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Units Titles Act 2010 – Disclosure Regime

Introduction

The Unit Titles Act 2010 came into force on 20 June 2011.

As from that date, a new disclosure regime has been introduced.

Firstly, there is a disclosure regime that is imposed upon vendors of a unit title property, for the benefit of purchasers.

Secondly, there is disclosure regime imposed upon the developer of a unit title development, for the benefit of the body corporate.

Disclosure of information by the vendor

The disclosure regime that applies on the sale of a unit is set out in sections 144 to 153 of the Act.

Contracting out of the disclosure regime is prohibited (section 145).

The vendor is obliged to provide the purchaser with –

- A **pre-contract disclosure statement**;
- A **pre-settlement disclosure statement**;
- If requested by the purchaser, an **additional disclosure statement**.

Pre-Contract Disclosure

This statement must be provided by the vendor to the purchaser before a binding agreement for sale and purchase is entered into, whether the agreement is conditional or unconditional.

This means that before accepting any purchase offer, a vendor must first make sure that the purchaser has received the pre-contract disclosure statement.

Vendors will need to work out the most practical way of ensuring that prospective purchasers receive a pre-contract disclosure statement.

Where a real estate agent is involved in the sale, it is likely that the pre-contract disclosure statement will be included in the information memorandum made available to prospective purchasers.

Before accepting an offer, vendors will need to determine whether the purchaser received the pre-contract disclosure statement before the submission of the purchaser's offer. If the real estate agent has a proper record of having supplied the pre-contract disclosure statement to the purchaser, then the vendor may be content to rely upon that record. Otherwise, where there is any doubt whether the purchaser has received a pre-contract disclosure statement, it will be best practice for the vendor to ensure that the purchaser is given a pre-contract disclosure statement before the vendor accepts the purchaser's offer.

Strangely, the Act makes no mention of any sanction if the vendor fails to make pre-contract disclosure. There is no express entitlement, for example, for the purchaser to elect to cancel the agreement if the disclosure is not made.

It will thus be left up to the Courts to interpret the intention of Parliament. This is a situation which is far from satisfactory.

From the point of view of the vendor, it will obviously be prudent to ensure that in every case pre-contract disclosure is made *before* a binding agreement is entered into, just in case the Courts should eventually rule that the purchaser is entitled to cancel.

The pre-contract disclosure statement must be in the prescribed form and contain the prescribed information. The prescribed form and information are set out in Form 18 of Schedule 2 to the Unit Titles Regulations 2011. A copy of this form is **attached**.

The form comprises certain general information, together with certain specific information, such as the amount of body corporate levies, funds held by the body corporate and particulars of the maintenance that the body corporate proposes to carry out in the next 12 months.

One specific item that must be disclosed is whether the unit or the common property, is, or has been, the subject of a leaky building claim.

Pre-Settlement Disclosure

Under the section 36 of old Unit Titles Act 1972, a purchaser could apply to the body corporate for a certificate giving certain information relating to the financial liabilities of the owner of the unit and the body corporate.

Under the standard form of agreement for sale and purchase of real estate, there has long been an obligation upon the vendor to provide the purchaser with a section 36 certificate not later than 5 working days before the settlement date.

The obligation to provide certain prescribed information not later than the 5th working day before the settlement date is now imposed by statute. Section 147 of the new Act obliges the vendor to provide a pre-settlement disclosure statement to the purchaser by this deadline.

There is no prescribed form for the pre-settlement disclosure statement but it must contain certain prescribed information. That information is set out in Regulation 34 of the Unit Titles Regulations 2011, a copy of which is **attached**.

The pre-settlement disclosure statement must contain or be accompanied by a certificate given by the body corporate certifying that the information in the statement is correct.

In practice, the obtaining of the pre-settlement disclosure statement will be no different than the practice that has been current up until now, in respect of section 36 certificates. It will simply be a matter of the vendor's solicitor asking the body corporate secretary to provide the pre-settlement disclosure statement in time for the vendor's solicitor to pass a copy on to the purchaser's solicitor not later than 5 working days before the settlement date.

