SCHOOL OF LAW
Faculty of Arts

MACQUARIE University
SYDNEY·AUSTRALIA

15 December 2023

Mark Feather
General Manager
Policy Australian Energy Regulator

Dear Mr Feather,

Re: Submission to Review of the AER exemptions framework for embedded networks

This submission should be read in conjunction with the attached draft paper "Green Strata: Just transition to green energy in housing development". That paper was written as part of my ongoing research on embedded networks in strata schemes, which is part of my larger research on strata title. I am the author of *Strata Title Property Rights: Private governance of multi-owned properties* (Routledge 2017), as well as multiple academic articles in the area. I have been engaged by governments in Australia and overseas to advise on their laws in relation to high density development. I am a long-term Academic Fellow of the Australasian College of Strata Lawyers, the peak industry body for lawyers working in strata industry. I am not an expert on energy regulation and have tried to focus my submission on aspects of embedded networks that relate to high density housing, my area of expertise.

I note that I am not a stakeholder in either the strata or energy industry. I am a professor in a publicly funded university, employed to produce objective, informed research for the benefit of the Australian community.

Issues Paper Questions

1. Do stakeholders consider one factor or principle should take precedence over another? If so, what weighting should we give the various principles or factors provided by the Retail Law and set out above, to support any case for change to the exemptions framework?

Is the AER's proposed approach to the exemption framework review the preferred approach? If not, what other factors or criteria should the AER consider?

Judging by the evidence given to NSW, Victorian and federal inquiries into embedded networks, the risks of embedded networks seem to outweigh their benefits. It is likely that those risks will increase exponentially as we strive to reach net zero through the production of 45% of Australia's energy supply through distributed energy resources (DER). This is privately owned infrastructure that can manufacture, store and manage renewable energy. Much of that DER will be located in strata and community title schemes because their legal

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structure allows for the collective ownership of DER located on common property and its management through a body corporate (owners corporation).

At their base, embedded networks exist because there is a group of customers (apartment owners and residents; retirement village apartment owners and residents; residents of land lease communities) on a single site creating the potential to bulk purchase energy at a discount. *That discount belongs to the consumers whose collective existence and needs creates the discount.* It does not belong to a developer or a company that has inserted itself between the group of customers and the energy retailers. Currently, much or all of that discount is being taken as profit by embedded network operators, in part to recoup the money they have spent providing developers with the infrastructure for free (see paper attached).

This is a system that benefits developers at the long-term expense of consumers. Contracts negotiated by a developer and an embedded network operator will invariably be for the benefit of those parties, not the ultimate consumers who have to pay for those contracts (apartment owners and residents) (see paper attached). It is inevitable that some or most of those contracts will be exploitative. Regulation cannot protect 'the long-term interests of energy customers in relation to price, quality, safety, reliability, security of supply, and emissions reduction' if energy is being delivered to customers through inherently exploitative or suboptimal contracts.

Companies could exist to assist bodies corporate with their embedded networks, but they should operate on a fee for service basis. The energy infrastructure in buildings belongs to the apartment owners; legally, because it is a fixture and morally, because owners paid the developer for it through their purchase prices (developers obviously do not pass on the windfall they made from the free installation of infrastructure). That infrastructure and the collective owners creates an opportunity for consumers to bulk purchase energy at a discount, which as noted, belongs to the owners. If owners need technical assistance running an embedded network or other DER, appropriately qualified professionals and companies could provide that assistance to the body corporate on a fee for service basis, in exactly the same way as strata managers assist bodies corporate with the complexity and compliance requirements of the strata title legislation or a licenced plumber or electrician helps them with the complexity of their ordinary infrastructure. There is no reason for companies to be installed in buildings by developers, through contracts with the body corporate, any more than plumbers, electricians, lift technicians, air conditioning technicians, strata managers, building managers or lawyers should be embedded in strata schemes through developer-made contracts. Those buildings belong to owners, and as property owners it is their basic right to determine who assists them with the management of the building and its infrastructure.

This is the right that every owner of a non-strata property enjoys. As a result of a foundational rule of modern property law, they are never tied to contracts that were formed by previous owners of their homes. The only reason strata owners and residents are tied to these contracts is because of the existence of a body corporate, which is a separate legal entity from its individual members. Bodies corporate are created by legislation so that strata owners can manage their own building and community. Bodies corporate are not created so that developers can make extra profit or so third party companies can benefit from long term contracts. That is an abuse of the strata title legislative form. The result is that embedded network customers do not have the same right to choose a retailer and they are denied customer protections afforded to other customers. There is no justification for this.

It seems that exemptions exist in multi-owned properties because it was assumed that the sale of energy is not a core part of a body corporate's 'business' (they in fact have no business) or that of retirement village operators and land lease community operators. That remains true, at least for bodies corporate, but it appears to be manifestly untrue for many exempt embedded network operators. Their core business does seem to be the sale of energy to consumers, and so it is unclear why they are entitled to exemptions.

2. *Is our proposed review scope reasonable? If not, what other supply arrangements should be considered and why?*

Yes, focussing on high density residential embedded networks is the correct focus. The reason there are so many embedded networks in this context is because:

a) It is much easier to install energy infrastructure when a building is being constructed by a single developer who controls the entire process, than retrofitting an existing building that is controlled by a group of owners who may have different property owning motivations (landlords vs owner occupiers), finances, commitments to renewable energy sourcing etc;
b) Many consent authorities (local councils or state governments) are tying planning approval of strata title developments to the inclusion of sustainability infrastructure, including energy infrastructure;
c) The strata title legal structure of apartment buildings makes them targets for embedded network operators, i.e. the existence of common property on which to site infrastructure and a separate body corporate/owners corporation that can be bound by a contract with an embedded network operator (see attached paper).

3. *Note on terminology at p12, footnote 7. The terminology used in strata title is frequently confusing and overlapping. The following is offered simply to assist AER:*

Strata title legislation is state- based. While it is largely consistent, there are some variations between states, particularly in relation to terminology.

Body corporate – this is a separate legal entity made up of all owners, not tenants. It is automatically created by the registration of a strata plan. (The strata plan subdivides the land and air into individual Torrens lots (apartments) and common property (owned by all owners). Registration of the plan creates the legal titles that the developer sells). 'Body corporate' was the original word used in all states, but NSW and Victoria now use the term 'owners corporation', WA uses 'strata company', SA uses 'strata corporation' and Qld still uses 'body corporate'.

All states have legislation that allows for the creation of low rise communities that use a strata title legal structure ie they have individually owned lots (houses or land), common property (roads, parks, infrastructure) and a governing body corporate. In some states this is called

‘community title’. The governing body will then be called a ‘community association’ or ‘neighbourhood association’. It is simply a body corporate, made up of all owners.

‘Body corporate’ is the easiest generic term to use for all governing bodies in strata and community title.

Bodies corporate include a lot of owners (potentially hundreds) and as a result, they can operate through a smaller ‘strata committee’ and might also be assisted by a strata manager. However, the ultimate power and authority in all multi-owned developments, high and low rise, rests with the body corporate, the separate legal entity made up of all owners. That is the only relevant entity for the purposes of energy regulation.

4) What factors are driving the increase in residential exemptions? 5) Which factors are having the biggest influence? 6) How common is it for new residential developments to be built as embedded networks?

