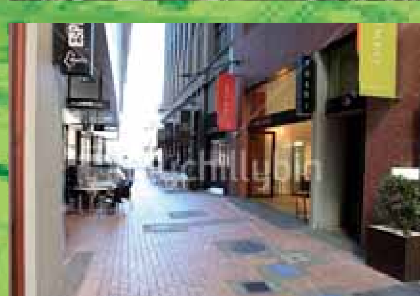
Body Corporate Guide

An essential handbook for anyone who has anything to do with unit titles



Debra Dorrington & Denise Marsden

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AD Law Limited

P O Box 7246

Wellesley Street

Auckland 1141

www.alexanderdorrington.co.nz

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INTRODUCTION

HOW THE UNIT TITLES ACT 2010 AFFECTS YOU

Understanding ownership of property bound by fences, trees, and rivers is easy. There are few complications. You can see the property and it can be occupied. You can walk from one end to the other and touch the boundary. Ownership is not dependent on your neighbours.

The notion that a person can own a three-dimensional shape in airspace can be more difficult to grasp. That's what a unit title is – a box described by measured dimensions, sometimes suspended above another area of defined space.

Ownership of space brings with it some specific complications. Where is the access? How can it be built on? Where does the power line run? What rights do I have to use the ground as support, and what do I own if the building falls down? Quite aside from whether Kiwis typically like to live in apartments or run their businesses in a strata-titled building, there are legal issues to address in respect of the structure. More on this in the chapters ahead.

The Unit Titles Act 2010 (UTA2010) is a streamlined piece of legislation governing the creation and management of a range of these three-dimensional shapes in airspace. It covers apartment blocks, large retail and mixed-use complexes, industrial parks, small residential developments, parking buildings and other uses.

The Act was passed into law in April 2010 and came into effect on 20 June 2011. It replaces the Unit Titles Act 1972 (we refer to this throughout as the 1972 Act), which was the legislation that introduced New Zealand to the concept of common property and set out a means for its shared use and management.

The changes affect every person, company or organisation who develops, owns, sells or buys a property that is a unit title. That includes those who are associated with these types of properties, such as body corporate managers, real estate agents and building managers.

In this e-book, we aim to provide clear, concise information to help you understand the new legislation.

We examine a range of unit title issues. We look at what rights and responsibilities come with ownership, what restrictions there are on use, and what governance structures and behaviours are required.

At the end of each chapter there is a brief list of points. If you don't have time to read through the book, do flick to these boxes. They will give you a heads up on the important points to remember.

The information is not intended to be legal advice. You should see a property lawyer for that. It is intended to introduce you to the Act, to get you thinking about how it might impact on you.

We hope you enjoy our views on the world of unit titles. We have certainly enjoyed writing it and are open to feedback, especially given there will be re-writes as the law develops. Do let us know of any practical examples to illustrate issues that arise.

Debra Dorrington and Denise Marsden
AlexanderDorrington Lawyers
www.alexanderdorrington.co.nz

CHAPTER 1

THE NEW ACT IN A NUTSHELL

Summary of the Unit Titles Act 2010

The UTA2010 builds on the regime previously established by the 1972 Act, and in doing so it:

- entrenches requirements of management and governance that previously could be manipulated
- introduces a more equitable means of contributing to shared costs
- introduces sinking funds and contingency funds
- eases the requirements for changing a unit title structure
- introduces new opportunities for development
- imposes new disclosure requirements.

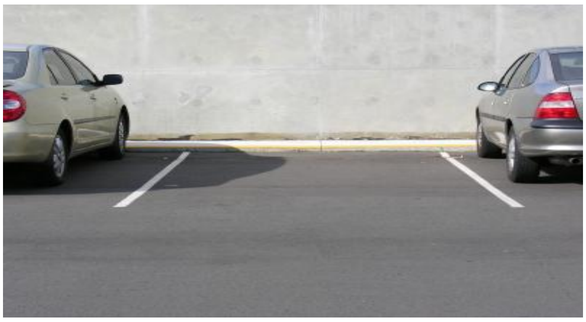
It creates a robust structure that can handle a range of scenarios, and is suitable for a small group of homes through to a mixed-use, multi-unit high-rise.

You'll need to know about the Act if you own or lease a unit title, if you sell them, trade them, develop them, fund them or manage them. You'll especially do well to turn your mind to the legislation within the first 12 months after it is introduced. If you don't, assumptions will be made and default situations outlined in the Act will prevail, even though they may be totally unsuitable to your situation.

What is a unit title?

Under the 2010 Act, an owner acquires ownership of the unit itself, an interest in the common property and a contingent right to share in ownership of all of the units if the unit plan is ever cancelled.

An owner might own a future development unit (an area to be developed at a later stage), or a principal unit that is already established as an apartment, a shop, a commercial office, a site for a sign or a car park. They might also own an accessory unit that is supplementary to a principal unit, such as a storage area.



A car park can be a unit title

Generally a principal unit must be associated with a building. Car parks are the exception to that rule. All other principal units must be in a building or part of a building or contain a building. The boundaries of the units, accessory units and common property are all defined on a unit plan lodged at Land Information New Zealand (LINZ).

Ownership can be further complicated by reference to a leasehold estate, a staged unit development or a layered development, each of which is examined in this book.

Governance and management structure

This ownership structure is overlaid with governance and management obligations. Owners must abide by rules, some of which are established by statute and some of which are created specifically for each building complex.

Voting rights attach to ownership. In some instances an owner gets more voting rights if they own a unit of greater value but in most instances it's one vote per unit.

Owners of a principal unit automatically become members of a body corporate. No one else can be a member. No one can choose to join just because they would like to. The body corporate is a separate legal entity created when the unit plan is deposited with LINZ.

The body corporate owns the common property but the individual owners have a beneficial interest in it. The interest is held jointly as tenants in common and is calculated by the relative value of a unit in relation to the value of each of the other units.

An owner is obliged to contribute to maintenance costs, which may include a sinking fund and contingency funds. Contributions to some costs are based on ownership, while contributions to others are based on use.

The nature of the development (and how well the ownership and use are run) is not dependent only on the owners and occupiers, but is also significantly influenced by the roles of and interaction among the following:

- the body corporate secretary or body corporate manager
- the building manager
- the body corporate committee
- the body corporate chairperson.

Ownership obligations

The statute sets out a range of responsibilities that attach to ownership. Some of these responsibilities can be managed by delegation while others require more specific input from the owner. A notable change from the earlier regime is the imposition of disclosure requirements on a sale. Disclosure obligations are especially imposed on those who develop unit titles.

The requirement to comply with body corporate rules remains, but the makeup of the rules differs from what owners will be used to. Also, unless a body corporate takes specific action to ensure otherwise, existing rules will fall away 15 months after the Act comes into force. They will be replaced with default rules provided by regulation. Those default rules do not cover issues peculiar to specific complexes, such as the requirements for a particular management arrangement to be in place.

Development

The UTA2010 offers new opportunities for developers. It lowers thresholds to enable change and provides for the further subdivision of existing units in layered developments. In addition, it maintains the regime of staged developments using future development units, but tidies up some inconsistencies that were experienced with that regime.

The legislation limits the extent to which a developer can maintain on-going control and sets guidelines for the review of long-term service contracts.

In short, the UTA2010 creates more flexibility as to how unit title developments are completed, but raises the bar in respect of management agreements that are initially put in place.

Transitional arrangements

The UTA2010 commenced on 20 June 2011. Bodies corporate existing at that date will transition fully to the UTA2010 over a 15 month period.

Despite the 15-month timeframe, it will be important for bodies corporate to address issues promptly. An annual general meeting must be held within six months of the Act coming into effect and, to ensure all changes are completed within the requisite timeframe, a number of meaty issues will need to be dealt with at that meeting.

Cancellation

The legislation deals with termination of unit titles both by agreement and through a decision of the Court.

More detailed information on all of these points can be found in the following pages of this book.

CHAPTER 2

SOME HISTORY AND BACKGROUND

How the unit title developed

Despite New Zealand's tradition of the quarter acre section, developers in this country have been building blocks of flats for over a hundred years. The first were established in the early 1900s. These included Courtville in Parliament Street in Auckland and Braemar on The Terrace in Wellington.

Sir George Grey Special Collections, Auckland City Libraries, 4-4846

These properties and others like them were examples of early apartment living in New Zealand.

Although Courtville is now a unit titled property and Braemar is an office block, they both began life as apartments with ownership of the land and building in a single title. A flat-owning company owned the land and buildings, and granted leases or licences to the occupiers. Few of these arrangements still exist – most have been replaced by the unit titles regime.

In 1957, a Supreme Court case considered the right of a person to have an interest in an upstairs flat as distinct from an entire property[1]. For the first time, the Court recognised that a person could own, and have a title to, an identified area above the ground.

The complexities of access, easements and shared management were not considered in that judgment, but it became clear that a separate title could issue for an identifiable area of airspace.

In the decade that followed, legislation was introduced in Australia to deal with the separate ownership of units within apartment buildings. Different laws were established in different states.

The Conveyancing (Strata Titles) Act 1961 in New South Wales was geared towards high-density inner-city apartment living. The Strata Titles Act 1967 introduced in Victoria was more in line with our lower-density urban living. This was the legislation that greatly influenced the New Zealand lawmakers and not much later the Unit Titles Act 1972 became law in this country.

Apartment living grows

Statistics from the 2006 census show that the number of people living in inner-city apartments in Christchurch, Wellington and Auckland quadrupled between 1996 and 2006[2]. Almost all of these people will have been living in unit titles.

Typical apartment dwellers are aged 20 to 29 and earn a higher wage than average. In the inner city, about 95% hold a formal qualification. Most are professional couples.

Apartment dwelling is not for everyone. New responsibilities come with living in close quarters and there is less flexibility with living arrangements. On the other hand, an apartment owner can enjoy security, the use of facilities they may not otherwise afford, an onsite manager to manage repairs, and a sense of community.

Whether these advantages justify living with rules will be a personal preference. If you are the sort to paint your front door red on a whim, hang your washing on the balcony, or practise the drums regularly, apartment living may not be your thing.

A useful Liveability Evaluation Index[3] was recently developed by a graduate of the Architecture School of Victoria University, Wellington, in order to provide a tool for evaluating the liveability of apartments. Although not in use yet, ultimately the tool is expected to be freely available as an online tool for a variety of people to access. It may be used by purchasers to look for compatible apartments, as a selling point by real estate agents, and by councils as part of the consent process.

The 1972 Act – How it worked

The 1972 Act introduced the concept of common property to New Zealand, and set out a means for its shared use and management. Under the 1972 Act, the method of owning shared property was called a stratum estate, and ownership was made up of three parts:

- ownership of units (with the recognition that ownership of the units could disappear, for example through damage)
- ownership of a share in property that was used in common with others
- a contingent right to share ownership in each of the units in the complex if the unit title arrangement was ever cancelled.

Not long after its introduction, the 1972 Act was amended. Changes were made in 1979 to allow for the development of land into unit titles in stages.

The legislation remained geared towards simple, primarily residential, clusters of units but has also been used for other purposes. It was the complexity of these uses that led to the call for changes to the 1972 Act.

Residential unit titles

The unit title regime has always been used for residential housing, whether for a string of flats, two entirely separate dwellings, a line of terraced houses or a high-rise residential development. The 1972 Act has been applied to them all.

Since the introduction of the 1972 Act, housing has intensified both in an urban sprawl and with greater high-rise and low-rise density. The 1990s in particular saw a revival of inner-city living, which was first popular at the turn of the 20th century, and that trend has continued to develop.

The Auckland Council is now planning for significant growth in its population and in the recently released discussion document 'Auckland Unleashed' urges the expansion of housing types to achieve a goal of more compact urban growth. These housing types include patio houses, duplexes, courtyard houses, maisonettes and others.[4] The unit title regime will be suitable for each of these.

Wellington City Council finalised an Urban Design Strategy in 2006, looking at expected urban growth over the next 25 to 50 years.[5] It estimated that 30,000 new dwellings would be needed in Wellington by 2056. Of these, 17,500 are expected to be high-density housing.[6]

Commercial unit titles

Unit titles are also commonly used for retail strips, industrial business parks and commercial buildings. They can even be used for signage and for single car parks.

The 1972 Act did not inhibit the use of unit titles for commercial developments. However, because it gave broad flexibility as to how the developments were to be managed, there has been a wide variance in the quality of on-going management and maintenance.

If the initial developer set up a management process that took into account a sinking fund, on-going management requirements and the possibility of upgrading, then expectations should have been well managed. However, this does not seem to have been the norm, with commercial developments completed according to standard body corporate rules and no anticipation of future changes.

Commercial properties, especially with a retail element, often need to be upgraded more regularly than residential. The owners are driven by economic requirements and generally are not the occupiers. Differing investors have differing expenditure horizons and in the past, a very small group of owners could prevent alterations and upgrades. That often created a stalemate and sometimes an unfortunate deterioration of the asset.

It will be interesting to monitor the influence of a compulsory sinking fund and the new body corporate rules in the UTA2010.

The new legislation, with its option of layered developments, its lowered thresholds for significant decision-making, and its requirements for future planning, may make it easier to maintain commercial properties to better standards.

A case of complexity

In Hamilton, a commercial retail development focused around a supermarket was in need of an upgrade. The property was tired and becoming less attractive to customers but the body corporate did not have funds sufficient to finance the upgrade. Through the sheer doggedness of one of the owners, the multiple owners reached an agreement to get the work done and the redevelopment was completed.

Because of the complexity involved with multiple ownership, reaching an agreement was time-consuming and cumbersome and the redevelopment took years and cost much more than it would have otherwise. This created disputes among the owners and for a time it became a difficult body corporate to manage.

Had a long term management plan been in place, supported by a robust sinking fund, the redevelopment would certainly have been easier.

Mixed-use titles

Since the 1980s, the 1972 Act has been used for increasingly complex developments. These include high-rise buildings; multi-use arrangements involving a mixture of commercial use and residential use; a variety of common property facilities; sophisticated arrangements for the provision of utilities; and structures using leasehold estates and licence rights.

These developments, and the issues that have arisen from them, made it very clear that the simple 1972 Act was insufficient to manage the complexities of the modern stratum title developments.

Example of a modern mixed-use development. Photo supplied by Barfoot & Thompson.

Example of a modern mixed-use development

In Auckland's Kingsland, there is a unit title development that was completed in 2006. It comprises 92 different titles, 90 of which are residential. The remaining titles are commercial and house a variety of retail tenants. The complex comprises five different buildings, and common facilities include a gym, a pool and a courtyard. A property management agreement has resulted in the appointment of a professional body corporate manager in addition to the body corporate secretary.

Review of the 1972 Act

In 1999, a Law Commission Report examined the different ways in which we share ownership of property in New Zealand.[7] Included in it was an examination of whether the 1972 Act adequately met requirements. The report identified the need to replace the legislation to cover the needs of modern developments.

The Law Commission Report suggested a number of changes to the way we share ownership of property, some of which were quite radical. For example, the report advocated the phasing out of cross leases, going as far as to suggest a mandatory requirement for the conversion of cross leases to a subdivision or unit title scheme. It also considered major changes to the unit title legislation.

Among other issues, the report also considered whether bodies corporate were required for simple schemes. It called for greater flexibility in staged developments, suggested mortgagees be made liable for payment of body corporate levies in much the same way as rates, and questioned whether bodies corporate ought not to be given the power of sale.

This was a radical paper and it prompted much discussion in the legal fraternity. While many of the proposals were not adopted, they led to vigorous debate around the issues related to sharing the ownership of land.

In the same year, the Auckland Regional Growth Forum was established. A standing committee of Auckland Regional Council, the Forum was given the mandate to develop a growth strategy, and made numerous recommendations.

An outcome of these developments was a report on intensive housing in Auckland.[8] This report called for a major review of the 1972 Act. But its key findings were not just about the inadequacies of the legislation. It also highlighted the inadequacies of the relationships between the different people involved in the development and use of unit titles, especially the relationships between owners and managers.

The identification of these types of issues, and many others including the impact of leaky building syndrome, has led to the evolution of a significantly more sophisticated law.

The UTA2010 also deals with inequities that have arisen in contributions to costs, the importance of long-term maintenance, and the problems caused by previous requirements for unanimous decision-making. We introduce this new law in the next chapter, and provide more detailed information throughout the book.

In brief:

- Unit titles have been with us for many years
- They are becoming more numerous and sophisticated – and more complex.

CHAPTER 3

IMPACT OF THE UTA2010 ON DEVELOPERS

The balancing act

The very process of buying, developing and selling a unit title development is an exercise in balance and daring. A myriad of relationships must be juggled by the developer amid the maze of regulatory and market requirements. It takes a certain stamina to push through all of that and still make money.

Best use of time always helps with cost saving and to this end, and to minimise risk, developers use pre-sale contracts for the sale of units. A buyer signs up to purchase something that has not yet been created. Armed with the pre-sale contracts, the developer finds funding and the confidence to proceed.

A degree of conflict between certainty and flexibility has always existed with these pre-sale contracts. The extent to which either dominates is generally dictated by the market and by the bank.

An astute buyer will want a degree of certainty, although a frenzied market and the prospect of a profit can diminish this desire. In the early 1990s, apartment developments in Auckland would sell out over the weekend. Clearly purchasers were paying minimal heed to the importance of certainty and relying instead on solicitor approval clauses and short-term due diligence provisions to extricate themselves where required.

Luxury apartments selling fast

East & Bays Courier 1994

This $8 million townhouse complex is going up in Parnell.

Manson Developments Ltd is building the 20 homes on a 2034 sq m site on the corner of Parnell Rd and Augustus Tce.

Developer Bruce Christian says they went on sale a week ago and half have been sold. Prices range from $369,000 to more than $550,000 each. Buyers are professional people who want to live near the city.

"They're people who've lived overseas in Chelsea, London and New York and like this style.

"They want city living but they don't want high rise. They still want their own front door and off street parking."

The terrace homes of three and four storeys, built around a square, should be finished by September.

Manson Developments is a Herne Bay-based family company which has built 200 city apartments, including Manhattan apartments in Albert St and it converted the old Auckland Regional Council headquarters.

The developer, on the other hand, wants the ability to make adjustments throughout the development where they might be needed to suit regulatory or market demands. Pre-sale contracts will usually anticipate that ability.

The conflict between certainty and flexibility will be magnified by the compulsory disclosure regime introduced by the UTA2010. The compulsory-disclosure regime may in fact stop developers marketing pre-sale contracts before resource consents have been issued. It will require developers to spend more time and money up front, formulating more precisely what they are selling before they go to the market. Instead of an architect's drawing, a brief plan, an idea and an application for consent, details about what is being sold will need to be developed. The new regime may also leave purchasers' conditions in the agreement for far longer than previously.

These outcomes will likely result from the purchasers' requirements under the legislation but may also result from the expectations of the developer's funders.

Developers and disclosure

General disclosure requirements are discussed in Chapter 8. The following is an analysis of the direct implications for developers of specific pre-contract, pre-settlement and turn-over disclosures, as well as additional disclosure requests by buyers.

Pre-contract disclosure

Pre-contract disclosure requires an analysis of process and an understanding of the nature and complexities of unit title ownership. The analysis includes both a general description of the elements of unit title ownership and some details that are specific to the relevant development. The form of the disclosure has been prescribed by regulation. A copy of the form that must be used is set out in Appendix 3. Pre-contract disclosure will not require developers to have all development documentation finalised.

Pre-settlement disclosure

Pre-settlement disclosure, on the other hand, may require a developer to have all development documentation finalised before a contract is created.

A pre-settlement disclosure statement must include a certificate from the body corporate certifying it is correct. But because the body corporate does not come into existence until the unit title plan is deposited, pre-settlement disclosure cannot be made until very close to settlement.

A buyer may delay settlement or cancel the agreement if the pre-settlement disclosure requirements are not met. However, the legislation does not give a purchaser the right to cancel an agreement if they receive the information but are not satisfied with it. That arrangement will need to be created by contract and no doubt agreements will be made conditional on the purchaser approving the pre-settlement disclosure information provided.

A developer cannot contract out of the obligation to provide the information. But a developer may be able to negotiate whether the purchaser can cancel if the purchaser is not satisfied with what is provided.

The risk to developers will be significantly increased if purchasers start to make their contracts conditional on approving the pre-settlement disclosure documents or if buyers' lenders do the same with their finance offers.

