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Legal Landscape

PROPERTY

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UNIT TITLES ACT 2010 – THREE MONTHS ON

It's been three months since the Unit Titles Act 2010 (**Act**) came into force. The Act was passed in April 2010, draft regulations issued on 9 May 2011, submissions on those regulations (**Regulations**) closed 10 June 2011 and the Act itself came into effect on 20 June 2011.

Some cynics would say, given the large delay between the passing of the Act and the release of the draft regulations, perhaps a little more time should have been made available for interested parties to make submissions on the draft regulations before the Act itself came into effect.

The question is whether the old adage "act in haste, repent at leisure" applies to this new regime. There has already been a lot of ink on paper dedicated to identifying possible problems such as:

- the rigidity of the disclosure requirements and the implications for the unwary of breaching those requirements;
- the absolute obligations and responsibilities of a chairman of a body corporate;
- the conflicts between existing rules and the compulsory regulations imposed on existing bodies corporate within the 15 month transition period;
- the practicality of layered developments;
- how realistic it is to expect existing bodies corporate to alter utility interests so they differ from ownership interests;
- the operational rules.

So, how are we dealing with these issues in practice, given the apparent uncertainties under the existing legislation?

Disclosure requirements

There is significant inconsistency amongst lawyers, bodies corporate, real estate agents, vendors and purchasers as to what levels of disclosure are required or should be sought. In addition, the deadlines

for meeting various disclosure requirements are very rigid and the apparent consequences of failing to meet them are dire, such as cancellation by notice.

In practice, parties enter agreements because they are willing vendors and purchasers. Unless there is a significant problem, parties will continue to complete those purchases and sales. Notwithstanding this, minor breaches of the disclosure requirements may be used by one party to renegotiate more favourable terms.

Another issue is where receivers and mortgagees or liquidators are trying to sell properties. They may be unable to provide the disclosure information because the body corporate secretary is perhaps unknown or is unwilling to provide information where levies are unpaid, or a mortgagee, receiver or liquidator is unwilling to certify information given the lack of involvement in the history of the property. Although there is an express prohibition against contracting out of the disclosure provisions, parties are in fact doing so and settling transactions without having legally binding agreements between them.

Only time will tell whether positions taken by such parties will have any real consequences. As with all things, it is only when parties are in dispute and unwilling to complete contractual arrangements that arguments about enforceability of contracts and consequences of breaching statutory obligations arise.

The responsibilities of the Chairman

Under the new regime the chairman of a body corporate (who must be an owner) has significant personal obligations and responsibilities. A number of those responsibilities can be delegated to a committee of body corporate owners and in turn some of those responsibilities can be contracted out (but not delegated) to a corporate body corporate manager/secretary. For the better functioning bodies corporate, in the long term it will be business as usual.

There is more of an issue where there are informal bodies corporate which don't have independent secretaries, such as where there is a small group of owners and one of the owners runs the body corporate by paying insurance premia on behalf of all and perhaps issuing small levy statements. The maintenance, long term maintenance plan and accounting obligations imposed under the new regime could create significant difficulties for such an owner including exposure to personal liability in certain cases.

Transitional period

On the face of it, existing bodies corporate have 15 months before they must fully comply with the new regime. However, there are a number of obligations imposed on bodies corporate which give rise to conflicts between existing rules and the Regulations. Bodies corporate need to be very careful how they manage the conflicts and make proactive decisions about whether the easier solution is to merely opt into the new regime sooner rather than later.

Different options for developments

One of the exciting changes introduced by the Act is the ability to layer strata developments so there can be, in effect, more than one development. In practice, whether parties are going to be prepared

to meet the possible additional costs of operating layered bodies corporate is an issue. A number of commentators believe that there is likely to be very little uptake of this innovative process. Again, only time will tell.

Utility/ownership interests

Another positive is the ability for bodies corporate to run two separate "interest" schedules - one for ownership interests and one for utility interests. This allows bodies corporate to adjust the quantum of levies based on specific circumstances rather than merely on valuation (which was the case in the past). Obviously when bodies corporate are set up, this is a perfect opportunity for matters to be considered which are relevant to the calculation of such interests.

For existing bodies corporate, the genuine ability to change these interests is probably limited given the voting structure in place that will be required. The likely self-interested voting of owners who get the benefit of, perhaps, unreasonable contributions by others to the total levies paid will likely come into play.

Operational rules

Most of what one would expect to see in the rules governing a body corporate is now set out in the Regulations and the Act so there should be a hopefully less litigious minefield around enforceability of rules.

Where to from here?

There are a number of amendments which we believe should be made to the Act and the Regulations. In the meantime, as with most property related matters, the practicality and common sense of those who deal with property means that it will more than likely be business as usual for most bodies corporate.

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