

## CURRENT ISSUES WITH UNIT TITLES

**Kay Keam**

**Partner**

**Martelli McKegg**

### 1. INTRODUCTION

1.1 In this paper, I intend to cover the following topics:

1.1.1 Disclosure;

1.1.2 Body corporate rules;

1.1.3 Selling off plans;

1.1.4 Issues for vendors and purchasers; and

1.1.5 Other issues under the Unit Titles Act 2010 (**Act**).

1.2 Each of these topics is vast and would warrant a seminar on its own. I have therefore concentrated on the more practical aspects of these topics.

### 2. DISCLOSURE

2.1 There are four types of disclosure that are required to be made under the Act being:

2.1.1 Pre contract disclosure<sup>1</sup>;

2.1.2 Pre settlement disclosure<sup>2</sup>;

2.1.3 Additional disclosure<sup>3</sup>; and

---

<sup>1</sup> Section 146 of the Act, clause 33 of the Unit Titles Regulations 2011 (**Regulations**) and form 18 of schedule 2 of the Regulations

<sup>2</sup> Section 147 of the Act and clause 34 of the Regulations

<sup>3</sup> Section 148 of the Act and clause 35 of the Regulations

#### 2.1.4 Turnover disclosure<sup>4</sup>.

2.2 The requirements the contents of these statements are set out in the Regulations. The format for the pre contract and turnover disclosure statements are set out in the Regulations. Templates for all of the statements (including pre settlement and additional disclosure statements) are available in Word format on the website for the Ministry of Business, Innovation and Employment (**DBH**) <http://www.dbh.govt.nz/unit-titles-templates>. I have attached copies of these templates with the permission of DBH.

2.3 It should be noted that a new definition of “contain” was inserted from 5 December 2013 so that information could be attached or incorporated in any other way<sup>5</sup>.

### 3. PRE CONTRACT DISCLOSURE

3.1 As the name suggests this statement must be provided by a vendor before an agreement for sale and purchase is signed. It is usual practice for this to be prepared by the vendor (rather than the body corporate) and for it to be attached to the agreement for sale and purchase.

3.2 Clause 33 of the Regulations sets out the information to be provided which is as follows:

- (a) *the amount of the contribution levied by the body corporate under section 121 of the Act in respect of the unit being sold; and*
- (b) *the period covered by such contribution; and*
- (c) *details of maintenance that the body corporate proposes to carry out on the unit title development in the year following the date of the disclosure statement, and how the body corporate proposes to meet the cost of that maintenance; and*
- (d) *the balance of every fund or bank account held or operated by the body corporate at the date of the last financial statement; and*

---

<sup>4</sup> Section 156 of the Act, clause 36 of the Regulations and form 19 of schedule 2 of the Regulation

<sup>5</sup> Section 144 of the Act was amended as from 5 December 2013 by Section 16 of the Unit Titles Amendment Act 2013 (**Amendment Act**)

- (e) *whether the unit or the common property is, or has been, the subject of a claim under the Weathertight Homes Resolution Services Act 2006 or any other civil proceedings relating to water penetration of the buildings in the unit title development; and*
- (f) *an explanation of the following:*
  - (i) *unit title property ownership; and*
  - (ii) *unit plans; and*
  - (iii) *ownership and utility interests; and*
  - (iv) *body corporate operational rules; and*
  - (v) *the information required to be contained in a pre-settlement disclosure statement; and*
  - (vi) *the information required to be contained in an additional disclosure statement; and*
  - (vii) *computer registers; and*
  - (viii) *the land information memorandum issued under section 44A of the Local Government Official Information and Meetings Act 1987; and*
  - (ix) *easements and covenants; and*
- (g) *how to obtain further information about the matters referred to in paragraph (f); and*
- (h) *an estimate of the cost of providing an additional disclosure statement.*

3.3 The task isn't as onerous as it would first appear as the disclosure form is attached to the Regulations and is able to be downloaded in Word format from the DBH website. I have attached as appendix 1 a copy of the template. As you can see it is a matter of completing the basic details on the front page and the last page. This information should be readily available to the vendor.