To manage the risk, a likely outcome is that some form of disclosure will be put into agreements (or delivered in some other way) and a condition will be imposed that allows the purchaser to refuse approval only if the pre-settlement disclosure is significantly different from the information provided earlier.

Just what pre-settlement disclosure comprises is set out in a table in Chapter 8.

Additional disclosure

A buyer can ask for additional information to be disclosed by the developer in limited circumstances. The legislation refers to one request only and the timeframe imposed for such a request is short. Unless there is a short settlement date, additional information must be asked for within the five working days after the agreement is signed. If there is a short settlement date, the time period within which the request is to be made is even shorter.

The purpose of the additional disclosure requirement is to enable the purchaser to access body corporate records about management, finance and governance. A table setting out what is to be included in additional disclosure is included in Chapter 8. With a pre-sale contract, the body corporate will not exist five working days after the agreement is signed and very limited additional disclosure information will be available.

Turn-over disclosure

A developer, as the original owner of a unit title development, must provide turn-over disclosure. This is information that must be given to the body corporate at the stage the developer (or associates) no longer have control over 75% of the voting power within the body corporate. That control could arise through ownership, by the giving of proxies or by some contractual relationship.

Once that control is relinquished, the developer must notify the body corporate that the control period has come to an end. The body corporate must hold a meeting within three months of that notice and at that meeting the developer is required to provide a further layer of information. Regulations prescribe the information to be provided. It includes details of:

- as-built plans and specifications

- asset schedules
- code compliance certificates
- maintenance schedules
- relevant resource consents
- warranties and guarantees
- fire evacuation plans
- building warrant of fitness and compliance schedule
- maintenance and service contracts.

Service contracts

Typically, developers will contract with a body corporate manager for on-going management or secretarial services. The contractual terms have at times been entrenched in body corporate rules. There may be a comprehensive agreement, or sometimes simply a relationship formed following a body corporate resolution.

Either way, the legislation now enables these relationships to be reviewed – if the body corporate has entered into the arrangement before the developer has given up control. A Court or Tenancy Tribunal can terminate a management contract entered into while the developer was still in control if it determines the contract is 'harsh and unconscionable'.

Just what amounts to 'harsh and unconscionable' will be determined by the Court. However, indications to date are that a management contract does not achieve that status simply by being long term. In Chapter 4 there is a discussion about a recent case concerning a long-term management agreement and whether it ought to be retained or cancelled by the Court.

The developer now has a statutory obligation to exercise reasonable skill, care and diligence in establishing a service contract that will bind a body corporate. The aim must be to ensure the terms of the contract achieve a fair and reasonable balance between the interests of the service contractor and the body corporate comprising the ultimate owner. The developer must take care to ensure the contract terms (including the manager's powers) are appropriate for the unit title development and do not adversely affect the body corporate's ability to perform its functions.

There are teeth to these provisions. If a Court determines a developer has not met the appropriate thresholds of these obligations the developer may be ordered to pay compensation to the body corporate. What's more, the Court can make that order not only against a developer, but against any associate of the developer who was a member of the body corporate in its early stages. That includes a trustee or an agent of the developer.

Layered developments

The UTA2010 introduces a new concept for on-going development of stratum titles – layered developments.

This opens the way for an existing principal unit to itself be subdivided and in fact have its own body corporate rules and separate management. Called a subsidiary unit title development, this regime will provide a greater degree of flexibility than was previously available. It could prove a useful tool for managing the development of mixed-use sites and for enabling buyers to in turn complete their own development.

When a layered development is completed, a subsidiary body corporate is created for the subsidiary unit title development. All of the owners in the subsidiary development remain part of the overarching body corporate. They are treated as the joint owner of the principal unit that was subdivided. However they in turn will each be a member of the subsidiary body corporate.

The layering can be repeated and it can be done in stages using future development units (FDUs). The UTA2010 includes diagrams setting out how layering might operate. One of them is reproduced here.

The layered development of a unit can be completed only if the body corporate to which the unit relates resolves to allow it. Unless the relief provisions in the UTA2010 are used, the resolution must be passed by at least 75% of the eligible voters who actually vote. One vote may be exercised for each principal unit. If an owner has a mortgage they must obtain the consent of their mortgagee before voting.

It remains to be seen how much detail will be required in these special resolutions, whether it will be sufficient that a developer, as a controlling owner, passes a resolution in anticipation of some, as yet unknown, future development, or whether these resolutions will need to precisely identify the activity to be undertaken.

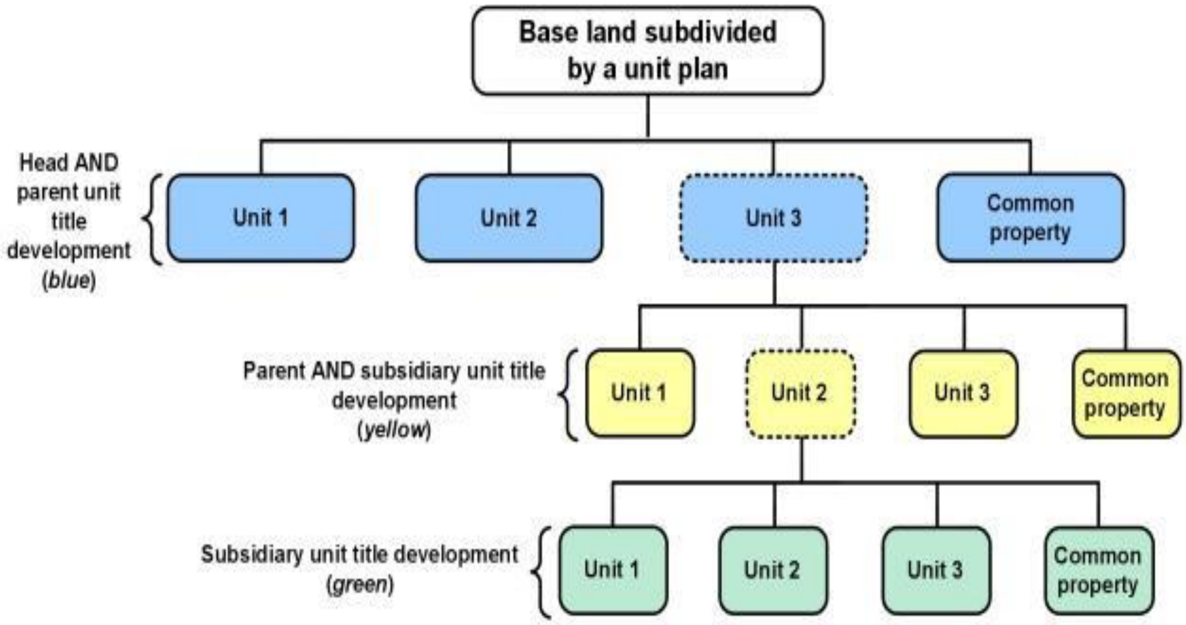
A resolution allowing the development will be a 'designated resolution' which has specific requirements. More information about these requirements is in Chapter 5.

A copy of the resolution must be lodged with LINZ, along with the application to deposit the plan for the subsidiary development. At the same time a certificate must be submitted to LINZ by the body corporate. The certificate must confirm:

- the resolution has been passed
- every person who is entitled to receive notice of that resolution has been served
- no outstanding objection remains.

This new process represents a significant increase in flexibility for unit owners. In the past, any adjustments to unit titles required either the underlying plan to be cancelled and re-created or a redevelopment plan to be prepared. Each option called for the consent in writing of all owners and all mortgagees. All owners were also required to sign the application for cancellation and redevelopment.

Although the layering regime sets out requirements for consents and notices, and allows for objections, the thresholds are lower and there may be room to pre-empt the resolution requirements.



Future development units

As in the past, a unit title development may be completed by stages using FDUs. This is done by the successive deposit of plans at LINZ.

A proposed unit development plan is first prepared setting out the whole of what is intended, including the final stages. Various stage unit plans are prepared identifying both the part of the development that has been completed up to that stage and what is to be developed in the future. FDUs are used to describe the property to be developed at a later stage.

Each stage unit plan must be consistent with the proposed unit development plan and is prepared in substitution for the previous stage plan. When all stages are completed, a complete unit plan is prepared specifying all the units and the whole of the common property in relation to buildings on the land.

A staged development process was available under the 1972 Act and has often been used. It has had its drawbacks:

- Flexibility was limited. Once the first stage was completed, any changes to the proposed development required the written consent of all registered owners and those with interests registered against the titles – unless the Court said otherwise.
- There was no insistence under the 1972 Act that the final plan be deposited. It was possible to leave a certificate of title as an FDU for an unlimited period of time.
- Because an owner of an FDU was not a body corporate member and therefore not required to contribute to body corporate levies, the FDU system enabled the premises to be used without a contribution to common costs. The flipside of this was that the FDU owner did not share ownership of the common property.

Some of these issues have been addressed in the new law.

In most circumstances, the proposed unit development plan can now be altered by special resolution. The resolution must be passed by 75% of the eligible voters who actually vote. Each principal unit has one vote. An FDU is not a principal unit and therefore has no vote, so the owners of the existing buildings on the site will have control over whether the anticipated development of the remaining land can be altered.

This type of resolution is a 'designated resolution' requiring a process to be followed that allows for objections.

The legislation also imposes an obligation on the owner of an FDU to contribute to costs once the FDU is in use. From that date, the owner is obliged to pay levies contributing to the long-term maintenance fund, to any contingency fund or any capital improvement fund, and to ground rental.

The extent to which FDU owners are obliged to contribute to ownership costs is calculated on the relative value of a unit (and associated accessory units) described in a proposed unit development plan. That is, on the basis of the unit that is expected to be created. The calculation is the same for a utility interest unless the body corporate determines otherwise.

An owner of an FDU owns a stratum estate in the FDU until a unit plan is deposited creating a replacement unit title (or the whole arrangement is cancelled).

On cancellation of a unit plan, the owner of an FDU has a right to a share in the underlying property based on their anticipated ownership interest, not the current value of the FDU. In the interim, they do not own a share in the common property. This is acquired only once the principal unit is created.

It's a wall. Is it a principal unit or an accessory unit or common property?

Conversion to unit titles

This section covers the conversion of cross leases and flat or office-owning company titles to unit title developments.

As previously, the legislation sets out a process for these conversions. The process is not dissimilar to what existed under the earlier legislation although the thresholds are different. Now a conversion can be completed even if not all parties involved consent.

An application for a conversion can be made where property is held as a cross lease or by a flat or office-owning company, and where the boundaries of the principal units will be exactly the same as they are in the licences or leases granted.

When the unit plan is deposited, the stratum estate in a unit vests in the person who previously held shares in the company that entitled them to exclusive use of the particular unit or, in the case of a cross lease, the person who was lessee of that unit under a cross lease.

Cross leases are generally given for a flat and a garage, not for exclusive-use areas such as the backyard. The use of exclusive-use areas is managed by a land covenant. It would seem logical that the backyard area would become an accessory unit but the language of the legislation does not seem to anticipate this. It is possible the yard will form part of the common property unless the issue is carefully addressed when completing the conversion.

Cross leases set out a variety of contractual obligations managing the relationship between the various flat owners. If the obligations are to be maintained, body corporate rules will have to be established covering off each of the relevant matters. If they cannot be maintained (for example, because they run contrary to the provisions entrenched in the UTA2010), the lease terms will fall away on conversion.

The process for completing the conversion is set out in part 4 of the legislation and depicted in the diagram on page 26.

To complete a conversion without involving the Court, a resolution must be passed by 75% of the landowners (or members of the company as appropriate).

If that threshold is not reached but a majority of the cross lease owners or company shareholders is in favour of the conversion, any one of them can apply to the High Court for an order allowing the conversion to a unit title. All owners (and anyone else having a registered interest in either the land or the shares) must be given notice of the Court application. They will have the right to be heard and, if appropriate, to lodge a covenant preventing the conversion.

The Court has a very wide discretion in respect of the application and may impose conditions on the conversion if it thinks fit.

Once a resolution is passed by the landowners, or a Court order given, notice of the pending conversion to unit titles must be given to anyone who has an interest in the land or shares. Notice must also be given to the relevant registrar (the Registrar of Companies, in the case of shares, or the Registrar-General of Land, in the case of land). There is additional procedural information to be given to each registrar as well, as set out in the Act.

Once notification is received, the Registrar-General of Land will make a notation on the titles advertising the intention to convert them to unit titles. Anyone claiming an interest in the land can register a caveat.

A process has been established to determine whether the caveat can be retained or whether it will prevent the conversion proceeding. If the person lodging the caveat does not consent to the deposit of a plan, any owner or the company can require them to apply to the High Court for an order that their caveat should not be removed. If they still don’t consent, the caveator is treated as having consented to the plan.

Provided they are satisfactorily served with notice of the proposal to convert to unit titles, those who have an interest in the property (but are not owners or shareholders) will not be required to consent to the conversion before the plan is deposited at LINZ.

The consent of all landowners (or share owners) will generally be required before a conversion plan can be deposited. The Registrar-General of Land can dispense with this requirement for consent. They can do so if they consider it would not be reasonable to insist on the consent being given and if there is no reason to believe that the plan does not correctly define the relevant units.

In other circumstances, the High Court can give consent to the deposit of the conversion plan on behalf of any person for whom consent is required.

Provisions are included to ensure any mortgage on the property pre-conversion is maintained but is not registered against common property. Provisions also ensure that an owner of the stratum estate under the UTA2010 will own the same unit they held either as a cross-leased title or through flat-owning shares.

The requirements of the Resource Management Act to obtain a subdivision consent and comply with resource management requirements do not apply to a conversion of an existing scheme to a unit title.

Minor boundary adjustments

A new regime has been established to enable a simple adjustment of boundaries. If the adjustment is to be made between units and it doesn't materially affect either the common property or the units where the boundaries are not being changed, the regime will apply. The adjustments do amount to subdivisions for the purpose of the Resource Management Act 1991 and any planning requirements will need to be met in the usual way.

The affected owners can jointly apply to the Registrar-General of Land for the boundary to be adjusted. A suitable plan must be prepared and deposited, and Council requirements must be met but there is no need for body corporate resolutions to be passed allowing the change. Instead the developer must provide detailed information to the body corporate, sufficient to enable the body corporate to certify that the development is one to which the boundary adjustment regime applies. LINZ will require that certificate before depositing the plan and changing the title.

Redevelopments

A redevelopment regime remains in place to deal with all redevelopment that is not a minor boundary adjustment. During the course of that process the body corporate applies to the Registrar-General of Land for a new plan to be deposited. Instead of all owners having to sign the application (as it was under the 1972 Act) the single body corporate entity can execute, following a decision by special resolution to do so. Any resolution to redevelop is a designated resolution.

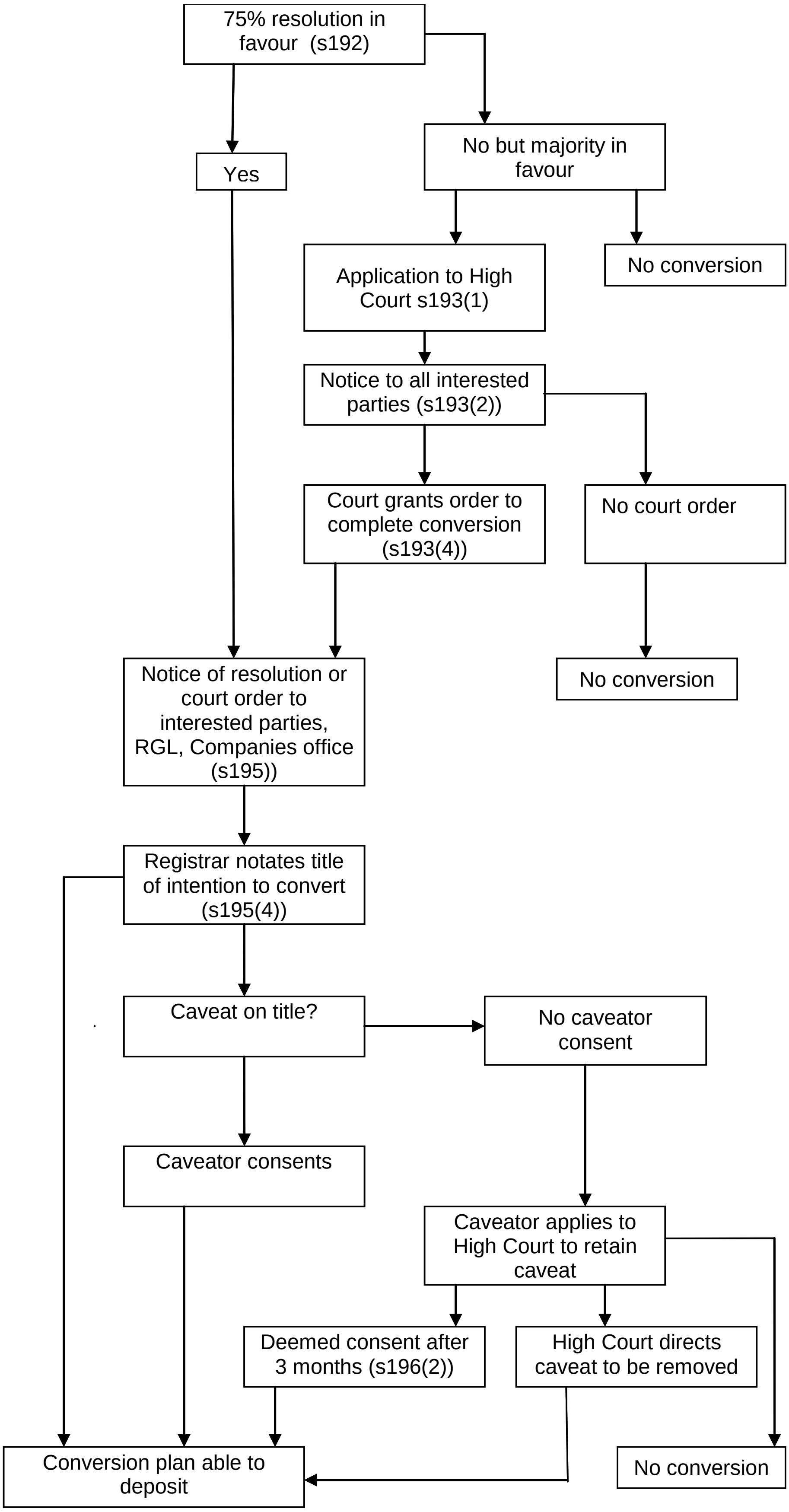
Before the plan is deposited the body corporate must give notice to a broad range of parties with interest in the property (including mortgagees) and must obtain the consent of all owners materially affected by the change. Any owner of an FDU that is in use is entitled to be involved in this process as if they were a full body corporate member.

Although these requirements are significant, they are nothing like as onerous as previously, when unanimous consent was required to undertake a redevelopment.

In brief:

- Rethink the cash flow – you'll have to spend money upfront
- Decide what you are selling before you sell it
- Disclose, disclose, disclose and then disclose
- Manage the impact of pre-settlement disclosure
- Think long term to maximise flexibility and opportunity
- Look out for new opportunities for development.

Conversion of cross leases or flat or office owning companies to Unit Titles under UTA2010



CHAPTER 4

MANAGEMENT OF BODIES CORPORATE

Who are the players?

Just who the body corporate manager is and how they operate can impact dramatically on what it is like to live in a unit title development.

Because body corporate managers oversee how the common property is maintained, they have an immediate impact on the quality of the shared environment.

But how they do their job will also impact on the occupiers' personal environment. Are they reasonable, competent, trustworthy and available? Do they make decisions unilaterally, by committee, or using a full democratic process? Do they live onsite or are they offsite, perhaps in a professional office? How well do they understand the living and working environment within the unit title development and what exactly is their expected role?

These are all important questions and there is a different answer for each body corporate manager and each unit title development.

The market in New Zealand for professional body corporate managers is quite small. A group of no more than five managers deals with the majority of bodies corporate in Auckland. Even taking into account managers through-out New Zealand, the industry is not big. Nor is it regulated.

In 2009, the government looked at the potential for regulating property managers in respect of both residential and commercial properties. The enquiry was spurred on by the new Real Estate Agents Act 2008.

It was decided that, in relation to residential properties, regulation of property managers was not justified[9]. Although that decision was recent there have since been calls for reassessment.[10]

Managers of commercial properties on the other hand do need to be registered agents in respect of some of their management activities. A third party manager whose role involves bringing about a property transaction (such as a lease or a sale) will require registration.

