The evolution of the anticommons: Exploring the implications of mixed-use developments on urban renewal by collective sales

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Abstract

The prevailing model for urban planning in Australia and many cities globally, the compact city, has for more than two decades advocated the dual ideals of higher density mixed-use living and urban renewal. Mixed-use developments comprising multiple owners with at least two different uses have become a staple of urban planning practice. Mixed-use developments activate key city and suburban sites and create vibrant places for people to live, work and play. However, as our cities continue to change and grow, and mixed-use developments need to be redeveloped, the private property rights we have created to make them possible threaten their own renewal, and risk future underuse of important sites. This thesis explores this emerging dilemma.

The thesis identifies mixed-use developments, and specifically mixed -use developments that contain at least one owners corporation (part strata), as anticommons property. Anticommons property is a type of property regime where the initial endowments are so disaggregated that ultimately, they risk the wasteful underuse of resources (Heller 1998). Underuse in this thesis is the inability to reassemble the fragmented property rights for a collective sale and urban renewal. The inability to reassemble may arise directly by the power of veto of owners to a reassembly of rights or indirectly by rights that impact the quality of decision making leading to underuse. Mixed-use property rights are identified by a legal analysis distinguishing mixed-use property from strata title property rights in strata schemes comprising one owners corporation. A case study of a beleaguered mixed-use development in Sydney illustrates the anticommons problem where a unanimous decision of many parties is required to sell the property as one for redevelopment. Analysis of the governing documents of 12 mixed-use developments identify further property rights, obligations, and restrictions unique to this type of property ownership that impact the quality of decision making leading to underuse of important sites. The mixed-use property rights identified include tiered decision-making regimes and rights of non-owners to make and interfere with fundamental decisions about the repair, maintenance, use, occupation, and disposal of neighbouring property. Interviews with lawyers and other experts responsible for creating these legal arrangements explain how these rights are created with indifference by developers and little judicial or legislative oversight.

The thesis concludes that as the built form of higher density living has evolved, anticommons risks have evolved in number and complexity. If we are to maintain a commitment to higher density cities and urban renewal, we must find a better way to

manage mixed-use property rights and end the life of these monolithic creatures of contemporary urbanism.

Chapter 1. Introduction

> Nothing may look less likely to change in a radical way than the status quo in city building, but nothing else may be more likely (Konvitz 1985, p.188).

Our cities are forever changing and for a multitude of reasons. Changes in household formations, the type of work we do and where we do it, and the lifestyles we choose, are all contributing factors. More recently, environmental issues, housing affordability, and the yet to be fully understood effects of a worldwide pandemic are driving changes to our cities. Being able to continue to reshape the built form to accommodate change is therefore fundamental to effective urban planning. However, as our cities are evolving, the ability to effect change is getting harder. Developments are becoming larger and more complex, with more fragmented ownership. Consequently, it is becoming more difficult to reassemble these properties when it comes time to redevelop them for greater intensity and different uses. This thesis explores this emerging dilemma.

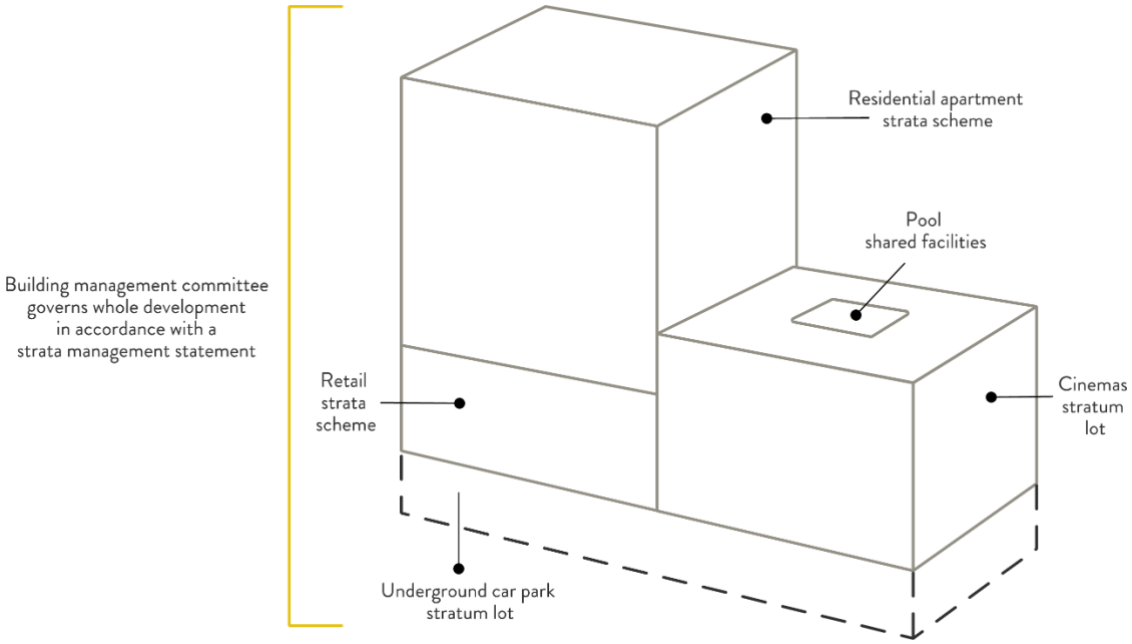
Urban planning in Australia, and many cities globally, has for over two decades been based on compact city planning (Bunker et al 2017; Crommelin et al 2017; Grodach and Limb 2020). Compact city planning has dual ideals: higher density mixed-use living, and urban renewal. Compact city planning can manifest by having developers of strategically important sites build things larger, incorporate more diverse uses within the one parcel of land, and pull them down to do it again when that development no longer fulfils the highest and best use of the land. Urban renewal is challenging enough when redeveloping a small block comprising a few apartments each used for the same purpose. The challenge becomes significantly greater when redeveloping a mixed-use development comprising, for example, several multi-owned towers of residential apartments on top of a shopping centre with a major supermarket as an anchor tenant, individually owned specialty shops around a plaza, a hotel for tourists, shared facilities, and a commercially operated car park underground.

Mixed-use developments are used by planning authorities as a revitalisation tool (Freestone 2008). They bring colour, vibrancy, and motion to our cities. They are big, and ambitious but enormously complex. By utilising strata title subdivision concepts and incorporating strata schemes within them which are called part strata schemes, mixed-use developments bring together different types of property owned and used by different types of people, for different reasons, at different times. This thesis concerns property in New South Wales and the laws and practices of that state. Unless the context requires

otherwise, the terms ‘mixed-use development’ and ‘mixed- use scheme’ mean mixed-use developments that are defined as ‘part strata’ in *the Strata Schemes Development Act 2015* (NSW) (Development Act) in which at least one of the lots (called a stratum lot) has been further subdivided by a strata scheme. The stratum lot subdivided by a strata scheme then becomes known as a stratum parcel.

Mixed-use properties are designed to share. They have many moving parts located over the site that are individually owned but shared by all and collectively controlled by representatives of each type of property use within the development. The relationships between the owners and users are constituted by customised legal instruments that attempt to wrangle these fragmented property rights and provide some coherent form of management but have been recognised by property law theorists as anticommons (Heller 1998; Sherry 2013a, 2017). Anticommons is a type of property regime where the initial endowments are so disaggregated that ultimately, they risk the wasteful underuse of resources (Heller 1998). Underuse is identified in this thesis as the inability to reassemble a mixed-use development for redevelopment when it is no longer serving its best use. Underuse may arise directly from exercising a power of veto of a collective sale or indirectly by factors affecting the quality of decision making throughout the life of the scheme. Anticommons is the counterpoint to Hardin’s (1968) tragedy of the commons (whereby unrestricted access to a resource result in wasteful overuse).

Fig. 1 Example of a mixed-use development



Conventional strata titled developments used for a single purpose have long been recognised as a form of anticommons property (Easthope, Hudson and Randolph 2013; Easthope and Randolph 2016; Harris and Gilewicz 2015; Sherry 2013a; Webb and Webber 2017; West and Morris 2003). In a classic way of addressing such problems, the New South Wales state government has intervened to make it easier for freehold strata schemes to be reassembled for redevelopment by reducing the collective sale decision-making threshold and providing for court ordered forced sales of property owned by dissentients (Bugden 2016; Crommelin et al 2018; Easthope, Hudson and Randolph 2013; Troy et al 2015; Troy et al 2017). A collective sale means a sale of the whole strata scheme and is a form of strata renewal provided for in Part 10 of the Development Act.

Mixed-use developments have also been recognised as anticommons property because of the power of veto of a sale by stratum lot owners and owners corporations in the scheme and the scope for developers to create unique and novel private property rights in the documents that govern the management of the mixed-use scheme (Sherry 2013b, 2017). However, the scope and nature of the anticommons problems arising from the instruments that create mixed-use developments and the formative actions of government, planning authorities, developers, lawyers, and owners in creating them have received limited academic and judicial attention. Perhaps because of this, collective sale of mixed-use properties has not been made easier by legislative intervention This thesis concerns property in New South Wales and the laws and practices of that state. Unless the context requires otherwise, the terms ‘mixed-use development’ and ‘mixed-use scheme’ mean mixed-use developments that are defined as ‘part strata’ in *the Strata Schemes Development Act 2015* (NSW) (Development Act) in which at least one of the lots (called a stratum lot) has been further subdivided by a strata scheme. The stratum lot subdivided by a strata scheme then becomes known as a stratum parcel.

The remainder of this chapter establishes the foundations for this study by briefly outlining the evolution and modern form of mixed-use developments, current approaches to reassembly of fragmented properties for urban renewal, and the research objectives and questions.

1.1 Mixed-use developments

The most elementary form of a mixed-use development is retail shops and restaurants at ground level and residential apartments above (Bugden 2016). This form of

development expanded beyond the traditional ‘shop top housing’ in Sydney in the 1980’s, initially through large developments on significant inner city land parcels. The Connaught in Liverpool Street, completed in 1984, is an early example with the YMCA headquarters, accommodation facilities, residential apartments, retail shops and car parking all in one building (Bugden 2006a).

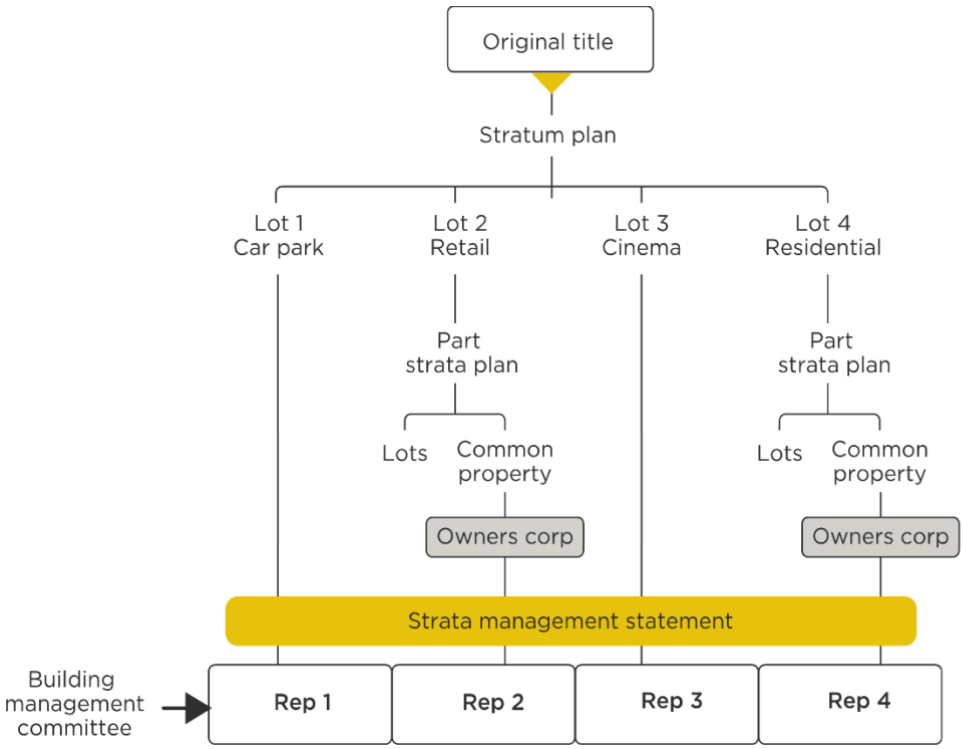
Some of the more recent mixed-use developments have become very complex. The more multifaceted the development, the more complicated the titling and managing arrangements. The Cove near Circular Quay in Sydney comprises two buildings and 76 car spaces retained by the original owner/developer, Trustees of the Roman Catholic Church, and a mix of individually owned residential apartments, commercial offices, underground car parking, and the Belgian Beer Café (Sherry 2013b). King Street Wharf, Darling Harbour is a more intricate version of a modern mixed-use development with nine tower buildings on the foreshore with a diverse mix of uses and common basement areas. Above the basements are private and public spaces and roads controlled by private owners under extensive documentation for the management of common components and equipment (Bugden 2006b). Sydney’s latest iconic mixed-use development, Barangaroo South, has been described as ‘mind-boggling in its complexity’ (Sherry 2013b, p. 403) and ‘astoundingly complex with lasting implications on thousands of future property owners and occupiers’ (Sherry 2017, p. 36).

Mixed-use developments are a more evolved form of development than a conventional block of apartments used mainly for a single purpose. Apartment blocks used mainly for a single purpose are typically subdivided by a strata plan which separates the land and buildings into individually owned lots (apartments) and common property which is shared by all the owners and occupiers and is held by an owners corporation according to the units of entitlement allocated to each lot owner and set out in the strata plan. A strata scheme describes the way titles are arranged, common property is managed, and the mutual rights and obligations of each owner and the owners corporation are determined. An owners corporation is a legal entity that all owners automatically join when they buy an apartment and leave when they sell. However, by the 1980’s developers and planning authorities wanted more than single use developments cut into smaller pieces. They wanted one development to comprise different types of property used for different purposes, but to the fullest extent possible, they wanted the owners separated principally so residential owners could not interfere with commercial operations (Bugden 2008). Accordingly, legislation was amended to allow for airspace subdivision where, for example, the owners of residential apartments are members of an owners corporation

that manages the residential lots and common property used only by residents (e.g., the foyer, lift well, and hallways) with an overarching committee responsible for parts of the mixed-use development shared by all components including the building structures, land, and common areas (mixed-use scheme). The committee for the management of a mixed-use scheme is called the building management committee (BMC). The governing document that contains the rights and obligations of the members of a mixed-use scheme that contains a strata scheme is called a strata management statement (SMS).

The following diagram illustrates the structure of the mixed-use scheme depicted in Fig 1 comprising four components where two of these component parts have been further subdivided to create separately owned lots and common property controlled by the owners corporations of the strata scheme within the mixed-use scheme.

Fig. 2 Example legal structure of a mixed-use development



1.2 Reassembling mixed-use property

As mixed-use developments have proliferated in number, type, and complexity, countries around the world have recognised that reassembling even the simplest of strata schemes for redevelopment is problematic because of the individual property rights created upon their formation and the dynamics of collective decision-making (Easthope, Hudson and Randolph 2013, p. 1422). In response several jurisdictions have introduced legislation

to facilitate collective sales of these types of properties by reducing the threshold for sale and dissolution of the strata scheme to a less-than-unanimous vote of owners. The threshold is 75% in New South Wales (NSW), 75% of the requisite quorum in New Zealand and 80%- 90 % in Singapore depending on the age of the scheme. It is 80%, British Columbia (Canada), and Florida (USA) (Ti, 2022; Crommelin et al 2020). It is also 80% in Western Australia (*Strata Titles Act 1985 (WA)*, s 174) and Northern Territory for buildings more than 30 years old (*Termination of Units Plans and Unit Titles Scheme Act 2017* (NT), s 6).

While there has been legislative intervention to facilitate collective sales of strata schemes involving just one owners corporation, there has been no such intervention to date in New South Wales for mixed-use schemes. This will be further explored in chapters 2 and 4 but for present purposes it is worth noting that the absence of legislative intervention is surprising when planners continue to regard mixed-use developments as an important part of the compact city. It is therefore essential we gain a better understanding of the impact of mixed-use schemes on urban renewal by collective sales.

1.3 Research questions

There is one overarching research question for this thesis: how do mixed-use property rights impact decision-making in ways that might impede collective sales for urban renewal purposes? This question leads us to examine the whole of life for mixed-use developments; from inception and the impact of various stakeholders on the formation of the rights and responsibilities that will bind future owners and their successors, through the operating life and the quality of decision-making, to the challenges of dealing with their inevitable obsolescence. The overarching research question frames a discussion of fundamental importance to the ideals of densification and renewal upon which our modern cities have been created and upon which we would have them continue to advance.

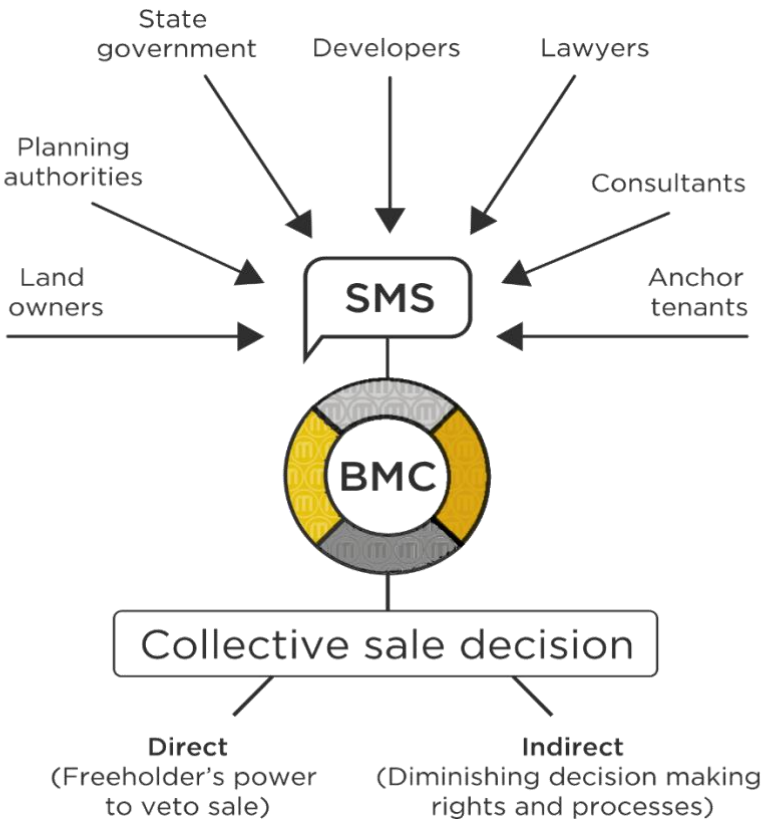
To help answer the overarching research question, there are two subsidiary research questions. The first is: how are mixed-use schemes different from strata schemes? The answer to this question helps conceptualise mixed-use schemes as a more evolved built form than the more common, and better understood, strata scheme. This question involves a detailed legal analysis of the legislation pursuant to which the two types of schemes are created, managed, and terminated. The analysis explores issues relating to the origins of the mixing of uses within a development, an additional property element

for owners within mixed-use properties, and a comparison of governance arrangements for strata schemes and mixed-use schemes.

The second of the subsidiary questions is: what additional property rights, obligations, and restrictions are created to facilitate mixed-use developments? This question calls for a legal analysis of the very essence of mixed-use schemes - the right to share property (facilities) owned by another. These rights are governed by the SMSs that are imposed by various parties upon formation of mixed-use developments. It is only by precisely identifying mixed-use property rights that we make them visible and better understand the effect of them and this form of property ownership on our built environment.

In identifying mixed-use property rights, it is helpful to recognize the parties that influence their creation. Figure 3 below illustrates the parties that influence the content of SMSs and demonstrates how BMCs are left to deal with direct and indirect impediments to a collective sale decision. The direct impediment is the right of mixed-use property owners (i.e., the owners of stratum lots and parcels in the scheme) to veto a sale by voting no when a unanimous yes decision is required. The indirect impediments are the mixed-use property rights that diminish the quality of decision-making throughout the life of the property and adversely affect the relationships that are necessary when the time comes to consider a collective sale. The role and motivations of each of the parties that influence a SMS will be discussed and the mixed-use property rights that indirectly and indirectly impact collective sales decisions will be identified.

Fig. 3 Mixed-use scheme decision makers, creators, and influencers



The thesis is divided into eight chapters (including this introduction). Chapter 2 is an overview of relevant academic literature about mixed-use developments. It identifies the knowledge gaps that this research seeks to fill by considering the literature on policy making about mixed-use developments, the perspectives of key creators, legal structuring of projects, the movement for collective sales, and anticommons theory. Chapter 3 outlines the mixed methods research approach that has been adopted and the rationale for these methods. The methods include legal doctrinal analysis, a case study, content analysis of SMSs, and expert interviews focusing on the creation and formation of mixed-use schemes. Chapter 4 provides legal analysis of key legal instruments governing mixed-use schemes, SMSs. In doing so it distinguishes mixed-use schemes from strata schemes which explains the evolution of mixed-use property rights. Chapter 5 is a case study of a mixed-use scheme in an inner suburb of Sydney that has a troubled history and needs renewal. It illustrates the anticommons effects and how mixed-use property rights have contributed to its demise. Chapter 6 analyses the contents of SMSs that govern 12 mixed-use schemes in Sydney and draws on insights from the interviews with authors of and contributors to SMSs to reflect on how these documents are drafted. Here we see how decisions made by various parties in the formative stage of a mixed-use development create mixed-use property rights and

impact future decision-making by the ultimate owners. Chapter 7 discusses the findings of the research and their troubling implications for urban renewal of mixed-use properties by collective sales. Chapter 8 contains concluding remarks and suggestions for further research and policy development about the reassembly of mixed-use schemes.

Chapter 2. Literature Review

This thesis positions mixed-use developments as a highly evolved form of property ownership which is a melting pot of rights created and held by different parties seeking different outcomes. In giving rights and creating restrictions to enable diverse uses, mixed-use developments have emerged as something of a mysterious feature of the urban landscape. They are often big and bold, but as Sherry (2017) notes, they are yet to receive much academic or judicial attention. This chapter is concerned with what we know so far about mixed-use developments. Where have they come from? What are the drivers for them? What deals have been done to put them together? What deals must be done to pull them apart?

Mixed-use property is an important feature of the compact city. A broad understanding of the principles of compact city planning helps illuminate the importance of mixed-use property and the level of policy commitment to its future. Mixed-use developments are not a passing fad. They must be understood from the various perspectives of those involved in their creation including planning authorities, developers and end users. With this form of property, developers and their lawyers have a great deal of freedom in the crafting of the bundle of property rights that are held by the owners. The relationship of developers and their lawyers, and their duty to the future owners, unknown at the time the rights are bundled, shines light on a power dynamic that exists in mixed-use developments, the consequences of which have yet to be fully appreciated. That time might be fast approaching as the collective sales movement takes hold as an agent of urban renewal.

The theoretical lens used to explore mixed-use developments is Heller's (1998) anticommons theory, which holds that, when too many people own pieces of one thing, nobody can use it effectively. Heller (1998, p. 624) posits anticommons properties arise when 'multiple owners are each endowed with the right to exclude others from a scarce resource, and no one has an effective privilege of use'. The theory holds that while private ownership usually creates wealth by enabling owners to exploit the resources of their property effectively, too much ownership has the opposite effect and leads to wasteful underuse. In this thesis, underuse is identified as the inability to reassemble a mixed-use development for redevelopment when it is no longer serving its best use. Anticommons theory helps identify anticommons risks in property ownership regimes and points us in the direction of possible solutions to assist with the renewal of this type of property.

This chapter begins with literature on compact city policy. This is followed by an examination of the drivers of the key players in the delivery of mixed-use development; planning authorities, developers, and property purchasers as the end users. The relationship between developer and lawyer is then considered with a focus on the freedoms and responsibilities of each as the authors of the documents that govern these types of properties. The next section deals with collective sales and how legislation has been passed to assist owners of some forms of strata property to come together and sell as one but does not apply to mixed-use developments. The literature review concludes with an examination of scholarly work on anticommons theory as the premise upon which we might approach the problem of reassembling mixed-use developments.

2.1 Compact cities: by design or demand?

Compact urban form for the redevelopment of our cities is deeply embedded in the psyche of urban planning and design frameworks in Australia and worldwide (OECD 2012). This is unsurprising given that by 2050, 70% of the world's population, and 86% in OECD countries, will live in urban areas (OECD 2012).

Compact city planning is characterised by dense and proximate developments linked to public transport systems with accessibility to local services and jobs (OECD 2012). The compact city planning model is predicated on social, economic, and ecological values, and holds that well managed compact city planning counteracts the negative impact of urban sprawl that would otherwise result from population growth and uncontrolled urban expansion. Conversely, if not managed well, compact cities can result in traffic congestion, air pollution, loss of recreational space and adverse housing affordability issues (OECD 2012).

Worldwide, compact city planning is an element in the major policy documents of most OECD countries (OECD 2012). In Australia most capital cities have an urban planning framework that is consistent with the ideal of compact city and that advocates the compact city form and diversity of lifestyle and housing options (OECD 2012). The concept of compact city planning was described as best practice in the Federal Government's Building Better Cities program of the 1990's (Bunker et al 2017). Later, Randolph (2006) described compact city planning as promising a revolution for Australian cities in the early years of this millennium. Compact city planning is now cemented in the state metropolitan strategies and major planning reviews and reforms

across Australia (Bunker 2014; Limb et al 2020). As a result, according to Troy et al (2020, p.20), there has been a 'revolution in housing supply' with multi-unit housing increasing between 2009 and 2017 from 27% to 47% of the national annual housing output. There are now more than three million apartments in Australia with over one million in New South Wales (NSW) accounting for 20% of housing in that state (Easthope et al 2023).

There are mixed views about the real effectiveness of the compact city model. Bunker (2014), in his report card on the model's effectiveness in Sydney, notes that while there has been an increase in the number of new dwellings constructed in the form of attached housing, many of these are outside of active centres that do not serve the 'compactness' element of the program. The author notes (Bunker 2014, p. 459):

> The strategy of concentrating mixed uses and activities in a hierarchy of activity centres, seen as a crucial instrument in articulating the compact city, has had mixed fortunes, most effective in a few locations in some major inner and middle suburbs.

More recent research by Troy et al (2020) contradicts this somewhat showing that density growth has increased in priority centres and has exceeded targets set in 2005 by the NSW Government by 50% (Troy et al 2020, p. 28). Their analysis of strata plan registrations shows a shift over this time to larger developments, with the average size of strata development in Sydney almost doubling from 17 lots in 2000 to 31 lots in 2015 (Troy et al 2020, p. 29).

There are a range of reasons posited in the literature for why compact city planning may not be working as well as it should in terms of delivering density and intensification. Bunker (2014) points to the tendency of politicians to issue political platforms masquerading as new urban plans. He concludes that as the gap between aspirations and realities of the plan are realised there should be less attention to 'the clumsy device of producing another plan in the same idiom and more effort at involving locals to activate different places in the short to medium term for achieving these objectives' (Bunker 2014, p. 459.)

Elsewhere, Bunker and others argue that the market drives densification as well as planning initiatives (Crommelin et al 2017). They observe that within neoliberal policy and governance frameworks, the implementation of the compact city model relies on the

market to deliver the required redevelopment creating a tension between financial viability and political feasibility. The authors also call for more flexible short-term planning, and prioritisation of crucial strategic locations. Pinnegar, Randolph, and Troy (2020) and Limb et al (2020), also recognise a misalignment between compact planning intent and market viability. Troy et al (2020, p. 34), conclude:

> In the absence of a more comprehensive reworking of housing and urban policy settings, housing supply will likely remain mostly a numbers game, albeit enabled by the planning system, but delivered where and when the market finds it most profitable to do so; a city planned primarily as a cadastre of potential development yield.

