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LAW·COMMISSION
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Report 59

Shared Ownership of Land

November 1999
Wellington, New Zealand

The Law Commission is an independent, publicly funded, central advisory body established by statute to undertake the systematic review, reform and development of the law of New Zealand. Its purpose is to help achieve law that is just, principled, and accessible, and that reflects the heritage and aspirations of the peoples of New Zealand.

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12 November 1999

The Honourable the Minister of Justice

Dear Minister

I am pleased to submit to you Report 59 of the Law Commission,
Shared Ownership of Land.

Yours sincerely

The Hon Justice Baragwanath
President

Preface

THIS REPORT WAS PRECEDED in January 1999 by a discussion paper (NZLC PP35) which was widely distributed. Its proposals for the phasing out of cross-leases received reasonably prominent media attention. There were about 40 submissions received from a variety of individuals and organisations. Appendix C is a list of those who made submissions. That list contains all the government entities and non-governmental organisations that might have been expected to wish to be heard on our proposals. The Law Commission is confident that it has amply performed its obligation to seek public comment and to consult interested parties.

This report has the same general structure as the preliminary paper, but some of the proposals in the earlier publication have been modified and others abandoned entirely in the light of points made to us in the submissions. One matter of understandable concern to many was the cost implications of the mandatory conversion of cross-leases that we proposed, and this report discusses in much greater detail than its predecessor both proposals to keep these costs to a minimum and our assessment of the likely scenario should there be no reform, as buildings at some not precisely foreseeable time in the future approach the end of their lives. There is much to be said for a stitch in time.

We were assisted in preparing this report by the same committee of experts that helped us with the discussion paper, namely:

JP Greenwood	Chapman Tripp Sheffield Young, Wellington
TA Jones	Glaister Ennor, Auckland
DW McMorland	Barrister, Auckland
GJ Shanahan	Rudd Watts & Stone, Auckland
R Thomas	Barrister, Auckland
JE Toomey	University of Canterbury

Virtually all the submissions we received were thoughtful and constructive. We were particularly assisted by the help given by the following:

JM Gunman
Alan Parkin and Roger Poole of Housing New Zealand

Bruce Manners, MD Morris and Bruce Purdie of the New Zealand Institute of Surveyors
Richard Cross

Ultimate responsibility for any inadequacies in the finished product is of course that of the Commission rather than any of those whose contribution we have acknowledged.

The draft statute has been drafted by V Wilson formerly of Parliamentary Counsel Office and now an associate in the Wellington office of Simpson Grierson. M Leaf was the Legal Research officer who worked on this project and DF Dugdale was the Commissioner in charge of the project.

1

Introduction

- 1 **T**HE NOT ENTIRELY PRECISE TERM “shared ownership” employed in the title to this report is intended to refer to the various methods by which proprietary or quasi-proprietary rights to defined parts of a single allotment of land and the structures thereon can be held by different persons. In New Zealand legislators were slow to respond to public demand for two particular types of landholding. One was the separate ownership of horizontally subdivided parts of a building of more than one storey which while always theoretically possible was never commercially attractive because of the complexity of the necessary ancillary easements. The other was the concentration of a number of dwellings (detached or not) on a single lot, in preference to a requirement that every separately owned home should be surrounded by its own curtilage of 32 to 40 perches. One of the concerns of this report is the legacy of the ingenious schemes devised by conveyancers to fill the void resulting from the absence of appropriate statutory provision to satisfy such market demands.
- 2 An early solution was the flat- or office-owning company in which the “owner” of each part of a building in fact owned a parcel of shares which carried with it the benefit of a lease or licence entitling exclusive occupancy of such part. This device was recognised by the Companies Amendment Act 1964 which, among other things, permitted the registration of such licences under the Land Transfer Act 1952. There was a hiccup when in *Jenkins v Harbour View Courts Limited* [1966] NZLR 1 the Court of Appeal ruled that leases or licences granted under such an arrangement were void as constituting a return of capital. To avoid the inconvenience of this result there was hastily enacted the Companies Amendment Act (No 2) 1965. The provisions first enacted as Part I of the Companies Amendment Act 1964 have been substantially re-enacted as Part VIIA of the Land Transfer Act 1952. Despite the provision for registration such licences tend not to be regarded by lenders as attractive securities.
- 3 The reason for the existence of flat- and office-owning companies effectively ceased with the enactment of the Unit Titles Act 1972. However, there seems no good reason to disturb flat- and office-

owning companies already in existence. Some people owning flats by this particular method are attracted by the power that can be conferred by the provisions of the constitution of a company to give other flat-owners absolute control as to who is to be permitted to buy or lease flats. Flat-holders are in this way able to exclude a new occupant whom they regard as unsuitable. (We received separate submissions from two shareholders in one Auckland flat-owning company suggesting, in effect, that the company had fallen into the hands of a coterie that abuses this and other powers. The suggestion made was that a flat-owning company should be obliged to convert to a unit title scheme if the company failed each year to pass a members' resolution positively favouring preservation of the company lease arrangement. Even assuming that the complaints in these two submissions are justified and that existing Companies Act machinery is inadequate to sort such matters out (issues which it is not the Law Commission's function to determine), the Commission does not favour changing the general law to solve problems that have arisen in this single instance.) But we think that no more such schemes should be created and this, judging from submissions received, seems to be the general view. Machinery already exists in the Unit Titles Act 1972 Part IV for the voluntary conversion of company lease schemes to unit title schemes. The merits of conversion are discussed in *Geddes v Devon Park Town Houses Limited* [1977] 1 NZLR 53.

- 4 The Municipal Corporations Amendment Act 1958 section 3(2) and the Land Subdivision in Counties Amendment Act 1958 section 2(2) provided that a lease of part of a building was not a subdivision of land. It was in reliance on this change in the law that the cross-lease system of "owning" flats was devised. Each cross-lease owner owns a lease (usually for 999 years) of a flat together with an undivided interest as tenant in common in equal shares with the other cross-lease owners of the entire allotment.
- 5 The passing of time brought refinements to the scheme. District Land Registrars are prepared to issue a composite certificate of title including both the leasehold interest and the undivided share in the allotment. The practice has evolved of each lessee being granted an area that the other lessees are excluded from using by a restrictive covenant. The effect of the Municipal Corporations Amendment Act 1971 section 35 and the Counties Amendment Act 1971 section 37 was to enable cross-leases of separate buildings on the same lot. Among other things, this has greatly facilitated the spread of "infill" housing, that is to say the erection and

disposition of new detached residences built on parts (usually the former back gardens) of residential lots. Statistics are not kept of the number of cross-lease developments nationwide, but we have been told by Auckland City that in its area there are some 39 000 individual flats that are owned within about 15 000 cross-lease arrangements.

- 6 Despite these improvements the cross-lease scheme is (for reasons particularised in chapter 2) irremediably flawed. In the Commission's view the policy objective should be the replacement of cross-leases either by subdivisions or by unit titles.
- 7 Under the Unit Titles Act 1972 a statutory code was established enabling ownership, in the strict sense, of strata estates in residences and business premises. Common property (driveways, stairwells and the like) is held by proprietors in shares defined as later discussed. There is a body corporate in which all the proprietors are the corporators with obligations that include the payment of rates and other outgoings, the maintenance of common property, and the levying of proprietors to procure the funds necessary for these purposes. In the view of the Commission, this scheme, admirable though it is, needs refining in the light of experience of its operation which includes its use in contexts (mixed multi-purpose developments, for example) not foreseen by those who devised it.

2 Cross-leases

THE PROBLEMS

- 8 **T**HE BASIC PROBLEM with the cross-lease system is perhaps public lack of awareness that there are problems. Here is one valuer's anecdote:

My firm was recently involved in the valuation of a cross-lease unit (1 of 2) where the owner of the rear flat had happily installed a substantial swimming pool, barbeque and pool surrounds (\$15,000) on the common ground. The owner of the front unit would be quite within his rights to spend his leisure time in the pool and cook Sunday Brunch on the barbeque!! (KB Garland (1986) 31 New Zealand Surveyor 343).

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 on whose recommendation they bound themselves to their purchase that they would be "as good as" owners. But of course they are in fact neither owners nor as good as owners. To date the number of occasions on which differences resulting from this have led to litigation is not great. 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. (The sorts of problems that can arise are exemplified by the case of *Hopper Nominees Ltd v White and Dryden*, (28 February 1997) unreported, High Court, Auckland, CP 199/94, discussed by DW McMorland in (1997) 7 BCB 276. In that case, a two flat cross-lease scheme had been surrounded by the spread of a suburban shopping area. A, in breach of its lease, had removed the flat and garage of which it was the cross-lease owner. B, in breach of its lease, was using the other flat for commercial purposes. A and B had been unable to agree on what their respective rights were. Williams J

indicated that the Court would order sale of the land on A's application, but that apportionment of the proceeds would reflect the greater value of B's entitlement.)

- 9 Under the cross-lease scheme the rights of the cross-lease owner depend not on settled legal rules but on the terms of the particular lease. One important difference between a lease and a freehold title is that a lease is susceptible of termination by re-entry for breach of its terms. The terms will have been settled by the developer (who may have been happy to take his money and run), and often in practice are found to be unsuitable or inept. The purchaser further down the line is unable to negotiate with the vendor for a variation of terms because this would necessitate the agreement of the other cross-lease owners; the purchaser must take the lease or leave it. Not infrequently the cross-lease method will have been used in situations (usually a large number of flats) where it is excessively cumbersome for the circumstances. Many covenants in cross-leases are drafted as personal covenants and do not pass the test at common law of "touching and concerning the land". The consequence is that they do not run with the land so as to bind successors. Clauses conferring power of attorney are an example.
- 10 At best, the lease is only of the original building site. Unless a new flat plan has been deposited and new leases registered, a cross-lease owner has no lease of any horizontal addition, for example, a conservatory or a carport. We say "at best" because some leases are of only the original building or part of it, as distinct from the building site. Some deposited flat plans are endorsed "Boundaries of areas to be leased are the external faces of exterior walls (structures, roofs) unless otherwise shown". In these cases what we have said of horizontal additions applies also to vertical additions. When the cross-lease owner comes to sell, the existence of such additions is a defect in title. The defect can be remedied only by the expensive process (which requires the co-operation of all the other cross-lease owners in the development) of cancelling the lease and replacing it by a lease that includes the addition. A general lack of awareness that this is the legal position leads quite innocent vendors into trouble. The problem is sufficiently widespread to have led to a change to the standard printed form of agreement for sale and purchase. This change does no more than regulate as between vendor and purchaser the consequences of such defects in title. It does nothing to solve the underlying problem. (See form of agreement for sale and purchase of real estate settled by the Real Estate Institute of New

Zealand Incorporated and the Auckland District Law Society Seventh Edition July 1999 clauses 5.3 and 7.3.)

- 11 The position where the underlying title is itself leasehold is even more hazardous. Each cross-lease owner is liable to the head lessor for all the rent due under the headlease (*Hawkes Bay Regional Council v Plested* [1994] 2 NZLR 1, 7). The lease of the flat has to be for a shorter term than the headlease and renewed on expiry of the headlease.
- 12 The physical or economic life of a flat is of course likely to be far shorter than 999 years. Different buildings on the same lot may have different life expectancies. This will usually be so where a new "infill" house 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.

HOW WE GOT INTO THIS SITUATION

- 13 The origin of the cross-lease system was as a means of exploiting a loophole in the rules restricting subdivision of land. It is not surprising that the use of legal machinery designed for one purpose causes problems when used for a different purpose. Whatever the social or resource management objectives intended by a prohibition on subdivisions in circumstances where cross-leases are resorted to, they have been frustrated. There is no physical difference, and therefore no genuine difference from a town planning point of view, between cross-leasing and a straightforward subdivision. So the sensible course is to substitute for cross-leases either subdivision or, if that is inappropriate (for example, in the case of flats in a building of more than one storey), unit titles. There is no reason why territorial local authorities should not exact precisely the same requirements whether the tenure is freehold or cross-lease. Many of them already do so and all of them should be encouraged to do so. Examples of remaining differences, difficult to justify on any logical ground given the absence of physical difference between subdivision by way of cross-lease and any other type of subdivision, are that density of development may be determined by the area of the total allotment ignoring internal exclusive use boundaries, daylight controls may similarly be imposed by reference to the perimeter boundary not internal boundaries, and provisions as to reserve fund contribution and for sewerage and storm water reticulation may differ.

