

Launch of
“Strata Title Property Rights –
Private governance of multi-owned properties”
by Cathy Sherry

University of New South Wales
2 August 2017

Mark Leeming¹

Everyone is interested in architecture. Perhaps the best illustration of this is the runaway success of Kevin McCloud’s “Grand Designs” television shows. Putting to one side the allure of McCloud himself, that success is in part a testament to the basic urge to build one’s own home, something which is never going to happen for the overwhelming majority of Australians. And even for those who merely end up *owning* their own home, increasingly that home will be a lot within a strata scheme or community title. There have been more than 1 million people living in Sydney in such schemes since 2011, and both the number and the proportion are only going to increase. Walking to this launch from the closest railway station this evening well illustrates the phenomenon. I passed a very rare single storey sandstone 19th century terrace a couple of minutes from Green Square, next to rows of late Victorian and early twentieth century two storey terraces. But then there were blocks of modern high density towers, before, after passing under Southern Cross Drive, one sees examples of the very worst of the 1960s and 70s three storey walk-ups, products of the legislation the subject of this book.

One of the things which the photographs in this delightful book (yes, photographs in a law book!) convey is the changing architecture of flats and apartments, connected with legislative changes. There is, in the case of planning law and laws governing communal living, a very close link between the legislative regime and the lived-in character of the urban environment.

¹ Judge of Appeal, Supreme Court of New South Wales.

Some people here might perhaps think that the legislative history of strata and community title legislation is a little dry. I hope it will not take long to demonstrate the inaccuracy of that view. In fact, it is an important part of the history of Sydney over the last six decades.

Some here may be familiar with that mainstay of junior barrister work in the 1950s and 1960s: technical arguments under the *Landlord and Tenant (Amendment) Act 1948*. But until reading Cathy's book, I did not know that s 62(5)(m) was regarded as a loophole – much like a demolition clause in a commercial lease – which enabled landlords to outflank the protection given to their tenants, if an owner needed to demolish and reconstruct the building. Cathy explains the small revolution of company title reconstructions, which were broadly borne of a desire to evict protected tenants, leading to what was described as an “intensive period of housing conflict” close to warfare in the 1950s. There is a fascinating link too with the predominantly company title buildings which were erected – which, because banks refused to accept shares as security for mortgage finance, were mostly built for the affluent in affluent suburbs.

That was the backdrop to the enactment of the *Conveyancing (Strata Titles) Act 1961* itself, which has enormously changed the character of Sydney. It is not only the name of that legislation which is bizarre (the Act has precious little to do with conveyancing, and that word has, happily, been dropped). That Act has a truly remarkable feature – it was drafted by and paid for by property developers, after almost a decade of inaction within government. None of that is revealed in Justice Macfarlan's foreword to that classic work published by the Law Book Company in 1962: “Strata Titles – a Handbook Comprising Annotations and Practice Notes on the Conveyancing (Strata Titles) Act 1961”, although there is a cryptic hint in the acknowledgement given to an inhouse lawyer of the Lend Lease Corporation.

But there was no secret about this. The Minister when introducing the bill said in Parliament:²

“Some months ago, the managing director of Civil and Civic Contractors Pty Ltd, Mr G J Dusseldorp, consulted the Attorney-General and Minister of Justice with reference to the setting up of the legal committee ... My colleague, in recognising the complete interdependence of both legal and commercial interest in solving the many problems which had to be overcome, was firmly convinced that legislation of

² NSW Parliamentary Debates, Legislative Assembly, 26 November 1959, p 2396.

the nature involved could find popular acceptance only if it emanated from a committee such as Mr Dusseldorp envisaged.”

The committee was the “Property Law Revision Committee”, chaired by Mr B P Macfarlan QC, the author the foreword of the 1962 book, and a very distinguished judge.

The conservative opposition warmed to the bill. Indeed, the member for Vaucluse said:³

“I do not want to be unduly critical, but this bill is not the brain-child of the Government. Civil and Civic Contractors Proprietary Limited paid a substantial fee to a lawyer who, after spending a great deal of time, produced the first draft of this measure. It is most important that the public should recognise this and that we should pay a tribute to those who initiated a process which, though lengthy, has produced this good result.”

Now please do not think that property developers were merely involved in *drafting* the legislation. After the bill was first read, debate was adjourned for more than a year, during which time it was said that “thousands of letters were received and each was considered by the legal committee, which acted not only as a drafting committee, but also as a committee considering the objections”.⁴ One wonders how dispassionately the lawyers retained by Mr Dusseldorp formulated their responses!

It is worth noting that the influence of the New South Wales legislation has been immense, and not merely throughout Australia. For example, the quotation cited above is from a detailed commentary in the 1964 volume of the South African Law Journal, and it seems that that jurisdiction substantially copied the New South Wales example.

Lend Lease was founded at around this time, and it of course is one of Australia’s most successful and well regarded construction companies. And Dusseldorp’s granddaughter is almost as familiar to the television screen as Kevin McCloud. As Janet King, Marta Dusseldorp was watched avidly, at least in my household, because my newborn nephew appeared as one of Janet King’s two twin children in the last episode of “Crownies”. Although the research underlying this book is painstaking and exacting, I believe that the

³ NSW Parliamentary Debates, Legislative Assembly, 17 November 1960, pp 2113-4.

⁴ H W Birch, “A Study of the Conveyancing (Strata Titles) Act 1961 (New South Wales) (1964) *South African Law Journal* 490 at 490.

author was unaware of that very close connection between me and the property developer behind the seminal strata titles legislation six decades ago. You will have to ask her whether she should have suggested a different person to launch her book had she known.

