



Property Speaking

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**Welcome to the Winter edition of *Property Speaking*.
We hope you find the articles of interest and useful to you.
If you would like to talk further about any of the topics covered
in this newsletter, please don't hesitate to contact us.**

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The next issue of Property Speaking will be published in November 2011.*

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New Unit Titles Legislation now in Force

New rules for body corporate and unit title holders

On 20 June 2011 the Unit Titles Act 2010 and the Unit Titles Regulations 2011 came into effect. The most widely understood form of a unit title is an apartment consisting of ownership of part of a building together with a share in the common property. Unit titles are used for retail and commercial properties, as well as hotels and apartment blocks, and are also commonly used in smaller two, three and four unit developments.

The new legislation has brought many changes to the unit titles regime, some of which are outlined below.

Common Property

The common property is now owned by the body corporate. Under the previous legislation the common property was owned collectively by all the unit owners.

Long-term maintenance plan and funds

Operating account: The body corporate must now establish and maintain an operating account to meet the expenses relating to the management and governance of the development, the provision of services and amenities for the benefit of the units, the costs associated with statutory compliance, any ground rental or licence fee relating to the base land, and the annual maintenance expenses.

This is not a significant change for large body corporates as they would generally already be running an account of this nature. For small developments however, for example a two unit development with no common property, it is unlikely that there would be an operating account. Contracting out of this is not an option; it is a statutory requirement.

Long-term maintenance plan: The body corporate must establish and maintain a long-term maintenance plan to cover at least a 10-year period. The plan should identify further maintenance requirements, estimate the costs involved and create a fund to pay for the long term maintenance. The plan must be reviewed at least once every three years.

Most large body corporates would have considered the long-term maintenance of the development so complying with this statutory requirement should not be too onerous. For small developments, however, this creates a new obligation to which they must comply.

Long-term maintenance fund: A body corporate must establish and maintain a long-term maintenance fund, unless the body corporate decides not to do so; this must be undertaken by special resolution. It is important that if a body corporate chooses not to establish a long-term maintenance fund a resolution recording that decision must be passed.

Disclosure statements are compulsory

Pre-contract disclosure to a prospective buyer: Before a buyer enters into an Agreement for Sale & Purchase for a unit the seller must provide a pre-contract disclosure statement to the buyer. This must include information on the body corporate levies, planned maintenance and how that is to be funded, details of money held by the body corporate, disclosure of any watertight home issues, the body corporate rules and other information about unit title ownership.

Pre-settlement disclosure to a prospective buyer: After the seller and the buyer have entered into an Agreement for Sale & Purchase, the seller must then provide the buyer with pre-settlement disclosure. This must include comprehensive disclosure about the body corporate levies and metered charges, including any outstanding debts, whether there are any unpaid costs relating to repairs to the building or infrastructure of the unit, penalty interest being charged by the body corporate, details of any proceedings pending against the body corporate in any court or tribunal, and any changes to the body corporate rules since the date of the previous disclosure. The disclosure must be provided no later than the fifth working day before settlement.

Additional disclosure: The buyer may request additional disclosure, at their own cost.

Consequences of failing to provide disclosure: If the seller does not give the pre-settlement disclosure statement and any requested additional disclosure statement to the buyer no later than the fifth working day before the settlement date the buyer may:

- » Delay settlement, or
- » Cancel the Agreement for Sale & Purchase by notice.

The seller, or a person authorised by the seller, must sign the disclosure statements and the buyer is entitled to rely on the information contained in the disclosure statements.

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Buyers Beware

No LIM or builder's report?

When you buy a house our advice is to check the Land Information Memorandum (LIM) and to consider getting a builder's report, and making these conditions in the Agreement. We have a story below which highlights the issues that a buyer found when purchasing their house.

In 2000, Mr & Mrs Ford bought a home from Mr & Mrs Ryan. A few months after settlement, the Fords' problems began. The house and garage lacked flashings at strategic points and some of the downpipes had been incorrectly sealed. These problems led to water leaks, significant cracks both to the exterior and interior, and swelling timber framing and mould stains. A subsequent builder's inspection identified a number of faults with the house. The cost of repairs were estimated to range from \$50,000 for targeted repairs to \$90,000 for a full reclad.

The Fords applied to the court to have their Agreement for Sale & Purchase (the Agreement) cancelled. They argued that the Ryans had warranted that all work on the property had the necessary code compliance certificates, when in fact some of the work did not. The District Court¹ held that the Fords did not have grounds to cancel the Agreement. Judge McKenzie confirmed the basic rule that it is entirely the buyer's responsibility to be satisfied as to the quality of the property being purchased.

What steps can you take?

How can you as a buyer be satisfied as to the quality of the property you intend to buy? There are two types of conditions which can be included in your Agreement which can help avoid any nasty surprises for you in the future.

One condition is to obtain a satisfactory Land Information Memorandum report (LIM) from the local authority. The LIM contains a host of information about the site, such as information on drainage, zoning and other planning issues, protected trees, builder's certificates and council permits, resource consents, special land features such as erosion and any rates owing.

When buying a property you should always bring your LIM to us so that we can help you with the information contained in it. We can discuss whether the LIM data will impact on your future use and enjoyment of the property, not to mention the future value of the property.

However, a LIM alone is not enough to avoid the situation in which the Fords found themselves. The LIM does not tell you about the condition of buildings on the site, and does not reveal any work that has been undertaken without the necessary permits. The LIM on its own would not have revealed all of the defects in the Fords' new home.

