaged.¹⁸

¹² Protection of Personal and Property Rights Act 1988, s 31.

¹³ Protection of Personal and Property Rights Act 1988, s 12.

¹⁴ Protection of Personal and Property Rights Act 1988, s 42.

¹⁵ Retirement Villages Act 2003, s 38(1). The Act does provide for exemptions from this requirement but it appears the necessary regulations have never been promulgated.

¹⁶ That is, the supervisor holds the relevant funds and returns them if the transactions falls through. In this way the money is protected against claims by creditors of the village if the village becomes insolvent.

¹⁷ Retirement Villages Act 2003, s 42.

¹⁸ Retirement Villages Code of Practice 2008, clause 22.6(d).

If there are significant problems with the operation of the village the statutory supervisor may step in to direct the provision of information to residents of the village, and to direct the operator to manage the village in a particular way.¹⁹ The latter power could be invoked in the aftermath of a significant natural event causing damage to the retirement village, but it is likely that a more direct form of authorisation would be desirable.

II Licences to Occupy and the Canterbury Experience

In New Zealand, the most common form of retirement village tenure is probably for residents to purchase a licence to occupy, generally structured as an occupation right agreement. The licence to occupy model is conceptually very simple. In return for some form of financial benefit to the village operator, the operator grants a licence to the resident, under which the resident may occupy a residential unit and may also access common facilities. The licence does not confer any kind of ownership of the residential unit or common facilities. Some village operators do operate schemes whereby a resident who vacates a residential unit receives back a portion of the price originally paid, but there is no legal obligation to do so.

Until recently these occupation right agreements normally provided for the right to occupy to come to an end if the future occupation of the relevant part of the retirement village became impossible as a result of an event for which neither the operator nor the occupant was to blame. Thus if a residential unit burned down completely and could not be occupied, the licence to occupy was rendered ineffective and the occupant was dependent on the goodwill of the village operator.²⁰

The licence-to-occupy model proved to be unsatisfactory in the aftermath of the Canterbury earthquakes of 2010 and 2011.²¹ A number of retirement villages were significantly damaged in the earthquakes. Four of them were located on land considered to be unsafe for future residents and red zoned so that reoccupation and rebuilding was not permitted. The owners of the retirement villages received payment from the government for their properties under the government's buyout scheme for land which could not be built on again but, as the Code of Practice then stood, they were under no

¹⁹ Retirement Villages Act 2003, s 43.

²⁰ Village operators are required to inform residents whether the operator will provide temporary accommodation while a unit is being repaired or replaced: Retirement Villages Code of Practice 2008, clause 22.9. There is no obligation to provide such temporary accommodation. For the position where rebuilding is impossible or unlikely see parts IV and V below.

²¹ For a more detailed account see Alison Chamberlain "Unit Titles, Cross Leases and Retirement Villages" in Jeremy Finn and Elizabeth Toomey (eds) *Legal Response to Natural Disasters* (Thomson Reuters, Wellington, 2015) at 322.

obligation to pass any of that money on to the residents.²² That meant most of the occupants were in no position to purchase alternative accommodation of anything like equal standard. The retirement village operators chose not to stand on their legal rights and very commendably made arrangements through the Retirement Villages Association for the 200 or so displaced occupants to find alternative accommodation in other retirement villages.

A A partial remedy in licence to occupy cases – Clause 47 of the Code of Practice

There was considerable disquiet at the unsatisfactory position after the Canterbury earthquakes which occurred for residents with only licences to occupy, and in 2013 the Retirement Villages Code of Practice was altered in a way which it was claimed would resolve the problem in future. This change appears as clause 47 of the Code.

The essential feature of the change is that the occupation right agreement entered into between the occupant and operator must contain a provision requiring the operator to repair or replace a damaged residential unit which has been damaged through no fault of the occupant, with the limiting provision that the parties may specify circumstances in which reinstatement or repair is not required. The Code gives as examples cases where the repair or reinstatement is not practical because of the extent of damage or destruction, or because the necessary local body consents to rebuilding cannot be obtained. The latter, but not the former, probably only restates the general law because inability to obtain building consents might be considered to frustrate the occupation right agreement in any case. Clause 47 goes on to require, as a minimum, that there be consultations between operator and occupant as to whether repair or reinstatement should take place.

The critical point of clause 47 is that an occupant whose right to occupy is terminated by a decision not to repair or reinstate a damaged unit, or when damage to the infrastructure means the village cannot continue to operate, will normally result in the occupant receiving back the capital sum paid for the occupation right agreement.²³ However that level of payment does not apply if the operator decides that repair or replacement of the unit is not possible and offers the resident:²⁴

²² The buy-out scheme for “red-zoned” land is described in detail by Elizabeth Toomey “Canterbury Earthquake Recovery Act 2011: Land and Resource Management Issues” in Jeremy Finn and Elizabeth Toomey (eds) *Legal Response to Natural Disasters* (Thomson Reuters, Wellington, 2015) at 252.

²³ Retirement Villages Code of Practice 2008, clause 47.2(e).

²⁴ Retirement Villages Code of Practice 2008, clause 47.4.

the option to transfer to another unit (either pre-existing or yet to be constructed) in the same retirement village or in another retirement village owned by that operator in reasonable proximity to the original village, with regard to the circumstances giving rise to this situation.

If that offer is made but not accepted, the occupation right agreement is treated as having been terminated by the resident, and the repayment rules described above do not apply. The former resident gets nothing.