3.4 It is a little unhelpful that the requirement is to explain the information in (f) and where to find it, rather than to have this information available for purchasers.

3.5 The Act does not specify any consequences for failure to make pre contract disclosure or making incorrect disclosure (other than an obligation to correct the inaccuracies<sup>6</sup>). One implication for failing to make pre contract disclosure would be the potential for a claim under the Contractual Remedies Act for misrepresentation.

#### 4. PRE SETTLEMENT DISCLOSURE

4.1 As the name suggests a seller is required to disclose certain information prior to settlement. A seller is unhelpfully defined in section 144 of the Act as the seller of a unit. This would therefore include a mortgagee exercising a power of sale.

4.2 Clause 34 of the Regulations sets out the information to be provided which is as follows:

- (a) *the unit number; and*
- (b) *the body corporate number; and*
- (c) *the amount of the contribution levied by the body corporate under section 121 of the Act in respect of the unit being sold; and*
- (d) *the period covered by such contribution; and*
- (e) *the manner of payment of the levy; and*
- (f) *the date on or before which payment of the levy is due; and*
- (g) *whether a levy, or part of a levy, due to the body corporate is unpaid and, if so, the amount of the unpaid levy; and*
- (h) *whether legal proceedings have been instituted in relation to any unpaid levy; and*
- (i) *whether any metered charges due to the body corporate are unpaid and, if so, the amount of unpaid metered charges; and*
- (j) *whether any costs relating to repairs to building elements or infrastructure contained in the unit are unpaid and, if so, the amount of unpaid costs; and*

---

<sup>6</sup> Section 150 of the Act

- (k) *the rate at which interest is accruing on any money owing to the body corporate by the seller; and*
- (l) *whether there are any proceedings pending against the body corporate in any court tribunal; and*
- (m) *whether there have been any changes to the body corporate operational rules since—*
  - (i) *the additional disclosure statement, if one has been provided; or*
  - (ii) *the pre-contract disclosure statement.*

- 4.3 The information to be provided is now to contain a certificate given by the body corporate certifying that the information in the statement is correct.<sup>7</sup> It should be noted that the body corporate may withhold this certificate if money is owed by the vendor to the body corporate<sup>8</sup>.
- 4.4 Whilst the disclosure form itself is not set out in the Regulations, the DBH has made available a sample form which can be downloaded from their website (copy attached as Appendix 2).
- 4.5 The Act provides that this statement must be provided to the purchaser no later than the fifth working day before the settlement date. If it is not provided by that time, the purchaser has the right to postpone settlement or cancel the agreement on 10 days' notice.<sup>9</sup> These statutory rights are recorded in the standard agreement for sale and purchase<sup>10</sup>.
- 4.6 As the standard agreement for sale and purchase provides that the deposit may not be released by the stakeholder until pre settlement disclosure has been made<sup>11</sup>, issues can arise where there is a long settlement. The vendor will want to make disclosure early so that the deposit may be released, whilst the purchaser will want to have a statement close to settlement which covers the period up to the settlement date. We have also had problems where the new levy is to be struck during the

---

<sup>7</sup> Section 147(3)(b) of the Act was amended as from 5 December 2013 by Section 17 of the Amendment Act

<sup>8</sup> Section 147(4) of the Act

<sup>9</sup> Sections 149 and 151 of the Act

<sup>10</sup> Clause 8.3 of the general terms of sale of ADLSi/REINZ Agreement for Sale and Purchase of Real Estate Ninth Edition 2012(2)

<sup>11</sup> Clause 2.4(3) and (4) of the general terms of sale

period between the date of the agreement and settlement. The parties will need to negotiate a compromise to assist both parties.

## 5. **ADDITIONAL DISCLOSURE**

5.1 Under the Act<sup>12</sup> a buyer of a unit is entitled to request certain information in relation to the unit and the body corporate of which it forms part.

