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UNIT TITLES ACT:

Lame duck and how to fix it

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UNIT TITLES ACT: LAME DUCK AND HOW TO FIX IT

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Introduction

I have been asked by the Planning Committee for this Conference to revisit my November 2015 paper, delivered at the NZLS Unit Titles Intensive. My task back in November was to highlight key reform areas needed to provide some common sense and pragmatism to assist unit title developments function, to break away from the inflexible approach and to fill the gaps in the Unit Titles Act 2011 (*the Act*) and the Unit Titles Regulations 2011 (*the Regulations*).

Apart from the growing number of complaints surrounding unit title developments, it seems lessons have not been learnt by the Ministry of Business, Innovation and Employment (MBIE). MBIE, over a number of years both recent, and through the former Department of Building and Housing, has undergone reasonably robust consultation. All that has resulted is technical amendments under the Unit Titles Amendment Act 2013, and more recently, through the Regulatory Systems Amendment Bill 2016. MBIE and the Government have ignored the cry for reform which has in particular seen The Herald in Auckland release examples of a number of nightmare problems associated with apartments and seen established through the initiatives of the Honourable Nikki Kaye MP, a working group which has prepared five separate papers with recommended changes to the law.

As I recently warned in my editorial to The Property Lawyer in March 2016, "*the proposed amendments* [in the Amendment Bill 2016] *do not assist the ongoing dialogue with the Ministry over the need for substantive reform of the Act and while that dialogue continues to slowly evolve, the economic and social impact on a number of apartment complexes will continue and the number of court and tribunal cases will continue to grow.*" This is an environment where the explosion in intensive apartment housing demands greater certainty and flexibility, to deal to the tension that exists between all owners and any individual owner in a community title structure. That needs to be balanced by the need for discipline and to deal equally with the tyranny of the majority as much as the tyranny of the minority within bodies corporate.

A primary reason, it seems, why no substantive reform has evolved is perhaps based around nervousness in undertaking a further exercise to produce substantive amendments and going through a Select Committee process when the legislation has only been in force for a little over five years. The problem with that stance is that it ignores entirely the fact that the Act and the Regulations are defective. The most basic of requirements, such as a penalty regime are missing and the need to establish a flexible and responsive regime for the governance of unit title developments (which is one of the key purpose statements referred to in s 3(c) of the Act) are not evident in the legislation.

Despite the large number of concerns voiced and tabled with Ministers and Government officials, many of which were raised in the Auckland Regional Council review styled "Unit

Titles Act 1972: The Case for Review Discussion Document August 2003" and more recently in the working group papers prepared for the Honourable Nikki Kaye, as noted above, we are still no further ahead.

I set out below those matters which I have come across since the Act came into force having dealt with many bodies corporate, some of which are very dysfunctional and others bereft of leadership or effective property management. All this against the backdrop of significant growth in the apartment market, the leaking building syndrome, earthquake strengthening requirements, poor building practices and the struggle for owners to find funding to cure defects.

Although I repeat to some extent the areas that need urgent reform from my November 2015 Intensive Paper, they bear repeating. I also flesh out more detail requiring change and simply add to the list to highlight that the problem is indeed serious. It is not capable of a temporary fix, but one that demands immediate solutions which will aid the administration and wellbeing of bodies corporate and unit owners.

I also set out in each case actual recommendations and rationales for change.

Dealing with recalcitrant owners and non-disputed levies

In situations where there is no dispute over levies, bodies corporate can only force recalcitrant owners to pay through the mechanism of obtaining a charging order or, if the owner is a company, issuing a statutory demand and appointing a liquidator. There is a need for a better approach.

Recommendation

The Act should be amended to allow bodies corporate to lodge a statutory lien against a recalcitrant owner's title where debts are not disputed and where they exceed the amount of (say $5,000). The lien would have the same impact as a charging order, allowing a body corporate to pursue sale of a unit in worst cases. Mortgagees need not fear such a regime since, from a practical perspective, they can always pay off the debt and add it to the loan if a recalcitrant owner agrees. In any event mortgagees will also rank ahead of a statutory lien.

Rationale

Allowing a mechanism such as a statutory lien charge should provide an incentive for recalcitrant owners to deal with their debts to their body corporate, reduce anxiety levels for bodies corporate which are under financial pressure and remove the burden of bodies corporate having to pursue court proceedings which are inherently time delayed and costly.

Long term maintenance plans and long term maintenance funds

A curious feature of the Act is that while it is compulsory to have a long term maintenance plan, it is not compulsory to have a long term maintenance fund with bodies corporate having the ability to opt out of establishing a long term maintenance fund by passing a special resolution: see ss 116 and 117 of the Act.

Without any fund or inadequate reserve funds future owners will undoubtedly inherit some significant debt.

Concerns have also been raised that the quality of long term maintenance plans are variable at best, with there being very few good quality templates to assist bodies corporate.

Although the Chief Executive of MBIE has power to monitor the financial and management regimes of bodies corporate under s 133 of the Act it is understood the monitoring role has not been exercised. In any event monitoring is not the same as enforcing. Also, if monitoring was done, it would be a full-time job!

Further, the idea that long term maintenance plans must cover a period of at least 10 years from the date of the plan, or last review of the plan, is wholly inadequate. Capital items of expenditure such as replacing roofs or lifts involve a 20 and/or 30 year lifecycle. The very standard promoted in the Act itself is inadequate.