There has, as yet, been no real test of these provisions but it may be doubted they are entirely satisfactory. The Code of Conduct does not require the offer of a substitute residential unit to be an offer of one of the equivalent size, condition or general amenity value. More pressingly, the retirement village occupants may simply have no viable alternative accommodation to which they can move temporarily while waiting for a replacement unit, whether in the same development or elsewhere, to be built. Nor indeed does the Code require that the offer be of a unit which will be available within a reasonable time. The question of reasonable proximity “in the circumstances” is a very difficult one to determine and the parties may need to go to court to have it resolved. It is, however, difficult to see that any more prescriptive standard would provide the flexibility that may be needed in the aftermath of a major event.

Thus, while the provisions of clause 47 are a significant improvement on the pre-amendment position, and are certainly substantially more in an occupant’s favour than the law in Australian jurisdictions, the position cannot yet be regarded as satisfactory.

B The Frustration of Contract Doctrine – and a Problem for Licence to Occupy Residents

As described earlier, a number of retirement homes and villages simply closed in the aftermath of the Canterbury earthquakes of 2010 – 2011 because the land on which they stood was red zoned, and therefore had to be vacated with rebuilding not possible. The discussion above of clause 47 notes the use of a contractual provision to assist residents faced with such major events. However, it is highly likely that a contractual obligation on the village owner to rebuild the common property areas, or any contractual obligation or covenant binding the unit owner to rebuild units in such circumstances would be considered to have been terminated through the common law doctrine of frustration of

contract.²⁵ That doctrine is sparingly applied by the courts, but holds that parties should not be held to a contractual bargain where there has been a major change in circumstances so that one, or both, parties now find that performance of their contractual obligations involves something radically different from what was earlier agreed. Thus if a contract is frustrated, neither party to it need perform it any further. However this does not entitle either of them to recover money or other benefits provided to the other prior to the frustrating event.

In *Auckland Council v Planet Kids Ltd* the New Zealand Supreme Court held that the court must apply a multifactorial test to determine whether the effect of an event was such that a contract was frustrated.²⁶ This is essentially a retrospective test, which means that the parties are not likely to be clear about their respective rights in the immediate aftermath of a potentially frustrating event. Nor indeed, may the position be clear for some considerable time, and relatively small differences in the facts may produce significant differences in the legal consequences. Reliance on the doctrine of frustration is therefore less than optimum if there is to be a smooth process for dealing with the consequences of a damaging event.²⁷

The upshot therefore may be that residents who are reliant on a contractual licence to occupy may find the agreement has been frustrated by the intervening event. If so, the contractual right to repayment of the capital sum paid to purchase the right of occupancy as projected under the Code will be lost because the contract has come to an end.²⁸ The Courts have a limited power to grant relief to parties to frustrated contracts but it is not at all clear whether these would apply in the circumstances envisaged by clause 47 of the Code.²⁹ Even if they did apply, litigation may well be needed, which will be both slow and expensive.

The simple answer to this problem is to put the right of recovery into the Retirement Villages Act 2003 rather than leaving it as part of a contract, so that issues of frustration of contract do not arise.

²⁵ See generally Burrows, Finn and Todd *Law of Contract in New Zealand*, (5th ed, LexisNexis, Wellington, 2016) at ch 20.

²⁶ *Auckland Council v Planet Kids Ltd* [2013] NZSC 147, [2014] 1 NZLR 149.

²⁷ See Jeremy Finn “Frustration of Contract and Dealing with Disasters” in Jeremy Finn and Elizabeth Toomey (eds) *Legal Response to Natural Disasters* (Thomson Reuters, Wellington 2015), and Toni Collins “The Doctrine of Frustration, Commercial Leases and the Canterbury Earthquakes” (PhD thesis, University of Canterbury, 2016) for a discussion of these issues in Christchurch following the Canterbury earthquakes.

²⁸ A lease of a retirement unit might also be frustrated.

²⁹ Contracts and Commercial Law Act 2017, s 63.

We also note that even if the occupant can enforce the right to recover a sum of money representing the price paid for their unit, they may well be unable to purchase a replacement property with equal amenities for anything like the same price. It is also likely that such unit owners will frequently have few external resources to meet an increase in cost, and little or no capacity to borrow to bridge a financial gap.

Recommendation 7.1. We recommend that the Retirement Villages Act be amended by incorporating a provision, based on but going further than, clause 47 of the Retirement Villages Code of Practice to better protect the right of the unit owner to recover an appropriate part of the capital cost if the village has to close after a disaster event.

7.1.1. We recommend that the new provisions should confer compensation as does clause 47 and also make it clear that the right to compensation is only lost if the operator of the village has offered alternative accommodation of roughly equal standard (or accommodation of a lower standard plus a reasonable cash sum in lieu of equivalence). Alternative accommodation should be provided where at all possible if the resident is not reasonably capable of engaging in the market to locate alternative premises.

7.1.2 We recommend that if the substitute accommodation is in a unit yet to be constructed, it should be mandatory that the accommodation will be available within a reasonable time. This could be reinforced by placing an obligation on the operator to pay for alternative accommodation in the meantime.