Grodach and Limb (2020) agree that compact city policy has tended to be overly reliant on market mechanisms resulting in unequal and piecemeal outcomes. The authors suggest more research is required to investigate other successful pathways to delivering different housing options. Grodach and Limb (2020) encourage further research to explore the extent to which activity centred policies are reshaping the urban experience and pose the questions: are these policies meeting intended outcomes, and what is influencing their development?

Searle (2020) offers another view on the success of compact city planning, at least in relation to the growth of Sydney. Searle (2020) argues that it is not so much policy decisions that have driven compactness as a political desire for population growth. Searle (2020) says this is the key driver of urban policy decision-making because population growth is advantageous for the federal government and a sign of success for the state government.

Whether or not it is the planning model itself, the pursuit of population growth, or the lure of development profit that has been the effective cause of higher density mixed-use development - or whether they all work together in an iterative way to shape density and the politics of density - is a matter for debate. What is beyond debate is the ‘emergence of a new mass market of collective property ownership in Australia in the form of strata title’ (Troy et al 2020, p.20). Mixed-use developments are an important part of this new mass market of collective property ownership and there is much to be learnt about them. The next section explores the concept of mixed-use developments as an integral part of our cities.

2.2 Perspectives on mixed-use developments

There are many parties involved in the formation of a mixed-use development including a range of advisors and consultants. The three that play a critical role are a planning authority to approve the development, a developer in search of profit, and end users committing their capital to meet their lifestyle and commercial aspirations. Each of these parties has a somewhat different agenda for the development and in this section their impact is considered. Why are mixed-use developments promoted by planners? How are they delivered by developers? What is the end users' experience?

2.2.1 The planners' perspective

Planners impact both the form and function of mixed-use developments. Internationally, the OECD (2012) positions mixed-use developments as the manifestation of higher-level concepts of 'compact city' and 'compact urban development', noting the distinction as matter of scale. In this positioning:

- 'Compact city' is a policy approach to urban development and urban form at a metropolitan scale,
- 'Compact urban development' typically refers to a development project at the neighbourhood scale, and
- 'Mixed-use land development' is site specific being, 'a combination of various usages in an urban area, including residential use, commercial space, offices, etc., typically achieved by deregulating land-use zoning' (OECD 2012, p. 16).

Scholars use a variety of ways to describe mixed-use developments from a planning perspective. Randolph and Easthope (2014, p. 220) describe mixed-use developments as the building form pursued by urban designers and planners alike as an 'icon of contemporary urbanism'. This type of mixed-use development operates within a particular site. Middleton (1995) citing Schake (1987) provides a more granular definition of a mixed-use development that operates at a broader neighbourhood or precinct scale adopted by the Urban Land Institute Washington DC:

- three or more significant revenue producing uses that in well planned projects are mutually supporting,
- significant physical and financial integration of the project components, therefore a relatively intense use of land, including uninterrupted pedestrian connections, and

- developments in conformance with a coherent plan stipulating type, scale of use, and permitted densities.

Writing in the mid-nineties about early Australian and USA mixed-use developments, Binning uses three similar concepts to describe mixed-use developments, ‘a particular site development typology, city uses within walking distance and close to public transport, and a sense of public realm where density is maximised by grouping uses and spaces, and consciously connecting them to surrounding areas’ (Binning 1995, p.15).

Within these various planning definitions of mixed-use development sit a variety of different types of development. Freestone (2008) provides a description of mixed-use developments according to their location or nexus with their surrounding environment as follows:

- transit oriented developments,
- suburban town centre precincts,
- mega projects,
- master planned projects,
- shop top housing, and
- apartment towers with retail showrooms and restaurants on the ground floor.

Rabianski and Sherwood Clements (2007) argues that the last on Freestone’s list is not a mixed-used development at all but rather a multi-use development that lacks the degree of project planning and integration necessary to be regarded as a mixed-use development in the proper sense. This thesis is concerned with mixed-use development within a specific site rather than the broader concept of mixed-use at a neighbourhood or precinct level. A more dimensional typology emerges from the work of Hoppenbrouwer and Louw (2005) cited by Rabianski et al (2009). The authors classify mixed-use developments by:

- functions (land uses),
- dimensions (premises, building, ground, and time),
- scale (buildings, block, district),
- texture (degree of mixing), and
- type of location (town centre, suburban, rural).

The descriptions and categories of mixed-used developments considered above provide helpful context for present purposes and future studies. However, the literature provides limited detail and examples of these types of developments and analysis of their effectiveness as a tool to deliver development policy, appropriate development profit, and their community acceptance (Freestone 2008; Rabianski et al 2009).

The various forms of mixed-use developments described in the previous section have become popular prescriptions for urban planners looking to enliven different urban places. According to Freestone (2008, p.14) mixed-used developments are a 'revitalisation tool' inspired by Jacobs (1961), modernist urban planning and 'stimulated by urban consolidation, compact city and new urbanist inspired policies'. Foord (2002, p. 60) in a call for research about the success of mixed-use developments, points out the need for urgency because of 'continued blind advocacy of mixed-use and compact urban form'. Anders (2004, p. 353) notes mixed-use developments are 'positively encouraged by government and championed as a regeneration saviour'. Gentin (2009) agrees and identifies entities within the Sydney planning system with a 'mixed-use agenda' including the (now defunct) Parramatta Road Redevelopment Authority, The City of Sydney, and the Urban Taskforce of Australia.

There is a familiar message in the writings of Foord (2002), Anders (2004), Freestone (2008) and Gentin (2009) that can be traced back to Rowley (1996). In acknowledging the appetite by planners for this form of development, each of them warns of the risk of zealotry and caution that mixed-use developments are not a panacea for all urban ills. Anders (2004, p. 363) warns, 'redevelopment should be driven by an area's social make-up. It should not be assumed that if a scheme is a mix of uses and is fully let that it regenerates the community'. Grant's research (2002) finds mixed-use development in Canada might be losing some economic vitality. Grant and Perrott (2011) highlight the dangers of Canada's ambitions to replicate the success and desirable European city urban form without facing the realities of the Canada's car dependent suburbs.

The way planners promote and, in some cases, prescribe mixed-use developments presents a risk given the limited research into the effectiveness of them to meet planning ambitions. This echoes similar observations about developers and end users considered in the next two sections. This thesis is not directly concerned with the success or failure of specific mixed-use developments but rather what happens to them all when they reach their end of usefulness. However, the extent to which they are being over prescribed, or

inappropriately prescribed by planners does increase the risk of obsolescence and accelerates the importance of addressing the challenges that obsolescence presents?

2.2.2 The developers' perspective

There is broad agreement that mixed-use developments are difficult for developers to finance, build, and deliver in a timely way to meet the diverse markets they target (Cheah and Tan 2005; Metzinger 2021; Wardner 2014). These difficulties are expanded upon later in this section. However, despite the difficulties, developers are still attracted to them for at least two reasons. Firstly, mixed-use developments are a means of diversifying revenue streams from a development to achieve the highest and best use of expensive land (Easthope, Hudson and Randolph 2013). Secondly, mixed-use developments are a way for developers to bring institutional investors to their projects (Bugden 2006c). Bugden (2006c) suggests institutional investors become interested in well-structured mixed-use developments because their investment will not be adversely affected by a disgruntled residential owner, and they are not likely to become embroiled in residential type disputes. There might be a third reason developers undertake mixed-use developments despite their difficulties: they align with the compact city strategic plans discussed above, meaning it may be easier to get a profitable development approval for a mixed-use development than a more conventional single strata development but this requires further investigation.

Cheah and Tan (2005) explore the difficulties faced by developers undertaking mixed-use developments by comparing the main requirements for mixed-use and single use developments at various stages of their development. Their analysis includes project initiation, feasibility, finance, planning and design, construction, and post-completion marketing and operations. The authors' observations are summarised in Table 1 below. As evidenced by the table mixed-use developments are more difficult for developers than single use developments at every stage in the development process.

*Table 1: Comparison of main development features between mixed-use and single-use development projects (*Source: adapted from Cheah and Tan (2005))

Development Phase	Requirements	Mixed-use development	Single-use development
Project initiation	Team	Diverse experienced team	One type of experience
	Engagement with public sector agencies	Extensive and crucial	Routine and minor
	Defining development objectives	Both financial and non-financial	Common and obvious
	Analysing market potential	Multiple market analysis and synergy required	Single market no synergy issues
Feasibility and Finance	Programs and strategies	Alternatives required	Independent program
	Feasibility analysis	Complex to optimise mix and programs	Simple pro-forma
	Financial commitment	Multi-layered structured finance facility	Singe source straight forward bank finance
Planning and design	Considerations	Complex involving urban design considerations	Conventional architectural and structural design issues
Construction	Contractors	Multiple	Single
	Interface	More specialists and designers	Fewer involved
Marketing and operational management	Marketing approach	Varied for numerous uses	Specifically targeted
	Promotion campaign	Long term approach to sustain public interest	More effort on presales and less after
	Management systems	Centralised for multiple uses	Single responsibility of property manager

Wardner (2014) agrees with Cheah and Tan (2005) that the construction and management of mixed-use developments requires a level of expertise and specialisation beyond normal high-density construction and adds two additional factors to the list of difficulties associated with developing this form of property. Firstly, development finance is more expensive because of the perceived higher risk of the development. Secondly, property cycles of the different types of property encapsulated in the development are hard to align.

The National Construction Code (NCC) illustrates Cheah and Tan's (2005) observations about the difficulties of constructing a mixed-use development. The NCC defines mixed-

use buildings as buildings with mixed uses and mixed or multiple classifications resulting in different building and constructions standards within the one development. For example, a building may have a basement carpark (class 7a) with ground floor retail space (class 6) and residential apartments (class 2) (Australian Building Codes Board 2020), each of which will have different building and construction standards under the NCC. This of course adds to the complexity of mixed-use developments from a developer's perspective.

Reflecting on one of the early, mixed-use developments in Sydney, Quay West, Davey (1995) alludes to one of the very fundamental difficulties of mixed-use developments and something of a paradox of this built form: mixed-use developments are built with the intent of bringing people together, but they are best designed and structured to keep people apart. For example, owners of commercial property do not want to see residential owners taking out their garbage and having furniture delivered as they are going about their business with colleagues. Davey (1995, p. 97) explains that at Quay West segregation was achieved by separate entrances, exits, facilities, and crisscrossing access ways that blurred the separation. For example, lifts passed through certain strata and certain floors without people necessarily knowing they were passing through property owned by different parties. The duplication of facilities that could otherwise be shared adds to the costs of mixed-use developments.

Levine and Inam (2004) found the top three impediments to mixed-use development to be local regulations, neighbourhood opposition, and insufficient market interest. The finding about local regulations by Levine and Inam (2004) seems to contradict Foord (2002), Anders (2004), Freestone (2008) and Gentin (2009). The apparent contradiction may lie in the meaning of the term 'local regulations' by those surveyed by Levine and Inam (2004). In a recent addition to the literature on mixed-use development from a developer's perspective, Metzinger (2021) compared the experiences of those developing mixed-use developments in 2004 and 2017. Metzinger (2021) took the surveys by Levine and Inam (2004) and replicated the survey in 2017, albeit to a different audience. Metzinger's comparison survey (2021) found the reported frequency of the top three impediments had significantly decreased over the 13-year interval. Metzinger (2021) concedes this might be due to the first survey being directed to developers and planners and the second survey being directed to construction managers and architects. However, in the end Metzinger (2021) concludes that the decrease in frequencies is conceivably a sign that regulators, financers, and members of the community are becoming more familiar with mixed-use developments. While Metzinger (2021) suggests

mixed-use developments might be becoming easier for developers on some measures he identified three new challenges not identified by the 2004 survey:

- keeping up with demand and growth,
- lack of implementation knowledge and development modelling, and
- these projects are becoming harder for smaller firms.

For all the complexities of mixed-use developments, there is little scholarly work to demonstrate that mixed-use developments deliver developers an appropriate profit for assuming a greater risk than single-use projects (Freestone 2008; Rabianski et al 2009). Herndon (2011) provides three case studies with varying degrees of success based on financial and other parameters but stops short of providing insight into specific profit and risk margins on mixed-use developments compared to single use 'bread and butter' developments. Nevertheless, mixed-use developments continue to be built. The commercial sensitivity of information about development profit might explain the absence of research on this topic. A more comprehensive analysis of the success of mixed-use development as a development genre is beyond the scope of this thesis. However, an understanding of the challenges of mixed-use development for developers provides important context for later considerations of how these projects come together and the impact that the developer's decisions on governance and design has on the users' experience throughout the life cycle of the property.

2.2.3 The users' perspective

This section reviews the literature about the experience of the owners and occupiers in mixed-use developments. Rabianski et al (2009, p. 223) observes that articles on mixed-use developments published in professional journals and magazines consist mostly of advocacy pieces promoting the 'live, work, play' community and purported environmental virtues of the concept whether at a neighbourhood level or a site-specific level. Other scholars have reported on the perceived attractiveness of mixed-use developments (Herndon 2011; Niemira 2007; Wardner 2014). However, much as there is little academic research on the success of mixed-use development from a planning and development perspective, there is also little empirical research on the success of this form of development from an owner or occupiers' point of view. Freestone (2008) calls for more research on mixed-use development both in terms of delivering outcomes for government and community acceptance.

While there is little academic research on the effectiveness of mixed-use developments from an owner/occupier point of view, there is broad, long-standing agreement on the challenges to this form of development presented by the legal concepts of strata subdivision that underpin separate ownership of different types of properties within mixed-use developments (Freestone 2008; Holliday 1995; Ploeger and Groetelaers 2014; Randolph and Easthope 2014). Holliday (1995) notes early market resistance to apartments in mixed-use developments including strata obligations, separate meters for services adding to development costs and increased building costs for residents due to commercial uses. Davey (1995) notes one of the problems with this form of development is that it is very hard to make a change as the legal structure is so complex. Davey (1995) also records that the success of Quay West development mentioned earlier was marred by an early dispute about the apportionment of lift usage costs between residential strata owners and the services apartment operator, resulting in the developer refunding $90,000 to residential owners (Davey 1995). This is not uncommon. Litigation about these types of disputes in other high profile Sydney developments is considered in the legal analysis in Chapter 4 and the case study in Chapter 5.

2.3 Legal structuring of mixed-use projects

While developers retain ultimate responsibility for all aspects of their developments, lawyers, and other property professionals play an important role in structuring mixed-use developments and authoring the documents that govern how they operate. This section reviews the literature on the role of developers, lawyers, and other property professionals in project structuring and the nature of the relationship between developers and owners arising from the way in which projects are set up.

Bugden (2018) describes the legalities of project structuring as the choice of title, the subdivision pattern for the project and the governing management structure that will impact the day-to-day operations. These concepts will be explored further in Chapter 4, but for present purposes it is helpful to note the following:

- the choice of title is between leasehold or freehold as the underlying tenure to the land upon which the project is built and decisions about what property becomes lot property held by individuals and what becomes common property and shared by all owners and users,

- the subdivision pattern describes the way the various uses are corralled into different ownership groups and what is contained within the common property for the strata schemes, and
- the governing management structure is a series of legal documents registered on the title for the project that determine how the parties share property and make decisions about the entire project.

Bugden (2018) notes responsibility for this work should rest with a team of professionals comprising a lawyer, project manager, surveyor, and strata manager as the core members. He adds that in larger projects town planners, architects, landscapers and various engineers and cost sharing consultants may also become involved. Australian literature is yet to explore in detail the role of lawyers in the legal design of mixed-use developments in any empirical way. Ploeger and Groetelaers (2014) provide an international example of the important role of lawyers responsible for the legal design of a mixed-use development. Their study found that in the Netherlands the lawyers decided what should be the responsibility of all the owners and what should be allocated to subsidiary entities using different parts of a development for different purposes. However, the results of their survey of property managers did not reflect well on the lawyers' ability to get this right (Ploeger and Groetelaers 2014, p. 281):

> One remarkable outcome of our survey was that all but one of the professional management agencies responsible for mixed-use complexes say that the notary should have been better informed about the (physical) characteristics of the building.

There are differing views about when the lawyers should become involved. Ploeger and Groetelaers (2007) found that lawyers should be engaged as early as possible, preferably through the architectural design phase. Their later study, however, found that less than 40% of property managers surveyed agreed that lawyers should be engaged early in the design phase. Most managers thought it was not the role of the lawyer to be involved in the architectural design an as they would have little understanding of the structural aspects involved (Ploeger and Groetelaers 2014, p. 281). The authors' findings on the attitude of property managers to the work of lawyers highlight a somewhat perplexing contradiction, with property managers expecting lawyers to know more about the physical characteristics of the development but also feeling they should not be involved in the design phase. This thesis explores this topic in Chapter 6.

The scope for lawyers to make their own choices about the contents of governing documents for mixed-use developments, and to get the choices wrong, is noted by Van Der Merwe (2018, p. 44) when commenting on voting right allocations in mixed-use developments in South Africa:

> The formulas employed are generally based on proportionate size (square footage or volume) or value of a unit, failing which expenses are shared equally. However, the use of the residential and commercial units in a mixed-use strata title scheme do not always generate common expenses proportionate to their size or value. Although the size of a section might be appropriate for the allocation of common expenses in strictly residential projects consisting of units of equal size and having approximately the same number and type of occupants, it might be entirely inappropriate in a mixed-use project consisting of residential units, offices, a hotel, and commercial stores in a single high-rise building.

While a team may contribute to the content of the governing documents, the ultimate responsibility rests with the developer. Blandy, Dixon and Dupuis (2006, p. 2374) find 'the power to oversee governance, decision making, and the overall management of developments can have long-term consequences'. Bugden (2018, p. 2) agrees and notes that the consequence of poor structuring includes:

- cost sharing inequity,
- unfair control by a particular owner or group of owners,
- inability to change management,
- inability for the developer to complete the project, or to complete their 'vision' for the project,
- lack of control over redevelopment or change of use,
- devaluation of components of the property, and
- general dispute and disharmony.

The nature of the relationships between developers and their property professionals and agents has a bearing on the long-term for owners and users. Developers have the ability in the formative stages of a mixed-use development to contractually bind owners to long-term agreements with the developer's favoured service providers and agents. These

might even be parties related to or formally associated with the developer. Blandy, Dixon and Dupuis (2006) found most owners were not aware of the relationships between the developer and other parties in the formation of the management arrangements. They found the owners felt excluded and powerless. Blandy, Dixon and Dupuis (2006, p. 2381) conclude that this process impedes the ability of the owners to realise the full potential of their legal rights to manage their property:

> Developers and agents are able to control the juridical field …because they are knowledgeable about legal process and can afford to employ specialists who work with the magic words of law, a powerful discourse from which most lay people are excluded.

Gibbons (2013) recognises the same power of a developer and its agents, having studied developer abuse through long-term management agreements in New Zealand. The author called for more research on the extent to which lawyers and legal words demonstrate and constitute power arrangements.

Literature on project structuring of mixed-use developments outlines what is involved in setting up a mixed-use development, who should be involved and when, the consequences of getting it wrong, and the way in which close, and in some cases, conflicted relationships between the developer and its chosen management and service suppliers can impact property rights. What has received little attention is how developers and their lawyers and consultants create these documents and what they contain. This knowledge is important because the owners bound by these arrangements for the life of the development are not known and not represented when the project is structured and documented. Therefore, there is a risk that the rights created by lawyers and consultants on behalf of developers may be imbalanced and materially affect the way important developments serve their desired purposes. This thesis contributes to knowledge about these matters.

2.4 Compact city renewal: collective sales and terminating mixed-use schemes

> What do we do about the strata market as it ages? This is already posing problems in some areas … But there are no systems in place to manage either the major overhaul of these properties or their eventual removal and redevelopment when they come to the end of life (Randolph, 2006, p. 484).

The end of life for strata buildings comes with decay due to age and poor choices about repairs and maintenance, developers recognising the possibility of more profitable use of land, and planning authorities continuing to preference newer, better, more diverse, and more compact developments (Easthope and Randolph 2021). Berding (2015) describes four stages in the life cycle of American condominium developments: everything is new and appears affordable; problems begin to appear and require special assessments; insufficient resources are set aside; finally, there is no way to obtain the necessary capital to continue, and 'the ship is a rudderless and sinking' (Berding 2005, p. 13-15 cited in McKenzie 2021, p. 253). Pinnegar, Randolph and Troy (2020) note the broader macroeconomic driver for redevelopment: cities have become part of a bigger real estate 'play' and the authors identify the collective interest of urban residents banding together to create 'super lots' as new actors in this market. The amalgamation of sites by urban residents is timely given the dwindling number of large strategically important industrial and commercial sites left for conversion to high density mixed-use developments.

In strata schemes any decision can be hard but one that ends the existence of a person's home must surely be the hardest. Harris and Gilewicz (2015) state the most important decision in the lifecycle of a multi-owned development is the one to dissolve it, which is driven by gains from redevelopment and/or the need for extensive renovation of the common property. Harris (2021) describes the dissolution of strata in British Columbia involving cancelling the constituting plan, winding up the strata corporation and terminating the private interests in the individual units. He also describes a transitory step where the former co-owners in the strata become co-owners of all property including what was once owned separately. The same process applies in New South Wales (Development Act, Part 10). Harris (2021) argues that understanding the process for facilitating a collective sale is crucial not only for understanding the rights of the individuals but also for determining the character of ownership of strata. The same must be said for mixed-use developments, although to date the literature on this form of property ownership has not ventured this far.

2.4.1 A legislative response to strata fragmentation

Until 2015 and the amendment of the Development Act to include Part 10 providing for strata renewal by collective sale plans and redevelopment plans, in NSW a termination of a strata scheme required either the unanimous agreement of all owners and their

mortgagees' consent or an order of the court that termination was warranted on just and equitable grounds (Ilkin 2017), usually confined to cases of damages beyond economic repair. Consequently, few schemes were terminated (Easthope and Randolph 2021).
Easthope and Randolph (2021) suggest a primary challenge in strata scheme decision-making is the diversity of interests of different owners e.g., owner occupiers versus absentee/investor owners; owners with emotional attachments to the building and others less attached; investor owners that have bought with long term plans to renovate and move in; and owners that may have bought for the redevelopment potential. At a more organisational level, Easthope and Randolph (2016) observe that increasing complexity of strata development design has a negative impact on the quality of management generally. Elsewhere the authors note this is most evident in a mixed-use development where the diverse need of multiple, often conflicting, user groups can pose major governance issues (Easthope and Randolph 2021).

In response to these reassembly problems and following the lead of other international jurisdictions, the NSW legislature reduced the requirements for a collective sale or redevelopment to support of 75% of owners (*Strata Schemes Development Act 2015* (NSW) s154) (Development Act). The requirement for legislative intervention to facilitate collective sales in single strata schemes is well understood (Bugden 2016; Crommelin et al 2018; Easthope, Hudson and Randolph 2013; Troy et al 2015; Troy et al 2017). Without it, individuals can hold out (Ilkin 2017) and land markets stagnate due to fragmentation of interests presenting significant barriers to redevelopment (Easthope, Hudson and Randolph 2009).

As pressure grew in NSW for legislative intervention to assist the renewal of strata titled property, public and policymaker concerns grew for the plight of the vulnerable in proposed redevelopments who had no desire to sell or the means financially and emotionally to withstand the progress of the sale proposal (Crommelin et al 2018). Research by Troy et al (2017) proved the concerns well founded. Their research found owners supported the notion that a minority should not unfairly hold out the majority, especially if their real intent was to obtain a disproportionate share of the proceeds, but there needed to be court protection for the vulnerable. Perhaps unsurprisingly, support for the reduction of the threshold limit required to make a collective sale was driven more by self-interest than planning ideals.

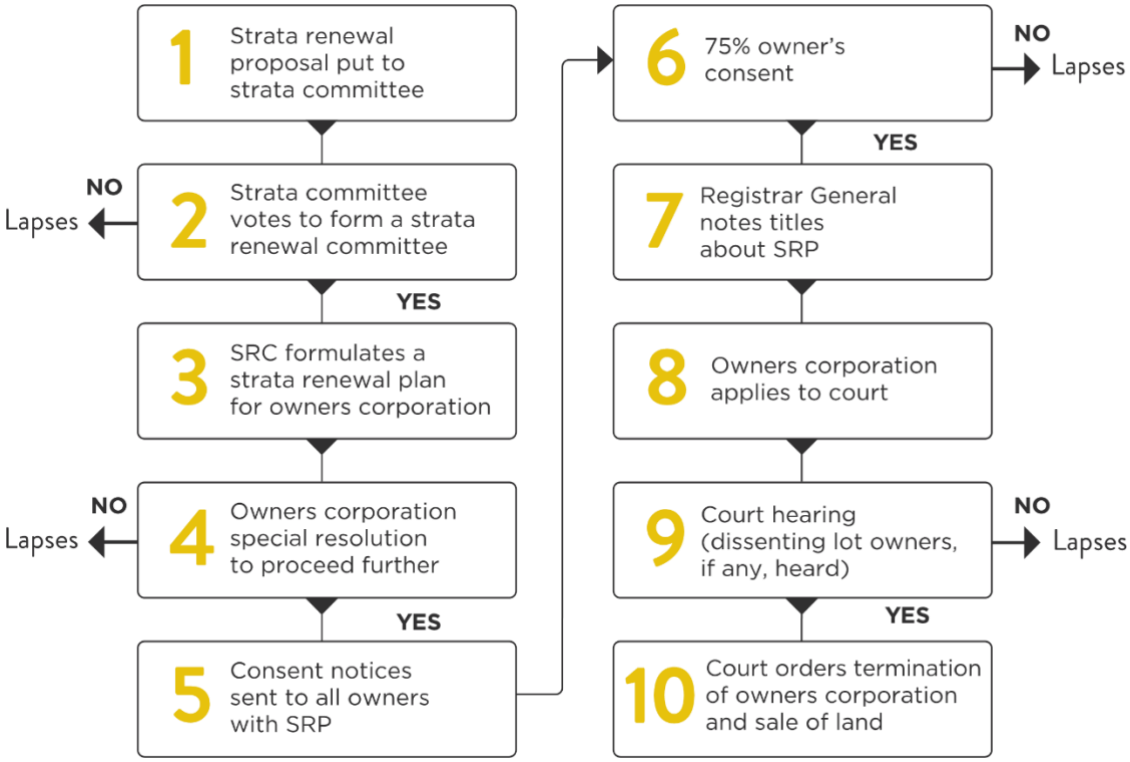
As a result of these concerns, the legislated process is complex (Fig 4). The second reading speech in the NSW Legislative Assembly for strata renewal laws highlighted five major safeguards for dissenting owners:

- the process is an opt in process requiring a simple majority decision of owners to proceed to consider the matter further,
- a thorough and transparent process has been established allowing any person to start a proposal with full disclosure of those involved, the sales and marketing process, and the outcomes to be achieved,
- compensation value for dissenting owners must satisfy the 'just terms' requirement set out in land resumption legislation,
- the required level of 75% support prevents a proposal being pushed through by a small group of owners with large holdings in the scheme, and
- the court must be satisfied that the renewal plan is 'just and equitable in all the circumstances', was prepared in 'good faith', and otherwise complies with the provisions of the legislation (Ilkin 2017).

