

1 July 2024

Department of Infrastructure, Transport,
Regional Development and the Arts

Dear Department,

Re: Submission on National Urban Policy

I am a professor in the Law School at Macquarie University and on the executive of the research group, Smart Green Cities. 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.¹ I have been engaged by governments in Australia and overseas to advise on their laws in relation to high density housing, including the UK government for the reform of their apartment law. I am a long-term Academic Fellow of the Australasian College of Strata Lawyers, the peak industry body for lawyers working in strata industry and am currently a member of the Strata and Building Consumer Roundtable, chaired by the NSW Building Commissioner, David Chandler.

Strata title is fundamental to urban policy

Strata title law, which is largely consistent between states, is fundamental to urban policy in all Australian cities. This is because:

- the key *mechanism* through which all Australian cities are going to get large numbers of people to live in limited space is strata title housing;
- the only way to ensure those people live happily, healthily and sustainably is to have functional strata title law;
- we cannot ensure that law is functional if governments, planners, and policy makers are unaware of the role that strata title is playing in the creation of our homes, infrastructure, communities and cities.

Strata title law is *private property law*, which is frequently forgotten in the planning of cities. The focus of city planning has traditionally been on *public planning law*. This is understandable because for most of the history of planning the creation of housing did not create complex private property titles, relationships, infrastructure, and communities. When low density, non-strata housing is constructed the purchaser pays the developer the purchase

¹ See [Cathy Sherry – Research Outputs — Macquarie University \(mq.edu.au\)](https://www.mq.edu.au/research-outputs)
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price for their freehold fee simple and has no other legal relationship with their vendor or their neighbours other than minimal obligations under dividing fences legislation and the law of nuisance. They have no other financial obligations other than the payment of council rates.

However, in contrast, when medium to high density housing is built, the private property titles - also freehold fees simple, but strata title - are part of a complex web of legal relationships and obligations, including financial. This profoundly affects the ongoing life and functionality of that housing for owners and residents. Purchasers buy an individual home (apartment, townhouse, freestanding house or vacant land), and become a co-owner of common property. That may just be stairs, a lift, and a car park, but increasingly it will be pumps, chillers, fire equipment, batteries, solar panels, trigeneration plants, or black and grey water treatment plants. In low rise strata or 'community title' estates, common property will include roads, parks, sporting facilities and bushland. Unlike owners of non-strata properties, strata owners have a legal obligation to maintain their land, buildings, and ever-increasing infrastructure.

That is a fundamentally important difference between strata and non-strata housing that must be appreciated by government and planners. The more complex a building, estate and its infrastructure, the more expensive it will be to run, and the more likely it will be that owners need to engage professional assistance, which in turn costs more money. *None* of these costs are imposed on non-strata owners, because outside of strata title law, it is legally impermissible to impose obligations to pay for infrastructure and services on freehold land.²

In addition to bearing financial obligations, apartment purchasers are legally bound to tens or hundreds of neighbours. They automatically become a member of a governing body corporate (owners corporation, strata corporation, neighbourhood or community association), akin to a private local government, which has extensive statutory rights and obligations that they must discharge. Owners and residents are legally obliged to comply with and enforce privately created by-laws, which regulate not just common property but individual homes. Most states' strata title legislation now runs to hundreds of pages, supplemented by regulations and associated case law.

The plant-covered development that the Department has used in its social media posts, [Central Park](#), in inner Sydney, is a good case in point. It is an extraordinarily complex stratum (volumetric) subdivision, made up of eight strata schemes, two large retail lots and a separate lot containing a recycled water plant. The documents that create and regulate people's homes are hundreds of pages long, and it is unlikely that anyone other than the skilled lawyers who created the development fully understand how it is meant to operate. Further, how it was

² Positive obligations on freehold land are unenforceable: *Pirie v Registrar General* [1962] HCA 58; 109 CLR 619; 36 ALJR 237; [1965] ALR 860. This is not an accident. It is a result of conscious efforts on the part of legislatures and the judiciary over the centuries during which our political and economic systems transformed from feudalism into a modern liberal democracy. See C Sherry, *Strata Title Property Rights: Private governance of multi-owned properties* (Routledge, 2017).

meant to operate is not necessarily how it is actually operating; like most complex developments, it has had its share of unanticipated problems.³

A 2 bedroom apartment in the Central Park development currently costs just shy of \$1 million, just below the median house price in Sydney. But on top of the purchase price, a homeowner must pay \$10,000 of strata levies each year, year after year. Highlighting the difference between strata and non-strata housing, the strata levies are almost 10 times as much as local council rates. While all homeowners incur maintenance costs, the difference between strata owners and non-strata owners is that the latter can defer maintenance costs until they can afford them (or indefinitely), and they will never have to pay for lifts, fire equipment, chillers, pumps and all of the other infrastructure that is essential in a high rise building.

