

Unit title developments running out of time to comply with new Act

November 2011

The calendar is closing in on bodies corporate who have not yet held their annual general meeting since the Unit Titles Act 2010 (and regulations) (UTA) came into force on 20 June 2011.

AGM to be held before 20 December 2011

The UTA requires all existing bodies corporate to hold an annual general meeting as soon as practicable after the UTA came into force and, in any event, within 6 months ie before 20 December 2011. It also sets out clear timeframes within which notices must be sent to owners in advance of the meeting.

Notice of intention to hold the AGM to be issued to all owners

First, a notice of intention to hold an annual general meeting must be issued to all owners (**Notice of Intention to Hold AGM**). This notice must be issued at least 3 weeks before the AGM. Taking the latest date on which a body corporate could hold its AGM (and still be within the required timeframe), 19 December, the Notice of Intention to Hold AGM would need to be issued by 28 November.

There are a number of matters prescribed by the UTA to be included in the Notice of Intention to Hold AGM. Importantly, the notice is to invite owners to nominate candidates for election as the chairperson and body corporate committee (where applicable); as bodies corporate are under an obligation to appoint a chairperson at this first AGM.

Bodies corporate must appoint chairperson at first AGM

Given that the chairperson must be an owner, or the director of an owner company, there will be bodies corporate who do not comply with this obligation: an owner can not be forced to volunteer their services as chairperson. The consequences for those bodies corporate are not clear. The Chief Executive of the Department of Building and Housing has powers to investigate any breach of the UTA, and to take such action (including legal proceedings) as the Chief Executive thinks proper. However, whether this would extend to having the court appoint an owner as a chairperson (against their will) would seem unlikely.

Notice of AGM

In addition to the Notice of Intention to Hold AGM, bodies corporate must also issue a notice of annual general meeting (**Notice of AGM**). This must be issued at least 2 weeks before the AGM. So, again taking the latest date on which a body corporate could hold its AGM (and still be within the required timeframe), the Notice of AGM must be issued by 5 December. However, the Notice of AGM must include, amongst other things, the nominations for candidates for election (which were invited under the Notice of Intention to Hold AGM). There will accordingly need to have been sufficient time for owners to respond to the Notice of Intention to Hold AGM in order for the Notice of AGM to be completed and issued.

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Items to be considered and/or resolved at first AGM

In addition to the appointment of the chairperson and body corporate committee members (if applicable), there are a number of requirements under the UTA which the body corporate should consider as part of the agenda for the first AGM. These include:

- **Removal of secretary and appointment of manager**

The office of secretary is not recognised under the Unit Titles Act 2010. The chairperson is the one with the statutory duties to perform many of the tasks previously belonging to the secretary. Accordingly, the body corporate should resolve, at the AGM, to remove the existing secretary. At the same time, however, the body corporate could resolve to appoint a manager to carry out various of the body corporate's and chairperson's duties. That manager could be the person/entity who is currently the secretary. (Note, however, that the statutory obligation to ensure the chairperson's duties are performed remains with the chairperson). The engagement by the body corporate and/or chairperson of a manager should be in writing and clearly set out the required duties and the parameters of the manager's authority.

- **Body corporate committee**

If the body corporate comprises 10 or more principal units, then it must form a committee unless it decides, by special resolution (i.e. 75%) not to do so. If the body corporate comprises 9 or fewer principal units, then by default it is not required to form a committee; although it may elect by special resolution to do so.

If the body corporate is to have a committee, then the owners need to resolve the number of

committee members and elect the committee members.

If a committee is formed, then the body corporate may delegate any of its duties or powers (with limited exceptions), either generally or specifically, to the body corporate committee by special resolution and written notice.

- **Transitional provisions**

There are a number of transitional provisions under the UTA which will not apply until the expiry of a 15 month transitional period (i.e. 19 September 2012) unless the body corporate resolves (by special resolution) that they will apply prior to that date. These include:

- *Body corporate rules*

Existing body corporate rules will become invalid from the expiry of the transitional period. Under the UTA, there is a default set of "operational rules". These relate to the use and enjoyment of the common property, disposal of rubbish and noise. The default rules are not going to be adequate for many developments which will need a more comprehensive set of operational rules. Bodies corporate should accordingly consider how the default operational rules should be added to, revoked or amended. Ideally they should also make such changes to the operational rules (if any) prior to the expiry of the transitional period.

- *Establishment of long term maintenance plan*

- *Establishment of long term maintenance fund*

- *Body corporate's duties of repair and maintenance*

Bodies corporate will become responsible for the repair and maintenance of "building elements" and "infrastructure"

(both as defined) that relate to, or serve, more than 1 unit. This will apply to all bodies corporate from the expiry of the transitional period on 19 September 2011; but they can decide (by special resolution) that they assume this responsibility sooner.

▪ *Financial compliance*

Does the body corporate want its financial statements audited? If not, it must pass a special resolution against this (not necessarily at the first AGM, but at least before the end of the financial year).

The body corporate may consider whether it wants to establish an “optional contingency fund” and/or an “optional capital improvement fund”.

If the body corporate wants to nominate any person(s) to operate the body corporate’s bank accounts, then it must do this, and specify the manner in which the account(s) may be operated, by special resolution. (This can be resolved at any general meeting i.e. not necessarily at the first AGM).

▪ *Utility interests*

The UTA has introduced a new concept of “utility interest”. Utility interests are now to be used in determining, amongst other things, an owner’s share of body corporate levies. The utility interest will be the same as the ownership interest (which is the same as previously known as a unit entitlement) but can be reassessed. Bodies corporate may consider a reassessment is appropriate where, for example, one of the units utilises shared facilities (such as lift) significantly more than others.

▪ *Insurance*

If the principal and accessory units are stand-alone units, then the body corporate may (by special resolution at a general meeting) require each unit owners to insure all the improvements within the boundaries of their unit (with the body corporate remaining responsible for insuring all improvements within the common property boundaries).

Conclusion

There are major decisions to be made by bodies corporate. Initially this will include the appointment of a chairperson at a first AGM to be held under the UTA before 20 December. However, early consideration should be given to other provisions of the UTA which will apply from 20 September next year.

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This article is intended to provide a general overview of the topics covered and is not intended to be relied upon as legal advice.

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