Landlords rights and obligations under the Unit Titles Act 2008

1. The Unit Titles Act 2008 and its regulations are are a result of many years of research and analysis by the various stake holders.Department of Building and Housing and the release of various discussion papers and numerous submissions made in response by interested parties around New
2. The 1972 Act was introduced to deal with an increase in small apartment

complexes.   Over the last 15 to 20 years there has been a dramatic increase in large inner-city apartment blocks, industrial parks and developments with mixed uses such as residential, commercial and retail.   The 1972 Act has been unable to deal with the increasingly complex issues that have arisen as a result of these changes.

3. The new Act has retained the underlying concept of subdividing land into a unit title development managed by all the unit owners together as a Body Corporate and governed by the Act and a set of Body Corporate Rules. However it also introduces several new concepts such as new Operational Rules, a disclosure regime for vendors, purchasers and developers, the ability to create layered developments where a principal unit is further subdivided into its own unit title development and Body Corporate, ownership and utility interests instead of unit entitlements, new thresholds for voting, new maintenance obligations for private and common property and an improved dispute resolution regime.
4. The new Act provided transition provisions to enable Bodies Corporate to adapt to certain changes by 1 October 2012. This date has now passed and all transitional matters should have been addressed at an AGM or EGM before 1 October 2012. If this has not occurred, these matters should be addressed at the next Annual General Meeting or at an Extraordinary General Meeting called for that purpose. Under the new Act there was a requirement that an AGM be called before 20 December 2011 for this purpose but there were no penalties if not called.
5. The changes introduced under the new Act impact on all those involved in the unit title industry including owners, landlords, prospective buyers, developers, Body Corporate Managers (previously known a Body Corporate Secretaries), building managers, surveyors, valuers, Council staff, solicitors and other professional advisors. However there are a number of specific matters that will affect commercial landlords and it will be essential that they consider the impact of the Act on their everyday activities and seek advice where necessary. The following paper sets out the key changes for landlords to be aware of.Overseas unit

owners of leased units

6. Under the new Act it is now a requirement that if a unit owner leases or licences their unit and they are out of New Zealand for more than 21 consecutive days they must appoint a person in New Zealand to act as their agent and notify the Body Corporate of their name, address for service and contact details. The agent does not need to be a professional property manager but if the unit is managed professionally it would seem logical that the manager is appointed as the agent for the purposes of the Unit Titles Act 2010. Managers should ensure their management agreement is drafted to incorporate this appointment.Voting and Proxies

7. Voting under the new Act is outlined in sections 88 to 104. Voting is based on one vote per unit for both special resolutions and ordinary resolutions. The threshold for a special resolution remains at 75% and the threshold for an ordinary resolution is still a majority of unit owners. The new Act now clearly states that a unit owner must have paid all outstanding levies to be able to vote at a meeting of the Body Corporate. The new Act no longer requires unanimous resolutions for any decisions of the Body Corporate. The removal of unanimous resolutions has been counter balanced by the retention of minority relief rights and the introduction of a new designated resolution objection procedure which enables owners, mortgagees and other interested parties to object to resolutions passed (discussed below).
8. Voting can be done via a proxy or by post. Where a landlord appoints a proxy to attend and vote at a Body Corporate meeting on the landlord’s behalf a new proxy form must be completed for each individual Body Corporate meeting. Regulation 14 states that each proxy appointment expires at the end of the related meeting. This is particularly important for Body Corporate Managers, building managers and property managers who may have been appointed proxy once in the past (often through a leasing arrangement) and have been relying on this appointment year after year. This is no longer permitted and the landlord must complete a new proxy form for each meeting, otherwise the proxy appointment will be invalid.
9. Another way of dealing with this issue is for the landlord to enter into a power of attorney with the person they wish to appoint as proxy. A separate power of attorney document could be entered into, or an appropriate clause could be inserted into the property manager’s contract or the lease depending on who is to be appointed attorney. Whatever the arrangement, it should state the attorney is appointed for a limited purpose only, that being as the proxy for the landlord at every Body Corporate meeting with a right to vote as instructed by the landlord. The landlord can revoke the appointment at anytime but until then there is no

need for them to complete a proxy form for every meeting. A new proxy form is still required for each meeting, but the attorney can complete this on behalf of the landlord as its appointed attorney. The appointed attorney can be whoever the owner chooses, for example, the property manager, the building manager, the Body Corporate Manager or another trusted person such as a family member or a professional advisor.