In short, strata title is complex property ownership, and it imposes significant burdens on private citizens. If we are going to rely on strata title to build our cities – *and that is inevitable* – governments must understand how strata title works, both in theory and in practice.

This submission highlights the ways in which strata title law and practice will determine the Commonwealth's ability to meet its six objectives in the draft National Urban Policy.

National Urban Policy – Consultation Draft May 2024

1. The private sector

There are key private sector actors missing from the draft policy on p15:- the private citizens who are going own and thus be legally responsible for private high and low-rise communities and their associated infrastructure. They, *not developers*, will be the people who are co-financing roads, technology and innovation, particularly sustainability infrastructure. Developers do not bear costs passed on to them by local councils and state governments. They pass those costs on to purchasers, through the purchase price of apartments, strata levies and contracts that bind the body corporate, that apartment owners must pay. This is discussed in more detail below in relation to embedded networks and green and blue infrastructure.

2. No-one and no place left behind

P 22 Housing affordability: A lack of well-located, diverse housing options is causing stress for an increasing number of households.

Urban development patterns: Continued outward growth contributes to sustainability concerns, loss of agricultural land, increased greenhouse gas emissions, urban heat island effect, high material footprint and greater infrastructure investment needs.

'Well-located, diverse housing options' is code for strata title. What those who are promoting this phrase (e.g., the NSW Productivity Commission) mean is medium to high density

³ [One Central Park Sydney: Broadway building's problems started with a falling plant \(smh.com.au\)](https://www.smh.com.au)

housing close to city centres, and in every city in Australia, *that will unavoidably be strata title*. The same can be said for any planning policies that seek to limit outward growth; urban consolidation means strata title. As a result, it is imperative that if government policy is going to promote strata title, policy makers must be aware that is what they are doing, and they must fully understand the consequences for owners, residents, communities and Australian society.

While the points that the draft policy makes in relation to the benefits of urban density (schooling, health care, employment) are well made, they *must* be balanced with the true costs of high-density and master planned housing. Failure to do so - as many think tanks and government reports have done - is simplistic policy that is setting Australian cities and people up for future failure. As illustrated above in relation to a 2-bedroom apartment in Central Park, owning an apartment in a complex, high density scheme – a so called ‘well located home’ – is extremely expensive. No one could describe a \$1 million apartment with \$10,000 of annual strata levies as affordable. While high rise buildings give us significant ‘bang for our buck’ in terms of density, it remains open to question if they can ever provide affordable housing.

Further, if the strata scheme you live in, whether high, medium or low rise, regulates how and where your children can play, prohibits you from keeping a pet, prevents you installing your own or collectively owned solar panels, and ties you to long term, exploitative contracts formed for the benefit of the developer and its associated companies, it won’t matter that your children have access to a good school. Urban density is only beneficial if it is done well. Doing it ‘well’, depends as much if not more on the private property titles that are being created than it does on design, architecture or planning law.

3. Our urban areas are safe

P 28 Inclusivity and safety in public spaces: Urban areas must be safe and inviting, promoting participation of people of all ages, cultures, abilities, genders, religions and backgrounds. Accessible and safe public spaces are vital for community wellbeing.

As a result of strata title, public spaces will increasingly be private property. Gated communities are rare in Australia, but private strata and community title developments that are open to the public are common. For example, although [Breakfast Point](#) and [Wentworth Point](#) in Sydney are publicly accessible, they are entirely privately owned suburbs. That means the publicly accessible space, including the roads, pavements and parks, must be paid for and insured by the private owners, a significant financial burden that raises questions of equity. That space is also regulated by privately written strata by-laws and community management statements. Unlike public government, that has an obligation to consider the community when creating law, private governments - bodies corporate - have no such obligation. They can regulate their own land in their own interest; that is the nature of private property.

For example, [Liberty Grove](#), a community title estate in Sydney's inner west, created a by-law that prohibited children under the age of 13 being on common property without a resident adult over the age of 21.⁴ No doubt the community created that rule to minimise their insurance premiums, but given the fact that the common property includes parks, basketball and tennis courts, as well as roads with a 20 km hour speed limit, and most children live in apartments with no outdoor space, the restriction clearly has an adverse effect on children's social, physical and mental well-being. The parks and sporting facilities were no doubt a condition of development consent, with planners considering the needs of residents in that community, but what they did not consider was the potential of privately written by-laws to take away the benefits that planning had given.

