2010

LEGISLATIVE ASSEMBLY FOR THE AUSTRALIAN CAPITAL TERRITORY

Unit Titles Amendment Regulation 2010 (No 1)

SL2010-37

EXPLANATORY STATEMENT

Presented by

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This explanatory statement relates to the *Unit Titles Amendment Regulation 2010 (No 1)* (the regulation) which amends the *Unit Titles Regulation 2001* (UTR).

Background

The *Construction Occupations Legislation Amendment Act 2010* (the Act) amended the *Construction Occupations (Licensing) Act 2004* (COLA) and *Unit Titles Act 2001* (UTA) to create a new construction occupation of works assessor. A works assessor will assess and collate stated requirements for a unit title application and provide that material to the applicant i.e. the person who engaged them in the form of a unit title assessment report. The applicant or lessee would then use the report as part of their application to the planning and land authority (the authority). The report is one element of the final application for unit titling a development and the authority retains responsibility for the final decision.

The construction occupation of works assessor was created following discussions with industry through the ACTPLAn Industry Monitoring Group (IMG) convened by the authority. The IMG was established as a result of the Chief Minister's Roundtable with industry, held in December 2008, to monitor and report on the implementation of the *Planning and Development Act 2007* and discuss ways to streamline processes and gain greater efficiencies for industry and government.

Industry indicated a desire to more fully integrate the unit title application process into the private certification processes because delays experienced during periods of peak demand were impacting on the final occupation of units.

The UTA, section 17, states the information that must be provided in an application to the authority to unit title an existing or approved development under construction.

The authority may approve an application under section 20 of the UTA if it is satisfied on reasonable grounds that the application fulfils stated requirements. Those requirements include that the application is in accordance with the UTA; each unit will be suitable for separate occupation and for a use that is not inconsistent with the lease; the proposed schedule of unit entitlement is reasonable; and any encroachments into a public place are satisfactory.

Previously, as part of determining an application for unit titling, the authority conducted site inspections and requested certification, if required, from relevant agencies, such as TAMS and ACTEW, on technical specifications for the development.

A site inspection covered such things as establishing that the building had been built in accordance with the approved plans (other than those matters covered by the *Building Act 2004*); that the landscaping was consistent with the approved landscape plan; that the location of units and unit subsidiaries was consistent with the site plan and floor plan; that encroachments have been identified and that these are permitted; that the proposed units and car spaces are correctly numbered and letter boxes provided; and so on.

It is expected that the new construction occupation of works assessor whose role will be to do the site inspection elements and collation of materials for unit title applications will deliver greater flexibilities to industry while maintaining the overall integrity of the process.

Overview

The amendments to the UTA by the Act provided for regulations to be made. New section 22B (2) and (5) of the UTA entitle a regulation to prescribe what an application by a developer to engage a works assessor must include and what a unit title assessment report must contain or anything that must accompany the report.

The regulation amends the UTR to insert these regulations. The purpose of the regulations is to ensure the planning and land authority is provided with all the information that is required by the authority to properly consider a unit title application in accordance with the authority's obligations under section 20 of the UTA.

Pursuant to new section 2A, a unit title assessment report must now accompany every unit title application. New section 2B prescribes what details and material must be included in a unit title report application by a developer to a works assessor to prepare a unit title assessment report. New section 2D prescribes the contents of a unit title assessment report under section 22B(5)(a). New section 2E prescribes the materials to accompany a unit title assessment report under section 22B(5)(b).

Section 19 of the Construction Occupations Legislation Amendment Act amended section 181 of the UTA to allow a regulation to create offences and fix maximum penalties of not more than 60 penalty units. New sections 2C, 2F and 2G of the regulation create offences with a maximum penalty of 60 penalty units. Penalty units are defined under the *Legislation Act 2001* and are presently $110.

The regulation also amends the *Planning and Development Regulation 2008* to clarify the exemption from development approval for landscape gardening.

Outline of Provisions

Clause 1 Name of regulation

Names the regulation as the *Unit Titles Amendment Regulation 2010 (No 1)*

Clause 2 Commencement

States that the regulation commences on the day after its notification.

Clause 3 Legislation amended

States that the regulation amends the *Unit Titles Regulation 2001* (UTR). The Note indicates that the regulation also amends the *Planning and Development Regulation 2008.*

Clause 4 New section 1A

Inserts new section 1A in part 1 to make it clear that the dictionary at the end of the regulation is part of the regulation. This clause is necessary because the regulation inserts a Dictionary (see Clause 8).

Clause 5 New division 2.1A

Inserts a new division 2.1A which provides information about the unit title assessment report which is prepared by the works assessor.

New section 2 provides definitions for the division for the terms ***planning documents*** and ***relevant development approval***.