As a further safeguard dissenting owners must have their reasonable costs paid by the owners corporation.

Ti (2019) notes the duties of governance and good faith on the strata renewal committee (step 2 in Fig 4) and compares similar laws in Singapore and British Columbia.

Fig. 4 Main steps for a court order for a collective sale of a conventional strata development.



To date, the NSW legislation has had mixed empirical results. Since being introduced in 2015, there has only been one case where the court has made a collective sale order on less than a unanimous vote (*Application by The Owners – Strata Plan No 61299* [2019] NSWLEC 111). In that case the sale was owner led and the scheme was comprised entirely of investors in a serviced apartment complex. While the owners did not unanimously support the sale because some were uncontactable or unresponsive, there were no dissenting owners actively opposing the court orders. Beyond highlighting the complex process involved even when unopposed, the decision does not give any insight into the inner workings and issues confronting actively dissenting owners (Crommelin et al 2017).

There have been two other cases in NSW where proceedings for collective sales orders were commenced but later withdrawn or abandoned. The judgment in a procedural pre-trial application in *The Owners – Strata Plan 6666 v GSA Australia Acquisitions No 2 Pty Ltd and Ors* [2018] NSWLEC 115 serves as example of the way well-funded dissenting owners can use the protections intended for the vulnerable to thwart the wishes of the super majority. In an application in these proceedings evidence was given that the three parties (the applicant owner's corporation, the supporting developer, and the dissenting owner/ developer) would each incur costs in the order of $500,000 to take the matter to trial.

One view of the poor ‘take up’ of strata renewal laws to facilitate collective sales is that the complex legislative process makes an otherwise difficult process all the harder. Crommelin et al (2017) offer another view. They reviewed land titles records in NSW for strata schemes cancelled by agreement and found an increase since 2015 when strata renewal laws were enacted. Their research also indicates a possible increase in termination of larger blocks. The authors note one possible explanation for this is that dissenting owners feel threatened by the possibility of contested strata renewal litigation, and however reluctantly, agree to sell resulting in a unanimous decision (Crommelin et al 2020).

2.4.2 Mixed-use re-development - forgotten or too hard?

There have been no reported collective sales of mixed-use developments to date. While there has been considerable legislative and academic focus on collective sales and redevelopment of strata schemes, the same cannot be said for mixed-use developments. The academic and legal criticism of the working detail of the legislative method for strata schemes including Easthope, Hudson and Randolph (2013) and Crommelin et al (2020) do not refer to strata renewal of mixed-use developments.

The further fragmentation of property rights arising from mixed-use developments in particular presents compounding challenges for the next generation of urban renewal professionals. At what stage does future renewal become either unviable or physically impossible? Crommelin et al (2017) note that as strata gets bigger it will prove almost impossible for owners to go it alone and that government can and should play a more positive and supportive role rather than a coercive one. If this is true of strata schemes, it must follow that it is true of mixed-use schemes, which by their very nature are more complex. This argument will be developed further in this thesis, drawing on insights from anticommons theory and the potential impact of anticommons property on urban change and development.

2.5 Anticommons theory

Heller (1998, p.668) defines anticommons property ‘as a property regime in which multiple owners hold effective rights of exclusion in a scarce resource’. In the context of this thesis, the subject property regime is mixed-use development, and the effective rights of exclusion are the rights of stratum owners, including the owners corporation of a stratum parcel, to refuse to participate in a collective sale. Anticommons theory helps identify rights, obligations and restrictions in property regimes that arise from the fragmentation of property interests that impede the effective use of property. The literature review that follows demonstrates that the application of this theory to strata schemes is well advanced by comparison to mixed-use property developments. The scholarly work on anticommons risks in strata schemes provides a theoretical premise for strata renewal laws to aid reassembly of strata schemes. Understanding strata scheme anticommons risks helps identify anticommons risks in mixed-use developments by directing attention to strata concepts that apply in mixed-use schemes.

2.5.1 The risk of anticommons

Heller (1998) and Heller and Eisenberg (1998) popularised the anticommons concept first introduced by Michelman (1982) (Vanneste et al 2006). Heller (1998, p 673) identifies anticommons property as one of a triumvirate of property types and distinguishes 'anticommons property from private property and commons property' in four ways:

- Anticommons property is a regime where multiple owners hold effective use of rights to exclude others from a rare resource.
- Ownership of anticommons property includes the ability of each owner to prevent others from obtaining a core bundle of rights to the object in question.
- Keeping the object in an anticommons form means the object is not readily available for more efficient use.
- Non private property may be anticommons property if rights of exclusion dominate just as common property can be if rights of inclusion dominate.

Heller (1998, p.677) describes a tragedy of the anticommons as follows:

> A tragedy of the anticommons can occur when too many individuals have rights of exclusion in a scarce resource. The tragedy is that rational individuals, acting separately, may collectively waste the resource by under consuming it compared with a social optimum.

Conceptually, Heller's tragedy of the anticommons is often explained by contrasting it with Hardin's tragedy of the commons (Hardin 1968). Heller's (1998) tragedy of the anticommons is the reverse of Hardin's concept (1968). The tragedy of the commons is the idea that where there are scarce resources and free access and a lack of exclusionary rights, resources are destroyed because no single user has the incentive to protect the common. This concept describes an unpleasant feature of the human condition. As Hardin (1968, p. 1244) puts it:

> Ruin is the destination to which all men rush, each pursuing his own best interest in a society that believes in freedom of the commons. Freedom in commons brings ruin to all.

Heller's (1998) theory arose from his study of new property rights in the Moscow store fronts of post-communist Russia, where control was shared between multiple parties. He observed empty stores but busy street stalls and kiosks doing brisk trade and identified a failure of private property due to excessive fragmentation where too many entities have rights of veto in relation to land, which in turns leads to stagnation of resources.

Hellers (1998) theory has its genesis in a property regime in transition, post-communist Russia, where the state may invertedly create anticommons property in a rush to take reformist action. However, he observes the same can occur in an established economy. While mixed-use development is considered in this thesis as an evolutionary form of strata property, the market in which it has been created, the New South Wales property market, is not one in transition and was not when mixed-use property developments began to emerge. The evolution of mixed-use part strata schemes as a variation of the strata theme occurs within a stable and well-established economy, property development in New South Wales. Regardless, the theory helps us understand this type of property.

The property transition that Heller (1998 p.647) studied included different forms of property including the Russian form of mixed-use property which he describes the following way:

> In a typical Russian apartment building, the ground floor may be commercial, while the matching units directly above are residential. Thus, the difference in performance can be attributed more to the legal regime and cultural milieu in which the object is embedded than to intrinsic physical distinctions in the space.

Hellers' (1998) description of Russian mixed-use property raises a distinction he makes about legal and spatial anticommons property. The former being anticommons property that is defined by different legal rights (such as the right to a freehold title for an apartments in a mixed-use development) and the latter being anticommons property that arises by the positioning and allocation of different parts of the property for different uses. As we will see in chapter four, mixed-use developments in New South Wales have elements of both legal and spatial anticommons. For example, there are legal rights to titles and shared facilities within the mixed-use developments as well as the segregation of uses as a function of project structuring. Hellers' (1998, p. 669) theory is useful to help, 'identify real-world puzzles that are otherwise unexplained'.

Anticommons property presents an entrepreneurial opportunity for aggregators or 'property bundlers' (Heller 1998, p. 650). He gives a numerical example of one form of Russian residential property, komunalkas (a form of shared housing) having an implicit value of $25,000 for each of four rooms and a market value of $500,000 as an aggerated piece of private property. In this example, the gross profit for the property bundler is $400,000. In considering the financial aspects of anticommons property, Heller (1998, p 652) notes that the property bundler may have to share some of the profits with some of the key tenants and owners of fragmented rights that provided special assistance to achievement the successful outcome, and the property bundler must also me transaction costs:

> … entrepreneurs incur the transaction costs of bundling anticommons property into private property form. These costs involve finding and negotiating with komunalka owners, locating and buying alternative apartments, renovating the empty apartment, finding renters or buyers for the new private property unit, policing the deal, and incurring various carrying costs and market risks.

In addition to transaction costs, Heller (1998) observes other factors impact the economics of bundling anticommons property including; the type of owner of the anticommons property, public or private, with the assumption that public authorities holding the property will be more difficult to deal with than private citizens, the number of owners and the homogeneity of their interests, the clarity of the respective owners legal rights, and option and contingent value expectations. Heller (1998, p 657) explains the option value and of contingent value as follows:

> It (*option value*) reflects the expected gain from converting anticommons property to private property through market transactions - an economic value. The contingent value represents the expected gain from rent-seeking that privileges one owner at the expense of the others - a political value. Option or contingent value may dominate an anticommons owner's decision on how to deploy her rights.

Hellers (1998) anticommons property regimes arise when the state's response to Hardin's tragedy of the commons goes too far. However, not all scholars view commons necessarily as a 'tragedy'. Ostrom (1990) for example, challenges the conventional wisdom that to avoid over consumption of common-pool resources must involve either privatising the commons or giving the power to regulate the commons to central

authorities. Ostrom (1990) argues that commons users can act informally and effectively manage the resource. Horowitz (2021), reviewing the scholarly works of John Habraken, Jane Jacobs and Elinor Ostrom and applying their perspectives to common interest developments, agrees that parties can cooperate in organizing the shared environment with minimal external control. In the context of mixed-use developments as a form of anticommons property this issue remains relatively unexplored. However, Heller (1998, p.659) offers three reasons why anticommons property is resistant to change and cooperation among the parties of the type Ostrom (1990) argues commons holders might exercise:

> Once anticommons property is created, markets or governments may have difficulty in assembling rights into usable bundles. After initial entitlements are set, institutions and interests coalesce around them, with the result that the path to private property may be blocked and scarce resources may be wasted. Deviant strategic behaviours, ordinary transaction costs, and contingent values may block bundling.

We have considered two of these three factors, transaction costs and contingent values. The third, deviant strategic behaviour, refers to the political machinations that may arise among the property bundlers and property rights holders individually and factional alliances that may be formed to achieve better outcomes at the expense of others. Heller (1998, p. 654) refers to the sometimes 'brutal effects' of overcoming anticommons'. In Hellers (1998) theory, even deviant strategic behaviour' has its roots in economics. Critics of Heller (1998) argue his theory is too focused on economics and overlooks the many emotional factors that might affect behaviour of the parties involved. King et al (2016) argues that Heller (1998, 2013) does not consider the impact of non-economic matters on reassembly such as personal resentment, irrationality, imperfect information, and decision-making complexity. As we will see in next sections and in chapter 4, these more human issues are all matters that exist in the strata paradigm. Therefore, the narrow economic focus of Heller (1998) must be acknowledged when applying his theory to mixed-use developments, and allowances made for additional obstacles to reassembly which are not economically rational.

Heller (2013) argues fixing anticommons tragedy is a key challenge for any legal system committed to innovation and growth. However, he suggests that before fixing the tragedy, the anticommons must first be made visible. The next section explores the literature that has made anticommons visible in the strata context before considering in section 2.5.4

what Heller (1998) would suggest can be done to overcome the tragedy of the anticommons.

2.5.2 Strata and anticommons theory

Several authors have recognised strata property as anticommons property (Easthope et al 2013; Easthope and Randolph 2016; Harris and Gilewicz 2015; Sherry 2006, 2013; Webb and Webber 2017; West and Morris 2003). This section explores the various forms of strata anticommons that have been identified to date. These are relevant to mixed-use developments because strata schemes can sit within mixed-use schemes.

The power of veto

Sherry (2011), writing before strata laws were amended to reduce the threshold for collective sale to 75% of a strata scheme, explains that the tragedy of the anticommons applies to all strata developments in Australia, because each owner could exclude others from realizing the value of their lot by voting against the sale. While harder to achieve than before, a power of veto remains an anticommons risk for strata schemes where support does not reach the required threshold of 75% of owners.

Strata by-laws

Other property rights in strata have been identified as being as much of an anticommons threat as the power to veto a sale. This includes the by-law making powers of an owners corporation including owners corporations that form part of a mixed-use development. The by-law making power in NSW is broad. By-laws may be made by developers and subsequent owners, ‘in relation to the management, administration, control, use or enjoyment of the lots or the common property and lots of a strata scheme’ (Management Act s 136). All owners, mortgagees, lessees, and occupiers, as well as the owners corporation itself are bound by the by-laws and breach can lead to penalties being imposed (Sherry 2017). Sherry (2017, p. 138) concludes that the by-law making power in strata and community title law enables the creation of ‘an open-ended bundle of property rights… allowing private citizens to dream up almost any obligation or restriction they please to attach then to freehold land’. Sherry (2013a) argues our homes are where we should be free to be ourselves and live the life we chose without the interference of others unless what we are doing is harmful to others.

Quality decision-making

Heller (2013, p.12) notes the anticommons concept refers at its core to fragmented ownership and the rights that this creates, but the idea extends to fragmented decision-making more generally. Webb and Webber (2017) pick up this theme of looking at the quality of decision-making as anticommons. They identify strata anticommons relating to quality of decision-making including:

- the inflexible lock in effects of the design and construction of high-rise condominiums with an inability to respond to cultural and demographic change, and
- apathy, absenteeism, and diversity among strata owners affecting decision making particularly in relation to the management of reserve funds for long term building maintenance.

The last of these points about reserve funds is consistent with Berding's (2005) summation of the decay of American condominiums discussed earlier i.e., that when there are mounting maintenance and repair obligations and the reserve funds are inadequate, the situation becomes hopeless for want of financial resources.

2.5.3 Mixed-use anticommons

As there have been fewer studies of mixed-use schemes compared to strata schemes, it is not surprising that fewer anticommons risks have been identified in mixed-use developments.

Sherry (2017) identifies anticommons risks arising in SMSs of mixed-use developments. The author observes that there are no statutory limits on the content of SMSs and like the by-law making power of conventional strata, authorship of SMSs are quasi-legislative powers given to private citizens. This, she says, gives rise to an inevitable temptation to impose novel obligations on successive owners. Returning to her theme about the legacy of long-gone predecessors in title, Sherry (2017) argues they should not determine the current use of land as land burdened by too many property rights is prone to underuse.

These are powerful doctrinal statements, but the literature on SMSs in mixed-use developments is without empirical research about the nature and extent of anticommons

risks in these documents. Exactly what are they, and how problematic are they to quality decision-making, particularly about obsolescence?

2.5.4 Overcoming anticommons

The solution for avoidance of a commons problem involves privatisation, regulation, and the introduction of a cooperative/consensus-based management structure. Heller (1998) recognises that this is essentially what strata schemes sought to achieve for multi-owned property. However, as we have seen muti-owned property (including strata schemes and mixed-use developments) are anticommons property.

Heller (1998) posits two solutions to the anticommons tragedy of underuse; the organic development of informal norms and co-operation of rights holders, and conversion to private property. The first method Heller (1998, p. 678) admits is likely doomed by groups that are not close knit and where property bundlers propose 'one-shot deals' to reassemble property. Mixed-use developments are not close knit and, by definition, the use is not homogeneous. Therefore, the informal co-operation of rights holder is an unlikely solution for mixed-use anticommons property.

The second of Hellers (1998) proposed solutions for anticommons problems, conversion to private property, comes about in his view by either market forces or regulatory intervention. We have traversed the difficulties Heller (1998) identifies for market driven solution; transaction costs, deviant strategic behaviour, and contingent value holding out. The question therefore becomes: is a legislatively imposed solution including, for example, compulsory reassembly by the state, warranted for conversion of mixed-use anticommons property to private property?

Heller (1998, p 688) observes:

> Well-functioning market legal systems allow this conversion but have numerous safeguard mechanisms to ensure that rights can be rebundled and the property can be put to use within a reasonable period.

The literature recognises that strata renewal laws for collective sales and redevelopment introduced in NSW to facilitate the reassembly of freehold strata schemes is an example of the second of Hellers (1998) solutions, and a less interventionist type of response to anticommons risks than state resumption. The many safeguards put in place by the NSW

government for collective sales has been set out earlier. As we have seen, there is scant evidence to date that this attempt at solving the anticommons tragedy for strata schemes has worked. We have also established that strata renewal laws including those facilitating collective sales with less than unanimous support do not apply to mixed—use developments.

Providing for legislative reform to reassemble mixed-use developments is challenging for the state. As Heller (1998, p. 687) observes, 'once governments create anticommons property, it may be difficult for them to redefine rights without either paying compensation or suffering a blow to their credibility'. In addition to a loss of credibility and market faith in the sanctity of freehold title, in legislating for the reassembly of mixed-use developments the government will face other obstacles identified by Heller (1998) including costs, compensation, and administrative complexities.

Heller (1998, p. 688) concludes the most effective solution to the anticommons problem is to place more attention on content of the property rights rather than merely there legal clarity:

> Property theory and transition practice have given insufficient weight to the role that the bundling of rights plays in avoiding anticommons tragedy… The experience of anticommons property in transition suggests that the content of property bundles, and not just the clarity of property rights, matters more than we have realized.

The reassembly of mixed-use schemes and the need for legislative intervention for reassembly remains unexplored. The question remains, should this approach be adopted for mixed-use developments? Should owners of property used for different purposes be able to force others to sell? What should be included in the bundle of rights for mixed-use property owners to prevent the tragedy of the anticommons for this form of property?

2.6 Literature review summary

Mixed-use developments present a perplexing problem: what to do with them when they have served their highest and best purpose and are no longer fit for purpose? This dilemma is visited upon us as a direct result of the dual ideals of the compact city philosophy of urban planning and design. A key contributor to the increasing complexity

of the built form of our cities is mixed-use developments. They are favoured by planners for the promise of vibrancy that they bring through their multitude of uses and users. This ideological preference for mixed-use developments has prevailed for what is approaching three decades. Curiously however, from the various perspectives of planners, developers, and end users, there is little research in Australia that mixed-use development work. The views of the iconoclasts are noted (Anders 2004; Foord 2002; Freestone 2008; Gentin 2009; Rowley 1996). They deliver a cautionary message of overzealous prescription of mixed-use development without better understanding their effectiveness. However, there seems to be limited appetite for change or alternative methods emerging for delivering dense, diverse, or different types of cities.

In the way mixed-use developments are created there is great freedom and power in the hands of the developers that structure the governance arrangements. Scholars, including Sherry (2013b, 2017), highlight wide ranging powers of developers, and their lawyers and other advisors to create expansionary and novel rights in these developments. Blandy, Dixon and Dupuis (2006) find this power can be used in exclusionary ways and can diminish the full rights of property owners to determine the way their property is managed. Beyond the warning of the legal scholars of how the powers of a developer might be used, there is a paucity of research about the scope and extent of such abuse and what lasting effect it might have on the way property is repurposed. This is something that this thesis will begin to probe.

In making strata renewal laws for strata schemes it is as if the legislature could ultimately accept the need to evict individuals from their homes and forcibly divest them of their investments in the name of urban renewal but could not countenance the same for the commercial sector. Heller (2013) provides useful insight into how this might be approached. He holds that before one can fix anticommons problems, one must first name them. To this end this thesis delves into the documents and processes that create mixed-use developments and identifies mixed-use property rights that are an anticommons threat to the renewal of these important properties.

Chapter 3. Methodology

The previous chapter demonstrates limited literature on collective sales of mixed-use developments. Collective sales activity has been identified in horizontal suburban housing blocks and vertical strata schemes but not yet in mixed-use developments. Accordingly, the research for this thesis is exploratory in nature. Neuman (2003) observes that exploratory research requires an open mind and a flexible investigative approach frequently using qualitative techniques. This chapter outlines the methodology and four methods adopted to undertake this thesis, with each method adding something to the others to enrich the findings.

3.1 Research methodology

This thesis uses a qualitative multi-methods approach. Multi-method research is any research that uses more than one research technique or strategy to study one or several closely related phenomena (Creswell and Plano Clark 2007; Nielsen 2012).

Nielsen (2012, p. 955) notes that multi-method research is particularly suited to social legal research that seeks to understand the law and its interaction with the social world:

> The best research uses a variety of methodologies to provide a more nuanced understanding of law, legal institutions, and legal processes than can be provided by any one methodology alone due to the complex nature of the social world in which they operate.

Neilson's (2012) point is well made by his analysis of the shortcomings of different types of qualitative research methods if they were applied alone. For example, he says interviews by themselves risk representativeness, where interviewees might answer questions in the way they think the interviewer wants or expects rather than according to the interviewees' experience. Similarly, document content analysis can suffer from the fact than many documents are created in an adversarial setting or according to the norms of other professionals such as lawyers and the media.

Multi-method research involves more than simply collecting data in different ways. It is the way the data is integrated that strengthens the findings. Lambert and Loiselle (2007) for example, used interviews and focus groups on their study of cancer information-seeking behaviour. They found moving back and forth between the data sets helped

discover convergence, divergence, and complementarity that enhanced data richness. The way this research proceeded and moved back and forth is discussed next.

3.2 Research methods

Four methods were used in this research: doctrinal legal research, a case study, content analysis and expert interviews. Each of the methods of data collection used will be discussed next followed by an outline of how they are integrated to answer the research questions.

3.2.1 Legal doctrine

The phenomena of collective sales and the ownership and management structure of mixed-use developments involve complex legal issues which call for doctrinal legal research. Pearce et al (1987) cited in Hutchinson (2010, p. 7) describe doctrinal research as:

> Research which provides a systematic exposition of the rules governing a particular legal category, analyses the relationship between the rules, explains areas of difficulty and, perhaps, predicts future developments.

Doctrinal research is more than a literature review. It involves two steps; firstly, locating the primary documents and secondly, having a trained expert in legal doctrine to read and analyse the law linking new information to a known body of law (Hutchinson and Duncan (2012, p. 113). The authors suggest in this sense 'it might be argued that doctrinal research has aspects of both qualitative and qualitative methodologies within it' (2012, p. 116).

In this research, the first step of the doctrinal review was locating the statutory law and common law about mixed-use developments and collective sales. The AustLII database of Australian legislation and case law was used to locate the relevant statutes and judgments in the leading cases on the topic from the High Court of Australia, Court of Appeal New South Wales, and the Supreme Court of New South Wales. The search for legislation and judgments was based on the researcher's experience and working knowledge of strata title law and management in New South Wales (NSW) and previous involvement as a lawyer in the few cases about collective sales that have so far made it to court.

3.2.2 Case study

This thesis contains a case study about a storied mixed-use development in Sydney, The Italian Forum. Yin (2014, p. 16) defines a case study as 'an empirical inquiry that investigates a contemporary phenomenon (the 'case') in depth and within its real-world context'. According to Neuman (2023 citing Vaughan 1992, p. 33) case studies help researchers connect the micro actions of individuals to macro social structures and processes. The case study for this thesis is a mixed-use development well known to legal and strata management experts, including the researcher, as having had varied success over the near twenty-five years of its existence. It was selected for in-depth study due to the richness of material publicly available about its trials and tribulations that helps paint a picture of a mixed-use development that has experienced more than one issue. Data about the case study property has been collected from the print media, legal case records, the NSW property register, and online media sites. The property has been visited on three occasions during the writing of this thesis to help understand the way the project has been legally structured and to observe the condition and retail and commercial vacancies. The information obtained from these sources informed the content analysis of strata management statements and the expert interviews that followed. Specifically, the case study identified four key issues for further investigation: external party attempts to control the future of the development, developer abuse of fiduciary duties as the creator and promoter of the development, unfair cost contributions, and voting allocations. These issues were pursued using the other research methods to verify their relevance and to learn more about them.

3.2.3 Content analysis

Content analysis is a research technique that 'identifies patterns in text and themes in bodies of documents' (Hutchinson and Duncan 2012, p. 118). Citing Bryman (2008, p. 692) Hutchinson and Duncan (2012, p.118) explain:

> There is an emphasis on allowing categories to emerge out of data and on recognising the significance for understanding the meaning of the context in which an item being analysed (and the categories derived from it) appeared.

Content analysis has been compared to doctrinal research but is different in that it is a process of 'quantifying the use of words and then examining the language, and not

simply what is said or the meaning of the words in the first instance' (Hutchinson and Duncan 2012, p. 118).

There is no publicly available list of mixed-use developments in New South Wales. To obtain copies of strata management statements requires a search of the Land and Property Information register of NSW for which fees are payable and basic information is required of the name or address of a mixed-use development. The 12 mixed-use developments chosen were known to the researcher from his previous work as a strata title solicitor and consultant as likely to be of interest because they were all complex, incorporating several usages and were known to have internal difficulties. Internet searches were conducted of the names of the mixed-use developments selected to obtain an address and other identifying information, and then copies of the strata management statements were obtained from Land and Property Information. The search fees were paid by the researcher.

An initial content analysis matrix was prepared concerning issues arising from the literature review contained in section two that would assist in exploring the research questions set out in section one. This was piloted on three strata management statements. As a result of the pilot a better understanding was developed of the content of the strata management statements and the initial content analysis matrix was expanded. The final form of the content analysis matrix examined 26 specific topics, including the following:

- *Identification details.* This included the registration date of the strata management statement, the law firm that authored the document, the number of pages it contained, and the type of development using Freestone's (2008) list.
- *Project structure.* These details identified the type of title selected for the project, the primary type of subdivision plan selected, the number and type of different use components to the development, and any external party interests in the development.
- *Management structure*. Here the focus was on the arrangements for the management of the 'whole of building issues' including the management forum or group, the membership of that group, voting rights of the members, whether the group had any rule making power and the method for resolving disputes.
- *Service contracts.* This looked at two main types of service contracts for the building management committee, building management contracts (also called

facilities management contracts) and strata management contracts. This did not cover any such contracts between the owners corporations within the mixed-use development and their service contractors.

- *Decision making.* This looks at the types of resolutions for making decisions about various matters.
- *Shared facilities cost sharing formula.* Here the focus was on identifying what type of formula was adopted to determine the proportion of costs each component would bear for the shared facilities.
- *Codes.* This looked at whether an architectural and landscape code or equivalent was in use and if so if it formed part of the strata management statement.
- *Building management committee control over strata decisions.* This section of the analysis identifies six ways a BMC might exercise a form of control over decisions of an owners corporation including declarations that:
    a. the strata management statement prevails over the owners corporation by-laws in the event of an inconsistency,
    b. the BMC must be consulted on a change of strata by-laws,
    c. the owners corporations must appoint the same service contractors as the BMC,
    d. the owners corporations must provide the BMC with their meeting papers and give the BMC a right to attend owners corporations meetings,
    e. the BMC must approve any changes to the common property of the owners corporation, and
    f. the BMC must be given access to the owners corporations common property.
- *Developer control rights*. This section identifies any rights reserved to the developer over and above the rights that might follow from continuing to own property in the development.

- *Termination process.* This section reveals if the strata management statement contains any provisions for the terminations of the mixed-use developments.

The content analysis of the 26 specific topics yielded 16 questions or topics that warranted discussion with the strata management and legal experts. The details of these questions appear further in this chapter. The results of the content analysis and expert interviews ultimately refined the main issues for discussion in answering the research questions.

Figure 5 below shows an example of how the content analysis identified and narrowed one of the seven final themes discussed in Chapter 7: how building management committees might exercise control over strata owners corporations.

Fig. 5 Narrowing the issues using different research methods: an example.

3.2.4 Expert interviews

Interviews are used in qualitative research to offer deeper insights than variable-based data collected in quantitative research (Silverman 2001). A broad objective of the semi structured interviews undertaken in this research is to provide information on issues concerning the legal structuring of mixed-use developments including the way developments are subdivided, and how decisions are made that bind owners on important issues for decades to come.

