

# The Shadow of the Financial Wrecking Ball Cast Over Poorly Maintained and Under-funded Body Corporate Complexes

*By John Gray*

Answering a simple question posed by an owner relating to maintenance in a body corporate situation used to be straight forward. Before 20 June, 2011 an owner could have asked, “The roof is leaking, who should fix it and who should pay?” Under the Unit Titles Act 1972 the simple answer was, “If the roof is within common property the body corporate pays. If it is within the unit then the unit owner pays”. However, the introduction of the Unit Titles Act 2010 has complicated the matter of maintenance somewhat for unit title complexes. Both the body corporate’s and the owner’s responsibilities are outlined under Sections 80 and 138 respectively.

## Section 80 – Owner Responsibility

Section 80 states that an owner “must repair and maintain the unit and keep it in good order to ensure that no damage or harm, whether physical, economic, or otherwise, is, or has the potential to be, caused to the common property, any building element, any infrastructure, or any other unit in the building”.

The definition of Common Property is unchanged but the Unit Titles Act 2010 has introduced the new terms “building elements” and “infrastructure”. “Building elements” include internal and external components of a building necessary to its structural integrity, aesthetics, or health and safety, and includes the roof, foundations, walls, decks, balconies, and cladding. “Infrastructure” includes pipes, wires, cables, gutters, and other matters necessary for shelter and services/utilities.

## Section 138 (1) – Body Corporate Responsibilities

Section 138 (1) states that a body corporate’s duty to repair and maintain extends to:

1. The common property; and
2. Any assets designed for use in connection with the common property; and
3. Any other assets owned by the body corporate; and

4. Any building elements and infrastructure that relate to or serve more than one unit.

The obligations of both the body corporate and the owners are clearly established. What has not been established is who pays for what.

### Section 138 (4) – Who Pays?

Section 138(4) states, “Any costs incurred by the body corporate that relate to repairs to building elements and infrastructure contained in a principal unit are recoverable by the body corporate from the owner of that unit as a debt...”

Therefore, the cost of repairing any building elements or infrastructure “situated within a principal unit” is recoverable from that unit owner. So, if the leaking roof from the original question is within common property, then section 138 (4) *will not* apply; meaning that the body corporate must repair it and the cost is shared among all owners in proportion to their utility interest. Conversely, if the roof is “contained within the boundaries of a principal unit”, then section 138 (4) *will apply* and the costs are recoverable from that unit owner.

### Section 126 and 138 – Conflicting Guidance

Section 126 indicates that where the body corporate does any work substantially for the benefit of one or more units, but not all units, or which benefits some owners more than others, then the cost of that work is recoverable from those specific unit owners, and not all owners.

If the complex is a multi-storey development this provides some guidance as to who should pay for the roof as it could be argued that while the roof is within the boundaries of say one principal unit only it is fundamental to the integrity of the entire building.

Sections 138 and 126 seem to conflict here and there is no specific guidance as to which section to adopt given this scenario. Because the legislation is poorly drafted in this way it can often lead to disagreement between owners which may ultimately need to be decided by either the Tenancy Tribunal, which has jurisdiction over certain disputes arising from matters covered by the Unit Titles Act 2010, or the Courts.

When dealing with large scale remedial and replacement work there often has to be a more pragmatic, fair and equitable approach to the apportionment of the costs of such remedial work. These are complex scenarios and are often made worse by the poor work of cadastral surveyors when preparing the unit plans when the position of units and common property

boundaries is not well thought out. Also, the work of valuers establishing the ownership interests (unit entitlements) is often not done well.

### Section 74 – Greater Certainty

To enable the body corporate to manage such large scale building projects, and to deviate from the default approach to apportionment established by the Act, an application for a scheme under Section 74 is generally considered the best way forward. Orders made under Section 74 empower the body corporate to undertake work on both common and unit property and to establish a framework for cost apportionment which is approved by the High Court giving greater certainty for the owners and their funders.

### Section 116 – Long Term Maintenance Plan

So there are many facets to the issues around maintenance of housing complexes that are governed under the Unit Titles Act 2010.

Section 116 introduces a mandatory requirement for bodies corporate to establish and maintain a Long Term Maintenance Plan (LTMP) that must cover a period of at least 10 years from the date the plan was originally prepared or the date of the last review. A review of these plans must be undertaken every three years. The purpose of the LTMP is to identify future maintenance requirements (including replacement) for those building elements and infrastructural items that serve more than one unit, or that fall within the boundaries of common property.

The LTMP must also provide an estimate of the costs involved in carrying out the required maintenance prescribed by the plan for the purposes of establishing and managing the funds and providing a basis for levying owners of principal units. This is a significant step forward in terms of mandating the requirement for such a plan, but curiously the requirement to establish and maintain a Long Term Maintenance Fund to provide the funding to execute the maintenance plan is not mandatory because a body corporate can pass a special resolution deciding not to establish such a fund.

For current owners and for those looking to buy into such a complex there is one piece of advice regarding LTMPs; make sure that the plan has been prepared by a competent Building Surveyor and that it has captured all of the building elements and infrastructure as set down in the Act and that ideally it has looked further out than 10 years given that so much of the major repair and replacement works will fall into years 25 to 35 of the age of the building. If the plan does not look out that far then there is real risk for current and new

owners that buy in further down the track given that they will have to fund the significant costs that will be necessarily incurred by the body corporate to give effect to the required maintenance, repair and replacement in the future.

### Long Term Maintenance Fund

The only prudent and fair way for the body corporate to deal with repairs and maintenance is to have a minimum of a 30 year plan and that funds for the major items that need to be replaced are collected from owners now, so that the Long Term Maintenance Fund slowly builds up over time to cover anticipated costs with a view to eliminate the potential for future financial shock. The failure to build adequate funds creates a “bow wave” of costs that will more than likely not be able to be funded by the owners at the time. This will have a crippling effect not only on the owners at that time, but also on the state and amenity of the building or buildings.

We have seen a lot of very short term thinking around LTMP's and the building of the funds. Current owners naively move to avoid creating robust LTMP's buy taking the cheaper options put up by firms that don't necessarily have the required competencies to prepare such plans, which effectively understate the maintenance requirements. The fund built to reflect such plans are therefore well short of what is actually required. On the other hand, we have seen some very competently prepared LTMP's but the current owners have failed to understand that the value of their units is inextricably linked not only to the current state of the building, but what the future ownership costs will be. So, by not fully funding their maintenance programme they have very seriously devalued their properties in the long term.

Sadly, this is not a factor that features in the thinking or analysis done by most valuers or the mortgagees when considering a loan application. In the years to come we are going to be dealing with owners suffering from the financial shock borne out of the failure of so many bodies corporate failing to take a more responsible approach to fulfilling their maintenance and funding obligations.