State governments in NSW have had urban consolidation policies that promote the construction of apartments for well over 30 years. It is not likely that the construction of apartments per se has driven the rise in embedded networks. Tens of thousands of apartments were constructed in Victoria, NSW and Qld from the late 1990s onwards, and yet it is only in recent years that embedded networks have become a problem.

In 2017, the Australian Energy Market Commission (AEMC) identified the increased focus of local councils on sustainable and smart infrastructure as ‘a significant catalyst for the establishment of larger-scale embedded network solutions at the precinct scale, and potentially, at a community scale in Australia’.[1] Councils created mandates and incentives for developers, including permission to build at higher density. Developers also perceived increase marketability of developments with smart, green facilities.[2] As noted above, the pressure and desire for sustainability infrastructure is going to increase markedly as we attempt to reach net zero by 2050.

Whatever the specific trigger for the construction of embedded networks, there is little doubt that they are connected to developers maximising their profit. That is their right as private profit-making entities. However, it is the government’s job to ensure developers do not do so at the expense of citizens and their basic rights. Government regulation of operators in private markets is a fundamental attribute of all fairly functioning markets in liberal democracies.

As described in the paper attached, Australian and global developers have a long history of making additional profit when constructing high rise buildings by exploiting the physical structure and paying capacity of future collective owners. Developers do this through contracts:

- negotiated by them and a third party service provider, but
- ultimately formed between the body corporate and the service provider.

[1] Australian Energy Market Commission, *2017 Retail Energy Competition Review*, 2017, 154
[2] Australian Energy Market Commission, *2017 Retail Energy Competition Review*, 2017, 151.

While these contracts have been profitable for developers, they are frequently a source of financial and social frustration for apartment owners *and* service providers who start their businesses considerably out of pocket having paid the developer in cash or kind for the contract. These contracts are the legal source of embedded networks. They provide the incentive for embedded network companies to provide infrastructure to developers for free because members of the body corporate (owners) and tenants will have to pay these contracts. Contracts will rarely have easy termination clauses for the body corporate (see article attached for further details).

5) *How do embedded networks result in lower energy prices for residential customers? Please provide supporting information. 8) How do infrastructure costs for new developments built as embedded networks compare to non-embedded networks? 9) How do higher-density complexes configured as embedded networks benefit residential buyers? Please provide supporting information. 10) What kind of innovative and emissions reduction arrangements can embedded networks offer residential customers? 11) What other benefits are there for residential embedded network customers? 12) How should we consider any consequential benefits such as improved access to affordable housing in this review?*

Based on the evidence presented to state and federal parliamentary inquiries into embedded networks it seems that they are not providing benefit to many customers (see paper attached). This is inevitable if the embedded network operator is not the body corporate itself but rather a profit-making entity that has provided infrastructure to the developer for free in return for a guaranteed income stream from the owners and residents of the development. There is no legal requirement for the embedded network operator to pass on savings to customers and it is hardly surprising that profit-making entities are not doing so.

6) *What support is there to stop the expansion of residential embedded networks by closing the NR2 registrable network exemption class? 25) What would be the impacts on customers, embedded network service providers, exempt sellers, embedded network managers, and other parties if we ceased granting exemptions for embedded networks with more than 10 residential customers? Please provide information to support your views.*

In the short time embedded networks have been allowed to flourish, the evidence to date is that they are undesirable for large numbers of consumers. Given their genesis in negotiations between developers and third party service providers, this is unsurprising. There is also evidence that many of the operators that have received exemptions are businesses whose primary activity is energy. It seems odd that they have been able to benefit from exemptions.

Developers will always find ways to build profitably within the regulatory environment in which they find themselves. Those frameworks vary from state to state and nation to nation. A number of big developers in Australia are global operators working in markedly different markets and legal systems. Any suggestion that it is not possible for them to do development unless they are allowed to continue to operate in the current environment is untenable.

In relation to the service provider businesses that have emerged in this sector, as noted above, it would be preferable if Australia developed an industry that provides services directly to bodies corporate to manage body corporate owned energy infrastructure on a fee for service basis. That is what we will need if 45% of Australia's energy is going to come from privately owned DER by 2050. Just as non-strata property owners need electricians, plumbers, solar panel companies, lawyers, builders, and real estate agents to help manage their homes, so too do bodies corporate. The size of many body corporate apartment buildings means that the infrastructure will be more sophisticated and the provision of services potentially more profitable, but that does not justify companies being installed in buildings by developers, leaving owners and tenants with no choice about who manages their infrastructure and provides them with energy.

Experience of other service providers installed by developers in strata schemes suggests that such a system is suboptimal for service providers, as well as consumers (see paper attached). Whether it is management rights business in the tourist industry in Qld or embedded network operators, they will all be substantially out of pocket in cash or kind when they begin their businesses. That is why they need bodies corporate and residents to be locked into long term contracts. It is an inherently flawed system for all parties, other than developers. Allowing it to continue will inevitably create future dispute, involving residents, owners and service providers. Developers will walk away untouched.

As a nation, we need renewable energy infrastructure. Much will be installed in high density and master planned housing, which will increasingly be home to millions of Australians. However, it is not the case that there is only one way of achieving this end, and there is no point achieving it in ways that will cause consumers ongoing harm. The Australian housing market is already deeply inequitable without adding exploitative energy contracts to the mix. I would recommend the reform options that provide the maximum protection to citizens (consumers), even if that has adverse effects for third party businesses or developers. This will produce the most sustainable systems, both environmentally and socially, for the nation.

Yours sincerely,

[redacted]

Professor Cathy Sherry

Macquarie Law School, Centre for Environmental Law and Smart Green Cities

Green strata: Just transition to green energy in housing development

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The 2017 Final Report of the Electricity Network Transformation Roadmap estimated that by 2050 up to 45% of Australia's electricity supply could be provided by millions of privately owned renewable energy generators, storage and management systems.[1] Known as 'distributed energy resources' or DER, these privately owned systems are any renewable energy unit that produces and/or manages power at household or business level. The most common examples are rooftop solar PV units, battery storage, thermal energy storage, electric vehicles and chargers, smart meters, and home energy management technology.[2] Rather than sourcing their power from the grid, millions of Australians will be producing or managing their own power, 'behind the meter' at household level. With the exception of electric vehicles, which are chattels, almost all other DER will be attached to land, making them fixtures (irrespective of contractual agreements to the contrary) and the property of the person or entity that owns the land.[3] As a result, private property law, both common law and statutory regimes, will be a fundamental part of the regulatory framework of DER.

Looking at the residential housing market in Australia, where much of this DER will be located, the majority of Australian households still live in freestanding, freehold fee simple homes, in other words, the iconic Australian dream. However, as a result of

[1] CSIRO and Energy Networks Australia 2017, *Electricity Network Transformation Roadmap: Final Report*, 2.

[2] Australian Renewable Energy Agency, 'Distributed energy resources', https://arena.gov.au/renewable-energy/distributed-energy-resources/, accessed 12 October 2023.