As another example of inflexibility s 117(3) provides that a special resolution is required where a body corporate needs to expend more than 10% of any item specified in the long term maintenance plan. That provision is far too inflexible, given the expediencies of getting remedial works underway and bearing in mind bodies corporate are unlikely to have the discipline to review their budgets in their long term maintenance plans every year (or even every three or five years). The focus needs to be on enabling necessary replacement works or remedial works, as long as the budget estimate is reasonable and in line with market, and avoiding the need for a special resolution. A body corporate committee should simply have the right to proceed but then maybe look to seek a ratification ordinary resolution.

Recommendations

Sections 116 and 117 need to be amended to:

- reflect the need to have longer term maintenance plans;
- introduce the need for annual or three yearly reviews;
- MBIE should provide a more detailed or decent template to assist bodies corporate;
- Long term maintenance funds should be compulsory; and
- The requirement in s 117(3) for a special resolution where expenditure is more than 10% of the maintenance item should be removed or at least substituted with an ordinary resolution. After all, necessary maintenance is compulsory, not discretionary.

Rationale

Having a robust long term maintenance plan and having a compulsory fund is good discipline for any household planning, and to avoid bodies corporate and unit owners being ambushed with significant expenditure downstream. Also, in answer to those who say why should existing owners pay upfront for future maintenance when they are no longer owners – my answer is that valuers should be taking into the account the amount (particularly if the fund is significant) of any long-term maintenance fund held and add to the market value of a unit what a valuer would consider a fair assessment of an owner's share in the fund.

Offence provisions and no defence

One of the more surprising and significant omissions in the Act is there is no penalty regime. While ss 142 and 143 of the Act address the general liability of owners and bodies corporate in tort law there is no incentive for delinquent owners, body corporate committees or bodies corporate to follow strictly the requirements of the legislation.

The lack of any offence provisions only serves to encourage bad behaviour.

Recommendations

Normal offence provisions be inserted into the Act. Additionally, body corporate committee members should be granted a defence of good faith, copying overseas jurisdiction examples.

Rationale

These additions are important to provide necessary discipline in the performance of administration of bodies corporate and to deliver the right incentives to produce better behaviour while encouraging owners to take chair and committee member roles.

Disclosure statements

The awkward and inadequate disclosure regime has been criticised in a number of previous seminar papers and published articles.

Suffice to say, the pre-contract disclosure statement should include additional information to ensure there is more transparency up front and remove the hopelessly drafted explanatory note on what a body corporate is. Providing meaningful and adequate information up front for sale agreements, tenders and auctions should be essential. Amalgamating the pre-contract, additional (where relevant) and pre-settlement disclosure statements should be promoted in order to streamline the proper approach to consumer protection.

Recommendations

As I noted in my November paper, any explanatory note of what constitutes a body corporate can simply be downloaded from MBIE's website. Key information some of which is in the additional disclosure sought should be in the pre-contract disclosure statement. Further, the pre-settlement disclosure statement should then only focus on whether there has been any material changes from the time of pre-contract disclosure.

Also, the draconian cancellation provision in s 151(2) needs to be adjusted to give a vendor an opportunity to remedy before any cancellation becomes effective.

The pre-contract disclosure statements need to include:

- body corporate insurance details;
- core terms of any property management agreement;
- copy of body corporate budget;

- details of the long term maintenance plan also identifying significant maintenance items that need attention and when;
- copy of any body corporate in-house rules/booklet;
- details of long term maintenance fund;
- copy of any body corporate rules;
- the last three years AGM and EGM minutes;
- information relating to any leaking building issues, not limited to actual lodgement of a claim under the Weathertight Homes Resolution Services Act, and reference any need for earthquake strengthening.

Finally, the turnover disclosure regime needs a complete overhaul to make it meaningful when purchasers are buying off the plans.

Rationale

Adopting a more transparent approach to disclosure with meaningful information being provided up front should deliver a fit for purpose disclosure regime and provide proper consumer protection. After all, the only document useful to any purchaser as a consumer protection measure is the pre-contract disclosure statement.

Section 74 schemes – damage and destruction

The ability for affected parties to seek High Court sanction to a remedial work programme is only available where damage or destruction exists. It is not available to sanction earthquake strengthening programmes if no damage or destruction is evident. This particularly affects converted or heritage buildings, leaving bodies corporate to attempt to convince unit owners of the need for earthquake strengthening.

Related issues concern what level of strengthening or national building standard is preferred, and importantly how funding can be arranged.

As a relevant aside, the decision in *Grafton Road Limited v Stalker and Others* [2015] NZHC 880 interestingly ordered a wall in excess of 6 metres to be demolished under s 325(e) of the Property Law Act 2007 and a s 74 scheme to be then put in place for remedial work. The Court perhaps filled a gap in making its decision in anticipation of destruction.

Recommendations

Section 74 should be amended by including the words "damaged, destroyed or where demolition and/or structural remedial work is otherwise required to preserve the structural integrity of building elements and/or infrastructure within a unit title development."

Rationale

The amendment will provide bodies corporate with a better pathway to fix various remedial work programmes through court sanction.

Survey plans

There is no specific requirement under the cadastral survey rules for surveyors to produce three dimensional plans showing clearly the demarcation between common property and principal and accessory unit boundaries.

The issue of demarcation of boundaries is not addressed in the Act and so remains a live issue when considering "who pays" for work either side of the boundaries.

Secondly, unlike some jurisdictions overseas, there is no express direction for owners to take responsibility for repairs of balconies, awnings, verandas, dormer windows and other appurtenances which are fixed to the exterior of buildings but which do not form part of a unit title.

The issue of protrusions beyond boundaries has led to case law one of which is relatively notorious where a number of High Court cases have featured in respect of the same building: see various High Court and Court of Appeal cases regarding the Endeans Building in Auckland such as *Body Corporate 95035 v Chang and Others* [2012] NZHC 2467, *CBD Investments (NZ) Ltd v Tan Corporate Trustees Limited and Others* [2012] NZCA 620 and *CBD Investments Limited v Body Corporate 95035* [2014] NZHC 72. Also see *Body Corporate 198900 v Bhana Investments Ltd and Others* [2015] NZHC 1620.

