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Strata plan cancellations in Australasia: A comparative analysis of nine jurisdictions

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STRATA PLAN CANCELLATIONS IN AUSTRALASIA: A COMPARATIVE ANALYSIS OF NINE JURISDICTIONS

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A growing number of Australasian jurisdictions now permit a super-majority of owners to terminate a co-owned building scheme allowing proprietors to redevelop, or more commonly, sell the underlying land. This planning tool aids municipal rejuvenation, prevents urban sprawl and provides new housing. In this article, I examine the provisions pertaining to cancellation of unit plans under nine jurisdictions — New Zealand and all eight jurisdictions in Australia. This comparative analysis highlights several unique aspects of the Unit Titles Act 2010 *(NZ) such as the way its voting thresholds are calculated and the idiosyncratic application of the 'just and equitable' standard in endorsing all forms of plan cancellations. At the same time, New Zealand's unit title jurisprudence has been described as 'relatively immature'. This confluence provides the basis to analyse these novel issues from both a doctrinal and comparative perspective across the nine jurisdictions.*

I INTRODUCTION

> I do not like the idea of moving someone from their home to increase the density of a building. But if we are going to absorb the projected increase in our population … we have a responsibility to look at these ageing buildings and reassess the situation.[1]

Whether called strata title,[2] community title,[3] unit title,[4] sectional title,[5] common

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1 New South Wales, *Parliamentary Debates*, Legislative Council, 21 October 2015 (Paul Green) <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardFull.aspx#/DateDisplay/HANSARD-1323879322-67856/HANSARD-1323879322-67790>.

2 As adopted by New South Wales, South Australia, Tasmania and Western Australia.

3 See *Body Corporate and Community Management Act 1997* (Qld) ss 9–10.

4 As adopted by New Zealand and, in Australia, Victoria, the Northern Territory and the Australian Capital Territory. While differing in nomenclature, strata and unit title are virtually synonymous.

5 *Sectional Titles Schemes Management Act 2011* (South Africa).

interest ownership[6] or common-hold,[7] the concept of subdividing ownership of a building into units or lots with separate titles while allowing proprietors to co-own the land and common facilities as equitable tenants-in-common,[8] is a ubiquitous model of property ownership in Australasia, and indeed, across the world.[9] Globally, the first to statutorily subdivide buildings into individually owned units appears to have been Belgium in 1924.[10] In the Commonwealth, the prize goes to Victoria in 1960,[11] followed shortly by New South Wales in 1961,[12] with strata ownership adopted by the rest of Australia eventually thereafter.[13] The predecessor to the *Unit Titles Act 2010* (NZ) ('*UTA 2010*') was the *Unit Titles Act 1972* (NZ) ('*UTA 1972*'), and was largely based on the *Strata Titles Act 1967* (Vic), explaining why the Victorian terminology of 'unit'[14] and hence 'unit title', rather than 'strata title', was adopted in New Zealand.[15]

The ingenuity of the Australian model lies in the grant of a separate certificate of title for each unit. This facilitates mortgage lending and hence marketability of

6 National Conference of Commissioners on Uniform State Laws, *Uniform Common Interest Ownership Act (As Amended in 2014)*.

7 *Commonhold and Leasehold Reform Act 2002* (UK).

8 A body corporate will typically own the common property of the development (ie carparks, stairwells, lifts), with the unit owners beneficially entitled to the common property as tenants-in-common in shares proportional to the ownership interest of their respective units: see *Unit Titles Act 2010* (NZ) s 54 ('*UTA 2010*').

9 Apart from New Zealand and all eight jurisdictions in Australia, other jurisdictions adopting this concept of ownership include the United States of America, Japan, Germany, the United Kingdom, India, France, Italy, Canada (Alberta and British Columbia), Brazil, Spain, Indonesia, the Netherlands, Switzerland, Turkey, Poland, Sweden, Thailand, Belgium, Austria, Ireland, the Philippines, Norway, the United Arab Emirates, Hong Kong, Denmark, Singapore, Malaysia, South Africa, Portugal, Greece, Hungary, Croatia, Slovenia, Estonia, Brunei and Fiji: see generally Cornelius Van Der Merwe (ed), *European Condominium Law* (Cambridge University Press, 2015).

10 *Loi du 8 Juillet 1924 revisant et complétant les dispositions du Code civil relatives à la copropriété* [Law of 8 July 1924 Amending and Supplementing the Civil Code with Respect to Coownership] (Belgium). See Cornelius Van der Merwe, 'European Condominium Law: Nine Key Choices' in Amnon Lehavi (ed), *Private Communities and Urban Governance: Theoretical and Comparative Perspectives* (Springer, 2016) 127, 130.

11 *Transfer of Land (Stratum Estates) Act 1960* (Vic), as enacted.

12 *Conveyancing (Strata Titles) Act 1961* (NSW), as enacted.

13 Brendan Edgeworth, *Butt's Land Law* (Lawbook, 7th ed, 2017) 951–2 [13.10].

14 See *Strata Titles Act 1967* (Vic) s 3 (definitions of 'unit' and 'unit entitlement'). The Northern Territory and the Australian Capital Territory appear to have similarly adopted Victoria's nomenclature. Conversely, South Australia and Western Australia adopt New South Wales' language in describing the subdivided property as 'strata': see below Table 1. Outside Australia, the New South Wales model appears more influential, having been adopted by Canada, South Africa, Singapore, Malaysia and Brunei, among others: Hazel Easthope and Bill Randolph, 'Governing the Compact City: The Challenges of Apartment Living in Sydney, Australia' (2009) 24(2) *Housing Studies* 243, 244.

15 See New Zealand, *Parliamentary Debates*, House of Representatives, 11 August 1972, 1766 (Martyn Finlay).

dwelling units, the 'original rationale' for this form of ownership.[16] Further, the Australian statutory scheme also sets out a governance framework to co-own, manage and, increasingly now, dissolve the multi-owned development, thus obviating problems inherent to company title (lack of security) or a long leasehold (no ownership of the underlying land), the ownership alternatives to a strata concept. As Christudason notes, '[Australian] [p]urchasers of units sought the twin benefits of an indefeasible title under the Torrens system and a full statutory scheme regulating the respective rights and duties of unit owners in a particular development'.[17]

Babie states that the creation of strata title condominiums provides for 'ever closer proximity in living'.[18] Paradoxically, this has resulted in apartment living being popular,[19] yet unwelcomed. Schrader observes that the opportunity to live in a stand-alone house has 'long been central to most New Zealanders' sense of place and wellbeing;[20] the 'quarter-acre pavlova'[21] dream engrained in the national psyche. Incredibly, a 2011 United Nations survey revealed that the greatest fear among a cohort of 132 New Zealanders aged 18–35 was the prospect of living in a city apartment.[22] In the same vein, Carroll, Witten and Kearns find that while Auckland[23] residents appreciate the convenience of living in a centrally located apartment, most survey respondents eschewed apartment living as they were concerned about the lack of play space for children, as well as safety concerns such as falling from a height.[24] This cultural preference for building out rather than up has led Dixon and Dupuis to note that since the 1990s there has been a 'need to manage Auckland's problems of urban sprawl, traffic congestion, and inadequate

16 Hazel Easthope and Bill Randolph, 'Collective Responsibility in Strata Apartments' in Erika Altmann and Michelle Gabriel (eds), *Multi-Owned Property in the Asia-Pacific Region: Rights, Restrictions and Responsibilities* (Palgrave Macmillan, 2018) 177, 178.

17 Alice Christudason, 'Subdivided Buildings: Developments in Australia, Singapore and England' (1996) 45(2) *International and Comparative Law Quarterly* 343, 346.

18 Paul Babie, 'How Property Law Shapes Our Landscapes' (2012) 38(2) *Monash University Law Review* 1, 16.

19 Justice Heath noted that apartment living is a 'popular form of residential dwelling in central Auckland': *World Vision of New Zealand Trust Board v Seal* [2004] 1 NLZR 673, 674 ('*World Vision*'). Strata or unit title developments are of course not limited to apartments, as the concept also includes horizontal developments.

20 Ben Schrader, 'The Origins of Urban Sprawl in New Zealand' in Morten Gjerde and Emina Petrović (eds), *UHPH_14: Landscapes and Ecologies of Urban and Planning History* (Australasian Urban History/Planning History Group, 2014) 749, 749.

21 See Austin Mitchell, *The Half-Gallon Quarter-Acre Pavlova Paradise* (Friday Project, 2013).

22 Charlie Gates, 'Young Kiwis' Greatest Fear', Stuff (online, 28 April 2011) <https://www.stuff.co.nz/the-press/4934918/Young-Kiwis-greatest-fear>.

23 Auckland is the most populous city in New Zealand. At about 1.5 million, it has approximately three times as many residents than the capital and New Zealand's second biggest city, Wellington.

24 Penelope Carroll, Karen Witten and Robin Kearns, 'Housing Intensification in Auckland, New Zealand: Implications for Children and Families' (2011) 26(3) *Housing Studies* 353, 359–63.

infrastructure'.[25] The researchers state that Auckland's government advocates urban intensification policies promoting medium density apartments in response to these problems.[26] In 2016, Watt estimated that Auckland had approximately 50,000 multi-unit apartments, and that a further 66,000 were needed to be built over the next 10 years to provide housing to support Auckland's burgeoning population.[27] Based on current estimates, some 1 in 10 New Zealanders nationally may live in an apartment by 2050;[28] in Auckland this is estimated to be 1 in 4.[29] In 2017, Fredrickson found that already 22%, 21% and 13% of all residences in Wellington City, Queenstown-Lakes District and Auckland were unit titles respectively, with the national proportion at 7%.[30] The conviction to prevent sprawl and encourage intensification is a national initiative not limited to Auckland;[31] Hamilton, Tauranga, Wellington and Christchurch have also been identified[32] as 'tier 1 urban environments' where local authorities are required to 'maximise benefits of intensification' in city centre zones.[33] Despite New Zealanders' apparent aversion to apartment living, the necessity of sustainable urban development means that the number of apartments will continue to grow across the country. Importantly, Weir rightly notes that strata schemes are not limited to residential developments: 'the creation by statute of strata title, community title schemes or common interest communities permits the development of residential,

25 Jennifer Dixon and Ann Dupuis, 'Urban Intensification in Auckland, New Zealand: A Challenge for New Urbanism' (2003) 18(3) *Housing Studies* 353, 354.

26 Ibid 354–5. The most recent Auckland Plan 2050 reiterates the need to promote urban intensification: Auckland Council, *Auckland Plan 2050: Developing the Auckland Plan 2050* (Report, June 2018) 66 <https://www.aucklandcouncil.govt.nz/plans-projects-policies-reports-bylaws/our-plans-strategies/auckland-plan/about-the-auckland-plan/Pages/the-auckland-plan-explained.aspx>.

27 Anne Gibson, 'Auckland Needs 66,000 Apartments in 10 Years', *New Zealand Herald* (online, 14 June 2016) <https://www.nzherald.co.nz/business/auckland-needs-66000-apartments-in-10-years/TPF3BUQTSNQMQXDZTOPTXWYHOE/>.

28 See Shane Jones, 'Bill to Modernise Apartment Laws Set for Introduction' (Media Release, New Zealand Government, 28 April 2008) <https://www.beehive.govt.nz/release/bill-modernise-apartment-laws-set-introduction>; Stats NZ, 'New Zealand's Population Could Reach 6 Million by 2050' (News Release, 8 December 2020) <https://www.stats.govt.nz/news/new-zealands-population-could-reach-6-million-by-2050>.

29 New Zealand, *Parliamentary Debates*, House of Representatives, 25 March 2010, 9864 (David Shearer).

30 Craig Fredrickson, *Arrested (Re)Development? A Study of Cross Lease and Unit Titles in Auckland* (Technical Report No 25, 10 October 2017) 129–31.