A mix of strata managers, development managers and strata lawyers were interviewed, each with more than 10 years' experience in their field (although not as many strata managers accepted the invitation to be interviewed as hoped). Eight interviews were conducted, lasting 45 to 60 minutes each. The selection of the participants was a result of a systematic review of prospective interviewees' professional work over many years. Attention was given to ensuring that the lawyers interviewed represented a range of types of developer that undertake mixed-use developments from large publicly listed developers to medium sized private developers. Snowballing techniques were also used, with the list supplemented by names of people recommended by research participants

as knowledgeable interviewees. In these cases, the identity of the referees was not disclosed.

Table 2 below provides an overview of the interviewees. It assigns a unique identifying number for each person, records the nature of their involvement in mixed-use developments and the state in which they work. The identifying numbers are used to reference the quotes from the interviewees throughout this chapter.

Table 2: Overview of expert interviewee participants

Identification Number	Profession/Role	State/s	Client Base
SM 1	Strata manager	NSW	High end developers
DM 1	Developer/ development manager	NSW and Vic	Large and medium size private developers
DM 2	Developer/ development manager	NSW and Vic	Large publicly listed developers and institutional development investors
SL 1	Strata lawyer	NSW	Large publicly listed and private developers
SL 2	Strata lawyer	NSW	Large publicly listed and private developers
SL 3	Strata lawyer	NSW	Large and medium size private developers
SL 4	Strata lawyer	NSW	Large and medium size private developers
SL 5	Strata lawyer	NSW	Large and medium size private developers

The interviews followed a similar line of questioning although the order of discussion was fluid. Some additional questions were asked of the development managers interviewed. Some of the questions were not asked of the development manager because they emerged from subsequent interviews with the strata lawyers.

The topics discussed in the interviews with the lawyers were prompted by the case study and the content analysis and centred in seven main themes listed below, with variations on these themes explored with the strata manager and the development managers:

- authorship details (to see if any law firms dominate the market and the extent to which conventions have developed on issues),
- project structure (to see if developers have been favoured by irregular titling arrangements and if external parties were given any rights of interests),
- developer rights and service contracts (to see if developers have imposed long-term agreements on owners denying them of their rights to make their own decisions about managing their property),
- decision making (to see if there is a bias towards a class or classes of owners),
- cost sharing methods (to see if shared facilities costs have been allocated unfairly),
- BMC control over owners corporations (to see if consumer protection rights for members of strata schemes have been overridden by the SMSs), and
- scheme termination (to see if any arrangements have been put in place for the inevitable end of the useful life of the schemes).

3.3 Integration of research methods

Table 3 below shows how the four research methods discussed above work together to answer the research questions and contribute to knowledge about mixed-use scheme and the way we terminate them by collective sales.

Table 3: Research Method Integration

No.	Question	Methods	Data	Output
1	What are the differences between mixed-use and strata?	Legal doctrine.	Legislation, Literature, Juments.	10-point comparison (See Table 4 Chapter 4.3)
2	What additional property rights are created to facilitate mixed-use developments?	Legal doctrine, Case study, Content analysis, Interviews.	Legislation, 12 x SMSs, Media, Websites, Interview transcripts.	Identified seven mixed- use property rights (see Figure 7 Chapter 7.3)
3	How do these rights impact decision making in ways that might impede collective sales of mixed-use developments for urban renewal purposes?	Legal doctrine, Case study, Content analysis, Interviews	Legislation, 12 x SMSs, Media, Websites, Interview transcripts.	List of 365 decision makers involved in terminating case study property) see Chapters 5, 6 and 7.

3.4 Ethics approval and funding

University of New South Wales granted ethics approval for this research on 19 April 2022, expiring on 27 April 2027 (Reference HC 220054). This thesis was funded by a scholarship granted by the Australian Research Council attached to DP 200101744 *Reassembling the city: Understanding resident led collective property sales.*

Chapter 4. Legal Analysis

The high-density element of compact city planning relies on legal subdivision techniques to allow separate spaces to be owned individually. Subdividing land and buildings provide density and allows for separate use, ownership, and financing of parts of a development. The different ways of subdividing property results in different management arrangements to govern the relationships between the ultimate owners and users of the development. The primary legal tool used to achieve high density is strata subdivision (Randolph 2006). However, different forms of strata subdivision have evolved as legal problems have been encountered by developers and end users seeking to combine ownership, shared facilities, and different uses of property in the one development (Dredge and Coiacetto 2011). The different forms of strata that have been created to make mixed-use developments possible are discussed here.

The chapter begins with the basic concept of strata subdivision and explores its origins, the nature of the property rights it creates, how strata is managed by an owners corporation, and other concepts that make strata a unique form of property ownership. This includes by-law making powers, collective decision-making, dispute resolution methods, and strata termination. These are important because strata schemes sit within mixed-use schemes. Reassembling a mixed-use scheme therefore involves a contemporaneous dissolution of the strata scheme. Next the chapter considers the variations on the strata concept that makes mixed-use developments possible, stratum subdivision and part strata subdivision. The chapter concludes with a comparison of a strata scheme and a mixed-use scheme to highlight the increasing complexity of evolving forms of strata and mixed-use property rights.

4.1 Strata subdivision

Strata is a form of subdivision that involves registering a plan that divides land into individually owed lots and shared common property (Bugden 2016). This method of subdivision is the staple of higher density property developments, mainly used for residential purposes. However, strata subdivision also plays an important role in creating mixed-use developments. Most mixed-use developments will have at least one lot subdivided by a strata plan creating an owners corporation within the mixed-use scheme.

4.1.1 Origins of strata

The strata concept has its origins in the limitation of freehold title to meet the needs of banks, developers and purchasers seeking higher density developments. Flats and apartment blocks began being developed in Sydney from the 1920s and by the 1950s were becoming more desirable and sought after. Developers and banks wanted to ride this development wave but were uncomfortable with the then prevailing company title ownership arrangements (Butler-Bowdon and Pickett 2007; Coleman 2021). Under company title a homeowners company owned the building and the shareholders held exclusive rights attaching to their shareholding to occupy their apartment. This made financing individual purchases difficult. The homeowners company held the title, and individual shareholders could only offer their shares as security for a loan to purchase their home unit. There was also a problem with private property laws and the management arrangements that were needed for home unit owners to live in attached housing forms. Under private property law freehold title could not be burdened with covenants that required owners to use the property in particular ways (*Austerberry v Corporation of Oldham* (1885) 29 Ch D 750). These requirements offended the laws of 'free hold' (Sherry 2017). Accordingly imposing rules and management agreements in place to make multi-owned properties work efficiently was problematic.

In response to this dilemma, a group of New South Wales (NSW) developers, lawyers and financiers devised a way to grant individuals title of space within a building to owners and have them collectively manage the common property (Ti 2022; Coleman 2021; Rath, Grimes, and Moore 1966). This solved both the financing and property law problems. As a result, the *Conveyancing (Strata Titles) Act 1961* (NSW) was passed on 1 July 1961 to 'facilitate the subdivision of land in strata and the disposition of the titles thereto' (Rath, Grimes and Moore 1966, p. xi). The next section describes the new form of property rights the legislation created.

4.1.2 Strata title property rights

Strata is a unique form of property ownership that has more to it than a title to freehold or leasehold land. In NSW, both freehold and leasehold land may be subdivided by strata plans of subdivisions (Development Act s 9). A freehold strata scheme is a strata scheme that is free of leases (Development Act s 4). A leasehold strata scheme means a strata scheme in which all lots and common property in the scheme are subject to a lease or leases registered under the Real Property Act 1990 (NSW): (Development Act s 11). In

New South Wales, mixed-use developments exist on both freehold and leasehold land. For this thesis there is no difference in the property rights and management structures for leasehold and freehold mixed-use schemes save that the strata renewal provisions of the Development Act apply only to freehold strata schemes (Development Act s 153).

According to Easthope (2019, p 4), strata is a 'dualistic' form of ownership where:

> …each apartment unit within a building is owned separately and individually, and the owners of the apartments also own collectively the common property (including infrastructure, and amenities). In this sense, there are two layers of ownership; the collectively owned property (the land, buildings and common areas) and the individually owned property of the interior of each apartment.

Easthope (2019) in her categorisation of apartment ownership above focuses on the duality of the rights acquired by the owner, the lot, and the common property. Van der Merwe (1994) recognises a third right, that is membership of the owners association. He opines that apartment ownership straddles two bodies of law, the law of property, and the law of associations (Van der Merwe 1994). Van der Merwe (1994) cites the German scholar Barmann as having developed this threefold unity theory of apartment ownership.

The Development Act provides the legal basis of the NSW system of strata title property rights. When a strata plan is registered land is divided into lots, or lots and common property (Development Act s 9). A 'lot' means one or more cubic spaces shown on a floor plan but does not generally include common infrastructure unless that is otherwise stated in the plan (Development Act s 4). The term 'common property' means any part of a parcel of land that is not within the boundaries of a lot (Development Act s 4). The boundaries of a lot are the inner surface of the wall, the upper surface of the floor and the under surface of the ceiling (Development Act s 6). Therefore, strata lot owners only have control to over the airspace within the boundaries of their lots, and even then, the use of this space may be impacted by strata by-laws discussed below. The balance of the land and buildings is held by the owners corporation.

The Development Act uses the term 'strata scheme' to describe this type of ownership that includes rights and obligations owed to other parties. A strata scheme is defined by the Development Act s 4 as comprising three elements:

- the way a parcel of land is subdivided under the Development Act,
- the way the voting rights, shared expenses, and an owner's share of land on winding up of the owners corporation ('unit entitlements') are allocated under that Act among the lots, and
- the rights and obligations, between themselves, of owners of lots and other persons having proprietary interest in or occupying the lots and the owners corporation as conferred or imposed under the Development Act or the Management Act.

The multifaceted nature of a strata scheme described above means that each strata scheme can be shaped differently. This is fundamental to creating a mixed-use development and highlights the freedom developers and their consultants have in creating customised strata and mixed-use property rights.

The first element of creating a strata scheme is to decide the way parcels of land within a strata plan will be allocated and defined. If the property in question is to be used exclusively by one party, it should be a lot. If the land in question is critical to the operation of the whole development, it should be common property to avoid future disagreements about access and the cost of maintaining the property. Next, if property is to be allocated as a lot, a decision must be made as to how to define the lot. For example, the lot might comprise separate parts. The apartment living space might be one part of the lot and a car parking or storage space might be shown as another part of the lot. The strata plan of subdivision can also override the legislative conventions for defining the boundaries of a lot.

The second element of creating a strata scheme requires developers to allocate the rights of different lots to owners using units of entitlement. Units of entitlements create a formula by which lot owners exercise voting rights in the owners corporation, share owners corporation expenses, and own the land upon which the strata scheme sits in the event of the termination of the strata scheme. To prevent abuse or injustice in the allocation of unit entitlements, the Development Act prescribes that they be set according to the respective values of the lots and a valuers certificate to this effect must accompany the strata plan when registered.

The third element of creating a strata scheme deals with the rights and obligations imposed by the Management Act on lot owners and others including the owners corporation. The main obligation on the lot owners is not to interfere with the support and shelter provided by that lot for another lot or common property or the passage of services and utilities passing through the service infrastructure in an owner's lot (Management Act s 151). The next section discusses the rights and obligations of the owners corporation.

4.1.3 Owners corporations

On the registration of strata plan common property automatically vests in the owners corporation and is freed or all mortgages and other interests that may have affected the land previously (Development Act s 24). An owners corporation is made up of the owners of the lots from time to time in the strata scheme and constitutes a body corporate under the name 'The Owners – Strata Plan No X' (X being the registered number of the strata plan to which that strata relates') (Management Act s 8).

Bugden (2016) describes the legal nature of an owners corporation as an incorporated body which has its own separate legal identity. Easthope (2016) likens an owners corporation to another form of urban governance sitting just below local authorities in that they make laws, collect taxes, and have elected representatives. She observes, 'they are very important and shape urban life' (Easthope 2019, p.6).

In a strata scheme, the owners corporation has the principal responsibility for the management of the scheme and, for the benefit of the lot owners, management, and control of the use of the common property, and the administration of the scheme (Management Act s 9). The key functions of the owners corporation are managing the finances of the strata scheme including the levying of contributions from members, keeping accounts and records, maintaining, and repairing the common property and taking out insurances for the strata scheme (Management Act s 9).

The developer of a strata titled property has the role of establishing the owners corporation (Bugden 2016). This occurs during what is usually a short time between the owners corporation coming into existence upon registration of the strata plan and the first buyers completing their acquisitions and becoming voting members of the owners corporation. In *Community Association DP No. 270180 -v- Arrow Asset Management Pty Ltd & Ors* [2007] NSWSC 527 it was held that at this time the developer is in a position

akin to the promoter of a company and owes fiduciary duty to the future members of the owners corporation. Johnston (2017) identifies a number of ways that developers' conflicts of interests in this period can impact strata owners: setting initial levies too low to make apartments more marketable; developer-friendly service contractors working for the developer for free to be rewarded by extra favourable terms imposed on future owners; poor building standards designed to lower costs and increase development profit; and failing to hand over building plans and specifications that would assist owners in any building defect claims against the developer and the builder. These matters have a long tail, and can impact owners, and subsequent owners, for decades (Johnston 2017). Disputes over these issues can result in strained relations within a strata scheme and ongoing sub-optimal decision making.

As owners corporations are created by statute - unlike individuals and more common forms of corporations engaged in commerce - owners corporations only have the powers conferred by legislation and cannot do anything for which they are not specifically or impliedly empowered (*Humphries v Proprietors 'Surfers Palms North' Group Titles Plan 1955* [1994] HCA 21). This limitation of powers becomes relevant to the end of life of a strata scheme. Strata schemes as discussed further in this chapter can only be terminated by unanimous agreement, or by the order of the court either on the grounds that it is just and equitable to do so or following a collective sale or redevelopment process set out in the Development Act. They are not entities that are well equipped to undertake entrepreneurial activities that are sometimes required in considering redevelopment options.

4.1.4 By-laws

Owners corporations have broad powers to make by-laws that are used by owners corporations in two ways. Firstly, by-laws are used to regulate behaviour and process for the use of lots and common property, and secondly by-laws grant unique forms of property rights over common property to some owners to the exclusion of others. Strata schemes begin with by-laws crafted by the developer (developer by-laws) or if none are provided with the strata plan at the time of registration, with model by-laws prescribed by the Management Act (s 134).

The impact of by-laws on the nature of development derives from their binding nature on a wide number of stakeholders. By-laws bind the owners corporation, the lot owners, banks, and financers acting as mortgagees, covenant chargees, tenants, and occupiers

(Management Act s 135). The nature of matters potentially covered by by-laws is wider even than the category of people they affect (Management Act s 136):

> By-laws may be made in relation to the management, administration, control, use or enjoyment of the lots and common property, and lots in the strata scheme.

The seminal statement about the broad nature of the by-law making power was made in *White -v- Betalli* (2007) 71 NSWLR 381 where it was held that by-laws could give lot owners rights over the use of another owners' lot, per Campbell JA at [205]:

> There is nothing in the notion of by-law that, of itself, imposes any kind of limitation on the kind of regulation that might be adopted, beyond that it is for the regulation of the particular community to which it applies. Any limitation on the type of restriction or regulation that can be a by-law must arise from the statute that enables the by-laws to be created, or from the general framework of statute law, common law and equity within which that local community is created and administered.

A relatively recent addition to the broad nature of the by-law making power is found in the amendment to the Management Act to allow by-laws limiting the number of adults that might occupy a bedroom (Management Act s 137) and to prohibit short-term rental accommodation (Management Act s 137A). These are examples of what Sherry (2017) would describe as an alteration of the fundamental rights of a property owner.

There are however some restrictions on the by-law making power. A by-law has no force or effect to the extent it is inconsistent with any law (Management Act s 136), or unreasonably prohibits the keeping of an animal (Management Act s 137B), or is harsh, unconscionable, or oppressive, prohibits or restricts dealings with a lot, restricts children from occupying a lot, or prevents the keeping of an assistance animal (Management Act s 139). *White -v- Betalli* (2007) 71 NSWLR 381, which was referred to earlier, was decided before the Management Act was amended to prohibit by-laws that are harsh, unconscionable, or oppressive. By-laws can be changed by a special resolution (Management Act s 141). A special resolution is one that is passed by a simple majority of voters (by unit entitlements), and the value of votes is not more than 25% against the resolution or 50% in the case of a sustainability infrastructure resolution (Management Act s 5).

There is a special category of by-laws that create valuable property rights that cannot be taken away without the consent of the beneficiary of the by-law. These are called ‘common property rights by-laws’. These by-laws confer a right of exclusive use and enjoyment or special privileges over part of the common property (Management Act s 142). They are commonly used in residential strata schemes to grant rights over, for example, car parking spaces, storage cages, parts of gardens, facilities, and roof space that might be more logically be used by one owner than others. In commercial strata schemes common property rights by-laws might relate to parking for shoppers and outdoor eating areas. This type of by-law is particularly important to termination of strata schemes and a refusal to surrender the right can amount to a veto to a collective sale by agreement and result in the owners corporation being forced to take court action to affect a sale.

As discussed in the literature review previously, the strata by-law making power has been characterised as an alteration of fundamental property rights that is unjustifiable and will inevitably alter society, not just for us, but for future generations (Sherry 2013a). The impact that by-laws have on society is not confined to the life of the strata scheme; they represent a further degree of fragmentation of titles and can also interfere with reassembly.

4.1.5 Collective decision making

Strata schemes are collective decision-making entities and disputes in owners corporations are common. Easthope (2019) notes that this is hardly surprising as people with diverse interests and backgrounds who live close together are bound to disagree, and the duality of strata property interests means neighbours are required to make decisions about their property collectively.

Johnston and Too (2015) summarise some of the literature highlighting strata dysfunctionality including owner apathy and lack of participation (Easthope et al 2014), lack of attention to repairs and maintenance (Easthope 2009), financial stress due to unbudgeted expenditure in maintenance and repairs (Arkcoll et al 2013), mismanagement by strata professionals (Easthope, Randolph and Judd 2012) and conflicts of interest involving stakeholders (Johnston, Guilding and Reid 2012).

The Management Act in some respects does not help harmonious collective decision making. For example, in making decisions owners corporations in NSW are not obliged to behave reasonably, as they are for example in Queensland (*Body Corporate and Community Management Act 1997* (Qld) s 94 (2)). Even in Queensland where this duty exists, in *Ainsworth -v- Albrecht* [2016] HCA 40 it was held that an owner is not obliged to vote altruistically or sympathetically at the expense of their own interest to advantage another owner.

A common source of disputes concerns the way in which an owners corporation discharges it primary duty to maintain and repair common property. The duty is to 'properly maintain and keep in a state of good and serviceable repair the common property and any physical property vested in the owners corporation' (Management Act s106). This duty arises immediately common property falls into disrepair and is not subject to reasonable endeavours, best efforts or the financial capacity of the owners corporation to effect the repairs: if common property is broken, it must be fixed, and fixed immediately even if the repairs only affect some owners, and even where caused by external parties such as developers and builders yet to make good on their responsibilities for the damage e.g., original building defects (*Siewa Pty Ltd -v- The Owners Strata Plan 35042* [2006] NSWSC 1157) (*Siewa*). The strict nature of these duties will be unfamiliar to the typical detached housing owner who, subject to public risk, has freedom to choose when, and how, to fix their home. Conversely, allowing strata owners to not fix their property immediately may impose unacceptable risk on the safety and well-being of occupants, their owners, and their investments (*Siewa*). This dichotomy is at the very heart of the difference between owning attached and detached property. It can lead to protracted and expensive disputes that are destructive of goodwill and can even lead to dysfunctionality and appointment of external administrators to strata schemes.

A breach of the statutory duty to maintain and repair common property by an owners corporation has serious financial consequences for owners. Owners corporations are unlimited liability entities, and the owners are jointly and severally liable for the debts of the owners corporation (Bugden 2005). An owners corporation cannot be wound up until all its debts are paid and if some owners do not pay their levies the owners corporation must keep levying the owners until those that can and do pay have discharged the owners corporation's liabilities (Bugden 2005). To date there have been no reported cases of financial mistakes and mismanagement of owners corporations in NSW that might risk personal financial ruin of owners. However, growing concerns are held for at

least two strata schemes in NSW presently carrying significant strata loans (with high interest rates) for owner led redevelopments that are experiencing trouble (O'Sullivan and Williams 2021; Innerwest 2020). In the United States of America, where the condominium system is much the same as strata in Australia, McKenzie (2021, p.248) reports 'there is substantial evidence highlighting the potential of CID *(common interest development)* private governments to make grievous errors, with disastrous consequences for owners and in some cases entire neighbourhoods'. The author cites condominium board failures 'due to fraud and embezzlement, disastrous board decisions, underfunding of necessary reserves, and hostile takeovers '(McKenzie 2021, p. 248).

Owners corporations, with their compulsory and automatic membership of diverse co-owners, collective decision-making obligations, and unlimited joint and several liability for joint decisions are, not surprisingly, challenging to manage and to secure agreement on important issues. Strata laws seek to strike the balance between the private property rights of the individual and shared rights of co-owners. There is necessarily some element of compromise in strata property ownership. That is the essence of sharing. Effective methods for dispute resolution are therefore important.

4.1.6 Strata dispute resolution

Tellingly, there are only two objects of the Management Act: to provide for management of strata schemes, and 'to provide for the resolution of disputes arising from strata schemes' (Management Act s 3).

Part 12 Management Act sets out three escalating methods of dispute resolution. Firstly, an owners corporation may establish a voluntary internal dispute resolution procedure (Management Act s 216). Secondly, there is a system for alternative dispute resolution by mediation, participation in which is compulsory for most types of disputes (Management Act s 218 and 227). Thirdly, application for a hearing and adjudication can be made to the NSW Civil and Administrative Tribunal (NCAT) (Management Act s 229). Additionally, there are appeal rights within the tribunal and to the courts. Major building defect matters involving strata schemes are heard in the District and Supreme Courts depending on the sums involved.

4.1.7 Strata termination

The literature on collective sales, including the need for legislative intervention to assist strata schemes to be renewed by collective sales or redevelopment plans, is considered in Chapter 2. This section considers the alternatives to the legislative strata renewal process i.e., termination by court order, and termination by unanimous agreement.

Strata schemes may be terminated by an order of the court (Development Act s 135). The court has the power to make orders about the following matters in making a termination order:

- the sale or disposition of owners corporation property,
- the discharge of liabilities of the owners corporation,
- the termination of any development scheme or staged development contract,
- the termination or amendment of a SMS that relates to the parcel,
- the persons liable to contribute to the discharge of liabilities of the owners corporation,
- the distribution of the assets of the owners corporation,
- the administration, powers, authorities, duties, and function of the owners corporation,
- the voting power at meetings,
- the appointment, powers, duties, and functions of any person to carry out the winding up, and
- any matters in which the court considers it just and equitable, in the circumstances of the case, to make provision in the order (Development Act s 136).

In *Brenchley -v- The Owners Strata Plan No 80609* [2022] NSWSC 646, by consent (and with substantial assistance from the court), bespoke orders were made pursuant to s 136 of the Development Act. This matter related to a five-lot scheme with two warring owners that was so badly affected by building defects that it was beyond repair and the best financial outcome for the parties was to wind up the owners corporation and sell the land for redevelopment. The case is significant for present purposes for three reasons. Firstly, the court noted there were no powers in the Development Act or the Management Act to conduct a winding up of a strata scheme in the way there is in the *Corporations Act 2001* (Cth) to facilitate the winding up for a company. Therefore, the court had to make

extensive orders to enable the winding up to proceed. Secondly, the orders acknowledged that all the debts of the owners corporation had to be discharged in priority to all other claims on the proceeds of sale save for the administrator's fees. Thirdly, the court recognised the difficult position of mortgagees of the lots if a termination order was made and the lot owners' titles merged in the land. The court made special orders protecting the mortgagees, so they were paid out before the lot owners received any part of the proceeds of sale.

The alternative to court ordered termination is to apply to the land titles Registrar General for termination by agreement of each owner, the lessor in the case of leasehold schemes, each registered lessee, each registered mortgagee, chargee, and the local planning authority (Development Act s 142). Terminating large strata schemes by agreement of all parties including lessees, and mortgagees of each lot is possible but requires substantial financial resources and patience. Australia's largest apartment developer, Meriton has recently concluded a collective sale of The Gardens in Brisbane. However, it took two years to reach agreement (Pearce, 2023) even though there were no commercial lots within the strata scheme.

4.2 Stratum and part strata subdivision

Stratum plans of subdivision and part strata subdivision make mixed-use development possible. This section considers their unique features to enable a comparison of the difference between them and strata schemes.

4.2.1 Origins of stratum subdivision

By the 1980's, early forms of mixed-use developments were being built in Sydney that used a cumbersome array of easements, leases, and overarching management contracts to facilitate mixed uses sharing facilities within one development. Accordingly, the *Conveyancing Act 1919* (NSW) (Pt 23, Div. 3B) was amended to allow for 'stratum' subdivision, also known as 'volumetric' or 'airspace' subdivision. This unlocked a more elegant way of delivering mixed-use developments to the market.

4.2.2 Stratum property rights

Bugden (2016, p. 31) describes stratum subdivision as 'effectively airspace subdivision' that 'divides land (above and below the surface) by reference to surveyors levels and

does not depend on a building or physical structure for defining boundaries as required for strata subdivision'.

A building management statement (BMS) may be registered with the plan of subdivision (*Conveyancing Act 1919* (NSW) s 196D). A BMS sets out how and what a BMC must do to manage the shared facilities for the stratum owners. If there is no further subdivision of the stratum lots in the building by a strata plan creating an owners corporation, then a BMS is not compulsory. The stratum owners are left to their own devices to manage their affairs.

The main advantage of stratum subdivision, according to Bugden (2016, p. 31), is that it allows each of the component parts of a mixed-use development to be separately defined. The author notes -

> The parts of the building and its land which need to be used jointly by the owners of two or more of the components (often referred to as the "shared facilities") are regulated by a contract known as a "building management statement". No owners corporation is responsible for the management of these shared facilities - they are managed and funded according to the terms of the commercial contract comprised in the building management statement. This type of structure is generally accepted by institutional investors as a satisfactory alternative to an owners corporation.

In a stratum subdivision, shared facilities include the building structure, because it provides essential support to the airborne stratum lots. Strata lots can also be further subdivided by strata plans so an owners corporation can exist within what was previously a stratum lot. The management arrangements for this configuration are considered further below.

Parts of land, buildings and airspace within a stratum subdivision can be further subdivided by strata plan to become a part strata subdivision (Development Act s 9). For example, a residential lot might be subdivided by strata plan into individual apartments and common property including for example the hallways, foyers, and lifts of the residential component. In this event, a separate owners corporation could be formed for the residential owners. Similarly, an office lot may be subdivided by strata plan into individually owned offices with the common property used only by the offices controlled by a separate owners corporation for that space. When part strata subdivision is used, a

SMS is registered on the title of all property in the mixed-use development that regulates the shared facilities. This takes the place of any BMS that might have been on the stratum title. The law about SMSs is considered later in this chapter.

4.2.3 Building management committees

Where there is a SMS, there must be a BMC (Bugden 2008). A BMC is comprised of representatives of each of the component parts of a mixed-used development and is effectively the body that makes decisions regarding shared facilities (Bugden 2008). Unlike an owners corporation in a strata development, a BMC is not a separate legal entity (Bugden 2008). It operates as the agent of the owners for decisions relating to matters covered in a SMS (Bugden 2008). An owners corporation in a mixed-use development must elect and instruct a representative to sit and vote on the BMC in accordance with decisions made at a meeting of strata owners before the BMC meeting. This can make debate and compromise difficult at BMC meetings as the owners corporation representatives have fixed instructions and miss the benefit of debate.