III Retirement Villages Under a Unit Title Scheme

A number of retirement villages in New Zealand operate under the Unit Titles Act 2010 regime, as modified by the Retirement Villages Act 2003. Owners of units within a retirement village have considerable security of tenure. Retirement villages must be registered, and the certificates of title or computer register for the relevant land will be endorsed with a statement recognising the priority of residents' rights over those of the holders of security interests secured against the land.³⁰

A key point of difference between a retirement village using unit titles and a normal unit title development is that the unit owners will not normally own any of the common areas

³⁰ Retirement Villages Act 2003, ss 21 and 22.

or facilities in the retirement village. Instead, they will own their own units and have rights of access and use over “common” areas and facilities owned by the retirement village operator, without having any financial or management obligations in relation to those areas and facilities.

The unit title model is quite well suited to individuals of full legal competence in circumstances where the retirement village is operating normally and there is a functioning and reasonably fair market for purchase and sale of the units.

However, difficulties can be anticipated if the market is disrupted, as is likely to happen after a significant event causing substantial damage to, or isolation of, the multi-unit development. Unit holders who wish to continue to reside in retirement village developments may have extreme difficulty in locating substitute accommodation. Thus, even though a unit owner may be well insured, and/or entitled to EQC compensation for a disastrous natural event, he or she is not readily able to purchase an equivalent because the demand for retirement home units is likely to outstrip supply - at least in the short and medium term.

Unit owners who wish to rebuild on the original site are entirely dependent on the willingness of the retirement village owner and operator to replace any damaged or destroyed common facilities which may be essential for the unit holder’s continued occupation in the retirement village. It is therefore essential that there are legislative or contractual obligations sufficient to protect the position of the unit holders.

IV Insurance Issues in Retirement Villages

Under the Retirement Villages Code of Practice 2008 the operator of the village is required to ensure that units owned by residents of the village are insured.³¹ Under the Code, the operator must obtain replacement cover if that is available. If it is not available (as is likely to be the case in New Zealand for the foreseeable future), there is an obligation to ensure that insurance valuations are updated as required under the terms of the insurance policy.³² This requirement may now be seen as totally insufficient because policies may provide for review at long intervals (if at all). Regular valuations should be compulsory. As noted earlier, it is possible, but not mandatory, for the statutory

³¹ Retirement Villages Code of Practice 2008, clause 22.1. The insurance provisions of the Unit Titles Act 2010 do not apply to retirement villages: Unit Titles Act 2010, s 11(g).

³² Retirement Villages Code of Practice 2008, clause 22.4(a).

supervisor to receive any insurance moneys as stakeholder for the residents.³³ We consider these matters are sufficiently important they should appear in the statute, rather than being placed in the Code.

There is also an apparent flaw in the Code structure. If insurance arrangements do not provide for the statutory supervisor to receive the insurance moneys as stakeholder, there is no provision to safeguard any proceeds of the insurance policy so as to make sure that they are available for the benefit of the unit owners. It would appear that the funds would be received as part of the general assets of the village operator and, as such, may be the subject of claims by creditors. Should that happen, the unit owners may not only lose their homes, but also find that the operator has no ability to pay for the homes to be reinstated or repaired.

In any case it is likely that disputes over the rights to the insurance payments would significantly delay any remedial work on the units in question. That is highly undesirable, and should be avoided if possible.

A number of the difficulties identified above may be eliminated or reduced by appropriate changes to the appropriate legislation or to the Code of Practice.

Recommendation 7.2: We recommend the Retirement Villages Act 2003 be amended to require that in all cases the village operator must insure the units owned by residents (recouping the insurance costs from those residents) so as to avoid the need to deal with multiple insurance companies in the event of an event requiring major repairs to, or reinstatement of, retirement village premises.

Recommendation 7.3: We recommend that the Retirement Villages Act 2003 be amended to impose on the statutory supervisor a duty of ensuring that insurance policies are maintained and maintained at a suitable level, with revaluations of the premises at not less than three year intervals.

Recommendation 7.4: We recommend that the Retirement Villages Act 2003 be amended to make the statutory supervisor the stakeholder for insurance monies due to unit owners after a damaging event. The supervisor should be required to pay the money to the unit holders immediately on receipt if there is no indication that the village will

³³ Retirement Villages Code of Practice 2008, clause 22.6(d).

cease operation, but to hold it for the benefit of those owners if there is a likelihood the village will cease operation or be radically restructured following a damage event.

This will both assist with transparency of the insurance regime and safeguard unit owners against claims on insurance funds by creditors of the village operator.

V Repair and Reinstatement Issues in Unit Title Retirement Villages

Repair and reinstatement of damaged units in unit title retirement villages is likely to be made difficult, not only by the inherent difficulties created by the Unit Titles Act regime but also by the exemption of retirement villages from certain parts of the Unit Titles Act 2010.³⁴ The most important of these is that s 74 of the Unit Titles Act 2010 does not apply. As discussed in chapter 5, if the members of the body corporate cannot reach agreement, s 74 may be of great importance in allowing the High Court to settle a scheme for repair following destruction or damage where the unit plan has not been cancelled. The Retirement Villages Act 2003 does not provide any replacement regime for s 74. Instead any disagreement over repair or reinstatement in a unit title retirement village will fall to be decided under the general decision-making processes for unit titles. This does not seem to be entirely satisfactory. In other chapters we have recommended aligning repair and reinstatement processes with a modified s 74, and it seems likely this would be advantageous in the retirement village context.³⁵

Recommendation 7.5: We recommend that provision be made in the Unit Titles Act 2010 for the extension of s 74 (or a similar provision) to unit title retirement villages.