31 Minister for the Environment (NZ), '*National Policy Statement on Urban Development 2020* (July 2020).

32 Ibid 31.

33 Ibid 11.

commercial and industrial communities'.[34] As with the Australian experience,[35] unit title ownership is of ever-increasing importance in New Zealand.

Unit title developments are created pursuant to s 16 of the *UTA 2010*, with this effected when the original proprietor of the land (typically the developer) deposits a plan in the prescribed form specifying the spatial layouts of the intended units in relation to the constructed building or buildings on the land.[36] A unit is defined as any space on the land with limited dimensions and that is 'designed for separate ownership'.[37] Because s 17 of the Act specifically states that the requisite subdivision of land to create units is only accomplished when the plan deposited is in relation to a 'building or buildings (if any) *already erected on the land*',[38] there can be no subdivision in relation to an unconstructed building. This obviates the complication of 'flying freeholds' that would arise if the Act allowed units to be created prior to construction. Without identifiable property, 'off-the-plan' buyers only have contractual as opposed to proprietary remedies against developers. This is, in fact, initially the case: assigning ownership interests to units is only undertaken by the developer as a prelude to depositing the unit plan.[39] Once construction is complete and an acceptable plan[40] is deposited, however, each unit comes with its separate title.[41] The word 'title' is significant. Purchasing a stratum estate created by the *UTA 2010* gives the unit's registered proprietor unimpeachable title under New Zealand's Torrens system of land registration.[42]

As the unit plan is the statutory instrument that subdivides the land to create each unit title, its cancellation reverses the process resulting in all the former unit-owners holding the land and buildings as tenants-in-common in shares proportionate to their ownership interests.[43] Once cancelled, the land can be sold to a developer or redeveloped by the incumbent owners, typically at a considerably higher building density. New Zealand's Productivity Commission has identified

34 Michael Weir, 'Pushing the Envelope of Proprietary Interests: The Nadir of the *Numerus Clausus* Principle?' (2015) 39(2) *Melbourne University Law Review* 651, 664.

35 See Lisa Toohey and Daniel Toohey, 'Achieving Quality Outcomes in Community Titles Disputes: A Therapeutic Jurisprudence Approach' (2011) 37(1) *Monash University Law Review* 298, 315; Edward SW Ti, 'Towards Fairly Apportioning Sale Proceeds in a Collective Sale of Strata Property' (2020) 43(4) *University of New South Wales Law Journal* 1494, 1495 ('Towards Fairly Apportioning Sale Proceeds').

36 *UTA 2010* (n 8) s 17.

37 Ibid s 5(1) (definition of 'unit').

38 Ibid s 17 (emphasis added).

39 Ibid s 38. This means that there is neither an assigned 'ownership interest' nor identifiable estate in land prior to construction and deposit of the unit plan.

40 Ibid pt 2 sub-pt 4 ('Requirements relating to unit plans').

41 Ibid s 43.

42 Ibid s 72 provides that the *Land Transfer Act 2017* (NZ) applies to stratum estates. The paramountcy provision under s 51(1) of that Act states that upon registration, title 'cannot be set aside'.

43 *UTA 2010* (n 8) s 180(2).

unlocking land supply as a 'necessary first step' to improve economies of scale in the land assembly process, with the Commission stating that this would significantly lower the cost of housing.[44] As of 2017, the zoning of more than 80% of unit and 'cross lease' titles allow for higher density residential development in the Auckland Unitary Plan; 44% of such properties have dwellings built before 1980.[45] New Zealand thus seems primed for urban consolidation, allowing for more potential usable floor area accommodated on the same footprint.

Indeed, the value of urban land depends largely on what and how much can be built on it. This is a multifaceted inquiry that asks not only what can be built on the surface of the land but, perhaps more importantly, what the resultant knock-on effects of urban development are, depending on how a city is organised. Trubka, Newman and Bilsborough find that the preference for low-density housing has resulted in urban sprawl across many cities in Australia. They observe that there is not only direct infrastructure costs for roads, utilities and drainage, but also indirect infrastructure costs which the government does not adequately take into account, stemming from the increased demands of public transport, schools, hospitals and emergency services.[46] The authors also find that the sprawling suburban planning model in many Australian cities places emphasis on travelling by car over healthier alternatives such as walking or riding, thus contributing towards both air pollution and obesity. Governments across Australasia, and indeed globally, see apartment living as a more sustainable urban form that is less damaging to the environment. Allowable building densities have thus increased to accommodate more potential occupants in city centres. As will be seen, in four of the nine surveyed jurisdictions (New Zealand, the Northern Territory, New South Wales and Western Australia), the respective governments have gone one step further and now permit owner-led non-unanimous plan cancellations. This can be seen as a planning tool politically less costly than compulsory acquisition. As a practical matter affecting an ever-increasing number of owners and occupiers, unit plan cancellations are certainly important.

A *Aim of the Paper*

Compared to its Australian peers, New Zealand's *UTA 2010* is unique in many ways. Several aspects of the statutory framework and the underpinning policy motivations appear to strongly facilitate plan cancellations. New Zealand has not only lowered its threshold for owner-led cancellations, from unanimity under the predecessor Act (the *UTA 1972*) to 75% under the current *UTA 2010*,[47] but has

44 New Zealand Productivity Commission, *Using Land for Housing* (Report, September 2015) 18.

45 Fredrickson (n 30) ii.

46 Roman Trubka, Peter Newman and Darren Bilsborough, 'The Costs of Urban Sprawl: Infrastructure and Transportation' (GEN Paper No 83, Australian Institute of Architects, April 2010); Roman Trubka, Peter Newman and Darren Bilsborough, 'The Costs of Urban Sprawl: Physical Activity Links to Healthcare Costs and Productivity' (GEN Paper No 83, Australian Institute of Architects, April 2010).

47 *UTA 2010* (n 8) s 177(3). Section 98(4) provides that for a special resolution on a body corporate motion to pass, 75% of voters must be in favour of the resolution.

also established a quorum of just 25% for such decisions to be made.[48] In contrast, all three Australian jurisdictions permitting non-unanimous owner-led cancellations (the Northern Territory, New South Wales and Western Australia) require the requisite special majority to be computed based on all ownership interests.[49] Further, in the New Zealand context, the requirement that 75% of votes support the cancellation can, on application to the court, be further reduced to 65%.[50] No country apart from New Zealand, to the author's knowledge, has such a provision. On the other hand, there are aspects of the New Zealand Act which appear to obscure the rationality of this 'pro-cancellation' approach. Under s 188 of the *UTA 2010*, regardless of whether an application to the court is made by a single owner or with the requisite special majority or even unanimously, the test of what is 'just and equitable' in ordering the plan cancellation is still to be applied. Perhaps these inconsistencies contribute towards why New Zealand's unit title jurisprudence has been described as still 'relatively immature'.[51]

This article explores these apparent contradictions in the *UTA 2010* and make suggestions how they can be resolved. Given that plan cancellations are an important tool to enable urban revitalisation, enhancing coherence in this area of law is significant. To facilitate my endeavour, I have compared the New Zealand framework of plan cancellations with all eight jurisdictions in Australia — New South Wales, Victoria, South Australia, Tasmania, Western Australia, the Australian Capital Territory and the Northern Territory. Learning from other systems is the most important reason to adopt a comparative method.[52] In comparing New Zealand with pan-Australian jurisdictions, I consider case law, legislative interpretation and policy considerations in the respective jurisdictions, while also accounting for differences in the wording of the respective statutes. This comparative exercise brings to the fore the varied approaches that are undertaken to solve similar issues across jurisdictions. Comparing New Zealand to Australia is appropriate given the similarities in legal systems in both countries, as well as the overlap in statutory frameworks pertaining to unit title law. While cancellations offer tantalising insights in property law, urban planning and the hold-out problem, it remains a relatively unexplored area of legal research, with no paper, to the best of my knowledge, adopting an antipodean approach.

Following this introduction, Part II discusses the policy and ethical considerations in permitting non-unanimous cancellations of unit plans. Part III gives a comparative overview of effecting cancellations in New Zealand and Australia, while Part IV looks at the mechanics of plan cancellations — via both an administrative authority and court order — across Australasia in more detail. Finally, Part V concludes.

48 Ibid s 95(1).

49 See below nn 82–4.

50 *UTA 2010* (n 8) s 211(1).

51 Thomas Gibbons, 'Units, Exclusion, and Governance: Bright Lines and Body Corporates in New Zealand' (2014) 26(2) *New Zealand Universities Law Review* 222, 223.

52 Bram Akkermans, 'The Comparative Method in Property Law' in Susan Bright and Sarah Blandy (eds), *Researching Property Law* (Palgrave, 2016) 90, 91.

II POLICY AND ETHICAL CONSIDERATIONS IN PERMITTING NON-UNANIMOUS PLAN CANCELLATIONS

Most Australasian jurisdictions allow a unit plan to be cancelled in one of two ways: by a court order on 'just and equitable' grounds or by resolution of the owners — typically unanimous, but by a super-majority in New Zealand, the Northern Territory, New South Wales and Western Australia. Exceptionally, as will be detailed below, Tasmania and Western Australia do not provide for a general power for the court to cancel a plan on 'just and equitable' grounds. These details are covered in greater detail in the next two sections. In this part of the paper, I deal with the inherent tension in permitting plan cancellations where this is supported by a less than unanimous resolution.

Since the mid-2000s, the Property Council of Australia has urged Australian governments to allow terminations on a 75% majority rather than requiring unanimity.[53] As a lobby group for developers, it is easy to be sceptical of such suggestions. In particular the argument canvassed by the Council that 'owners who want to realise the investment potential of their properties [would be] stymied by the strata title straitjacket' of unanimity appears excessive.[54] Troy et al critique this point as unit owners have an unfettered right to sell their own unit at any time;[55] owners are at most denied 'supernormal profits' from having the development sold collectively.[56] That unit owners seeking a plan cancellation and sale are typically motivated by the expectation of supernormal profits[57] hardly assuages the feelings of minority owners seeking quiet enjoyment. The portrayal of greedy developers encircling a development thus makes sentiments of minority owners easy to empathise with. Crommelin et al also note that because lower income groups are more likely to live in multi-owned apartment buildings, it is especially important to ensure that laws allowing for less-than-unanimous cancellations do not disenfranchise this vulnerable group.[58] Further, even where owners receive a premium above the standalone value of their apartment, a difficulty remains for owners wishing to buy in the same locale, especially if there are multiple owners

53 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 19 February 2009, 2493 (Delia Lawrie, Minister for Justice and Attorney-General).

54 Property Council of Australia, *Strata Title Renewal* (Report, 2009) 5.

55 Laurence Troy et al, '"It Depends What You Mean by the Term Rights": Strata Termination and Housing Rights' (2017) 32(1) *Housing Studies* 1, 8.

56 I have previously explained that it is reasonable to assume that the collective value of the scheme is greater than the sum of all its constituent units. If it were not, the majority owners would simply sell their individual units in the market: Ti, 'Towards Fairly Apportioning Sale Proceeds' (n 35) 1518–19.

57 Edward SW Ti, 'Collective Best Interests in Strata Collective Sales' (2019) 93(12) *Australian Law Journal* 1025, 1031 ('Collective Best Interests').