10. The attorney must also be aware that each time the attorney signs a document on behalf of the owner using the power of attorney, a non revocation certificate must be signed. This does add another step to the process but the attorney signs it, not the landlord which makes it easier. This arrangement has been put to the test in a recent High Court case Lihua Ltd v Body Corporate 366611 [2012] NZHC 1975 where several leases that previously appointed the tenant as proxy on an ongoing basis were varied inserting a power of attorney clause instead. The clause appointed the tenant as attorney for the purposes of appointing a proxy. This approach was upheld by the High Court when challenged by other owners as a device to avoid the prohibition in the new Act on enduring proxies.
11. Also of note is the change in the threshold for a quorum at a Body Corporate

meeting which has dropped from 33% to 25%. Both proxy votes and postal votes are included in the quorum calculation (see section 95 and regulation 13).Designated Resolution Procedure

12. A new designated resolution objection regime has been introduced to ensure all unit owners, their mortgagees and any other parties with a registered interest in all units are notified when a special resolution is passed relating to specific matters noted in section 212 of the UTA. These include special resolutions for the method of calculating utility interests, subdividing a principal unit, dealings with common property, easements and covenants over common property, redevelopments needing a new unit plan, depositing a substituted proposed unit plan, and cancelling the unit plan. A notified party can object to the resolution within 28 days provided they notify the Body Corporate of their objection and they make an application to the appropriate decision maker, i.e. the Tenancy Tribunal, District Court or High Court. If their application is successful the resolution can be overturned.
13. In some instances when leasing a unit to a tenant, the tenant may require the right to occupy a part of the common property. The landlord is granted the right to occupy the common property by the Body Corporate through a lease or licence, which is then subleased or sublicensed to the tenant. The use of a part of the reception or lobby that is common property, or the right to display signage

on the common property roof of a building, are both examples of this. A special resolution by the Body Corporate is required when leasing or licensing common property, and this type of resolution falls within the designated resolution procedure. The landlord will need to be prepared to pay the Body Corporate's costs to complete the designated resolution procedure and notify all owners, mortgagees and other parties with a registered interest in the units in the development, as well as responding to any objections. The landlord should ensure that the sublease or sublicence includes an obligation on the tenant to reimburse the landlord's costs if appropriate.Operational Rules

14. The majority of the Schedule Two rules in the 1972 Act have been entrenched into the provisions of the new Act and the Schedule Three rules in the 1972 Act have been redrafted into two short rules now known as the Operational Rules in

Schedule One of the Regulations. Just as the Schedule Two and Three rules under the UTA 1972 were often amended to suit the needs of a unit title development, the Operational Rules will also need amending for most commercial developments. Amendments are made by ordinary resolution only.

15. However caution is warranted to ensure rule amendments do not breach

sections 105 and 106 of the new Act and case law established under the 1972 Act which still applies. Given the default Schedule Two rules in the 1972 Act are entrenched into the provisions of the new Act, the matters usually included in those rules, such as unit owner and Body Corporate maintenance obligations and governance rules regarding meetings, voting, resolutions and appointment of the Body Corporate Secretary, cannot be included in the new Operational Rules.

instead any amendments to the Operational Rules should cover

operational matters, including but not limited to, use of and damage to common property, parking, rubbish, signage, aerials, lifts, deliver areas, hazards, leasing a unit, contractors, and noise and conduct etc.

16. Commercial tenants are bound by the Operational Rules. Section 105 of the 2010 Act states that all occupiers of units are bound by the rules and this position has not changed from the 1972 Act. What has changed is the ability to bring a claim against a commercial tenant before the Tenancy Tribunal, despite the tenancy not being residential. The UTA 2010 contains a new dispute

resolution regime (discussed below) which enables various different parties to bring claims against a tenant that is in breach of the Body Corporate's Operational Rules. This right does not sit with the landlord only. The Body Corporate, another owner and even another tenant can all make claims against a tenant in breach of the Operational Rules. The intention of giving the Tenancy Tribunal jurisdiction in this area is to provide a faster dispute resolution service at a lower cost. However the Tribunal application fees of $850 and $3,300 for different categories of claims have been criticised as being too high and a deterrent to unit owners and Bodies Corporate.