- 14 In the view of the Commission cross-leases should be phased out and replaced by subdivision or unit title. Later in this report we propose provisions under which, in certain circumstances, a body corporate can under the Unit Titles Act be dispensed with. This should make conversion of a cross-lease scheme to unit titles in those circumstances more acceptable. Whereas in the case of company leases it is sufficient to forbid the creation of new schemes, in the case of cross-leases the Commission believes there should also be a positive programme of conversion, either to subdivision or to a unit title scheme. In our discussion paper (para 15) we suggested that what is needed is:
- (a) the voluntary conversion of cross-lease schemes to subdivisions;
 - (b) the prohibition of new cross-lease or company lease schemes; and
 - (c) the mandatory conversion of cross-lease schemes to unit title schemes or subdivisions. (Part IV of the Unit Titles Act 1972 already contains machinery for the voluntary conversion of company lease and cross-lease schemes to unit title schemes.)

PHASING OUT

- 15 Of these three objectives there was widespread support in submissions to us for the first: the immediate prohibition of new cross-lease schemes. The Real Estate Institute of New Zealand Incorporated, the Auckland City Council, and the Property & Land Economy Institute of New Zealand Incorporated all support that proposal. The New Zealand Institute of Surveyors believes that "it would be a sensible course to phase out cross-lease ownership in favour of fee simple subdivisions or Unit Titles". Local Government New Zealand says "We acknowledge that cross-leases have created some problems and ideally, no more should be created." We are told by the New Zealand Law Society that while about 50 per cent of legal practitioners strongly favour an end to cross-leases and that "They believe that any attempt to introduce legislation to cure defects is not a realistic option, and, if achieved, would merely prolong a form of ownership which is artificial and confusing", other practitioners take a contrary view. Housing New Zealand supports the phasing out of the cross-lease title system over a 10 year period.
- 16 There was of course no objection to proposal (b): the voluntary conversion of cross-lease schemes. There was however criticism of proposal (c): mandatory conversion. One argument advanced was that those holding under cross-lease schemes see as an advantage the regulation that is possible under such a scheme of the behaviour

of neighbours living in very close proximity. 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 or (in the case of unit titling) under body corporate rules under the conversion process we propose. (Any reader minded to dismiss as frivolous the reference in this context to a domestic pet is referred to the final bullet point in paragraph 58.) A far more common argument opposing the reform proposed was the cost of conversion, particularly as it may affect older people of modest means. This important question of the cost of mandatory conversion we discuss below. We propose that the objective of 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. The intended consequence of this would be that to enable any other dealing to be registered the cross-lease owners will need to convert the cross-lease scheme to a subdivision or a unit title scheme.

THE MECHANICS OF CONVERSION FROM CROSS-LEASE TO SUBDIVISION

- 17 In no case would we expect there to be a need to redefine the external boundaries of the previous existing allotment. There may well be cases where the definition of internal boundaries on the existing cross-lease flat plan is sufficiently precise to enable the Registrar, after consultation with the Chief Surveyor, to dispense with the deposit of a new plan of definition pursuant to the proviso to the Land Transfer Act 1952 section 167(1). We are told that in Auckland, but not everywhere else, for a decade or so all cross-lease flat plans were accompanied by a survey sheet which demonstrated accurately the fixing of building positions relative to allotment boundaries but that this practice was abandoned on the coming into force, on 1 May 1999, of the less demanding requirements of the National Cadastral Survey Guidelines necessitated by the Survey Regulations 1998 (SR 1998/441). We are told that although the position varies from Registry to Registry, in many cases covenant boundaries have been accurately defined. We would expect that in most cases a plan of definition will need to be deposited to define the boundaries of the newly created allotments.

18 Because of the costs associated with this we considered other options:

- Under section 167(2) a District Land Registrar may in his discretion in cases of hardship dispense with the deposit of a plan and issue a title "Limited as to Parcels", that is, with the boundaries not guaranteed. The hardship referred to is, however, confined to hardship linked to the value of the land. In our preliminary paper we rejected, as a solution to the problem of the cost of surveying, the issue of titles limited as to parcels in every case on the basis that this would merely postpone the need to incur survey costs. This view was generally accepted by those who made submissions. It was submitted to us by a senior Christchurch conveyancer that the market would eventually force the registered proprietors of such titles to take the necessary action to have full titles issued. It depends of course on what is meant by "eventually". There are, the New Zealand Institute of Surveyors pointed out to us, still dealings with limited titles 75 years after the Land Transfer (Compulsory Registration of Titles) Act 1924 came into force. The analogy is no doubt, by reason of the more rapid turnover of residential than other properties, less than perfect. The matter is one on which opinions may legitimately differ, but in the Commission's view the integrity of the Register, which is too precious to be jeopardised, prevents the adoption as a general solution of the issue of titles limited as to parcels.
- We gave particular consideration to a paper *Flathold: A New Estate in Land* (Department of Justice, Wellington, 1989) by Mr Bryan Hayes, the then Registrar-General of Land, which shares with this report the objective of doing away with domestic cross-leasing, but proposes as a solution the creation of a new estate in land. In the end we decided that the precise solution proposed by Mr Hayes added an unnecessary complication to the law. We have, however, been assisted in arriving at the recommendations we do make in this report by our reading of Mr Hayes' paper and by the depth of experience and knowledge on which it is founded.

THE CONVERSION APPLICATION

19 The procedure which we propose for converting a cross-lease scheme to a subdivision, where all interested parties are in agreement, is the lodging of an application with the Registrar signed by the parties setting out what has been agreed as to

ownership of lots, easements and restrictive covenants, by a reference to a plan of definition under section 167 deposited for the purpose or to any substitute accepted by the Registrar. The legislation should provide that consent to the conversion by any person other than the cross-lease owners is not needed, and that upon issue of the new certificate of title the title should be subject to any existing registered interest to be noted on the certificate of title in such a manner as to preserve its priority. The situation where there is a material difference between encumbrances registered against the land and those registered against the cross-lease will rarely be encountered but is possible (as the case of *Harman & Co Solicitor Nominee Company v Secureland Mortgage Investment Nominees Limited* [1992] 2 NZLR 416 demonstrates). In the overwhelming majority of cases, the Registrar can be expected to encounter no difficulty in determining priorities, following what is in effect a statutorily authorised merger of the lessors' and lessees' interests. In the very rare case where he is in doubt, the Registrar can protect the position by lodging a caveat under section 211(d).

20 In our Preliminary Paper (para 15) we said:

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.

The New Zealand Institute of Surveyors supported this view. They said:

In terms of conversion of existing cross-leases there should *not* be a revisiting of the scheme by local authorities as the process will only be a change in the form of tenure and not a change in land use. It should only be processed by Land Information New Zealand and the Local Authority does not need to know.

The Real Estate Institute of New Zealand Inc said:

The REINZ supports the contention of the Commission that Territorial Local Authorities should encourage conversion of cross-lease to unit-title or subdivisions and be prevented from thwarting this desirable objective by invoking their powers under the Resource Management Act. It would be clearly inappropriate for them to require the physical

upgrading of a building when there is no change in use, or effective ownership, but merely the “tidying-up” of the method of tenure.

Local Government New Zealand said:

The Local Government sector is extremely concerned about the proposal that cross-leases become subdivisions without local authority approval. Local Authority approval is necessary to allow conditions regarding rights of way, services/infrastructure and party walls, especially when the District Registrar is unlikely to police these matters.

But the present mess is essentially the consequence of territorial local 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.

- 21 Auckland City advanced a number of reasons why a subdivision consent to the conversion under the Resource Management Act should be required, of which probably the most cogent was a concern for the integrity of the Council’s property database. Housing New Zealand suggested as a compromise that there be a requirement that territorial local authorities certify on any survey plan to be deposited that “the boundaries defined on the plan reflect the occupation of the site and/or the dimensioned covenant areas on the existing cross-lease plan”, observing “This mechanism would give the [territorial local authority] the opportunity to update its records, could attract a nominal fee and should not be able to be withheld”. The Law Commission remains of the view that its original proposal was the correct one but to it could be added a provision that a notice comparable to a notice of sale should be given to the territorial local authority (see Rating Powers Act 1988 section 106).
- 22 We have considered various ways of keeping as low as possible the costs of the easements and restrictive covenants likely to be needed in the case of many conversions. We considered, for example, recommending the enactment of a schedule of standard terms for a party wall easement as a new part of the Seventh Schedule to the Land Transfer Act. In the end, however, the neater solution seemed to be to combine the approach of the Unit Titles Act 1972 section 11 with the requirement of a notation against the title of the sort to be found in the Local Government

Act 1974 section 461. It will be open to the parties either as part of the proposed section 121S application or subsequently either to waive the rights conferred by this section (and therefore the need for a memorial drawing attention to their existence) or to substitute for such general provisions a more precise formulation. A decision whether or not to adopt the last mentioned course will no doubt be governed to a large degree by the cost of a survey, which in most cases will be necessary to properly define the easement. Our draft makes it clear that the Local Government Act 1974 section 348 does not apply to any rights of way created as part of the process.

- 23 It seems to us appropriate that no registry fees should be chargeable in respect of conversions. 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 Unit Titles Act 1972, the legislature failed to harken to proposals that the creation of further cross-leases be outlawed.

The “composite” certificate of title is a creature of district land registrar made law; there appears to be no serious breach in principle of the Land Transfer Act but there is no express authority to issue such certificates of title. (Hayes, op cit pg 9, at para 4.4)

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 COST OF CONVERSION

- 24 The various cost-saving measures discussed to this point are:
- dispensing with mortgagees’ and other consents;
 - dispensing with territorial local authority consents;
 - eliminating or reducing the cost of easements and restrictive covenants; and
 - dispensing with registration fees.

This leaves an irreducible minimum of legal and surveying costs. As to that balance, we proposed in our preliminary paper a delay before compulsion bites. We said (paras 15–16):

Obviously it is desirable to avoid a situation in which pensioner unit holders are suddenly landed with the survey and legal costs necessary to convert their form of tenure. We propose that objective (c) be achieved indirectly, by a prohibition after 10 years of the registration

of any dealing affecting a cross-lease. (The view has been expressed that a shorter period, say 5 years, would be preferable, and we invite comment on that point.) . . . From the point of view of parties likely to be affected by the financial imposition of converting a lease, it seems to us that this approach is workable. Unless the parties choose to act sooner, in most cases conversion costs need not be incurred until after 10 years, and even then only on the occasion of the registration of a dealing by any of the unit holders in the scheme.

25 Much of the concern that has been expressed to us has been the result of one or two media reports (for example, an article in the *Taupo Times* on Friday 23 April 1999, which triggered a batch of anxious letters from local readers) failing to make it clear that we were not proposing immediate expenditure. We think that the statute should provide for an Order in Council to fix the date for mandatory conversion, such date to be not less than 10 years after the royal assent to our proposed statute. This delay will mean that:

- a substantial proportion of affected leases will have been acquired with notice of the pending obligation; and
- where there has been no change of ownership between the date of our statute and the appointed day, those affected will have a considerable period in which to make appropriate financial arrangements.

26 The urgent matter is stopping any more cross-leases. Our proposed requirement of an Order in Council will enable the passing of our proposed statute, while leaving it for the government of a decade hence to make the final decision as to when the provision as to mandatory conversion should be brought into force in the light of such matters as the then economic climate and the number of voluntary conversions. An alternative method of allowing reform to proceed, while postponing the incurring of the survey costs, would be to permit the issue of titles limited as to parcels, but this would not be a sensible solution partly for the reasons advanced in paragraph 18 and partly because such a solution would not work if the appropriate conversion was to unit title.