Section 2 Definition – div 2.1A

Planning documents for a parcel means the approved plans (for the meaning of approved plans, see the Dictionary), and:

- For a development under the Planning and Development Act, a notice of decision given under that Act;
- For a development under a planning and development law in force before the commencement of the Planning and Development Act, an approval given under that law;
- For works in a designated area under the *Australian Capital Territory (Planning and Land Management) Act 1988 (Cwlth),* a copy of the proposal to perform works submitted to the National Capital Authority (NCA) together with any plans and specifications, and a copy of the works approval by the NCA.

This definition ensures that the provisions regarding unit title assessment reports apply to all the various forms of development approvals not just those under the Planning and Development Act. For example, if the development is on designated land, the only development approval will be in the form of a works approval from the National Capital Authority. There is no Notice of Decision which is only issued under the Planning and Development Act.

Relevant development approval for a parcel means the ***planning documents*** that show the approval status of development on the parcel immediately before the unit title application is made.

New section 2A Prescription of parcel – Act, s17 (5) (b)

Prescribes a parcel as a parcel under the UTA, section 5(a). Section 5(a) states that a parcel is land proposed (in a unit title application) to be subdivided under the UTA. This means that a unit title assessment report (UTAR) is required for every unit title application whether it relates to commercial, residential, old or new development, and so on.

Section 2B Unit title assessment report application - Act, s22B (2)

When applying to a works assessor for a UTAR, the developer must provide sufficient details in the application to enable the assessor to make an informed decision about accepting the job. This is because under new section 22B of the UTA, an assessor must prepare the UTAR if the assessor agrees to undertake the work. The application, therefore, must include details about the parcel of land (block section number etc), the applicant (ABN, postal address, telephone contact number, etc), the number of units applied for, proposed commencement and completion

dates, whether staged development is involved, and a copy of the relevant development approval. The application must be signed by the applicant. Relevant development approval is defined for the division in new section 2 (see above).

Section 2C Offence – false or misleading information in application

A person commits an offence if the person knowingly or recklessly includes in an application for a UTAR, information that is false or misleading, or omits something without which the information is false or misleading. The maximum penalty for the offence is 60 penalty units. Penalty units are defined under the Legislation Act. Section 19 of the Construction Occupations Legislation Amendment Act amended the UTA to allow a regulation to create offences and fix maximum penalties of not more than 60 penalty units.

Section 2D Unit title assessment report – contents – Act, s22B (5) (a)

Section 2D prescribes the contents of a UTAR. This section refers to the works assessor as a ***unit title assessor***. This term is defined in section 22A of the UTA (which was inserted by the Construction Occupations Legislation Amendment Act). A ***unit title assessor*** means:

(a) a works assessor licensed under the Construction Occupations (Licensing) Act; or

(b) a building surveyor licensed under the Construction Occupations (Licensing) Act when providing a works assessment service;

A ***works assessment service*** is defined in s14A of the Construction Occupations (Licensing) Act.

The contents of the UTAR can be broadly broken up into 3 areas. The first area is administrative or general. The second refers to matters relating to the site inspection of the development by the unit title assessor and the 3rd refers to matters relating to the development approval (DA) for the development.

Administrative and general matters include setting out in the UTAR details sufficient to identify the parcel to be subdivided; the particulars of the unit title assessor preparing the report; and the date the report was prepared. The report must be signed. The unit title assessor must state he conducted a site inspection after the development has been completed and the date of each site inspection.

There must also be included in the UTAR, a statement by the unit title assessor that the unit entitlements shown on the certification of unit entitlements are the same as those shown on the schedule of unit entitlement form and that the total number of unit entitlements shown on the form is 10,100,1000,10000 or 1000. The schedule of unit entitlement is defined in section 8 of UTA and under the Act, must be 10,100,1000,10,000 or 100,000.

When a unit title assessor receives an application from a developer to do a UTAR for a parcel and agrees to do the work, the assessor, first of all, looks at the relevant development approval which has been provided with the application from the developer. If the development approval for the parcel includes conditions other than a condition that applied only in the construction stage of the development, the assessor must report on whether the condition has been complied with. If a condition has not been complied with, the unit title assessor liaises with the developer to ensure the condition is met.