17. All tenants (commercial and residential) should be given a full copy of the Body Corporate Operational Rules as well as a full copy of all amendments made (discussed below). These should be provided promptly to the tenant. Clause

34.6 of the revised ADLSI Deed of Lease 6th edition states that "the tenant shall comply with the rules of the Body Corporate and the provisions of the [Unit Titles] Act to the extent that they apply to the Tenant's use of the property". This mirrors the provisions of the new UTA 2010 as discussed above.

18. From a property management and Body Corporate management point of view, of importance is the removal of all references to the Body Corporate Manager (previously known as Secretary) from the new rules. Under the 1972 Act the Body Corporate Manager was usually appointed under the old Schedule Two rules. In some instances they were appointed based solely on this method and no contract was entered into. The appointment of a Body Corporate Manager is not mentioned anywhere in the new Operational Rules or in the new Act or Regulations. Instead this relationship needs to be established by way of contract between the Body Corporate and the Manager appointed. The contract should clearly set out the tasks the Manager is to carry out on behalf of the Body

Corporate, the remuneration, the term and renewal arrangements (if any). One of the common tasks carried out by the Body Corporate Manager under the 1972 Act was preparing and signing section 36 Certificates for a vendor to provide a purchaser before settlement. The section 36 Certificate regime has now been replaced by various disclosure statements (discussed below) and it will be vital that the contract with the Body Corporate Manager refers to the Manager
carrying out these new tasks for the Body Corporate.

19. Another key point to note is that the new Operational Rules did not apply from the commencement of the new Act on 20 June 2011. Instead there was is a 15 month transition period under section 220 where all rules adopted under the

1972 Act remained in place until 1 October 2012. From 1 October 2012 the new default Operational Rules in Schedule 1 of the Unit Titles Regulations 2011 applied automatically. It is important that all Bodies Corporate consider whether these new default rules are adequate, and if not they should amend their rules by ordinary resolution. The amendments will apply once registered with Land Information New Zealand using prescribed Form 15 in the Regulations. If this is not done any existing rules registered with LINZ are unenforceable as they were automatically replaced by the new default rules on 1 October 2012. If the Body Corporate has not considered this already, this should now be a matter of priority.

20. Bodies Corporate will need to think carefully when making amendments to the default Operational Rules in the new Act. Amendments must comply with sections 105 and 106 of the new Act and previous rule amendment case law from the 1972 Act will still apply. Bodies Corporate should seek legal advice before making rule amendments under the new Act.
21. In a commercial or mixed use unit title development it is particularly important

that any rules contained in the registered amended rules of a development under the UTA 1972 relating to the use of units are re-inserted into the new Operational Rules. If use of unit rules are changed under the new Act this may have a significant impact on a tenant's business operation. For example, if a rule amendment under the 1972 Act stated that all units were to be used for residential purposes except for unit A which could be used as a cafe, it is essential that the rule remains to enable the tenant of unit A to continue operating as a cafe. Under the old 1972 Act this type of rule would usually require a unanimous resolution. Under the new 2010 Act only an ordinary resolution is required which is simply a majority vote at a meeting of the Body Corporate. Other examples are rules that grant one unit building naming rights, or grant one unit use of all common property storage units. Where a landlord has been granted these rights and they pass the benefit of them on to the tenant, the landlord should ensure those rules are retained. Under the new Act a licence or lease is a more secure way of retaining these rights, because if contained in the new Operational rules only, they could be changed at any time by ordinary resolution of the Body Corporate.

22. It is important that a commercial landlord gets involved in the rule review and

amendment process under the new UTA (if it has not occurred already), and they exercise their vote as a member of the Body Corporate at the general meeting called to vote on the new proposed rules. It the landlord does not exercise its

vote, important rules could be amended or removed to the detriment of the landlord and its tenancy arrangements.

23. The Auckland District Law Society Inc have recently released model Operational Rules for residential, commercial and mixed use developments which are available for purchase from the Society's website (www.adls.org.nz). The model rules were drafted by Pidgeon Law, an Auckland based legal firm. Each set of rules has been carefully drafted to meet the requirements of the new Act and to comply with past case law and are designed to replace the default Operational Rules in the new Act. They are a starting point only and in most cases they will need amending to suit the particular needs of the development, particularly commercial developments, and legal advice should be sought to assist with this.