THE CONSEQUENCES OF INACTION

27 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. If the dwellings have all been built at the same time they will probably have roughly the same

life expectancy; but a new infill house may, as already noted, still retain value when the original house is past repairing. One may guess that few, if any, of the cross-lease dwellings built since 1971 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 the 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 (which unlike our proposals will involve jumping through whatever are the then resource management hoops) or to surrender their leases and sell the whole property en bloc. If there is no agreement as 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 almost certainly will not). A partition application might be a possibility, but this is likely to be very much more expensive than the proposals 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 beyond repair stage. It is surely better to try and sort out such potential problems now, than to shut one's eyes to them.

CONTESTS AS TO CONVERSION TERMS

- 28 To this point we have been considering the mechanics of conversion on the premise that all interested parties are in agreement. One effect of the requirement of mandatory conversion is that it becomes necessary to provide a mechanism to resolve disputes among interested parties where it is proposed to convert cross-leases to freehold. Where it is proposed under the Unit Titles Act 1972 Part IV to convert cross-leases to titles under that statute, there is a provision analogous to the one we propose in section 58 of that Act. There should be a provision to the effect that any cross-lease owner should have the right to apply to a District Court to determine before the date appointed for mandatory conversion whether there should be a conversion (taking into account among other things any financial hardship to the opposing owners), and, if yes, the terms of such conversion; and a provision that any owner on or after the date appointed

for mandatory conversion may apply for an order settling the terms of conversion including any restrictive covenants.

The Unit Titles Act 1972 section 58 should be amended to substitute reference to a District Court for the High Court. We would expect the terms of conversion, in respect of which differences could arise, to include the terms of any easements and restrictive covenants not covered by our paragraph 19 proposal and the boundaries of the parcels of land to be vested in the respective flat holders, particularly where there are no formally defined exclusive use areas. Even where there are formally defined restrictive use areas, the fact that the normal sausage-flat configuration will give a larger parcel to the end units and that parcels may have different economic values (if one or more but not all provide space for future development, for example, or if the consequence of the dimensions of one or more but not all being that a use after subdivision will not conform with planning requirements) may be a source of difference. The suggestion was made to us that the tribunal to which these applications could be made should be the Land Valuation Tribunal. Some applications may well involve valuation issues, and the element of judicial specialisation that would result from the proposal is attractive, but we decided in the end that there would not be enough applications on which valuation issues arise to make this a suitable solution.

Our recommendation is therefore that jurisdiction should rest in the District Court, but we hope that it is possible to provide a procedure that is quick, efficient and informal and involves, where practical, specialist judges.

CONVERTING LEASEHOLD INTERESTS FROM CROSS-LEASE TO UNIT TITLE

- 29 Ground lessors are usually reluctant to agree to unit title schemes because the Unit Titles Act 1972 section 27 abolishes their right of re-entry and for other reasons that have been expressed by John O'Regan as follows:

The most important starting point is that the lessor must consent to the deposit of the unit plan (s 5(1)(f)). If acting for a lessor who has been asked to give such consent, probably the best advice that one can give is: don't – for the following reasons –

- (i) The lessor's consent is not required to any future dealing with the stratum estate in leasehold including a transfer of the estate (s 24).
- (ii) The liability of the original lessee and subsequent assignees prior

to deposit of the plan may be terminated on deposit of the plan – see *New Zealand Railways Corporation v Body Corporate 64686* (1990) 1 NZ ConvC 190, 500.

- (iii) The effective lessee becomes the Body Corporate with a pro-rata guarantee by unit proprietors (in proportion to unit entitlement) (ss 23 and 26).
- (iv) Rights of forfeiture, re-entry and distress are lost (s 27). As a rather cumbersome alternative to those remedies, a lessor may, under section 28, apply for appointment of an administrator (a right which all creditors of the Body Corporate enjoy under section 40) or for cancellation of the unit plan (again a remedy available to all creditors of the Body Corporate in terms of section 46).
- (v) The lease does not expire on the date on which it says it is to expire. Instead it continues until certain events occur as set out in section 29.

(John O'Regan and Rod Thomas *Cross Leases and Unit Titles: Problems and Solutions*: New Zealand Law Society Seminar Booklet (Wellington, 1994) para 7.6(6).)

We think that Part IV of the Unit Titles Act 1972 should be amended to make it clear that the head lessor, despite section 5(1)(f), does not have any veto on a transfer from cross-lease to unit title. As a quid pro quo we suggest that section 27 do not apply to unit title schemes converted from cross-lease schemes.

3 Unit titles

PHYSICAL DIMENSIONS OF UNITS

30 **T**HE TERM UNIT is defined in section 2 of the Unit Titles Act 1972 to mean the following:

unit, in relation to any land, means part of the land consisting of a space of any shape situated below, on, or above the surface of the land, or partly in one such situation and partly in another or others, all the dimensions of which are limited, and that is designed for separate ownership

On the basis of this definition the unit could be:

- a polyhedron of space defined without reference to any building;
- a polyhedron of space forming part of a building; or
- a polyhedron of space which includes the whole or part of a building.

Our preliminary paper discussed various provisions which had, or arguably had, the effect of carving down the breadth of the definition of "unit" in section 2. There was general agreement among those who made submissions on this point that any ambiguity should be resolved. It is clear that the effect of requiring the boundaries of the polyhedron to coincide with the physically ascertainable parts of a building, would be that the owner of the polyhedron would be deprived of one means of excluding interference with his privacy and views and of extending his building without the complications attendant on redefining the shape of his polyhedron.

31 It is important to keep separate in one's thinking what are three distinct considerations:

- what real property law should permit;
- what resource management and other public health and welfare considerations should prohibit; and
- what should be regulated in the interests of consumer protection.

32 On the first of these three points, there is no reason why as a matter of real property law (subject always to the practical need

for proper monumentation for identification purposes) polyhedrons not bounded by either part of a building or the earth's surface should be prohibited. The second point was a matter of concern to the framers of the Unit Titles Act 1972, and explains such provisions as section 5(1)(g) (a troublesome provision amended in 1973 and in 1979) and section 5A (added in 1979). Since then, however, there has been enacted the Resource Management Act 1990 which includes the deposit of a unit plan within its Part X definition of "subdivision". The effect of this and other statutes and delegated legislation is that polyhedrons defined without reference to buildings or the earth's surface need not be prohibited by the Unit Titles Act for resource management or like considerations because such considerations are regulated by that other legislation.

- 33 As to consumer protection, the argument is that purchasers of units forming part of the early stages of a development are entitled to knowledge of what is intended in the later stages, but in this respect there is no essential difference between the purchasers of unit titles and the purchasers of lots in an ordinary subdivision. In either case, to the extent that future development is material to such purchasers, they can stipulate for appropriate covenants as a term of their contract of sale. We return to this issue in paragraph 52.
- 34 Our recommendation therefore is that the Unit Titles Act 1972 should be amended to make it clear that no surface of a principal unit needs to be bounded by a building or the earth's surface but that such a unit may be wholly made up of open air space. (It will be necessary to return to this topic when we come to discuss the statutory provisions for staged development contained in Part I of the Unit Titles Amendment Act 1979.) As part of the reform proposed, the Unit Titles Act 1972 section 5(1)(g) and section 5A should be modified and R33(1) of the Survey Regulations 1998 (SR 1998/441) should be revoked.

THE NEED FOR A BODY CORPORATE

- 35 In our preliminary paper we observed (para 24):
- The requirement for body corporates typically operates efficiently and well in the case of commercial premises and of residential premises that consist of a large number of units or are owned by commercially sophisticated persons; in other cases body corporates are frequently little understood and their existence ignored. This neglect can lead to problems when, for example, a unit holder wishes to sell and a section 36 certificate is requisitioned. In the view of the Commission,

it would do no violence to the scheme of the statute to dispense with a body corporate in the case of very simple schemes. Eligible schemes can be defined as those with no common property other than driveways or party walls (thus only single storey projects would be included).

Our draft statute gives an extended definition of relevant common property.

We also observed (para 25) that:

. . . the developments eligible to elect to operate without bodies corporate will by definition be so small and simple that the compliance costs of providing a body corporate are largely wasted and any alternative machinery is unnecessary.

- 36 The submissions received broadly agreed that such a problem as we suggested did exist. There was a suggestion that a perception of the requirement of a body corporate as an unnecessary complication and a continuing expense contributed to the reluctance to abandon cross-leases in favour of unit titles. The concerns expressed in the submissions we received in response to our suggestion of dispensing with body corporates in some circumstances were these. First, it was suggested that the body corporate should be retained where the number of units exceeds four. The Commission accepts that there is merit in a ceiling figure but recommends that it be six. Housing New Zealand pointed out with perfect logic that the developments we define as eligible for dispensation with a body corporate would be entirely suitable for subdivision and that this would be a preferable alternative. We agree, but subdivision raises the issue of cost already discussed in the context of the conversion of cross-leases. We recommend that there be available in the simple cases with which we are concerned subdivision on terms analogous to our proposal for cross-leases, but that retention of unit titles with elimination of the body corporate should be available as a cheaper alternative. Some concern was expressed that abolition of the body corporate could leave an administrative vacuum, and at the absence of a process to call the body corporate back from the dead. These concerns are partly met by our proposed ceiling in the number of units above which the body corporate may not be dispensed with. In practice, the absence of formal administrative processes is not a problem in cross-leased developments of comparable size. Moreover, it should not be overlooked that as a last resort section 40, which provides for the appointment of an administrator, is available. This section, contrary to our working paper proposal, should continue to apply, and will need some refinement to govern the situation where there is no body corporate.

- 37 The procedure we recommend for dispensing with a body corporate in the case of a new scheme or for the abolition of an existing body corporate is to be found in section 16 of the draft statute in Appendix B.

UNIT ENTITLEMENT

- 38 Under section 6 the statute provides for the assignment to every principal unit of a unit entitlement on the basis of the unit's value in relation to the other units. This entitlement is the basis of various determinations set out in section 6(3) and includes: the ownership of common property in section 9; the apportioning of levies among unit holders in section 15(2)(c); the apportionment of entitlement if a plan is cancelled in section 45(7); and voting rights in clause 27 of Schedule 2. A fundamental flaw in this scheme is that it makes one test do too much work. The basis of the entitlement on cancellation is not necessarily an appropriate basis for apportioning liability for share of outgoings. A lift, for example, may be of little or no use to a ground floor owner. This fact may be highly relevant to the apportionment of outgoings but have no relevance to entitlement on cancellation of the plan or on voting rights.
- 39 Another flaw is that relative values may change during the life of the building. A view from a particular unit, for example, may be built out. There may be zoning changes which allow ground floor units to be used as shops or upper levels to be used as serviced residential apartments or a hotel. A building that is only part of the polyhedron that comprises a principal unit, may be extended horizontally or vertically.
- 40 On the first of these points, section 33, relating to repairs and other works, already acknowledges that if the cost of such works does not benefit all units equally, it should be apportioned according to actual benefit. There is, in practice, a difficulty in determining whether particular expenditure is governed by this section or by section 15(2)(c) which provides for a levying in proportion to unit entitlement. Section 37(5) permits varying the powers of the body corporate "other than those conferred or imposed by this Act" which of course includes section 15(2)(c). We think the solution to this part of the problem is a provision allowing differential levies along the lines of section 33(a).
- 41 As to entitlement for voting purposes and on cancellation, there should be provision for varying the entitlement at any time before

cancellation by unanimous agreement. There should be further provision for an application to the court by an aggrieved party if other owners fail to accede to a proposal by him for reassessment of the entitlement of his unit or that of another.

INSURANCE

42 In our preliminary paper (para 31) we wrote:

Section 15(1)(b) imposes on bodies corporate an obligation to insure all buildings and other improvements. It is not necessary or appropriate that this obligation should apply to stand-alone buildings contained in a unit space. We recommend amending section 15 by inserting subsection (2A)

(2A) Despite subsection (1)(b), the body corporate is not required to insure and keep insured any building on the land that is a stand-alone building contained in a unit space.