Recommendations

The cadastral survey rules should be amended to make three dimensional plans compulsory for unit title developments. This also should be reflected in the Act itself.

The Act should also be amended to require that in respect of any protrusions that comprise balconies, awnings and the like, the principal unit owner who has the benefit of such balconies or awnings and the like should be obliged to carry out and/or pay for any repair works to those areas, unless the cause of the remedial work was the result of damage (such as water penetration) emanating from another unit or common property.

Rationale

It would make lawyers' lives much happier (if perhaps less profitable) if there was greater transparency around demarcation points within unit title developments and if arguments over protrusions fell away to a large extent.

Dispute resolution

If ever there was a scheme which acted as a disincentive to resolve disputes, the regime under the Act and the Residential Tenancies (Unit Title Disputes) Rules 2011 and the Unit Titles (Unit Title Disputes – Fees) Regulations 2011 implements a process which is adversarial and expensive, and polarises positions as between owners, rather than serving to bring warring parties together.

A more flexible regime which is cost effective and provides swift outcomes is needed to remedy one of the most obvious flaws in the legislation.

Disputes involving orders which do not exceed $50,000 are heard in the Tenancy Tribunal. Where the amount exceeds $50,000 but less than $200,000, the District Court has jurisdiction. Disputes involving title of the land or in excess of $200,000 go to the High Court. This is an arbitrary regime and is just plain wrong. Moreover it gets worse. For average complexity Category 1 disputes involving repair or maintenance of common property, governance of a body corporate or decisions or procedures of a body corporate, the application fee is an exorbitant $3,300. Low complexity Category 2 disputes involving day to day management or owner/occupier behaviour attract an alarming fee of $850.

Recommendations

A process is needed which avoids an adversarial set up in a public forum. The Queensland model, where a body corporate Ombudsman is empowered to find an alternative dispute resolution process (which would ordinarily involve a mediation process) is attractive. While the Tenancy Tribunals have their own mediation process, that process is only available after a dispute is filed and a significant fee is paid and typically then only for Category 2 disputes.

For flexibility there should be a direct ability to appoint investigators, auditors, mediators or adjudicators to determine disputes and/or put in place an Ombudsman or Commissioner-type scheme.

A cost-effective and flexible dispute regime could be centralised through the appointment of an Ombudsman or Commissioner, assisted by investigating officers appointed to determine the substance of complaints or disputes and with the power to dismiss frivolous or vexatious matters. Funding of such a service could be by way of levying bodies corporate.

Disputes involving land should be able to be heard in forums other than the High Court.

Amendments are also needed to s 174(2) of the Act so that if body corporate rules provide for disputes to be submitted to mediation or arbitration, then the parties involved in the dispute should do so rather than for the rules to be usurped by the Tenancy Tribunal's jurisdiction.

Rationale

Having a dedicated Ombudsman or Commissioner armed with investigating officers should prove a more cost effective regime in the long run and provide a better platform to get swift decisions.

Role of property managers

There is no reference to property managers or body corporate secretaries in the Act or Regulations. Additionally (somewhat surprisingly), there is no regulatory and licence regime (in the Act or elsewhere) governing the conduct of property managers and the way they administer body corporate funds.

For many unit title developments property managers are a necessity and are engaged to look after the administration and day to day operational requirements of a complex. The

historical role of body corporate secretaries has essentially not changed but a lacuna exists. Property managers who assume a property management and secretarial-type role are not regulated yet a number of bodies corporate will have significant funds available to them which funds are administered by property managers. As noted in a tribunal decision of Brian Stephenson in *Body Corporate 190834 and Others v Body Corporate Administration Limited* dated 14 August 2015, the role of a property manager is akin to that of a trustee. The risk exposure for bodies corporate should not be underestimated.

In addition there is uncertainty as to whether property managers should be asked to prepare disclosure documentation (many do of course), and whether they should have the ability to sign s 147 certificates (which form part of the pre-settlement disclosure regime) and other certificates and notices on behalf of a body corporate, provided they are duly authorised by the body corporate to do so.

Recommendations

The property manager market should be regulated akin to the real estate agents industry. An opportunity was lost when the government previously declined to regulate property managers, even though government papers recommended such regulation.

Once registered, property managers should be empowered to sign certificates and notices arising out of the Act and Regulations provided they are authorised by their body corporate.

In addition management contracts need to be for fixed terms of no longer than say 3-6 years to avoid abuse, particularly by developers and they should include KPI's and appropriate termination provisions to inject proper discipline in the market of management services.

Rationale

Reinstating the role of property managers and/or body corporate secretaries simply addresses the reality of what happens on a day-to-day basis in many unit title developments in New Zealand.

Regulating the property management market will address a key omission dating back to when the real estate industry was regulated.

Tenants

A great number of units are occupied by tenants. However tenants are not bound by the Act or Regulations (although tenants are bound by the rules of a body corporate under s 105(3)(c) of the Act) and there is no alignment between the Residential Tenancies Act and the Act. Unfortunately, the situation is not made any better by poorly drafted tenancy agreements and inadequate body corporate rules.

A good example of the need to bind tenants is where access is required to carry out repairs. Section 80 in the Act refers to an owner's responsibility to allow such access but the definition of "owner" does not extend to include an occupier of a unit.

Recommendations

Section 80 should be amended to include additional reference to occupiers of a principal unit in subclauses (a), (d) and (k). An alternative might be simply to have a separate provision in the Act which places the onus on occupiers or tenants to abide by certain obligations of owners.