Disclosure regime when buying and selling a unit

24. If a landlord wishes to sell their tenanted unit, as well as providing the required notice to the tenant and carrying out the usual requirements on settlement, such as apportioning rent and providing the original signed lease, the UTA 2010 adds another layer of compliance called the disclosure regime. If the landlord was also the original developer there may be further developer disclosure requirements that must be met by the landlord upon the sale of the tenanted unit (discussed in the next section below).
25. The disclosure regime is mandatory for sellers, buyers and developers of unit title developments. The legislation introduces the terms "seller" and "buyer" to replace proprietor and purchaser used in section 36 of the 1972 Act. Section 36 certificates are replaced with a pre-settlement disclosure statement and the consequences of non compliance are more severe than under the 1972 Act.
26. The new regime affects not only seller and buyers, but also Body Corporate Managers, developers, real estate agents and solicitors. Failure to comply in some circumstances can cause an agreement to be cancelled or settlement delayed so compliance is very important. It is not possible to contract out of any part of the disclosure regime.
27. The new regime applies as follows:
28. a) The seller must provide the buyer (at the sellers cost, with a "pre-

contract disclosure statement" before the sale and purchase agreement is entered into (section 146). This statement is compulsory and must be in prescribed Form 18 of the Regulations. It contains information on general terms in the new Act and details on where to get further information, the current and proposed levies, maintenance planned in the next 12 months, the cost of an additional disclosure statement, and whether the unit or common property is or has been the subject of civil proceedings relating to water penetration or a claim under the Weathertight Homes Resolution Services Act 2006. As soon as a property is listed with a real estate agent, the agent should request the pre-contract disclosure statement from the Body Corporate Secretary to ensure there are no hold ups and include the authority from the seller to do so in the agent's listing authority The seller must sign the statement,

or they can elect some else to sign. If an agent is asked to sign they should ensure they have prior written instructions from the seller and require an indemnity from the seller to cover any costs or liability incurred as a result. They should also ensure the statement contains a disclaimer clause to further protect the agent. The website for the Building and Housing section of the Ministry of Business Innovation and Employment (previously the Department of Building and Housing) has a very useful precedent for Form 18, see www.dbh.govt.nz/unit-titles-templates).

1972. b) Then the seller must provide the buyer (at the seller's cost) with a "pre-settlement disclosure statement" no later than 5 working days before Like the pre-contract statement, this statement is also compulsory. It must include a certificate from the Body Corporate certifying that the information in the statement is correct. The Body Corporate can withhold the certificate if there are any unpaid debts owed to the Body Corporate by the seller, including outstanding levies (section 147). The pre-settlement disclosure statement is very similar to the section 36 certificate required under the UTA 1972. There is no prescribed form but it must contain the details listed in section 147 and regulation 33. The Body Corporate Manager usually signs this statement, and as discussed above it is essential that the power to do so is included in the contract between the Body Corporate Manager and the Body Corporate.
1973. c) The next statement is optional only and is called an "additional

disclosure statement". The buyer may request it from the seller within 5 working days after the date of the agreement or within 10th working days before settlement, which ever date comes first. The buyer must pay the seller's costs for this statement and the cost estimate will already have been included in the pre-contract disclosure statement. However non payment by the buyer does not allow the seller to withhold the statement. The statement includes all the matters listed in regulation 35 including details of outstanding invoices to be paid by the Body Corporate, debts owed to the Body Corporate, information on regular Body Corporate expenses, contracts entered into, insurance policy premiums and excesses, text of motions voted on at the last AGM, amendments to the Operational Rules and the Long Term Maintenance Plan. Given the tight timeframes involved it will be essential that the Body Corporate Manager acts on all additional disclosure statement requests quickly and efficiently.

28. The buyer cannot cancel if there is anything in the pre-settlement disclosure

statement or additional disclosure statement that it dislikes, unless the

agreement has been amended to include a condition stating that the agreement is conditional upon the buyer being satisfied with these statements.

29. There are no express consequences for not supplying the pre-contract disclosure statement prior to the agreement being signed. However non compliance is not recommended as there is a risk the buyer may argue the

agreement is invalid. This is yet to be tested through the dispute resolution regime but no doubt it will be in due course.

30. Under sections 149 and 151 of the new Act, if the seller does not provide the

pre-settlement disclosure statement or the additional disclosure statement on

time, or does not provide it at all, the buyer can postpone settlement to 5 working days after receipt, or cancel the agreement by giving 10 days notice (not working days). There is no guidance in the new Act as to whether the 10 days notice to cancel is intended to allow the seller time to rectify the matter. This will be for the parties to negotiate between themselves. Given their are important timeframes involved with supplying each statement and severe consequences for getting it wrong, it will be essential for Body Corporate Managers in particular to respond promptly too all requests for statements and have processes in place to do so.

