

23 July 2020

Hon David Parker, Attorney-General

## **Consistency with the New Zealand Bill of Rights Act 1990: Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill**

### **Purpose**

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1. We have considered whether the Unit Titles (Strengthening Body Corporate Governance and Other Matters) Amendment Bill ('the Bill'), a member's Bill in the name of Hon Judith Collins, is consistent with the rights and freedoms affirmed in the New Zealand Bill of Rights Act 1990 ('the Bill of Rights Act').
2. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act. In reaching that conclusion, we have considered the consistency of the Bill with s 14 (freedom of expression) and s 17 (freedom of association). Our analysis is set out below.

### **The Bill**

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3. The Unit Titles Act 2010 ('the principal Act') provides a legal framework for the ownership and management of unit title developments, where multiple owners hold a type of property ownership known as a unit title.<sup>1</sup> The Bill amends the principal Act.
4. The explanatory note states that the Bill is a response to a recent examination of the principal Act, discussions with professionals from the property sector, and a paper released during the period when the Hon Dr Nick Smith was the Minister for Building and Construction.
5. The Bill includes amendments to:
  - a. improve the information disclosure regime to prospective buyers of units;
  - b. strengthen the governance arrangements in relation to the body corporate, the (owner) entity responsible for the management and operation of a unit title complex;
  - c. increase the professionalism and standards of body corporate managers; and
  - d. ensure that planning and funding of long-term maintenance projects is adequate and proportionate to the size of the complex concerned.
6. The explanatory note also states that the proposals in the Bill aim to strike a balance between the benefits of additional compliance requirements and any costs that these requirements may impose. Prospective homeowners need to consider apartments and

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<sup>1</sup> 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.

other high-density living arrangements as a viable and attractive living alternative to other more traditional forms of property.

## Section 14 – Freedom of expression

7. Section 14 of the Bill of Rights Act affirms that everyone has the right to freedom of expression, including the freedom to seek, receive, and impart information and opinions of any kind in any form. The right has been interpreted as including the right not to be compelled to say certain things or to provide certain information.<sup>2</sup>
8. Clause 15 of the Bill inserts several provisions which introduce accountability requirements to body corporate committees and their members. New ss 114B to 114F set out what and how conflicts of interest of members of a body corporate committee are to be dealt with. Under the new s 114C a member of a body corporate committee who is interested<sup>3</sup> in a matter must disclose details of their interest in certain matters. New s 114D prohibits an interested member from voting or taking part in a decision of the committee on the matter, or from signing any document relating to the entry into a transaction or the initiation of the matter.
9. However, where a member has such an interest, they may still participate in committee discussion relating to the matter and be present at the time the committee makes a decision on the matter (unless the committee decides otherwise). These provisions are based on those found in other New Zealand legislation, and appear to be a balanced and proportionate approach to setting accountability requirements for committee members relating to conflicts of interest.
10. Clause 18 of the Bill inserts several provisions relating to information that is required to be disclosed to a prospective buyer. These largely replicate the existing regime, with a couple of notable exceptions. The new ss 146 and 148 require a pre-contract disclosure statement to be provided by the seller to a buyer, and for that statement to be endorsed by the body corporate as being complete and correct. The seller remains responsible for discussing any issues arising from the statement with the buyer. These requirements improve the information disclosure regime to prospective buyers.
11. Clause 20 of the Bill inserts new requirements into the Act relating to large<sup>4</sup> and medium<sup>5</sup> residential developments. These include reporting requirements, requirements regarding long-term maintenance plans, and requirements about establishing and auditing long-term maintenance funds (which includes the submission of annual records and statements). In addition, the Bill provides a mechanism for body corporate committees of medium residential developments to opt out of complying with certain requirements, if they do so by special resolution.
12. These provisions *prima facie* limit freedom of expression under s 14 of the Bill of Rights Act.

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<sup>2</sup> See, for example, *Slaight Communications v Davidson* 59 DLR (4th) 416; *Wooley v Maynard* 430 US 705 (1977).

<sup>3</sup> An interested member is defined in new s 144C(3) of the Bill.

<sup>4</sup> Large residential development is defined in new s 157A(4) as meaning a unit title development that includes no fewer than 30 principal units that are primarily used as residences.

<sup>5</sup> Medium residential development is defined in new s 157A(4) as meaning a unit title development that includes no fewer than 10 but no greater than 29 principal units that are primarily used as residences.

13. Where a provision is found to limit a particular right or freedom, it may nevertheless be consistent with the Bill of Rights Act if it can be considered a reasonable limit that is justifiable in terms of s 5 of that Act. The s 5 inquiry may be approached as follows:
  - a. Does the provision serve an objective sufficiently important to justify some limitation of the right or freedom?
  - b. If so, then:
    - i. Is the limit rationally connected with the objective?
    - ii. Does the limit impair the right or freedom no more than is reasonably necessary for sufficient achievement of the objective?
    - iii. Is the limit in due proportion to the objective?<sup>6</sup>
14. The provision of this information is connected to the body corporate and the body corporate committees' functions and purpose. To the extent that such provisions engage the right in s 14 (as to whether such information is truly 'expressive' in nature), we consider that they are rationally connected to the Bill's objective of providing sufficient protection and transparency for people buying or already living in a unit title complex.
15. The requirements for information (including disclosure of information) are, in our view, proportionate and limit the right to freedom of expression no more than is reasonably necessary as the Bill only requires the provision of information necessary for achieving the objectives, and only to specified parties, who have an interest in receiving that information.
16. Overall, we consider that the limits imposed by the Bill on the freedom of expression are justified under s 5 of the Bill of Rights Act.

### **Section 17 – Freedom of association**

17. For completeness, we note that cl 17 of the Bill amends s 139 of the principal Act in relation to entering into service contracts. The amendments do not prohibit entering into contracts; however, they place some restrictions on what service contracts may contain in certain circumstances. It is, therefore, arguable that the amendments *prima facie* engage the right of freedom of association.
18. The explanatory note states that these are intended to provide extra safeguards in relation to any service contracts that the owner may enter so as not to unfairly burden or disadvantage the body corporate members once control (and benefit or responsibility, or both) passes from the original owner.
19. To the extent that this provision engages the right of freedom of association, we consider that these restrictions are a balanced and reasonable approach to regulation and to the objectives of the Bill.

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<sup>6</sup> *Hansen v R* [2007] NZSC 7 [123].

## **Conclusion**

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20. We have concluded that the Bill appears to be consistent with the rights and freedoms affirmed in the Bill of Rights Act.

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