While it is appreciated that owners can and should bind their tenants to allow a body corporate to inspect for damage or to carry out work, and require tenants to vacate units where reasonably substantial works have to be undertaken it would be better to codify such requirements.

Also like New South Wales where apartment blocks contain a majority of tenants they should have a voice at body corporate meetings for matters not directly related to body corporate budgets and the like.

Rationale

The above amendments would avoid disputes between owners and tenants and bodies corporate.

Service contracts

The ability for bodies corporate to upset service contracts by invoking the provisions of s 140 of the Act, while admirable, simply does not go far enough.

There are many examples in New Zealand where developers and related entities enter into encumbrances, signage licence agreements etc. in abuse of the privileged position developers have before there is any sell-down of units. Examples include 100 year management agreements or those with 10 year rights of renewal giving security of tenure for 30 years and beyond. Also, there exist 50 year signage licences with the body corporate receiving no rental return. Such contracts can readily be seen to be unfair and unconscionable, and ought to be subject to challenge along with service contracts.

In addition guidelines should be promulgated to assist courts in considering what is harsh or unconscionable. As noted in my November 2015 paper, such a list could include the following considerations:

- the length of term of the service contract, with or without rights of renewal;
- whether any close relationship existed between the original developer and the service contractor;
- whether the service contract is negotiated at arm's length and truly reflective of a fair bargain;
- whether the remuneration for the service contractor is linked to CPI or fixed dollar increases on an annual basis, or a true market basis;
- whether the services or duties to be performed by the service contractor under the service contract actually warrant such remuneration, particularly if, for example, third party commercial contractors are also engaged;

- whether the termination provisions under the service contract are one-sided in the service contractor's favour;
- the standard of provision of services over a period of time; and
- whether (to what extent) the service contractor would be unfairly prejudiced if the service contract was terminated.

Recommendations

The definition of service contract should be expanded to include such devices as encumbrances and advertising licence rights or any similar type agreement or lease or licence. Guidelines as noted above should also be inserted into s 140.

Rationale

The above amendments would address broader areas of abuse which still exist in the unit title market, and would provide guidance to the High Court when considering what is harsh or unconscionable. This would also assist potential applicants to determine whether worthwhile action should be taken.

Repairs and maintenance – interplay of sections 80(1)(g), 126 and 138

There has been considerable debate around reconciling the operation of these sections in the Act.[1] and [2]

In one sense, the provisions can be seen as complementary: see *Wheeldon v Body Corporate 342525* [2015] NZHC 884. In another sense, they can be seen to be in conflict. Thomas Gibbons, at p 74 of his text *Unit Titles Law and Practice*, suggests that *"the general should prevail over the specific, and therefore if more than one person benefits from the repair, recovery from all those persons under s 126 is more reasonable*" than under s 138(4) (which arguably only allows recovery of costs from the individual owner of any principal unit which contains the building element or infrastructure to be repaired).

The essence or purpose behind the repair and maintenance sections should be seen as follows:

- Where an owner creates a nuisance (eg water leaking from that owner's principal unit into another unit), then that owner is liable for the cost of remedial work: see s 80(1)(g) of the Act. There will be some grey areas (eg where water leaks both from common property and from principal units).
- Where remedial work is carried out to building elements and infrastructure, and some of the units only benefit or they benefit substantially more than others to a distinct and ascertainable amount, then the owners who benefit as a general rule should pay (and not owners who do not benefit): see s 126(1) and s 126 of the Act. However, it should be open to bodies corporate to take a holistic view, within reason, and require that all

[1] Leading cases include *Body Corporate 114424 v LV Trust Holdings Limited and others* [2014] NZCA 21; *Tisch v Body Corporate 318596* [2011] NZCA 420; *Lau v Tan Corporate Trustees Limited* [2013] NZHC 2381 and *Wheeldon v Body Corporate 342525* [2015] NZHC 884.

[2] Also see articles by Rod Thomas "*Berachan and Unit Titles*" [20130 NZLJ 211 and Thomas Gibbons and David Bigio on "*Maintenance and Schemes*" in their paper set out in the NZLS 2013 Unit Titles Intensive.

owners contribute even if they do not directly benefit. Certainly the many s 74 schemes put before the High Court include a range of outcomes as to who pays. Going outside the Act on funding repairs appears to be allowed, based on the Court of Appeal decision in *Tisch v Body Corporate 318596* [2011] NZCA 420. A few s 74 scheme cases have endorsed the position that it is appropriate to step outside the Act where many owners agree it is otherwise considered fair and reasonable: see for example *Body Corporate 208399 v Thomson and Others* [2015] NZHC 548; *Body Corporate 19728 v Umbrella Holdings Limited and Others* [2013] NZLR 429; *Body Corporate 312431 and Stirling v Auckland City Council and Others* [2015] NZHC 961; *Body Corporate 161883 v Maui Investments Limited and Others* [2016] NZHC 135; *Body Corporate 589766 v Brocorp Properties Limited and Others* [2015] NZHC 2891; and *Body Corporate 194769 and Wheatley and Others v Wheatley and Krstev* (2016) NZHC 856.