31. Section 150 allows the seller to correct any inaccuracies in a disclosure

statement given to a purchaser by providing a correct statement within 5 working days of the seller becoming aware of the inaccuracy. An inaccuracy includes a detail that has become inaccurate since the date of the statement. If the correct statement is provided after 5 workings from settlement, the buyer can delay
settlement for 5 working days from receipt.

32. All three statements must be dated and signed by the seller, or a person

authorised by the seller, and the buyer may rely on the information contained in the statement as conclusive evidence of the accuracy of its contents. As discussed above if anyone other than the vendor signs a statement, prior written instructions should be obtained from the seller and those instructions should be kept on file.

Disclosure regime for developers

33. As well as complying with the above disclosure regime when selling individual units, under sections 154 to 156 of the new Act when a developer has sold enough units that they can no longer exercise 75% of the votes of the Body Corporate they must immediately notify the Body Corporate. The 75% vote calculation is based on either one vote per unit or on ownership interest, whichever calculation reaches the 75% target first. This change in voting power is called the end of the control period.
34. At this point the Body Corporate must call a general meeting within 3 months and at that meeting a "turnover disclosure statement" must be supplied by the developer. The turnover disclosure statement must be in prescribed Form 19 in the Regulations and contain all matters listed in regulation 36. These include building plans, code compliance certificates, building warrants of fitness, fire evacuation plans and protection systems, warranties and guaranties for construction products, resource consent obligations and compliance schedules, as well as details of Body Corporate assets and liabilities, recommended maintenance plans, existing or proposed maintenance and service contracts and terms of any licences or leases over common property. At the same time the developer must also disclose details of any interest it has in any contract or arrangement made by the Body Corporate up to the date of the turnover disclosure statement.

35. Given the volume of information required in the statement it will be important for

the developer to begin compiling the information as early as possible to ensure there are no delays causing non compliance under the Act.

36. If the developer becomes aware that any information contained in the turnover disclosure statement was inaccurate at the date of the statement, they must supply a corrected statement within 5 working days.

Building Maintenance Obligations

37. The new Act introduces new maintenance obligations for the Body Corporate

and two new important terms. The first new term is "building elements" which are the external and internal components of the building or land which are necessary to the structural integrity and exterior aesthetics of the building, such as the roof, balconies, decks, cladding systems, foundations and retaining walls etc. The second new term is "infrastructure" which are the pipes, wires, ducts, conduits, gutters, cables, conducting, transmission equipment etc, required to supply services and utilities to and from units and common property such as water, electricity, stormwater, sewerage, drainage, gas, telecommunications etc. These terms are defined in section 5 of the new Act.

38. Under the 1972 Act unit owners were responsible for the repair and maintenance of their own unit and the Body Corporate was responsible for the repair and maintenance of common property. These obligations were set out in the rules of the Body Corporate. These obligations remain the same under the new Act (see sections 80 and 138). However the Body Corporate now has additional rights and obligations in relation to the repair and maintenance of units. Under section 138(2) of the new Act, the Body Corporate must maintain, repair or renew all "building elements" and "infrastructure" that relate to or serve more than one unit. For example, if the outside of the building needs painting, or the roof needs to be redone, these would be considered to be building elements that serve more than one unit under section 138(2) and the Body Corporate must carry out and pay for the work. This applies regardless of whether all or any part of the outside of the building or roof is unit property. Under the old 1972 Act if any part of the outside of the building or the roof were unit property the Body Corporate had no responsibility for that unit property and had no real power to compel a unit owner to repair their property. Now under the new Act the Body Corporate has responsibility for those parts that are unit property, and under section 138(3) it can recover any repair cost relating to a specific unit from that unit owner. This

enables the Body Corporate to step in and carry out repairs on a unit owner's behalf and recover its costs. This is especially beneficial where a unit owner is refusing to carry out work on building elements or infrastructure within its own unit and as a result other units and the common property are at risk. The key point to note is the infrastructure or building elements concerned must relate to or serve more than one unit. If they relate to or serve a single unit only (and are not common property) the Body Corporate cannot rely on section 138 to take action on its own accord.

39. These new maintenance obligations did not apply until 1 October 2012, at which point they became compulsory. This gave Bodies Corporate time to consider the impact of the new provisions and if they wanted to adopt them early they could by passing a special resolution. See discussion below on how these new maintenance obligations affect landlords specifically.