If the government wants urban areas that are accessible and inclusive, that promote physical and mental health, it has to be aware of the effect of high density and master planned development, aka strata and community title, on publicly accessible space. Publicly accessible space that is owned by the local council is not the same as publicly accessible space that is owned by private citizens. We must ensure that local councils are adequately funded so they do not jump at every opportunity to pass off the costs of infrastructure and open space to a small group of citizens who live in strata and community title. That is currently happening in many local council areas.

P 28 Resilience: Australia's cities face increasing hazards and disasters, making it crucial to improve community resilience. This includes addressing flooding, sea-level rise, heatwaves, bushfires and storms. Strategic planning and resilient infrastructure development are necessary to manage risks to housing and critical infrastructure.

If we want to create cities that are high density and resilient, we need to understand the challenges of high density development in the context of natural disasters and global crises like pandemics. Kennedy et al point out that many more residents were adversely affected by the 2011 Brisbane floods than the 1974 floods because of the construction of high density housing on the Brisbane River with hundreds of residents.⁵ As a result of this construction, the damage and subsequent insurance costs from the flood were much higher because the plant and equipment in the basements of high rise buildings – which were inundated - is so expensive. That plant and equipment is also necessary for the basic liveability of apartments. It provides the lifts that allow people to reach and evacuate their homes; it includes the pumps that delivery water for drinking, bathing, clothes washing and toilet flushing; it provides the electricity and air conditioning systems that ventilate people's homes; and it houses the telephone and internet cabling that is essential for communication, as well as the fire systems

⁴ C Sherry, *Strata Title Property Rights: Private governance of multi-owned properties* (Routledge, 2017), 207-214.

⁵ Kennedy, Rosemary, Hughes, Ashlea, Liu, Sze, Paulsrud, Marita, North, Peter, & Lewis, James (2012) Living through extreme weather events and natural disasters: How resilient are our high-rise high-density typologies? In Crowhurst Lennard, S (Ed.) Proceedings of the 49th Annual International Making Cities Livable Conference on True Urbanism: Planning Healthy Communities for All. International Making Cities Livable Council, United States, pp. 1-14.

that protect resident life. When Brisbane authorities were compelled to disconnect electricity during the 2011 floods, all of these services shut down, creating a range of building crises including an inability for older people to evacuate, problems delivering food, and stifling heat in buildings dependent on air conditioning, built without cross-ventilation.⁶

I conducted research during the COVID-19 Delta variant lockdown in New South Wales, which analysed the failure of public health orders to make any distinction between a freestanding house on 500 square metres and a 50 lot strata scheme.⁷ The result was orders that were non-sensical and ineffective in relation to high density housing, the housing form that creates the greatest risks for an airborne disease. By way of example, while it was illegal for millions of people in NSW who were not COVID positive or a close contact to leave their freestanding homes, it was *always legal* for an apartment resident, *who was COVID positive* to leave their apartment, and move freely through common property, mixing with hundreds of other residents. Because the orders were written with no reference to different housing forms, it was only illegal for them to leave the building, not their individual apartment. Those orders were manifestly irrational, offending the rule of law and compromising public health.

When it became clear to the NSW government that high density apartments presented an obvious risk for the transmission of an airborne disease, the response was to enact public health orders that locked entire, specific apartment blocks down, making it illegal for residents to leave for any reason, including food and exercise. The only buildings these orders applied to were low income private and social housing schemes, raising serious questions about equity and discrimination.

If we want housing to be resilient, particularly during urban crises, governments must understand the physical and legal reality of high density and master planned housing.

4. Our urban areas are sustainable

P 31 Net zero and urban emissions reduction: Urban areas need to transition to a lower carbon future and achieve net zero emissions by 2050 to align with global climate goals and Australia's commitments.

To a large degree, the carbon future of Australian cities will be determined by the ownership of energy infrastructure by private homeowners, regulated by private property law, not public ownership, regulated by public law. By 2050, up to 45% of Australia's electricity supply will be provided by millions of privately 'distributed energy resources' or DER.⁸ These are any renewable energy unit that produces and/or manages power at household or business level, the most common examples being rooftop solar PV units, battery storage, thermal energy storage, electric vehicles and chargers, smart meters, and home energy management technology. *Much*

⁶ Ibid.