58 Laura Crommelin et al, 'A New Pathway to Displacement: The Implications of Less-Than-Unanimous Strata Renewal Laws for Vulnerable Residents' (2020) 56(4) *Australian Planner* 261, 267, citing Hazel Easthope, Laurence Troy and Laura Crommelin, City Futures Research Centre, *Equitable Density: The Place for Lower Income and Disadvantaged Households in a Dense City* (Report No 1, July 2017) 4.

concurrently trying to purchase.[59] Cancellations by a super-majority are thus controversial because they allow for the ouster of minority owners from their homes. This upheaval is disquieting as it runs contrary to the long-held belief that 'the house of every one is his castle'.[60]

While units and single dwellings are both Torrens title,[61] the rights and obligations of a unit owner are markedly different from a proprietor owning a single dwelling house. These include being subject to the development's by-laws governing how common property is used and maintained,[62] and in an increasing number of jurisdictions, the fact that a majority of unit owners is empowered to cancel the unit plan and sell the land. The realities differentiating a unit title from single dwelling ownership have resulted in comments that unit title ownership is comparatively less secure. In New South Wales, an opposition Member of Parliament stated that laws allowing cancellation by non-unanimous special resolution 'constitute a new exception to indefeasibility of title'.[63] Edgeworth observes that strata renewal by majority consensus is 'at odds with the general rationale for private property rights',[64] while in the context of British Columbia, Harris describes the dissolution of a strata scheme by a super-majority as a taking of property interests from those who oppose the sale.[65] These concerns have to be balanced against the realities of urban needs. Sherry notes that a deteriorating strata building can adversely affect adjacent communities.[66] She has thus adopted a practical view and is not averse to majoritarian cancellation of unit plans if there are countervailing gains in housing.[67] Urban sprawl and housing shortages are a germane problem in many cities across Australia and New Zealand. Requiring

59 Crommelin et al (n 58) 265.

60 *Semayne's Case* (1604) 5 Co Rep 91; 77 ER 194, 194.

61 *UTA 2010* (n 8) s 72 provides that the *Land Transfer Act 2017* (NZ) applies to stratum estates. The paramountcy provisions under the *Land Transfer Act 2017* (NZ) state that, barring fraud and overriding interests, title 'cannot be set aside' upon registration: at ss 51–2. This position is consistent across Australia.

62 Sherry argues that because there is 'little limit on the content of by-laws', Australian legislation fails to recognise that there are qualitative differences between the by-laws of some bodies corporate which essentially create or divest proprietary interests in units or common property: Cathy Sherry, 'How Indefeasible Is Your Strata Title: Unresolved Problems in Strata and Community Title' (2009) 21(2) *Bond Law Review* 159, 160, 160–80 ('How Indefeasible Is Your Strata Title').

63 New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 October 2015, (Guy Zangari) <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardFull.aspx#/DateDisplay/HANSARD-1820781676-63400/HANSARD-1820781676-63349>.

64 Edgeworth (n 13) 1149.

65 Douglas C Harris, 'Owning and Dissolving Strata Property' (2017) 50(4) *University of British Columbia Law Review* 935, 944.

66 Cathy Sherry, 'Termination of Strata Schemes in New South Wales: Proposals for Reform' (2006) 13(3) *Australian Property Law Journal* 227, 230.

67 See Cathy Sherry, 'Strata Law Overhaul a Step Too Far', *Sydney Morning Herald* (online, 23 August 2015) <https://www.smh.com.au/opinion/strata-law-overhaul-a-step-too-far-20150823-gj5mz5.html>.

unanimity before allowing plan cancellation essentially prefers incumbent owners, possibly denying a city's essential workers centrally located accommodation and job opportunities.[68] The New Zealand Department of Building and Housing's report to the Social Services Select Committee on the Unit Titles Bill 2008 (NZ) observed that unanimity had been 'cumbersome, time-consuming and impractical, particularly for larger developments, and often led to hold-out situations where the body corporate was unable to act in the best interests of the majority of unit owners'.[69] Unsurprisingly, the four Australasian jurisdictions permitting majority plan cancellations have based their decisions to do so on the need to provide more housing[70] and prevent hold-outs which curtail urban rejuvenation.[71]

There have also been doctrinal justifications canvassed in support of majoritarian cancellations. Elsewhere, I have suggested that the legislation permitting a cancellation by a super-majority simply recasts the in-specie rights of possessory ownership: they are replaced with the right to receive a fair apportionment of the sale proceeds.[72] A majority sale may be seen as a 'statutory covenant' which the owner implicitly consents to when purchasing the unit.[73] A cancellation by a super-majority is more ethical than a compulsory acquisition, even though majority cancellations have often attracted criticism while public takings are generally accepted globally. The rationale for this can be summarised as follows:

1. Consent: in a private taking, a super-majority actually wants to sell, while in a public taking the State forces the sale at a time of its choosing without regard for consent;

68 Shen makes these observations in relation to Boston's inner cities: Q Shen, 'Location Characteristics of Inner-City Neighborhoods and Employment Accessibility of Low-Wage Workers' (1998) 25(3) *Environment and Planning B: Urban Analytics and City Science* 345. While Shen's findings may not be entirely applicable to Australasia's urban layout, there are clear justice reasons for facilitating job and housing opportunities to a broad spectrum of society which remains valid to the Australasian context.

69 Department of Building and Housing (NZ), *Departmental Report to the Social Services Select Committee on the Unit Titles Bill 2008* (Report, July 2009) 21.

70 New South Wales, *Parliamentary Debates*, Legislative Assembly, 20 October 2015 <https://www.parliament.nsw.gov.au/Hansard/Pages/HansardFull.aspx#/DateDisplay/HANSARD-1820781676-63400/HANSARD-1820781676-63349>. Ray Williams MP stated: 'There is a great need across the Sydney metropolitan area to provide housing.'

71 '[Majority cancellation] will make it easier to redevelop a unit title property … [i]t will also prevent hold-outs': New Zealand, *Parliamentary Debates*, House of Representatives, 5 March 2009, 1715 (Phil Heatley, Minister of Housing); 'This legislation is aimed at those who constantly undermine the wishes of the majority of property owners in an old and devalued unit block': Northern Territory, *Parliamentary Debates*, Legislative Assembly, 26 November 2014, 5608 (Peter Chandler, Minister for Lands, Planning and the Environment); 'I live in an area undergoing significant revitalisation, and under the existing legislation if there is not 100 per cent agreement on the termination of the scheme, it cannot progress — and it can be just one person holding out': Western Australia, *Parliamentary Debates*, Legislative Assembly, 21 August 2018, 4941 (Liza Harvey).

72 Ti, 'Collective Best Interests' (n 57) 1036.

73 Ibid 1027.

2. Price: in a private taking, minority owners take a share in the supernormal sale price while in a public taking market value is the benchmark; and

3. Land use: the purpose for which land is taken is not necessarily for more pressing social ends in a public taking than in a private taking.[74]

There are conflicting considerations both in support for and against majoritarian plan cancellations. Ultimately the political process and priorities determine whether and how a jurisdiction should permit such private takings. Pocock observes that an unconditional 'reliance on the free market does not promote an optimal level of land assembly'.[75] The reality is that non-unanimous owner cancellations are already part of the strata framework in New Zealand, the Northern Territory, New South Wales and Western Australia. Pressing urban needs suggest that more Australian jurisdictions are likely to take the plunge, with Queensland likely to be the next Australian state to enact legislation permitting cancellations by a super-majority.[76] The next section presents a comparative overview of plan cancellations in New Zealand and Australia.

III PLAN CANCELLATIONS IN AUSTRALIA AND NEW ZEALAND

One of the rationales for revising New Zealand's *UTA 1972* to its current form (the *UTA 2010*) was that it was 'not sophisticated enough to successfully regulate the relationships, rights and responsibilities necessitated by common property ownership and management in multi-unit developments'.[77] The 2010 Act has modernised many aspects of unit title law. Significant for present purposes is the amendment allowing unit plans to be cancelled by a non-unanimous super-majority.[78] While the 1972 Act was modelled after the *Strata Titles Act 1967* (Vic), the current 2010 iteration is sui generis, especially where cancellations are

74 Ti, 'Towards Fairly Apportioning Sale Proceeds' (n 35) 1498–9. The learned academic Sherry notes that the protection afforded to private property from expropriation in the Anglo-Australian legal tradition is extremely thin: Sherry, 'How Indefeasible Is Your Strata Title' (n 62) 165–6. She cites *Griffiths v Minister for Lands, Planning and Environment* (2008) 235 CLR 232, 243 [28]–[30] (Gummow, Hayne and Heydon JJ, Gleeson CJ agreeing at 237 [1]) where a 5:2 majority of the Australian High Court held that in the compulsory acquisition of native title, the justificatory phrase 'for any purpose whatsoever' in the *Lands Acquisition Act 1978* (NT) s 43(1) meant that land can be taken solely to enable the Territory to grant such land to another person for private use.

75 Melissa Pocock, 'Compulsory Acquisition, Public Benefits and Large-Scale Private Sector Redevelopments: Can Australia Learn from the United Kingdom?' (2014) 19(3) *Local Government Law Journal* 129, 141.

76 See William Duncan et al, 'Government Property Law Review: Options Paper Recommendations' (Recommendations Paper, Commercial and Property Law Research Centre, Queensland University of Technology, 2017).

77 Tim Jones, Peter Fuller and Brenna Waghorn, 'Unit Titles Act 1972: The Case for Review' (Discussion Report, Auckland Regional Growth Forum, August 2003) 1.

78 *Units Titles Act 1972* (NZ) s 45 ('*UTA 1972*'), as repealed by *UTA 2010* (n 8) s 218, required a unanimous resolution for plan cancellation.

concerned. Unlike New Zealand, Victoria only permits unanimously supported plan cancellations.[79] The Northern Territory from 2008, New South Wales from 2016 and Western Australia from 2020 are the only three Australian jurisdictions in which plan cancellations supported by a super-majority have been allowed.[80] Apart from such owner-led cancellations, whether unanimous or super-majority driven, most Australasian jurisdictions also permit the court (or tribunal) to cancel the plan and order the winding up of the body corporate on 'just and equitable' grounds. There are thus generally two ways to cancel a plan:

1. By a court order upon the application of an 'interested party' (such as an owner or creditor of the body corporate), which does not need a minimum ownership threshold to apply, for the court exercises its discretion on 'just and equitable grounds'; or

2. An owner-led cancellation application to the relevant authority (eg the Registrar of Land) which, depending on the jurisdiction, could require 75–100% support.

Tasmania[81] and Western Australia[82] only allow for owner-led cancellations; their legislation does not give the court a general power to terminate a plan on 'just and equitable' grounds. An owner-led plan cancellation has traditionally required unanimity, but as stated, New Zealand, and in Australia, the Northern Territory, New South Wales and most recently Western Australia have reduced these thresholds: 75% in New Zealand[83] and New South Wales,[84] 80–95% in the Northern Territory,[85] and 80% in Western Australia.[86] The remaining five Australian jurisdictions (the Australian Capital Territory, Queensland, South

79 *Subdivision Act 1988* (Vic) s 32(j) ('*Vic Act*').

80 See below nn 84–6.

81 *Strata Titles Act 1998* (Tas) s 27 ('*Tas Act*') provides only for owner-led cancellations supported unanimously.

82 *Strata Titles Act 1985* (WA) s 171 ('*WA Act*'). Section 182 provides for unanimous or 80% owner-supported cancellation. The latter is subject to confirmation by the Strata Administrative Tribunal ('SAT'), and provided there are at least five lots comprising the scheme: at ss 182(7), 183.

83 *UTA 2010* (n 8) ss 98(4), 177(3)(a).

84 *Strata Schemes Development Act 2015* (NSW) ss 154 (definition of 'required level of support'), 176 ('*NSW Act*'). Part 10 of the Act provides the process for undertaking a 'strata renewal', whereby a strata scheme is collectively sold or redeveloped: at s 156. There are other circumstances in which a strata scheme can be terminated, without judicial intervention, such as by a unanimous (unless the Registrar-General agrees otherwise) application to the Registrar-General under pt 4 div 4 of the Act: see at s 142(3).