Long Term Maintenance Plan

40. The new Act also introduces a compulsory Long Term Maintenance Plan under section 116. The Plan must include estimated costs for the maintenance and replacement of common property, infrastructure and building elements and cover a minimum of 10 years. It must be regularly reviewed and at a minimum every three years. Levies are raised using utility interests through the Long Term Maintenance Plan fund. Generally the costs will be spread out equally across the 10 year period but it is entirely up to the individual Body Corporate to decide by resolution. Many developments already have maintenance plans in place and Body Corporate Managers and building managers will need to assist the Body Corporate with amending these plans to meet the new Act, or creating them from scratch if required. The Long Term Maintenance Plan became compulsory on 1 October 2012.
41. The new Long Term Maintenance Plan will ensure that all common property

maintenance and infrastructure and building element maintenance are all

addressed by the Body Corporate as a whole and adequate planning is in place. There must be a fund for the Long Term Maintenance Plan but the Body Corporate can opt out of this if they pass a special resolution. This is not recommended as it seems to defeat the purpose of having the Plan itself and the Body Corporate and unit owners will be in a far stronger position if funds are put aside on an annual basis rather than raising special levies as and when they are needed. If an owner wishes to sell their unit, the balance of the fund will be shown in the pre-contract disclosure statement given to the purchaser before the contract is signed. A purchaser will be far more attracted to the unit if they can clearly see there is a fund in place to support the compulsory plan.

How do the new Building Maintenance obligations and the Long Term Maintenance Plan affect commercial landlords?

42. The obligations of landlord and tenant in relation to the repair and maintenance of a commercial unit being leased are still a matter of contract between the parties. The new UTA 2010 does not change this position. The landlord is legally bound to maintain the leased unit and contribute to common property maintenance under the new Act, and the extent to which the tenant takes on these obligations is set out in the lease terms. Notwithstanding the lease arrangement it must be remembered that the landlord is still ultimately liable to the Body Corporate under the Act.
43. Although it may appear that the Body Corporate has additional obligations under section 138 to repair and maintain building elements and infrastructure (discussed above) and as a result the unit owners, i.e. landlord, may incur higher

levies to fund such work, if the new sections of the Act are applied properly the Body Corporate can recover costs that relate to unit property from the relevant unit owner. The key to apportioning costs under the new Act is to know where the legal boundaries of unit property and the common property start and stop. The skills of a specialist unit title surveyor can best answer this question and a survey boundary report is an essential tool for a Body Corporate to have under the new Act.

44. Any increase in repair and maintenance costs on a landlord under the new Act will generally be driven by the compulsory Long Term Maintenance Plan. If no plan, or a minimal plan, was in place prior to the Act there will likely be an increase in levies struck across the board each year under the new Act.
45. The key issue for a commercial landlord to consider is whether they can recover any of the repair and maintenance costs set out in the Long Term Maintenance Plan from the tenant, and at what point in time this can be recovered. The landlord should analyse the Plan together with the terms of the lease governing maintenance and repair costs, and establish which estimated costs in the Plan are recoverable from the tenant. At this point it is important to distinguish between the raising of a levy on the landlord for the Long Term Maintenance Plan fund and the spending of money from the fund by the Body Corporate for the work set out it in the Plan. It is only when the latter occurs that the landlord can recover the cost from the tenant, i.e. costs can only be recovered from the

tenant when money from the fund is actually used to pay for repair and maintenance work of a kind that is recoverable from the tenant. For example, under the standard terms of the ADLSI Deed of Lease 6th edition, where the Long Term Maintenance Plan sets out estimated lift repair costs this is a tenant recoverable cost under the terms of the lease. The landlord's portion of that cost is recoverable from the tenant, but only when the Body Corporate spends money from the fund to repair lifts. This could be several years down the track after the initial levy was raised for the estimated cost in the Plan. The cost cannot be recovered any earlier, despite the fact that the landlord has already paid the annual levies for this estimated work.

46. Again using the standard terms of the ADLSI Deed of Lease 6th edition, an

example of a cost in the Long Term Maintenance Plan that cannot be recovered from the tenant would be the cost to fully replace the roof of the building. This is a structural repair to the building payable by the landlord, not the tenant, and the landlord's portion of the associated cost for this work recorded in the Long Term Maintenance Plan cannot be recovered from the tenant.