Managing bodies corporate necessitates a range of skills to deal with the many aspects involved. Unless they are especially small, bodies corporate need managers to:

- manage the administration of the body corporate including organising meetings
- manage shared facilities including the building, garden, pool, gym, etc.
- manage the financials including setting budgets and corresponding levies, collecting levies and financial reporting.

Inevitably there are social issues that need to be dealt with too, involving not only neighbourhood disturbances but also the development of the community side of body corporate living.

In the past, these different roles have been undertaken by body corporate secretaries, body corporate managers, building managers and facilities managers, although it would be unusual to have all of these roles for a simple body corporate.

Under the UTA2010 these roles will evolve and are likely be performed by one or perhaps two different contractors in each instance. Secretarial and common management issues will be dealt with by a body corporate manager. The management of the individual units and physical site facilities management will be handled by a building manager.

For simple bodies corporate, all of these roles might be carried out by one manager. For bodies corporate of larger size and scale, various entities and/or individuals might provide these management services.

Who's who – understanding the jargon

- Body corporate secretary: responsible for managing the financial and administrative functions for the body corporate under the 1972 Act.
- Body corporate manager: a broader role than a body corporate secretary, including management of the common property, body corporate meetings and other matters, as well as purely secretarial tasks.
- Building manager: generally a live-in manager who also manages the facilities within the complex. Often has letting contracts for the individual units and will manage those units for private owners.
- Facilities manager: responsible for managing the facilities, which might include the common property and/or individual units.

There is no legal obligation to appoint a body corporate manager. Indeed some home owners will not use a manager at all and will look after the shared requirements of their development themselves.

Larger and more complicated developments take a greater amount of time, effort and knowledge to comply with the legal requirements imposed on owners as members of the body corporate, and to put in place other desirable management regimes. For this reason, the role of the body corporate manager is destined to stay.

What happened under the 1972 Act?

Traditionally, under the 1972 Act, a body corporate secretary was appointed for administration purposes. As a matter of practice they then had all sorts of other management roles delegated to them. Despite their broad management role they were often referred to as the 'body corporate secretary' or, quite incorrectly, the 'body corporate'.

It became increasingly common with large complexes to see bodies corporate with two separate managers working together managing different aspects of the property. A body corporate secretary might manage the administration arm and a building manager might manage the rest of the issues. It was not so common to see further appointments of separate facilities managers.

Sometimes this dichotomy created tensions.

Tensions have also arisen when the management regime has been appointed by the developer when they still had control of the body corporate and before the units were sold.

An appointment in these circumstances certainly makes sense as an interim arrangement. It creates stability during a time of change and it enables the body corporate members some time to assess how they wish to handle matters in the future. It also makes good economic sense for developers, who recognise they have an asset to sell in addition to the physical properties they have built, that is, management rights.

But the New Zealand apartment-living public has reacted strongly to having a management regime imposed on them long term. Sometimes they prefer to determine their own style of management and the imposition in the manner of a long-term, hard-to-move management regime can leave the owners feeling disenfranchised. That becomes especially unpalatable in a market where unit values have decreased.

Now the UTA2010 sets guidelines for entry into management agreements in this initial period. It also provides a mechanism for review after the developer has appointed the manager. This review of the contracts is explained further in Chapter 3.

Attack on the contracts

In February 2011 the High Court gave its judgement on whether or not the body corporate secretarial services contract and management contract at the Westin Hotel Auckland were void. The secretarial services contract was declared void but the management contract was not.

The building is run as a hotel, but legal title is held by multiple owners in unit titles. Most are investor owners. Many live overseas.

The contracts appointing both the building manager and the body corporate secretary had been put in place by the developer before the investors bought their apartments. These arrangements were contemplated in the body corporate rules. The building manager and body corporate secretary were both entities related to the developer. The contracts were each for 10 year terms and renewable for a further 10 years.

The management contract

The management contract was enforceable said the Court. The judge recognised that in a large unit development, the engagement of a building manager was essential to control, manage and administer the common property. The 10 year term, payment of a fee of $173,000 (subject to review) and right to renew were all terms that the building manager could enforce against the body corporate. The body corporate rules that enabled this contract to be entered into were appropriate and did not appreciable expand the body corporate's powers. Each of the current owners had the chance to review the management arrangements before buying their apartment.

Although the body corporate could enter into the management contract on such terms as it thought fit, there were some individual terms that were reflected in the management contract which were ultra vires. The judge allowed these provisions to be severed from the management contract. These included:

- the exclusive letting rights granted to the manager which prohibited anyone else from arranging any letting
- a prohibition on the grant of management rights without the manager's consent
- the manager's power to assign or transfer its rights or delegate its duties without the consent of the body corporate.

The body corporate secretary's contract

The contract appointing the body corporate secretary was void and unenforceable. It went beyond the allowable terms of appointment. The Westin contract did not allow the body corporate to remove the secretary in a general meeting. The Court saw this as an important power. It said the secretary's role is concerned with the financial management of the body corporate and the right to remove the secretary at a general meeting is designed to enable the individual owners to protect their financial interests.

Who is the manager's client?

The body corporate manager contracts with the body corporate, which operates as a separate entity.

However, there may be a diverse range of members in the body corporate and different stakeholders will have different expectations. The resident owners want a particular standard of living or workplace while the investment owners do not concern themselves so much with aesthetics. Tenants will want the body corporate working well but will not have a voice in its decisions.

Commercial owners have different interests to the residential owners, and owners of FDUs are different again.

Body corporate committee

Although the contract for the provision of management services will be between the manager and the body corporate, for practical purposes the relationship will exist between the committee and the manager. Members of the committee might be drawn from each of the diverse groups of owners but they might also represent just one of the groups. The makeup of the committee and their personal involvement in the property will have a significant impact on management decisions.

Because the interplay between the committee and the body corporate manager is a key relationship, bodies corporate may include in their rules requirements about representation on the committee.

A body corporate may delegate almost all of its powers and duties to a committee, but by doing so it does not avoid responsibility for ensuring those duties are met. Delegation may be achieved by special resolutions specific to each of the powers (or group of powers) or by a more broadly worded resolution applying to a range of circumstances.

Certain powers may not be delegated and remain with the body corporate. These are:

- the power of delegation
- the ability to reassess ownership interests and utility interests
- the obligation of the body corporate to comply with rules
- responsibilities relating to the application of insurance money.

A body corporate committee cannot in turn delegate those powers and duties that have been delegated to it.

Consultation during the process of developing the UTA2010 regulations made it clear there was support for regulations about the committee structure. The regulations now entrench specific procedural requirements. Regulations 22-28 set out processes and requirements for:

- electing the committee, and the chairperson
- eligibility for election
- replacing committee members
- conducting committee business
- reporting to the body corporate
- the delegation of duties to the body corporate committee.

How is the body corporate manager appointed?

A body corporate may contract with a third party for the delivery of management services but there is no obligation to do so. If they do, it is important this arrangement is formalised by written agreement, that there is clarity of responsibilities and that the requirements of the agreement do not attempt to expand the body corporate powers.

Previously, the body corporate secretary was appointed at the annual general meeting by ordinary resolution. Often the form of appointment was very simple – sometimes a resolution passed at an annual general meeting said just that. Market trends are expected to insist that this will no longer be sufficient and detailed management agreements will be the norm.

Duties the body corporate manager will be expected to perform will vary, but it is likely they will include:

- arranging and supervising all maintenance and repairs to the common property
- arranging all service contracts for the building's services
- arranging cleaning and caretaking
- establishing and implementing the long-term maintenance plan
- managing building alterations or additions
- arranging building security
- managing any subletting of common property
- arranging and managing insurances
- managing the payment of all property operating costs

- preparing and issuing notices levying contributions from proprietors and ensuring payment
- providing a summary of bank accounts and budgeting for the body corporate
- obtaining compliance schedules and annual building warrants of fitness for the building
- managing compliance with legislation and in particular the Health and Safety in Employment Act
- maintaining the register of owners
- convening the body corporate meetings (including committee meetings)
- operating the body corporate's bank accounts
- dealing with the body corporate's correspondence including pre-settlement disclosure certificates
- providing vendors with the information they require to meet disclosure obligations on sales
- ensuring compliance with body corporate rules.

Case law in this area has confirmed that there is no difficultly with the building management agreement being a term contract. It has also confirmed that there is no difficulty with the building manager having a right to renew a contract. However, the ambit of the contract, and the means by which it is created will have to comply with the UTA2010 requirements. In particular there are requirements relating to management agreements put in place by developers. These requirements are discussed in Chapter 3.

What is good management?

Earlier in the chapter it was explained how managing a body corporate involves counterbalancing the differing expectations of diverse parties – people who own and/or occupy units have different backgrounds, expectations and financial robustness.

The new legislation will not change the impact of that diversity but it does make some improvements to help align the different expectations by:

- creating a clear definition of building infrastructure and a very clear obligation to maintain that structure
- introducing tools such as the long-term maintenance plan
- recognising the different criteria when assessing costs and recognising that while in some circumstances it is appropriate to share costs based on ownership, in others costs are better based on usage.

The UTA2010 supports a democratic style of body corporate management. This is driven by a need to ensure proper respect is given to people's property rights, particularly where they involve the dwelling they live in.

Some might argue that this democratic style doesn't fit the situation, that management by committee is ineffective and inefficient. They might argue that unit title properties can better be managed as a company, and that a person's property rights can be respected in much the same way as a company shareholding by giving them minority protection. The argument runs that the members can elect a board to ensure good governance and leave the actual management to property experts. But that is not the regime we have.

Managing the money

Cabinet acknowledged that competent management of finance was a key duty of the body corporate. Because of this, provisions relating to dealing with money and to financial reporting are contained in the main provisions of the Act, making them unable to be altered by vote.

Accounts

An operating account needs to be created for meeting expenses incurred at least once a year for the maintenance of the development. These expenses include those relating to the management and governance of the unit title development, provision of services and amenities for the benefit of the unit title development, statutory and regulatory compliance, and ground rental.

Each body corporate will be able to determine who may operate that account and the manner in which it may operate.

A body corporate is obliged to establish and maintain a long-term maintenance fund unless members decide by a special resolution that they do not wish to do so. The cash in that fund may be applied only towards spending on the long-term maintenance plan. The body corporate is limited in how it applies this maintenance fund by the amounts that are specified in the long-term maintenance plan.

In addition, a body corporate can establish a number of optional funds, including;

- a contingency fund to provide for costs that are not budgeted
- a capital improvement fund.

The body corporate must ensure that each fund is kept separate.

Accounting records

Obligations to provide financial statements, and audit and monitor the accounting records are also set out in the legislation. These are detailed in the schedule in Appendix 2. Financial statements must include;

- a statement of the assets and liabilities of the body corporate

- a statement of the body corporate's income and expenditure during the financial year to which the statement applies
- anything else the body corporate determines should be in the statement
- explanatory material.

The intention of the changes in the Act is to ensure that there is clarity for unit owners that common funds are managed transparently and appropriately. As well, the expectation is that bodies corporate are provided with flexibility to choose reporting standards. A complex development with a larger budget may choose more stringent reporting standards than a smaller body corporate. The regulatory requirements are intended to recognise these differences.

Although these financial obligations are imposed on the body corporate in the legislation, managers will generally deal with the issues. The service contract will set out the extent to which the managers are to be involved in managing the funds, as well as the expectations that will be placed on them.

Raising funds

The body corporate can, from time to time, decide the amount that needs to be raised for each of the funds and impose levies on the owners of principal units. The levies for the capital improvement fund will be in proportion to each unit owner's ownership interest. In relation to each of the other funds, the proportion will be established in accordance with each owner's utility interest.

Unpaid levies are recoverable as debts due to the body corporate, from both the person who was the unit owner at the time the levy became payable and the person who is the unit owner at the time the proceedings are instituted.

Interest can be charged by the body corporate in relation to any unpaid debt. The legislation prescribes that the interest rate must not exceed 10% per annum.

The new Act identifies that the body corporate might undertake repair in circumstances where it does not benefit each of the units uniformly. The Court has the ability to determine the apportionment of the costs of work and whether the apportionment should follow the utility interest or not.

A body corporate can borrow money. It can also invest money – in investments that are authorised by law as being appropriate for trust funds. A body corporate may not grant a mortgage or any encumbrance over the common property.

If the body corporate holds surplus funds it can redistribute them among the unit owners in the same proportions the money was raised.

Managing the meetings

Under the legislation, a chairperson must be elected at every annual general meeting (AGM).

Regulations prescribe that only an owner will be eligible to be a chairperson. (This is expected to create real administrative difficulties as currently body corporate secretaries struggle to find volunteers for committee roles). The regulations also set out the minimum responsibilities of a chairperson, the election process, the process for replacing the chairperson, and the ability of the body corporate to confer additional responsibilities as required.

An AGM must be called by the chairperson (unless it is the very first meeting) and in the manner the regulations require.

An extraordinary general meeting (EGM) may be called by the chairperson or the body corporate committee at any other time. If a notice asking for an EGM to consider specific issues is signed by the owners of 25% or more of the principal units and then given to the chairperson, the chairperson must call an EGM.

Details as to the processes and requirements of such meetings are outlined in the next chapter, which covers governance.

Duties of the chairperson

- maintain the register of unit owners
- call for AGMs and EGMs
- prepare agenda and minutes of meetings
- chair the meetings
- record resolutions
- keep financial records
- have financial statements audited
- liaise between the committee and the owners
- sign documents on behalf of the body corporate
- notify owners of pending and actual decisions made outside of general meetings
- resign if they no longer own a unit
- anything else the body corporate decides

unless these duties are delegated to the committee.

Managing the maintenance

A central requirement of the body corporate manager is the ability to ensure the repair and maintenance of common property and infrastructure. This has been clarified with the advent of leaky buildings.

The management of these responsibilities directly impacts not only the value of the individual units but the amenity value of occupying the units as well.

The legislation imposes a requirement on bodies corporate to each prepare and maintain a long-term maintenance plan. These plans will identify future maintenance requirements and estimate their costs. The plan must cover at least 10 years from its initial preparation or its last review and must be reviewed at least every 3 years.

Although they can be expanded to include additional requirements, long-term maintenance plans must cover the common property, the building elements and the infrastructure of the development. 'Building elements' is a term that is defined in UTA2010. It includes components of any building or land on a unit plan that are necessary to the structural integrity of the building, the aesthetics of the building or the maintenance of heath and safety. They include roofs, balconies, foundations and retaining walls.

A plan will identify the life expectancy of each item and provide on-going guidance for owners making annual maintenance decisions. A plan may recognise that certain elements of the building will not be maintained.

Unless it decides otherwise, a body corporate must establish a long-term maintenance fund which will be applied in funding the long-term maintenance plan. Contributions to the fund will be levied on the basis of the utility interests of owners.

The new legislation also allows for optional funds. These might be thought necessary to cover unexpected contingencies or improvements over and above the maintenance allowed for in the long-term maintenance plan. Optional funds might be relevant, for example, where a development includes a heritage element or further development of common property is expected.

No penalty applies if the optional funds are not put in place – they are optional after all. There may be practical difficulties with meeting lump-sum costs that arise periodically and management costs may be exacerbated, but there will be no statutory penalty. Nor does the legislation impose any statutory penalty for the failure to put a long-term maintenance plan in place even though the plan is obligatory.

Signing documents

The body corporate will be required to sign documents from time to time. In the past, common seals have been used, witnessed in accordance with the body corporate rules. The new legislation does not include a requirement for common seals to be used. The body corporate chairperson (or the committee chairperson if the power has been delegated) may sign documents on behalf of the body corporate. The signature must be witnessed by a member of the body corporate committee. If there is no committee the witness can be a member of the body corporate. If there is only one member of the body corporate an independent witness must be used.

Except in the case of an emergency, the body corporate must approve entry into any contract before the document is signed.

In brief:

- Democracy rules
- Who manages and how they manage really matters
- There’s room for flexibility
- But not in everything.

CHAPTER 5

GOVERNANCE

The body corporate under the 1972 Act

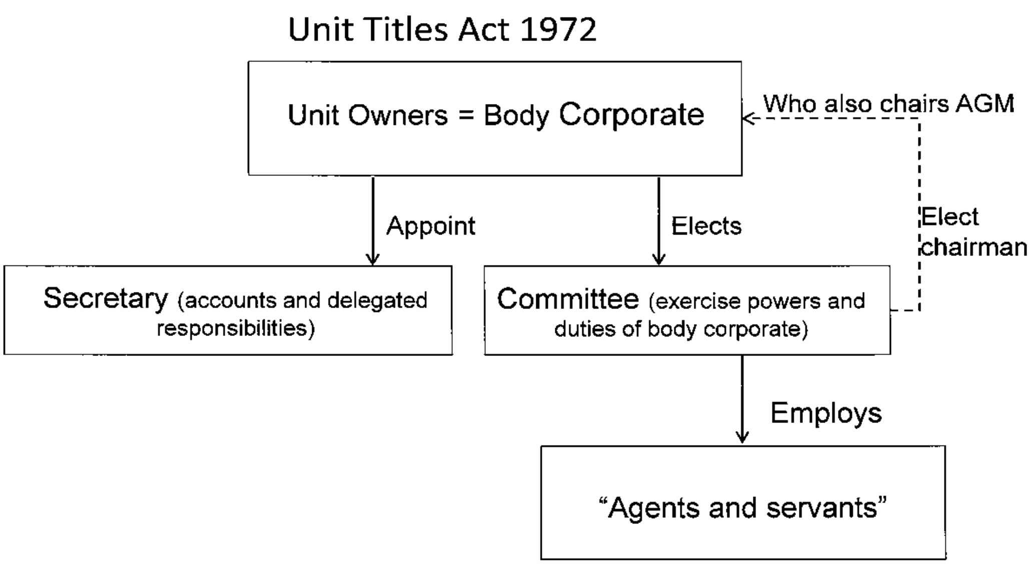
Under the 1972 Act, the unit owners together were the 'body corporate'. If there were more than three registered owners, a committee was required. That committee exercised and performed all of the powers and duties of the body corporate. In general, committee members needed to be registered unit owners. Committee members were elected to their roles, and the committee appointed a chairperson, who had a casting vote.

The committee was entitled to employ 'agents and servants' to assist it.

The only reference to a body corporate secretary was in the draft rules set out in the schedule to the 1972 Act. Under those rules, the unit owners appointed a secretary. The secretary's responsibilities were to keep proper books of account, prepare a balance sheet and send this to owners, and carry out other functions as delegated.

Some bodies corporate delegated all the management functions to the body corporate secretary. Others made separate appointments.

Structure of body corporate



The body corporate under the UTA2010

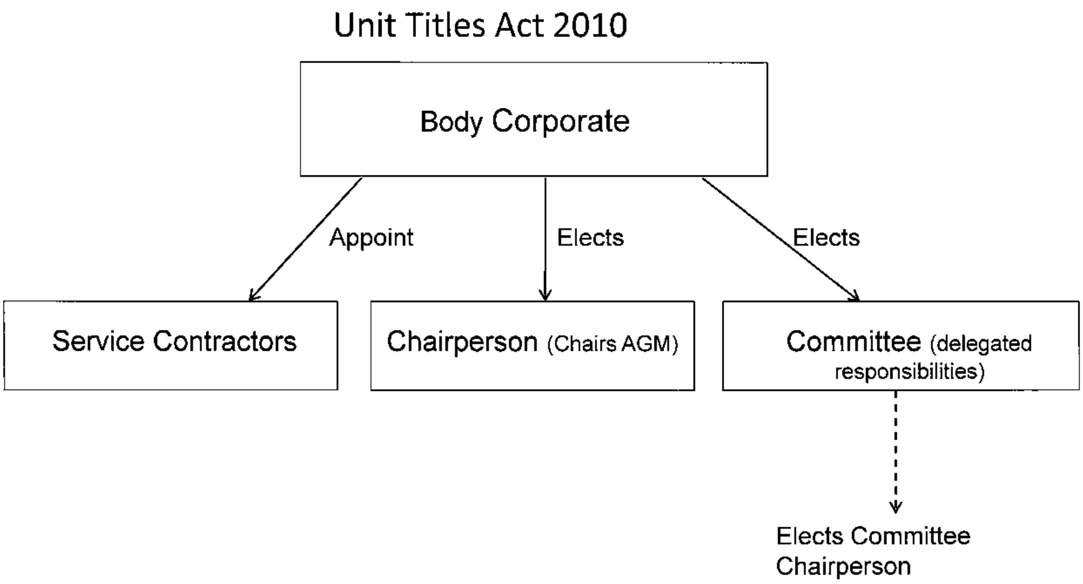
Under the UTA2010, all registered unit owners are body corporate members. The body corporate is an entity comprised of those members. It operates as a separate body.

