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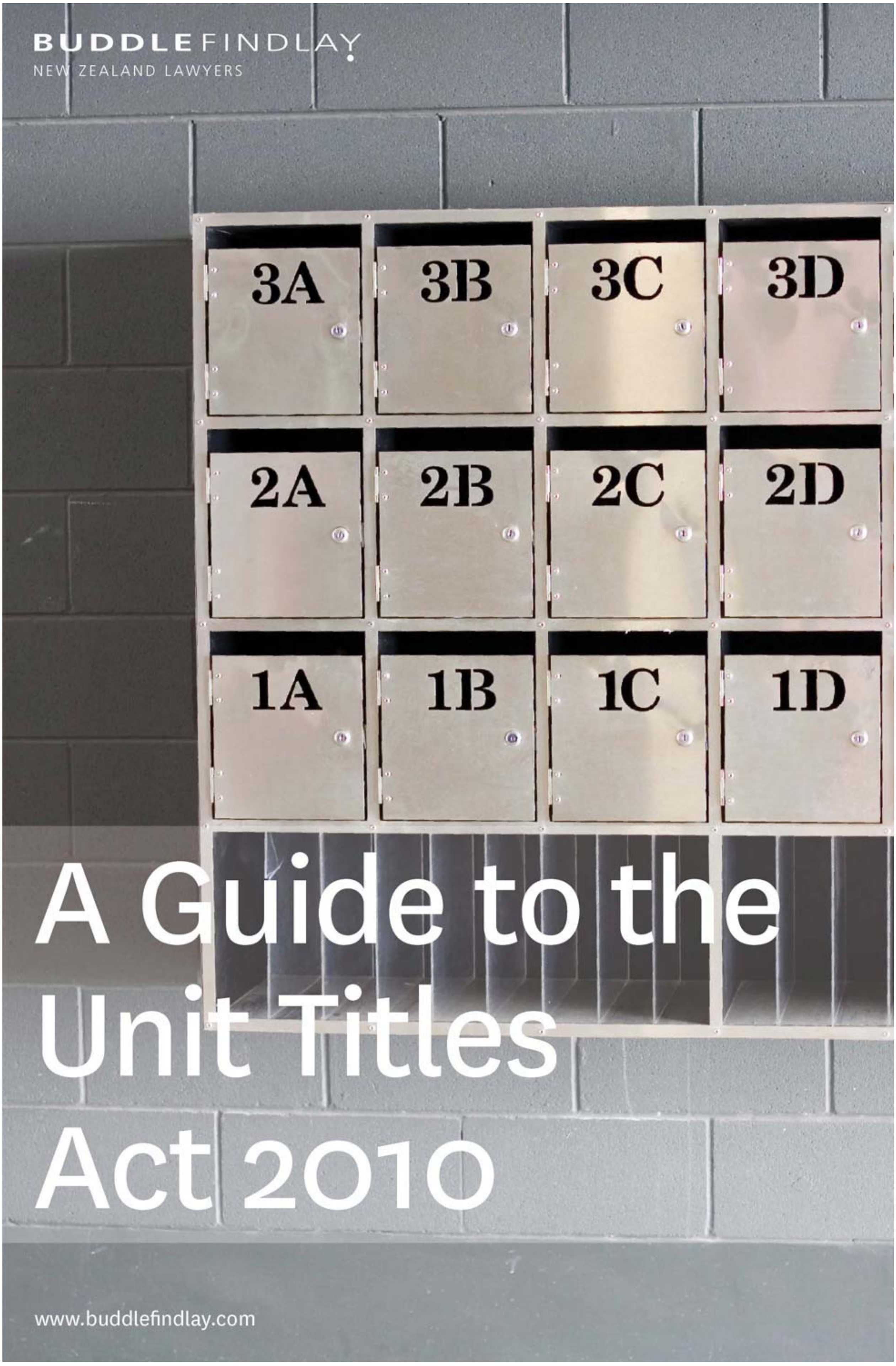

A Guide to the Unit Titles Act 2010

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Background

The Unit Titles Act 2010 (the 2010 Act) comes into effect on 20 June 2011. This is a brief introduction to the core concepts in the new Act. Some are variations on the 1972 approach but others are entirely new. This is not intended as a definitive guide to the 2010 Act nor the regulations made under the 2010 Act which contain a lot of further detail on certain areas of body corporate operations.

As people spend more time using the 2010 Act other issues will arise and this guide will be updated accordingly.

How does the 2010 Act affect an existing unit title development?

All existing unit title developments will be deemed to be unit title developments under the 2010 Act. This will mean that from 20 June 2011 all of the 2010 Act will apply to existing unit title developments apart from two exceptions. These exceptions are the body corporate operational rules and the long-term maintenance plans. The 2010 Act also deals with some transitional matters allowing for a smooth transition from the 1972 Act to the 2010 Act.

Body corporates have 15 months after the 2010 Act comes into force to deal with their existing rules. It was expected that the regulations under the 2010 Act would have detailed body corporate operational rules. This would have allowed existing body corporates to assess whether the new rules were more suitable than their existing ones. At one stage it was expected that the regulations would contain two sets of rules, one set for residential and one set for non-residential. However, the regulations only contain two rules which relate to general matters of being community minded.

This leaves existing body corporates with a more complicated decision. If they have a full set of existing rules (which many do) they will have to check the rules for compliance with the 2010 Act, amend them if necessary, approve those rules at a body corporate meeting and then notify LINZ in the prescribed form. For many body corporates this will be the easiest and quickest method of dealing with the problem. This will only require a simple majority of the owners to vote in favour.

An issue may arise where existing body corporates have had disputes over rules. The requirement to reconsider rules may allow some owners to seek new rules to resolve those disputes. An example that has been used is where you have a mixed-use development with residential and retail and the current rules give certain rights to the retail units. If the owners of residential units comprise a majority in the development they could force through rules that disadvantage the retail units. This would be subject to some limitations but the opportunity exists for some disputes over rules.