4.2.4 Strata management statements

A SMS must be registered when a part stratum is created (Development Act s 99). A SMS takes effect 'as an agreement under seal' binding on the owners corporation and each owner within a strata scheme in the mixed-use scheme jointly and severally as well as their mortgagees and lessees (Development Act s 105). According to Bugden (2016, p. 34) a SMS regulates the shared facilities and is 'effectively a statutory contract which becomes part of the title to the lots, and which is automatically binding on new owners and occupiers'. The SMS is an integral part of the success of a mixed-use development (NSW Government 2021).

Sherry (2017, p. 35) notes that SMSs are typically drafted by the developer's lawyer and recorded on the title of all property in the mixed-use development. She observes 'registration turns what began as a contract negotiated by the original parties involved in the development into a statutory property right that will bind all subsequent owners.' (Sherry 2017, p. 35). The author further notes that there are no specific limitations on what might be included in a SMS in NSW and inevitably this tempts developers to use management statements to impose novel obligations on successive owners. As shown by the case study these 'novel obligations' can cause problems for future owners when the time comes to renew the scheme.

While there are no legislative restrictions on what might be contained in a SMS, the Development Act provides what must be included and further provisions that may be included. The things that must be included in a SMS (Development Act Sch 4 Cl 2) are:

- the establishment and composition of a BMC,
- the functions of the committee and office holders of the BMC,
- the way the statement may be amended,
- a process for dispute resolution,
- the fair allocation of costs of shared expenses and details of the method used to apportion the costs,
- a review process to ensure cost allocation remains fair, with a review to occur at least once each five years, and
- the way notices are served.

The matters that may be included in a SMS (Development Act Sch 4 Cl 4) are:

- access arrangements,
- garbage storage and collection arrangements,
- meetings of the BMC,
- keeping of records,
- safety and security measures,
- the appointment of managing agents,
- the control of unacceptable noise levels,
- prohibiting or regulating trading activities,
- service contracts, and
- architectural codes to preserve the appearance of the budlings.

A SMS has no effect to the extent that it is inconsistent with the site's planning approval, an order made under the Management Act, or any other law (Development Act s 105).

4.2.5 Part strata decision making

Decision making processes for a BMC are determined by the SMS. There are no statutory provisions about how decisions should be made. The leading cases in the superior courts about SMSs indicate these are areas of serious dispute in mixed-use schemes:

- *Owners Corporation Strata Plan No 70672 -v- Trustees of the Roman Catholic Church for the Archdiocese of Sydney* [2011] NSWSC 973 where the court declined to set aside the SMS because it was alleged to favour the developer.
- *The Italian Forum Ltd -v- The Owners Strata Plan 60919* [2012] NSWSC 895 where the case was dismissed on technical grounds, but the court doubted there was any limit on what could be contained in a SMS.
- *The Owners Strata Plan No 74602 -v- Eastmark Holdings Pty Ltd* [2015] NSWSC 1981 where the court considered whether provisions apportioning costs were unfair and therefore capable of being varied or terminated under the *Contracts Review Act 1980* (NSW) and the court ruled again in favour of a developer where it was alleged by the owners that it had loaded the SMS with unfair provisions.

However, not all high-profile disputes about SMSs are about cost sharing issues. In the recent case of *Walker Corporation Pty Ltd -v- The Owners – Strata Plan No 6161* [2023] NSWCA 125, the dispute centred on a clause in the SMS permitting the BMC to force an owners corporation within the strata scheme to use the same strata managers as administered the whole development for the mixed-use scheme.

4.2.6 Part strata dispute resolution

Disputes about part strata schemes may be made to the NCAT by any person bound by a SMS (Management Act s 226). However, the NCAT must not make an order about a part strata scheme if the SMS prohibits the determination of disputes by NCAT, or any of the parties to the dispute fail to consent to its determination by NCAT (Management Act s 232). This provision exists to spare commercial stratum lot owners in a mixed-use scheme from NCAT if they would prefer a higher authority to rule on a dispute involving them and their property (Bugden 2008).

4.2.7 Part strata termination

There are no special provisions for the termination of part strata or stratum schemes. Therefore, terminating a mixed-use development with an owners corporation for a strata scheme as a member is a two-step process. Firstly, the strata scheme must be terminated, and secondly, the lots in stratum plan must be amalgamated or sold concurrently for redevelopment.

Strata scheme termination is discussed in Section 4.1.7 and can happen by order of the court or by the Registrar-General for land titles where there is unanimous agreement of all owners, mortgagees, and others with interests in the land and common property. A SMS ceases to have effect upon the termination of all strata schemes to which it relates (Development Act s 105). As discussed earlier regarding strata scheme termination, the result of a termination of a strata scheme is that all interests in the lots and common property of the strata scheme merge in the title of the land upon which the strata scheme is situated. In the case of a termination of all strata schemes affected by a SMS for a mixed-use development, the result would be that the stratum plan survives and all those with an interest in the lots and common property of the former strata schemes are owners as tenants in common in a lot within the stratum. By agreement then of all lot owners, the stratum lots could be amalgamated for sale as a single parcel of land or sold collectively to a single purchaser for redevelopment.

There are no provisions to force the sale of a dissenting stratum lot owner, as there are for a strata scheme. Therefore, a stratum owner can hold out on a collective sale and prevent a collective sale or redevelopment of a mixed-use development.

4.3 Comparing strata and mixed-use development part strata schemes

The analysis of the law concerning strata schemes and mixed-use development in the previous two sections of this chapter highlight important differences summarised in Table 3 below. The differences which are of critical importance to the reassembly of mixed-use schemes are discussed here.

Table 4: Comparison of strata schemes and mixed-use schemes.

	Strata scheme	**Mixed-use scheme**
1. Application	One use (typically)	Mixed-use
2. Origins	Market demand for single titles in attached housing	Planning authority for activation of important sites
3. Membership	Owners + one owners corporation jointly and severally	Stratum lot owners + one or more owners corporations + strata lot owners jointly and severally
4. Types of property rights	Lots Common property	Lots Common property Shared facilities
5. Binding instruments	Strata Plan S 88 instruments (easements) By-laws	Part strata plan S 88B instruments (easements) SMS
6. Governing body	Separate legal entity (owners corporation)	BMC i.e., an unincorporated committee representing members as agents + and owners corporation for the strata scheme/s
7. Governance model	Collective decision making	Tiered decision making 'Whole of development' by BMC with owners corporations responsible for common property within their strata schemes
8. Voting rights	Determined by relative values	Determined by the developer or the developer's lawyer's preference not necessarily related to value
9. Third party rights	By easement, restrictive covenant	By SMS
10. Collective sales	Legislatively assisted (75%)	No legislative assistance - unanimity of all parties bound by the SMS including each lot owner within the strata schemes forming part of the mixed-use scheme

The different types of schemes are used differently by developers. Strata schemes are used for single or stand-alone schemes where usually the use of all lots is the same.

Some single strata schemes include a small number of strata lots that may be used for commercial purposes subject to planning approval, but these are normally a convenience service and not a true mixed-use scheme. When users are mixed in the one development the troubles with strata detailed in the literature review will be accentuated. No matter how much segregation planners and lawyers try to achieve in development policy guidelines and SMSs respectively, on the big issues, including renewal, a meeting of the minds must occur.

Although both types of schemes have their origins in changing trends, the primary drivers are different. Strata came from a push by developers to meet changing market demands for attached housing. The main driver for part strata was for mixed-use developments favoured by planning authorities seeking to activate important sites and commercial property owners wanting to be separated from residential strata scheme owners. As established by the literature mixed-use developments are difficult to undertake, so it is reasonable to assume that generally developers prefer something easier like a residential strata scheme without the complications noted in Table 3 earlier. It is also reasonable to assume that most developers will be better at delivering strata schemes than mixed-use developments. The relative abilities of developers and their familiarity with the nuances of project structuring of mixed-use schemes is likely to affect their success and good governance.

In reassembling a mixed-use scheme, the comparison in this chapter identifies a third dimension of apartment ownership in a mixed-use scheme that must be reckoned with. This is the right to shared facilities under a SMS and controlled by the BMC. As stated by Easthope (2019) a strata scheme is two dimensional (lots and common property). A mixed-use scheme has an extra dimension, shared facilities, created by the SMS and managed by the BMC. This represents another layer of decision-making on all issues including the ultimate decision to end the scheme.

The voting rights for how decisions are made in a BMC are determined differently in a mixed-use scheme. In strata schemes voting rights are determined by unit entitlements, which in turn are based on a relative valuation of lots within the scheme. This arrangement protects the lot owners in a strata scheme from injustice or recklessness in allocating voting rights. It is also reasonable to assume that owners within a strata scheme perceive voting rights set by relative value of property as a simple and apparently fair way for a strata scheme to be established. In a mixed- use scheme there is no such consumer protection. Voting rights and can be allocated in any way the

developer likes and instructs the lawyers to prepare the SMS. This freedom of developers and lawyers to create the mixed-use scheme as they like, extends to other aspects of the development. A strata scheme is created with more lot owner protection than a part strata mixed-use scheme. For example, legislation for the creation of strata schemes limit the term and of various types of service contractors where no such protection exists for a SMS.

The Development Act is currently being reviewed by the NSW Government The report on the review suggests that voting rights determined in SMSs are being considered and notes there is no requirement for the management statement to balance the rights of the various types of lot owners in the scheme, with the result that some stakeholders report that voting is unfairly tipped in favour of the commercial owners' notes (Department of Customer Services 2021). There is apparently no appetite for aligning voting rights with contributions or prescribing a one rule fits all for voting rights. The report recommends only that the law provides that the method of allocating voting rights is fair.

The final difference of note relates to collective sales. A freehold strata scheme may be terminated for a collective sale or redevelopment with a 75% vote. Dissenting owners can be forced to sell out under terms approved by the court. There is no such provision for mixed-use schemes. Their pathway to renewal requires unanimity not just of owners, but also their registered lessees, and financiers. This might explain why there are no reported cases to date of termination of mixed-use schemes. The next chapter considers an example of a case where termination seems beneficial but has yet to be achieved, thus offering insights into just how challenging this process is in practice.

Chapter 5. The Italian Forum, a case study

A once exciting mixed-use development with vibrant retail outlets, busy restaurants, and frequent cultural events, The Italian Forum, Leichhardt, New South Wales (NSW) is the subject of this case study. More recently visitors have described it differently: 'Empty'; 'Deserted'; This place is dead'; 'Sad to see what has happened to The Italian Forum' (TripAdvisor 2023).

The Italian Forum is a mixed-use part strata development at 23 Norton Street Leichardt NSW 2040, five km west of Sydney's CBD. It comprises 165 Tuscan-styled residential apartments, 62 commercial lots including restaurants, shops and offices, and a 300-seat theatre surrounding a traditional styled Italian piazza. This case study explores what has happened to this mixed-use development over its near 25-year history, from a celebrated gift to the Sydney Italian community, through early success, a litigious middle age, early onset decay, and a recent proposed plan for renewal. The Italian Forum is almost a textbook example of Berding's (2005) four stage life cycle of American condominium developments referred to earlier. At first everything is new and affordable, then things breakdown requiring special levies, there are insufficient funds at hand and no way of raising capital. However, this case study investigates more than funding issues that have plagued this development. There are deeper reasons why The Italian Forum is so troubled, including power imbalances among the owners of strategically important parts of the development, developer covenants prescribing use of the piazza and cultural centre and obliging the owner to promote cultural events, unfair cost allocations for shared facilities, and dysfunctional governance. To adopt the words of Neuman (2003, p 33), this case study helps to 'connect the micro level, or the actions of individual people, to the macro level, or large-scale social structures and processes'.

5.1 History of the development

Leichhardt, the suburb in which The Italian Forum is situated, has a long history with Sydney's Italian community as one of the early settlements for Italian migrants in the 1950's and 1960's. Indeed, the initial success and subsequent demise of the development has been described as a colourful story in the history of Sydney's Italian community (Pazzano 2021).

The development sits on a parcel of land that was a gift to the Italian community by the NSW State Government to mark Australia's bicentenary in 1988 (Schwartzkoff 2009).

The foundation stone was laid by the then Italian President Francesco Cossiga. However, the gift came with strings attached, with 10% of the land always to be used for cultural purposes. A positive covenant was registered on the title to ensure that would always be the case. The terms of the positive covenant include a requirement that the owners of the cultural centre and piazza ensure that the cultural facilities and outdoor recreational area are utilised principally for cultural and similar activities and are open to the public at all reasonable times and are kept in good repair and condition.

A special purpose company, The Italian Forum Limited (TIFL), was formed by members of the Italian community to undertake the development and manage the cultural aspects of the development. The project was plagued with problems from the start. It would take 10 years for TIFL to raise the necessary funds and procure a builder/development manager to deliver the project (Cubby and Chrysanthos 2022). The builder went into liquidation part way through the construction and the first of five Supreme Court cases involving The Italian Forum was settled, providing $3.5 million for a new builder to finish the construction. The development was finished just before 2000.

Image 1: Italian Forum Cultural Centre

(Licensed by the researcher)

An examination of the development's website at the time of writing gives some insight into its present state. The Italian Forum's website and the websites of commercial leasing agents operating in the area show just over 40% of the shops, offices and restaurants are vacant (Commercial Real Estate 2023; Italian Forum 2023). Many of the links on the development's website are no longer functional. Only three of the 12 restaurants remain open. Recent print media confirms the sad situation (Dumas SMH. Kozoil SMH, Cubby and Chrysanthos 2022, CityHub 2022). The parallel between the empty stores in Moscow studied by Heller (1998) and the empty shops and offices at The Italian Forum is compelling.

5.2 Legal titling and management structure

The stratum plan for the development was registered on 27 August 1999 subdividing the land and buildings into five stratum lots, each with a different use:

- Lot 11 for residential apartments,
- Lot 12 for the cultural centre,
- Lot 13 for commercial shops and restaurants,
- Lot 14 for the carpark, and
- Lot 15 for the piazza.

Lots 11 and 13 were further subdivided by part strata plans. Lot 11 was subdivided by Strata Plan No. 60918 creating 165 residential apartment lots and common property. Lot 13 was subdivided by Strata Plan No 60919 creating 62 commercial lots and common property. The covenant that requires 10% of the land to be used for cultural purposes is also recorded on the titles of all property within the development.

The strata management statement (SMS) was registered on the title of all lots in the development binding the owners about matters relating to the management of the whole development. The SMS is a 38-page document that was prepared by the lawyers for TIFL. The SMS has been amended twice since registration. References are to the SMS as originally registered. The parties bound by the SMS include:

- the owners corporation for the two strata schemes, the residential owners corporation and the commercial owners corporation,
- the registered proprietor of the other three stratum lots, the carpark, the cultural centre, and the piazza,

- the registered proprietor, lessees, occupier, or mortgagee in possession of any lot in the strata schemes,
- a lessee, occupier, or mortgagee in possession of the carpark, the cultural centre, or the piazza, and
- any other person in whom the fee simple of any part of the land is vested for the time being, or the lessee, occupier, or mortgagee in possession of that part.

There is a building management committee (BMC) that manages and operates the building on behalf of the members. The members of the BMC are one representative from each of:

- the owners corporation of the residential strata scheme,
- the owners corporation of the commercial strata scheme,
- the registered proprietor of the carpark,
- TIFL, or when it ceases to own the cultural centre, the registered proprietor of the cultural centre, and
- TIFL, or when it ceases to own the piazza, the registered proprietor of the piazza.

Each member of the BMC has one vote per lot. Therefore, TIFL, which owned the cultural centre and the piazza, had two of the five votes. The two votes on the BMC have since past to the new owner of the cultural centre and piazza which is discussed later in this chapter. The main functions of the BMC are as follows:

- operate, maintain, renew, and replace the shared facilities and common areas,
- change or add to the shared facilities and common areas,
- control the use of the shared facilities and common areas in a fair manner,
- create and implement a maintenance program for the shared facilities, and
- effect insurances as required by the Management Act and the SMS.

A unanimous resolution is required to amend the SMS and change anything to do with shared facilities and shared costs for operating and maintaining those facilities. A unanimous resolution requires a vote in the affirmative by all financial members.

Clause 22 of the SMS and the by-laws of the owners corporations of the commercial strata scheme imposed a long-term obligation on the commercial owners corporation to

pay a levy of $60,000 to TIFL for the administrative, promotional, and cultural activities conducted in the cultural centre, the ownership of which was retained by TIFL.

The shared facilities are set out in a schedule to the SMS as shown in the table below. The method used for determining the allocation of costs for the various items is not disclosed in the SMS. The SMS was registered before the reforms mentioned in Chapter 4 requiring a SMS to record the methods used for cost allocation. As Table 5 below indicates, roughly 50% of shared costs are attributed to the residential strata scheme, 30% to the commercial strata scheme, 10% to the cultural centre, 10% to the carpark. The piazza, retained by TIFL, makes no contribution to the costs of the shared facilities although it has a vote on the BMC.

Table 5: The Italian Forum shared facilities cost allocations. (Source, Registrar General 1989)

SMS Ref.	Item	Residential Strata	Cultural Centre	Commercial Strata	Carpark	Piazza
Sch A Part 1						
1.1	Sprinkler system	50%	10	27	13	0
1.2	Hydrant system	53%	0	34	14	0
1.3	Fire Alarm monitoring	48%	10	30	12	0
1.4	Passive fire systems	50%	10	27	13	0
1.5	Emergency warning and intercoms	48%	10	30	12	0
1.6	Emergency lighting and exit signs	48%	10	30	12	0
2.1	Subsoil pumps and sanitary systems	48%	10	30	12	0
2.2	Gas supply and meters	48%	5	35	12	0
2.3	Arrester system	0%	0	100	0	0
2.4	Kitchen exhaust system	0%	0	100	0	0
2.5	Shared sewerage lines	48%	5	35	12	0
3.1	Mechanical services	53%	0	34	14	0
3.2	Air conditioning chilled water	0%	0	100	0	0

4.1	Electrical supply switchboard lighting	48%	10	30	12	0
4.2	Public area lighting	48%	5	35	12	0
5.1	Access control	40%	9	50	1	0
5.2	Access control – public car space	40%	9	50	1	0
6.1	Communication cables	72%	1	26	1	0
Sch A Part 2						
1	Main driveway	48%	10	30	12	0
2	Arcade, laneway, and walkways	48%	10	30	12	0
3	Fire stairs	48%	10	30	12	0
4	Service areas	48%	10	30	12	0
5	Public area fitments and landscaping	48%	10	30	12	0
Sch B						
	Centre managers fee	15%	20	40	20	0
	Audit fees	20%	20	40	20	0
	Management fees	20%	20	40	20	0
	Insurance premiums	20%	20	40	20	0

The SMS contains a further special privilege for TIFL as the owner of the cultural centre. By clause 14.8 of the SMS the owner of the cultural centre has the right to apply to the local authority for a development approval for a building to be situated on the roof top of the cultural

centre without being required to obtain the written consent of the other members and the other members must not prevent the cultural centre owner lodging an application for local authority approval for the further development. This special privilege is limited to the right to apply for the development approval as an adjoining land owner and does not, for example, prevent any members of the BMC lodging an objection to the local authority granting the development approval. To date this right has not been exercised.

The decision by TIFL to make the piazza a separate stratum lot, and to retain ownership of that lot, created a power imbalance in the development. The piazza is shared by and benefits all owners and users of the development. It is by its nature the focal point of the development. It impacts the amenity of all property within the development yet is controlled by one party. The owner of that lot will always have effective control the future of The Italian Forum, and it does so without contributing to the shared costs of the space.

5.3 Levies and cost allocations

The owners within the development have contested management contracts and promotional levies. A promotional levy payable by the owners corporation of the commercial strata scheme has been at the centre of this dispute.

The promotional levy dispute began in 2009 when owners of a restaurant in the commercial strata scheme refused to pay a levy imposed by their owners corporation on various members of the commercial strata scheme and claimed just over $20,000 in restitution for payments already made. The promotional levy on the members of the owners corporation for the commercial strata scheme was to meet the commercial owners corporation's liability of $60,000 per annum to TIFL for the administration and promotion of cultural events and to generally promote The Italian Forum as a retail and commercial centre. Following a tribunal adjudication, an appeal to the tribunal, and a hearing in the Supreme Court, the restaurant owners won on the basis that the owners corporation did not have the power to seek contributions from lot owners other in accordance with their units of entitlement in the commercial strata scheme (T*he Italian Forum Ltd -v- The Owners Strata Plan 60919*).

The decision in the 2009 proceedings, that the commercial owners corporation could not levy its members for contributions to the $60,000 per annum promotional levy to The Italian Forum Pty Ltd, escalated over the subsequent years and resulted in further proceedings in the Supreme Court in 2012. By this time TIFL had failed to pay some

$420,000 to the BMC for its contribution to shared costs as the owners of the cultural centre, and the commercial owners corporation had failed to pay approximately $300,000 to TIFL arguing that the 2009 decision meant it was legally unable to raise the funds from its members. The commercial owners corporation lost again as did the residential owners corporation joined in the proceedings. Costs were ordered against the commercial and residential owner corporations. What is relevant is that a significant and costly internal dispute, presumably destructive of goodwill within the ownership of the development, was caused by what were perceived as novel and unfairly allocated levies and contributions to activities benefiting all owners, not just those burdened with the costs.

5.4 Positive covenant on use

The obligation to use 10% of the development for cultural purposes has been a significant issue of dispute in the life of the development. Disputes on this issue have manifested in two ways: firstly, on the administration and sale of the assets of TIFL, and secondly, in complaints from members of the owners corporations for the residential and commercial strata schemes that a failure to fulfil the obligations has contributed to the demise of the development.

By 2012 The Italian Forum was described by the Leichardt local authority as a 'White Elephant' (Dumas SMH, Cubby SMH). The federal government injected $3.5 million into the cultural centre relaunch in the same year but that did not save the company. In 2013 TIFL entered voluntary administration and ultimately its assets including the cultural centre and the piazza were put up for sale. The administrator attracted bids from four prospective purchasers but after two Supreme court applications challenging the administrator's proposed sale to the highest bidder, the properties were sold to the lowest bidder, another Italian community group called CO.AS.IT. The deciding factor was pressure from the Leichardt Council to maintain the status as an Italian cultural precinct consistent with the covenant imposed on the land when gifted to the Italian community by the NSW government in 1988. CO.AS.IT paid $2.8 million for the cultural centre and the piazza.

The development fared no better under its new owner. In press announcements at the time of the acquisition CO.AS.IT said it intended to run Italian language classes, community markets, and other events. The mayor at the time said, 'he hoped the sale would mean new life for The Italian Forum and that the warring parties would put the conflict behind them' (Koziol 2014). Nearly 10 years later the warring parties were still at

war. Owners of the commercial and residential strata schemes lodged a formal complaint with the NSW government alleging a breach of the terms of the cultural use covenant by CO.AS.IT, claiming its inactivity was contributing to the demise of the development. The allegations were denied and the minister responsible decided not to intervene in the dispute.

Recently, it seems CO.AS.IT has also given up on making The Italian Forum work, with media reports that it has entered a contract for the sale of the cultural centre and piazza to a private developer, Redstone (Wilmot 2023). The contract for the cultural centre and the piazza reportedly settles in late 2023. If the contract settles the new developer will control two of the five votes on the BMC and hold the title to the cultural centre and piazza which are critical to any redevelopment. The new developer will also have the right to lodge a development application for the airspace above the cultural centre without objection from the other members of the BMC. The covenant for cultural use reportedly survives this transaction as well, with media reporting that CO.AS.IT will retain an entitlement to 20 days a year use of the cultural centre and piazza for cultural events. There is more discussion about the prospects for renewal of the site if this sale goes ahead later in this chapter.

The covenant requiring use for cultural purposes had a defining impact on the future of the development in 2014 when TIFL became insolvent and went into administration. Without the covenant the cultural centre and piazza might have ended up in other hands which may or may not have been for the better. Either way, the case study serves as an example of the way covenants on the future use of property may not be in the best interest of the effective use of the land when the original possessors are gone.

5.5 Management dysfunction

Unsurprisingly given the litigious history of the development, the relationship between the owners has been strained and has affected the quality of decision-making within the BMC (Dumas 2014).

The Sydney Morning Herald published a photo montage in 2014 showing the decline of development over the years (Sydney Morning Herald 2014). In 2022, reflecting a breakdown in communication among owners, the commercial strata scheme resorted to a Freedom of Information application to extract information from CO.AS.IT about what events they had planned and outlining to the NSW government why it was not

responsible for the failure of the commercial strategy for the development (Cubby and Chrysanthos 2022).

In August 2022 there were reports of arguments among the owners of the commercial strata scheme, factions within the owners corporation for the residential strata scheme, and CO.AS.IT about the removal and replacement of polystyrene arches found to be a fire hazard (Cubby and Chrysanthos 2022). Shortly after the strata manager servicing both the BMC and the two owners corporations resigned (Cubby and Chrysanthos 2022; CityHub 2022).

The governance arrangements within the SMS are likely to have contributed to the lack of quality decision-making. Most significant decisions require the unanimous decision of the five members of the BMC. With each member having one vote, the voting rights are disproportional to the contributions of the five members to the cost of the shared facilities.

A complicated dispute resolution clause such as the one in the SMS for this development can also impede good decision-making. The clause requires the parties to exchange detailed notices about the dispute and if they cannot resolve the dispute by meeting, then the dispute must be determined by an expert appointed by the Law Society. Faced with deadlocks in the BMC, by the SMS the parties are denied fast and affordable access to the disputes tribunal, NCAT. Instead, the parties must surrender to the expert determination of a solicitor who may not necessarily be the most experienced person to determine a development management issue. To return to Berding (2005 pp. 13-15), finally ‘the ship is rudderless and sinking’.

5.6 Prospects of renewal

The sale of the cultural centre and piazza by CO.AS.IT to a private developer, Redstone, for $11.8 million was announced in April 2023 (Wilmot, 2023). Commenting on the sale Co.AS.IT said:

> The Italian Forum had become difficult to manage and for reasons outside our control the precinct has seen a significant drop in patronage. Faced with the growing pressures to support our broader programs, the sale of the property will provide significant opportunities for both consolidation and growth in our core programs to the community.

The sale has been met with reports of trepidation about the piazza and the cultural centre falling into hands of a private developer rather than a community-based organisation. There is also little known about the past development history and experience of Redstone (Modaro 2023). A lack of transparency about the sale has caused concern for the Mayor of the Inner West Council (Segaert and Cubby 2003). The local state member of parliament Ms. Kobi Shetty shares these concerns. She says, 'it is disappointing to see the sale of this part of The Italian Forum and it passing to private interests' (Modaro 2023). As to the future, Redstone has to date made only general comments about its plans to revitalise the development (Segaert 2023). The airspace above the cultural centre will no doubt be important. Modaro (2023) reports that under the planning policy for nearby Parramatta Road, the airspace above the cultural centre is open for development of a high-rise residential tower of up to 23 stories.