The body corporate can delegate some, but not all, of its duties and powers to the body corporate committee by special resolution.

If there are nine or fewer principal units in a unit title complex, it is a matter of choice for the owners to form a committee. However, a body corporate of 10 or more principal units must form a committee unless the body corporate votes not to.

A number of existing committees in smaller body corporate developments could be discontinued under the new Act if the owners wished.

Structure of body corporate



Annual general meetings

Each year, a body corporate is obliged to call an annual general meeting (AGM). The first AGM must be held as soon as practicable when a body corporate is created. It must be held no later than six months after the date of deposit of the new unit plan or settlement of the sale of the first unit, whichever is later.

Subsequent AGMs must be held once each calendar year and no later than 15 months after the previous AGM.

An AGM was required under the 1972 Act and now, under the UTA2010, the procedures for calling that meeting and voting at it are more tightly prescribed.

The chairperson must ensure a notice of intention to have an AGM is issued 3 weeks before the intended meeting (and 6 weeks before in respect of a layered development). In that notice the chairperson will identify when and where the meeting will be and invite issues for consideration. The notice will also remind each owner that they cannot vote at the meeting unless all outstanding contributions have been paid. The details of what must be in the notice are set out in regulations.

Another notice must be issued 1 week later (or 3 weeks later for layered developments) setting out the agenda, the text of motions to be decided and associated issues. Detailed requirements are also set out in the regulations.

Extraordinary general meetings

An extraordinary general meeting (EGM) must be called by the chairperson if representatives of 25% or more of the principal units give notice requiring this, or as otherwise set out in the regulations. An EGM is then subject to the same rules regarding quorum and voting as an AGM.

Voting power

Under the UTA2010, a quorum is achieved if those entitled to exercise the voting power for 25% or more of the principal units are present. A properly constituted proxy will count. This is a lower threshold than was previously required.

Under the 1972 Act, generally it had been difficult to encourage members to attend their AGM unless there was a big problem such as leaky apartments or management issues. The new Act recognises this by lowering the quorum requirement from one-third to one-quarter.

Also, under the old Act, non-payment of levies meant you were excluded from voting for ordinary resolutions, though you could vote on resolutions requiring a unanimous decision. Now, if an owner has not paid their dues, they cannot vote.

To vote, a registered proprietor must be over the age of 16, named on the register of owners and have paid all levies and other amounts payable in respect of the unit.

Under the new Act, mortgagees are entitled to intervene and exercise the vote on behalf of a unit. Most mortgages already reflect this. Although a mortgagee vote usually occurs only if the mortgagee has retaken possession or is exercising its power of sale, a mortgagee may vote in other circumstances as well.

The register of owners is an important part of the eligibility criteria. An owner can appoint a representative, but that representative needs to be recorded as a representative on the register before they can vote. If this is not done and an owner cannot attend a meeting, the owner must appoint a proxy in order to vote.

Unit owners can vote without calling a general meeting. They can simply sign a resolution. An example of the required form is in Appendix 3. For an ordinary resolution, a majority of eligible voters will need to sign. For a special resolution, the threshold increases to 75% of eligible voters.

Proxies

The new legislation anticipates proxies. However, regulation makes it clear these are for particular meetings only. The regulations do not authorise the granting of enduring proxies, which have in the past been entrenched in body corporate rules.

A proxy must be appointed in writing, and the appointment signed by the voter giving the proxy. If two or more people own a unit and wish to vote by proxy they must appoint one person as joint proxy. The proxy form prescribed by the regulations is in Appendix 3.

Ordinary resolutions

A simple majority of votes was needed to pass an ordinary resolution under the 1972 Act. That majority needed to be achieved from the quorum present. Each principal unit had one vote. To put it another way, 16.67% of principal unit owners could in theory make a binding ordinary resolution.

Under the UTA2010, each principal unit has one vote for an ordinary resolution and a majority of eligible voters is needed to pass the resolution. Taking the quorum requirements into account, this means 12.6% of the unit owners could theoretically pass an ordinary resolution.

A voter can also cast their vote by post. The postal voting form is in Appendix 3.

Special resolutions and unanimous resolutions

Under the 1972 Act, a special resolution could be passed if those entitled to exercise three-quarters of the value of the votes (measured by unit entitlement) and three-quarters of the votes (measured by the number of principal units) voted in favour.

This threshold was seen as too high. Many bodies corporate have suffered from inertia and have been unable to move forward on critical issues, especially leaky homes, because of the high thresholds.

The 1972 Act compounded this problem by requiring a unanimous resolution in some scenarios. This was as it sounds – 100% of unit owners had to agree. Full consensus is difficult to achieve in any setting.

Under the UTA2010, the requirement for a unanimous resolution is removed and the threshold for a special resolution lowered. There is a new procedure for designated resolutions and a polling regime.

For a special resolution, each principal unit has one vote. Only eligible voters may vote and 75% of the eligible voters can carry a special resolution. Given the quorum requirements, this theoretically means 18.85% of registered owners can carry a special resolution, compared with 24.75% under the 1972 Act.

Designated resolutions

The UTA2010 identifies certain designated resolutions. These are resolutions relating to:

- subdividing to create a subsidiary unit title development
- depositing a substituted deposited plan
- approving the method of apportionment of a utility interest
- sales, leases or licenses of common property
- additions to common property, or granting or changing legal rights with respect to these
- redevelopments
- spending insurance money other than on replacing or rebuilding
- purchasing reversionary interests
- cancelling unit plans.

After passing a designated resolution, the body corporate is obliged to serve a notice on all unit owners and people with a registered interest in a unit, for example a mortgagee, caveator, or person with an interest under the Joint Family Homes Act.

Within 28 days of receiving a notice, a person who has been served a notice can object to the designated resolution. When a person objects they must also file an application for relief (a claim that the resolution is unjust or inequitable) with the Court or Tenancy Tribunal. A notice of objection fails if it is out of time or if an application for relief is not made.

If no objection is made, or if at a hearing a resolution is confirmed, the body corporate must lodge a certificate with the Registrar-General of Land certifying that the resolution has been passed and the notice procedures followed.

Polling

Under the 1972 Act, anyone could demand a poll at a general meeting. The purpose of the poll was to more carefully assess the numbers on each vote.

If a poll was demanded, each vote would then correspond in value to its unit entitlement, the votes then tallied accordingly and the resolution passed only if the requisite percentages were achieved on that basis.

The UTA2010 also covers polling. A poll can be requested by any proprietor present at an AGM. If this occurs, 50% of the ownership interest represented by those voting needs to vote in favour. It gives greater voting rights to those who own units of greater value.

For example in a development comprising 100 units where a matter is decided by ordinary resolution but put to a poll, the following may apply:

Ordinary resolution	• 1 vote per unit • 25 owners present (= a quorum) • Passed if 51% of the unit owners (13) vote in favour (i.e. a majority)
Ordinary resolution – when a poll is demanded	• 1 vote per unit • 25 owners present (= a quorum). Their ownership interests total 1000. • Passed if unit owners with ownership interest totalling 500 or more vote in favour – this could be more or fewer than 13 unit owners.

Relief for majority or minority

Relief, or judicial relief, is a legal phrase used to describe circumstances where a Court will remedy an unjust or inequitable decision.

The 1972 Act allowed relief to the majority and to the minority. The majority could seek relief from the Court if, on a resolution that required a unanimous vote, 80% or more voted in favour.

The minority could seek relief if a decision of the body corporate was inequitable.

Relief continues to be available to the majority and minority under the UTA2010.

Any person who votes against a resolution may apply for relief on the grounds the resolution would be unjust or inequitable for the minority. The application needs to be made quickly, within 28 days of the resolution being passed. The application may be made to the Court, or to the Tenancy Tribunal depending on the disputed issue.

Where a special resolution is required and 65% of eligible voters have voted in favour, any eligible voter can seek relief for the majority if the failure to have the resolution passed would be unjust or inequitable on the majority. As with relief for the minority, the application is made to the Court, or to the Tenancy Tribunal.

In brief:

- The governance structure has changed
- Much of it is entrenched in statute
- Voting thresholds are lower
- Not happy? Relief is available.

CHAPTER 6

BODY CORPORATE RULES

Body corporate rules are referred to as 'operational rules' in the new legislation. They will bind the body corporate itself, the owners of principal units, and, unlike under the prior regime, the owners of any future development units (FDUs). They will also bind any occupier (for example a tenant), and mortgagee who has possession of a principal unit or an FDU.

Template rules

Template rules are not set out in the UTA2010 itself but are established by regulation. They deal with practical issues such as rubbish, noise and parking on common property.

These rules may be amended by an ordinary resolution of the body corporate.

Any changes to the template rules will be effective only once they have been recorded at LINZ.

The UTA2010 regulates the ambit of the operative rules. Any changes to rules that have been prescribed by regulation must relate either to 'the control, management, administration, use or enjoyment of the principal units, future development units, accessory units or common property', or to the regulation of the body corporate[11].

In addition, the changes must be related specifically to the powers that have been provided to the body corporate under the UTA2010. If the rules go beyond that, they will be invalid.

In the past, the body corporate rules established by statute typically have been amended when a unit title development was first completed. This was generally to increase the level of control or to manage a heightened level of sophistication. Sometimes the amended rules ran foul of the law because they went beyond what the law entitled the body corporate to implement. There's more information about these later in the chapter under the heading 'Ultra vires rules'.

Such widespread re-writes of the rules may no longer be needed. Many of the issues that typically would have prompted changes to the rules have now been entrenched in the legislation itself. These cannot be altered by a body corporate resolution.

For example, the UTA2010 allows an owner to alter their unit within the unit boundary if those changes do not materially affect other units or common property. An owner must allow a body corporate representative to come into their unit to view its condition, ensure compliance with the UTA2010, maintain commonly used infrastructure and common property, and ensure rules are being dealt with.

The UTA2010 also prescribes how and when meetings are to be held and the role of the committee. These matters were historically dealt with within body corporate rules. Now they are part of the statute itself.

Issues once covered by rules but now entrenched in the UTA2010 deal with:

- the ability to make alterations to a unit
- permitting the body corporate representatives to enter a unit
- maintenance obligations
- voting rights
- establishment of committees
- running AGMs.

Body corporate operational rules

Baseline operational rules are set out in regulations. They are very brief. Here they are in full:

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.

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

Under the previous regime, bodies corporate or their committees would often attempt to create regulations in addition to the registered rules. This practice might continue.

Typically these additional rules might govern noise, rubbish, visitors, use of common car parks or a swimming pool. They were generally put in place as a pragmatic tool to deal with day-to-day issues.

However, under both the UTA2010 and the previous Act, these arrangements are not effective as body corporate rules and do not bind body corporate members. The signatories might be bound by a contractual commitment, but that will not necessarily include everyone who uses the body corporate facilities.

While these arrangements might be of some practical use, from a legal perspective they are a cumbersome and often unlawful means of attempting to make rules. They cannot be relied on as an alternative to properly created body corporate rules.

Transition

Transitional provisions in the UTA2010 delay the imposition of the prescribed body corporate operational rules on existing bodies corporate for 15 months. Bodies corporate will have that time to consider their status quo, determine whether the prescribed operational rules are appropriate for them, and make changes.

A body corporate can, by special resolution, decide to bring forward the move to new rules and do away with the 15-month wait.

Unless the body corporate decides to go ahead earlier, when the 15 months end the default rules under the 1972 Act will stop being effective. Any rules established by the body corporate under the UTA2010 will take their place. In the absence of a resolution for and registration of replacement rules, the template operational rules set out in the UTA2010 will apply.

Two possible interpretations of the transitional provisions regarding rules may be made. The first is that amendments to the standard rules that have been properly made and registered before 20 June 2011 will continue to apply during the transition. An alternative view is that only the default rules in the schedules of the 1972 Act apply during transition.

If the second interpretation proves to be correct, the transitional time will be extremely disruptive, with bodies corporate that have developed their own rules, being lumped with the default rules of the regime (which they have previously rejected). Then, in December 2012 they will have a change of rules again.

Many of the existing rules were established by developers before the people who now live in the communities moved there. Many developers entrenched commercial arrangements and levels of control. These rules will all need to be re-examined and, during the transition period in the absence of a majority approval for their retention, they will fall away.

A detailed description of the transitional requirements is set out in Chapter 10.

Rules must be properly created

Many of the body corporate rules in New Zealand are unlawful for one of two reasons – their practical creation and the ambit of the rules.

For many years it was common practice when creating a unit title development to prepare all of the documentation at the same time. The developer would sign the body corporate rules as the owner and would lodge those rules with LINZ at the same time as the subdivision documentation was lodged. Once LINZ checked the documents, a unit plan would be deposited, certificates of title issued and the body corporate rules registered against the supplementary record sheet.

Although this was an efficient process it was not the right thing to do. Only the body corporate can sign off the body corporate rules. But the body corporate did not come into existence until the unit title plan was deposited.

The matter was put to the test in Court. It was determined that any body corporate rules registered before the body corporate was created were void.

This ruling impacted hugely on body corporate rules throughout New Zealand. The more vigilant of the body corporate secretaries will have orchestrated the re-registration of the rules, making any adjustments as required.

Unlawful body corporate rules crop up surprisingly often. Given the Court case, and the need to review the rules under the UTA2010, we may see them with less frequency. However, once new developments are created under the UTA2010, there will be potential for this same problem to re-occur.

Ultra vires rules

This is a complex area of unit titles law. Ultra vires is Latin for 'beyond the powers'. It deals with rules that attempt to govern beyond what the body corporate is entitled to control. Remember, a body corporate 'has no powers, other than those that [legislation] bestows upon it, and it has no duties or obligations other than those that [legislation] imposes upon it[12].

In recent years, an increasing number of challenges have been made to body corporate rules on the basis of the rules being ultra vires. The cases are all concerned with the 1972 Act. Unfortunately some of the decisions conflict, meaning it may not always be entirely clear whether a rule is ultra vires or not.

The principles established by these authorities are still applicable under the UTA2010 and rules can still be ultra vires. Any powers or duties conferred or imposed on the body corporate that are not directly in line with the powers or duties conferred or imposed under the UTA2010 will be invalid. So will any amendment or addition that is inconsistent with the UTA2010 or other legislation.

Bodies corporate updating their existing rules under the UTA2010 may well come face to face with these ultra vires issues in another guise – in trying to reach decisions about whether parts of existing rules should apply under the new Act.

By necessity, during the transitional period bodies corporate across the country are going to have to address whether their rules are ultra vires. The new legislation will force them to carefully consider their existing rules and to determine whether they are still appropriate.

Lessons learned from case law

The ultra vires principles developed from case law have been summarised in a High Court decision in July 2010[13]. They include:

- a body corporate can introduce an additional power or duty only if it is incidental to the performance of the powers or duties imposed by the legislation
- a rule which 'appreciably expands' the existing powers and duties of the body corporate goes too far
- a rule change may not prohibit or restrict the ability to transfer, lease, mortgage or otherwise deal with a unit (because the statute specifically says so)
- a body corporate cannot bypass the requirement for unanimity where unanimity is required by legislation
- to categorise a rule as requiring unanimity or not you need to have regard to its effect.

Examples of rules deemed ultra vires

- interference with voting rights at AGMs (including reserving powers of veto, appointing the original developer to exercise registered unit owners' votes, appointing the body corporate secretary as proxy, and precluding the passing of resolutions without a particular owner's consent)
- interference with the makeup and election of the body corporate committee (such as requiring people who are not owners to be members)
- a requirement that the body corporate be a party to a management agreement where the amount payable to the manager includes a large compensation payment to the original developer for negotiating a rent-free period for the body corporate
- allowing termination of the appointment of the body corporate secretary (or a management company) by special or unanimous resolution only
- prohibiting any changes at all to a unit without the body corporate's consent
- obliging an FDU owner to pay body corporate levies
- granting wide redevelopment rights to a registered proprietor beyond what was intended by the 1972 Act
- granting exclusive letting arrangements to management companies.

Ultra vires resolutions

Care needs to be taken that the proper process is used in passing resolutions. Already there is case law about ultra vires resolutions that were used to change rules. If resolutions are passed to create new rules by ordinary resolution where they should be passed by special resolution, the resolutions (and therefore the rules) will be ultra vires.

Examples that have previously come up in case law include rules creating:

- a requirement that all unit owners pay a $5,650 deposit, and execute a detailed security and access protocol in order to get access to their units
- a requirement that committee consent be obtained for any change in the use of a unit.

Subsidiary bodies corporate

In Chapter 3 there is an explanation of layered developments where a unit can itself be subdivided into a further unit title development.

In a layered development, a subsidiary body corporate is created, which manages the principal unit being subdivided. The legislative requirements of body corporate rules will apply to this subsidiary body corporate, with one further requirement. Any rules created will need to comply with the rules of the over-arching parent body corporate.

It's important to get the rules right!

On the corner of Shortland Street and Jean Batten Place in Auckland is a multi-storey building. It was unit titled in February 1994. The whole of the ground level and a mezzanine level was called unit A. Not long after, a redevelopment plan was lodged which divided unit A into 2 units. These new units were called B and C.

Between February 1994 and the redevelopment, body corporate rules were established which purported to remove any obligation of the owner of unit A (the ground floor) to contribute to the costs of the lobby, lifts and basement carparks. When the redevelopment was completed the rules were not amended to use correct unit references. As a result the rules said unit A was not required to contribute to such costs but in fact there no longer was a unit A. The Court said unit B under the redevelopment plan was not the unit A described in the original plan (although they occupied similar space). The owner must contribute to levies in respect of the lobby, lifts etc.

Much later, in March 2003, the body corporate brought in some new rules. An owner was not to use a unit for any purpose that damaged the reputation of the building unless they first obtained consent of the body corporate. Examples included a brothel, a shop, a school, a residence. In the default body corporate rules under the 1972 Act, there were two schedules. The rules in one had to be amended unanimously. In the other they could be amended by resolution.

The resolution made to adopt these new rules was not unanimous. The Court decided the resolution ought to have been unanimous. Because it was not, the rule was invalid. The Court's decision was that the wide powers reserved by the new rule were not 'of and incidental to' those matters that the 1972 Act identified as rules to be amended by ordinary resolution. This was the case even though the default rules prohibited the use of a unit 'for any purpose which is illegal or may be injurious to the reputation of the building'.

In brief:

- Live by the rules
- New rules are coming, like it or not
- Rules count only if they are properly made
- Tidy the mess during transition
- Layers of units mean layers of rules.

CHAPTER 7

BUYING A UNIT

When you are buying a property, there is a lot to think about. It doesn't matter whether it is a home, an investment or a place for your business, a myriad of issues need to be taken into account – is the location appropriate and the layout suitable? Is there room for growth? Will the maintenance obligations be overwhelming? Does it leak? Are the local facilities good enough? Does it stack up financially?

When you buy a unit title, many additional issues need to be considered. But purchasers often buy unit titles without paying much attention to these issues and often don't know exactly what they are buying. This can cause future problems.

A purchaser can walk into a unit, see what it looks like, see the common facilities and understand to a certain degree the physical dimensions of what they are purchasing, but not get the full picture. When you walk into a house or a standalone factory unit and see the bricks and mortar you get a very clear understanding of what you are buying. Sometimes, with a complex unit title development, things are more sophisticated.

The new disclosure regime should ensure relevant information is provided to the purchaser prior to the settlement. But there may be additional issues to consider that are not included in those documents. This chapter elaborates on some of those issues.

Exactly what is for sale?

Fundamental as it may seem, it is always worthwhile checking the unit plan to see that the unit you think you are buying is precisely the one that the contract refers to. It is surprising how often that is wrong. Have a look too at the car park, any storage areas and any access areas to make sure that precisely the right units are described.

It is worth finding out just where the boundary between the separate property and the common property is. This differs between unit title developments and the smallest of differences can have a significant impact. If the exterior wall of your unit is common property, its maintenance will be the responsibility of the body corporate. If the exterior wall of your unit is your own property, you will have the responsibility. That demarcation has been especially relevant when dealing with leaky building obligations.