If an existing body corporate never adopted rules and is, instead, relying on the rules set out in the Second and Third Schedules of the 1972 Act it will have to adopt a full set of rules under the 2010 Act.

Long-term maintenance plans are discussed in detail later on in this guide. They require body corporates to plan for future maintenance of various elements of the buildings. A body corporate can postpone the requirement to establish these long-term maintenance plans. Again, they can take the 15 month transition period in which to do so.

The most difficult transition but fortunately short-lived concerns the disclosure regime. Again, this is discussed in detail later on in this guide but in broad terms the disclosure regime requires the seller of a unit to provide certain information to the buyer of a unit.

On 20 June 2011 the transitional provisions for disclosure will apply if a buyer and seller have entered into an agreement for sale and purchase and there are five working days or less before settlement date. In other words, settlement is on 27 June 2011 or earlier. If it applies the buyer cannot delay settlement or cancel the agreement if pre-settlement disclosure is not made. Also the buyer cannot request additional disclosure. The seller can agree to provide disclosure if it chooses to do so.

Confusion may arise due to section 228(4) of the 2010 Act which states that nothing limits the seller's obligations under section 36 of the 1972 Act. Section 36 does not impose any obligations on sellers. It merely requires the body corporate to respond to applications for certificates. It is more likely that pre 20 June 2011 contracts will require the seller to provide a section 36 certificate prior to settlement. On a practical level it may be better for the section 36 certificate to be obtained prior to 20 June 2011. If that is impossible then the body corporate should provide a pre-settlement disclosure. The information is largely the same so the form is likely to be irrelevant.

For all other contracts the new disclosure regime will apply.

Does a unit title development have to have a body corporate committee?

A body corporate of nine or fewer units can elect not to form a body corporate committee. Given that the 2010 Act relies on the body corporate to do a number of things that are vital to the operation of the Act it is unlikely that many body corporates will elect to take advantage of this right.

All other unit title developments must have a body corporate committee.

What sort of powers and obligations do body corporates have under the 2010 Act?

As with the 1972 Act, the body corporate comes into existence when the unit plan for the development is deposited.

Section 77 provides that a body corporate may do anything authorised by the Act or any other Act, and may do anything a natural person of full age and capacity may do, except as provided for in the Act.

Section 78 then provides that a body corporate may only act under section 77 for the purpose of performing its duties or exercising its powers. Clearly this is a limitation on the body corporate powers.

Sections 79 and 80 then set out the responsibilities and rights of owners of principal units.

Section 79 provides that an owner of a principal unit:

- Has all the rights derived from being registered as the owner of the unit under the Act
- Holds a share in the common property
- Is entitled to exercise votes

- Is entitled to quiet enjoyment of his or her unit without interruption by other unit owners or occupiers or the body corporate or its agents, except as authorised by the Act
- Has the right to enforce the body corporate operational rules.

Interestingly, a unit owner may make alterations, additions or improvements to his or her unit, so long as these are within the unit boundary and do not materially affect any other unit or common property.

Section 80 then sets out the responsibilities of owners of principal units. An owner of a principal unit must permit the body corporate to enter the unit at any time in an emergency and at all reasonable hours after giving reasonable notice to view the condition of the unit:

- To ascertain compliance with the obligations under the Act
- To maintain, repair or renew any infrastructure for services and utilities that serve more than one unit and any building element that affects more than one unit, or the common property
- To maintain, repair or renew any common property
- To ensure the body corporate operational rules are being complied with.

Unit owners are obviously also required to comply with all laws and to keep and maintain their unit in good order to ensure that no damage or harm is or has the potential to be caused to the common property, any building element, any infrastructure or any other unit in the building.

Section 81 deals with absentee owners. This is defined as someone who leases or licenses their unit, and who is absent from New Zealand for longer than three consecutive weeks. Absentee owners must appoint a person in New Zealand to act as his or her agent and advise the body corporate of the agent's name, address for service and contact details. If the owner of the unit does not appoint an agent or has appointed an agent who fails to enforce the body corporate operational rules, the body corporate may enforce those rules itself.

The body corporate has powers and duties set out in section 84. However, section 84 merely provides that the body corporate has the powers and duties set out in a list of sections, rather than stating any new powers or duties.

The body corporate is required to pay the ground rental from any levies or a leasehold unit title development, and must do so before making any other payments.

How does the 2010 Act deal with body corporate governance?

The 2010 Act and the regulations aim to bring a much greater level of clarity to body corporate governance. In particular the regulations:

- Provide certainty to unit owners that those responsible for the day-to-day running of the body corporate do so transparently, democratically and in the interests of the majority of unit owners
- Ensure that unit owners are not unjustly disenfranchised from holding elected positions within the body corporate or committee
- Promote accountability between those responsible for the day-to-day running of the body corporate and unit owners.

How are meetings of the body corporate arranged?

All meetings of a body corporate are general meetings. The first annual general meeting must be held as soon as practicable, and in any event within six months after the date of the deposit of the unit plan. Existing body corporates will be deemed to have had their unit plan deposited on 20 June 2011.

At that first meeting the body corporate must nominate and elect a chairperson in accordance with the regulations. Subsequent meetings must be held once every calendar year and not later than 15 months after the previous meeting.

The annual general meeting must be called by the chairperson in accordance with the regulations.

An extraordinary general meeting must be called by the chairperson in accordance with the regulations if a notice asking for it is proposed in a notice signed by or for the unit owners of not less than 25% of the principal units and given to the chairperson. Alternatively, an extraordinary general meeting may be called by the chairperson or the body corporate committee in accordance with the regulations.

The regulations require:

- The body corporate to issue notice of an annual general meeting to every unit holder for the first meeting, in the case of every other meeting, notice is issued by the chairperson
- Notice to be issued at least three weeks before the date of the meeting where it is a parent unit title development, in every other case notice must be served at least two weeks in advance
- That the notice includes the agenda, motions to be decided, names of candidates for election and voting procedures for voting by proxy or post.

How many owners are required for a quorum?