85 Depending on the age of the building, provided the building is at least 15 years old: *Termination of Units Plans and Unit Title Schemes Act 2014* (NT) s 4(1) (definition of 'required percentage'), pt 4 ('*NT Act*'). Part 3 of the Northern Territory Act also allows plan cancellations by unanimity for developments less than 15 years: at s 7. The Northern Territory is the only Australasian jurisdiction to differentiate voting thresholds depending on the age of the building.

86 Subject to confirmation by the SAT and provided there are at least five lots comprising the scheme: *WA Act* (n 82) s 182(7).

Australia, Tasmania and Victoria) require resolutions without dissent for owner-led plan cancellations.[87] There are thus five jurisdictions in Australia (the Australian Capital Territory, New South Wales, the Northern Territory, Queensland, Tasmania, Victoria) as well as New Zealand which permit plan cancellations via either a court order or an owner-led application. For ease of reference, Table 1 below compares these differences.

Table 1

Jurisdictional legislation	Court cancellation on 'just and equitable' grounds	Thresholds for owner-led cancellation
Unit Titles Act 2010 (NZ)	Section 188.	By 75% special resolution, with 25% quorum of principal units: ss 95, 98(4), 177(3)(a). Failing a special resolution, if at least 65% of eligible voters vote in favour, can apply to have the resolution confirmed on the ground that failure would be 'unjust or inequitable': s 211(1).
Unit Titles Act 2001 (ACT)	Section 161A.	By unanimity: s 160(3).
Strata Schemes Development Act 2015 (NSW)	Section 136.	By 75% of all lots: ss 154 (definition of 'required level of support'), 182.
Termination of Units Plans and Unit Title Schemes Act 2014 (NT)	Part 5.	If the development is at least: • 30 years of age — by 80% approval of all lots; • 20 years of age, but less than 30 years — by 90% approval of all lots; • 15 years of age, but less than 20 years — by 95% of all lots. Section 4(1) (definition of 'required percentage'). If less than 15 years of age *or* has fewer than 10 units — can only be by unanimity: pt 3 s 7, pt 4 s 8(b).
Body Corporate and Community Management Act 1997 (Qld)	Section 78(2).	By unanimity: s 78(1)(b).
Strata Titles Act 1988 (SA)	Section 17(1)(b), read with *Strata Titles Regulations 2018* (SA) reg 7.	By unanimity: ss 17(1)(a), (2).
Strata Titles Act 1998 (Tas)	×	By unanimity: s 27(2).
Subdivision Act 1988 (Vic)	Section 34G.	By unanimity: s 32(j).
Strata Titles Act 1985 (WA)	×	80% approval of all lots provided there are at least five lots comprising the scheme otherwise by

87 *Unit Titles Act 2001* (ACT) s 160(3) ('*ACT Act*'); *Body Corporate and Community Management Act 1997* (Qld) s 78(1) ('*Qld Act*'); *Strata Titles Act 1988* (SA) s 17(2); *Tas Act* (n 81) s 27(2); *Vic Act* (n 79) s 32(j).

		unanimity: s 182(7).

A *Comparative Critique of Plan Cancellations in New Zealand*

In respect of New Zealand's court-ordered cancellations, s 187(1) of the *UTA 2010* provides that the body corporate supported by special resolution, an administrator (typically representing a creditor), or even a single unit owner can apply for the cancellation of the unit plan, on 'just and equitable' grounds.[88]

In respect of owner-led applications to the Registrar for cancellation, the requisite threshold is 75% of unit owners *who vote* at the meeting of the owner's body corporate,[89] provided that the modest quorum — the higher of 25% of all unit owners or two owners — is met.[90] If there are no objectors, the Registrar can cancel the plan.[91] Unit owners opposing cancellation by the Registrar can lodge a notice of objection;[92] the matter is decided by the High Court, again on the 'just and equitable' formulation.[93] Interestingly, the New Zealand Act also provides for 'majority relief'.[94] Where the 75% threshold is not met but at least 65% of eligible voters support cancellation, any owner who supported the resolution can petition the High Court for the plan to be cancelled, on the ground that a failure to do so would be 'unjust or inequitable on the majority'.[95] According to the parliamentary debates, allowing for the potential to endorse a 65% threshold was to cater for small developments which could have only as few as three owners:

> The new subsection allows for a decision to be made where 65 percent of the owners agree, as opposed to 75 percent. In the case of a unit title development that has three units, in order to have 75 percent agreement we would have to have 100 percent agreement, which is certainly not what we intended.[96]

Thus, while on the face of the legislation there is no requirement for the court to only consider such 'majority relief' for small developments, a purposive interpretation of the section suggests that it may be prudent for courts to be slow

88 *UTA 2010* (n 8) s 188(2).

89 Ibid s 98(4). Prior to the enactment of the 2010 Act, unanimity from *all* owners was needed, not just those who were present at the meeting: *UTA 1972* (n 78) s 45, as repealed by *UTA 2010* (n 8) s 218.

90 *UTA 2010* (n 8) s 95.

91 Ibid s 179.

92 Ibid s 213(3).

93 Ibid s 215(2). The High Court is the appropriate decision-maker: see at s 177(6)(b).

94 The heading of ibid pt 5 sub-pt 3 reads: 'Minority and majority relief'.

95 Ibid s 211.

96 New Zealand, *Parliamentary Debates*, House of Representatives, 25 March 2010, 9874 (Moana Mackey).

in allowing the threshold to be lowered to 65% in larger developments. For clarity, however, if the New Zealand legislature wanted specific rules tied to the size of the development, this should have been made explicit. In the Northern Territory, for instance, a non-unanimous cancellation can only be made in respect of developments older than 15 years and in which there are at least 10 units.[97] In Western Australia, non-unanimous cancellations only apply to strata title schemes with five or more lots.[98] As it stands, s 211 of the *UTA 2010* leaves it open to interpretation whether courts have discretion to lower the cancellation threshold to 65% even in larger developments. This increases uncertainty for minority unit owners and to that extent is an unsatisfactory provision.

Thomas notes that because of the modest quorum requirement of 25%, only 18.75% of owners actually need to support the cancellation for a special majority (assuming the meeting is constituted only by the bare quorum).[99] This is a provision unique to New Zealand that sets it apart from all of its Australian counterparts which permit super-majority cancellations. The resolution thresholds in the Northern Territory,[100] New South Wales[101] and Western Australia[102] allowing non-unanimous cancellations refer explicitly to the requisite voting percentages being in relation to all owners, rather than merely voting owners. The clear policy behind allowing unit plans to be cancelled via resolutions underpinned by this low quorum was efficacy. New Zealand's then Minister of Housing declared: 'This … will make it easier to redevelop a unit title property … It will also prevent hold-outs and will mean that unit owners who do not vote will not be able to hold up the process'.[103] Non-resident or uncontactable owners who do not take part in the voting process may thus unwittingly allow their developments to vote to have their plan cancelled. While an apparent affront to property rights, this is no more draconian than subjecting citizens to a government elected by those who choose to be active participants in the democratic process. While there may be contentions what the ideal quorum should be, insofar as preventing hold-outs are concerned, the distinctive New Zealand model of computing votes based on

97 *NT Act* (n 85) s 8.

98 *WA Act* (n 82) s 182(7)(a).

99 Rod Thomas, 'Enactment of the Unit Titles Act 2010 (New Zealand): Analyses of Key Provisions with Discursive Commentary' (Research Paper, 22 August 2019) 26. This point was also noted during the parliamentary debates. 'By my calculation [the 25% quorum] means that a special resolution could be passed by as little as 19 percent of the unit title owners': New Zealand, *Parliamentary Debates*, House of Representatives, 25 March 2010, 9870 (Phil Twyford).

100 For a development at least 30 years of age, 'required percentage' means '*owners* who together have the right to vote in relation to at least 80% of the total interest entitlement': *NT Act* (n 85) s 4 (definition of 'required percentage' para (a)) (emphasis added). Paragraphs (b)–(c) stipulate higher thresholds in respect of newer developments, but are otherwise worded identically.

101 '[R]equired level of support, in relation to a strata renewal plan for a strata scheme, means the support … of the *owner or owners* of at least 75% of the lots': *NSW Act* (n 84) s 154 (definition of 'required level of support') (emphasis added).

102 '[T]he number of votes cast … is at least 80% of the *total number of lots* in the scheme': *WA Act* (n 82) s 182(7)(b) (emphasis added).

103 New Zealand, *Parliamentary Debates*, House of Representatives, 5 March 2009, 1715 (Phil Heatley, Minister of Housing).

present and voting owners is to be lauded. Indeed, jurisdictions which require cancellation resolutions to be in proportion to all unit owners can easily result in indifferent or uncontactable owners scuttling the collective best interests of the development.

It is evident from the *UTA 2010* that only cancellations which have special majority support and face no objections will be cancelled by the Registrar.[104] A body corporate with special majority support may thus choose to either apply to the High Court directly for a cancellation under s 187 as plaintiff,[105] or make its application to the Registrar under s 177 then wait to see if there are any objectors, and if there are, resist the application in the High Court as defendant, under s 215. Thus, in respect of a successful owner-led cancellation in New Zealand, this could range from as low as 18.75% of unit owners, to unanimity. In respect of cancellation applications made to the High Court, even a single owner or creditor of the body corporate has standing to initiate a cancellation. In both contexts, however, the *UTA 2010* adopts the 'just and equitable' standard in deciding whether to approve a cancellation. Indeed, the phrase 'just and equitable' appears thrice in the *UTA 2010*: court-ordered cancellations under s 188(2),[106] hearings where there is an objector to a Registrar's cancellation under s 215(2),[107] and when at least a 65% majority (but short of a special majority) is seeking cancellation under s 211(2).[108]

Given the repetitive use of the phrase, it is appropriate to briefly discuss what the words 'just and equitable' mean.

B *'Just and Equitable' Cancellations*

As explained by the Australian Capital Territory Supreme Court in *Re Unit Titles Ordinance 1970 and Proprietors of Unit Plan No 139* ('*Re Ordinance 1970*'), the basis for cancelling a unit plan on grounds of 'justice and equity' appears to have its roots in corporations law, which in particular seeks to prevent oppression to minority shareholders, and hence by analogy, minority owners.[109] As shown in

104 See *Dominion Finance Group Ltd (in rec and liq) v Body Corporate 382902* (2012) 14 NZCPR 252, 262 [38] (Fogarty J) ('*Dominion Finance*').

105 This was the approach by the owner of eight of the nine lots in *Lake Hayes Property Holdings Ltd v Petherbridge* (2014) 15 NZCPR 590: see at 593 [3]–[5] (Panckhurst J) ('*Lake Hayes*').

106 *UTA 2010* (n 8) s 188(2) relevantly provides:

> The High Court may authorise that the unit plan be cancelled if—
> (a) the High Court is satisfied that it is just and equitable that the body corporate be dissolved and the plan cancelled having regard to—
> (i) the rights and interests of any creditor of the body corporate; and
> (ii) the rights and interests of every person who has any interest in any unit or in the base land or in any part of the base land …

107 'The appropriate decision-maker must not make an order under subsection (1) unless it is satisfied that it is just and equitable to do so': ibid s 215(2).

108 'The appropriate decision-maker may make an order confirming the resolution, subject to any terms and conditions it sees fit, if it is satisfied that it is just and equitable to do so': ibid s 211(2).

109 (1986) 83 FLR 166, 174 (Miles CJ) ('*Re Ordinance 1970*').