VI Information from Other Jurisdictions

The range of problems in New Zealand is evident. It is not clear that there are alternatives in other jurisdictions which provide significantly better ways of dealing with these issues.

A England

In England, the most common form of retirement village involves a multi-unit development on one or more lots of land, with the retirement village operator either owning the freehold or being the lessee of the relevant area of land. Residents of the retirement village will usually lease their units from the village operator. In such cases, control of the premises is governed by the terms of a sublease by the retirement village

³⁴ Unit Titles Act 2010, s 11. For discussion of the Unit Titles Act regime see Chapter 5.

³⁵ For discussion of s 74 see Chapter 5.IV.

operator to the occupant, although the sublease must not be inconsistent with any head lease to the village operator.

England does not operate equivalents of the New Zealand or Australian retirement village legislation. While there are retirement village developments and retirement homes, these will almost inevitably be on leasehold tenure and will be regulated by the terms of those leases, with restrictive covenants limiting the classes of persons who can reside on the premises and preventing alienation to anyone but an approved purchaser.³⁶ Another English academic confirmed the use of leasehold arrangements, but considered that in many cases the details of the lease arrangements were unclear, particularly in relation to maintenance requirements.³⁷ Obviously in the event of a major disaster the landlord will be responsible for reinstatement or repair of the buildings to the extent provided in the lease, but there may be significant room for argument over repair responsibilities where a smaller scale event has inflicted more limited damage.

Should the entire village, or units within it, be damaged by some significant event the first issue will be to determine whether events were covered by the provisions within the lease or sublease. As these arrangements are likely to differ significantly from one retirement village or one retirement operator to another, it is to be expected that there would be considerable uncertainty as to the position.

B Hong Kong

Hong Kong does not have legislation specifically governing retirement villages, as there are no such developments. Matters will therefore be regulated through the normal deed of mutual covenant process.³⁸ There is a relatively small government scheme, administered through the Secretary for Home Affairs, under which an owner's corporation in a building largely occupied by senior citizens may be able to get loans from the government to carry out renovations and repairs which are needed, but for which there are otherwise insufficient funds. The government recoups its loans by claims against the units after the resident dies or vacates the building.³⁹

C Australia

By far the best comparators for New Zealand are the various statutory regimes in Australia, although differences in practice do somewhat limit the value of such comparisons.

³⁶ Interview with academics, England, August 2016.

³⁷ Interview with academic, England, September 2016.

³⁸ See the discussion in Chapter 2.III.

³⁹ Interview with academic, Hong Kong, August 2016.

A key point about the Australian retirement village industry is that while regulation is by the individual states, the principal funder of individuals in care in rest homes or retirement homes is the Commonwealth. The Commonwealth has taken legislative steps to ensure that retirement villages which include retirement home or rest care facility (regardless of tenure system) do not attract customers who seek to acquire a normal retirement village by promising that the resident will be guaranteed a place in the retirement home or rest care facility should the resident's health require him or her to stop living independently. This necessarily inclines residents to occupation under licences or leases rather than purchasing units so as to give greater flexibility to move to a different development to obtain higher levels of care.

Our empirical work in this area was undertaken in Melbourne. As seems to be common throughout Australia, the majority of retirement villages in Victoria operate through either leasing residential premises to occupants, or granting a licence to occupy. These interests can be entered onto the title to the land, so as to gain the benefit of indefeasibility.⁴⁰ It is possible to place a priority agreement on the title, which gives the purchaser of a dwelling within the retirement village priority over other creditors should the operator become bankrupt or go into liquidation.⁴¹

Retirement villages in Victoria will normally be insured through a policy over the whole village, organised by the operator, but with the capacity to recoup costs from residents.

Where a village development uses strata title tenure, it is usual for there to be a management contract for the strata title units which will place administrative responsibilities on the operator of the village. The management agreement, where there is one, or the terms of a lease or licence will usually contain provisions stipulating who is eligible to live in the unit and to give the operator some control over, or involvement in, the process of resale.

A Queensland academic, Gary Bugden, has suggested that in Australia strata title has been an available option for retirement villages for a considerable period. However, leasehold tenure was now used more frequently because the revenue and taxation

⁴⁰ In New Zealand a lease, but not a licence to occupy, may be registered.

⁴¹ This is similar to the New Zealand position under ss 22 and 23 of the Retirement Villages Act 2003. For discussion of a priority lien for other purposes in unit title developments see Chapter 5.VI.

implications for developers and operators were more favourable. Those benefits outweighed the less satisfactory management structure.⁴²

Some governments have intervened with legislation to create a better fit between the strata titles tenure system and “the complex management and service arrangements in the complex”.⁴³ However Bugden considered that a modular approach to regulation, as in the Queensland unit titles legislation, would be the best model but, failing that, changes to retirement village legislation may be the only viable option.⁴⁴

Bugden’s view on strata title villages can be compared with other research by Lucy Craddock and Andrea Blake who document a very strong trend across Australia towards retirement villages where residents occupy their individual dwellings - which are always part of a larger development - either under a licence to occupy or under some form of lease, rather than as part of a strata title development which would provide greater security for owners.⁴⁵ Much here depends on the term of the lease. Craddock and Blake suggest that most will be on 99 year leases, which may be registered against the title (if the dwelling has a separate title) so as to provide some security of tenure. In many cases the retirement village will operate by requiring the purchasing resident to lease the dwelling from the village, and then receive occupation rights under a sublease. This does provide for greater flexibility as to occupation but Craddock and Blake suggest that the model may be attractive to developers and operators because the sublease can contain provisions facilitating the operation of the retirement village which could not be imposed on a normal residential freeholder.⁴⁶ There are also a very small number of residential village occupants who directly rent their residential space from the operator.