At a general meeting a quorum will be the persons entitled to exercise the voting power of not less than 25% of the principal units or their proxies. If the body corporate contains two or more members, a quorum must be at least two members.

The regulations provide that:

- A meeting may proceed without a quorum if people who have cast postal votes together with those present are entitled to exercise the voting power in respect of not less than 25% of the principal units in the development
- If a quorum is not reached and the above does not apply the meeting must be adjourned until one week later and must proceed whether a quorum exists or not.

How are the committee and chairperson elected?

The regulations cover the election process for the chairperson and committee in detail. For the chairperson the regulations require that:

- The chairperson or subsidiary body corporate representative must be an owner of a principal unit or a director of a company that owns a unit who has been nominated by another owner
- The chairperson or subsidiary body corporate representative must be elected by ordinary resolution at every annual general meeting
- The chairperson or subsidiary body corporate representative may be removed by ordinary resolution of the body corporate at an extraordinary general meeting.

The regulations set out the minimum responsibilities of the chairperson including maintaining the register of unit owners, preparing the agenda for each general meeting and keeping financial accounts and records.

The body corporate must decide how many members it will have on its committee and the number required for a quorum.

A committee member can nominate themselves or they can be nominated by another owner. If another owner nominates someone, that person must consent to being nominated.

What is the body corporate register?

The body corporate is required to keep a register of the unit owners. The regulations provide that a register is kept of unit holders names, unit numbers, address for service and contact details. The chairperson or body corporate committee may search the register for the purpose of giving notice of body corporate meetings, resolutions voted on and serving documents.

What can the body corporate delegate to the committee?

The body corporate must provide a written notice of what functions it delegates to the committee and the committee must report to the body corporate on those functions.

The regulations require that a notice must be served on each member of the body corporate that:

- Describes each duty or power that is being delegated and the restrictions on that power
- Specifies the duration of the delegation
- Contains a statement that the notice of delegation is the body corporate committee's authority to perform each duty or power
- Specifies the frequency of the body corporate committee reports on the delegation to the body corporate.

A body corporate committee must report to the body corporate at each annual general meeting with a description of the duties and powers delegated to it and an update on the fulfilment of those duties and exercise of powers.

A body corporate is entitled to delegate any of its duties or powers, either generally or specifically to the body corporate committee by special resolution in written notice. The body corporate cannot delegate the power to delegate, nor can it delegate the power to reassess ownership interests and utility interests. It can also not delegate the ability to require the body corporate to comply with the operational rules or the ability to deal with insurance moneys.

Who can vote at a body corporate meeting?

A person is eligible to vote at the general meeting of a body corporate if they are aged 16 and over and their name is entered on the register of owners of principal units as the owner of the principal unit or the representative of that owner, or who is a nominee of a company, the name of which is entered on the register of owners of principal units as the representative of the owner.

"Representative of the owner" is defined as a person who is a guardian, trustee, receiver or other representative of the owner, and is authorised to act on the owner's behalf, or a person authorised by law to administer, manage or control the property of the owner.

An eligible voter cannot vote unless all their body corporate levies have been paid. If an eligible voter is required by their mortgage to obtain the consent of the mortgagee before exercising a vote, then that condition must be complied with. There is no indication as to how the body corporate might know this is the case. There is also no provision outlining the consequences of an owner breaching this provision.

If someone is in dispute with the body corporate over their levies, they are able to pay their levies noting that they are in dispute if the purpose of making that payment is simply to exercise their vote.

Mortgagees can exercise votes on behalf of the owners; however they need to give written notice to the body corporate that they intend to do so.

How are votes counted at a meeting?

If a motion at a meeting is to be decided by ordinary resolution, then one vote only may be exercised for each principal unit. For the motion to be passed, a majority of the eligible voters who vote, must vote in favour of that resolution. An ordinary resolution passed in this way is subject to a request for a poll under section 99, and the motion being confirmed by that poll.

If a motion is to be decided by special resolution, then again only one vote may be exercised for each principal unit. For a special resolution to pass, however, 75% of the eligible voters must vote in favour of the resolution. Again, special resolutions are subject to a request for a poll.

If a poll is requested, only one vote may be exercised for each principal unit on a special poll. For an ordinary resolution to pass, it is important to note that if a poll is requested, 50% of the ownership interests represented by those voting must vote in favour of the motion. Similarly, in relation to special resolutions, for the motion to pass 75% of the ownership interests represented by those voting must vote in favour.

According to the Department of Building and Housing, a practice had developed where some professional body corporate managers obtain enduring proxy votes from unit owners. Apparently these operate in a similar fashion to powers of attorney. According to the Department these enduring proxy votes have a number of negative consequences if improperly used by the holder including:

- If the enduring proxy is held on behalf of absentee or investor unit owners the holder has the ability to vote to the detriment of other unit owners who actually live in the development
- The voter eligibility provisions of the Act are circumvented allowing a non-unit owner to vote as they wish on body corporate matters as if they have a property right in the development; and
- Enduring proxies allow a person to vote where a conflict of interest may exist, e.g. on a motion that proposes to renew their contract for services.

The regulations now provide that a proxy is appointed for a particular meeting only. The proxy will expire at the end of the general meeting or, if the meeting is adjourned, at the end of the reconvened meeting. Unit owners are also entitled to exercise the right to vote by casting a postal vote which must be in the prescribed form.

A resolution can be passed without a general meeting, provided that notice is given to eligible voters in accordance with the regulations. A resolution signed in writing by not less than 50% of eligible voters for an ordinary resolution, or 75% for a special resolution, is as valid as if it had been passed at a meeting of the voters.

The regulations provide that a notice passing a resolution must have the following information:

- Statement that the resolution that accompanies the notice is to be passed without a general meeting
- Instructions on how to vote
- Name and address of the person to whom the vote must be returned and the date by which the vote must be cast
- The percentage of eligible voters needed to vote to pass the resolution
- A statement that no poll can be requested in relation to the resolution.

With all of these added responsibilities how does the body corporate manage its money?

