The new Unit Titles Act - what does it mean for developers?

Unit title development is on the brink of a new era with the impending Unit Titles Act 2010, which will soon replace the current outdated legislation. Duncan Cotterill has played a significant role in shaping the unit title reform. Led by Bruno Bordignon, we made submissions in each public consultation phase, participated in the working groups established by the Department of Building and Housing and the New Zealand Law Society and have consulted to the Government. Specifically, we have lent our expertise in the new key area of layered developments based on our broad expertise in other jurisdictions. Clearly, we have the expertise to help you.

Property developers are set to benefit from new legislation surrounding unit titles and buyers will be better protected.

Under the Unit Titles Act 2010, the structure and management of unit title schemes will be much more flexible, particularly for large, staged or complex developments. With this new flexibility comes additional responsibility in the form of the "consumer protection" provisions including a new disclosure and reporting regime. Overall, the new regime is also likely to require greater co-ordination among all relevant parties - developers, lawyers, surveyors, valuers, quantity surveyors and body corporate managers.

Now is the time for savvy developers is get their heads around what the new legislation will mean and to position themselves as potential leaders in the market. Once the new Unit Titles Act is in force, it will apply to existing as well as new unit title developments, although there is 15 months grace .

AT A GLANCE

The new Unit Titles Act 2010 offers:

- Greater flexibility for the structure and management of unit title schemes, particularly large, staged or complex developments with:
  - The introduction of layered developments;
  - Redefinition of the "unit entitlement" concept;
  - Introduction of optional financial funds and a sinking fund concept; and
  - Relaxation of the "unanimous consent" provisions of the 1972 Act.
- Additional disclosure and reporting responsibilities and duties when entering service contracts while in control of a body corporate.
- A chance to:
  - Review the structure of current and potential unit title developments under its control on a number of fronts including unit entitlements, rules, layered developments, what funds should be adopted etc;
  - Be an early adopter with respect to current developments. Evidence suggests that developments which make provision for proper governance and financial management can increase in value;
  - Revisit staging of developments and contribution requirements.
  - Determine what considerations will start to form the basis for the setting of utility entitlements.

KEY FEATURES

Principal Units (PU) & Common Property

A new definition makes it clear that a Principal Unit must contain a building or be contained in a building, or be a car park. Common property will be owned by the body corporate (although each unit owner will still have a beneficial interest).

Unit Entitlements

Probably one of the most common criticisms of the outmoded 1972 Act is the inflexibility surrounding unit entitlements, which are now spliced in two:

- Ownership interest - determined by reference to relative value of the unit in relation to each other unit. The ownership interest is used to determine matters such as the beneficial interest in the common property, voting rights, capital improvement fund levies and surpluses, and ground rental liability (for leasehold estates).
- Utility interest - the utility interest is the same as the ownership interest unless it is reviewed. The utility interest is used to determine matters such as unit contributions to the long-term maintenance fund, optional contingency fund, and the operating account (together with refund of any surpluses arising out of them).

Ownership and utility interests may be reviewed provided a special resolution is passed at the general meeting of a body corporate, however, they must not be reviewed more than once every 36 months.

Future Development Units (FDU)

FDU owners are now considered members of the body corporate for certain purposes, including payment of levies where a FDU is being used as a place of residence, business or otherwise.

Layered developments

A completely new concept of layered developments allows for grouping of several individual unit title developments. These will all subscribe to a parent unit title (which may also contain other principal units) with each subsidiary development forming a subsidiary body corporate to manage the affairs of their units and any associated common property.

It is most likely to be used in mixed use developments or sister developments wanting to share certain common facilities. It may also be looked at to convert existing pseudo layered style developments which use incorporated societies or management agreements.

Unanimity relaxed

The previous requirement for key body corporate decisions to be made unanimously has been replaced with a 75% voting threshold (special resolution) to prevent blocking by one or two owners. However, dissenting minority unit holders can appeal a decision they believe is unjust.

Long term maintenance and financial management

The new Act allows four new funds to be established by a body corporate - mandatory funds for operating expenses and long term maintenance; along with optional contingency and capital improvement funds.

A "long term maintenance plan" will now be required, covering the next 10 years, an estimate of the costs involved for those works and a basis for levying owners to cover them. The body corporate must then establish and maintain a fund based on that plan.

Developers will need to weigh up if any of the optional funds are relevant or useful. For example, the optional capital improvement fund might be useful for lower grade commercial buildings to pool funds to improve services such as lifts and air conditioning. In addition, leases of units will need to cover who is responsible for what levies.

Body corporate must keep proper financial records and, unless resolved otherwise, these must be audited.

Easements, covenants and access lots

Flexibility has been introduced allowing:

- Dealings with easements or covenants relating to the underlying fee simple title;
- A body corporate the ability to grant or acquire easements and covenants over or for the benefit of the common property;
- Principal Unit owners to grant or acquire easements and covenants over or for the benefit of their unit to a greater degree than permitted under the current Act; and
- A body corporate to own a share in an access lot, whch will be treated as common property.

Redevelopments

These are now separated into two categories:

- Adjustments between units that do not materially affect the common property or other units. In such a case, an amendment to the unit title plan can be lodged as opposed to a completely new redevelopment plan; and
- All other redevelopments, in which case a redevelopment plan is required together with the support of a special resolution.

New disclosure regime

A new regime will apply consisting of:

- Upfront pre-contractual disclosure by the seller of a unit before a buyer enters into an agreement;
- Pre-settlement disclosure by the seller to the buyer; and
- Additional disclosure (where requested by the buyer within specific time frames).

The original owner or developer must also make a "turnover disclosure" to the body corporate once that original owner (or its associates) ceases to be in "control" of the body corporate (by exercising 75% or more of the votes at a body corporate meeting).

Differing remedies apply according to the disclosure obligations with deferring of settlement or termination allowed where post-contractual disclosure is not made on time. Details on what is required to be disclosed have been left to the regulations (not yet available). Developers and vendors will be responsible for ensuring that the disclosure statements provided are accurate as the new Act provides that purchasers are entitled to rely on the information included.

Developers' duties to the body corporate

In terms of additional responsibilities developers should note:

- While still in control of a body corporate, developers must exercise reasonable skill, care and diligence and act in the best interests of the body corporate in ensuring that any service contracts entered into with third parties are fair and reasonable and appropriate in all the circumstances. A developer may be liable for damages if it fails to meet these obligations and a court may also terminate such service contacts if they are proved harsh or unconscionable.
- A body corporate must keep proper financial records and, unless resolved otherwise, these must be audited.

CONCLUSION

The devil is in the detail, some of which will remain unknown until draft regulations are released. We will be watching for developments and will provide updates as the date for implementation of the new regime approaches.

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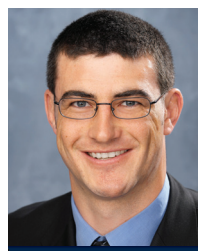

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