⁴² Gary F Bugden “Strata and Community Titles in Australia - Issues 1 : Current Challenges” (paper presented to Strata and Community Title in Australia for the 21st Century Conference, Griffith University, Brisbane, 2009) at [9.5].

⁴³ Gary F Bugden “Strata and Community Titles in Australia - Issues 1 : Current Challenges” (paper presented to Strata and Community Title in Australia for the 21st Century Conference, Griffith University, Brisbane, 2009) at [9.6].

⁴⁴ Gary F Bugden “Strata and Community Titles in Australia - Issues 1 : Current Challenges” (paper presented to Strata and Community Title in Australia for the 21st Century Conference, Griffith University, Brisbane, 2009) at [9.7]. For discussion of the Queensland legislation see Chapter 5.IX.

⁴⁵ Lucy Craddock and Andrea Blake “The impact of tenure type on the desire for retirement village living” in *Proceedings of the 18th Annual Pacific Rim Real Estate Society Conference* (University of South Australia, Adelaide, 15-18 January 2012).

⁴⁶ Lucy Craddock and Andrea Blake “The impact of tenure type on the desire for retirement village living” in *Proceedings of the 18th Annual Pacific Rim Real Estate Society Conference* (University of South Australia, Adelaide, 15-18 January 2012) at 5.

Cradduck and Blake suggest that the prevalence of leasehold and licence to occupy tenures in Australian retirement villages is driven by the advantages to the operator or developer in retaining ownership of the land, which provides the option of redevelopment of the land for other purposes if desired in later years.⁴⁷ There are further advantages in that there is no need to obtain the issue of separate titles for each residential unit, or to create a body corporate within the first year of operation as would be the case under strata title legislation.

New South Wales also has legislation, the Retirement Villages Act 1999, which applies to retirement villages whatever the nature of the tenure of the residence.⁴⁸ However certain parts of the Act are more directed at strata title schemes than any other form of tenure.

It should be noted that a process of online consultation about New South Wales strata title laws received relatively few comments directed at tenure systems for retirement villages operating through a strata title development. While concerns were expressed over such matters as operator influence over the body corporate, especially in regard to setting of fees and budgets, only one respondent specifically sought more detailed legislative rules for strata title retirement villages.⁴⁹

VII Less Common Forms of Multiple Occupancy Accommodation

There are a range of other long-term residence arrangements which may sometimes run parallel to, or intermingle with, systems for multiple tenures on a single block of land. These arrangements may take a number of forms, some of which may give at least a degree of apparent security of tenure to an occupant.

A Boarding houses

For example in many jurisdictions there are boarding houses, where occupants pay a daily, weekly or monthly fee to occupy a bedroom (sometimes sharing it with another occupant) and have a right to the joint use of some communal facilities and to the provision of some meals. In some jurisdictions the rights of occupants are solely determined by contract between the occupant and the owner or operator of the residential

⁴⁷ Lucy Cradduck and Andrea Blake “The impact of tenure type on the desire for retirement village living” in *Proceedings of the 18th Annual Pacific Rim Real Estate Society Conference* (University of South Australia, Adelaide, 15-18 January 2012) at 7.

⁴⁸ Retirement Villages Act 1999 (NSW), s 5. That section lists a number of exclusions, principally to do with care facilities for the elderly.

⁴⁹ Global Access Partners Pty Ltd *Strata Laws Online Consultation: Final Report* (Sydney, April 2012) at 45.

premises, but in New Zealand there is a degree of regulation of boarding houses with six or more tenants. Under the Residential Tenancies Act 1986, tenants for periods of 28 days or more have a recognised and, to some limited extent, protected right to occupy a particular room.⁵⁰

However the Residential Tenancies Act 1986 does not provide satisfactorily for the position where an external event means repair or reinstatement of the boarding house premises is necessary. There is a general obligation on landlords during the duration of a boarding house tenancy to:⁵¹

ensure that the premises are in a reasonable state of repair, having regard to the age and character of the premises and the period during which the premises are likely to remain habitable and available for residential purposes.

On its face this would require repair or reinstatement no matter the level of damage, a requirement which is clearly impractical if a building is seriously damaged, let alone destroyed. The landlord can terminate a boarding house tenancy without cause by giving 28 days' notice, so that any breach of the repair obligation would be limited in time.⁵² By contrast, a tenant need only give 48 hours' notice.⁵³ Therefore, it appears that the position under the statute is that landlords would be likely to breach their statutory obligations if the building is damaged. It is not clear what remedy would be available for breach of the Act. One possibility would be for the tenant to recover the costs of alternative accommodation – something which could be very expensive in the aftermath of a significant disaster event. Legislative intervention seems necessary.

Recommendation 7.6: We recommend that Part 2A of the Residential Tenancies Act 1986 be reviewed and an appropriate provision be enacted to provide for the termination of a boarding house tenancy, and the consequences of that termination, by the destruction of, or severe damage to, the boarding house premises.