The 2010 Act provides that the body corporate must establish and maintain a long-term maintenance fund. The body corporate can by special resolution decide not to establish this. However, if the body corporate has a long-term maintenance plan and levies on an annual basis for that, it is unlikely that the body corporate would vote to have no such fund.

The long-term maintenance fund can only be applied towards spending relating to the long-term maintenance plan. The body corporate must by special resolution approve any amount to be spent on any one maintenance item if the amount exceeds the amount specified for that item in the long-term maintenance plan by more than 10%.

The Act also allows the body corporate to spend or borrow money and invest any money in any investment authorised by law for the investment of trust funds.

This will not require the body corporate to be advised by any particular sort of investment advisor nor will the body corporate themselves have to be approved for such activities. Clearly, unit owners will have to have a great deal of trust in their body corporates if the body corporates are to invest the long-term maintenance fund or other funds.

We have already touched on the long-term maintenance account but the body corporate has other financial obligations.

In order to meet certain expenses a body corporate must have an operating account. These expenses are hardly surprising and cover:

- Those relating to management and governance of the development
- Those relating to the provision of services and amenities for the benefit of the development
- Ground rental or licence fees
- Those incurred at least once a year for maintenance.

A body corporate can opt to have a contingency fund to provide for unbudgeted expenditure. It can also opt to have a capital improvement fund. This is to provide for spending that is not in the long-term maintenance plan and adds to or upgrades the development.

Section 132 requires the body corporate to keep accounting records that:

- Correctly record and explain the transactions of the body corporate
- Enable the financial position of the body corporate to be determined with reasonable accuracy at any time
- Enable the financial statements of the body corporate to be readily and properly audited or reviewed.

The regulations will prescribe a form for financial statements which must be audited by an independent auditor, reviewed by an accountant or verified by an accountant under specific procedures as determined by the body corporate. In any event, the person must be a person qualified to act as an auditor for a company under section 199 of the Companies Act. These financial statements must then accompany the notice of the annual general meeting.

The 2010 Act allows the chief executive of the Department of Building and Housing to see all information relating to the long-term financial and maintenance planning of the development. Clearly this power should be used sparingly but it should allow body corporates who are failing in their planning obligations to be brought back on track.

Are there restrictions on the body corporate spending money?

The regulations set out the parameters of spending. The body corporate or committee can spend from the operating account on unbudgeted items where funds are available, the spending relates to the exercise of a body corporate power or duty, the body corporate will continue to be able to meet its debts in the ordinary course of business and the amount does not exceed 10% of the total annual budget.

How are body corporate levies raised?

Body corporates are given the power to determine the amounts to be raised for each fund established and impose levies on the owners to maintain each of those funds. In the case of the operating account, long-term maintenance and any contingency fund, the levy must be in proportion to the owner's utility interest. In relation to the capital improvement fund the owner is to be levied in proportion to the ownership interest.

Any levies imposed by a subsidiary body corporate must be sufficient to pay any levies raised by the head body corporate, the parent body corporate or any other parent body corporate located between the subsidiary body corporate and its head body corporate.

The 2010 Act requires the body corporate to fix the date on which payments of levies are due. The amount of any unpaid levy together with any reasonable cost incurred in collecting the levy are recoverable as a debt due to the body corporate by the person who is the owner at the time the levy became payable or by the person who is the unit owner at the time the proceedings are instituted.

The 2010 Act allows the body corporate to charge interest on any amounts not paid by a unit owner. The amount of interest charged cannot exceed 10% per annum.

How can the body corporate deal with the common property?

The 2010 Act provides that the common property is owned by the body corporate. The owners of all of the units are beneficially entitled to the common property as tenants in common. This is in proportion to the shares as set out by the ownership interest in respect of their units.

Under the 2010 Act the body corporate may pass a special resolution to sell part of the common property or grant a lease or licence over part of the common property. This has caused a great deal of concern over the years. The proceeds obtained by the body corporate as the result of any sale, lease or licence of the common property must be distributed to the owners. This is distributed in shares proportional to their ownership interests. Any amounts payable to unit owners can be offset against their liability for body corporate levies.

The 2010 Act also now provides that any interest in land outside of the land that makes up the development may be transferred to the body corporate and included in the common property if the body corporate has resolved to do so by special resolution and the interest in land is transferred free from any registered mortgage or encumbrance.

What obligations will the seller have when selling a unit?

A seller has an obligation to provide a series of disclosure statements to the buyer. There are four types of disclosure under the 2010 Act, pre-contract, pre-settlement, additional and turnover. The first three types of disclosure are all triggered when a unit is being sold. The last type is only triggered when the original developer has sold around 25% of the units.

The 2010 Act provides that the disclosure requirements cannot be contracted out in any agreement.

The 2010 Act provides for the pre-contract disclosure which will be in the form prescribed under the regulations.

In terms of pre-settlement disclosure, the seller must provide the disclosure statement no later than the fifth working day before the settlement date. As set out in the regulations, the statement will contain a certificate certifying the information as correct from the body corporate. Interestingly, a body corporate can withhold its certificate if any debt that is due by the unit owner is unpaid. Pre-settlement disclosure is largely similar to the section 36 certificates under the 1972 Act.

The buyer can also request the additional disclosure set out in the regulations. This request may be made at any time, before whichever of the following dates occurs first, being the close of the fifth working day after the date that the agreement was entered into, or the close of the tenth working day before the settlement date. The buyer is required to reimburse the seller the reasonable costs incurred in providing the additional disclosure, but the seller cannot withhold disclosure due to non-payment.

If the seller provides a pre-settlement disclosure statement or additional disclosure statement later than the fifth working day before settlement, or on the last working day before the settlement date, the seller has not provided a pre-settlement disclosure statement or, if one had been requested, an additional disclosure statement, then the buyer may postpone settlement until the fifth working day after the date on which the disclosure statement is provided.

If the seller becomes aware that information in any of the disclosure statements was inaccurate when it was made, or has since become inaccurate, then they must provide the buyer a statement correcting that inaccuracy.