Table 1 above, the phrase is adopted in 6 of the 9 jurisdictions surveyed, bar South Australia, Tasmania and Western Australia.[110] New Zealand specifies what factors should be taken into account in a 'just and equitable' exercise of discretion.[111] In the main, these are fairly commonsensical — the rights and interests of all owners and creditors should be taken into account — and should not be controversial. It is nevertheless important to give some colour to the phrase. In the context of winding up, Callaway says that the expression 'just and equitable' is a single test (not what is just, and what is equitable) to ensure that the justice applied will be equitable justice, ie 'the justice of the individual case'.[112] This was echoed by the New Zealand High Court in *Lake Hayes Property Holdings Ltd v Petherbridge* ('*Lake Hayes*') where Panckhurst J held, in relation to a plan cancellation under s 188 of the *UTA 2010*:

> The phrase 'just and equitable' means equitable justice, the justice of the individual case. All matters relevant to the rights and interests of creditors or interest holders must be considered. And, importantly, the evaluation must be conducted with proper regard to the scheme and purpose of the Act.[113]

Dominion Finance Group Ltd (in rec and liq) v Body Corporate 382902,[114] as well as *OM Hardware Ltd v Body Corporate 303662*,[115] are also relevant decisions of the New Zealand High Court. In both these cases, the objection was not in relation to whether the plan should be cancelled but whether, and if so, how, the court should reassess ownership interests[116] following a cancellation, considering its duty to make a 'just and equitable' decision. The High Court affirmed the need to '[look] at all the facts',[117] and be 'responsive to the particular fact situation occurring'.[118] In the same vein, the Privy Council hearing an appeal from the West Indian Court of Appeal in *Loch v John Blackwood Ltd* held that the court's discretion to wind up a company on 'just and equitable' grounds is to be exercised 'upon a sound induction of all the facts of the case'.[119]

110 Regulation 7 of the *Strata Titles Regulations 2018* (SA) provides certain express criteria the Court must consider in making its decision, including whether any unit owners object to the cancellation, the possibility of adverse consequences if cancellation is granted or refused, and any other reasons 'in the interests of justice'.

111 See above n 106.

112 FH Callaway, *Winding Up on the Just and Equitable Ground* (Law Book, 1978) 5.

113 *Lake Hayes* (n 105) 603 [48].

114 *Dominion Finance* (n 104).

115 [2015] NZHC 190 ('*OM Hardware*').

116 Essentially what share of the land each owner should get. *UTA 2010* (n 8) s 177(7) requires that a certificate from a registered valuer must accompany any application to the Registrar for a plan cancellation, showing a reassessment for all the units in the development. The *UTA 2010* thus contemplates that the relative values of the units may have varied from the time of development to cancellation. This is a fascinating area but beyond the scope of the current paper.

117 *Dominion Finance* (n 104) 255 [5] (Fogarty J).

118 *OM Hardware* (n 115) [40] (Dunningham J).

119 [1924] AC 783, 788 (Lord Shaw).

Synthesising these rules, it is submitted that contextual justice specific to the facts of the case, while allowing the decision-maker some flexibility, is thus sought when deciding whether a non-unanimous cancellation should be endorsed. At the same time however, the 'just and equitable' standard is not a placeholder for palm tree justice. In the hallowed case of *Baird v Lees*,[120] Lord Clyde of the Scottish Court of Sessions held in the context of considering the 'just and equitable' ground to liquidate a company that the discretion must be 'judicially exercised' and that '[i]t is not enough for the [c]ourt in exercising it to have … "God and a good conscience" before its eyes; grounds must be given which can be examined and justified'.[121]

Apart from deciding what is 'just and equitable', a question arguably more important is *who* has the burden of proving whether a termination meets the requisite standard. As the case law will show, courts sometimes grapple with whether a balancing test should be adopted (with evidentiary considerations secondary) or whether the applicant should always bear the burden of proof. In New Zealand, because the 'just and equitable' standard applies for applications whether supported by the requisite super-majority or not, a key point I make in this article is that the phrase should take on a pro-cancellation hue when the requisite majority threshold is met. Under s 177 of the *UTA 2010*, the body corporate supported by a special majority can apply to the Registrar for a plan cancellation as of right.[122] Only if there are objections will a hearing be conducted under s 215. Curiously, the body corporate can also opt to apply to the court for a cancellation under s 187 of the Act.[123] On its face, the burden is on the minority where the body corporate proceeds under s 177, but the super-majority carries the burden under s 187. This inconsistency is unsatisfactory. Justice considerations require that a cohort of owners with the requisite super-majority support should be treated equally whether s 177 or s 187 is the starting point. Given that the legislation has stipulated that a special majority is the bright line for owners to organise their property interests around, it is rational that the starting point should be to order the cancellation when this threshold is met. A close examination of plan cancellations in the next section explains my arguments in more detail.

IV EXAMINING PLAN CANCELLATIONS IN DETAIL

This section examines specifically the two ways plans are cancelled: cancellations made to an authority supported by an owner's resolution and cancellations made to court.

120 1924 SC 83 ('*Baird*').

121 Ibid 90. This decision was cited with approval in the context of a plan cancellation in *World Vision* (n 19): at 686 [63].

122 *UTA 2010* (n 8) s 177(1).

123 Ibid s 187(1)(a). Any unit owner can also make the application under s 187, but as with the body corporate, they will bear the burden of proof: at sub-s (c).

A *Cancellations Supported by Resolution to an Administrative Authority*

This category of plan cancellations or strata terminations (as the case may be) occurs when the body corporate makes an application to the relevant authority seeking for the plan to be cancelled and the units amalgamated, allowing for the land to be sold for redevelopment. Intuitively, in jurisdictions requiring unanimity, the authority should not need to concern itself, vis-a-vis the owners, with substantive matters of justice. This is indeed observed in the statutory language of the five Australian jurisdictions requiring unanimity before an application to cancel the plan is made to the relevant authority.[124] The remaining three jurisdictions in Australia which allow for non-unanimous cancellations also specifically cater for cancellations with unanimous support. In these three jurisdictions, depending on whether the resolution is supported unanimously or with the requisite super-majority, different sub-sections apply.[125] None of the jurisdictions surveyed contemplate the 'just and equitable' yardstick in their provisions for unanimous plan cancellations — it is language adopted only where non-unanimous resolutions are concerned. Instead, the provisions focus on ensuring that the procedural requirement of filing a unanimous resolution is met. This is rational drafting given that all unit owners must support the plan cancellation under these provisions.

In the four jurisdictions permitting non-unanimous cancellation (New Zealand, the Northern Territory, New South Wales and Western Australia), the legislative language is understandably more conservative, as permitting the super-majority to cancel the strata scheme results in the termination of property rights in the units for the minority. In particular, all four jurisdictions adopt the phrase 'just and equitable' in deciding whether to permit a non-unanimous cancellation. Thus, under s 183 of the *Strata Titles Act 1985* (WA), the termination proposal must, inter alia, be 'just and equitable' having regard to the interests of the strata owners, with non-consenting owners either receiving a 'like for like' exchange or at least 'fair market value' for their unit.[126] Under s 182(1)(d) of the *Strata Schemes Development Act 2015* (NSW), the strata renewal plan's settlement terms must be 'just and equitable in all the circumstances'. For schemes with more than 10 units and which are older than 15 years, ie schemes where unanimity is not required, s 17(1) of the *Termination of Units Plans and Unit Title Schemes Act 2014* (NT) provides that the Tribunal may only approve a super-majority termination if it is 'just and equitable to do so' and any minority objections made in respect of the

124 See above n 87.

125 Section 7 of the *NT Act* (n 85) allows any plan to be cancelled with unanimous support, but can *only* be cancelled by unanimity where the strata scheme is less than 15 years old: see at ss 6(1), 8. Section 182(6) of the *WA Act* (n 82) permits unanimous cancellations made to the Registrar of Titles. Non-unanimous resolutions with 80% support or more must be endorsed by the SAT: at sub-s (7). Section 142 of the *NSW Act* (n 84) requires the application for termination by the Registrar-General to be signed inter alia by 'each owner'; otherwise a strata renewal plan which is supported by 75% of lot owners must be sanctioned by the Land and Environmental Court under pt 10 div 7 of the Act: ss 154 (definitions of 'court', 'required level of support'), 178, 182.

126 *WA Act* (n 82) s 182(9)(b)–(c).

cancellation are 'unreasonable'. Finally, the *UTA 2010* also directs the Court to apply the 'just and equitable' standard in determining whether to endorse a majoritarian cancellation, though for applications made initially to the Registrar, the test is only applied when an objection is made under s 215 of the Act.[127] For ease of reference, Table 2 below makes these comparisons.

Table 2

Jurisdiction legislation	Minimum majority needed and any prerequisites	Substantive requirements absent unanimity
Unit Titles Act 2010 (NZ)	If applying to Registrar: 75% special resolution with 25% quorum of principal units: ss 95, 98(4), 177(3)(a). Failing special resolution, 65% of *eligible voters*, if not allowing cancellation would be 'unjust or inequitable': s 211(1). If applying directly to the High Court, any unit owner, or the body corporate by special resolution: s 187(1).	If applying to Registrar, and an objection is made: 'just and equitable to do so': s 215(2). If applying directly to the High Court: 'just and equitable' having regard to the rights and interests of: • creditors of the body corporate'; and • every person with any interest in any unit or the land. Section 188(2)(a).
Strata Schemes Development Act 2015 (NSW)	75% of all lots: ss 154 (definition of 'required level of support'), 178(1).	Land and Environment Court must give effect to strata renewal plan for: • a collective sale, if the proposed distribution of sale proceeds to each lot is at least equal to its 'compensation value', and settlement terms are 'just and equitable in all the circumstances'; • a redevelopment, if amount dissenting owners are to be paid is at least equal to their lot's 'compensation value', or the 'total consideration' they would've received under the plan, whichever is higher. Sections 182(1)(d)–(e).
Termination of Units Plans and Unit Title Schemes Act 2014 (NT)	If the development is at least: • 30 years of age — by 80% approval of all lots; • 20 years of age, but less than 30 years — by 90% approval of all lots; • 15 years of age, but less than 20 years — by 95% of all lots. Section 4(1) (definition of 'required percentage'). **Prerequisite:** development must have at least 10 units *and* be at least 15 years of age; otherwise	Tribunal may only approve termination if: • 'just and equitable to do so'; and • any objection by a unit owner is 'unreasonable'; or • 'otherwise necessary', taking into account any prescribed matters. Section 17(1). Tribunal must also consider: • the extent to which a unit owner is 'likely to suffer adverse consequences' if the termination is or is not ordered; • the the 'financial benefits and risks of the proposed termination';

127 *UTA 2010* (n 8) ss 177(4), 215(2).

	unanimity is required: ss 6(1), 8.	• whether a different court or Tribunal order would be more appropriate than than an order for termination Section 17(2). An application must be made to the Tribunal in any case where the resolution is not unnanimous: ss 9–12.
Strata Titles Act 1985 (WA)	80% of all lots: s 182(7)(b). **Prerequisite:** scheme must have five or more lots; otherwise unanimity is needed: ss 182(6), (7)(a).	Tribunal can only confirm a termination resolution if: • lot owners who do not support termination will receive 'fair market value' compensation or a 'like for like exchange'; and • termination proposal 'is otherwise just and equitable', having regard to the interests of lot owners, occupiers, registered mortgagees of lots, and any others with a property interest in the strata titles scheme that is Sections 183(9)(b)–(c).