Although this proposal was supported by some who made submissions, others pointed out that in practice the effect on the balance of units forming part of a complex of an unrepaired stand-alone building was such that the provision in section 38(3) – to the effect that every unit proprietor has an insurable interest in every other unit – was not just a statutory fiction but a plain statement of fact. As put by the Property and Business Law Committee of the Auckland District Law Society “who wants the dwelling next door to be burnt down and be under insured?” This point can, we think, be met by making our proposed provision dependent on the unanimous agreement of all the proprietors. Our proposal will include provision for such a resolution in the Second Schedule, which will be valuable for searching purposes.

DEALINGS IN COMMON PROPERTY

43 In our preliminary paper (para 32) we wrote:

Subsections 18(1) and 19(2) require the deposit of a new unit plan if common property is transferred or acquired. This is unnecessarily cumbersome in the case of, for example, a boundary adjustment. The sections should be modified to allow a dispensing power to the District Land Registrar in appropriate cases . . .

We repeat that proposal. The intention is that the variation should be properly noted in the supplementary record sheet. We make a similar proposal in relation to minor adjustments between units not involving any common property.

RECOVERY FROM DEFAULTERS

- 44 The Commission expressed the received view of conveyancing lawyers when it observed in its discussion paper that there are practical difficulties for body corporates in recovering levies from unit holders who do not pay what is due from them. (See, for example, O'Regan and Thomas, *op cit* pg 16, para 6.5(d).) We said (para 33):

There is of course a clear right to sue but to do so is all too often uneconomic. If the unit holder does not pay that unit holder's share of a levy then to meet its outgoings the body corporate has to borrow the money. Except for the interest provision in section 34A, there is at present no machinery for casting the cost of this on to the unit holder. As it stands, the only section under the Act imposing any sanction other than interest on the defaulting unit holder is the provision in clause 28 of Schedule 2 depriving such a unit holder of voting rights. (Even here a unit holder cannot be excluded from voting when unanimous resolution is required.) This deprivation is not usually much in the way of an incentive to payment where a unit holder is sufficiently thick-skinned not to pay what is owing.

- 45 The Commission in its preliminary paper considered three solutions to this problem. The first was to ensure that at least the body corporate will be paid if a dealing is registered against a particular unit. The way to do this is to require production to the Registrar of a section 36 certificate on registration of any dealing and to empower the body corporate to withhold such certificate if there are arrears. It may be noted that the South African Sectional Titles Act (No 95) of 1986 section 15B(3)(a)(i)(aa) is a comparable provision. It has been held that the effective preference this confers on the body corporate can be fitted conceptually into the statutory scheme of distribution among creditors of an insolvent as a cost of realisation: *Nel No v Body Corporate of the Seaways Building* (1995) (1) SA 130. Appropriate provisions to effect this are the following:

16A Certificate of proprietor's liability to be produced to Registrar

No Registrar may enter a memorial on a certificate of title issued under this Act if

- (a) the memorial relates to a mortgage, charge, transfer, or other dealing affecting the title; and
- (b) a certificate under section 36 was not included with that mortgage, charge, transfer, or other dealing when the instrument was presented for registration.

Amend section 36 by adding subsection (2):

(2) The body corporate may refuse to provide a certificate under subsection (1) in respect of a proprietor if there are moneys due from that proprietor to the body corporate and those moneys are unpaid.

- 46 The second was to make first mortgagees liable for levies by analogy with the Rating Powers Act 1988 section 139. To achieve this we recommended a new section 15A be inserted into the Unit Titles Act:

15A Recovery of contributions from first mortgagee

(1) If a proprietor defaults in the payment of a contribution levied under section 15(2)(c), the body corporate may recover that amount from any person who is a first mortgagee of the unit in respect of which the amount is payable.

(2) If a first mortgagee pays a contribution under subsection (1), the amount so paid, until it is repaid to the mortgagee, must be treated as forming part of the money secured by the mortgage and bears interest at the same rate, or, if the mortgagee so decides, is recoverable by him or her from the mortgagor or proprietor.

- 47 The Commission also gave some thought to recommending the insertion in the statute of a provision entitling the body corporate to exercise a power of sale in the event of a continuing default. An analogy is the power in Article 12 of Table A to the Companies Act 1955 for a company to sell shares over which it had a lien. There would need to be adequate provision for notice and other safeguards comparable to the duties imposed on a mortgagee.

- 48 These proposed solutions were welcomed by some and viewed with dubiety by others. It was said of the first that it was wrong to subject every transaction to the proposed procedure when a result that was better (because it lacked the element of delay) was obtainable by the usual processes of judgment and of execution. It was said further, that it could mean that a proprietor in dispute with his body corporate but anxious to have a dealing finalised could be held to ransom. It was said (correctly) of the second, that it was incomplete because it did not extend to liabilities under section 33 (relating to works not for the benefit of all units equally) and that in any event the liability was too open-ended for the proposal to be fair. It was said of the third that it was excessively heavy-handed when measured against the amounts likely to be involved. We think that the problems are really just

another unfortunate consequence of the unwise abandonment in the District Courts Rules of the default summons procedure that once provided a relatively swift and inexpensive method of recovering unpaid and uncontested debts. Our view is that it is important to pursue reform in the area of debt collection procedure. Since publication of our preliminary paper there has been decided the case of *Godoy v Body Corporate No 164980* (14 June 1999) unreported, High Court, Auckland, M Nos 1904–1906/98. Fisher J in that case held that the effect of section 34 was to impose liability on the proprietor for solicitor-and-client costs and other consequential expenses in circumstances analogous to non-payment of levies and amounts due under section 33. We were told by one practitioner that even before this case courts if asked to do so have been in practice prepared to award to body corporates solicitor-and-client costs (that is, complete costs incurred, not just a proportion). It remains the case however that the body corporate has no security for moneys due. For this reason, in this report we endorse the first two proposals suggested in our preliminary paper and referred to above. If problems arise in practice as a result of bodies corporate withholding section 36 certificates from desperate sellers to procure payment of disputed amounts, we would expect such disputes to be susceptible of swift resolution. The grant of an injunction requiring issue of the certificate subject to the dispute moneys being paid to a stakeholder is one obvious solution.

STAGED DEVELOPMENTS

- 49 In our preliminary paper (para 37) we advanced certain proposals in relation to Part I of the Unit Titles Amendment Act 1979 relating to staged developments. We do not advance those proposals in this paper, because it seems to us now (as it did to various parties making submissions on our preliminary paper) that assuming the acceptance of our recommendations in relation to the definition of units and in relation to unit entitlements, there has ceased to be any reason for the existence of the present statutory provisions for staged developments. The present scheme is in various respects troublesome. Section 5(5), by requiring strict adherence at subsequent stages to a Proposed Unit Development Plan deposited at the outset, can by its inflexibility impose substantial costs. As has been said by John O'Regan (op cit pg 16, 89):

3.9 In practice, this has proved to be a particularly burdensome and costly requirement. District Land Registrars have interpreted the words "in any way" literally and there can be no criticism of them

for that. The rationale of the prohibition against change is that the purchaser of the first unit in a staged development should know as much about the future environment into which he is buying as will the purchaser of the final unit to be erected. In practice, surveyors find that they may need, particularly where topography plays an important part in the siting of dwellings or where excavation is required prior to the siting of a dwelling, to effect slight changes to layout or location of a building. In larger developments, this can cause developers immense problems, not so much in the production of a new proposed unit development plan, but in obtaining the consent of a veritable army of existing proprietors and mortgagees – not to mention their advisers who seek, naturally, to be paid by the developer for their advice.

These problems can effectively diminish the advantages to the developer of section 6(3) of the Unit Titles Amendment Act 1979 which protects a developer against future changes to by-laws or to Resource Management Act requirements. It would be far more satisfactory if any variation to the original scheme were monitored by the territorial local authority. In our view, no further staged developments under Part I of the Unit Titles Amendment Act 1979 should be permitted. There are better methods.

- 50 It seems to us that once it becomes clear that a unit may be comprised wholly of open air space and once flexibility in unit entitlements becomes permitted, it then becomes possible to devise a neater and simpler approach to staged developments than that provided by the 1979 amendment. Essentially our proposal is that a developer who (perhaps because he is undercapitalised, or because he wants to test the market for his product) wishes to proceed in stages should be permitted to do so by subdividing the property to provide for the units it is desired to construct and sell immediately and for a unit designated a "balance unit". When he is ready to do so he can proceed to deal with the balance unit. Our proposed amendment provides that a subdivision of the balance unit (which is "a redevelopment" within the meaning of that term as defined) will not require the consent of the proprietors of the existing units despite section 44(4).
- 51 This arrangement, unlike the present law, will make the developer liable for his share of all outgoings.
- 52 It is said that the scheme provided by the 1979 amendment has the merit of providing a purchaser of an early unit with particulars of the balance of the development. (It should be noted that the present statutory provisions do not bind the developer as to when the balance of the work will be performed.) If the particulars of

the balance of the development are important to an early buyer, such a buyer can stipulate for the appropriate provisions as a matter of contract. Such a buyer's position is not essentially different, in this respect, from that of an early buyer of a lot in an ordinary subdivision. Examples of litigation in this class are *Kenneth Williams & Co Ltd v Thomas* (1980) 1 NZ ConvC 190, 583 (a subdivision) and *McKearney v Holdsworth Group Ltd* (9 June 1999) unreported, High Court, Auckland, CP 433/98 (a unit bought off the plans).

- 53 The main benefit to developers in a staged development plan is that under section 6 of the 1979 amendment approval for the whole project remains valid despite the passage of time and any changes to by-law or Resource Management Act requirements. This is the counterpart of the problem already discussed of the policing by the Registrar of departures from the original proposal. We think that in this respect too the mistake has been made of confusing what the law of real property should make provision for and the strictly extraneous question of Resource Management Act requirements. We may doubt whether the legislators of 1979 contemplated the long lapses of time between consent and performance that have in fact occurred. So O'Regan (op cit pg 16, para 3.11) comments in 1994 that:

There are examples around the country of incomplete developments commenced in the heady days of the mid-1980's and, since the "crash" on more or less permanent deferment.

The Resource Management Act 1991 has its own provisions as to duration of consents (sections 123–127) and there can be no real warrant for departing from them.

HERITAGE AND LIKE COVENANTS

- 54 It has become not uncommon for people to use the Unit Titles Act for arrangements where they join together to buy a place of natural beauty which is treated as part of the common property, while having unit titles in respect of homes erected on the property (tucked away in a stand of native bush for example). The legislation should make it clear that:

- (a) a heritage covenant pursuant to the Historic Places Act 1980 section 6;
- (b) an open space covenant pursuant to the Queen Elizabeth The Second National Trust Act 1977 section 22;

- (c) an agreement declaring land to be protected private land pursuant to the Reserves Act 1977 section 76; and
- (d) a covenant pursuant to the Reserves Act 1977 section 77.

are easements for the purposes of the Unit Titles Act 1972 section 4(3A), section 7(1), section 9(3), and section 17, but not for the purposes of section 45(5)(c).

EASEMENTS

- 55 Once a unit plan has been deposited, the effect of section 4(3) is that an easement may not be surrendered or varied. In O'Regan's words (op cit pg 16, para 5.3) "Suspended animation by statute thus prevails". We propose an amendment to allow, subject to the appropriate consents, the variation or surrender of easements appurtenant to the common property or to a particular unit.

BODY CORPORATE RULES

- 56 Section 37 and Schedules 2 and 3 provide rules: those set out in Schedule 2 may be added to, amended or repealed by unanimous resolution of the proprietors and not otherwise; those set out in Schedule 3 may be added to, amended or repealed by resolution of the body corporate at a general meeting. In section 37(5)–(6), there are limitations with the broad purpose of ensuring that the basic proprietary entitlement of unit holders is not interfered with and that body corporates stick to their knitting and do not engage in outside activities for profit. Section 42 provides that in cases requiring unanimity, where unanimity has not been achieved but a vote of 80 per cent in favour has been obtained, application may be made to the High Court to approve the change despite the lack of unanimity. The 80 per cent threshold means that unless there are at least five units a single proprietor can thwart any attempt at change.