The current norm is for the boundary between common property and the individually held unit to be mid-way through the exterior wall. That has not always been the case and many of the earlier unit title developments were not completed in this way. In those instances, the location of the boundary seems to have been an arbitrary decision made by the individual surveyors.

It is not always an easy task to find out exactly where that boundary is, either. The unit title plan is not always clear. A surveyor will be able to analyse the plan and provide that information.

Once you are sure that the property is correct, it is worth taking the time to understand the relevant legal description.

Unit title property ownership

Ownership of a unit title involves a bundle of rights in addition to the ownership of a physical unit. The right includes:

- a beneficial interest in the common property owned by the body corporate (the extent of which is calculated in accordance with the ownership interest)
- a share in the whole of the property if the unit plan is ever cancelled
- rights of support, shelter and protection to enable use of the unit and the common property
- rights for the provision of services
- uninterrupted access and use of light as it existed when the unit title plan was deposited
- a right to maintain existing overhanging eaves.

These last four rights affect only the land that the unit title is built on.

Stratum estates in leasehold

A unit title development can be based on leasehold land or freehold land. There are large tracts of downtown Auckland city that have unit title developments completed on leasehold land. That arrangement is not so prevalent in other New Zealand cities although it does appear in Wellington.

The land is held by a freeholder. Their interest is in the underlying ownership of the land and they receive an annual rental for its use. They have no ownership of the buildings that are erected on the land although they could find themselves in the position of owning those buildings should the lease be cancelled.

The owner of the freehold in these circumstances is not generally the developer. The developer will take a long-term lease and build the units on the leased land.

On its creation, the body corporate becomes bound by the responsibilities of the lessee under that lease. Each of the owners is then treated as a guarantor of the obligations under the lease. The liability under the guarantee is limited. It relates only to the period they own the unit and is limited proportionate to the value of the unit as against the total value of all units in the development.

This arrangement does create an additional layer to the unit title structure and one that is often misunderstood (if understood at all) by the owners of the units. They often see the asset they own as a single unit and don't give much thought to the prospect of the lease either falling into default or, worse, being forfeited.

Provided the rent is paid, the lease will remain in place. However, payment of the rent is generally dependent on payment of body corporate levies by each of the unit holders. There are several recent examples of circumstances where the body corporate has been unable to pay the rent to the landlord.

One of the landlord's remedies if the rent is unpaid is to apply to the Court for cancellation of the unit plan. Following that they can also apply to the Registrar-General of Land for cancellation of the lease.

Recently a developer did try to complete a unit title development on the basis of a sub-leasehold estate. The matter was taken to Court and it was determined that the 1972 Act did not allow sub-leasehold developments. The new legislation makes it clear that sub-leasehold developments are specifically prohibited.

When purchasing a unit where there is a leasehold estate, the legal description will be a 'stratum estate in leasehold' in the relevant principal units and accessory units. That description will be shown on the title.

What easements or restrictions are relevant?

There are two places to look to see what easements and restrictions might impact on use of the units and the common property. Information is provided on the title to the unit itself, but it is also set out in the supplementary record sheet.

Easements may be registered against the certificate of title to a particular unit, although that is not particularly common. If they are created in this way and if the unit plan is ever cancelled, the easements will similarly be cancelled. Usually the certificate of title to a unit will simply record changes in ownership and the registration of charges and mortgages.

Easements and restrictions are more likely to be registered against the supplementary record sheet. This is where restrictions that relate to the property as a whole, or to just the common property, will be registered. In fact, whenever a potential purchaser is looking at the legal title to a unit, to fully understand the interests affecting their ownership they must consider both the certificate of title for the individual unit and the supplementary record sheet.

The supplementary record sheet provides a great deal of information about the underlying land of a development. It identifies the relevant plan, the date it was deposited, each of the title references for the units comprised in the development and each of the interests that affect the common property. Here easements and other restrictions are commonly registered.

Body corporate rules will be noted against the supplementary record sheet as will the address for service of the body corporate. Subsidiary developments will also be noted there, including the ownership interest that was subdivided.

'Ownership interest' and 'utility interest'

Under the UTA2010, each unit title property will have an allocated ownership interest, which will be relevant for determining a range of things relating to property rights. The ownership interest will be recorded at LINZ. It will impact on owners' voting rights, their interest in the common property and the extent of their contribution to capital improvements. It identifies an owner's share in the underlying property if the unit title structure is ever cancelled.

Under the 1972 Act, the 'ownership interest' was called 'unit entitlement'. Both relate to a value assigned to each principal unit and accessory units by a valuer when the plan is deposited with LINZ.

Under the old regime, body corporate levies were based on unit entitlements. Because unit entitlements were based on value, different owners using the same facilities were required to contribute to costs to differing extents. This system was criticised as being unfair and imposing an irrelevant assessment model on costs.

In some instances, use is a better criterion for cost allocation. It seems unfair that the owner of the penthouse unit must pay more for the costs of maintaining the swimming pool than the owner of the bottom unit, just because their unit has a greater value. Also, it may seem unfair that the owner of a bottom unit should contribute to the cost and maintenance of a lift at all. And what about the responsibility to contribute to the maintenance of the common property roof or facilities used by residents in a mixed use development?

The new legislation has attempted to limit these discrepancies with the provision of utility interests in addition to ownership interests.

As indicated above, the ownership interest attached to each of the units is assessed prior to the unit plan being deposited. The assessment is based on value and a valuer will certify the comparative values of each of the units. It forms the basis for assessing rights and responsibilities attributable to ownership.

A utility interest forms the basis of assessing obligations and rights of owners in respect of maintenance and operational costs. There is much more flexibility in determining how these costs are to be shared between owners. The default position is that the utility interest is the same as the ownership interest, but it is more easily adjusted.

The body corporate can reassess the utility interest on a fair and equitable basis, having regard to the relevant benefits and costs.

Prior to the passing of the new legislation, a change in the assessment of unit entitlements required a unanimous decision. Now, once a plan has been deposited, the body corporate can decide by a special resolution to reassess either the ownership interest or the utility interest or both. It can make a decision to change these interests only every three years.

The reassessments are undertaken on the same basis as the interests were originally established. A valuer assesses the ownership interest based on comparative value. The body corporate reassesses the utility interest based on what is fair and equitable.

What obligations go with the purchase?

There are now significant obligations imposed on sellers to disclose information about unit titles to buyers. The information is disclosed at various stages of the buy/sell transaction. The requirements are explained in detail in the next chapter.

In addition real estate agents are obliged to pass on information they know or should know about properties they are selling.

In Appendix 1 there is a long list that sets out the rights and the responsibilities that attach to being an owner of a body corporate.

Body corporate rules

In Chapter 6 there is a discussion about rules that have been improperly made and their impact. Before buying a unit it is worth reviewing the relevant rules to determine which might work and which do not. Read the rules and be clear you can live with these rules. Check others are complying with the rules. This point is especially relevant for residences but impacts on commercial and industrial properties too.

Although a lot of the fundamental rules are common across unit title developments, each complex will vary from the other in relation to the extent of the rules and the extent to which they impinge on the use to which units can be put.

The rules relate both to common property and to the individually owned units They might prescribe limitations on further work that can be undertaken, the colour the exterior wall must be painted, whether you can have an animal, how late you can make noise, or whether you can hang your laundry on the balcony.

In the expectation that the rules have been properly made, any purchaser of a unit will be bound by them and will need to comply with them.

In your own standalone home away from other houses, it may be fine to regularly cook meals that cause pungent smells, practice your drums well into the night, put as many pot plants as you want outside your front door and dry your undies on the verandah. That flexibility may not be appropriate in apartment living where people live and work in close proximity with each other.

Check your financial obligations

It is important to view the budget and minutes to understand your likely financial obligations, as well as to check that other owners are paying their levies. In fact a vendor is required to provide this information to a purchaser under the unit titles regime.

Each body corporate should have a budget. Viewing the budget will give the buyer some insight into the issues that are relevant to the development and any potential for change to expected costs. Many of the budgetary items will be uniform across unit title developments but of course there will be issues that are specific to the different complexes.

There may be costs not yet in the budget that will impact on the financial obligations of an owner. For this reason it is worthwhile looking beyond the budget and either speaking to the property manager or examining the minutes of the body corporate. That can enable a buyer to fully understand the issues that affect the community living or the work environment in the development, and to see whether there are any expected significant costs or changes.

It is common now for purchasers to request copies of the minutes and there ought to be no problem with body corporate secretaries, managers or vendors providing the information to an interested buyer.

Check for long-term maintenance funds and maintenance plans

The new legislation requires that bodies corporate must each establish a long-term maintenance plan. Unless they resolve not to, they must also adopt a fund to cover long-term maintenance. Any resolution not to create the fund must be a special resolution. Additional optional funds may also be created.

These requirements have been a direct response to the failure of bodies corporate to anticipate significant maintenance obligations. As unit titles have become much more a part of New Zealand life, we have learned that there is a need for sinking funds and for better long-term management of maintenance. In the absence of these arrangements, people establish divergent views of what they expect to contribute to maintenance and the potential for dispute is significant.

There is more about these funds and plans in Chapter 4. It will be interesting to see whether their existence or otherwise impacts on values and marketability of units.

On the purchase of a unit title, you can expect to receive the benefit of a proportion of the funds held. If all levies are up to date, that proportion will be reflective of either the utility interest or the ownership interest attributed to the unit, depending on the nature of the fund. If levies have not been paid, a purchaser faces liability for bringing unpaid levies up to date.

Understand your voting rights and obligations

A unit owner may have to vote on the budget and the representatives of the local committee only once a year. However, it is worth understanding the circumstances in which an owner does get to vote and what that vote means.

Some decisions must be made by a 75% majority. Some decisions can be made by a simple majority decision. In Chapter 5 there is a more detailed analysis of voting structure.

Unless a levy is disputed, an owner who has not paid their levies will not have a right to vote.

Check the community environment

It is worth understanding the community environment that as owner you will be part of.

Clearly the community environment will vary among properties and will depend on the style of management, the state of the body corporate finances and a number of matters previously dealt with in this chapter. Primarily it will come down to the people who live and work within these legal structures.

Check who manages and how well do they do it

Numerous different styles and structures can be found within unit title developments – from autocratic to very democratic. More information about these styles and how they work can be found in Chapter 4.

The use of committees will also impact on how the site is managed. Commonly a committee of, say, three or four people will be appointed to make many of the decisions on behalf of owners. The body corporate rules will detail the powers these committees have and the minutes will identify who is on the committee.

Minutes of committee meetings are not required to be made available to the members of the body corporate. However, they may be available and it is worth enquiring if you do want an in-depth understanding of how decisions are made and by whom.

The committee is generally elected annually. That will be an opportunity to get involved and really understand, and have some influence on how a development is managed.

Legal compliance

As with all real estate purchases its important to establish the extent of compliance with regulatory requirements. Vendor warranties provided in the standard agreements for sale and purchase address these issues but it is also worth establishing for yourself whether Council records identify any matter of concern. These might not be limited to issues relating just to the property being bought.

A land information memorandum may identify issues of non-compliance in respect of other parts of the unit title development. If code compliance certificates have not issued for all the development it will be worth understanding why. If other units in the development have leaky building problems, understand the significance of that. If a current building warrant of fitness is not available, get to the bottom of why. Unlike the purchase of a stand-alone house a buyer's enquire will extend to understanding what's going on with the neighbours.

Common mistakes

Paul Reid, an apartment investor and trader, recently published a text called 'The 5 Common Mistakes People Make Buying Apartments'. It's a useful tool for those looking to buy a home that is a unit title. You can access copies at www.iconicity.co.nz.

In brief:

- Know what you're buying
- It's complicated but the vendor has to give you a lot of explanatory information – read it
- Some of it you have to ask for first
- Check your responsibility for day to day operational costs, long-term maintenance, contingencies, or capital improvement funds
- There are rules to live by
- If you've paid up, your vote counts
- If you don't vote, others can change things around you – including your own responsibilities.

CHAPTER 8

SELLING A UNIT

Selling is a complex procedure

Selling a unit title involves more than selling the physical unit and the chattels in it. The vendor is selling rights and obligations which are interwoven with the duties and powers of the body corporate and any service providers. If a unit is managed or serviced there are further complexities.

It is important to have skilled experts assist if you do not have the knowledge to deal with these issues yourself, as you will see from the information and examples below.

In preparing to sell, those things that are usually relevant when selling a property remain so under the new legislation:

- private sale or agency
- marketing methods
- presentation and/or staging
- pricing
- what property and/or chattels are included
- sale method – auction, tender, negotiation
- contract type and terms including warranties being given
- tenancy arrangements (if applicable)
- transfer of warranties or guarantees (if applicable)
- GST (if applicable).

With a unit title there are additional issues. Consider the following:

- any restrictions or requirements concerning sale embedded in the body corporate rules
- unit title warranties set out in the agreement for sale and purchase
- disclosure obligations on both the vendor and the agent
- body corporate management issues
- body corporate finances, including payment of levies and special levies
- transfer of the long-term maintenance fund (and any other funds)
- building management issues
- litigation that the body corporate may be involved in.

These issues will impact not only on the price but also on the likelihood of a successful sale.

Identifying what is being sold

The property being sold will be described as a principal unit and accessory units shown on a unit plan.

If alterations or additions are made to a unit and they extend beyond the legal boundaries shown on the plan, that matter will need to be addressed in the drafting of the agreement. If it is not addressed then, the warranties and representations given by the vendor in the small type of the standard form agreement may be inappropriate. Check too that the numbering and location of the unit and accessory units match those shown on the unit plan. Most agreements will make rectifying issues like these a matter for the seller to resolve before settlement. That can be an unwelcome, expensive and often difficult process.

The title will probably identify rights and restrictions on the units and the underlying land. It is good practice to review these and to check if they impose any further requirements on a sale. It would be unusual for these to restrict a sale but sometimes they do necessitate further consents to complete the transaction.

If the unit is leasehold, the status of the underlying ground lease will also be very important. The ground rent is usually payable by the body corporate. A buyer will want to know when the rent was last reviewed, when the term expires and whether the lease can be renewed. They will want to be certain rent is paid to date and there are no actual or expected breaches of the lease terms.

Restrictions on sale

The body corporate rules might contain restrictions on sale. These rules might require approval of the buyer by the body corporate, perhaps with set time periods for seeking and obtaining approval, and with pre-conditions to be satisfied as part of the approval process.

Other contracts, such as management contracts, leases and tenancy agreements, might contain restrictions or requirements concerning sales. For example, where an owner enters into a contract with a manager directly, the management contract requires a seller to obtain a written commitment from the buyer to be bound following settlement. The Quadrant in Auckland is an example of where this is required. The agreement for sale and purchase needs to deal with this matter and oblige the buyer to sign and deliver the necessary document.

Restrictions on sales might also arise from a proposed change of use. With residential units this is less likely and tends to arise only if moving from or to a serviced or managed model. If a commercial unit is being sold, and the use of the unit is to change, consent from the body corporate may be needed if the rules require it.

A surprise on the title

Leon had sold his unit located on the Auckland waterfront. Many years before, an incorporated society had been established to look after the common interests of the many unit titled buildings in the area. The society collected an annual levy and to protect its right to receive those levies it registered an encumbrance against the titles. The society then stopped operating and was struck off the companies register. In order to register the transfer of the unit title to the new owner, the society's consent was required. But it no longer existed.

Unit title warranties

The REINZ/ADLS standard form of agreement for sale and purchase is compiled by the Real Estate Institute of New Zealand and the Auckland District Law Society and used universally for the transaction of unit titles. It has the seller making extra promises (or giving extra warranties) when a unit title is being sold. These include promises that:

- the seller will provide a copy of insurance policies or certificates and a pre-settlement disclosure
- other than regular contributions, there are no contributions proposed or levied by the body corporate that have not been disclosed
- all sums due by the seller have been paid in full
- there are no judgments against the body corporate that remain unsatisfied or any order made by the Court under the 1972 Act
- there are no proceedings against or by the body corporate
- all changes to the rules have been disclosed and there are no proposed changes
- the body corporate has not granted any lease, license, easement or special privilege over the common property that has not been disclosed
- dealings with the common property or changes to the development have been disclosed
- the seller had no knowledge or notice of any fact which suggests the body corporate will be involved in court action or the owner might incur further liability under unit title legislation
- at possession all body corporate levies will be paid up.

When signing an agreement to sell a unit title it is important to work through and check that the warranties are appropriate. If the standard form warranties are not appropriate they should be deleted or altered as needed, otherwise a buyer might have rights to cancel or may be able to insist on settlement at a reduced price.

Disclosure revisited

While the new disclosure obligations are extensive for a seller, some level of disclosure has always been required of sellers of unit titles. They have had to provide a certificate identifying specific information about matters prescribed in section 36 of the 1972 Act. Those disclosures were made once the agreement was in existence, and buyers could not do much if problems were revealed.

If these certificates were not provided, the buyer could delay settlement but the certificates were not subject to the buyer's prior approval. Section 36 certificates were in the most part obtained for sellers by their lawyer and from the body corporate secretary.

So in a sense, the pre-settlement disclosure regime described in the UTA2010 is not entirely new.

History of the new disclosure obligations

The drafters of the new legislation wanted to better ensure housing-market participants were well informed. They reasoned that empowered buyers would lead to a more efficient housing sector. The leaky building crisis has been a significant driver of this new disclosure regime.

In the Regional Growth Forum Report 'Bodies Corporate' (January 2003)[14] it was identified that, at least in Auckland, potential buyers and new owners were not well informed about what they were buying into with a unit title. Agents were viewed as having a limited awareness of body corporate matters and even lawyers, unless well informed about body corporate issues and the Act, were not advising well on possible pitfalls and problems.

A general need was identified for people planning to purchase units to be better educated. At that stage, the recommendation was for councils in association with other parties to take responsibility for these issues.

In the August 2003 report 'Unit Titles Act 1972: The Case for Review Discussion Document'[15] this expectation had progressed to an independent, government-funded office providing information and education on bodies corporate, together with councils taking a more proactive role. Lawyers were to provide better advice to buyers, and buyers would become more aware from these education sources.

Then other jurisdictions were reviewed and it was evident there needed to be more emphasis on the need for consumers to have a broad range of information about the unit being purchased. The common thread was the onus on the seller to supply information to a buyer. For example, Queensland had the 'Community Management Statement' where financials, rules and material contracts were provided, and a buyer was able to withdraw from a contract if the information was inadequate or unsatisfactory.

Disclosure under the UTA2010

A seller of a unit is now required to supply at least three types of disclosure statements to buyers:

- a pre-contract disclosure statement
- a pre-settlement disclosure statement
- an additional disclosure statement.

Developers are also required to provide turn-over disclosure. There are specific legal requirements about how this disclosure must be delivered. Also, the buyer can rely on the disclosure statements as conclusive evidence that the information is accurate. For this reason, and because of the consequences of going wrong information, it is extremely important to take care about what information is provided, its accuracy and its proper delivery.

Pre-contract disclosure statement

The seller must provide the pre-contract disclosure statement to the buyer before the buyer enters into any agreement for sale and purchase, whether conditional or unconditional.

This pre-contract disclosure statement must be in the prescribed form which is set out in Appendix 3. The statement includes general information about unit titles as well as some specific information on the unit to be sold.

It may well be included in marketing materials and given to all potential buyers. When an agreement is being prepared it should include an acknowledgment from the buyer that the pre-contract disclosure statement has been delivered to them. The standard ADLS/REINZ agreement includes this acknowledgement.

A good real estate agent will help manage this obligation, in conjunction with the seller's lawyer and body corporate manager.

Pre-settlement disclosure statement

The pre-settlement disclosure statement must be provided by the seller to the buyer within five working days of settlement. It's the new section 36 certificate and delivery will likely be managed by the seller with their lawyer, in conjunction with the body corporate manager.

The pre-settlement disclosure statement must contain prescribed information.

It must also contain or be accompanied by a certificate given by the body corporate confirming that the information in the statement is correct. The body corporate is not required to give this certificate if the seller is behind on paying levies.

Pre-settlement disclosure requires the provision of these details

- unit number
- body corporate number
- amounts due for levies and charges
- how and when payments are due
- how much is unpaid
- whether recovery proceedings are underway
- any unpaid repair costs
- any legal proceedings against the body corporate
- changes to the rules.