Surprisingly, unlike the statutory frameworks in all eight Australian jurisdictions, the *UTA 2010* does not provide for a separate section which caters specifically for unanimously supported cancellations. Thus, regardless whether a plan cancellation is supported by a special majority or is unanimously supported, an application for the Registrar to cancel the plan is still made under s 177 of the *UTA 2010*. In this respect, the approach taken by the three Australian jurisdictions differentiating between unanimous and non-unanimous cancellations in their statutory frameworks — the Northern Territory, New South Wales and Western Australia — is preferable. Where unanimous applications for cancellation are concerned, it is not necessary for the decision-maker to consider matters of substantive justice vis-a-vis the owners. Conversely more scrutiny ought to be levied in respect of non-unanimous cancellations (ie no bad faith, no conflicts of interest), and even greater scrutiny levied if a plan application is made by less than a super-majority. As the *UTA 2010* does not distinguish between unanimously and non-unanimously supported cancellations, the objection process under s 213 and subsequent appeal as contemplated under s 177(6)(b) — provisions which are reasonable in the case of non-unanimous cancellations — are still available to a unit owner who did not initially object to the cancellation. While s 210(1) states that an owner seeking minority relief must be one who initially voted against the resolution, sub-s (1A) specifically states that this provision does not apply to a 'designated resolution', of which cancellation of a unit plan under s 177 is, pursuant to s 212(k), one such resolution.[128] Because there is no separate provision catering only for unanimous cancellations under the *UTA 2010*, the understandably more rigorous standard of ensuring a 'just and equitable' outcome applies to non-unanimous and unanimous cancellation applications alike. This potentially creates unnecessary contentions and uncertainty should, for instance, a unit owner have a change of heart and wish

128 Section 213 therefore applies to the resolution, which only provides in generic terms: '*Any* person served with a notice [of the resolution] may, within 28 days of being served with that notice, give written notice … to the body corporate of his or her objection': *UTA 2010* (n 8) s 213(3) (emphasis added).

to subsequently object to a cancellation which he or she voted for at the initial resolution.

As noted earlier in respect of non-unanimous applications for plan cancellations, New Zealand starkly differs from the Northern Territory, New South Wales and Western Australia in two aspects. First, while all three Australian jurisdictions require the requisite super-majority to be in proportion to all ownership interests, the special majority needed to effect a plan cancellation in New Zealand is in respect of owners present and voting in the owner's meeting, subject only to a 25% quorum. Second, the New Zealand Act allows for the court on application, to lower the requisite threshold to 65%; no such flexibility exists in the three comparable Australian jurisdictions. Comparing the various statutes suggests that the *UTA 2010* was intended to be more 'pro-cancellation' than its Australian counterparts.

B *Court-Ordered Cancellations*

Apart from applications to the Registrar, court-ordered cancellations are the second way to cancel a plan. This is further broken down into two categories of court-ordered cancellations: those ordered when the court is exercising its discretion to act in a 'just and equitable' manner per se, and those with a requisite special majority to cancel the plan. In respect of the former, these have been present in most jurisdictions for several decades; case law interpreting sections of a now repealed Act therefore remains relevant as the interpreted sections will be in *pari materia* with the revised legislation, assuming a contrary intention is not evinced. In relation to court-ordered cancellations requiring a super-majority there is a dearth of case law. This is due to the fact that there are only four Australasian jurisdictions which have only relatively recently introduced such legislation — the Northern Territory (2008), New Zealand (2010), New South Wales (2016) and Western Australia (2020). As discussed in the prior segment, unanimous plan cancellations are not typically ordered by court as they are dealt with by the relevant administrative authority.

In this segment, I argue that there ought to be a sharper distinction between the court's discretion to act in a 'just and equitable' manner per se, and the court's discretion to order a plan cancellation when this is supported with the requisite special majority. While both types of court-ordered cancellations are statutorily based on the same 'just and equitable' standard, in the latter case, the justice consideration *is* the fact that a large majority of owners want the plan cancelled — in such cases, courts should arguably focus only on ensuring that there is no bad faith or other impropriety in the voting process. On the other hand, when the court is hearing an application for a plan cancellation based on its 'just and equitable' jurisdiction in toto, such as when a single owner is seeking a plan cancellation, the test should be interpreted strictly as it is an application made against democratic choice.

A court has a 'broad discretion'[129] in exercising its 'just and equitable' jurisdiction to cancel a plan and it is this particular power which is analogous to ordering a winding-up of a corporation due to oppression of minority shareholder rights. Thus, in the seven Australasian jurisdictions which provide for this general power to order a plan cancellation, even a single owner (or creditor) has standing to make an application for a winding up.[130] It is also apparent that in jurisdictions which only allow for owner-led plan cancellation applications to the relevant authority based on unanimity, any constituent segment of owners short of unanimity would also have to fashion its application to the court based on the 'just and equitable' standard. Interestingly, where the court-ordered cancellation is premised on support by a requisite super-majority, as permitted in New Zealand, the Northern Territory, New South Wales and Western Australia, the court is once again instructed to ensure that the cancellation is only endorsed where it is 'just and equitable' to do so. As compared to the general power of the court to cancel a plan based on equitable justice, the complexion of an application supported by the statutorily required super-majority of owners is markedly different. The justice consideration in the latter is the fact that most owners support cancellation, which speaks to the overall interests of the development. In purchasing a unit, proprietors can be deemed to take on the inherent risk that their ownership rights can be recast to the financial value of their share in the development. When this super-majority vote is reached, the court's focus should arguably not be on second-guessing the merits of the decision but instead on ensuring that the votes genuinely represent the collective will of the development, ie that the votes were tallied correctly, that there was no impropriety in obtaining the votes and that body corporate members were not labouring under any conflicts of interest.[131] In other words, since the legislature has allowed for super-majority cancellations, the court should arguably treat such applications as it would a unanimous application, after ensuring that there was no aspect of bad faith in the voting process. Support for this can be found in the unreported case of *Re Unit Titles Act 1972 and Bell* ('*Re Bell*').[132] The High Court in *Re Bell* was dealing with s 42 of the *UTA 1972*, which provided for relief absent unanimity:

129 *Owners of Argosy Court Strata Plan 21513 v Wise* (2016) 90 SR (WA) 148, 163 [56] (McCann DCJ) ('*Owners of Argosy Court*').

130 Of course, there is nothing stopping a super-majority of owners from applying to court for it to cancel a plan on 'just and equitable' circumstances, even in jurisdictions which separately provide for initiating a plan cancellation via a special majority.

131 The closest provision in this regard is s 165(1) of the *NSW Act* (n 84):

> If—
> (a) a member of a strata renewal committee has a pecuniary or other interest in the proposed collective sale or redevelopment under a strata renewal proposal, and
> (b) the interest may raise a conflict with the proper performance of the committee's function,
> the member must, as soon as practicable after becoming aware of the potential conflict, disclose the nature of the interest to a meeting of the strata committee.

The strata renewal committee is a select owner's committee which proposes the details of the cancellation plan to the Owners Corporation. New South Wales is the only Australasian jurisdiction to have such a committee.

132 (High Court of New Zealand, Jaine J, 22 October 1992) ('*Re Bell*').

> In any case where, in accordance with this Act or rules under this Act, a unanimous resolution, or the consent, of all the proprietors is necessary before any act may be done and that resolution or consent is not obtained, but the resolution or act is supported by 80% or more of those entitled to vote, any person included in the majority in favour of the resolution or act may apply to the Court to have the resolution as supported or the consents as obtained declared sufficient to authorise the particular act proposed; and, if the Court so orders, the resolution shall be deemed to have been passed unanimously or the consent of all the proprietors obtained, as the case may be.[133]

Section 42 of the 1972 Act is similar to s 211(1) of the *UTA 2010*:

> In any case where this Act requires a special resolution and the resolution is not passed but 65% of the eligible voters have voted in favour of the resolution, any eligible voter who voted in favour of the resolution may apply to the appropriate decision-maker to have the resolution confirmed on the grounds that the effect of the failure of the resolution to be passed would be unjust or inequitable on the majority.[134]

Under s 42 of the *UTA 1972*, the court had the power to 'so order' a resolution with at least 80% of the vote deemed as a unanimous resolution. Under s 211(1) of the *UTA 2010*, the court is empowered to regard a resolution with at least 65% of the vote as a deemed special resolution where a failure to do so is 'unjust or inequitable' on the majority. The difference resides in the fact that unanimity was the default requirement for decision-making under the 1972 Act, while a special majority of 75% is the default majority needed to effect decisions under the 2010 Act. Section 211(1) of the *UTA 2010* also differs from s 42 of the *UTA 1972* in requiring the court to consider whether not endorsing the resolution would be 'unjust or inequitable' on the majority.

Van der Merwe has described Jaine J's interpretation of s 42 of the *UTA 1972* as a 'hands off' approach.[135] In that case, his Honour held that the purpose of the section was to prevent the wishes of a large majority, democratically determined, from being thwarted by the views of a small minority. Materially, the Court held that '[t]he merits of the matter are best determined by those who are affected by it … [i]t should not be for the Court to substitute its view on the merits of the proposal'[136] and further, that the court's 'attention should be directed towards the procedures that led to the passing of the resolutions rather than the merits of them'.[137]

According to Jaine J, s 42 of the *UTA 1972* was thus limited to a consideration of

133 *UTA 1972* (n 78) s 42

134 *UTA 2010* (n 8) s 42.

135 CG van der Merwe, 'How Far Are Unanimous Resolutions of a Sectional Title General Meeting in Actual Fact Unanimous: A Critical Analysis of the Provisions of the Sectional Titles Act with Regard to Unanimous Resolutions' (2016) 79(2) *Tydskrif vir Hedendaagse Romeins-Hollandse Reg* [Journal of Contemporary Roman-Dutch Law] 177, 192.

136 *Re Bell* (n 132) 5.

137 Ibid 5–6.

procedural or motivational irregularities or improprieties rather than the merits of a decision. In citing *Re Bell* with approval in *World Vision of New Zealand Trust Board v Seal* ('*World Vision*'),[138] Heath J further clarified that because unit owners are free to vote as they wish, their 'motivation to vote in a particular way will rarely be called into question if fraud has not been established'.[139] Following *World Vision*, the correctness of Jaine J's decision in *Re Bell* was again endorsed by the High Court in *Creak v Body Corporate No 180838*.[140] While s 211 of the *UTA 2010* adds the ubiquitous 'just and equitable' phrase, it is suggested that the spirit of *Re Bell* can nevertheless apply in interpreting ss 211 and 188 (court-ordered cancellations), and by extension, the relevant sections in all the surveyed jurisdictions which allow for non-unanimous cancellations.

It is recalled that in all four jurisdictions permitting super-majority-led cancellations, the legislation still exhorts to court to make the cancellation order only where it is 'just and equitable' to do so. As the cohort of super-majority owners are the applicants seeking cancellation, the burden would be on them to prove that the cancellation is kosher. This is unsatisfactory as it appears to place a single proponent seeking cancellation under the court's general powers on the same footing as a large majority of owners seeking the same. Instead, I suggest that where the requisite majority is reached, the court should generally respect the wishes of the super-majority and order the plan to be cancelled, unless there is evidence of bad faith or impropriety. Considerations of justice and equity where a single proponent is advocating for cancellation are different to an application supported by the statutory requisite super-majority. The principle advanced is thus that decisions relating to the development should largely be left with the owners, and from this perspective, it is understandable why South Australia, Tasmania and Western Australia preclude giving their courts a general power to cancel unit plans per se. Perhaps the correct compromise would be for courts in jurisdictions permitting majoritarian cancellations to hold that once the statutory majority is reached, the default would be for the plan to be cancelled *unless* there are 'just and equitable' reasons not to do so. This shift, only apparently subtle, would result in the reversal of the burden of proof on the minority resisting the cancellation. The suggested approach also correctly distinguishes the different justice principles underpinning majoritarian-led court cancellations and court cancellations made on 'just and equitable' grounds per se — in the latter, the burden should remain on the applicant to convince the court to have the plan cancelled.

The legislation and case law in relation to both categories of court-ordered plan cancellations do not in the main adequately distinguish between the two types of court applications. Democracy is not advanced if courts seeing the words 'just and equitable' in both categories, erroneously treat court-ordered cancellations per se and majoritarian-led cancellations in the same manner. Equally, decision-makers do not appear to have recognised that urban rejuvenation was the raison d'être in enacting majoritarian-led cancellations while cancellations based on the court's

138 *World Vision* (n 19) 681–2 [46], quoting ibid 5–7.

139 *World Vision* (n 19) 682 [46].