In *Re Bell* (22 October 1992) unreported, High Court, Wellington, M243/92, Jaine J suggested that the purpose of the section was to prevent "the wishes of a large majority democratically determined" being "thwarted by the views of a small minority". In the Court's view:

The merits of the matter are best determined by those who are affected by it and have personal knowledge of it and after the matter has been considered by them with the opportunity for debate at a properly convened meeting of the Body Corporate. It should not be for the

Court to substitute its view on the merits of the proposal and this Court is not persuaded that the reasons for opposing the motions must be examined with a view to considering whether the minority view on the merits of the proposal should be upheld with the result that the wishes of the majority could not be given effect to.

This approach to the application of section 42 would seem effectively to reduce the requirement of unanimity to one of 80 per cent support.

- 57 Section 43 entitles any member of an outvoted minority to seek relief from the High Court. In *Spencer-Inight v Johnston* [1999] 3 NZLR 103 Randerson J indicated that the appropriate approach to section 43 applications was as follows:

While the focus of the section is undoubtedly upon the effect of the act proposed upon the minority unit holder or holders and whether it would be inequitable for that minority, the inquiry is not confined solely to the interests of the minority. All the circumstances of the case are to be taken into account and, in my view, that enables consideration of a broad range of circumstances including the position of the majority unit holder or holders. I accept the submission made on behalf of the defendants that the task of the Court is to assess the effects of the proposed act on an objective basis having regard to the established facts. The expression "inequitable" implies material unfairness or injustice to the minority unit holder. Although I consider regard may be had to the fact that the minority unit holder/s will be deemed to have been aware when acquiring their unit or units that they hold only a minority interest, such considerations could not be permitted to become a dominant factor for otherwise the section would be deprived of the remedial effect intended. Finally, it is clear that the Court retains a discretion to grant relief under the section even where it is satisfied that the effect would be inequitable for the minority. The section does not give any guidance as to how such discretion should be exercised and it is undesirable and unnecessary to attempt to do so here. (p 106)

This approach was approved in *Godoy v Body Corporate No 164980* (14 June 1999) unreported, High Court, Auckland, M Nos 1904–1906 198. Fisher J in that case reformulated the test in the following words:

Upon an application under s 43, the onus lies upon the complaining minority. In deciding whether a development would be inequitable to a minority, one is concerned with the interests of the majority as well as the minority. All the circumstances of the case are to be taken into account. The test is objective, but only in the sense that the minority's own personal opinions and feelings as to alleged inequity are not in issue. The personal circumstances of the minority can be taken into

account in considering the impact upon their individual circumstances. In deciding whether a proposed rule change would be equitable, one consideration which could occasionally be helpful is to compare the new rule with the way in which the statutory default rules in the Third Schedule to the Unit Titles Act would have impacted upon the same situation. It is reasonable to assume that the default rules are not inequitable per se, although of course steps taken in reliance upon more liberal rules in the meantime could make it inequitable to revert to something akin to the default rules. Finally, it may be noted that the Court has a discretion. Even where the Court concludes that the effect of an act of a majority would be inequitable for the minority, the distinct phrase "and if the Court so orders" imports an overriding discretion whether to intervene.

- 58 In the light of certain requests contained in our preliminary paper for expressions of opinion and the responses received, but also on the basis of recommendations from other sources, we recommend as follows:
- In our preliminary paper we asked "Should the requirement of unanimity be replaced by a percentage and, if so, what percentage?" All of those who responded to this question were of the view, with which we agree, that the fundamental nature of the Schedule II Rules makes a departure from unanimity inappropriate.
 - We asked "Should the 80 per cent threshold for section 42 applications be reduced and, if so, to what level?" It is recommended that a section 42 application be able to be made where the resolution is supported by the owners of one of only two principal units and in any other case where it is supported on a poll by two-thirds of all possible votes.
 - We asked whether the statute should contain some guidelines for the exercise of the section 42 discretion. The requirement of unanimity to vary the Schedule II rules is because of their fundamental importance to the rights of unit holders. In light of the "hands-off" approach of the High Court in *Re Bell*, the statute should provide that a section 42 order should not be made if the effect of the proposed resolution would be to change, so far as any opponent of the resolution is concerned, the essential elements of the scheme as they were when such opponent contracted to acquire his or her interest.
 - There should, out of abundant caution, be express power to establish a sinking fund for deferred maintenance and replacement items.

- The issues that the High Court has to date been required to determine under sections 42 and 43 are relatively minor. *Godoy & Anor v Body Corporate No 164980* referred to in paragraph 57, for example, concerned amendment of a rule allowing “small domestic animals” to exclude all except small birds or goldfish, the amendment being opposed by the owners of a Rhodesian Ridgeback dog 22 inches high at the withers. These sections should be altered to vest jurisdiction in the District Court or in an arbitrator if the parties so agree. Our earlier observations, in relation to contested applications for conversion from cross-leasing, as to the need for a procedure that is quick, efficient and informal and involves specialist judges where practical applies similarly in the context of section 42 and 43 applications.
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Jointly owned access lots

- 59 **T**HERE ARE MANY OLDER SUBDIVISIONS where instead of access lots being apportioned among the properties they serve, with each portion of the lot being subject to a right of way in favour of owners of the other portions, the method adopted has simply been for the owners of the rear lots to be co-owners of the complete access lot. This device seems to have returned to favour as a result of the enactment in 1978 of the Local Government Act 1974 section 279(2)(e) (now Resource Management Act 1991 section 220(1)(b)(iv)) coupled with section 321(3)(c). We are told that the change effected by these provisions was welcomed partly because of the difficulties of portrayal of very narrow strips particularly when colour was abandoned in 1972 and partly because the cost of some pegging was avoided. If the machinery used had been that of reciprocal rights of way, the rights implied by Schedule 9 of the Property Law Act 1952 would have been applicable. There is a need for a comparable provision in the case of jointly owned access lots. Under the general law a co-owner has no right to contribution to the cost of repairs (*Leigh v Dickeson* (1884) 15 QBD 60). To get around the problem the Commission recommends enacting the new sections 126H and 126I of the Property Act 1952 to be found in our draft statute. In the draft section included in our discussion paper the definition of access strip required provision of access to be the *sole* purpose of laying of the strip. Our present draft omits the word *sole* because such strips are often used for such additional purpose as piping, water, gas and electricity. We have substituted the term "access lots" for the term "access strips" used in our earlier draft to avoid confusion with the Resource Management Act 1991 section 237B which provides for "access strips" in a different context.
- 60 The proposal set out in the previous paragraph which was contained (but without the amendments we have referred to) in our preliminary paper was unanimously approved by those persons making submissions who commented on it. There were those making submissions who wanted the provision to go further. They say that the present provisions of the Property Law Act 1952 relating to rights of way needs strengthening; in particular, by

making express provision for an affected party or parties to take the initiative to have works carried out, to provide some machinery for determining what works are appropriate, and to resolve disputes along much the same lines as the Fencing Act 1978. There is obvious merit in these proposals but they are outside the scope of what we are trying to do in the present report, which is to sort out problems relating to shared ownership of land.

- 61 The Unit Titles Act 1972 section 5(1)(b) provides that a unit title can be deposited only if it comprises all of the land in one title. An accidental consequence of this provision is that that statute is unavailable in relation to a lot the access to which is comprised in a separate jointly owned access lot. There is no obvious reason why the provisions of the Unit Titles Act should not be available in those circumstances and we propose an amendment to section 5(1)(b) to make this clear.
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APPENDIX A

Summary of recommendations

- A1 No further flat or office owning companies (within the meaning of the Land Transfer Act 1952 Part VIIA) should be permitted.
- A2 No further cross-lease schemes should be permitted.
- A3 There should be provision for voluntary conversion of cross-lease schemes to subdivisions.
- A4 After a date to be fixed by Order in Council not earlier than 10 years after the royal assent to the proposed legislation ("the mandatory date"), no instrument should be registered against any cross-lease title, with the intended consequence that to enable any other dealing to be registered the scheme would need to be converted to a subdivision or a unit title scheme.
- A5 Until the mandatory date a District Court on the application of any interested party should have power to direct either a conversion to subdivision or a conversion under the Unit titles Act 1972 Part IV to unit titles.
- A6 Any dispute as to the terms of a conversion should be resolved by the District Court, and the Unit Titles Act 1972 section 58 should be amended to give that Court the appropriate jurisdiction in the case of cross-lease to unit title conversions.
- A7 The procedure for agreed cross-lease to subdivision conversions should be the lodging of an application with the Registrar signed by all interested parties. Such application should set out what the parties have agreed as to the ownership of lots, easements, and restrictive covenants, by a reference to a plan of definition under section 167 deposited for the purpose or to any substitute accepted by the District Land Registrar.
- A8 There should be a provision enabling the parties to elect to not precisely define in such application easements and other ancillary rights, but to rely on a broadly stated statutory entitlement analogous to the Unit Titles Act 1972 section 11. If this election is made, that fact must be noted against the new title.

- A9 The consent of no person other than the cross-lease owners to a conversion should be needed.
- A10 The entitlement of encumbrancers should be noted against merged titles in such a way as to preserve their priorities.
- A11 The territorial local government must receive a notice of the conversion analogous to the notice of sale required by the Rating Powers Act 1988 section 106.
- A12 If the title underlying a cross-lease scheme is itself leasehold and the cross-lease scheme is converted to a unit title scheme, the Unit Titles Act section 27 shall not apply to such unit title scheme.
- A13 There should be no Registry Office charge in relation to applications.
- A14 The Unit Titles Act 1972 section 2 should be amended to make it clear that a unit may be wholly comprised of open air space.
- A15 Where a Unit Titles Scheme comprises no more than six units and there is shown on the Unit Plan no common property other than driveways or party walls, in the case of existing schemes the owners of all the units should have the right either to dispense with the body corporate or to subdivide analogously to our proposals for cross-leases, and in the case of new schemes to dispense with the body corporate.
- A16 The Unit Titles Act 1972 should be amended:
- (a) to permit, despite section 15(2)(c), differential levies on a basis analogous to the "substantially for the benefit" formula in section 33;
 - (b) to permit varying unit entitlements at any time before cancellation by unanimous agreement or by the order of the Court;
 - (c) to give power by unanimous resolution to remove the obligation on bodies corporate to insure stand-alone buildings;
 - (d) to permit, despite sections 18(1) and 19(2), minor variations to the boundaries of the unit plan without deposit of a new unit plan subject to (with the consent of the Registrar) appropriate annotation of the supplementary record sheet, and to permit minor variations to the boundaries between units where the proprietors of those units and any mortgagees agree;
 - (e) to require production of a section 36 certificate to the District Land Registrar on registration of any dealing;

- (f) to make first mortgagees liable for levies under section 15(2)(c);
- (g) to disallow future use of the staged development procedure provided by the Unit Titles Amendment Act 1979 Part I;
- (h) to provide that a unit styled a Balance Unit may be subdivided by a new unit plan without the consent of the proprietors of existing units;
- (i) to make provision for unit title schemes to be subject to heritage and like covenants;
- (j) to reduce in certain small developments the 80 per cent threshold laid down by section 42 and enacting a guideline to the exercise of the discretion under that section;
- (k) to make express provision for a sinking fund;
- (l) to transfer jurisdiction under sections 42 and 43 to the District Court;
- (m) to amend the "all the land in one title" provision in section 5(1)(b) to exclude interests in jointly owned access lots; and
- (n) to provide as a new section 4(3B) that notwithstanding section 4(3) an easement appurtenant to any unit or the common property may be surrendered or varied with the consent of every proprietor and every mortgagee of all the units in the development.