[3] *TEC Desert Pty Ltd v Commissioner of State Revenue (Western Australia)* (2010) 241 CLR 576; *SPIC Pacific Hydro Pty Ltd v Chief Commissioner of State Revenue (NSW)* [2021] NSWSC 395; (2021) 113 ATR 24.

consistent state urban consolidation policies,[4] increasing numbers of people live in strata title apartments. In New South Wales, there are just over 1 million strata apartments that are home to almost 1.3 million people or 16% of the population.[5] Although strata title has existed since the early 1960s,[6] 43% of NSW strata schemes were created after 2000. With the current Minns government enthusiasm for high density development, that figure is set to rise sharply in coming years. In Victoria, half a million people (8% of the population) live in almost 1 million strata lots, with 55% of schemes registered since 2000. In Queensland, 400,000 people (8% of the population) live in 500,000 strata lots, with half being built after 2000. In the remaining states the number of strata schemes is smaller, but growing, as all cities seek to minimize urban sprawl. These figures are an underestimation of the real numbers of strata residents as they do not capture low rise developments, often called 'community title'.[7] These developments are master planned estates that use the same legal structure as strata title. Individual lots will be townhouses, freestanding houses, or even initially vacant land, rather than an apartment. These developments range from coastal golf course housing estates[8] to rural intentional communities or communes.[9]

Strata schemes are not simply home to millions of people, they constitute big business. First, almost 50% of apartments are owned by investors, who as a result of federal

[4] Hazel Easthope, Bill Randolph and Sarah Judd, 'Governing the Compact City: the Role and Effectiveness of Strata Management' (CityFutures Research Centre, 2012) 10.

[5] All figures come from UNSW City Futures, *Australasian Strata Insights Report and Infographics,* 2022.

[6] *Conveyancing (Strata Titles) Act 1961* (NSW). Most states enacted similar legislation in the 1960s, which has been reformed at least once. The NSW strata legislation has been reformed three times, in 1973, 1996 and 2015. The current legislation in NSW is the *Strata Schemes Development Act 2015* (NSW), which deals with the subdivision of land, and the *Strata Schemes Management Act 2015* (NSW), which regulates the on-going operation of schemes. The basic structure of all states' strata legislation is the same, and to avoid the inclusion of multiple similar provisions, this chapter will use the NSW legislation as the exemplar Acts.

[7] Queensland uses the term body corporate community for high and low rise estates created under the *Body Corporate and Community Management Act 1997* (Qld), but most states use the term 'community title' for low rise subdivisions. In NSW, community title estates are created by the *Community Land Development Act 2021* (NSW) and regulated by the *Community Land Management Act 2021* (NSW).

[8] For example, Magenta Shores on the NSW Central Coast, https://magentagolf.com.au/play/ and Sanctuary Cove on the Gold Coast, Qld, https://sanctuarycove.com/, accessed 25 October 2023.

[9] For example, Crystal Waters Ecovillage on the Sunshine Coast, Qld, https://crystalwaters.org.au/, accessed 25 October 2023

government tax policies, such as negative gearing and the partial capital gains tax exemption, have been encouraged to treat residential property as an asset class for building wealth.[10] Then there are the businesses that service strata schemes – strata management agencies, building managers, real estate agents, lawyers, and tradespeople. In 2021, the total value of professional services provided to strata schemes in Australia was over $650 million, and the total value of trades services over $6.9 billion. Finally, there are businesses *physically embedded* in strata schemes by developers. These are the owners of infrastructure such as a hotel, serviced apartments, a rental manager's office, grey and blackwater treatment plants and increasingly DER, coupled with contracts that bind the bodies corporate. The value of these businesses is unknown and growing.

What makes strata property rights attractive for DER?

It is the legal structure of strata and community schemes that make them attractive for DER and other infrastructure. Whether high or low rise, all schemes are created by the registration of plans of subdivision that divide land into individually owned lots – apartments, houses, vacant lots – and common property. Common property is typically the corridors, stairs, foyers, lifts, and car parks of an apartment building, and possibly recreational facilities like gyms and pools. In community schemes, the common property will be more extensive - roads, pavements, parks, bushland, stormwater and sewerage – in other words, infrastructure that is traditionally publicly owned. Whether in a strata or community scheme, all common property is owned by lot owners as

[10] Isla Pawson, 'Reframing Australia's housing affordability problem: The politics and economics of negative gearing [2018] *Journal of Australian Political Economy*, (81), 121–143.

tenants in common,[11] in proportion to their lot or unit entitlements.[12] Contrary to lay assumptions, even if publicly accessible, common property is private property.[13]

Common property is the first attribute of strata and community title that facilitates the provision of green infrastructure, including DER. As noted above, plant and equipment, such as solar arrays, batteries, or meters, must be physically located on some land, and as a result of the doctrine of fixtures will belong to the landowner. Because strata title allows for the collective ownership of land – common property – it also allows for the collective ownership and use of DER, if DER are located on common property. Instead of everyone owning their own individual solar panels or batteries, owners in a strata or community scheme can collectively own DER, including more substantial and technologically sophisticated DER than they could afford alone.

Second, unlike ordinary houses that we can allow to fall down around our ears, strata schemes have a statutory obligation to maintain and repair common property.[14] This is the fairest option for collectively owned land and buildings, because if left to their own devices, some owners would fail to pay for maintenance and repair. Each year, the scheme must estimate its administrative and capital works costs and levy individual owners accordingly.

While this might seem obvious, it is in fact revolutionary in orthodox property law, and was the single most important driver for the initial enactment of strata title legislation. This is because in orthodox Anglo-Australian property law, while it is possible to sell a

[11] There are only two ways to own property with others in Anglo-Australian law – as joint tenants or tenants in common. Joint tenants own in equal shares and if one dies, the other takes the property by survivorship. It is the appropriate form of co-ownerships for spouses. In contrast, tenants in common can own in unequal shares, and there is no right of survivorship. It is the appropriate form of co-ownership for commercial parties and for unrelated lot owners in a strata scheme. The term 'tenant' can be misleading; in this context, it simply means owner and does not indicate the existence of a lease.

[12] All lots in strata schemes have a 'unit entitlement'. The total unit entitlement for a scheme is a random number, for example, 1000, but the number allocated to a specific unit, for example 70 or 96, represents the unimproved market value of a lot relative to other lots. For example, a three-bedroom penthouse might have a unit entitlement of 110, while a studio apartment has a unit entitlement of 60. Unit entitlements determine an owner's share of the land should the scheme ever be terminated, and the land sold. They also determine the owner's share of the overall levies that must be paid each year to run and maintain the scheme.

[13] Cathy Sherry, 'Does Discrimination Law Apply to Residential Strata Schemes?' (2020) 43(1) *University of New South Wales Law Journal* 307, 311-312.

[14] *Strata Schemes Management Act 2015* (NSW), s106.

freehold fee simple coupled with a restriction (e.g., not to build above a certain height, not to subdivide, not to use the premises for commercial use),[15] it is not possible to sell a freehold fee simple coupled with a positive obligation to pay money.[16] There is good reason for this. Feudalism had acquainted generations of judges with the problems associated with landownership burdened by feudal 'dues' (monetary payments). Judges and parliaments worked for centuries to eradicate property doctrines that allowed feudal overlords and long dead ancestors to impose obligations and control over current owners' use of land.[17] The product of this was the modern freehold fee simple, the most fulsome and free interest in land, that allows the current owner to socially and economically exploit that land as they please, subject only to government regulation. This freedom is simultaneously a product of, and constitutive of, capitalism and democracy.[18] However, if a high rise building or master planned estate is going to be subdivided into individual freehold fees simple – the political preference of successive Australian governments and electorates[19] - the prohibition on positive obligations on freehold land must be overcome to ensure the collectively owned common property is maintained. That is what the levying provisions in strata title legislation do: they impose positive obligations to pay money on freehold fees simple.