47. What this means for a commercial landlord is that in most situations they cannot simply hand over the levy statement and demand payment in full from the tenant. It is quite likely not all costs in the levy statement are tenant costs. Before handing the levy statement to the tenant, the landlord needs to carefully review the statement, the Plan, the Body Corporate budget and expenditure accounts and the lease terms, and work out which levy costs are recoverable from the tenant and whether or not they are recoverable at that point in time, or later when the costs have actually been incurred. A line by line analysis of all of these documents is the best approach to ensure all possible costs are recovered and those that cannot be recovered are excluded. If the landlord does not carry out

this exercise for each levy statement they risk leaving themselves open to

challenge by the tenant. Whenever the Plan is amended or updated the landlord should carry out the same exercise. Rather than simply handing the tenant the levy statement expecting full payment, the landlord needs to turn its mind to what it's and tenant's rights and obligations are around maintenance and repairs
under the lease and the UTA 2010.

48. A commercial landlord should also be taking the above into account when setting their rent for the leased unit. Any maintenance or repair outgoings that are not recoverable from the tenant as a result of analysing the Body Corporate budget

and Long Term Maintenance Plan (as discussed above) should be recovered through the annual rent where possible.

49. From a commercial tenant's perspective, keeping its obligations for repair and maintenance to a minimum is its best possible position. How much or how little is up to the parties to negotiate. A tenant may want to consider negotiating a reduction in its portion of certain maintenance and repair costs if it does not use the related service as much as other units. For example a tenant occupying a unit on the ground floor that does not use the lift in the building might argue they should pay a lesser amount in relation to lift maintenance, or none at all. The "proportion of outgoing" percentage in clause 3.1 of the ADLSI Deed of Lease 6th edition goes some way to allow for this, but it does not allow the use of a different percentage for each different type of outgoing. The issue for the landlord in this scenario is that they are left having to pay the Body Corporate the balance of their portion of the particular outgoing. A point to consider for a landlord in this situation is the ability for the Body Corporate to reassess utility interests (which are used to calculate repair and maintenance levies) to more fairly reflect the use of services and amenities by different units. The following discussion explains the new ownership and utility interest regime and landlords should not overlook the possible benefits of reducing their costs through reassessing utility interests. However any possible benefits will depend significantly on the development, and it must be noted that the new reassessment regime is not without its own faults.

Ownership Interests and Utility Interests

50. The new Act introduces ownership interests and utility interests which completely replace unit entitlements. As at 20 June 2011 when the new Act came in to force unit entitlements were immediately deemed to be ownership interests and utility interests.
51. Under section 38 of the new Act ownership interests are used (among other things) to establish a unit owner's portion of levies for the capital improvement fund and ground rental (if any), to calculate voting when a poll is called at a Body Corporate meeting, to establish a unit owner's beneficial interest in the common property and if the unit plan is cancelled their interest in the underlying fee simple.
52. Under section 39 of the new Act utility interests are used to establish a unit

owner’s portion of levies for the operating account, the Long Term Maintenance Plan fund and the optional contingency fund.

53. Under the 1972 Act there were often disputes as to how costs are apportioned across units using unit entitlements based on relative value, particularly where the building is a mixed use development containing both residential and commercial units using services and facilities to a degree that does not match their unit’s relative value. The intention of the new ownership interest and utility interest regime is to introduce flexibility and an alternative way to divide costs by having separate utility interests and the ability to reassess them. Both ownership interests and utility interests can be reassessed every 3 years by special resolution of the Body Corporate. The first reassessment must be three years from the date of deposit of the unit plan.
54. Under the new Act ownership interests are always prepared by a registered valuer based on relative value, in the same manner as unit entitlements were under the 1972 Act. The new Act introduces a valuer’s certificate recording the ownership interests which must be lodged with Land Information New Zealand. However utility interests are set based on a method chosen by the Body Corporate which must be fair and equitable having regard to the relevant benefits and costs to units. The Body Corporate can decide whether they wish to engage the assistance of a third party to calculate utility interests, such as a property maintenance expert or other suitably qualified professional. A valuer may also be of some assistance depending on the development. The intention of the regime is to reduce disputes in this area by enabling utility interests to better reflect a unit’s contribution toward certain Body Corporate expenditure. The key issues with this new concept is the lack of guidance in the new Act on how to recalculate utility interests and the possibility that owners that had hoped to benefit may in fact be disadvantaged depending on the method used. Exactly how this new concept will work should become clearer over time, but until then the matters is somewhat unclear. Caution is warranted and professional advice should be sought.
55. It is important to note that ownership interests and utility interests are exactly the same unless the Body Corporate reassesses them as different figures under the reassessment regime, or unless the developer sets separate ownership interests and utility interests figures at the outset of a new development when depositing the unit plan.