- In general terms, the body corporate retains the primary responsibility to carry out repairs to or maintenance of common property, common property assets, and any building elements and infrastructure relating to or serving more than one unit (whether or not the work is carried out by the body corporate's appointed contractor, or by an owner's contractor appointed with the agreement of the body corporate via the body corporate committee): see s 138(1) of the Act. In the seminal *Wheeldon* decision, Justice Muir identified that unfortunate conflicts exist in reconciling the three relevant sections and he saw a need to fill the gap: see paragraphs 58 to 66 in his judgment. Also, the Judge decided that the wording "relates to or serves" in s 138(1)(d) is not confined to adjoining units but is causally relevant to another unit whether physically *or economically* (as in non-adjoining), and that aesthetics form part of that analysis.
- Levies or funds required for the body corporate to carry out repairs or maintenance ought to be established and recovered *prior to* the actual work being commenced. Sections 126 and 138 can be interpreted as requiring affected owners only to pay costs which have already been incurred by the body corporate. However, that is inconsistent with s 121 regarding the setting up of funds under ss 117, 118 and 119 and the raising of levies on unit owners generally.
- While s 80(1)(a) allows a body corporate to view the condition of a unit and repair or renew building elements and infrastructure which affects more than 1 unit or the common property or both – what if no-one else is affected? There needs to be the power to enter and repair if any owner does abide by s 80(1)(g).

Recommendations

Sections 126 and 138 should refer to each other but make it abundantly clear that:

- levies for funding need to be imposed ahead of any agreed work programme; and
- a body corporate can resolve to require owners to pay for works within that owner's unit *or* can assume responsibility for payment based on owners' utility interests where the structural integrity or aesthetics of a building are under threat (a good example is where roofs are within principal units).

It would also be useful to state in the legislation that bodies corporate may decide whether all owners, individual owners or a mixture of individual owners and all owners should contribute to funding. For example owners in a modern tower block in need of recladding benefit much more than the owners in the lower floors of a historic building component which has no recladding issue. Here the wisdom is that even though the owners below do

not get a substantial direct benefit they do however benefit by association and with the stigma of a leaking building being removed and so should contribute something.

Also, some debate is welcome over whether the optional capital improvement fund should be based on an owner's ownership interest and not utility interest, most bodies corporate currently have not adopted different values for ownership and utility interests.

Rationale

Some legislative tidy up is required to:

- fill the gaps noted by Justice Muir and reconcile properly all of the provisions relating to repairs and maintenance work (accepting that a holistic approach appears to be preferred by the Courts); and
- address current difficulties in the raising of funds for such work ahead of any work programme (recognising that bodies corporate need the flexibility to do what is both reasonable and fair without being bound by any rigid regime in imposing levies).

Impact of Health and Safety at Work Act 2015 (HSWA)

Bodies corporate and body corporate committees are not specifically mentioned in the HSWA. It is however likely that chairpersons and body corporate committee members will be deemed to be "officers" for the purposes of the new legislation.

Under the HSWA, "an officer or a person conducting a business or undertaking" (*PCBU*) is required to exercise due diligence to ensure that the PCBU complies with any duty or obligation it has under the HSWA. "Officer" is defined, in relation to a body corporate, as any person occupying a position in the body that is comparable with that of a director of a company. The test as to whether you are a deemed officer is simply whether persons who occupy positions that allow them to exercise significant influence over the management of the business or undertaking including health and safety. The equivalent legislation in Australia on which the HSWA is based, provides that bodies corporate are exempt if they do not engage any workers as employees and the common property areas are used for residential purposes only.

Recommendations

The Act or the HSWA should follow the Australian legislation by exempting bodies corporate from compliance if they do not engage any workers as employees and where common property areas are used for residential purposes only.

Rationale

The amendments would simply remove many hundreds of bodies corporate from having specific health and safety obligations when the risk is decidedly minimal.

Utility interest

The concept of the utility interest is welcome. Basing the allocation of operating expenses between owners on the relative value of units is somewhat artificial and can be a hit and miss approach. Also, it was not unknown for developers under the old unit titles regime to exercise undue influence on assessments of the relative values of units, which has resulted in a number of developments having very distorted levy regimes.

Further, there are many situations where expenditure within a body corporate is only relevant to some owners. An unfair burden can be imposed on ground floor owners if they are called upon to contribute towards the costs of lift maintenance and capital replacement of component parts and entire lifts which they never use.

However, assessment of utility interests in s 41(5) of the Act on the basis of what is "fair and equitable" needs to be drawn out further. Varying positions appear to have been adopted (or not adopted at all) by bodies corporate, because it is too hard to work out a decent one size fits all formula to fit the criteria of "fair and equitable".

Some bodies corporate have simply tried to base utility interests against percentages of the likely estimated cost of items. However what really is needed in many cases is a simpler formula. For example in a mixed development of residential and commercial units why not allow residential owners to pay for their common areas, and usage of lifts and their own security services while commercial owners on the ground floor bear their own costs of repair and maintenance? Such a formula should be able to be worked out generically without requiring the precision of a line by line or ~~a~~ percentage calculation of individual expenses.

Recommendations

A more robust provision should be inserted into cl 41 which allows bodies corporate to split out the cost of repair and maintenance and operational expenses on a generic basis particularly as between different uses within a complex.

Rationale

The amendments would overcome practical difficulties of working through what is "fair and equitable" when a more generic approach can be adopted.

Insurance provisions

There are a number of uncertainties which exist in the insurance provisions ss 134 to 137.

For example:

- There are no provisions covering off the particular perils or events which need to be insured against, unlike s 15(1)(b) of the Unit Titles Act 1972. Indeed it is not even clear that bodies corporate need to take out earthquake insurance cover, although clearly it would be unwise to ignore doing so.
- In s 135, reference is made to bodies corporate having to take out insurance against all buildings and other improvements on the base land for their "full insurable value".

Reference to full insurable value does not include replacement cover as referred to in s 137(2)(b). What was intended?