A17 There should be provisions governing the maintenance and repair of access lots.

APPENDIX B

Draft Shared Ownership of
Land Act 200–

TABLE OF PROVISIONS

1	Short Title and commencement	6	New sections inserted
	Part 1		126H Rights implied in respect of access lots
	Amendments to Land Transfer Act 1952		126I Jurisdiction of Court in respect of access lots
2	Part to be part of Land Transfer Act 1952		Part 3
3	New Part inserted		Amendments to Unit Titles Act 1972
	Part VIIIB	7	Part to be part of Unit Titles Act 1972
	Prohibition and Conversion of Cross-Leases	8	Interpretation
	121Q Meaning of cross-lease	9	Subdivision of land into units
	121R Prohibition on dealing with cross-leases	10	Subdivision effected when plan deposited
	121S Voluntary conversion of cross-leases	11	Restrictions on deposit of plan
	121T What applications under section 121S must contain	12	Units including open space
	121U Incidental rights	13	Unit entitlement
	121V Variation, etc of incidental rights	14	Issue of certificate of title in respect of unit
	121W Notification of conversion of cross-lease to subdivision	15	Heritage covenants and other similar covenants
	121X Consent for conversion	16	Body corporate not required in certain cases
4	Fees	17	Duties of body corporate
	Part 2	18	Certificate of proprietor's liability to be produced to Registrar
	Amendments to Property Law Act 1952	19	Registration of transfers of common property
5	Part to be part of Property Law Act 1952	20	Additions to common property
		21	Recovery of contributions from first mortgagee

22	Certificate of proprietor's liability		
23	Rules		
24	Relief in cases where unanimous resolution required		
25	Relief for minority		
26	Redevelopment		
27	Minor adjustments to units		
28	New sections inserted		
	45A Proprietors may agree on different basis for determining shares in estates		
	45B Subdivision of land on cancellation of plan in certain cases		
29	Cancellation of plan following decision of Court		
30	Application and interpretation of this Part		
31	Effect of deposit of unit plan		
32	Second Schedule amended		
33	Repeal of Part I of Unit Titles Amendment Act 1979		
			Part 4
			Amendments to Resource Management Act 1991
		34	Part to be part of Resource Management Act 1991
		35	Interpretation
		36	Meaning of "subdivision of land"
		37	Prohibition on subdivision by way of cross lease or company lease
		38	Information to accompany applications for subdivision consents
		39	Restrictions upon deposit of survey plan
		40	Cancellation of prior approvals
		41	Approval of survey plans when esplanade reserve or esplanade strips required
		42	Transitional and saving provisions

A BILL INTITULED

An Act to reform the law relating to the shared ownership of land

BE IT ENACTED by the Parliament of New Zealand as follows:

1 Short Title and commencement

This Act may be cited as the Shared Ownership of Land Act 200–.

PART 1

AMENDMENTS TO LAND TRANSFER ACT 1952

2 Part to be part of Land Transfer Act 1952

- (1) This Part is part of the Land Transfer Act 1952 (in this Part referred to as the principal Act).
- (2) Except for section 121R, this Part comes into force on the day after the date on which this Act receives the Royal assent.

COMMENTARY

Section 1

- C1 The bill has been drafted on the premise that it will be subdivided into separate bills during its passage through Parliament.

3 New Part inserted

The principal Act is amended by inserting, after Part VIIA, the following Part:

"PART VIIB**"PROHIBITION AND CONVERSION OF CROSS-LEASES****"121Q Meaning of cross-lease**

"For the purposes of this Part, 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 the cross-lease itself.

"(2) Subsection (1) does not apply to

"(a) a transmission; or

"(b) a vesting order under section 99; or

"(c) the vesting of an estate or interest under section 99A; or

"(b) an application under section 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 this Act.

Section 3

- C2 *Section 121Q*. This section defines the term “cross-lease” which is not a legal term of art.
- C3 *Section 121R*. The effect of this section is to forbid the registration after a mandatory conversion date of any dealing affecting the title of a cross-lease owner other than a transmission, a vesting order, or a conversion application under *section 121S*. The mandatory conversion date would be fixed by Order in Council and must be no sooner than 10 years after the commencement of the Act.

"121S Voluntary conversion of cross-leases

- "(1) On the application of all registered proprietors of a parcel of land that is subject to a cross-lease, the Registrar may cancel all certificates of title for that land and issue new certificates of title that effect a subdivision of that land, as defined in section 218(1) of the Resource Management Act 1991, into the parts specified in the application.
- "(2) In every case, the new certificates of title are subject to all encumbrances, liens, and interests (other than any lease of the kind referred to in section 121Q) to which the prior certificates of title and leases were subject immediately before those titles and leases were cancelled.
- "(3) When the Registrar issues the new certificates of title, the Registrar must enter on each new certificate of title, all encumbrances, liens, and interests as specified in subsection (2) so as to preserve their registered priority.
- "(4) No Registrar may refuse to grant an application simply because the territorial authority has not granted a subdivision consent to the registered proprietors for the land.
- "(5) Except for the registered proprietors, no consent to an application under this section is required from any other person.

"121T What applications under section 121S must contain

- "(1) Every application under section 121S must
 - "(a) relate to the whole of the parcel of land; and
 - "(b) specify the easements, incidental rights, and any restrictive covenants to which the registered proprietors have agreed with respect to the parcel of land, or specify that section 121U applies; and
 - "(c) be accompanied by a plan of the kind referred to in section 167(1) or any other plan that the Registrar requires under that section.
- "(2) To avoid any doubt,
 - "(a) the prior permission of the territorial authority under section 348 of the Local Government Act 1974 is not required for any rights of way specified in an application under section 121S; and
 - "(b) a survey plan under the Resource Management Act 1991 is not required for the purposes of that application.

Section 3 commentary continued

- C4 *Section 121S.* This section provides that the procedure for conversion from cross-lease to subdivision is by application to the Registrar (*subsection 1*). *Subsections (2)* and *(3)* are concerned with bringing down encumbrances on to the new titles. *Subsections (4)* and *(5)* make it clear that no consents (whether from territorial local authorities, encumbrancers or head lessees) are required other than those of the registered proprietors.
- C5 *Section 121T.* This section particularises the contents of a *section 121S* application. It must relate to the whole parcel of land, and specify any easements, or restrictive covenants, and whether *section 121U* applies. There must be a Land Transfer Plan defining the boundaries of the new lots. *Subsection 3* makes it clear that the consent of the territorial local authority is not required to any right of way and that any requirement under the Resource Management Act 1991 of a survey plan does not apply.

“121U Incidental rights

- “(1) This section applies if the registered proprietors, in an application under section 121S, specify that it applies.
- “(2) The land to which the application relates is subject to and has appurtenant to it the following rights as are necessary for the reasonable use or enjoyment of that land:
 - “(a) rights of support, shelter, and protection; and
 - “(b) rights for the passage or provision of water, sewerage, drainage, gas, electricity, oil, garbage, air, telephone, radio, and television services, and all other services of any nature over every part of the land; and
 - “(c) rights for the registered proprietors, their servants, tenants, agents, licensees and invitees at all times by day and night to go or pass with or without vehicles, machinery, and implements of any kind over parts of the land commonly used for those purposes.
- “(3) The land to which the application relates is subject to and has appurtenant to it
 - “(a) a right to the full, free, and uninterrupted access and use of light to or for any windows, doors, or other apertures existing at the date of the application and enjoyed at that date; and
 - “(b) a right to maintain overhanging eaves existing at the date of the application.
- “(4) The rights created by this section carry with them all ancillary rights necessary to make them effective as if they were easements.
- “(5) This section does not affect any land other than the land to which the application relates.
- “(6) To avoid any doubt, the prior permission of the territorial authority under section 348 of the Local Government Act 1974 is not required for any rights of way created by this section.
- “(7) The Registrar must enter on each new certificate of title issued under section 121S, a memorandum that the land is subject to and has appurtenant to it, the rights created by this section.

“121V Variation, etc of incidental rights

- “(1) The rights referred to in section 121U may be varied, negated, added to, or surrendered as if they were an easement registered under this Act.
- “(2) Sections 9OE and 9OF apply, with the necessary modifications, to the variation, negating, addition, or surrender of those rights, as the case may be.

Section 3 commentary continued

- C6 *Section 121U*. This provision is intended to avoid the need to particularise easements and like rights. It is based on a comparable provision in the Unit Titles Act 1972 section 11. The requirement of notification on the title contained in *subsection 7* is founded on a comparable provision in the Local Government Act 1974 section 461.
- C7 *Section 121V*. This section would provide machinery for the extinguishing or varying of *section 121U* rights.

"121W Notification of conversion of cross-lease to subdivision

- "(1) Subject to subsection (2), every registered proprietor who is issued with a new certificate of title under section 121S must, within 1 month after the date that the new certificate of title is issued, give written notice of the new certificate of title to the territorial authority in whose district the land is situated.
- "(2) If a solicitor or other authorised agent acted on behalf of the registered proprietor in relation to the new certificate of title, that solicitor or agent must give the notice referred to in subsection (1) to the territorial authority.

"121X Consent for conversion

- "(1) Subject to subsection (2), if a person's consent is required for an application under section 121S, and that person is dead or cannot be found or refuses to consent or does not consent within a reasonable time, or if for any reason it is impracticable to obtain the consent of that person, a District Court, on the application of any applicant under that section, may if the Court thinks fit consent on behalf of that person to the application.
- "(2) If an application is made under this section before section 121R comes into force, the District Court must have regard to the financial circumstances of any person who has refused to consent to the application under section 121S.
- "(3) If the District Court makes an order under this section, the Court may impose such conditions as it thinks fit.
- "(4) In any case where the District Court consents, it may, by the same or any subsequent order, require any person having the custody or control of any certificate of title or instrument to produce it to the Registrar to dispense with the production of it."

4 Fees

Section 235 of the principal Act is amended by inserting, after subsection (1), the following subsection:

- "(1A) Despite subsection (1), no regulations made under this Act may prescribe fees in respect of
 - "(a) an application under section 121S; or
 - "(b) the approval of a plan referred to in section 121T(c)."

Section 3 commentary continued

- C8 *Section 121W*. This section, analogously to the Rating Powers Act 1988 section 106, provides for notification of the change of ownership to the territorial local authority.
- C9 *Section 121X* is concerned with the situation where the registered proprietors are not in agreement. A District Court may provide the necessary consent. The Court may impose conditions. If the application is made before the mandatory conversion date, the Court must take into account the financial circumstances of a dissentient.

Section 4

- C10 *Section 235(1)(A)*. This new subsection would proscribe the charging of registration fees in relation to *section 125S* applications.

PART 2
AMENDMENTS TO PROPERTY LAW ACT 1952

5 Part to be part of Property Law Act 1952

This Part is part of the Property Law Act 1952 (in this Part referred to as the principal Act).

6 New sections inserted

The principal Act is amended by inserting, after section 126G, the following sections:

“126H Rights implied in respect of access lots

“(1) Where an access lot includes a driveway, or a proposed driveway, a proprietor of the access lot is entitled

“(a) to a reasonable contribution from the other proprietors towards the cost of establishing, maintaining, upkeeping, and repairing the driveway to an appropriate standard; and

“(b) to recover from the other proprietors, the costs of repairs to the driveway caused by any wilful or negligent act, and any other costs caused by those other proprietors, their servants, contractors, permitted occupants, residents, or invitees that arise out of the use of the driveway.

“(2) For the purposes of this section, access lot, in relation to a subdivision, means a separate allotment in the subdivision created for the purpose of providing access from any of the allotments of the subdivision to an existing road or street.

proprietor, in relation to an access lot, means the registered proprietor of each allotment which the access lot serves and who owns a share in the access strip.

“126I Jurisdiction of Court in respect of access lots

Section 126F (other than subsections (1)(a), (1)(b), and (3)) applies in respect of an access lot that comprises a driveway, or a proposed driveway, under section 126H and any references in section 126F to

“(a) a covenant or an easement or both are to be read as references to an access lot; and

“(b) work are to be read as references to establishing, maintaining, upkeeping, or repairing the driveway, as the case may be.”