5.2 Clause 35 of the Regulations sets out the information to be provided which is as follows:

- (a) *the contact details for the body corporate and body corporate committee (if any); and*
- (b) *the balance of every fund or bank account held or operated by the body corporate at the date of the last financial statement; and*
- (c) *amounts due under invoices to be paid by the body corporate at the date the additional disclosure statement is requested; and*
- (d) *details of regular expenses that are incurred at least once a year; and*
- (e) *amounts owed to the body corporate at the date the additional disclosure statement is requested; and*
- (f) *the following details of every current insurance policy held by the body corporate:*
  - (i) *the name of the insurer; and*
  - (ii) *the type of policy; and*
  - (iii) *the amount of the current premium; and*
  - (iv) *the amount of any excess payable under the policy; and*
- (g) *the following details of every current contract entered into by the body corporate:*
  - (i) *the names of the parties; and*

---

<sup>12</sup> Section 148 of the Act

- (ii) *the goods or services to be provided under the contract; and*
- (iii) *the price at which the goods or services are to be provided; and*
- (iv) *the term of the contract; and*
- (h) *information about every lease to which the base land is subject; and*
- (i) *the text of motions voted on at the last general meeting and whether each motion was passed or not; and*
- (j) *whether the body corporate's operational rules are different from the prescribed body corporate operational rules, and if so, what the differences are; and*
- (k) *a summary of the long-term maintenance plan, including—*
  - (i) *details of maintenance to be carried out; and*
  - (ii) *details of maintenance carried out in the last year; and*
  - (iii) *whether there is a long-term maintenance fund; and*
  - (iv) *if there is a long-term maintenance fund,—*
    - (A) *the amount determined by the body corporate that has been, or will be, levied during the term of the long-term maintenance plan to maintain the fund; and*
    - (B) *whether the current balance of the fund is projected to be sufficient to meet the body corporate's obligations under the plan.*

5.3 It should be noted that the purchaser may now request just some of the information (rather than all of the prescribed information).<sup>13</sup>

5.4 A purchaser may request this statement up until the earlier of the fifth working day after the date of the agreement or the tenth working day before the settlement date.

---

<sup>13</sup> Section 148 (1) of the Act was amended as from 5 December 2013 by Section 18(1) of the Amendment Act

This short time frame should be borne in mind if a statement is going to be requested as part of a due diligence investigation.

- 5.5 The statement is to be provided to the purchaser within five working days of the request being received. Whilst the Act contemplates that the vendor will provide the information, it is more usual for this information to be provided by the Body Corporate. Whilst the disclosure form itself is not set out in the Regulations, the DBH has also made available a sample form which can be downloaded from their website (copy attached as Appendix 3).
- 5.6 Whilst the purchaser has a right of cancellation if disclosure is not made, there is no right to approve the statement.
- 5.7 The standard agreement for sale and purchase contains provisions for the stakeholder to hold the deposit pending the expiry of the request period and resolution of any issues where the disclosure is not made or is late<sup>14</sup>.
- 5.8 The purchaser is to pay for the statement and the cost of its preparation<sup>15</sup>. An estimate of this cost is included in the pre contract disclosure statement. The standard agreement for sale and purchase provides for this cost to be paid on settlement or deducted from the deposit if the agreement does not proceed<sup>16</sup>. Therefore a vendor may be exposed if no deposit is paid and the agreement is cancelled.

## 6. **TURNOVER DISCLOSURE**

- 6.1 Clause 36 of the Regulations sets out the information which the original owner of the development must disclose to the body corporate when the original owner and associates no longer hold 75% of the votes (being the end of the “control period”). This information is as follows:

- (a) *the date on which the control period ended; and*
- (b) *details of any as-built plans and specifications of the unit title development; and*