- In s 137(2)(a) bodies corporate may by special resolution require unit owners of "standalone units" to insure their own improvements within their own boundaries (but with the body corporate remaining responsible for insuring all improvements within the common property boundaries). However, the definition of "standalone units" is obscure. In any event, it may be better to provide that owners of units within different building blocks, whether joined by party walls or standalone units, have the ability to take out their own insurance cover (noting of course that any owner may take out concurrent cover as permitted in terms of s 173(1)(a)). Allowing such an approach could be open to debate as a block or single unit which insures for indemnity only and is destroyed may never be built again if sufficient insurance proceeds are not available and without being redeveloped become a stain on a unit title development.
- A further difficulty is in s 137(2)(b) where indemnity cover may be permitted if full replacement cover "is not available in the market". Does a "not available in the market" include circumstances where full replacement cover is unaffordable such as what occurred post Christchurch earthquakes when the insurance market peaked. One unit title complex that I am aware of faced an increased premium from $45,000 to over $500,000! Fortunately the insurance market has dropped back in recent times, at least for now.
- A further practical issue is that it ought to be compulsory for bodies corporate which have say in excess of 9 units to arrange officer's liability cover for committee members since such members can be held personally liable for their actions or inactions – see *Guardian Retail Holdings Ltd v Buddle Findlay* [2013] NZAR 988 (HC).

Recommendations

The insurance provisions should be tidied up to create more certainty and with more flexibility.

Rationale

Insurance is never an easy topic to cover off in legislation. Bodies corporate and their advisors need to understand the meaning of the insurance provisions better than they do now.

Administrator appointments

Thankfully, administrator's appointments are rare. Equally the courts need to be wary about appointing an administrator, particularly where technical procedural oversights occur and ratification can easily cure: see recent case *An Li Tao v Strata Title Administration Ltd and Pendya* (2016) NZHC 814.

Unfortunately there is no provision in the Act which states that an administrator is immune from personal liability for any act or omission that the administrator makes in good faith *or* that an administrator may arrange for appropriate insurance cover (or be noted against an existing officers and liability cover) in assuming the role of administrator.

In addition administrators should be able to seek directions and orders from the High Court even though there may be inherent jurisdiction, as noted in the cases of *Re Falconer* [1981] 1NZLR 266 HC at 272 and *Cassin v Richardson* [2006] NZFLR 1068 CA at 38-42 and in *Securitibank Limited (in liquidation)* [1978] 1NZLR 97 HC at 105-107.

Provision should also be inserted into s 141 to make it abundantly clear that owners of units and their mortgagees cease to have any voting rights upon the appointment of an administrator.

Finally, consideration should be given to empower an administrator to investigate wrongful acts of any owner(s), committees or body corporate and to seek High Court approval of any recommended remedy to put matters right.

Recommendations

The proposed amendments set out above should be made to s 141 to provide better clarity for administrators and for the High Court in making appointments.

Rationale

The above amendments would fill the gaps in s 141 to provide better certainty and provide for a more meaningful administrator outcome.

Body corporate unit ownership and borrowing

There is no express right for a body corporate to own or lease a principal and/or accessory unit. While a body corporate has the power to borrow there is no express right for a body corporate to mortgage common property (in fact it is prohibited under s 130(2)) or actually enter into a mortgage and/or guarantee: see *Body Corporate 345866 v Pog Mo Thon Limited and Others* [2014] NZHC 3323, which held that under the old 1972 Act a body corporate had no power to lease or guarantee resulting in the lease and guarantee in that case being invalid and unenforceable.

There are in my view sound policy reasons for a body corporate to own or to lease or mortgage units or enter into encumbrances such as those to protect on-going management arrangements.

A number of more sophisticated unit developments have managers on site who live in units typically owned or leased by the manager. Anecdotally I understand that some bodies corporate have formed companies and those companies hold the manager's unit. There may well also be cases where trusts are involved in which individuals or entities hold the manager's unit on behalf of a body corporate.

Additionally, situations arise where recalcitrant owners have charging orders placed against their units with charging orders being in favour of a body corporate. When the sale of a unit is enforced through the registrar or by auction there is no express provision which allows a body corporate to take title.

Moreover, there should be no reason why a body corporate cannot own a number of carparking units for leasing or licensing out to help defray body corporate levies **or** raise a

mortgage against accessory units or any other unit held by a body corporate in order to assist with any top up funding required especially for the purposes of carrying out remedial or urgent capital replacement work.

As for voting rights, provision could simply be inserted that the body corporate would be an eligible voter as the owner of a unit and would have one vote per principal unit exercisable by the chairperson or his or her nominee.

Recommendations

That bodies corporate be permitted to own managers units and carpark units and to lease or take out mortgages or encumbrances over units.

Rationale

These changes would promote flexibility and help defray body corporate expenditure.

Governance issues

There are a plethora of issues concerning the role of chairpersons and body corporate committees which are simply not addressed in the Act or the Regulations. There are important omissions. There is also a misunderstanding that the Act and Regulations adequately provide for all governance features concerning decision making. In simple terms, there are too many gaps and confusing and inadequate regulations. These have resulted in disagreements and irregularities occurring on a reasonably frequent basis, which in turn have led to a number of High Court cases.

In broad terms the sort of matters not adequately addressed, or not addressed at all, include the following:

- There are no body corporate committee procedures set out in regulation (see the attached basic procedure list which I insert in body corporate rules).
- There are no conflict of interest rules such as those noted in the Crown Entities Act 2004 (which could act as a useful template).
- The s 206 provisions regarding access to records and information of bodies corporate are woefully inadequate. Having a Court of Appeal decision (*Lihua Ltd v Body Corporate 366611 and Others* [2013] NZCA 630) opine on such matters only exposes the folly of the Act not adequately addressing what can be accessed, balanced against by the need to observe privacy concerns.
- The delegation provisions, in particular ss 101, 108 and 109, are in need of some considerable refinement to give committees much greater flexibility and certainty regarding what they can and cannot do such as delegating to managers and also to provide for emergency or necessity situations where quick action is required, without the need to pass special resolutions. Ordinary resolutions in such cases should suffice.
- Delegations should also extend to property managers such as authorising the entering into of routine contracts – here Regulation 17 is most unhelpful.
- There should be a process to allow ratification of resolutions to occur. Ratification may typically be required where some irregularity or procedural voting error occurs such as

a motion to pass a resolution not recording the fact that it is a special resolution or maybe where funds in a special account are diverted for another but for a lawful and sound purpose.