Desirable as this may be, the consequence of circumventing the prohibition on positive obligations means that developers are now free to sell fee simple titles and impose obligations on them to pay not just for the maintenance of a building, but for an unlimited range of infrastructure and facilities. That is why we have lifestyle or resort style master planned estates today, with private pools, gyms, landscaped gardens, and sporting facilities, and we did not have them in the past, specifically, any date prior to the enactment the *Sanctuary Cove Resort Act 1985* (Qld), the first legislation to facilitate this kind of development.[20] Net zero targets now mean that infrastructure is

[15] These are *Tulk v. Moxhay* (1848) 2 Ph 774; 41 ER 1143 restrictive covenants.

[16] *Austerberry v. Corporation of Oldham* (1885) 29 Ch D 750 (CA); *Pirie v. Registrar General* (1962) 109 CLR 619.

[17] A W B Simpson, *A History of the Land Law* (Clarendon Press, 2nd ed, 1986), 208-9.

[18] Joseph William Singer, 'Democratic estates: property law in a free and democratic society', [2009] 94(4) *Cornell Law Review* 1009.

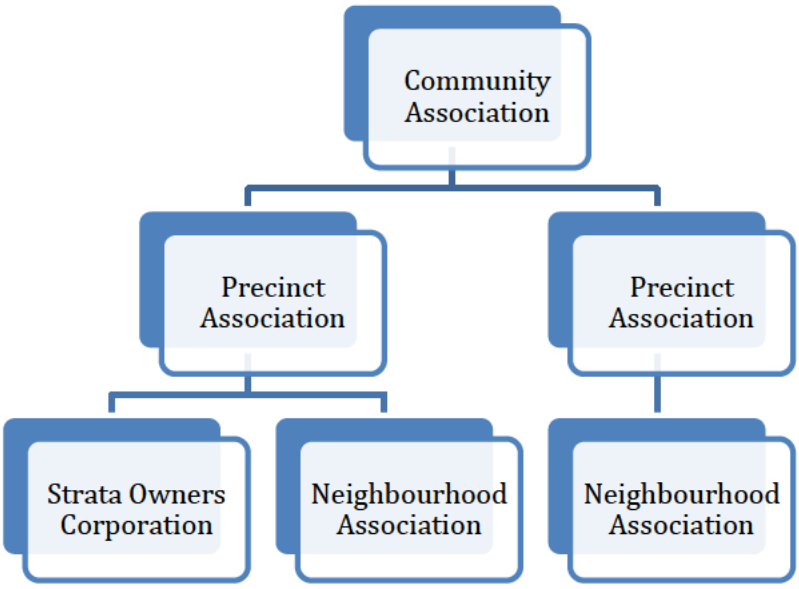
[19] While long term leasehold is the norm in many jurisdictions, Australian governments and citizens have a centuries' old preference for freehold fees simple: Cathy Sherry, *Strata Title Property Rights: Private governance of multi-owned properties* (Routledge, 2017), 11.

[20] Cathy Sherry, "Land of the Free and Home of the Brave? The Implications of United States Homeowners Association Law for Australian Strata and Community Title", (2014) 23 *Australian Property Law Journal* 94

less likely to be a swimming pool or golf course, and more likely to be green infrastructure, including DER.

The third aspect of strata and community title that makes it attractive for DER is the existence of a separate body corporate. On the registration of a strata or community plan, a governing body corporate, made up of all lot owners is automatically created. Confusingly, the names of these bodies differ between states and even within a state – owners corporation, strata company, community association, precinct association, and neighbourhood association. However, they are all simply separate legal entities made up of owners (not tenants). When people colloquially talk about 'the strata', this is the body to which they are referring. Although the body corporate might be assisted by a strata and/or building manager, these people are simply agents. Ultimately, all power in a strata or community scheme rests with the body corporate.

Large community title schemes – master planned estates - can be 'tiered' and have multiple bodies corporate. For example, in NSW a large site might have an overarching community association, two subsidiary precinct associations, which in turn have further subsidiary neighbourhood associations and/or owners corporations. This allows the site to be physically subdivided into discrete sections and most importantly, to allocate costs appropriately. In the diagram below, each neighbourhood association may be a group of townhouses which share a pool, solar panels, battery, or other infrastructure. The communal infrastructure will be the individual neighbourhood association's common property, and as a result the owners have both exclusive use of it and exclusive responsibility to pay for it via levies. Other collectively used infrastructure, such as roads, pavements, parks and green infrastructure, might be part of the over-arching community association common property, accessible by all residents of the estate. Individual owners are members of their own body corporate (the strata owners corporation or neighbourhood association), and those bodies corporate are then members of the body corporate above them.



Sample governance structure in a tiered community scheme[21]

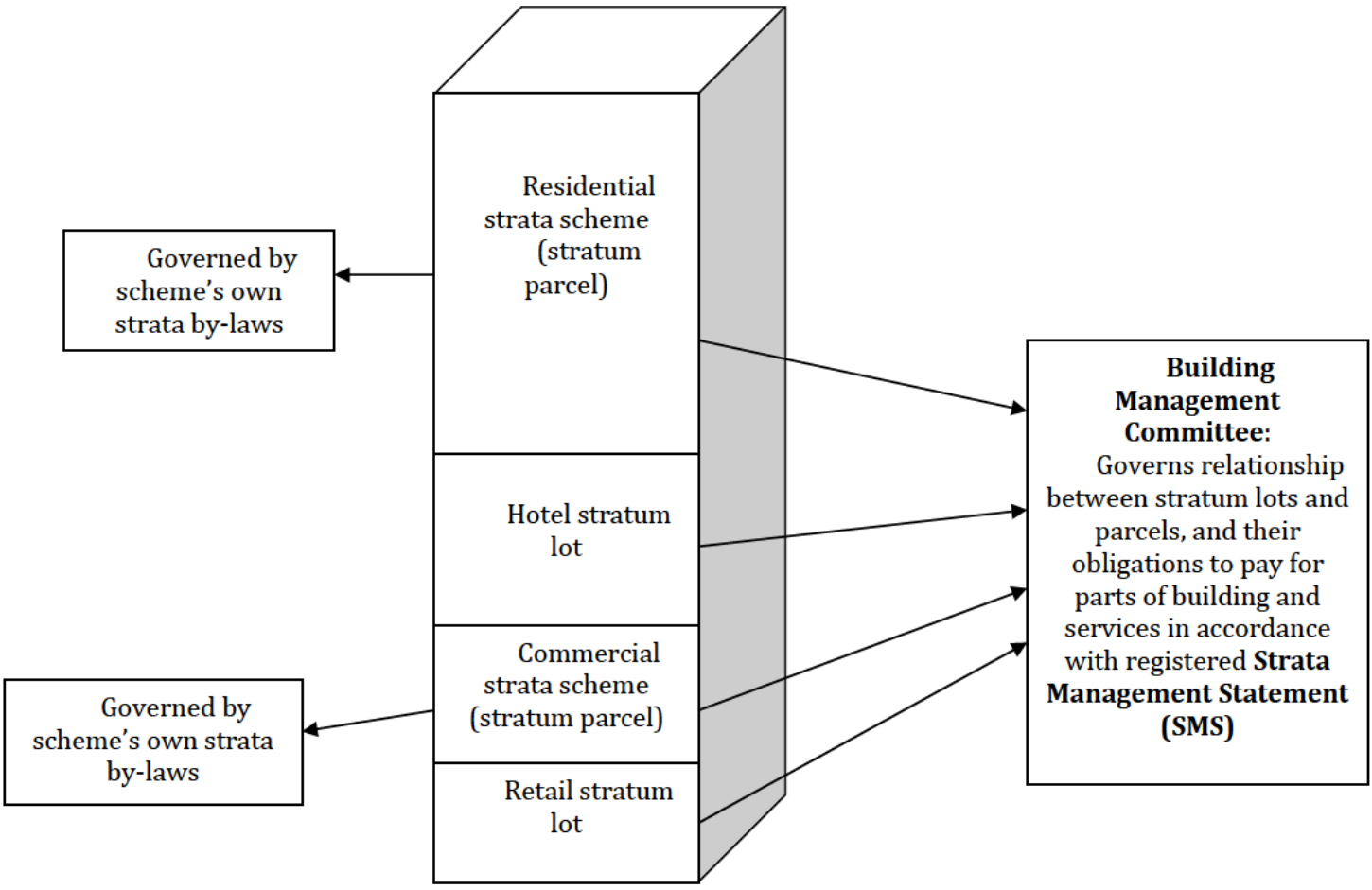
The final aspect of strata and community title legal structure that makes strata title attractive for DER is the existence of by-laws. All strata schemes are registered with by-laws or 'management statements' in community or neighbourhood schemes. These are entirely private regulation initially created by the developer, but subsequently alterable by the body corporate with special majority vote. While there are model by-laws in the legislation, developers are under no obligation to use them, and frequently do not, particularly in large strata schemes or master planned estates. They draft lengthy, bespoke by-laws/management statements that support the kind of community they wish to create and the facilities and services they want to provide.