A touch of realism was injected into the parliamentary debates by the Member for Wollongong-Kembla:⁵

“[L]et it also be remembered that obviously groups of contractors intend to profit from the expenditure on public utilities of many year’s standing in some of the inner suburbs of Sydney. These people are not in business for the good of their health. Frankly, I should like to know the special interest of Mr Dusseldorp in this matter. His motives might be quite laudable, but I should like to know precisely what they are.”

That question was never answered. It brings to mind the evidence marshalled in *McCloy v New South Wales* as to whether the legislative ban upon political donations by property developers was a measure which was reasonably appropriate and adapted to advance the legitimate object of reducing the risk of undue or corrupt influence in property decisions.⁶ Rather than returning to the 1950s and 60s, the State focussed merely on eight adverse reports published by ICAC since 1990 concerning corruption in land development.⁷ It is a pity Cathy’s book was not published a year or so earlier.

But seriously, it is easy to be lightheartedly sceptical of the role of property developers, without appreciating that they, large and small, have a role to play in the vitally important issue of the debate on property and planning law. It is one thing to be concerned about their involvement in decisions concerning particular developments or zoning decisions. It is another to appreciate that as the structures erected four and five or more decades ago age and decay, there is an important question (it is in a sense the modern equivalent to s 62(5)(m) of the *Landlord and Tenant (Amendment) Act*) as to the circumstances in which those structures may be acquired and redeveloped.⁸

Let me try to illustrate how and why the book is provocative and makes the reader think.

⁵ NSW Parliamentary Debates, Legislative Assembly, 1 December 1959, pp 2472.

⁶ (2015) 257 CLR 178; [2015] HCA 34.

⁷ See the summary in 257 CLR at 183-184 and see the judgment at [50]-[51] and [234].

⁸ See the amendments introduced in 2015 to “required level of support” and “strata renewal plan” in the *Strata Schemes Development Act 2015* (NSW).

Cathy observes that English and Australian law insisted, since at least the mid nineteenth century, that only negative covenants were enforceable against successors in title, while the law in the United States took a wider view. The consequence was a century of Home Owner Associations making enforceable covenants, including most famously covenants insisting on racial segregation, which seem still to exist today, although the Supreme Court ruled in 1964 that their *enforcement* was contrary to the 14th Amendment: *Shelley v Kraemer* (one of Thurgood Marshall's successes).⁹ Americans still live with the consequences today. *Shelley* was brought in relation to a "people of the Caucasian race only" covenant on Labadie Avenue in inner city St Louis, Missouri – about 3 miles from Ferguson.

Happily, the Australian experience is much less extreme. The book asks the question: what is the difference between an obligation imposed by a majority of co-owners of a communal dwelling not to hang your washing on the your balcony, and an obligation not to display a political advertisement on your balcony?

"What right does the body corporate have to protect the visual facade of the collectively owned building? What right does the body corporate have to regulate activity inside an owner's privately owned lot? If it has such a right, does it extend to curbing the expression of political opinion? Even if someone has apparently bargained away their freedom to post signs in their home by purchasing with notice of the ban on signs, should we enforce the bargain? Would it matter if the lot was in a 12-lot strata scheme or in a 1,000 lot community scheme which was effectively an entire suburb?"¹⁰

Those questions reflect the major focus of this book, which is when and how should private citizens, acting self-interestedly, be permitted to make enforceable rules binding property owned by those in the same building or community scheme? It is not clear that the predominantly one-size-fits-all regulatory approach is best. Cathy also draws attention to the variety of ways in which the by-law making power is something of a hybrid between private property rights and public law rights. Is a by-law of the same nature as delegated legislation, being an instrument authorised to be made under the strata titles legislation? Or is it more like a "statutory contract" like the constitution of a company which is given (by

⁹ 334 US 1 (1964).

¹⁰ Page 65.

dint of s 140 of the Corporations Act) contractual force binding the fluctuating body of members?

Cathy explains that, as it turns out, this basic question has turned out to be a hard one. The question was considered by the Court of Appeal in 2007, although it was not necessary to decide it.¹¹ There may come a case where the difference matters, not least because there are different principles of construction applicable to contract and statute, and (at least arguably) different materials available to a court to perform that task.

Finally, I should note that the book does not merely raise important theoretical questions. Cathy observes that the growth in apartment living, including by families, has very important public health consequences. For example, doctors at Westmead Children's Hospital noticed a spike in children injured in falls from windows and balconies after 2007. So did doctors at other paediatric hospitals. That led to the establishment of a working party, an awareness campaign, and ultimately legal reform, compelling retrofitting of locks to all windows which are more than 3 metres from the ground: see especially the *Strata Schemes Management Amendment (Child Window Safety Devices) Act 2013* (NSW). The modesty of the author is such that it is necessary to read note 111 on page 226 to see that she personally wrote the provisions which became law in this State. This is an example of law reform that truly saves lives, although Cathy makes the important point that this reform only goes so far: there has also been a large increase in falls of children from balconies, but the amendment only applies to windows, so that protection of balconies is left to – as you will by now have guessed – by-laws.

Like good architecture, the book is well designed. Like the best law books, it is designed to be read. It is slim enough to take home to read on the weekend, and provocative and engaging enough to mean that dipping into a chapter is likely to lead to more.

In short, this is a terrific book. I urge you to read it. I declare it well and truly launched.

Mark Leeming

¹¹ *The Owners of Strata Plan No 3397 v Tate* (2007) 70 NSWLR 344; [2007] NSWCA 344.