The big difference is that under the new Act there is a serious penalty for the vendor if the vendor fails to provide the pre-settlement disclosure statement on time.

If the vendor provides the pre-settlement disclosure statement later than the 5th working day before the settlement date, then the purchaser may, by notice in writing, postpone the settlement date until the 5th working day after the pre-settlement disclosure statement is provided.

If the vendor fails to provide the pre-settlement disclosure statement by the close of business on the last working day before the settlement date, then the purchaser may, by written notice, postpone the settlement date until the 5th working day after the date on which the disclosure statement is provided.

The purchaser is also given the right to decide to cancel the agreement for sale and purchase, rather than postponing the settlement date. That election can be made by the purchaser by giving the vendor 10 days notice in writing.

The right of cancellation is clearly a very serious matter for a vendor who could end up losing a sale at the last minute, simply by being a day late in supplying the purchaser with a pre-settlement disclosure statement. This could have serious consequences if the vendor has committed to the purchase of another property, or made other financial commitments, in reliance upon the sale.

Additional Disclosure

Under section 148 of the Act, the purchaser may request an additional disclosure statement.

This request may be made at any time before the earlier of:

1. The close of the 5th working day after the date of the agreement; or
2. The close of the 10th working day before the settlement date.

If the purchaser makes a request for additional disclosure, then the vendor must provide the additional disclosure statement no later than the 5th working day after the date on which the request is made.

There is no prescribed form for the additional disclosure statement, but it must contain the prescribed information which is set out in Regulation 35 of Unit Titles Regulations 2011, a copy of which is **attached**.

The purchaser must pay to the vendor all reasonable costs incurred by the vendor in providing the additional disclosure statement, but non-payment of these costs does not justify the vendor withholding disclosure.

The information to be included in the additional disclosure statement is much more extensive than that required for either the pre-contract disclosure statement or the pre-settlement disclosure statement. It includes, for example, particulars of the body corporate insurance, contracts entered into by the body corporate, a summary of the long-term maintenance plan and the text of the motions submitted at the last general meeting of the body corporate and whether each motion was passed or not.

It is difficult to see the rationale for Parliament deciding that this information need only be made available upon request, after the contract has been signed, rather than upfront in the pre-contract disclosure statement. If the intention is to provide the purchaser with all relevant information so that the purchaser can make an informed decision whether to buy the unit, then all of this information should be made available before the contract is signed. Once the contract has been signed, it will be too late for the purchaser to cancel, even if the purchaser should be unhappy with the information that has been disclosed. The Act does not give the purchaser any rights of cancellation if the purchaser finds that the information is unsatisfactory.

Because there is no statutory right of cancellation on those grounds, it seems to me that it would be prudent for the purchaser of a unit title to make any purchase contract conditional upon the additional disclosure statement being acceptable to the purchaser in all respects.

If the vendor fails to provide an additional disclosure statement within the 5 working day period allowed, then the purchaser will have the same right to postpone the settlement date or to cancel the contract that the purchaser has in the case of the late supply of a pre-settlement disclosure statement.

This poses an even greater risk for the vendor than the risk of cancellation for being late in providing a pre-settlement disclosure statement for the reason that:

1. The period of 5 working days is a tight deadline.
2. There is much more information to be obtained than for either a pre-contract disclosure statement or a pre-settlement disclosure statement.
3. The vendor will be reliant upon the body corporate providing most of the information.

The risk of cancellation, if the pre-settlement disclosure statement or the additional disclosure statement are supplied late, will impose a heavy responsibility upon the body corporate to respond promptly to a request by the vendor to provide the necessary information and, in the case of the pre-settlement disclosure statement, to certify that the information is correct.

In the case of pre-settlement disclosure there will usually be a reasonable time available for the vendor to procure a certified pre-settlement disclosure statement from the body corporate. An example, say, if there are 15 working days between the date the contract becomes unconditional and the settlement date, the vendor will have 10 working days to obtain the statement by the statutory deadline, being the 5th working day before the settlement date. However, in the case of a request for an additional disclosure statement, the vendor will have 5 working days only from the date of the request.