Apart from concerns by the local authority about the maintaining a cultural focus for the development, the proposed renewal by Redstone will be impacted significantly by the terms of the SMS that will bind it as the owner of the cultural centre and the piazza. The right to develop the airspace permits the developer to lodge a development application without objection of the members of the BMC. However, Clause 14. 8 of the SMS specifically allows individual members to object to the local council's consideration of the application once an application has been lodged. Further, clause 14.8 (d) requires the owners of the cultural centre on completion of the works to meet and consider altering the shared costs between members because of the work. It will be difficult to procure agreement from so many parties, and as explained in Chapter 4 a mixed-use development does not have the benefit of statutory intervention to force a sale of interests by dissenting parties once the 75% threshold has been reached. The SMS requires any disputes about this to ultimately be determined by a solicitor with more than 10 years' experience acting as an expert. The solicitor's decision will be final and binding on the parties. In practical terms the renewal plan will require negotiation and unanimous agreement of all the members of the BMC to a new SMS. This will provide the parties with an opportunity to address past wrongs, but equally it might open old wounds.

An alternative to the Redstone revitalisation plan is a collective sale of the entire development including the residential strata scheme. This can be proposed by any person and might be of interest to a developer attracted to the possibility of much higher density for the site. However, this path is not without its difficulties as well due to the fragmentation of ownership and the creation of third-party interests. Table 6 below sets out the steps that would be required to achieve a collective sale of The Italian Forum

using the strata renewal laws to terminate the two strata schemes within the development. Of course, a collective sale could be achieved by unanimous agreement however given the number of parties involved, as demonstrated by the Table 6, a collective sale is more likely to be achieved by using the strata renewal laws to force dissenting strata lot owners to sell. The table also shows that for a mixed-use development comprising 230 titles in all, there are an estimated 365 decision makers that would be required to make a variety of decisions to affect the sale. The table below is a stark illustration of one aspect of Hellers (1998) anticommons theory, that too many decision makers risks underuse.

Table 6: The Italian Forum estimated decision makers and types of decisions to be made to achieve a mixed-use scheme collective sale.

Parties	Role	Nature of decisions to be made
1	Collective sale proponent	Any person or organisation proposing strata renewal by collective sale
1	NSW State Government	Consent to release positive covenant for cultural use
1	Registrar General NSW	Register notice of strata renewal plans, consent to the termination of the plans and amalgamation of the titles.
1	Land and Environment Court	Two court orders terminating the strata schemes upon being satisfied that the consumer protection mechanisms have been satisfied and it is otherwise just and equitable that the orders be made.
1	Local authority	Consent to strata terminations upon payment of all outstanding rates and charges
1	BMC	Unanimous resolution to terminate the strata management statement
1	Strata manager	Agreement to discharge three agreements - one for each of the owners corporations and one for the BMC
1	Building Facilities manager	Agreement to discharge three agreements - one for each of the owners corporations and one for the BMC

1	Energy substation lessee	Surrender of the lease for energy substation
2	Strata committees	Two decisions to refer strata renewal proposal for further consideration
2	Owner Corporations	Each requiring a special resolution to adopt the strata renewal plan and an ordinary resolution to apply to the courts for orders to give effect to the plan
3	Mixed-use stratum lot owners	Consenting to the strata renewal plans and agreeing to sell their strata lots
11	Commercial lot mortgagees	Discharging mortgages assuming 17% commercial lots mortgaged figures for residential strata lots mortgaged in the absence of commercial lot statistics *
28	Residential lot mortgagees	Discharging mortgages *
30	Commercial tenants	Agreeing to early termination of leases assuming 48% commercial lots mortgaged figures for residential strata lots mortgaged in the absence of commercial lot statistics *
62	Commercial strata owners	Deciding to accept or reject the strata renewal proposal with at least 75% consenting to the strata renewal plan
80	Residential tenants *	Deciding to accept termination of tenancies
165	Residential owners	Deciding to accept or reject the strata renewal proposal with at least 75% consenting to the strata renewal plan
365	Total decisions to be made	

(* indicates Easthope et al (2023) figures have been applied to make reasonable estimations)

The total excludes the unknown number of individual owners with common property rights which require the consent of the owner to be released in the owner's unfettered discretion.

5.7 Case study summary

This case study demonstrates the manifestation of anticommons in the ownership arrangements at The Italian Forum in at least four ways.

5.7.1 Titling of the piazza

The titling of the piazza as a separate stratum lot has created a power imbalance within the development because of its strategic importance. The owner of the piazza and cultural centre will always have the upper hand in negotiations about what happens next at The Italian Forum. The piazza is so central to the operation of the whole development that it ought to have been made common property. As evidenced by Image 2 below, everyone must use it to traverse the site and access their property and as the name of the development indicates, all owners face on to it. The owners' upper hand will be more powerful in the case of a revitalisation than a reassembly by collective sale in which case every owner has a power of veto. The titling of the piazza is an example of Hellers' (1998) spatial anticommons risk.

Image 2: The Italian Forum piazza (11.45 am 7 June 2023)

(Photo by the researcher)

5.7.2 Positive covenant on title

The positive covenant on the title requiring the cultural centre and piazza for a minimum amount of use has interfered with the sale of these strategically important pieces of the

development and resulted in two Supreme Court hearings. Without the positive covenant purchasers with different agendas for the site may have been enticed to purchase and redevelop the cultural centre and piazza in different ways that may have been more successful that previous efforts and benefited the owners. Further, the positive covenant has led to disputes about the commitment of the two successive owners of the cultural centre and piazza to fulfill their obligations to hold these events and contribute to the ongoing vibrancy of the development. In the event of differences among owners arising about the present proposal for revitalisation, the enforcement of the terms of conditions of the positive covenant is possibly a sleeping issue that could be litigated as part of a war of attrition between competing owners or groups of owners. The tactic of litigating about legal technicalities to wear down the proponent of a collective sale has been observed in strata schemes (*Application by The Owners – Strata Plan 6666 v GSA Australia Acquisitions No 2 Pty Ltd and Ors* [2018] NSWLEC 115 referred to in section 2.4.2).

5.7.3 Apportionment of cost for maintaining the piazza

The developer-imposed conditions for the commercial strata scheme owners to pay a promotional levy not shared proportionately has caused dispute and resulted in an application to the tribunal and a further two Supreme Court cases. Such disputes strain relations and exhaust limited resources. Strained relationships are not helpful when difficult decisions must ultimately be made about the termination of the mixed-use scheme and collective sale for redevelopment.

5.7.4 Scheme management dysfunctionality

The general dysfunctionality of the BMC as reported in the media – where stakeholders have reported voting deadlocks, ongoing factional disputes, and financial mismanagement – is a form of anticommons affecting the effective use of the development. The vacancies, lack of cultural and promotional activity, and general disrepair of the piazza and common facilities are the symptoms of this dysfunctionality.

5.7.5 Conclusions about the case study

Heller observes that once anticommons emerge in a property, reassembly can be ‘brutal and uneven’ (Heller 1998, p. 678). Time will tell if one or more of the four issues identified by this case study as evidence of anticommons at The Italian Forum will contribute to such an outcome. In stand-alone residential strata schemes considered in Chapter 2

there is evidence of brutality and uneven results where parties have contested proposals for collective sales. At The Italian Forum there is fertile ground for this possibility. Its litigious history does not bode well for a peaceful ending.

The analysis of SMSs and expert interviews in the next chapter provide further issues to those identified as anticommons at The Italian Forum. These additional issues are inherent in the SMS for The Italian Forum and may yet be raised in the challenges that lie ahead for this property.

Chapter 6. Content analysis and interviews

The anticommons issues at The Italian Forum, and disputes in the court cases discussed in the literature review and legal analysis (Chapters 2 and 4 respectively) arise from the legal structuring of projects in the strata plan and strata management statements (SMS). While the legal responsibility for preparing these documents sits with developers, the developers' lawyer has a key role in shaping these arrangements (Blandy, Dixon and Dupuis 2006; Bugden 2018; Ploeger and Groetelaers 2014). This chapter explores how this dynamic works.

Twelve SMSs for mixed-use developments in Sydney were analysed and eight professionals involved in structuring of projects and authoring SMSs were interviewed. The SMSs were mainly selected based on the researcher's prior professional knowledge of them as being complex structures projects and each having had more than one issue that had been problematic for the owners. Three of the SMSs were selected to add some diversity to the type of mixed-use development studied to explore if the content of the SMSs for these schemes were any different. The process for the content analysis as set out in Chapter 3 involved discerning seven themes for analysis that emerged from a pilot examination of three SMSs, the legal analysis in Chapter 4, and the issues arising from the case study in Chapter 5. Seven themes emerged from this process:

- authorship roles and responsibilities (to see if any law firms dominate the market and the extent to which conventions have developed on key issues),
- project legal structure (to see if developers have been favoured by irregular titling arrangements and if external parties have been given any special rights or interests),
- developer rights and service contracts (to see if developers have imposed special arrangements in their favour, including related party or conflicted long-term agreements denying owners the right to make their own decisions about managing their property),
- decision making arrangements (to see if there is a bias towards a class or classes of owners),
- cost sharing methods (to see if shared facilities costs have been allocated unfairly),

- Building Management Committee (BMC) control over owners corporations (to see if, consumer protection rights for members of strata schemes have been overridden by the SMSs), and
- scheme termination (to see if any arrangements have been put in place for the inevitable end of useful life of the schemes).

The interviewees were not necessarily authors of the selected SMSs and were not told which projects' SMSs were reviewed. The eight interviews that followed probed the seven themes that had emerged from the content analysis as warranting investigation to better understand the reasoning for the contents of the SMS. Some matters arose from the interviews that required a further review of the SMSs in the iterative way of multi-method research. There were 16 broad questions or topics discussed with the interviewees as follows:

- What is your usual role in mixed-use development projects?
- What are your main responsibilities when performing their role?
- How would you describe your level of involvement?
- What type of input do you have in the design, structuring and authorship of strata management statements?
- What other professions / occupations did you usually interact with in these types of projects?
- How many iterations of a SMS are there usually before it was finalised?
- What is your average legal fee for preparing a SMS?
- How do you determine membership of the BMC?
- What approach do you take to determining voting rights for the different components of a scheme?
- What, if any, limitations do you place on voting rights for those not contributing to the cost of that item?
- Who identifies shared facilities and who determines the shared costs?
- Are there special arrangements that favour some use components?
- Are there special arrangements made for developers intending to hold on to property in the development?
- How should disputes be resolved and who determines that?
- What are the main issues that owners fight about?
- How do you deal with termination and redevelopment issues?

Five strata lawyers were interviewed, all of whom represented a range of developers from publicly listed entities and institutional development investors to large and medium size developers. The strata lawyers are identified as SL1 to SL5. Two development managers were interviewed. Each had undertaken their own mixed-use developments as well as having worked as employees or contractors in a development management role for major developers. The development managers are referred to as DM1 and DM2.

The response to invitations to strata managers to participate in the research was poor. There was only one interview with a strata manager who is referred to as SM1. SM1 worked only with 'high-end developers' and was usually engaged towards the end of construction. Although there was only on one interview with a strata manager, the results of that interview are important because of the pivotal role of strata managers in mixed-use schemes.

6.1 Authorship roles and responsibilities

The investigations about authorship focused on how the development team worked together in preparing the SMS prior to the purchasers settling on their property and becoming bound by the document. The investigations delved into how each of the parties felt about their role and the input of others and the commercial tensions at play that might bear upon the quality of the end document.

6.1.1 The developer's perspective on the role of lawyers and strata managers

The interviews revealed quite a disconnect between development managers and their lawyers about the importance of the lawyers' role in shaping the project.

Each of the strata lawyers interviewed took their instructions from their client's internal development team or project manager and provided the first draft to them for review. Surveyors and engineers were the other professions commonly consulted by the lawyers or the developers after getting the first draft. Architects, urban designers, and project managers were less likely to be consulted.

Some of the lawyers explained that they liked to become involved early in the project design phase because they could add value to the project design by bringing legal issues to the table for early consideration. However, the development managers did not see value in seeking this input. The development managers made clear that they regarded

the lawyers as necessary but did not see real value in what they did and consequently retained the lawyers late in the process. They saw them as scribes rather than creatives. The development managers did not seem to appreciate the complexity of the lawyers' work or the wide autonomy that lawyers had in wording provisions in the SMS that would impact the functioning of the development in the long term. When asked about the role of the lawyer DM1 said:

> I don't hold lawyers in highest of regard. They're a means to an end. They don't add as much value to a project as they think they do.

A comment from DM2 reflected the same type of attitude:

> (Lawyers) come in later once we have resolved all of the major issues then we hand it over to the lawyers to document it accordingly…as opposed to adding a lot of value…

The development managers were not that enamoured with strata managers either: 'strata managers can be good' (DM1); 'we have not been super impressed' (DM2).

The strata manager interviewed did not have much involvement in the content of SMSs. Sometimes SM1 would provide ideas about practical matters to 'the high-end legal firms' engaged by the developers. SM1 was involved 'more in finessing the documents rather than drafting them'.

6.1.2 The lawyer's perspective on the contribution of the developers

Contrary to the development managers' perceptions, the lawyers appreciated the importance of their work and its long-term impact on the projects and successive owners. However, they felt limited in what they could do in some cases because of the lack of insight of the developers and commercial tensions about fees and time to produce the SMS.

The strata lawyers acknowledged the broad discretion they had to decide on the content of the document. Two strata lawyers indicated their clients did not care much about what they put in the documents. For example, SL3 noted 'a lot of the document depends on my drafting wishes and skills at the time.' Another said 'clients [*developers*] are bad at giving instructions. They really don't care too much' (Sl4).

Each of the strata lawyers expressed feelings of responsibility to serve the interests of the developers who were paying their fees, but also to be fair to the unknown and unrepresented purchasers who would live with the documents. For example, one interviewee acknowledged, 'I will say my documents have been developer weighted but I think this is done in a fair way' (SL3). Another interviewee spoke of the challenge of writing these documents for a developer client, but knowing that these documents will govern other parties and will need to change when new issues arise in the future:

> You're not actually negotiating a document or agreement with a counterparty but you're nevertheless trying to establish and create a document that is to be certain enough to provide a framework that is robust and enforceable and clear but also flexible enough that it can stand the test of time… (SL2)

Returning to this point later SL2 pondered, 'But then does the lawyer itself together with the developer almost have this little 'f' fiduciary?' This is a reference to the fiduciary duty owned by developers to unknown purchasers as the creators and promoters of mixed-use schemes. For a developer of a mixed-use scheme the fiduciary duty is a duty not to place itself in a position of conflict or to profit from contracts entered between it and the members of the mixed-use scheme without proper disclosure. The statement by SL2 perhaps reflects the inherent sense of duty lawyers have to their clients because on the case law authorities detailed in the legal analysis in Chapter 4 there is nothing 'little' about the developers' fiduciary duties.

The strata lawyers' view of the importance of their work went beyond awareness of their power to affect others in the long term to include considerations of the complexity of matters they had to address in the documents. A study of the length of the SMSs gave some insight into the complexity of the documents and context for the consideration of the commercial issues affecting the relationship between developer and lawyer. The SMSs ranged in length from 30 pages to 185, with the average length being 87 pages. By comparison, the model by-laws for a simple stand-alone strata scheme under the Management Act is two pages, and the by-laws for a larger complex might normally be 10 to 20 pages.

All the strata lawyers reported downward pressure on fees and increasing pressure to deliver the document fast. The number of iterations of the draft varied from one to 10.

The number of drafts was impacted by the point at which the strata lawyers were involved. Earlier appointments resulted in additional drafts as aspects of the development changed during construction. The mid-range average legal fee for a SMS, excluding other related documents (for example, the Section 88 Instrument and the strata by-laws), was $11,750 (based on estimates from four of the five strata lawyers). There was one outlier who estimated the cost to be at least $50,000 on the basis that 'there was at least 100 hours work in getting it right' (SL5). This estimate was excluded from the calculation of the average cost although both the hourly rate and the time estimate may be correct. Applying a conservative hourly rate of $500 per hour for strata lawyers the average fee would suggest that about three to four working days (six chargeable hours per day) are being spent on each SMS over the course of a project's initial development phase, which might be two to three years. This is not a great deal of time for something as complex as a SMS. It might be that the outlier (SL5) is correct at least in terms of what the work is worth, if not what is being paid.

6.1.3 Conclusions about authorship

The disconnect between developers and lawyers about the value of legal work combined with fee and timing pressures has likely contributed to rather formulaic pro-forma documents in use in the market.

The SMSs analysed spanned 21 years from 1999 to 2020. One firm of lawyers and its successors authored five of the twelve statements (the dominant firm). Each of the other seven statements had different authors. The dominant firm's statements were identical on several issues:

- expert determination of disputes,
- methods for allocating shared facility costs (pre amendments on this issue),
- the terms of the SMS prevailing over owners corporation by-laws in the event of an inconsistency, and
- the absence of termination rights.

Among the dominant firm's statements there were strong similarities on rulemaking powers, developer control rights, capped fees, and maximum terms of service contracts for building management and strata management. These similarities extend across all the SMSs. There is a certain sameness about them despite having been authored by different firms over a relatively long period and relating to projects with diverse uses.

Indeed, there is little to indicate any innovation or fresh thinking about the contents over more than two decades. Of course, the Development Act (2015) is prescriptive about certain matters that must be included in a SMS which explains the sameness to some extent. However, the insights provided by the interviews might indicate other factors at work. The developers' attitude towards the lawyers' role as being somewhat perfunctory might suggest a lack of interest in providing instructions and paying an appropriate fee for something more customised that would perhaps better serve the future.

6.2 Legal structuring of projects

As discussed in Chapter 2, the legal structuring of projects involves choosing what will be on title and what will be common property, how the owners corporations for the strata schemes will be arranged, what will be shared facilities, and where are they best located (Bugden 2018). The purpose of the analysis of this detail was threefold. Firstly, to see if developers were favoured over owners with irregular titling arrangements (as existed for example, with the titling of the piazza at The Italian Forum). Secondly, to determine if any external parties were given rights or interests in the mixed-use schemes, representing a further fragmentation of rights in mixed-use schemes that might impede reassembly. Thirdly, to determine what other factors may be influencing the way projects are structured from a legal perspective. This section begins with a discussion about who is involved in legal structuring of projects and when this happens.

6.2.1 Involvement in legal structuring

The legal structuring of the project is done contemporaneously with the preparation of the SMS and many of the views and findings about legal structuring of projects are consistent with the findings about the authorship of SMSs.

On the question of involvement in legal structuring, the strata lawyers fell into two groups: those involved in, or who liked to be involved in pre-development approval (60%), and those that did not, or stated no preference (40%). Those that preferred to be involved pre-development approval said they were more likely to do so with 'practiced developers' (SL1) and getting involved early could add value to the development's design. However, one interviewee admitted to some 'push back' from developers on the strata lawyer's design contributions that resulted in facilities being duplicated for the sake of avoiding disputes in the longer term (SL1). Another indicated that the contribution to design (for example by advocating for duplicate facilities) was really 'only tweaking', because

essentially a mixed-use development is a compromised development where co-owners are sharing facilities to reduce costs and increase amenity (SL5). As stated previously, the development managers did not favour involving strata lawyers in project structuring.

6.2.2 Irregular titling arrangements favouring developers

Developers and their lawyers, as the guiding minds behind the structuring and governance arrangements for a mixed-use scheme, have the opportunity and the power to title the scheme to advantage the developer, particularly if the developer or its related parties are maintaining an interest in the development. For example, if a developer was retaining an interest in the management of the facilities on a long-term contract awarded to a related party, the developer might cause the title for the reception, facilities management areas, and storage areas to be on title and vest in the developer or a related party rather than the owners. This gives the developer a strategic advantage in negotiating an additional term with the owners when the contracts expire because a competitor cannot access the parts of the site necessary to do this job. This is something that has happened in strata schemes and consumer protection laws have been included in the Management Act to prevent this practice. However, these laws do not apply to mixed-use schemes. Scholars such as Blandy, Dixon and Dupuis (2006), Gibbons (2013), and Johnston (2017) have written about these types of abuse of power by developers as fiduciary agents of the future owners.

Surprisingly, and at odds with the scholarly literature, of the 12 SMSs only one contained anything irregular in the project structuring or unfair additional rights in the SMS. This was the case study project, The Italian Forum. At The Italian Forum, the developer and now its successor in title has title to the piazza and makes no contributions to the shared facilities for that space. By controlling this space as the registered proprietor of a lot in the mixed-use scheme, the developer has denied other owners ultimate control of property that is essential for access and egress to other properties, and which is an integral element affecting the amenity of the entire site. At The Italian Forum, the developer also retained air space development rights, but that aspect of the arrangements does not disadvantage other owners given disclosure of the future development and having the right as individuals to object to the future development.

Despite the apparent lack of developer power abuse in mixed-use schemes, in the absence of laws curbing these practices, developers and their lawyers remain able to disadvantage future owners and in so doing create scope for disagreement.

6.2.3 External party rights and interests

Another potential advantage for developers is the capacity in mixed-use schemes to grant rights to external parties that diminish the traditional rights of property owners.

Three of the SMSs had external parties with interests under the SMS. These included:

- a marine authority as the lessee of a leasehold mixed-use scheme,
- a planning authority retaining rights of approval of architectural and landscaping changes, and
- a public art owner, retaining rights over the way the installation is kept.

Only one of the three SMSs with external parties had a representative on the BMC and voting rights (the marine authority). Its situation is somewhat unique as it is the lessee of a leasehold mixed-use scheme, the only one in the study. Therefore, the voting rights and representation rights seem fair.

Four of the five strata lawyers recalled instances of SMSs giving rights to third parties over owners' property. These included:

- Approval for the renovation or redevelopment of lots reserved to the project delivery entity (SL1),
- No changes to the SMS without the consent of the anchor tenant (SL2),
- Embedded facilities service contracts for electricity supply (SL4), and
- Public authorities with zero expense contribution but final say on upkeep of what would otherwise have been public space under their control (SL5).

As with the investigation into irregular titling patterns favouring developers, there is little evidence of abuse or widespread creation of external party rights, at least in the SMSs reviewed. However, the lawyers' interviews do refer to some cases of external rights which could be problematic for owners, particularly embedded networks, and special arrangements for anchor tenants.

6.2.4 Other influences on legal structuring of projects

Two factors influencing legal structuring arose from the interviews that were not detected in the SMS review: the influence of anchor tenants and the separation of certain facilities among different users.

The was strong agreement by the strata lawyers and the development managers on the influence of anchor tenants (such as large supermarket chains) on the content of the SMS. Most strata lawyers (4/5) spoke of this; for example, SL4 claimed that 'big supermarkets dictate everything'. Others commented that the requirements of anchor tenants were 'first to be considered' (SL1), and 'had a big input at the start of the project' (SL3). DM2 said of supermarket operators, 'you'd have to engage them early because tenants like Coles and a Woolworths have very specific requirements'. DM1 too commented anchor tenants like large supermarket chains have very specific requirements and their own manuals and consultants.

There was one design issue on which both development managers agreed, and that related to keeping users as separate as possible. One of the strata lawyers that did get involved in project structuring agreed with this principle. Garbage bin rooms were highlighted as an issue by both developers: 'I always have two bin rooms. Never let "resi" people and commercial share a bin room' (DM1). While the strata manager interviewed did not become involved in the structuring of the strata titles arrangements nor design issues about where things were located, they agreed that when it came to design and location of shared facilities, keeping owners as separate as possible was the best practice.

6.3 Developer related service contracts

As previously noted, the propensity of developers to abuse their powers of formation of mixed-use developments and strata schemes emerged strongly from the literature review. The literature suggested one way this power was abused was the imposition of long-term management contracts on future owners for which the developer may have received payment or some other benefit (Sherry 2013b; 2017, Johnston 2017;). There is no limitation on the length of these agreements in mixed-use schemes (Sherry 2017). The maximum term of building management contracts for strata schemes under the Management Act is 10 years, and three years for strata management. Therefore, interviewees were asked about the existence of long-term management contracts for

building management and strata management and other special rights or privileges granted to the developer, that might be considered an abuse of the developer's role as a promoter of the mixed-use scheme.

All 12 statements provided for the BMC to enter into building management agreements (some used the term 'facilities manager' which is used interchangeably with building manager). One half of the statements stipulated the maximum term of the contract. Three provided the building management agreement be no more than three years, one provided for a term of no more than five years, one at no more than 10 years, and one of 15 years. None of the statements forced the owners corporations to use the same building manager. None of the contracts were annexed to the statements.

All but one of the statements provided for the BMC to appoint a strata manager to assist them. Four provided for maximum terms of not more than three years. Two contained provisions that the strata manager for the owners corporation had to be the same as the strata manager for the BMC.

If the Management Act is taken as a measure of reasonableness for the protection of consumer rights, the SMSs met that standard for building management contracts, save for one. The same can be said for the length of term of the strata management statements. However, as there were no contracts annexed to the SMSs it is not possible to draw any conclusions about the fairness or otherwise of the other terms and conditions or the consideration, if any, paid to the developer for entering the contracts. Nonetheless, the findings regarding long-term service agreements did not match the scholarly concerns of Sherry (2013a; 2017) and the unhealthy practices of developers in strata schemes detected by Johnston et al (2012) and Johnston (2017).

As to other special privileges and rights for developers in SMSs, the review revealed developers were given rights to continue development and related work in nine of the 12 statements if the works had not been completed at the time of registration of the SMS. The development managers acknowledged that special provisions for the developer to finish the development were often included so that they could finish the master planned develop they had promised.

DM2 agreed and added that they had not seen anything else that favoured a developer unfairly. DM1 expressed caution about arrangements that overtly favoured the developer over others, such as the sale of long-term management contracts:

> People aren't stupid and if you do things or push things it can unwind very quickly.

These comments, like the results of the document analysis, suggest a more ethical approach to the imposition of long-term service contracts and special privileges for developers than might be assumed from the literature on these topics. Generally, where special rights were granted, there seemed to be good reasons. The development managers recognised some downside to irregular arrangements that might be seen to unfairly favour a developer at the expense of owners. However, as there were only two development managers interviewed, and they self-selected for the interviews it may be that they are more likely 'top tier' developers that are more ethical than some and therefore not representative.

6.4 Shared facilities costs

The identification of shared facilities and the allocation of costs for the shared facilities were identified by all strata lawyers and the strata manager as a primary source of dispute in mixed-use developments. However, the development managers thought differently, claiming this was an issue that mainly arose during the sales process and went away once the rationale for sharing the cost was explained to prospective purchasers.

The SMSs were analysed for methods of cost allocation of shared facilities and irregularities that favoured the developer or one class of owner over others. The statements fell into two clear positions: fixed percentage allocations and mixed methods. Seven set out fixed percentage splits for each shared facility; these were all statements authored before the amendment to the Development Act requiring the statements to stipulate method for costs allocation, which applied from 30 November 2016 onwards (Ilkin 2017, p. 229). In four SMSs, the methods for determining each item were separately shown with a mix of methods including area, car park allocation, number of apartments and equal distributions according to anticipated usage. One statement stipulated gross floor area as the basis of determining the costs sharing formula. The review also identified two special arrangements regarding cost sharing. In two of the statements there was provision for some of the users to get the use of shared facilities without making any contribution to shared cost. In another statement (for The Italian Forum)

there was a special levy applicable to only one member. In that case the special levy went to the developer and not to the BMC.

According to SL5, the method for sharing costs was historically determined by lawyers. All strata lawyers agreed that shared facility schedules and cost allocations are schedules which are now done by experts engaged by the developers. One lawyer said this could cost between $10,000 and $12,000 and had seen costs for these schedules up to $35,000 (SL3). This change in practice came about because of amendments to the Development Act in 2015 to require the method of allocation costs to be outlined in the SMS for each shared facility, with a review of the fair and reasonable allocation of these costs required every five years. The lawyers agreed these amendments are working well.