- Abuses which arise with proxy voting should be dealt to particularly where one person has a large number of proxy votes. Also it must be an anomaly that owners of carparks which are principal units have a right to one vote the same as owners who own a residential unit (or commercial or industrial) together with accessory units. Picture the scenario where there are 30 residential units and 60 carparks, which are also principal units, but 30 of which are retained by the developer for rental purposes. The developer has 30 votes and of course would force a poll vote each time which is cumbersome.
- The timeshare voting error in Schedule 2 of the Act noted in my November 2015 Unit Titles Intensive paper should be tidied up.
- There are no provisions allowing for the appointment of subcommittees although they are often formed in practice.
- The role of chairperson needs to be further clarified. There is a vague reference to "another person who may not be an owner" as being able to chair an annual general meeting. We know that there are many cases where no owners are prepared to take on the role of chairperson, even at general meetings. So there should be an express legislative allowance for an independent chairperson who is not an owner to be appointed in those situations where there is dysfunctionality amongst the owners or where simply no owners are prepared to chair a meeting.
- As many bodies corporate struggle to get a quorum, non-eligible voters (who are in arrears with levies) present at meetings should also be counted as part of the quorum.
- There will be cases where local authorities and crown agencies may own units and so a duly appointed representative should have a right to vote for such entities.

Recommendations

A tidy up of the day-to-day procedural issues is needed, particularly in the Regulations, to create more certainty around meetings of bodies corporate and committees and to tidy up permitted delegations (extending to recognising the role of body corporate managers).

Rationale

Changes would assist flexibility and create certainty over management roles and decision making within bodies corporate and committees.

Layered unit title development – simultaneous deposit

The Act appears not to allow a head parent unit title plan and subsidiary plan to be deposited at the same time. As a consequence, because of the designated resolution regime, the deposit of a subsidiary plan will be unnecessarily delayed.

Recommendation

The lodgement of a head parent and subsidiary plan at the same time should be allowed, provided necessary consents from registered proprietors and any registered interest holder are obtained and s 212 should be correspondingly amended to exclude the need for a designated resolution process.

Rationale

Layered developments are valuable as a development tool and the change to allow simultaneous lodgement of parent and subsidiary plans would avoid delays and financial pressure in many cases.

(I am grateful for Tim Jones for pointing out the above gap in the Act.)

Section 80(1)(i)

One of an owner's responsibilities under s 80 is to not make any additions or structural alterations to their unit which materially affect any other unit or common property without the written consent of the body corporate.

There is an argument that the reference to additions or structural alterations should capture aesthetic values as well such as external textures and colours of a unit. Also, the material effects are limited in s 80(1)(i) to that which affects any other unit or the common property. Should they apply to units which are in a different building block?

Recommendation

The wording in s 80(1)(i) should be expanded to include any aesthetic effects (including texture and colour) on the external appearance of any other unit within a development.

Rationale

It is important for unit developments to retain their character when significant additions and structural alterations are undertaken. Equally important are the aesthetics of any development. Although some body corporate rules require a body corporate's prior approval to any change in colour scheme or the texture of external areas within a unit, most bodies corporate still do not have a separate list of rules which govern such matters and which extend an owner's responsibilities beyond s 80 of course the danger in extending rules beyond those envisaged by s 80 also raises an issue whether they will be ultra vires.

Sections 163 and 167 – stratum estates in leasehold

Section 163 includes an implied guarantee by unit owners of leasehold land that they are jointly liable to guarantee lease payments to the lessor. However in a situation, for example, where a majority of owners have paid off their ground lease payments or form an entity to acquire the lessor's interest, leaving a minority of owners who retain their leasehold

interest, the minority not participating in any scheme could in theory call upon the majority to guarantee payment. This would be patently absurd and unfair.

Further, in s 167 it is an oddity that a body corporate does not have the ability to purchase the lessors estate if there is no right of first refusal or option to purchase in the existing base lease.

Recommendation

Section 163 should be amended to modify the implied guarantee provisions in circumstances where some owners agree with a ground lessor to pay an upfront capital payment to release themselves from the burden of paying an annual rent.

Secondly, s 167 should be amended so that regardless of whether a right of refusal or option to purchase exists a body corporate may through a special resolution negotiate and enter into an agreement to purchase the lessor's estate in the base land.

Rationale

To provide an opportunity for owners with a leasehold unit title to remove the burden of paying rent in perpetuity and effectively freehold their unit – although the ground lease would remain in place where a minority number of owners were unable to participate in and purchase it would permit owners to gradually acquire outright a lease of the base land if there was a willing lessor but not make it compulsory for all owners to participate.

Summary

The above outline of some of the day-to-day problems facing unit developments serves to underscore why the legislation is a lame duck. The Act and Regulations are not convincing or effective, and solutions to problems are elusive or non-existent.

If the recommendations set out above were implemented, in my view, the number of disillusioned owners and negative economic and social impacts would be greatly reduced.