For the sake of completeness, and because these developments are increasingly popular with developers, particularly for sustainable development, stratum subdivision needs to be explained. Stratum subdivisions are created under a brief section of the *Conveyancing Act 1919* (NSW), Part 23, Division 3B, and they facilitate mixed use development favoured by planners and government.[22] Individual buildings and land can be subdivided into ordinary Torrens lots, only some of which are then further strata

[21] Precinct schemes are in fact rare. The more tiers a community scheme has, the more complicated and expensive it is to run, and so lawyers try to avoid excessive layers of management.

[22] Stratum or volumetric subdivision is also possible in Queensland, under the *Land Title Act 1994* (Qld) (s 48D and Pt 4 Div 4) and in Victoria under the *Subdivision Act 1988* (Vic) (s 27).

subdivided.[23] The ordinary Torrens lots will typically have an investor owner who uses the lot for retail, commercial or even tourism purposes, while the residential component of the building will be a separate strata scheme with individual apartments and common property. The attraction of stratum subdivision is that it allows commercial owners to exist outside of a residential strata scheme and thus outside of the consumer protection provisions in the strata legislation. This diagram illustrates a simple stratum subdivision of a single building, although most stratum subdivisions are of buildings and land (often extensive):



Stratum subdivision ('part building strata scheme') under *Conveyancing Act* 1919 (NSW) Pt 23 Div 3B.

[23] Strata and community title are also Torrens title. The only alternative to Torrens title is Old System title, which is now non-existent in some states, and infinitesimal in all other states.

While the strata scheme will have common property, the overall stratum subdivision does not. However, being housed in a single building or development, all lots will need to share services and infrastructure such as lifts, chillers, pumps and fire equipment. These will be located on the property of a single stratum lot, and thus owned by the owner of that lot, but their shared use and costs will be regulated by a building or strata management statement (BMS or SMS). This is simply a document that is drafted by the initial developers' lawyer, and registered on the Torrens register. As a registered dealing it binds anyone who buys a lot in the development, including the strata owners corporation.[24] A BMS/SMS *must* contain certain matters such as insurance, damage and disputes, it *may* contain provisions on the appointment of a managing agent, trading activities, service contracts, and an architectural code, however it is not limited to this list.[25] It is a highly unregulated document,[26] and can contain provisions as surprising as the annual payment of $60,000 for the promotion of Italian cultural events, as the SMS did in the troubled and eventually failed Italian Forum development in Leichardt.[27] Like strata levying provisions, the costs schedule in a BMS/SMS overcomes the orthodox prohibition on positive obligations on freehold land, making it viable to install infrastructure and facilities in developments, including DER. In addition to maintenance provisions, BMSs must establish a 'building management committee' (BMC), made up of all stratum lot owners and any owners corporations, although owners can be excluded with their consent. Unlike a strata body corporate, a BMC is not a separate legal entity.

Stratum subdivision is the preferred legal form for developers doing complex, sustainable developments, the most well-known being Barangaroo and Central Park. Barangaroo, Australia's first carbon neutral development, includes a water recycling plant, 6000 square metres of solar panels and a centralized cooling system that takes

[24] A basic principle of all Torrens legislation is that new registered proprietors are bound by whatever is already recorded on the register: *Real Property Act 1900* (NSW), s42.
[25] *Conveyancing Act 1919* (NSW), sch 8A cl 5(3).
[26] As a result of problems with inequitable BMS/SMS (see for example, *Owners Corporation Strata Plan 70672 v. The Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2011] NSWSC 973 and Cathy Sherry, 'Building management statements and strata management statements: unholy mixing of contract and property', [2013] 87(6) *Australian Law Journal* 393), the legislation was altered so that BMS/SMS must contain a 'fair' allocation of costs, and be reviewed every five years to ensure they remain fair: *Conveyancing Act 1919*(NSW), sch 8A, cl 2(1)(e1) and (e2).
[27] *Italian Forum Ltd v. Owners – Strata Plan 60919* [2012] NSWSC 89. See also, Cathy Sherry, *Strata Title Property Rights: Private governance of multi-owned properties* (Routledge, 2017), 142-148.

water from Sydney Harbour.[28] Central Park, the plant covered building near Sydney's Central Station, has a low carbon tri generation power plant and a black and grey water recycling plant, and was awarded a 5 green star rating. [29] All of that green infrastructure is private property that somebody has to own and maintain. Titles are allocated by the registered stratum subdivision plan and costs are allocated by the registered BMS/SMS.

Maximising developer profit: developer-made body corporate contracts

Two elements of strata, and similar property forms, are particularly attractive for developers. First, the existence of common property on which to site facilities and infrastructure, coupled with the legal obligation to pay for its upkeep through levies. As noted, that makes it viable for developers to provide infrastructure that will not simply fall into disrepair, and developers may generate greater profits from sales if facilities and infrastructure are attractive to investors and homeowners. However, that is a big 'if'. Residential sales prices are driven by factors that can have nothing to do with the residence itself, the most obvious being low interest rates which have fuelled a 30-year unbroken, property boom in Australia. Consumers have also become more wary of facilities like pools and gyms, which they now generally understand they will be responsible to maintain and repair. Finally, while people might be intellectually and morally committed to net zero, that does not necessarily translate to their hip pockets. Thus, the inclusion of facilities and infrastructure, green or otherwise, will not guarantee higher developer profit.