Finally, if the seller does not provide the disclosure statements within the times set out in the Act, and the buyer does not postpone the settlement date, then the buyer may cancel the agreement for sale and purchase by giving ten days' notice in writing to the seller.

What is pre-contract disclosure?

This must be provided by the seller of the unit before an agreement is signed. This is probably best achieved by making it part of the property marketing information provided by the agent.

This must contain the following:

- Amount of contribution levied in respect of unit
- Period covered by such contribution
- Details of maintenance to be carried out in the year following disclosure and how costs are to be met
- Balance of all funds or bank account held or operated by body corporate at date of last financial statement
- Whether the unit or the common property is or has been subject to a claim under weathertight homes legislation or other proceedings relating to water penetration
- An explanation of the following:
  - unit title property ownership
  - unit plans
  - ownership and utility interests
  - body corporate operational rules
  - the information to be included in a pre-settlement disclosure
  - the information to be included in an additional disclosure statement
  - computer registers
  - LIMs
  - easements and covenants
- How to obtain further information about the matters referred to above
- An estimate of providing the additional disclosure statement.

This is a long list but is fairly standard for all units in a development. The responses to bullet points 1-5 are unit specific and will need to be generated on an individual basis. As a stop gap, the Department of Building and Housing has a guide to unit titles that covers some of these issues. Hopefully the Department will produce a new guide as part of the reforms.

A body corporate should be able to have a standard set of responses to bullet points 6-8.

What is pre-settlement disclosure?

This must be provided at least five working days prior to settlement and contain the following:

- The unit number
- The body corporate number
- Amount of contribution levied in respect of unit
- Period covered by such contribution
- Manner of payment of the levy
- The date on or before the levy is due to be paid
- Whether a levy or part of a levy is unpaid and, if so, the amount of the unpaid levy
- Whether legal proceedings have been instituted in relation to any unpaid levy
- Whether any metered charges due are unpaid and, if so, the amount
- Whether any costs relating to repairs to building elements or infrastructure contained in the unit are unpaid and, if so, the amount
- The rate at which interest is accruing on any money owing to the body corporate
- Whether there are any proceedings pending against the body corporate in any court or tribunal
- Whether there have been any changes to the body corporate operational rules since the additional disclosure statement or the pre-contract disclosure statement.

This must be certified by the body corporate. A body corporate can elect to withhold a certificate if any debt due to the body corporate is unpaid. Although potentially problematic this can be dealt with as part of the settlement process by ensuring that any debts due will be paid out of the settlement funds.

What is additional disclosure?

This will allow a buyer to request further information depending on what level of due diligence they wish to do. The pre-contract disclosure will set out what additional disclosure can be requested by buyers.

Additional disclosure must contain the following:

- Contact details for the body corporate and body corporate committee
- Balance of all funds or bank account held or operated by the body corporate at date of last financial statement
- Amounts due under invoices to be paid by the body corporate at the date the additional disclosure is requested
- Details of regular expenses incurred at least once a year
- Amounts owed to the body corporate at the date the additional disclosure is requested
- The following details of every current insurance policy held by the body corporate:
  - name of insurer
  - type of policy
  - amount of current premium
  - amount of excess payable under the policy
- The following details of every current contract entered into by the body corporate:
  - names of the parties
  - goods and services to be provided under the contract
  - the price at which the goods or services are to be provided
  - term of the contract
- Information about leases to which the base land is subject
- The text of motions voted on at the last AGM and whether the motion was passed or not

- Whether the body corporate's operational rules are different from the prescribed rules and what those differences are
- A summary of the long-term maintenance plan including:
  – details of maintenance to be carried out
  – whether there is a long-term maintenance fund
  – if there is a fund, the amount that has been or will be levied during the term of the long-term maintenance plan to maintain the fund and whether the current balance of the fund is projected to be sufficient to meet the body corporate's obligations under the plan.

It would be in a buyer's interest to obtain the additional disclosure as the information in it will be very helpful in understanding the body corporate and the way it is being run.

What is turnover disclosure?

This is required when the control period ends (see below). It recognises that the original developer will hold a lot of information that the body corporate will need going forward. The proposal is for the developer to provide the body corporate with information for the development that:

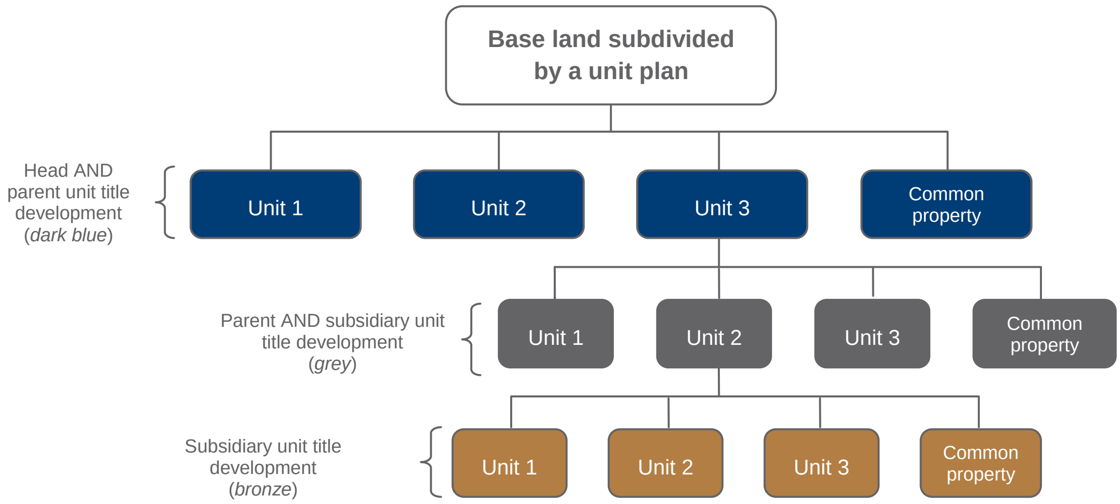
- The developer would be reasonably expected to have compiled with or obtained during the development process such as building plans, specifications, warranties and guarantees for products
- Give details of what the developer has done when they had a controlling interest in the development such as existing and proposed maintenance and service contracts
- Statutory documents such as code compliance certificates and BWOF
- Would assist the body corporate in maintaining the development such as maintenance schedules of construction materials and infrastructure from manufacturers or installers.