The key thing that needs to happen is for a selected group of external advisers who have day-to-day experience in dealing with both legal and practical body corporate issues to come up with tailored amendments to the Act and Regulations and for MBIE to drive home those solutions. With respect, the officials at MBIE and its predecessors left to their own devises do not possess the necessary skill set or experience to make it happen.

It is now 20 years since in my then role as Convenor of the New Zealand Law Society Property Law and General Practice Committee I wrote to Minister Doug Graham on 25 July 1996 highlighting the need to replace the 1972 Act and identified some key issues for reform. Regrettably I do not appear to have succeeded in pushing for better reform and I suspect I maybe become the lame duck and join the ranks of the disillusioned.

Finally to whet the appetite further it is interesting to look at changes to strata law in New South Wales passed on 28 October 2015 which included such reforms as:

- meetings through social media, video and teleconference;

- lifting standards and accountability of strata managing agents and building managers and providing that agent agreements will be limited to a term of one year in the first year then up to three years after the first year with a possible three month extension;
- assistance hotline and free advocacy service for vulnerable residents;
- introduce mandatory defect inspection reports and building bonds to enhance consumer protection – bonds will be 2% of contracted work and be used to fix any defective work;
- compulsory inspections by independent building inspectors 12-18 months post-construction;
- fines introduced for non-compliance;
- reform model by-laws to make it easier to keep pets;
- reforms to curb proxy farming by limiting the number of proxy votes to be held by one person;
- where tenants are a majority in a development, to give tenants a voice at meetings.

Proceedings of Body Corporate Committee on conduct at meetings

1. Chairperson
   a) The Committee shall appoint the chairperson of the Committee from one of their number from years to year.
   b) The Committee may also elect one of their number to act as deputy chairperson in the absence of the chairperson, from year to year. In the absence of the chairperson the deputy chairperson can exercise the powers and perform the duties of the chairperson.

2. Meetings
   c) Meetings of the Committee shall be convened, adjourned, and otherwise regulated in such manner, as the Committee from time to time think fit.
   d) At the first Committee meeting each year the Committee shall appoint the chairperson and if there is one the deputy chairperson.

3. Notice of Meetings
   e) The Chairperson or any two Committee members may request the chairperson to convene a special meeting of the Committee.
   f) Not less than seven days' notice of a meeting of the Committee must be sent to every Committee member who is in New Zealand, and the notice must include the date, time and place of the meeting and the matters to be discussed. The notice period may be truncated if any matter is considered urgent requiring deliberation.
   g) An irregularity in the notice of a meeting is waived if all the Committee members entitled to receive notice of the meeting attend the meeting without protest as to the irregularity or agree to the waiver.

4. Methods of holding meetings
   A meeting of the Committee may be held either:
   h) by the number of the Committee members who constitute a quorum, being assembled together at the place, date and time appointed for the meeting; or
   i) by means of an audio, or audio and visual, communication by which all the Committee members participating and constituting a quorum can simultaneously hear each other throughout the meeting.

5. Quorum
   j) A quorum for a meeting of the Committee is at least [four] Committee members.
   k) No business may be transacted at a meeting of the Committee unless a quorum is present, but resolutions promoted may be circulated for approval by the Committee or otherwise passed and ratified at the next Committee meeting.

6. Conflict of interest
   Any Committee member who is in any way whether directly or indirectly interested in any matter must declare the nature of his or her interest at a meeting of the Committee.

7. Voting

l) Every Committee member has one vote.

m) The chairperson shall not have a casting vote.

n) The Committee shall endeavour to make all decisions by consensus but where after ample time for consideration, no consensus can be reached, the Committee shall exercise their powers by majority vote.

o) A Committee member present at a meeting of the Committee is presumed to have agreed to and voted in favour of, a resolution of the Committee unless he or she expressly dissents from or votes against the resolution at the meeting.

p) No Committee member shall vote where a conflict arises with regard to any decision requiring the Committee to vote. The chairperson of the Committee shall rule in the event of any indecision over whether or not any Committee member should refrain from voting but be counted in the quorum and if the chairperson is conflicted the deputy chairperson shall assume the role of chairperson for the purpose of decision.

8. Minutes

The Committee must ensure that minutes are kept of all proceedings at their meetings.

9. Resolutions without a physical meeting

q) A resolution in writing assented to by a two-third majority of the Committee then entitled to receive notice of a meeting of the Committee, is valid and effective as if it had been passed at a meeting of the Committee duly convened and held.

r) Any such resolution may consist of several documents (including facsimile or other means of communication) in like form each signed or assented to by one or more members of the Committee.

s) A teleconference meeting between a number of the Committee who constitute a quorum, shall be deemed to constitute a meeting of the Committee. All the provisions in this Schedule relating to meetings shall apply to teleconference meetings so long as the following conditions are met:

(i) all of the Committee members for the time being entitled to receive notice of a meeting shall be entitled to notice of a teleconference meeting and to be linked for the purposes of such a meeting. Notice of a teleconference meeting may be given on the telephone;

(ii) throughout the teleconference meeting each participant must be able to hear each of the other participants taking part;

(iii) at the beginning of the teleconference meeting each participant must acknowledge his or her presence for the purpose of that meeting to all the others taking part;

(iv) a participant may not leave the teleconference meeting by disconnecting his or her telephone or other means of communication without first obtaining the chairperson's express consent. Accordingly, a participant shall be conclusively presumed to have been present and to have formed

part of the quorum at all times during the teleconference meeting unless he or she leaves the meeting with the chairperson's express consent;

(v) a minute of the proceedings at the teleconference meeting shall be sufficient evidence of those proceedings, and of the observance of all necessary formalities, if certified as a correct minute by the chairperson of that meeting.

10. Other proceedings

Except as provided in this document, the Committee may regulate their own procedure.