Even if the Residential Tenancies Act 1986 is reviewed, it is clear there will continue to be difficulties for boarding arrangements which do not come within that Act. Such arrangements will be regulated solely by the law of contract, which is likely to be problematic should there be an event causing significant damage to the premises, and

⁵⁰ See generally Residential Tenancies Act 1986, Part 2A.

⁵¹ Residential Tenancies Act 1986 s 66I(1)(b).

⁵² Residential Tenancies Act 1986 (NZ) s 66U(1).

⁵³ Residential Tenancies Act 1986 (NZ) s 66V.

therefore requiring replacement of the premises or substantial repairs to them. The key question will be whether the occupant's rights of residence are terminated by the event, or whether they continue despite the event, thereby placing an obligation on the operator to provide substitute accommodation until the contract has been lawfully terminated by notice or otherwise. If there are express provisions in the contract between occupant and operator which provide a regime which will apply where large-scale repair, or reinstatement, is needed, those express provisions will prevail. Otherwise termination or continuation of the boarding agreement may depend on whether or not the doctrine of frustration on contract applies.⁵⁴ It is far from clear that it would do so.

B Supported Residential Services Premises

In the state of Victoria there are a relatively small number of premises (134 in 2016) which operate as supported residential services (SRS) premises. These are premises which provide collaborative living places where occupants share bedrooms and have a right to use communal dining and cooking facilities, in accordance with specified residential rules. Some older premises may have up to four residents in a single bedroom, although recent approvals have been for a maximum of two residents per bedroom.⁵⁵ There is only a limited a degree of regulation of SRS premises. The relevant local authority must approve the use of land for SRS purposes and also approve the construction of any new building.

While at one time aged persons made up the dominant occupant group in SRS facilities, this has changed markedly over recent decades. Aged persons may now more readily access specialist residential retirement premises and are likely to seek better amenities. There is now a much greater percentage of younger persons in SRS residences, particularly persons with significant psychological or social problems such as mental health issues or drug addiction. Welfare and governmental agencies are likely to seek to place individuals with such problems into SRS premises because the operators provide a degree of supervision and care which may be necessary - for example ensuring medication is taken - which is not likely to occur in the completely unregulated boarding house sector.

Victoria operates a relatively light handed form of regulation of SRS residences as there is no longer an obligation to seek governmental approval in principle prior to creating a

⁵⁴ For discussion of frustration of contract see part II above.

⁵⁵ Interview with officials, Melbourne, August 2016.

new SRS residence. There are a number of providers who seek SRS accreditation in the short term while the provider obtains accreditation as a full aged-care facility - a status necessary to make them eligible to receive Commonwealth subsidised funding. Generally this has worked satisfactorily. The legislation does provide for certain levels of qualified staff to be employed, but the ratio of qualified staff to residents is lower than in some other states, such as Queensland.⁵⁶ There are also provisions as to repair and maintenance, but so far Victoria has not experienced any event which required large-scale movement of residents in one such SRS facility to another. Short term transfers during repairs or other minor maintenance and refurbishment are common.

VIII Summary of Recommendations

Recommendation 7.1. We recommend that the Retirement Villages Act be amended by incorporating a provision, based on but going further than, clause 47 of the Retirement Villages Code of Practice to better protect the right of the unit owner to recover an appropriate part of the capital cost if the village has to close after a disaster event.

7.1.1. We recommend that the new provisions should confer compensation as does clause 47 and also make it clear that the right to compensation is only lost if the operator of the village has offered alternative accommodation of roughly equal standard (or accommodation of a lower standard plus a reasonable cash sum in lieu of equivalence). Alternative accommodation should be provided where at all possible if the resident is not reasonably capable of engaging in the market to locate alternative premises.

7.1.2 We recommend that if the substitute accommodation is in a unit yet to be constructed, it should be mandatory that the accommodation will be available within a reasonable time. This could be reinforced by placing an obligation on the operator to pay for alternative accommodation in the meantime.

Recommendation 7.2: We recommend that the Retirement Villages Act 2003 be amended to require that in all cases the village operator must insure the units owned by residents (recouping the insurance costs from those residents) so as to avoid the need to deal with multiple insurance companies in the event of an event requiring major repairs to, or reinstatement of, retirement village premises.

⁵⁶ Interview with officials, Melbourne, August 2016.

Recommendation 7.3: We recommend that the Retirement Villages Act 2003 be amended to impose on the statutory supervisor a duty of ensuring that insurance policies are maintained and maintained at a suitable level, with revaluations of the premises at not less than three year intervals.

Recommendation 7.4: We recommend that the Retirement Villages Act 2003 be amended to make the statutory supervisor the stakeholder for insurance monies due to unit owners after a damaging event. The supervisor should be required to pay the money to the unit holders immediately on receipt if there is no indication that the village will cease operation, but to hold it for the benefit of those owners if there is a likelihood the village will cease operation or be radically restructured following a damage event.

Recommendation 7.5: We recommend that provision be made in the Unit Titles Act 2010 for the extension of s 74 (or a similar provision) to unit title retirement villages.

Recommendation 7.6: We recommend that Part 2A of the Residential Tenancies Act 1986 be reviewed and an appropriate provision be enacted to provide for the termination of a boarding house tenancy, and the consequences of that termination, by the destruction of, or severe damage to, the boarding house premises.

CHAPTER 8

SUMMARY OF RECOMMENDATIONS

This chapter repeats for convenience the 35 recommendations made in earlier chapters.