What is a layered development?

The 2010 Act introduces a new concept of layered unit title developments.

Set out below is the illustration taken from the Act itself which explains the concept.

Example 2 - Layered unit title development



Under the new layered development regime, principal units in a unit title development can be further subdivided into what is called a “subsidiary unit title development”. In addition, any principal unit in a subsidiary unit title development can be subdivided into a further subsidiary unit title development. A unit title development containing a principal unit that has been subdivided into a subsidiary unit title development is known as the “parent unit title development" (if it is the top layer of the development, it is also simultaneously called the “head unit title development”).

The subdivision of a principal unit into a subsidiary unit title development is only permitted if the body corporate of the unit development which the principal unit is part of has, by special resolution, agreed to allow the subdivision, and if there are no objections from parties who are entitled to object (such as other unit owners). All the usual local authority consents for unit title subdivisions must also be obtained.

If a developer wants to carry out a staged development where its decisions have not been made then staged developments remain a possibility under the 2010 Act.

The subdivision of a principal unit to create a subsidiary unit title development is effected by the deposit of plans with LINZ and the issue of new titles for the subsidiary units.

The layered unit title development regime provides a more flexible structure than has been available for traditional unit title developments and it may be useful for mixed-use developments. Every subsidiary unit title development will have its own units, common property, and body corporate. A body corporate will be able to manage its subsidiary unit title development independently from the parent unit title development and from any other subsidiary unit title developments. However, the 2010 Act does require subsidiary body corporates to appoint a representative to attend parent body corporate meetings.

The 2010 Act states that where a principal unit has been subdivided into a subsidiary unit title development it still remains a principal unit in the parent unit title development. The rights and obligations that apply to the principal units, such as payment of body corporate levies to the body corporate of the parent unit title development, will continue to apply. However, the title for the principal unit is not able to be dealt with because it has been subdivided into the new subsidiary unit titles.

The 2010 Act has some provisions on layered developments that are worth noting.

Section 87 makes it clear that under a subsidiary unit title development of a leasehold property the party responsible for the payment of the ground rental is the head body corporate.

Section 134 provides that the head body corporate has the insurable interest for a subsidiary unit title development while the individual unit owners also have an insurable interest. This is logical given the way in which subsidiary unit title developments are set up.

Section 135 follows on from this and requires the head body corporate to insure the subsidiary unit title development.

Section 165 provides that a subsidiary body corporate can apply for relief against the cancellation of a unit plan brought by the lessor. Again this makes sense.

What are ownership and utility interests?

Unit entitlements under the 1972 Act have been replaced with ownership interests and utility interests.

A unit plan must assign ownership interests to each unit and each accessory unit. The ownership interest is fixed by a registered valuer on the basis of the relative value of the unit in relation to each of the other units.

The ownership interest is used to determine a range of matters including:

- The beneficial interest of the owner in the common property
- The voting rights of an owner when a poll is requested
- The share of the owner in the underlying fee simple
- The share of the owner in respect of levies made for capital improvements under section 121
- The extent of the owner's obligation for ground rental.

Again, the utility interest must be assigned when the unit plan is deposited. The utility interest will be the same as the ownership interest unless otherwise shown on the unit plan.

The utility interest is used to determine a range of matters including the extent of the owner's obligation in respect of levies for the long-term maintenance fund, the optional contingency fund and the operating account. This will allow utility interests to better reflect use of the common property. If you consider a mixed-use development with escalators and lifts and other systems, the utility interest can be set to reflect the actual usage of those facilities by individual units. A ground floor unit that has no need to use lifts could have a lower utility interest than a unit that uses the lift.

Section 41 allows both interests to be reassessed. Reassessment requires a special resolution at a general meeting. A decision to reassess may only be made if 36 months have passed since the deposit of the plan or the date of the last reassessment.

A reassessment of the ownership interest is again done on the basis of relative values to each other. This will allow values to be reassessed more periodically and hopefully enable ownership interests to more regularly reflect actual value.

Utility interests may be reassessed by the body corporate on a fair and equitable basis having regard to the relevant benefits and costs to the units. This provides a great deal of flexibility to the body corporate. There is nothing stopping the body corporate from obtaining independent advice on this issue. The only requirement is that the body corporate must approve the method to be used by special resolution.

How will the 2010 Act deal with ongoing maintenance of the development?

Long-term maintenance plans are a requirement of section 116 of the Act. This section provides that:

1. *"A body corporate must establish and regularly maintain a long-term maintenance plan.*
2. *A long-term maintenance plan must cover a period of at least 10 years from the date of the plan or the last review of the plan.*
3. *The purpose of a long-term maintenance plan is to -*
    a. *identify future maintenance requirements and estimate the costs involved; and*
    b. *support the establishment and management of the funds;*
    c. *provide a basis for the levying of owners of principal units; and*
    d. *provide ongoing guidance to the body corporate to assist it in making its annual maintenance decisions."*

Section 116 ties in to section 138 of the Act. Section 138 provides that the body corporate must manage, maintain, and keep in a good state of repair, the common property and that the body corporate must maintain, repair or renew all building elements and infrastructure.

This is clearly different from the 1972 Act that merely requires the body corporate to keep the common property in a good state of repair. The question is what will be required.

What is the definition of common property?

The common property is defined as all land that is not contained in a principal unit, an accessory unit or a future development unit.

In the case of a subsidiary unit title development "common property" means that part of the principal unit subdivided to create the subsidiary unit title development that is not contained in a principal unit, accessory unit or future development unit.

So the definition of common property is relatively similar to the existing definition of common property.

What is the definition of building element?