Insurance Details

One piece of information that is critical to a purchaser prior to settlement is the body corporate insurance cover. A purchaser will be unable to draw down mortgage finance without first supplying to the bank or other lender a certificate of currency which records full particulars of the body corporate cover and which notes the interest of the bank or other lender as mortgagee. That certificate can only be obtained if the purchaser has particulars of the body corporate insurance policy.

Under the Act, information about the body corporate's insurance cover is available through the additional disclosure statement only, for which the purchaser must make a request and for which the purchaser must pay the reasonable costs of the vendor in providing it.

To overcome this problem, the REINZ/ADLSi standard form of agreement for sale and purchase has retained its existing provision that, as a matter of contract, the vendor must provide the purchaser with a copy of an insurance certificate for the body corporate cover not later than the 5th working day prior to the settlement date.

This means that the vendor will have a contractual obligation to provide particulars of the insurance cover even if the purchaser does not request an additional disclosure statement.

Rectification of inaccuracies in disclosure statements

If, before the settlement date, the vendor becomes aware that information contained in a pre-contract disclosure statement, a pre-settlement disclosure statement or an additional disclosure statement was inaccurate when the statement was given or has, since it was given, become inaccurate, then the vendor must within 5 working days after becoming aware of that inaccuracy, or any longer period agreed between the vendor and the purchaser, provide the purchaser with a statement correcting the inaccuracy.

If a statement correcting an inaccurate disclosure statement is not given within the period of 5 working days before the settlement date, then the purchaser may, by notice

in writing, postpone the settlement date until the 5th working day after the date on which the statement correcting the inaccuracy was provided.

Interestingly, there is no right of cancellation arising from an inaccurate disclosure statement. From the vendor's perspective, then, it will be better to ensure that a disclosure statement is provided on time, even though it may be inaccurate, because the inaccuracy can always be corrected later without the risk of cancellation. There will be limits to this, of course, because a disclosure statement that is grossly inaccurate will probably be deemed not to comprise a proper disclosure statement for the purposes of the Act.

Further requirements concerning disclosure statements

Each disclosure statement must be dated and signed by the vendor or a person authorised by the vendor.

Purchaser may rely on information

The purchaser is entitled to rely on the information contained in any of the disclosure statements as conclusive evidence of the accuracy of the matters contained in that information.

Disclosure information by Developer

Section 154 of the Act provides that the original owner, being the person holding 100% of the body corporate votes at the time of the depositing of the unit plan, must notify the body corporate once the original owner and associates of the original owner hold less than 75% of the voting rights.

The body corporate must then hold a general meeting within 3 months and at that meeting the original owner must provide the body corporate with:

1. **A turn-over disclosure statement;** and
2. A statement disclosing any interest that the original owner or an associate of the original owner has in any contract or arrangement made with the body corporate.

The turn-over disclosure statement must be in the prescribed form and contain the prescribed information. The prescribed form and information are set out in Form 19 of Schedule 2 to the Unit Titles Regulations 2011. A copy of this form is **attached**.

As can be seen, the intention of the turn-over disclosure statement is to provide the body corporate with all of the information about the construction of the development that will be required to enable the body corporate to carry out its future obligations in respect of repair and maintenance, compliance with health and safety and other requirements in relation to the building and building services.

Peter Nolan

24 June 2011

Pre-contract Disclosure

Unit Titles Regulations 2011

Schedule 2

Form 18 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:

Pre-Settlement Disclosure

Unit Titles Regulations 2011

34 Pre-settlement disclosure statement

The following information is prescribed for the purposes of section 147(3)(a) of the Act (which requires a pre-settlement disclosure statement to contain the prescribed information):