---

<sup>14</sup> Clause 2.4(3) and (4) of the general terms of sale

<sup>15</sup> Section 148(5) of the Act

<sup>16</sup> Clause 8.5 of the general terms of sale



- (c) *the assets and liabilities of the body corporate at the date of the meeting required by section 155 of the Act; and*
- (d) *the rent, term, and rights of renewal of any lease or licence granted over the common property; and*
- (e) *details of any code compliance certificates that have been issued under the Building Act 2004 in relation to the unit title development; and*
- (f) *details of any recommended maintenance schedules for construction materials and infrastructure in relation to the unit title development; and*
- (g) *details of any resource consent or heritage obligations relating to the unit title development; and*
- (h) *details of any warranties and guarantees for products used in the construction of the unit title development; and*
- (i) *details of any fire evacuation plans and fire protection systems for the unit title development; and*
- (j) *details of any building warrant of fitness that has been supplied under section 108 of the Building Act 2004 for the unit title development; and*
- (k) *details of any compliance schedule issued under section 102 of the Building Act 2004 in relation to the unit title development; and*
- (l) *details of existing and proposed maintenance and service contracts for the unit title development, including contractors' contact details.*

6.2 The disclosure form is attached to the Regulations and is able to be downloaded in Word format from the DBH website (copy attached as Appendix 4).

6.3 A general meeting must be held within three months of the giving of the notice<sup>17</sup>.

---

<sup>17</sup> Section 155 of the Act

6.4 The original owner must rectify any inaccuracies in the statement within five working days of becoming aware of those inaccuracies<sup>18</sup>. The body corporate may allow a longer period.

## 7. BODY CORPORATE RULES

7.1 I intend to provide a very basic outline of the issues in relation to body corporate rules.

7.2 Under the Unit Titles Act 1972 (**Old Act**), the default rules were set out in schedules 2 and 3 of the Act. These rules and any rules amended under the Old Act were replaced as from 1 October 2012 with the default rules under the Act. The governance (voting, committees and quorum), levies and maintenance provisions of those schedules are now in the Act. A detailed analysis of these changes appears in “The Unit Titles Act 2010” July 2011 NZLS Seminar Booklet.

7.3 The default operational rules under the Act are very basic and are as follows:

1. *An owner or occupier of a unit must not—*

(a) *damage or deface the common property:*

(b) *leave rubbish or recycling material on the common property:*

(c) *create noise likely to interfere with the use or enjoyment of the unit title development by other owners or occupiers:*

(d) *park on the common property unless the body corporate has designated it for car parking, or the body corporate consents:*

(e) *interfere with the reasonable use or enjoyment of the common property by other owners or occupiers.*

2. *An owner or occupier of a unit must dispose of rubbish hygienically and tidily.*

7.4 The default operational rules are unlikely to be adequate for most body corporates other than stand alone residential units.

---

<sup>18</sup> Section 157 of the Act

- 7.5 The DBH has set out some guidelines for additional considerations for body corporate operational rules for residential developments, commercial developments, mixed-use developments and layered developments. The DBH guidelines are available at <http://www.dbh.govt.nz/unit-titles-body-corp-operational-rules>.
- 7.6 ADLSi has also published Model Operational Rules for residential, commercial/industrial and mixed use title developments. Liza Fry Irvine has discussed these rules in detail in her ADLSi seminar paper, ADLSi Model Rules, March 2012 and in the joint paper with Thomas Gibbons at the NZLS Property Law Conference in 2012, UTA 2010, Reading Between The Lines.
- 7.7 Review of body corporate rules needs to be done carefully and the ADLSi model operational rules and the DBH guidelines should be viewed as useful guides rather than a quick fix.
- 7.8 You will all be aware of the issue of ultra vires whereby rules will not be enforceable if they are outside of the scope of section 106 of the Act. In particular, rules must “relate to –
- (a) *The control, management, administration, use, or enjoyment to the principal units, future development units, accessory units, or common property; or*
  - (b) *The regulation of the body corporate.”*

The rights and powers must be incidental to the powers and duties conferred or imposed on the body corporate under the Act.

- 7.9 The use of land covenants over the underlying land prior to the deposit of the unit plan should be considered to avoid any such issues. Examples would include material competition or preservation of visibility sightlines for units.