Carrying out alterations to the Unit

56. When a tenant wishes to carry out alterations to the unit, the terms of the lease will govern how this occurs and under what conditions. The landlord must remember that it has an obligation to the Body Corporate to obtain consent to work on a unit in certain circumstances. Under the 1972 Act, the default Body Corporate rules set out the circumstances in which the landlord must seek Body Corporate consent. Default rule 1(f) said “a proprietor shall make no additions or structural alterations to the unit without the consent of the Body Corporate”. Often registered amendments were made to this default rule to suit the Body

te’s needs. Under the new Act the consent requirement is no longer

contained in the rules and is now found entrenched in sections 79(e) and

80(1) (i). This means these sections apply in all situations and any amendment to these sections in the Body Corporate rules would be a breach of the rule amendment provisions in the Act, and will be an invalid rule amendment. These sections state that when an owner carries out work within its unit, Body Corporate consent is only required when that work materially affects other units or common property. There is no definition of “materially affects” in the Act, andCorpora
its application will need to be looked at on a case by case basis. Essentially sections 79(e) and 80(1)(i) set a higher threshold than the 1972 Act default rule on alterations, which should generally benefit landlords as consent will not be required as often under the new Act. If there is any uncertainly as to whether Body Corporate consent is needed advice should always be sought.

Dispute Resolution Regime

57. Many submissions were made on improving the dispute resolution regime while the 1972 Act was under review. Rather than limiting disputes to the court system as the 1972 Act did, the new Act introduces the Tenancy Tribunal to assist in resolving disputes using mediation and adjudication processes already in place under the Residential Tenancies Act. The dispute does not have to be residential in nature for the Tenancy Tribunal to be used, as its jurisdiction under the UTA 2010 covers both commercial and residential matters (subject to the limits below).

58. The Tenancy Tribunal has jurisdiction to hear disputes up to and including

$50,000 in value but it cannot hear claims relating to insurance or title of land

regardless of value. The District Court is able to hear claims above $50,000 and up to and including $200,000, but it can only hear insurance claims up to $50,000, and it cannot hear claims relating to title of land regardless of value. The High Court hears claims above $200,000 and all other claims that the Tenancy Tribunal and District Court cannot hear.

59. The new Act also states clearly who can bring claims under the Tenancy

Tribunal regime and those persons include (among others) other unit owners (i.e. other landlords), other tenants, and "service contractors" such as Property Managers, Building Managers, and Body Corporate Managers. The Building and Housing section of Ministry of Business Innovation and Employment website has many useful resources explaining the dispute process as well as application forms that can be completed on line (see [www.dbh.govt.nz/unit-titles)](www.dbh.govt.nz/unit-titles).

60. Sections 172 to 174 of the UTA clearly state that parties to an agreement cannot contract out of the unit title disputes regime. This means that where a unit title dispute arises under a commercial lease the regime in the UTA overrides any dispute resolution clause in a lease, such as an arbitration clause. However it is more than likely most disputes arising from leases of unit title premises would be between landlord and tenant and come under the terms of the lease. An example of a unit title dispute that would have to come under the UTA dispute regime, and not under any dispute resolution clauses in the lease, would be where a tenant

breaches the Body Corporate Operational Rules. Landlords and tenants need to be mindful of this point when drafting terms of a lease and dealing with disputes.

Conclusion

61. The UTA 2010 adds a further layer of complexity for landlords and it is important to ensure that leases reflect the reality of the building's Body Corporate situation, such as the Operational Rules, operating expenses, proxy appointments and unit alterations (to name a few) to ensure that the landlord doesn't get caught in the middle of their respective obligations to the Body Corporate and to the tenant.

Whilst the new Act has addressed some issues that hampered the 1972 Act, there is disappointment that the disclosure regime leaves disclosure of key information until after an agreement will have become unconditional, that there is little guidance on the utility interest regime, there may be some conflict in the building maintenance provisions in the Act, and the filing fees for filing disputes with the Tenancy Tribunal are too high.   The new Act is under review in 2013, but whether all of the shortcomings will be addressed is unknown at this stage.

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