There was no clear preference for how the costs should be allocated on an item-by-item basis. One lawyer said, ‘floor area and replacement values were old methods and were blunt instruments’ (SL1). Another said they provided a guide to the developer and the cost consultants about the various methods that might be used for the different costs items and allowed the developer to do a ‘sense check’ on their use (SL2). One interviewee felt strongly that the main problem causing disputes about shared facilities was the lack of definition in the schedules about what the items described covered (SL5).

The way costs are shared for the shared facilities in mixed-use developments clearly emerged as a key issue from the legal analysis of decided cases. To an extent the issue has been mitigated by the amendments to the Development Act 2015 requiring the method for allocating shared costs to be set out in SMSs and granting the parties a right each five years to review the schedule of shared facilities and the cost allocations. However, errors in the methodology adopted for allocating costs and unfair allocations can remain an issue in the first five years of a mixed-use scheme. These are the formative years of a mixed-use scheme and disputes within the BMC at this time will not be conducive to quality decision-making and good working relationships.

6.5 Decision making arrangements

This line of enquiry examined governance arrangements including the membership of management committees, the allocation of voting rights to members, the types of resolutions required for making decisions, the power to make rules about management processes and procedures, and the methods for determining disputes. These are important issues affecting quality decision-making.

6.5.1 BMC membership

Each of the statements provided for a BMC to deal with 'whole of building issues' as required by the Development Act. The approach to allocation of membership as expressed by the lawyers largely reflected the contents of the SMSs on this issue.

All the strata lawyers and one of the development managers were at one on the issue of membership of the BMC. They all provided for equal membership for each component of the development. No reasons were given for why this was thought to be right. The other developer (DM2) had not given the matter much thought.

However, one of the SMSs provided for four lots of the same type of use i.e., commercial, to each be members of the BMC. This resulted in unequal representation of the commercial owners on the BMC for that development, which contains many residences. This was the only irregularity detected in the formation of the BMCs.

6.5.2 Allocation of voting rights

While most interviewees were at one regarding BMC membership, the same could not be said of how to allocate votes to BMC members. The issue of voting within the BMC unearthed different answers and a degree of uncertainty as to best way to handle this. All the lawyers and the strata manager exhibited deep thinking on this issue. The same was not true of the development managers, who had no fixed views.

The statements showed three bases for allocating voting rights for members of the BMC:

- equal votes for each type of use (e.g., 20 votes for each use),
- proportionate aggregate replacement insurance values for each type of use (e.g., if the residential part was insured for $70M, and the retail part was insured for $30M, the votes on all issues would be 70/30 until such time as the buildings

were revalued for insurance purposes and then they would assume the new proportions), and

- unequal votes where the method of allocating the votes was not disclosed (e.g., 40%, 40%, 20%).

Eight of the statements provide for equal voting rights, two were based on the proportions of the value of the components determined periodically, and two were unequal with no disclosure of the basis for the allocation.

The interviews confirmed the use of these three allocation methods and described one additional way used by the strata lawyers for allocating voting rights: weighted shared facility cost contributions, i.e., votes on each issue are determined by the shared cost contributions to each item the subject of a vote. So, if costs for shared fire services were shared 60% to residential, 30% to offices and 10% to retail, votes on the fire service provider or spending money on that item would be weighted accordingly. If no contribution was made to an item by a member there would be no voting rights on that issue.

Four of the five strata lawyers interviewed favoured either equal voting rights or fixed percentage voting rights (SL1, SL2, SL3 and SL5). These methods were said to leave 'no one party with the whip hand' and 'force collaboration' (SL1). These four lawyers each approached the voting rights issue with a similar philosophy, which took the fundamental role of the BMC as the starting point. In their view, the role of the BMC is to make to decisions about the whole building and therefore, relative contributions to cost and proportionate value are irrelevant. As one interviewee said:

> Votes weighted to cost contribution on each matter is in my opinion misguided. If I only pay 10% of the fire services costs, this does not reflect my interest or reliance on that service. (SL5).

Only one interviewee favoured the weighted shared cost method without specifying the reason (SL4). Opposing this view, SL3 said, 'If it's done on value the residential component will always out vote the others, so what's the point of having a building management committee at all?'

SM1 approached membership of BMCs, voting rights and contributions to shared costs as intertwined issues and referred to old 'SMSs' where all use components had one vote but contributed to expenses in vastly different proportions. SM1 compared these to more recent SMSs which tended to have more elaborate voting arrangements. SM1 described a project where the voting rights on each issue were different and determined by how much each member contributed to the costs of that item. SM1 observed that this made conducting meetings very difficult. However, SM1 believed the 'old way' was problematic for owners and caused disputes between different groups of users. SM1 referred to another project where the residential component was three times the value of the commercial component but the commercial component (the only other component in the development) had equal voting rights. This caused problems when agreeing budgets and striking levies. SM1 thought the way cost sharing is determined in single strata schemes by proportionate valuation worked well but accepted that it was not always the fairest method in a mixed-use development.

An interesting issue arose in interviews with the strata lawyers, that went to the heart of the differences between owners in mixed-use developments. Four of the five lawyers referred to the danger of disputes and poor relationships arising within a BMC when corporate owners appoint employees to be their representatives for non-residential space and they must work with residential owners. The comments were to the effect that a perceived lack of care or reluctance of employee members to take a position on a matter aggravated residential owners, who tended to be more emotionally engaged. One lawyer described the problem 'they [*employees of institutional owners on a BMC*] don't want to or can't make decisions' (SL1). Another said 'if not interested, employees ticking a box are lazy participants [compared to] people with personal connection. Corporates should think carefully about who they nominate as members to BMC' (SL3).

6.5.3 Types of resolutions for BMC decisions

The types of resolutions for a BMC and the application of them to matters for decision were consistent across the interviews and the documents.

All SMSs provide for decisions to be made by three types of resolutions: ordinary, special, and unanimous. Ordinary resolutions were provided for by eight statements and all 12 provided for unanimous resolutions for changes to the SMS including shared facilities cost allocations. However, unanimous did not always mean that a 'yes' vote had to be cast by all entitled to vote. In two statements all parties had to vote yes for there to

be a unanimous decision. In the others a unanimous decision was deemed to be one where no party voted against the motion.

The real significance of this issue in terms of anticommons risk is the way each of the SMSs provided for all decisions of any consequence to be made unanimously. This invariably included making any change to the SMS, including changes about shared facilities and cost contributions. The high bar for these sorts of decisions means that effective dispute resolution procedures are important to resolving disputes constructively and without rancour.

6.5.4 Dispute resolution

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Questions about the most appropriate method of dispute resolution provoked strong opinions; as one interviewee put it, ‘dispute resolution clauses in strata management statements are a disaster area’ (SL5).

All 12 SMSs provided for dispute resolution with a unanimous preference for expert determination over tribunal, arbitration, or the courts. However, four SMSs provided for a right to ultimate court relief but only on matters of law, leaving experts to finally determine all questions of fact in dispute.

The preference for avoiding courts was also evident in the interviews. Most lawyers preferred expert determinations that were final and binding except on matters of law. One preferred the tribunal and another the Supreme Court. However, the minority interviewees on this issue were strongly critical of the expert determination approach. For example, criticisms of expert determinations from SL5 included:

- lack of clarity in the material the experts are to be given,
- uncertainty as to what type of expert should be appointed for different types of disputes,
- uncertainty about the application of natural justice, procedural fairness, and the rules of evidence, and
- confusion about whether the expert’s determinations should be based on legal principles and reasoning or on the expert’s professional opinion and own knowledge.

SM1 regarded the dispute resolution provisions of some SMS as unsatisfactory, preferring court determination rather than tribunal or experts. SM1 described the tribunal method as 'scary' because the outcomes were uncertain and inconsistent.

The findings about dispute resolution identify an important issue not featured in the literature. To purportedly deny property owners the right to judicial determination of their disputes is a serious matter. It means important determinations are left to an expert who, depending on the wording of the statements, may not be bound by legal principles and procedural fairness. This issue might be one where the lawyers' intentions are good - i.e., the avoidance of expensive and time-consuming litigation but the solution (expert determination) is misconceived or poorly executed.

6.6 Building management committee control

This category of factors was concerned with the way the BMC might exercise control over the internal affairs of the strata scheme owners corporations within the mixed-use schemes. The potential for oppression of the strata schemes does not feature in the academic literature as a factor that might impact the functionality and quality of decision making in mixed-use schemes. However, signs of this being an issue for strata schemes became evident from the review of the leading cases on SMSs in Chapter 4. One of the cases, *Walker Corporation Pty Ltd v The Owners -Strata Plan No 61618* [2022] NSWSC 1246 (*Walker's case*), was directly concerned with a provision in the SMS dictating the strata schemes must use the services of the same manager appointed to the BMC.

The following potential levers for oppression or interference in strata scheme decision-making were discovered:

- Ten of the statements provided for architectural and landscaping codes, or the equivalent, with four of these not annexing the code. This means that changes to the lots and common property within the strata schemes are the subject of external intervention.

- To the extent of an inconsistency between the SMSs and the by-laws of owners corporations bound by them, just over half (seven) of the statements provided for the subordination of the strata scheme by-laws.

- Five statements required the owners corporation to consult the BMC before changing their by-laws.

- Eight statements required that the owners corporations must use the same contractors or contractors approved by the BMC.

- Eight statements required the owners corporation to give the BMC a copy of their meeting papers before the meeting and to allow a representative of the BMC to attend the meetings,

- Ten statements provided for the BMC to have a right of veto on alterations to common property of the owners corporations, and

- Ten statements also provided for the BMC to have access to the lots and common property in the strata plans.

It is worth noting that with only one exception, the potential levers for oppression of strata schemes by the BMC outlined above did not arise as an issue in the expert interviews as something that may have an impact on the relationships within the BMC. The one exception was the requirement for the appointment of the same strata managers with two of the strata lawyers acknowledging that this was an issue that was recently ventilated in *Walkers* case.

6.7 Termination Process

The issue of termination of mixed-use developments is of critical importance to this thesis. None of the 12 statements outlined a process for termination. Also, none of the statements provided for termination to be the subject of a special or unanimous resolution. Similarly, the interviews revealed a lack of attention to this issue which scholars like Harris and Gilewicz (2015) have identified as the most important decision in the lifecycle of a property ownership regime like a mixed-use scheme.

At the outset questions to the interviewees about termination of mixed-use strata schemes resulted in a clear division between the development managers and the lawyers. These differences are consistent with the earlier observed differences in attitude to the work of a SMS. The development managers did not know how a scheme might be

terminated for redevelopment. The lawyers had thoughts on the issue, but all agreed it was unchartered territory.

Three of the five lawyers had not seen a SMS deal with termination. One lawyer had seen a clause required by the City of Sydney that mentioned termination but was merely 'an agreement to agree', effectively adding nothing because the parties could always mutually agree on termination and any other issues outside the SMS (SL1). The clause did not provide any process to reach agreement such as that set out in the Development Act for the renewal of single strata schemes. One lawyer had seen a clause in a SMS dealing with termination of a scheme that required the unanimous agreement of all parties (SL2). Again, there was no process or ways set out for dealing with dissenting owners. The other three interviewees had not encountered the matter in SMSs. One interviewee described termination of mixed-use development as 'the elephant in the room' (SL1). Another said: 'It's just a grey, messy black hole that needs our attention (SL2).

By this comment, SL2 invokes the thinking of Heller (1998) about brutal and uneven results when anticommons rear their head in reassembly and redevelopment contests.

6.8 Conclusions about the findings

The findings on the seven issues that are the focus of the analysis and interviews fall into two categories: those where the literature pointed towards the possibility of abuse by developers and their lawyers based on evidence from strata schemes (three issues), and those that had less focus in the literature because they were more related to mixed-use schemes that have received less attention (four issues).

The three issues in the first category are authorship, structuring, and long-term management agreements that favour developers unfairly. The four issues in the second category are shared facility cost allocations, the mechanics of mixed-use decision-making, BMC subversion of strata decision-making, and scheme termination provisions. As a general proposition, there was not as much evidence of developer abuse in these matters, despite what the scholarly work on strata schemes would suggest.

Concerning authorship, the main finding was the development managers' relative indifference to the importance of details in the SMS and the consequential failure to accept the value proposition that the lawyers perceived in their work. The lawyers

acknowledged the ‘power of the pen’ noted by the academics including Blandy, Dixon, and Dupuis (2006), as well as their difficult position owing a duty to their client developer, their lack of instructions, and no negotiator for the future owners. While there was no evidence of overt authorship power abuse to favour developers (save perhaps for the case study property), the findings about authorship may help to explain how some of the more problematic mixed-use property rights arise that constitute the second category outlined above i.e., shared facility costs, mechanics of decision-making, BMC subversion of strata decision-making, and termination processes. These issues might have their genesis in the disconnect between lawyers and their clients, which has led to a lack of opportunity and funding to review these matters with the benefit of decades of operational experience since they were first conceived.

Irregularities stemming from legal structuring of titles and subdivision patterns were the exception rather than the rule. Apart from the case study property, there were no apparent irregularities that unfairly or unconscionably favoured developers. Surprisingly, the same can be said for the third issue, long-term management agreements. The length of long-term management contracts imposed by developers was not significantly out of step with the Management Act for strata schemes. However, the management contracts were not annexed to any of the SMSs and may contain provisions that do unfairly or unconscionably favour the developer. Further, there are no documents available for public analysis that determine how the managers were appointed and if the developer sold the management rights and kept the proceeds (with or without proper disclosure to the future owners).

The academic concerns about developer abuse and conflict, made compellingly by Johnston et al (2012), Sherry (2013a: 2017), and Johnston (2017), were made largely in relation to strata schemes, not mixed-use schemes. The scholars’ concerns are backed by the decided cases about strata schemes and legislative reforms found necessary to curb the practices. This begs the question: why is there little evidence of abuse in mixed-use schemes which is a comparatively unregulated environment? The answer may lie in the calibre of developers and lawyers working on mixed-use developments. There may also be something in the point raised about the early and extensive requirements of sophisticated anchor tenants that might not accept these types of arrangements. Further research on this topic could be helpful. Nevertheless, the potential for opportunistic developer abuse of duties arising from authorship and a lack of consumer protection regulation remains present and as such is a potential anticommons for mixed-use schemes.

The second category of issues are related more to mixed-use schemes. These issues were about decision-making arrangements (including dispute resolution clauses that purport to deny access to the courts), cost sharing for shared facilities, subversion of strata scheme decision making and rights by the BMC, and termination provisions (or the lack thereof). It is on this point that this research has revealed several possible anticommons risks that are unique to mixed-use schemes. Provisions in the SMS like these, with the potential to irritate and disenfranchise decision-makers, can lead to deadlocks and disputes. This was the case in The Italian Forum. These types of provisions all likely flow from the developers' disinterest and the lawyers' drafting freedom. Bugden (2018) and Van Der Merwe (2018) outline ways in which lawyers may get these things wrong. It may be that anticommons have inadvertently arisen in SMSs for mixed-use schemes because of errors of judgement, omissions, and oversights.

This research demonstrates several factors may have contributed to these potential anticommons: developer disinterest, legislative inattention, and price and timing pressure on lawyers. Whatever the reasons, the research has identified a class of mixed-use property rights that give rise to anticommons risks not previously identified byteh literature. The following chapters discuss how these mixed-use property rights might impact on the quality of relationships and decision making of owners within these schemes, including the hardest of all decisions; how to terminate them.

Chapter 7. Discussion

As the forms of apartment ownership in Australia have evolved to include mixed-use schemes, so have the anticommons risks. What began with a single share in a company has grown to include a freehold title, membership of an owners corporation, and rights and responsibilities for adjacent shared property. The consequences of this evolution are significant and affect the way our cities should advance.

7.1 The evolution of apartment ownership

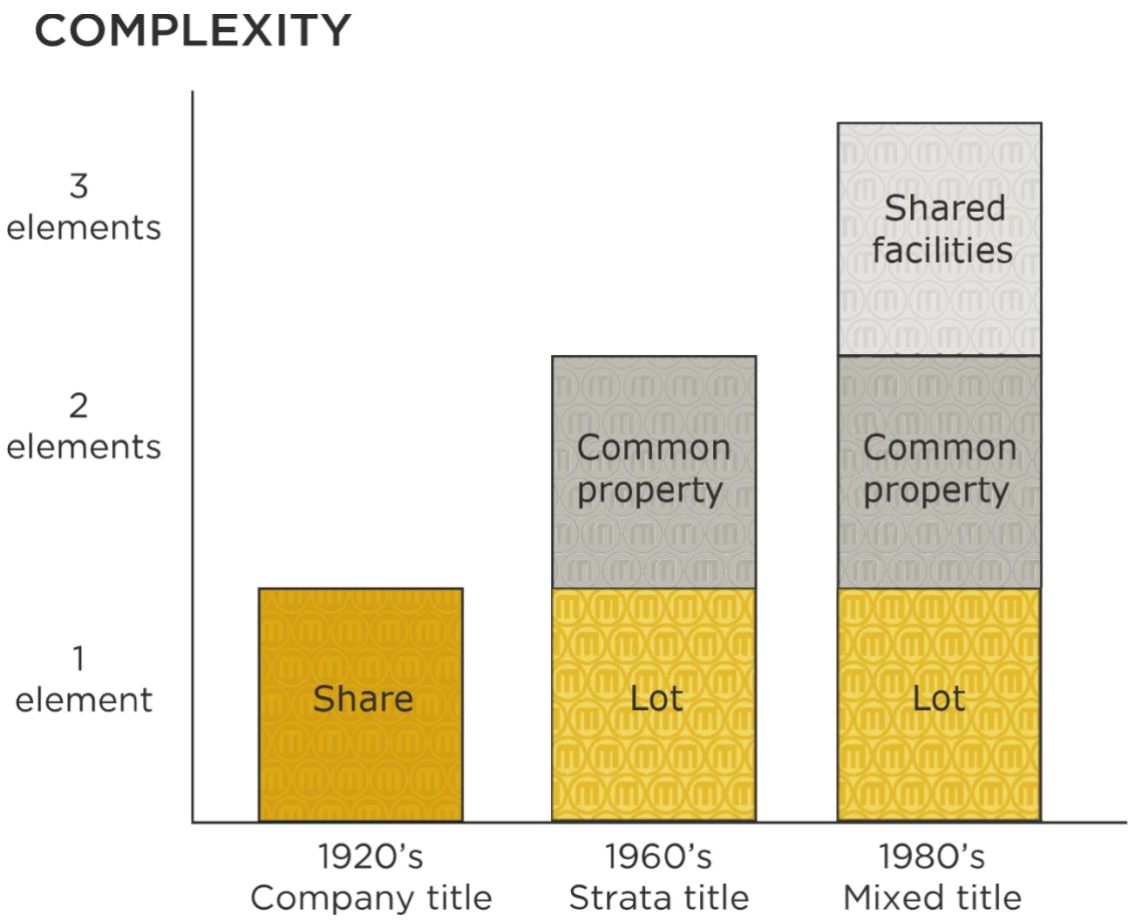
Apartment ownership began in Australia in the 1920's using company title that consisted of one thing: a share in a company. The share entitled you to exclusive use of an apartment in the building owned by the company. Meetings were simple and generally people understood how companies work under a board of directors. While some company title buildings still exist, the titling structure has fallen out of favour with banks, developers, and owners.

With the introduction of strata in the 1960's, apartment ownership became about owning two things; a lot in the strata scheme that was yours alone, and a membership of an owners corporation in which the common property is vested. But the associations operated more like micro governments than more familiar associations, for example, the local golf club or the parents and friends association of the local school. An owners corporation for a strata scheme is more like a micro government in that strata schemes have a constitution (the strata plan), hold elections (for the committee), make laws (by-laws), collect tax (levies), and issue approvals (to do renovations to lots and to keep pets).

By the 1980s with the invention of airspace subdivision, ownership of an apartment in a mixed-use scheme became concerned with three things: a lot in a strata scheme, a membership of the owners corporation for the strata scheme, and a right to the shared facilities owned by adjoining owners in the mixed-use scheme. This has introduced the residential sector to the corporate sector as co-owners and occupiers of property, and forty years later we are beginning to understand the challenges this presents.

It is helpful to conceptualise these differences in the form of ownership as an evolutionary process of apartment ownership as depicted in Fig 6 below.

Fig. 6 The evolution of apartment ownership in Australia



As each new element has been added to apartment ownership, the number and type of relationships among the owners has increased threatening the quality of relationships and decision-making, and the likelihood of a fair and peaceful reassembly when the time comes for renewal. This much becomes evident from the consideration of the differences between strata and mixed-use schemes and the identification of additional property rights and responsibilities peculiar to mixed-use schemes.

7.2 Mixed-use as more evolved and complex strata schemes

Distinguishing mixed-use schemes from strata schemes helps conceptualise property ownership in mixed-use schemes and identifies elements of mixed-use property ownership that are unique to this form of property. Table 4 (Chapter 4.3) identifies no fewer than ten differences between the types of schemes, which are discussed here thematically.

7.2.1 Origins and drivers of strata and mixed-use schemes

The origins and drivers of the two concepts are instructive. Strata schemes originated from the aspirations of developers and lenders responding to market demands for high density living that could be individually financed. This form of title has gained widespread market acceptance with more than 3 million strata lots in Australia valued at over 1.3 trillion dollars (Easthope et al 2023). By comparison, mixed-use schemes are a more difficult undertaking for developers than strata and are seemingly driven more by policy and planning considerations than the development sector's appetite for them.

Planning preferences for mixed-use schemes can be a danger without research and insight into what a community really wants and needs (Anders 2004). What seems right for property today might not be right in the future. The positive covenant for the continued use of the cultural centre and piazza for cultural purposes at The Italian Forum illustrates the point. While not necessarily common (it was the only positive covenant identified in the SMS review), it has had a significant impact. Had the positive covenant not been imposed, different choices could have been made about its future in 2014 when the cultural group that developed the scheme failed, and again more recently when the second cultural group conceded defeat. The 'dead hand' of the positive covenant has already been raised once again in media exchanges about the recent conditional sale of the cultural centre and piazza to a private developer. Both the local mayor and state government member are calling for the original cultural intent of the development to be maintained. They remain committed to the positive covenant despite a near 25-year history of failure by two community groups and a development that is so obviously in need of new life. A misconceived mixed-use development is one thing, but one that is shackled to the past by a statutorily enforceable legal instrument like the positive covenant at The Italian Forum is truly a tragedy of the anticommons. While it exists, there is no blank page for reimagining this development.

7.2.2 Mixing property usage

The mixed-use distinction between the types of schemes affects the laws that apply to a property, the relationships between the different users, and the selection of managers. In terms of property ownership, the mixing of uses triggers different building standards and laws that complicate management, compliance, and insurance for owners of all categories of use. For example, the legal analysis shows that when workplaces and homes are mixed, work health and safety laws apply to parts of the property that are

shared with residential owners that otherwise would not be exposed to this higher standard of care.

When it comes to people and relationships within a mixed-use scheme, the expert interviews highlight the differences between the priorities and engagement of representatives of the different users on the building management committee (BMC). Corporate members that represent institutional owners of mixed-use property might not be as engaged and as concerned by lifestyle factors as residents. Likewise, residents may care less for the practical realities of commerce that affect their corporate co-owners.

Finally, the different uses within a mixed-use development creates problems relating to the selection of managers. Managing commercial property requires different skills to managing residential property. Commercial properties are more likely to be managed by large multinational real estate corporations. Residential properties are more likely to be managed by private owner operators operating a single building or a small group of buildings. These divergent managers operate on different scales, with different resources and culture. If one type of manager does all types of property within the development, there is the potential for at least one group of owners to be disenfranchised. If the roles are split along property usage lines, unclear boundaries between the responsibilities of two types of managers companies is a potential source of conflict and inefficiency.

7.2.3 Property characteristics

The comparison of the two types of schemes highlights a fundamental difference in the nature of the property elements that comprise strata and mixed-use. The third element that defines a mixed-use scheme, shared facilities, means neighbours have mutual rights to use each other's separately owned property. A right of use like this can come from a lease or an easement, but a right to shared facilities in a mixed-use scheme comes with additional rights that are proprietary in nature. A SMS for a mixed-use scheme creates shared facility rights that are rights to decide how and when the shared facilities owned by others are managed, repaired, maintained, replaced, financed, insured, and ultimately decommissioned upon winding up of the mixed-use scheme. A SMS has effect as a statutory agreement under seal binding individual owners in a strata scheme, their owners corporation, and the commercial owners to the covenants the SMS contains (Development Act s 105). Arguably, this gives the owner of a residential lot an actionable

right to bring legal proceedings against, for example, an institutional owner of a supermarket leased to an international operator for 30 years. What this means is yet to be examined by the courts, but it is a live issue. The theories of apartment ownership of Van der Merwe (1994) and before him Barmann include association (i.e., owners corporation) membership as an element of apartment ownership. However, they have not envisaged a separate statutory property right emanating from the SMS potentially entitling an individual to exercise rights in the SMS over their neighbours' land. The possibility remains open that an individual owner in a strata scheme within a mixed-use scheme could block the dissolution of the mixed-use scheme. If there is any doubt about the rights of an individual apartment owner to do this, there can be no doubt about the right of a one or more members of the BMC to do so. We shall return to this later in this chapter.

7.2.4 Decision making arrangements

Heller (1998, 2013) recognises matters that affect quality decision-making as presenting an anticommons risk, just as he does the fundamental right to veto a sale. The differences in the remaining attributes of the two types of schemes summarised in the table in section 4.3 can be grouped together as matters affecting decision-making of strata schemes and the BMC:

There are two decision-making forums, owners corporations for strata schemes, and the BMC for all owners including the strata schemes. For strata schemes, this means two levels of decision-making. Matters on notice before the BMC must be voted upon by the owners corporation for the strata scheme and then again at the BMC. This is inefficient and inflexible. It means that the representatives of the strata schemes, instructed to vote in accordance with the directive of the strata scheme they represent, cannot change their minds at the BMC meeting. Corporate representatives are employed in companies where decisions are made and communicated in a top-down way. Strata schemes work bottom-up with the management committee having relatively limited power with the big decisions being made at a general meeting. The intersection of these different ways of making decisions is problematic.

The instruments that govern the parties' rights and duties to each other are different in form if not in legal effect. By-laws govern strata schemes and SMSs govern mixed-use schemes. Each is a form of delegated law making with statutory effect (Sherry 2017); however, a SMS is a largely a creature of the imagination of the developer and its

lawyers, with little consumer protection oversight compared to the Management Act which applies to strata schemes. For example, the way a developer sets voting rights is determined by law for strata schemes and by the unfettered discretion of the developer in a mixed-use scheme. Again, The Italian Forum assists in understanding how this freedom to create bespoke management arrangements for a mixed-use development sits uncomfortably with the prescriptive nature of the management arrangements for a strata scheme. The developer's decision at The Italian Forum to impose a promotional levy on some members within the commercial strata scheme conflicted with the Management Act requirement in the commercial strata scheme to collect levies strictly in accordance with unit contributions. The result was years of dispute in the tribunal and ultimately, the Supreme Court. Moreover, in the meantime, the non-payment of levies by both warring parties meant important maintenance and repair work was not carried out, potentially contributing to the early decay of the development.

The governance model for each type of scheme is different. Strata schemes are collective decision-making bodies without externalities. A BMC is an unincorporated representative committee making decisions that bind their members and in respect of which external parties can veto decisions. Decision-making in strata schemes is hard enough when all members are at least united by common property ownership. It is reasonable to assume therefore that introducing external parties is likely to change the dynamics completely. Divided interests (or the perception of divided interests) make for difficult meetings and relationships.

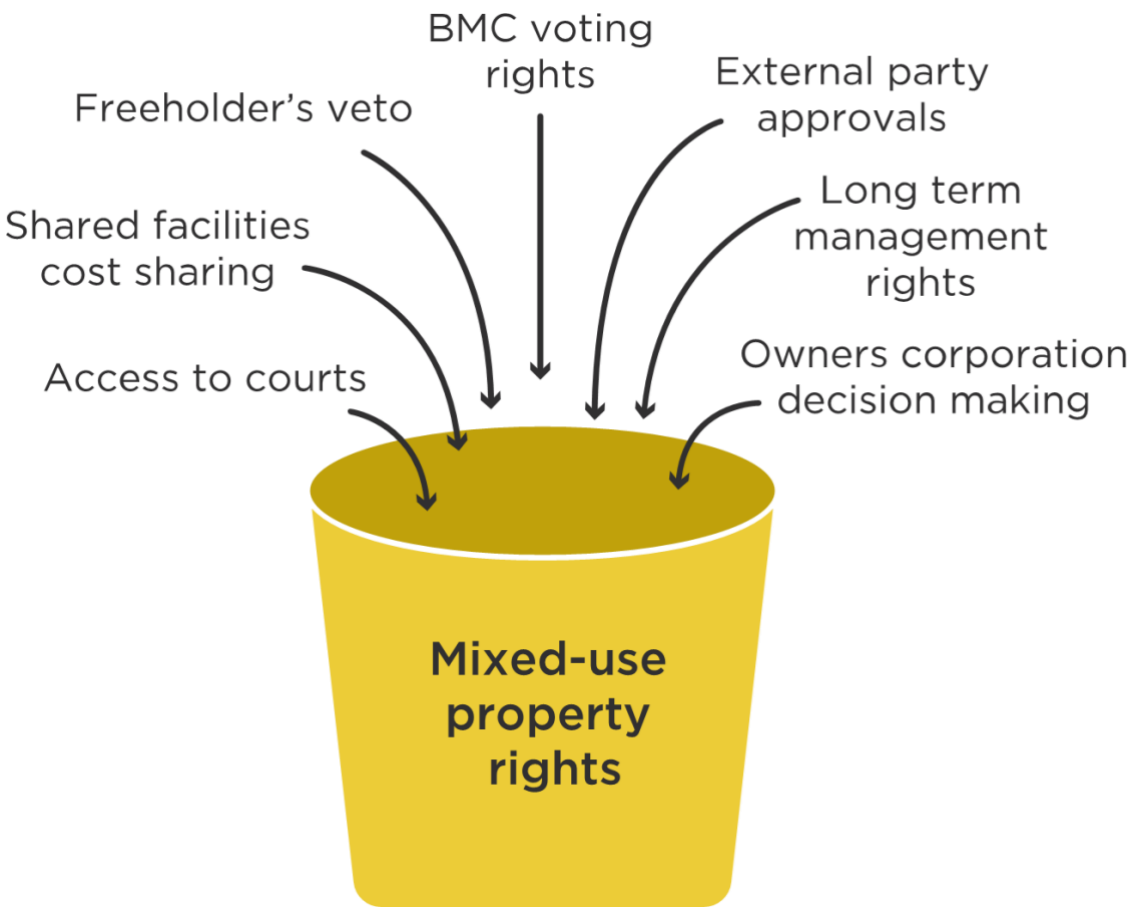
Strata renewal laws apply to freehold strata schemes and not to mixed-use developments or for that matter, leasehold strata schemes. For better or for worse, strata scheme members can now force the sale of their co-owners' property. This right does not apply to a mixed-use scheme. A strata scheme in a mixed-use scheme can be dissolved and sold to another party but not without the agreement of the owners of the other parts of the mixed-use scheme and the co-operation of their financiers that hold mortgages over various parts of the property. Therefore, in mixed-use schemes there remains a way for an owner (including an owners corporation) to hold out and block a redevelopment.

Each of the matters listed above add their own complications to decision-making of owners within a mixed-use development and must be regarded as anticommons inherent in a mixed-use scheme.

7.3 Mixed-use property rights

Mixed-use developers occupy a rare position of power under contemporary property laws. They can create interests in land that do not sit comfortably with legal doctrines developed over many hundreds of years such as the *numerus clausus* principle that seeks to limit the number of recognised property interests that can be created. By these laws, freehold land is limited in the number of ways it can be carved up and controlled by predecessors in title. These doctrines make for a free market in finite land resources without future constraints and obligations on use and ownership. The ability to create a mixed-use scheme displaces these principles. Therefore, it is important to better understand mixed-use property rights and central to this is identifying and defining them. This thesis has identified the mixed-use property rights depicted in Figure 7 below.

Fig. 7 The basket of mixed-use property rights



7.3.1 Freeholder's veto

The power to veto a collective sale of a mixed-use development is inherently derived from the ownership of freehold property within a mixed-use scheme. It is a power held by all owners, including an owners corporation for a strata scheme within the mixed-use development. The power of veto in mixed-use schemes has not been tempered by developers and lawyers exercising their powers as authors of SMSs. These types of provisions have not been incorporated into any of the SMSs that have been reviewed. There are no restrictions in the Development Act that would prevent provisions in a SMS that replicate the strata renewal laws for collective sales in a strata scheme. One lawyer interviewed described termination of mixed-use developments as 'the elephant in the room'. Developers and lawyers with unrestricted powers of authorship could write their own endings for mixed-use development but appear to have chosen not to do so.

7.3.2 External party approvals

Authorship of a SMS provides an opportunity for a developer to create rights for external parties that do not own property within the mixed-use development that allows them to have a role in decision-making or at least influence decisions. Again, there is no restriction on this power in the Development Act. However, despite this wide-ranging power, in the SMSs studied there is only one case where the power has been used. In the SMS for that development, the relevant planning authority retains the right to approve architectural and landscaping standards for the development even after it ceases to be a property owner within the mixed-use scheme. The planning authority in question was a co-developer of mixed-use development and while there is some logic to a planning authority having control over such matters, it is perhaps an excessive intrusion on individual property ownership for it to have granted itself the additional right to be involved in the owners internal decision making about changes to architectural and landscaping standards for the life of the mixed-use scheme. Although this thesis does not demonstrate any widespread use or abuse of this power, without legislative oversight, the potential for further fragmentation and anticommons risk remains live.

7.3.3 Long-term management rights

The unrestricted powers of authorship of a SMS leaves it open for developers to expropriate building and strata management rights. As previously noted, this is not permitted in strata schemes by the Management Act restrictions on developers. The problem with such arrangements, and the reasons for restricting these rights in strata schemes, is that the contracts burden owners with long term liabilities for services they

may not want and creates positions of some power and influence for buildings and strata managers that they can use to affect owners' decisions. While the SMSs studied do not display wanton abuse by developers of this right, Sherry (2017) notes that the legislative framework in which these rights might be created is without the protection that are afforded a lot owner in a standalone strata scheme. Accordingly, the opportunity remains for developers to create new and innovative interests in land that further fragment mixed-use ownership in ways that make it harder to have them redeveloped.

7.3.4 Owners corporation decisions

Owners corporations in mixed-use schemes are not created as equals to their standalone counterparts. The SMSs studied for this thesis all purport to subvert the rights and processes of the strata schemes within the mixed-use schemes in material ways. Most SMSs stated that the provisions of the SMS prevail to the extent of inconsistency with the by-laws of a strata scheme, but this merely reflects the terms of the Development Act. In other cases, the subversion emanates from the SMS and not legislation. For example, in most of the SMSs, architectural and landscaping codes override owners corporations decisions about how their property is kept and give the BMC a right of veto in alterations to the common property of the owners corporation. Also, most of the SMSs dictate that the owners corporations must use the same contractors as the BMC. The recent Court of Appeal decision in *Walker Corporation Pty Ltd v The Owners -Strata Plan No 61618* [2022] NSWSC 1246 discussed earlier demonstrates that a BMC enforcing this right can lead to trouble.

There are other provisions in the SMSs that are more subtle in the way they operate to subvert the operations of a strata scheme in a mixed-use development. Most of the statements require the owners corporations to provide a copy of the meeting papers to the BMC before the meetings are held and provide for a representative of the BMC to have a right to attend the meeting. In situations where the BMC and an owners corporation are at odds this is unfair to strata scheme members and potentially provides the BMC with confidential and commercially sensitive information. In another example of an intrusion of property rights, most of the SMSs allow the BMC access to the lots and common property within the strata scheme. There is no rider on the way these rights are to be exercised (for example, only in cases of emergency or where there is risk to life and property). These provisions enable extraordinary violations of confidentiality and property rights.

7.3.5 BMC Voting rights

The way BMC voting rights are allocated by a SMS create rights for owners that are not necessarily equal or fair. The case study and the other SMSs studied show a variety of ways to approach voting rights that are premised on different philosophical beliefs by the lawyers as authors of these documents. There is an obvious preference by lawyers for voting rights to be equal reflecting the relative equal importance to all owners of the use of shared facilities and services. However, absent prescriptive legislation for this approach, residential users (who will usually pay the largest share of the shared facilities costs) may feel disenfranchised. The Management Act deals with this issue decisively for strata schemes by providing voting rights and costs sharing is to be done by relative valuation at the time the scheme is created. Legislation that settles contentious issues like voting rights, even in an unpopular way, could reduce the scope for conflict and make for better relationships and decision-making.

7.3.6 Shared facilities and cost sharing

The right to shared facilities inherent in mixed-use schemes comes with a responsibility to contribute to the costs of maintaining these facilities even though they are owned by others. As one lawyer said, mixed-use schemes are essentially a compromise. The allocation of the cost contributions for shared facilities has historically been a source of significant dispute, as evidenced by the number of superior court decisions reviewed alleging unfair allocations. The lawyers agreed that the amendments to the Development Act about disclosure of the method for allocating costs and allowing for a review every five years has been effective in reducing conflict. This is an example of the point made in the previous section, that legislation on contentious issues can help reduce the scope for conflict. Ultimately this must help decision-making in properties at risk of anticommons.

7.3.7 Access to courts for dispute resolutions

The right to access the courts to determine a dispute with co-owners of property is comprised in mixed-use developments. The Development Act denies access to the disputes tribunal if any party objects but getting to the court as an alternative is not a given. Most SMSs provide for expert determination as final and binding on the parties with the expert in most cases being a solicitor. Few of the SMSs provide for ultimate access to the courts and even then, they are restricted to questions of law and not fact. This represents a substantial loss for mixed-use property owners. The lawyers'

preference for expert dispute determination was strong and seemed to be based more on a concern about the quality of decisions by the tribunal, than any evidence of experts (solicitors) doing a better job. The Management Act has a strong focus on dispute resolution process for strata schemes that is not mirrored by the Development Act for mixed-use schemes, yet the latter are more complex.

7.4 Mixed-use property reassembly risk

The research undertaken here demonstrates that mixed-use property rights can impede reassembly for collective sales directly by permitting a right of veto on a collective sale, and indirectly by the way they impact quality decision-making within the mixed-use scheme.

The direct impediment to a collective sale of a mixed-use development is of course grounded in freehold property theory. The freedom to sell to whomever one chooses, and on terms one chooses is fundamental to freehold property. In mixed-use developments, this right has been preserved by all those involved in the creation of mixed-use property rights. However, at the same time they have allowed other mixed-use property right to be created that indirectly diminish the traditional rights of freehold property owners to use, manage and sell their property freely. These include external party approvals, long-term management rights, owners corporation subversion, unequal BMC voting rights, unfair shared facility cost allocations, and restricted access to courts for dispute resolution.

The failure to manage anticommons property can be brutal, uneven, and slow for property owners (Heller 1998). There is evidence of this in strata schemes even though they have legislatively assisted termination. This is made clear by the previously discussed cases; *Brenchley -v- The Owners Strata Plan No 80609* [2022] NSWSC 646 where the parties needed extensive assistance from the courts to wind up a deadlocked strata scheme; *Application by The Owners – Strata Plan No 61299* [2019] NSWLEC 111 where dissenting owners funded by a developer with a competing strata renewal proposal saw three parties at risk of incurring legal fees estimated at more than $500,000 each; and The Gardens where negotiations took two years to reach a conclusion (Pearce 2023). Without legislatively assisted termination, mixed-use schemes will fare worse.

The creators and influencers of mixed-use property rights have it within their power to make the end of mixed-used schemes less brutal and more even. They have failed to do this in the following ways:

- Landowners impede collective sales both directly and indirectly. Imposing positive covenants and restrictions on the way land is used after it passes from their hands can have a direct impact. The Italian Forum is an example of a positive covenant restricting the pool of potential purchasers in a collective sale situation. The pool is limited to those that are comfortable taking on the obligation to provide cultural activities and to use the redeveloped property accordingly. Landowners with a co-developer role in mixed-use developments can also create interests that serve their own agenda in the long term and interfere in decision making, for example, the development giving rights to the planning authority to approve alteration to the architectural and landscaping codes for that development.
- Planning authorities miss an opportunity to remedy or prevent anticommons by imposing misconceived and ineffective development approval conditions in a SMS. The City of Sydney did this with a practice of requiring SMS conditions for termination that required unanimity without any process for dealing with hold outs and protection for the vulnerable. The failure to require workable procedures for termination and redevelopment is a remedy for anticommons lost.
- Legislators fail to assist collective sales decision-making by not reducing the threshold for a sale and protecting the rights of dissenting owners forced to sell. Legislators contribute to poor quality decision making by not legislating for important issues that affect decision making such as voting rights, dispute resolution and protecting owners corporation rights and processes, and
- Developers, lawyers, consultants, and anchor tenants by their stipulations, whims and oversights diminish decision-making quality and rights. This includes incorporating provisions in SMSs that impede collective sales decisions and not including other provisions that could assist such decision-making.

Mixed-use property rights have been identified together with their sources to make them visible and understood. They have been determined as anticommons risks. Mixed-use property rights that are additional to anticommons risks in strata schemes exist in all the SMSs examined to varying extents. It remains to consider in the next and final chapter how mixed-use property rights might impede the advancement of our cities.

Chapter 8. Conclusion

Mixed-use developments are the preferred way for enlivening sites and precincts within our cities, yet the literature about them in Australia is limited. This thesis addresses one aspect of this gap: what happens when they are no longer serving their best use and the land upon which they are situated should be repurposed. This is of fundamental importance to a society that is wedded to the urban ideals of higher density and renewal. This concluding chapter uses the answers to the two subsidiary questions discussed in the previous chapter to address the overarching research question of this thesis: how mixed-use property rights might interfere with urban renewal by collective sales.

8.1 The compact city paradox

The dual ideals of compact city planning, higher density, and urban renewal, give rise to something of a paradox. The basic legal technique for delivering higher density, strata title subdivision, has for at least two decades been understood as the natural enemy of urban renewal. The more fragmented sites become with multiple holders of property rights, the harder it becomes to reassemble them. This is the paradox of compact city theory.

One way of addressing risks to the underuse of resources, theorized by Heller (1998), is to legislate the solution. Legislatures worldwide, including New South Wales, have intervened in the decision-making process of strata schemes and reduced the threshold by which the majority can force a minority to sell their homes and investment properties. Some countries have gone further and taken an active role in identifying sites for urban regeneration, assisting owners to undertake studies to assess the likely outcome, negotiating terms for a collective sale, and ultimately directing sales if reasonable offers are not accepted (Kim et al 2013). This contravenes centuries of private law and conventions about the sanctity of freehold property. This compromise of freehold property rights highlights the commitment of urban policy and law makers to ongoing densification and scale. However, despite this strong stand for the reassembly and redevelopment of fragmented strata titled properties, it is as if mixed-use developments do not exist. Both the literature and the legislation do not grapple in any detail with intricacies of mixed-use property rights and what they mean for urban renewal. Neither would it seem have the developers and lawyers as authors of the documents that give life to these schemes.

The time for reckoning with this dilemma has come. The case study featured in this thesis illustrates signs of decay in a mixed-use development that has not yet stood for 25 years. Large sites for mixed-use developments are becoming scarce, while planners maintain a preference for this form of development even if the evidence about their fitness for purpose is limited. Further, the time for thinking about what to do with these developments coincides with emerging neighbourhood activity which sees owners of contiguous land coming together to sell their properties collectively for redevelopment, chasing super profits. Collective sales are happening horizontally in the suburbs, and vertically in strata schemes with the added complexities of the latter being assisted by legislation reducing the threshold for forced sales.

8.2 Evolving ownership regimes

The conceptualisation of mixed-use property as a more evolved form of strata property has assisted in defining mixed-use property rights and their impact on collective sales. In the last one hundred years higher density ownership arrangements have evolved in Australia from company title, with a single element of property ownership (a share in a home unit company) to strata ownership, with two elements (a freehold or leasehold title, and membership of an owners association), to include mixed-use ownership, with three elements (a freehold or leasehold title, membership of an owners association, and shared facilities with other members of the building management committee for the mixed-use scheme). The evolution of strata to include mixed-use forms of property ownership has increased decision-making complexity in two ways; firstly, by increasing the number of decision makers involved, and secondly by enlarging the scope and process for decision making. As to the increased number of decision makers involved, the case study property illustrates the point where some 365 decision makers have been identified as being involved in a decision to make a collective sale of a 230-lot mixed-use scheme. The additional complexity of mixed-use schemes is evident from the comparison made in this thesis of the two most recent forms of ownership. However, it is the strata form rather than the mixed-use (part strata) form of ownership that has had more attention and is therefore better understood.

Since the inception of strata titles 60 years ago, there has been considerable judicial, academic, and legislative focus on strata management and development issues. The superior courts, for example, have helped define the limitations on the powers of owners corporations the relatively wide range of powers to create private property rights in the

form of by-laws and the fiduciary duties of a developer to account for the undisclosed profits made on the sale of long-term management rights. Academics cited in this thesis have made a substantial contribution to understating strata issues particularly over the last 20 years.

Strata academics and lawyers have helped with such matters as strata title governance, the nature of strata title property rights, by-law making powers, developer conflicts of interest, strata renewal and collective sales. They have also identified anticommons risks in strata in the form of the power of veto of any one owner, and in by-laws and long-term management agreements creating private property rights and denying others, 'locked-in-design', apathy, absenteeism, and inadequate spending of reserve funds.

The New South Wales legislature has helped the understanding of strata as well by focusing on the areas of reform, significantly, the strata renewal laws made 2015 for freehold strata schemes including collective sales. Legislatively, the strata management laws of New south Wales (NSW) are now in their fourth iteration, with the fifth currently under consideration.

The combined result of this judicial, academic, and legislative focus on strata schemes is a well-accepted form of tenure that has delivered higher density to our cities and is expected to continue doing so. However, four decades on from passing laws in NSW that made mixed-use (part strata) developments easier for developers and lawyers to structure, this form of property ownership has escaped the same extent of judicial, academic, and legislative attention that strata schemes have received. The judicial considerations of the superior courts concerning mixed-use (part strata) property have, until the recent decision in *Walker's* case (2022), been confined to cases about cost sharing arrangements Academically, scholars have written about the legal aspects of SMSs, but less scholarly work has been done on the efficacy and challenges presented by mixed-use developments. Similarly, the legislative reform agenda for mixed-use (part strata) schemes has been modest by comparison to strata schemes. The owners and users of mixed-use (part strata) developments are no less deserving of such attention. Indeed, based on the findings of this thesis, as a more evolved and complex form of property ownership, mixed-use developments need more attention.

8.3 Making mixed-use property anticommons visible

By employing mixed methods this thesis has identified seven mixed-use property rights that represent potential anticommons risks for this form of property ownership. These are additional to the anticommons rights inherent in strata schemes that have been identified previously by Sherry (2011) and West and Webber (2017).

8.3.1 Stratum lot right of veto

The classic form of anticommons, the right to veto a sale of co-owned property, remains the right of a mixed-use stratum lot property owner. The right is held by strata schemes that are members of mixed-use (part strata) scheme and individual owners of other stratum lots in mixed-use scheme property. This right has not been interfered with by the legislature as it has been for strata schemes. The strata renewal laws in Part 10 of the Development Act do not apply to part strata parcels and do not provide for the necessary orders to be made to force the sale of stratum lot owners in a mixed-use scheme that do not want to participate in a collective sale. The analysis of the SMSs does not show any evidence of developers exercising their authorship rights to modify this right by including any process for terminations of mixed-use schemes. The power dynamic held by lawyers as authors of documents for the management of co-owned property is according to the lawyers interviewed real and well understood by them, if not their clients. However, the content analysis on this issue failed to identify any use of this power dynamic to address this most obvious and direct risk of anticommons in a mixed-use scheme.

8.3.2 External party approvals

The right to grant external parties approval rights in mixed-use schemes when creating the legal structure of a mixed-use scheme has been identified as a mixed-use property right. This risks irregular titling arrangements with external party involvement in future decision making, and preferences for anchor tenants. Save for the case study property, there is no evidence in this study of the overt abuse of this right by developers or their lawyers. However, absent legislative restrictions prohibiting or regulating the creation of such rights this remains a potential anticommons risk.

8.3.3 Long-term management rights

The right to impose developer related contracts and arrangements can create mixed-use property rights. This potentially has an adverse effect on mixed-use property

relationships because of the lack of legislative oversight given to these arrangements compared to those in strata schemes. However, the investigations into the existence of these arrangements on the face of the SMSs studied did not bear witness to the concerns expressed by Sherry (2017) and Johnston (2017) about the developers abuse of powers in this way in relations to strata schemes. This is not to say those authors' concerns are not well founded. There were no documents available to enable a consideration of terms and conditions of these agreements and the dealings between the developers and the ultimate holders of these rights.

8.3.4 Owners corporation decision making rights

The rights of a BMC to be concerned with, and possibly subvert, decision making of strata scheme that are members of the BMC is a mixed-use property right that has been identified as an anticommons risk. These controlling powers are expressed in several ways: some purport to be prohibitive, some are regulative, others are directive and others still, consultative. One of the alleged directive rights, the right of the BMC to dictate which strata manager must be retained by the strata scheme, has recently been ruled invalid (Walker's case 2022).

8.3.5 Shared facility costs

The right to allocate contributions to shared facility costs is a mixed-use property right that has deep ideological roots. This issue has challenged lawyers and has led to most of the superior court decisions about mixed-use schemes. The method of sharing costs divides thinking of those responsible for authoring SMS's. The alternative methods include relative property value, number of users, the occupation of space of the users, or the importance of use and access to the respective users. The issue is intertwined with the allocation of voting rights for BMC decision making with some thinking one's decision-making rights about a shared facility should be aligned with one's responsibility for the costs related to that facility. The consensus of the lawyers interviewed is that different methods of costs sharing should be applied to different items as appropriate, but the key issue is disclosure of the method of determining the allocation which is now legislatively prescribed as a requirement of the SMS.

8.3.6 BMC voting rights

The allocation of voting rights on the BMC is related to the previous issue about the allocation of costs for shared facilities. Unlike shared costs, there is no legislative

guidance in the Development Act about how BMC voting rights should be allocated. As to the relationship of this issue to voting rights on the BMC, there was a different consensus of lawyers interviewed. Most preferred voting rights be equal so that no group of users had the upper hand in negotiations. Legislation reform on this topic alone could save many mixed-use property owners from falling into disputation about relative rights.

8.3.7 Access to the courts

This study has found mixed-use property rights include the right to determine decision-making processes in a SMS. These processes include membership, voting allocations, types of resolutions required for various decisions, and the dispute resolution methods available to the parties. There was a degree of sameness associated with the SMSs on these issues. Of concern is the approach taken to dispute resolution with most lawyers favouring a fetter in the right to access the courts to seek final resolution. This is as concerning as the denial of access to the courts. The alternative prescribed by most lawyers, is that the dispute be determined by experts (mainly lawyers), that need have no regard to the laws of evidence or procedural fairness. This may explain the lack of cases to make it to the superior courts on mixed-use property rights. It might also be a festering sore in the myriad of relationships that exist in mixed-use property.

8.4 Impeding collective sales

The seven mixed-use property rights discussed above risk impeding collective sales directly and indirectly. Of course, the first of the rights identified above, the stratum lot holders power of veto of a collective sale in a mixed-use (part strata) scheme, is the most obvious and direct of the possible anticommons. In Heller's (2013) view, as a more direct risk, the power of veto should be the easiest to fix, as of course it has been to an extent in relation to collective sales of strata schemes. One way is to do for mixed-use schemes what the NSW State Government (and other legislatures nationally and internationally) have done for strata schemes, by providing a framework for a collective sale including reduced thresholds to stop the hold outs. There are other ways too, where the state might create authorities and processes to target and assist, and in some cases force, groups of owners to undertake renewal. This is a topic that future researchers may take up.

The remaining six mixed-use property risks that have been identified above are indirect impediments that affect the quality of decision-making in mixed-use developments. They are harder to see, and therefore harder to fix. This research has made this category of

anticommons risks in mixed-use property visible. To fix them entirely is nigh on impossible. People with different property interests will always disagree. However, the scope for them to become anticommons risks impeding the renewal of mixed-use property developments can be reduced substantially by thoughtful legislative amendments that reign in the freedom and powers of developers and their lawyers when authoring SMSs. The spectrum for state intervention in anticommons property ranges from reducing collective sales decision-making thresholds (for example, strata schemes in New South Wales) to compulsory resumption by the state. Between these extremes lie various degrees of state-based intervention and assistance to owners grappling with this problem. The experience of property owners and professionals in Singapore is likely to be edifying as that country has a more active strata renewal market than most because of its density and limited land resources. Countries that have experienced natural disasters and have been forced to deal with reassembly and redevelopment of high density multi-owned properties would also be useful inclusions in further research (for example, Japan, South Korea, and New Zealand). Future research might be directed to assessing the relative success of these options.

8.5 Research limitations and further research

This research is of course not without its limitations. Like all qualitative research, the findings cannot be generalised. As exploratory research, the findings should be critically evaluated by further research including with owners of mixed-use property to see if the risks identified are in fact causing harm and, if so, the extent to which they are impeding collective sales.

In undertaking any such further research, as well as interviewing owners, a broader panel of strata lawyers, development managers, and strata managers would benefit the findings. While the number of strata lawyers interviewed allowed for a diversity of views to emerge, this was less the case with the development managers and the single strata manager who agreed to participate.

A detailed review of the experience of other jurisdictions in Australia and internationally has been beyond the scope of this thesis and would assist evaluate the findings. There will of course be lessons to be learnt from other jurisdictions with mixed-use developments about how they structure mixed-use properties and how they reassemble them. On the specific issues addressed by this thesis, the termination of mixed-use schemes, further research about the experiences of strata owners and occupiers and

the observations of strata managers about the decision-making processes within mixed-use schemes would be helpful. The findings of this research about mixed-use property rights and how they might impede collective sales will provide a useful foundation for such research.

8.6 Towards better ends

From the empty shops in Moscow observed by Heller (1998) to the empty shops and restaurants of The Italian Forum, Leichardt, anticommons risks have evolved and become harder to see. At the same time the built form in which they exist has evolved and become hard to miss. Addressing anticommons in mixed-use schemes is no easy business for legislators. The heavy-handed interventions that may have addressed the anticommons problems of residential strata schemes will not sit easily with big business now occupying mixed-use developments. Legislators will need courage to intervene. To fail may mean that the icons of contemporary urbanism risk becoming ruins.

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