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A NEW REGIME FOR UNIT TITLE DEVELOPMENTS

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The Unit Titles Bill proposes to revamp the unit titles regime to meet the needs of intensive title ownership in New Zealand today. The Bill has now had its first reading in Parliament and has progressed to the select committee stage. The Social Services Select Committee has called for public submissions on the Bill by Friday, 24 April 2009.

The Department of Building and Housing has also issued a separate document outlining the likely regulations that would apply to unit title developments once the Bill is passed into law. There will be separate consultation on the regulations at that time.

While there is a need for a revamp of the current unit titles regime, the proposed changes do not cater for all forms of strata title development as well as some may have hoped for. In particular, the Bill may not work as well, or at all, for those involved in commercial, mixed-use, shopping centre or car park unit developments. This is perhaps a consequence of the “consumer protectionist” flavour of the Bill, which appears to be aimed at residential unit title developments.

The Bill also introduces additional regulatory hurdles, which will increase compliance costs for a number of

stakeholders, including developers, bodies corporate and owners. Some of the proposed changes, such as the increased disclosure requirements, may also affect the marketability of unit titles for both developers and owners alike.

All existing unit titles will have a transitional period of 15 months in which to convert to the new regime. As such, it is important for stakeholders in existing unit title developments to be aware of the proposed changes.

### Key changes

#### Disclosure requirements for vendors and developers

One of the most fundamental changes proposed in the Bill is the mandatory general disclosure requirement for vendors and developers.

Specifically, the Bill requires vendors to provide a disclosure statement before a sale and purchase agreement is signed and another disclosure statement five days before settlement. A purchaser may also require a vendor to provide an additional disclosure statement before settlement within five working days of the purchaser’s request.

The Bill proposes that a purchaser will be entitled to defer settlement if a pre-settlement or an additional disclosure statement is provided later than the specified timeframe. A purchaser may also elect to cancel the agreement for sale and purchase if a pre-settlement or additional disclosure statement is not provided within the specified timeframe.

A purchaser of a unit title currently has the ability under the ADLS standard form agreement to defer settlement if a section 36 certificate has not been provided within the required timeframe. A right to cancel for non-disclosure is a major change to the current rights between a vendor and a purchaser of a unit title. This could have a significant impact on vendors, especially where a disclosure statement has been inadvertently omitted and would otherwise have not contained any information justifying cancellation of a binding unconditional agreement.

Vendors will also be responsible for ensuring that their disclosure statements contain accurate information, as a purchaser will be entitled to rely on that information. This is arguably a shift away from the *caveat emptor* principle, which currently underlies the general legal position between a vendor and a purchaser.

In addition to the statements referred to above, a developer will be required to provide disclosure statements:

- dealing with construction of the development and compliance with the Building Act; and
- advising of any direct or indirect interest the developer has in any contract or arrangement with a body corporate.

### **Developers' duties to the body corporate**

Consistent with its "consumer protectionist" flavour, the Bill imposes obligations on developers relating to agreements between the body corporate and third parties entered into when the developer controls the body corporate.

A developer may be liable for damages if it fails to meet its obligations to the body corporate. In addition, a court may terminate a "service contract" entered into by a body corporate if it is found to be harsh or unconscionable.

### **Dispute resolution**

The Bill requires that parties to a unit title development submit disputes to the tribunals specified in the Bill instead of proceeding to arbitration. This may cut across procedures agreed between parties to deal with disputes e.g. rent determinations in a ground lease.

### **Long-term maintenance plans and sinking funds**

Another significant change proposed by the Bill is the requirement for a body corporate to create a "long-term maintenance plan". That plan must identify maintenance requirements that are expected to arise in the following 10 years, an estimate of the costs involved in undertaking those maintenance works, and a basis for levying owners for such costs. The body corporate must then establish and maintain a sinking fund based upon that long-term maintenance plan.

A body corporate would also have an ability to create a contingency fund for maintenance, repairs or renewals that are not covered under the long-term maintenance plan.

A sinking fund seems to be a sensible change as it should provide owners with more certainty around potential maintenance costs, rather than facing a surprise levy for painting or other remedial work. It is unclear though how the interest of a unit owner in the sinking fund is to be dealt with on the sale of a unit.

### **Common property**

Common property is to be owned by the body corporate rather than each of the unit owners as tenants in common. It is proposed that each owner would still have a beneficial interest in the common property. This should make dealings with the common property (such as leases, licences and easements) much simpler to deal with.

### **Ownership and maintenance of structural elements**

The Bill provides for a body corporate to own and be responsible for maintaining, repairing and renewing those building elements that are essential to the structural integrity or exterior aesthetics of a building, the health and safety of persons that occupy the building and any infrastructure that relates to or serves one or more units.

This is intended to prevent liability for these costs from falling on a single unit owner. Ground lessors who have an interest in ensuring that the improvements are maintained will also welcome this change.

### **Unanimous resolutions**

It is proposed that the current requirement for unanimous decisions on certain matters be replaced with a 75% voting threshold. This will prevent voting on key matters such as redevelopments, amendments to unit plans and the grant of easements or other interests over the common property from being blocked by one owner. There are rights for dissenting minorities if the

majority vote on a matter impacts on the minority.

### **Layered developments**

A new feature introduced by the Bill is the ability for large or mixed-use unit title developments to be “layered” by permitting a principal unit to be further subdivided into “subsidiary units”.

The owners of such “subsidiary units” would form a “subsidiary body corporate” to manage the affairs of their units and associated common property. The subsidiary body corporate would be treated as the unit owner of the subdivided principal unit.

This means that a unit title development could have a number of subsidiary bodies corporate, each separately managing the interests of particular groups of owners while having input into the dealings of the parent body corporate. This will be a useful mechanism for mixed-use developments such as shopping centres.

### **Mortgagees and caveators**

A key change for mortgagees and caveators is that their consent will no longer be required to register dealings at Land Information New Zealand, although mortgagees and caveators are required to be given notice of certain resolutions that may affect the title. Any person served with a notice may object to that resolution and apply for relief to the Court.

### **Principal units and unit entitlements**

The Bill clarifies that a principal unit must contain a building or be contained in a building. This will prevent unit titles of “open space” developments such as car parks. This moves unit titles further away from the characteristics of a fee simple title.

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In addition, the Bill proposes that unit entitlements be determined in two ways, based on ownership interests and utility interests. This will allow developers to levy owners based on their use of common areas/facilities, as well as the value of their unit where relevant.

## Next steps

We expect a number of the proposed changes may not survive the select committee review process in their current form. We will be keeping a watching brief on the Bill as it progresses through the legislative process.

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