A second condition is to obtain a satisfactory builder's report which will give information on the structural soundness of the buildings on the property. We can include such a condition for you in your Agreement.² A builder's report can ensure that any structures on the property have been built in compliance with the relevant permits and regulations. This is important not just to ensure the property is safe for your use, but also to avoid any adverse effect on the future value of the property.

Once all the conditions are met, the Agreement is legally binding. If you have included a LIM condition but not a builder's report condition, and it turns out that building work on the site has been done without a permit, in most cases you are still legally obliged to complete the sale. If you have included a builder's report condition in your Agreement, there are a number of options open to you to complete the sale. You could negotiate repairs with the seller, or negotiate the price down. To avoid any issues at settlement, you should consult with us to ensure those negotiations are recognised in the Agreement.

When you are buying a home, we strongly recommend that you see us before you sign the Agreement. We can help to ensure the home that you intend to buy meets your requirements, and there are no nasty surprises.

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Operational rules

The default body corporate rules have been amended by the new legislation. Existing unit title developments have 15 months (from 20 June 2011 to 19 September 2012) to amend, revoke or make additions to their operational rules. If this is not carried out, the new default rules will apply.

Insurance: a reminder

All unit title developments must be insured by the body corporate, and not by the individual owners. The individual owners should have insurance for their internal fixtures, fittings, chattels and contents which are not covered by the body corporate insurance. The new legislation has brought in major changes. If you run a body corporate or own a unit title property and need some guidance on how to comply with these new provisions, please be in touch.

NB: We have more on the management agreements required by this new legislation on [Page 4](#).

¹ Ford v Ryan (2007) 8 NZCPR 945.

² The Fords did receive a builder's report which outlined some concerns about the building, however, they chose not to heed it.

Property Briefs

Rest home subsidies and the abolition of gift duty

Recently, much has been made of the government's intention to do away with gift duty from 1 October. The abolition of gift duty will allow you to complete a gifting programme in one fell swoop by making a transfer of property to your family trust and then completing a single gift of the full purchase price to the trust.

However the abolition of gift duty will not affect the position of the Ministry of Social Development (MSW) in assessing your financial position for the purposes of rest home subsidies; the MSW's assessment is entirely independent of the Inland Revenue Department's gift duty assessments. When the announcement of the abolition of gift duty was made, some suggested that by taking advantage of no gift duty and completing the single gift of the sale value of the asset to the trust, you would thereafter be eligible for government subsidies for services such as rest home care. However, that is not the case.

The MSW has a stringent regime of assessing whether or not you may have 'deprived' yourself of assets prior to a means assessment of income and assets. Essentially, the MSW allows you to hold certain assets at the time of making an application for subsidies for health care. Additionally, the MSW will allow you to gift no more than \$6,000 for the five years prior to the application, and for the years prior to that, of \$27,000/year. Any gifting over those levels may be considered by the MSW as 'deprivation' of assets and the MSW will include that excess gifting or disposal of assets in a means assessment, thereby clawing back the transaction that deprived you of assets.

The important message is that after 1 October a one-off gift to a family trust to take advantage of the abolition of gift duty and thereby transferring ownership of assets to the trust will not prevent the MSW from assessing your assets and gifting during your lifetime for the purposes of means assessment for rest home subsidies.

The longevity and independence of a trust will help you in an MSW assessment of deprivation in a means assessment. However after 1 October, if you attempt to avoid payment of rest home subsidies by completing a single gift in close proximity to a claim for rest home subsidies (or similar), it is unlikely to be effective.

Buying and selling a unit title property: management agreements

Since the Unit Titles Act 2010 came into force on 20 June 2011, we expect to see a greater level of transparency and disclosure of relevant information in respect of unit title properties. The contents and effect of management agreements (MA) are often overlooked when entering into Agreements for Sale & Purchase (the Agreement).

If you are selling a unit, the subject of an MA consideration should be given at the outset as to whether the buyer intends to become a party to the MA – or not. Care and advice needs to be taken in drafting the Agreement to ensure that any notice periods for ending the MA are recorded and adhered to, and any options to purchase – or first rights of refusal to purchase – are satisfied. A recent decision of the Real Estate Agents Authority Complaints Assessment Committee³ provided that any commissions payable to Real Estate Agents in respect of the MA should be supported by an Agency Agreement (s126 of the Real Estate Agents Act 2008).

NB: There is more on the unit titles legislation requirements for long term maintenance plans, and pre-contract and pre-settlement disclosures on [Page 2](#).

Residential property developments to become acceptable investments under New Zealand Immigration investor category instructions

Effective from 25 July 2011, an investment of at least \$1.5 million in a residential property development now qualifies as an acceptable investment for the purposes of obtaining a residence visa under the Investor Category from Immigration New Zealand. The following conditions, however, must be met:

1. The residential property must be a new development on vacant land
2. Renovations or extensions to existing developments will not qualify
3. All regulatory approvals in terms of building consents and resource consents (where necessary) will need to be obtained. The cost of the same will not be permitted to be calculated in the total investment sum
4. The applicant must intend to make a commercial return in the open market, and
5. Family members or anyone associated with the principal investor must not reside in the residential property development.

The government has introduced residential property developments as an acceptable form of investment to jump start the construction sector in New Zealand.