- (a) the unit number; and
- (b) the body corporate number; and
- (c) the amount of the contribution levied by the body corporate under section 121 of the Act in respect of the unit being sold; and
- (d) the period covered by such contribution; and
- (e) the manner of payment of the levy; and
- (f) the date on or before which payment of the levy is due; and
- (g) whether a levy, or part of a levy, due to the body corporate is unpaid and, if so, the amount of the unpaid levy; and
- (h) whether legal proceedings have been instituted in relation to any unpaid levy; and
- (i) whether any metered charges due to the body corporate are unpaid and, if so, the amount of unpaid metered charges; and
- (j) whether any costs relating to repairs to building elements or infrastructure contained in the unit are unpaid and, if so, the amount of unpaid costs; and
- (k) the rate at which interest is accruing on any money owing to the body corporate by the seller; and
- (l) whether there are any proceedings pending against the body corporate in any court or tribunal; and
- (m) whether there have been any changes to the body corporate operational rules since—
 - (i) the additional disclosure statement, if one has been provided; or
 - (ii) the pre-contract disclosure statement.

Additional Disclosure

Unit Titles Regulations 2011

35 Additional disclosure statement

The following information is prescribed for the purposes of section 148(4) of the Act (which requires an additional disclosure statement to contain the prescribed information):

- (a) the contact details for the body corporate and body corporate committee (if any); and
- (b) the balance of every fund or bank account held or operated by the body corporate at the date of the last financial statement; and
- (c) amounts due under invoices to be paid by the body corporate at the date the additional disclosure statement is requested; and
- (d) details of regular expenses that are incurred at least once a year; and
- (e) amounts owed to the body corporate at the date the additional disclosure statement is requested; and
- (f) the following details of every current insurance policy held by the body corporate:
 - (i) the name of the insurer; and
 - (ii) the type of policy; and
 - (iii) the amount of the current premium; and
 - (iv) the amount of any excess payable under the policy; and
- (g) the following details of every current contract entered into by the body corporate:
 - (i) the names of the parties; and
 - (ii) the goods or services to be provided under the contract; and
 - (iii) the price at which the goods or services are to be provided; and
 - (iv) the term of the contract; and
- (h) information about every lease to which the base land is subject; and
- (i) the text of motions voted on at the last general meeting and whether each motion was passed or not; and
- (j) whether the body corporate's operational rules are different from the prescribed body corporate operational rules, and if so, what the differences are; and
- (k) a summary of the long-term maintenance plan, including—
 - (i) details of maintenance to be carried out; and
 - (ii) details of maintenance carried out in the last year; and
 - (iv) if there is a long-term maintenance fund,—
 - (A) the amount determined by the body corporate that has been, or will be, levied during the term of the long-term maintenance plan to maintain the fund; and
 - (B) whether the current balance of the fund is projected to be sufficient to meet the body corporate's obligations under the plan.

Turn-over Disclosure

Schedule 2

Form 19

Turn-over disclosure statement

Section 156, Unit Titles Act 2010

Property: [address]

Body Corporate Number: [number]

Turn-over disclosure statement

1

This turn-over disclosure statement is provided in accordance with section 156(1) of the Unit Titles Act 2010.

2

[Set out the following information:

- . *the date on which the control period ended:*
- . *details of any as-built plans and specifications of the unit title development:*
- . *the assets of the body corporate:*
- . *the liabilities of the body corporate:*
- . *details (rent, term, and rights of renewal) of any lease or licence granted over the common property:*
- . *details of any code compliance certificates that have been issued under the Building Act 2004 in relation to the unit title development:*
- . *details of any recommended maintenance schedules for construction materials and infrastructure in relation to the unit title development:*
- . *details of any resource consent or heritage obligations relating to the unit title development:*
- . *details of any warranties and guarantees for products used in the construction of the unit title development:*
- . *details of fire evacuation plans and fire protection systems for the unit title development:*
- . *details of any building warrant of fitness that has been supplied under section 108 of the Building Act 2004 for the unit title development:*
- . *details of any compliance schedule issued under section 102 of the Building Act 2004 in relation to the unit title development:*
- . *information about existing and proposed maintenance and service contracts for the unit title development, including contractors' contact details.]*

Date: [day, month, year]

Signed: