Fourth Generation Strata Laws for New South Wales

Dr Cathy Sherry
Faculty of Law
University of New South Wales

Introduction

After three years of consultation, the New South Wales government has released the Strata Schemes Management Bill 2015 and the Strata Schemes Development Bill 2015. The Bills are open for comment until August 12, 2015 and are the latest attempt in longstanding strata title legislative efforts to 'get it right'. Of course no legislation is ever going to 'get it right', remedying all the problems that plague strata schemes, because strata schemes are the sharing of limited amounts of space between multiple parties with divergent interests, desires and convictions. As any lawyer could tell you, that is an inevitable recipe for dispute.

The Bills are the fourth generation of strata law for New South Wales, following the initial enactment of the *Conveyancing (Strata Titles*) Act in 1961 and major revisions in 1973 and 1996. This paper will look at select issues in both Bills, including the highly contentious proposal for strata termination. While I won't address the history of strata legislation today, the first section of the paper covers that (sometimes surprising) legal and social history for those who are interested to read at their leisure. There is particular reference to the role that developers have played in the enactment of strata and community title legislation. The material is based on research for my forthcoming book *Strata Title Property Rights: Private Governance of Multi-Owned Properties*, (Routledge, 2016). The history of legislative development provides interesting food for thought in the current context of legislative amendment and the social and built environment changes amendments may trigger.

The Path to Strata and Community Title Legislation

It is a truism that Australians have had a long love affair with freestanding houses on a quarter acre block – the Great Australian Dream. The corollary of consistent preference for freehold ownership of freestanding houses in leafy, green suburbs was a deep antipathy to high-density apartment living on the part of governments and planners. Despite some attempts to house working class families in apartments (for example the mooted plans for five-storey buildings in the Rocks in 1902, after the outbreak of the Plague, and the completion of the Strickland Flats in 1914, still standing on Cleveland Street, Chippendale),[1] apartments were never accepted as an option for mass housing of New South Wales' citizens. Planners and governments consistently characterised apartments as 'the slums of the future',[2] ironically preferring to house working class families in the slums of the present – the dilapidated terraces of inner Sydney.[3]

The plethora of pre-1960s apartment buildings in the inner, middle ring and beachside suburbs of Sydney make it clear that despite government policy, some people were living outside the Great Australian Dream.[4] They fell roughly into two groups and their tenure is significant.

The first group was young, single and often bohemian; writers, artists, and performers, people prepared to explore a life beyond suburbia.[5] Robin Slessor recalled that when his brother, famous Australian poet Kenneth Slessor, found a flat in the Kings Cross area in the 1920s, for their mother, 'the idea of taking a flat was only one step away from announcing he was going to shack up with a prostitute'.[6] Of course not all apartment dwellers were bohemian; many were simply single men and women who preferred the freedom of apartment life to the mean regulation of privately run boarding and lodging houses.[7] From the 1930s onwards, the

[1] Caroline Butler-Bowdon et al, *Homes in the Sky* (Melbourne University Publishing, 2007) 2–5.
[2] Ibid 2–7.
[3] For an evocative depiction of this housing, see Ruth Park, *Harp in the South* (Houghton Mifflin, 1948); Ruth Park, *Poor Man's Orange* (Collins/Angus & Robertson, revised ed, 1992).
[4] 70 000 apartments were built in Sydney between the wars: Butler-Bowdon et al, above n1, 8.
[5] Louis Nowra, *Kings Cross* (NewSouth, 2013).
[6] Quoted in Geoffrey Dutton, *Kenneth Slessor: A Biography* (Viking, 1991) 41, cited in Butler-Bowdon et al, above n 1, 8.
[7] Ibid.

apartments from Kings Cross to the eastern beaches increasingly housed European refugees for whom apartment living had been the norm.

This first group of apartment dwellers were tenants, and in the character of Australia urban leases, their tenure was relatively short and insecure. Although technically incorrect, governments and citizens would not characterise these leases as 'ownership'.

The second group of apartment dwellers were a different class altogether. They lived in company units,[8] and owing to a refusal of lending institutions to finance the purchase of company title units, they were 'people who had sufficient independent resources to buy their flats – a well-to-do stratum of society.'[9]

Some of the very first apartment buildings to be constructed in Sydney were company title, most notably The Astor, built on Sydney's Macquarie Street in 1923. Both the physical form, and often the legal structure of Sydney's early apartments were copied from the United States. Physically, apartments resembled those in New York and Chicago (which were in turn modelled on Paris), and they were marketed as elite urban living. For the New South Wales landed gentry, apartments were a glamorous city bolt hole, and for wealthy city residents, they presented a solution to the lack of availability of servants necessary to run huge Victorian houses.[10] The Astor had a café and restaurant in the basement which sent up food to apartments in a dumb waiter. It also had a caretaker, who attended to residents' every need, from arranging funerals to sending a boy down to David Jones. The resident caretaker of The Astor in the 1930s eventually had a nervous breakdown, quite possibly brought on by the demands of his wealthy clientele.[11] No doubt many modern strata managers could sympathise with his plight.

Legally, The Astor was modelled on New York's 'co-operative' apartments, which were a corporate share-holding model, with which the wealthy business people to whom they were marketed, were familiar.[12] Australian buildings like The Astor used the same 'co-op' form,

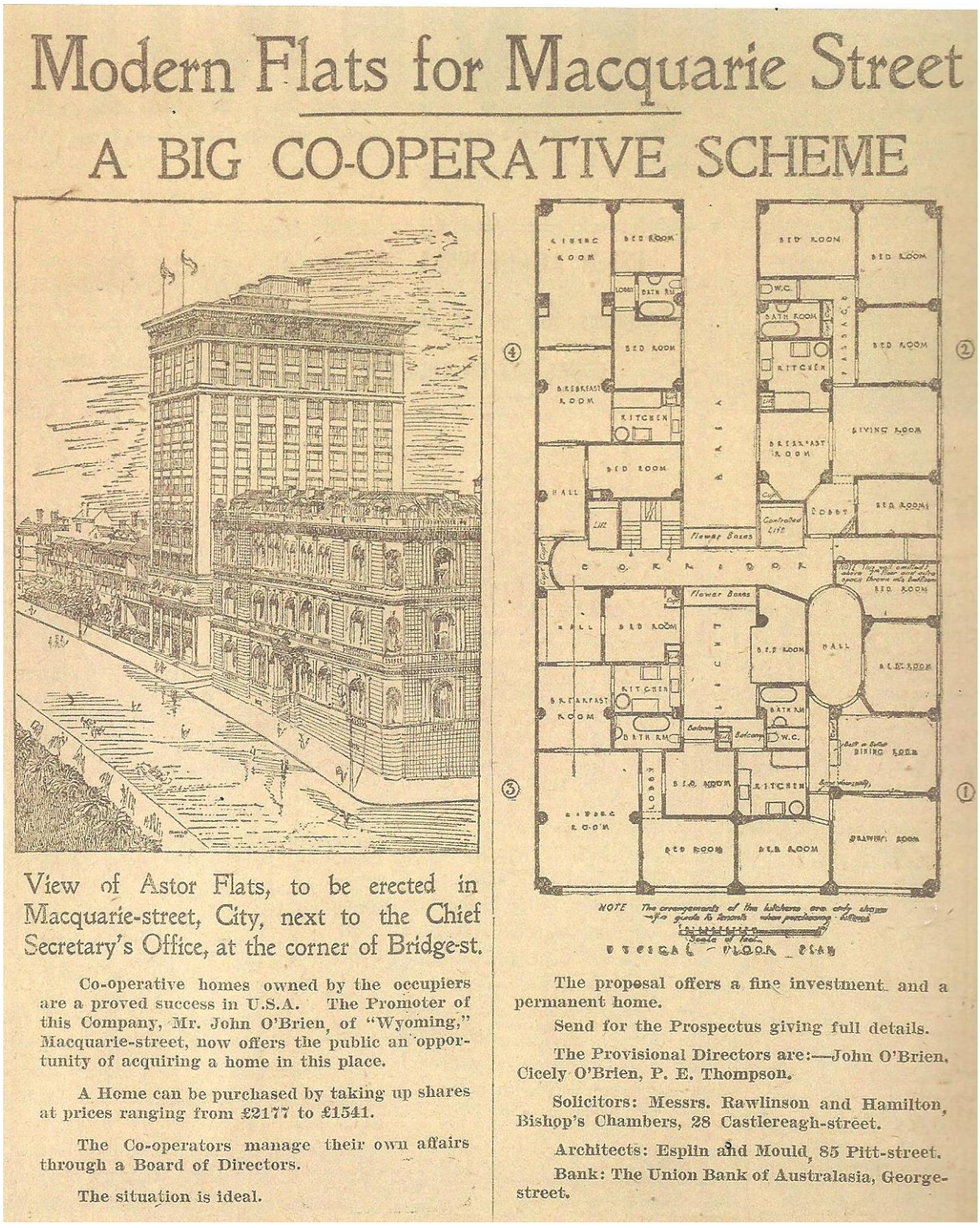
[8] Although there were some tenants in company title buildings, leasing was often prohibited by the company's articles of association (see below), and thus buildings could be exclusively owner-occupied.
[9] Alex Kondos, 'The Hidden Faces of Power: A Sociological Analysis of Housing Legislation in Australia', in Roman Tomasic (ed), *Legislation and Society in Australia* (Unwin Hyman, 1980), 340.
[10] Butler-Bowdon et al, above n 1, 36–40.
[11] Jan Roberts (ed), *The Astor* (Ruskin Rowe, 2003) 41.
[12] In New York co-operatives, a corporation owns the land and building and grants a lease to apartment owners when they purchase shares: Robert M Nelson, 'Examining Cooperative Conversion: An Analysis of Recent New York Legislation' (1982) 11 *Fordham Urban Law Journal* 1089, 1093.

although it became known as 'company title' in Australia. A company owned the land, and apartments were purchased by buying shares in the company; the company then granted purchasers a lease of their apartment.[13] A board of directors managed the building through the company's articles of association, which included the power to veto any transfer of shares, thus controlling the class of potential owners. While The Astor's company title form was promoted as a 'fine investment and a permanent home',[14] as noted above, banks did not agree. The power of the board of directors to veto sales interfered with the ease of a mortgagee's power of sale and as a result, banks would not lend money for the purchase of a company title apartment.[15] Consequently, company title could never provide housing for the masses. Vetting or outright banning of tenants, facilitated by the articles of association, intensified this problem.

[13] These leases were held to be invalid for failure to satisfy the leasehold rule of certainty of duration: *Wilson v Meudon P/L* [2005] NSWCA 448, [65] (Hodgson JA). A lease which runs as long as someone owns shares in a company title building is uncertain as to duration because it cannot be known when someone might decide to sell their shares/apartment. Ultimately, the invalidity of leases is not particularly problematic, as all shareholders have a vested interest in respecting other shareholders' rights to exclusive occupation of their apartments.

[14] See Figure 3.

[15] AF Rath, PJ Grimes and JE Moore, *Strata Titles* (Lawbook, 1966), xii.



Modern Flats for Macquarie Street

A BIG CO-OPERATIVE SCHEME

View of Astor Flats, to be erected in Macquarie-street, City, next to the Chief Secretary's Office, at the corner of Bridge-st.

Co-operative homes owned by the occupiers are a proved success in U.S.A. The Promoter of this Company, Mr. John O'Brien, of "Wyoming," Macquarie-street, now offers the public an opportunity of acquiring a home in this place.

A Home can be purchased by taking up shares at prices ranging from £2177 to £1541.

The Co-operators manage their own affairs through a Board of Directors.

The situation is ideal.

NOTE The arrangements of the kitchens are only shown as a guide to tenants when purchasing flats.

TYPICAL FLOOR PLAN

The proposal offers a fine investment and a permanent home.

Send for the Prospectus giving full details.

The Provisional Directors are:—John O'Brien, Cicely O'Brien, P. E. Thompson.

Solicitors: Messrs. Rawlinson and Hamilton, Bishop's Chambers, 28 Castlereagh-street.

Architects: Esplin and Mould, 85 Pitt-street.

Bank: The Union Bank of Australasia, George-street.

Figure 1 The marketing brochure for The Astor, 1921[16]

[16] Roberts, above n 74, 29.

During the post-World War II housing shortage, the leasehold tenure of apartments and company title converged to cause a crisis.[17] The New South Wales Labor government passed the *Landlord and Tenant (Amendment) Act 1948* (NSW) (‘*LTA Act*’) which capped rents and drastically limited powers of ejectment. This was designed to stop landlords exploiting the housing shortage for financial gain, but the unintended consequence was that the private sector stopped building apartments for rental purposes, worsening the housing shortage.[18]

Developers did not stop building apartments altogether. They discovered a useful loophole in section 62(5)(m) of the *LTA Act*, which allowed eviction if the premises were ‘reasonably required by the lessor for reconstruction or demolition’. As a result, ‘a company floated to own the old or reconstructed flats could, within the law, evict the existing tenants.’[19] For developers, often working in concert with real estate agents, this became an irresistible way of freeing land of rent-control provisions. For tenants who did not want to, or could not afford to buy, unfinanced, the new company title flat, the practice was disastrous. In the files of the Department of the Attorney General and Minister for Justice, Kondos found ‘scores’ of representations from disgruntled tenants, who were being effectively forced from their homes through company title conversions.[20] The proposed termination provisions in the Strata Schemes Development Bill 2015 may produce exactly the same effect. Kondos described the 1950s as an ‘intensive period of housing conflict’ in Sydney, with ever increasing pressure on government to find a workable solution to the problem of freehold ownership of apartments.[21]

In 1950, the New South Wales Labor government established the Property Law Revision Committee, with L W Taylor, a solicitor as Chairman, J Baalman, the Chief Examiner of Titles as Executive Member, and C D Monahan, a barrister, who later became a judge.[22] The

[17] There was a third form of apartment ownership whereby people owned buildings as tenants in common. As lending institutions considered this as undesirable a security as company title: Rath, Grimes and Moore, above n 15, xiii; and as it did not create a governing body, tenancy in common buildings were rare. In the process of consulting with the New South Wales Law Reform Commission on *Disputes in Company Title Units*, Report No 115 (2007), the Commission told me that they estimated that there were only six tenancy in common buildings left in Sydney.

[18] Kondos, above n 9, 339.

[19] Ibid.

[20] Exactly the same phenomenon occurred in New York in the post-War period with mass conversions of rental buildings to co-operatives, which along with condominium conversions (the United States’ equivalent of strata title), continues to this day: Nelson, above n 12, 1093. In the early 1970s, the United States Federal government initiated an inquiry into developer abuse in the process of both condominium and co-operative conversions: Federal Department of Housing and Urban Development, ‘Condominium and Cooperative Study’ (1975).

[21] Kondos, above n 9, 340.

[22] The following description relies on Kondos, above n 9.

Committee reported to the Minister in 1957, with both Taylor and Monahan satisfied with the existing company title method of owning flats and Baalman strongly disagreeing. Baalman insisted that only way to overcome the major deficiency of company title shares being inadequate security for a mortgage was to introduce legislation for the creation of freehold title to apartments. Kondos argues that many people involved in wider apartment title discussions, including the Local Government Association, the Law Society, leading solicitors' firms and the Registrar General, remained convinced that the problem of apartment ownership could be solved with legislation standardising procedures and the articles of associations for company title. However, the balance was tipped in favour of strata title legislation when a consortium of construction companies weighed into the debate in 1958. Baalman was the consortium's legal counsel.

Naturally, the consortium's interest in the issue was to increase the market of potential purchasers for their product. Without finance to assist in the purchase of apartments, the pool of purchasers would be forever limited to those of substantial independent means. Further, the *LTA Act* made the option of purchasing (or in the case of developers themselves, retaining) freehold title to rent very unattractive indeed.

On 18 December 1958, the managing director of a large construction company representing the consortium wrote to the Minister for Justice stating that his company was building several home unit projects and had more on the drawing boards. He stated that the company had 'specialised knowledge, therefore, of the disadvantages of the present situation regarding home unit titles, more particularly in respect of the provision of long-term finance to the purchase of such units'.[23] He revealed that the company had employed counsel to consider the issue and that this had led to a solution that they would be prepared to share with the Minister. On 3 February 1958, the consortium did exactly that, presenting the Minister with a draft '*Stratified Titles*' bill.

The bill was assessed by the Senior Legal Officer of the Registrar General's Department, drawing a 'devastatingly critical' report. This led to the consortium hastily organising a luncheon at the Wentworth Hotel on 11 March 1959, to which they invited a 'who's who of the managers of the urban system.'[24] If it was not extraordinary enough that a private consortium took it upon itself to organize such an event, the consortium proceeded to

[23] Kondos, above n 9, 351.
[24] Ibid 354.

instigate, supervise *and pay* the drafting committee that spent the next eight months considering the bill. As Kondos notes, this was 'a remarkable arrangement, to say the least, in the law-making process of any society.'[25]

The Conveyancing (Strata Titles) Bill 1959 (NSW) was presented to Parliament on 26 November 1959, but only after the Senior Legal Officer met with the senior officers of eight lending institutions, on the explicit instruction of the Minister for Justice. The Minister wanted to ensure that the Bill had the uncritical support of these institutions and 'the event stands as a symbolic confirmation that the *CSTA* was primarily geared to meet the needs of financial institutions.'[26]

After the first reading in 1959, the passage of the Bill was suspended for over a year so that interested bodies could comment. Rath, Grimes and Moore said that many did so and that 'as a result the *Act* represents not so much a scheme devised by a drafting committee as one embodying the considered views of a community'.[27] The *Act* came into force in July 1961, allowing the creation of the desired freehold title to apartments by the registration of a strata plan of subdivision. Any space falling outside individual apartments or strata 'lots' was common property, owned by all proprietors as tenants in common.[28] A body corporate was automatically created by the legislation, made up of all lot owners, not tenants, and it was responsible for the financial and administrative management of the scheme. The body corporate's duties included insuring and keeping the common property in a state of good and serviceable repair,[29] and its powers included the ability to raise 'levying contributions' to discharge those obligations. In other words, legislation had been used to overcome the common law and equitable limitation that positive covenants to pay money could not be attached to freehold titles. All apartment titles were burdened with positive obligations to pay for maintenance.

The body corporate was also given the power to enforce by-laws. The by-law making power was for 'the control, management, administration, use and enjoyment of the lots and common

[25] Ibid 355. While extreme, this set the pattern for future strata and community title law reform. Developers and their lawyers have had consistent input into strata law reform in New South Wales.
[26] Ibid 358.
[27] Rath, Grimes and Moore, above n 15, xi. This pattern has also been repeated with widespread community and 'stakeholder' consultation on subsequent strata reviews.
[28] *CSTA* s 9(1).
[29] Ibid s 15(1)(f).

property', and while there were by-laws provided in the First and Second Schedule, both could be repealed or amended by an appropriate majority. The only express limit on the by-law making power was a prohibition on restrictions on transfer, lease and mortgage of lots, to prevent the very problems the *Act* was designed to solve re-emerging.[30] Other than this, the legislature had given private citizens an almost *carte blanche* power to write rules for their neighbours by virtue of ownership of property.

It is important to note that in the history that Kondos records about the creation of the *Act*, there is seemingly a complete absence of concern amongst any of the people involved in the drafting of the Bill about private citizens being given this power. Kondos does make reference to the '[d]ifficulties associated with the 'house management' aspect of home unit living' being 'the chief area of [public] complaint as reflected by the large number of letters that poured into the Attorney General's office in the latter half of the 1950s'.[31] He notes with disapproval that these difficulties did not seem to constitute a problem in the eyes of Baalman, the Executive Member of the Property Law Revision Committee. However, the complaints made by members of the public seem to relate to the *lack* of 'house rules' needed for harmonious living; they do not extend to any concern with the limits that might need to be placed on the power to create such rules. Even Kondos himself, writing thoughtfully and critically 20 years later, using 'power' and 'the pursuance of one's interest in preference to the interests of others'[32] as the explicit basis for his analysis, did not consider the questions that arise when private citizens are given a quasi-law-making power by virtue of property ownership.

One obvious explanation for the lack of attention paid to this new power was that at the time the *CSTA* was drafted, it only applied to buildings and not land, and that those buildings were relatively small. It is necessary to clarify this statement immediately, because technically, the first part is incorrect. The *CSTA* allowed for the subdivision of land with a strata plan. Owing to the maxim 'cuius est solum eius est usque ad coelum et ad inferos', 'land' stretches from the heavens to the centre of the earth below,[33] and it was (and still is), airspace 'land' that a strata plan subdivides. Realistically, the only way to subdivide air is by reference to structures

[30] Ibid s 13(3).
[31] Kondos, above n 9, 345.
[32] Ibid 332.
[33] Although as Gray points out, the space above land is the lower, useable stratum of air: Kevin Gray, 'Property in Thin Air' (1991) 50 *Cambridge Law Journal* 252.

built in that air and that is precisely what the strata plan did; it defined the boundaries of each lot by reference to floors, walls and ceilings of the building in which the lot was contained.[34] Although technically the strata plan was subdividing 'land', in reality what it was doing was subdividing a building with minimal land around it.

That building was also likely to be relatively small – six to twelve apartment 'walk-ups' being the norm. This was because the vast majority of Sydney apartment buildings were constructed on freestanding housing lots, purchased by small builders who redeveloped one housing lot at a time.[35] In Kings Cross and Darling Point, those housing lots were the site of former Georgian and Victorian mansions, with sandstone walls and wrought iron gates often still standing as testament to past architectural glories. From Manly to Bondi to Bankstown, apartment buildings were built on the site of former Great Australian Dreams, Federation or California bungalows surrounded by gardens. Harry Seidler described Sydney's apartment construction thus:

> The total effect of this demolition of individual houses for replacement on the same site by now quite standard three-storey flats is truly horrifying. The results are barrack-type buildings, their long dimensions filling the depth of the narrow allotment. What used to be yards at the back and on the sides … are denuded of vegetation and paved for cars. On floors above, the living rooms of adjacent blocks face each other across the five metre wide canyon.[36]

[34] *CSTA* s 4(1)(d).
[35] Butler-Bowdon et al, above n 1, 159–67.
[36] Harry Seidler, quoted in Robin Boyd, *The Australian Ugliness* (Penguin, 1980) 255, cited in Butler-Bowdon et al, above n 1, 160.

Figure 2 Typical post-*Conveyancing (Strata Titles) Act* 1961 three-storey walk ups, Randwick, Sydney.[37]

The physical form of apartment buildings was legally, socially and politically significant. The physical area that the new by-law making power applied to was small, and the number of people regulated was limited. This is in contrast to the United States, where the doctrine of 'real' (positive) covenants had led to the regulation of large horizontal areas of land, not just single buildings; great swathes of suburbia and entire planned towns were regulated by privately-written and enforced covenants. The scale of this regulation (measured by both land area and population), raises questions that the regulation of a six-lot strata scheme does not. Thus, it is not surprising that the by-law making power did not cause initial concern.

However, in 2014, the landscape of strata title in New South Wales has changed dramatically. First, many schemes are no longer three-storey walk-ups. They are very high-rise buildings with hundreds of strata lots and even more owners and tenants, all of whom are regulated by the by-laws. Second, while large schemes are still a minority, there are thousands more smaller schemes today than there were in the 1960s; in fact there are over 63,000 schemes at

[37] Author's own photo (on file).

current count.[38] By 2011, over a quarter of Sydney's population, just over 1 million people, lived in strata title apartments,[39] and the New South Wales government predicts that by 2034, half of the state's population will live or work in a strata or community scheme.[40] There is a qualitative difference between a few thousand people being regulated by by-laws and having the power to regulate others, and millions of people being subjected to and wielding that power. Finally, the strata title form has been extended to horizontal subdivisions by the *Community Land Development Act 1989* (NSW) ('*CLDA*') and the *Community Land Management Act 1989* (NSW) ('*CLMA*'), allowing developers to copy the private planned communities that have existed in the United States for a century.[41] Some community title developments are low-rise master planned estates with extensive recreation facilities, like Macquarie Links[42] and Harrington Grove[43] in Sydney's south west, while others are a conglomeration of high-rise strata schemes, like Jacksons Landing, in Sydney's inner city. Jacksons Landing is a community scheme comprised of 20 strata schemes with 3000 residents.[44] Breakfast Point, a tiered[45] community scheme on the Parramatta River, contains both low-rise and high-rise buildings, with its country club and 'village green' bearing testimony to its United States' antecedents.[46] Physically large and populous schemes invariably employ professional strata managers and caretakers, adding valuable third party businesses to the already complex legal, social and property mix. A 1960s strata resident of a six lot scheme, transported into Jackson's Landing might be tempted to say, 'Toto, I've a feeling we're not in Kansas anymore'.[47]

---

[38] There were 8500 schemes registered under the *CSTA*: Alex Ilkin, *NSW Strata and Community Schemes Management and the Law* (Lawbook, 4th ed, 2007) 9. Today, there are 63,660 schemes in New South Wales: NSW Fair Trading, 'Strata & Community Title Law Reform Position Paper' (November 2013), 2.

[39] Hazel Easthope, Bill Randolph and Sarah Judd, 'Governing the Compact City: the Role and Effectiveness of Strata Management' (CityFutures Research Centre, 2012), 11.

[40] NSW Fair Trading, above n 38, 2.

[41] Australian lawyers who were instrumental in the creation of the community title legislation in New South Wales had been on regular 'study tours' to the United States to learn about homeowner association and condominium development.

[42] DP 270152; see community website at Monarch's Macquarie Links Estate <http://www.macquarielinks.net>.

[43] DP270613 see community website at Harrington Grove: Grove Life, *Community Documents* <http://grovelife.com.au/community-documents>.

[44] DP270215; see community website at Jackson's Landing <http://www.jacksonslanding.net.au/>.

[45] Tiered community schemes have multiple subsidiary schemes called precinct, neighbourhood, and/or strata schemes.

[46] DP270347; see community website at Breakfast Point <http://www.breakfastpoint.com>.

[47] *The Wizard of Oz* (Directed by Victor Fleming and George Cukor, Metro-Goldwyn-Mayer, 1939) 20:51.

Figure 3 Aerial view of Breakfast Point, a community scheme containing multiple strata and other subsidiary schemes, Mortlake, Sydney[48]

Figure 4 Breakfast Point Country Club[49]

[48] Breakfast Point <http://www.breakfastpoint.com/>.

[49] 'A rare combination of beauty and amenity; Breakfast Point is a sanctuary for those who want to live a life less ordinary': Breakfast Point, *Explore Breakfast Point* <http://www.breakfastpoint.com/explore-breakfast-point/>.

As noted in the introduction, this Bill is the fourth iteration of strata legislation in New South Wales, replacing the current *Strata Schemes Managemen*t Act 1996 (SSMA), which in turn replaced and greatly extended the management parts of the 1973 *Strata Titles Act*. The 1996 Acts had split titling and management of strata schemes for the first time, in recognition of the fact that strata title is simultaneously a way of subdividing land and allocating titles, as well as the creation of a community of owners and occupiers, along with associated businesses. The complex mix of property and financial interests is an inevitable source of conflict that the SSMA tries to minimise.

The Bill does not propose to radically alter the strata management landscape, however the way in which it has been drafted is concerning. Anyone who is familiar with the Queensland *Body Corporate and Community Management Act* 1997 (BCCMA) will know that it is not an entirely happy piece of legislation. While wading through all 444 sections of the BCCMA one day, (pausing to occasionally bang my head on the nearest wall), it suddenly struck me why it is such a poor piece of legislation – it is drafted as though it is a commercial contract and not an Act of Parliament.

When lawyers draft commercial contracts they are paid to cover their client's back. They do so by anticipating every possible scenario that may arise and clarifying every possible ambiguity. As there are only two parties to a contract, it is actually feasible to address almost all eventualities that may arise between the parties. Further, exercising appropriate lawyerly caution, commercial contracts are frequently drafted to state the obvious; it is better to err on the side of caution than fail to protect a client.

In contrast, with no exaggeration, legislation is written to regulate millions of people in millions of circumstances. It is simply impossible to anticipate all of the circumstances in which millions of people may find themselves and when legislation attempts to do so, it becomes bloated and unworkable. Legislation should be the enactment of a limited number of broad rules that can be applied to multiple circumstances; it should not be the enactment of vast numbers of very specific rules designed to address multiple, individual issues. This is not a conservative, 'we need to cut the red tape' argument; it is simply an observation about good writing and drafting.

Bloated and unnecessarily wordy legislation is difficult for lawyers to use and impossible for lay people. As a result, care should be taken not to state the obvious and not to use words that mean the same thing. This can easily make an Act a third longer than it needs to be. Unfortunately, the Bill contains repeated examples of unnecessary words, such as 'by or under this Act' and 'imposed or conferred'. I challenge anyone to explain the difference between 'by this Act' and 'under this Act'. There is none.

Further, there are multiple examples of stating the obvious, in the style of commercial contracts. For example, after explaining in excessive detail how an owners corporation may delegate its powers to a strata managing agent in s52, s53(1) then states, "A function delegated under this Division may, while the delegation remains unrevoked, be exercised from time to time in accordance with the delegation." Who would have guessed?

More fundamentally, there are multiple sections that 'state the obvious' in reference to other areas of law, notably agency and corporate law. No property legislation is a code; it operates over the body of existing common law and equity and it operates in conjunction with other Acts. Lawyers and lay people are assumed to know that other law. This Bill has multiple sections that assume that agency and corporate law do not exist. Everyone in the community will deal with an agent or a corporation on multiple occasions; owners corporations are not unique in that regard.

For example, s154 specifically authorises a company that owns a lot to appoint a nominee to exercise any function conferred on a lot owner by the Act, and for the acts of the nominee to be treated as acts of the owner of the lot. Companies always have to act through human beings and there is a well-established method for them to do so. The ability of a human being to act for a company is a matter of corporate law, not strata law, and is a completely superfluous inclusion in the Bill.

Similarly, the Bill seems to be blind to the common law of agency. For example, having needlessly stated that a function delegated to a strata manager can be exercised while the delegation is on foot, s53 goes on to state:

> (2) Despite any delegation made under this Division, the owners corporation may continue to exercise all or any of the functions delegated.

(3) Any act or thing done or suffered by a strata managing agent while acting in the exercise of a delegation under this Division:
(a) has the same effect as if it had been done or suffered by the owners corporation, and
(b) is taken to have been done or suffered by the owners corporation

Both ss(2) and (3) are simply a restatement of the basic common law of agency that continues to operate unless expressly excluded by the legislation. A principal can always continue to act for themselves, despite appointment of an agent, and the acts of the agent are always taken to be the acts of the principal, so long as they are within actual or apparent authority.[50] That is the whole point of agency.

Presumably because owners corporations have had difficulty obtaining accounts from strata agents, new provisions have been included in s58 and s59 to give owners corporations a statutory right to access information about trust accounts, transactions and money received in relation to the owners corporation. Given the fact that agents have clear and longstanding common law duties to keep accounts and given principals access to them, even after termination of the agency,[51] these sections seem superfluous.

I am not meaning to be pernickety about the drafting of the Bill. These flaws in drafting go to the root of two fundamental problems with strata legislation. First is that with every re-enactment, the legislation gets longer, making it increasingly unworkable for lay people and non-legal professionals. There is no point putting a huge amount of thought and work into legislation if the people it is intended to benefit can't get through it. Secondly, the Bill feeds the misguided belief that strata is a law unto itself and that lawyers, strata managers and owners do not need to look beyond the Acts. This is completely incorrect. Owners corporations, strata managers, lot owners and developers are subject to the general law as much as the next person. By spelling out basic principles of other law, such as agency, the Bill encourages the erroneous belief that only the rules spelled out in the legislation bind players in strata schemes.

[50] *Toll (FGCT) Pty Limited v Alphapharm Pty Limited* [2004] HCA 52
[51] *Barkley v Barkley Brown* [2009] NSWSC 76

Moving on to more substantive matters, tenants have been given a seat at the table, but not a vote. Under s33, if at least half of the lots in the scheme are let, tenants can appoint a representative to attend strata committee meetings ('strata committee' is the new name for executive committees), but can be excluded from meetings at which financial matters or termination proposals are being discussed. As half of all strata stock in Sydney is rented, this is a welcome development.

Less welcome are the lukewarm provisions on commissions for strata managers. Under s60, these are required to be disclosed to the owners corporation to be permissible. Disclosure is a much abused concept in strata legislation, with a lack of recognition that if something is wrong, it does not miraculously become right because you have disclosed it. If someone is employed to do a job for you, they are required to serve your best interests in that regard. If we employed a plumber and discovered that he was sourcing supplies from the company that gave him the best holiday to Bali, we would be none too pleased. I have never been able to understand why strata managers should be in any different position from anyone else who is employed to provide a service. The fact that they would apparently go broke if they could not receive commissions has never persuaded me otherwise.

s106(5) is a pleasing inclusion in the Bill, stating that an owner of a lot in a strata scheme may recover from the owners corporation, as damages for breach of statutory duty, any loss suffered by the owner as a result of a contravention of the statutory duty to repair common property, (formerly in s62, now in s106(1)). s106(5) will reverse the finding of Tobias JA in *Owners Strata Plan 50276 v Thoo* [2013] NSWCA 270 at [221] that a breach of the statutory obligation to repair does not entitle a lot owner to sue an owners corporation for damages. Tobias JA's decision overturned the longstanding authorities of *Seiwa Pty Ltd v The Owner of Strata Plan 35042* [2006] NSWSC 1157, *Trevallyn-Jones v Owners Strata Plan No 50358* [2009] NSWSC 694, and *Nicita v Owners of Strata Plan 64837* [2010] NSWSC 68. Tobias JA reasoned that the remedy provided by the SSMA was the dispute resolution provisions in the Act that allowed an owner to obtain an order from the Tribunal compelling the owners corporation to do the repairs. The difficulty with Tobias JA's reasoning is that lot owners can lose tens of thousands of dollars in rent or incur the obligation to pay rent elsewhere, if their apartment is uninhabitable as a result of owner's corporation failure to repair. Tobias JA's ruling lead plaintiffs like that in *McDonough v The Owners Strata Plan No 57504* [2014]

NSWSC 1708 to mount creative arguments in relation to breach of trust by the owners corporation in order to recover money. The proposed new section will give owners a clear right to recover money and provide a much needed incentive for owners corporations to act promptly to repair.

Owners corporations have been given the right to not carry out repairs if they are in the process of suing an owner or other person for damage to common property, so long as delay in repair will not affect the safety of the building (s106(4)). They have also been given the power to pass by-laws adopting a common property memorandum, specifying which parts of common property are the responsibility of the owners corporation and which the responsibility of lot owners. While this is has clear advantages, as it is currently drafted, the provision is open to abuse. There has to be some mechanism for lot owners to protect themselves from the owners corporation unfairly and inequitably imposing the cost of maintenance of significant parts of common property on them. For example, in a small scheme with a garden that is largely accessible from the ground floor apartment(s), the OC may decide that the ground floor apartments should pay for the entire cost of maintaining the garden. By way of comparison, exclusive-use by-laws cannot be created in favour of a lot without their written consent, specifically to avoid the imposition of costs on lot owners without their agreement.

It is heartening to see s139(1), that by-laws can now not be 'harsh, unconscionable or oppressive', although it is disappointing that 'unreasonable' was not included. I think that some stakeholders objected to the term 'unreasonable' on the grounds that it was too vague and undefinable. Trying to be as tactful as I can, this argument is fatuous. An Austlii search of the word 'reasonable' in all NSW legislation turns up over 18,000 results. A search for 'unreasonable' turns up over 1600. The draft State Bill itself, uses the word 'reasonable' many times. The law requires lawyers and citizens to apply the concept of reasonableness every day because human activity is rarely black and white; grey is inevitable and judgement-calls have to be made; eg a tenant is liable for damage, *reasonable* wear and tear excepted.

The reason that reasonableness is an essential limit on the by-law making power is that by-laws are a form of private legislation. The Act empowers private citizens to create rules that regulate not only commonly owned property, but people's private homes, without any of the limits on power that apply to government legislative power. If a scheme only has 6 lots, this

power may not be too concerning; if a scheme has 500 or 5000 lots, it is akin to the power of a small local government. There is not space here to expand on the terrible things that human beings can do to each other when given the legal power to regulate each other's land and homes, but having written a book on the subject, perhaps you might take my word for it. In addition to being kind, considerate and decent, human beings can be selfish, cruel and exploitative; give them the power to legislate for their neighbours and they will display all of those traits.

In any event, case law makes it clear that by-laws have to be reasonable, per Young JA at [89] in *Casuarina Rec Club Pty Limited v The Owners - Strata Plan 77971* [2011] NSWCA 159. The legislature would do well to follow the lead of the Supreme Court.

On the subject of selfish and cruel by-laws, the Bill continues to give owners corporations the power to ban pets completely. While the default position is that pets are allowed with owners corporation consent, which cannot be unreasonably withheld, owners corporations and developers do not have to choose the default position. They can simply ban all pets, no matter how quiet and unobtrusive those pets may be. The power to regulate activities inside someone's home that do not affect others is not simply unnecessary in strata schemes, it is deeply undemocratic. The basis of all liberal democracies is 'negative liberty' – that we are free to do as we please so long as we do not harm others – and there is absolutely no reason for strata schemes to be exempt from the fundamental principles of democratic society. As any legal theorist will tell you, all law requires a moral basis in order to garner support and compliance. The reason so many schemes have trouble with people smuggling pooches and cats in handbags through the lobby is that most people do not accept that their neighbours are morally entitled to determine what happens inside their own home.

Demonstrating the illogical position of pet bans, the legislation now spells out that smoking can constitute a nuisance or hazard that unreasonably interferes with the use or enjoyment of common property or lots (s153). This is illogical, because the legislation has always allowed schemes to ban smoking inside people's apartments, irrespective of the impact or lack thereof on others, (*Salerno v Proprietors of Strata Plan No 42724* (1997) 8 BPR 15,457). Unless it could be argued that a by-law banning all smoking is 'oppressive, harsh or unconscionable', schemes continue to have that power. However, many baulk at exercising it because they feel uncomfortable about the idea of regulating what people do in their own home. Apparently

that discomfort does not extend to forcing someone to have their cat, who never leaves the apartment and never makes a noise, 'put to sleep'.