Section 6

- C11 These sections provide for the sharing of the cost of repairing and maintaining shared access lots analogously to existing statutory provisions relating to reciprocal rights of way (see Part 4 of this Report).

PART 3
AMENDMENTS TO UNIT TITLES ACT 1972

- 7 Part to be part of Unit Titles Act 1972**
This Part is part of the Unit Titles Act 1972 (in this Part referred to as the principal Act).
- 8 Interpretation**
Section 2 of the principal Act is amended by inserting, after the definition of the term "accessory unit", the following definition:
"balance unit means a unit that is proposed to be developed or subdivided into 1 or more units (with or without common property) at a later stage and that is shown on the unit plan as a balance unit:".
- 9 Subdivision of land into units**
Section 3(1) of the principal Act is amended by inserting, after paragraph (aa), the following paragraph:
"(ab) if the registered proprietor so wishes, a balance unit; and".
- 10 Subdivision effected when plan deposited**
Section 4 of the principal Act is amended by inserting, after subsection (3A), the following subsection:
"(3B) Despite subsection (3), an easement appurtenant to any unit or the common property may be surrendered or varied but only with the consent of every proprietor and every mortgagee of all the other units comprising the development."
- 11 Restrictions on deposit of plan**
Section 5 of the principal Act is amended by inserting, after subsection (1), the following subsection:
"(1A) Subsection (1)(b) does not prevent the deposit of a plan in any case where the land to which the plan relates is held in more than one certificate of title because it includes a jointly owned access lot."
- 12 Units including open space**
The principal Act is amended by inserting, after section 5A, the following section:
"(5B) Despite sections 5(1)(g) and 5A(1)(a), nothing in this Act or the Resource Management Act 1991 prevents the deposit of a unit plan where the boundaries of a principal unit shown on the unit plan are not bounded by a building or the earth's surface, and that principal unit may be wholly comprised of open space."

Section 8

- C12 The definition of a balance unit is required as part of the new more flexible provisions for staged developments.

Section 9

- C13 This change is necessitated as part of the new procedure for staged developments.

Section 10

- C14 This section would alter the existing law by permitting the surrender or variation with the consent of all proprietors and mortgagees of easements appurtenant to any unit or to the common property.

Section 11

- C15 This section would repair the oversight referred to in paragraph 61 of this Report.

Section 12

- C16 The proposed section would make it clear that a principal unit may consist solely of air space and need not be bounded by a building or the earth's surface.

13 Unit entitlement

Section 6 of the principal Act is amended by repealing subsections (1) and (2), and substituting the following subsections:

- "(1) For the purpose of determining the matters specified in subsection (3), before the unit plan is deposited, a unit entitlement must be assigned to every principal unit, accessory unit, and balance unit.
- "(2) No change may be made in the unit entitlement of any unit after the unit plan is deposited unless
 - "(a) section 19(5)(d) or section 44(3) applies; or
 - "(b) the body corporate agrees by unanimous resolution, to add new rules to those set out in the Second Schedule that fix or state the manner in which the body corporate must fix the unit entitlement."

14 Issue of certificate of title in respect of unit

Section 8 of the principal Act is amended by repealing subsection (2), and substituting the following subsection:

- "(2) Despite subsection (1)(a), the Registrar may, at the request of the registered proprietor,
 - "(a) issue a separate certificate of title for any principal unit, which certificate of title may include also 1 or more accessory units:
 - "(b) issue a separate certificate of title for a balance unit."

15 Heritage covenants and other similar covenants

The principal Act is amended by inserting, after section 11, the following section:

- "11A If any of the following covenants or agreements are entered into in respect of a unit or land to which a unit plan relates, they are to be treated as an easement for the purposes of sections 4(3A), 4(3B), 7(1), 9(3), and 17 of this Act:
 - "(a) a heritage covenant under section 6 of the Historic Places Act 1993:
 - "(b) an open space covenant under section 22 of the Queen Elizabeth The Second National Trust Act 1977:
 - "(c) an agreement for private protected land under section 76 of the Reserves Act 1977:
 - "(d) a conservation covenant under section 7 of the Reserves Act 1977."

Section 13

- C17 This section would change the existing law by removing the requirement that unit entitlement be fixed by valuation and by making a provision for changing unit entitlement.

Section 14

- C18 The change to the existing subsection is needed as part of the new procedure for staged developments.

Section 15

- C19 The proposed new section would make provision for heritage covenants and the like.

16 Body corporate not required in certain cases

The principal Act is amended by inserting, after section 12, the following section:

- "12A(1) Section 12 does not apply if
- "(a) there are no more than 6 principal units shown on the unit plan; and
 - "(b) the common property comprised in the unit plan consists entirely of a driveway or a party wall or both; and
 - "(c) either
 - "(i) before the deposit of the plan, all the registered proprietors of the land to which the plan relates elect to dispense with the requirement for a body corporate; or
 - "(ii) after the deposit of the unit plan, the proprietors of all the units comprised in the plan elect to dissolve the body corporate.
- "(2) If an election is made under subsection (1)(c)
- "(a) the registered proprietors of the land to which the unit plan relates are the proprietors of all the units comprised in the unit plan, and all other assets of the body corporate, as tenants in common in shares proportional to the unit entitlement in respect of their respective units; and
 - "(b) sections 13, 16, 17, 36, 37, 41 to 43, 50, 51, and 54 do not apply; and
 - "(c) sections 14, 15, 19, 20, 23, 26, 28, 32 to 34A, 38, 40, and 44 to 49 apply, with the necessary modifications, as if references in those sections to the body corporate were references to the registered proprietors.
- "(3) No election under subsection (1) has effect until
- "(a) the registered proprietors have lodged a notification of the election and an accompanying declaration with the Registrar; and
 - "(b) the Registrar has entered on the supplementary record sheet an appropriate memorial relating to the election.
- "(4) The declaration must state that the election has been duly made and that the body corporate has no liabilities or assets other than
- "(a) the common property shown on the unit plan; and
 - "(b) the common property that is not shown on the unit plan but which
 - "(i) consists of air space; or
 - "(ii) is below ground; or
 - "(iii) is common property by virtue of regulation 41(6) of the Survey Regulations 1972.
- "(5) The body corporate is to be treated as having been dissolved on the date the Registrar enters a memorial recording the election on the supplementary record sheet.

Section 16

- C20 The proposed new section would give effect to the proposals in this report for dispensing with a body corporate in appropriate circumstances.

“(6) For the purposes of this section driveway means that part of the common property where the proprietors, and their servants, tenants, agents, licensees, and invitees at all times by day and night are permitted to go or pass with or without vehicles, machinery, and implements of any kind: party wall means a wall that separates 2 or more units.”

17 Duties of body corporate

- (1) Section 15(1)(f) of the principal Act is amended by adding the words “, and provide for the deferred maintenance of the common property and any replacement items”.
- (2) Section 15(2)(a) of the principal Act is amended by inserting, after the words “common property,” the words “and for any deferred maintenance or replacement items,”.
- (3) Section 15 of the principal Act is amended by inserting, after subsection (2), the following subsections:
 - “(2A) Despite subsection (2)(c), the body corporate may raise amounts for the expenditures referred to in subsection (2)(a), in the following way:
 - “(a) if the expenditure is substantially for the benefit of 1 unit only, by levying a contribution on the proprietor of that unit:
 - “(b) if the expenditure is substantially for the benefit of some of the units only, by levying contributions on the proprietors of those units rateably according to their unit entitlements:
 - “(c) if the expenditure benefits 1 or more of the units substantially more than it benefits the others or other of them, by levying contributions on the proprietors of those units in such shares as it thinks fit having regard to the relative benefits of those units.
 - “(2B) Despite subsection (1)(b), if the rules of the body corporate allow the body corporate to elect not to insure and keep insured any such building and the body corporate has unanimously so resolved, the body corporate is not required to insure and keep insured any building on the land that is a stand-alone building contained in a unit space.”

18 Certificate of proprietor’s liability to be produced to Registrar

The principal Act is amended by inserting, after section 16, the following section:

- “16A No Registrar may enter a memorial on a certificate of title issued under this Act if
- “(a) the memorial relates to a mortgage, charge, transfer, or other dealing affecting the title; and
 - “(b) a certificate under section 36 was not included with that mortgage, charge, transfer, or other dealing when the instrument was presented for registration.”

Section 17

- C21 The proposed new subsections would modify in certain respects the duties of bodies corporate. *Subsections (1) and (2)* are intended to remove any doubts as to the power of a body corporate to create a sinking fund. *Subsection (3)* permits differing levies to reflect the benefit from proposed expenditure and authorises a body corporate not to insure a stand-alone unit if all unit proprietors agree.

Section 18

- C22 The proposed section would prohibit a Registrar from registering certain transactions without production of a section 36 certificate.

19 Registration of transfers of common property

Section 18 of the principal Act is amended by adding the following paragraphs:

- "(6) A transfer need not be accompanied by a new unit plan under subsection (1) if, because of the nature of the common property being transferred, the Registrar after consultation with the Chief Surveyor under the Survey Act 1986 is of the view that a new unit plan is not required.
- "(7) If subsection (6) applies, subsections (3) to (5) apply, with the necessary modifications, as if the reference to a new unit plan was a reference to a unit plan.
- "(8) To avoid any doubt, the Registrar may register a transfer to which subsection (6) applies by causing an appropriate memorial relating to the transfer to be noted on the supplementary record sheet."

20 Additions to common property

Section 19 of the principal Act is amended by adding the following subsections:

- "(7) A transfer need not be accompanied by a new unit plan under subsection (3) if, because of the nature of the land or unit being transferred, the Registrar after consultation with the Chief Surveyor under the Survey Act 1986 is of the view that a new unit plan is not required.
- "(8) If subsection (7) applies, subsections (3) to (5) apply, with the necessary modifications, as if the reference to a new unit plan was a reference to a unit plan.
- "(9) To avoid any doubt, the Registrar may register a transfer to which subsection (7) applies by causing an appropriate memorial relating to the transfer to be noted on the supplementary record sheet."

21 Recovery of contributions from first mortgagee

The principal Act is amended by inserting, after section 32, the following section:

- "32A(1) If a proprietor defaults in the payment of a contribution levied under section 15(2)(c) or section 15(2A), the body corporate may recover that amount from any person who is a first mortgagee of the unit in respect of which the amount is payable.
- "(2) If a first mortgagee pays a contribution under subsection (1), the amount so paid, until it is repaid to the mortgagee, must be treated as forming part of the money secured by the mortgage and bears interest at the same rate, or, if the mortgagee so decides, is recoverable by him or her from the mortgagor or proprietor."

Sections 19 and 20

- C23 These proposed sections are intended to permit adjustment to the boundaries of common property without a new unit plan if the Registrar so agrees.

Section 21

- C24 The proposed section would make a first mortgagee liable for body corporate levies in the same way as a first mortgagee currently is for rates under the Rating Powers Act 1988 section 139.

22 Certificate of proprietor's liability

Section 36 of the principal Act is amended by adding the following subsection:

"(2) The body corporate may refuse to provide a certificate under subsection (1) in respect of a proprietor if there are moneys due from that proprietor to the body corporate and those moneys are unpaid."

23 Rules

Section 37 of the principal Act is amended by inserting, after subsection (5), the following subsection:

"(5A) Subsection (5) does not apply if rules are added, as referred to in section 6(2)(b), that fix or state the manner in which the body corporate must fix the unit entitlement."

Section 22

- C25 This proposed provision should be read with *section 18*. Together they are designed to assist a body corporate to recover moneys outstanding from defaulting unit proprietors by requiring a section 36 certificate (which may be withheld if there are moneys due but unpaid) to be provided to a Registrar on registering certain transactions.

Section 23

- C26 This new section is part of the procedure proposed for varying unit entitlements.