⁷ C Sherry 'All About the Land: The (Mis)application of Public Health Orders to Strata Schemes during the Delta Variant COVID-19 Outbreak in Sydney, Australia' (2023) *Sydney Law Review*, 45(2), pp. 279-303.

⁸ Final Report of the Electricity Network Transformation Roadmap (2017)

of this will be constructed inside new strata and community title developments because they are the easiest way to create collectively owned and maintained infrastructure. In an ordinary residential subdivision, there is no collectively owned land on which to site DER, there is no legal mechanism to make people pay for it and there is no legal structure to manage it. In contrast, in a strata or community scheme, common property is a place to site DER, the levying provisions provide a way of paying for it and the body corporate is a legal entity that can manage it. While it is hard to retrofit existing strata schemes with DER such as solar panels, it is easy to construct strata schemes with DER from scratch.

While strata and community title hold great promise for making our cities more sustainable, *this will only become a reality if government understands the strata title legal structure.* One very clear example will suffice – embedded networks.

Embedded networks theoretically allow for the bulk purchase of electricity, water or gas at a parent metre with savings being passed on to consumers within the network (apartment residents). They can facilitate sustainability if energy is generated on site (solar panels, trigeneration plants etc) and/or is bought from renewable sources. They can also facilitate sustainable technology such as heat pumps for hot water. As a result of their sustainability potential, embedded networks have been incentivised through planning approval in thousands of new apartment developments in east coast states the last decade.

However, the reality of embedded networks does not meet their financial or sustainability potential. Residents in apartment buildings with embedded networks are not receiving discounts, are being charged above market rates with limited access to retail competition, and ironically, they often receive limited or no sustainably sourced energy.⁹ This is because they are created through contracts negotiated by developers with embedded network operators, for their mutual benefit, and not the benefit of apartment residents. There have been multiple parliamentary and regulatory inquiries into exploitative embedded network practices, at great public expense.¹⁰ However, all have thus far failed to solve the problem because they have focused on energy regulation, rather than the root of the problem, strata title law and practices.

Embedded networks are a good example of the pressing need for strata expertise to inform attempts to make our high density cities sustainable.

⁹ C Sherry, ‘Locked In: Renewable energy embedded networks in multi-owned housing’, (2024) *Journal of Energy and Natural Resources Law*, (forthcoming).

¹⁰ New South Wales Legislative Assembly Committee on Law and Safety, *Embedded Networks in New South Wales* (Report 3/57, November 2022); Australian Energy Market Commission (AEMC), *Final Report: Review of regulatory arrangements for embedded networks* (28 November 2017); Victoria State Government Department of Environment, Land, Water and Planning, *Embedded Networks Review: Final Recommendations Report*, (January 2022); Australian Energy Market Commission, *Retail Energy Competition Review* (2017); Australian Energy Market Commission, *Final Report: Updating the Regulatory Frameworks for Embedded Networks* (10 June 2019); Office of Energy and Climate Change, New South Wales Treasury, *Embedded Network Action Plan*; NSW Independent Pricing and Regulatory Tribunal (IPART), *Embedded Networks: Final Report* (April 2024).

P 31 Green and blue spaces: A lack of or inequitable distribution of natural spaces in urban areas can impact on biodiversity and climate resilience.

A lack of equitable distribution of blue and green spaces in our cities is being exacerbated by the privatisation of blue and green spaces through strata and community title. As noted above, while gated communities are rare in Australia, large amounts of what would traditionally have been publicly owned green and blue space is now being included in the common property of strata and community title developments. For example, the ‘Village Green’ in the middle of Breakfast Point is private property, as are all of the facilities inside community title developments like Harrington Grove in south west Sydney. That includes Harrington Forest, 280 hectares of woodland, the ‘largest private conservation area’ in Sydney.

Privatising blue and green spaces raises questions of equity for:

- the people who are excluded from these amenities (e.g., swimming pools, tennis courts) because they cannot afford housing in these developments, and
- the owners inside developments who are being made to insure and maintain what has traditionally been publicly owned space and is frequently required to be publicly accessible (e.g., parks, bushland).

Conclusion

Medium to high density cities are constructed with strata title. There is no alternative. If governments want to ensure that our cities are equitable, affordable and sustainable, they need to ensure that strata title housing is equitable, affordable and sustainable. It can only be so if strata title law and practice are fair and workable.

I am happy to assist the Department in any way with strata title expertise, both law and policy. I am familiar with strata title law in all states. Please do not hesitate to contact me in this regard.

Yours sincerely,



Professor Cathy Sherry

Macquarie Law School and Smart Green Cities