However, the second element of strata title will – the existence of a separate body, that a developer can cause to enter contracts that ultimate homeowners will have to pay. Those contracts can either be with a subsidiary of the developer, creating an on-going income stream, or with associate of the developer, who will provide the developer with a kickback in cash or kind.

Developers around the world have used this power in a range of ways, for their own benefit,[30] but the most notorious example in Australia is the management rights

[28] Barangaroo, 'Sustainability' https://www.barangaroo.com/past-present-future/a-21st-century-transformation/sustainability accessed on 27 October 2023.

[29] Frazers Property, 'Central Park, Sydney' https://www.frasersproperty.com.au/Our-Properties/Completed/NSW/Central-Park, accessed on 27 October 2023

[30] See Ann Dupuis and Jennifer Dixon Sarah Blandy (eds), *Multi- owned Housing: Law, Power and Practice* (Ashgate, 2010)

industry, concentrated in Queensland tourism.[31] In the course of constructing a development, the developer will negotiate with a management company to sell the 'management rights' with the result that developments look like tourist facilities, while in fact being individually owned strata title apartments.[32] 'Management rights' typically consist of a long-term contract to provide services to the body corporate such as cleaning, security, supervising common property, a right to run a letting pool for short-term tourists, ownership of a commercial or residential lot, and/or exclusive use of a foyer or reception desk. A management company will pay the developer for these rights, and the longer the contract that binds the body corporate and the more it allows the management company to charge, the more the management rights company will be prepared to pay the developer. The owners of apartments, who will ultimately have to pay for these services, are completely absent from the negotiations. Management and other contracts are theoretically disclosed to purchasers in contracts of sale, but because all initial sales in Australia occur 'off-the-plan', prior to the construction of the building or the finalization of any of the legal documents, what is 'disclosed' is typically the *possibility* of such a contract, with key provisions, such as costs, left blank. Further, disclosure is embedded in lever arch folder thick contracts that few purchasers or even their lawyers understand.

Management rights have caused considerable dispute when owners ultimately discover that they are paying for services that they do not want or need, or which do not represent value for money. Legislative reform has attempted to provide owners with some protection, for example by limiting what developers can do in the 'initial period' (the period in which the developer still controls a special majority vote of the body corporate) and by mandating that some developer-made contracts terminate at the first annual general meeting controlled by owners.[33] However, in practice, developers step around these provisions. Owners with no knowledge of the development itself or any experience managing complex development are given little choice but to ratify or novate the developer negotiated contract at the first annual general meeting, binding the

[31] Cathy Sherry, *Strata Title Property Rights: Private governance of multi-owned properties* (Routledge, 2017), 132-136.

[32] For example, Q1 on Queensland's Gold Coast, https://www.q1.com.au/ accessed 29 October 2023.

[33] For example, in NSW, building management contracts theoretically must terminate at the first annual general meeting if they were formed during the period of developer control: *Strata Schemes Management Act 2015*, s 68.

body corporate to a contract that has not been negotiated in their interest. In NSW, the Supreme Court has held that the sale of management rights is a breach of fiduciary duty by a developer, but this case law has had limited impact on development practice.[34] In Queensland, the developer's right to sell management rights is enshrined in legislation.[35]

Developer contracts and renewable energy: the embedded network experience

The ability for a developer to contractually bind a body corporate for its own financial gain has profound implications for a just transition to renewable energy. This has already been amply demonstrated by consumers' experience of embedded networks across Australia.

Embedded networks are private networks that provide electricity, hot or cold water or gas to a group of consumers. In theory, they allow for bulk purchase at a discount, via a single 'parent' connection point, with the savings being passed on to consumers. Groups of consumers are typically found in shopping centres, residential parks (caravan parks) and strata or community schemes; they may be property owners or tenants. Embedded networks have increased exponentially in NSW in the past decade, with two authorised retailers, seven exempt sellers and 900 households in electricity embedded networks in 2013 ballooning to 793 authorised retailers, 161 exempt sellers, and 95 400 households in electricity embedded networks and 64 325 households in gas embedder networks supplying gas and hot water in 2022.[36] Embedded networks have been facilitated by exemptions from the requirement to be an authorized network operator and authorized retailer under the National Electricity Law if the sale of energy is not the operator's core business or the cost of authorization outweighs the benefits to consumers.[37]

Embedded networks do not always use renewable energy or other green infrastructure, but they can and increasingly will. To facilitate the uptake of renewable energy, an

[34] *Community Assoc DP No 270180 v. Arrow Asset Management Pty Ltd* [2007] NSWSC 527, [229] (McDougall J)

[35] *Body Corporate and Community Management Act 1997* (Qld), ss112-113.

[36] New South Wales Legislative Assembly Committee on Law and Safety, *Embedded Networks in New South Wales*, Report 3/57, November 2022, ('*Embedded Networks in NSW* Report'), 12.

[37] Australian Energy Market Commission, *Final Report: Review of regulatory arrangements for embedded networks*, 28 November 2017, 22-24.

embedded network could purchase power from a solar or wind producer off-site or purchase or generate green energy on-site. For example, a strata scheme could have roof-top solar, or a community title scheme could have a large bank of solar arrays, producing energy for the common property and/or residents, as well as selling power back to the grid. Those arrays could be ordinary common property, managed and controlled by the body corporate, or common property over which an embedded network operator has contractual and by-law control.

It is the potential of embedded networks to facilitate renewable energy that drove the marked increase in their construction. Writing in 2017, the Australian Energy Market Commission (AEMC) identified the increased focus of local councils on sustainable and smart infrastructure as 'a significant catalyst for the establishment of larger-scale embedded network solutions at the precinct scale, and potentially, at a community scale in Australia'.[38] Councils created mandates and incentives for developers, including permission to build at higher density. Developers also perceived increase marketability of developments with smart, green facilities.[39] The increase in embedded networks to facilitate sustainability is set to continue. Stephen Angel, Network Development Manager, Jemena Gas Networks (NSW), told a NSW Parliamentary Inquiry in 2022 that 'embedded networks aren't just limited to energy and aren't just limited to gas. We are seeing there is potential there for larger precinct type models, particularly when we look at net zero carbon and innovation in that space'.[40] Victoria recently banned embedded networks in new residential buildings, with the exception of those that use 100% renewable energy, thereby guaranteeing the increased construction of renewable energy embedded networks.[41]

Why did Victoria create a general ban on embedded networks when they can produce savings for consumers and drive innovation? The answer is that despite initial government and developer enthusiasm, embedded networks rapidly obtained a very bad

[38] Australian Energy Market Commission, *2017 Retail Energy Competition Review*, 2017, 154

[39] Australian Energy Market Commission, *2017 Retail Energy Competition Review*, 2017, 151.

[40] Stephen Angel, Jemena, Transcript, *Report on Proceedings Before Legislative Assembly Committee on Law and Safey Embedded Networks in New South Wales*, Legislative Assembly, 12 August 2022, 35, ('Transcript 12 August 2022').