140 (2008) 9 NZCPR 378, 397 [82] (Woodhouse J).

equitable jurisdiction per se, being historical, did not have urban needs in mind. Going forward, it is respectfully suggested that courts could be more mindful on the nature of the court application before them, as well as the factors that should be taken into account in deciding whether to permit a plan cancellation. In my view, this correctly distinguishes the situation where the court is given a general power to cancel a plan with the situation where the legislation specifically provides for a requisite special majority to petition the court to cancel the plan.

In the next segment, I discuss the case law in relation to court-ordered cancellations on 'just and equitable' grounds per se with those supported by the requisite super-majority.

1 *Cancellations Made on 'Just and Equitable' Grounds Per Se*

In *World Vision*, Heath J observed that 'the phrase "just and equitable" has a respectable legal pedigree', with its roots lying in insolvency law, as the standard to determine whether a company or partnership should be dissolved.[141] Justice Heath grouped the bases outlined by Callaway on which orders have been made to wind up a corporate entity on 'just and equitable' grounds into five categories:

1. 'A failure of the substratum of the company's business' (departure from original objects);[142]

2. An ousting of management rights from minority shareholders (in the case of a quasi-partnership or closely held private company);[143]

3. 'A breach of statutory, common law or equitable duty … resulting in loss of confidence by the complaining shareholder[s]';[144]

4. 'A deadlock in the management of the company';[145] and

5. Other cases involving particular hardship.[146]

It is observed that the five categories sometimes overlap (particularly items 2, 3 and 4). While not every strata cancellation will correspond neatly to one of these five categories, Callaway's bases have utility in giving guidance to the types of circumstances where courts should apply their discretion to order a plan cancellation. Thus, destruction of buildings or loss of common property would, coincidentally enough, fall under 'loss of substratum', while irreparable loss of

141 *World Vision* (n 19) 686 [62].

142 Ibid 689 [65], citing Callaway (n 112) 9–10, 61–75.

143 *World Vision* (n 19) 689 [65], citing Callaway (n 112) 32–8.

144 *World Vision* (n 19) 689 [65], citing Callaway (n 112) 26–38, 76–90.

145 *World Vision* (n 19) 689 [65], citing Callaway (n 112) 84–6.

146 *World Vision* (n 19) 689 [65], citing Callaway (n 112) 91–6.

communication leading to deadlock between owners could conceivably fall under any of items 2, 3 or 4. Severe hardship (item 5) and ousting of management rights (item 2) could also possibly see an overlap, depending on the facts. In the same way that courts should generally endorse majoritarian-led cancellations (where the statute specifically provides for this), it is suggested that courts should also not too readily permit plan cancellations under its general discretion to do justice and equity, for to hold otherwise would undermine the jurisdiction conferred on the court in respect of majoritarian-led cancellations. Courts could achieve this by ensuring that the applicant discharges its burden of proof and that the circumstances calling for the cancellation generally fall within a well-traversed category such as those outlined by Callaway. What follows is an overview of comparative case law where the court has considered an application to cancel a plan made solely on 'just and equitable' grounds across five Australasian jurisdictions: Victoria, New South Wales, the Australian Capital Territory, Western Australia and New Zealand. There is no available case law focusing on court-ordered cancellations on 'just and equitable' grounds in respect of the four other jurisdictions: the Northern Territory, South Australia, Tasmania and Queensland.

Owners Corporation CS1728U v City of Ballarat (Owners Corporations)[147] provides the archetypal example of a tribunal exercising its power to cancel a plan on 'just and equitable' circumstances per se — loss or destruction of common property. The development in that case consisted of 13 townhouses surrounding a private roadway named Dianne Court, the only common property belonging to the development. Following the compulsory acquisition of Dianne Court, the owners successfully filed an application before the Victorian Civil and Administrative Tribunal seeking a cancellation of the plan and winding up order of the owners corporation.[148] While a plan cancellation ordinarily results in the owners holding the land as tenants-in-common, the Tribunal exceptionally allowed the 13 lots to remain individually owned;[149] this was only feasible because the townhouses were standalone units without any vertically attached lots.

Another common situation where plan cancellations are endorsed is when repair or reinstatement costs are prohibitive. This was the situation in *Erling v The Owners Strata Plan No 8891*,[150] in which the New South Wales Supreme Court heard an application under s 51 of the former *Strata Schemes (Freehold Development) Act 1973* (NSW). The five-unit development in that case was badly dilapidated, and estimates had placed the cost of complete rectification at about $1 million, with the amount needed to achieve minimum habitability at about $300,000.[151] As evidence from a valuer showed that neither option would result in at least the equivalent gain in the collective value in the units, the court granted the

147 [2015] VCAT 533.

148 Ibid [5]–[8] (Senior Member Vassie).

149 Ibid [10].

150 [2010] NSWSC 824.

151 Ibid [7](ii)–(iii) (Einstein J).

cancellation.[152]

The Australian Capital Territory Supreme Court allowed a plan cancellation and subsequent amalgamation of land, despite objections by a minority owner in *Re Ordinance 1970*.[153] As the Australian Capital Territory has always required unanimity for owner-led applications, the question was whether the cancellation was 'just and equitable', pursuant to s 97 of the *Unit Titles Ordinance 1970* (ACT). The application was for the cancellation of the existing plan, followed by the amalgamation of another plot of land and finally the subdivision of the whole development creating a new plan.[154] As the cost of the amalgamated land and related development works were all paid by the proprietor (the supermarket owner) whose lot was next to the land to be amalgamated, the subdivision would see that proprietor owner hold a higher proportion of the development's ownership interests. Effectively the supermarket owner would hold a larger ownership interest in the new development. In allowing the cancellation, the Supreme Court did not exhaustively discuss the 'just and equitable' standard but did suggest that a cancellation should not be granted if it were 'not for the benefit of the proprietors of the units as a whole'.[155] Miles CJ rejected the arguments made by the dissenting owner, including that the minority owner would have its rights 'diluted for no compensation'.[156] While acknowledging that the dissenting owner (Unit 7) would have its unit entitlements drop from 104 to 92 (out of 1000), the court rightly held that the minority owner would not suffer any diminution of their proprietary interest.[157] This is patent because the total value of the development would have increased with the addition of the adjacent land.

Another possible argument, though not raised by the dissenting owner, was that in holding 396 out of 1000 units, the supermarket owner would hold too much voting power. Again, this was rightly rejected by Miles CJ;[158] to hold otherwise would mean that in any strata development, proprietors should be limited to how many units they can buy. In allowing the cancellation, amalgamation and subdivision of the development, the Court noted that Ministerial approval had been obtained for the amalgamation of the land (suggesting a pro urban consolidation policy even in 1986).[159] What is curious about the case is that much of the judgment focused on how the objections raised by the dissenting owner were not cogent. As the party seeking the cancellation, the burden ought to have been on the applicant owners corporation to prove that the cancellation, amalgamation and subdivision sought were 'just and equitable'. In referencing the phrase 'for the benefit of the

152 Ibid [7](vi).

153 *Re Ordinance 1970* (n 109).

154 Ibid 167 (Miles CJ).

155 Ibid 174.

156 Ibid 173.

157 Ibid.

158 Ibid.

159 Ibid 171–2.

proprietors of the units as a whole', therefore, the Court was perhaps mindful that only one owner opposed the application.

In *Owners of Argosy Court Strata Plan 21513 v Wise*,[160] the Western Australia District Court approved a plan cancellation under the then s 31 of the *Strata Titles Act 1985* (WA),[161] despite the fact that a majority of unit owners *opposed* the application. There appears to have been two interrelated aspects in approving the cancellation. McCann DCJ found it material that the relationship between the owners corporation and the majority owners resisting the cancellation had irretrievably deteriorated,[162] with years of strata levies left unpaid, as well as a string of related litigation commenced by the latter. The Court expressed the view that the owners corporation would not be able to function properly,[163] and that the majority owners regularly took a 'pointless and oppositional stance beyond reasonableness'.[164] The Court thus found that the 'lack of mutual confidence'[165] between the parties had resulted in 'gridlock',[166] with termination facilitating 'a practical and commercial outcome which is to the advantage of all parties'.[167] The Court found that the subject matter of the strata plan had ceased to exist when dongas[168] in each of the 12 lots were damaged by a tropical cyclone. Essentially, because the relationship between the majority owners and the owners corporation had permanently broken down, in the context of the damage to the dongas, there was no viable way to restore occupation rights to the unit owners.[169] In this case there was again no discussion how the applicants had satisfied the court of the 'just and equitable' reasons for ordering the cancellation, with emphasis seemingly placed on the unreasonableness of the majority owners resisting cancellation.

World Vision is the only decision amongst all surveyed jurisdictions which explicitly states that an applicant seeking a cancellation based on the court's 'just and equitable' powers has the onus of satisfying the court of this standard on the balance of probabilities.[170] This is far from trite; as the discussions on the previous two cases show, courts sometimes fail to make this distinction and focus instead

160 *Owners of Argosy Court* (n 129).

161 *WA Act* (n 82) s 31(3)(g), as at 4 September 2015. In its current iteration, Western Australia does not provide for court-ordered plan cancellations: see at pt 12. However, the case remains useful for comparative analysis.

162 The learned McCann DCJ found that 'the second defendants [part of the majority owners] have been excessively obstructive, and disregarded judicial and statutory orders, for a long time, and such will continue indefinitely': *Owners of Argosy Court* (n 129) 167 [84].

163 Ibid 168 [90].

164 Ibid 168 [91].

165 Ibid 170 [106].

166 Ibid 171 [109].

167 Ibid 171 [111].

168 Dongas are transportable, free-standing dwellings which are part of the common property: ibid 151 [10]–[11].

169 Ibid 171 [116].

170 *World Vision* (n 19) 690 [77] (Heath J).

on the justifications given by the owners resisting the cancellation. The development here consisted of two buildings — one an office building that belonged to the applicant ('World Vision') as a single unit while the second was a residential building made up of six units. Thus, while the applicant owned just one of seven units in the development, its unit was significantly larger than others. At issue was whether the applicant could cancel the plan and essentially partition the lot such that the office building had separate title unencumbered by the *UTA 1972*. World Vision was seeking an independent fee simple title because the value of the office building would be worth significantly more if it were free from the *UTA 1972*; demolition and subsequent construction of a new building would yield World Vision significantly more value. At the same time, World Vision presented uncontroverted evidence that the subdivision of the site would also increase the value of the residential lots. Conversely, the response by the residential unit owners was far more tepid — the main argument being that the rights of residents should not be 'subordinated to the desire of World Vision to achieve a better sale price for its office building'.[171]

In rejecting the cancellation application, Heath J held that World Vision's desire to realise the best possible price for the land was insufficient to interfere with the rights and interests of the residents by granting the application and that as a stratum owner, World Vision must, like the residential unit owners, remain subject to the *UTA 1972*.[172] Because the two buildings were already physically separate, and financially the court seemed to accept that allowing a partition would be a win-win for both sides, it may appear challenging to see why the application was denied. In truth, Heath J's judgment was sagacious, being a proper application of the test requiring the applicant to prove on the balance of probabilities that the court ought to exercise its 'just and equitable' jurisdiction to cancel the plan. Candidly, Heath J admitted that in considering the discretionary test under the then s 46 of the *UTA 1972*, he was initially 'attracted to an approach which balanced competing rights and interests of relevant participants'.[173] Had he adopted that approach, it would seem that the plan cancellation would have been allowed — there was evidence of economic loss to the office building owner without any apparent loss to the residential units (indeed the evidence was that the residents would also gain).[174] Justice Heath however correctly realised that the court's power to order a plan cancellation on 'just and equitable' circumstances should be read narrowly, with the burden squarely on the applicant to prove its case.