The most urgent of the recommendations are those from chapters 3 and 4. This is so in relation to Chapter 3 because the issue of Māori land and its uses is currently before Parliament and we believe proposals for changes to relevant law need to be underpinned by more far-reaching research than has currently been the case. The risk of enacting legislation which does not adequately deal with existing and foreseeable problems is very real. The reforms recommended in Chapter 4 are urgent for a different reason – simply that the cross lease process is deeply flawed and it is imperative that it be discontinued – and existing cross leases addressed by statute before there is a major expansion of cross lease developments in Auckland and other regions.

The remaining reforms are less urgent but we believe they come at an opportune time as MBIE has begun public discussions on possible changes to the Unit Titles Act 2010, and our research and recommendations will contribute to the debate and planning for reform.

Our recommendations are:

Recommendation 3.1: We recommend that a new Part of the current Land Transfer Act 1952 be enacted after Part VIIA (Flat and office owning companies’): “Part VIIB: Prohibition of and Conversion of Cross-Leases”.¹

Recommendation 3.2: We recommend the clauses 121Q and 121R of the proposed Sale of Land Bill be enacted as part of Part VIIB of the Land Transfer Act 1952.

Recommendation 3.3: We recommend that a further section be inserted in the proposed SOL Bill, and then enacted as part of Part VIIB of the Land Transfer Act 1952, after s 121Q and before s 121R, simply stating:

121 QA: “No Registrar shall register any new cross lease instrument”.

¹ Should the current Land Transfer Bill be passed (see Land Transfer Bill (2016) No 118-2) this new Part should be placed after Part 3, subpart 6 (Flat and Office Owning Companies).

Recommendation 3.4: We recommend that s 66 (“Certificates of title in respect of leasehold interests”) and s 72 (“Tenants in common entitled to separate certificates of title”) of the Land Transfer Act 1952 be amended to make the prohibition on any further cross leases clear. The new amendments (s 66(6) and s 72(2)) (with the current wording in s 72 becoming s 72(1)) would state:

“For the avoidance of any doubt, this section must not be used as a mechanism to create a cross lease title.”

Recommendation 3.5: We recommend clauses 121S and 121T of the proposed Sale of Land Bill be enacted as part of Part VIIB of the Land Transfer Act 1952.

Recommendation 3.6: We recommend that the Resource Management Act 1991 be amended by inserting after s 218 a new provision to prohibit subdivision by way of cross lease.

Recommendation 3.7: We consider that where existing cross leases are converted to a small number of unit titles, the regulatory and management provisions should be less onerous than those that currently exist under the Unit Titles Act 2010.

3.7.1. We recommend that the body corporate be regulated under a modified and simpler version of the current 2010 Act. While guidance in relation to medium sized and large sized unit title entities can be found in the size threshold limits proposed by the Ministry of Business, Innovation and Employment Discussion Document, “Review of the Unit Titles Act 2010”;²

3.7.2. We recommend that in the case of converted cross lease entities with six or fewer units, these entities should operate under an even less strict regime than that Discussion Document proposes for entities of up to 10 units.

Recommendation 3.8: We recommend that if existing cross leases are not converted to a subdivision or a unit title, all parties to the lease must be insured by a single insurer. A legislative provision to this effect is essential.

Recommendation 3.9: We recommend that if existing cross leases are not converted to a subdivision or a unit title, there be a mandatory statutory requirement in an appropriate

² Ministry of Business, Innovation and Employment *Review of the Unit Titles Act 2010: Discussion Document* (December 2016) at 3.1.

statute whereby Councils require consent from all parties to a cross lease complex before the Council grants a building consent for any work which will change the footprint of any building on the land covered by the cross lease. Some procedure would be necessary to address the issue of an owner unreasonably withholding his or her consent.

Recommendation 3.10: We recommend that if cross leases are not converted to a subdivision or a unit title, the Tenancy Tribunal (perhaps renamed appropriately) be given jurisdiction to hear disputes involving cross lease land, other than those going to title, up to a maximum claim not exceeding \$50,000.00.

Recommendation 4.1: We recommend that the Government convene an urgent inquiry to propose specifically tailored legislative and policy solutions for residential homes on Māori land following a natural disaster that start from the premise that Māori land is a taonga tuku iho.

Recommendation 4.2. We recommend that Government agencies encourage further research including with an empirical focus to better understand the issues unique for Māori land.

Recommendation 4.3. We recommend that Government agencies consider legislative reform of the Building Act 2004 to better recognise the need to support the development of papakāinga and whanau housing.

Recommendation 4.4: We recommend that Government agencies consider policy reform to ensure policies are most effective for supporting the building of future-proofed robust homes on Māori land across the country.

Recommendation 4.5. We recommend that Government agencies consider how to better support Māori land to more permanent and well functioning vital infrastructure that is likely to withstand and/or alleviate some of the effects of natural disasters for the residential homes.

Recommendation 5.1: We consider the clear delineation of boundaries within unit title developments is crucial. We recommend that consideration is given to compulsory delineation by way of 3-D mapping for any new large scale unit title complexes. We suggest that existing large scale developments become subject to this requirement if any major changes are made.

Recommendation 5.2: We recommend that bodies corporate should be given the power to enter a unit to carry out a repair to a defect which is likely to affect other units or common property, where a unit owner has failed to comply with a formal notice in writing to do the work.