The definition of "building element" is much more complex. It includes *"the external and internal components of any part of a building or land on a unit plan that are necessary to the structural integrity of the building, the exterior aesthetics of the building, or the health and safety of persons who occupy or use the building and including, without limitation, the roof, balconies, decks, cladding systems, foundations systems (including all horizontal slab structures between adjoining units or underneath the lowest level of the building), retaining walls, and any other walls or other features for the support of the building".*

If you break that definition down, you end up considering three key factors:

- The structural integrity of the building
- The exterior aesthetics and look of the building
- The health and safety of persons who occupy or use the building.

Clearly that is potentially very wide ranging and will place responsibility for maintenance for all of these elements onto the body corporate.

What is the definition of infrastructure?

The definition of "infrastructure" is also extremely detailed and includes *"pipes, wires, ducts, conduits, gutters, watercourses, cables, channels, flues, conducting, or transmission equipment necessary for the provision of water, sewerage, drainage, stormwater removal, gas, electricity, oil, shelter, protection from fire, security, rubbish collection, air, telephone connections, internet access, radio reception, television reception, or any other services or utilities to or from a unit or to or from the common property".*

What does the long-term plan need to contain?

The long-term maintenance plans must cover the common property, the building elements and infrastructure. It can also include any other items that the body corporate decides to include.

If the body corporate decides not to maintain any items during the life of the plan it must do so by ordinary resolution.

Otherwise the plan must state:

- The period covered by the plan
- The estimated age and life expectancy of each item covered by the plan
- Whether there is a long-term maintenance fund
- If there is a fund, state the amount determined by the body corporate to be applied to maintain the fund each year
- Who prepared the plan.

The plan must then be reviewed every three years or more frequently if it decides to do so.

What do the long-term planning requirements mean for body corporates?

What is clear from both the definitions and the level of planning that will be required is that many body corporate managers will need to either obtain specialist advice from external consultants to help them put together the plans or completely contract out the preparation of the plans.

Clearly, the concept of long-term maintenance plans is a strong one. It is important that anyone looking at purchasing a unit has an understanding of what the actual cost of owning that unit is both day-to-day and also over the longer extended period to which the plan the relates. It also provides certainty to those owners that works will be funded and carried out so that their investment in their property (whether it be purely their residence or an investment property) is going to be shielded as much as it can be from an asset protection perspective.

Existing body corporates who come through the transition phase and have to face up to these new requirements, may be concerned. It almost goes without saying that there will be some form of transition shock for many unit title development owners, particularly in larger cities where multi-storey unit title developments are common.

A by-product of all of this must be that existing body corporates who have to start producing these plans will undoubtedly have to start increasing levies not only to cover the anticipated future maintenance requirements but also to cover the increased costs of producing the plans. While this may be viewed as an unattractive outcome, most people would agree that it is important that unit title developments are maintained and run properly so that consumers have confidence in their investment.

What has happened to body corporate rules?

Body corporate rules have been a source of litigation over the last few years. It was hoped that the 2010 Act would make some moves toward tidying up an area that has caused considerable concern. However the sections in the 2010 Act largely replicate the 1972 Act provisions.

There have been a number of cases under the 1972 Act about rules. In particular, these cases often relate to the power to amend the body corporate rules in order to grant long-term contracts often to body corporate managers.

Section 37 of the 1972 Act dealt with the body corporate rules. The net effect of that section was that any amendment or addition to the rules was not permitted unless it:

- Related to the control, management, administration, use or enjoyment of the units or the common property or to the regulation of the body corporate or to the powers and duties of the body corporate other than those conferred or imposed by the Act
- Conferred or imposed a power or duty; such power or duty must be incidental to the performance of the duties and powers imposed on the body corporate by the Act
- Did not modify or destroy any right implied or created by the Act.

"Incidental" has been defined as being *"related to and relatively minor by comparison to the other matter"*. This means that any new power or duty created by an amendment or addition to the rules must relate to, or follow from, the default rules. Secondly, any new power or duty must not dramatically depart from the existing powers and duties including the Act.

It has been stated that a rule which "appreciably" expands the existing powers and duties of the body corporate, as set out in the default rules, cannot be merely incidental to those existing powers and duties.

There have been several cases in which proprietors of units have sought to argue that rules embedded in the body corporate rules are not valid, especially where they restrict the freedom of an owner to rent the unit for themselves.

The 2010 Act deals with the powers and duties of the body corporate in section 84. Rather than set out expressly what rights and powers a body corporate has, the 2010 Act provides that the body corporate has the powers and duties set out in various other sections. Not surprisingly many of these relate to dealing with maintenance and asset protection including the operation of the funds needed for those duties.

Section 105 of the Act relates to the body corporate operational rules (as the body corporate rules are now to be known). This clause provides that the operational rules are those prescribed by regulation. As there are only two default rules, the important part of the existing case law is how additions to the rules will be considered.

Section 106 of the Act provides that any amendment or addition to the rules must relate to the control, management, administration, use or enjoyment of the principal units, accessory units and the common property or to the regulation of the body corporate. It goes on to provide that no powers or duties may be conferred or imposed on the body corporate that are not incidental to the powers and duties conferred or imposed on the body corporate by the Act.

Section 106(4) provides that any amendment or addition that is inconsistent with the 2010 Act will be invalid.

The issues relating to invalid body corporate rules under the Act have therefore not been remedied by the 2010 Act. Any rule that is more than incidental will be invalid.

What can a body corporate do about contracts that a developer entered into before selling units?

Over the years there has been considerable criticism of contracts entered into by a developer at the development stage on terms which are extremely favourable or are to entities that the developer itself controls. The 2010 Act allows the body corporate to review some of these contracts.

Service contracts are broadly defined and mean a contract between a body corporate and another person (known as the service contractor) engaging the service contractor for a term of at least one year to supply services to the body corporate or to the unit owners. There is no definition of services. Accordingly this definition will pick up a wide variety of contracts from cleaning services to management contracts.

The key element for both of these sections is whether the developer no longer has control as defined in the 2010 Act. Section 6 provides that the control period in relation to a unit title development means the period beginning on the date the unit plan is deposited and ending on the date described in section 6(2).