## 8. **SELLING OFF PLANS**

- 8.1 It is now becoming increasingly common for properties to be sold off plans. The ADLSi documents and precedents committee is currently drafting an agreement for sale and purchase of land and a dwelling to be built and we will then use this to develop more complex documents for unit titles.
- 8.2 Drafting and reviewing an off the plans agreement requires balancing the vendor’s need for flexibility and the purchaser’s desire for certainty. This is particularly in relation to:

- 8.2.1 Conditions: Examples of common conditions include:
- (a) Achieving a minimum level of pre sales;
  - (b) Obtaining a resource consent and/or building consent on terms and conditions satisfactory to the vendor;
  - (c) Board approval condition.
- 8.2.2 Variations to plans and specifications and materials by the vendor due to the terms of the resource consent or building consent. A purchaser may wish to have controls on variations to the size of the apartment and in particular, does the size include the balcony.
- 8.2.3 Ability to substitute materials – particularly where they are unavailable;
- 8.2.4 Encumbrances – either required as a condition of the resource consent or building consent or if they are considered necessary or desirable by the vendor;
- 8.2.5 Form of body corporate rules and ability to change them;
- 8.2.6 Sunset dates giving a right of cancellation should settlement not have taken place by a certain date – should they be for the benefit of just the purchaser or both parties? Also does the vendor have the right to extend the sunset date.
- 8.2.7 Accruals clause (also called lowest price clause);
- 8.2.8 Maintenance period – how long and when should this run from (practical completion or settlement). Such periods are usually between 30 – 90 days.
- 8.3 As you will appreciate, there is also the issue of what to do regarding pre contract disclosure. My practice is to attach to the agreement a statement with as much completed as possible (which is often very little). I have seen a number of agreements with acknowledgments that pre contract disclosure has been made in such circumstances. Given that it is not possible to contract out of the Act,<sup>19</sup> it remains to be seen if the Court will uphold such acknowledgments on the basis that they do not “exclude or limit the obligation to disclose” under the Act and what the consequences will be.

---

<sup>19</sup> Section 145 of the Act.

## 9. ISSUES FOR VENDORS AND PURCHASERS

9.1 **Rights of cancellation** – keep in mind the purchaser's right of cancellation within 14 days of the date of the agreement under section 225 of the Resource Management Act where the plan has not been approved by Council under section 223 of that Act. The purchaser also has the further right to cancel which arises at any time after the later of:

- (a) the expiration of two years after the date of granting of the resource consent; or
- (b) one year after the date of the agreement.

This right arises if the vendor has not:

- (a) made reasonable progress towards submitting a survey plan to the territorial authority for its approval; or
- (b) deposited the survey plan within a reasonable time after the date of its approval.

9.2 **Consent to alterations** – a record of the consent of the body corporate to any additions or structural alterations should be kept. Whilst the Act requires an owner to give notice to the body corporate prior to the commencement of any additions or structural alterations<sup>20</sup>, the consent of the body corporate is only required where the additions or structural alterations materially affect any other unit or the common property<sup>21</sup>. Clause 8.6 of the standard agreement sets out the requisitions procedure where body corporate consent was required. The purchaser can give notice requiring such consent and is entitled to cancel if the vendor is unwilling or unable to require such consent. Enquiries should therefore be made to ascertain whether consent was actually required under the Act.

9.3 **Encroachment into common property** – it is not uncommon for there to be alterations to the unit which encroach into the common property. I have had two instances recently. One was where the owner enclosed a deck. The roof and sides of the enclosure were in the airspace which formed part of the common property. The other was where the owner erected a fence on the common property and then

---

<sup>20</sup> Section 80(1)(h) of the Act

<sup>21</sup> Section 80(1)(i) of the Act

landscaped the common property within the fenced area as though it was part of his unit.

The technically correct manner to document such encroachments is to correct the unit plan and transfer the relevant part of the common property to the unit owner. This can be a complicated and expensive process – particularly if there are a number of owners involved.

The standard agreement<sup>22</sup> gives the purchaser a right to requisition in such circumstances.

A less expensive (although not as robust) alternative is to give the owner a licence or special privilege to use the relevant part of the common property<sup>23</sup>. This requires a special resolution. It was common in rules under the Old Act to make provision for this in the body corporate rules and for the rights to be determinable by special resolution. The Act does not expressly provide that such rights to be determinable by special resolution but presumably this is the case (subject to possible equitable redress).