Once all conditions are met, it is then appropriate for the unit title assessor to carry out the site inspection and provide various assessments in the report based on the site inspection. The unit title assessor reports on:

- the extent to which the physical development is consistent with the site plan and floor plan for the parcel (site plan and floor plan are defined in the Dictionary). The unit title assessor reports on the position of the boundaries for the parcel, each unit and unit subsidiary, and the common property in relation to the site plan and floor plan;
- the extent to which each unit and unit subsidiary has access to common property without requiring access through another unit or unit subsidiary;
- whether the development is consistent with the site plan and floor plan in relation to the footprint of buildings on the parcel. Footprint is defined in subsection (3). ***Footprint***, of a building on a parcel, means the part of the parcel covered by the extremities of the building at or projected to ground level. This definition encompasses things above the ground as well as things below the ground such as basements;
- if landscape plans form part of the relevant development approval, the assessor must also state that he inspected the landscaping on the parcel and that it complies with the relevant development approval;

- the position of boundary fences and boundary walls and the number of each unit and each non –adjoining unit subsidiary, allocated car park and storage cage is accurately depicted on the site plan and floor plan. For the purposes of checking the numbering of units and subsidiaries, an address schedule can be taken into account. Address schedule is defined in the Dictionary as a schedule that shows the relationship between the numbering of units on the site plan or floor plan of the parcel and the door numbering and street address of the units in the parcel. It can happen, particularly for large blocks of units, that the unit number on the site plan is not the same as the number on the door of the unit. For example, if a block of units has two street frontages, one unit may have one street address and another unit a different street address. Also, units can be numbered in accordance with their floor – for example, in a block of units, units on the second floor may be numbered 201, 202, 203, etc, and units on the 4th floor may be numbered 401, 402, 403, etc. Site plans and floor plans merely list the number of units in numerical order starting at 1, that is, units are numbered on the site plan as 1, 2, 3, and so on. The address schedule provides a reconciliation of the different numbering of the units on the site plan and the actual street address of the unit. An address schedule is prepared by the developer and is given to the assessor under section 22C of the UTA (which allows the assessor to request further information from the developer);
- provides a statement that there is a letter box for each unit and for the owner's corporation and that the numbers on the letter boxes correspond to the numbers of the units, taking into account, if applicable, an address schedule;
- the extent to which the development is consistent with the relevant development approval in relation to the number of units in the development and the position of various things such as boundary fences, if such things are shown on a plan that forms part of the DA.

Subsection 2D(2) clarifies the situation when the development is a staged development. When a unit title assessor is preparing a unit title assessment report for a development that is a staged development, the unit title assessor only need consider those parts of the relevant development approval (defined see s2) that are

relevant to the stage of the development being assessed. The Unit Title Act only provides for one application and one decision, therefore, in real terms, the unit title assessor will only be looking at the first stage of the development.

Note 1 of section 2D refers to Codes of Practice. A Code of Practice is made under section 104 of the Construction Occupations (Licensing) Act and is a tool whereby the construction occupation registrar can prescribe how a licensed person may do certain things. The intent is that Codes of Practice for key aspects of the work of a unit title assessor will be developed and used. For instance, a Code of Practice can provide further information about how to do a site inspection, how to inspect landscaping and how to prepare a fitness for unit title certificate.

Section 2E Unit title assessment report – accompanying material – Act, s22B (5) (b)

Section 2E sets out the accompanying material for a UTAR. These materials provide the authority with the information necessary to determine a unit title application as well as provide a record of the documents used by the unit title assessor in preparing the report.

The accompanying material prescribed includes the relevant development approval; relevant certificates of occupancy and use; a certification of unit entitlements and schedule of unit entitlement form, both of which is not more than 3 months old; a site plan, floor plan and surveyor's declaration that are not more than 3 months old; and a copy of the permit if permission for the development is required under the *Roads and Public Places Act 1937*, section 9.

The accompanying material also includes a fitness for unit title certificate that is not more than 3 months old, issued by an eligible building surveyor certifying that each proposed unit in the parcel is suitable for separate occupation. Such a certificate is required by the authority in deciding whether to approve the unit title application under section 20 of the UTA (the authority has to be satisfied on reasonable grounds that each unit is (or will be) suitable for separate occupation (s.20(b)).

Eligible building surveyor is defined in subsection (2) and means a building surveyor who would be eligible to be appointed as a building certifier of the building if the building were to be built when the fitness for unit title certificate is given. This means the unit title assessor, if qualified as an eligible building surveyor, can provide the

fitness for unit title certificate or if not, they can employ another suitably qualified person.

Requiring certain documents such as the site plan and floor plan, as well as the unit title assessment report, to be no older than 3 months when the unit title application is lodged with the authority, ensures the authority is dealing with the most up to date information which in turn, improves the efficiency of the unit titling process.

Further accompanying material include certification by a registered surveyor that is not more than 3 months old that any structure not shown on the site plan or floor plan does not encroach on any boundaries. Recent certification from a registered surveyor is also required that any encroachments are allowed under the UTA and the relevant development approval and that the attachment complies with the approval based on a site inspection. If an encroachment is over leased land, the certification needs to include the Land Titles Office dealing number of the registered transfer and grant of the easement.

There is also provision that the unit title assessor include in the report any other information obtained by the assessor under UTA, section 22C.

