THE UNIVERSITY
OF
NEW SOUTH
WALES

FACULTY OF LAW

2 December 2016

Proposed Medium Density Housing Code

Submission

I am an Associate Professor in the Faculty of Law, UNSW, and my area of expertise is strata and community title. I am the author of *Strata Title Property Rights: Private governance of multi-owned properties* (Routledge UK, 2016), as well as multiple academic articles, (http://www.law.unsw.edu.au/profile/cathy-sherry/publications). I am an Academic Fellow of the Australian College of Community Association Lawyers (ACCAL). The following submission is based on my strata law research.

1. First, the government should be congratulated on this initiative. It is extremely important and much needed. Trying to solve Sydney's density problem solely with the construction of large-scale high rise buildings is a mistake. Large-scale high rise buildings are extremely expensive and complex to run and to maintain. The task of doing so is beyond the expertise of most lay people who own those apartments. As a result, they are forced to rely on the assistance of professional managers, with mixed results. Even with good professional assistance, it is inevitable that the ownership and occupation of a single building by multiple, diverse people will lead to dispute. While policies of urban consolidation are essential for Sydney, at no point in the process of pursuing these policies has any government considered or calculated the costs – monetary and social – of strata disputes.

2. Medium density housing avoids many of these problems. Medium density strata schemes are able to be managed by lay people, often without having to pay for professional assistance. They are of a size and scale that people can maintain on their own.

3. However, dispute in medium or small strata schemes is as inevitable as dispute in large strata schemes. As a result, strata and community title should be discouraged whenever possible. As the proposed policy acknowledges, medium density development is frequently strata title when it does not need to be. If there is no commonly used property, there is no need to incorporate the entire edifice and complexity of strata title.

4. I would encourage the government to go further in its efforts to actively discourage strata and community title. That is, common property should be discouraged whenever possible. Developers often include common facilities to aid marketing, for example by including 'exclusive resort-style facilities' or green utilities. Architects and planners are often in favour of common property and facilities because they can increase amenity. Councils favour common property because it can allow them to avoid infrastructure costs (eg roads, sewers, pavements), not just initially, but in perpetuity. However, developers, architects, planners and councils do not need to worry about the long-term management of that common property and the purchasers who do, frequently do not realise that 'exclusive' simply means, 'you own it, you pay for it and if you cannot agree about it, you are going to fight over it'. Common property and facilities should be included only when strictly necessary, and developers, architects, planners and councils must have a clear understanding of its long-term social and legal ramifications.

5. In addition to creating common property, strata and community title automatically create private governing bodies made up of all owners (owners corporations, neighbourhood, precinct and community associations), as well as private by-laws and management statements. These give ordinary citizens the power to write laws for their neighbours' properties and lives. Most people will wield this power benignly, but not

all. Some will do so foolishly, ignorantly and even vindictively. Reflecting on the extensive and uncritical development of private common interest communities (our strata and community title) in the post-War period in the United States, Professor Evan McKenzie writes:

> '[one] point cannot be overemphasized: the entire institution of common interest housing rests on the volunteer directors, yet they are unpaid, untrained, often unqualified, and almost entirely unsupported by the governments whose work they are often doing', (McKenzie, *Beyond Privatopia: Rethinking Private Residential Government*, Urban Institute Press, 2011, p14).

Professor McKenzie goes on to highlight the danger of investing private citizens with governing power:

> The most basic principle of liberal democratic and constitutional government is the requirement that it must include enforceable limits on the power of government … Liberal democrats of the Founders' era believed that people cannot be trusted with unlimited power, because we are naturally selfish creatures and our emotions override our intellect. We are easily convinced that, by an amazing coincidence, the very course of action that suits our own self-interest just happens to be the morally correct and wise rule for the entire society, (McKenzie, *Beyond Privatopia: Rethinking Private Residential Government*, Urban Institute Press, 2011, p114).

The problems with lay governance, highlighted by Professor McKenzie, are already clearly and repeatedly visible in strata schemes and strata litigation in New South Wales.

Very high density properties need by-laws to ensure that people do not unreasonably disturb each other; medium density properties do not. Millions of Sydneysiders live in medium density terraces and semi-detached houses, sharing common walls and rooves, and they have no ability to regulate what their neighbours do. There is minimal dispute in relation to terrace housing, and ordinary property law (cross easements for support of common walls, nuisance) and public law (eg the *Companion Animals Act 1998* (NSW), *Protection of the Environment Operations Act 1997* (NSW)), is more than adequate to address disputes when they do arise.

The problem with strata by-laws and community management statements is that if you give people the power to control what others do, they will start to worry about what others do. For

example, in an ordinary residential subdivision, there is nothing that residents can do about neighbours' children bouncing balls, playing chasing or yelling during the day and so most people simply accept it as a normal and healthy part of living in a community. In strata and community schemes, by-laws can be written to restrict or ban children playing on any common property (not just common property that is dangerous), and as a result, some residents cannot resist the urge to wield that power (eg see *The Owners of 111 The Broadview Landsdale – Survey Strata Plan 38894 v Colavecchio* [2004] WASTR 15). The same point can be made about the colour of people's blinds, the weight of their pets, the plants in their gardens, the style of their mailbox…..the list is unlimited. All of these things and more can be regulated in strata and community schemes, often for questionable gain, and at the expensive of costly, disruptive and distressing dispute. Without the ability to regulate in the first place, that is, withhout strata by-laws or community management statements, these disputes would simply not arise.

6. Non-strata title subdivision, along with easements (cross easements for support of party walls, easements over collectively used driveways etc), can meet the needs of most medium density subdivision. Sydney's long history of terrace and semi-detached housing unequivocally demonstrates this. They are extremely successful and harmonious forms of housing, and should be encouraged in preference to strata and community title.

7. Finally, it is very important that all sections of government understand strata and community title. Strata and community title *are both Torrens title.* There is almost no non-Torrens land left in New South Wales, and that that does exist (Old System title) cannot be subdivided with a strata or community plan. Strata and community plans are registered Torrens subdivisions and the title that purchasers buy are freehold, fee simple *Torrens titles,* (with the exception of leasehold strata subdivision, which is not freehold, but is still Torrens title). It is essential that the government stop using the term Torrens title incorrectly. The Torrens registration system is the most fundamental plank in our property owning system. The correct terminology is strata title and non-strata title or non-strata subdivision. Misusing the term Torrens title, and claiming that strata is not Torrens title just encourages further misunderstanding of the titles that people are developing or buying. It might be advisable for the Department

of Planning to liaise more closely with Land and Property Information to avoid this kind of mistake in the future.

My sincerest congratulations to the government on the medium density housing initiative. It is most welcome.

Regards,
Cathy Sherry

Associate Professor
Faculty of Law
UNSW Scientia Education Academy Fellow
UNSW
T: 0402 570 082
E: c.sherry@unsw.edu.au