Recommendation 5.3: We recommend that bodies corporate should not be given the power to upgrade the development under s 138.

Recommendation 5.4: We recommend that thought is given to streamlining the current s 74 procedure so that a hearing before a High Court Judge is not necessary in every case. While consultation with the judiciary and interested parties will be necessary we suggest the following alternatives (subject to any appropriate rights of appeal or review):

- That Associate Judges of the High Court be empowered to give approval to a scheme under s 74 “on the papers” where there is no (or very minor) opposition to the scheme (including where some unit owners are silent through lack of engagement); or
- That Associate Judges of the High Court be empowered to hear applications for a scheme in open court where there is no (or very minor) opposition to the scheme (including where some unit owners are silent through lack of engagement); or
- High Court Judges (rather than Associate Judges) be empowered to consider applications under s 74 on the papers.

Recommendation 5.5: We recommend that consideration is given to empowering a body corporate to apply to the High Court to settle a scheme to enable the body corporate to undertake works, to a reasonable level, that would make the unit title development more resilient to potential hazards such as earthquakes, fires or floods. We consider that s 74 may provide an appropriate starting point or template for such a provision.

Recommendation 5.6: We recommend that the insurance for all unit title developments (regardless of size) be revalued every three years. Bodies corporate should not be able to opt out of this requirement.

Recommendation 5.7: We recommend that consideration is given to the introduction of a lien for limited purposes. Such a lien would allow a body corporate to recover debts accrued by a unit owner in the context of necessary repairs to a development, or work done to increase the resilience of a development to natural disasters. It should give the

body corporate priority over a secured lender. Consideration should be given to whether this priority should be up to a maximum level.

Recommendation 5.8: We recommend that the following changes be made to current law or proposed reforms in relation to long-term maintenance plans and long-term maintenance funds:

5.8.1 We recommend that, as suggested by the Ministry, long-term maintenance plans be signed by a member of a recognised surveying group or professional group;

5.8.2 We recommend that, as suggested by the Ministry, the timeframe for long-term maintenance plans be extended to 30 years;

5.8.3 We recommend that, as suggested by the Ministry, that *large* bodies corporate must have long-term maintenance funds;

5.8.4 We further recommend that *medium* sized bodies corporate not be permitted to opt out of the requirement to have a long-term maintenance fund;

5.8.5 We recommend that, as suggested by the Ministry, that long-term maintenance plans for medium and large bodies corporate must be reviewed every three years;

5.8.6 We recommend that the proposal that the plan is also signed by the body corporate chairperson at an Annual General Meeting is given further thought. At the very least, a defence of due diligence should be available to a chairperson signing a document in these circumstances;

5.8.7 We recommend that members of the body corporate should be informed in each annual report of the degree to which the maintenance plan for the relevant year has been carried out; and

5.8.8 We recommend that, as suggested by the Ministry, that a template for long-term maintenance plans is developed to assist bodies corporate in meeting the requirements of the Act.

Recommendation 5.9: We recommend that bodies corporate be empowered to alter the purpose for which long-term maintenance funds have been put aside to enable to the repair of unforeseen or unexpected damage, or to use funds to increase the resilience of the development to potential natural disasters. A body corporate should be able to exercise this power if there is unanimous agreement to the proposal. If there is not unanimous support, a body corporate should be able to apply to the High Court for directions in a manner similar to that under s 74.

Recommendation 5.10: We recommend that there should be an ability for bodies corporate to raise levies from particular unit owners ahead of repairs or maintenance being undertaken. However, any body corporate that wishes to do so should have to seek a court order in order to do so. Such an order could be similar to the process currently allowed for under s 74.

Recommendation 5.11: We recommend that the proposal in the Ministry of Business, Innovation and Employment Discussion Document regarding size thresholds be adopted, subject to further thought being given to simplifying the range and extent of reporting requirements for small developments.

Recommendation 5.12: We recommend that careful attention is paid to ensuring that it is clear which requirements apply to each size of complex, and that new regulations in line with the Queensland model be considered.

Recommendation 6.1: We recommend that in the process of finalizing the reform proposals for Unit Titles (as presented in the December 2016 MBIE Discussion Document) particular account be taken of the difficulties for mixed-use buildings of the current and the proposed regimes, and that these issues be addressed before any relevant legislative changes are formulated.

Recommendation 6.2: We recommend that the definitions of “residential building” and “dwelling” in the Earthquake Commission Act 1993 should be clarified to exclude premises predominantly used for commercial short-stay accommodation from coverage. Eligibility for EQC cover should depend on actual use to which individual units are put. In consequence, consideration should be given to a more nuanced criterion than the current “50 percent or more” of particular floors of the building so that actual usage is better reflected in EQC cover and levies.

Recommendation 7.1. We recommend that the Retirement Villages Act be amended by incorporating a provision, based on but going further than, clause 47 of the Retirement Villages Code of Practice to better protect the right of the unit owner to recover an appropriate part of the capital cost if the village has to close after a disaster event.

7.1.1. We recommend that the new provisions should confer compensation as does clause 47 and also make it clear that the right to compensation is only lost if the operator of the village has offered alternative accommodation of roughly equal standard (or accommodation of a lower standard plus a reasonable cash sum in lieu of equivalence). Alternative accommodation should be provided where at all possible if the resident is not reasonably capable of engaging in the market to locate alternative premises.

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