Section 6(2) is complex. It provides that the end date for the control period is the day after the last date on which were a vote of the body corporate to be held by the original owner or one or more associates of the original owner or the original owner together with one or more associates of the original owner would be entitled to exercise 75% or more of the votes of the body corporate when the following are taken into account:

a) The number of principal units owned by the original owner or an associate or associates of the original owner or the share of the total interest of all units as fixed under section 38(1) that is held by the original owner or an associate or associates of the original owner
b) The number of principal units where the original owner or an associate or associates of the original owner, hold proxies to vote or the share of the total ownership interests of all units where the original owner or an associate or associates of the original owner hold proxies to vote
c) The number of principal units in respect of which the owners of those units have a contractual obligation to the original owner or an associate or associates of the original owner to vote in a particular way or the share of the total ownership interests in all units in respect of which the owners of units making up that share have a contractual obligation to the original owner or an associate or associates of the original owner to vote in a particular way.

The definition of "associate of the original owner" means a person who:

- Is controlled by the original owner or is subject to the original owner's direction or influence
- Is the original owner's agent, trustee or representative or acts in any way on behalf of the original owner
- Acts jointly or in concert with the original owner
- Participates in the business activities of the original owner as a consequence of any arrangement or understanding with the original owner; or
- Would come within any of the above points if the reference to the original owner in any of those paragraphs were instead a reference to another associate of the original owner.

These are very detailed definitions. In totality they mean that the control period will end once the original owner or associates exercise less than 75% of the vote when all of those factors are taken into account.

The 2010 Act applies if a body corporate enters into a service contract before the date that the control period ends.

The original owner and any associate of the original owner who is a member of the body corporate during the control period must exercise reasonable skill, care and diligence and act in the best interests of the body corporate as constituted after the date that the control period ends in ensuring that the:

- Terms of the contract achieve a fair and reasonable balance between the interests of the service contractor and the body corporate as constituted after the date that the control period ends
- Terms are appropriate for the development
- Powers to be exercised and functions required to be performed by the service contractor under the service contract are appropriate to the development and do not adversely affect the body corporate's ability to carry out its functions.

The 2010 Act then allows the body corporate to apply to court for compensation if it appears that the body corporate has suffered loss or damage because there has been a failure to comply with these requirements. The people who can be ordered to pay compensation are the original owner or an associate of the original owner who is a member of the body corporate during the control period.

The body corporate may also apply to the courts for an order terminating the contract. This is only available if it appears to the Court that the contract is *"harsh or unconscionable"*.

There is no guidance as to how this phrase is to be interpreted. In standard contractual terms unconscionable bargains allow a party to seek to set aside a service contract if the following elements are found (as set out in paragraph 213 of The Laws of New Zealand - Contract):

- The weaker party must be under a significant disability
- The stronger party either knows or ought to know of that disability
- The stronger party has victimised the weaker in the sense of taking advantage of the weaker party's disability either by act of extortion of the bargain or passive acceptance of it in circumstances where it is contrary to conscience that the bargain should be accepted
- A marked inadequacy of consideration (such as the contract price being higher than the market price) may be significant.

In the context of the 2010 Act these elements will generally be present as the contracts will usually have been entered into before the development has commenced or when the developer controls the body corporate. The body corporate as constituted after the control period ends will be a weaker party that has been taken advantage of when the contract was entered into by the developer.

"Harsh" is not a common method of describing the condition of a contract. However, even dictionary definitions have an element of "severe" or "excessive". Again, whether a contract is harsh will depend on the facts but inadequacy of consideration will be an important consideration. Another important consideration will be whether the contract reflects the prevailing market conditions.

It is also worth remembering that the developer will probably owe the future body corporate a fiduciary duty and the body corporate would theoretically have the remedies available for breach of that duty including rescission of contract and damages.

Either way a body corporate saddled with a long-term management contract which is of no benefit to the development will be able to at least seek compensation or termination under the 2010 Act. This is a much better situation than body corporates have under the 1972 Act.

How do owners deal with disputes?

The area of dispute resolution has been significantly altered.

The Tenancy Tribunal now has jurisdiction to hear and determine all disputes arising between a list of people in relation to a unit title development. The people are:

- Owners or former owners of principal units
- An FDU owner
- Occupiers of principal units and FDU's
- A body corporate
- An administrator
- A registered valuer
- A service contractor
- A prospective purchaser
- An original owner
- A lessor of base land
- The chief executive.

It might be surprising to see the chief executive of the Department of Building and Housing on that list. However, the chief executive has powers to investigate breaches of the Act and the ability to take legal action if necessary (see section 202).

The Tenancy Tribunal does not have jurisdiction to:

- Make order for sums or claims in excess of $50,000
- Hear disputes relating to application of insurance proceeds to reinstatement
- Hear disputes relating to title to land.

Section 171(5) makes it clear that title to land includes redevelopments, cancellation of unit plans and conversions.

Parties can reduce a claim to get under the $50,000 limit.

It is clear that the range of matters that could come before a Tenancy Tribunal is potentially large and could cover mailers that have not traditionally been heard by tribunal members. Complicated contractual and valuation issues may arise which are outside the experience of the tribunal. Equally, however, there is no doubt that small disputes in unit title developments do not need to go to the High Court as they do currently. Hopefully over time the tribunal will prove a valuable addition to the dispute resolution process.

The Tenancy Tribunal itself has recognised that there may be some important limits to its powers. Many issues may look appropriate for hearing by the Tenancy Tribunal but will result in a finding that, for instance, the body corporate operational rules need to be amended. One view of this is that an order to amend the rules (which are registered) will be a matter relating to title. On that basis a rules dispute would still have to go to the High Court. This will require an examination on a case by case basis to decide which is the appropriate forum for any dispute.

For claims between $50,000 and $200,000 the parties must go to the District Court except for disputes over title to land for which the District Court does not have jurisdiction.

For claims over $200,000 or relating to title to land, parties will have to go to the High Court.

No agreement that attempts to exclude or limit the jurisdiction of any of the above bodies has any effect.

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