Additional disclosure statement

The third type of disclosure statement is called an additional disclosure statement. This is required only if requested by a buyer. That request could be made via the real estate agent or the lawyers, or perhaps directly. It can be made within five working days of the date the agreement is signed or, if earlier, 10 working days before the settlement date.

If a request is made for an additional disclosure statement, the seller must deliver the additional disclosure statement within five working days. If information is needed from other sources this might be a tight time period.

Unlike the pre-contract disclosure and pre-settlement disclosure, the buyer must pay all reasonable costs incurred by the seller in providing an additional disclosure statement. However, the legislation provides non-payment of those costs does not justify the seller withholding disclosure.

The contractual requirement to pay the costs is expected to be covered in agreements for sale and purchase if possible, although that will not avoid the seller having to foot the bill if a buyer does not pay the body corporate manager for the provision of information and does not make the agreement unconditional.

It may become normal for those providing the information to ask to be paid before providing the information. It may also become normal for sellers to provide this information as a matter of course and simply take the cost of providing into account when assessing the price.

Regulations prescribe what information can be requested as part of an additional disclosure statement.

Additional disclosure require the provision of these details

- contact details for body corporate and committee
- bank account balances
- unpaid invoices owed by the body corporate
- regular expenses
- sums owed to the body corporate
- insurance details
- contractual obligations of the body corporate
- lease details
- recent general meeting motions
- any rule changes
- summary of long-term maintenance plan and details of work done and to be done
- details of long-term maintenance fund
- more information about the financial status of the development.

What happens if disclosure is not done properly?

There are serious consequences under the UTA2010 if a seller does not properly attend to disclosure. There are also consequences under the standard form agreement for sale and purchase, and under the general law.

The UTA2010

The buyer can delay settlement if the pre-settlement disclosure statement or additional disclosure statement is late. Settlement can be delayed until the fifth working day after the date all disclosure has been completed.

More significantly, the buyer can cancel the agreement for sale and purchase if the seller does not provide the pre-settlement disclosure statement or additional disclosure statement in time. The buyer must give 10 days' notice in writing to cancel. Nothing in the Act says the seller can avoid cancellation by providing the information following receipt of any such notice.

The UTA2010 does not provide any remedies for a buyer if a pre-contract disclosure statement is late.

Unless a specific provision is included in an agreement for sale and purchase enabling them to do so, a buyer cannot postpone settlement or cancel an agreement because they are not satisfied with the contents of disclosure statements. However, a buyer might have rights under the general law to cancel or seek damages if there are problems disclosed, as discussed below.

If a seller becomes aware that information in any of the disclosure statements they have given was inaccurate (or has since become inaccurate), then the seller must give the buyer a statement correcting the inaccuracy. The seller has five working days from becoming aware of the issue to do this.

Once the statement correcting the inaccuracy is given, the buyer may postpone the settlement date for five working days. That is to allow the buyer to assess the information provided and to determine what action, if any, they should take.

General law

Under general law, if information provided by a seller is inaccurate a buyer might have rights to sue for damages or cancel an agreement, or both. Depending on who the seller is, there might also be remedies for the buyer under consumer legislation.

How to arrange disclosure

Irrespective of who actually provides the information, it is the seller who has the responsibility of ensuring proper disclosure. The disclosure statements must be dated and signed by the seller or by a person authorised by the seller.

The body corporate is obliged to make copies of any records and documents required for disclosure available for purchase by unit owners. The copies must be made available within a reasonable time. The body corporate may charge the seller for any reasonable costs incurred in providing the records and documents.

Real estate agents and lawyers will play a key role in helping sellers manage these disclosure obligations. Other possible sources of information include building managers, accountants, councils, other owners, and perhaps the internet. It is an issue to be discussed by sellers with their agents and lawyers, and worked through prior to listing.

Diarising dates

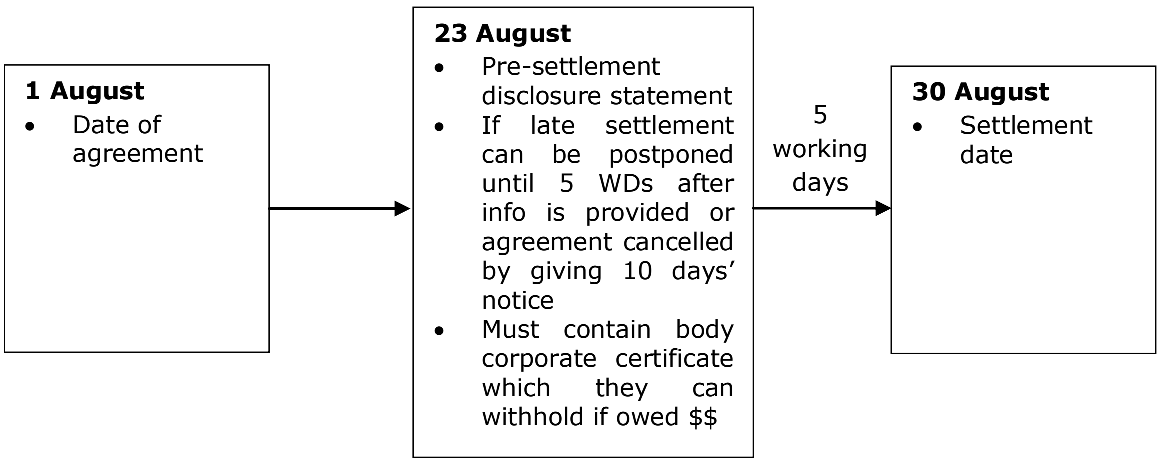
Sellers should diarise the relevant dates with their agents and lawyers to ensure disclosure obligations are properly managed.

Here’s an example assuming the date of the agreement for sale and purchase is 1 November 2011, the date of settlement is 1 December 2011 and an additional disclosure statement is requested on 7 November 2011. You can see from this that there are a number of dates to manage.

The important dates	Example
Date of sale and purchase agreement – the pre-contract disclosure statement must be given by the seller to the buyer before this date.	1 November 2011
The earlier of five working days after the date of the sale and purchase agreement and 10 working days before settlement – if buyers want an additional disclosure statement they need to request it not later than this date.	8 November 2011 (the request is in time)
Five working days after a request for additional disclosure – the additional disclosure statement must be given by the seller to the buyer on or before this date.	15 November 2011
Five working days before settlement – the pre-settlement disclosure statement must be given by the seller to the buyer on or before this date.	24 November 2011

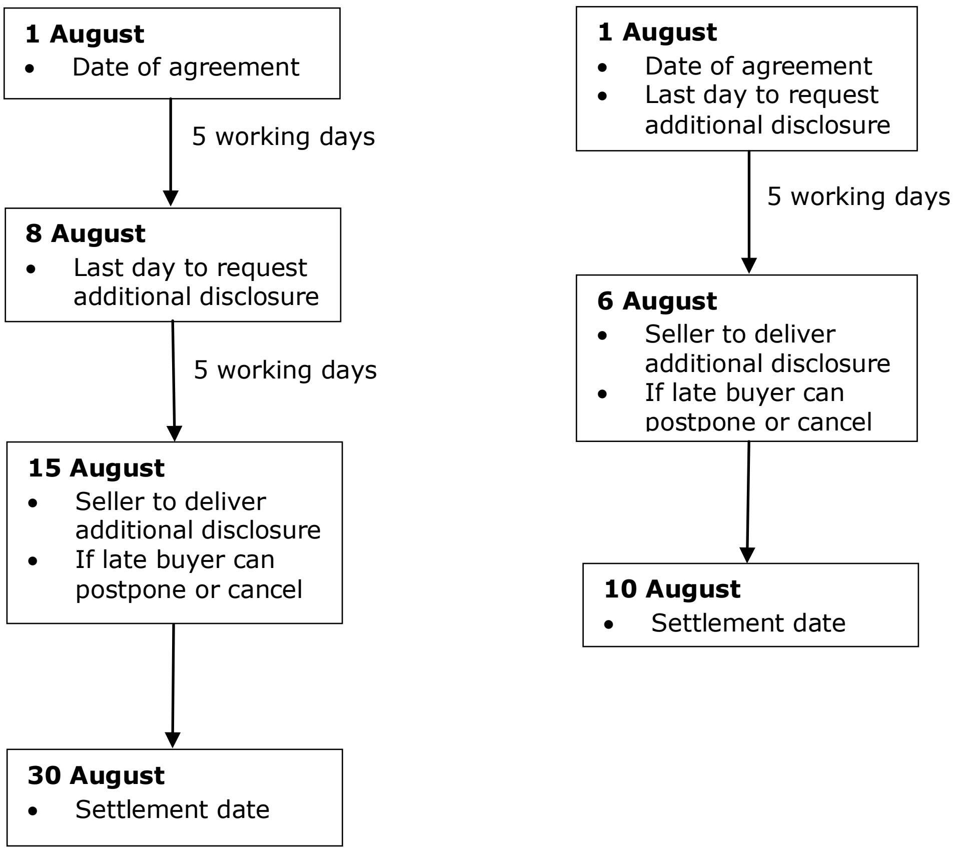
Here's another example presuming the agreement is dated 1 August and provides for settlement at the end of that month.

Pre-settlement disclosure timeframes



In this example the additional disclosure timeframes are set out. The diagram on the left sets out the requirements when there are more than 10 working days between the date of the agreement and the settlement date. The diagram on the right represents the timeframes when there is a short settlement.

Additional disclosure timeframes



Existing agreements

For information on disclosure obligations for agreements for sale and purchase that exist at the date the UTA2010 commences, refer to Chapter 10. Transitional provisions are covered there.

Body corporate management issues

Buyers currently request (and under the UTA2010 will be entitled to expect) copies of body corporate minutes. A well-informed buyer will also want to know who the current body corporate secretary is and to assure themselves that the body corporate is being properly managed.

The role of body corporate secretary has been discontinued under the UTA2010. The focus will now be on the body corporate manager.

Some small bodies corporate may not have a secretary or manager at all. In this case, a seller and a buyer may have to do extra work to ensure sufficient information is provided to the buyer. This may include an assessment of the management of the body corporate.

An organised seller will obtain this information in advance of needing it, and will review it, consider any issues that the minutes disclose and be ready to respond to the buyer's questions.

An issue of developer control

Bob purchased an apartment a couple of years ago. At that time, the developer, Build Limited, still owned the majority of the apartments. Build Limited continues to do so although its financial position has deteriorated significantly. But the company effectively controls the decisions of the body corporate, and treats the property as its own.

Levies remain unpaid by the developer and the body corporate is powerless to do anything about it as the necessary votes cannot be obtained. A director of Build Limited, John, controls the body corporate committee too, having voted himself chairperson. The committee does not meet regularly, and if it does John is hardly ever there.

At the time Bob bought, the body corporate's financials were in good shape and it appeared well managed and well run. Things now look to be altogether different.

With the new legislation Build Limited will be unable to vote until it pays its levies, John can be removed from the committee by an ordinary resolution, Build Limited can be charged interest on unpaid levies at 10% per annum.

Building management issues

When considering the quality of a building's management, a buyer is likely to check – in addition to the actual management – the quality of the building itself, any maintenance issues, the building manager's contract, the management fees and any related contracts, such as the lease of the manager's apartment. Disclosure requirements do not insist that everything is working perfectly, only that the purchaser is properly made aware of the status quo.

A case of shoddy management

Deirdre owns a managed CBD apartment. A management contract exists between Deirdre and ABC Limited, the manager. ABC Limited rents out the apartment and collects the rent. It is then to deduct rates, body corporate levies and a management fee, and remit the net proceeds to Deirdre. If the apartment is not rented out, Deirdre is responsible for rates and levies.

Deirdre sells her apartment at an auction, using a standard form agreement which requires the apportionment of outgoings at settlement. There are large rates arrears and body corporate arrears. ABC Limited has been deducting the money from Deirdre's rent but has not been paying the council or the body corporate. The arrears need to be paid so that settlement of the sale can occur, so Deirdre ends up paying the rates twice. Deirdre keeps her rights against ABC Limited to have these sums reimbursed to her but collection is going to be difficult. To rub salt into the wound, ABC Limited's lawyer requires fees to be paid to it so the management contract can be transferred to the new owners.

For someone leaving this management structure the cheaper option may be simply to pay the outgoings and the fees and move on, but a purchaser will want to manage the situation carefully. Through the disclosure requirements the buyer will become aware of the situation. They will then need to monitor the flow of money.

Body corporate finances

The state of the body corporate's finances will be very important to buyers and will need to be reviewed in the context of forthcoming responsibilities.

Sellers must pay any special levies that have already been levied or which are already contemplated for the unit in question – unless an arrangement is agreed otherwise with the buyer. These levies might be costs for work that is not relevant to the development as a whole but might arise where a unit owner has damaged common property and is being made to reimburse the cost of fixing it. Special levies are also likely where there is litigation or there are costs incurred outside the annual budgets.

Transfer of funds

The balance sitting in long-term maintenance funds, contingency funds and capital improvement funds will, if a seller does nothing, transfer to the new owner. The seller needs to consider whether they wish to receive some or all of any surplus funds that the body corporate may decide to distribute to unit owners at some future time.

GST

Proper tax advice should be obtained by sellers where they claimed GST on the purchase of their unit. This affects serviced and sometimes managed units in particular. Sale (and, for that matter, change in use) can create GST obligations. If in doubt, check.

Change of owner

Once the sale of a unit is completed, a seller must notify the body corporate of the new buyer's contact details so that the register of owners can be updated. If this is not done, the seller remains liable for costs incurred in respect of the unit, including for levies.

If the register has not been updated, the buyer will be unable to vote at body corporate meetings unless all the attendees at the meeting agree otherwise.

The notification of change of ownership is usually managed by the lawyers.

Transfer of accessory units

It is possible to sell accessory units to other unit owners. Car parks are commonly sold by one owner to another. The process is usually quite straight forward. It involves the transfer of the accessory unit from one title to the other and the resultant issue of a new title.

Accessory units cannot be sold to others outside the body corporate. Accessory units must always attach to principal units.

In brief:

- Do your homework – understand what you are selling
- Read the small type
- Check dates very carefully
- Disclose.

CHAPTER 9

CANCELLATION

Although cancellation of a unit plan is not often undertaken it can be appropriate in a range of circumstances. These include:

- destruction of the buildings
- development of the common property that had not originally been anticipated
- splitting a single body corporate into two separate entities
- a restructure of ownership of neighbouring unit title developments.

Sometimes this can be completed by agreement, but that is not always the case. The UTA2010 (as did the 1972 Act) sets out the bases for completing cancellation by agreement and through a declaration of the High Court.

Cancellation by the Registrar

Under the 1972 Act the Registrar-General of Land was able to cancel a unit plan if an application was made by all of the unit owners. That was an extremely high threshold. The process in UTA2010 is broadly similar, however only the body corporate entity is required to sign the application. This can be done once a special resolution is passed resolving to effect a cancellation; so the threshold is lower. A resolution to cancel a unit plan is a designated resolution so the process explained in Chapter 5 will apply.

To ensure concerned parties are aware of the proposal to cancel the unit plan, and in addition to the designated resolution process, a body corporate must serve a draft application for cancellation on every unit owner and every person with a registered interest in any unit. A copy of the application and the resolution must also be served on any lessor (if the development is on leasehold land).

This gives these parties an opportunity to use the designated resolution process to object to the cancellation.

Before the application for cancellation may be lodged, a valuer must reassess both the ownership interests and the proposed ownership interests of any FDU.

On cancellation the underlying land is owned by the unit owners in the same shares as they held their ownership interests. So, for example, if a unit owner's ownership interest was 102/10,000th and the unit plan was cancelled, that owner would own a 102/10,000th share in the land.

If title is shared by joint tenants, then the share of the land vests in them jointly. If they are tenants in common e.g. 60/40 then their shares are divided based on those same percentages, so in the example one person would own 60% of 102/10,000th (i.e. approximately a 61/10,000th share) and the other would hold 40%. Certificates of title would issue on this basis.

The body corporate is deemed dissolved on a cancellation and the assets held by the body corporate are distributed to the owners. The long-term maintenance fund, the operating account and any capital improvement fund or contingency fund must be distributed on the same basis that levies for these funds were paid just before cancellation. All other property and money held by the body corporate is shared in the same way as the land. The exception to this arrangement is where an owner owes the body corporate money. If a debt is owed it can be off-set against the owner's share of the assets.

Despite having been dissolved, the body corporate continues to be liable for any debts it owed at the time of cancellation and in respect of court action that was underway. The people who owned units at that time will also have personal liability in respect of such court action. Those owners are treated as having guaranteed any payment due to a successful plaintiff if an action is in tort. Each owner's guarantee is limited, taking into account their ownership interest, sums paid because they were joined in the action, and any amount recovered by the body corporate under its insurance policy.

Staged unit developments and subsidiary plans add an extra complication to the cancellation process. A unit plan cannot be cancelled while it contains a subsidiary unit title development. Any subsidiary plan will need to be cancelled first.

A stage unit plan can be cancelled. There is a process in the UTA2010 that sets out a method for determining the ownership of the underlying land. The effect on the cancellation is for shares to be determined based on the ownership interests that exist (for existing units) and that are proposed (in respect of FDUs). This will mean that even though an FDU may be bare land, on cancellation the share of the land and buildings owned by an FDU owner will be assessed as if their proposed unit had been built.

Cancellation by Court

A unit plan can also be cancelled if that is authorised by the High Court. The body corporate itself can apply to the High Court if it resolves (by special resolution) to do so. So can someone who has been appointed by the High Court as an administrator. An owner can also apply for an order for cancellation.

Like the process for cancellation by application to the Registrar-General of Land, there is a requirement to serve notice on interested parties. However there is no requirement to use the designated resolution process.

People who have an interest in the land are entitled to be heard by the court in relation to the cancellation. This includes not just owners but also anyone with a registered interest or any easement, an insurer and the Registrar-General of Land.

The court will take into account the rights of those involved and has a broad discretion to impose conditions on the cancellation. It will make a declaration as to whether the cancellation is allowed, and if so on what terms. Once the declaration is made, anyone who applied for the application can apply to the Registrar-General of Land who must then register the cancellation. The application must be made within 6 months of the court decision.

Easements on cancellation

Easements warrant particular comment. Most easements relating to unit titles will apply to the underlying land, but that is certainly not the case with all easements. They may be granted over single units, over neighbouring property in favour of single units or over a unit created in a subsidiary development unit. On cancellation these easements are separately considered.

A court can impose conditions in a declaration for cancellation and will presumably deal with easements in those conditions. On an application to the Registrar-General of Land there are rules that deal with easements and covenants.

- Every easement or covenant that is for the benefit of a unit will be cancelled
- Every easement or covenant that is over any unit will be cancelled
- Easements and covenants that existed before the unit titles were created will survive
- Easements and covenants that affect common property only will survive.

In brief:

- Plans can be cancelled
- By special resolution
- Or court order
- It’s easier than it was
- Some easements will disappear.

CHAPTER 10

TRANSITION FROM OLD TO NEW

Start date

The UTA2010 became effective on 20 June 2011. Bodies corporate existing at that date will transition fully to the UTA2010 over a 15 month period. There is a lot to do in that period and it is important to address the issues as quickly as possible.

The request for disclosure documents will likely be the first issue bodies corporate will need to deal with and a system (complete with forms and pricing) ought to be established quickly to deal with requests. Disclosure requirements are discussed in Chapters 3 and 8. However, there are a number of other issues that require addressing during the transitional period.

The first AGM

A first AGM under the UTA2010 must be held as soon as practicable after 20 June 2011 and at least by 20 December 2011. That gives the body corporate a little more than 5 months to get ready for the first AGM. Subsequent AGMs must be held in the next calendar year and no later than 15 months after the previous AGM.

At the first AGM the body corporate must nominate and elect a chairperson. The AGM should also address other new requirements under the UTA2010. These include:

- delegations to the body corporate committee
- the management of the operating account
- how the financial statements and new auditing requirements will be met
- whether the maintenance regime set out in the legislation will apply
- whether or not a long-term maintenance fund is to be established
- whether to adopt new operational rules.

Changing rules

One of the first decisions for an existing body corporate to make during the transition is whether to remain bound by its existing rules. The transition phase creates a time within which bodies corporate can make this election, as the new body corporate operational rules do not apply immediately. The existing rules apply for 15 months (until 1 October 2012) unless a body corporate elects within that time to adopt new rules created under the UTA2010.

There is a differing view as to how this transition period works.