Finally, the greatest gain for apartment owners is the introduction of a developer building bond to cover seemingly inevitable building defects. The bond will be 2% of the contract price for the building work and will be paid into a Building Bond Account, maintained by the Office of Finance and Services. The building bond must be paid out or refunded within 2 years of completion of the building work or within 60 days of a final inspection report being given to the developer, whichever occurs later. The bond will cover residential building work that is exempt from the home building compensation insurance requirements under the *Home Building Act 1989*. Call me cynical, but I imagine developers' lawyers are now working tirelessly to devise ways to minimise or avoid the application of the provisions to their clients.

Strata Schemes Development Bill 2015

This Bill has rolled the *Strata Schemes (Freehold Development) Act* 1973 and the *Strata Schemes (Leasehold Development) Act* 1986 into one Act. The most contentious provisions are those that relate to the termination of freehold strata schemes.

These provisions allow for the termination of strata schemes with less than unanimous agreement of lot owners. While the provisions are dressed up as 'collective sale' and 'strata renewal', I would argue that all they will do is make life easier and more profitable for developers. Instead of having to pay the true market value of all lots – erroneously often referred to as a 'hold out' – and sometimes having to forgo buildings in which no amount of money will persuade owners to sell, developers will now only need to buy 75% of the lots, before being able to force the remaining owners out. The provisions allow private citizens – developer lot owners or ordinary lot owners – to compulsorily acquire their neighbours' homes simply because it is profitable for them to do so. If the government acquired our properties on the same basis, (which the New South Wales government is constitutionally well able to do), revolution would ensue.

The ostensible justification for the changes are to remedy the problem of run-down strata schemes in which doing repairs is like moving the deckchairs on the Titanic, and to achieve greater urban density. Unfortunately the government forgot to include either in the legislation. The government is working on the assumption that the market will automatically deliver these ends because run-down schemes and land that can be redeveloped at higher density will be the most profitable to renew. Neither are necessarily the case. Research done by my colleagues at City Futures, UNSW, demonstrates that most schemes that are viable for redevelopment at a profit are on the lower north shore, eastern suburbs, Manly and Cronulla.[52] As anyone who is familiar with those areas is aware, many schemes in those areas are well-maintained and demolishing them will not be solving problems with decaying housing infrastructure. In contrast, in areas like Cabramatta/Fairfield, Campbelltown/Liverpool and Wiley Park/Lakemba, where there are undoubtedly run-down strata schemes, redevelopment will not be viable. Further, while it is likely that most schemes will be redeveloped at higher density, this is not necessarily the case. The notorious scheme on Notts Ave, Bondi Beach, that a developer failed to buy out because two owners refused to sell, was to be redeveloped from an 8 lot to a 4 lot scheme, halving the density of the site.

Of course it would be possible to tie the new provisions to buildings which are run-down or land that has to be redeveloped at higher density, both of which would make the changes acceptable to my mind, but the government has not chosen this option.

The new provisions envisage that schemes will either agree to a collective sale to a developer or to a renewal plan. The collective sale provisions may be workable, but the renewal plans seem nothing more than a fantasy to me. We know for a fact that many, if not all schemes, struggle to collectively do basic maintenance to their common property. How exactly the same groups of people are going to collectively agree to pull the entire building down and rebuild it, is hard to imagine. Lay people cannot develop high rise buildings, even with professional assistance. Further, most financiers would run a mile from the prospect of financing a redevelopment in which multiple lay people have a say. The developments lenders are going to finance are those in which the developer has bought 75% of the lots and the entire redevelopment process (the renewal committee, the disclosure etc) is a rubber

[52] Troy, Easthope, Randoph and Pinnegar, *Renewing the Compact City: Interim Report*, 2015, https://www.be.unsw.edu.au/sites/default/files/upload/pdf/cityfutures/Renewing%20the%20Compact%20City%20-%20V4_Interim%20Report_2014_06_19_0.pdf.

stamp by the developer's lawyer. If the renewal and sale provisions are read with reference to a 4 lot scheme in which a developer has bought 3 apartments, (possibly covertly through separate companies), a 8 lot scheme in which a developer has bought 6 apartments or a 24 lot scheme in which a developer has bought 18 apartments, it is clear that the 'protection' for lot owners are meaningless. Reading the provisions this way, it is obvious that the changes simply make it easier for developers to buy out schemes – they only have to buy 75% consensually and can force a sale of the other 25%.

With the property industry using sleights of hand like 'urban renewal' and 'hold outs' to justify the changes, I am not sure that everyone clearly understands that these changes will force people to sell their homes simply because they live in an apartment. They are no different to a provision that required people to sell their freestanding house if 6 of the 8 people in their block had agreed to sell to a developer. Elderly people who simply do not have the energy or physical ability to move will be forced to sell; young people and families who have made apartments their home and have formed attachments to the local community and its services like schools, will be forced to sell. Tenants will be forced to move. Almost all of these people, by definition, will not be able to afford to live on the redeveloped site and many will not be able to afford to remain in the area, rents and property values having increased so dramatically in Sydney. This will be the case in relation to schemes that have been perfectly well-maintained and do not need redevelopment, and it will be the case in relation to people and areas that, unlike the swathes of low-rise suburbs in Sydney, are already doing more than their fair share for urban density.

Conclusion

With the exception of the new termination provisions, which I predict could lead to intense community dissatisfaction and the depression of apartment values, overall, the proposed Bills are not revolutionary. They have some desirable provisions and some undesirable. Strata will continue as it always has with the inevitable tensions and disputes that arise when multiple parties share land.