Subsection (2) provides a definition of ***certificate of occupancy and use***. For development on or after 1 July 1995, it is a certificate issued under the *Building Act 2004.* For development before 1 July 1995, it is a certificate issued under the *Building Act 1972* (repealed) and the approval of plumbing or drainage work issued under the *Energy and Water Act 1988* (repealed). This reflects the different legislative schemes applicable to certificates of occupancy before and after 1 July 1995.

Subsection (2) also defines the term ***registered surveyor's declaration form*** which means the surveyor's declaration form approved under the *Land Titles Act 1925*, section 140.

Section 2F Offence – preparing false or misleading unit title assessment report

New section 2F creates an offence of knowingly or recklessly preparing a false or misleading unit title assessment report or omitting something without which the report is false or misleading. A partner can commit the offence under s2F(2) though there are defences for partners under s2F(3). It is a defence if the partner proves:

(a) that the partner did not know about the false and misleading report and reasonable precautions were taken and appropriate diligence was exercised to avoid the preparation of a false or misleading report; or

(b) that the partner was not in a position to influence the other partners in relation to the preparation of the report.

Section 19 of the Construction Occupations Legislation Amendment Act amended the UTA to allow a regulation to create offences and fix maximum penalties of not more than 60 penalty units. The maximum penalty for these offences is 60 penalty units. A penalty unit is defined under the Legislation Act and is currently $110.

Section 2G Offence – providing false or misleading unit title assessment report in application for unit title

New section 2G creates an offence of knowingly or recklessly providing a unit title assessment report as part of a unit title application that is false or misleading or omits something without which the report is false or misleading. A partner can commit the offence under s2G(2) though there are defences for partners under s2G(3). It is a defence if the partner proves:

(c) that the partner did not know about the false and misleading report and reasonable precautions were taken and appropriate diligence was exercised to avoid the provision of a false or misleading report; or

(d) that the partner was not in a position to influence the other partners in relation to the provision of the report.

The maximum penalty for the offences is 60 penalty units.

Clause 6 Permissible unit subsidiaries – Act, s19, section 3 (1) (a) (i)

Removes air conditioner as a unit subsidiary. Section 19 (1) of the UTA states that a unit title application must show any unit subsidiary as a building or part of a building with boundaries defined by reference to the floors, walls and ceilings of the building (see also the Note to Sec 12 UTA).

An air-conditioning unit is not a building with floors, walls and a ceiling and therefore, cannot be classified as a unit subsidiary.

Clause 7 New section 6 (3)(c) to (e)

Inserts new section 6 (3) (c) (d) and (e). Section 6 states that boundary diagrams must accompany a unit title application and what the diagrams must show. New subsections (c), (d) and (e) expand what must be shown in a boundary diagram. The diagrams must show the position of boundary fences and boundary walls; the nature and extent of any encroachments whether on leased or unleased land, and their relationship to the parcel; and the site and nature of any existing or proposed easements affecting the parcel.

Clause 8 New dictionary

Inserts a new dictionary which defines terms added by the regulation.

Clause 9 Planning and Development Regulation 2008, schedule 1, section 1.104(1)(a)

For consistency of terminology with the Territory Plan, the words “residential purposes” are substituted with the words “residential use”

Clause 10 Planning and Development Regulation 2008, schedule 1, new section 1.104(1)(aa)

Inserts new section 1.104(1)(aa) after section 1.104. Schedule 1 of the Planning and Development Regulation prescribes development that is exempt from the requirement for development approval (DA) under the Planning and Development Act. Section 1.104 of schedule 1 sets out the parameters of the exemption for landscape gardening.

The insertion of new section 1.104(1)((aa) clarifies the exemption. Together with clause 9 which ensures the section refers to residential “use” rather than residential “purposes” consistent with the Territory Plan definitions, new section (aa) clarifies that the exemption for landscaping can not apply if there is a condition of a development approval that landscaping be done in accordance with a landscape plan until after that condition has been met.

For instance, a development approval for a multi unit housing development may have a condition that the landscaping has to be done in accordance with an approved landscape plan. Once the landscaping has been done in accordance with the approved plan, that is, the condition has been complied with, any further landscaping may be DA exempt. For example, there is a DA for a development of townhouses. If the DA includes a condition that the landscaping of the grounds has to be done in a

particular way, then this initial landscaping can not be DA exempt. However, once the townhouses are built and the initial landscaping completed, as approved, further landscaping (eg of individual townhouses by owners) may be DA exempt.

Clause 11 Planning and Development Regulation 2008, schedule 1, section 1.104(3) new definition of *residential use*

Inserts a new definition of ***residential use*** in section 1.104(3) as a consequence of changes made by clause 9 above to section 104(1)(a).