It is important that a copy of the licence or special privilege be provided to the body corporate manager or secretary. Note the warranty in clause 8.2(9) of the standard agreement that *“No lease, licence, easement or special privilege has been granted in respect of any part of the common property which has not been disclosed in writing to the purchaser”*.

- 9.4 **Remediated properties** - additional care during due diligence needs to be taken with properties which have been remediated following the discovery of weathertightness issues or other damage.
- 9.5 **Disclosure of weathertightness issues** – the pre contract disclosure statement requires disclosure of *“whether the unit or the common property is, or has been, the subject of a claim under the Weathertight Homes Resolution Services Act 2006 or any other civil proceedings relating to water penetration of the buildings in the unit title development”*. If the owner or body corporate has either not commenced proceedings at all or reached a private settlement, these instances will not be

---

<sup>22</sup> Clause 5.2(b)

<sup>23</sup> Section 56 of the Act

technically caught by the requirement for disclosure. A private settlement agreement may have a confidentiality provision preventing disclosure.

In considering what questions to ask when there is ongoing litigation or previous litigation which resulted in settlement, a purchaser will want to know if there is a Remedial Works Agreement (commonly used for smaller body corporates with no formal remedial scheme) or a Conduct and Distribution Agreement. These agreements will deal with arrangements in place for distributing settlement funds and reaching agreements on the manner of repair.

It has also been pointed out that *“a key element that purchasers will wish to understand is whether there are ongoing leaking problems even if claims have not been lodged”*<sup>24</sup>. Such problems are not required to be disclosed in the pre contract and pre settlement disclosure statements.

There can also be issues if proceedings are issued after the date of the pre contract disclosure. The vendor has an obligation to rectify the inaccuracies in the statement<sup>25</sup> but the purchaser has no right to approve or object (other than in relation to remedies for misrepresentation or the like).

Clause 8.2(6) of the standard agreement provides that the *“vendor has no knowledge or notice of any fact which might give rise to or indicate the possibility of ...liability under the Act...”* Given the wideness of this warranty, care needs to be taken if the vendor has any indication of possible or previous weathertightness issues.

- 9.6 **Mortgagee sale** – A mortgagee may have difficulty complying with the disclosure requirements even where there is a professional body corporate secretary. Section 206 of the Act only allows an owner to have access to records. The Property Law Section sought an amendment to the Act to allow the disclosure requirements to be contracted out of in the case of a mortgagee sale<sup>26</sup>.

## 10. OTHER ISSUES UNDER THE ACT

- 10.1 **Appointment of a chairperson** – the Property Law Section also raised that there have been difficulties in obtaining nominees for the position of chair because of the

---

<sup>24</sup> Memorandum of 26 October 2011 attached to Property Law Section letter of 21 February 2012

<sup>25</sup> Section 150 of the Act

<sup>26</sup> Letter of 21 February 2012 to Minister of Building and Construction

requirement for the chair to be an owner<sup>27</sup>. They sought an amendment to allow the appointment of an appropriate professional.

10.2 **Long term maintenance plans** – these are to be reviewed at least three yearly<sup>28</sup>.

Therefore a lot of plans will now need to be reviewed given that the Act commenced on 20 June 2011.

10.3 **Governance and advice** – tying in the need to have the ability to have a professional chair is the need to have appropriate professional governance and advice.

Committees are made up of owners who may not have the skills or experience to fulfil the roles which are thrust upon them. Many body corporate secretaries are just that and provide accounting and secretarial services. It is unrealistic to expect them to provide the much needed legal advice. Committee members potentially face legal liability if they make decisions which are contrary to the rights and obligations of the body corporate under the Act. Therefore we need to remind our clients who have units to take appropriate legal advice as required.

---

<sup>27</sup> Letter of 21 February 2012 to Minister of Building and Construction

<sup>28</sup> Clause 30(2) of the Regulations



## APPENDICES

1. Pre contract disclosure statement
2. Pre settlement disclosure statement
3. Additional disclosure statement
4. Turnover disclosure statement