2 *Cancellations with Super-Majority Support*

A review of the four Australasian jurisdictions allowing for super-majority cancellations (New Zealand, the Northern Territory, New South Wales and Western Australia) unearths just one case, from New Zealand, dealing squarely

171 Ibid 685 [59].

172 Ibid 693 [94].

173 Ibid 689 [76].

174 See ibid 692 [89].

with how the court ought to approach an application to terminate a plan in the face of a minority objector, in a jurisdiction permitting owner-led, super-majority cancellations.[175]

Lake Hayes concerned a nine-unit development in central Otago which enjoyed lake views. Eight of the units belonged to a property company while one unit belonged to Ms Petherbridge.[176] As a percentage of ownership, the company held a 90.85% interest while Petherbridge owned 9.15%. Pursuant to s 188 of the *UTA 2010*, the majority owner applied to the Court to have the plan cancelled. While Panckhurst J was certainly correct to order the plan cancellation, parts of the reasoning are not beyond reproach. In coming to his decision, his Honour held it material that 'the body corporate had been effectively defunct for 30 years' and that the units were 'past their economic lifetime'.[177] That his Honour found the body corporate defunct for three decades was certainly a material factor in deciding to cancel a plan under the court's power to do so on 'just and equitable' grounds — this appears to fall under Callaway's third base: a 'breach of statutory, common law or equitable duty … resulting in loss of confidence by the complaining shareholder'.[178] The application before the Court however was made by an owner holding more than 90% stake in the development. Surely this should not mean that if the body corporate were functioning and the units in good repair, a special majority cohort of owners would never be able to cancel the plan?

Panckhurst J seemed to place insufficient emphasis on the facts before him, that eight of the nine ownership lots were seeking cancellation. The Court failed to give enough credence to the relevant statutory amendments in the *UTA 2010* which provide for plan cancellations led by a super-majority. Instead, his Honour seemed to apply the equivalent test under the 1972 standard which did not contemplate super-majority-led cancellations. In this respect, Panckhurst J's comment that s 46 of the *UTA 1972* is 'in substance identical' to s 188(2) of the *UTA 2010* is accurate only from the circumscribed perspective that the words in both sections are similar.[179] More importantly, the contexts in both Acts, and therefore sections, are different. There was no statutory provision or political will for non-unanimous, owner-led plan cancellations under the 1972 Act. Under the *UTA 2010*, however, s 177 allows a special majority to seek a plan cancellation via the Registrar. As

175 *Lake Hayes* (n 105). In other cases, the dispute is over the court exercising its 'just and equitable' discretion to reassess the relative ownership interests of the proprietors: see *Dominion Finance* (n 104); *OM Hardware* (n 115). Similarly, while there has been one case in New South Wales dealing with strata renewals, the focus there was readjusting unit entitlements as the price ascribed to five utility lots, following their original unit entitlements, was less than what the lots would have received under compulsory acquisition, a mandatory threshold under the *NSW Act* (n 84): *Application by the Owners — Strata Plan No 61299* [2019] NSWLEC 111. To the author's knowledge, there is no relevant case law from the Northern Territory or Western Australia.

176 *Lake Hayes* (n 105) 592.

177 Ibid 605 [53]. Even on a court's 'just and equitable' discretion per se, disrepair is not sufficient to destroy the 'substratum' of the unit development. His Honour had visited the site and variously described the units as of 'modest size', and that the development was 'dated' and 'tired' but never damaged or destroyed: at 594 [7], 601 [39].

178 *World Vision* (n 19) 689 [75] (Heath J), citing Callaway (n 112) 26–38, 76–90.

179 *Lake Hayes* (n 105) 602 [45].

noted earlier, the *UTA 2010*'s strong proclivity for urban rejuvenation and hence allowing for non-unanimous plan cancellations is evidenced not only from s 177 itself but also from s 95 (which provides a 25% quorum of owners is sufficient for a special majority vote) and s 211 (which provides the court's discretion to lower the requisite special majority to 65% of eligible voters). The final justification that courts should distinguish between the two types of court-ordered cancellations (on 'just and equitable' grounds per se and on 'just and equitable' grounds supported by a special majority) is the text of s 187(1) of the *UTA 2010*, which states who may bring an application under s 188(2). For completeness, the relevant parts of both provisions are replicated:

> **187 Application to High Court for order of cancellation of unit plan**
> (1) Any 1 or more of the following persons may apply to the High Court for the cancellation of the unit plan:
> (a) the body corporate for the unit title development to which the unit plan relates, after a special resolution to do so; or
> (b) an administrator; or
> (c) 1 or more unit owners.
> …
>
> **188 Cancellation of unit plan by High Court**
> …
> (2) The High Court may authorise that the unit plan be cancelled if—
> (a) the High Court is satisfied that it is just and equitable that the body corporate be dissolved and the plan cancelled having regard to—
> (i) the rights and interests of any creditor of the body corporate; and
> (ii) the rights and interests of every person who has any interest in any unit or in the base land …[180]

It is immediately observable that s 187(1)(a) distinguishes between a body corporate supported with a special resolution and '1 or more unit owners', in sub-s (c). Because any subcategory of owners short of a special majority would fall under s 187(1)(c) of the *UTA 2010*, it stands to reason that an internally consistent interpretation of the statute would require the Court to treat an application supported with the requisite special majority markedly different than one that is not. While s 188(2)(ii) states that 'the rights and interests of every person who has any interest in any unit' must also be taken into account in authorising the cancellation of a unit plan, it is submitted that where the application is supported by the statutorily required super-majority, guidance from *Re Bell* should be taken:[181] the interests of minority owners should be limited to procedural propriety in the voting process and a lack of bad faith on the part of the owners supporting the sale.

Short of belabouring the point, the majority owners in *Lake Hayes* could have made

180 *UTA 2010* (n 8) s 187–878.

181 *Re Bell* (n 132).

an application to the Registrar to cancel the plan under s 177 of the *UTA 2010*.[182] Cancellations in this respect are automatic unless there is an objection, in which case it is dealt with at a court hearing under s 215. Section 177 was created to facilitate plan cancellations where this is supported by the requisite special majority. As the minority owner would be the applicant in an objection hearing, this presumably means that the burden would be on the minority owner to resist the cancellation. Section 188 applications should therefore be read in the context of the *UTA 2010* as a whole, in particular, the policy purpose of urban consolidation and rejuvenation. Regardless of whether a special majority of owners choose to make an application for a plan cancellation under s 177 with the Registrar or s 188 with the High Court, the same justice consideration — the collective wishes of a super-majority — are present. Accordingly, *Lake Hayes* could arguably have made a sharper distinction between court applications supported by the requisite super-majority threshold (as it was before his Honour) and those applications simply asking the court to exercise its 'just and equitable' discretion. In failing to do so, the judgment appears to be inconsistent with the overall purpose and tone of the *UTA 2010*.

V CONCLUSIONS

> We are tāngata whenua, people of the land; the land and people are inseparable. So we take great interest in the proposal in this bill to update the law regarding the subdivision, development, and management of land. … But it would be stretching the rainbow to say that the management of the multiple ownership of land is easy.[183]

This article has intricately examined the strata legislation of nine jurisdictions across Australasia. Compared to its Australian counterparts, New Zealand's *UTA 2010* presents several novel aspects that are almost certain to result yet in a throve of interesting decisions in the years to come. Some of these observations include that the *UTA 2010* instructs the High Court to adopt the 'just and equitable' standard for cancelling a unit plan whether this is supported by special majority or not. While the 'just and equitable' standard is understandable for court-ordered cancellations not supported by a super-majority, applying the same test even for cancellations supported by this super-majority, especially in the manner adopted in the *Lake Hayes* decision, is extraneous. The overall tenor of the four Australasian Acts permitting non-unanimous plan cancellations is to facilitate plan cancellations. Following the principle laid out in *Re Bell*, where the requisite super-majority is met, the default position should be to allow the plan cancellation unless there is impropriety in the way the votes were counted or an element of bad faith on the part of the unit owners proposing the plan cancellation is detected. That the *UTA 2010* is particularly supportive of plan cancellations is seen from the fact that while the statute states that a special majority of 75% is needed to support an application to the Registrar, the High Court has discretion to grant a cancellation

182 There was no discussion why the majority owners did not seek this route: see *Lake Hayes* (n 105) 600 [33].

183 New Zealand, *Parliamentary Debates*, House of Representatives, 5 March 2009, 1721 (Rahui Katene).

where at least a 65% majority of eligible voters has acquiesced. Compared to all other jurisdictions (to the best of my knowledge, globally), this is novel. Further, in computing the requisite majority needed to effect a majoritarian cancellation, the *UTA 2010* counts only owners present and voting at the requisite meeting. This is again unlike all other Australasian jurisdictions which require the thresholds to be in proportion to all ownership interests. While these robust provisions are intended to prevent hold-outs and facilitate urban renewal, they are currently slightly let down when the court insufficiently distinguishes between owner-led plan cancellation applications from applications to the court for a plan to be cancelled simply on the basis that it is 'just and equitable' to do so.

There are several 'best-practices' across the surveyed jurisdictions that should be highlighted. The Northern Territory has set the minimum age of a building to have its plan cancelled at 15 years, with varying resolution thresholds ranging 80–95% depending on how old the development is. This is an enlightened approach that balances urban development needs with wastefulness in potentially tearing down a building well before obsolescence. New South Wales has established a strata renewal committee (a sub-committee of the owners corporation) to be in charge of the renewal/cancellation process. As these committee members invariably interact with property agents and developers during the negotiation and voting process, the New South Wales Act importantly reminds committee members to be mindful of potential conflicts of interest. South Australia, Tasmania and Western Australia all choose not to give the court a general power to terminate a plan based on 'just and equitable' grounds. Cancellation applications in these three States all require support of a unanimous or special majority resolution, as the case may be. This approach correctly places emphasis on the rights of owners to choose. Finally, New Zealand's decision to allow for special resolutions endorsing a cancellation based on a quorum of owners is commendable. Absentee or indifferent owners result in deadlock and there is little injustice suffered, provided that all owners are properly informed of the meeting. Conversely, New Zealand's decision to allow for the court to deem a 65% vote to be a 75% vote should be revised as it creates significant uncertainty in the voting process. If the concern was in respect of three-unit developments (as was suggested in the Hansard), the better approach would have been to explicitly state that for three-unit developments, a two-unit majority is sufficient. Indeed, the exact required number of units relating to varying matters is specified in both the Northern Territory and Western Australian statutes.

Self-determination means that individuals have the liberty to choose their own non-criminal actions. Courts should take a more facilitative role to endorse cancellations, the higher the support for the cancellation. When a large majority of owners exercise their ownership rights in deciding what to do with their property, this should be the primary principle in determining what 'just and equitable' means. Thus, it is patent that in the case of a unanimously supported cancellation, apart from ensuring that any creditor of the body corporate is not out of pocket, the court should invariably endorse the proposal. In the Northern Territory Legislative Assembly, Attorney-General and Justice Minister John Elferink said that statutory parameters are not needed when all unit owners agree to have a plan terminated:

> We do not seek to intrude into people's rights to engage in free contract. Where there is a meeting of the minds, which is a term in the law of contract that everybody agrees, you do not have to stick parameters around it; they can stick their own parameters around unanimity.[184]

Conversely, the lower the owner support for the plan cancellation, the more the courts should scrutinise the grounds of termination and the computation of respective ownership interests, applying the 'just and equitable' standard judiciously. While there may be debate for what constitutes an ideal application of the court's discretion between the parameters of unanimity and, say, a single proponent seeking cancellation, the bright line should be the statutory minimum threshold for owner-led plan cancellations in the jurisdictions that provide for this. Other than ensuring an absence of bad faith or any procedural irregularities in the voting process, courts should adopt a 'hands-off approach' to accord with the purpose and policy of the legislation.

184 Northern Territory, *Parliamentary Debates*, Legislative Assembly, 26 November 2014, 5615 (John Elferink, Attorney-General and Minister for Justice).