Another view is that on 20 June 2011 all bodies corporate reverted to schedule 2 and 3 of the 1972 Act. This seems to add an unnecessary complication to the transition that will result in bodies corporate changing the rules twice in a very short period of time.

Existing rules might be those set out in schedules 2 and 3 of the 1972 Act (if no changes have been made or if the alternative interpretation of the legislation is correct) or other rules that have been designed specifically for the development and properly registered under the 1972 Act.

There is a conflict in the transitional provisions of the UTA2010. The existing rules will address, among other things, the role of the body corporate secretary, establishment of and role of committees, the management of AGMs. Requirements regarding these issues are entrenched in UTA2010. It is not clear what happens if there is a discrepancy between the old rules (which remain effective under the transitional provisions) and the entrenched provisions (which become effective on 20 June 2011).

Body corporate rules under UTA2010 are discussed in more detail in Chapter 6.

To change the rules during the 15 month transition period, a body corporate will need to pass a special resolution opting out of the existing rules and transitional arrangements and opting into the relevant provisions of the UTA2010. If the intention is to amend the operational rules that have been prescribed in the regulations, an ordinary resolution of the body corporate is required.

At the end of the transition period a body corporate that has not resolved to adopt new rules will be subject to the new operational rules created by the UTA2010. The majority of bodies corporate will not want this automatic default situation to occur, and will instead create rules that suit their development. Bodies corporate are likely to use this opportunity to review their existing regime and change any unpopular rules.

Financial and auditing

The requirements for financial statements and for auditing will also need to be considered promptly. Under the UTA2010 statements must be audited and financial statements provided to an accountant within 2 months of the body corporate's end of the financial year unless a body corporate decides by special resolution to opt out of this requirement. Depending on timing, this requirement for an audit might need an urgent decision to be made.

The financial year of a body corporate does not necessarily run from 1 April each year. Unless a body corporate determines otherwise, it will run from the date the body corporate is established.

The decision as to who can deal with the body corporate's operating account also needs to be urgently addressed. There is no transitional period for these requirements. In the absence of any prior resolution, the body corporate will need to determine, by special resolution, who may operate the current accounts and how. Resolutions that have been passed pursuant to the 1972 Act will remain in effect.

Maintenance

For most bodies corporate their maintenance responsibilities will remain as set out in the 1972 Act until 20 September 2012. Others may choose to opt into the provisions of the UTA2010 earlier than that.

Under the 1972 Act, the maintenance obligations of the body corporate were in the Schedule 2 rules, and could be amended by unanimous resolution. These obligations extended only to the common property.

Under the UTA2010 the body corporate is required to maintain and repair the common property and also any building elements and infrastructure which are shared by 2 units or more. This will need to be properly budgeted for and assessed.

Bodies corporate who wish to opt in early to these requirements must do so by special resolution. Some may choose to, so that managing common building maintenance is easier and more effective. However, that will require developing a long-term maintenance plan.

Long-term maintenance plan

The UTA2010 requires a body corporate to have a long-term maintenance plan. This is mandatory. The regulations require long-term maintenance plans to cover the common property, building elements and infrastructure of the development as well as any additional items that the body corporate decides by ordinary resolution to include. Items can be excluded from the maintenance plan too. Refer to Chapter 4 for more detail.

For existing bodies corporate this requirement can either be implemented immediately or deferred for 15 months. Deferral would allow bodies corporate an opportunity to plan for and determine how to meet this requirement.

To opt in immediately will require a special resolution.

Long-term maintenance fund

Bodies corporate may choose whether to have a long term maintenance fund or not. The default position imposes a requirement to have such a fund, so if it is not required the body corporate must formally decide to forego such an arrangement. The decision must be made by special resolution. That decision can be delayed for the 15 month transition period as no long-term maintenance fund is required during that time.

Legal proceedings

Legal proceedings that have commenced under the 1972 Act will continue to be determined as if the 1972 Act were still in force, unless the parties agree otherwise. There is now the option to have the Tenancy Tribunal determine disputes for less than $50,000 that meet prescribed criteria. Bodies corporate that have lower value disputes in progress might wish to transfer to the Tenancy Tribunal.

Unit entitlements

All principal and accessory units are currently allocated unit entitlements. With the commencement of the UTA2010 these unit entitlements will immediately be deemed to be 'ownership interests'. In a similar manner the utility interest for all existing units will be deemed to be the same as the ownership interest. During the transitional period bodies corporate may well consider whether this arrangement is appropriate or whether a more equitable division of operational costs is appropriate.

Ownership of common property

On 20 June 2011 all common property will become owned by the relevant body corporate. Previously the common property was held by all of the unit owners as tenants in common in the same proportion as their unit entitlements.

Resolutions

The prior resolutions made by the body corporate do not fall away with the passing of the UTA2010. Any body corporate resolution made under the 1972 Act can still be implemented.

Seller's disclosure obligations

Agreements for sale and purchase of units that have been signed by 20 June 2011 but have not yet settled may be subject to the new disclosure obligations described in Chapter 8.

The transitional period for disclosure arrangements was very short, with only one week between when the UTA2010 came into force and when the disclosure obligations were fully applicable. If the settlement date was on or before 27 June 2011 then a buyer did not have the right to delay settlement or cancel the agreement on the basis a pre-settlement disclosure statement had not been provided.

A buyer with a settlement date on or before 27 June 2011 had no right to request an additional disclosure statement. Presumably there was no obligation on the seller to deliver a pre-contract disclosure statement either, as the commencement of the UTA2010 will have been after the date of the agreement. Sellers will have been obliged to provide section 36 certificates before settlement could take place if the settlement date was 27 June 2011 or earlier.

If the settlement date was due on or before 27 June, but settlement actually takes place until after 27 June 2011, the pre-settlement disclosure statements and additional disclosure statements may be required. This will depend on whether 'settlement date' means the date the buyer pays the vendor, or the date the agreement says is the settlement date. Both definitions are given in the UTA2010.

A conservative approach is appropriate, and sellers should endeavour to disclose, given that they run the risk of delays in settlement or cancellation if these disclosure obligations are not complied with within the appropriate timeframe.

Examples of disclosure requirements during transition

- Agreement dated 21 June 2011 or after – no transition and full disclosure regime applies.
- Agreement dated 18 June and settlement 18 July 2011 – settlement date outside transition so pre-settlement disclosure and additional disclosure required. Buyer can cancel or defer settlement if disclosure not made on time. Pre-contract disclosure presumably not required. Section 36 certificate may be required under the agreement.
- Agreement dated 18 June and settlement 24 June 2011. Within transition – pre-settlement disclosure required but no additional disclosure and presumably no pre-contract disclosure. Buyer cannot cancel or defer settlement for failure to provide if settlement occurs on the expected date and is not delayed beyond 27 June 2011.

Review of service contracts

Bodies corporate will have the right during the transitional period to argue that service contracts put in place by the original developer are harsh and unconscionable and should be terminated.

However, during this transition period the body corporate will not have the rights introduced by the UTA2010 to seek compensation.

Court proceedings

Unless the parties agree otherwise, any existing proceedings will continue as if the UTA2010 had not been passed.

Survey plans

If a unit plan is approved under the 1972 Act, it may still be lodged with LINZ after 20 June 2011.

In the absence of specific transitional provisions relating to the deposit of plans under UTA2010, LINZ has come up with some rules for lodgement after 20 June 2011 where consents have been obtained under the 1972 Act[16].

- instruments lodged before 20 June 2011 will be dealt with under the 1972 Act even though they may be processed after that date.
- instruments lodged on or after 20 June 2011 but based on processes begun under the 1972 Act will be accepted by LINZ if the documents are drawn up in accordance with the 1972 Act.
- unless further stages in a staged development fall within the points listed above, those stages will be treated as having to comply with the UTA2010, irrespective of whether earlier stages were dealt with under the 1972 Act.

The UTA2010 requires that principal units (other than carparks) must be contained in or contain the whole or part of a building. Currently there are principal units that will not comply with this requirement. The UTA2010 recognises that redevelopments may occur that involve these principal units. Those redevelopments may take place under UTA2010 even though a principal unit that did not previously comply with this requirement will still not comply following the redevelopment.

In brief:

- Don't dilly-dally, there's a lot to do before 1 October 2012
- Get ready to provide lots of disclosure information
- Find a chairperson
- Existing rules will last until 1 October 2012
- Develop a long-term maintenance plan
- Time to reconsider the rules.

APPENDIX ONE

RIGHTS AND RESPONSIBILITIES OF AN OWNER OF A UNIT

	An owner of a principal unit	An owner of a future development unit
Body corporate s76	Is a member of the body corporate.	Is only deemed a member of the body corporate for certain purposes.
Levies s121	Must pay levies.	Must pay levies once the FDU is in use.
Ownership rights s79	Has ownership rights set out in section 79.	
Ownership responsibilities s80	Has ownership responsibilities set out in section 80.	Must comply with all ownership responsibilities once the future development unit is being used.
Common property s54 s56	Holds a beneficial interest in the common property proportionate to their ownership interest.	If the common property is sold, an owner of an FDU that is in use is to be treated as a member of the body corporate.

	An owner of a principal unit	An owner of a future development unit
Voting rights s79(c) s96 s97 s98 s102 s580(1)(c)	Is entitled to vote if they are a paid up registered owner (unless the payment is disputed), over 16 years old and have the consent of their mortgagee if required. An owner must consult with a mortgagee if required to do so. They may vote by proxy. Only one vote can be exercised for each principal unit.	
Use of the unit s79(d)	Is entitled to the quiet enjoyment of their unit.	Must give written notice to the body corporate when the unit is in use.
Alterations s79(e) s80(1)(h) s80(1)(i)	Provided they first tell the body corporate, may make alterations to their unit that are within the unit boundary and do not materially affect other units or common property. Must not make alterations that materially affect other units or common property without the consent of the body corporate.	
Disputes s79(f) s171(2)	Has the right to use of the dispute resolution process set out in the Act. (The Tenancy Tribunal has jurisdiction to hear unit title disputes involving an owner.)	(The Tenancy Tribunal has the jurisdiction to hear unit title disputes involving an FDU owner.)

	An owner of a principal unit	An owner of a future development unit
Rules s79(g) s80(1)(j) s83(3) s105	Has the right to enforce the body corporate rules but must comply with rules including the rules of a parent or subsidiary body corporate.	Is bound by body corporate operational rules.
Meetings s79(h)	May attend general meetings of the body corporate.	
Access s80(1)(a)	Must allow the body corporate into the unit on reasonable notice or in emergency for maintenance and enforcement of rules purposes.	Must allow the body corporate into the unit on reasonable notice or in emergency for maintenance and enforcement of rules purposes if the FDU is in use.
Decisions s80(1)(b)	Must give effect to body corporate decisions.	Must give effect to body corporate decisions if the FDU is in use.
Regulations s80(1)(d) s80(1)(e)	Must comply with regulatory requirements including any notices required by authorities.	Must comply with regulatory requirements including any notices required by authorities if the FDU is in use.
Outgoings s80(1)(f) s125	Must pay outgoings associated with the unit, including rates/levies and metered services.	Must pay outgoings associated with the FDU if the FDU is in use.

	An owner of a principal unit	An owner of a future development unit
Repair s80(1)(g)	Must keep the unit in good repair.	Must keep the unit in good repair if it is in use.
Absentee s80	Must appoint an agent if the unit is leased and the owners is absent from New Zealand for longer than 3 weeks and advise the body corporate of details.	Must appoint an agent if the unit is leased and the owners is absent from New Zealand for longer than 3 weeks and advise the body corporate of details.
Change of ownership s85	Give the body corporate written notice of changes of ownership.	
Agreements s123		May reach an agreement with the body corporate for work to be undertaken or money spent that is of mutual benefit.
Cancellation s190	Is entitled to a proportionate share ownership of the units and common property on cancellation of the unit titles.	Is to be treated as a member of the body corporate in respect of any cancellation of a unit plan.
Disclosure s5 s144-157	Must comply with the obligations to disclose information to the buyer on a sale.	Probably falls within the definition of a unit and therefore should comply with the obligations to disclose information to the buyer on a sale.

APPENDIX TWO

RESPECTIVE POWERS AND DUTIES OF BODIES CORPORATE IN A LAYERED DEVELOPMENT

Responsibilities and powers	**Head body corporate** (All owners of the a unit title development where one of the units has in turn been subdivided)	**Subsidiary body corporate** (All owners of subsidiary unit title development only)
Fixing and re-assessing ownership interests and utility interests (sections 38-42)		The ownership interest and utility interest of a principal unit must be reassessed when that principal unit is subdivided.
Acting as an agent for absent owners for the purpose of enforcing the body corporate operational rules (section 81)		
Keeping and maintaining a register of all of the owners of principal units and accessory units (section 85)		

Responsibilities and powers	**Head body corporate** (All owners of the a unit title development where one of the units has in turn been subdivided)	**Subsidiary body corporate** (All owners of subsidiary unit title development only)
Signing documents on behalf of an owner (section 86)	Provided the appropriate process is followed a body corporate can sign any document that needs to be signed by an owner to carry out a resolution the body corporate has made or any order made by the High Court. The body corporate may sign the document if the owner refuses to do so of it the owner fails to do so after 10 work days of having been served a notice requiring execution. If it's a designated resolution or an application for relief has been made you must wait for the relevant periods to expire before notice is given.	
Payment of ground rental to a lessor (section 87)	The head body corporate must pay the ground rental to the lessor before making any other payments.	
Calling general meetings (sections 90-94)	A body corporate (for head & for subsidiary) must have a general meeting within 6 months of the later of	Once a subsidiary body corporate receives notice of general meeting of its parent body corporate the subsidiary

Responsibilities and powers	Head body corporate (All owners of the a unit title development where one of the units has in turn been subdivided)	Subsidiary body corporate (All owners of subsidiary unit title development only)
	the date the unit plan is deposited, and the settlement date of the first sale of a unit. At that meeting they must elect a chairperson. A body corporate must have an annual general meeting with not more than 15 months between meetings. A parent body corporate or a parent body corporate committee must given notice of any general meeting to each of its subsidiary bodies corporate and must not vote on a resolution unless notice is given.	must call a general meeting and that meeting must be held before the parent body corporate's general meeting. At the meeting the subsidiary body corporate (or committee members must consider the matters on the agenda of the parent body corporate's (or committee's) general meeting). Any matter on the agenda of the parent body corporate to be decided by ordinary resolution must first be decided by the subsidiary body corporate by ordinary resolution (or committee as appropriate). Any matter on the agenda of the parent body corporate to be decided by special resolution must first be decided by the subsidiary body corporate by special resolution (or committee as appropriate). The subsidiary body corporate will direct its representative to vote in favour of

Responsibilities and powers	Head body corporate (All owners of the a unit title development where one of the units has in turn been subdivided)	Subsidiary body corporate (All owners of subsidiary unit title development only)
		the decision made at the general meeting or to abstain (as the case may be). • the subsidiary body corporate must appoint a subsidiary representative to attend parent body corporate meetings and • must give notice of the representative to the parent body corporate. • the representative of the subsidiary body corporate may attend general meetings of the parent body corporate and represent the parent body corporate (or body corporate committee); (a) as the subsidiary body corporate (or committee) directs; (b) and in the best interests of the subsidiary body corporate (or committee) The subsidiary body corporate representative must abstain if they have

Responsibilities and powers	**Head body corporate** (All owners of the a unit title development where one of the units has in turn been subdivided)	**Subsidiary body corporate** (All owners of subsidiary unit title development only)
		not been given directions in relation to any matter. When voting at a general meeting of a parent body corporate, a representative of a subsidiary body corporate has one vote in an ordinary resolution and one vote in a special resolution.
Complying with body corporate operational rules (section 105(3)) Changing body corporate operational rules (section 105(2) and 106)	A parent body corporate may make or change rules but must not make rules that conflict with the existing operational rules of any subsidiary where the subsidiary's rules have been properly made unless the subsidiary body corporate agrees to the amendment but subject to that: (a) there is a conflict between subsidiary body corporate operational rules and the parent body corporate operational rules the parent body corporate operational rules prevail.	May make subsidiary body corporate rules that do not conflict with the rules of any parent body corporate.

Responsibilities and powers	**Head body corporate** (All owners of the a unit title development where one of the units has in turn been subdivided)	**Subsidiary body corporate** (All owners of subsidiary unit title development only)
	(b) there is more than one layer and if there is conflict between a subsidiary body corporate's operational rules and its head body corporate operational rules, the head body corporate operational rules prevail.	
Delegating powers to a body corporate committee (section 108)	A head body corporate may, by special resolution delegate most of its powers to a body corporate committee. It may not delegate the power of delegation, the right to reassess ownership interests and utility interests, the obligation to comply with body corporate rules or the rights to apply insurance money.	A subsidiary body corporate may, by special resolution delegate most of its powers to a body corporate committee. It may not delegate the power of delegation, the right to reassess ownership interests and utility interests, the obligation to comply with body corporate rules or the rights to apply insurance money.
Establishing and maintaining operating account (section 115)	A head body corporate must establish and maintain an operating account to meet the costs of: • management and governance • services and amenities • regulatory compliance	A subsidiary body corporate must establish and maintain an operating account to meet the costs of: • management and governance • services and amenities • regulatory compliance

Responsibilities and powers	**Head body corporate** (All owners of the a unit title development where one of the units has in turn been subdivided)	**Subsidiary body corporate** (All owners of subsidiary unit title development only)
	• ground rental or licence fees • frequent maintenance	• ground rental or licence fees • frequent maintenance
Establishing and maintaining a long term maintenance plan (section 116)	A head body corporate must establish and maintain a long-term maintenance plan to • maintain at least the common property, building elements, and infrastructure. • cover at least 10 years. • identify future maintenance requirements and costs. • support the establishment and management of a long-term maintenance fund and any contingency fund or capital improvement fund. • provide a basis of levying owners (as per the owner's utility interest. • provide a guide for on-going maintenance decisions.	A subsidiary body corporate must establish and maintain a long term maintenance plan to • maintain at least the common property, building elements, and infrastructure. • cover at least 10 years. • identify future maintenance requirements and costs. • support the establishment and management of a long-term maintenance fund and any contingency fund or capital improvement fund. • provide a basis of levying owners (as per the owner's utility interest. • provide a guide for on-going maintenance decisions.
Long term maintenance fund (section	The head body corporate may establish	The subsidiary body corporate may

Responsibilities and powers	Head body corporate (All owners of the a unit title development where one of the units has in turn been subdivided)	Subsidiary body corporate (All owners of subsidiary unit title development only)
117)	and maintain a long term maintenance fund. A special resolution is required to decide not to establish such a fund.	establish and maintain a long term maintenance fund. A special resolution is required to decide not to establish such a fund.
Optional contingency fund (section 118)	A head body corporate may establish contingency funds to provide for unbudgeted expenditure.	A subsidiary body corporate may establish contingency funds to provide for unbudgeted expenditure.
Optional capital improvement fund (section 119)	A head body corporate may establish and maintain a capital improvement fund.	A subsidiary body corporate may establish and maintain a capital improvement fund.
Raising funds and imposing levies (section 121)	A body corporate may impose levies calculated in accordance with the act, must specify when the levies are due and interest is due on any unpaid debt.	A body corporate may impose levies calculated in accordance with the act, must specify when the levies are due and interest is due on any unpaid debt.
Recover money due from owners, whether non-payment of levies, or recovery of repair costs. (section 124, 125, 126, 127)		
Spending, borrowing, investing and	A head body corporate may spend,	A subsidiary body corporate may spend,

Responsibilities and powers	**Head body corporate** (All owners of the a unit title development where one of the units has in turn been subdivided)	**Subsidiary body corporate** (All owners of subsidiary unit title development only)
distributing money, distributing property (sections 130 & 131, section 209)	borrow or invest money but may not grant a mortgage or a charge or any encumbrance over the common property. When distributing funds, a body corporate must treat a subsidiary body corporate as a unit owner of the principal unit that was subdivided to create the subsidiary unit title development.	borrow or invest money but may not grant a mortgage or a charge or any encumbrance over the common property comprised in the subsidiary development. A subsidiary body corporate to which proceeds are distributed must deal with the proceeds in relation to any subsequent subsidiary unit title development in the same manner as a head body corporate.
Keeping accounting records and submitting yearly financial statements to an independent auditor (sections 132 & 133)	The head body corporate must keep accounting records that are correct, complete, readily available for review and complying with any regulatory requirements. Within 2 months of the end of each financial year the body corporate must have the statements audited by an independent auditor or an accountant unless a special resolution determines that is not necessary. The body	The subsidiary body corporate must keep accounting records that are correct, complete, readily available for review and complying with any regulatory requirements. Within 2 months of the end of each financial year the body corporate must have the statements audited by an independent auditor or an accountant unless a special resolution determines that is not necessary. The body

Responsibilities and powers	Head body corporate (All owners of the a unit title development where one of the units has in turn been subdivided)	Subsidiary body corporate (All owners of subsidiary unit title development only)
	corporate must provide a copy of the most recent financial statements with the notice of the annual general meeting. The body corporate must allow the Department of Building and Housing access to the unit title development and any documents relating to the long-term financial and maintenance regime of the body corporate.	corporate must provide a copy of the most recent financial statements with the notice of the annual general meeting. The body corporate must allow the Department of Building and Housing access to the unit title development and any documents relating to the long-term financial and maintenance regime of the body corporate.
Insurance (section 135, 137)	The head body corporate has an insurable interest in the property covered by the principal insurance policy. Unless the units are stand alone and the body corporate decides by special resolution to have each owner effect separate insurance the head body corporate must ensure and keep insured all buildings and other improvements on the base land to their full insurable	Although the obligation to insure rests with the head body corporate, a subsidiary body corporate may wish to have its interests noted on the policy.