[41] *Electricity Industry Act 2000* (Vic) General Exemption Order 2022, Order in Council, Victoria Government Gazette, 4000 G 39 29 September 2022.

reputation, necessitating a Federal inquiry[42] and multiple state inquiries.[43] The 2017 AEMC Federal inquiry found that 'an appropriate balance between innovation, consumer protection, and access to retail market competition' was not being achieved and that the current regulatory framework was not fit for purpose.[44] The 2022 New South Wales Legislative Assembly Committee on Law and Safety Inquiry found that contrary to the theory of cheaper energy prices for consumers through bulk purchase, savings are not passed on to customers, who often pay higher bills inside a network.[45] The Public Interest Advocacy Centre (PIAC) suggested that,

> [e]mbedded networks are not designed to serve or support the interests of the people living in them. They are allowed in the hope that innovative operators will pass benefits on to residents, but they have become a mechanism for additional profit for developers and operators, leading to the rapid growth in their employment.[46]

The NSW Distribution Network Services Providers - Ausgrid, Endeavour Energy and Essential Energy - were scathing, stating that customers were being adversely affected in relation to reliability standards, connection standards, billing information, outage notifications, guaranteed service levels and appropriate protections for life support customers.[47] There were also serious concerns about the safety of high voltage embedded networks and the inability of the current regulatory framework to create a safe environment in the future with the increase in two-way flow of energy from DER.[48]

There have been particular problems with embedded networks for hot water, with the NSW inquiry hearing of a customer who had been billed $9700 for 14 months of hot water. This is a result of an inherent weakness in consumer protection legislation, also seen in strata legislation – 'clever' lawyers can step around static provisions. In this instance, while water and energy are both regulated, their combination – hot water – is

[42] Australian Energy Market Commission, *Final Report: Review of regulatory arrangements for embedded networks*, 28 November, 2017

[43] Victoria State Government, *Victorian Government response to the Embedded Networks Review*, July 2022; *Embedded Networks in NSW* Report.

[44] Australian Energy Market Commission, *Final Report: Review of regulatory arrangements for embedded networks*, 28 November, 2017, iv.

[45] *Embedded Networks in NSW* Report, 17.

[46] Douglas McCloskey, PIAC, Transcript 12 August 2022, 21.

[47] Francoise Merit, Endeavour Energy, Transcript 12 August 2022, 49-50.

[48] Francoise Merit, Endeavour Energy, Transcript 12 August 2022, 57.

not.[49] Customers in hot water embedded networks have been intentionally made to fall between the stools of the National Energy Customer Framework and the *Water Industry Competition Act 2006* (NSW) (WICA) leaving them with no consumer protection. The NSW Inquiry recommended that the NSW Government immediately ban the separate charging of hot water embedded networks and implement proper price protection measures.[50]

However, the problem of embedded networks cannot be solved with energy market regulation because this regulation does not go to the root of the problem – long-term contracts which the developer causes the body corporate to enter. The NSW Inquiry heard specific testimony on the problems of embedded networks in strata schemes, particularly for new schemes in which it is 'very rare' for there not to be one or more embedded network contracts.[51] Industry experts explained that energy and water infrastructure, including solar panels and EV charging, is installed in the building by an embedded network operator at no charge in return for the developer causing the owners corporation to enter into a long term contract with substantial fees.[52] While s132A of the *Strata Schemes Management Act 2015* (NSW) limits the length of electricity, gas and other utility contracts to 3 years, ss(4) was included to exempt embedded networks so as not to pre-empt recommendations from the AEMC Report. As a result, these contracts can last for decades, contain roll-over clauses, impossible penalty provisions for early termination (e.g., a requirement for the body corporate to pay for the infrastructure, plus 5-10 years' of the operator's profit), and create practical impossibility for consumers to change providers (denying them the alleged benefits of market competition).[53] Contracts can also prevent owners making green upgrades, or prevent them benefiting from existing green technology. In the case of one building

[49] *Embedded Networks in NSW* Report, 19; Energy and Water Ombudsman NSW, 'Hot water embedded networks', March 2021, https://www.ewon.com.au/page/publications-and-submissions/reports/spotlight-on/hot-water-embedded-networks accessed 27 October 2023.

[50] *Embedded Networks in NSW* Report, 18.

[51] Stephen Brell, Strata Community Australia (SCA), Transcript 12 August 2022, 10.

[52] Glen Streatfeild, Transcript 12 August 2022, 41; Strata Community Australia (SCA) Submission 136 to New South Wales Legislative Assembly Committee on Law and Safety, *Embedded Networks in New South Wales*, 5.

[53] Strata Community Australia (SCA) Submission 136, 8; Glen Streatfeild, Transcript 12 August 2022, 47.

with solar panels installed by the developer, the owners could not ascertain who was benefiting from the 20-year solar contract, simply that it was not them.[54]

Contracts are presented to the owners corporation at the first annual general meeting – the point at which the developer no longer controls a special majority vote – and they are asked or actively 'coerced' into novating or ratifying the contract.[55] The Committee was given evidence of strata managers telling owners that they had until midnight to sign or their water or power would be turned off. Those managers have been installed by the developer and have a vested interest in doing the developer's bidding.[56] The developer's bidding will be to ensure the body corporate enters the contract or a clause in the developer-embedded network provider contract will be triggered, compelling the developer to pay for the hitherto free infrastructure.[57] These practices directly mirror those that have caused so much dispute with management contracts in the tourism industry, described above.

Several submissions stressed the importance of disclosure of embedded networks in sales contracts and leases, while Strata Community Australia (SCA), the peak body for strata managers, also recommended that developers be required to disclose any commission, rebate or ownership regime (i.e. kickback) given to the developer.[58] Disclosure is a time honoured but largely ineffective consumer protection mechanism in relation to land, particularly strata schemes. The theory is that if purchasers or lessees are made aware of burdens in relation to the land, they can make an informed decision about whether to acquire the land or lease. The theory has more holes than Swiss cheese.[59] First, disclosure assumes that consumers are able to read and understand complex contracts for strata and community title properties, which as noted, are typically a lever arch folder thick, being documents that regulate extremely legally and physically complex developments. While lawyers and licensed conveyancers can in theory advise on the legal structure, in practice it is unlikely that general practitioners or conveyancers understand the legal structures devised by specialist development lawyers.

[54] Ms Eloise O'Connell, Submission 12.
[55] *Embedded Networks in NSW* Report, 35. Stephen Brell, Transcript 12 August 2022, 9.
[56] Glen Streatfeild, Transcript 12 August 2022, 46
[57] Stephen Brell, Transcript 12 August 2022, 12
[58] *Embedded Networks in NSW* Report, 36
[59] Cathy Sherry, *Strata Title Property Rights: Private governance of multi-owned properties* (Routledge, 2017), 62, 92-98, 136

It is even less likely that lawyers, conveyancers or purchasers understand the engineering complexity of large-scale developments with embedded networks, and the inevitable costs associated with running and maintaining them. Second, disclosure assumes that all relevant details will be disclosed. However, because new apartment sales always occur off-the-plan, prior to the construction of the building, the drawing of final architectural and engineering plans, and the finalization of infrastructure and the contracts in relation to them, key sections of disclosure documents, most importantly costs, are invariably blank. Third, disclosure assumes that it is possible to disclose the ultimate functioning and costs of complex engineering, energy and market systems which will change unpredictably over time. Fourth, and most importantly, disclosure assumes that a person who does not like what they are told can simply choose to live elsewhere. This has always been untrue in relation to land, although this may not have been as clear in the past as it is in Australia's current chronically tight housing market. Unlike other consumer items, land (housing) is an inherently finite and essential resource. There are not unlimited properties from which consumers can choose, and consumers do not have the option to choose nothing. Housing is a basic necessity for survival, as well as any kind of fully realized life.[60] Consumers, particularly tenants, have limited financial resources; jobs, family, and community ties limit consumers to specific areas; and consistency in market product limit genuine alternatives. Finally, if something is inherently unfair or exploitative, disclosing it does not miraculously make it fair; some things should simply be prohibited. As property theorist Joseph Singer argues,

> some relationships are out of bounds…some contract terms are off the table…[and] there are some things you should not ask of others; there are some demands that cannot justly be made in a free and democratic society.[61]

Unfortunately, it does not seem that the Committee or any submissions raised the fundamental flaw in disclosure as a means of consumer protection in this area, and the

[60] Waldron, Jeremy, 'Homelessness and the Issue of Freedom' (1991) 39 *UCLA Law Review* 295.