24 Relief in cases where unanimous resolution required

The principal Act is amended by repealing section 42, and substituting the following section:

"42(1) This section applies if

"(a) under this Act or rules under this Act, a unanimous resolution or the consent of all the proprietors is necessary before any act is done; and

"(b) that resolution or consent is not obtained; but

"(c) either,

"(i) where there are only 2 principal units, the proprietor of 1 of those units supports the resolution or act; or

"(ii) in any other case, two-thirds of those entitled to vote on a poll support the resolution or act.

"(2) Any proprietor or proprietors supporting the resolution or act, may apply to a District Court to have the resolution as supported or the consensus as obtained declared sufficient.

"(3) A District Court may not make an order under this section unless it is satisfied that to do so would not diminish the value of or unreasonably interfere with the use or enjoyment of the unit of a proprietor who opposes the application.

"(4) If the District Court so orders, the resolution is to be treated as having been passed unanimously or the consent of all the proprietors as having been obtained, as the case may be."

25 Relief for minority

Section 43 of the principal Act is amended

(a) by omitting the words "to the Court" and substituting the words "to a District Court"; and

(b) by omitting the words "if the Court" and substituting the words "if the District Court".

Section 24

- C27 The proposed new section would replace the present *section 42*. The substantive changes effected by the new section are to transfer jurisdiction from the High Court to the District Court, to impose by the proposed *subsection (3)* a test governing the court's exercise of its jurisdiction and to lower the proportion of supporters needed to allow the section to be invoked.

Section 25

- C28 This section would transfer jurisdiction under *section 43* from the High Court to the District Court.

26 Redevelopment

- (1) Section 44(2)(c) of the principal Act is amended by adding the words “, and whether or not there remains a balance unit:”.
- (2) Section 44(2)(d) of the principal Act is amended by omitting the words “, which apportionment shall be determined by a registered valuer within the meaning of the Valuers Act 1948, subject to payment to the valuer of such fee as he may fix”.
- (3) Section 44 of the principal Act is amended by repealing subsection (3), and substituting the following subsections:
 - “(3) Where a redevelopment involves the inclusion in a unit of part of the common property or the erection of 1 or more units on the common property, the unit entitlements of all units that will be on the land to which the plan of redevelopment relates must be reassessed, and a new unit entitlement must be assigned to every such unit at the date on which the reassessment is made.
 - “(3A) Despite subsection (3), a reassessment may be made as at the date the current unit entitlements were made if the development is of a relatively minor nature.”
- (4) The principal Act is amended by inserting after subsection (4), the following subsection:
 - “(4A) Subsection (4) does not apply in any case where the plan of redevelopment only relates to the subdivision of a balance unit.”

27 Minor adjustments to units

The principal Act is amended by inserting, after section 44, the following section:

- “44A(1) If the proprietors of 2 or more units wish to adjust the situation of the boundary separating their units, the proprietors may apply to the Registrar for a memorial to be noted on the relevant certificates of title and for a memorial to be entered on the supplementary record sheet noting the adjustment.
 - “(2) An application need not be accompanied by a plan of redevelopment if, because of the nature of the adjustment, the Registrar is of the view that a plan of redevelopment is not required.
 - “(3) Before an adjustment is noted under subsection (1), the following persons must give written consent to the adjustment:
 - “(a) every proprietor who is affected by the adjustment; and
 - “(b) every mortgagee and caveator (being a caveator whose caveat was lodged with the Registrar before the application for the adjustment was made) who is affected by the adjustment.
 - “(4) To avoid any doubt, this section does not apply to an adjustment to the boundaries of the common property.”

Section 26

- C29 The proposed amendments contain the rest of the statutory changes needed by the substituted procedure for staged development.

Section 27

- C30 The proposed section provides a new procedure for adjustment of boundaries between principal units.

28 New sections inserted

The principal Act is amended by inserting, after section 45, the following sections:

"45A Proprietors may agree on a different basis for determining shares in estates

(1) If all the proprietors apply under section 45 to the Registrar to cancel the unit plan, sections 45(5)(a) and 45(5)(b) do not apply if all those proprietors determined, by unanimous resolution, before the cancellation of the unit plan to vest the estates referred to in section 45(5) on a different basis from that relating to their unit entitlements as referred to in section 9.

"(2) If subsection (1) applies, on the cancellation of the unit plan,
 "(a) the estates referred to in sections 45(5)(a) and 45(5)(b) vest in the persons who were the proprietors of the units immediately before the cancellation of the unit plan on the basis determined by those proprietors; and
 "(b) the estate referred to in section 45(5)(b) merges with the estate referred to in paragraph (a).

"(3) To avoid any doubt, the proprietors may, under section 45(7), determine by unanimous resolution, before the cancellation of the unit plan, that any property and money of the body corporate be distributed on a different basis from that relating to their unit entitlements.

"45B Subdivision of land on cancellation of plan in certain cases

"(1) If

"(a) the proprietors of all the units shown on a unit plan apply under section 45 for the cancellation of the unit plan; and

"(b) there are no more than 6 principal units shown on the unit plan; and

"(c) the common property comprised in the unit plan consists entirely of a driveway or a party wall or both within the meaning of section 12A(6); and

"(d) the proprietors also apply for a subdivision of the land (as defined in section 218 of the Resource Management Act 1991) to which the unit plan relates; and

"(e) the application is accompanied by a plan of the kind referred to in section 167(1) or any other plan that the Registrar requires under that section,

the Registrar may cancel the unit plan, and instead of complying with sections 45(5)(a), 45(5)(b), and 45(6), issue new certificates of title that effect a subdivision of the land into the parts specified in the application.

"(2) No Registrar may refuse to grant an application under subsection (1) simply because the territorial authority has not granted a subdivision consent to the proprietors of all the units.

"(3) To avoid any doubt, a survey plan under the Resource Management Act 1991 is not required for the purposes of the application."

Section 28

- C31 As part of the proposed new flexibility in fixing share entitlements, this section and section 29 permit parties on cancellation of a unit plan to agree among themselves as to new unit entitlements.

29 Cancellation of plan following decision of Court

Section 47 of the principal Act is amended by adding the following subsection:

“(5) Section 45A applies when an application is made to the Registrar under this section.”

Section 29

- C32 As part of the proposed new flexibility in fixing share entitlements, this section and section 28 permit parties on cancellation of a unit plan to agree among themselves as to new unit entitlements.

- 30 Application and interpretation of this Part**
Section 56(2) of the principal Act is amended by inserting, after the definition of the term “company”, the following definition:
“Court means a District Court.”
- 31 Effect of deposit of unit plan**
Section 64(3) of the principal Act is amended by adding the following paragraph:
“(g) despite section 21, if the unit plan relates to an estate as lessee or licensee in any land, section 27 does not apply to the lessor or proprietor of any unit.”
- 32 Second Schedule amended**
Clause 3 of the Second Schedule of the principal Act is amended by adding the following paragraph:
“(f) on a unanimous resolution, elect not to insure or keep insured any building on the land that is a stand-alone building contained in a unit space.”
- 33 Repeal of Part I of Unit Titles Amendment Act 1979**
(1) Part I of the Unit Titles Amendment Act 1979 is repealed.
(2) Despite subsection (1), if a proposed unit development plan has been deposited in accordance with section 5 of the Unit Titles Amendment Act 1979 before this Act comes into force, Part I of the Unit Titles Amendment Act 1979 continues in force for the purposes of effecting, in stages, the subdivision to which the plan relates as if that Part had not been repealed.

PART 4

AMENDMENTS TO RESOURCE MANAGEMENT ACT 1991

- 34 Part to be part of Resource Management Act 1991**
This Part is part of the Resource Management Act 1991 (in this Part referred to as the principal Act).

Section 30

- C33 This section confers on a District Court the powers conferred under Part IV relating to the conversion of existing schemes.

Section 31

- C34 Under the proposed paragraph, *section 27* would not apply following a conversion where the underlying title is leasehold.

Section 32

- C35 This is a machinery provision, part of the new exemption from the requirement to insure stand-alone buildings where all proprietors agree.

Section 33

- C36 The new procedure for staged development permits the repeal of Part 1 of the Unit Titles Amendment Act 1979 except for partly completed staged subdivisions.

35 Interpretation

Section 2(1) of the principal Act is amended by omitting the definition of the term "survey plan", and substituting the following definition:

"survey plan means a plan of subdivision of land, or a building or part of a building, prepared in a form suitable for deposit under the Land Transfer Act 1952 or with the Registrar of Deeds; and any Crown plan prepared for a similar purpose as the case requires, and includes a unit plan:".

36 Meaning of "subdivision of land"

(1) Section 218(1)(a) of the principal Act is amended by repealing subparagraph (iv).

(2) Section 218(2) of the principal Act is amended by repealing paragraph (b), and substituting the following subsection:

"(b) any parcel of land or building or part of a building that is shown or identified separately on a survey plan; or".

37 Prohibition on subdivision by way of cross-lease or company lease

The principal Act is amended by inserting, after section 218, the following section:

"218A(1) No person may grant a cross-lease or company lease in respect of any part of an allotment.

"(2) No survey plan may be deposited under the Land Transfer Act 1952 or with the Registrar of Deeds for the purposes of section 11(1)(a) if the survey plan is to enable the grant of a cross-lease or company lease.

"(3) Despite section 226, no Registrar may issue a certificate of title for any land that is shown as a separate allotment on a survey plan (being a certificate issued to give effect to the subdivision shown on that survey plan) if the survey plan is to enable the grant of a cross-lease or company lease.

"(4) For the purposes of this section, the terms cross-lease and company lease include a memorandum of cross-lease or company lease in renewal or in substitution for a cross-lease or company lease."

Sections 35 and 36

- C37 These provisions would exclude references to cross-leases and company leases from the current definitions of survey plan and subdivision of land.

Section 37

- C38 The proposed new section forbids cross-leases and company leases.

- 38 Information to accompany applications for subdivision consents**
Section 219(b) of the principal Act is amended by omitting the words "by the grant of a cross-lease or company lease or".
- 39 Restrictions upon deposit of survey plan**
Section 224 of the principal Act is amended by repealing paragraph (f), and substituting the following paragraph:
"(f) In the case of a subdivision of land to be effected by the deposit of a unit plan, the territorial authority is satisfied on reasonable grounds that every existing building or part of an existing building (including any building or part of the building under construction) to which the unit title plan relates complies with, or will comply with, the provisions of the building code specified in section 46(4) of the Building Act 1991, and a certificate authenticated by the territorial authority under section 252 of the Local Government Act 1974 is lodged with the Registrar or Registrar of Deeds, as the case may require; and".
- 40 Cancellation of prior approvals**
Section 227(2) of the principal Act is amended by omitting the words ", or a cross-lease or company lease".
- 41 Approval of survey plans when esplanade reserve or esplanade strips required**
Section 237(3)(a) of the principal Act is amended by omitting the words "the grant of a cross-lease or company lease or by".
- 42 Transitional and saving provisions**
- (1) If a subdivision consent has been granted in respect of the division of an allotment by way of a company lease or cross-lease before this Act comes into force, section 218A does not apply, and sections 2(1), 218, 219, 224, 227, and 237 apply for the purpose of effecting the subdivision as if those sections had not been amended by this Act.
- (2) If
- (a) a person wishes to divide an allotment by way of the grant a cross-lease; and
- (b) the allotment comprises an estate in leasehold; and
- (c) the term of the cross-lease does not exceed the term of the leasehold referred to in paragraph (b),
- then section 218A does not apply, and sections 2(1), 218, 219, 224, 227, and 237 apply in respect of the allotment as if those sections had not been amended by this Act.

Sections 38 to 41

- C39 These proposed provisions would delete unnecessary references to cross-leases and company leases.

Section 42

- C40 This transitional provision permits renewals of cross-leases where the underlying title is a renewable lease and the term of the cross-lease has necessarily been fixed at a period shorter than that of the headlease.

APPENDIX C

List of submitters

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Auckland District Law Society's Property and Business Law
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