Responsibilities and powers	Head body corporate (All owners of the a unit title development where one of the units has in turn been subdivided)	Subsidiary body corporate (All owners of subsidiary unit title development only)
	value. If owners take out separate insurance, the body corporate must still ensure any improvements on common property. The head body corporate must take out any insurance that it is required by law to take out and may take out additional insurance. The head body corporate must notify its insurer of any additions or structural alterations of any work.	
The application of insurance money (section 136(4))	A head body corporate must apply insurance proceeds to the reinstatement of the unit title development.	

Responsibilities and powers	**Head body corporate** (All owners of the a unit title development where one of the units has in turn been subdivided)	**Subsidiary body corporate** (All owners of subsidiary unit title development only)
Repair and maintenance of common property, assets designed for use in connection with the common property, infrastructure and building elements and access for those purposes (section 138)	The head body corporate must maintain common property and body corporate assets and building elements and infrastructure that relate to more than one unit. If that involves repairs to a unit that has been developed as a subsidiary unit development, the head body corporate may recover the costs of such repairs from the subsidiary body corporate.	The subsidiary body corporate must maintain the common property in the subsidiary development and any assets owned by the subsidiary body corporate or used in connection with the subsidiaries common property.
Service contracts (section 39)	If while the developer is still entitled to exercise 75% of the votes of the body corporate, the body corporate has committed to a contract for the supply of services and that contract is for a term of longer than one year, the body corporate must act in the best interests of the body corporate in ensuring a balance is achieved between the	If while the developer is still entitled to exercise 75% of the votes of the body corporate, the body corporate has committed to a contract for the supply of services and that contract is for a term of longer than one year, the body corporate must act in the best interests of the body corporate in ensuring a balance is achieved between the

Responsibilities and powers	Head body corporate (All owners of the a unit title development where one of the units has in turn been subdivided)	Subsidiary body corporate (All owners of subsidiary unit title development only)
	interests of the service contractor and the interests of the body corporate, that the terms are appropriate for the unit title development that the powers and functions described in the contract are appropriate and do not adversely affect the ability of the body corporate to carry out its functions.	interests of the service contractor and the interests of the body corporate, that the terms are appropriate for the unit title development that the powers and functions described in the contract are appropriate and do not adversely affect the ability of the body corporate to carry out its functions.
Providing records and documents on request from a unit owner (section 206)	A body corporate must provide an owner with copies of records and documents if requested by an owner. The documents to be provided include rules, insurance policies the long-term maintenance plan, agendas, minutes and financial statements.	A body corporate must provide an owner with copies of records and documents if requested by an owner. The documents to be provided include rules, insurance policies (including those held by a head body corporate) the long term maintenance plan, agendas, minutes and financial statements.
Appointment of administrator (section 141)	A head body corporate or parent body corporate may apply to the High Court for the appointment of an administrator of a subsidiary.	A subsidiary body corporate may apply to the High Court for the appointment of the administrator of its parent body corporate.

Responsibilities and powers	Head body corporate (All owners of the a unit title development where one of the units has in turn been subdivided)	Subsidiary body corporate (All owners of subsidiary unit title development only)
Consents to additions or structural alterations (section 82)	The parent body corporate or the head body corporate may withhold consent if the additions or structural alterations change the boundary of the subsidiary unit title development or have a material impact on the use or amenities of the parent unit title development or head unit title development.	The subsidiary body corporate may only consent to additions of structural alterations to any principal unit in the subsidiary unit title development that materially affect any other unit in the parent unit title development or the common property of its parent unit title development if it has the written consent of the body corporate for each unit title development layer between it and the head unit title development and the body corporate for the head unit title development.

APPENDIX THREE

Useful forms

- Proxy appointment
- Postal voting
- Notice of resolution to be decided without a general meeting
- Pre-contract disclosure

Proxy appointment form

Sections 102(3), Unit Titles Act 2010

To [*name of person authorised to receive proxy appointment forms*]

Unit plan: [*reference number*]

Body Corporate Number: [*number*]

Proxy appointment

We/I*, [*full name, address*], being the owner/owners* of [*principal unit*] and therefore an eligible voter within the meaning of section 96(1) of the Unit Titles Act 2010, appoint [*full name*] as my/our* proxy for the purposes of the general meeting of the body corporate to be held on [*date*].
*Select one.

If the general meeting is adjourned and reconvened, this proxy appointment is valid for the purposes of the reconvened meeting.

Motions

Complete the following table.

Motions	Type of resolution
[*Summarise the motion*.]	[*State whether the motion requires an ordinary or special resolution and whether, is passed, the resolution would be a designated resolution*.]

Date: [*day, month, year*]

Signature of eligible voter:

Notes

1. This proxy appointment expires at the end of the general meeting referred to in the form or, if that meeting is adjourned, the end of the reconvened meeting.

2. The full text of motions is contained in the notice of general meeting, a copy of which should be provided to the proxy.

3. Your proxy may not vote unless all body corporate levies, and other amounts that are owing in respect of your unit, have been paid.

4. If the unit owner is a body corporate or an unincorporated body, the representative (recorded in the register of unit owners) of the unit owner must sign the form.

5. If the unit is owned by more than 1 person, every owner must sign the form.

6. If the unit is owned by more than 1 person, one of the unit owners may be appointed as proxy.

Postal voting form

Sections 103, Unit Titles Act 2010

To [*name of person authorised to receive postal voting forms]*

Unit plan: [*reference number*]

Body Corporate Number: [*number*]

Instructions

You are entitled to vote at the body corporate meeting to be held on [*date, place*] by casting a postal vote. The motions to be decided at the meeting are summarised in the table below and more particularly set out in the notice of meeting. If you intend to cast a postal vote, you must indicate your vote in the final column of the table and return the form to [*name of person authorised to receive and count postal votes*] so that it is received by [*date*].

Postal vote

We/I*, [*full name, address*], being the owner/owners* of [*unit number*] and therefore an eligible voter within the meaning of section 96(1) of the Unit Titles Act 2010, intend to cast the following postal vote(s) at the meeting of the body corporate to be held on [*date, place*].
*Select one.

Motions

Complete the following table.

Motion	Type of resolution	Instructions on voting procedure	Vote
[*Summarise the motion*]	[*State whether the motion requires an ordinary or special resolution and whether, if passed, the resolution would be a designated resolution.]*	[*Include information on voting procedure in relation to any of the motions if necessary.]*	[*Indicate in the case of each motion whether you vote for, or against, the motion, or that you wish to abstain.]*

If the general meeting is adjourned and reconvened, this postal vote is valid for the purposes of the reconvened meeting.

Date:

Signature of eligible voter:

Notes

1. The body corporate completes the instructions section and the text of the motions. You should complete the postal vote section and the vote section.

2. Your postal vote will not be counted if any body corporate levies, or other amounts that are payable in respect of your unit, are outstanding.

3. If a poll is requested, your ownership interest will be counted as part of the poll. If no poll is requested, your postal vote will be counted as 1 vote. You cannot request a poll.

4. If at the general meeting of the body corporate the wording of a motion is materially altered, your postal vote in relation to that motion will not be counted. It is the responsibility of the chairperson to decide what constitutes a material alteration. If you are concerned that your postal vote may not be counted as a result of an amendment to a motion, you should consider appointing a proxy to attend and vote at the meeting on your behalf.

5. If a quorum is not present at the general meeting of the body corporate, and regulation 13(1) of the Unit Titles Regulations 2011 does not apply, the meeting will be adjourned until the same day 1 week later and your postal vote will be counted at that meeting.

6. If the unit owner is a body corporate or an unincorporated body, the form must be signed by the representative (recorded in the register of unit owners) of the unit owner.

7. If the unit is owned by more than 1 person, every owner or his or her authorised representative must sign the form.

Notice of resolution to be decided without

general meeting

Sections 104, Unit Titles Act 2010

To [*name of eligible voter]*

Unit plan: [*reference number*]

Body Corporate Number: [*number*]

Instructions

1. The attached resolution is to be decided by the body corporate without a general meeting.

2. You are entitled to vote in favour of, or against, the resolution. If you are in favour, you should sign the resolution and return it to [*full name, address*] so that it is received by [*date*]. If you are against the resolution, you should not sign it or return it.

3. An ordinary resolution must be signed by not less than 50% of eligible voters, and a special resolution must be signed by 75% of eligible voters, in order to be passed.

4. No poll can be requested in relation to the resolution.

Date: [*day, month, year*]

Signature of body corporate:

Pre-contract disclosure statement

Section 146, Unit Titles Act 2010

Unit plan: [*reference number*]

Body Corporate Number: [*number*]

Unit number: [*number*]

Pre-contract disclosure statement

1. This pre-contract disclosure statement is provided to prospective buyers of the property in accordance with section 146(1) of the Unit Titles Act 2010.

General information

2. [*Set out a brief explanation of each of the following:*

   - *unit title property ownership:*
   - *unit plan;*
   - *ownership and utility interests:*
   - *body corporate operational rules:*
   - *pre-settlement disclosure:*
   - *additional disclosure:*
   - *computer register:*
   - *land information memorandum:*
   - *easements and covenants.*]

3. Further information about the matters set out above can be obtained from [*name, address*].

Information about the unit

4. The amount of the contribution levied by the body corporate under section 121 of the Unit Titles Act 2010 in respect of the unit is $[*amount*].

5. The period covered by the contribution in paragraph 4 is [*period*].

6. The body corporate proposes to levy $[*amount*] under section 121 of the Act in the next 12 months.

7. The body corporate proposes to carry out the following maintenance on the unit title development in the next 12 months: [*set out details of proposed maintenance*].

8. The body corporate has the following accounts: [*set out details of every bank account held by the body corporate*].

9. Under section 148 of the Unit Titles Act 2010, a buyer may request an additional disclosure statement before the settlement of an agreement for sale and purchase of a unit. The buyer must pay to the seller all reasonable costs incurred by the seller in providing the additional disclosure statement. The estimated cost of providing an additional disclosure statement is $[*amount*].

10. *Select the statement that applies.*

    The unit or the common property is, or has been, the subject of a claim under the Weathertight Homes Resolution Services Act 2006 or other civil proceedings relating to water penetration of the buildings in the unit title development.

    or

    The unit or the common property is not currently, and has never 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.

Date: [*day, month, year*]

Signed:

GLOSSARY

Accessory unit A unit that is shown on the unit plan as an accessory unit and is designed for use that is supplementary to a principal unit. Accessory units are commonly used for car parks, storage areas or access ways that are shared by some but not by everyone. Separate titles cannot issue for accessory units. They can only be transferred with principal units or from one principal unit to another.

Base land This is the phrase used in the new legislation to describe the underlying land of a unit title development. It includes the land that is originally subdivided but also is flexible enough to include any common property added to that or removed from it. It also includes any shared rights to an access lot even though that access lot may be partly owned by people who are not part of the unit title development.

Body corporate A body corporate is automatically created when a unit plan is deposited. It is a separate entity that can do things a natural person may do. The members of the body corporate are all of the owners of units that are described in a unit plan. An owner of an FDU is not a member of a body corporate. In layered developments a subsidiary body corporate is a body corporate for the subsidiary unit title development.

Body corporate committee A committee to whom powers of the body corporate have been delegated.

Body corporate manager This is the term we have used to describe the party with whom the body corporate contracts to carry out management and secretarial functions. A body corporate may contract with a body corporate manager for a range of purposes including to ensure compliance with body corporate obligations, for the management of common property, and body corporate meetings and for secretarial tasks.

Body corporate operational rules These are rules that are binding on the owners, occupiers and mortgagees of units. Each body corporate will have its own rules which will be either the rules prescribed by legislation or rules the body corporate has registered at Land Information New Zealand.

Body corporate secretary The Unit Titles Act 1972 imposed an obligation in the precedent body corporate rules to appoint a secretary to keep proper books of account and to carry out various functions as they were delegated by the body corporate.

Building manager This is the term we have used to describe the person with whom the body corporate or the body corporate manager or body corporate secretary contracts to provide on-site maintenance. They may manage specific units for private individuals and/or maintenance of the common property.

Common property This is the part of the body corporate development that is not a principal unit, nor an accessory unit nor a future development unit. It is land and associated fixtures that are available for general use.

Cross lease Cross leases are a form of ownership developed in the 1960s and used extensively until the passing of the Resource Management Act in 1991. Neighbours together own the whole of the property that comprises their sections. As owners they are jointly a landlord. They lease their respective homes to each other and grant each tenant areas that are available for exclusive use. This method of ownership is extensively used in New Zealand.

Deposit of unit title plan When a unit title plan is prepared it must be lodged at Land Information New Zealand. Once all regulatory requirements are met for the unit title subdivision, the preparation of the plan and the relevant legal documents, and LINZ is satisfied with the documentation, the plan will deposit. Separate titles can then issue and the body corporate will have come into being.

Designated resolution These are particularly important resolutions that are identified in the UTA2010. If a designated resolution is passed a process must be used that allows for objections. The process is described in Chapter 5.

Flat or office-owning company This is a method of ownership used prior to the enactment of the Unit Titles Act 1972 where a number of people wanted to share ownership and use of a building. A person will own a parcel of shares in a company that owns the building. They will also have the benefit of a lease or licence entitling them to exclusive occupancy of part of the building. These arrangements continue to exist but are not common in New Zealand.

Future development unit or FDU An area identified within a unit title development as an area that is to be developed at a later stage is called a future development unit.

Head body corporate In a layered development the head body corporate is the body corporate of the initial unit title development.

Head unit title development This is the primary unit title development where there is layered unit title developments.

Layered unit title development A new concept introduced by the Unit Titles Act 2010, this refers to a subdivision of a unit title into further units.

LINZ Land Information New Zealand.

Long-term maintenance fund A fund established by the body corporate, contributed to by the owners of principal units and used for payment of costs incurred in the long-term maintenance of the development.

Long-term maintenance plan Bodies corporate are required to put a long term maintenance plan in place to ensure future maintenance requirements are understood and met. Regulations prescribe the components of a long-term maintenance plan.

Ordinary resolution For an ordinary resolution to pass a majority of the eligible voters who vote must vote in favour of the resolution. One vote may be exercised for each principal unit. If a poll is requested 50% of the 'ownership interest' must vote in favour of the resolution.

Ownership interest This is a concept created by the UTA2010. An ownership interest is fixed by a registered valuer before a unit plan is deposited. It is calculated on the relative value of the unit in relation to other units within the development. An ownership interest forms the basis for assessing the obligations and rights of the owners including their beneficial interest in the common property, voting rights if a poll is required and their contribution to capital costs.

Parent body corporate This is the body corporate that is created when a parent unit title development is completed in a layered development.

Parent unit title development When a layered development is completed, the phrase parent unit title development is used to describe the unit title development that contains the principal unit that has been subdivided. Sometimes this will be the head unit title development, but if there are more than two layers there will be both a head unit title development and another parent unit title development.

Pre-contract disclosure Describes the information that a seller is required to give to a buyer at least 5 working days before the settlement date. The information to be disclosed is prescribed by regulation.

Pre-settlement disclosure This phrase describes the information that must be given to a buyer by the seller before settlement. It must include a certificate from the body corporate confirming the information is correct. Regulation prescribes what information is required to be provided.

Principal unit This means a unit that is shown on the unit plan as a principal unit. It will generally be used as a residence or for business and must be within a building or contain a building (or part of a building) unless it is a car park. A car park may be a principal unit. A future development unit is not usually a principal unit. In a layered development a reference to a principal unit that has been subdivided will also include a reference to the accessory unit that was also subdivided.

Proposed unit development plan A proposed unit development plan must be prepared when a staged development is contemplated. It sets out the finalised development that is intended to result once each of the stages has been completed.

Quorum At a general meeting those entitled to exercise the vote of 25% or more of the principal units constitute a quorum. If there are 2 or more members in a body corporate the quorum must be at least 2 members.

Redevelopment Redevelopment is a legally defined term to describe changes made to a unit title development. Not all changes are redevelopments.

Register of owners A body corporate must keep a register of all owners of principal units and accessory units. Regulations set out specific information that must be included in the register.

Special resolution For a special resolution to pass 75% of the eligible voters who vote on the resolution must vote in favour of the resolution. One vote may be exercised for each principal unit. If a poll is requested 75% of the 'ownership interest' must vote in favour of the resolution.

Stage unit plan A plan that describes the units and common property that have been completed in a particular stage and identifies any balance (that will be completed in future stages) as future development units.

Staged development A unit title development that is completed in stages.

Stratum estate The rights that are acquired when owning a unit. These include the fee simple (or leasehold) estate in the unit, a right to shared ownership of all units if the unit plan is ever cancelled and, other than for an FDU, a share in common with other unit holders in the common property.

Subsidiary body corporate A subsidiary body corporate is the body corporate that is created in a layered development when a unit title plan for a subsidiary unit title development is deposited.

Supplementary record sheet This is a record sheet that is created by the Registrar-General of Land. It sets out that the body corporate owns the common property and that owners of all of the units are entitled to the common property and records any interests that affect the land for the underlying development.

Turn-over disclosure The UTA2010 imposes an obligation on the original owner of a unit title development to give the body corporate information about the development and about any contractual interest the owner is retaining. This is called turn-over disclosure. The precise requirements of turn-over disclosure are set out in regulations.

The 1972 Act This is shorthand we have used for the Unit Titles Act 1972.

Unit A unit is an area with defined dimensions that is designed for separate ownership. It may be on, above or below the surface of the land. In general discussion people will use a 'unit' to describe their apartment or workplace but from a legal perspective the definition it not limited to the boundaries of a building.

Unit entitlements The Unit Titles Act 1972 required that a valuer assess the unit entitlements for each principal unit and each accessory unit. The assessment was done when the plan was first deposited with Land Information New Zealand. It was calculated on the relative value of the unit in relation to other units within the development and formed the basis for assessing the obligations and rights of the owners including their share in the common property and their contributions to levies.

Unit plan Unit plan is a term that includes any type of plan deposited with Land Information New Zealand in accordance with either the Unit Titles Act 1972 or the Unit Titles Act 2010.

Unit title development This is all of the units and the common property comprised in a development completed under either the Unit Titles Act 1972 or the Unit Titles Act 2010.

UTA2010 This is a shorthand we have used for the Unit Titles Act 2010.

Utility interest This is a concept created by the Unit Titles Act 2010. It forms the basis for assessing obligations and rights of owners in respect of long-term maintenance, contingency funds and operating accounts. A utility interest may or may not be the same as a ownership interest.

Many of the words and phrases in this glossary are defined in the legislation itself. The definitions set out in this book are not intended to be precise legal definitions. Their intention is to give the reader a general understanding of how the word or phrase is commonly used. They should not be relied on for precise legal opinions.

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Debra and Denise.

ABOUT THE AUTHORS

Debra Dorrington and Denise Marsden are both partners in Auckland CBD law firm AlexanderDorrington. Both specialise in property law and know the new Unit Titles Act 2010 inside and out. They give pragmatic legal advice to developers, owners, managers, bodies corporate, lessors and lessees – in fact anyone involved in property. Both authors are regular bloggers and presenters on property topics.

Debra Dorrington

Denise Marsden

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