[61] Joseph William Singer, 'Democratic estates: property law in a free and democratic society', [2009] 94(4) *Cornell Law Review* 1009, 1048.

Committee recommended that disclosure of embedded networks be included in leases and contracts of sale.[62]

At their core, third party operated embedded networks present the same risk of all privitisation, exposing privatisation's basic flaw – all private operators enter the market to make a profit, and that profit has to come from somewhere. While in theory it can come from technology and innovation, often it comes out of consumers' pockets. Contrary to standard assertions that the private sector is always more efficient and competent, that is frequently not the case, and at the extreme end, many private operators in emerging industries are 'cowboys', a concession that was readily made about the embedded network sector by government and industry witnesses at the NSW Parliamentary Inquiry. AEMC recognizes that privatizing infrastructure also creates structural risks when operators manage multiple sites. If one of these businesses fails - a real risk in an emerging industry with inexperienced operators - 'multiple sites in discrete locations around the country could be affected, impacting potentially thousands of consumers'.[63] Privatisaton of essential energy services presents one of the greatest challenges for a just energy transition.

Can Embedded Networks Work?

Embedded networks can be beneficial but only if they are negotiated for the benefit of the body corporate, the entity made up of owners who will pay the bills.[64] There are two ways to ensure this occurs – by imposing fiduciary duties on a developer negotiating a contract for the body corporate or by allowing the body corporate made up of owners to negotiate contracts for itself. In relation to the former, a fiduciary is prohibited from placing themselves in a position in which their own self-interest and their duty to the principal conflict or from making an undisclosed profit (secret commissions or kickbacks) from their position.[65] The New South Wales Supreme Court has already held that a developer owes a fiduciary duty a body corporate,[66] which is breached by the sale

[62] *Embedded Networks in NSW* Report, 34.
[63] Australian Energy Market Commission, *2017 Retail Energy Competition Review*, 2017, 179.
[64] Stephen Brell, Transcript 12 August 2022, 10.
[65] *Hospital Products Ltd v United States Surgical Corporation* (1984) 156 CLR 41.
[66] *Community Assoc DP No 270180 v. Arrow Asset Management Pty Ltd* [2007] NSWSC 527, [229] (McDougall J)

of management rights contracts. This principle applies equally to embedded network contracts sold by the developer.

In relation to a body corporate negotiating contracts itself, there is evidence that this results in beneficial arrangements. First, it is possible for existing schemes to be retrofitted with embedded networks and/or green infrastructure, facilitated in NSW by reduced voting thresholds for sustainability infrastructure.[67] The NSW Parliamentary Inquiry received no evidence that retrofitting by bodies corporate was a source of exploitation and dispute. Although a housing co-operative, rather than a strata scheme, Stucco, a not-for-profit housing co-operative jointly owned by Stucco, the Department of Family and Community Services and the University of Sydney, provides an example of a successful green embedded network retrofit.[68] The converted warehouse with eight apartments, and 40 residents, was retrofitted with solar panels and a battery, supported by an $80,000 innovation grant from the City of Sydney. The building now has a high level of energy self-sufficiency which consumers actually benefit from, being charged around 75 per cent of the pro-rated external tariff charged to Stucco at the parent connection point. Ironically, Stucco, which is clearly not in the primary business of retailing energy, had difficulty obtaining network operator and retailer exemptions because the exemption process is geared to for-profit embedded network operators.

Second, body corporate negotiation is possible at the inception of the development even if the developer has initially negotiated with a service provider. For example, the NSW Parliamentary Inquiry was given evidence of an owners corporation that was presented with a 15 year, $90,000 stormwater contract at their first annual general meeting. Fortunately, one owner had a procurement background and managed to persuade the other owners not to ratify the contract, despite the owners being told (presumably by the developer or an associate) that there was no other Australian provider and that their warranties would be voided if they did not sign. The owner with procurement experience swiftly found another provider at the cost of $1500 a year, a quarter of the cost of the developer-made contract.[69] On a financial level, this is a demonstration of the obvious fact that a contract negotiated by the person who will pay it is bound to be more

[67] *Strata Schemes Management Act 2015* (NSW), s5(1)(b)(ii) and s132B.

[68] Australian Energy Market Commission, *2017 Retail Energy Competition Review*, 2017, 155-156

[69] Karen Stiles, OCN, Transcript 12 August 2022, 13.

robust than a contract negotiated by a person who will not. However, on a social justice level, it is an example of 'the fundamental principle that owners should have the democratic right to decide how their collectively owned property will be used and…how people will live in their collective environment.'[70] It is consistent with the democratic values of modern property law, which after centuries of political and legal activism, wrestled control of land from feudal overlords and predecessors in title, vesting it in current owners and possessors.[71] Developer-made contracts create a form of predecessor control that is essential feudal.

Conclusion

Karen Stiles, Executive Director of the Owners Corporation Network (OCN), explained to the NSW Parliamentary Inquiry that 'since the turn of the century the New South Wales development industry has carefully characterised its interest as being in accord with the national economic interest to the point where consumer protection becomes roadkill in the corridors of parliaments.'[72] The power of the development industry to continue this practice will be infinitely enhanced by government and community commitment to meet net zero through the uptake of renewable energy and DER. To the extent that developers can align their financial self-interest with sustainability goals they will continue to ride roughshod over residential property owners and tenants, ensuring an inherently unjust and potentially ineffective energy transition.

Solutions cannot be found in energy market regulation alone. The privately owned DER that will be responsible for up to 45% of Australia's energy generation by 2050 is physical plant and equipment that has to be situated on *someone's* land and *someone* has to pay for its maintenance and use. Strata and community schemes, as well as stratum subdivisions, are prime targets for this infrastructure, with their collectively owned or shared land, and their statutory mechanisms for mandating payments. If we are going to ensure a just energy transition in the residential sector, we have to engage with the private property law that regulates the high density and master planned developments that Australians will increasingly call home. In doing so, we must ensure that

[70] Karen Stiles, OCN, Transcript 12 August 2022, 9.

[71] Joseph William Singer, 'Democratic estates: property law in a free and democratic society', [2009] 94(4) *Cornell Law Review* 1009; Cathy Sherry, *Strata Title Property Rights: Private governance of multi-owned properties* (Routledge, 2017), 51.

[72] Karen Stiles, OCN, Transcript 12 August, 9.

developers, as original owners of land, are not permitted to control the land, infrastructure, and energy services ultimately owned and paid for by the residents of that land.